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## The Role of Efficiency Claims in Antitrust Proceedings

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**THE ROLE OF EFFICIENCY CLAIMS IN ANTITRUST PROCEEDINGS**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on the Role of Efficiency Claims in Antitrust Proceedings held by the Competition Committee in October 2012.

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

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

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur le rôle des allégations de gains d'efficacité dans les procédures d'application du droit de la concurrence qui s'est tenue en octobre 2012 dans le cadre du Comité de la concurrence.

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

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

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	5
BACKGROUND NOTE .....	11
CONTRIBUTIONS FROM DELEGATIONS	
Australia .....	61
Chile .....	73
Colombia .....	83
European Union .....	89
Germany .....	95
Indonesia .....	105
Japan.....	107
Korea.....	115
Mexico.....	121
New Zealand .....	125
Russian Federation .....	135
South Africa .....	145
Sweden .....	153
Switzerland.....	155
Chinese Taipei.....	161
Turkey .....	167
United Kingdom.....	173
United States .....	189
BIAC .....	197
CONTRIBUTIONS FROM EXPERTS	
Mr. Hans W. Friederiszick -- <i>Dominant and Efficient– on the Relevance of Efficiencies in Abuse of Dominance Cases</i> .....	207
Ms. Helen Jenkins -- <i>Efficiency Assessments in European Competition Policy and Practical Tools</i> .....	245
Mr. Frederic M. Scherer -- <i>Merger Efficiencies and Competition Policy</i> .....	257
SUMMARY OF DISCUSSION .....	287
***	
SYNTHÈSE .....	303
NOTE DE RÉFÉRENCE .....	309
COMPTE RENDU DE LA DISCUSSION .....	365



## EXECUTIVE SUMMARY

*By the Secretariat*

Several key points emerge from the discussion at the roundtable, the background paper and the delegates' and experts' written submissions:

- (1) *Welfare economics points to various sources of efficiency gains. The conflict between allocative vs. productive efficiency and static vs. dynamic efficiency is addressed by the Williamson trade-off, which in an economic downturn faces several constraints.*

The sources of efficiency examined in economic welfare analysis are static (allocative, productive) or dynamic. The underlying rationale for mergers can be the possibility of achieving efficiency gains. Thus, most merger assessments will discuss productive and/or dynamic efficiency. Practices examined as abuse of a dominant position, while potentially exclusionary, may also have such efficiency benefits (for example, tying or bundling practices).

The tension underlying competition policy is effectively between allocative vs. productive efficiency and static vs. dynamic efficiency. The welfare standard in use in a specific competition regime also affects whether certain types of efficiency gains are more easily accepted in practice. Rivalry and competitive markets result in pricing closely linked to underlying costs (allocative efficiency), to the benefit of consumer welfare. Thus, the intervention by competition authorities is to ensure that allocative efficiency is achieved and that firms do not earn excessive returns through exclusionary practices or mergers that hamper rivalry. Still, some mergers may yield lower-cost or higher-quality outputs (productive or dynamic efficiency), to the benefit of total welfare. One of the difficulties in competition assessment is to weigh consumer and producer welfare in a balanced way, so that efficiency benefits can be accepted when they increase producer welfare.

This conflict was addressed by Oliver Williamson, who proposed a total welfare approach. He argued that, if significant efficiencies occur, gains from efficiency tend to outweigh losses in consumer welfare, which provides strong theoretical evidence in favour of mergers. Professor Scherer expressed doubts with regard to the current validity of the Williamson trade-off, which are motivated by the economic downturn, in particular the widespread unemployment and Keynesian liquidity trap. Under non-crisis conditions, presuming full employment, resources released through merger-based efficiencies enable social gains by releasing resources that are used in other economic sectors to provide goods and services that benefit consumers. However, with high levels of unemployment, those resources may leak and efficiencies may not provide a consumer benefit. Second, the Williamson trade-off assumes that Say's law operates. That is, in the first instance, because of the monopoly power achieved through the merger, the price is raised and the consumer surplus is converted into higher profits or producer surplus. Next, those profits are assumed to re-circulate into effective demand for additional investment goods or through incremental consumer demand when distributed to shareholders. But in a Keynesian liquidity trap, Say's law does not operate because firms and shareholders tend to accumulate profits that they choose not to invest. Finally, there is some concern regarding a transfer of what before a merger was consumers' surplus to producers' surplus and ultimately to the merging company's

shareholders. If one assumes after Alfred Marshall that the marginal utility of money diminishes as wealth increases, a transfer to predominantly wealthy shareholders constitutes a redistribution of income from average-wealth consumers to rich consumers with lower marginal utilities. This implies a welfare loss, hence the consumer welfare standard would need to be favoured over the total welfare standard.

The consumer welfare standard might also be better suited to the institutional setting within which competition policy operates. The argument in favour of consumer welfare is that under total welfare there are deficits in the institutional setting. Since consumers' interests are not equally represented in comparison to firms' interests, the welfare standard has to reflect this imbalance. Further, consumer welfare can help achieve optimum or second-best equilibrium with regard to the most welfare-enhancing combination of firms in a merger.

- (2) *Even though not all jurisdictions have introduced efficiency claims, such claims have been progressively playing a more significant role in competition analysis. Competition authorities that allow for efficiency claims in their antitrust proceedings have developed various approaches with regard to procedure and substantive provisions.*

Although a substantial number of jurisdictions have explicitly recognised efficiency claims in mergers, the insertion of efficiency-related provisions is not yet a common practice. Even if some legal systems do not foresee an efficiency defence, efficiency considerations may play a practical role in assessing individual cases due to specific provisions inherent to national competition acts. For instance, in Germany there is some scope for the consideration of efficiencies in the context of the balancing clause or under the ministerial authorisation. Next, the SIEC test will further promote a more effects-based assessment of merger cases and more efficiency claims seem likely. Another reason why the legislator may implicitly renounce the introduction of efficiency defence is that only the most anti-competitive mergers are prohibited (e.g. in Switzerland).

In jurisdictions where efficiency claims are introduced, several issues emerge. First, with regard to procedure, there may be an asymmetry in the analysis of efficiencies and anti-competitive effects. An efficiency defence might be a part of a two-stage process, where first there is a finding that a merger is anti-competitive, and second it is examined whether it can be justified on efficiency grounds. In other words, efficiencies are considered as a counterbalance to anti-competitive effects. There is a risk here that efficiency analysis becomes unnecessary if there are no anti-competitive effects. In an efficiency rebuttal, instead, evidence on efficiency claims forms part of a holistic analysis of positive and negative effects of the merger under consideration.

Second, the merging parties – upon which the burden of proving efficiencies is placed – may have a difficult job in making their case. This originates from the difficulty to substantiate efficiency claims with clear-cut and quantifiable evidence on merger's likely effects.

The next concern regards the crediting of fixed-cost efficiencies in mergers. In evaluating dominance of firms many jurisdictions apply the LRAIC or the AAC test that incorporates fixed-cost elements. In mergers, evaluation of variable costs is favoured. Thus, it is necessary to examine retrospectively the fixed-cost efficiencies in the approved mergers. This would allow probing the reason why agencies do not accept that all costs are marginal in the long run and why they offer different treatment to fixed-cost and marginal-cost efficiencies.

Other concern regards the treatment of dynamic efficiencies. The literature provides many examples supporting the view that dynamic efficiencies have a considerably greater potential to

benefit consumers than static efficiencies. In the US, for example, dynamic efficiencies have been progressively taken into account, as the *Genzyme/Novazyme* case exemplifies.

Another issue concerns the merger specificity requirement. When taken literally, it would prevent the acceptance of an efficiency defence in many cases. Theoretically, parties could nearly always enter into contractual relations to combine resources and extract synergies. In some jurisdictions (e.g. Australia) the competition authority does not consider whether a conduct is necessary to achieve the likely net public benefits, and consideration of any alternative solutions is relevant when those alternatives are likely in the foreseeable future, absent the proposed conduct. Hence, the conduct is authorised if: i) those other means are not likely to occur in the counterfactual because of lack of market incentives or other reasons; ii) the conduct would produce efficiencies as compared to the counterfactual.

Efficiencies can also be taken into account at different stages of procedure. In the United Kingdom some of the efficiency claims made with respect to mergers are accepted either as part of the analysis of competitive effects or at the remedies stage in the form of relevant consumer benefits. In a number of cases when efficiencies were clear-cut, they were given considerable weight as part of the remedies package.

Finally, in some cases efficiency considerations or other objective justifications have allowed the clearance of mergers to monopoly or near-monopoly. For instance, competition authority in Colombia agreed to a merger between six companies, which attained a market share of 85.7 per cent. The decision was based on: operational model proposed by the firms, consideration that prices were regulated by a public authority, and the pursuit of the national economic interest. In New Zealand the competition authority also agreed to a merger to monopoly based on productive efficiencies and efficiencies linked with economies of scale and cost savings.

- (3) *There is a variety of tools and techniques to quantitatively assess whether the claimed efficiencies will materialise after the merger.*

Competition authorities and merging parties recognise that efficiency claims have to be evidence-based and quantifiable. For competition authorities, the evaluation of anticipated efficiencies is a difficult task since the type of efficiencies claimed and the role of such claims in the assessment of different antitrust cases vary significantly. It is widely acknowledged that it is often difficult to obtain reliable and adequate data which is crucial to estimate sound economic models. Further, there is a risk that economists provide parties with different models that come to different conclusions. This, however, should not imply that efficiency considerations are not given appropriate weight in antitrust assessment. As competition authorities become more familiar with measuring and verifying efficiencies, they become more likely to give such claims more weight in their proceedings.

Contributions submitted to the Secretariat point to different techniques that may help understand the likely benefits of corporate arrangements. Professor Scherer indicates in his paper that impartial observers with substantial experience in the relevant industry are best suited to assess claims that mergers will yield significant efficiencies. Dr. Jenkins specifies that cross-sectional and panel modelling of performance analysis using techniques such as data envelopment analysis (DEA) can be helpful to identify and quantify efficiency gains in antitrust proceedings. It can handle multiple inputs and outputs that cannot be reduced to a single input or a single output measure. The DEA measures efficiency by reference to an efficiency frontier, which is constructed as linear combinations of efficient companies. The method assumes that two or more companies can be combined to form a virtual company, with composite costs and outputs. The

actual companies are compared with these virtual companies. If another actual or virtual company or their combination achieves the same output as the actual company at a lower cost, the actual company is judged to be inefficient. The DEA also informs whether the claimed effect is merger specific. Consequently, the method gives the competition authority more comfort about the verifiability of the claimed efficiency.

Compensating Marginal Cost Reduction (CMCR) is another practical tool that might serve to assess efficiencies. It has already been applied in Sweden in the context of merger assessment. Its underlying idea is that information about current margins and diversion ratios is enough to calculate the marginal cost efficiencies required to offset the increase in market power resulting from a merger. The advantage of the CMCR is that it only requires data on pre-merger mark-ups, diversion ratios and the exact marginal-cost reductions. Hence, there is no need to estimate pass-through or cost reductions to consumers. Nor is there a need to estimate how non-merging competitors would react to price changes.

- (4) *Ex-post evaluation of efficiencies enables competition authorities to examine performance of mergers and to improve their antitrust analysis. Some of its results can be used by the merging parties to validate their claims during an investigation.*

*Evaluation indicates under what conditions and in the presence of which variables efficiency claims are likely to be credible and eventually occur in the market. Hence, it allows for a quantitative assessment of claimed efficiencies. Benchmark tests are another practical outcome of the evaluation exercise. For instance, in the US evaluation has allowed to elaborate a method by which a quality metric can be devised and applied to assess ex-post effects of a merger in the healthcare sector.*

Contributions to the Roundtable show that *ex-post* evaluations of mergers provide ambiguous conclusions with regard to the achievement of claimed efficiencies. Submissions from Japan and the US show that mergers do not always improve performance of firms. The background paper analyses a wide range of studies and comes to the conclusion that this may be due to the fact that there are many case- and sector-specific factors which influence the outcome. The reliability and effects of the *ex-post* examination of consummated mergers depend on dataset and variables examined.

- (5) *Questions regarding efficiency claims are also pertinent in dominance cases, in particular in the IT sector, as there is less guidance from legislation and case law than in mergers. Further analysis on how a more integrated approach to efficiencies and anti-competitive effects can be implemented in dominance cases is required.*

While in many jurisdictions (Canada, EU, US) legal provisions on abuse of a dominant position make no explicit allowance for an argument based on efficiency gains, legislation in some countries (Mexico, Republic of South Africa, Turkey) clearly allows dominant firms to bring forward efficiency claims. Despite lack of an explicit provision, a possibility to justify potentially anti-competitive conduct on efficiency grounds has been recognised by the EU and the US courts, as well as in soft-law instruments of the European Commission. However, the review of Article 102 TFEU decisions shows that efficiency defences are not invoked in majority of cases. In their paper Friederiszick and Gratz assert that since 2009 in 42 per cent of cases efficiencies or another objective justifications were put forward, in particular in the IT sector. Given the growing number of cases in this sector, it is recognised that a sound regulatory environment is crucial to handle efficiency considerations appropriately.

Moreover, business and antitrust perspectives on potentially anti-competitive conduct differ. Empirical analysis of motives behind low price strategies, undertaken by Friederiszick and Gratz, shows that pricing below average variable cost is a common practice. Business managers consider aggressive pricing to be less advisable for a leading company in a growing market, which is either due to the fact that such practice is regarded as less effective for larger firms or because of well-understood consequences of violating antitrust rules.

With regard to procedure, efficiencies in dominance cases are considered either as a defence or as a factor in the overall analysis of the competitive impact of a conduct in question. The first scenario is a two-stage analysis, in which the existence of abuse is established in the first place. Second, it is assessed whether claimed efficiencies outweigh potential anti-competitive effects. The second approach implies that efficiencies are an integral factor of the overall assessment. Hence, they are more intertwined with anti-competitive concerns. As a consequence, the prohibition of the potentially abusive conduct is not applied when efficiencies outweigh anti-competitive effects. The background paper notes that practical difficulties may be the main reason why competition authorities are tempted to consider efficiencies as a defence rather than as one of the factors in an overall assessment of abuse. Still, in some jurisdictions (Turkey) a balancing test is carried out. Hence, further analysis on how a more integrated approach to efficiencies and anti-competitive effects can be implemented in dominance cases is required.



## BACKGROUND NOTE

*By the Secretariat* \*

### 1. Introduction

Although efficiencies and efficiency claims have been vigorously discussed for decades now – notably at least since efficiency considerations were (first implicitly and then explicitly) integrated into the assessment of mergers and agreements between competitors – their role in competition law has recently gained greater prominence, as witnessed by a number of recent merger decisions in different jurisdictions. Efficiency claims are also increasingly more often put forward in abuse of dominance or monopolisation cases, although it is fair to say that in these cases such claims have had little practical impact so far.

This growing role of efficiency claims in competition law is partly linked to the steady rise of the importance of economic analysis, including the adoption of an “effect-based” (as opposed to a “per se”) approach in many jurisdictions. Economic analysis certainly has the potential of significantly improving the quality of analysis: On the one hand, it helps to determine which types of conducts, agreements and transactions are capable of and likely to raise competition concerns, while on the other hand it helps to understand what types of justification can be used to overturn potential findings of anti-competitive effects.

However, the fact that efficiencies play an ever more important role in competition law by no means implies that their assessment is easy and unproblematic. To start with, economic efficiency can mean different things to lawyers and economists. As Professors Gifford and Kudrle (2005) warned, “*although courts, policymakers and lawyers all speak of ‘economic efficiency’ or ‘efficiency’, they are not always careful to use those terms in the precise way that economists do.*” Consequently, even if there may well be a wide consensus among antitrust scholars and practitioners that one of the prime objectives of competition law should be to promote economic efficiency, competition authorities may find it difficult to duly take into account efficiency claims put forward by the firms, or worse they may apply the concept in an imprecise and inconsistent manner.

Moreover, there are a number of issues (several of which are discussed in this Note) which need to be addressed and can be treated differently in different jurisdictions. For example, whether to accept certain types of efficiency gains (*e.g.* fixed-cost savings) or not depends on the welfare standard a specific competition authority applies. Similarly, the different standards of proof required of efficiency claims will determine whether such claims are allowed. A related theme is how to verify (and in many cases quantify) possible efficiency gains. There are several quantitative techniques for carrying out this assessment, either during an investigation or *ex-post*. This is particularly relevant as one of the work streams of the OECD’s Competition Committee is precisely to evaluate the impact of competition enforcement and advocacy activities.

In the next Section of this Note the basic types of efficiencies (allocative, productive, dynamic and transactional) are introduced, after which a proposal to change priorities in the hierarchy of antitrust goals is summarised. The next Chapter covers the treatment of efficiency claims in mergers and is followed by

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\* This Background Note was written by Fiorenzo Bovenzi and Anna Pisarkiewicz, Senior and Junior Competition Policy Experts, respectively, in the Competition Division of the OECD.

an extensive review of *ex-post* assessment in Chapter 3; the role of efficiency claims in dominance cases is discussed in Chapter 4, while conclusions are presented in Chapter 5.

This Note specifically covers the role of efficiency claims in mergers and dominance cases. It does not address the variety of non-merger agreements that competitors can enter into, *e.g.* production and research and development (R&D) joint ventures, joint purchasing agreements and technology licensing agreements. On the one hand, these agreements present the same basic trade-off as mergers, *i.e.* there is a need to balance possible anti-competitive effects deriving from a reduction in competition with consumer-benefitting efficiency gains. Accordingly, some of the issues discussed in this Note will carry over to horizontal and vertical agreements as well. At the same time, there is substantial guidance and case-law available to the parties on how to structure the agreement in a way which does not violate antitrust rules. This is the case, for example, of the European Union, where Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) and the various general block exemption regulations deal with this issue.

## 1.1 *Types of efficiencies*

In competition policy it is customary to distinguish between *static* and *dynamic* efficiencies. The key difference between the two concepts is the relevant time horizon over which these efficiencies display their effects, as we explain in turn below. An additional and possibly broader category of efficiencies – transactional efficiencies – is also described.

### 1.1.1 *Static efficiencies: Allocative and productive (or technical) efficiency*

In the case of static efficiencies firms (and consumers) are observed at a particular point in time, like in a snapshot. The technology with which goods are produced is also assumed to be fixed, *i.e.* not subject to change.

Within the category of static efficiencies it is possible to distinguish the following two sub-categories:

- Allocative efficiency; and
- Productive (or technical) efficiency.

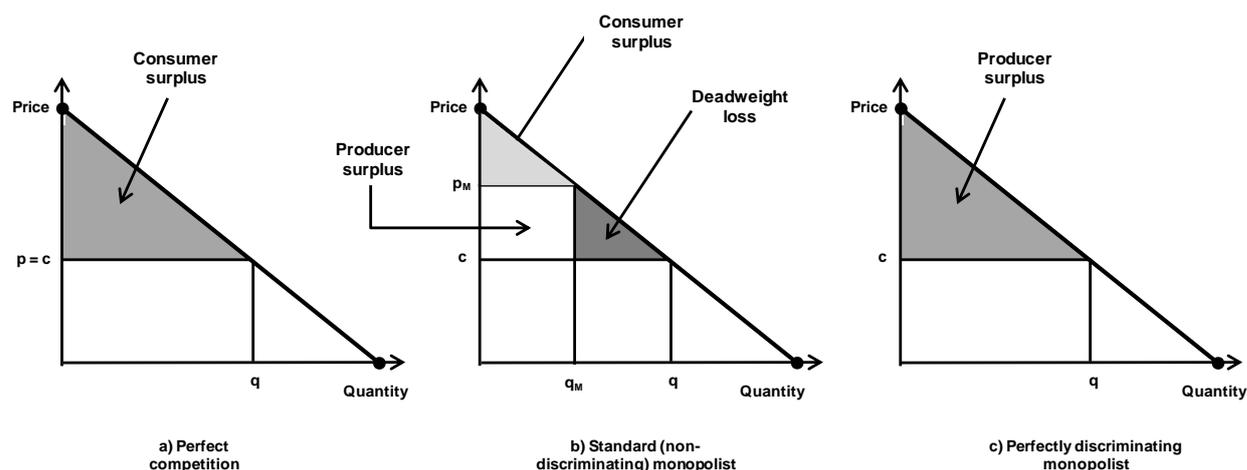
A market achieves allocative efficiency when its “*processes lead society’s resources to be allocated to their highest valued use among all competing uses*” (Kolasky and Dick, 2003, p. 242) or when “*all gains from trade are exhausted*” (de la Mano, 2002, p. 11). In other words, when allocative efficiency is achieved, firms produce their output until the marginal cost of a unit is equal to the value of such unit for consumers. In that case, consumers willing to pay a price at least equal to the marginal cost of producing a good are supplied. Moreover, the quantity produced of the good is optimal and the aggregate social welfare (*i.e.* the sum of consumer and producer surplus) is maximised.

For example, in a perfectly competitive market, where firms are atomistic and their conduct does not affect the market price, all consumers pay exactly a price equal to the marginal cost and their surplus is equal to the aggregate social welfare (*i.e.* producer surplus is equal to zero).

Consider, instead, a monopolist who is unable to discriminate and therefore charges the same price to all consumers. In this case the market outcome is not efficient from an allocative viewpoint, because there are some consumers who are willing to pay a price below the price set by the monopolist but still above the marginal cost of the good (so that it is socially efficient to produce an additional unit) and yet they are not supplied. In other words, “*this outcome is allocatively inefficient since there still remain opportunities for profitable trade*” (de la Mano, 2002, p. 11). This happens because, if the monopolist reduced the price in

order to sell to those “marginal” consumers who are not supplied, it would have to do the same for all the other “infra-marginal” consumers and such reduction would not be profitable. The result is that, while both consumers and the monopolist earn a positive surplus, the aggregate social welfare is not maximised and there is a welfare loss which is called “deadweight loss”. Moreover, the quantity of the good produced is below the socially optimal amount.

**Figure 1: Consumer and producer surplus in three different market scenarios**



A perfectly discriminating monopolist is, however, also an efficient market outcome from an allocative viewpoint, because there is no welfare loss for society. In this case, the monopolist is able to charge each consumer a different price, and in particular each consumer pays exactly the amount he is willing to pay for the good (even if such amount is above the marginal cost). The monopolist then extracts the entire rent from each consumer, so that its surplus is equal to the aggregate social welfare. The quantity of the good produced in this scenario is the same as with perfect competition, although the wealth distribution between consumers and producers is at opposite ends of the possible range.

These three different market outcomes are illustrated in the Figure above. In particular, in panel b) it is possible to see the deadweight loss which is equal to the area of the triangle in darker grey and measures the extent of allocative inefficiency.

As discussed in the next Chapter, horizontal mergers – between competitors at the same level of the supply chain – will increase the degree of allocative inefficiency in a market, if there are no off-setting cost reductions or other types of efficiency gains. In contrast, vertical mergers – between firms at different levels of the supply chain – enhance allocative efficiency, *e.g.* by avoiding double marginalisation.

Productive (or technical) efficiency refers to the ability of a firm to produce a *given* quantity at a particular point in time using a combination of the necessary inputs (*e.g.* labour, capital, raw material) which minimises production costs. In other words, if a firm is technically efficient, it is not possible to produce that given quantity of output at a lower cost (even though there may be several combinations of inputs available to achieve this result). Another way of saying this is that the firm operates on the frontier of its production possibilities.

Again, it is generally accepted that a monopolist is not only allocatively, but also technically inefficient. The reason is that, since a monopolist does not face competition from rival firms, its managers have little incentive to minimise production costs – a concept known as X-inefficiency, first introduced by Leibenstein (1966).

### 1.1.2 *Dynamic efficiencies*

Dynamic efficiencies are related to the ability of a firm and its incentives to introduce new products or processes of production (or to improve existing ones), *i.e.* to “*move the efficient frontier of production faster or further forward*” (Motta, 2004, p. 55). Dynamic efficiencies are therefore linked to innovation, learning by doing and research and development (R&D) activity; contrary to static efficiencies, then, they display their effects over time.<sup>1</sup>

### 1.1.3 *Transactional efficiencies*

In addition to allocative, productive and dynamic efficiencies, some authors also define a fourth, broad category, transactional efficiencies.<sup>2</sup> In accordance with the principles of “transaction cost economics”, these efficiencies allow firms to reduce the transaction costs they incur in dealings with their business partners, and therefore facilitate the achievement of other types of efficiencies.

For example, mergers and other forms of “deep” co-operation among firms (such as research and production joint ventures) can be explained by the desire to achieve transactional efficiencies. This happens when firms prefer to bypass the market and internalise the transactions between them rather than be involved in complex contracts which are costly and difficult to write, execute and enforce. In particular, according to this view, the motivation behind most vertical mergers is not just the pursuit of greater allocative efficiency (through the elimination of double marginalisation), but more often the reduction of transaction costs deriving from not having to rely any longer on arm’s-length transactions. As Kolasky and Dick (2003, p. 251) note, “*joint ventures and common ownership can help align firms’ incentives and discourage shirking, free riding and opportunistic behaviour that can be very costly and difficult to police using arm’s-length transactions.*”

There are several factors which make the pursuit of transactional efficiencies compelling. For example, the more often two firms interact (or the greater the prospect they will maintain a continuing relationship), the greater is the potential of reducing transaction costs by merging. Similarly, the presence of specialised, transaction-specific assets may also push firms towards deeper integration in order to avoid the risk of opportunistic behaviour or “hold-ups”. The same applies when there is uncertainty or incomplete information about the value of resources over time.

## 1.2 *Trade-offs between different types of efficiencies*

It is important to note that not all types of efficiencies can be realised at the same time. In particular, de la Mano (2002) identifies the following two trade-offs:

- Allocative vs. productive efficiency; and,
- Static vs. dynamic efficiency.

In a static context, it may well be that mergers resulting in cost savings (*i.e.* an increase in productive efficiency) increase the price paid by consumers (so these are worse off and there is a greater allocative inefficiency), while at the same time welfare increases for the whole society (*i.e.* consumers and producers taken both into account). This is the essence of Williamson’s (1968) trade-off model (see sub-section 2.2),

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<sup>1</sup> For an extensive discussion of dynamic efficiencies, see OECD (2007a), *Dynamic Efficiencies in Merger Analysis*, [DAF/COMP\(2007\)41](#).

<sup>2</sup> See Williamson (1977, section IV) and Kolasky and Dick (2003, pp. 249 - 251).

where a merger to monopoly is shown to be capable of enhancing welfare when there is a reduction in marginal costs.

As to the second trade-off (static vs. dynamic efficiency), there can be sectors or industries where innovation is greater when firms have the possibility to acquire a monopolist position, at least temporarily, and thus charge a price which is above marginal cost during such a period.

In these sectors competition mainly occurs through “races” to innovate rather than through price setting, in a process known as Schumpeterian rivalry, after the economist Joseph Schumpeter who listed innovation as a central feature of modern economies. In the pharmaceutical sector, for example, firms compete to develop innovative medicines, which can then be patented and protected from competition for several years. During the period of patent protection, firms are usually able to charge a supra-competitive price, which allows them to recoup the high costs incurred during the research and development stages.

As a result, a merger to monopoly (or which would create a dominant position) in these sectors where Schumpeterian rivalry is prevalent could (at least in principle) allow the merging firms to pool complementary skills and assets (or avoid duplications of research efforts) and give rise to innovative products in the long run, although price competition might be dampened in the short term. In these cases, where consumers can be immediately harmed by the merger-related price increases, competition authorities face a difficult task because dynamic efficiencies may occur with some delay and are difficult to verify and quantify (see sub-section 2.5). On the other hand, dynamic efficiencies have the potential to outweigh static reductions in allocative efficiency and therefore should be carefully evaluated.

### ***1.3 Antitrust goals: A need to change priorities?***

Some commentators – notably, Porter (2001, 2002) – have suggested the need for a re-assessment of the current hierarchy of antitrust goals. In particular, Porter (2002) notes that, while it is important to protect short-run consumer welfare, the benefits of healthy competition are in fact much broader.

Competition drives productivity growth through innovation and “productivity growth is central because it is the single most important determinant of long-term consumer welfare and a nation’s standard of living” (Porter, 2002, p. 3). Yet, he asserts that this element is missing in the current competition analysis.

If productivity growth is to be the new goal of antitrust, dynamic considerations should then have a more prominent role than static concerns (such as increases in market power and reductions in technical efficiency), which Porter (2002) says have dominated U.S. antitrust policy so far. For example, according to this new perspective, higher prices from a merger would be a concern only when they are not justified by improvements in quality features and services, because improvements of this type also enhance productivity (despite the post-merger higher prices).

An example in this respect comes from the healthcare market (Coate, 2005). New treatments which improve outcomes and are valued by surviving consumers may also substantially increase the total cost of the treatment. A way for the antitrust analyst to reconcile these effects and properly assess value creation would be to look at the quality-adjusted price of a product rather than at its price only.

To determine the impact of a merger on productivity growth, Porter (2002) then suggests a dynamic approach based on five “forces”: i) threat of entry; ii) threat of substitute products or services; iii) bargaining power of buyers; iv) bargaining power of suppliers; and, v) rivalry among current competitors. In practice, this new approach puts less emphasis on defining the relevant markets than the current analysis and goes straight into the examination of competitive effects. Moreover, while it takes into consideration market concentration, it gives equal weight to all five forces,

Perhaps surprisingly, the adoption of productivity growth as a new antitrust standard calls for more caution in the treatment of mergers than other corporate growth strategies. Porter (2002) explains that this is so because: i) by removing independent competitors from the market, mergers inevitably raise issues for the health of competition; ii) a merger does not necessarily increase productivity, iii) according to some empirical evidence, mergers do not tend to be successful; iv) smaller, focused acquisitions are more likely to improve productivity than mergers among leaders; and, v) strong financial market pressures favour mergers rather than growth strategies.

## 2. Efficiency claims in mergers

### 2.1 Introduction

Firms merge for a variety of reasons. One motivation may, for example, be market power, *i.e.* the merger may increase the merging firms' ability to raise prices above marginal cost, either unilaterally or in (explicit or tacit) co-operation with their rivals. Some managers may acquire other firms for self-serving purposes, *e.g.* to "build an empire", to enhance their personal reputation or reduce the risk of being ousted by external investors. Or because they want to exploit imperfections in capital markets and see an opportunity in buying undervalued companies. In almost all cases, however, it will also be suggested that the merger allows the merging firms to achieve some efficiencies, such as economies of scale and scope in production and distribution, staff rationalisation, financial synergies (in the form of a lower cost of capital) and other synergies.<sup>3</sup>

Efficiencies can have a prominent role in the case of non-horizontal (*i.e.* vertical and conglomerate) mergers, and this is nowadays explicitly recognised by most antitrust agencies.<sup>4</sup>

A vertical merger, *i.e.* between firms operating at different levels of supply chain allows, for example, the internalisation of certain externalities and the alignment of incentives, by avoiding the "double mark-up" problem.<sup>5</sup> In addition, it can bring about production efficiencies and savings as well as transaction cost savings, *e.g.* because the merger improves the co-ordination between the two merging firms and eliminates the scope for opportunistic behaviour. In a conglomerate merger (where firms have neither a horizontal nor vertical relationship) consumers may benefit from one-stop shopping, *i.e.* the possibility of buying a range or portfolio of products from a single buyer rather than separately from different suppliers.

In horizontal mergers the focus has traditionally been on the loss of direct rivalry between the merging firms in the same relevant market, because this loss could enhance market power and harm consumers. Only after Oliver Williamson published his seminal article in 1968, it was realised (as is explained in the next section) that a loss in allocative efficiency resulting from greater market power could

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<sup>3</sup> Obviously, firms may decide to merge for a combination of the reasons listed above. See Trautwein (1990), and the references therein, for a survey of merger explanations, and Matsusaka (1993), who explores merger motives during the conglomerate merger wave of the late 1960s in the United States. From a more general view, the economic literature has also tried to explain two stylised facts about mergers, *i.e.* why i) they occur in waves, often in response to technological or regulatory shocks, which may be difficult to predict; and ii), within a wave, mergers cluster by industry. In this respect, see Mitchell and Mulherin (1996) and the discussion in Andrade, Mitchell and Stafford (2001).

