

## STUDIENVEREINIGUNG KARTELLRECHT E.V.

Feldmühleplatz 1  
D - 40545 Düsseldorf  
Postfach 10 17 43  
D - 40008 Düsseldorf

### Chairman's office address:

Place du Champ de Mars 5  
Bastion Tower  
B - 1050 Brussels  
Tel: +32 2 504 7021  
Fax: +32 2 504 7500  
frank.montag@freshfields.com

European Commission  
Directorate General for Competition  
Consultation Non-Horizontal Merger Guidelines  
Merger Registry  
B-1049 Brussels  
Belgium

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### Comments on the European Commission's Draft Guidelines on the assessment of non-horizontal mergers

1. The Studienvereinigung Kartellrecht is a registered association incorporated under German law. Its purpose is the promotion of science and research in the field of national, European and international competition law. The Studienvereinigung Kartellrecht has more than 700 lawyers specialised in competition law as members, mainly from Germany, Austria and Switzerland.
2. The Studienvereinigung Kartellrecht ("Studienvereinigung") welcomes the Commission's initiative to provide guidance as to how the Commission assesses non-horizontal mergers. The Draft Commission Guidelines on the assessment of non-horizontal mergers ("Draft Guidelines") identify the key factors to be taken into account and provide a useful framework for the analysis. In particular, the Studienvereinigung welcomes:
  - the clarifications that market power in at least one market is a necessary condition for competitive harm,
  - the consistent application of the three-step test (ability to foreclose, incentive to foreclose, and impact on effective competition), and
  - the assessment of all three elements of this test on the basis of a coherent and economically sound analysis.

**VORSTAND:** Dr. Frank Montag (Vorsitz) - Dr. Albrecht Bach - Dr. Ingo Brinker - Dr. Wolfgang Deselaers - Dr. Franz Hoffet - Prof. Dr. Dirk Schroeder - Dr. Christoph Stadler - Prof. Dr. Gerhard Wiedemann - Dr. Hanno Wollmann  
Ehrevorsitzende: Dr. Cornelis Canenbley - Alfred-Carl Gaedertz  
Ehrenmitglieder: Oliver Axster - Prof. Dr. Rainer Bechtold - Jochen Burrichter - Dr. Otfried Lieberknecht

3. However, there are a number of issues specified below where we think that the Draft Guidelines can and should be improved to achieve their objective to ensure more predictability and consistency of decisions in this area of enforcement.

**1. General principle: non-horizontal mergers are unlikely to raise competition concerns unless there are exceptional circumstances**

4. The Draft Guidelines acknowledge that non-horizontal mergers are “generally less likely to create competition concerns than horizontal mergers” (para. 11). It is also acknowledged that “conglomerate mergers in the majority of circumstances will not lead to any competition problems” (para. 90).

5. These rather vague statements provide very little guidance in practice and do not properly reflect the fundamental differences between horizontal and non-horizontal mergers. First, non-horizontal mergers do not entail any loss of direct competition between the merging firms. Second, non-horizontal mergers typically provide for substantial efficiencies (e.g., elimination of double marginalisation, Cournot effect). Third, competitive harm in non-horizontal mergers normally occurs only indirectly through the merging parties’ future conduct post merger, such as a refusal to deal or tying and bundling, and not from the concentration itself.

6. Although the Draft Guidelines acknowledge the first and the second difference (paras. 12-14), they refer to the third one only indirectly: “The more immediate and direct the overall anticompetitive effect of a merger, the more likely the Commission is to raise competition concerns” (para. 21). However, in non-horizontal mergers, the anticompetitive effects are typically not “immediate and direct”, but depend on the merging parties’ conduct post merger. In fact, the Draft Guidelines almost exclusively discuss scenarios where the competitive harm results from such future conduct.

