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DISERTAČNÍ PRÁCE

Regulace Vertikálního Spojování Soutěžitelů v Nové Ekonomice v Právu USA a EU

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I. Úvod

1. Pojem vertikálního spojení soutěžitelů

Vertikálním spojením soutěžitelů se rozumí získání kontroly [1] jedním soutěžitelem nad druhým, jestliže každý působí na rozdílném stupni výrobního nebo distribučního řetězce.[2] Z hlediska charakteristiky zúčastněných soutěžitelů lze rozlišit dva případy: soutěžitel se buď snaží ovládnout zdroje svých vstupů a pak jde o „vzestupné" nebo „zpětné" spojení („upstream" nebo „backward" merger), anebo integrace probíhá naopak směrem ke konečnému spotřebiteli, což lze nazvat jako „sestupné", resp. „dopředné" spojení („downstream" nebo „forward" merger). Dále užíváme termíny „vzestupné" a „sestupné" spojení.

Vertikální spojení tedy probíhá mezi soutěžiteli, kteří nepůsobí na stejném trhu, a proto nedochází k bezprostřední změně v úrovni koncentrace na relevantních trzích. Omezení hospodářské soutěže u vertikálních spojení je sice méně pravděpodobné než u spojení horizontálních, nelze však říci, že by vertikální spojení byla bezproblémová.[3]

Např. ve Spojených státech amerických se v průběhu doby přístup k vertikálním spojením výrazně měnil. Až do druhé poloviny sedmdesátých let se většina těchto spojení považovala za nepřípustnou, třebaže omezení soutěže v jednotlivých případech nemuselo být velké.[4] Posléze se však přístup soudů začal měnit a vertikální spojení byla tolerována dokonce i v případě koncentrace poměrně vysokých tržních podílů.[5] Změna Pokynů k posuzování spojování (Merger Guidelines) Ministerstva spravedlnosti USA v roce 1982 pak proces liberalizace dovršila – vertikálním spojením nadále nebyly kladeny téměř žádné překážky. V nedávné době se americké úřady v několika případech vrátily k restriktivnější politice,[6] což bylo

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[1] Získání kontroly je nabytí akcií (podílového kapitálu) nebo jmění přejímaného soutěžitele, případně ovládnutí přejímaného soutěžitele jiným způsobem. Touto otázkou se poprvé důsledněji zabývala novelizace § 7 Claytonova zákona z roku 1950.

[2] Vertikální spojení bylo judikatorně (Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 315 (N.D.Ill. 1965)) definováno takto: „Při vertikálním spojování [...] se jedná o integraci komplementárních provozů působících na různých stupních výrobního nebo produkčního řetězce." *Id.*, 317.

[3] Non-Horizontal Merger Guidelines (USA), § 4.0.

[4] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[5] Frauehauf Corp. v. FTC, 603 F. 2d 345 (1979).

[6] Cadence Corp., C-3761 (7. srpna 1997); Silicon Graphics Corp., C-3626 (14. listopadu 1995).

především důsledkem nového přístupu k hospodářským účinkům vertikálních spojení.

Kritika omezování vertikálního spojování vycházela zejména z chicagské školy, podle které je vertikální integrace pojmově tržně efektivní. Postupně se podařilo hypotézy chicagské školy prověřit empirickými studiemi, což bylo impulsem pro komplexnější „post-chicagský" náhled na antimonopolní politiku. Ten se sice (pod vlivem ekonomických doktrín strategického chování a teorie her) podobně jako chicagská škola soustředil na ekonomickou analýzu a uznával kladný potenciál mnohých spojení, zároveň však odmítl pohled na vertikální spojení jako na něco, co je příznivé samo o sobě. Místo toho byla zdůrazňována potřeba hodnotit oprávněnost veřejnoprávní intervence v té které typové situaci.[7] Pozornost se následně soustředila na problematiku tzv. síťových externalit (network externalities) jako zvláštnosti některých odvětví průmyslu, jejichž produkce je závislá na určitém standardu kompatibility, především v oblasti informačních technologií a telekomunikací. Princip síťových externalit spočívá v tom, že hodnota veškeré kompatibilní produkce (sítě) se zvyšuje s každým přírůstkem v počtu uživatelů sítě.[8]

2. Vertikální spojování a nová ekonomika

„Novou ekonomiku", resp. průmysl vyspělých technologií tvoří podniky, které se prosadily na trhu výraznými inovacemi. Hodnota úspěchu soutěžitelů spočívá především v oblasti duševního vlastnictví, což pochopitelně znamená, že jejich pozice je v neustálém ohrožení ze strany inovujících konkurenčních podniků. Hovoří se také o „inovačním průmyslu" nebo „high-tech průmyslu" a do popředí se dostává schumpeteriánský proces kreativní destrukce, kdy inovační proces likviduje stará odvětví průmyslu a vytváří nová.

Nová ekonomika je prakticky synonymem průmyslu informačních technologií, tedy domény software a hardware, elektronických sítí, mobilních telekomunikací a biotechnologií. Stále více se projevuje potřeba soustředit výrobní aktivity na klíčové produkty, které rozhodují o vývoji trhu. Následkem toho dochází k vertikální integraci soutěžitelů a k uzavírání vertikálních dohod k zajištění efektivních dodávek vstupů a

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[7] Michael H. Riordan & Steven C. Salop, „Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., „Equilibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, „The foreclosure Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, „Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

[8] Carl Shapiro, Exclusionary in Network Industries, 7 Geo. Mason. L. Rev. 673 (1999).

odbytu výstupů.

Již bylo zmíněno, že vertikální spojení jsou považována spíše za nástroj zefektivňování podnikání než za prostředek omezování hospodářské soutěže. Věc však není tak jednoznačná – o tom, že vertikální integrace může být a také je zdrojem problémů, nemůže být sporu. Jedná se zvláště o otázku vstupu nových soutěžitelů na trh v odvětvích průmyslu charakterizovaných síťovým efektem, jako jsou telekomunikace, elektronické komunikace nebo média. Soutěžitelé, kteří získali dominantní postavení na poli duševního vlastnictví, se nezřídka snaží vyloučit své konkurenty z přístupu na trh tím, že znemožní kompatibilitu jejich produkce se svou sítí.[9]

V překotně se vyvíjejícím prostředí nové ekonomiky charakterizovaném velkým množstvím inovací a nových technologií vyžaduje každý případ vertikální fúze nebo sdružení soutěžitelů individuální a komplexní analýzu celé řady otázek. Jedná se především o určení relevantního trhu, tržního podílu a odpovídajících prostředků nápravy. Mnohé tradiční metody používané k posuzování vlivu spojení na hospodářskou soutěž a zejména ke stanovení tržního podílu se míjejí účinkem. High-tech průmysl je příznačný značnou rozmanitostí produkce a náhlými změnami v tržním postavení soutěžitelů. Důsledkem investic do duševního vlastnictví jsou významné úspory z rozsahu, které vedou ke koncentracím dodavatelů. Na druhou stranu jednotlivé úspěšné inovace mohou zcela zvrátit situaci na trhu, a proto je také samotná vedoucí tržní pozice předmětem permanentního ohrožení.

To vše vede k úvaze, zda stávající přístup k vertikálnímu spojování a vertikálním dohodám soutěžitelů odpovídá trhům nové ekonomiky a zda by nebylo možné nalézt vhodnější metodu, která by byla založena např. na dynamické analýze trhu. Z určitého pohledu se to dokonce jeví jako nutnost. V této práci se proto pokusíme ukázat některé problémy hospodářské soutěže spojené s fenoménem nové ekonomiky a navrhnout analytické mechanismy, které by mohly lépe reflektovat specifika vertikálního spojování.

3. Návrh

Část I seznamuje s pojmy jako „vertikální spojování" nebo „nová ekonomika" a s jejich vývojem v právním a ekonomickém myšlení a snaží se objasnit, proč v současné době jde o tak aktuální téma soutěžní politiky. Část II popisuje vývoj vnímání

[9] Evropská komise, Generální ředitelství pro podniky: Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, executive summary, s. 1, (listopad 2001).

vertikálního spojování soutěžitelů v průběhu doby a podává základní charakteristiky tohoto fenoménu. Část III se zaměřuje na specifika tzv. high-tech průmyslu a část IV zkoumá hlavní soutěžní problémy vertikální integrace v prostředí nové ekonomiky. V části V se analyzují hospodářské aspekty vertikálního spojování v nové ekonomice, především to, jakým způsobem ekonomická věda historicky hodnotila soutěžní účinky vertikálního spojování, jak se tyto teorie přizpůsobily podmínkám inovačního průmyslu a co je v tomto směru základním soutěžním problémem. Část VI navrhuje založit hodnocení soutěžních účinků vertikálního spojování v prostředí nové ekonomiky na dynamickém přístupu. Část VII představuje a srovnává současnou právní úpravu vertikálního spojování v USA a EU a naznačuje další vývoj s ohledem na nové trendy. Část VIII podává charakteristiku kategorií „relevantní trh" a „tržní síla" v nové ekonomice v jejich tradičním pojímání a navrhuje jejich modifikace pro podmínky nové ekonomiky. V části IX se obecně shrnují soutěžní účinky vertikální integrace v nové ekonomice. Část X pak srovnává americká a evropská pravidla posuzování spojování (Merger Guidelines) a navrhuje jejich výklad, případně změny s ohledem na novou tržní situaci. Část XI nakonec obsahuje závěrečné poznámky.

II. Základní rysy vertikálního spojování

Mezi charakteristikou horizontálního a vertikálního spojování existuje řada rozdílů. Již bylo řečeno, že vertikální integrace se týká soutěžitelů působících na různých úrovních produkčního řetězce. To je klíčový aspekt hned v několika ohledech. Zatímco u horizontálních spojení dochází k přímému omezení konkurence, vertikální spojení bezprostředně nesnižují počet podniků na kterémkoli relevantním trhu. Z teorie nekoordinovaných účinků (non-coordinated effects theory) plyne, že vytváření a upevňování tržní síly je až důsledkem vertikálního spojení (např. vázaný prodej) a nikoli jeho pojmovým znakem, jako tomu je v případě strukturálních změn trhu u horizontálního spojení. Vertikální integrace se vždy dotkne nejméně dvou trhů, což je u horizontálního spojování neznámý jev – analýza účinků vertikálního spojení je proto víceúrovňová a komplikovanější. Faktorem, který může zásadně ovlivnit hodnocení věci (a jenž je třeba o to důkladněji zkoumat), je míra úspor, ke kterým vertikální spojení povede, např. pokud jde o transakční náklady, dojde-li k nahrazení smluvních vztahů mezi nezávislými subjekty vztahy interními.

Ačkoli snižování cen vyvolané nehorizontální integrací má pro hospodářskou soutěž obvykle příznivý účinek, nemusí tomu tak být vždy. Zásadní roli má v tomto směru fáze po završení spojení, kdy se postupně snižuje konkurenční potenciál na trhu a ostatní soutěžitelé mohou být z trhu dokonce vytlačeni. Poté spojenému soutěžiteli nebude nic bránit znovu zvýšit ceny. V jiných případech může být důsledkem horizontálního spojení omezování přístupu na trh nebo bránění v tržním posilování ostatním soutěžitelům (třebaže nemusejí být z trhu přímo vytlačováni), což je v důsledku neméně nebezpečné.

Významné rozdíly mezi horizontálním a vertikálním spojováním existují, také pokud jde o předvídatelnost hospodářských účinků spojení. V obou případech je třeba hodnotit pravděpodobné účinky spojení vážením očekávaných úspor na jedné straně a možných škod způsobených omezením konkurenčního prostředí na straně druhé. V případě vertikálního spojování je ovšem taková analýza daleko obtížnější. U horizontálních spojení panuje mezi většinou ekonomů a odborníků na soutěžní právo shoda: spojí-li dva soutěžitelé své podniky na horizontální úrovni, nepředstavuje větší komplikaci hodnotit účinky transakce za pomocí strukturálních a dalších faktorů. Analyzovat účinky vertikálního spojení je ale poměrně kontroverzní úkol.

Teorie omezování soutěže musejí nejen pozorně definovat faktory, které

znamenají újmu konkurenci, nýbrž především by měly postoupit od teoretického zkoumání směrem k prověřování závěrů v jednotlivých odvětvích průmyslu a v rámci praktik daného odvětví. Nelze jednoduše předpokládat, že újma ostatním soutěžitelům nutně znamená újmu soutěži.[10]

Analýza horizontálního spojování pracuje s poměrně stabilní a rozvinutou teorií soutěžních účinků, třebaže proces poměřování hospodářských úspor a negativních soutěžních účinků může být mnohdy komplikovanou záležitostí. To však neplatí v případě vertikálního spojování: teorie soutěžních účinků je daleko méně propracovaná (a to i tam, kde je újma hospodářské soutěži snadno předvídatelná) a podmínky, za kterých hodnocení probíhá, jsou obtížněji uchopitelné. Vertikální analýza vyžaduje zkoumání dvou relevantních trhů a jejich vzájemných vztahů, zatímco horizontální analýza se soustředí pouze na jediný trh. Stejně tak existuje řada druhů možných hospodářských úspor plynoucích z vertikálních spojení, které lze předem obtížně identifikovat.

Přesto však lze ze současné podoby teorie vertikálního spojování učinit některé důležité závěry. Antimonopolní úřady by měly věnovat vertikálnímu spojování náležitou pozornost, tak aby nemařily spojení, která jsou hospodářsky efektivní a představují jen malé riziko újmy. Je typické, že zatímco míra omezení soutěže je u vertikálního spojování obtížněji určitelná než u horizontálních fúzí, hospodářské výhody lze vyčíslit poměrně snadno. Absence propracované teorie vertikálních účinků má však za následek, že transakce musejí být posuzovány více na základě povahy jednotlivých případů, bez pomoci pravidel, která by stanovila kritéria hodnocení.

[10] RBB Brief 18, „Turning the Tables: Why Vertical and Conglomerate Mergers are Different," RBB Economics, březen 2006, s. 2.

III. Klíčové rysy nové ekonomiky

Odvětví průmyslu, ve kterých o pozici na trhu rozhoduje dynamická konkurence, vykazují určitá specifika, respektive odchylky od učebnicového modelu konkurence „cena / produkce". To má významné důsledky v oblasti analýzy soutěžních účinků. Nová ekonomika se vyznačuje značným potencionálem úspor z rozsahu, síťovým efektem, vysokou rizikovostí a vysokou ziskovostí, principem „vítěz bere všechno", náhlými vstupy na trh a výstupy z trhu, intenzivním využíváním lidských zdrojů, vysokými fixními náklady a nízkými marginálními náklady, mezipodnikovou spoluprací při definování standardů produkce, vertikální integrací atd.

1. Síťový efekt

Mnohá průmyslová odvětví zabývající se vyspělými technologiemi, především ta, která se zaměřují na software, internetové technologie nebo obecně telekomunikace, vykazují síťový efekt. Odvětví průmyslu se označuje jako „síťové", jestliže hodnota sítě (kompatibilní produkce) pro jednotlivého spotřebitele přímo nebo nepřímo závisí na množství uživatelů sítě (kompatibilní produkce).[11]

2. Vysoká rizikovost a vysoká ziskovost

V dynamických odvětvích průmyslu je třeba k úspěchu v hospodářské soutěži nevyhnutelně investovat do výzkumu a vývoje a dosáhnout vysoké míry návratnosti těchto investic. Investice do výzkumu a vývoje jsou z konkurenčních a technologických důvodů rizikové. Uspěje-li však soutěžitel se svou investicí, získá přinejmenším dočasně takový tržní potenciál a volnost určovat cenu nad maginální náklady, aby mohl bez ohledu na konkurenci dosáhnout mimořádnou míru návratnosti.

3. Vítěz bere všechno

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[11] Besen, Stanley and Joseph Farrell, „Choosing How to Compete: Strategies and Tactics in Standardization," *Journal of Economic Perspectives*, sv. 3, č. 2, 1994, s. 117; Evans, David S, and Bernard J. Reddy, „Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," in *Intellectual Property Antitrust 1996*, Practicing Law Institute, 1996; Katz, Michael and Carl Shapiro, „Systems Competition and Network Effects," *Journal of Economic Perspectives*, sv. 3, č. 2, 1994, s. 93; Katz, Michael and Carl Shapiro, „Network Externalities, Competition, and Compatibility," *American Economic Review*, sv. 75, č.3, 1985, s. 424-440.

Hospodářská soutěž v průmyslu vyspělých technologií často probíhá v cyklické podobě s tím, že v rámci každého cyklu dochází prostřednictvím inovací k nahrazení stávajícího produktu, případně k vývoji produktu zcela nového. V prvním cyklu podnik významně investuje do vývoje nového výrobku, který se může stát základem nové technologické kategorie. Soutěžitelé, kteří uspějí, okamžitě získají vysoké tržní podíly a zisky. Důsledkem síťového efektu je silný lídr trhu, a proto v mnoha odvětvích high-tech průmyslu probíhá neustálý boj o tuto pozici. Náklady na změnu dodavatele ani povaha trhu obvykle nebrání nahrazení dosavadních favoritů novými lepšími produkty.[12]

4. Intenzivní využití lidských zdrojů

Mnohá odvětví průmyslu nové ekonomiky využívají lidské práce o poznání intenzivněji než tradiční průmysl, který je založen na hmotném kapitálu. To je důsledkem toho, že fixní náklady inovujících soutěžitelů jsou tvořeny především pracovními náklady v souvislosti s vývojem nového zboží.

5. Vysoké fixní náklady a nízké marginální náklady

Podniky v prostředí nové ekonomiky mívají vysoké fixní náklady a nízké maginální náklady. K prosazení vlastního zboží na trhu je třeba značných investic, a to buď do výzkumu a vývoje nebo do rozvoje síťových systémů. Jakmile však dojde k výchozím investicím, není již vytváření dalších jednotek produkce zvláště nákladné. Protože v mnoha inovačních odvětvích průmyslu je průměrný náklad daleko vyšší než marginální náklad, neexistuje ideálně konkurenční prostředí a trh negeneruje automaticky zisk k pokrytí nákladů investovaných do výzkumu a vývoje.

6. Vertikální integrace

Udržování konkurenceschopnosti na neustále se rozšiřujících trzích vyspělých technologií vyžaduje soustředit činnost na klíčové segmenty produkce. Zákonitým důsledkem toho je sestupná a vzestupná vertikální integrace soutěžitelů a uzavírání vertikálních dohod k zajištění efektivnějších dodávek vstupů a odbytu výstupů.

[12]David S. Evans, Richard Schmalensee, „Some economic aspects of antitrust analysis in dynamically competitive industries," Working Paper 8268, National Bureau of Economic Research, květen 2001, s. 12.

IV. Základní problémy vertikálního spojování v prostředí nové ekonomiky

Jak již bylo uvedeno, vertikální spojování se často považuje spíše za prostředek k dosahování úspor než za nástroj omezování konkurence. Přesto však i vertikální integrace může znamenat ohrožení soutěže, a to především pokud jde o omezování přístupu na trh. Odvětví průmyslu, ve kterých se projevuje síťový efekt, jako jsou telekomunikace, elektronické komunikace nebo média, jsou často založena na určitém technologickém standardu a odepření přístupu k tomuto standardu novým soutěžitelům má za následek nedostatek interoperability jejich produkce, a tedy nemožnost uplatnění.

Předmětem posuzování by kromě toho měl být také potenciál vertikální transakce k ovlivnění souvisejících trhů na vyšších a nižších úrovních, než na kterých bezprostředně působí spojované podniky. [13]

1. Překážky pro vstup na trh, vyloučení z trhu

1.1 Síťový efekt, standardizace a vyloučení z trhu

Významným rysem ekonomiky elektronických technologií je zvýšená závislost na širokém souboru vertikálně propojených aktivit, zejména sdílení informací, obsahu aplikací nebo síťových struktur.

V kontextu sbližování technologických standardů je vertikální integrace a sdružování častým důvodem ohrožení soutěže, zejména pokud jde o problematiku interoperability a nezávislosti jednotlivých výrobků a služeb. Další ohrožení představuje situace, kdy soutěžitel, který je majitelem dispozičních oprávnění k síti, přístupové aplikaci nebo zásadním prvkům obsahu sítě, prosazuje své výrobky nebo služby jako standard produkce. Proto se hodnocení antisoutěžních praktik v podmínkách nové ekonomiky musí soustředit především na zkoumání, zda poskytovatelé klíčových segmentů produkce nevyužívají svého vlivu k uvalení překážek vstupu na trh.

K ilustraci problému lze použít příklad sdružení významné mediální společnosti a známého poskytovatele internetových služeb v oblasti on-line distribuce hudby. Vezmeme-li v úvahu pozici obou soutěžitelů na trzích, na kterých působí, lze si dobře představit, že budou v pokušení učinit ze své produkce standard (normu) na rozvíjejícím

[13] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (listopad 2001).

se trhu on-line hudby. Konkrétně mohou zavést formát hudebních souborů, který bude kompatibilní jedině s jejich hubebním přehrávačem, čímž by se stali „strážci" trhu a mohli by diktovat podmínky pro distribuci.

Jedna ze základních praktik omezování soutěže vyžadující důkladnou analýzu je situace, kdy dominantní soutěžitel odmítá umožnit přístup ke své síti ostatním soutěžitelům (např. v oblasti zajišťování přístupu k síti internet), čímž jim zvyšuje náklady, případně aplikuje selektivní cenovou politiku za účelem odlákání zákazníků od konkurence.[14]

Bariéry vstupu však samy o sobě nemusejí znamenat problém na trzích, na kterých dochází k průběžnému technologickému pokroku. Např. na trhu elektronických komunikací se mohou uplatnit inovační řešení, která pocházejí nikoli od skutečných, ale jen potencionálních soutěžitelů, kteří zatím na trhu nepůsobí. Pak je třeba posuzování soutěžních otázek založit především na zkoumání perspektiv budoucího vývoje.[15]

1.2 Práva duševního vlastnictví a bariéry vstupu na trh

Síťový systém je jednotnou strukturou, jejíž součásti jsou reprezentovány velkým počtem samostatných soutěžitelů, které ale v zájmu kompatibility podléhají jednomu standardu. Podnik, který vyrábí některý ze základních komponentů síťové struktury, má samozřejmě zájem zachovat si exkluzivitu, místo aby se musel o své know-how dělit s ostatními soutěžiteli. Jestliže je výrobek předmětem patentové, autorskoprávní nebo třeba jen smluvní ochrany, je jednodušší dosáhnout interoperability monopolizací produkce než zaváděním standardů mezi samostatnými soutěžiteli.

Síťové struktury nejsou samy o sobě tím, co by mělo hodnotu pro spotřebitele, ale plní především funkci kanálů, které ke spotřebitelům přivádějí služby, jež jsou předmětem jejich zájmu. To je jeden z projevů vertikální integrace. Tak např. operační systém představuje platformu pro softwarové aplikace, a výrobce operačního systému se tak může snadno rozhodnout pro doplnění portfolia produkce o softwarové aplikace. Moderní operační systémy jsou konec konců samy o sobě složeny z více původně samostatných programů, které mohou pocházet od více výrobců. Poskytovatelé připojení a dalších prostředků pro přístup k internetu se mohou vzestupně integrovat za

[14] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (listopad 2001) s. 7.

[15] Evropská komise: Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, bod 80.

účelem rozšíření nabídky o služby založené na využívání internetu jako je e-shopping nebo audiovizuální aplikace.

1.3 Vertikální spojování, monopolizace a hospodářská soutěž

Proces vertikálního spojování může hospodářskou soutěž paradoxně i podněcovat. To lze snadno objasnit, když si uvědomíme, že soutěž o dosažení monopolního postavení je důležitým prvkem hospodářské soutěže vůbec. Čím více je monopolní postavení chráněno před účinnou soutěží, tím intenzivnější boj se vede o dosažení tohoto postavení; a jsou-li všechny možné (dovolené) způsoby jak dosáhnout monopolního postavení společensky užitečné, pak je žádoucí i soutěž o toto postavení. Soutěžitel, který přijde jako první s novým produktem a který požívá jak ochrany práva duševního vlastnictví, tak výhod plynoucích z úspor z rozsahu, získá lukrativní monopol a právě tyto perspektivy výrazně urychlují inovační činnost.[16] A co více, monopol pravděpodobně získá ten soutěžitel, který původně svůj výrobek distribuoval za velmi nízkou cenu. V rámci standardní síťové struktury, kde každý nový uživatel zvyšuje hodnotu síťové služby pro stávající uživatele, je soutěžitel motivován k cenovým pobídkám pro nové uživatele, protože takto vynaložené prostředky budou zhodnoceny vyšší cenou, kterou budou stávající uživatele ochotni hradit za přístup k rozsáhlejší síti. Tento scénář je zvláště pravděpodobný v případech, kdy je síťová struktura přirozeně monopolní, tedy když ostatní podniky nebudou vůbec ochotny soutěžit. Čím rychleji se síťová struktura rozvine do definitivní podoby, tím déle bude monopolista chráněn před potencionální konkurencí. Perspektivy monopolu v rámci síťové struktury tak podněcují nejen vysokou míru inovací, ale také politiku nízkých cen, která uživatele vede k co nejrychlejšímu vstupu do systému. Riziko spojené s tím, že se spotřebitelé musí připojit k dosud neetablované síti, se kompenzuje pozdějším výrazným vzestupem cen.

Tradiční sítě jako jsou telefonní systémy nebo železnice vyžadovaly vysokou míru investic, a proto bylo velmi obtížné vybudovat paralelní síť. Pozice monopolu byla mimořádně silná. O co nižší investice však vyžaduje vytvoření sítě, o to vratší je monopolní postavení. Vzhledem ke značné míře inovací v oblasti software a komunikačních technologií, mimořádnému objemu celosvětově dostupného kapitálu a rychlosti, jakou jsou elektronické sítě zaváděny do provozu, se nezdá, že by konkurence na poli nových síťových struktur byla zvláště ohrožena. Mnohokrát byl např.

[16] Posner, R. „Antitrust in the New Economy," *Antitrust Law Journal*, 2001, s. 925-943.

zaznamenán prudký pád z pozice, která se zdála být bezpečně monopolní. Realitu nové ekonomiky lze popsat jako schumpeteriánskou bouři kreativní destrukce, v níž je vývoj rozdělen na úseky, ve kterých je trh sice ovládán dočasnými monopoly, které ale maximalizují míru inovací, jejichž společenský užitek přesahuje nevýhody krátkodobých monopolních cen.

Klíčový význam tedy má možnost soutěžit o monopolní pozici na trhu. Nelze však popřít, že již samotná existence monopolu mnohé soutěžitele od inovační činnosti odrazuje. Navíc při intenzivních síťových externalitách mohou výhody úspor nákladů převážit nad tržním potenciálem nových technologií. Tento syndrom bývá označován jako vývojová závislost (path dependence): trh může uvíznout na mrtvém bodě, protože aktuální poměry síťové struktury přinášejí soutěžiteli, který má monopol, zisk z úspor nákladů.

Ačkoli to nemusí být zřejmé, právo proti omezování hospodářské soutěže se primárně nezabývá monopolním postavením jako takovým. Nejedná se o protiprávní jednání, pokud soutěžitel získá monopol v souladu se zákonem, především pokud mu k monopolu dopomohou inovace chráněné právem duševního vlastnictví. Šíře této ochrany je věcí zákonodárce. Protiprávně nejedná ani ten, kdo stanoví monopolní ceny nebo nezachází se všemi partnery za rovných podmínek s úmyslem maximalizovat monopolní zisk. Zejména nyní, po překonání doktríny *Alcoa*[17] se uznává, že i monopol může svádět boj s ostatními soutěžiteli, kteří buď již působí na trhu nebo jsou jen potencionální konkurencí, a to za předpokladu, že nevytlačuje z trhu soutěžitele, kteří jsou stejně nebo více efektivní.[18] Skutečnost, že i pro soutěžitele s vynikající technologií je obtížné zviklat pozici monopolu podporovaného síťovými externalitami, nemá sama o sobě pro ochranu hospodářské soutěže větší význam. Sféru nové ekonomiky nijak zvlášť neovlivňuje ani zákaz uzavírání dohod o určování cen nebo spojování směřující k cenové fixaci. Neexistují např. legislativní překážky nastavování mezipodnikových standardů, pokud z takové spolupráce mohou profitovat spotřebitelé.

Středem pozornosti aplikace soutěžního práva v oblasti nové ekonomiky by měly být pouze způsoby, kterými monopolní soutěžitelé brání vstupu nováčků na trh.

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[17] United States v. Aluminum Co. of America, 148 F. 2d 416 (2nd Cir. 1945).

[18] Viz např. Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F. 2d 370, 375 (7th Cir 1986).

V. Teorie vertikálního spojování v prostředí nové ekonomiky

1. Vývoj economického přístupu k vertikálnímu spojování

Účinky vertikálního spojování na hospodářskou soutěž byly dlouhou dobu diskusní záležitostí. Podle starších teorií, jak byly rozvíjeny v judikatuře od 50. do 70. let minulého století, se vertikální integrace jednoznačně považovala za škodlivou, měla totiž znemožňovat přístup soutěžitelů k dodavatelům a odběratelům, a tak rozšiřovat monopolizaci z jednoho trhu na druhý.[19] Proti tomu vstoupila v 60. a 70. letech chicagská škola, podle které vertikálně integrovaný soutěžitel nemá žádný důvod vylučovat své rivaly z trhu a pokud by se o to přece pokoušel, ostatní soutěžitelé se mohou jednoduše chránit spoluprací s neintegrovanými dodavateli a odběrateli. Stoupenci chicagské školy tvrdili, že vertikální spojování má ve většině případů soutěžně příznivé, případně neutrální účinky.[20] Toto pojetí zaznamenalo značný ohlas a bylo příčinou benevolentního přístupu k verikálnímu spojování v 70. a 80. letech.[21]

Střední cestu v téže době reprezentovala tzv. teorie transakčních nákladů, která sice nově objasnila, že vertikální integrace může mít své oprávněné ekonomické důvody, uznávala ale, že soutěžitelé disponující odpovídající tržní silou mohou prosazovat strategie, které mají jen málo společného s oprávněnými zájmy spotřebitelů.[22]

V poslední době se pak objevuje přístup nazývaný „post-chicagská ekonomie", který se pokouší vertikální spojování vysvětlit pomocí teorie her, a tak identifikovat okolnosti, za kterých vertikální spojování vede k negativnímu ovlivňování tržního prostředí.

Důsledkem všech těchto přístupů je, že vertikální integrace zůstává i nadále sporným tématem. Současná soutěžní politika USA a EU stojí na východisku, že vertikální integrace sice může působit narušování soutěže a být příčinou nedovolených

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[19] Chen, Y., „On Vertical Mergers and Their Competitive Effects," RAND Journal of Economics, sv. 32, č. 4, s. 667-685, 2001.

[20] Bork, R.H., The Antitrust Paradox: a policy at war with itself, New York, 1978; Posner, R. A., Antitrust Law, Chicago: University of Chicago Press, 1976.

[21] Riordan, M., „Anticompetitive Vertical Integration by a Dominant Firm," American Economic Review 88, s. 1232-48, 1998.

[22] Williamson, Oliver E., Markets and Hierarchies: Analysis and Antitrust Implications, Free Press, New York (1975); Williamson, Oliver E., The Economic Institutions of Capitalism, Free Press, New York (1985).

dohod, zároveň ale uznává, že často jde o oprávněný zdroj úspor.[23]

2. Chicagská škola

Chicagská doktrína hodnocení soutěžních účinků vertikálního spojování je založena na modelu stupňované monopolizace (leverage monopoly) a postupující monopolizace (successive monopoly). Závěrem obou těchto modelových mechanismů je, že vertikální integrace obecně znamená růst ekonomického blahobytu.

2.1 Monopolní zisk

Podle chicagské školy je vyloučeno, aby vzestupný monopol, který je chráněn trvalými tržními bariérami, dále stupňoval svůj zisk. Jestliže monopol pomocí smluvních vztahů odčerpá z trhu nižší úrovně veškerý monopolní zisk, pak vertikální integrace nemůže vést k agregaci dalšího zisku. Vertikální spojení musí tedy mít jiný účinek než zvyšování monopolní síly.[24]

Model stupňovaného monopolu předpokládá následující skutečnosti: (i) v sestupném směru produkčního řetězce působí soutěžitelé o přibližně stejné velikosti; (ii) rozsah produkce v sestupném směru produkčního řetězce je fixní; (iii) na trhu působí vzestupný monopol; (iv) neexistuje cenová regulace; a (v) v sestupném směru produkčního řetězce probíhá nenarušená hospodářská soutěž.

Kalkulace monopolního zisku je v takovém případě založena na poznatku, že vhodnou volbou velkoobchodní ceny si vzestupný monopol může pojistit, aby cena na trhu nižší úrovně odpovídala jím nastavené ceně, a aby se tedy zisky na trhu, na kterém působí, rovnaly jeho vlastním ziskům. Ceny na trhu nižší úrovně, množství produkce a zisky budou stejné, ať se monopol dále vertikálně integruje nebo ne. Monopol dosáhne zisku při odbytu pomocí velkoobchodní přirážky: v důsledku fixního rozsahu produkce na trzích nižší úrovně bude tato přirážka jednoduše přenositelná na konečné spotřebitele. Vertikální integrace tedy nezvyšuje zisk a není nutná k dosažení monopolního zisku.

3. Post-chicagská škola

[23] American Bar Association Antitrust Law Section, Antitrust Law Developments, 5. vyd., ABA Publishing (ABA: 2003).

[24] Michael H. Riordan, „Competitive Effects of Vertical Integration," referát přednesený na LEAR conference on „Advances in the Economics of Competition Law" v Římě, s. 8 (2005).

Ve středu pozornosti post-chicagské školy stála stejně jako u její předchůdkyně ekonomická analýza vertikálního spojování. I post-chicagská škola uznávala (za použití ekonomických studií strategického chování a teorie her) pozitivní účinek mnohých vertikálních spojení. Odmítla však pojetí vertikálního spojování jako něčeho, co je samo o sobě příznivé, a místo toho kladla důraz na individuální posuzování intervence v jednotlivých typech případů.[25] Přechod mezi chicagskou a post-chicagskou školou je ovšem pozvolný a nelze apriori tvrdit, že by obě byly navzájem neslučitelné.

Post-chicagská škola se zaměřuje především na problematiku vertikálního spojování zasahujícího trhy, kde neexistuje optimální soutěžní prostředí. Narušování soutěže v post-chicagském pojetí na prvém místě znamená zvyšování nákladů ostatních soutěžitelů a nikoli přímo vylučování trhu.[26]

Hovoří-li se v tomto kontextu o zvyšování nákladů, obvykle se jedná o náklady na vstupy. Po uskutečnění spojení dojde ke zvýšení cen vstupů odebíraných z trhů vyšší úrovně produkčního řetězce, čímž se zvýší náklady soutěžitelům působícím na nižší úrovni trhu. To má za následek uvolnění tržního tlaku na integrovaného soutěžitele, který má přístup ke vstupům za ceny na úrovni mezních nákladů. Ceny vstupů zároveň rostou, protože integrovaný soutěžitel buď zastaví dodávky soutěžitelům na nižší úrovni trhu anebo jim bude dodávat za vyšší cenu. V rámci samotného vertikálně spojeného soutěžitele bude cenotvorba probíhat po interní linii a bude samozřejmě existovat tlak na její usměrňování. Z toho vyplývá další zvýšení potenciálu určování cen na nižších úrovních trhu, a tedy další zvýšení cen vstupů a vzestup tržní síly integrovaného soutěžitele.

4. Vertikální spojování v odvětvích průmyslu se síťovým efektem

4.1 Úvod

Odvětví průmyslu, ve kterých se projevuje tzv. síťový efekt, tvoří značnou část ekonomiky. Jedná se především o telekomunikace, internet a služby spojené s internetem, výrobu software a hardware a další odvětví, která byla v posledních letech motorem světové ekonomiky. S problematikou však souvisí také provozování

[25] Michael H. Riordan & Steven C. Salop, „Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., „Equilibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, „The foreclosure Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, „Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

[26] *Id.*, 324.

rozhlasového a televizního zpravodajství, zábavní průmysl, aerolinie, železnice, provozování silniční sítě, dopravní a zasílatelské služby atd.

Síťový efekt s sebou nese (stejně jako každá jiná nepůvodní strukturace trhu) potencionální soutěžní rizika, a to zejména rizika plynoucí z vertikální integrace a následného chování vertikálně integrovaných soutěžitelů. Máme především na mysli prosazování vázaného prodeje, uzavírání nedovolených dohod nebo manipulaci technickými standardy. K úspěšnému vstupu na trh, na kterém působí vertikálně integrovaný soutěžitel, je třeba zároveň vstoupit na všechny ostatní trhy, na kterých tento soutěžitel působí. To je samozřejmě obtížné. Nováčci většinou mívají užší technologické a finanční zázemí, čímž se pravděpodobnost vzniku nové konkurence radikálně snižuje.[27]

4.2 Zvláštnosti trhů se síťovým efektem

Síť je tvořena uzly a vlákny, která uzly spojují. Podstata sítě spočívá v kompatibilitě mezi různými uzly a vlákny – služba poskytovaná v rámci sítě z povahy vyžaduje aktivaci nejméně dvou uzlů sítě.

Společným a definičním znakem odvětví průmyslu, ve kterých se můžeme setkat se síťovým efektem, je obrat, který se rapidně zvyšuje s rozsahem spotřeby. Existence síťových externalit je základním příčinným faktorem rozvoje a ziskovosti odvětví průmyslu označovaných jako „nová ekonomika". Trh vykazuje síťový efekt (resp. síťové externality), když se hodnota každé dodatečné jednotky produkce pro kupujícího zvyšuje s počtem celkem prodaných jednotek produkce. Důvodem síťového efektu je kompatibilita. V klasických sítích vznikají síťové externality proto, že se uživatel může prostřednictvím větší sítě spojit s více osobami.[28]

V odvětvích, kde se síťový efekt neprojevuje, se ochota spotřebitele zaplatit za poslední jednotku produkce snižuje s počtem prodaných jednotek. Jde o zákon poptávky, který se tradičně uplatňuje ve vztahu k téměř veškeré produkci. V případě síťového trhu se však ochota spotřebitele zaplatit za poslední jednotku produkce naopak zvyšuje a zákon poptávky dostává trhliny: poptávková křivka v některých svých úsecích překvapivě směřuje vzhůru.

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[27] Nicholas Economides, „Competition Policy in Network Industries: An Introduction," Stern School of Business, New York University, New York, 2003.

[28] Nicholas Economides, „Competition Policy In Network Industries: An Introduction," Stern School of Business, New York University, s. 5, 2003.

Trhy se silným síťovým efektem, kde soutěžitelé vytvářejí vlastní technické standardy, fungují na principu „vítěz bere všechno". Distribuce tržních podílů a zisku v rámci jednoho trhu je výrazně nerovná (a to i v případě, lze-li hovořit o trhu v rovnovážném stavu). Není žádným překvapením, pokud tržní podíl největšího soutěžitele dosahuje násobku tržního podílu druhého soutěžitele, tržní podíl druhého soutěžitele dosahuje násobku tržního podílu třetího, atd.

Důvod je zřejmý. Soutěžitel s vyšším tržním podílem je schopen dosáhnout vyšších prodejů kompatibilního zboží, a jeho produkce je proto pro spotřebitele hodnotnější. Naopak soutěžitel s nižším tržním podílem se musí spokojit s nižšími prodeji.

Obecně sice platí, že užitek jednotlivých spotřebitelů se zvyšuje s počtem soutěžitelů na trhu, agregovaný užitek se však naopak snižuje. Jinými slovy, čím více soutěžitelů, tím méně je trh efektivní. To je logický důsledek skutečnosti, že méně podniků na trhu znamená lepší koordinaci a intenzivnější síťový efekt. Jestliže se počet soutěžitelů snižuje, pozitivní síťový efekt se zvyšuje a tento růst je zdrojem vyšších hodnot, než které by mohli vyprodukovat soutěžitelé, kteří trh opouštějí. Nejvyšší celkový užitek je tak dosahován v monopolním prostředí. To je pozoruhodné dilema, před kterým se ocitají antimonopolní úřady.

V odvětvích průmyslu bez síťového efektu monopolní prostředí minimalizuje jak užitek spotřebitelů tak agregovaný tržní užitek. V síťovém tržním modelu ovšem maximalizace užitku pro jednotlivé spotřebitele znamená potlačení agregovaného užitku. Nerovnost je na síťových trzích přirozeným jevem, a proto by bylo chybou vysoké zisky některých soutěžitelů přisuzovat praktikám omezujícím soutěž. Omezování soutěže není příčinou tržních nerovností.

Ani možnost volného vstupu na trh nevede k optimálnímu konkurenčnímu prostředí. Vezmeme-li v úvahu trh se silným síťovým efektem, na kterém působí několik zavedených soutěžitelů, vstup nového soutěžitele pravděpodobně nepovede k významnější změně struktury trhu. Ačkoli odstraňování překážek vstupu na trh může podnítit konkurenční prostředí, výsledek nemusí vést ke změně tržních podmínek. Tedy ani autoritativní prosazování podmínek k zajištění možnosti vstupu na trh nemusí mít samo o sobě reálný účinek.

To se může zdát poněkud paradoxní, uvědomíme-li si, kolik úsilí se v praxi věnovalo problematice volného vstupu na trh s představou, že se tím podaří povzbudit konkurenci, snížit ceny a v důsledku také redukovat zisky. V síťovém průmyslu sice

volný vstup na trh znamená neomezený počet soutěžitelů, zcela se ale míjí účinkem, pokud jde o snižování tržních nerovností, cen a zisků. Nové vstupy na trh většinou nejsou schopny ukrojit podíl ze zisků lídrů trhu.

Zvláště důležitý pak je poznatek, že na vyváženém síťovém trhu téměř nedochází k nedovolenému omezování soutěže. Soutěžitelé jsou schopni dosáhnout vysokých objemů výroby nebo dominantního postavení v rámci pravidel soutěže, a nemusejí se proto uchylovat k uzavírání trhu, vynucování nepřiměřených podmínek, vázaným obchodům, vytváření překážek pro vstup na trh nebo jiným podobným praktikám. Jak již bylo řečeno, mimořádné tržní nerovnosti jsou přirozené.

Může tedy být vůbec dosaženo pokroku v podmínkách soutěže na síťovém trhu? Ano, ale tržní rovnováhy je třeba docílit prostřednictvím kompatibility produkce, což bude mít za následek jak vyšší užitek pro spotřebitele, tak vyšší agregovaný užitek, ať bude na trhu působit libovolný počet soutěžitelů. A je možné, aby k těmto cílům přispělo právo na ochranu hospodářské soutěže? Částečně ano, řešení ovšem bude do značné míry spočívat v oblasti práva duševního vlastnictví. Zásah veřejné moci bude odůvodněn pouze tehdy, jestliže se soutěžitel dopustí jednání, které zřetelně směřuje k omezení soutěže.[29]

[29] Nicholas Economides, „Competition Policy In Network Industries: An Introduction," Stern School of Business, New York University, 2003.

VI. Nové přístupy k hodnocení dynamických trhů

1. Teorie dynamické soutěže

Na otázku, co je dynamická soutěž, se nabízí více odpovědí a nepanuje shoda, která z nich je nejpřesnější nebo alespoň prakticky nejužitečnější. Autorem nejznámější teorie je Joseph Schumpeter. Ten nepopíral, že se mohou vyskytnout podmínky blížící se dokonalé soutěži, zdůrazňoval ale, že pro uspokojování lidských potřeb mají význam především nové výrobky, nové technologie a nové způsoby organizace obchodu.

Nejznámějšími následovníky Schumpetera jsou stoupenci tzv. evolučních teorií soutěže. Někteří z Schumpeterových spolupracovníků rozvinuli komplementární teorie, které hospodářskou soutěž pojímají jako proces získávání nových poznatků. Studium interakce soutěžních vztahů a technologických změn kromě toho vedlo k oživení zájmu o teorie vývojové závislosti (path dependence), podle kterých i zanedbatelné faktory v počáteční fázi vývoje trhu mohou vést k pozdějším rozsáhlým a obtížně předvídatelným změnám. Z méně známých směrů lze zmínit např. teorie strategického řízení, které explicitně na soutěž nahlížejí jako na dynamický proces.

Žádné z uvedených pojetí si však nemůže činit nárok na postižení všech aspektů tržní reality. Pro náš účel jsou podstatné zejména ty z nich, které mohou podat praktickou odpověď na otázky, jenž jsou předmětem našeho zájmu.

Nelze např. popřít, že ekonomické teorie zabývající se inovační činností znamenají nezanedbatelný přínos pro soutěžní politiku, protože nabízejí komplexní pohled na inovační proces a jeho důsledky. My však musíme soustředit pozornost na soutěžní otázky tak bezprostředně, jak je to jen možné, protože přílišná šíře náhledu obvykle znemožňuje aplikovat teoretické poznatky v praxi.

Především je třeba mít na paměti, že ačkoli jsou ekonomické teorie cenným zdrojem myšlenek, k jejich přenesení do praxe je třeba vždy učinit analytický krok, který z abstraktních pouček učiní instrumentárium použitelné pro rozhodnutí toho kterého případu.

2. Dynamický přístup k hodnocení vertikálních spojení

2.1 Úvod

Důležitým nástrojem pro posuzování strukturálních změn vyvolávaných

vertikálním spojováním je zejména vytyčení hranic inovačních trhů; jedná se o identifikaci faktorů, které podněcují výzkum, vývoj a tempo inovačních aktivit. Vliv fúze na inovace se obecně může projevit buď jako soutěžní účinek na nižší úrovni produkčního řetězce anebo jako strukturální účinek na vyšší úrovni inovačního trhu.

2.2 Struktura trhu a inovace

Třebaže není pochyb o užitečnosti inovací, jinak tomu je, pokud jde o otázku, zda intenzita soutěže je přímo úměrná míře investic do výzkumu a vývoje. Význam technologických inovací v tržní ekonomice zdůrazňoval především Joseph Schumpeter. Schumpeter rozvinul hypotézu, že existuje příčinný vztah mezi koncentrací trhu a mírou inovací,[30] a právě monopol má mít nejlepší předpoklady pro absorbci rizika a nákladů na inovační aktivity.

V Schumpeterově tržním modelu existuje jen málo přímé (okamžité) konkurence mezi lídrem trhu a ostatními soutěžiteli, konkurenční boj však probíhá na poli inovací, což pozici lídra trvale ohrožuje. Zastánci liberálního přístupu v antimonopolní politice tvrdí, že fúze představují jen malou újmu soutěži, protože ohrožení pozic přichází odjinud – z oblasti technologických inovací. Spojování soutěžitelů může být v důsledku prospěšné, protože umožňuje agregaci komplementárních zdrojů, čímž dochází ke zrychlování inovačního procesu. Administrativní zásahy na inovačních trzích tak nemohou znamenat nic více než riziko podvázání inovačních aktivit a nebezpečí jiných nepředvídatelných důsledků.

Autorem odlišného přístupu je Kenneth J. Arrow, který ukázal, že monopol nedává takovou motivaci investovat do inovací, jako má nováček na trhu nebo soutěžitel na konkurenčním trhu.[31] Arrowův model spočívá na několika předpokladech. Za prvé, inovace, o kterou se jedná, se musí vztahovat k existujícímu produktu nebo výrobnímu procesu, jinak se i monopolista bude chovat podobně jako nováček. Inovace musí nahrazovat stávající produkt nebo snižovat jeho výrobní náklady. Za druhé, struktura trhu (ať se jedná o monopolní nebo konkurenční trh) neomezuje možnost přivlastnit si výsledek inovační činnosti; jedná se tedy především o trhy, na kterých lze bez větších obtíží dosáhnout patentové ochrany. A za třetí, neexistují zásadní rozdíly v efektivitě inovačních aktivit mezi jednotlivými soutěžiteli.

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[30] Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, s. 106, 1950.

[31] Kenneth J. Arrow, „Economic Welfare and the Allocation of Resources to Innovation", The Rate and Direction of Inventive Activity, s. 609-625, National Bureau of Economic Research ed., 1962.

Arrowovy teorie byly postupně rozvíjeny dalšími autory.[32] S touto problematikou souvisejí také práce, které objasňují vztahy mezi strukturou trhů a mírou inovací u společných podniků založených za účelem inovací. Výzkum a vývoj podle těchto závěrů strádá v prostředí charakterizovaném vysokou mírou koncentrace.

Inovace odměňují monopolistu tím, že mu umožňují dosáhnout dalšího zisku. Co monopol od inovací naopak odrazuje, je perspektiva, že nového zisku bude třeba dosáhnout na úkor dosavadního zisku a že stávající produkce zastará. Takové nebezpečí naopak nehrozí nováčkům nebo soutěžitelům působícím na konkurenčním trhu, kteří tudíž mohou čerpat celou hodnotu inovace; a i kdyby tomu tak nebylo, Arrow dokázal, že nejméně, čeho mohou tito soutěžitelé dosáhnout, je zisk, kterého by za stejných podmínek dosáhl monopolista.

Na tyto úvahy navázali další autoři.[33] Stěžejní myšlenkou je přitom to, že zisky, které monopol dosahuje, jsou inovacemi spíše ohrožovány než zvyšovány. Vliv hospodářské soutěže na inovační činnost ovšem závisí na řadě dalších okolností daných specifiky toho kterého odvětví a toho kterého soutěžitele. To pochopitelně komplikuje obecnou analýzu.

2.3 Obtíže prosazování soutěžního práva v inovačním prostředí

Vezmeme-li v úvahu otázku technologických inovací, mění se tradiční přístup posuzování spojování soutěžitelů ve dvou podstatných směrech. Především je třeba mít na paměti, že inovační přínos se může dostavit nejdříve po uskutečnění integrace. To znamená, že předpověď vývoje inovační činnosti musí být součástí hodnocení účinků spojení, třebaže by mělo jít o klasické posuzování výkonnosti trhu, jako je např. statická analýza cenotvorby. Tak např. za indikátor tržní síly se standardně považuje velikost tržního podílu. Zásadní inovace ale může vést k prudkému propadu soutěžitele, který by

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[32] Partha Dasgupa & Joseph E. stiglitz, „Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1, 1980; Tom K. Lee & Louis L. Wilde, „Market Structure and Innovation: A Reformulation," 94 Q.J. Econ. 429, 1980; Glenn C. Loury, „Market Structure and Innovation," 93 Q.J. Econ. 395, 1979. Jennifer F. Reinganum, „The Timing of Innovation: Research Development, and Diffusion," Handbook of Industrial Organization, s. 849, Richard L. Schumalensee & Robert D. Willig eds., 1989.

[33] Viz např. Partha Dasgupta & Joseph E. Stiglitz, „Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1 (1980); Tom K. Lee & Louis L. Wilde, „Market Structure and Innovation: A Reformulation, 94 Q.J.Econ 429 (1980); Glenn C. Loury, „Market Structure and Innovation," 93 Q.J. Econ 395 (1979); Jennifer F. Reinganum, The Timing of Innovation: Research, Development, and Diffusion, in Handbook of Industrial Organization 849 (Richard L. Schmalensee & Robert D. Willig eds., 1989).

se podle velikosti tržního podílu mohl nadále zdát jako dominantní. Michael L. Katz a Howard A. Shelanski[34] označují tento jev jako „efekt inovačního vlivu".

Inovace ovšem mohou být samy o sobě důležitým faktorem výkonu trhu, který může být ovlivňován integrováním soutěžitelů. To je druhý způsob, jak se inovační aktivity odrážejí na antimonopolní politice. Tím, že integrace souvisejí s mírou inovací, může mít spojení podstatný příznivý vliv na výkonnost trhu a užitek pro spotřebitele, přestože krátkodobý efekt se nemusí jevit jako pozitivní. Spojující se soutěžitelé obvykle argumentují, že integrace jim umožní inovovat, zatímco antimonopolní úřady kontrují, že integrace povede ke ztrátě konkurence, která by byla inovačně příznivějším prostředím. Právě zjištění, zda integrace povede ke zvýšení nebo snížení míry inovační činnosti, by mělo být předmětem pozornosti antimonopolních úřadů. Michael L. Katz a Howard A. Shelanski[35] nazývají tento jev jako „efekt inovačních motivací".

K hodnocení „efektu inovačních motivací" je třeba se ptát, jak ovlivní změna struktury trhu celkový užitek spotřebitelů plynoucí z povahy a míry inovací (které mohou snížit výrobní náklady nebo přinést nové produkty na trh). U „efektu inovačního vlivu" je třeba zaujmout opačný přístup. Nejde o to, jak struktura trhu ovlivní inovace, nýbrž jak inovace ovlivňují strukturu trhu a soutěž. V důsledku kalkulace inovací se může stát statické hodnocení struktury trhu nespolehlivým nebo zcela nepoužitelným. Vliv inovací může být rozhodujícím faktorem pro posouzení, zda zasáhnout proti integraci a jaký zvolit prostředek nápravy.

2.4 Účinky inovační činnosti na trhu s tradiční strukturou

2.41 Současný a budoucí trh

Definice trhu je důležitým prvkem soutěžní analýzy; jejím předmětem je odvozování pravidel soutěže ze vzorců chování spotřebitelů. Účelem definice trhu je vymezení relevantního trhu výrobků nebo služeb, na kterém mohou soutěžitelé na sebe navzájem vykonávat tlak, a tak ovlivňovat své chování.[36]

Základním problémem dynamického trhu je nestabilita tržního prostředí.

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[34] Michael L.Katz and Howard A. Shelanski, „Mergers and Innovation," Professor of Law, University of California, Berkeley, s. 13, 2006.

[35] Michael L.Katz and Howard A. Shelanski, „Mergers and Innovation," Professor of Law, University of California, Berkeley, s. 13, 2006.

[36] Europe Economics, „The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, s. 38-39 (12. září 2003).

Každá technologická změna znamená zároveň změnu v portfoliu produktů, způsobu produkce nebo cen produktů a tím také změnu vzorců tržního chování spotřebitelů a soutěžních tlaků. V důsledku toho musí odpovídající definice dynamického trhu spočívat na analýze účinků inovačního procesu pramenících z technologických změn a na analýze vzorců tržního chování spotřebitelů.

Takové hodnocení však ještě nemusí zohledňovat vliv integrace na zboží, které sice ještě nebylo uvedeno na trh, jehož uvedení lze ale s vysokou pravděpodobností očekávat – i tato skutečnost má význam pro analýzu trhu. Podobně se může ukázat jako nedostatečné hodnotit pouze vývoj trhu, na kterém spojovaní soutěžitele aktuálně působí, jestliže lze očekávat, že se předmětem jejich zájmu v budoucnu stanou další trhy.

2.5 Účinek vertikálních spojení na inovační činnost

2.51 Pojetí inovačních trhů v právu USA

Diskuze o inovačních trzích se v USA v polovině 90. let minulého století rozšířila také do oblasti soutěžního práva: tvrdilo se, že antimonopolní úřady by měly při analýze účinků spojení zohledňovat také perspektivní trhy. Článek 7 Claytonova zákona zakazuje spojení, která by mohla ve značné míře snížit hospodářskou soutěž anebo znamenat vytvoření monopolu. Antimonopolní odbor Ministerstva spravedlnosti USA a Federální obchodní komise zahrnovaly pod článek 7 obecně ta spojení, která pravděpodobně ovlivní ceny zboží na relevantních trzích. Je totiž jednodušší hodnotit účinek spojení na základě kvantifikovatelných kritérií, než provádět komplikovanou analýzu víceúrovňové soutěže.

Analýza inovačních trhů zdůrazňuje důležitost mimocenové, technologické konkurence, čímž se snaží chránit dynamickou stránku ekonomické efektivity, zejména pokud jde o průmysl vyspělých technologií. K formálnímu zohlednění specifik inovačních trhů došlo v metodice prosazování práva na ochranu hospodářské soutěže až v roce 1995, když v rámci Intellectual Property Guidelines byly rozlišeny tři trhy: trhy výrobků a služeb, technologické trhy a inovační trhy.

Intellectual Property Guidelines definovaly inovační trh následujícím způsobem:

> „Inovační trh sestává z výzkumných a vývojových aktivit zaměřených na produkci nového nebo zlepšeného zboží anebo nových nebo zlepšených postupů a z blízkých substitutů takového výzkumu a vývoje. Blízkými substituty se rozumí výzkumné a

vývojové aktivity, technologie a zboží, které významně omezují výkon tržní síly související s výzkumem a vývojem, např. omezením možnosti a motivace hypotetického monopolu zpomalit průběh výzkumu a vývoje..."

V této definici je hned několik pozoruhodných míst. Výkon tržní síly ze strany hypotetického monopolu je vztažen na zpomalování výzkumu a vývoje a nikoli na zvyšování cen. Inovační trhy se neváží k trhům produktů, nýbrž k trhům, na kterých se soutěžitel chystá uplatnit svou inovaci.[37]

Vliv spojení soutěžitelů na inovační činnost je patrný jednak na trhu produktů a jednak na vyšší úrovni inovačního trhu (jako důsledek strukturálních změn). Třebaže spojení nemusí ovlivňovat probíhající nebo potencionální soutěž na kterémkoli z relevantních trhů, může znevýhodnit spotřebitele tím, že dojde k omezení soutěže na poli inovací.[38] Ve srovnání s jinými formami necenové konkurence je užitek spotřebitelů plynoucí z inovačních aktivit jednodušeji doložitelný. Inovace znamenají nové produkty a spotřebitelé budou nové produkty kupovat jen tehdy, když z nich budou mít užitek. Pozice spotřebitelů se zlepšuje s množstvím inovací, pokud zároveň nedojde k omezení dodávek nebo růstu cen jiných výrobků nebo služeb.[39]

Aplikace analýzy inovačních trhů se ale v praxi potýká s mnohými obtížemi. Základním problémem je vymezit to, co má být předmětem analýzy – inovace se totiž obvykle objevují v rozmanitých formách a mají různé zdroje.

Autory koncepce inovačních trhů jsou pracovníci amerického Ministerstva spravedlnosti Richard Gilbert a Steven Sunshine.[40] Podle nich jsou těžištěm analýzy spojení na inovačním trhu tři úkoly. Jednak je třeba prověřit, zda spojený soutěžitel bude vůbec s to ovlivnit agregovanou tržní míru investic do výzkumu a vývoje. Dále je nutné objasnit, zda spojený soutěžitel bude mít důvod ke snížení inovačního výkonu. A nakonec je třeba určit, zda se integrace odrazí na efektivitě nákladů na výzkum a vývoj. Jedná se o podobný postup jako u hodnocení efektivity produkce. Pokud budou integrující se soutěžitelé disponovat komplementárními výrobními kapacitami, mohou těžit z úspor z rozsahu. Omezení nadbytečných nákladů na výzkum a vývoj povede k

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[37] Davis, R.W., Innovation markets and merger enforcement: current practice in perspective, Antitrust Law Journal, 71 (2003).

[38] Richard J. Gilbert and Steven C. Sunshine, „Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. 569 (1995).

[39] Richard J. Gilbert and Steven C. Sunshine, id. s. 573.

[40] Richard J. Gilbert and Steven C. Sunshine, „Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. s. 587-594 (1995).

redukci nákladů, nikoli však k redukci míry inovací.

