



POLICY ROUNDTABLES

Vertical Mergers

2007

Introduction

The OECD Competition Committee debated vertical mergers in February 2007. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Jeffrey Church for the OECD, written submissions from Brazil, the Czech Republic, Denmark, the European Commission, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Portugal, Romania, South Africa, Spain, Switzerland, Chinese Taipei, Turkey, the United Kingdom, the United States, and BIAC as well as an aide-memoire of the discussion.

Overview

The antitrust economics of vertical mergers, and hence the enforcement policy toward them, are substantially more complicated than they are for horizontal mergers. Vertical mergers are presumed, on both theoretical and empirical grounds, to be efficiency enhancing, but that does not mean they are always welfare enhancing or in the interests of downstream consumers.

They may result in foreclosure and it is difficult to identify when foreclosure is anticompetitive. The analytical framework for assessing the likelihood of anticompetitive foreclosure (input or customer) involves an evaluation of (i) the integrating firm's ability to foreclose, (ii) the integrating firm's incentives to foreclose, and (iii) the effect of foreclosure on the downstream market.

Ex post enforcement, using monopolisation or abuse of dominance provisions is not always an effective substitute for *ex ante* vertical merger enforcement. A coordinated effect arises from a vertical merger if post-merger firms are able to coordinate more effectively, either because it makes reaching a tacit agreement on the coordinated outcome easier or makes enforcement more effective.

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Mergers in Financial Services (2000)
Notification of Transnational Mergers (1999)
Merger Cases in the Real World - A Study of Merger Control Procedures (1994)

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Vertical Mergers, held by the Competition Committee in February 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les fusions verticales, qui s'est tenue en février 2007 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper, several key points emerge:

- (1) *The antitrust economics of vertical mergers, and hence the enforcement policy toward them, are substantially more complicated than they are for horizontal mergers.*

First, vertical mergers are typically a source of considerable price and non-price efficiencies. Non-price efficiencies arise from the increase in coordination often realised from a vertical merger, coordination that cannot be realised through the use of contracts alone because of incompleteness.

Vertical mergers often lead to lower prices because of the elimination of double marginalisation when there is market power up and downstream pre-merger. Instead of paying a wholesale price that includes a mark up over marginal cost, the integrated firm will be able to access the input at its marginal cost. This gives it an incentive to increase output downstream, to the benefit of consumers. Contractual incompleteness, typically attributable to difficulties firms have monitoring investment and effort to increase sales by their supplier or distributor, often means that it is more important to have margins both up and downstream to provide incentives to increase volume, rather than to have efficient contracting that provides for marginal cost pricing.

Second, vertical mergers are different from horizontal mergers because they do not change market shares in a relevant market or eliminate a direct source of competitive constraint. If there is an anticompetitive effect from a vertical merger it must be indirect, arising from changes in incentives or constraints.

- (2) *Vertical mergers are presumed, on both theoretical and empirical grounds, to be efficiency enhancing, but that does not mean they are always welfare enhancing or in the interests of downstream consumers.*

Vertical mergers can result in an anticompetitive effect—harm to consumers or a reduction in efficiency—if they result in either foreclosure or enhanced coordination. The difficult challenge for effective enforcement policy is distinguishing anti-competitive from pro-competitive transactions. Effective enforcement policy should be informed by the limited circumstances identified by the economics literature when a vertical merger results in harm to consumers or efficiency and the empirical evidence that most vertical mergers are efficiency enhancing. The presumption that vertical mergers on average are pro-competitive suggests scepticism that a given transaction will be anticompetitive and a bias that the cost of false injunctions exceeds the cost of false clearances. The cost of false injunctions includes not only forgoing benefits to consumers in the case at hand, but also casting a “chill” over other potentially pro-competitive vertical mergers. This suggests that to enjoin a vertical merger, the facts of the case must be particularly persuasive and supportive of the alleged theory of harm and, to the extent possible, rule out competing explanations that support an efficiency rationale for the transaction.

- (3) *Identifying that a vertical merger might result in foreclosure is necessary but not sufficient for enforcement.*

While a vertical merger may harm competitors, enforcement policy usually requires that the harm to competitors also have an anticompetitive effect. Anticompetitive foreclosure results in harm to consumers and arises when foreclosure harms competitors sufficiently that their competitive constraint on the vertically integrating firm is relaxed.

Input foreclosure occurs when the vertically integrated firm no longer sells, or sells at a higher price or offers a lower quality, to downstream rivals. For an anticompetitive effect, however, not only must input foreclosure result in higher input prices or lower quality for downstream rivals, the effect of those higher input prices and/or reduced quality on the unintegrated rivals must also raise prices, or otherwise harm consumers, downstream.

Customer foreclosure occurs when the downstream division of the integrated firm no longer sources supply from independent upstream firms. If the resulting reduction in sales volume leads to an increase in the average cost or marginal cost of upstream competitors, then, to the extent there is exit (because of higher average costs) or reduced competitive vigour (because of increased marginal costs) the competitive constraint these firms exert on the upstream division of the integrated firm will be reduced, leading to greater market power upstream and higher input prices. For anticompetitive customer foreclosure, the increase in input prices must lead to an increase in prices in the downstream market.

- (4) *Identifying when foreclosure is anticompetitive is difficult since integration often has two inherent effects (internalisation of double marginalisation and foreclosure) that have different implications for the effect of the transaction on prices in downstream market.*

Both effects arise from the same source, the creation of a cost asymmetry between the integrating firm and its unintegrated rivals from the vertical merger. If the transaction results in the internalisation of double marginalisation for the integrating firm, it will have an incentive to increase its output and lower prices in the downstream market. On the other hand if the transaction creates market power in the upstream market and increases input prices, unintegrated downstream rivals will reduce their output and raise prices in that market. The net effect of the vertical merger (assuming no other non-price efficiencies) depends on which of these effects dominates, requiring an integrated analysis of the transaction on downstream prices. If there is anticompetitive foreclosure and non-price transaction specific efficiencies, then a further trade off is required to assess whether the vertical merger is anticompetitive, i.e., reduces the welfare of consumers or impairs efficiency. The requirement for an integrated approach to incorporate internalisation of double marginalisation, non price efficiencies, and foreclosure highlights the need for not only a case by case approach, but also the development of methodologies that explicitly proxy or measure the effects of the transaction.

- (5) *The analytical framework for assessing the likelihood of anticompetitive foreclosure (input or customer) involves an evaluation of (i) the integrating firm's ability to foreclose, (ii) the integrating firm's incentives to foreclose, and (iii) the effect of foreclosure on the downstream market.*

Ability

The assessment of the integrating firm's ability to engage in input foreclosure involves determining the extent of market power in the upstream market post-transaction and the effect

that foreclosure will have on the ability of downstream firms to compete. The greater the share of the input in downstream cost and the smaller the extent to which downstream firms can substitute away from its use, the greater the effect of foreclosure on unintegrated rivals' costs.

The effect on prices upstream from input foreclosure is, however, typically ambiguous. The reduction in supply by the integrated firm suggests an increase in prices, but if that results in less demand for the input then there will be downward pressure on the upstream price. The two effects that reduce demand are the withdrawal by the integrating firm from the upstream market and the reduction in market share of unintegrated rivals downstream as the vertically integrating firm expands. The ability of the vertically integrated firm to raise input prices by reducing supply might be dominated by changes in demand, leading to lower input prices.

Determining the integrating firm's ability to engage in customer foreclosure involves an assessment of the effect of customer foreclosure on market power upstream and how upstream unintegrated rivals are affected. Customer foreclosure requires reducing demand sufficiently that rivals, due to economies of scale and scope upstream, find it unprofitable to enter or to remain in the market. As in the case of input foreclosure, market power in the upstream market post-transaction and the effect that increases in upstream prices have on the ability of downstream firms to compete, are important in assessing the integrating firm's ability to foreclose.

The ability to foreclose depends on the absence of effective counter-strategies by disadvantaged rivals. An effective counter-strategy eliminates the cost asymmetry created by the vertical merger. Counter-strategies include a vertical merger, investment and entry by the unintegrated rival firms, or sponsoring entry of an unaffiliated firm.

Market power, however, while indicative of the ability to foreclose, also signals potentially large gains from internalising double marginalisation. Hence in the case of vertical mergers, safe harbours are important for identifying transactions that are unlikely to cause competition problems, and it is helpful to bear in mind that market power is only a necessary – not a sufficient – condition for a vertical merger to be anticompetitive.

Incentives

An evaluation of the incentive for foreclosure depends on its profitability. Even if it is possible, it may not be profitable since it will typically involve a trade off between upstream and downstream profits. In the case of input foreclosure, the integrating firm that forecloses forgoes upstream profits in order to increase its profits downstream. In the case of customer foreclosure, foreclosure can be costly if the unintegrated rivals have lower costs or a higher quality input. This cost must be compared to the increase in profitability both upstream and downstream to determine if an incentive for customer foreclosure exists.

Anticompetitive Effect

The last step involves assessing the effect of successful foreclosure on the downstream market. This involves not only determining the effect that foreclosure has on the ability of unintegrated rivals to compete, but more generally requires (i) an assessment of the competitiveness of the downstream market, since there may be other sources of competition sufficient to prevent pass through of the increased costs of unintegrated rivals and (ii) an assessment of how the vertical merger changes the incentives of the vertically integrated firm to lower prices and expand output in the downstream market.

- (6) *A coordinated effect arises from a vertical merger if post-merger firms are able to coordinate more effectively, either because it makes reaching a tacit agreement on the coordinated outcome easier or makes enforcement more effective.*

A number of hypotheses regarding the potential for a vertical merger to have a coordinated effect have been advanced including that the vertical merger might eliminate a disruptive buyer, enhance transparency of wholesale pricing, or facilitate information exchange. While a theoretical possibility, it is unclear whether the practical significance of a coordinated effect from a vertical merger warrants the same enforcement priority as foreclosure.

- (7) *Ex post enforcement, using monopolisation or abuse of dominance provisions is not always an effective substitute for ex ante vertical merger enforcement.*

A reliance on ex post enforcement depends on the deterrence effect of abuse of dominance/monopolisation provisions. The effectiveness of those provisions depends on the likelihood that the conduct contravenes the provisions, the likelihood of successful enforcement, the time and resources required for an enforcement action, and the nature of the remedies available.

SYNTHÈSE

par le Secrétariat

1. Les débats lors de la table ronde, les contributions écrites des délégués et la note de synthèse du Secrétariat font ressortir un certain nombre de points clés :

- (1) *Sous l'angle économique de la lutte contre les pratiques anticoncurrentielles, et donc des mesures d'application, les fusions verticales apparaissent nettement plus compliquées que les fusions horizontales.*

En premier lieu, les fusions verticales induisent généralement d'importants gains d'efficience à la fois au niveau des prix et en dehors des prix. Les efficacités hors prix sont générées par l'amélioration de la coordination résultant souvent des fusions verticales, coordination que le seul recours aux contrats ne permet pas, étant donné leur incomplétude.

Les fusions verticales entraînent souvent une baisse des prix car on élimine la double marginalisation qui prévalait avant la fusion lorsque l'entreprise en aval et l'entreprise en amont avaient toutes deux un pouvoir de marché. En effet, au lieu d'acquitter un prix de gros qui inclut une marge commerciale en plus du coût marginal, l'entreprise intégrée peut obtenir le bien intermédiaire à son coût marginal. Cela l'incite à augmenter la production en aval, au bénéfice des consommateurs. L'incomplétude contractuelle, généralement imputable aux difficultés qu'ont les entreprises à surveiller les investissements de leurs fournisseurs ou distributeurs et les efforts qu'ils réalisent pour accroître les ventes, implique souvent qu'il est plus important d'avoir des marges en amont comme en aval afin d'inciter à l'augmentation des volumes, plutôt que des relations contractuelles efficaces où les prix sont fixés au coût marginal.

En second lieu, les fusions verticales diffèrent des fusions horizontales en ce qu'elles ne modifient pas les parts de marché, ni n'éliminent une source directe de pression concurrentielle. Si une fusion verticale produit un effet anticoncurrentiel, celui-ci doit être indirect, et résulter de l'évolution des incitations ou des pressions.

- (2) *Sur la base d'éléments théoriques et empiriques, on suppose que les fusions verticales ont des effets positifs en termes d'efficience, mais cela ne signifie pas toujours qu'elles améliorent le bien-être général ni qu'elles jouent dans l'intérêt des consommateurs en aval.*

Les fusions peuvent avoir un effet anticoncurrentiel – elles nuisent aux consommateurs ou diminuent l'efficience – si elles entraînent un verrouillage du marché ou une amélioration de la coordination. Le défi compliqué à relever pour une application efficace des règles en matière de fusions verticales consiste à distinguer les opérations anticoncurrentielles des opérations favorables à la concurrence. Des mesures d'application efficaces doivent prendre en compte le constat des études économiques selon lequel les fusions verticales nuisent aux consommateurs ou à l'efficience dans des circonstances limitées et les données empiriques montrant que la plupart des fusions verticales améliorent l'efficience. L'a priori selon lequel les fusions verticales sont dans l'ensemble propices à la concurrence conduit à douter qu'une transaction particulière nuise à la concurrence et à estimer que le coût des injonctions injustifiées l'emporte sur celui des

autorisations de fusion injustifiées. Le coût d'une injonction injustifiée inclut, non seulement la perte d'avantages pour les consommateurs dans le cas d'espèce, mais aussi le risque de décourager d'autres fusions verticales potentiellement favorables à la concurrence. Pour s'opposer à une fusion verticale, il faut donc que les faits en cause soient particulièrement convaincants, qu'ils confortent la thèse d'une fusion préjudiciable à la concurrence et, dans la mesure du possible, qu'ils excluent les éléments justifiant l'opération pour des raisons d'efficience.

- (3) *Le fait de constater qu'une fusion pourrait entraîner une exclusion de la concurrence est nécessaire mais non suffisant pour appliquer les règles de lutte contre les pratiques anticoncurrentielles.*

Tandis qu'une fusion verticale est susceptible de nuire aux concurrents, le régime d'application des règles suppose que ce préjudice ait aussi un effet anticoncurrentiel. L'exclusion anticoncurrentielle nuit aux consommateurs et se produit lorsque les concurrents sont suffisamment touchés pour que leur pression concurrentielle sur l'entreprise en voie d'intégration verticale diminue.

Lorsque l'entreprise verticalement intégrée ne vend plus à ses rivaux en aval, leur vend plus cher, ou leur offre une qualité inférieure, ceux-ci se trouvent de fait exclus du marché des biens intermédiaires (exclusion en amont). Toutefois, pour que l'effet soit anticoncurrentiel, il faut seulement que l'exclusion provoque une hausse des prix des biens intermédiaires ou une baisse de la qualité pour les rivaux en aval, mais aussi que cette hausse de prix et/ou cette baisse de qualité pour les concurrents qui ne font pas partie de la fusion verticale entraîne une hausse des prix en aval ou d'autres préjudices pour les consommateurs.

Il y a exclusion au niveau de la clientèle (exclusion en aval) quand la division aval de l'entreprise intégrée ne se fournit plus auprès d'entreprises indépendantes d'amont. Si la diminution des ventes en volume qui en résulte entraîne une hausse du coût moyen ou du coût marginal des concurrents en amont, alors, dans la mesure où il y a des sorties (en raison de la hausse des coûts moyens) ou un affaiblissement de la concurrence (en raison de l'augmentation du coût marginal), les pressions concurrentielles que ces entreprises exercent sur la division amont de l'entreprise intégrée se trouvent amoindries, d'où un renforcement du pouvoir de marché de l'entreprise intégrée en amont et une hausse des prix des biens intermédiaires. Pour que l'exclusion en aval soit anticoncurrentielle, l'augmentation des prix des intrants doit entraîner une hausse des prix sur le marché en aval.

- (4) *Il est difficile de déterminer si une exclusion est anticoncurrentielle car l'intégration a souvent deux effets intrinsèques (internalisation de la double marge et exclusion de la concurrence) qui ont des implications différentes pour l'impact de l'opération sur les prix du marché en aval.*

Ces deux effets ont la même origine, à savoir l'asymétrie de coûts induite par la fusion verticale entre l'entreprise en voie d'intégration et ses rivales non intégrées. Si l'opération entraîne l'internalisation de la double marge pour l'entreprise en voie de fusion, celle-ci sera incitée à augmenter sa production et à baisser ses prix sur le marché en aval. En revanche, si l'opération crée un pouvoir de marché en amont et augmente les prix des biens intermédiaires, les concurrents non intégrés en aval réduiront leur production et augmenteront les prix sur ce marché. L'effet net de la fusion verticale (à supposer qu'il n'y ait pas d'autres efficacités hors prix) dépend duquel de ces effets sera le plus important, ce qui nécessite une analyse intégrée des effets de l'opération sur les prix en aval. S'il se produit une exclusion anticoncurrentielle et des efficacités hors prix particulières découlant de l'opération, un arbitrage est alors nécessaire pour

déterminer si l'opération est anticoncurrentielle, c'est-à-dire, si elle diminue le bien-être des consommateurs ou nuit à l'efficacité. Le besoin d'une démarche intégrée pour prendre en compte l'internalisation de la double marge, les efficacités hors prix et l'exclusion de la concurrence souligne la nécessité non seulement d'adopter une approche au cas par cas, mais aussi de développer des méthodes pour évaluer ou mesurer clairement les effets de l'opération.

- (5) *Le cadre analytique pour l'estimation de la probabilité d'exclusion anticoncurrentielle (en amont ou en aval) suppose une évaluation (i) de la capacité d'exclusion de l'entreprise en voie d'intégration, (ii) de ses incitations à exclure et (iii) de l'effet de l'exclusion sur le marché en aval.*

Capacité

Pour évaluer la capacité de l'entreprise en voie de fusion à pratiquer une exclusion au niveau des biens intermédiaires, il faut déterminer l'étendue du pouvoir du marché en amont après la fusion et l'effet que l'exclusion aura sur la capacité concurrentielle des entreprises en aval. Plus la part du bien intermédiaire dans les coûts en aval est élevée et plus faibles sont les possibilités pour l'entreprise d'aval de le remplacer par un autre intrant, plus important sera l'effet de l'exclusion sur les coûts des entreprises rivales non intégrées.

Toutefois, l'exclusion au niveau des biens intermédiaires a généralement des effets ambigus sur les prix en amont. La réduction de l'offre par l'entreprise intégrée laisse supposer une hausse des prix, mais si elle entraîne une diminution de la demande du bien intermédiaire, une pression à la baisse s'exercera sur le prix d'amont. Les deux facteurs qui font baisser la demande sont le retrait de l'entreprise intégrée du marché d'amont et la réduction de la part de marché des concurrentes non intégrées en aval à mesure que l'entreprise en voie de fusion se développe. La capacité de l'entreprise verticalement intégrée à augmenter le prix du bien intermédiaire en réduisant l'offre peut être neutralisée par les évolutions de la demande, d'où une baisse du prix du bien intermédiaire.

Afin de déterminer la capacité de l'entreprise en voie de fusion à pratiquer une exclusion au niveau de la clientèle, il faut évaluer l'effet de cette exclusion sur le pouvoir du marché d'amont et les conséquences sur les concurrents non intégrés en amont. L'exclusion en aval implique de réduire suffisamment la demande pour que le maintien ou l'entrée sur le marché cesse d'être rentable aux yeux des entreprises rivales, du fait des économies d'échelle et de gamme sur le marché d'amont. Comme dans le cas de l'exclusion au niveau des biens intermédiaires, pour évaluer la capacité de l'entreprise en voie de fusion à exclure la concurrence, il importe d'examiner le pouvoir de marché en amont après la fusion et l'effet que produisent les hausses de prix en amont sur la capacité concurrentielle des entreprises en aval.

La capacité d'exclusion dépend de l'absence de contre-stratégies efficaces de la part des entreprises rivales désavantagées. Une action de rétorsion efficace élimine l'asymétrie de coûts générée par la fusion verticale. Les contre-mesures des entreprises rivales non intégrées peuvent consister à réaliser une fusion verticale, un investissement et une entrée, ou à favoriser l'entrée d'une entreprise non affiliée.

Cependant, s'il dénote la capacité d'exclusion, le pouvoir de marché met en évidence des gains potentiellement importants tirés de l'internalisation de la double marge. Par conséquent, dans le cas des fusions verticales, la présence de dispositions protectrices est importante pour identifier les opérations qui ne causeront probablement pas de problèmes de concurrence. En outre, il est

utile de garder à l'esprit que le pouvoir de marché ne constitue qu'une condition nécessaire – et non suffisante – pour établir le caractère anticoncurrentiel d'une fusion verticale.

Incitations

L'évaluation de l'incitation à exclure dépend de la rentabilité économique de cette exclusion. Même si elle est réalisable, elle peut ne pas être rentable car elle implique généralement un arbitrage entre les profits en amont et en aval. Dans le cas de l'exclusion au niveau des biens intermédiaires, l'entreprise en voie de fusion qui exclut perd des profits en amont afin d'augmenter ses profits en aval. Lorsqu'elle est pratiquée au niveau de la clientèle, l'exclusion peut être coûteuse si les entreprises rivales non intégrées ont des charges moins élevées ou un bien intermédiaire de meilleure qualité. Ce coût doit être comparé à l'augmentation de la rentabilité à la fois en amont et en aval pour déterminer s'il existe une incitation à exclure.

Effet anticoncurrentiel

La dernière étape consiste à évaluer l'effet d'une exclusion réussie sur le marché en aval. Cela requiert non seulement une estimation de l'effet de cette exclusion sur la capacité concurrentielle des rivales non intégrées, mais, de façon plus générale, (i) une évaluation de la compétitivité du marché en aval, dans la mesure où il peut exister d'autres sources de concurrence suffisantes pour empêcher la répercussion de la hausse des coûts des entreprises rivales non intégrées et (ii) une évaluation de la manière dont la fusion verticale modifie les incitations de l'entreprise verticalement intégrée à abaisser les prix et à augmenter la production sur le marché en aval.

- (6) *Une fusion verticale induit un effet coordonné si, après la fusion, les entreprises sont en mesure de coordonner plus efficacement leurs actions, soit parce que la fusion leur permet plus facilement d'arriver à un accord tacite sur le résultat coordonné, soit parce qu'elle rend la mise en œuvre plus efficace.*

On a avancé un certain nombre d'hypothèses concernant le potentiel qu'a une fusion verticale d'exercer un effet coordonné : elle pourrait notamment éliminer un acheteur « perturbateur », accroître la transparence des prix de gros ou faciliter l'échange d'informations. Bien que tout cela soit théoriquement possible, dans l'optique des organismes d'exécution il n'est pas certain que l'incidence pratique d'un effet coordonné émanant d'une fusion verticale justifie une priorité aussi élevée que l'exclusion.

- (7) *L'exécution ex post de la loi, au moyen des dispositions relatives à la monopolisation ou à l'abus de position dominante, ne se substitue pas toujours efficacement à l'application à priori des règles concernant les fusions verticales.*

L'intérêt du recours à l'exécution ex post dépend de l'effet dissuasif des dispositions relatives à l'abus de position dominante ou à la monopolisation. L'efficacité de ces dispositions dépend de la probabilité de constater des agissements qui les enfreignent, de la probabilité d'une application réussie, du temps et des ressources nécessaires pour mettre en place une mesure d'exécution et de la nature des recours disponibles.

BACKGROUND NOTE¹

1. Introduction

Unlike any consensus that might exist regarding horizontal cases—both mergers between and agreements among competitors—there is not a consensus regarding appropriate enforcement policy with respect to vertical mergers. This is reflected in controversy over the merits of cases pursued by the Federal Trade Commission and the Department of Justice in the United States and by the European Commission over the last decade or so; typically either the absence of official vertical merger guidelines or their apparent irrelevance to enforcement practice; and concerns that the economics of vertical mergers is not yet sufficiently developed to allow identification of “clear, bright-line principles” that might form a consensus and underpin enforcement guidelines. Notwithstanding the controversy and policy uncertainty—or perhaps because of it—the European Commission, as part of its merger control reforms announced in 2002, is in the process of drafting non-horizontal merger guidelines.

The objective of this background note is to provide a review of the economics literature on the competitive effects of vertical mergers and to analyse how economic principles have been applied in a number of illustrative cases. The note considers the main theories relevant for an understanding of vertical mergers that will result in anticompetitive harm, where anticompetitive harm means a harm to competition such that either consumer or total welfare is reduced.² The theories are assessed for their relevance and usefulness for informing welfare enhancing antitrust enforcement. This is done by considering a number of recent cases and suggesting options for “best-practice” enforcement policy and guidelines with respect to vertical mergers.³

¹ Prepared by Jeffrey Church, Department of Economics, University of Calgary, Calgary, Canada. This paper is based on, and follows closely in some respects, an earlier study sponsored by the European Commission, see Church (2004).

² Consumer surplus is a measure of the gains from trade that accrue to consumers. It is the sum over all units of the difference between what a consumer was willing to pay for a unit less what they actually had to pay for that unit. A total welfare standard is implemented by assessing changes in total surplus. Total surplus is the sum of producer and consumer surplus. Producer surplus is the difference between revenues and avoidable costs: it is a measure of the gains from trade that accrue to firms. When economists observe that a conduct is inefficient, they mean that it results in a decrease in total surplus. Because consumer and producer surplus are dollar measures of changes in welfare, when total surplus decreases from a change, for instance a vertical merger, then those made better off by the change—the winners— could not compensate those harmed by the change—the losers—and still be better off, i.e., winners. An efficiency enhancing change increases total surplus, implying that winners could compensate losers and still be better off. It does not imply that compensation will be paid, only that the change creates enough wealth that it could be.

³ The note also provides an overview of existing vertical merger guidelines in four jurisdictions.

1.1 Key Points

1.1.1 Overview

- The antitrust economics, and hence enforcement policy, of vertical mergers is substantially more complicated than for horizontal mergers for two reasons. First, vertical mergers often lead to lower prices because of the elimination of double marginalisation when there is market power up and downstream pre merger. Instead of paying a wholesale price that includes a mark up over marginal cost, the integrated firm will “pay”, post merger, only marginal cost for the upstream input. This gives it an incentive to increase output downstream, to the benefit of consumers. Second, any anticompetitive effect from a vertical merger must be indirect since the transaction itself does not eliminate a competitor.
- When the downstream market is perfectly competitive, the single profit result indicates that a monopolist upstream cannot increase its profits by integrating downstream. By charging the appropriate wholesale price it can extract all of its monopoly profits. This suggests vertical integration in these circumstances is motivated by efficiency considerations that lead to lower costs and greater output. The single profit result does not hold if downstream firms can substitute away from the input of the monopolist when it exercises market power (variable proportions in production), the input can be used in a variety of different downstream products with different elasticities of demand for the input, or the upstream monopolist is regulated. While a vertical merger in the case of variable proportions might lead to higher downstream prices, the view is that it does not justify antitrust enforcement because it is difficult to determine in any given case whether higher or lower prices will result, the magnitude of any increase is likely small, and there are other contractual mechanisms that are likely less costly for the upstream monopolist.
- The Post-Chicago theories of anticompetitive harm from a vertical merger focus on how foreclosure either raises rivals’ costs or reduces rivals’ revenues and how these negative effects on rivals result in anticompetitive harm, i.e., harm to consumers or a reduction in efficiency (total welfare). The focus of the theories is on the effect and incentives for foreclosure. Input foreclosure occurs when the vertically integrated firm no longer sells, or sells at a higher price to downstream rivals. Customer foreclosure occurs when the vertically integrated firm no longer buys from upstream rivals.
- The modern theories of input and customer foreclosure provide a template for antitrust enforcement to vertical mergers. Those theories demonstrate that the indirect link from a vertical merger to an increase in market power and anticompetitive harm involves determining (i) the incentive for foreclosure; (ii) the effect of foreclosure on rivals and, in turn, how it affects their ability to compete; (iii) how the change in their ability to compete impacts competition; (iv) how the vertical merger changes the incentives of the integrated firm in the downstream market; and (v) the impact on the welfare of consumers, or efficiency, from the change in competition and the change in behaviour of the vertically integrated firm.

1.1.2 Input Foreclosure

- The hypothesis associated with input foreclosure is that the integrated firm has an incentive to change the behaviour of its upstream division post-merger because it will internalise the effect on downstream prices when setting its optimal price in the market for the input, i.e., it will recognise that there is an additional benefit from raising its input price, i.e., higher downstream profits from an increase in prices and market power downstream. For an anticompetitive effect, however, not

only must foreclosure result in higher input prices, the effect of those higher input prices on the unintegrated rivals must also raise prices, or otherwise harm consumers, downstream.

- The effect on prices upstream from input foreclosure is typically ambiguous. On the one hand the reduction in supply/changed incentives for the integrated firm suggests an increase in prices, but there are two offsetting effects that lead to a demand reduction and suggest that prices upstream might fall. In the case of complete foreclosure the withdrawal by the integrated firm reduces demand. Moreover, in either the complete or partial foreclosure cases the cost advantage downstream from elimination of double marginalisation results in changes in market share: an increase in the share of the integrating firm and a reduction in the share of its unintegrated rivals. The reduction in the share of the unintegrated rivals reduces their demand for the input. While the incentives are for the vertically integrated firm to raise the price of the input, this incentive could easily be dominated by the change in demand, leading to lower input prices in equilibrium. An analysis of the incentives of the vertically integrating firm can be very misleading. Moreover, even if the price of the input rises, prices downstream could still fall as a result of the output expansion of the vertically integrated firm from the elimination of double marginalisation.
- The potential for anticompetitive harm from a vertical merger is greater if there is complete foreclosure, i.e., the integrated firm does not trade in the upstream market. Commitment not to participate upstream is accomplished by making the upstream production of the integrated firm incompatible with unintegrated downstream firms. The incentive to foreclose by adopting a specific technology depends on the trade off between lost upstream profits and increased downstream profits.
- The incentive of the vertically integrated firm to behave differently in the upstream market in order to raise rivals' costs depends on its effectiveness. The more competitive post-merger the upstream or downstream markets, the less the incentive to change its behaviour in the upstream market. Its incentive to raise rivals' costs will be less, the less the extent that it can affect the price upstream or the price downstream by foreclosure.
- The benefits to the integrated firm and the potential for anticompetitive harm from raising rivals' costs arise from the cost asymmetry created downstream. Cost symmetry can be restored if the unintegrated rivals downstream can engage in a counter merger. If pre merger contracting upstream is efficient, i.e., the marginal unit is sold at marginal cost, then an anticompetitive effect from a vertical merger is much more unlikely since it does not create cost asymmetry.
- The economics of vertical mergers highlights the difficult assessment required in determining the impact of a vertical merger on downstream prices even when the integrated firms can commit not to participate in the upstream market: the trade off between the output expanding effect of eliminating double marginalisation and the output contracting effect of foreclosure, and this latter only if in fact the wholesale price rises. The trade off is inherent: it arises from the cost asymmetry created by the vertical merger when there is double marginalisation. To determine whether the vertical merger has an anticompetitive effect requires netting out the two effects.

1.1.3 Customer Foreclosure

- Customer foreclosure occurs when, post-merger, the downstream division of the integrated firm no longer sources supply from independent upstream firms. If the resulting reduction in sales volume leads to an increase in the average cost or marginal cost of upstream competitors, then, to the extent there is exit (because of higher average costs) or reduced competitive vigour (because of increased marginal costs) the competitive constraint these firms exert on the upstream division

of the integrated firm will be reduced, leading to greater market power upstream and higher input prices.

- For customer foreclosure to be credible either (i) technological reasons associated with integration create a credible commitment that the downstream division will not source from an independent supplier or (ii) it must be profit maximising for the downstream division to forgo external supply.
- One set of theories involving customer foreclosure that lead to an anticompetitive effect involve a trade off between a reduction in double marginalisation and monopolisation of the upstream market. The monopolisation of the upstream market arises when the reduction in sales downstream interacts with economies of scale upstream and leads either to the exit of the integrated firm's upstream rival(s) or entry deterrence. Customer foreclosure can have an anticompetitive effect even if there is efficient contracting pre merger, i.e., there is an absence of double marginalisation.
- Customer foreclosure can also have an anticompetitive effect when consumer demand is responsive to variety differentials. If consumers value variety then a variety differential, where one firm has a broader product range than another, raises its demand and in doing so also reduces the demand and revenues of its rivals. An integrated firm could end up with a variety advantage if post-merger it forecloses. Foreclosure here means not supplying a rival with access to the products controlled by the integrated firm: if consumers value variety, then a variety advantage can provide the integrated firm with market power or lead to monopolisation. The incentives for foreclosure depend on the trade off between increased profits from greater sales to consumers and decreased profits from not supplying the rival(s). The increase in profits depends on the effect of variety differences on demand. An important consideration is the availability of counter strategies and explicit consideration of whether the foreclosed firm can also merge and foreclose and/or whether barriers to entry into "varieties" are sufficient that a rival cannot match a foreclosing rival.

1.1.4 Coordinated Effects

- A coordinated effect arises from a vertical merger if post-merger firms, either upstream or downstream, are able to more effectively coordinate, either because it makes reaching a tacit agreement on the coordinated outcome easier or makes enforcement more effective. A number of hypotheses regarding the potential for a vertical merger to have a coordinated effect have been advanced including that the vertical merger might eliminate a disruptive buyer, enhance transparency of wholesale pricing, or facilitate information exchange. It is important to observe, however, that these theories all assume that, depending on the case theory, at least one of the upstream and downstream markets are conducive to coordination. If the relevant market is not, then the coordinated effects of a vertical merger are not likely to be significant.

1.1.5 Efficiencies

- Much of the controversy associated with vertical merger enforcement arises from the widely held view that anticompetitive harm from such a transaction is unlikely and that the motivation for a vertical merger is not to enhance or preserve market power, but to realise efficiencies. In general efficiencies can arise because the enhanced coordination made possible by a vertical merger allows for (i) production efficiencies and savings; (ii) internalisation of vertical externalities and alignment of incentives; and (iii) transaction cost savings, including mitigating opportunistic behaviour.

1.1.6 *Implications for Enforcement Policy and Vertical Merger Guidelines*

- Two important considerations should inform vertical merger policy. First, vertical integration is ubiquitous and is typically efficiency enhancing. The economic presumption, on both theoretical and empirical grounds, is that vertical mergers are likely efficiency enhancing and good for consumers. Second, while the economics of vertical mergers suggests that vertical mergers can be anticompetitive, the key to welfare enhancing enforcement is identifying and distinguishing the few transactions that merit investigation and prohibition because of their anticompetitive effects from the typical case whose effect is positive or neutral. Consequently there is the potential for three types of errors: (i) the anticompetitive theory of harm cannot necessarily be distinguished on the basis of facts from explanations that suggest the rationale for the vertical merger is to realise non-price efficiencies; (ii) it is not enough that the anticompetitive theory of harm is consistent with the facts, it must also be established that within that theory the facts are consistent with an anticompetitive outcome, e.g., the raising rivals' cost effect dominates the elimination of double marginalisation; (iii) there are likely other non-price efficiencies realised, requiring a trade off between anticompetitive harm (if any) and the magnitude and effect of the non-price efficiencies.
- The presumption that vertical mergers on average are procompetitive suggests scepticism that a given transaction will be anticompetitive and a bias that the cost of false injunctions exceeds the cost of false clearances. The cost of false injunctions includes not only forgoing benefits to consumers in the case at hand, but potentially casting a "chill" over other potentially pro-competitive vertical mergers. This strongly suggests that to enjoin a vertical merger, the facts of the case must be particularly persuasive and supportive of the alleged theory of harm and, to the extent possible, rule out competing case theories. The theory of anticompetitive harm should be coherent, i.e., the behaviour alleged post-merger is profit-maximising, and relevant, i.e., is consistent with the facts of the case.
- These considerations suggest a structured rule of reason approach to assessing vertical mergers, consisting of three stages: (i) a market power screen; (ii) a theory of the case and factual screen; and (iii) an assessment of offsetting non-price efficiencies realised by the vertical merger. Stage two of the structured rule of reason approach involves: (i) establishing the incentive for foreclosure; (ii) establishing the effect of foreclosure on rivals and, in turn, how it affects their ability to compete; (iii) establishing how the change in their ability to compete impacts competition; (iv) establishing how the vertical merger changes the incentives of the integrated firm in the downstream market; and (v) establishing the impact on the welfare of consumers, or efficiency, from the change in competition and the change in the behaviour of the vertically integrated firm.

1.1 *Definitions*

A horizontal merger occurs when the products of the merging firms are in the same antitrust market, i.e., might exert a significant competitive constraint upon each other pre-merger. Non-horizontal mergers occur when the products of the parties to the transaction are in separate antitrust markets. A useful taxonomy for non-horizontal mergers is to distinguish between vertical and conglomerate mergers. Conglomerate mergers are neither horizontal nor vertical.

Prior to a vertical merger the two firms are either in, or there is a possibility that they might be in, a customer-supplier relationship. Pre-transaction, the firms are located at different stages of production or distribution, with one producing an input used by the other. Post-merger, the two separate firms are replaced by a single firm that now performs both activities or stages of production. A vertical merger

replaces an actual or potential market transaction, where an input is traded between firms, with a transfer within the same firm. While the replacement of a market transaction with internal exchange is the “observational content of vertical integration, it does not fully capture the essence of vertical integration. Vertical integration also means the ownership and complete control over neighbouring stages of production or distribution.”⁴ A vertical merger can involve integration forward, where the upstream firm (pre merger the seller) acquires a downstream firm (pre merger the buyer), for example, the acquisition by a shoe manufacturer of a shoe retailer or an automobile manufacturer of a taxi service or car rental firm. A vertical merger involving backwards integration occurs when the buyer acquires the seller, for example the acquisition by an automobile manufacturer of a parts supplier or an aluminium manufacturer that purchases bauxite mines.

A conglomerate merger involving firms that produce complements is similar to a vertical merger. In a conglomerate merger involving complements, customers “assemble” the goods into systems prior to consumption. The distinction between vertical and complementary mergers is based on the assembler. In vertical mergers it is a downstream firm that buys complements from upstream producers and engages in activities that transform the inputs into output that is sold to consumers. In a complementary product merger, it is the consumer that buys the set of complements and assembles them for consumption. Because both vertical and complementary product transactions involve acquisition of complements—which the various stages in a production chain can be viewed as—the economics of mergers between producers of complements is often similar to that of vertical mergers.

1.2 *Antitrust Concerns*

Antitrust concerns typically arise only if a vertical merger results in an increase in market power which, in turn, reduces welfare, either consumer or total. A firm's ability to exercise market power is constrained by its customers' ability to substitute to products supplied by competing firms.⁵ A firm can exercise market power if the possibilities for substitution, either to other suppliers of the same product, or different products, are limited, and likely to remain so, for an extended period of time.

A horizontal merger may lead to an increase in market power if the effect of the merger is to eliminate a significant avenue of substitution. A unilateral effect occurs when post-merger a significant substitution alternative for consumers is internalised by the firm.⁶ Alternatively, a horizontal merger might facilitate the interdependent exercise of market power and give rise to a coordinated effect if the elimination of a competitor makes it easier for the remaining firms in the market to more effectively coordinate their behaviour, restrict competition, and, collectively exercise greater market power.

The two possible avenues for an increase in market power are the same for a vertical merger, but the mechanisms are not as direct or obvious. Indeed, if anything it is likely that the merged firm has an incentive to lower prices. In many instances, *ceteris paribus*, lowering the downstream price increases sales and profits of the upstream firm, an external effect that the downstream firm would have ignored pre merger, but which will be internalised post-merger. For these two reasons the antitrust economics of vertical merger are therefore substantially more complicated than a horizontal merger. A well founded antitrust challenge to a vertical merger must establish that the transaction increases or maintains market

⁴ Perry (1989, p. 186).

⁵ Antitrust market power is typically defined as the ability to profitably raise price above competitive levels.

⁶ Consider two firms and products *A* and *B*. If there is a unilateral effect then pre-merger one of the constraints that prevented the producer of *A* from raising its price was loss of sales to *B*. Post-merger, however, the merged firm will internalize this cross-effect: it will recognize that an additional advantage of raising the price of *A* is to increase demand for *B* for which its profit margin is positive.

power and harms welfare. In a unilateral effects case the onus is to establish that the transaction makes the products of other producers less attractive as substitutes than they were pre-merger, resulting in a decrease in the integrated firm's elasticity of demand, an increase in market power, and a negative effect on consumers or efficiency. This might result because the products of competitors post-merger have a lower quality or higher prices. The literature on the anticompetitive rationales and effect of vertical mergers surveyed in this background paper identify how the transaction changes incentives and/or constraints on the merged firm, thereby enhancing its market power and reducing welfare.

2. Economics of Vertical Mergers

This section provides an overview of the economics of the competitive effects of vertical mergers and the circumstances consistent with a vertical merger leading to an increase in market power and a reduction in welfare.⁷ The review begins with the two contributions of the Chicago school that suggest that vertical mergers are likely welfare enhancing. These are the successive monopoly model and the monopoly leverage model. The more recent contributions considered next relax the assumptions of the Chicago school analysis of monopoly upstream and either perfect competition or monopoly downstream. Instead they consider situations where there is imperfect competition in at least one stage of production after integration. The modern foreclosure literature considers whether, and when, a vertical merger either raises the costs of rivals or reduces the revenue of rivals. The final theory considered explores the possibility that a vertical merger can result in a coordinated effect. The section concludes with a brief discussion of efficiencies associated with vertical mergers.

2.1 *The Chicago School*

The evaluation of the competitive effects of vertical mergers has traditionally been based on the monopoly leverage and the successive monopoly models. The implication of both of these models is that vertical mergers are welfare enhancing.

2.1.1 *Monopoly Leverage and the Single Profit Result*

The monopoly leverage model establishes the single profit result. This result states that there is only one monopoly profit and therefore that a monopolist upstream cannot increase its profits by leveraging its monopoly power into a competitive downstream market. It can realise its monopoly profits by charging the appropriate price in the market in which it is a monopolist: integrating downstream into a competitive market does not increase its market power or profits, and if anything might reduce its profits if it is a high-cost supplier downstream. The monopoly leverage model assumes (i) identical downstream firms; (ii) downstream production is fixed proportions; (iii) an upstream monopolist; (iv) the absence of price regulation; and (v) perfect competition downstream.

The single profit result is based on the observation that by appropriate choice of the wholesale price the upstream monopolist can insure that the price in the competitive market downstream is identical to the price a vertically integrated monopolist would set and its profits in the upstream market equal the profits of the vertically integrated monopolist.⁸ The downstream price, quantity, and the profits of the monopolist

⁷ The welfare implications of a vertical merger depend on the welfare standard adopted. The efficiency or total welfare standard assesses the welfare consequences of a vertical merger by considering its effect on total surplus. A consumer welfare standard considers only the effect of the transaction on consumers. The impact of the transaction on consumers is assessed by considering the effect it has on consumer surplus.

⁸ To see this, suppose that the profit-maximizing price charged downstream by a vertically integrated monopolist is 10. Then the profit per unit of the vertically integrated firm equals 5 if the marginal cost of upstream production is 3, and 2 is the cost of the other inputs used in downstream production. In the absence of vertical integration the price in the perfectly competitive downstream market will equal the

are identical whether the monopolist integrates or not. The monopolist earns the monopoly profit in its wholesale market by imposing the monopoly mark-up in the wholesale market: because of fixed proportions and competition downstream this mark-up is simply passed onto final consumers by the downstream sector. Vertical integration does not increase profits, and a vertical merger is not required to realise monopoly profits. If it integrates it provides the downstream services and incurs the downstream marginal costs. If there is vertical separation, competitive downstream firms provide the downstream activity and incur the downstream marginal costs.

Since increased profits and market power are not the reason for the vertical merger, the argument is that the rationale for the vertical merger must be based on realising efficiencies that lead to lower per unit costs. Lower per unit costs, whether upstream or downstream, lead to an increase in the monopolist's profit and it can further increase its profits by increasing sales, which it can do so only by lowering the price to consumers, thereby making them better off as well.

It is well known that the single monopoly profit theory is not robust to changes in its underlying assumptions:

(i) Variable Proportions Downstream

If there are variable proportions downstream, then when the upstream monopolist exercises monopoly power in the wholesale market, downstream firms will substitute away from its input to other inputs. As a result it is no longer profit maximising for the upstream monopolist to impose the vertically integrated monopoly mark-up in the wholesale market. The substitution by the downstream firms means that their marginal cost of production is higher than if they had access to the monopolised input at the efficient price (marginal cost).

Vertical integration and foreclosure by the monopolist has two effects: (i) it restores its monopoly mark-up and (ii) the costs of production downstream are reduced. These two effects mean that the welfare economics of the vertical merger are not straightforward. If the cost decrease from reversing the inefficient input substitution is larger (smaller) than the market power effect, prices downstream will decrease (increase).⁹ Even in the case where prices downstream rise and consumer welfare (surplus) decreases, total surplus might also increase: the loss to consumers from higher prices is less than the gain to the vertically integrated firm from reducing costs and raising prices.

The traditional view is that "it is not clear that variable proportions raises a major policy issue on vertical integration"¹⁰ and that a determination of the impact of a vertical merger on consumers is difficult since the relationship between the two effects is complex and the measurement problems

marginal cost of production downstream: $p = 2 + w$, where w is the upstream price charged by the monopolist.

The profit maximizing price of the upstream monopolist when it is not integrated is to set its upstream price such that the downstream price is the same as if it was vertically integrated downstream: $w = 10 - 2 = 8$. If it charges this price, the marginal cost of the downstream firms will equal 10—and since the assumption of fixed proportions insures that sale of the upstream input equals sales of the downstream good—the quantity demanded will be the same as the vertically integrated quantity. Its profit per unit will be $8 - 3 = 5$, which is identical to the profit per unit it would earn if it were vertically integrated.

⁹ The gain associated with using efficient input proportions depends on the elasticity of substitution in production, i.e., how easily downstream firms can substitute for the monopolized input as its price rises. The price increase in the downstream market depends on the elasticity of demand downstream.

¹⁰ Perry (1989, p. 192).

sufficiently formidable that judgments of what the net effect is likely to be would be very unreliable.¹¹ Given the costs associated with increased firm size from vertical integration,¹² vertical integration “is a relatively drastic solution to what is primarily a pricing problem.”¹³ The point is that there are many just as effective vertical restraints and alternative pricing schedules, e.g., a two-part tariff, that eliminate the inefficiencies associated with variable proportions and avoid the costs of vertical integration.¹⁴

(ii) Price Discrimination (Heterogeneous Uses for the Input)

If the input supplied by the upstream monopolist is used in many different industries with varying demand conditions then the input monopolist may have an incentive to integrate to effect price discrimination.¹⁵ In the absence of integration and effective arbitrage the upstream monopolist will not be able to charge higher prices for the input to inelastic users (high value users) and lower prices to elastic users (low value users). It is restricted to charging both groups the same price. The classic example is Alcoa’s integration into aluminium cable (elastic demand), while it was not vertically integrated into aircraft parts (inelastic demand).

Vertical integration or vertical merger into the low value use can eliminate arbitrage and enable the monopolist to price discriminate. If it is a monopolist in the input, then it can monopolise the low value use by implementing a price squeeze on the independent downstream firms in that use. A price squeeze involves lowering the price of the downstream good with the low value use, while raising the price of the input. The input monopolist only offers the input for sale at the higher price, based on the willingness to pay of the high value users. In conjunction with the low price that the monopolist charges low value users, this makes it unprofitable for independent downstream firms to supply low value users and they are forced out of the market.

In general the welfare effects of a vertical merger motivated by, and which implements, price discrimination are ambiguous. Profits increase, and assuming competition downstream, prices downstream in the low value market fall and prices in the high value downstream market rise. Efficiency may rise or fall: a necessary condition for total surplus to rise is an increase in output.¹⁶ In general, the effect on consumers in aggregate is also ambiguous, but the surplus of the high type falls and the surplus of the low value users rises.

¹¹ Fisher and Sciacca (1984, p. 21).

¹² The inefficiencies from expanding the size of the firm are typically related to incentive problems created by increased firm size. See Church and Ware (2000, Chapter 3) for a summary of the costs associated with increasing the size of a firm.

¹³ Perry (1989, p. 192).

¹⁴ Under a two part tariff the monopolist would charge the downstream firms a per unit charge and a fixed fee for the right to buy. The per unit charge is efficient if it equals the marginal cost of the upstream product.

¹⁵ The monopolist in this case will find it profit maximizing to engage in third-degree price discrimination. It would like to charge a higher price to groups with relatively inelastic demands and a lower price to groups with relatively elastic demands. This pricing pattern reflects the difference in demand side substitution possibilities across different groups.

¹⁶ The technical condition for when output will expand—a necessary but not sufficient condition for total surplus to increase—is found in Varian (1989, p. 623). It depends on the curvature of the demand curves. An increase in output is necessary: if aggregate output was unchanged—which is true if demand curves are linear—then total surplus must fall since under price discrimination, gains from trade are still possible, while under uniform pricing they are exhausted. These unexhausted gains from trade arise because under

However, if there are large differences in willingness to pay across downstream uses and the size of the low value market is small, then price discrimination will benefit the low value users and the firm without harming the high value users. In this case, the uniform monopoly price is based on the willingness to pay of the high types only: the low types are excluded by the high price. Hence under price discrimination the price charged the high types is the same, but the low types are now also served, increasing their surplus and the profits of the firm.

(iii) Evading Price Regulation

If the market power of the upstream monopolist is effectively controlled by price regulation, then it has an incentive to try to circumvent this restraint on its market power and profit by vertically integrating.¹⁷ Vertically integrating downstream gives it the ability to realise its monopoly profits in a downstream unregulated market by (i) discriminating against other downstream firms in the provision of the input or (ii) engaging in cost misallocation whereby the costs of the downstream division are “attributed” to the regulated upstream division.

Escaping an effective regulatory constraint in the regulated market using anticompetitive discrimination by vertical merger involves (i) merging with a downstream firm that uses the regulated product as an input; and (ii) discriminating against competitors in the downstream market by lowering the quality of their input, raising their costs of using the input, or, in the extreme, not supplying them at all. If the regulated firm is able to do these two things, it will be able to raise its price for the downstream good above the level that would prevail in the absence of its integration and discrimination strategy. It is through its profit margin on sales of the downstream good that it exercises its upstream market power and earns monopoly profits.

An alternative strategy available to a monopolist that subverts effective cost-based regulation is to enter a downstream market with the intent of reallocating costs from the downstream market to the regulated upstream market. This has the effect of relaxing the price constraint in the regulated market and increasing profits—provided costs are only reallocated from competitive markets and not increased. Transferring costs increases the price in the regulated market and the profits from doing so are realised in the unregulated market. The transferring of costs creates or widens the differential between the revenues and accounting costs of the regulated firm in the unregulated market.

Efforts by the regulated upstream monopolist to escape a regulatory constraint on its monopoly power, by vertical merger with a downstream firm that enables it to engage in discrimination or cost misallocation are typically inefficient, leading to either higher prices for consumers in the downstream market (discrimination) or in the upstream market (cost misallocation). In addition since both strategies can put competitors in the downstream market at a disadvantage, they can result in a transfer of market share from the independent downstream firms to the vertically integrated firm that is inefficient if the independent firms have lower costs downstream than the integrated firm. The cost misallocation strategy puts competitors in the downstream market at a disadvantage if it involves marginal costs. In this case the regulated market provides a “cross-subsidy” to the downstream market with the result that the monopolist can behave downstream as if its marginal cost is lower. This may be an effective means for the regulated firm to commit

price discrimination, the distribution of output across markets is not efficient. The last unit sold to the high value users has a greater value than the last unit sold to the low value users. Under uniform pricing these values are equal.

¹⁷

See Church and Ware (2000) Chapter 26 and references therein for a more detailed discussion.

to aggressive behaviour post-entry which could result in entry deterrence or exit in the downstream markets leading to higher prices downstream for consumers as well.

In addition, a monopolist subject to effective cost based regulation could integrate upstream and use transfer pricing to evade the regulatory constraint downstream. It pays inflated prices and only buys from its upstream affiliate, thereby relaxing any cost-based regulatory constraint downstream and earning its monopoly profits on sales of the input. This frustrates the cost based regulatory scheme and leads to higher prices downstream for consumers.

2.1.2 *The Successive Monopoly Model*

The successive monopoly model considers the effect of integration between an upstream monopolist and a downstream monopolist.¹⁸ It shows that the effect of the vertical merger is welfare improving because it eliminates double marginalisation. Pre-merger the upstream monopolist exercises its market power by raising the wholesale price above its marginal cost. When the downstream monopolist exercises market power in its market, it raises the downstream price above its marginal cost—which includes the upstream margin. When the downstream firm sets its profit-maximising price, at the margin it equates the two effects of an increase in its price: (i) the gain on its inframarginal units (quantity it continues to sell); and (ii) lost profits on its marginal units (the product of its margin and units no longer sold because of the price increase). It ignores, however, the lost profits of the upstream firm on the lost sales from raising the downstream price and hence reducing demand upstream. This is an example of a vertical pricing externality: the downstream firm does not consider the effect of its action on the profits of the upstream firm.

In these circumstances a vertical merger makes both consumers and the two firms better off. Under vertical integration the downstream division faces the true marginal cost of production for the upstream input. The decrease in the marginal cost downstream due to vertical integration provides the firm with a profit incentive to expand output and lower prices, making consumers better off. Equivalently, the vertical merger internalises the vertical pricing externality: the integrated firm in considering the lost profits from a price increase will internalise the lost margins both up and downstream. Hence the integrated firm has an incentive to charge lower prices since the cost to it of raising its price is greater.

The internalisation of double marginalisation is an important *potential* source of efficiency associated with any vertical transaction where there is market power both up and downstream pre-merger. The successive monopoly model allows for a very simple exposition of the gains from eliminating double marginalisation. However, it assumes that the upstream firm has all of the bargaining power between the two firms and that the monopolist upstream uses uniform pricing and not nonlinear pricing. If the upstream firm has available sufficient vertical restraints it can achieve the integrated level of profits without having to integrate.¹⁹ For instance, it could set its wholesale price equal to its marginal cost (at the monopoly output) and then use a fixed franchise fee to extract the monopoly profits.

Moreover, if the upstream firm cannot credibly make take it or leave it offers, and bargaining is efficient, then the two firms will set the efficient transfer price, but negotiate over the division of the

¹⁸ The modern literature starts with Spengler (1950). Scherer's (2005, p. 67) most recent attribution of the insight is to Alexander Hamilton in *Federalist Paper No. 22* published in 1787.

¹⁹ The single monopoly profit result can be extended if there is imperfect competition downstream provided that the upstream monopolist has sufficient instruments, i.e., vertical restraints. The role of the restraints is to (i) internalize both vertical and horizontal externalities so that firms downstream maximize industry profits when they maximize their profits and (ii) enable profit extraction by the upstream firm. See Mathewson and Winter (1984).

monopoly profits when determining the franchise fee. If bargaining is inefficient however, then even with nonlinear pricing the transfer price might exceed marginal cost and double marginalisation will exist and be eliminated by integration.²⁰

2.2 *An Introduction to Foreclosure*

The traditional antitrust concern with vertical mergers is foreclosure: post merger some buyers and some sellers are precluded from the market. Until the late 1970s and early 1980s the antitrust treatment of vertical mergers in the United States, based on concerns over foreclosure, was very restrictive.²¹ The post-Chicago economics of foreclosure reconsiders the potential for foreclosure to harm consumers by enquiring into the effect of a vertical merger on competition, something that the Chicago models cannot address since post merger in these models there are no unintegrated firms either upstream and/or downstream.²² The modern theories of the anticompetitive effects of vertical mergers from foreclosure address this question by assuming imperfect competition up and/or downstream. The modern, or Post-Chicago, analysis of the foreclosure effects of a vertical merger focus on how foreclosure either raises rivals' costs or reduces their revenues, and how these negative effects on rivals result in an anticompetitive effect, i.e., harm to consumers or efficiency. Those theories establish the indirect link from a vertical merger to market power and anticompetitive harm involves determining: (i) the incentive for foreclosure; (ii) the effect of foreclosure on rivals and, in turn, how it affects their ability to compete; (iii) how the change in their ability to compete impacts competition; (iv) how the vertical merger changes the incentives of the integrated firm in the downstream market; and (v) the impact on the welfare of consumers, or efficiency, from the change in competition and the change in the behaviour of the vertically integrated firm downstream.

The hypothesis associated with raising rivals' costs typically involves input foreclosure. Input foreclosure occurs when post-merger the price of the upstream input rises, raising the costs of competing

²⁰ See Riordan (2005).

²¹ For instance, see *Brown Shoe Co. v. United States*, 370 US 294 (1962) and *Ford Motor Co. v. United States*, 286 F. Supp. 401 (1968), affirmed 405 US 562 (1972). In *Brown Shoe* the US Supreme Court prohibited a vertical merger between two shoe companies, Brown Shoe (the third largest retailer and fourth largest shoe manufacturer, its market share in manufacturing was 4%) and Kinney (the largest retailer with a 1-2% share of national shoe sales and the twelfth largest manufacturer with a 0.5% market share). In *Autolite* it prohibited a merger between a maker of ignition systems (Autolite with a 15% share of sparkplug production) and an automobile manufacturer (Ford with a 10% share of sparkplug purchases). The 1968 US Merger Enforcement Guidelines suggested that a merger between a supplier with a 10% market share and a purchaser who accounted for 6% of demand upstream would be challenged unless there were no barriers to entry.

The judicial hostility to vertical mergers in the United States eased in the late 1970s. For instance in *Fruehauf Corp v. FTC*, 603 F. 2d 345 (2nd Cir. 1979) the appeals court overturned an order of the Federal Trade Commission blocking the acquisition of a wheel supplier by the manufacturer of trailers where the wheel purchases of the trailer manufacturer were less than 6% of the market. In *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.* 826 F.2d 1235 (3rd Cir. 1987), Alberta Gas alleged that the purchase by du Pont of Conoco would foreclose its sales of methanol to Conoco. The court observed that post merger Alberta Gas' sales had increased and, like *Fruehauf*, the court noted that the effect of the vertical merger was not anticompetitive, but instead the effect of the vertical merger was likely a realignment of trade between upstream and downstream buyers. See Schlossberg (2004) and Morse (1998) for a detailed discussion of vertical merger enforcement in the United States.

²² One of the critiques of decisions like *Brown Shoe* and *Autolite* is that they never specify how foreclosure harms consumers. See Hovenkamp (2001, p. 324) who observes that "Foreclosure was largely thought of as an evil for its own sake."

downstream firms. This might relax the competitive constraint on the integrated firm that has access to the input at marginal cost. The price of the input rises because the integrated firm either stops supplying competing downstream firms (complete foreclosure) or does so at a higher price (partial foreclosure). The hypothesis is that the integrated firm has an incentive to change the behaviour of its upstream division post-merger because it will internalise the effect on downstream prices when setting its optimal price in the market for the input, i.e., it will recognise that there is an additional benefit from raising its input price: higher downstream profits from an increase in prices and market power downstream. In either the complete or partial case, the increase in the input price can be due either to a unilateral effect or a coordinated effect attributable to the change in behaviour of the integrated firm upstream. For an anticompetitive effect, however, not only must foreclosure result in higher input prices, the effect of those higher input prices on the unintegrated rivals must also raise prices, or otherwise harm consumers, downstream.

The hypothesis associated with reducing rivals' revenues typically involves customer foreclosure. Customer foreclosure occurs when, post-merger, the downstream division of the integrated firm no longer sources supply from independent upstream firms. If the resulting reduction in sales volume leads to an increase in the average cost or marginal cost of upstream competitors, then, to the extent there is exit (because of higher average costs) or reduced competitive vigour (because of increased marginal costs) the competitive constraint these firms exert on the upstream division of the integrated firm will be reduced, leading to greater market power upstream and higher input prices. The higher input prices, in turn can result in input foreclosure downstream.²³

The next two sections consider the economics of how, and when, a vertical merger can result in either raising rivals' costs or reducing the revenues of rivals in markets characterised by imperfect competition.

2.3 *Input Foreclosure*

2.3.1 *Raising Rivals' Costs*

The modern theory of the potential for input foreclosure from a vertical merger considers the incentives for, and the effect of, another vertical merger when there is oligopoly up and downstream pre-merger and unintegrated competitors post merger.²⁴ The effect of the vertical merger is to introduce a cost asymmetry between the integrated firm downstream and its unintegrated downstream rivals. The downstream marginal cost of the integrated firm will be reduced because of the elimination of double marginalisation: it now has access to the upstream good at marginal cost. How much of a cost advantage

²³ Normally we would expect the downstream price to increase, but in the case where input markets are local and the downstream market global, the effect of the increase in cost will be a reduction in output in the local market, not an increase in price. On the other hand, input foreclosure could lead to customer foreclosure. Input foreclosure gives the vertically integrated firm a cost advantage downstream, which leads to an expansion in its market share. This increase in market share reduces the demand for its unintegrated rivals upstream. If there are economies of scale upstream, this indirect demand effect, combined with a commitment by the integrated firm not to buy from upstream rivals, could induce their exit.

²⁴ There are two streams of this literature. The first which starts with Salinger (1988) assumes competition downstream involves homogeneous products and quantity competition, i.e., Cournot behavior. Extensions to this literature include Gaudet and Long (1996), Schrader and Martin (1998), Higgins (1999), and Avenel and Barlet (2000). A similar literature, not treated separately but which has many of the same implications, assumes instead that downstream products are differentiated and competition in the downstream market is over price, i.e., Bertrand competition. This line of research begins with Ordober, Saloner, and Salop (1990) and important contributions include Reiffen (1992), Reiffen and Vita (1995), Choi and Yi (2000), and Chen (2001).

it has relative to its unintegrated rivals depends on the change in the upstream price. The change in the input price depends on whether the integrated firm no longer participates in the upstream market, i.e., it no longer supplies what are now competing downstream firms. If it withdraws from the upstream market, the interplay of three effects determines whether the price of the input rises for the unintegrated firms in the downstream market.²⁵

First, the withdrawal of the integrated firm's upstream division reduces competition upstream, raising the market power of the remaining input suppliers. This supply effect suggests that price should rise. Second, the withdrawal of the integrated firm's downstream division reduces demand for the input. Third, there is an induced fall in demand for the upstream input as well. The cost advantage of the integrated firm provides it with a competitive advantage downstream that translates into an increase in its quantity sold and a decrease in the quantity sold by its unintegrated rivals in the downstream market. The two demand effects put downward pressure on the upstream price. Whether the price of the input paid by unintegrated downstream firms rises or falls depends on whether the supply or demand effects dominate.²⁶ Moreover, even if the upstream price increases, the downstream price might still fall if the output expansion of the integrated firm exceeds the reduction in output of its unintegrated rivals downstream.²⁷ For instance, the downstream price will rise if the vertical merger involves the last independent supplier upstream and the exclusion of the unintegrated downstream firms from foreclosure creates a significant increase in market power for the remaining integrated firms.²⁸

This analysis points out the importance of distinguishing between the effects of the vertical merger on the incentives of the integrated firm and the equilibrium outcome. A first-order approach would infer an increase in the upstream price by simply looking at how the incentives of the integrated firm change as a result of the merger. However, while necessary, this is not enough to infer either an increase in the input price or the price downstream. Consideration of the effect of the vertical merger on these two prices requires an assessment of the new equilibrium post merger. This consideration involves determining how other firms, up and downstream, will respond to the change in behaviour of the vertically integrated firm (both up and downstream), and in particular the induced fall in demand by downstream rivals.²⁹

A key issue is the credibility of non-participation by any and all of the integrated firms in the upstream market.³⁰ In general it is not clear that it is profit-maximising for them to withdraw from this

²⁵ Salinger (1988) defines an increase in the upstream price as foreclosure.

²⁶ The supply effect depends on the elasticity of derived demand for the input and on the intensity of competition upstream. The less elastic downstream demand, the less elastic the demand for the input. The less elastic derived demand and the less aggressive competition upstream, the bigger the supply effect. The demand effect depends on the size of the firms that are party to the transaction and the extent of double marginalization.

²⁷ Salinger demonstrates that for the downstream price to rise, the number of downstream firms must be sufficiently larger than the number of upstream firms and more than half of the upstream firms already integrated.

²⁸ Salinger shows that in these circumstances a vertical merger is also likely to be profitable because of the market power effects.

²⁹ Reiffen and Vita (1995) and Sibley and Doane (2002) explore how the input price upstream will rise or fall depending on the interplay of the demand effect and the changed incentives of the integrated firm when there is a differentiated duopoly downstream.

³⁰ Salinger argues that the credibility of foreclosure is not an antitrust issue, but instead an uninformative debate about economic modeling. See M. Salinger, Federal Trade Commission, "Is it Live or Is It Memorex? Models of Vertical Mergers and Antitrust Enforcement," Prepared Remarks for the Association of Competition Economics Seminar on Non-Horizontal Mergers (September 7, 2005).

market. Alternative “vertical conjectures” suggest that integrated firms will find it profitable to participate in the upstream market.³¹ The incentive for a vertically integrated firm to participate in the upstream market will be different from those of its unintegrated rivals. The integrated firm will internalise the effect that reducing supply in the upstream market will raise the price of the input, reducing the output and competitive constraint of its rivals in the downstream market. Moreover, if the effect on downstream profits is sufficiently large, the integrated firm will have an incentive to engage in strategic purchasing, i.e., become a net buyer upstream even though it can produce the input at lower cost than the upstream price. In general it is willing to forgo profits in the upstream market to increase its profits downstream—in the extreme it is willing to incur losses in the upstream market to increase its profits downstream.

When the integrated firms participate in the upstream market, the supply effect is not as large as in the case of complete withdrawal. The equilibrium effect on downstream prices is that they decrease as the number of firms that are integrated increase.³² The analysis of the effects of a vertical merger when integrated firms are unable to commit not to participate in the upstream market suggests that vertical mergers are good for consumers and, that, if anything, there are too few vertical mergers.

The welfare effects of a vertical merger, therefore, depend critically on the credibility of non-participation in the upstream market by the integrated firms: increases in the downstream price are more likely if the integrated firm withdraws from the upstream market. Such commitment might be possible under vertical integration if integrated firms can choose to use a different technology process that locks upstream and downstream production units together. The adoption of this “specific” technology makes the upstream production of the integrated firm incompatible with the production processes of the unintegrated downstream firms. A pair of up and downstream firms that vertically integrate and adopt the specific technology instead of the “standard” technology will not only foreclose supplying the upstream market, they will also be foreclosed from buying in the upstream market.^{33, 34} Technological choice provides the

³¹ A vertical conjecture pins down the vertically integrated firms’ beliefs regarding the behavior of other firms upstream and downstream when they transact in the upstream market. Schrader and Martin (1998) characterize the assumptions made by Salinger as Cournot conjectures by vertically integrated firms to their input sales and Bertrand conjectures by vertically integrated firms to their input purchases. The latter implies that the integrated firm acts like a perfectly competitive firm in the upstream market, i.e., as a price taker. The Gaudet and Long (1996), Schrader and Martin, and Higgins (1999) analyses assume Cournot conjectures by the vertically integrated firm to both upstream sales and purchases, i.e., that rivals will hold their output constant at each level.

³² See the discussion in Church (2004, pp. 39-42).

³³ Non-vertically integrated firms are unlikely to adopt a specific technology since this exposes them to the threat of opportunistic behavior and expropriation of their investment. The idea here is that in the absence of vertical integration, firms will be reluctant to invest in a specific asset that binds them to a specific trading partner because instead of paying average total cost to induce supply, a buyer can choose to offer only average variable cost—which excludes the sunk expenditures associated with the specific investment. The sunk component of the specific investment is not recovered by the seller, but instead is surplus that the seller expected to receive—or they would not have invested—which instead the buyer is able to retain. Vertical integration is thought to be a mechanism to encourage specific investment since the possibility of expropriation of sunk expenditures should not be, or is much less likely to be, an issue under common ownership. See Church and Ware (2000, Chapter 3) and cites therein.

³⁴ For this reason utilization of the specific technology entails both input foreclosure and customer foreclosure.

basis for complete foreclosure to be credible: adoption of the specific technology makes it impossible for the integrated firm to participate in the upstream market.³⁵

The profitability of foreclosure from adopting the specific technology depends on a trade off. Foreclosure results in an increase in downstream profits for the integrated firm as it will have a cost advantage from the elimination of double marginalisation. On the other hand it will involve an opportunity cost: the integrated firm will forgo sales and profits in the upstream market. The greater the number of downstream firms, the less favourable this trade off and the less likely the incumbent will integrate and foreclose. A larger number of downstream firms decreases the advantage of having a cost advantage, limiting the benefits of foreclosure, while at the same time increasing the opportunity costs of integration and foreclosure since the upstream market will be larger. The greater the competitive pressure downstream, the lower downstream margins and the smaller the cost disadvantage of unintegrated rivals and the cost advantage of integrated firms.

The incentive of the vertically integrated firm to behave differently in the upstream market in order to raise rivals' costs depends on its effectiveness. The more competitive post-merger the upstream or downstream markets, the less the incentive to change its behaviour in the upstream market. Its incentive to raise rivals' costs will be less, the less the extent that it can affect the price upstream or the price downstream by foreclosure.

The downstream benefits from the vertical merger depend on the cost asymmetry that it creates between the integrated firm and its unintegrated rivals. This asymmetry however, will not be maintained if a counter merger results, i.e., the unintegrated downstream rivals also merge with an unintegrated upstream firm.³⁶ In evaluating the competitive effects of a vertical merger, it is important to consider the possibility that it will initiate counter mergers which not only eliminate the advantage of the first mover, but rather than restore the status quo, result in an industry structure which is more competitive.³⁷

A counter merger will not be a factor if it is not possible because an unintegrated upstream supplier is not available or entry barriers are too high, making sponsoring entry or integration by internal growth unprofitable. Moreover, if the vertical merger gives rise to external benefits, then those benefits might be lost by retaliation, in which case pairs of unintegrated firms might find it more profitable to remain unintegrated than to merge. That is, a counter merger might not be profitable in response to an initial vertical merger if the profits of an unintegrated upstream and downstream firm are greater if they do not retaliate than if they do even though (i) their aggregate profits have been reduced by the initial vertical merger and (ii) the vertical merger would restore cost parity downstream.³⁸

Alternatively, a second counter measure is that unintegrated downstream firms might protect themselves by adopting strategies that change the incentives of the integrated firm to act aggressively downstream. For instance if the unintegrated downstream firm must incur a switching cost (perhaps due to

³⁵ A second advantage to the vertically integrated firm is that the costs of using the specific technology are likely less than the standard technology, reflecting that the assets required to support trade can be tailored to a specific trading partner.

³⁶ Alternatively, rather than a vertical merger, the unintegrated downstream firms can enter the upstream market on their own.

³⁷ Consumers will typically prefer an industry structure where all firms are vertically integrated, since it results in the complete elimination of double marginalization. Firms on the other hand will typically prefer the vertical structure where none are integrated.

³⁸ See Choi and Yi (2000) for an example involving uncertainty over cost as a function of technological choice.

adoption of a specific technology), then it has an incentive to select the integrated firm as its supplier, locking it in to the integrated firm.³⁹ The unintegrated downstream rival does this as a defensive measure. In the wholesale market the switching cost provides the integrated firm with room to raise the price at which it supplies the unintegrated downstream firm above competitive levels. The unintegrated firm realises that this margin provides the integrated firm with an incentive to maintain sales in the wholesale market. The integrated firm can do this by pricing its downstream differentiated product less aggressively, offsetting its incentive to lower it from the elimination of double marginalisation.

The value of maintaining volumes of the upstream good to the unintegrated rival depends on the cost to the unintegrated downstream firm of switching suppliers. The greater this cost, the higher the input price that can be charged by the unintegrated rival, and thus the less competitive the integrated firm's downstream prices. If the switching cost is relatively small, then prices for both downstream products fall and consumers are made better off. If the switching cost associated with changing suppliers is relatively large, then vertical merger increases the price of both downstream products. The size of the critical switching cost for which prices rise is decreasing in the extent to which the two downstream goods are substitutes. Hence the counter measure, while good for the unintegrated firms, can contribute to the anticompetitive harm of the vertical merger.

Input foreclosure arises when upstream firms exercise market power, i.e., raise the transfer price above marginal cost. If upstream pricing involves the use of two part tariffs and bargaining is efficient then the input will be transferred at marginal cost, regardless of the extent of competition upstream. A vertical merger in these circumstances will not have an effect on variable costs downstream and cannot result in higher downstream prices. If the elimination of an upstream supplier increases the bargaining power of the remaining suppliers vis-à-vis the unintegrated downstream firms, then the possibility exists that if the unintegrated upstream firms do not have complete information or cannot set downstream specific fixed fees, that the increase in bargaining power will result in franchise fees for some downstream firms that, for some firms are too high.⁴⁰ Consequently they will exit, reducing competition and raising downstream prices.

The economic models of how input foreclosure from a vertical merger can raise the costs of rivals provide the foundation for assessing how a vertical merger can harm competitors. In particular they highlight the importance of assessing the market power of the unintegrated upstream firms post-merger and the effect of the increase in upstream prices on the downstream costs of unintegrated rivals. They also highlight the importance of the credibility of foreclosure by the integrated firms and the potential for counter measures, in particular counter mergers. Finally, the literature makes clear the difficult assessment required in determining the impact of a vertical merger on downstream prices even when the integrated firms can commit not to participate in the upstream market: the trade off between the output expanding effect of double marginalisation and the output contracting effect of foreclosure, and this latter only if in fact the wholesale price rises.

³⁹ See Chen (2001). The switching costs the unintegrated rival would incur if it switched suppliers gives the integrated firm "commitment" to raise its price above competitive levels. The Chen result depends on competition downstream being over price and between differentiated products. The dependence of its sales on the upstream price is the link the unintegrated firm uses to its advantage. Under Cournot competition the quantity of the unintegrated downstream firm is taken as fixed when the vertically integrated firm maximizes its profits.

⁴⁰ See Riordan (2005).

Monopoly Maintenance

The discussion of the effect of a vertical merger in the preceding section was fairly general. A more specific case that has attracted attention involves vertical merger and foreclosure that preserves or maintains a monopoly upstream.⁴¹ A vertical merger that maintains an upstream monopoly by raising entry barriers upstream corresponds to the following set of circumstances: (i) a homogenous downstream product; (ii) an incumbent monopolist upstream threatened by entry; (iii) a relatively concentrated downstream market; (iv) vertical integration enables adoption of a specific technology that precludes participation by the integrated firm in the upstream market, i.e., input foreclosure; (v) integration and foreclosure reduce the entrant's profits such that it is deterred from entering; (vi) uniform pricing upstream; and (vii) neither entry into both the upstream and downstream market by the entrant is profitable, nor a counter merger involving the entrant and an unintegrated downstream firm. The vertical merger is potentially anticompetitive because it deters entry upstream and forecloses *all* competition downstream, thereby potentially raising downstream prices relative to what they would have been had the upstream firm entered. While entry deterrence makes it more likely that the vertical merger will lead to higher downstream prices, the trade off between the reduction in competition upstream and downstream from foreclosure versus the benefits of eliminating double marginalisation still exists. It is possible that an integrated downstream monopolist with implicit marginal cost pricing results in lower downstream prices than an industry structure with unintegrated duopoly upstream. This is more likely the case when double marginalisation is significant, i.e., the downstream market is very concentrated.⁴²

Foreclosure affects the profitability of entry. It increases the profitability of entry because it eliminates competition in the upstream market—the entrant will be a monopoly supplier of the unintegrated downstream firms. On the other hand it reduces the profitability of entry by reducing demand in the upstream market. Demand is reduced for two reasons: (a) the downstream subsidiary of the vertically integrated firm only sources from its upstream subsidiary;⁴³ and (b) the integrated firm has a cost advantage over its unintegrated rivals downstream. The extent to which foreclosure reduces demand upstream for an entrant depends on the number of downstream firms. If there are only a few, then the demand effect is more likely to be significant, but if there is extensive competition downstream, the demand effect will be minimal. There are a critical number of downstream firms, beyond which vertical integration and foreclosure results in greater profits for the entrant. That is, in these cases vertical integration does not raise barriers to entry, but facilitates entry upstream. The greater economies of scale upstream, the more likely the reduction in the profits of an entrant attributable to foreclosure results in entry deterrence and maintenance of monopoly.

2.3.2 *Restoring Monopoly Power*

A very different perspective on the anticompetitive effects of vertical mergers has received considerable attention recently in the economics literature.⁴⁴ This literature considers the effectiveness of vertical merger and foreclosure in restoring or preserving market power in the upstream market by eliminating competition downstream. Suppose for clarity that production downstream is carried out in

⁴¹ This scenario is modeled by Avenel and Barlet (2000). Its usefulness for welfare improving antitrust enforcement is discussed by Scheffman and Higgins (2004).

⁴² For Avenel and Barlet's specific parameterization, it is the case if the downstream market is a duopoly. Church's conclusions with regard to the welfare effects of this model are overstated (2004, pp. viii and 54).

⁴³ The result of the technological choice by the integrated firm is therefore both input and customer foreclosure.

⁴⁴ This literature begins with Hart and Tirole (1990). For a recent comprehensive treatment see Rey and Tirole (2003).

fixed proportions. The downstream firms incur a constant cost to transform one unit of the upstream good into the downstream good that they sell.

The key to this approach is the observation that when the terms of trade, or contracts, between an upstream and downstream firm are unobservable or unverifiable by others, the upstream monopolist has a commitment problem. Suppose that the upstream monopolist enters into a contract with a downstream firm to maximise industry profits. This contract would require the downstream firm to sell the monopoly quantity and the upstream monopolist would then extract the monopoly profits through a fixed franchise fee. This is an application of the single monopoly profit result. The monopoly quantity maximises profits by setting marginal revenue equal to marginal cost, where marginal revenue is the change in revenue from selling the last, or marginal, unit. It is the sum of the price received for the marginal unit and the loss on inframarginal units. The loss on inframarginal units equals the change in the price required to induce consumers to buy one more unit multiplied by the inframarginal units sold—the units that would be sold without lowering the price.

The commitment problem arises because after entering this contract the monopolist upstream has an incentive to supply other downstream firms. By doing so it can increase its profits: the reason its profits rise is that when the second downstream firm makes sales, the reduction in price reduces the value of the inframarginal units of the first downstream firm, not the monopolist. The reduction on revenue downstream on the units sold by the first downstream firm because price falls with the increased supply are not borne by the upstream monopolist, but by the first retailer. Consequently the monopolist will have an incentive, and will be able to reach a mutually profitable agreement, with a second downstream firm to expand its sales. Anticipating this, however, the first downstream firm will not enter into a contract under which it sells the monopoly quantity in return for a fixed fee equal to the monopoly profits—since it will not earn monopoly profits. Unable to commit not to expand output, because it is profitable, the monopolist is not able to even earn her monopoly profit. Vertical integration has been suggested as one way that the monopolist could internalise the loss from expanding output downstream, thereby eliminating its incentive to find alternative downstream buyers and preserving its monopoly power and profits: the losses on the inframarginal units from increasing output through a different downstream firm are borne by the downstream operation of the integrated firm.⁴⁵ Thus its profits would go down if it sold more to another downstream firm: its incentive to offer a sweetheart deal to additional downstream firms is eliminated.

It has been argued that the implications of this model for vertical merger policy are unlikely to be significant.⁴⁶ First, as with variable proportions, it seems unlikely that vertical integration is the obvious solution to this problem. Instead it is likely to be solved at lower cost through the use of exclusive contracts. Moreover, the actions taken here by the monopolist to solve the commitment problem are designed to preserve its monopoly power, not by excluding competitors downstream, but by placing constraints on its behaviour. While it is true that a vertical merger in these circumstances would preserve its market power, that preservation is not achieved by relaxing a constraint on its market power by reducing competition. Hence it is not clear that this type of behaviour is a legitimate target for antitrust enforcement, provided, of course, the monopoly upstream has been obtained legitimately, through superior competitive performance.

⁴⁵ The commitment problem identified here is very similar to that associated with a durable goods monopolist. A durable goods monopolist has an incentive to engage in intertemporal price discrimination, since the loss on inframarginal units from lowering the price through time is borne by consumers who purchased in earlier periods. Anticipating this, consumers have an incentive to act strategically and substitute between periods. This reduces the monopoly power of the durable good monopolist. Here the discrimination is not over time, but over downstream firms. See Church and Ware (2000, Chapter 4) and cites therein for discussion of durable goods monopoly.

⁴⁶ See Church (2004, pp. 82-85).

2.4 *Customer Foreclosure*

Customer foreclosure occurs when the integrated firm no longer sources supply from upstream competitors: the foreclosure effect of the transaction is to reduce demand and hence revenues of upstream rivals. The demand of the downstream firm that integrates is now captured by the upstream division of the integrated firm. The hypothesis of customer foreclosure is that this reduction in demand reduces volumes for the upstream competitors of the integrated firm, leading to an increase in either their marginal or average cost. In either case, the effect may be to reduce the competitive constraint the unintegrated upstream firms have on the upstream division of the integrated firm. This happens in the short-run if the lost volume causes an increase in the marginal cost of the unintegrated firms, reducing their ability to compete, or in the long-run if it increases their average cost and induces their exit. A key consideration is identifying how the harm to rivals ultimately harms consumers (or efficiency).

The profitability of customer foreclosure depends on continuing to supply competing downstream firms at higher prices post merger. Notice that this concern is the exact opposite of the “input foreclosure” hypothesis. The concern with input foreclosure was that the integrated firm would no longer supply downstream firms, creating market power for its rivals upstream, which increases the market power downstream of the integrated firm. Under customer foreclosure the objective is to create market power upstream for the integrated firm: depending on competitive conditions downstream this might also lead to increased prices downstream.⁴⁷

There is only a very small formal literature in economics that explicitly addresses customer foreclosure. Instead it has been argued that an understanding of the economics of customer foreclosure can be addressed by considering the economics literature on exclusionary agreements.⁴⁸ Of course in the case of an exclusive dealing contract, the contract insures that the buyer does not source from any other upstream supplier. In the case of a vertical merger for customer foreclosure to be credible either (i) technological reasons associated with integration create a credible commitment that the downstream division will not source from an independent supplier or (ii) it must be profit maximising for the downstream division to forgo external supply.

The theories suggesting harm from a vertical merger are of four sorts. In one set there is competition between upstream firms to merge with a single downstream firm (competition for exclusivity). In the second there is a first-mover advantage, an incumbent upstream firm can merge before its competitors enter the market (first-mover advantage and exclusivity). The models in the third set are similar to those in the second, but they are based on models of tying complements. In the fourth set, firms compete in the downstream market on the basis of “bundles” of products, where demand depends on the variety in a bundle. Hence if a vertical merger between an upstream supplier of a product and a downstream firm reduces the variety of a competitor’s bundle it will reduce demand and revenues of the downstream competitors of the integrated firm. In this setting foreclosure by the integrated firm involves not supplying its upstream product to competing downstream firms, an action that reduces the variety or quality of the integrated firm’s downstream competitors.

2.4.1 *Competition for Exclusivity*

Consider a situation where there are two upstream firms that produce a differentiated input and one downstream firm. The inputs are specific to an output good: if the downstream firm buys both inputs then

⁴⁷ Normally we would expect the downstream price to increase, but in the case where input markets are local and the downstream market global, the effect of the increase in cost will be a reduction in output in the local market, not an increase in price.

⁴⁸ See Church (2004, Section 3.3).

it will be a multiproduct firm downstream and sell two competing substitutes. If it purchases the input from only one of the upstream firms, then it produces and sells only the output product that uses that input.

There are two foreclosure possibilities depending on whether there is efficient contracting.⁴⁹ If contracting is inefficient, so that there is double marginalisation, then foreclosure post merger involves raising the price of the downstream unintegrated product in order to divert demand to the integrated product.⁵⁰ If contracting is efficient then the profitability of a vertical merger requires that foreclosure increase market power in a second, unrelated, market: precluding sales to the downstream firm in an initial market because of the merger may allow the integrated firm to monopolise supply upstream to a second market.⁵¹ This will be the case if there is a fixed cost upstream and sales to the second downstream firm are insufficient to insure their recovery. In these circumstances an exclusive deal between an upstream firm and the first downstream firm precludes the second upstream firm from supplying the second downstream firm. As a result the first upstream firm, as a result of the exclusionary agreement, becomes a monopolist supplier of the second downstream firm/market.

(i) Inefficient Contracting

The question is whether, and when, the integrated firm would have an incentive to raise the downstream price of the unintegrated product downstream in order to *increase* the sales and maybe even the price of its own product.⁵² In this situation a vertical merger eliminates double marginalisation on the upstream brand of the merging firm, reducing its cost to the monopolist downstream to marginal cost. This increases the margin on the integrated product, providing the integrated firm with an incentive to increase its sales. It can do this by lowering the price of its brand downstream and increasing the price of the unintegrated product.

The diversion effect is the profitability of raising the price of the unintegrated product: it is increasing in the extent to which demand diverts from the unintegrated to the integrated product as the price of the unintegrated product rises and in the margin of the integrated good. If the fall in marginal cost and the diversion effect are both small, then holding the supply price of the

⁴⁹ Efficient contracting means that the contracts between up and downstream firms maximize their joint profits. It precludes, in particular, double marginalization. Joint profit-maximization requires that input be transferred from the upstream firm to the downstream firm at the upstream marginal cost of production.

⁵⁰ See Salinger (1991).

⁵¹ See Bernheim and Whinston (1998).

⁵² In this setting, with differentiated products downstream, the integrated firm is unlikely to find it profit-maximizing to engage in complete foreclosure: the monopolist downstream will have incentives to carry both products unless there are large product specific fixed costs or the marginal cost of one of the goods exceeds the willingness to pay of consumers. Instead there is partial foreclosure; the vertical merger provides the integrated firm with an incentive to raise the price of its unintegrated rival's product. It is straightforward to see that complete foreclosure is not an equilibrium unless even in its absence the integrated firm would find it optimal not to sell any of the unintegrated competing, but differentiated product. To see this, suppose that the integrated firm forecloses. Because the products are differentiated, the effect of this is to raise the demand for its downstream product as consumers substitute to its product and away from the (now unavailable) competing product. However, because the two goods are imperfect substitutes, some consumers will not substitute to the product of the integrated firm. Provided the willingness to pay of these consumers exceeds the marginal cost of the unintegrated product, the joint profits of the unintegrated supplier and the integrated firm will increase if they sell at least one unit of the rival's product. Moreover, if marginal consumers for the integrated product switch to the unintegrated product, profits will rise since the marginal profit on the integrated product is essentially zero, but it is positive on the unintegrated product.

unintegrated product constant, the price of both products will decrease. If the fall in marginal cost is large and the diversion effect relatively small, then holding the supply price of the unintegrated product constant, the price of the integrated good will fall, and the price of the unintegrated good will rise. If the diversion effect is large enough relative to the fall in marginal cost, then holding the supply price of the unintegrated product constant, the prices of both goods will rise.

However, the upstream price of the unintegrated good is not fixed. Instead the unintegrated firm will have an incentive to lower its price to create a larger margin for its product downstream, partially offsetting the incentives created by the elimination of double marginalisation for the integrated product. This may or may not lead to lower downstream prices for the unintegrated product. The net impact on downstream prices depends in a complicated manner on the demand system, i.e., all own and cross price elasticities of demand, marginal costs, and the level of double marginalisation pre-merger for the integrated good.

Consumers benefit when integration results in a decrease in both prices. Their welfare is harmed when both prices increase. In aggregate their welfare may go up or down—as measured by consumer surplus—when the price of one product rises and the price of the other falls. If the two products are relatively close substitutes, then it is more likely that the prices of one or both products downstream will increase. Moreover, the profits of the independent upstream firm fall when the downstream price of its product rises: its price is reduced and so too is its volume. If it has avoidable fixed costs, this could result in its exit or preclude its entry, harming consumers.

(ii) Efficient Contracting

In the case of efficient contracting and only a single downstream market, the two upstream firms and the downstream firm will be able to enter into bilateral contracts that set the transfer price at marginal cost for both upstream products and maximise industry profits. The downstream firm will set the profit-maximising prices for the two goods based on marginal cost pricing and pay fixed fees to the upstream firms. There is no market power incentive for vertical integration if there is a single market and efficient contracting: the use of bilateral contracts between the downstream firm and the two upstream firms is sufficient to maximise industry profits.

However, if there is a second market, then vertical integration might make customer foreclosure profitable if its costs are less than its benefits. The benefit is that it may relax the competitive constraint the upstream rival exerts on the vertically integrated firm in another market, increasing its market power and profits in that second market. For instance if economies of scale in the upstream market are sufficient that without sales in both markets, production is not profitable, foreclosure in the first market will induce exit in the second market. Foreclosure of the second manufacturer in the first market results in the monopolisation of the second market. Alternatively, if the lost volumes from being foreclosed in the first market increases the marginal costs of the foreclosed firm in the second market, then its competitive constraint will be relaxed, though it is not completely foreclosed.

Unlike in the case of inefficient contracting where foreclosure was partial, here the foreclosure by integration is complete, with the integrated firm refusing to buy the input, and hence market the associated downstream good, of its upstream rival. Antitrust harm to consumers from this model is consistent with the following circumstances: (i) efficient contracting between up and downstream firms; (ii) monopoly downstream, sustained by barriers to entry that preclude two-stage entry; (iii) differentiated products upstream; (iv) multiple unrelated downstream markets; (v) exclusion must be profitable—the gain in profits from monopolising another market must

exceed the loss in the market in which there is a vertical merger (from the lost sales from not handling/using the rival's product)—this is more likely the less differentiated the products; (vi) exclusion is effective—the vertical merger will result in an increase in market power in another market, either because it results in the exit of upstream competitors or because a reduction in volume raises the marginal cost of upstream competitors in those markets.

2.4.2 *First Mover Advantages and Exclusivity*

Suppose instead that the situation involves an upstream monopolist who produces a homogenous good that is used as an input downstream. The downstream product is differentiated and the downstream market a duopoly. Are there circumstances under which the incumbent upstream monopolist would merge with a downstream firm in order to deter entry of a more efficient rival upstream?⁵³ If post-entry there is price competition upstream and economies of scale are sufficiently large that entry will only be profitable if sales by the entrant are above some minimum level, the answer will be yes. Foreclosure and integration is profitable because it deters entry upstream and maintains the incumbent's status as the monopoly supplier of the unintegrated downstream firm. The effect on consumers will be negative, since with price competition upstream, the price upstream is the same whether there is entry or not.⁵⁴ Without a reduction in the integrated firm's marginal cost, the prices of both goods will go up downstream.

More generally if there was quantity competition upstream after entry, the price upstream would likely be greater than the marginal cost of the incumbent. The welfare economics then involve a familiar trade off: foreclosure and integration raises the input price of the unintegrated downstream firm, but eliminates double marginalisation for the integrated firm. Then, depending on which has greater impact, the effect of integration and foreclosure can be to raise prices downstream relative to the downstream prices that would prevail if upstream entry occurred. The more competitive the upstream market post-entry the more likely that the efficiency advantages from double marginalisation will not dominate and downstream prices will rise if there is a vertical merger and foreclosure. Moreover, since the entrant has a cost advantage, productive efficiency is sacrificed if the entrant is deterred.

Integration downstream by the upstream monopolist that precludes entry, maintains market power, and harms consumers occurs when (i) economies of scale preclude entry if an entrant is not able to capture sufficient market share downstream;⁵⁵ (ii) vertical merger by the incumbent and foreclosure precludes the entrant from realising economies of scale necessary for profitable entry; (iii) foreclosure is credible—credibility is possible either because the integrated firm can design its downstream products to be incompatible with the upstream input of the entrant or it is profitable, in which case the gains from monopolisation upstream and raising rivals' costs downstream are greater than the lost profits downstream from not sourcing supply from the low cost entrant; and (iv) the entrant is more efficient and competition upstream is over price. The entry deterring effects of vertical merger are reduced if the entrant expects that it will have a cost advantage post-entry that it can use to make the threat of foreclosure non-credible through negotiations—this is facilitated if the entrant can price discriminate between the integrated and unintegrated downstream firms.⁵⁶

⁵³ See the adaptation of Stefanadis (1998) by Church (2004).

⁵⁴ The entrant sets its price equal to the cost of the incumbent if it enters.

⁵⁵ To the extent that the entrant and the unintegrated downstream firm can attract consumers through price competition, vertical merger and foreclosure will be more difficult. This suggests that if the products are relatively homogeneous, entry deterrence by vertical merger will be difficult.

⁵⁶ Renegotiation is an issue if the entrant would have lower costs than the incumbent and the integrated firm can use the input of the entrant. The question is whether the entrant can offer the incumbent a price for its input which makes the incumbent better off even though it loses its upstream monopoly and profits. The

2.4.3 Vertical Merger and Tying Complements

Suppose that consumers assemble systems composed of one unit of good *A* and one unit of good *B*, i.e., the two goods are perfect complements and consumed in fixed proportions. Suppose there is a dominant firm in the market for *A* who also produces the component *B*, but there is competition in the production of *B* from a second firm. The tying literature has considered the incentive of the monopolist to condition purchase of its monopoly good (the tying good) on purchase of the second good (the tied good). The tying literature has identified three sets of circumstances under which tying by the monopolist in *A* to its product *B* increases market power and harms consumers. In the first tying by the monopolist of *A* to its product *B* enhances its market power in the primary, or tying good market (*A*).⁵⁷ Second, tying to a complement might prevent entry into the primary market, thereby maintaining its market power.⁵⁸ Third, tying might allow it to leverage its monopoly power in *A* to the market for *B*.⁵⁹

These tying hypotheses can be transformed into hypotheses about the effect of a vertical merger by assuming that instead of consumers assembling systems, the monopolist of *A* does it for them. The monopolist of *A* is the downstream firm: it purchases *B* components upstream that it combines with its *A* component, and then it sells the resulting systems to consumers. Suppose that two *B* products are available, *B*₁ and *B*₂ so that in the absence of integration the downstream monopolist can produce two separate goods, system *AB*₁ and *AB*₂. Then the effects of integrating into *B*₁ and no longer buying input *B*₂ is identical to the competitive effects of tying: only system *AB*₁ is available. Without access to the *A* component, the rival system *AB*₂ is foreclosed from the downstream market. In order to foreclose, the *A* monopolist has to be able to commit to the tie: this typically is achieved by disrupting compatibility between *A* and the *B* component supplied by rivals, i.e., a technological tie.

While providing insights into the incentives and effects of a vertical merger, the welfare implications are not necessarily obvious. The welfare implications will depend on the nature of the upstream market pre-transaction. If contracts in the upstream market are efficient, i.e., involve marginal cost pricing for the last unit, then the welfare effects of the tying models are applicable to a vertical merger. On the other hand, if the upstream market pre-transaction involved prices at the margin that exceed marginal cost, then an efficiency effect not captured by the models attributable to a vertical merger is the elimination of double marginalisation.

(i) Enhancing Market Power in the Primary Market

A monopolist may have an incentive to tie its monopoly good to a complement to reduce competition in its primary market when there is an inferior substitute for its “monopoly” good.⁶⁰

ability of the entrant to make an acceptable offer depends on whether it can price discriminate and charge a lower price to the integrated firm than its unintegrated rival. Integration with renegotiation or renegotiation that results in price discrimination can be beneficial for consumers. See Church (2004, pp. 124-127) for a discussion of how anticipation by the entrant that the incumbent will renegotiate facilities entry.

⁵⁷ See Whinston (1990).

⁵⁸ Carlton and Waldman (2002). The analysis of Carlton and Waldman is similar to Whinston’s discussion of tying complements when there is an inferior alternative in the tying good market, but instead of eliminating an inferior rival in the primary market (the market in which the firm is a monopolist), the focus is on preserving that power by deterring entry.

⁵⁹ See Whinston (1990).

⁶⁰ To be more precise, suppose first that there is not an inferior substitute for the monopoly product *A*. Then the monopolist would not have an incentive to tie. Tying would reduce its profits since some consumers

The presence of this substitute puts a limit on the surplus it can extract by raising the price of its monopoly product in the absence of tying. Hence the monopolist may have an incentive to tie its monopoly product and complement: doing so provides it with an incentive to lower the price of its complement since the only way to earn its monopoly margin is to convince consumers to buy its pair of goods, or system, not the rival system. As a result it prices as if the marginal cost of its *B* unit has been reduced by the profit margin from the sale of an *A* unit. If there are fixed costs associated with the production of the complement, then the increase in price competition for it and loss of market share to the monopolist might induce the rival producer of the complement to exit the market. As a result, of course, the inferior system ceases to exist and the inferior substitute for the monopoly good is also excluded.

Tying to monopolise a complement and reduce competition in the primary market is feasible under the following conditions: (i) the tying firm is dominant in the primary complement with market power restricted by the presence of inferior substitutes; (ii) differentiated duopoly in the complementary (tied) product; (iii) economies of scale in the tied product; (iv) the commitment to offer only its system is credible; (v) tying will result in the exit of the independent tied good producer or prevent its entry, therefore also inducing the exit of the inferior competitor in the tying good market; (vi) tying is profitable.

The profitability of tying complements in these circumstances depends on whether the rival system is in fact excluded and whether the gain from removing the limit on the price of the monopoly good makes up for its lost sales as some consumers who dislike the monopolist's complementary product stop purchasing the monopoly product. It will be profitable if the constraint on pricing by the inferior alternative is significant, i.e., they are close substitutes, and the differentiation in the complementary products is limited, so that the exodus from the market attributable to tying is limited. The extent to which tying reduces the price of the tied complementary product depends on the margin for the tied product and the willingness of the consumers of the competing complementary product to substitute away from the tied good as its price changes. The larger either of these the greater the incentive the monopolist has to lower its price when it ties.

The effect of the tie on consumer welfare is negative: the result of the tie is a reduction in variety and higher prices for the system AB_1 .

(ii) Preserving Market Power in the Primary Market

Tying by a dominant firm in systems markets can preserve market power by deterring entry into its monopoly or primary market. The key assumption is that a rival system producer can enter into the complementary product today (with a product superior to that of the incumbent), but its entry into the primary good is delayed into the future.

When faced with the threat of entry into its primary market, the monopolist has an incentive to sell its two products as a bundle or system. This tie precludes sales of the complementary product offered by its rival today, and because that reduces its profits, it may preclude the entrant

who would buy *A* as part of an AB_2 system may opt not to purchase at all if only AB_1 systems are available. In general the monopolist of *A* has an incentive to make sure that the number of varieties of *B* is large and their price is low. This increases the surplus associated with consumption of a system, surplus that the monopolist can extract by raising the price of a system. The availability of an inferior substitute implies that if the monopolist tries to charge the monopoly price for either system, a competitor will find it profitable to enter and offer inferior systems using the lower quality *A* component.

from entering. For tying to be effective, the entrant must not be able to recover the fixed costs of entry associated with simultaneously entering both markets in the future. Tying is necessary to deter entry if in its absence the rival would have found it profitable to enter today with the complement and introduce the primary good in the future. Tying is profitable for the incumbent when it deters entry and the loss in profits today from not sharing in the surplus created by the entrant's superior complement—whose presence would allow the incumbent to charge a higher price for the primary good—is less than the monopoly profits it preserves in the future by deterring the entrant and not being replaced. Finally, the tie must be a commitment not to provide the primary good independently.

Tying is more likely to be profitable for the incumbent when the size of the market in the future is large relative to its size today, the superiority of the complementary product of the entrant relatively small, the difference between willingness to pay and marginal cost of a system large, and the discount factor close to one. Tying will be effective and is required to exclude entry of a competing system when the size of the market today is relatively large and/or the discount factor close to one, i.e., the entrant patient. When the market size is large today, tying eliminates substantial profits for the entrant from entering the complementary product in the first period. When the discount factor is close to one, the profits from introducing the primary good in the second period are valuable, hence providing the entrant with an incentive to enter with its complementary good in the first period. If the market size today is relatively large and/or the discount factor close to one, then the effectiveness of tying will also increase as the quality advantage of the entrant increases. The reason is that under these circumstances increasing the quality advantage makes it more likely that staged entry will be profitable. Tying is also more likely the smaller the fixed costs of entering the primary product market.

Tying reduces consumer welfare since it eliminates competition in the second period from the alternative system, a system that is preferred by consumers.

Alternatively, suppose that production of the complementary product does not entail fixed costs, but is instead characterised by a direct network externality. The more consumers that buy the same complementary product the greater their benefit. Then by tying in the first period, the monopolist is able to create an installed base of users for its complementary product in the second period. This serves to deter entry of the competing system, since without sales in the first period, the introduction of a competing system by the entrant may not be profitable.

(iii) Leveraging When the Complement has an Alternative Use

If there is an alternative use for the complement, i.e., one that does not depend on the simultaneous purchase of *A*, then the monopolist may tie its *B* product to *A* in order to monopolise *B*. Because *A* is not essential for the use of *B* in this alternative market, the *A* monopolist does not benefit from the presence of a competing component in the market for *B*.⁶¹ Hence it may find it profitable to monopolise the market for *B*. The means for it to do this is to tie *A* to *B*. This will be successful if tying *A* to *B* reduces, i.e., forecloses, enough of the market to firm 2 that it cannot cover its fixed costs and exits. This will be profitable if the market for the independent use of *B* is large. The reduction in competition in the market for *B* harms consumers.

⁶¹ See the discussion *supra* at footnote 60.

The economics of tying to deter entry is very similar to the monopoly maintenance input foreclosure theory to deter entry and customer foreclosure from a first mover advantage. All three depend on the interaction of foreclosure and scale effects to prevent entry, enhance market power, and harm consumers.

2.4.4 *Variety Effects*

A portfolio, or range, effect arises if consumer demand is responsive to variety differentials. If consumers value variety then a variety differential, where one firm has a broader product range than another, raises its demand and in doing so also reduces the demand and revenues of its rivals. An integrated firm could end up with a variety advantage if post-merger it forecloses. Foreclosure here means not supplying a rival with access to the complements controlled by the integrated firm: if consumers value variety, then a variety advantage can provide the integrated firm with market power or lead to monopolisation.

Two situations have been considered in which a firm has a competitive advantage when it has a larger range, or portfolio, of products than its rivals. These are indirect network effects⁶² and demand uncertainty.⁶³

(i) Indirect Network Effects

Suppose systems consist of two components, where one component (“hardware”) can be combined with many different varieties of the second component (“software”) to produce consumption benefits. A key attribute of these hardware-software systems is that typically the willingness of consumers to pay for a hardware technology is increasing in the variety of compatible software: the more software available for the hardware, the more surplus created and the greater the value of the hardware for consumers. In such a market foreclosure could arise if, after a merger between a hardware firm and a software firm, the integrated firm ceased to supply compatible software for rival hardware technologies or systems, giving it a variety advantage. This advantage might create market power for the integrating and foreclosing firm in the market for hardware.

For foreclosure to occur: (i) it must be profitable, i.e., the increase in hardware profits must be greater than the lost software profits from not supplying the other system; (ii) if a counter merger and foreclosure by the foreclosed system makes foreclosure not profitable, then such retaliation must not be profitable. The second condition is possible since competition between equivalent systems might be very aggressive, leading to low prices and profits.

Suppose that there are two downstream firms, each of which produces a system composed of a differentiated hardware component and bundled software. The two downstream firms compete over the price of their system and the variety of software “bundled” with their hardware. Suppose that initially both software varieties are available for both downstream systems. In this case, the competition between the two hardware firms is only over price and the extent of price competition depends only on the extent of hardware differentiation. If contracting for software involves fixed fees, i.e., not per subscriber fees, then there is always a fixed fee that an

⁶² Church and Gandal (2000) and Church and Matheson (2007). In Church and Gandal software is sold independently of hardware. Church and Matheson show that the same effects and intuition apply when hardware firms acquire software in an upstream market and then bundle it with their hardware in the downstream market.

⁶³ Ma (1997).

integrating and foreclosing firm can pay the unintegrated software firm that (i) makes integration and foreclosure profitable, but (ii) also makes retaliation unprofitable.

The effect of foreclosure in the downstream market is to expand the market share and the price of the foreclosing firm's system, clearly increasing its profits. The software variety advantage of the integrating and foreclosing firm decreases the elasticity of demand for its system and allows it to charge a higher price, while the price of the foreclosed firm's bundle decreases, as does its profits. The increase in profits for the foreclosing system is sufficient to make the integrating firms better off than in the unintegrated equilibrium even after paying a fixed fee to the unintegrated software firm sufficient to make retaliation unprofitable. Retaliation restores the initial hardware price and profits of the downstream systems. Because foreclosure raises profits and fixed fees are available to redistribute those profits, the integrated firm can always "bribe" the unintegrated software firm not to integrate and foreclose.

There are two foreclosure equilibria. An interior foreclosure equilibrium arises when hardware is relatively differentiated relative to the marginal benefit of an additional software variety. Monopolisation is the result if hardware is relatively undifferentiated relative to the marginal benefit of an additional software variety. In either case consumers are harmed by higher prices. In both cases some consumers adopt a less preferred system, while those on the foreclosed system in the interior equilibrium also consume less software.

(ii) *Demand Uncertainty*

Suppose that consumers have to sign up with a service provider before their preferences are known over a set of substitutes. After selecting a service provider, the uncertainty is resolved and their most preferred product revealed. Under these circumstances, the service provider with the widest variety of products will have a variety advantage since it is more likely ex ante that they will have a better match between available products and preferences (once they are known). This raises the possibility that an integrated firm may decide not to make its products available to other service providers.

The reason consumers select a service provider and enter into contracts with it prior to knowing their valuation of the goods in the service provider's bundle has to do with the fixed costs of providing consumers with any products. These fixed costs of providing consumers access—or a connection—imply that there will not be a spot market in products that operates once valuations are revealed, since that would require consumers to have a connection with all service providers. For instance in video distribution, consumers typically purchase access to only one video distributor, for instance either the local cable company or a direct broadcast satellite service, and cannot switch between multiple video distributors at any instance. Instead, because of the fixed costs of connection, different providers of video programming compete by offering a range of programming and consumers make their selection on the basis of the range of potential programming and the cost of the connection.

Competition between service providers downstream is based on the expected value of their bundles. The value of a bundle depends on the prices and the variety of products offered. Assuming homogenous consumers, the downstream firm selected to provide service (by all consumers) is the firm that can offer the greatest expected surplus when it earns non-negative profits. This provides an integrated firm with an incentive to foreclose its rival, since that reduces the expected surplus of its rival's bundle and allows the integrated firm to charge a higher price and still monopolise the downstream market.

For foreclosure to occur, as in the indirect network effects case, it must be profitable and a foreclosed firm must not counter merge. If the foreclosed downstream firm could counter merge, it would be in a position to foreclose in retaliation and potentially restore parity in the product offerings. However, if the expected value of one of the two product offerings is greater than that of the other, then it follows that in a bilateral foreclosure equilibrium, the integrated firm with the inferior product would not be able to set a price sufficiently low to assure adoption without incurring losses.⁶⁴ Consequently, the integrated firm with the inferior product will find it profitable to sell to its rival, rather than be shut out at retail.

Foreclosure is profitable if at the pre-merger prices it is more profitable for the superior upstream product provider to foreclose and integrate, rather than supply both downstream firms. This is more likely to be true, the more competitive the upstream market and the lower pre-merger mark-ups upstream. If it is true that at pre merger prices integration and foreclosure is profitable, then integration and foreclosure will likely be profitable, since integration lowers the costs of the integrated firm—by eliminating double marginalisation—and the price response by its upstream rival is unlikely to make integration unprofitable.

The insights of these two models on the value of a variety advantage likely apply to other settings where there is a fixed cost associated with providing (or obtaining) service and consumers value variety. For example, most restaurants and bars obtain fountain soda service from a single provider. Their preferences for a fountain soda service might depend on the variety of products offered. More generally, the insights are potentially applicable to any situation where demand depends on the variety of services available. In particular, they illustrate the importance of (i) assessing the incentives for foreclosure and recognising that they depend on a trade off between increased hardware profits and decreased software profits; (ii) the effect of variety differences on demand; and (iii) the importance of counter strategies and explicit consideration of whether the foreclosed firm can also merge and foreclose with a complement supplier and/or whether barriers to entry into the complementary products are sufficient that a rival cannot introduce its own set of complements.

2.5 *Coordinated Effects*

The collective exercise of market power occurs when a group of firms coordinate their price increases to reduce the extent of substitution by their customers to each other. A coordinated effect arises from a vertical merger if post-merger firms, either upstream or downstream, are able to more effectively coordinate, either because it makes reaching a tacit agreement on the coordinated outcome easier or makes enforcement more effective.

A number of hypotheses regarding the potential for a vertical merger to have a coordinated effect have been advanced in the antitrust literature, including that the vertical merger might eliminate a disruptive buyer, enhance transparency of wholesale pricing, or facilitate information exchange.⁶⁵ It is important to observe, however, that these theories all assume that, depending on the case theory, at least

⁶⁴ Consumers will make their adoption decision between the two competing vertically integrated providers based on expected benefits. In a mutual foreclosure situation where each system offers only one product, the system with the product whose expected value is higher, i.e., is more likely to match the preferences of consumers, will have an advantage. The expected value differential means that the system with the preferred product can slightly undercut the lowest price of its rival (marginal cost) and still make profits, while insuring zero adoptions of the competing system.

⁶⁵ The formal economics literature that considers the potential for a coordinated effect from a vertical merger is very small and very recent. It consists, as far as can be ascertained, of the contributions by Nocke and White (2005) and Chen and Riordan (2004). For discussion of both see Riordan (2005).

one of the upstream and downstream markets are conducive to coordination. If the relevant market is not, then the coordinated effects of a vertical merger are not likely to be significant.

2.5.1 *Elimination of a Disruptive Buyer and Enhanced Incentives to Coordinate*

If a vertical merger eliminates a disruptive buyer, it could facilitate coordination upstream under two conditions. These are (i) sales to the buyer are particularly important to upstream suppliers, perhaps due to its volume; and (ii) there is evidence that the buyer has been able to disrupt coordination by fostering price competition.

The reason for the enhanced incentive to cooperate created by vertical merger follows more generally from the fact that post-merger the integrated firm has more of an interest in raising the price upstream: higher input prices raise the costs of its rivals downstream, relaxing their competitive constraint on its downstream division, leading to enhanced market power and profits downstream. Vertical integration provides it with less incentive to deviate since it benefits more from upstream coordination. A vertically integrated firm is more likely to incur the costs of coordinating—lost profits from not cheating on the coordinate outcome today—because its benefit from doing so in the long run is greater—higher profits both up and downstream. While an unintegrated firm might not be willing to incur the costs of commitment (reduced output in the short-run), an integrated firm might be willing to do so. Dynamic considerations might make commitment profitable for an integrated firm, even though it is not profitable for an unintegrated firm.⁶⁶ The greater the benefit of the downstream division from raising the costs of its rivals, the more vertical merger will enhance incentives for an integrated firm to cooperate with coordinated pricing upstream.

2.5.2 *Enhanced Monitoring*

Increased vertical integration may contribute to the ability of upstream firms to monitor each others pricing and identify deviations from coordinated outcomes. Coordination at the upstream level may be difficult because prices are not transparent. If transaction prices at the wholesale level (upstream market) are secret, then detection and punishment of deviations from the coordinated outcome will be difficult. Retail prices (prices in the downstream market), however, may be more visible, in which case extensive integration that allows for firms to monitor adherence to coordination through visible retail prices instead of unobservable wholesale prices will enhance coordination.

Alternatively, if the extent of vertical integration is less, retail prices could be used to detect cheating at the wholesale level *if* variations in the retail price are attributable to fluctuations in wholesale prices. However, retail price fluctuations could also be attributable to changes in the costs of retailing. Vertical integration may provide a firm with information on the costs of retailing, allowing it to extract more information regarding wholesale prices from retail prices and thus may make detection of deviations from an upstream coordinated outcome easier.

2.5.3 *Information Exchange*

A vertical merger could enhance transparency by creating a conduit (the downstream subsidiary) for the exchange of information between upstream firms. Provided the downstream subsidiary post-merger continues to purchase from the upstream rivals of the vertically integrated firm, the potential exists for the downstream division to transfer information regarding the prices and offers of those rivals to its upstream

⁶⁶ Alternatively, an integrated firm might be willing to build a reputation for not supplying its downstream rivals, i.e., foreclosure, even though an unintegrated firm would choose not to because its benefit from doing so is less. See the discussion regarding the credibility of commitment *supra* at Section 2.3(a).

division.⁶⁷ There are three necessary conditions for information exchange under these circumstances to facilitate coordination.⁶⁸ These are that the information has to be projectable (believed to be an accurate indication of prices offered to other buyers), it must be unique (not readily and verifiably available from other sources), and the input market must be conducive to coordination. Even if these three conditions are satisfied, it is not clear how useful the information will be for coordinating upstream input suppliers if the conduit is one way—from rival upstream firms through the downstream subsidiary to the upstream subsidiary of the vertically integrated firms—and only the information set of the vertically integrated firm is enhanced.

On the other hand, it has been suggested that in a relatively unintegrated vertical structure, a vertical merger can be destabilising and reduce the extent of coordination upstream. The reason is that a vertical merger, by creating asymmetries between upstream firms creates a maverick. In particular if integration is associated with a reduction in transparency, because the vertically integrated firm has an incentive and the ability to secretly expand its sales through its downstream subsidiary, a vertical merger can be pro-competitive. The incentive to increase sales arises if the merger eliminates double marginalisation.⁶⁹

2.6 *Efficiencies*

Much of the controversy associated with vertical merger enforcement arises from the widely held view that anticompetitive harm from such a transaction is unlikely and that the motivation for a vertical merger is not to enhance or preserve market power, but to realise efficiencies. In general efficiencies can arise because the enhanced coordination made possible by a vertical merger allows for (i) production efficiencies and savings; (ii) internalisation of vertical externalities and alignment of incentives; and (iii) transaction cost savings, including mitigating opportunistic behaviour.⁷⁰

3. **Vertical Merger Guidelines**

This section provides an overview of the vertical merger guidelines of the United States, the United Kingdom, Australia, and Canada.

3.1 *United States*

The *Non-Horizontal Merger Guidelines* in the United States were issued in 1984 by the Department of Justice. They identify the “principle theories under which the Department is likely to challenge” vertical

⁶⁷ The focus here is on one way communication—from the rival upstream firm, through the downstream subsidiary to the upstream subsidiary of the vertically integrated firm. The possibility exists that the downstream subsidiary acts as a two way conduit that facilitates explicit collusion. We do not consider this further, based on the recognition that this type of behavior is reachable under the antitrust laws. The concern here is with the vertical merger creating conditions which facilitate coordination that is not reachable—typically—under laws prohibiting conspiracy to lessen competition.

⁶⁸ Riordan and Salop (1995, pp. 558-560).

⁶⁹ This is recognized in the US Merger Guidelines in Section 2.12. See also Baker (2002, pp. 176-177) for further discussion.

⁷⁰ See Bishop et al (2005) for an exhaustive treatment of efficiencies that might be realized by a vertical merger.

mergers.⁷¹ Unlike the relevant sections of the 1968 *Merger Guidelines*, the concern is not with foreclosure.⁷² Instead there are three concerns:

- (i) The vertical merger raises entry barriers by requiring entry to occur both up and downstream. For this to be a concern, three conditions must hold: (a) the extent of integration that results post-transaction must be sufficiently extensive that entry into the primary market—that for which there are competitive concerns—would also require entry into the secondary market; (b) the additional requirement to enter into the secondary market must make entry into the primary market more difficult and less likely to occur; and (c) the increase in entry barriers to the primary market is likely to negatively affect performance in the primary market.⁷³
- (ii) The vertical merger makes coordination easier or more effective, either because it makes it easier to monitor upstream prices or eliminates a disruptive buyer.
- (iii) The vertical merger provides a means for a regulated utility to evade effective price regulation.

In the first two cases the *Guidelines* provide a (semi) safe harbour: if the Herfindahl Hirschman Index is less than 1800 in the primary market a challenge is “unlikely”.