<sup>4</sup> See, for example, paragraph 13 of the European Commission's Guidelines on the assessment of non-horizontal mergers: "*Vertical and conglomerate mergers provide substantial scope for efficiencies.*"

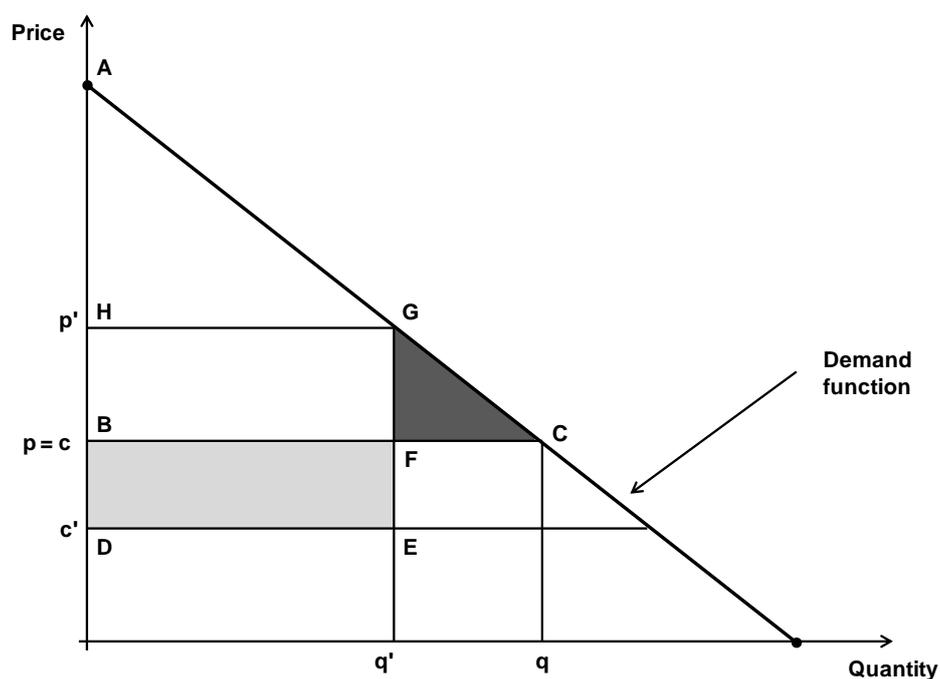
<sup>5</sup> See OECD (2007b).

well be compensated by an increase in productive efficiency.<sup>6</sup> Williamson's article then paved the way for a greater consideration of efficiencies in modern merger control.

## 2.2 Williamson's trade-off

Williamson (1968) was the first to challenge the conventional wisdom of the time by suggesting that efficiency gains (in the form of cost savings) could outweigh the increase in market power resulting from a merger. To make this point, he used a simple example which he denoted as the "naive trade-off model", described below and in Figure 2.

Figure 2. Williamson's (1968) naive trade-off model



Suppose that before the merger the market is in a competitive equilibrium, the price being equal to the marginal cost ( $p = c$ ). In this case, the aggregate social welfare corresponds entirely to the consumer surplus (because firms earn zero economic profits) and is illustrated by the area of the triangle ABC. Suppose now that there is a merger to monopoly and that after the merger the marginal cost falls to  $c'$ ,<sup>7</sup> while at the same time the price increases to  $p'$  (and the quantity produced declines from  $q$  to  $q'$ ). Note that, while the price does increase, it increases by less than it would have done if there were no reduction in marginal cost; similarly, quantity declines by less than it would have absent cost savings.

The merger has two opposite effects on welfare, hence the trade-off between efficiencies and market power.<sup>8</sup> The reduction in consumer surplus is equal to the area of the trapezoid HBCG, whereas the

<sup>6</sup> This trade-off is purely static. For the role of dynamic efficiencies in mergers, see OECD (2007a).

<sup>7</sup> The standard assumption in the model is that these costs represent true social costs. In other words, cost savings due to, for example, increased monopsony power resulting from the merger would not count as a social gain (Whinston, 2007).

<sup>8</sup> In theory, even a merger to monopoly could lead to a reduction in prices (and thus increase the aggregate social welfare) if cost savings are sufficiently large. In that case, there would obviously be no trade-off between efficiencies and market power; on the contrary, the merger would result in a net allocative-

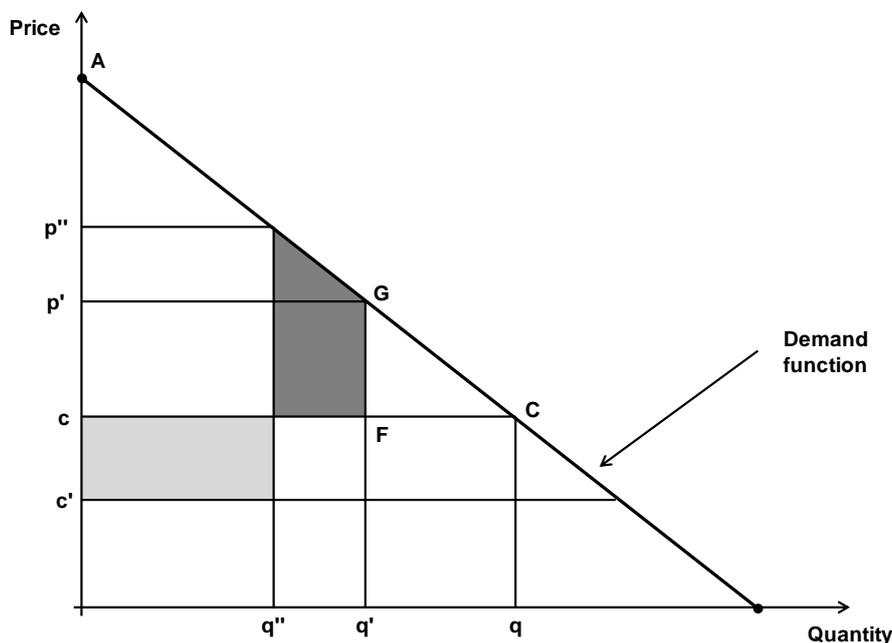
producer surplus increases from 0 to an amount equal to the area of the rectangle HDEG. The resulting aggregate social welfare is then given by the area of the trapezoid ADEG, the rectangle HDEG being a transfer from consumers to producers.

Whether society as a whole gains after the merger then depends on whether the producers' gain is larger than the consumers' loss, *i.e.* whether the area of the light-shaded rectangle BDEF (which is equal to the merger-induced cost savings) is larger than the area of the dark-shaded triangle GFC (*i.e.* the deadweight loss caused by price being above marginal cost post-merger).

Williamson (1968) made the point that even a small reduction in marginal cost – of the order of 5 to 10 per cent – may be enough to offset the welfare loss due to the price increase caused by the merger, *i.e.* that “*rectangles tend to be larger than triangles*” (Whinston, 2007, p. 2374).

One important point, however, to be noted about Williamson's (1968) simple model is the assumption that price is equal to marginal cost before the merger. This may not always be true and, if price is above marginal cost, then the relevant comparison is not between a triangle and a rectangle, but between a trapezoid and a rectangle and “*rectangles are not bigger than trapezoids*”. This can be seen in Figure 3 below, where the prevailing price before the merger is  $p'$ , which increases to  $p''$  afterwards (despite a reduction in marginal costs from  $c$  to  $c'$ ). In other words, when firms have some degree of market power prior to the merger, it is no longer true that small cost savings are sufficient to offset a price increase, *i.e.* even small increases in price can cause significant reductions in welfare (Whinston, 2007, p. 2374).

**Figure 3. Williamson's (1968) naive trade-off model**




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efficiency gain. In this respect, Williamson (1977, p. 707, footnote 26) noted that “*market power is only a necessary and not a sufficient condition for undesirable price effects to exist.*” There would still be the question, however, of whether a monopoly is the best way to foster productive and dynamic efficiencies.

## 2.3 *How the attitude towards efficiencies has changed over time*

Williamson's paper of 1968 was the first to show rigorously the trade-off between market power and merger efficiencies. His approach, however, was not embraced right away in the Merger Guidelines published that same year in the United States as he "*was too far ahead of his time*" (Shapiro, 2010, p. 141). In fact, it was not fully taken up until the revision of the section on efficiencies in the Horizontal Merger Guidelines in 1997, as is explained in the next sub-section.

### 2.3.1 *The United States*

The U.S. Supreme Court initially adopted a hostile view on efficiencies in merger cases.<sup>9</sup> For example, Williamson (1968, p. 19) noted that in 1962 "*in a unanimous opinion, the Court took the position in "Brown Shoe"*<sup>10</sup> *that not only were efficiencies no defense, but a showing that a merger resulted in efficiencies could be used affirmatively in attacking the merger since small rivals could be disadvantaged thereby.*" In other words, at the time the main concern seems to have been that efficiencies realised by the merging firms could put small (and often inefficient) rivals at a disadvantage. This view was reaffirmed by the Supreme Court in its *Philadelphia National Bank* and *Procter & Gamble* decisions of 1963 and 1967, respectively.<sup>11</sup>

Despite these judicial precedents, however, the Merger Guidelines published by the U.S. Department of Justice (DoJ) in 1968 did allow a limited efficiency defence.<sup>12</sup> This (as well as the fact that the Supreme Court allowed efficiency considerations in some non-merger cases, e.g. *GTE Sylvania*<sup>13</sup>) encouraged merging parties to put forward efficiency claims in some cases.

Another significant step towards incorporating efficiencies in merger analysis occurred when the DoJ revised its Merger Guidelines in 1984. Firstly, with these Guidelines efficiencies became an integral part of the competitive assessment, i.e. they ceased to be a defence against a presumption of illegality. Secondly, the 1984 Merger Guidelines explained the criteria which were going to be used to evaluate efficiencies and provided a comprehensive list of the types of efficiencies that the DoJ would consider.<sup>14</sup> These changes

<sup>9</sup> This section partly draws upon Kolasky and Dick (2003). See also Mueller (1996).

<sup>10</sup> *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

<sup>11</sup> *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>12</sup> Paragraph 10 of the 1968 Merger Guidelines reads as follows: "*Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.*"

It is worth noting that Oliver Williamson worked as Special Economic Assistant to the Assistant Attorney General for Antitrust at the Department of Justice during 1966 and 1967.

<sup>13</sup> *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 35 (1977).

<sup>14</sup> Cf. Section 3.5 of the 1984 Merger Guidelines: "*Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Department may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to*

represented a marked difference compared to the approach taken by the DoJ just two years earlier (in 1982), when a new set of Merger Guidelines had first been published.<sup>15</sup> At the same, the Federal Trade Commission (FTC) also relied on efficiencies (as well as other factors) to allow (subject to conditions) a production joint venture between General Motors and Toyota in 1984.

The 1992 Horizontal Merger Guidelines – which for the first time were jointly published by the DoJ and the FTC – left the section on efficiencies largely unchanged compared to the 1984 version, with one important exception. That is, the sentence providing that efficiencies would not be considered unless they were established by “clear and convincing evidence” was removed. This change further contributed to efficiency claims being more frequently put forward by merging parties.<sup>16</sup>

A major revision of the section on efficiencies, however, occurred in 1997, when an approach consistent with Williamson (1968) was adopted. In particular, the 1997 revision explained that “*efficiencies generated through a merger can enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products*” (section 4). It also set out the criteria to admit efficiencies by defining cognisable efficiencies as “*merger-specific efficiencies that have been verified and do not arise from anti-competitive reductions in output or service.*”

Finally, the latest Guidelines published in 2010 did not substantially modify the approach taken in the 1997 revision (see also section 2.5). The 2010 Guidelines, however, considered dynamic efficiencies in more detail and recognised that “*such efficiencies may spur innovation but not affect short-term pricing*” (section 10). They also cautioned that “*research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.*”

In line with this trend, some recent cases examined by the U.S. DoJ and FTC dealt with efficiencies to a significant extent.

In 2004, for example, the FTC closed its investigation of Genzyme’s acquisition of Novazyme, which was consummated in 2001.<sup>17</sup> Both firms were engaged in conducting early pre-clinical studies relating to a treatment for Pompe disease – a rare, often fatal, disease affecting infants and children, for which there was no effective treatment at the time of the merger.

The main concern arising from the merger was that it would negatively affect the pace and scope of research into the development of a treatment for Pompe disease. The FTC, however, found no evidence that the merger reduced R&D spending on either the Genzyme or the Novazyme program or slowed progress along either of the R&D paths. In fact, according to the (majority of) FTC’s Commissioners, there

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*specific manufacturing, servicing, or distribution operations of the merging firms, although, as a practical matter, these types of efficiencies may be difficult to demonstrate.”*

<sup>15</sup> The 1982 Merger Guidelines had limited the consideration of efficiency claims to “extraordinary cases” only, arguably an even more restrictive standard than the “exceptional circumstances” used in the 1968 Guidelines. Moreover, they had “*tilted the playing field even further against efficiencies by treating efficiencies as an affirmative defense, like the failing company doctrine, and not as part of the agency’s competitive effects analysis*” (Kolasky and Dick, 2003, p. 203).

<sup>16</sup> Over time, efficiency claims have also been more widely accepted in courts; see, for example, *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Circuit 1991); *FTC v. Butterworth Health Corp.*, 121 F.3d 708 (6th Circuit 1997); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Circuit 1999); and, for a non-hospital case, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Circuit 2001).

<sup>17</sup> The investigation was closed with a 3-1-1 vote, with Commissioners Thompson and Jones Harbour dissenting and not participating in the vote, respectively. See the FTC’s press release of 13 January 2004 at: <http://www.ftc.gov/opa/2004/01/genzyme.shtm>.

were strong reasons to believe that the merger would likely create benefits that would save patients' lives. In particular, FTC's Chairman noted that the merger "*made possible comparative experiments and provided information that enabled the Novazyme program to avoid drilling dry holes. By accelerating the Novazyme program, the merger may have increased its odds of success. Moreover, the merger made possible synergies that will help avoid a delay in the Novazyme program.*"<sup>18</sup>

Similarly, in March 2008 the DoJ decided not to challenge the proposed merger of XM Satellite Radio with Sirius Satellite Radio, two satellite radio providers.<sup>19</sup> The authority noted that the merger would not enable the parties to profitably increase prices to satellite radio customers for several reasons, including: i) a lack of competition between the parties in important segments (*e.g.* in the car manufacturer channel) even without the merger; ii) the competitive alternative services available to consumers, such as traditional AM/FM and HD radio services; iii) technological change<sup>20</sup> that is expected to make those alternatives increasingly attractive over time; and, iv) efficiencies likely to flow from the transaction that could benefit consumers.

In respect of efficiencies, the DoJ said that its investigation had confirmed that the parties were likely to realise significant variable and fixed cost savings through the merger. However, it had not been possible to estimate the magnitude of the efficiencies with precision due to the lack of evidentiary support provided by XM and Sirius. Moreover, many of the efficiencies claimed by the parties were not credited or were discounted because they did not reflect improvements in economic welfare, could have been achieved without the proposed transaction, or were not likely to be realised within the next several years.

Nevertheless, the DoJ estimated that the variable cost savings most likely to be passed on to consumers in the form of lower prices would be substantial. For example, thanks to these savings the parties would be in a position to consolidate development, production and distribution efforts on a single line of radios and thereby eliminate duplicative costs and realise economies of scale. According to the DoJ, these efficiencies alone were likely to be sufficient to undermine an inference of competitive harm.

In another case (*FTC v. H.J. Heinz Co. and Milnot Holding Corporation*), of 2000-01, however, efficiency claims were rejected.

The merger would have brought together the second and third largest producers of jarred baby food, since at the time of the proposed merger Heinz and Beech-Nut – accounting for 17 per cent and 15 per cent of total sales, respectively – were much smaller than Gerber, the leading firm with more than 65 per cent of the market. The FTC's main concern was that this "3-to-2" merger would have reduced wholesale competition and this in turn would have led to higher prices at both wholesale and retail levels. Moreover, new entry that could challenge the parties' increased post-merger market power appeared "difficult and improbable" in the presence of high barriers.

In turn, the merging parties asserted that the transaction would have yielded merger-specific savings (mostly productive efficiencies) in the range of US\$ 9.4 million to US\$ 12 million. In particular, consolidating production of baby food at Heinz's modern plant in Pittsburgh and closing down outdated Beech-Nut's facility in Canajoharie, New York, would have allowed a reduction in the variable cost of approximately 43 per cent (deriving mostly from cost savings in salaries and operating costs as well as in the cost of converting raw materials, reducing waste and consolidating administrative overhead). This kind of efficiencies is explicitly recognised in the U.S. Horizontal Merger Guidelines, which state in Section 4:

<sup>18</sup> Statement of Chairman Timothy J. Muris in the matter of *Genzyme Corporation / Novazyme Pharmaceuticals*, available at: [www.ftc.gov/os/2004/01/murisgenzymestmt.pdf](http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf).

<sup>19</sup> See the DoJ's press release of 24 March 2008 at: [http://www.justice.gov/atr/public/press\\_releases/2008/231467.htm](http://www.justice.gov/atr/public/press_releases/2008/231467.htm)

<sup>20</sup> Namely, next-generation wireless networks will make streaming Internet radio to mobile devices possible.

“efficiencies resulting from shifting production among facilities formerly owned separately [...] enable the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.” On top of that, the parties provided evidence of distribution efficiencies, notably of a reduction by 15 per cent in the distribution of Beech-Nut products.

The FTC argued that the claimed efficiencies were unlikely to outweigh the anti-competitive effects of the merger. Moreover, they were not cognizable as they could have been achieved through other means. The District Court, however, sided with the parties accepting their efficiency claims and denied the FTC’s request for a preliminary injunction.<sup>21</sup>

The FTC appealed the judgment, which led to the Court of Appeals reversing the District Court’s decision.<sup>22</sup> In particular, the Court of Appeals ruled that the evidence accepted by the lower court was insufficient as it fell short of the findings “necessary for a successful efficiencies defence in the circumstances of this case”. The Court identified three major deficiencies. First, the District Court should have taken into account the reduction in total variable manufacturing cost rather than mere variable conversion cost which accounts for only a small percentage of the former. Such a difference has significant implications as it “cuts the asserted efficiency gain in half”, from 43 per cent to 22.3 per cent. Second, the District Court should have considered the reduction over the merged firm’s combined output, rather than that of Beech-Nut alone. Lastly, the District Court did not explain why Heinz could have not achieved the claimed efficiencies by means other than merger. As a result of this judgement, the parties ultimately decided to abandon the proposed merger.

### 2.3.2 The European Union

The Council Regulation no. 4064/89 of 21 December 1989, which originally regulated the appraisal of mergers by the European Commission until 2004, did not contain any specific provision about efficiency claims.

As a result, the most viable (and perhaps sole) option for the merging firms to put forward an efficiency claim appeared to be by reference to Article 2(1)(b) of Regulation 4064/89, which stated that the Commission had to take into account (among other factors) “*the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition*” when assessing concentrations.

This was not an easy path and, indeed, the Commission’s decisional practice in those years was not favourable to efficiency claims. In early decisions the Commission outlined a number of requirements, *e.g.* that efficiencies had to be substantial, merger-specific and passed on to consumers, with the burden of proof resting on the merging parties.<sup>23</sup> In some other cases, however, the Commission adopted a more hostile approach arguing that the claimed efficiencies contributed to creating or strengthening a dominant position and had therefore to be considered as evidence that the proposed concentration would be anti-competitive. It seemed to some commentators that in practice the Commission was putting forward an “efficiency offense” argument.<sup>24</sup>

<sup>21</sup> *FTC v. H.J. Heinz Co. et al*, 116 F. Supp. 2d 190 (2000).

<sup>22</sup> *FTC v. H.J. Heinz Co. and Milnot Holding Corporation*, 246 F. 3d 708 (2001).

<sup>23</sup> See Fackelmann (2006, section 3.2) for a review of the early Commission’s decisions, including: *Aerospatiale-Alenia / de Havilland* (Case IV/M.053) of 1991; *ACCOR / Wagon-Lits* (Case IV/M.126) of 1992; and, *Saint-Gobain / Wacker-Chemie / NOM* (Case IV/M.774) of 1997.

<sup>24</sup> See, for example: *AT&T / NCR* (Case IV/M.50) of 1991, *MSG Media Service* (Case IV/M.469) of 1994, *Nordic Satellite Distribution* (Case IV/M.490) of 1996, *De Beers / LVHM* (Case IV/M.2333) of 2003, and especially *General Electric / Honeywell* (Case IV/M.2220) of 2004, which illustrated the extent of the divergence between the European and U.S. approaches at the time.

In contrast, Council Regulation no. 139/2004 of 20 January 2004, which superseded Regulation 4064/89, allowed efficiencies to play a greater and even decisive role in merger assessment. In particular, recital 29 of the preamble states: “*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 harms to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition.*”<sup>25</sup> Also, the Guidelines for the assessment of horizontal mergers issued by the Commission just few weeks later contained a specific section on efficiencies (see section 2.5 for a summary of the main provisions).<sup>26</sup> More recently, in 2008, the Commission once again confirmed the role of efficiencies in merger assessment in the context of non-horizontal mergers.<sup>27</sup>

In practice, to date the European Commission has cleared no merger solely on the basis of efficiencies. Efficiency claims, however, have been discussed in a number of mergers; and, in some cases remedies accepted by the Commission may have helped securing efficiencies. Below is a summary of the Commission’s approach in a recent horizontal case (*Ryanair / Air Lingus*) and two non-horizontal (*TomTom / TeleAtlas* and *Nokia / Navteq*) ones.

- Efficiencies in *Ryanair / Air Lingus*<sup>28</sup>

Ryanair and Aer Lingus are the biggest airlines operating from Ireland, competing (at the time of the proposed merger) on 35 routes. The European Commission found that post-merger the new entity would have a monopoly on 22 routes and a market share exceeding 60 per cent on the remaining 13 routes.

Ryanair asserted that the merger would allow significant efficiencies, deriving mainly from “operational cost savings”, as a result of: i) larger scale; and, ii) rationalisation within Aer Lingus, once Ryanair’s business model (and related expertise in generating lower costs and greater efficiencies) would be applied to it (including via better and more innovative management). These savings would come from several areas, such as: staff costs, aircraft ownership costs, maintenance costs, airport charges and ground operational costs, ancillary sales and, finally, distribution efficiencies.

The Commission, however, identified erroneous assumptions and inaccuracies in Ryanair’s estimations and rejected the efficiency claims, predominantly on the ground that they were not verifiable.

- Efficiencies in *TomTom / TeleAtlas* and *Nokia / Navteq*<sup>29</sup>

At the time of the proposed merger, TomTom was one of the main suppliers of Portable Navigation Devices (PNDs) and navigation software and decided to integrate backwards by acquiring a provider of navigable digital map databases, TeleAtlas.

The parties argued that the merger would allow them to eliminate a double mark-up, thereby allowing them to expand profitably sales of PNDs. However, the problem raised by efficiencies

<sup>25</sup> However, as Fackelmann (2006, p. 21) notes, efficiencies as such are not mentioned in the legally binding part of Regulation 139/2004. Moreover, the wording of article 2(1)(b) is also the same as in Regulation 4064/89.

<sup>26</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. [2004] C 31/5.

<sup>27</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. [2008] C 265/6.

<sup>28</sup> Case COMP/M.4439, *Ryanair / Aer Lingus* [2007].

<sup>29</sup> Cases COMP/M.4854, *TomTom / TeleAtlas* [2008] and COMP/M.4942, *Nokia / Navteq* [2008].

associated with the elimination of double mark-ups is that they may not always be merger-specific. In this respect the Commission's Non-Horizontal Merger Guidelines explain that "*the problem of double mark-ups is not always present or significant pre-merger, for instance because the merging parties had already concluded a supply agreement with a price mechanism providing for volume discounts eliminating the mark-up.*"<sup>30</sup> In *TomTom / TeleAtlas*, however, the Commission had evidence that showed that it was unlikely that the same beneficial effects could be secured in other ways and therefore concluded that the claimed efficiencies were merger-specific.

Similar arguments were examined in *Nokia / Navteq*, which also involved backward integration. This time, Nokia, active in the downstream market for the provision of mobile handsets, acquired Navteq, a provider of navigable digital maps.

As in *TomTom / TeleAtlas*, the Commission considered efficiencies resulting from the internalisation of the double mark-ups to be merger-specific. Unlike in the previous case, however, the Commission could not rely on existing contracts to conclude that the same effects could not have been achieved in the absence of the merger. This was because at the time the provision of navigation services on mobile handset was a nascent activity. Nonetheless, the Commission considered that "*the pricing structure for sales of digital map databases for mobile applications should not be significantly different than those that currently exist in the PND market*" (paragraph 368).

In *TomTom / TeleAtlas* the merging parties also asserted that, by using data collected by TomTom, the map generation process would improve post-merger. Consequently, the new entity could produce "better maps – faster". The Commission agreed that the claimed efficiency would benefit consumers, but doubted whether such efficiency was merger-specific and verifiable. A precise estimation of claimed efficiencies, however, was not necessary because the proposed transaction did not give rise to anti-competitive effects.

### 2.3.3 Current trends and recent cases in other jurisdictions

Efficiency claims have never had an easy life in merger analysis, as summarised above. Nowadays, however, an increasing number of jurisdictions incorporate efficiency considerations into the merger guidelines issued by national competition authorities and are often explicitly acknowledged in national competition acts and statutes. By way of example, the Korean Monopoly Regulation and Fair Trade Act states that a merger which may substantially lessen competition in a particular relevant market is nonetheless to be permitted when "the enhancement of efficiency attainable through the merger is greater than the anticompetitive effect."

Moreover, even if the number of cases decided on the basis of efficiencies continues to be low, merging parties increasingly more often put forward efficiency claims, and on a few occasions efficiencies have actually turned out to be an important factor in the analysis.

Furthermore, most often, the merging parties will claim that the merger brings about supply-side efficiencies, *i.e.* efficiencies which allow them to lower their production costs and in turn their prices (see also the Appendix). This kind of efficiencies is relatively difficult to prove, as discussed so far.

Demand-side efficiencies – which arise in the case of complementary products – may instead be easier to prove, because it is in the parties' own interest (*i.e.* it is profit-maximising) to lower prices. This happens because lowering the price of one product increases the demand for all the products brought under common ownership after the merger (since the products are complements) and in turn increases profits.

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<sup>30</sup> Footnote 7 in para. 55.

This logic has recently been applied in a merger of radio stations in the United Kingdom, as discussed in Box 1 below.

**Box 1: Demand-side efficiencies in a merger of radio stations in the United Kingdom**

In August 2008, the UK Office of Fair Trading (OFT) cleared the acquisition of GCap Media by Global Radio UK with respect to the Greater London area. While efficiencies were not the only reason behind the OFT's decision to clear the acquisition in this area, they actually "tipped the balance in favour of clearance in London". This is the first OFT's decision in which the authority relied on efficiencies to conclude that the acquisition would not harm consumers.

In the UK efficiencies can be taken into account where: i) they avert the adverse effects of a substantial lessening of competition (SLC) by enhancing rivalry; or, ii) they do not avert an SLC, but will nonetheless be passed on after the merger in the form of customer benefits that offset the adverse effects that would arise from the SLC. The relevant criteria are essentially the same as those of the European Commission, *i.e.* efficiencies must be demonstrable, merger-specific and likely to be passed on to customers.

In *Global / GCap* the OFT found compelling evidence of a specific type of demand-side efficiencies known as Cournot effects. These arise when products are complements so that lowering the price of one product drives additional sales of it and also of other products which are used with (but not instead of) it. Common ownership (*e.g.* by way of a merger) then makes it possible to internalise the positive effect of a lower price of one product on sales of its complements. In other words, as in vertical mergers, common ownership solves a double-marginalisation problem and enhances allocative efficiency.

In the specific case, after the merger the merging parties would become able to set the price of bundles of their complementary radio stations<sup>31</sup> in London more efficiently (from the advertisers' viewpoint) than either party selling advertising on one or more than one of its radio stations independently.

The OFT also gave some credit to the proposition that in a two-sided market, such as radio, additional demand-side efficiencies could result from post-merger product repositioning of radio stations in London. In particular, by changing format and/or programming after the merger, the parties' radio stations would individually achieve greater demographic specialisation and, all combined, a larger and more focused total audience. These indirect network effects would in turn increase the value of airtime to advertisers. This argument, as the OFT pointed out, is supported both by economic theory as well as empirical evidence concerning the radio broadcasting sector in other jurisdictions.

The OFT noted that both types of efficiencies would improve the merging parties' offer to listeners and advertisers and could be characterised as rivalry-enhancing. The parties' rivals would indeed need to improve their commercial offer if they want to win and retain customers made better off by the merger. As a result, the merger would enhance overall rivalry and benefit customers in the London area, notwithstanding the loss of rivalry between the merging parties themselves.

As a final remark it is worth noting that, while the OFT accepted efficiency claims with respect to the London area, it found that such claims did not meet the required standard of proof in relation to the East Midlands and they were therefore discarded.<sup>32</sup>

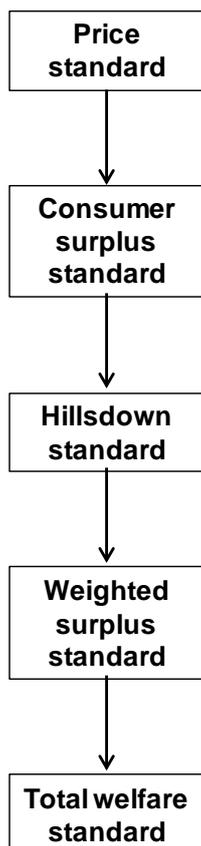
<sup>31</sup> The OFT noted that, although the merger between Global Radio UK and GCap Media is horizontal to a degree (because it is a merger of owners of radio stations in the London area which are substitutable for each other to some degree), the parties' respective stations are more complementary than they are substitutable. Since advertisers often purchase airtime from multiple London stations as a bundle to ensure maximum coverage for their campaigns, the horizontal merger in London is then more like a conglomerate merger.

<sup>32</sup> In this case the OFT also considered supply-side rivalry-enhancing efficiencies, namely savings in fixed and variable costs. However, it found that variable cost savings were not substantiated, whereas the large savings in fixed costs claimed by the parties could not demonstrably be passed on to customers.

## 2.4 *Welfare standards and efficiency claims*

The assessment of potential efficiency gains in merger analysis crucially depends on which welfare standard a specific competition authority applies. The most common standards proposed by the literature and used in practice are briefly described below. As in Renckens (2007), the order (see Figure 4 below) is increasing in the weight given to producer surplus and the role that efficiency claims play.

**Figure 4. Welfare standards, ranked according to the weight assigned to producer surplus**



### 2.4.1 *Price standard*

Under this standard, a merger resulting in a price increase will not be approved. In the literature, however, it is not always clear whether efficiencies can be taken into account. For example, a distinction can be made between a *pure* price standard (where efficiencies are not taken into account, even if they are large enough to outweigh any merger-induced price increases), and a *modified* price standard, where a merger would be approved if it gave rise to efficiencies capable to offset a price increase post-merger.

### 2.4.2 *Consumer surplus (CS) welfare standard*

The difference between this standard and the modified price standard discussed above is not always well defined in the literature. In short, a merger which reduces consumer surplus will not be approved. Under a broad definition of the standard, efficiencies as well as non-price considerations (*e.g.* those related to product quality, choice and innovation) can be taken into account to offset a post-merger price increase.

Among the jurisdictions which rely on this standard, there are the European Commission, the United Kingdom, the United States<sup>33</sup>, Finland and Ireland.

#### 2.4.3 *Hillsdown standard*

Unlike previous standards, this standard – which takes its name from a Canadian case of the early 1990s<sup>34</sup> – considers both consumer and producer surplus. According to this standard, a merger is approved only if the efficiencies it generates exceed the entire reduction in consumer surplus.

In other words, while producer surplus is taken into account, it is given a smaller weight than consumer surplus. This criterion is seldom applied in practice, because it is difficult to implement and is also internally inconsistent since “*it would permit some mergers that make consumers worse off and block some mergers that make society as a whole better off*” (de la Mano, 2002, p. 23).

#### 2.4.4 *Weighted surplus (WS) welfare standard*

Suggested for the first time in the Canadian *Superior Propane* case (see below), this standard requires competition authorities to assign their own weight to the two components of aggregate social welfare, *i.e.* consumer and producer surplus, even on a case-by-case basis. A merger is then approved only when the weighted sum of consumer and producer surplus is positive. While this standard explicitly recognises producers’ gains (and there is no requirement for these to be passed on to consumers), these are typically given less weight than consumers’ interests. There is also a question of legal certainty in respect of which weights need to be used to evaluate consumer and producer surplus.

#### 2.4.5 *Total surplus (TS) welfare standard*

The total surplus welfare standard assigns equal weights to the consumer and producer surplus. This means that a merger resulting in a price increase can still be approved if the efficiency gains accruing to producers are greater than the deadweight loss suffered by consumers. In other words, not only efficiency gains are permitted even if they are not passed on to consumers (as in the Hillsdown and weighted surplus criteria), but transfers of wealth from consumers to producers are also completely neutral (in that consumer and producer surplus are given the same weight).

The total welfare standard is often advocated by economists, who argue that competition authorities should not consider redistributive effects of mergers on the grounds that: i) such effects are difficult to assess; and, ii) benefits to both consumers and producers are equally worthy of protection. In practice, however, few competition authorities, notably Norway and Canada, use this standard today.<sup>35</sup>

<sup>33</sup> While there has been some debate about which welfare standard the U.S. competition authorities effectively apply, it is now generally accepted that the United States rely on the consumer welfare standard. Judge Frank Easterbrook, for example, observed that: “*the choice [Congress] saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges*” (Easterbrook, 1986).