7. It was mainly for that reason (normally no immediate change in the conditions of competition) that the Court of First Instance has confirmed that non-horizontal mergers<sup>1</sup>

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<sup>1</sup> CFI, case T-5/02, Tetra Laval, at para. 155 (confirmed by ECJ, C-12/03 P, para. 74 et seq.). Although this statement refers to conglomerate mergers, it should, by analogy, apply also to vertical mergers given that the three factors set out above, which distinguish non-horizontal merges from horizontal mergers, typically apply to vertical mergers as well. As to this analogy, see CFI, case T-210/02, General Electric, para. 295.

are “generally” “neutral or even beneficial”, and hence, as a rule, not anticompetitive. We strongly believe that the Draft Guidelines should set out this rule-exception principle, which is also reflected in the ICN Merger Guidelines Workbook (April 2006)<sup>2</sup>, in clearer terms, for instance as follows:

“*As a rule, non-horizontal mergers are unlikely to create competition concerns unless there are exceptional circumstances.*” (para. 11)

“*However, there are exceptional circumstances in which non-horizontal merges may significantly impede competition. Such exceptional circumstances exist where (i) the merged entity has market power in at least one of the markets concerned, and (ii) the merger is likely to change the ability and incentive of the merged entity to compete in ways that cause harm to consumers (impact on effective competition).*” (para. 15)

## 2. Market power and safe harbour

8. The Studienvereinigung welcomes the clarification in paragraphs 23, 26 and 34 that non-horizontal mergers raise no competition concerns “unless the merged entity has market power in at least one of the markets concerned” (“market power as a necessary condition for competitive harm”). However, the wording in para. 98, pursuant to which “foreclosure is unlikely to give rise to concern if the new entity [...] has no market power in any of the markets concerned”, is confusing and should be brought into line with the general principle (no foreclosure without market power).
9. The Studienvereinigung welcomes the general concept of a safe harbour in paragraph 25. However, for the determination of the appropriate thresholds, the following elements should be taken into account:
  - Horizontal mergers are presumed to be compatible with the common market where the combined share of the merged entity does not exceed 25%<sup>3</sup>. Given that non-horizontal mergers are generally less likely to raise competition

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<sup>2</sup> “Conglomerate mergers normally do not harm consumers. However, in rare circumstances, such mergers may raise competition concerns” (H.13). “Vertical mergers [...] should rarely be a cause for concern” (H.1).

concerns, the corresponding threshold for non-horizontal mergers should be substantially higher than 25%. In particular, given the differences between the tests under Article 81 EC and the Merger Control Regulation (SIEC), an “analogy”<sup>4</sup> to the threshold in Regulation No 2790/1999 does not appear appropriate.

- Horizontal mergers with an HHI above 2000 are considered unlikely to raise concerns if the overlap is small (delta below 150)<sup>5</sup>. In non-horizontal mergers, there is, by definition, no overlap at all. Therefore, an HHI value appears not or at least less appropriate to be used as an indicator for a safe harbour.
- It is generally accepted that a non-horizontal merger can raise concerns only if the merged entity (i) has market power in at least one market, and (ii) a relatively strong position in a related (downstream, upstream, or neighbouring) market. Without such a strong position on the related market, there is normally no ability or incentive to foreclose in ways that cause harm to consumers.

10. On this basis, the Studienvereinigung considers it more appropriate to use an asymmetric (minimum) market share threshold, along the following lines:

“The Commission is unlikely to find concern in non-horizontal mergers unless the market share of the new entity exceeds (i) 40% in one market, and (ii) 30% in any of the related<sup>6</sup> markets concerned.”

In this way, a merger involving shares of e.g. 31% and 2% would (rightly) benefit from the safe harbour, contrary to the proposal in paragraph 25.

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<sup>3</sup> Recital 32 of the Merger Control Regulation; para. 18 of the Guidelines on horizontal mergers.

<sup>4</sup> Footnote 18.

<sup>5</sup> Para. 20 of the Guidelines on horizontal mergers.

<sup>6</sup> In cases where there are no such related markets, a higher market share threshold would appear appropriate.

### 3. Burden and standard of proof

11. According to the case law of the CFI and ECJ, when assessing a (non-horizontal) merger, the Commission has to comply with the following principles:

- The Commission must consider “comprehensively all circumstances which are relevant for assessing the effects of a given concentration”<sup>7</sup>.
- The Commission can/must block a merger (only) if it is able to show, on the basis of “convincing evidence”, that the merger would, “in all likelihood” significantly impede competition in the “relatively near future”<sup>8</sup>.
- The quality of the evidence to be produced by the Commission is “particularly important”<sup>9</sup> where the competitive harm depends on the merged entity’s behaviour after the merger, as is typically true in non-horizontal mergers.