3.2 *Canada*

The Competition Bureau’s *Merger Enforcement Guidelines* date from 2004.⁷⁴ They have the same form as their US counter-parts, indicating case theories that suggest potential competitive harm from a vertical merger. The two case theories mentioned follow the US: (i) increased barriers to entry attributable to two-stage entry and (ii) the transaction’s potential to facilitate coordination by enhancing transparency in both upstream and downstream markets. The Canadian guidelines clarify that in the case of two-stage entry the Bureau would be concerned if actual entry that would have had an important constraining effect on prices is impeded. In the case of downstream markets, the Bureau notes that a vertical merger could enhance transparency by making wholesale purchases more transparent or by strengthening punishment for deviations downstream. Both results are possible if the vertically integrated firm is a supplier to other downstream firms.

3.3 *United Kingdom*

The Office of Fair Trading (OFT) issued *Mergers: Substantive Assessment Guidance* in 2003.⁷⁵ Section 5 describes competitive concerns arising from a vertical merger. The OFT observes that vertical

⁷¹ Department of Justice, *Non-Horizontal Merger Guidelines*, 1984 available at www.usdoj.gov/atr/public/guidelines/2614.htm.

⁷² The 1968 *Merger Guidelines* are available at www.usdoj.gov/atr/hmerger/11247.htm. Section II describes enforcement policy for vertical mergers.

⁷³ Morse (1998, p. 1225) notes that the two-stage entry theory could be viewed as a “reconstituted foreclosure theory” with the *Guidelines* emphasis on “sufficient unintegrated capacity in the secondary market” (Section 4.211, footnote omitted).

⁷⁴ Available online at www.competitionbureau.gc.ca/internet/index.cfm?itemid=1245&lg=e. Part 10 describes vertical merger enforcement policy.

⁷⁵ Available online at www.offt.gov.uk/NR/rdonlyres/283E1C2D-78A6-4ECC-8CF5-D37F4E4D7B22/0/oft516.pdf.

mergers are often efficiency-enhancing, but could give rise to competitive concerns. The specific competitive concerns mentioned are foreclosure and facilitating coordination. The document makes clear that these concerns “are likely to arise only if market power exists or is created in one or more markets along the supply chain.”⁷⁶

The discussion of foreclosure includes the potential for both customer and input foreclosure. Highlighted is input foreclosure from denying upstream rivals access to downstream distribution and refusal to supply a product when variety downstream is important. The OFT also clearly distinguishes between the ability and the incentives for foreclosure, noting that just because a vertical merger provides a firm with the ability to foreclose does not mean that foreclosure would be profitable. Only if it is profitable is foreclosure likely.

3.4 Australia

The Australian Competition and Consumer Commission (ACCC) published its *Merger Guidelines* in 1999.⁷⁷ The ACCC observes that the concern with vertical mergers is their potential to affect horizontal competition. However, the ACCC defines two safe harbour conditions: (i) a four-firm concentration ratio less than 75% and post-merger market share of the merged firm less than 15%; or (ii) the market share of the merged firm will be less than 40%. Only if one of these two thresholds is exceeded, import competition is ineffective, and there are high barriers to entry are vertical mergers likely to raise concerns.

The ACCC guidelines indicate five potential concerns: (i) extension of market power from one stage of production to another through input or customer foreclosure, pre-emption of competition through discriminatory access to an essential input, and, via control of the essential input, access to commercially sensitive information on its downstream rivals; (ii) creation of barriers to entry by requiring two stage entry, especially in regard to distribution facilities; (iii) enabling of price discrimination; (iv) facilitation of coordination upstream; and (v) frustration of effective downstream regulation.

4. Selected Cases

This section considers a number of recent cases to illustrate some of the nuances associated with vertical merger enforcement. A difficulty with vertical merger enforcement is, especially in the United States, that the recent increase in enforcement has not been matched by an increase in litigated cases. The enforcement actions by the agencies in the US have been resolved by consent decree.⁷⁸

4.1 Barnes & Noble’s Proposed Acquisition of Ingram Book Company

In November of 1998, Barnes & Noble (B&N) announced its acquisition of Ingram Book Company for \$600 million.⁷⁹ At the time, B&N was the largest retailer of books in the United States, with an estimated market share of almost 30%, while Ingram was the number one wholesaler of books. B&N’s annual revenues were approximately \$3 billion per year, Ingram’s \$1.4 billion. Ingram had 11 distribution

⁷⁶ *Mergers: Substantive Assessment Guidance* at Section 5.1.

⁷⁷ Available online at www.accc.gov.au/content/index.phtml/itemId/304397. Paragraphs 5.148 to 5.160 address vertical merger policy.

⁷⁸ See Leary (2002-2003, pp. 128-129).

⁷⁹ This case is based on R. Parker, Federal Trade Commission, “Global Merger Enforcement,” Prepared Remarks Before the International Bar Association (September 28, 1999) and, especially, Sibley and Doane (2002).

centres in the US and estimates indicate a market share of 67% in the wholesale book market.⁸⁰ B&N had its own distribution system, but it also sourced books from Ingram. The transaction was investigated by the Federal Trade Commission (FTC).

Book wholesalers are an intermediary between book publishers and book retailers. Not only do book wholesalers typically stock a large number of titles from many publishers, they also take special orders. The larger ones, such as Ingram, offer support services, including databases of books in print, insurance, market information/stocking advice, and credit.⁸¹ The next largest major wholesaler, Baker & Taylor, was not only significantly smaller than Ingram, the range and quality of the services it provided to retail bookstores were judged to be significantly inferior relative to Ingram. The FTC assessment was that Ingram faced “rather limited competition” and “as a wholesaler to the segment of the market not captive to internal distribution, Ingram is overwhelmingly dominant.”⁸²

Book retailers can be distinguished from other stores that sell books on the grounds that they select their own titles, carry a wide range of titles and special order titles. This excludes a number of other sources from which consumers purchase books, but includes online retailers. B&N was the market leader, with one close competitor—Borders—which had a market share of just over 25%. The next largest chains each accounted for a little more than 3% of book sales. Independent book retailers, on the other hand, had an aggregate market share in 1998 of more than 31%.⁸³

The transaction raised some horizontal concerns. B&N’s distribution centres were a platform for it to enter the wholesale market and it had indicated publicly its intention to do so. Ingram had responded by making efforts to improve its prices and quality of service to retain some B&N volumes, changes that had spilled over to benefit other retailers. However, the main focus of the FTC’s investigation was on the potential for foreclosure by B&N of its downstream rivals if it acquired Ingram. B&N would have the ability to foreclose its rivals from an important supplier: the concern was not only that B&N would stop supplying downstream rivals, but would raise their costs in more subtle ways by charging higher prices or providing lower quality services, i.e., either price discrimination or non-price discrimination strategies were available to raise the costs of its rivals’ downstream. The focus of the FTC’s investigation appears to have been on whether foreclosure would be profitable for B&N.

For foreclosure to be profitable the gains from raising the price at retail must be greater than the lost sales at the wholesale level. Some perception, perhaps inaccurate, of how the FTC might have considered the issue of profitability is on the record.⁸⁴ Rather than consider the post merger equilibrium, the approach

⁸⁰ This market share appears to exclude the share of books distributed internally by B&N.

⁸¹ In particular book wholesalers are distinguished from rack-jobbers: rack jobbers serve mass merchants and supermarkets, where they select the titles, ship, and dress the racks, i.e., unpack and display the books. While publishers can distribute their books directly, and typically do for new titles, they are not likely in the same market as book wholesalers because they are not a one stop shop, capable of supplying titles from a variety of publishers, and are unable to fill orders as quickly as book wholesalers. The corresponding geographic market is the United States.

⁸² R. Parker, Federal Trade Commission, “Global Merger Enforcement,” Prepared Remarks Before the International Bar Association (September 28, 1999) at p. 2.

⁸³ Independent book retailers are differentiated from the chains by their selection of titles (based on local market knowledge) and local content. The geographic market that includes book retailers is local.

⁸⁴ R. Parker, Federal Trade Commission, “Global Merger Enforcement,” Prepared Remarks Before the International Bar Association (September 28, 1999) compares wholesale and resale margins of B&N. The presentation here follows the more detailed analysis of the incentives for B&N post merger to raise the costs of its rival by Sibley and Doane (2002).

taken was a “first-order” approach. The first order approach involves an evaluation of how the incentives of the vertically integrated firm change post-transaction.⁸⁵ It involves comparing the gains from raising the cost of the downstream rival with the losses in the wholesale market from reduced wholesale sales. The beneficial effect per unit is the B&N retail margin per unit (retail price minus marginal cost) times the diversion ratio from the increase in the price of the rival—from raising the costs of the rivals. The cost of the RRC strategy is the lost wholesale margin per unit (wholesale price minus marginal cost) times one minus the diversion ratio.⁸⁶

A critical diversion ratio can be calculated by setting the gain equal to the loss. If the actual diversion ratio is greater, then the RRC strategy will be profitable—as will raising the price in the wholesale market. If the actual diversion ratio is less, then the RRC strategy will not be profitable. Calculating the critical diversion requires estimates on prices and marginal costs. The estimates are consistent with an incentive to raise rivals’ costs.⁸⁷

This analysis, when combined with an analysis of competition post merger upstream by the FTC suggested the potential for a significant increase in the upstream price. The FTC considered, and concluded, that the options available to other book retailers downstream if B&N engaged in a RRC strategy, were “not very good”. This is consistent with a finding that the upstream price was likely to rise post-transaction and the effect on other book retailers would be significant. Moreover, the extent to which efficiencies would be realised from elimination of double marginalisation is reduced, since B&N was already vertically integrated and any efficiencies were not necessarily merger specific: they could be realised by internal growth.

The FTC was also concerned that an integrated B&N would have access to commercially sensitive information about downstream retailers it supplied. In particular, because Ingram provided credit, B&N would have access to financial information about its rivals and, by observing the content of orders, B&N would acquire information on titles and quantities of books purchased from Ingram. The competitive concerns regarding B&N’s access to this information are that it would enable them to free-ride on investments to develop demand by other retail booksellers. This incentive to free-ride would reduce the incentive of other book retailers to make these investments.

The acquisition was abandoned in the face of reported opposition by the FTC in the press. B&N used the \$600 million to expand its existing distribution system. Because B&N was already integrated, the output expanding effect downstream from the elimination of double marginalisation would be less significant: not only would this reduce the expansion of output by B&N post merger, it would reduce the reduction in demand upstream by its unintegrated rivals, making it more likely that a reduction in upstream demand would not offset the effect on the upstream price of the incentives of B&N to raise rivals’ costs. The net effect is more likely to be an increase in upstream prices.

⁸⁵ See Section 2.3(a) for a discussion of the first-order approach that looks only at the incentives of the vertically integrating firm versus an equilibrium analysis that considers the effect of the merger after all firms have responded to the change in behaviour by the vertically integrated firm.

⁸⁶ The diversion ratio is the fraction of demand that switch to B&N at retail per unit lost at wholesale. One minus the diversion ratio is the quantity lost at wholesale.

⁸⁷ The base case estimate reported is 0.114. The actual estimate of diversion, based on market shares from independent retailers is 0.435, well above the critical value. These estimates assume that Ingram is a monopolist upstream. Sibley and Doane (2002) suggest an adjustment to approximate the response of competing wholesalers.

4.2 *Premdor*

In 2000 Premdor entered into a \$500 million transaction to acquire Masonite Corporation.⁸⁸ Premdor was the largest manufacturer of interior molded doors in the world, with sales of these doors in excess of \$300 million in the US in 2000. Masonite manufactured molded door skins (hereafter door skins), an input into interior molded doors. Revenues from interior molded doorskins for Masonite in 2000 were approximately \$230 million in the US. In the summer of 2001 the Antitrust Division filed a complaint and settlement requiring divestiture of one of Masonite's two US facilities.

A door skin is made from a mat of fibrous material such as wood chips or saw dust. The mat is cut into sheets and pressed into panelled designs and textures. The door skins look like they are made of solid wood, but are much less costly to produce. Two door skins, one for the front and one for the back, are then combined with a door frame to make a molded interior door.⁸⁹ The door skins account for up to 70% of the costs of an interior molded door.

At the time of the transaction there were two major players in the door skin (upstream) and molded door (downstream) markets. One firm, not party to the transaction or complaint and not identified, was already vertically integrated.⁹⁰ Premdor had a 40% market share of the molded door market. Its major competitor was In Door. There was also a competitive fringe consisting of nine firms, none of which had a market share greater than 5%.

Masonite and In Door produced the vast majority of door skins. Masonite was the larger of the two firms with over 50% of the market and Premdor was its major customer. The third largest door skin manufacturer with less than 10% of the market, was a joint venture that included Premdor. All of the joint venture's output was sold to Premdor. Both In Door and Masonite sold to the unintegrated downstream door manufacturers.

The Department of Justice (DOJ) alleged that the market was susceptible to coordination: it was concentrated and the product was homogenous. Moreover, the downstream market had seen convictions in 1994 for price fixing. The DOJ alleged that post-transaction four constraints on coordinated conduct would be relaxed:

- (i) Changed Incentives for Masonite. Prior to the merger, Masonite would frustrate coordination downstream by increasing sales to the competitive fringe. Post-merger, this incentive is removed. The DOJ observed:⁹¹

In addition, Masonite acts as a significant competitive constraint in the interior molded door market. Premdor and the non-party firm have an incentive to attempt to coordinate pricing by reducing output. Coordination would reduce the output of interior molded doors, and lead to higher door prices. However, such an output reduction would also

⁸⁸ Source material for this case is: *US v. Premdor*, Competitive Impact Statement and Complaint, Civil No.: 01-01CV696, United States District Court for the District of Columbia, 3 August 2001; Katz (2002), Dick (2003), and Riordan (2005).

⁸⁹ The complaint alleges two product markets: interior molded door skins and interior molded doors. The geographic market upstream was the United States, while the downstream markets were local in scope. The geographic extent of the markets was assessed based on transportation cost considerations.

⁹⁰ Following Katz (2002) and for the sake of convenience and clarity, call this firm In Doors.

⁹¹ *US v. Premdor*, Competitive Impact Statement, Civil No.: 01-01CV696, United States District Court for the District Court of Columbia, 3 August 2001 at 6.

reduce the output of interior molded doorskins sold in the United States, harming Masonite. Thus, Masonite would have an incentive to disrupt such coordination through increased sales to the other non-vertically integrated door manufacturers. After the proposed transaction, a vertically integrated Premdor/Masonite combination will not have the same incentive to defeat coordination in the interior molded door market by increasing sales to the non-integrated door manufacturers since the combined company would be competing against those door manufacturers, and would benefit from an increase in the prices of interior molded doors.

- (ii) **Changed Incentives for Premdor.** The DOJ alleged that expansion by Premdor upstream in the door skin market constrained the ability of Masonite and In Door to coordinate in the upstream market. Post-merger, Premdor would have less incentive to expand its output upstream, since it benefits from higher upstream prices, as an integrated supplier, in the downstream market.⁹²
- (iii) **Cost Asymmetry.** In Door constrained coordination because its lower cost structure created incentives for it to lower prices to obtain greater market share. The ability to coordinate would be enhanced because the merger would create cost parity. Premdor would have similar costs post-merger due to the elimination of double marginalisation.
- (iv) **Transparency.** Pre-merger asymmetries of information impeded coordination. Those asymmetries would be eliminated by the merger. As the DOJ observed:

Finally, the asymmetries of information available to the firms about the upstream and downstream markets impede coordination. Masonite specialises in interior molded doorskin production, whereas its most significant competitor, the non-party firm, competes in both the interior molded doorskin and interior molded door markets. The differences in vertical integration between the two firms create information asymmetries that would make it difficult for the firms to monitor and punish deviations from attempted coordination on the terms of sale of interior molded doorskins. For example, since the non-party firm uses internally most of the doorskins it produces, Masonite lacks an ability to observe a market price for the non-party firm's doorskins and the number of doorskins that it produces. Similarly, since Masonite does not sell in the downstream market, it lacks information about the non-party firm's production and pricing in the interior molded door market. The proposed acquisition would eliminate much of the information uncertainty by adding Premdor's downstream market information to Masonite's upstream market information, enhancing the combined firm's ability to detect deviations by the non-party firm on any coordinated price increase.

The terms of the settlement were designed to allow Premdor to capture the efficiencies from the vertical merger—internalisation of double marginalisation—while at the same time mitigating the incentives for enhanced coordination. This was achieved by allowing Premdor to acquire only the assets that were necessary for it to meet its current requirements and requiring the rest to be divested.

4.3 Foreclosure and the FTC Redux

The evolution of the FTC's enforcement policy on vertical mergers and the influence of economic theory on analysing the facts are nicely illustrated by three relatively similar cases, two in the electronics

⁹² Riordan argues that this is similar to an analysis that post-merger Premdor has a unilateral incentive to raise the costs of its rivals downstream, i.e., engage in input foreclosure. See Riordan (2005, p. 47)

design automation (EDA) market and one involving liquid based Pap tests. The two EDA cases are the review of Cadence Design Systems' acquisition of Cooper & Chyan Technology (CCT) in 1997 and Synopsys' acquisition of Avant! in 2002. The liquid based Pap test case involved Cytac's acquisition of Digene, also in 2002.⁹³ Cadence's acquisition was allowed to proceed, but only after Cadence made significant behavioural commitments; after eight months the FTC closed its investigation of the acquisition of Avant! by Synopsys, allowing the transaction to proceed.⁹⁴ The FTC voted to seek a preliminary injunction blocking Cytac's acquisition of Digene, and the transaction was subsequently abandoned.

4.3.1 *Cadence/CCT*

In 1996 Cadence announced its intention to acquire CCT for \$400 million. At the time, Cadence was one of two major suppliers of integrated circuit (IC) layout environment software—the other was Avant!—and CCT had the only commercially available “constraint driven shape based IC routing tool.”⁹⁵ In general there are two aspects of IC design: (i) logical description of the IC; and (ii) a physical map of the wafer the IC is made from. The front end, the logical description of the IC, is done using design software, while the back end, the physical map of the IC, involves using layout software tools that among other things, “place and route” the electronic components and their connections. The back end software used is often a layout

⁹³ Source material for the three cases:

Cadence/CCT:

Sher (2002); *In the matter of Cadence Design Systems, Inc.* Consent Order, Complaint, and Analysis of Proposed Consent Order to Aid Public Comment, FTC File No. 971-0033 (1997); “FTC Settlement with Cadence, Cooper & Chyan to Preserve Competition in automated Chip Design Software” Press Release FTC (May 8, 1997); Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (May 8, 1997); Statement of Commissioner Mary L. Azcuenaga Concurring in Part and Dissenting in Part in the Matter of Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (May 8, 1997); Dissenting Statement of Commissioner Roscoe B. Starek III in the Matter of Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (May 8, 1997).

Synopsis/Avant!:

J. Simmons, Federal Trade Commission, “Merger Enforcement at the FTC,” Prepared Remarks Before the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (October 24, 2002); “Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc.” Press Release FTC (July 26, 2002); Muris (2003); Muris (2005); Scheffman and Higgins (2004); Statement of Commissioner Mozelle W. Thompson in Synopsys Inc./Avant! Corporation (July 26, 2002); Statement of Commissioner Thomas B. Leary in Synopsys Inc./Avant! Corporation (July 26, 2002); Statement of Commissioner Shelia F. Anthony in Synopsys Inc./Avant! Corporation (July 26, 2002); and Sher (2002).

Cytac/Digene:

J. Simmons, Federal Trade Commission, “Merger Enforcement at the FTC,” Prepared Remarks Before the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (October 24, 2002); “FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp.” Press Release FTC (June 24, 2002); Muris (2003); Muris (2005); and Scheffman and Higgins (2004).

⁹⁴ This investigation had two interesting twists: (i) the investigation was not closed until seven weeks after the transaction closed at the end of the mandatory waiting period under the *HSR Act*; and (ii) in separate statements three of the Commissioners indicated that they would monitor Cadence for evidence of anticompetitive conduct in the future and urged competitor and customers to assist the FTC in its ongoing monitoring efforts.

⁹⁵ An integrate circuit is a microchip—the postage-stamp (or smaller!) electronic components found in everything from toasters to personal computers.

environment in which compatible tools for different functions (placement, routing, and analysis and verification) are used by IC designers.

Cadence's sales from its IC layout environment software were approximately \$70 million world wide per year, whereas CCT's sales from its routing tool were \$13 million. The FTC was concerned that post-merger Cadence would have an incentive to foreclose other routing software by making it incompatible with its layout environment. Because of Cadence's dominance—and installed base of users—the effect of its foreclosure would require a competing entrant of routing tools to enter at both levels, i.e., with a layout environment and a routing tool. At the time, there was evidence of at least one other firm developing a routing tool that would compete with CCT's product. Hence, the FTC asserted, if Cadence were to act on its incentive, the transaction would raise barriers to entry into the routing market, leading to a substantial lessening of competition or the maintenance of a monopoly in routing tools.

The FTC did not really consider the incentives for Cadence to make other routers incompatible. Instead they put particular emphasis on the fact that in the past Cadence had encouraged compatibility with its environment for tools that it did not supply and had done the opposite for competing tools. The FTC allowed the transaction to proceed provided Cadence instituted measures to keep its layout environment open to all makers of layout tools. The FTC believed that this order mitigated the foreclosure effects, without sacrificing the efficiencies associated with vertical integration.

4.3.2 *Synopsis/Avant!*

In 2002 Synopsis was the dominant supplier of front end designer software, with a market share of approximately 90%. Avant! was one of two large suppliers of suites of back end tools, with a 40% market share: its major competitor was Cadence. The transaction raised the same concerns as the Cadence/CCT merger did: would Synopsis foreclose other suppliers of suites of back end tools from its front end software by either making it incompatible or reducing interoperability, which given the importance of time to market deadlines, might be just as effective.

The FTC structured their inquiry by asking two questions: (i) would Synopsys have an incentive to further the market position of Avant! by making it harder for other back end suites/tools to communicate with Synopsys' front end software? and (ii) if so, would such a strategy have an adverse effect on competition and harm consumers?

The FTC never got beyond (i), as the FTC was unable to “pinpoint concrete evidence” to assess the relevance of the “plausible” theory that foreclosure would either (i) lead to a reduction in competition in the back end market or (ii) weaken existing competitors sufficiently that it would reduce the likelihood they would challenge Synopsys in the upstream market. There was also insufficient evidence to assess the possibility that any anticompetitive harm would be counterbalanced by efficiencies from integration. Instead, the FTC observed that Synopsis had a policy of making its software interoperable. Furthermore, both the parties and IC designers (customers) believed that there was considerable scope for efficiencies to be realised from tighter integration of front end and back end tools. In particular they anticipated that tighter integration would allow them to more efficiently design “increasingly tiny and densely-packed ICs.” Indeed it was anticipated that the next generation of EDA platforms would integrate front and backend software, but when and if this would happen was up in the air.

4.3.3 *Cytc/Digene*

Cytc and Digene produced and sold tests used to screen for cervical cancer. Cytc had 93% of the liquid-based Pap test market. TriPath was the only other firm that had approval to sell a liquid Pap test in the US. Three other firms were developing tests, but it was unlikely they would enter in the next two years.

Digene was the only producer of a DNA-based test for the human papilloma virus (HPV). Digene's monopoly in DNA based tests was unlikely to be threatened by entry. The HPV is understood to be the cause of most cervical cancer and the Digene test is used as a secondary screening tool when the liquid Pap test results are equivocal.

The Digene test is typically used in conjunction with a residual sample from a liquid Pap test. In this respect the two screening tools are complements. The concern of the FTC was that post merger Digene would make its test incompatible with that of competing liquid based Pap tests. It was alleged that it could do this two ways: (i) using the two tests on the same sample requires regulatory approval, approval that would be difficult to obtain without Digene's cooperation; and (ii) by not offering Digene's test independently or at a price that would enable another supplier of a liquid Pap test to be competitive with a Cytyc/Digene bundled price. Without compatibility, other liquid Pap test suppliers would be foreclosed from the market, including TriPath. The FTC did not find evidence of efficiencies and the concerns of customer representatives over the competitive effects of the transaction were consistent with the FTC's theory of the case. Consequently, the FTC voted to seek an injunction to block the transaction over concerns that it would reduce competition and increase prices in the primary cervical cancer screening test market and the transaction was abandoned as a result.

4.3.4 *Comment on these Cases*

The Cadence/CCT decision was split 3-2. One of the dissenting Commissioners observed that the theory of the case was not compatible with economic theory. In particular, he argued that Cadence had an incentive not to foreclose, but instead to support competition and variety in the routing market, since doing so would allow it to charge higher prices for its layout environment software.⁹⁶ Moreover, based on the monopoly maintenance theory discussed above, the concern should not have been with monopolising the routing market, but instead with whether the transaction would preserve Cadence's monopoly power upstream in the layout environment market. This might have been the case if monopolising the routing tools market led to the exit of Avant!, its competitor upstream.

The Synopsis/Avant! transaction appears to present almost exactly the same facts as the Cadence/CCT transaction, except that Synopsis' market position upstream was stronger: it was the only dominant firm. The FTC, however, while expressing concern over the back end tool market, also acknowledged concern about the possibility of entry deterrence in the market for integrated software suites, which would include the upstream Synopsis software product.

In the case of Digene/Cytyc, the incentives for exclusion post-merger are much clearer when it is recognised that Digene would not be able to extract all of its monopoly profits just by pricing its product appropriately.⁹⁷ The reason is that its product was only used if the outcome of the liquid based Pap test was ambiguous. Hence it appears reasonable, without further investigation, that it would have been able to increase its profits by monopolising/maintaining its monopoly of the liquid based pap test market by making the Digene test incompatible with other liquid based pap tests.⁹⁸

⁹⁶ Dissenting Statement of Commissioner Roscoe B. Starek III in the Matter of Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (May 8, 1997).

⁹⁷ This point is made by Scheffman and Higgins (2004, p. 976).

⁹⁸ See Section 2.4(c)(iii).

Comparisons of the two decisions, Digene/Cytc and Synopsis/Avant!, both involving a firm with substantial market power, have highlighted six significant differences in facts that explain the difference in the two decisions:⁹⁹

- (i) The theory of harm. In Digene/Cytc it was clear how rival liquid Pap suppliers would be harmed, but it was not so clear how they would be harmed in Synopsis/Avant!. There was the promise of significant efficiency advantages from integrating the two products, but what the changes would be and what the effect on competing back end products would be was not clear.
- (ii) Incentives for the integrated firm to engage in foreclosure differ between the two cases. In Digene/Cytc the incentives for foreclosure were consistent with theory. In Synopsis/Avant! it was not clear that the threat of upstream entry provided the incentives for foreclosure suggested by theory.
- (iii) Extent of upstream competition. In Synopsis/Avant!, there was limited competition from other upstream firms, while there was not an alternative to Digene. Hence the downstream foreclosure effect in Synopsis/Avant! is weaker.¹⁰⁰
- (iv) Timing of the anticompetitive effect. In Cytc/Digene, the effect was immediate: the foreclosure of TriPath. The effect was much more speculative and farther in the future in Synopsis.
- (v) Potential efficiencies. The efficiencies in Cytc/Digene were not compelling, but their potential in Synopsis/Avant! was.
- (vi) Views of downstream consumers. In Cytc/Digene, consumers expressed concern, but they were supportive of the transaction in Synopsis/Avant!.

4.4 Coca-Cola Company and Cadbury Schweppes in Canada

In December 1998 The Coca-Cola Company (TCCC) reached an agreement with Cadbury Schweppes plc (CS) to pay approximately \$1.85 billion for the acquisition of Cadbury Schweppes' international beverage business in all but three countries,¹⁰¹ including carbonated soft drink brands such as Canada Dry, Schweppes, Orange Crush, and Dr Pepper.¹⁰² After facing antitrust scrutiny in more than 100 countries, the merger came to a close 18 months later with TCCC having acquired CS's beverage business in approximately 160 countries for around \$1 billion. The transaction was abandoned due to antitrust concerns in most of Europe, Australia, Mexico, and Canada.

The production and sale of carbonated soft drinks (CSDs) begins with the production and sale of concentrate to bottlers. The bottler adds carbonation, water, and a sweetener to the concentrate and bottles the finished product which is then sold for final consumption. Alternatively, the concentrate producer or

⁹⁹ Muris (2003), Muris (2005), and Scheffman and Higgins (2004).

¹⁰⁰ It might be the case that the presence of the upstream rivals to Synopsis provide it with more of an incentive to foreclose if foreclosure would result not only in the exit of downstream competitors to Avant!, but also the exit of Synopsis' upstream rivals. See Section 2.4(c)(i).

¹⁰¹ The three countries were the United States, France, and South Africa.

¹⁰² This case write up is based on, and follows closely, Abere et al (2002).

the bottler supplies syrup for fountain dispensers. The syrup is then diluted with water and carbonation is added by the dispenser. The shares of CSD sales in Canada by the three branded producers were almost 40% for The Coca-Cola Company's (TCCC), 34% for PepsiCo (Pepsi) and just under 10% for Cadbury Schweppes (CS).

In Canada, TCCC distributes concentrate for its products through a network of bottlers (Red System). Those bottlers are owned primarily by Coca-Cola Enterprises, in which TCCC has a significant ownership interest. Its leading brands are a cola and a lemon lime flavoured CSD, Coca-Cola and Sprite. Similarly, Pepsi supplies concentrate to a separate bottling network (the Blue System). Pepsi's leading brands in Canada are also a cola and a lemon lime flavoured CSD, Pepsi and 7UP.

Cadbury Schweppes did not have any bottling facilities in Canada. Rather it supplied concentrate and licensed its various brands through its Canadian subsidiary to the Red and Blue systems. Its key brands are two ginger ales—Schweppes and Canada Dry—and two orange flavoured CSDs—Orange Crush and C-Plus. Across Canada these brands were paired. In any geographic region one of these pairs is licensed to the Red system, the other to the Blue system. Neither TCCC nor Pepsi had a ginger ale or orange flavoured CSD of any significance.

The Competition Bureau's (Bureau) concerns stemmed from the fact that the transaction would put TCCC in a position of being an input supplier to an important rival, with the possibility of it being able to engage in either partial or full foreclosure. Specifically, the Bureau's concern was that the Red system would foreclose access to the Blue system of its CS brands. The Red system could foreclose by no longer supplying concentrate to the Blue system. The potential for a reduction in the competitive constraint posed by the Blue system arises in the fountain market if there is a portfolio effect: retailers demand a full range of flavours and the inability of the Blue system to provide a full range of products if it loses its CS brands reduces its demand and increases the demand for the Red system, allowing the Red system to charge higher prices for its CSDs.¹⁰³

In considering the incentives for complete foreclosure, the Bureau's theory of the case depended on a portfolio effect in the fountain channel. Retailers in this channel usually deal exclusively with one CSD supplier and there will be a portfolio effect if fountain demand at the wholesale level depends not only on the relative number of flavours that a bottler can offer, but on the key CS brand flavours (orange and ginger ale/mixers). If the demand effect is significant, then elimination of the Blue system's orange and ginger ale/mixer could put it at a material competitive disadvantage. The effect of foreclosure would be to increase the price and volume of Red fountain CSD sales and decrease both the price and volume of Blue fountain CSD sales.

However, the extent of these price effects, the competitive disadvantage of the Blue bottlers, and the incentive for foreclosure depend on the importance to demand for the Blue bottlers of maintaining a full portfolio of flavours that includes their present CS flavours. If this effect is small then it is not likely that TCCC will have an incentive to foreclose Blue bottler access to these brands: the increase in profits on Red system CSD fountain sales does not make up for its lost profits on foregone sales of concentrate to Blue bottlers.

¹⁰³ The Bureau defined three product markets, carbonated soft drinks by distribution channel. The three distribution channels were grocery stores, impulse/single serve (convenience stores), and fountain (restaurants, bars, movie theatres etc.). The Bureau's RRC theories of the case did not include the grocery channel because of competition from private label store brands. The presentation here considers only the fountain channel. See Abere et al for discussion of the RRC theory in convenience stores, evidence that does not support the Bureau's product market definition, and discussion of the potential for the transaction to have a coordinated effect.

The size of the demand effect depends on the extent to which consumers will switch to other retailers or reduce their consumption of all beverages if a retailer does not have CS brands. Ginger ale/mixer and orange share of CSD sales (total, and especially fountain) suggest that these flavours are not determinative of retailer choice by consumers. The choice between two pizza parlours is unlikely to depend on which has an orange fountain drink or the brand of its orange fountain drink.

However, if the effect was sufficient to provide the TCCC with an incentive to foreclose, both retailers and the Blue System had access to counter measures. Retailers at very little cost could maintain their own supply of oranges and ginger ale/mixers in bottles/cans or source from more than one fountain CSD supplier, including private label suppliers. The relatively small volume of these flavours and the relatively limited number of establishments where particular CS flavours in the fountain have limited substitutes and are important (primarily ginger ales/mixers for use in preparation of alcoholic beverages) suggests the feasibility of maintaining a supply of these flavours in bottles.

More importantly, the Blue system could respond by introducing its own replacement brands or licensing third party brands, and it will clearly have a strong incentive to do so if oranges and/or ginger ales/mixers have an important effect on fountain demand. In particular the Blue system has the flexibility to introduce replacement brands that already exist in other countries owned by Pepsi (e.g., Slice, an orange flavour CSD) or by others (e.g., Seagram's ginger ales and mixers). Since, at the time, fountain retailers did not advertise brands available in the orange or ginger ale/mixer flavour segment, brand loyalty and advertising costs would not be a barrier to introducing replacement brands. Indeed for those that are most likely to require a specific CS flavour segment replacement—bars for ginger ale/mixers—there is often no on-premise advertising or identification of the ginger ale/mixer brands available. At the time the largest fountain retailer in Canada sold both unbranded orange and root beer CSDs.

Recognition of the profitability and ease with which the Blue system could respond with replacement brands limits the ability of TCCC to foreclose or otherwise raise the costs of the Blue system. Such a response would result in a loss in margins from concentrate sales to the Blue system without any off-setting advantage in the sale of Red system CSDs.

The experience in the root beer segment is instructive regarding the procompetitive efficiencies possible from this vertical merger. Both TCCC and Pepsi successfully introduced their own root beer brands within a year of each other. Previously they had each supplied a CS branded root beer. The two brands were A&W and Hires, both of which consumers were familiar with because of the age of the brands and their availability in grocery stores, but that had limited national advertising. Both systems were able to seamlessly replace their root beers with brands licensed from TCCC (Barq's) and PepsiCo (Mug) using relatively small national advertising campaigns. In the process they revitalised sales of root beer in Canada. The clear implication is that effective brand management and relatively small investments in national brand capital can result in tremendous expansion in flavour segments like root beer. It is hard not to argue that this increase in output was not procompetitive.

5. Implications for Enforcement Policy

This section considers the implications for enforcement policy, and in particular vertical merger guidelines, of the economic understanding of the competitive effects of vertical mergers. The economic theories surveyed above show that vertical mergers can be anticompetitive, i.e., harm consumers and/or efficiency. The key to welfare enhancing antitrust enforcement is identifying and distinguishing those transactions that merit investigation and prohibition because of their anticompetitive effects from those whose effect is positive or neutral. The usefulness of the economics of the competitive effects of vertical mergers depends on whether or not it is able to identify, in practice, anticompetitive vertical mergers.

A number of difficulties in jumping from the theory of anticompetitive harm associated with vertical mergers to actually identifying problematic transactions have been identified. These include the following:

- (i) The economic theories of anticompetitive harm are examples of exemplifying theory.¹⁰⁴ These theories show what might happen, not what must happen. As a result there are three possible sources of error in fashioning enforcement policy that is consistent with either consumer welfare or efficiency. First, they are not testable and while they can be shown to be consistent with the facts, that consistency does not necessarily rule out alternative explanations that are also consistent with the facts, in particular that the vertical merger is intended to realise non-price efficiencies.¹⁰⁵ Second, intrinsic to a vertical merger, typically, are two effects: (a) an efficiency gain attributable to internalisation of double marginalisation and, potentially, (b) an increase in the input price upstream.¹⁰⁶ The transaction's overall impact on welfare depends on which effect dominates and that depends on the values of exogenous variables, identified in the discussion of the models, such as the number of downstream firms, elasticity of demand, extent of product differentiation, level of costs, etc. Even if the right model can be identified, that is not enough—in addition it must be determined whether the parameters that correspond to anticompetitive harm prevail.¹⁰⁷ Third, a final source of error is that there may be other non-price efficiencies associated with the transaction, requiring a trade off of their magnitude and effect against the harm from (any) enhancement or maintenance of market power.

Case-specific facts will matter, as will whether those facts are sufficient to determine whether the transaction results in anticompetitive harm. There is a danger that antitrust tribunals and enforcement agencies may not be capable of administering complex theories and distinguishing between competing explanations.¹⁰⁸ Rather than carefully assessing the facts—assuming that the relevant facts can be ascertained—and determining which effect dominates, the risk instead is that the theories will be used to rationalise prior beliefs or hunches.¹⁰⁹ Finally, the theories are often highly stylised and, for tractability, involve simplifying assumptions, giving rise to questions about the results in more general circumstances.¹¹⁰

- (ii) Vertical integration is ubiquitous, whether attained by internal growth or merger and it is typically efficiency enhancing. The economic presumption, on both theoretical and empirical grounds, is that vertical mergers are likely efficiency enhancing and good for consumers.¹¹¹

¹⁰⁴ See Fisher (1989).

¹⁰⁵ Hovenkamp (2001, pp. 272-273). The non-price efficiencies are those discussed in Section 2.6.

¹⁰⁶ See Cooper et al (2005b) and Church (2005) for a discussion of the importance of netting out these two effects before making conclusions about whether there is any anticompetitive harm.

¹⁰⁷ Cooper et al (2005c, p. 47).

¹⁰⁸ Hovenkamp (2001, p. 269).

¹⁰⁹ Brennan (2004, p. 921).

¹¹⁰ Cooper et al (2005a, p. 648) and M. Salinger, Federal Trade Commission, "Is it Live or Is It Memorex? Models of Vertical Mergers and Antitrust Enforcement," Prepared Remarks for the Association of Competition Economics Seminar on Non-Horizontal Mergers (September 7, 2005) at p. 4.

¹¹¹ This is the first principle of the European Commission's Economic Advisory Group for Competition Policy (EAGCP) for Non-Horizontal Merger Guidelines. See EAGCP (2006). The presumption is reinforced by

These considerations should inform antitrust enforcement policy on vertical mergers by identifying the possibility and cost of two types of errors. The two types of errors are an erroneous injunction when the merger is procompetitive and an erroneous clearance when the merger is anticompetitive. An optimal enforcement policy involves challenging a vertical merger if the expected loss from not challenging (false clearance) is greater than the expected loss from challenging (false injunction).¹¹² A decision to challenge should then depend on the costs and the probability of each type of error. The assessment of the probability of an error should depend on both the presumption that a vertical merger is procompetitive and the facts of a particular case. The presumption that vertical mergers on average are procompetitive suggests a low prior belief or view that a given transaction will be anticompetitive and a bias that the cost of false injunctions exceeds the cost of false clearances. The cost of false injunctions includes not only forgoing benefits to consumers in the case at hand, but potentially casting a “chill” over other potentially pro-competitive vertical mergers.¹¹³

In terms of enforcement policy, this strongly suggests that to enjoin a vertical merger, the facts of the case must be particularly persuasive and supportive of the alleged theory of harm and, to the extent possible, rule out competing case theories. The theory of anticompetitive harm should be coherent, i.e., the behaviour alleged post-merger is profit-maximising, and relevant, i.e., is consistent with the facts of the case. The requirement of a specific theory of harm and a convincing demonstration of its relevance, rather than a presumption of anticompetitive harm based on market share or extent of the market foreclosed, is not easy, but that is consistent with a presumption that vertical mergers are efficient. Enforcement agencies and antitrust tribunals should be confident that the theory of anticompetitive harm is the correct theory of the case and that the facts of the case are consistent with when that theory indicates a vertical merger is anticompetitive.¹¹⁴

These considerations have led to proposals to use a structured rule of reason to assess vertical mergers.¹¹⁵ The analytical approach under a structured rule of reason consists of the following stages:

(i) Market Power Screen

The first stage involves assessing whether it will be possible to exercise market power post-merger.¹¹⁶ This will involve market definition and an assessment of barriers to entry. In the context of vertical mergers the focus will usually be on the exercise of market power at the consumers’ level, i.e., in downstream, or retail, markets. Typically the concern, consistent with the case theories outlined above, will be with market power that is significant and durable.

two recent surveys of the empirical effects of vertical restraints and vertical mergers. Cooper et al (2005a, p. 658) in surveying the empirical literature on vertical restraints/vertical integration conclude that (i) most studies demonstrate that they are procompetitive (result in lower prices and greater output); (ii) the source of the procompetitive effect is likely the elimination of double marginalization or other cost saving; (iii) instances where the effect was unambiguously anticompetitive rare. This conclusion is consistent with that of Lafontaine and Slade (2005). See Scherer (2005) for a critique of Cooper et al based on concerns regarding the sample of articles surveyed.

¹¹² Cooper et al (2005a, p. 659). A false clearance or false negative is a type II error and indicates under deterrence. A false injunction or false positive is a type I error and indicates over deterrence.

¹¹³ Again, this point is emphasized by the EAGCP (2006, Principle 5).

¹¹⁴ This is consistent with Winter’s (2005) emphasis on the relevance of the facts of the case and the role that theory can play in providing the facts with coherence.

¹¹⁵ See Church (2004, pp. 8-10), Bishop et al (2005) and Bishop et al (2006).

¹¹⁶ This is one of the EAGCP (2006) principles.

(ii) Theory of the Case and Factual Screen

The second stage involves identifying a coherent theory explaining why the vertical merger would maintain, enhance, or create market power downstream that leads to an anticompetitive effect, i.e., harms consumers or results in inefficiency. This involves an integrated analysis, or netting out, when the source of both the anticompetitive harm and the potential efficiencies is the same, i.e., elimination of double marginalisation. It is in this stage that pricing efficiencies inherent to the transaction are considered as part of the analysis of anticompetitive effects. Coherence means that the firm will find it profit-maximising to engage in the conduct made possible by the merger that gives rise to the anticompetitive effect. Moreover, the facts of the case must be consistent with the theory. Consistency with the theory will require demonstrating that the behavior of the firm post-merger alleged to be anticompetitive is in fact profit-maximising.

For foreclosure to harm competition, it must be shown that rivals cannot respond by adopting effective counter-measures, foreclosure has a materially negative effect on the competitive constraint of the integrating firm, and the impact on consumers/efficiency, either in the short-run or long run, is adverse. Short-run harm can result either because existing competitors' abilities to compete are impaired or imminent entry is deterred. Long-run harm is more speculative and results from the exit of competitors.

(iii) Efficiencies

The third stage involves an assessment of offsetting *non-price* efficiencies realised because of the vertical merger. Only if the efficiencies do not offset the anticompetitive effects of the vertical merger is antitrust enforcement warranted. In this context the anticompetitive effects depend on whether it is a consumer welfare standard or a total welfare standard that is the relevant objective for competition policy. If it is a consumer welfare standard, then the trade off between efficiencies and market power depends on the net effect on consumer surplus, which in the absence of changes to quality or product variety, involves an assessment of the effect on the price paid by consumers. If it is the total welfare standard, then the trade off between efficiencies and market power depends on the effect of the vertical merger on total surplus.

Stages one and two have been presented sequentially. In practice they are likely to constitute a simultaneous exercise: the theory hypothesised to be applicable will indicate the relevant market in which to look for market power. The balancing exercise in stage three is likely to be costly and subject to error. As a result it should only be entered into if both of the first two stages indicate a concern.

5.1 *The Debate over Vertical Merger Guidelines*

There is considerable debate over the merits and relevance of the existing vertical merger guidelines in the United States¹¹⁷ and whether new vertical merger guidelines that reflect the advances in economic analysis discussed above are warranted or possible.¹¹⁸ The intent of guidelines is to enhance enforcement transparency by detailing when, why, and how a transaction might raise antitrust concerns. Guidelines are of value to the extent that they “contribute towards predictability and consistency.”¹¹⁹ Predictability and

¹¹⁷ The merits and relevance of the existing US Vertical Merger Guidelines are questioned by, among others, Wilcox (1995), Leary (2002-2003), American Bar Association (2004), Pitofsky (2005), and Muris (2005),

¹¹⁸ Klass and Salinger (1995), Reiffen and Vita (1995), Leary (2002-2003), Scheffman and Higgins (2004), American Bar Association (2004), Gotts et al (2005), and Hofer and Williams (2006).

¹¹⁹ EAGCP (2006) Principle 6.

consistency reduce uncertainty and allow firms to assess, at least in broad terms, the risk of antitrust liability. Guidelines provide predictability and consistency by clarifying in advance the process and analysis that an enforcement agency will follow. For this to occur, the relevant enforcement agency must be willing to follow/adopt the analytical framework presented in its guidelines.

It is much easier to adopt guidelines when there is a consensus on the appropriate analytical framework and the evidence required. A perceived lack of intellectual consensus on the appropriate framework for the analysis of vertical mergers and the evidence required to support a case underlies some resistance to revised or new guidelines.¹²⁰ Alternatively, some have suggested simply that it is not possible to provide guidance since “vertical merger analysis is necessarily both highly complex and highly fact and institution specific.”¹²¹ Because each case is sufficiently idiosyncratic, it is not possible to draft guidelines that are generally applicable.

Ideally, the economics of vertical mergers would provide the foundation for structural guidelines. Structural guidelines encapsulate rules which define the circumstances when a vertical merger is presumed to raise antitrust concerns and when it is not. That is, the guidelines identify key variables that can be observed pre-merger as well as what those variables imply about the merger’s effect on market power and consumer or total welfare. Unfortunately, it does not appear to be possible to provide such a mapping for vertical mergers.¹²² The difficulty with following such an approach are (i) the empirical relationships applicable to any situation are simply not available; (ii) they are not likely to be available because the search for such regularities across markets is not a very active research agenda and (iii) the differences across markets likely matter for the implications of a vertical merger: the facts of a case matter!

Instead the foundation provided for vertical merger guidelines is much more circumscribed. The guidelines would follow a structured rule of reason, similar to that proposed above. The guidelines would indicate situations when a vertical merger would raise concerns and why, but would not indicate the structural conditions pre-merger under which the enforcement agencies would be concerned. On the other hand, they would indicate the method of analysis that the enforcement agency would follow, in particular the questions and evidence that are relevant.

This note’s review of the economics and antitrust of vertical mergers suggests the following steps for stage two of the structured rule of reason: (i) establish the incentive for foreclosure; (ii) establish the effect of foreclosure on rivals and, in turn, how it affects their ability to compete; (iii) establish how the change in their ability to compete impacts competition; (iv) establish how the vertical merger changes the incentives of the integrated firm in the downstream market; and (v) establish the impact on the welfare of consumers, or efficiency, from the change in competition and the behaviour of the integrated firm.

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¹²⁰ See American Bar Association (2004), Gotts et al (2005), Hofer and Williams (2006).

¹²¹ Scheffman and Higgins (2004, p. 967).

¹²² This is not to say that it has not been tried. See Riordan and Salop (1995) for a recent attempt. See also the reaction by Reiffen and Vita (1995). An earlier attempt is Fisher and Sciacca (1984).

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NOTE DE RÉFÉRENCE¹

1. Introduction

Il existe un consensus sur les fusions horizontales — sur les fusions comme sur les ententes entre concurrents — mais il n’y en a pas sur le respect de règles concernant les fusions verticales. On en veut pour preuve la controverse sur la pertinence de décisions de la Commission fédérale du commerce et du ministère américain de la Justice et de la Commission européenne sur les dix dernières années environ. En fait, il n’y a généralement pas de principes directeurs officiels sur les fusions verticales, ou ces principes sont en apparence inapplicables au niveau concret. En outre, on craint que l’aspect économique des fusions verticales ne soit pas encore suffisamment développé pour dégager des principes « clairs, évidents » susceptibles de déboucher sur un consensus et de servir à des règles d’application. Malgré cette controverse et les incertitudes sur les mesures à prendre — ou peut-être en raison même de cela — la Commission européenne, dans le cadre des réformes sur le contrôle des fusions annoncées en 2002, est en train de rédiger des principes directeurs sur les fusions non horizontales.

La présente note de référence passe en revue les travaux théoriques traitant des effets des fusions verticales sur la concurrence et analyse la manière dont on a appliqué les principes économiques dans un certain nombre de cas donnés à titre d’illustration. Elle prend en compte les principales théories applicables à la compréhension des fusions verticales anticoncurrentielles, le terme « anticoncurrentiel » désignant un état de fait nuisible à la concurrence qui entraîne un moindre bien-être du consommateur ou du bien-être global². On juge les théories en fonction de leur pertinence et de leur utilité pour l’application des règles anticoncurrentielles destinées à améliorer le bien-être général. Cela consiste concrètement à étudier un

¹ La présente note a été préparée par Jeffrey Church, section Economie, Université de Calgary, Calgary, Canada. Elle s’appuie sur une étude antérieure parrainée par la Commission européenne, qu’elle suit de près à certains égards. Voir Church (2004).

² Le surplus du consommateur mesure les profits pour les consommateurs. C’est la somme sur tous les produits de la différence entre ce que le consommateur est prêt à payer et ce que le consommateur doit payer pour ce produit. On calcule une norme de bien-être en déterminant les évolutions du surplus total. Le surplus total est la somme du surplus du producteur et de celui du consommateur. Le surplus du producteur est la différence entre ses revenus et les coûts évitables. Ce surplus mesure les profits commerciaux que les entreprises dégagent. Lorsque les économistes observent qu’un comportement est inefficace, ils veulent dire par là que ce comportement entraîne une baisse du surplus total. Le surplus du consommateur et celui du producteur sont des mesures monétaires de l’évolution du bien-être. Par conséquent, lorsque le surplus total diminue suite à un changement, par exemple, une fusion verticale, ceux dont la situation s’améliore en raison de ce changement — les gagnants — peuvent ne pas dédommager ceux dont la situation s’est dégradée suite à ce changement — les perdants — et se trouver dans une meilleure situation qu’avant, c’est-à-dire être gagnants. Un changement qui améliore l’efficacité augmente le surplus total. Les gagnants peuvent donc dédommager les perdants tout en continuant à bénéficier d’une meilleure situation qu’avant. Cela ne veut pas dire qu’une compensation sera versée aux perdants, mais seulement que le changement crée suffisamment de richesse pour que les deux parties soient gagnantes.

certain nombre d'exemples récents et à suggérer des mesures d'application et des principes directeurs relevant de la « pratique optimale » en matière de fusion verticale³.

1.1 Points clés

1.1.1 Généralités

- Sous l'angle économique de la lutte contre les pratiques anticoncurrentielles, et donc des mesures d'application, les fusions verticales apparaissent nettement plus compliquées que les fusions horizontales et ce, pour deux raisons. En premier lieu, les fusions verticales entraînent souvent une baisse des prix car on élimine la double marge commerciale à deux stades lorsque l'entreprise en aval et l'entreprise en amont qui fusionnent avaient toutes deux un pouvoir de marché avant la fusion. En effet, au lieu d'acquitter un prix de gros qui inclut une marge commerciale en plus du coût marginal, l'entreprise intégrée, après la fusion, ne paie que le coût marginal du bien intermédiaire d'amont. Cela l'incite à augmenter la production en aval, au bénéfice des consommateurs. En second lieu, tout effet anticoncurrentiel d'une fusion verticale ne peut être qu'indirect, puisque cette fusion n'élimine directement aucun concurrent.
- Lorsque le marché en aval est parfaitement concurrentiel, une entreprise monopolistique en amont ne peut pas augmenter ses profits simplement en reprenant une entreprise en aval. En pratiquant le prix de gros adéquat, elle peut tirer tous les bénéfices de sa situation de monopole. Dans ce cas, l'intégration verticale semble motivée par des considérations d'efficacité qui permettent de baisser les coûts et d'augmenter la production. Il ne peut y avoir augmentation des profits de l'entreprise intégrée si les entreprises en aval peuvent, par substitution, diversifier leur approvisionnement en biens intermédiaires auprès de l'entreprise monopolistique d'amont même si celle-ci a un pouvoir sur le marché (proportions fixes de production en amont et en aval), ou si l'on peut utiliser le bien intermédiaire dans divers produits différents en aval ayant des élasticités différentes de la demande, ou encore si l'entreprise monopolistique en amont est régulée. Une fusion verticale, en présence de proportions variables de production en amont et en aval, peut faire monter les prix en aval, mais on estime que cela ne justifie pas l'application de mesures anti-monopole parce qu'il est difficile de déterminer dans un cas donné si cela va faire monter ou baisser les prix, parce que l'ampleur de toute hausse risque d'être limitée et parce qu'il existe d'autres mécanismes contractuels probablement moins coûteux pour l'entreprise monopolistique d'amont.
- Les théories postérieures à l'École de Chicago portant sur les conséquences nuisibles des fusions verticales en termes de concurrence se concentrent sur la façon dont l'exclusion de la concurrence augmente les coûts ou diminue le chiffre d'affaires des entreprises rivales, et la manière dont ces effets négatifs sur les entreprises rivales entraînent des conséquences nuisibles à la concurrence et donc, nuisibles aux consommateurs, ou entraînent une diminution de l'efficacité (bien-être total). Ces théories se focalisent sur les effets de l'exclusion de la concurrence et sur les motivations qui amènent une entreprise à pratiquer une telle exclusion. Lorsque l'entreprise verticalement intégrée ne vend plus à ses rivaux en aval, ou leur vend plus cher, ceux-ci se trouvent de fait exclus du marché des biens intermédiaires. Lorsque l'entreprise verticalement intégrée n'achète plus auprès de ses rivaux en amont, ceux-ci se trouvent exclus de la clientèle de cette entreprise.

³ La présente note donne aussi un aperçu des principes directeurs existants en matière de fusions verticales dans quatre pays.

- En matière de fusions verticales, les théories modernes sur l'exclusion du marché des biens intermédiaires et sur l'exclusion de la clientèle fournissent un modèle pour la lutte contre les pratiques anticoncurrentielles. Selon ces théories, la démonstration du lien indirect entre, d'une part, une fusion verticale et, d'autre part, un renforcement du pouvoir de marché et un préjudice anticoncurrentiel, suppose de connaître (i) les motivations de l'entreprise qui exclut ses rivaux (ii) l'effet de cette exclusion sur les rivaux et la manière dont cela affecte leurs capacités concurrentielles (iii) la façon dont l'évolution de leur capacité concurrentielle affecte la concurrence (iv) la façon dont la fusion verticale modifie les incitations de l'entreprise intégrée sur le marché en aval (v) enfin, les effets de l'évolution de la concurrence et de l'évolution du comportement de l'entreprise intégrée verticalement, sur le bien-être des consommateurs ou l'efficacité.

1.1.2 *Exclusion du marché des biens intermédiaires*

- L'hypothèse sur laquelle se fonde l'exclusion de la concurrence du marché des biens intermédiaires consiste à dire que l'entreprise intégrée est incitée à modifier le comportement de sa division amont une fois la fusion réalisée, car elle internalise l'effet sur les prix en aval en fixant le prix optimum sur le marché du bien intermédiaire. En effet, elle constate qu'elle tire un bénéfice supplémentaire de la hausse du prix de ce bien en dégageant des profits plus importants par l'augmentation des prix et de son pouvoir de marché en aval. Toutefois, pour que l'effet soit anticoncurrentiel, il ne faut pas seulement que l'exclusion de la concurrence provoque une hausse des prix des biens intermédiaires, il faut aussi que cette hausse du prix pour les rivaux qui ne font pas partie de la fusion verticale entraîne une hausse des prix en aval ou soit défavorable aux consommateurs.
- En règle générale, l'exclusion de la concurrence au niveau des biens intermédiaires a des effets ambigus sur les prix en amont. De fait, la diminution de l'offre et l'évolution des motivations de l'entreprise intégrée laissent supposer une hausse des prix, mais il y a deux effets compensateurs qui entraînent une diminution de la demande et laissent augurer une possible baisse sensible des prix en amont. L'exclusion totale de la concurrence par l'entreprise intégrée réduit la demande. En outre, s'agissant d'une exclusion totale ou partielle de la concurrence, l'avantage en termes de coût en aval résultant de l'élimination de la double marge commerciale entraîne une évolution des parts de marché, à savoir une augmentation de la part de l'entreprise intégrée et une diminution de la part de ses rivaux exclus de la fusion. La diminution de la part des rivaux non intégrés fait baisser leur demande de biens intermédiaires. Alors que l'entreprise verticalement intégrée est incitée à augmenter le prix du bien intermédiaire, l'évolution de la demande peut aisément l'emporter sur cette incitation et provoquer une baisse des prix d'équilibre du bien intermédiaire. De fait, une analyse des motivations de l'entreprise verticalement intégrée risque d'être très trompeuse. De plus, même s'il y a une hausse du prix du bien intermédiaire, les prix en aval sont malgré tout susceptibles de baisser en raison de l'augmentation de la production de l'entreprise verticalement intégrée due à l'élimination de la double marge commerciale.
- Une fusion verticale nuit encore davantage au libre jeu de la concurrence en cas d'exclusion totale de la concurrence, lorsque l'entreprise intégrée n'est pas présente sur le marché amont en tant qu'acteur commercial. Cette absence de participation au marché amont résulte de l'incompatibilité de la production amont de l'entreprise intégrée et des entreprises présentes en aval qui ne font pas partie de la fusion. C'est la relation entre la perte de profits en amont et l'augmentation des profits en aval qui détermine la motivation de l'entreprise intégrée à exclure la concurrence en adoptant une technologie spécifique.

- La motivation de l'entreprise verticalement intégrée à se comporter différemment sur le marché amont pour renchérir les coûts de ses rivaux dépend de l'efficacité de ce comportement. En effet, plus les marchés amont ou aval sont concurrentiels suite à la fusion, moins l'entreprise intégrée est incitée à changer son comportement sur le marché amont. Sa motivation pour renchérir les coûts de ses rivaux est d'autant moins grande qu'elle a moins le pouvoir d'affecter les prix en amont ou en aval en excluant ses concurrents.
- Les avantages d'une hausse des coûts de ses rivaux pour l'entreprise intégrée et le risque de nuire au libre jeu de la concurrence s'expliquent par l'asymétrie des coûts créée en aval. On peut retrouver cette asymétrie des coûts si les concurrents qui ne font pas partie de la fusion verticale réagissent en créant une contre fusion. Si les échanges commerciaux en amont avant la fusion sont efficaces, c'est-à-dire si l'unité de production marginale est vendue au coût marginal, il est beaucoup moins probable que la fusion verticale nuise à la concurrence car cette fusion ne crée aucune asymétrie de coûts.
- Sous l'angle économique, les fusions verticales font ressortir la difficulté de juger de leurs effets sur les prix en aval, même lorsque les entreprises intégrées s'engagent à ne pas participer au marché amont. Cela dépend de l'arbitrage entre l'augmentation de la production due à l'élimination de la double marge commerciale et la diminution de cette production résultant de l'exclusion de la concurrence et encore, pour cette dernière, à condition que les prix de gros augmentent. Cet arbitrage est incontournable : il est dû à l'asymétrie de coûts créée par la fusion verticale en présence des deux marges commerciales, d'amont et d'aval. Pour savoir si la fusion verticale nuit au libre jeu de la concurrence, il faut faire le solde net des deux effets.

1.1.3 Exclusion de la clientèle

- La clientèle se trouve exclue quand, postérieurement à la fusion verticale, la division aval de l'entreprise intégrée ne se fournit plus auprès d'entreprises indépendantes d'amont. Si la diminution des ventes en volumes qui en résulte entraîne une hausse du coût moyen ou du coût marginal des concurrents en amont, alors, dans la mesure où il y a exclusion de la concurrence (en raison de la hausse des coûts moyens) ou affaiblissement de la concurrence (en raison de l'augmentation du coût marginal), les pressions concurrentielles que ces entreprises exercent sur la division amont de l'entreprise intégrée se trouvent amoindries et il en résulte un plus grand pouvoir de marché de l'entreprise intégrée en amont et une hausse des prix des biens intermédiaires.
- Pour qu'il y ait véritablement exclusion de la clientèle, (i) il doit y avoir des raisons technologiques associées à l'intégration qui font que la division aval de l'entreprise intégrée ne vas pas s'approvisionner auprès d'un fournisseur indépendant (ii) ou la renonciation de la division aval à l'approvisionnement externe doit avoir pour effet de maximiser ses profits.
- Une série de théories relatives à l'exclusion anticoncurrentielle de la clientèle fait appel à l'idée d'arbitrage entre la diminution de la double marge commerciale et la monopolisation du marché amont. Il y a monopolisation du marché amont lorsque la baisse des ventes en aval interagit avec les économies d'échelle en amont et entraîne l'élimination des rivaux de l'entreprise intégrée en amont ou dissuade toute entrée sur le marché. L'exclusion de la clientèle peut avoir des conséquences nuisibles à la concurrence

et ce, même si les échanges commerciaux antérieurs à la fusion sont efficaces, c'est-à-dire même en l'absence de double marge commerciale.

- L'exclusion de la clientèle peut aussi avoir des effets nuisibles au libre jeu de la concurrence lorsque la demande des consommateurs est sensible à la variété des produits. Si les consommateurs attribuent une valeur à cette variété, alors, toute différence de ce point de vue, s'agissant d'une entreprise dont la gamme de produits est plus fournie que celle d'une autre entreprise, fait augmenter la demande de produits de cette entreprise et, ce faisant, diminue aussi la demande et le chiffre d'affaires de ses rivaux. Une entreprise intégrée peut bénéficier d'un avantage en termes de variété de produits si elle élimine sa clientèle après la fusion verticale. On entend ici par élimination de la clientèle le fait, pour l'entreprise intégrée, de ne pas permettre à un rival d'accéder aux produits contrôlés par elle. Si les consommateurs assignent une valeur à la variété des produits, un avantage de ce point de vue peut conférer un pouvoir de marché à l'entreprise intégrée ou conduire à une monopolisation. Les motivations qui président à l'exclusion de la clientèle dépendent de l'équilibre respectif entre l'augmentation des profits due à la hausse des ventes aux consommateurs et la baisse des profits due au non approvisionnement des rivaux. L'augmentation des profits dépend de l'effet des différences de variété sur la demande. L'existence de stratégies possibles pour contrer cette exclusion est un facteur important. Par ailleurs, il faut considérer explicitement si l'entreprise exclue peut elle aussi fusionner avec une autre et exclure aussi sa clientèle, et/ou si les barrières à l'entrée sont suffisantes, en sorte qu'un rival ne peut pas concurrencer l'entreprise qui exclut.

1.1.4 *Effets coordonnés*

- Il y a effet coordonné d'une fusion verticale si les entreprises d'amont ou d'aval, après la fusion, sont en mesure de coordonner plus efficacement leur actions, soit parce que cela leur permet plus facilement d'arriver à un accord tacite sur le résultat coordonné ou parce que cela en facilite l'application. On a avancé un certain nombre d'hypothèses concernant le potentiel qu'a une fusion verticale d'avoir un effet coordonné, y compris le fait que la fusion verticale peut éliminer un acheteur « perturbateur », renforcer la transparence des prix de gros ou faciliter l'échange d'information. Il importe toutefois d'observer que ces théories supposent toutes que, selon le cas, au moins un des marchés d'amont et d'aval a des effets coordonnés. Si tel n'est pas le cas, les effets coordonnés d'une fusion verticale ne sont guère susceptibles d'être appréciables.

1.1.5 *Efficiences*

- Une bonne partie de la controverse sur l'application des règles relatives aux fusions verticales vient de l'opinion très largement répandue selon laquelle ces fusions sont peu susceptibles de nuire au libre jeu de la concurrence et la motivation d'une fusion verticale n'est pas de renforcer ou de préserver un pouvoir de marché, mais de dégager des efficiences. En général, les efficiences sont dues au fait que la meilleure coordination permise par les fusions verticales débouche sur (i) des efficiences et des économies de production (ii) une internalisation des externalités verticales et une harmonisation des motivations (iii) des économies de coûts en termes de transaction, y compris en atténuant les conséquences de comportements opportunistes.

1.1.6 *Implications au niveau des mesures d'application et des principes directeurs des fusions verticales*

- Il faut prendre en compte deux éléments importants en matière de fusion verticale. En premier lieu, les fusions verticales sont très répandues et, normalement, accroissent l'efficacité. Au niveau économique, on suppose, théoriquement et empiriquement, que les fusions verticales ont des effets positifs en termes d'efficacité et qu'elles sont bonnes pour le consommateur. En second lieu, alors que la nature économique des fusions verticales donne à penser qu'elles peuvent entraver le jeu de la libre concurrence, ce qui importe pour assurer l'amélioration du bien-être, c'est de déterminer et de distinguer les rares transactions sur lesquelles il vaut la peine de se pencher et qui méritent d'être interdites en raison de leurs effets anticoncurrentiels, des transactions où, en règle générale, leur effet est positif ou neutre. Trois types d'erreurs risquent donc de se présenter : (i) il n'est pas obligatoire de distinguer sur une base factuelle la théorie des effets nuisibles au libre jeu de la concurrence des explications qui donnent à penser que l'intérêt d'une fusion verticale est de dégager des efficacités autres qu'au niveau des prix (ii) il ne suffit pas que la théorie des effets nuisibles au libre jeu de la concurrence puisse s'appliquer aux faits, il faut également montrer que, dans le cadre de cette théorie, les circonstances donnent des résultats nuisibles à la concurrence, par exemple que la hausse des coûts des rivaux a des effets plus importants que l'élimination de la double marge commerciale (iii) la fusion verticale permet probablement de réaliser des efficacités autres que sur les prix qui nécessitent un arbitrage entre les conséquences préjudiciables à la concurrence (le cas échéant) et l'ampleur et les effets des efficacités autres qu'au niveau des prix.
- L'a priori selon lequel les fusions verticales sont en moyenne positives pour la concurrence laisse donc penser que l'on doute qu'une transaction soit nuisible à la concurrence et participe d'une idée préconçue selon laquelle le coût d'une injonction donnée de manière injustifiée à l'entreprise intégrée est supérieur au coût de la délivrance erronée d'une autorisation de fusion. Le coût d'une injonction injustifiée inclut, non seulement la perte des avantages pour les consommateurs dans le cas d'espèce, mais aussi le risque de « jeter un froid » sur d'autres fusions verticales potentiellement favorables à la concurrence. Pour s'opposer à une fusion verticale, il semble donc que les faits doivent être particulièrement pertinents, aller dans le sens de la théorie de la fusion nuisible au libre jeu de la concurrence et, dans toute la mesure du possible, exclure les théories favorables à la concurrence. Pour qu'une fusion soit considérée comme anticoncurrentielle, il faut avancer des arguments cohérents, c'est-à-dire que le comportement allégué de l'entreprise intégrée après la fusion doit maximiser ses profits, et cohérents aussi avec les faits.
- D'après ces considérations, l'évaluation des fusions verticales doit se faire selon une démarche raisonnée en trois étapes : (i) le critère du pouvoir de marché (ii) une analyse théorique du cas d'espèce et une analyse des faits selon certains critères (iii) et une évaluation des efficacités compensatrices hors prix réalisées par la fusion verticale. Le deuxième stade de cette démarche raisonnée implique de déterminer : (i) les motivations de l'entreprise intégrée pour exclure les concurrents et les clients (ii) les effets de cette exclusion sur les rivaux et sur la capacité de ceux-ci à exercer une concurrence (iii) dans quelle mesure la modification des capacités concurrentielles de ces rivaux influe sur le terrain de la concurrence (iv) de quelle manière la fusion verticale change les motivations de l'entreprise intégrée sur le marché aval (v) les conséquences du changement du paysage concurrentiel et du changement de comportement de l'entreprise verticalement intégrée sur le bien-être des consommateurs ou sur l'efficacité.

1.1 Définitions

Il y a fusion horizontale lorsque les produits des entreprises qui fusionnent font partie du même marché au sens de la réglementation antitrust, à savoir que ces produits sont susceptibles d'exercer une pression concurrentielle importante les uns sur les autres, avant la fusion. Les fusions non horizontales sont celles où les produits des parties à l'opération relèvent de marchés séparés au sens de la réglementation antitrust. Pour les fusions non horizontales, il est utile de distinguer entre les fusions verticales et les conglomérats. En effet, les conglomérats ne sont ni des fusions horizontales, ni des fusions verticales.

Avant la fusion verticale, les deux entreprises sont ou peuvent être dans une relation client - fournisseur. Elles se situent à des étapes différentes de production ou de distribution, l'une produisant un bien intermédiaire qui est utilisé par l'autre. Après la fusion, les deux entreprises séparées sont remplacées par une seule entreprise qui assure désormais les deux activités ou étapes de production. La fusion verticale remplace donc une transaction de marché réelle ou potentielle au titre de laquelle un bien intermédiaire fait l'objet d'une opération commerciale entre les deux entreprises, par un transfert de ce bien intermédiaire au sein de la même entreprise. Si le remplacement d'une transaction de marché par un échange interne à l'entreprise est « le contenu observable de l'intégration verticale, il ne rend pas intégralement compte de l'essence de l'intégration verticale. En effet, cette intégration consiste aussi en la propriété et le contrôle complet des étapes voisines de production ou de distribution »⁴. Une fusion verticale peut consister en une intégration vers l'aval, l'entreprise d'amont (qui se trouve dans la position du vendeur avant la fusion), acquiert une entreprise en aval (l'acheteur avant la fusion). Ce peut être par exemple l'acquisition d'une boutique de chaussures par un fabricant de chaussures, ou l'acquisition d'un service de taxis ou d'une entreprise de location de voitures par un fabricant d'automobiles. Une fusion verticale avec intégration vers l'amont consiste en l'acquisition du vendeur par l'acheteur, par exemple l'acquisition d'un fabricant de pièces détachées par un constructeur automobile ou de mines de bauxite par un sidérurgiste.

Une fusion de type conglomérat entre entreprises fabricant des produits complémentaires est similaire à une fusion verticale. Dans une fusion de conglomérat concernant des produits complémentaires, les clients « assemblent » les marchandises pour en faire des systèmes avant consommation. La distinction entre fusions verticales et fusions complémentaires tourne autour de l'assembleur. En effet, dans les fusions verticales, l'entreprise d'aval achète les biens complémentaires auprès des fabricants d'amont et se livre à des activités de transformation des biens intermédiaires en produits finaux vendus au consommateur. Dans une fusion impliquant des produits complémentaires, c'est le consommateur qui achète l'ensemble des compléments et les assemble aux fins de consommation. Étant donné que les fusions verticales et les fusions concernant des produits complémentaires impliquent toutes deux l'acquisition de compléments — on peut décrire ainsi les diverses étapes d'une chaîne de production — la nature économique des fusions entre fabricants de produits complémentaires est souvent identique à celle des fusions verticales.

1.2 Cas d'entrave au libre jeu de la concurrence

Il n'y a entrave au libre jeu de la concurrence que lorsqu'une fusion verticale entraîne un plus grand pouvoir de marché de l'entreprise intégrée qui, à son tour, nuit au bien-être du consommateur ou au bien-être total. La capacité d'une entreprise à exercer son pouvoir de marché est limitée par la capacité de ses clients à trouver des produits de substitution auprès des concurrents de cette entreprise⁵. Une entreprise peut exercer un pouvoir de marché si les possibilités de substitution, auprès d'autres fournisseurs du même

⁴ Perry (1989, p. 186).

⁵ On définit généralement le pouvoir de marché entravant le jeu de la libre concurrence comme étant la capacité à augmenter rentablement les prix au-delà des niveaux d'une concurrence normale.

produit ou de produits différents, sont limitées et sont susceptibles de rester limitées pendant une longue période de temps.

Une fusion horizontale peut déboucher sur une augmentation du pouvoir de marché si cette fusion a pour effet d'éliminer une possibilité appréciable de produits de substitution. Il y a effet unilatéral lorsque, après une fusion, une possibilité importante d'approvisionnement en produits de substitution est internalisée par l'entreprise intégrée⁶. D'autre part, une fusion horizontale peut faciliter l'exercice coordonné du pouvoir de marché et donner lieu à un effet coordonné si l'élimination d'un concurrent permet aux entreprises restantes sur le marché de coordonner plus facilement et plus efficacement leur comportement, de restreindre la concurrence et d'exercer collectivement un plus grand pouvoir sur le marché.

Les deux solutions possibles pour augmenter le pouvoir de marché sont les mêmes dans le cas d'une fusion verticale, mais les mécanismes en jeu ne sont pas aussi directs ou évidents. De fait, il est même probable que l'entreprise intégrée a une motivation pour baisser ses prix. Dans de nombreux cas, toutes choses étant égales par ailleurs, le fait de baisser le prix en aval augmente le chiffre d'affaires et les bénéfices de l'entreprise d'amont. L'entreprise d'aval n'aurait pas tenu compte de cet effet extérieur avant la fusion, effet qui se trouve internalisé après la fusion. Pour ces deux raisons, le côté antitrust du point de vue économique est donc sensiblement plus compliqué dans le cas d'une fusion verticale que dans le cas d'une fusion horizontale. Pour pouvoir contester de manière fondée une fusion verticale au motif qu'elle nuit au libre jeu de la concurrence, il faut démontrer que l'opération augmente ou maintient le pouvoir de marché de l'entreprise intégrée et qu'elle nuit au bien-être. Dans le cas d'un effet unilatéral, il faut démontrer que l'opération rend les produits de concurrents moins attrayants en tant que substituts que ce n'était le cas avant la fusion, provoquant ainsi une diminution de l'élasticité de la demande de l'entreprise intégrée, un renforcement de son pouvoir de marché et un effet négatif sur les consommateurs ou en termes d'efficacité. Cela peut être dû au fait que les produits des concurrents après la fusion sont de moins bonne qualité ou sont plus chers. Les études théoriques sur la logique anticoncurrentielle des fusions verticales et leurs effets que nous passons en revue dans le présent document de référence montrent comment ces fusions modifient les motivations et/ou les contraintes de l'entreprise intégrée, renforçant ainsi son pouvoir de marché et nuisant au bien-être.

2. Aspect économique des fusions verticales

La présente section décrit de manière générale l'aspect économique des effets des fusions verticales sur la concurrence et les situations dans lesquelles une fusion verticale provoque une augmentation du pouvoir de marché de l'entreprise intégrée et une diminution du bien-être⁷. Nous commençons par les deux contributions de l'École de Chicago selon lesquelles les fusions verticales ont probablement des effets positifs sur le bien-être. Ces contributions sont le modèle des monopoles successifs et le modèle de l'effet de levier monopolistique. Les contributions plus récentes que nous passons ensuite en revue assouplissent les hypothèses de l'École de Chicago en matière de monopole en amont et de concurrence parfaite ou de

⁶ Soit deux entreprises et produits *A* et *B*. En cas d'effet unilatéral, l'une des contraintes qui, avant la fusion, empêche le fabricant de *A* d'augmenter ses prix est le risque de pertes au niveau de son chiffre d'affaires auprès de *B*. Toutefois, après la fusion, l'entreprise intégrée internalise cet effet. Elle constate en effet qu'une hausse du prix de *A* augmente aussi la demande de *B* pour laquelle sa marge bénéficiaire est positive.

⁷ Les conséquences d'une fusion verticale sur le bien-être dépendent de la norme de bien-être que l'on adopte. La norme d'efficacité ou de bien-être total évalue les conséquences d'une fusion verticale sur le bien-être en analysant ses effets sur le surplus total. La norme de bien-être du consommateur ne prend en compte que l'effet de la fusion verticale sur le consommateur. On évalue les effets de la fusion verticale sur le consommateur en analysant ses conséquences sur le surplus du consommateur.

monopole en aval. Au lieu de cela, elles considèrent des situations de concurrence imparfaite à au moins un stade de la production après la fusion. Les travaux théoriques actuels sur l'exclusion de la concurrence analysent si et quand une fusion verticale augmente le coût des rivaux ou en diminue le chiffre d'affaires. La dernière théorie examinée étudie la possibilité qu'une fusion verticale ait un effet coordonné. On conclut la section par une brève discussion des efficacités associées aux fusions verticales.

2.1 *L'École de Chicago*

Les effets des fusions verticales sur la concurrence sont habituellement évalués selon les modèles de l'effet de levier monopolistique et des monopoles successifs. D'après ces deux modèles, les fusions verticales ont des conséquences positives sur le bien-être.

2.1.1 *Effet de levier monopolistique et profit unique*

Le modèle de l'effet de levier monopolistique fait appel au principe du profit unique. Selon ce principe, il ne peut y avoir qu'un seul profit de monopole et donc, une entreprise en situation de monopole en amont ne peut pas augmenter ses bénéfices en exploitant son pouvoir monopolistique sur un marché aval concurrentiel. Elle peut concrétiser ses profits de monopole en pratiquant le prix approprié sur le marché où elle est en situation de monopole : son intégration en aval dans un marché concurrentiel n'augmente pas son pouvoir de marché ou ses bénéfices et d'ailleurs, elle risque plutôt de faire baisser ces bénéfices si elle est en position de fournisseur à coûts élevés sur le marché aval. Le modèle de l'effet de levier monopolistique prend pour hypothèse que (i) les entreprises en aval sont identiques (ii) les proportions de production en aval sont fixes (iii) il y a en amont une entreprise en position de monopole (iv) il n'y a pas de réglementation des prix (v) et qu'il y a concurrence parfaite en aval.

Le principe du profit unique est fondé sur l'observation selon laquelle, en choisissant un prix de gros approprié, l'entreprise en situation de monopole en amont peut s'assurer que le prix sur le marché concurrentiel en aval est identique au prix que fixerait une entreprise monopolistique verticalement intégrée et que ses bénéfices sur le marché amont sont identiques aux bénéfices de l'entreprise monopolistique verticalement intégrée⁸. En aval, le prix, les quantités et les bénéfices de l'entreprise en situation de monopole sont les mêmes, que cette entreprise soit verticalement intégrée en non. L'entreprise monopolistique dégage son profit de monopole sur son marché de gros en imposant une prime de monopole. En raison de l'hypothèse de départ des proportions fixes de production en amont et en aval, et de la concurrence en aval, cette prime est simplement répercutée sur le consommateur final en aval. L'intégration verticale n'augmente pas les bénéfices et il n'est pas nécessaire d'en passer par là pour dégager des profits de monopole. Si l'entreprise participe à une intégration verticale, elle fournit les

⁸ Concrètement, supposons que le prix pratiqué en aval par une entreprise monopolistique verticalement intégrée et permettant de maximiser ses bénéfices, est de 10. Si le coût marginal de la production en amont est de 3 et le coût des autres biens intermédiaires utilisés dans la production en amont est de 2, le bénéfice unitaire de l'entreprise verticalement intégrée est donc de 5. En l'absence d'intégration verticale, le prix sur le marché aval parfaitement concurrentiel est égal au coût marginal de production en aval : $p = 2 + w$, formule dans laquelle w est le prix en amont pratiqué par l'entreprise en situation de monopole.

Le prix pratiqué par l'entreprise monopolistique d'amont qui permet de maximiser ses profits lorsque cette entreprise n'est pas intégrée, est fixé de telle manière que le prix d'aval est identique à ce qu'il serait si l'entreprise était verticalement intégrée en aval : $w = 10 - 2 = 8$. Si l'entreprise pratique ce prix, le coût marginal des entreprises en aval est de 10 — et étant donné qu'en raison de l'hypothèse des proportions de production fixes en amont et en aval, les ventes du bien intermédiaire d'amont étant égales en volume aux ventes du produit fini en aval, la quantité demandée est la même que dans le cas de l'intégration verticale. Le bénéfice unitaire est de $8 - 3 = 5$, soit un chiffre identique au bénéfice unitaire de l'entreprise si elle était verticalement intégrée.

services en aval et supporte les coûts marginaux d'aval. Si, au contraire, il y a séparation verticale, les entreprises concurrentielles en aval assurent les activités d'aval et assument les coûts marginaux d'aval.

Étant donné que l'augmentation des bénéfices et le pouvoir de marché ne sont pas les raisons qui président à l'intégration verticale, l'argument consiste à dire que cette intégration doit s'expliquer par des efficiences qui permettent de faire baisser les coûts unitaires. La baisse de ces coûts unitaires, en amont ou en aval, provoque une augmentation des bénéfices de l'entreprise en position de monopole qui peut encore accroître son profit en augmentant son chiffre d'affaires. Elle ne peut le faire qu'en baissant le prix pour les consommateurs, améliorant du même coup le bien-être de ceux-ci.

On sait pertinemment que la théorie du profit monopolistique unique ne résiste pas très bien aux changements des hypothèses qui la sous-tendent :

(i) Proportions de production variables en aval

En cas de proportions de production en aval non identiques à celles de l'amont, lorsque l'entreprise en amont exerce un pouvoir monopolistique sur le marché de gros, les entreprises en aval substitueront les biens intermédiaires de l'entreprise monopolistique par d'autres biens intermédiaires. Par conséquent, l'imposition sur le marché de gros par ladite entreprise de la prime monopolistique due à l'intégration verticale ne permet plus de maximiser les profits. Les entreprises d'aval procédant à une substitution, leur coût marginal de production est supérieur à ce qu'il serait si elles avaient accès au bien intermédiaire « monopolisé » au prix efficient (c'est-à-dire au coût marginal).

L'intégration verticale et l'exclusion de la clientèle ou de l'accès aux biens intermédiaires par l'entreprise monopolistique ont deux effets : (i) elles restaurent la prime monopolistique en matière de prix (ii) elles diminuent les coûts de production en aval. Ces deux effets montrent que les conséquences de l'intégration verticale au niveau du bien-être économique ne sont pas évidentes. Si, en inversant la substitution inefficace des biens intermédiaires, cela entraîne une baisse des coûts plus importante que l'effet du pouvoir de marché, les prix en aval diminuent et si cette baisse des coûts est moins importante que cet effet, les prix en aval augmentent.⁹ Le surplus total peut aussi augmenter, même dans le cas où les prix en aval augmentent et où le bien-être du consommateur (le surplus) baisse, puisque la perte pour les consommateurs due à la hausse des prix est inférieure au gain obtenu par l'entreprise verticalement intégrée grâce à la réduction des coûts et à la hausse des prix.

Selon l'avis général, « il n'est pas sûr que la variabilité des proportions de production entre amont et aval soit un problème majeur pour les intégrations verticales »¹⁰ et il est difficile de déterminer les effets d'une intégration verticale sur les consommateurs étant donné que la relation entre les deux effets est complexe et les problèmes de mesure suffisamment redoutables en sorte que les jugements sur leur effet net ne peuvent être que très peu fiables¹¹. Au vu des

⁹ Les proportions efficientes de biens intermédiaires permettent des gains qui dépendent de l'élasticité de substitution de la production, en d'autres termes, de la facilité avec laquelle les entreprises d'aval peuvent trouver des substituts au bien intermédiaire « monopolisé » à mesure que le prix de ce bien intermédiaire augmente. La hausse du prix sur le marché aval dépend de l'élasticité de la demande en aval.

¹⁰ Perry (1989, p. 192).

¹¹ Fisher et Sciacca (1984, p. 21).

coûts qu'entraîne l'augmentation de la taille de l'entreprise une fois intégrée verticalement¹², cette intégration est « une solution plutôt radicale à un problème qui est avant tout une question de fixation des prix. »¹³ Le fait est qu'il y a de nombreuses possibilités d'exercer des restrictions concurrentielles et d'établir une tarification, toutes aussi effectives les unes que les autres, comme par exemple un tarif en deux parties supprimant les inefficiences associées aux proportions variables de production et évitant les coûts de l'intégration verticale¹⁴.

(ii) Différenciation en termes de prix (utilisation hétérogène des biens intermédiaires)

Si le bien intermédiaire fourni par l'entreprise monopolistique d'amont est utilisé dans de nombreux secteurs d'activité différents présentant des caractéristiques de demande différentes, cette entreprise peut être incitée à s'intégrer verticalement pour procéder à une différenciation au niveau des prix.¹⁵ En l'absence d'intégration et d'arbitrage effectif, l'entreprise monopolistique d'amont n'est pas en mesure d'augmenter les prix du bien intermédiaire qu'elle pratique auprès des clients dont la demande est inélastique (les utilisateurs de grande valeur pour elle) et de baisser les prix pour les clients dont la demande est élastique (utilisateurs de faible valeur). Elle est cantonnée à pratiquer le même prix pour les deux groupes d'utilisateurs. L'exemple classique est l'intégration d'Alcoa dans les câbles en aluminium (demande élastique), alors que le groupe n'avait pas opéré d'intégration verticale dans les pièces détachées pour l'aéronautique (demande inélastique).

L'intégration ou la fusion verticale dans un segment de clientèle à faible valeur pour l'entreprise intégrée rend l'arbitrage inutile et permet à l'entreprise monopolistique d'opérer une discrimination au niveau des prix. Si cette entreprise est en position de monopole pour le bien intermédiaire, elle peut alors aussi se placer en situation de monopole auprès de la clientèle à demande élastique en « étranglant » par les prix les entreprises indépendantes d'aval présentes dans ce débouché. Un étranglement par les prix consiste à abaisser le prix du bien d'aval de faible valeur, tout en augmentant le prix du bien intermédiaire. L'entreprise en situation de monopole pour le bien intermédiaire n'offre ce bien à la vente qu'au prix augmenté, en se fondant sur le fait que les utilisateurs de grande valeur sont prêts à payer ce prix. Vu le faible prix que l'entreprise monopolistique pratique auprès des utilisateurs de faible valeur, l'offre des entreprises indépendantes d'aval à destination des utilisateurs de faible valeur n'est donc pas rentable et ces entreprises se trouvent donc évincées du marché.

En général, les effets sur le bien-être d'une intégration verticale motivée par une discrimination au niveau des prix effectivement mise en oeuvre, sont ambigus. Les profits augmentent et, à supposer que la concurrence existe en aval, les prix d'aval sur le marché à faible valeur baissent

¹² Les inefficiences dues à l'augmentation de la taille de l'entreprise intégrée s'expliquent généralement par les problèmes de motivation créés par cette augmentation de taille. Voir Church et Ware (2000, Chapitre 3) pour une synthèse des coûts associés à l'augmentation de la taille d'une entreprise.

¹³ Perry (1989, p. 192).

¹⁴ Dans le cadre d'une double tarification, l'entreprise monopolistique pratique un prix à l'unité pour les entreprises d'aval et un montant fixe pour le droit d'acheter. Le prix à l'unité est efficient s'il est égal au coût marginal du produit d'amont.

¹⁵ Dans ce cas, l'entreprise en situation de monopole maximise ses profits en pratiquant une discrimination par les prix au troisième degré. Elle souhaitera augmenter ses prix pour les groupes dont la demande est relativement inélastique et baisser ses prix pour les groupes dont la demande est relativement élastique. Cette structure de prix s'explique par les différentes possibilités de substitution qu'ont différents groupes du côté de la demande.

et les prix sur le marché aval de grande valeur augmentent. L'efficacité peut progresser ou diminuer : pour que le surplus total augmente, il faut nécessairement que la production augmente¹⁶. En général, l'effet global sur les consommateurs est également ambigu, mais le surplus pour les utilisateurs de grande valeur diminue et le surplus pour les utilisateurs de faible valeur augmente.

Cependant, s'il existe de grandes différences entre les utilisateurs d'aval au niveau du prix qu'ils sont prêts à payer et si le marché de faible valeur est peu important, la discrimination par les prix bénéficie alors aux utilisateurs de faible valeur et à l'entreprise, sans porter préjudice aux utilisateurs de grande valeur. Dans ce cas, le prix monopolistique uniforme correspond uniquement au prix que les utilisateurs de grande valeur sont prêts à payer : les utilisateurs de faible valeur se trouvent exclus par le prix élevé. Par conséquent, dans le cadre de la discrimination par les prix, le prix pratiqué pour les utilisateurs de grande valeur ne change pas, mais les utilisateurs de faible valeur sont également servis, ce qui augmente leur surplus et les profits de l'entreprise.

(iii) Contournement de la réglementation des prix

Si le pouvoir de marché de l'entreprise monopolistique d'amont est effectivement contrôlé par une réglementation des prix, cette entreprise est incitée à chercher à contourner cette restriction à son pouvoir de marché et à ses profits, en procédant à une intégration verticale¹⁷. Une intégration verticale en aval permet à l'entreprise de concrétiser ses profits de monopole sur un marché d'aval non réglementé (i) en pratiquant une politique discriminatoire à l'encontre d'autres entreprises d'aval au niveau de l'offre du bien intermédiaire (ii) ou en détournant l'affectation des coûts de la division d'aval pour les attribuer la division d'amont réglementée.

Pour contourner une contrainte réglementaire effective sur le marché réglementé par une discrimination anticoncurrentielle en procédant à une fusion verticale, il faut (i) fusionner avec une entreprise d'aval pour laquelle le produit réglementé est un bien intermédiaire (ii) et pratiquer une discrimination à l'encontre des concurrents sur le marché aval en diminuant la qualité de leur bien intermédiaire, en augmentant leurs coûts d'utilisation de ce bien ou, cas extrême, en ne les approvisionnant pas du tout. Si l'entreprise soumise à réglementation est en mesure de faire ces deux choses, elle peut alors augmenter le prix des produits d'aval au-delà du niveau qui prévaudrait en l'absence de l'intégration verticale et de sa stratégie discriminatoire. L'entreprise exerce son pouvoir sur le marché amont et tire ses profits monopolistiques de la marge bénéficiaire qu'elle dégage sur les ventes de son produit d'aval.

¹⁶ Varian (1989, p. 623) décrit la condition technique préalable à la croissance de la production — condition nécessaire mais non suffisante pour que le surplus total augmente. Elle dépend du profil des courbes de la demande. Une augmentation de la production est nécessaire si la production totale ne change pas — ce qui est vrai si les courbes de la demande sont linéaires. Le surplus total doit donc diminuer étant donné qu'en cas de discrimination par les prix, il est toujours possible de dégager des profits commerciaux, alors qu'en cas de prix uniforme, cela n'est plus possible. Ces profits commerciaux s'expliquent par le fait que lorsqu'il y a discrimination par les prix, la répartition de la production entre les marchés n'est pas efficiente. La valeur de la dernière unité de production vendue aux utilisateurs de grande valeur est supérieure à la valeur de la dernière unité vendue aux utilisateurs de faible valeur. En cas de prix uniformes, ces valeurs sont équivalentes.

¹⁷ Voir Church et Ware (2000) chapitre 26 et les références qui s'y trouvent pour une discussion plus détaillée.

L'entreprise monopolistique dispose d'une autre stratégie pour contourner la réglementation sur les coûts : entrer sur un marché aval dans l'intention de réaffecter les coûts du marché d'aval vers le marché réglementé d'amont. Cela a pour effet de desserrer la contrainte sur les prix au niveau du marché réglementé et d'accroître les profits — à la condition de ne réaffecter les coûts qu'à partir de marchés concurrentiels et que ces coûts ne soient pas alourdis. Ce transfert de coûts augmente le prix sur le marché réglementé et les profits que l'on en tire sont réalisés sur le marché non réglementé. Le transfert des coûts crée ou accroît l'écart entre les revenus et les coûts comptables de l'entreprise réglementée sur le marché non réglementé.

Les tentatives par l'entreprise monopolistique d'échapper à une contrainte réglementaire sur son pouvoir de monopole en procédant à une intégration verticale avec une entreprise d'aval qui lui permet de pratiquer des mesures discriminatoires ou de détourner l'affectation de ses coûts, sont en général inefficaces. En effet, elles conduisent à une hausse des prix pour les consommateurs sur le marché aval (discrimination) ou sur le marché amont (détournement de l'affectation des coûts). En outre, étant donné que les deux stratégies peuvent désavantager les concurrents sur le marché aval, elles risquent d'aboutir à un transfert de part de marché des entreprises indépendantes d'aval vers l'entreprise verticalement intégrée. Or, ce transfert est inefficace si les entreprises indépendantes ont des coûts moins élevés en aval que l'entreprise intégrée. La stratégie de détournement de l'affectation des coûts désavantage les concurrents sur le marché aval si cela porte sur les coûts marginaux. Dans ce cas, le marché réglementé fournit une « subvention croisée » au marché aval, avec pour conséquence que l'entreprise en situation de monopole peut se comporter en aval comme si son coût marginal était plus faible. Cela peut être un moyen effectif pour l'entreprise réglementée d'adopter un comportement agressif après son entrée sur le marché aval et cela peut dissuader les concurrents d'entrer sur ce marché ou les en évincer, provoquant par là même une hausse des prix en aval pour les consommateurs.

Par ailleurs, une entreprise monopolistique assujettie à une réglementation des coûts peut procéder à une intégration en amont et, par les prix de transfert, échapper aux contraintes réglementaires en aval. Elle paie des prix gonflés et n'achète qu'auprès de sa filiale amont, desserrant ainsi toute contrainte réglementaire fondée sur les coûts en aval et réalisant ses profits de monopole sur les ventes du bien intermédiaire. Cela fait échec à la réglementation des coûts et entraîne une hausse des prix en aval pour les consommateurs.

2.1.2 *Le modèle des monopoles successifs*

Le modèle des monopoles successifs considère l'effet de l'intégration entre une entreprise en situation de monopole sur le marché amont et une entreprise en situation de monopole sur le marché aval.¹⁸ Ce modèle montre que l'intégration verticale améliore le bien-être car elle élimine la double marge commerciale. Avant la fusion, l'entreprise monopolistique d'amont exerce son pouvoir de marché en augmentant le prix de gros au-delà de son coût marginal. Lorsque l'entreprise en position de monopole sur le marché aval exerce son pouvoir de marché, elle augmente le prix d'aval pour le porter au-dessus de son coût marginal — ce coût incluant la marge d'amont. Lorsque l'entreprise d'aval fixe le prix qui lui permet de maximiser ses profits, elle prend un prix à la marge correspondant aux deux effets de l'augmentation de prix : (i) le gain sur les unités vendues en deçà de la marge (les quantités que l'entreprise continue à vendre) (ii) et le manque à gagner en termes de bénéfices sur les unités à la marge (le produit de sa marge et des unités que l'entreprise ne peut plus vendre en raison de l'augmentation de prix). Toutefois, cela ne tient pas compte des profits non réalisés par l'entreprise d'amont sur les ventes perdues du fait de

¹⁸ Les travaux théoriques à l'époque moderne débutent avec Spengler (1950). Très récemment, Scherer (2005, p. 67) a attribué la paternité de ce modèle à Alexander Hamilton dans le *Federalist Paper* n° 22 publié en 1787.

l'augmentation du prix en aval et de la diminution de la demande en amont que cela implique. C'est un exemple d'externalité de l'intégration verticale au niveau des prix : l'entreprise d'aval ne prend pas en compte l'effet de son action sur les profits de l'entreprise d'amont.

Dans ces circonstances, une intégration verticale améliore la position des consommateurs et des deux entreprises intégrées. Dans le cadre d'une intégration verticale, la division d'aval doit supporter le véritable coût de production marginal du bien intermédiaire d'amont. La baisse du coût marginal en aval due à l'intégration verticale est une incitation pour l'entreprise, en termes de bénéfices, à augmenter la production et à baisser les prix, améliorant ainsi la situation des consommateurs. De la même manière, l'intégration verticale internalise l'externalité au niveau des prix. Au vu des profits perdus en raison de l'augmentation de prix, l'entreprise intégrée internalise les marges perdues, en amont comme en aval. L'entreprise intégrée a donc une motivation pour baisser les prix étant donné que le coût de la hausse de ces prix est pour elle supérieur.

L'internalisation de la double marge commerciale est une source *potentielle* importante d'efficacité de toute fusion verticale lorsque les entreprises jouissent avant l'opération d'un pouvoir de marché en amont comme en aval. Le modèle des monopoles successifs permet d'exposer de manière très simple les gains que l'on retire de l'élimination de la double marge. Cependant, ce modèle présuppose qu'entre les deux entreprises, c'est l'entreprise d'amont qui détient tous les pouvoirs de négociation et que l'entreprise monopolistique d'amont pratique des prix uniformes et non pas non linéaires. Si l'entreprise d'amont peut jouer sur un nombre suffisamment important de contraintes verticales, elle peut dégager les niveaux de profits d'une intégration verticale sans avoir besoin de procéder à cette intégration¹⁹. Elle peut par exemple fixer son prix de gros à son coût marginal (au niveau de production monopolistique) et pratiquer un montant fixe pour toucher ses profits de monopole.

En outre, si l'entreprise d'amont ne peut pas faire des offres fermes et non négociables, et si la négociation est efficiente, les deux entreprises fixeront le prix de transfert efficient, mais négocieront sur le partage des profits de monopole lorsqu'elles détermineront le montant fixe. Cependant, si la négociation n'est pas efficiente, le prix de transfert peut être supérieur au coût marginal, même en cas de fixation de prix non linéaires. La double marge existante se trouvera éliminée du fait de l'intégration²⁰.

2.2 Exclusion des clients et du marché du bien intermédiaire : introduction

Le problème classique des intégrations verticales du point de vue de leurs effets anticoncurrentiels est l'exclusion : après l'intégration, certains acheteurs et certains vendeurs se trouvent exclus du marché. Jusqu'à la fin des années 70 et au début des années 80, les fusions verticales aux États-Unis étaient traitées de manière très restrictive en termes de pratiques anticoncurrentielles, en raison de leurs effets d'exclusion²¹. Après l'École de Chicago, les théories économiques à propos de l'exclusion reconsidèrent le

¹⁹ On peut étendre le profit monopolistique unique lorsque la concurrence est imparfaite en aval, à condition que l'entreprise monopolistique en amont dispose de suffisamment de moyens, c'est-à-dire de contraintes verticales. Ces contraintes ont pour rôle (i) d'internaliser les externalités verticales et horizontales, en sorte que les entreprises d'aval maximisent les profits du secteur quand elles maximisent leur propre profit (ii) de permettre à l'entreprise amont de dégager un profit. Voir Mathewson et Winter (1984).

²⁰ Voir Riordan (2005).

²¹ Voir par exemple *Brown Shoe Co. v. United States*, 370 US 294 (1962) et *Ford Motor Co. v. United States*, 286 F. Supp. 401 (1968), confirmé par 405 US 562 (1972). Dans *Brown Shoe*, La Cour Suprême des États-Unis a interdit une fusion verticale entre deux entreprises de chaussures, Brown Shoe (le troisième détaillant et le quatrième fabricant de chaussures avec une part de marché de 4 % pour la fabrication) et Kinney (le plus gros détaillant avec une part de marché de 1-2 % des ventes de chaussures aux États-Unis et le douzième fabricant avec une part de marché de 0.5 %). Dans le cas *Autolite*, la Cour Suprême a interdit une fusion entre un fabricant de systèmes d'allumage (Autolite, avec une part de marché de 15 %

potentiel qu'a l'exclusion de nuire aux consommateurs en se posant la question des effets d'une fusion verticale sur la concurrence, une question que les modèles de l'École de Chicago ne peuvent pas traiter puisque, suite à la fusion et d'après ces modèles, il n'existe pas d'entreprises non intégrées, en amont et/ou en aval²². Les théories modernes sur les effets anticoncurrentiels des fusions verticales en matière d'exclusion traitent cette question en supposant que la concurrence est imparfaite en amont et/ou en aval. L'analyse moderne, postérieure à l'École de Chicago, des effets d'exclusion d'une intégration verticale porte sur la manière dont cette exclusion augmente les coûts des entreprises rivales ou diminue leur chiffre d'affaires, et sur la manière dont ces effets négatifs sur ces entreprises rivales sont préjudiciables au libre jeu de la concurrence, c'est-à-dire la mesure dans laquelle ils sont préjudiciables aux consommateurs ou à l'efficacité. Ces théories établissent le lien indirect entre une intégration verticale et le pouvoir de marché. Pour apprécier le préjudice anticoncurrentiel, il faut déterminer : (i) les motivations qui président à l'exclusion (ii) l'effet de l'exclusion sur les entreprises rivales et la manière dont cela affecte les capacités concurrentielles de ces entreprises (iii) la manière dont la modification de leurs capacités concurrentielles affecte la concurrence (iv) la manière dont la fusion verticale modifie les motivations de l'entreprise intégrée sur le marché aval (v) et les conséquences des changements dans la concurrence et des changements de comportement de l'entreprise intégrée en aval sur le bien-être des consommateurs ou sur l'efficacité.

Le critère relatif à la hausse des coûts des entreprises rivales inclut normalement l'exclusion du marché du bien intermédiaire. Il y a exclusion du marché du bien intermédiaire lorsque, après l'intégration verticale, le prix du bien intermédiaire d'amont augmente, ce qui renchérit les coûts des entreprises concurrentes en aval. Cela peut diminuer la pression de la concurrence sur l'entreprise intégrée qui a accès au bien intermédiaire au coût marginal. Le prix du bien intermédiaire augmente parce que l'entreprise intégrée arrête d'approvisionner les entreprises concurrentes en aval (exclusion totale) ou parce qu'elle les approvisionne à un prix plus élevé (exclusion partielle). On part du postulat que l'entreprise intégrée est motivée pour changer le comportement de sa division d'amont après l'intégration car cela lui permet d'internaliser l'effet sur les prix d'aval lorsqu'elle fixe son prix optimal sur le marché du bien intermédiaire, c'est-à-dire qu'elle se rend compte qu'elle tire un profit supplémentaire à augmenter le prix du bien intermédiaire : elle augmente ses profits en aval en renchérissant les prix et elle accroît son pouvoir de marché en aval. Dans le cas de l'exclusion complète comme dans celui de l'exclusion partielle, l'augmentation du prix du bien intermédiaire peut être due à un effet unilatéral ou à un effet coordonné

dans la fabrication de bougies) et un constructeur automobile (Ford, dont les achats de bougies d'allumage représentent 10 % du marché). D'après les Principes directeurs de 1968 concernant les règles en matière de fusions aux États-Unis, une fusion entre un fournisseur détenant une part de marché de 10 % et un acheteur représentant 6 % de la demande en amont ferait l'objet d'une contestation, à moins qu'il n'y ait pas d'obstacle à l'entrée.

Aux États-Unis, l'hostilité des tribunaux vis-à-vis des fusions verticales s'est atténuée à la fin des années 70. Dans *Fruehauf Corp v. FTC*, 603 F. 2d 345 (2^e Circ. 1979), la cour d'appel a censuré une décision de la Commission Fédérale du Commerce (Commission fédérale du commerce) qui bloquait le rachat par un constructeur de camions d'un fournisseur de roues, alors que les achats de roues par le constructeur étaient inférieurs à 6 % du marché. Dans l'espèce *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.* 826 F.2d 1235 (3^e Circ. 1987), Alberta Gas alléguait que le rachat de Conoco par du Pont l'empêcherait de vendre du méthanol à Conoco. Le tribunal a fait observer qu'après la fusion, les ventes d'Alberta Gas avaient augmenté et, comme pour *Fruehauf*, le tribunal a noté que l'intégration verticale n'avait pas d'effet anticoncurrentiel, mais qu'il s'agissait plutôt d'une réorganisation des échanges entre acheteurs d'amont et d'aval. On se référera à Schlossberg (2004) et Morse (1998) pour une discussion détaillée de l'application des règles en matière de fusions verticales aux États-Unis.

²²

Des décisions comme *Brown Shoe* et *Autolite* sont notamment critiquées car elles ne précisent jamais comment l'exclusion nuit aux consommateurs. Voir Hovenkamp (2001, p. 324) qui fait remarquer que « l'exclusion était largement considérée comme un mal en elle-même ».

attribuable au changement de comportement de l'entreprise intégrée en amont. Toutefois, pour qu'il y ait un effet contraire au libre jeu de la concurrence, il faut non seulement que l'exclusion provoque une hausse des prix du bien intermédiaire, mais aussi que cette hausse ait pour résultat, pour les entreprises concurrentes non intégrées, de faire monter les prix en aval ou qu'elle soit préjudiciable d'une quelconque autre manière aux consommateurs en aval.

Le critère relatif à la baisse des revenus des entreprises rivales inclut normalement l'exclusion de la clientèle. Il y a exclusion de la clientèle lorsque, après l'intégration verticale, la division d'aval de l'entreprise intégrée ne s'approvisionne plus auprès d'entreprises d'amont indépendantes. Si la baisse des ventes en volume qui en résulte entraîne une augmentation du coût moyen ou marginal des concurrents d'amont, alors, dans la mesure où il y a exclusion de la concurrence (en raison de la hausse des coûts moyens) ou une moindre intensité de la concurrence (en raison de la hausse des coûts marginaux), les pressions concurrentielles de ces entreprises sur la division amont de l'entreprise intégrée se trouvent diminuées, donnant à l'entreprise intégrée un plus grand pouvoir de marché en amont et poussant les prix du bien intermédiaire à la hausse. La hausse du prix du bien intermédiaire peut, à son tour, entraîner en aval une exclusion de l'accès des concurrents au bien intermédiaire²³.

Les deux sections suivantes étudient l'aspect économique d'une fusion verticale sous l'angle de la manière et du moment où cette fusion peut augmenter les coûts des entreprises rivales ou diminuer le chiffre d'affaires des rivaux sur des marchés caractérisés par une concurrence imparfaite.

2.3 Exclusion du marché du bien intermédiaire

2.3.1 Hausse des coûts des entreprises rivales

La théorie moderne relative au potentiel d'exclusion du marché du bien intermédiaire provoqué par une fusion verticale prend en compte les motivations et les effets d'une autre fusion verticale en présence d'un oligopole en amont et en aval avant la fusion et en présence de concurrents non intégrés après la fusion²⁴. La fusion verticale a pour effet d'introduire une asymétrie de coûts entre l'entreprise intégrée en aval et ses rivaux non intégrés en aval. Le coût marginal en aval de l'entreprise intégrée se trouve diminué en raison de l'élimination de la double marge commerciale : cette entreprise a en effet désormais accès au bien d'amont au coût marginal. L'ampleur de cet avantage au niveau des coûts par rapport à ses concurrents non intégrés dépend de l'évolution du prix en amont. L'évolution du prix du bien intermédiaire

²³ On s'attendrait normalement à ce que le prix aval augmente, mais si les marchés du bien intermédiaire sont locaux et si le marché d'aval est mondial, l'augmentation des coûts a pour effet de diminuer la production sur le marché local et non pas d'augmenter le prix. D'un autre côté, l'exclusion du marché du bien intermédiaire peut entraîner l'exclusion de la clientèle. En effet, l'exclusion du marché du bien intermédiaire donne à l'entreprise verticalement intégrée un avantage de coût en aval qui augmente sa part de marché. Cette augmentation de la part de marché diminue la demande des entreprises rivales non intégrées en amont. S'il y a des économies d'échelle en amont, cet effet indirect de la demande, conjugué à l'engagement de l'entreprise intégrée de ne pas acheter auprès de ses concurrents d'amont, peut aboutir à l'exclusion de ces concurrents.

²⁴ Il y a deux tendances au niveau théorique. La première, qui débute avec Salinger (1988), prend pour hypothèse que la concurrence en aval porte sur des produits homogènes et est quantitative, c'est-à-dire qu'il s'agit d'une concurrence à la Cournot. Cette théorie est développée notamment par Gaudet et Long (1996), Schrader et Martin (1998), Higgins (1999), Avenel et Barlet (2000). Une école similaire, qui n'est pas traitée séparément mais qui comporte de nombreuses implications semblables, prend pour hypothèse que les produits d'aval sont différenciés et que la concurrence sur le marché aval porte sur les prix, c'est-à-dire qu'il s'agit d'une concurrence à la Bertrand. Cette tendance commence avec Ordovery, Saloner et Salop (1990) et inclut des contributions importantes, dont celles de Reiffen (1992), Reiffen et Vita (1995), Choi et Yi (2000), Chen (2001).

est fonction de la participation ou de la non participation de l'entreprise intégrée au marché d'amont, c'est-à-dire de savoir si elle continue ou non d'approvisionner des entreprises d'aval devenues concurrentes. Si l'entreprise intégrée se retire du marché d'amont, trois effets déterminent, par leur jeu réciproque, la hausse ou non du prix du bien intermédiaire pour les entreprises non intégrées sur le marché aval²⁵.

Premier effet : le retrait de la division amont de l'entreprise intégrée diminue la concurrence en amont, ce qui augmente le pouvoir de marché des fournisseurs restants du bien intermédiaire. Cet effet sur l'offre donne à penser que le prix de ce bien devrait augmenter. Deuxième effet : le retrait de la division aval de l'entreprise intégrée diminue la demande du bien intermédiaire. Troisième effet : cela induit aussi une baisse de la demande du bien intermédiaire en amont. L'avantage de l'entreprise intégrée au niveau des coûts lui procure un avantage concurrentiel en aval qui se traduit par une augmentation de ses volumes de ventes et une diminution des ventes en volumes de ses rivaux non intégrés sur le marché aval. Les deux effets au niveau de la demande font pression sur le prix d'amont. L'évolution à la hausse ou à la baisse du prix du bien intermédiaire payé par les entreprises d'aval non intégrées dépend de celui des effets qui domine, l'effet au niveau de l'offre ou l'effet au niveau de la demande²⁶. De plus, même si le prix d'amont augmente, le prix d'aval peut cependant baisser si l'augmentation de la production de l'entreprise intégrée est supérieure à la baisse de la production de ses rivaux non intégrés en aval²⁷. A titre d'exemple, le prix en aval augmente si le dernier fournisseur indépendant en amont participe à l'intégration verticale et si l'exclusion des entreprises d'aval non intégrées entraîne une nette progression du pouvoir de marché des entreprises intégrées restantes²⁸.

Cette analyse souligne l'importance de la distinction entre les effets de la fusion verticale sur les motivations de l'entreprise intégrée, et l'équilibre qui en résulte. En première approche, en regardant simplement l'évolution des motivations de l'entreprise intégrée en raison de la fusion verticale, on pourrait déduire qu'il y a augmentation du prix d'amont. Toutefois, si cela est nécessaire, ce n'est pas suffisant pour en déduire une augmentation du prix du bien intermédiaire ou du prix en aval. Pour juger de l'effet de l'intégration verticale sur ces deux prix, il faut évaluer le nouvel équilibre postérieur à l'intégration. Pour ce faire, il faut déterminer comment les autres entreprises, en amont et en aval, réagiront à l'évolution du comportement de l'entreprise intégrée verticalement (en amont comme en aval), et en particulier quelle sera la diminution induite de la demande par les entreprises rivales d'aval²⁹.

La crédibilité de l'absence de participation de l'une quelconque des entreprises intégrées au marché amont est un point essentiel³⁰. En général, il n'est pas évident que ces entreprises aient intérêt à se retirer

²⁵ Selon Salinger (1988), une hausse du prix d'amont constitue une exclusion.

²⁶ L'effet au niveau de l'offre dépend de l'élasticité de la demande dérivée du bien intermédiaire et de l'intensité de la concurrence en amont. Moins la demande aval est élastique, moins la demande du bien intermédiaire est élastique. Moins la demande dérivée est élastique et moins la concurrence est forte en amont, plus l'effet au niveau de l'offre est important. L'effet de la demande dépend de la taille des entreprises parties à la transaction et de l'ampleur de la double marge.

²⁷ Salinger montre que pour que le prix d'aval augmente, il faut que le nombre d'entreprises en aval soit suffisamment plus important que le nombre d'entreprises d'amont et représente plus de la moitié des entreprises d'amont déjà intégrées.

²⁸ Salinger montre que, dans ces circonstances, une fusion verticale est aussi susceptible d'être rentable en raison des effets du pouvoir de marché.

²⁹ Reiffen et Vita (1995) et Sibley et Doane (2002) examinent les modalités de la hausse ou de la baisse du prix du bien intermédiaire en fonction du jeu réciproque de l'effet de la demande et de l'évolution des motivations de l'entreprise intégrée lorsqu'il existe un duopole différencié en aval.

³⁰ D'après Salinger, cette crédibilité ne relève pas d'une question de comportement anticoncurrentiel, mais est un débat stérile sur les modèles économiques. On consultera à ce propos M. Salinger, Commission fédérale

de ce marché pour dégager des profits maximum. L'examen d'autres conjectures possibles donne à penser qu'il est rentable pour les entreprises intégrées de participer au marché amont³¹. La motivation d'une entreprise verticalement intégrée pour participer au marché amont est différente des motivations des entreprises rivales non intégrées. En effet, l'entreprise intégrée internalise l'effet de diminution de l'offre sur le marché amont qui augmente le prix du bien intermédiaire, réduit la production et la pression concurrentielle de ses rivaux sur le marché aval. En outre, si l'effet sur les profits en aval est suffisamment important, l'entreprise intégrée est incitée à se livrer à des achats stratégiques, c'est-à-dire devenir acheteur net en amont, même si elle peut produire le bien intermédiaire à un coût inférieur au prix amont. En général, l'entreprise intégrée est prête à renoncer à ses profits sur le marché amont pour accroître ses profits sur le marché aval. À la limite, elle est prête à subir des pertes sur le marché amont pour augmenter ses profits en aval.

Lorsque les entreprises intégrées participent au marché amont, l'effet du côté de l'offre n'est pas aussi important qu'en cas de retrait complet. Les prix d'aval, au titre de l'effet d'équilibre, baissent en proportion inverse de l'augmentation du nombre d'entreprises intégrées³². L'analyse des effets d'une fusion verticale lorsque les entreprises intégrées ne peuvent pas s'engager à ne pas participer au marché amont, montre que ces fusions sont bonnes pour les consommateurs et, si l'on doit dire quelque chose sur les fusions verticales, c'est qu'elles sont trop peu nombreuses.

Par conséquent, les effets de bien-être d'une fusion verticale dépendent de façon décisive de la crédibilité que l'on peut attacher à la non participation des entreprises intégrées au marché amont. On assistera plus probablement à une hausse des prix en aval si l'entreprise intégrée se retire du marché amont. Cet engagement de non participation est possible dans le cadre d'une intégration verticale si les entreprises intégrées peuvent choisir une technologie différente qui lie les unités de production d'amont et d'aval les unes aux autres. L'adoption de cette technologie « spécifique » rend la production en amont de l'entreprise intégrée incompatible avec les processus de production des entreprises non intégrées en aval. Deux entreprises d'amont et d'aval qui procèdent à une fusion verticale et adoptent une telle technologie « spécifique » au lieu de la technologie « standard » ne vont pas seulement arrêter de fournir le marché en amont, elles ne peuvent plus acheter sur ce marché.^{33, 34} Le choix technologique est à la base de la

du commerce, « Is it Live or Is It Memorex ? Modèles de fusion verticale et application des règles relatives aux comportements anticoncurrentiels » - remarques pour le Séminaire de l'Association pour l'étude des aspects économiques de la concurrence sur les fusions non horizontales (7 septembre 2005).

³¹ Ces conjectures représentent l'opinion des entreprises verticalement intégrées sur le comportement d'autres entreprises en amont et en aval lorsqu'elles effectuent des transactions sur le marché amont. Schrader et Martin (1998) décrivent les hypothèses de Salinger comme étant des conjectures à la Cournot faites par les entreprises verticalement intégrées sur leurs ventes de bien intermédiaire, et des conjectures à la Bertrand faites par les entreprises verticalement intégrées sur leurs achats de bien intermédiaire. Dans le second cas, cela suppose que les entreprises intégrées agissent comme des entreprises parfaitement concurrentielles sur le marché amont, c'est-à-dire acceptant le prix. Les analyses de Gaudet et Long (1996), Schrader et Martin, et Higgins (1999) supposent que l'entreprise verticalement intégrée fait des conjectures à la Cournot par rapport aux ventes et aux achats en amont, c'est-à-dire que les entreprises rivales maintiennent leur production constante à chaque niveau.

³² Voir la discussion dans Church (2004, pp. 39-42).