Přes opatrný přístup, který Gilbert a Sunshine zvolili, se jejich koncepce setkala s převážně negativním ohlasem.[41] Tvrdilo se např., že konstrukce inovačních trhů bude ve většině případů zbytečná a nepřinese nic více než analýzu potencionální soutěže na trzích produktů, zatímco v ostatních případech bude jen předpovídáním nepředpověditelného.[42] Profesor Dennis Carlton prohlásil před Federální obchodní komisí, že v praxi bude velmi obtížné určit, které ze spojení mají být blokovány z inovačních důvodů, a že koncepce inovačních trhů by mohla snadno vést k prudkému snížení předvídatelnosti aplikace práva na ochranu hospodářské soutěže.[43]

V kontextu článku 7 Claytonova zákona mohou být úvahy o omezování konkurence na inovačních trzích zohledněny přinejmenším třemi způsoby. Za prvé, omezení míry inovací lze charakterizovat jako soutěžní účinek na trhu výrobků a služeb.[44] Za druhé, utlumení inovační aktivity může být součástí „potencionálního omezení soutěže".[45] A za třetí, inovační trh představuje pomůcku pro určení oblastí, kde navržené spojení může zapříčinit omezení konkurence na trhu produktů.[46]

Ačkoli ztráta inovačního potenciálu je podle dosavadní judikatury nepochybně antisoutěžním účinkem, tradiční analýza nemusí odhalit všechny trhy, které mohou být tímto způsobem dotčeny. Navíc, i kdyby bylo možné všechny dotčené trhy takto identifikovat, nemusí jít – posuzováno tradičními způsoby – o porušení pravidel soutěže, jestliže spojovaní soutěžitelé nejsou přímými konkurenty a nejsou ani ve vertikálním tržním vztahu.

2.52 Inovační trhy a přístup EU

Evropská komise přijala dne 28. listopadu 2007 Pokyny pro spojované společnosti, které jsou ve vertikálním nebo konglomerátním vztahu (Guidelines for

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[41] Ronald W. Davis, „Innovation Markets and Merger Enforcement: Current Practice in Perspective," 71 Antitrust L.J. 677 (2003).

[42] Richard T. Rapp, „The Misapplication of the Innovation Market Approach to Merger Analysis," 64 Antitrust L.J. 19 (1995).

[43] Dennis W. Carlton, „Antitrust Policy Toward Mergers when Firms Innovate: Should Antitrust Recognize the Doctrine of Innovation Market?" Slyšení před Federální obchodní komisí o globální a inovační konkurenci (25. října 1995).

[44] PPG Indus., 628 F. Supp. 885.

[45] Institut Merieux S.A., 5 Trade Reg. Rep. (CCH) ¶ 22,779, 22,505 (1990).

[46] United States v. General Motors Corp., No. 93-530 (D.Del. 16. listopadu 1993).

merging companies with vertical and conglomerate relationship) (IP/07/1780). Pokyny zdůrazňují, že Komise bude brát v úvahu jak možné antisoutěžní účinky vertikálních spojení, tak přínosy spojení (doložené stranami).[47] Komise kromě toho může rozhodnout, že spojení je do té míry tržně přínosné, že nejsou dány důvody pro jeho neslučitelnost se společným trhem podle článku 2 odst. 3 nařízení o spojování podniků. Má jít především o případy, kdy přínosy spojení s vysokou pravděpodobností zvýší schopnost a motivaci spojeného soutěžitele jednat prosoutěžně ve prospěch spotřebitelů, čímž dojde k vyvážení negativních integračních účinků.[48]

Pokud jde o obecný přístup k inovačním trhům, Pokyny pro nehorizontální spojení stanoví, že „účinná soutěž přináší spotřebitelům užitek, např. nižší ceny, vyšší kvalitu produkce, široký výběr zboží a služeb a inovace... Zvýšení tržní síly za těchto podmínek znamená možnost jednoho nebo více soutěžitelů zvyšovat ceny, snižovat objem a kvalitu produkce, zužovat výběr zboží a služeb a redukovat míru inovací, to vše pro zajištění vlastního zisku...".[49] A dále „...úsilí o zvýšení odbytu na jedné úrovni trhu (např. zvýšení kvality služeb nebo míry inovací) může integrovanému soutěžiteli přinést vyšší zisk na jiných úrovních trhu". Tím Komise zřetelně dává najevo, že inovace budou hrát důležitou roli při posuzování celkového užitku dosahovaného spojením.

Přístup k inovačním trhům v právu EU tak poměrně výrazně zohledňuje také otázku přínosů, které může spojení soutěžitelů znamenat.

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[47] Guidelines on the assessment of non-horizontal mergers under the Council regulation on the control of concentrations between undertakings, IV(28).

[48] Id. IV (52).

[49] Guidelines on the assessment of non-horizontal mergers under the Council regulation on the control of concentrations between undertakings, II. § 10 (2007).

VII. Běžný regulační systém vertikálního spojování v právu USA a EU

1. Právo USA

V americkém právu lze vertikální spojení posuzovat podle řady federálních předpisů, zejména podle Shermanova zákona, Claytonova zákona a zákona o Federální obchodní komisi. Určité právní nástroje existují také na úrovni členských států federace.

1.1 Článek 7 Claytonova zákona

Kontrola spojování soutěžitelů má v USA (ve srovnání s EU) poměrně dlouhou historii. Základní ustanovení soutěžního práva týkající se jak fúzí tak akvizic a zakládání společných podniků je článek 7 Claytonova zákona (přijatého v roce 1914 a novelizovaného v roce 1950), který zakazuje spojování omezující hospodářskou soutěž. Článek 7, jak nabyl účinnosti v roce 1914, zní:

> Žádná společnost zabývající se obchodní činností nesmí nabýt, ať přímo nebo nepřímo, zcela nebo zčásti, akcie anebo jiný podílový kapitál jiné společnosti, která se zabývá obchodní činností, jestliže by účinkem mohlo být podstatné snížení soutěže mezi společností, jejíž kapitál je nabýván, a společností, která kapitál nabývá, nebo omezení obchodní činnosti v kterékoli oblasti nebo společenství anebo tendence k vytvoření monopolu v kterémkoli odvětví obchodní činnosti.[50]

Původně se zdálo, že toto znění omezuje aplikaci článku 7 pouze na horizontální spojení. Proto byla v roce 1950 přijata novela, která do dosahu ustanovení výslovně zahrnula také nabytí jmění jiného soutěžitele a vypustila spornou formulaci, která vedla k restriktivnímu výkladu.

V době platnosti původního znění článku 7 se prakticky nevyskytovaly pokusy zasáhnout proti vertikálním spojením. Přístup se změnil s rozhodnutím ve věci *United States v. E.I. du Pont de Nemours & Co.*[51], podle kterého se článek 7 na vertikální

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[50] Clayton Act, ch. 323, §7, 38 Stat. 731 (1914) (aktuální znění: 15 U.S.C. § 18 (1976)).

[51] 353 U.S. 586 (1957).

integraci přece jen vztahuje.[52] Nejvyšší soud v této věci podrobil článek 7 legislativně-historickému výkladu a shledal, že zavedený způsob aplikace nepostihuje celou jeho šíři. Celkem se totiž jedná o tři zákazy; dovolena nejsou ani spojení, která jen omezují obchod nebo směřují k monopolizaci. Nejvyšší soud konstatoval, že tyto zákazy jsou použitelné na všechny typy spojování; účelem novelizace z roku 1950 pak nebylo nic více než „vyjasnění, že článek 7 se týká kteréhokoli spojení nebo akvizice, ať vertikální, konglomerátní nebo horizontální....“[53]

Stejný závěr vyplynul i z věci *Brown Shoe Co. v. United States.*[54] Nejvyšší soud sice uvedl, že se dosah článku 7 v původním znění zdál být omezen na nabytí, která „mohou vést k podstatnému snížení soutěže mezi společností, jejíž kapitál je nabýván, a společností, která kapitál nabývá...“[55], v poznámce pod čarou ale připustil nesprávnost původního výkladu a ztotožnil se s rozhodnutím ve věci *du Pont*:

> Vypuštěním formulace „nabytí – nabývaný“ z původního znění [...] Kongres zamýšlel vyjasnit, že článek 7 se vztahuje nejen na spojení mezi přímými soutěžiteli, ale také na vertikální a konglomerátní spojení, jejichž účinkem může být omezení konkurence v kterékoli oblasti obchodu a v kterékoli části země.[56]

To znamenalo definitivní konec pochybností o aplikovatelnosti článku 7 Claytonova zákona na vertikální integraci. Obecné podmínky stanovené článkem 7 však zůstávají stejné. Ustanovení není možné použít, jestliže (1) některý ze spojovaných soutěžitelů není korporací[57]; (2) obchodní činnost některého ze spojovaných soutěžitelů nepřesahuje hranice jednoho členského státu USA[58]; (3) transakce, která je důvodem spojení, není akvizicí[59]; (4) předmětem akvizice nejsou ani akcie ani aktiva; nebo (5)

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[52] *Id.*, 590-92.

[53] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957).

[54] 370 U.S. 294 (1962).

[55] 370 U.S. 312.

[56] Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

[57] 15 U.S.C. § 18 (1976).

[58] United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 275-76 (1975).

[59] United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-83 (S.D.N.Y. 1960); Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 374-76 (N.D. Ga. 1975), potvrzeno: 535 F. 2d 313 (5th Cir. 1976).

transakce je vyňata z působnosti článku 7.[60] Kontrola spojení, která nesplňují tato kritéria, se musí zakládat na jiných předpisech, zejména na článcích 1 až 3 Shermanova zákona, článku 5 zákona o Federální obchodní komisi a zákonech členských států. Tyto předpisy obvykle vyžadují splnění přísnějších požadavků než Claytonův zákon, a proto zpravidla přicházejí na řadu až tehdy, když je Claytonův zákon mimo hru.

1.2 Shermanův zákon

Spojení, převzetí soutěžitele anebo společné podniky mohou naplňovat rovněž skutkovou podstatu článků 1[61] nebo 2[62] Shermanova zákona jako bezdůvodné omezování soutěže nebo pokus o monopolizaci. Článek 1 Shermanova zákona stanoví, že „všechny dohody, trusty a jiné formy spojení anebo spolčení s úmyslem omezit obchod nebo podnikání mezi členskými státy nebo se zahraničím se považují za protiprávní…"[63] Standard Shermanova zákona se tradičně považuje za přísnější než pouhé „zárodečné stádium" omezení soutěže, které je již dostatečným důvodem pro zásah podle Claytonova zákona – protiprávní je pouhá tendence k podstatnému snížení soutěže nebo k vytvoření monopolu. Raná judikatura na základě Shermanova zákona působila dojmem, že zakázaná jsou všechna spojení mezi velkými soutěžiteli[64]. Ve věci *United States v. Columbia Steel Co.*[65] však Nejvyšší soud vyjasnil, že obvyklý „test racionality" je třeba aplikovat i v případě spojení podle článku 1 Shermanova zákona, tedy že za zakázaná lze považovat jen ta spojení, která nejsou podložena oprávněnými důvody. Ačkoli jedno ze stanovisek Nejvyššího soudu naznačovalo, že naplnění tohoto

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[60] Článek 7 vyjímá ze své působnosti nabytí akcií „výlučně za účelem investice" a dovoluje zakládání dceřiných společností za účelem podpory podnikání soutěžitele.

[61] Všechny dohody, trusty a jiné formy spojení anebo spolčení s úmyslem omezit obchod nebo podnikání mezi členskými státy nebo se zahraničím se považují za protiprávní. Osoba, která se účastní nezákonných dohod, spojení nebo spolčení, se dopouští trestného činu a může být potrestána pokutou až do 10.000.000 USD, je-li korporací, nebo 350.000 USD v ostatních případech anebo trestem odnětí svobody až na tři roky, případně obojím.

[62] Osoba, která monopolizuje, pokouší se monopolizovat anebo která se účastní na spojení nebo se spolčí s jinou osobou či osobami za účelem monopolizace kteréhokoli segmentu obchodu nebo podnikání mezi členskými státy nebo se zahraničím, se dopouští trestného činu a může být potrestána pokutou až do 10.000.000 USD, je-li korporací, nebo 350.000 USD v ostatních případech anebo trestem odnětí svobody až na tři roky, případně obojím.

[63] 15 U.S.C. § 1 (1976).

[64] United States v. Southern Pac. Co., 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pac. R.R., 226 U.S. 61 (1912); Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

[65] 334 U.S. 495 (1948).

standardu by nemuselo být až tak obtížné[66], pozdější praxe ukázala, že je jednodušší vyhovět požadavkům Claytonova zákona než „testu racionality" podle Shermanova zákona.[67]

Také článek 2 Shermanova zákona lze použít k intervenci proti spojením, která se vymykají Claytonovu zákonu. Zaměření tohoto ustanovení je podstatně jiné, než je tomu u článku 7 Claytonova zákona, a proti nebylo ani sporu o jejich vzájemný vztah.[68] Článek 2 především stanoví, že osoba, která monopolizuje, pokouší se monopolizovat, anebo která se účastní na spojení nebo se spolčí s jinou osobou či osobami za účelem monopolizace kteréhokoli segmentu obchodu nebo podnikání mezi členskými státy nebo se zahraničím, se dopouští trestného činu..."[69] Integrace se tak dostává do rozporu s článkem 2 jen tehdy, jestliže vyústí v monopol nebo je pokusem o monopolizaci trhu nebo spolčením za tím účelem. Zachytit spojení tímto filtrem je evidentně obtížnější než za použití Claytonova zákona.

1.3 Pokyny k posuzování nehorizontálních spojení (Non-horizontal Merger Guidelines)

Teorie omezování hospodářské soutěže prostřednictvím vertikálního spojování, především pokud jde o uzavírání trhu a nedovolené dohody, jsou podrobně rozebírány v Pokynech k posuzování nehorizontálních spojení vydaných v roce 1984.

Aby bylo možné hovořit o uzavírání trhu, vyžaduje se (nikoli však postačuje) splnění tří následujících podmínek: (a) stupeň vertikální integrace mezi trhy musí dosahovat takové intenzity, že soutěžitel – aby mohl vstoupit na primární trh – musí zároveň vstoupit na sekundární trh; (b) nutnost vstupu na sekundární trh musí výrazně nebo alespoň nezanedbatelně znesnadňovat vstup na primární trh; (c) struktura a další vlastnosti primárního trhu musejí nahrávat antisoutěžnímu jednání do té míry, že obtížnost vstupu na sekundární trh může ovlivnit výkonnost primárního trhu.

Prosazování amerického soutěžního práva ve vztahu vertikálnímu spojování je

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[66] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669-70 (1964).

[67] United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 343 n.16 (E.D. La. 1968).

[68] Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 794 (S.D.Tex. 1971), potvrzeno: 476 F. 2d 989 (5th Cir. 1973).

[69] 15 U.S.C. § 2 (1976).

obecně považováno (ve srovnání s jinými jurisdikcemi) za kolísavé. Před koncem 70. let minulého století se postihovala široká škála vertikálních spojení bez ohledu na to, do jaké míry byla jednotlivá spojení skutečnou příčinou omezování soutěže.[70] Poté se přístup soudů změnil a odpor k vertikálním spojením polevil i v případě spojení poměrně vysokých tržních podílů.[71] Vrcholem této tendence byla revize Pokynů k posuzování spojení Ministerstva spravedlnosti USA z roku 1982, která znamenala výraznou liberalizaci náhledu na vertikální integraci, takže byl dán volný průchod téměř každému vertikálnímu spojení. V poslední době se úřady pod vlivem nových ekonomických poznatků v některých případech vracejí k restriktivnímu přístupu[72].

2. Právo EU

2.1 Úvod

Základními ustanoveními Smlouvy ES pojednávajícími o hospodářské soutěži jsou (i) článek 81, který zakazuje dohody mezi podniky, rozhodnutí sdružení podniků a jednání ve vzájemné shodě, které by mohly ovlivnit obchod mezi členskými státy a jejichž cílem nebo výsledkem je vyloučení, omezení nebo narušení hospodářské soutěže na společném trhu, s tím, že Evropská komise může udělit výjimku z tohoto zákazu, a (ii) článek 82, který zakazuje zneužití dominantního postavení na společném trhu nebo jeho podstatné části jedním nebo více podniky, pokud to může ovlivnit obchod mezi členskými státy. Regulační rámec pro provedení článků 81 a 82 obsahuje nařízení Rady (ES) č. 1/2003[73].

Nařízení o spojování podniků[74] zakazuje jakékoli spojení, které zásadně naruší účinnou hospodářskou soutěž na společném trhu nebo na jeho podstatné části, zejména v důsledku vzniku nebo posílení dominantního postavení (článek 2 odst. 3 nařízení ES s spojování podniků).

Zkušenosti Komise jsou sice poměrně krátké, přesto je však užitečné

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[70] Brown Shoe Co. v. United States, 370 U.S. 294 (1962) a Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[71] Fruehauf Corp. v. FTC, 603F.2d 345 (1979).

[72] Cadence Corp., C-3761 (7. srpna 1997); Silicon Graphics Corp., C-3626 (14. listopadu 1995).

[73] Nařízení Rady (ES) č. 1/2003 ze dne 16. prosince 2002 o provádění pravidel hospodářské soutěže stanovených v článcích 81 a 82 Smlouvy.

[74] Nařízení Rady (ES) č. 139/2004 ze dne 20. ledna 2004 o kontrole spojování podniků (nařízení ES o spojování).

analyzovat, jak se v průběhu doby měnil vztah soutěžní politiky EU k vertikálnímu spojování. Je zajímavé, že legislativa věnuje vertikálnímu spojování takřka stejnou pozornost jako spojování horizontálnímu. Např. informační požadavky kladené na oznamující strany se poměrně extenzivně týkají všech vertikálních a horizontálních vztahů mezi stranami.

Problematika vertikální integrace je dokonce jedním ze stěžejních bodů nařízení o spojování podniků. Jak vyplývá z článku 2[75], ústředním tématem vertikálního spojování je otázka přístupu na trh. Hodnotí-li Komise transakci, musí vzít v úvahu „tržní postavení dotčených podniků a jejich hospodářskou a finanční sílu, stávající alternativy pro dodavatele a uživatele, jejich přístup k dodávkám nebo na trh, právní nebo jiné překážky vstupu na trh...."

Pozornost Komise je tak směrována k tradičnímu přístupu zdůrazňujícímu vylučovací účinky vertikálních spojení, avšak jen potud, pokud může být důsledkem těchto účinků vytvoření nebo posílení dominantního postavení. Dominantní postavení je skutečně jediným významným kritériem hodnocení spojení soutěžitelů v EU.

Právní úprava je doplňována zvláštními předpisy týkajícími se jednotlivých hospodářských sektorů a také doporučeními a pokyny, které sice nejsou právně závazné, ale jsou Komisí respektovány. Doporučení a pokyny jsou významným vodítkem pro hodnocení soutěžních účinků spojení především v praxi. Bod 28 preambule nařízení ES o spojování podniků stanoví, že „za účelem vyjasnění a vysvětlení hodnocení spojení

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[75] Článek 2 nařízení ES o spojování zní:

1. Spojení, na něž se použije toto nařízení, se hodnotí v souladu s cíli tohoto nařízení a následujícími ustanoveními, aby se zjistilo, zda jsou či nejsou slučitelná se společným trhem.

Při tomto hodnocení Komise vezme v úvahu:

a) potřebu zachování a rozvoje účinné hospodářské soutěže na společném trhu, mimo jiné vzhledem ke struktuře všech dotčených trhů a skutečné nebo možné soutěži ze strany podniků majících své sídlo uvnitř nebo mimo Společenství;

b) tržní postavení dotčených podniků a jejich hospodářskou a finanční sílu, stávající alternativy pro dodavatele a uživatele, jejich přístup k dodávkám nebo na trh, právní nebo jiné překážky vstupu na trh, směry vývoje nabídky a poptávky, pokud jde o příslušné zboží a služby, zájmy zprostředkovatelů a konečných spotřebitelů a technický a hospodářský vývoj, je-li to ku prospěchu spotřebitelů a nebrání to hospodářské soutěži.

2. Spojení, které zásadně nenaruší účinnou hospodářskou soutěž na společném trhu nebo na jeho podstatné části, zejména v důsledku vzniku nebo posílení dominantního postavení, bude prohlášeno za slučitelné se společným trhem.

3. Spojení, které zásadně naruší účinnou hospodářskou soutěž na společném trhu nebo na jeho podstatné části, zejména v důsledku vzniku nebo posílení dominantního postavení, bude prohlášeno za neslučitelné se společným trhem.

prováděného Komisí podle tohoto nařízení, je vhodné, aby Komise zveřejnila pokyny, které by poskytly spolehlivý ekonomický rámec pro hodnocení spojení za účelem určení, zda mohou nebo nemohou být prohlášena za slučitelná se společným trhem."

V neposlední řadě velmi důležitý zdroj porozumění hmotnému právu představují rozsudky Soudu prvního stupně a Evropského soudního dvora. Jedná se zejména o výklad článků 81 a 82 Smlouvy ES, protože z rozhodnutí Komise bývá soudně přezkoumáváno jen velmi malé procento.

2.2 Články 81 a 82 Smlouvy ES

Článek 82 Smlouvy ES zakazuje jakékoli zneužití dominantního postavení jedním nebo více soutěžiteli na podstatné části společného trhu, které by mohlo ovlivnit obchod mezi členskými státy. Článek 82 Smlouvy ES je třeba aplikovat a vykládat stejně jako článek 81 ve světle úkolu Společenství podle článku 3 písm. g) Smlouvy ES, tedy v zájmu vytvoření stému zajišťujícího účinnou hospodářskou soutěž na společném trhu.

Článek 81 zakazuje vyloučení, omezení nebo narušení hospodářské soutěže dohodami nebo jednáním ve vzájemné shodě bez ohledu na tržní sílu zúčastněných podniků. Naopak článek 82 se vztahuje pouze na soutěžitele, kteří disponují odpovídající tržní silou, a jeho účelem je zabránit zneužití tržní síly k újmě hospodářské soutěži. Zakazuje se zneužití jak jednostranným jednáním, tak souvisejícími jednáními více soutěžitelů. V tomto případě (narozdíl od článku 81) není třeba jednání více soutěžitelů ve shodě prokazovat.

2.3 Pokyny EU k nehorizontálním spojením

Článek 2 nařízení Rady (ES) č. 139/2004 ze dne 20. ledna 2004, o kontrole spojování podniků, přikazuje, aby Komise hodnotila spojení, na něž se nařízení použije, s cílem zjistit, zda je v souladu se společným trhem. Za tímto účelem musí Komise podle článku 2 odst. 2 a 3 posoudit, zda spojení může podstatně narušit účinnou soutěž, zvláště v důsledku vytvoření nebo posílení dominantního postavení na trhu nebo jeho podstatné části.

13. února 2007 Komise zahájila veřejné konzultace ve věci návrhu Pokynů k hodnocení nehorizontálních spojení podle nařízení Rady (ES) č. 139/2004, o kontrole spojování podniků (Commission Guidelines on the assessment of non-horizontal

mergers). 28. listopadu 2007 pak Komise přijala Pokyny ke spojování společností ve vertikálních nebo konglomerátních vztazích (Guidelines for merging companies with vertical and conglomerate relationship) (IP/07/1780).

Jak plyne již z názvu, předmětem Pokynů jsou specifika soutěže v kontextu jiných než horizontálních spojení. Komise zejména objasňuje svá kritéria, pokud jde relevantní tržní podíly a úroveň přípustné koncentrace.[76] Dále Komise prezentuje příklady, kdy vertikální nebo konglomerátní spojení může – podle tradičních zásad – významně narušit účinnou soutěž, a označuje okolnosti, kdy vertikální integrace pravděpodobně bude znamenat, že soutěžitelé pozbudou přístup k důležitému dodavateli nebo budou muset čelit zvýšeným cenám vstupů, což povede k růstu cen pro konečné spotřebitele.[77]

Pokyny čerpají ze zkušeností s posuzováním nehorizontálních spojení podle nyní platného nařízení o spojování podniků i podle nařízení č. 4064/89, které nabylo účinnosti dne 21. září 1990, a také z judikatury Evropského soudního dvora a Soudu prvního stupně. Je pravděpodobné, že se Pokyny budou dále vyvíjet a rozpracovávat pro použití v jednotlivých případech.[78]

Výklad předpisů o nehorizontálním spojování, který zaujímá Komise, pochopitelně nemá normativní sílu ve vztahu rozhodovací činnosti Evropského soudního dvora nebo Soudu prvního stupně.[79]

2.4 Směrnice EU o sítích a službách elektronických komunikací (rámcová směrnice).

V prostředí postupující liberalizace telekomunikačního trhu byly přijaty zvláštní předpisy o hospodářské soutěži mezi operátory působícími v oblasti telekomunikací. Potenciál rozvoje telekomunikací je totiž možné realizovat pouze v podmínkách skutečné konkurence a totéž se týká nezbytné míry konvergence na

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[76] Sdělení Komise „Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings", odstavec 6.

[77] Tisková zpráva Komise (IP/07/1780), Brusel, 28. listopadu 2007.

[78] Sdělení Komise „Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings", odstavec 8.

[79] Sdělení Komise „Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings", odstavec 9.

vertikální úrovni (pokud jde o multimediální aplikace atd.).[80]

S účinností k 25. květnu 2003 došlo ke kompletní revizi právního rámce telekomunikačního trhu EU. Neustálé sbližování technologií v oblasti telekomunikací, médií a informačních sítí totiž vyžaduje jednotný přístup. Právní úprava v současné době sestává kromě směrnice o sítích a službách elektronických komunikací také z autorizační směrnice, přístupové směrnice, směrnice o univerzální službě a směrnice o zpracovávání osobních údajů a ochraně soukromí v odvětví elektronických komunikací.

Především je nezbytné rozlišit otázky přenosu dat a obsahu přenosu. Předmětem zájmu směrnic je výhradně problematika přenášení dat a nikoli obsah vysílání nebo jiných služeb poskytovaných prostřednictvím elektronických sítí. Směrnice nejsou např. na překážku opatřením přijímaným na komunitární nebo národní úrovni, pokud jde o podporu kulturní a jazykové rozmanitosti anebo ochrany mediální plurality.

V souvislosti s komplexní a dynamickou povahou současných trhů elektronických komunikací zavádí rámcová směrnice novou definici podniků s významnou tržní silou, a to propojením pojmu „významná tržní síla" s dominancí podle článku 82 Smlouvy ES. Rámcová směrnice předvídá přímé instruování vnitrostátních regulačních orgánů při aplikaci soutěžněprávních kategorií „relevantní trh" a „dominantní postavení". Komise má v tomto směru za úkol vypracovat pokyny pro vnitrostátní regulační orgány, kterými stanoví kritéria pro vymezení trhu a posuzování významné tržní síly v aplikační praxi.

[80] Komise přijala od roku 1990 celkem šest směrnic podle článku 86 odst. 3 Smlouvy ES za účelem otevření telekomunikačního trhu (k 1. lednu 1998).

VIII. Definice relevantního trhu a analýza tržní síly v nové ekonomice

1. Definice relevantního trhu a analýza tržní síly v nové ekonomice

Dokonce i při nedostatku inovace existují dvě obecné obavy týkající se významu, který je spojen s definicí trhu při posuzování spojení. Za prvé je zde otázka, zda je definice trhu ve skutečnosti nezbytná pro řádný rozbor spotřebitelského prospěchu a přínosů účinků spojení. Za druhé existují obavy, že postupy při formální definici trhu mohou být ve skutečnosti v některých případech překážkou pro správnou analýzu. Inovace zvyšuje tyto dva problémy jak s ohledem na statickou analýzu cen a účinky produkce, tak s ohledem na dynamické analýzy investic a inovací.

Aby bylo možné pochopit obavy, proč postup při spojení klade důraz na vymezení trhů, je užitečné popsat podrobněji mechaniku vymezení trhu. Existují dlouhodobé zásady, jimiž ekonomové definují příslušnost výrobku na trh: dva výrobky nebo služby jsou na stejném relevantním trhu, pokud je budou spotřebitelé vnímat jako dostatečně blízké substituty. Podobná logika se používá pro zeměpisné rozdělení trhu. Kdy jsou ale substituty dostatečně blízko, že by měly být zahrnuty na stejném trhu? Pro upřesnění konceptu dostatečně blízkého substitutu ekonomové často používají zobrazení trhu přes test nazývaný „test hypotetického monopolisty". Tento test se ptá, zda hypotetický zisk maximalizující monopol nad skupinou výrobků v dané oblasti může být ziskový a přitom zvyšovat ceny nad určitou úroveň o malou, ale významnou částku po delší dobu.

Skupina výrobků posuzovaných v testu tvoří relevantní trh. Skutečně relevantní trh je nejmenší soubor výrobků, které monopolista potřebuje kontrolovat, aby i při zvýšené ceně byl ziskový.[81]

Zvýšení ceny zvýší hypotetický zisk monopolu, pokud propad objemu prodeje je dostatečně kompenzován vyšší cenou za prodané jednotky. Tím hypotetický test monopolisty ukazuje, že soubor výrobků nebo zeměpisné oblasti tvoří relevantní trh, je-li hypotetický monopolista schopen malého, ale významného a dlouhodobého zvyšování ceny, aniž by to vedlo k tomu, že spotřebitelé přejdou na náhradní zboží tak, že cena zvýšení se stane nerentabilní.

2. Význam inovace při využití definicí trhu k předpovědi stálých cenových účinků spojení

[81] U.S. 1992 Horizontal Merger Guidelines, § 1.0 and 1.11.

Přítomnost významných inovací zhoršuje napětí již existující v definici trhu kvůli vlastnostem různých, dodavateli diferencovaných výrobků, které se mohou stále významným způsobem měnit a způsobovat tím zvláště obtížné určení hranice trhu s jistotou.

Z výše uvedeného přístupu vyplývá, že nejdůležitější tradiční test je „nahraditelnosti poptávky", která v zásadě může být posuzována ve vztahu k funkčním vlastnostem výrobku, jeho zamýšlenému použití, jeho provedení a aspektům jeho prezentace a řadě dalších. Nicméně, ve většině případů, cenové testy měřící schopnost poptávky reagovat na zvýšení ceny, jako je pružnost poptávky nebo křížová-cenová elasticita, představují nejlepší indikátor pro zkoumámí nahraditelnosti poptávky, neboť ceny odrážejí všechny informace o trhu vztahující se k výrobku v jediné proměnné.

Otázka, která vzniká, pokud se jedná o vymezení trhů v nové ekonomice, je, zda cena zůstává nejspolehlivějším kritériem, nebo zda jsou vhodnější ostatní prvky, např. funkční vlastnosti, zamýšlené použití... atd. Internetová infrastruktura je složena z velkého množství hospodářských subjektů (IBPs, ISP, prodejci,locální smyčkový operátor), kteří umožnují konečným uživatelům mít přístup k on-line službám a výrobkům. Všechny tyto subjekty jsou navzájem úzce spojeny za účelem zajištění spolehlivého a kvalitního přístupu k veškerému internetu: na ISP potřebují páteřní služby k nabízení širokého přístupu k internetu a potřebují locální smyčka, aby mohli oslovit koncové uživatele.

V případě existence vertikální integrace mezi dvěma těmito operátory existuje nebezpečí, že subjekt vzniklý takovýmto spojením přistoupí k diskriminaci ve prospěch svých vlastních služeb, například tím, že zvyší konkurenční náklady na přístup do locální smyčky nebo k jeho páteřní síti. Za účelem posouzení možného protisoutěžního jednání je identifikace jednotlivých trhů v internetové infrastruktuře zásadní.

Evropská komise přijala pokyny pro analýzu trhu a posuzování významné tržní síly (VTS) (Guidelines on market analysis and the assessment of signifiant market power), jak požaduje článek 15 (2) [82] 'rámcové směrnice'. Pokyny stanovují zásady, že vymezení trhů a analýzu hospodářské soutěže budou provádět národní regulační orgány (NRO).

Pokyny Evropské komise pro analýzu trhu v oblasti elektronických

[82] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Article 15(2): "The commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereafter 'the guidelines') which shall be in accordance with the principles of competition law."

komunikačních sítí a služeb navrhují seskupit výrobky nebo služby, které spotřebitelé používají pro stejné účely (konečné užití) [83]. Ačkoli konečné užití výrobku nebo služby úzce souvisí s jeho fyzikálními vlastnostmi, různé druhy výrobků nebo služeb mohou být použity pro stejné cíle.

3. Výpočet podílů na trhu

Určitá specifika internetu otevírají problém týkající se výpočtu tržního podílu na relevantním trhu. Ve skutečnosti ne vždy je možné založit tento výpočet na obratu. V některých případech již Komise považuje za vhodnější založit výpočet na další ukazatelých, jako jsou výrobní kapacity,[84] kapacita strojového parku,[85] pevně učiněné objednávky [86] nebo reklamní příjmy z TV vysílání.[87]

Podobně v oblasti internetu mohou být další kritéria, jako je například provoz na webových stránkách nebo na síťové infrastruktuře, množství registrovaných uživatelů na tržišti nebo portálu, více relevantní než obrat. V internetovém průmyslu neexistuje preferovaná jednotka měření, ale existuje shoda o tom, že relevantní obraz by mohl být vytvořen s použitím více než jednoho indexu. Kromě příjmů a návštěvnosti jsou možnými měřícími indexy (a) počet uživatelů, (b) počet adres v dosahu, (c) velikost instalovaného výkonu, (d) skutečná šířka pásma používaného pro provoz výměny dat, (e) počet míst přístupu. Vzetí v úvahu pouze jedné jednotky nemuže odrážet přesně sílu sítě.

4. Zeměpisný trh

Sdělení Komise o vymezení relevantního trhu stanoví, že „relevantní zeměpisný trh zahrnuje oblast, ve které se dotyčné podniky účastní nabídky a poptávky výrobků nebo služeb, ve které jsou podmínky hospodářské soutěže dostatečně homogenní a která může být odlišena od sousedních oblastí, protože podmínky hospodářské soutěže jsou v těchto oblastech znatelně odlišné."[88]

Pokud jde o zeměpisný rozsah trhu s nejvyšší spojitostí, je pravděpodobné, že

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[83] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03),§ 44.
[84] Cargill/Unilever, COMP IV/M.26, 1990.
[85] Delta Airlines/Pan Am, COMP/M.130, 1991.
[86] Aerospatiale-Alenia/DeHavilland, OJ L 334/42, 1991.
[87] Bertelsmann/News International/Vox, D. Comm. Sept. 6, 1994, point 22.
[88] Commission Notice on the definition of the relevant market (OJ C 372 on 9/12/1997), § 8.

bude globální vzhledem k rozměru páteřních sítí. Komise usoudila v případě WorldCom / MCI, že existuje jeden globální trh. Pokud jde o sekundární Internetový přístupný poskytovatel(ISP/Internet Service Provider)[89] a prodejce služeb, zeměpisný rozsah může být užší, buď národní nebo regionální, a to z důvodu potřeby locálních smyčkových služeb nebo instalace pevné linky za účelem fyzického připojení účastníků se svými zákazníky.

[89] An **Internet service provider** (**ISP**, also called **Internet access provider** or **IAP**) is a company which primarily offers their customers access to the Internet using dial-up or other means of data elecommunication. ISPs may provide Internet e-mail accounts to users which allow them to communicate with one another by sending and receiving electronic messages through their ISPs' servers. ISPs may provide other services such as remotely storing data files on behalf of their customers, as well as other services unique to each particular ISP.

IX. Analýza celkových účinků vertikálních spojení v nové ekonomice

1. Úvod

Vertikální spojení se týkají dvou nebo více různých společností působících na různých trzích výrobků. To znamená, že vertikální spojení nemusí bezprostředně vést ke snížení počtu soutěžících společností na určitém trhu. Naopak, vertikální spojení může účinně snížit transakční náklady tím, že nahradí smluvní vztahy více efektivními vnitroskupinovými vztahy.

Přestože takové snížení cen přinášené ne-horizontálními spojeními je obvykle pro-soutěžní, mohou za určitých okolností nastat proti soutěžní následky. Primární soutěžní obavou v těchto případech je, že schopnost soutěžící společnosti konkurovat spojenému podniku bude po spojení snížena na takovou úroveň, která povede k její okrajové pozici nebo úplnému vytlačení z trhu. Poté by spojený podnik byl schopen zvednout ceny. Alternativně to může vést k odrazení od vstupu nebo expanze na trhu, což umožní, aby si společnost zachovala svou tržní sílu.

Každá teorie omezení hospodářské soutěže musí tedy nejen pečlivě specifikovat podmínky, které vedou k tvrzené újmě, ale musí jít nad rámec pouhého teoretického hodnocení protisoutěžních nebezpečí, a to testováním teorie narušení oproti charakteristikám a chování pozorovaného odvětví. Zejména nelze předpokládat, že poškození soutěžitelů nutně nebo dokonce obvykle vede k narušení hospodářské soutěže.[90]

Z teorie vertikálního spojení vyplývají některé důležité závěry. Za prvé, kontrolní orgány musí být velmi opatrné v přijímání opatření proti vertikálním transakcím, aby se zabránilo snižování efektivních dopadů spojení, která představují malé nebezpečí narušení soutěže. Je pravděpodobné, že negativní vlivy budou vznikat obtížněji, zatímco vyrovnávající výhody se budou projevovat lehčeji než v horizontálním kontextu. Nedostatek kvalitně zpracované teorie účinků také znamená, že vertikální transakce budou posuzovány v mnohem větší míře na základě konkrétních případů, bez výhod konkrétních směrnic pro vertikální spojení s jasně vymezenými hraničními podíly.

Odvětví „Nové ekonomiky" jsou charakteristická klesajícími průměrnými náklady (na bázi výrobku, nikoliv podniku), širokou škálou výroby, mírnými

[90] RBB Brief 18, "Turning the Tables: Why Vertical and Conglomerate Mergers are Different", RBB Economics, March 2006, p. 2.

kapitálovými požadavky vzhledem k tomu, co je k dispozici pro nové podniky na moderním kapitálovém trhu, velmi vysokou mírou inovací, rychlými a častými vstupy a výstupy a úsporami z rozsahu ve spotřebě (také známými jako „sítové externality"), jejichž provedení může vyžadovat buď monopol nebo mezipodnikovou spolupráci při stanovení pravidel. V odvětvích charakteristických síťovými účinky, jako jsou telekomunikace, elektronické komunikace nebo sdělovací prostředy, se často na trhu objeví dominantní pravidlo. V tomto kontextu to brání součinnosti mezi jeho výrobky.

S ohledem na infrastrukturu E-ekonomiky existuje zvyšující se závislost na širokých a rozmanitých vertikálně souvisejících činnostech, které zahrnují zejména poskytování informací a kapacity, síťové infrastruktury a přístupových aplikací. V souvislosti se sbližováním technologií, vertikální integrace obvykle vedou hlavně k soutěžním obavám týkajícím se vzájemné součinnosti a závislosti mezi různými výrobky a službami. Další obavou je možnost, že držitel klíčové kapacity, sítí nebo přístupových aplikací může vnucovat své výrobky nebo služby jako pravidlo. Proto se hodnocení protisoutěžních praktik v nové ekonomice musí zaměřit zejména na zamezení držitelům základních výrobků nebo služeb ve vytváření překážek vstupu na trh a tím v omezování přístupu na trh. Navíc jelikož vertikální integrace a spojování může mít dopad na vzestupné a sestupné úrovně trhu, měly by být pečlivě prozkoumány i možnosti společností podílejících se na transakci zneužít jejich postavení na příbuzných trzích. [91]

Hodnocení spojení na dynamických a inovativních trzích je výzvou pro tradiční soutěžní teorie. Soutěž v high-tech odvětvích zahrnuje sledy závodů ve vývoji nového výrobku nebo nahrazení stávajícího výrobku prostřednictvím drastické inovace.V úvodní fázi společnosti mohutně investují do vývoje nového produktu, který vytváří novou kategorii nebo se stane raným vůdcem v nové kategorii. Vítěz dočasně získá velký podíl na trhu a vysoké zisky. Zatímco síťové účinky mají tendenci posilovat vedoucí pozici, mnoho high-tech odvětví je složeno ze sledů závodů o vedoucí postavení na trhu. Velké inovace se vyskytují opakovaně a náklady na změnu a nastavení nebrání nahrazení vůdců lepšími výrobky.[92] Proto mají vertikální spojení v high-tech odvětví velmi extrémní prosoutěžní a protisoutěžní faktory. Vítězové v inovačním závodě získávají dominantní nebo monopolní postavení a upevňují svoji pozici síťovými efekty nebo vysokými náklady na změnu pro zákazníky.

Proto v případě, že vyhodnocujeme účinky vertikálních spojení v high-tech

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[91] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, Nov. 2001.

[92]David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

odvětvích, měli bychom zvážit různé paradoxní extrémně prosoutěžní a protisoutěžní faktory, které vyplývají z vertikálních spojení. Někdy to bude velmi složité a nejednoznačné a je třeba sladit akademický přístup s praktickou podporou ekonomů, právníků a antimonopolních orgánů.

2. Právní systém v USA

2.1 Úvod

S ohledem na vertikální spojení jsou základní teorie o chování vedoucím k narušení hospodářské soutěže popsány v U.S. 1984 Merger Guidelines on Non-Horizontal Mergers. Tyto teorie se především vztahují k vyloučení a nekalým praktikám.

Hodnocení spojení v dynamických a inovativních trzích je výzvou pro tradiční soutěžní teorie. Vertikální integrace jsou obvykle spojeními nesoutěžících společností tam, kde je výrobek jedné společnosti nezbytnou součástí či doplňkem k výrobku druhé. Taková spojení dosahují hlavně prosoutěžních přínosů. Vertikální integrace může snížit transakční náklady, vést k synergickému zlepšení v designu, výrobě a distribuci konečného výrobku, a tím pozvednout hospodářskou soutěž. V důsledku toho většina vertikálních spojení vzbuzuje jen málo soutěžních obav. Nicméně, jak se odráží v 1984 US Merger Guidelines, některé vertikální akvizice můhou být protisoutěžní. Vertikální spojení mohou vytvořit či zvýšit vstupní bariéry, které vedou k vyšším cenám nebo nižší kvalitě nebo inovaci pro spotřebitele. Například v odvětvích s rozsáhlými sítěmi mnoho společností již má tržní sílu prostřednictvím vlastnictví zavedených sítí nebo nainstalovaných základen zahrnující obrovské fixní náklady. Vertikální spojení mohou v některých případech zvýšit tyto překážky vstupu na trh ještě více zvýšením nákladů a snížením inovací a kvality pro spotřebitele.

2.2 Dopady vertikální integrace na chování účastníků na relevantních trzích

S ohledem na vertikální spojení, U.S. 1984 Merger Guidelines on Non-Horizontal Mergers popisuje základní teorie, kdy by mohlo docházet k omezování hospodářské soutěže. Tyto teorie se především vztahují k vyloučení a nekalým praktikám.

Pokud jde o vyloučení, existují tři nutné, nikoliv dostačující, podmínky: „(a) stupeň vertikální integrace mezi oběma trhy musí být tak rozsáhlý, že vstupující na jeden trh (primární trh) by museli vstoupit na další trh (sekundární trh), (b) požadavek vstupu na sekundární trh musí učinit vstup na primární trh výrazně obtížnější a méně pravděpodobný, (c) struktura a další charakteristiky primárního trhu musí jinak

napomáhat nesoutěžnímu chování, takže zvýšená obtížnost vstupu zřejmě ovlivní jeho chování."[93]

Jak může vertikální spojení zvýšit překážky vstupu na trh? První obecná kategorie protisoutěžních teorií předpokládá, že v některých případech může vertikální integrace bránit konkurenci v přístupu k potřebným vstupům nebo zvýšit náklady na jejich získání. Například v nedávném článku profesor Riordan a Salop vyvinuli další protisoutěžní teorie „zvyšování nákladů konkurence", kde vertikálně integrovaná společnost je schopna zvýšit náklady svým konkurentům buď na vzestupném nebo na sestupném trhu. Takový efekt bránění může zvýšit ceny nebo snížit kvalitu nebo inovaci pro spotřebitele na sestupu. V konečném důsledku se účinky takového vyloučení mohou projevit tak, že společnost, která se snaží vstoupit na jeden trh, musí vstoupit na oba trhy, což výrazně zvyšuje obtížnost vstupu. Za druhé, vertikální spojení může napomáhat nekalým praktikám buď na vzestupném nebo sestupném trhu. Akvizice dodavatele jeho odběratelem může vytvářet příležitosti ke sledování vzestupné soutěže dodavatelů. Vertikální spojení může také zahrnovat nákup mimořádně nebezpečného sestupného odběratele. Odstranění odběratele, který představuje dodavatele jiné vzestupné společnosti, může umožnit nekalé praktiky na vzestupném trhu. Existuje třetí teorie protisoutěžního omezení plynoucí z vertikálního spojení - vertikální spojení, která jsou určená k obcházení cenových předpisů. Například, jestliže se předpis snaží omezovat tržní sílu přirozeného monopolu, monopolista může mít motivaci k vertikální integraci na neregulované trhy, aby se pokusil získat monopolní zisk, který mu není dopřán na regulovaném trhu. Tato teorie byla základem pro pro změněný konečný rozsudek v případu monopolu AT & T a byla v poslední době využita DOJ při napadnutí transakce British Telecom / MCI.[94]

A. Vyloučení / Zvyšování nákladů konkurence

Vertikální spojení potenciálně poškozuje sestupné soutěžitele tím, že zvýší jejich náklady, nebo tím, že učiní jejich výrobek méně atraktivní pro spotřebitele. Takového poškození je možno dosáhnout odmítáním, zhoršováním, či zvyšování ceny přístupu k důležitému vstupu, pro který nejsou k dispozici žádné blízké substituty (vyloučení vstupů). Vertikální integrace také potenciálně škodí vzestupným soutěžitelům. Odmítání obchodu sestupnou částí vertikálně spojené společnosti by mohlo zmenšit zákaznickou základnu vzestupných soutěžitelů (vyloučení zákazníků). Snížená zákaznická základna

[93] The U.S. Merger Guidelines, § 4.21.
[94] Christine A. Varney, "Vertical Merger Enforcement Challenges at the FTC", PLI 36th Annual Antitrust Institute, San Francisco, California (1995).

může ohrozit životaschopnost vzestupných soutěžitelů snižováním úspor z rozsahu a odrazováním od investic do zlepšení výrobků a procesů nezbytných k zachování konkurenceschopnosti.

Přesvědčivý dopad teorie omezující vertikální integrace má dva zásadní prvky. Za prvé, stejně nákladné náhradní vstupy nejsou k dispozici. Za druhé, vertikálně integrovaná společnost má motivaci, aby se stáhla z trhu se vstupy nebo zvýšila cenu vstupu. Pokud je vertikálně integrovaná společnost i nadále připravena a ochotna agresivně soutěžit v dodávání sestupné konkurenci, pak vertikální integrace nezvýší tržní sílu dodavatelů konkurenčních vstupů.

To je nyní zvláště důležité s ohledem na určitá síťová odvětví, jako jsou telekomunikace, kabely a počítače, kde si některé společnosti udržují stávající tržní sílu prostřednictvím vlastnictví zavedených sítí vyznačujících se vysokými překážkami vstupu, včetně obrovských fixních nákladů. S ohledem na poskytování připojení k Internetu, hlavní protisoutěžní praktiky, které mohou být realizovány společností v dominantním postavení a které vyžadují pečlivou analýzu, mohou sestávat z odmítnutí poskytnoutí přístupu do svých sítí, zvyšování nákladů své konkurence, snižování kvality připojení nebo selektivních cen, které mají přilákat zákazníky od soutěžitelů.[95]

V roce 1995, Time Warner, druhá největší americké kabelové televizní stanice, oznámila svoji dohodu o získání Turner Broadcasting System, největší americké kabelové televizní sítě. V roce 1996, po důkladném šetření, FTC(US Federální Obchodní Komise) povolilo akvizice Time Warner / Turner, bez soudního řízení, ale pod podmínkou poměrně skromných požadavků na otevřený přístup a omezení na případné nakládání s některými menšinovými podíly v Time Warner, které by získaly ostatní mediální společnosti v důsledku výměny Turner akcií za akcie Timer.[96] V tomto případě Time Warner Inc, předseda Pitofsky došel k závěru, že „Time Warner a TCI po spojení by měly mít možnost: (1) zamezit nepřidruženým programovým aktivitám v přístupu k jejich kabelovým systémům na ochranu svých programových aktiv a (2) znevýhodnit konkurenční MVPDs (Multichannel Video Programming Distributors/ Distributoři Multikanalových Video-Progrmů) zavedením cenové diskriminace. (...) Například uvedení nového kanálu, který by mohl dosáhnout úspěšného postavení, by bylo téměř nemožné bez distribuce buď přes Time Warner nebo TCI kabelové systémy. Vzhledem k získaným úsporám z rozsahu, úspěšné zahájení nového významného kanálu obvykle vyžaduje distribuci přes MVPDs, která pokryje 40-60% předplatitelů. (...) TCI

[95] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (Nov. 2001) p. 7.
[96] FTC Docket No. C-3709 (Feb. 3, 1997).

a Time Warner jsou dva největší MVPDs v USA s tržními podíly 27 %, resp. 17%. Přenos na jedné nebo obou sítích je pro nové programy zásadní k dosažení konkurenční životaschopnosti. Pokus o nahrazení pokrytí těchto systémů dáváním dohromady smluv s velkým množstvím o mnoho menších MVPDs je nákladné a časově náročné. Komise byla seznámena s důkazy o tom, že odmítnutí pokrytí systémy Time Warner a TCI by mohlo zpozdit vstup potenciálních významných kanálů o několik let."[97]

V roce 1995 Komise dospěla ke shodě se Silicon Graphics,[98] Inc (SGI), která umožnila provedení dvou akvizi dotýkajících se stejné obavy z vertikálního vyloučení, to hrozilo vyloučením inovační soutěže. Podle stížnosti Komise, SGI, dominantní poskytovatel zábavních grafických konzolí s 90% podílem na trhu, navrhl, že získá Alias a Wavefront, dva ze tří dominantních vývojářů zábavní grafiky a softwaru pro animaci založených na Unixu, používaných na těchto konzolích. Komise byla znepokojena vertikálním vyloučením v obou směrech: konkurenční výrobci konzolí by nemohli efektivně konkurovat, pokud by Alias a Wavefront navrhovali svůj software, aby byl kompatibilní pouze s konzolemi SGI, a konkurenční vývojáři zábavní grafiky by byli odtrženi od 90% trhu, pokud by SGI uzavřela svoje dříve otevřené softwarové rozhraní, takže design by byl kompatibilní pouze se softwarem společností Alias a Wavefront. Komise rovněž vyjádřila obavy, že pokud SGI umožní Alias a Wavefrontu pokračovat v práci s výrobci konkurenčních konzolí na vývoji doplňkových výrobků, mohla by používat patentované informace získané v průběhu těchto vývojů a získat nespravedlivou soutěžní výhodu oproti těmto soutěžitelům.

Na druhé straně existovaly silné náznaky, že kombinace spojené kapacity SGI, Alias a Wavefrontu by vedla k významným zlepšením. V zájmu zachování hospodářské soutěže a aby bylo současně umožněno dosažení těchto potenciálních inovací, Komise vyjednala souhlas, který umožnil provést sloučení za třech hlavních podmínek. Za prvé, aby byla zachována hospodářská soutěž v oblasti konzolí, Komise požaduje po subjektu, který vznikne spojením, aby přistoupil ke Komisí schválené dohodě se soutěžiteli, podle které je po SGI požadováno použít nejlepší snahy k zajištění optimální součinnosti hlavních softwarových programů firmy Alias s konzolemi konkurence. Za druhé, udržovat korektní hospodářskou soutěž, což zahrnuje opatření znemožnující převod patentovaných informací na stanice SGI. A konečně, k udržení soutěže v oblasti softwaru je po SGI požadováno udržovat otevřenou architekturu a zveřejňovat programovací rozhraní pro její konzole a upuštit od diskriminace nesoftwarových

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[97] Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, In the Matter of Time Warner Inc. Docket No. C-3709.

[98] FTC Docket No. C-3626 (November 14, 1995)

konkurentů firem Alias a Wavefront.

V síťových odvětvích však volný vstup nevede k dokonalé hospodářské soutěži. Jakmile je několik společností na trhu se silnými síťovými účinky, tak při vstupu nových soutěžitelů, a to i za podmínek volného vstupu, není změna struktury trhu významná. Ačkoli odstraňování překážek vstupu na trh může podpořit hospodářskou soutěž, výsledná hospodářská soutěž nemůže významně ovlivnit strukturu trhu. Společnosti, které nejsou lídry v síťových odvětvích, mají malou naději na dosažení takové pozice, pokud nepřijdou s velkou inovací, takovou, která může prorazit výhodu, kterou zajišťují sítové účinky vůdcům v odvětví. Pokud existuje šance, že dnešní výrobky budou nahrazeny velkou inovací, lídrovo přežití závisí na přinesení takové inovace na trh dříve, než druzí. To znamená, že v trzích se silnými síťovými účinky nemohou být antimonopolní orgány schopny významně ovlivnit strukturu trhu odstraňováním překážek pro vstup. Na těchto trzích by mělo být hodnocení hospodářské soutěže založeno na dopředu hledícím přístupu.[99] Podobné analýzy můžeme také nalézt v případech AT & T / McCaw, Eastman Kodak Co / Image Tech. SVCS, atd.

B. Zvýšená protisoutěžní koordinace

Vertikální spojení mohou také zvýšit protisoutěžní koordinaci, pokud má být důležitá cenová nebo necenové informace, zejména technologie, sdílena mezi dodavatelem a zákazníkem. Opět musí být splněno několik podmínek, než může být vertikální spojení považováno za omezující hospodářskou soutěž tímto způsobem. Stejně jako v případě vyloučení, trh vstupů musí být obezřetný na užití tržní síly po spojení, jinak je jen malá šance na koordinované chování, i když integrovaný podnik zvýšil informovanost. Obdobně je mnohem vyšší pravděpodobnost protisoutěžních účinků, pokud je možné užití sestupné tržní síly.[100]

Jiné podmínky, než struktura trhu, jsou také důležité. Za prvé, musí existovat významné transakce mezi integrovaným podnikem a jedním nebo více nepřidruženými zákazníky nebo dodavateli. Bez takové transakce neexistuje žádný kanál pro informace, který by mohl tvořit základ pro koordinaci. Za druhé, informace vyměněné

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[99] EU Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, paragraph 80.

[100] Again, downstream market power is not strictly necessary for a welfare effect. As explained in connection with the foreclosure theory, even without downstream market power, there would be no welfare effect if the output producers have efficient substitutes for the input or if the customers of the output producers have efficient alternatives for the output product. However, it is not entirely implausible that under specified conditions competitively sensitive information obtained by an integrated firm can significantly impair market performance upstream and result in a welfare loss downstream.

prostřednictvím vztahu zákazník/dodavatel musí být spolehlivé, užitečné při dosažení podmínek koordinace pro další transakce, a nepřístupné z jiného kanálu. Nakonec, stejně jako u ostatních vertikálních teorií, koordinace musí být převedena do schopností a motivací ke zvýšení cen, s výsledným prospěšným účinkem pro sestupný trh.

C. Vyhýbání se předpisům

Vertikální spojení může vést k protisoutěžnímu vyhýbání se předpisům. Tato teorie má snad nejčistší akademický původ a byla prozkoumána do hloubky v souvislosti se změněným konečným rozsudkem v případu monopolu AT & T. Je nesporné, že tato teorie je za vhodných okolností věrohodným základem pro nalezení protisoutěžních účinků.

Typické odůvodnění předpisů je omezit tržní sílu přirozeného monopolu. Pokud vertikální spojení umožňuje integrovanému podniku obcházet takové předpisy a uplatnovat tržní sílu na regulovaném trhu nebo na přilehlých trzích, je pravděpodobné, že dojde ke snížení prospěchu. Nejběžnějším příkladem toho, jak vertikální spojení může být využito k vyhýbání se předpisům, – ve skutečnosti je to příklad 1984 Guidliines – je, když umělé ceny převodu umožní vyhnout se předpisům.

2.3 Přínosy a čistý dopad na hospodářskou soutěž

Přestože se nemusí zdát intuitivně zřejmé, kdy vertikální spojení skutečně povede k takovému protisoutěžnímu výsledku, spíše než jednoduše k poškození soupeře, existuje několik indicií na pomoc antimonopolním orgánůn k takovému určení. Určitě čím větší je tržní podíl společností, které se vertikálně spojují, tím větší je pravděpodobnost, že sestupní zákazníci budou poškozeni.

Tržní síla je pouze jedním z důležitých prvků při rozpoznávání konkurenčních efektů vertikální integrace. Dalším je síla smluv. Odstranění přirážkové ochrany pro vertikální integrace vyžaduje, aby podniky nemohly dosáhnout tohoto na základě místních smluv. To je nejzřejměji případ, kdy je obtížná cenová diskriminace. Smlouvy v mnoha středních trzích nicméně představují omezení a nelineární oceňování. Proto by mělo existovat nějaké břemeno žalovaných, aby prokázali, že faktické podmínky týkající se smluv podporují odstraňování přirážkové ochrany. Zároveň řada různých smluvních selhání může podporovat teorii zvyšování nákladů konkurence nebo teorii obnovení monopolní síly, což vyžaduje uložit podobné břemeno na žalobce. Tento rámec navrhuje „bitvu teorií" se soudy a regulačními orgány posuzujícími jednotlivé

relativní základy alternativ.[101]

Obecněji řečeno, je chybou předpokládat, že pouze jedna teorie soutěžních účinků může být platná v daném případě. Jak torie o zvyšování konkurenčních nákladů, tak teorie o odstranění přirážek mohou být přijatelné. Za takových okolností by účastníci debaty měly poskytnout důkaz o věcných slutečnostech na podporu teorií a o skutečném významu takové teorie na hospodářský blahobyt. Kontrolními otázkami jsou, zda vertikální integrace může způsobit podstatně vyšší ceny, nižší škálu výrobků, nebo nižší kvalitu výrobku. Soud nebo regulační orgán by měl zvážit důkazy, aby určil, která teorie je důležitější pro pochopení účinků vertikálního spojení případ od případu. Vyrovnání velikosti účinků soutěžních efektů vyzývá ke strukturovanému přístupu „rule of mason" ke zvážení důkazů a vyhodnocení pravděpodobných důsledků vertikálního spojení na ekonomickou prosperitu. Mezitím by další pokrok na akademickém poli měl soudům a regulačním orgánům pomáhat v rozvoji dynamického přístupu k hodnocení účinků vertikální integrace. Pokud jde o vertikální spojení, i přesto, že hodnocení je obdobné, Non-Horizontal Merger Guidelines by měly klást větší význam na účinnou obranu, než v případě horizontálních spojení. Tyto Guidelines uvádějí, že „rozsáhlý charakter vertikální integrace může představovat důkaz, že vertikální intergrace si mohou dovolit podstatná úsporná opatření. Proto Federální Obchodní Komise klade větší důraz na očekávané zvýšení přínosů při rozhodování, zda napadnout vertikální spojení, než při rozhodování, zda napadnout horizontální spojení."[102]

3. Právní systém v EU

3.1 Úvod

Existují dva hlavní způsoby, jak nehorizontální spojení může zásadně narušit účinnou hospodářskou soutěž: nekoordinované a koordinované vlivy. Nekoordinované vlivy se mohou objevit převážně tam, kde nehorizontální spojení vede k „vyloučení". Termín „vyloučení" bude použit k popisu všech případů, kdy je přístup skutečné nebo potenciální konkurence k dodávkám nebo na trh omezen nebo vyloučen v důsledku spojení, čímž se sníží schopnost nebo motivace takových společností konkurovat. V důsledku takového vyloučení jsou následně slučované společnosti a možná i někteří soutěžitelé schopni ziskového zvýšení ceny účtované odběratelům. Koordinované účinky nastávají, pokud spojení změní charakter hospodářské soutěže takovým

[101] Michael H. Riordan, "Competitive Effects of Vertical Integration," at the LEAR conference on 'Advances in the Economics of Competition Law" at Rome (June 2005).
[102] The 1992 U.S. Merger Guidelines, § 4.24.

způsobem, že se podstatně zvýší pravděpodobnost, že podniky které dříve nekoordinovaly své chování, ho koordinovat budou, aby zvýšily ceny nebo jinak omezovaly účinnou hospodářskou soutěž. Spojení může rovněž usnadnit koordinaci, popřípadě ji více stabilizovat a zefektivnit, pro podniky, které své chování koordinovaly již před spojením. Při posuzování účinků spojení na hospodářskou soutěž Komise porovnává soutěžní podmínky, které by vyplynuly z oznámeného spojení, s podmínkami, které by existovaly bez spojení. Ve většině případů poskytují podmínky hospodářské soutěže existující v době spojení vhodné srovnání pro posouzení účinků spojení. Nicméně v některých případech bude Komise brát v úvahu budoucí změny trhu, které lze rozumně předvídat. Zejména při posuzování, co tvoří relevantní srovnání, musí Komise vzít v úvahu pravděpodobný vstup nebo odchod podniků z trhu, kdyby se spojení neuskutečnilo. Komise může vzít v úvahu budoucí vývoj trhu, který vyplývá z budoucích úprav předpisů.[103]

Ve svém hodnocení Komise zváží, jak případné protisoutěžní efekty vyplývají ze spojení, tak možné pro-soutěžní efekty vyplývající z odůvodněných zvýšení přínosů ku prospěchu spotřebitelů. Komise zkoumá různé řetězce příčin a následků s cílem zjistit, které z nich jsou nejpravděpodobnější. Čím bezprostřednější a přímější je vnímání protisoutěžních dopadů spojení, tím je pravděpodobnější, že Komise vyřkne obavy z narušení hospodářské soutěže. Obdobně, čím okamžitější a přímější jsou prosoutěžní účinky spojení, tím je pravděpodobnější, že Komise zjistí, že ruší protisoutěžní účinky.[104]

3.2 Právní základ

V závislosti na Guidelines pro posuzování nehorizontálního spojení,[105] podíly na trhu a úroven koncentrace poskytují užitečné první známky o tržní síle a soutěžním významu jak spojujících se stran, tak jejich soutěžitelů 106 Je nepravděpodobné, že Komise bude považovat za znepokojující nehorizontální spojení, ať již na koordinované nebo nekoordinované bázi, pokud nový subjekt bude mít po spojení v každém z dotčených trhů nižší než 30% tržní podíl a HHI(Herfinahl - Herschiman Index)[107] nižší

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[103] COMP/M. 3696 E.ON/MOL (2005), at points 457-463.

