

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

(2008/C 265/07)

### I. INTRODUCTION

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(1)</sup> (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 concentrations <sup>(2)</sup> where the undertakings concerned are active on different relevant markets <sup>(3)</sup>. In this document, these concentrations will be called 'non-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 merger <sup>(4)</sup>.
5. 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) <sup>(5)</sup>. 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 concerned <sup>(6)</sup>. In such a case, the Commission will appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices <sup>(7)</sup>.

<sup>(1)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

<sup>(2)</sup> 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.

<sup>(3)</sup> 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, 5.2.2004, p. 5) ('Notice on Horizontal Mergers').

<sup>(4)</sup> 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.

<sup>(5)</sup> 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).

<sup>(6)</sup> 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).

<sup>(7)</sup> 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.

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 (EEC) 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 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 negatively influence parameters of competition <sup>(1)</sup>.
11. Non-horizontal mergers are generally less likely to significantly impede effective competition 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 market <sup>(2)</sup>. 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 <sup>(3)</sup>. The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the 'internalisation of double mark-ups'. Similarly, 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.
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 which the products are sold. Similarly, 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.

<sup>(1)</sup> 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 also be understood to 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.

<sup>(2)</sup> 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.

<sup>(3)</sup> 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 a complementary role in getting a product to the market.

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 consumers <sup>(1)</sup>. 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 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 <sup>(2)</sup>. In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns.
17. There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects <sup>(3)</sup>.
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 price <sup>(4)</sup> charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter 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 to 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 that would have prevailed without the merger <sup>(5)</sup>. 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 will 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 impending regulatory changes <sup>(6)</sup>.

<sup>(1)</sup> See Article 2(1)(b) of the Merger Regulation and paragraph 84 of the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

<sup>(2)</sup> 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'.

<sup>(3)</sup> See Section II of the Notice on Horizontal Mergers.

<sup>(4)</sup> For the meaning of the expression 'increased prices' see footnote 8.

<sup>(5)</sup> 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.

<sup>(6)</sup> 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.

21. In its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers <sup>(1)</sup>. 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 perceived anti-competitive effects of a merger, the more likely the Commission is to raise competition concerns. Likewise, the more immediate and direct the pro-competitive effects of a merger, the more likely the Commission is to find that they counteract any anti-competitive effects.
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 a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. The Commission will examine this issue before proceeding to assess the impact of the merger on competition.
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 <sup>(2)</sup>.
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 % <sup>(3)</sup> and the post-merger HHI is below 2 000.
26. In practice, the Commission 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;
  - (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.
27. The Commission will use the above market share and HHI thresholds as an initial indicator of the absence of competition concerns. However, these thresholds do not give rise to a legal presumption. The Commission is of the opinion that it is less appropriate in this context to present market share and concentration levels above which competition concerns would be deemed to be likely, as the existence of a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but is not a sufficient condition <sup>(4)</sup>.

### IV. VERTICAL MERGERS

28. 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 possible pro-competitive effects stemming from efficiencies substantiated by the parties.

<sup>(1)</sup> See Section VII on efficiencies in the Notice on Horizontal Mergers.

<sup>(2)</sup> 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, 9.12.1997)). Special care must be taken in contexts where vertically integrated companies supply products internally.

<sup>(3)</sup> 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 (OJ L 336, 29.12.1999, p. 21). Where a merged entity would have a market share just above the 30 % threshold on one market but substantially below on other, related, markets competition concerns will be less likely.

<sup>(4)</sup> See Sections IV and V.