³³ Il est peu probable que les entreprises non intégrées verticalement adoptent une technologie spécifique étant donné que cela les expose au risque d'un comportement opportuniste et de l'inutilité de leur investissement. L'idée ici est qu'en l'absence d'intégration verticale, les entreprises hésitent à investir dans un actif spécifique qui les lie à un partenaire commercial spécifique car, au lieu de payer le coût total moyen pour être sûr d'être approvisionné, l'acheteur peut ne proposer que le coût variable moyen qui exclut les dépenses irrécupérables liées à l'investissement spécifique. La partie irrécupérable de l'investissement spécifique n'est pas récupérée par le vendeur. En fait, il s'agit du surplus que le vendeur s'attendait à percevoir - sinon il n'aurait pas investi - et dont bénéficie l'acheteur. On considère que

crédibilité de l'exclusion totale : en effet, l'adoption d'une technologie spécifique empêche l'entreprise intégrée de participer au marché amont³⁵.

La rentabilité économique de l'exclusion du marché du bien intermédiaire et de la clientèle provoquée par l'adoption de la technologie spécifique dépend d'un arbitrage. L'exclusion entraîne une augmentation des profits d'aval pour l'entreprise intégrée. En effet, elle tire un avantage en termes de coûts de la suppression de la double marge. D'autre part, l'exclusion présente un coût d'opportunité : l'entreprise intégrée renonce aux ventes et aux profits sur le marché amont. Plus le nombre d'entreprises d'aval est élevé, moins cet arbitrage est favorable et moins l'entreprise est susceptible de s'intégrer au départ et de provoquer des exclusions. Un plus grand nombre d'entreprises d'aval diminue l'intérêt d'un avantage en termes de coûts, limite les bénéfices de l'exclusion tout en augmentant les coûts d'opportunité de l'intégration et de l'exclusion puisque le marché amont devient plus important. Plus la pression concurrentielle est forte en aval, plus les marges d'aval sont faibles et moins le désavantage des entreprises non intégrées et l'avantage des entreprises intégrées en termes de coûts sont importants.

L'entreprise verticalement intégrée peut être incitée à se comporter différemment sur le marché amont pour augmenter les coûts des entreprises rivales. Cela dépend de l'efficacité de cette démarche. Plus les marchés amont et aval sont concurrentiels après la fusion verticale, moins l'entreprise intégrée est incitée à modifier son comportement sur le marché amont. Moins l'entreprise intégrée peut influencer sur les prix en amont et en aval par le jeu de l'exclusion, moins elle est incitée à augmenter les coûts de ses rivaux.

Les profits de la fusion verticale sur le marché aval dépendent de l'asymétrie des coûts qu'ils créent entre l'entreprise intégrée et ses rivales non intégrées. Toutefois, cette asymétrie n'est pas maintenue en cas de formation d'une autre fusion verticale pour contrer la première, c'est-à-dire si les entreprises rivales d'aval non intégrées fusionnent aussi avec une entreprise d'amont non intégrée³⁶. Pour évaluer les effets d'une fusion verticale sur la concurrence, il importe de prendre en compte l'éventualité d'une « contre fusion » qui, non seulement, annule les avantages de l'entreprise qui a pris la première l'initiative de la fusion, mais qui, au lieu de restaurer le statu quo, débouche sur une structure sectorielle plus concurrentielle³⁷.

Il n'y a pas de « contre fusion » si celle-ci est impossible en raison de l'absence de fournisseur indépendant en amont ou si les obstacles à l'entrée sont trop élevés, ce qui ne permet alors pas de susciter une entrée ou une intégration par croissance interne. En outre, si l'intégration verticale permet des

l'intégration verticale est un encouragement à un investissement spécifique étant donné que le risque de l'inutilité des dépenses irrécupérables ne devrait pas poser de problème, ou devrait poser beaucoup moins de problèmes, dans une situation où ces investissements et ces dépenses sont propriété commune à l'acheteur et au vendeur. Voir Church et Ware (2000, Chapitre 3) et les citations qui y sont faites.

³⁴ Pour cette raison, le recours à la technologie spécifique entraîne à la fois l'exclusion du marché du bien intermédiaire et l'exclusion de la clientèle.

³⁵ Il y a un deuxième avantage pour l'entreprise verticalement intégrée, à savoir que les coûts d'utilisation de la technologie spécifique sont probablement inférieurs à ceux de la technologie standard, ce qui s'explique par le fait que l'on peut ajuster les actifs nécessaires aux échanges commerciaux en fonction des besoins d'un partenaire commercial spécifique.

³⁶ Autre possibilité, au lieu d'une intégration verticale, les entreprises d'aval non intégrées peuvent entrer sur le marché d'amont à titre individuel.

³⁷ Les consommateurs préfèrent généralement une structure sectorielle où toutes les entreprises sont verticalement intégrées puisque cela entraîne l'élimination complète de la double marge. D'autre part, les entreprises préfèrent normalement, quant à elles, l'intégration verticale lorsque aucune d'entre elles n'est intégrée.

bénéfices externes, ceux-ci peuvent être perdus par des mesures de rétorsion, auquel cas les entreprises non intégrées peuvent estimer qu'il est plus rentable de rester à l'écart de l'intégration que d'y participer. En d'autres termes, une contre fusion risque de ne pas être rentable en réponse à une fusion verticale initiale lorsque les profits d'une entreprise d'amont et d'aval non intégrée sont supérieurs en l'absence de mesures de rétorsion qu'en présence de telles mesures, même si (i) leurs profits au total se trouvent diminués par la fusion verticale initiale (ii) et si cette contre fusion verticale restaurerait la parité des coûts en aval³⁸.

Par ailleurs, les entreprises non intégrées en aval peuvent se protéger en adoptant des stratégies qui modifient les motivations de l'entreprise intégrée pour agir de manière agressive sur le marché aval. Si, par exemple, l'entreprise non intégrée en aval doit subir un coût de changement (en raison peut-être de l'adoption d'une technologie spécifique), elle est incitée à choisir l'entreprise intégrée en tant que fournisseur, ce qui la lie celle-ci³⁹. L'entreprise rivale non intégrée en aval le fait en tant que mesure défensive. Sur le marché de gros, le coût du changement donne une certaine latitude à l'entreprise intégrée pour augmenter le prix auquel elle approvisionne l'entreprise non intégrée d'aval, au delà des niveaux de prix concurrentiels. L'entreprise non intégrée se rend compte que cette marge incite l'entreprise intégrée à maintenir ses ventes sur le marché de gros. L'entreprise intégrée peut le faire en fixant un prix moins agressif pour son produit différencié d'aval, compensant ainsi sa motivation à baisser le prix due à l'élimination de la double marge.

L'intérêt pour l'entreprise intégrée de maintenir les volumes de vente du bien d'amont à l'entreprise rivale non intégrée dépend du coût supporté par l'entreprise d'aval non intégrée au titre du changement de fournisseurs. Plus ce coût est élevé, plus le prix du bien intermédiaire que peut pratiquer l'entreprise rivale non intégrée est élevé et par conséquent, moins les prix de l'entreprise intégrée en aval sont compétitifs. Si le coût du changement de fournisseurs est relativement modeste, les prix des deux produits d'aval baissent et les consommateurs y gagnent aussi. Si le coût du changement de fournisseurs est relativement élevé, la fusion verticale augmente le prix des deux produits d'aval. Le niveau du coût du changement à partir duquel les prix augmentent baisse en fonction de la mesure dans laquelle les deux produits d'aval sont des substituts. Ainsi, la contre fusion, si elle a des effets positifs pour les entreprises non intégrées, peut contribuer à porter préjudice à la politique anticoncurrentielle de la fusion verticale.

Il y a exclusion du marché du bien intermédiaire lorsque les entreprises d'amont exercent leur pouvoir de marché, à savoir qu'elles portent le prix de transfert au-delà du coût marginal. Si la fixation des prix en amont se fait sous forme de double tarif et qu'il est efficace de négocier, le bien intermédiaire est alors transféré au coût marginal et ce, quel que soit le degré de concurrence en amont. Dans ces circonstances, une fusion verticale n'a pas d'effet sur les coûts variables en aval et ne peut pas entraîner de hausse des prix en aval. Si l'élimination d'un fournisseur en amont augmente le pouvoir de négociation des fournisseurs restants vis-à-vis des entreprises non intégrées d'aval, il se peut donc que, si les entreprises d'amont non intégrées ne disposent pas d'information complète ou ne peuvent pas pratiquer des prix fixes spécifiques en aval, l'augmentation du pouvoir de négociation débouche sur des droits de franchise pour certaines entreprises d'aval, trop élevés pour certaines d'entre elles⁴⁰. Elles se trouvent donc exclues, ce qui diminue la concurrence et fait monter les prix en aval.

³⁸ Voir Choi et Yi (2000) pour un exemple d'incertitude sur les coûts en fonction du choix de la technologie.

³⁹ Voir Chen (2001). Les coûts pour l'entreprise rivale non intégrée en cas de changement de fournisseur permettent à l'entreprise intégrée de faire monter ses prix au-delà des niveaux concurrentiels. Cela dépend du fait de savoir si la concurrence en aval porte sur les prix et s'il y a concurrence entre produits différenciés. L'entreprise non intégrée se sert à son avantage de la dépendance de ses ventes par rapport au prix d'amont. Dans une concurrence à la Cournot, les volumes de l'entreprise d'aval non intégrée sont fixes lorsque l'entreprise verticalement intégrée maximise ses profits.

⁴⁰ Voir Riordan (2005).

Les modèles économiques qui déterminent comment l'exclusion du bien intermédiaire provoquée par une fusion verticale peut augmenter les coûts des entreprises rivales, permettent d'évaluer comment une fusion verticale peut nuire à ses concurrents. Ces modèles soulignent en particulier l'importance qu'il y a à évaluer le pouvoir de marché des entreprises d'amont non intégrées après la fusion verticale et l'effet de l'augmentation des prix d'amont sur les coûts des entreprises rivales non intégrées en aval. Ils soulignent aussi l'importance de la crédibilité de l'exclusion pratiquée par les entreprises intégrées et la possibilité de contre-mesures, et notamment de « contre fusions ». Enfin, les travaux théoriques font clairement ressortir la difficulté de l'évaluation nécessaire pour déterminer les effets d'une intégration verticale sur les prix en aval, même lorsque les entreprises intégrées peuvent s'engager à ne pas participer au marché d'amont. C'est une question d'arbitrage entre l'effet d'accroissement de la production dû à la double marge et l'effet de diminution de la production dû à l'exclusion et encore, pour cette dernière, uniquement si le prix de gros augmente.

Maintien du monopole

Dans la section précédente, la discussion des effets d'une fusion verticale est de nature assez générale. Un cas plus particulier a attiré l'attention : il s'agit des fusions verticales et des exclusions qui préservent ou maintiennent un monopole sur le marché amont.⁴¹ Le scénario d'une fusion verticale qui maintient un monopole en amont en rehaussant les obstacles à l'entrée se produit lorsqu'il existe : (i) un produit d'aval homogène (ii) une entreprise monopolistique déjà en place, menacée par l'entrée de nouvelles entreprises (iii) un marché d'aval relativement concentré (iv) une intégration verticale qui permet d'adopter une technologie spécifique excluant l'entreprise intégrée du marché d'amont, c'est-à-dire du marché du bien intermédiaire (v) une intégration et une exclusion qui diminuent les profits de l'entreprise entrante dans une mesure telle qu'elle est dissuadée d'entrer (vi) l'uniformité des prix en amont (vii) et lorsqu'il n'est pas rentable pour l'entrant de pénétrer sur le marché amont et le marché aval, et qu'une contre fusion entre l'entreprise entrante et une entreprise non intégrée en aval n'est pas rentable non plus. La fusion verticale est potentiellement contraire au libre jeu de la concurrence car elle dissuade l'entrée sur le marché amont et exclut *toute* concurrence en aval, ce qui fait potentiellement monter les prix d'aval par rapport au niveau où ils se seraient trouvés si l'entreprise d'amont était entrée sur le marché aval. Bien qu'en raison de l'effet de dissuasion à l'entrée, la fusion verticale provoquera plus probablement une hausse des prix en aval, il existe toujours un arbitrage à faire entre la diminution de la concurrence en amont et en aval due à l'exclusion, et les avantages d'une élimination de la double marge. La présence d'une entreprise monopolistique intégrée en aval dont les prix sont implicitement fixés au coût marginal, peut permettre des prix d'aval inférieurs à ceux que donnerait une structure de marché avec la présence d'un duopole non intégré en amont. Cela sera plus probablement le cas si la double marge est importante, c'est-à-dire si le marché d'aval est très concentré.⁴²

L'exclusion a des effets sur la rentabilité de l'entrée sur le marché. Elle augmente cette rentabilité car elle élimine la concurrence sur le marché amont — l'entreprise entrante est en situation de monopole en tant que fournisseur des entreprises d'aval non intégrées. D'un autre côté, elle diminue cette rentabilité en faisant baisser la demande sur le marché amont. La diminution de la demande a deux explications : (a) la filiale d'aval de l'entreprise verticalement intégrée ne s'approvisionne qu'auprès de sa filiale d'amont⁴³ (b)

⁴¹ Ce scénario est modélisé par Avenel et Barlet (2000). Son utilité au niveau de l'application des règles antitrust destinées à améliorer le bien-être est débattue par Scheffman et Higgins (2004).

⁴² Pour les paramètres spécifiques de Avenel et Barlet, c'est le cas si le marché d'aval fait l'objet d'un duopole. Les conclusions de Church surévaluent les effets de ce modèle sur le bien-être (2004, p. viii et 54).

⁴³ Le choix technologique de l'entreprise intégrée a donc des effets au niveau de l'exclusion du marché du bien intermédiaire comme de l'exclusion de la clientèle.

et l'entreprise intégrée bénéficie d'un avantage de coût en aval par rapport à ses rivales non intégrées. La mesure dans laquelle l'exclusion diminue la demande en amont pour une entreprise entrante dépend du nombre d'entreprises présentes en aval. Si celles-ci sont peu nombreuses, l'effet sur la demande est probablement important, mais si la concurrence est importante en aval, l'effet sur la demande sera minimal. Il existe un nombre critique d'entreprises en aval, au-delà duquel l'intégration verticale et l'exclusion augmentent les profits de l'entreprise entrante. En effet, dans cette situation, l'intégration verticale ne rehausse pas les obstacles à l'entrée mais facilite l'entrée sur le marché amont. Plus les économies d'échelle en amont sont importantes, plus la probabilité est grande qu'une diminution des profits d'un entrant en raison de l'exclusion aboutisse à dissuader l'entrée sur le marché et à maintenir le monopole.

2.3.2 *Restauration du pouvoir de monopole*

Les études économiques se sont récemment beaucoup penchées sur un aspect très différent des effets anticoncurrentiels des fusions verticales.⁴⁴ Ces travaux analysent l'efficacité des fusions verticales et de l'exclusion à restaurer ou à préserver le pouvoir de marché en amont en éliminant la concurrence en aval. Supposons concrètement que la production en aval se fait en proportions fixes par rapport à l'amont. L'entreprise d'aval supporte un coût constant de transformation du bien amont en bien aval qu'elle vend.

Cette démarche est fondée sur l'observation selon laquelle, lorsque les termes de l'échange ou le contrat entre une entreprise d'amont et une entreprise d'aval ne peuvent pas être constatés ou vérifiés par les autres entreprises, le monopoleur d'amont se trouve confronté à un problème. Supposons que le monopoleur d'amont passe un contrat avec une entreprise d'aval pour maximiser ses profits. Ce contrat implique que l'entreprise d'aval vende la quantité de monopole et que le monopoleur d'amont dégage ses profits de monopole par un prix correspondant à un montant fixe, tout ceci en application du profit unique de monopole. La quantité de monopole maximise les profits en fixant le chiffre d'affaires marginal au niveau du coût marginal, le chiffre d'affaires marginal étant celui qui représente la différence due à la dernière unité vendue ou unité marginale. C'est la somme du prix perçu sur la vente de l'unité marginale et du manque à gagner sur les unités vendues en dessous de la marge. Le manque à gagner sur les unités vendues en dessous de la marge est égal à l'évolution du prix nécessaire pour inciter les consommateurs à acheter une unité de plus, multipliée par les unités vendues en dessous de la marge — les unités qui seraient vendues sans avoir à baisser le prix.

Le problème du monopoleur en amont se pose parce que, après avoir conclu le contrat, le monopoleur est incité à fournir d'autres entreprises en aval. Ce faisant, il peut augmenter ses profits. En effet, lorsque la deuxième entreprise d'aval vend, la diminution du prix fait baisser la valeur des unités vendues en dessous de la marge pour la première entreprise d'aval, mais pas pour le monopoleur. La diminution du chiffre d'affaires en aval réalisé sur les unités vendues par la première entreprise d'aval en raison de la baisse des prix due à l'augmentation de l'offre, n'est pas supportée par le monopoleur d'amont, mais par le premier vendeur au détail. Par conséquent, le monopoleur est motivé pour passer un accord mutuellement profitable, qu'il sera en mesure de conclure avec une seconde entreprise d'aval pour accroître ses ventes. Toutefois, anticipant cela, la première entreprise d'amont ne conclura pas de contrat l'obligeant à vendre la quantité de monopole en contrepartie d'un montant fixe correspondant aux profits de monopole puisqu'elle ne dégagera pas de profits de monopole. Étant donné qu'il ne peut pas s'engager à ne pas augmenter sa production car cette augmentation est rentable, le monopoleur n'est même pas en mesure de concrétiser son profit de monopole. On a avancé que l'intégration verticale était une façon pour le monopoleur d'internaliser la perte causée par l'expansion de la production en aval, annihilant ainsi sa motivation à trouver d'autres acheteurs en aval tout en préservant son pouvoir et ses profits de monopole : les pertes sur

⁴⁴ Ces travaux ont débuté avec Hart et Tirole (1990). Pour un traitement complet et récent de la question, voir Rey et Tirole (2003).

les unités vendues en dessous de la marge, dues à l'augmentation de la production d'une entreprise d'aval différente, sont supportées par la division aval de l'entreprise intégrée⁴⁵. Les profits de l'entreprise baisseraient si elle vendait davantage à une autre entreprise d'aval : elle n'a plus de motivation à proposer un traitement de faveur à d'autres entreprises d'aval.

On a argué que ce modèle n'a probablement pas d'implications importantes pour les règles applicables en matière de fusion verticale⁴⁶. En premier lieu, comme pour les proportions variables de production, l'intégration verticale ne semble pas la solution évidente à cette question qui serait probablement résolue à moindre coût par des contrats d'exclusivité. De plus, les mesures prises dans ce cas par le monopoleur pour résoudre son dilemme ont pour objectif de préserver son pouvoir de monopole, non pas en excluant les concurrents en aval, mais en limitant son action. Certes, dans ces circonstances, une fusion verticale préserve son pouvoir de marché, mais cette préservation ne résulte pas de l'assouplissement d'une limitation à son pouvoir de marché due à une diminution de la concurrence. Il n'est donc pas sûr que ce type de comportement soit un objectif légitime pour des mesures de lutte contre les pratiques anticoncurrentielles, à condition bien évidemment que la position de monopole en amont ait été obtenue légitimement, grâce à une performance supérieure à celle de ses concurrents.

2.4 *Exclusion de la clientèle*

Il y a exclusion de la clientèle lorsque l'entreprise intégrée ne s'approvisionne plus auprès de concurrents d'amont. Cet effet d'exclusion diminue la demande et donc, les revenus des rivaux de l'entreprise intégrée. La demande de l'entreprise d'aval qui rentre dans la fusion verticale est désormais captée par la division d'amont de l'entreprise intégrée. L'exclusion de la clientèle est due au fait que cette diminution de la demande réduit les volumes des concurrents d'amont de l'entreprise intégrée, ce qui augmente les coûts marginaux ou moyens desdits concurrents. Dans un cas comme dans l'autre, cela peut avoir pour effet d'alléger les contraintes concurrentielles que les entreprises d'amont non intégrées font peser sur la division d'amont de l'entreprise intégrée. C'est ce qui arrive à court terme si les manques à gagner en volumes provoquent une augmentation du coût marginal des entreprises non intégrées, amoindrissant ainsi leurs capacités concurrentielles, ou ce qui se produit à long terme si cela a pour effet d'augmenter leur coût moyen et d'entraîner leur sortie du marché. Il est essentiel de déterminer comment le préjudice infligé aux concurrents affecte en dernier ressort les consommateurs (ou pèse sur l'efficacité).

Pour que l'exclusion de la clientèle soit rentable, il faut que l'entreprise intégrée continue après la fusion verticale à approvisionner les entreprises concurrentes d'aval à des prix plus élevés. On remarquera que c'est exactement l'opposé de l'hypothèse qui préside à l'exclusion du marché du bien intermédiaire. Le problème avec l'exclusion de l'accès au bien intermédiaire est que l'entreprise intégrée n'approvisionne plus les entreprises d'aval, ce qui crée un pouvoir de marché pour ses rivaux d'amont. En aval, cela augmente le pouvoir de marché de l'entreprise intégrée. Dans la situation de l'exclusion de la clientèle,

⁴⁵ Le problème soulevé ici est très similaire à celui auquel est confronté un monopoleur qui produit des biens durables. En effet, un monopoleur de ce type est motivé pour pratiquer une discrimination inter temporelle par les prix, étant donné que les pertes au niveau des unités vendues en dessous de la marge en raison de la baisse du prix à la longue, sont supportées par les consommateurs qui ont acheté au cours de périodes précédentes. Anticipant ces conséquences, les consommateurs sont incités à agir de façon stratégique et à trouver des substituts d'une période sur l'autre. Cela diminue le pouvoir de monopole de l'entreprise monopolistique productrice de biens durables. Dans ce cas, la discrimination ne s'opère pas avec le temps, mais s'opère sur les entreprises d'aval. Voir Church et Ware (2000, Chapitre 4) et les citations qui y sont faites pour une discussion du monopole de biens durables.

⁴⁶ Voir Church (2004, pp. 82-85).

l'objectif est de créer un pouvoir de marché en amont pour l'entreprise intégrée. En fonction des conditions de concurrence en aval, cela peut aussi entraîner une augmentation des prix sur le marché aval.⁴⁷

Il y a très peu de travaux théoriques en économie qui traitent explicitement de l'exclusion de la clientèle. Par contre, il a été dit que l'on peut comprendre les mécanismes économiques de l'exclusion de la clientèle en consultant les études économiques portant sur les accords ayant des effets d'exclusion⁴⁸. En cas de contrat d'exclusivité, ce document stipule bien évidemment que l'acheteur ne s'approvisionne pas auprès d'un quelconque autre fournisseur en amont. S'agissant d'une fusion verticale, pour que l'exclusion de la clientèle soit crédible (i) les raisons technologiques associées à l'intégration doivent susciter un engagement crédible de la part de la division d'aval de ne pas s'approvisionner auprès d'un fournisseur indépendant (ii) ou bien la renonciation par la division d'aval à tout approvisionnement externe doit maximiser ses profits.

Il existe en théorie quatre types de situations où les fusions verticales sont dommageables pour la concurrence. Dans un premier cas, les entreprises d'amont se font concurrence pour fusionner avec une seule entreprise d'aval (concurrence pour l'exclusivité). Dans le deuxième cas, il y a l'avantage de l'entreprise qui est la première : une entreprise d'amont déjà en place peut fusionner en aval avant que ses concurrents n'entrent sur le marché (avantage du premier et exclusivité). Les modèles du troisième cas sont similaires à ceux du deuxième, mais portent sur des produits complémentaires qui lient les entreprises parties à la fusion. Dans le quatrième cas, les entreprises se font concurrence au niveau du marché aval sur la base d'un ensemble de produits pour lesquels la demande dépend de la variété des produits figurant dans cet ensemble. En conséquence, si une fusion verticale entre le fournisseur d'un produit en amont et une entreprise en aval a pour résultat de réduire la variété de l'ensemble de produits d'un concurrent, cela diminue la demande et le chiffre d'affaires des concurrents de l'entreprise intégrée en aval. Dans ce cas de figure, l'exclusion par l'entreprise intégrée consiste à ne pas livrer son produit d'amont aux entreprises concurrentes d'aval, ce qui réduit la variété ou la qualité de l'offre des concurrents de l'entreprise intégrée en aval.

2.4.1 Concurrence pour l'exclusivité

Prenons le cas de deux entreprises d'amont qui produisent chacune un bien intermédiaire différencié, et d'une entreprise d'aval. Supposons que les biens intermédiaires sont spécifiquement consacrés à un bien final. Si l'entreprise d'aval achète les deux biens intermédiaires, elle devient une entreprise multi - produits en aval et elle vend deux substituts concurrents. Si elle achète le bien intermédiaire auprès d'une seule entreprise d'amont, elle ne produit et vend alors que le produit final ayant utilisé ce bien intermédiaire.

Il existe deux possibilités d'exclusion, selon qu'il y a ou non des relations contractuelles efficientes.⁴⁹ Si les relations contractuelles sont inefficientes, et qu'il y a une double marge, l'exclusion après la fusion verticale suppose une hausse du prix du produit d'aval non intégré pour réorienter la demande vers le produit intégré.⁵⁰ Si les relations contractuelles sont efficientes, pour que l'intégration verticale soit

⁴⁷ On s'attendrait normalement à ce que le prix en aval augmente, mais dans le cas où les marchés du bien intermédiaire sont locaux et où le marché d'aval est mondial, l'augmentation des coûts a pour effet de diminuer la production sur le marché local, et non pas d'augmenter le prix.

⁴⁸ Voir Church (2004, Section 3.3).

⁴⁹ L'efficacité des relations contractuelles fait référence à la situation dans laquelle les contrats entre les entreprises d'amont et d'aval maximisent leurs profits communs. Cette efficacité exclut notamment toute existence d'une double marge. Pour qu'il y ait maximisation des profits communs, le bien intermédiaire doit être transféré de l'entreprise d'amont vers l'entreprise d'aval au coût de production marginal en amont.

⁵⁰ Voir Salinger (1991).

rentable, il faut que l'exclusion augmente le pouvoir de marché sur un deuxième marché n'ayant pas de rapport avec le premier. Cela empêche toute vente à l'entreprise d'aval sur le marché initial parce que la fusion verticale peut permettre à l'entreprise intégrée de monopoliser au niveau de l'amont l'approvisionnement d'un second marché⁵¹. C'est ce qui se passe en cas de coût fixe en amont et si les ventes à la deuxième entreprise d'aval ne sont pas suffisantes pour assurer leur rentabilité. Dans ces circonstances, tout contrat d'exclusivité entre une entreprise d'amont et la première entreprise d'aval empêche la deuxième entreprise d'amont d'approvisionner la deuxième entreprise d'aval. En conséquence, la première entreprise d'amont, en raison du contrat d'exclusivité, devient un fournisseur monopolistique de la deuxième entreprise d'aval et du marché d'aval.

(i) Situation où les relations contractuelles sont inefficaces

Il s'agit de savoir si l'entreprise intégrée serait incitée à faire augmenter en aval le prix du produit non intégré pour *accroître* ses ventes et peut-être même le prix de son propre produit et à quel moment elle le serait⁵². Dans cette situation, la fusion verticale élimine la double marge sur la marque du produit d'amont de l'entreprise intégrée, ramenant son coût vis-à-vis du monopoleur d'aval au coût marginal. Cela augmente la marge du produit intégré et constitue une motivation pour l'entreprise intégrée d'augmenter ses ventes. C'est ce que peut faire cette entreprise en abaissant le prix de sa marque en aval et en faisant augmenter le prix du produit non intégré.

L'effet de la diversion est représenté par la rentabilité de l'augmentation du prix du produit non intégré. Il y a augmentation dans la mesure où la demande est détournée du produit non intégré vers le produit intégré puisque le prix du produit non intégré augmente, et en proportion de la marge du produit intégré. Si la baisse du coût marginal et l'effet de diversion sont tous deux modestes, le prix des deux produits baisse si l'on maintient constant le prix de fourniture du produit non intégré. Si la baisse du coût marginal est importante et l'effet de diversion est relativement faible, et à prix d'approvisionnement constant du produit non intégré, le prix du produit intégré baisse et le prix du produit non intégré augmente. Si l'effet de diversion est suffisamment important par rapport à la baisse du coût marginal, à prix d'approvisionnement constant du produit non intégré, les prix des deux produits augmentent.

⁵¹ Voir Bernheim et Whinston (1998).

⁵² Dans ce cas de figure, en présence de produits différenciés en aval, l'entreprise intégrée n'estimerait probablement pas qu'une exclusion complète maximise ses profits. En effet, le monopoleur en aval est incité à prendre en charge les deux produits, sauf en cas de coûts importants spécifiques au produit, ou sauf si le coût marginal de l'un des produits est supérieur au prix que les consommateurs sont prêts à payer. Au lieu de cela, il y a exclusion partielle. L'intégration verticale donne à l'entreprise intégrée une motivation pour faire monter le prix du produit de son rival non intégré. On voit manifestement qu'une exclusion complète ne constitue pas un équilibre à moins que, même en son absence, l'entreprise intégrée trouve qu'il serait optimal de ne vendre aucun des produits concurrentiels non intégrés, mais différenciés. Pour ce faire, supposons que l'entreprise intégrée exclut le produit concurrent. Les produits étant différenciés, cela a pour effet d'augmenter la demande des produits d'aval de l'entreprise intégrée puisque les consommateurs substituent le produit concurrent (devenu indisponible) par le produit de l'entreprise intégrée. Cependant, les deux produits étant des substituts imparfaits, certains consommateurs ne vont pas substituer le produit concurrent par le produit de l'entreprise intégrée. À condition que le prix que ces consommateurs sont prêts à payer soit supérieur au coût marginal du produit non intégré, les profits communs du fournisseur non intégré et de l'entreprise intégrée vont augmenter s'ils vendent au moins une unité du produit de l'entreprise rivale. De plus, si les consommateurs à la marge du produit intégré passent au produit non intégré, les profits augmentent puisque le profit à la marge sur le produit intégré est fondamentalement de zéro mais qu'il est positif pour le produit non intégré.

Toutefois, le prix d'amont du produit non intégré n'est pas fixe. L'entreprise non intégrée est incitée à en baisser le prix pour avoir une marge plus importante sur son produit en aval qui compense ainsi en partie l'intérêt de l'élimination de la double marge sur le produit intégré. Cela peut ou non faire baisser les prix du produit non intégré en aval. L'effet net sur les prix d'aval dépend de façon complexe de la demande, à savoir des élasticités de la demande par rapport aux prix individuels et croisés, des coûts marginaux et de l'importance de la double marge sur le produit intégré avant l'intégration verticale.

Les consommateurs tirent un bénéfice lorsque l'intégration verticale fait baisser les deux prix et subissent un préjudice lorsqu'elle fait monter les deux prix. Globalement, le bien-être des consommateurs, tel que mesuré par le surplus du consommateur, peut augmenter ou diminuer lorsque le prix d'un produit augmente et le prix de l'autre diminue. Si les deux produits sont des substituts relativement proches, il est plus probable que les prix de l'un ou des deux produits en aval augmentent. En outre, les profits de l'entreprise indépendante d'amont baissent lorsque le prix d'aval de son produit augmente : le prix du produit d'amont baisse et les volumes aussi. Si cette entreprise a des coûts fixes évitables, cela risque d'entraîner sa sortie du marché ou d'empêcher son entrée sur le marché, portant ainsi préjudice aux consommateurs.

(ii) Situation où les relations contractuelles sont efficaces

Dans la situation où les relations contractuelles sont efficaces et où il n'y a qu'un seul marché d'aval, les deux entreprises d'amont et l'entreprise d'aval peuvent conclure des contrats bilatéraux établissant le prix de transfert au coût marginal pour les deux produits d'amont tout en maximisant les profits. L'entreprise d'aval fixe les prix de maximisation des profits sur les deux produits par rapport au prix correspondant au coût marginal et paie des montants fixes aux entreprises d'amont. En termes de pouvoir de marché, il n'y a pas d'incitation à l'intégration verticale en présence d'un seul marché et de relations contractuelles efficaces : le recours à des contrats bilatéraux entre l'entreprise d'aval et les deux entreprises d'amont suffit à maximiser les profits.

Par contre, s'il y a un second marché, l'exclusion de la clientèle peut s'avérer rentable en cas d'intégration verticale si les coûts en sont moindres que les bénéfices. Au titre des bénéfices, cela peut diminuer la pression concurrentielle que l'entreprise rivale en amont exerce sur l'entreprise verticalement intégrée sur un autre marché, ce qui augmente ainsi le pouvoir de marché de cette dernière et ses profits sur l'autre marché. Par exemple, si les économies d'échelle sur le marché amont ne suffisent pas en sorte qu'en l'absence de ventes sur les deux marchés, la production n'est pas rentable, l'exclusion sur le premier marché entraîne la sortie du second marché. L'exclusion de la deuxième entreprise sur le premier marché entraîne la monopolisation du second marché. Par contre, si les pertes en volumes dues à l'exclusion du premier marché augmentent les coûts marginaux sur le second marché de l'entreprise exclue du premier marché, les pressions concurrentielles sur cette entreprise diminuent alors, bien que l'entreprise ne soit pas totalement exclue.

Contrairement à la situation où les relations contractuelles sont inefficaces et où l'exclusion est partielle, l'exclusion due à l'intégration verticale est complète. L'entreprise intégrée refuse d'acheter le bien intermédiaire de son rival d'amont, et donc de vendre en aval le produit fini fabriqué avec ce bien intermédiaire. Le préjudice anticoncurrentiel que subissent les consommateurs dans ce modèle correspond aux circonstances suivantes : (i) des relations efficaces entre les entreprises d'amont et d'aval (ii) un monopole en aval soutenu par des obstacles qui empêchent une entrée à deux étapes (iii) des produits différenciés en amont (iv) de multiples marchés en aval, non liés les uns aux autres (v) une exclusion rentable — le bénéfice

des profits tirés du monopole sur l'autre marché doit être supérieur aux pertes sur le marché où l'intégration verticale a eu lieu (ces pertes étant dues au manque à gagner en termes de ventes suite à la non utilisation du produit de l'entreprise rivale) — une situation d'autant plus probable que les produits sont moins différenciés (vi) une exclusion effective — l'intégration verticale entraîne un plus grand pouvoir sur un autre marché, soit parce qu'elle évince les concurrents d'amont, soit parce que la baisse des volumes augmente le coût marginal des concurrents d'amont sur ces marchés.

2.4.2 *Avantages pour l'entreprise qui agit la première et exclusivité*

Au lieu de cela, supposons la situation dans laquelle un monopoleur en amont fabrique un produit homogène utilisé comme bien intermédiaire en aval. Le produit d'aval est différencié et le marché d'aval est un duopole. Se peut-il que le monopoleur déjà en place en amont fusionne avec une entreprise d'aval pour dissuader toute entrée d'un rival plus efficace en amont⁵³ ? Si, après une telle entrée, il y a concurrence sur les prix en amont et si les économies d'échelle sont suffisamment importantes en sorte que l'entrée ne soit rentable qu'à la condition que le chiffre d'affaires de l'entreprise entrante soit supérieur à un certain niveau minimum, cette fusion peut avoir lieu. L'effet d'exclusion et l'intégration sont rentables car ils dissuadent l'entrée en amont et préservent la position de l'entreprise déjà en place en tant que fournisseur monopolistique de l'entreprise d'aval non intégrée. Cela est négatif pour les consommateurs puisque, comme il y a toujours concurrence sur les prix en amont, le prix d'amont ne change pas, qu'il y ait ou non entrée sur ce marché⁵⁴. En l'absence de baisse du coût marginal de l'entreprise intégrée, les prix des deux produits augmentent en aval.

De façon plus générale, s'il y a concurrence quantitative en amont après l'entrée d'une entreprise rivale, le prix en aval est probablement supérieur au coût marginal de l'entreprise déjà en place. En termes économiques de bien-être, on se trouve face à un arbitrage bien connu : l'exclusion et l'intégration font monter le prix du bien intermédiaire pour l'entreprise non intégrée en aval, mais elles éliminent la double marge pour l'entreprise intégrée. Par conséquent, en fonction de celui des facteurs qui a les effets les plus importants, l'intégration et l'exclusion peuvent entraîner des prix en aval supérieurs à ce qu'ils seraient en cas d'entrée d'une entreprise rivale sur le marché amont. Plus le marché amont est concurrentiel après l'entrée de l'entreprise rivale, plus il est probable que les avantages de la double marge en termes d'efficacité ne seront pas dominants et les prix d'aval augmenteront s'il y a intégration verticale et exclusion. De plus, étant donné que l'entreprise entrante a un avantage de coûts, il n'y a plus d'efficacité en termes de production si cette entreprise est dissuadée d'entrer.

L'intégration en aval par le monopoleur d'amont qui empêche toute entrée maintient le pouvoir de marché et porte préjudice au consommateur lorsque (i) les économies d'échelle font obstacle à une entreprise entrante si celle-ci n'est pas en mesure de prendre une part de marché suffisante en aval⁵⁵ (ii) l'intégration verticale à l'initiative de l'entreprise déjà présente et l'exclusion empêchent l'entreprise entrante de réaliser les économies d'échelle nécessaires pour que son entrée soit rentable (iii) l'exclusion est crédible, soit parce que l'entreprise intégrée peut concevoir ses produits d'aval en sorte qu'ils soient incompatibles avec le produit intermédiaire de l'entreprise entrante en amont, ou parce que cette exclusion est rentable, auquel cas les gains de la situation de monopole en amont et la hausse des coûts des

⁵³ Voir l'adaptation de Stefanadis (1998) par Church (2004).

⁵⁴ L'entreprise entrante fixe son prix à la hauteur du coût de l'entreprise déjà présente.

⁵⁵ Dans la mesure où l'entreprise entrante et l'entreprise non intégrée d'aval peuvent attirer les consommateurs par la concurrence sur les prix, l'intégration verticale et l'exclusion sont alors moins évidentes. Cela laisse supposer que si les produits sont relativement homogènes, il est plus difficile de dissuader une entrée en procédant à une fusion verticale.

entreprises rivales en aval sont supérieurs au manque à gagner en termes de bénéfices en aval dû au fait que l'entreprise intégrée ne peut pas s'approvisionner auprès de l'entreprise entrante à bas coûts (iv) l'entreprise entrante est plus efficiente et la concurrence en amont s'exerce au niveau du prix. Les effets dissuasifs à l'entrée produits par une fusion verticale se trouvent amoindris si l'entreprise entrante s'attend à bénéficier d'un avantage de coût une fois entrée, bénéfice qu'elle peut utiliser pour neutraliser la crédibilité par des négociations — situation facilitée si l'entreprise entrante peut opérer une discrimination par les prix entre les entreprises d'aval intégrées et non intégrées⁵⁶.

2.4.3 Fusion verticale et produits complémentaires liants

Supposons que les consommateurs assemblent des systèmes composés d'une unité du produit *A* et d'une unité du produit *B*, en sorte que ces deux produits sont des compléments parfaits consommés en proportions fixes. Supposons également qu'il y a une entreprise dominante sur le marché du produit *A* qui fabrique également le produit *B*, mais qu'il y a de la concurrence au niveau de la production de *B* exercée par une seconde entreprise. Les travaux théoriques sur les produits complémentaires ont étudié la motivation du monopoleur à lier l'achat du produit sur lequel il détient une position de monopole (le « produit liant ») à l'achat du second produit (le « produit lié »). Ces travaux mettent en évidence trois cas dans lesquels le fait pour le monopoleur de lier le produit *A* à son produit *B* augmente le pouvoir de marché et porte préjudice aux consommateurs. Dans le premier cas, le fait pour le monopoleur de lier le produit *A* à son produit *B* augmente son pouvoir de marché sur le premier marché ou marché du « produit liant » (*A*)⁵⁷. Dans le deuxième cas, le fait pour le monopoleur de lier son produit à un produit complémentaire risque d'empêcher l'entrée sur le premier marché, ce qui lui permet de conserver son pouvoir de marché.⁵⁸ Dans le troisième cas, le fait de lier les deux produits peut permettre au monopoleur de bénéficier d'un effet de levier de son pouvoir de monopole sur *A* vers le marché de *B*⁵⁹.

On peut transformer ces hypothèses sur les produits liants et liés en hypothèses sur l'effet d'une fusion verticale en supposant qu'au lieu que ce soient les consommateurs qui assemblent les produits, c'est le monopoleur *A* qui le fait. Le monopoleur pour le produit *A* est l'entreprise d'aval. Elle achète des composants *B* en amont qu'elle assemble avec son propre composant *A*. Elle vend ensuite le système assemblé aux consommateurs. Supposons que deux produits *B* sont disponibles, *B*₁ et *B*₂ en sorte qu'en l'absence d'intégration verticale, le monopoleur d'aval peut fabriquer deux produits finaux assemblés, *AB*₁ et *AB*₂. Dans ce cas, l'intégration verticale dans le marché de *B*₁ et le fait de ne plus acheter le

⁵⁶ La négociation est possible si l'entreprise entrante a des coûts inférieurs à l'entreprise déjà présente et si l'entreprise intégrée peut utiliser le bien intermédiaire de l'entreprise entrante. La question est de savoir si l'entreprise entrante peut proposer à l'entreprise déjà en place un prix pour son produit intermédiaire qui améliore suffisamment la situation de l'entreprise déjà présente, même si cette dernière perd son monopole et ses profits en amont. La capacité de l'entreprise entrante à faire une offre acceptable dépend de la question de savoir si elle peut discriminer par les prix et facturer à l'entreprise intégrée un prix inférieur à celui qu'elle pratique auprès des concurrents non intégrés. L'intégration avec négociation ou avec une négociation qui entraîne une discrimination par les prix peut être bénéfique pour les consommateurs. Voir Church (2004, pp. 124-7) pour une discussion sur les modalités selon lesquelles l'anticipation par l'entreprise entrante d'une négociation de l'entreprise en place facilite l'entrée sur le marché.

⁵⁷ Voir Whinston (1990).

⁵⁸ Carlton et Waldman (2002). L'analyse de Carlton et Waldman est similaire à la discussion de Whinston sur les produits complémentaires « liants » lorsqu'il existe une solution de rechange moins intéressante sur le marché des produits liants, mais au lieu d'éliminer une entreprise rivale inférieure sur le premier marché (le marché sur lequel l'entreprise détient une situation de monopole), on met l'accent sur la préservation de ce pouvoir de monopole en dissuadant l'entrée sur ce marché.

⁵⁹ Voir Whinston (1990).

produit intermédiaire B_2 ont au niveau de la concurrence des effets identiques à ceux de produits liés : seul le produit assemblé AB_1 reste disponible. Privé de l'accès au composant A , le système rival AB_2 est exclu du marché aval. Pour obtenir cet effet d'exclusion, le monopoleur A doit pouvoir mettre en place un système de produits liés, ce qui peut généralement se faire en rendant incompatibles le produit A et le produit B fournis par les entreprises rivales, en d'autres termes, en mettant en place un lien technologique.

Si tout cela nous donne de bons aperçus sur les motivations qui président aux fusions verticales et à leurs effets, les conséquences au niveau du bien-être ne sont pas forcément évidentes. Ces conséquences dépendent de la nature du marché amont avant la fusion. Si les relations contractuelles sur le marché amont sont efficaces, c'est-à-dire si le prix de la dernière unité vendue est fixé au coût marginal, les effets des modèles avec produits « liants » peuvent s'appliquer à une fusion verticale. Par contre, si les prix à la marge sur le marché amont avant la fusion sont supérieurs au coût marginal, il y a un effet d'efficacité dont les modèles attribuables à une fusion verticale ne rendent pas compte : c'est l'élimination de la double marge.

(i) Renforcement du pouvoir de marché sur le marché du produit de base

Un monopoleur peut être incité à lier son produit monopolistique à un produit complémentaire pour diminuer la concurrence sur son marché de base lorsqu'il existe un substitut de qualité inférieure pour son produit monopolistique⁶⁰. La présence de ce substitut limite le surplus que ce monopoleur peut dégager en augmentant le prix de son produit monopolistique, en l'absence de produits « liants ». Le monopoleur peut donc être incité à lier son produit monopolistique avec le produit complémentaire. En effet, cela lui donne un motif de baisse du prix de son produit complémentaire puisque la seule manière de concrétiser sa marge monopolistique consiste à convaincre les consommateurs d'acheter le système composé de ses deux produits, et non pas le système rival. En conséquence, le monopoleur fixe ses prix comme si le coût marginal unitaire de son produit B se trouvait diminué de la marge bénéficiaire tirée de la vente d'une unité du produit A . Si la fabrication du complément comporte des coûts fixes, l'intensification de la concurrence par les prix pour ce complément et la perte de marché au profit du monopoleur peuvent forcer l'entreprise rivale fabricante du produit complémentaire à sortir du marché. Par conséquent, le système inférieur cesse bien évidemment d'exister et le substitut de moins bonne qualité au produit monopolistique se trouve aussi exclu.

On peut lier des produits pour obtenir une situation de monopole sur un produit complémentaire et diminuer la concurrence sur le marché de base, dans les conditions suivantes : (i) l'entreprise qui lie les produits doit être dominante au niveau du produit complémentaire de base, son pouvoir de marché étant limité par la présence de substituts inférieurs (ii) il doit y avoir un duopole différencié pour le produit complémentaire (lié) (iii) des économies d'échelle doivent pouvoir être réalisées sur le produit lié (iv) l'engagement par le monopoleur de ne proposer que son système doit être crédible (v) le fait de lier les produits entraîne la sortie du marché du

⁶⁰ Plus concrètement, supposons d'abord qu'il n'y a pas de substitut inférieur pour le produit monopolistique A . Dans ce cas, le monopoleur n'a alors pas de motivation pour lier les produits. En effet, cette liaison diminue ses profits car certains consommateurs qui achèteraient A en tant que composant de l'ensemble AB_2 peuvent décider de ne pas acheter du tout si seuls les ensembles AB_1 sont disponibles. En général, le monopoleur du produit A est incité à s'assurer que le nombre de variétés du produit B est important et que le prix du produit est faible. Cela augmente le surplus associé à la consommation de l'ensemble et le monopoleur peut dégager ce surplus en augmentant le prix de l'ensemble. S'il existe un substitut inférieur, cela veut dire que si le monopoleur tente de pratiquer le prix de monopole pour l'un et l'autre des ensembles de produits, il sera rentable pour un concurrent d'entrer sur le marché et de proposer des ensembles inférieurs incluant le composant A de moins bonne qualité.

producteur indépendant du produit lié ou empêche son entrée sur le marché, ce qui entraîne aussi la sortie du concurrent fabriquant le produit inférieur sur le marché des produits liés (vi) la liaison entre les produits est rentable.

Dans ces circonstances, le fait de lier les produits complémentaires n'est rentable que si l'ensemble de produits rival est exclu de fait et si le gain tiré de la suppression de la limite au prix du produit monopolistique compense la perte de chiffre d'affaires due au fait que certains consommateurs qui n'apprécient pas le produit complémentaire du monopoleur arrêtent d'acheter le produit monopolistique. Cette liaison des produits est rentable si la pression sur les prix que met le substitut inférieur est importante, à savoir s'il s'agit de substituts très similaires et si la différenciation des produits complémentaires est limitée, en sorte que la sortie du marché due à la liaison des produits est aussi limitée. La mesure dans laquelle la liaison des produits abaisse le prix du produit complémentaire lié dépend de la marge sur le produit lié et de savoir si les consommateurs du produit complémentaire concurrent sont prêts à prendre un substitut au produit lié en cas d'évolution de son prix. Plus l'un ou l'autre de ces facteurs est important, plus le monopoleur a un motif de baisser son prix lorsqu'il lie les produits.

Le fait de lier les produits a des conséquences négatives sur le bien-être des consommateurs. En effet, il en résulte une diminution de la variété des produits et une hausse de prix pour l'ensemble AB_1 .

(ii) Préservation du pouvoir de marché sur le marché de base

La liaison de produits par une entreprise dominante sur un marché peut préserver le pouvoir de marché de cette entreprise en dissuadant l'entrée de concurrents sur son marché monopolistique ou de base. On part du postulat fondamental que le fabricant d'un système rival peut aujourd'hui pénétrer sur le marché du produit complémentaire (avec un produit de qualité supérieure à celui de l'entreprise déjà en place), mais que son entrée sur le marché du produit de base est repoussée à plus tard.

Le monopoleur, face au risque d'entrée sur le marché de son produit de base, est incité à vendre ses deux produits sous forme d'un seul ensemble ou système. Cette liaison des deux produits exclut pour le moment les ventes du produit complémentaire par les entreprises rivales du monopoleur. Le monopoleur peut empêcher l'entrée d'autres entreprises sur ce marché, car cela risque de diminuer ses profits. Pour que la liaison entre les produits soit effective, l'entreprise entrante ne doit pas être en mesure de récupérer les coûts fixes d'entrée impliqués par son entrée simultanée sur les deux marchés. La liaison entre les produits est nécessaire pour dissuader l'entrée si, en l'absence de cette liaison, il aurait été rentable pour l'entreprise rivale d'entrer aujourd'hui avec le produit complémentaire et d'introduire le produit de base plus tard. La liaison entre les produits est rentable pour l'entreprise déjà en place si cette liaison a pour effet de dissuader l'entrée et si la perte de profits aujourd'hui due à l'absence de partage du surplus créé par le produit complémentaire supérieur de l'entreprise entrante — dont la présence permettrait à l'entreprise en place de fixer un prix plus élevé pour le produit de base — est inférieure aux profits de monopole que l'entreprise en place conserve à l'avenir en dissuadant l'entreprise entrante et qu'il n'y a pas de produit de remplacement. Enfin, pour que la liaison des produits soit effective, elle doit consister en un engagement de ne pas fournir indépendamment le produit de base.

La liaison entre les produits est plus probablement rentable pour l'entreprise déjà en place si la taille future du marché devrait être importante par rapport à sa taille actuelle, si la supériorité du produit complémentaire de l'entreprise entrante est relativement faible, si la différence entre le

prix que sont prêts à payer les consommateurs et le coût marginal de l'ensemble de produits est importante, et si le facteur d'actualisation est proche de un. Cette liaison entre les produits est efficace et doit exclure l'entrée d'un système concurrent si le marché a actuellement une taille importante et/ou si le facteur d'actualisation est proche de un, c'est-à-dire si l'entreprise entrante patiente. Si la taille du marché est importante aujourd'hui, la liaison entre les produits ne permet pas à l'entreprise entrante de dégager initialement des profits substantiels sur le produit complémentaire. Si le facteur d'actualisation est proche de un, les profits tirés de l'introduction ultérieure du produit de base sont intéressants, ce qui motive l'entreprise entrante pour entrer initialement sur le marché du produit complémentaire. Si la taille actuelle du marché est relativement importante et/ou le facteur d'actualisation est proche de un, l'efficacité de la liaison entre produits augmente aussi à mesure que l'avantage qualitatif de l'entreprise entrante progresse. En effet, dans ces circonstances, l'amélioration de l'avantage qualitatif rend une entrée à plusieurs niveaux d'autant plus rentable. En outre, moins les coûts fixes d'entrée sur le marché du produit de base sont élevés, plus la liaison entre produits est probable.

Le fait de lier des produits diminue le bien-être du consommateur puisque cela élimine, dans une deuxième période, la concurrence de l'autre ensemble de produits préféré des consommateurs.

Supposons par ailleurs que la production du produit complémentaire n'entraîne pas de coûts fixes, mais se caractérise par une externalité de réseau directe. Plus le nombre de consommateurs qui achètent le même produit complémentaire est élevé, plus leur bénéfice est important. En liant les produits dès la période initiale, le monopoleur peut créer pour la deuxième période une base d'utilisateurs de son produit complémentaire. Cela contribue à dissuader l'entrée sur le marché de l'ensemble concurrent, car en l'absence de chiffre d'affaires dans la période initiale, l'introduction d'un système concurrent par l'entreprise entrante risque de ne pas être rentable.

(iii) Effet de levier si le produit complémentaire peut avoir une autre utilisation

Si le produit complémentaire peut recevoir une autre utilisation qui ne dépende pas de l'achat simultané du produit *A*, le monopoleur peut lier son produit *B* au produit *A* pour bénéficier d'un monopole sur *B*. Sur ce marché de remplacement, étant donné que le produit *A* n'est pas indispensable à l'utilisation de *B*, le monopoleur de *A* ne bénéficie pas de la présence d'un composant concurrent sur le marché de *B*⁶¹. Il peut donc estimer qu'il est rentable d'être en situation de monopole sur le marché de *B*. Pour ce faire, il lie le produit *A* au produit *B*. Cette stratégie réussira si cette liaison affecte, en fait exclut, une part suffisamment importante de marché détenue par l'entreprise 2, telle que cette entreprise ne peut pas couvrir ses coûts fixes et qu'elle est obligée de sortir du marché. Cette stratégie est rentable si le marché de l'utilisation du produit *B* tout seul est important. La diminution de la concurrence sur le marché de *B* est préjudiciable aux consommateurs.

Dans ses aspects économiques, la stratégie qui consiste à lier des produits pour dissuader l'entrée sur le marché est très similaire à la stratégie d'exclusion du marché du bien intermédiaire visant à maintenir le monopole afin d'empêcher l'entrée sur le marché, et à la stratégie d'exclusion de la clientèle par l'avantage de l'entreprise ayant pris l'initiative. Ces trois stratégies dépendent de l'interaction entre l'exclusion et les effets d'échelle empêchant l'entrée sur le marché. Elles augmentent le pouvoir de marché et portent préjudice aux consommateurs.

⁶¹ Voir la discussion ci-dessus, note de bas de page 60.

2.4.4 Effets de la variété des produits

Si la demande des consommateurs est sensible à la variété des produits, il s'ensuit toute une série d'effets. Si les consommateurs assignent une valeur à cette variété, lorsqu'une entreprise a une gamme plus large de produits qu'une autre, elle bénéficie d'une augmentation de la demande qui, ce faisant, diminue la demande auprès des entreprises rivales et le chiffre d'affaires de celles-ci. Une entreprise intégrée peut bénéficier d'un avantage en raison de la variété de ses produits si, après la fusion verticale, elle met en oeuvre une politique d'exclusion. Dans ce cas, on entend par exclusion le fait de ne pas permettre à une entreprise rivale d'accéder au produit complémentaire contrôlé par l'entreprise intégrée. Si les consommateurs confèrent une valeur à la variété des produits, un avantage de ce point de vue peut procurer un pouvoir de marché à l'entreprise intégrée ou aboutir à une situation de monopole.

On a considéré deux situations dans lesquelles une entreprise possède un avantage concurrentiel dû à une gamme de produits plus étendue que ses rivaux. Il s'agit des effets de réseau indirects⁶² et de l'incertitude de la demande⁶³.

(i) Effets de réseau indirects

Supposons que les ensembles de produits sont constitués de deux composants dont l'un (le matériel) peut être combiné avec différentes variétés du deuxième composant (logiciels) au bénéfice du consommateur. Les systèmes combinant matériel et logiciels ont notamment pour caractéristique majeure que les consommateurs étant prêts à payer pour une technologie de matériel, cela augmente la variété de logiciels compatibles. Plus le nombre de logiciels compatibles avec le matériel est grand, plus le surplus créé est important et plus la valeur du matériel est élevée pour le consommateur. Dans un tel marché, il peut y avoir exclusion si, après fusion entre un fabricant de matériel et un fabricant de logiciel, l'entreprise intégrée cesse de fournir des logiciels compatibles avec les technologies ou systèmes rivaux de matériels, ce qui confère à cette entreprise un avantage en termes de variété. Cet avantage peut procurer à l'entreprise qui intègre et exclut un pouvoir sur le marché du matériel.

Pour qu'il y ait exclusion : (i) cette exclusion doit être rentable, à savoir que l'augmentation des profits sur le matériel doit être supérieure aux pertes de profits sur les logiciels dues à l'absence de fourniture de l'autre système (ii) si une contre fusion et l'exclusion pratiquée à son tour par le système exclu ne permettent de rentabiliser l'exclusion initiale, ces mesures de rétorsion ne peuvent pas être rentables. La seconde condition est possible puisque la concurrence entre des systèmes équivalents risque d'être très forte et de déboucher sur des prix et des profits très bas.

Supposons deux entreprises d'aval dont chacune fabrique un système comprenant un élément matériel différencié et un logiciel intégré. Ces deux entreprises d'aval se font concurrence sur le prix de leur système et sur la variété du logiciel intégré sur le matériel. Supposons au départ que les deux variétés de logiciels sont disponibles pour les deux systèmes d'aval. Dans ce cas, la concurrence entre les deux entreprises de fabrication de matériel ne se situe qu'au niveau du prix et l'intensité de cette concurrence ne dépend que de la différenciation du matériel. Si le logiciel peut être acheté pour un montant fixe et non pas pour un montant d'abonnement, il y a toujours un montant fixe qu'une entreprise intégrée et qui exclut ses concurrents peut payer à l'entreprise

⁶² Church et Gandal (2000), Church et Matheson (2007). Dans l'étude de Church et Gandal, le logiciel est vendu indépendamment du matériel. Church et Mathewson montrent que les mêmes effets se produisent lorsque l'entreprise fabricante du matériel achète le logiciel sur un marché d'amont et l'intègre ensuite dans son matériel vendu sur le marché aval.

⁶³ Ma (1997).

non partie à la fusion et qui (i) fait que la fusion et l'exclusion sont rentables (ii) et qui fait également que les mesures de rétorsion ne sont pas rentables.

L'exclusion sur le marché aval augmente la part de marché et le prix du système de l'entreprise qui exclut ses concurrents, ce qui accroît manifestement ses profits. L'avantage en matière de variété des logiciels de l'entreprise intégrante et qui exclut ses concurrents, diminue l'élasticité de la demande de son système et lui permet de pratiquer un prix plus élevé, tandis que le prix du logiciel intégré de l'entreprise exclue baisse, de même que ses profits. L'augmentation des profits du système qui évince ses concurrents suffit à améliorer la situation des entreprises parties à la fusion par rapport à l'équilibre qui existait avant cette fusion, même après avoir payé une somme fixe à l'entreprise de logiciels qui ne fait pas partie de la fusion verticale, et à rendre toute mesure de rétorsion non rentable. La rétorsion restaure le prix initial du matériel et les profits des systèmes d'aval. Étant donné que l'exclusion augmente les profits et que la pratique de montants fixes permet de redistribuer ces profits, l'entreprise non intégrée peut toujours « suborner » l'entreprise de logiciels extérieure à la fusion verticale pour que cette dernière ne participe pas à cette fusion et ne pratique donc pas l'exclusion.

Il y a deux équilibres d'exclusion. Il y a équilibre interne lorsque le matériel est relativement différencié par rapport au bénéfice marginal d'une variété supplémentaire de logiciel. Lorsque le matériel est plutôt indifférencié par rapport au bénéfice marginal d'une variété supplémentaire de logiciel, on se trouve alors devant une situation de monopole. Dans un cas comme dans l'autre, la hausse des prix porte préjudice aux consommateurs dont certains adoptent le système qui n'est pas celui qu'ils préfèrent, tandis que ceux qui ont adopté le système exclu dans le cadre de l'équilibre interne consomment également moins de logiciel.

(ii) *Incertitude de la demande*

Supposons que les consommateurs doivent contracter avec un prestataire de services avant que ne soient connues leurs préférences en matière de substituts. Après avoir choisi un prestataire de services, il n'y a plus d'incertitude de la demande et le produit que les consommateurs préfèrent est connu. Dans ces circonstances, le prestataire de services bénéficiant de la plus grande variété de produits a un avantage car il est a priori plus probable que les consommateurs auront une offre de produits disponible plus adaptée à leurs préférences (une fois celles-ci connues). Une entreprise intégrée peut alors décider de ne pas mettre ses produits à la disposition d'autres prestataires de services.

Si les consommateurs choisissent un prestataire de services et passent des contrats avec lui avant de savoir la valeur pour eux de son offre, c'est en raison des coûts fixes de la fourniture des produits. Ces coûts fixes d'accès ou de connexion des consommateurs à un produit veulent dire qu'il n'y a pas de marché au comptant des produits une fois que leurs valeurs sont connues car il faudrait pour cela que les consommateurs soient en relation avec tous les prestataires de services. Dans la diffusion vidéo, par exemple, les consommateurs achètent l'accès à un seul diffuseur, par exemple le câblo-opérateur local ou un diffuseur direct par satellite. Il ne peut pas passer à tout moment d'un diffuseur à un autre. En fait, en raison des coûts fixes de la connexion, les différents fournisseurs de programmes vidéo se concurrencent en proposant une gamme de programmes et les consommateurs font leur choix sur la base des programmes offerts et du coût de la connexion.

La concurrence entre les prestataires de services en aval est fondée sur la valeur attendue de leur offre. La valeur de l'offre dépend des prix et de la variété des produits proposés. À supposer que les consommateurs ont des caractéristiques homogènes, l'entreprise d'aval choisie (par tous les

consommateurs) pour fournir le service est celle qui peut apporter le plus grand surplus à condition qu'elle dégagne des bénéfices. Une entreprise intégrée est donc incitée à exclure son rival car cela diminue le surplus que le rival peut attendre de son offre et cela permet à l'entreprise intégrée de fixer un prix plus élevé tout en continuant de monopoliser le marché aval.

Pour qu'il y ait exclusion, comme dans le cas de l'effet de réseau indirect, cette exclusion doit être rentable pour l'entreprise intégrée et il ne faut pas que l'entreprise exclue réagisse par une contre fusion. En effet, si l'entreprise d'aval exclue peut former une contre fusion, elle est alors en position d'exclure à titre de rétorsion et de restaurer la parité dans l'offre de produits. Cependant, si la valeur attendue de l'une des deux offres est supérieure à l'autre, dans un équilibre bilatéral de l'exclusion, l'entreprise intégrée dont le produit est inférieur ne serait pas en mesure de fixer un prix suffisamment bas pour assurer l'adoption du produit par les consommateurs sans subir des pertes⁶⁴. Par conséquent, il serait rentable pour l'entreprise intégrée dont le produit est inférieur de vendre à son rival plutôt que d'être évincée au niveau du marché des consommateurs finaux.

L'exclusion est rentable si, aux prix en vigueur avant la fusion verticale, il est plus rentable pour le fournisseur d'amont du produit supérieur d'exclure et de participer à la fusion, que de fournir les deux entreprises d'aval. Cela est d'autant plus susceptible de se produire que le marché aval est d'autant plus concurrentiel et que les primes en amont sont plus faibles avant la fusion. Si, aux prix antérieurs à la fusion, l'intégration et l'exclusion sont rentables, cette intégration et cette exclusion seront profitables après la fusion puisque cette fusion diminue les coûts de l'entreprise intégrée en éliminant la double marge et la réaction en amont des rivaux de l'entreprise intégrée est peu susceptible de rendre l'intégration non rentable.

Ce que nous disent ces deux modèles sur la valeur d'un avantage au niveau de la variété des produits s'applique selon toute vraisemblance à d'autres cas de figure comprenant un coût fixe dû à la fourniture ou à l'obtention d'un service, lorsque les consommateurs assignent une valeur à la variété des produits. La plupart des restaurants et des bars, par exemple, s'approvisionnent en sodas au siphon auprès d'un fournisseur unique. Leur préférence pour un service de sodas au siphon dépend peut-être de la variété des produits offerts. Plus généralement, les résultats de ces deux modèles peuvent s'appliquer à toute situation où la demande dépend de variété des services disponibles. Ils montrent particulièrement l'importance qu'il y a (i) à évaluer les motivations d'une exclusion en admettant que ces motivations dépendent d'un arbitrage entre une augmentation des profits sur le matériel et une diminution des profits sur les logiciels (ii) à cerner les effets sur la demande des différences en termes de variété (iii) et à évaluer l'importance des stratégies de rétorsion, en examinant explicitement si l'entreprise exclue peut aussi procéder à une fusion verticale et exclure à son tour avec l'aide d'un fournisseur de produit complémentaire et/ou si les obstacles à l'entrée sur le marché des produits complémentaires sont suffisamment élevés, en sorte qu'un rival ne peut pas introduire sa propre gamme de produits complémentaires.

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Les consommateurs font leur choix entre les deux fournisseurs concurrents et verticalement intégrés en fonction des bénéfices attendus. Dans une situation d'exclusion bilatérale, où chaque système n'offre qu'un produit, le système comportant le produit dont on attend la plus grande valeur, donc celui le plus susceptible de satisfaire les préférences des consommateurs, a un avantage. En raison de la différence de valeur attendue, le système qui inclut le produit préféré des consommateurs peut être vendu à un prix légèrement inférieur au prix le plus bas du système rival (le coût marginal) tout en continuant d'être rentable et en s'assurant que le système concurrent ne sera adopté par aucun consommateur.

2.5 *Effets coordonnés*

Il y a exercice collectif d'un pouvoir de marché lorsqu'un groupe d'entreprises coordonnent leurs augmentations de prix pour diminuer les possibilités de substitution par leur clientèle d'un produit de l'une d'entre elles par les produits des autres. Une fusion verticale donne naissance à un effet coordonné si, après la fusion, les entreprises, en amont ou en aval, sont en mesure de se coordonner plus efficacement, soit parce qu'il est alors plus facile d'arriver à un accord tacite sur le résultat à obtenir, ou parce que la mise en oeuvre de cette politique est plus efficace.

Les études théoriques sur la lutte contre les ententes anticoncurrentielles ont émis un certain nombre d'hypothèses sur la possibilité qu'une fusion verticale conduise à une coordination des entreprises concernées, notamment le fait qu'une fusion de ce type est susceptible d'éliminer un client perturbateur, rend les prix de gros plus transparents et facilite les échanges d'information.⁶⁵ Il importe toutefois d'observer que toutes ces théories supposent qu'en fonction de la théorisation des faits, l'un au moins des marchés d'amont ou d'aval amène à une coordination. Si ce n'est pas le cas pour le marché pertinent, une coordination des entreprises dans le cadre d'une fusion verticale ne risque guère d'avoir des effets appréciables.

2.5.1 *Élimination d'un acheteur perturbateur et motivations supplémentaires en faveur de la coordination*

L'élimination d'un acheteur perturbateur par la fusion verticale peut faciliter la coordination en amont, mais sous deux conditions : (i) que les ventes à cet acheteur soient particulièrement importantes pour les fournisseurs d'amont, en raison peut-être des volumes concernés (ii) qu'il y ait des preuves que l'acheteur a pu perturber la coordination en alimentant une concurrence par les prix.

Les motivations supplémentaires à la coordination suscitées par une fusion verticale s'expliquent plus généralement par le fait qu'après la fusion, l'entreprise intégrée a davantage intérêt à relever les prix en amont. En effet, la hausse du prix du produit intermédiaire renchérit les coûts de ses rivaux en aval, diminue l'intensité de la concurrence sur ses activités en aval, ce qui renforce son pouvoir de marché et ses profits en aval. La fusion verticale l'incite moins à ne pas observer une attitude coordonnée étant donné qu'elle bénéficie davantage de la coordination en amont. Une entreprise verticalement intégrée est davantage susceptible de supporter les coûts de la coordination, à savoir les profits perdus par le fait de ne pas tricher aujourd'hui sur les résultats de la coordination, étant donné que ce comportement procure à l'entreprise des bénéfices plus importants à long terme, en amont comme en aval. Une entreprise non intégrée ne souhaite pas forcément supporter les coûts d'un engagement (moindre production à court terme), alors qu'une entreprise intégrée peut le désirer. Un tel engagement peut être rentable pour une entreprise verticalement intégrée en raison de considérations évolutives, même si cela ne l'est pas pour une entreprise non intégrée⁶⁶. Plus la division aval de l'entreprise intégrée profite de la hausse des coûts de ses rivaux, plus la fusion verticale renforce les incitations d'une entreprise intégrée à coopérer par une coordination des prix en amont.

⁶⁵ Les études économiques qui analysent la possibilité qu'une fusion verticale puisse avoir un effet coordonné sont très peu nombreuses et très récentes. Il s'agit, à notre connaissance, des contributions de Nocke et White (2005), Chen et Riordan (2004). Pour une discussion de ces deux travaux, voir Riordan (2005).

⁶⁶ Une entreprise intégrée peut aussi vouloir se construire une réputation de ne pas approvisionner ses rivaux d'aval (exclusion), bien qu'une entreprise non intégrée ne le ferait pas car elle en tirerait moins de bénéfices. Voir plus haut la discussion sur la crédibilité de cet engagement, section 2.3(a).

2.5.2 *Meilleure surveillance des prix et du respect de la coordination*

Un renforcement de l'intégration verticale contribuer à augmenter la capacité des entreprises d'amont à surveiller les prix des autres et à repérer le non respect des résultats attendus de la coordination. La coordination en amont peut s'avérer difficile parce que les prix ne sont pas transparents. Si les prix de gros (marché amont) sont secrets, il est alors difficile de détecter et de sanctionner le non respect des résultats de la coordination. Les prix de détail (ceux du marché aval), sont toutefois plus visibles et dans ce cas, une fusion poussée permettant aux entreprises de surveiller le respect de la coordination grâce à des prix de détail visibles au lieu de prix de gros non observables, améliore la coordination.

Par contre, si l'intégration verticale est moins poussée, on peut se servir des prix de détail pour détecter les « tricheries » au niveau des prix de gros à *condition que* les fluctuations des prix de détail puissent être attribuées aux fluctuations des prix de gros. Néanmoins, les fluctuations des prix de détail peuvent aussi être attribuées à l'évolution des coûts de la vente au détail. Une fusion verticale peut fournir à une entreprise des informations sur les coûts de la vente au détail, ce qui lui permet de recueillir davantage de renseignements sur les prix de gros à partir des prix de détail et peut faciliter la détection d'éventuels écarts par rapport au résultat que devrait donner une coordination en amont.

2.5.3 *Échange d'informations*

Une fusion verticale est susceptible d'améliorer la transparence en créant un véhicule (la filiale aval) d'échange d'informations entre les entreprises d'amont. À condition que la filiale aval continue après la fusion d'acheter auprès des rivaux amont de l'entreprise verticalement intégrée, la division aval peut communiquer à sa division amont des informations sur les prix et les offres de ces rivaux⁶⁷. Dans ces circonstances, pour que l'échange d'informations facilite la coordination, il faut trois conditions nécessaires⁶⁸. Il faut en premier lieu que l'information puisse servir pour faire des projections (c'est-à-dire qu'il faut que l'on estime qu'elle donne une indication exacte des prix proposés à d'autres acheteurs), qu'elle soit unique (qu'elle ne soit pas facilement accessible et vérifiable auprès d'autres sources), et que le marché du produit intermédiaire soit propice à la coordination. Même si ces trois conditions sont satisfaites, l'utilité de l'information pour la coordination des fournisseurs de produits intermédiaires en amont n'est pas évidente si le véhicule qui relaie l'information ne fonctionne que dans un sens, à savoir des entreprises rivales d'amont, en passant par la filiale d'aval, vers la filiale amont des entreprises verticalement intégrées et si seules les informations de l'entreprise verticalement intégrée sont valorisées.

On a suggéré d'autre part que, dans une structure verticale relativement non intégrée, une intégration verticale peut être déstabilisante et restreindre la portée de la coordination en amont. En effet, une fusion verticale, en créant des asymétries entre les entreprises d'amont, suscite le risque de comportements individualistes. Si, notamment, la fusion est associée à une moindre transparence du fait que l'entreprise verticalement intégrée est incitée à augmenter secrètement le chiffre d'affaires de sa filiale d'aval et est en mesure de le faire, une fusion verticale peut donc aller dans un sens favorable au développement de la

⁶⁷ Il s'agit ici essentiellement d'une communication à sens unique — de l'entreprise rivale d'amont, en passant par la filiale aval, vers la filiale d'amont de l'entreprise verticalement intégrée. La filiale aval peut agir comme un véhicule de communication dans les deux sens, ce qui faciliterait alors une collusion explicite. Nous n'étudions pas ce scénario plus avant, dans la mesure où nous estimons que ce type de comportement peut relever de la compétence des lois antitrust. Le problème qui se pose ici est une fusion verticale créant des conditions facilitant la coordination et qui ne relève pas, normalement, des lois prohibant les ententes anticoncurrentielles.

⁶⁸ Riordan et Salop (1995, pp. 558-60).

concurrence. Il existe une motivation pour augmenter les ventes si la fusion élimine la double marge commerciale⁶⁹.

2.6 *Efficiences*

Le débat sur l'application des règles relatives aux fusions verticales s'explique en grande partie par l'opinion largement répandue selon laquelle ces fusions sont très peu susceptibles de nuire au libre jeu de la concurrence et une fusion verticale n'est pas motivée par un renforcement ou une préservation d'un pouvoir de marché, mais a pour objet de dégager des efficiences. En général, il peut y avoir des efficiences parce que la coordination renforcée rendue possible par une fusion verticale permet (i) des efficiences de production et des économies (ii) l'internalisation des externalités verticales et le rapprochement des motivations (iii) des économies en matière de coûts de transaction, y compris en atténuant les effets de comportements opportunistes⁷⁰.

3. Principes directeurs en matière de fusions verticales

La présente section donne un aperçu des principes directeurs en vigueur concernant les fusions verticales aux États-Unis, au Royaume-Uni, en Australie et au Canada.

3.1 *États-Unis*

Les *Principes directeurs régissant les fusions non horizontales* aux États-Unis ont été publiés en 1984 par le ministère américain de la Justice. Ces principes exposent « les théories en vertu desquelles le ministère est susceptible de contester » les fusions verticales⁷¹. Contrairement aux articles des *Principes directeurs de 1968* sur le même sujet, il ne s'agit pas de traiter l'exclusion⁷². Les trois préoccupations des Principes directeurs de 1984 sont les suivantes :

- (i) les cas où une fusion verticale dresse des barrières à l'entrée en obligeant à une entrée simultanée sur le marché amont et sur le marché aval. Pour que cela soit un problème, trois conditions doivent être satisfaites : (a) le degré d'intégration qui résulte de la fusion verticale doit être suffisamment poussé, en sorte que l'entrée sur le premier marché, celui pour lequel se posent des problèmes de concurrence, nécessite aussi l'entrée sur le deuxième marché (b) la nécessité d'entrer concomitamment sur le deuxième marché doit rendre l'entrée sur le premier marché plus difficile et moins susceptible de se produire (c) le relèvement des obstacles à l'entrée sur le premier marché doit avoir pour effet probable de peser sur la performance de ce marché⁷³.

⁶⁹ C'est ce qu'admettent les principes directeurs des États-Unis sur les fusions, dans leur article 2.12. Voir aussi Baker (2002, pp. 176-7) pour une discussion plus approfondie.

⁷⁰ Voir Bishop *et al.* (2005) pour un exposé exhaustif des efficiences qu'une fusion verticale peut réaliser.

⁷¹ Ministère américain de la Justice, *Principes directeurs régissant les fusions non horizontales*, 1984, consultable à l'adresse www.usdoj.gov/atr/public/guidelines/2614.htm.

⁷² Les *Principes directeurs* de 1968 sur les fusions peuvent être consultés à l'adresse suivante : www.usdoj.gov/atr/hmerger/11247.htm. Le chapitre II décrit les mesures d'application pour les fusions verticales.

⁷³ Morse (1998, p. 1225) note que l'on peut considérer la théorie de l'entrée simultanée sur deux marchés comme une « reconstitution de la théorie de l'exclusion », vu l'accent mis par les *Principes directeurs* sur la présence d'une « capacité suffisante sur le deuxième marché des entreprises non intégrées » (article 4.211, note de bas de page non citée).

- (ii) la fusion verticale facilite la coordination ou la rend plus effective, soit parce qu'il est alors plus facile de contrôler les prix en amont ou d'éliminer un acheteur perturbateur.
- (iii) la fusion verticale permet à une entreprise de services aux collectivités réglementée de contourner la réglementation des prix.

Dans les deux premiers cas, les *Principes directeurs* constituent une (demi) protection : si l'indice de Herfindahl Hirschman est inférieur à 1800 sur le premier marché, la fusion a peu de chances d'être contestée.

3.2 *Canada*

Les *Lignes directrices en matière de fusion* édictées par le Bureau de la concurrence datent de 2004⁷⁴. Elles se présentent sous la même forme que leurs homologues des États-Unis, avec indication de deux cas dans lesquels une fusion verticale est susceptible de nuire au libre jeu de la concurrence. Ces deux cas sont les mêmes qu'aux États-Unis : (i) un relèvement des obstacles à l'entrée dû à l'obligation d'une entrée simultanée à deux niveaux (ii) le potentiel qu'a la fusion verticale de faciliter la coordination en renforçant la transparence sur le marché amont et sur le marché aval. Les lignes directrices canadiennes précisent qu'en cas d'entrée à deux niveaux, l'attention du Bureau serait attirée si cette entrée avait pour effet de l'empêcher de peser sur les prix. Pour les marchés d'aval, le Bureau note qu'une fusion verticale est susceptible d'améliorer la transparence au niveau des prix de gros ou de renforcer cette transparence en accentuant les sanctions pour transgression des règles en aval. Ces deux conséquences sont possibles si l'entreprise verticalement intégrée fournit les autres entreprises en aval.

3.3 *Royaume-Uni*

En 2003, le Bureau de la concurrence (Office of Fair Trading - OFT) a publié le document intitulé : *Fusions : principes directeurs pour l'évaluation*⁷⁵. Le chapitre 5 de ce document décrit les questions qui se posent en présence d'une fusion verticale. L'OFT fait observer que les fusions verticales permettent souvent d'améliorer l'efficacité mais peuvent donner lieu à des problèmes en matière de concurrence. Les problèmes mentionnés sont l'exclusion et le fait que ces fusions facilitent la coordination. Le document indique clairement que ces problèmes potentiels « ne sont susceptibles de se poser que s'il existe un pouvoir de marché ou si ce pouvoir est créé sur un ou plusieurs marchés le long de la chaîne d'approvisionnement »⁷⁶.

La question de l'exclusion inclut à la fois l'exclusion de la clientèle et l'exclusion du marché du bien intermédiaire. Les principes directeurs britanniques mettent particulièrement en exergue l'exclusion du marché du bien intermédiaire qui consiste en l'impossibilité pour les entreprises rivales d'aval d'avoir accès à la distribution en aval et le refus de l'entreprise intégrée de fournir un produit lorsque la variété en aval est un facteur important. L'OFT distingue aussi clairement entre la capacité d'exclusion et les motivations pour exclure et fait remarquer que le fait pour une fusion verticale de permettre à une entreprise d'exclure ne veut pas dire pour autant que cette exclusion serait rentable. L'exclusion n'est probable que si elle est rentable.

⁷⁴ Disponible en ligne : www.competitionbureau.gc.ca/internet/index.cfm?itemid=1245&lg=e. Le chapitre 10 décrit les mesures d'application des règles en matière de fusions verticales.

⁷⁵ Disponible en ligne : www.offt.gov.uk/NR/rdonlyres/283E1C2D-78A6-4ECC-8CF5-D37F4E4D7B22/0/oft516.pdf.

⁷⁶ *Fusions : Principes directeurs pour l'évaluation* au chapitre 5.1.

3.4 *Australie*

La Commission australienne sur la concurrence et la consommation (Australian Competition and Consumer Commission - ACCC) a publié en 1999 les *Principes directeurs en matière de fusions*⁷⁷. L'ACCC fait observer que les fusions verticales peuvent affecter la concurrence horizontale. La Commission définit toutefois deux conditions dans lesquelles cela ne devrait pas risquer de se produire : (i) en présence d'un ratio de concentration à quatre entreprises de moins de 75 % et une part de marché, après fusion, de l'entreprise intégrée de moins de 15 % (ii) en présence d'une part de marché de l'entreprise intégrée de moins de 40 %. Une fusion verticale n'est susceptible de poser des problèmes que si l'un de ces deux seuils est dépassé, si la concurrence à l'importation est inefficace et les obstacles à l'entrée sont élevés.

Les principes directeurs de l'ACCC mentionnent cinq problèmes potentiels : (i) l'élargissement du pouvoir de marché d'une étape de la production à une autre en excluant l'accès au marché du produit intermédiaire ou en excluant la clientèle, en préemptant la concurrence par la mise en place d'un accès discriminatoire à un produit intermédiaire essentiel et, par le biais du contrôle de ce produit intermédiaire essentiel, l'accès à des informations commerciales sensibles sur les entreprises rivales d'aval (ii) érection de barrières à l'entrée en obligeant à une entrée à deux niveaux, notamment pour ce qui concerne les infrastructures de distribution (iii) le fait de rendre possible une discrimination par les prix (iv) le fait de faciliter la coordination entre entreprises en amont (v) le contournement de toute réglementation effective en aval.

4. **Quelques exemples récents**

La présente partie du document analyse un certain nombre de cas récents qui nuancent l'application des règles concernant les fusions verticales. Ces cas présentent la particularité, tout spécialement aux États-Unis, que la récente augmentation des cas d'application n'a pas été suivie d'une progression équivalente du nombre de contentieux. L'intervention des administrations concernées aux États-Unis a débouché sur des décisions judiciaires enjoignant le défendeur de s'abstenir de procéder à l'opération⁷⁸.

4.1 *Rachat proposé de Ingram Book Company par Barnes & Noble*

En novembre 1998, Barnes & Noble (B&N) a annoncé le rachat de Ingram Book Company pour 600 millions USD⁷⁹. A ce moment-là, B&N était le plus gros détaillant de livres aux États-Unis, avec une part de marché estimée de près de 30 %, tandis que Ingram était le numéro un dans la vente en gros de livres. Le chiffre d'affaires annuel de B&N était d'environ 3 milliards USD, celui de Ingram de 1.4 milliard USD. Ingram possédait 11 centres de distribution aux États-Unis et, selon les estimations, une part de marché de 67 % sur le marché de gros des livres⁸⁰. B&N avait son propre système de distribution, mais s'approvisionnait aussi en livres auprès de Ingram. L'opération fit l'objet d'une enquête par la Commission fédérale du commerce (Commission fédérale du commerce - FTC).

⁷⁷ Disponible en ligne à l'adresse suivante : www.accc.gov.au/content/index.phtml/itemId/304397. Les paragraphes 5.148 à 5.160 traitent des mesures relatives aux fusions verticales.

⁷⁸ Voir Leary (2002-2003, pp. 128-9).

⁷⁹ On a repris ce cas de R. Parker, Commission fédérale du commerce, « Global Merger Enforcement », remarques devant l'Association internationale du barreau (28 septembre, 1999) et tout particulièrement de Sibley et Doane (2002).

⁸⁰ Il semble que cette part de marché exclut les livres commercialisés par les circuits de distribution interne de B&N.

Les vendeurs de livres en gros sont des intermédiaires entre les éditeurs et les vendeurs au détail. Non seulement les vendeurs en gros stockent généralement un grand nombre de titres publiés par de nombreux éditeurs, ils prennent aussi des commandes spéciales. Les grossistes, tel Ingram, fournissent des services de support, dont notamment des bases de données recensant les livres imprimés, des assurances, des informations de marché et des conseils de stockage, et du crédit⁸¹. Le grand grossiste suivant, Baker & Taylor, n'était pas seulement nettement plus petit qu'Ingram, la gamme et la qualité des services fournis aux détaillants étaient considérés comme nettement inférieurs à ceux d'Ingram. De l'avis de la FTC, Ingram n'était aux prises qu'avec « une concurrence plutôt limitée » et « en tant que grossiste du segment du marché qui n'est pas captif de la distribution interne, Ingram jouit d'une domination écrasante »⁸².

On peut distinguer les détaillants d'autres commerces qui vendent des livres par le fait qu'ils choisissent leurs titres, ont une vaste gamme de livres et que l'on peut leur passer des commandes spéciales de livres. Cela exclut un certain nombre d'autres commerces auprès desquels les consommateurs achètent des livres, mais cela inclut les détaillants en ligne. B&N était leader sur le marché, avec un concurrent qui le talonnait, Borders, avec une part de marché tout juste supérieure à 25 %. Les chaînes suivantes les plus importantes réalisaient chacune à peine plus de 3 % des ventes de livres. Par ailleurs, les libraires indépendants détenaient en 1998 une part de marché globale de plus de 31 %⁸³.

L'opération posait certains problèmes en matière de fusion horizontale. Les centres de distribution de B&N constituaient une plateforme qui lui permettait d'entrer sur le marché de gros et la société avait publiquement indiqué son intention en ce sens. Ingram avait répondu en faisant des efforts pour améliorer ses prix et la qualité du service, afin de s'assurer une partie des volumes de B&N. Ces changements avaient aussi bénéficié à d'autres détaillants. Cependant, l'objet principal de l'enquête de la FTC portait sur le potentiel d'éviction de ses concurrents d'aval par B&N en cas d'acquisition d'Ingram. B&N serait en mesure d'évincer ses rivaux auprès d'un fournisseur important. On ne craignait pas seulement que B&N arrête d'approvisionner les rivaux d'aval, mais que le groupe ferait monter les coûts de ces rivaux de manière plus subtile en pratiquant des prix plus élevés ou en fournissant des services de moins bonne qualité, c'est-à-dire en pratiquant une politique de discrimination sur les prix ou à d'autres niveaux pour alourdir les coûts de ses rivaux en aval. Il semble que l'enquête de la FTC ait porté sur le fait de savoir si l'exclusion serait profitable pour B&N.

Pour qu'une exclusion soit rentable, il faut que le profit tiré de la hausse des prix au détail soit supérieur au manque à gagner en termes de ventes en gros. On a des éléments d'information, peut-être imprécis, sur la façon dont la FTC a pu aborder la question de la rentabilité de l'exclusion⁸⁴. Au lieu

⁸¹ On distingue notamment les grossistes purs des grossistes étalagistes qui desservent les gros commerces et les supermarchés. Ces grossistes étalagistes choisissent les titres, assurent l'expédition et mettent les livres sur les étalages, c'est-à-dire qu'ils déballent et disposent les livres. Tandis que les éditeurs peuvent distribuer leurs livres directement (ce qu'ils font pour les nouveaux livres), ils ne se situent pas sur le même marché que les autres grossistes, car ils ne sont pas « universels » en ce sens qu'ils ne peuvent pas fournir des livres publiés divers éditeurs et ne sont pas en mesure de satisfaire des commandes aussi rapidement que les grossistes en livres. Le marché géographique pertinent est celui des États-Unis.

⁸² R. Parker, Commission fédérale du commerce, « Global Merger Enforcement », remarques préparées pour l'Association internationale du barreau (28 septembre, 1999) p. 2.

⁸³ On distingue les grossistes indépendants des chaînes en raison de leur choix des titres (sur la base de la connaissance du marché local) et du contenu local. Le marché géographique pertinent pour ces grossistes est le marché local.

⁸⁴ R. Parker, Commission fédérale du commerce, « Global Merger Enforcement », remarques préparées pour l'Association internationale du barreau (28 septembre, 1999) compare les marges de gros et les marges de détail de B&N. Notre exposé de cette question fait suite à l'analyse plus détaillée par Sibley et Doane (2002) des motivations de B&N après la fusion dans le sens d'une augmentation des coûts des rivaux.

d'envisager l'équilibre après la fusion, on a considéré la situation en « première approche ». Cette approche suppose d'évaluer l'évolution des motivations de l'entreprise verticalement intégrée après la fusion⁸⁵. Elle consiste à comparer les profits tirés de la hausse des coûts de l'entreprise rivale en aval, au manque à gagner sur le marché de gros dû à la baisse des ventes sur ce marché. L'effet unitaire positif représente la marge unitaire au détail de B&N (le prix de vente au détail moins le coût marginal) multiplié par le ratio de diversion dû à la hausse du prix pour les entreprises rivales (hausse du coût des rivaux). La stratégie de hausse des coûts des entreprises rivales a un coût : le manque à gagner unitaire sur la marge de gros (le prix de gros moins le coût marginal) multiplié par 1 moins le ratio de diversion⁸⁶.

On peut aussi calculer le ratio critique de diversion en posant au départ que le profit est égal au manque à gagner. Si le ratio de diversion est positif, la stratégie de hausse des coûts des entreprises rivales est alors rentable, de même qu'une hausse du prix sur le marché de gros. Si le ratio de diversion est négatif, cette stratégie n'est pas rentable. Pour calculer le ratio critique de diversion, il faut disposer d'estimations sur les prix et les coûts marginaux. Ces estimations doivent tenir compte de la motivation d'augmentation des coûts des entreprises rivales⁸⁷.

Cette analyse, conjuguée à une analyse par la FTC de la concurrence en amont après la fusion, donne à penser qu'il y a possibilité d'augmenter nettement les prix en amont. La FTC a considéré et conclu que les options disponibles pour les autres vendeurs de livres au détail en aval « n'étaient pas très bonnes » si B&N s'engageait dans une stratégie d'augmentation des coûts des entreprises rivales. C'est une conclusion logique par rapport à la constatation que le prix en amont allait probablement augmenter après la fusion et que les effets sur les autres détaillants seraient importants. En outre, l'ampleur des efficiences dues à l'élimination de la double marge était limitée puisque B&N était déjà verticalement intégré et ces efficiences n'étaient pas nécessairement liées spécifiquement à la fusion : elles pouvaient être réalisées par croissance interne.

La FTC était aussi préoccupée par le fait que B&N, une fois intégré, aurait accès à des informations commerciales sensibles sur les détaillants d'aval que le groupe fournissait. En particulier, étant donné qu'Ingram distribuait du crédit, B&N aurait accès à des informations financières sur ses rivaux et, en consultant le contenu des commandes, B&N aurait des renseignements sur les titres et les quantités de livres achetés à Ingram. En ayant accès à ces informations, on pouvait craindre que B&N bénéficie gratuitement des investissements d'autres vendeurs de livres au détail destinés à développer la demande. Un tel avantage pour B&N diminuerait l'intérêt pour les autres détaillants de procéder à ces investissements.

Face à l'opposition, rapportée par la presse, de la FTC à l'opération, B&N a renoncé au rachat d'Ingram. B&N a consacré les 600 millions USD au développement de son système existant de distribution. B&N étant déjà intégré, l'élimination de la double marge devrait avoir des effets moins

⁸⁵ Voir en 2.3(a) une discussion de l'analyse en première approche qui n'étudie que les motivations de l'entreprise qui s'apprête à s'intégrer verticalement, comparée à une analyse d'équilibre qui considère les effets de l'intégration après que toutes les entreprises ont réagi au changement de comportement de l'entreprise verticalement intégrée.

⁸⁶ Le ratio de diversion représente la fraction de la demande au détail qui va vers B&N, sur le manque à gagner unitaire au niveau des ventes en gros. Le manque à gagner sur le marché de gros est égal à un moins le ratio de diversion.

⁸⁷ Dans la meilleure des estimations, le ratio de diversion est de 0.114. Sur la base des parts de marché des détaillants indépendants, l'estimation est de 0.435, un niveau nettement supérieur à la valeur critique. Ces estimations partent du postulat qu'Ingram détient une position de monopole en amont. Sibley et Doane (2002) suggèrent d'apporter un ajustement pour avoir une idée approchante de la réaction des grossistes concurrents.

importants sur l'expansion de la production en aval : cette intégration réduit non seulement l'expansion de la production de B&N après la fusion, elle diminue aussi la demande en amont émanant de ses rivaux non intégrés et il est alors plus probable que cette diminution ne compense plus l'effet sur les prix d'amont de la motivation de B&N à augmenter les coûts de ses rivaux. En termes nets, l'effet est plus probablement une hausse des prix d'amont.

4.2 *Premdor*

En 2000, Premdor s'est engagé à racheter pour 500 millions USD Masonite Corporation⁸⁸. Premdor était le plus gros fabricant mondial de portes d'intérieur moulées, avec un chiffre d'affaires de plus de 300 millions USD aux États-Unis en 2000. Masonite fabriquait des films de contre-plaqué pour porte moulée (appelés ci-après « les films »), films qui sont des produits intermédiaires dans la fabrication des portes d'intérieur moulées. En 2000, Masonite réalisait aux États-Unis des ventes de films pour portes moulées d'environ 230 millions USD. Au cours de l'été 2001, les services antitrust américains ont demandé que Premdor se désinvestisse de l'une des deux usines de Masonite aux États-Unis.

Un film de contre-plaqué pour porte est constitué d'un matériau fibreux tel que des copeaux ou de la sciure de bois. Ce matériau est découpé en feuilles et appliqué par collage sur des panneaux et textures. Le film donne l'impression que la porte est faite de bois massif, mais il est beaucoup moins cher à fabriquer qu'une porte en bois plein. Deux films, l'un pour le devant et l'autre pour l'arrière de la porte, appliqués au cadre de porte, donnent une porte d'intérieur moulée⁸⁹. Les films représentent jusqu'à 70 % du coût d'une porte d'intérieur moulée.

Au moment de l'opération, il y avait deux entreprises majeures sur le marché des films pour portes (marché amont) et des portes moulées (marché aval). Une entreprise non identifiée, non partie à l'opération et n'ayant pas déposé de réclamation, était déjà verticalement intégrée⁹⁰. Premdor détenait 40 % du marché des portes moulées. Son principal concurrent était In Door. Il existait aussi une frange d'entreprises concurrente au nombre de neuf, dont aucune ne détenait de part de marché supérieure à 5 %.

Masonite et In Door fabriquaient la grande majorité des films. Masonite était la plus importante des deux entreprises, avec plus de 50 % du marché. Premdor était son plus gros client. Le troisième fabricant de films de porte, avec moins de 10 % du marché, était une joint venture qui incluait Premdor. L'intégralité de la production de la joint venture était vendue à Premdor. In Door et Masonite vendaient toutes deux à des fabricants de porte non intégrés en aval.

Le ministère américain de la Justice a allégué que le marché risquait de faire l'objet de politiques coordonnées : il était concentré et le produit était homogène. De plus, il y avait eu en 1994 sur le marché aval des condamnations pour fixations abusives de prix. Selon le ministère, l'opération, si elle se réalisait, aurait pour conséquence d'atténuer quatre restrictions à une politique coordonnée :

⁸⁸ Nos sources documentaires sont : *US v. Premdor*, Exposé des conséquences sur la concurrence et plainte, Civil n° : 01-01CV696, Tribunal de district de Columbia, 3 août 2001; Katz (2002), Dick (2003) et Riordan (2005).

⁸⁹ La plainte fait état de deux marchés de produits : celui des films de contre-plaqué pour portes d'intérieur moulées, et celui des portes moulées. Le marché géographique d'amont concerné est celui des États-Unis, alors que les marchés d'aval sont de nature locale. On a déterminé la portée géographique des marchés en fonction des coûts de transport.

⁹⁰ Suivant en cela Katz (2002) et dans un souci de clarté, nous appelons cette entreprise In Doors.

- (i) Changement des motivations pour Masonite. Avant la fusion, Masonite empêche toute coordination sur le marché aval en augmentant ses ventes aux entreprises concurrentes. Après l'opération, Masonite n'est plus incitée à augmenter les dites ventes. Le ministère de la Justice a fait les observations suivantes⁹¹ :

En outre, Masonite exerce une pression concurrentielle importante sur le marché des portes d'intérieur moulées. Premdor et l'entreprise extérieure à l'opération sont incitées à coordonner la fixation de leurs prix en diminuant la production. Cette coordination ferait diminuer la production de portes d'intérieur moulées et ferait monter les prix des portes. Cependant, cette diminution de la production réduirait aussi la production de films pour portes d'intérieur moulées aux États-Unis, portant ainsi préjudice à Masonite. Par conséquent, Masonite aurait une motivation pour perturber cette coordination en augmentant ses ventes aux autres fabricants de portes non intégrés verticalement. Après l'opération envisagée, un ensemble Premdor/Masonite verticalement intégré n'aurait pas la même motivation à empêcher, par une augmentation des ventes aux fabricants de portes non intégrés, une coordination sur le marché des portes d'intérieur moulées. En effet, les deux entreprises une fois réunies deviendraient concurrentes de ces fabricants de portes et bénéficieraient d'une augmentation des prix des portes d'intérieur moulées.

- (ii) Changement des motivations pour Premdor. Selon le ministère américain de la Justice, l'expansion de Premdor en amont sur le marché des films pour portes restreignait les possibilités pour Masonite et In Door de se coordonner sur le marché amont. Après la fusion, Premdor serait moins incitée à augmenter sa production en amont car elle bénéficierait de prix plus élevés en amont, en tant que fournisseur intégré du marché aval⁹².
- (iii) Asymétrie de coûts. Avant la fusion, In Door limitait la coordination car sa structure de coûts moins lourde était une incitation à baisser ses prix pour avoir une plus grande part de marché. Or, la fusion accroîtrait les possibilités de coordination étant donné que cette opération permettrait une parité des coûts. Premdor aurait des coûts identiques après la fusion en raison de l'élimination de la double marge.
- (iv) Transparence. Avant la fusion, les asymétries au niveau de l'information empêchaient la coordination. Ces asymétries se trouveraient éliminées par cette fusion. Comme l'a fait observer le ministère américain de la Justice :

En fin de compte, les asymétries d'information entre les entreprises sur les marchés amont et aval empêchent une coordination. Masonite est spécialisée dans la production de films pour portes d'intérieur moulées, alors que son concurrent le plus sérieux, l'entreprise qui n'est pas partie à la fusion, est présent à la fois sur le marché des films pour portes d'intérieur moulées et sur celui des portes d'intérieur moulées. Les différences entre les deux entreprises en termes d'intégration verticale créent des asymétries d'information qui

⁹¹ *US v. Premdor*, exposé des conséquences sur la concurrence, jugement civil n° : 01-01CV696, Tribunal de district de Columbia, 3 août 2001, page 6.

⁹² Selon Riordan, cela est semblable à l'analyse d'après laquelle, une fois la fusion réalisée, Premdor est incitée unilatéralement à augmenter les coûts de ses rivaux en aval, en d'autres termes, à exclure ses rivaux du marché du bien intermédiaire. Voir Riordan (2005, p. 47).

compliquent la tâche de ces entreprises si elles veulent surveiller et sanctionner les écarts par rapport à la coordination voulue sur les conditions de vente des films pour portes d'intérieur moulées. Par exemple, étant donné que l'entreprise qui n'est pas partie à la fusion utilise pour elle-même la plupart des films pour portes qu'elle produit, Masonite n'est pas en mesure de constater un prix de marché pour ces films utilisés en interne et de connaître le nombre de films produit par cette entreprise. De la même manière, Masonite ne vend pas sur le marché aval, n'a pas d'information sur la production de la société qui n'est pas partie à la fusion et sur les prix du marché des portes d'intérieur moulées... L'acquisition projetée éliminerait en grande partie l'incertitude sur ces informations en cumulant l'information de Premdor sur le marché aval à l'information de Masonite sur le marché amont, ce qui augmenterait d'autant la capacité de l'entité fusionnée à repérer les écarts de l'entreprise extérieure à la fusion par rapport à toute augmentation de prix coordonnée.

L'accord qui a réglé l'affaire a été rédigé en sorte que Premdor puisse bénéficier des efficiences de la fusion verticale – l'internalisation de la double marge – tout en modérant les incitations à une plus grande coordination. C'est ce qui a été fait en n'autorisant Premdor à ne racheter que les actifs qui lui étaient nécessaires pour que l'entreprise réponde à ses besoins du moment et en exigeant la cession des autres actifs.

4.3 *L'exclusion et l'évolution de la position de la FTC*

L'évolution de la politique de la FTC' en matière d'application des règles sur les fusions verticales et l'influence de la théorie économique sur l'analyse des faits sont très bien illustrées par trois cas relativement similaires, deux dans le marché de l'automatisation de la conception électronique (EDA ou Electronic Design Automation) et un concernant le test de Pap en phase liquide. Les deux cas relatifs à l'automatisation de la conception électronique sont l'examen de l'acquisition par Cadence Design Systems de Cooper & Chyan Technology (CCT) en 1997 et le rachat de Avant! Par Synopsis en 2002. L'affaire concernant le test de Pap en phase liquide portait sur le rachat par Cytyc de Digene, également en 2002⁹³.

⁹³ Sources documentaires pour les trois cas :

Cadence/CCT :

Sher (2002); *Affaire Cadence Design Systems, Inc.* Ordonnance judiciaire, plainte et analyse de la proposition d'ordonnance pour contribuer au débat, Dossier FTC n° 971-0033 (1997) ; « règlement édicté par la FTC avec Cadence, Cooper & Chyan pour sauvegarder la concurrence dans les logiciels de conception automatisée des puces » Communiqué de presse de la FTC (8 mai 1997) ; déclaration du Président Robert Pitofsky et des membres de la commission Janet D. Steiger et Christine A. Varney dans l'affaire Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (8 mai 1997) ; déclaration du membre de la commission Mary L. Azcuenaga approuvant en partie et n'étant pas d'accord en partie dans l'affaire Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (8 mai, 1997) ; opinion dissidente du membre de la commission Roscoe B. Starek III dans l'affaire Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (8 mai 1997).

Synopsis/Avant! :

J. Simmons, Commission fédérale du commerce, « Merger Enforcement at the FTC, » remarques préparées pour le dixième congrès annuel de l'Annual Golden State Antitrust and Unfair Competition Law Institute (24 octobre 2002) ; « Votes de la Commission fédérale du commerce pour clore l'enquête sur le rachat de Avant! Corporation par Synopsys, Inc. » Communiqué de presse de la FTC (26 juillet, 2002) ; Muris (2003) ; Muris (2005) ; Scheffman and Higgins (2004). Déclaration du membre de la commission Mozelle W. Thompson dans Synopsys Inc./Avant! Corporation (July 26, 2002) ; Déclaration du membre de la commission Thomas B. Leary dans Synopsys Inc./Avant! Corporation (July 26, 2002) ; Déclaration du

Cadence a été autorisé à procéder à l'acquisition, mais seulement après avoir pris des engagements importants. Au bout de huit mois, la FTC a clos son enquête sur le rachat de Avant! par Synopsys, en donnant son feu vert⁹⁴. La FTC a voté en faveur d'une injonction préliminaire bloquant le rachat de Digene par Cytac, et l'opération a ensuite été abandonnée.

4.3.1 *Cadence/CCT*

En 1996, Cadence a annoncé son intention de racheter CCT pour 400 millions USD. À l'époque, Cadence était l'un des deux grands fournisseurs de logiciel d'implantation de circuits intégrés — l'autre étant Avant! — et CCT était propriétaire du seul outil de routage de circuit imprimé de forme contrainte⁹⁵. La conception d'un circuit imprimé comprend généralement deux aspects : (i) la description logique du circuit (ii) la carte physique de la galette sur laquelle se trouve le circuit imprimé. La partie frontale du circuit, à savoir la description logique du circuit imprimé, est réalisée à l'aide d'un logiciel de conception, tandis que « l'arrière-plan », la carte physique du circuit imprimé, fait appel à des logiciels d'implantation qui, entre autres choses, placent sur le circuit et routent les composants électroniques et leurs connexions. Le logiciel utilisé pour l'arrière-plan du circuit est souvent un environnement d'implantation dans lequel les concepteurs des circuits imprimés utilisent des outils compatibles pour différentes fonctions (positionnement, routage, analyse et vérification).

Le chiffre d'affaires de Cadence pour les ventes mondiales de logiciels d'implantation de circuit imprimé était d'environ 70 millions USD annuels, alors que le chiffre d'affaires de CCT pour les outils de routage était de 13 millions USD. La FTC craignait qu'après la fusion, Cadence ne soit incitée à exclure du marché d'autres logiciels de routage en les rendant incompatibles avec son propre environnement d'implantation. En raison de la position dominante de Cadence — et de sa clientèle d'utilisateurs — une exclusion obligerait un concurrent fabriquant des outils de routage et désirant s'introduire sur le marché à entrer aux deux niveaux, c'est-à-dire au niveau des logiciels d'implantation et à celui des outils de routage. À l'époque, on savait qu'il y avait au moins une autre entreprise qui avait mis au point un outil de routage susceptible de concurrencer celui de CCT. La FTC affirmait donc que, si Cadence devait agir selon ses intérêts, l'opération dresserait des obstacles à l'entrée sur le marché du routage, conduisant à une nette diminution de la concurrence ou au maintien d'un monopole dans les outils de routage.

La FTC n'a pas réellement pris en compte les motivations de Cadence à rendre les autres routeurs incompatibles. En fait, la Commission a particulièrement insisté sur le fait que, dans le passé, Cadence avait encouragé la compatibilité avec son environnement pour des outils que la société ne fournissait pas elle-même et avait fait le contraire pour des outils concurrents. La FTC a autorisé l'opération, à la

membre de la commission Sheila F. Anthony dans Synopsys Inc./Avant! Corporation (July 26, 2002) ; and Sher (2002).

Cytac/Digene:

J. Simmons, Commission fédérale du commerce, « Merger Enforcement at the FTC, » remarques préparées pour le dixième congrès annuel du Golden State Antitrust and Unfair Competition Law Institute (24 octobre 2002) ; « La FTC cherche à bloquer le rachat de Digene par Cytac » Communiqué de presse de la FTC (24 juin 2002) ; Muris (2003) ; Muris (2005) ; Scheffman et Higgins (2004).

⁹⁴ L'enquête a eu deux caractéristiques intéressantes : (i) elle n'a pas été close avant sept semaines après la fin de l'opération suite à l'échéance de la période obligatoire d'attente en vertu de la loi Hart Scott Rodino (ii) dans des déclarations séparées, les membres de la Commission ont indiqué qu'ils surveilleraient le comportement de Cadence à l'avenir pour prévenir tout agissement anticoncurrentiel et ont instamment demandé aux concurrents et aux consommateurs d'aider la FTC dans ses efforts de surveillance.

⁹⁵ Un circuit intégré est une puce de la taille d'un timbre poste (ou plus petit encore !), un composant électronique que l'on trouve partout, depuis le grille-pain jusqu'aux ordinateurs personnels.

condition que Cadence fasse en sorte que son environnement d'implantation soit ouvert à tous les fabricants d'outils d'implantation. Selon la FTC, cette décision devait atténuer les effets de l'exclusion, sans sacrifier les efficiences associées à l'intégration verticale.

4.3.2 *Synopsis/Avant!*

En 2002, Synopsis était le fournisseur dominant de logiciels frontaux pour les circuits, avec une part de marché d'environ 90 %. Avant! était l'un des deux principaux fournisseurs de suites d'outils pour l'arrière-plan des circuits, avec une part de marché de 40 %. Son principal concurrent était Cadence. L'opération soulevait le même genre de préoccupation que la fusion Cadence/CCT : Synopsis allait-elle ainsi exclure les autres fournisseurs d'outils pour l'arrière-plan des circuits, du marché de son logiciel frontal, en rendant ce logiciel incompatible ou difficilement compatible, ce qui, étant donné l'importance du délai de mise sur le marché, pouvait s'avérer tout aussi efficace en termes d'exclusion.

La FTC a structuré son enquête en posant deux questions : (i) Synopsys avait-elle une motivation pour favoriser la position sur le marché de Avant! en rendant plus difficile la communication entre les autres outils pour l'arrière-plan des circuits et le logiciel frontal de Synopsys des circuits ? (ii) dans l'affirmative, cette stratégie aurait-elle un effet négatif sur la concurrence et porterait-elle préjudice aux consommateurs ?

La FTC n'a jamais été plus loin. En effet (i), la FTC n'a pas pu « mettre le doigt sur des preuves concrètes » de la pertinence de la théorie « plausible » selon laquelle l'exclusion (i) entraînerait une diminution de la concurrence sur le marché de l'arrière-plan (ii) ou affaiblirait suffisamment les concurrents existants, en sorte que cela diminuerait la probabilité que ces concurrents rivalisent avec Synopsys sur le marché amont. Il n'y avait aussi pas suffisamment d'éléments pour évaluer la possibilité que tout préjudice anticoncurrentiel soit contrebalancé par les efficiences de l'intégration. Au lieu de cela, la FTC a fait observer que Synopsis avait pour politique de rendre son logiciel compatible. De plus, selon les parties à l'affaire et les fabricants de circuits imprimés (les clients), il y avait une grande latitude pour dégager des efficiences en intégrant plus étroitement les outils frontaux et d'arrière-plan. Ils tablaient particulièrement sur le fait qu'une intégration plus étroite leur permettrait de concevoir plus efficacement « des circuits imprimés de plus en plus petits et contenant de plus en plus de composants ». On s'attendait d'ailleurs à ce que la génération suivante de plates-formes EDA d'automatisation de la conception électronique intègre les logiciels frontaux et d'arrière-plan, mais le moment de cette intégration et sa réalisation éventuelle n'étaient pas encore déterminés.

4.3.3 *Cytc/Digene*

Cytc et Digene fabriquaient et vendaient des tests de dépistage du cancer du col de l'utérus. Cytc détenait 93 % du marché du test de Pap en phase liquide. TriPath était la seule autre entreprise américaine autorisée à vendre le test de Pap en phase liquide. Trois autres entreprises étaient en train de mettre au point des tests, mais il était peu probable qu'elles entrent sur ce marché dans les deux années suivantes. Digene était le seul fabricant d'un test ADN pour le papillomavirus humain. Il était peu probable que le monopole de Digene sur les tests ADN soit menacé par l'entrée d'un concurrent sur le marché. Il semble que le papillomavirus soit la cause de la plupart des cancers du col de l'utérus et le test de Digene sert de second outil de dépistage lorsque les résultats du test de Pap en phase liquide sont équivoques.

Le test de Digene est normalement pratiqué sur un échantillon résiduel d'un test de Pap en phase liquide. De ce point de vue, les deux outils de dépistage sont complémentaires. La préoccupation de la FTC était qu'après la fusion, Digene rende son test incompatible avec les tests de Pap en phase liquide concurrents. Cela pouvait, disait-on, se faire de deux manières : (i) pour utiliser les deux tests sur un même échantillon, il fallait une autorisation des autorités réglementaires, autorisation difficile à obtenir sans le concours de Digene (ii) en ne proposant pas le test de Digene de façon indépendante ou en ne le proposant

pas à un prix permettant à un autre fournisseur de test de Pap en phase liquide d'être compétitif par rapport au prix global des tests Cytyc/Digene. En l'absence de compatibilité, les autres fournisseurs de test de Pap en phase liquide se trouveraient exclus du marché, TriPath inclus. La FTC n'avait pas de preuves d'efficacité et les préoccupations des représentants des clients concernant les effets de la fusion sur la concurrence rejoignaient la position théorique de la FTC sur le sujet. La FTC a donc voté dans le sens d'une demande d'injonction pour bloquer l'opération, arguant que celle-ci affaiblirait la concurrence et augmenterait le prix du premier test de dépistage du cancer du col de l'utérus. En conséquence, la fusion a été abandonnée.

4.3.4 Commentaires sur ces affaires

Le vote de la FTC dans l'affaire Cadence/CCT a été de 3 contre 2. L'un des membres de la Commission ayant émis un vote dissident a fait observer que la position théorique sous-tendant la décision n'était pas compatible avec la théorie économique. Cette personne a notamment exposé que Cadence avait une motivation pour ne pas pratiquer l'exclusion, mais au contraire pour soutenir la concurrence et la variété sur le marché du routage, puisque cela lui permettrait de facturer des prix plus élevés pour son logiciel d'environnement d'implantation⁹⁶. De plus, sur le fondement de la théorie de la sauvegarde du monopole dont il a été discuté plus haut, le souci n'aurait pas porté sur la monopolisation du marché du routage, mais sur le fait de savoir si l'opération préserverait le pouvoir de monopole de Cadence en amont sur le marché de l'environnement d'implantation. Cela aurait pu être le cas si la monopolisation du marché des outils de routage avait conduit à l'éviction de Avant!, son concurrent en amont.

Les faits de l'opération Synopsis/Avant! paraissent presque exactement les mêmes que ceux de Cadence/CCT, sauf que la position de Synopsis sur le marché amont était plus solide. En effet, c'était la seule entreprise dominante. Toutefois, la FTC, tout en exprimant ses préoccupations sur le marché des outils d'arrière-plan, a fait également état de son souci d'une dissuasion possible à l'entrée sur le marché des suites de logiciels intégrés, qui affecterait le logiciel d'amont de Synopsis.

Dans l'affaire Digene/Cytyc, les motivations qui président à une exclusion après la fusion sont bien plus claires si l'on admet que Digene n'aurait pas été en mesure de dégager tous ses profits de monopole en se contentant simplement de fixer le prix de son produit au juste niveau⁹⁷. La raison en est que ce produit n'est utilisé que si les résultats du test de Pap en phase liquide sont ambigus. Il apparaît donc raisonnable de dire, sans aller plus avant, que Digene aurait été en mesure d'augmenter ses profits en monopolisant ou en conservant son monopole sur le test de Pap en phase liquide, en rendant son test incompatible avec les autres tests de Pap en phase liquide⁹⁸.

La comparaison des deux décisions, Digene/Cytyc et Synopsis/Avant!, toutes deux concernant une entreprise détentrice d'un important pouvoir de marché, fait ressortir six différences majeures au niveau des faits qui expliquent que les deux décisions n'aient pas été semblables⁹⁹ :

- (i) La théorie du préjudice. Dans l'affaire Digene/Cytyc, on voyait clairement comment les fournisseurs concurrents du test de Pap en phase liquide subiraient un préjudice, alors que dans l'affaire Synopsis/Avant!, cela n'était pas si manifeste. L'intégration des deux produits donnait la perspective d'avantages importants en

⁹⁶ Opinion dissidente du membre de la Commission Roscoe B. Starek III dans l'affaire Cadence Design Systems, Inc./Cooper & Chyan Technology Inc. (8 mai 1997).

⁹⁷ Cette observation est faite par Scheffman et Higgins (2004, p. 976).

⁹⁸ Voir Section 2.4(c)(iii).

⁹⁹ Muris (2003), Muris (2005), ainsi que Scheffman et Higgins (2004).

termes d'efficience, mais on ne voyait pas clairement quels changements cela entraînerait et quels seraient les effets sur les produits concurrents d'arrière-plan.

- (ii) Les motivations de l'entreprise intégrée pour pratiquer l'exclusion sont différentes d'une affaire à l'autre. Dans Digene/Cytec, les motivations pour l'exclusion étaient cohérentes avec la théorie. Dans Synopsis/Avant! la menace d'une entrée sur le marché amont ne constituait pas de façon manifeste une motivation pour l'exclusion comme le suggérait la théorie.
- (iii) L'intensité de la concurrence en amont. Dans l'affaire Synopsis/Avant!, les autres entreprises d'amont exerçaient une concurrence limitée, alors que dans l'affaire Digene, il n'y avait pas d'autre alternative pour cette dernière. L'effet de l'exclusion était donc plus faible dans le cas Synopsis/Avant!¹⁰⁰.
- (iv) Le moment où l'effet anticoncurrentiel se produit. Dans Cytec/Digene, cet effet était immédiat : l'exclusion de TriPath. Pour Synopsys, l'effet était beaucoup plus aléatoire et plus lointain dans le temps.
- (v) Efficacités potentielles. Les efficacités dans l'affaire Cytec/Digene n'étaient pas un facteur absolument déterminant, alors que les efficacités potentielles l'étaient dans Synopsys/Avant!.
- (vi) L'opinion des consommateurs sur le marché aval. Dans Cytec/Digene, les consommateurs ont exprimé leur préoccupation, alors que dans Synopsys/Avant!, ils approuvaient l'opération.

4.4 *Coca-Cola et Cadbury Schweppes au Canada*

En décembre 1998, la société Coca-Cola a conclu un accord avec Cadbury Schweppes portant sur le rachat, pour environ 1.85 milliard USD, des activités internationales de Cadbury Schweppes dans les boissons, à l'exclusion de trois pays¹⁰¹. L'accord comprenait aussi des marques de boissons gazeuses non alcoolisées, telles Canada Dry, Schweppes, Orange Crush et Dr Pepper¹⁰². Après avoir fait l'objet d'enquêtes antitrust dans plus de 100 pays, la fusion était quasiment réalisée 18 mois plus tard. Coca-Cola avait racheté les activités de boissons de Cadbury Schweppes dans environ 160 pays, pour un prix d'à peu près 1 milliard USD. L'opération fut cependant abandonnée en raison de problèmes au niveau des pratiques anticoncurrentielles dans la plupart des pays d'Europe, en Australie, au Mexique et au Canada.