<sup>34</sup> Hillsdown Holdings Ltd. had acquired Ontario Rendering Company Ltd in July 1990. The Commissioner of Competition challenged the merger arguing that it resulted in a substantial lessening of competition in the non-captive red meat rendering market in southern Ontario. The Tribunal, however, was not convinced and allowed the merger arguing that Section 96 of the Canadian Competition Act suggests considering wealth transfers as well as deadweight losses in the trade-off analysis between efficiency gains and higher monopoly power.

<sup>35</sup> The choice is to some extent politically motivated. See, for example, Kokkoris (2010): “*In reality [...], the choice of as welfare standard does not reflect the findings of the economic science, but rather has the*

#### 2.4.6 *Weighted and total surplus in Canada: The Superior Propane case*

Canada provides an interesting example of the debate around which standard – notably, a weighted or total surplus standard – should be used to assess mergers. This debate originated with the *Superior Propane* case.

In December 1998, Superior Propane acquired all the shares of its main competitor, ICG Propane, thereby merging Canada's two largest firms active in the market for the distribution of propane and related equipment. Following the merger, the new entity's market share amounted to approximately 70 per cent.

After the acquisition had taken place, the Commissioner of Competition filed an application before the Competition Tribunal, seeking an order to dissolve a merger or any other remedy that would prevent the 'substantial lessening of competition'. The Tribunal issued its first decision in August 2000, with which it denied the Commissioner's application and allowed the merger.

In its decision the Tribunal agreed with the Commissioner that the merger was likely to substantially lessen competition in the market. However, the Tribunal also accepted the efficiency claims submitted by the parties and found that gains in efficiency would be greater than and would offset anti-competitive effects. In particular, on the basis of the submitted evidence, the Tribunal found that, while higher prices would have led to a deadweight loss to the economy of approximately \$6 million per year, the merger would produce significant costs savings from efficiencies of \$29.2 million per year. Most of Superior's claimed efficiencies were productive in nature. Dynamic efficiencies, on the other hand, were discarded since they were considered to be too speculative.

To balance the anti-competitive effects, the Tribunal employed the total surplus standard. In the Tribunal's view this standard was correct for two reasons. First, it was consistent with the economists' view on what was the appropriate method of estimating the effects. Second, it complied with section 96 of the Act, the Commissioner's own Merger Enforcement Guidelines of 1991 and the objectives pursued by the Parliament in adopting merger-specific provisions of the Act.

The Commissioner appealed the first Tribunal's decision to the Federal Court, arguing that the Tribunal was wrong to apply the (unweighted) total surplus standard and refused to consider the redistributive effects of the wealth transfer from consumers to producers. The Court remanded the case for re-consideration to the Tribunal, because, in its view, the Tribunal had failed to "*ensure that all of the objectives of the Competition Act, and the particular circumstances of each merger, could be considered in the balancing exercise mandated by section 96.*" In particular, the Court stated that the Tribunal had erred when it ignored potential transfer of wealth from consumers to producers. The Court, however, did not provide guidance as to what test it would consider appropriate for balancing the merger's anticompetitive effects, but pointed out that the balancing proposed by the Commission seemed to take into account all of the Competition Act's objectives.

The Tribunal took a second decision in 2002, when it dismissed the Commissioner's application again. The Commissioner appealed again to the Court, attacking the Tribunal's second decision on the grounds that it had not complied with the court's guidance, which clearly suggested that redistributive effects should be taken into account when assessing potential effects of the merger. This time, however, the Court dismissed the Commissioner's appeal, ruling that the Tribunal's second decision followed its previous direction.

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*nature of a political choice, which works against the adoption of the total surplus standard.*" For theoretical discussions of the merits of different welfare standards, see Besanko and Spulber (1993), Lyons (2002), and Neven and Röller (2005). See also Heyer (2006).

## 2.5 *Standard of proof: When do competition authorities admit efficiency claims?*

### 2.5.1 *Criteria to admit efficiency claims*

Since information about potential efficiency gains in mergers is solely in the merging firms' possession (which puts competition authorities at disadvantage), or sketchy or non-existing at all in some cases, it is not surprising that most agencies adopt a cautious approach when they evaluate efficiency claims.

The European Commission, for example, allows efficiencies only when the following three conditions are cumulatively met:<sup>36</sup>

- *Efficiencies must benefit consumers.* This condition requires that at least some of potential efficiency gains from the merger are passed on to consumers, for example in the form of lower prices. This follows from the application of a consumer welfare standard (see section 2.4 above) which, in the European Commission's Horizontal Merger Guidelines (paragraph 79), is stated as "*consumers will not be worse off as a result of the merger.*"<sup>37</sup> In addition, the Commission mentions at paragraph 81 of the Guidelines that consumers may also benefit from new or improved products or services which may result, for example, from increased R&D activity and innovation, thus explicitly recognising the role that dynamic efficiencies can play in merger cases.<sup>38</sup>
- *Efficiencies must be merger-specific.* Claimed efficiencies are only allowed when: i) they are the direct result of the proposed merger; and, ii) they cannot be achieved to a similar extent by less anti-competitive, yet realistic and attainable alternatives, such as internal expansion by one or both merging parties, licensing agreements, joint ventures or a merger which is structured differently. If these alternatives<sup>39</sup> exist, then the claimed efficiencies cannot be considered as merger-specific and are therefore to be disregarded.
- *Efficiencies must be verifiable.* In order for efficiency claims to be admitted, the merging parties are required to provide evidence that efficiencies are likely to materialise and are large enough to offset any potential harm to consumers deriving from the merger. Ideally, this evidence should enable antitrust agencies to *quantify* the claimed efficiencies and the resulting benefit to consumers. Or, if this is not possible, the evidence provided should at least allow them to clearly identify a positive and non-marginal impact on consumers.<sup>40</sup>

<sup>36</sup> See Section VII of the European Union's Guidelines on the assessment of horizontal mergers. Other jurisdictions use a similar framework, although there may of course be variations.

<sup>37</sup> See also paragraph 77: "*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.*"

<sup>38</sup> See, however, Fackelmann (2006, section 3.4) for a critical assessment of the role that dynamic efficiencies can play in the European merger control system.

<sup>39</sup> In its assessment the European Commission only considers "*alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned*" (Horizontal Guidelines, paragraph 85). The U.S. authorities adopt a similar approach, *i.e.* the assessment does not to include merely theoretical alternatives.

<sup>40</sup> de la Mano (2002, p. 52) stresses the need not to overemphasise the requirement to quantify efficiencies, especially in the case of dynamic efficiencies: "*The risk is that undue weighting is placed on quantifiable factors such as short term productive efficiency gains at the expense of hard-to-measure dynamic efficiency effects. Dynamic efficiency is the least quantifiable form of efficiency but is almost always the most economically significant component of global efficiency gains. Therefore, in practice, sufficient weight*

A number of related requirements follow from these three conditions, namely in the case of the European Commission:

1. Efficiencies must be substantial and timely.

As noted above, the claimed efficiencies must be of a magnitude capable to offset any potential harm to consumers. There is a relationship between the two metrics, *i.e.* the greater the potential harm to consumers, the greater in size (and more certain) efficiencies must be, at least up to a certain market concentration threshold.

Efficiencies will therefore be seldom useful in extreme cases. The European Commission's Guidelines on the assessment of horizontal mergers (at paragraph 84) state that "*it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.*" The U.S. Horizontal Merger Guidelines also make a similar point in section 10: "*In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly.*"

The Dutch hospital case summarised in Box 2 below, however, represents a notable exception. In particular, the decision of the Dutch competition authority (NMa) is interesting because: first of all, it is one of the first cases in Europe concerning a horizontal merger where efficiency defence has made a difference; and, secondly, efficiency considerations played an important role even if the criteria for submitting such claims were not (at least initially) fully met.

In fact, this was not the first time that the NMa had examined efficiencies. Notably, in August 2008 the Dutch authority unconditionally cleared a transaction between the only two national, door-to-door distributed directories in the Netherlands, thereby allowing European Directories to acquire Gouden Gids.<sup>41</sup>

The transaction at first sight looked like a two-to-one merger because the only two nationwide print directories were planning to merge. However, the parties asserted that such view did not reflect market reality as the growth of internet search and advertising was profoundly altering the directories market.

The NMa decided to clear the transaction mostly on the basis of demand-side efficiencies. According to the parties, the transaction would bring benefits to both non-overlap and overlap advertisers.<sup>42</sup> The non-overlap advertisers would be able to increase their penetration and the 'price per eyeball' would fall. The overlap advertisers, on the other hand, would benefit mostly from the fact that they would only need to advertise in one directory, which would also allow them to benefit from lower prices. Overall, the transaction would improve a price-quality ratio for both groups of advertisers.

Having examined the claims put forward by the merging parties, the competition authority concluded that they satisfied the three-criteria test. The pass on to consumers would be immediate, while a

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*should be put on a qualitative judgement on the likelihood that such less-measurable efficiencies will effectively take place.*"

<sup>41</sup> Decision No. 6246 of the Board of the Netherland Competition Authority, *European Directories – Truvo Nederland*, available at: [http://www.nma.nl/en/images/6246BCV\\_ENG23-153892.pdf](http://www.nma.nl/en/images/6246BCV_ENG23-153892.pdf)

<sup>42</sup> Users of directories tend to consult only one directory. Since both Gouden Gids and de Telefoongids (published by European Directories) account for a significant share of the market, many firms that use directories to increase their visibility advertise in both directories (overlap advertisers).

demonstrable and merger specific effect of the mergers was that it would allow the advertisers to reach a larger audience.

Efficiencies must also be timely, since the later they are expected to occur in the future, the less weight they are given. This is because efficiencies occurring in a more distant future are unlikely to be capable to offset any consumer harm which materialises in the short-term and are more difficult to verify.<sup>43</sup>

### **Box 2: Efficiencies in a merger to near-monopoly in the Netherlands<sup>44</sup>**

In 2009 the NMa cleared (after a phase-II investigation) a merger between two hospitals in the Netherlands. The merger initially raised serious competition concerns, namely: i) after the merger the new entity would hold a near-monopolist position with 84 per cent and 88 per cent in the markets for clinical general and non-clinical general hospital care, respectively; and, ii) as a result of that position, the choice for patients in the affected region would be reduced. However, the merging parties stressed that the merger would bring about efficiency gains and the NMa, having accepted such claims (to some extent), ultimately cleared the merger (subject to substantial remedies).

The criteria in the Netherlands competition law to allow efficiencies in merger proceedings are similar to those of most jurisdictions, *i.e.* efficiencies can be accepted only if they fulfil three cumulative conditions: i) efficiencies must be passed on to consumers; ii) they must be merger-specific and iii) verifiable.

In the case at hand, the NMa accepted that the efficiencies claimed were merger-specific, but the parties had to offer remedies to satisfy the remaining two criteria.

In particular, with respect to the pass-on of benefits to consumers, the merging parties argued that after the merger the quality of care provided in the hospitals would increase, which in turn would directly benefit consumers. The NMa, however, was not convinced that the increase in quality would offset a possible price increase. The parties then proposed to: i) set maximum prices, on the basis of a national price cap, for specialist medical care (which was not included in the basic compulsory healthcare insurance); ii) establish a higher-level intensive and emergency care unit within three years; and, iii) comply with a requirement concerning the minimal size of departments and treatments offered per specialist.

To meet the verifiability criterion, the merging hospitals had to facilitate the entrance of potential new suppliers of specialist medical care with a view to create more competition. Such a remedy effectively implied that specialists would be allowed to work at the parties' hospitals as well as at other places.

In this case, then, not all three conditions to allow efficiencies in a merger were initially satisfied. However, the remedies imposed by the NMa served to make sure that the claimed efficiencies would materialise. While the outcome of the case may have been significantly affected by public considerations<sup>45</sup>, the case nonetheless illustrates the link between the remedies and efficiencies.

<sup>43</sup> Neither the U.S. nor the European Commission's Horizontal Guidelines set out a specific time frame during which efficiencies can be admitted. Kocmut (2005, p. 33) writes that "*one has to highly commend the [European] Commission for not placing an absolute bar on the timeframe in which the efficiencies are to be achieved, despite proposals by some scholars that a four-year time period should count as relevant.*"

<sup>44</sup> Case no. 6424/427, *Ziekenhuis Walcheren/Oosterscheldeziekenhuizen*, 25 March 2009.

<sup>45</sup> Renckens (2009), for example, points out that it was probably a combination of factors that have led the NMa to clear the merger with far-reaching remedies that would likely not have been accepted in other cases. First, the Health Inspectorate (IGZ) played a key role in the case. It argued that in the absence of the merger there was a risk that one or both hospitals would go bankrupt. Second, the IGZ also stressed the public good characteristic of basic healthcare services which, according to Renckens, may have helped the merging parties in convincing the NMa that the merger had to be cleared if the service provision in the relevant market was to be guaranteed.

2. Efficiencies must *in principle* benefit consumers in the same relevant (product and geographic) markets where consumers are likely to suffer harm as a result of the proposed merger.
3. Efficiencies leading to a reduction in variable or marginal costs are more easily admitted than those leading to a reduction in fixed costs, since the former are more likely to be passed on to consumers in the form of lower prices.<sup>46, 47, 48</sup>

### 2.5.2 *Burden of proof and evidence relevant to assess efficiency claims*

The assessment of efficiency claims by competition authorities in merger cases is difficult for two main reasons. The first reason is that there is usually an informational asymmetry, *i.e.* the information which can be used to verify those claims is solely held by the merging parties.<sup>49</sup> The consequence of this is that the burden of proof is put squarely on the merging firms, as is explicitly stated by the European Commission (Horizontal Guidelines, paragraph 87).<sup>50, 51</sup>

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<sup>46</sup> As is well known, firms maximise profits when deciding how much output to produce and in this exercise fixed costs (*i.e.* those which do not vary with output) play no role, at least in the short run. The question becomes more complicated in the long run (because all costs then become variable) and in the assessment of dynamic efficiencies, where a reduction in fixed costs (deriving, for example, from a combining together different inputs or eliminating duplications) can lead to more R&D activity and innovation capable of benefitting consumers.

<sup>47</sup> Estimating the extent to which a reduction in variable or marginal costs is passed on to consumers is a difficult task and may require the use of sophisticated quantitative techniques. Röllner, Stennek and Verboven (2001, section 3) provide an overview using examples from the empirical literature on tax incidence, intermediate goods price transmission (*e.g.* in agriculture and energy economics) and exchange rate pass-through. They also draw a distinction between industry-wide pass-on (which results from a shock affecting all firms in the industry) and firm-specific pass-on (which only affects selected firms, *e.g.* cost savings realised by the merging firms).

<sup>48</sup> On the other hand, cost reductions resulting from an anti-competitive reduction in output cannot be counted as efficiencies for the benefit of consumers (European Commission's Guidelines on the assessment of horizontal mergers, paragraph 80). Likewise, cost reductions in the form of lower input costs (obtained because, say, the merger increases the merged entity's bargaining position vis-à-vis its suppliers) cannot be admitted because they merely represent a transfer of wealth from suppliers to the merged entity (de la Mano, 2002, p. 44).

<sup>49</sup> Competition authorities may also find it difficult to verify the merging firms' efficiency claims with third parties, *e.g.* rivals suppliers. These either are not in a position to comment or (even worse) have an incentive to undermine the merging firms' claims if they think the merger will make them worse off.

<sup>50</sup> This is also the position of many economists, including Fisher (1987, p. 36): "*The burden of proof as to cost savings or other offsetting efficiencies, however, should rest squarely on the proponents of a merger, and here I would require a very high standard. Such claims are easily made and, I think, often too easily believed.*"

<sup>51</sup> Competition authorities also have to discharge their burden of proof in relation to proving the anti-competitive effects of a merger, so there is a delicate balance between the authorities and the parties. In some cases a tension may arise. In the Canadian case Commissioner of Competition v. CCS Corporation, of 2012, for example, CCS argued that it had been precluded from being able to meet its own burden of proof in relation to efficiencies to the extent that the Commissioner had failed to properly discharge her own burden of proof in respect of the anti-competitive effects of the merger. Ultimately, the Competition Tribunal found that, despite the Commissioner's failure, CCS was not prejudiced, but the case clearly shows the importance for a competition authority of diligently discharging its burden of proof.

*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*

The second problem is that, while competition authorities require evidence if not to quantify, at least to *qualitatively* assess possible efficiencies, such evidence may be incomplete or not available at all. In this respect, it should be noted that the merging parties – when making their case for efficiencies – are subject to a standard of proof which is not higher than the one used for other elements of the competitive assessment, such as the price effects of the merger or possibility of entry. In addition, as is the case in merger analysis, the evidence relevant to assess efficiency claims can come from a variety of sources. The European Commission, for example, lists:

- Internal documents that were used by the management to decide on the merger;
- Statements from the management to the owners and financial markets about the expected efficiencies;
- Historical examples of efficiencies and consumer benefit; and,
- Pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.<sup>52</sup>

## 2.6 *Efficiencies as a rebuttal or a defence?*

An important procedural question in merger analysis is how to frame efficiency claims, namely whether they should be treated as a defence or a rebuttal.

In the former case, the efficiency defence is part of a formal two-stage process, where first a merger is deemed to be anti-competitive and then is justified on efficiency grounds. In the latter case (efficiencies as a rebuttal), evidence on efficiency claims is taken into account as a part of a holistic analysis of competitive effects, together with other “exculpatory” elements, *e.g.* evidence on entry.

There is also a link with the choice of welfare standard that is applied. Notably, an efficiency defence is invoked to justify a merger which would harm consumers, *i.e.* this approach allows competition authorities to offset consumers’ losses against producers’ gains and is coherent with the application of a total welfare standard. Instead, an efficiency rebuttal is consistent with the application of a consumer welfare standard because the gains resulting from the merger must be sufficient to ensure that consumers are not harmed, *i.e.* prices must not rise after the merger.

A related procedural question is how efficiency considerations are incorporated into merger analysis. In summary, three different approaches have been proposed in the literature (see Rölller *et al.*, 2001):

- The general-presumption approach;
- The case-by-case approach; and.
- The sequential approach.

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<sup>52</sup> Paragraph 88 of the European Commission’s Guidelines on the assessment of horizontal mergers.

Under the first approach, if a merger is not problematic (*e.g.* because the parties have low market shares), no specific, explicit consideration is given to efficiencies (although it is somehow presumed that they offset any negative effect resulting from the merger). In the second method, efficiencies can be fully integrated into the overall analysis in each and every case.

The first approach saves scarce resources and reduces the informational burden on the parties. However, because it relies on indirect, structural indicators (such as market shares or concentration indices), it entails the risk of reaching the wrong conclusions. On the other hand, the analysis under a case-by-case approach is likely to be more accurate, but it requires a considerable amount of information which may not always be available.

In light of the shortcomings of the first two approaches, it is not surprising that many competition authorities apply (and many authors recommend) the sequential approach.<sup>53</sup> Under this method, competition authorities first use general presumptions to differentiate between problematic and unproblematic mergers. Only when a given merger is flagged as problematic, it is subject to further investigation, during which efficiencies can be examined. Naturally, it remains the question of whether efficiencies should be considered simultaneously with other factors (*e.g.* entry) or a more limited investigation should take place. This obviously depends on a number of factors, including the time available for each investigation, the quality of the evidence on efficiency claims and the seriousness of competition concerns. Competition authorities are therefore required to strike a delicate balance between the accuracy and correctness of their analysis and these constraints.

## 2.7 *Conclusions on efficiency claims in mergers*

The article that the eventual Nobel-laureate Oliver Williamson published in 1968 paved the way for a greater consideration of efficiencies in merger analysis. Nowadays, most jurisdictions at least mention efficiencies in their competition laws or in the competition authorities' merger guidelines. In some cases, *e.g.* the United States and the European Union, the treatment of efficiencies in the guidelines has become more and more refined over time.

In parallel with these developments, the merging parties have gained more confidence in presenting efficiency claims to competition authorities. Accordingly, the number of mergers where efficiencies have played a significant role (sometimes in combination with a remedy package) has grown, as some recent mergers approved by the European Commission and the Dutch competition authority show.

However, it is fair to say that the number of mergers where efficiencies are decisive or are even discussed is still small at present. This may certainly reflect the fact that most mergers do not raise competition concerns and in any event antitrust agencies prefer to employ their scarce resources in tasks other than the assessment of efficiency claims.

There may also be some other – and more substantial– obstacles to the assessment of efficiency claims in mergers. It would be interesting, for example, to discuss whether the application of a consumer welfare standard (which is used in many jurisdictions) makes it inherently more difficult to accept efficiency claims. Related to this, there is also the question of whether competition authorities have set too stringent criteria for accepting efficiency claims. And – from a more procedural viewpoint – of whether efficiency claims are more appropriately examined as a defence (after a merger has been found to be anti-competitive) or a rebuttal (*i.e.* as an integral part of the overall competition assessment).

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Sequential approach is, for example followed in the European Union, Australia and the United Kingdom.

### 3. Do efficiency gains ever materialise in mergers? A review of *ex-post* assessments

As noted in the previous Chapter, the assessment of efficiency claims by antitrust agencies during the investigation of a specific merger is a challenging exercise, not least because the relevant evidence is solely held by the merging parties and difficult to verify, or it is incomplete or not available at all.

With time, however, it is possible to conduct an *ex-post* review of whether the claimed efficiencies have actually materialised. In this context, this Chapter summarises some of the methods which have been used in the empirical literature and the corresponding conclusions. To a large extent, the focus is on studies which aim at verifying whether efficiencies materialised and, if so, measuring them. The large empirical literature on whether prices decline after a merger takes place – which can also be interpreted as a test of efficiency claims – is therefore not surveyed.<sup>54</sup>

By way of introduction, section 3.1 below presents the evidence drawn from event studies about whether mergers create value for the shareholders of the companies involved. The following section discusses a strand of the literature which uses the same approach, but seeks to respond to the specific question of whether mergers generate efficiencies. After that, studies which look at a variety of variables (such as profits, sales, market shares, costs, R&D inputs and outputs, and productivity levels) are presented in sequence.

This Chapter is also related to other material published by the Competition Division on *ex-post* assessment of competition policy interventions. This is a strategic theme of the OECD's Competition Committee and it will be discussed at future roundtables as well.

#### 3.1 Mergers, shareholder value and efficiency gains

There is abundant evidence – based on short-term event studies which look at changes in share prices around the time when the transaction is announced – that overall mergers create value for shareholders of the participating firms.<sup>55</sup>

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<sup>54</sup> Many studies have looked at the price effects of mergers in a variety of sectors. Among others, see: Ashenfelter, Hosken and Weinberg (2011), Ashenfelter and Hosken (2010), Barton and Sherman (1984), Borenstein (1990), Hastings and Gilbert (2005), McCabe (2002), Prager and Hannan (1998), Taylor and Hosken (2007), and Vita and Sacher (2001). Weinberg (2007), Whinston (2007) and Pautler (2001) are valuable surveys of this literature, which overall points towards the conclusion that prices rise after a merger.

Generally, this literature looks at the short-run price effects of a merger. One exception is Focarelli and Panetta (2003), who consider the impact of mergers in the Italian banking industry both in the short and long run. The reason is that improvements in efficiency (such as those resulting from cost reductions and merging disparate workforces with different cultures) may emerge only after some time. They find that the deposit rates (*i.e.* the remuneration that the bank pays to retail depositors for borrowing their money) of the merging banks falls in the short run, but increases in the long run, compared to a control group of non-merging banks. This is consistent with the notion that mergers benefit consumers in the long run.

<sup>55</sup> See Andrade, Mitchell and Stafford (2001), who use data for the United States for the period from 1973 to 1998, and Betton, Eckbo and Thorburn (2008), for an update to 2005. These results are consistent with those presented in early papers by Jensen and Ruback (1983) and Jarrell, Brickley and Netter (1988); see also the survey by Caves (1989). Malmendier, Opp and Saidi (2012), however, argue that there may be no such thing as value creation from mergers. Using data on unsuccessful merger bids in the United States between 1980 and 2008, they show that, when the bid is financed with cash, the value of target companies remains significantly above its pre-announcement level (net of market-wide share price movements) by the time a merger bid fails, whereas that does not happen when the bid is financed with equity. Moreover, they

The split of the gains between acquirers and targets is, however, not uniform. In particular, shareholders of the target company receive most of the gains, with the merger premium (*i.e.* the excess return relative to the benchmark of the whole market) ranging between 16 per cent and almost 24 per cent. Shareholders of the acquiring company, instead, may expect to lose as much as 4 per cent of the value of their shares (compared to non-participating firms) and it could be said that they “*appear to come dangerously close to actually subsidizing these transactions*” (Andrade, Mitchell and Stafford, 2001, p. 111).<sup>56</sup> Finally, for the target and acquirer combined, the average abnormal return in the announcement period is reliably positive and equal to about 2 per cent, which suggests that on average mergers do create net value for shareholders.

The way a specific merger is financed is also important for value creation, especially for shareholders of acquiring companies. Indeed, on average, they obtain a negative abnormal return when their company finances a merger (even partially) through the issue of additional equity, as opposed to, for example, financing the merger with cash. Instead, shareholders of acquiring companies can expect a small and positive abnormal return (although not statistically different from zero) when no equity at all is used to finance the merger.<sup>57</sup> Shareholders of target companies also receive higher returns when cash is used instead of equity. Lastly, mergers which are financed with equity are found not to increase aggregate shareholder value at all. In contrast, when there is no equity financing, the combined (*i.e.* target and acquirer) return is positive and statistically significant.

### 3.2 *Changes in share prices of rivals, customers and suppliers*

The finding in the literature based on event studies that mergers increase shareholder value is reassuring, but it does not identify the source of such gains. In particular, it does not provide evidence that mergers improve the efficiency of participating firms; *i.e.*, that the additional shareholder value created by a merger is the result (on balance) of efficiency gains rather than of greater market power. In order to respond to this question, a more refined approach is needed, as explained below.

Eckbo (1983), for example, looked at a sample of 55 horizontal mergers challenged by the Federal Trade Commission or the Department of Justice in the United States between 1963 and 1978 and showed that the estimation of abnormal stock returns to the merging firms’ *rivals* can be useful to shed light on the question of whether mergers enhance market power more than efficiency.

In particular, he carried out such estimation around the time of two important public events, namely: i) the announcement of the merger proposal; and, ii) the subsequent announcement that competition authorities challenged the merger under Section 7 of the Clayton Act. The proposition which is tested is then the following: If the merger enhances market power more than efficiency, rivals of the merging firms

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find that post-failure cash acquirers return to their pre-announcement level, whereas stock acquirers trade at lower prices. They argue that, taken together, these findings suggest that cash bids are “all about the target” and indicative that the target company was undervalued before the merger bid, whereas stock bids are “all about the acquirer” and reveal prior acquirer overvaluation. In other words, since arguably there is no merger effect (as the sample only includes failed bids), the revaluation of the target company in case of cash bids is explained by the revision of beliefs about its stand-alone value.

<sup>56</sup> Moeller, Schlingemann and Stulz (2005), however, report that shareholders of acquiring firms suffered much larger losses (around US\$ 240 billion) in the period from 1998 to 2001 than during the entire merger wave of the 1980s (when the loss amounted to US\$ 4 billion in total). These large losses are not due to a transfer of value to shareholders of target companies. Instead, they are the result of a small number of acquisitions with extremely large losses. In contrast, in the same period the average acquisition still creates positive value for shareholders of acquiring firms.

<sup>57</sup> See Table 4 in Andrade, Mitchell and Stafford (2001).

should earn *positive* abnormal returns around the time when the merger proposal is announced, because the merger is likely to increase prices and rivals are also expected to benefit from such merger-induced monopoly rents.<sup>58</sup> In addition, if this assumption is correct, rival firms should earn *negative* abnormal returns in response to the subsequent news that the merger is challenged by the competition authorities, because the prospect of monopoly rents becomes uncertain.

The results for the observed sequence of abnormal returns around the time a merger is announced and then challenged appear to contradict the proposition that the net effect of mergers is to increase market power. In particular, Eckbo (1983) finds that on average rivals earn small but positive (and statistically significant from zero) abnormal returns around the merger proposal announcement, followed by zero or positive abnormal returns in response to subsequent news of the agencies' complaint. According to Eckbo (1983), this pattern is consistent with the hypothesis that a typical merger in his sample likely increases efficiency.

The same conclusion is also reached by Eckbo and Wier (1985), who look at a sample of cases challenged by the U.S. antitrust agencies after the introduction of the Hart-Scott-Rodino Act in 1978, and Stillman (1983). In particular, Stillman (1983) rejects the market-power hypothesis by examining a small sample of 11 horizontal challenged mergers for the period 1964 to 1972 and finding that direct competitors of the merging firms earn zero average abnormal returns in response to both merger announcements and antitrust complaints.

These early papers by Eckbo (1983), Eckbo and Wier (1985) and Stillman (1983) have spurred a large literature using the same methodology. For example, Eckbo (1992) and Atkas, de Bodt and Roll (2007) find significantly negative abnormal returns to rival firms in response to the announcement of horizontal mergers in the case of Canada and the European Union, respectively. On this basis, these results also reject the market-power hypothesis.<sup>59</sup>

An interesting variation is proposed by Fee and Thomas (2004), who calculate abnormal returns to upstream suppliers and downstream (corporate) customers (as well as to rivals) of the merging firms, following merger announcement.<sup>60</sup> The intuition in the case of customers is the following: If a merger increases market power, customers should earn negative abnormal returns because they are likely to pay higher prices after the merger. In this respect, Fee and Thomas (2004) find no systematic evidence of

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<sup>58</sup> Note that Eckbo (1983) frames his analysis around the "collusion" hypothesis, *i.e.* that a horizontal merger may reduce the costs of enforcing a tacit collusive agreement among rivals within the same industry, rather than around the possibility of harm to consumers resulting from unilateral conduct. This was in line with the practice of U.S. antitrust agencies at the time.

<sup>59</sup> For a sceptical view on this methodology, however, see Schumann (1993). He reviews a sample of 37 cases from the period 1981 to 1987 (when mergers in the United States were less likely to be challenged than in the past) and, although reporting a pattern of abnormal returns identical to those found in earlier studies, notes that the size distribution of firms within the industry, the extent to which efficiencies generated by the merger are firm-specific and the effect of the merger on competition all have an impact on the pattern of rivals' abnormal returns. His conclusion is then that "*practically any pattern of rivals' abnormal returns can be consistent with some story of predominately precompetitive or anticompetitive mergers. To the extent this is the case, we are left to conclude that the examination of the patterns of rivals' stock returns may not be an effective method for determining how horizontal mergers might affect product prices*" (Schumann, 1993, p. 694).

<sup>60</sup> Shahrur (2005) also examines the impact of a merger announcement on the stock prices of suppliers and customers, although using a different selection methodology from Fee and Thomas (2004). His conclusion is that on average mergers are driven by efficiency considerations, rather than by the desire to increase market power or buyer power.

customer losses, even for customers that are particularly reliant on the merging firms. Moreover, there is evidence that the mergers with the largest gains to the merging firms also produce gains to customers.

In respect of suppliers, Fee and Thomas (2004) distinguish between suppliers who retain a relationship with the merged entity after the merger and those whose relationship is terminated, perhaps following a bidding competition to sell to the merged entity. Specifically, Fee and Thomas (2004) show that only the suppliers that are terminated experience negative abnormal returns around the merger announcement and significant negative cash-flow changes post-merger. In contrast, suppliers that are retained increase their market share, but do not experience significant abnormal returns or changes in operating performance, *i.e.* it would appear that retained suppliers sell more units at a lower price. Fee and Thomas (2004) interpret this asymmetric impact of mergers on suppliers' stock returns and their operating performance as evidence that mergers are indeed capable of increasing the buyer power of the merging firms and force upstream suppliers to be more efficient.

### 3.3 *Analysis of pre- and post-merger firms' profits*

Another way of determining whether mergers generate efficiencies is to compare firms' profits before and after the merger and then understand the source of any difference. An example of this approach is provided by Healy, Palepu and Ruback (1992), who use a sample of the 50 largest acquisitions in the United States during the period from 1979 to 1984 to examine the merging firms' performance (measured in terms of operating cash flows) during the five years before the merger and the five years after the merger, compared to an industry benchmark.

They find that the merging firms' cash-flow returns significantly improve after the merger and seek to understand the source of this improvement, in particular whether it is the result of managerial focus on short-term performance which may threaten the long-term viability of the merged entity.