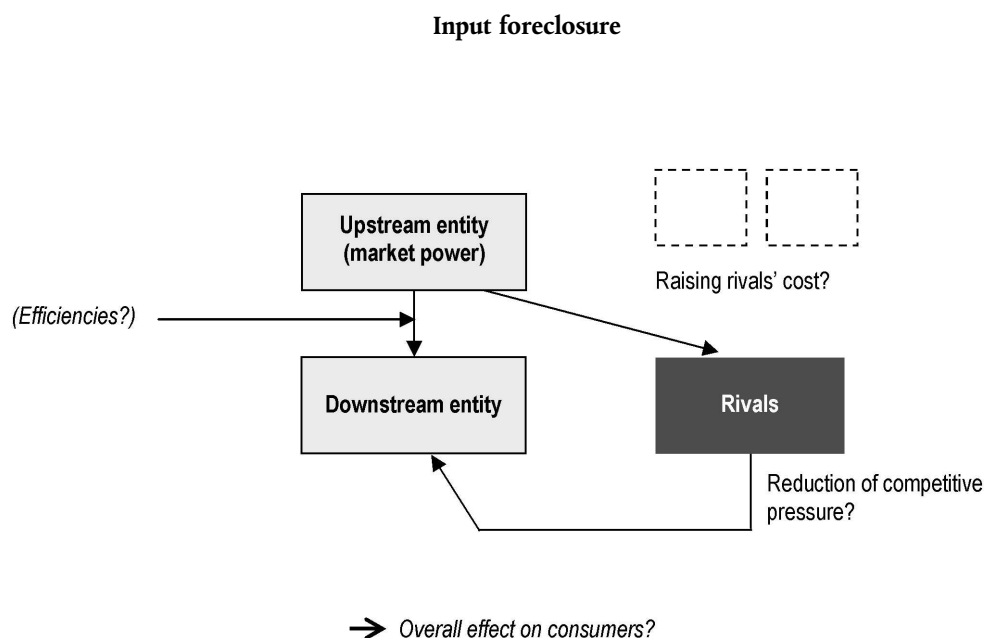
### A. Non-coordinated effects: foreclosure

29. A merger is said to result in foreclosure 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. Such 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. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers <sup>(1)</sup>.
30. 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) <sup>(2)</sup>.

#### 1. Input foreclosure

31. Input foreclosure arises 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 under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the merger may, however, 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



<sup>(1)</sup> For the meaning of the expression 'increased prices' see footnote 8. For the meaning of 'consumers', see footnote 16.

<sup>(2)</sup> See Merger Regulation, Article 2(1)(b), referring to 'access to supplies' and 'access to [...] markets', respectively.

32. 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 <sup>(1)</sup>. In practice, these factors are often examined together since they are closely intertwined.

#### A. Ability to foreclose access to inputs <sup>(2)</sup>

33. 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 when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger <sup>(3)</sup>. 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 <sup>(4)</sup>. Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied <sup>(5)</sup>. In its assessment, the Commission may consider a series of alternative or complementary possible strategies.
34. Input foreclosure may raise competition problems only if it concerns an important input for the downstream product <sup>(6)</sup>. This is the case, for example, 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 market <sup>(7)</sup>, or it may represent a significant source of product differentiation for the downstream product <sup>(8)</sup>. It may also be that the cost of switching to alternative inputs is relatively high.
35. For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of 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.
36. 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 capacity constraints or, more generally, face decreasing returns to scale <sup>(9)</sup>. 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.

<sup>(1)</sup> See e.g. Case COMP/M.4300 — Philips/Intermagetics, COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, COMP/M.4389 — WLR/BST, COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space and Telespazio, COMP/M.4494 — Evraz/Highveld, and COMP/M.4561 — GE/Smiths Aerospace.

<sup>(2)</sup> The term 'inputs' is used here as a generic term and may also cover services, access to infrastructure and access to intellectual property rights.

<sup>(3)</sup> See e.g. Case COMP/M.1693 — Alcoa/Reynolds (2000), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 257-260.

<sup>(4)</sup> See e.g. Case COMP/M.2861 — Siemens/Drägerwerk/JV (2003), Case COMP/M.3998 — Axalto, point 75.

<sup>(5)</sup> See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.

<sup>(6)</sup> See e.g. Case COMP/M.3868 — Dong/Elsam/Energi E2, Case COMP/M.4094 — Ineos/BP Dormagen, points 183-184, Case COMP/M.4561 — GE/Smiths Aerospace, points 48-50.

<sup>(7)</sup> 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); see also, e.g. Case COMP/M.3410 — Total/GDF, points 53-54 and 60-61.

<sup>(8)</sup> For instance, personal computers are often sold with specific reference to the type of microprocessor they contain.

<sup>(9)</sup> See e.g. Case COMP/M.4494 — Evraz/Highveld, point 92 and points 97-112.