[104] EU non-horizontal mergers guidelines, II. § 21.

[105] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007.

[106] Id. III. § 24.

[107] "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market oncentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$).

The HHI takes into account the relative size and distribution of the firms in a market and

než 2000.108 V praxi to znamená, že Komise nebude taková spojení zevrubně zkoumat, neexistují-li zvláštní okolnosti, jako například jeden nebo více z následujících faktorů: (a) spojení se účastní společnost, která bude pravděpodobně v blízké budoucnosti významně expandovat např. kvůli nedávné inovaci, (b) mezi účastníky trhu existují významné vzájemné podíly nebo společné vedení, (c) jeden ze spojujících se podniků je podnik s vysokou pravděpodobností narušujícího koordinovaného chování, (d) jsou přítomy známky minulé nebo pokračující koordinace nebo usnadňujících postupů[109].

Komise bude používat výše podílů na trhu a prahové hodnoty HHI jako počáteční ukazatel pro určení neexistence obav z ohrožení hospodářské soutěže. Tyto mezní hodnoty však nejsou důvodem k právní domněnce. Komise je toho názoru, že v tomto kontextu je méně vhodné ukazovat podíl na trhu a stupeň koncentrace, kteréžto soutěžní obavy jsou považované za pravděpodobné, jelikož existence významného podílu na alespoň jednom z dotčených trhů je nezbytnou, avšak nedostatečnou, podmínkou pro omezení soutěže.[110]

Klasický problém při návrhu antimonopolní politiky je, jak odradit od chování, které je protisoutěžní a snižuje blahobyt, a zároveň neodradit od prosoutěžní, blahobyt posilující hospodářské soutěže, kterou má antimonopolní politika chránit. Tento klasický problém přetrvává i v odvětvích nové ekonomiky. Je nezbytné, aby se dnes orgány pro hospodářskou soutěž, zaměřily na sílu dynamické hospodářské soutěže. Na rozdíl od rozhodnutí typu cena/výstup, analýza dynamické hospodářské soutěže vyžaduje mimo jiné evidenci o struktuře investic do rozvoje nových výrobků, kontrole kritických aktiv (zejména duševního vlastnictví a distribučních kanálů) a přesvědčení účastníků trhu a informovaných pozorovatelů o charakteru a tempu inovací. Zejména je třeba vzít v úvahu zranitelnost vůdčích společností na vstup poháněný drastickou inovací. Na druhé straně existuje mnoho věcí, jako je například stanovení cen, spojení do monopolu, nebo uzavření základních distribučních kanálů, které společnosti nové ekonomiky s podstatnou tržní silou v zásadě mohou dělat pro to, aby omezily hospodářskou soutěž.

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approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines § 1.51*

[108] Id. III. § 25.

[109] Id. III. 26.

[110] Id. III. 27.

Hi-tech odvětví se obvykle vyznačují vysokou mírou rozlišení výrobků a dramatickými posuny v postavení podniků na trhu. Proto tradiční definice analýzy trhu, jejíž studie se omezují na rozhodnutí podniků cena-výstup, mohou představovat vážně zkreslující obraz o soutěžních vztazích v nové ekonomice. Úspěšné subjekty v Schumpeterianských odvětvích jsou omezeny především dynamickou soutěží: hrozbou, že jiná společnost přijde s nějakou drastickou inovací, která způsobí, že poptávka po výrobku stávajícího subjektu opadne. Nový výrobek může být buď mnohem lepší verzí starého výrobku, nebo to může být zcela odlišný výrobek, který odstraňuje potřebu starého výrobku a síťové účinky často tvoří účinné překážky pro vstup srovnatelných výrobků.

V důsledku toho musí správné zjištění tržní síly v nové ekonomice obsahovat seriozní analýzu síly dynamiky hospodářské soutěže. Je důležité, například, posoudit vlastnictví a investice do příslušného duševního vlastnictví, které může zahrnovat technologie, které v současné době nejsou v komerčním použití. Je-li například aktuální tržní vůdce vlastníkem všech duševních vlastnictví nezbytných pro radikální inovace, dynamická soutěž nebude účinná.

V zájmu dosažení tohoto cíle se tvrdí, že stávající nástroje EU nejsou navrženy tak, aby odpovídaly tomuto druhu dynamické analýzy, konkrétně nařízení o kontrole spojování podniků [111], které je patrně hnáno v podstatě potvrzováním dominantního postavení na trhu nebo posilováním dominantního postavení, na rozdíl od přístupu v hodnocení dohod podle článku 81 (3) a nařízení 17. Komise se spoléhá hlavně na klasický test dominance stanovený v čl. 2 odst. 2 nařízení o spojování: „spojení, které nevytváří nebo neposiluje dominantní postavení, v důsledku čehož by byla významně omezena účinná hospodářská soutěž na společném trhu nebo na jeho podstatné části, by mělo být prohlášeno za slučitelné se společným trhem." V závislosti na Guidelines pro posuzování nehorizontálních spojení [112], nehorizontální spojení nepředstavuje žádné nebezpečí pro účinnou hospodářskou soutěž, pokud subjekt, který vznikl spojením, nemá alespoň v jednom z dotčených trhů významnou tržní sílu (což nemusí nutně vést k dominantnímu postavení). Komise přezkoumá tuto otázku dříve, než přistoupí k posouzení dopadu spojení na hospodářskou soutěž [113]

Ale v nařízení o kontrole spojování podniků není nic, co by bránilo uplatňování dynamického přístupu k ospravedlnění dočasného dominantního postavení v rychle se

[111] Council Regulation (EC) 139/2004.
[112] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, 2007.
[113] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings. 2007.

měnícím konkurenčním prostředí („křehký monopolista, vítěz bere většinu",...). Ale je vidět, že v nařízení o kontrole spojování podniků je výslovně stanoven dynamický přístup v souvislosti se spojením v nové ekonomice. Ve skutečnosti článek 2 § 2, by neměl být vykládán izolovaně. Čl. 2 odst. 1 (tedy předcházející testu dominance) výslovně stanoví, že „při schvalování spojení Komise vezme v úvahu potřebu udržovat a rozvíjet účinnou hospodářskou soutěž na společném trhu (...) postavení zúčastněných a jejich hospodářskou a finanční sílu, dostupné alternativy pro dodavatele a uživatele, jejich přístup k dodávkám nebo na trh, jakékoli právní či jiné překážky vstupu na trh, vývoj nabídky a poptávky, zájem spotřebitelů a technologický a hospodářský pokrok, za předpokladu, že to je výhodou pro spotřebitele a není to překážkou hospodářské soutěže". Články 2 (1) a 2 (2) se vzájemně doplňují. Neměly by být vykládány izolovavě. Umožňují zvláštním postupem zvýšení přínosů, které ospravedlňuje vytvoření dočasného dominantního postavení, a současně zachování a rozvíjení účinné hospodářské soutěže na společném trhu.

Dominantního postavení ve většině odvětví nové ekonomiky nemá stejný význam jako v tradiční ekonomice. Dominantní postavení může být považováno za přirozenou součást nové ekonomiky, jak tomu často je na nově vznikajících trzích, kde hospodářská soutěž ještě neexistuje nebo jen v omezené formě. Navíc dominance je obvykle nestabilní a dočasná, protože nová technologie může být rychle nahrazena jinou. Proto, přestože navrhované spojení vytváří nebo posiluje dominantní postavení, nemá automaticky za následek to, že „efektivní hospodářská soutěž na společném trhu by byla významně narušena."

Guidelines pro posuzování horizontálních spojení poskytují jednu velmi důležitou klauzuli o dynamické analýze v nové ekonomice. Stanoví, že „na trzích, kde je inovace významnou soutěžní silou, může spojení zvýšit schopnost a motivaci společností přinášet nové inovace na trh, a tím vytvářet konkurenční tlak na soupeře vedoucí na takovém trhu k inovacím. Alternativně může být účinná hospodářská soutěž významně narušena spojením mezi dvěma významnými inovátory, například mezi dvěma soutěžiteli s „pipeline" výrobky vztahujími se k určitému trhu výrobků. Podobně podnik s relativně malým podílem na trhu může být významnou soutěžní silou, pokud vlastní slibné „pipeline" výrobky."[114]

Nová Guidelines EU pro posuzování nehorizontálního spojení stanoví, že „Účinná hospodářská soutěž přináší prospěch spotřebitelům, například v podobě nízkých cen, vysoce kvalitních výrobků, širokého výběru zboží a služeb a inovací. (...).

[114] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, (2004/C 31/03), § 38.

„Zvýšení tržní síly" v této souvislosti odpovídá schopnosti jednoho nebo více podniků výnosně zvýšit cenu, snižovat výrobu, zužovat výběr výrobků, zhoršovat jakost zboží a služeb, omezovat inovace, nebo jiným způsobem negativně ovlivňovat parametry hospodářské soutěže."[115] Díky těmto doložkám Komise dala jasně najevo, že při posuzování účinků vertikálního spojení budou inovace zohledněny jako důležité prosoutěžní faktory. To znamená, že již při vypracovávání Guidelines pro nehorizontální spojení Komise počítala s dynamickým přístupem k inovativním odvětvím.

Guidelines Komise EU pro analýzu trhu a posuzování významné tržní síly pro elektronické komunikační sítě a služby [116] ukazují dobrý směr v řešení těchto problémů. Samozřejmě, tyto Guidelines se vztahují pouze na omezené oblasti, ale mohou být použity v podobných případech s rozšířeným výkladem nebo to mohou být dobré modely v případě vydávání nebo změn obecných předpisů o vertikálním spojení. Pro posouzení tržní síly přijímají tyto Guidelines [117] dynamické přístupy k soutěži. Je to ustanovení, že „je důležité zdůraznit, že existenci dominantního postavení není možné stanovit pouze na základě velkých podílů na trhu. Jak bylo uvedeno výše, existence vysokého podílu na trhu jednoduše znamená, že dotčený subjekt může být v dominantním postavení. Proto by NRO měly provést důkladnou a celkovou analýzu ekonomické charakteristiky relevantního trhu dříve, než dospějí k závěru, že jde o existenci významné tržní síly. V tomto ohledu mohou použít pro měření síly podniku chovat se ve velké míře nezávisle vůči svým konkurentům, zákazníkům a spotřebitelům následující kritéria. Tato kritéria zahrnují mimo jiné: (a) celkovou velikost podniku, (2) kontroly ne snadno nahraditelné infrastruktury, (c) technologické výhody nebo převahu, (d) absenci nízké vyrovnávací kupní síly, (e) snadný nebo privilegovaný přístup na kapitálové trhy a k finančním zdrojům, (f) diverzifikaci výrobků/služeb (např. kombinované výrobky nebo služby), (g) úspory ze síly, (h) úspory z rozsahu, (i) vertikální integrace, (j) vysoce rozvinutou distribuci a rozsáhlou distribuční síť, (k) absenci potenciální konkurence, (l) překážky expanze."[118] Speciálně pro hodnocení vertikálních spojení budou velmi důležité faktory (i) (j) (l). Dále je stanoveno, že „zjištění dominantního postavení závisí na posouzení snadnosti vstupu na trh. Ve

[115] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.
[116] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).
[117] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

[118] EU Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), §3.1, (78).

skutečnosti absence překážky vstupu na trh odrazuje podnik s významným tržním podílem od v zásadě nezávislého protisoutěžního chování. V odvětví elektronických komunikací jsou překážky vstupu na trh často vysoké, ať již kvůli stávající legislativě nebo jiným regulačním požadavkům, které mohou omezit počet dostupných licencí nebo poskytování určitých služeb. (např. GSM/DCS nebo 3G mobilní služby). Kromě toho, překážky vstupu na trh existují v případě, kdy vstup na relevantní trh vyžaduje velké investice a plánování kapacit po dlouhou dobu, aby byl rentabilní. Nicméně, vysoké bariéry vstupu na trh se mohou stát méně relevantními, pokud jde o trhy charakterizované pokračujícím technologickým pokrokem. Na trzích elektronických komunikací mohou soutěžní omezení pocházet z nových hrozeb od potenciálních soutěžitelů, kteří nejsou v současné době na trhu. Na těchto trzích by mělo být konkurenční hodnocení založeno na perspektivním, dopředu hledícím přístupu. "[119]

3.3 Hlavní kritéria pro posuzování účinků na hospodářskou soutěž

Spojení, které by výrazně narušilo účinnou hospodářskou soutěž na společném trhu nebo jeho podstatné části, zejména v důsledku vzniku nebo posílení dominantního postavení, by mělo být prohlášeno za neslučitelné se společným trhem.[120] Komise je toho názoru, že v tomto kontextu je méně vhodné ukazovat podíl na trhu a stupeň koncentrace, kteréžto soutěžní obavy jsou považované za pravděpodobné, jelikož existence významného podílu na alespoň jednom z dotčených trhů je nezbytnou, avšak nedostatečnou, podmínkou pro omezení soutěže[121]. Při tomto hodnocení by Komise měla brát v úvahu: (a) potřebu udržet a rozvinout účinnou hospodářskou soutěž na společném trhu se zřetelem na mimo jiné strukturu všech dotčených trhů a skutečnou nebo potenciální soutěž ze strany podniků nacházejících se buď uvnitř nebo vně Společenství, (b) tržní postavení dotyčných podniků a jejich hospodářskou a finanční sílu, stávající alternativy pro dodavatele a uživatele, jejich přístup k dodávkám nebo na trh, jakékoli právní či jiné překážky vstupu na trh, zásobování a trendy poptávky pro příslušné zboží a služby, zájmy průběžných a konečných spotřebitelů a vývoj technického a hospodářského pokroku, pokud je pro spotřebitele výhodou a není to překážkou hospodářské soutěže.[122]

V prostředí ex-ante je tržní síla měřena v podstatě s odkazem na sílu daného

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[119] Id., § 3.1, (80).
[120] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation), Article 2, § 3.
[121] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007, III. §27.
[122] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation), Article 2, § 1 (a)(b).

podniku zvýšit ceny omezením produkce, aniž by si způsobil významné ztráty z prodeje nebo výnosů.[123] Tržní síla podniku může být omezena existencí potenciální konkurence. NRO by tedy měl brát v úvahu pravděpodobnost, že podniky které v současné době nepůsobí na trhu s daným výrobkem, mohou rozhodnout ve střednědobém horizontu vstoupit na trh po malém, ale významném a nepřechodném zvýšení ceny. Podniky, které jsou v případě takového zvýšení ceny v postavení změnit nebo rozšířit své linky na výrobu/služby a vstoupit na trh, se účastní, i když v současné době nevyrábějí daný výrobek nebo neposkytují příslušné služby.[124]

Skutečnost, že podnik s významným postavením na trhu postupně ztrácí podíl na trhu, může dobře ukazovat, že trh se stává více soutěžním, ale to předem nezamezuje zjištění významné tržní síly. Na druhé straně, měnící se tržní podíly v průběhu času mohou svědčit o nedostatečné tržní síle na relevantním trhu.[125] Pokud jde o metody používané pro měření velikosti trhu a podílu na trhu, jak objem prodeje tak prodejní hodnoty mohou poskytnout užitečné informace. V případě hromadných výrobků se přednost dává objemu, v případě diferencovaných výrobků (tj. značkových výrobků) se často považují za lepší hodnota tržeb a jejich podíl na trhu jako obraz relativních postavení a síly jednotlivých poskytovatelů.[126]

3.4 Vyloučení /nekoordinované účinky

Vyloučení je považováno za důsledek spojení tam, kde je v důsledku spojení pro soutěžitele omezován skutečný nebo potenciální přístup k dodavatelům nebo na trhy, čímž se sníží schopnost nebo motivace takových společností soutěžit. Takové vyloučení může odradit soutěžitele od vstupu nebo rozšíření nebo podpořit jejich odchod. Vyloučení tak lze nalézt i tehdy, pokud rivalové, kterých se týká vyloučení, nejsou nuceni k opuštění trhu. Stačí totiž, že soupeři jsou znevýhodněni, což následně vede k méně efektivní soutěži. Takovéto vyloučení je považováno za proti-soutěžní tam, kde slučované společnosti a možná také někteří z jejich soutěžitelů jsou schopni díky získané moci zvyšovat ceny účtované spotřebitelům.

Můžeme odlišit dvě formy vyloučení. První je, když spojení vyvolává zvýšení nákladů u sestupných soutěžitelů tím, že omezí jejich přístup k důležitým vstupům (vyloučení vstupů). Druhým je, když spojení, omezí přístup vzestupným soutěžitelům k

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[123] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), § 3.1 (73).
[124] Id. § 3.1 (74).
[125] Id. § 3.1 (75).
[126] Id. § 3.1 (76).

dostatečné zákaznické základně (vyloučení zákazníků).

Vyloučení vstupů vzniká tehdy, pokud nový subjekt po spojení přistupuje k omezení přístupu k výrobkům a službám, které by jinak bez spojení dodával, čímž zvyšuje náklady jeho sestupným soutěžitelům tím, že je pro ně těžší získat dodávky vstupů za podobných podmínek jako bez spojení. To může vést k tomu, že subjekt vzniklý spojením se ziskem zvyšuje ceny účtované odběratelům, což vede k významnému narušení účinné hospodářské soutěže. Významným měřítkem je, zda zvýšení vstupních nákladů povede k vyšším cenám pro spotřebitele. Jakékoli přínosy vyplývající ze spojení však mohou vést k tomu, že spojený podnik sníží cenu tak, že celkový dopad na spotřebitele je neutrální nebo pozitivní.[127]

Při posuzování pravděpodobnosti scénáře s protisoutěžním vyloučením vstupu, Komise zkoumá, za prvé, zda subjekt, který vznikl spojením, by po spojení měl možnost odepřít přístup k podstatným vstupům, za druhé, zda bude mít motivaci tak učinit, a za třetí, zda strategie vyloučení bude mít významný nepříznivý dopad na sestupnou hospodářskou soutěž.[128]

A. Schopnost vyloučení

Uzavření vstupů se může vyskytnout v různých formách. Subjekt vzniklý spojením se může rozhodnout nespolupracovat se svou skutečnou nebo potenciální konkurencí ve vertikálně souvisejícím trhu. Další možností je, že spojený podnik se může rozhodnout omezit dodávky a/nebo zvýšit ceny účtované konkurenci a/nebo jinak zhoršovat podmínky pro dodávky, než jaké by byly bez spojení. [129] Dále se spojený podnik může rozhodnout pro takový výběr technologií v rámci nového podniku, který není kompatibilní s technologií, kterou zvolily konkurenční společnosti [130] K vyloučení může také dojít lstivější formou, jako je snížení kvality dodávaných vstupů.[131]

Vyloučení vstupů může vyvolat problémy hospodářské soutěže pouze v případě, jde-li o důležité vstupy pro sestupnou produkci. [132] To je například případ, když příslušný vstup představuje relativně významnou částku v nákladech na cenu sestupné produkce. Bez ohledu na jeho náklady může být vstup dostatečně důležitý také z jiných

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[127] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, § 31.

[128] See e.g., Case COMP/M. 4300, Philips/Intermagnetics; COMP/M.4314, Johnson & Johnson/Pfizer Consumer Healthcare; COMP/M. 4389, WLR/BST; COMP/M.4403.

[129] Case COMP/M. 1693 Alcoa/Reynolds (2000); COMP/M.4403 Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 257-260.

[130] COMP/M. 2861 Siemens/Drägerwerk/JV (2003); COMP/M. 3998 Axalto/Gemplus, point 75.

[131] COMP/M. 4314 Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.

[132] COMP/M. 3868 Dong/Elsam/Energi E2; COMP/M. 4094 Ineos/BP Dormagen, points 183-184; COMP/M. 4561, GE/Smiths Aerospace, points 48-50.

důvodů. Například může být vstup rozhodující složkou, bez které by na trhu nemohla být sestupná produkce efektivně vyráběna nebo prodávána,[133] nebo může pro sestupnou produkci představovat významný zdroj odlišení výrobku. Je také možné, že náklady na přechod na alternativní vstupy jsou poměrně vysoké. [134]

Vertikálně integrovaná společnost, která vznikla spojením, musí mít významný vliv na vzestupný trhu, aby z uzavření vstupů vznikaly obavy. Pouze za těchto okolností se dá očekávát, že spojená společnost bude mít významný vliv na podmínky hospodářské soutěže na vzestupném trhu, a tím na ceny a dodací podmínky na sestupném trhu.[135] Spojený podnik má možnost vyloučení sestupných soutěžitelů pouze, pokud by omezování přístupu ke svým vlastním vzestupným produktům nebo službám mohlo negativně ovlivnit celkovou dostupnost vstupů na sestupném trhu, pokud jde o cenu nebo kvalitu. To může být případ, kdy zbývající vzestupní dodavatelé jsou méně efektivní, nabízejí méně preferované alternativy, nebo nemají dostatečnou schopnost rozšířit produkci v reakci na omezení nabídky, např. kvůli kapacitním omezením nebo obecněji pokud čelí klesajícím výnosům z rozsahu.[136]

Při rozhodování, do jaké míry může dojít k vyloučení vstupů, je třeba vzít v úvahu, že rozhodnutí subjektu vzniklého spojením spoléhat se na nabídku vstupů své vzestupné pobočky může také uvolnit kapacity části zbývajících dodavatelů vstupů, od kterých sestupná pobočka nakupovala předtím.[137]

Ve svém hodnocení Komise na základě dostupných informací zváží, zda existují účinná a včasná protiopatření, která by mohly rozvinout konkurenční společnosti. Taková protiopatření zahrnují možnost změnit svůj výrobní proces tak, aby byl méně závislý na vstupu příslušném nebo podporovaném novými vzestupnými dodavateli.[138]

B. Motivace k vyloučení

Motivace k vyloučení závisí na rozsahu, v jakém je vyloučení rentabilní. Vertikálně integrovaný podnik bude brát v úvahu, jaký vliv bude mít jeho zásobování sestupných soutěžitelů vstupy nejen na zisk jeho vzestupné pobočky, ale také jeho sestupné pobočky. V podstatě, spojený podnik čelí kompromisu mezi ztrátou zisku na vzestupném trhu v důsledku snížení prodeje vstupů (skutečným nebo potenciálním) soutěžitelům a zvýšením zisků v krátkodobém nebo dlouhodobém horizontu, rozšířením

[133] Case T-210/01, General Electric v. Commission [2005], ECR II-000); COMP/M. 3410 Total/GDF, points 53-54 and 60-61.
[134] EU non-horizontal merger guidelines, IV. § 34.
[135] EU non-horizontal merger guidelines, IV. § 35.
[136] COMP/M. 4494 Evraz/Highveld, point 92 and points 97-112.
[137] EU non-horizontal merger guidelines, IV. § 37.
[138] EU non-horizontal merger guidelines, IV. § 39.

sestupného prodeje a nebo v určitých případech o zvýšení cen pro spotřebitele.[139] Tento kompromis závisí na výši zisku, který spojený podnik získává vzestupně a sestupně.[140] Pokud jsou ostatní skutečnosti konstantní, platí, že čím nižší je sestupná marže, tím nižší je ztráta z omezení prodeje vstupů. Podobně, čím vyšší je vzestupná marže, tím vyšší je zisk ze zvýšení podílu na sestupném trhu na úkor soutěžitelů, vůči kterým působí vyloučení.[141]

Motivace pro integrované společnosti zvyšovat náklady konkurence dále závisí na předpokládaném rozsahu, ve kterém by mohla být sestupná poptávka odkloněna od soutěžitelů, vůči kterým působí vyloučení, a podíl takovéto poptávky, který může získat navazující sestupná pobočka spojeného podniku.[142] Tento podíl bude obvykle tím vyšší, čím menší kapacita spojeného podniku bude omezena v porovnání s neuzavřenými sestupnými soutěžiteli a čím více výrobků spojené společnosti bude blízkými substituty s výrobky soutěžitelů, vůči kterým působí vyloučení. Vliv na sestupnou poptávku bude také vyšší, pokud dotčený vstup představuje významný podíl na nákladech sestupných soutěžitelů, nebo představuje-li postižený vstup rozhodující součást sestupného výrobku.[143]

Motivace k vyloučení skutečných nebo potenciálních soutěžitelů může rovněž spočívat v tom, do jaké míry může sestupná pobočka integrovaného podniku očekávat, že získá prospěch z vyšších cenových úrovní sestupně jako výsledku strategie, jejímž cílem je zvýšit soutěžitelovi náklady.[144]

C. Celkově pravděpodobný dopad na efektivní hospodářskou soutěž

Obecně lze říci, že spojení přináší obavy z narušení hospodářské soutěže vyloučením vstupů, pokud povede ke zvýšení cen na sestupném trhu a tím významně poškodí účinnou hospodářskou soutěž. Za prvé k protisoutěžnímu vyloučení trhu může dojít, pokud vertikální spojení umožní spojujícím se stranám zvýšit náklady sestupným soutěžitelům na trhu, což povede k tlaku na jejich prodejní ceny. Výrazné poškození účinné hospodářské soutěže obvykle vyžaduje, aby podniky, na které se vyloučení vztahuje, hrály důležitou roli v soutěžním boji na sestupném trhu. Čím vyšší je podíl

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[139] The EU non-horizontal merger guidelines, IV. § 40.
[140] COMP/M. 4300 Phillips/Intermagnetics, points 56-62; COMP/M. 4576 AVR/Van Gansewinkel, points 33-38.
[141] The EU non-horizontal merger guidelines, IV. § 41.
[142] COMP/M. 3943 Saint-Gobain/BPB (2005), point 78.
[143] 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, would be diverted to the integrated firm's downstream unit. See, e.g. COMP/M. 2738 GEES/Unison; COMP/M. 4561 GE/Smiths Aerospace, points 60-62.
[144] See, e.g. COMP/M. 4314 Johnson & Johnson/Pfizer Consumer Healthcare, points 131-132.

konkurence, které by se týkalo vyloučení na sestupném trhu vyloučena, tím je pravděpodobnější, že spojení může vést k významnému zvýšení cen v sestupném trhu a tím na něm výrazně bránit účinné hospodářské soutěži[145]. I přes relativně malý podíl na trhu ve srovnání s jinými hráči může určitá společnost hrát významnou roli při konkurenčním srovnání s dalšími hráči,[146] například proto, že je blízký konkurent vertikálně spojeného podniku, nebo proto, že je agresivní soutěžitel.[147] Za druhé, účinná hospodářská soutěž může být významně narušena zvýšováním překážek vstupu na trh pro potenciální konkurenty.[148] Vertikální spojení může vyloučit potenciální hospodářskou soutěž na sestupném trhu v okamžiku, kdy spojený podnik pravděpodobně nebude dodávat dalším potenciálním subjektům na sestupném trhu nebo pouze za méně výhodných podmínek než při neexistenci spojení. Pouhá pravděpodobnost, že subjekt, který vznikl spojením, bude po spojení provádět strategii vyloučení, již sama o sobě může vytvořit silný odstrašující účinek na potenciální vstupující.[149] Účinná hospodářská soutěž na sestupném trhu může být vážně narušena tím, že zvýší překážky vstupu, zejména pokud vyloučení vstupů znamená pro potenciální soutěžitele, že je třeba vstoupit jak na navazující sestupnou, tak na vzestupnou úroveň tak, aby mohli účinně konkurovat na jednom nebo druhém trhu.

Pokud zůstane dostatek věrohodných sestupných soutěžitelů, jejichž náklady nebudou mít tendenci k nárůstu například proto, že jsou sami o sobě vertikálně spojeny [150] nebo jsou schopni přechodu na vhodné náhradní vstupy, konkurence těchto společností může představovat dostatečné omezení spojeného podniku a tím zabránit výrobním cenám stoupat nad úroveň před spojením.[151] Účinek na hospodářskou soutěž na sestupném trhu musí být rovněž posuzován s ohledem na vyrovnávací faktory, jako je například přítomná kupní síla nebo pravděpodobnost, že vstup vzestupně by udržel účinnou hospodářskou soutěž.[152]

V případě America Inc Online (AOL)/Time Warner [153] Komise vyjádřila obavy, že AOL, kvůli spojení s Time Warner (která dále měla v plánu sloučit své hudební vydavatelství a nahrávací činnosti s EMI) a kvůli svému evropskému joint venture s Bertelsman, by kontrolovala přední zdroje hudebních vydavatelských práv v Evropě.

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[145] See, e.g. Case COMP/M. 4494 Evraz/Highveld, points 97-112.
[146] See. e.g. Case COMP/M. 3440 EDP/ENI/GDP (2004).
[147] EU non-horizontal merger guidelines, IV. § 48.
[148] See, e.g. Case COMP/M. 4180 Gaz de France/ Suez, points 876-931; Case COMP/M. 4576 AVR/Van Ganswinkel, points 33-38.
[149] See, e.g. Case COMP/M. 3696 E.ON/MOL (2005).
[150] See, e.g. Case COMP/M. 3653 Siemens/VA Tech (2005), at point 164.
[151] EU non-horizontal merger guidelines, IV. § 50.
[152] EU non-horizontal merger guidelines, IV. § 51.
[153] Case No. COMP/M. 1845, 2000.

AOL je vedoucím poskytovatelem přístupu k internetu v USA a jediný takový poskytovatel s celo-evropskou působností. Time Warner je jedním z největších světových mediálních a zábavních společností s podíly na televizních sítích, časopisech a vydavatelstvích knih, hudby, filmové zábavy a kabelových sítích. Spojení vytvořilo prvního internetového, vertikálně integrovaného poskytovatele výrobků, šířícího výrobky značky Time Warner (hudba, zpravodajství, filmy, atd.) prostřednictvím internetové distribuční sítě AOL.

Kvůli strukturálnímu a smluvnímu vztahu AOL s Bertelsmann by měl nový subjekt také přednostní přístup k výrobkům Bertelsmann, zejména do jeho velké hudební knihovny. V důsledku by nová společnost kontrolovala hlavní zdroje hudebních vydavatelských práv v Evropě, trh, na němž třetina je v držení Time Warner a Bertelsmann společně. Za těchto okolností bylo pravděpodobné, že by se nový subjekt stal dominantním v nově se rozvíjejícím trhu on-line internetové hudbu a stál by se 'vrátným', a tím by byl schopen diktovat podmínky pro šíření zvukových souborů přes Internet. Také by bylo možné, aby nový subjekt formátoval hudbu Time Warner a Bertelsmann takovým způsobem, aby byla kompatibilní pouze s hudebním přehrávačem AOL (Winamp), ale ne s konkurenčními hudebními přehrávači. Na druhé straně Winamp by byl schopen přehrávat hudbu od konkurenčních hudebních společností, které používají obecný otevřený formát. Z důvodu tohoto technického omezení ostatních přehrávačů by nový subjekt byl také schopne vnutit Winamp jako dominantní hudební přehrávač.

Tyto příklady zdůrazňují, že je důležité analyzovat možnost vyloučení a diskriminujících strategií na trzích vysoké inovace. Tyto jsou možným zdrojem znepokojení, pokud jedna ze stran disponuje významnou tržní silou na vzestupném a / nebo sestupném trhu.

Komise zablokovala vytvoření joint venture mezi Bertelsmann (německá největší mediální společnost), Kirsh (společnost poskytující televizní přenosy a lídr na trhu filmové zábavy) a Deutsch Telekom (vlastník/provozovatel téměř všech německých širokopásmových sítí) pro rozvoj digitální placené televize jako zprostředkovatele administrativní a technické služby pro ostatní televizní vysílatele.[154] Komise dospěla k závěru, že by vzniklo trvalé dominantní postavení v důsledku navrhovaného rozvoje infrastruktury podniku a vertikálního spojení. Tento podnik byl považován za hrozbu jak pro potenciální soutěž mezi spojenými podniky, tak omezením potenciálních vstupujících, kteří by se nechtěli zavázat k investicím potřebným na rozvoj konkurenčních sítí. V tomto ohledu Komise našla předpokládané úspory z rozsahu (a

[154] MSG Media Services (COMP/M.469)

výhody spotřebitelů z nich vyplývající) jako nedostatečné oproti pravděpodobným protisoutěžním vlivům podniku, protože by mohly odradit ostatní od vstupu. Komise také vyjádřila obavu, že podnik, jako dodavatel základní infrastruktury pro jiné provozovatele placeného televizního vysílání, se může chovat oportunisticky, například prostřednictvím poskytování přístupu za diskriminačních podmínkek, technicky zkreslovat budoucí vývoj, vzájemné nahraditelnosti mezi různými prvky tohoto systému a zneužívání soutěžně citlivých informací. V součtu došla Komise k závěru, že i když navrhovaný podnik může vytvořit poptávku po nových službách, je pravděpodobné, že by mohl být tak protisoutěžní, že by v dlouhodobém horizontu bránil technickému a ekonomickému pokroku. Konkrétně se rozhodnutí změnilo v porovnání navrhovaného podniku s hypotetickým soutěžním trhem bez ohledu na to, zda soutěž mezi jednotlivými poskytovateli byla ve skutečnosti doložitelná.

3.5 Obrana přínosů v právním systému EU

Historie kontroly spojování v EU je mnohem kratší než v USA, protože neexistoval žádný právní nástroj, který by umožňoval Komisi systematicky kontrolovat tento typ operací před rokem 1989, kdy Rada přijala Nařízení o spojování (Merger Regulation). Podle tohoto nařízení je spojení povoleno, pokud nevytváří nebo neposiluje dominantní postavení, v důsledku čehož by byla významně narušena účinná hospodářská soutěž.[155] Tento test je znám jako test dominance.

Donedávna v právním systému EU, Nařízení o spojování a judikatura podotýkaly, že Komise není připravena k vyvažování efektivnosti a dominantního postavení, ale spíše odhalovaly, že má dostat přednost zachování a udržení soutěžního trhu před vším ostatním, včetně ekonomických účinků.

V roce 2004 Rada EU změnila ES Nařízení o spojování a po důrazné diskuzi stanovila, že „za účelem stanovení dopadu spojení na hospodářskou soutěž na společném trhu je vhodné zohlednit všechny odůvodněné a pravděpodobné přínosy předložené dotyčnými podniky. Je možné, že přínosy vyplývající ze spojení vyváží dopady na hospodářskou soutěž, zejména možnou újmu způsobenou spotřebitelům, která mohla jinak vzniknout, a že v důsledku toho spojení zásadně nenaruší účinnou hospodářskou soutěž na společném trhu nebo na jeho podstatné části, zejména v důsledku vzniku nebo posílení dominantního postavení."[156] A dodala, že „Komise bude publikovat pokyny o podmínkách, za jakých mohou být přínosy zohledněny při

[155] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Article 2.
[156] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), recital (29).

posouzení spojení." Podle tohoto ustanovení vydala Komise EU v roce 2004 Guidelines pro posuzování horizontálních spojení, v nichž objasnila, že „...je možné, že přínosy vyvolané spojením vyrovnají účinky na hospodářskou soutěž a zejména možné poškození spotřebitelů, které by jinak mohlo vzniknout..."[157]

V rámci Guidelines EU pro nehorizontální spojení je stanoveno, že „Komise v hodnocení vezme v úvahu jak možné protisoutěžní účinky vyplývající z vertikálního spojení, tak možné účastníky podložené prosoutěžní účinky vyplývající z přínosů."[158] Dále je podrobně dodáno, že „Komise se může rozhodnout, že jako důsledek přínosů, které spojení přináší, není žádné opodstatnění prohlásit spojení za neslučitelné se společným trhem podle článku 2 (3) Nařízení o spojování. To bude platit v případě, kdy Komise je v pozici usoudit na základě dostatečných důkazů, že přínosy ze spojení pravděpodobně posílí schopnost a motivaci subjektu vzniklého spojením jednat prosoutěžně ve prospěch spotřebitelů, čímž vyváží nepříznivé účinky na hospodářskou soutěž, který by jinak spojení mohlo mít."[159]

Dále obsahuje klauzuli, že „zejména vertikální spojení umožňuje spojenému podniku pohltit předchozí dvojité zvyšování cen vyplývající z toho, že obě strany stanovovaly před spojením ceny nezávisle. V závislosti na tržních podmínkách, snížení kombinované zvýšené ceny (vzhledem k situaci, kdy cenová rozhodnutí na obou úrovních nejsou napojena) může umožnit vertikálně spojenému podniku, aby se ziskem zvyšoval výstup na sestupném trhu."[160]

Co se týká přístupu v oblasti inovačních trhů, je jasné, že „účinná hospodářská soutěž přináší prospěch spotřebitelům, například v podobě nízkých cen, vysoce kvalitních výrobků, širokého výběru zboží a služeb a inovací... „Zvýšení tržní síly" v této souvislosti znamená schopnost jednoho nebo více podniků výnosně zvýšit ceny, snižovat výrobu, zužovat výběr nebo zhoršovat jakost zboží a služeb a omezovat inovace..."[161] A dodává, že „... další úsilí ke zvýšení prodejů na jedné úrovni (např. zlepšení služby nebo posílení inovace) může pro integrovaný podnik poskytnout větší prospěch, který bude brát v úvahu výhody, které se objeví na jiných úrovních." Tímto ustanovením Komise EU dává jasně najevo, že inovace bude velmi důležitým klíčovým faktorem při hodnocení posílení konkurenčních účinků zvyšujících prospěch.

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[157] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, VII.
[158] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, IV(28).
[159] Id. IV (52).
[160] Id. IV (55).
[161] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, II. § 10 (2007).

A konečně Guidelines EU pro nehorizontální spojení obsahují velmi kritický pohled na dynamické přístupy v analýze vertikálního spojení. V bodě 56 a 57 obsahují ustanovení, že „vertikální spojení mohou dále dovolit zúčastněným lepší koordinaci procesu výroby a distribuce, a tedy úspory na nákladech na zásoby". „Obecněji, vertikální spojení může sjednotit motivaci zúčastněných s ohledem na investice do nových výrobků, nových výrobních procesů a při marketingu produktů..."

X. Pokyny US a EU pro posuzování nehorizontálních spojení

1. Pokyny US pro posuzování nehorizontálních spojení

Pokyny US k spojením soutěžtelů ministerstva spravedlnosti z roku 1968 obsahují oddělené sekce analyzující možné protisoutěžní dopady horizontálních, vertikálních a konglomerátních spojení. S ohledem na vertikální akvizice, pokyny z roku 1968 uvádí, že k protisoutěžnímu jednání by mohlo dojít „kdykoli určitá vertikální akvizice nebo série akvizic, a to jednou nebo více společnostmi na trhu nabídky nebo poptávky, má výraznou tendenci vytvářet překážky pro vstup na některý z těchto trhů nebo znevýhodňovat stávající neintegrované nebo částečně integrované společnosti na obou trzích způsobem, který nesouvisí s ekonomickou výkonností."

V revizi pokyny k spojením soutěžtelů z roku 1982 se ministerstvo spravedlnosti řídilo ekonomickým přístupem ke spojení, který eliminoval tradiční horizontální, vertikální a konglomerátní organizační rámec ve prospěch horizontální / nehorizontální klasifikace. Obojí, jak jeho pokynz z roku 1982 tak dodatky z roku 1984, vidí ochranu spotřebitelů skrz zvýšení ekonomické výkonnosti společností a trhů k jedinému pojetí antimonopolního práva.[162]

Vzhledem k tomuto přístupu není překvapující, že se Guidelines odchylují od většiny z precedentů vertikálních a konglomerátních spojení. Guidelines začínají s tvzením, že nehorizontální spojení samozřejmě zahrnují společnosti, které nepůsobí na stejném trhu. Nutně následuje, že taková spojení nepřinášejí žádné bezprostřední změny v úrovni koncentrací na žádném relevantním trhu, jak je definován v § 2 těchto Guidelines..."[163] Z tohoto pohledu je podle Guidelines u nehorizontálního spojení vznik soutěžního problému méně pravděpodobný, než u horizontálního spojení.

Přesto Guidelines připouštějí, že nehorizontální spojení nejsou vždy neškodná."[164] Tato mohou být protiprávní, pokud (1) způsobují vyloučení konkrétních potenciálních vstupujících,[165] (2) vytvoří „soutěžně závadné překážky vstupu,"[166] (3) umožňují tajné dohody nebo,[167] (4), v případě vertikálních akvizicí vytvářejí významné příležitosti k obcházení regulace sazeb. [168] Stejně jako u horizontálních spojení,

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[162] Wayne D. Collins and James R. Loftis, III, Non-Horizontal Mergers: Law and Policy, American Bar Association Section of Antitrust Law, Monograph 14, p. 37-38 (1988).
[163] U.S. Department of Justice Merger Guidelines (1984), § 4.0.
[164] Id. at § 4.0.
[165] Id. at § 4.1
[166] Id. at § 4.21.
[167] Id. at § 4.22.
[168] Id. at § 4.23.

Guidelines upřesňují, že vytvoření výkonnosti bude hodnoceno ve spojení s nehorizontálními spojeními.[169]

2. Pokyny EU pro posuzování nehorizontálních spojení

Dne 13. února 2007 Evropská komise zahájila veřejné konzultace o návrhu Pokynů Evropská komise pro posuzování nehorizontálních spojení (Guidelines on the assessment of non-horisontal mergers) podle nařízení Rady (ES) č. 139/2004 o kontrole spojování podniků („Nařízení o spojování", resp. „Návrh Guidelines"). Dne 28. listopadu 2007 Evropská komise přijala Pokyny pro sloučení společností s vertikálním a konglomerátním vztahem (IP/07/1780) (Guidelines for merging companies with vertical and conglomerate relationship).

Obecné pokyny uvedené v oznámení o horizontálních spojeních jsou také důležité v souvislosti s nehorizontálními spojeními. Účelem těchto Guidelines je soustředit se na ty aspekty soutěže, které jsou důležité pro specifické podmínky nehorizontálních spojení. Kromě toho stanoví přístup Evropské komise k podílům na trhu a prahovým hodnotám v této souvislosti.[170] Guidelines poskytují příklady, které jsou založeny na zavedených ekonomických zásadách, ve kterých vertikální a konglomerátní spojení mohou významně poškodit účinnou hospodářskou soutěž na předmětných trzích. Například nastiňují okolnosti, za nichž by vertikální spojení mohlo pravděpodobně vyústit v situaci, kdy konkurenčním společnostem je odepřen přístup k důležitému dodavateli nebo tyto čelí zvýšeným cenám za své vstupy, což by v konečném důsledku vedlo k vyšším cenám pro spotřebitele.[171]

Pokyny uvedené v tomto dokumentu čerpají a rozpracovávají vyvíjející se zkušenosti Evropské komise s hodnocením nehorizontálních spojení podle nařízení č. 4064/89 od jeho vstupu v platnost dne 21. září 1990, podle nařízení o spojování v současném znění, stejně jako podle judikatury Soudního dvora a Soudu prvního stupně Evropských společenství. Zásady zde obsažené budou v jednotlivých případech použity a dále rozvíjeny a zdokonalovány Evropskou komisí.[172]

Výkladem Nařízení o spojování v podaní Evropské komise, pokud jde o posouzení nehorizontálních spojení, není dotčen výklad, který může podat Soudní dvůr

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[169] Id. at § 4.24.
[170] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 6.
[171] EU Commission Press Release (IP/07/1780), Brussel, 28th November 2007.
[172] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 8.

nebo Soud prvního stupně Evropských společenství.[173]

3. Komentář

Existuje reálné sblížení v zásadách, jimiž se řídí posuzování spojení soutěžitelů v regulačních systémech horizontálních spojení EU a USA. Totéž nelze říci o nehorizontálních spojeních. Guidelines Evropské komise odrážejí nejen vůli, nýbrž odhodlání zamezit nehorizontálním spojením, která hrozí, že omezí hospodářskou soutěž na sestupných a vzestupných trzích.[174]

Co je odlišné mezi ekonomickým základem v pozadí politiky nehorizontálních spojení v USA a v EU?

Dovolte mi, abych zmínila nejprve USA. Merger Guidelines z roku 1984 byly vytvořené pod vedením profesora (tehdy asistent Attorney General) Williama Baxtera, Baxter byl velkým zastáncem Chicagské ekonomické školy a chicagská škola ekonomického myšlení se v Guidelines z roku 1984 zřetelně odráží. Konkrétně Guidelines přijaly dvě teorie omezené odpovědnosti za nehorizontální spojení (s výjimkou odpovědnosti za vyloučení potenciálních soutěžitelů nebo za vyhýbání se regulačním sazbám). Za prvé, Guidelines předpokládají, že nehorizontální spojení mohou vést k nekalým praktikám buď na vzestupném nebo na sestupném trhu.[175] Tato teorie je v souladu s Chicagskou školou ekonomie, protože nekalé praktiky jsou jedním z mála druhů chování, které je považováno za neefektivní a tudíž i zhoubné. Za druhé, Guidelines z roku 1984 předpokládají, že nehorizontální spojení může vyloučit hospodářskou soutěž tím, že vytváří nežádoucí bariéry pro vstup na trhy, na které získaná společnost a nabývající společnost soutěží.[176] Avšak vznik takovéto překážky vstupu je považován za reálnou hrozbu pouze za velmi omezených okolností - jmenovitě: (a) pokud vstup do obou trhů je nezbytný pro možnost soutěžit v jednom z nich, a (b), pokud nehorizontální spojení činí současný vstup podstatně obtížnější.[177]. V Guidelines neexistuje žádná zmínka o příležitosti a pobídce, které mohou existovat po transakci pro nabývající společnost, aby se zapojila do chování, která mohou ochromit

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[173] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9.

[174] J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement", at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, September 27-28, 2007.

[175] Department of Justice, Non-Horizontal Merger Guidelines, § 4.22, 49 Fed. Reg. 26,823 (June 29, 1984).

[176] Department of Justice, Non-Horizontal Merger Guidelines, § 4.25, 49 Fed. Reg. 26,823 (June 29, 1984).

[177] Id. at § 4.211-4.212.

soupeře na vzestupných nebo na sestupných trzích- chování jako odmítnutí obchodu, agresivní cenová politika nebo různé formy spekulací, jako je například vázaný obchod, seskupení obchodů, věrnostní slevy a výlučné obchody. Naopak, Guidelines naznačují, že nehorizontální spojení téměř vždy zvýšují přínosy.[178]

Naproti tomu Guidelines Evropské komise pro nehorizontální spojení silně čerpají ze studia ekonomické teorie-především post-Chicagské-ekonomické teorie, užité generálním ředitelstvím pro hospodářskou soutěž v roce 2004.[179] Zohledňujíc post-Chicagské ekonomy, Guidelines výslovně předpokládají odpovědnost, kdy po transakci, nabývající společnost bude mít schopnost i motivaci ochromit soupeře na vzestupných nebo na sestupných trzích tím, že zvýší jejich náklady a zavede výlučné obchody, agresivní stanovování cen nebo spekulace. Přesněji řečeno, Guidelines pro posuzování nehorizontálních spojení se zaměřují na možnost, že chování (tj. transakce v případě nehorizontálních spojení) vyloučí soupeře z účinné soutěže v neprospěch spotřebitelů.[180] Například EU Guidelines o nehorizontálních spojeních se soustředí na to, zda vertikální spojení dává nabývající společnosti schopnost a motivaci k zavedení jednání, které bude nevýhodné pro její soupeře - ať už jde o úplné vyloučení nebo strategii zaměřenou na zvýšení nákladů soupeřů. Přesto vyloučení samo o sobě není dostačující. Guidelines se potom ptají, zda soutěž - a spotřebitelé - budou vyloučením poškozeni.

Nedávný právní článek zmiňuje, že americká antimonopolní výkonná moc se zaměřuje téměř výhradně na dopad spojení na cenu a kvalitu, přičemž oproti tomu prošetřování v Evropě je širší a zahrnuje všechny možné škodlivé účinky na spotřebitele a jejich možnost výběru.[181] Naopak, Guidelines EU o nehorizontálním spojení respektující vyloučení soutěžitelů by mohly být chápány tak, že přínosy nemohou

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[178] Id. at § 4.0 and 4. 24, "An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger."

[179] Jeffrey Church, Impact of Vertical and Conglomerate Mergers, 2004.

[180] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, § 29, "A merger is said to result in foreclosure where actual or potential rival's 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."

[181] Neil Averitt & Robert H. Lande, Using the "Consumer Choice" Approach to Antitrust Law, 74 Antitrust L.J. 175, 2007.

ospravedlnit vylučovací praktiky ve vysoce koncentrovaném odvětví. [182] Tyto Guidelines připouštějí, že vertikální a konglomerátní spojení mohou vytvářet přínosy. Nicméně, také popisují celou řadu případů, ve kterých tato spojení mohou poškodit spotřebitele, nehledě na potenciál pro přínosy. [183]

Významným opomenutím ze strany Guidelines o nehorizontálním spojení v USA a EU je absence jakékoli diskuse o tom, jak Komise analyzuje vliv vertikálního spojení v inovačně zaměřených odvětvích. Pravděpodobně je tomu tak proto, že Guidelines pro horizontální spojení nevytyčují výslovný postup, jak analyzovat účinky na hospodářskou soutěž v nových odvětví. To by nemělo být překvapující. Ekonomické analýzy, jež jsou základem pro Guidelines o spojeních, stejně jako předchozí federální analýzy spojení, se zaměřily především na cenovou soutěž, protože to je to, o čem víme asi nejvíce. To má za následek, že návod, jak analyzovat hospodářskou soutěž v oblasti inovace, musí být z větší části přebírán z diskuzí o cenové soutěži.

Vzhledem k nahromaděným precedentním případům je třeba, aby oba právní systémy byly doplněny krok za krokem. Myslím, že v současné době je tento krok téměř připraven.

[182] J. Thomas Rosch, Commissioner, FTC. Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuse, at the St. Gallen International Law Forum, 11 May, 2006.
[183] J. Thomas Rosch, Commissioner, FTC, before the St. Gallen International Competition Law Forum, 10-11 May, 2007.

XI. Závěr

Hodnocení spojení na dynamických a inovativních trzích je výzvou pro tradiční soutěžní teorie. Konkurence v high-tech odvětvích zahrnuje sledy závodů ve vývoji nového výrobku nebo nahrazení stávajícího výrobku prostřednictvím drastické inovace. V úvodu závodu společnosti mohutně investují do vývoje nového výrobku, který vytváří novou kategorii nebo se stane tahounem v nové kategorii. Vítěz dočasně získá velký podíl na trhu a vysoké zisky. Jelikož vlivy sítě mají tendenci posilovat vedoucí pozici, mnoho high-tech odvětví se skládá ze sledů závodů o vedoucí postavení na trhu.

Proto v případě vyhodnocení účinků vertikálních spojení na high-tech odvětví bychom měli zvážit různé paradoxní extrémně pro nebo proti soutěžní faktory, které vyplývají z vertikálních spojení. Někdy je to velmi složité a nejednoznačné.

Ústřední problém, který vzniká při analýze na dynamickém trhu, pochází z relativní nestability trhů v čase a možnosti hospodářské soutěže vztahující se na výrobky, jež mají být teprve zavedeny. Pokud se očekává, že se rozsah působnosti relevantního trhu výrazně změní v průběhu času v důsledku změn vlastností výrobku, nebo je-li očekávaná změna povahy hospodářské soutěže na tomto trhu, pak analýza hospodářské soutěže na současném relevantním trhu pravděpodobně nebude spolehlivým ukazatelem hospodářské soutěže v budoucnosti. Pokud spojení aktuálně vytváří dominantní postavení nebo monopol a narušuje hospodářskou soutěž na relevantním trhu, přetrvá toto dominantní nebo monopolní postavení v budoucnu? Naopak, zdá-li se spojení na současných trzích neškodné, nemůže se stát překážkou pro hospodářskou soutěž na budoucím trhu?

K řešení problému nestability na relevantních trzích podotýkáme, že je možné posuzovat jejich vývoj na základě zjištění nějakých širších technicko-ekonomických trendů. Toto hodnocení bude založeno na analýze technologických změn a nutnosti posuzovat širší trendy na trhu, které by mohly ovlivnit výrobky, u kterých se očekává, že budou soutěžit na trhu, a vývoj zvyklostí spotřebitelů, pokud jde o substituty.

Antimonopolní analýzy tradičně věnují zvláštní pozornost tomu, zda některé společnosti mají významné podíly na trhu. Nicméně konkrétní charakteristiky odvětví nové ekonomiky zpochybňují, zda tradiční přístup je stále opodstatněný. V souvislosti s high-tech odvětvími se zdají být lepší odpovědí dynamičtější analýzy, které umožnují zhodnotit soutěžní síly na příslušných trzích a zajistit a udržet účinnou hospodářskou soutěž mezi hráči.

K pokrytí těchto problémů je právní základ USA a EU příliš slabý a, jak již bylo uvedeno výše, z důvodu zvláštních charakteristik inovativních odvětví není tak snadné

vytvořit jednoduchou a obecnou právní úpravu. Ekonomové a právnící se připravovali na tento projekt již dlouho a soudy a antimonopolní úřady nahromadily případy. Guidelines Evropské komise pro analýzu trhu a posuzování významné tržní síly pro elektronické komunikační sítě a služby[184] vykazují dobré návody na řešení těchto problémů. Samozřejmě, že tyto Guidelines se vztahují pouze na omezený sektor ve specifických oblastech, ale mohou být použity v podobných případech s rozšířeným výkladem nebo mohou být vhodné jako modely v případě, že budeme vydávat zákony nebo měnit obecné předpisy o vertikálních spojeních.

Existují dva hlavní způsoby, kterými nehorizontální spojení mohou zásadně narušit účinnou hospodářskou soutěž: nekoordinované a koordinované účinky. Nekoordinované účinky mohou nastat hlavně, když nehorizontální spojení vedou k vyloučení. Termín „vyloučení" bude použit k označení všech případů, kdy přístup k dodávkám nebo na trh je pro skutečné nebo potenciálné soutěžitele v důsledku spojení obtížnější nebo nemožný, čímž se sníží jejich schopnost a / nebo zájem soutěžit. V důsledku tohoto vyloučení, spojující se společnosti a možná někteří z jejich soutěžitelů mohou být schopni se ziskem zvýšit ceny účtované zákazníkům.

V důsledku toho musí správné zjištění tržní síly v nové ekonomice obsahovat seriozní analýzu rázu dynamické hospodářské soutěže. Je důležité například posoudit vlastnictví a investice do příslušného duševního vlastnictví, které může zahrnovat technologie, které nejsou v současné době komerčně využívané. Je-li například aktuální tržní vůdce vlastníkem všeho duševního vlastnictví nezbytného pro radikální inovace, dynamická soutěž nebude účinná.

Ohledně nehorizontálních spojení, regulace vertikálních spojení EU je poměrně velmi dobře zavedena. I když to není dost na pokrytí rychle se měnících trendů, alespoň shledáváme několik ustanovení s dynamickým přístupem. Mezi případy EU generálního ředitelství pro soutěž a US Ministerstvo Spravedlnosti(US Department of Justice) může snadno najít dynamické přístupy, které se zabývají vertikálními spojeními v nové ekonomice. Proto si myslím, že nejprve by Evropská komise měla shromáždit příslušné případy a upravit Guidelines pro nehorizontální spojení. Po nahromadění těchto případů můžeme extrahovat určitá obecná společná pravidla. Jak jsem již uvedla výše, jelikož vertikální spojení v nové ekonomice obsahuje extrémní množství pro a proti soutěžních znaků ve svých původních charakteristikách, je téměř nemožné pokrýt všechna vertikální spojení několika určitými a obecnými pravidly, pak bude lepší soustředit se na doplnění Guidelines pro nehorizontální spojení podrobněji a případ od případu.

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[184] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

Guidelines Evropské komise pro elektronické komunikační sítě a služby budou velmi užitečné při zlepšování Guidelines pro vertikální spojení.

V americkém antimonopolním právu, za dlouhou dobu diskuzí, právní a ekonomické výzkumy nashromáždily poměrně rozvinuté teorie a čas od času změnily náhled na soutěžní účinky vertikálních spojení – „Harvardská škola", „Chicagská škola" a „post-Chicagská škola" atd. A díky US Fedrální Obchodní Komise a Ministerstvo spravedlnosti soudních sporů existuje již mnoho nashromážděných případů. Po změně Guildelines pro horizontální spojení USA z roku 1984 byly Guidelines pro nehorizontální spojení USA odloženy na dlouhou dobu v tichosti stranou, protože přístupy US Fedrální Obchodní Komise a Ministerstvo spravedlnosti byly ovlivněny „Chicagskou školou", případů napadnutých vertikální spojení bylo velmi málo. A tradičně, americký kongres dosud nechává tento úkol řešit antimonopolní orgány a Ministerstvo spravedlnosti případ od případu, než aby vydal potřebnou legislativu nebo změnil formální antimonopolního zákony nebo Guidelines. Právě proto Guidelines Spojených států pro nehorizontální spojení nestačí k tomu, aby ukázaly cestu pro antimonopolní orgány, společnosti a spotřebitele, jak předvídat budoucí vyvoj. Jak je uvedeno výše, bude nutné doplnit současné Guidelines pro nehorizontální spojení o nové dynamické přístupy a pravidla získané z jednotlivých zvláštních případů a vědeckých teorií. Myslím, že není nutné měnit Sherman Act nebo Clayton Act, mohou být vykládány pružně k přizpůsobení se měnícím novým trendům.