In contrast with this hypothesis, however, Healy, Palepu and Ruback (1992) show that the post-merger improvement in cash-flow returns for the merging firms derives from an increase in asset productivity rather than an increase in operating margins. Moreover, they find no evidence that the improvement in cash-flow returns comes at the expense of long-term performance, since after the merger the merging firms maintain their capital expenditure and R&D intensity relative to other firms in their industries.<sup>61</sup>

This result, however, differs from the one reached earlier by Ravenscraft and Scherer (1989), who examine earnings performance during the period from 1974 to 1977 for target firms acquired between 1950 and 1977. They find that profitability of acquired firms declined after the merger, which contradicts not only the results in Healy, Palepu and Ruback (1992), but also the conclusions drawn in the several papers based on stock market reaction summarised in section 3.2.

### 3.4 *Joint analysis of firms' profits and sales*

Rather than looking at profits only, Gugler *et al.* (2003) suggest a *joint* analysis of profits and sales to assess the net effect of a merger, *i.e.* whether efficiency gains after a merger takes place turn out to be greater than increases in market power, or *vice versa*. In particular, the test which Gugler *et al.* (2003) carry out is the following: If a merger increases market power more than efficiency, the merging firms'

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<sup>61</sup> In addition, Healy, Palepu and Ruback (1992) show that the improvement in cash flow returns explains a significant portion of the increase in equity value of the merging firms when the merger is announced. This would suggest that the stock price reaction to mergers is driven by the anticipation of economic gains after the merger.

profits should increase, whereas their sales should fall (because the price increases by more than the reduction in marginal cost, if there is any such reduction). In contrast, if the overall effect of the merger is to increase the efficiency of the merging firms, then *both* profits and sales should go up.<sup>62</sup>

There is also the question of the counterfactual, *i.e.* how to estimate what would have happened to profits and sales if the merger had not taken place and thus establish whether a merger increased profits and sales. To solve this problem, Gugler *et al.* (2003) calculate the level of profits reported by a benchmark group of firms operating in the same industry as that of the merging firms and compare it with the actual profits made by the merging firms. The same methodology is applied in the case of sales. In addition, the comparison between predicted and actual values is done for each of the five years following the year in which the merger takes place. The sample used in the study includes up to 3,000 mergers in each year of observation, from all major jurisdictions.

Gugler *et al.* (2003) find that in a majority of mergers actual profits of the merging firms were higher than those reported by their rivals. However, the opposite was true for sales. It would then be difficult to judge whether a merger was successful by using just one of these two variables. As noted above, Gugler *et al.* (2003) are able to resolve this ambiguity and determine the welfare effect of mergers by looking at changes in *both* profits and sales. They report that, on average, *profitable* mergers in their sample appear to increase market power (*i.e.* that the market-power effect dominates any efficiency gains). Overall, only about 29 per cent of the total number of mergers included in the study was found to result in increases in both sales and profits, *i.e.* to be efficiency-enhancing. These results appear to be consistent across different jurisdictions, *i.e.* the effect of a merger in terms of efficiency and market power do not seem to depend on the country of origin of the merging firms.

### 3.5 Using market shares to assess efficiency gains: The case of the semiconductor industry

Gugler and Siebert (2007) use a test based on market shares to assess efficiency gains in the semiconductor industry. Semiconductors (*i.e.* memory chips, microcomponents, and other components such as logic, discrete, and optical devices) are mainly used as inputs for the computer industry, consumer electronics and communications equipment. It is a capital-intensive and highly innovative industry. For example, the ratio of R&D expenditure to sales is 13 per cent, which is higher than in the pharmaceutical and computer industries (Gugler and Siebert, 2007, p. 647).

The Herfindahl-Hirschman Index for the whole industry was around 400 in the period from 1989 to 1998 (which is the period considered by Gugler and Siebert (2007)), although it was considerably larger in the microcomponents (more than 2,000 in 1998 and 1999) than in the memory segment. This is consistent with the view that in the memory segment products are less differentiated and price competition is more intense, whereas the microcomponents segment has oligopolistic features.

To study whether mergers and research joint ventures (RJVs) on balance generate efficiencies in this industry, Gugler and Siebert (2007) apply a simple and intuitive test based on pre- and post-merger market shares. They note that, under a variety of assumptions about firm behaviour and market characteristics, economic theory consistently predicts that after a merger the merging firms' combined market share will drop if the market-power effect (which is due to the potential loss of rivalry) outweighs the efficiency gains. In contrast, if the efficiencies generated by the merger are sufficient to outweigh the market-power effect, the merging firms' combined market share will increase.

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<sup>62</sup> It is of course possible that post-merger both profits and sales go down if the merger reduces efficiency and such reduction outweighs any increase in market power. In their paper Gugler *et al.* (2003) also assume that in a merger all efficiency gains derive from a reduction in marginal costs which translates into lower prices and thus leads to an increase in both sales and profits. They do not test separately for efficiency gains deriving from a reduction in fixed costs (which would lead to an increase in profits and no change in sales).

Their results indicate that at industry level mergers and RJVs increase the market share of participating firms, which provides evidence that efficiency gains dominate any potential anti-competitive effects for both types of co-operation. The same is true at a more disaggregate level, although the efficiency effects were found to be larger in the microcomponents than in the memory segment. Gugler and Siebert (2007, p. 656) explain this finding in terms of the different characteristics of the two segments: “*More differentiation in the microcomponents market imposes lower market power gains following from mergers, and fewer efficiency gains are necessary to overcompensate any market power effects. Moreover, more net entry in the microcomponents market results in a higher response by outsiders, resulting in a higher industry output and lower prices. Therefore, we find more net efficiency-enhancing mergers/RJVs in the microcomponents industry relative to mergers/RJVs in the memory market.*”

This study found that mergers and RJVs enhance efficiency in the semiconductor industry. However, it does not shed light on whether the efficiency gains are merger-specific, and it might in fact appear that RJVs are as well suited as mergers for this purpose, at least in this industry. Furthermore, data limitations do not allow identifying the source of efficiency gains, and in particular whether dynamic efficiencies are more prevalent than static ones. This issue is relevant in the pharmaceutical industry as well, as is explained below.

### **3.6 The impact of mergers on R&D activity: The case of the pharmaceutical industry**

One way of testing whether mergers are capable of generating dynamic efficiencies and greater innovation is to examine their impact on R&D inputs and outputs. Ornaghi (2009) does just that for the pharmaceutical industry during the period from 1998 to 2004. In particular, he studies the impact of 27 mergers among the largest manufacturers of pharmaceutical products on the merging firms’ ability and incentives to innovate.

Ornaghi (2009) shows that, compared to a control group made of non-merging firms<sup>63</sup>, the merging firms’ research inputs and outputs (measured by R&D expenditure and number of important patents filed in a year, respectively) decline in the year of the merger as well as in the three years following the merger. Mergers are also found to have a negative impact on research productivity, measured by the ratio of the number of patents to R&D expenditure. Overall, then, Ornaghi (2009)’s results cast doubts on the view that mergers deliver significant dynamic efficiencies capable to offset possible anti-competitive effects.<sup>64</sup>

While Ornaghi (2009) focuses on full integration between firms by way of mergers or acquisitions, Danzon, Nicholson and Sousa Pereira (2003) explore instead the role of development alliances in determining the success of R&D activity in the pharmaceutical industry.

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<sup>63</sup> Ornaghi (2009) tries to account for the possibility that the firms’ decision to merge and their research activities are correlated (*i.e.* for the possibility that merger decisions are endogenous) in two ways. First, he compares the merging firms’ innovation outcomes with those of a control group of non-merging firms which have pre-existing observable characteristics similar to those of the merging firms. This should make it possible to attribute changes in the performance of the two groups solely to the merger. Secondly, to check the robustness of his results, he forms an additional and more restricted control group by including only non-merging firms which carry out technological activities very close to those of the merging firms.

<sup>64</sup> This result contrasts with the one found by Hall (1987), who looks at a dataset on all publicly traded U.S. manufacturing firms acquired between 1976 and 1986 and reports no evidence that mergers and acquisitions cause a reduction in R&D spending in merging firms compared to non-merging firms. This result holds for the aggregate sample, however; at the individual industry level, the results are too imprecisely measured to draw firm conclusions.

Development alliances are usually formed between small, discovery-focused bio-technology firms and large pharmaceutical firms. Small firms develop drug leads and then out-license these leads to the large firms, which subsequently take responsibility for drug lead optimisation, development through clinical trials<sup>65</sup> and ultimately regulatory approval. These alliances then allow each type of firms to focus on their respective comparative advantages, *i.e.* discovery of new molecules for small firms and drug development and licensing in the case of larger firms, so that they both gain from collaboration as well as from risk- and cost-sharing. This is confirmed by the pattern reported in Danzon, Nicholson and Sousa Pereira (2003) that there is a greater extent of co-development in phases II and III than in phase I, sought especially by small and medium firms. In other words, it seems that small firms often have the skills and resources necessary to carry out the relatively small Phase-I trials, but tend to seek a large partner for the more complex and expensive Phase-II and Phase-III trials.

The results in Danzon, Nicholson and Sousa Pereira (2003) (who use data on over 900 firms for the period 1988 to 2000) show that alliances with large firms increase the probability of success (*i.e.* of advancing from one phase to the following one in clinical trials) for drugs originated by small firms which are in Phase II and III (*i.e.* the most complex and expensive ones), but not for those drugs in Phase I. The previous experience of both in- and out-licensing companies (measured by the number of compounds a firm has developed over time) also seems to play a role in determining the success rate of drugs under development in Phase II and III, but again not in Phase I. On the basis of these results, Danzon, Nicholson and Sousa Pereira (2003, p. 29) argue that alliances work well as “*a source of both funding and expertise for small firms and a source of products for large firms.*”

The extent to which prior to the merger the merging firms overlap in R&D and product markets also seem to matter for assessing the impact of a merger. In particular, Cassiman *et al.* (2005) find that, when firms operate in complementary technological fields before the merger, they increase their R&D efforts and also report better R&D performance after the merger, because they are able to realise synergies and economies of scope in the R&D process. In contrast, when firms are active in the same technological fields, the merger decreases both their R&D activity and performance<sup>66</sup>, *i.e.* there are no R&D economies of scale (arising, for example, from elimination of duplication) in such cases. Moreover, within the group of firms active in the same technological fields, merging firms which are also rivals in product markets experience a worse R&D performance than non-rivals.

### **3.7 *Measuring X-efficiency before and after a merger in the banking, electricity and paper industries***

An obvious (but subject to availability of data) way to assess whether mergers can benefit consumers is to calculate a measure of X- (or technical) efficiency for both a group of merging firms and a control group of non-merging firms, and then see how this measure changes as a result of a merger.

This can be done in various ways. Peristiani (1997), for example, estimates a flexible cost function (the “translog” one) using data for all bank mergers (about 4,900 individual transactions) in the United States from 1980 to 1990. His results suggest that acquiring banks experienced a small (but significant)

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<sup>65</sup> During the development phase, new chemical entities undergo three clinical trials: Phase-I trials test whether the new drug is safe in healthy subjects; phase-II and phase-III trials test whether the drug is effective in small and large samples of patients with the target disease, respectively. After the drug completes Phase-III trials successfully, the originator company can submit a request for regulatory and marketing approval (Danzon, Nicholson and Sousa Pereira (2003, p. 2)).

<sup>66</sup> Cassiman *et al.* (2005) are also able to explain why in such cases R&D performance worsens after the merger: Key employees tend to leave the merged entity, its R&D portfolio becomes more focused, the R&D horizon becomes shorter and internal funds available to R&D decrease.

decline in X-efficiency after the merger, compared to the control group, although post-merger performance varied considerably among merger participants. The key determinants of this performance appeared to be post-merger increases in the bank's credit risk (measured by changes in the loan-to-asset ratio), the number of employees and total amount of deposits.

Kaur and Kaur (2010) use a different technique (Data Envelopment Analysis – DEA) to study the impact of mergers on the cost efficiency of Indian commercial banks during the period from 1990 to 2008. They find that on average mergers improve cost efficiency, although with one important exception, *i.e.* the case of strong, healthy banks acquiring smaller distressed rivals. While these mergers – usually encouraged by the government – help protecting the interests of retail depositors of weak banks, they do not contribute to making the merged entity more cost-efficient.

Kwoka and Pollitt (2007) also use DEA to understand how mergers among electricity distribution companies in the United States during the period 1994 – 2003 affected cost efficiency. A crucial point in their analysis is that, while mergers brought different companies under common ownership, the reporting obligations imposed by the regulatory authorities remained unchanged and thus allowed to identify buyers and sellers separately even after the merger had taken place. Kwoka and Pollit (2007) find results which are somewhat surprising. First, they show that, in the years prior to the merger, acquirers were not more efficient than target firms (the sellers). In fact, sellers were more efficient than both acquirers and other distribution companies not involved in any merger. More notably, sellers' efficiency (as measured by their operating expenses) declined after the merger, while acquirers recorded little or no gain to offset such losses. Mergers in the U.S. electricity distribution sector, then, do not appear to increase cost efficiency.

Yet another approach to estimate cost efficiency is illustrated by Pesendorfer (2003) in the context of the U.S. paper industry during the mid-1980s. In particular, Pesendorfer (2003) estimates firms' marginal costs from data on their investment decisions, existing capacity levels and number of plants. He then observes how such cost estimates vary with a merger for both acquiring and acquired companies. His results show that both buyers and sellers were relatively efficient compared to the group of non-merging firms; in addition, a majority of buyers becomes even more efficient after the merger as a result of additional capacity and a greater number of plants.

Pesendorfer (2003) is also able to estimate the total welfare effects from the wave of horizontal mergers occurred in the mid-1980s in the paper industry. Aggregating across various product categories, he calculates that total welfare increased by almost US\$ 900 million per year, with the majority of these gains accruing to consumers (US\$ 600 million) rather than to producers (who saved slightly less than US\$ 300 million per year).

### **3.8 *The impact of ownership changes on productivity in the U.S. manufacturing sector***

Two different studies – Lichtenberg and Siegel (1987) and McGuckin and Nguyen (1995) – have examined how firm productivity changes after an ownership change in the U.S. manufacturing sector.

In particular, Lichtenberg and Siegel (1987) use the Census Bureau's Longitudinal Establishment Data (LED) on more than 20,000 relatively large manufacturing plants for the period 1972 to 1981. They report that about 21 per cent of the plants in this sample changed owners at least once during the ten-year period considered.

Their study focuses on the impact (at the level of the individual plant) of ownership changes on total factor productivity (TFP), which is estimated as the residual growth rate in output after accounting for changes in the quantity of inputs (*i.e.* capital, labour and raw materials) used. The authors find that acquired plants were less productive than industry averages prior to acquisition, but their productivity increased after

an ownership change. In particular, plants which experienced an ownership change experienced a 0.58 per cent higher TFP growth than plants in the same industry that did not change owners.

The LED database used by Lichtenberg and Siegel (1987), however, contains primarily large plants. Approximately 82 per cent of the plants included in the LED file employed 250 or more workers and almost 53 per cent of the plants included in the sample had more than 500 workers. This is not representative of the population of U.S. manufacturing plants, since the corresponding figures (as reported by Lichtenberg and Siegel (1987)) are only 4 per cent and 1.7 per cent, respectively. In addition, Lichtenberg and Siegel (1987) used a “balanced” panel of plants, because their sample included plants operating throughout the period, excluding those which were opened or closed at some point between 1972 and 1981. Given these features, there is a possibility that their results may be invalid because of a “selection bias”.

This prompted McGuckin and Nguyen (1995) to address the same question – the effect of ownership changes on firm productivity – using a different dataset. Notably, these authors use the Census Bureau’s Longitudinal Research Database (LRD) and study establishments which were transferred in the period 1977 to 1982. Their approach is to compare plant productivity in 1987 with the initial level in 1977 for both plants which at some point were sold and those which did not change ownership.

In addition, McGuckin and Nguyen (1995) only focus on plants in the food manufacturing industry (a sector which experienced substantial merger activity in the period considered) and use an “unbalanced panel”, *i.e.* a sample which also includes plants that only operated during part of the period. As a result, many more small plants are included in McGuckin and Nguyen (1995)’s study than in Lichtenberg and Siegel (1987)’s analysis.

Another significant difference between the two studies is that, to measure firm productivity, McGuckin and Nguyen (1995) mostly use labour productivity (in particular, the ratio of plant labour productivity to the average industry labour productivity) rather than TFP, because of data limitations.

McGuckin and Nguyen (1995) then show that acquired plants have above-average productivity prior to acquisition, although this does not apply to large plants (those having 250 workers or more, the size mostly considered by Lichtenberg and Siegel (1987)). In addition, McGuckin and Nguyen (1995) show that plants experiencing ownership changes had higher productivity growth rates than plants which did not change owner – a finding which is robust to a variety of checks and consistent with what Lichtenberg and Siegel (1987) found.

Overall, then, these two studies suggest that synergies and related efficiencies are important motives for a change in ownership. This is reassuring, although some caveats – like the fact that neither of the two studies deals with endogeneity when estimating productivity – are in order when interpreting the results.

### **3.9 Conclusions on ex-post assessments**

This Chapter has summarised several *ex-post* assessments addressing the question of whether mergers enhance efficiency or not. In short, the answer to that question is equivocal. Some mergers (or joint ventures) enhance efficiency, some do not. This should not be surprising, because there are many case- and sector-specific factors which influence the outcome. In fact, in the case of the U.S. manufacturing sector (see the previous sub-section) the answer seems to depend on the dataset and variables examined.

This finding should not, however, be necessarily disheartening. First of all, the reviews in this Chapter have also shown that it is not impossible to *quantitatively* assess whether the claimed efficiencies – even dynamic ones – materialised or not after a merger.

On the contrary, there is a variety of methods – and of variables – which competition authorities can use for this task. Some methods are more sophisticated and data-intensive, others are easier to implement. And some, *e.g.* the estimation of a suitable cost function, could even be used by the merging parties to validate their claims during an investigation.

#### **4. Efficiency claims and objective justification in dominance and monopolisation cases**

##### **4.1 *The legal treatment of the efficiency defence in dominance cases***

###### **4.1.1 *National competition laws and statutes***

In many jurisdictions the legal provisions in respect of an abuse of a dominant position and monopolisation seem to make no allowance for a justification based on efficiency gains. This is the case, for example, of Section 2 of the U.S. Sherman Act, which says that “*every person who shall monopolize [...] any part of the trade or commerce among the several States [...] shall be deemed guilty of a felony.*” Similarly, Article 102 of the TFEU appears to establish an absolute prohibition of an abuse of dominance, thereby depriving dominant firms of a possibility to justify their conduct.

This contrasts with other areas of competition law, where an efficiency defence is nowadays clearly available. In the European Union, for example, anti-competitive agreements, decisions of associations of undertakings and concerted practices that would be prohibited under Article 101(1) of the TFEU may nonetheless be lawful if they satisfy the conditions laid down in Article 101(3). In addition, as noted in Chapter 2, recital 29 of the Regulation 139/2004 clearly states that a merger that could otherwise be prohibited can proceed if the efficiencies it brings about counteract the effects on competition and in particular the potential harm to consumers.

A similar situation arises in Canada. Section 96 of Canada’s Competition Act explicitly provides that a merger shall not be blocked if it brings or is likely to bring efficiencies that will be greater than, and will offset, the effects of any prevention or lessening of competition. In contrast, Section 79 prohibiting an abuse of a dominant position does not foresee an efficiency exception in the assessment of whether the conduct is anti-competitive.

This is not to say that provisions allowing the justification of an alleged abuse do not exist. South Africa’s Competition Act, for example, explicitly provides that dominant firms can bring forward efficiency claims to justify their otherwise potentially anti-competitive conduct. In particular, in accordance with Section 8 of the Act, a dominant firm cannot engage in exclusionary conduct unless it can show technological efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its conduct.

In France, Article 420-4 of the Commercial Code (which applies to both agreements as well as abuse of dominance) provides that a given conduct is lawful if the undertakings involved can prove that their conduct satisfies a number of criteria, namely: i) the conduct ensures economic progress, *e.g.* by creating or maintaining jobs; ii) it does not eliminate competition in a substantial part of relevant market; and, iii) a fair share of the resulting profit is transferred to consumers.

A similar provision can also be found in Article 10 of the recently reformed Mexican Competition Act, which requires the Mexican Competition Commission to examine whether the efficiency gains resulting from the conduct favourably affect the competitive process.

#### 4.1.2 Courts and guidelines

Even if the majority of national competition laws and statutes do not explicitly provide for a possibility to justify potentially anti-competitive conduct on any grounds (including efficiency ones), this possibility has nonetheless been recognised in practice by the courts and in soft-law instruments, such as guidelines.

In Canada, for example, the Competition Bureau and courts admit that dominant firms may have a valid business justification for engaging in a specific conduct. Such a justification may prevail if the firm can prove that the reasonably foreseeable anticompetitive effects were not in fact the predominant purpose of the conduct at hand. According to the Federal Court of Appeal, “a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts”.<sup>67</sup> This approach is now also clearly endorsed in the recently released Enforcement Guidelines on the Abuse of Dominance Provision. In the document the Bureau explained that it “will examine the credibility of any efficiency or pro-competitive claims raised by the allegedly dominant firm(s), their link to the alleged anti-competitive practice, and the likelihood of these claims being achieved” when examining the overriding purpose of an alleged anti-competitive practice.<sup>68</sup>

In the United States, it has long been recognised that monopolisation cases do not preclude the assessment of efficiencies, despite the wording of Section 2 of the Sherman Act. For example, as explained in section 4.5 below, efficiencies (or lack thereof) were repeatedly mentioned by the U.S. Supreme Court in its landmark refusal-to-deal decision, *Aspen Skiing*.<sup>69</sup> Moreover, efficiency considerations featured prominently in the later withdrawn U.S. Department of Justice Report on Single-Firm Conduct under section 2 of the Sherman Act. The Report explicitly acknowledged that “*legal and economic scholarship has revealed that many single-firm practices once presumed to violate section 2 can create efficiencies and benefit consumers.*”<sup>70</sup>

In Europe, both the European Commission and Community Courts were initially reluctant to acknowledge efficiency justifications in dominance cases. With time, however, this restrictive approach has started to gradually relax.

In 1988, for example, in *Tetra Pak I*,<sup>71</sup> the Commission implicitly confirmed that dynamic efficiencies could represent an objective justification. In 1999, the Court of First Instance (nowadays the General Court) for the first time invoked efficiency considerations in *Irish Sugar*, stating that the lawfulness of the conduct is to be based “*on criteria of economic efficiency that were consistent with the interests of consumers.*”<sup>72</sup>

<sup>67</sup> *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée*, 2006 FCA.

<sup>68</sup> Competition Bureau [2012], Enforcement Guidelines: The Abuse of Dominance Provisions – Sections 78 and 79 of the Competition Act, available at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/\\$FILE/cb-abuse-of-dominance-provisions-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf)

<sup>69</sup> *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1513 (10<sup>th</sup> Cir. 1984).

<sup>70</sup> U.S. Department of Justice (2008), ‘Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act’, available at: <http://www.justice.gov/atr/public/reports/236681.pdf>

<sup>71</sup> Commission Decision of July 26, 1988 - *Tetra Pak I*, O.J. [1988] L 272/27.

<sup>72</sup> Case T-228/97, [1999] ECR II-2969.

There have been some decisions suggesting the contrary, though. In *Atlantic Container*, the European Court of Justice (ECJ) disapproved the idea that a dominant firm could justify its conduct on the grounds of the benefits it produced. Specifically, it stated that “*it must be noted at the outset that there is no exception to the principle in Community law prohibiting abuse of a dominant position. Unlike Article 101 TFEU, Article 102 does not allow undertakings in a dominant position to seek to obtain exemption for their abusive practices. [...] Consequently, there can be no excuses to the prohibition of abuse by dominant undertakings.*” In other words, “*because Article [102] of the Treaty does not provide for any exemption, abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties.*”<sup>73</sup>

Despite this rejection, over subsequent years the Community Courts have nonetheless explicitly recognised admissibility of efficiency defence under Article 102.

The General Court showed its readiness to accept efficiency claims in *British Airways*<sup>74</sup> and *Michelin II*,<sup>75</sup> but in the end the claims were rejected in both cases. Still, on appeal in *British Airways*, the ECJ ruled that “*it has to be determined whether the exclusionary effect [...] may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer*”, thereby unequivocally confirming that there is a place for efficiency considerations in dominance cases.<sup>76</sup>

More recently, the ECJ confirmed admissibility of efficiency claims in *Post Danmark* case, holding that a dominant firm may demonstrate that “*its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.*”<sup>77</sup>

The European Commission’s Guidance of 2009 on its enforcement priorities in applying Article 102 also recognises efficiencies as a possible defence, stating that “*the Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.*”<sup>78</sup> To be admitted, however, this defence must satisfy certain conditions, as is explained in the next section.

#### **4.2 Standard and burden of proof**

Having established that efficiency claims are admissible in the assessment of dominance and monopolisation cases, there is a question of when such claims should be allowed and how they should be assessed in practice.

The European Commission adopts a set of relatively strict requirements. In particular, similarly to the requirements of Article 101(3) TFEU, an efficiency defence in dominance cases is admissible when the following conditions are cumulatively satisfied:

<sup>73</sup> Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para. 1112.

<sup>74</sup> Case T-219/99, *British Airways plc v. Commission* [2003], ECR II-5917.

<sup>75</sup> Case T-203/01, *Manufacture Française des Pneumatiques Michelin v. Commission (Michelin II)* [2003] ECR II-4071.

<sup>76</sup> Case C-95/04 P, *British Airways plc v. Commission* [2007], ECR I-2331.

<sup>77</sup> Case C-209/10, *Post Danmark A/S v. Konkurrencerådet* [2012], not yet reported.

<sup>78</sup> Paragraph 30, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 045 , 24/02/2009, pp. 7 – 20.

- Efficiencies have been, or are likely to be, realised as a result of the conduct;
- The allegedly abusive conduct is indispensable to the realisation of those efficiencies, *i.e.* there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies;
- The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and,
- The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.<sup>79</sup>

Some commentators, notably Ahlborn and Padilla (2008), have suggested that these conditions are likely to be too demanding to be satisfied. Arguably, however, the Discussion Paper which was published by the Commission to stimulate the debate about the enforcement of Article 102 included an additional criterion, namely that efficiency gains have to be passed on to consumers. This criterion now appears to be to some extent subsumed into criteria 3 and especially 4 above, since the Commission explains that, in the absence of rivalry between undertakings, “*the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.*”<sup>80</sup>

When it comes to procedural considerations, efficiencies can be considered either as a defence or as a factor in the overall analysis of the competitive impact of a conduct in question. The first scenario entails a two-stage analysis, in which an applicant (either the competition authority or a private plaintiff) first establishes the existence of the abuse and then it is assessed (by a court, for example) whether claimed efficiencies outweigh potential anti-competitive effects. The second approach implies that a competition authority considers efficiencies as an integral factor of its overall assessment. In its aftermath, the provision on the abuse of dominant position becomes inapplicable where efficiencies outweigh anti-competitive effects.<sup>81</sup>

Either way, the burden of proving the existence of outweighing efficiencies falls squarely on the dominant firm. This is clearly stated in the European Commission’s Guidance on the enforcement priorities in applying article 102 (paragraph 31):

*It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.*

This is consistent with the relevant jurisprudence. In Microsoft, for example, the General Court ruled that “*although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any pleas of objective justification*

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<sup>79</sup> Paragraph 30, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 045 , 24/02/2009, pp. 7 – 20.

<sup>80</sup> *Ibidem.* See also Bellis and Kasten (2010).

<sup>81</sup> One could argue that the latter approach is more consistent with the wording of those provisions which do not explicitly foresee the need or the possibility to justify the conduct once a competition authority has determined that dominant position has been effectively abused.

*and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.”*

It is also worth noting, however, that some authorities cannot ignore any available evidence of pro-competitive efficiencies, even if it is not directly brought forward by the undertaking concerned.<sup>82</sup>

Practical difficulties may be the main reason why competition authorities may be tempted to consider efficiencies as a defence rather than one of the factors in an overall assessment of abuse itself. This, however, should not lead them to postpone the assessment of efficiencies if they want to avoid the risk of substantially underestimating the role of efficiencies in abuse of dominance cases.

#### **4.3 Are efficiencies an objective justification?**

As noted earlier, in *Aspen Skiing*, the U.S. Supreme Court admitted (at least in principle) that a dominant firm’s conduct can be justified and referred to efficiency and legitimate business reasons.

This raises the question of the relationship between the various concepts that national legislations, statutes and case-law can refer to when discussing grounds on which dominant firms can justify their conducts. In particular, while the relationship between objective justification and efficiencies is likely to vary across jurisdictions, the question is whether efficiencies fall within the more broadly defined category of objective justification.

In the European Union, for example, the European Commission foresees that, in its enforcement of Article 102 cases, a dominant undertaking may seek to justify its conduct “*by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers.*”<sup>83</sup> Such statement would seem to endorse, at least in the case of the European Commission, the view that efficiencies and objective justification are two distinct grounds on which a dominant firm may seek to justify its potentially anti-competitive conduct.

#### **4.4 Internal consistency and treatment of efficiencies in dominance cases**

The admissibility of efficiency claims in dominance cases is also linked to what goals national legislations and statutes assign to competition law.

Were undertakings allowed to rebut presumptions and justify their behaviour in their proceedings concerning mergers and agreements (but not in dominance cases), then the exclusion of such a possibility in dominance cases would put into question the internal coherence of the competition system as a whole. This is not just a speculative risk. In *Continental Can*, for example, the European Court of Justice held that, because Article 101 and 102 TFEU pursue the same goals, they cannot be interpreted in a way that would lead to contradictory conclusions.<sup>84</sup>

<sup>82</sup> According to the ICN Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws the burden of proving efficiencies falls on the firm, inter alia in Czech Republic, Denmark, European Union, France, Germany, Korea, the Netherlands, Turkey and United States. In Italy, however, the competition authority has to factor in efficiencies even if the firm has not mentioned them, as long as necessary evidence is available.

<sup>83</sup> Paragraph 28, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 045 , 24/02/2009, pp. 7 – 20.

<sup>84</sup> Case 6/72, *Continental Can v. Commission* [1973] ECR 215, paragraph 25.

Moreover, the assessment of efficiencies in dominance cases may be jeopardised when competition authorities are required to pursue more than just one objective (*e.g.* in addition to maximising efficiency). Again, this risk may be real. South Africa's Competition Act, for example, explicitly foresees economic efficiency and the provision to consumers of competitive prices and product choices as two of the objectives pursued by the Act. However, the purpose of the Act is also to promote employment and advance the social and economic welfare of South Africans; [...]; to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and, to promote a greater spread of ownership, in particular to increase the ownership of historically disadvantaged persons" (Article 2 of Act 89, 1998).

#### 4.5 *Efficiency claims in practice: An overview of selected dominance cases*

To date efficiencies have not played a decisive role in any dominance case. Some evolution can nonetheless be observed, at least in the European Union, where (just as in merger proceedings) dominant firms increasingly more often submit efficiency claims to escape liability under Article 102 TFEU; and, such claims are reviewed by the Commission and Community Courts.

While not successfully, efficiency claims have been put forward, for example, in *Wanadoo*,<sup>85</sup> *Telefónica*,<sup>86</sup> *Microsoft*,<sup>87</sup> and *Intel*.<sup>88</sup> In *Wanadoo*, the General Court stated that "*an undertaking that charges predatory prices may enjoy economies of scale and learning effects on account of increased production precisely because of such pricing. The economies of scale and learning effects cannot therefore exempt that undertaking from liability under Art. 82.*"<sup>89</sup>

In addition to certain distrust towards efficiency claims, the lack of evidence substantiating the existence of the claimed efficiencies can also be a problem with an efficiency defence in dominance cases.<sup>90</sup> For example, in *Intel* the company asserted that the exclusivity requirements of its rebates allowed it to attain four different types of efficiencies: lower prices, economies of scale, other cost savings and production efficiencies as well as risk sharing and marketing efficiencies.<sup>91</sup> These, according to Intel, would not have been achieved without the implementation of conditional rebates. However, the Commission rejected all four efficiencies because Intel failed to show what the precise efficiencies would be or why would exclusivity conditions create such efficiencies.

While in this case Intel failed to provide sufficient and convincing evidence, it may also be the case that it is difficult for the dominant firm to meet the test laid down by the Commission.<sup>92</sup> Geradin (2009), for

<sup>85</sup> Commission Decision, COMP/38.233, *Wanadoo Interactive*.

<sup>86</sup> Commission Decision, COMP/38.784, *Wanadoo España v. Telefónica*.

<sup>87</sup> Commission Decision, COMP/C-3/37.792, *Microsoft v. Commission*.

<sup>88</sup> Commission Decision, COMP/37.990, *Intel*.

<sup>89</sup> Case 340/03, *France Télécom v. Commission* [2007] ECR 00107, paragraph 217.

<sup>90</sup> See, for example, Tosza (2009) who points out that "the mere reproduction of arguments often-cited in economic literature is not sufficient and the dominant undertaking needs to link them to its individual situation and support with evidence."