37. 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.
38. When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power <sup>(1)</sup>. 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 aggressively <sup>(2)</sup>.
39. In its assessment, the Commission will 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

40. 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, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.
41. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream <sup>(3)</sup>. 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 rivals <sup>(4)</sup>.
42. 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

<sup>(1)</sup> 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).

<sup>(2)</sup> 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.

<sup>(3)</sup> See e.g. Case COMP/M.4300 — Philips/Intermagetics, points 56-62, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

<sup>(4)</sup> 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.

demand that the downstream division of the integrated firm can capture <sup>(1)</sup>. 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 substitutes. The effect on downstream demand will also be higher if the affected input represents a significant proportion of downstream rivals' costs or if the affected input represents a critical component of the downstream product <sup>(2)</sup>.

43. 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 <sup>(3)</sup>. The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins <sup>(4)</sup>.
44. An upstream monopolist that is already able to fully extract all available profits in vertically related markets may not have any incentive to foreclose rivals following a vertical merger. The ability to extract available profits from the consumers does not follow immediately from a very high market share <sup>(5)</sup>. Such a finding would require a more thorough analysis of the actual and future constraints under which the monopolist operates. When all available profits cannot be extracted, a vertical merger — even if it involves an upstream monopolist — may give the merged entity the incentive to raise the costs of downstream rivals, thereby reducing the competitive constraint they exert on the merged entity in the downstream market.
45. 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 entity <sup>(6)</sup>, the type of strategies adopted on the market in the past <sup>(7)</sup> or the content of internal strategic documents such as business plans.

<sup>(1)</sup> 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.

<sup>(2)</sup> Conversely, if the input accounts only for a small share of the downstream product and is not a critical component, even a high market share upstream may not give the merged entity the incentive to foreclose downstream rivals because few, if any, sales would be diverted to the integrated firm's downstream unit. See e.g. Case COMP/M.2738 — GEES/Unison; Case COMP/M.4561 — GE/Smiths Aerospace, points 60-62.

<sup>(3)</sup> See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 131-132.

<sup>(4)</sup> 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).

<sup>(5)</sup> One situation in which this may not be the case would be when the monopolist has a so-called commitment problem which it is unable to solve. For example, a downstream buyer may be willing to pay a high price to 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. Another case in which the monopolist cannot obtain all available monopoly profits may arise when the company cannot differentiate its prices among customers.

<sup>(6)</sup> 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 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), Case COMP/M.4403 — Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 121 and 268.

<sup>(7)</sup> The fact that, in the past, a competitor with a similar market position as the merged entity has stopped supplying inputs may demonstrate that it is commercially rational to adopt such a strategy (see e.g. COMP/M.3225 — Alcan/Pechiney (2004), at point 40).



46. 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 them <sup>(1)</sup>. 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 law <sup>(2)</sup>, (ii) the likelihood that this illegal conduct could be detected <sup>(3)</sup>, and (iii) the penalties which could be imposed.

### C. Overall likely impact on effective competition

47. In general, a merger will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition.
48. First, 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 prices. 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 <sup>(4)</sup>. Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players <sup>(5)</sup>, for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.
49. Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors <sup>(6)</sup>. 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 already create a strong deterrent effect on potential entrants <sup>(7)</sup>. 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 future <sup>(8)</sup>.

<sup>(1)</sup> Case C-12/03 P, *Commission v Tetra Laval BV* [2003] ECR I-000, paragraphs 74-76. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, at paragraph 73.

<sup>(2)</sup> Case T-210/01, *General Electric v Commission* [2005] ECR II-000, specifically at points 74-75 and 311-312.

<sup>(3)</sup> For instance, in Case COMP/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.

<sup>(4)</sup> See e.g. Case COMP/M.4494 — Evraz/Highveld, points 97-112.

<sup>(5)</sup> See e.g. Case COMP/M.3440 — EDP/ENI/GDP (2004).

<sup>(6)</sup> See e.g. Case COMP/M.4180 — Gaz de France/Suez, points 876-931, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

<sup>(7)</sup> See Case COMP/M.3696 — E.ON/MOL (2005), at point 662 *et seq.*

<sup>(8)</sup> See paragraph 20. 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.