La production et la vente de boissons gazeuses non alcoolisées débutent par la fabrication et la vente de concentrés aux entreprises de mise en bouteille. Celles-ci procèdent à la carbonatation, ajoutent de l'eau et un édulcorant au concentré et mettent le produit fini en bouteilles qui sont vendues pour consommation

¹⁰⁰ Il se peut que la présence d'entreprises rivales de Synopsis en amont l'incite davantage à pratiquer l'exclusion si cette exclusion n'entraîne pas seulement l'éviction des concurrents en aval de Avant!, mais aussi l'éviction des rivaux de Synopsis en amont. Voir Section 2.4(c)(i).

¹⁰¹ Les trois pays étaient les États-Unis, la France et l'Afrique du Sud.

¹⁰² Pour la présentation de cette affaire, nous nous sommes fondés sur Abere *et al.* (2002), dont nous nous inspirons étroitement.

finale. Par ailleurs, les fabricants de concentré ou l'entreprise de conditionnement en bouteilles fournissent du sirop pour les bars et restaurants. Le sirop est alors dilué dans de l'eau et la carbonatation est ajoutée par l'entreprise de distribution en fontaine. Au Canada, les parts du marché des boissons gazeuses non alcoolisées détenues par les trois marques productrices étaient au moment de l'opération de 40 % pour Coca-Cola, de 34 % pour PepsiCo (Pepsi) et d'un tout petit peu moins de 10 % pour Cadbury Schweppes.

Au Canada, Coca-Cola distribue du concentré pour ses produits par un réseau d'entreprises de mise en bouteille (Red System). Ces entreprises sont essentiellement propriété de Coca-Cola Enterprises dont Coca-Cola détient une part importante. Ses marques principales sont une boisson à base de cola et une boisson gazeuse non alcoolisée à base de citron vert, Coca-Cola et Sprite. Pepsi approvisionne en concentré un réseau séparé de mise en bouteille (Blue System). Les marques principales de Pepsi au Canada sont également une boisson à base de cola et une boisson gazeuse non alcoolisée à base de citron vert, Pepsi et 7UP.

Cadbury Schweppes n'avait pas d'usine de mise en bouteilles au Canada. Par l'intermédiaire de sa filiale canadienne, la société approvisionnait en concentré les entreprises de mise en bouteille Red et Blue Systems et leur accordait des licences sur ses diverses marques. Ses marques principales sont deux boissons gazeuses au gingembre, Schweppes et Canada Dry, et deux boissons gazeuses non alcoolisées à l'arôme d'orange, Orange Crush et C-Plus. Ces deux marques étaient associées sur l'ensemble du Canada. Dans toutes les régions, l'une des deux paires de boissons est licenciée auprès de Red System, l'autre paire auprès de Blue System. Ni Coca-Cola ni Pepsi ne produisaient des quantités un tant soit peu importantes de boisson gazeuse au gingembre ou boisson gazeuse non alcoolisée à l'arôme d'orange.

La préoccupation du Bureau canadien de la Concurrence était que l'opération mettrait Coca-Cola en situation de devenir fournisseur d'un produit intermédiaire auprès d'un rival important, avec la possibilité pour Coca-Cola de procéder à une exclusion partielle ou totale. Plus précisément, le Bureau craignait que Red System n'exclue Blue System de l'accès à ses marques Cadbury Schweppes. Red System pouvait pratiquer l'exclusion en ne fournissant plus de concentré à Blue System. Il y a diminution possible de la pression concurrentielle par Blue System en cas d'effet de portefeuille sur le marché des bars et restaurants : si les détaillants exigent une gamme complète d'arômes et si Blue System n'est pas en mesure de fournir une gamme complète de produits au cas où il perdrait le bénéfice des marques Cadbury Schweppes, cela fait baisser sa demande et augmente la demande auprès de Red system, permettant à ce dernier de facturer des prix plus élevés pour ses boissons gazeuses non alcoolisées¹⁰³.

En considérant les motivations d'une exclusion complète, l'approche théorique du cas faite par le Bureau dépendait d'un effet de portefeuille au niveau du marché des bars et restaurants. De manière générale, les commerçants sur ce marché traitent exclusivement avec un fournisseur de boissons gazeuses non alcoolisées. Il y a donc un effet de portefeuille si la demande en gros de ces distributeurs dépend non seulement du nombre relatif d'arômes que peut offrir une entreprise de mise en bouteilles, mais aussi des principaux arômes de la marque Cadbury Schweppes (orange et boissons au gingembre/mixtes). Si l'effet de la demande est important, l'élimination des boissons à arôme orange et des boissons au gingembre/mixtes de Blue System peut être pour ce dernier très désavantageux en termes de concurrence.

¹⁰³

Le Bureau de la concurrence a défini trois marchés de produits pour boissons gazeuses non alcoolisées par chaîne de distribution. Les trois chaînes de distribution sont les épiceries, les magasins de proximité et self-services, et les restaurants, bars, cinémas, etc.). Pour l'application de sa théorie sur la diminution de la pression concurrentielle, le Bureau n'a pas inclus les épiceries en raison de la concurrence des marques propres. Dans notre exposé, nous ne prenons en compte que les restaurants, bars et cinémas. Voir Abere *et al.* pour une discussion de la théorie de la diminution de la pression concurrentielle dans les magasins de proximité qui ne va pas dans les sens de la définition du marché de produit donnée par le Bureau de la concurrence, et pour une discussion de l'effet coordinateur potentiel de l'opération.

Cette exclusion aurait pour effet d'augmenter le prix des ventes et les quantités vendues de boissons gazeuses non alcoolisées de Red Sytem aux bars et restaurants et de diminuer le prix et les volumes de vente de boissons gazeuses non alcoolisées de Blue System.

L'ampleur de ces effets sur les prix, le préjudice concurrentiel subi par les entreprises de mise en bouteille de Blue System et les motivations à exclure, dépendent toutefois de l'importance que revêt, au niveau de la demande, le maintien pour ces entreprises d'un portefeuille complet d'arômes comprenant les arômes qu'elles possèdent au titre de la marque Cadbury Schweppes. Si cet effet est peu important, il est improbable que Coca-Cola soit motivé pour empêcher les entreprises de mise en bouteille d'avoir accès à ces marques : l'augmentation des profits au niveau des ventes de boissons gazeuses non alcoolisées de Red System aux bars et restaurants ne compense pas le manque à gagner sur les ventes de concentré aux entreprises de mise en bouteille de Blue System auxquelles il serait ainsi renoncé.

L'ampleur de l'effet sur la demande dépend de la mesure dans laquelle les consommateurs se tourneront vers d'autres détaillants ou réduiront leur consommation de l'ensemble des boissons si un détaillant ne vend pas des boissons de marque Cadbury Schweppes. D'après la part que représentent les boissons à arôme d'orange et les boissons à arôme de gingembre/mixtes dans le total des ventes de boissons gazeuses non alcoolisées (et particulièrement des ventes aux bars et restaurants), ces arômes ne sont pas un facteur déterminant de choix du commerce par les consommateurs. En effet, il est peu probable que le choix d'une pizzeria se fasse en fonction de celle qui propose des boissons à l'arôme d'orange ou de celle qui propose telle ou telle marque de boisson à l'arôme d'orange.

Cependant, si cet effet sur la demande était suffisant pour donner à Coca-Cola une motivation pour exclure un concurrent, les détaillants comme Blue System disposaient malgré tout de mesures de riposte. Pour un coût très modeste, les détaillants pouvaient conserver leur propre approvisionnement en boissons à l'arôme d'orange et en boissons à arôme gingembre/mixtes, en bouteilles ou canettes, ou s'approvisionner auprès de plusieurs fournisseurs de boissons gazeuses non alcoolisées, y compris des fournisseurs sous marque propre. Étant donné le nombre relativement faible de ces arômes et le nombre relativement limité d'établissements où les boissons aromatisées de marque Cadbury Schweppes n'ont qu'un nombre limité de substituts tout en étant importantes (essentiellement les boissons à arôme gingembre/mixtes utilisées en préparation de boissons alcoolisées), il semble que ces boissons puissent continuer d'être fournies en bouteilles dans ces gammes d'arômes.

Observation plus importante, Blue System pouvait répondre en introduisant ses propres marques de remplacement ou en prenant des licences sur des marques de tiers. Il était de toute évidence fortement incité à le faire si les boissons à arôme d'orange et/ou les boissons à arôme gingembre/mixtes avaient un effet important sur la demande des bars et restaurants. Blue System en particulier, dispose de la latitude nécessaire pour introduire des marques de remplacement déjà existantes dans d'autres pays et propriété de Pepsi (par exemple Slice, une boisson gazeuse non alcoolisée à arôme d'orange) ou autres (les boissons à arôme gingembre/mixtes de Seagram). Étant donné qu'à l'époque, les bars et restaurants ne faisaient pas de publicité pour les marques de boissons à arôme d'orange ou gingembre/mixte, la fidélité à une marque et les coûts publicitaires n'étaient pas un obstacle à l'introduction de marques de remplacement. D'ailleurs, pour les commerces qui sont le plus susceptibles d'avoir besoin d'une catégorie d'arôme de remplacement des boissons de marque Cadbury Schweppes, à savoir les bars qui servent des boissons au gingembre/mixtes, il n'y a souvent pas de publicité sur place et aucune indication des marques de boissons gingembre/mixtes que l'on peut consommer. Au moment de l'affaire, le débitant de boissons le plus important au Canada vendait aussi bien des boissons gazeuses non alcoolisées à l'arôme d'orange que des boissons à base de « root beer » (« racinette »).

Il faut admettre que Blue System pouvait aisément réagir de façon rentable en adoptant des marques de remplacement, ce qui limitait la capacité de Coca-Cola à exclure ou encore à augmenter les coûts de

Blue System. De telles mesures de la part de Coca-Cola auraient entraîné une perte sur les marges de ventes de concentré à Blue System, sans avantage compensatoire au niveau de la vente de boissons gazeuses non alcoolisées par Red System.

L'expérience dans le segment de la « root beer » donne des enseignements intéressants sur les efficacités, favorables à la concurrence, que l'on peut dégager d'une telle fusion verticale. Coca-Cola comme Pepsi ont introduit avec succès leur propre marque de root beer dans un intervalle d'un an. Auparavant, elles fournissaient chacune une marque de root beer dans le cadre de Cadbury Schweppes. Ces deux marques étaient A&W et Hires, toutes deux familières pour les consommateurs en raison de leur ancienneté et du fait qu'on les trouvait dans les épiceries, mais dont la publicité était limitée au niveau national. Les deux systèmes ont pu remplacer sans solution de continuité leurs root beers par des marques sous licence Coca-Cola (Barq's) et PepsiCo (Mug) et ce, avec des campagnes nationales de publicité relativement modestes. À cette occasion, Coca-Cola et PepsiCo ont relancé les ventes de root beer au Canada. On voit donc qu'une gestion efficace des marques conjuguée à des investissements relativement limités au niveau national peut déboucher sur un très fort développement de certaines catégories de boissons comme la root beer. On peut difficilement nier qu'un tel développement ait été favorable à la concurrence.

5. Implications pour l'application des règles en matière de fusion verticale

La présente partie du document examine sous l'angle de l'application des règles, notamment des principes directeurs en matière de fusion verticale, les effets économiques des fusions verticales sur la concurrence. Les théories économiques que nous avons passées en revue montrent que les fusions verticales peuvent avoir des effets négatifs sur le jeu de la concurrence, en portant préjudice aux consommateurs et/ou à l'efficacité. Pour une application réussie des règles de lutte contre les pratiques anticoncurrentielles et dans le but d'améliorer le bien-être, il est essentiel de repérer et de faire ressortir les opérations qui méritent une enquête et qui devraient être interdites en raison de leurs effets négatifs sur la concurrence, de celles dont les effets sont positifs ou neutres. L'aspect économique des effets des fusions verticales sur la concurrence peut être utile si cela permet concrètement de déterminer les fusions verticales qui entravent le libre jeu de la concurrence.

Nous avons mis en évidence un certain nombre de difficultés pour le passage du préjudice anticoncurrentiel théorique causé par les fusions verticales, à la détermination concrète des opérations qui posent un problème. Ces difficultés sont notamment les suivantes :

- (i) Les théories économiques qui sous-tendent le concept de préjudice anticoncurrentiel sont fondées sur des exemples¹⁰⁴. Elles indiquent ce qui pourrait arriver, et non pas ce qui arrivera forcément. Il existe donc trois sources possibles d'erreurs au niveau de l'application des règles ayant pour objectif le bien-être du consommateur ou l'efficacité. En premier lieu, on ne peut pas tester ces théories et, bien que l'on puisse démontrer qu'elles sont cohérentes avec les faits, cette cohérence n'exclut pas obligatoirement d'autres explications tout aussi cohérentes avec les faits, notamment que la fusion verticale a pour objectif de dégager des efficacités autres que sur les prix¹⁰⁵. En deuxième lieu, une fusion verticale a normalement deux effets : (a) un gain d'efficacité attribuable à l'internalisation de la double marge et, potentiellement, (b) une augmentation du prix du

¹⁰⁴ Voir Fisher (1989).

¹⁰⁵ Hovenkamp (2001, pp. 272-3). Les efficacités hors prix sont abordées à la section 2.6.

bien intermédiaire en amont¹⁰⁶. L'effet global de l'opération sur le bien-être dépend de celui des effets individuels qui domine et qui dépend à son tour de la valeur des variables exogènes dont nous avons parlé dans la discussion des modèles (par exemple, le nombre d'entreprises d'aval, l'élasticité de la demande, l'ampleur de la différenciation des produits, le niveau des coûts, etc.). Même si l'on peut déterminer le modèle qui convient, cela ne suffit pas. Il faut aussi déterminer si les paramètres qui correspondent à un préjudice contraire au libre jeu de la concurrence ont un rôle prédominant¹⁰⁷. En troisième lieu, il existe une dernière source d'erreurs : l'opération peut comporter d'autres efficiences hors prix qui nécessitent de mettre en parallèle l'importance et l'effet de ces efficiences, d'une part, et le préjudice causé par tout éventuel renforcement ou maintien du pouvoir de marché, d'autre part.

Les faits spécifiques d'un cas sont un élément important, de même que la question de savoir si ces faits suffisent à déterminer si l'opération entraîne un préjudice anticoncurrentiel. Il existe un risque que les juridictions antitrust et les autorités chargées de l'application des règles ne soient pas en mesure de gérer des théories complexes et de distinguer entre des explications concurrentes¹⁰⁸. Au lieu d'une évaluation soigneuse des faits (à supposer que l'on puisse apprécier les faits pertinents) et de la détermination des effets dominants, on risque d'utiliser les théories pour donner a posteriori une justification rationnelle à des opinions ou des pressentiments antérieurs¹⁰⁹. Enfin, les théories sont souvent formulées de manière très abstraite. Pour les utiliser concrètement, il faut simplifier les hypothèses, ce qui amène à douter des résultats plus généralement¹¹⁰.

- (ii) On trouve des exemples de fusion verticale partout, qu'elle résulte d'une croissance interne ou d'une fusion, et cette fusion améliore normalement l'efficacité. On part du postulat économique que les fusions verticales, au niveau théorique comme au niveau concret, sont positives pour l'efficacité ainsi que pour les consommateurs¹¹¹.

¹⁰⁶ Voir Cooper *et al.* (2005b) et Church (2005) pour une discussion sur l'importance de faire le solde net de ces deux effets avant de tirer des conclusions sur l'existence ou non d'un préjudice contraire au libre jeu de la concurrence.

¹⁰⁷ Cooper *et al.* (2005c, p. 47).

¹⁰⁸ Hovenkamp (2001, p. 269).

¹⁰⁹ Brennan (2004, p. 921).

¹¹⁰ Cooper *et al.* (2005a, p. 648) et M. Salinger, Commission fédérale du commerce, « Is it Live or Is It Memorex? » « Modèles de fusions verticales et application des règles antitrust », remarques préparées pour le séminaire de l'Association de l'économie concurrentielle sur les fusions non horizontales (7 septembre 2005) p. 4.

¹¹¹ C'est le premier des principes directeurs en matière de fusions non horizontales édicté par le Groupe consultatif auprès de la Commission européenne sur la politique de la concurrence. Voir le document de 2006. Ce postulat est conforté par deux récentes enquêtes sur les effets concrets des pratiques verticales restrictives et des fusions verticales. Cooper *et al.* (2005a, p. 658) ont étudié les travaux théoriques sur les pratiques verticales restrictives et les fusions verticales. Ils en concluent que (i) la plupart de ces travaux apportent la preuve que ces opérations sont favorables à la concurrence (baisse des prix et augmentation de la production) ; (ii) l'effet favorable à la concurrence trouve son origine dans l'élimination de la double marge ou autres économies de coûts (iii) il n'y a que de rares exemples où les conséquences de l'opération sont contraires au libre jeu de la concurrence et ce, de manière non ambiguë. Cette conclusion rejoint celle de Lafontaine et Slade (2005). Voir Scherer (2005) pour une critique de Cooper *et al.* fondée sur l'échantillon d'articles théoriques passés en revue par ces auteurs.

Ces considérations doivent servir aux mesures d'application des règles relatives à la lutte contre les comportements anticoncurrentiels, car elles informent sur le risque et le coût de deux types d'erreurs : la délivrance d'une injonction judiciaire erronée alors que la fusion visée par l'injonction est favorable à la concurrence, et la délivrance erronée d'un feu vert alors que la fusion est un obstacle au libre jeu de la concurrence. Une application optimale des règles implique de mettre en cause une fusion verticale si les inconvénients attendus d'une absence de contestation (autorisation erronée) sont supérieurs aux inconvénients attendus d'une mise en cause (injonction erronée)¹¹². La décision d'attaquer le bien-fondé d'une fusion doit donc dépendre des coûts et de la probabilité de chaque type d'erreur. L'évaluation de la probabilité d'erreur devrait dépendre du postulat de départ selon lequel une fusion verticale est normalement favorable à la concurrence, et des faits spécifiques. En raison du postulat de départ sur le caractère généralement « pro concurrentiel » des fusions verticales, on estime donc a priori qu'il est peu probable qu'une opération de ce type soit contraire au libre jeu de la concurrence et cela suppose que l'on incline vers l'idée que le coût d'une injonction erronée est supérieur au coût d'une autorisation erronée. Le coût d'une injonction erronée inclut non seulement le renoncement aux avantages de la fusion pour les consommateurs, mais aussi le fait de « refroidir » les aspirations à d'autres fusions verticales potentiellement favorables à la concurrence¹¹³.

On peut donc penser que, pour adresser une injonction à une fusion verticale, il faut que les faits soient particulièrement convaincants, correspondent à la théorie avancée à l'appui de l'allégation de préjudice anticoncurrentiel et, dans la mesure du possible, que cela exclue les théories concurrentes. La théorie du préjudice anticoncurrentiel doit être cohérente, c'est-à-dire que le comportement allégué après la fusion doit avoir pour effet de maximiser les profits, et cohérente avec les faits de l'espèce. Il n'est pas facile de satisfaire à l'exigence d'une théorie spécifique du préjudice et d'une démonstration convaincante de sa pertinence, plutôt que de supposer au départ qu'il y a un préjudice anticoncurrentiel en raison des parts de marché détenues ou de l'importance du marché objet de l'exclusion. Cependant, une telle attitude est cohérente avec l'idée que les fusions verticales sont efficaces. Les administrations chargées de l'application des règles et les juridictions chargées de la lutte contre les pratiques anticoncurrentielles doivent être assurées que la théorie du préjudice anticoncurrentiel est celle qui doit s'appliquer au cas dont il s'agit, et avoir la certitude que les faits spécifiques sont cohérents avec la constatation que, selon la théorie, une fusion verticale est anticoncurrentielle¹¹⁴.

Ces considérations ont amené des propositions en faveur d'une démarche structurée et raisonnée d'évaluation des effets des fusions verticales¹¹⁵. L'approche analytique d'une démarche raisonnée consiste à suivre les étapes suivantes :

(i) le critère du pouvoir de marché

La première étape consiste à déterminer s'il sera possible d'exercer un pouvoir de marché après la fusion¹¹⁶. Cela suppose que l'on définisse le marché et que l'on évalue les obstacles à l'entrée

¹¹² Cooper *et al.* (2005a, p. 659). Une autorisation erronée ou une décision erronée d'absence de caractère anticoncurrentiel de l'opération sont des erreurs de type II. Elles sous-estiment l'aspect dissuasif de la fusion sur la concurrence. Une injonction erronée ou décision erronée de caractère anticoncurrentiel de la fusion sont des erreurs de type I. Elles surestiment l'aspect dissuasif de la fusion sur la concurrence.

¹¹³ Ici encore, ce point est souligné par le Groupe consultatif auprès de la Commission européenne sur la politique de la concurrence (2006, Principe 5).

¹¹⁴ Cela va dans le sens de Winter (2005) qui met l'accent sur l'importance des faits de l'espèce et sur le rôle que peut jouer la théorie à assurer la cohérence des faits.

¹¹⁵ Voir Church (2004, pp. 8-10), Bishop *et al.* (2005) ainsi que Bishop *et al.* (2006).

sur ce marché. Pour les fusions verticales, on mettra généralement l'accent sur l'exercice d'un pouvoir de marché au niveau des consommateurs, c'est-à-dire au niveau de l'aval ou des marchés de détail. Conformément aux théories exposées plus haut, il s'agira de déterminer si ce pouvoir de marché est important et durable.

(ii) la théorie appliquée au cas d'espèce et le critère factuel

La deuxième étape consiste à déterminer une théorie cohérente qui explique les raisons pour lesquelles la fusion horizontale préserverait, renforcerait ou susciterait un pouvoir de marché en aval ayant des effets anticoncurrentiels, c'est-à-dire portant préjudice aux consommateurs ou provoquant des inefficiences. Pour cela, il faut procéder à une analyse intégrée ou au calcul d'un solde net lorsque le préjudice anticoncurrentiel et les inefficiences potentielles ont une origine identique, à savoir l'élimination de la double marge. C'est à ce stade que l'on prend en compte les inefficiences inhérentes à la fusion en termes de prix, en tant que partie de l'analyse des effets anticoncurrentiels. On entend par théorie cohérente le fait que l'entreprise maximiserait ses profits se comportant de la façon, rendue possible par la fusion, qui produit l'effet anticoncurrentiel. De plus, les faits doivent être cohérents avec la théorie, ce qui nécessite de démontrer que le comportement jugé anticoncurrentiel de l'entreprise après la fusion doit en fait permettre à celle-ci de maximiser ses profits.

Pour que l'exclusion soit préjudiciable à la concurrence, il faut démontrer que les entreprises rivales ne peuvent pas réagir en adoptant des contre-mesures efficaces, que cette exclusion diminue fortement les pressions concurrentielles sur l'entreprise en voie de fusion et qu'elle affecte les consommateurs et/ou l'efficacité, à court ou à long terme. Il peut y avoir un préjudice à court terme si les capacités des concurrents existants sont affectées ou si la fusion empêche toute entrée imminente sur le marché. Les préjudices à long terme sont plus aléatoires et résultent de la sortie de concurrents du marché.

(iii) l'évaluation des efficacités

La troisième étape consiste en une évaluation des efficacités compensatrices *autres qu'au niveau des prix*, obtenues en raison de la fusion verticale. On ne doit appliquer les règles antitrust que si les efficacités ne compensent pas les effets anticoncurrentiels de la fusion horizontale. Dans ce contexte, les effets anticoncurrentiels dépendent de savoir si l'objectif visé par les mesures prises pour sauvegarder le libre jeu de la concurrence est la défense du bien-être du consommateur ou la défense du bien-être total. Si l'objectif est une norme de bien-être du consommateur, l'arbitrage entre les efficacités et le pouvoir de marché dépend de l'effet net sur le surplus du consommateur, ce qui implique, à qualité et variété du produit égales, d'évaluer l'effet sur le prix payé par les consommateurs. Si l'objectif est le bien-être total, l'arbitrage entre les efficacités et le pouvoir de marché dépend de l'effet de la fusion verticale sur le surplus total.

Nous présentons les étapes un et deux à la suite l'une de l'autre. En pratique, elles interviennent plus probablement en même temps : la théorie que l'on estime applicable indique le marché qu'il faut prendre en compte pour évaluer le pouvoir de marché. L'exercice d'arbitrage de l'étape trois risque d'être coûteux et sujet à erreur. Il ne doit donc être pratiqué que si les étapes un et deux posent un problème.

¹¹⁶ C'est l'un des principes directeurs du Groupe consultatif auprès de la Commission européenne sur la politique de la concurrence (2006).

5.1 *Débat sur les principes directeurs en matière de fusions verticales*

On débat beaucoup des mérites et de la pertinence des principes directeurs existants en matière de fusions verticales aux États-Unis¹¹⁷ et de savoir s'il faudrait ou s'il serait possible d'édicter de nouveaux principes directeurs sur les fusions verticales tenant compte des progrès de l'analyse économique dont il est question plus haut¹¹⁸. Les principes directeurs ont pour but d'améliorer la transparence des règles d'application en décrivant dans le détail quand, pourquoi et comment une fusion est susceptible de soulever des problèmes anticoncurrentiels. Ces principes directeurs ont une valeur dans la mesure où « ils contribuent à la prédictibilité et à la cohérence »¹¹⁹. La prédictibilité et la cohérence réduisent l'incertitude et permettent aux entreprises, du moins de façon assez large, d'évaluer le risque qu'elles courent de contestation d'une fusion au titre de la lutte contre les comportements anticoncurrentiels. Les principes directeurs permettent cette prédictibilité et cette cohérence en clarifiant à l'avance le processus et l'analyse que suivra l'administration chargée de faire appliquer les règles. Pour ce faire, ladite administration doit être prête à suivre et adopter le cadre analytique exposé dans les principes directeurs.

Il est bien plus facile d'adopter des principes directeurs lorsqu'il y a consensus sur le cadre analytique qui convient et sur les faits requis pour juger une fusion. L'absence ressentie de consensus intellectuel sur le cadre approprié d'analyse des fusions verticales et sur les faits requis pour contester une fusion risque d'être dû à une résistance à toute révision ou nouvelle version des principes directeurs¹²⁰. D'un autre côté, d'aucuns ont carrément déclaré qu'il n'est pas possible d'édicter des principes directeurs étant donné que l'analyse d'une fusion verticale est nécessairement à la fois très complexe et très dépendante des faits et des institutions¹²¹. Selon cette idée, chaque cas étant suffisamment spécifique, on ne peut donc pas rédiger des principes directeurs d'application générale.

Dans l'idéal, l'aspect économique des fusions verticales doit structurer les principes directeurs. Ces principes structurés établissent des règles qui définissent les circonstances dans lesquelles une fusion verticale est présumée poser des problèmes de concurrence et les circonstances dans lesquelles elle est présumée n'en pas poser. En d'autres termes, les principes directeurs font ressortir les variables essentielles que l'on peut observer avant l'opération, et ce que ces variables signifient quant à l'effet de l'opération sur le pouvoir de marché et sur le bien-être du consommateur ou le bien-être total. Cela ne semble malheureusement pas possible dans le cas des fusions verticales¹²². En effet, la difficulté de cette approche est (i) qu'aucune relation empirique applicable dans toute situation n'a été trouvée pour le moment (ii) qu'on ne risque guère pour le moment de dégager ces relations empiriques étant donné que la mise en évidence de relations récurrentes sur l'ensemble des marchés ne fait pas partie des grandes priorités de la recherche (iii) et que les différences entre les marchés jouent probablement un rôle important au niveau des effets d'une fusion verticale : les faits de l'espèce ont leur importance !

¹¹⁷ Les mérites et la pertinence des principes directeurs existants en matière de fusions verticales aux États-Unis sont mis en doute, notamment par Wilcox (1995), Leary (2002-2003), l'Association des avocats américains (2004), Pitofsky (2005) et Muris (2005).

¹¹⁸ Klass et Salinger (1995), Reiffen et Vita (1995), Leary (2002-2003), Scheffman et Higgins (2004), Association des avocats américains (2004), Gotts *et al.* (2005), et Hofer et Williams (2006).

¹¹⁹ Groupe consultatif auprès de la Commission européenne sur la politique de la concurrence (2006) principe 6.

¹²⁰ Voir Association des avocats américains (2004).

¹²¹ Scheffman et Higgins (2004, p. 967).

¹²² Cela ne veut pas dire que l'on n'a pas essayé. Voir une tentative récente de Riordan et Salop (1995). Voir également la réponse de Reiffen et Vita (1995). Voir Fisher et Sciacca (1984) pour une tentative antérieure.

Au lieu de cela, les principes directeurs en matière de fusion verticale reposent sur des fondements bien plus limités. Il faudrait que ces principes suivent une démarche raisonnée similaire à celle exposée plus haut. Ils devraient indiquer les situations où une fusion verticale pose des problèmes et en donner la raison, mais n'indiqueraient pas les conditions structurelles avant fusion sur lesquelles se pencheraient les administrations chargées de l'application des règles. Par ailleurs, les principes directeurs indiqueraient les méthodes d'analyse à suivre par ces administrations, et en particulier les questions et les éléments factuels à prendre en compte.

Les aspects économiques et anticoncurrentiels des fusions verticales étudiés par le présent document suggèrent l'enchaînement suivant pour la deuxième étape de la démarche raisonnée : (i) établir l'existence d'une motivation pour exclure (ii) déterminer l'effet de cette exclusion sur les entreprises rivales et sur la manière dont cela affecte leurs capacités concurrentielles (iii) déterminer de quelle manière l'évolution de leurs capacités concurrentielles agit sur la concurrence (iv) déterminer de quelle manière la fusion verticale modifie les motivations de l'entreprise intégrée sur le marché aval (v) et déterminer les effets de l'évolution du paysage concurrentiel et du comportement de l'entreprise intégrée sur le bien-être des consommateurs ou l'efficacité.

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CZECH REPUBLIC

1. Introduction

The present material is a contribution of the Czech Republic to the round table discussion on vertical mergers held on the occasion of the meeting of the OECD Competition Committee in February 2007. On the basis of an analysis of the decision-making activities of the Office for the Protection of Competition (hereafter "Office") in the area of control of concentrations in 2001 – 2006 focused on the very issue of vertical mergers and vertical effects of the mergers, the present material attempts to answer a number of basic questions, which were introduced in the call for contributions. It is divided into several parts: the first describes how the Office distinguishes between vertical mergers on the one hand and the horizontal and conglomerate mergers on the other hand, and it defines the general opinion on the typical danger of vertical mergers for competition. The second part summarises the Office's information on situations, when vertical mergers may lead to the distortion of competition in terms of the specific effects of these mergers. The next part of the contribution is devoted to issues of so-called efficiencies and finally, giving some important cases from the decision-making practice of the Office, the material documents issues discussed to date.

As mentioned above, the contribution summarises the Office's information on the evaluation of 40 purely vertical mergers in 2001 – 2006 and experience in evaluations of the so-called vertical impacts of a number of other mergers, which were not purely vertical. Of the total ca 650 mergers evaluated in the given period, the purely vertical mergers make up ca 5%. In spite of the relatively small number of cases the practical experience and results of analyses conducted during the evaluations can be generalised into concrete conclusions and can contribute to the dissemination of empirical information on vertical mergers.

2. Definition of a vertical merger, distinguishing from conglomerate and horizontal mergers

2.1 Definition

The Czech Competition Act does not give definitions of horizontal, vertical or conglomerate mergers. A conglomerate merger is defined in the regulations of the Office, which specifies the elements of notification of the merger, as the merger of undertakings, all of which operate on various relevant markets, and among which there is no horizontal or vertical relationship. Neither this regulation, although it explicitly distinguishes between horizontal and vertical mergers from the point of view of the amount of compulsorily submitted data, gives the definition; the definition was not given in any other document of the Office, which could be considered to be a soft-law.

In such a situation the definition of vertical merger is a matter of theory and decision-making practice. If we are to make the most general definition of vertical merger as this concept is understood in the Office's decision-making practice, then it is a merger in which undertakings operating at various levels of the distribution chain of the process, i.e. not competitors, but for example car manufacturers and their distributor. The indicator of the vertical merger is the fact that in this case the activities of the merging undertakings do not overlap and their market shares on the individual relevant markets do not increase; however the market power can considerably increase by merger of the emerging subject due to the appearance of strong vertical bonds, which may distort the competition, particularly by way of closing one or more markets to new undertakings. Basically this definition is in accordance with the definition of

vertical merger as it is given in the Draft Regulations of the Committee for the Evaluation of Non-Horizontal mergers.¹

To make the picture complete we must add that in the Czech Republic The Competition Authority considers horizontal mergers to be mergers of undertakings, which are in mutual competitive relationship (both actual and potential), and conglomerate mergers are mergers and acquisition of undertakings who are in a relationship, which is neither purely horizontal nor vertical.

Generally we must distinguish two situations, i.e. in the light of the relationship within a concrete merger between vertical and horizontal bonds, or to what extent is it at the same time a conglomerate merger. In the first category are purely vertical mergers, i.e. such mergers in which only undertakings operating at various levels of the supplying chain and which bear no additional element of horizontal or conglomerate concentration concentrate. Such mergers are only few and far between in the decision-making practice of the Office; the above datum informs about the purely vertical mergers. In practice more often than not we see that the assessed merger of undertakings concentrates undertakings among which the relation is both vertical and horizontal. In such cases rather than to rely on the predominating character of the merger we should talk about the vertical (and horizontal) impacts of the mergers and to evaluate these mergers on the basis of rules, which are applied to evaluate either horizontal or vertical mergers. If the present contribution further deals with vertical mergers, it means both purely vertical mergers and mergers with a vertical impact.

2.2 *Basic characteristics, potential danger for competition*

The basic difference between vertical and horizontal mergers lies in the type-different quality, intensity and immediate impact of the merger on the existing level of competition.

The basic competitive danger associated with *horizontal mergers* is the fact that one of the undertakings may leave the relevant market due to which the supply or demand will be limited, competitive pressure reduced, and as a last resort it may have an immediate effect on the price level, quality or extent of supply on the relevant market. Horizontal merger leads to the removal of an important competitive restriction (keeping an eye on each others prices), which maintains the price level on the relevant market at a competitive level. Therefore in the case of horizontal mergers, where one or more undertakings involved in the merger dispose of an important market power, we infer that the merger will lead to further strengthening of the market power and to immediate introduction of higher prices.

Therefore when evaluating horizontal mergers we typically assess if the danger that the newly emerged entity will be able to increase prices immediately and will have an urge to do so is imminent, the probability of a negative impact of the concentration is monitored on the market where the undertaking resulting from the merger has the necessary market power. On the other hand with *vertical mergers* it is most frequently monitoring whether the entity emerging from the merger will have the opportunity and will attempt to limit competition on the market, which vertically links up with the relevant market where its market power is concentrated (*upstream* and *downstream* market). This may come about e.g. by means of increasing prices or limiting supplies on the downstream market where it disposes of an important market power, which will increase the costs of their competitors on the upstream market or reduce the demands of their customers. The final effect of such behaviour may be a negative effect on innovation; it may lead to reduced quality of products and limit the possibility of selection of products by the end consumer. In such cases we speak about the effect of closing the market, the consequence of which may be

¹ Draft Regulations for the Evaluation of Non-Horizontal Mergers of Companies according to the Regulation of the Council (ES) No. 139/2004, on control of mergers of companies

that competitors will leave the market, or the potential competitors may be discouraged to enter such a market and so according to the Office this effect presents the greatest potential danger of vertical mergers.

The other basic typical difference between vertical and horizontal mergers is the fact that the former category is more frequently associated with advantages (so-called efficiencies). Thorough evaluation, both individually and in connection with any factors in favour of distorting competition, is a prerequisite that the Office will consider all key circumstances determining the standing and behaviour by merging the entity on the market. The opinion of the Office is that vertical mergers are more probably associated with considerable advantages (efficiencies), than horizontal mergers, and that is why in the case of vertical mergers there should be an assumption (refutable) that these mergers are pro-competitive.²

We can summarise that any negative effects resulting from horizontal and vertical mergers are achieved in different ways; they are based on different principles and they are also to different extents balanced by positive effects and so the analyses conducted by the Office differ.

3. Situations when vertical merger may considerably distort competition

In the case of vertical mergers there are two situations when they might considerably distort competition. As in the case of horizontal mergers also in cases of vertical mergers we distinguish cases when the transaction resulted in uncoordinated (one-sided) effects and cases when the merger increased the danger of coordinated behaviour.

Uncoordinated effects of vertical merger are namely closing the market when the merger offers the merging companies the ability and grounds to undertake measures, which will restrict or eliminate access of competing entities to supplies or their access to markets. This will reduce the ability or grounds of these competing entities to compete. In the Office's practice two forms of closure are distinguished: (i) closure of access to inputs (*input foreclosure*), when the merger increases the competitors' expenses on the *downstream* market by limiting access to an important input, and (ii) closure of access to customers (*customer foreclosure*), when the merger limits access of the competitors on *upstream* markets to a substantial part of customers, increasing the expenses of these competitors on the *upstream* markets for inputs or investments. Closing access to sources means to limit supplies on the downstream market and following increase in expenses of independent customers. Access to customers is closed in a situation when the entity resulting from the merger operates on the downstream market as an important customer of products, which are also supplied by its competitors operating on the upstream market. In such cases vertical merger may lead to a situation when the competing suppliers will have no access to an important customer, which will reduce the income of competitors of the merging undertaking. At the same time barriers are formed against the entry of new suppliers.

The danger for competition may also lie in the fact that via the implementation of the vertical merger one of the merging undertakings will gain access to confidential or commercially sensitive information about the activities of their competitors on the *downstream* or *upstream* markets. This may occur if the other merging undertaking is an important supplier or customer of these competitors and within regular business connections has access to this information. Such a situation may also be classified as uncoordinated impact of vertical merger.

Effects of vertical merger are coordinated if after implementation the conditions for mutual coordination of competitive behaviour either emerge or improve by merger of the entity and its competitors on the upstream or downstream market. In other words whether the result of the vertical merger will be the

² Bishop, S., Lofaro, A., Rosati, F., Young, J., The efficiencies – enhancing effect of non-horizontal mergers (Brussels; European Commission) 2005

emergence or enhancement of collective dominance is monitored. The analysis of coordinated effects of vertical mergers is very similar to the analysis conducted when assessing the probability that the horizontal merger will result in the creation or improvement of conditions for the coordination of competitive behaviour on the market. In such cases and when assessing vertical mergers the Office would apply criteria developed by the practice of European courts, particularly in the judgements of the Court of the First Instance in the case of *Airtours*³ or *Impala*⁴. The Office would explore if the existing or future degree of market transparency would allow the undertakings in a sufficient degree mutual monitoring of the competitive behaviour of the others and especially observing the terms of coordination; whether a deterrent mechanism exists, which could be used by one group of involved undertakings in the case that one or more of the involved undertakings would be found to deviate from coordinated behaviour; and whether the reaction of entities not partaking in the coordination is not capable of neutralising the expected results following from the coordination.

4. Procedure of the Office when assessing vertical mergers

Analysis of the decision-making activities of the Office in the area of concentration of undertakings proved that cases of purely vertical mergers with low market shares of all the involved undertakings, on both *upstream* and *downstream* markets, did not substantially distort competition. Thus, these mergers were always approved with no radical reservations. They were frequently cases where a great number of competitors of the entity created by the concentration operated on all or most of the markets and when this merger rather than a danger for competition promised advantages for the economy. In such cases the Office relied on an analysis of market shares and market structure. This was the case when for instance assessing the purely vertical merger of *ETA/Plastkov*, when the producer of electrical appliances gained control over the producer of pressed plastic components for electrical appliances. The Office discovered that there were dozens of producers of electrical appliances on the market, which eliminated the formation of coordinated or uncoordinated effects and that on the contrary the merger created conditions for achieving efficiencies in the form of improvement of organisation control or coordination of the innovation process.

In the decision-making process of the Office as unproblematic were considered such vertical mergers, which were assessed and immediately permitted, where the producer or importer of certain products gained control over his/her exclusive distributor (*Maxxium/Maxxium Czech* – import and distribution of beverages with a higher alcohol content), or when the merging undertakings had been structurally connected even before the merger, even though it did not establish vertical integration (*Agrofert Holding/Zenza* – production of feed rations and pig breeding). In accordance with the doctrine of the bankrupting company also such vertical merger was permitted, which met the characteristics of rescue mergers (*Agftrading/Melbro* – chicken fattening and slaughter of chickens) or if the undertaking was in liquidation (*Čepro/Benzina s.p.* – pipelines and filling stations).

In some few cases the Office investigated if the apprehension of some competitors or consumers that the vertical merger would increase the danger of uncoordinated effects in the form of closure of the market was well-founded. The Office explored the probability of limiting or stopping deliveries of a certain product to independent customers (e.g. *Agrofert Holding/Unipetrol*, *Linde Technoplyn/BorsodChem MCHZ*), refusal of entry of the independent producers to the distribution network (e.g. *Dalkia Morava/Zásobování teplem Ostrava*, *Bijouterie/Swarovski/ORNELA/Bižuterie Česká Mincovna*), or danger of increasing the wholesale prices of the delivered goods (*ČEZ/Regionální distribuční společnosti*, *Linde Technoplyn/Chemopetrol*). In some cases the Office also verified the danger that vertical merger would facilitate access of one of the merging undertakings to commercially sensitive information about their

³ Judgement of the Court of the First Instance T-342/99 in the matter of *Airtours v. Komise*

⁴ Judgement of the Court of the First Instance T-464/04 in the matter of *Impala v. Komise*

rivals, but the result was negative (*Nilfisk Advance/NF Products*). At the same time the Office's findings indicated that the danger of uncoordinated effects in the form of closing the market or collecting commercially sensitive information was imminent only in cases when the market power of at least one of the merging undertakings on "his/her" market was strong. Identified misgivings of potential negative impacts, particularly on oligopolistic markets, are the ability to limit or stop deliveries for independent customers or to increase wholesale customer prices; i.e. cases of potential closure of access to sources (input foreclosure).

If these findings should be confronted with economic theory, the above information comes close to the conclusions of the so-called Salinger's model⁵, which assumes that after the merger the new entity emerged on the oligopolistic market will not supply the independent customers what may lead to a reduced number of undertakings on this market. The findings are also close to the conclusions of the RRC (Raising Rivals Cost) model of Ordover, Saloner and Salop⁶, according to whom vertical integration creates a market power on the upstream market, which then leads to higher wholesale prices for independent customers on the downstream market increasing their expenses and limiting their competitive ability.

In cases where the Office indeed discovered the danger of negative impacts of the merger on competition in the form of cutting off supplies or increasing wholesale prices, the condition for the approval of the merger was to accept commitments or impose conditions, which would eliminate this danger. In such cases the commitments were aimed for instance at modification of contracts with independent customers to avoid refusal of deliveries or price or quota discrimination (*Linde Technoplyn/Chemopetrol*, *Agrofert Holding/Unipetrol*). However not always are the accepted commitments sufficient to eliminate the danger of future anticompetitive behaviour (compare below).

In terms of the overall evaluation of analyses of purely vertical mergers, the assumption of a predominating pro-competitive impact of the vertical merger was confirmed in practice. It also appears that in practice both the RRC theory and the theory of removing double marginalisation (see further) were confirmed. In cases when one of the merging undertakings disposed of strong market power, it was possible to eliminate the danger of future anti-competitive behaviour by accepting commitments. Such *ex ante* measures are usually sufficient, although in practice we saw cases when the Office had eventually to proceed to *ex post* measures to protect competition. During the studied period not even one purely vertical merger was banned, only in one case a structural condition was imposed and in six other cases behavioural commitments were accepted.

5. Generally about efficiencies of vertical mergers in the Office's practice

The basic substantive test applied by the Office (test of substantive distortion of competition) is based on a demonstrative enumeration of criteria, which should be explored when evaluating the merger. Within the framework of the total evaluation of the case this conception of the Office generally, i.e. also in the case of vertical mergers, allows to take into consideration all advantages (efficiencies) resulting from the merger as declared by the merging entities provided that these advantages are the customer's profit and do not mean a barrier for competition. Although the evaluation of efficiencies resulting from the concentration of undertakings is not explicitly listed among the demonstratively enumerated ones, the Office takes these efficiencies into account in the decisions and conforms to the rules laid out by the European Commission.

⁵ *Salinger, M. A.*, Vertical Mergers and Market Foreclosure, 103 Q.J. Economics 345 (1988), quotation from *Scheffman, D. T. and Higgins, R. S.*, Vertical Mergers, Theory and Policy *Georgie Mason Law Review* 12; 967-977, 2004

⁶ Adapted from *Riordan, M. H.* Competition Effects of Vertical Integration; Rome, June 23-25, 2005, p. 27

The efficiencies resulting from the merger may balance the impact on competition and particularly the potential damage to the customer; in such a case the merger does not substantially distort competition. It is namely the case when these efficiencies move the entity created by merging to behave in a more pro-competitive way in favour of the consumer. Primarily the efficiencies must have a direct impact on the consumer whose standing may not become worse after the merger; the efficiencies must be seen on the markets, threatened by a competitive problem, within a short period of time; the efficiencies must be connected exclusively with the merger (irrelevant are efficiencies, which appear on the market in a different way); the efficiencies must be verifiable.

In its decision-making practice with vertical mergers the Office works on the assumption that in overall evaluations of the impact of the merger in the first place it is necessary to evaluate whether the integration results in higher costs or in an other way affects the other undertaking (e.g. by refusing supplies or increasing input prices) or facilitates coordinated action. The next step, which must follow immediately, is to identify and analyse the benefits for the consumer and the economy as a whole, i.e. if the merger will have a positive effect on prices, quality of products, wider range etc. In conclusion the identified advantages are compared with the potential negative impacts on competition.

In its decision-making activities concerning the purely vertical mergers the Office identified in the first place the following types of advantages (efficiencies):

- removal of double marginalisation and with it connected higher amount of delivered goods due to lower prices or innovation;
- better coordination when making decisions on new products;
- better organisation of the production process and giving preference to modern and environment-friendly technologies;
- improving the continuity of supplies;
- reducing transaction expenses;
- improving marketing;
- preventing profit expropriation – in some cases the company operating on the upstream market is not capable of making full use of the advantages from its investments because some other company in the vertical exploits part of it. By merging all the advantages of the investments will remain with the new entity.

6. Important cases of mergers with vertical effects solved by the Office

The next part describes important cases of mergers with vertical impacts in the framework of which the Office discovered the danger that competition would be distorted due to the arising or intensifying vertical integration of merging undertakings. Each short description of the case is focused on specificities of the identified danger, on the measures taken in the form of a commitment, and possibly also on reflecting the effectiveness of such a solution from the point of view of later behaviour based on the merging of the entity.

6.1 *Linde Technoplyn/BorsodChem MCHZ*

This is the only purely vertical merger whose approval was conditioned by the Office by meeting a structural commitment. The merger was to be as follows: Linde Technoplyn, as the producer, distributor and dealer of technical and medicinal gases, would gain control over the only plant for filling nitrogen oxide (N₂O) into storage tanks and pressure bottles on the relevant market. Although the merger resulted in vertical integration between the only producer of this technical gas and undertaking with an important position on the market of distribution of technical gases, as a consequence of which the new entity could

increase prices for their customers, the Office approved the merger under certain conditions. The Office discovered that the original owner intended to close the old and unprofitable filling plant so that gas would have to be imported to the relevant market from abroad; this would considerably increase the prices and Linde would be the only prospective buyer and investor in the filling plant. The merger was approved with a commitment according to which the resulting entity would have to continue delivering the technical gas to independent customers under undiscriminating conditions.

The following period showed that the applied *ex ante* measures in the form of the commitment did not prevent the new entity to eventually enforce a commitment of exclusive purchase from their customers, i.e. that they purchase the total consumption of technical gases from them. On top of that the company allowed discrimination when they applied considerably different prices for the individual customers for deliveries of technical gas. This behaviour was considered as an abuse of the dominant position and the Office sanctioned Linde Technoplyn *ex post*.

6.2 ČEZ/Regional distribution companies

The core of the case is the merger of company ČEZ, the dominant producer of electric energy in the Czech Republic (market share ca 70 %), with five out of the eight regional distribution companies, which hold a local monopoly on the specified territories for the distribution of electric energy and which also operated as the most important suppliers of electric energy to eligible customers.

In addition to the danger arising from the horizontal concentration on the market of electric energy for eligible customers the Office saw the primary danger in the emergence of *vertical integration* between the dominant producer and the undertakings who together dispose of more than a 60% share in deliveries for eligible customers. The Office saw the danger in that the up to now independent regional distributors lost the opportunity to purchase electric energy from independent producers as rivals of ČEZ. In addition, the Office was concerned that ČEZ, through its *blocking shares*, would have a negative effect on the independent competition behaviour of the remaining three rival independent distribution companies, and that it may do the same through its 34 % share in the operator of the transmission network system, the ČEPS company.

At the end of 2002 after considering all circumstances the Office approved the merger on three conditions of a structural character. In addition to the reduction of the market share on the relevant market these conditions were aimed at reducing the potential negative impacts caused by vertical integration and the removal of structural bonds through which the ČEZ company could exercise its influence on the behaviour of its rivals and which could also be a basis for coordinated effect on the supply market for eligible customers. The focus of the second and third conditions was on this objective. Execution of these conditions should have *de facto* reduce the intensity of vertical integration.

According to the *second condition*, in regional distribution companies not controlled by ČEZ (JME, JČE and PRE) the *blocking minority shares should be sold* (34%). That is to say that JME, JČE and PRE belonged to the most important suppliers of electric energy to eligible customers and after the merger took place they were to be the only important rivals by merging of the resulting entity on this relevant market. The Office deduced that the existence of the blocking minority share of ČEZ in its most important competitors would allow this company, in accordance with the provisions of the Commercial Code or statutes, to block and in this way negatively affect some principal decisions influencing the long-term competitive behaviour of these important competitors. At the same time this fact could reduce the motivation and possibilities of JČE, JME and PRE to be fully independent competitive forces on the market. The transfer of the minority shares in these companies had to ensure that ČEZ would in no way be involved in the business policy of JČE, JME and PRE and that these companies would continue to be an active competitive power in the sector of electric energy. According to the Office the sale of the minority

shares and removal of any personal connection is an appropriate measure in cases where the motivation to compete on the market should be strengthened.

Another condition of the Office was the *obligation to sell the blocking minority share (34%) in the ČEPS company* as the operator of the “backbone” transmission system. The Office deduced that independent and impartial working of the transmission system is a prerequisite for the constitution and existence of the electric energy market; its urgency increases in cases when a dominant entity in the area of production or business is on the market, or if the dominant production, business and monopoly distribution are vertically integrated. If it is a matter of the influence of the blocking minority share on competitive behaviour of such an entity the above considerations apply too. Moreover the Office reached the conclusion that the dominant ČEZ producer, as the only shareholder of ČEPS, would have sufficient experience with the operation of the electric energy sector. In this respect it is a qualitatively different shareholder, with a command and interests on the market different than in the case of the state, which was directly and indirectly the owner of the other shares in the ČEPS company. As a danger for the development of efficient competition the Office considered the potential persisting possibility of preference of supplies of auxiliary services from ČEZ over supplies from other companies due to the existence of this structural linkage.

Although the decision was attacked by an appeal and subsequently also by a request for a change in the conditions, the changes in no way affected the conditions and the ČEZ company indeed sold the minority shares in the competing companies and operator of the transmission system. It is also interesting that ČEZ exchanged the minority blocking shares with its competitors in the individual distribution companies; this resulted in complete removal of structural bonds among the most important competitors on the market of supplies for eligible customers and thus, among others, in the reduction of the danger of mutual coordination in competitive behaviour, which is facilitated in the case of the existence of such bonds.

Competition on electric energy markets is gradually developing; during this time two energetic groups have shaped in the Czech Republic, which compete in the area of supplies for eligible customers. As much as the Office focused on the area of energy on a long-term basis and is continuously monitoring the behaviour of the key undertakings, since the merger has come into being no reason was found to institute proceedings concerning dominance or cartel agreements, which would impose *ex post* measures. It can be assumed that obligations, which were imposed within the proceedings permitting the merger also contributed to this result. Likewise the establishment of the so-called *virtual power plant* contributed to the development of competition in the electric energy sector; thanks to it the independent businesspeople in the electric energy sector have access to supplies of electric energy produced by the dominant undertaking on the market for market prices. This measure accepted as an obligation in the next stage of the above described proceedings reduced the danger of vertical closure of the market, specifically *input foreclosure*. Planned dealing in electric energy on the commodity exchange should have the same effect.

6.3 RWE GAS/Transgas/regional distribution companies

In May 2002 the Office approved the merger of company RWE with company Transgas, which is involved in international and domestic transport of natural gas in the Czech Republic, and with all the other eight distribution gas companies operating in the area of distribution and supply of natural gas in the Czech Republic. As a consequence of the merger vertical integration of the dominant importer of natural gas with six distribution companies came about. In this case the Office also proceeded to define three conditions; however in contrast to the above case they were only behavioural conditions. The concern of the Office that competition would be distorted due to the merger concerned, in particular, the future standing of the company Moravské naftové doly (Moravian Oil Fields, hereafter only “MND”), which was and still is the sole competitor of Transgas on the market of natural gas storage and at the same time the greatest producer

of natural gas in the Czech Republic. In connection with this merger a danger was seen that this sole competitor of Transgas on the market of storage of natural gas and gas lifting in the Czech Republic would cease to exist as a consequence of the influence exerted on its activities, or that it would be cornered by the merging undertakings. The thing is that both Transgas and one of the distribution companies had a portion of ownership in MND, which could result in efforts to gain control over MND or to coordinate the procedure when claiming the right of vote in MND; this could be seen as an obstacle when accepting key decisions on the competitive behaviour of MND towards RWE. The decision to approve the merger therefore contained conditions aimed at elimination of this danger; the conditions stated that the resulting entity of the merger should in no way gain direct or indirect control over MND, or to block the decisions of MND on intentions, which would be evidently competitive towards RWE.

In 2002, by imposing the above conditions, the Office attempted to create conditions for future effective competition and to make sure that the consumer would not be under pressure of a monopoly process, but that the prices for gas would be the result of competition. The question however is whether the accepted *ex ante* measures were sufficient and whether in the given case they did not count too much on the discouraging character of legislation forbidding the abuse of the dominant position. In 2005, on the basis of complaints of a number of customers and competitors, the Office instituted administrative procedure at the end of which the Office imposed the historically highest fine for abuse of the dominant position, which the integrated entity had committed. Vertical integration had enabled or facilitated all the forms of dominance abuse, which RWE committed. It can only be speculated if the present situation would have been different had the merger not been accepted in the form it had been put forward, or if during the proceedings at the Office the merger had been modified due to structural conditions being imposed as was the case of the *ČEZ/Regional distribution companies* merger.

6.4 *UPC/Karneval*

Due to this transaction of 2006 concentration of two of the most important operators of cable TV in the Czech Republic took place. Apart from the primary danger of horizontal impacts it was discovered that the merger also *enhanced vertical integration* due to the effect of the Liberty Global group, to which UPC belongs, in the area of wholesale supplies of the software. In their decision the Office expressed their concern that the merger of two of the most important operators in the area of “pay-TV” supplies and with it connected significant expansion of their clientele would considerably boost the negotiating position over the providers of the software (bulk distributors of paid TV programmes); apart from the positive effect in the shape of reduced prices for cable TV for the end customer it could lead to increased margin by merging the emerged entity and to a limitation of the extent of supplies from the software provider (reduction of funds for the development of programmes and purchase of films from the software provider). The consequence of such a situation would be restricted extent and attractiveness of the programmes for the end customers. In other words, merging in this case should have resulted in the rise of a vertical market power based on the ability of the formed entity to exert pressure on the provider of the software and in this way to control him/her. This effect on the *upstream* market, as the Office agreed with some competitors, may considerably reduce the offer and extent of the software because the entity resulting from the merger will be able to reduce the price for the provided software and this could reduce the ability of competitive providers to finance the entire extent and variety of the programmes to the detriment of the end customer. A similar effect in the form of enhancing the negotiating position may be the increase in the market power by merger of the emerging entity in relation to other suppliers, for instance suppliers of technological elements and equipment. In this case the identified danger based on vertical integration was also eliminated by means of the behavioural commitment.

6.5 ČEZ/North Bohemian Mines

In November 2005 the Office approved a merger in the first stage with no commitments, as a consequence of which ČEZ, the dominant producer and supplier of electric energy in the Czech Republic, won exclusive control over North Bohemian Mines operating in the area of lignite mining. In this case it was a vertical merger because ČEZ is an important consumer of so-called energetic lignite, which the North Bohemian Mines supply. The Office assessed the formation of the *vertical linkage of the ČEZ group with the North Bohemian Mines* only as *intensification and property confirmation* of the already existing factual vertical linkage between the most important domestic producer of electric energy on the one hand and the most important domestic producer of lignite on the other hand. This factual linkage is based on long-term contracts for coal deliveries, their volume (deliveries of the North Bohemian Mines to ČEZ represented the major turnover of this company) and particularly the technological linkage among the power plants of the ČEZ company for coal delivered by the North Bohemian Mines. However the Office deduced that also after the merger was carried out the possibility of delivering to other customers would be maintained and they pointed out that on the basis of long-term contracts ČEZ takes energetic lignite from all four main producers of this raw material in the Czech Republic. No radical changes in the structure of these purchases after the merger is carried out can be expected, neither for technological reasons. On the example of foreign energetic groups the Office pointed out that the linkage between suppliers of raw material for the production of electric energy and producers of electric energy is a common phenomenon.

DENMARK

1. Vertical mergers: Ferti Supply – a Danish case

On 22 February 2006, the Danish Competition Authority (hereinafter the “DCA”) approved the creation of a joint venture – Ferti Supply A/S.¹ The case concerns the commercial fertiliser market.

The joint venture was a merger in the sense of the Danish Competition Act and was, thus, subject to merger control. However, in economics terms it is not clear that the transaction was similar to a vertical merger. This is because the movement of assets took place at the same level of the value chain – the wholesale level. Nevertheless, two features of the transaction raised concerns similar to the concerns raised by real vertical merger (that is a merging of assets at different levels of the value chain): First exclusivity contracts linked the parent companies (operating at different levels) closer together. Second the profit sharing mechanism would to some extent align the parents’ incentives.

2. Summary

In 2005, two large Danish feeding stuff companies (Dansk Landbrugs Grovvarerelskab A.m.b.A., hereinafter “DLG”, and AgroDanmark, A.m.b.A., hereinafter “AgroDK”) and a large Norwegian producer of commercial fertilisers (Yara Danmark A/S, hereinafter “Yara”) notified the creation of a joint venture named Ferti Supply, which would take over the notifying parties’ fertiliser wholesale activities, i.e. purchase, sale and distribution of fertilisers in Denmark.

Market investigations and economic modelling revealed several concerns related to the creation of the joint venture – mainly connected to two three-year exclusivity agreements; one where Ferti Supply would be exclusive distributor of Yara’s products in Denmark, and one where DLG and AgroDK would purchase fertilisers from Ferti Supply exclusively.

Access for competing fertiliser producers/traders to the distribution network would become increasingly difficult, as Ferti Supply would control approximately 60 % of this network. The restricted access was supported by the exclusivity agreed between Yara and Ferti Supply (**input foreclosure**) and the obligation undertaken by both DLG and AgroDK to source exclusively from Ferti Supply the first three years (**customer foreclosure**). This would diminish the competitive pressure from alternative suppliers, once Ferti Supply was created.

Because both DLG and AgroDK would source from the same channel, there was furthermore a significant risk that they would be able to **tacitly coordinate prices** downstream to the detriment of end-users. This risk was increased due to the fact that DLG and AgroDK for three years could not source from other channels but Ferti Supply.

In response to the concerns raised by the DCA, the parties submitted commitments that would abolish the agreed exclusivities downstream and Ferti Supply’s long term minimum purchase obligation upstream.

¹ The case is available in English at <http://www.ks.dk/konkurrence/afgoerelser/2006/r22-02/ferti-eng/>

3. The market

Fertilisers are essential products for plant growing farmers. The production and distribution of fertilisers can be described in three steps, production – wholesale – retail, and in each of these three steps value is added to the products.

Since 2004, no significant production of fertilisers has taken place in Denmark. All fertilisers are therefore either imported by purchasing entities or supplied through producers' local sales entities. Import typically takes place by relatively small ships (3-5,000 tons). The size of these ships makes it possible for them to enter a large number of local harbours in Denmark, cf. Figure 1.

Figure 1: Danish ports used by the parties today



Whereas fertilisers are produced throughout the year, the consumption of fertilisers takes place over a three-month period. This makes storing essential. Fertilisers are traditionally handled in bulk. This requires large storage facilities as different kinds of fertilisers cannot be mixed. The increased use of big bags (bags of 650 or 1,000 kg) in the distribution from wholesale/retail to farmer may, however, change this pattern.

Given the continuous production and the seasonal consumption, fertiliser producers make use of the services of wholesalers when it comes to storage and distribution.

Retailers do typically not possess the same storage and logistics facilities as wholesalers and therefore purchase at a later point in time and much smaller quantities. End-users (farmers) may postpone their purchase of fertilisers while waiting for low prices to come about. Therefore, retailers mostly adjust their

purchases according to the seasonal demand of the farmers. This demand may vary from year to year depending on climatic circumstances, the chosen crops and the condition of the soil. On average, a retailer's assortment of commercial fertilisers has a range of roughly 20-40 different types of commercial fertilisers². This typically makes it advantageous to be member of cooperatives such as DLG, DLA and AgroDK, as it may be difficult for a single retailer to sell a full shipload of each type of fertilisers within the area in which he is active.

Retailers add value to the fertilisers by arranging transportation to the end-user, by arranging credit facilities, by storing the product up to and during the consumption period, and by offering the farmer a range of products and brands to choose from.

Typically, transportation to end-users takes place in bulk by trucks with a grab/crane. The services involved with delivery are paid by end-users but made available by retailers. Therefore, sales to Danish farmers require access to a distribution network endowed with a certain amount of trucks and the required loading/unloading equipment.

Retailers are mainly located close to the end-users. Their customer knowledge and their customer relationship are of importance to the end-users. Retailers typically carry a broad product portfolio, including also insurance, telephony and energy. Often trades occur where, for instance, the farmer's grain is traded with feed or seed corn. It is also important for retailers to be positioned close to the end-users in order to be able to deliver quickly upon demand. According to the parties, it is common for end-users to pick up their quantities of fertilisers successively from a retail storage facility concurrently with use. Therefore, the retail segment is composed of a fine-meshed network of local divisions.

As the sale of fertilisers is often linked with the sale of other products, it is important for retailers to be active within all the four main areas: seeds, raw materials, crop protection and fertilisers. Seeds constitute the largest proportion of these four whereas fertilisers amount to the smallest proportion; buyers will often choose retailers who are able to supply products from all of the four areas. Therefore, it is important for a retailer to be able to supply fertilisers, in order not to lose potential seed customers.

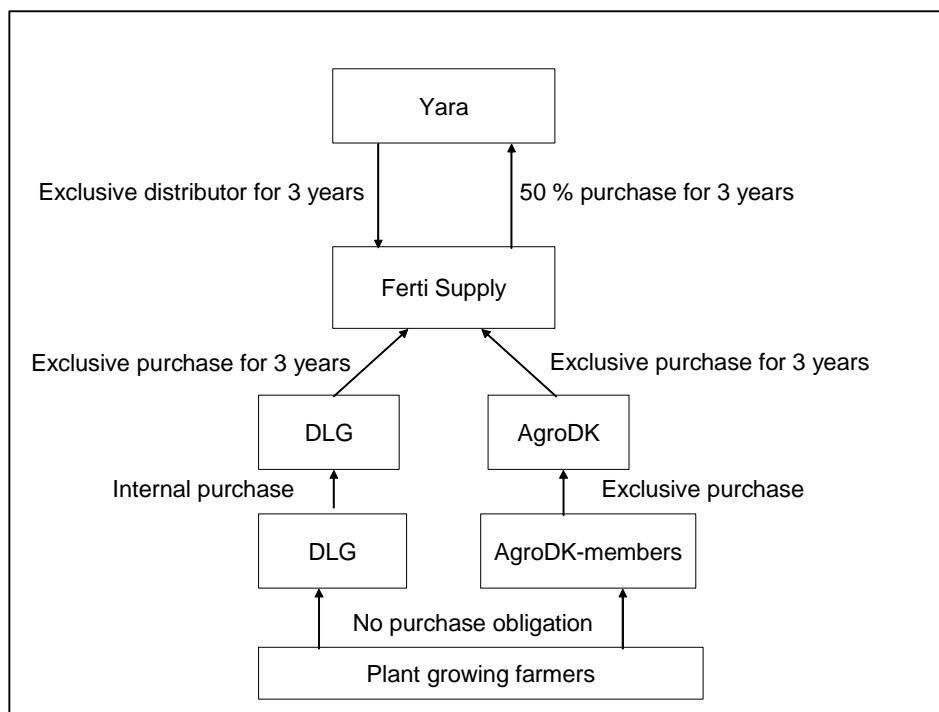
Many farmers are members of feeding stuff co-operatives (a.o. DLG and the members of DLA). Farmers belonging to a co-operative are under no obligation to buy their fertilisers from the co-operative. However, "residual payment" is an integrated part of the principle of co-operatives, where the co-operatives' surplus is divided among the members according to their share of the turnover. This may induce farmers to primarily trade with their own co-operative.

4. The joint venture and the exclusivity agreements

In 2005, two large Danish feeding stuff companies DLG and AgroDK and a large Norwegian producer of commercial fertilisers Yara notified the creation of a joint venture named Ferti Supply³, which would take over the notifying parties' fertiliser wholesale activities, i.e. purchase, sale and distribution of fertilisers in Denmark. The structure of the co-operation is shown in figure 1.

² Not including speciality fertilizers and liquid fertilizers. The estimate is based on price lists from members of AgroDK.

³ The merger had community dimension and was subject to the European Commission's jurisdiction, but the parties requested the Commission to refer it to the Danish Competition Authority for examination and decision, cf. Article 4(4).

Figure 1: The structure of the co-operation

In connection with the creation of Ferti Supply, the parties entered into supply/distribution agreements with the joint venture. These agreements contained exclusivity and purchase obligations with a duration of three years. DLG and AgroDK would purchase fertilisers exclusively from Ferti Supply and Ferti Supply was obliged to purchase at least 50 % of its requirement from Yara. At the same time, Ferti Supply would become Yara's sole distributor in Denmark. Favourable pricing mechanisms between Yara and Ferti Supply upstream and between Ferti Supply and DLG/AgroDK downstream had also been determined by the parent companies. Ferti Supply's profit would be divided between the parents in respect of their owner share, i.e. 50 % for Yara, 40 % for DLG and 10 % for AgroDK.

5. Access to the market

In Denmark, where most fertilisers are imported by ship, the only way the products flow from producers to end-users is through the already established distribution network, consisting of feedingstuff companies' storage facilities etc. Accordingly, in order to reach local retailers, producers need access to the logistic services of wholesalers. Thus, access to the relevant fertiliser products upstream, and access to the distribution network downstream, is of vital importance to producers, wholesalers and retailers.

Ferti Supply would be able to control approximately 60 %¹ of both the distribution network at wholesale level and of the retail segment (through its parents DLG and AgroDK), cf. table 1. Correspondingly, the second largest feedingstuff company, DLA Agro, would control access to 30-35 % of the market through a parallel cooperation with the Finnish fertiliser producer, Kemira.

¹ Assumed to correspond to the combined market share of DLG and AgroDK.

Table 1: Market shares

Market share (%)	Production	Wholesale	Retail
Yara	15-25		
DLG		40-50	40-50
AgroDK		5-15	5-15
<i>Ferti Supply</i>		<i>55-60</i>	
Kemira	30-40		
DLA Agro		30-35	30-35

Overall, the structural changes occurring from the increased vertical integration of the Danish fertiliser market meant that 90-95 % of the market would be controlled by two “gatekeepers”. Bypassing these gatekeepers would require that competing producers or purchasers set up their own infrastructures, and such infrastructures required – according to the DCA’s market investigation – a certain scale and scope and underlying logistics. According to testimonies from competing fertiliser producers it was considered doubtful whether establishing own, parallel distribution channels would be economically viable for new entrants.

6. Customer foreclosure

In Denmark, customer foreclosure is defined much in accordance with the practise of the European Commission. Customer foreclosure may arise when a vertical integration is likely to restrict upstream rivals’ access to important downstream consumers. Such a situation may occur when a supplier integrates with an important customer in the downstream market, thereby foreclosing access to a sufficient customer base to its rivals in the upstream market. This may also affect the downstream rivals’ ability to compete, possibly enabling the merged entity to profitably reduce the overall output on the downstream market and higher prices.

In the Ferti Supply case, customer foreclosure was considered possible for the following reasons:

Farmers’ purchases are not tied, but in the past they have bought very limited amounts bypassing the retail segment. For the first three years after the establishment of the joint venture, Ferti Supply had the sole and exclusive right to purchase from Yara and to supply DLG/AgroDK. Thereby, this part of the retail segment (60 %) would be effectively shielded from other producers. As Ferti Supply was obliged to buy minimum 50 % of the total purchase from Yara, at least 30 % – and probably more – would in this way be reserved for Yara exclusively. The shielding of the market was further substantiated by a parallel cooperation in the fertiliser market between DLA Agro and Kemira.

7. Input foreclosure

Input foreclosure is also defined much in accordance with the European Commission. There may be a risk of input foreclosure when a vertical integration is likely to raise the costs of downstream rivals by restricting their access to an important input. Input foreclosure may significantly impede effective competition where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger.

In the Ferti Supply case, customer foreclosure was considered possible for the following reasons:

Corresponding to suppliers' problems regarding access to the Danish market, it could become increasingly difficult for retailers to compete if they were not part of the established networks. It was forbidden for Yara to look up customers actively², and attractive offers from Yara would not automatically reach the Danish market without Ferti Supply as the intermediary. Without sufficient scale and infrastructure independent retailers would not be able to bypass Ferti Supply and secure for themselves competitive prices/rebates from international fertiliser producers – and if/when purchasing from Ferti Supply, they may even have to pay overcharges. Such (smaller) companies did not pose a competitive threat to Ferti Supply, DLG or AgroDK; instead they risked being pushed out of the market.

8. Tacit collusion

A vertical integration may influence the likelihood of collusion by reducing the number of competitors, making tacit coordination a real possibility (coordinated effects of the transaction). Even when rivals are not excluded from the market, this may be a risk. Such competitors may find themselves in a more vulnerable situation and therefore choose not to contest the situation of co-ordination, but instead live under the shelter of the increased price level.

With the creation of Ferti Supply, DLG/AgroDK would purchase all their fertilisers jointly and at the same price for the initial three years. As their purchase price made up more than 4/5 of the retail price, a significant risk of tacit collusion arose. Such collusion would affect approximately 60 % of the wholesale/retail market, where prices were likely to increase. Furthermore, 1/3 of the market would be similarly affected by the parallel agreement between DLA Agro and Kemira. After the effectuation of these agreements, the wholesale fertiliser market would therefore be a duopoly, lessening the incentive for competition due to the fear of a price war.

Before the transaction three retailers were independently buying fertilisers upstream and competing downstream in the retail market. After the transaction the largest and third largest retailer would most probably act as one and thereby increasing the risk of uncoordinated price rises.

9. Price squeeze

DLG and members of AgroDK compete with DLA members and other feedingstuff companies on sales to farmers. Retailers offer farmers a wide assortment of products, used in the production activities of the farmers. Fertilisers are seasonal products, and the same is the case for several other products such as seeds, and to a lesser extent pesticides, purchase of grain and sales of feed. The competitive pressure varies from product to product. With keen competition on some of the other products, DLG/AgroDK's retailers could have an incentive to keep fertiliser prices relatively high, and use the gained profit to lower prices on other products (which may constitute a larger part of total turnover, e.g. animal feed). Thereby, the cooperation could enable them to put a squeeze on their competitors, for example within the feedingstuff sector.

The net result was likely to be higher fertiliser prices to farmers compared to a situation with market competition.

² Yara was allowed to make passive sales to the Danish market, but this was unlikely to compensate. Yara had no passive sales to the Danish market at the time.

10. Price mechanisms

Demand for fertilisers is inelastic, and it is not likely that demand will increase even if significant price reductions take place.³ Demand is not likely to decrease significantly either, even in the case of increased prices, as plants will still need the same amount of nutrients. In a market characterised by diminutive demand elasticity, barriers to entry and price-conscious purchasers, the price effects of a restriction of competition can be considerable. Therefore, correct pricing in the fertiliser market is of great importance.

In an attempt to estimate the relative change in the retail price level, an asymmetric Cournot model was set up. The model took into account three effects in the retail market following from the creation of Ferti Supply and the parallel agreement between DLA Agro and Kemira:

- lower costs;
- increased buyer power and cost advantages due to better coordination in terms of logistics and production of scale. This effect would lower prices;
- increased market concentration;
- when AgroDK retailers were included in the Ferti Supply cooperation, these retailers could be expected to engage in the collusive behaviour as well. This effect would increase prices;
- higher costs to minor, independent retailers;
- since these retailers to some extent would be excluded from Yara's and Kemira's distribution channels, they could be prevented from achieving low-price supplies. Hence, minor, independent retailers would face higher costs. This effect would increase prices.

Incorporated in the model were the cost reductions of DLG, AgroDK and DLA Agro, a collusion index, the elasticity of demand and the percentage reduction in costs.

The analysis showed that the creation of Ferti Supply could cause a significant increase in the retail price level.

11. Remedies

It was the assessment of the DCA that – especially during the first three years after it had been put into effect – the creation of Ferti Supply would impede effective competition significantly. This was due to the fact that the establishment of the joint venture entailed a high degree of vertical integration, shielding the market significantly from competition.

In response to the concerns raised by the DCA, the parties submitted commitments that would abolish the agreed exclusivities downstream and Ferti Supply's long term minimum purchase obligation upstream. Instead, the parties agreed that Ferti Supply would negotiate one-year-contracts with both Yara and DLG/AgroDK. As the contracts expired each year, other producers/wholesalers would be given access to Ferti Supply, DLG and AgroDK and their distribution network. The 50 % minimum purchase obligation that existed before the proposed commitments was abolished and replaced by a one-year-quantity agreement. Competitors would thus have the same opportunities as Yara to approach Ferti Supply, DLG

³ Due to the legal limit for Danish fertilizer usage.

and AgroDK with competitive offers, and neither was bound by any pre-existing, long term minimum purchase obligation. In this way, the Danish fertiliser market would not be locked in.

The proposed commitments met the competitive concerns identified, and the DCA concluded – on that basis – that the creation of Ferti Supply did not significantly impede effective competition in the Danish fertiliser market, why it was approved, on the condition that the notifying parties implemented the proposed commitments before the creation of Ferti Supply was put into effect

FINLAND

1. Definition

The Act on Competition Restrictions (the Competition Act), which is the basis of Finnish merger control, does not provide a general definition for the concept of a vertical merger. In the merger guidelines issued by the Finnish Competition Authority (FCA) in 1998, a vertical merger is defined as a merger where the parties operate at different stages of the processing chain of a product and the merger does not have a direct impact on the market shares of the companies in the relevant markets. A conglomerate merger is an arrangement where the parties operate on separate markets which do not have horizontal overlaps or vertical links. The companies are not each other's competitors, and no changes occur in the market shares of the companies as a direct result of the merger. In the merger notification, the notifier shall provide information on, among other things, the vertical activities of the parties. In the notification form, the vertical markets are defined as product markets which, at an earlier or later stage of the distribution chain, are in relation to the relevant markets, and the information shall be given if the parties' combined market share on some of these markets in Finland is a minimum of 20 per cent.

In the merger decision Rautaruukki Oyj / PPTH Steel Management Oy¹, the vertical relation of the parties has been described as follows: Rautaruukki and PPTH operate at different stages of the production chain, *i.e.* their business activities have no horizontal overlaps but instead, they are in a vertical relation to each other. Rautaruukki does not prepare end-products competing with PPTH's products; it mainly produces materials for the manufacture of end-products. In its own production, PPTH uses steel products, components and façade structures manufactured by Rautaruukki. PPTH acquires from Rautaruukki the majority of the steel stock and components it uses.

The concept of an upstream/downstream firm has not been defined in the relevant legislation or in the merger guidelines. It has also not been explicitly stated in individual cases which firm operates in the downstream and which in the upstream market. However, it may be stated on basis of the above case example that the downstream firm has implicitly been defined based on the direction of the trade whereas the upstream firm is identified as the one producing intermediate products.

In the Government Bill of 1997 leading to the enactment of merger control provisions (the Government Bill) it is explicitly stated that horizontal mergers are generally considered more harmful than vertical arrangements. According to the merger guidelines the primary effect of **horizontal mergers** is in the decrease in the number of independent firms in the market. Regarding **vertical mergers** a dominant position may arise or be strengthened if a firm *e.g.* acquires important procurement sources or distribution channels which competitors also depend on. Further, a potential issue raised in the 1997 report of the working group deliberating the amendment of the Competition Act relates to situations where the vertical arrangement leads to the transfer of the market power of a dominant firm to another distribution level. Regarding **conglomerate mergers** the merger guidelines state that such a merger may have harmful impacts, for example when the conglomerate as a result of the merger enters a market, where the operators do not have equally vast resources. Additionally, the working group report cites as a potential competition

¹ The FCA's decision of 21 December 2005, Rautaruukki Oyj/PPTH Steelmanagement Oy (diary no 702/81/2005).

concern the situation of the linking markets: when the same firms operate on several mutually independent markets, their interdependency increases, which may lead to cartel-like conduct or the transfer of the monopoly power of a dominant company to new markets.

As a special case of vertical mergers, the law prescribes on situations where electricity producers integrate vertically by acquiring distribution companies engaging in network business and retail sales. A merger in the electricity market may be prohibited, if as a result of it the combined share of the parties transmission operations exceeds 25 per cent on a national level of the amount of electricity transmitted at 400 V in the distribution grid. The market shares are calculated so that all the operations of the parties and of the entities or facilities belonging in the same group of companies are included.

2. Anti-Competitive Effects of Vertical Merger

Vertical foreclosure has not been defined in the Finnish legislation or in the Government Bill. In the merger guidelines, the chapter on the assessment of a mergers discusses vertical relations as a factor that may confer market power. These relations may have effects on competition when a company has the control over the procurement sources or the major distribution channels. The acquisition of the major procurement sources or distribution channels may in the worst case lead to a situation where the competitors' access to the procurement sources or distribution channels may be completely foreclosed. Consequently also the barriers to entry may rise because entry may then require investments at several stages of the production and distribution chain. It has also been pointed out that effects on competition may arise from the interdependencies of the firm and its customers and distributors when *e.g.* the minority shareholding of the concentration in a customer company may result in precedence being given to the concentration in trade relations, even if a competitor would be able to offer products on more favourable terms.

The reasoning behind the market-specific regulation concerning mergers in the electricity market can be found in the Government Bill. It is stated that vertical integration between an electricity producer and a company engaging in retail sales and distribution may cause competition concerns in the electricity market, particularly because the production and wholesale market of electricity is highly concentrated and the major operators have significant market power. Vertical integration may also decrease the number of distribution channels available to potential new producers and hence significantly weaken the conditions of entry.

In the following, we go through the questions presented through concrete cases. It should be pointed out in this context that the FCA has reviewed few solely vertical mergers where even the suspicion of competition concerns has arisen (Rautaruukki, Cygate, Lohja Rudus, Finland Post). In the cases presented below, the parties have already had dominant or a near dominant position on one or more markets. Additionally, some cases where, in addition to horizontal overlaps, vertical integration has also had a bearing (Sonera/LSP, Valio/AitoMaito) are also listed here. These cases are included in order to achieve a more comprehensive idea of what kind of vertical relations may be of importance in a dominance analysis. In some cases, a specific arrangement may potentially raise several kinds of competition concerns.

Raising the costs of rivals and price squeeze. Following a vertical integration, a concentration might be able to raise the expenses of its competitors operating in the downstream markets, *e.g.* by raising prices or prolonging their delivery times. In the assessment of competitive problems, not only the possibility but also the incentive of the concentration to enforce a price squeeze or otherwise to raise the costs of the competitors shall be assessed.

In the Rautaruukki / PPTH merger case, it was suggested to the FCA that competition concerns would arise mainly in the market of industrial and office steel constructions, as Rautaruukki might, in integrating

to the steel construction market, be able to influence the competitive situation on the market by its strong position in the steel raw material and component markets. The market parties were concerned that the post-merger Rautaruukki would be able to favour PPTH, which is further down the production chain, *e.g.* by offering more favourable prices, delivery times and other conditions. However, PPTH had already formerly acquired the majority of its steel products from Rautaruukki, and the share of its purchases of the sales of Rautaruukki's steel products in Finland was only 0–10 per cent. Since Rautaruukki's objective as a manufacturer of steel is to increase the demand of steel, and the significance of PPTH's purchases is relatively small in relation to Rautaruukki's turnover, Rautaruukki does not have a particular incentive to favour PPTH. Additionally, favouring PPTH might before long lead to a reduction of competition in the steel construction market and consequently a decrease in the demand of steel and increase the demand of concrete construction work.

The Lohja Rudus Oy Ab /Abetoni Oy² arrangement also involved vertical integration, as Abetoni used as raw material of its own concrete products *e.g.* the aggregates of Lohja Rudus and the concrete of Finnsementti Oy, which is part of the same CRH plc Group as Lohja Rudus. In this case, the FCA examined *inter alia* whether the merger would strengthen Abetoni's position in the downstream market of concrete products, *i.e.* whether the merger would lead to the discrimination of Abetoni's competitors in the raw material market, either by Lohja Rudus adjusting its products for the use of Abetoni only or by Lohja Rudus giving price cuts to Abetoni. It emerged from the FCA's investigations that it was not possible to technically tailor the raw materials of concrete so as to fit the production of one concrete producer better than another. As for price cuts, it emerged from the investigations that a hypothetical 20 per cent price cut in concrete would have only led to an approximately 5 per cent a cut in the prices of some of Abetoni's end-products whereas, in other products, the effect of that price cut would have been significantly lower. Additionally, the investigations showed that the end-products were partially replaceable. In addition to Abetoni's position, the FCA also investigated, among other things, whether the already strong position of Finnsementti would be further strengthened in the upstream concrete market as a result of the merger, when an actual and potential buyer of imported concrete exited the market. Particularly due to the small value of Abetoni's concrete purchases, the FCA came to the conclusion that Finnsementti's dominant position was not reinforced. Additionally, the investigations showed that the price increases of concrete made by Finnsementti in the previous years had resulted in an increase of imports and decrease in the company's market share.

Acquiring sensitive information about unintegrated competitors. In a vertical merger, where one party cooperates with the other party's competitors in either purchasing or distribution, sensitive information of the competitors' activities may be transferred within the concentration. It depends on the market and the nature of the information whether such information constitutes a particular competitive advantage. Harm to competition and the end-users may arise *e.g.* in a situation where the information obtained results in that the concentration does not have to price its products as aggressively as without the said information. Mere complication of an individual competitor's activities is, however, not enough to intervene with the merger, if a dominant position does not arise or is not strengthened as a result of it.

In the TeliaSonera AB / Cygate AB³ merger, TeliaSonera acquired an operator which had as its customers several telecom operators competing with TeliaSonera in the end-product markets. Cygate *e.g.* delivers solutions for executing trunk networks and corporate telecom services to telecom operators, whereas TeliaSonera competes with them in the said markets. The market parties pointed out that the implementation of the merger provided TeliaSonera with access to its competitors' business secrets. Obtaining information concerning for instance the corporate telecom service markets, such as to which

² FCA's decision of 19 December 2003, Lohja Rudus Oy Ab/Abetoni Oy (diary no 1024/81/2002).

³ FCA's decision of 22 December 2006, TeliaSonera AB/Cygate Group AB (diary no 970/81/2006).

firms and by which solutions competitors deliver services may provide TeliaSonera with a competitive advantage and complicate the activities of the competitors in the end-product market. However, corporate telecom services are also provided by actors independent of the telecom operators and there are also several operators in the trunk network market, including operators that do not need Cygate's services. Hence, the FCA found that as TeliaSonera does not have a dominant position nor does one arise as a result of the merger on the rather competitive end-product markets, there is no need to intervene with the merger.

Other. In the Valio Oy / AitoMaito⁴ merger arrangement the parties had major overlaps in their business activities but the FCA's merger decision also pays particular attention to vertical integration. As a result of the concentration, the share of the cooperatives belonging to the Valio Group rose up to approximately 80 per cent in the purchase of raw milk from producers. Valio is vertically integrated to several markets in the dairy field and its market share *e.g.* in liquid dairy products increased from approximately 60 per cent to over 70 per cent. A major competitive problem arose in the retail market of raw milk when the target organisation involved in the collection and processing of raw milk independent of the Valio Group exited the market, as competitors of Valio were no longer able to purchase more raw milk from it for their own production of the downstream products. Following the merger, Valio's competitors became increasingly dependent on the milk deliveries and purchases of the Valio Group's raw milk. Additionally, the concentration was the only major supplier of skimmed and standardised milk and raw cream. Valio was able to strongly influence its competitors' ability to compete in the market of processed dairy products. Valio had no incentives to deliver raw milk, skimmed milk, standardised milk or raw cream to its competitors, since Valio would have, by so doing, improved their potential to operate in the downstream markets. In the conditions imposed on the merger, Valio was *inter alia* ordered to sell a maximum of 150 million litres of raw milk to its competitors.

In the Finland Post Oy / Atkos Printmail Oy⁵ merger arrangement, Atkos, which provides printing and mailing services, was transferred to the Post's sole control. The FCA found that the merger had harmful vertical effects on competition. In the assessment, attention was paid to the Post's dominant position in the transport and distribution of addressed letters, the significant market power of Atkos in the printing and mailing service market and the lack of transparency in the pricing of the Post's eLetter. The FCA found that the merger might, in a manner significantly impeding competition, strengthen the Post's dominant position in the transport and distribution market of letters. The strengthening of a dominant position was found to follow from the possibility for cross-subsidisation and the mutual tying of products and hence the weakening of the competitors' position and the entrants' potential entry to the field. It was found that the Post had a possibility to favour Atkos at the expense of its competitors by using terms of distribution which were discriminatory of the competitors. The conditions imposed on the merger were set to decrease the risk of cross-subsidisation and the attractiveness of the mutual tying of the products. The conditions improved the transparency of the cost structure and pricing.

Network incentives. In the Sonera / LSP⁶ arrangement in 2001, Sonera obtained control in a local telephone company. In its decision, the FCA examined *inter alia* the impacts of the merger in the development of the mobile telephony market and found that the established operators that are integrated in several markets have an apparent interest to prevent the emergence of the network effects relating to the business activities of new operators independent of their network. Operating in the mobile telephony market and integrated in several adjacent markets, Sonera had, in the FCA's estimate, several means

⁴ FCA's decision of 20 June 2000, the dairy and marketing business of Valio Oy/Kainuun Osuusmeijeri, Osuuskunta Maito-Pirkka and Aito Maito Fin Oy (diary no 1151/81/1999).

⁵ FCA's decision of 2 February 2001, Suomen Posti Oy/Atkos Printmail Oy (diary no 2/81/2001).

⁶ FCA's decision of 3 August 2001, Sonera Oyj/Loimaan Seudun Puhelin Oy (diary no 1202/81/2000).

available to it to implement this strategy, such as tying and cross-subsidisation as well as mergers and acquisitions.

Short/long term effects. Intervening with a merger requires that the dominant position arising or strengthening as a result of the merger significantly prevents competition. In the Government Bill significance is defined as that the harmful effects arising as a result of a concentration are either intense or of long standing. Despite a dominant position, a merger may be permitted when it is to be seen that the concentration shall, in a short term, lose its dominance *e.g.* as a result of increase of foreign competition or the entry of new companies into the market. Hence, short term harm to competition does not exceed the threshold to intervene with the merger.

Counterstrategies. In the merger guidelines it is stated, that characteristic of a dominant position is some technical, legal, strategic, financial or other competitive advantage which the competitors of a that firm cannot replace by imitating or developing competitive advantages of their own. A company which is in a dominant position is always able to respond to the competitive means used by its competitors and hence steer the price level or terms of delivery of the product. The competitors' possibilities to implement different counterstrategies have to therefore be taken in the consideration in the assessment of vertical mergers. If they have efficient counterstrategies available to them, with which to respond to the competitive advantages of the concentration, the concentration does not necessarily have market power.

3. Efficiencies and Vertical Mergers

The Government Bill states that the effects of a merger shall be assessed in their entirety, where the reduction of competition caused by the merger is taken into account on the one hand and the potential efficiency benefits of the merger on the other. Thus, there is no efficiency defence *per se* but rather the efficiency benefits of the merger are taken into consideration in the overall assessment of that merger. The effects of a merger may vary in different markets. Only the efficiency benefits arising from the merger and relevant to the Finnish markets have significance in the analysis. The efficiency gain must also benefit the customers or consumers.

The efficiency benefits of vertical mergers have not been explicitly evaluated in the FCA's case-law. As a mere example, in the LohjaRudus / Abetoni merger, the parties cited as efficiency benefits that since the parties' product lines are mostly supplementary of each other, the customers and consumers would benefit from the proposed arrangement when the new group is able to offer a more extensive selection. However, the parties did not show in which way these benefits would be merger-specific. It is not clear either whether such benefits would have been enough to outweigh any competition problems. Since the FCA did not find that a dominant position arising or strengthened as a result of the arrangement, it did not explicitly evaluate the mentioned efficiency benefits in the clearance decision.

4. Evidence and Enforcement Policy

Under the provisions of the Competition Act, prohibiting a merger or imposing conditions on its implementation requires that, as a result of it, a dominant position which significantly impedes competition in Finland shall arise or be strengthened. This dominance test prescribed in the Competition Act is obviously a primary framework of analysis also in the assessment of vertical mergers. Intervening with a merger requires that the market or the markets in which a dominant position shall arise to the parties or the existing dominant position of either party shall be strengthened have to be identified. Hence, as a rule, the investigation of a vertical merger and the analysis of its competitive effects takes place in the same manner as with a horizontal merger.

The FCA has not used econometric models, natural experiments on prices or structural variables pre-merger in the assessment of vertical mergers. Generally, when examining mergers, opinions are invited from a variety of market operators (customers, competitors, suppliers, incl. foreign), market data is collected and independent statistics are used and, when necessary, evidence is collected on visits to the companies. *E.g.* in the Rautaruukki case, the FCA requested import information when examining whether other downstream companies were dependent on the production input of the domestic upstream firm Rautaruukki.

Since, as stated above, the Finnish merger control is based on the dominance test, in order to intervene with a merger, the FCA shall be able to identify a dominant position in one or more of the markets the parties are active in. Therefore it is also necessary to examine the market shares and the concentration rates of the markets and to assess, generally, whether the parties to the concentration have market power in either the upstream or the downstream market.

In Finland, there are no guidelines on the assessment of vertical mergers.

5. Remedies

Ex post control allows a non-intervention with vertical mergers which, despite potential harmful effects for competition or competitors, have efficiency benefits increasing consumer welfare. Finnish legislation, however, has clearly opted for ex ante control where mergers resulting in a creation or strengthening of a dominant position that significantly impedes competition, shall be intervened with.

A potential deterrent effect brought about by the control of the abuse of dominant position has not been incorporated into the legislation or explicitly assessed in the case-law.

FRANCE

La question spécifique que pose le contrôle des concentrations emportant des effets verticaux, à savoir la mesure des gains d'efficacité pour les entreprises en cause, et leur comparaison par rapport au risque éventuel de perte de bien-être pour les consommateurs, fait actuellement l'objet d'un vif intérêt de la part des autorités de concurrence dans de nombreux pays de l'OCDE. C'est notamment le cas pour les autorités membres du Réseau Européen de Concurrence, qui ont été associées au projet de lignes directrices de la Commission Européenne sur les concentrations non horizontales. A l'occasion de l'examen de ce projet, la France a été amenée à faire valoir son point de vue sur l'appréciation des dommages potentiellement causés par les effets verticaux d'une opération de concentration.

Il s'agit en tout état de cause d'un sujet de vif intérêt pour la France. En témoigne l'organisation par la DGCCRF en avril 2006, d'un « atelier de la concurrence¹ » sur le thème des concentrations « verticales et conglomerales ». Cette conférence avait pour but de tenter de répondre à une préoccupation majeure des praticiens de la concurrence actuellement : « Comment seront contrôlées les concentrations verticales et conglomerales après GE/Honeywell et Tetra-Laval/Sidel ? ». Cette journée a été l'occasion d'échanges fructueux sur le sujet, entre économistes et juristes d'une part, entre autorités de concurrence et opérateurs économiques d'autre part, et a permis de mieux circonscrire cette question difficile.

La nature intrinsèquement différente des effets verticaux par rapport aux effets horizontaux, que non seulement la théorie économique, mais également la pratique décisionnelle ont permis de mieux circonscrire, laisse clairement apparaître la nécessité d'un traitement différencié de la problématique verticale dans les décisions prises au titre du contrôle des concentrations. C'est d'ailleurs la conclusion à laquelle ont abouti les services de la Commission européenne, et à laquelle la délégation française souscrit pleinement. Lorsque, au cours de l'instruction d'une opération notifiée, une problématique verticale apparaît, il convient d'accorder un examen particulier aux gains d'efficacité générés par la concentration, d'importance au moins équivalente à l'accroissement du pouvoir de marché des entreprises en cause.

L'intégration systématique de la question des gains d'efficacité, dans le cadre analytique d'une opération ayant des effets verticaux sensibles, peut permettre de mieux apprécier la réalité des risques concurrentiels.

Bien que les deux questions appellent naturellement des traitements juridiques différents, la France note que l'analyse économique de l'impact vertical d'une opération de concentration est très proche de celle des restrictions verticales. Ce sont le plus souvent les mêmes mécanismes économiques qui sont à l'œuvre lors de l'examen prospectif d'une opération de concentration soulevant des problématiques verticales, et lors de l'évaluation rétrospective des effets d'une pratique anticoncurrentielle telle qu'une restriction verticale. Aussi pourrait-il éventuellement s'avérer profitable que le document de synthèse du Secrétariat du Comité de la Concurrence de l'OCDE rapproche la question du contrôle ex-ante des concentrations emportant des effets verticaux de celle de l'approche ex-post des restrictions verticales.

¹ Atelier de la concurrence de la DGCCRF du 5 avril 2006, « Comment seront contrôlées les concentrations verticales et conglomerales après GE/Honeywell et Tetra-Laval/Sidel ? », sous la présidence de Me Anne WACHSMANN, avocate et de M. Patrick REY, professeur d'économie à l'Université de Toulouse.

La délégation française se félicite d'apporter sa contribution à ces travaux de réflexion sur la politique de concurrence, dont le but ultime n'est autre que de promouvoir au niveau international un droit adapté aux spécificités des marchés, c'est-à-dire qui favorise l'efficacité économique, et qui soit en définitive garant d'une croissance stable et pérenne, au bénéfice du plus grand nombre.

Afin de permettre à l'OCDE de préparer au mieux la table ronde du 22 février prochain, le Secrétariat trouvera ci-après quelques unes des réflexions menées par la France sur les spécificités de l'analyse des effets verticaux dans le cadre d'une opération de concentration. Si la France ne dispose pas pour l'heure de document de travail propre à cette question, certains passages des lignes directrices de la DGCCRF relatives au contrôle des concentrations (en général) s'intéressent spécifiquement aux effets verticaux. La pratique de la DGCCRF n'est donc pas vierge en la matière. Dans la présentation qui en est faite ci-après, les exemples concrets d'application de la pratique nationale ont été rapprochés des éléments d'économie théorique qui les ont inspirés, qu'il s'agisse d'opérations purement verticales, ou d'opérations qui ont laissé apparaître – entre autres problèmes horizontaux ou congloméraux – des problématiques verticales.

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Introduction

Contrairement aux effets horizontaux d'une concentration, pour lesquels il est aujourd'hui acquis qu'ils peuvent créer des problèmes de concurrence, les effets verticaux sont un concept plus flou, en proie à une polémique persistante depuis la présentation qu'en a faite l'École de Chicago : si l'objet de la politique de la concurrence est de promouvoir l'efficacité économique au bénéfice des consommateurs, est-il véritablement pertinent d'examiner ces effets verticaux, qui, le plus souvent, accroissent l'efficacité du processus de production ? La théorie économique s'accorde en effet à reconnaître que la coordination entre des entreprises situées à différents stades de la chaîne de production est profitable à l'efficacité productive. Pour autant, il serait abusif d'écarter *a priori* l'existence de tout risque concurrentiel.

Aussi, la difficulté qu'éprouvent les autorités de concurrence à produire des lignes directrices relatives aux concentrations verticales ne fait que refléter la complexité qu'il y a à dégager les grandes lignes d'une notion qui appelle le plus souvent une analyse au cas par cas. Dans la lignée des réformes prises depuis 2004 du régime communautaire de contrôle des concentrations, la Commission européenne a notamment proposé un projet de lignes directrices pour les concentrations non-horizontales, qui devrait être soumis à consultation prochainement. La rédaction de ce projet, à laquelle les autorités nationales ont notamment été associées dans le cadre d'un comité consultatif, a eu le mérite d'initier une réflexion sur la nature des effets verticaux, et sur leurs implications en termes de risque anticoncurrentiel.

A l'issue de ce travail, si d'aucuns peuvent encore regretter qu'il n'existe toujours pas de principe « clair et précis » qui permette de départager sans difficulté les opérations de nature à emporter un risque de celles qui sont sans danger, il reste que la réflexion menée s'est avérée particulièrement bénéfique. Elle aura permis de mieux circonscrire la question des effets verticaux et d'en percevoir toute la difficulté. Elle aura également démontré l'impérieuse nécessité d'appliquer un raisonnement spécifique pour apprécier chaque cas d'espèce.

1. Appréhension des effets verticaux dans le régime français de contrôle des concentrations

A titre liminaire, la délégation française souhaite attirer l'attention du Comité de la concurrence de l'OCDE sur une question d'ordre lexical. Le terme de « concentration verticale » utilisé dans l'appel à contribution ne semble pas le plus approprié pour évoquer la problématique en cause. En effet, il n'est pas rare qu'une autorité de concurrence soit amenée à étudier plusieurs effets anticoncurrentiels possibles d'une même opération de concentration, qu'ils soient horizontaux, verticaux ou congloméraux. Aussi n'y a-t-il *a priori* aucune raison de qualifier une telle opération préférentiellement de concentration « horizontale », « verticale » ou « conglomérale », puisqu'elle pourrait être les trois à la fois. A titre illustratif, une opération emportant un chevauchement horizontal d'activité, pourra donner lieu à des questions sur l'existence de la création ou de l'accroissement d'un risque horizontal de forclusion si elle implique une firme préalablement intégrée.

C'est notamment le cas pour les opérations les plus importantes examinées par la DGCCRF, telle la prise de contrôle de l'opérateur de télévision payante par satellite TPS par Vivendi Universal², qui était déjà présent dans ce secteur via Groupe Canal+ et possédait déjà notamment la plateforme satellitaire CanalSat. La DGCCRF notait alors que « *compte tenu de la diversité des activités exercées par le groupe Vivendi et les cibles ainsi que de l'intégration verticale de ces entreprises, trois catégories de marchés seront analysées successivement : les marchés de l'acquisition de contenus audiovisuels (Sections I et II), les marchés aval (Section II) et, enfin, les marchés connexes (Section III).* »

² C2006-02 / Lettre du ministre de l'économie, des finances et de l'industrie du 30 août 2006, aux conseils de la société Vivendi Universal, relative à une concentration dans le secteur de la télévision payante.

La délégation française préconise donc que le choix du vocabulaire utilisé porte plutôt sur la nature des effets anticoncurrentiels que sur la qualification de l'opération de concentration elle-même. Aussi parlera-t-on préférentiellement d'une opération de concentration emportant des effets verticaux que de « concentration verticale », car rien n'empêche en théorie le cumul des effets anticoncurrentiels pour une même opération.

Les concentrations sont soumises en France aux dispositions du code de commerce relatives à la concentration économique (Livre IV, Titre III). Plus précisément, il s'agit des articles L.430-1 à 10 de ce code, qui s'inscrivent dans le paradigme théorique commun à l'ensemble de la politique de concurrence au sein de l'Union européenne : la concurrence, en permettant un processus de sélection efficace des offreurs sur les marchés, est bénéfique aux consommateurs, dans la mesure où elle permet d'aboutir à la meilleure allocation des ressources rares, en d'autres termes, à la diffusion d'une grande variété de produits et de services au meilleur prix, dans une perspective dynamique d'amélioration de la qualité par l'innovation.

Dans ce contexte, le but du contrôle des concentrations est de vérifier qu'il ne résulte pas du rapprochement envisagé entre des entreprises un accroissement excessif de leur pouvoir de marché. Ce dernier pourrait en effet permettre à la nouvelle entité fusionnée de s'affranchir de la discipline du marché pour augmenter ses prix, baisser la qualité de ses produits, ou ralentir ses efforts d'innovation, au détriment des consommateurs.

Ce souci est particulièrement prégnant lorsque l'opération emporte un risque horizontal, c'est-à-dire entraîne un chevauchement d'activité des entreprises parties à la fusion sur au moins un même marché, car disparaît alors effectivement un acteur indépendant, ce qui réduit le degré de concurrence prévalant sur ce marché.

Il l'est également, mais dans une mesure moindre, lorsque la concentration emporte des effets verticaux. Il s'agit d'une opération qui aboutit à la création d'une entité fusionnée à partir d'entreprises qui étaient préalablement présentes sur des marchés en relation verticale, c'est-à-dire situés à des stades différents d'un même processus de production ou de commercialisation. A l'issue d'une telle concentration, la nouvelle entité est présente à plusieurs stades de la chaîne de transformation du produit. La nature des problèmes de concurrence éventuellement soulevés n'est pas la même dans le cas d'une relation verticale :

- Les parties à l'opération n'étaient pas, préalablement à l'opération, en concurrence frontale sur un même marché : l'opération ne peut donc pas donner lieu mécaniquement à une réduction **directe** de l'intensité concurrentielle. Il peut néanmoins résulter d'une telle opération des risques concurrentiels indirects, qu'il convient d'analyser.
- En revanche, en fusionnant des entreprises situées à des stades différents de la chaîne de production au sens large (c'est-à-dire incluant la commercialisation), ces opérations peuvent avoir des conséquences positives, en accroissant l'*efficacité* du processus de production grâce à une meilleure coordination entre les différentes étapes du processus productif.

Avant de préciser la pratique nationale quant à l'instruction de tels dossiers de concentration, il convient de rappeler quelques éléments essentiels de la base juridique sur laquelle s'appuie le régime français de contrôle des concentrations.

1.1 Définition des effets verticaux en droit français de la concurrence

Comme expliqué précédemment, il n'existe pas, à proprement parler, de définition des « concentrations verticales » en droit interne. En revanche, les lignes directrices de la DGCCRF relatives

au contrôle des concentrations reconnaissent la pertinence d'une *analyse spécifique des effets verticaux*, comme le précise le paragraphe 353 :

« Même en l'absence de toute addition de parts de marché, une opération peut notamment susciter des questions de concurrence si elle réunit dans une même entreprise des activités situées à des stades différents de la vie d'un même produit ou d'un même service. De telles concentrations permettent souvent d'intégrer des étapes différentes de la fabrication d'un produit ou de la conception d'un service, ou encore d'intégrer la fabrication conception avec la commercialisation. L'un des exemples types d'intégration verticale est l'achat, par un fabricant, d'un réseau de distribution de son produit [...] »

Sans explicitement définir ce qu'ils pourraient être, les lignes directrices de la DGCCRF reconnaissent l'existence et la particularité des effets verticaux. Elles imposent donc d'examiner les relations commerciales entre des firmes situées à des étapes différentes d'une même chaîne de production.

I.2 Définition des secteurs amont et aval

Il n'existe pas de base juridique qui permette d'identifier en soi des entreprises « amont » ou « aval ». Cependant, la pratique a communément distingué plusieurs types de marchés, en fonction de leur emplacement dans la chronologie de la chaîne de production : les entreprises situées le plus à l'amont commercialisent des biens (« input ») consommés dans le processus de production des entreprises plus en aval.

Le dernier maillon de la chaîne de production est celui de la commercialisation aux clients finals. Aussi est-il de tradition que la pratique française désigne les marchés à destination des consommateurs ultimes des produits sous le vocable « marchés aval ». En ce qui concerne les marchés de la chaîne de production, ils sont le plus souvent dénommés « marchés amont » par simplicité, mais il peut arriver que l'analyse du cas requière de dénommer plus de deux marchés pour une même chaîne de production.

Dans l'affaire Vivendi Universal/TPS précitée, la DGCCRF a par exemple étudié non seulement des marchés « amont » mais des marchés « intermédiaires » en plus des marchés « aval ». En effet, la décision précise que « *l'analyse concurrentielle horizontale, et, lorsque cela se justifie, verticale et conglomérale, de l'opération notifiée et l'examen des remèdes éventuellement adoptés seront effectués, sur les marchés **amont** (Section I), **intermédiaires** (Section II) et **aval** (Section III) de la chaîne de valeur et sur les autres marchés concernés (Section IV).* »³

I.3 Attention portée aux effets verticaux dans le cadre d'une opération de concentration

Le code de commerce pose les principes qui sous-tendent le contrôle français des concentrations, fondé sur un examen très large des éventuels problèmes de concurrence soulevés par l'opération notifiée. Préalablement à toute prise de décision, la DGCCRF doit évaluer le risque « *d'atteinte à la concurrence* », au sens des articles L.430-5 et L.430-6 du code de commerce. Le spectre du contrôle est donc potentiellement très étendu : tout risque d'atteinte à la concurrence doit être examiné de manière circonstanciée, que l'opération fasse naître des chevauchements d'activité entre les entreprises en cause (« effets horizontaux »), ou que ces dernières soient actives sur des marchés voisins, c'est-à-dire amont et aval (« effets verticaux ») ou connexes (« effets congloméraux »).

Le décret n° 2002-689 du 30 avril 2002 fixe les conditions d'application du livre IV du Code de commerce relatif à la liberté des prix et de la concurrence. Son annexe I précise les informations que doit

³ Décision Vivendi Universal/TPS précitée, soulignement ajouté.

contenir tout dossier de notification, et notamment celles permettant à la DGCCRF d'examiner les marchés concernés ou affectés par l'opération. Ces éléments sont demandés aux entreprises pour un marché donné lorsque « *une entreprise au moins [...] exerce des activités sur ce marché et qu'une autre de ces entreprises ou groupe exerce des activités sur un marché situé **en amont ou en aval** ou connexe, **qu'il y ait ou non des relations de fournisseur à client entre ces entreprises*** ». Parmi les éléments qui doivent être portés à l'examen de la DGCCRF figurent notamment « *les accords de coopération (horizontaux et verticaux) conclus par les entreprises ou groupes [...] sur les marchés affectés, tels que les accords de recherche et développement, les accords de licence, de fabrication en commun, de spécialisation, de distribution, d'approvisionnement à long terme et d'échanges d'information.* » (§ f)

Les dispositions légales et réglementaires n'imposent donc pas *a priori* une démarche différenciée selon la nature de l'opération. Elles attestent en revanche de l'intérêt porté par les pouvoirs publics en France aux effets verticaux susceptibles d'être induits par toute opération de concentration, effets dont l'examen fait pleinement partie de l'instruction.

C'est donc dans la pratique décisionnelle de la DGCCRF, souvent en ligne avec celle de la Commission européenne, qu'il convient de rechercher les précisions nécessaires quant à la mise en œuvre concrète du contrôle des concentrations emportant des effets verticaux.

I.4 Pratique décisionnelle relative aux effets verticaux

A titre liminaire, et avant que chacun de ces points ne soit développé de façon plus complète et illustrée dans les parties II. et III. suivantes, on peut résumer la pratique décisionnelle nationale en matière d'effets verticaux par deux notions.

Une opération de concentration soulevant des effets verticaux génère intrinsèquement des gains d'efficacité liés au fait que l'intégration verticale permet une optimisation du processus de production tout au long de la chaîne de production (a). Toutefois, on ne peut pas exclure *a priori* que cette même opération puisse également être à la source d'effets anticoncurrentiels (b). Le rôle de l'instruction est donc de réaliser un bilan de ces deux différents effets, potentiellement bénéfiques ou nuisibles au bien-être du consommateur, pour en estimer l'impact net sur l'économie.

a) Les gains d'efficacité liés à l'intégration verticale

Le processus de production des biens requiert souvent plusieurs transformations entre la matière première et le produit final délivré au consommateur. La division de la chaîne de production entre plusieurs entreprises peut être source d'inefficacité économique. Ce défaut d'efficacité est dû à l'absence de prise en compte, par chaque acteur indépendant, de l'impact de ses décisions individuelles sur les choix économiques opérés par ses partenaires. On parle alors « d'effet externe » ou « d'externalité ». Ce cas de figure ne se présente pas forcément uniquement dans les situations où le processus de « fabrication » du produit est segmenté entre plusieurs entreprises : dans la plupart des marchés, les producteurs ne vendent pas directement leurs biens au consommateur final, mais font appel à des intermédiaires (grossistes ou détaillants) pour les distribuer. Un défaut de coordination entre producteur et distributeur peut tout autant être une source d'inefficacité.

Le défaut de concertation dans la chaîne de production au sens large peut être corrigé par différentes méthodes, et notamment par l'intégration verticale, qui permet à l'entité fusionnée « d'internaliser les externalités ». Il reste que l'intégration verticale n'est qu'une méthode parmi d'autres pour optimiser les transactions opérées au cours du processus productif : des relations commerciales de long terme, régies contractuellement, peuvent également permettre de réduire les coûts de transaction, garantir la stabilité des approvisionnements et des débouchés, et offrir les possibilités d'une meilleure coordination.

Il convient donc de garder à l'esprit que les concentrations, entre des entreprises situées à différents stades de la chaîne de production, peuvent être considérées comme une alternative à des contrats, lesquels sont encadrés par le droit des pratiques anticoncurrentielles. En conséquence, d'un point de vue économique, il semble logique d'adopter une attitude similaire dans l'appréciation des effets d'un contrat et celle d'une intégration verticale. La démarche consistant à procéder au cas par cas, et à *mesurer les effets économiques de l'opération* avant de prendre une décision, semble en définitive la plus adaptée.

b) *Les risques d'atteinte à la concurrence liés aux effets verticaux*

Les risques d'atteinte à la concurrence liés aux effets verticaux peuvent prendre deux formes principales : les effets non coordonnés et les effets coordonnés. Pour les besoins de l'analyse de ces risques, l'autorité de concurrence est appelée à comparer les conditions qui prévalaient avant l'opération, et celles qui vont probablement en résulter.

- Les **effets non coordonnés** reposent essentiellement sur le risque de *forclusion*. La concentration peut permettre à l'entité fusionnée de réduire (voire éliminer) l'accès des concurrents soit à une source d'approvisionnement, soit à des débouchés. Ce comportement peut éventuellement entraîner à terme un dommage aux consommateurs.
- Les **effets coordonnés** correspondent à une *modification de la structure concurrentielle* des marchés. Une concentration, en accroissant les échanges d'information entre les différents stades de la chaîne de production, désormais réunis au sein d'une structure commune, peut par exemple améliorer la connaissance que chaque entreprise fusionnée a du fonctionnement de son secteur et accroître ainsi la transparence des marchés. Cette modification peut être de nature à créer ou à renforcer une position dominante collective (« PDC ») des entreprises sur un marché. On parle de création lorsque des firmes, qui au préalable n'étaient pas en position dominante collective, pourront éventuellement l'être à l'avenir, car elles seront structurellement incitées à limiter l'intensité de la concurrence entre elles (ce qui pourra entraîner une augmentation globale des prix). Le renforcement évoque une situation où l'opération renforce les conditions de stabilité d'une PDC préalable, et facilite la collusion tacite entre les firmes détenant cette position.

* * *

En définitive, si les parties disposent d'un faible pouvoir de marché (quelques points de parts de marché), il semble très improbable que l'opération se traduise par une atteinte à la concurrence en raison de ses effets verticaux. Il convient cependant de rester vigilant dans l'examen des conditions dans lesquelles s'opère la concentration, notamment lorsqu'une des parties à l'opération est un « animateur de la concurrence » (« *maverick* »). Une opération où un tel acteur disparaît (par exemple une firme innovante ou de façon analogue, un entrant potentiel) est susceptible d'emporter des effets portant atteinte à la dynamique concurrentielle du marché.

Par ailleurs, la vigilance s'impose également en fonction du contexte concurrentiel. Lorsque par exemple des liens capitalistiques croisés relient les différents acteurs du marché, lorsque le secteur a déjà fait l'objet de condamnations pour entente, ou lorsque les conditions structurelles du marché (degré de concentration, niveau de transparence, évolution constatée des prix, conditions d'entrée) semblent être favorables à une collusion tacite, l'instruction doit également porter sur les effets coordonnés.

2. Effets verticaux et efficiences

De même que certains contrats de long terme entre des entreprises qui entretiennent des relations verticales, la concentration entre des entreprises respectivement offreur et demandeur sur un même marché peut donner lieu à d'importants gains d'efficience.

Sans faire une présentation exhaustive des différents gains à attendre d'une opération de concentration, la délégation française souhaite donner quelques exemples d'éléments qui ont déjà été pris en compte dans une décision prise au titre du contrôle national des concentrations, ou pourraient l'être à l'avenir.

Ces gains d'efficience sont liés à la résorption d'une asymétrie d'information entre les différents stades de la production et à la prise en compte, dans le calcul économique de la nouvelle entité fusionnée, des effets générés par l'activité d'un secteur sur l'autre. Enfin, la réduction des coûts de transaction plaide également en faveur de l'intégration verticale.

2.1 La question de la double marge (externalité verticale)

Dans une relation verticale entre un producteur et un distributeur indépendants, chacune des deux entreprises se comportent de façon autonome. Cependant, les choix opérés par l'une ont des implications sur la seconde, et inversement ; implications qui ne donnent pas forcément lieu à compensation monétaire. En termes économiques, on dira qu'il y a des externalités croisées dans la relation verticale producteur/distributeur.

La question des externalités affectant la relation verticale entre des entreprises disposant d'un pouvoir de marché, mieux connue sous le nom de « double marge » a été identifiée pour la première fois par Spengler en 1950⁴. Le comportement individuel de maximisation des profits des producteurs et distributeurs disposant d'un pouvoir de marché les conduit à pratiquer un prix (« de gros » sur le marché amont ou « final » sur le marché aval) plus élevé que celui que pratiquerait une firme intégrée verticalement disposant d'un pouvoir de marché équivalent. Les consommateurs payent donc un prix trop élevé (ou disposent d'une quantité de biens trop réduite) par rapport à une situation efficace économiquement : au final, producteur, distributeur et consommateur perdent en bien-être par rapport à la situation idéale.

L'exemple traditionnellement utilisé pour présenter le phénomène de double marge est un modèle qui voit se faire face deux monopoles, l'un à l'amont, l'autre à l'aval. Cependant, la question de la double marge se pose dès lors qu'il existe un pouvoir de marché (même en deçà du monopole) à l'amont et à l'aval. Toutes les situations oligopolistiques en relations verticales sont donc potentiellement concernées par ce phénomène : les externalités verticales causent une inflation du prix au-delà d'un niveau « optimal », c'est-à-dire celui qu'établirait spontanément une structure verticalement intégrée.

Si les entreprises coordonnaient leur tarification, elles n'appliqueraient la marge (liée au pouvoir de marché) qu'une seule fois au lieu de deux : elles constatent en effet qu'une baisse du prix sur le marché final leur permettrait d'accroître le profit total généré par l'industrie, l'accroissement du volume des ventes compensant plus que largement la baisse de la marge unitaire. En définitive, l'entreprise intégrée internalise les externalités générées par un secteur sur l'autre, et devient alors économiquement plus efficace.