<sup>91</sup> Commission Decision, COMP/37.990, *Intel*, paras. 1632-1639.

<sup>92</sup> In its decision (paragraph 1624), the Commission explained that "*in order to objectively justify its conditional rebates, Intel would have to show that there is an efficiency [...], that the conduct is capable of achieving the legitimate goal, that it had not equally effective alternative in achieving the legitimate goal with a less restrictive or less exclusionary effect and finally that the conduct is 'proportionate', in the sense that the legitimate objective pursued by Intel should be outweighed by the exclusionary effect.*"

example, points out that a dominant firm may find it difficult to demonstrate, often several years after it implemented commercial practice subject to investigation, that “*no equally effective alternative [...] with a less restrictive or less exclusionary effect*” were available.

In the United States, the courts have acknowledged long time ago that there is a room for efficiencies in monopolisation cases. In *Aspen Skiing*, in its analysis of whether Aspen Skiing’s refusal to deal with its long-standing commercial partner and competitor, Aspen Highlands, violated Section 2 of the Sherman Act, the Supreme Court approvingly quoted Judge Bork and Professors Areeda and Turner who all agreed that, as long as a firm competes on merits, its conduct should be allowed. In particular, quoting Judge Bork, the Court held that “*if a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behaviour as predatory.*”<sup>93</sup> Having reiterated that the defendant’s conduct was neither “*motivated by efficiency concerns*” nor justified by “*legitimate business reasons*”, the Supreme Court confirmed that a defendant will not violate Section 2 as long as they can justify their conduct.

Efficiencies, for example, were quite extensively discussed in the *Microsoft case* which arose pursuant to separate complaints filed by the United States and by individual states. First, in 2000, the District Court ruled that Microsoft violated Sections 1 and 2 of the Sherman Act. In particular, the firm had illegally maintained a monopoly in the market for Intel-compatible PC operating systems, attempted to gain a monopoly in the market for internet browsers and tied two separate products.<sup>94</sup> Microsoft appealed the District Court’s judgment arguing that integration of Internet Explorer into Windows was both beneficial and innovative and that it moreover required the non-removal of the web browser. The Court of Appeal, however, ruled that the firm failed to specify and substantiate those claims.

With respect to tying, U.S. courts generally considered such conduct as *per se* invalid.<sup>95</sup> In the *Microsoft case*, however, the Court of Appeal altered that rule and adopted a rule of reason approach to take into account alleged efficiency effects of tying.<sup>96</sup> The Court, in particular, pointed out that “*because of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered*”. In the Court’s view, such efficiencies could result, for example, from savings in distribution and consumer transaction costs as well as potential economies of scope.

In addition to expressly stating that Section 2 Sherman Act requires a rule-of-reason approach, the Court of Appeals laid down a four-stage test for determining whether Section 2 has been violated. First, the alleged behaviour must have an ‘anti-competitive effect’, meaning harm to the competitive process and thereby harm to consumers. Second, the plaintiff has to demonstrate that the monopolist’s conduct indeed has the requisite anti-competitive effect. Third, if the plaintiff successfully establishes anti-competitive effect, the defendant can put forward “*a pro-competitive justification – a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal*”.<sup>97</sup> Lastly, if the justification itself is not rebutted, then the plaintiff must demonstrate that anti-competitive harm of the conduct outweighs the pro-competitive benefit.

<sup>93</sup> Ibidem, quoting Robert Bork [1978], *The Antitrust Paradox*.

<sup>94</sup> *United States v. Microsoft Corporation*, 87 F. Supp. 2d 30 (2000).

<sup>95</sup> See, for example, *Jefferson Parish Hospital, Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-18 (1984).

<sup>96</sup> The Court considered the *per se* rule’s direct consumer demand laid down in *Jefferson Parish* and indirect custom inquiries to be “*a poor proxy for net efficiency from newly integrated products*” as they were generally backward-looking. *United States v. Microsoft Corporation*, 253 F.3d 34 (2001).

<sup>97</sup> Ibidem.

## 5. Conclusions

Efficiency considerations have been playing a progressively more significant role in competition analysis since Oliver Williamson published his seminal article in 1968. Even if to date efficiency claims have turned out to be decisive only in a relatively small number of cases, merging firms and also dominant undertakings have gained more confidence in presenting them to competition authorities.

This in turn implies that competition authorities are required to develop and update their expertise in evaluating efficiency claims.

The assessment by competition authorities of efficiency claims is however not easy and several issues need to be addressed. One is to what extent an agency may balance potential efficiency gains (including those in terms of fixed-cost savings, as opposed to marginal-cost reductions) against any anti-competitive effects resulting from a specific transaction or conduct – a question which is inherently linked to the welfare standard that the agency applies. The standard of proof which is required of efficiency claims may also be another controversial issue, especially in the case of dynamic efficiencies, which are more speculative and therefore more difficult to verify. From a procedural viewpoint, it is also important to establish whether efficiency considerations are an integral part of the overall competition assessment or rather a defence against the finding that a specific transaction or conduct is anti-competitive.

If possible, these questions are even more important in dominance cases, because there is less guidance available from case law and guidelines. In addition, bearing in mind differences between competition analysis in mergers and unilateral conduct cases, the agencies should consider whether the same or different criteria as to the standard and burden of proof should guide the assessment of efficiency claims.

Finally, as competition authorities gain more experience in assessing efficiency claims, they might consider conducting *ex-post* assessment of efficiency claims. For this, there is a variety of tools and techniques to quantitatively assess whether the claimed efficiencies – even dynamic ones – materialised or not after the merger. This knowledge would allow the agencies to validate the accuracy of their analysis and to improve their treatment of efficiency claims in future cases.

## APPENDIX.

### SOURCES OF EFFICIENCY GAINS

Efficiencies – be they static, dynamic or transactional – can arise in a variety of ways. This Appendix provides a brief (and non exhaustive) list of such sources, and their relevance in competition policy. In general, the discussion refers to efficiencies arising from mergers, but this by no means implies that efficiencies cannot also result from an agreement among competitors or a dominant firm’s conduct.

#### 1. Rationalisation of production across plants

When plants (or firms) have different marginal costs, cost savings may be realised by shifting production from one plant with high marginal costs to another plant with lower costs, while maintaining the same aggregate level of output. These savings result from the rationalisation of production across plants (see Röller, Stennek and Verboven, 2001, p. 43).

Rationalisation is fully achieved when the marginal cost of production is the same in all plants, *i.e.* there are no further benefits which can be exploited by shifting production between plants. There may also be an extreme case when the plant with the lowest marginal cost has no capacity constraint, in which case it is efficient to move all the production to such plant and close all the other ones. In this case, additional savings would come from avoiding duplication of fixed costs altogether.

In a merger, rationalisation of production can also occur when the merging firms produce differentiated products, for example by concentrating production of each good in one of the plants (de la Mano, 2002, p. 65). Rationalisation of production capacity can be of particular importance in mergers involving declining industries (Dutz, 1989).

#### 2. Economies of scale

In simple terms, economies of scale exist when average costs decline with output, *i.e.* the more output is produced, the lower unit costs are. In general, in the short term economies of scale exist only up to a certain level of output (defined as “minimum efficient scale” – MES – in the economic literature). Beyond this level, average costs start rising again, *e.g.* because some inputs (such as plant capacity, physical capital, and managerial resources) are available in fixed quantity and constrain further output expansion.<sup>1</sup>

In a merger, typical sources of short-run economies of scale are the combination of a larger output in a single firm or plant, which lowers variable or incremental costs and helps firms to achieve a more efficient scale.

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<sup>1</sup> The average cost curve is then U-shaped. Estimating the level at which economies of scale are exhausted, *i.e.* the minimum efficient scale of an industry, may be complicated, and the MES is likely to change over time and vary from one industry to another. An industry where average costs decline over the entire range of relevant output levels is called a “natural monopoly”, because it is efficient that only a single firm supplies the entire market.

Another possible source is the avoidance of duplication of fixed costs, such as back-office resources, marketing expenditure, rental of facilities and other overheads. In other words, after a merger the merging parties avoid paying the same fixed costs twice. Moreover, by combining the output of the two firms within a single entity, the merger allows these fixed costs to be spread over a larger amount of output. In practice, however, competition authorities tend to give little consideration to reduction in fixed costs because, even if these cost savings are merger-specific, verifiable and often quantifiable, they are unlikely to be passed on to consumers in the form of lower prices (de la Mano, 2002, p. 63). For example, the Irish Merger Guidelines explicitly mention, among the efficiencies that are generally not considered, “*efficiencies related to economies of scale and scope that do not involve marginal cost reductions.*”<sup>2</sup> This issue, however, is linked to which welfare standard a competition authority applies. In particular, where a total welfare standard is used, fixed-cost savings are generally taken into account.

This approach may need to be reconsidered in the context of dynamic efficiencies where lower fixed costs “*may motivate firms to undertake R&D projects that they previously considered too expensive or too risky*”,<sup>3</sup> which may in turn benefit consumers. The U.S. Antitrust Modernization Commission has expressly recognised this possibility saying that “*the agencies and courts should give greater credit for certain-fixed cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries.*”<sup>4</sup> Katz and Shelanski (2004) also noted that “*it is important that fixed costs not be summarily excluded from the efficiencies analysis when innovation is at issue.*”

In the long run, economies of scale can arise from specialisation (as employees become more and more specialised in a small number of tasks) and learning by doing (unit costs decline as more output is produced over time). Apart from production, economies of scale can also exist in other functions, such as marketing, distribution and R&D.

### 3. Synergies

Farrell and Shapiro (2001) take a more sceptical view about economies of scale noting that: i) at least in principle, economies of scale can be achieved unilaterally, *i.e.* without a merger (for example, through internal growth); and, ii) they may not benefit consumers (*e.g.* if such gains are not large enough or not passed on).

Farrell and Shapiro (2001) then go on to define “synergies” as genuine, merger-specific efficiencies based upon the close integration of specific, core and hard-to-trade assets owned by the merging parties. In contrast with broader efficiencies, these synergies would then “*require co-operation and co-ordination of the two firms’ assets that allow production on a superior production function, as distinct from causing different choices (such as scale) on a fixed production function. In other words, synergies allow output / cost configurations that would not be feasible otherwise.*”<sup>5</sup> According to Farrell and Shapiro (2001), synergies associated with horizontal mergers would include: co-ordination of joint operations *e.g.* in an oil field; sharing complementary skills in manufacturing and distribution; improved interoperability between related products; and, improved configuration of a railroad network.

<sup>2</sup> Notice in respect of Guidelines for Merger Analysis (2002), paragraph 5.10.

<sup>3</sup> See OECD (2007a), p. 30.

<sup>4</sup> Antitrust Modernization Committee (2007), Report and Recommendations, Chapter I.B, p. 49. Available at: [http://govinfo.library.unt.edu/amc/report\\_recommendation/chapter1.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf)

<sup>5</sup> Farrell and Shapiro (2001), p. 673. Farrell and Shapiro (2001) is linked to their previous article (Farrell and Shapiro, 1990), where, using a Cournot model in which firms compete by setting quantities, they prove that – for price to decrease after a merger – the merged entity must achieve a significantly lower marginal cost than either of the merging parties had before the merger.

#### **4. Economies of scope**

Economies of scope exist when it is cheaper to produce two or more products jointly than to produce each product separately. If that is the case, there is then an incentive to have multi-product plants rather than plants specialising in producing individual products. A refinery producing petrol and other refined oil products is a possible example. Economies of scope can be derived from the more efficient use of common raw inputs as well as technical knowledge which can be applied to produce and sell multiple products.

#### **5. Technological progress**

A merger may also allow two firms to combine complementary technological and managerial skills and assets, from which greater innovation can follow. The same is true for R&D expenditure. In particular, pooling of R&D resources may lead to greater economies of scale (as the corresponding fixed costs are spread over a larger output), but also to faster innovation and dynamic efficiencies.

#### **6. Reduction of slack**

A firm's internal efficiency can be increased when, for example, a merger replaces less capable management with a more effective one, although there is little empirical evidence to support a "management discipline" effect provided by mergers (de la Mano, 2002, p. 68).

#### **7. Savings in procurement costs**

Mergers may allow merging firms to achieve savings in procurement costs (or purchasing economies; see Röller, Stennek and Verboven, 2001, pp. 46 – 47), *e.g.* because they obtain better terms and conditions from suppliers as a result of greater bargaining power. These savings, however, are generally considered as transfers of wealth from suppliers to the merging firms, *i.e.* they are pecuniary in nature, and are therefore not accepted as efficiencies.

There are cases, however, where savings in procurement costs represent genuine economies. This happens, for example, when the merging firms pay a two-part tariff, *i.e.* a fixed fee which does not vary with the amount purchased plus a variable part which does depend on the amount purchased. In this case, the greater the volume of inputs purchased, the lower the unit price paid by the merging firms.

#### **8. Financial and tax savings**

A merger may allow the combined entity to have access to more and better sources of financing, or to reduce its risk profile, which may in turn result in lower capital costs. These savings have the potential of being verifiable and passed on to consumers.

In addition, there may be cases where firms decide to merge because the combined entity will benefit from tax savings. For example, the acquirer may offset its tax liabilities against the acquired company's credits and losses. These would, however, only be pecuniary and not real cost savings. As such, they would hardly count as efficiencies.

#### **9. Demand-side efficiencies**

Some products exhibit network effects, *i.e.* for consumers their value increases with the number of people using such a product over a network or a platform. This is the case, for example, of telephones and e-mail. In these cases, a merger combining the customer bases of different firms may create a larger network and thus benefit consumers. In particular, this could be the case when a firm is already relatively larger than its rivals and the merger just speed up the "tilting" of the whole market towards the dominant

firm. Where two or more firms are still competing to emerge as the leading company in the market, a merger might not however be beneficial for consumers.

When products are complements (*e.g.* in the case of a conglomerate merger), demand-side efficiencies may also arise because “*lowering the price of one product increases demand for it and for other products that are used with it*” (United Kingdom’s Merger Assessment Guidelines, 2010, paragraph. 5.7.17), an outcome which is made possible by common ownership of the complementary products. An example of this effect from a recent merger in the United Kingdom is provided in Box 1 in the main body of this Note.

In addition, when products are not substitutes and customers have an incentive to buy a range of products from a single supplier, there may be efficiencies arising from “one-stop shopping”, *e.g.* because purchasing from a single supplier reduces transaction costs or, where products are complementary, ensures improved product compatibility or quality assurance (see the United Kingdom’s Merger Assessment Guidelines, 2010, paragraph 5.7.18). These benefits could, however, well be labelled as economies of scope in purchasing (rather than in production).

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## AUSTRALIA

### 1. Overview of Competition and Consumer Act and scope for evaluating efficiencies

The *Competition and Consumer Act 2010* (the CCA) is Australia's national competition and consumer law. The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA.

The object of the CCA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".<sup>1</sup> This reflects the notion that competition is generally the best way to enhance welfare by promoting economic efficiency in all its dimensions – allocative, productive and dynamic. Thus there are prohibitions in the CCA against misuse of market power (unilateral conduct) and contracts, arrangements or understandings (CAU) that substantially lessen competition (SLC). Similarly, mergers are prohibited if they would have the effect or likely effect of SLC.

Of particular relevance to the role of efficiency claims in enforcement of the CCA are various provisions of the CCA which are not subject to a SLC test. The treatment of exclusive dealing<sup>2</sup> arrangements depends on whether the arrangement results in a SLC or constitutes third line forcing. Third line forcing conduct is a *per se* breach of the CCA. However, other types of exclusive dealing arrangements will only raise concerns if they SLC in a market. Secondary boycotts are prohibited if they have the purpose of causing substantial loss or damage to a competitor. CAU that contain exclusionary provisions or cartel provisions – i.e. seek to fix prices, rig bids, restrict output, or allocate customers, suppliers or territories – are prohibited *per se*. Other CAU are subject to a SLC test. The private disclosure of pricing information between competitors in relation to prescribed goods and services<sup>3</sup> is also prohibited *per se*, while other information disclosures between competitors are only prohibited where they have the purpose of SLC. Retail price maintenance is also *per se* prohibited.

Nevertheless, otherwise anti-competitive CAU between businesses<sup>4</sup> can provide efficiency gains that may offset or outweigh the detrimental effects on competition. This is particularly the case where there is market failure. Thus the CCA also contains provisions that allow parties to these arrangements to apply for protection from legal action for mergers and conduct where the public benefits (largely efficiencies) outweigh any public detriment; thus providing flexibility and recognising that, in certain circumstances, arrangements which restrict competition can nonetheless generate net benefits (efficiencies).

There are two processes under which legal protection may be obtained – these are known as 'authorisation' and 'notification'. The relevant process will generally depend on the type of conduct for which legal protection is sought.

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<sup>1</sup> Section 2 of CCA.

<sup>2</sup> Exclusive dealing occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.

<sup>3</sup> These provisions currently only apply to the banking sector in relation to deposits and loans.

<sup>4</sup> Including in relation to exclusive dealing, primary and secondary boycotts, resale price maintenance, information exchanges and cartel provisions.

While only the Court may determine if conduct constitutes a contravention of the CCA, the ACCC is responsible for deciding whether to grant legal protection in relation to conduct that may otherwise breach the competition provisions of the CCA. The decision as to whether or not to grant legal protection is an administrative decision of the ACCC subject to review by the Australian Competition Tribunal (the Tribunal) and appeal on matters of law to the Federal Court of Australia.

Legal protection may also be sought for mergers that may otherwise breach the merger provisions of the CCA on the basis that the public benefits outweigh any detriment arising from the merger. Since 2007, the Tribunal is the judicial body responsible for exercising the powers under the CCA to authorise mergers and thus provide immunity from section 50 of the CCA. Prior to 2007, the ACCC performed this role.

The Australian provisions for authorisation and notification provide a broad framework for considering the efficiencies arising from potentially anti-competitive conduct. Of particular note is that consideration of efficiencies arising from the proposed conduct extends beyond the efficiencies arising in the market directly affected by the conduct to a consideration of the wider benefits to society as a whole.

## **2. Misuse of market power and efficiencies**

The CCA contains provisions that prevent businesses with substantial market power from taking advantage of that power for a proscribed anti-competitive purpose. Section 46 of the CCA defines misuse of market power as taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into that or any market; or deterring or preventing a person from engaging in competitive conduct in that or any other market.

The term ‘taking advantage’ does not involve any more than the use of the market power involved.<sup>5</sup> The High Court of Australia has stated that:

*...if the impugned conduct has a business rationale, that is a factor pointing against finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its market power...<sup>6</sup>*

Furthermore, the use of substantial market power must be for a proscribed purpose. For example, the adoption by a manufacturer that has a substantial degree of market power, of a system of distribution involving vertical constraints does not immediately lead to the necessary conclusion that the manufacturer has an anti-competitive purpose. When the state of the market is considered the activity may be pro-competitive<sup>7</sup>.

The ACCC is not able to authorise conduct which only relates to the misuse of market power provisions. However, it is often the case that such conduct can also be considered under other provisions (such as the exclusive dealing and/or CAUs that restrict dealings or affect competition). In those circumstances it may be possible to authorise such unilateral conduct if it would likely deliver net public benefits.

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<sup>5</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6, 167 CLR 177.

<sup>6</sup> *Boral Bessers Masonry Ltd v ACCC* [2003] HCA 13; (2001) 205 CLR 1. In 2008, Subs.46(6A) was inserted into the CCA, which lists various matters which the Court may have regard to in determining whether a firm has ‘taken advantage’ of substantial market power, including “whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market.”

<sup>7</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13, (2001) 205 CLR 1.

Even if the efficiency benefits of unilateral conduct by a powerful firm are not able to be considered under the authorisation or notification provisions of the CCA, Australia considers it is unlikely that misuse of market power provisions would deter beneficial conduct by powerful firms. In order to take action under the misuse of market power provisions, the ACCC must establish that a substantial purpose of the conduct was anti-competitive rather than a legitimate business rationale such as the pursuit of greater efficiencies.

In Australia's experience, careful consideration of the evidence as to the purpose of the conduct can sometimes lead to a conclusion that conduct which may initially appear anti-competitive is actually efficiency enhancing.

### 3. Efficiency claims in mergers

Section 50 of the CCA prohibits mergers that would have the effect, or be likely to have the effect of SLC in a market.

Merger parties have three avenues available to have a merger considered and assessed:

- the ACCC assesses the merger on an informal basis. This provides merger parties with the ACCC's view on whether the merger is likely to SLC (and therefore whether the ACCC would seek to block the acquisition in the Federal Court), but does not provide immunity from proceedings by other interested parties.<sup>8</sup>
- the ACCC assesses an application for formal clearance of a merger to determine whether it would be likely to SLC. If granted, merger parties are provided with legal protection from court action under section 50.<sup>9</sup>
- the Tribunal assesses an application for authorisation of a merger which if granted provides legal protection from court action under section 50. The Tribunal may grant authorisation if it is satisfied that the proposed merger is likely to result in such a benefit to the public that the merger should be allowed to occur. This test is broader than the competition test in section 50 and allows consideration of efficiency claims in circumstances where a merger may otherwise substantially lessen competition.

When assessing a merger under the informal or formal merger process, the ACCC is required to take account of a list of non-exhaustive 'merger factors' that are set out in subsection 50(3) of the CCA. These factors are consistent with the policy intent of section 50 and seek to focus attention on the key potential structural and behavioural constraints on a merged firm and thus the efficiency of markets, rather than the efficiency of individual firms.

The ACCC and the Courts are not required to take into account the nature and extent of any likely firm-specific efficiencies, such as realisation of economies of scale or scope and other cost efficiencies when considering a potential breach of section 50. A merger that removes or weakens competitive constraints to such an extent that it is likely to SLC will, unless authorised, contravene section 50 of the CCA even if the merged firm's efficiency would increase significantly as a result of the merger. However, the efficiency enhancing aspects of a merger are relevant in the context of section 50 to the extent that they may impact on the competitiveness of markets, for example by creating a new effective competitor.

<sup>8</sup> Other parties may also apply to the Federal Court for a declaration or divestiture (but not injunction) and any person suffering loss or damage as a result of a merger that breaches s. 50 can apply for damages.

<sup>9</sup> If the ACCC denies formal clearance, the merger parties may apply to the Tribunal for review of the ACCC's decision.

Consideration of the efficiencies arising from a merger is more directly relevant to an application for authorisation to the Tribunal on public benefit grounds. The statutory test for authorisation of mergers requires the Tribunal to be “...satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.”<sup>10</sup>

The CCA does not define ‘benefit to the public’, although the Tribunal has said that it should be considered to include ‘...anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.’<sup>11</sup>

In addition, in the context of merger authorisation, the Tribunal must have regard to a significant increase in the real value of exports, a significant substitution of domestic products for imported goods and all other relevant matters that relate to the international competitiveness of any Australian industry as benefits to the public.<sup>12</sup>

Australia notes that very few parties elect the merger authorisation path<sup>13</sup>, despite the prima facie benefit of an analytical framework which enables efficiency and public benefit considerations to be taken into account. There are likely to be several reasons for this including the public nature of the review compared with the informal review process.

#### **4. Authorisation of anti-competitive conduct**

Authorisation provides statutory protection against legal action being taken under the competition provisions of the CCA against the parties for engaging in the authorised conduct.<sup>14</sup>

The ACCC may grant authorisation if it is satisfied that the relevant statutory test has been met. The ACCC is statutorily required to make a decision whether to grant authorisation within six months of a valid application being received and legal protection commences from the date specified in the ACCC’s determination.<sup>15</sup>

There are two statutory authorisation tests, with the test to be applied depending on the nature of the proposed conduct for which authorisation is sought.

- For authorisation to engage in CAU, including cartels (other than boycotts), exclusive dealing (other than third line forcing) or disclosure of information for the purpose of SLC, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct

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<sup>10</sup> Section 95AZH(1) of the CCA.

<sup>11</sup> *Re Queensland Co-operative Milling Association Ltd Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 182-183.

<sup>12</sup> Section 95AZH(2) of CCA.

<sup>13</sup> Indeed, there have been no applications for authorisation of a merger since the responsibility for review of such applications was transferred to the Tribunal in 2007.

<sup>14</sup> Statutory protection may be limited to particular parties, to particular time periods, and in some instances, may be subject to conditions imposed by the ACCC.

<sup>15</sup> The decision as to whether or not to grant legal protection is an administrative decision and is subject to review by the Australian Competition Tribunal and appeal to the Federal Court of Australia.

would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.<sup>16</sup>

- For authorisation to engage in a primary or secondary boycott, resale price maintenance, third line forcing or a private disclosure to competitors of information relating to price where the disclosure is not in the ordinary course of business, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct would result or be likely to result in such a benefit to the public that it should be allowed.<sup>17</sup>

The ACCC is able grant authorisation subject to conditions. These conditions are generally designed to improve the balance of public benefits and detriments and/or to require the collection of information which will facilitate the ACCC's ability to evaluate whether claimed public benefits have been realised over the term of the authorisation if, and when, reauthorisation of the conduct is sought.<sup>18</sup> The purpose of any conditions is not to substantially redraft or redesign proposed conduct. The ACCC will generally only authorise conduct for a specified period of time as it is cannot be satisfied that the relevant public benefit will be met beyond the specified time period.<sup>19</sup>

## 5. Notification of anti-competitive conduct

As an alternative to authorisation, statutory protection for exclusive dealing conduct, certain collective bargaining arrangements and the private disclosure to competitors of price information, can be achieved by lodging a notification with the ACCC.

Unlike the authorisation regime, the statutory protection provided by a notification comes into force automatically and parties do not have to wait for a decision from the ACCC to grant the protection.<sup>20</sup>

The ACCC can object to a third line forcing notification if it is satisfied that the likely public benefit will not outweigh the likely public detriment from the conduct.<sup>21</sup> The same test applies when considering whether to revoke a notification for the private disclosure of information to competitors.

For other types of exclusive dealing, the ACCC can revoke a notification if it is satisfied that the notified conduct is likely to result in a SLC and the likely benefit from the conduct will not outweigh the likely detriment to the public.

<sup>16</sup> Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

<sup>17</sup> Subsections 90(8), 90(8A), 90(8B) and 90(9) of the CCA.

<sup>18</sup> Broadly the grant of an authorisation may be subject to a condition precedent and/or a continuing condition. A condition precedent requires something to be done before the authorisation comes into effect. A continuing condition requires something to be done for the authorisation to continue and would usually involve periodic reporting over the term of the authorisation to demonstrate compliance with the condition.

<sup>19</sup> The decision as to whether or not to grant legal protection is an administrative decision and is subject to review by the Australian Competition Tribunal and appeal to the Federal Court of Australia.

<sup>20</sup> For exclusive dealing conduct other than third line forcing the statutory protection commences on the date the notification is validly lodged with the ACCC. For notifications involving third line forcing conduct, collective bargaining arrangements or the private disclosure to competitors of price information the statutory protection comes into force at the end of a 14-day statutory period that begins on the day the notification is validly lodged, unless objected to by the ACCC in that period.

<sup>21</sup> Section 93(3A) of the CCA.

Similarly, as an alternative to authorisation, in certain circumstances small businesses are able to obtain legal protection for collective bargaining by lodging a valid notification with the ACCC.<sup>22</sup> Legal protection for the notified collective bargaining arrangement begins at the conclusion of a 14-day statutory period and lasts for three years. For collective bargaining arrangements that involve price fixing or collective boycott, the ACCC may object to the notification if it is satisfied that the benefit to the public that would result from the conduct does not outweigh the detriment to the public. For all other collective bargaining arrangements, the ACCC may object to the notification if it is satisfied that the conduct would result in a SLC and the conduct has not resulted, or is not likely to result, in a benefit to the public, or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

The ACCC may review and revoke the legal protection provided by a notification at any time, provided the relevant statutory test to revoke the notification is met. Decisions made by the ACCC to revoke notifications can be reviewed by the Tribunal.

## 6. Public benefits and detriments

Public benefit is not defined in the CCA. However, the Tribunal has stated that it includes:<sup>23</sup>

*... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress”.*

*Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society’s resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass “progress”; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.*

The CCA does not expressly limit the range of public benefits which may be taken into account by the ACCC to those that address market failure or improve economic efficiency. –However, in the ACCC’s experience, most public benefits can be broadly attributed to improvements in efficiency in one or more of its dimensions – allocative, productive and/or dynamic – by addressing a source of market failure.

Public detriment is also not defined in the CCA and there are some differences in wording between the authorisation tests in relation to public detriment. The Tribunal has defined it as:<sup>24</sup>

*... any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...*

In many cases, the only identifiable detriments will be those constituted by a lessening of competition. Potential public detriments associated with a lessening of competition include higher prices and costs, reduced choice, quality and innovation.

An issue for the ACCC and Tribunal is who constitutes the “public”? The choice of public benefit standard is not without controversy. The Tribunal has adopted a ‘modified total welfare standard’.<sup>25</sup>

<sup>22</sup> To lodge a collective bargaining notification, the value of each member’s transaction with the target of the collective bargaining must be less than \$3 million per year.

<sup>23</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169.

<sup>24</sup> *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42,683.

*... in our view, the objective and statutory language of the CCA, as well as precedent, support the use of a form of the total welfare standard as the most appropriate standard for identifying and assessing public benefit. We say a 'form of' the total welfare standard because ... whilst the Tribunal does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, it may be that, in some circumstances, gains that flow through to only a limited number of members in the community will carry less weight.*

The ACCC considers that benefits accruing mainly to the applicants can constitute public benefits and it is not necessary for the benefits to be passed on to end consumers. However, the ACCC will also consider whether the savings will be sustained over time. The ACCC gives more weight to sustained benefits which flow through to the broader community.

The CCA does not require the Tribunal, ACCC or the applicant to quantify the level of public benefits and detriments likely to result from proposed conduct. The ACCC's assessment of an application for authorisation is primarily qualitative in nature and relies on the facts of a matter to identify the relevant public detriments and public benefits and determine their relative importance. However, where possible, and particularly with complex applications, the ACCC encourages applicants to quantify the size of claimed benefits and detriments.

## **7. Rationale for authorisation and notification provisions**

The authorisation and notification provisions of the CCA reflect the reality that real world markets seldom reflect the theoretical ideal of perfect competition which provides the nexus between competition and the promotion of efficiency and welfare and underpins the object of the CCA. Instead, real world markets are often characterised by one or more of economies of scale, positive and negative externalities, public good characteristics, high transaction costs, relationship specific investments and assets, information asymmetry, high search and switching costs, agency and moral hazard and the behavioural biases of consumers. The presence of such market imperfections means that there are circumstances where competitive markets fail to achieve the most efficient outcomes and to maximise welfare.

In the presence of market failure, restrictions on competition may be an appropriate way to address the source of the market failure and thus improve efficiency and welfare. This would be the case if the benefits of addressing the market failure outweigh the detriment arising from restricting competition such that there would be a net gain in efficiency. This trade-off can also be seen as balancing the public benefits from the proposed conduct for which authorisation is sought, against the public detriments arising from that conduct. In these circumstances granting authorisation to engage in otherwise potentially anti-competitive conduct would be consistent with the object of the CCA.

In this regard, the Tribunal has noted:<sup>25</sup>

*The object of the restrictive practices provisions of the [Trade Practices] Act is the promotion of competition. Nevertheless, the very existence of authorisation points to the recognition that there may be exceptional circumstances in which business conduct associated with a lessening of competition may have value to society. We cannot rely upon the functioning of competitive markets to deliver everything "of value to the community generally.*

Authorisations and notifications are administrative procedures which seek to accomplish the above, by providing an efficient mechanism to recognise and enable conduct in breach of the CCA but ultimately

<sup>25</sup> Re Qantas Airways Limited [2004] ACompT 9 at 185.

<sup>26</sup> Re 7-Eleven (1994), ATPR 41-357 at 42677. The *Trade Practices Act 1974* was the precursor to the CCA.

in the public interest. The provisions are intended not to impose unnecessary burdens in terms of costs and delays upon business or upon the effective operation of the ACCC, and are designed to be consistent with the self enforcing nature of the CCA. These formal authorisation and notification provisions distinguish the Australian law from most of its overseas counterparts.

Where the proposed conduct is consistent with this objective, the ACCC will grant authorisation or allow a notification to stand. When considering the trade-off between the benefits of addressing market failure and the costs of restricting competition, the ACCC does not consider whether the conduct is *necessary* to achieve the likely net public benefits, or whether the proposed conduct is the *best* way to achieve the desired net public benefits. Indeed it is possible that there may be better targeted and greater efficiencies achieved through some other means. Consideration of any alternative solutions would only be relevant to the ACCC's assessment to the extent that those alternatives were *likely in the foreseeable future* absent the proposed conduct – in other words if those alternatives form part of the counterfactual.