Z toho vyplývá, že Guidelines USA a EU pro horizontální a nehorizontální spojení musí být změněny takto: je potřeba doložky (a) definující koncept „inovativního trhu", (b) dynamického a praktického vymezení relevantního trhu a postupy zhodnocení dominantního postavení nebo tržní síly, (c) v případě hodnocení účinků na hospodářskou soutěž, orgány musí hodnotit nejen cenové vlivy, ale další různorodé dynamické účinky na budoucí trhy z dlouhodobého hlediska, např. jakosti výrobků, široký výběr výrobků a služeb, inovace, atd. (d) multi-dimenzionální úvahy o soutěžních podmínkách, (e) ochrany přístupu konkurence k 'základním zařízením', (f) akceptace obrany „dynamických přínosů".

SEZNAM POUŽITÉ LITERATURY

MONOGRAFIE

E. Robinson, The Structure of Competition Industry 20 (rev. ed. 1958).

F. Scherer, Industrial Market Structure and Economic Performance, (2d ed. 1980).

Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, (1950).

M.Waterson, Economic Theory of The Industry, (1984).

Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989).

Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, (1984).
Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, 96-98 (1984).

Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds. 1989).

Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

Robert H. Bork, The Antitrust Paradox (1978).

Robert S, Schlossberg, Mergers and Acquisitions: Understanding the Antitrust Issues, ABA Section of Antitrust Law, 2d. Edition, (2004).

Sullivan, Handbook of the law of antitrust 588 (1977).

ČLÁNEK

Benjamin Klein et.el., "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J.L. & Econ. 297 (1978).

Bernhart, "Vertical Integration and Demanded Variability", 25 J. Indus. Econ. 213 (1977).

Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics

in Standardization," Journal of Economic Perspectives, Vol. 3, No. 2, 1994.

Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics in Standardization," Journal of Economic Perspectives, Vol. 3, No. 2, (1994).

Blair & Kaserman, "Uncertainty and the Incentive for Vertical Integration," 26 S. Econ. J. 266 (1978).

Bruce H. Kobayashi, "Game Theory and Antitrust: A Post Mortem," 5 Geo. Mason. L. Rev. 411 (1997).

Carl Shapiro, "Exclusionary in Network Industries," 7 Geo. Mason. L. Rev. 673 (1999).

Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979).

Christine A. Varney, "Vertical Merger Enforcement Challenges at the FTC", PLI 36th Annual Antitrust Institute, San Francisco, California (1995).

Coase, "The Nature of the Firm," 4 Economica 386 (1937).

David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, (May 2001).

Davis, R.W. "Innovation markets and merger enforcement: current practice in perspective, Antitrust Law Journal, 71 (2003).

Dennis A. Yao and Susan S. DeSanti, "Innovation Issues under the 1992 Merger Guielines", 61 Antitrust L.J. 521, (1992-1993).

Dennis W. Carlton, "Antitrust Policy Toward Mergers when Firms Innovate: Should Antitrust Recognize the Doctrine of Innovation Market?" Testimony before the Federal Trade Commission Hearings on Global and Innovation-based Competition (Oct. 25, 1995).

Dennis W. Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979).

Elena Cefis, Mark Grondsma, Anna Sabidussi, Hans Schenk, "The Role of Innovation in Merger Policy: Europe's Efficiency Defence versus America's Innovation Markets Approach," Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Discussion Paper Series nr: 07-21, (2007).

EU DG Commission, "Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy," executive summary, (2001).
Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, (12 September 2003).

European Commission, "Towards a new framework for Electronic Communications infrastructure and associated services", Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, The 1999 Communications Review, 1999.

Evans, David S, and Bernard J. Reddy, "Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," in Intellectual Property Antitrust 1996, Practicing Law Institute, 1996.

Fisher & Sciacca, "An Economic Analysis of Vertical Merger Enforcement Policy," 6 Research in L. & Econ. 1, (1984).

Frederick R. Warren-Boulton, "Vertical Control with Variable Proportions," 82 J. Pol. Econ. 783 (1974).

Gary L. Roberts & Steven C. Salop, Efficiencies in Dynamic Merger Analysis, 19 World Competition L.& Econ. Rev. 5, (1996).

Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (Nov. 2001).

Glenn C. Loury, "Market Structure and Innovation," 93 Q.J. Econ 395 (1979).

Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum. Bus. L. Rev. 257, 323 (2001).

J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement", at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, September (2007).

J. Thomas Rosch, Commissioner, FTC. Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuse, at the St. Gallen International Law Forum, 11 May, 2006.

Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990).

Jeffrey Church, "Impact of Vertical and Conglomerate Mergers," 2004.
Jennifer F. Reinganum, " Timing of Innovation: Research Development, and Diffusion," Handbook of Industrial Organization, p.849, Richard L. Schumalensee & Robert D. Willig eds., (1989).

Jennifer F. Reinganum, "The Timing of Innovation: Research Development, and Diffusion," Handbook of Industrial Organization, Richard L. Schumalensee & Robert D. Willig eds., 1989.

John M. Vernon & Daniel A. Graham, "Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

Katz, Michael and Carl Shapiro, "Network Externalities, Competition, and Compatibility," American Economic Review, Vol. 75, No.3, 1985.

Katz, Michael and Carl Shapiro, "Systems Competition and Network Effects," Journal of Economic Perspectives, Vol. 3, No. 2, 1994.

Kenneth J. Arrow, "Economic Welfare and the Allocation of Resources to Innovation", The Rate and Direction of Inventive Activity, National Bureau of Economic Research

ed., 1962.

Kenneth J. Arrow, "Vertical Integration and Communication," 6 Bell J. Econ. 173 (1975).

Klein, Crawford & Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J. Law Econ. 297 (1978).

Loftis, "How to Analyze Dual Distribution Problems," 1 Antitrust Counseling and Litigation Techniques, J. von Kalinowski ed. (1987).

Lopatka, John E. and William H. Page, "Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion," in E. Gellhorn and L. Ribstein eds, Supreme Court Economic Review, University of Chicago Press, (1999).

M. Howard Morse, "Vertical Mergers: Recent Learning," 53 Bus. Law. 1217 (1998).

M.L. Greenhut & H.Ohta, "Related Market Conditions and Interindustrial Mergers," 66 Am. Econ. Rev. 267-77 (1976).

M.L.Greenhut & H.Ohta, "Vertical Integration of Successive Oligopolists," 69 Am. Econ. Rev. 137 (1979).

Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989).

Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995).

Michael H. Riordan, "Competitive Effects of Vertical Integration," at the LEAR conference on 'Advances in the Economics of Competition Law" at Rome (June 2005).

Michael L. Katz & Howard A. Shelanski, "Schumpeterian Competition and Antitrust Policy in High-Tech Markets", University of California, Berkeley, Competition, Vol. 14, (2005).

Michael L.Katz and Howard A. Shelanski, "Mergers and Innovation," Professor of Law, University of California, Berkeley, p. 13, 2006.
Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, (1984).

Neil Averitt & Robert H. Lande, "Using the 'Consumer Choice' Approach to Antitrust Law," 74 Antitrust L.J. 175, (2007).

OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, "Merger Review in Emerging High Innovation Markets," (2003).

OECD/GD 65 "Efficiency claims in Mergers and other Horizontal Agreements." (1996).

Oliver Williamson, "The Vertical Integration of Production: Market Failure Consideration," 61 Am. Econ. Rev. 112 (1971).

Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds.,1989.

Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

Partha Dasgupa & Joseph E. stiglitz, "Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1, 1980.

Parthasaradhi Mallela & Babu Nahata, "Theory of Vertical Control with Variable Proportions," 88 J. Pol. Econ. 1009 (1980).

Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991).

Posner, R. "Antitrust in the New Economy," Antitrust Law Journal, 2001.

Richard G. Parket, Trends in Merger Enforcement and Litigation, Remarks Before the Annual Briefing for Corporate Counsel (16, 9. 1998).

Richard J. Gilbert and Steven C. Sunshine, "Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. 569 (1995).

Richard T. Rapp, "The Misapplication of the Innovation Market Approach to Merger Analysis," 64 Antitrust L.J. 19 (1995).

Robert Kramer, "Antitrust Consideration in International Defense Mergers," Chief, Litigation II Section, Antitrust Division, United States Department of Justice, (1999).

Roger G. Blair & David L. Kaserman, "Uncertainty and the Incentive for Vertical Integration," 45 Southern Econ. J. 266 (1978).

Ronald W. Davis, "Innovation Markets and Merger Enforcement: Current Practice in Perspective," 71 Antitrust L.J. 677 (2003).

Scott A. Stempel, "Government Shows Increasing Concern with Vertical Mergers," Antitrust, (1994).

Steven C. Salop & David T. Scheffman, "Recent Advantages in the Theory of Industrial Structure, Raising Rivals' Costs," 73 Am. Econ. Rev. 267 (1983).

Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Vertical Merger Enforcement Policy", Before the American Bar Association, Section of Antitrust Law Spring Meeting, (1995).

Thomas G. Krattenmaker & Steven C. Salop, "Anticompetitive Exclusion: Raising Rival's Cost to Achieve Power Over Price," 96 Yale L.J. 209 (1986).

Timothy J. Muris, The Government and Merger Efficiencies: Still Hostile After All These Years, 7 Geo. Mason. L. Rev. 729, 734 (1999).

Tom K. Lee & Louis L. Wilde, "Market Structure and Innovation : A Reformulation, 94 Q.J.Econ 429 (1980).

Vernon & Graham, "Profitability of Monopolization by Vertical Integration," 79 J. Pol. Econ. 924 (1971).

William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 208 (2003).

Williamson, Oliver E., "Economies as an antitrust defense: the welfare trade-offs," American Economic Review 58, (1968).

DOKUMENT

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laied down in Article 81 and 82 of the Treaty.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation).

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings,(2004/C 31/03).

Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, (2007).

Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03).

Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and

services (Framework Directive).

Regulation (EC) No 2887/2000 of the European Rarliament and of the Council of 18 December 2000 on the unbundled access to the local loop.

U.S. The Sherman Antitrust Act (1890)

U.S. The Clayton Antitrust Act (15 U.S.C. §§ 12-27, as amended) (1914)

Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a, as amended) (2001 amendments).

The U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, (April 2, 1992).

US Department of Justice and Federal Trade Commission, Anti-trust guidelines for the licensing of Intellectual Property, (April 6 1995).

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Vertical Merger Regulation in the New Economy under the U.S. and EU legal systems

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PROHLÁŠENÍ

Prohlašuji, že jsem tuto disertační práci zpracoval samostatně a že jsem vyznačil prameny, z nichž jsem pro svou práci čerpal, způsobem ve vědecké práci obvyklým.

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I. Introduction

1. Definition of Vertical Merger

A vertical merger is an acquisition [1] which combines two companies that operate in successive stages of the production or distribution chain.[2] As vertical mergers involve firms that do not operate in the same market, it necessarily follows that such mergers produce no immediate change in the level of concentration in any relevant market. Although vertical mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous.[3]

Through U.S legal history, the analytical framework applied to vertical mergers has changed over time. In the absence of a consensus as to the proper standard susceptible to statutory codification, Congress passed the conundrum to the courts to resolve on a case-by-case basis. By enabling the courts to proceed through a "common law" approach to developing antitrust law, society could gain the benefits of incremental progress and learning by past mistakes.

Prior to the late 1970s, a wide number of vertical mergers were prohibited whereas they presented relatively small foreclosure effects.[4] Then, in the late 1970s, the courts' analysis began to change, being less reluctant as with vertical mergers even where the market shares were relatively significant.[5] In 1982, the revision of the Merger Guidelines by the Department of Justice resulted in a significant liberalization, and almost no vertical mergers were challenged during this period. More recently, the U.S. authorities have restated a critical approach in several cases,[6] due in particular to a renewal in the economic analysis of the

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[1] An acquisition, as opposed to other business relationships, is the assumption of ownership and control by the acquiring firm of either the stock or assets of the acquired firm. Clayton Act § 7 was amended in 1950 to cover asset acquisitions as well as stock acquisitions.

[2] In Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 315 (N.D.Ill. 1965), the court defined vertical mergers as follows: "Vertical combinations...join complementary facilities by integrating different stages in the production or distribution process." Id. at 317.

[3] U.S. Non-Horizontal Merger Guidelines, § 4.0.

[4] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[5] Frauehauf Corp. v. FTC, 603 F. 2d 345 (1979).

[6] Cadence Corp., Docket No C-3761 (Aug. 7, 1997); Silicon Graphics Corp., Docket No

effects of vertical mergers.

Chicago School argued that vertical integration through merger is typically efficient and should not be discouraged. It has been also argued that a vertical merger may create efficiencies by eliminating the price distortion caused by double monopoly markup where there is market power in both the upstream and downstream markets.[7]

Over time, empiricists found opportunities to test the theoretical approach of the Chicago School, which sometimes included simplifying assumptions inconsistent with the facts of particular cases.[8] New economic research led to a more complex and textured "post-Chicago" view of vertical mergers and vertical restraints, which may be more likely than the Chicago School approach to support challenges under certain circumstances. At the same time, however, it has been observed that the more convoluted post-Chicago approach is more difficult to apply and more likely to lead to ambiguous results.[9]

Based on economic studies of strategic behavior and game theory, post-Chicago merger enforcement continued the Chicago School's focus on economic analysis and recognized the efficiency-enhancing potential of many vertical mergers. At the same time, however, post-Chicagonians rejected the view of vertical mergers as almost per se benign and instead emphasized whether intervention was warranted in particular types of cases.[10]

2. The New Economy and Vertical Merger Regulation

C-3626 (Nov. 14, 1995).

[7] John M. Vernon & Daniel A. Graham, "Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

[8] This approach has been called a "post-Chicago" view of antitrust analysis. Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach", 63 Antitrust L. J. 513 (1995).

[9] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum. Bus. L. Rev. 257, 271 (2001).

[10] Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

The "New economy" or the "High-tech industry" can be defined as firms whose fortunes are tied to the success in the creation of intellectual property and are highly vulnerable to successful innovation by others. Nowadays these industries are normally referred to as "New economy", "high innovation industry", "innovation intensive industry", "innovation based industry", or "high-tech industry". Many economist would call "Schumpeterian" the process of "creative destruction" whereby innovation destroys old industries and creates new ones.

Merger enforcement statistics illustrate the increased importance of innovation concerns in antitrust policy. Until the mid-1990s, the DOJ and FTC in the U.S rarely mentioned innovation as a reason to challenge a merger. From 1990 until 1994, the DOJ and the FTC alleged adverse impacts on innovation in only about 3% of all merger challenges. From 1995 to 1999, the agencies cited adverse innovation effects in 18% of merger challenges. The agencies' concern about innovation effects continued to increase in the first part of the new century. From 2000 to 2003 the DOJ and FTC mentioned innovation effects as reason to challenge the merger in 38% of merger challenges.

Table 1. Challenges to Mergers and Acquisitions: Fiscal Year 1990-2003

	Fiscal year	DOJ	FTC	Total	Percentage of Challenges Concerned with Innovation Effects
Merger Challenges	1990-1994	64	71	135	
	1995-1999	121	148	269	
	2000-2003	41	67	108	
Challenges Concerned with Innovation Effects	1990-1994	2	2	4	3%
	1995-1999	11	36	47	17.5%
	2000-2003	17	24	41	38.3%

* Sources: DOJ/FTC Annual Reports to Congress; Agency complaints and news releases.

Moreover, in 1950 not one of the 100 highest valued firms spent more than five percent of revenues on R&D, and in 1970 only nine of the top 100 exceeded this level. But in 1999, 38 of the 100 highest valued

firms spent at least five percent of revenue on R&D, with 22 firms spending more than ten percent.[11]

Nowadays, the "new economy" is almost synonymous with the information-technology industries. These include computer software, computer hardware, Internet-based business, communication networks, mobile telephony, and biotechnology. In such a high technology industries, it is of increasing importance for companies to concentrate their business on core activities in order to improve their competitiveness in widening markets. This leads to a tendency for companies to integrate vertically with other companies active upstream and downstream and to conclude vertical agreements to ensure efficient supply of inputs and sales of output.

As mentioned above, vertical mergers are generally deemed to yield efficiencies in the companies' way of doing business rather than to lessen competition. However, these transactions can also give rise to competition concerns in that they could, in particular, facilitate foreclosures of competitors. In industries characterized by network effects, such as the telecommunications, electronic communications or media sectors, a dominant standard often emerges in the market where certain firms possess existing market power through ownership of established networks marked by high entry barriers, including huge sunk costs and exclusive intellectual property rights.

In a fast moving environment characterized by rapid innovation and evolving technologies, vertical integration and alliances in New Economy sectors give rise to the need for complex analysis of a number of competition issues in any given transaction such as the definition of relevant markets, the appraisal of market power or the assessment of appropriate remedies. Some of the traditional techniques used to define and measure market power in antitrust analysis may not be appropriate. High- tech industries are typically characterised by high levels of product differentiation and dramatic shifts in firms' market positions. Heavy investment in the creation of intellectual property typically results in significant scale economies, leading to substantial seller concentration.

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[11] [11] David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 6.

Market leadership may nevertheless be contestable as a result of the constant threat of drastic innovations by rivals.

This raises the question of whether the existing criteria and the traditional approach to vertical mergers and agreements in the New Economy are adequate for these evolving markets and whether a different and more appropriate method, based on a dynamic analysis of the markets, is necessary. It means that the existing instruments and traditional approach to competition assessment may well need to be reassessed in light of the specific characteristics of the New Economy.

In this thesis I will introduce vertical merger regulation systems under the U.S. and EU legal policy, criticize current systems, and suggest new directions. It means I will analyze current case laws and vertical merger guidelines and compare both legal systems. And I will show what is different between two legal systems and what should each legal system learn from the others. As a concrete solution, I will suggest how each legal system should be changed and which directions should take.

3. Proposal

Part I introduce the definition of "vertical merger" and "New economy", and how it is dealt in through legal history and economic theories, and now why it is hot issues of the antitrust policy. Part II write about historical perceptions and key characteristics of vertical mergers. Part III discuss about key characteristics of high-tech industries. Part IV discuss about on main competitive problems of vertical mergers in the new economy. Part V analyze about economics of vertical mergers especially in the new economy; how historically academic scholars dealt on competitive effects of vertical mergers and how it is adjusted in case of innovative industries'. And what is main competitive problem in high-tech industries' vertical mergers. Part VI suggest dynamic approach in evaluating competitive effects in the new economy. Part VII introduce and compare current U.S and EU vertical merger regulation systems and new suggestions to cover new trends. Part VIII introduce definition of relevant market and market power in the new economy. I introduce classical approaches and suggest new one for the New Economy. Part IX analyze Overall competitive effects of vertical mergers in the New

Economy. Part X compare with U.S and EU vertical merger Guidelines and suggest how it should be closed and changed to cover new trends. Part XI will be concluding remarks.

II. Key Characteristics of Vertical Mergers

What are the Differences between the Issues Raised by Horizontal Mergers and those Raised by Non-horizontal Mergers?

Vertical mergers involve two or more different companies operating at different product markets. This differs from horizontal mergers in key respects. First, and most obviously, unlike horizontal mergers-which lead to a loss of direct competition between the merging firms- vertical mergers do not immediately lead to a reduction in the number of competing firms in any given market. Conversely, vertical mergers can create efficiencies reducing transaction costs by replacing contractual relationships with more efficient intra-group arrangements. Second, in the case of non-coordinated effects theories, the creation or strengthening of market power in vertical merger cases typically result from strategic conduct that the merged entity would undertake post-merger (e.g., refusal to deal, tying and bundling)- in contrast to market power caused by structural changes to the market in the case of horizontal mergers,

Although such price reductions brought about by non-horizontal mergers are usually pro-competitive, they may, under certain circumstances, give rise to anti-competitive outcomes. The primary competitive concern in these cases is that post merger, the ability of rival firms to compete with the merged firm will be reduced to such an extent that they are marginalized or driven from the market altogether. Once this has occurred, the merged firm would then be able to increase prices. Alternatively, entry or expansion may be deterred, allowing the firm to preserve its market power.

Any theory of competitive harm must therefore not only carefully specify the conditions that give rise to alleged harm, but must go beyond a mere theoretical assessment of the anti-competitive possibilities by testing the theory of harm against observed industry characteristics and behavior. In particular, it cannot be assumed that harm to competitors necessarily or even usually results in harm to competition.[12]

Some important conclusions follow from the state of vertical

[12] RBB Brief 18, "Turning the Tables: Why Vertical and Conglomerate Mergers are Different", RBB Economics, March 2006, p. 2.

merger theory. First, the enforcement agencies need to exercise caution in taking actions against vertical transactions to avoid chilling efficiency-enhancing mergers that pose little risk of harm to competition. It is likely that anticompetitive effects will be more difficult to establish, while offsetting efficiencies gains will be easier to show than in the horizontal context. The lack of a highly articulated theory of effects also means that vertical transactions will be examined on a much more case-specific basis without the benefit of concrete vertical merger guidelines with bright line thresholds.

III. Key Characteristics of the New Economy

Industries in which dynamic competition for the market is important have several of the following characteristics. Each characteristic reflects a deviation from the textbook model of static price/output competition and has important implications for antitrust analysis. These industries differ markedly from most of the industries in which modern antitrust doctrine emerged, and particularly from industries that manufacture traditional physical goods. The "new economy" industries are characterized by falling average costs (on a product, not firm basis) over a broad range of output, modest capital requirements relative to what is available for new enterprises for the modern capital market, very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption (also known as "network externalities"), the realization of which may require either monopoly or inter-firm cooperation in standards setting. And vertical integration is tends to be more common in the new one, precipitating an unusually large number of firms into customer or supplier relations with other firms that are also its competitors.[13]

1. Network Effects

Many high-tech industries, particularly those based on computer software, the Internet, or telecommunications generally, have network effects. An industry is often described as a "network industry" if the value of the network to any one consumer depends importantly, either directly or indirectly, on the number of other consumers on the network.[14]

Network effects are a source of scale economies- in consumption

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[13] Posner, R. "Antitrust in the New Economy," *Antitrust Law Journal*, 2001, p.925-943.

[14] Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics in Standardization," *Journal of Economic Perspectives*, Vol. 3, No. 2, 1994, p. 117; Evans, David S, and Bernard J. Reddy, "Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," in *Intellectual Property Antitrust 1996*, Practicing Law Institute, 1996; Katz, Michael and Carl Shapiro, "Systems Competition and Network Effects," *Journal of Economic Perspectives*, Vol. 3, No. 2, 1994, p. 93; Katz, Michael and Carl Shapiro, "Network Externalities, Competition, and Compatibility," *American Economic Review*, Vol. 75, No.3, 1985, p. 424-440.

rather than production- and thus tend to produce markets with at most a small number of clear leaders, making it difficult for firms with small shares to survive unless they produce significant innovation. It means that the value of a product increases with the number of people on the same network. Firms that are not leaders in network industries have little hope of reaching that status unless they come up with a major innovation-one that can defeat the advantage that network effects bestow on the industry leaders. If there is a chance that today's products will be replaced by a major innovation, a leader's survival depends on bringing that innovation to market before others do. As a result, competition in network industries often involves intense R&D efforts aimed at capturing or retaining market leadership.[15]

Such network effects are clearly relevant, efficient and occasionally unavoidable. However, they increase the risk that one firm, by achieving a critical mass or tipping point will dominate a market or retain market power for an extended period of time.

Network effects are therefore relevant to competition analysis in two specific ways. First, the same demand-side economies of scale that induce the creation of a network in the first place can also serve as strong barriers to competition against the network, even by those who might offer a superior alternative. Once customers become locked-in to a product incorporating the current technology, they may be reluctant to switch to another product with a superior technology because of the premium associated with the widespread use of a common technology and switching costs.

Such entry barriers increase the likely duration of market power and facilitate in turn the exercise of such market power by the industry leader. This is especially likely if the network effects are substantial and if the network has a large installed base of users and if there exist a large number of complements for the network. Second, network effects increase the incentive to engage in anti-competitive strategies. Entry barriers created by network economies can be minimized to the extent that new entrants or rival networks may take advantage of comparable

[15] David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 10-11.

network economies by, for example, having their users interconnected with the leading network or their products interoperating with complements of the dominant network. As a result, one would expect that there exist a likely incentive for firms to engage in anti-competitive practices to foreclose competitors access to such network economies.

2. High Risks and High Profitability

In dynamic industries, firms must be expected to earn a competitive rate of return on their R&D investments. These investments are risky, for competitive as well as technological reasons. If these investment succeed, they at least temporarily produce enough market power, enough ability to charge prices that exceed the corresponding marginal costs of production to yield a supra-competitive rate of return. Because of network effects and scale economies, as well as legally protected intellectual property, high-tech industries generally have a small number of relatively large firms at any point.

3. High Rewards only for Winners

Competition in some high-tech industries involves sequences of races to develop a new product or to replace an existing product through drastic innovation. In the initial race, firms invest heavily to develop a product that create a new category or becomes an early leader in a new category. Winners get large market shares and high profits for a while. While network effects tend to reinforce leadership position, in many high-tech industries there are sequential races for market leadership. Major innovations occur repeatedly, and switching costs and lock-in do not prevent displacement of leaders by better products.[16]

These winner-take-all races arise for two related reasons. First, network effects create a snowball effect for firms that are first to have many satisfied customers. When a firm attracts additional customers, the value of its product increase, making it possible to attract still more customers. Second, there are scale economies at the firm level because

[16]David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

of high fixed intellectual property costs, so that making more sales enables firms to get their average costs down and to make profits while charging low prices.

4. Labor and Human Capital Intensity

Many new-economy industries make more intensive use of labor and less intensive use of tangible capital than old-economy industries. This is because the fixed costs incurred by high-technology firms are mainly for the labor used to develop their products.

5. High Fixed Costs and Low Marginal Costs.

Firms in the new-economy tend to have high fixed costs and low marginal production costs. They often must invest a great deal to develop their products, either because they must make substantial investments in R&D, or because they must invest in a network system. But once they make this initial investment, it is cheap to create additional units. Because average is much larger than marginal cost in many of these innovation-driven industries, markets cannot be perfectly competitive and generate profits sufficient to cover the cost of R&D.

6. Vertical Integration

In high-technology industries, it is of increasing importance for companies to concentrate their business on core activities in order to improve their competitiveness in widening markets. This lead to a tendency for companies to integrate vertically with other companies active upstream and downstream and to conclude vertical agreements to ensure efficient supply of inputs and sales of output.

7. Comment

In high technology industries competition can be particularly significant, because it affects not only the prices consumers are charged for existing products, but more importantly because it encourages innovations that improve the quality of future generations of products.[17]

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[17] Daniel L. Rubinfeld, "Competition, Innovation, and Antitrust Enforcement in Dynamic Network Indusgries", Duputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Addressed before the Software Publishers Association, 1998

Success achieved through better products and vigorous competition is to be commended, not condemned. The antitrust laws not designed to penalize successful companies when their success is based on behavior that creates efficiencies and benefits consumers. Then the antitrust laws are directed toward restricting specific practices that are likely to be anticompetitive because such practices are not in the long run interest of consumers. Firms that have attained substantial market power by fair and legitimate means through superior skill are free under the antitrust laws.

However, strategies that successful companies find most profitable can be anti-competitive as a whole. Specific practices that discourage competing firms from innovating and which are likely to result in slower innovation than desired can be counter to the interests of consumers. In particular, we must watch for practices that prevent the adoption of superior products by potential entrants, or the use of dominant firm's power to foreclose competitors' access to basic infrastructures or essential resources for production or innovation.

Spring Simposium, San Jose, California, (March 24, 1998).

IV. Main Competitive Problems of Vertical Mergers in the New Economy

Vertical mergers are generally deemed to yield efficiencies in the companies' way of doing business rather than to lessen competition. However, these transactions can also give rise to competition concerns in that they could, in particular, facilitate foreclosures of competitors. In industries characterized by network effects, such as the telecommunications, electronic communications or media sectors, a dominant standard often emerges in the market. In this context, thereby preventing interoperability with its products.

With respect to E-economy infrastructure, there is an increased dependence on a wide-ranging and diversified set of vertically related activities, which notably include the provision of information and content, network infrastructure and access applications.

In a context of convergence of technologies, vertical integrations are likely to raise major competition concerns relating to interoperability and interdependence between different products and services. Another concern is the possibility that the holder of key content, key network or key access applications may impose its products or services as a standard. Therefore, the assessment of New Economy anti-competitive practices must focus in particular on the possibility for holders of essential products or services to raise barriers to entry, thereby foreclosing market access.

Moreover, because vertical integration and alliance may impact downstream and upstream levels, opportunities for companies involved in the transaction to leverage their position in related markets should be closely scrutinized. [18]

1. Barriers to Entry/ Foreclosure

1.1 Network Externality, Standardization and Foreclosure

With respect to E-economy infrastructure, there is an increased

[18] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, Nov. 2001.

dependence on a wide-ranging and diversified set of vertically related activities, which notably include the provision of information and content, network infrastructure and access applications.

In a context of convergence of technologies, vertical integrations and alliances are likely to raise major competition concerns relating to interoperability and interdependence between different products and services. Another concern is the possibility that the holder of key content, key network or key access applications may impose its products or services as a standard. Therefore, the assessment of New Economy anti-competitive practices must focus in particular on the possibility for holders of essential products or services to raise barriers to entry, thereby foreclosing market access. To illustrate the typical concerns linked to interoperability and access, which can result from a vertical transaction, one can take the example of an alliance between a major media and entertainment company and a well-known Internet provider whose object is to deliver on-line music. Given the strong position of the companies in their respective markets, they could be tempted to impose their products as standards in the emerging on-line music market. In particular, they may format the content in such a way that it is only compatible with their own music player. Thus they would become the gatekeeper to the on-line music market and could dictate the conditions for the distribution of on-line music.

With respect to the provision of Internet connectivity, which is one of the crucial services in the New Economy sectors, the main anti-competitive practices that may be implemented by a dominant company and requiring careful analysis, may consist of refusing to grant access to its networks, raising its rival's costs, degrading the quality of the connection or pricing selectively to attract customers away from competitors.[19]

However, high barriers to entry may become less relevant with regard to markets characterised by on-going techonological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be

[19] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (Nov. 2001) p. 7.

based on a prospective, forward-looking approach.[20]

1.2 Intellectual Property Rights and Foreclosure

Normal network system is a single network, but its components are owned by a vast number of separate firms and individuals. The components have, however, been standardized to assure interoperability. A firm that manufactures one of the essential components of a network would prefer to be the exclusive source of that component rather than be required to disclose the information that would enable competitors to duplicate it. If the component is subject to intellectual property protection through patent, copyright, or contract, then the requisite uniformity may be more readily achievable by monopoly provision than by standardization.

Networks are not valuable to the consumers in themselves; they are conduits for the services that the consumer values. This is one point at which vertical integration enters the new economy. An operating system is a platform for software applications, and so the writer of operating system software may decide to write software applications to ride on it. Modern operating systems are themselves composites of separate programs which may be provided by separate companies or by one company. Firms that provide dial-up connections and other facilities for accessing and browsing the World Wide Web can integrate forward into the provision of Web-based services such as shopping and video.

1.3 Vertical Integration, Monopolization, and Competition

Vertical integration but paradoxically can induce toward monopoly or also oddly toward competitiveness. The paradox can be dissolved by a reminder that competition to obtain a monopoly is an important form of competition. The more protection from competition the firm that succeeds in obtaining a monopoly will enjoy, the more competition there will be to become that monopolist; and provided that the only feasible or permitted means of obtaining the monopoly are socially productive, this competition may be wholly desirable. A firm that will have the protection

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[20] EU Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, paragraph 80.

both of intellectual-property law and economies of scale in consumption, if it is the first to come up with an essential component of a new-economy product or service, will have a lucrative monopoly, and this prospect should accelerate the rate of innovation.[21] What is more, the successful monopolist is likely to be a firm that initially charges a very low price for the new product that it has created. In the normal network system, since every new subscriber increases the value of the service to the existing subscribers, a network company has an incentive to provide price inducements to new subscribers, as the money it will lose on them may be more made up for by the higher price that existing subscribers will pay for access to a larger network. This is especially likely if the network will be a natural monopoly, in the sense that no competitor would find it feasible to duplicate it. Then the faster the network reaches maturity the longer the monopolist will be protected from challenges to his monopoly. The prospect of a network monopoly should thus induce not only a high rate of innovation but also a low-price strategy that induces early joining and compensates the early joiners for the fact that eventually the network entrepreneur may be able to charge a monopoly price.

The focus of concern with the application of antitrust law to the new economy is on the methods by which a firm that has a monopoly share of some market in a new-economy industry might seek to ward off new entrants.

2. Vertical Merger and Information Accessibility

One of anticompetitive problem concerned with vertical mergers is strategic use of information gained in one project to obtain competitive leverage in other projects. As a result of a vertical acquisition, a firm may relate to a rival as both a horizontal competitor and a customer or supplier. In its position as customer or supplier, the merged firm may gain access to competitively sensitive information concerning its horizontal competitors. Competition may be affected in several ways. If, for example, the merged firm gains access to competitively sensitive

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[21] Posner, R. "Antitrust in the New Economy," *Antitrust Law Journal*, 2001, p.925-943.

information that reduces its uncertainty about a competitor's bids in a downstream market, the merged firm may be able to bid less aggressively in that market. In addition, by gaining access to its competitor's proprietary design information, long-run innovation may suffer as rivals would be less willing to invest in R&D because its vertically integrated rival could free-ride off its efforts. Similarly, if the non-integrated firm believes that it faces exclusion or discrimination from the integrated firm, it may choose to withdraw from the market or compete less aggressively.[22]

[22] Richard G. Parker & David A. Balto, "The Merger Wave: Trends in Merger Enforcement and Litigation, 55 Bus. Law. 351, 394 (1999).

V. Economics of Vertical Mergers in the New Economy

1. Developments of Economic Approaches about Vertical Mergers

There has been a long debate on the competitive effects of vertical integration. The traditional market foreclosure theory, which was accepted in leading court cases in the 1950s through the 1970s, viewed vertical mergers as harming competition by denying competitors access to either a supplier or a buyer and leverage monopoly from one market to another.[23] This informal version of the foreclosure theory was criticized by the Chicago School of the 1960s and 1970s. They revealed the logical flaws of the traditional theory and argued that a vertically integrated firm has no incentive to exclude its rivals, if it did try to exclude them, rivals could protect themselves by contracting with other unintegrated firms. They subsequently defended that vertical integration was most likely to be pro-competitive or competitive neutral.[24] Their criticism had a major influence on antitrust activities and was largely responsible in the 1970s and 1980s for the dormancy of antitrust enforcement with vertical elements.[25]

Transaction Cost Economics of the 1970s and 1980s staked a middle ground, identifying new efficiency rationales for vertical integration, while cautioning that firms with market power may have strategic goals poorly aligned with consumer welfare.[26]

Recently, a new literature on vertical foreclosure named "Post-Chicago Economics" applied game theoretic tools to develop new theories of strategic vertical integration and identify circumstances in which vertical integration alters industry conduct to the detriment of competitors and consumers.

Vertical integration raises contentious issues for antitrust policy

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[23] Chen, Y., "On Vertical Mergers and Their Competitive Effects," RAND Journal of Economics, Vol. 32, No.4, p.667-685, 2001.

[24] Bork, R.H., The Antitrust Paradox: a policy at war with itself, New York, 1978; Posner, R. A., Antitrust Law, Chicago: University of Chicago Press, 1976.

[25] Riordan, M., "Anticompetitive Vertical Integration by a Dominant Firm", American Economic Review 88, p.1232-48, 1998.

[26] Williamson, Oliver E., Markets and Hierarchies: Analysis and Antitrust Implications, Free Press, New York (1975); Williamson, Oliver E., The Economic Institutions of Capitalism, Free Press, New York (1985).

and industry regulation. Antitrust policy in the US and EU recognize that a vertical merger can create incentives for anticompetitive foreclosure or facilitate collusion, while remaining mindful that vertical integration can achieve efficiencies.[27]

2. The Chicago School

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

2.1 Single Monopoly Profit

The Chicago School contends that an upstream monopolist protected by durable barriers to entry can claim a monopoly profit but once. If an upstream monopolist can use contracts to extract fully a monopoly profit from a downstream market, then there is no role for vertical integration to play in leveraging monopoly power to obtain any additional profit. The single monopoly theory presumes that vertical integration has some purpose other than leveraging monopoly power.[28]

The monopoly leverage model assumes (i) identical downstream firms; (ii) downstream production is fixed proportions; (iii) an upstream monopolist; (iv) the absence of price regulation; and (v) perfect competition downstream.

The single profit result is based on the observation that by appropriate choice of the wholesale price the upstream monopolist can insure that the price in the competitive market downstream is identical to the price a vertically integrated monopolist would set and its profits in the upstream market equal the profits of the vertically integrated monopolist. The downstream price, quantity, and the profits of the monopolist are identical whether the monopolist integrates or not. The

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[27] American Bar Association Antitrust Law Section, Antitrust Law Developments, 5th edition, ABA Publishing (ABA: 2003).

[28] Michael H. Riordan, "Competitive Effects of Vertical Integration," presented at the LEAR conference on "Advances in the Economics of Competition Law" at Rome, p. 8 (2005).

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

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

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

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

The traditional view is that "it is not clear that variable proportions

raises a major policy issue on vertical integration" and that a determination of the impact of a vertical merger on consumers is difficult since the relationship between the two effects is complex and the measurement problems sufficiently formidable that judgments of what the net effect is likely to be would be very unreliable.[29] Given the costs associated with increased firm size from vertical integration.

3. Post-Chicago School

Based on economic studies of strategic behavior and game theory, post-Chicago merger enforcement continued the Chicago School's focus on economic analysis and recognized the efficiency-enhancing potential of many vertical mergers. At the same time, however, post-Chicagonians rejected the view of vertical mergers as almost per se benign and instead emphasized whether intervention was warranted in particular types of cases.[30] The relationship between the post-Chicagoans and the Chicago School is, however, evolutionary rather than revolutionary.

The post-Chicago view focuses vertical merger concerns on vertical integration into markets that do not behave competitively. In the post-Chicago literature, "foreclosure" generally means raising rival's costs, not outright market exclusion.[31]

The hypothesis associated with raising rival's costs typically involves input foreclosure. Input foreclosure occurs when post-merger the price of the upstream input rises, raising the costs of competing downstream firms. This might relax the competitive constraint on the integrated firm that has access to the input at marginal cost. The price of the input rises because the integrated firm either stops supplying competing downstream firms or does so at a higher price. The hypothesis is that the integrated firm has an incentive to change the

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[29] Fhsher, A. A., and R. Sciacca, "An Economic Analysis of Vertical Merger Enforcement Policy." Research in Law and Economics 6, p. 1-133, 1984.

[30] Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

[31] *Id.* at 324.

behavior of its upstream division post-merger because it will internalize the effect on downstream prices when setting its optimal price in the market for the input, i.e., it will recognize that there is an additional benefit from raising its input price: higher downstream profits from an increase in prices and market power downstream. In either the complete or partial case, the increase in the input price can be due either to a unilateral effect or a coordinated effect attributable to the change in behavior of the integrated firm upstream.

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

3.1 Foreclosure/Raising Rival's Cost[32]

A vertically integrated firm might engineer an increase in rival's costs by driving up the price of a scarce input. By artificially increasing its own demand for the scarce input, the vertically integrated firm elevates the market price of the input, thus raising the costs of its non-integrated rivals. Vertical integration matters for this incentive, because self-supplied input requirements are insulated from the price increase. Put another way, by driving up the market price of input, the vertically integrated firm increases the value of its own upstream assets. The greater returns of downstream foreclosure outweigh the higher opportunity cost of these assets. Consequently, the higher input price impacts the costs of the integrated firm and its downstream competitors

[32] Choi, J. P. and Yi, S.S., "Vertical Foreclosure with The Choice of Input Specifications," RAND Journal of Economics Vol. 31, No.4, p. 717-743, 2001; Ordover, J., Saloner, G. and Salop, S., "Equilibrium Vertical Foreclosure," American Economic Review, Vol. 80(1), p.127-142, 1990.

asymmetrically. This cost-raising strategy benefits the downstream operation of the integrated firm by causing rivals to exit market or otherwise reduce their supply of the final good. Riordan demonstrates that net effect on economic efficiency is negative when an integrated dominant firm's output market share is high relative to its input market share.[33]

An issue for this Raising Rival's Cost theory is the credibility of the upstream division's refusal to deal with downstream competitors. The problem is that it may be irresistible for the vertically integrated firm to undercut the input prices of upstream rivals. After all, if there are profits to be earned by selling to downstream competitors, then the vertically-integrated firm would like to capture those profits as long as the expense to its downstream profits is sufficiently small. If the upstream products are differentiated, so that upstream firms have a limited ability to steal business from a rival with a small price cut, then credibility is less of an issue and a vertical integrated firm has a greater incentive actually to execute a refusal-to-deal strategy. In contrast, if the upstream product market is homogeneous, then the vigor of competition in the upstream market might be unaffected by vertical integration, leaving both competitors and consumers unharmed.

Downstream competitors might consider countermeasures to limit the damage from a rival's vertical merger with an upstream supplier, including integrating backwards also, or cultivating an alternative source of supply. In some cases, the threat of defensive backward integration by rivals limits the raising rival's cost effect of vertical integration.[34] A rival downstream firm, by promising to pay the integrated supplier a profit on upstream sales, weakens the integrated firm's incentive to compete aggressively in the downstream market. This collusive effect of vertical contracting arises because the integrated firm threats the foregone upstream profits as an opportunity cost of winning a downstream sale.[35]

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[33] Riordan, Michael H., "Anticompetitive Vertical Integration by a Dominant Firm." American Economic Review 88, p.1232-1248 (1998).

[34] Ordover, Janusz A., Steven C. Salop, and Garth Saloner, "Equilibrium Vertical Foreclosure." American Economic Review 80, p. 127-142 (1990).

[35] Chen, Yongmin, and Michael H. Riordan, "Vertical Integration, Exclusive Dealing, and Ex Post Cartelization." Columbia University Department of Economics working paper (2004).

Similarly, a raising rival's costs strategy can preserve the market power of a vertically integrated firm by deterring entry into upstream and downstream markets. Suppose that a potential entrant has the present ability to enter the downstream market with a superior product by sinking a fixed cost, and a future ability to enter the upstream market by investing in R&D. If the firm enters the downstream market only, then bargaining with the upstream incumbent results in some distribution of rents between to the two firms. The new entrant might be able to capture additional rents from its superior downstream product by integrating backwards when its R&D investment comes to fruition.

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

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

The downstream benefits from the vertical merger depend on the cost asymmetry that it creates between the integrated firm and its unintegrated rivals. This asymmetry however, will not be maintained if a counter merger results, i.e., the unintegrated downstream rivals also

merge with an unintegrated upstream firm.[36] In evaluating the competitive effects of a vertical merger, it is important to consider the possibility that it will initiate counter mergers which not only eliminate the advantage of the first mover, but rather than restore the status quo, result in an industry structure which is more competitive.[37]

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

Alternatively, a second counter measure is that unintegrated downstream firms might protect themselves by adopting strategies that change the incentives of the integrated firm to act aggressively downstream. For instance if the unintegrated downstream firm must incur a switching cost (perhaps due to adoption of a specific technology), then it has an incentive to select the integrated firm as its supplier, locking it in to the integrated firm.

3.2 Comment

For an anticompetitive effect, however, not only must foreclosure result in higher input prices, the effect of those higher input prices on the unintegrated rivals must also raise prices, or otherwise harm consumers, downstream.

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

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

[38] Choi J. P., and S.S. Yi., "Vertical Foreclosure with the Choice of Input Specification," Rand Journal of Economics 31, p.717-743, 2000.

4. Vertical Merger in Network Industries

4.1 Introduction

Network industries are a large part of world economy. A key network industry is telecommunications, including the Internet and the world wide web services. Another key network industry is computer software and hardware. These sectors, telecommunications and computers, have been the engines of fast growth of the world economy. In the other sectors it include broadcasting and cable television in news and entertainment sector, airlines, railroads, roads, and shipping and delivery service in transportation sector, etc.

In networks, as in other settings, there are potentially anti-competitive issues arising from the possibility of vertical integration and the behavior of vertically integrated firms. These may include, the bundling of components through vertical integration, contract, or manipulation of technical standards so that an entrant must enter both components markets even if it desires to enter only one of the markets. Often firms have expertise or a technical advantage in only one component, and would like to enter only in the market for that component. An incumbent can strategically alter the market environment through acquisition or contract so that the entrant can only be successful if it enters more than one market. This increases the financial hurdle for an entrant, and it also forces it to sell components where it does not have expertise. Thus, it makes it more likely that entry will not occur.[39]

4.2 Special Features of Markets with Network Effects

Many network industries exhibit increasing returns to scale in production: unit average cost decreases with increasing scale of production. Often incremental cost is negligible (for example in software). However, these are also features of non-network industries and are not the defining feature of network industries. Thus, increasing returns to scale in production is also not the defining feature of the competition policy issues that are rooted in the existence of networks.

Networks are composed of complementary nodes and links. The

[39] Nicholas Economides, "Competition Policy in Network Industries: An Introduction," Stern School of Business, New York University, New York, 2003.

crucial defining features of networks is the complementarity between the various nodes and links; a service delivered over a network requires the use of two or more network components. Thus, network components are complementary to each other.

A common and defining feature of network industries is the fact that they exhibit increasing returns to scale in consumption, commonly called network effects. The existence of network externalities is the key reason for the importance, growth, and profitability of network industries and the "new economy". A market exhibit network effects (or network externalities) when the value to a buyer of an extra unit is higher when more units are sold, everything else being equal.

Network effects arise because of complementarities. In a traditional network, network externalities arise because a typical subscriber can reach more subscribers in a larger network.[40]

In traditional non-network industries, the willingness to pay for the last unit of a good decreases with the number of units sold. This is called "the law of demand", and is traditionally considered to hold for almost all goods. However, the existence of network effects implies that, as more units are sold, the willingness to pay for the last unit may be higher. This means that for network goods, the fundamental "law of demand" is violated: for network goods, some portions of the demand curve can slope upwards. This means that, for some portions of the demand curve, as sales expand, people are willing to pay more for the last unit.

Markets with strong network effects where firms can choose their own technical standards are "winner-take-most" markets. In these markets, there is extreme market share and profits inequality. The market share of the largest firm can easily be a multiple of the market share of the second largest, the second largest firm's market share can be a multiple of the market share of the third, and so on. In equilibrium, there is extreme market share and profits inequality.

The reason for the inequality is straightforward. A firm with a large market share has higher sales of complementary goods and therefore its good is more valuable to consumers. Conversely, a firm with small market share has lower sales of complementary goods.

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[40] Nicholas Economides, "Competition Policy In Network Industries: An Introduction," Stern School of Business, New York University, p. 5, 2003.

Although consumers' surplus is increasing in the number of active firms, total surplus is decreasing. That is, the more firms in the market, the lower is total welfare. This remarkable result comes from the fact that when there are fewer firms in the market there is more coordination and the network effects are larger. As the number of firms decreases, the positive network effects increase more than the dead weight loss, so that total surplus is maximized in a monopoly. Total surplus is highest while consumers surplus is lowest in a monopoly. This poses an interesting dilemma for antitrust authorities. Should they intervene or not? In non-network industries, typically both consumers' and total surplus are lowest in a monopoly. In this network model, maximizing consumer's surplus would imply minimizing total surplus. Compared to the market equilibrium under compatibility, the incompatibility equilibrium is deficient along many dimensions.

Because inequality is natural in the market structure of network industries, there should be no presumption that anti-competitive actions are responsible for the creation of market share inequality or very high profitability of a top firm. Thus, no anti-competitive acts are necessary to create this inequality.

In network industries, free entry does not lead to perfect competition. In a market with strong network effects, once few firms are in operation, the addition of new competitors, even under conditions of free entry, does not change the market structure in any significant way. Although eliminating barriers to entry can encourage competition, the resulting competition may not significantly affect market structure. This implies that, in markets with strong network effects, antitrust authorities may not be able to significantly affect market structure by eliminating barriers to entry.

The remarkable property of the incompatibility equilibrium is the extreme inequality in market shares and profits that is sustained under conditions of free entry. Antitrust and competition law have placed a tremendous amount of hope on the ability of free entry to spur competition, reduce prices, and ultimately eliminate profits. In network industries, free entry brings into the industry an infinity of firms, but it fails miserably to reduce inequality in market shares, prices and profits. Entry does not eliminate the profits of the high production firms. And, it

is worth noting that, at the equilibrium of this market, there is no anti-competitive behavior. Firms do not reach their high output and market domination by exclusion, coercion, tying, erecting barriers to entry, or any other anti-competitive behavior. The extreme inequality is a natural of the market equilibrium.

At the long run equilibrium of this model with free entry, an infinity of firms have entered yet the equilibrium is far from competitive. No anti-competitive activity has led firms to this equilibrium. Traditional antitrust intervention cannot accomplish anything because the conditions that such intervention seeks to establish already exist in this market. Unfortunately, the desired competitive outcome is not.

Can there be an improvement over the market incompatibility equilibrium? Yes, a switch to the compatibility equilibrium which has higher consumers' and total surpluses for any number of firms. Is it within the scope of competition law to impose such a change? It depends. Firms may have a legally protected intellectual property right that arises from their creation of the design of the platform. Only if anti-competitive behavior was involved, can the antitrust authorities clearly intervene.

In network industries, antitrust interventions may be futile. Because "winner-takes-most" is the natural equilibrium in these markets, attempting to superimpose a different market structure may be both futile and counterproductive.

4.3 Competition Policy Issues in Network Industries

Interconnection issues in telecommunications, railroads, airline, and other transportation networks are very common. Often one company controls exclusively a part of the network, which is required by others to provide services. We call this network part "a bottleneck." A Dominant company's foreclosure of independents through a refusal to interconnect shows the importance of complementarities in networks and the way that companies can leverage dominance in one market to create dominance in a market for complementary goods, especially when the complementary good requires the monopolized input to provide a final service.

VI. New Approaches for Assessing Dynamic Markets

1. Dynamic Competition Theories

Exactly what is dynamic competition? Scholars offer a number of answers to this question, and there is no consensus on which theory of dynamic competition is the most accurate or useful. By far the most prominent dynamic theory of competition is associated with Joseph Schumpeter. Although Schumpeter did not deny that real world market can resemble the perfectly competitive model, he argue that the most significant advances in human well-being come from forms of competition that involve new products, new technologies, new sources of supply, and new forms of business organization.

In addition to Schumpeter, other scholars have also developed dynamic theories of competition. "Evolutionary" competition theorists are perhaps Schumpeter's best-known modern descendants. Some of Schumpeter's fellow Austrian economists developed complementary theories that emphasize competition as a process for the discovery of new knowledge. More recently, the interaction of competition and technological change has prompted interest in theories of path dependence, in which small variations in initial conditions can lead to large and unpredictable change in the market's evolution. Finally and less well known in the economics are strategic management theories that explicitly view competition as a dynamic process.

There are models that can be considered better than others, to the extent that they answer more practically the question that we are interested in. No model can ever hope to capture all the relevant features of reality for every practical purpose. We must make use of different models, even though they may seem contradictory, if we are to gather a sufficient understanding of innovation for the purpose of informing on competition policy analysis. This approach implies, for instance, that the models most appropriate to be used as a theoretical underpinning for competition policy may differ from the models most appropriate to be used in the context of industrial innovation policy. It is therefore instructive to briefly review the ultimate economic issues that we are interested in. My aim in the study is to focus on analytical guidance that is relevant to the assessment of vertical mergers within the context of

dynamic markets.

1.1 Schumpeterian Competition

Schumpeterian competition is about active, risk-taking entrepreneurs seeking the new product, the new organization, the new source of supply, that provides a decisive cost or quality advantage. It is not about squeezing price down to marginal cost, or bringing more inputs to the same production process, but about discovering an entirely new production process.

The fundamental neoclassical economics problem is the allocation of scarce resources among unlimited desires. Consumers maximize utility, constrained by their budgets and preferences. Firms maximize profit, constrained by production technologies. After all maximizing calculations are made, no one can be better off without making someone else worse off, so no further exchanges are made-the economy has settled into a general equilibrium.

Schumpeter focused on changes that upset an existing equilibrium, because he believed capitalist economies were rife with such shocks. He argued that allocation in static environments was an unimportant phenomenon compared with the enormous innovations that capitalist produced.

Economic equilibrium is disturbed by innovation created by entrepreneurs pursuing R&D. The economy is jarred into disequilibrium and firm behavior must change to succeed. Quick implements of innovation earn transitional large profits. Imitation of innovation erodes profits and return the economy to equilibrium. Competition is dynamic and requires time; short run inefficiency must be tolerated to achieve long run efficiency. The striving for profit motivates the entrepreneur to seek innovation. Firms are more innovative when they anticipate that they will be allowed to exploit the market power created by their innovation. Market equilibria cannot be predicted because the innovation process is unpredictable.

Heterogeneous firms: Different innovation strategies drive different market and business strategies. Monopolies or market power: The existence of profits and market power reduces and spread the risk inherent in R&D portfolios, attract more qualified human capital, and

create the incentive to innovate. Changing leaders in a market: Innovation is disruptive and older firms tend to be reluctant to adopt innovations. Discontinuous Change: Not evolution but "catastrophe." Supranormal profits: Return to innovation. Continual innovation in dominant firms: R&D is a way to maintain dominance in the face of imitators.

Aim for long run efficiency: today's inefficiency may be the necessary step to tomorrow's efficiency. Allow rewards to entrepreneurship. Market power is not per se anticompetitive. Do not subsidize dying firms. Allow for dynamic considerations in regulation.

Schumpeterian theory cautions against attacking dominant market structures, but is not an argument to ignore behavior that is an abuse of dominance.

1.2 Evolutionary Competition

In real world markets, novelty constantly arises, innovations respond to incentives, firms differ and decision-makers have limited information and rely in rules of thumb and routines derived from experience. Markets evelve over time, with no inherent tendency to achieve equalibrium. The competitive process reveals the new innovations and routines that are successful, and firms that invent or adopt them quickly will succeed and survive.

Bounded rationality: Individuals have limited ability to receive, process, and communicate information, not only because of imperfect information, but also because of complexity. Hence one cannot plan for all contingencies. Behavioral models: Firms cope with complexity and change by adopting decision rules. Endogenous Change: choices made by firms are affected by past choices, firms can change market conditions. Real Time: There is no discernible end point; many actions are irreversible, and sequence is important.

Firms develop unique routines and decision rules in response to external factors. The routines comprise a "corporate culture." Current routines depend on experience and cannot be readily transplanted into other firms. A firms searches for better routines by experimenting and innovating, or by imitating. Unusually high profits signal a well-adapted routine. Competitive markets "select" superior routines.

Heterogeneous firms: there is no "optimal adaptation," different bundles of routines can coexist in the market. Constant trial-and-error: novelty is continually introduced into the economic system. Short-run adjustments. Positive profits, not maximum profits; imperfect knowledge and bounded rationality preclude maximization behavior.

De-emphasize market concentration: market structure is not a cause but an effect. De-emphasize interventions on outcomes: in an evolutionary process, there is no perfect outcome that intervention can achieve. Emphasize interventions on process: encourage discovery, innovation, adaptation and feedback. Allow failure: without failure, there is not way to distinguish successful from unsuccessful adaptations.

In this model, abusive practices are those that interfere with the process of adaptation, discovery and innovation.

1.3 Austrian Competition and Entrepreneurship

In Austrian analysis, individuals operate in a world of uncertainty; they make mistakes; they operate in a world of surprise. But they are not passive agents and operate by searching for opportunities. Market are a mechanism which permits individuals to act on their limited information, to get feedback and to communicate knowledge to others. Market structure says nothing about competitive intensity. Enterpreneurs identify gaps created by incomplete information and exploit them for profit.

Individualism: System-wide or market-wide perspectives mask the interactions. Uncertainty: 2 types ignorance: a person is aware of the existence of all relevant knowledge but does not have it all. Sheer ingnorance: knowledge of which an individual does not even know he is ignorant, and cannot imagine to exist. Radical subjectivism: knowledge, expectations and the relationship between ends and means is subjective. Real time: time is irreversible and individuals are constantly buffeted by new knowledge, so no end point and no equilibrium.

Unexpected events: not a sign of inefficiency or waste, but real world; spurs action. Brand names and advertising: not a sign of market power and differentiation, but necessary in a world of ignorance. Innovation: Benefits come from producers entering markets with entirely new cost structures or products, not by driving price to marginal cost.

Product differentiation: heterogeneous customers lead sellers to tailor their products. Entrepreneurial profits. Rivalrous behavior: not just price, but other diemensions of product quality.

Intervene sparingly, it at all: Do not use the conventional model as the basis for intervention. Trademarks and branding are important to convey information to customers. Allow supranormal profits: profits encourage intrepreneurs. De-emphasize market concentration: concentration ratios convey no information about rivalry. Analyze entry barriers over the long run: the search for sustainable advantage is what drives entrepreneurs. De-emphasize market power: penalizes sellers who are most successful in meeting customer demands.

1.4 Path Dependence

If an industry exhibits increasing returns and network effects, then competition may not select the most efficient winner. Increasing returns means that unit costs fall as output increases. Network effects means that customer demand for a product increases the more other customers buy it. This means that an early advantage allows a firm to pull ahead of its rivals to achieve dominance.

Increasing returns: due to either technology or learning by doing, costs fall as output increases. Network effects: the utility of a product increases the more people buy it. Uncertainty: There is not enough information to predict dominant products or standards. No persuation: advertising does not affect consumer choice. Irreversible Investments: There are sunk costs that have no value in other uses.

Long standing market dominance: firms that get an early lead will remain in the lead. Concentrated markets: Network effects create "lock-in" so that customers prefer the dominant firm. Profit opportunities left unseized: Consumers will not switch to a superior product due to lock-in. No assurance of efficiency: Timing determines winners, not efficiency.

Intervention has a role: the setting of standards is a key role in the development of the market. Intervene in young markets: Once dominance and lock-in occur, it is too late. Focus on Efficiency: Because market forces will not drive efficiency, government should prevent dominance. Deregulate and deconcentrate together: Simply removing barriers to entry are insufficient. Theory provides justification for industrial policy.

1.5 Resource-Based Competition

Companies develop "core competencies" that yield sustainable competitive advantages. Companies compete in acquiring resources, sometimes poaching from each other; e.g., Silicon Valley engineers. But competencies are not always transferable, often relying on complementarities inside the firm; resources are not perfectly mobile. A comparative advantage in resources becomes a competitive advantage in the marketplace. Superior returns are a result of the scarcity of skilled resources, especially managerial and human resources, not dominance or abuse of market power.

Broad definition of resources: incorporates intangible resources such as human skills and knowledge, legal items like patents and trademarks, organizational skills and corporate culture, brands, reputation, and supplier relationships. Resources are heterogeneous and scarce. Resources are imperfectly mobile. Information is costly and skills are often ambiguous and hard to explain.

Disequilibrium: rivalry never ends. Heterogeneous firms: Firms will adopt different strategies and address different market segments. Above normal profits: Sustainable advantage that emerges from superior skills will earn superior returns; this is an efficient outcome.