⁴ Spengler, J.J. 1950. "Vertical Integration and Anti-Trust Policy." *Journal of Political Economy*. 58 : 347-52

L'existence de ces efficiences est reconnue par la pratique des autorités nationales de concurrence, tant par le Conseil de la concurrence que par la DGCCRF. L'opération Groupe Arc International⁵, dans le secteur de la distribution en gros des produits des arts de la table, qui avait pour effet d'intégrer verticalement les quatre grossistes au sein du groupe, en les réunissant dans une même entité économique (alors même que ces derniers étaient auparavant liés par une centrale d'achat commune, Fliba) a notamment permis de rappeler la doctrine décisionnelle en la matière. Reprenant à son compte les conclusions de l'avis du Conseil de la concurrence, la DGCCRF rappelait d'une façon générale que « *une intégration verticale est porteuse de gains d'efficacité dès lors qu'elle favorise une prise de décision commune entre l'amont et l'aval et qu'elle permet de réduire l'ampleur de la double marginalisation.* »

Autre exemple, pour autoriser l'acquisition du Groupe Exposium⁶ par Unibail, dans le secteur de l'organisation de salons, la DGCCRF a réalisé une analyse des effets verticaux. L'opération n'entraînait en effet d'addition de parts de marché sur aucun des marchés concernés, mais pouvait s'analyser comme une intégration verticale : Unibail était active sur le marché amont de la gestion de sites de congrès-expositions et Exposium sur le marché aval de l'organisation de foires et salons. Les deux acteurs étaient présents en région parisienne.

L'internalisation verticale permise par une concentration entre un gestionnaire de site et un organisateur de foires et salons peut générer des efficiences. Certains salons sont par exemple créés à l'initiative d'organisations professionnelles, qui peuvent faire le choix de retenir un prestataire extérieur spécialisé pour l'organiser. Dans le cadre d'un appel d'offres sont sélectionnés à la fois l'organisateur de l'événement et/ou le lieu où il se tiendra. La DGCCRF note dans sa décision qu' « *il peut arriver qu'un organisateur et un gestionnaire de site, qu'ils soient intégrés ou non, répondent conjointement à l'appel d'offres* ». Il y a donc des gains d'efficience à proposer à la fois l'infrastructure et son exploitation : l'intégration verticale peut constituer une façon de les internaliser.

L'intégration verticale n'est toutefois pas la seule solution possible en théorie.

Des clauses contractuelles entre producteur et distributeur pourraient également permettre de mieux prendre en compte ces externalités. La plus simple (mais elle est souvent interdite en droit) pourrait consister à fixer le prix de vente au consommateur final au niveau que choisirait une structure intégrée. Cette technique n'est toutefois possible que si le prix de vente au consommateur final est observable. La fixation d'un quota de vente peut également donner le même résultat, si tant est que le niveau de ventes requis s'avère optimal pour la structure intégrée.

Une autre possibilité pour restaurer l'efficacité allocative est de pratiquer une tarification non linéaire : pour vendre le produit, le distributeur s'acquitte d'un droit d'entrée fixe, puis achète chaque unité de bien à un prix unitaire. Ce mode de tarification permet de faire converger les intérêts du distributeur avec ceux du producteur, en alignant le prix unitaire sur le coût marginal de production. Ce contrat incitatif, fondé sur une tarification non linéaire, peut prendre plusieurs formes : une politique de rabais croissant avec le nombre d'unités achetées peut ainsi inciter à vendre plus ; un quota minimal de vente à faire des efforts de commercialisation... Le distributeur est alors incité à vendre exactement au même prix qu'une structure intégrée. Le profit obtenu est le plus important possible, et une partie de ce profit est rétrocédée au producteur sous la forme du droit d'entrée fixe. La clef de répartition du profit entre producteur et distributeur est alors fonction du pouvoir de négociation de l'un et de l'autre.

⁵ C2004-86 / Lettre du ministre d'État, ministre de l'économie, des finances et de l'industrie, du 24 novembre 2004 aux conseils du Groupe Arc International relative à une concentration dans le secteur de la distribution en gros des produits des arts de la table.

⁶ C2005-6 / Lettre du ministre de l'économie, des finances et de l'industrie du 14 mars 2005, aux conseils de la société Unibail Holding SA, relative à une concentration dans le secteur de l'organisation de salons.

Par ailleurs, d'autres formes de contrats envisageables, qui permettent de restaurer l'efficacité économique globale de l'industrie, peuvent consister en une distribution exclusive ou la mise en œuvre d'une simple coordination des politiques commerciales.

Toutefois ces clauses contractuelles ne sont pas équivalentes à l'intégration s'il existe des incertitudes portant sur l'évolution du marché (liées notamment à la bonne exécution du contrat, au niveau de la demande finale ou aux coûts de distribution), ou si le distributeur est averse au risque..

Une tarification non-linéaire pourrait certes inciter le distributeur à réagir aux chocs de demande ou de coût comme une firme intégrée, mais ce serait au prix d'une prise de risque pour lui trop importante : si le distributeur est averse au risque, le producteur serait contraint de lui assurer un niveau minimum de profit (or, précisément, l'assurance tue l'incitation). En revanche, la solution offerte par l'intégration verticale permet d'atteindre un niveau d'efficacité équivalent, sans poser le problème de l'aversion au risque.

Enfin, il convient de rappeler qu'il n'est pas possible, d'un point de vue juridique, de placer sur un même plan concentrations et restrictions verticales, même si leurs effets économiques sont souvent proches. Tout contrat peut être résilié. Par rapport à l'intégration verticale, cette potentialité accroît l'incertitude sur les effets économiques qu'on peut en attendre. Par ailleurs, la coordination des stratégies tarifaires ne soulève pas les mêmes risques juridiques s'il s'agit de deux entités du même groupe intégré ou si elle émane de deux entreprises indépendantes : dans le premier cas, il s'agit d'une décision autonome de l'entreprise intégrée, alors que, dans le second, l'accord sur les prix peut tomber sous le coup du droit des ententes.

Du point de vue du producteur, le problème de la double marge n'existe que si les entreprises à l'aval sont en mesure de pratiquer une marge, c'est-à-dire si elles disposent d'un pouvoir de marché. Une solution intéressante, si elle était possible, consisterait donc à tenter d'éliminer le pouvoir de marché des distributeurs. Dans ce cas, plus la concurrence entre distributeurs sera féroce, plus faible sera le taux de marge appliqué à l'aval, et donc plus faible sera l'effet de double marginalisation.

Aussi peut-on s'interroger sur la pertinence de certaines clauses contractuelles adoptées par les producteurs, qui consistent à accorder des exclusivités territoriales à leurs distributeurs. En leur conférant des monopoles locaux dans certaines zones géographiques, ces dernières aggravent mécaniquement le phénomène de double-marge. Ce paradoxe est intéressant en ce qu'il permet d'introduire un autre type d'externalité susceptible d'affecter les relations producteur/distributeur, de nature à réduire l'efficacité économique, et auquel l'intégration apporte également une solution : l'opportunisme (« *free-riding* ») de certains distributeurs indépendants.

2.2 La question du comportement de « passager clandestin » (externalité horizontale)

Outre les externalités verticales entre producteur et distributeur, évoquées à l'instant, il convient de noter l'existence d'externalités horizontales entre les distributeurs eux-mêmes. Comme il vient d'être précisé, ces externalités horizontales peuvent également être sources d'inefficacité économique.

Le service de commercialisation⁷ (niveau et qualité) par un distributeur donné constitue une externalité pour les autres distributeurs du même produit. A titre d'exemple, les efforts réalisés par un distributeur, par exemple pour mettre le produit en avant (souci de la qualité de la mise en rayon, mise à disposition d'un personnel qualifié suffisamment nombreux pour aider les clients, etc.) ont un impact direct non seulement sur le profit du producteur, mais également sur les ventes des autres distributeurs du même

⁷ Telser, L.G. 1960. "Why Should Manufacturers Want Fair Trade?" *Journal of Law and Economics*. 3 : 86-105, a le premier étudié cette question.

produit. Dans le même esprit, certains auteurs⁸ suggèrent que certains distributeurs fournissent aux consommateurs un *service de certification de la qualité*. En acceptant de stocker des quantités importantes de produits, ou à mettre en place un service après-vente, ils garantissent implicitement la qualité aux yeux du consommateur : leur propre confiance dans le produit est un signal envoyé aux consommateurs finals. Mais cette activité de certification a un coût pour le distributeur, alors qu'il lui est impossible de s'approprier l'ensemble des bénéfices qu'elle permet de dégager.

En réalité, l'impact économique de ces services (commercialisation, certification) ne peut jamais être totalement approprié par le distributeur qui les dispense, dans la mesure où il peut exister des reports de la demande vers d'autres distributeurs du produit, reports d'autant plus importants que la différence de prix sera importante entre les distributeurs. Or, si les distributeurs concurrents proposent le même produit sans fournir en complément les services annexes, qui en quelque sorte participent de la valeur du bien, ils supporteront des coûts moins importants et seront en mesure de vendre ce bien meilleur marché : ils pourront donc capter une part plus importante de la demande, sans avoir fourni le moindre effort de commercialisation.

Si le coût de comparaison entre les distributeurs n'est pas trop important, le consommateur utilisera dans un premier temps les services de commercialisation du distributeur qui les a dispensés (après avoir obtenu tous les conseils et informations nécessaires à son achat), puis s'adressera finalement au distributeur concurrent (le plus proche) qui proposera le produit au meilleur prix. Chaque distributeur anticipant ce phénomène sera naturellement enclin à restreindre son offre de service : à la limite, si les efforts de service ne sont absolument pas appropriables, aucun distributeur n'en fournira. Cette situation peut alors s'avérer sous optimale pour le producteur, car son produit ne sera jamais mis en avant par les distributeurs. Mais les consommateurs y perdront également, car ils n'obtiendront jamais le service de commercialisation, qui apporte en soi une valeur au produit qu'ils achètent.

Au final, le distributeur qui fournit le service de commercialisation le fait pour le bénéfice de l'ensemble des distributeurs, mais en assume seul la charge. *De facto*, ce service est un bien public, pour lequel les autres distributeurs adoptent un comportement de passager clandestin. La conséquence est qu'aucun distributeur n'est incité à fournir un tel service, ce qui a pour conséquence un sous-investissement global, qui réduit *in fine* le profit du producteur, des distributeurs, et le bien-être des consommateurs. En définitive, le comportement opportuniste (« *free-riding* ») des agents est source d'inefficience économique.

La solution la plus simple aurait pu consister à maintenir des conditions homogènes de tarification entre les distributeurs. En théorie, la fixation des prix, par le biais d'une entente entre les opérateurs, aurait pu limiter la tentation du *free-riding*. Cependant, elle est contraire aux dispositions légales en vigueur. Les exclusivités territoriales peuvent également permettre de limiter l'opportunisme de certains distributeurs : les consommateurs n'ont alors de meilleur choix que de s'adresser au distributeur de leur zone, car la disposition contractuelle a pour effet d'augmenter le coût de comparaison entre les distributeurs : elle réduit donc l'incitation des distributeurs à se comporter en passager clandestin. Une distribution sélective, c'est-à-dire réservée à des distributeurs qui remplissent certaines conditions particulières (portant par exemple sur la qualité du service) peut également être au bénéfice du producteur, dans la mesure où elle lui permettra de garantir l'image de marque de son produit (pour lequel il peut réaliser des investissements substantiels en publicité par exemple) tout au long de la chaîne de production : un producteur de biens de luxe pourra par exemple spécifier des conditions pour la distribution qui imposent une présentation de ses biens dans des boutiques de centre-ville, et non en supermarchés ou magasins discomptes. Les conséquences en termes de dévalorisation de l'image de marque du produit seraient de nature à réduire non

⁸ Marvel, H.P. et McCafferty, S. 1984, "Resale Price Maintenance and Quality Certification." *Rand Journal of Economics*. 15 : 346-59.

seulement le profit des entreprises, mais également le bien-être que retirent les consommateurs habituels de ce genre de produits.

Il reste que l'efficacité des clauses contractuelles est parfois sujette à caution. En effet, pour un bien donné, l'effectivité de la stratégie est conditionnée, notamment, au caractère observable du comportement adopté par le distributeur d'une part, et le consommateur lui-même, d'autre part.

Pour les produits de grande consommation, il existe généralement un degré de transparence suffisant pour que le producteur soit en mesure de vérifier les conditions de vente sur le marché final (mise en rayon, prix pratiqué, etc.) Cependant, pour les autres biens, lorsque la vente est conditionnée à un processus de négociation *intuitu personae* entre le distributeur et le client final, le producteur est plus démuné pour vérifier la mise en œuvre effective de sa stratégie commerciale.

Par ailleurs, si les coûts de transport sont faibles au regard du prix d'un produit donné, on peut douter de l'efficacité d'une exclusivité territoriale.

Enfin, si les distributeurs qui bénéficient d'un tarif non linéaire incitatif en profitent pour acheter en grande quantité et revendre à d'autres distributeurs, c'est-à-dire jouent le rôle d'un grossiste, le contrat au départ incitatif peut s'avérer totalement inopérant.

En définitive, l'intégration verticale peut parfois constituer une alternative à des clauses contractuelles verticales, substituables dans leurs effets, mais défaillantes en pratique, du fait des conditions structurelles de fonctionnement du marché. En possédant ses distributeurs, le producteur sera en mesure de mieux internaliser l'externalité que chaque distributeur impose aux autres, et se prémunir du risque d'une concurrence qui aboutit mécaniquement à réduire le niveau de service offert.

2.3 Une réalité souvent plus complexe, mêlant simultanément plusieurs types d'externalités

Même en se limitant à une analyse purement statique, les deux phénomènes de double marge (externalité verticale) et d'opportunisme (externalité horizontale) peuvent coexister en pratique.

D'un point de vue statique, la réalité des relations producteurs/distributeurs, peut se modéliser sous la forme d'un oligopole de producteurs (qui dispose d'un certain pouvoir de marché) confronté à un autre oligopole pour la distribution des biens sur le marché. Les distributeurs se font donc concurrence pour servir les clients finals : les conseils qu'ils prodiguent aux clients participent de leur effort de commercialisation, mais les fruits de leurs efforts ne sont qu'en partie appropriables.

Dans ce contexte, on retrouve à la fois le problème usuel de double marge (à cause des pouvoirs de marché à l'amont et à l'aval), qui tend à accroître les prix au-delà de leur niveau optimal, et le phénomène de *free riding*, qui incite les distributeurs à fournir un effort de commercialisation minimal.

Dans une perspective dynamique, il convient de tenir compte des coûts fixes qui affectent le surplus social. Ainsi le nombre de distributeurs n'est généralement pas posé de façon exogène, mais suit une logique d'entrée conditionnée par les perspectives de profit sur le marché. Un distributeur potentiel décidera d'entrer dans l'industrie s'il anticipe un profit de nature à couvrir ses coûts fixes d'installation. Néanmoins, une partie des bénéfices qu'il tirera de son entrée sera due à un effet de cannibalisation de la clientèle des distributeurs déjà en place : le distributeur n'internalisera pas les effets externes de son entrée sur les bénéfices de ses concurrents – ce qu'aurait fait une firme intégrée – ce qui peut conduire à une situation économiquement sous optimale de surinvestissement dans le réseau de distribution.

Une structure non intégrée aura donc tendance à susciter un trop grand nombre d'entrées sur le marché aval. En termes d'efficacité économique globale, ce surinvestissement participe d'une mauvaise

allocation des ressources, dommageable au surplus social. L'intégration verticale peut alors augmenter le bien-être, en réduisant la *duplication* des coûts fixes.

En définitive, l'intégration verticale permet d'accroître l'efficacité économique de l'industrie, en « internalisant les externalités », qu'il s'agisse d'externalité horizontale ou verticale. Il ne s'agit pas du seul schéma qui permette de tels gains, certains restrictions le peuvent également. Le rôle des autorités de concurrence est de mesurer l'impact de ces gains au regard des risques concurrentiels que l'opération peut faire encourir par ailleurs. Ces développements font l'objet de la partie suivante.

3. Effets verticaux et risques concurrentiels

Bien que les concentrations qui emportent des effets verticaux permettent la plupart du temps une amélioration de l'efficacité économique dans le secteur en cause, il reste que de telles opérations ne sont pas *a priori* exemptes de risques anticoncurrentiels.

Les gains d'efficacité interviennent différemment dans l'analyse des concentrations selon qu'elles entraînent des effets horizontaux ou verticaux.

Les gains d'efficacité d'une opération à effets horizontaux ne sont examinés que pour vérifier s'ils sont de nature à compenser l'atteinte à la concurrence : il convient d'apprécier « *si l'opération apporte au progrès économique une contribution suffisante pour compenser les atteintes à la concurrence.*»⁹

Une opération entraînant des effets verticaux bénéficie en revanche *de facto* d'une présomption favorable dans la mesure où l'intégration verticale est très souvent de nature à accroître en soi l'efficacité de la chaîne de production : le risque anticoncurrentiel n'est évoqué que s'il est susceptible de neutraliser le bénéfice social attendu des gains d'efficacité, et de porter atteinte au bien-être des consommateurs.

Une autorité de concurrence examinant un effet vertical doit donc procéder en plusieurs étapes pour démontrer l'existence d'un risque d'atteinte à la concurrence : i) d'abord établir que la nouvelle entité disposera d'un pouvoir de marché significatif, ii) montrer ensuite en quoi la position de cette dernière lui offre l'opportunité de mettre en œuvre une stratégie d'éviction (coordonnée ou non avec d'autres acteurs), iii) évaluer subséquemment la nature des incitations qu'elle aurait à mettre en œuvre une telle stratégie, et iv) estimer enfin l'impact d'une telle stratégie sur le bien-être des consommateurs.

3.1 Établir l'existence d'un pouvoir de marché de la nouvelle entité

Pour qu'une opération soulevant une problématique verticale ne soit pas de nature à porter atteinte à la concurrence, il convient de vérifier que le dommage potentiel à la concurrence ne surpasse pas les gains d'efficacité. Or il est plus qu'improbable qu'une entreprise qui ne dispose pas d'un pouvoir de marché significatif sur au moins un des marchés en cause soit en mesure de provoquer un tel dommage. Il appartient donc aux autorités de concurrence de vérifier si les parties disposent déjà, ou vont acquérir une position qui leur confère un véritable pouvoir de marché.

L'entreprise intégrée dispose d'un fort pouvoir de marché notamment lorsqu'elle est en position dominante. Comme le précise le paragraphe 358 des lignes directrices de la DGCCRF relatives au contrôle des concentrations, « *les effets anticoncurrentiels de l'intégration verticale sont particulièrement importants lorsque l'une des parties à l'opération est en position dominante sur l'un des marchés de la chaîne verticale. Cette analyse a notamment été menée (pour conduire à des autorisations sous réserve d'engagements ou d'injonctions) dans le cadre des intégrations verticales réalisées par les opérateurs*

⁹ Article L.430-6 du code de commerce.

historiques dans le secteur de l'énergie, en particulier sous l'angle de la capacité à fournir aux clients concernés des offres globales couplant la fourniture d'énergie et de services d'entretien, susceptibles de conduire à une atteinte à la concurrence par éviction des autres opérateurs¹⁰. »¹¹

Ce pouvoir de marché peut être absolu, comme dans le cas d'une entreprise en position dominante, ou relatif, comme dans le cas où une entreprise qui, en deçà de la position dominante, est en mesure de mener une stratégie rentable d'augmentation unilatérale de ses prix¹². Aussi est-il impératif d'examiner l'existence d'un pouvoir de marché de la nouvelle entité avant d'aborder la question des effets anticoncurrentiels.

Si on ne peut limiter la question du pouvoir de marché à une affaire de parts de marché, il reste qu'une faible part de marché plaide en faveur de l'absence de pouvoir de marché. En ce qui concerne l'appréhension d'un risque vertical, le seuil de 30% de parts de marché, par référence au seuil utilisé pour l'analyse des restrictions verticales, semble communément admis comme seuil d'alerte par les autorités communautaire et nationales.

Par exemple, dans sa décision autorisant la reprise par le Groupe Arc International de quatre de ses distributeurs, la DGCCRF, après avoir rappelé l'importance des gains d'efficience dans les opérations de ce type, indiquait toutefois, à l'instar du Conseil de la concurrence, « *que la transmission de gains d'efficacité aux consommateurs est conditionnée par l'absence de pratiques de forclusion qui seraient rendues possible par l'intégration.* » Pour analyser les risques de forclusion, le Conseil proposait « *une analogie avec le raisonnement applicable aux clauses restrictives de concurrence passées entre un fournisseur et ses distributeurs* ». Il énonçait alors « *qu'en matière de restrictions verticales la Commission européenne ne retient pas qu'il y ait de risque concurrentiel si la part de marché du fournisseur n'excède pas 30 %.* »

L'examen des risques liés à l'intégration verticale ne présente donc d'intérêt que si les parties ont une position forte sur au moins un des deux marchés en cause, amont ou aval. Il arrive donc très souvent que les autorités de concurrence n'examinent pas plus avant ces risques, se contentant de constater une absence de pouvoir de marché, qui aurait pu justifier une instruction plus approfondie.

A titre d'exemple, la faiblesse des parts de marché en cause dans l'opération d'acquisition de Celliande par Ista¹³, dans le secteur de l'installation et de l'entretien de compteurs, a permis à la DGCCRF d'évoquer rapidement les risques verticaux sans s'y attarder davantage. Les deux entreprises étaient présentes dans le secteur de la fourniture de différents services liés à la gestion de la facturation de la consommation de chaleur, d'eau et d'électricité dans les logements. Les principaux risques liés à cette opération étaient donc horizontaux. Cependant, dans la mesure où CVC (actionnaire contrôlant de Ista) contrôlait également le groupe Elster (présent en France en tant que producteur de compteurs d'eau et de gaz), il était légitime que l'autorité de concurrence s'interroge sur un éventuel impact vertical de l'opération. Compte tenu de l'activité de Celliande, la relation verticale entre Celliande et Elster n'était

¹⁰ Arrêté C 1999-79 EDF/ Clemessy du 17 mars 2000 et décisions C 2001-190 CGST Save/ Domoservices du 25 juin 2002 et C 2004-180 GDF/ CGST Save du 4 février 2005.

¹¹ Soulignement ajouté.

¹² Par exemple, le rachat par une entreprise non dominante d'un *maverick* très agressif en prix pourrait lui permettre d'augmenter sensiblement ses prix auprès d'une frange non négligeable des consommateurs (ceux du *maverick*) sans pour autant aboutir à une position dominante. Pour un exemple concret, on peut se reporter au cas communautaire M.3916 T-Mobile/TeleRing.

¹³ C2006-87 / Lettre du ministre de l'économie, des finances et de l'industrie du 28 septembre 2006, au conseil du groupe Ista, relative à une concentration dans le secteur de l'installation et de l'entretien de compteurs.

susceptible d'impacter que le segment de la production de compteurs d'eau. Or, sur ce segment, la part de marché d'Elster était inférieure à [0-10]%, et ce dernier était en concurrence avec d'autres acteurs puissants, comme Actaris [30-40]%, Sensus (environ [10-20]%) et Sappel (environ [10-20]%). Au regard de ces seules parts de marché, la DGCCRF a conclu que l'opération n'était pas « *susceptible de porter atteinte à la concurrence en raison de ses effets verticaux supposés.* »

De façon analogue, dans sa décision d'autorisation de l'acquisition du groupe Volagel¹⁴ par la société Angliss International Limited, la DGCCRF, étant donné la faiblesse de la présence des parties sur le marché amont, a exclu d'entrée le risque d'atteinte à la concurrence, sans entrer dans d'autres détails : « *Au plan vertical, on relève par ailleurs que l'activité de transformation de volaille exercée par les parties est marginale (environ 1 million d'euros de chiffre d'affaires annuel), et l'opération n'a donc pas d'effet sur les activités aval.* »

En revanche, il revient aux autorités de concurrence d'examiner avec vigilance la question du pouvoir de marché, et l'ensemble des problèmes de concurrence qui peuvent en résulter lorsque les parties à l'opération détiennent des parts de marché, voire des positions sur des segments de marché, importantes.

Dans l'opération Unibail/Exposium précitée, les parts de marché des parties étaient par exemple relativement importantes : Unibail détenait ([50-60]%) (en valeur) de parts de marché, leader du marché amont de la gestion de sites de congrès-expositions en région parisienne, et les autres acteurs étaient au nombre de trois seulement : la CCIP ([40-50]%), l'État ([0-10]%) et GL Events ([0-10]%). Le marché aval de l'organisation de foires et salons en région parisienne était en revanche très fragmenté : les six principaux opérateurs y détenaient chacun une position modeste (avec une part de marché dans la fourchette [0-10]%, Exposium arrivant en troisième position, le reste du marché étant éclaté entre de nombreux opérateurs détenant moins de 1% de parts de marché. Dans ce contexte, « *compte tenu des positions des parties sur leurs marchés respectifs, il [est] appar[u] nécessaire de s'interroger sur le risque que l'opération ne conduise Unibail à privilégier Exposium pour l'organisation de salons sur les sites qu'elle [gère], afin de renforcer la position de cet organisateur et d'évincer ses concurrents.* »

Il s'agit pour la plupart d'aspects de stratégie industrielle, qui peuvent avoir pour effet, soit d'évincer certains concurrents (actuels ou potentiels) du ou des marché(s) en cause, soit de bénéficier de la modification de la structure concurrentielle du secteur pour promouvoir l'atonie concurrentielle entre les acteurs encore en place. L'ensemble de ces effets possibles, non coordonnés (forclusion) aussi bien que coordonnés (collusion), peuvent avoir pour impact de réduire sensiblement le bien-être des consommateurs. Cette nouvelle source d'inefficience allocative doit dans tous les cas être comparée aux gains d'efficience productive, avant que l'autorité compétente ne rende sa décision.

3.2 Démontrer la possibilité des risques verticaux

Après avoir démontré que la nouvelle entité bénéficiera d'un pouvoir de marché à l'issue de l'opération, il convient de prouver que cette nouvelle donne structurelle offre aux parties la possibilité de mettre en œuvre des stratégies qui font peser un risque au bien-être des consommateurs.

En théorie, une analyse verticale peut conduire à examiner deux types de risques : un risque de fermeture des marchés (forclusion) lié à un effet non coordonné, c'est-à-dire résultant d'un choix stratégique émanant de la seule nouvelle entité (a) ainsi qu'un risque de création ou de renforcement d'une position dominante collective, qui serait dû à la convergence d'intérêt d'un petit nombre d'acteurs du marché formant un oligopole (b).

¹⁴ Lettre du ministre de l'économie, des finances et de l'industrie en date du 15 mai 2003, au conseil de la société Angliss International Limited, relative à une concentration dans le secteur de la volaille.

a) *Les effets non coordonnés : la restriction d'accès aux approvisionnements ou aux débouchés*

Le risque principal d'effets non coordonnés lié à une concentration soulevant une problématique verticale est la mise en œuvre, par la firme intégrée, d'une politique de forclusion : l'entreprise utilise son pouvoir de marché pour dissuader l'entrée ou inciter la sortie de ses concurrents sur un marché.

La logique se décline sous deux formes de forclusion, selon que le pouvoir de marché de l'entité fusionnée est à l'amont ou à l'aval du secteur. Si une entité verticalement intégrée dispose d'un pouvoir de marché à l'amont, elle pourra restreindre l'approvisionnement en matière première de ses concurrents sur le marché aval (*'input foreclosure'*). Si elle détient un pouvoir de marché à l'aval, elle sera en mesure de limiter les débouchés de ses concurrents sur le marché amont (*'customer foreclosure'*).

Le paragraphe 354 des lignes directrices de la DGCCRF relatives au contrôle des concentrations précise l'existence d'un tel risque de forclusion à l'amont ou à l'aval, lié à l'importance des parts de marché :

« L'intégration verticale peut poser des problèmes si elle prive les concurrents [...] de leurs matières premières ou de leurs inputs ou si elle les rend dépendants, pour leur approvisionnement, des parties à la concentration. Inversement, la même dépendance peut se produire pour la commercialisation ou la distribution. Enfin, *si les parts de marché, en amont ou en aval, des parties à l'opération sont élevées, il peut même se produire des phénomènes de fermeture de marché (« forclusion »)* : notamment, si l'une des parties est un intervenant majeur sur un marché intermédiaire, la concentration peut, en modifiant ses incitations, l'amener à se retirer de ce marché et à favoriser des transactions internes, ce qui peut faire disparaître le marché lui-même.¹⁵

La question a longtemps fait l'objet d'un débat entre économistes, de savoir si la maîtrise d'une ressource ou d'une infrastructure essentielle par une firme intégrée de l'amont à l'aval pouvait inciter cette dernière à en restreindre l'accès à ses concurrents pour accroître son pouvoir de marché.

i) Le « laissez-faire » préconisé par l'École de Chicago

L'École de Chicago, qui fut la première à étudier la question, ne reconnaît aucune pertinence au risque lié à une éventuelle éviction des concurrents du marché, arguant du caractère intrinsèquement efficient des effets verticaux.

En partant d'un modèle simple où un monopole fait distribuer ses produits par des acteurs en concurrence pure et parfaite, les théoriciens de l'École de Chicago montrent que le producteur est en mesure d'extraire une rente de monopole du marché aval¹⁶. Dans ce cas d'école, une intégration verticale du producteur avec un de ses distributeurs n'entraînera aucune augmentation du pouvoir de marché du monopole (qui est déjà maximal), et ne lui permettra pas d'augmenter son prix (qui est déjà le plus élevé possible). Il n'existe qu'un seul profit de monopole (le fameux « *single monopoly profit* »), et si une concentration verticale a lieu dans ces conditions, elle ne peut s'expliquer que par des raisons d'efficacité économique, et non par un calcul stratégique en vue d'accroître le pouvoir de marché.

¹⁵ Soulignement ajouté.

¹⁶ Comme on l'a vu au préalable, il n'y a pas de problème de double-marge puisque les distributeurs sont en concurrence pure et parfaite, et appliquent par hypothèse un taux de marge nul.

L'École de Chicago montre qu'une stratégie de forclusion, menée dans un cadre plus général comportant plusieurs firmes à l'amont et à l'aval, n'entraînerait pas forcément de dommage supplémentaire au consommateur final.

Rien n'indique d'abord qu'il y aurait effectivement forclusion si une entreprise intégrée réduisait ou arrêta ses approvisionnements à ses concurrentes à l'aval. Les autres fournisseurs pourraient par exemple augmenter leur part de marché en approvisionnant la demande non satisfaite. L'effet sur les prix pourrait ensuite être ambigu : l'arrêt des transactions pourrait entraîner un report vers une autre technologie, et à terme réduire la demande et entraîner une baisse du prix de l'*input* rationné. Cette stratégie peut donc entraîner une baisse, plutôt qu'une hausse, du prix à l'issue de la concentration.

ii) Les nuances apportées par les économistes post-Chicago et la surveillance des risques anticoncurrentiels

Ce n'est que récemment que les économistes ont montré que, dans certaines conditions, les effets verticaux pouvaient entraîner des problèmes anticoncurrentiels. Les modèles de théorie des jeux ont permis de comprendre qu'il existait des situations de risque de forclusion.

Les effets anticoncurrentiels entraînés par une opération de concentration peuvent concerner les entreprises en place, bien entendu, mais également toutes celles qui pourraient désirer entrer sur le marché. Le paragraphe 355 des lignes directrices de la DGCCRF relatives au contrôle des concentrations évoque notamment le fait que *« l'intégration d'un distributeur (ou d'un fournisseur) contribue également à renforcer les barrières à l'entrée, et porte donc atteinte à la concurrence potentielle. »*

Le paragraphe 384 (8°) précise par ailleurs comment l'existence d'effets de forclusion peut renforcer les barrières à l'entrée : *« Lorsqu'un volume important de transactions sur un marché devient internalisé, le fonctionnement du marché peut être profondément modifié, ce qui peut conduire des intervenants à sortir **ou des entrants potentiels à ne pas entrer**. De même, l'existence de contrats d'approvisionnement de long terme ou d'exclusivités peut verrouiller un marché en bloquant l'entrée et le développement des concurrents. Enfin, certaines opérations peuvent modifier les incitations des entreprises fusionnantes à intervenir sur un marché (par exemple lorsqu'elles acquièrent la taille critique pour internaliser la production d'un composant).¹⁷ »*

Dans certains cas spécifiques, il peut donc être stratégique pour l'entité fusionnée de mettre en œuvre une stratégie d'éviction, soit pour accroître son pouvoir de marché immédiatement, soit pour dissuader des entrants potentiels d'intervenir sur ses marchés historiques, et diminuer la dynamique concurrentielle.

Sachant que ces stratégies sont possibles, il est de la responsabilité des autorités de concurrence de vérifier le caractère probable de leur mise en œuvre effective, et d'en comparer les effets avec les gains d'efficacité par ailleurs apportés par l'opération.

b) *Les effets coordonnés*

Les concentrations qui emportent des effets verticaux peuvent faciliter l'émergence d'une structure de marché favorable à la collusion tacite. En d'autres termes, elles peuvent soulever le risque de création (et *a fortiori* de renforcement) d'une position dominante collective (« PDC »).

¹⁷

Soulignement ajouté.

i) Les conditions théoriques d'appréhension du risque de création ou de renforcement d'une PDC

Les conditions de démonstration du risque de création ou de renforcement d'une PDC, posées par l'arrêt *Airtours/First Choice* du TPICE, ont été utilisées dans un seul exemple d'application de ce type d'analyse par la pratique de la DGCCRF (*Vinci/ASF*). Un tel risque de PDC n'a de chance de survenir dans certains marchés que lorsque trois conditions particulières sont remplies :

- Les entreprises du secteur doivent être capables d'interpréter les mouvements de prix et de quantités sur le marché sans qu'une communication directe entre elles soit nécessaire. La transparence de l'information est en effet un préalable indispensable à toute collusion tacite. Elle permet à chaque acteur non seulement de converger vers un prix supra concurrentiel, mais également de surveiller les comportements des autres acteurs du marché, notamment pour détecter ceux qui dévieraient de la ligne d'action commune. Or l'intégration verticale entre des entreprises situées à des stades différents de la chaîne de production peut accroître le degré de transparence du marché. La structure intégrée accède notamment à des informations sensibles sur le fonctionnement des deux secteurs, ce qui permet de mieux contrôler les prix pratiqués par l'ensemble des acteurs du marché.
- Il doit exister une forme de mécanisme de rétorsion crédible empêchant les acteurs de dévier de l'équilibre collusif. Or ce mécanisme de rétorsion sera d'autant plus efficace que l'entreprise verticalement intégrée est un client ou un fournisseur important des ses concurrents. Le fait que les entreprises se rencontrent sur plusieurs marchés (ce que la théorie économique appelle les « contacts multi marchés ») peut permettre une plus grande stabilité de la collusion tacite, en autorisant des mesures de rétorsion mieux ciblées, et donc potentiellement plus efficaces. Or, lorsqu'il y a intégration verticale, les entreprises peuvent être en concurrence tout au long de la chaîne de production.
- La collusion tacite ne doit pas être remise en cause par la présence de concurrents actuels et potentiels ou de clients disposant d'un contre-pouvoir de marché. Or les effets verticaux, en autorisant l'adoption d'une stratégie d'éviction, renforcent les barrières à l'entrée, ce qui peut limiter la capacité des tiers à animer la concurrence.

ii) Un cas d'espèce illustrant la pratique décisionnelle de la DGCCRF : l'opération *Vinci/ASF*

La prise de contrôle exclusif de la société *Autoroutes du Sud de la France* (« ASF ») et de sa filiale *ESCOTA* par le groupe *Vinci*¹⁸ a notamment permis à l'autorité nationale de concurrence de mener une analyse portant sur les effets coordonnés liés à une intégration verticale.

Au moment de l'opération, le groupe *Vinci* était présent dans cinq secteurs principaux : l'exploitation de concessions (notamment autoroutières), l'énergie, la construction et l'entretien des routes, la construction d'immeubles, et l'immobilier. Deux de ces secteurs pouvaient être considérés comme en relation verticale : les concessions autoroutières sont consommatrices de travaux de construction et d'entretien routiers.

- *Vinci* était présent dans le secteur de la construction et de l'entretien des autoroutes, via sa filiale *Eurovia*.

¹⁸

C2006-03 / Lettre du ministre de l'économie, des finances et de l'industrie du 6 mars 2006, aux conseils de la société *Vinci*, relative à une concentration dans le secteur des infrastructures autoroutières.

- En termes de concessions autoroutières, Vinci contrôlait déjà la société ARCOUR (concessionnaire de l'autoroute Artenay-Courtenay) et détenait des participations dans Cofiroute et ASF. En prenant le contrôle d'ASF et de sa filiale ESCOTA, Vinci acquérait le concessionnaire exploitant le premier réseau autoroutier français.

L'opération était *a priori* susceptible d'emporter des effets horizontaux et verticaux. La DGCCRF a donc examiné les deux types de risques. Cependant, pour les besoins de la présente contribution écrite, seuls les effets verticaux feront l'objet d'un développement dans ce document.

Le Conseil de la concurrence avait été saisi pour avis par l'Association pour le maintien de la concurrence sur le réseau autoroutier (AMCRA)¹⁹ en vue de la rédaction du cahier des charges du contrat de concession des sociétés privatisées. De même, la Commission européenne avait mené sa propre analyse du secteur, lorsqu'elle avait autorisé l'opération Eiffage/Macquarie/APRR²⁰. Reprenant à son compte les conclusions de l'analyse développée par ces autorités de concurrence, la DGCCRF notait dans sa décision qu' « *il conv[enait] d'examiner si l'impact vertical de l'opération lié à l'acquisition d'une société concessionnaire d'autoroute par un groupe actif dans le secteur des travaux publics, y compris en ce qu'il conduirait à la disparition d'opérateurs, [était] de nature à produire des effets anticoncurrentiels qui se répercuteraient négativement sur les conditions de l'offre de services de transport autoroutier et/ou sur les conditions des offres de travaux des marchés concernés définis ci-après, et donc, en bout de chaîne, sur le consommateur final.* »

Après avoir écarté les risques de forclusion sur les marchés de travaux – terrassement, chaussées, génie civil – et leurs éventuelles segmentations, la DGCCRF²¹ a alors examiné le risque de création ou de renforcement d'une position dominante collective.

Cette question pouvait effectivement paraître pertinente pour quelques marchés concernés. Les trois principaux groupes de construction que sont Bouygues, Eiffage et Vinci étaient liés structurellement au travers de Cofiroute. La présence des constructeurs Vinci et Eiffage dans deux sociétés d'exploitation d'autoroutes étant susceptible de rendre le marché plus transparent, en permettant à chacun d'eux d'accéder aux offres détaillées de ses concurrents sur les marchés de la construction, aurait pu faire naître un risque de création ou de renforcement de PDC.

La DGCCRF a toutefois rejeté ce risque, en constatant à titre liminaire que « les parts de marché des trois principaux opérateurs [n'étaient] sont pas équilibrées (le leader générant sur le marché des travaux de chaussées un chiffre d'affaires égal à celui réalisé par les deux suivants combinés) », puis en utilisant les critères usuellement retenus depuis l'arrêt Airtours pour qualifier l'existence d'une position dominante collective.

Concernant plus spécifiquement la transparence, il notait en particulier « que les produits ne sont pas nécessairement homogènes (les caractéristiques techniques de nombre de marchés de travaux sont définies au plan local), que la transparence n'est pas complète pour l'ensemble du marché sur lequel des appels

¹⁹ Avis du Conseil de la concurrence, n° 05-A-22, du 2 décembre 2005 relatif à une demande d'avis de l'Association pour le maintien de la concurrence sur le réseau autoroutier (AMCRA) sur les problèmes de concurrence pouvant résulter de la privatisation annoncée des sociétés d'économie mixte concessionnaires d'autoroutes.

²⁰ Décision de la Commission européenne M. 4087 du 15 février 2006.

²¹ Le Conseil de la concurrence, dans son avis du 2 décembre 2005, s'est également interrogé sur un tel risque de création d'une position dominante collective, dans l'hypothèse d'une acquisition de contrôle des autoroutes par des opérateurs actifs sur les marchés de travaux.

d'offres subsistent. » Quant à la possibilité de remise en cause par des entreprises non parties à l'oligopole, il précisait également que « la concurrence actuelle d'entreprises indépendantes est réelle. »

Au final, au vu de ces éléments, la DGCCRF a conclu « qu'il ne saurait être mis en évidence la création d'une quelconque position dominante collective entre les trois majors du secteur ».

L'absence de risque de création des conditions d'une collusion tacite sur les marchés de la construction n'a pas suffi à autoriser l'opération, mais a contribué à la conclusion de la décision : « *l'analyse des effets verticaux de l'opération de concentration tant du point de vue de ses effets sur les marchés pertinents identifiés que du point de vue des recommandations générales du Conseil de la concurrence sur la nécessité du maintien de mécanismes propres à assurer une mise en concurrence sur les marchés de travaux permet de considérer que l'acquisition d'ASF/Escota par le groupe Vinci n'est pas de nature à soulever de problèmes de concurrence.* »

L'analyse de la DGCCRF en l'espèce a donc requis de vérifier qu'aucun risque de création d'une position dominante collective n'était liée à un effet vertical. Il s'agit *a priori* de la première (et pour le moment la seule) application concrète de ce test dans la pratique française du contrôle des concentrations.

3.3 *Estimer la nature et l'ampleur des incitations*

Comme exposé ci avant, il semble que la mise en œuvre de stratégies d'éviction ou de stratégies collusives est théoriquement possible, mais n'a en revanche aucun caractère automatique. Il appartient donc aux autorités de concurrence de rester vigilantes dans leur appréciation des motivations réelles des entreprises en cause, et sur l'effectivité du risque allégué. Pour ce faire, elles doivent vérifier si les parties ont des incitations particulières à adopter le comportement rendu possible par l'opération, puis si ce comportement est de nature à avoir des effets anticoncurrentiels sensibles pour le consommateur.

L'incitation à mener une stratégie de forclusion ou une stratégie de collusion dépend de leur rentabilité. L'entité fusionnée réalise donc un arbitrage entre la baisse de son profit sur un marché et l'accroissement de son profit sur l'autre marché ou entre la hausse d'un profit de court terme (en cas de déviation) et d'un profit de long terme (si la collusion tacite se poursuit).

Par exemple, dans le cas d'une restriction portant sur les approvisionnements des concurrents, il faut savoir si les ventes plus faibles réalisées à l'amont (puisque les concurrents ne sont plus approvisionnés) peuvent être compensées par les ventes plus importantes (et éventuellement des prix pratiqués plus élevés) à l'aval.

L'autorité de concurrence doit vérifier les motivations des parties à mettre en œuvre une telle stratégie : peut-il être dans l'intérêt de la firme intégrée d'arrêter d'approvisionner les acteurs indépendants, ou d'augmenter les tarifs qu'elle pratique pour le faire ? Si ces entreprises indépendantes sont présentes sur des marchés différents (ou même proposent des substituts imparfaits au produit de la firme intégrée), cesser de les approvisionner (ou augmenter ses prix) peut induire le risque de perdre un volume de vente, et donc de réduire les profits futurs.

Par ailleurs, si l'entreprise intégrée ne dispose que d'un pouvoir de marché relatif pour le produit qu'elle envisage de rationner, et qu'il existe d'autres producteurs ou d'autres distributeurs suffisamment concurrentiels, une stratégie de forclusion n'a que peu de chance de s'avérer profitable pour la firme intégrée.

L'étude des incitations de la nouvelle firme intégrée à mener une stratégie de forclusion procède d'une analyse similaire à celle menée dans le cadre d'une concentration horizontale : il s'agit de vérifier le *caractère probable et rentable d'une telle stratégie*. Dans l'idéal, les variables à considérer pour le faire

sont alors notamment l'élasticité de la demande pour l'*input*, les capacités (éventuellement excédentaires) des concurrents, l'existence de concurrents potentiels. Plus les concurrents à l'amont seront contraints en capacité et plus les produits seront de proches substituts à l'aval, plus l'incitation à la forclusion sera grande. Plus la part de marché de l'entité fusionnée est importante à l'aval, plus une stratégie de hausse unilatérale des prix pourra être rentable.

La prise en compte du caractère illégal de la pratique de forclusion doit être, conformément à la jurisprudence de la CJCE, un élément sur lequel s'appuie l'autorité de concurrence pour évaluer la probabilité du risque : la nouvelle entité la rentabilité d'une stratégie répréhensible au regard de la sanction probable à laquelle elle s'expose.

Concernant l'opération Unibail/Exposium précitée, le risque de forclusion a pu être écarté pour plusieurs raisons.

- D'abord, la part d'activité représentée par chaque acteur pour l'autre était relativement faible : Exposium n'avait organisé en 2003/2004 que huit salons sur les sites gérés par Unibail, soit environ [5-10]% de la surface totale louée sur la même période par Exposium pour organiser ses salons. Par ailleurs, Exposium ne représentait que [0-5]% du chiffre d'affaires locatif du pôle congrès-expositions d'Unibail.
- Ensuite, une réorientation massive du chiffre d'affaires réalisé au profit de la nouvelle entité paraissait peu probable. Les sites pour l'organisation d'un salon sont en effet des substituts imparfaits : le choix s'opère sur des critères objectifs : localisation, accessibilité (métro, aéroport, capacité de parking...), superficie disponible, critères sur lesquels le gestionnaire d'espaces d'exposition n'a pas de prise. Comme le précisait alors la DGCCRF : « *Il n'est pas concevable de déplacer arbitrairement un salon d'Exposium sur un site d'Unibail qui ne correspondrait pas à la nature du salon.* »
- Inversement, Unibail n'aurait eu aucun intérêt à refuser un salon qu'elle accueillait jusqu'alors pour le remplacer par un salon d'Exposium. L'effet sur la réputation aurait pu être fortement dommageable à Unibail, car les clients habituels auraient pu « *être réticents à contracter avec un gestionnaire d'espace susceptible de refuser un salon d'une année sur l'autre, contrairement aux usages de la profession.* » Le non-respect des procédures de réservation aurait pu nuire à la réputation commerciale d'Unibail. En outre, un problème de capacité se serait posé : pendant les principaux salons d'Exposium organisés à Paris Nord Villepinte (SIAL et SIMA), sont également organisés, sur le site de la Porte de Versailles, des salons de grande envergure : le Silmo, la Fiac, Equip'Hotel et le Salon de l'Agriculture. Unibail n'avait, en conséquence, aucun intérêt à se priver des revenus de ces salons, qui comptent parmi les plus importants qu'elle héberge.

3.4 Estimer les effets des stratégies alléguées

Il convient par ailleurs de *mesurer les effets anticoncurrentiels des stratégies*. Même si la firme intégrée décide de cesser d'approvisionner ou de distribuer (ou augmente ses prix), il n'est pas démontré *a priori* que les prix vont augmenter sur le marché, parce que d'une part les firmes concurrentes peuvent éventuellement augmenter leur propre offre, et d'autre part la demande peut baisser (notamment à cause du retrait du marché de certains concurrents de la firme intégrée). De tels éléments seraient alors de nature à faire baisser les prix.

La présence de contre-pouvoirs de la demande, ou la perspective d'entrées sur le marché, peuvent également permettre d'écarter le risque. S'il reste sur le marché un certain nombre de concurrents

crédibles, également verticalement intégrés, ou en mesure de s'adresser à d'autres fournisseurs ou distributeurs, leur seule présence peut permettre de discipliner la nouvelle entité, et d'éviter le risque de forclusion.

Pour autoriser l'opération de rachat de Lev (loueur d'engins élévateurs à des professionnels) par Pinguely²² (fabricant d'engins élévateurs et de matériel de terrassement), la DGCCRF a été amenée à examiner des problématiques verticales : l'opération aboutissait à une intégration d'une activité amont (la fabrication) avec une activité aval (la location). Les risques de forclusion ont pu être écartés pour plusieurs motifs²³, et notamment le contre-pouvoir de la demande : les loueurs (non liés aux fabricants par des contrats de longue durée ou d'exclusivité) disposaient toujours de la faculté, après l'opération, de s'approvisionner auprès de plusieurs fabricants et de faire jouer la concurrence entre eux.

Enfin, l'effet ultime sur le bien-être du consommateur final peut tout de même demeurer positif, du fait de l'élimination des externalités évoquées plus haut, et notamment du phénomène de double-marge. Le prix sur le marché aval peut parfaitement décroître, même si certains intermédiaires payent un prix légèrement plus élevé pour leur approvisionnement.

On ne peut donc pas dire a priori quel effet l'emportera sur les autres. Il convient donc plus que jamais de tenir compte de l'ensemble des effets d'efficience qui peuvent être de nature à contrebalancer les éventuels risques de forclusion.

4. Conclusion

La lecture de la pratique réalisée dans le cadre du contrôle des concentrations peut donner l'impression qu'aucun principe général ne peut être dégagé concernant les problématiques verticales : leur grande complexité appelle toujours un examen circonstancié des effets, au cas par cas. Le plus souvent, l'intégration verticale aura des conséquences positives en termes d'efficacité économique. Toutefois, il peut arriver, dans certaines circonstances spécifiques que seule l'instruction permettra de définir, que cette même intégration verticale conduise à des effets anticoncurrentiels, qui dépassent les gains attendus.

L'analogie entre les concepts de concentration et de restrictions verticales est manifeste : l'intégration verticale liée à une concentration peut souvent être vue comme un substitut à une restriction verticale, en ce qu'elle permet d'atteindre des effets économiques équivalents.

Intégration comme restriction verticale ne sont susceptibles de porter atteinte à la concurrence que si les entreprises en cause disposent d'un fort pouvoir de marché. D'un point de vue opérationnel (et bien que la part de marché ne soit pas le seul élément constitutif du pouvoir de marché), on pourrait envisager d'écarter d'emblée les risques si la part de marché cumulée des firmes est inférieure à 30%. Il s'agit par exemple du seuil préconisé par la Commission européenne dans son projet de lignes directrices. Il s'agit également du seuil défini pour les restrictions verticales.

Pour autant, la question de l'attitude à adopter face aux firmes disposant d'un pouvoir de marché non négligeable (et à plus forte raison les firmes dominantes) reste entière.

²² Lettre du ministre de l'économie, des finances et de l'industrie du 19 novembre 2003, au conseil de la société Pinguely relative à une concentration dans le secteur de la location d'engins élévateurs.

²³ Lev était d'abord un acteur de taille modeste de sur le secteur de la location (très atomisé), ensuite, dans la mesure où les sociétés de location représentaient pas moins de [60-70]% de ses ventes d'engins élévateurs, Pinguely n'aurait eu aucun intérêt particulier à favoriser sa seule filiale. Par ailleurs la concurrence des autres fabricants vis-à-vis de Pinguely était vive, et portait sur l'ensemble de leurs produits.

L'examen au cas par cas doit alors permettre de montrer l'arbitrage qui existe nécessairement entre les gains d'efficacité apportés par l'opération, et les éventuels effets anticoncurrentiels qui y sont liés.

A ce titre, il convient de noter que la jurisprudence de la CJCE a fixé dans ses arrêts récents un standard de preuve particulièrement élevé en matière d'effets verticaux. Cet élément, combiné à la présomption positive dont bénéficient les effets verticaux en matière de gains d'efficacité, pourrait conduire les autorités de concurrence à adopter une attitude plus ouverte aux solutions de remèdes proposées par les parties, en vue de répondre aux problèmes de concurrence identifiés.

Dans cette perspective, les remèdes comportementaux pourraient être plus adaptés aux problématiques concurrentielles soulevées que les engagements de nature structurelle. En effet, dans l'hypothèse où l'instruction aurait permis de démontrer qu'il n'existe aucun doute sur le fait que l'opération permet un accroissement de l'efficacité économique dans l'industrie, et où l'intégration verticale ne serait pas de nature à éliminer toute concurrence sur les marchés en cause, un engagement comportemental pourrait s'avérer particulièrement approprié. N'affectant pas la structure verticalement intégrée de la nouvelle entité, il ne remettrait pas en cause les gains d'efficacité générés par l'opération. En contraignant la nouvelle entité à maintenir un accès à ses infrastructures, ressources ou débouchés, cet engagement éliminerait également tout risque de forclusion. Se poserait naturellement la question de la durée d'un tel engagement comportemental, les décisions prises au titre du contrôle des concentrations n'ayant pas pour objet de se substituer à la régulation sectorielle des marchés.

En tout état de cause, le but de la politique de concurrence n'est pas de soutenir les concurrents, mais de protéger la concurrence. L'essentiel est donc de démontrer que l'effet en cause est de nature à porter atteinte à la concurrence, et au bien-être des consommateurs finals. Il appartient aux entreprises parties à l'opération, et à leurs conseils, d'apporter tous les éléments de nature à estimer les gains d'efficacité apportés par l'opération, et de démontrer qu'ils sont supérieurs aux risques anticoncurrentiels supposés.

GERMANY

1. The term “vertical merger”

German competition law does not contain a legal definition of the term “vertical merger“. The Bundeskartellamt assumes the existence of a vertical merger where the participating companies are not active in the same market (which would be the case in a horizontal merger) but are operating in up-stream and down-stream levels of the production or sales process. Conglomerate mergers on the other hand are mergers where the products of the participating companies stand in a complementary or substitutional relationship to one another.

In the Bundeskartellamt’s practice, however, there are only relatively few mergers that are “purely” horizontal, vertical or conglomerate. The majority of the mergers notified to the Bundeskartellamt affect several markets. As a consequence, one and the same merger can have horizontal, vertical and conglomerate features. The definition of the relevant market also plays a significant role that should not be underestimated because it depends on the market definition as to under which category a merger falls.

2. Statutory basis for the examination of vertical mergers

The German Act against Restraints of Competition (ARC) stipulates that a merger is to be prohibited if it is expected to create or strengthen a dominant position (Section 36 (1) ARC). The Act does not distinguish between horizontal, vertical or conglomerate mergers.

Under the ARC a company is dominant if, as a supplier or buyer, it has a paramount market position in relation to its competitors. In assessing whether a paramount market position exists account is taken in particular of the company’s market share, its financial power, its access to supply or sales markets, its links with other companies, barriers to entry, potential competition, and its ability to shift its supply or demand to other goods or commercial services (Section 19 (2) No 2 ARC).

3. Anti-competitive effects of vertical mergers

Since vertical mergers do not lead to an addition of market shares, the Bundeskartellamt’s examination focuses in particular on the question of whether or not the merger will lead to market foreclosure effects. Such market foreclosure effects occur in particular where, on account of its own excellent access to the supply or sales markets, a dominant company can make access to these markets difficult or even impossible for its competitors.

Vertical integration and the possibilities it offers to force out competitors or foreclose the market is an issue that is frequently discussed in economic literature. Market foreclosure effects can occur both at the upstream and the downstream market level. Where, for example, access to preliminary products is impeded, competition can be hindered by the integrated company through its pricing policy vis-à-vis the buyers of these products or through its pricing strategy on the sales market.

Where a company has better access to supply and sales markets than its competitors this can lead to a deterioration of market structures. In the Bundeskartellamt’s view this requires, however, that at least one of the participating companies has had a strong market position even before the merger. The merger thus

may only have anti-competitive effects if the vertically integrated company gains a dominant position post-merger on one of the markets affected. In addition it has to be examined whether competitors depend on the supply by or demand from the vertically integrated company. For example, one important aspect for the competitive assessment is whether or not access to scarce commodities or resources will be impeded by the merger.

Anti-competitive effects can also occur if a potential competitor is deterred by the vertical merger. Here, the assessment has to focus in particular on whether or not the competitor would have entered the dominated market had the merger not occurred.

Another aspect to be examined is the transfer of financial power, which opens up possibilities to squeeze out competitors, e.g. by lowering sales prices.

The three cases reported below illustrate these assessment principles. The first two cases exemplify under which conditions anti-competitive effects are established (case 1) or not established (case 2). The third case illustrates the Bundeskartellamt's enforcement practice in the energy supply sector. Electricity and gas markets are the most important sectors of the Bundeskartellamt's enforcement practice with regard to vertical mergers. In these markets there is already a high degree of vertical integration with negative effects on competition. The Bundeskartellamt has issued several prohibition decisions and clearances subject to remedies against vertical energy mergers during the past years.

3.1 Case example: Axel Springer Verlag AG / PSG Postdienst Service GmbH

In 1997 the Bundeskartellamt prohibited the acquisition of PSG Postdienst Service GmbH (PSG) by Axel Springer Verlag AG (Springer).

At that time PSG was owned by Deutsche Post AG and operated about 240 press retail outlets, of which 31 were railway station bookshops, in the Eastern *Länder* of Germany. Springer, the acquiring company, was a media company mainly engaged in the area of newspapers, magazines and printing products. Amongst other products, it published the "Bild-Zeitung", the tabloid with the widest circulation in Germany.

According to the Bundeskartellamt's findings the acquisition of PSG would have strengthened Springer's dominant position in several markets, including the national and the Berlin reader market for over-the-counter newspapers and the respective markets for newspaper advertising.

Springer's dominant position would have been strengthened due to its participation in a downstream sales level, in this case the press retail sector. This would have been the first time that a publishing house participated in a downstream sales level. Until that time press distribution in Germany had been structured in a way which guaranteed neutrality vis-à-vis the publishing houses, i.e. distribution conditions were the same for each newspaper or magazine. The acquisition of PSG would have led to a vertical integration, which would have offered Springer the opportunity to exert influence on the activities in the final distribution level and thus improve its access to the sales markets. At the same time access conditions for actual competitors would have deteriorated and barriers to market entry for potential competitors increased. Moreover, Springer would have gained the possibility to expand its market position to newspaper markets that until then had not been dominated and consequently to indirectly secure its position in those markets which it already dominated.

3.2 *Case example: Nokia Corp. / Symbian Ltd.*¹

In 2004 the Bundeskartellamt examined a project by Nokia, the world's leading manufacturer of mobile phones, to increase its share in Symbian Ltd. by 31.1 % to a total of 63.3 % after the merger.

Symbian was founded in 1998 as a joint venture of Ericsson, Nokia and Psion. The company's objective was to develop an open operating system standard to match the requirements set by hardware manufacturers of mobile devices. Symbian developed the "Symbian OS" operating system and licensed it worldwide to its shareholders and other manufacturers of mobile devices. Symbian had a subsidiary, UIQ Technology AB, which developed and licensed a user interface (interface between user and hardware) that could only be used together with Symbian OS.

The Bundeskartellamt's investigations showed that the merger not only had vertical effects on the worldwide market for smartphones but also horizontal effects on the worldwide market for integrated operating systems for these devices. In the vertically affected market the investigation focused on the question of whether the merger could be expected to foreclose this market or permanently secure Nokia's market position.

At the time of the decision Nokia was the world's leading supplier of smartphones with market shares between 50 % and 95 % in Europe. However, this market position was not yet secured as the market for smartphones was still in an expansion phase.

Even before the merger took place a shareholder agreement safeguarded non-discriminatory access to the Symbian products for all shareholders. Although the merger provided Nokia with extensive opportunities for influence, these did not significantly increase Nokia's access to the primary products Symbian OS and Symbian/UIQ. In fact the merger did not alter the fact that shareholders would have non-discriminatory access to Symbian's products. Moreover, Nokia's influence on Symbian/UIQ has been restricted due to an additional agreement with Sony-Ericsson which was concluded during the course of the merger control proceedings. In this additional agreement Nokia committed itself not to hinder fair and non-discriminatory access for its competitors to Symbian OS or Symbian/UIQ. Furthermore Nokia agreed to support the further development already planned for Symbian/UIQ.

Finally, a foreclosure of the market for smartphones was not to be expected because most of Nokia's competitors were not dependent on supplies by Symbian. In view of the "Microsoft Smartphone" integrated operating system, Palm OS and Linux in connection with Java, the competitors had sufficient possibilities to switch to alternative suppliers.

The proposed concentration was therefore cleared.

3.3 *Case example: Mainova AG / Aschaffener Versorgungs GmbH*²

In 2004 the Bundeskartellamt prohibited the proposed acquisition of shares in Aschaffener Versorgungs GmbH ("AVG") by Mainova AG ("Mainova"). In the Bundeskartellamt's view the project was likely to strengthen the dominant positions of Mainova and AVG in the gas supply market.

¹ The full text of the decision is available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B7-29-04.pdf>

² The full text of the decision is available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B8-27-04.pdf>

Mainova, a company predominantly owned by the City of Frankfurt, is a regional energy provider (electricity, gas, heating and water) operating in and around the city of Frankfurt/Main.

AVG, a company owned by the City of Aschaffenburg supplies end customers in the city of Aschaffenburg with electricity, gas, water and district heating. AVG's gas supply network is connected to Mainova's grid gas network.

The following relevant markets were defined in this case: Firstly, the distribution level of the regional grid gas supply which, in geographic terms, covered Mainova's transmission network suitable for supplying local distributors; and secondly, the end customer market for gas (i.e. large and small customers) which, in geographic terms, was represented by AVG's gas distribution network.

The Bundeskartellamt's investigations showed that the merger would have enabled Mainova to strengthen its dominant position in the supply to municipal utilities in its network area. This would have been achieved by securing the already existing supply to AVG. Mainova's rights to information and possibilities to exert influence via its representation on the supervisory board would have increased its chances to be considered for new gas supply contracts. Furthermore Mainova would have gained extensive knowledge of its competitors' offers and might have been able to undercut them.

It was also to be expected that AVG and its municipal majority shareholder would consider the interests of the minority shareholder, i.e. Mainova. In the case of two equivalent offers, the final decision was likely to be in favour of the offer submitted by the minority shareholder. The planned shareholder structure also had a certain deterrent effect on other suppliers so that these would be prevented from the start to make a competing offer for the supply of gas to AVG. Potential competitors would be discouraged as well from engaging in aggressive competitive behaviour. The participation would therefore increase Mainova's ability to ward off follow-up competition.

The merger would also have strengthened AVG's dominant position in its network area. Potential competition from Mainova would thus be stifled from the start. Without the association under company law Mainova would have had an incentive to offer gas supply to small customers by transmission. This would have involved aggressive competition which could have been initiated above all by Mainova which, as the closest upstream network operator, was in a better position to do this than any other regional gas supply company. The proposed association would definitely have been unlikely to result in the development of such a transmission competition between Mainova and AVG.

4. Efficiencies

As the "scoping paper"³ explains, vertical mergers can give rise to several types of efficiencies. These include, in particular, enhanced coordination, alignment of incentives, production efficiencies, transaction cost savings, internalisation of non-price externalities and as well as the internalisation of price externalities, in particular the elimination of double marginalisation. The Bundeskartellamt does not share the view that vertical mergers normally lead to significant efficiencies as empirical studies do not seem to support such a general statement. Vertical mergers may or may not lead to merger-specific efficiencies.

In its case analysis, the Bundeskartellamt generally treats efficiencies neither as an efficiency offence nor as a formal efficiency defence. Under German merger control efficiency gains and competitive disadvantages are generally not quantified on a case-by-case basis. Although the ARC does not provide for an explicit efficiency defence, in its substantive evaluation the Bundeskartellamt has to weigh up the positive and negative competition effects of the merger on the relevant markets. The creation or

³ COMP/2006.102

strengthening of a dominant position can only be predicted if the expected negative effects of the merger on the structure of the market outweigh the possible positive effects.

The German law also stipulates that a merger cannot be prohibited if the companies involved prove that the merger will also lead to improvements of the conditions of competition which outweigh the disadvantages of dominance. (Section 36 (1) of the ARC) The parties to the merger can invoke this clause if the substantive examination of a merger concludes that the requirements for prohibition are fulfilled. However, to avert a prohibition it would have to be proved that the merger would improve competitive conditions on a market other than the one affected by the merger, on which market dominance is created or strengthened. High demands have to be placed on the quality of improvement on the alternative market to be considered for this to outweigh the deterioration of competition structures on the dominated market. As a general rule the alternative market also has to be dominated and this dominance reduced by the merger. This rule generally allows for the consideration of pro-competitive effects of mergers in third markets.

4.1 Case example: SES Astra/Premiere Digital Playout Center⁴

Even if German merger control does not provide for an explicit efficiency defence, the Bundeskartellamt weighs the positive and negative competition effects of the merger on the relevant markets affected. An example where the pro-competitive effects outweighed the anti-competitive effects was the clearance in December 2004 of the acquisition by SES Global Europe S.A. of all the shares in DPC Digital Playout Center GmbH of the Premiere Fernsehen GmbH & Co. KG.

The takeover affected the market for broadcasting satellite programmes as well as the pay TV end consumer market in Germany. SES Global operated the ASTRA satellite fleet in Europe and in particular provided transponder capacity to broadcasting service providers for the transmission of programmes via satellite to end consumers (DTH “direct to home”). DPC provided Premiere with intracompany technical services for pay TV (so-called digital platform: encoding, SmartCard management, set-top boxes).

The merger led to a strengthening of SES Astra’s dominant position in the national market for DTH transponders. The strengthening of SES Astra’s dominant position resulted from the vertical integration of the dominant satellite provider with the only service provider which was able to grant access to the Premiere set top boxes for satellite reception. Thus, two essential technical components of pay TV advance services were bundled under one provider.

However, the unbundling of the digital platform for pay TV from Premiere resulted in improved conditions of competition in the national pay TV market. So far, Premiere had dominated the pay TV market and sealed it off by using proprietary encoding technology and a matching set top box infrastructure. With the merger, access to the established set top box infrastructure was provided by SES Astra, a company which is independent of Premiere. Thus, a significant entry barrier to the pay TV market was eliminated. According to the Bundeskartellamt’s findings, the positive effects on the pay TV market outweighed the negative effects on the DTH transponder markets.

5. Enforcement policy and remedies

The Bundeskartellamt also scrupulously examines vertical mergers because under certain circumstances they can also have damaging effects. A “presumption of unobjectionability” sometimes called for in the case of vertical mergers seems inappropriate.

⁴ The full text of the decision is available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion05/B7-150-04.pdf>

Also in the case of vertical mergers the prohibition of abusive practices cannot replace merger control. Only a proportion of the possible negative effects of vertical mergers are covered under the prohibition of abusive practices. The hypothesis that private and state sanctions for violating the prohibition of abusive practices are generally sufficiently deterrent to prevent illegal predatory or market foreclosure practices, is questionable since the actual deterrent effect of sanctions cannot be estimated reliably.

Contrary to the opinion of the European Court of First Instance in the cases Tetra Laval/Sidel and GE/Honeywell it is not generally useful to establish the deterrent effect of the prohibition of abusive practices in a specific case. In many cases even the assessment of whether a hypothetical behaviour would violate the prohibition of abusive practices is ambiguous. If a competition authority were to carry out an ex-ante substantive assessment of each possible variant of abuse of power, it would soon run up against its limits. Irrespective of these practical problems, such an "Article 82 defence" leads to a paradoxical result: As the most damaging hypothetical practices would be most likely to violate the ban on abusive practices, only the more harmless variant/practices can be assumed for analysis under merger control.

If a competition authority's prohibition decision in the case of a vertical merger is based on future behaviour, the appropriate standard of proof is whether, from an economic point of view, this behaviour is likely to occur. In German practice and case law structural criteria are given primary consideration, also in the examination of vertical mergers. The Bundeskartellamt's prohibition decisions are thus not primarily based on the participating parties' likely future behaviour, but above all on the merger's possible effects resulting from market foreclosure, the elimination of potential competition and increased financial strength. If a prohibition is based on the participating parties' future behaviour, the standard of proof applied by the Bundeskartellamt is whether this behaviour is likely to occur. A certain behaviour is to be considered likely if it is possible and commercially reasonable.

Under German merger control only structural remedies are admissible, in particular, for instance, the obligation to sell companies or parts of companies. Any remedy which would subject the conduct of the companies concerned to continued control, is explicitly inadmissible under German competition law (§ 40 (3) sentence 2 ARC). Accordingly the Bundeskartellamt would not be able to clear a merger subject to a remedy that forbids the companies to resort to abusive practices. This regulation corresponds with the experience gained by the Bundeskartellamt that behavioural remedies are generally not a suitable method to dispel competition concerns under merger control.

JAPAN

1. Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations

Japan's Antimonopoly Act prohibits a business combination if its effect will substantially restrain competition. The Japan Fair Trade Commission ("JFTC") published the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations" ("Merger Guidelines") in 2004 and clarified its position on what business combinations may be substantially to restrain competition. The Merger Guidelines cover not only horizontal business combinations but also vertical and conglomerate business combinations.

2. The JFTC's position on vertical business combinations in the Merger Guidelines

The Merger Guidelines define vertical business combinations as business combinations between companies in a different level of trade, such as producers and distributors. Vertical business combinations do not reduce the number of competitive units in any particular field of trade. Therefore, they have less impact on competition than horizontal ones, and their effect may usually not be substantially to restrain competition except for cases where substantial restraint of competition is caused by closure of or exclusion from markets, by coordinated conducts and so on.

Whether the vertical business combinations may be substantially to restrain competition in any particular field of trade is reviewed from the view points of both unilateral conducts by the combined companies and coordinated conducts between the combined companies and their competitors.

Cases where the effect of vertical business combinations may be substantially to restrain competition by means of unilateral conducts are as follows. After a vertical combination is completed, it is profitable for the combined companies to trade within their group. As a result, there could be cases where other companies would in fact lose the opportunities to trade with the combined companies, and the transactions among the group may raise problems of closure or exclusivity. Consequently, a situation is likely to emerge where the combined companies will be able to freely control trade conditions, including prices, to a certain extent¹. In addition, even when the combined companies continue to do business with their competitors after the vertical combination, if the competitors are in a more disadvantaged position in the business with the group than before, the impact on competition will be significant since effective competition can no longer be expected.

On the other hand, the cases where the effect of vertical business combinations may be substantially to restrain competition by means of coordinated conducts are as follows. After a manufacturer and

1 For example, suppose that a manufacturer of finished goods has a large market share and purchases raw materials from many suppliers. When such a manufacturer merges with one of its suppliers and only uses the raw materials from it, the other suppliers are likely to lose their business opportunities with the manufacturer that is their large customer. Similarly, suppose that a supplier of a raw material has a large market share and supplies to many manufacturers of finished goods. When the supplier merges with one of the manufacturers and only supplies the raw materials to it, the other manufactures are likely to lose business opportunities with their major supplier of raw materials.

distributor vertically merge, for example, the manufacturer will obtain its competitors' information on prices and so on through the distributor. As a result, the manufacturers, including the combined one, might be able to estimate each other's behavior with high reliability. In such cases, a situation is likely to emerge where the combined companies and their competitors will be able to freely control prices and so on to a certain extent; thus the effect of a vertical business combination may be substantially to restrain competition.

3. Individual cases

In the following section we introduce the case "Acquisition of stocks of Amatsuji Steel Ball Mfg. Co., Ltd. by NSK Ltd." in order to show how to practically assess the closure of and exclusion from markets and coordinated conducts mentioned above. Also, we refer to the case "Acquisition of stocks of the General Sekiyu K.K. by Exxon Group" as an example of a vertical integration case with remedies.

3.1 Acquisition of stocks of Amatsuji Steel Ball Manufacturing Co., Ltd., by NSK Ltd

This case involved a plan by NSK Ltd. ("NSK"), which is in the business of manufacturing and selling ball-bearings, etc., to acquire all of the stocks of Amatsuji Steel Ball Manufacturing Co., Ltd. ("Amatsuji"), which is in the business of manufacturing and selling steel-balls (parts of ball bearings). See the tables below for the structures of the steel-ball (upstream) and ball-bearing (downstream) markets. As described below, it was judged that the transaction in this case would not substantially restrain competition in those relevant markets.

Steel-balls			Ball-bearings		
Rank	Manufacturer	Share	Rank	Manufacturer	Share
1	Amatsuji	Approx. 50%	1	NSK	Approx. 35%
2	Company A	Approx. 40%	2	Company B	Approx. 25%
	Other companies	Approx. 5%	3	Company C	Approx. 20%
	Imports	Approx. 5%	4	Company D	Approx. 5%
				Other companies	Approx. 5%
				Imports	Approx. 10%
	Total	100%		Total	100%
HHI: Approx. 4,200			HHI: Approx. 2,400		

Note: The market shares do not count steel-balls produced by ball-bearing manufacturers.

3.1.1 Substantial restraint of competition through unilateral conducts

Refusal by Amatsuji to supply steel-balls to ball-bearing manufacturers other than NSK

Amatsuji needs to ensure a sales volume above a certain quantity in order to reduce the cost of steel-ball production. If Amatsuji refuses to supply steel-balls to ball-bearing manufacturers other than NSK, it will not be able to avoid a significant loss of sales volume. Thus, it was thought that Amatsuji would continue supplying steel-balls to ball-bearing manufacturers other than NSK. Furthermore, even if Amatsuji refused to supply steel-balls to other ball-bearing manufacturers, it was thought that those ball-bearing manufacturers that were also manufacturing steel-balls by themselves would be able to respond to the refusal by raising their self-production ratio, while those ball-bearing manufacturers that were not manufacturing steel-balls would be able to procure steel-balls by switching to Amatsuji's competitors. Accordingly, it was judged that unilateral conducts by Amatsuji would not substantially restrain competition in the ball-bearing market.

Refusal by NSK to procure steel balls from steel ball manufacturers other than Amatsuji

NSK procures steel-balls from steel-ball manufacturers other than Amatsuji. From the standpoint of ensuring the stability of steel-ball procurement, NSK had no incentive to discontinue the procurement of steel-balls from steel-ball manufacturers other than Amatsuji, and thus wished to continue procuring from them. Moreover, even if NSK refused to procure steel-balls from steel-ball manufacturers other than Amatsuji, there were other large ball-bearing manufacturers that could replace NSK as customers. In light of these factors, it was judged that unilateral conducts by NSK would not substantially restrain competition in the steel-ball market.

3.1.2 *Substantial restraint of competition through coordinated conducts*

Coordinated conducts among steel ball manufacturers

Amatsuji will be able to learn of the sales prices for steel-balls charged by other steel-ball manufacturers to NSK. However, ball-bearing manufacturers that also self-manufacture steel-balls act as deterrents against price coordination among steel-ball manufacturers. In addition, it is thought that steel-ball manufacturers would have no incentive to engage in price coordination that may lead to lower sales volume, since it is beneficial for steel-ball manufacturers to use the advantage of scale. Accordingly, it was judged that coordinated conducts by Amatsuji and its competitors would not substantially restrain competition in the steel-ball market.

Coordinated conducts among ball-bearing manufacturers

NSK will be able to learn of the sales prices for steel-balls charged by Amatsuji to other ball-bearing manufacturers, but the business scale of ball-bearing manufacturers differs, and the sales cost of each product usually varies. Consequently, it would not be easy for NSK to estimate the sales prices for ball-bearings charged by its competitors based on the price information obtained through Amatsuji. Thus, it was judged that coordinated conducts by NSK and its competitors would not substantially restrain competition in the ball bearing market.

3.2 *Acquisition of stocks of the General Sekiyu K.K. by Exxon Group*

This is a case where Exxon Corporation (“Exxon”), an energy-related all-round corporation in the US, intended to acquire additional stocks of General Sekiyu K.K. (“General”), an oil wholesaler. Exxon’s subsidiaries and sub-subsidiaries already hold stocks of General, and the proposed acquisition would increase the Exxon group’s share of General to over 50%. After this acquisition, the total market shares in Okinawa Prefecture (islands located in the southwestern region of Japan) of General and Esso Sekiyu K.K., an oil wholesaler in the Exxon group, will become 42.6% (the largest) for gasoline, 37.4% (the largest) for kerosene, 36.6% (the largest) for light oil, and 58.8% (the largest) for heavy oil.

There are only two oil manufacturers in Okinawa Prefecture, and General holds the majority of stocks of Nansei Sekiyu K.K. (“Nansei”), one of the two oil manufacturers. Therefore, there was concern that this acquisition would lead to barriers to entry into the oil wholesale market in Okinawa Prefecture, since the Exxon group is able to control the management of Nansei.

Regarding this concern, the companies have offered to take measures not to interfere in Nansei’s decisions concerning its customers, so that new entries in the oil wholesale market will not be restricted. Considering this offer, the JFTC judged this acquisition may not be substantially to restrain competition in the market for the time being.

KOREA

1. Introduction

1.1 Definition

Under the Notification on M&A Review Guidelines ("Guidelines")¹ of the Korea Fair Trade Commission ("KFTC"), a vertical merger is defined as a merger between companies which are adjacent in the chain of production and distribution of any given products or services. Thus, parties in a vertical merger are interdependent to each other in the supply and demand of inputs. In the review of a vertical merger, one merging party which supplies the inputs to the other merging party is referred to as the "upstream firm", whereas the other merging party which purchases the inputs is referred to as the "downstream firm."

Sometimes, however, it can be difficult to distinguish a vertical merger from other types of merger. For example, in a merger between a shipbuilding company and a company which finances capital to shipbuilders, one may be confused as to whether the merger should be considered as a vertical or a conglomerate one. If capital financing is regarded as one of the production process of shipbuilding, this merger may be analysed as vertical, while it may be reviewed as conglomerate if capital financing is merely considered as a complement to shipbuilding. In addition, in case of dual distribution where a manufacturer and a wholesale distributor simultaneously participate in the retail distribution market, a merger between the manufacturer and the wholesale distributor may be regarded as either horizontal or vertical merger.

1.2 Efficiency of Vertical Mergers

In general, a vertical merger is more favorably treated in the merger review process than a horizontal merger because it is generally known that a vertical merger brings about many efficiency-enhancing effects while its impact on competition is mainly indirect and complex affecting the cost structure or demand of rival firms and their pricing strategy on the product provided to consumers.

For example, it is generally known that a vertical merger may have the following efficiency benefits. First, a vertical merger may facilitate better coordination between the two with respect to product design and production, to serve each other's best interest. Without a vertical merger, the input supplier may have to consider various needs of multiple purchasers in its product design and production, and the input purchaser may worry about its ideas for product design improvement being used by the input supplier to benefit its competitors.

Second, a vertical merger eliminates free-rider problem because it internalises the pro-competitive benefits of product promotion within the vertically integrated firms. Without a vertical merger, the upstream firm would not carry out a product promotion to boost demand for the product, if the revenue from the promotion goes into the pocket of the downstream firm while the cost for the promotion is covered by the upstream firm, and vice versa.

¹ [http://ftc.go.kr/data/hwp/review\(1999_2\).doc](http://ftc.go.kr/data/hwp/review(1999_2).doc)

Third, when the input market is not perfectly competitive, in which case the price of the input may exceed the marginal cost level, a vertical merger may rationalise the input usage to a certain extent. After the merger, the input supplier may transfer the input to its downstream division at a price equal to the marginal cost, not at the pre-merger price in excess of the marginal cost. Consequently, it may result in more use of inputs at lower price.

Fourth, when both the input and output markets are imperfectly competitive, a vertical merger may lower the output price by eliminating one of the two markups.²

1.3 Anti-Competitive Effects of Vertical Mergers

On the other hand, a vertical merger can cause anticompetitive effects. First, a vertical merger can increase the merged firms' incentives to engage in exclusionary conduct by foreclosing their competitors at both upstream and downstream levels.

Second, vertical mergers might be able to increase the likelihood of tacit or express coordinated conduct by facilitating the exchange of pricing and other competitively sensitive information among the competing input suppliers through their transaction with the downstream division of the vertically integrated firm.

Third, a vertical merger may be pursued as a way of evading cost-based price regulation. In the face of regulations on maximum price, the downstream division may try to obtain monopoly profit in the input market in circumvention of the downstream price regulation simply by paying higher price than is usually required for inputs provided by its affiliate upstream division under normal market situations.

Thus, it is the role of the antitrust agencies to balance these conflicting effects of a vertical merger. This article illustrates the KFTC's review system on a vertical merger under the Guidelines, and then shares implications from the KFTC's past antitrust enforcement experiences.

2. KFTC's Enforcement System on Vertical Merger

2.1 Review System under the M&A Review Guidelines

The Guidelines, enacted in 1998, provide KFTC's merger review process. Under the Guidelines, review of all types of mergers, whether horizontal, vertical or conglomerate, starts with the definition of relevant product and geographic market. After the relevant market is defined, the type of the merger is determined. The Guidelines provide different lists of the factors to be considered for each type of the merger in the review process to find out whether there are competitive harms caused by the merger in question. If the merger is found to have anticompetitive effects, the KFTC analyses the efficiency and failing company defenses, if raised by the merging parties. When the KFTC concludes that the defenses do

² This effect is frequently referred to as "elimination of double marginalization." For example, supposing that the price for an output product that maximizes the monopolistic profit is \$100, and the production cost of the upstream and downstream firm is \$35 and \$40 respectively, the ideal margin for the product will be \$25, which should be divided between the two firms properly. However, if the two firms are well aware of the other's cost structure, each firm will try to maximize its own monopolistic profit by setting its price at \$100 minus the other's cost. Therefore, the premerger price charged by the two independent firms will be \$60 and \$65 respectively. However, the resulting output price now will be \$125, not \$100. This means that the outcome of the two firms' independent behaviour does not guarantee the maximization of the monopolistic profit. In this case, a vertical merger, by internalizing the cost and profit structure of the two firms, would lead to lower output price, \$100 in the hypothesis, maximizing the merged firm's monopolistic profit

not exceed the anticompetitive effects to justify exception, it imposes corrective measures on the merger to remedy the competitive harms.

With respect to the vertical merger, the Guidelines mainly focus on the possibility of the market foreclosure effect and raising of entry barriers.

2.2 *Market Foreclosure Effect of Vertical Mergers*

Under the Guidelines, market foreclosure effect is defined as circumstances which may substantially lessen competition by foreclosing the channels for supply or sales of other competing firms.

Regarding the analysis of market foreclosure effect, the Guidelines provide various factors to be considered. First, if the vertically integrated firms retain more than a certain level³ of market shares in both the upstream and downstream relevant markets after the merger, the merger may substantially lessen the competition. Second, other factors to be considered include the purpose of the merger, the possibility of the foreclosed competing firms obtaining substitute channels for supply or sales such as export to or import from foreign markets, the extent of vertical integration of competitors, the growth prospect of the industry in question, the merging parties' business plan such as facility expansions, likelihood of collusion to exclude competitors, the situation of the upstream and downstream relevant markets and the impact of the merger on the markets.

2.3 *Potential of the Vertical Merger to Raise Entry Barriers*

In addition, under the Guidelines, the KFTC must analyse the potential of the vertical merger to raise entry barriers in relevant markets. The competitive concerns may arise if the vertical merger takes place between large-scale companies or involves many companies in a successive channel of distribution, since it may increase the minimum amount of capital investment needed to make a new entry or require a new entrant to simultaneously enter all the relevant markets. These situations may further substantially lessen competition by raising entry barriers in relevant markets.

2.4 *Comparison with Competitive Concerns in Horizontal or Conglomerate Mergers*

The above-mentioned competitive concerns regarding vertical mergers are somewhat different from those concerning horizontal or conglomerate mergers. In case of horizontal mergers, the Guidelines provide that major antitrust harms are the possibilities of unilateral and coordinate effects. In other words, the KFTC will focus on the analysis of whether the horizontal merger will increase the monopoly power of the merging parties to raise their prices irrespective of the competitors' response and whether the horizontal merger will encourage the competitors to tacitly or explicitly collude with each other to compete less vigorously in the relevant market.

In case of conglomerate mergers, the Guidelines provide that major antitrust harms lie in the possibility of lessening potential competition. In this regard, the KFTC's analysis of a conglomerate merger will focus on two aspects; first, whether the merging parties could have entered each other's relevant market by itself if it had not been for the merger; and second, whether the merger eliminates one company with the potential to enter the relevant market which could be a competitive threat to the other players in the relevant market in raising their prices.

³ Under the Guidelines, the threshold is 50% or more of the market share taken by the merging parties or 70% or more of the market share taken by the biggest three firms including the merging parties in a given relevant market.

2.5 *Conclusion*

Thus, different elements are considered for different types of mergers. As a result, the investigative tools, such as relevant evidence and economic models to predict the impact of the proposed merger, may also be quite different. Since the vertical merger is generally most likely to bring about efficiency-enhancing effects as discussed earlier, it is very important to understand what is the essence of the transaction, who are mostly affected by the merger and exactly how they are affected.

3. **KFTC's Enforcement Experience on Vertical Merger**

3.1 *Merger between Hyundai Motors and Hyundai Autonet (2005)*

3.1.1 *Facts of the Case*

Hyundai Motors("Hyundai") is a large car manufacturing company which takes about 2/3 of Korean car market in combination with its affiliate Kia Motors. Hyundai Autonet("Autonet") is the largest auto parts company in Korea in the field of electronic auto parts such as car audio, navigation, engine management system control unit, airbag control unit and transmission control unit. Hyundai also participates in the electronic auto parts market through its subsidiaries. Therefore, the merger between Hyundai and Autonet is considered both as horizontal and vertical merger. After merger, the merging parties take more than 2/3 of Korean car market and nearly 50 percent of Korean electronic auto parts market.

3.1.2 *Competitive Concerns*

Regarding the aspect of vertical merger⁴, the KFTC concluded that there were competitive concerns because of the possibility of market foreclosure effect caused by Hyundai against electronic auto parts companies other than Autonet.

In this regard, it should be noted that market foreclosure effect can be further divided into input foreclosure and customer foreclosure. Input foreclosure means the concerns that the upstream division of the vertically integrated firm may foreclose its supply of input to the downstream companies which are in competition with its downstream division. Meanwhile, customer foreclosure refers to the possibility that the downstream division of the vertically integrated firm may foreclose its purchase of inputs with the upstream companies which are in competition with its upstream division.

These two kinds of market foreclosure effects do not always take place simultaneously. For example, here in the Autonet case, main competitive harms arose in the form of customer foreclosure. Because Hyundai had more than 2/3 of Korean car market, if it chose to turn to Autonet for most of its purchase of electronic auto parts, other competing electronic auto parts companies might not find sufficient substitute channels for sales. Moreover, the explicit purpose of the merger was to promote vertical integration between the merging parties. Hyundai's purchase takes about 2/3 of total sales of electronic auto parts and car companies and electronic auto parts companies maintain long-term cooperative relationships through long-term transaction agreements from the time a new concept car is under development until the time its repair service is provided several years after the new car is commercialised. For these two reasons, the electronic auto parts companies in competition with Autonet may not be able to find alternative channels of

⁴ Detailed discussion regarding the aspect of horizontal merger is omitted in this article, except that the KFTC did not find significant competitive concerns in this regard.

sales once they are foreclosed from Hyundai's purchase of electronic auto parts in the early stages of developing a new concept car.

However, input foreclosure was relatively less problematic in Autonet case. The KFTC concluded that the market situation would not allow Autonet to try to foreclose its input supply to other car companies by favoring Hyundai in its input supply. First of all, there were about 10 other electronic auto parts companies available as substitute channel for input supply. Moreover, some of the competitors were foreign companies with the highest technology in the electronic auto parts market. In addition, Autonet had large scale idle facilities. Under these circumstances, even if Autonet had tried to discriminate against unaffiliated car companies, it would have resulted in reducing its own sales without any adverse effects on car companies.

Instead, there is incentive for the car companies to stop doing business with Autonet because of their concern that their competitively sensitive information regarding their plans for new cars might be revealed to their major competitor, Hyundai, by its affiliate Autonet which may acquire the information through its input supply relationship with them.

3.1.3 Corrective Measures

In designing appropriate remedies in the Autonet case, the KFTC considered the fact that Hyundai formed a consortium with Siemens VDO Automotive ("Siemens"), a German electronic auto parts company, to pursue the merger. Hyundai's purpose of the merger was to boost cooperative relationship with Siemens so that Hyundai and Siemens could join their efforts for technological development in related fields. Therefore, a prohibition of the stock acquisition to remedy the market foreclosure effects would also have blocked any efficiency gains from the joint technological development. Partial divestiture of Autonet's assets would undermine the joint technological development and reduce the scale of production, which would hurt the efficiency.

Taking these circumstances into account, the KFTC decided to impose behavioral remedies rather than structural remedies. Thus, the KFTC imposed corrective measures on Hyundai under which Hyundai was obliged to establish and implement a "program for fair dealings" that provides guidelines to prohibit unfair discrimination against unaffiliated electronic auto parts companies in favor of Autonet. In addition, Hyundai was required to report the details of its transactions with any electronic auto parts companies to the KFTC for 3 years.

3.2 Merger between Dongyang Nylon and Hankook Caprolactam (1996)

3.2.1 Facts of the Case

In 1995, there were four major nylon manufacturers in Korea. Three of them, including Dongyang Nylon ("Dongyang"), had caprolactam supplied from Hankook Caprolactam ("Hankook") for their nylon production. Hankook, co-founded by the three nylon manufacturers, provided caprolactam to each of the three companies according to the proportion of their shareholding, yearly production and daily production capacity. Against this backdrop, in 1996, Dongyang acquired additional shares of Hankook to hold a total of 30.14 percent stake in Hankook.

The four major nylon manufactures accounted for about 50 percent of the nylon market. As for caprolactam, Hankook was the only domestic supplier occupying about 34% of the total Korean caprolactam market, rest of which was held by a number of foreign suppliers.

3.2.2 *Competitive Concerns*

Before the merger, three out of four major nylon manufacturers including Dongyang purchased caprolactam from Hankook for their nylon production. The volume purchased by each nylon manufacturer was largely proportional to its market share in nylon market.

Under these circumstances, the KFTC concluded that the merger might substantially lessen competition in the nylon market by input foreclosure. The conclusion was mainly based on the possibility that Dongyang might exercise its control over Hankook to switch its caprolactam supply from other nylon company to Dongyang. Factual evidence which supported this conclusion included Dongyang's huge expansion of its production facility, higher price of imported caprolactam which was the only available substitute for other nylon companies, and the difficulty in making new entry in the caprolactam market due to the large capital investment required. Therefore, if the merging parties tried to bring about input foreclosure, it could raise other nylon companies' costs, thus substantially lessening competition in the nylon market.

3.2.3 *Corrective Measures*

When the KFTC reached the conclusion discussed above, the merging parties voluntarily abandoned the merger by selling the acquired stocks. Therefore, the case was closed without significant corrective measures except the order to prohibit Dongyang's future merger with Hankook and to announce in the newspaper that such corrective measures were imposed on Dongyang.

4. **Conclusion**

As discussed earlier, it should be noted that antitrust agencies must be more careful in reviewing competitive harms or potential consumer injury in a vertical merger than in a horizontal one. The reasons are; first, vertical mergers are likely to result in larger cost savings and other efficiency benefits than horizontal mergers; second, complaints about specific vertical mergers are often made by the competitors of the merging parties while competitive concerns about horizontal mergers are often raised by the consumers; and third, the magnitude of harm suffered by consumers solely from the elimination of choice is relatively limited in situations where the merger is unlikely to trigger price increase. Therefore, antitrust agencies must carefully look for potential consumer injury in reviewing a vertical merger to overcome the above-mentioned hurdles.

In this respect, the review process regarding vertical mergers has much to be improved whether in Korea or elsewhere in the world.⁵ Until now, it may not be clear in many cases in what scenario the competitive harms of vertical mergers will occur, what kinds of economic models should be used to predict the impact of vertical mergers, and what consumer injury occurs in a given vertical merger case and how it can be effectively proved.

At this point, however, it can be surely said that the difficulties should not justify insufficient review of a specific vertical merger. Many antitrust agencies including the KFTC will continue to sharpen their review process on vertical mergers, and these efforts will ensure further development in effective antitrust enforcement on vertical mergers in the near future.

⁵ For example, in case of the KFTC, its merger review process on vertical mergers may be improved in the future in that it currently relies relatively much on the analysis of foreclosure effect based on the market shares of the merging parties.

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MEXICO

Introduction

This document presents a summary of the approach followed by the Federal Competition Commission (CFC) in assessing vertical mergers. The Federal Law of Economic Competition (FLEC or Law) and its Regulations outline the key economic elements to be considered in assessing the competitive effects of mergers. However, these provisions are not specific for vertical mergers. On the other hand, the CFC has not developed guidelines for assessing this type of mergers. Thus the approach described below is based on decisions associated with illustrative vertical merger cases.

The document starts with a description of the regulatory framework associated with merger control, highlighting the provisions most relevant to vertical mergers. Section 2 delves into the definition of vertical mergers. Section 3 identifies the criteria used to evaluate the competitive effects of vertical mergers. Section 4 refers to the efficiencies considered in this assessment and section 5 addresses remedies. Finally, section 6 presents some final remarks.

1. Evidence and enforcement policy

The analytical framework used to assess the competitive effects of vertical mergers is derived from the general merger control provisions of the FLEC and its Regulations.

Article 16 of the Law prohibits mergers whose purpose or intent is to reduce, harm or hinder the competition process. According to Article 17, the following are indications of an anticompetitive merger: i) it can confer the merged entity the power to unilaterally fix prices or restrict supply (acquisition of substantial market power); ii) it may be intended to substantially restrict competitors' access to the market (foreclosure), and ii) it has the purpose or effect of substantially facilitating carrying out unlawful monopolistic conducts (coordinated effects). The CFC annotations for the economic analysis of mergers state that vertical mergers are evaluated in accordance with this article 17 of the Law.

According to Article 18 of the FLEC, when assessing a merger the CFC must consider the following elements:

- the relevant market where the merger takes place, the economic agents participating in such market and their market power, and the level of market concentration;
- the impact of the merger on competitors, customers, and related markets and firms;
- merging parties' stakes in other undertakings participating in the relevant market or related markets, as well as other undertakings stakes in the merging parties;
- alleged efficiency gains¹ derived from the merger.

¹ Article 6 of the FLEC Regulations allows parties to defend relative monopolistic practices based on efficiency gains. This article lists as efficiency gains the following: 1) savings that would reduce

The second and third elements listed above provide for an analysis of the competitive impact of mergers involving firms in related markets. The CFC presumes a merger to be anticompetitive if ownership relationships may endow the parties with privileged access to an important input or with an advantageous position regarding distribution, marketing or advertising of the relevant product; and if the parties have or may obtain substantial market power in related relevant markets.

The framework set up by the FLEC is complemented by its Regulations:

- Articles 9-13 identify the rules to be considered when defining the relevant market and determining the existence of market power, including a non-exhaustive list of entry barriers.
- Article 16 lists the type of conditions that the CFC can impose on mergers, such as ordering or prohibiting conducts; divesting assets; changing or eliminating terms and conditions of the intended transaction; and other conditions to avoid anticompetitive effects.
- Article 20 specifies the information required for a notification, including economic information: 1) financial statements; 2) description of the merger's objectives and type of operation; 3) capital structure before and after the merger; 4) non competition clauses and their justification; 5) identification of agents involved in the transaction; 6) description of the principal goods and services produced or supplied by the agents involved, identifying their use in the relevant market and a list of similar goods and services and the agents that produce, distribute or trade them in the domestic market; 7) market shares of merging parties and their competitors; 8) location of plants or business establishments, and centres of distribution and their relationship with the merging parties. In addition, whenever it is justified, the CFC can require additional information.

In addition to this framework, the powers for requiring information to undertakings related to the merger, allows the CFC to use a variety of evidence in its analyses, including structural variables pre-merger; testimony of end-use customers; incriminating documents; and complaints by competitors.² On the other hand, economic models are rarely used.

2. Definition of a vertical merger

The analytical framework described above does not provide a definition of vertical mergers or distinguish between vertical and conglomerate mergers. Notwithstanding, the preamble to the bill proposing the 1992 competition law indicated the existence of two distinct types of mergers: those having a direct impact within a relevant market and those whose impact results from chaining different stages of a productive process. It also acknowledged that the latter tend to involve a more complex analysis because they are likely to generate efficiency gains derived from savings in fixed organisation costs and transport costs.

production costs or increase output at a given cost; 2) economies of scope; 3) reduction in administrative costs; 4) transfer of technology or market knowledge; and 5) network economies. This non-exhaustive list appears in Article 16 of the proposed new Regulations (pending approval), which provides that a merger will be deemed pro-competitive if the parties to it demonstrate that its consumer welfare enhancing effects permanently outweigh its anticompetitive effects.

² According to article 26, section IV of the Regulations to the FLEC, the CFC will take into consideration information provided in a complaint regarding a notified merger. The complaint, however will be dismissed.

Former Commissioner García Alba refers to vertical mergers as those “whereby a firm acquires another firm that produces inputs for its processes” and explains that “Concentration of substantial market power in input production may harm producers who use them, but vertical integration does not further increase existing concentration in the input market”.³ Hence, vertical mergers are reviewed as mergers involving firms that participate in different relevant markets which have no impact on competition within each market, but require an assessment of the effect of the merger in related markets and a consideration of whether the parties hold stakes in firms participating in related markets, as provided by article 18 of the FLEC.

Typically, the CFC distinguishes the upstream firm from the downstream firm by referring to the direction of trade, as depicted in the three cases discussed below.

2.1 *Gasoducto Tamaulipas*

In the San Fernando project case, the notified operation was a joint venture between El Paso Energy International Company (EPIC) and Pemex Gas y Petroquímica Básica (PGPB) to build and operate a pipeline for transporting natural gas in Tamaulipas state and two “compression stations”. A new corporation, Gasoducto Tamaulipas, S de R.L. de C.V. (GT) was created to hold the transportation permit, assets and related contracts. The pipeline would link two branches of the National Gas Pipeline System (SNG), owned by PGPB, in order to ensure natural gas supply to the Federal Electricity Commission (CFE), a state-owned electricity firm, and independent energy producers in several regions.

The parties were already partners in Gasoductos de Chihuahua (GCH), which renders natural gas transportation services to CFE, and also built and operates a pipeline to supply a thermoelectric plant in Samalayuca, Chihuahua. EPIC, is a US firm that develops energy infrastructure projects in several countries, and provides financing, building and related services for energy infrastructure projects. It is a subsidiary of El Paso Corporation which is a major electric energy and natural gas producer in the US. PGPB is a subsidiary of Pemex, the state-owned oil firm. It is a vertically integrated firm involved in natural gas and liquefied petroleum gas activities, including processing, storage, transportation, distribution and commercialisation, among other, and holds shares in several Mexican energy firms. It owns the SNG, the Naco- Hermosillo system and has a stake in GCH. In addition it is the sole domestic provider of natural gas.

Because of the scope of the joint venture, the CFC defined the relevant market as natural gas transportation. The joint venture in GT thus involved a vertical merger because of PGPB’s role as the sole provider of natural gas (upstream) and its participation in down stream distribution and commercialisation activities.

2.2 *Acquisition of shares in GAP*

In 2006 Controladora Mexicana de Aeropuertos notified its intention to acquire 25.5% of the shares of Aeropuertos Mexicanos Pacífico (AMP)⁴, owner in turn of 15% of the shares of Grupo Aeroportuario del Pacífico (GAP) which controls 12 airports in Mexico.⁵

³ García-Alba Iduñate, Pascual. Experience from a decade of analyzing competition, in The first decade of the Federal Competition Commission, 2003.pg 143.

⁴ CNT-04-2006

⁵ GAP airports are located in Guadalajara, Puerto Vallarta, Tijuana, San José del Cabo, Silao (Bajío), Hermosillo, Mexicali, Los Mochis, La Paz, Manzanillo, Morelia y Aguascalientes.

The operation was deemed not to entail a horizontal merger because there was no overlap in the lines of business of the purchasing and selling groups. While the purchasing group's activities comprised developing tourist sites in the northwest region of the country, its controlling investors did not participate in airport operation, management or exploitation or in the provision of airport services. However, these investors held a minority share in Grupo Mexicana de Aviación, a major airline. Since airlines are users of services provided by airport managers and operators, the CFC assessed this as a vertical merger.

2.3 Sinergia

Three self-service chain stores, namely Controladora Comercial Mexicana, Gigante and Tiendas Soriana, notified a joint venture to create Sinergia de Autoservicios (Sinergia), which would provide them advice and representation in the purchase of inputs and goods.

The CFC identified the three relevant markets in which chain stores participate: i) wholesale purchasing, which were independently carried out by each chain store premerger; ii) distribution from the chains' independent distribution centres to the points of sale; and iii) retail sale of goods to final consumers that takes place in the stores. Sinergia would actively participate in the first market and tentatively in the second, but it was not meant to affect the retail sales market because the chain stores would remain competitors, with independent pricing and marketing strategies. However, the CFC sought to determine any coordination effects deriving from the merger in this market.

3. Anti-Competitive Effects of Vertical Mergers

The analytical framework set by the competition legislation does not provide guidance as to the circumstances under which vertical foreclosure or coordinated effects may arise. Merger review is not necessarily based on a specific theory of harm, although hypothesis on the foreseeable conduct are used.

3.1 Gasoducto Tamaulipas

Based on PGPB's 90% market share, the CFC found that it had substantial market power in the relevant market, premerger. The joint venture would have the effect of strengthening this status as well as its position as sole provider of Natural gas and its participation in commercialization activities. Thus, the CFC decision established that, "regarding natural gas transportation and related markets it would be unlikely for another agent to acquire a significant share in the natural gas chain, similar to PGPB's, that could offset its participation as provider, transporter and retailer". The CFC further determined that there existed no economic agents that could offset PGPB's dominant position either in the short or long term, because it would require a significant investment and a demand large enough to support it. In addition, the CFC found that the feasibility of alternative natural gas providers, by means of imports, was contingent on the development of new transportation infrastructure by an agent other than PGPB. This situation led the CFC to determine that PGPB's dominant position deterred private investments.

San Fernando project stipulated that PGPB would contract in advance the whole capacity of the pipeline and the CFC found evidence that it had committed to supply independent producers, i.e. to sell them natural gas and provide them transportation services. The CFC deemed that by reserving total capacity PGPB sought to strengthen its transportation share and significantly increase its advantageous position in commercialisation. It did so despite open access and non-discrimination obligations established in sector regulation. These obligations mandate interconnection with other transport permit holders whenever capacity is available and it is technically feasible, and to expand transportation systems to meet user needs. The CFC thus considered it was unlikely that PGPB would provide open access and non-discriminatory treatment or that it would charge independent producers equivalent or similar fees in future contracts, because the capacity reservation meant that it faced nil competition. In sum, the CFC found that

by means of reserving total capacity the merger would have a total customer foreclosure effect in the downstream commercialisation market.

3.2 Sinergia

In the wholesale furnishing market the CFC found that several providers would exceed the concentration safe harbour. In addition, the purchases of Sinergia chain stores together with Walmart's accounted for a significant portion of their sales to chain stores. On the other hand, none of the providers represented a share larger than 4% of the chain stores sales incomes. In spite of these asymmetries, the CFC found no foreseeable foreclosure effects.

In its analysis of possible coordination effects in the retail market, the CFC calculated concentration indices assuming Sinergia chain stores as a single undertaking in the locations where they coincided premerger, and found that in 59 locations the concentration levels exceeded the CFC safe harbours. The CFC further held that the ownership links created, by means of Sinergia and the chain stores, the ability to share information on prices and amounts purchased by Sinergia for each one of them, would threaten competition. The CFC therefore estimated that the parties to Sinergia would likely coordinate their supply or pricing policies in locations where there are no other competitors. This coordination effect was one of the reasons for objecting the merger.

Following an appeal filed by the parties, the CFC reassessed its analysis of coordination effects in view of the elements they provided to establish that the ownership relation in Sinergia would not entail any information exchange: the staff of Sinergia would have no contact with the chain stores except for that required to undertake its advisory functions and would contact each store separately. In any event, Sinergia would only negotiate the basic cost of supply but not the final sale price of each product. This price is determined by each chain store considering factors such as transportation costs and their particular discount and trade policies, among other. The CFC thus authorised the merger subject to certain conditions.

4. Efficiencies and Vertical Mergers

The CFC is mandated to consider efficiency gains in its merger review procedures, including those set out in article 6 of the Regulations: 1) savings that would reduce production costs or increase output at a given cost; 2) economies of scope; 3) reduction in administrative costs; 4) transfer of technology or market knowledge; and 5) network economies. Internalisation of vertical pricing externalities is not expressly mentioned, but could be considered as generating cost savings and output expansion.

4.1 Gasoducto Tamaulipas

The parties contested that the joint venture would generate the following efficiency gains: greater efficiency in the nationwide gas pipelines network derived from the strategic nature of the pipeline to be built; ensure natural gas supply in the highest demand zone and benefit users with reduced prices. The CFC questioned the alleged tariff reduction in view of PGPB's dominant position and its ability to reserve total capacity which had a foreclosure effect that made it likely for PGPB to incur in anticompetitive conduct.

4.2 Sinergia

The CFC acknowledged efficiency gains in the market for wholesale purchasing resulting from the joint operation of larger volumes, which would allow the Sinergia chain stores to obtain terms similar to Walmart's and thus attain a better competitive position with respect to this chain store.

On the other hand, the parties failed to demonstrate the generation of efficiency gains in the distribution market, which they expected to accrue in the medium term by coordinating their independent distribution systems. Such efficiencies would strengthen the competitive process and benefit final consumers.

The CFC objected to the merger but modified its decision in the appeal procedure. In addition to reconsidering the coordination effects the CFC also took account of the efficiency gains alleged in the appeal which comprised a wide variety of effects.

5. Remedies

The preventive approach adopted by the CFC by providing for a pre-notification procedure is based on the assumption that it is more effective to challenge a merger before it is carried out than reverting a consummated transaction.⁶ The FLEC empowers the CFC to impose conditions on a merger (conduct relief), to order partial or full divestiture of unlawful mergers, and to fine them.⁷ In practice, the FCC has blocked or conditioned mergers only when it concluded that they could clearly harm the process of competition and free market access. Some of the conditions imposed in the cases reviewed are clearly intended to prevent the merged firm from incurring in abusive conduct.

5.1 *Gasoducto Tamaulipas*

The joint venture was conditioned to:

- i) Set open and non-discriminatory access clauses in supply contracts regarding private commercialisers and independent producers.
- ii) Non-discriminatory treatment and exclusion of competition deterring provisions in natural gas supply contracts between PGPB and independent producers.
- iii) Divestiture of PGPB's shares in the firm that held the transport permit (by means of an auction), five years after starting operations.

These conditions allowed PGPB to participate in the joint venture, which enabled the necessary construction of infrastructure, but at the same time required it to step down from transportation activities involved in the venture.

5.2 *Acquisition of shares in GAP*

In view of the vertical relationship entailing airline service providers as users of airport managers and operators the CFC considered it was necessary to preserve independence among these services to avoid any conflict of interests that could lead to discriminatory conduct tending to favour the airline in which investors held stakes.

Although sector regulation allows firms investing in airports to hold a maximum 5% ownership in airlines, the CFC determined that airport management and operation, and air transport services are substantially related, and therefore considered that investors' stakes in Grupo Mexicana de Aviación could adversely affect competition. It thus authorised the investors to purchase the shares of AMP but on the condition that they sell their shares in the holding of the airline.

⁶ Preamble to the bill of the 1992 competition law.

⁷ The maximum fine is equivalent to 4.153 million USD.

5.3 *Sinergia*

The parties to Sinergia were required to present a mechanism to secure and enable the CFC to verify: i) that the joint venture would not be a means for undertaking collusive practices and ii) the efficiency gains they affirmed would ensue from the creation of Sinergia. These efficiencies entailed service quality enhancement regarding providers; adoption of international standards in the handling of goods; savings resulting from increased performance indicators (lower purchase returns); adoption of best practices in purchasing, distribution and logistics; transportation consolidation; rationalise the use of distribution centres; adoption of a joint electronic data interchange system, among other.

6. **Final remarks**

The CFC has not developed vertical merger guidelines and there are no particular statutory provisions for vertical merger analysis, other than the general analytical framework stipulated in the competition legislation. These legal provisions mandate the CFC to undertake an integral analysis of vertical mergers that includes an assessment of market power and foreclosure and coordinated effects, as well as an evaluation of efficiency gains. As a consequence the CFC will only object to a vertical merger when there are clear indications that its anticompetitive effects offset any efficiency gains. Remedial actions implemented have attempted to deal with any adverse incentives resulting from the merger.

NETHERLANDS

1. Introduction

The Netherlands would like to offer some comments on the issue of vertical mergers. What follows is not an all-encompassing analysis, but a discussion of a few essential aspects of vertical mergers and an outline of the NMa's practical application of the concept. We thus hope to contribute to the development of a more explicit framework for analysing vertical mergers.

Our comments are structured as follows. Firstly, we discuss the different aspects of an exact definition of vertical mergers and their (anti-)competitive effects from the point of view of competition policy. Secondly, we illustrate the NMa's practice of analysing vertical mergers by briefly reviewing a number of key merger cases in telecommunications markets. Finally, we will give some closing remarks.

The message we want to convey is that vertical mergers are a complex phenomenon (from an economic perspective). From the point of view of competition policy they must be regarded as relevant if they potentially transfer/enhance a dominant position from one level of the value chain to another level in the same value chain. In doing so, they are essential to establishing dominant positions.

2. Essential aspects of vertical merger

The Dutch Competition Act does not contain a specific paragraph on vertical mergers, nor does it stipulate what the anti-competitive effects of a vertical merger may be. Based on case-law (see below) a vertical merger consists of a concentration between two or more firms which are active on different levels of the production chain/value chain. Vertical mergers and conglomerate mergers often require a similar type of analysis.

In the NMa's practices with regard to the analysis of vertical mergers, it is presumed that such mergers often generate pro-competitive effects, mainly through efficiency gains, as well as the absence of elimination of direct competition in most cases. Vertical mergers are therefore less likely to lead to anti-competitive effects than horizontal mergers. Vertical mergers, assuming no horizontal overlap is present, are more likely to be closely scrutinised when, either upstream or downstream, a strong position of at least one of the parties to the merger exists. The NMa already applies a simplified procedure for vertical mergers with market shares on both vertically related markets below 30%.

The analysis employed to assess possible anti-competitive effects is based on the ability/incentive/significant effect framework as developed by the European Commission¹. The fourth element necessary for anti-competitive effects to lead to a dominant position concerns the fact that there has to be a causal relationship between the effects and the merger. A vertical merger may create or strengthen a dominant position through non-coordinated effects mainly when it gives rise to foreclosure. Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where

¹ See for example the decision of the European Commission in COMP/M.2803 – *Telia/Sonera*, 10th July 2002, p 91.

the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure)², thereby increasing the cost of inputs to independent downstream competitors.

3. Case studies

In this section a selection of intervention cases will be discussed. Since 1998 the NMa has dealt with over a hundred merger cases involving vertical issues, mostly within financial markets, energy markets, media markets and the construction industry. Over the past two years, the NMa has completed two important vertical merger cases, dealing predominantly with vertical issues in the telecommunications sector. Only one of these cases resulted in the conclusion that a dominant position could possibly be created because of a vertical merger.³

3.1 UPC – Canal+

UPC was the largest cable television operator in the Netherlands, while Canal+ is the most important provider of pay-television. In 2005 the NMa, after an in-depth investigation, cleared this vertical merger. Initially the NMa concluded that this vertical merger could possibly foreclose other pay-television providers by restricting access to UPC's cable network (customer foreclosure) or foreclose other infrastructure television operators by refusing them access to the content of Canal+ (input foreclosure).

In the first phase investigation, an integrated cable network operator/pay-television operator was presumed to have an incentive to foreclose other pay-television providers, based on previous decisions of the NMa and the European Commission⁴. In addition to the theoretical ability to foreclose, UPC showed a history of conflicts regarding alleged foreclosure of rivals.

In the second phase investigation the NMa more thoroughly studied the incentives the ability to foreclose and the significant effect of foreclosure of other pay-television operators and other infrastructure television operators by UPC.

The prevailing sector regulation implemented by OPTA reduced UPC's ability to foreclose other pay-television operators. The incentives to foreclose other pay-television providers by restricting access to UPC's cable network were reduced through the emergence of alternative networks for (pay-)television, such as the copper networks (ADSL). The emergence of new networks also reduced the possible effects of foreclosure. Due to the fact that the only competitor of Canal+, Cinenova, lost its contract with two other cable television operators, it was no longer a viable competitor because of its insufficient customer base. The inquiry by the NMa also revealed that no other companies were intent on entering the pay television market in the Netherlands. Because of the lack of (potential) competitors, the occurrence of foreclosure seemed less likely and its possible effects were further reduced. The possible effects were even further reduced because of the strong countervailing power of the large movie producing companies, the so called

² See Council Regulation (EC) No 139/2004 of 20 January 2004, Official Journal L 24, 29.01.2004, p. 1., Article 2(1)(b), referring to “access to supplies” and “access to [...] markets”, respectively.

³ The NMa decision in case 4490/UPC – Canal+, 28th June 2005 and the NMa decision in case 5454/KPN – Nozema Services, 6th March 2006.

⁴ See the NMa decision in case 3052/Liberty Media – Casema, 6th November 2002 and the European Commission decision in COMP/M.2876 - Newscorp/Telepiù, 2nd April 2003.

Hollywood Majors.⁵ These Hollywood Majors could easily by-pass UPC, as wholesaler, and deliver their content directly to other pay-television providers.

On the possible foreclosure of other infrastructure television operators through a refusal of access to the content of Canal+, the NMa concluded with regard to the cable network operators that UPC was contractually obliged to supply the content of Canal+ to other cable network operators, so the ability to foreclose cable network operators was limited. Furthermore, the NMa concluded that the possible effect of foreclosure was limited because of the fact that the content of Canal+ was not essential for other infrastructure network operators to be successful.

3.2 *KPN – Nozema Services*

KPN is the incumbent telecom provider in the Netherlands. Besides its telecom-activities, KPN is the (co-) owner of several radio/TV towers. Nozema Services is one of the three companies in the Netherlands, active in the field of broadcasting radio signals by air. To be able to broadcast these signals Nozema Services required access to the radio/TV towers of KPN. Through the acquisition of Nozema Services KPN became vertically integrated in the radio broadcasting chain.

The anti-competitive effects of this vertical merger were analysed using the ability/ incentive/ significant effect paradigm that was also used in UPC – Canal+. First the ability of KPN to foreclose rivals or to use a price squeeze was determined based on the fact that there were no alternative infrastructures for the radio/TV towers of KPN for broadcasting radio signals (input foreclosure). Secondly, prior to the concentration, KPN was not active in the downstream market of broadcasting radio signals and therefore had no incentive to foreclose or use a price squeeze. Now that KPN, as a result of this merger, had become active in the downstream market the incentive to foreclose or use a price squeeze was assumed because it could strengthen KPN's position in the downstream market and allow the company to act independently of other national radio signal broadcasters. In order to determine whether this foreclosure by KPN had any significant effect, the position of Nozema Services was analysed as well as possible mitigating factors.

Nozema Services has for many years been the largest provider of broadcasting services for radio-operators in the Netherlands. Nozema Services provides services for 20 out of the 32 public and commercial national FM-radio stations. According to the notifying parties there are some mitigating factors: sector specific regulation, digitisation of the radio spectrum, the fact that only two competitors are affected and the fact that KPN already offers non-discriminatory access to its infrastructure. After reviewing these factors the NMa concluded that they insufficiently counterbalanced the significant anti-competitive effects of the vertical integration.

In order to clear the merger, KPN was willing to sell all of its radio/TV towers to an independent company within a period of two years and, meanwhile, to transfer control to NOVEC, a telecom infrastructure operator controlled by the Dutch government.

4. **Concluding remarks**

A review of NMa practice in dealing with vertical mergers indicates that the NMa applies a clear definition of what constitutes an anti-competitive vertical merger and employs a similar framework to the European Commission in determining the effects of vertical mergers.

⁵ These *Majors* are: Universal Pictures, Paramount Pictures Corporation, Sony Picture Entertainment (Columbia Pictures, Tristar Pictures and since recently MGM), Walt Disney Studios (Buena Vista, Touchstone, Miramax), Fox Filmed Entertainment (Twentieth Century Fox), Warner Bros Studios en Dreamworks SKG.

Vertical issues were analysed in a number of cases, but in only one case did the NMa determine that a possible dominant position could be created. The NMa therefore already applies a simplified procedure for vertical mergers whenever market shares on both vertically related markets are below 30%. Reviewing threshold values employed by other competition authorities can be useful in further refining vertical merger procedures.