## **8. Assessment framework**

The ACCC applies a consistent, forward looking analytical approach to its assessment of applications for authorisation and notification. The analysis is forward-looking and focuses on assessing public benefits and detriments that would result or be likely to result from the proposed conduct within the foreseeable future. This is achieved by comparing the likely future *with* the conduct that is the subject of the authorisation or notification (the factual) to the likely future *without* the conduct that is the subject of the authorisation (the counterfactual). Specifically, the ACCC compares the public benefits and detriments likely to arise under the factual with the public benefits and detriments likely to arise under the counterfactual in order to determine whether to grant authorisation or allow the notification to stand.

The ACCC's assessment of benefits and detriments focuses on the areas of competition that are most likely to be impacted by the conduct for which authorisation is sought. In this regard the focus of the analysis can extend beyond the markets or areas where the conduct is located.

The ACCC has considered applications for authorisation that seek to address a range of market failures (although the applications may not be couched in a market failure framework and are not required to be). The following examples illustrate some of the issues that the ACCC has encountered in deciding whether to grant legal protection to potentially anti-competitive conduct on public benefit (efficiency) grounds.

## **9. Examples**

### **9.1 Externalities**

The ACCC has considered several applications for authorisation of industry arrangements that seek to address environmental externalities (where the costs to the environment arising from the production and/or consumption of products are not reflected in market prices). Individual market participants lack the incentive to unilaterally engage in conduct that 'internalises' the externality so that prices better reflect the full costs and benefits of production and consumption. Thus restrictions on competition, and cooperation between competitors, may be appropriate to tackle the problem and improve efficiency. In the following examples it is possible that the objectives of the conduct may have been achieved through other means. However, as noted above, consideration of such means is relevant only to the extent that they are likely in the foreseeable future.

- The Australian Paint Manufacturers Federation (APMF) sought authorisation to impose a two cents per litre levy on the wholesale supply of architectural and decorative (A&D) paint in Australia to fund a 12 month waste paint collection trial in Victoria. The ACCC considered that the trial would be likely to assist in the development of a national waste paint collection scheme while at the same time improving the efficiency of waste paint collection in Victoria and reducing the environmental harm caused by improper disposal of paint in that State.<sup>27</sup>
- Refrigerant Reclaim Australia (RRA) sought reauthorisation of a product stewardship scheme to recover, reclaim, store or safely dispose of refrigerant, thereby reducing greenhouse gas emissions. This is funded by a levy of \$2 per kilogram. As individual market participants lack the incentive to unilaterally engage in conduct that addresses the environmental externality in a competitive market, agreement between competitors may be appropriate. Indeed the ACCC considered the scheme delivers a net public benefit by facilitating greater compliance with environmental regulation resulting in a reduction in the volume of ozone depleting substances and synthetic greenhouse gases released into the atmosphere. Authorisation was granted subject to conditions that require RRA to enhance the transparency of its scheme by publishing its Annual Report and the methodology used to calculate recovery rates under the scheme on its website.<sup>28</sup>

## 9.2 *Collective bargaining arrangements*

The ACCC has granted authorisation, or allowed notifications to stand, for numerous collective bargaining arrangements which seek to address imbalances in market power and bargaining power<sup>29</sup>, reduce transactions costs<sup>30</sup>, address information asymmetries<sup>31</sup> and provide the opportunity for greater input into contract negotiations relative to individual negotiations or standard form contracts. In these circumstances, collective bargaining can help to achieve more efficient outcomes than would otherwise be the case by reducing the costs and barriers to effective negotiation. However, these benefits must be weighed against the costs of restricting competition between firms who would otherwise be in competition with one another, including the potential for coordination of conduct beyond that for which authorisation is obtained. Detriments (reduced allocative efficiency) may arise when collective bargaining results in increased prices, less choice or lower quality to consumers.

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<sup>27</sup> ACCC, 2011, Determination, application for authorisation No. A91251, 20 April.

<sup>28</sup> ACCC, 2011, Determination, application for authorisation No. A91256, 12 May.

<sup>29</sup> If one party to a negotiation has market power, it is more likely to make a ‘take-it-or leave it’ offer in the event that negotiations fail. A party with relatively stronger bargaining power will be able to extract most of the available gains from contracting.

<sup>30</sup> If transaction costs are high this can reduce the incentives to negotiate some potential mutually beneficial opportunities if the expected benefits of doing so are less than the transactions costs, resulting in economic inefficiency. Actions which reduce transaction costs, such as collective bargaining, can increase trade opportunities and improve economic efficiency.

<sup>31</sup> In situations where a buyer or seller has incomplete information (i.e. an information asymmetry) the party who is not well informed may accept less or offer different terms (or prices) than they would if more information was available to them. As a result, market outcomes may not promote efficiency and welfare. Information asymmetries can often be addressed by improving the transparency of market information.

This general framework can be illustrated by the following examples of recent collective bargaining arrangements considered by the ACCC:

- Transactions costs savings - Western Australian Broilers Growers' Association<sup>32</sup> and Australian Dairy Farmers Ltd<sup>33</sup>.
- Imbalances in bargaining power and market power – Australian Processing Tomato Growers<sup>34</sup> and Rural Doctors Association of Australia<sup>35</sup>
- The potential for detriment arising from collusion – Hertz Australia Pty Ltd<sup>36</sup>
- The potential for harm to third-party businesses - Hertz Australia Pty Ltd<sup>37</sup> and ACT Health Food Cooperative Ltd<sup>38</sup>

### 9.3 *Airline alliances*

National restrictions on airline ownership mean that economies of scale and scope that would usually be achieved via merger often have to be achieved through co-operative arrangements between otherwise competing airlines. Hence the authorisation provisions are particularly important to airlines that operate in, and to and from Australia.

Aviation agreements have the potential to deliver significant efficiencies through economies of scale and scope, improved scheduling, reduction of wingtip to wingtip flying and the reduction or elimination of double marginalisation on complementary services. However, these benefits can often only be achieved through highly restrictive agreements involving revenue sharing and agreements over prices, capacity and scheduling. If there is sufficient remaining competition in a market, these efficiencies are likely to be pro-competitive. However, where competition is limited there is often a difficult trade-off to be made.

The ACCC has recently considered several proposed airline alliances. Four involved the domestic carrier Virgin Blue which sought to enter into a series of alliances with Delta (December 2009), Air New Zealand (December 2010), Etihad (February 2011) and Singapore Airlines (December 2011) to create a global network. The ACCC was satisfied that on balance, the coordination and efficiencies which the agreements between Virgin and Delta would facilitate were likely to enhance Virgin and Delta's ability to compete with the incumbents on routes across the Pacific Ocean and thus authorisation was granted for five and a half years.

The ACCC identified competition concerns on a number of routes between Australia and New Zealand in relation to the Virgin/Air New Zealand alliance. Conversely, the ACCC identified a number of

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<sup>32</sup> ACCC, 2011, Determination: application for authorisation A91262, 16 June.

<sup>33</sup> ACCC, 2011, Determination: Application for revocation of A90966 and substitution with A91263, 4 August.

<sup>34</sup> ACCC, 2012, Determination: application for authorisation A91270, 24 February.

<sup>35</sup> ACCC, 2008, Determination: application for authorisation A91078, 14 May.

<sup>36</sup> ACCC, 2010, Objection Notice in respect of a collective bargaining notification lodged by Hertz Australia Pty Ltd, Notification no. CB00143, 16 July.

<sup>37</sup> ACCC, 2010, Objection Notice in respect of a collective bargaining notification lodged by Hertz Australia Pty Ltd, Notification no. CB00143, 16 July.

<sup>38</sup> ACCC, 2008, Determination: application for authorisation A91071, 6 February.

efficiencies in relation to trans-Tasman flights. After balancing these considerations, the ACCC's draft determination proposed to deny authorisation. The ACCC ultimately granted authorisation for three years subject to conditions which required the airlines to maintain and grow the number of seats flown on routes where competition concerns were identified.

Virgin and Etihad, did not compete on any routes and so the ACCC considered that the alliance between those airlines would be unlikely to result in any public detriment. As the ACCC identified public benefits arising from this alliance, authorisation was granted for five years. Similarly, the ACCC identified material public benefits arising from the alliance with Singapore Airlines and considered it unlikely that significant public detriment would arise despite some overlap in the routes flown by the alliance partners. This was because of differences in the services offered by the partners which reduced the degree of substitutability between them. There were also a number of other airlines which offered competing services.

## 10. Codes of conduct

Codes of conduct can be an effective way to address a number of market failures but they necessarily require considerable coordination and agreement between competitors. Consequently, the ACCC examines many codes of conduct under the authorisation provisions of the CCA.

Medicines Australia's code of conduct is an example of the issues that can arise when considering the public benefits and detriments associated with codes of conduct.<sup>39</sup> The ACCC has considered several versions of Medicines Australia's code over several years and is currently considering the latest version. The code addresses market failures associated with asymmetric information, agency and moral hazard by setting standards for the marketing and promotion of prescription pharmaceutical products in Australia.

In 2006, Medicines Australia lodged an application to revoke existing authorisations relating to the code and to substitute these with new authorisations in respect of Edition 15 of the Code. The ACCC granted authorisation for three years in July 2006 subject to a public reporting condition to increase the transparency around the provision of hospitality to healthcare providers at educational events sponsored by Medicines Australia members. The condition reflected the ACCC's concerns about enforcement of the code and hence the magnitude of the public benefits arising from the code's implementation. The authorisation was subject to a review by the Australian Competition Tribunal which granted authorisation subject to a similar reporting condition in 2007.

In December 2009, the ACCC re-authorised a revised version of the code for three years. This version of the code fully incorporated the public reporting requirements that were previously imposed as conditions, as well as a number of other amendments to enhance enforcement, increase transparency and restrict advertising and promotional claims.

## 11. *Ex post* review

The ACCC does not conduct *ex post* reviews of its authorisation decisions. If an authorisation expires and reauthorisation is sought to enable the parties to continue engaging in the conduct, the ACCC will review the extent to which the claimed public benefits and detriments eventuated under the initial term of authorisation. In some instances the ACCC may require the provision of relevant data to facilitate that assessment as a condition of authorisation.

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<sup>39</sup> Medicines Australia is the industry body representing prescription pharmaceutical companies in Australia.

The ACCC may also review and possibly revoke an authorisation or notification on its own initiative.<sup>40</sup> However, none of these activities amount to an *ex post* review.

The ACCC does not conduct *ex post* reviews of its merger decisions. If merger parties have provided the ACCC with an ongoing court enforceable undertaking under s.87B of the CCA to enable the merger to proceed, the ACCC will conduct on-going monitoring of compliance with the undertaking.<sup>41</sup> However, this monitoring does not amount to an *ex post* review.

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<sup>40</sup> Specifically, the ACCC may initiate a review if the decision to grant authorisation was based on misleading or deceptive evidence or information, a condition of authorisation has not been complied with, or there has been a material change in circumstances since authorisation was granted.

<sup>41</sup> Ongoing undertakings are typically behavioural or quasi-structural in nature and seek to modify or constrain the behaviour of the merged firm.

## CHILE\*

### 1. Institutional and legal framework

The institutional arrangement for competition law in Chile considers both an administrative body and a judicial body. The Fiscalía Nacional Económica (hereinafter, the “FNE”; also legally translated as “National Economic Prosecutor’s Office”) is an independent government competition agency in charge of detection, investigation and prosecution of competition law infringements, issuing also technical reports and performing competition advocacy activities. The *Tribunal de Defensa de la Libre Competencia* (hereinafter, the “TDLC”; also legally translated as “Free Competition Defense Tribunal”) is the decisional judiciary body having exclusive jurisdiction on competition law and adjudicating in both adversarial procedures (referred to infringements such as cartels or dominance abuses) and non-adversarial ones (concerning merger review, among others). The TDLC’s rulings are subject to appeal before the Supreme Court.

The legal standard the Competition Act provides for intervention is defined as *any action, act, deed or contract that prevents, restricts or hinders free competition or tends to produce such an effect*. The Act does not contain any explicit references to economic efficiencies, neither as an element that -if harmed or threatened- justifies intervention, nor as a justification or defense legitimating restraints to competition. However, since the application of the law has become increasingly economic-effects-oriented in the last 15 years, the definition, identification and assessment of efficiencies in the FNE’s administrative analysis, as well as in the case-law analysis by the TDLC are unavoidable steps, particularly, regarding mergers and abuse of dominance/vertical restraints cases.

The remaining part of this contribution aims at providing some insights regarding conceptual, methodological and evidentiary issues regarding efficiency claims raised by parties in competition law proceedings, particularly, in mergers and abuse of dominance/vertical restraints cases. It must be stated that both competition authorities, the FNE and the TDLC analyze efficiencies at different procedural stages. For the reason above, amongst others, each body’s conclusions on efficiency claims in case analysis have not always coincided. Although this submission is a joint contribution of the FNE and the TDLC, the document identifies the relevant differences wherever necessary.

### 2. Conceptual issues regarding efficiency claims

#### 2.1 *Efficiency claims in merger cases*

The FNE, when drafting its report on specific merger transactions cases which is later submitted to the TDLC, regularly evaluates efficiency claims raised by parties as potential counterweights to anticompetitive effects in merger analysis. According to FNE’s reports, claimed efficiencies must have the following features: (i) to be reasonably verifiable; (ii) not attainable by alternative mechanisms less harmful or risky for competition; (iii) be able to be passed to consumers. The evidence of their existence and magnitude should be provided by the parties.

The TDLC has enumerated the requirements for efficiency claims to be considered, in the following terms: *In order to evaluate potential efficiencies in mergers, this Tribunal [...] has required that they*

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\* Joint contribution from FNE and TDLC.

*should be verifiable, inherent to the merger under review, i.e., not attainable within a reasonable length of time by other transactions not implying market concentration and must not be the result of anticompetitive restraints to the quantity or quality of the relevant products. Additionally, this Tribunal considers that claimed efficiencies with regards to a merger should translate, with a reasonable probability and within a reasonable time frame into reduced consumer prices or better products quality.*<sup>1</sup>

According to FNE's reports, productive efficiencies consist in reduction in marginal costs and reduction in agency costs due to the transaction. On the contrary, reductions in fixed costs are not commonly considered as counterweights to anticompetitive effects, but only in markets where dynamic elements of competition are relevant and thus where fixed costs reductions may be translated into more innovation, improvement of products, more variety, or into short-term reductions in operational production costs.

As to dynamic efficiencies, the FNE has considered in its reports that they can have an indirect mitigation role regarding anticompetitive effects. For instance, a merged entity could be in position of increasing prices but at the same time generating an efficient firm structure able to create new and better products. In such a case, according to the FNE's Draft of the New Version of the Internal Guide for the Analysis of Horizontal Merger Transactions, the FNE would perform a qualitative assessment of both expected effects.<sup>2</sup>

The TDLC has admitted dynamic efficiencies in VTR/Metropolis in the following terms: *Technological elements play a fundamental role in framing the structure of the telecommunications sector [...] the constant development of new technologies, and particularly their convergence, generate very dynamic conditions in markets, opening the possibility of competition. [...] This Tribunal is convinced that in the mid-term, technological dynamism in this sector will eliminate that dominance in the paid TV, increasing competition in the whole telecommunications sector.*<sup>3</sup>

The TDLC by and large shares the FNE's conception regarding productive efficiencies; however, the dissenting vote in Shell/Terpel held that reduction in fixed costs may also result in effects on prices, and thus fixed cost reductions should also be considered as merger efficiencies when they translate into reduction in prices.<sup>4</sup>

## **2.2 Efficiency claims in abuse of dominance/vertical restraints cases**

The role of efficiency claims in adversarial proceedings is to counterweight the theory of harm supporting the alleged infringement. From a legal point of view, the assessment of efficiency claims is inherently associated with the qualification of the legality/illegality of the conduct under analysis.

In exclusionary cases, the FNE identifies a harm to competition when rivals' costs are raised or markets are foreclosed. As to vertical restraints, these practices may be identified as vehicles for facilitating coordination among competitors. Thus, the FNE confronts its theory of harm with the claimed

<sup>1</sup> TDLC's Decision No. 39/2012 (*Shell/Terpel*) (Rc. 10.2.); available at: [http://www.fne.gob.cl/wp-content/uploads/2012/08/reso\\_39\\_2012.pdf](http://www.fne.gob.cl/wp-content/uploads/2012/08/reso_39_2012.pdf)

<sup>2</sup> FNE's Draft of the New Version of the Internal Guide for the Analysis of Horizontal Merger Transactions; available at: <http://www.fne.gob.cl/english/wp-content/uploads/2012/08/Guide-for-Analysis-of-Merger-Transaction.pdf>

<sup>3</sup> TDLC's Decision No. 1/2004 (*VTR/Metrópolis*) (Rc. 7 and 10); available at: [http://www.fne.gob.cl/wp-content/uploads/2011/05/reso\\_0001\\_2004.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/05/reso_0001_2004.pdf)

<sup>4</sup> Dissenting vote, Rc. 31 and ff., in TDLC's Decision No. 39/2012 (*Shell/Terpel*), *supra*, footnote 1.

efficiencies the restraint allegedly has in order to determine the strategy it will follow for enforcing the law or otherwise trying to resolve the dispute.

The TDLC identifies and assesses claimed efficiencies as part of an adversarial proceeding in which one of its major tasks is to determine whether the claimed efficiencies of the restraints are able to counterweight the theory of harm invoked by the FNE or by a private plaintiff. This analysis is crucial in TDLC's qualification of the legality/illegality of the conduct because, at the end of the day, a wrongful conduct should have an actual or potential inefficient outcome in the market, according to an economic-effects-oriented approach to competition law.

Productive efficiencies in terms of reduction in variable costs and reduction in agency costs are the most commonly kind of claimed efficiencies. However in some conduct cases, particularly in price discrimination cases, allocative efficiency is usually part of the arguments raised by the defendant.

### **3. Methodological issues**

#### **3.1 *Efficiency claims in merger cases***

As mentioned above, productive efficiencies are associated mainly with reductions in marginal costs due to transaction's synergies, plant specialization, reductions in costs of capital, achievement of scale economies –when they are not attainable in other ways within a reasonable time horizon, scope economies, density economies and whatever productive advantage associated with the joint operation of merging parties and with the reduction in operational costs. Savings in fixed costs, such as elimination of duplications, are considered only if relevant competitive variables in the industry support the assumption that these savings will be passed to consumers in a short length of time, for instance, by an increase in R&D investments, improvements in quality, more product variety or reductions in operational costs due to improvements in productive processes.

The above criteria for considering efficiency claims by the FNE are reflected in some cases detailed below for illustrative purposes.

##### **3.1.1 *SMU/Supermercados del Sur***

SMU is the third supermarket chain in the country. In September 2011, SMU celebrated a merger with the fourth chain, Supermercados del Sur (SDS). After closing the transaction SMU submitted a consultation before the TDLC proposing several engagements for mitigating the competitive risks raised by the transaction. In addition, SMU claimed that the transaction produced efficiencies counterweighing in part the anticompetitive effects.

Claimed efficiencies by SMU included personnel reduction in the back office (e.g. by the suppression of duplicated departments), savings in marketing due to the unification of brands, and savings in freights and logistics due to scale economies in products distribution.

In order to verify whether the claimed efficiencies complied with the FNE requirements<sup>5</sup>, the FNE requested additional information to SMU, to be submitted under confidentiality, explaining details of the claimed efficiencies.

The FNE reviewed and assessed the information provided by the company and concluded that only a small percentage of alleged savings satisfied the requirement of being reasonably verifiable. Amongst the

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<sup>5</sup> *Supra* ¶4.

verifiable savings, most of them consisted in fixed costs and, besides, the competitive structure of the supermarket industry, according to the FNE, did not provide guarantees that these savings were able to be passed to consumers.

As part of its conclusions, the FNE admitted as counterweight to the merger's anticompetitive risks only those efficiencies associated with reductions in operational costs due to improvements in distribution systems, efficiencies which magnitude was significantly inferior to the anticompetitive risks identified.<sup>6</sup>

TDLC's decision on this case is still pending.

### 3.1.2 *Shell/Terpel*

In November 2011, Terpel Chile (which parent company in Colombia had been taken over by the major Chilean actor, Copec) submitted a consultation before the TDLC regarding whether Shell could be the acquirer of its assets. In the market of liquid fuels sold in gas stations, Shell was the second company in the market with a 15% market share, behind Copec holding a 60%. Terpel Chile was the fourth actor with a 9,4% market share.

In its submission, the company claimed several efficiencies produced by the proposed transaction, including the optimization of the logistic network for fuel distribution, transportation and storage, a more efficient use of advertising budget, the introduction of technological developments in marketing techniques, and the acquisition of a minimum efficient scale in the demand of refined product which would allow the company to make imports directly and independently.

The FNE's analysis concluded that the claimed efficiencies related to fuel storage and transportation complied with the requirements, in the sense that they were feasible (although not completely verifiable), strictly inherent to the transaction, and able to be passed to consumers. Thus, the FNE admitted these efficiencies as partial counterweights to the anticompetitive risks associated with the transaction. Regarding anticompetitive risks not counterweighted nor mitigated by the accepted efficiencies, the FNE requested to the TDLC several mitigation remedies including the divestment of several assets.<sup>7</sup>

In a 3 to 2 divided decision on this case, the TDLC disagreed with the FNE analysis, did not admit any of the claimed efficiencies and did not authorize the transaction considering that there were no mitigation remedies able to mitigate the significant anticompetitive risks raised by the transaction.<sup>8</sup> TDLC's decision considered crucial that efficiencies were able to be passed to consumers with a significant probability, and thus, the efficiencies effectively pressing prices downward were those consisting in marginal costs savings. The majority held that claimed marginal costs savings, in some cases, had not been sufficiently proved and, in others, the savings were not strictly inherent to the transaction but achievable without the transaction. Thus, the efficiency claims were dismissed.<sup>9</sup>

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<sup>6</sup> FNE's report, submitted to the TDLC on December 10<sup>th</sup>, 2011; available at: [http://www.fne.gob.cl/wp-content/uploads/2011/12/inf\\_tdlc\\_009\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/12/inf_tdlc_009_2011.pdf)

<sup>7</sup> FNE's report, submitted to the TDLC on December 20<sup>th</sup>, 2011; available at: [http://www.fne.gob.cl/wp-content/uploads/2011/12/inf\\_tdlc\\_010\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/12/inf_tdlc_010_2011.pdf)

<sup>8</sup> TDLC's Decision No. 39/2012 (*Shell/Terpel*); available at: [http://www.fne.gob.cl/wp-content/uploads/2012/08/reso\\_39\\_2012.pdf](http://www.fne.gob.cl/wp-content/uploads/2012/08/reso_39_2012.pdf)

<sup>9</sup> For the dissenting vote, on the contrary, claimed efficiencies would allow the creation of a viable competitive entity able to compete effectively with Copec in the short-term. Disagreement with the treatment of efficiencies by the majority included a different view on the standard for considering them verifiable and the kind of efficiencies that may be considered as counterweights. As to this last point, the

The company challenged TDLC's decision and the final decision on the case is still pending before the Supreme Court.

### 3.1.3 *Nestlé/Soprole*

In November 2010 the two major buyers of crude milk companies and main actors in the selling of dairy products, Nestlé and Soprole, submitted a consultation before the TDLC regarding a Joint Venture for the joint production of several dairy products. Both companies represented jointly the 58% of the processed crude milk in Chile.

The companies claimed several productive and dynamic efficiencies associated with the Joint Venture.

Productive efficiencies were associated mainly with avoiding duplications in corporate marketing investment, production lines, distribution forces and human resources in marketing, manufacture, logistics and back office departments.

As to productive efficiencies, the FNE concluded in its report that claimed costs reductions were in most part verifiable and inherent to the transaction. Although, regarding the requirement of transferability to consumers, the FNE differentiated between reduction in fixed costs and reduction in variable costs, being the latter the only costs likely to be passed to consumers. Thus, the FNE accepted as counterweights to anticompetitive risks only the efficiencies associated with costs reductions in the marketing, manufacture and logistics departments, which were considered variable costs.

As to dynamic efficiencies, the companies claimed that the Joint Venture would allow them to reach a critical mass of consumers that would make profitable the introduction in Chile of innovations Nestlé subsidiaries have developed in other countries and, additionally, complementarities of both companies would allow them to increase processing plants' production and returns, and hence turn projects allowing them to broadening product variety into viable projects.

The FNE's analysis on claimed dynamic efficiencies dismissed the allegation that the Joint Venture would facilitate the introduction of innovative developments because the FNE understood that once the sunk cost associated to the innovation take place, its transference to other countries could be made at a low marginal cost, and thus, requiring a critical scale to motivate the innovation transfer was not considered determinant for the transfer to take place. Regarding the complementarities alleged as allowing improvements in production processes, the FNE considered that incentives for innovation and for productive improvements were rather supported in the intensity of competition between Nestlé and Soprole, which would be reduced by the Joint Venture. Thus, the FNE relied more on the intensity of competition rather than on companies' commitments with the authority to ensure that improvements in production processes and innovation will take place, particularly since it was clear that those efficiencies were attainable without the Joint Venture.<sup>10</sup>

The companies aborted the Joint Venture and withdrew their submission before the issuing of the TDLC's decision on the case.

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minority vote expresses that savings increasing producer surplus are a fundamental incentive allowing the producer to define its competitive strategy and thus, fixed costs savings effectively affect investment decisions and market prices. In the long-term, the dissent continues, all costs are variable costs and thus a reduction in incremental or avoidable fixed costs would have an impact on prices.

<sup>10</sup> FNE's report, submitted to the TDLC on March 4<sup>th</sup>, 2011; available at: [http://www.fne.gob.cl/wp-content/uploads/2011/06/itlc\\_0002\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/06/itlc_0002_2011.pdf)

### 3.2 *Efficiency claims in abuse of dominance/vertical restraints cases*

Claimed efficiencies in conduct cases are determinant for the qualification of the legality/illegality of the conduct. From an economic-effects-oriented approach to competition law a wrongful conduct should at least have the potential effect of an inefficient outcome in the market and thus, at least in theory, efficiencies gained by the restraint could outweigh the harm to competition caused by the same restraint.

Some cases are presented below to illustrate how the analysis proceeds in conduct cases.

#### 3.2.1 *FNE's complaint against CCU*

In March 2008, the FNE submitted a complaint against the major beer producer, CCU, possessing 83% market share of the national beer market.

CCU implemented a vertical restraint consisting in exclusivity arrangements with hotels, restaurants, bars, clubs and other equivalent distributors in the channel 'immediate consumption', causing an exclusionary effect with regards to potential competitors in the market. CCU reinforced the practice by requiring from the distributors the exclusivity in beer promotional and advertising activities in the premises where the arrangements were in force. The FNE accused CCU had incurred in an exclusionary abuse of dominance.

CCU responded the complaint claiming that exclusivity arrangements had been celebrated with a small part of its customers, and that the arrangements were part of a marketing campaign aimed at advertising its products, and thus a service provided by the customers to CCU for which CCU paid a price. Thus, considering that the arrangements involved only a small part of its customers, CCU claimed that the arrangements had an advertising and promotional purpose and not an exclusionary effect.

The FNE discarded the argument raised by CCU because the strategy, although including only part of its customers, was oriented towards premises in uptown quarters, which were the target market for the feasible potential competitors, craft brewers.

The FNE and CCU settled the case and the settlement was approved by the TDLC. As part of the settlement, CCU made several commitments aimed at limiting exclusionary risks of the arrangements and refraining from reintroducing a similar policy in the future. In the settlement the FNE evaluates exclusivity arrangements from the point of view of its anticompetitive exclusionary effects, and hence dismissed the advertising and promotional purpose alleged by the defendant. The FNE evaluates exclusivity arrangements stating that they *may be justified when the scope of the vertical restraint is strictly limited to its object, and never when the purpose of the restraint is to prevent, hinder or restrain the exhibition or sales of alternative products or services.*<sup>11</sup>

#### 3.2.2 *FNE's complaint against CCF*

In June 2008, the FNE submitted a complaint against Compañía Chilena de Fósforos ("CCF"), the dominant company in the industry of matches, possessing a consistent market share over 80%.

FNE's complaint reproached CCF of agreeing exclusivity contracts and introducing non-linear price incentives with retailers that had an exclusionary effect on potential competitors, as well as other exclusionary practices.

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<sup>11</sup> The settlement between FNE and CCU, approved by the TDLC in July 23th, 2008, is available here: <http://www.fne.gob.cl/wp-content/uploads/2012/03/CCU-2008.pdf>

As to exclusivity contracts and non-linear price incentives, the FNE dismissed any efficiency justifications for these vertical restraints. Indeed, CCF had submitted an economic report arguing that these vertical restraints had augmented efficiency in the market, an argument elaborated as follows: (i) CCF had made major investments in brand building and development, particularly investing in improving products' precision and safety; (ii) CCF's competitors have developed products and brands that aim at associating their image to CCF's; (iii) If CCF's matches attract some consumers as a result of said investments, rivals and distributors have incentives for selling alternative matches and hence earn the additional margin generated due to smaller investments in brand development and reputation made by alternative matches; (iv) Thus, CCF's vertical restraints were an effective mechanism for protecting CCF's investments.

When adjudicating in this case, the TDLC dismissed the efficiency claim raised by CCF in the following terms: *For this Tribunal, in cases not directly nor indirectly associated with a previous exclusivity, a purpose of preventing the entry of new competitors had existed too; because in the market context described above and due to the dominant position of CCF, there is no evidence in this case making possible to presume the existence of scale economies or efficiencies for justifying the system of discounts and capable of explaining why different discounts were agreed with each distributor. The above mentioned, for this Tribunal, demonstrates that CCF designed a 'specific suit for each distributor', which may be explained only by the purpose of rising artificial barriers preventing the entry of new competitors and no evidence submitted in the case allows to hold that they are justified in conditions being general, uniform and objective or in costs conditions.*<sup>12</sup>

### 3.2.3 FNE's investigation on the exclusivity contract between Nestlé and Keylogistics

Case No. 1604-2009, filed with no further action. In 2009 the FNE investigated a complaint submitted by a small producer of crafted ice creams, 'Lecherías Loncomilla', which reproached an exclusivity arrangement agreed between ice cream producer Nestlé and logistics company Keylogistic. According to Loncomilla's complaint, the exclusivity arrangement prevented Loncomilla to transport and distribute its products by an efficient mechanism.

During its investigation, the FNE confirmed the existence of the arrangement as well as the existence of advantages in distribution costs, experience and applied knowledge of Keylogistics relatively to its competitors in the logistics of ice cream distribution to supermarkets.

The FNE determined that the above advantages had been acquired by Keylogistics as the product of know-how transference from Nestlé. In fact, Keylogistics had begun ice cream distribution to supermarkets in 2005 when hired by Nestlé and was financed and monitored by Nestlé in the implementation of the logistic system.

Thus, the inclusion by Nestlé in the first distribution contract of a covenant forbidding Keylogistics to supply logistic services to Nestlé's rivals using investments and experience provided by Nestlé was considered as legitimate by the FNE.

However, in FNE's resolution closing the investigation with no further action<sup>13</sup>, the FNE expresses that, by and large, a transference of the kind of know-how involved in this case did not justify agreeing on exclusivity terms forever. Thus, such an exclusivity arrangement should be limited in time and be strictly

<sup>12</sup> TDLC, Ruling No. 90/2009 Rc. 152°; available here: [http://www.fne.gob.cl/wp-content/uploads/2011/03/sent\\_0090\\_2009.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/sent_0090_2009.pdf)

<sup>13</sup> FNE's, filing resolution, November 10<sup>th</sup>, 2011; available here: [http://www.fne.gob.cl/wp-content/uploads/2011/12/arch\\_028\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/12/arch_028_2011.pdf)

restrained, specific and proportional to the purposed protection. The arrangement's object cannot restrain or limit competition in the market.

Since the exclusivity covenant was contained only in the first distribution contract between Nestlé and Keylogistics which expired in August 2009 and that it was not included in the new contract, the FNE decided not to submit a complaint against Nestlé before the TDLC, although it warned on the effective end of the exclusivity.

#### 3.2.4 FNE's complaint against Cámara de Comercio

As mentioned above, in some conduct cases, particularly in price discrimination cases, efficiencies claims have been supported in the absence of harm to allocative efficiency.

In a price discrimination case in 2007, FNE's complaint against *Cámara de Comercio*, the latter was accused of abusing its dominant position, by charging excessive prices to individuals interested in being removed from the commercial information database that the defendant has to maintain according to a legal mandate. In this case the TDLC noted that the price structure applied by the defendant discriminated by the amount of the debt that should be informed as fulfilled, charging higher prices for clearing higher debts from the database. However, even though the price structure was considered not based on costs, the TDLC held that the pricing mechanism increased the volume of transactions, thus increasing the quality of the information provided to the financial system -compared to a flat price, for example. Therefore, in this case, price discrimination was considered not to be against competition law, given the described allocative efficiency considerations.<sup>14</sup>

## 4. Evidentiary issues

Both the FNE and the TDLC understand that merging parties and defendants in conduct cases have the burden of proving the existence of efficiencies and their magnitude according to their claims, as well as the other requirements efficiencies must fulfill in order to be considered.