Deemphasize market structure: firm strategies determine market structure, not vice versa. Allow experimentation: Do not discourage product differentiation and advertising. Examine interactions between resource markets and downstream markets. De-emphasize concerns about profits.

1.6 Comment

It is true that economic theory relating to innovation could have implications for competition policy analysis to the extent that they allow a fuller picture of the innovative process and its wider implications. Nonetheless, it is essential to be as focused as possible when drawing from different economic theories because too much breadth can restrict attempts to move from economic theory to operational guidance. Where literature provides policy information for variables outside the realms of competition policy it is not directly relevant to the study. For example, at

a very general level, I am interested in theories that explain how different firms may have different incentives and abilities to innovate, and how a vertical merger could affect this.

However, it should be recognized that while the review of the economic theories provides extremely valuable concepts and ideas for this purpose, a substantial analytical step is required to move from this to a set of operational guidance that can be used by competition policy practitioners. This step must seek to build bridges between the concepts set out above and the realities of competition policy practice.

2. Dynamic Approach for Evaluating Vertical Mergers

2.1 Introduction

Delineating innovation markets can be a valuable instrument for evaluating the effects of merger-induced structural changes on the incentives for research and development and the resulting pace of industrial innovation.

The impact of a merger on innovation can be analyzed as competitive effects in downstream products markets or as the consequence of structural effects in upstream innovation markets.

2.2 Market Structure and Innovation

While there is little controversy over the value of innovation, the issue of whether more competition leads to greater investment in research and development is much less settled. Joseph A. Schumpeter was a leader among economists who stressed the important role technological innovation plays in capitalist economies. Schumpeter advanced the hypothesis that there exists a causal connection between market concentration and the pace of technological innovation.[41] At the heart of Schumpeter's argument is a monopoly's supposed superior ability to absorb the costs and risk of innovative activity.

Kenneth J. Arrow offered a competing hypothesis. He showed in a theoretical model that a monopolist has less incentive to invest in innovation than a new entrant or a firm in a competitive industry.[42]

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[41] Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, p.106, 1950.

[42] Kenneth J. Arrow, "Economic Welfare and the Allocation of Resources to Innovation", The Rate and Direction of Inventive Activity, p.609~625, National Bureau of Economic

Arrow's model rests on several crucial assumptions. First, the innovation must be related to the existing product or process; otherwise even the monopolist would qualify as a new entrant for the innovation. The innovation considered in Arrow's model is either a product that is substitute for an existing product or a process that lowers the cost of producing the existing product. Second, the type of market structure that exists prior to the innovation (whether a monopoly or an industry with many firms) does not affect the ability of an innovator to appropriate the value of a new product or process. This assumption would be satisfied by a regime of perfect patent protection for a new product or process. Finally, firms do not differ in the effectiveness of their innovative effort.

Others have refined and extended Arrow's result that competitive industries have a greater incentive to invest in R&D than do monopolies.[43] Colsely related to this literature are studies that explore the implications of market structure for the rate of innovation in the context of research joint ventures. These analyses also support the conclusion that R&D may suffer in markets characterized by high levels of concentration.

An innovation benefits a monopolist only to the extent that it increases the ability of the monopolist to extract additional profits from consumers. What deters the monopolist from innovating then is the prospect that the innovation will "cannibalize" the profits from its present monopoly or induce the obsolescence of its existing products. By contrast, a newcomer to the industry, or a firm that operates in a perfectly competitive industry, has no stream of profits that would be displaced by an innovation. The incentive of such firms to invest in innovative effort is the ability to receive the entire value of the innovation. Even if it is not, Arrow showed that the entrant would earn at least what is the value of the innovation to the monopolist, and in many cases the new entrant would earn significantly more.

Research ed., 1962.

[43] Partha Dasgupa & Joseph E. stiglitz, "Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1, 1980; Tom K. Lee & Louis L. Wilde, "Market Structure and Innovation: A Reformulation," 94 Q.J. Econ. 429, 1980; Glenn C. Loury, "Market Structure and Innovation," 93 Q.J. Econ. 395, 1979. Jennifer F. Reinganum, "The Timing of Innovation: Research Development, and Diffusion," Handbook of Industrial Organization, p.849, Richard L. Schumalensee & Robert D. Willig eds., 1989.

Others have refined and extended Arrow's result that competitive industries have a greater incentive to invest in R&D than do monopolies.[44] In each of these models, the monopolist's prior stream of profits reduces its incentive to innovate.

The impact of competition on innovation furthermore depends on many firm- and industry-specific factors that complicate the task of making such predictions.

2.3 How Innovation Complicates Merger Enforcement

The conventional paradigm and the issues for merger review change substantially in two broad ways when technological innovation is taken into account. The first way is that innovation can happen if the proposed merger is consummated. That is, technological change can fundamentally alter the nature of the appropriate analysis even if one focuses on traditional, product-market performance measures, such as static pricing efficiency. For example, market shares are often used as an indicator of market power. But in theory at least, significant innovation may lead to the rapid displacement of a supplier that, by traditional measures such as current market share, appears to be dominant. Michael L.Katz and Howard A. Shelanski[45] refer to this effect of innovation on merger analysis as the "innovation impact" effect.

The second way in which innovation can fundamentally affect merger policy is that innovation can itself be an important dimension of market performance that is potentially affected by a merger. That is, through its effects on innovation, a merger can generate considerable efficiency and consumer-welfare effects even apart from any direct effects on short-run product market competition. Merging parties frequently assert that their transaction will allow them to engage in greater innovation, while antitrust enforcers may object to transaction on

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[44] See, e.g., Partha Dasgupta & Joseph E. Stiglitz, "Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1 (1980); Tom K. Lee & Louis L. Wilde, "Market Structure and Innovation : A Reformulation, 94 Q.J.Econ 429 (1980); Glenn C. Loury, "Market Structure and Innovation," 93 Q.J. Econ 395 (1979); Jennifer F. Reinganum, The Timing of Innovation: Research, Development, and Diffusion, in Handbook of Industrial Organization 849 (Richard L. Schmalensee & Robert D. Willig eds., 1989).

[45] [45] Michael L.Katz and Howard A. Shelanski, "Mergers and Innovation," Professor of Law, University of California, Berkeley, p. 13, 2006.

the grounds that it will lead to a loss of competition that would otherwise spur innovation. To assess fully the impact of a merger on market performance, merger authorities and court must examine how a proposed transaction changes market participants' incentives and ability to undertake investments in innovation. Michael L.Katz and Howard A. Shelanski[46] refer to this effect of innovation on merger policy as the "innovation incentives" effect.

To examine the innovation incentive effect, one asks how the change in market structure and competition brought about by a merger will likely affect consumer welfare through effects on the pace or nature of innovation that might reduce costs or bring new products to market. To examine the innovation impact effect, the situation is reversed. It refers not to how market structure will affect innovation but to how innovation will affect the evolution of market structure and competition. Innovation is a force that could make static measures of market structure unreliable or irrelevant, and the effects of innovation may be highly relevant to whether a merger should be challenged and to the kind of remedy antitrust authorities choose to adopt.

The two ways that innovation may factor into merger analysis have important policy implications. To the extent that innovation is itself a significant objective, antitrust agencies need to understand the relationship between market structure and innovation in a given case with sufficient depth to distinguish legitimate from merely opportunistic claims that the merger will benefit, or at least not harm, innovation incentives. Similarly, the fact that innovation may affect the post-merger marketplace in ways that are hard to predict challenges merger authorities to distinguish mere claims by the merging parties that they face potential, innovation-based competition from situations in which such potential entry really exists.

Finally, the importance of innovation incentives raises the question of whether the enforcement guidelines and precedent aimed at promoting conventional competitive goals of low prices and high output are consistent with promoting the goal of efficient innovation. To the extent

[46] Michael L.Katz and Howard A. Shelanski, "Mergers and Innovation," Professor of Law, University of California, Berkeley, p. 13, 2006.

that tension exists between innovation and the static economic goals of merger policy, merger enforcement must develop a framework for deciding how to make trade-offs between those objectives.

2.4 The Effects of Innovation on the Traditional Product Market Structure

2.41 Definition of Current and Future Market

Market definition is an important element of merger and anticompetitive analysis and seeks to identify the competitive constraints that derive from consumers' substitution patterns. Then the purpose of market definition is to identify a relevant market as those products and services, the suppliers of which are capable of existing effective competitive pressure on each other and of constraining each other's behavior.[47]

The major challenge that dynamic market pose to market definition derives from the instability of the market environment. Technological change alters the set of products or services sold, how they are produced, their characteristics and prices and hence affects substitution patterns and the related competitive constraints. This instability may be most profound when the markets considered are reflecting a substantial change in the underlying technological paradigm but can also derive from less drastic change along a given technological trajectory. Consequently, the basis for a sound market definition in dynamic markets lies in the proper analysis of the impact of innovation arising from technological change on consumers' substitution patterns, guided by a sound analytical framework.

Changing consumers' substitution patterns imply that the temporal aspect of market definition is likely to be particularly important. Most clearly the boundaries of the current relevant market will evolve, perhaps due to changes in product characteristics and relative prices. Consequently, analyzing whether two products are substitutes today may provide a poor guide of whether they will be substitutable, and hence likely to compete in the future.

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[47] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 38-39 (12 September 2003).

Furthermore, expectation that new products will be introduced in the future may provide a constraint on the terms under which current products are supplied. This suggest the potential importance of using the concepts of a future market to consider how the current relevant market can be expected to evolve over time.

In addition, competition assessment of a merger, by dominant firm may need to pay attention to the competitive effects on products not yet supplied to the market, but whose introduction on the market can be anticipated to some reasonable extent; this has implications for market definition analysis. For example, in analyzing a merger in a dynamic setting, it may be necessary to consider not only the future evolution of markets for the merging firm's current products, but also the relevant future markets on to which the firms are expected to introduce new products. Thus we may define future markets to enable forward-looking competition assessment between current products and forward-looking competition assessment between potential new products.

2.42 Use of Hypothetical Monopolist Test

The definition of market boundaries on the basis of demand substitutability is often implemented by means of the hypothetical monopolist test. The approach that we propose to market definition in dynamic cases retains the hypothetical monopolist test as the central conceptual framework but takes the impact of technological and other innovative change into account by defining current and future markets and considering the time dimension of market definition.

Practically, market definition in dynamic markets would be based on the analysis of technological change and would be likely to proceed on a qualitative rather than quantitative basis. Quantitative economic analysis aimed at identifying price elasticity can be a useful component of the definition of relevant markets, although its applicability may often be limited by the availability of useful data. Quite clearly, the more we consider markets in the future and products that are yet to be introduced the less use series of historical data will be.

In practice it is likely that in dynamic markets the hypothetical monopolist test can be used on a qualitative dimension as a conceptual framework to evaluate various sources of evidence such as the

consideration of product characteristics and intended use, evidence of substitution in the recent past, consumer preferences, switching costs, etc. Market definition would tend to be based on thought experiments, supported by understanding of the technologies evolving and possibly data from consumer surveys. What seems important, however, is that in analyzing current substitution patterns no undue weight is given to differences in product characteristics *per se*. Such differences are relevant only inasmuch as they restrict substitution patterns between different products.[48]

Moreover, it should be noted that technological changes taking place outside the current relevant market might also have an important impact on its evolution, e.g. on the identification of future relevant product markets. For instance, technological change that affects the products in a different market than the relevant one may impact on the latter due to convergence of products' characteristics and functionalities. Hence, it is necessary that a broad approach is followed, which considers intra-market but also broader technological trends. Nevertheless, the analysis should remain always a focused investigation on the consideration of predictable techno-economic trends over a reasonable time-horizon that are likely to have a direct impact on the products considered, rather than economy-wide general technological trends.

2.5 The Effects of Vertical Merger on Innovation

2.51 Introduction

What about the use of market definition to assess a merger's effects on innovation itself? The purpose of defining relevant markets is to identify the boundaries of competition in order to make predictions about post-merger price and output levels. When the question instead involves post-merger innovation levels, a fundamental issue is whether a focus on product markets is appropriate to the analysis.

An argument in favor of taking a product-market focus is that the ultimate aim of innovation and the way in which it affects consumers is the creation of products and processes that allow an innovator or its

[48] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 39-40 (12 September 2003).

licensees to compete successfully in one or more product markets.

An argument against this approach is the claim that the notion of a well-defined product market is too limiting because the products of the future cannot be predicted with any degree of certainty and, more fundamentally, that a sustained stream of innovations rather than any particular product is in the long run most important for consumer welfare. A potential response is to consider markets defined in terms of innovation capabilities rather than specific products. But even here one must ultimately tie the analysis to some notion of commonality if not potential competition among products to know which innovation capabilities are relevant.

Consider two firms wishing to merge that have strong R&D capabilities in similar areas but are not at present significant product-market competitors with one another. From the standpoint of static price competition, presumptively no public policy rationale exists for blocking the merger. But if the firms are the only two or are among the few firms that have the capability to undertake particular innovation efforts, then the antitrust agencies might nonetheless be concerned with the consumer-welfare effects of the proposed merger.

Antitrust enforcers might be concerned either that (a) the two firms would have otherwise engaged in competing R&D efforts that would have led to their becoming direct, product-market competitors, or (b) the merged firm will reduce its R&D and lower the probability that even one supplier brings out improved products or processes. The first of these concerns is ultimately about potential competition in the particular product markets at issue in the merger. The second concern, however, is squarely about innovation and arises even when the innovation under consideration might not lead to product-market competition between the merging firms. The same two concerns arise when the merging parties compete in what today are unconcentrated markets but where the firms are the only two or are among the few firms that have the capability to undertake substantial innovation efforts necessary to develop future products in this area.

These two concerns raise legal and economic issues for market definition and the subsequent competitive effects analysis. A first issue arises from the fact that potential competition cases are difficult to bring

successfully in the U.S and EU. Courts tend to be skeptical of claims that a merger will harm consumers by reducing future competition between two merging firms that are not at present competing with one another.[49] A second issue is that it may be extremely difficult to define a product market if one does not yet know what the product will be. A third issue is that changes in upstream innovation can have effects on multiple downstream product markets. A fourth consideration is that, as discussed above, the relationship between competition and innovation is much less understood than that between competition and price or output levels.

2.52 "Innovation Market" Approach in the US Legal System

In the mid 1990s, "the Innovation Markets" debate enriched the discussion by adding the idea that a special future market should be taken into account by antitrust authorities when valuating the impact of a merger in the US. Section 7 of the Clayton Act prohibits a merger that "may be substantially to lessen competition or tend to create a monopoly." Antitrust Division and Federal Trade Commission have generally interpreted it for mergers that are likely to affect prices in relevant products and geographical markets. The reason is that it is easier to assess the effect of a merger on a quantifiable dimension like prices. However, competition can appear in different dimensions and antitrust authorities must take these dimensions into consideration.

The innovation markets analysis is motivated by the desire to "account for the importance of non-price, technological competition in merger review, thereby protecting the dynamic efficiency of the economy, especially in the high technology industries. The formal recognition of the "innovation markets" as an enforcement tool came in 1995 when Intellectual Property Guidelines announced the tripartite distinction among goods and services markets, technology markets and innovations.

The Intellectual Property Guidelines define an innovation market

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[49] General principles of antitrust law require "clear proof" or at least a "reasonable probability" that entry into the new market would in fact have occurred in the near future and disallow speculation about "ephemeral possibilities." (United States v. Marine Bancorp, 418 U.S. 602, 617, 623 (1974); Tenneco, Inc. v. FTC, 689 F. 2d 346, 352 (2d Cir. 1982); In re B.A.T. Industires, 104 F.T.C. 852, 919-928(1984).

as:

"An innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development. The close substitutes are research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to retard the pace of research and development. The agencies will delineate an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

In assessing the competitive significance of current and likely potential participants in an innovation market, the Agencies will take into account all relevant evidence. When market share data are available and accurately reflect the competitive significance of market participants, the Agencies will include market share data in this assessment. The Agencies also will seek evidence of buyers' and market participants' assessments of the competitive significance of innovation market participants. Such evidence is particularly important when market share data are unavailable or do not accurately represent the competitive significance of market participants. The Agencies may base the market shares of participants in an innovation market on their shares of identifiable assets or characteristics upon which innovation depends, on shares of research and development expenditures, or on shares of a related product. When entities have comparable capabilities and incentives to pursue research and development that is a close substitute for the research and development activities of the parties to a licensing arrangement, the Agencies may assign equal market shares to such entities."

Depending on this definition, several points are of special. The exercise of market power from a hypothetical monopolist is framed in terms of retarding or reducing innovation efforts, but not in terms of price increase, as the focus changed to innovation competition. Innovation markets do not refer to a product market but to a market where "one prepares to sell innovation products some time in the future."[50]

The effect of a merger on innovation can be analyzed in the

[50] Davis, R.W. "Innovation markets and merger enforcement: current practice in perspective, Antitrust Law Journal, 71 (2003).

product market or as a consequence of structural effects in the upstream innovation market. Even if a merger has no effect on the actual or potential competition in any relevant product market, it may however have adverse effects on consumers' wealth by reducing competition in innovation.[51] Compared to many other forms of non-price competition, it is easier to show that consumers benefit from increased innovation. Innovation generates new products that consumers can enjoy, and consumers will buy the new products only if they provide net positive surplus. Thus, consumers are strictly better off with more product innovation, provided that there is no reduction in the supply or increase in the price of other products or services.[52]

The practical application of the innovation market analysis poses concrete difficulties. The most critical problem is the identification of the boundaries of analysis. This task is further complicated by the fact that innovations come in many different forms and from diverse sources.

Richard Gilbert and Steven Sunshine, both at the time working at the Department of Justice, developed the concept of "innovation markets."[53] Depend on their theories, the merger analysis under an innovation market perspective should be aimed at identifying three key effects. The first effect is to investigate if the merged firm has the ability to reduce total market investments in R&D. This is equivalent to the definition of the merged firms share in the relevant product market. The possibility of a company to benefit from a reduction in R&D expenditures is limited if other competitive innovative firms can easily increase their investment in R&D and would do that in response to the merged firm's reduction in R&D. The second effect is to evaluate if the merged firms have the incentive to reduce the innovative effort. Even if the company has the ability to reduce research investments, it may not have the interest to do so. If the competition is high in other downstream products and from other firms that have the necessary assets, merged companies

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[51] Richard J. Gilbert and Steven C. Sunshine, "Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. 569 (1995).

[52] Richard J. Gilbert and Steven C. Sunshine, id. p.573.

[53] Richard J. Gilbert and Steven C. Sunshine, "Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. p.587-594 (1995).

could have an interest in maintaining or increasing the actual level of R&D efforts. The third effect is to determine if the merger may have an impact on the efficiency of the R&D expenditures. This analysis is similar to the valuation of the production efficiencies. The argument is that when merging firms possess complementary assets, they might be able to exploit economies of scale. The reduction of redundant R&D activities would lead to a cost reduction but not to a reduction in innovation.

Despite the cautious way Gilbert and Sunshine recommended using innovation markets, the idea has met with substantial skepticism and criticism.[54] One commentator argued that the innovation market idea is in most cases "superfluous" and amounts to little more than analysis of potential competition in product markets, while in the remaining cases it is a dangerous foray into unknown economic relationships that promises to do at least as much harm as good.[55] Professor Dennis Carlton testified before the FTC that it would be too difficult in practice for antitrust agencies successfully to identify mergers that should be blocked on innovation grounds, and he opinioned that " a movement toward relying on the concept of innovation markets could easily lead to a vast decline in the predictability of enforcement policy and in the reliability of enforcement in improving welfare."[56] Yet others have questioned the legal basis on which enforcement agencies and courts could base decisions on non-price effects like innovation.

The innovation markets framework provides a methodology for identifying mergers that are likely to affect competition in output markets through a lessening of innovation. Section 7 of the Clayton Act provides that no person shall acquire the stock or assets of another person "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[57] The Supreme

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[54] Ronald W. Davis, "Innovation Markets and Merger Enforcement: Current Practice in Perspective," 71 Antitrust L.J. 677 (2003).
[55] Richard T. Rapp, "The Misapplication of the Innovation Market Approach to Merger Analysis," 64 Antitrust L.J. 19 (1995).
[56] Dennis W. Carlton, "Antitrust Policy Toward Mergers when Firms Innovate: Should Antitrust Recognize the Doctrine of Innovation Market?" Testimony before the Federal Trade Commission Hearings on Global and Innovation-based Competition (Oct. 25, 1995).
[57] 15 U.S.C. § 18.

Court has held that "line of commerce" refers to the relevant product market, which in turn the Court has declared an important dimension of "the area of effective competition."[58] Product market boundaries are typically drawn with reference to price elasticity of goods and services sold in commerce.[59]

Generally speaking, an allegation of reduced competition in innovation can be incorporated into Section 7 analysis in at least three ways. First, a reduction in innovation can be characterized as a competitive effect in a goods or services market.[60] Second, dampened innovative activity could be an integral part of a claim of reduced potential competition.[61] Third, an innovation market can be used to identify the areas in which the proposed merger is likely to lessen competition in output markets.[62]

Although loss of innovation is certainly an anticompetitive effect under existing case law, reliance on this mode of analysis may not allow identification of all markets that are harmed by the loss of innovation resulting from the merger. Moreover, even if all the affected markets could be identified, there may be no antitrust violation under traditional methods of analyzing vertical mergers if the merging firms are neither competitors nor vertically related.

The theory of potential competition also fails to capture all markets that could be harmed by the loss of innovation competition.[63] A merger that lessens innovation could result in increased prices in one or more markets in which only one of the merging firms participates and the other firm is not an actual or perceived potential competitor. Focusing on innovation cures these deficiencies in the analysis. The innovation markets framework provides a principal basis for identifying all relevant welfare losses in output markets due to reduced innovation competition. It reaches mergers with demonstrable anticompetitive effects not

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[58] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).
[59] U.S. 1992 Merger Guidelines, § 1.0, 1.11.
[60] PPG Indus., 628 F. Supp. at 885.
[61] Institut Merieux S.A., 5 Trade Reg. Rep. (CCH) ¶ 22,779 at 22,505 (1990).
[62] United States v. General Motors Corp., No. 93-530 (D.Del. filed Nov. 16, 1993).
[63] The potential competition theory requires that one of the two merging firms participate in a concentrated market and the other be an actual or perceived potential entrant. See, e.g., United States v. Marine Bancorporation, 418 U.S. 602, 639-40 (1974).

captured by other methods of analyzing mergers.

A finding of illegality under Section 7 must rest on a probable effect on commerce. Unless technology is sold in a classical "buyer-seller" transaction, such an effect can come about only if the innovation is incorporated into a product that ultimately is sold downstream to consumers. Although the innovation markets framework begins by identifying the effects on innovation, given structural changes in the output market, the question of whether the merged firm has the ability and the incentive to reduce innovation depends to a large extent on the particular configurations of the relevant output markets. The analysis ends with an evaluation of the effects of reduced innovative activity in these markets.[64]

2.53 "Innovation Markets" and EU Legal Approaches

On 28th November 2007, EU Commission adopts Guidelines for merging companies with vertical and conglomerate relationship (IP/07/1780). Also in this guidelines, it is provided that "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."[65] And further, it is added in detail that "the Commission may decide that, as a consequence of the efficiencies that the merger brings about, there are no ground 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 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."[66]

Concerned on innovation market approach, EU non-horizontal

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[64] Richard J. Gilbert and Steven C. Sunshine, "Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets," 63 Antitrust L.J. 569 (1994-1995).

[65] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, IV(28).

[66] Id. IV (52).

merger guidelines are making clear that "effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation...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..."[67] And added that "...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." Then with this provision EU Commission makes clear that innovation will be very important key factors in case evaluating welfare-enhancing competitive effects.

Then, in EU legal system, innovation market approaches are dealt with as a kind of efficiency defence.

2.6 Comparison between Two Legal Systems

Why the definition guidance and overall approach that we have proposed differ from the US "innovation market" approach? The 1995 Guidelines in the US introduced the concept of an "innovation market" as an analytical tool to consider the competitive effects on innovation and R&D, rather than identified "future product markets" in EU.[68]

Both the innovation markets and the efficiency defense approach are aimed at including innovation concerns in merger assessment. The path followed to reach the same objective is however different in, at least, two main aspects. First, innovation market approach focuses on a specific market, the market of innovation. In practical terms, this is translated into looking at the efforts of the merger on the R&D activities. As R&D represents an input for innovation, the output market is not anymore the core of the authorities' analysis. On the other side, EU's "efficiency defense" focuses on the output market of innovation considering mainly the potential effects of the transaction on new or

[67] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, II. § 10 (2007).

[68] US Department of Justice and Federal Trade Commission, "Anti-trust guidelines for the licensing of Intellectual Property," April 6 1995.

improved products or processes. Second, the scope of the efficiency defense is to allow transactions that would have been otherwise blocked because of the associated anticompetitive effects on the market. The scope of "the innovation market" approach seems to be, on the contrary, to block mergers that could have a negative impact on the competition in innovation.[69]

In a world of rapid technological advance, it is important that antitrust law pay greater attention to innovation issues. By assigning innovation an important role in merger analysis, the innovation markets approach will aid antitrust authorities to adopt a more dynamic perspective.

2.7 Dynamic Competitive Effects Analysis

The central issue that arises when this analysis is undertaken in a dynamic market originates from the relative instability, over time, of the markets concerned and the possibility of competition concerns relating to products yet to be introduced. If the scope of the relevant market is expected to change significantly over time due to changes in product's characteristics, or if nature of competition in that market is expected to change, analysis of competition in current relevant markets is unlikely to be a reliable indicator of competition in the future. If a merger creates dominant position or monopoly and impedes competition on a current relevant market, is this dominant or monopoly position likely to remain in the future? Conversely, if a merger appears innocuous on current markets, is there still an impediment to competition in a future market?

We can imagine that one merged entity do not compete in any current relevant market but are investigating in R&D to innovate new products that, if successfully introduced, would compete in the future. Despite the absence of competition between the firms in current relevant markets, the merger may raise competition concerns that relate to future product markets. In this case, the state of competition in current product markets is completely uninformative of the state of competition in the

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[69] Elena Cefis, Mark Grondsma, Anna Sabidussi, Hans Schenk, "The Role of Innovation in Merger Policy: Europe's Efficiency Defence versus America's Innovation Markets Approach," Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Discussion Paper Series nr: 07-21, p.22 (2007).

foreseeable future, and the need arises to define a future market to allow competitive assessment. In the context of merger investigations, the definition of separate future relevant markets of this kind (i.e. market definition from the perspective of products yet to be introduced, rather than from the perspective of the future evolution of the current relevant markets) is most likely to be useful in cases where innovation is step-wise and the nature of future products can be reasonably anticipated in advance. This "innovation market" approaches have been already used in US legal system in several cases and majority of scholars accepted this concept, but in EU legal system hadn't yet directly.

At the other extreme, a merger may lead to the creation of a dominant position only on a current relative market. Whether this represents a significant impediment to competition may depend on how the current market definition is relevant into the future. This instability problem is perhaps most acute for those markets that, at the time of the investigation, are subject to significant changes in the main technological paradigm, especially when these changes are capability-destroying and thus likely to result in profound transformations of the competitive environment.

To address the instability problem of relevant markets, we suggest that a forward-looking consideration of their evolution is possible on the basis of the identification of some broad techno-economic trends. This assessment would be based on analysis of technological changes and need for a consideration of broad market trends that would affect the products expected to compete in the market and the evolution of consumer's substitution patterns. The firms' "capability to supply" analysis would complement this analysis by considering which firms would have the ability to supply, and hence compete in, future product markets.

Hence, this approach maintains the traditional conceptual framework for analysis within relevant markets, which may both defined for both current and future products, but offers a structured way to incorporate the consideration of market dynamics into the analysis by the assessment of the impact of the process of technological change on future competition in relevant markets.

VII. Current U.S and EU Vertical Merger Regulation Systems and New Suggestions

1. U.S. Legal System

Under U.S. legal system, vertical mergers may be attacked under a variety of federal statutes, including the Sherman Act, Clayton Act, and Federal Trade Commission Act, as well as by state attorney general in a variety of ways.

1.1 Section 7 of the Clayton Act

The history of control of concentrations in the U.S. is relatively long when compared with the EU. The principal U.S. antitrust provision governing mergers, acquisitions and joint ventures is Section 7 of the Clayton Act[70] (enacted in 1914 and amended in 1950), which prohibits concentrations that may reduce competition. Section 7 of the Clayton Act which, as ariginally passed in 1914, provided:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[71]

The language emphasized here originally was thought to limit the

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[70] "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly....."

[71] Clayton Act, ch. 323, §7, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 18 (1976)).

applicability of section 7 to horizontal mergers. In 1950, however, Congress amended section 7, explicitly including asset acquisition within its scope and eliminating the language which was thought to restrict the section to horizontal mergers.

Because of the limiting language in the original section 7, the government did not challenge a vertical merger under section 7 until *United States v. E.I. du Pont de Nemours & Co.*[72] In that case the Supreme Court held that, even as originally enacted, section 7 applied to vertical mergers.[73] The Court, after examining the legislative history of section 7, found that the emphasized language of section 7 specified only one of three prohibitions contained in section 7 and that mergers which might "restrain commerce" or "tend to create a monopoly" were also prohibited. The Court held that these prohibitions could and did apply to all types of mergers, stating that the purpose of the 1950 amendment to section 7 was merely "to make it clear that it applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal...."[74]

The holding of du Pont was endorsed in *Brown Shoe Co. v. United States*.[75] The Court in *Brown* initially noted that section 7 as originally passed did appear to be confined to acquisition that "would result in a substantial lessening of competition *between the acquiring and acquired companies*..."[76] In a footnote, however, the Court accepted the holding in the *du Pont* case that "such a construction of § 7 was incorrect."[77] The Court held that Congress,

> by the deletion of the "acquisition-acquired" language in the original text...hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.[78]

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[72] 353 U.S. 586 (1957).
[73] *Id.* at 590-92.
[74] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957).
[75] 370 U.S. 294 (1962).
[76] 370 U.S. at 312.
[77] *Id.* at 313 n.21.
[78] Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

The Courts thus have held that section 7 of the Clayton Act generally is applicable to vertical mergers. There are, however, essentially five statutory jurisdictional prerequisites to its invocation. The section cannot be applied to a business combination when: (1) either of the merging companies is not a corporation[79]; (2) either of the corporations is not engaged in interstate commerce[80]; (3) the transaction that led to the combination is not an acquisition[81]; (4) the transaction that led to the combination did not involve stock or assets; or (5) the transaction is exempt from application of section 7.[82] Challenging those mergers that fall outside the scope of these limits requires invoking other antitrust statutes. These statutes, section 1 through 3 of the Sherman Act, section 5 of the Federal Trade Commission Act, and various provisions of state antitrust laws, generally have narrower standards for judging mergers than the Clayton Act and thus normally are invoked only when a business combination is outside the Act's jurisdictional limits.

1.2 Sherman Act

Mergers, acquisitions and joint ventures may also be challenged under Sections 1[83] and 2[84] of the Sherman Act as unreasonable restraints or as attempts at monopolization. Section 1 of the Sherman Act

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[79] 15 U.S.C. § 18 (1976).

[80] United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 275-76 (1975).

[81] United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-83 (S.D.N.Y. 1960); Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 374-76 (N.D. Ga. 1975), *aff'd*, 535 F. 2d 313 (5th Cir. 1976).

[82] Section 7 exempt stock acquisitions "solely for investment" and also permits the formation of subsidiary corporations to aid in concluding a corporation's business.

[83] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[84] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…"[85] The traditional view is that the Sherman Act standard requiring an actual restraint of competition is harder to meet than the Clayton Act's "incipiency" standard, which requires only a tendency to substantially lessen competition or create a monopoly. The early cases under the Sherman Act seemed to hold that all mergers which involved large firms are illegal.[86] Subsequently, the Supreme Court in United States v. Columbia Steel Co.[87] formulated a different standard for judging mergers under the Sherman Act by concluding that mergers under section 1 of the Sherman Act must be judged by that Act's traditional "rule of reason," thereby prohibiting only unreasonable mergers. Although a later Supreme Court opinion suggested that this standard might be easier to satisfy than the Clayton Act standard,[88] subsequent cases have confirmed that the Clayton Act standard is less difficult to satisfy than the Sherman Act rule of reason.[89]

Section 2 of the Sherman Act, like section 1, may be used to attack mergers outside the jurisdictional limits of the Clayton Act. Because the focus of this section differs in most respects from that of section 7 of the Clayton Act, there has been little confusion concerning the difference in their standards.[90] Section 2 provides in part that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…"[91] Thus, a merger violates section 2 only if it results in a monopoly or constitutes an attempt or conspiracy to

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[85] 15 U.S.C. § 1 (1976).
[86] United States v. Southern Pac. Co., 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pac. R.R., 226 U.S. 61 (1912); Northern Sec. Co. v. United States, 193 U.S. 197 (1904).
[87] 334 U.S. 495 (1948).
[88] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669-70 (1964).
[89] United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 343 n.16 (E.D. La. 1968).
[90] Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 794 (S.D.Tex. 1971), aff'd, 476 F. 2d 989 (5th Cir. 1973).
[91] 15 U.S.C. § 2 (1976).

monopolize the market. Consequently, to have a merger condemned under this standard is more difficult than under the Clayton Act incipiency standard.

1.3 Historical Perceptions of Vertical Mergers in U.S. Legal System

1.31 Early Cases

The antitrust treatment of vertical mergers tends to be fact specific, with emphasis on whether a likelihood of harm to competition can be demonstrated in the particular transaction at hand. Because the analytical framework applied to vertical mergers has changed over time, an understanding of the historical development of the legislative, jurisprudential, and economic underpinning of vertical merger law is essential.

At first, vertical mergers were thought to be immune from challenge under section 7 of the Clayton Act. The original Clayton Act as it was enacted in 1914, prohibited acquisitions of stock that would tend substantially to lessen competition between the acquiring and the acquired companies in any line of commerce. Antitrust scrutiny of vertical mergers has been more sporadic and less analytically consistent than that of horizontal mergers. Government challenges to vertical mergers have been far less frequent than to horizontal mergers. During the entire period from 1914 to 1950, the Department of Justice brought only three vertical merger cases,[92] while the Federal Trade Commission brought only two vertical cases.[93] Undoubtedly, during this period some potential challenges were deterred by the commonly accepted view that vertical mergers were not subject to scrutiny under the threshold of illegality set by the Clayton Act. As originally enacted, Section 7 prohibited acquisitions by one corporation of the stock or other share capital of another corporation, where the effect of the acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition.[94] While the

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[92] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957); United States v. General Motors Corp., 1952 Trade Cas. (CCH) ¶67,324(N.D. Ill. 1952); United States v. Swiss Bank Corp., 1940-43 Trade Cas. (CCH) ¶ 56, 188 (D.N.J. 1941).

[93] Aluminum Co. of Am. v. FTC, 284 F. 401 (3d Cir. 1922); Austin, Nicholas & Co., 9 F.T.C. 170 (1925).

[94] Sullivan, Handbook of the law of antitrust 588 (1977); ABA Antitrust Section,

Clayton Act draftmen may have intended that the emphasis be placed on the words "may be" so that prospectively anticompetitive consolidations could be reached in their incipiency, in practice the focus centered on the requirement that the prospective loss of competition occur "between" the acquiring and acquired companies. Under this view, shared for many years by the Department of Justice and the Federal Trade Commission, before the 1950 amendments, the coverage of the Clayton Act extended only to mergers and acquisitions between direct, horizontal competitors, and did not reach anticompetitive vertical acquisitions.[95] Vertical acquisitions, therefore, had to be challenged under the Sherman Act, which was widely regarded to be more demanding on plaintiffs than the Clayton Act.[96] But even after the Supreme Court made clear that jurisdiction over vertical mergers existed under the Clayton Act,[97] the number of government prosecutions did not increase substantially.[98]

A second explanation for the small number of challenges to vertical mergers lies in their economics. Firms vertically integrate for a variety of reasons, the most common being: (1) to reduce uncertainty over the availability or quality of supplies or the demand for output;[99] (2)

Monograph No.7, Merger Standards under U.S. Antitrust Laws 6-17, n.46 (1981).

[95] Brown Shoe Co. v. United States, 370 U.S. 294, 314 n.25, 317 n.30 (1962); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 615-17 (1957); Federal Trade Commission, Report on Conglomerate Mergers and Acquisitions 168 (1955). While the government antitrust enforcement agencies were reluctant to challenge vertical mergers under Section 7, occasionally a private plaintiff would invoke the statute. See, e.g., Ronald Fabrics Co. v. Verney Brunswick Mills, Inc., 1946-47 Trade Cas. (CCH) ¶ 57,514 (S.D.N.Y. 1946).

[96] Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.33, 329 (1962).

[97] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 590-92 (1957).

[98] Examples of cases initiated by the Department of Justice, see, e.g., Ford Motor Co. v. United States, 405 U.S. 562 (1972); United States v. Agri-mark, Inc., 512 F. Supp. 737 (D.Vt. 1981); United States v. Hammermill Paper Co., 429 F. Supp. 1271 (W.D.Pa. 1977); United States v. Sybron Corp., 329 F. Supp. 919 (E.D.Pa. 1971); United States v. Kimberly-Clark, 264 F. Supp. 439 (N.D.Cal. 1967); United States v. Standard Oil Co., 253 F. Supp. 196 (D.N.J. 1966); United States v. Kennecott Copper Co., 231 F. Supp. 95 (S.D.N.Y. 1964); United States v. Aluminum Co. of America, 233 F. Supp. 718 (E.D.Mo. 1964); United States v. Schenley Indus., Inc., 1957 Trade Cas. (CCH) ¶ 68,664 (D.Del. 1957).

[99] M.Waterson, Economic Theory of The Industry, 96-98 (1984); Arrow, Vertical Integration and Communication, 6 Bell J. Econ. 173 (1975); Bernhart, Vertical Integration and Demanded Variability, 25 J. Indus. Econ. 213 (1977); Blair & Kaserman, Uncertainty and the Incentive for Vertical Integration, 26 S. Econ. J. 266 (1978); Carlton, Vertical Integration in Competitive Markets Under Uncertainty, 27 J. Indus. Econ. 189

to take advantage of available economies of integration that result from eliminating the "middlemen";[100] (3) to protect against monopolistic or oligopolistic behavior of either suppliers or buyers with whom the firm must otherwise deal;[101] and (4) to reduce transaction costs (including sales taxes, marketing expenditures, and the monitoring of contractual performance and externalities, such as "free-rider" problems in connection with point-of-sale services.[102] Each of these reasons can be pro-competitive. Each may lower the cost of production and distribution to the surviving firm, possibly benefiting consumers in the form of lower prices and, in any event, making more productive use of resources.

Under some circumstances, however, vertical mergers are perceived to have the potential to be anticompetitive. The case law suggests four primary sources of this anticompetitive potential. First, by acquiring a firm in an adjacent level in the chain of manufacture and distribution, the acquiring firm has the power as a matter of corporate governance to "foreclose" its competitors from access to the goods or services of the acquired firm. Second, where an acquiring firm is sufficiently powerful in its own markets, it may be able to "leverage" this power into other markets through a vertical merger. Third, the vertical merger may increase barriers to entry into the markets of either the acquiring firm, the acquired firm, or both. Finally, the merger may facilitate a price squeeze or price discrimination.

1.32 The 1950 Amendments to the Clayton Act

The Clayton Act was amended in 1950 to make clear that Section 7 applied to vertical and conglomerate mergers. The language emphasized

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(1979).

[100] F. Scherer, Industrial Market Structure and Economic Performance, 88-91 (2d ed. 1980).

[101] Vernon & Graham, Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

[102] Fisher & Sciacca, An Economic Analysis of Vertical Merger Enforcement Policy, 6 Research in L. & Econ. 1,4, 11-16 (1984); Loftis, How to Analyze Dual Distribution Problems, 1 Antitrust Counseling and Litigation Techniques, J. von Kalinowski ed. 1987; E. Robinson, The Structure of Competition Industry 20 (rev. ed. 1958); Coase, The Nature of the Firm, 4 Economica 386 (1937); Williamson, The Vertical Integration of Production: Market Failure Consideration, 61 Am. Econ. Rev. 112 (1971); Klein, Crawford & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law Econ. 297 (1978).

here originally was thought to limit the applicability of section 7 to horizontal mergers. In 1950, however, Congress amended section 7, explicitly including asset acquisition within its scope and eliminating the language which was thought to restrict the section to horizontal mergers. It was provided that "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly...." The number of challenges to vertical mergers by the government, however, did not increase dramatically even after the 1950 amendments and a confirmation by the U.S. Supreme Court that the Clayton Act applied to vertical mergers.[103]

1.33 Brown Shoe and Vertical Foreclosure

Judicial analysis of vertical mergers under the amended Section 7 of the Clayton Act begins with *Brown Shoe Co. v. United States.*[104] The Division challenged the merger of the Brown Shoe Company with the G.R. Kinney Company. Although each company was integrated into both manufacturing and retailing of men's, women's, and children's shoes, Brown Shoe was primarily a manufacturer and Kinney was primarily a retailer.

The U.S. Supreme Court affirmed the district court's finding that the merger violated amended Section 7. The Court indentified the foreclosure of a portion of the market to competitors as the "primary vice of a vertical merger or other arrangement tying a customer to a supplier...which deprives... rivals of a fair opportunity to compete."[105] In addition, the Court's analysis stated that where the fraction of the market foreclosed to competitors does not approach either monopoly proportions or a de minimis share of the market, other non-market

[103] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590-92 (1957).
[104] 370 U.S. 294 (1962).
[105] 370 U.S. at 324.

share factors must be considered in the analysis of the merger.[106] These other factors include "the nature and purpose of the arrangement" and any trend toward concentration arising from vertical integration in the industry.[107] The Court also cautioned, however, in the language of Section 7, that only those mergers whose effect may be substantially to lessen competition or tend to create a monopoly are unlawful under the Clayton Act.[108]

The approach to vertical merger analysis described in *Brown Shoe* became the method of analysis for subsequent lower court decisions for the next twenty years. Most courts adopted a mechanical approach to vertical merger analysis in which the facts of the particular case were analogized to those in *Brown Shoe*. In particular, courts examine the percentage of the market foreclosed to competitors, the purpose of the acquisition, the concentration in the relevant markets, and whether there was a trend toward vertical integration in the industry.[109]

This approach was also incorporated into the 1968 Merger Guidelines. The 1968 Merger Guidelines stated that the Division would ordinarily challenge a merger between an upstream firm accounting for 10 percent or more of sales in its market and a downstream firm accounting for 6 percent or more of the total purchase in its market.[110] The underlying theory was the same as that articulated by the U.S. Supreme Court in Brown Shoe, the perceived harms resulting from foreclosure.[111]

1.34 Chicago School

The theory of foreclosure articulated by the U.S. Supreme Court in Brown Shoe became the subject of considerable criticism as part of a broader law and economic challenge to fundamental assumptions underlying antitrust law. Because much of the criticism emanated from the University of Chicago, the critics came to be referred to as the

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[106] *Id.* at 328-29.
[107] *Id.* at 332.
[108] *Id.* at 324.
[109] Ash Grove Cement Co., v. FTC, 577 F. 2d 1368 (9th Cir. 1978).
[110] U.S. Department of Justice, Merger Guidelines (1968) § 12-13.
[111] U.S. Department of Justice, Merger Guidelines (1968) § 11.

"Chicago School." The critic argued that foreclosure, as articulated in Brown Shoe, is nothing more than a conclusory label.

First, according to the Chicago School critique, a monopolist will set output at the level that maximizes its profits, or "rents," given a firm specific cost structure and product -specific demand conditions. Because of the firm- and product-specific nature of the monopolist's economic calculus, a firm cannot simultaneously exploit monopolies in two products that are used in fixed proportion to each other.[112] The products that are used in fixed proportion to each other. The monopolist may achieve its profit-maximizing output for one product or the other but not both, because differences in cost and demand conditions between the two markets will result in a different profit-maximizing output for each other. Thus, it was argued, there is a "single monopoly rent" which can be taken at either monopolized level of the vertical chain, but not both. Given this analysis, Chicago School adherents reasoned that motivations for vertical mergers should not be assumed to lie in the desire to leverage a monopoly from one market to another, but instead in the desire to create significant, potentially pro-competitive, integrative efficiencies.

Second, even in cases in which vertically-related products are used in variable proportion to each other, Chicago School critics saw the competitive effects of complete vertical foreclosure by a monopolist as indeterminate.[113] It was argued that given the difficulty of predicting whether the price would go up or down, or remain unchanged, there should be no intervention in the marketplace under these circumstances.

Third, the justification for judicial intervention was seen as even less compelling where market power was not found at either relevant level of the vertical chain. In that situation, a vertical merger would

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[112] The Chicago School critics recognized that this explanation applies only where one unit of the input is needed to produce on unit of output. See Robert H. Bork, The Antitrust Paradox, p. 228-30 (1978).

[113] Parthasaradhi Mallela & Babu Nahata, Theory of Vertical Control with Variable Proportions, 88 J. Pol. Econ. 1009 (1980); M.L.Greenhut & H.Ohta, Vertical Integration of Successive Oligopolists, 69 Am. Econ. Rev. 137 (1979); M.L. Greenhut & H.Ohta, Related Market Conditions and Interindustrial Mergers, 66 Am. Econ. Rev. 267-77 (1976); Frederick R. Warren-Boulton, Vertical Control with Variable Proportions, 82 J. Pol. Econ. 783 (1974); John M. Vernon & Daniel A. Graham, Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971);

result only in a temporary foreclosure at worst, because supplier and customers would simply realign their relationships after the merger to match the remaining unforeclosed supply to the unforeclosed demand.[114]

Fourth, Chicago School critics argued that vertical integration through merger is typically efficient and should not be discouraged. Vertical mergers, for example, were viewed as tending to reduce transaction costs associated with the transfer of the product to the downstream division; for example, it may be more costly to buy, sell, and monitor quality through vertical contracts than to do so internally.[115] Similarly, coordination in design may be achieved more readily in a vertically integrated firm than when arm's length negotiations are required. There may also be complementarities in the production stage that serve to reduce inventories and eliminate the international cost of transportation or successive processing. A vertical merger can also increase efficient investment by internalizing incentives to eliminate opportunism and assuring the supply of inputs when there is market risk.[116]

Finally, it has been argued that a vertical merger may create efficiencies by eliminating the price distortion caused by double monopoly markup where there is market power in both the upstream and downstream markets.[117]

1.35 Post-Chicago School

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[114] Robert H. Bork, The Antitrust Paradox 232 (1978).

[115] Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds., 1989); Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

[116] Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989); Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, 96-98 (1984); Dennis W. Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979); Benjamin Klein et.el., "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J.L. & Econ. 297 (1978); Roger G. Blair & David L. Kaserman, "Uncertainty and the Incentive for Vertical Integration," 45 Southern Econ. J. 266 (1978); Kenneth J. Arrow, "Vertical Integration and Communication," 6 Bell J. Econ. 173 (1975).

[117] John M. Vernon & Daniel A. Graham, "Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

As one commentator has observed, "the Chicago School contribution to antitrust did two things. First, it gave us much that was useful. Second, it was oversold." [118] Over time, empiricists found opportunities to test the theoretical approach of the Chicago School, which sometimes included simplifying assumptions inconsistent with the facts of particular cases.[119]

New economic research led to a more complex and textured "post-Chicago" view of vertical mergers and vertical restraints, which may be more likely than the Chicago School approach to support challenges under certain circumstances. At the same time, however, it has been observed that the more convoluted post-Chicago approach is more difficult to apply and more likely to lead to ambiguous results.[120]

Based on economic studies of strategic behavior and game theory, post-Chicago merger enforcement continued the Chicago School's focus on economic analysis and recognized the efficiency-enhancing potential of many vertical mergers. At the same time, however, post-Chicagonians rejected the view of vertical mergers as almost per se benign and instead emphasized whether intervention was warranted in particular types of cases.[121] The relationship between the post-Chicagoans and the Chicago School is, however, evolutionary rather than revolutionary.

The post-Chicago view focuses vertical merger concerns on vertical integration into markets that do not behave competitively. The post-Chicago approach is similar to the traditional "foreclosure" theory of vertical mergers, except for refinements that control the excesses of the traditional foreclosure approach.[122] At the same time, the foreclosure

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[118] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique", 2001 Colum. Bus. L. Rev. 257, 267 (2001).

[119] This approach has been called a "post-Chicago" view of antitrust analysis. Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach", 63 Antitrust L. J. 513 (1995).

[120] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum. Bus. L. Rev. 257, 271 (2001).

[121] Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

[122] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum.

discussed in post-Chicago literature is not necessarily the foreclosure of *Brown Shoe*. In the post-Chicago literature, "foreclosure" generally means raising rival's costs, not outright market exclusion.[123]

Antitrust enforcement authorities have incorporated much of the new thinking into their enforcement policies and have stepped up enforcement activity against vertical mergers,[124] leading to a number of enforcement actions based at least in part on various permutations of the raising rival's costs theory.[125]

The post-Chicago began largely as a result of research dealing with possible anticompetitive effects of vertical integration generally.[126] For example, mergers may anti-competitively "raise rival's costs" in cases in which a downstream firm (the un-excluded firm) is able to purchase exclusionary rights through vertical contract or merger from multiple upstream suppliers, in essence to facilitate a tacit cartel of the upstream suppliers against disadvantaged downstream competitors. Subsequently, the interest of post-Chicago vertical analysis has also been directed to "network externalities," a peculiarity of certain highly networked industries, especially computers and telecommunications, in which access to a network may become increasingly more valuable each time a user is added to the network because a larger network can be employed to reach more users.[127]

Bus. L. Rev. 257, 323 (2001).

[123] *Id.* at 324.

[124] M. Howard Morse, Vertical Mergers: Recent Learning, 53 Bus. Law. 1217 (1998); Scott A. Stempel, Government Shows Increasing Concern with Vertical Mergers, Antitrust, Fall 1994, p. 17; Richard G. Parket, Trends in Merger Enforcement and Litigation, Remarks Before the Annual Briefing for Corporate Counsel (16, 9. 1998),

[125] United States v. Enova Corp., 63 Fed. Reg. 33,396 (June 18, 1998); PacifiCorp, 5 Trade Reg. Rep. (CCH) ¶24,384 (Feb. 18, 1998); Lockheed Martin Corp., 122 F.T.C. 161 (1996); Hughes Danbury Optical Sys., 121 F.T.C. 495 (1996); Silicon Graphics, Inc., 120 F.T.C. 928 (1995); United States v. Sprint Corp., 60 Fed. Reg. 44,049, 44,058 (D.D.C. Aug. 24, 1995); Eli Lilly & Co., 120 F.T.C. 243 (1995); United States v. AT&T, 59 Fed. Reg. 44,158, 44,166 (D.D.C. Aug. 26, 1994).

[126] Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rival's Cost to Achieve Power Over Price, 96 Yale L.J. 209 (1986); Steven C. Salop & David T. Scheffman, Recent Advantages in the Theory of Industrial Structure, Raising Rivals' Costs, 73 Am. Econ. Rev. 267 (1983). But see Bruce H. Kobayashi, Game Theory and Antitrust: A Post Mortem, 5 Geo. Mason. L. Rev. 411 (1997).

[127] Carl Shapiro, Exclusionary in Network Industries, 7 Geo. Mason. L. Rev. 673 (1999).

1.4 Non-horizontal Merger Guidelines

More specifically with regard to vertical mergers, the U.S 1984 Merger Guidelines on Non-Horizontal Mergers describes the principal theories likely to create harm to competition. These theories mainly refer to foreclosure and collusion.

Regarding foreclosure, three conditions are necessary, but not sufficient, for this problem exist:

- The degree of vertical integration between the two markets must be so extensive that entrants to one market (the primary market) also would have to enter the other market (the secondary market).
- The requirement of entry at the secondary level must make entry at the primary level significantly more difficult and less likely to occur.
- The structure and other characteristics of the primary market must be otherwise so conducive to non-competitive performance that the increased difficulty of entry is likely to affect its performance.

In practice, the antitrust enforcement of vertical mergers in the U.S. can be considered as vacillating by comparison with other jurisdictions. Prior to the late 1970s, a wide number of vertical mergers were prohibited whereas they presented relatively small foreclosure effects.[128] Then, in the late 1970s, the courts' analysis began to change, being less reluctant as with vertical mergers even where the market shares were relatively significant.[129] In 1982, the revision of the Merger Guidelines by the Department of Justice resulted in a significant liberalization, and almost no vertical mergers were challenged during this period. More recently, the U.S. authorities have restarted a critical approach in several cases[130], due to a renewal in the economic analysis

[128] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); and Ford Motor Co. v. United States, 405 U.S. 562 (1972).
[129] Fruehauf Corp. v. FTC, 603F.2d 345 (1979).
[130] Cadence Corp., C-3761 (Aug. 7, 1997); Silicon Graphics Corp., C-3626 (Nov. 14,

of the effects of vertical mergers.

1.5 Comment

As I mentioned above, U.S antitrust policy and economics is heavily influenced by Chicago School economics. Chicago School Economics posits that competitors are likely to engage in rational and efficiency-enhancing conduct rather than conduct whose purpose and effect is simply to eliminate rivals, and, if they do not, markets are likely to correct themselves.[131] Thus, Chicago School economics tend to discount the significance of conduct alleged to exclude or cripple rivals and to assume instead that the conduct is likely to be efficiency-enhancing in purpose and effect.[132] Chicago School thinking has gained significant traction in the Supreme Court's jurisprudence as reflected in decisions such as Sylvania, Matsushita, Brooke Group, Trinko, Weyerhaeuser, and most recently in Leegin.[133]

However, in the 1980s, economists and lawyers alike began to question some of the fundamental assumptions underpinning the Chicago School's teachings. Scholars bubbled "post-Chicago School" have presented scenarios in which leveraging monopoly power can not only be a profitable for the monopolist but also significantly anticompetitive. For example, raising rival's cost theorists, like Professor Salop, argue that concerted refusal to deal, tying, and exclusive dealing may be more readily explained not as devices for destroying a rival altogether but rather for making the rival's production or distribution more costly, thereby impairing the competitive process and injuring consumers.[134]

1995).

[131] J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement," at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, 2007.

[132] Robert Bork, The Antitrust Paradox: A Policy at War with Itself, New York: Basic Books, 1978; Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L.Rev. 1984.

[133] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574 (1986); Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Weyerhaeuser v. Ross Simmons, 127 S.Ct. 1069 (2007); Leegin Creative Leather Prods. v. PSKS, Inc., 127 S.Ct. 2705 (2007).

[134] Thomas Krattenmaker & Steve Salop, Antitrust Analysis of Anticompetitive Exclusion: Raising Rival's Costs to Achieve Power over Price, 96 Yale Law Journal 209, (1986); Michael H. Riordan & Steve Salop, Evaluating Vertical Mergers: A Post-Chicago

Thus, post-Chicago School economics in general is more concerned about conduct that hobbles rivals as competitors and tend to eschew presumptions that conduct is efficiency-enhancing. Post-Chicago thinking appears to be reflected in a number of recent European judicial decisions, including France Telecom, British Airways, General Electric, and Tetra Laval.[135]

2. EU Legal System

2.1 Introduction

The principal competition rules of the EC Treaty are, at first, Article 81 of the EC Treaty that prohibits agreements between firms, decisions by associations of firms and concerted practices which may affect trade between member states of the EU and which have, as their object or effect the prevention, restriction or distortion of competition, subject to exemption to be granted by the Commission. Secondly, Article 82 of the EC Treaty prohibits any abuse by one or more firms of a dominant position in so far as it may affect trade between member states of the EU. Council Regulation (EC) No. 1/2003[136] contains the principal regulatory framework for the enforcement of Article 81 and 82.

A specific merger regulation [137] prohibits concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market(EC Merger Regulation Article 2 (3)).

Even though the Commission experience is shorter, it is possible to analyze the evolution over the time of the EU policy approach with regard to vertical aspects of concentrations. For example, it can be noted that the merger legislation focuses almost as much on vertical aspects as

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Approach, 63 Antitrust L. J. 513, (1995); Janusz Ordover, Garth Saloner & Steven Salop, Equilibrium Vertical Foreclosure, 80 Am. Econ. Rev. 127 (1990).

[135] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (CFI), aff'd Case Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (CJ); General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI); British Airways plc v. Commission, T-219/99, T-340/03, 2007 ECR (CFI).

[136] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty.

[137] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

on horizontal aspects. For instance, the information requirements imposed on the notifying parties cover explicitly and quite extensively any vertical and horizontal relations between the parties.

Moreover, vertical aspects are among the main concerns of the Merger Regulation. Article 2[138] shows that foreclosure is the central issue in the approach of the EU to vertical aspects of mergers. It indicates that, when the Commission makes its appraisal of the transaction, it must take into account "the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to suppliers or markets, any legal or other barriers to entry...."

Therefore, the Commission concern is placed within the traditional approach to the exclusionary effects resulting from a vertical merger, but only in so far as these effects might create or reinforce a dominant position. The creation or strengthening of a dominant position is, indeed

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[138] Article 2 of the EC Merger Regulation (Appraisal of concentration):

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of , among other things, the structure of all the markets concerned and the actual or potential competition form undertakings located either within or out with the Community;
(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to suppliers or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

the only relevant test in assessing a merger in the EU.

These regulations are supplemented by specific regulations applying to specific sectors as well as notices and guidelines which do not have the force of law but binds the Commission in its administrative proceedings and are an essential point of reference in any competition assessment. ECMR preamble (28) provides that "In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market".

Finally, decisions form the European Court of First Instance and the Court of Justice provide the substantive law with a framework of important decisions primarily on Article 81 and 82 assessments since very few merger decisions have been challenged in courts.

2.2 Article 81 and 82 of EC Treaty

Article 82 of EC Treaty prohibits any abuse of a dominant position by one or more firms in a substantial part of the Common Market that may affect trade between member states. Article 82 of EC Treaty is to be applied and construed, like Article 81, in the light of the task assigned to the Community by Article 3(g) of the EC Treaty of instituting a system ensuring the maintenance of effective competition in the Common Market.

Article 81 prohibits the prevention, restriction or distortion of competition by means of an agreement or concerted practice between firms, regardless of whether whether they have market power. By constrast, Article 82 applies only to firms that have market power and seeks to prevent the abuse of such power for anticompetitive ends. It prohibits the abuse of market power both by the unilateral conduct of a single firm, and by the interdependent action of several oligopolists. In the latter case, no agreement or concerted action between multiple actors must be proved as under Article 81.

2.3 The Historical perceptions of EU Merger Regulation

2.31 Introduction

Merger control under article 81 would be unsatisfactory. Nullity is

a poor sanction if it results in the acquiring firm not owning the assets of the target company. If it were to sell them in the course of business a purchaser would get no title. An order to sell the assets would be far less disruptive of commerce.

In *Continental Can*, the Court gave the Commission power under article 82 to forbid a acquisition by a firm already dominant of an actual or potential competitor when this would virtually eliminate competition. The Commission, however, wanted to be able to monitor mergers before they were consummated and was concerned by mergers that might lead to a dominant position. In 1972 it proposed that the Council should adopt a regulation requiring the parties to a merger to notify it in advance and giving the Commission power to restrain mergers. Eventually, in 1989, the Council adopted regulation 4064/89 giving the Commission such powers. The new system operated well in practice; however, the debate over the thresholds which brought a merger within the Community system continued. Article 1(3) of the Regulation required a review of the thresholds in 1993, though this review was delayed until 1996. In 1996, the Commission issued a Green Paper outlining the issues which would be addressed in the review.[139]The main concern was the level of the thresholds. They were initially fixed at a very high level in order to obtain support from States that wished to retain control over 'national' mergers. The Commission proposed that the thresholds be lowered. Two options were suggested a simple lowering of the existing thresholds or a more complicated system depending on the existence of 'multiple filings', situation in which a proposed concentration would otherwise be likely to be investigated and considered under several Member States' competition controls. Political agreement was reached on the reform of the merger control system along the lines of the 'multiple filing' proposal and an amending Regulation was adopted by Council on 30 June 1997[140] and came into force on 1 March 1998.