POLAND

There are two different approaches to vertical relations on the market. The first is connected with a classical competition theory¹. It concentrates on the defects caused by horizontal mergers and horizontal market structure. According to the classical approach, vertical integration can be dangerous only due to the fact that it can affect the horizontal structures. In line with the second approach², vertical agreements of companies may improve the effectiveness and rationalise the costs. They do not always disturb horizontal market structures. The dangers of vertical relations and restraints can be minimised by relevant legal regulations. These two aspects³ of vertical mergers should be taken into account in the control procedures.

1. Legal regulations of mergers of entrepreneurs in the Polish law

The article 20 of the Polish Constitution states that the basis of the Polish economic system shall be “a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners”. It defines freedom of market activities as a fundamental rule of economic life. However, according to article 22 “limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons”. Controlling mergers of companies should be considered as a form of such limitation.

The Polish law acknowledges the necessity of state control over mergers of entrepreneurs. The main controlling body in this sphere is the Office of Competition and Consumer Protection (“Office”, “OCCP”). Its work is based on the Act of 15 December 2000 on Competition and Consumer Protection (“Act of 2000”, “Act”) and the Regulation 139/2004/EC of the Council of 20 January 2004 on the control of concentrations between undertakings.

The Act does not provide a specific definition of the term “concentration”. Nevertheless, it specifies a list of situations, when a transaction should be reported to the President of the OCCP. First of all, under the current law, a concentration is to be notified to the OCCP only when the total turnover of the entrepreneurs who participate in the process exceeds the equivalent of 50 million EUR in the preceding year. However, in the opinion of the OCCP, only the largest concentrations should be controlled, as only those seriously affect the market. Therefore, an amendment to the Act, which is currently discussed in the Polish Parliament provides an increase of the turnover thresholds in the cases of concentration of entrepreneurs. Upon the amendment the obligation will apply only to the transactions carried out by the entrepreneurs who have achieved the total turnover that exceeds 1 billion EUR in the world or EUR 50 million PLN in Poland.

Moreover, according to the Polish law, “concentrations” should be reported to the President of the OCCP in case they take form of one of the situations exposed in the article 12 of the Act, i.e.: a merger of

¹ According to Anna Zielińska-Głębocka, an example of such classical theory is the Georg Stigler’s model; Anna Zielińska-Głębocka, *Podstawowe założenia teorii konkurencji*, [in:] Zdzisław Brodecki (ed.) *Konkurencja*, Lexis Nexis 2004.

² The Chicago School approach, for example Harold Demsetz, *Industry structure, market rivalry and public policy*, “Journal of Law and Economics”, 1973.

³ Anna Zielińska-Głębocka, *Podstawowe założenia teorii konkurencji...*

two or more independent entrepreneurs, consisting in taking direct or indirect control over another entrepreneur or a number of them, e.g. through the shares (acquisition) as well as in creating a new company by the companies that already exist (joint venture). Additionally, the intention of a concentration should be reported when one person takes charge of the managing or controlling bodies of two or more competing entrepreneurs. Also, in the case of taking over or acquisition of stocks or shares of another entrepreneur resulting in achieving at least 25% of votes at a general assembly or assembly of partners and initiating to exercise the rights arising from stocks or shares taken over or acquired without prior notification.

The Polish model of concentration enforcement is a model of ex-ante notification (in opposition to the ex-post approach). It is consistent with the approach of the European Commission, which has competence in the ex-ante concentration control of companies with a turnover over 5 000 000 000 Euro (or 2 500 000 000 Euro, depending on other conditions). The ex-ante approach helps to avoid situations when a decision made by an antimonopoly organ is actually a reaction to an existing harm (as in case of post-ante notifications).

The Act of 2000 describes (art. 13) five situations when the obligation of the notification of concentration is excluded:

- a) There is no need of reporting the concentration when the turnover of the entrepreneurs in Poland from last two years has not exceeded the equivalent of 10 million euro. However, even in this case, when the concentration can create or strengthen the dominant position on the market, the intention of it should be notified;
- b) When the financial institution, the normal activities of which include investing in stocks and shares of other entrepreneurs, takes over the shares on a temporary basis without the intention of executing the shareholder rights (except from the right to dividend);
- c) When the entrepreneur acquires on a temporary basis stocks and shares with a view to securing debts, provided that such entrepreneur does not exercise the rights arising from these shares/stocks (except from the right to sell). In the moment when executing of shareholder rights begins, the obligation of notifying the concentration appears;
- d) When it is an effect of insolvency proceedings (except from a situation when shares are taken over by a competitor or member of competitor's capital group);
- e) In case of concentration of entrepreneurs from the same capital group.

After the administrative proceeding the President of the Office issues a decision. The consent is given when the concentration is not regarded to be a restriction for the competition on the market. There is a possibility of issuing a conditional consent. In this case, the President of the Office can burden the entrepreneur with specific obligations. In particular, he can oblige the company to sell part of its property or to dispose of control over another company (for example through selling the shares). The company may be also obliged to grant certain licenses (e.g. for selling products) to the competitor. The obligations described in the Act are not exhaustive; it means that the actual obligations can be different from those mentioned in the Act. In the decision, the President of the OCCP imposes upon the company the obligation of reporting about the realisation of the specified conditions.

The President of the OCCP prohibits the concentration if it causes significant restriction for the competition on the market (art. 17). However, even in this case consent can be given if the concentration could “*contribute to economic development or technical progress*” and if it had a “*positive effect on the national economy*”.

The decisions of the President of the OCCP expire if the concentration has not been made two years from the decision. Nevertheless, the date can be prolonged (to three years) on application of the participant of the concentration under the condition that the entrepreneur proves that there have been no significant changes of situation and the concentration still does not cause danger of restricting competition on the market.

The President can reverse his decision if it has been based on unreliable information, for which the entrepreneurs are responsible. The decision can also be reversed if the entrepreneurs do not realise the obligations stated in the conditional agreement. If the decision had been realised already, the President of the Office can order the division of the company, selling out the shares or dismissal of the member of the managing body. An appeal against all types of decisions can be submitted to the Court of Competition and Consumer Protection (District Court in Warsaw).

The controlling procedure may involve the so-called “*interested subject*” (art. 95), which may submit a motion to participate in the control. It is a subject, which is not a participant of the merger, nevertheless has a legal interest connected with the case. It may be, i.e. an entrepreneur active on the market, where the concentration is going to occur. The OCCP in one of the cases admitted as an “*interested subject*” a group of franchisers who signed contracts with the company, which was to be acquired. The “*interested subject*” has an insight into the files of the case within the scope it is necessary to protect his rights (providing that this will not infringe the enterprise’s business secret, or any other secrets being liable to protection). It may also submit documents and explanations about the circumstances of the case.

The Act of 2000 does not make a distinction between “vertical” and “horizontal” mergers. Terms of “vertical merger” and “horizontal merger” can be referred to the terms appearing in the Regulation of the President of the Council of Ministers of 3 April 2002 on Notifying of the Intention of Concentration of Undertakings. It defines the relevant market, which is influenced by the concentration in vertical or horizontal configuration. According to this Regulation, the relevant market, which is influenced by the concentration in horizontal configuration is “*every product market, where at least two entrepreneurs-concentration participants are engaged and where the concentration leads to common market share higher than 20%*”. On the other hand, the relevant market, which is influenced by the concentration in vertical configuration, is every product market if at the same time: (1) at least one entrepreneur-concentration participant is active on this market, (2) it is at the same moment the market of purchase/sale for at least one of the others entrepreneurs-concentration participants, (3) individual or common market share of the entrepreneurs-concentration participants is higher than 30% (no matter if they are currently bound as deliverer and recipient on this market).

2. The effects of vertical mergers in comparison to horizontal and conglomerate mergers

Although in the Polish law there is no direct distinction between restrictions connected with vertical and horizontal or conglomerate mergers, the consequences can vary depending on type of the transaction.

Horizontal mergers involve companies at a single level of the supply chain. This kind of concentration unifies manufacturers of substitutive products, thus creating a direct competitive restraint. Conglomerate mergers take place between companies, which operate on different markets. Non-horizontal mergers (both vertical and conglomerate) unify the deliverers of complementary (or unrelated) products, therefore they do not foreclose the competition in a direct way. The direct consequence of a non-horizontal merger is in many cases pro-competitive.

Non-horizontal mergers allow preventing profit losses. In a process of a vertical concentration externalities are internalized, which leads to potential efficiency gains. In case, where various products are produced in scope of a single company, the costs can be lower than in a situation, when they are produced by different companies. Internalisation of pricing externalities is profitable for customers. Besides, vertical

integration results in a more efficient use of inputs and productive assets, because of improved managerial and financial efficiency⁴. It eases the coordination of design, production and distribution of goods. It excludes the need for negotiation and execution of contracts and minimises the risk and uncertainty (according to the transaction cost theory). In conclusion, it may be said that vertical mergers have many assets, which are not achievable by horizontal or conglomerate mergers. These arguments were raised i.e. in the controlling proceedings which will be described later.

Additionally, competitors of the integrated company may be stimulated to a counter-merger, achieving the access to the upstream distribution or downstream production at minimal cost⁵. The first merger might cause a series of vertical mergers, which would maximise the profits of companies.

However, vertical integration and foreclosure also reduce the potential new entrants' profits in such way that they are deterred from entering on a certain market. Negative aspects of vertical integration include price squeeze (minimising the difference between the price at which it sells the products to the external competitors and the price at which the end-products are sold by the "internal" company in one's capital group) and supply squeeze (putting competitors from the purchasing company in disadvantage by refusing to sell them products). Vertical mergers can also lead to restraints to the potential customers, when either the products are only delivered to a particular group of recipients or certain groups are excluded from delivery.

Vertical mergers give rise to anticompetitive effect thus increasing likelihood of predation, which is banned in article 8 of the Act of 2000 ("abusing the dominant position"). Predation occurs at both levels of market concentration: when the merged companies aim to harm the rivals and after the rivals' exit from the market. One of the most common forms of it is direct or indirect imposing of unfair prices, including too high or flagrantly low prices (predatory prices), extended deadlines of payment or other conditions of sale/purchase of products. The second abuse of a dominant position, mentioned in the Act, is foreclosure of production, distribution or technical development to the detriment of contractors or consumers. Other forms of abuse include: using diversified or harmful conditions in similar contracts with contractors or consumers, creating dependence between the contract's closure and fulfilling other irrelevant performance, acting against development of competition on the market, imposing unfair conditions of the contracts by a dominant entrepreneur, dividing the market by territorial, assortment or subject criteria, creating harmful conditions for consumers' vindication of rights. In all abovementioned cases, the President of the OCCP has competence to issue a prohibition of a particular activity. The list in the article 8 is not exhaustive; "abuse of the dominant position" can also include other activities, which cause harm to competitors or customers.

However, the analysts of competition policies and predation practices notice that it is essential to distinguish between (a) harmful reduction of prices as an element of predation policy and (b) reduction of prices which is profitable and results just from high effectiveness of production⁶. In the first case, after eliminating the competitors an increase of prices occurs. In the second case, reduction of prices is permanent as it is a consequence of higher productivity. In this case, eliminating the competitors is a natural result of fair competition in the market.

⁴ Kimon Bishop, Andrea Lofaro, Francisco Rosati, Juliet Young, *The Efficiency-Enhancing of Non-Horizontal Mergers*, Office for Official Publications of the European Communities, 2005.

⁵ Jeffrey Church, *The impact of Vertical and Conglomerate Mergers on Competition*, Department of Economics, University of Calgary 2004.

⁶ Ibidem.

As it will be pointed out in the analysis of the Carey Agri case, the negative changes can be prevented by means of imposing special conditions on the merged companies. The practical solutions to these problems will be discussed in the analysis of particular cases in Poland.

3. Vertical mergers control – case studies

This part of the presentation will be devoted to examples of decisions made by the President of the OCCP concerning vertical mergers in Poland: the first case was finalised with an approval for a performance of a vertical merger, the second was terminated with a conditional approval. In the third case the merger was prohibited.

- (1) In October 2006 the President of the OCCP issued a decision consenting a vertical merger in the sector of municipal services. The concentration was planned in a form of acquisition. **Remondis Aqua** GmbH & Co. located in Luenen notified the intention of acquiring 49,9% shares in the Polish company **Municipal Services Company** (Zakłady Gospodarki Komunalnej i Mieszkaniowej, further: ZGKiM) located in Drobin. The concentration would lead to obtaining 49,9% votes on the associates' assembly.

Remondis is active on such markets as community waste reception and disposal, cleaning streets and roads, cultivation of plants, construction works and burial services, cleaning, maintenance and repair of road signs. ZGKiM works in similar scope of sanitary services and municipal property management.

The OCCP stated that the concentration would have influence on the market in both horizontal and vertical configuration (the limits of 20% and 30% of shares defined in the Regulation were exceeded). The market of waste storage, on which ZGKiM operates, is a market of sales for Remondis, Department in Plock. Therefore, the companies are connected in a relation "deliverer-producer".

However, the Office also stated that the concentration would not be a significant restriction to the competition on the market. It would have a marginal influence on the relevant markets. The President of the OCCP took into account the fact that the concentration would enable investments and will create new places of work, therefore diminishing unemployment. The acquisition would improve the infrastructure of ZGKiM, ensuring finances for the necessary improvement of the water supply system and sewage system. It would be profitable for both economic and technical development.

- (2) A different example of a vertical merger – in alcoholic drinks sector – was finalised with a conditional consent for concentration in September 2005. The concentration was planned in a form of acquisition of Polmos company from Białystok by Carey Agri International Poland. The passive participant of this merger – **Polmos Białystok** – works in the scope of production and sales of alcoholic drinks. The activity of both companies on various levels of the market turnover results in a vertical character of this merger. The companies fulfilled legal prerequisites for both merger in a horizontal configuration (vodka sales and delivery) and merger in a vertical configuration (vodka production, sales and delivery). However, the concentration thresholds (20% for horizontal mergers, 30% for vertical mergers) were not exceeded, so the concentration was in harmony with legal regulations.

In administrative proceedings the President of the OCCP took into account the foreseen vertical direction of the consolidation in the branch of alcoholic drinks. It could lead to a situation when the market position of the producer would be determined by its position in the scope of distribution. It could cause a supply squeeze as well as a price squeeze. The antimonopoly body evaluated that the period of these changes would be the next 3-4 years –

in consequence, it was justified to impose the obligations on Carey Agri in the years 2005-2008. The President of the OCCP issued the consent for concentration under two conditions. Carey Agri had to resign the exclusiveness in distribution of vodkas offered by Bols and Polmos Białystok for the benefit of the entrepreneurs outside Carey Agri capital group. Furthermore, the company was obliged to sell 35% of its products in the period of 2005-2008 by hands of independent distributors. The final decision aimed at maintaining the rule that distributing companies should compete by means of differentiating the offered products.

- (3) After the acquisition of Polmos Białystok, Carey Agri had a strong position on the market of alcoholic drinks. Nevertheless, it submitted a notification concerning the acquisition of another significant producer, **Jabłonna Lublin**. In this case, the OCCP prohibited the acquisition (in the decision issued in May 2006) due to the significant shares of the entrepreneur in the markets of production of pure vodka and brand vodka. The new concentration would lead to acquiring over 20% of shares in the relevant markets. The combined share of the entrepreneurs in the market of vodka sales (pure vodka as well as brand vodka) would exceed 30%. This meant that the concentration would influence the market in both horizontal and vertical configuration. The consent could not be issued.

The analysis of current concentration on the market and potential future concentration (after the merger) are calculated with help of Herfindahl-Hirshman indicator⁷. The indicators after the merger showed a high level of concentration on the market.

In both cases of mergers in the market of alcoholic drinks the intention of Carey Agri was to acquire the brands, which are well known by Polish consumers. It would minimise the necessary costs of promotion and advertising. After the acquisition of their producers and after creating a net of internal distributors, Carey Agri would be able to limit the activities of non-merged distributors on the market, for example by refusing to sell them the most popular brands. This thesis was confirmed in the opinion poll, ordered by the OCCP. According to the consumers as well as the competitors of Carey Agri, the brands offered by acquired companies Polmos Białystok and Jabłonna Lublin were the most recognisable alcoholic drinks in the market of pure and brand vodka. Therefore in case of Polmos Białystok the condition for the consent was the obligation sell the most famous products of Polmos (“Absolwent”, “Żubrówka”) through independent distributors. However, the crucial factor in both cases was the level of concentration on the relevant market. In case of Polmos Białystok, the thresholds defined by law (20% for horizontal merger, 30% for a vertical one) were not exceeded, so the consent was issued. In case of Jabłonna Lublin and the prohibition, the threshold was exceeded. The case of Carey Agri has also proved the importance of opinion polls as an auxiliary element during administrative proceedings. The competitors who filled in the questionnaires paid attention to the harmful effects of restrictions in the distribution of popular brands.

4. Summary

The effects of vertical mergers differ from those which arise from horizontal mergers. They include certain positive aspects, which are not always implied by non-vertical integration. However, with all

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In the branch where only one entrepreneur is active, HHI indicator comes to 10 000. In the situation of huge competition in the market, the indicator approaches 1. The concentration spectrum in this model is divided into three scopes: (1) non-concentrated market (HHI lower than 1000), (2) medium concentrated market (HHI 1000-1800), (3) highly concentrated market (HHI over 1800).

vertical concentrations it is essential to consider the probable competitive consequences of the merger in both markets of the delivering company and the market of the purchasing company.

It is not necessary to take complete control over an entrepreneur from another level of production in order to restrict the competition on the market. Often it is enough to be in possession of a minor share in order to create stable vertical boundaries and change the situation on the market. In consequence, the results of vertical concentration are often similar to the results of vertical agreements⁸.

It is worth distinguishing between short-term positive consequences of the mergers (beneficial for customers due to the fact that are conducted with intention to harm the rival companies) and long-term effects, connected with competitors' exit from the market or deterrence. Long-term effects may involve restricting equal access to customers (by reducing the ability of competing companies to gain such market shares that are necessary to achieve a satisfactory level of production) and well as restricting equal access to suppliers (using supply squeeze strategy and imposing difficult burden of entries for new companies).

On the other hand, mergers in a vertical configuration (as in the case of the Polish municipal services sector) can create financial stability necessary to conduct huge investment. Therefore they facilitate technical and economic development.

⁸ *Piotr Mueck, Doświadczenia Polski w kontroli koncentracji*, Office of Competition and Consumer Protection, 2004.

PORTUGAL

According to article 12 of the Law No. 18/2003 of 11 June, approving the legal framework for competition, the Portuguese Competition Authority must assess whether or not a concentration would create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it. This is the test which must be used whether one is dealing with horizontal mergers, or instead with non-horizontal mergers and, in particular, with vertical mergers.

A vertical merger is one which involves companies operating at different levels of the supply chain, such as a manufacturer (“upstream firm”) merging with one of its distributors (“downstream firm”). One should also note that, in practice, the assessment of a merger may encompass the analysis of both horizontal and non-horizontal effects, since there may be mergers between actual or potential competitors in one or more of the relevant markets in appreciation where vertical relationships may also be encountered.

When dealing with vertical mergers, it is generally accepted that such kind of mergers are less likely to raise competition concerns than horizontal mergers. Unlike horizontal mergers, vertical mergers do not imply the loss of direct competition between the merging parties in the same relevant market. Besides, there is a greater scope for possible efficiency effects from vertical integration, largely discussed in the related literature.

For instance, with vertical integration, one may avoid double marginalisation problems, i.e., firms internalise double mark-ups. Lowering the mark-up downstream may lead to increased sales not only downstream but also upstream and vice-versa. A merger between vertically related firms may also decrease transaction costs and allow for better coordination of investments and innovations, and a better organisation of the production process.

These possible efficiencies which may result from a vertical merger, with potentially pro-competitive effects, must be balanced out with the possible anti-competitive effects of the merger. In certain circumstances, a vertical merger may lead to the creation or strengthening of a dominant position with a significant impact on effective competition, as it may change the ability and incentive to compete by the merging parties and their competitors in a way which may harm consumers.

One may distinguish between non-coordinated effects and coordinated effects of a merger. The former may give rise to competition concerns as there can be foreclosure in the market as a consequence of the merger – access to supplies or markets by actual or potential competitors may be hampered or eliminated as a result of the merger, reducing their ability and/or incentives to compete. The latter may be of concern if, as a result of the merger, there is a change in the structure of the market which may make coordination possible or easier, more stable or more effective between firms in a market.

An important remark to be made is that the likelihood of competition concerns resulting from a vertical merger, either through foreclosure or by facilitating coordination, is intimately related with the existence or creation of market power in one or more markets along the supply chain.

As a result of a vertical merger, there may be potential for both input and customer foreclosure (non-coordinated effects), so as to extend market power from one stage of production to another. Input

foreclosure consists in restricting the access of downstream rivals to an important input, thereby raising its downstream rival's costs. Customer foreclosure consists in restricting access to upstream rivals to a sufficient customer base.

In analysing the possible foreclosure effects of a merger, the Portuguese Competition Authority will assess whether the merged entity will have the ability to foreclose, whether it will have the incentive to do so, and whether the foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.

A vertical merger may also facilitate tacit coordination (coordinated effects). In analysing coordinated effects, the Portuguese Competition Authority follows closely the Judgment of the Court of First Instance in the Case *Airtours v Commission* (Case T-342/99, 2002, ECR II-2585, paragraph 62), where three conditions are considered necessary for coordination to be sustainable: ability to monitor whether the terms of coordination are being adhered to; ability to detect and punish deviations; reaction of competitors or customers not enough to jeopardise coordination.

The European Commission has recently launched a public consultation on draft Merger Guidelines for companies in a vertical or conglomerate relationship. These guidelines will contribute to enhance enforcement transparency in the assessment of vertical merger cases at the Commission level. The guidelines will also be an important tool for EU Member States' National Competition Authorities who have also their own experience in dealing with vertical mergers and vertical effects of mergers.

1. Brief notes on the Portuguese Experience

The Portuguese Competition Authority, since its creation in 2003, has not so far blocked a merger uniquely on the grounds of vertical anti-competitive effects.

To illustrate some of the vertical issues involved in merger operations in Portugal, we will summarise a few of the recent merger cases.

1.1 *Sonaecom/PT*

In 2006, the Portuguese Competition Authority analysed a hostile take over by Sonaecom over Portugal Telecom (PT). The merger was cleared subject to remedies proposed by Sonaecom.

Portugal Telecom, the incumbent, is a vertically integrated firm, owning both the PSTN network and the Cable network, and offering services at the retail level, such as telephony and broadband. Simultaneously, PT is present in the multimedia sector, with activity in the distribution and exhibition of cinema and in cable TV. Portugal Telecom is also active in the mobile communications market and is a supplier of media content for mobile services.

Sonaecom is a retail competitor of Portugal Telecom, offering services such as telephony and broadband through indirect access or through direct access, namely via local loop unbundling. Sonaecom also controls a mobile network operator. Sonaecom is part of the Sonae Group who has the strongest position in the management of shopping centres in Portugal, a market which is vertically related to the exhibition of cinema markets, and to the distribution of mobile communication services.

With respect to the fixed telephony network, PT had a dominant position in most of the markets analysed, both at the wholesale and the retail levels. Its dominant position was being reinforced at the retail level by Sonaecom's presence in the market. The Portuguese Competition Authority, also taking into account past behaviour of PT, concluded that PT had the incentive and the ability to hamper access to its

network, by delaying access or discriminating downstream competitors in favour of its downstream affiliate. This could happen both in indirect access to the network and in local loop unbundling.

Sonaecom proposed a set of remedies to restore effective competition in the markets, which included horizontal separation of the PSTN and the cable networks, and, in case Sonaecom divests the cable network, it will also implement a vertical functional or operational separation. The latter consists in the accounting and organisational separation of the PSTN network between infrastructure and services. Vertical functional separation aims at reducing/removing the incentives that the integrated company has to distort downstream competition. It may enhance transparency and provide incentives for the network operator to facilitate entry (e.g., via Local Loop Unbundling). Functional separation was preferred to structural separation (where ownership would also be separate), as there would be difficulties in physically separating the infrastructure from the services in a market environment which is subject to constant innovation and change, while functional separation was considered to be more flexible and more easily subject to review.

In the appreciation of this merger case, the Competition Authority has identified vertical relationships between the mobile communications market (where both PT and Sonaecom are present) and, on one hand, the production of media content (where PT is present), and on the other hand, the management of shopping centres (where Sonaecom is present), as mentioned above.

In what concerns the first relationship, Sonaecom has offered as a remedy to divest all activity in the media sector, which remove any vertical concerns that might have resulted from the take over. With respect to the second relationship, the market investigation allowed the Competition Authority to conclude that the retail distribution of mobile services and products can be located in several different shops, not only at shopping centres with a bigger dimension, such as the ones controlled by Sonae. More than 70% of the sales of the downstream competitor in mobile services were obtained in commercial spaces not owned by Sonae. As such, vertical competition concerns from foreclosure were disconsidered.

As a result of the merger, the new entity would have a strong market power in the exhibition of cinema which is vertically related to the management of shopping centres. Some of PT's cinemas are located in Sonae's shopping centres. The Competition Authority concluded that Sonae could favour the new entity's cinemas, which could lead to foreclosure. Sonaecom proposed a remedy which consisted in the divestiture of all activity in the exhibition of cinema.

1.2 Unibetão/Sicobetão

In 2006, the Portuguese Competition Authority cleared a merger between two companies (Unibetão and Sicobetão) in the concrete production and distribution markets, with the imposition of remedies. The analysis of the merger allowed to conclude that the proposed merger could lead to the creation or strengthening of a dominant position, raising both horizontal and vertical competition concerns.

Unibetão (the acquiring company) is part of the Secil Group, one of the main national producers and suppliers of cement. The cement market is vertically related with the downstream concrete market. The Competition Authority concluded that, as a result of the merger, there would be increased barriers to entry in the concrete market, as the vertically integrated company Secil was increasing its market power.

The Competition Authority considered that a set of remedies were necessary, in order to give its clearance to the merger operation, which were related to the acquisition of cement to independent importers of cement.

1.3 Galp/Esso

In 2005, the Portuguese Competition Authority blocked the acquisition by Galp of Filling/Service Stations, dedicated to distribution coloured diesel to fishing boats, belonging to Esso, in the Ports of Matosinhos, Figueira da Foz, Peniche, Lisboa, Portimão e Olhão, in Portugal.

Galp was also present in all those markets and is part of the Galp Energia Group which explores, imports, and refines crude oil, and distributes and commercialises transformed petroleum products, being the main operator in these markets in Portugal.

As a result of the merger, Galp would have a leading position in all the relevant markets, except Portimão.

The market for coloured diesel is characterised by heavy barriers to entry, which result from the position of Galp at the different levels of the supply chain, not replicable by its competitors: imports of oil, refination of crude oil, distribution and commercialisation of fuel in the national market, storage capacity.

The vertical competitive concerns, related to input foreclosure, accrued to the horizontal concerns resulting from the merger operation. The Competition Authority has concluded it should block the proposed merger as it would create or strengthen a dominant position that would result in significant barriers to effective competition in the identified relevant markets.

1.4 Lactogal/International Dairies

In 2007, the Portuguese Competition Authority cleared a merger, with the imposition of remedies, which consisted in the acquisition of International Dairies by Lactogal.

Lactogal is the main national company in the milk industry, transforming raw milk and producing pasteurised milk, UHT milk, cheese, ioghurt, and other milk based products.

International Dairies controls Renoldy which operates in Portugal, distributing the products of the Leche Celta Group (also controlled by International Dairies), and also collects and transforms raw milk, producing UHT milk.

The relevant markets analysed were: (i) the production and commercialisation of UHT milk; and (ii) the production and commercialisation of pasteurised milk. There was also a related market considered in the analysis, the collection of raw milk market.

The merger would reinforce the dominant position of Lactogal in the relevant markets, which would be aggravated by a vertical effect. In fact, the elimination of Renoldy in the collection of raw milk would raise barriers to entry and expansion in the markets of milk based products, due to the difficulties of obtaining the raw milk from producers. After the merger, Lactogal would control over 70% of the raw-input for the industry, in Portugal.

As a result of these difficulties, there would be a reduced incentive to entry in the milk industry, reducing contestability in these markets, which would strengthen the dominant position of Lactogal in the analysed markets.

Lactogal proposed to divest Renoldy, as a solution to the competition concerns identified by the Competition Authority. This remedy allowed for the merger to be cleared.

SPAIN

1. Introduction

Merger control is bound to deal with transactions involving horizontal, vertical and conglomerate effects. However referential notices by competition authorities aimed at setting a methodology for vertical and conglomerate analysis lag behind those intended to make explicit a methodology for the assessment of horizontal mergers.

In this respect, the 2002 *Communication on key elements for the assessment of mergers by the Spanish Servicio de Defensa de la Competencia (SDC)* makes some general references to vertical mergers without setting a specific pattern or methodology of analysis. As a result, the approach of Spanish Competition Authorities to vertical analysis is flexible and on case by case basis, within the limits set by our legal framework, national and European precedents and case-law of the Spanish Supreme Court, and the Courts of Justice and of First Instance of the European Communities.

The present note describes three cases involving vertical effects that may contribute to show how such effects have been dealt with by Spanish Competition Authorities.

2. Assessment of vertical mergers: Spanish guidance

The Spanish Competition Authorities follow a substantive test, whereby it must be ascertained whether a transaction threatens to impede the maintenance of effective competition within the markets concerned.

Among the recent cases where an important part of the analysis was devoted to vertical and conglomerate effects, and which required an in-depth investigation by the Tribunal de Defensa de la Competencia (TDC)¹, it is worth mentioning the following:

2.1 *Gas Natural / Endesa (2006)*²

Gas Natural, the main operator of gas markets in Spain, intended to take sole control of Endesa, one of the two biggest electricity operators in Spain, through a hostile public bid³.

The **product markets** the Spanish Competition Authorities considered to be relevant for analysis were the following:

¹ According to the Competition Law 16/1989, mergers requiring an in-depth analysis are studied by the Tribunal de Defensa de la Competencia (TDC) that issues a mandatory not binding report for the Government which is responsible for the final decision.

² See final decision in:
<http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N05082ACMWEB.pdf>

³ Gas Natural has recently withdrawn from the acquisition process of Endesa given the terms of the competing bid made by E.On

- In the gas sector: wholesale supply; infrastructures for gas imports (basically international gas pipelines and regasification plants); transport of gas (high pressure gas pipes); distribution of gas (low pressure gas pipes); and supply of gas to final customers (differentiating between power producers; big industrial consumers; and small and residential consumers).
- In the electricity sector: production and wholesale electricity supply; ancillary services; distribution (low tension) of electricity; and supply of electricity to final customers (differentiating between high tension and low tension customers).

According to the analysis carried out by the Spanish Competition Authorities, Gas Natural counted on a dominant position in the markets for wholesale supply of gas and supply of gas to final consumers (market share higher than 60%). Endesa, in turn, was considered to enjoy a joint dominant position together with Iberdrola in the markets for production and wholesale supply of electricity and supply of electricity to final consumers (market share higher than 35%).

The horizontal overlap in such markets was well below 10%.

- In gas markets, where Gas Natural was the outstanding leader and Endesa the newcomer, Endesa's highest market share was in the supply of gas to big industrial consumers (5%).
- In electricity markets, Gas Natural was the new entrant and Endesa the incumbent. In this case, Gas Natural was mostly present in wholesale power supply (4% market share), through CCGT production plants.

Besides, although Gas Natural was a new entrant in electricity markets and Endesa was a new entrant in gas markets, both had rational growth prospects in their respective new markets on the grounds of their position in their original markets, due to the increasing convergence between gas and electricity.

The competition analysis focused on a set of significant vertical effects:

- Vertical integration in different gas markets: wholesale supply of gas, infrastructures for gas imports, transport of gas and supply of gas to final customers. Given the vertical integration of Gas Natural, the transaction risked to bring about significant vertical effects far beyond those resulting from the mere horizontal overlap in market shares as a wholesale gas supplier. In particular, the transaction would enhance the dominance of Gas Natural as a gas supplier and raise barriers to entry in the different gas markets, thus increasing Gas Natural's ability to foreclose gas markets. For instance, Endesa held stakes at the new Medgaz pipeline, between Spain and Algeria, planned to start up in 2009 and in the regasification plants' projects of Sagunto and Mugardos.
- Vertical integration between gas and electricity markets. In this case, CCGT electricity plants are the main technology used to increase power production capacity in Spain. Meanwhile, Gas Natural was the only supplier of gas to third power producers (although some of its competitors supplied themselves their gas needs), and Endesa had a joint dominant position (together with Iberdrola) in the electricity generation market, where Gas Natural was a new entrant with a high potential of growth. As a result, vertical integration could lead to rises of costs, exclusionary practices or information asymmetries that could foreclose the power producing market.
- Vertical integration of distribution and supply of gas or electricity markets. Although distribution of gas and electricity are regulated activities, and every distribution network is a

natural monopoly, in practice having presence in the distribution of gas or electricity could provide a competitive advantage in the supply markets. In particular, due to the addition of Endesa's gas distribution networks, Gas Natural could be able to use its reinforced presence to consolidate its dominant position in the supply of gas markets.

As for conglomerate effects, the Spanish Competition Authorities raised several issues. In particular, there was a concern about the fact that the merged entity could use its significant position in the supply of both gas and electricity to become the only supplier with the capacity to make competitive dual-fuel supply offers, which might help it to reinforce its position in both supply markets.

On the ground of such foreclosure and conglomerate risks, the Council of Ministers decided to clear the transactions on some conditions, among which:

- Gas release program in the wholesale market (3 bcm), above Endesa's supply capacity (2 bcm). Such release would give access to third competitors to a supply of natural Gas higher than Endesa's, until new natural gas import infrastructures were operational.
- Divestiture of electricity production capacity, far above the horizontal overlap (4.300 MW, in contrast with Gas Natural capacity of 2.800 MW), that jointly with the prior condition, would help to offset the foreclosure effects in the electricity generation market.
- Divestiture of Endesa's assets in regasification plants
- Reduction of Gas natural and Endesa's stakes in Enagas, the system operator. The resulting company could reach a maximum 1% share in Enagas and could not be present in its board.
- Enabling third power producers to call off their gas supply contracts with Gas Natural.
- Divestiture by the resulting entity of part of the distribution networks (1.500.000 distribution points, exceeding the horizontal addition of Endesa's 300.000 distribution points), that would help to make up for the conglomerate effects by creating two relevant competitors.
- Divestiture of the equivalent to the Gas Natural supply business of electricity to final consumers and to the Endesa's business of gas natural supply to final consumers in the deregulated markets.
- Establishing an independent operator that would manage the change of supplier procedures of the clients of the resulting entity gas and electricity networks.
- Requiring the functional separation (unbundling) of distribution and supply of gas or electricity activities.

2.2 *Sogecable/via Digital (2002)*⁴

This transaction involved the integration of DTS Distribuidora de Televisión Digital S.A. (Vía Digital), the second pay TV operator in Spain, in Sogecable S.A., leader of the Spanish pay TV market.

⁴ See final decisions in:

http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N-280_1_ACM.htm

http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N-280_2_ACM.htm

The former was controlled by the Spanish Telefónica group. The latter was jointly controlled by means of a shareholders' agreement by the Spanish media group Promotora de Informaciones S.A. (Prisa) and Groupe Canal + S.A., belonging to Vivendi Universal. After the merger, Sogecable would continue to be controlled by Prisa and Canal+, while Telefónica would hold a significant participation in the merged entity.

The main relevant product market was the pay television market (downstream market). Nevertheless, there were other product markets, closely related to pay TV which were also affected (upstream markets) by the concentration: a) acquisition of rights of premium contents (the "main drivers" for consumers that decide to subscribe to a pay TV): regular football events in which Spanish teams participate and exclusive rights for premium films; b) production and sale of TV thematic channels; c) production and sale of audiovisual works for television (any type of audiovisual works for analogical or digital, free or pay TV); d) Telecommunication services (telephony and Internet access) and e) wholesale digital platform services.

In all cases, the geographic markets were considered to be national in scope given the existing cultural and language barriers of national nature.

In pay TV, the Sogecable market share of around 55% in terms of subscribers would reach around 80% as a result of the mergers. Sogecable would become the sole satellite television platform in Spain and would only compete with cable operators.

The merger raised concerns stemming from the position of the parties in the upstream markets of acquisition of rights of premium contents (football, premium films, and thematic channels) strongly related to pay TV market and from the position of Telefónica in telecommunications markets.

The merger had a negative effect on effective competition in the market of acquisition and sale of rights of football events, hindering new entrance. This effect was due, on the one side, to the fact that Sogecable would hold English clauses for more than 50% of the Spanish football clubs in the forthcoming negotiation of the broadcasting rights concerning the *Liga Española and the Copa de S.M. El Rey*; on the other hand, anticompetitive effects would have also arisen from excessively long exclusivity periods for these rights.

The merger also raised concerns in the market of acquisition of exclusive rights to broadcast films produced by the *Major American Studios* for first and second pay TV windows. Sogecable's seven Major Studios' rights would be increased by the addition of the rights corresponding to the only one Major Studio held by Via Digital, let alone the exclusivity periods agreed.

Moreover, the production and commercialisation of TV thematic channels and production and marketing of audiovisual works for TV markets would suffer a reduction in demand. Sogecable was present in these markets both in the supply and the demand sides. As a result, the merger could bring about incentives for Sogecable to hinder access to the new platform by certain producers and distributors. The merger could also result in a higher dependence by cable operators on the access to Sogecable's contents to be offered on their programming.

In addition, the participation of Telefonica (a provider of fixed telephony services, broadband Internet access and pay TV through ADSL) in Sogecable could have anticompetitive effects in telecom markets. Sogecable and Telefónica would be interested in developing a joint supply of pay TV, voice and data services. As a result, it would be very difficult for the rest of the companies which offer Internet access services to compete with a joint offer of the ADSL services of Telefónica and the Sogecable contents, which would strengthen the dominant position of Telefónica in the broadband Internet access market and the fixed telephony market.

The Council of Ministers decided that the anticompetitive effects that the mergers threatened to create could be offset by a set of conditions basically aiming at:

- The availability of the resulting satellite platform services as a carrier for other independent TV channels.
- Preserving information pluralism (obligation to carry any information channel or prohibition of any common strategy of Sogecable and Telefónica in other media markets).
- The protection of competition in emerging markets, preventing the acquisition by Sogecable of exclusive rights for transmission through means different from television and, in particular, rights corresponding to mobile telecommunications and Internet.
- The reduction of the existing entry barriers to the markets for contents through the limitation of the duration of the contracts for acquisition of premium films and football events along with the elimination of the English clauses.
- Preventing Sogecable from being an exclusive distributor in Spain of thematic channels produced by Major Studios or international distributors.
- Giving access to third pay TV operators to thematic channels produced by Sogecable and to at least one channel including major studios films in pay TV first window.
- Keeping the existing model of exploitation of football rights and sublicensing exclusive contents to third TV operators.
- Making sure that resulting efficiencies would be passed through to consumers in form of a wider channel offer while maintaining the quality of contents, together with restrictions to increasing subscriber payments during four years (inflation rate-x).
- Preventing the joint commercialisation of the services of Sogecable and Telefónica and discrimination by Sogecable in favour of Telefónica when commercialising its services.

2.3 *Adeslas/Global Consulting/Lince (2006)*⁵

The merger consisted of the acquisition by the insurance company ADESLAS, S.A. and GLOBAL CONSULTING PARTNERS, S.A. of the joint control over LINCE SERVICIOS SANITARIOS, S.A. (at that moment exclusively controlled by Global Consulting) and their subsidiaries SEGURO COLEGIAL MEDICO QUIRURGICO, S.A. and LINCE ASISTENCIA MEDICA Y HOSPITALARIA, S.L.

The relevant upstream product markets were the private health insurance market and the health insurance market for public groups (civil servants). Downstream, the health assistance service markets were also considered to be relevant in the province of Ciudad Real.

LINCE SERVICIOS, through its subsidiary SEGURO COLEGIAL, provided health insurance services in the province of Ciudad Real. Additionally, LINCE SERVICIOS provided health services in Ciudad Real. As a result it was a vertically integrated operator.

⁵ See final decision in:

<http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/N06069ACMWEB.pdf>

ADESLAS acquired the joint control over one hospital which represented of 95% of beds in private hospital beds in Ciudad Real, and more than half of the private specialised medicine and diagnosis tests centres of that province.

Taking into account the vertical relationship of the affected markets, the dominant position of LINCE SERVICIOS in Ciudad Real in the health service markets, the position of ADESLAS in the Spanish health insurance and health services markets, the Spanish Competition Authorities concluded that the merger could impede effective competition in the health insurance market given the risk of foreclosure of health services supply in Ciudad Real, even if there was no horizontal addition of market shares.

On these grounds, the Council of Ministers decided to clear the transaction subject to the following conditions, which would impede vertical foreclosure of markets:

1. Non exclusivity in the relationship between the merged entity and hospitals and doctors in Ciudad Real. This condition aimed to ensure that third insurance companies might be able build up competitive catalogues of health services in Ciudad Real.
2. Access in non discriminatory terms by customers of third health insurers to health infrastructures controlled by the parties in Ciudad Real.
3. The temporary obligation for the notifying parties to act, at the request of any health insurer, as the provider in Ciudad Real of health services to the civil servants third insurers may cover in that province. Since Civil servants insurance is negotiated in national terms, and insurers are asked to provide national wide health coverage, if the resulting company, dominant in Ciudad Real, refused such services to third insurers, these might find it difficult to live up to the conditions set by the civil service.

SUISSE

1. Introduction

Dans le cadre des contrôles des opérations de concentration, les autorités suisses de la concurrence se conforment à la Loi sur les cartels et autres restrictions à la concurrence (ci-après : LCart) ainsi qu'à l'ordonnance sur le contrôle des concentrations d'entreprises (ci-après OCCE), qui complète et précise les articles de la LCart relatifs à ce domaine.

La législation suisse ne distingue pas les concentrations «horizontales» des concentrations «verticales». La Commission de la concurrence (Comco) et son secrétariat ne disposent pas non plus de lignes directrices spécifiques aux concentrations verticales.

Dans son appréciation des concentrations (horizontales ou verticales), la Commission de la concurrence (ci-après : Comco) examine si une position dominante est créée ou renforcée et, le cas échéant, si celle-ci peut conduire à une suppression de la concurrence efficace sur le marché sans qu'il ne résulte d'amélioration des conditions de concurrence sur un autre marché qui l'emporte sur les inconvénients de la position dominante. Cela sous-entend que la loi suisse admet des arguments d'efficacité pour une concentration lorsque des effets positifs, en particulier verticaux, résultent d'une concentration.

De plus, indépendamment de l'atteinte des seuils de chiffres d'affaires, toute concentration à laquelle participe position dominante sur un marché doit être notifiée, dans la mesure où la concentration concerne soit ce marché, soit un marché voisin ou situé en amont ou en aval (art. 9 al. 4 LCart). Les concentrations verticales ou visant un conglomérat auxquelles participe une entreprise en position dominante n'échappent donc pas à ce contrôle des concentrations renforcé.

La loi suisse différencie les accords en matière de concurrence passés entre des entreprises effectivement ou potentiellement concurrentes de ceux passés entre des entreprises occupant différents échelons du marché. En effet, selon l'art. 5 al. 4 LCart, entré en vigueur le 1^{er} avril 2004, le terme «vertical» renvoie à des cas qui concernent des entreprises occupant différents échelons du marché. On comprend ainsi que les fusions verticales impliquent des sociétés actives à des échelons différents du marché.

2. Expériences des autorités suisses de la concurrence en la matière

2.1 *Constat*

La Comco a rarement eu à examiner de manière approfondie (phase II) des cas de concentrations verticales, c'est-à-dire entre des sociétés uniquement actives à des échelons différents du marché. En général, les entreprises sont au moins directement concurrentes sur un marché.

Jusqu'à présent, la Comco n'a interdit ou autorisé une concentration moyennant des charges ou conditions, en raison notamment d'effets verticaux que dans un seul cas (cf. Bell AG/SEG Poulets plus bas). Cela est explicable notamment par les raisons suivantes :

La théorie des effets verticaux est relativement peu développée. Alors que la création ou le renforcement d'une position dominante est présumé être néfaste, les effets verticaux peuvent être aussi bien positifs que négatifs pour la concurrence (cf. Swisscom/Cybernet ci-après).

Les effets verticaux sont considérés en général comme peu problématiques sauf si une entreprise a une position dominante sur un marché et que la concentration étend cette position dominante sur un marché en amont et en aval (cf. Swisscom/Cinetrade, DPC 2005/2, ch. 167).

Dans les cas où une entreprise est effectivement en position dominante ou au moins très puissante sur un marché, l'effet de causalité de la concentration sur un marché en aval ou en amont est difficile à prouver. Les seuls éléments de preuve rencontrés jusqu'à présent sont les craintes émises par les concurrents. Pour un effet horizontal, on est en présence de preuves plus tangibles (parts de marché, barrières à l'entrée, etc.).

2.2 Exemples de cas avec des effets verticaux

Parmi les cas peu nombreux de ce type que la Comco a traités, on peut citer les concentrations Bell/SEG Poulets ainsi que les concentrations Swisscom/Cybernet et Zschokke/Batigroup.

2.3 Bell AG/SEG Poulets AG (DPC 1998/3, p. 392)

Coop, le numéro deux de la grande distribution alimentaire suisse, est verticalement intégré dans le domaine de la volaille (fermiers liés par des contrats exclusifs, abatage, transformation, vente en gros/importateur, vente au détail). Bell, une filiale de Coop, envisageait de racheter l'entreprise SEG Poulets, le numéro deux sur le marché de l'abatage de volailles.

La concentration avait un effet horizontal car l'achat de SEG d'une part augmentait considérablement les parts de marché de Bell sur le marché de l'abatage et d'autre part augmentait la symétrie avec le numéro un de la grande distribution alimentaire (Migros). Après la concentration, seuls Migros et Coop détenaient une chaîne de valeur complètement intégrée. Ainsi, Coop et Migros détenaient ensemble une position dominante collective sur le marché de l'abatage de volailles, marché protégé des importations par des réglementations étatiques.

Cette position dominante collective avait des effets sur les marchés en amont et en aval. Par ce rachat de SEG Poulets dans le groupe Coop, les fermiers sur le marché en amont et les vendeurs en gros/importateurs, sur le marché en aval perdaient un fournisseur indépendant pour l'abatage. Pour ces raisons, la Comco a autorisé la concentration à la condition que Bell cède l'intégralité de sa participation dans « Favorit AG », une entreprise active dans l'abatage de volailles ayant une part de marché d'environ 20 à 30%, à un concurrent indépendant de Coop et de Migros.

2.4 Swisscom/Cybernet (DPC 2006/2, p. 248)

Swisscom, l'opérateur de téléphonie historique, présent sur de nombreux marchés des télécommunications (téléphonie fixe, téléphonie mobile, internet, etc.) envisageait de racheter le concurrent Cybernet actif dans le domaine de l'internet haut débit aux PME.

Dans le cadre de son examen approfondi, la Comco a notamment analysé les effets verticaux entraînés par cette fusion. Elle a pris en compte le fait que, d'une façon générale, les fusions verticales peuvent entraîner des effets tant pro que anti-concurrentiels. Une telle fusion peut, d'une part, conduire à des gains en termes d'efficacité favorables aux consommateurs. Mais, d'autre part, des effets anticoncurrentiels peuvent survenir. Ainsi, une entreprise intégrée verticalement ne livrant plus, ou alors à un prix excessif,

les entreprises concurrençant ses filiales, peut conduire à un cloisonnement des intrants et entraver ainsi ses concurrents.

Dans le cas de la fusion en question, les concurrents craignaient que Cybernet soit favorisée dans l'achat de services intermédiaires pour les produits xDSL, étant donné qu'elle appartiendrait à Swisscom. Ils redoutaient également que Swisscom cherche à éliminer ses concurrents en rachetant les petits offreurs présents sur le marché. Cependant, cette crainte n'a pas été confirmée car Swisscom offrait avant la concentration généralement à tous les licenciés ISP (Internet service Providers) le service Internet haut débit aux mêmes conditions en vue de la revente. La Comco est donc arrivée à la conclusion que cette fusion n'amènerait pas de modifications fondamentales et qu'il n'y avait pas ainsi de raison de craindre un cloisonnement vertical.

2.5 Zschokke/Batigroup¹

La Comco a également envisagé les effets verticaux d'une concentration horizontale dans le cadre de la fusion entre les entreprises de construction Zschokke Holding SA et Batigroup Holding SA. En effet, Zschokke, en tant qu'entreprise générale, fait appel aux prestations des entreprises de construction. On aurait pu craindre que, suite à cette fusion, Zschokke ne s'adresse plus qu'à Batigroup pour les prestations de construction. Cependant, étant donné la structure organisationnelle (centres de profit) de l'entreprise actuelle, reprise par la nouvelle entité, cette crainte n'était pas fondée. En effet, chaque centre de profit a une responsabilité de résultats et charge donc les meilleurs offreurs de réaliser les différents travaux.

¹ Publié prochainement dans « Droit et Politique de la Concurrence (DPC) », disponible sous format électronique www.weko.ch, dans la rubrique « nouvelles décisions ».

TURKEY

Rules on merger control are regulated in the Act No 4054 on the Protection of Competition (the Competition Act) and Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No 1997/1).¹ These constitute the basic legislation on merger control. The basic aim of merger control rules is to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. Therefore, dominance test delineates the basic framework for merger review.

It should be mentioned that there are no definitions for different types of mergers in the legislation apart from list of cases considered as a merger or an acquisition. However, in an earlier case², Competition Board provides the following explanation on vertical mergers: “... *vertical concentrations that may be defined as merger of undertakings which take place in different stages of the production of a product ...*” It seems from the wording that there should be a vertical connection between the relevant markets. As to the difference between vertical and conglomerate mergers, one decision³ by the Competition Board provides that the merger in question demonstrates features of conglomerate mergers as the parties are producers of different products and shift from one product to another is very hard as it requires large costs. Moreover, conglomerate mergers happen to be in relevant markets that do not overlap and have no vertical connection and as a result rarely cause negative impacts on competition.

Similar to the absence of definition of various types of mergers, the legislation does not provide particular guidelines applicable to vertical mergers. There are some general remarks in Communiqué No 1997/1 on principles to be taken into account in the assessment of mergers regardless of merger's being vertical, horizontal or conglomerate. According to the relevant article “... *the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, ...the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors ...*” are to be taken into consideration while assessing mergers. As is seen from the principles, the criteria to assess mergers are not exhaustive and they are complemented by evaluations in the case law of the Competition Board.

¹ Privatisation transactions are subject to Communiqué numbered 1998/4 on the Procedures and Principles to be pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid. However, provisions of Communiqué No 1997/1 are also applicable to acquisitions via privatisation transactions provided that they are not contrary to Communiqué No 1998/4.

² *DUSA/KORDSA*, 3.3.1999; 99-12/95-37.

³ *EADS*, 18.4.2000, 00-14/135-67.

Following explanations might be provided regarding some competitive assessments by the Competition Board in its decisions involving vertical mergers. However, it should be mentioned that the case law on vertical mergers is still being developed.

Based on the definition provided above, the Competition Board in the same decision mentions that vertical concentrations do not change the market structure directly. However, it is also provided that they may create significant entry barriers and competitive disadvantages. Therefore, it may be said that despite the fact that vertical concentrations do not change the number of competitors; an important competitive problem they involve is foreclosure of the market to new entry.⁴ Whether the remaining undertakings operating in the downstream markets will be able to find alternative suppliers of input following the transaction is considered important in clearing vertical mergers.⁵ Thus the possibility of foreclosure is an important aspect considered in the review of vertical mergers. In this context, in case acquired upstream firm already sells most of its production of the raw material to the acquirer downstream firm might indicate that there would be no actual change in the relevant markets.⁶ No market share indicators are available to prove foreclosure and individual analysis is done in each case.

In one case⁷ regarding the acquisition via privatisation of a fertiliser producer by another one already operating with a strong market position in the market, the likely impact of the transaction in distribution stage have been taken into account. It is very advantageous that a fertiliser producer has a countrywide distribution network. Following the acquisition, it was thought that the acquirer whose dealers already outnumbered any of the fertiliser producers could increase its bargaining power further by increasing the number of its dealers with the participation of the dealers of the acquired company as well as by extending the supply of urea. As a result of increase in the bargaining power and extension of supply of urea, number of dealers already tied to the acquirer via exclusive purchase contracts would increase and this, by raising the entry barrier nature of distribution network, would complicate sales by importers to final users.

In another privatisation case⁸ regarding acquisition of Turkish Petroleum Refineries Corporation (TÜPRAŞ) holding 86% of the crude oil refining capacity in Turkey by an acquirer under the control of an oil producer, the Competition Board cited that following benefits might be obtained by undertakings via vertical integration:

- diminishing operational costs;
- ensuring the security of raw material supply;
- diminishing capital costs and ensuring profit stability;
- maintaining and developing the existing market;
- eliminating those problems arising out of long-run agreements;
- providing reliable data and the possibility of being able to make a long-run plan.

Such benefits are cited as general remarks that have led to increasing vertically integrated structure in primary (exploration, production) and secondary (refining, transportation, storage, distribution) operations

⁴ *Degussa/RAG*, 27.2.2003; 03-13/136-64.

⁵ *Degussa/RAG*, 27.2.2003; 03-13/136-64. *Privatisation of Div-Han*, 25.3.2004; 04-22/247-52.

⁶ *Kuraray/Troplast*, 6.1.2005; 05-01/5-5.

⁷ *Privatisation of IGSAŞ*, 3.11.2000; 00-43/464-254.

⁸ *Privatisation of TÜPRAŞ*, 29.1.2004; 04-09/77-19.

of the oil markets worldwide. In this case, it was thought that as imports in Turkish oil market is mainly characterised by spot purchases, TÜPRAŞ could increase its capacity depending on advantages to be obtained by vertical integration in purchasing raw material and this might create barrier to market entry because increase in capacity could sustain the spot character of the imports and prevent imports from having a structural character based on long-run agreements. Therefore, while the privatisation transaction was authorised, it was decided that because advantages arising from vertically integrated structure could create barrier to market entry in imports and refining sector, investments to increase capacity should be observed following the acquisition to make an assessment under rules on abuse of dominance.

Conclusion

As seen from the above explanations, the key concern about the vertical mergers is the possibility of foreclosure due to vertical integration. In this regard, the TCA has examined the vertical mergers carefully to see whether there is any foreclosure or not as a result of the merger. In this regard, in order to avert the risk of a possible vertical foreclosure, the TCA considered the existence of actual or potential alternatives. On the other hand, the TCA has taken into consideration the possible efficiency gains from the merger when evaluating the final impact of the transaction on competition.

UNITED KINGDOM

Introduction

The following note discusses the approach taken in the UK for vertical mergers and broadly follows the set of questions set out in the OECD invitation for submissions: (I) definition of vertical mergers; (II) anti-competitive effects of vertical mergers; (III) efficiencies; (IV) evidence and enforcement policy; and (V) remedies. This is a joint submission by the UK Office of Fair Trading (OFT) and UK Competition Commission (CC).

The UK would like to highlight that vertical mergers are often benign or pro- competitive, though they will sometimes result in a substantial lessening of competition. Some economists have gone further than this to argue that vertical mergers are always benign – for example on the basis of the argument that there is only ever one monopoly profit to be earned in a vertical supply chain. However, it is now well-understood that this particular theoretical result depends on strong assumptions and in other circumstances vertical foreclosure may indeed be a profitable strategy. The UK therefore believes that it is important to consider on a case by case basis whether or not the incentive and ability to foreclose exists. Whether a particular strategy is profitable or not will depend on the specifics of the case. Furthermore, there may be cases where firms could inadvertently foreclose a market by simply benefiting from significant efficiencies as a result of the merger.

The UK competition authorities have significant experience in assessing vertical mergers at both the first and second stages. While vertical adverse findings are less common than horizontal ones, we have found a substantial lessening of competition in two recent cases: a stock exchange case¹ and a rail wagon maintenance case².

1. Definition

Vertical, horizontal and non-horizontal mergers are defined in the Competition Commission (CC) and Office of Fair Trading (OFT) guidelines.

1.1 Vertical mergers

Vertical mergers involve the merger of firms that operate at different levels of the supply chain of a particular good or service³. In a vertical merger, the merging firms' products are in different markets and one merging party produces an input to the other merging party's product.

¹ *Deutsche Börse AG, Euronext NV and London Stock Exchange plc: A report on the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV*, November 2005, Competition Commission

² *Railway Investments Limited and Marcroft Holdings Limited: Completed acquisition by Railway Investments Limited of Marcroft Holdings Limited*, September 2006, Competition Commission

³ Section 3.64, *Merger References: Competition Commission Guidelines CC2 June 2003*.

1.2 *Conglomerate mergers*

Conglomerate mergers involve firms that operate in different product markets. They may be product extension mergers (i.e. between firms that produce different but related/ complementary products) or pure conglomerate mergers (i.e. between firms operating in entirely different markets). Conglomerate mergers are therefore distinct from vertical mergers.

1.3 *Identification of upstream and downstream markets*

Markets for products at an earlier stage of production are generally defined as upstream markets; and those at a later stage, downstream markets. There may be a supply chain involving one or more upstream markets⁴. Where a production process is not strictly sequential, the supplier of any inputs to that production process is considered an upstream firm, while the producer of the final output is described as a downstream firm. By way of example, in EWS/Marcroft⁵, a merger involving rail wagon maintenance, the provision of rail wagon maintenance services was considered as upstream whereas the provision of rail haulage services was considered downstream.

However a strict definition of whether firms are upstream or downstream is not usually necessary for an analysis of foreclosure and indeed it is often not possible – for example if some active firms are already vertically integrated. Rather, it is more important to be able to clearly describe a potential theory of harm based on a foreclosure argument and then to conduct a rigorous assessment of whether this is a likely outcome of the merger.

Evidence on the nature of upstream and downstream markets is gathered in a number of ways including submissions from interested parties, site visits, hearings and analysis by professional staff including economists, lawyers, accountants and business advisors.

1.4 *Differences between horizontal, vertical and conglomerate mergers*

When assessing horizontal mergers between firms producing substitutes we can generally presume a negative effect on consumer welfare due to the elimination of a rival, since, for example, prices will typically rise all else equal. However, (1) the price rise may not necessarily be substantial and (2) all else may not be equal. On the latter point, for example, if the merger achieves substantial synergies, then it may well lead to an overall reduction in prices and an improvement in consumer welfare.

Vertical mergers do not directly eliminate competition between horizontal rivals, meaning the possible competitive harm arising from vertical mergers is typically more complex and harder to identify than in horizontal mergers. Generally, a vertical merger will only raise competition concerns when the firms involved are able to exercise market power in one or more markets along the supply chain. A vertical merger may still lead to an increase in market power, but this would arise from foreclosure of rivals, rather than directly as a result of the merger.

Similarly, conglomerate mergers do not directly eliminate a competitive constraint since they bring together suppliers of complementary or otherwise unsubstitutable products. Mergers of complementary goods generally provide an incentive for firms to lower prices and rarely lead to a substantial lessening of competition. However, as with vertical mergers, in some circumstances, a merged firm may be able to exercise market power more effectively by having a strong position in separate but related markets than it

⁴ Section 2.35, *Merger References: Competition Commission Guidelines CC2 June 2003*

⁵ *Railway Investments Limited and Marcroft Holdings Limited: Completed acquisition by Railway Investments Limited of Marcroft Holdings Limited*, September 2006, Competition Commission

could from operating in either of the markets separately, either strategically or non-strategically. The primary competitive concern in these cases is that post merger, the ability of rival firms to compete with the merged firm will be reduced to such an extent that they lose significant market share or are driven from the market altogether, possibly allowing the merged firm to increase prices in the long-term. Alternatively, entry or expansion may be deterred, allowing the firm to preserve its market power.⁶

1.5 Mergers that raise both horizontal and vertical issues

The CC has considered two mergers that have raised significant vertical concerns under the Enterprise Act 2002, the proposed purchase of the London Stock Exchange by Deutsche Börse AG and Euronext NV (LSE) and the completed purchase of Marcroft by Railway Investments Limited (a wholly-owned subsidiary of English Welsh and Scottish Railway Holdings Limited (EWS)). Both of these had horizontal and vertical dimensions. Vertical concerns do not arise without market power in at least some markets – either upstream or downstream. In some cases, mergers will cause vertical concerns primarily because they increase the market power at one level of the supply chain. In such circumstances, remedying the horizontal concern can simultaneously remedy any vertical concerns. However, in other cases it is possible that vertical concerns arise irrespective of horizontal concerns arising from the merger. In both of the above cases, while the potential of both horizontal and vertical concerns was raised by the OFT, the CC concluded that there was only a substantial lessening of competition of a vertical nature.

2. Anti-Competitive Effects of Vertical Mergers

2.1 Definition of foreclosure

In the UK, vertical foreclosure is not limited to the exclusion of non-vertically integrated firms from a market, but also includes a range of behaviours including refusal to deal, raising barriers to entry, and raising rivals' costs.

2.2 Types of foreclosure

There are two types of foreclosure strategy: (1) restricting rivals' access to inputs and (2) restricting rivals' access to customers. Foreclosure can be a deliberate strategy, but it can also, as discussed at the end of this section, be unintentional. Within these two types of vertical foreclosure, there are a number of methods of foreclosure and these will have varying effects in different markets, so the effects of each method must be analysed in each case, taking into account market specific characteristics. In analysing these potential effects, a decision needs to be taken as to whether or not the merger will result in a substantial lessening of competition. In forming this judgement it is critical to evaluate the merged entity's **incentive** and **ability** to foreclose and the likely **effect** of any such foreclosure.

Restricting rivals' access to inputs can involve raising the price of an input, reducing the quality of that input or denying access altogether. The ability to foreclose using these strategies depends on the merged firm having market power in the input market. Furthermore, in order to affect the merged firm's downstream competitors, this input must be important to the downstream product, account for a significant proportion of production costs, and/ or be particularly difficult substitute with another supplier's product.

Restricting access to customers involves the vertically integrated downstream firm sourcing all, or a significant proportion of their upstream input from the newly integrated upstream firm. The ability for this to have the potential to cause competition concerns depends, at least, on the downstream firm accounting for a large share of downstream demand or being an important route to market. Another factor affecting

⁶ Section 6.3, *Mergers – substantive assessment guidance*, Office of Fair Trading 2003

the merged firm's ability to restrict access will be the ease with which it can expand capacity to meet the increase in demand brought about by the downstream firm sourcing all requirements from it.

Foreclosure can have the effect of reducing other market players' abilities to compete, in some cases leading to their exit of the market and/ or a reduced ability to enter or expand in the market. Increased barriers to entry are particularly harmful in markets where there are currently few incumbent competitors and/ or markets that are newly open to competition. As a result of this loss of current or potential future competition in the market, the merged entity may have the ability to raise prices and/ or reduce quality. If a merged firm restricts access to its inputs, this could also remove a competitive constraint on other suppliers of this input, giving them more market power and potentially allowing them to raise their price.

Whether or not a merged firm will employ a foreclosure strategy will depend on the profitability of such a strategy – if it is more profitable to foreclose than not, the firm will have the incentive to foreclose. In the case of input foreclosure, there will be a trade off between profit lost through a reduction in sales of the input and an increased profit due to increased sales and/ or market power in the downstream market. In the case of customer foreclosure the trade-off is between profit lost as a result of only buying input from the vertically integrated upstream firm and profit gained through increased sales and prices potentially both upstream and downstream. Another possible incentive to foreclose is to protect any market power the firm has in either market: in some cases downstream vertical integration can discourage entry upstream and vice versa.

Foreclosure can also affect efficiency: if the merged firm is able to drive competitors at one level out of the market, the lack of competition may reduce the pressure to increase efficiency. Also if foreclosure causes input prices to downstream rivals to rise or reduces economies of scope for upstream rivals, they will have less ability to innovate and improve efficiency.

There may be cases where efficiencies achieved as a result of the merger enable the merged firm to become significantly more competitive downstream. This would have the result of lowering prices in the short run. If other firms are unable to replicate such efficiencies, they could lose market share and in the long-run could even be forced to exit. This could enable the merged firm to raise prices in the long-run. In such cases where an identical firm to either the upstream or downstream part of the merged entity could not replicate such efficiencies, the merger may be seen as anti-competitive. Timescales are therefore particularly important in vertical mergers and both long-term and short term effects must be considered.

2.3 Co-ordinated effects

The influence of vertical mergers on the likelihood of co-ordination is unclear: vertical mergers can make tacit collusion more likely, but they can also make it less likely.

On the one hand, for example, vertical integration can lead to greater price and cost transparency since the part of the vertically integrated firm involved in the downstream market will often deal with many of the firms in the upstream market. It will therefore have information about them, increasing transparency in the upstream market. Similarly, the part of the vertically integrated firm involved in the upstream market will often deal with many firms in the downstream market and hence the vertically integrated firm may benefit from increased transparency in the downstream market. Increased transparency usually helps coordination since tacit agreements can be monitored at lower cost. On the other hand, vertical integration can also lead to more asymmetry in the market when other market players are not vertically integrated. Greater asymmetry may make tacit collusion less likely. Furthermore, in the long run, where foreclosure leads to elimination of competitors in a market, there will be fewer firms in that market to monitor, which may make tacit collusion easier.

As in horizontal mergers, any analysis of coordinated effects will focus on market transparency, ability to monitor rivals' behaviour, punish deviation and sustain tacitly collusive outcomes and, in particular, any affect that the merger has on these factors. Vertical integration may also increase the flexibility of market participants to make hidden monetary transfers between players. Such mechanisms may also help sustain tacitly collusive arrangements.

3. Efficiencies

The CC and the OFT inquiry processes allow for assessment of efficiencies as part of the substantial lessening of competition analysis and at the remedies phase. It is often more appropriate to consider efficiencies in vertical mergers as part of the analysis of potential foreclosure. Once the ability and incentive of foreclosure have been established, a merger would only be cleared on efficiency grounds in exceptional circumstances.

There are two types of efficiencies:

- Merger specific efficiencies expected to enhance competition in either upstream or downstream markets by creating a more effective competitor. These rivalry enhancing effects are considered as part of the assessment of whether the merger gives rise to an SLC.
- Merger-specific efficiencies, which are not rivalry-enhancing but which give rise to customer benefits. These are evaluated as part of the assessment of remedies. For example, in the LSE case, the possible customer benefits such as cost reductions from the adoption of a common IT system was considered as part of the remedies process.

The efficiencies must meet the following three criteria in order to be considered as part of the SLC or remedies decisions: i) the efficiencies must be as a direct result of the merger and could not occur without the merger (for example by alternative contractual arrangements), ii) they must be demonstrable and iii) they must be likely to be passed on to consumers. It is often difficult to show, in the absence of compelling evidence, that efficiency gains will not only arise but will also be passed on to a sufficient extent to customers, especially where there are few remaining constraints on the parties.

3.1 *Non-linear pricing and efficiencies.*

We will consider both cost and pricing efficiencies resulting from vertical mergers. However, we recognise that if pre-merger, the upstream firm was charging a non-linear price to its downstream customer, it is unlikely that the merger will produce pricing efficiencies from the elimination of double marginalisation. The pricing agreements in place specifying non-linear pricing should, according to the theory of efficient contracting, have reduced or eliminated double-marginalisation in the pre-merger situation. However, in practice, the UK has found that this may not always be the case. The UK has not yet needed to evaluate these issues in the context of a vertical merger at this stage.

4. Evidence and Enforcement Policy

The OFT and CC both have sections on assessing vertical mergers in their merger guidelines which provide brief guides to approaching this type of case. These guidelines do not give detailed technical guidance, in part reflecting the continually evolving economic literature in this area. However, both the OFT and CC publish the analysis behind all of their decisions, setting out the approaches taken and evidence relied upon.

4.1 Analytical framework

In order to show that there is a significant lessening of competition from a vertical merger as a result of a potential foreclosure strategy, it must be shown that the firm has the ability to foreclose or raise prices and also the firm has the incentive to follow that strategy.

The ability of the merged firm to engage in a foreclosure strategy will depend on its power in the markets involved in the merger. High market shares do not necessarily mean a firm has market power and similarly, a firm may have market power without particularly high market shares. As discussed above, market power also requires some form of inelasticity of demand or supply for a firm's products. For example, lack of substitutable products, high switching costs, capacity constraints, a lack of alternative suppliers and a lack of similarity (in terms of quality and specification) of other alternative products each may provide incumbent firms with market power. In downstream foreclosure, market power may be derived through acquiring a particularly important route to market. The ability to foreclose will also depend on there not being any counterstrategies available to competitors. Possible counterstrategies available to rivals to input foreclosure include adapting their production process to be able to use a different input, purchasing an upstream player or begin producing the input themselves. Similarly a counterstrategy to customer foreclosure would be to vertically integrate themselves or find another route to market. Buyer power and possible entry upstream or downstream must also be considered as possible disrupting forces to foreclosure.

If it is established that a firm has the ability to foreclose, the next step is to establish the firm's incentives to foreclose. Firms may have conflicting incentives in relation to foreclosure. On the one hand, firms may take advantage of the increased efficiencies resulting from the merger by offering lower prices to customers increasing sales and revenue. Alternatively, for example, where a firm has the ability to foreclose rivals' access to inputs, it will have the incentive to do so when the product of the margin and volume of lost sales in the upstream market is less than the product of the margin and volume of any increase in sales achieved as a result of the foreclosure strategy. As a result theories of harm may be complex and hard to prove.

To determine which is the most profitable strategy, it is useful to attempt to quantify or measure the net benefit of each strategy. It may be possible to estimate whether there is likely to be a positive net profit from a foreclosure strategy.

In particular, an estimate for loss in upstream sales is sometimes possible; and is easiest to obtain if foreclosure means that access would be denied completely. The increase in sales as a result of the input foreclosure strategy will depend on the capacity of the downstream part of the merged firm and the ease with which it can expand: by raising input prices, rival downstream firms will face higher costs and be less competitive and demand is likely to divert away from these firms. If the merged firm is able to readily increase capacity it should be able to expand sales. The increase in volume will also depend on the market share of the merged firm relative to non-foreclosed rivals: the larger this is, the higher the proportion of diverted sales it will receive. Other factors affecting the volume of sales diverting to the merged firm will be barriers to entry in the downstream market and the substitutability of the merged firm's product and rivals' products.

Case Study

In the LSE case, the incentive for the proposed owner of LSE to engage in a foreclosure strategy was established using this simple analysis. The group considered whether the merger might reduce the credibility of future entry by third parties, given the merged firm's likely increased control over clearing services in the UK. In this case, there would have been no loss of sales from the upstream firm as the LSE is the only provider of such services. Were *Deutsche Börse* to buy LSE, the CC thought it likely that the merged firm would use a *Deutsche Börse*-controlled clearing service instead of the existing clearing service. Euronext already had a large shareholding and influence in the existing clearing service used under contract by LSE. The CC found SLCs arising from both the anticipated Euronext/ LSE and the *Deutsche Börse*/ LSE mergers because of the ability and incentive of either merged firm to foreclose entry and expansion of other potential providers of trading services in the UK via the merged firms' improved control of, or influence over, clearing services.

4.2 Evidence

We note that, to date, the development and use of more sophisticated empirical techniques (such as demand estimation or vertical merger simulation modeling) has been limited in the assessment of vertical mergers compared with horizontal mergers. The UK is interested in the further development of empirical vertical merger simulation models which can be used in a range of contexts and also in learning about other countries' experiences in this area. However, even where it is not possible to use sophisticated techniques, we seek to collect the evidence that would enable us to form a judgment on firms' ability and incentive to engage in a foreclosure strategy post-merger. The analytical framework set out above, helps identify the evidence that is most relevant to this decision.

Evidence provided by the merging firms and other interested parties including customers and competitors is invaluable when considering the potential effects of a merger. This evidence can be in the form of responses to questionnaires requesting market and financial data, internal documents and interviews. We note that competitors can have an incentive to complain in efficiency-enhancing but competitively benign non-horizontal mergers, if they expect that the merged firm will be a more effective competitor post-merger. When competitors do complain, however, they can be a useful source of information in assessing whether the merging parties have the incentive or ability to foreclose – if they are unable to substantiate their claims, it is possible that their claim is a strategy to delay the merger.

In EWS/ Marcroft, customer evidence (submissions and hearing transcripts) was relied upon to determine if EWS's ability to foreclose could be constrained by customers choosing to bring maintenance in-house. The merging parties argued that maintenance customers operating in the downstream haulage market could switch from using EWS/ Marcroft and self-supply rail maintenance. The evidence provided showed that end-use customers faced significant obstacles to establishing in-house maintenance as a substitute to using EWS/ Marcroft and would only be considered in extreme circumstances.

5. Remedies

The UK recognises that, where applicable, Article 82 and national competition law may have a deterrent effect on the merged entity to engage in foreclosing behaviour. The UK considers the effectiveness of this deterrence and its ability to counteract the commercial incentives of the merged entity on a case-by-case basis.

The costs and benefits of an ex-post versus an ex-ante approach to vertical merger enforcement were explored as part of the CC's consideration of the deterrent effect from the abuse of dominance provisions of the Competition Act on EWS's possible incentives to reduce quality/ increase prices to its downstream competitors post merger. The merging firms argued that the incentive to raise rivals costs and/ or foreclose as a result of the merger was deterred by the possibility of action under the Chapter II prohibition of the

Competition Act 1998. The CC recognised that the prohibitions and the potential for investigation could have a deterrence effect on the merged entity's behaviour. However, the CC considered that effective deterrence in this case relied on three factors: first the likelihood that the conduct expected would contravene the prohibition and be illegal, secondly the likelihood of any such conduct being the subject of successful enforcement action, and thirdly the time frame within which such enforcement action could be taken.

The CC considered these factors and concluded that the deterrent effect of the prohibitions on abuse of dominance was too uncertain to counteract the incentives to raise prices and/ or reduce service quality to competitors in the downstream market. It was the CC's view in this case that the uncertainty of whether the prohibition actually applied to prices set at a particular level and the practical realities of the enforcement process - in terms of the time taken to investigate and the short period of time needed to cause harm to downstream competitors - are likely to diminish the deterrent effect of the prohibitions. These practical realities cast doubt on whether any attempt by the merged entity actually to raise prices or reduce service quality could necessarily be addressed immediately.

In the UK's experience, assessing vertical mergers can be challenging. On the whole theories of competitive harm can be dispelled by analysis to show that either ability or incentive (or both) are not present. However, as show by our two recent anticompetitive vertical mergers, in some cases a credible story of harm arising from a vertical merger can be told. It is therefore important to identify possible foreclosure strategies in vertical mergers and carefully consider the evidence in each case.

UNITED STATES

Vertical mergers continue to command the attention of competition authorities and economic researchers. In their enforcement posture toward mergers, both vertical and horizontal, the US Department of Justice and Federal Trade Commission (hereafter “the Agencies”) pursue the overarching goal of economic efficiency. Vertical mergers differ in fundamental respects from horizontal mergers, however, and these differences are reflected in the Agencies’ differing treatment of these two classes of merger. For reasons discussed herein, vertical mergers merit a stronger presumption of being efficient than do horizontal mergers, and should be allowed to proceed except in those few cases where convincing, fact-based evidence relating to the specific circumstances of the vertical merger indicates likely competitive harm.

1. Theory of the Firm

The spur to any merger, whether horizontal or vertical, is an anticipated improvement in coordination between the merging parties, insofar as this raises joint profit over the alternatives to integration. Improved coordination frequently, although not invariably, also serves the broader interests of efficiency. Assessing the likely effects of a given merger requires an understanding of the contractual alternatives to integration the parties face.

Ronald Coase was the first to address integration issues in the economics literature, in his classic study of the nature of the firm.¹ Coase posed the fundamental question of why some economic activities are organised within firms, while others are transacted across markets. In principle, parties prefer to organise an economic activity within a firm when doing so would entail lower transaction costs (or higher joint profit) than would a market transaction. Firm boundaries are determined by the scope of economic activity that, by being withdrawn from the market and organised within the firm, maximises the parties’ joint profit.²

Contractual incompleteness poses a key impediment to joint profit maximisation, especially for transactions conducted at arm’s length.³ Contracts are typically incomplete, in part because it would be prohibitively costly to enumerate the appropriate rights and obligations of the parties in every conceivable contingency. Moreover, some important features of the parties’ economic relationship may not be amenable to verification by a third party, such as a court or arbitrator, and so may not be contractually enforceable.

¹ Ronald H. Coase, *The Nature of the Firm*, 4 *Economica*, 386-405 (1937).

² There are costs as well as benefits to organizing economic activity within a firm. For example, diseconomies of scope in managerial control limit the extent of firms.

³ *Id.* at 390-391. Among other factors, Coase discusses the costs of discovering relevant prices and of negotiating repeatedly when transactions are conducted at arm’s length. For evidence on how costs of price determination affect contracts, see Francine Lafontaine and Scott E. Masten, *Contracting in the Absence of Specific Investments and Moral Hazard: Understanding Carrier-Driver Relations in US Trucking*, NBER Working Paper 8859 (2002). For evidence on how costs of repeated negotiation affect contracts, see Keith J. Crocker & Scott E. Masten, *Pretia ex Machina? Prices and Process in Long Term Contracts*, 34 *Journal of Law & Economics*, 64-69 (1991).

2. Imperfect Coordination

The incompleteness of contracts gives rise to problems of coordination between parties dealing at arm's length. When coordination is imperfect, neither party takes fully into account the effects that its actions have on the other party's profit. The policy implications of imperfect coordination differ sharply, however, according to whether the coordination involves goods that are substitutes or complements.

2.1 *Horizontal Coordination*

Horizontal relationships involve substitute goods. Two goods are substitutes if a change that increases the quantity demanded of one, such as a reduction in the good's price or an improvement in its quality, leads to a fall in demand for the other. Imperfect coordination between suppliers of substitute goods implies that neither party fully internalises the adverse effect that a reduction in its price or improvement in its quality has on the other party's profit.

Lack of coordination between suppliers of *substitute* goods is an essential aspect of competition. While uncoordinated behavior depresses the horizontal parties' joint profits, it tends to increase overall efficiency, by spurring the parties to lower price and improve quality as each seeks to steal business from the other. This externality between the parties could be better internalised by their horizontal merger, which would tend to result in higher prices or a slackened pace of quality improvement.

The basic economic intuition that improved coordination between substitute goods, as through a horizontal merger, tends to raise price and lower efficiency can be overturned if there are also sufficiently large efficiencies created by the merger. These include merger-specific reductions in cost that come from combining complementary assets, eliminating duplicate activities, or achieving scale economies, as well as quality improvements specific to the merger.⁴

The incompleteness of contracting between horizontal parties that gives rise to coordination problems is partly by design, as a matter of public policy. For example, competitors are prohibited from reaching a naked agreement to fix prices, because such explicit coordination would harm efficiency. Competitors are allowed to reach other types of agreement (more vertical in character), such as tolling arrangements whereby a firm with a comparative disadvantage at one stage of the production process outsources this function to a more efficient rival.

2.2 *Vertical Coordination*

Vertical relationships differ fundamentally from horizontal ones, in that vertical relationships involve complementary goods. Two goods are complements if a change that increases the quantity demanded of one, such as a reduction in the good's price or an improvement in its quality, leads to a rise in demand for the other. Imperfect coordination between suppliers of complementary goods implies that neither party fully internalises the salutary effect that a reduction in its price or improvement in its quality has on the other party's profit.

Improved coordination between suppliers of *complementary* goods is an essential aspect of efficiency. Such improved coordination not only raises the parties' joint profits, but tends to increase overall efficiency as well through lower prices or improved quality. This externality between the parties could be better internalised by their vertical merger, which would tend to result in lower prices or a quickened pace of quality improvement.

⁴ Federal Trade Commission & US Department of Justice, Commentary on the Horizontal Merger Guidelines (2006) at 49.

The basic economic intuition that improved coordination between complementary goods, as through vertical merger, tends to lower price and increase efficiency can be overturned if there is also a sufficiently large horizontal effect created by the merger, such as the substantial foreclosure of rivals or facilitation of explicit collusion at some vertical stage.

One class of coordination problems between vertically related parties is moral hazard, in which a party can benefit privately by taking a non-price action (or failing to take an action) that would lower joint profits. A classic example is the problem of holdup in specific investments. An asset is specific if its value within a given relationship exceeds its value when deployed elsewhere. For example, the supplier of an intermediate good may customise an asset to better serve the demands of a particular customer. The customer may thereafter hold up the supplier, by negotiating a price so low that the supplier cannot recover the investment costs it has sunk. As another example of moral hazard, a franchisee may free ride on a franchisor's investments in building a brand reputation for quality, by shirking on the effort necessary to maintain quality at the franchisee's outlet.⁵ Anticipating opportunism by the other party, an investor will tend to curb investment in specific assets, to the detriment of joint profit.

Holdup problems may be mitigated within a firm. If a supplier and customer vertically merge, the combined firm can wield considerable authority over how resources are allocated internally. Empirical studies have generally found that vertical integration is more prevalent where asset specificity is more important.⁶ These studies indicate that mitigating holdup is an important source of efficiency flowing from vertical mergers. Other potential sources of efficiency from vertical merger over vertical contracting include improvements in the incentives for agents to exert effort and reductions in monitoring costs.

The incompleteness of contracting also tends to impede the maximisation of joint profits because of the classic problem of double (or successive) markups. When a supplier of an intermediate good and a customer deal at arm's length, each may incorporate a markup over marginal cost into its pricing. Successive markups reduce joint profits because of a pricing externality. In setting its price, neither party internalises the depressive effect its markup has on the other party's sales. Double markups thus tend to restrict output.

The parties might be able to solve a double-markup problem through negotiation, for example by agreeing to a two-part tariff in which the upstream firm's per-unit price is set at marginal cost. However, such a solution typically is not reached. Positive markups are ubiquitous, even in very competitive markets. In franchising, for example, royalty rates are a common contracting feature.⁷ Franchisees are typically at some risk of moral hazard by the franchisor. Franchisee revenues could be undermined by the franchisor shirking on efforts to maintain franchise quality. Royalty rates can mitigate such moral hazard, by

⁵ While it is the upstream firm that is subject to holdup in both of these examples, specific investments by downstream firms may likewise run the risk of opportunism. For a detailed discussion of franchising issues, see Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* (2005).

⁶ For a recent survey and discussion that emphasizes the role of asset specificity, see Paul L. Joskow, *Vertical Integration*, in *Handbook of the New Institutional Economics* (2005). In the context of franchising, franchisors with higher brand-name value tend to manage a larger proportion of company-owned units, relying less on franchisee units. For evidence on this relationship among franchisors in the United States, see Francine Lafontaine & Kathryn L. Shaw, *Targeting Managerial Control: Evidence from Franchising*, NBER Working Paper 8416 (2001). Similar results have been found for franchisors in France and Brazil. See Thierry Penard, Emmanuel Raynaud & Stephane Saussier, *Dual Distribution in Franchised Chains: An Empirical Analysis Using French Data*, working paper, Centre ATOM, University of Paris I (2002), and Paulo F. Azevedo & Vivian L. dos Santos Silva, *Contractual Mix in Brazilian Franchising*, mimeo, Federal University of Sao Carlos, SP, Brazil (2002).

⁷ Blair & Fontaine, *supra* note 3.

delivering to the franchisor a stream of royalties contingent on franchisee sales that the franchisor would stand to lose by shirking on quality.⁸ More generally, positive markups received by both upstream and downstream firms can assure the recipients' mutual performance of their no verifiable duties.⁹

A double markup may thus reflect an efficient contractual response to a problem of two-sided moral hazard. It may also reflect the successive exercise of market power by the contracting parties. In either case, vertical merger can improve efficiency by mitigating the double markup. Importantly, the greater the market power in each successive market, the more severe the double-markup problem under arms-length contracting and the greater the potential for vertical merger to achieve efficiencies by eliminating this problem.

3. Merger Enforcement

The goal of US antitrust enforcement with regard to vertical mergers is the same as for horizontal mergers: to promote efficiency by deterring only those mergers that are likely to substantially lessen competition. To the extent that vertical mergers differ in fundamental respects from horizontal mergers, merger analysis appropriately takes these differences into account.

3.1 Horizontal Mergers

In the case of horizontal mergers, the Agencies apply an analysis described in the Horizontal Merger Guidelines ("HMG").¹⁰ Under the HMG,¹¹ the Agency delineates relevant markets, identifying participants in those markets and calculating their market shares.¹² If post-merger concentration in the relevant market would fall below a certain threshold, the market is considered unconcentrated and the merger is unlikely to have adverse competitive effects. In this case, no further analysis is ordinarily required.¹³ A horizontal merger's potential for adverse effects tends to be greater the more post-merger concentration exceeds the threshold.¹⁴ The Agency investigates the merger's potential for unilateral or coordinated competitive effects.¹⁵ A horizontal merger's potential for harm is undermined, however, if entry is easy. The Agency

⁸ Lafontaine & Shaw, *supra* note 4, at 22.

⁹ See Benjamin Klein & Keith Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *Journal of Political Economy*, 615-641 (1981), and Klein, *The Economics of Franchise Contracts*, 2 *Journal of Corporate Finance*, 9-37 (1995).

¹⁰ US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (issued April 2, 1992; revised April 8, 1997) available at:

<http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

¹¹ The order of analytical elements in the listing that follows has no analytical significance. See Federal Trade Commission & US Department of Justice, *Commentary on the Horizontal Merger Guidelines* (March 2006), available at:

<http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

Commentary at 2: "Each of the Guidelines' sections identifies a distinct analytical element that the Agencies apply in an integrated approach to merger review. The ordering of these elements in the Guidelines, however, is not itself analytically significant, because the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets." See also the discussion *infra* note 20.

¹² *Guidelines*, *supra* note 10, Sections 1.0-1.4.

¹³ *Id.*, Section 1.51.

¹⁴ *Id.*, Section 1.51.

¹⁵ *Id.*, Section 2.

examines the timeliness, likelihood and sufficiency of the entry alternatives a potential entrant might practically employ.¹⁶

Where the analysis of a horizontal merger raises substantial concerns regarding the merger's potential for creating or enhancing market power, the Agency considers the merger's cognisable (merger-specific and verifiable) efficiencies. The Agency will not challenge a merger if cognisable efficiencies are of such a character and magnitude that the merger is not likely to be anticompetitive.¹⁷

Both the concentration thresholds and the treatment of market power and efficiency issues in horizontal merger analysis are policy responses to the problem of inference in merger enforcement.¹⁸ These features reflect aspects of the relationship between market power and efficiency that are particular to horizontal mergers. Insofar as vertical mergers differ in relevant respects from horizontal mergers, an economic analysis of vertical mergers and efficient enforcement policy towards them will appropriately reflect these differences.

All horizontal mergers have at least some potential to realise efficiencies, if only by eliminating redundant overhead costs. When the relevant markets are unconcentrated, the risk of adverse competitive effects from a horizontal merger is small. The threshold below which markets are considered unconcentrated strikes a balance such that the generic efficiencies typically achievable through merger outweigh the small risk of competitive harm posed by horizontal mergers falling below this threshold. From the Agency's perspective, the threshold economises on scarce enforcement resources, allowing the Agency to better deploy these resources to the investigation of mergers whose risk of competitive harm is more substantial.¹⁹ From the perspective of the business community, the threshold provides clarity on the Agency's enforcement posture with regard to the large majority of horizontal mergers, removing a potential stumbling block to business planning.

The market characteristics that are indicative of whether a horizontal merger is likely to substantially create or enhance market power, such as concentration, elasticities of demand, the nature of competitive interactions among market participants, and ease of entry, provide no information on the merger's potential to achieve efficiencies. This independence has two consequences for horizontal merger enforcement. First, it allows many horizontal merger investigations to be terminated at an early phase based on the likely absence of market power post-merger, without the need to consider cognisable efficiencies.²⁰ This

¹⁶ *Id.*, Section 3.

¹⁷ *Id.*, Section 4.

¹⁸ For a general discussion of inference issues in merger enforcement, see Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 *Antitrust Law Journal*, 375-422 (2005); see also Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, Economic Analysis Group Discussion Paper 07-3 (2007), at 3. For discussions within the context of vertical restraints and/or vertical mergers, see Michael W. Klass & Michael A. Salinger, *Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases?*, 40 *Antitrust Bulletin*, 667-698 (1995); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust as a Problem of Inference*, 23 *International Journal of Industrial Organization*, 639-664 (2005); Michael A. Salinger, *Is it Live or is it Memorex? Models of Vertical Mergers and Antitrust Enforcement*, presentation to the Association of Competition Economics Seminar on Non-Horizontal Mergers (2005).

¹⁹ The threshold also limits the risk that the parties to a procompetitive horizontal merger are burdened by additional costs of investigative compliance (Type I error). For a general discussion of Type I and II errors see Heyer and Cooper et al., *supra* note 17.

²⁰ *Commentary*, *supra* note 10, at 1: "For more than 95% of the transactions reported under HSR [the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 USC. 18a], the Agencies promptly determine—i.e., within the initial fifteen or thirty day statutory waiting period that immediately follows HSR filings—that

economises on enforcement resources, as the Agency undertakes a detailed consideration of cognisable efficiencies only in the minority of cases in which a horizontal merger would otherwise have the potential to substantially lessen competition. Second, the more substantial a horizontal merger's potential for lessening competition, the greater must its cognisable efficiencies be for the Agency to conclude that the merger is not likely to be anticompetitive.

3.2 *Vertical Mergers*²¹

Vertical mergers have a stronger claim to being efficient than do horizontal mergers, given the fundamentally different effects of improved coordination between complements versus substitutes, as discussed above. This basic intuition can be overturned, however, if a vertical merger is shown to have a substantial horizontal effect of adversely affecting competition. Theories of competitive harm arising from vertical merger typically require the presence of market power, which is absent in unconcentrated markets. Thus vertical mergers, like horizontal mergers, merit having an unconcentrated-market threshold in their assessment.²²

Vertical mergers also differ from horizontal mergers, however, in that market power and efficiency issues are typically closely linked for vertical mergers, given the pervasiveness of double-markup problems in arm's-length dealings between vertically related parties. The greater the market power (in its respective market) of each party to a vertical merger, the greater the potential for their merger to increase efficiency by eliminating the double markup between them. It is not necessarily the case that a vertical merger poses greater risk of competitive harm the greater is the market power of each merging party. This counsels that great care be taken when analysing vertical mergers.

By improving coordination between the merging parties and thereby mitigating problems such as double markup and moral hazard, the overwhelming majority of vertical mergers increase efficiency.

Not all improvements in coordination between the parties to a vertical merger are efficiency-increasing, however. For example,²³ an upstream firm dealing at arm's length may not take into account the effect on its downstream contracting partner of the prices the upstream firm charges to downstream rivals. The higher the input price that downstream rivals face, the more easily could the downstream partner steal business from rivals and also profitably raise its own price. Vertical merger could internalise

a substantial lessening of competition is unlikely." *Commentary*, *supra* note 10, at 2: "If the conditions necessary for an anticompetitive effect are not present...the Agencies terminate their review because it would be unnecessary to address all of the analytical elements" enumerated in the HMG. For a history of the evolution of the treatment of efficiencies, see William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 *Antitrust Law Journal*, 207-251.

²¹ The Non-Horizontal Merger Guidelines from Section 4 of the Department's 1984 *Merger Guidelines*, available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>, remain in effect, although developments in economic understanding over the last 23 years have refined the Agencies' enforcement policy in various respects. See 1 ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002) 362-68.

²² Vertical mergers, like horizontal ones, typically allow some elimination of redundant overhead costs. In addition, problems of moral hazard and double markup are pervasive in arm's length dealings between suppliers and their customers. The mitigation of these problems is a typical source of efficiency for vertical mergers, but not for horizontal mergers.

²³ Note also that if an industry's price is regulated, a vertical merger by a regulated firm into an unregulated industry could allow the merged firm to evade the price regulation by requiring customers to purchase an unregulated product at high prices. Presumably the industry's regulators would attempt to prevent this type of regulatory evasion.

this pricing externality, resulting in the upstream affiliate raising price to the downstream affiliate's rivals, thereby raising the rival's costs and rendering them less effective competitors. This is a source of competitive harm that could result in higher output prices. The risk of such a price squeeze is low, however, if the upstream market is unconcentrated or entry into the market is easy, so that downstream rivals have alternative sources of supply competing for their input purchases.

A closely related competitive concern is that vertical merger could lead to the outright foreclosure of unintegrated rivals either upstream or downstream, by withdrawing capacity from the market to deploy it internally. This withdrawal of capacity from rivals could cause those rivals to face higher costs and so ultimately lead to higher output prices. However, to the extent that the merging parties deal with other firms pre-merger, ending such trade in favor of internal supply will typically free up capacity elsewhere in the market, so that unintegrated rivals may be able to realign their supply relationships post-merger to avoid foreclosure.

A vertical merger may also affect the stability of explicit collusion. For example, a vertical merger might facilitate explicit collusion by making some prices more transparent, so possibly lowering the costs of monitoring compliance with a horizontal price-fixing agreement.²⁴ Vertical merger may also destabilise a cartel, however. For example, the elimination of a double markup may render an integrated firm more disruptive to a cartel, by sharpening the firm's incentive to lower price and expand output.

A growing theoretical economics literature has explored circumstances under which a vertical merger may cause competitive harm.²⁵ Theoretical models of vertical merger typically reach ambiguous conclusions about competitive effects, or reach conclusions that exemplify the potential for competitive harm from vertical merger but are not robust to plausible changes in the models' underlying assumptions. Given the fragility of these theoretical results, they offer no sound general guidance to vertical merger enforcement policy.

Two Federal Trade Commission cases decided in 2002 underscore the fact that any vertical enforcement action should have a strong empirical basis.

In the Commission's *Cytoc/Digene* case, Digene was the only company in the US selling a DNA-based test for the human papillomavirus (HPV), which is believed to cause nearly all cervical cancer cases. Cytoc's products account for 93% of US liquid-based Pap tests, which are the most widely used sensitive primary screening tool for the detection of cervical cancer. It is vitally important for manufacturers of liquid Pap tests to have viable access to Digene's HPV test. By purchasing Digene, Cytoc would have been in a position to limit its only existing competitor by limiting access to Digene's HPV test. In a similar manner, it could also have thwarted the entry of other firms that had planned to begin selling liquid Pap tests in the near future. The proposed acquisition would have eliminated future competition from Digene's HPV test itself, both in conjunction with Pap testing and later on a stand-alone basis to test for cervical cancer. Moreover, for years into the future, TriPath (the other liquid pap test competitor) and other potential new entrants would have been substantially impeded from competing without the merged firm's

²⁴ Similarly, vertical integration may sometimes lead to elevated prices in an oligopoly setting in which firms recognize the interdependence of their unilateral pricing decisions on their profits.

²⁵ For surveys and analyses of this literature, see Klass & Salinger and Cooper et al., *supra* note 16, Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, IDEI working paper (2003), Jeffrey Church, *The Impact of Vertical and Conglomerate Mergers on Competition*, Final Report to the Directorate General for Competition, European Commission (2004), and Simon Bishop, Andrea Lofaro, Francesco Rosati & Juliet Young, *The Efficiency-Enhancing Effects of Non-Horizontal Mergers*, Report to the Enterprise and Industry Directorate General, European Commission (2005).

cooperation. Therefore, the Commission concluded that the potential for consumer harm was very real, and the Commission voted to block the merger.²⁶

In the *Synopsys/Avant!* merger, the situation was quite different. The merger involved software that is used in the design of computer chips. Synopsys had a nearly 90% share of “logical synthesis” or “front-end” tools for chip design, and Avant! had a share of about 40% of so-called “place and route” or “back-end” tools. The major issue was whether the merger would give Synopsys the ability and incentive to enhance the back-end competitive position of the formerly independent Avant!, by making it harder for competing back-end products to communicate with Synopsys's dominant front-end product. In contrast to *Cytec/Digene*, customers supported the *Synopsys* merger because it was viewed as an important potential solution to a pressing industry need. Customers hoped it would speed the development of a relatively seamless integration between the front-end and back-end tools, resulting in a vastly improved product. Such integration is required in order to develop ever-shrinking chips economically. Moreover, although there were several theories of potential competitive harm, the facts did not suggest that Synopsys would have either the incentive or the ability to foreclose competitive products sufficiently to harm consumers. After considering all the facts, the Commission voted unanimously to allow the merger.²⁷

In 2001, the US Department of Justice (DOJ) challenged the merger of Premdor and Masonite. Premdor was the world's largest producer of interior molded doors, while Masonite was a major producer of interior molded doorskins, a key input into the production of interior molded doors. Although the merger was primarily vertical, it also had a significant horizontal component, as Premdor had recently acquired some capacity to produce doorskins in competition with Masonite. While Premdor's presence upstream in the doorskin market was small, the firm had the potential to expand doorskin production in response to any explicit collusion between Masonite and the other major doorskins supplier. Doorskins are homogeneous products, concentration in this market was high and entry was difficult—characteristics that tend to make explicit collusion possible. DOJ concluded that the merger of Premdor and Masonite would remove a substantial impediment to explicit collusion in doorskins. Pursuant to a consent decree, the merged entity divested a doorskins production facility and other assets to restore competition in the doorskins market.²⁸

4. Conclusion

In a dynamic economy, changing economic conditions continually shift the boundaries of firms that best coordinate the allocation of economic resources. Assessing the likely effects of a given merger requires an understanding of the contractual alternatives to integration. Given the incompleteness of contracts, parties typically face coordination problems that integration tends to mitigate. The policy implications of improved coordination differ sharply, however, according to whether substitutes or complements are involved. While horizontal and vertical mergers both typically (although not invariably) increase efficiency, vertical mergers have a stronger claim to being efficient, because coordination between complements tends to lower prices, while coordination among substitutes tends to raise prices.

Vertical mergers, like horizontal mergers, merit having an unconcentrated-markets threshold in their assessment. Assessment of vertical mergers differs from that of horizontal mergers, however, in that

²⁶ See Press Release, Federal Trade Commission Seeks to Block Cytec' Corporation's acquisition of Digene Corporation, FTC File No. 021-0098 (June 24, 2002), *available at*: http://www.ftc.gov/opa/2002/06/cytec_digene.htm.

²⁷ See Press Release, Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc., FTC File No. 021-0049 (July 26, 2002), *available at*: <http://www.ftc.gov/opa/2002/07/avant.htm>.

²⁸ See *US v. Premdor, Inc.*, No. 1:01CV01696 (D.D.C. 2001).

market power and efficiency issues are typically closely linked for vertical mergers, given the pervasiveness of double-markup problems among vertical relationships at arm's length. A vertical merger's potential for creating efficiencies by eliminating a double markup tends to increase with the market power of each merging party. Even when a vertical merger has the potential for anticompetitive effects, these effects are often offset by the inherent efficiency of mitigating double marginalisation.

For these reasons vertical mergers generally raise fewer competitive concerns than do horizontal mergers. An overly aggressive enforcement posture toward vertical mergers would run the risk of hindering the ongoing realignment of firm boundaries that is necessary to maintaining an efficient allocation of resources in a dynamic economy.

EUROPEAN COMMISSION

**DRAFT COMMISSION GUIDELINES ON THE ASSESSMENT
OF NON-HORIZONTAL MERGERS**

1. Introduction

Article 2 of the EC Merger Regulation¹ provides that the European Commission has to appraise mergers with a view to establishing whether or not they "would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position", in the EU market or a substantial part of it.

In 2004, the European Commission adopted its Notice on the assessment of horizontal mergers under the EC Merger Regulation ("EC Horizontal Merger Guidelines"). In these Merger Guidelines, the Commission sets out the analytical approach it takes in assessing the likely competitive impact of mergers between actual or potential competitors (so-called horizontal mergers).

The Commission wishes to provide similar guidance on the assessment on non-horizontal mergers, covering concentrations of a vertical and conglomerate nature. For this purpose, the Commission intends to adopt Draft Guidelines on the assessment of non-horizontal mergers in the course of February 2007. These Draft Guidelines will form the subject of a public consultation. Through this consultation, which is scheduled to last for a period of three months, the Commission hopes to receive valuable feed back on the content of the Draft Guidelines.

2. Overview of the Draft Non-Horizontal Merger Guidelines

The Draft Guidelines are structured in four main parts: (i) a general overview, (ii) the definition of "safe harbours" in terms of market shares and concentration levels, (iii) the assessment of vertical mergers, (iv) the assessment of conglomerate mergers.

An important message that the Commission wishes to convey in the Draft Guidelines is that non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers.

First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market. As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.

Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other.² The integration of complementary activities or

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1.

² Products or services are called "complementary" (or "economic complements") when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into

products within a single firm may produce significant efficiencies and be pro-competitive. For instance, in vertical mergers, efforts to increase sales at one level (e.g. by lowering price, or by stepping up innovation) will benefit sales at the other level. Depending on the market conditions, integration may increase the incentive to carry out such efforts. In particular, after the vertical integration, lowering the mark-up downstream may lead to increased sales not only downstream but also upstream and vice versa. This is often referred to as the “internalisation of double mark-ups”.

Nonetheless, there are circumstances in which non-horizontal mergers may significantly impede effective competition. This is essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers.

The Draft Guidelines make clear in this respect that when intermediate customers are actual or potential competitors of the parties to the merger, the Commission will focus on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in and of itself viewed as a problem. It is the impact on effective competition on which the Commission will focus, not the mere impact on competitors at some level of the supply chain³.

The Draft Guidelines state in this context 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.

Accordingly, the Draft specifies “safe harbours” so as to avoid analysis in cases which are clearly unlikely to raise competition issues. The Commission is unlikely to find concern in non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below [30%]⁴ and where the post-merger HHI is below [2000]. In practice, it will not extensively investigate such mergers, except where some special circumstances are present, which render market shares less useful as a proxy for the competitive conditions in the market.

As to the possible anticompetitive effects of non-horizontal mergers, the Draft Guidelines outline two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects.

Non-coordinated effects may principally arise when non-horizontal mergers give rise to *foreclosure*. In the Draft Guidelines, the term “foreclosure” is used to describe any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete. As a result of such foreclosure, the merging companies – and, possibly, some of its competitors as well – may be able to profitably increase the price

the final product. For instance, both production and distribution fulfil an indispensable role in getting a product to the market.

³ One example of this approach can be found in the case COMP/M.3653 Siemens/VA Tech (2005), in which the Commission assessed the effect of the transaction on the two complementary markets for electrical rail vehicles and electrical traction systems for rail vehicles, which combine into a full rail vehicle. While the merger allegedly reduced the independent supply of electrical traction systems, there would still be several integrated suppliers which could deliver the rail vehicle. The Commission thus concluded that even if the merger had negative consequences for independent suppliers of electrical rail vehicles “sufficient competition would remain in the relevant downstream market for rail vehicles”.

⁴ In analogy to the indications given in Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Official Journal L 336, 29.12.1999, pages 21-25.

charged to consumers or cause harm to consumers in other ways. These instances are referred to as “anticompetitive foreclosure”.

In assessing the likelihood of an anticompetitive foreclosure scenario, the Commission will examine, first, whether the merged entity would have, post-merger, the ability to substantially foreclose a market, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.

In practice, these three factors are often examined together since they are closely intertwined. Nonetheless, the Commission finds it useful to make clear that even though the merged entity may have the ability to foreclose, it may not have the incentive to do so. Second, even where the merged entity may have the ability and incentive to foreclose, this may not have a significant detrimental effect on consumers. The latter hold true, in particular, when the merger gives rise to substantial efficiencies.

In assessing the effects of a merger, the Commission will consider both the possible anti-competitive effects arising from the merger and the pro-competitive effects stemming from efficiencies identified and substantiated by the parties.

Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms, which were coordinating prior to the merger.

3. Conclusion and next steps

Through the adoption of Guidelines on the assessment of non-horizontal mergers, the Commission aims at giving further guidance on its policy in this area. By providing a coherent analytical framework, the Guidelines will contribute to the level of predictability of the Commission's assessment of non-horizontal mergers.

In the first instance, Draft Guidelines are adopted for public consultation. The Commission would warmly welcome any comments on the Draft from the delegations to the OECD and from the public at large.

ANNEX

DRAFT COMMISSION NOTICE

**GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS UNDER THE COUNCIL
REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS**

DRAFT COMMISSION NOTICE**Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings****Draft - for the purpose of public consultation****I. INTRODUCTION**

- 1 Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹ (hereinafter: the “Merger Regulation”) provides that the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2 (2) and (3), whether or not a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, in the common market or a substantial part of it.
- 2 This document develops guidance as to how the Commission assesses concentrations² where the undertakings concerned are active on distinct relevant markets³. In this document, these concentrations will be called “non-horizontal mergers”.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004, Official Journal L 24, 29.01.2004, p. 1.

² The term *concentration* used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this Document, unless otherwise specified, the term “merger” will be used as a synonym for concentration and therefore cover all the above types of transactions.

³ Guidance on the assessment of mergers involving undertakings which are actual or potential competitors on the same relevant market (“horizontal mergers”) is given in the Commission Notice: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. OJ C 31, 05.02.2004, pages 5-18 (“Notice on Horizontal Mergers”).

- 3 Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers.
- 4 Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the “upstream firm”) merges with one of its distributors (the “downstream firm”), this is called a vertical merger⁴.
- 5 Conglomerate mergers are mergers between firms that are in a relationship, which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers)⁵. In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).
- 6 The general guidance already given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of the present document is to concentrate on the competition aspects that are relevant to the specific context of non-horizontal mergers. In addition, it will set out the Commission’s approach to market shares and concentration thresholds in this context.
- 7 In practice, mergers may entail both horizontal and non-horizontal effects. This may for instance be the case where the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned⁶. In such a case, the Commission will appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices⁷.
- 8 The guidance set out in this document draws and elaborates on the Commission’s evolving experience with the appraisal of non-horizontal mergers under Regulation No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The

⁴ In the present Document, the terms “downstream” and “upstream” are used to describe the (potential) commercial relationship that the merging entities have with each other. Generally the commercial relationship is one where the “downstream” firm purchases the output from the “upstream” firm and uses it as an input in its own production, which it then sells on to its customers. The market where the former transactions take place is referred to as the intermediate market (upstream market). The latter market is referred to as the downstream market.

⁵ The distinction between conglomerate mergers and horizontal mergers may be subtle, e.g. when a conglomerate merger involves products that are weak substitutes for each other. The same holds true for the distinction between conglomerate mergers and vertical mergers. For instance, products may be supplied by some companies with the inputs already integrated (vertical relationship), whereas other producers leave it to the customers to select and assemble the inputs themselves (conglomerate relationship).

⁶ For instance, in certain markets upstream or downstream firms are often well-placed potential entrants. See, e.g., in the electricity and gas sector, Case COMP/M.3440 - EDP/ENI/GDP (2004). The same may hold for producers of complementary products. See, e.g., in the liquid packaging sector, Case COMP/M.2416 - TetraLaval/Sidel (2001).

⁷ Guidance on the assessment of mergers with a potential competitor is given in the Notice on horizontal mergers, in particular at paragraphs 58 to 60 thereof.

Commission may revise the notice on non-horizontal mergers from time to time in the light of future developments and of evolving insight.

- 9 The Commission's interpretation of the Merger Regulation as regards the appraisal of non-horizontal mergers is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. OVERVIEW

- 10 Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An "increase in market power" in this context refers to the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition⁸.
- 11 Non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers.
- 12 First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market⁹. As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.
- 13 Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are *complementary* to each other.¹⁰ The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. For instance, in vertical mergers, efforts to increase sales at one level (e.g. by lowering price, or by stepping up innovation) will benefit sales at the other level. Depending on the market conditions, integration may increase the incentive to carry out such efforts. In particular, after the vertical integration, lowering the mark-up downstream may lead to increased sales not only downstream but also upstream and vice versa. This is often referred to as the "internalisation of double mark-ups".
- 14 Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in

⁸ In this Document, the expression "increased prices" is often used as shorthand for these various ways in which a merger may result in competitive harm. The expression should be understood to also cover situations where, for instance, prices are decreased less, or are less likely to decrease, than they otherwise would have without the merger and where prices are increased more, or are more likely to increase, than they otherwise would have without the merger.

⁹ Such a loss of direct competition can, nevertheless, arise where one of the merging firms is a potential competitor in the relevant market where the other merging firm operates. See paragraph 7 above.

¹⁰ In this document, products or services are called "complementary" (or "economic complements") when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into the final product. For instance, both production and distribution fulfil an indispensable role in getting a product to the market.

which the products are sold. Similarly, mergers which involve products belonging to a range of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping.

- 15 However, there are circumstances in which non-horizontal mergers may significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. This is essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers.
- 16 In the context of competition law, the concept of “consumers” encompasses intermediate and ultimate consumers¹¹. When intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in and of itself a problem. It is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain¹².
- 17 There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects¹³.
- 18 Non-coordinated effects may principally arise when non-horizontal mergers give rise to *foreclosure*. In this document, the term “foreclosure” will be used to describe any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete. As a result of such foreclosure, the merging companies – and, possibly, some of its competitors as well – may be able to profitably increase the price¹⁴ charged to consumers. These instances will be referred to as “anticompetitive foreclosure”.
- 19 Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms, which were coordinating prior to the merger.
- 20 In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions

¹¹ See Article 2(1)(b) of the Merger Regulation.

¹² One example of this approach can be found in the case COMP/M.3653 Siemens/VA Tech (2005), in which the Commission assessed the effect of the transaction on the two complementary markets for electrical rail vehicles and electrical traction systems for rail vehicles, which combine into a full rail vehicle. While the merger allegedly reduced the independent supply of electrical traction systems, there would still be several integrated suppliers which could deliver the rail vehicle. The Commission thus concluded that even if the merger had negative consequences for independent suppliers of electrical rail vehicles “sufficient competition would remain in the relevant downstream market for rail vehicles”

¹³ See Section II of the Notice on Horizontal Mergers.

¹⁴ For the meaning of the expression “increased prices” see footnote 8.

that would have prevailed without the merger¹⁵. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison. The Commission may take into account future market developments that result from expected regulatory changes.¹⁶

- 21 In its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the pro-competitive effects stemming from efficiencies identified and substantiated by the parties. The Commission examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the overall anti-competitive effect of a merger, the more likely the Commission is to raise competition concerns.
- 22 This document describes the main scenarios of competitive harm and sources of efficiencies in the context of vertical mergers and, subsequently, in the context of conglomerate mergers.

III. MARKET SHARE AND CONCENTRATION LEVELS

- 23 Non-horizontal mergers pose no threat to effective competition unless the merged entity has market power in at least one of the markets concerned.
- 24 Market shares and concentration levels provide useful first indications of the market power and the competitive importance of both the merging parties and their competitors.¹⁷
- 25 The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below [30%]¹⁸ and where the post-merger HHI is below [2000]. In practice, it will not extensively investigate such mergers, except where special circumstances such as, for instance, one or more of the following factors are present:
- (a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation;

¹⁵ By analogy, in the case of a merger that has been implemented without having been notified, the Commission would assess the merger in the light of the competitive conditions that would have prevailed without the implemented merger.

¹⁶ This may be particularly relevant in cases where effective competition is expected to arise in the future as a result of market opening. See e.g. Case COMP/M.3696 - E.ON/MOL (2005), at points 457 to 463.

¹⁷ See also Section III of the Notice on Horizontal Mergers. The calculation of market shares depends critically on market definition (see Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372/5, 9 December 1997). Special care must be taken in contexts where vertically integrated companies supply products internally.

¹⁸ In analogy to the indications given in Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Official Journal L 336, 29.12.1999, pages 21-25.

- (b) there are significant cross-shareholdings or cross-directorships among the market participants;
- (c) one of the merging firms is a firm with a high likelihood of disrupting coordinated conduct;
- (d) indications of past or ongoing coordination, or facilitating practices, are present.

26 The Commission will use the above market share thresholds and HHI levels as an initial indicator of the absence of competition concerns. However, they do not give rise to a legal presumption. The Commission is of the opinion that presenting market share and concentration levels above which there are competition concerns is less appropriate in this context. Indeed, market power in at least one of the markets concerned is a necessary condition for competitive harm, not a sufficient condition¹⁹.

IV. VERTICAL MERGERS

27 This section sets out the Commission's framework of analysis in the context of vertical mergers. In its assessment, the Commission will consider both the possible anti-competitive effects arising from vertical mergers and the pro-competitive effects stemming from efficiencies identified and substantiated by the parties.

A. Non-coordinated effects: foreclosure

28 A vertical merger may significantly impede effective competition through non-coordinated effects mainly when it gives rise to foreclosure. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. As a result of such foreclosure, the merging companies – and, possibly, some of its competitors as well – may be able to profitably increase the price charged to consumers²⁰.

29 Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure)²¹.

1. Input foreclosure

30 A merger may significantly impede effective competition through input foreclosure where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input

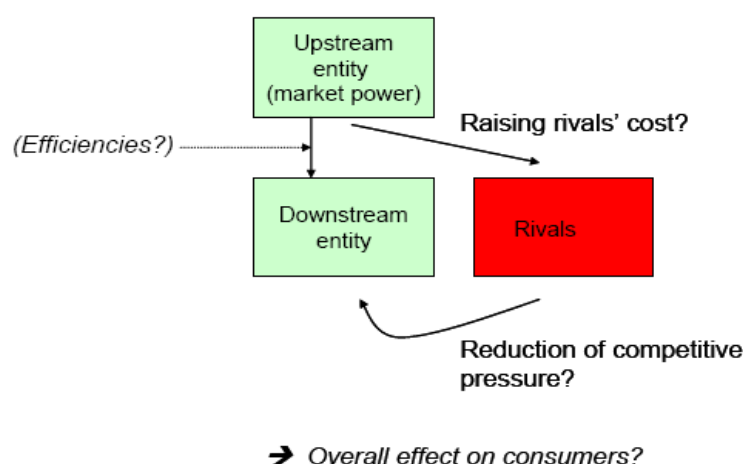
¹⁹ See Sections III and IV.

²⁰ For the meaning of the expression "increased prices" see footnote 8. For the meaning of "consumers", see paragraph 16.

²¹ See Merger Regulation, Article 2(1)(b), referring to "*access to supplies*" and "*access to [...] markets*", respectively.

under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers. Any efficiencies resulting from the merger, however, may lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive. A graphical presentation of this mechanism is provided in Figure 1.

Figure 1 - Input foreclosure



- 31 In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream. In practice, these factors are often examined together since they are closely intertwined.

*A. Ability to foreclose access to inputs*²²

- 32 Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges in supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger.²³ Further, the merged entity may opt for a specific choice of technology within the new firm which is not compatible with the technologies chosen by rival firms.²⁴ Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied. In its

²² The term “inputs” is used here as a generic term and may also cover services, access to infrastructure and access to intellectual property rights.

²³ See e.g. Case COMP/M.1693 - Alcoa/Reynolds (2000).

²⁴ See, e.g., Case COMP/M.2861 - Siemens/Drägerwerk/JV (2003).

assessment, the Commission may consider a series of alternative or complementary possible strategies.

- 33 Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, in particular, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market²⁵, or it may represent a significant source of product differentiation for the downstream product²⁶. It may also be that the cost of switching to alternative inputs is relatively high.
- 34 For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have market power in the upstream market. It is only in these circumstances that the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.
- 35 The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction, for example because they face binding capacity constraints or, more generally, face decreasing returns to scale²⁷. Also, the presence of exclusive contracts between the merged entity and independent input providers may limit the ability of downstream rivals to have adequate access to inputs.
- 36 When determining the extent to which input foreclosure may occur, it must be taken into account that the decision of the merged entity to rely on its upstream division's supply of inputs may also free up capacity on the part of the remaining input suppliers from which the downstream division used to purchase before. In fact, the merger may merely realign purchase patterns among competing firms.
- 37 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 independent suppliers with increased market

²⁵ For instance, an engine starter can be considered a critical component to an engine (Case T-210/01, *General Electric v. Commission* [2005], ECR II-000).

²⁶ For instance, personal computers are often sold with specific reference to the type of microprocessor they contain.