50. If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated <sup>(1)</sup> 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.
51. The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power <sup>(2)</sup> or the likelihood that entry upstream would maintain effective competition <sup>(3)</sup>.
52. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties <sup>(4)</sup>. 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.
53. 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 cumulative <sup>(5)</sup>.
54. Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive.
55. In particular, a vertical merger allows the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger <sup>(6)</sup>. 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 market <sup>(7)</sup>.
56. A vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs.
57. 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, a downstream distributor entity might have been reluctant to invest in advertising and informing customers about the qualities of products of the upstream entity when such investment would also have benefited the sale of other downstream firms, the merged entity may reduce such incentive problems.

<sup>(1)</sup> See e.g. Case COMP/M.3653 — Siemens/VA Tech (2005), at point 164.

<sup>(2)</sup> See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

<sup>(3)</sup> See Section VI on entry in the Notice on Horizontal Mergers.

<sup>(4)</sup> See Section VII on efficiencies in the Notice on Horizontal Mergers.

<sup>(5)</sup> See, more specifically, paragraphs 79 to 88 of the Notice on Horizontal Mergers.

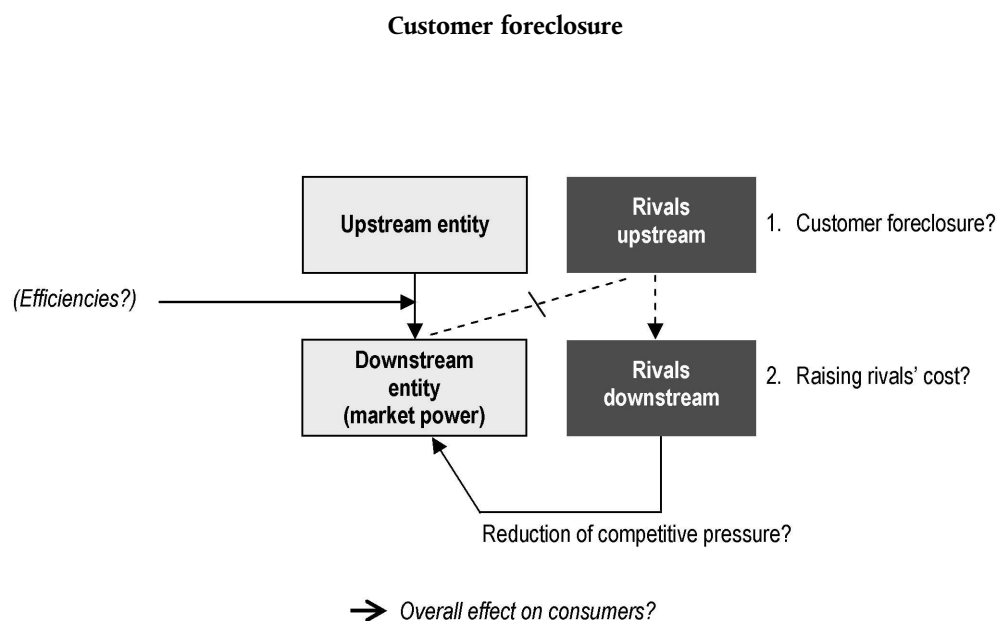
<sup>(6)</sup> See also paragraph 13 above.

<sup>(7)</sup> 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. The efficiencies associated with the elimination of double mark-ups may thus not always be merger specific because vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anti-competitive effects. In addition, a merger may not fully eliminate the double mark-up when the supply of the input is limited by capacity constraints and there is an equally profitable 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.

## 2. Customer foreclosure

58. Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market <sup>(1)</sup>. 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. For customer foreclosure to lead to consumer harm, it is thus not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. A graphical presentation of this mechanism is provided in Figure 2.

Figure 2



59. 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 <sup>(2)</sup>.

## A. Ability to foreclose access to downstream markets

60. 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 required goods or services 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 merger <sup>(3)</sup>.

<sup>(1)</sup> See footnote 4 for the definition of 'downstream' and 'upstream'.

<sup>(2)</sup> See e.g. Case COMP/M.4389 — WLR/BST.

<sup>(3)</sup> 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.