Prompted by a revision clause which calls for the Commission to revisit the rules and procedures periodically, the Commission launched a review of the current merger control regime at the end of 2001, which

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[139] Community Merger Control Green Paper on the Review of the Merger Regulation COM (96) 19 final.
[140] Council Regulation (1310/97 EEC), OJ L180/1, 1997.

should lead to a proposal for a new Regulation by the end of the year 2002.

Under Regulation 4064/89, the Commission has the power to review concentration with "a Community dimension", in other words concentrations which meet the thresholds laid down in Article 1. 2 or 1. 3 of the Regulation. The adoption of the these thresholds is subject to a number of provisions and exceptions.

Through the use of the notion of "concentration with a Community dimension", the Regulation determines the scope of the respective jurisdictions of the Commission and the national authorities in the field of merger control. The Commission has almost exclusive jurisdiction to review concentrations having such a dimension, while Member States' competition authorities are free to exercise their jurisdiction over concentrations which fall below the thresholds.

Decisions on the compatibility of a concentration with Regulation 4064/89 are taken either by the Commission as a college or by an individual Commissioner to whom the college of Commissioners have delegated the authority to make such a decision. However, the appraisal of concentrations under the Regulation is primarily entrusted to Directorate B of the Commission's Directorate-General for Competition(DG COMP) : the Merger Task Force.

Regulation 4064/89 has created a body of substantive and procedural rules designed to enable the Commission to control concentrations which could potentially affect competition within the Community. Under the Regulation, a concentration with a Community dimension must be notified to the Commission[141] and must be suspended until it has been approved[142]. Within a month of notification, the Commission must decide whether or not the concentration gives rise to competition concerns.[143] If it does, then the Commission must initiate second phase proceedings.[144] The duration of these proceedings must not exceed four months.[145] During these four months, the Commission

[141] Regulation No. 4064/89, Article 4.
[142] Regulation No. 4064/89, Article 7(1).
[143] Regulation No. 4064/89, Article 10(1).
[144] Regulation No. 4064/89 Article 6(1)(c).
[145] Regulation No. 4064/89 Article 10(3).

must determine whether the concentration creates or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.[146] If it does, then the Commission must declare it incompatible with the common market.[147]

A decision of compatibility adopted on competition of either first phase or second phase proceedings may be the result of commitments on the part of the undertakings concerned so as to ensure the compatibility of the concentration with the common market. In that case the Commission's decision may require these undertakings to fulfill certain conditions and obligations.[148] If they fail to do so, the Commission is entitled to revoke the declaration of compatibility.[149] Such a decision may also be revoked where the Commission finds that it was based on incorrect information for which one of the undertakings is responsible.[150]

2.32 Council Regulation No. 139/2004

On 11th December 2002, following the consultation of Member States and the business and legal community, the Commission proposed a comprehensive reform of EC merger control.

The package is composed of :

- a proposal for the revision of the EC Merger Regulation;
- a draft notice on the assessment of dominance in horizontal mergers;
- a draft set of best practice guidelines on the manner in which merger investigations must be conducted.

In the meantime, the Commission has faced unprecedented criticism in the wake of three judgements of the Court of First Instance overturning on appeal the prohibition decisions taken in Airtours/First Choice, Schneider/Legrand and Tetra Laval/Sidel. Lessons must be

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[146] Regulation No. 4064/89 Article 2(2) and 2(3).
[147] Regulation No. 4064/89 Article 8(3)
[148] Regulation No. 4064/89 Article 6(1)(b) and Article 8(2)(2).
[149] Regulation No. 4064/89, Article 8(5)(b).
[150] Regulation No. 4064/89, Article 8(5)(a).

drawn from these judgments. In particular, it is clear that the Court of First Instance expects the European Commission to deliver a very high standard of proof, and this should have clear implications for the way in which the Commission conducts its investigations and drafts decisions.

The new Regulation entered into force on 1 May 2004. This reform is the most far-reaching reform of European merger control since the adoption of the EC Merger Regulation in December 1989.

The European reform certainly have consequences at national level. It have consequences with respect to the substance of merger control since the European practice, under the meticulous and stringent review of the Court of First Instance, is a source of influence for national decisions. In particular, it will be interesting to scrutinize how the Commission will make use of in-house and external economic expertise, how it will apply the notion of dominance in non collusive oligopolies or how it will deal with specific factors such as efficiencies (benefits generated by the merger).

The European reform have consequences on activities at national level. One of the objectives of the review is to optimize the allocation of merger cases between the Commission and national competition authorities in the light of the principle of subsidiary, while at the same time tackling the persistent phenomenon of "multiple filings" (i.e. notification to various competition authorities within the EU).

The core of the jurisdictional reform is to simplify and render more flexible the Merger Regulation's provisions concerning the referral of cases from the Commission to Member States and vice versa. In addition, where at least 3 Member States decide to refer a case to the Commission, the Commission will acquire exclusive jurisdiction over the case throughout the EEA. But National rules will continue to differ in various respects not only in terms of procedure but also of substance (for example, not all European countries use "the dominance Test", most jurisdictions make some provision, albeit residually, for the consideration of public interest criteria of one kind or another in the assessment of mergers, etc.).

The merger control regulation establishes both the substantive and procedural framework for evaluating mergers, acquisitions and "full-function" joint ventures. The criteria, which the Commission must apply

in appraising transactions, is whether the transaction would create or strengthen a dominant position that would significantly impede effective competition.

Mergers and full-function joint ventures having a Community dimension must be notified to the Commission in advance of their implementation. Community dimension is based on turnover, not on market share thresholds. Transaction may not be implemented until the Commission has given clearance or the time limit for Commission action has expired.

The assessment of mergers and joint ventures requires to take into account both pro and anti-competitive effects. The current merger control regulation prohibits large mergers and full-function joint ventures that create or strengthen a dominant position while leaving to assessment under Article 81 and 82 of other transactions, such as non-full-function joint ventures or other forms of cooperation between enterprises that may coordinate the competitive behavior of the business entities concerned which remain independent afterwards. Transactions that are too small to be subject to the merger control regulation remain subject to member states competition laws, including member state merger control rules.

2.33 EU Non-horizontal Merger Guidelines

Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("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.

The Commission has launched, on 13 February 2007, a public consultation on draft Commission Guidelines on the assessment of non-horizontal mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Merger Regulation

and "the Draft Guidelines" respectively). On 28th November 2007, EU Commission adopted Guidelines for merging companies with vertical and conglomerate relationship (IP/07/1780).

The general guidance given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of this Guidelines 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 the this context.[151] The Guidelines provide examples, based on established economic principles, of where vertical and conglomerate mergers may significantly impede effective competition in the markets concerned. For instance, they outline the circumstances under which a vertical merger could be likely to result in competing companies being denied access to an important supplier or facing increased prices for their inputs and thus ultimately lead to higher prices for consumers.[152]

The guidance set out in this document draws and elaborates on the Commission's evolving experience with the appraisal of non-horizontal mergers under Regulation No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases.[153]

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.[154]

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[151] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 6.
[152] EU Commission Press Release (IP/07/1780), Brussel, 28th November 2007.
[153] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 8.
[154] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9.

2.34 EU Directive for Electronic Communications Networks and Services (Framework Directive).

In the context of liberalization, specific legislation was introduced for the telecommunications sector to ensure competition between operators. The potential of development in this sector, as well as necessary convergence with the communications sector through vertical multimedia applications can only be achieved with true competition between players in these sectors.[155]

On 25th July 2003, the regulatory framework for telecommunications in the EU was completely overhauled. The current regulatory framework for telecommunications has been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition.[156] On 10 November 1999, the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions entitled 'Towards a new framework for electronic communications infrastructure and associated services- the 1999 communications review'. In that communication, the Commission reviewed the existing regulatory framework for telecommunications, in accordance with its obligation under Article 8 of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunication of open market provision[157]. It also presented a series of policy proposals for a new regulatory framework for electronic communications infrastructure and associated services for public consultation.

On 26 April 2000 the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Region on the result of the public consultation on the 1999 communications review and orientations for the

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[155] Since 1990, the Commission has adopted six Directives under Article 86(3) of the Treaty to open the telecommunications sector with effect for 1st January 1998.

[156] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), recital (2), p. 1.

[157] OJ L 192, 24.7. 1990 p.1, Directives as amended by Directive 97/51/EC of the European Parliament and of the Council (OJ L 295, 29. 10. 1997, p.23).

new regulatory framework. The communication summarized the public consultation and set out certain key orientations for the preparation of a new framework for electronic communications infrastructure and associated services.[158]

The convergence of the telecommunications, media and information technology sectors means all transaction networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorisation Directive), Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user's rights relating to electronic communications networks and services (Universal Service Directive), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, (hereafter referred to as 'the Specific Directives').

It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defense of media pluralism. The content of television program is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.[159] The separation between the regulation of transmission and

[158] Id. preamble (3), p.1.

[159] OJ L 298, 17.10. 1989, p.23. Directive as amended by Directive 97/36/EC of the

the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.[160]

Recognizing the complex and dynamic character of today's electronic communications markets, the Framework Directive provides a new definition of undertakings with "significant market power"(SMP) by equating SMP in the new regulatory framework with the concept of dominance under Article 82 of the EC Treaty. In aligning SMP with the concept of dominance, the Framework Directive foresees a need to guide NRAs in applying the competition law concepts of "relevant market" and "dominant position". It therefore requires the Commission to adopt Guidelines on market definition and the assessment of SMP for NRAs to use in the application of the new concept of SMP.

The new regulatory package impose ex ante regulatory obligations only where there is no effective competition, i.e. where there are one or more undertakings with SMP in a relevant market (generally excluding emerging markets). Conversely, where competition is effective and no operator is deemed to have SMP, regulators are obliged to remove any obligations imposed under the current regulatory framework. The concept of SMP is therefore central to the procedure for deciding which operators will be subject to ex ante regulation.

The European Commission has adopted Guidelines on market analysis and the assessment of Significant Market Power (SMP), as required by Article 15(2)[161] of Directive 2002/21/EC on a new common regulatory framework for electronic communications service (the Framework Directive). The Guidelines set out the principles that national regulatory authorities (NRAS) will use to define markets and analyze

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European Parliament and of the Council (OJ L 202, 30.7.1997, p.60).

[160] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), preamble (5), p. 1.

[161] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Article 15(2): "*The commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereafter 'the guidelines') which shall be in accordance with the principles of competition law.*"

effective competition. The Guidelines were developed on the basis of existing case law of the Court of First Instance and the Court of Justice and on the Commission's own decision-making practice in defining the relevant market and applying the concept of single and collective dominance, in particular with regard to electronic communications markets. Other competition law notions, such as "leveraging of market power", are also addressed.

The Guidelines are expected to draw upon the following documents: the "Guidelines on the application of EEC competition rules in the telecommunications sector", the "Commission Notice on the definition of relevant market for the purposes of Community competition law", and the "Notice on the application of competition rules on access agreements in the telecommunication sector".

More particularly, the appraisal of effective competition will be done using the principles of Community competition law, under Article 82 of the Treaty, and Article 2 of the Merger Regulation.[162]

The Guidelines set out the parallelism between the notion of dominant position contained in Article 82 of the EC Treaty and the notion of SMP in Article 14 of the Framework Directive. The Guidelines explain the concept of dominance with regard to the jurisprudence of the European Court of Justice and the Court of First Instance and the established practice of the Commission

3. Comparison of US and EU Vertical Merger Regulation

As I mentioned above, U.S antitrust policy and economics is heavily influenced by Chicago School economics. The Chicago School began as an economic critique of the interventionist antitrust jurisprudence of the mid-twentieth century and the rules of *per se* illegality governing a variety of conduct. [163] Its early adherents

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[162] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation).

[163] Aaron Director and E. Levi, "Law and the Future: Trade Regulation, 51 Northwestern University Law Review 281 (1956); William S. Bowman, "Tying Arrangements and the Leverage Problem, 67 Yale Law Review 19 (1957); John S. McGee, Predatory Price Cutting: The Standard Oil (N.J) Case, 1 J.L. & Econ. 137 (1958); Richard Posner, Antitrust Law, An Economic Perspective, Chicago: University of Chicago Press, 1976; Robert Bork, The Antitrust Paradox: A Policy at War with Itself,

demonstrated that the assumptions underlying the *per se* rules of that era were unsound and sought to ground antitrust law in price theory and efficiencies.

Underpinning these views about the proper limits of antitrust law enforcement was a series of interrelated assumptions and collusions. The core assumption was that antitrust is –or at least ought to be– concerned solely about allocative and productive inefficiencies that may pose a threat to the maximization of society's wealth. Perhaps Judge Bork best summed up this view when he wrote that "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so as to produce either no gain or a net loss in consumer welfare.[164]

Chicago School Economics posits that competitors are likely to engage in rational and efficiency-enhancing conduct rather than conduct whose purpose and effect is simply to eliminate rivals, and, if they do not, markets are likely to correct themselves.[165] Thus, Chicago School economics tend to discount the significance of conduct alleged to exclude or cripple rivals and to assume instead that the conduct is likely to be efficiency-enhancing in purpose and effect.[166] Chicago School thinking has gained significant traction in the Supreme Court's jurisprudence as reflected in decisions such as *Sylvania, Matsushita, Brooke Group, Trinko, Weyerhaeuser,* and most recently in *Leegin.*[167] More specifically, beginning with the landmark decision in *Sylvania,* the Supreme Court has gradually embraced-with a few exceptions- the Chicago School's perspectives on antitrust.[168]

New York: Basic Books, 1978.

[164] Bork, The Antitrust Paradox at 9.

[165] J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement," at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, 2007.

[166] Robert Bork, The Antitrust Paradox: A Policy at War with Itself, New York: Basic Books, 1978; Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L.Rev. 1984.

[167] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574 (1986); Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Weyerhaeuser v. Ross Simmons, 127 S.Ct. 1069 (2007); Leegin Creative Leather Prods. v. PSKS, Inc., 127 S.Ct. 2705 (2007).

[168] Aspen Skiing, 472 U.S. 585; Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

However, in the 1980s, economists and lawyers alike began to question some of the fundamental assumptions underpinning the Chicago School's teachings. Scholars bubbled "post-Chicago School" have presented scenarios in which leveraging monopoly power can not only be a profitable for the monopolist but also significantly anticompetitive. For example, raising rival's cost theorists, like Professor Salop, argue that concerted refusal to deal, tying, and exclusive dealing may be more readily explained not as devices for destroying a rival altogether but rather for making the rival's production or distribution more costly, thereby impairing the competitive process and injuring consumers.[169] Thus, post-Chicago School economics in general is more concerned about conduct that hobbles rivals as competitors and tend to eschew presumptions that conduct is efficiency-enhancing. Post-Chicago scholars are not urging a return to pre-1970s antitrust law enforcement policies and practices. Rather, they reflect a different approach to the problems posed by dominant firms. Post-Chicago thinking appears to be reflected in a number of recent European judicial decisions, including *France Telecom, British Airways, General Electric,* and *Tetra Laval.*[170]

To be sure, post-Chicago School antitrust is not without its critics. A central criticism voiced by some is that post-Chicago theories rely on "possibility theorems" that reveal why certain activity could be anticompetitive if a number of conditions are satisfied.[171] According to those critics, those conditions are seldom met in the real world, and they have suggested that post-Chicago School theories lack empirical verification and can lead to false positives.[172]

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[169] Thomas Krattenmaker & Steve Salop, Antitrust Analysis of Anticompetitive Exclusion: Raising Rival's Costs to Achieve Power over Price, 96 Yale Law Journal 209, (1986); Michael H. Riordan & Steve Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 Antitrust L. J. 513, (1995); Janusz Ordover, Garth Saloner & Steven Salop, Equilibrium Vertical Foreclosure, 80 Am. Econ. Rev. 127 (1990).

[170] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (CFI), aff'd Case Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (CJ); General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI); British Airways plc v. Commission, T-219/99, T-340/03, 2007 ECR (CFI).

[171] David S. Evans & Jorge Padilla, "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach, 72 U. Chi. L. Rev. 73, 79 (2005).

[172] Malcolm B. Coate & Jeffrey H. Fischer, "Can Post-Chicago Economics Survive Dauber?, 34 Akron L. Rev. 795, 852 (2001); Herbert Hovenkamp, The Antitrust Enterprise: Principle and Excution 39 (2005).

At least at the theoretical level the differences between these two schools of thought can be significant. The Chicago School's efforts to ground antitrust enforcement in price theory and efficiencies has led to skepticism of many claims outside of outright collusion. The post-Chicago School approach with its focus on strategic game theory is not as skeptical about the potential for competitive injury, resulting in a greater tendency toward enforcement.

There have been very few challenges to non-horizontal mergers in the United States. The federal antitrust law enforcement agencies have not litigated to conclusion a single merger challenge on a vertical theory since 1979.[173] The last official word of the agencies on merger enforcement policy- the 1992 merger guidelines- did not mention vertical or conglomerate mergers at all. Indeed, one has to look back to the guidelines issued by the Department of Justice in 1984 for the last mention of non-horizontal mergers.

Meanwhile, European system seem to have embraced a different school of economic thinking. Many of the theories underlying the Commission's recent Article 82 cases are grounded in what is often referred to as post-Chicago School economics. Indeed, post-Chicago theories also appear to play an important role in DG Competition's ongoing policy review of Article 82 and non-horizontal merger enforcement.[174] DG Competition discussion paper on the application of Article 82[175] is focused exclusively on exclusionary practices. The fundamental inquiry is whether the conduct completely or partially forecloses competitors from "profitable access to a market."[176] The Discussion Paper's approach, unlike that of the Chicago School, does not assume that the challenged conduct is efficient. The dominant firm can argue that its

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[173] Fruehauf Corp. v. FTC, 603 F. 2d 345 (2d Cir. 1979).

[174] J. Thomas Rosch, Commissioner, Federal Trade Commission, "I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?, at the International Bar Association Antitrust Section Conference, 2007.

[175] DG Competition, European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse," 2005.

[176] Id. p. 58. ("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 aggressively. Rivals may be disadvantaged where the dominant company is able to directly raise rivals' costs or reduce demand for the rivals' products.").

challenged conduct was efficient- but it bears the burden of proof. Indeed, DG Competition signaled that efficiency, while a defense to a claim of infringement, is not an excuse for infringement-"ultimately the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains."[177]

[177] Id. p 91.

VIII. Definition of Relevant Market and Market Power Analysis in the New Economy

1. Under US Legal System

1.1. Introduction

In order to determine the effects of a merger on market concentration, it is necessary to define one or more relevant markets.[178] Defining market boundaries with respect to their product and geographic scopes is thus a first step under the Merger Guidelines and is also typically an early issue in any merger litigation. Indeed, given the weight that the courts attach to market concentration measures and the extent to which these measure depend on how market boundaries are drawn, it is often said that the outcome of merger litigation turns almost entirely on whether the market is defined narrowly or broadly and, thus, on whether the merging parties are viewed as having few or many competitors.

1.2. Market Definition and Market Share Determination

An increase in concentration in the relevant product and geographic markets is taken as a proxy for a decrease in competition that – if large enough – will lead to a significant increase in the prices faced by consumers. Modern merger policy does not contain a rigid market share threshold, instead, merger analysis today begins with a set of presumptions established in the Guidelines, and these presumptions are based on a measure of market structure that is more nuanced than simply adding the market shares of the merging parties. The Guidelines adopt the Herfindahal-Herschman Index (HHI), which one calculates by taking the individual market share of each firm in the market, squaring it, and then adding all the squared figures together to get a single index number. This "sum of the squares of the market shares" figure communicates two important things that a single firm's market share or a

[178] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

four-firm concentration ratio (another measure used in the past) does not: a picture of concentration for the entire relevant market, and a measure of the distribution of market shares across all firms in the market. The HHI is higher where market share is unevenly distributed across firms than if it is evenly distributed.

Depending on the level of HHI, the antitrust agencies adopt different presumptions about the impact of the proposed merger. Under the Guidelines, if the post-merger would be below 1000, the agencies consider the market to be unconcentrated and generally view the merger as unlikely to have adverse effects on competition. If the post-merger HHI is between 1000 and 1800, the agencies label the market moderately concentrated and become concerned only if the merger would raise the HHI more than 100 points within that range. Post-merger HHIs above 1800 are the most likely to trigger an enforcement action under the Guidelines. Such markets are deemed highly concentrated and mergers that have the effect of raising the HHI more than 50 points in the range above 1800 raise concerns, while those proposed transactions that would raise the HHI more than 100 points are presumed to be anticompetitive. But it is pointed that the HHI calculation supplies only a presumption of harm, a presumption that must be followed by assessment of market factors other than concentration that determine a merger's competitive effects.

2. Under EU Legal System

2.1 Introduction

Definition of the relevant market is the primary important step in any competition analysis. The traditional criteria found in the Commission notice on the definition of the relevant market defines a relevant product market as a product market which "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[179]

The task of defining the market on which a company is operating is one of the most important issues in competition law as it permits to

[179] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 7.

assess its market power and to identify who are the competitors capable of constraining it. To offer more transparency on its competition policy, the Commission adopted a notice on the relevant market, which is intended to set out the economic principles on which the Commission bases its approach.[180]

2.2 Main Criteria for Defining the Relevant Market

2.21 The Relevant Product /Service Market

Depending on new Guidelines, 'relevant product market' are defined as a market which comprises all those products and /or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.[181]

2.22 The Relevant Geographic Market

'Relevant geographic markets' are defined as a market which "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area."[182] The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets.

The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant

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[180] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03).

[181] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 7

[182] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 8.

position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[183] Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analyzed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.[184]

The same approach is followed by the Commission in its application of Article 82 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No. 1/2003, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market.

The criteria for defining the relevant market are applied generally for the analysis of certain types of behavior in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analyzing a concentration, where the analysis is essentially prospective, from an analysis of past behavior. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behavior.[185]

Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective

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[183] Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche (1979) ECR 461, and confirmed in subsequent judgments.

[184] [184] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 10.

[185] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 11.

disciplinary force on the suppliers or a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.[186]

The competitive constraints arising from apply side substitutability and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

2.23 Demand Substitution

The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising form small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.[187]

Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.[188]

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[186] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 13.

[187] [187] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 15.

[188] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 16.

The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increase in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the suppliers' products.

Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.[189]

2.24 Supply Substitution

Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behavior of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.[190]

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[189] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 19.

[190] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 20.

These situations typically arise when companies market a wide range of qualities of grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition.[191]

3. Definition of Relevant Market and Market Power in the New economy

3.1 Market Definition in the New Economy

Even in the absence of innovation, there are two broad concerns about the importance that is attached to market definition in merger review. First, there is a question of whether market definition, in fact, necessary to a sound analysis of the consumer-welfare and efficiency effects of a merger. Second, there are concerns that the mechanics of formal market definition may actually be an obstacle to good analysis in some instances. Innovation heightens these two concerns both with respect to static analysis of price and output effects and to dynamic analysis of investment and innovation.

In order to understand the concerns about merger policy's emphasis on defining markets, it is useful to describe in more detail the mechanics of market definition. There is a long-standing principle by

[191] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), § 23.

which economists define the product scope of a market: two goods or services are in the same relevant market if consumers view them as sufficiently close substitutes. A similar logic is used for geographic scope. When are substitutes sufficiently close that they should be included in the same market? To give more precision to the concept of sufficiently close substitutes, economists undertaking market delineation exercises often conduct the so-called "hypothetical monopolist test". This test asks whether a hypothetical, profit-maximizing monopolist over a group of products in a given area could profitably raise prices above a specified level by a small but significant amount for a sustained period of time.[192] The group of products considered in the test comprises a candidate relevant market. The actual relevant market is the smallest set of products the monopolist would need to control in order to raise prices profitably.[193]

A price increase will raise a hypothetical monopolist's profits unless unit sales volume falls sufficiently to offset the higher price received for the units sold. Thus, the hypothetical monopolist test indicates that a set of products or a geographical area constitutes a relevant market if the hypothetical monopolist could make a small but significant and non-transitory increase in price without causing enough consumers to switch to substitute goods so that the price increase becomes unprofitable.

3.11 Implication of Innovation for the Use of Market Definition to

[192] U.S. 1992 Horizontal Merger Guidelines, § 1.0, "...A relevant market is a group of products and a geographic area that is no longer than necessary to satisfy this test. The 'small but significant and non-transitory' increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases. Absent price discrimination, a relevant market is described by a product or group of products and a geographic area. In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses respectively determine the scope of the product market and the geographic market..."; FTC v. Swedish Match, 131 F. Supp. 2d 151, 160 (D.D.C. 2000); California v. Sutter Health Systems, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001); Katz, Michael L., and Carl Shapiro, "Critical loss: Let's tell the whole story," Antitrust Spring: 49-56, (2003).

[193] U.S. 1992 Horizontal Merger Guidelines, § 1.0 and 1.11.

Predict the Static Price Effects of a Merger

Definition of the relevant market is the primary important step in any competition analysis. The traditional criteria found in the Commission notice on the definition of the relevant market defines a relevant product market as a product market which "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[194]

The task of defining the market on which a company is operating is one of the most important issues in competition law as it permits to assess its market power and to identify who are the competitors capable of constraining it.

There is emerging recognition that a proper economic analysis of a merger's effects does not require formal definition of bright-line boundaries. Proponents of the view that market definition may be superfluous include former chief economists of both principal U.S. antitrust agencies. For example, Professor Jonathan Baker, a former Director of the U.S. Federal Trade Commission's Bureau of Economics, observed:

> Indeed, if a merger can be shown to harm competition directly, antitrust should not need to spend much effort on market definition...[If] the likely harm to competition from a merger can be demonstrated directly, there exists a market where harm will occur, but there is little need to specify the market's precise boundaries.[195]

The presence of significant innovation exacerbates the strains already present in market definition because the characteristics of various suppliers' differentiated products may constantly shift in significant ways, making it especially hard to draw bright-line market boundaries with certainty.

Above mentioned approach shows that the most important traditional

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[194] Commission Notice on the definition of the relevant market (OJ C 372 on 9/12/1997), § 7.

[195] Baker, Jonathan B., "Contemporary Empirical Merger Analysis," George Mason Law Review 5: 347-6 (1997).

test is that of "demand substitutability," which in principle, can be assessed by referring to the product functional characteristics, its intended use, its performances, its presentation aspects and so on. However, in the majority of cases, price tests measuring demand responsiveness to a price increase, such as demand elasticity or cross-price elasticity, represent the best indicator for testing demand substitutability, since prices reflect all the market information pertaining to the product characteristics in a single variable.

A question, which arises when dealing with the definition of markets in the New Economy, is whether the price remains the most reliable criterion or whether other elements e.g., functional characteristics, intended use...etc. would appear to be more adequate. The Internet infrastructure is made of a multitude of operators (IBPs, ISPs, resellers, local loop operators), which enable end-users to have access to on-line services and products. All these operators are closely linked to one another in order to provide a reliable and quality access over all Internet: the ISPs need the backbones to offer access to the Internet at large and they need the local loop to reach the end-users.

When there is a vertical integration between two or these operators, there would be an incentive for the merged entity to discriminate in favor of its own service; for example, by raising rival costs for the access to its local loop or to its backbone network. Therefore, to assess the potential anti-competitive effects, the identification of separate markets in the Internet infrastructure is crucial.

On 26 April 2000 the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Region on the result of the public consultation on the 1999 communications review and orientations for the new regulatory framework. The communication summarized the public consultation and set out certain key orientations for the preparation of a new framework for electronic communications infrastructure and associated services.[196]

The convergence of the telecommunications, media and information technology sectors means all transaction networks and

[196] Id. preamble (3), p.1.

services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorisation Directive), Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user's rights relating to electronic communications networks and services (Universal Service Directive), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, (hereafter referred to as 'the Specific Directives'). It is necessary to separate the regulation of transmission from the regulation of content.

This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of medeia pluralism.

Recognizing the complex and dynamic character of today's electronic communications markets, the Framework Directive provides a new definition of undertakings with "significant market power"(SMP) by equating SMP in the new regulatory framework with the concept of dominance under Article 82 of the EC Treaty. In aligning SMP with the concept of dominance, the Framework Directive foresees a need to guide NRAs in applying the competition law concepts of "relevant market" and dominant position". It therefore requires the Commission to adopt Guidelines on market definition and the assessment of SMP for NRAs to use in the application of the new concept of SMP.

The new regulatory package impose ex-ante regulatory obligations only where there is no effective competition, i.e. where there

are one or more undertakings with SMP in a relevant market (generally excluding emerging markets). Conversely, where competition is effective and no operator is deemed to have SMP, regulators are obliged to remove any obligations imposed under the current regulatory framework. The concept of SMP is therefore central to the procedure for deciding which operators will be subject to ex-ante regulation.

The European Commission has adopted Guidelines on market analysis and the assessment of Significant Market Power (SMP), as required by Article 15(2)[197] of Directive 2002/21/EC on a new common regulatory framework for electronic communications service (the Framework Directive). The Guidelines set out the principles that national regulatory authorities (NRAS) will use to define markets and analyze effective competition. The Guidelines were developed on the basis of existing case law of the Court of First Instance and the Court of Justice and on the Commission's own decision-making practice in defining the relevant market and applying the concept of single and collective dominance, in particular with regard to electronic communications markets. Other competition law notions, such as "leveraging of market power", are also addressed.

The EU Commission's guidelines on market analysis in the electronic communications networks and services proposes to group together products or services that are used by consumers for the same purposes (end use).[198] Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind of products or services may be used for the same end. For instance, consumers may use dissimilar services such as cable and satellite connections for the same purpose, namely to access the Internet. Conversely, paging services and mobile telephony services, which may appear to be capable of offering the same service, that is, dispatching of

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[197] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Article 15(2): "The commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereafter 'the guidelines') which shall be in accordance with the principles of competition law."

[198] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), § 44.

two-way short message, may be found to belong to distinct product markets in view of their different perceptions by consumers as regards their functionality and end use.[199] In order, therefore, to complete the market-definition analysis, an NRA, in addition to considering products or services whose objective characteristics, prices and intended use make them sufficiently interchangeable, should also examine, where necessary, the prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test.[200] It means that it is also necessary to analyze demand substitutability by applying the "hypothetical monopolist test". In order to do so, in traditional markets, the National and European Authorities make use of any previous evidence of consumer's behavior. But what is adequate in the traditional market may not be relevant in the Internet infrastructure and rapidly changing new technology conditions.

As different types of operators are involved in the service for the provision of connectivity to the Internet (IBS, ISP, resellers), there is a question as to whether they are substitutable to one another or whether they constitute distinct markets. From an Internet user point of view, the main concern is to have access over all internet at appropriate standards of quality, speed and reliability. Therefore, the connectivity service has to be obtained from operators who are capable of providing such a service, namely the IBPs, which provide "top-level connectivity".

In the WorldCom/MCI decision, the Commission took the view that "the providers of such Internet access [namely the top-level connectivity access] services could be vertically integrated to a greater or lesser extent, and might be top-level networks in their own right, secondary peering ISPs or resellers" and asked the following question: "The issue for the purposes of market definition is whether ISPs all compete against one another to provide the same connectivity services, or whether there are any distinct and narrower markets within the sector."

In its analysis of the WorldCom/MCI merger, the Commission identified the market for the provision of "top-level or universal Internet connectivity" as a separate market from the connectivity provided by ISPs and resellers. Indeed, it considered that neither the secondary

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[199] Id. § 45.
[200] Id. § 48.

peering ISPs nor the resellers were capable of significantly constraining the behavior of the top-level networks and preventing them from acting independently. In case of AOL/Time Warner, U.S. FTC defined that the relevant product market is the provision of "residential broadband internet access service" and "broadband internet transport service".[201]

3.12 The Substitutabilitys Test

In accordance with the notice on the definition of the relevant market for the purpose of Community Competition Law, "the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. [...] Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy."[202]

Demand-side substitution enables NRAs to determine the substitutable products or range of products to which consumers could easily switch in case of a relative price increase. In determining the existence of demand substitutability, NRAs should make use of any previous evidence of consumers' behavior. Where available, an NRA should examine historical price fluctuations in potentially competing products, any records of price movements, and relevant tariff information. In such circumstances evidence showing that consumers have in the past promptly shifted to other products or services, in response to past price changes, should be given appropriate consideration. In the absence of such records, and where necessary, NRAs will have to seek and assess the likely response of consumers and suppliers to a relative price increase of the service in question.[203]

However, the examination of the physical characteristics may have a greater importance as the electronic communications market is not mature and as, unlike in most traditional markets, data on historical price

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[201] American Online Inc., a corporation, v. Time Warner, Docket No. C-3989 (December 15, 2000).

[202] Commission Notice on the definition of the relevant market (OJ C 372 on 9/12/1997), § 15.

[203] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), § 49.

fluctuations are generally not available. The price tests may not be as a decisive indication as it is in other sectors. The Commission appears indeed more cautious, in using price tests. As mentioned in the WorldCom/MCI decision, the Commission indicated that "a price increase of say 5 to 10 % is unlikely to be sufficient to encourage switching".[204]

The possibility for consumers to substitute a product or a service for another because of a small, but significant lasting price increase may, however, be hindered by considerable switching costs. Consumers who have invested in technology or made any other necessary investments in order to receive a service or use a product may be unwilling to incur any additional costs involved in switching to an otherwise substitutable service or product. In the same vein, customers of existing providers may also be 'locked in' by long-term contracts or by the prohibitively high cost of switching terminals. Accordingly, in a situation where end users face significant switching costs in order to substitute product A for product B, these two products should not be included in the same relevant market.[205]

3.13 Calculation of Market Shares

Depending on Guidelines on the assessment of non-horizontal mergers,[206] 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.[207] The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000.[208] 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)

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[204] WorldCom/MCI, Case No IV/M. 1069, § 69.
[205] Id. § 50.
[206] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007.
[207] Id. III. 24.
[208] Id. III. 25.

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.[209]

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 conditions for competitive harm, but is not a sufficient condition.[210]

Certain specificities of the Internet raise problems concerning the calculation of market share on the relevant market. Indeed, basing this calculation on turnover does not seem appropriate in every case. In some cases, the Commission has already considered more appropriate to base the calculation on other measures, such as production capacity,[211] fleet capacity,[212] orders firmly booked[213] or advertising revenue of TV broadcasters.[214]

Similarly, in the Internet context, other criteria, such as the traffic on a website or on the network infrastructure, the quantity of registered users on a marketplace or a portal, may be more relevant than the turnover. In the Internet industry, there is no preferred unit of measurement but there is a consensus that a reasonable picture might be produced by using more than one index. Apart from revenue and traffic flow, possible measurement indices are (a) the number of subscribers, (b) the number of addresses reachable, (c) the size of installed capacity links, (d) the actual bandwidth used for traffic exchange, (e) the number of points of presence. Taking into account only one unit may not reflect accurately the strength of a network.

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[209] Id. III. 26.
[210] Id. III. 27.
[211] Cargill/Unilever, COMP IV/M.26, 1990.
[212] Delta Airlines/Pan Am, COMP/M.130, 1991.
[213] Aerospatiale-Alenia/DeHavilland, OJ L 334/42, 1991.
[214] Bertelsmann/News International/Vox, D. Comm. Sept. 6, 1994, point 22.

As regards the number of subscribers for instance, the problem is to identify how many real users there are. For example, a network, with a large proportion of corporate subscribers might register a low number of individual subscribers, but each company customer might have their own private internal network with many connected users. The same problem arises when using the number of web sites, as some web sites are important and frequently visited whilst others are unknown to most subscribers. The Commission has indicated in WorldCom/MCI that "different websites could have widely varying degrees of importance, which would not be reflected in a simple tally count. Accordingly, no attempt was made to use these data in order to draw conclusions."[215]

Similarly, with the respect to points of presence, there is, in principle, a correlation between the network size and the number of points of presence because backbones would deploy a point of presence where they have a critical mass of customer to reach. However, this index is one of the less reliable, according to some commentators, as the number of point of presence will rather depend on the architecture than on the network size. Moreover one network may have a wide number of points of presence with a large volume of low-usage subscribers, whilst another network may have a small number of points of presence with few high-usage subscribers. In WorldCom/MCI, the Commission indicated that "although the number of point of presence may equate to the number of subscribers in a given region, the number of subscribers may not itself be an accurate indication of network size (for example, one network might have large volume of low-usage subscribers and many points of presence, whilst another might have comparatively few high-usage subscribers and a small number of points of presence)."

Therefore, the market being not mature, the measurement of market shares must be assessed with caution by using several criteria. Traffic flow appears in practice to be the most relevant measurement. Nonetheless, as the Commission acknowledged "the figures might be affected by sudden surges, such as short-term interest in a particular web site." Besides, as little statistics are available on the overall traffic volume, it is the combination of these criteria that will best reflect the

[215] WorldCom/MCI, § 100.

exact strength of the network.

3.14 Geographic Market

The Commission Notice on the definition of the relevant market define that "the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas."[216]

As regards the geographic extent of the top-level connectivity market, it is likely to be global due to the worldwide dimension of the backbone networks. The Commission considered in the WorldCom/MCI case that there is one global market. In this decision, the Commission indicated that "the international nature of the Internet becomes more marked with larger ISPs, who often operate on a national or international level. Although the top-level networks, which have emerged so far, have their centers of operations in the United States of America, they are the only providers who can provide transit to all parts of the Internet. This can be contrasted with conventional voice telephony, where traditionally operators have tended to focus their activities in a particular territory, and to relay traffic, which has to pass across that territory. The terms on which any ISP anywhere in the world can operate depend upon the terms on which it can obtain transit directly or indirectly for these providers. They are in the event highly vertically integrated. For example, UUNet has retail level subsidiaries in many European countries." It further explained that "a rise in prices for access to the top-level networks would affect consumers everywhere in the world."[217]

Concerning secondary peering ISPs and resellers' services, the geographic scope may be narrower, either national or regional, due to the need for local loop services or the installation of a fixed line in order to connect physically the subscribers with their customers. In

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[216] Commission Notice on the definition of the relevant market (OJ C 372 on 9/12/1997), § 8.
[217] WorldCom/MCI, § 82.

WorldCom/MCI, the Commission stated that "the geographic extent of the different markets for Internet services depends on which level is being looked at. Physical connection from the final user to the ISP, whether by dial-up or dedicated access, can only be provided locally, by a supplier active at the local level, and in any event is not usually part of the ISP's service offering. Such a connection could be provided by a local telephone company, or indeed by any other supplier of such cabling facilities. The geographic markets at this level are thus regional or national, depending on the scope of the supplier's cable network."[218] In American Online Inc.(AOL)/Time Warner Inc. case, US FTC Commission defined the relevant geographic markets are "Time Warner cable service area and the United States".[219]

4. Comment

Market definition is an important element of merger and anticompetitive analysis and seeks to identify the competitive constraints that derive from consumers' substitution patterns. Then the purpose of market definition is to identify a relevant market as those products and services, the suppliers of which are capable of existing effective competitive pressure on each other and of constraining each other's behavior.[220]

The major challenge that dynamic market pose to market definition derives from the instability of the market environment. Technological change alters the set of products or services sold, how they are produced, their characteristics and prices and hence affects substitution patterns and the related competitive constraints. This instability may be most profound when the markets considered are reflecting a substantial change in the underlying technological paradigm but can also derive from less drastic change along a given technological trajectory. Consequently, the basis for a sound market definition in dynamic markets lies in the proper analysis of the impact of innovation arising from technological

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[218] WorldCom/MCI, § 80.

[219] American Online Inc., a corporation, v. Time Warner, Docket No. C-3989 (December 15, 2000).

[220] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 38-39 (12 September 2003).

change on consumers' substitution patterns, guided by a sound analytical framework.

Changing consumers' substitution patterns imply that the temporal aspect of market definition is likely to be particularly important. Most clearly the boundaries of the current relevant market will evolve, perhaps due to changes in product characteristics and relative prices. Consequently, analyzing whether two products are substitutes today may provide a poor guide of whether they will be substitutable, and hence likely to compete in the future.

The definition of market boundaries on the basis of demand substitutability is often implemented by means of the hypothetical monopolist test. The approach that we propose to market definition in dynamic cases retains the hypothetical monopolist test as the central conceptual framework but takes the impact of technological and other innovative change into account by defining current and future markets and considering the time dimension of market definition.

Practically, market definition in dynamic markets would be based on the analysis of technological change and would be likely to proceed on a qualitative rather than quantitative basis. Quantitative economic analysis aimed at identifying price elasticity can be a useful component of the definition of relevant markets, although its applicability may often be limited by the availability of useful data. Quite clearly, the more we consider markets in the future and products that are yet to be introduced the less use series of historical data will be.

In practice it is likely that in dynamic markets the hypothetical monopolist test can be used on a qualitative dimension as a conceptual framework to evaluate various sources of evidence such as the consideration of product characteristics and intended use, evidence of substitution in the recent past, consumer preferences, switching costs, etc. Market definition would tend to be based on thought experiments, supported by understanding of the technologies evolving and possibly data from consumer surveys. What seems important, however, is that in analyzing current substitution patterns no undue weight is given to differences in product characteristics *per se*. Such differences are relevant only inasmuch as they restrict substitution patterns between

different products.[221]

A question, which arises when dealing with the definition of markets in the New Economy, is whether the price remains the most reliable criterion or whether other elements e.g., functional characteristics, intended use...etc. would appear to be more adequate. The Internet infrastructure is made of a multitude of operators (IBPs, ISPs, resellers, local loop operators), which enable end-users to have access to on-line services and products. All these operators are closely linked to one another in order to provide a reliable and quality access over all Internet: the ISPs need the backbones to offer access to the Internet at large and they need the local loop to reach the end-users.

When there is a vertical integration between two or these operators, there would be an incentive for the merged entity to discriminate in favor of its own service; for example, by raising rival costs for the access to its local loop or to its backbone network. Therefore, to assess the potential anti-competitive effects, the identification of separate markets in the Internet infrastructure is crucial.

The EU Commission's guidelines on market analysis in the electronic communications networks and services proposes to group together products or services that are used by consumers for the same purposes (end use).[222] Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind of products or services may be used for the same end.

In the new economy, the possibility for consumers to substitute a product or a service for another because of a small, but significant lasting price increase may, however, be hindered by considerable switching costs. Consumers who have invested in technology or made any other necessary investments in order to receive a service or use a product may be unwilling to incur any additional costs involved in switching to an otherwise substitutable service or product. In the same vein, customers of existing providers may also be 'locked in' by long-

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[221] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 39-40 (12 September 2003).

[222] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), § 44.

term contracts or by the prohibitively high cost of switching terminals. Accordingly, in a situation where end users face significant switching costs in order to substitute product A for product B, these two products should not be included in the same relevant market.[223]

Under US and EU horizontal and non-horizontal merger regulations and guidelines, it is very difficult for us to find dynamic approaches for the definition of relevant markets and substitutability tests. It need soon to be amended to adjust to new industrial trend. For this task, EU Commission guidelines for electronic communications networks and services will show very useful directions.

[223] Id. § 50.

IX. Overall Competitive Effects Analysis of Vertical Mergers in the New Economy

1. Introduction

Vertical mergers involve two or more different companies operating at different product markets. It means that vertical mergers do not immediately lead to a reduction in the number of competing firms in any given market. Conversely, vertical mergers can create efficiencies reducing transaction costs by replacing contractual relationships with more efficient intra-group arrangements. Furthermore, in the case of non-coordinated effects theories, the creation or strengthening of market power in vertical merger cases typically result from strategic conduct that the merged entity would undertake post-merger (e.g., refusal to deal, tying and bundling)- in contrast to market power caused by structural changes to the market in the case of horizontal mergers,

Although such price reductions brought about by non-horizontal mergers are usually pro-competitive, they may, under certain circumstances, give rise to anti-competitive outcomes. The primary competitive concern in these cases is that post merger, the ability of rival firms to compete with the merged firm will be reduced to such an extent that they are marginalized or driven from the market altogether. Once this has occurred, the merged firm would then be able to increase prices. Alternatively, entry or expansion may be deterred, allowing the firm to preserve its market power.

Any theory of competitive harm must therefore not only carefully specify the conditions that give rise to alleged harm, but must go beyond a mere theoretical assessment of the anti-competitive possibilities by testing the theory of harm against observed industry characteristics and behavior. In particular, it cannot be assumed that harm to competitors necessarily or even usually results in harm to competition.[224]

Some important conclusions follow from the state of vertical

[224] RBB Brief 18, "Turning the Tables: Why Vertical and Conglomerate Mergers are Different", RBB Economics, March 2006, p. 2.

merger theory. First, the enforcement agencies need to exercise caution in taking actions against vertical transactions to avoid chilling efficiency-enhancing mergers that pose little risk of harm to competition. It is likely that anticompetitive effects will be more difficult to establish, while offsetting efficiencies gains will be easier to show than in the horizontal context. The lack of a highly articulated theory of effects also means that vertical transactions will be examined on a much more case-specific basis without the benefit of concrete vertical merger guidelines with bright line thresholds.

The "New Economy" industries are characterized by falling average costs (on a product, not firm basis) over a broad range of output, modest capital requirements relative to what is available for new enterprises for the modern capital market, very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption (also known as "network externalities"), the realization of which may require either monopoly or inter-firm cooperation in standards setting. In industries characterized by network effects, such as the telecommunications, electronic communications or media sectors, a dominant standard often emerges in the market. In this context, thereby preventing interoperability with its products.

With respect to E-economy infrastructure, there is an increased dependence on a wide-ranging and diversified set of vertically related activities, which notably include the provision of information and content, network infrastructure and access applications. In a context of convergence of technologies, vertical integrations are likely to raise major competition concerns relating to interoperability and interdependence between different products and services. Another concern is the possibility that the holder of key content, key network or key access applications may impose its products or services as a standard. Therefore, the assessment of New Economy anti-competitive practices must focus in particular on the possibility for holders of essential products or services to raise barriers to entry, thereby foreclosing market access. Moreover, because vertical integration and alliance may impact downstream and upstream levels, opportunities for companies involved in the transaction to leverage their position in related

markets should be closely scrutinized. [225]

Evaluating mergers in dynamic and innovation markets presents challenges to traditional antitrust theory. Competition in high-tech industries involves sequences of races to develop a new product or to replace an existing product through drastic innovation. In the initial race, firms invest heavily to develop a product that create a new category or becomes an early leader in a new category. Winners get large market shares, high profits, for a while. While network effects tend to reinforce leadership position, in many high-tech industries there are sequential races for market leadership. Major innovations occur repeatedly, and switching costs and lock-in do not prevent displacement of leaders by better products.[226] Thus, vertical merger in high-tech industries have very extreme pro-competitive and anti-competitive factors. Winners in innovative race take dominant or monopoly position and reinforce that position with network effects or high switching costs of customers.

Consequently, in case we are evaluating competitive effects of vertical merger in the high-tech industries, we should consider of various paradoxical extremely pro-competitive and anti-competitive factors which deriving from vertical mergers. Sometimes that will be very complex and ambiguous and need harmonious academic and practical support from economists, lawyers, and antitrust agencies.

The central issue that arises when this analysis is undertaken in a dynamic market originates from the relative instability, over time, of the markets concerned and the possibility of competition concerns relating to products yet to be introduced. If the scope of the relevant market is expected to change significantly over time due to changes in product's characteristics, or if nature of competition in that market is expected to change, analysis of competition in current relevant markets is unlikely to be a reliable indicator of competition in the future. If a merger creates dominant position or monopoly and impedes competition on a current relevant market, is this dominant or monopoly position likely to remain in

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[225] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, Nov. 2001.

[226] David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

the future? Conversely, if a merger appears innocuous on current markets, is there still an impediment to competition in a future market?

To address the instability problem of relevant markets, we suggest that a forward-looking consideration of their evolution is possible on the basis of the identification of some broad techno-economic trends. This assessment would be based on analysis of technological changes and need for a consideration of broad market trends that would affect the products expected to compete in the market and the evolution of consumer's substitution patterns.

Antitrust analysis traditionally pays particular attention to whether any firms have significant market shares. However, the specific characteristics of New Economy industries make it doubtful that the traditional approach is still justified. In the context of high-tech industries, a more dynamic analysis rather appears to be the best answer in order to assess the competitive forces of the markets concerned and to ensure and maintain effective competition between the players.

2. In the US Legal System

2.1 Introduction

The history of the control of concentration in the US is relatively long when compared with the EU. The principal US antitrust provision governing mergers, acquisitions and joint ventures is Section 7 of the Clayton Act (enacted in 1914 and amended in 1950), which prohibits concentrations that may reduce competition. Mergers, acquisitions and joint ventures may also be challenged under Sections 1 and 2 of the Sherman Act as unreasonable restraints or as a attempts for monopolization.

In general, these statutes prohibit acquisitions of assets or stocks where "the effects of such acquisition may be substantially lessen competition, or to tend to create a monopoly" [227] In addition, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have issued a set of written guidelines, which provides a structure within which one can evaluate the legality of a particular transaction.[228]

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[227] Section 7 of the Clayton Act.

[228] "Antitrust Guidelines for Collaborations Among Competitors," 4 Trade Reg. Rep. (CCH) 13,161 (April 7, 2000); U.S. DOJ/FTC 1992 Horizontal Merger Guidelines, The

Among the different steps that are necessary for the evaluation of a merger (identification of the relevant products and geographic markets, assessment of the market shares, etc…), there is one that must be particularly underlined as being emphasized in the U.S., which is the evaluation of efficiencies. More specifically with regard to vertical mergers, the U.S. 1984 Merger Guidelines on Non-Horizontal Mergers describes the principal theories likely to create harm to competition. These theories mainly refer to foreclosure and collusion.

In practice, the antitrust enforcement of vertical mergers in the U.S. can be considered as vacillating by comparison with other jurisdictions. Prior to the late 1970s, a wide number of vertical mergers were prohibited whereas they presented relatively small foreclosure effects.[229] Then, in the late 1970s, the courts' analysis began to change, being less reluctant as with vertical mergers even where the market shares were relatively significant.[230] In 1982, the revision of the Merger Guidelines by the Department of Justice resulted in a significant liberalization, and almost no vertical mergers were challenged during this period. More recently, the U.S. authorities have restated a critical approach in several cases,[231] due, in particular, to rapidly developing network industries, innovative industries, vertical merger trends, and a renewal in the economic analysis of the effects of vertical mergers following changes of market structure.

Evaluating mergers in dynamic and innovation markets presents challenges to traditional antitrust theory. Vertical integrations are usually mergers of non-competing companies where one's product is a necessary component or complement of the other's. Such mergers mainly achieve pro-competitive efficiency benefits. Vertical integration can lower transaction costs, lead to synergistic improvements in design, production and distribution of the final output product and thus enhance competition. Consequently, most vertical arrangements raise few competitive concerns. However, as reflected in the 1984 US Merger

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1984 Merger Guidelines, U.S. DOJ, 4 Trade Reg. Rep (CCH) 13,103.

[229] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[230] Frauehauf Corp. v. FTC, 603 F. 2d 345 (1979).

[231] Cadence Corp., Docket No C-3761 (Aug. 7, 1997); Silicon Graphics Corp., Docket No C-3626 (Nov. 14, 1995).

Guidelines, some vertical acquisitions can be anticompetitive. Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising costs and reducing innovation and quality for consumers.

In 1970s and 1980s, "Chicago School" scholars argued that vertical integration through merger is typically efficient and should not be discouraged. Vertical mergers, for example, were viewed as tending to reduce transaction costs associated with the transfer of the product to the downstream division.[232] Similarly, coordination in design may be achieved more readily in a vertically integrated firm than when arm's length negotiations are required. There may also be complementarities in the production stage that serve to reduce inventories and eliminate the international cost of transportation or successive processing. A vertical merger can also increase efficient investment by internalizing incentives to eliminate opportunism and assuring the supply of inputs when there is market risk.[233] It has been also argued that a vertical merger may create efficiencies by eliminating the price distortion caused by double monopoly markup where there is market power in both the upstream and downstream markets.[234]

Based on economic studies of strategic behavior and game theory,

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[232] Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds., 1989; Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

[233] Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989); Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, 96-98 (1984); Dennis W. Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979); Benjamin Klein et.el., "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J.L. & Econ. 297 (1978); Roger G. Blair & David L. Kaserman, "Uncertainty and the Incentive for Vertical Integration," 45 Southern Econ. J. 266 (1978); Kenneth J. Arrow, "Vertical Integration and Communication," 6 Bell J. Econ. 173 (1975).

[234] John M. Vernon & Daniel A. Graham, "Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

"post-Chicago School", which is appeared at the beginning of 1990s, continued the Chicago School's focus on economic analysis and recognized the efficiency-enhancing potential of vertical mergers. At the same time, however, post-Chicagonians rejected the view of vertical mergers as almost per se benign and instead emphasized whether intervention was warranted in particular types of cases.[235]

The post-Chicago view focuses vertical merger concerns on vertical integration into markets that do not behave competitively. The post-Chicago approach is similar to the traditional foreclosure theory of vertical mergers, except for refinements that control the excesses of the traditional foreclosure approach.[236] At the same time, the foreclosure discussed in post-Chicago literature is not necessarily the foreclosure of *Brown Shoe*. In the post-Chicago literature, foreclosure generally means raising rival's costs, not outright market exclusion.[237]

Antitrust enforcement authorities have incorporated much of the new thinking into their enforcement policies and have stepped up enforcement activity against vertical mergers,[238] leading to a number of enforcement actions based at least in part on various permutations of the raising rival's costs theory.[239]

For example, mergers may anti-competitively raise rival's costs in cases in which a downstream firm (the un-excluded firm) is able to

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[235] Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995); Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991); Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

[236] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum. Bus. L. Rev. 257, 323 (2001).

[237] *Id.* at 324.

[238] M. Howard Morse, Vertical Mergers: Recent Learning, 53 Bus. Law. 1217 (1998); Scott A. Stempel, Government Shows Increasing Concern with Vertical Mergers, Antitrust, Fall 1994, p. 17; Richard G. Parket, Trends in Merger Enforcement and Litigation, Remarks Before the Annual Briefing for Corporate Counsel (16, 9. 1998),

[239] United States v. Enova Corp., 63 Fed. Reg. 33,396 (June 18, 1998); PacifiCorp, 5 Trade Reg. Rep. (CCH) ¶24,384 (Feb. 18, 1998); Lockheed Martin Corp., 122 F.T.C. 161 (1996); Hughes Danbury Optical Sys., 121 F.T.C. 495 (1996); Silicon Graphics, Inc., 120 F.T.C. 928 (1995); United States v. Sprint Corp., 60 Fed. Reg. 44,049, 44,058 (D.D.C. Aug. 24, 1995); Eli Lilly & Co., 120 F.T.C. 243 (1995); United States v. AT&T, 59 Fed. Reg. 44,158, 44,166 (D.D.C. Aug. 26, 1994).

purchase exclusionary rights through vertical contract or merger from multiple upstream suppliers, in essence to facilitate a tacit cartel of the upstream suppliers against disadvantaged downstream competitors. Subsequently, the interest of post-Chicago vertical analysis has also been directed to "network externalities," a peculiarity of certain highly networked industries, especially computers and telecommunications, in which access to a network may become increasingly more valuable each time a user is added to the network because a larger network can be employed to reach more users.[240]

2.2 Main Competitive Problems

Competition in high-tech industries involves sequences of races to develop a new product or to replace an existing product through drastic innovation. In the initial race, firms invest heavily to develop a product that create a new category or becomes an early leader in a new category. Winners get large market shares and high profits for a while. While network effects tend to reinforce leadership position, in many high-tech industries there are sequential races for market leadership.[241]

These winner-take-all races arise for two related reasons. First, network effects create a snowball effect for firms that are first to have many satisfied customers. When a firm attracts additional customers, the value of its product increase, making it possible to attract still more customers. Second, there are scale economies at the firm level because of high fixed intellectual property costs, so that making more sales enables firms to get their average costs down and to make profits while charging low prices.

Many high-tech industries, particularly those based on computer software, the Internet, or telecommunications generally, have network effects. An industry is often described as a "network industry" if the value of the network to any one consumer depends importantly, either directly or indirectly, on the number of other consumers on the

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[240] Carl Shapiro, Exclusionary in Network Industries, 7 Geo. Mason. L. Rev. 673 (1999).
[241] David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

network.[242]

Network effects are a source of scale economies- in consumption rather than production- and thus tend to produce markets with at most a small number of clear leaders, making it difficult for firms with small shares to survive unless they produce significant innovation. It means that the value of a product increases with the number of people on the same network. Firms that are not leaders in network industries have little hope of reaching that status unless they come up with a major innovation-one that can defeat the advantage that network effects bestow on the industry leaders. If there is a chance that today's products will be replaced by a major innovation, a leader's survival depends on bringing that innovation to market before others do. As a result, competition in network industries often involves intense R&D efforts aimed at capturing or retaining market leadership.[243]

Such network effects are clearly relevant, efficient and occasionally unavoidable. However, they increase the risk that one firm, by achieving a critical mass or tipping point will dominate a market or retain market power for an extended period of time.

Network effects are therefore relevant to competition analysis in two specific ways. First, the same demand-side economies of scale that induce the creation of a network in the first place can also serve as strong barriers to competition against the network, even by those who might offer a superior alternative. Once customers become locked-in to a product incorporating the current technology, they may be reluctant to switch to another product with a superior technology because of the premium associated with the widespread use of a common technology

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[242] Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics in Standardization," Journal of Economic Perspectives, Vol. 3, No. 2, 1994, p. 117; Evans, David S, and Bernard J. Reddy, "Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," in Intellectual Property Antitrust 1996, Practicing Law Institute, 1996; Katz, Michael and Carl Shapiro, "Systems Competition and Network Effects," Journal of Economic Perspectives, Vol. 3, No. 2, 1994, p. 93; Katz, Michael and Carl Shapiro, "Network Externalities, Competition, and Compatibility," American Economic Review, Vol. 75, No.3, 1985, p. 424-440.

[243] David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 10-11.

and switching costs. Such entry barriers increase the likely duration of market power and facilitate in turn the exercise of such market power by the industry leader. This is especially likely if the network effects are substantial, if the network has a large installed base of users, and if there exist a large number of complements for the network.

Second, network effects increase the incentive to engage in anti-competitive strategies. Entry barriers created by network economies can be minimized to the extent that new entrants or rival networks may take advantage of comparable network economies by, for example, having their users interconnected with the leading network or their products interoperating with complements of the dominant network. As a result, one would expect that there exist a likely incentive for firms to engage in anti-competitive practices to foreclose competitors access to such network economies.

Normal network system is a single network, but its components are owned by a vast number of separate firms and individuals. The components have, however, been standardized to assure interoperability. A firm that manufactures one of the essential components of a network would prefer to be the exclusive source of that component rather than be required to disclose the information that would enable competitors to duplicate it. If the component is subject to intellectual property protection through patent, copyright, or contract, then the requisite uniformity may be more readily achievable by monopoly provision than by standardization.[244]

Vertical integration paradoxically can induce toward monopoly or also oddly toward competitiveness. The paradox can be dissolved by a reminder that competition to obtain a monopoly is an important form of competition. The more protection from competition the firm that succeeds in obtaining a monopoly will enjoy, the more competition there will be to become that monopolist; and provided that the only feasible or permitted means of obtaining the monopoly are socially productive, this competition may be wholly desirable. A firm that will have the protection both of intellectual-property law and economies of scale in consumption, if it is the first to come up with an essential component of a new-

[244] Posner, R. "Antitrust in the New Economy," *Antitrust Law Journal*, 2001, p.925-943.

economy product or service, will have a lucrative monopoly, and this prospect should accelerate the rate of innovation.[245]

Consequently, in case we are evaluating competitive effects of vertical merger in the high-tech industries, we should consider of various paradoxical extremely pro-competitive and anti-competitive factors case-by-case which deriving from vertical mergers. Sometimes that work will be very complex and ambiguous and need harmonious academic and practical support from economists, layers, and antitrust agencies.

