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Weighing up the "Good" and the "Bad" of Vertical Mergers

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Guidelines

-Commission’s 2004 Guidelines on horizontal mergers

-Commission’s 2007 Guidelines on non-horizontal mergers (hereinafter: the Guidelines)

COMMISSION'S APPRAISAL (para 1. of the Guidelines)

- Article 2 of 'Merger Regulation' 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**

Definition of “non-horizontal” merger

- Generic term for vertical and conglomerate mergers

- Vertical mergers involve companies operating at different levels of the supply chain. (Guidelines para 4.

- Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers). (Guidelines para 5.

- As oppose to horizontal mergers

Effective competition

- brings benefits to consumers, <u>such as</u>

  low prices, high quality products, a wide selection of goods and services, and innovation

- 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’

  the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition (Guidelines, para 10)

If merger affects competitors is not in itself a problem

- it is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain

- competitive harm v consumer harm

- in particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns (Guidelineds, para 16)

The “Good” of Vertical Mergers

Non-horizontal mergers are generally less likely to SIEC than horizontal mergers (para 11 –

- NO loss of direct competition between the merging firms in the same relevant market
- PROVIDE substantial scope for efficiencies benefit consumers, be merger-specific and be verifiable
- **complementarity -)** decrease in mark-ups downstream – higher demand also upstream - the upstream suppliers
- **internalisation of double mark-ups –)** an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits
- **other efforts to increase sales at one level** (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels

Cont.

- **decrease transaction costs** and allow for a **better co-ordination** in terms of product design, the **organization of the production process**, and the **way in which the products are sold**

- mergers which involve products belonging to a range or portfolio 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**

BUT unfortunatelly no “safe-harbour”!

- 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 % and the post-merger HHI is below 2 000.** (Guidelines, para 25

- **Bishop- 25% in ECMR& HHI concerns**

The “Bad” of Vertical Mergers

No threat to effective competition UNLESS:

- the merged entity has a significant degree of market power in at least one of the markets concerned (Guidelines, para 23

- Effects-based test, consumer welfare being the primary objective, no competition concerns if merger only harms rivals!

Circumstances in which non-horizontal mergers MAY SIEC (Guidelines, para 15.)

- .NON-COORDINATED EFFECTS:

a) INPUT FORECLOSURE

b) CUSTOMER FORECLOSURE

- .OTHER NON-COORDINATED EFFECTS:

Access to commercially sensitive information

- .COORDINATED EFFECTS

STEP APPROACH

- . ABILITY TO FORCLOSE
- . INCENTIVE TO FORECLOSE
- . OVERALL LIKELY IMPACT ON EFFECTIVE COMEPTITION

Putting Guidelines into perspective: TomTom/Tele Atlas

- TomTom produces portable navigation devices ('PNDs' –satellite navigation devices or 'SatNavs'), primarily for car use
- Tele Atlas, the target firm, is one of two providers of navigable digital maps offering complete coverage of Europe and North America
- Navigable digital maps are essential inputs for PNDs

Merger rationale

- the development by TomTom of a software innovation branded as ‘TomTom Map Share’
- since TeleAtlas’current map process is relatively lengthy and expensive−least several months before a new map version with corrected data can be released
- it possible to integrate TomTom’s community feedback into the map creation process
- the result, the merged firm would be able to *‘make better maps faster’*
- to the ultimate benefit of the consumers of satellite navigation services

Commission’s Decision

- No coordinated effects, although duopoly
- Non-coordinated effects:

Incentive to foreclose analysed- input foreclosure

- Access to Tele Atlas’ navigable digital maps used by TomTom’s competitors, and ultimately on the possible impact on final consumers
- Clearance!

The “Good” of Vertical Mergers prevails in past, after 2007 case law

Conclusion

- CASES

- Google/DoubleClick, approved March 2008
- IBM/Telelogic, approved March 2008
- TomTom/Tele Atlas, approved May 2008
- Nokia/NAVTEQ, approved July 2008