61. 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 output <sup>(1)</sup>. For customer foreclosure to be a concern, it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market <sup>(2)</sup>. 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 ground <sup>(3)</sup>.
62. Customer foreclosure can lead to higher input prices in particular if there are significant economies of scale or scope in the input market or when demand is characterised by network effects <sup>(4)</sup>. It is mainly in such circumstances that the ability to compete of upstream rivals, be they actual or potential, can be impaired.
63. For instance, customer foreclosure can 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. In the presence of economies of scale or scope, customer foreclosure may also 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.
65. 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 quality <sup>(5)</sup>. This may reduce their ability to compete in the long run and possibly even cause their exit from the market.
66. 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 if it finds other uses or secondary markets for its input without incurring significantly higher costs.

<sup>(1)</sup> 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.

<sup>(2)</sup> See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002) at points 54-57.

<sup>(3)</sup> See e.g. Case COMP/M.81 — VIAG/Continental Can (1991), point 51, see e.g. Case COMP/M.4389 — WLR/BST, points 33-35.

<sup>(4)</sup> Economies of scale or scope exist when an increase in scale or scope of production leads to a reduction in average unit cost. Network effects occur when the value of a product for a customer increases when the number of other customers also using it increases. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

<sup>(5)</sup> 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 achieved, however, if a potential entrant has access to a broader customer base including customers in other relevant markets. See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2978 — Lagardère/Natexis/VUP (2003).

67. In its assessment, the Commission will 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 possibility that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure <sup>(1)</sup>.

#### B. Incentive to foreclose access to downstream markets

68. 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.
69. 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.
70. 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 margins <sup>(2)</sup>.
71. 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 unlawful <sup>(3)</sup>.

#### C. Overall likely impact on effective competition

72. 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 to profitably raise prices or reduce the overall output on the downstream market.

<sup>(1)</sup> 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.

<sup>(2)</sup> 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.

<sup>(3)</sup> The analysis of these incentives will be conducted as set out in paragraph 46 above.

73. 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.
74. 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 differentiation <sup>(1)</sup>. 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 competition <sup>(2)</sup>.
75. 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 future <sup>(3)</sup>.
76. The effect on competition must be assessed in light of countervailing factors such as the presence of countervailing buyer power <sup>(4)</sup> or the likelihood that entry would maintain effective competition in the upstream or downstream markets <sup>(5)</sup>.
77. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties <sup>(6)</sup>.

## B. Other non-coordinated effects

78. The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals <sup>(7)</sup>. 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 consumers <sup>(8)</sup>. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

<sup>(1)</sup> 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).

<sup>(2)</sup> See paragraph 47-50 of the present Notice.

<sup>(3)</sup> 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.

<sup>(4)</sup> See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

<sup>(5)</sup> See Section VI on entry in the Notice on Horizontal Mergers.

<sup>(6)</sup> For the assessment of efficiencies in a vertical context, see Section V.A.1 above.

<sup>(7)</sup> 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).

<sup>(8)</sup> 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.

### C. Coordinated effects

79. 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 merger <sup>(1)</sup>.
80. 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').
81. 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 deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination <sup>(2)</sup>.

#### *Reaching terms of coordination*

82. 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 <sup>(3)</sup>.
83. For instance, when a vertical merger leads to foreclosure <sup>(4)</sup>, 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.
84. Vertical mergers may also increase the degree of symmetry between firms active in the market <sup>(5)</sup>. 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.
85. 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 prevented.

<sup>(1)</sup> See Case COMP/M.3101 — Accor/Hilton/Six Continents, points 23-28.

<sup>(2)</sup> See Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, paragraph 62.

<sup>(3)</sup> See e.g. Case COMP/M.3314 — Air Liquide/Messer Targets, points 91-100.

<sup>(4)</sup> Foreclosure would have to be shown by the Commission along the lines of Part A of this Section.

<sup>(5)</sup> See Case COMP/M.2389 — Shell/DEA; Case COMP/M.2533 — BP/EON. Alternatively, vertical integration may also decrease the degree of symmetry between firms active in the market, rendering coordination more difficult.

*Monitoring deviations*

86. 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 monitor deviations more effectively.
87. 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*

88. Vertical mergers may affect coordinating firms' incentives to adhere to the terms of coordination. For instance, a vertically integrated company may be in a position to more effectively punish rival companies when they choose to deviate from the terms of coordination, because it is either a crucial customer or supplier to them <sup>(1)</sup>.