Evidentiary issues regarding efficiency claims are associated with the requirement of being verifiable. Compliance with this requirement has been developed by TDLC's case law.

In Decision No. 24/2008 on the D&S/Falabella merger case, the TDLC held that "the only estimations of efficiencies were presented, and even prepared by the parties of the proposed merger. Therefore, the Tribunal cannot consider them as having any more value than any other declaration of the party that presents it".<sup>15</sup>

In Decision No. 37/2011 on the Lan/Tam merger case, the TDLC held something similar: "...the parties of a proposed merger should justify the source, type and probable extent of such efficiencies. This requires that the alleged efficiencies are to be verifiable enough, in the sense that their logic and consistency should be replicable, and from that logic might be deduced a reasonable probability that such efficiency will occur. This is to say, alleged efficiencies should not be mere conjectures or speculations, but they should be reasonable enough and they should be justified on arguments or objective data. This requires knowing, ideally, not only the model used to estimate the expected values of the efficiencies, in case it proceeds, but also the different assumptions supporting the prediction method. Only in such way,

<sup>14</sup> TDLC's, June 27th, 2007, Ruling No. 56/2007; available here: [http://www.fne.gob.cl/wp-content/uploads/2011/03/sent\\_0056\\_2007.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/sent_0056_2007.pdf)

<sup>15</sup> TDLC's Decision No. 24/2008; available here: [http://www.fne.gob.cl/wp-content/uploads/2011/03/reso\\_0024\\_2008.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/reso_0024_2008.pdf)

*the estimated values could be verified: first, replicating them, and then evaluating the reasonability degree of the estimations presented*".<sup>16</sup> In this case the TDLC held that, although most of the claimed efficiencies had a reasonably high probability to occur, it was not possible to replicate the estimations of the parties, and thus, should be dismissed.

As to conduct infringement cases, the FNE or the corresponding private plaintiff have a significant burden of proof regarding the elements of the infringement, particularly, the charge of proving actual or potential effects on competition the infringement produced. However, once the FNE has established a *prima facie* case and the defendant claims efficiencies in regard to the conduct under analysis, the burden of convincingly proving the existence and magnitude of the claimed efficiencies to the TDLC bears on the defendant who claimed the efficiencies. Thus, it is not a burden of the FNE to prove the contrary, i.e. the inexistence or irrelevance of the claimed efficiencies in order to maintain the illegal character of the infringement.

The Supreme Court held the criteria above in the following terms: The defendant's reasoning is not correct [...] in the sense that the challenged ruling had incurred in an inversion in the burden of proof rules, because the justification of an infringement should be proven by the party arguing that justification. Thus the TDLC is right when holds that no efficiency, scale economies or costs economies motivations have been proven –despite having been claimed since the response to the complaint in order to argue that the contractual arrangements are justified by the competition law. Consequently, it is not correct to argue that the ruling under challenge forces the defendant to prove the legality of its conduct, on the contrary, it is the defendant himself who is arguing a justificatory element with regards to a conduct proved *prima facie* illegal and due to this he puts himself in the procedural position of proving the claimed excuse.<sup>17</sup>

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<sup>16</sup> TDLC's Decision No. 37/2011; available here: [http://www.fne.gob.cl/wp-content/uploads/2011/11/Reso\\_37\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/11/Reso_37_2011.pdf)

<sup>17</sup> Supreme Court, June 2nd, Docket No. 277-2010, Ruling on complaint recourse against TDLC, December 14<sup>th</sup>, 2009, Ruling No. 90/2009, (*FNE vs. CCF*).



## COLOMBIA

In light of the efficiency claims made to the Superintendence of Industry and Commerce (SIC – National competition authority), the authority approach is discussed briefly taken into account a main break point in time (2009). The different dispositions in the law regarding economic efficiencies for mergers are presented chronologically, in order to perceive the SIC's different positions and major variations over time. Also a discussion of when claimed efficiencies should be recognized in merger analysis is presented through various cases.

### 1. Role of efficiency before law 1340 of 2009

Law 155 of 1959 in its Article 4 provides that the Superintendent has the duty to block to a merger request when it is established that if approved "it tends to produce an undue restriction of competition." In addition, Decree 2153 of 1992, article 51 stated that the Superintendent of Industry and Commerce should refrain from blocking a merger when "in the terms of Article 4 of Law 155 of 1959: when stakeholders can demonstrate that significant improvements in efficiency can be made, so that results rely in cost savings, and they cannot be achieved by other means. It also has to ensure that it will not result in a constraint of supply in the market."

In furtherance of the foregoing, the Superintendence of Industry and Commerce, in 2003, gave systematic interpretation to these items through the "Circular Única" (which is a standard that is modified over time while maintaining its essential concept), considered that Article 51 had to be considered as an exception in the mergers regulation. This treatment was derived from the Civil Procedure Code enforced at the time (Article 175 which states that "It is for the parties to prove the factual standards that establish the legal effect they seek").

The consequences of that position were consecrated in Circular 002 of 2003, that even though it was revoked that year, it reflected the position of the Superintendence regarding the scope of Article 51:

#### *"2.3.2. Clause of efficiency*

*The clause in Article 51 of Decree 2153 of 1992 provides that the Superintendent of Industry and Commerce may not block merger operations when stakeholders show that they can have significant improvements in efficiencies, so that results rely in cost savings, and they cannot be achieved by other means. It also has to ensure that it will not result in a constraint of supply in the market.*

A reading of this provision suggests several conditions must be demonstrated and quantified in full by stakeholders, so that the Superintendence of Industry and Commerce can consider the application of the exception when making its decision.

- The operation should produce efficiencies. That is, as a result of the merger, the economy uses fewer resources to produce the same goods and services while maintaining the same quality, or the same resources to produce more of the same goods or services;

- Efficiencies should produce cost savings for merged companies. This is assessed taking into account, among others, whether the operation allows companies to achieve economies of scale, if you can reduce costs through specialization of production plants, improvements in logistics or lower fixed costs sales, research and development, administration and other costs. Evaluated in similar terms if the operation allows a greater volume of discounts on the purchase of inputs or better prerogatives of others involved in the production or distribution chain when they are out of country, or have greater bargaining power with respect to the company resulting from the operation, so that it contributes to balance this disadvantage;
- Efficiencies should be meaningful. In that order, the benefits derived from efficiencies must be sufficiently representative so outweigh involving undue effects. Within the criterion of significance it has to evaluate the probability that efficiencies can actually materialize. It also has to show the effect that the operation would have on consumers and how it protects their interests.
- The efficiencies cannot be achieved by other means. In that respect, it must be shown that efficiencies could not be achieved by different mechanisms of the merger, which in turn produce lower anticompetitive effects which other mechanisms leads to.
- There must be an effective mechanism to ensure that the supply of goods or services will not be reduced as a result of the operation. To measure the effect It has to be analyzed the way the obligation is to be complied, the instruments provided to ensure compliance and how it can be verified.

This trend regarding efficiency treatment seen as an exception, is observed in in the following SIC (Colombian Competition Authority) cases:

### ***1.1 ETERNIT case***

Through resolution 14002 of 2002, the merger request between ETERNIT COLOMBIANA S.A., ETERNIT ATLÁNTICO S.A., ETERNIT PACIFICO S.A. (owned by the company MEXALIT S.A.) y COLOMBIT S.A. was resolved.

In development of such a request, the parties filed a description of projected merger synergies derived from the operation in case it was approved, estimated in COP\$100.063 million, equivalent according to the parties to 7.97% of the sales of the companies involved in the operation.

The efficiencies argued by the parties were:

- Specialization and optimization of the different production lines and reducing purchasing costs of raw materials.
- Shipping logistics savings for trade adjustment.
- Increased volumes of flat plates.
- Increased volumes of PVC pipe.
- Increased volumes of asbestos cement pipe.
- Savings in administrative and commercial expenses.

The Superintendence of Industry and Commerce did not accept that such synergies could be considered as efficiencies in terms of Article 51 because:

- For any of efficiencies it was explained why it is not possible that these savings were achievable by other means.
- None of the efficiencies identified by the petitioners justifies and explains the amount that would be obtained by the savings generated (one by one).
- Regarding the cost reduction in purchased of raw materials, the Superintendence found that this effect was the result of the dominant position and not an economic efficiency.
- Finally regarding the savings that met the requirements of sufficient evidence, it was found that they could not be considered significant.

Therefore, the Superintendence found that none of the efficiencies comply with the requirements of Article 51 of Decree 2153, and blocked the projected merger transaction.

## **1.2 PAVCO case**

Through resolution 14002 of 2002, the merger request between PAVCO S.A. y RALCO S.A was granted.

*“to ensure compliance with the provision contained in Article 51 of Decree 2153 of 1992, the Office believes that recognized the efficiencies should be sufficient to override the likely harm to consumers and competition in the relevant market that would result in case the operation take place, so, the greater the potential adverse effects on competition as a result of operation, the higher efficiency must be recognized arising therefrom, to conclude their significance. Therefore, this case is framed within the clause of Article 51 of Decree 2153.”*

Given the above, it was considered that the efficiencies described in the operation were not sufficient to proceed by the exception, so although the merger was granted, operation remedies were imposed on the proposed transaction.

## **2. Role of efficiency after law 1340 of 2009**

With the issuance of law 1340 of 2009 that amended Article 51 of Decree 2153 of 1992, the criteria described in resolution 4861 of 2004 was applied, to establish the following:

*“The SIC(national competition authority) may not block a merger if interested parties demonstrate within the respective process, with studies based on methodologies of recognized technical value, that the beneficial effects of the transaction for consumers exceed the possible negative impact on competition and that such effects cannot be achieved by other means.*

*In this case, the commitment that the beneficial effects will be passed on to consumers should be followed up by the authority.*

*The Superintendence of Industry and Commerce may abstain to block a merger, when independent of the national market share of the merged firm, external market conditions guarantee free competition in the country.”*

In this sense, the Superintendence has the obligation to evaluate the efficiency of the market to establish the existence of the exception, and continues with the merger requirement as the only way to prove the efficiencies that are described by the parties, but also adds a requirement to prove that the benefit of the efficiencies products (i) exceeds the anticompetitive effect and (i) will be transferred to consumers.

After that authority approach, the burden of proof for efficiencies relies in the parties, taking into account that they should claim them as an exception. But the competition authority has a posterior proactive approach in the sense that it concludes throughout its economic analysis and criteria, if the exception is framed within the disposition.

Following this criterion, resolution 255 of 2012 where SOCIEDAD PORTUARIA REGIONAL DE BUENAVENTURA S.A., MARITRANS S.A., GRANPORTUARIA BUENAVENTURA LTDA., TERMINAL ESPECIALIZADO DE CONTENEDORES DE BUENAVENTURA S.A., ELEQUIP S.A. and NAUTISERVICIOS S.A. projected a merger to operate a Port, proved that the efficiency structural elements were sufficient, and consequently the merger was approved through the efficiency exception. The analysis of the authority was the following:

The parties filed a petition on the grounds of an implementation of a model operational integration that will run through one of the parties. This model has as a main purpose put together efforts, knowledge, resources, and equipment, in order to be channeled by the operator. As a result of the operation the operator would result in charge of the operations through land, water and transportation of containers in the deck and in different zones of the terminal where merchandise is stocked.

The first analysis made by the SIC was to calculate the market share of the intervenients, and the result was a very concentrated relevant market with an 85.7% share. Concluding that by the merger the result would've had been a clear dominant position of the merged entity.

The main issue was whether the merged entity operation fit into the efficiency exception established in Paragraph 3, Article 9 of Law 1340 of 2009. And the analysis was to measure if the possible anticompetitive effects would be compensated by the efficiency derived from the merged entity. Once it was proved that the efficiency could not be obtained by a different mean and that the productivity would increase with the operation between 42% and 50%, the SIC approved the merger under the grounds of economic efficiencies.

The methodology used by the competition authority in terms of efficiency is established in the Merger Guidelines issued in 2012. It is considered that if from the structural merger analysis is concluded that an undue competition restriction takes place, an efficiency analysis has to be the next step. The SIC considers that efficiencies are produced in two ways: supply side efficiencies and demand side efficiencies, and the method for determining whether efficiency is present in a merger, follows that criteria.

Article 191 of the Merger Guidelines defines that "The supply side efficiencies occur when, as a result of the merger between firms, the merged entity can offer their products at a lower cost". The main examples in this type of efficiency are:

- Cost savings: Refers to the technical, administrative and accounting aspects.
- Double marginalization: When in a vertical mergers a level of efficiency is achieved through the integration of two or more productive stages avoiding a double marginalization or double benefit (to the producer, distributor or marketer).
- Increase incentives for investing: When as a result of a merger, the merged entity has the incentives to invest in new products, new technologies or new marketing strategies. This applies when companies don't want to incur in that investment because it can benefit its competitors.
- Repositioning of a product: When the merged entity and its competitor reposition a product, giving the consumers a broader variety of products.

The demand side efficiency is explained in the Merger Guidelines when as “a result of a merger, an increase in the incentive for consumers is generated, to purchase products offered by the integrated entity due to the achievement of greater productivity, efficiency, quality and service”. The main examples in this type of efficiency are:

- The network effects: arise when consumers of services offered through a platform, are more concerned about the network when the number of users who use that network increases. Merger can improve the competitiveness of a network offering its services to more users and improving them.
- Price effects: When as a result of a merger a price reduction occurs in the direct product, and as a consequence of that, an increase in the demand of that product and in its complementary products arises.
- One-stop shopping: Effect produced when, after a merger the consumer only has to deal with one company to purchase its products.

In every case regarding a demand or supply side efficiency, a quantitative analysis should support and demonstrate the operation. After this is evaluated, the merger is granted through a remedy, or otherwise blocked.

### **3. Conclusion**

The SIC position in the efficiency claims in merger matters, shows consistency in how the authority has treated efficiency procedures and analysis. A big step taken by the authority was the issuance of the Merger Guidelines, which compiles the procedure and economic variables that should be taken into account when dealing with efficiencies in a merger. It also maintains clear that efficiencies should be considered as an exception and not as part of the structural analysis in every case, which means that they should only be a concern when an undue restriction in competition is proved.



## EUROPEAN UNION

### 1. Introduction

In its competition analysis in antitrust and mergers cases, the European Commission ('Commission') generally applies an approach which endeavours to assess the effects an agreement, unilateral conduct or a concentration has on competition and consumer welfare. Such an approach entails the identification of the potential anti-competitive effects on parameters of competition such as price, quantity, product quality and variety, and innovation, as well as the pro-competitive effects, notably efficiencies. The analysis of efficiencies can play a role both in antitrust and mergers cases assessed by the Commission.

In the area of antitrust, Article 101 of the Treaty on the Functioning of the European Union ('TFEU') specifically foresees that an agreement which has an anti-competitive object or effect may nevertheless be unproblematic from a competition point of view where the agreement contributes to improving the production or distribution of products or to promoting technical or economic progress, that is to say where the agreement gives rise to efficiencies – provided, *inter alia*, that those efficiencies offset the restriction of competition the agreement would likely bring about.

Even though the wording of Article 102 TFEU, which prohibits abuses of a dominant position, does not contain an efficiency defence, the Court of Justice of the European Union has recently confirmed that dominant companies have the opportunity to advance efficiency arguments in order to justify conduct which may otherwise be regarded as abusive.<sup>1</sup>

Pro-competitive effects are also one of the aspects considered in EU merger control and the potential for mergers to give rise to efficiencies is foreseen in the legislative bases for merger control at the EU level. When analysing whether a merger would significantly impede effective competition, the Commission performs an overall competitive assessment in which various factors can be taken into account, including the development of technical and economic progress, i.e., efficiencies – provided that they benefit consumers and do not form an obstacle to competition.<sup>2</sup> This means that in the overall assessment whether a proposed concentration gives rise to a significant impediment to effective competition, efficiencies are an important factor of the assessment, on the basis of which intervention against a merger may ultimately not be warranted. However, the conditions for taking efficiencies into account are strict and well-defined in the Commission's merger guidelines.

Guidance from the Commission on the treatment of efficiencies in antitrust and merger cases is set out in various guidelines and notices. To name but a few: for example, the General Guidelines concerning agreements<sup>3</sup> describe the different types of efficiencies that may play a role in antitrust cases and the criteria those efficiencies must fulfil in order to be relevant; the Horizontal Guidelines<sup>4</sup> set out the kind of

<sup>1</sup> Case C-209/10 *Post Danmark* [2012] ECR I-not yet reported, paragraphs 41 et seq.

<sup>2</sup> See Article 2(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.1.2004, p.1 ('EU Merger Regulation').

<sup>3</sup> Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97.

<sup>4</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1.

efficiencies that different types of cooperation agreements between competitors, such as research and development or joint production agreements, may give rise to; the Commission's Guidance Paper on Article 102 TFEU<sup>5</sup> also contains information on the efficiencies that certain types of potentially abusive conduct can bring about; and, the Commission's Horizontal Merger Guidelines<sup>6</sup> and Non-Horizontal Merger Guidelines<sup>7</sup> explain how the Commission will deal with efficiency arguments in merger proceedings. These documents are not only internal guidelines for the Commission's staff, they are also intended to help companies self-assess whether their agreements, unilateral practices or mergers are, or would be, in compliance with EU competition law on the basis of efficiencies.

In the field of antitrust, since the overhaul of the procedural regime for the application of EU competition law in 2004, the Commission has not "cleared", by decision, agreements (or unilateral practices) based on efficiencies that offset competitive harm. In case anti-competitive effects of an agreement or unilateral practice were offset by efficiencies, the Commission would simply not bring a case or close a case that had already been opened. This does not require a reasoned decision which would set out in detail the efficiencies analysis that has prompted the closure of the case. However, the Commission has in the recent past made antitrust prohibition decisions that have discarded the efficiency claims made by the parties.<sup>8</sup>

Given that the Commission needs to adopt reasoned decisions at the end of merger investigations and that a non-confidential versions of these decisions are published, the case practice of the Commission with regard to efficiencies is transparent.<sup>9</sup> Regardless of whether any pro-competitive effects claimed by the merging parties are ultimately acknowledged by the Commission or not, the Commission's decision will normally include an assessment of the issue. This is at least the case for those mergers where the merging parties make an "efficiency defence", meaning that the parties argue that a competition problem preliminarily identified by the Commission would be counteracted by the merger's pro-competitive effects of a merger.

To date the Commission has in a number of merger cases acknowledged the potential for pro-competitive effects to satisfy the necessary conditions under EU merger control. These cases primarily concern non-horizontal merger cases, but also include horizontal mergers. At the same time, the Commission has so not identified a horizontal merger where the harm would have been counteracted or even outweighed by pro-competitive effects.

By way of final introductory remark, in particular in the context of EU merger control, it should be underlined that the business term "synergies", which is often used in the context of proposed mergers, does not necessarily encompass the same effects as the concept of efficiencies in the competition policy context. There can be overlaps between the two categories of effects, but the pro-competitive effects that are eligible as "efficiencies" under competition policy need to fulfil certain cumulative conditions.

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<sup>5</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C45, 24.2.2009, p. 7.

<sup>6</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.2.2004, p. 5.

<sup>7</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C265, 18.10.2008, p. 6.

<sup>8</sup> See, for example, Cases COMP/34.579 – *MasterCard*, COMP/36.518 – *EuroCommerce* and COMP/38.580 – *Commercial Cards*, Decision [C\(2007\)6474](#) final of 19 December 2007, upheld on appeal by the General Court on 24 May 2012 in Case T-111/08 *MasterCard* [2012] ECR II-not yet reported.

<sup>9</sup> See, for example, Cases COMP/M.6166 – *Deutsche Börse/NYSE Euronext* or COMP/M.4439 – *Ryanair/Aer Lingus I*.

## 2. Taxonomy of efficiency claims and the scope for considering efficiencies under different areas of competition law

In principle, all objective economic efficiencies can be acceptable in EU antitrust and merger proceedings, irrespective of the terminology used to describe them. Hence, acceptable efficiencies include "static and dynamic" efficiencies, "allocative, productive and dynamic efficiencies" or "cost and qualitative" efficiencies. Such efficiencies may, for example in the context of a joint production agreement, be cost savings, better production technologies or increased product variety. A research and development agreement that combines complimentary skills and assets may result in improved or new products and technologies being developed and marketed more rapidly.

Whereas the fact that it may require some time for dynamic efficiencies to materialise does not in principle stand in the way of their acceptance, the Commission takes the view that the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding their generation. In addition, it should be noted that the value of a gain accruing to consumers in the future may not be the same as a present gain.<sup>10</sup>

Mergers may also bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. Of particular relevance could be cost savings that lead to a reduction of variable or marginal costs. Another example of efficiencies could be new or improved products developed and marketed by a joint venture that also pools its parents' research and development activities.

The Commission has faced numerous kinds of efficiency claims in merger cases. A main distinction could be made between horizontal and non-horizontal mergers. In horizontal cases, the Commission most often faces claims of economies of scale and scope such as in production or distribution. In certain industries claims also include pro-competitive network effects. Furthermore, innovation as a function of research and development is mentioned frequently. Claims can also include other aspects such as reputation, trust or ability to serve specific demand. In non-horizontal merger cases, the Commission frequently faces arguments concerning the internalisation of externalities, that is to say the elimination of double-marginalisation in vertical mergers or conglomerate mergers involving complementary products. Ultimately, any claims of pro-competitive effects are always industry- and case-specific.

The Commission's merger guidelines set out the general framework for the analysis of efficiencies in a pragmatic way. They do not define the terms "static" or "dynamic" efficiencies or any other related terms such as "allocative" or "productive" efficiencies. Nor do the guidelines articulate a preference for any type of efficiencies over another. They do however indicate that marginal cost savings are more likely to meet the necessary conditions than fixed cost savings due to the higher likelihood of being passed on to consumers. This approach is in line with the Commission applying a consumer welfare standard in its merger assessment.

Dynamic efficiencies are more difficult for the Commission to take into account in merger cases in particular due to their timing. The Horizontal Merger Guidelines explain that, in general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them.<sup>11</sup> The fact that dynamic efficiencies may be expected to take longer time to materialise than static efficiencies and are therefore inherently more uncertain may therefore – despite the fact that merger control is a prospective analysis – reduce the importance the Commission can give them in a merger case. However, this also reflects the typical time horizon for the Commission's assessment of a merger's impact.

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<sup>10</sup> General Guidelines, paragraphs 87 and 88.

<sup>11</sup> Horizontal Merger Guidelines, paragraph 83.

### 3. Assessing efficiency claims

The criteria applied for assessing efficiency claims in antitrust investigations are similar irrespective of whether the analysis takes place in the context of the investigation of an agreement or a unilateral practice.

With regard to agreements, the relevant criteria are described in the Commission's General Guidelines.<sup>12</sup> Notably, all efficiency claims must be substantiated by the party that wishes to rely on them so that the Commission can verify: the nature of the claimed efficiencies; the causal link between the agreement and the efficiencies; the likelihood and magnitude of each of the claimed efficiencies; and how and when each of the claimed efficiencies would be achieved. In addition, the restrictions of competition generated by the agreement must be indispensable to attaining the efficiencies. Moreover, consumers must receive a fair share of the efficiencies and the agreement must not lead to the elimination of competition. If all those criteria are fulfilled, it can be concluded that the efficiencies created by an agreement offset its restrictive effects on competition.

To succeed with an efficiency defence in the context of unilateral conduct, a dominant company would need to show that: the efficiency gains that are likely to result from the potentially abusive conduct offset any likely negative effects on competition and consumer welfare generated by that conduct; those efficiency gains have been, or are likely to be brought about as a result of the potentially abusive conduct; the potentially abusive conduct is necessary for the achievements of those efficiency gains; and the potentially abusive conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.<sup>13</sup>

In order to be taken into account in an antitrust investigation by the Commission, efficiency claims must be substantiated so that they can be verified. To this end, parties must bring forward convincing arguments and evidence. To this end, they can submit qualitative and/or quantitative evidence. For example, in the case of cost efficiencies, parties must as accurately as reasonably possible calculate or estimate the value of those efficiencies and describe in detail how they have computed the amount. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted by the parties must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise in the future. If qualitative efficiencies such as new or improved products or other non-cost based efficiencies are claimed, the nature of those efficiencies and how and why they constitute an objective economic benefit must be described and explained in detail. Where an agreement has not yet been implemented and, consequently, efficiencies are yet to be attained, the parties must substantiate any projections as to the date from which the efficiencies will become operational.

As regards non-horizontal mergers, the Commission's Non-Horizontal Merger Guidelines acknowledge that "*vertical and conglomerate mergers provide substantial scope for efficiencies*".<sup>14</sup> Indeed, in non-horizontal mergers for example their potential for eliminating double-marginalisation is directly taken into account when analysing the merging parties' incentives to foreclose and the effects of the notified merger on downstream markets.<sup>15</sup> The specific conditions for dealing with efficiencies stemming

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<sup>12</sup> General Guidelines, paragraphs 51 et seq.

<sup>13</sup> Case C-209/10 *Post Danmark* [2012] ECR I-not yet reported, paragraph 42.

<sup>14</sup> Non-Horizontal Merger Guidelines, paragraph 13.

<sup>15</sup> See, for example, Cases COMP/M.4854 – *TomTom/Tele Atlas* or COMP/M.4942 – *Nokia/Navteq*.

from horizontal mergers in the context of an EU merger control assessment are defined in the Horizontal Merger Guidelines.<sup>16</sup>

The most important conditions for efficiencies to be eligible in a merger investigation are defined in detail for horizontal merger cases: efficiencies need to be merger-specific, verifiable and benefit consumers. In other words, the efficiencies need to be a direct consequence of the merger and cannot be achieved by less harmful alternatives; they need to be foreseeable and substantial, which in practice is often illustrated by quantifying them; finally, the benefit to consumers requires that any substantial and timely efficiencies would be passed-on to consumers in the form of price reductions or improvements of non-price parameters. In *Deutsche Börse/NYSE Euronext*<sup>17</sup>, the Commission accepted that the proposed merger would have likely generated efficiencies but found that those efficiencies would not be enough to outweigh the competitive harm the merger would have given rise to.

In order to demonstrate efficiencies in a merger case, the most promising sources of evidence include internal documents of the merging parties, in particular those which their management used to take decisions when preparing the merger. Moreover, historical examples of efficiencies with consumer benefit as well as external studies on the efficiency gains prepared before the merger are relevant. Finally, statements from management to owners and financial markets may also be considered informative.<sup>18</sup>

Both in the fields of antitrust and mergers, the Commission will in principle only take account of those efficiencies that offset the harm suffered by the consumer groups that are adversely affected by the restrictive agreement, unilateral practice or merger. This means that in principle it will be efficiencies generated in the market in which the competitive harm occurs that can be relied upon to offset that harm.<sup>19</sup>

#### 4. Procedural issues

In antitrust cases, the Commission follows a "staggered approach" when analysing the anti-competitive effects and the efficiencies that an agreement or a unilateral practice may generate. This is mirrored by the allocation of the burden of proof. While the Commission has the burden of proof for showing a restriction of competition under Article 101 TFEU or an abuse of a dominant position under Article 102 TFEU, the burden of proof for demonstrating efficiencies rests on the parties that invoke them in defence. This rule is enshrined in the European regulation governing antitrust procedures<sup>20</sup> and has recently been confirmed by the Court of Justice of the European Union with regard to efficiencies claimed in the context of investigations concerning the abuse of a dominant position.<sup>21</sup>

Such an allocation of the burden of proof is justified as the information required to assess the claimed efficiencies is usually exclusively held by the parties. Consequently, it is incumbent on them to provide the relevant information to allow the Commission to assess whether or not there will be efficiencies. Not doing so will mean that the Commission is not in a position to include an efficiencies analysis in its assessment. Consequently, the parties bear the responsibility for any potentially ensuing adverse effects on consumer welfare that their inaction may give rise to. Where a party has provided substantiated evidence concerning

<sup>16</sup> Horizontal Merger Guidelines, paragraphs 76 et seq.

<sup>17</sup> Case COMP/M.6166.

<sup>18</sup> Horizontal Merger Guidelines, paragraph 88.

<sup>19</sup> See Horizontal Merger Guidelines, paragraph 79; General Guidelines, paragraph 43.

<sup>20</sup> See Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4.1.2003, p. 1.

<sup>21</sup> Case C-209/10 *Post Danmark* [2012] ECR I-not yet reported, paragraph 42.

efficiencies, the Commission must examine that evidence and cannot simply discard the arguments made without explanation or justification. If the Commission is not satisfied with substantiated efficiency claims it must refute those claims and provide reasons for its position. Otherwise, the burden of proof borne by the party making the efficiency claims is considered to be discharged.

In merger cases essentially the same principles apply. Given that the merging parties are in possession of most information relevant for the assessment of efficiencies in mergers, it is under EU merger control incumbent upon the parties to claim the efficiencies and to provide in due time the information to assess whether the claimed pro-competitive effects meet the necessary conditions. This does not mean that the Commission does not customarily take into account relevant information obtained during an investigation from other market participants such as competitors. However, the parties are the primary source of relevant information. This seems entirely appropriate given that the parties are normally striving for approval of the merger and hence have an incentive to provide the relevant information on efficiencies.

As to the steps taken in the assessment, in non-horizontal mergers the analysis of efficiencies, notably the possible elimination of double-marginalisation, is directly factored into the assessment of whether the merging parties will have an incentive to foreclose post-merger and of the effects of the merger on downstream markets. For horizontal mergers, the Commission may initially follow a sequential approach whereby it first identifies the potential competitive harm and then addresses the question of efficiencies. However, ultimately the Commission needs to conduct an overall assessment and reach a conclusion on whether a merger is more likely than not to give rise to a significant impediment of effective competition. This of course includes both the harmful and possible pro-competitive effects. The precise path to reaching a conclusion is of reduced importance given that Commission ultimately needs to take a decision on the basis of a merger's overall impact in a market.

## **5. Ex-post assessment of efficiency claims**

To date the Commission has not carried out an ex-post assessment of efficiencies that were claimed by the parties under investigation in an antitrust case. Nor has the Commission carried out an ex-post assessment of efficiencies claimed during merger investigations.

The Commission has conducted an ex-post assessment of its merger policy in the past. This has led, for example, to the 2004 revision of the EU Merger Regulation and to a comprehensive review of the Commission's remedies policy in merger cases. Given that the Commission has so far not yet approved a horizontal merger case on the basis that the merger-specific efficiencies would offset or even outweigh the merger-specific harm, there does not currently seem to be a meaningful basis for an ex-post assessment of efficiencies in merger cases.

## **6. Conclusion**

Under EU competition law, efficiencies are an integral part of the competition assessment both under antitrust and merger rules. The principles for the assessment of efficiencies in these two areas are largely the same and based on sound economics. Clear procedural provisions govern the way parties under investigation can claim efficiencies. These procedural provisions underline that the responsibility for raising and substantiating pro-competitive effects lies with the companies under investigation.

## GERMANY

### 1. Introduction

This contribution is structured in two parts. The first part provides a brief overview of the ongoing international debate on the role of efficiency claims in antitrust proceedings with the aim of identifying some of the most relevant issues at stake. In the second part, the particular legal situation and experience gained in Germany are presented for each area of competition law enforcement, i.e. merger control, anticompetitive agreements and unilateral conduct. For each area, first the respective legal framework is briefly described to lay out the legal scope for the consideration of efficiency claims. Subsequently, the experience gained from case-practice is presented on the basis of several selected cases.

### 2. International debate and relevant issues

The international debate on efficiency claims in antitrust proceedings displays a certain peculiarity: there seems to be (almost complete) agreement between scholars and practitioners that mergers, anti-competitive agreements and unilateral conduct of dominant players can generate countervailing efficiency gains. Yet, there is much less agreement on the implications of this insight for the design of competition law provisions and procedures. On the one hand, the underlying economic concepts such as the classical *Williamson-Trade-off*<sup>1</sup> are widely accepted.<sup>2</sup> On the other hand, the question of how to best integrate efficiency considerations in law enforcement is the subject of continued discussions.

This applies in particular to the area of merger control. A number of jurisdictions allow for an explicit efficiency defence in merger control proceedings.<sup>3</sup> However, despite this common ground, the specific design of the legal framework differs between these jurisdictions<sup>4</sup> and its implementation in specific cases is subject to ongoing intense debates (examples are respective discussions in the United States<sup>5</sup> and the EU

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<sup>1</sup> Oliver E. Williamson, 1968, Economies as an Antitrust Defense: The Welfare Tradeoffs, *American Economic Review*, Vol. 58, No. 1, pp. 18-36.

<sup>2</sup> In very general terms, the Williamson-Tradeoff model discusses the trade-off between welfare gains through lower costs of production and welfare losses due to increased market power associated with mergers yielding economies.