2.3 Basic Framework for Competitive Effects Analysis

Riordan and Salop sets for the three-step framework for evaluating the competitive effects of vertical integration.[246] The first step evaluates if vertical integration is likely to raise the costs or otherwise damage the viability of competitors, or make collusion easier. The second step evaluates likely adverse consequences for consumers, e.g. higher prices, lower quality, or less product variety. The final step puts possible efficiencies of vertical integration into the balance to evaluate net competitive effects.

Barriers to entry are unlikely to affect market performance if the structure of the market is otherwise not conducive to monopolization of collusion. Adverse competitive effects are likely only if overall concentration, or the largest firm's market share, is high. The Department is unlikely to challenge a potential competition merger unless overall concentration of the acquired firm's market is above 1800 HHI(a somewhat lower concentration will suffice if one or more of the factors indicate that effective collusion in the market is particularly likely). Other things being equal, the Department is increasingly likely to challenge a merger as this threshold is exceeded.[247] If entry to the market is generally easy, the fact that entry is marginally easier for one or more firms is unlikely to affect the behavior of the firms in the market. The Department is unlikely to challenge a potential competition merger when

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[245] Posner, R. "Antitrust in the New Economy," *Antitrust Law Journal*, 2001, p.925-943.
[246] Riordan, Michael H. And Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," Antitrust Law Journal 63, p.513-568 (1995).
[247] US Non-Horizontal Merger Guidelines, § 4.131.

new entry into the acquiring firm's market can be accomplished by firms without any specific entry advantages under the conditions stated in Section 3.3. Other things being equal, the Department is increasingly likely to challenge a merger as the difficulty of entry increase above that threshold.[248]

A classic problem in the design of antitrust policy is how to deter conduct that is anticompetitive and welfare reducing, while not discouraging the very pro-competitive, welfare-enhancing competition that antitrust is designed to protect. This classic problem persists in the New Economy industries. It is necessary for competition authorities to focus today on the vigor of dynamic competition. Unlike price/output decisions, analysis of dynamic competition requires evidence about, among other things, the pattern of investment in developing new products, the control of critical assets (particularly intellectual property and distribution channels) and the beliefs of market participants and informed observers about the nature and pace of innovation. In particular, one must consider the vulnerability of leading firms to entry powered by drastic innovation. But on the other hand, there are many things, such as price fixing, merger to monopoly, or foreclosure of essential distribution channels, that the New Economy companies with substantial market power could in principle do to reduce competition.

A question, which arises when dealing with the definition of markets in the New Economy, is whether the price remains the most reliable criterion or whether other elements (functional characteristics, intended use, etc...) would appear to be more adequate.

High tech industries are typically characterised by high levels of product differentiation and dramatic shifts in firms' market positions. Thus traditional market definition analysis, which studies constraints on firms' price-output decisions, can present a seriously misleading picture of competitive relations in the new economy. Successful incumbents in Schumpeterian industries are constrained primarily by dynamic competition: by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent's product to collapse. The new product may be just a vastly better version of the old product,

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[248] US Non-Horizontal Merger Guidelines, §4.132.

or it may be an entirely different product that eliminates the demand for the old product and network effects are often effective barriers to the entry of comparable products.

As a result, a proper market-power inquiry in the new economy must include a serious analysis of the vigor of dynamic competition. It is importance, for example, to examine ownership of and investment in relevant intellectual propery-which may involve technologies not currently in commercial use. If, for instance, the current market leader owns all intellectual property necessary for radical innovation, dynamic competition will not be effective.

The communications market is still dominated by incumbent vertically integrated market players who still have massive market share in their national market, and who seek to leverage that market power into related markets. Nevertheless, specific markets in the communications sector are seeing vastly increased levels of competition, such as in the mobile markets, and new entrants to the market are making inroads into the market share of incumbent operators in all market segments, to a greater or lesser extent.[249]

2.31 The Effects of Vertical Integration on the Conduct of Participants in the Relevant Markets

With regard to vertical mergers, the US 1984 Merger Guidelines on Non-Horizontal Mergers describes the principal theories likely to create harm to competition. These theories mainly refer to foreclosure and collusion.

Regarding foreclosure, three conditions are necessary, but not sufficient, for this problem exist: "(a) the degree of vertical integration between the two markets must be so extensive that entrants to one market (the primary market) also would have to enter the other market (the secondary market), (b) the requirement of entry at the secondary level must make entry at the primary level significantly more difficult and

[249] European Commission, "Towards a new framework for Electronic Communications infrastructure and associated services", Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, The 1999 Communications Review, 1999, p.365.

less likely to occur, (c) the structure and other characteristics of the primary market must be otherwise so conducive to non-competitive performance that the increased difficulty of entry is likely to affect its performance."[250]

How can a vertical merger increase barriers to entry? The first general category of anti-competitive theories posits that, in certain instances, vertical integration can foreclose rivals from access to needed inputs or raise their costs of obtaining them. For example, in a recent article, Professor Riordan and Salop have developed further anticompetitive theories of "raising rival's costs", where a vertically integrated company may be able to increase the costs of its rivals in either the upstream or downstream market. Such foreclosure effect can raise prices or reduce quality or innovation to consumers downstream. Ultimately, such a foreclosure effect may require that firms seeking to enter one of the markets must enter both markets, significantly increasing the difficulty of entry. Second, a vertical merger can facilitate collusion in either the upstream or downstream market. Acquisition of a supplier by a purchaser may create opportunities to monitor the upstream supplier's competition. Also, a vertical merger may involve the purchase of a particularly disruptive downstream buyer. By eliminating a buyer who played one upstream firm off of another, such a merger may facilitate collusion in the upstream market. There is a third theory of anticompetitive harm arising from vertical mergers- vertical mergers that are designed to evade pricing regulations. For example, when regulation seeks to constrain the market power of a natural monopoly, the monopolist may have incentives to integrate vertically into unregulated markets in order to extract the monopoly rents denied in the regulated market. This theory was the basis for much of the Modified Final Judgment in the AT&T monopoly case and was most recently utilized by DOJ in its British Telecom/MCI transaction challenge.[251]

A. Foreclosure/Raising Rival's Costs

The first step evaluates the likely effects of vertical integration on

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[250] The U.S. Merger Guidelines, § 4.21.

[251] Christine A. Varney, "Vertical Merger Enforcement Challenges at the FTC", PLI 36th Annual Antitrust Institute, San Francisco, California (1995).

the unilateral and coordinated conduct of participants in relevant markets. Vertical integration might increase the costs or otherwise damage the viability of competitors, or might better enable tacit or express collusion. Such effects might occur either in upstream or downstream relevant markets. A vertical merger potentially injures downstream competitors by raising their costs or by making their product less attractive to consumers. Such injuries might be accomplished by denying, degrading, or raising price of access to an important input for which there are no close substitutes (input foreclosure). Vertical integration also potentially harms upstream competitors. A refusal to deal by the downstream division of a vertically integrated firm might shrink the customer base of upstream rivals (customer foreclosure). A reduced customer base can threaten the viability of downstream rivals by compromising economies of scale and discouraging investments in product and process improvements necessary to remain competitive.

A convincing input foreclosure theory of harmful vertical integration has two crucial elements. First, equally cost-effective substitute inputs are unavailable. Second, a vertically integrated firm has an incentive to withdraw from the input market or raise the price of the input. If a vertically integrated firm remains ready and willing to compete aggressively to supply downstream rivals, then vertical integration does not increase the market power of rival input suppliers.

A convincing theory of customer foreclosure similarly has two major elements. First, vertical integration must reduce the customer base of rival upstream firms at given prices. For this to happen, the downstream division of the integrated firm must have the incentive to refuse to deal with or to reduce its purchases from outside suppliers. Moreover, rival upstream firms must lack the incentive or be unable easily to expand sales to other downstream customers. If the upstream division of the integrated firm is capacity constrained, or if the integrated firm withdraws from supplying the downstream market, perhaps pursuant to an input foreclosure strategy, then rival upstream suppliers arguably would suffer little or no net decrease in demand from the resulting realignment of customer-supplier relationships. Second, the reduced customer base must place rival upstream firms at a competitive disadvantage to the integrated firm. There are various ways for this to

happen. A reduced customer base might sacrifice economies of scale or scope, thus raising the marginal costs of rival upstream firms. If the resulting cost disadvantage were sufficiently great, then rivals might leave the market. Otherwise, higher marginal costs might cause rivals to stem profit losses by raising prices resulting in a further loss of customers. A reduced customer base might also cause upstream rivals to reduce investments in process innovation or product improvement. Innovation is itself a source of scale economies, because any reduction in the unit cost or a price premium for higher quality is captured on the entire customer case. Thus, a reduced customer base reduces the returns to innovation.

This is particularly important now with respect to certain networked industries -such as telecommunications, cable, and computers-where certain firms possess existing market power through ownership of established networks marked by high entry barriers, including huge sunk costs. With respect to the provision of Internet connectivity, the main anti-competitive practices that may be implemented by a dominant company and requiring careful analysis, may consist of refusing to grant access to its networks, raising its rival's costs, degrading the quality of the connection or pricing selectively to attract customers away from competitors.[252]

In 1995, Time Warner, the second largest U.S. cable television system operator, announced its agreement to acquire Turner Broadcasting System, which was the largest U.S. cable television network. In 1996, after a thorough investigation, the FTC permitted the Time Warner/Turner acquisition to be consummated without a court challenge, but subject to fairly modest open access requirements, and to limitations on and eventual disposition of certain minority holdings in Time Warner that other media companies would have acquired as a result of the exchange of Turner shares for Timer Shares.[253] In this matter of Time Warner Inc., Chairman Pitofsky concluded that "post-acquisition Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming

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[252] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (Nov. 2001) p. 7.
[253] FTC Docket No. C-3709 (Feb. 3, 1997).

assets; and (2) disadvantage competing MVPDs, by engaging in price discrimination. (...) For example, the launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.(...) TCI and Time Warner are the two largest MVPDs in the U.S with market shares of 27% and 17% respectively. Carrage on one or both systems is critical for new programming to achieve competitive viability. Attempting to replicate the coverage of these systems by lacing together agreements with the large number of much smaller MVPDs is costly and time consuming. The Commission was presented with evidence that denial of coverage on the Time Warner and TCI systems could further delay entry of potential marquee channels for several years."[254]

In 1995, the Commission reached a consent with Silicon Graphics,[255] Inc. (SGI) that allowed two acquisitions to proceed while at the same addressing vertical foreclosure concerns that threatened to eliminate innovative competition. According to the Commission's complaint, SGI, the dominant provider of entertainment graphics workstations with a 90% market share, proposed to acquire Alias and Wavefront, two of the three dominant developers of Unix-based entertainment graphics and animation software that operate on those workstations. The Commission was concerned about vertical foreclosure in both directions: rival workstation manufacturers could not compete effectively if Alias and Wavefront designed their software to be compatible only with SGI's workstations, and rival entertainment graphics software manufacturers would be foreclosed from 90% of a market if SGI closed it previously open software interface so that only Alias and Wavefront could design compatible software. The Commission also was concerned that if SGI did allow Alias and Wavefront to continue to work with rival workstation manufacturers to develop complementary products,

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[254] Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, In the Matter of Time Warner Inc. Docket No. C-3709.

[255] FTC Docket No. C-3626 (November 14, 1995)

it could use proprietary information received in the course of those efforts to obtain an unfair competitive advantage over those workstation competitors.

On the other hand, there were strong indications that the combination of SGI, Alias and Wavefront's complementary capacities would lead to important innovation. In order to maintain competition while at the same time allowing the achievement of these potential efficiencies, the Commission negotiated a consent order that allowed the merger to proceed subject to three main conditions. First, to preserve workstation competition, the Commission required the merged entity to enter into a Commission-approved porting agreement with a workstation competitor under which SGI would be required to use best efforts to ensure optimal interoperation of Alias' leading software programs with the competitor's workstations. Second, to keep competition fair, the order included a firewall provision prohibiting the transfer to SGI of the workstation competitor's proprietary information. Finally, to maintain software competition, the order required SGI to maintain an open architecture and publish its application programming interfaces for its workstations, and to refrain from discriminating against outside software rivals of Alias and Wavefront.

But in network industries, free entry does not lead to perfect competition. In a market with strong network effects, once few firms are in operation, the addition of new competitors, even under conditions of free entry, does not change the market structure in any significant way. Although eliminating barriers to entry can encourage competition, the resulting competition may not significantly affect market structure. Firms that are not leaders in network industries have little hope of reaching that status unless they come up with a major innovation-one that can defeat the advantage that network effects bestow on the industry leaders. If there is a chance that today's products will be replaced by a major innovation, a leader's survival depends on bringing that innovation to market before others do. This implies that, in markets with strong network effects, antitrust authorities may not be able to significantly affect market structure by eliminating barriers to entry. In such markets, the competitive assessment should be based on a prospective, forward-

looking approach.[256] We can also fined similar analysis in AT&T/McCaw case, Eastman Kodak Co/ Image Tech. SVCS, etc.

B. Increased Anticompetitive Coordination

Vertical mergers can also increase anticompetitive coordination when important price and non-price information, particularly technology, must be share between the supplier and the customer. Again, several conditions must be satisfied before a vertical merger can be considered likely to harm competition in this manner. As with foreclosure, the input market must be susceptible to the exercise of post merger market power, otherwise there is little chance of coordinated conduct, even if the integrated firm has increased information. Similarly, there is a much higher likelihood of anticompetitive effect if the exercise of market power downstream is possible.[257]

Conditions other than market structure are also important. First, there must be substantial transactions between the integrated firm and one or more non-affiliated customers or suppliers. Without such transactions, there is no conduit for information that can form the basis for coordination. Second, the information exchanged through the customer/supplier relationship must be reliable, useful in reaching terms of coordination for other transactions, and not available through any other channel. Finally, as with the other vertical theories, the coordination must translate into an ability and an incentive to raise prices with a resulting welfare effect downstream.

C. Evasion of Regulation

A vertical merger can lead to anticompetitive regulatory evasion.

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[256] EU Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, paragraph 80.

[257] Again, downstream market power is not strictly necessary for a welfare effect. As explained in connection with the foreclosure theory, even without downstream market power, there would be no welfare effect if the output producers have efficient substitutes for the input or if the customers of the output producers have efficient alternatives for the output product. However, it is not entirely implausible that under specified conditions competitively sensitive information obtained by an integrated firm can significantly impair market performance upstream and result in a welfare loss downstream.

This theory has perhaps the purest academic pedigree and has been explored in depth in connection with the Modified Final Judgment in the AT&T monopoly case. There is little dispute that this theory is a plausible basis for finding anticompetitive effects under appropriate circumstances.

The typical justification for regulations is to constrain the market power of a natural monopoly. If a vertical merger allows an integrated firm to evade that regulation and exercise market power in either the regulated market or an adjacent market, it is possible that welfare will be reduced. The most common example of how a vertical merger can be lead to regulatory evasion– in fact, it is the 1984 Guidelines example– is when artificial transfer prices allow rate regulation avoidance.

The Department's challenge to the British Telecom/MCI transaction is premised on potential anticompetitive effects arising from regulatory evasion. BT is the dominant provider of international telecommunications services in the United Kingdom. MCI is a significant long distance and international carrier in the United States. Telephone services between the U.K and the U.S. are provided pursuant to an international agreement under which BT charges the same price, a "settlement rate," for terminating calls from the U.S. carriers in the U.K. as the U.S. carriers charge for terminating U.K. calls in the U.S. Additionally, FCC policy provides that BT will send calls to the U.S. carriers in the same proportion it receives them from those carriers. So, if 60 percent of the traffic from the U.S. to BT is from AT&T, BT will send 60 percent of its U.S. calls to AT&T.

The acquisition had two aspects: A 20 percent investment by BT in MCI and a joint venture between BT and MCI to provide enhanced global business communication services. The Department concluded that this integration gave BT and MCI the ability and incentive to evade the proportionate return policy and, as a result, to raise the international settlement rate. In addition, BT and MCI, through their venture or otherwise, could use private lines to send traffic between them outside the international accounting system, which would increase the incentive to raise the settlement rate. These factors led the Department to conclude that the proposed transaction likely would result in higher international rates over the correspondent network.

The Department's concerns were remedied by a consent decree that provided transparency and certain requirements relating to international simple resale. Increased transparency provides the telecommunications regulators in the U.K. and the U.S. the ability to detect regulatory evasion. The international simple resale requirements insure that BT and MCI cannot send traffic outside of the international accounting system until their competitors have similar abilities.

2.32 Anticompetitive Impact on the Output Market

One criticism of the foreclosure or "raising rivals' costs" theory is that harm to competitors does not always result in harm to competition. Thus, even in a raising rival's cost theory, some showing of likely consumer injury should be required before a vertical merger is challenged-that is, a likely increase in quality-adjusted price or likely decrease in output.[258] It is widely agreed that competition policy should concern itself with injury to consumers rather than mere injury to competitors. Competitive market generally improve economic welfare by weeding out less efficient competitors. Consequently, policies that protect inefficient competitors may undermine competitive processes to the ultimate detriment of consumers.

What necessarily follows is that before the antitrust agencies would find harm to competition arising form a vertical merger, there must be a probable downstream output or price effect. That effect does not arise simply because input prices are raised to non-integrated rivals-these increased input prices must translate downstream into higher market prices or lower output.[259]

Consumer injury results from input or customer foreclosure only if output prices rise, product quality decrease, or consumer have fewer choices. For example, there is no welfare effect if increased input prices cause the non-integrated firms to reduce output but simultaneously the integrated firm increases output so that total market output is unchanged. What are the necessary condition? First, the upstream market must be

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[258] Id. p. 1.

[259] Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Vertical Merger Enforcement Policy", Before the American Bar Association, Section of Antitrust Law Spring Meeting, (1995).

susceptible to a unilateral or coordinated exercise of market power after the merger. To analyze this question, the U.S. Department start with the basic principles in the 1992 Horizontal Merger Guidelines, including market definition, concentration, entry, and unilateral and coordinated effects. Then will be asked whether market power can be exercised after the merger because the merger itself may create such power. A finding of upstream market power is necessary because without it the merged firm is unlikely to be able to effect, unilaterally or in coordination with its rivals, higher prices or reduced output in the upstream market. Second, the structure and circumstances of the downstream market should also be conductive to the exercise of unilateral or coordinated market power after the merger. Again, the U.S. antitrust agencies relies on the 1992 Horizontal Merger Guidelines to aid the analysis. Downstream competition may prevent a price increase if customers can switch to a substitute product. If other producers can expand output, or if new entrants can begin production, there can not be competitive problem. More generally, if market power exists upstream but not downstream, a vertical merger is unlikely to change materially the prices set in the downstream market.

The theory's focus on market power as a necessary condition is appropriate because a vertical merger is likely to harm competition unless it gives the integrated firm the ability and the incentive to induce new market equilibria upstream and downstream. With market power, an integrated firm may be able to raise its rival's costs or foreclosure access to inputs. It may be able to raise costs directly by inducing a price increase. It may also raise its rival's cost by impairing their ability to operate above minimum efficient scale. In any event, the integrated firm must also have the incentive to do so, that is, a post merger upstream price increase must increase the integrated firm's total profit upstream and downstream. In conclusion, a harm to competition can only be found where higher prices or a reduction in output can be found in the downstream market. If the vertical merger simply allows the integrated firm to capture a larger share of the downstream market without reducing total output, there is no output effect.

2.33 Efficiency and Net Competitive Impact

Although it may not seem intuitively obvious when a vertical merger indeed will lead to such an anticompetitive outcome, rather than simply harm rivals, there are several indicia to help antitrust enforcers in making such a determination. Certainly the greater the market share of the companies that are vertically integrating, the greater the probability that downstream customers will be injured.

Market power is only one important structural element for discerning the competitive effects vertical integration. Another is the power of contracts. An eliminating markups defense for vertical integration requires that firms are unable to achieve this efficiency with arm's length contracts. This is most clearly the case when price discrimination is difficult. Contracts in many intermediate markets, however, feature restraints and nonlinear pricing. Thus, there should be some burden on defendants to show that factual conditions regarding contracts support an eliminating markups defense. At the same time, a different set of contractual failures might support a raising rival's costs theory or restoring monopoly power theory, requiring a similar burden on plaintiffs. Such a framework suggests a "battle of theories" with courts and regulatory authorities adjudicating the relative merits of the alternatives.[260]

More generally, it is a mistake to suppose that only one theory of competitive effects can be valid in any given case. Both a raising rival's costs theory and an eliminating markups theory might be plausible. In such circumstances, parties to the debate should provide evidence on factual conditions supporting the theories and on the actual importance of the theories for economic welfare. The controlling questions are whether vertical integration is likely to cause significantly higher prices, less product variety, or lower product quality. The court or regulatory authority should weigh the evidence to determine which theory is the more important one for understanding the competitive effects of vertical integration on a case-by-case basis. The balancing of the magnitude of competitive effects calls for a structured "rule of reason" approach to weigh the evidence and evaluate the likely consequences of vertical integration for economic welfare. Meanwhile, further progress on the

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[260] Michael H. Riordan, "Competitive Effects of Vertical Integration," at the LEAR conference on 'Advances in the Economics of Competition Law" at Rome (June 2005).

academic front should assist the courts and regulatory authorities in developing a dynamic approach to evaluating the competitive effects of vertical integration.

3. In the EU Legal System

3.1 Introduction

It is commonly agreed that 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 EU 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. [261] Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers. First, unlike horizontal mergers, vertical mergers do not entail the loss of direct competition between the merging firms in the same relevant market.[262] As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical mergers.[263] Second, vertical 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. 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

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[261] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.

[262] 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 operate.

[263] EU Non-horizontal merger guidelines, II. § 12.

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 "internalization 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.[264] Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organization of the production process, and the way in which the products are sold. 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.[265]

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.[266]

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 of effective competition that matters, not the mere impact on competitors at some level of the supply chain.[267] In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concern.

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[264] EU Non-horizontal merger guidelines, II. § 13.
[265] EU Non-horizontal merger guidelines, II. § 14.
[266] Id. II. § 15.
[267] 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".

An undertaking shall be deemed to have significant market power if, either individually or jointly with others, if enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.[268] The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant impediment to effective competition.[269]

Concentration within the scope of the Merger Regulation shall be appraised in accordance with the objectives of this Regulation[270] and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account : (a) the need to maintain and develop effective competition within the common market in view of among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[271]

As the Court has stressed, a finding of a dominant position does not preclude some competition in the market. It only enables the undertaking that enjoys such a position, if not to determine, at least to have an appreciable effect on the conditions under which that competition will develop, and in any case to act in disregard of any such

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[268] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). Article 14, § 2.

[269] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, 2004/C 31/30.

[270] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, 2004/C 31/30.

[271] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation), Article 2, § 1 (a)(b).

competitive constraint so long as such conduct does not operate to its detriment.

The Commission will use the 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 conditions for competitive harm, but is not a sufficient condition.[272]

There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects. Non-coordinated effects may principally arise when non-horizontal mergers give rise to "foreclosure". The term "foreclosure" will be used 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 charged to consumers. Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behavior, 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. In assessing the competitive effects of a merger, the Commission compare the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. 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

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[272] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007, III. §27.

constitute the relevant comparison. The Commission may take into account future market developments that result from impending regulatory changes.[273]

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. 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.[274]

3.2 Basic Legal Basis

Depending on Guidelines on the assessment of non-horizontal mergers,[275] 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.[276] The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000.[277] 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

[273] COMP/M. 3696 E.ON/MOL (2005), at points 457-463.
[274] EU non-horizontal mergers guidelines, II. § 21.
[275] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007.
[276] Id. III. § 24.
[277] Id. III. § 25.

ongoing coordination, or facilitating practices, are present.[278]

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 conditions for competitive harm, but is not a sufficient condition.[279]

A classic problem in the design of antitrust policy is how to deter conduct that is anticompetitive and welfare reducing, while not discouraging the very pro-competitive, welfare-enhancing competition that antitrust is designed to protect. This classic problem persists in the New Economy industries. It is necessary for competition authorities to focus today on the vigor of dynamic competition. Unlike price/output decisions, analysis of dynamic competition requires evidence about, among other things, the pattern of investment in developing new products, the control of critical assets (particularly intellectual property and distribution channels) and the beliefs of market participants and informed observers about the nature and pace of innovation. In particular, one must consider the vulnerability of leading firms to entry powered by drastic innovation. But on the other hand, there are many things, such as price fixing, merger to monopoly, or foreclosure of essential distribution channels, that the New Economy companies with substantial market power could in principle do to reduce competition.

A question, which arises when dealing with the definition of markets in the New Economy, is whether the price remains the most reliable criterion or whether other elements (functional characteristics, intended use, etc...) would appear to be more adequate.

High tech industries are typically characterized by high levels of product differentiation and dramatic shifts in firms' market positions. Thus traditional market definition analysis, which studies constraints on firms' price-output decisions, can present a seriously misleading picture

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[278] Id. III. 26.
[279] Id. III. 27.

of competitive relations in the new economy. Successful incumbents in Schumpeterian industries are constrained primarily by dynamic competition: by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent's product to collapse. The new product may be just a vastly better version of the old product, or it may be an entirely different product that eliminates the demand for the old product and network effects are often effective barriers to the entry of comparable products.

As a result, a proper market-power inquiry in the new economy must include a serious analysis of the vigor of dynamic competition. It is importance, for example, to examine ownership of and investment in relevant intellectual property-which may involve technologies not currently in commercial use. If, for instance, the current market leader owns all intellectual property necessary for radical innovation, dynamic competition will not be effective.

The communications market is still dominated by incumbent vertically integrated market players who still have massive market share in their national market, and who seek to leverage that market power into related markets. Nevertheless, specific markets in the communications sector are seeing vastly increased levels of competition, such as in the mobile markets, and new entrants to the market are making inroads into the market share of incumbent operators in all market segments, to a greater or lesser extent.[280]

In order to achieve this objective, it has been argued that the existing EU instruments are not designed to address this kind of dynamic analysis and more specifically the merger control Regulation[281] which is arguably driven essentially by asserting dominance or strengthening dominance, as opposed to the approach taken in assessing agreements according to Article 81 (3) and Regulation 17. The Commission relies heavily on the classical test of dominance provided for in Article 2 paragraph 2 ECMR: "a concentration which does not create or

[280] European Commission, "Towards a new framework for Electronic Communications infrastructure and associated services", Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, The 1999 Communications Review, 1999, p.365.
[281] Council Regulation (EC) 139/2004.

strengthening dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market." Depending on Guidelines on the assessment of non-horizontal mergers, [282] 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.[283]

But there is nothing in the ECMR, which prevents applying a dynamic approach to justify temporary dominance in a fast moving competitive environment ("fragile monopolist, winner takes most"...). But it can be seen that the dynamic approach in relation to mergers in the New Economy is specifically provided for in the ECMR. Indeed, Article 2 § 2 should not be read isolation. Article 2 paragraph 1 (thus coming before the dominance test) specifically provides that "in making his appraisal of mergers, the Commission shall take into account the need to maintain and develop effective competition within the common market(...), the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or market, any legal or other barriers to entry, supply and demand trends, the interest of consumers, and the developments of technical and economic progress provided that it is to consumer's advantage and does not form an obstacle to competition." Article 2(1) and 2(2) are complementary. They should not be read in isolation. They allow for the specific treatment of efficiencies to justify the creation of a temporary dominant position, whilst preserving and developing effective competition in the common market.

Dominance for most New Economy industries does not have the same meaning as in traditional economy. Dominance can be considered as inherent to the New Economy, as it often involves emerging markets where limited or no competition yet exist. Moreover, dominance is

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[282] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, 2007.

[283] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings. 2007.

usually fragile and temporary as any new technology may be rapidly superseded by another one. Therefore, even though the proposed merger creates or strengthens a dominant position, this does not automatically mean as a result that "effective competition would be significantly impeded in the common market."

Guidelines on the assessment of horizontal mergers provide one very important clause for dynamic analysis in the New Economy. It provide that "in markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two competitors with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products."[284]

New EU Guidelines on the assessment of non-horizontal mergers provide that "Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. (...) 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."[285] With this clauses, the Commission made clear that when they assess competitive effects of vertical merger, they will regard innovation as important pro-competitive factors. It means when the Commission drafted non-horizontal merger guidelines, they already considered about dynamic approach concerned to innovation industries.

EU Commission guidelines on market analysis and the assessment of significant market power for electronic communications networks and services[286] show good directions to solve these problems. Of course this

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[284] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, (2004/C 31/03), § 38.

[285] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.

[286] Commission guidelines on market analysis and the assessment of significant market

guidelines apply only for limited areas but it can be applied similar cases with extended interpretation or it can be good models in case we will legislate or amend general vertical merger regulation.

For assessment of market power this guidelines takes dynamic competition approaches. It is providing that "it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others: (a) overall size of the undertaking, (2) control of infrastructure not easily duplicated, (c) technological advantages or superiority, (d) absence of low countervailing buying power, (e) easy or privileged access to capital markets/financial resources, (f) product/services diversification (e.g. bundled products or services), (g) economies of scale, (h) economies of scope, (i) vertical integration, (j) a highly developed distribution and scale network, (k) absence of potential competition, (l) barriers to expansion."[287] Especially, for assessment of vertical merger, (i)(j)(l) will be very important factors. Further, it is providing that "A finding of dominance depends on an assessment of ease of market entry. In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behavior by an undertaking with a significant market share. In the electronic communications sector, barriers to entry are often high because of existing legislative and other regulatory requirements which may limit the number of available licences or the provision of certain cervices. (i.e. GSM/DCS or 3G mobile services). Furthermore, barriers to entry exist

power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

[287] EU Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), §3.1, (78).

where entry into the relevant requires large investments and the programming of capacities over a long time in order to be profitable. However, high barriers to entry may become less relevant with regard to markets characterized by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective, forward-looking approach."[288]

3.3 Main Criteria for Assessing Competitive Effects

A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.[289] 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 conditions for competitive harm, but is not a sufficient condition.[290] In making this appraisal, the Commission shall take into account : (a) the need to maintain and develop effective competition within the common market in view of among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out with the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[291]

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[288] Id., § 3.1, (80).
[289] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation), Article 2, § 3.
[290] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2007, III. §27.
[291] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of

In an ex-ante environment, market power is essentially measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues.[292] The market power of an undertaking can be constrained by the existence of potential competitors. An NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market participants even if they do not currently produce the relevant product or offer the relevant service.[293]

The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market.[294] As regard the methods used for measuring market size and market shares, both volume sales and value sales provide useful information for market measurement. In the case of bulk products preference is given to volume whereas in the case of differentiated products (i.e. branded products) sales in value and their associated market share will often be considered to reflect better the relative position and strength of each provider.[295]

3.31 Foreclosure/Non-coordinated Effects

A merger is said to result in foreclosure where actual or potential rival's access to suppliers 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

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concentration between undertakings (the EC Merger Regulation), Article 2, § 1 (a)(b).

[292] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), § 3.1 (73).

[293] Id. § 3.1 (74).

[294] Id. § 3.1 (75).

[295] Id. § 3.1 (76).

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.

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).

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.[296]

Customer foreclosure may occur when a supplier integrate with an important customer in the downstream market. 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 rival's 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

[296] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, § 31.

profitable to establish higher prices on the downstream market.[297]

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.[298]

A. Ability to foreclose

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 favorable than they would have been absent the merger.[299] 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.[300] Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied.[301]

Input foreclosure may raise competition problems only if it concerns an important input for the downstream product.[302] 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,[303] or it may represent a significant source of product

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[297] Id. § 58.

[298] See e.g., Case COMP/M. 4300, Philips/Intermagnetics; COMP/M.4314, Johnson & Johnson/Pfizer Consumer Healthcare; COMP/M. 4389, WLR/BST; COMP/M.4403.

[299] Case COMP/M. 1693 Alcoa/Reynolds (2000); COMP/M.4403 Thales/Finmeccanica/Alcatel Alenia Space/Telespazio, points 257-260.

[300] COMP/M. 2861 Siemens/Drägerwerk/JV (2003); COMP/M. 3998 Axalto/Gemplus, point 75.

[301] COMP/M. 4314 Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.

[302] COMP/M. 3868 Dong/Elsam/Energi E2; COMP/M. 4094 Ineos/BP Dormagen, points 183-184; COMP/M. 4561, GE/Smiths Aerospace, points 48-50.

[303] Case T-210/01, General Electric v. Commission [2005], ECR II-000); COMP/M.

differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.[304]

For input foreclosure to be 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.[305] The merged entity would only have the ability to foreclosure 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.[306]

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.[307]

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.[308]

B. Incentive to foreclose

The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take

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3410 Total/GDF, points 53-54 and 60-61.

[304] EU non-horizontal merger guidelines, IV. § 34.

[305] EU non-horizontal merger guidelines, IV. § 35.

[306] COMP/M. 4494 Evraz/Highveld, point 92 and points 97-112.

[307] EU non-horizontal merger guidelines, IV. § 37.

[308] EU non-horizontal merger guidelines, IV. § 39.

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 gains, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.[309] The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream.[310] 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.[311]

The incentive for the integrated firm to raise rivals' costs further depend on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture. [312] 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.[313]

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.[314]

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[309] The EU non-horizontal merger guidelines, IV. § 40.
[310] COMP/M. 4300 Phillips/Intermagnetics, points 56-62; COMP/M. 4576 AVR/Van Gansewinkel, points 33-38.
[311] The EU non-horizontal merger guidelines, IV. § 41.
[312] COMP/M. 3943 Saint-Gobain/BPB (2005), point 78.
[313] 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, would be diverted to the integrated firm's downstream unit. See, e.g. COMP/M. 2738 GEES/Unison; COMP/M. 4561 GE/Smiths Aerospace, points 60-62.
[314] See, e.g. COMP/M. 4314 Johnson & Johnson/Pfizer Consumer Healthcare, points

C. Overall likely impact on effective competition

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. First, anticompetitive foreclosure may occur when a vertical merger allow 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.[315] Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players,[316] for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.[317] Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors.[318] 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 favorable 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.[319] 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.

131-132.

[315] See, e.g. Case COMP/M. 4494 Evraz/Highveld, points 97-112.

[316] See. e.g. Case COMP/M. 3440 EDP/ENI/GDP (2004).

[317] EU non-horizontal merger guidelines, IV. § 48.

[318] See, e.g. Case COMP/M. 4180 Gaz de France/ Suez, points 876-931; Case COMP/M. 4576 AVR/Van Ganswinkel, points 33-38.

[319] See, e.g. Case COMP/M. 3696 E.ON/MOL (2005).

If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated[320] 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.[321] The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power or the likelihood that entry upstream would maintain effective competition.[322]

In the America Online Inc (AOL)/Time Warner [323] case the Commission was concerned that AOL, because of the merger with Time Warner (which in turn had planned to merge its music recording and publishing activities with EMI), and because of its European joint ventures with Bertelsman, would have controlled the leading source of music publishing rights in Europe. AOL is the leading Internet access provider in the US and the only such provider with a pan-European presence. Time Warner is one of the world's biggest media and entertainment companies with interests in television networks, magazines and book publishing, music, filmed entertainment and cable networks. The concentration created the first Internet vertically integrated content provider, distributing Time Warner's branded content (music, news, films, etc.) through AOL's Internet distribution network.

Because of AOL's structural and contractual links with Bertelsmann, the new entity would also have had preferred access to Bertelsmann's content and, in particular, to its large music library. As a result, the new company would have controlled the leading source of music publishing rights in Europe, a market of which one third is held by Time Warner and Bertelsmann together. In these circumstances it was likely that the new entity would have become dominant in the emerging market for Internet music delivery online by becoming a 'gatekeeper' and thus being able to dictate the conditions for the distribution of audio files over the Internet. It would also have been possible for the new entity to

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[320] See, e.g. Case COMP/M. 3653 Siemens/VA Tech (2005), at point 164.
[321] EU non-horizontal merger guidelines, IV. § 50.
[322] EU non-horizontal merger guidelines, IV. § 51.
[323] Case No. COMP/M. 1845, 2000.

format Time Warner's and Bertelsmann's music in such a way as to be compatible only with AOL's music player (Winamp), but not with competing music players. On the other hand Winamp would have been able to play the music of competing record companies which generally use non-proprietary formats. Thus, because of the technical limitations of other players, the new entity would also have been able to impose Winamp as the dominant music player.

These example highlight that the importance of analyzing the possibility of foreclosure and exclusionary strategies in high innovation markets. They are a possible source of concern, if one of the parties possesses significant market power in an upstream and/or downstream market.

The Commission blocked the formation of a joint venture between Bertelsmann (Germany's largest media company), Kirsh (a broadcaster and leading supplier of film entertainment) and Deutsch Telekom (the owner/operator of nearly all German broadband networks) for the development of a digital pay-TV administrative and technical services to other broadcasters. [324] The Commission concluded that a durable dominant position would arise as a result of the proposed venture's infrastructure development and vertical integration. The venture was deemed both to threaten potential competition between the co-venturers and to foreclose potential entrants who would not undertake the investments required to develop competing networks. In this regard, the Commission treated the parties' anticipated economies of scale and scope (and consumer benefits resulting from them) as exacerbating the likely anti-competitive effects of the venture, since they could deter others from entering. It also expressed concern that the venture, as suppliers of essential infrastructure to other pay-TV providers, might engage in opportunistic behavior through, for example, the provision of access on discriminatory terms, technological bias in future developments, cross-subsidiary among different elements of the system, and misappropriation of competitively sensitive information. In sum, the Commission concluded that although the proposed venture might create demand for new services, it was likely to be so anti-competitive as to

[324] MSG Media Services (COMP/M.469)

hinder technical and economic progress in the long run. Notably, the decision appear to turn on a comparison of the proposed venture with a hypothetical, competitive market without regard to whether competition between multiple providers was in fact sustainable.

3.32 Coordinated Effects

A merger may change the nature of competition in such a way that firms that previously were not coordinating their behavior, 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.[325]

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 for jointly maximizing 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 maximization would yield. Firms will refrain from undercutting the high prices charged by their competitors in a coordinated way because they anticipate that such behavior would jeopardize 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 behavior would entail in the longer term, as it would be expected to trigger an aggressive response by competitors ("a punishment").[326]

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

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[325] See, Case COMP/M. 3101 Accor/Hilton/Six Continents, points 23-28.
[326] EU non-horizontal merger guidelines, IV. § 80.

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 achieved 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 jeopardize the results expected from the coordination.[327]

4. Efficiencies and Welfare Trade-Offs

4.1 Definition of "Dynamic Efficiency" and "Transactional Efficiency"

In general, the term "economic efficiency" does not merely refer to a situation where costs are minimized. Instead, it refers to any number of situations that tend to increase the economic value of social and consumer welfare. Efficiencies can be defined by using four general descriptive categories: allocative efficiency, productive efficiency, dynamic efficiency, and transactional efficiency.[328] Here I will explain concept about "dynamic efficiency" and "transactional efficiency" which has important role in analyzing competitive effects of vertical merger.

Dynamic Efficiencies relate to the effect of competition and potential competition on costs and product quality in the long run.[329] The idea is that short run allocative and productive inefficiency brought on by market power can be offset by the benefits of "creative destruction" which occurs over time and results from product innovations and technological advancements in the production and distribution process.[330] Even if a firm has market power, it will be forced to invest resources in research and development to improve its product and productive processes because the firm faces the constant threat of other firm's innovation. As a result, short-run allocative inefficiency is held in check.

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[327] See, Case T-342/99, Airtours v. Commission, [2002] ECR II-2585, points 23-28.
[328] William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 208 (2003).
[329] William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. p.247-248 (2003).
[330] Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, (1950).

A key ingredient with dynamic efficiencies is that because product differentiation and innovation create barriers to entry that can lead to supra-competitive profits, firms have an incentive to innovate. Without the potential to achieve those barriers to entry and the resulting supra-competitive profits, there is far less incentive to use resources for research and development. Hence, intellectual property laws provide a legal mechanism barrier to entry for new creations, and as a consequence, they promote dynamic efficiency. Likewise, mergers enhance dynamic efficiency and reduce prices by facilitating innovations, and these innovations are passed along to society through diffusion.[331] The idea of diffusion is extremely important to consumer welfare because it suggests that technological enhancements to both products and the production process diffuse to rival firms over time, thereby multiplying the efficiencies by the output of an entire industry.

Transactional efficiencies occur where a firm is able to reduce costs associated with business transactions through business practices, contracts, and organizational forms. There are several ways in which a firm can obtain transactional efficiencies. With respect to vertical mergers, firms in the distributional chain are often repeat players, and they incur expense each time the firms negotiates a new deal. However, if the firms merge, such costs can be avoided. Another situation is where the product is highly specialized and dependant upon an input that can be provided only by one firm. Once the downstream firm has committed resources to producing the specialized product, the input supplier, knowing that the downstream firm does not want sunk costs, will hold out to extrapolate more out of the downstream firm. Finally, transactional inefficiencies arise because firms do not have complete information when negotiating contracts. This is referred to as information costs. A merger can eliminate information costs because merging firms then have access to more information.

4.2 Roles of "Welfare Standards" for Efficiency Defense

There are two competing welfare standards in antitrust economics:

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[331] Gary L. Roberts & Steven C. Salop, Efficiencies in Dynamic Merger Analysis, 19 World Competition L.& Econ. Rev. 5, p.7-8 (1996).

the total welfare standard and the consumer welfare standard.[332] Both seek to protect consumers. The difference is that the total welfare standard seeks to protect consumers by way of maximizing welfare for society, whereas the consumer welfare standard treats consumers as the end goal of antitrust.

Proponents of a total welfare standard are concerned with maximizing total consumer and producer surplus, not with wealth transfer between consumer and producer.[333] Under a total welfare standard, mergers can be damaging when they produce allocative inefficiency, or deadweight loss, as a result of monopolistic behavior (i.e. reducing output to maximize profits) by the merging firms.[334] Thus, the extent to which the merger will lead to such a misallocation of resources is weighed against the extent to which the merger will lead to efficiencies, which create value for society as a whole.

Where a consumer welfare standard is used, the concern is the net effect on consumers instead of the net effect on society. Thus, in addition to deadweight loss, a merger's potential to reduce output and raise prices is also considered anticompetitive because it results in a transfer of wealth from consumers to the producers.

As mentioned previously, the ability to achieve temporary supra-competitive profits is an important element to dynamic efficiency since such profits are an incentive for a firm to separate itself form the competition through superior ideas and innovation. At the same time, the threat of entry imposes at least some degree of price restraint on the firm with market power, and in order to maintain its position, it must expend some resources in ensuring that its product and business processes are the most technologically advance. Thus, in the short run, consumers might pay more for a product as a result of the wealth transfer, but in the long run consumers are better off because dynamic competition produces ideas and innovation that result in greater allocative and productive efficiencies and these efficiencies are diffused

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[332] Timothy J. Muris, The Government and Merger Efficiencies: Still Hostile After All These Years, 7 Geo. Mason. L. Rev. 729, 734 (1999).
[333] Robert H. Bork, The Antitrust Paradox 91 (rev. ed. 1993); Richard A. Posner, Antitrust Law: An Economic Perspective 8 (1976).
[334] Robert H. Bork, The Antitrust Paradox, p. 50-89 (rev. ed. 1993); Richard A. Posner, Antitrust Law: An Economic Perspective, p. 8-18 (1976).

throughout the entire economy.

The idea of dynamic competition does make an assumption that could be subject to criticism by proponents of a consumer welfare standard. At the outset, it assumes that monopolists will invest any supra-competitive profits in research and development in order to maintain its dominant market position. In this way, the firm is using innovation and resulting efficiencies as a barrier to entry. However, it is plausible that a monopolist might instead its profits to create other barriers to entry that do not create value for society.

The traditional consumer welfare model suffers from a failure to consider dynamic competitive effects, and it is a fair criticism of the traditional total welfare standard to say that it is not entirely consider with the consumer protection goal of antitrust.

4.3 Vertical Merger Competitive Effects Analysis and Efficiency Defense

If the analysis of market shares and other market characteristics that a proposed merger will not give rise to a significant competitive problem, one can conclude that the merger will not harm competition and consumers. An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger.[335]

But if a significant competitive problem is predicted by the preceding stages of analysis, then one must conduct another stage of review to predict correctly whether a proposed merger will benefit or harm consumers. Simply put, a merger that is expected to give the merging parties the ability to raise prices profitably might nonetheless lead to greater social welfare and, eventually, to lower prices and/or better products over time if the merger gives rise to sufficient cost savings of the right sort.[336] Under the U.S. Merger Guidelines' approach, cost savings count as efficiencies if they are merger-specific and are

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[335] The U.S. Merger Guidelines, § 4.24.

[336] Williamson, Oliver E., "Economies as an antitrust defense: the welfare trade-offs," American Economic Review 58, p.18-36 (1968).

passed on to consumers.[337] Efficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected.[338]

Efficiencies claimed in relation to high innovation markets would be roughly the same as those encountered in mergers in more static markets. The main difference would be that efficiencies related to the innovative process could prove to be both more important and difficult to assess than efficiencies related to existing products. They are more important because of their on-going nature.

Difficult efficiency issues could also arise when a merger facilitates the adoption of a standard. Whether or not such an effect should be counted as efficiency would depend on two factors: would the standard tend to promote or reduce competition; and are there are less anticompetitive means of achieving the same result.[339]

In the vertical merger context, efficiency analysis is typically more difficult. Some have argued that efficiencies may be intrinsic to most vertical transactions. Undoubtedly there are efficiencies from coordination between levels in the functional chain, but that ignores the question of how much of those efficiencies can be achieved by the parties short of the merger. Despite these difficulties, it remains true that certain types of plausible efficiencies can come out of a vertical merger that are completely absent in the horizontal merger context. First, a vertical merger can reduce transaction costs. It eliminates the necessity for negotiation and execution of contracts, reduces associated risk and uncertainty, discourage opportunism, and facilitates the communication of information. A second and related efficiency is improved coordination of design, production, and distribution. Finally, a vertical merger may promote more efficient pricing through internalizing external pricing decisions[340] or by elimination of double-markup.

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[337] The U.S. Merger Guidelines, § 4.0.

[338] The U.S. Merger Guidelines, § 4.0.

[339] OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, "Merger Review in Emerging High Innovation Markets," p.28 (2003).

[340] "Internalizing the externality" recognizes that an integrated producer of two complements may find that its profit maximizing price for the sale of both products to be different (and lower) than the two profit maximizing prices for the products if sold by independent firms. For example, an integrated producer of a personal computer and associated peripheral equipment with monopoly power in both markets will likely sell

4.4 Double Mark-up as Efficiency Defense

Before describing specific theories of competitive effects in the vertical context, it is useful to consider two concepts that have frequently been used only a single monopoly rent in any chain of production and distribution. This theory says, very simply, that a monopolist at any stage in a multistage production and distribution chain can extract all the surplus out of that chain. Therefore, the theory posits, the addition of a second monopolist to that chain-or the extension of monopoly power into a second market by vertical merger-would not result in an output reduction to the ultimate consumers. Although the theory is useful as a first order model, the model works only under certain circumstances. First, the monopolist's output must be used by its downstream customers in fixed proportions: otherwise, the downstream customers could switch to another mix of inputs. Second, the model assumes that the single monopolist has exercised all available market power at its functional level. If not, and a vertical merger increases the monopolist's ability to exercise market power (perhaps through raised entry barriers), that merger may reduce welfare. The model also assumes perfect competition downstream, without which considerations of double marginalization and price discrimination come into play. Additionally, it assumes a lack of any constraining regulation.

There conditions make practical application of the single monopoly rent model far from universal. Moreover, the model is essentially static. It does not consider how vertical integration may affect incentives and abilities to invent. Additionally, it assumes that under practical conditions a monopolist has the information and ability to extract all available rents, even if there are several layers downstream. The complexities of the real world make this proposition often seem implausible.

4.5 Efficiency Defense in the US Legal System

4.51 Evolution of US Policies

Among the different steps that are necessary for the evaluation of a merger (identification of the relevant products and geographic markets,

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the peripherals at a lower price than an independent firm would sell the same equipment to increase demand for the integrated system.

assessment of the market shares, etc...), there is one that must be particularly underlined as being emphasized in the U.S., which is the evaluation of efficiencies.

In certain competition enforcement regimes it is recognized that a merger that may have significant anti-competitive effects should nevertheless be permitted if it also would result in improvements in efficiency that are greater than the anti-competitive effects of the transaction. In practice, efficiencies are usually relevant in merger analysis only when there is concern that the transaction is otherwise anti-competitive.

Both in the EU and the US legal system have been concerned with the question of the extent to which efficiency claims should be allowed in defense of mergers. Today in the US efficiency claims constitute a factor that must be weighed when appraising the effects of a merger. However, US policy has considerably changed over the years. For example, in the case FTC v. Procter and Gamble Co. (1967),[341] the Supreme Court stated "possible economies cannot be used as defense against illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

The current framework for analyzing efficiencies is set forth in the US 1992 joint Horizontal Merger Guidelines, as revised in 1997. The agencies recognized that "the primary benefit of mergers to the economy is their potential to generate such efficiencies." In assessing the impact of efficiencies, the agencies must consider only those efficiencies that are "merger-specific" and "cognizable". "Merger-specific" efficiencies are those that are realizable only through the proposed merger. "cognizable efficiencies" are merger-specific efficiencies that "have been verified and do not arise from the anti-competitive reductions in output or service". They include, for example, achieving economies of scale, better integration of production facilities, lower transportation costs, improvement of quality...etc. When cognizable, merger-specific efficiencies exist, the agencies require them to be passed on to the consumer, and eventually to be sufficient to reverse the merger's

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[341] FTC v. Procter and Gamble Co., 386 U.S. 568, 580 (1967); Brown Shoe Co. v. United States.

potential anti-competitive effects.[342]

The taking into account of efficiencies is limited to the fact that they may almost never justify a merger to monopoly. The difference with the EU is therefore strong where the EC Merger Regulation states that "efficiencies are assumed for all mergers up to the limit of dominance."

Concerning vertical mergers, even though the appraisal is similar, the Non-Horizontal Merger Guidelines give the efficiency defense a greater importance than in the case of horizontal mergers. These guidelines indicate that "an extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger."[343]

4.6 Efficiency Defense in the EU Legal System

4.61 Evolution of EU Policy

The history of the control of concentration in the E.U. is much shorter than the U.S., as no legal instrument allowing the Commission to control systematically this type of operation existed before 1989, when the Council adopted the Merger Regulation. Under this Regulation, a concentration is authorized if it does not create or strengthen a dominant position as result of which effective competition would be significantly impeded.[344] This test is known as the dominance test.

Even though the Commission experience is shorter it is possible to analyze the evolution over the time of the EU policy approach with regard to vertical aspects of concentrations. The experience that the Commission has gained in this area permits to compare its approach with that of the U.S.

For example, it can be noted that the merger legislation focuses almost as much on vertical aspects as on horizontal aspects. For instance, the information requirements imposed on the notifying parties cover explicitly and quite extensively and vertical and horizontal relations

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[342] US Horizontal Merger Guidelines, § 3.5.
[343] The 1992 U.S. Merger Guidelines, § 4.24.
[344] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Article 2.

between the parties.[345] Moreover, vertical aspects are among the main concerns of the Merger Regulation. Article 2 shows that foreclosure is the central issue in the approach of the E.U. to vertical aspects of mergers. It indicates that, when the Commission makes its appraisal of the transaction, it must take into account "the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry..."[346]

In the 21st Annual Competition Report in 1991, the Commission has made its first policy statement with regard to vertical integration. It considered that the main area of concern is the conditions of access to inputs and outlets and the risk that the merged entity might affect these conditions through vertical integration. By restricting the access to inputs or to downstream outlets, the merged entity might become dominant or reinforce its dominance. Therefore, the Commission concern is placed within the traditional approach to the exclusionary effects resulting from a vertical merger, but only in so far as these effects might create or reinforce a dominant position. The creation or strengthening of a dominant position is, indeed, the only relevant test in assessing a merger in the EU. The prevailing of this test in the EU has a direct consequence on the EU approach to the efficiency doctrine.

In the case Aerospatiale-Alenia/De Havilland in 1991,[347] the Commission addressed the question of efficiency for the first time. However, it did not decide whether it would admit the efficiency defense in the EU merger control as it just dismissed the existence of the efficiencies alleged by the parties. The Commission considered, indeed, that "without prejudice as to whether such consideration are relevant for assessment under Article 2 of the Merger Regulation", the costs reductions concerned were of little magnitude in relation to the total turnover of the merged entity and that it was unclear whether those costs savings were attributable to the merger.

Later, in 1994, in the MSG Media Service case,[348] the Commission

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[345] See Form CO relating to the Notification of a concentration.
[346] EU Merger Regulation 139/2004, Article 2, (1)(b).
[347] COMP M. 53, OJ L 334/42 (1991).
[348] COMP M. 469, OJ L 364/1 (1994).

rejected more clearly the efficiency defense argument advanced by the parties. In this case the parties point out that the rapid acceptance of digital television will be promoted by the services offered by MSG. The Commission agreed to this proposal that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress. However, the Commission considered that "the reference to this criterion in Article 2(1)(b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition".

Furthermore, the Commission made it clear in a Commission Policy Roundtable of the OECD that "there is no real legal possibility of justifying an efficiency defense under the Merger Regulation. Efficiencies are assumed for all mergers up to the limit of dominance- "the concentration privilege." Any efficiency issues are considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited."[349]

In conclusion, in the EU legal system, the text of the Merger Regulation and the case law suggested that the Commission is not prepared to balance efficiencies with dominance, they rather reveal that the maintenance and preservation of competitive markets prevail over any other considerations, including economic efficiency.

In 2004, the Council of EU amended the EC Merger Regulation, and, after vigorous discussion, provided that "in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."[350] And added that "the Commission should publish

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[349] OECD/GD 65 "Efficiency claims in Mergers and other Horizontal Agreements." (1996).

[350] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of

guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration." According to this provision, in 2004, EU Commission issued Guidelines on the assessment of horizontal mergers in which made clear that "...it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have..."[351]

As above mentioned, the EU Commission has launched, on 13 February 2007, a public consultation on draft Commission Guidelines on the assessment of non-horizontal mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Merger Regulation and "the Guidelines" respectively). On 28th November 2007, EU Commission adopts Guidelines for merging companies with vertical and conglomerate relationship (IP/07/1780). Also in this guidelines, it is provided that "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."[352] And further, it is added in detail that "the Commission may decide that, as a consequence of the efficiencies that the merger brings about, there are no ground 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 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."[353]

Further, there is clauses that "in particular, a vertical merger allows the merged entity to internalize any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger. Depending on the market conditions, reducing the combined mark-up

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concentrations between undertakings (the EC Merger Regulation), recital (29).

[351] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, VII.

[352] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, IV(28).

[353] Id. IV (52).

(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."[354]

Concerned on innovation market approach, there is made clear that "effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation...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..."[355] And added that "...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." Then with this provision EU Commission makes clear that innovation will be very important key factors in case evaluating welfare-enhancing competitive effects.

Finally, EU non-horizontal merger guidelines are announcing very critical viewpoint for dynamic approaches in vertical merger analysis. In paragraph 56 and 57 they are providing that "a vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs." "More generally, a vertical merger may align the incentive of the parties with regard to investments in new products, new production processes and in the marketing of products..."

4.7 Comment on Efficiency Defense System

The current framework for analyzing efficiencies is set forth in the US 1992 joint Horizontal Merger Guidelines, as revised in 1997. The agencies recognized that "the primary benefit of mergers to the economy is their potential to generate such efficiencies."

Concerning vertical mergers, even though the appraisal is similar, the Non-Horizontal Merger Guidelines give the efficiency defense a greater importance than in the case of horizontal mergers. These

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[354] Id. IV (55).

[355] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, II. § 10 (2007).

guidelines indicate that "an extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger."[356]

EU Guidelines on the assessment of horizontal mergers provide one very important clause for dynamic analysis in the New Economy. It provide that "in markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two competitors with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products."[357]

New EU Guidelines on the assessment of non-horizontal mergers provide that "Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. (...) 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."[358] Finally, EU non-horizontal merger guidelines are announcing very critical viewpoint for dynamic approaches in vertical merger analysis. In paragraph 56 and 57 they are providing that "a vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs." "More generally, a vertical merger may align the incentive of the parties with regard to investments in new products, new production processes and in the marketing of products..."

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[356] The 1992 U.S. Merger Guidelines, § 4.24.
[357] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, (2004/C 31/03), § 38.
[358] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.

As above mentioned, US and EU legal system adopted efficiency defense in case they assess competitive effects of vertical mergers. But there are two fundament barriers that prevent efficiencies from being adequately considered. First, both legal system have adopted an approach that is based on a static consumer welfare model, which means that the principal concern of a merger is its short run effect on price. Although such a model can be inclusive of productive and allocative efficiencies, it often precludes consideration of dynamic efficiencies and transactional efficiencies as part of the initial analysis. Then, the courts and agencies proceed by assuming that price varies directly with market concentration despite the fact that studies show that this is often not true. Once concentration reaches a certain point, mergers are often presumed to have an anticompetitive price effect. Modern economics demonstrates that focusing solely on concentration oversimplifies price theory and can result in an inaccurate prediction.

Since it often ignores dynamic efficiencies as part of its presumption, the current framework for considering efficiencies should be changed. The courts and agencies should continue to consider efficiencies on a case by case basis, but several analytical changes are needed. The big presumption on concentration should be eliminated. Market concentration should be considered, but only as one factor in balancing the competitive effects. Second, the long run benefits of dynamic competition should be given more weight when balanced against short run price increases. Indeed, individual characteristics of a given market can make the market more conducive to long run dynamic competition despite high market concentration.

Of course US and EU legal system has minimal clauses about dynamic efficiency considerations, but in rapidly changing high-tech industries, the courts and agencies should analyze competitive effects of vertical mergers case-by-case basis depending on long-run consumer welfare basis. Then, it will possible to accumulate guidelines clauses to evaluate some more precisely vertical competitive effects. Vertical merger of high-tech industries basically contains paradoxically pro-competitive and anti-competitive characters. Thus, it will be very difficult to extract simple and general common rules to cover majority of cases.

5. Comment on Overall Competitive Effects Analysis

Evaluating mergers in dynamic and innovation markets presents challenges to traditional antitrust theories. Vertical integrations are usually mergers of non-competing companies where one's product is a necessary component or complement of the other's. Such mergers mainly achieve pro-competitive efficiency benefits. Vertical integration can lower transaction costs, lead to synergistic improvements in design, production and distribution of the final output product and thus enhance competition. Consequently, most vertical arrangements raise few competitive concerns. However, as reflected in the 1984 US Merger Guidelines, some vertical acquisitions can be anticompetitive. Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising rival's costs and reducing innovation and product quality for consumers.