*Reactions of outsiders*

89. 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.
90. 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**

91. 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 markets <sup>(2)</sup> (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).
92. 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. In its assessment, the Commission will consider both the possible anti-competitive effects arising from conglomerate mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

<sup>(1)</sup> For instance, in a case that was subsequently withdrawn (Case COMP/M.2322 — CRH/Addtek (2001)) the merger involved an upstream dominant supplier of cement and a downstream producer of pre-cast concrete products, both active in Finland. The Commission provisionally took the view in the administrative procedure 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.

<sup>(2)</sup> See also Form CO, Section IV, 6.3(c).



### A. Non-coordinated effects: foreclosure

93. 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 leverage <sup>(1)</sup> a strong market position from one market to another by means of tying or bundling or other exclusionary practices <sup>(2)</sup>. Tying and bundling as 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.
94. 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 consumers <sup>(3)</sup>. In practice, these factors are often examined together as they are closely intertwined.

#### A. Ability to foreclose

95. 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 tying or bundling.
96. 'Bundling' usually refers 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 in fixed proportions. With mixed bundling the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price <sup>(4)</sup>. Rebates, when made dependent on the purchase of other goods, may be considered a form of mixed bundling.
97. 'Tying' usually refers to situations where customers that purchase one good (the tying good) are required to also 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).
98. 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 customers <sup>(5)</sup>. Similarly, technical tying is only an option in certain industries.
99. In order to be able to foreclose competitors, the new entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging

<sup>(1)</sup> There is no received definition of 'leveraging' but, in a neutral sense, it implies 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').

<sup>(2)</sup> These concepts are defined further below.

<sup>(3)</sup> See Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraphs 327, 362-363, 405; Case COMP/M.3304 — GE/Amersham (2004), point 37, and Case COMP/M.4561 — GE/Smiths Aerospace, points 116-126.

<sup>(4)</sup> 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.

<sup>(5)</sup> See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 35.

parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product, e.g. because of product differentiation <sup>(1)</sup> or capacity constraints on the part of rivals.

100. 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.
101. 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 for 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 play <sup>(2)</sup> 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.
102. 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.
103. 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 customers <sup>(3)</sup>. 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 foreclosure <sup>(4)</sup>.
104. 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. The fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns <sup>(5)</sup>.

#### B. Incentive to foreclose

105. 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.

<sup>(1)</sup> 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.

<sup>(2)</sup> 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.

<sup>(3)</sup> See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 39.

<sup>(4)</sup> 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.

<sup>(5)</sup> See e.g. Case COMP/M.2608 — INA/FAG, point 34.

106. Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers are 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 all <sup>(1)</sup>.
107. 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.
108. 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).
109. In its assessment of the likely incentives of the merged firm, the Commission may take into account other factors such as the ownership structure of the merged entity <sup>(2)</sup>, the type of strategies adopted on the market in the past or the content of internal strategic documents such as business plans.
110. 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 unlawful <sup>(3)</sup>.

#### C. Overall likely impact on prices and choice

111. 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).
112. 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 particular in those industries where the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future.
113. 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.

<sup>(1)</sup> See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 59.

<sup>(2)</sup> For instance, in cases where two companies have joint control over a firm active in one market, and only one of them is active on the neighbouring market, the company without activities on the latter market may have little interest in foregoing sales in the former market. See e.g. Case T-210/01, *General Electric v Commission* [2005] ECR II-000, paragraph 385 and Case COMP/M.4561 — GE/Smiths Aerospace, point 119.

<sup>(3)</sup> The analysis of these incentives will be conducted as set out in paragraph 46 above.

114. The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power <sup>(1)</sup> or the likelihood that entry would maintain effective competition in the upstream or downstream markets <sup>(2)</sup>.
115. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties <sup>(3)</sup>.
116. Many of the efficiencies identified in the context of vertical mergers may, *mutatis mutandis*, also apply to conglomerate mergers involving complementary products.
117. 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 <sup>(4)</sup>.
118. 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 apart <sup>(5)</sup>. 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.

#### B. Co-ordinated effects

119. 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.
120. 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.
121. 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.

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<sup>(1)</sup> See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

<sup>(2)</sup> 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.

<sup>(3)</sup> See Section VII on efficiencies in the Notice on Horizontal Mergers.

<sup>(4)</sup> 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.

<sup>(5)</sup> See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131.