²⁷ For instance, in Case COMP/M.2322 - CRH/Addtek (2001; case withdrawn), the merger involved an upstream dominant supplier of cement and a downstream producer of pre-cast concrete products, both active in Finland. Imports of cement from the Baltic countries were capacity constrained, whereas imports from Russia at that time were deemed not be of sufficient quality to be a real alternative to the merged entity's supply of cement.

power²⁸. This increase in third-party market power will be greater the lower the degree of product differentiation between the merged entity and other upstream suppliers and the higher the degree of upstream concentration. However, the attempt to raise the input price may fail when independent input suppliers, faced with a reduction in the demand for their products (from the downstream division of the merged entity or from independent downstream firms), respond by pricing more aggressively²⁹.

- 38 In its assessment, the Commission may consider, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms would be likely to deploy. Such counterstrategies include the possibility of changing their production process so as to be less reliant on the input concerned or sponsoring the entry of new suppliers upstream.

B. Incentive to foreclose access to inputs

- 39 The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain from expanding sales downstream or, as the case may be, being able to raise price in that market.
- 40 The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream. Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals³⁰.
- 41 The incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture³¹. This share will normally be higher the less capacity constrained the merged entity will be relative to non-foreclosed downstream rivals and the more the products of the merged entity and foreclosed competitors are close substitutes³².

²⁸ The analysis of the likely effect of the removal of a competitive constraint is similar to the analysis of non-coordinated effects with horizontal mergers (See Section IV of the Notice on Horizontal Mergers)

²⁹ Also the nature of the supply contracts between upstream suppliers and the downstream independent firms may be important in this respect. For instance, when these contracts use a price system combining a fixed fee and a per-unit supply price, the effect on downstream competitors' marginal costs may be affected less than when these contracts involve only per-unit supply prices.

³⁰ It has to be considered that upstream and downstream margins may change as a result of the merger. This may impact upon the merged entity's incentive to engage in foreclosure.

³¹ See, e.g. Case COMP/M.3943 - Saint-Gobain/BPB (2005), point 78. The Commission noted that it would be very unlikely that BPB, the main supplier of plaster board in the UK, would cut back on supplies to rival distributors of Saint-Gobain, in part because expansion of Saint-Gobain's distribution capacity was difficult.

³² For instance, in Case COMP/M.2322 - CRH/Addtek (2001; case withdrawn), the merger involved an upstream dominant supplier of cement and a downstream producer of pre-cast concrete products in Finland. As national Finnish regulations for the construction sector had led to a substantial standardisation of pre-cast concrete products in Finland, the Commission considered that many

- 42 The incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals' costs. The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins³³.
- 43 In its assessment of the likely incentives of the merged firm, the Commission may take into account various considerations such as the ownership structure of the merged entity³⁴, the type of strategies adopted on the market in the past³⁵ or the content of internal strategic documents such as business plans.
- 44 In addition, when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels. This appraisal, however, does not require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them³⁶. Moreover, 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. In particular, the Commission will consider, on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law³⁷, (ii) the likelihood that this illegal conduct could be detected³⁸, and (iii) the penalties which could be imposed.

C. Overall likely impact on effective competition

- 45 A merger will raise competition concerns because of input foreclosure only if it would significantly impede effective competition in the downstream market.

customers would switch to the merged entity in case of a relative increase in the price of those competitors facing higher costs for cement.

³³ It must be noted that the less the merged firm can target a specific downstream market, the less it is likely to raise its prices for the input it supplies, as it would have to incur opportunity costs in other downstream markets. In this respect, the extent to which the merged entity can price discriminate when the merged entity supplies several downstream markets and/or ancillary markets may be taken into account (e.g. for spare parts).

³⁴ For instance, in cases where two companies have joint control over a firm active in the upstream market, and only one of them is active downstream, the company without downstream activities may have little interest in foregoing input sales. In such cases, the incentive to foreclose is likely to be smaller than when the upstream company is fully controlled by a company with downstream activities. See e.g. Case COMP/M.3440 - EDP/ENI/GDP (2004).

³⁵ The fact that, in the past, a competitor with a similar market position than the merged entity has stopped supplying inputs may demonstrate that it is commercially rational to adopt such a strategy (See e.g. Alcan/Pechiney, M. 3225 (2004), at point 40).

³⁶ Case C-12/03 P, Commission v. Tetra Laval BV, ECR I-000, paragraphs 74-76. Case T-210/01, General Electric v. Commission [2005], ECR II-000, at paragraph 73.

³⁷ Case T-210/01, General Electric v. Commission [2005], ECR II-000, specifically at points 74-75 and 311-312.

³⁸ For instance, in Case M.3696 E.ON/MOL (2005), points 433 and 443-446, the Commission attached importance to the fact that the national Hungarian regulator for the gas sector indicated that in a number of settings, although it has the right to control and to force market players to act without discrimination, it would not be able to obtain adequate information on the commercial behaviour of the operators. See also Case COMP/M.3440 - EDP/ENI/GDP (2004), point 424.

- 46 First, such anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market thereby leading to an upward pressure on their sales prices³⁹. Significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players⁴⁰, for instance because it is a close competitor of the vertically integrated firm⁴¹.
- 47 Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors. A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may also create a strong deterrent effect on potential entrants⁴². Effective competition on the downstream market may be significantly impeded by raising barriers to entry, in particular if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future⁴³.
- 48 If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated⁴⁴ or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.

³⁹ Where downstream prices are not likely to increase in the short run, foreclosed rivals may still lose significant sales to the merged entity. As a result of lower revenue streams, foreclosed rivals may be restricted in their ability to invest so as to further compete downstream, to the detriment of consumers in the future (See, for related concerns, the section on customer foreclosure)

⁴⁰ See e.g. Case COMP/M.3440 - EDP/ENI/GDP (2004).

⁴¹ A vertical merger may also allow an upstream supplier to exercise its market power more effectively. For example, a downstream buyer may be willing to pay a high price from an upstream monopolist if the latter does not subsequently sell additional quantities to a competitor. But once the terms of supply are fixed with one downstream firm, the upstream supplier may have an incentive to increase its supplies to other downstream firms, thereby making the first purchase unprofitable. Since downstream firms will anticipate this kind of opportunistic behavior, the upstream supplier will be unable to fully exploit its market power. Vertical integration may restore the upstream supplier's ability to commit not to expand input sales as this would harm its own downstream division.

⁴² See Case COMP/M.3696 - E.ON/MOL (2005), at point 662 et seq.

⁴³ See paragraph 20. It is important that regulatory measures aimed at opening a market are not rendered ineffective through the merger of vertically-related incumbent with market power thereby potentially closing off the market, or eliminating each other as potential entrants.

⁴⁴ See e.g. Case COMP/M.3653 - Siemens / VA Tech (2005), at point 164.

- 49 The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power⁴⁵ or the likelihood that entry upstream would maintain effective competition⁴⁶.
- 50 Further, the effect on competition needs to be assessed in light of efficiencies identified and substantiated by the merging parties⁴⁷. The Commission may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.
- 51 When assessing efficiencies in the context of non-horizontal mergers, the Commission applies the principles already set out in Section VII of the Notice on Horizontal Mergers. In particular, for the Commission to take account of efficiency claims in its assessment of the merger, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative⁴⁸.
- 52 Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive.
- 53 A vertical merger may allow the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger⁴⁹. Depending on the market conditions, reducing the combined mark-up (relative to a situation where pricing decisions at both levels are not aligned) may allow the vertically integrated firm to profitably expand output on the downstream market⁵⁰.
- 54 A vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs.
- 55 More generally, a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products. For instance, whereas before the merger, the upstream entity might have been reluctant to invest in the sales force of the downstream entity when such investment would also have benefited the sale of other upstream firms' products, the merged entity does not face such incentive problems.

⁴⁵ See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

⁴⁶ See Section VI on entry in the Notice on Horizontal Mergers.

⁴⁷ See Section VII on efficiencies in the Notice on Horizontal Mergers.

⁴⁸ See, more specifically, paragraphs 79 to 88 of the Notice on Horizontal Mergers.

⁴⁹ See also paragraph 13 above.

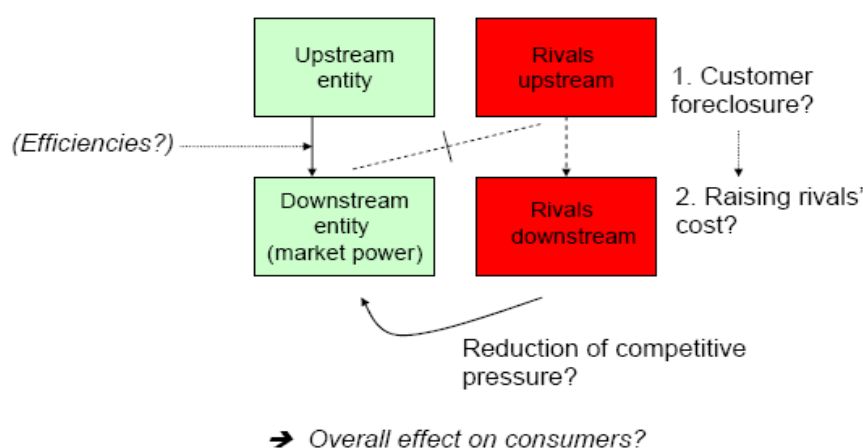
⁵⁰ It is important to recognise, however, that the problem of double mark-ups is not always present or significant pre-merger, for instance because the merging parties had already concluded a supply agreement with a price mechanism providing for volume discounts eliminating the mark-up. Besides, a merger may not fully eliminate the double mark-up when the supply of the input is capacity constrained and there is an important alternative use for the input. In such circumstances, the internal use of the input entails an opportunity cost for the vertically integrated company: using more of the input internally to increase output downstream means selling less in the alternative market. As a result, the incentive to use the input internally and increase output downstream is less than when there is no opportunity cost.

- 56 The above mentioned efficiencies may not always be merger specific in that vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anti-competitive effects.

2. Foreclosing access to customers

- 57 Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market⁵¹. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may allow the merged entity profitably to establish higher prices on the downstream market. Any efficiencies resulting from the merger, however, may lead the merged entity to reduce price, so that there is overall not a negative impact on consumers. A graphical presentation of this mechanism is provided in Figure 2.

Figure 2 - Customer foreclosure



- 58 In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals, second, whether it would have the incentive to reduce its purchases upstream, and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.

A. Ability to foreclose access to downstream markets

⁵¹ See footnote 4 for the definition of “downstream” and “upstream”.

- 59 A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its internal needs from its upstream division and, as a result, may stop purchasing from its upstream competitors. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger⁵².
- 60 When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output⁵³. For customer foreclosure to be a concern, it must be the case that the vertical merger involves an undertaking which is an important customer in the downstream market⁵⁴. If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground⁵⁵.
- 61 Customer foreclosure can lead to higher input prices only if there are significant economies of scale or scope in the input market⁵⁶. It is only in such circumstances that the ability to compete of upstream rivals, be they actual or potential, can be impaired.
- 62 In the presence of economies of scale or scope, customer foreclosure may render entry upstream by potential entrants unattractive by significantly reducing the revenue prospects of potential entrants. When customer foreclosure effectively results in entry deterrence, input prices may remain at a higher level than otherwise would have been the case, thereby raising the cost of input supply to downstream competitors of the merged firm.
- 63 Customer foreclosure can also lead to higher input prices when existing upstream rivals operate at or close to their minimum efficient scale. To the extent that customer foreclosure and the corresponding loss of output for the upstream rivals increases their variable costs of production, this may result in an upward pressure on the prices they charge to their customers operating in the downstream market.
- 64 Further, when customer foreclosure primarily impacts upon the revenue streams of upstream rivals, it may significantly reduce their ability and incentive to invest in cost reduction, R&D and product quality⁵⁷. This may reduce their ability to compete in the long run and possibly even cause their exit from the market.

⁵² For instance, in cases involving distribution, the merged entity may be less likely to grant access to its outlets under the same conditions as absent the merger.

⁵³ The loss of the integrated firm as a customer is normally less significant if that firm's pre-merger purchases from non-integrated firms are a small share of the available sales base for those firms. In that case, sufficient alternative customers are more likely to be available. The presence of exclusive contracts between the merged entity and other downstream firms may limit the ability of upstream rivals to reach a sufficient sales volume.

⁵⁴ See e.g. Case COMP/M.2822 - ENBW/ENI/GVS (2002) at points 54-57.

⁵⁵ See e.g. Case COMP/M.81 - VIAG / Continental Can (1991), point 51.

⁵⁶ A production process exhibits economies of scale or scope when the increased scale or scope of production leads to a reduction in unit cost. This includes, for example, also network effects.

⁵⁷ An input supplier foreclosed from an important customer may prefer to stay out of the market if it fails to reach some minimum viable scale following the investment. Such minimum viable scale may be

65 In its assessment, the Commission may take into account the existence of different markets corresponding to different uses for the input. If a substantial part of the downstream market is foreclosed, an upstream supplier may fail to reach efficient scale and may also operate at higher costs in the other market(s). Conversely, an upstream supplier may continue to operate efficiently scale if it finds other uses or secondary markets for its input without incurring significantly higher costs.

66 In its assessment, the Commission may consider, on the basis of the information available, whether there are effective and timely counter-strategies, sustainable over time, that the rival firms would be likely to deploy. Such counterstrategies include the likelihood that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure⁵⁸.

B. Incentive to foreclose access to downstream markets

67 The incentive to foreclose depends on the degree to which it is profitable. The merged entity faces a trade-off between the possible costs associated with not procuring products from upstream rivals and the possible gains from doing so, for instance, because it allows the merged entity to raise price in the upstream or downstream markets.

68 The costs associated with reducing purchases from rival upstream suppliers are higher, when the upstream division of the integrated firm is less efficient than the foreclosed suppliers. Such costs are also higher if the upstream division of the merged firm is capacity constrained or rivals' products are more attractive due to product differentiation.

69 The incentive to engage in customer foreclosure further depends on the extent to which the upstream division of the merged entity can benefit from possibly higher price levels in the upstream market arising as a result of upstream rivals being foreclosed. The incentive to engage in customer foreclosure also becomes higher, the more the downstream division of the integrated firm can be expected to enjoy the benefits of higher price levels downstream resulting from the foreclosure strategy. In this context, the greater the market shares of the merged entity's downstream operations, the greater the base of sales on which to enjoy increased margins⁵⁹.

70 When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and

achieved, however, if a potential entrant has access to a broader customer base including customers in other relevant markets. See Case No. COMP/M. 1879 – Boeing/Hughes (2000); Case No. COMP/M.2978 - Lagardère/Natexis/VUP (2003);

⁵⁸ For instance, in Case COMP/M.1879 – Boeing/Hughes (2000), point 100, it was considered, among several other factors, that in view of the high fixed costs involved, if competing satellite launch vehicle providers were to become less cost-competitive relative to the merged entity, they would try to cut prices in order to salvage volume and recoup at least part of their fixed costs rather than accept losing a contract and incur a higher loss. The most likely impact would therefore be greater price competition rather than market monopolisation.

⁵⁹ If the vertically integrated firm partially supplies inputs to downstream competitors it may benefit from the ability to expand sales, or as the case may be, to increase input prices.

the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful⁶⁰.

C. Overall likely impact on effective competition

- 71 Foreclosing rivals in the upstream market may have an adverse impact in the downstream market and harm consumers. By denying competitive access to a significant customer base for the foreclosed rivals' (upstream) products, the merger may reduce their ability to compete in the foreseeable future. As a result, rivals downstream are likely to be put at a competitive disadvantage, for example in the form of raised input costs. In turn, this may allow the merged entity profitably to reduce the overall output on the downstream market, thus leading to price increases.
- 72 The negative impact on consumers may take some time to materialise when the primary impact of customer foreclosure is on the revenue streams of upstream rivals, reducing their incentives to make investments in cost reduction, product quality or in other competitive dimensions so as to remain competitive.
- 73 It is only when a sufficiently large fraction of upstream output is affected by the revenue decreases resulting from the vertical merger that the merger may significantly impede effective competition on the upstream market. If there remain a number of upstream competitors that are not affected, competition from those firms may be sufficient to prevent prices from rising in the upstream market and, consequently, in the downstream market. Sufficient competition from these non-foreclosed upstream firms requires that they do not face barriers to expansion e.g. through capacity constraints or product differentiation⁶¹. When the reduction of competition upstream affects a significant fraction of output downstream, the merger is likely, as with input foreclosure, to result in a significant increase of the price level in the downstream market and, therefore, to significantly impede effective competition⁶².
- 74 Effective competition on the upstream market may also be significantly impeded by raising barriers to entry to potential competitors. This may be so in particular if customer foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. In such a context, customer foreclosure and input foreclosure may thus be part of the same strategy. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future⁶³.
- 75 The effect on competition must be assessed in light of countervailing factors such as the presence of countervailing buyer power⁶⁴ or the likelihood that entry would maintain effective competition in the upstream or downstream markets⁶⁵.

⁶⁰ The analysis of these incentives will be conducted as set out in para 44 above.

⁶¹ The analysis of such non-coordinated effects bears similarities with the analysis of non-coordinated effects in horizontal mergers (See Section IV of the Notice on Horizontal Mergers).

⁶² See paragraph 45-48 of the present Notice.

⁶³ It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.

⁶⁴ See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

- 76 Further, the effect on competition needs to be assessed in light of efficiencies identified and substantiated by the merging parties⁶⁶.

B. Other non-coordinated effects

- 77 The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals⁶⁷. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers⁶⁸. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

C. Coordinated effects

- 78 As set out in Section IV of the Notice on Horizontal Mergers, a merger may change the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger⁶⁹.
- 79 Market coordination may arise where competitors are able, without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. In a normal competitive setting, each firm constantly has an incentive to compete. This incentive is ultimately what keeps prices low, and what prevents firms from jointly maximising their profits. Coordination involves a departure from normal competitive conditions in that firms, are able to sustain prices in excess of what independent short term profit maximisation would yield. Firms will refrain from undercutting the high prices charged by their competitors in a coordinated way because they anticipate that such behaviour would jeopardise coordination in the future. For coordinated effects to arise, the profit that firms could make by competing aggressively in the short term ("deviating") has to be less than the expected reduction in revenues that this behaviour would entail in the longer term, as it would be expected to trigger an aggressive response by competitors ("a punishment").
- 80 Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as

⁶⁵ See Section VI on entry in the Notice on Horizontal Mergers.

⁶⁶ For the assessment of efficiencies in a vertical context, see Section V.A.1 above.

⁶⁷ See Case COMP/M.1879 – Boeing/Hughes (2000); Case COMP/M.2510 – Cendant/Galileo, point 37; Case COMP/M.2738 – Gees/Unison, point 21; Case COMP/M.2925 – Charterhouse/CDC/Telediffusion de France, point 37-38; Case COMP/M.3440 – EDP/ENL/GDP (2004).

⁶⁸ See e.g. Case COMP/M.2822 – ENBW/ENI/GVS (2002), at point 56; Case COMP/M.3440 – EDP/ENI/GDP (2004), points 368-379; Case COMP/M.3653 – Siemens/VA Tech (2005) points 159-164.

⁶⁹ See Case COMP/M.3101 – Accor/Hilton/Six Continents, points 23-28.

current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination⁷⁰.

Reaching terms of coordination

- 81 A vertical merger may make it easier for the firms in the upstream or downstream market to reach a common understanding on the terms of coordination.
- 82 For instance, when a vertical merger leads to foreclosure⁷¹, it results in a reduction in the number of effective competitors in the market. Generally speaking, a reduction in the number of players makes it easier to coordinate among the remaining market players.
- 83 Vertical mergers may also increase the degree of symmetry between firms active in the market⁷². This may increase the likelihood of coordination by making it easier to reach a common understanding on the terms of coordination. Likewise, vertical integration may increase the level of market transparency, making it easier to coordinate among the remaining market players.
- 84 Further, a merger may involve the elimination of a maverick in a market. A maverick is a supplier that for its own reasons is unwilling to accept the co-ordinated outcome and thus maintains aggressive competition. The vertical integration of the maverick may alter its incentives to such an extent that co-ordination will no longer be prevented⁷³.

Monitoring deviations

- 85 Vertical integration may facilitate coordination by increasing the level of market transparency between firms through access to sensitive information on rivals or by making it easier to monitor pricing. Such concerns may arise, for example, if the level of price transparency is higher downstream than upstream. This could be the case when prices to final consumers are public, while transactions at the intermediate market are confidential. Vertical integration may give upstream producers control over final prices and thus base co-ordination on those prices.
- 86 When it leads to foreclosure, a vertical merger may also induce a reduction in the number of effective competitors in a market. A reduction in the number of players may make it easier to monitor each other's actions in the market.

Deterrent mechanisms

⁷⁰ See Case T-342/99, *Airtours v Commission*, [2002] ECR II-2585, paragraph 62.

⁷¹ Foreclosure would have to be shown by the Commission along the lines of Part A of this section.

⁷² See Case COMP/M.2389 – *Shell/DEA*; Case COMP/M.2533 – *BP/EON*.

⁷³ The incentive of a vertically integrated firm to participate in coordination at the upstream level may be increased when such a course of action is in line with a strategy of raising downstream rivals' cost, which, in turn, may confer market power to the merged entity's downstream division. Alternatively, coordination downstream may avoid that downstream competitors turn to other, possibly less attractive sources of supply.

- 87 Vertical mergers may further improve the scope for ensuring that coordinating firms find it in their best interest to adhere to the terms of coordination. For instance, a vertical integrated company may be in a position to more effectively punish rival companies when they chose to deviate from the terms of coordination, because it is either a crucial customer or supplier to them⁷⁴.

Reactions of outsiders

- 88 Vertical mergers may reduce the scope for outsiders to destabilise the coordination by increasing barriers to enter the market or otherwise limiting the ability to compete on the part of outsiders to the coordination.
- 89 A vertical merger may also involve the elimination of a disruptive buyer in a market. If upstream firms view sales to a particular buyer as sufficiently important, they may be tempted to deviate from the terms of co-ordination in an effort to secure their business. Similarly, a large buyer may be able to tempt the co-ordinating firms to deviate from these terms by concentrating a large amount of its requirements on one supplier or by offering long term contracts. The acquisition of such a buyer may increase the risk of co-ordination in a market.

V. CONGLOMERATE MERGERS

- 90 Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets⁷⁵ (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use).
- 91 Whereas it is acknowledged that conglomerate mergers in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition.

A. Non-coordinated effects: foreclosure

- 92 The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage⁷⁶ a strong market position from one market to another by means of tying or bundling or other exclusionary practices⁷⁷. Tying and bundling as

⁷⁴ For instance, in Case COMP/M.2322 - CRH/Addtek (2001; case withdrawn), the merger involved an upstream dominant supplier of cement and a downstream producer of pre-cast concrete products, both active in Finland. The Commission held that the new entity would be able to discipline the downstream rivals by using the fact that they would be highly dependent on cement supplies of the merged entity. As a result, the downstream entity would be able to increase the price of its pre-cast concrete products while making sure that the competitors would follow these price increases and avoiding that they turn to cement imports from the Baltic states and Russia.

⁷⁵ See also Form CO, Section IV, 6.3 (c).

⁷⁶ There is no received definition of "leveraging" but, in a neutral sense, it is being able to increase sales of a product in one market (the "tied market" or "bundled market"), by virtue of the strong market position of the product to which it is tied or bundled (the "tying market" or "leveraging market").

⁷⁷ These concepts are defined further below.

such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

- 93 In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers⁷⁸. In practice, these factors are often examined together as they are closely intertwined.

A. Ability to foreclose

- 94 The most immediate way in which the merged entity may be able to use its market power in one market to foreclose competitors in another is by conditioning sales in a way that links the products in the separate markets together. This is done most directly either by bundling or tying.
- 95 "Bundling" relates to the way products are offered and priced by the merged entity. One can distinguish in this respect between pure bundling and mixed bundling. In the case of pure bundling the products are only sold jointly. With mixed bundling the products are still available separately, but the sum of the stand-alone prices is higher than the bundled price⁷⁹. Rebates, when made dependent on the purchase of other goods, are a form of mixed bundling⁸⁰.
- 96 "Tying" occurs when customers that purchase one good (the tying good) are required also to purchase another good from the producer (the tied good). Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors). Contractual tying entails that the customer when purchasing the tying good undertakes only to purchase the tied product (and not the alternatives offered by competitors).
- 97 The specific characteristics of the products may be relevant for determining whether any of these means of linking sales between separate markets are available to the merged entity. For instance, pure bundling is very unlikely to be possible if products are not bought simultaneously or by the same customers⁸¹. Similarly, technical tying is only an option in certain industries.
- 98 Foreclosure is unlikely to give rise to concern if the new entity, prior to it engaging in exclusionary practices, has no market power in any of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important

⁷⁸ See Case T-210/01, *General Electric v Commission*, [2005], ECR II-000, para. 327, 362-363, 405; Case COMP/M.3304 - GE/Amersham (2004), point 37.

⁷⁹ The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.

⁸⁰ Accordingly, mixed bundling is sometimes also referred to as multiproduct rebates.

⁸¹ See, e.g., Case COMP.M.3304 – GE/Amersham (2004), point 35.

and there are few relevant alternatives for that product, e.g. because of product differentiation⁸² or capacity constraints on the part of rivals.

- 99 Further, for foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.
- 100 Generally speaking, the foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications on the conditions of supply in the market in the future. Notably, where a supplier of complementary goods has market power in one of the products (product A), the decision to bundle or tie may result in reduced sales by the non-integrated suppliers of the complementary good (product B). If further there are network externalities at play⁸³ this will significantly reduce these rivals' scope for expanding sales of product B in the future. Alternatively, where entry into the market for the complementary product is contemplated by potential entrants, the decision to bundle by the merged entity may have the effect of deterring such entry. The limited availability of complementary products with which to combine may, in turn, discourage potential entrants to enter market A.
- 101 It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse.
- 102 In its assessment, the Commission considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms may deploy. One such example is when a strategy of bundling would be defeated by single-product companies combining their offers so as to make them more attractive to customers⁸⁴. Bundling is further less likely to lead to foreclosure if a company in the market would purchase the bundled products and profitably resell them unbundled. In addition, rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure⁸⁵.
- 103 Customers may have a strong incentive to buy the range of products concerned from a single source (one-stop-shopping) rather than from many suppliers, e.g. because it saves on transaction costs ("portfolio effect"). However, the fact that the merged entity will have a broad range of products does not, as such, raise competition concerns.

⁸² For instance, in the context of branded products, particularly important products are sometimes referred to as 'must stock' products. See, e.g., Case COMP/M.3732 – Procter&Gamble/Gillette (2005), point 110.

⁸³ When a product features network externalities, this means that customers or producers derive benefit from the fact that other customers or producers are using the same products as well. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

⁸⁴ See, e.g., Case COMP/M.3304 – GE/Amersham (2004), point 39.

⁸⁵ See, e.g., Case COMP/M.1879 – Boeing/Hughes (2000), point 100; Case COMP/M.3304 – GE/Amersham (2004), point 39. The resulting loss of revenues may, however, in certain circumstances, have an impact on the ability of rivals to compete. See Section C.

B. Incentive to foreclose

- 104 The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable. The merged entity faces a trade-off between the possible costs associated with bundling or tying its products and the possible gains from expanding market shares in the market(s) concerned or, as the case may be, being able to raise price in those market(s) due to its market power.
- 105 Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers is not interested in buying the bundle, but instead prefers to buy only one product (e.g. the product used to leverage), sales of that product (as contained in the bundle) may significantly fall. Furthermore, losses on the leveraging product may arise where customers who, before the merger, used to “mix and match” the leveraging product of a merging party with the product of another company, decide to purchase the bundle offered by rivals or no longer to purchase at all⁸⁶.
- 106 In this context it may thus be relevant to assess the relative value of the different products. By way of example, it is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.
- 107 However, the decision to bundle and tie may also increase profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or a combination of the two (See Section C. below).
- 108 When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful⁸⁷.

C. Overall likely impact on prices and choice

- 109 Bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market. The reduction in sales by competitors is not in and of itself a problem. Yet, in particular industries, if this reduction is significant enough, it may lead to a reduction in rivals’ ability or incentive to compete. This may allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good) and/or to maintain market power (in the market for the tying or leveraging good).
- 110 In particular, foreclosure practices may deter entry by potential competitors.. They may do so for a specific market by reducing sales prospects for potential rivals in that market to a level below minimum viable scale. In the case of complementary products, deterring entry in one market through bundling or tying may also allow the merged entity to deter entry in another market if the bundling or tying forces potential competitors to enter both product markets at the same time rather than entering only one of them or entering them sequentially. The latter may have a significant impact in

⁸⁶ See, e.g., Case COMP/M.3304 – GE/Amersham (2004), point 59.

⁸⁷ The analysis of these incentives will be conducted as set out in para 44 above.

particular in those industries where the demand pattern at any given point in time has dynamic implications on the conditions of supply in the market in the future.

- 111 It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate merger. The same holds when few single-product rivals remain, but these have the ability and incentive to expand output.
- 112 The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power⁸⁸ or the likelihood that entry would maintain effective competition in the upstream or downstream markets⁸⁹.
- 113 Further, the effect on competition needs to be assessed in light of the efficiencies identified and substantiated by the merging parties⁹⁰.
- 114 Many of the efficiencies identified in the context of vertical mergers may, *mutatis mutandis*, also apply to conglomerate mergers involving complementary products.
- 115 Notably, when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged firm may internalise this effect and may have a certain incentive to lower margins if this leads to higher overall profits (this incentive is often referred to as the “Cournot effect”). In most cases, the merged firm will make the most out of this effect by means of mixed bundling, i.e. by making the price drop conditional upon whether or not the customer buys both products from the merged entity.⁹¹
- 116 Specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart⁹². For instance, it may be more efficient that certain components are marketed together as a bundle rather than separately. Value enhancements for the customer can result from better compatibility and quality assurance of complementary components. Such economies of scope however are necessary but not sufficient to provide an efficiency justification for bundling or tying. Indeed, benefits from economies of scope frequently can be realised without any need for technical or contractual bundling.

⁸⁸ See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

⁸⁹ See, e.g., Case COMP/M.3732 – Procter&Gamble/Gillette (2005), point 131. See also Section VI on entry in the Notice on Horizontal Mergers.

⁹⁰ See Section VII on efficiencies in the Notice on Horizontal Mergers.

⁹¹ It is important to recognise however that the problem of double mark-ups is not always present or significant pre-merger. In the context of mixed bundling, it must further be noted that while the merged entity may have an incentive to reduce the price for the bundle, the effect on the prices of the individual products is less clear cut. The incentive for the merged entity to raise its single product prices may come from the fact that it counts on selling more bundled products instead. The merged entity’s bundle price and prices of the individually sold products (if any) will further depend on the price reactions of rivals in the market.

⁹² See, e.g., Case COMP/M.3732 – Procter&Gamble/Gillette (2005), point 131.

B. Co-ordinated effects

- 117 Conglomerate mergers may in certain circumstances facilitate anticompetitive co-ordination in markets, even in the absence of an agreement or a concerted practice within the meaning of Article 81 of the Treaty. The framework set out in Section IV of the Notice on Horizontal Mergers also applies in this context. In particular, co-ordination is more likely to emerge in markets where it is fairly easy to identify the terms of co-ordination and where such co-ordination is sustainable.
- 118 One way in which a conglomerate merger may influence the likelihood of a coordinated outcome in a given market is by reducing the number of effective competitors to such an extent that tacit coordination becomes a real possibility. Also when rivals are not excluded from the market, they may find themselves in a more vulnerable situation. As a result, foreclosed rivals may choose not to contest the situation of co-ordination, but may prefer instead to live under the shelter of the increased price level.
- 119 Further, a conglomerate merger may increase the extent and importance of multi-market competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplining mechanisms in ensuring that the terms of co-ordination are being adhered to.

BRAZIL

1. Introduction

Vertical mergers are probably more common than horizontal mergers. Virtually all firms are to some extent vertically integrated. Although quite common, there are few cases in which vertical integration required antitrust intervention. This seems to be the case in US and EU jurisdictions and it is certainly the case in Brazil.

Despite of an alleged academic dispute regarding the antitrust concerns about vertical mergers, as opposed to horizontal mergers, the lower incidence of interventions of the Council for Economic Defence (CADE)¹, in vertical mergers is not mainly due to uncertainty, debates or controversy regarding the possible effects of each case on competition and efficiency. Vertical mergers are usually harmless to competition and motivated by efficiency reasons, such as transaction costs economising. As a consequence, the majority of the vertical mergers cases do not require antitrust interventions.

Even though there are some interesting cases in the Brazilian experience in which vertical mergers called for antitrust remedies, almost all of them are related to the presumption of market foreclosure or, more generally, raising rivals costs. Moreover, it is noteworthy that restrictions to vertical mergers, although not common, became more frequent in the last five years. This distinct pattern of antitrust intervention, however, apparently is not motivated by changes in authorities' perceptions on the subject. Privatisation of infrastructure in late 1990's and some conduct cases related to refusal to sell and price discrimination in the beginning of the century seems to be the likely candidates that explain this shift towards more restrictions to vertical mergers.

This paper is organised as follows. Next section presents the definition of vertical integration and related arrangements, such as quasi-vertical integration, in Brazil. Third section discusses the main antitrust concerns in vertical mergers in Brazil, particularly market foreclosure and raising costs of actual and potential rivals, and efficiencies that are generally taken into account. Moreover this section presents some anticompetitive effects that, although not a main concern in vertical mergers analyses, may motivate remedies. Fourth section addresses the enforcement policy, the forthcoming vertical merger guidelines and a summary of cases. Fifth section brings the results of three illustrative cases in order to discuss the remedies that are generally adopted, particularly when there is any presumption of market foreclosure and non-negligible efficiency gains.

2. Definition: vertical mergers and related forms

In contrast with horizontal mergers, in which activities that may be substitutable to each other are organised under the same control, vertical mergers are related to the unification of complementary activities within a hierarchy (Motta, 2004; Riordam, 1990; Tirole, 1988). In that sense, vertical mergers are not restricted to activities in a 'production chain', but may include lateral integration, such as R&D, information technology support, security and unaccountable others activities that are complementary to each other in the provision of a final good.

¹ The competition agency that is responsible for the judgment of all competition cases in Brazil.

The analysis of vertical mergers in Brazil usually employs the terms upstream and downstream, standing for the timing of production. The reason for employing these terms is just for rapid reference of each stage of production, but do not imply different treatment. The presumption of market foreclosure, for instance, is investigated both in the upstream and downstream markets.

It may result from the expansion of current activities by means of new investments in the complementary activity (vertical expansion), of the creation of a vertically integrated firm (vertical formation) or by the acquisition of control over existent assets (vertical merger). It is noteworthy that firms do not have to submit the first two types of vertical integration if they do not imply any change in control, although they may be subject to ex-post control, by a conduct investigation, if they use any structural or strategic advantage (among them those related to vertical control) in order to lessen competition.

Vertical contracting that implies shared control over relevant assets must be submitted to the Brazilian competition authorities. The analysis generally focus on the type of control that the vertically related firm holds, such as veto power or decision rights over relevant strategic variables.

Cases involving vertical quasi-integration, following the definition of Blois (1972), are commonly analysed as a vertical merger if any sort of relevant control is transferred. As a consequence, decisions of antitrust authorities in such cases follow the precaution principle, implicitly admitting that both vertically related firms would behave as a single entity. On the other hand, the minority share on an upstream or downstream company is not a major concern in decisions, which implicitly ignore the effects on aligning incentives among vertically related firms².

3. Vertical control and competition policy: main concerns in the Brazilian jurisdiction

3.1 *Anti-Competitive Effects*

Decisions regarding vertical mergers in the Brazilian jurisdiction are mainly concerned with market foreclosure, increasing rival costs and/or, more generally, limiting their ability to compete in costs, innovation or differentiation. The control over innovative assets, for instance, may inhibit the ability of rivals to compete in markets in which innovation is the major source of competition. Similarly, the acquisition of rights over irreproducible inputs for differentiation – e.g. the tenant mix in the competition among shopping centers or the access to unique media events in the media industry – may also block entry. In contrast, vertical integration that does not restrict supply or demand faced by competitors (i.e. vertical expansion) is not a major concern.

Despite the well-known Chicago School critique (Hovenkamp, 2005; Ray and Tirole, forthcoming), market foreclosure and strategic movements with the primary goal to restrict competition are systematically under the scrutiny of Brazilian antitrust authorities. This practice is supported by the following argument: even though it is not possible to leverage the monopoly profits in two stages in the same production chain, those actions prevent actual or potential competition in the market in which the company has a dominant position. For example, a company that faces competition by a fringe of firms may vertically integrate in order to raise costs of those competitors and lessen competition in its former market.

² For instance, in the vertical merger that resulted in the creation of Braskem, a petrochemical integrated company, the minority share of the new company in a downstream firm, Politeño, was not taken into account in the antitrust analysis.

Moreover, vertical control may block entry in the market in which potential entrants threaten a former dominant position³.

Vertical control is usually associated with various types of efficiencies. In Brazilian jurisdiction decisions generally make reference to economies of scope (Scherer and Ross, 1990), information and coordination failures and transaction costs (Williamson, 1985, 1991, 1996, 2005). There are some cases that are founded in the argument of double marginalisation, as a potential benefit from a vertical merger (Tirole, 1988).

Although theoretically appealing, this argument requires three necessary conditions that restrict its applicability: a) market power in both production stages should be lawful or legitimate, b) both firms should not recognise ex-ante their interdependence (i.e. both decide prices and quantities parametrically and not strategically) (Dobson et al., 1998), and c) a contractual schema, such as two part tariff, is not possible or economical. Inasmuch as those conditions are not easily met, this type of efficiency did not support alone any single decision.

Inasmuch as efficiencies are presumed in vertical merger cases, they are analysed under the rule of reason. The antitrust authorities are required to collect evidence to presume that the merger is harmful or may be potentially harmful to competition, although it is not necessary to predict a quantitative amount of welfare loss. In contrary, to the merger firms incur the burden of the proof of the existence of non-negligible and case-related efficiencies.

As a consequence, the treatment of efficiencies is similar in vertical merger and other types of mergers, even though efficiencies are, in practice, presumed in the former. If the merger implies any substantial risk to competition, similarly to the analysis of horizontal mergers, the parties must prove them with reasonable degree of confidence.

Given that vertical integration is largely associated to efficiencies, antitrust remedies try to prevent anticompetitive effects whereas preserving efficiency gains. This approach is supported by the Brazilian Antitrust Law (Law 8.884/94), which states that mergers and contracts that have any potential harm to competition are to be approved only if, among other conditions, their design is restricted to the necessary conditions to achieve the intended benefits. Preserving efficiency gains in general implies avoiding ex-ante remedies (structural restrictions) in favour of conduct restrictions. That was the case in one vertical merger involving the Brazilian hydrocarbons company Petrobras, in which the huge efficiencies called for a behavioural restriction, but preserving the main elements of the transaction. This case is presented in more detail in the fifth section.

4. Enforcement policy and summary of cases

Although the Economics of vertical integration is full of controversy, particularly after the critique of Chicago School, antitrust decisions in Brazil are quite consistent. The main and almost unique concern, as already appointed, is market foreclosure or, more generally, raising rivals costs. In general, decisions do not mention problems such as better conditions for horizontal co-ordination, and few mentioned price discrimination or the creation of entry barriers. However, even in those cases, the analysis does not address these issues in depth, and no case resulted in restriction based on these arguments (price discrimination, horizontal co-ordination effects or entry barriers).

³ This was the main argument that support CADE's decision that considered unlawful the exclusivity contracts undertaken by Shopping Iguatemi with several high-end clothing stores, listing a set of specific targeted Shopping Centers to whom the exclusivity was addressed

In contrast, the analysis of presumption of market foreclosure or raising rivals costs invariably obey the following steps, that consist in necessary conditions for foreclosure to occur and be rational.

First, at least one of the companies should have dominant position, measured mainly by market share or vertical differentiation when the relevant market is highly differentiated.

Second, the vertical merger, by means of refusal to sell or price discrimination, may be able to affect price, so as to harm competition of actual or potential rivals. For this second condition to be met, market structure, rivalry among others competitors and entry barriers need to be so that a price increase may be stable enough to exclude rivals or block entry. In particular, it is necessary to investigate if rivals may themselves vertically integrate in order to prevent strategic cost rising.

Since 2001, the Brazilian competition system has its own horizontal merger guidelines that, although it does not lock up decisions of antitrust authorities, play an important directive role of antitrust analysis. In 2003, the competition authorities that compose the Brazilian Competition Policy System (BCPS) (SDE, SEAE and CADE) began to discuss the convenience of vertical merger guidelines or even the inclusion of this subject in an amplified merger guideline that would account for any type of merger.

By the beginning of 2007, after several seminars and research papers, there is a not yet implemented revised version of the horizontal merger guidelines and a preliminary version of the vertical merger guidelines.

The preliminary version of the vertical merger guidelines was submitted to commissioners and several other members of the Brazilian Competition Policy System. As a consequence, consistent with former antitrust decisions, it has as a major concern the likelihood of foreclosure and raising costs of rivals. On the other hand, the proposal of vertical merger guidelines brings other issues that are not commonly analysed in past antitrust decisions, such as double marginalisation.

Table 1 presents a summary of decisions regarding vertical mergers cases in Brazilian jurisdiction, from 2002 to 2005. Cases presented are classified in two types: a) approved without restrictions; and b) approved with restrictions. The last category is divided in two groups: restrictions motivated by the vertical control and restrictions motivated by other reasons, such as non-competition clauses or related to horizontal mergers. It is noteworthy that there is not a single case of a transaction that was blocked because of vertical control anticompetitive effects.

Table 1
BCPS: decisions in vertical merger cases (2002-2006)*

Vertical Mergers		2002	2003	2004	2005	2006
Approved without restrictions		96.6%	96.2%	80.8%	72.2%	82.6%
Approved with restrictions	Restriction motivated by vertical control	1.7%	0.0%	15.4%	11.1%	13.0%
	Restrictions motivated by other reasons	1.7%	3.8%	3.8%	16.7%	4.3%
TOTAL		100%	100%	100%	100%	100%

Source: CADE

* The sample contains all cases, among the cases filed under the Article 54 of Law 8.884/94, that required any vertical analysis. It is likely that the absolute number of cases is underestimated, since in some cases vertical integration is *prima facie* irrelevant for antitrust purposes.

Table 1 reveals two important features of the Brazilian experience in vertical mergers. First the proportion of restrictions motivated by vertical control is quite low, as expected, given the likelihood efficiencies and the necessary and uncommon conditions for the occurrence of foreclosure or raising costs of rivals.

Second the proportion of restrictions in vertical merger cases increased significantly in the last three years. A qualitative analysis of the previous period corroborates this trend. There is not a single case of restrictions motivated by vertical mergers before 2000.

A detailed examination of a sample of decisions, all summarised in the annex of this paper, indicates that this trend towards more restrictions does not arrive from theoretical controversy or a change of authorities' perception on that matter. Decisions, as already mentioned, in general follow a consistent approach to identify competition problems related to market foreclosure or raising costs of rivals. There is not in the selected cases any indication of a change in the antitrust analysis, but only in their conclusions.

Restrictions are still unusual, but more frequent because there are more vertical merger cases that required greater care. Privatisation of infrastructure in the late 1990s and the newly born regulation institutions of public utilities are the likely candidates to explain why the proportion of cases with restrictions has been increasing.

Among the most paradigmatic cases is worth mention several acquisitions made by Companhia Vale do Rio Doce (CVRD), a former state company in the mining sector, that controls the relevant logistic system (railways and ports), two transactions made by Petrobras, that holds monopolistic position in the production of Petroleum Liquefied Gas and the production and transportation of natural gas, towards downstream markets, and a conduct case in the seaport logistics. Some of these cases are presented in detail on the next section.

5. Some illustrative cases

This section presents selected cases in which vertical control turn out to be a major issue, requiring antitrust intervention. This is not, however, a comprehensive neither a representative list of cases. The only and modest purpose of the following report of cases is to illustrate the type of antitrust concern related to vertical control and the remedies that the Brazilian jurisdiction has been implementing.

5.1 Sky-DirecTV

- a. One of the most relevant and recent merger cases in Brazil was Sky-DirecTV that brought together the two largest paid televisions that make use of DTH technology. The case consists in two transactions. First, the well-known acquisition in the US of 34% of the DirecTV by the News Corp, which had participation in the Sky Brasil and was already controller of Fox, one of the most prominent media group. As a consequence, this transaction resulted in horizontal and vertical integration.
- b. The second transaction, the News Corp., that was already a minority shareholder in Sky Brasil, acquired Sky's control from its former partner, Globo Group, the most important media group in Brazil, which remained in the company as a minority shareholder. As a consequence, the second transaction resulted in horizontal concentration and reduced the vertical control of Globo – who provides the majority of differentiated channels with domestic content – in the downstream market.

- c. In order to retain some vertical control in the downstream market, Globo preserved contractually some decision rights regarding the transmission of domestic content in the merged company.
- d. The transaction has an effect on the relevant market of paid television, which includes the service provided by means of other technologies, such as cable TV and MMDS. The primary preoccupation was the horizontal concentration that resulted from the merger, particularly in regions where cable TV or MMDS were not available. This sort of problem motivated a set of restrictions whose details are beyond the scope of this paper.
- e. The merger also had some interesting vertical implications that required appropriate remedies. First, the News Corp. by means of its subsidiary Fox, which directly controls the merged company, is a major competitor in the provision of content (channels) for paid television. As a consequence, it could use its vertical control in order to preserve its dominant position in both markets.
- f. Second, as already mentioned, Globo, which holds dominant position in the provision of domestic content, could use its decision rights on transmission in the merged company in order to block entry in its upstream market (domestic content).
- g. In short, the decision required Globo to withdraw its decisions rights on the line up of Sky-DirecTV and restricted Fox to acquire relevant irreproducible input for differentiation in the domestic market of media content, particularly the exclusive rights on sports events, such as the transmission of Brazilian soccer leagues. A similar restriction was imposed to Globo in a conduct case related to the market of sport channels.

5.2 *Petrobras-White Martins (Gemini Project)*

- a. Petrobras and White Martins set up a joint venture in order to explore the incipient market of Liquefied Natural Gas (LNG), under the name of “Gemini Project”. White Martins holds dominant position in industrial gas market, although is an entrant in the energy market.
- b. Petrobras controls the pipeline infrastructure for natural gas transportation, as well Brazilian production of gas and importation from Bolivia, the main foreign source of natural gas. Petrobras is also monopolist in Liquefied Petroleum Gas (LPG), the primary substitute for LNG. Although Brazil has a regulatory agency for Petroleum and Gas (ANP), it does not regulate prices of both natural gas and LPG. As a consequence, it was found quite plausible that Petrobras might be able to deter entry in natural gas distribution, and for future competitors in the supply of LNG.
- c. The transaction promotes significant efficiencies and benefits to consumers. It is a new product, granting access to energy from natural gas for consumers that were located in regions where density was not sufficient for direct distribution by means of pipelines. Moreover the investments in plants for liquefying natural gas are specific to the transaction, requiring close coordination and safeguard to hold-up, which makes vertical integration an efficient governance structure for reducing expected transaction costs.
- d. Inasmuch as efficiencies are huge and quite evident, the BCPS chose a remedy for attenuating the risks for competition, whereas maintaining the expected efficiency benefits. The major concern was that Petrobras could favour its joint venture with White Martins by raising the price of natural gas for distributors of LNG or natural gas. In addition, the joint venture was offering take-or-pay long-term contracts that could block entry of potential

entrants (Aghion and Bolton, 1987). Instead of a structural remedy, that would certainly harm the efficiency benefits, CADE proposed the transparency of prices and contracts to potential entrants and to the agency itself, aiming to reduce the costs of identifying and prosecuting an unlawful conduct.

5.3 *Companhia Vale do Rio Doce (CVRD)*

- a. CVRD holds operating concessions for a number of freight railway lines and harbour terminal facilities that provide services both to its own mines and steel production facilities and to other customers as well.
- b. Some of the customers served by CVRD's lines are competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD. Where the discrimination does not involve tariffs regulated by ANTT, CADE has prime jurisdiction.
- c. In 2000 transaction CVRD acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil. CADE decided to jointly analyse seven merger operations involving CVRD. Two of them involved the privatisation process and the sale of participation of one partner called CSN, one of the biggest Brazilian steel producers, and the other five are related to the acquisition of mines and of participation on railroads.
- d. SEAE and SDE agreed that adverse effects could arise in both the iron ore and the rail service markets and proposed various remedial conditions to CADE. ANTT, in consultation with SDE, invoked its own statutory authority to issue a precautionary order imposing certain restrictions on CVRD until CADE issued a determination.
- e. In 2005, CADE approved the operation with a restriction that CVRD should choose between sale one of its company (which gave to CVRD the control of a strategic railroad) or to sell one of its mines. CVRD appealed to the judiciary against the decision alleging that the decision was taken by the qualified vote of the president and so, although it is established in the Brazilian Competition Law, it was not valid. The judicial decision is still pending.

6. Concluding remarks

The analysis of vertical mergers is routine in the Brazilian jurisdiction. Despite the academic controversy regarding their anticompetitive effects, antitrust authorities in Brazil are quite consistent in their decisions regarding vertical mergers, systematically investigating the likelihood of market foreclosure and raising the costs of rivals. Moreover, efficiencies resulted from economies of scope, information and coordination failures and transaction costs are taken into account whenever a transaction may be harmful to competition.

Inasmuch as vertical mergers are considered most of the time harmless to competition – or, more precisely, the conditions for the presumption of market foreclosure or raising the costs of rivals are restrictive and uncommon – and they are associated to several types of efficiencies, the vast majority of cases are approved without restriction.

Nevertheless, there are some cases that require full scrutiny by antitrust authorities, and appropriate remedies in order to mitigate the presumed anticompetitive effects. Transactions that at least one of the firms holds dominant position and raising the costs of rivals is possible and rationalisable are the typical candidates for antitrust remedies.

The privatisation of public utilities in the late 1990's and the newly born regulatory institutions brought renewed relevance to vertical mergers analysis in Brazil, inasmuch as these sectors share the features that are more likely to be associated with vertical control anticompetitive effects. That is the main reason that explains the increased number of cases that deserved antitrust remedies in recent years, even though restrictions are still not frequent.

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ANNEX

A SUMMARY OF ILLUSTRATIVE CASES

PROCESS	OPERATION	POTENTIAL ANTICOMPETITIVE EFFECTS	DIAGNOSTIC	REMEDIES
Nº: 08012.010301/99-09 Commissioner: Roberto Pfeiffer Decision date: September, 4 th / 2002	Partnership between Holdercim Brasil S.A. and Comcrepav S.A. for the construction of Betonserv Ltda and the acquisition of Intermix Ltda. and Intervales Ltda. in the market of concrete production for construction industry.	Vertical integration: the controller of Holdercim , the Holderbank Group , is a important manufacturer of basics inputs for concrete production, which raised the concern about market foreclosure.	Vertical integration harmless to competition: (i) only 10% of cement production is supplied to concrete companies; and, (ii) Holdercim market share was not significantly high. Transaction approved without restrictions.	N/A
Nº: 08012.007714/2004-53 Commissioner: Ricardo Villas Bôas Cueva Decision date: February, 2nd / 2005	Acquisition of the control of Kévia Siderurgia Ltda. by BMP Siderurgia S.A. , through public auction.	Iron produced by Kévia , is a basic input in the steel production by BMP .	Vertical integration harmless to competition: (i) Kévia was already exclusive supplier of BMP before the transaction, and (ii) Kévia market share was only 2,8%. Transaction approved without restrictions.	N/A
Nº: 08012.002930/2005-93 Commissioner: Ricardo Villas Bôas Cueva Decision date: June, 15 th /2005	Acquisition of the control, in Brazil, of LD Forest Products S.A. (Dreyfus Group) , by Arauco Brasil Ltda.	Vertical integration: (i) wood and wood resins produced by LD Forest Products are input for MDF (medium density fiberboard) wood panels, produced by Arauco.	Vertical integration harmless to competition: it already existed before the transaction. Transaction approved without restrictions.	N/A
Nº: 08012.002173/2002-13 Commissioner: Miguel Tebar Barrionuevo Decision date: November, 5 th /2003	Acquisition, by World Minerals, Inc. , of assets and properties used in the production of <i>perlita</i> by Eucatex Química e Mineral Ltda.	Vertical integration: the Alleghany Group (share controller of World Minerals) produces a basic input for <i>perlita expandida</i> production by Eucatex.	Vertical integration harmless to competition: the market share of World Minerals is 18%, less than other competitors. Transaction approved without restrictions.	N/A
Nº: 08012.006519/2002-44 Commissioner: Thompson Andrade Decision date: February,	Acquisition by Amanco Brasil Ltda. of 20% of Herten shares.	Vertical integration: Herten offers molds for plastic injections that are inputs for Amanco activities. Moreover, the	Vertical integration harmless to competition: (i) Herten market share is less than 2%; and, (ii) there	N/A

PROCESS	OPERATION	POTENTIAL ANTICOMPETITIVE EFFECTS	DIAGNOSTIC	REMEDIES
11 th /2004		Nuevas Group , controller of Amanco , produces technology for the molds production.	are more than 300 companies in this relevant market. Transaction approved without restrictions.	
Nº: 08012.003663/00-67 Commissioner: Miguel Tebar Barrionuevo Decision date: May, 29 th /2002	Acquisition of the control of Safco Tecnologia Ltda. by Agilent Technologies Brasil Ltda.	Horizontal concentration in the market of aerial interface instruments for cellular telephone systems, and vertical integration between Safco and Agilent	Vertical integration harmless to competition: i) market in expansion; and, (ii) absence of exclusiveness clause among the claimers and its clients. Transaction approved without restrictions.	N/A
Nº: 08012.008536/02-16 Commissioner: Thompson Almeida Andrade Decision date: September, 9 th /2003	Acquisition of 70% of the shares of Ambiterra Soluções Ambientais Ltda. by Eve Participações Ltda. , controlled by Essencis Soluções.	Vertical integration between engineering services and environment consulting (Ambiterra) and services of industries residues treatment (Essencis).	Vertical integration harmless to competition: (i) Ambiterra market share is 3,5%; (ii) market in expansion; (iii) absence of barriers to market entry; (iv) low entry barriers for new competitors. Transaction approved without restrictions.	N/A

PROCESS	OPERATION	POTENTIAL ANTICOMPETITIVE EFFECTS	DIAGNOSTIC	REMEDIES
<p>Nº: 08012.007704/99-07 Commissioner: Miguel Tebar Barrinuevo Decision date: September, 11th/2002</p>	<p>Acquisição of 25% shares of Supermix Concreto S.A by Cia. Cimento Portland Itaú, controlled by Votorantim Group.</p>	<p>Vertical integration: Votorantim Group supply inputs for the concrete production (cement and cobblestone).</p>	<p>Vertical integration harmless to competition: (i) low entry barriers in downstream market; (ii) possibility of upstream vertical integration by construction firms into concrete supply; (iii) low participation of concrete companies in cement demand. Transaction approved without restrictions.</p>	<p>N/A</p>
<p>Nº: 08012.003086/02-75 Commissioner: Thompson de Almeida Andrade Decision date: January, 15th/2003</p>	<p>Acquisition of the control of OX Comércio de Veículos e Participações Ltda. by Volvo do Brasil Veículos Ltda., and, as consequence, the indirect control of Gotemburgo, concessionaire of Volvo.</p>	<p>Vertical integration between Volvo activities and Gotemburgo's.</p>	<p>Vertical integration harmless to competition: (i) there is no effect on competition because Volvo became only the indirect controller of one of its concessionaires; (ii) the share control of Volvo on Gotemburgo is temporaire (only 3 years). Transaction approved without restrictions.</p>	<p>N/A</p>
<p>Nº: 08012.005430/02-61 Commissioner: Thompson de Almeida Andrade Decision date: February, 26th/2003</p>	<p>Acquisition of the control of Target Company, formerly held by Siemens Aktiengesellschaft, by Kohlberg Kravis & Co. ("KKR").</p>	<p>Vertical relations between KKR products and others involved in the transaction.</p>	<p>Vertical integration harmless to competition: insignificance of the revenue related to the products vertically integrated. Transaction approved without restrictions.</p>	<p>N/A</p>

PROCESS	OPERATION	POTENTIAL ANTICOMPETITIVE EFFECTS	DIAGNOSTIC	REMEDIES
<p>Nº: 08012.006136/01-95 Commissioner: Thompson de Almeida Andrade Decision date: May, 14th /2003</p>	<p>Acquisition of part of Henkel Group, called Cognis Group, by the investment funds Fundos Schroders Grup and Fundos de GS Group.</p>	<p>(i) horizontal concentration on the market of Cognis do Brasil and TFL Holding Gmbh; (ii) vertical integration between TFL and Cognis do Brasil because Cognis offers to TFL chemical products used in the initial period of the productive chain.</p>	<p>Vertical integration harmless to competition: (i) market share insufficient to presume market power; (ii) there is no exclusive dealing agreement between Cognis do Brasil and TFL; (iii) the purchases of TFL by Cognis do Brasil are sporadic. Transaction approved without restrictions.</p>	<p>N/A</p>
<p>Nº: 08012.009500/03-31 Commissioner: Luís Fernando Rigato Vasconcellos Decision date: July, 13th /2005</p>	<p>Acquisition of the control of Invista Inc., which belonged to Dupont Group, by Koch Industries.</p>	<p>Vertical integration: Exclusive dealing clause between Koch and Dupont.</p>	<p>Although the clause in reference is neutral to Koch, since its production of poliamidas for engineering plastic production will be acquired by DuPont, that clause can inhibit the access to Koch production in the in short term and, in the long term, can reduce the incentives of the company purchaser in promoting investments to supply other players. Transaction approved with restrictions.</p>	<p>Supression of the exclusiveness clause of the contract.</p>
<p>Nº: 08012.000497/00-01; 08012.004904/00-97; 08012.007454/00-49 Commissioner: Thompson de Almeida Andrade Decision date: February, 4th /2004</p>	<p>Acquisition of the control of fertiliser companies by Bunge and Cargill Groups. All the acquired companies were shareholders of Fertifós Administração e Participações S.A and Ultrafertil.</p>	<p>Vertical integration Both Bunge and Cargill produces fertilisers NPK and uses inputs based on phosphorus.</p>	<p>(i) The share control exerted by Bunge and Cargill on Fertifos would be conducive to cooperation; (ii) increase in the final fertiliser market concentration; (iii) loyalty premium increase consumers' switching costs and</p>	<p>Elimination of any requirement of trade information to customers. Alienation of shares so as to reduce participation</p>

PROCESS	OPERATION	POTENTIAL ANTICOMPETITIVE EFFECTS	DIAGNOSTIC	REMEDIES
			provided information about trade. Transaction approved with restrictions.	of Bunge and Cargill on the board of directors of Fertifos
<p>Nº: 08012.003632/01-97 Commissioner: Ricardo Villas Bôas Cueva Decision date: September, 29th / 2004</p>	<p>Agreement between Sadia S.A., Cargill Agrícola S.A. e Danone S.A. through which they form an Eletronic Portal business to business, <i>for</i> purchasing services and products.</p>	<p>Vertical integration in the orange juice market involving Cargill and Danone.</p>	<p>The 12th clause of the Agreement constitutes an obligation of exclusive utilisation of the purchase trust by the parts, duly warned payment of punitive fine. Such clause could force the sellers to establish exclusiveness agreements with the claimants. The clause in reference is unnecessary to achieve the object of the transaction , which means that the penalty imposed was not justified. Transaction approved with restrictions.</p>	<p>(i) The 12th clause of the Agreement exclusion; (ii) obligation of submission contractual amendments to the Brazilian System of Economy Defense.</p>
<p>Nº: 08012.000225/99-98 Commissioner: Ruy Santacruz Decision date: April, 12th / 2000</p>	<p>Lease agreement of the port of Angra dos Reis celebrated between Companhia Docas do Rio de Janeiro e FCA Angraporto S.A.</p>	<p>(i) vertical integration railroad-port because the Port of Angra dos Reis is served by Ferrovía Centro-Atlântica S.A. which controls 90% of de capital stock of FCA</p>	<p>Vertical integration harmless to competition: (i) Ferrovía Centro-Atlântica serves only the Port of Angra dos Reis, (ii) Angra's port is responsible for less than 10% of the portuary market e (iii) other ports like Sepetiba and Rio de Janeiro are served by another railroad - MRS Logística S.A. Approved without restrictions.</p>	<p>N/A</p>

ROMANIA

1. Introduction. Background considerations on merger control in Romania

Romanian merger control is regulated by the Competition Law No.21/1996, republished. The statutory provisions dealing with merger control were introduced in 1996, but in 2004 significant amendments entered into force in order to bring Romanian Competition Law in line with EU competition rules. The merger control rules contained in the Romanian Competition Law are given detail and expanded upon through secondary legislation.

Through its merger control, Romanian Competition Council (RCC) aims at blocking economic concentrations that are likely to restrain, prevent or significantly distort competition on the Romanian market or on a part of it.

It is noteworthy, when assessing whether the notified economic concentration is or is not compatible with a normal, competitive environment, that the RCC applies various criteria set out in the Romanian Competition Law that cover both horizontal and vertical mergers. Such criteria are as follows:

- the need to maintain and develop competition on the Romanian market, in view of the structure of all markets concerned and the actual or potential competition;
- the market share of the undertakings involved, their economic and financial power;
- alternatives available to suppliers and users, their access to supplies and markets, as well as any other impediments for market access;
- the supply and demand trend of the relevant products and services;
- the extent to which the intermediate and ultimate customers interests may be affected;
- the contribution to economic and technical progress.

RCC makes an efficiency analysis of the concentrations susceptible of leading to a significant restriction, prevention or distortion of competition on the Romanian market or a part of it. Such economic concentrations may be cleared if parties involved in the economic concentration prove the cumulative fulfilment of the following conditions:

- the economic concentration is going to contribute to increasing economic efficiency, enhancing production, distribution or technological progress or increase of export competitiveness;
- the positive effects outweigh the negative effects on restriction of competition; and
- to a reasonable extent, consumers benefit from the resulting gains, especially through lower prices.

The Romanian competition legislation does not include a specific regulation for vertical mergers. However, RCC cannot excuse those mergers from antitrust scrutiny. Therefore, our analysis of vertical mergers is carried out on a case-by-case basis.

2. Enforcement

Vertical mergers are perceived by RCC as economic concentrations involving undertakings operating at different levels of production-distribution chain.

Vertical merger enforcement involves the same weighing of possible efficiency gains against potential competitive harms as horizontal enforcement, according to the conditions presented above.

Insofar, in our practice, Competition Council dealt mostly with horizontal mergers that were assessed within the legal framework presented above. However, there were as well merger cases involving both horizontal and vertical aspects, such as the case that will be presented in this contribution.

The case below illustrates how RCC applied the economic theory in its enforcement practice, despite of lack of official vertical merger guidelines in force. That is why, in this case, RCC relied on a detailed factual basis, in deciding whether to challenge the merger. In addition, we felt necessary to deeply assess the possible anticompetitive effects of the merger, focusing on exclusionary effects.

In 2006, the RCC analysed an economic concentration between Flamingo International SRL (Flamingo) and Flanco International SRL (Flanco). Flamingo achieved sole control over Flanco, by acquiring 100% of Flanco's equity shares.

3. The acquiring undertaking: Flamingo

Flamingo is active in the wholesale of computers, peripheral equipments and software and belongs to the Flamingo Group, who is active mainly on the market for the import/assembling, wholesale and retail sale of IT&C and electronic products.

Other companies that belong to Flamingo Group are the following:

- Flamingo Computers – whose object of activity is the assembly and retail of IT&C and electronic products,
- Flamingo Distribution Centre – whose object of activity is the wholesale of computers, peripheral equipments and software products;
- Future Shop – whose object of activity is the retail of GSM products and photo/digital products.

Flamingo performs the largest part of the domestic and foreign acquisitions, acting thus as an acquisition channel of products and components for Flamingo Group's companies and Flamingo branches operating abroad.

4. The acquired undertaking: Flanco

Flanco is active in the retail sale of IT&C and electronic products and it operates a national retail chain.

5. Horizontal and vertical aspects of the merger

This merger gave rise to both horizontal and vertical issues.

Horizontal issues were stemming from the overlaps found between Flamingo's and Flanco's activities in the markets for retail sale of IT&C and electronic products.

Also, it involved vertical aspects, since:

- Flamingo - is active in the wholesale market of IT&C and wholesale market of electronic products (upstream markets);
- Flanco – is active in the retail market of IT&C and retail market of electronic products (downstream markets).

6. Vertical Aspects

Both wholesale and retail markets are fragmented, consisting in numerous small players and a few strong competitors.

However, the vertical foreclosure theory was applied for the following grounds:

- Flamingo Group is an important vertically integrated player in IT&C and electronic products fields;
- Flanco is an important retailer of IT&C and electronic products;
- Post-merger, the merged entity would become the second largest player on the retail sale market of IT&C and electronic products, while maintaining the same market position at wholesale level;
- Flamingo Group's strategy targets an ascending volume of sales.

So, our analysis aimed at assessing if the vertical combination of Flamingo's presence in IT&C and electronic products wholesale markets and Flanco's presence in IT&C and electronic products retail markets would not result in vertical foreclosure, i.e., that:

- Flanco's competitors in IT&C and electronic products retail markets would not be foreclosed from access to Flamingo's IT&C and electronic products, i.e. at upstream level

and

- Flamingo's competitors in IT&C and electronic products wholesale markets would not be foreclosed from access to sale their similar products through Flanco retail chain shop or other retail networks, i.e. at downstream level.

7. IT&C market

The IT&C sector is one of the most dynamic sectors of the Romanian economy, with a growth rate of almost 15% per year.

The activity of Flamingo Group is concentrated towards this category of products, the IT&C segment representing a significant weight in its turnover, unlike Flanco, to which the IT&C segment has a secondary contribution in its turnover.

8. Upstream wholesale market foreclosure

In assessing the upstream wholesale market foreclosure, we found that costs of entry were insignificant, market access was not subject to administrative barriers and there were enough close substitutes sold by other upstream firms to Flamingo's products.

So, if Flamingo denies access to its IT&C products to other downstream retailers, the latter would still have the possibility to purchase IT&C products from a large number of other importers and suppliers, which are Flamingo's competitors.

It was concluded that there would be no risk of any of the market concerned being closed off, as significant alternatives and competing sources of supply would continue to be available after the takeover.

9. Downstream retail market foreclosure

The most significant segment of the IT&C market is computers. Following the analysis, it resulted that Flanco retail network had an absorption capacity of 80% of Flamingo Group's wholesale capacity.

Having in view that Flamingo Group's strategy targets an ascending volume of sales, it results that, even if Flamingo Group becomes the exclusive supplier of this kind of products for Flanco, Flamingo would still need to turn to third retail partners at least for an amount of 20% of its wholesale capacity.

9.1 Conclusion

- The competitors of Flamingo Group will not be restricted in respect of their possibilities of selling their products at retail level, even if Flanco would sell exclusively Flamingo's products, for the reasons explained above.
- Furthermore, numerous undertakings operate in retail market of IT&C products. Therefore, there are other viable alternatives of retail sale for Flamingo Group's competitors. This conclusion was sustained also by the other players in the retail market, which provided their opinions at RCC's request. All answers received stated that the respondents had no objections to the implementation of the merger.

11. Electronics products market

As concerns the electronic products, we carried out the same analysis at downstream and upstream level, concluding that no competition concerns could arise after the merger.

12. Horizontal aspects

We sought to ensure as well that the combination of Flamingo Group and Flanco did not increase concentration unacceptably and have horizontal anticompetitive effects on the retail sale markets of both IT&C and electronic products impacted by the merger.

Evidence related to horizontal overlaps showed that:

- Post-merger, the new entity would become the second largest retailer in Romania in terms of sales and the first largest network of shops, comprising about 196 outlets.
- Flanco and Flamingo Group networks of shops will operate distinctly in the future;

12.1 Conclusion

RCC's market survey indicated that for all markets concerned, enough competitors would continue to exert competitive constraints on the new entity after the merger.

13. Outcome of RCC's evaluation

Following the assessment of both vertical and horizontal aspects of the Flamingo/Flanco merger, we ultimately concluded that this merger did not lead to a creation or consolidation of a dominant position on any of the relevant markets. Moreover, this merger consolidated the competitive environment, by balancing the playing field, and ultimately improving consumer welfare.

14. RCC position towards guidelines on non-horizontal mergers

We consider that a specific framework regulating non-horizontal mergers is extremely useful. Having in view the large variety of such economic concentrations that arise in practice, specific guidelines would provide legal certainty and an improvement in the assessment of non-horizontal mergers, leading to better reasoned decisions relating to such operations.

SOUTH AFRICA

1. Introduction

While most mergers notified to the Competition Commission have continued to be horizontal in nature (54% of finalised mergers in 2005/06) there have been a significant number of mergers that are vertical in nature. In 2005/06 11% of mergers were identified as vertical and 26% were conglomerate.¹ Moreover, a significant proportion of the mergers that have been prohibited, or approved with conditions, since the Competition Act came into force in 1999 have been vertical. It is important to note, however, that the great majority of vertical mergers have been unconditionally approved.

There are no specific provisions relating to vertical mergers in the South African competition legislation. The South African legislation turns on a substantial prevention or lessening of competition test (in 12A(1)). However, the Competition Act further sets out factors that the authorities must take into account in determining this in 12A(2), which have implications for vertical mergers (as also conglomerate or horizontal mergers). These factors include the probability that firms will behave competitively or cooperatively after the merger, ease of entry, levels and trends of concentration and any history of collusion, degree of countervailing power, dynamic characteristics (innovation, product differentiation), and the nature and extent of vertical integration.

The record on vertical mergers points to characteristics of the South African economy, possibly shared by other developing countries, which have given cause for closer scrutiny than is typically the case in large industrialised economies. These characteristics include it being small and concentrated, with extensive cross-holdings common by the major firms. The South African economy is also located far from other industrial economies and has historically had high levels of protection and extensive regulation of several sectors through state marketing boards and other arrangements. It is not uncommon for there to be a dominant firm or duopoly in upstream and/or downstream markets. The South African competition authorities have thus been wary of vertical mergers which may have the effect of shielding firms from increased competitive forces, such as from importers, as well as mergers which potentially provide better monitoring and punishment, increasing the likelihood of coordination or its continued maintenance.

The key mergers which have raised concerns of a vertical nature include:²

- Schumann Sasol – Price’s Daelite in the wax and candle markets (23/LM/May01);
- Mondi – Kohler Core & Tubes in paperboard and cores & tubes markets (06/LM/Jan02);
- SAB/Coleus – Rheem in bottletops and beverages markets (75/LM/Oct02);
- Sasol – Engen in the liquid fuels refining and distribution markets (101/LM/Dec04).

¹ The Commission applies internationally accepted definitions, such as captured in the ICN Merger Guidelines Workbook.

² The rulings on these cases are available on the Competition Tribunal’s website www.comptrib.co.za

In ruling on these mergers the Competition Tribunal has made explicit reference to the ongoing competition law and economics debates on the treatment of vertical mergers. In addition, detailed expert economic evidence has been led before the Tribunal by both South African and leading international economists.

As would be expected, the evidence and analysis led has covered the issues of foreclosure, raising rivals costs, increasing barriers to entry and coordinated effects. In problematic cases the possible anti-competitive effects have been weighed against efficiencies. The elimination of double marginalisation has not played a major role in cases and nor have cases tended ultimately to turn on efficiencies. The main issues have been around the plausibility of the different theories of harm. Merging parties' experts have typically portrayed the concerns in this regard as speculative and unsubstantiated. The first vertical merger prohibited by the Tribunal (Schumann Sasol – Price's Daelite) was overturned on appeal on the grounds that there was no evidence of barriers to entry in the upstream and downstream markets.

This paper reflects on decided cases to highlight particular challenges in the approach adopted by the South African authorities.

2. Anti-competitive effects

The South African authorities typically go through the steps in a vertical merger of asking:

- Are there high levels of concentration in the upstream and/or downstream market?
- Is there the ability to behave anti-competitively?
- Is there the incentive to behave anti-competitively?
- What will the effects be, and on whom?

The main anti-competitive effects, or theories of harm, in vertical mergers can be grouped into considerations related to:

- foreclosure and raising rivals costs (or reducing rivals revenue)
- barriers to entry
- coordinated effects

The authorities have also undertaken an in-depth exploration of strategic behaviour in industries (notably liquid fuels) in order to assess how a vertical merger may change this behaviour and the outcomes.

We draw on the main cases to illustrate how these issues have arisen and been addressed in practice.

2.1 Foreclosure and raising rivals costs

Most of the concerns have occurred where there are high levels of concentration upstream. The assessment of the authorities has thus focused on issues of input foreclosure, raising rivals costs and other behaviour which could squeeze the margins or negatively impact on the competitive position of the rivals to the merging entity in the downstream market. The Competition Tribunal, in particular, has taken the different strategies together, as alternative means for a vertically integrated firm pursuing an exclusionary objective.

2.2 *Input foreclosure and raising rivals costs*

2.2.1 *Schumann Sasol – Prices Daelite*

The Schumann Sasol (“SCHS”)/Prices Daelite (“PD”) merger involved the supplier of almost all of the candle wax (SCHS) in South Africa, proposing to acquire the largest manufacturer of household candles, PD (with over 40% market share). The Competition Commission had recommended conditions designed to curb any discrimination against PD’s competitors in the downstream household candle market. The Tribunal, however, found that such a condition was inadequate given the different ways in which the merged entity could weaken the competition provided by downstream candle-manufacturers and ultimately turn the firms into mere distributors of the PD product, as appeared to be SCHS intention. This would raise obstacles to competing suppliers of wax in the South African market.

According to the Tribunal, SCHS could engage in predatory pricing of candles (having the same margin-squeeze effect as discriminating in input prices). SCHS position as the dominant supplier of the critical input in candle manufacturing also accorded it “privileged insight into the capacities and strategies of its downstream subsidiary’s competitors” in what is a very low margin business.

The Competition Appeal Court overturned the Tribunal’s prohibition of the merger on the grounds that foreclosure strategies would not be profitable because of low barriers to entry. While the Tribunal had acknowledged low barriers to entry in candle-manufacturing, the Tribunal held that, on the available evidence, independent candle manufacturers had ready access to imported wax.

2.2.2 *Mondi – Kohler*

The second major vertical merger related to the proposed acquisition by Mondi, one of the two paper manufacturers of Kohler Cores & Tubes (KC&T), the largest manufacturer of cores and tubes (which use paper core board as the main input). Another dimension to this transaction was that the upstream paper supplier also bought the downstream cores and tubes for use in the production of its own output. The Tribunal explicitly recognised the changing recognition of circumstances in which vertical transactions may be problematic, including making reference to the insights from game theory and ‘post Chicago’ theories of anti-competitive harm. In addition, the Tribunal was concerned about the effect of the merger in facilitating coordinated conduct given the duopolistic nature of the upstream market.

According to the Tribunal, Mondi’s incentives were perfectly aligned with those of its closest rival Sappi. In fact, any post-merger self-dealing by the integrated Mondi, would grant Sappi the license to reap monopoly rents from nonintegrated consumers of its core-board. The Tribunal argued that “Mondi’s interest in allowing Sappi to charge a monopoly price to its customers resides in the impact of Sappi’s monopoly price in the downstream core and tube market – it raises the cost of Mondi’s rivals in the downstream cores and tubes market thus either enabling Mondi’s newly acquired cores and tubes division to capture a larger market share of this market, or, more rationally, enabling it to raise its prices to its customers in the downstream market, a market in which it will, through its acquisition of KC&T, already command a dominant share”.

The parties maintained that the availability of an alternative product to Mondi’s core-board (trademarked Ndicore), namely Sappi’s Spiralwind, and the fact that Sappi, by suddenly requiring that the cores and tubes that it purchases be manufactured from Sappi product alone, would effectively eliminate any prospect of input foreclosure. Furthermore, they argued that post-merger, they would not self-deal, but would continue to sell and buy core-board and cores and tubes respectively from the open market. As already stated, the Tribunal saw Sappi’s Spiralwind not as an ideal substitute to Mondi’s Ndicore, as these two companies’ incentives were aligned for conduct coordination. Moreover, the Tribunal maintained that

any open market dealings by the integrated Mondi would be a tool for critical price information sharing between the only two firms (Mondi and Sappi) in the upstream market for paper products.

The Tribunal's prohibition of the merger was upheld by the Competition Appeal Court.

2.2.3 *Sasol – Engen merger*

In this merger, Sasol, the main refiner of liquid fuels (predominantly petrol and diesel) in South Africa sought to merge with Engen, another large refiner which also had an extensive distribution and retail network. For historical reasons Sasol had a very limited distribution and retail network. The major competitive effects considered by the Competition Tribunal in its ruling were related to foreclosure as it determined that the inland position of Sasol's refining capacity and the logistics constraints in bringing refined product from the coast where the Engen refinery was located meant that the refineries were in different geographic markets.

The key question addressed by the Tribunal was whether the merged entity, with 82% of the production of refined product in the inland market, would foreclose on the other oil companies' distribution and retail operations in the inland market as a result of the merger. The merger meant that the new entity would have 40% of the inland Gauteng Province market for the sale of petrol at service stations. Foreclosure would mean they could increase their share of the distribution and retail market significantly, however, it was also noted that the credible threat of foreclosure was all that was required to force higher prices for bulk supply, together with price leadership and lower market share in the distribution and retail market on rivals.

Detailed models of the profitability of foreclosure were presented by economists on both sides. Evidence in support of these models included in-depth treatment of the logistical ability of the other oil companies to defeat foreclosure in the inland markets by bringing product from the coast, by prioritising important customers and by being able to regain market share at a later date, and by being able to retaliate in other markets. Given the difficulties in projecting over uncertain variables, the Tribunal found the threat of foreclosure credible and noted that even the merging parties' economist conceded that on earlier versions of data provided to him it was a close call⁷.

2.3 *Customer foreclosure*

2.3.1 *Schumann Sasol - Prices Daelite*

As previously stated, this transaction entailed the acquisition (by a dominant supplier of an important input - candle wax), of the largest buyer (or producer of household candles) of the said input. According to the Tribunal, this would result in the removal of the buyer, PD, thus ensure that any entry into the upstream candle wax market is confined to the fringes of the market. The Tribunal found that potential entrants would be excluded from the largest part of the market in an area of production subject to scale economies. The only avenue available to them would be to simultaneously enter the household candle market as well. However, this two-level entry was found to be unlikely and risky, given that the downstream household candle market was dominated by a single producer (PD) who would, worse still, be owned by the dominant supplier (SCHS) of candle wax post-merger.

2.4 *Barriers to entry*

Evidence and argument on barriers to entry has played a key role in several cases, particularly in the Schumann Sasol (SCHS)/Prices Daelite (PD) matter. In Sasol – Engen, entry barriers were not contested, while in Mondi – Kohler the merging parties claims of easy importing of paper board did not stand up to scrutiny. Given the relatively small size of the South African market and high levels of concentration in the

manufacture of key material inputs such as wax and paper board (together with significant economies of scale), the barriers to importing have been a feature of several cases.³ The transactions costs in arranging imports, and the volumes of business required to make imported material a viable option for continuous production operations, have been debated at some length in hearings.

In the Schumann Sasol (SCHS)/Prices Daelite (PD) matter, the Tribunal found that the acquisition by SCHS of PD would ensure that SCHS's competitors in candle wax are kept on the fringes of the market. They would be excluded from the largest part of the market with the removal of PD from the open market (although there was already a long-term supply agreement between SCHS and PD). In the Tribunal's view the merger also enabled further consolidation in the downstream market through foreclosure in order to "maintain the already significant barriers in the upstream market". Therefore the only option to enter the upstream candle wax market would be to simultaneously enter the downstream candle market. With small imports of candle wax from China and no import duties levied on candle wax, the Tribunal held that the proposed transaction would make it more difficult for importers to be a competitive alternative. The Competition Appeal Court questioned the evidential basis for this finding given the low entry barriers in candle making found by the Tribunal.

In the Mondi/KC&T matter, the Tribunal found that the formidable market power of the upstream paper products duopoly disabled any possible importation of core-board. An example cited was an occasion when KC&T sought alternative supply from overseas. This was short-lived as Mondi, it was reported, stopped supplying them with core-board, thus raising their costs. Also, the insistence by Sappi (the other half of the duopoly) that all cores and tubes that it purchases should use its own material shut the door completely for imports.

2.5 *Coordinated effects*

Although potentially a very significant source of harm, coordinated effects have not been relied on in any merger prohibition. They were analysed in some detail in Mondi - Kohler, and found to exist, but the Tribunal ultimately also concluded that foreclosure alone would have been enough for the prohibition. In this case, the possible unilateral input foreclosure also had the effect of increasing the market power of the other major supplier. The mutual recognition by the upstream duopoly could also be characterised as increased likelihood of tacit coordination resulting from the proposed merger. The Competition Appeal Court supported the Tribunal's finding that the merger increased the market power of the other supplier, Sappi, as well as the merging entity, whether through explicit coordination or parallel conduct.

2.6 *Consideration of strategic behavior in the Sasol – Engen merger*

A large part of the Sasol-Engen merger evaluation addressed the likely outcomes in terms of the effect of the merger on strategic behaviour. The Tribunal found that the merger effectively 'changed the rules of the game' in a way which meant less competitive outcomes. In particular, the credible threat of foreclosure resulting from the merger meant in the Tribunal's assessment that it would weaken the rivalry between producers, with the OOCs accommodating, accepting both smaller market share and the price leadership of Sasol as the dominant firm. In addition, strategic documents referred to by the Tribunal clearly indicated Sasol's interests in raising the costs of the OOCs and limiting logistics capacity to bring product inland.

This suggests a broader assessment of unilateral effects from vertical mergers in tight oligopolies which takes into account the effects on the non-coordinated outcomes in such markets, as well as the implications for the likelihood of coordination. This recognises that, while firms' interests are pitted against each other in such markets in terms of the incentives to increase market share, their interests are

³ For example, in a merger in forestry and sawn timber parties made claims as to the ease of importing.

also shared in ensuring that supra-competitive pricing is maintained. A vertical merger may change the balance between firms within such markets, while simultaneously providing mechanisms for more effective enforcement of coordinated outcomes.

3. Efficiencies and Vertical Mergers

The South African authorities have explicitly recognised the grounds for expecting efficiencies from vertical mergers, including through

- improved coordination;
- internalisation of externalities;
- elimination of double marginalisation.

These are, however, also difficult to measure and the decisions have tended to stand or fall on the first round of assessment as to the substantial lessening or prevention of competition. Where efficiencies have been proposed in vertical mergers they have therefore not swung the decision.⁴⁵

In the Sasol-Engen merger ruling there was considerable evidence presented on the efficiencies, the extent to which the efficiencies were merger specific, and whether the efficiencies would outweigh the possible anti-competitive harm from the merger. However, as the economist for the merging parties conceded that even his calculation of the efficiencies would not outweigh the harm from foreclosure, were it to be credible, the Tribunal did not need to go further in evaluating the efficiencies.

4. Evidence and enforcement policy

As already noted, the assessments of vertical mergers have involved detailed evidence, including that presented by experts, parties, customers, competitors and industry experts. The evidential basis for models has been thoroughly tested, particularly in the Sasol-Engen merger hearing. In Mondri-Kohler case the Tribunal directed that evidence be given by various industry participants who had not originally been called by the merging parties or the Competition Commission in order that the issues be thoroughly ventilated. The importance of the evidence of factual witnesses has also been highlighted in understanding the particular nature of the South African markets in question, given the high levels of concentration which prevail. In addition, the recent cases have also demonstrated the importance of a full and rigorous process of discovery.

5. Remedies

In several cases the authorities have noted the difficulties and undesirability of using behavioural remedies to attempt to cure possible anti-competitive consequences of vertical mergers. This goes to the difficulties in monitoring remedies and in anticipating the different strategies through which dominant and vertically integrated firms may insulate themselves from effective competition. In one case the conditions were dependent on agreement being reached between rivals as to the terms of access to a network, where the rivals did not reach agreement. There have, however, been cases where remedies have been successfully imposed of a structural nature, and where the contractual terms were agreed and included in the order of the Tribunal.

⁴ Citing, for example, Riordan, M. and S. Salop (1995) 'Evaluating Vertical Mergers: A Post-Chicago Approach', *Antitrust Law Journal*, 63.

⁵ There has, however, been a horizontal merger where it was approved on efficiency grounds despite the merger meaning a substantial increase in concentration (Trident-Baldwins).

CHINESE TAIPEI

1. Introduction

1.1 Definition

The Chinese Taipei FTC's definition of a vertical merger is the vertical integration of two (or more) merging enterprises positioned in different production/sales stages, one of which (the upstream enterprise) produces the input required by the other (the downstream enterprise). A vertical merger can also refer to a situation where a single enterprise covers both stages of production.

The difference between an upstream enterprise and a downstream enterprise is based upon:

- the product timeline : An enterprise that first produces a part of the product is the upstream enterprise.
- An enterprise selling the product to the final consumer is the downstream enterprise.
- trading directions.

It shall be comprehensively determined on a case-by-case basis.

1.2 Concerned Degree of Different Merger Types

A horizontal merger leads to a reduction in the number of current enterprises in the market and directly increases market concentration. A vertical merger does not increase market concentration. However, it might cause one enterprise at one end of the vertical merger (either upstream or downstream) to extend its market power to the other end of the merger thereby affecting the competitiveness of the industry at the other end. Since the FTC takes the method of negative listings to categorise the conglomerate merger, any merger that does not fall under the description of a horizontal merger or vertical merger is referred to as a conglomerate merger. In other words, enterprises that are part of a conglomerate merger have neither a horizontal competing relationship nor a vertical relationship between the upstream and downstream enterprises.

The FTC pays a high degree of attention to a horizontal merger, a medium degree of attention to a vertical merger and a low degree of attention to a conglomerate merger.

The key point in controlling a horizontal merger is to determine whether the increase in market concentration resulting from the merger will inappropriately diminish the competition, while that regarding controlling a vertical merger is to determine whether the merger will cause an improper extension of market power. As for a conglomerate merger, attention needs to be directed toward whether or not the merging enterprise has critical potential in terms of horizontal or vertical competing possibilities. Then, the conglomerate merger can be evaluated by means of a relative analytical method.

2. Analysis Factors of Vertical Merger

A vertical merger does not necessarily increase the concentration in the market where the merging enterprises are. Therefore, a vertical merger is a different type of merger from a horizontal merger, which has a direct impact on the market structure. Thus, the FTC, in accordance with “The Fair Trade Commission Guidelines on Handling Merger Filings,” employs the following factors as its evaluation standards to determine whether a vertical merger will give rise to competition restraints:

- the probability of other competitors selects their trading counterparts after the merger;
- the degree of difficulty for an enterprise not participating in the merger enters the relevant market;
- the possibility of merging parties abuses its market power in the relevant market; and
- other factors that may result market foreclosure.

After taking into consideration the aforesaid competition restraining factors, there is no suspicion of obvious competition restraints, then it can be considered that the overall economic benefits of the merger will outweigh the disadvantages resulting from the restraints on competition. Otherwise, the overall economic benefits shall be further examined to determine whether the overall economic benefits of the merger outweigh the disadvantages resulting from the competition restraints.

In other words, only when a merger case brings disadvantages resulting from competition restraints will it be necessary for the FTC to proceed with a further examination of the overall economic benefits.

The FTC’s considerations in regard to the overall economic benefits of the merger are:

- (1) consumer interests;
- (2) the merging parties are originally at the weaker position in the trading;
- (3) one of the merging parties is a failing enterprise; and
- (4) other concrete results related to overall economic benefits.

According to the preceding paragraph, it can be found that most cases to do with entering into a further review of the overall economic benefits are those with possibilities of competition restraints. Therefore, the FTC pays more attention to reviews at this stage. If none of the enterprises to the merger is a failing enterprise or was originally in the weaker position, these enterprises of vertical merger will in particular be required to explain how the merger will bring advantages to consumers and how it will benefit the economy as a whole.

Although a vertical merger may improve coordination and increase efficiency, thereby saving trading costs and excluding double marginalisation, its externalisation of internal profits remains uncertain during the merger review. Thus, the FTC expressly stipulates in the “Guidelines on Cable Television Relevant Industries” that enterprises involved in a vertical merger explain how to proceed with the externalisation of internal profits and make promises, for example, to submit their current and future positive measures to prevent themselves from restraining the competition¹.

¹ FTC “Guideline on Cable Television Relevant Industries” II, (2).

3. Efficiency Factors of Horizontal and Vertical/Conglomerate Merger

According to the aforementioned Article 6, Paragraph 2 of the “The Fair Trade Commission Guidelines on Handling Merger Filings,” the FTC only further reviews the efficiency of the overall economic benefits when a horizontal merger, vertical merger or conglomerate merger gives rise to obvious concerns over competition restraints.

When reviewing the concern of competition restraints brought by the horizontal merger, vertical merger or conglomerate merger, considerations may differ according to the different merger types. Nevertheless, the considerations for all three types of merger are the same when it comes to the efficiency stage (overall economic benefits).

When reviewing a vertical merger, the FTC mainly emphasises the market structure of the enterprises involved in the vertical merger, previous violations of competition laws by the enterprises participating in the merger, precedents of violation of competition laws by the industry, opinions given by the competent authority of the industry, and opinions of the general public.

Additionally, when reviewing merger cases, the FTC will consult with relevant competent authorities² and publish information regarding merger filings on the Internet during the reviewing process for related enterprises and the general public to express their opinions.

Furthermore, if an enterprise that is a party to the merger had previously engaged in anti-competitive acts, even though no express rules are provided, the FTC will in particular consider the possibilities that such specific acts might lead to an improper extension or abuse of its market power in relation to the other market.

4. Individual Case

In 1999, the FTC made a decision to against a vertical merger related 2 main channel program providers with 9 cable television system operators.

According to the “Guideline on Cable Television Relevant Industries”, FTC has expressed to the public that the following factors will be considered in vertical merger cases :

- Whether the number of channels owned by an enterprise of vertical merger exceeds 1/4 of the number of available channels.
- Whether the channels owned by the enterprises of vertical merger are irreplaceable in the market.
- Whether the number of consumers owned by the system operator and its affiliates exceeds 1/3 of the total subscribers nationwide.
- Whether the number of cable television system operator and its affiliates, controlled exceeds 1/3 of the number of the total cable television system operators nationwide.

² Article 14 of “The Fair Trade Commission Guidelines on Handling Merger Filings” provides, “the Commission shall deliberate opinions of the competent authority when reviewing the merging filing to assess the overall economic benefits and the disadvantages of competition restraints.”

The shareholders of 2 main channel program providers wished to directly or indirectly obtain the power to control 9 cable television system operators. These 9 system operators mostly had more than a 40% market share within their own operating regions. Through the merger, the applicants would become multi-systems operators in the downstream enterprises. The FTC thought that, by jointly deciding on the prices, the enterprises involved in the merger could lower their purchase costs to improve their competitiveness or threaten any potential competitors. As a result, the system operators not participating in the merger would have difficulty competing with these enterprises involved in the merger; and potential competitors would face entry barriers. The structure of the cable television system would become more concentrated.

In addition, one of channel program providers was authorised by 12 program channels while the other one was authorised by 18. Therefore, they could affect 30 channels at most, which was 40% of the available channels under the cable television system at that time. Although the vertical merger might be able to lower trading costs, ensure stable broadcasting of channels and provide various online services, it could also force competitors to withdraw from the market or to participate in the merger or concerted actions through channel providers refusing to issue licenses or system operators refusing to broadcast. In such instances, the upstream and downstream markets would both be blocked.

The applicants refused to sell their shares in the channel providing enterprises as the condition for the merger's approval. They merely claimed that their business operations after the merger would be consistent with the Fair trade Law. However, the applicants did not submit current and future measures for refraining from implementing competition restraints, even though the applicants stated that foreign funds and technology would be attracted through the merger to enhance the industry's operating nature and establish a cross-island network, and that the transformation and improvement of the cable television and communication industries would be facilitated to provide better quality service that would lead to a great diversity of recreation, information and telecommunications. However, the FTC indicated that the merger was not the only way to draw foreign funds or technology. Individual system operators would also be able to accomplish the same through separate negotiations. In addition, the cable television network is only one of the infrastructures of information and communications. The overall economic benefits created by the network can also be achieved through other methods that are consistent with the competition laws and regulations.

Finally, the FTC blocked this vertical merger notification because of the high level of concern over the competition restraint.

5. Remedy

In the event that a vertical merger is similar to other types of merger, though no obvious restraints might show when merger notification are filed, it might still be possible to occur monopoly or dominant position along with the growth of business after the merger³. Therefore, the FTC feels that it is difficult to analyse which type of approach (an ex post vs. an ex ante approach) is superior by utilising the information on costs and benefits. Either ex post or ex ante approach has its function. For vertical merger, a review shall be firstly carried out to those cases reaching the threshold. Enterprises that pass the review will still need to comply with Article 10 (monopoly) or Article 19 (abuse of superior position) of the Fair Trade Law in case that these enterprises might abuse their market power through their growing operations in the future.

³ The operation of enterprises after the merger could be uncertain. A merger could increase enterprises' market power; but it could also become a failure due to difference corporate cultures.

BIAC

BIAC welcomes the opportunity to comment on the issue of vertical mergers.

1. Introduction

Vertical integration is an important vehicle used by firms to lower their costs and compete more effectively. Thus, vertical mergers presumptively should be viewed as competition-enhancing arrangements and should not be subjected to regulatory intervention absent extraordinary circumstances that demonstrate a significant likelihood of competitive harm.

As a firm strives to innovate – both in terms of productivity and product selection – its need for inputs and distribution alternatives evolves, sometimes in ways that are unanticipated. Firms must make elections about the structure and organisation of their company that will allow them to thrive in a dynamic and competitive marketplace. Indeed, firms that do not adapt are doomed to failure.

In establishing consumer welfare as the definitive objective of competition policy, competition laws should be applied to protect the competitive environment for firms striving for innovation and efficiency rather than protecting firms that adopt a static approach. Vertical mergers present a prime opportunity for inefficient firms to attack their competitors and seek the protection of regulators. Heeding these complaints, however, often will merely entrench the existing inefficiencies of the industry and prevent consumers from recognising the benefits of innovation.

Striking the proper enforcement balance in the evaluation of vertical mergers need not be difficult. To optimise consumer welfare, we respectfully suggest that agencies should observe the following principles in considering vertical mergers:

- a. Vertical mergers should be recognised principally as cost-reducing, efficiency enhancing transactions and presumptively should be viewed as beneficial to competition;
- b. Agencies should intervene in vertical mergers only in those exceptional circumstances where well-established theories of competitive harm and real-world factual conditions of the merger converge to demonstrate that a substantial likelihood of harm to consumers will occur.
- c. A conclusion that a vertical merger will result in significant competitive harm should not be reached without evaluating the counterstrategies available to rivals in the absence of regulatory intervention. Allowing the dynamics of a competitive market to play out is a preferable alternative to regulatory intervention and will result in the greatest enhancement to consumer welfare.
- d. Care should be taken to avoid the “chilling effects” of Type II error which will discourage or delay other firms from pursuing strategies and organisational structures that enable them to reduce costs and compete more effectively. The risks of over-enforcement are particularly significant in the area of non-horizontal mergers.

- e. Theories of economic harm in vertical mergers based on other than input foreclosure and customer foreclosure – even those that may be sound in theory – have significant limitations and should be approached with considerable scepticism.
- f. The elimination of double marginalisation is a first order benefit that should be recognised as a laudable motivating factor for vertical mergers.
- g. The analysis of efficiencies should be an integral part of analysing whether anticompetitive effects will result from vertical mergers.

Each of these considerations is discussed below.

2. Assessing Potential Competitive Harm

Because of the competitive benefits that stem from inherent efficiency gains, vertical mergers will rarely present factual circumstances which suggest that competitive harm is likely. The analysis below focuses on the two principal theories on which vertical mergers should be analysed: (a) input foreclosure and (b) customer foreclosure.

2.1 Vertical Mergers and the Potential for Input Foreclosure

The potential for input foreclosure is one of the principal theories of competitive harm and can serve as a legitimate basis for enforcement against vertical mergers. For competitive harm to occur as a result of input foreclosure, however, a number of market factors must be considered and particular conditions must be satisfied.

First, for input foreclosure to be an applicable theory of harm, the upstream firm must be able to raise the input price to downstream rivals either directly or indirectly.¹ This is not likely if the upstream market remains sufficiently competitive and if downstream firms can substitute easily to alternative inputs. In other words, the analysis should include an assessment of market power in both the upstream market and the downstream market(s). The factors that would enter into such an analysis include a comprehensive examination of the upstream suppliers and their ability and incentive to continue selling to downstream customers. In addition, evidence that downstream customers already purchase from multiple upstream suppliers suggests that switching costs are low for downstream customers. Low switching costs would allow the downstream firms to turn to alternative suppliers if faced with a price increase from the merged entity.

Second, for input foreclosure to harm competition, an increase in the input price charged by the integrated or merged firm to downstream customers must also lead to an increase in the price charged by the downstream firms to their customers.² The reason is that absent an increase in the output price of the downstream firms, the incentive to increase the price of the input in order to implement a raising rival's cost strategy vanishes. As several models note, the benefit to a vertically integrated firm that engages in a strategy of input foreclosure is the higher profit margin downstream, which can only result if the price of the downstream industry's product is higher. Whether such a pass through is likely depends on a careful assessment of the product market in which the downstream firms compete. For instance, the downstream

¹ The upstream market typically refers to firms that supply inputs, while the downstream market typically refers to firms that produce the product or service that encompasses the input and is sold to the final customer

² A price squeeze that attempts to force other downstream firms from the market is a variation of this theory. During the period of the squeeze, the price charged by the downstream firms to their customers may not rise. However, the theory posits a price increase following the exit of the rivals being squeezed.

firms who purchase the merged entity's inputs could well face competition from rivals who sell products based on different technologies and inputs.

Third, even if a strategy of input foreclosure is likely to increase the merged firm's downstream profit margins, the increase in downstream profits for the merged firm must be greater than the cost of the strategy, i.e., the loss in upstream profits. This cost, which stems from the vertically integrated firm's decision to forego sales of its product to downstream rivals, for example, cannot be ignored. Yet for an input foreclosure strategy to be rational, the analysis must consider the balancing of the two opposing effects: higher downstream profits at the cost of lower upstream profits. The costs of exclusionary strategies are real and immediate and, as such, have the effect of lessening the incentives to deploy such strategies in a wide variety of market scenarios.

A fourth, but related, condition is that the vertically integrated firm must be able to commit to a post-integration strategy of foreclosure. Commitment is a critical component of the theory as it ensures the rationality of an anticompetitive input foreclosure strategy. Otherwise, the vertically integrated firm could well find it optimal to continue supplying its downstream rivals.

Fifth, for input foreclosure to have a competitive effect, counterstrategies that avoid foreclosure must not be available to the allegedly foreclosed rivals. As noted above, the ability of downstream rivals to merge with rival upstream suppliers could well stimulate competition or reverse the exclusionary strategy that was allegedly made possible by the transaction.

Sixth, the vertical merger is likely to yield efficiencies, which would include the possible elimination of double marginalisation. As noted earlier, the conditions in which the efficiencies are likely to be most significant are also the conditions that are likely to create the opportunity for foreclosure. In addition, vertical integration could reduce the integrated firm's costs and improve the firm's productivity. Such benefits would counter the risk of competitive harm.

2.2 *Vertical Mergers and the Potential for Customer Foreclosure*

Under the conventional customer foreclosure hypothesis, the vertically integrated downstream firm no longer purchases supply from unintegrated upstream competitors, as all of its demand for inputs would be supplied by its upstream affiliate. In theory, the reduction in demand could limit the addressable market or the sales volume available to the integrated firm's upstream rivals, thereby affecting their ability to achieve economies of scale. As a result, over time, upstream rivals who are unable to implement a counterstrategy may exit the market. The analysis of customer foreclosure, which focuses on an integrated firm's ability to reduce its rivals' revenues by denying them access to customers, is similar to the framework described above for input foreclosure. For instance, an analysis of both input and customer foreclosure would involve an analysis of relevant market definition, the nature of the products sold, the competition among the firms in that market, and barriers to entry.

There are nonetheless important distinctions between the two theories of vertical foreclosure. Putting aside efficiencies, input foreclosure has the direct potential to lead to higher prices in the short run by raising the costs of the integrated firm's downstream rivals. In contrast, customer foreclosure presents a more limited potential for prices to rise in the short run. Prices would not rise until after there was sufficient exit from the industry by the unintegrated rivals, which is less likely to occur in the short run except in cases of monopsony. Because exit may not be immediate, the potential harm to competition due to customer foreclosure may not occur until much later, if at all.³ Because the short run and long run

³ If this were to occur, downstream firms may be able to turn to rival upstream suppliers. Depending on the circumstances, this could take time and require costly investments. Moreover, additional time may be

effects are likely to differ, competition policy should treat and distinguish the two theories appropriately. The following market facts and conditions should be considered.

First, as noted above, for anticompetitive customer foreclosure to be credible, both the upstream *and* downstream markets must be conducive to the exercise of market power. In particular, the analysis should focus on the merged firm's ability to control access to the ultimate customer or end user. Factors that would enter into such an analysis include the various ways in which the ultimate end users or customers obtain the product or service they want to purchase and the extent to which they can purchase those products and services without going through the merged entity. This implies a careful assessment of the variety of ways in which products are sold into the downstream market and the available methods of distribution.

Second, customer foreclosure is not likely if the cost of switching is relatively low. For instance, consider a theory where a first mover may be able to lock up customers, thereby denying a new entrant sufficient volume to realise economies of scale. Whether, in fact, customers are locked in to the first mover will depend on a variety of factors, such as the terms and duration of supply contracts and the dynamics of contract renegotiations.⁴

Third, the analysis also should consider whether the potentially foreclosed rival firms are as efficient as the integrated entity, as harm to competition, under normal circumstances, would require, at a minimum, the elimination of unintegrated rivals who are at least as efficient as the integrated firm prior to the attempted foreclosure.

Fourth, whether harm to competition is likely will depend on the cost structure of the integrated firm's upstream rivals. This analysis would include an assessment of the economies of scale and scope of the upstream rival suppliers, as well as the relative efficiency of those firms.⁵ Moreover, the analysis would consider the timing and likelihood of exit by the unintegrated rivals, as this is the first step that could allow the integrated firm to raise its prices. Together, these are factors that would affect the integrated firm's ability to place its upstream rivals at a disadvantage in a way that would lead to higher prices.

required if entry into the upstream market is needed to provide the non-integrated downstream firms with competitive upstream supply.

⁴ For example, the European Commission addressed this issue in the context of the barriers to entry encountered in the energy sector. In its recent decision blocking the proposed acquisition by Energias de Portugal (EDP) a Spanish electricity provider, of Gas de Portugal (GDP), the Commission concluded that, after the acquisition, EDP would have the incentive to source all of its supply from its upstream integrated partner, GDP. In its analysis, the Commission determined that there would not be sufficient new gas demand from other power producers, and concluded that none of the commitments offered were sufficient to eliminate the customer foreclosure effect of the proposed concentration. (Case No COMP/M.3440 ENI/EDP/GDP, 09/12/2004; affirmed by the Court of First Instance in Case T-87/05, 21 September 2005.)

⁵ The danger in not performing this type of analysis carefully was described in the recently published DG Comp Merger Remedies Study. The study noted, without identifying the transaction, that in "a rare instance of potential customer foreclosure, the remedy required the complete divestiture of the merging parties' activities in the (small) upstream market. That way, the merging parties' only competitor in the upstream market could not be foreclosed from its customer base, specifically, the merging parties. In this case (as in any other vertical case), the complete divestiture of the activities in one of the vertically related markets resolved the foreclosure concerns; however, the purchaser experienced considerable difficulties in attempting to establish itself in the market, and reported that its survival remains uncertain." (Merger Remedies Study, DG Comp Staff paper, Alex Kopke, Katharina Kraak, Damien Levie (DG ENTR), Justin Menezes, Sandra Plas, Walter Tretton, (October 2005), ¶17, p. 30.)

Fifth, for anticompetitive foreclosure to be a viable theory, the framework of analysis should include an assessment of the natural equilibrium that would result had there been no vertical merger or no attempted foreclosure. It is possible, for instance, that exclusive contracting is the natural equilibrium, in which case the vertical merger would not effectively change the structure of the marketplace. However, even though the structure of the market may be similar, a merger may change the incentives sufficiently so that prices may be lower and overall market output may be higher.

Sixth, the analysis must consider the incentives of the integrated firm to engage in customer foreclosure. This would involve an assessment of the costs and profit margins of the integrated firm's downstream unit, as well as customer demand for the downstream products. For example, if the downstream firm can make additional profits by purchasing a rival upstream firm's product and selling it to its downstream customers because, for instance, the quality of the product is higher, then customer foreclosure would not be a credible theory. That is because the integrated firm would continue to have an incentive to purchase products from rival upstream suppliers.

Seventh, the extent to which the integrated upstream firm is likely to react to downstream pricing is also an important factor. The counterstrategies available to the unintegrated firms need to be assessed. Because there are likely to be strategic reactions, the analysis will likely involve consideration of facts such as the own- and cross-price elasticities of demand for the various products in the marketplace, as well as the capacity and ability of rival firms to respond competitively.

Eighth, a vertical merger is likely to generate efficiencies and cost savings. This would include the possible elimination of double marginalisation. Again, as noted earlier, the conditions in which the efficiencies are likely to be most significant are also the conditions that are likely to create the opportunity for foreclosure. In addition, vertical integration could reduce the integrated firm's costs, improve the firm's productivity, and reduce transaction costs for the ultimate customer or end user. Such benefits could counter the risk of competitive harm.

3. Accounting for the Competitive Responses and Counterstrategies of Rivals

Foreclosure is the principal theory of competitive harm for many vertical transactions. Yet most of the economic models of competitive harm in vertical mergers do not account for the competitive responses and counterstrategies by the potentially foreclosed competitors. Yet to assume away such a response is not realistic. Just as coordinated effects theory in horizontal mergers requires a conclusion that a competitive response will occur to a change in the behaviour of one competitor, a competitive response to vertical integration must also be assumed. In order to remain competitive in the marketplace, the natural response of a competitor will be to implement a counterstrategy to offset the competitive advantage (i.e., reduced cost) of its rival. The key question becomes whether in those rare instances where a vertical merger might pose competitive harm such competitive response will be sufficient to counter any competitive effect flowing from the vertical merger.

The net competitive impact of a vertical merger involves an assessment of the market dynamics and the counterstrategies that are available to other firms in the market. For example, consider a vertical merger involving an upstream firm and a downstream firm that creates the potential for input foreclosure or the prospect that a downstream firm may face higher input prices. Whether or not rival downstream firms are likely to be foreclosed depends in large part on their ability to deploy effective counterstrategies at non-prohibitive costs.⁶ For instance, the downstream firm may be able to merge with another upstream firm to secure its supply of the input. If such a counterstrategy were available, the ultimate market outcome could

⁶ For a recent example under European merger control law where effective counterstrategies were deemed to exist, see Case No. COMP M. 4300 Philips- Intermagnetics.

well be more competitive than in the absence of the merger. Thus, despite industry consolidation resulting from two successive mergers, competition in the downstream market may well be more intense to the benefit of consumers. This is particularly important in industries characterised by systems competition.

The consideration of counterstrategies reflects that merging firms' rivals are often able to revise their market strategies, and possibly their own organisational structure, to account for changes in market circumstances.⁷ Both the short run and long run consequences of a transaction are incorporated by this consideration. In some cases, a non-horizontal transaction could lead to lower prices in the short run, but higher prices in the long run. In other cases, such an acquisition could put rivals at a "disadvantage" in the short run, but not in the long run as rivals develop new strategies and competitive responses. A failure to consider counterstrategies and rely instead on a static view of the market and the options of upstream and downstream rivals will result in both poor enforcement decisions and a loss of consumer welfare.

4. Avoiding Chilling Effects on Competitive Vertical Integration

The chilling effects of enforcement against vertical mergers are greater than in many other areas of competition policy. At the same time, enforcement experience and the analysis of outcomes is much more limited than in horizontal mergers and other areas of competition law (e.g., cartels). Thus, both the risk and the cost of inaccurate enforcement decisions (particularly Type II error) should be recognised as heightened in the case of vertical mergers.

Enforcement decisions regarding vertical mergers have an important influence on the decisions made in the marketplace. Uncertainty can stem from a patchwork of enforcement initiatives that are at times only partially revealed to, or understood by, non-parties to a transaction. These actions influence not only those transactions that occur, but also those transactions that are being contemplated. Both Type I and Type II errors can lead to significant "chilling effects" and unintended injury to consumers.⁸ Obviously, consumers may be particularly harmed if firms decide to forego non-horizontal transactions that may give rise to significant dynamic efficiencies.

Because of the collateral impact of enforcement actions, agencies should ensure that a high level of evidence exists with respect to the key factual and economic principles described above. Applying a high standard of proof prior to undertaking enforcement against vertical mergers will help to ensure that the net results of enforcement are in the best interests of consumers.

Conversely, then, without empirical evidence and practical experience to provide assurance that enforcement is well-justified, enforcement against vertical mergers may prove detrimental to consumer welfare. Thus, an established intersection of theory and practice is a prerequisite to sound enforcement, particularly in the field of vertical mergers. Enforcing against the marginal case, even if it results in an arguable elimination of instantaneous competitive effects, may have net adverse results when considering the chilling effect of the enforcement action.

⁷ Whether the relevant counterstrategies include alliances, contractual arrangements, and other alternatives that do not require formal integration or a merger is best determined on a case by case basis. As noted above, the nature and magnitude of the vertical efficiencies of a merger are intrinsic to the transaction itself and the parties involved. Likewise, whether there is a non-merger counterstrategy that is likely to be relevant and effective in helping rivals to compete against the integrated firm will depend on the specific circumstances of the industry and the particular rivals involved in implementing such a strategy. Because the efficiencies are likely to be intrinsic to the parties involved, the mere presence of a viable non-merger counterstrategy does not imply that the efficiencies of integration are not merger-specific.

⁸ This point is specifically noted by Professor Church in his remarks to the Association of Competition Economists on September 8, 2005.

5. Limitations of Alternative Economic Models of Vertical Mergers

Alternative models of economic harm for vertical mergers that rely on effects other than input foreclosure or customer foreclosure should be viewed with substantial scepticism.

Despite the fact that much of the economic literature on vertical relationships starts from the presumption that vertical transactions are driven by efficiency considerations, the potential for non-horizontal mergers to lower costs or enhance competition generally is not emphasised or given sufficient weight in most recent economic assessments of vertical mergers. In fact, the objective of these studies is often to consider how non-horizontal mergers might, in theory, lead to competitive harm rather than to focus on the cost-benefit analysis of vertical mergers in a broader sense.

These recent studies of the economic models, including the Church Report of 2004, tend to focus on the “post-Chicago” literature. In general, these models focus on the potential for competitive harm rather than the potential for vertical mergers to improve static or dynamic efficiency and enhance competition. This is not a criticism of the Church Report or of the post-Chicago literature, but a reminder that the post-Chicago literature is focused on developing and explaining theories of competitive harm, which was a research goal that stemmed in part from the recognition that the Chicago School already laid out a strong case for the procompetitive rationale for vertical mergers. As a result, more recent studies tend to apply game-theoretic models in order to explore the conditions under which theoretical exceptions to the general presumption (that most vertical mergers generate efficiency gains) may exist, but the general rule is still widely credited – even by these recent studies.

Although the weight of post-Chicago economic analysis may skew towards the identification of market settings in which vertical arrangements could lead to potential competitive harm, a proper analytical framework should credit the potential for vertical mergers to increase economic efficiency and enhance competition. In this regard, agencies should recognise that (a) the elimination of double marginalisation and other vertical inefficiencies are first-order benefits of a non-horizontal transaction; (b) the merger-related efficiencies and cost savings often arise because they resolve problems that cannot be solved practically through contractual solutions; (c) an empirical approach to estimating and assessing the magnitude of the efficiencies is an integral step of the analysis; and (d) the ability of rival firms to engage in counterstrategies that could further enhance competition in the marketplace is a key consideration.

These alternative models normally do not provide a sufficient basis for assessing competitive impact for several key reasons. First, the knowledge base regarding the competitive impact of vertical mergers is not sufficiently developed to identify the specific conditions under which a particular kind of transaction would likely harm competition. The conclusions that follow from many of the key models are not robust in that changes in assumptions can lead to very different conclusions. Consider, for example, the conclusions of a well-known model of vertical integration by Ordover, Saloner, and Salop. In that model, if downstream firms compete on prices of their differentiated products, then vertical mergers could be harmful to consumers; yet if the downstream competition took the form of “capacity competition” or “quantity competition” rather than price competition, then the opposite would be true.

Second, there are many categories of economic models, and many more specifications of those models, that can be used to describe the possible competitive impact of a particular transaction. Each will apply only to a very small fraction of cases, however, and the applicability of any particular model is likely to depend entirely on the facts. Regulatory review must identify and clearly articulate the theories that are useful in real world situations. In other words, regulatory action should rely on more than a theoretical

harm. It must reflect demonstrable harm based on a sound theoretical foundation incorporating realistic assumptions that reflect the actual market facts and conditions.⁹

Third, many of the economic theories yield only a partial picture of the likely effects of an actual vertical merger. For example, most, if not all, of the models do not account for efficiencies, new product introductions, and other benefits that might stem from a particular vertical transaction. Efficiencies are particularly important as the integration may have lowered costs, including transaction costs. Similarly, most models do not account for the possibility that competition could be more intense following vertical integration. Thus, a sound analysis of a vertical merger must look to account for dynamics that may not be accounted for in theoretical economic models.

Fourth, as described above, a vertical merger is likely to generate a broad array of efficiencies.¹⁰ Thus, a proper competitive analysis of a vertical transaction requires an integrated consideration of the efficiencies and the potential for anticompetitive harm. This is complicated by the fact that these efficiencies in many cases, e.g., quality assurance, mitigating a holdup problem or dynamic efficiencies, are not readily quantifiable. But this does not relieve the burden of considering the efficiencies. A failure by an enforcement agency to evaluate the efficiencies in a vertical merger simply because they are difficult to quantifying would be equivalent to a failure to consider anticompetitive harm of a vertical merger because it is difficult to quantify. Both lost efficiencies and anticompetitive harm can lead to a reduction in consumer welfare and both must therefore be fully considered, particularly in a vertical merger where the two cannot be extricated.

Fifth, given the state of economic knowledge, enforcement actions should be based only on theories that are well established in the economic literature, e.g., input foreclosure, customer foreclosure, and tying. For these theories, it is uncontroversial that the potential for competitive harm exists. In practice, assessing the actual harm to competition (or the likelihood of such harm), and balancing the procompetitive benefits against the potential harm to competition, are the subjects of much debate.

Theories involving coordinated effects, financial leverage, financial predation, and the like are hypotheses that are relatively new compared to models of vertical foreclosure and tying. Given the state of this literature, it may be more appropriate to delay an assessment of these models to the future—after additional theoretical research and empirical study have become available—and to focus on the basic vertical merger models.

6. The Elimination of Double Marginalisation Is a First Order Benefit that Should Be Acknowledged

When upstream and downstream firms are not integrated, the problem of double marginalisation arises because each firm does not take into account the impact of adding a mark-up on the profit of the other firm. The volume of output purchased by the ultimate consumer is inefficiently reduced because the consumer price includes mark-ups (i.e., profit margins) imposed by both the downstream and upstream firms. In some cases, the retail prices could even exceed the monopoly price of the manufacturer's product. This result often can be avoided if vertical integration occurs.

⁹ See also, EAGCP, "Non-Horizontal Merger Guidelines: Ten Principles, A Note by the EAGCP Merger Sub-Group," August 17, 2006, point 3 ("...the implication is that the appropriate theory of competitive harm must be particularly carefully "tuned" to the merger in question, specifying the mechanisms through which such harm would be likely to occur.").