Competition in high-tech industries involves sequences of races to develop a new product or to replace an existing product through drastic innovation. In the initial race, firms invest heavily to develop a product that create a new category or becomes an early leader in a new category. Winners get large market shares, high profits, for a while. While network effects tend to reinforce leadership position, in many high-tech industries there are sequential races for market leadership. Major innovations occur repeatedly, and switching costs and lock-in do not prevent displacement of leaders by better products.[359] Thus, vertical merger in high-tech industries have very extreme pro-competitive and anti-competitive factors. Winners in innovative race take dominant or monopoly position and reinforce that position with network effects or high switching costs or lock-in effects of customers.

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[359]David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

Consequently, in case we are evaluating competitive effects of vertical merger in the high-tech industries, we should consider of various paradoxical extremely pro-competitive and anti-competitive factors which deriving from vertical mergers. Sometimes that work will be very complex and ambiguous and need harmonious academic and practical support from economists, lawyers, and antitrust agencies.

The central issue that arises when this analysis is undertaken in a dynamic market originates from the relative instability, over time, of the markets concerned and the possibility of competition concerns relating to products yet to be introduced. If the scope of the relevant market is expected to change significantly over time due to changes in product's characteristics, or if nature of competition in that market is expected to change, analysis of competition in current relevant markets is unlikely to be a reliable indicator of competition in the future. If a merger creates dominant position or monopoly and impedes competition on a current relevant market, is this dominant or monopoly position likely to remain in the future? Conversely, if a merger appears innocuous on current markets, is there still an impediment to competition in a future market?

To address the instability problem of relevant markets, we suggest that a forward-looking consideration of their evolution is possible on the basis of the identification of some broad techno-economic trends. This assessment would be based on analysis of technological changes and need for a consideration of broad market trends that would affect the products expected to compete in the market and the evolution of consumer's substitution patterns.

Antitrust analysis traditionally pays particular attention to whether any firms have significant market shares. However, the specific characteristics of New Economy industries make it doubtful that the traditional approach is still justified. In the context of high-tech industries, a more dynamic analysis rather appears to be the best answer in order to assess the competitive forces of the markets concerned and to ensure and maintain effective competition between the players.

To cover these problem, US and EU legal basis is too weak and as I mentioned above, because of special characteristics of innovation industries, it is not so easy to make simple and general legal standards. Economists and layers have prepared for this projects already long time

and the courts and antitrust agencies also accumulated cases. EU Commission guidelines on market analysis and the assessment of significant market power for electronic communications networks and services[360] show good directions to solve these problems. Of course this guidelines apply only for limited sector-specific areas but it can be applied similar cases with extended interpretation or it can be good models in case we will legislate or amend general vertical merger regulation.

For assessment of market power this guidelines takes dynamic competition approaches. It is providing that "it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others: (a) overall size of the undertaking, (2) control of infrastructure not easily duplicated, (c) technological advantages or superiority, (d) absence of low countervailing buying power, (e) easy or privileged access to capital markets/financial resources, (f) product/services diversification (e.g. bundled products or services), (g) economies of scale, (h) economies of scope, (i) vertical integration, (j) a highly developed distribution and scale network, (k) absence of potential competition, (l) barriers to expansion."[361] Especially, for assessment of vertical merger, (i)(j)(l) will be very important factors.

Further, it is providing that "...barriers to entry exist where entry into the relevant requires large investments and the programming of capacities over a long time in order to be profitable. However, high

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[360] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

[361] EU Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), §3.1, (78).

barriers to entry may become less relevant with regard to markets characterized by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective, forward-looking approach."[362]

There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects. Non-coordinated effects may principally arise when non-horizontal mergers give rise to "foreclosure". 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 charged to consumers.

High tech industries are typically characterised by high levels of product differentiation and dramatic shifts in firms' market positions. Thus traditional market definition analysis, which studies constraints on firms' price-output decisions, can present a seriously misleading picture of competitive relations in the new economy. Successful incumbents in Schumpeterian industries are constrained primarily by dynamic competition: by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent's product to collapse. The new product may be just a vastly better version of the old product, or it may be an entirely different product that eliminates the demand for the old product and network effects are often effective barriers to the entry of comparable products.

As a result, a proper market-power inquiry in the new economy must include a serious analysis of the vigor of dynamic competition. It is important, for example, to examine ownership of and investment in relevant intellectual property-which may involve technologies not currently in commercial use. If, for instance, the current market leader owns all intellectual property necessary for radical innovation, dynamic

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[362] Id., § 3.1, (80).

competition will not be effective.

The 1995 Intellectual Property Guidelines in the US introduced the concept of an "innovation market" as an analytical tool to consider the competitive effects on innovation and R&D, rather than a factor of "efficiency defense" in EU.[363]

Both the innovation markets and the efficiency defense approach are aimed at including innovation concerns in merger assessment. The path followed to reach the same objective is however different in, at least, two main aspects. First, innovation market approach focuses on a specific market, "the market of innovation". In practical terms, this is translated into looking at the efforts of the merger on the R&D activities. As R&D represents an input for innovation, the output market is not anymore the core of the authorities' analysis. On the other side, EU's "efficiency defense" focuses on the output market of innovation considering mainly the potential effects of the transaction on new or improved products or processes. Second, the scope of the efficiency defense is to allow transactions that would have been otherwise blocked because of the associated anticompetitive effects on the market. The scope of "the innovation market" approach seems to be, on the contrary, to block mergers that could have a negative impact on the competition in innovation.[364]

In a world of rapid technological advance, it is important that antitrust law pay greater attention to innovation issues. By assigning innovation an important role in merger analysis, the innovation markets approach will aid antitrust authorities to adopt a more dynamic perspective.

New EU Guidelines on the assessment of non-horizontal mergers provide that "effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. (...) An "increase in market power" in this context refers to the ability of one or more firms to profitably increase prices, reduce

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[363] US Department of Justice and Federal Trade Commission, "Anti-trust guidelines for the licensing of Intellectual Property," April 6 1995.

[364] Elena Cefis, Mark Grondsma, Anna Sabidussi, Hans Schenk, "The Role of Innovation in Merger Policy: Europe's Efficiency Defence versus America's Innovation Markets Approach," Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Discussion Paper Series nr: 07-21, p.22 (2007).

output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition."[365] With this clauses, the Commission made clear their viewpoint that when they assess competitive effects of vertical merger, they will assess competitive effects with dynamic approaches not only with static price effects but also with diverse factors such as high quality products, a wide selection of goods and services, and innovation. Further more it means that they will consider about how concerned merger will affect for "innovation" itself. It means the Commission made clear that when they analyze competitive effects of vertical mergers, they will consider about not only how merged high-tech industry will affect product market competition but also how they will affect future's "innovation competition" itself.

With non-horizontal merger guidelines, EU vertical merger regulation system is comparatively very well established. Even though if is not enough to cover rapidly changing trends, at least we can find several clauses of dynamic approaches. Among EU DG commission and DOJ cases, we can find easily dynamic approaches concerned with vertical mergers in the New Economy. Thus, I think, at first, EU Commission should collect concerned cases and step-by-step fill in and amend non-horizontal merger guidelines. After these cases is accumulated, we can extract some general common rules. As I mentioned above, because vertical mergers in the new economy contains extremely pro-competitive and anti-competitive characters, it will be better to concentrate on amending non-horizontal merger guidelines in detail and case-by-case. Sometimes that work will be very complex and ambiguous and need harmonious academic and practical support from economists, layers, and antitrust agencies. EU Commission guidelines for electronic communications networks and services will be very helpful in solving practical cases and in preparing improved vertical merger guidelines.

Under US antitrust law, academically legal and economic approaches are discussed comparatively long time and have changed viewpoints on competitive effects of vertical mergers-"Chicago School"

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[365] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.

and "post-Chicago school". And through FTC and DOJ, there are already many cases are accumulated concerned with non-horizontal mergers in the new economy. After amendment 1984 US Horizontal merger guidelines, US non-horizontal merger guidelines were put aside long time quietly, because FTC and DOJ influenced with "Chicago School" theories challenged vertical mergers very few. And traditionally American Congress let this task solve antitrust agencies and DOJ by case-by-case so far. Thus, US non-horizontal merger guidelines are not enough to show the ways for antitrust agencies, firms, consumers to predict future. As above mentioned, it is will be needed to fill in current non-horizontal merger guidelines by new dynamic approaches and rules which is extracted from each special cases. I think they don't need to amend Sherman Act or Clayton Act; it can be interpreted flexibly to adjust new changing trends.

Consequently, the US and EU horizontal and non-horizontal merger regulation need to be amended minimally as following directions: there need clauses of (a) indicating "innovation market" concepts, (b) accepting dynamic and practical dominant position or market power assessment, (c) in case of assessing competitive effects, agencies evaluate not only about price effects, but the other diverse dynamic competitive effects with long-run viewpoint about future's markets, e.g. products quality, a wide selection of goods and services, innovation, etc. (d) protecting competitor's access to 'essential facility', (e) accepting "dynamic efficiency" defense.

X. Vertical Merger Guidelines in the US and EU

1. US Non-horizontal Merger Guidelines

The 1968 Department of Justice Merger Guidelines, which contained separate sections analyzing the possible anticompetitive consequences of horizontal, vertical, and conglomerate mergers. With respect to vertical acquisitions, the 1968 Guidelines stated anticompetitive consequences could result "whenever a particular vertical acquisition, or series of acquisitions, by one or more of the firms in a supplying or purchasing market, tends significantly to raise barriers to entry in either market or to disadvantage existing non-integrated or partly integrated firms in either market in ways unrelated to economic efficiency."

In the 1982 revision of the Merger Guidelines, the Department of Justice took an economic approach to merger policy that eliminate the traditional horizontal, vertical, conglomerate organizational framework in favor of a horizontal/non-horizontal classification. Its 1982 Guidelines, and the 1984 amendments, both view the protection of consumer welfare through the enhancement of economic efficiency of firms and markets to the sole concern of antitrust law.[366]

Given this approach, it is not surprising that the Guidelines depart from most of the vertical and conglomerate merger precedents. The Guidelines begin with the proposition that because, "by definition, non-horizontal mergers involve firms that do not operate in the same market. It necessarily follows that such mergers produce no immediate change in the level of concentration in any relevant market as defined in Section 2 of these Guidelines..."[367] From this the Guidelines observe that non-horizontal mergers are less likely than horizontal mergers to create competitive problem.

Nonetheless, the Guidelines recognize that non-horizontal mergers

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[366] Wayne D. Collins and James R. Loftis, III, Non-Horizontal Mergers: Law and Policy, American Bar Association Section of Antitrust Law, Monograph 14, p. 37-38 (1988).
[367] U.S. Department of Justice Merger Guidelines (1984), § 4.0.

are not "invariably innocuous."[368] They can be unlawful to the extent they (1) eliminate specific potential entrants,[369] (2) create "competitively objectionable barriers to entry,"[370] (3) facilitate collusion,[371] or, (4) in the instance of vertical acquisitions involving both regulated industries and non-regulated industries, create substantial opportunities for evasion of rate regulation.[372] As with horizontal mergers, the Guidelines specify that the creation of efficiencies will be evaluated in connection with non-horizontal mergers.[373]

1.1 Barriers to Entry from Vertical Mergers

In certain circumstances, the vertical integration resulting from vertical mergers could create competitively objectionable barriers to entry. Stated generally, three conditions are necessary (but not sufficient) for this problem to exist. First, the degree of vertical integration between the two markets must be so extensive that entrants to one market (the "primary market") also would have to enter the other market (the "secondary market") simultaneously. Second, the requirement of entry at the secondary level must make entry at the primary level significantly more difficult and less likely to occur. Finally, the structure and other characteristics of the primary market must be otherwise so conducive to noncompetitive performance that the increased difficulty of entry is likely to affect its performance. The following standards state the criteria by which the Department will determine whether these conditions are satisfied.[374] Barriers to entry are unlikely to affect performance if the structure of the primary market is otherwise not conducive to monopolization or collusion. The Department is unlikely to challenge a merger on this ground unless overall concentration of the primary market is above 1800 HHI (a somewhat lower concentration will suffice if one or more of the factors discussed in Section 3.4 indicate that

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[368] Id. at § 4.0.
[369] Id. at § 4.1
[370] Id. at § 4.21.
[371] Id. at § 4.22.
[372] Id. at § 4.23.
[373] Id. at § 4.24.
[374] 1984 U.S Vertical Merger Guidelines, § 4.21.

effective collusion is particularly likely). Above that threshold, the Department is increasingly likely to challenge a merger that meets the other criteria set forth above as the concentration increases.[375]

1.2 Vertical Integration to the Retail Level

A high level of vertical integration by upstream firms into the associated retail market may facilitate collusion in the upstream market by making it easier to monitor price. Retail prices are generally more visible than prices in upstream markets, and vertical mergers may increase the level of vertical integration to the point at which the monitoring effect becomes significant. Adverse competitive consequences are unlikely unless the upstream market is generally conducive to collusion and a large percentage of the products produced there are sold through vertically integrated retail outlets.[376] The Department is unlikely to challenge a merger on this ground unless 1) overall concentration of the upstream market is above 1800 HHI (a somewhat lower concentration will suffice if one or more of the factors discussed in Section 3.4 indicate that effective collusion is particularly likely), and 2) a large percentage of the upstream product would be sold through vertically-integrated retail outlets after the merger. Where the stated thresholds are met or exceeded, the Department's decision whether to challenge a merger on this ground will depend upon an individual evaluation of its likely competitive effect.[377]

1.3 Elimination of a Disruptive Buyer

The elimination by vertical merger of a particularly disruptive buyer in a downstream market may facilitate collusion in the upstream market. If upstream firms view sales to a particular buyer as sufficiently important, they may deviate from the terms of a collusive agreement in an effort to secure that business, thereby disrupting the operation of the agreement. The merger of such a buyer with an upstream firm may

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[375] 1984 U.S Vertical Merger Guidelines, § 4.213.
[376] 1984 U.S Vertical Merger Guidelines, § 4.221.
[377] 1984 U.S Vertical Merger Guidelines, § 4.221.

eliminate that rivalry, making it easier for the upstream firms to collude effectively. Adverse competitive consequences are unlikely unless the upstream market is generally conducive to collusion and the disruptive firm is significantly more attractive to sellers than the other firms in its market. The Department is unlikely to challenge a merger on this ground unless 1) overall concentration of the upstream market is 1800 HHI or above (a somewhat lower concentration will suffice if one or more of the factors discussed in Section 3.4 indicate that effective collusion is particularly likely), and 2) the allegedly disruptive firm differs substantially in volume of purchases or other relevant characteristics from the other firms in its market. Where the stated thresholds are met or exceeded, the Department's decision whether to challenge a merger on this ground will depend upon an individual evaluation of its likely competitive effect.[378]

1.4 Evasion of Rate Regulation

Non-horizontal mergers may be used by monopoly public utilities subject to rate regulation as a tool for circumventing that regulation. The clearest example is the acquisition by a regulated utility of a supplier of its fixed or variable inputs. After the merger, the utility would be selling to itself and might be able arbitrarily to inflate the prices of internal transactions. Regulators may have great difficulty in policing these practices, particularly if there is no independent market for the product (or service) purchased from the affiliate. As a result, inflated prices could be passed along to consumers as "legitimate" costs. In extreme cases, the regulated firm may effectively preempt the adjacent market, perhaps for the purpose of suppressing observable market transactions, and may distort resource allocation in that adjacent market as well as in the regulated market. In such cases, however, the Department recognizes that genuine economies of integration may be involved. The Department will consider challenging mergers that create substantial opportunities for such abuses.[379]

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[378] 1984 U.S Vertical Merger Guidelines, § 4.222.
[379] 1984 U.S Vertical Merger Guidelines, § 4.23.

1.5 Efficiencies

As in the case of horizontal mergers, the Department will consider expected efficiencies in determining whether to challenge a vertical merger. An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger.[380]

2. EU Commission Guidelines on the Assessment of Non-horizontal Mergers

2.1 Introduction

The Commission has launched, on 13 February 2007, a public consultation on draft Commission Guidelines on the assessment of non-horizontal mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Merger Regulation and "the Draft Guidelines" respectively). On 28th November 2007, EU Commission adopts Guidelines for merging companies with vertical and conglomerate relationship (IP/07/1780).

The general guidance given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of this Guidelines 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 the this context.[381] The Guidelines provide examples, based on established economic principles, of where vertical and conglomerate mergers may significantly impede effective competition in the markets concerned. For instance, they outline the circumstances under which a vertical merger could be likely to result in competing companies being denied access to an important supplier or facing increased prices for their inputs and thus ultimately lead to higher

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[380] 1984 U.S Vertical Merger Guidelines, § 4.24.

[381] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 6.

prices for consumers.[382]

The guidance set out in this document draws and elaborates on the Commission's evolving experience with the appraisal of non-horizontal mergers under Regulation No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases.[383]

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.[384]

2.2 General Framework

The Guidelines' general discussion of non-horizontal mergers in any event goes a long way towards addressing the main criticisms of past Commission practices, as well as certain popular misconceptions that appear to have arisen in this regard. Key statements of basic principles include the following: First, non-horizontal mergers "are generally less likely to create competition concerns than horizontal mergers (para. 11). Second, non-horizontal mergers "provide substantial scope for efficiencies, (para. 13). For example, vertical mergers can replace the monopoly profits of two firms at two different stages of product with a lower internalized mark-up of a single, integrated firm. There may also be transaction cost savings and better planning of production and distribution. Third, it can be presumed that non-horizontal mergers pose no threat unless the merged entity has market power. As a rebuttable presumption, the Guidelines state that the

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[382] EU Commission Press Release (IP/07/1780), Brussel, 28th November 2007.

[383] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 8.

[384] Draft Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 9.

Commission in unlikely to take action where the post-merger share in each of the markets concerned is below 30% and the post-merger Hirschman-Herfindahl Index is below 2000 (para. 25). Fourth, the ultimate concern in non-horizontal mergers is harm to consumers, whether intermediate or final consumers (para. 16). The fact that a merger affects competitors is not in and of itself a problem. Finally, strategic conduct carried out in response to a non-horizontal merger (e.g. tying and bundling) may be efficient in many cases (para. 92).

2.3 The Approach to Vertical Mergers

As the guidelines acknowledge, by virtue of bringing together complementary rather than substitutable products, non-horizontal mergers-whether vertical or conglomerate - give rise to substantial scope for cost and price efficiencies and are therefore predominantly pro-competitive.

However, non-horizontal mergers may under certain particular circumstances give rise to anti-competitive outcomes. The guidelines state that 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.[385] The primary competitive concern in these cases arises where the merger denies the ability of rival firms to compete to such an extent that they are marginalized or driven from the market altogether. In such circumstances, a non-horizontal merger might result in increased prices through this foreclosure effect.

In its discussion of the competition problems that can arise from vertical mergers, the Commission distinguishes between cases involving: (1) issues of unilateral effects resulting from foreclosure of rivals by the merged entity and (2) issues of coordinated effects between the merged entity and rivals.

The Guidelines also distinguish between two forms of vertical foreclosure: (1) input foreclosure and (2) customer foreclosure. Input foreclosure arises where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input that is

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[385] Draft Guidelines para. 15.

owned or controlled by the merged entity. In contrast, customer foreclosure relates to the opposite situation where the merger is likely to foreclosure upstream rivals by restricting their access to a sufficient customer base (para. 29). Both forms of foreclosure essentially rely on the same underlying theory-that limiting rival's access to inputs or customers can increase their costs and, if the foreclosure is extensive enough, may lead to price increases.

In its assessment, the Commission will consider both the possible anti-competitive effects arising from vertical mergers and the pro-competitive effects stemming from efficiencies identified and substantiated by the parties (para. 27). But it is important to recognize that short-run effects that harm competitors also bring direct benefits to consumers. The analysis of potential anti-competitive effects must therefore carefully specify the conditions that give rise to the purported outcome, and must go beyond a mere theoretical assessment by accounting for observed industry characteristics and behavior. This Brief presents some suggested changes to the guidelines that we believe would bring them more into line with established economic analysis and clarify how the potential anti-competitive effects of non-horizontal mergers can be assessed in practice.[386]

2.31 Foreclosure

Guidelines distinguish two kinds of anti-competitive foreclosure. 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).

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 (para. 31).

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[386] RBB Brief 22, "(Fore)closing the Gap: The Commission's Draft Non-horizontal Merger Guidelines", RBB Economics, July 2007.

A. Ability to foreclose access to inputs

For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have market power in the upstream market, whereby it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality (para. 34). The foreclosure must concern an important input, for example, where the input represents a significant cost factor, the input constitutes a critical component without which the downstream product cannot be manufactured or sold, the input represents significant source of product differentiation, or the cost of switching to alternative inputs is relatively high (para. 33).

In customer foreclosure cases, the vertical merger must involve an undertaking that is an important customer in the downstream market. This depends on whether there are sufficient economic alternative in the downstream market for the upstream rivals to sell their products. It there is a sufficiently large customer base that is likely to turn to independent suppliers, competition concerns are unlikely to arise (para. 60). An important clarification in this connection is that upstream rival's ability to compete can only be impaired if there are significant economies of scale or scope in the input market (para. 61). If there are such economies, denying upstream producers access to important downstream customers can increase their costs of production and so lead to price increases.

B. Incentive to foreclose access to inputs

As with vertical mergers, the issue of incentive to foreclosure is said by the Guidelines to turn on the degree to which the tying, bundling or other exclusionary strategy is profitable (para. 104). Tying, bundling, or other strategies may involve some loss of business (e.g. if enough customers still wish to purchase stand-alone products), but there may also be gains in market share or price increases. In considering the incentives to engage in strategic conduct, the Guidelines state that the relative sizes and profitability of the tied and tying markets (if the latter is more profitable that the former, a tying strategy may not make sense) and the possibility that the conduct itself could be unlawful (if the conduct is clearly unlawful and easily detectable, the incentives to carry it out are much less) are important factors (para 106-108).

C. Adverse effect on competition

The Guidelines state that merely reducing rival's sales does not in itself harm competition (para. 109). Instead, there must be a sufficiently large reduction in competition to allow the merged entity to raise prices, e.g., a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition (para. 111). The conditions required for non-horizontal mergers to harm competition through foreclosure are as follows:

- As a result of the merger, competing suppliers will lose volumes to the merged party and as a result are marginalized. It is important to be clear as to what is meant by the marginalisation of competitors. For example, where a non-horizontal merger causes the merged entity to reduce its prices, this will adversely affect competitors in the sense that they will find it harder to make sales at the margins that prevailed prior to the price reduction. But, as noted above, price reductions are almost always to be welcomed as pro-competitive. A price reduction can be said to marginalize competitors only if, at any given price level, the competitive constraint provided by rivals were to be reduced following that (temporary) reduction. Similarly, the loss of access to suppliers or customers will only marginalize a competitor if it adversely affects pricing decisions, by, for example, leading to an increase in short-run marginal costs.

- Rival suppliers to the merging parties will find it unattractive or impractical to respond by adopting a similar strategy (or "counter strategy") that reduces the impact of the merged party's actions. By merging with other firms or by arriving at equivalent contractual arrangements (so-called "teaming arrangements"), the rival suppliers may be able to deploy strategies that diminish or eliminate the competitive advantages of the hypothesized strategy (e.g. bundling or raising rivals' costs). The act of seeking and implementing such arrangements

will often be an important part of the dynamic competitive process that is sparked by non-horizontal mergers. Where such responses to the merged firm's hypothesized strategy are plausible the competitive concern will be mitigated.

- As a result of the above chain of events, a sufficient number of competitors are marginalized so that competition and consumers are likely to be adversely affected in the long-run. In consequence, prices will increase and customer interests will be harmed. This can only occur if those competitors are marginalized to such an extent so as to significantly affect short-run marginal costs or be forced to withdraw permanently from the market.

2.32 Efficiencies

Guidelines states that "vertical 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. The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive."[387]

3. Overall likely impact on effective competition

The Guidelines generally provide a useful framework for analyzing non-horizontal mergers, as well as being broadly in line with current economic thinking.

4. Comment

Policies that provide useful information and guidance to the marketplace should be based on a concrete understanding of the policies being espoused to ensure that there is no unintended harm. This understanding should reflect economic and judicial concepts that are well

[387] Draft Guidelines, para. 13.

established and well understood, and a broad base of prosecutorial and judicial experience.[388]

There is real convergence in the principles governing the assessment of mergers between competitors in EU and US horizontal merger regulation systems. The same cannot be said for non-horizontal mergers. The EU Commission's guidelines reflect not only a willingness but a determination to challenge non-horizontal mergers which threaten to lessen competition in upstream and downstream markets.[389]

Prior to issuance of the Merger Regulation in 1989 the EU Commission lacked explicit authority to challenge mergers at all (though the Commission did challenge them under Article 85 and 86 despite the recognized shortcoming of those tools). Even under the Merger Regulation (amended in 2004), it is arguable that the Commission's burden of proof when challenging a merger prospectively goes beyond proof of the probability of anti-competitive effects because the Regulation requires the Commission to prove that the transaction "would significantly impede effective competition...."[390]

More fundamentally, non-horizontal mergers are generally alleged to threaten to facilitate conduct that will cripple upstream or downstream rivals- refusals to deal, predatory pricing, tying, bundling, loyalty discounts, etc.[391] Chicago School economists are skeptical whether that type of conduct should be treated as a Sherman Act violation at all. So, insofar as U.S. agencies and courts are indeed influenced by Chicago School economists, it seems doubtful that they are signaling that Sherman Act, rather than Section 7 of the Clayton Act, is the proper statue to look to in order to address concerns respecting non-horizontal

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[388] International Chamber of Commerce, "Comments on the Church Report and its Implications for Non-Horizontal Merger Guidelines", A Report to the European Commission on behalf of the International Chamber of Commerce, 13 September 2006, p. 4.

[389] J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement", at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, September 27-28, 2007.

[390] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), preamble 24.

[391] Tetra Laval BV v. Commission, T-5/02, 2002 ECR II 4381 (CFI), Commission v. Tetra Laval BV, C-12/03P, 2005 ECR I 987 (CJ); General Electric Company v. Commission, T-210/01, 2005 ECR II 5575 (CFI).

mergers.

What is different between the economic basis underlying non-horizontal merger policy in the U.S. and in E.U.?

Let me begin by considering the United States. The 1984 Merger Guidelines were authored under the leadership of Professor (then Assistant Attorney General) William Baxter; General Baxter was a very strong supporter of Chicago School economics, and Chicago School economic thinking is clearly reflected in the 1984 guidelines. Specifically, the guidelines embrace two limited theories of liability for non-horizontal mergers (apart from liability based on the elimination of potential competitors or on the evasion of rate regulation). First, the guidelines posit that non-horizontal mergers may facilitate collusion in either the upstream or downstream market.[392] That theory is consistent with Chicago School economics since collusion is one of the few kinds of conduct that is considered to be inefficient and hence, pernicious. Second, the 1984 guidelines posit that a non-horizontal merger may foreclose competition by creating objectionable barriers to entry in the markets in which the acquired and acquiring firm compete.[393] However, the creation of such entry barriers is recognized as viable threat only in very limited circumstances- namely, (a) when entry into both markets is necessary in order to compete in one of them, and (b) when the non-horizontal merger makes simultaneous entry substantially more difficult.[394] There is no mention in the guidelines of the opportunities and incentives that may exist, post-transaction, for the acquiring firm to engage in conduct that may cripple rivals in upstream or downstream markets- conduct such as refusal to deal, predatory pricing, or various forms of leveraging, such as tying, bundling, loyalty rebates, and exclusive dealing. To the contrary, the guidelines suggest that non-horizontal mergers are almost always efficiency-enhancing.[395]

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[392] Department of Justice, Non-Horizontal Merger Guidelines, § 4.22, 49 Fed. Reg. 26,823 (June 29, 1984).

[393] Department of Justice, Non-Horizontal Merger Guidelines, § 4.25, 49 Fed. Reg. 26,823 (June 29, 1984).

[394] Id. at § 4.211-4.212.

[395] Id. at § 4.0 and 4. 24, "An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a

This view of foreclosure and this expansive view of efficiencies seem to have been embraced by the agencies since 1984, regardless of the party in power, at the agencies, there have been no litigated challenges to non-horizontal mergers since then. There have been a number of consent decree- approximately twenty - where non-horizontal effects, to varying degree, have played a role in the analysis.[396] However, in all of these cases, with one possible exception, the descriptions of liability are consistent with the theories of liability embraced by the 1984 Non-Horizontal Guidelines.[397] Significantly, moreover, in their written submission to the OECD with respect to vertical mergers, the United States federal antitrust enforcement agencies urged explicit endorsement of a presumption that non-horizontal mergers are efficiency-enhancing.[398]

In contrast, the EU Commission's non-horizontal merger guidelines draw heavily from a study of economic theory- particularly post-Chicago economic theory- commissioned by DG Comp in 2004.[399] Reflecting post-Chicago economists, the guidelines expressly posit liability where, post-transaction, the acquiring firm will have the ability and incentive to cripple rivals in upstream and downstream markets by raising their costs and engaging in exclusive dealing, predatory pricing or leveraging. More specifically, the guidelines on the assessment of non-horizontal mergers focus on the likelihood that the conduct (i.e., the transaction in the case of non-horizontal mergers) will foreclose rivals from competing effectively to the disadvantage of consumers.[400] For example, the EU

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horizontal merger."

[396] Since the issuance of the 1984 Merger Guidelines, the agencies have challenged approximately 23 matters based at least in part on non-horizontal theories.

[397] Commission have pointed to recent settlements as evidence that the government has embraced theories of effects beyond those found in the 1984 guidelines.

[398] United States sumission to the Organization for Economic Cooperation & Development "Roundtable on Vertical Mergers", Feb. 15, 2007.

[399] Jeffrey Church, Impact of Vertical and Conglomerate Mergers, 2004.

[400] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, § 29, "A merger is said to result in foreclosure where actual or potential rival's 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

non-horizontal guidelines focus on whether a vertical merger will give the acquiring firm the ability and the incentive to engage in conduct that will disadvantage its rivals- whether that is complete foreclosure or a strategy designed to increase its rivals' costs. Yet foreclosure alone is not enough. The guidelines then ask whether competition – and consumers- will be harmed by the foreclosure.

Furthermore, the EU non-horizontal merger guidelines place the burden on the parties to demonstrate that there are cognizable efficiencies to the conduct that outweigh any potential for harm, rather than presuming that they will exist. And guidelines make it clear that the parties must demonstrate that the efficiencies will benefit consumers. These positions contrast with the official position of the U.S. agencies as reflected in its recent comments to the OECD.[401]

A recent law review article assert that American antitrust enforcement focuses almost exclusively on a merger's impact on price and quality whereas the inquiry in Europe is broader to include all possible detrimental effects on consumer choice.[402] On the contrary, EU's non-horizontal guidelines respecting foreclosure of competitors could be read to assert that efficiencies could not justify exclusionary practices in a highly concentrated industry. [403] Thoes guidelines

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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."

[401] United States sumission to the Organization for Economic Cooperation & Development "Roundtable on Vertical Mergers", Feb. 15, 2007, "(36) Vertical mergers, like horizontal mergers, merit having an unconcentrated market threshold in their assessment. Assessment of vertical mergers differs from that of horizontal mergers, however, in that market power and efficiency issues are typically closely linked for vertical mergers, given the pervasiveness of double-markup problems among vertical relationships at arm's length. A vertical merger's potential for creating efficiencies by eliminating a double markup tends to increase with the market power of each merging party. Even when a vertical merger has the potential for anticompetitive effects, these effects are often offset by the inherent efficiency of mitigating double marginalization. (37) For these reasons vertical mergers generally raise fewer competitive concerns than do horizontal mergers. An overly aggressive enforcement posture toward vertical mergers would run the risk of hindering the ongoing realignment of firm boundaries that is necessary to maintaining an efficient allocation of resources in a dynamic economy."

[402] Neil Averitt & Robert H. Lande, Using the "Consumer Choice" Approach to Antitrust Law, 74 Antitrust L.J. 175, 2007.

[403] J. Thomas Rosch, Commissioner, FTC. Reflections on the DG Competition Discussion

acknowledge that vertical and conglomerate mergers may create efficiencies. However, they also describe a host of instances in which those mergers may harm consumers, notwithstanding the potential for efficiencies.[404]

A significant omission from the EU non-horizontal merger guidelines is the absence of any discussion on how the Commission analyze the effect of a vertical merger on innovation-based industries. This is likely because the Horizontal Merger Guidelines don't lay out an explicit approach how to analyze competitive effects in innovative industries. This should not be surprising. The economic analysis underlying the Merger Guidelines, as well as prior federal merger analysis, focus primarily on price competition, since that is what we know the most about. As a result, guidance on how to analyze competition in innovation for the most part must be borrowed from the price competition discussion.

But, at least, 1992 U.S. Horizontal Merger Guidelines § 1.521 provide that

> " Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agency may conclude that the historical market share of that firm overstates its future competitive significance. The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data."

I think this paragraph has very important meaning in adjusting U.S. antitrust system for new changes in merger trend. At least through this paragraph we can catch how we evaluate competitive effects of mergers in innovation-based mergers. It means U.S. antitrust agencies

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Paper on the Application of Article 82 to Exclusionary Abuse, at the St. Gallen International Law Forum, 11 May, 2006.

[404] J. Thomas Rosch, Commissioner, FTC, before the St. Gallen International Competition Law Forum, 10-11 May, 2007.

will treat current market share of that firm overstates its future competitive significance. The Agency will consider reasonably "predictable effects of recent or ongoing changes in market conditions" in interpreting market concentration and market share data. But they don't give exact and detailed examples what does "predictable effects of recent or ongoing changes in market conditions" means and how we should interpret on concrete cases.

This situation is not remedied, since the problem stems from how difficult it is to assess the current and likely future state of innovation and to devise appropriate measurements for comparisons of R&D and other forms of innovation competition. In addition, there is a general lack of knowledge and agreement by the legal and economic professions about the fundamental mechanisms of non-price competition, including innovation competition. We believe that an incisive and persuasive treatment of non-price competition in the context of a merger case will often need to go beyond the actual statements of the Guidelines. Such an analysis should draw heavily on the underlying economic and legal principles upon which the Guidelines framework is built.[405]

[405] Dennis A. Yao and Susan S. DeSanti, "Innovation Issues under the 1992 Merger Guielines", 61 Antitrust L.J. p.521, 1992-1993.

XI. Conclusion

Vertical mergers involve companies operating at different levels of the supply chain. It means that vertical mergers do not immediately lead to a reduction in the number of competing firms in any given market. The creation or strengthening of market power in vertical merger cases typically result from strategic conduct that the merged entity would undertake post-merger (e.g., refusal to deal, tying and bundling). The analysis of competitive effects is therefore multi-layered in the case of vertical mergers and often more complicated.

There are important differences in our ability to predict the economic consequences of mergers depending on whether the transactions are horizontal or vertical in nature. In both cases, antitrust analysis requires an assessment of the proposed transaction's likely effects through a weighing of expected efficiency gains against potential harms from any lessening of competition. However, because of differences in the analysis of both competitive effects and efficiencies, the balancing process is typically more difficult with vertical mergers.

The "new economy" industries are characterized by falling average costs (on a product, not firm basis) over a broad range of output, modest capital requirements relative to what is available for new enterprises for the modern capital market, very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption (also known as "network externalities"), the realization of which may require either monopoly or inter-firm cooperation in standards setting. In industries characterized by network effects, such as the telecommunications, electronic communications or media sectors, a dominant standard often emerges in the market. In this context, thereby preventing interoperability with its products.

With respect to E-economy infrastructure, there is an increased dependence on a wide-ranging and diversified set of vertically related activities, which notably include the provision of information and content, network infrastructure and access applications. In a context of convergence of technologies, vertical integrations are likely to raise major competition concerns relating to interoperability and interdependence between different products and services. Another

concern is the possibility that the holder of key content, key network or key access applications may impose its products or services as a standard. Therefore, the assessment of New Economy anti-competitive practices must focus in particular on the possibility for holders of essential products or services to raise barriers to entry, thereby foreclosing market access. Moreover, because vertical integration and alliance may impact downstream and upstream levels, opportunities for companies involved in the transaction to leverage their position in related markets should be closely scrutinized. [406]

1. About Market Definition Standards

Market definition is an important element of merger and anticompetitive analysis and seeks to identify the competitive constraints that derive from consumers' substitution patterns. Then the purpose of market definition is to identify a relevant market as those products and services, the suppliers of which are capable of existing effective competitive pressure on each other and of constraining each other's behavior.[407]

The major challenge that dynamic market pose to market definition derives from the instability of the market environment. Technological change alters the set of products or services sold, how they are produced, their characteristics and prices and hence affects substitution patterns and the related competitive constraints. This instability may be most profound when the markets considered are reflecting a substantial change in the underlying technological paradigm. Consequently, the basis for a sound market definition in dynamic markets lies in the proper analysis of the impact of innovation arising from technological change on consumers' substitution patterns, guided by a sound analytical framework.

Changing consumers' substitution patterns imply that the temporal aspect of market definition is likely to be particularly important. Most

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[406] Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, Nov. 2001.

[407] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 38-39 (12 September 2003).

clearly the boundaries of the current relevant market will evolve, perhaps due to changes in product characteristics and relative prices. Consequently, analyzing whether two products are substitutes today may provide a poor guide of whether they will be substitutable, and hence likely to compete in the future.

The definition of market boundaries on the basis of demand substitutability is often implemented by means of the hypothetical monopolist test. The approach that we propose to market definition in dynamic cases retains the hypothetical monopolist test as the central conceptual framework but takes the impact of technological and other innovative change into account by defining current and future markets and considering the time dimension of market definition.

Practically, market definition in dynamic markets would be based on the analysis of technological change and would be likely to proceed on a qualitative rather than quantitative basis. Quantitative economic analysis aimed at identifying price elasticity can be a useful component of the definition of relevant markets, although its applicability may often be limited by the availability of useful data. Quite clearly, the more we consider markets in the future and products that are yet to be introduced the less use series of historical data will be.

In practice it is likely that in dynamic markets the hypothetical monopolist test can be used on a qualitative dimension as a conceptual framework to evaluate various sources of evidence such as the consideration of product characteristics and intended use, evidence of substitution in the recent past, consumer preferences, switching costs, etc. Market definition would tend to be based on thought experiments, supported by understanding of the technologies evolving and possibly data from consumer surveys. What seems important, however, is that in analyzing current substitution patterns no undue weight is given to differences in product characteristics *per se*. Such differences are relevant only inasmuch as they restrict substitution patterns between different products.[408]

A question, which arises when dealing with the definition of

[408] Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, p. 39-40 (12 September 2003).

markets in the New Economy, is whether the price remains the most reliable criterion or whether other elements e.g., functional characteristics, intended use...etc. would appear to be more adequate. The Internet infrastructure is made of a multitude of operators (IBPs, ISPs, resellers, local loop operators), which enable end-users to have access to on-line services and products. All these operators are closely linked to one another in order to provide a reliable and quality access over all Internet: the ISPs need the backbones to offer access to the Internet at large and they need the local loop to reach the end-users.

The EU Commission's guidelines on market analysis in the electronic communications networks and services proposes to group together products or services that are used by consumers for the same purposes (end use).[409] Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind of products or services may be used for the same end.

In the new economy, the possibility for consumers to substitute a product or a service for another because of a small, but significant lasting price increase may, however, be hindered by considerable switching costs. Consumers who have invested in technology or made any other necessary investments in order to receive a service or use a product may be unwilling to incur any additional costs involved in switching to an otherwise substitutable service or product. In the same vein, customers of existing providers may also be 'locked in' by long-term contracts or by the prohibitively high cost of switching terminals. Accordingly, in a situation where end users face significant switching costs in order to substitute product A for product B, these two products should not be included in the same relevant market.[410]

2. About Competitive Effects Analysis

Secondly, evaluating mergers in dynamic and innovation markets presents challenges to traditional antitrust theory. Competition in high-

[409] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), § 44.
[410] Id. § 50.

tech industries involves sequences of races to develop a new product or to replace an existing product through drastic innovation. In the initial race, firms invest heavily to develop a product that create a new category or becomes an early leader in a new category. Winners get large market shares, high profits, for a while. While network effects tend to reinforce leadership position, in many high-tech industries there are sequential races for market leadership. Major innovations occur repeatedly, and switching costs and lock-in do not prevent displacement of leaders by better products.[411] Thus, vertical merger in high-tech industries have very extreme pro-competitive and anti-competitive factors. Winners in innovative race take dominant or monopoly position and reinforce that position with network effects or high switching costs or lock-in effects of customers.

Consequently, in case we are evaluating competitive effects of vertical merger in the high-tech industries, we should consider of various paradoxical extremely pro-competitive and anti-competitive factors which deriving from vertical mergers. Sometimes that will be very complex and ambiguous and need harmonious academic and practical support from economists, lawyers, and antitrust agencies.

The central issue that arises when this analysis is undertaken in a dynamic market originates from the relative instability, over time, of the markets concerned and the possibility of competition concerns relating to products yet to be introduced. If the scope of the relevant market is expected to change significantly over time due to changes in product's characteristics, or if nature of competition in that market is expected to change, analysis of competition in current relevant markets is unlikely to be a reliable indicator of competition in the future. If a merger creates dominant position or monopoly and impedes competition on a current relevant market, is this dominant or monopoly position likely to remain in the future? Conversely, if a merger appears innocuous on current markets, is there still an impediment to competition in a future market?

To address the instability problem of relevant markets, we suggest

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[411]David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, May 2001, p. 12.

that a forward-looking consideration of their evolution is possible on the basis of the identification of some broad techno-economic trends. This assessment would be based on analysis of technological changes and need for a consideration of broad market trends that would affect the products expected to compete in the market and the evolution of consumer's substitution patterns.

Antitrust analysis traditionally pays particular attention to whether any firms have significant market shares. However, the specific characteristics of New Economy industries make it doubtful that the traditional approach is still justified. In the context of high-tech industries, a more dynamic analysis rather appears to be the best answer in order to assess the competitive forces of the markets concerned and to ensure and maintain effective competition between the players.

To cover these problem, US and EU legal basis is too weak and as I mentioned above, because of special characteristics of innovation industries, it is not so easy to make simple and general legal standards. Economists and layers have prepared for this projects already long time and the courts and antitrust agencies also accumulated cases. EU Commission guidelines on market analysis and the assessment of significant market power for electronic communications networks and services[412] show good directions to solve these problems. Of course this guidelines apply only for limited sector-specific areas but it can be applied similar cases with extended interpretation or it can be good models in case we will legislate or amend general vertical merger regulation.

For assessment of market power this guidelines takes dynamic competition approaches. It is providing that "...the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent

[412] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

independently of its competitors, customers and consumers. These criteria include amongst others: (a) overall size of the undertaking, (2) control of infrastructure not easily duplicated, (c) technological advantages or superiority, (d) absence of low countervailing buying power, (e) easy or privileged access to capital markets/financial resources, (f) product/services diversification (e.g. bundled products or services), (g) economies of scale, (h) economies of scope, (i) vertical integration, (j) a highly developed distribution and scale network, (k) absence of potential competition, (l) barriers to expansion."[413] Further, it is providing that "...barriers to entry exist where entry into the relevant requires large investments and the programming of capacities over a long time in order to be profitable. However, high barriers to entry may become less relevant with regard to markets characterized by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective, forward-looking approach."[414]

There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects. Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure. 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 charged to consumers.

As a result, a proper market-power inquiry in the new economy must include a serious analysis of the vigor of dynamic competition. It is important, for example, to examine ownership of and investment in relevant intellectual property-which may involve technologies not

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[413] EU Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03), §3.1, (78).
[414] Id., § 3.1, (80).

currently in commercial use. If, for instance, the current market leader owns all intellectual property necessary for radical innovation, dynamic competition will not be effective.

3. About "Innovation Market" Concepts

The 1995 Intellectual Property Guidelines in the US introduced the concept of an "innovation market" as an analytical tool to consider the competitive effects on innovation and R&D, rather than a facter of "efficiency defense" in EU.[415]

Both "the innovation markets" and "the efficiency defense" approach are aimed at including innovation concerns in merger assessment. The path followed to reach the same objective is however different in, at least, two main aspects. First, innovation market approach focuses on a specific market, "the market of innovation". In practical terms, this is translated into looking at the efforts of the merger on the R&D activities. As R&D represents an input for innovation, the output market is not anymore the core of the authorities' analysis. On the other side, EU's "efficiency defense" approach focuses on the output market of innovation considering mainly the potential effects of the transaction on new or improved products or processes. Second, the scope of the efficiency defense is to allow transactions that would have been otherwise blocked because of the associated anticompetitive effects on the market. The scope of "the innovation market" approach seems to be, on the contrary, to block mergers that could have a negative impact on the competition in innovation.[416]

In a world of rapid technological advance, it is important that antitrust law pay greater attention to innovation issues. By assigning innovation an important role in merger analysis, the innovation markets approach will aid antitrust authorities to adopt a more dynamic perspective.

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[415] US Department of Justice and Federal Trade Commission, "Anti-trust guidelines for the licensing of Intellectual Property," April 6 1995.

[416] Elena Cefis, Mark Grondsma, Anna Sabidussi, Hans Schenk, "The Role of Innovation in Merger Policy: Europe's Efficiency Defence versus America's Innovation Markets Approach," Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Discussion Paper Series nr: 07-21, p.22 (2007).

New EU Guidelines on the assessment of non-horizontal mergers provide that "effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. (...) 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."[417] With this clauses, the Commission made clear their viewpoint that when they assess competitive effects of vertical merger, they will assess competitive effects with dynamic approaches not only with static price effects but also with diverse factors such as high quality products, a wide selection of goods and services, and innovation. Further more it means that they will consider about how concerned merger will affect for "innovation" in itself. It means the Commission made clear that when they analyze competitive effects of vertical mergers, they will consider about not only how merged high-tech industry will affect product market competition but also how they will affect future's "innovation competition" itself.

4. Suggestions for US and EU Systems

With non-horizontal merger guidelines, EU vertical merger regulation system is comparatively very well established. Even though it is not enough to cover rapidly changing trends, at least we can find several clauses of dynamic approaches. Among EU DG commission and DOJ cases, we can find easily dynamic approaches concerned with vertical mergers in the New Economy. Thus, I think, at first, EU Commission should collect concerned cases and amend non-horizontal merger guidelines. After these cases is accumulated, we can extract some general common rules. As I mentioned above, because vertical mergers in the new economy contains extremely pro-competitive and anti-competitive characters in its original characteristics, it is almost impossible to cover all vertical merger cases with several certain and

[417] EU Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, II. § 10.

general rules, then, it will be better to concentrate on amending non-horizontal merger guidelines in detail and on case-by-case basis. EU Commission guidelines for electronic communications networks and services will be very helpful in improving vertical merger guidelines.

Under US antitrust law, legal and economic researches have accumulated comparatively developed theories through long time discussions and have changed viewpoints time to time on competitive effects of vertical mergers –"Harvard School", "Chicago School", and "post-Chicago school" etc. And through FTC and DOJ judicial challenges, there are already many cases are accumulated. After amendment 1984 US Horizontal merger guidelines, US non-horizontal merger guidelines were put aside long time quietly, because FTC and DOJ approaches were being influenced with "Chicago School" theories, number of challenged vertical merger case were very few. And, traditionally, American Congress let this task solve antitrust agencies and DOJ by case-by-case so far than legislate or amend formal antitrust act or guidelines. Thus, US non-horizontal merger guidelines are not enough to show the ways for antitrust agencies, firms, consumers to predict how will in the future. As above mentioned, it is will be needed to fill in current non-horizontal merger guidelines by new dynamic approaches and rules which is extracted from each special cases and scholarly theories. I think they don't need to amend Sherman Act or Clayton Act; it can be interpreted flexibly to adjust new changing trends.

Consequently, the US and EU horizontal and non-horizontal merger relgulation need to be amended minimally as follow :

there need clauses (a) indicating "innovation market" concepts and their proper basic characters, (b) dynamic and practical relevant market definition and dominant position or market power assessment approaches, (c) in case of assessing competitive effects, agencies evaluate not only about price effects, but the other diverse dynamic competitive effects with long-run viewpoint about future's markets, e.g. products quality, a wide selection of goods and services, innovation, etc. (d) multi-dimensional consideration about competitive circumstances, (e) protecting competitor's access to 'essential facility', (f) accepting "dynamic efficiency" defense.

REFERENCES

MONOGRAPH

E. Robinson, The Structure of Competition Industry 20 (rev. ed. 1958).

F. Scherer, Industrial Market Structure and Economic Performance, (2d ed. 1980).

Joseph A. Schumpeter, Capitalism, Socialism, and Democracy, (1950).

M.Waterson, Economic Theory of The Industry, (1984).

Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989).

Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, (1984).
Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, 96-98 (1984).

Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds. 1989).

Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

Robert H. Bork, The Antitrust Paradox (1978).

Robert S, Schlossberg, Mergers and Acquisitions: Understanding the Antitrust Issues, ABA Section of Antitrust Law, 2d. Edition, (2004).

Sullivan, Handbook of the law of antitrust 588 (1977).

ARTICLES

Benjamin Klein et.el., "Vertical Integration, Appropriable Rents, and the

Competitive Contracting Process," 21 J.L. & Econ. 297 (1978).

Bernhart, "Vertical Integration and Demanded Variability", 25 J. Indus. Econ. 213 (1977).

Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics in Standardization," Journal of Economic Perspectives, Vol. 3, No. 2, 1994.

Besen, Stanley and Joseph Farrell, "Choosing How to Compete: Strategies and Tactics in Standardization," Journal of Economic Perspectives, Vol. 3, No. 2, (1994).

Blair & Kaserman, "Uncertainty and the Incentive for Vertical Integration," 26 S. Econ. J. 266 (1978).

Bruce H. Kobayashi, "Game Theory and Antitrust: A Post Mortem," 5 Geo. Mason. L. Rev. 411 (1997).

Carl Shapiro, "Exclusionary in Network Industries," 7 Geo. Mason. L. Rev. 673 (1999).

Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979).

Christine A. Varney, "Vertical Merger Enforcement Challenges at the FTC", PLI 36th Annual Antitrust Institute, San Francisco, California (1995).

Coase, "The Nature of the Firm," 4 Economica 386 (1937).

David S. Evans, Richard Schmalensee, "Some economic aspects of antitrust analysis in dynamically competitive industries", Working Paper 8268, National Bureau of Economic Research, (May 2001).

Davis, R.W. "Innovation markets and merger enforcement: current

practice in perspective, Antitrust Law Journal, 71 (2003).

Dennis A. Yao and Susan S. DeSanti, "Innovation Issues under the 1992 Merger Guielines", 61 Antitrust L.J. 521, (1992-1993).

Dennis W. Carlton, "Antitrust Policy Toward Mergers when Firms Innovate: Should Antitrust Recognize the Doctrine of Innovation Market?" Testimony before the Federal Trade Commission Hearings on Global and Innovation-based Competition (Oct. 25, 1995).

Dennis W. Carlton, "Vertical Integration in Competitive Markets Under Uncertainty," 27 J. Indus. Econ. 189 (1979).

Elena Cefis, Mark Grondsma, Anna Sabidussi, Hans Schenk, "The Role of Innovation in Merger Policy: Europe's Efficiency Defence versus America's Innovation Markets Approach," Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Discussion Paper Series nr: 07-21, (2007).

EU DG Commission, "Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy," executive summary, (2001). Europe Economics, "The Development of Analytical Tools for Assessing Market Dynamics in the Knowledge Based Economy," Final Report by Europe Economics, (12 September 2003).

European Commission, "Towards a new framework for Electronic Communications infrastructure and associated services", Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, The 1999 Communications Review, 1999.

Evans, David S, and Bernard J. Reddy, "Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," in Intellectual Property Antitrust 1996, Practicing Law Institute, 1996.

Fisher & Sciacca, "An Economic Analysis of Vertical Merger Enforcement Policy," 6 Research in L. & Econ. 1, (1984).

Frederick R. Warren-Boulton, "Vertical Control with Variable Proportions," 82 J. Pol. Econ. 783 (1974).

Gary L. Roberts & Steven C. Salop, Efficiencies in Dynamic Merger Analysis, 19 World Competition L.& Econ. Rev. 5, (1996).

Gide Loyrette Nouel, Competition Assessment of Vertical Mergers and Vertical Agreements in the New Economy, Final Report, (Nov. 2001).

Glenn C. Loury, "Market Structure and Innovation," 93 Q.J. Econ 395 (1979).

Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," 2001 Colum. Bus. L. Rev. 257, 323 (2001).

J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement", at the Fordham Competition Law Institute's 34th Annual Conference on International Antitrust Law & Policy, New York City, September (2007).

J. Thomas Rosch, Commissioner, FTC. Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuse, at the St. Gallen International Law Forum, 11 May, 2006.

Janus A. Ordover, et al., "Equalibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990).

Jeffrey Church, "Impact of Vertical and Conglomerate Mergers," 2004.
Jennifer F. Reinganum, " Timing of Innovation: Research Development, and Diffusion," Handbook of Industrial Organization, p.849, Richard L. Schumalensee & Robert D. Willig eds., (1989).

Jennifer F. Reinganum, "The Timing of Innovation: Research

Development, and Diffusion," Handbook of Industrial Organization, Richard L. Schumalensee & Robert D. Willig eds., 1989.

John M. Vernon & Daniel A. Graham, "Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971).

Katz, Michael and Carl Shapiro, "Network Externalities, Competition, and Compatibility," American Economic Review, Vol. 75, No.3, 1985.

Katz, Michael and Carl Shapiro, "Systems Competition and Network Effects," Journal of Economic Perspectives, Vol. 3, No. 2, 1994.

Kenneth J. Arrow, "Economic Welfare and the Allocation of Resources to Innovation", The Rate and Direction of Inventive Activity, National Bureau of Economic Research ed., 1962.

Kenneth J. Arrow, "Vertical Integration and Communication," 6 Bell J. Econ. 173 (1975).

Klein, Crawford & Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J. Law Econ. 297 (1978).

Loftis, "How to Analyze Dual Distribution Problems," 1 Antitrust Counseling and Litigation Techniques, J. von Kalinowski ed. (1987).

Lopatka, John E. and William H. Page, "Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion," in E. Gellhorn and L. Ribstein eds, Supreme Court Economic Review, University of Chicago Press, (1999).

M. Howard Morse, "Vertical Mergers: Recent Learning," 53 Bus. Law. 1217 (1998).

M.L. Greenhut & H.Ohta, "Related Market Conditions and Interindustrial Mergers," 66 Am. Econ. Rev. 267-77 (1976).

M.L.Greenhut & H.Ohta, "Vertical Integration of Successive Oligopolists," 69 Am. Econ. Rev. 137 (1979).

Martin K. Perry, "Vertical Integration: Determinants and Effects," 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, 213-15 (Richard Schmalensee & Robert D. Willig eds., 1989).

Michael A. Salinger, "Vertical Mergers and Market Foreclosure," 77 Q. J. Econ. 345 (1988).

Michael H. Riordan & Steven C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust L.J. 513 (1995).

Michael H. Riordan, "Competitive Effects of Vertical Integration," at the LEAR conference on 'Advances in the Economics of Competition Law" at Rome (June 2005).

Michael L. Katz & Howard A. Shelanski, "Schumpeterian Competition and Antitrust Policy in High-Tech Markets", University of California, Berkeley, Competition, Vol. 14, (2005).

Michael L.Katz and Howard A. Shelanski, "Mergers and Innovation," Professor of Law, University of California, Berkeley, p. 13, 2006.
Michael Waterson, ECONOMIC TEHORY OF THE INDUSTRY, (1984).

Neil Averitt & Robert H. Lande, "Using the 'Consumer Choice' Approach to Antitrust Law," 74 Antitrust L.J. 175, (2007).

OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, "Merger Review in Emerging High Innovation Markets," (2003).

OECD/GD 65 "Efficiency claims in Mergers and other Horizontal Agreements." (1996).

Oliver Williamson, "The Vertical Integration of Production: Market

Failure Consideration," 61 Am. Econ. Rev. 112 (1971).

Oliver Williamson, "Transaction Cost Economics," Handbook of Industrial Organization 136-82 (Richard Schmanlensee & Robert D. Willig eds.,1989.

Oliver Williamson, "Vertical Integration and related Variations on a Transaction-Cost Economics Theme," New Developments in the Analysis of Market Structure 149-77 (Joseph E. Stiglitz & G. Frank Matthewson eds., 1986).

Partha Dasgupa & Joseph E. stiglitz, "Uncertainty, Industrial Structure, and the Speed of R&D," 11 Bell J. Econ. 1, 1980.

Parthasaradhi Mallela & Babu Nahata, "Theory of Vertical Control with Variable Proportions," 88 J. Pol. Econ. 1009 (1980).

Patrick Bolton & Michael D. Whinston, "The "foreclosure" Effects of Vertical Mergers," 147 J. Inst. & Theoretical Econ. 207 (1991).

Posner, R. "Antitrust in the New Economy," Antitrust Law Journal, 2001.

Richard G. Parket, Trends in Merger Enforcement and Litigation, Remarks Before the Annual Briefing for Corporate Counsel (16, 9. 1998).

Richard J. Gilbert and Steven C. Sunshine, "Incorporating Dynamic Efficiency Concerns in Merger Analysis: the Use of Innovation Markets," 63 Antitrust L.J. 569 (1995).

Richard T. Rapp, "The Misapplication of the Innovation Market Approach to Merger Analysis," 64 Antitrust L.J. 19 (1995).

Robert Kramer, "Antitrust Consideration in International Defense Mergers," Chief, Litigation II Section, Antitrust Division, United States Department of Justice, (1999).

Roger G. Blair & David L. Kaserman, "Uncertainty and the Incentive for Vertical Integration," 45 Southern Econ. J. 266 (1978).

Ronald W. Davis, "Innovation Markets and Merger Enforcement: Current Practice in Perspective," 71 Antitrust L.J. 677 (2003).

Scott A. Stempel, "Government Shows Increasing Concern with Vertical Mergers," Antitrust, (1994).

Steven C. Salop & David T. Scheffman, "Recent Advantages in the Theory of Industrial Structure, Raising Rivals' Costs," 73 Am. Econ. Rev. 267 (1983).

Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Vertical Merger Enforcement Policy", Before the American Bar Association, Section of Antitrust Law Spring Meeting, (1995).

Thomas G. Krattenmaker & Steven C. Salop, "Anticompetitive Exclusion: Raising Rival's Cost to Achieve Power Over Price," 96 Yale L.J. 209 (1986).

Timothy J. Muris, The Government and Merger Efficiencies: Still Hostile After All These Years, 7 Geo. Mason. L. Rev. 729, 734 (1999).

Tom K. Lee & Louis L. Wilde, "Market Structure and Innovation : A Reformulation, 94 Q.J.Econ 429 (1980).

Vernon & Graham, "Profitability of Monopolization by Vertical Integration," 79 J. Pol. Econ. 924 (1971).

William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 208 (2003).

Williamson, Oliver E., "Economies as an antitrust defense: the welfare

trade-offs," American Economic Review 58, (1968).

DOCUMENTS

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laied down in Article 81 and 82 of the Treaty.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation).

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings,(2004/C 31/03).

Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, (2007).

Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03).

Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

Regulation (EC) No 2887/2000 of the European Rarliament and of the Council of 18 December 2000 on the unbundled access to the local loop.

U.S. The Sherman Antitrust Act (1890)

U.S. The Clayton Antitrust Act (15 U.S.C. §§ 12-27, as amended) (1914)

Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a, as amended) (2001 amendments).

The U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, (April 2, 1992).

US Department of Justice and Federal Trade Commission, Anti-trust guidelines for the licensing of Intellectual Property, (April 6 1995).