12. The Studienvereinigung believes that these fundamental principles on burden and standard of proof, which are not dealt with at all in the Draft Guidelines, should be properly reflected, for instance in Section II (overview), in order to ensure their consistent application<sup>10</sup>. Moreover, some language even appears to be at odds with these principles and should be amended. More specifically:

- Paragraph 21 refers to “possible” anticompetitive effects, as opposed to “likely” effects.
- Pursuant to paragraphs 20, 32, 38 and 66, the Commission “may” consider a number of elements in its competitive assessment, such as the ability of rivals to develop counter-strategies. However, to the extent that such elements are relevant for the assessment of the merger and its competitive effects, they must be considered by the Commission.

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<sup>7</sup> ECJ, case 12/03 P, Tetra Laval, para. 74.

<sup>8</sup> ECJ, case 12/03 P, Tetra Laval, para. 74; CFI case T-210/02, General Electric, paras. 65, 295; CFI, case T-342/99, Airtours, para. 63.

<sup>9</sup> ECJ, case C-12/03 P, Tetra Laval, para. 44; CFI, case T-210/02, General Electric, para. 66.

<sup>10</sup> See, for instance, Section H.19 of the ICN Merger Guidelines Workbook (April 2006): “The theory of competitive harm to consumer welfare needs to be substantiated by convincing evidence”.

#### 4. Competitor foreclosure and Article 82 EC

13. The Studienvereinigung welcomes the clarification that it is the impact on effective competition that matters (harm to consumers), and not the mere impact on competitors (para. 16). However, the Draft Guidelines remain vague as to the level of competitor foreclosure that does matter to establish consumer harm (e.g. para. 73: “sufficiently large fraction of output is affected”; para. 28: “sufficient that rivals are disadvantaged and consequently led to compete less effectively”; or para 46: “the higher the proportion of rivals which would be foreclosed, the more likely is [competitive harm]”). Although it may be difficult to provide for more specific guidance, there should, in any event, be a consistent approach with Article 82 EC, the deterrent effect of which forms an important element in the analysis (as acknowledged in para. 44). According to the Commission’s Discussion Paper on Article 82 EC, only the foreclosure of an “as efficient” competitor would normally be considered a relevant foreclosure needed to establish an abuse<sup>11</sup>. If this test is applied in the framework of an *ex post* review under Article 82 EC, it should also apply in the context of an *ex ante* merger review, i.e. that the foreclosure of competitors “less efficient” than the merged firm should not normally be considered an “anticompetitive foreclosure” within the meaning of paragraph 18 which causes harm to consumers.

#### 5. Efficiencies

14. Although the Draft Guidelines remarkably say nothing about the evidence the Commission has to produce, it is very explicit about the “sufficient evidence” to be “identified and substantiated” by the parties in relation to efficiencies (e.g. paras. 21, 50, 76, and 113). This mismatch, as well as the unspecified reference in paragraph 51 to the efficiency section in the Guidelines on horizontal mergers, is unfortunate. First, non-horizontal mergers are typically efficiency-enhancing and, in any event, generally more likely to create efficiencies to the benefit of consumers than horizontal mergers. Second, the anticompetitive effects of a non-horizontal merger often have the same source (e.g. bundling) as the pro-competitive benefits of the merger (risk of an “efficiency offence”). Therefore, the Studienvereinigung submits that the strict

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<sup>11</sup> Paras. 54 et seq., in particular para. 66 of the Discussion Paper on Article 82 (December 2005).

conditions for proving efficiencies in horizontal mergers are not normally appropriate in non-horizontal mergers. If, as they should, efficiencies are to play an integral and meaningful role in the analysis of competitive harm, the evidentiary burden on the parties should (i) not be insurmountable in practice, and (ii) relate to that on the Commission to establish anticompetitive effects<sup>12</sup>. For instance, this could, at the very least, be clarified in paragraphs 21 and 51 as follows:

“In its assessment, the Commission will consider both the likely anticompetitive effects arising from the merger and the likely pro-competitive effects stemming from efficiencies” (para. 21).

“However, the Commission will take into account in this analysis that there are generally stronger efficiency arguments for non-horizontal mergers than for horizontal mergers.”<sup>13</sup> (para. 51)

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<sup>12</sup> Cf. the striking imbalance in para. 21: “In its competitive analysis, the Commission will consider both the *possible* anti-competitive effects and the pro-competitive effects stemming from efficiencies *identified and substantiated* by the parties.”

<sup>13</sup> See the Note by the EAGCP Merger Sub-Group of 17 August, Non-Horizontal Merger Guidelines: 10 Principles, p. 4.