¹⁰ The RBB Report, *infra* note 15, describes the variety of efficiencies that are often engendered by non-horizontal mergers.

A vertical merger can generate efficiencies by internalising this externality and putting the downstream pricing decision in the hands of the upstream manufacturer (or a downstream retailer), which does not have an incentive to increase downstream prices above competitive joint profit-maximising levels. In other words, an integrated entity maximises its profits by eliminating the double markup, which leads to lower prices to end users and customers. There may be non-price benefits, as well, such as improved supply chain management, product scheduling, product improvements and new product innovation. These are first-order benefits to consumers, and they are benefits that are more likely when the downstream distributor or retailer may have market power.

The efficiencies associated with the elimination of double marginalisation are intrinsic to a vertical merger—they lower the marginal costs of selling the downstream products, thereby inducing the integrated firm to lower downstream prices and to compete in selling the downstream products more vigorously.¹¹

Theories of vertical foreclosure often require the presence of significant market power in both the upstream and downstream markets, as well as economies of scale and/or scope in both markets, which imply that there may be a gap between prices and marginal costs along the vertical chain of production and distribution. However, it is this gap that sets the stage for vertical integration to align the incentives of parties along the vertical supply chain and to eliminate double marginalisation and other inefficiencies, with the effect of enhancing output and competition downstream. Thus, when the preconditions (e.g., market power) do not exist, vertical mergers should presumptively be viewed as likely to eliminate double marginalisation to the benefit of consumers.

The empirical evidence suggests that vertical integration (and vertical restrictions generally) tends to benefit consumers. An authoritative recent survey concluded that “most studies show that vertical restraints increase (or at worst, do not reduce) economic welfare.”¹² These include studies that confirm that vertical integration (and vertical restraints) can reduce double marginalisation and other costs.¹³ The conclusions of this survey echo those reached by prominent practitioners and scholars who state that “the empirical evidence concerning the effects of vertical restraints on consumer wellbeing is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision.”¹⁴

7. Consideration of Efficiencies Is Integral to Vertical Merger Analysis

For merger policy, the intrinsic nature of the efficiencies that arise from a vertical merger implies that an assessment of these efficiencies cannot be conducted using a “two stage” approach, as is often the case with a horizontal merger. The main reason is that it is difficult to disentangle the efficiencies from the anticompetitive effects as the two are inextricable. Thus, an explicit assessment of the potential

¹¹ These points (and the points that follow) have been made before by Robert Willig and B. Douglas Bernheim in presentations they have given on the economic foundations for vertical merger Guidelines in the US. Recently Farrell and Weiser have posited a more general formulation of the Cournot effect in dynamic market settings. See Farrell and Weiser, “Modularity, Vertical Integration and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age,” *Harvard Journal of Law and Technology*, 17 (2004), p. 86-134.

¹² James Cooper, Luke Froeb, Daniel O’Brien, and Michael Vita, “Vertical Restrictions and Antitrust Policy: What about the Evidence,” *Competition Policy International*, Vol. 1, No. 2, Autumn 2005, p. 48.

¹³ *Id.*, p. 56-58.

¹⁴ Francine LaFontaine and Margaret Slade, “Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy,” in *Handbook of Antitrust Economics* (forthcoming 2005), p. 22.

efficiencies from the transaction is central to the entire competitive assessment. As noted in the RBB Report, “it will very often be the case that the source of efficiencies realised by the merging parties is also the source of the competition concern.”¹⁵ This is particularly true when assessing the competitive issues surrounding the potential for foreclosure. This position is confirmed by, for instance, the Economic Advisory Group for Competition Policy (EAGCP).¹⁶

This does not suggest that a vertical transaction with significant efficiencies will necessarily give rise to any degree of anticompetitive effect. Rather, it suggests that the analysis of a vertical merger cannot properly proceed by first considering anticompetitive effects and later evaluating efficiencies. Rather, the analysis of efficiencies – and weight accorded to efficiencies in the analysis of a vertical merger – must be given primacy in the analysis of the merger’s potential competitive effect.

The starting point for understanding the competitive implications of a vertical merger is to recognise the likelihood that the transaction will reduce or eliminate the inefficiencies that can arise when the incentives of vertically-related parties are not aligned. Of course, even if the prospect for efficiencies is obvious, firms may not be able to quantify the efficiency gains easily; the acquirer may not have all of the information it needs from the target to do such a calculation or the market may be evolving so that such a computation is not possible. As a corollary, an approach that explicitly recognises the efficiency-enhancing rationale for vertical transactions is called for, without requiring the acquirer to have quantified all of the efficiencies prior to the acquisition. This is because, as almost universally accepted in the literature, the prospect for vertical transactions to facilitate profitable anticompetitive market conduct is much more limited than in the case of horizontal transactions.

7.1 Vertical Transactions Often Resolve Problems that Cannot be Solved Practically through Contractual Solutions

Many vertical relationships that are based on contract – i.e., that do not involve integration through merger – are threatened by the prospect of opportunism and free riding. Opportunism occurs when one party (for instance, an upstream firm) can take advantage or “hold up” another party (such as, a downstream firm) after the downstream firm may have made investments that limit the ability of the firm to turn to alternative upstream suppliers. Free riding is another common problem that arises between upstream and downstream firms.¹⁷ A vertical merger is one way to resolve the potential for opportunism and free riding.

The benefits of a vertical merger are particularly important in situations where other ways to resolve the potential for opportunism or free riding are not likely to work. Consider, for example, the downstream firm (Firm A) that is unwilling to build a manufacturing line that can only use a relatively unique input sold by a single upstream supplier (Firm B). Firm A may be concerned that after it builds the manufacturing line, Firm B would take advantage of the situation and raise its prices. To resolve the potential for such hold up or opportunism, Firm A may want a long term contract that provides some protection against opportunistic price increases in the future. Firm A also may want an exclusive dealing arrangement, which would give it the assurance needed that the upstream supplier will not sell its product to competing downstream purchasers in a way that would diminish the return on Firm A’s investment in the manufacturing line. Thus, a possible solution is a contract that specifies that the upstream firm B will

¹⁵ RBB Economics, “The Efficiency-Enhancing Effects of Non-Horizontal Mergers,” p. 121.

¹⁶ See, supra note 9, p. 5 (“The assessment of the effects of a vertical merger must not presume consumer harm and then look for countervailing efficiencies.”).

¹⁷ For example, a manufacturer may be unwilling or less willing to invest the resources needed to promote the efforts of a downstream retailer if it believes that its rivals may benefit more than it will.

supply Firm A, the downstream firm, exclusively. However, Firm B may be unwilling to limit itself to a single downstream purchaser because it may be costly in ways that limit its feasibility (e.g., by limiting Firm B's returns). Firm B may also be unwilling to engage in exclusive dealing because it may be well positioned to expand its output in ways that Firm A is not prepared, independently, to accommodate. In other words, even though contracting is one way to resolve problems related to opportunism (or free riding), it may be infeasible or impractical. These are circumstances in which vertical integration can be the only efficient solution as a means to aligning the incentives of the upstream and downstream parties in a way that encourages both parties to make the necessary commitments and investments that would benefit ultimate customers.

The discussion above highlights the importance of appreciating the rationale for a particular vertical merger, which often is an attempt to remedy or improve upon contractual arrangements that have failed to align the incentives or coordinate the actions of independent upstream and downstream parties. For instance, the goal of aligning the incentives of upstream and downstream parties is easy to state, but often too difficult or impractical to accomplish through contractual arrangements. Similarly, the provision of the technical information needed to assure product compatibility and interoperability is not always easy through contractual means, as it may involve the sharing of confidential or proprietary information.

7.2 *Empirical Assessment of the Magnitude of the Efficiencies*

Given the presumption to be afforded to efficiencies, parties to a vertical merger should not be required to conduct an empirical assessment of efficiencies in order to gain approval, even in those rare cases in which competitive harm is conceivable. However, in order to reach an informed judgment that a vertical merger is – on balance – harmful, agencies should consider the extent to which the efficiencies can be quantified in order to provide assurance that an enforcement action will not unnecessarily eliminate significant consumer benefits.

The empirical literature provides a useful starting point for identifying the magnitudes of efficiencies that should be considered, as there are a number of studies that attempt to estimate the cost savings and efficiencies of vertical mergers and vertical restraints. Indeed, the literature shows that there are a number of methodological approaches that can and have been used.¹⁸ If reliable data are available to quantify efficiencies, an assessment of the vertical efficiencies may involve an analysis of the prices, costs, and profit margins of unintegrated parties at the various levels of the vertical supply chain at issue and a comparison of these data to the actual or anticipated prices, costs, and profit margins of integrated entities in the marketplace. As an example, it may be possible to compare the prices charged by other integrated firms in the market to the total price that customers are or would be charged by single product sellers. The difference in prices would be an estimate of the cost savings to customers from integration. In this respect it is also noteworthy that the European Commission has recently commissioned a study to facilitate the practical application of the efficiency test under Article 81(3) of the Treaty.¹⁹

¹⁸ See, for example, Francine LaFontaine and Margaret Slade, "Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy," in *Handbook of Antitrust Economics* (2005); James Cooper, Luke Froeb, Daniel O'Brien, and Michael Vita, "Vertical Antitrust Policy as a Problem of Inference," Vanderbilt University Law School Law and Economics, Working Paper Number 05-12, (February 18, 2005); William S. Comanor, F.M. Scherer, and Robert L. Steiner, "Vertical Antitrust Policy as a Problem of Inference: The Response of the American Antitrust Institute," (April 18, 2005); and John Geweke, "Empirical Evidence on the Competitive Effects of Mergers in the Gasoline Industry," University of Iowa Working Paper, (July 16, 2003).

¹⁹ DG Enterprise and Industry, "Practical Methods to Assess Efficiency Gains in the Context of Article 81(3) of the EC Treaty," Final report by Copenhagen Economics.

The analysis should not focus solely on prices and profits – there also may be empirical data from prior transactions that may be helpful in assessing the organisational and supply chain efficiencies. Similarly, it may be possible to show the nature of the vertical inefficiencies by analysing the experience of two unintegrated parties who may have teamed together to produce a product or service—delays in getting a new product to market due to coordination failures, cost overruns, or the number of customer complaints may be informative. Even if these natural experiments do not quantify the efficiency itself, they can be helpful in demonstrating the rationale for the transaction or the vertical inefficiency that the transaction is intending to resolve.

It may be harder to assess the efficiencies resulting from the elimination of opportunistic behaviour. However, by acknowledging that a firm's organisational form is a competitive choice, the analytical framework would appropriately encompass the factors that affect both the potential for competitive harm and the potential for efficiencies and other consumer benefits. For example, an analysis of the circumstances in which opportunism and free riding may occur would be very useful. Additional evidence that the parties were not able to agree on a contractual solution or that an existing contract did not work may be helpful in shedding light on the efficiencies of integration. Furthermore, market factors, including marketplace uncertainty, the amount of the fixed and sunk investments, the magnitude of firm-specific investments, and transaction costs may be important factors.

The ultimate focus of any analysis of vertical mergers should be on competitive outcomes, rather than the presence or absence of a particular kind of vertical arrangement. An empirical analysis of the efficiencies can maintain the focus on the net competitive outcome of the merger and should be pursued whenever possible.

8. Conclusion

The vast majority of vertical mergers are motivated by efficiency considerations and many vertical merger transactions, do not result in a meaningful structural change in the marketplace. Market shares in the upstream and downstream markets, for instance, often do not increase as a direct result of the transaction. Thus, the focus of the analysis should be on the potential for efficiencies as well as the potential for the merged firm to extend any market power that it may have in the upstream or downstream market. BIAC submits that these potential effects should be evaluated in one comprehensive analysis. Moreover, given the presumption of efficiency gains, a finding of negative effects requires a particularly careful factual analysis, as well as a clear articulation of the theory of harm. While there might be some value in vertical merger guidelines, the difficulties associated with the very nature of non-horizontal mergers, that various different forms they take and the current state of the economic literature, make such a task especially hard.

SUMMARY OF THE DISCUSSION

The Chairman began by observing that there was considerable common ground among the submissions. Indeed most of the submissions generally agreed upon four points: (i) vertical mergers are different from horizontal mergers because they do not change market shares in a relevant market or eliminate a direct source of competitive constraint; (ii) vertical mergers are likely a significant source of efficiencies; (iii) vertical mergers can still be problematic if they result in foreclosure or enhance coordination; and (iv) merger challenge is warranted when the anticompetitive effect outweighs the efficiency effect. The Chairman noted that the issue of foreclosure is very interesting because often what in fact is a source of efficiency may also be one of the reasons why it might create some kind of foreclosure.

Before moving to a discussion of the contributions from each country, the Chairman invited the delegation from the European Commission to provide an overview of its recently realised draft guidelines on the assessment of non-horizontal mergers.

1. Overview of the EC Draft Guidelines

A delegate from the EC explained that the rationale for the development and adoption of non-horizontal merger guidelines arose from a perceived need to provide guidance on the substantive elements the Commission will take into account and how its inquiry will be structured when the Commission assess the vertical and conglomerate effects of mergers. The demand for guidelines was attributable to: (i) the requirement that the Commission publish its decisions in both clearance and prohibition cases; (ii) confirmation by the European courts that there is no presumption of legality of non-horizontal mergers; and (iii) the prevalence of concerns regarding the competitive effects of vertical mergers in newly liberalised industries, most notably in the energy sector.

The draft guidelines have four main parts: (1) a general overview; (2) a definition of safe harbours in terms of market shares and concentration levels; (3) the assessment of vertical mergers; and (4) the assessment of conglomerate mergers.

A very important message found throughout is that non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers. First, and unlike horizontal mergers, they don't eliminate competition between the merging parties, and secondly, because they provide substantial scope for efficiencies, including the internalisation of double mark-ups. Nevertheless there are circumstances in which non-horizontal mergers may significantly impede effective competition, essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging parties.

The draft guidelines state 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. The Commission is unlikely to have concerns over the competitive effects of a non-horizontal merger where the market share post-merger of the new entity in each of the markets concerned is below 30% and where the post-merger HHI is below 2000.

The analytical framework identifies two possible anti-competitive effects from vertical and conglomerate mergers. The two main theories of harm considered are non-coordinated and coordinated

effects. In assessing the potential for a non-coordinated effect, the Commission will consider: (i) the ability to foreclose, (ii) the incentive to foreclose; and (iii) whether foreclosure would likely have a negative impact on competition. In assessing the potential for a coordinated effect, the Commission will consider whether post merger firms will have a stronger ability and incentive to coordinate.

The delegate emphasised two points:

- The draft guidelines incorporate a consumer welfare standard. This means that when intermediate customers are actual or potential competitors of the parties to the merger, the Commission will focus on the effects of the merger on the customer to which the merged entity and those competitors are selling. The focus of the analysis will be on the impact on effective competition and ultimately on the welfare of consumers.
- The draft guidelines indicate that the Commission will undertake an integrated assessment of the anticompetitive harm and all possible transaction specific efficiencies.

The goals for the non-horizontal merger guidelines are to contribute to the predictability of the Commission's analysis and to contribute to accurate and consistent assessments of non-horizontal mergers, transactions which often involve very complex assessments.

2. Definitions and Presumptions

The Chairman began by noting that there are different sensitivities: many contributions agree that the competition concerns of vertical mergers are certainly not the same as horizontal cases, because usually horizontal competition is not threatened and on top of this, efficiencies are more likely than in horizontal mergers. This leads to a view, notably from BIAC, that there should be a favourable presumption for vertical mergers, a presumption which is not necessarily shared by all delegations.

The German delegation is the most extreme example of a reserved judgment on vertical mergers. The German contribution notes: "The Bundeskartellamt does not share the view that vertical mergers normally lead to significant efficiencies as empirical studies do not seem to support such a general statement." Moreover, the contribution states that "The Bundeskartellamt also scrupulously examines vertical mergers because under certain circumstances they can also have damaging effects. A 'presumption of unobjectionability' sometimes called for in the case of vertical mergers seems inappropriate." This contrasts with the statement from BIAC (and others) that, "Vertical integration is an important vehicle used by firms to lower their costs and compete more effectively. Thus, vertical mergers presumptively should be viewed as competition-enhancing arrangements and should not be subjected to regulatory intervention absent extraordinary circumstances that demonstrate a significant likelihood of competitive harm." The Chairman invited the German delegation to defend their standpoint, perhaps provide a summary of the evidence which provides a basis for their skepticism regarding the potential for efficiencies from vertical mergers, whether in the academic literature or elsewhere, and provide some perspective on their enforcement practice.

A German delegate responded that the quotation on efficiencies should not be read out of context. The sentence preceding the one quotes is "As the scoping paper explains vertical mergers can give rise to several types of efficiencies, these include in particular enhance coordination, alignment of incentives, production efficiencies, transaction costs savings, internalisation of non-price externalities and as well as the internalisation of price externalities in particular the elimination of double marginalisation." and the following sentence is "Vertical mergers may or may not lead to merger specific efficiencies". Germany agrees that vertical mergers can give rise to efficiencies, but there is no general presumption in terms of a *per se rule* that there are efficiencies from vertical mergers.

In practice the German delegate stated that there is not much difference between the cartel office and that of the EC. The Bundeskartellamt assesses every merger that is notified on a case by case basis. The focus of the assessment is not on market shares since the parties are not active in the same markets, but rather the question of foreclosure and coordinated effects. In each case three questions must be considered: (i) Is there input foreclosure; (ii) is there customer foreclosure; and (iii) how likely is the danger of coordinated effects? The German delegation noted that vertical merger enforcement, especially in the energy sector, had become important.

The Chairman then turned to the contribution of France. The Chairman observed that the French contribution emphasised that vertical integration might be a preferred substitute for vertical contractual relations, which could have the same effect but may be more fragile.

A delegate from France explained that there are two important differences between vertical integration and vertical contracts. First of all, from an economic point of view, contracts are not equivalent to vertical integration in an uncertain environment. Second, the judicial treatment of vertical restraints and vertical mergers differs.

3. Anticompetitive Effects of Vertical Mergers

To begin the discussion of the anticompetitive effects of vertical mergers, the Chairman turned to the Netherlands and their position that competitive concerns arise from a vertical merger if it results in the transfer or enhancement of a dominant position from one level of the value chain to another level in the same value chain. To provide context the Chairman asked about the KPN-Noxema case discussed in the contribution from the Netherlands in which a vertical merger was blocked because of concern over such leverage. In this case KPN was the owner of several radio and TV towers and Noxema was one of three companies that provided broadcasting infrastructure for broadcasting radio signals. The Chairman invited the delegation from the Netherlands to explain why the single profit result of the Chicago school did not hold in this case, i.e., why would integration increase the profits of KPN above the profit-maximising wholesale price?

A delegate from the Netherlands responded that there were two reasons why the single monopoly result did not apply and therefore leverage was a concern. First, the towers they owned were not only used for radio broadcasting, which has no substitute so that its demand is inelastic, but also telecom operators for which there were substitutes available so their demand was more elastic. So KPN was not able to charge the monopoly price for both types of users. Second, there was a regulatory constraint on the price that could be charged upstream.

The delegate then explained that the theory of competitive harm was based on concerns that foreclosure would result in monopolisation of the downstream market, leading to price increases, quality reduction, or a delay in the adoption of digital technology. The remedy required KPN to sell its towers to an independent third party, re-establishing the status quo, i.e., one party having control of all the towers but not being vertically integrated. The merger and proposed remedy is currently under judicial review.

The Chairman came back to his question about the incentives for prices to rise, noting that the elimination of double marginalisation would provide KPN with incentives to reduce prices *not* raise them.

A Netherlands delegate responded that before the merger there was a monopolist on the upstream market, but the market downstream was relatively competitive. Hence the reduction in competition from foreclosure was likely to have a greater effect on prices than the internalisation of double marginalisation, with the net result being an increase in prices downstream.

The Chairman then turned to the EC draft guidelines and its two broad scenarios of foreclosure (input and customer). He invited the EC to expand on those scenarios, in particular to identify when those scenarios appeared to be likely? What is the evidentiary test that would apply to validate those scenarios of harm? What are the assumptions about barriers to entry, about difficulties for other competitors to enter the market, and on the integrated firm's ability to commit to withdraw from the upstream market?

A delegate from the EC began by explaining the application of its three step analysis to the most likely scenario of harm, input foreclosure. The draft guidelines explain that it could take different forms, with the most radical form being withdrawal, when the upstream part of the merging entity stops supplying downstream customers. But probably most commonly foreclosure will involve the upstream entity supplying customers downstream at higher prices or at worse conditions than before. In order to prove that this will happen and that it will ultimately harm consumers the EC will have to prove first that the upstream entity has the ability to enter into these practices. For ability the key message of the draft guidelines is that the integrated firm must have market power upstream. The draft guidelines also note, however, that ability also requires that the input upstream represents a significant cost factor for the competitors downstream or is otherwise a critical component for competitors downstream.

The second step involves assessing the incentives for foreclosure. To assess incentives, the draft guidelines propose a determination of the trade-off between the profits that the company will lose by reducing sales upstream and the profits that it will gain later on by being able to expand its sales downstream or raise prices there. This trade off may be quantifiable, but other times may be suggested by considering key factors. For instance, if margins upstream are low, downstream they are high, and if the company can expand successfully downstream, then it is more likely that foreclosure is profitable. The jurisprudence also requires that the EC consider whether the existing legal framework, and in particular the operation of article 82, provides sufficient disincentives for companies to engage in these practices post-merger.

The third step requires proving that there will be harm, a negative effect on consumers. For this the draft guidelines state that the number of rivals that are foreclosed must be of sufficient importance in the downstream market that prices downstream will rise. The EC would also consider the impact of the vertical merger on entry barriers and the effect on potential competitors. This might be negative either because now they will have to enter two levels simultaneously which makes entry more difficult or because their input costs will be raised. This type of situation is particularly common in newly liberalised industries, where the concern is that vertical integration will reduce competition in markets that have just been opened to competition.

Finally, as part of the third step, efficiencies must be taken into account. These efficiencies, including the elimination of double-mark ups, must be substantiated by the parties and must be merger specific. There are many settings where there is no elimination of a double mark-up either because there was no mark-up prior to the merger, for instance in regulated markets upstream, or because the merger will not eliminate this mark-up.

Entry deterrence and the commitment to withdraw from the input market are really important factors in the analysis but neither is a necessary condition to prove harm. First as to entry deterrence, the establishment of entry barriers upstream is necessary for market power upstream, but it is not a requirement that the merger will increase these barriers. Even if the barriers remain as they were there is the risk that these entities could raise prices downstream.

If the merged entity finds a way to make the commitment to withdrawal from the upstream market very strong—for instance through technical integration that makes the integrated firm's input incompatible with others—this certainly will increase the likelihood of foreclosure. However, this is not strictly

necessary: the incentive to increase profits is sufficient to establish the incentive to engage in raising rival costs strategy and in the end to produce harm.

The Chairman observed that France's contribution follows the same analysis, or in any case it elaborates on the same stages of analysis. The Chairman invited France to explain the considerations and factors, in the context of the merger between Unibail and Expositum, which indicate the incentives, or lack thereof, for the integrated firm to foreclose.

A delegate from France responded that establishing whether foreclosure was profitable is a necessary step and that it will depend on the facts of each case. The incentives for foreclosure will depend on factors like the degree of concentration on the market of the product concerned and on the degree of substitutability between the products of the firm and those of its competitors. Unibail operated in the upstream market of conference and exhibition site management acquired control of Expositum, a firm active in the downstream market for trade and exhibition site management. At the time of the transaction, the upstream market share of Unibail was quite large: it had about half the congress and exhibition sites in the Parisian region. However, the antitrust analysis suggested that foreclosure was unlikely since it was not likely to be profitable. This conclusion was based on the following three facts.

First, the two firms had relatively little involvement with the other. Expositum had only organised 8 fairs on sites managed by Unibail in 2003-2004, which was less than 10% of the total area Expositum had rented during the same period to organise its fairs and conventions. In the same manner, Expositum contributed less than 5% to Unibail's rental revenues. Second, a massive reorientation following the merger was unlikely. Exhibition sites are imperfect substitutes, the choice being made on objective criteria: location, accessibility, available size, which cannot be easily influenced by the site manager. Third it is not in Unibail's interest to no longer host an exhibition and replace it by one organised by Expositum, mainly because the effect on Unibail's reputation with clients would have been severely damaged and there was a capacity problem in the Parisian region. During the main fairs organised by Expositum on a site situated in the North of Paris, very large fairs were systematically organised every year in the South of Paris on sites managed by Unibail. Given this implicit capacity constraint, Unibail would likely have no interest in abandoning these fairs to make room for those organised at the same time by Expositum in the North of Paris.

The Chairman then considered the following statement from the submission of Mexico: "The CFC presumes a merger to be anti-competitive if ownership relationships may hand out the parties with privileged access to an important input or with an advantageous position regarding distribution marketing or advertising of the relevant product and if the parties have or may obtain substantial market power in related relevant markets." In contrast to the approach of the EC and its three step approach, it appears that in Mexico the burden of proof for the competition authority appears to be much lighter, that it has to show that there is a possibility only and it does not have to consider either incentives for foreclosure or whether the effect of foreclosure would be anticompetitive. And if there is a presumption of anti-competitive behaviour in this kind of structural situation, it raises the interesting question as to whether and how this presumption can be overcome by the parties?

A delegate from Mexico began by noting that Mexican competition law does not distinguish between horizontal and vertical mergers. The legal provisions do not account for the conceptual differences between horizontal and vertical mergers including for example the greater need to weigh incentives for future anti-competitive behaviour in the case of vertical mergers.

In practice, the focus is on the likelihood of anti-competitive conduct which includes the incentives for this type of conduct. The likelihood of anti-competitive conduct deriving from vertical merger is an essential element and when considering the comparative risks of anticompetitive effects against

efficiencies, it is necessary to consider the likelihood of the anti-competitive behaviour occurring and for that it's absolutely essential to look at the incentives. Frequently, in vertical merger cases, the remedies applied have been aimed at inhibiting the incentive to actually engage ex-post in anti-competitive behaviour.

The Chairman noted that the US submission makes the point that double marginalisation often exists because of moral hazard problems. The Chairman invited the US delegation to explain this point and to comment on its implications for enforcement policy with respects to vertical mergers.

A US delegate noted that many years ago Ronald Coase observed why it was more effective for some activities to be done within a firm rather than between two firms in the market place. The reason is that it's too costly to write detailed contracts; that means it's wrong to assume that contracting will always eliminate double marginalisation even in the presence of market power. Even in the presence of market power if the contracting parties could do it, they'd like to structure a contract that eliminates double marginalisation and have lump sum payments, so that there is no efficiency induced at the margin. But the fact is, contracting costs prevent that and therefore marginal prices aren't set at marginal costs.

The source of the contracting costs that prevent efficient pricing has to do with moral hazard problems that arise from the fact that there is unobservability of certain actions and, in particular, the optimal amount of effort or investment required for efficiency. For example, in order for a manufacturer to induce sales effort by a distributor, it might be hard for that manufacturer to observe directly the optimal amount of effort and to pay the distributor directly for that. So instead what the manufacturer will do is grant an exclusive territory to the distributor, let the distributor promote his product, charge a price in excess of the distributor's marginal cost, and by so creating such a property right and an incentive, it creates the incentive for the distributor to invest in promotion.

The advantage of creating incentives for investment and effort is not limited to only the distributor, but can apply as well to the manufacturer. Suppose that a distributor is concerned about inducing a manufacturer of one of its products to advertise. Suppose further that the distributor prefers that the manufacturer advertise because it can do so at a lower cost than the distributor. The contractual solution would require the distributor to pay the manufacturer for the optimal amount of advertising effort, but this solution will not work if the distributor has no idea what that optimal amount should be or finds it difficult to observe it directly. Instead what is often observed, for example in a franchisor-franchisee relationship, is that the franchisor gets paid based on a fraction of total sales, because total sales are a rough indicator of how well the advertising effort or promotional effort is contributing to additional sales.

In each of these two cases pricing is not at marginal cost, the efficient solution that would emerge if the world were perfectly observable and monitoring perfect. In an imperfect world, contracts cannot be expected to efficiently allocate resources in the sense that all prices will always be at marginal cost. That is precisely what Coase was driving at when he explained why sometimes activities take place more efficiently within a firm rather than as a contracting arrangement between firms. It means that vertical mergers will generate efficiencies or can generate efficiencies by mitigating this double marginalisation problem.

Now as Coase points out, there are other costs for doing things inside a firm. It is not obviously always correct to do something within a firm, but the whole justification for defining a firm as a set of activities arises from the fact that there are a set of activities that can be more efficiently done within a firm than relying explicitly on contract. A requirement for a vertical merger to raise competitive concerns is the existence of market power, but that is also precisely the same situations in which vertical integration will get rid of double marginalisation and will create an efficiency. This means that in considering a vertical merger where there might be an anticompetitive effect there is in most cases also automatically an

efficiency effect, and whether it completely offsets the anti-competitive effect in those cases when it exists is an empirical matter. The delegate also stressed that the anti-competitive effects from foreclosure identified by economic theory are quite fragile and depend on assumptions that should be verified empirically.

The Chairman then observed that a vertical merger might result in a coordinated effect. The Chairman noted that the theoretical possibility was recognised in many contributions, though there were very few coordinated cases discussed in the contributions. The Chairman noted that the contribution from BIAC was particularly skeptical about the possibility that vertical mergers might lead to coordinated effect. The Chairman invited the delegation from BIAC to comment on the difficulties and limitations of coordinated effect theories of harm as a basis for vertical merger enforcement.

A BIAC delegate responded by indicating that there were two key issues with respect to a coordinated effect arising from a vertical merger. The first was how a vertical merger would change the structure of the market such that coordination is possible after the transaction but not before. The second is the practical issue of meeting the burden of proof.

A second BIAC delegate indicated that while it was not impossible for a coordinated effect to arise, but in practice the conditions for a coordinated effect to arise from a vertical merger are very rare. Instead BIAC would prefer that the scope of intervention should be limited to those fairly mainstream theories of competitive harm such as input and customer foreclosure which themselves are quite fragile, rather than move into lots of other areas. The reasons are that vertical mergers don't eliminate direct competition and bring together complementary elements, giving rise to an economic presumption of lower prices and better coordination. It is very important not to discourage those mergers without a very compelling reason to do so.

The BIAC delegate expressed concern that the appropriate balance between type 1 and type 2 errors needs to be considered. They noted that while it is natural for competition authorities' to keep their options open and make sure they don't miss out on a possible reason for blocking a deal, it should be recognised that this is not costless. The cost that arises from keeping the options open to investigate all kinds of theories of potential harm arises from the risk of chilling pro-competitive mergers due to the increased probability of false convictions.

The Chairman responded by noting that it's not so painful for competition authorities unless there is significant evidence that the type 2 error is more costly than the type 1 error. The Chairman challenged BIAC for the evidence that competition authorities have made the wrong choice.

A BIAC delegate responded that there was such evidence, including the absence of a compelling case where a vertical merger had actually led to an increased risk of coordination and that there is a genuine presumption which is perfectly valid in terms of economics that bringing together complements tends to reduce prices.

A delegate from the EC addressed the skepticism concerning coordinated effects in vertical mergers. While noting the difficulties in trying to establish coordinated effects generally, the delegate observed that there are many different ways in which a vertical merger could actually affect one of the criteria that are used to establish coordination. Vertical mergers could certainly make it easier to reach terms of coordination between the players in the market, simply by reducing the number of players that have to coordinate, as well as by increasing symmetry for instance or increasing market transparency. It could make it easier to monitor deviation by allowing one company to know the prices of their competitors. It could facilitate punishment mechanisms, as it may be easier to punish a firm that is a customer or a

supplier. And finally it can limit the role of outsiders and the way in which outsiders can deter cooperation.

In relation to this last point the delegate mentioned a case that the Commission assessed last year. There is no final decision because the parties withdrew in the second phase. The situation involved all the players but one used a particular technology, the exception was the market leader had its own proprietary technology. The vertical merger involved the second player in the market merging with the company which owned the technology used by most firms. This vertical integration could have resulted in the new merged entity foreclosing all the fringe players by not providing the technology or by increasing the costs to access its intellectual property rights. The result is that this market would end up being almost a duopoly, presenting a lot of the typical characteristics of a market where coordination is possible. As the parties withdrew quite early in the second phase, the EC did not go into details to assess incentives, etc; but certainly it's a setting where coordination could arise. The contribution of our US colleagues discusses a vertical merger challenged in 2001 by the Department of Justice where the theory of harm was a coordinated effect. The EC would conclude that coordinated effects should not be ignored when assessing the competitive effects of a vertical merger.

A US delegate elaborated on the Premdor case mentioned by the EC. The reason for concerns over a coordinated effect was that the vertical merger would increase the flow of information and the ability to coordinate as a result. Just because the cases in which there is competitive harm from a vertical merger because of coordinated effects are rare, does not mean that they do not exist.

The US delegate went on to observe that since vertical integration is the very essence of what is meant by a firm, aggressive enforcement can impose very large costs on every firm, not just the merging parties. On the other hand, there are two reasons to think the probability of an anticompetitive effect from a vertical merger is relatively low. First, in the economic literature it is difficult to find models where there is a profitable incentive to foreclose. Second, the vertical merger may simply result in a shuffling of suppliers and buyers since there is no aggregate change in the amount of capacity. Firms that used to supply the integrated firm have their capacity released to supply the rest of the market. Moreover, if the vertically integrated firm is acquiring more capacity than it needs, then foreclosure can be a very costly strategy.

A second US delegate commented on false negatives, observing that if a false negative occurs there is a chance that the market will correct it and certainly ex post it can be observed and perhaps the enforcement agency can learn from and in the future recognise that those sorts of situations deserve a closer look. The problem with false positive is much bigger since the chilling and disincentive effect potentially affects many firms, not just in the particular market concerned, but also a wide variety of additional markets, and this type of error is not self correcting.

3. Efficiencies and Integrated Analysis

The Chairman indicated that one of the difficulties of analysing a vertical merger is that vertical mergers often necessarily involve both foreclosure and an efficiency benefit from the internalisation of double marginalisation. The presence of both effects puts a premium on sorting out which dominates. The contribution from Denmark discusses a case involving a joint venture between three large retail sellers of fertilisers to farmers and a significant supplier of fertilisers. To sort out the efficiency gains and the anti-competitive effects of the transaction the Danish competition authority built a model of the markets involved and simulated the effect of the joint venture on the retail prices. The Chairman invited the Danish delegation to comment on the approach used to sort out the two effects.

A delegate from Denmark explained that estimates of the price effects from the joint venture were based on a Cournot model. The efficiency gains included, among other things, lower costs to the parties

and optimisation of the logistic facilities. The anti-competitive effects were, amongst other things, the risk of foreclosure and raising rival costs as well as increased collusion between the merging parties. One major problem encountered was collecting reliable data, especially on demand elasticity where surveys were used. This was addressed by extensive sensitivity analysis: different values were used for the demand elasticity, the degree of collusion and for the increase in rivals' costs. All of the scenarios quite consistently predicted a significant increase in the retail price level.

The Chairman noted that the South African contribution discussed a vertical merger between a refiner and a distributor of oil products, with the unusual aspect that the refiner had a large wholesale market share but very limited access to retail distribution. The Chairman invited the South African delegation to respond to two questions: (1) Was the elimination of double marginalisation taken into account for example in considering possible efficiency gains from this merger?; and (2) Was there really a concern with vertical foreclosure given the fact that the integrated firm would have only a 40% retail market share?

A delegate from South Africa began by given some background on the petroleum industry in South Africa. Salient facts include: (i) the industry is still regulated, but might be liberalised; (ii) the inland refiner with the large market share makes oil from coal, was previously state owned, and not allowed to have a retail distribution network; (iii) the ability to import refined products from the coast is limited by transportation bottlenecks; (iv) the pre-merger wholesale price was determined by a bargaining game between a few large buyers and the inland wholesaler.

Underlying the analysis of the incentive and effects of foreclosure was how the acquisition would impact the bargaining game. The key change was that the inland refiner would now have more bargaining power, since it now had a means to dispose of its refined product when it threatened to cut off the other retailers if they did not pay a higher price. This wasn't a theoretical possibility as even before the merger they had shut inland capacity and forced the other oil companies to increase supply from the coast by using trucks.

The tribunal ruled that as long as there was a credible threat of foreclosure, then the integrated firm would be able to charge monopoly prices. The tribunal found that it was not necessarily a strategy that has to be implemented, but it has to be a credible threat to strengthen the bargaining position of the inland refiner.

Double marginalisation wasn't actually raised by the merging parties, it wasn't something that was considered by the tribunal, it clearly would have been in the merging parties' interest to do so, but it didn't arise in this particular case.

4. Evidence and Enforcement Policy

The Chairman then turned to the contribution of the UK and their efforts to quantitatively determine whether foreclosure was profitable, i.e., how they established the incentive for foreclosure.

A delegate from the UK began by remarking on the necessity of proceeding on a case by case approach and that in the UK the practice it to examine the incentive ability and the effect of foreclosure. The delegate also observed that pure vertical merger cases were rare, but there had been two recent cases where vertical issues were prominent.

The EWS Marcroft case involved a freight wagon maintenance company and a haulage company, where maintenance was an input to haulage. The allegation was that the integrated firm would be able to foreclose the downstream haulage market by restricting access to maintenance post-merger. Maintenance, while it was a small input cost, was very critical because it ensured the smooth running of the haulage services. The Office of Fair Trading was able to obtain estimates of the margins and market sizes upstream

and downstream. The upstream margins were low and it was a very small market, whereas downstream margins were in comparison much higher and the market was huge. On this basis it seemed clear that the lost profit from foreclosure upstream would be easily outweighed by the profit gained by increasing market shares downstream even if they didn't manage to foreclose the whole downstream market and gained only a small proportion of it. Although it is a very simple analysis and doesn't take account of post-merger price rises and changes in volumes, it gives a good indication of whether or not a foreclosure strategy would be profitable.

The Chairman then turned to the contribution of Korea, and a case in its submission involving Hyundai, the largest automobile manufacturer, which took a large interest in a major supplier of electronic auto parts. The Chairman invited Korea to explain (i) the role of market share evidence in this case and its interpretation, given that large market shares are consistent with both the potential for large efficiencies or a large anticompetitive effect; and (ii) the remedy.

A delegate from Korea responded by providing some brief background information:

Hyundai Motors is a large car manufacturing company with approximately 2/3 of the Korean car market; the acquired firm was the largest supplier of electronic auto parts; Hyundai also participates in the electronic auto parts market so the merger was both horizontal and vertical; post merger the Hyundai would control 50% of the Korean electronic auto parts market. The market share evidence was used to indicate the need for further investigation.

The concerns over the potential for foreclosure were based on two considerations. First, post-merger the portion of electronic auto parts provided by non-affiliated companies to Hyundai would be reduced from 75% to nearly 33% of total electronic auto parts purchase made by Hyundai. Second, new cars and new auto parts are developed jointly and their life cycle in the market goes together for about 6 to 8 years from the stage of development to the stage of sales and later service. Since the purpose of the merger was to enhance coordination between the two stages of production and given the joint development, foreclosure concerns were credible.

In crafting a remedy, the KFTC recognised the advantages of the vertical merger for enhancing innovation and that these benefits would be lost if the merger was blocked or a divestiture required. Instead the KFTC imposed a behavioural remedy which required Hyundai to establish and implement a programme for fair trading and provide guidelines to prohibit unfair discrimination against unaffiliated auto part manufacturers in favour of its subsidiaries. Hyundai was required to report details of its transactions with all electronic auto parts companies to the KFTC for 3 years.

The Chairman then turned to the Romanian submission and its discussion of the Flamingo-Flanco case which involved distribution and sales of computer and electronic products. It seems from the contribution from Romania that the Commission was satisfied that there was no possible harm to be done by this transaction and it was allowed. The Chairman invited the Romanian delegation to explain the market shares of the firms involved and the use of thresholds to screen cases.

A delegate from Romania noted that the market shares in the case were below the 30% safe harbour identified by the draft EC guidelines both upstream and downstream. The case is consistent with those thresholds in the sense that there were sufficient competitive constraints post merger to allay concerns about foreclosure and the competitive effect of the merger. In addition, the investigation found that there would be substantial efficiencies from the transaction, in particular higher quality service in the retail shops of the acquired firm.

The Chairman noted that in Poland's submission a case considered involved a merger between a distributor and a producer of vodka that was also characterised by relatively low market shares, but in this instance the Polish competition authority objected to the merger and granted clearance only after obtaining a behavioural remedy. The Chairman asked the Polish delegation to explain the Polmols case.

A delegate from Poland responded that post-transaction the largest distributor would own the two most popular brands of vodka, while the third most popular brand would also be owned by an integrated distributor. Hence there were concerns that other distributors would be foreclosed from the three most popular brands and other vodka producers would be foreclosed from distribution. The remedy imposed constraints on the integrated firm such that at least 35% of its two brands for a period of three years would be distributed by independents. This was to give time for distributors and other producers to adjust to the new market reality: independent distributors would be strengthened and small producers would have time to find other distributors.

The Chairman observed that the contribution of Switzerland indicated little experience with vertical mergers. The Chairman noted that the Swiss contribution remarked on the difficulty of proving harm from a vertical merger and, in particular, highlighted evidentiary issues. The Chairman invited the Swiss delegation to comment on the difficulty of establishing harm and the role of complaints by competitors.

A delegate for Switzerland responded that the issue of proving harm was not necessarily connected to the nature of vertical mergers in general, but to the fact that the cases which were notified were not very problematic in terms of vertical effects, either because of an absence of market power or effect on market structure, and so it is more correct to say that harm was unlikely, even though competitors had expressed concern. The Swiss delegate noted that the Swiss competition authority had recently required that the members of the board of directors of Swiss Grid – which operates the high-voltage electricity network – not be allowed to be on the board of directors of firms situated upstream or downstream from this market. The restriction is under appeal.

The Chairman then returned to the US submission. The Chairman noted that the US submission called for a strong empirical basis for vertical merger enforcement.

In addition, in the US contribution there is a discussion of two cases with different outcomes. One of them, the Digene case, where the FTC was convinced that post-merger the merging firms would have the ability and incentive to foreclose and in effect harm consumers while in the Synopsis-Avant! case it came to the opposite conclusion. The Chairman invited the US delegation to explain the meaning/implementation of a strong empirical basis, the empirical basis used in these two cases, and why those differing empirical bases resulted in different conclusions.

A delegate from the US responded by differentiating the facts of the two cases. In the Cytoc-Digene case, Cytoc had a 93% share in liquid Pap tests which is used for determining the likely presence of cervical cancer in women. Its only competitor was TriPath, which had a 7% share. Digene made a complementary test which identified the human papaloma virus (HPV), the virus which causes cervical cancer. These two tests can be, and often are, used in a complementary fashion. The theory of the case was that the integrated firm would not support rival liquid Pap test suppliers in obtaining regulatory approval from the FDA, regulatory approval which was required to use the Digene product in combination with rival's products. Industry participants were concerned that TriPath would be harmed immediately and would be rendered a less effective competitor in addition to the deterrence of future entry at that level from a failure to get FDA approval.

By contrast Avant! and Synopsis involved the merger of two complementary producers of software. Avant had a 40% share in the production of so-called 'back-end tools' for semi-conductor chip design.

Synopsis had a 90% share of logical synthesis or front-end tools for chip design. Customers who bought the chips and wanted to use the chips reported enthusiastically that the combination of these two upstream and downstream chip design firms would enable more efficient production in integrated design of a chip. It would have a major economic advantage for the customers. Avant!'s share in the back-end tools for chip design was only 40%, so other back-end tool makers were available to combine with potential entrants into the logical synthesis front-end design.

The US delegate highlighted the key role that customer complaints or ultimate user complaints played in both cases.

The contribution from Chinese Taipei discusses a case where specific sector regulations are important. It's a case in which the FTC blocked a vertical merger between two main channels and nine cable TV operators. The Chairman noted that the analysis of this case appears to be based on structural variables.

A delegate from Chinese Taipei explained that the analysis was indeed structural, since it was based on guidelines specific to the cable television industry. These guidelines were enacted in 1999 and arose out of a foreclosure case in which two vertically integrated firms (programming and operating) agreed to buy programming only from each other and not from other competitors. The thresholds in the Guidelines were set based on empirical studies and market surveys.

The Chairman then asked the delegation from Japan the importance of structural analysis in their assessments of vertical mergers. The Chairman referenced a case reported in the Japanese contribution between a manufacturer of steel balls, the upstream party of the merger, and a manufacture of ball bearings at the downstream level. The market share was 50% at the upstream level and 35% at the downstream level.

A delegate from Japan responded that after review it was concluded that the transaction would not restrain competition substantially in the relevant markets. For ball bearing manufacturers in the downstream market it is critical to ensure stable supplies of steel balls. Therefore in order to avoid the risk associated with any disruption of supply of steel balls, some manufacturers in the downstream actually manufacture themselves steel balls that they use as input for their own ball bearing production. At the time when the transaction was proposed the production volume of steel balls by such downstream firms amounted to more than half of that of the upstream firm of the merging parties. The existing vertically integrated companies could easily increase the volume of production of steel balls if necessary. As a result even if the vertically integrated firm refused to supply the steel balls to competing firms downstream, those firms which produce upstream products by themselves were able to respond by raising the ratio of their own set of production of steel balls and thus unilateral conduct by the merging parties would not harm competition substantially in the downstream market. Moreover, the existence of such ball bearing manufacturers which produce steel balls by themselves would act as a deterrent to coordinated conduct among steel ball manufacturers.

5. Vertical Merger Enforcement Guidelines

The Chairman turned to the submission of Brazil and observed that Brazil is in the middle of preparing its own vertical merger enforcement guidelines. The Chairman noted that it would be interesting to know how the Brazilian guidelines compare to those of the EC. The Chairman also had a question for BIAC. One of the conclusions of the BIAC submission is "While there might be some value in vertical merger guidelines, the difficulties associated with the very nature of non-horizontal mergers, the various different forms they take and the current state of the economic literature, make such a task especially hard." While it may be difficult, isn't that precisely why it could be useful to have guidelines because the

theory is very complex and therefore having guidelines might be particularly good for the business community, give some advance warning of what might be in store, and allow businesses to anticipate the problem?

A delegate from Brazil explained that a preliminary version of their guidelines had been circulated in early 2007. The major concern is market foreclosure or more generally limiting the ability of rivals to compete in cost innovation or differentiation. The proposed framework encompasses definition of relevant markets, historical conditions, market share and entry barriers, expected effects on rivals and incentives to foreclose, and efficiencies, such as scope economies and the reduction of information and transaction costs. The Brazilian guidelines do not assume elimination of double marginalisation. The view is that double marginalisation might persist post-merger or that because of nonlinear tariffs not exist pre-merger. Unlike the EC, there is no mention of coordinated effects.

A delegate from BIAC explained that their position was not that guidelines are worthless or would not be able to capture the difficult analysis of non-horizontal mergers. BIAC's point is that because of the complexity of the economic literature in this area, the difficulty predicting both the short and long term effects of a vertical merger, and the presumption of efficiencies, care should be taken that any guidelines are not over inclusive. The cost of over inclusion is that it discourages companies from entering transactions, which if they were analysed properly, are pro-competitive.

A delegate from the US responded to the remarks of the Brazilian delegate by noting that while it is true that complicated contracts can solve the double marginalisation problem, it is often the case in practice that they are not used. Hence it is important to observe the nature of contracts pre-transaction. Moreover, while bringing the transaction inside the firm might not necessarily internalise double marginalisation, it is an example of why firms form. The elimination of double marginalisation is an example of how a firm can eliminate transaction costs by internalising the transaction. Vertical integration is what a firm does if it gets rid of a double marginalisation when it is too costly to do so by contract.

6. Remedies

The final issue that arises from the contributions is remedies. Are there cases where possibly it is better to use abuse of dominance or monopolisation provisions rather than trying to prevent a structural change ex ante?

The Finnish submission expresses concerns that an anticompetitive implication of a vertical merger is a price squeeze. The Chairman invited the delegation from Finland to discuss whether there are any differences between foreclosure and a price squeeze and, if there are, whether if the concern is a price squeeze it is better to address this from a policy perspective by an ex post approach under relevant abuse of dominance provisions.

A delegate from Finland replied that foreclosure can be realised by several different strategies, price squeeze being one of them. Ex post control allows for non-intervention with vertical mergers which, despite potential harmful effects for competition or competitors, have efficiency benefits increasing consumer welfare. The question remains, however, whether these efficiency benefits are then passed on to the consumers in case the concentration is in a position to implement a price squeeze. The mere possibility of the concentration engaging in price squeezes does not justify intervening with a merger, and it is important that the likelihood of such a strategy is assessed in light of the market structure post-merger. Finnish legislation still operates with the dominance test, where mergers resulting in a creation or strengthening of a dominant position that significantly impedes competition shall be challenged. The ability and the incentive of the concentration to implement different foreclosure strategies have to be

analysed case by case as well as whether such behaviour would then lead to harmful effects to competition/consumers.

The Chairman then addressed the submission of the Czech Republic (CR). The CR allowed a merger between the main importer of natural gas and 6 distribution companies. Subsequently this integrated firm was fined for abuse of dominance where “the vertical integration from the merger had enabled or facilitated all of the forms of abuse of dominance which RWE committed”. Does this indicate that it was or was not a mistake to allow the merger?

A delegate from the Czech Republic responded that the case had been instructive and provided some background. The transaction in this case involved a merger between the sole importer of natural gas, the sole transportation system operator and six of eight distribution companies. At the time there was no competition because the sector was fully regulated. With liberalisation, however, those eight regional distributors are the only viable entrants in the open gas market. The integrated firm was able to engage in a number of practices that made it very difficult for the independent distributors to compete. This case therefore shows the importance of vigorous merger control. In 2002 there was too much reliance on the ability of ex-post control, on the efficiency and power of the regulatory office, and on the effects of the market opening. However, the case is still before the courts.

The Chairman then turned to the submission of Turkey. It discusses a vertical merger between an oil producer and a refining concern with 86% of the crude oil refining capacity in Turkey. The submission notes the potential for efficiencies and that vertical integration of crude oil producers and refineries is common worldwide. The Chairman invited the Turkish delegation to explain the anticompetitive concerns and whether those concerns could have been addressed using ex-post control.

A delegate from Turkey explained that this case (TUPRAS I) was a privatisation case. The Turkish Competition Authority has two ways to affect the privatisation process. One is whenever the tender specifications are prepared but before the transaction is announced to the public, and the other is later when a particular firm is identified as the acquirer. At this second stage (authorisation stage), the Competition Board acts as a *law enforcement agency* by issuing binding provisions under its merger control provision found in Article 7 of the Act no. 4054 on the Protection of Competition. The District Administrative Court decided to impose a ‘stay of execution’ with respect to the sale of TUPRAS. Thus, the Privatisation Authority took this decision to the Council of State (Court of Appeal). The Council of State cancelled the Privatisation Authority’s decision that confirmed the sale. In brief, there were many cases before the courts concerning the ‘legality of this sale’. Therefore, the privatisation of this refining company was realised from scratch afterwards via the so-called ‘TUPRAS II’ case.

In the Turkish Petroleum Refineries Corporation/TUPRAS I case, the Competition Board cited benefits such as diminishing operational costs, ensuring security of raw material supply, diminishing capital costs, maintaining and further developing the existing market as benefits that were expected to be obtained via vertical integration in worldwide oil markets in general. In the TUPRAS I case, the highest bidder willing to buy the Turkish Petroleum Refineries Corporation was an oil and gas company outside the geographical boundaries of Turkey called EFREMOV. (Based in Germany, EFREMOV is an associate company of TAFTNET in Tatarstan, producing 25 million tons of crude oil.). Based on the above mentioned peculiarity of the world oil markets, being the authorisation agent the Competition Board decided that this newly created vertical structure of the Turkish Petroleum Refineries Corporation, which would be active in the ‘crude oil production’ and ‘refining’ markets, might create entry barriers in refining markets and for imports. That is why it was deemed important to follow the investments of TUPRAS related to capacity increases after its transfer to EFREMOV.

Nevertheless, this was a very controversial case with respect to its legality before the courts and its sale to EFREMOV was not realised at all. Therefore, the need for an ex-post evaluation from the competition policy perspective becomes void in this respect.

7. General Discussion

A delegate from France raised an issue regarding remedies in vertical merger cases. The delegate suggested that, given the high standards of proof set by the European Court of Justice to establish harm from a vertical merger and, a rather positive presumption in terms of efficiencies, a more open attitude towards remedial solutions by enforcement agencies was required. In particular, perhaps behavioural remedies are more appropriate than structural remedies. An example might be a constraint on the integrating firm to maintain access to its infrastructure, to its resources and to its markets. This constraint could eliminate the risk of foreclosure. Of course this raises the issue of the duration and monitoring/enforcement of the constraint, since a behavioural commitment for the authorisation of a merger should not substitute for sector regulation.

The Chairman responded that Korea had an example in which behavioural constraints were adopted because they were trying to confront the anticompetitive effects arising in a vertical merger without sacrificing the efficiency benefits and it did not appear that the implementation of the mechanism of these constraints required considerable monitoring by the competition authorities

8. Chairman's Closing Comments

The Chairman noted that there seemed to be a considerable consensus on the appropriate analytical framework and evidentiary requirements in assessing the competitive effects of vertical mergers. In particular, the need for a case by case approach arises because the recognition that the theoretical underpinnings for enforcement are both complex and fragile puts the emphasis on the facts of a case.

The specific points made by the Chairman were:

- In assessing foreclosure it is important to consider the relationship between the amount of upstream capacity acquired and the downstream requirements of the integrated firm. When the upstream capacity exceeds the downstream requirement, foreclosure is more likely to be an issue.
- There is not much enthusiasm for coordinated effect: while possible it is empirically rare that coordinated effects will arise from a vertical merger.
- Assessing the incentive for foreclosure and the trade off between up and downstream profits is key to assessing the probability of foreclosure.
- An integrated analysis is often required since the source of the anticompetitive harm also gives rise to efficiency benefits. The examples in the submissions illustrate how this has been done on a case by case basis.

RÉSUMÉ DE LA DISCUSSION

Le Président commence par faire remarquer que de nombreux points communs ressortent des contributions soumises. D'ailleurs la plupart de ces contributions s'entendent de manière générale sur quatre points : (i) les fusions verticales diffèrent des fusions horizontales dans la mesure où elles ne changent pas les parts de marché dans un marché donné et n'éliminent pas de source directe de contrainte concurrentielle ; (ii) les fusions verticales sont probablement une source significative d'efficacités ; (iii) les fusions verticales peuvent néanmoins poser un problème si elles entraînent un verrouillage ou favorisent une coordination ; et (iv) la remise en cause de la fusion se justifie quand l'impact anticoncurrentiel vient contrebalancer l'effet d'efficacité. Le Président note que la question de verrouillage est très intéressante car, souvent, ce qui est une source d'efficacité peut aussi être une des raisons à l'origine d'une forme de verrouillage.

Avant de passer à l'examen des contributions de chaque pays, le Président invite la délégation de la Commission européenne à donner une vue d'ensemble de son projet récent de lignes directrices sur les concentrations non horizontales.

1. Vue d'ensemble du projet de lignes directrices de la Commission européenne

Un délégué de la Commission européenne explique que la logique d'élaboration et d'adoption des lignes directrices sur les concentrations non horizontales vient de la perception de la nécessité de donner des lignes directrices sur les principaux aspects que la Commission prendra en compte et il précise la façon dont l'enquête de la Commission va être organisée pour évaluer les effets verticaux et les effets congloméraux des fusions. La demande de lignes directrices est due : (i) à l'exigence d'une publication par la Commission de ses décisions en cas d'accord ou de refus ; (ii) à la confirmation par les tribunaux européens qu'il y a présomption de légalité des fusions non horizontales ; et (iii) à la prévalence d'inquiétudes concernant les effets sur la concurrence des fusions verticales dans les secteurs récemment libéralisés, en particulier le secteur de l'énergie.

Le projet de lignes directrices se compose de quatre parties : (1) une vue d'ensemble générale ; (2) une définition des régimes de protection en termes de parts de marché et de degrés de concentration ; (3) l'évaluation des fusions verticales ; et (4) l'évaluation des fusions conglomérales.

S'il est un message très important qui ressort tout du long, c'est que généralement les fusions non horizontales risquent moins que les fusions horizontales de susciter des préoccupations en matière de concurrence. Premièrement, et contrairement aux fusions horizontales, elles n'éliminent pas la concurrence entre les parties qui fusionnent, et deuxièmement, elles ouvrent des possibilités substantielles d'efficacités, y compris l'internalisation des doubles majorations des prix. Néanmoins, il existe certaines circonstances dans lesquelles les fusions non horizontales peuvent considérablement nuire à une concurrence efficace, essentiellement parce qu'une fusion non horizontale peut changer la capacité et les incitations des parties qui fusionnent à entrer dans le jeu de la concurrence.

Le projet de lignes directrices précise que les concentrations non horizontales constituent une menace pour l'efficacité de la concurrence, sauf si l'entité fusionnée détient un pouvoir sur au moins un des marchés concernés. La Commission ne s'inquiétera sans doute pas des effets pour la concurrence d'une

fusion non horizontale lorsque la part de marché après la fusion de la nouvelle entité dans chacun des marchés concernés est inférieure à 30 % et lorsque l'IHH après la fusion est inférieur à 2000.

La grille d'analyse met en évidence deux effets anticoncurrentiels possibles provenant des fusions verticales et conglomérales. Les deux principales théories sur les préjudices qui sont envisagées portent sur les effets de coordination et de non-coordination. Lors de l'évaluation des possibilités d'effets de non-coordination, la Commission examinera : (i) la capacité à mettre en place un verrouillage, (ii) l'incitation à mettre en place un verrouillage ; et (iii) l'éventualité d'un impact négatif sur la concurrence dû à un verrouillage. Lors de l'évaluation des possibilités d'effets de coordination, la Commission examinera si les entreprises après la fusion sont plus capables de se coordonner ou si elles y sont incitées.

Le délégué souligne deux points :

- Le projet de lignes directrices contient une norme de protection des consommateurs. Autrement dit, lorsque les clients intermédiaires sont des concurrents effectifs ou potentiels des parties à la fusion, la Commission se concentrera sur les conséquences de la fusion sur le consommateur auquel l'entité fusionnée et ces concurrents vendent leur production. L'analyse mettra l'accent sur l'impact d'une concurrence effective et, en définitive, sur la protection des consommateurs.
- Le projet de lignes directrices montre que la Commission entreprendra une évaluation intégrée des dommages anticoncurrentiels et de toutes les efficacités possibles spécifiques à l'opération.

Les lignes directrices sur les fusions non horizontales ont pour objectif de contribuer au caractère prévisible de l'analyse de la Commission et à des évaluations précises et cohérentes des fusions non horizontales, transactions qui souvent font intervenir des évaluations extrêmement complexes.

2. Définitions et présomptions

Le Président commence par signaler que différentes sensibilités sont en présence : de nombreuses contributions conviennent que les préoccupations en matière de concurrence face aux fusions verticales ne sont certes pas les mêmes que dans le cas de fusions horizontales, car habituellement la concurrence horizontale n'est pas menacée et, de plus, des efficacités sont plus probables que dans les fusions horizontales. Cela amène à penser, notamment du côté du BIAC, qu'il devrait y avoir une présomption favorable vis-à-vis des fusions verticales, présomption qui n'est pas nécessairement partagée par toutes les délégations.

La délégation allemande est l'exemple même d'un jugement réservé sur les fusions verticales. Selon la contribution allemande : « Le Bundeskartellamt ne pense pas que les fusions verticales donnent lieu habituellement à des efficacités significatives car les études empiriques ne semblent pas appuyer une telle affirmation générale. » De plus, on peut lire dans cette contribution : « Le Bundeskartellamt examine en outre soigneusement les fusions verticales car, dans certaines circonstances, elles peuvent aussi avoir des conséquences dommageables. Une 'présomption d'impossibilité d'objection' parfois invoquée dans le cas de fusions verticales semble inadaptée. » Ce point de vue s'oppose à celui du BIAC (et d'autres) selon lequel « l'intégration verticale est un moyen important utilisé par les entreprises pour réduire leurs coûts et de faire plus efficacement face à la concurrence. Par conséquent, on doit présumer que les fusions verticales sont des accords favorisant la concurrence et ne doivent pas être soumis à une intervention des instances de réglementation, sauf circonstances extraordinaires démontrant une probabilité importante d'entraves à la concurrence. » Le Président invite la délégation allemande à défendre son point de vue, à

fournir éventuellement une synthèse des éléments justifiant son scepticisme à l'égard des efficiences pouvant provenir des fusions verticales, que ce soit dans les recherches universitaires publiées ou ailleurs, et à brosser un tableau de ses pratiques en matière d'application du droit.

Un délégué allemand répond que le passage sur les efficiences ne doit pas être interprété en dehors de son contexte. La phrase précédant ce passage est la suivante : « Comme l'étude exploratoire l'explique, les fusions verticales peuvent donner lieu à plusieurs types d'efficiences, notamment un renforcement de la coordination, un alignement des incitations, des efficiences de production, des économies de frais de transactions, une internalisation des externalités indépendantes des coûts, en particulier l'élimination de la double majoration des prix. » Et la phrase qui vient aussitôt après est : « Les fusions verticales peuvent donner lieu ou non à des efficiences spécifiques aux fusions ». L'Allemagne reconnaît que les fusions verticales peuvent aboutir à des efficiences, mais il n'y a pas de présomption générale que des efficiences découlent obligatoirement des fusions verticales.

Dans la pratique, le délégué allemand déclare qu'il n'y a pas grande différence entre le point de vue de l'Office fédéral de lutte contre les cartels (Bundeskartellamt) et celui de la CE. Le Bundeskartellamt évalue chaque fusion qui est signalée selon une approche au cas par cas. L'évaluation se concentre non pas sur les parts de marché, car les parties n'exercent pas leurs activités sur les mêmes marchés, mais sur la question du verrouillage et des effets de coordination. Dans chaque cas, trois questions doivent être posées : (i) y a-t-il verrouillage au niveau des intrants ; (ii) y a-t-il verrouillage au niveau des clients ; et (iii) quel est le risque d'effets de coordination ? La délégation allemande souligne que l'application d'une fusion verticale, surtout dans le secteur de l'énergie, a pris de l'importance.

Le Président aborde ensuite la contribution de la France. Le Président fait remarquer que la contribution française a insisté sur le fait que l'intégration verticale pourrait constituer un substitut privilégié à des relations contractuelles verticales qui sont susceptibles d'avoir les mêmes conséquences, mais sont plus fragiles.

Un délégué de la France explique qu'il y a deux grandes différences entre l'intégration verticale et les contrats verticaux. Tout d'abord, d'un point de vue économique, les contrats ne sont pas équivalents à une intégration verticale dans un contexte d'incertitudes. Ensuite, le traitement juridique des contraintes verticales et des fusions verticales est différent.

3. Effets anticoncurrentiels des fusions verticales

Pour commencer l'examen des effets anticoncurrentiels des fusions verticales, le Président se tourne vers les Pays-Bas, évoquant leur position selon laquelle une fusion verticale suscite des inquiétudes sur le plan de la concurrence si elle aboutit au transfert ou au renforcement d'une position dominante qui la fait passer d'un niveau de la chaîne de valeur à un autre niveau de cette même chaîne de valeur. Pour préciser le contexte, le Président s'enquiert du cas KPN-Noxema évoqué dans la contribution des Pays-Bas dans le cadre de laquelle une fusion verticale a été bloquée en raison d'inquiétudes face à un tel effet de levier. En l'occurrence, KPN était propriétaire de plusieurs antennes de radio et de télévision et Noxema était une des trois entreprises qui fournissaient l'infrastructure de télédiffusion pour les signaux radio de télédiffusion. Le Président invite la délégation des Pays-Bas à expliquer pourquoi le théorème du bénéfice unique de l'école de Chicago ne pouvait s'appliquer dans ce cas, autrement dit pourquoi l'intégration augmenterait-elle les bénéfices de KPN au-delà du prix de gros maximisant le bénéfice ?

Un délégué des Pays-Bas répond que deux raisons expliquent pourquoi le théorème du monopole unique ne s'appliquait pas et donc pourquoi l'effet de levier était préoccupant. Premièrement, les tours que détenait KPN ne servaient pas uniquement à la radiodiffusion, qui n'a pas de substitut de sorte que sa demande n'est pas élastique, mais qu'elles servaient aussi à des opérateurs de télécommunication pour

lesquels des substituts étaient disponibles de sorte que la demande était plus élastique. Ainsi, KPN n'a pas pu facturer le prix de monopole aux deux types d'utilisateurs. Deuxièmement, une contrainte réglementaire sur le prix pouvait être facturée en amont.

Le délégué explique ensuite que la théorie des dommages à la concurrence se fondait sur la crainte que le verrouillage n'entraîne un monopole du marché en aval, provoquant des augmentations des prix, une baisse de la qualité ou un retard dans l'adoption de la technologie numérique. La mesure correctrice proposée par KPN de vendre ses tours à un tiers indépendant, a rétabli le *statu quo*, autrement dit une partie ayant le contrôle de toutes les tours mais n'étant pas verticalement intégrée. La fusion et la mesure correctrice proposée sont actuellement examinées par les tribunaux.

Le Président revient à sa question sur les incitations à une augmentation des prix, notant que l'élimination de la double majoration des prix inciterait KPN à baisser les prix et non à les augmenter.

Un délégué des Pays-Bas répond qu'avant la fusion, il existait un monopole sur le marché en amont, mais que le marché en aval était assez concurrentiel. Par conséquent la réduction de la concurrence due au verrouillage risquait d'avoir un impact plus marqué sur les prix que l'internalisation de la double majoration des prix, le résultat net étant une augmentation des prix en aval.

Le Président passe alors au projet de lignes directrices de la CE et à ses deux grands scénarios de verrouillage (intrants et clients). Il invite la CE à développer ces scénarios, et en particulier à préciser quand ces scénarios semblent être probables. Quels critères de preuve s'appliqueraient pour valider ces scénarios de dommages ? Quelles sont les hypothèses sur les obstacles à l'entrée, les difficultés pour d'autres concurrents d'accéder au marché et la capacité de l'entreprise intégrée à s'engager à se retirer du marché en amont ?

Un délégué de la CE commence par expliquer l'application de son analyse en trois étapes au scénario de dommages le plus probable, le verrouillage concernant les intrants. Le projet de lignes directrices explique qu'il prendrait différentes formes, la plus radicale étant le retrait, quand la partie en amont de l'entité qui fusionne cesse de fournir les clients en aval. Cela étant, le verrouillage le plus courant concerne sans doute l'entité en amont qui fournit les clients en aval à des prix supérieurs ou dans des conditions pires qu'auparavant. Pour prouver que tel est le cas et que cela finira par faire du tort aux consommateurs, la CE devra prouver d'abord que l'entité en amont a la possibilité de se livrer à de telles pratiques. En ce qui concerne cette capacité, le message essentiel du projet de lignes directrices est que la société intégrée doit avoir un pouvoir de marché en amont. Le projet de lignes directrices souligne aussi, cependant, que cette capacité suppose aussi que les intrants en amont représentent un élément de coût significatif pour les concurrents en aval ou constituent une composante critique pour les concurrents en aval.

La deuxième étape porte sur l'évaluation des incitations au verrouillage. Pour évaluer les incitations, le projet de lignes directrices propose de trouver un compromis entre les bénéfices que va perdre l'entreprise en réduisant ses ventes en amont et les bénéfices qu'elle engrangera plus tard parce qu'elle peut développer ses ventes en aval ou augmenter ses prix à ce niveau. Ce compromis peut être quantifiable, mais il peut parfois ressortir de l'examen d'un certain nombre de facteurs essentiels. Par exemple, si les marges en amont sont faibles, si elles sont élevées en aval, et si l'entreprise peut réussir à se développer en aval, il est alors plus probable que le verrouillage soit rentable. La jurisprudence exige aussi que la CE examine si le cadre juridique existant, en particulier l'application de l'article 82, est suffisamment dissuasif pour que les entreprises ne se livrent pas à ces pratiques après la fusion.

La troisième étape exige de prouver qu'il y aura un dommage, un effet négatif sur les consommateurs. À cet égard, le projet de lignes directrices précise que le nombre de concurrents qui font l'objet d'un verrouillage doit être suffisamment important sur le marché en aval pour que les prix en aval augmentent.

La CE envisagerait également l'impact de la fusion verticale sur les obstacles à l'entrée et l'effet sur les concurrents potentiels. Elle pourrait s'avérer négative soit parce qu'à présent les concurrents vont devoir entrer à deux niveaux simultanément, ce qui rend leur entrée plus difficile, soit parce que le coût des intrants va augmenter. Ce type de situation est particulièrement courant dans les secteurs récemment libéralisés, où l'on craint que l'intégration verticale ne réduise la concurrence sur des marchés qui viennent de s'ouvrir.

Enfin, dans le cadre de la troisième étape, les efficiences doivent être prises en compte. Ces efficiences, y compris l'élimination d'une double majoration des prix, doivent être prouvées par les parties et être spécifiques à la fusion. Dans bien des circonstances, il n'y a pas d'élimination de la double majoration des prix soit parce qu'il n'y en avait pas avant la fusion, par exemple sur des marchés en amont qui sont réglementés, soit parce que la fusion n'éliminera pas cette double majoration.

Les démarches consistant à dissuader les entrées sur le marché et à s'engager à se retirer du marché des facteurs constituent vraiment des éléments importants dans l'analyse mais aucun d'eux n'est une condition nécessaire pour prouver l'existence de dommages. Tout d'abord en ce qui concerne la dissuasion d'entrer, il faut dresser des obstacles à l'entrée en amont pour s'assurer un pouvoir de marché en amont, mais la fusion ne doit pas nécessairement accentuer ces obstacles. Même si les obstacles restent tels qu'ils étaient, le risque existe que ces entités relèvent les prix en aval.

Si l'entité issue de la fusion trouve un moyen de s'engager très nettement à se retirer du marché en amont — par exemple à travers une intégration technique qui rend les intrants de la société intégrée incompatibles avec d'autres — cela va certainement renforcer la probabilité d'un verrouillage. Cependant, ce n'est pas strictement nécessaire : l'incitation à augmenter les bénéfices suffit à établir l'incitation à se livrer à une stratégie d'augmentation des coûts des concurrents et en définitive à provoquer des dommages.

Le Président fait remarquer que la contribution de la France effectue la même analyse ou, dans certains cas, développe les mêmes étapes d'analyse. Le Président invite la France à expliquer les considérations et les facteurs, dans le contexte de la fusion entre Unibail et Exposium, qui témoignent d'incitations, ou de l'absence d'incitations pour l'entreprise intégrée à procéder à un verrouillage.

Un délégué de la France répond que la détermination de la rentabilité ou non d'un verrouillage est une étape nécessaire et qu'elle dépend des faits dans chaque cas. Les incitations au verrouillage dépendent de facteurs comme le degré de concentration sur le marché du produit concerné et de la substituabilité entre les produits de l'entreprise et ceux de ses concurrents. Unibail, qui exerçait ses activités sur le marché en amont de la gestion des sites d'expositions et de conférences a pris le contrôle d'Exposium, société intervenant sur le marché en aval de la gestion des sites de commerces et d'expositions. À l'époque de la transaction, la part du marché en amont d'Unibail était assez importante : elle détenait environ la moitié des sites d'expositions et de congrès de la région parisienne. Cependant, l'analyse au regard du droit de la concurrence indiquait qu'un verrouillage était peu probable dans la mesure où il avait peu de chance d'être rentable. Cette conclusion se fondait sur les trois faits suivants.

Premièrement, les deux entreprises avaient relativement peu de relations entre elles. Exposium n'avait organisé que 8 salons sur les sites gérés par Unibail en 2003-04, ce qui représentait moins de 10 % de la surface totale qu'Exposium avait louée pendant la même période pour organiser ses salons et ses conventions. De même, Exposium avait contribué à moins de 5 % des recettes d'Unibail au titre des locations. Deuxièmement, une réorientation massive à la suite de la fusion était peu probable. Les sites d'expositions sont des substituts imparfaits, le choix reposant sur des critères objectifs : emplacement, accessibilité, taille disponible, qui ne peuvent être facilement influencés par le gestionnaire des sites. Troisièmement, il n'est pas dans l'intérêt d'Unibail de ne plus abriter une exposition et de la remplacer par une autre organisée par Exposium, d'autant que les conséquences sur la réputation d'Unibail auprès de ses

clients aurait été très dommageables et qu'il existait un problème de capacité dans la région. Pendant les principaux salons organisés par Expositum dans un site situé dans le nord de Paris, de très grands salons étaient systématiquement organisés chaque année dans le sud de Paris dans des sites gérés par Unibail. Étant donné cette contrainte implicite de capacité, Unibail n'aurait probablement eu aucun intérêt à abandonner ces salons pour faire de la place à ceux qu'organisait au même moment Expositum dans le nord de Paris.

Le Président aborde ensuite la déclaration suivante dans la contribution soumise par le Mexique : « La CFC estime qu'une fusion est anticoncurrentielle si des relations actionnariales peuvent ouvrir aux parties un accès privilégié à un intrant important ou une position avantageuse concernant la distribution, la commercialisation ou la publicité en rapport avec le produit concerné et si les parties ont obtenu ou pourraient obtenir un pouvoir de marché substantiel sur les marchés concernés. » Contrairement à l'approche de la CE et à sa démarche en trois étapes, il semble qu'au Mexique, la charge de la preuve pour les autorités de la concurrence soit bien plus légère, qu'il s'agit simplement de montrer qu'il y a une possibilité et qu'il n'est pas nécessaire de se pencher sur d'autres incitations au verrouillage ou d'examiner si l'impact du verrouillage sera anticoncurrentiel. Et s'il y a présomption de comportement anticoncurrentiel dans ce type de situation structurelle, cela soulève la question intéressante de savoir si cette présomption peut être surmontée par les parties et de quelle manière.

Un délégué du Mexique commence par faire remarquer que le droit de la concurrence au Mexique n'établit pas de distinction entre les fusions horizontales et verticales. Les dispositions légales ne tiennent pas compte des différences conceptuelles entre les fusions horizontales et verticales, et notamment de la nécessité plus impérative d'évaluer les incitations à un futur comportement anticoncurrentiel dans le cas des fusions verticales.

Dans la pratique, l'accent est mis sur la probabilité d'une conduite anticoncurrentielle, qui comprend les incitations à ce type de conduite. La probabilité d'une conduite anticoncurrentielle découlant d'une fusion verticale est un point important et, quand on compare les risques des effets anticoncurrentiels et les efficacités, il importe de réfléchir à la probabilité qu'un comportement anticoncurrentiel survienne et, à cette fin, il est absolument essentiel d'étudier les incitations. Fréquemment, dans les cas de fusions verticales, les remèdes appliqués visaient à empêcher qu'il y ait des incitations à se livrer effectivement *ex post* à un comportement anticoncurrentiel.

Le Président souligne que, selon la contribution soumise par les États-Unis, la double majoration des prix découle souvent de problèmes d'aléa moral. Le Président invite la délégation des États-Unis à expliquer ce point de vue et à commenter ses implications pour la politique des autorités à l'égard des fusions verticales.

Un délégué des États-Unis fait remarquer qu'il y a bien des années, Ronald Coase a constaté qu'il était plus efficace que certaines activités soient menées au sein d'une entreprise plutôt qu'entre deux entreprises sur le marché. La raison en est qu'il est trop coûteux de rédiger des contrats détaillés ; autrement dit, on a tort de partir du principe que la sous-traitance élimine toujours la double majoration des prix, même en présence d'un pouvoir de marché. Même en présence d'un pouvoir de marché, si les parties contractantes le pouvaient, elles aimeraient élaborer un contrat qui élimine la double majoration des prix et bénéficier de paiements forfaitaires, pour qu'aucune efficacité ne soit induite à la marge. Le fait est, cependant, que les coûts de sous-traitance les en empêchent et, par conséquent, les prix marginaux ne sont pas fixés aux coûts marginaux.

Si les coûts de sous-traitance empêchent la détermination efficace des prix, cela vient de problèmes d'aléa moral dus au fait que l'on ne peut observer certaines actions et, en particulier, la quantité optimale d'efforts ou d'investissements nécessaires à l'efficacité. Par exemple, si un fabricant veut susciter des

efforts de vente de la part d'un distributeur, il peut lui être difficile d'observer directement la quantité optimale d'efforts et de payer directement le distributeur à cet effet. Par conséquent, le fabricant accordera plutôt un territoire exclusif au distributeur, le laissera faire la promotion de son produit, facturera un prix supérieur au coût marginal du distributeur et, en créant ainsi un droit de propriété et une incitation, il amènera le distributeur à investir dans la promotion.

L'avantage de créer des incitations à investir et à fournir des efforts ne se limite pas au distributeur, mais peut s'appliquer aussi au fabricant. Supposons qu'un distributeur cherche à inciter un fabricant d'un de ses produits à faire de la publicité. Supposons en outre que le distributeur préfère que ce soit le fabricant qui fasse la publicité parce qu'il peut le faire à moindre frais que lui. La solution contractuelle exigerait que le distributeur paie au fabricant la quantité optimale d'effort publicitaire, mais cette solution ne marchera pas si le distributeur n'a aucune idée de ce que doit être cette quantité optimale ou estime difficile de l'observer directement. En revanche, ce que l'on observe souvent, par exemple dans une relation franchiseur-franchisé, c'est que le franchiseur est rémunéré en fonction d'une part du total des ventes, car le total des ventes constitue un indicateur approximatif de la contribution des efforts publicitaires ou des efforts promotionnels aux ventes supplémentaires.

Dans chacun de ces deux cas, la détermination des prix ne se fait pas au coût marginal, solution efficiente à laquelle on aboutirait si le monde était parfaitement observable et parfaitement contrôlable. Dans un monde imparfait, on ne peut pas s'attendre à ce que les contrats distribuent efficacement les ressources au sens où tous les prix seront toujours au coût marginal. C'est exactement ce que voulait dire Coase quand il expliquait pourquoi, parfois, des activités se déroulent plus efficacement dans une entreprise que dans le cadre d'un accord de sous-traitance entre entreprises. Cela signifie que les fusions verticales génèrent ou peuvent générer des efficacités en atténuant ce problème de double majoration des prix.

Cela dit, comme le souligne Coase, se charger de certaines opérations au sein d'une entreprise génère d'autres coûts. Manifestement, ce n'est pas toujours une bonne idée d'effectuer une opération au sein d'une entreprise, mais toute la justification pour définir une entreprise comme un ensemble d'activités vient du fait qu'il existe un ensemble d'activités qui peut être effectué plus efficacement au sein d'une entreprise plutôt qu'en s'appuyant explicitement sur un contrat. Pour qu'une fusion verticale suscite des inquiétudes en matière de concurrence, il faut qu'il existe un pouvoir de marché, mais il s'agit précisément des mêmes situations où l'intégration verticale se débarrassera de la double majoration des prix et créera une efficacité. Autrement dit, quand on examine une fusion verticale dans le cadre de laquelle il peut exister un effet anticoncurrentiel, il y a dans la plupart des cas aussi automatiquement un effet d'efficacité, et la question de savoir s'il vient totalement contrebalancer l'effet anticoncurrentiel dans les cas où il est présent est d'ordre empirique. Le délégué souligne aussi que les effets anticoncurrentiels dus au verrouillage identifiés dans la théorie économique sont assez fragiles et dépendent d'hypothèses qui doivent être vérifiées empiriquement.

Le Président indique qu'une fusion verticale peut résulter d'un effet de coordination. Il note que la possibilité théorique a été admise dans de nombreuses contributions, même si très peu de cas de coordination y sont abordés. Le Président souligne que la contribution du BIAC est particulièrement sceptique sur la possibilité que les fusions verticales puissent donner lieu à un effet de coordination. Il invite la délégation du BIAC à analyser les points épineux et les limites des théories relatives aux dommages provoqués par les effets de coordination pour s'en servir comme base de l'application du droit aux fusions verticales.

Un délégué du BIAC répond en précisant qu'il y a deux aspects essentiels à propos d'un effet de coordination découlant d'une fusion verticale. Le premier est la façon dont une fusion verticale change la

structure du marché de telle sorte qu'une coordination est possible après la transaction mais pas avant. Le deuxième est le problème pratique de pouvoir assumer la charge de la preuve.

Un deuxième délégué du BIAC précise que, même s'il n'est pas impossible qu'un effet de coordination survienne, dans la pratique les conditions pour qu'un tel effet se produise à l'issue d'une fusion verticale sont très rares. Le BIAC préférerait en revanche que le champ d'intervention se limite aux théories assez courantes sur les dommages anticoncurrentiels comme le verrouillage des intrants et des clients qui sont eux-mêmes assez fragiles, plutôt que de porter sur de multiples domaines. Selon lui en effet, les fusions verticales n'éliminent pas la concurrence directe et réunissent des éléments complémentaires, ce qui donne lieu à une présomption économique de prix inférieurs et d'amélioration de la coordination. Il est très important de ne pas décourager ces fusions sans avoir une raison impérieuse de le faire.

Le délégué du BIAC exprime ses préoccupations quant à la nécessité de trouver un juste équilibre entre les erreurs de type 1 et de type 2. Il fait remarquer que, s'il est naturel que les autorités de la concurrence se laissent leurs possibilités ouvertes et veillent à ne pas passer à côté d'une raison éventuelle pour bloquer une opération, il faut reconnaître que cela n'est pas sans représenter un coût. Le coût que génère ce maintien des possibilités ouvertes pour étudier toutes sortes de théories des dommages potentiels vient du risque de paralyser des fusions favorables à la concurrence en raison d'une augmentation de la probabilité de convictions erronées.

Le Président répond en soulignant que cela ne pose pas de grave problème pour les autorités de la concurrence sauf s'il existe des preuves significatives montrant que l'erreur de type 2 est plus coûteuse que l'erreur de type 1. Le Président demande au BIAC des preuves que les autorités de la concurrence ont fait le mauvais choix.

Un délégué du BIAC répond que ces preuves existent, y compris l'absence de cas convaincant où une fusion verticale a effectivement entraîné une accentuation du risque de coordination, et qu'il y a une vraie présomption qui est parfaitement valable sur le plan économique selon laquelle le rapprochement de compléments tend à réduire les prix.

Un délégué de la CE répond au scepticisme concernant les effets de coordination des fusions verticales. S'il reconnaît les difficultés rencontrées généralement pour tenter d'établir les effets de coordination, il affirme qu'une fusion verticale peut en fait affecter de bien des manières un des critères qui sert à établir la coordination. Les fusions verticales pourraient certainement faciliter une entente entre les intervenants sur le marché à propos des conditions de coordination, simplement en réduisant le nombre d'intervenants qui doivent se coordonner, ainsi qu'en augmentant la symétrie par exemple ou en améliorant la transparence du marché. Elles pourraient faciliter le suivi des écarts en autorisant une entreprise à connaître les prix de ses concurrents. Elles pourraient faciliter les mécanismes de sanctions, car il peut être plus facile de sanctionner une entreprise qui est un client ou un fournisseur. Enfin, elles peuvent limiter le rôle des tiers et les moyens qu'ont ces derniers de dissuader la coopération.

En ce qui concerne ce dernier point, le délégué mentionne un cas que la Commission a évalué l'an dernier. Il n'y a pas eu de décision finale car les parties se sont retirées pendant la deuxième phase. La situation faisait intervenir tous les acteurs du marché, mais l'un d'eux utilisait une technologie particulière, cette exception étant constituée par le leader du marché qui se servait sa propre technologie exclusive. La fusion verticale portait sur le deuxième acteur sur le marché et l'entreprise qui utilisait la technologie employée par la plupart des entreprises. Cette intégration verticale aurait pu aboutir à ce que la nouvelle entité fusionnée verrouille le marché à tous les intervenants marginaux en refusant de leur fournir la technologie ou en augmentant le coût d'accès à ses droits de propriété intellectuelle. Le résultat aurait été que ce marché finisse par devenir pratiquement un duopole, présentant de nombreuses caractéristiques d'un

marché où une coordination est possible. Comme les parties se sont retirées assez tôt durant la deuxième phase, la CE n'est pas entrée dans les détails pour évaluer les incitations, etc. ; mais, de toute évidence, il s'agit d'une situation où une coordination aurait pu se produire. La contribution de nos collègues américains traite d'une fusion verticale remise en cause en 2001 par le ministère de la Justice, dans le cadre de laquelle la théorie des dommages était un effet de coordination. La CE conclurait que les effets de coordination ne doivent pas être ignorés lors de l'évaluation des effets concurrentiels d'une fusion verticale.

Un délégué des États-Unis commente le cas *Premdor* mentionné par la CE. La raison qui faisait craindre un effet de coordination était que la fusion verticale augmenterait le flux d'informations et en conséquence la capacité de coordination. Or ce n'est pas parce que les cas sont rares où une fusion verticale provoque des dommages concurrentiels en raison d'effets de coordination, qu'ils n'existent pas.

Le délégué des États-Unis ajoute que, comme l'intégration verticale constitue l'essence même de ce que signifie une entreprise, une application du droit agressive peut faire peser de très lourdes charges sur chaque entreprise, pas seulement les parties qui fusionnent. En revanche, deux raisons donnent à penser que la probabilité d'un effet anticoncurrentiel dû à une fusion verticale est relativement faible. Premièrement, dans les publications économiques, on trouve difficilement des modèles où il existe une incitation rentable au verrouillage. Deuxièmement, la fusion verticale peut simplement résulter d'un remaniement des fournisseurs et des acheteurs, car en termes agrégés il n'y a pas de changement des capacités. Les entreprises qui fournissaient auparavant l'entreprise intégrée voient leur capacité libérée pour fournir le reste du marché. De plus, si l'entreprise faisant l'objet d'une intégration verticale acquiert plus de capacité que de besoin, le verrouillage peut être une stratégie extrêmement coûteuse.

Un deuxième délégué des États-Unis donne son avis sur les faux négatifs, faisant remarquer qu'en présence d'un faux négatif, il se peut que le marché le corrige, qu'on peut certainement le constater *ex post* et que les instances chargées de l'application du droit peuvent en tirer des leçons et reconnaître à l'avenir que ce genre de situations mérite un examen plus approfondi. Le problème du faux positif est plus grave car l'effet paralysant et dissuasif peut affecter de nombreuses entreprises, pas seulement sur le marché concerné, mais aussi sur toutes sortes d'autres marchés, et ce type d'erreur ne se corrige pas d'elle-même.

3. Efficacités et analyse intégrée

Le Président indique qu'une des difficultés de l'analyse d'une fusion verticale est que les fusions verticales font souvent nécessairement intervenir tant le verrouillage qu'un avantage en termes d'efficacité provenant de l'internalisation de la double majoration des prix. La présence des deux effets impose d'autant plus de déterminer qui domine. La contribution du Danemark évoque un cas concernant une coentreprise entre trois grands détaillants vendant des fertilisants aux agriculteurs et un important fournisseur de fertilisants. Pour déterminer les gains d'efficacité et les effets anticoncurrentiels de la transaction, les autorités danoises de la concurrence ont élaboré un modèle des marchés concernés et ont simulé l'impact de la coentreprise sur les prix de détail. Le Président invite la délégation danoise à commenter l'approche utilisée pour déterminer les deux effets.

Un délégué du Danemark explique que les estimations des effets sur les prix dus à la coentreprise se fondent sur un modèle de Cournot. Les gains d'efficacité comportaient, entre autres, des coûts inférieurs pour les parties et l'optimisation des installations logistiques. Les effets anticoncurrentiels étaient, entre autres, le risque de verrouillage et l'augmentation des coûts des concurrents ainsi qu'une collusion accrue entre les parties à la fusion. Un des grands problèmes rencontrés aura été la collecte de données fiables, surtout sur l'élasticité de la demande pour laquelle des enquêtes ont été utilisées. Une analyse de sensibilité étendue a été effectuée à cette fin : différentes valeurs ont servi pour l'élasticité de la demande, le degré de

collusion et l'augmentation des coûts des concurrents. Tous les scénarios ont prévu de façon assez cohérente une augmentation significative des prix de détail.

Le Président signale que la contribution de l'Afrique du Sud évoque une fusion verticale entre un raffineur et un distributeur de produits pétroliers, l'aspect inhabituel étant que le raffineur avait une grande part du marché du commerce de gros mais un accès très limité à la distribution de détail. Le Président invite la délégation de l'Afrique du Sud à répondre à deux questions. (i) L'élimination de la double majoration des prix a-t-elle été prise en compte par exemple en examinant d'éventuels gains d'efficacité provenant de cette fusion ? (2) Craignait-on vraiment un verrouillage vertical, sachant que l'entreprise intégrée n'aurait que 40 % de la part de marché ?

Un délégué de l'Afrique du Sud commence par donner des informations contextuelles sur le secteur pétrolier en Afrique du Sud. Les faits saillants sont notamment les suivants : (i) le secteur est encore réglementé, mais pourrait être libéralisé ; (ii) le raffineur local doté de la grande part de marché fait du pétrole à partir du charbon, il appartenait auparavant à l'État et il n'était pas autorisé à avoir un réseau de distribution pour la vente de détail ; (iii) la capacité à importer des produits raffinés à partir des côtes est limitée par des goulots d'étranglement en matière de transport ; (iv) le prix de gros avant la fusion était déterminé par un mécanisme de marchandage entre quelques grands acheteurs et le grossiste local.

La question sous-jacente à l'analyse de l'incitation et des effets en matière de verrouillage était de savoir quel serait l'impact de l'acquisition sur le mécanisme de marchandage. Le changement fondamental était que le raffineur local avait à présent plus de pouvoir de marchandage, car il avait désormais un moyen d'écouler son produit raffiné en menaçant d'exclure les autres détaillants s'ils refusaient de payer un prix supérieur. Il ne s'agissait pas là d'une possibilité théorique, car même avant la fusion, il avait restreint la capacité locale et obligé les autres sociétés pétrolières à augmenter l'approvisionnement provenant du littoral en utilisant des camions.

Le tribunal a jugé que, tant qu'il existait une menace crédible de verrouillage, l'entreprise intégrée serait en mesure de facturer des prix de monopole. Il a conclu qu'il ne fallait pas nécessairement que ce soit une stratégie devant être mise en œuvre, mais que la menace de renforcer la position de marchandage du raffineur local devait être nécessairement crédible.

La question de la double majoration des prix n'a pas été soulevée par les parties à la fusion, le tribunal ne s'est pas penché sur cette question, cela aurait été manifestement dans l'intérêt des parties fusionnant de le faire, mais le problème n'a pas été examiné dans ce cas particulier.

4. Les preuves et la politique d'application du droit

Le Président s'intéresse ensuite à la contribution du Royaume-Uni et à ses efforts pour déterminer quantitativement si un verrouillage a été rentable, autrement dit sa méthode pour établir l'incitation au verrouillage.

Un délégué du Royaume-Uni commence par faire remarquer la nécessité d'adopter une approche au cas par cas et précise qu'au Royaume-Uni, la pratique consiste à examiner la capacité d'incitation et l'effet du verrouillage. Le délégué signale également que les cas de fusions purement verticales sont rares, mais que, dans deux cas récents, les aspects verticaux ont occupé une place prépondérante.

Le cas EWS Marcroft portait sur une société de maintenance de wagons de marchandises et une entreprise de traction, la maintenance constituant un intrant de la traction. L'allégation était que l'entreprise intégrée serait en mesure de verrouiller le marché en aval de la traction en restreignant l'accès à la maintenance après la fusion. La maintenance, même si elle représentait un faible coût d'intrant, constituait un aspect extrêmement critique car elle assurait le fonctionnement sans heurts des services de traction.

L'Office of Fair Trading a pu obtenir des estimations des marges et des tailles de marché en amont et en aval. Les marges en amont étaient faibles et le marché était très petit, tandis que les marges en aval étaient en comparaison beaucoup plus élevées et le marché était immense. En tenant compte de ces données, il apparaissait clairement que la perte de bénéfice due à un verrouillage en amont serait facilement compensée par le bénéfice obtenu en augmentant la part de marché en aval, même si l'entreprise ne parvenait pas à verrouiller tout le marché en aval et n'en prenait qu'une petite part. Bien qu'il s'agisse d'une analyse très simple qui ne tient pas compte des augmentations de prix et des changements de volumes après la fusion, elle donne une bonne indication de la rentabilité ou non d'une stratégie de verrouillage.

Le Président passe ensuite à la contribution de la Corée, se penchant notamment sur un cas évoqué dans la contribution soumise concernant Hyundai, premier constructeur automobile, qui a pris une importante participation dans un fournisseur de premier plan de composants automobiles électroniques. Le Président invite la Corée à expliquer (i) le rôle des preuves de parts de marché dans ce cas et leur interprétation, étant donné que de grandes parts de marché peuvent engendrer de grandes efficacités ou un effet anticoncurrentiel important ; et (ii) les mesures correctrices.

Un délégué de la **Corée** répond en donnant quelques brèves informations contextuelles :

Hyundai Motors est un grand constructeur automobile détenant environ les deux tiers du marché automobile coréen ; l'entreprise ayant fait l'objet de l'acquisition est le principal fournisseur de composants automobiles électroniques ; Hyundai intervient aussi sur le marché de composants automobiles électroniques, de sorte que la fusion est à la fois horizontale et verticale ; après la fusion, Hyundai devait contrôler 50 % du marché des composants automobiles électroniques. Les preuves de parts de marché ont servi à faire ressortir la nécessité d'une poursuite de l'enquête.

Les craintes d'un éventuel verrouillage reposaient sur deux considérations. Premièrement, après la fusion, la part des composants automobiles électroniques fournie par les entreprises non affiliées à Hyundai serait ramenée de 75 % à près de 33 % du total des achats de composants automobiles électroniques effectués par Hyundai. Deuxièmement, les nouvelles voitures et les nouveaux composants automobiles sont conçus conjointement et leur cycle de vie sur le marché est lié pendant 6 à 8 ans, du stade de développement au stade de la vente et à l'entretien ultérieur. Comme le but de la fusion était d'améliorer la coordination entre les deux stades de la production et étant donné la conception conjointe, les craintes de verrouillage étaient crédibles.

En élaborant des mesures correctrices, la KFTC a reconnu que la fusion verticale avait l'avantage d'améliorer l'innovation et que cet avantage serait perdu si la fusion était bloquée ou un désinvestissement demandé. La KFTC a cependant imposé des mesures correctrices comportementales en exigeant de Hyundai qu'il conçoive et mette en place un programme de commerce équitable et formule des lignes directrices pour interdire une discrimination déloyale à l'encontre de fabricants de composants automobiles non affiliés et en faveur de ses filiales. Il a été demandé à Hyundai de communiquer à la KFTC pendant 3 ans des précisions sur ses transactions avec toutes les sociétés de composants automobiles électroniques.

Le Président passe ensuite à la contribution soumise par la Roumanie et à son examen de l'affaire Flamingo-Flanco, qui portait sur la distribution et la vente de produits informatiques et électroniques. Apparemment, d'après la contribution de la Roumanie, la Commission était convaincue que cette transaction ne pouvait provoquer aucun dommage et elle a été autorisée. Le Président invite la délégation roumaine à donner des indications sur les parts de marché des entreprises concernées et l'utilisation de seuils pour passer en revue les cas.

Un délégué de la Roumanie note que les parts de marché étaient en l'occurrence inférieures au seuil de sécurité de 30 % défini dans les lignes directrices de la CE, tant en amont qu'en aval. Le cas est cohérent avec ce seuil dans le sens où il existait suffisamment de contraintes concurrentielles après la fusion pour dissiper les craintes concernant un verrouillage et un effet concurrentiel de la fusion. En outre, l'enquête a montré que la transaction génèrerait des efficacités substantielles, en particulier une meilleure qualité de service chez les détaillants de l'entreprise acquise.

Le Président signale que, dans la contribution soumise par la Pologne, un cas examiné concernait une fusion entre un distributeur et un producteur de vodka qui se caractérisait aussi par de faibles parts de marché, mais qu'en l'occurrence, les autorités polonaises de la concurrence se sont opposées à la fusion et n'ont accordé leur feu vert qu'après avoir obtenu des mesures correctrices comportementales. Le Président demande à la délégation polonaise d'expliquer l'affaire Polmols.

Un délégué de la Pologne répond qu'après la transaction, le premier distributeur posséderait les deux marques de vodka les plus populaires, tandis que la troisième marque la plus appréciée serait aussi détenue par un distributeur intégré. Par conséquent, on pouvait craindre que les autres distributeurs soient exclus des trois marques les plus populaires et que les autres producteurs de vodka le soient de la distribution. Les mesures correctrices imposaient des contraintes à l'entreprise intégrée comme la distribution d'au moins 35 % de ses deux marques pendant une période de trois ans par des indépendants. Cela permettait de donner le temps aux distributeurs et à d'autres producteurs de s'ajuster à la nouvelle réalité du marché : les distributeurs indépendants seraient renforcés et les petits producteurs auraient le temps de trouver d'autres distributeurs.

Le Président constate que la contribution de la Suisse signale peu d'expérience des fusions verticales. Il précise que cette contribution souligne la difficulté de prouver des dommages dus à une fusion verticale et, en particulier, met l'accent sur les problèmes de preuves. Le Président invite la délégation suisse à commenter la difficulté d'établir des dommages et le rôle des plaintes des concurrents.

Un délégué de la **Suisse** répond que la difficulté de prouver des dommages n'est pas nécessairement liée à la nature des fusions verticales en général, mais au fait que les cas qui ont été signalés ne posaient pas vraiment de problèmes d'effets verticaux, en raison d'une absence de pouvoir de marché ou encore d'impact sur la structure du marché ; par conséquent il est plus correcte de dire que des dommages étaient peu probables, même si les concurrents ont exprimé des inquiétudes. Le délégué suisse souligne que les autorités suisses de la concurrence avaient récemment demandé que les administrateurs de Swiss Grid – qui exploite le réseau d'électricité haute tension – ne soient pas autorisés à faire partie du conseil d'administration d'entreprises situées en amont ou en aval de ce marché. La restriction est en appel.

Le Président revient à la contribution soumise par les États-Unis. Il souligne que cette contribution exige de solides fondements empiriques pour mettre en œuvre une fusion verticale.

En outre, dans la contribution des États-Unis, deux cas sont traités qui ont des issues différentes. Pour l'un deux, l'affaire Digene, la FTC était convaincue qu'après la fusion, les entités ayant fusionné auraient la capacité de verrouiller et y seraient incitées et provoqueraient de fait des dommages pour les consommateurs, tandis que pour l'affaire Synopsis-Avant!, elle a abouti à la conclusion opposée. Le Président invite la délégation américaine à expliquer la signification/mise en œuvre de solides fondements empiriques, les fondements empiriques utilisés dans ces deux cas et les raisons pour lesquelles ces fondements empiriques différents ont donné lieu à des conclusions différentes.

Un délégué des États-Unis répond en différenciant les faits dans les deux cas. Dans l'affaire Cytoc-Digene, Cytoc avait une part de marché de 93 % dans les tests de Pap en milieu liquide qui servent à déterminer la présence probable d'un cancer du col de l'utérus. Son seul concurrent est TriPath, qui

possède une part de marché de 7 %. Digene a effectué un test complémentaire qui repère le virus du papillome humain (VPH), le virus qui provoque le cancer du col de l'utérus. Ces deux tests peuvent être utilisés, et le sont souvent, de façon complémentaire. La théorie sur laquelle se fondait cette affaire était que l'entreprise intégrée ne soutiendrait pas les fournisseurs concurrents du test de Pap en milieu liquide pour l'obtention du feu vert réglementaire de la part de la FDA, autorisation de mise sur le marché requise pour utiliser le produit Digene en combinaison avec les produits des concurrents. Les intervenants du secteur craignaient que TriPath ne subissent des effets négatifs immédiats et ne devienne un concurrent moins efficace, sans parler de la dissuasion d'une entrée future à ce niveau due à l'impossibilité d'obtenir l'accord de la FDA.

Par contre, Avant! et Synopsis portaient sur la fusion de deux concepteurs complémentaires de logiciels. Avant! détenait une part de 40 % de la production de ce que l'on appelle les « outils de *back-end* » pour la conception de circuits intégrés semi-conducteurs. Synopsis avait une part de marché de 90 % de la synthèse logique ou des outils de conception des circuits intégrés. Les clients qui achetaient les circuits intégrés et souhaitaient les utiliser affirmaient avec enthousiasme que la combinaison de ces deux entreprises de conception de circuits intégrés en aval et en amont permettrait une production plus efficace grâce à la conception conjointe d'un circuit intégré. Elle présenterait un avantage économique important pour les consommateurs. La part d'Avant! dans les outils de conception des circuits intégrés n'était que de 40 %, de sorte que d'autres intervenants proposant des outils de conception étaient présents pour combiner des entrants potentiels dans la conception de « *front-end* » de la synthèse logique.

Le délégué des États-Unis souligne le rôle essentiel des plaintes des consommateurs ou des plaintes des utilisateurs finaux dans les deux cas.

La contribution de Taipei, Chine traite d'un cas où les réglementations spécifiques du secteur sont importantes. Dans cette affaire, la commission de la concurrence a bloqué une fusion verticale entre deux grandes chaînes et neuf opérateurs de télévision câblée. Le président note que l'analyse de ce cas semble fondée sur des variables structurelles.

Un délégué de Taipei, Chine explique que l'analyse était effectivement structurelle, car elle reposait sur des lignes directrices spécifiques au secteur de la télévision câblée. Ces lignes directrices ont été mises en place en 1999 à la suite d'un cas de verrouillage dans lequel deux entreprises intégrées verticalement (programmation et exploitation) ont convenu de s'acheter mutuellement leur programmation et de ne pas l'acheter auprès d'autres concurrents. Les seuils figurant dans les lignes directrices ont été définis en fonction d'études empiriques et d'études de marché.

Le Président demande ensuite à la délégation du Japon quelle est l'importance de l'analyse structurelle dans les évaluations des fusions verticales. Le Président se réfère à un cas signalé dans la contribution japonaise entre un fabricant de billes d'acier, la partie en amont de la fusion, et une usine de roulements à bille au niveau de l'aval. La part de marché est de 50 % au niveau de l'amont et de 35 % au niveau de l'aval.

Un délégué du Japon répond qu'après examen, il a été conclu que la transaction ne restreindrait pas considérablement la concurrence dans les marchés concernés. Pour les fabricants de roulements à bille du marché en aval, il est indispensable de s'assurer un approvisionnement stable de billes d'acier. Par conséquent, pour éviter le risque associé à toute interruption de l'approvisionnement de billes d'acier, certains fabricants en aval produisent en fait eux-mêmes des billes d'acier qu'ils utilisent comme intrants de leur propre fabrication de roulements à bille. Au moment où la transaction a été proposée, le volume de production des billes d'acier par ces entreprises en aval représentait plus de la moitié de celui de l'entreprise en amont des parties à la fusion. Les sociétés verticalement intégrées existantes pouvaient facilement augmenter le volume de production de billes d'acier si nécessaire. En conséquence, même si la

société verticalement intégrée refusait de fournir des billes d'acier aux entreprises concurrentes en aval, ces sociétés qui fabriquaient elles-mêmes les produits d'amont étaient capables de réagir en augmentant la part de leur propre production de billes d'acier et, par conséquent, une conduite unilatérale des parties fusionnant ne pourrait nuire considérablement à la concurrence sur le marché en aval. De plus, l'existence de tels fabricants de roulements à bille qui produisent eux-mêmes des billes d'acier aurait un effet dissuasif sur une conduite coordonnée entre fabricants de billes d'acier.

5. Lignes directrices concernant la mise en œuvre des fusions verticales

Le Président passe à la contribution du Brésil et fait remarquer que le Brésil est en train de préparer ses propres lignes directrices concernant la mise en œuvre des fusions verticales. Le Président fait remarquer qu'il serait intéressant de comparer ces lignes directrices à celles de la CE. Il a aussi une question à l'intention du BIAC. Une des conclusions de la contribution soumise par le BIAC est la suivante : « Bien que les lignes directrices sur les fusions verticales puissent présenter un certain intérêt, les difficultés associées à la nature même des concentrations non horizontales, les différentes formes qu'elles revêtent et l'état actuel de la documentation économique, rendent une telle tâche particulièrement ardue. » Si cette tâche est difficile, n'est-ce pas justement la raison pour laquelle des lignes directrices seraient utiles, car la théorie est extrêmement complexe et, par conséquent, les entreprises peuvent vraiment avoir avantage à disposer de lignes directrices car elles peuvent les alerter sur ce qui peut se passer et leur permettre d'anticiper le problème ?

Un délégué du Brésil explique qu'une version préliminaire des lignes directrices a été diffusée au début de 2007. La principale préoccupation est un verrouillage du marché ou, plus généralement, une restriction de la capacité des concurrents à rivaliser en matière d'innovation ou de différenciation des coûts. Le dispositif proposé comprend une définition des marchés concernés, les conditions historiques, les parts de marché et les obstacles à l'entrée, les effets attendus sur les concurrents et les incitations au verrouillage, ainsi que les efficacités, comme les économies d'envergure et la réduction des coûts d'information et de transaction. Les lignes directrices brésiliennes ne partent pas du principe d'une élimination de la double majoration des prix. Le point de vue est que la double majoration des prix peut persister après la fusion ou, en raison de tarifs non linéaires, ne pas exister après la fusion. Contrairement à celles de la CE, les lignes directrices brésiliennes ne mentionnent pas les effets de coordination.

Un délégué du BIAC explique que leur position n'est pas que les lignes directrices ne présentent aucun intérêt ou ne seraient pas capables de rendre compte de la complexité de l'analyse des fusions non horizontales. Pour le BIAC, étant donné la complexité des publications économiques dans ce domaine, la difficulté de prévoir tant les effets à court terme qu'à long terme d'une fusion verticale, et la présomption d'efficacités, il faudrait veiller à ce que les lignes directrices ne cherchent pas trop à tout couvrir. À vouloir tout couvrir, on risque de décourager les entreprises de conclure des transactions qui, si on les analyse convenablement, sont favorables à la concurrence.

Un délégué des États-Unis répond aux remarques du délégué brésilien en soulignant que, même si des contrats compliqués peuvent résoudre le problème de la double majoration des prix, dans la pratique ils ne sont souvent pas utilisés. Par conséquent, il importe d'examiner la nature des contrats avant la transaction. De plus, si l'internalisation de la transaction dans l'entreprise n'aboutit pas nécessairement à internaliser la double majoration des prix, c'est un exemple des raisons qui poussent à la création d'entreprises. L'élimination de la double majoration des prix est un exemple d'un moyen permettant à une entreprise d'éliminer les coûts de transaction en internalisant la transaction. Une intégration verticale est ce que fait une entreprise pour se débarrasser d'une double majoration des prix quand il est trop coûteux de le faire par contrat.

6. Mesures correctrices

Le dernier problème soulevé dans les contributions porte sur les mesures correctrices. Existe-t-il des cas où il vaut peut-être mieux utiliser des dispositions relatives à l'abus de position dominante ou aux monopoles plutôt que d'essayer d'empêcher un changement structurel *ex ante* ?

La contribution de la Finlande exprime la crainte que les conséquences anticoncurrentielles d'une fusion verticale soient des prix d'éviction. Le Président invite la délégation de la Finlande à examiner s'il existe une quelconque différence entre le verrouillage et les prix d'éviction et, le cas échéant, lorsque l'on redoute des prix d'éviction, s'il vaut mieux aborder la question par l'action des pouvoirs publics avec une approche *ex post* en vertu des dispositions correspondantes en matière d'abus de position dominante.

Un délégué de la Finlande répond que le verrouillage peut être réalisé par différentes stratégies, les prix d'éviction en étant une. Le contrôle *ex post* permet de ne pas intervenir en cas de fusions verticales qui, malgré les effets potentiellement dommageables pour la concurrence ou les concurrents, ont des avantages en termes d'efficacités qui améliorent la protection des consommateurs. Reste à savoir, cependant, si les avantages en termes d'efficacités sont ensuite répercutés sur les consommateurs lorsque la concentration permet de mettre en œuvre des prix d'éviction. La simple éventualité que la concentration donne lieu à la pratique de prix d'éviction ne justifie pas d'intervenir en cas de fusion et il importe d'évaluer la probabilité d'une telle stratégie au regard de la structure du marché après la fusion. La législation finlandaise fonctionne toujours avec le test de position dominante, en fonction duquel les fusions entraînant la création ou le renforcement d'une position dominante qui entrave considérablement la concurrence seront remises en cause. La capacité et l'incitation de la concentration à appliquer différentes stratégies de verrouillage doivent être analysées au cas par cas, de même que la question de savoir si un tel comportement provoquerait des effets dommageables pour la concurrence/les consommateurs.

Le Président passe ensuite à la contribution soumise par la République tchèque. La République tchèque a autorisé une fusion entre le principal importateur de gaz naturel et 6 sociétés de distribution. Cette entreprise intégrée s'est vu ensuite appliquer une amende pour abus de position dominante car « l'intégration verticale résultant de la fusion avait permis ou facilité toutes les formes d'abus de position dominante commises par RWE ». Faut-il en déduire qu'autoriser la fusion était une erreur ?

Un délégué de la République tchèque répond que le cas a été instructif et fournit un certain contexte. La transaction consistait en l'occurrence en une fusion entre le seul importateur de gaz naturel, le seul opérateur de système de transport et six ou huit entreprises de distribution. À l'époque, il n'y avait pas de concurrence car le secteur était entièrement réglementé. Avec la libéralisation, cependant, ces huit distributeurs régionaux constituent les seuls entrants viables sur le marché ouvert du gaz. La société intégrée a pu se livrer à un certain nombre de pratiques qui ont considérablement entravé la possibilité pour les distributeurs indépendants d'entrer en concurrence. Ce cas montre par conséquent l'importance d'un contrôle énergétique des fusions. En 2002, il existait une trop grande dépendance vis-à-vis de la capacité de contrôle *ex post*, de l'efficacité et du pouvoir de l'autorité de tutelle et des effets de l'ouverture du marché. Cela étant, l'affaire est en cours de jugement par les tribunaux.

Le Président s'intéresse ensuite à la contribution soumise par la Turquie. Elle traite d'une fusion verticale entre un producteur de pétrole et une raffinerie détenant 86 % de la capacité de raffinage de pétrole brut en Turquie. La contribution souligne les efficacités potentielles et le phénomène courant d'une intégration verticale des producteurs de pétrole brut et des raffineries dans le monde. Le Président invite la délégation de la Turquie à expliquer les préoccupations anticoncurrentielles et les mesures qui auraient pu être prises concernant ces inquiétudes en recourant à un contrôle *ex post*.

Un délégué de la Turquie explique que cette affaire (TUPRAS I) était un cas de privatisation. Les autorités turques de la concurrence ont deux moyens d'agir sur le processus de privatisation. L'un se manifeste au moment où le cahier des charges de l'appel d'offre est préparé mais avant l'annonce de la transaction au public, et l'autre au moment où une entreprise donnée est identifiée comme acquéreur. À ce deuxième stade (stade de l'autorisation), le Conseil de la concurrence intervient en tant *qu'instance chargée de la mise en œuvre* en élaborant des dispositions contraignantes aux termes des règles de contrôle des fusions prévue dans l'article 7 de la Loi n°4054 sur la protection de la concurrence. Le tribunal administratif de district a décidé d'imposer un « sursis à exécution » concernant la vente de TUPRAS. Les instances chargées de la privatisation ont fait appel de la décision auprès du Conseil de l'État (Cour d'appel). Le Conseil de l'État a annulé la décision des instances chargées de la privatisation qui confirmait la vente. Pour résumer, de nombreuses affaires ont été portées devant les tribunaux concernant la « légalité de cette vente ». La privatisation de cette raffinerie a donc eu lieu par la suite en partant de zéro à travers l'affaire appelée « TUPRAS II ».

Dans l'affaire Turkish Petroleum Refineries Corporation/TUPRAS I, le Conseil de la concurrence a évoqué les avantages comme la réduction des frais d'exploitation, la sécurité de l'approvisionnement en matières premières, la réduction du coût du capital, le maintien et le développement du marché existant, avantages que l'on peut attendre de manière générale d'une intégration verticale des marchés pétroliers dans le monde. Dans le cas TUPRAS I, le mieux disant qui souhaitait acheter la Turkish Petroleum Refineries Corporation était une société de pétrole et de gaz en dehors du territoire turc appelée EFREMOV. (Basée en Allemagne, EFREMOV est une société associée de TAFTNET au Tatarstan, qui produit 25 millions de tonnes de pétrole brut.) En se fondant sur la particularité des marchés mondiaux du pétrole mentionnée plus haut, le Conseil de la concurrence, en tant qu'organisme devant donner l'autorisation, a décidé que cette structure verticale nouvelle de la Turkish Petroleum Refineries Corporation, qui exercerait ses activités sur les marchés de la « production de pétrole brut » et du « raffinage », pourrait créer des obstacles à l'entrée sur les marchés du raffinage et pour les importations. Il a donc paru important de suivre les investissements de TUPRAS en rapport avec l'augmentation de ses capacités après son transfert à EFREMOV.

Néanmoins, la légalité de cette affaire a été contestée devant les tribunaux et la vente de l'entreprise à EFREMOV n'a pas eu lieu. Une évaluation *ex post* sous l'angle des actions publiques à mener sur le plan de la concurrence ne se justifie donc plus en l'occurrence.

7. Discussion générale

Un délégué de la France soulève la question des mesures correctrices dans les cas de fusion verticale. Le délégué suggère que, compte tenu des normes rigoureuses de preuve établies par la Cour européenne de Justice pour déterminer si une fusion verticale provoque des dommages et d'une présomption plutôt positive en termes d'efficacités, une attitude plus ouverte à l'égard des mesures correctrices est requise de la part des instances chargées de l'application du droit. En particulier, les mesures correctrices comportementales sont peut-être plus appropriées que les mesures correctrices structurelles. À titre d'exemple, on peut imposer à l'entreprise faisant l'objet de la fusion de maintenir l'accès à son infrastructure, à ses ressources et à ses marchés. Cette contrainte peut éliminer le risque de verrouillage. Bien entendu, cela soulève la question de la durée et du suivi/de la mise en œuvre de la contrainte, car un engagement comportemental pour obtenir l'autorisation d'une fusion ne doit pas se substituer à la réglementation du secteur.

Le Président répond que la Corée avait un exemple où des contraintes comportementales ont été adoptées dans une tentative de faire pièce aux effets anticoncurrentiels d'une fusion verticale sans sacrifier les avantages provenant des efficacités et, apparemment, la mise en œuvre du mécanisme de ces contraintes n'exigeait pas un suivi considérable de la part des autorités de la concurrence.

8. Commentaire de clôture du Président

Le Président fait remarquer qu'il existe manifestement un grand consensus sur la grille d'analyse appropriée et les normes de preuve pour évaluer les effets sur la concurrence des fusions verticales. En particulier, la nécessité d'une approche au cas par cas se fait sentir car le constat de la complexité et de la fragilité des fondements théoriques met l'accent sur les faits se produisant dans une affaire.

Le Président tire les conclusions suivantes :

- Pour évaluer un verrouillage, il importe de considérer la relation entre la capacité en amont acquise et les exigences en aval de l'entreprise intégrée. Quand la capacité en amont dépasse les exigences en aval, on peut s'attendre à ce qu'il soit question de verrouillage.
- Les effets de coordination ne suscitent guère d'enthousiasme : même si cela peut se produire, d'un point de vue empirique il arrive rarement que des effets de coordination soient provoqués par une fusion verticale.
- L'évaluation de l'incitation à verrouiller et du compromis entre les avantages en amont et en aval est indispensable pour déterminer la probabilité d'un verrouillage.
- Une analyse intégrée est souvent nécessaire car la source des dommages anticoncurrentiels génère aussi des avantages en termes d'efficacités. Les exemples des contributions soumises montrent les modalités de cette analyse au cas par cas.