<sup>3</sup> See the respective country contributions in the Committee's 2009 Roundtable on Standard for Merger Review ([DAF/COMP\(2009\)21](#)) and the 2007 Roundtable on Dynamic Efficiencies in Merger Analysis ([DAF/COMP\(2007\)41](#)).

<sup>4</sup> See e.g. An Renckens, 2007, Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense, *Journal of Competition Law & Economics*, Vol. 3, No. 2, pp. 149-179; Robert Pitofsky, 2006, Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches, *Fordham International Law Journal*, Vol. , No. 5, pp. 1413-1425.

<sup>5</sup> See e.g. Daniel Sokol and James A. Fishkin, 2011, Response: Antitrust Merger Efficiencies in the Shadow of the Law, *Vanderbilt Law Review*, vol. 64, pp. 45-72; Jamie Henikoff Moffitt, 2010, Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis, *Vanderbilt Law Review*, Vol. 63, pp. 1697-1754.

about merger control practice).<sup>6</sup> Also in other areas of competition law enforcement the debate on the appropriate integration of efficiency considerations seems far from being settled. The continuous debate on what is the appropriate legal framework for the assessment of vertical restraints, in particular resale price maintenance (RPM), provides one of the most prominent recent examples in this regard.<sup>7</sup>

Several explanations may be relevant for this current state of the debate on the appropriate role of efficiency claims in antitrust proceedings. First, it has to be recognized that from an economic point of view the seminal *Williamson trade-off* – despite being theoretically straightforward – at best seems to provide a very basic concept which, however, cannot provide sufficient guidance for law enforcement practice in individual cases. In addition, the framework of the *Williamson trade-off* exclusively focuses on short-term effects and thus neglects any dynamic efficiency considerations which are, however, even more difficult to determine and measure than short-term efficiencies and their passing-on in form of potential short-term price decreases.<sup>8</sup>

Furthermore, current economic analysis of potential efficiencies of specific types of mergers, agreements or unilateral conduct is characterized by a certain asymmetry. Whereas theoretical analysis is very well elaborated and sophisticated, there seems to be a continuous need for more empirical work. Again, merger control and the assessment of RPM may provide useful insights in this respect: With regard to horizontal and vertical mergers potential efficiencies are well understood in theory but there are relatively few empirical studies that analyse the determinants of whether and to what extent these potential efficiencies effectively materialize. At the same time the existing body of research shows that in a significant number of cases the expected efficiency gains have not been realised.<sup>9</sup> Also for RPM the conclusion still holds that “*most of the [theoretical] pros and cons of RPM have been well-known for at least 20 years. What is needed is more empirical work.*”<sup>10</sup> One reason for the lack of sufficient empirical

<sup>6</sup> See e.g. Kocmut Mitja, 2006, Efficiency Considerations and Merger Control- Quo Vadis, Commission?, European Competition Law Review, Vol. 27, No. 1, pp. 19-27; Hanne Iversen, 2010, The Efficiency Defence in EC Merger Control, European Competition Law Review, Vol. 31, No. 9, pp. 370-376; Lars-Hendrik Röller, 2010, *Efficiencies* in EU Merger Control: Do *They Matter?*, in: Hans Jürgen Ramser and Manfred Stadler (eds.), *Marktmacht*, Tübingen, pp. 185-195; Peter L. Ormosi, 2010, Merger Remedies versus Efficiency Defence: An analysis of merging parties’ litigation strategy in EC merger cases, ESRC Centre for Competition Policy, CCP Working Paper 10-1, available at [https://www.uea.ac.uk/polopoly\\_fs/1.141357!ccp10-1.pdf](https://www.uea.ac.uk/polopoly_fs/1.141357!ccp10-1.pdf).

<sup>7</sup> See e.g. the Committee’s 2008 Roundtable on Resale Price Maintenance ([DAF/COMP\(2008\)37](#)); Christian Ewald, 2012, The Economics of Resale Price Maintenance – Why Europe is right not to follow the USA on the ‘slippery slope’ of *Leegin*, *Journal of European Competition Law and Practice*, Vol. 3, pp. 300-307.

<sup>8</sup> For a presentation of this problem see e.g. Alison Oldale and Jorge Padilla, 2010, For Welfare’s Sake? Balancing Rivalry and Efficiencies in Horizontal Mergers, *Antitrust Bulletin*, Vol. 55, No. 4, pp. 953-990.

<sup>9</sup> See e.g. Michael D. Whinston, 2007, Antitrust Policy toward Horizontal Mergers, in: Mark Armstrong and Robert H. Porter (eds.): *Handbook of Industrial Organization*, Vol. 3, Amsterdam: North-Holland, pp. 2369-2440, here pp. 2424, et seq.; Röller, Lars-Hendrik, Johan Stennek and Frank Verboven, 2006, Efficiency Gains from Mergers, in: Fabienne Ilzkovitz and Roderick Meiklejohn (eds.): *European Merger Control. Do We Need an Efficiency Defense?*, Cheltenham: Edward Elgar, pp. 84-201; Mueller, Dennis C., 2004, Efficiency versus Market Power through Mergers, in: Manfred Neumann and Jürgen Weigand (eds.), *The International Handbook of Competition*, Cheltenham, pp. 65-87; Paul A. Pautler, 2001, Evidence on Mergers and Acquisitions, FTC Working Paper 243, available at <http://www1.ftc.gov/be/workpapers/wp243.pdf>.

<sup>10</sup> 2008 Roundtable on Resale Price Maintenance ([DAF/COMP\(2008\)37](#)), p. 58; for a comprehensive overview of the available empirical evidence see e.g. Jürgen-Peter Kretschmer, 2011, How to Deal with Resale Price Maintenance: What can we learn from empirical results?, MAGKS Joint Discussion Paper Series in Economics, No. 16-2011; available at: [http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/16-2011\\_kretschmer.pdf](http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/16-2011_kretschmer.pdf).

evidence may be the fact that a reliable *ex-post* assessment and measurement (let alone any reliable *ex-ante* estimation) of efficiency effects of a specific merger, agreement or unilateral conduct entails significant difficulties.

Considering this state of affairs in economics, it seems fairly unlikely that different jurisdictions will draw fully identical conclusions on how to integrate efficiency claims in antitrust proceedings. By contrast, it seems inevitable and necessary that policy considerations have a significant impact on a jurisdiction's approach to efficiency claims. If competition policy e.g. attaches significantly more weight to the risk of type-1 errors (i.e. the risk of over-enforcement in the sense of prohibiting pro-competitive mergers, agreements or conduct) than to the risk of type-2-errors (i.e. the risk of under-enforcement in the sense of permitting anti-competitive mergers, agreements or conduct), a regime with a stronger focus on potential efficiencies will most likely prevail. If on the contrary, more or even the preponderant weight is attached to the negative impact of anticompetitive mergers, agreements or unilateral conduct on effective competition (i.e. the risk of type-2-errors), the legal framework will most likely entail stricter requirements with regard to the assignment of the burden and the level of proof for any efficiency claim. Remaining differences in the legal approach to efficiency claims may to a large extent also reflect the divergence in the overall systems of competition law. Even complete agreement on the underlying (economic) concepts therefore most likely would neither imply uniform optimal rules<sup>11</sup> nor identical outcomes in individual cases.

All in all, the core issues concerning the appropriate role of efficiency claims in antitrust proceedings seem to be less rooted in fundamentally different perceptions of the relevant economic background. Instead, existing differences between jurisdictions are most likely mainly the result of different conclusions on the appropriate translation of the relevant economic insights into the legal framework and enforcement practice. In any event, it seems highly appropriate to thoroughly distinguish between both of these aspects – the (theoretical and empirical) economic background on the one hand and its translation into the legal process of competition law enforcement on the other – to allow for a fruitful and rewarding debate on the pros and cons of different approaches to the role of efficiency claims in antitrust proceedings.

### **3. Legal framework and decision practice in Germany**

This section highlights the particular legal situation and decision practice in Germany in the different areas of competition law enforcement, i.e. merger control, anticompetitive agreements and unilateral conduct. With regard to each area, first the respective legal framework is sketched to describe the scope for the consideration of efficiency claims. Then, the experience gained from case-practice is discussed.

#### **3.1 Merger Control**

##### *3.1.1 Legal framework under the German competition law*

The substantive test in German merger control has been the market dominance test since it was first introduced into the Act against Restraints of Competition (ARC, in German: Gesetz gegen Wettbewerbsbeschränkungen, GWB) in 1973. According to § 36 (1) ARC the BKartA shall prohibit a concentration which is expected to create or strengthen a dominant position. However, with the proposed 8th Amendment of the ARC the substantive test in German merger control will be changed (see below – 3.1.2). The underlying purpose of merger control is to protect competition as an effective process. Intervention by the BKartA is, therefore, not contingent upon the proof of any welfare impairment in a specific case.

<sup>11</sup> This insight has been recognized in the literature as well. See for example David S. Evans, 2009, Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules, available at <http://ssrn.com/abstract=134279710>; Brett H. McDonnell and Daniel A. Farber, 2003, Are Efficient Antitrust Rules Always Optimal?, *Antitrust Bulletin*, Vol. 48, No. 3, pp. 807-835.

The application of the dominance test is based on a detailed case-by-case analysis.<sup>12</sup> In addition, the ARC contains statutory presumptions for the existence of a dominant position in § 19 (3) ARC.<sup>13</sup> The presumptions are, however, rebuttable and the BKartA still bears the obligation to fully investigate the competitive environment and the effects of the merger (ex officio principle; *Amtsermittlungsgrundsatz*). The presumptions effectively only apply if, after a thorough investigation, neither the existence nor the absence of dominance can be conclusively established (*non liquet*). These provisions are, thus, best understood as a device to incentivize the merging parties to provide the authority with all the necessary evidence in a timely manner and to substantiate any assertions brought forward in the course of the proceedings.

### 3.1.2 Role of efficiency claims

It has to be stressed that with the dominance test the intervention threshold is deliberately set high in German merger control. If a merger does not lead to the creation or strengthening of a dominant position, the merging firms are free to pursue their efficiency goals without interference by German merger control (general presumptions approach). Whether projected efficiencies effectively materialize ex post in any particular case is thus not the concern of German competition law.<sup>14</sup>

The ARC does not provide for an explicit efficiency defence. However, certain types of case-specific efficiencies and other positive merger-related effects can be taken into account under specific circumstances. For example, efficiencies can be considered with regard to the market in which competition concerns have been identified, but only if they have a structural impact on the competitive conditions in the market.<sup>15</sup> Mere cost savings or improved capacity utilization are not sufficient.<sup>16</sup>

In addition, there is some scope for the consideration of certain efficiencies and other positive effects in the context of the balancing clause under § 36 (1) ARC and the ministerial authorization under § 42 ARC. Some of the considerations relevant in both cases overlap. There are, however, also noteworthy differences.

<sup>12</sup> The general analytical approach taken by the Bundeskartellamt (BKartA) in assessing whether mergers create or strengthen a dominant position is described at length in the Guidance paper on Substantive Merger Control from March 2012, which is available in English at [http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle\\_e/Guidance\\_Document\\_on\\_Substantive\\_Merger\\_Control.php](http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/Guidance_Document_on_Substantive_Merger_Control.php).

<sup>13</sup> These presumptions are based on market shares: Single dominance is presumed if one undertaking has a market share of at least one third in the relevant market. Collective dominance is presumed if up to three undertakings reach a combined market share of 50% or if up to five undertakings reach a combined market share of two thirds.

<sup>14</sup> For a diverging view see Dennis C. Mueller, 1996, *Antimerger Policy in the United States: History and Lessons*, *Empirica*, Vol. 23, No. 3, pp. 229-53; *ibid.*, 1997, *Merger Policy in the United States: A Reconsideration*, *Review of Industrial Organization*, Vol. 12, no. 5-6, pp. 655-685. With regard to the mixed evidence on merger efficiencies Mueller argues for a lowering of the intervention threshold to e. g. a market share of 20% combined with an efficiency defense. See also Daniel A. Crane, 2011, *Rethinking Merger Efficiencies* (March 4, 2011), *Michigan Law Review*, Vol. 110, 2011; University of Michigan Law & Econ, *Empirical Legal Studies Center Paper No. 11-001*; University of Michigan Public Law Working Paper No. 230. Available at SSRN: <http://ssrn.com/abstract=1777204>. Crane argues for the symmetric treatment of anticompetitive effects and efficiencies.

<sup>15</sup> See e.g. Bundeskartellamt, Case B7-22/05 - *Iesy (Apollo) / Ish*, decision of 20.6.2005, paras 160, et seq.

<sup>16</sup> See Bundeskartellamt, Case B1-275/98 - *Pfleiderer / Coswig*, decision of 21.4.1999, para 21.

The balancing clause stipulates an exemption from the prohibition criterion. Under this exemption, a merger is cleared if the companies prove that the concentration will also have pro-competitive effects on a different market ("improved market"). The improvements must outweigh the negative effects on the market in which dominance is created or strengthened ("impaired market"). In principle, only improvements of the structural preconditions for effective competition may fulfil this requirement.<sup>17</sup> § 36 (1) ARC imposes the burden of proof with respect to the applicability of the balancing clause on the merging parties. Only if the merging parties are not in a position to effectively prove the facts on which the expected pro-competitive effects are based, but at least assert all the relevant facts that are required, the BKartA is obliged to investigate these facts (ex officio principle).<sup>18</sup>

In recent years, the BKartA has applied the balancing clause in merger control decisions on, inter alia, cable networks<sup>19</sup>, satellite broadcasting and the provision of pay-TV services<sup>20</sup>, local newspaper markets<sup>21</sup> and markets for the supply of electricity and gas.<sup>22</sup> In the case B7-200/07 - KDG/Orion<sup>23</sup>, for example, the BKartA established that the proposed merger would strengthen Kabel Deutschland GmbH's (KDG) dominant position in the market for feeding in broadcast signals into broadband cable networks.<sup>24</sup> The notifying parties, however, were able to prove that the concentration would significantly improve the competitive conditions in the markets for broadband internet access (DSL) and fixed-line telephony.<sup>25</sup> As a result of the merger, KDG was considered to be able and have sufficient incentives to offer for the first time internet access and fixed-line telephony services to more than 800,000 households. This merger-specific effect was considered to outweigh the expected anti-competitive effects in the market for the provision of cable-TV-services.

The legal instrument of the ministerial authorization (MA) under § 42 ARC also provides scope for the consideration of efficiencies and positive merger effects. It has to be noted, however, that an MA is only applicable in case of a prohibition decision by the BKartA.<sup>26</sup> Upon application, the Federal Minister of Economics and Technology can override the prohibition decision on the grounds of potential advantages to the economy as a whole or public interest considerations. Dynamic aspects may also play a role.

<sup>17</sup> See BGH Wirtschaft und Wettbewerb/E BGH 2425, 2431 - Niederrheinische Anzeigenblätter; BGH Wirtschaft und Wettbewerb/E BGH 2899, 2902 – Anzeigenblätter II.

<sup>18</sup> See BGH Wirtschaft und Wettbewerb/E BGH 1533, 1539 - Erdgas Schwaben.

<sup>19</sup> Bundeskartellamt, Case B7-200/07 - KDG / Orion, decision of 3.4.2008; Bundeskartellamt, Case B7 - 22/05 - Iesy (Apollo) / Ish, decision of 20.06.2005.

<sup>20</sup> Bundeskartellamt, Case B7 - 150/04 - SES / DPC, decision of 28.12.2004. This case was described in the Contribution by Germany to the 2007 Roundtable on Dynamic Efficiencies in Merger Analysis ([DAF/COMP\(2007\)41](#)), at p. 163.

<sup>21</sup> Bundeskartellamt, Case B6 - 38/09 - Schleswig-Holsteiner Zeitungsverlag / Erwerb der Elmshorner Nachrichten u.a., decision of 09.07.2009.

<sup>22</sup> Bundeskartellamt, Case B8 - 93/07 - RWE / SWKN, decision of 23.10.2007.

<sup>23</sup> See Bundeskartellamt, Case B7-200/07 - KDG / Orion, decision of 3.4.2008. See also the press release from 4 April 2008 in English which is available at [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008\\_04\\_04.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_04_04.php).

<sup>24</sup> See paras 36, et seq. of the decision cited above.

<sup>25</sup> See paras 270, et seq. of the decision cited above.

<sup>26</sup> See also the summary of the conditions for the ministerial authorization and the procedures on the website of the Federal Ministry of Economics and Technology at <http://www.bmwi.de/DE/Themen/Wirtschaft/Wirtschaftspolitik/wettbewerbspolitik,did=6176.html> (in German only).

Since 1973 there have been 21 applications for an MA, of which 7 were granted, 4 subject to conditions.<sup>27</sup> The latest application concerned the merger between the university hospital Greifswald and the local hospital Wolgast in north-eastern Germany, which was authorized in April 2008. As part of the MA proceedings, an opinion by the Monopolies Commission is obtained (§ 42 (4) ARC).<sup>28</sup>

Both the balancing clause as well as the MA may lead to the toleration of the creation or strengthening of market dominance, provided there are positive merger effects. As stated above, some of the economic effects to be considered in this context are the same as those considered in an explicit efficiency defence. There are, however, also important differences since, for example, under the balancing clause only merger effects on third markets can be taken into account.

With the proposed 8th Amendment of the ARC the substantive test in German merger control will be changed to the SIEC test ("significant impediment to effective competition").<sup>29</sup> Market dominance will, however, be maintained as the standard example. The balancing clause and the MA will also be maintained. An explicit efficiency defence will not be introduced. This approach in particular takes account of (1.) the scope for considering efficiencies already provided in the existing legal framework of the balancing clause and the MA and (2.) the fact that the (implementation) cost of an (additional) explicit efficiency defence therefore may be higher than the benefits of a more sophisticated assessment of the allegedly efficiency enhancing effects of individual merger cases. It also takes note of the rather limited practical relevance of the explicit efficiency defence for the final outcome of merger proceedings in other jurisdictions.<sup>30</sup>

### 3.2 *Anti-competitive agreements*

#### 3.2.1 *Legal framework in Germany*

The legal framework for the assessment of efficiency claims in the context of anticompetitive agreements is largely aligned with the respective European rules. In general, agreements between undertakings and concerted practices which restrict competition are governed by Art. 101 of the Treaty on the Functioning of the European Union (TFEU) as well as § 1 et seq. ARC. The substantive law in § 1 ARC closely mirrors Art. 101 (1) TFEU, while § 2 ARC is virtually identical with Art. 101 (3) TFEU. Most importantly, other than in merger control, undertakings are not required to notify agreements in advance and there is no obligation for the competition authorities to decide on a potential exemption of an agreement. In terms of substance, Art. 101 (1) TFEU as well as § 1 ARC prohibit all agreements, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition. Agreements of minor importance fall outside the scope of this provision (de-minimis clause) with the precise conditions laid out in respective notices by the European

<sup>27</sup> See the list of applications on the website of the Federal Ministry of Economics and Technology at <http://www.bmwi.de/BMWi/Redaktion/PDF/Wettbewerbspolitik/antraege-auf-ministererlaubnis.property=pdf.bereich=bmwi2012.sprache=de.rwb=true.pdf>

<sup>28</sup> See the list of special reports by the Monopolies Commission at [http://www.monopolkommission.de/sonder\\_gesamt.html](http://www.monopolkommission.de/sonder_gesamt.html).

<sup>29</sup> To date the bill has been introduced into parliament but the final readings and the passage are impending. The Government's draft legislation is available at <http://dipbt.bundestag.de/dip21/btd/17/098/1709852.pdf> (in German only).

<sup>30</sup> For these reasons, also the German Monopolies Commission, the advisory body of the German federal government for competition matters, in its special report on the envisaged amendment of the ARC, also argued against the introduction of an explicit efficiency defence in the course of the adoption of the new substantive test. Monopolkommission, Sondergutachten 63: Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, paras 29, et seq.

Commission<sup>31</sup> and the BKartA.<sup>32</sup> As a general rule, agreements below certain market share thresholds are considered to fall within the scope of the *de-minimis* clause. Hard-core restrictions such as horizontal price-fixing or the allocation of markets or customers are, however, excluded from this exemption.

In addition, a legal exemption exists for certain types of agreements and concerted practices which fulfil the prerequisites laid down in Art. 101 (3) TFEU and § 2 ARC. The following cumulative conditions for exemption must be met:

- The agreement / concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, and
- allows consumers a fair share of the resulting benefit (pass-on to consumers).
- The agreed restrictions of competition are indispensable to attain these benefits, and
- do not lead to an elimination of competition for a substantial part of the products in question.

For the sake of efficient enforcement and to provide sufficient guidance to firms, these general conditions are further specified with regard to certain types of agreements in the form of Block Exemption Regulations (BERs) and guidelines. These Regulations and guidelines also apply *mutatis mutandis* to the assessment of agreements and concerted practices under German law (§ 2 (2) ARC).<sup>33</sup>

Based on this legal framework, the scope for efficiency considerations is twofold. Below the thresholds laid down in the BERs and the *de-minimis* notices, companies may pursue the potential efficiency gains of agreements without any interference by competition law. In addition, the legal exemptions of Article 101 (3) TFEU and § 2 ARC may apply if the relevant thresholds are exceeded. The burden of proving that the agreement in question fulfils the conditions indicated above is on the parties of the agreement. In particular, expected efficiency gains and the resulting benefit to consumers (pass-on) must be put forward and sufficiently substantiated.

### 3.2.2 *Decision-practice*

The BKartA regularly assesses efficiency claims under the legal framework described above. Current inquiries concern inter alia the potentially efficiency-enhancing effects of purchasing co-operations in the retail sector and the competitive assessment of best-price guarantees (most favoured customer clauses) in platform markets (hotel reservation systems). In the context of these ongoing proceedings the parties involved economic experts to substantiate the alleged efficiency effects. Two recently concluded cases concerning internet-based video-on-demand services and the collective marketing of TV-rights for major sport events will be described below.

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<sup>31</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), *Official Journal C* 368, 22.12.2001, pp. 13-15.

<sup>32</sup> Notice no. 18/2007 of the Bundeskartellamt on the Non-Prosecution of Cooperation Agreements of Minor Importance (“*de minimis* Notice”) of 13 MGWBh 2007, available on the website of the Bundeskartellamt at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0703\\_Bagatellbekanntmachung\\_e\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0703_Bagatellbekanntmachung_e_Logo.pdf).

<sup>33</sup> The relevant documents can be accessed via the website of the European Commission at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

In March 2011, the BKartA prohibited the creation and operation of a joint video-on-demand (VoD) platform by the two major private broadcasting groups RTL and Pro7Sat1.<sup>34</sup> Since the VoD-platform was intended to operate as a joint venture, the project was assessed under the relevant merger control provisions as well as under Article 101 TFEU and §§ 1 and 2 ARC. With regard to merger control, the BKartA ultimately concluded that the transaction would further strengthen the pre-existing collectively dominant position of RTL and Pro7Sat1 on the market for TV advertising. The assessment under Article 101 TFEU and §§ 1 and 2 ARC came to the conclusion that the parties would coordinate their business interests via the joint venture and agreements related to its operation. In its assessment the BKartA gave careful attention to the potential positive effects of a VoD-platform.<sup>35</sup> The BKartA in particular acknowledged the efficiency benefits resulting from an increased range of VoD-offers as well as the positive effects associated with a simplified navigation through the online-contents of the parties involved (“one stop-shop”). Furthermore, the positive impact on the available capacity for in-stream video advertising which in particular would have benefitted advertising clients was considered. These benefits were, however, not deemed sufficient to offset the anti-competitive effects. In particular, RTL and Pro7Sat1 had entered into ancillary agreements which served to restrict competition and which were not deemed indispensable for the attainment of the benefits mentioned. These agreements inter alia concerned the limitation of access to the platform to (German and Austrian) TV stations and restrictions with regard to the duration of availability and quality of the content. Finally, a prohibition was also inevitable since the parties involved were not prepared to agree to changes in the relevant contractual framework which would have allowed for a different assessment of the balance between the prospective efficiencies and anticompetitive effects of the project.

In January 2012 the BKartA furthermore concluded its assessment of several agreements on the joint marketing of the media rights for the major German football leagues.<sup>36</sup> In principle, the pooling and central marketing of the clubs' media rights by the German Football League (Deutsche Fußball-Liga; DFL) constitutes a restriction of competition according to Art. 101 (1) TFEU and § 1 ARC. After detailed investigations, the BKartA however considered the marketing arrangements eligible for exemption under certain circumstances and finally declared several commitments by the parties binding according to § 32b ARC. The relevant commitments also referred to the design of packages to be offered as well as to the design of the auction applied by the DFL. In terms of substance, the pooling and central marketing of media rights for the 1<sup>st</sup> and 2<sup>nd</sup> German football league was found to result in a number of advantages and efficiencies compared to an individual marketing of the media rights by the respective clubs.<sup>37</sup> It was further held that the efficiencies would not only benefit the direct purchasers of the media rights but also the final consumer, i.e. the viewers. The main efficiency effect was considered to stem from the offer of a combined league product which was recognized as an improved product and, hence, a qualitative

<sup>34</sup> Bundeskartellamt, Case B6 - 94/10 - ProSiebenSat1 Media AG / RTL Interactive GmbH, decision of 17.03.2011, (accessible online via <http://www.bundeskartellamt.de/wDeutsch/archiv/EntschFusArchiv/2011/EntschFusion.php>). See also the case summary in English which is available at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B06-094-10-ENGLISH.pdf?navid=47>. On 8 August 2012 the Higher Regional Court in Düsseldorf on appeal by the parties upheld the prohibition decision (Case VI-Kart 4/11 (V); not yet published).

<sup>35</sup> See paras 227, et seq. of the decision cited above.

<sup>36</sup> Bundeskartellamt, Case B6 - 114/10 - Zentralvermarktung der Medienrechte der Fußball-Bundesliga und 2. Bundesliga ab der Saison 2013/2014, decision of 12.01.2012 (accessible online via <http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartellW3DnavidW2639.php>). See also the press release from 13 January 2012 in English which is available at [http://www.bundeskartellamt.de/wEnglisch/News/press/2012\\_01\\_13-II.php](http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_13-II.php).

<sup>37</sup> See paras 59, et seq. of the decision cited above.

efficiency effect. This finding was confirmed by an in-depth analysis of viewers' behaviour and preferences. In addition, a more comprehensive coverage of all matches was considered. Finally, central marketing was considered to facilitate the offer of popular formats such as combined live broadcasting of all games and timely highlight coverage which were both found to conform specifically to the preferences of final consumers.

### 3.3 *Unilateral conduct / abuse of dominance*

The German rules on unilateral conduct of dominant firms (abuse of a dominant position) have been in force, with some modifications, since the introduction of the in 1958. § 19 (1) ARC stipulates a general prohibition of abuse of market power by dominant companies similar to Article 102 TFEU. Besides § 19 ARC, another provision (§ 20 ARC) addresses abusive behaviour. It prohibits some abusive practices not covered by § 19 ARC and contains some special national prohibition rules that are not covered by Article 102 TFEU (e.g. sales below cost). Several other rules (e.g. "unfair hindrance") in substance significantly overlap with § 19 (4) ARC.

§§ 19, 20 ARC prohibit exclusionary and exploitative abuses of dominance. While § 19 (4) No. 1 and 4 and § 20 (1) and (2) ARC relate to exclusionary abuses, § 19 (4) No. 2 and 3 ARC relate to exploitative abuses. Effectively, the provisions on exclusionary abusive practices cover all relevant types of conduct which may substantially impair effective competition.

#### 3.3.1 *Scope for efficiency claims*

The German provisions governing unilateral conduct do not contain a statutory efficiency defence. However, the provisions of §§ 19, 20 ARC include the requirement of an objective justification for the abusive behaviour. Some provisions expressly state the requirement of such objective justification (e.g. § 19 (4) No. 1 and 3; § 20 (1) ARC), in other cases this requirement has been developed by the decision practice of the courts. According to established case law, to determine whether a certain behaviour of a dominant firm may be considered objectively justified, an overall assessment and weighing of its "effects"<sup>38</sup> has to take place while the general purpose of the ARC, which is to protect the freedom of competition, must be given particular weight. This very broad interpretation of the legal requirement of an objective justification for the allegedly abusive behaviour in principle also provides scope for the consideration of efficiency claims. In this context, it should, however, also be noted that, according to established case law, the protection of effective competition ultimately has to be given particular weight.

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<sup>38</sup> The relevant jurisprudence of the German Federal Court of Justice in this context in fact does not use the term "effects" but instead refers to the assessment and weighing of the "interests" of all the relevant parties involved.



## INDONESIA \*

### 1. Introduction

Indonesian competition law, the Law No.5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition has one of objectives of creating business effectiveness and efficiency. However, there is no further description by other articles and the elucidation of the competition law. Theoretically, efficiency refers to number of related concepts of maximalization and utilization of overall resources in production process of goods and services. Efficiency is often self-defined by competition agency from the production cost saved which lead to price reduction in the future. In many non-merger competition cases, efficiency was correlated to the total welfare. Efficiency is assumed as how much the consumer is benefitted from the performed competition enforcement (price reduction). In M&A analysis, efficiency measures as cost efficiency, by which how much cost is secured as the result of mergers activities. The inconsistency or lack of formal definition on efficiency by the Indonesian competition law caused a self-interpretation by court in defining their own efficiency.

### 2. Efficiency measurement by the Commission

In M&A notification, efficiency claim shall be submitted by the company proposing the M&A activities, by showing (i) how much efficiency will be resulted by the M&A; and (ii) how much efficiency will be enjoyed by the consumer as the result of such activity. The Commission then will conduct an assessment on the efficiency claims submitted by the proposing enterprises.

Under these circumstances, check and balance between produced efficiency and potential unfair competition should be well measured. Should the value of unfair competition beyond the expected efficiency, then fair competition will be preferred because fair competition by its nature will lead to efficient enterprises in the market.

Efficiency claim proposed by the enterprises among others may cover cost efficiency, increased existing capacity, increased economic scale, and increased product quality and distribution. Efficiency tends to short-term price reduction if the enterprises conduct efficiency on its marginal or variable costs. In contrary, efficiency on fixed costs might not lead to short-term price reduction to instantly enjoy by consumer. The Commission scrutinizes the important of arguments on efficiency claims very distinctly to differentiate between efficiency on variable, marginal, or fixed cost thereof.

### 3. Case study

The Commission received notification for share acquisition by Indonesia Coal Resources Corp (“ICR”) on Citra Tubindo Sukses Perkasa Corp (“CTSP”) with merged assets of Rp 12.3 trillion and merged total sales of Rp 1.7 trillion, which initiated by the reason of business expansion. ICR is a company deal with marketing and distribution of coals, while CTSP is a company deal with excavation of coals. The ICR has market share (from sales) of 0.02% and 0.15% market share for coal’s reserve. The CTSP has

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\* The report is prepared by the Foreign Cooperation Division for the OECD Competition Committee Meeting (24-25 October 2012). For further information, please kindly visit our website ([eng.kppu.go.id](http://eng.kppu.go.id)) or email us at [international@kppu.go.id](mailto:international@kppu.go.id).

market share of 0.15% for coal's reserve. It was acknowledged that both companies are not having significant market power or dominant position that might caused to unilateral conduct or coordination of mining, producing, and purifying of coal's excavation.

In term of efficiency, the share acquisition will assist CTSP in transporting and selling the refined coals through ICR. The acquisition is then will support distribution process of coals to consumer. In term price, the Government for the national interest's purposes will supervise the coal production and export by developing a formula for fixing the price of coals. The price formula will act as reference by enterprises in introducing their own price, and thus, market price mechanism will remain. Under which condition, as enterprises with small market share, it is not profitable for ICR to fix a price that may distort market competition.

In other case, the share acquisition of Indosiar Karya Media Corp (Indosiar) by Elang Mahkota Teknologi Corp (Elang) with joint sales value of Rp 4.1 trillion and joint assets of Rp 5.2 trillion. Indosiar is one of the national free to air television network. Elang Group owns one of the free to air television network, calls SCTV. The acquisition is indirectly increased coordination between Indosiar and SCTV.

Efficiency is calculated based on company's policy before and after the acquisition. At the implementation level, it was forecasted that there will be a joint utilization of production facility and broadcasting infrastructure between SCTV and Indosiar, especially on the back-office system (SAP and Gen 21) owned by SCTV which can escalated the efficiency of Indosiar. In term of broadcasting's content, SCTV focused their business in television movie and entertainment, while Indosiar focused their business on colossal and teenager series. So, both televisions have different focus. In addition, they also will develop joint network with external production houses. The combination of many is expected to increase the competency of SCTV in competing with other broadcaster's groups.

Potential losses by advertising companies after the acquisition are relatively small. This is due to high product elasticity in advertising industry (no barrier to entry), where a small change in quality (rating) of certain program, may lead to movement of the advertisements to other programs or televisions. Under this characteristic, there is a small chance of losses to the advertising company through their unilateral behavior.

## JAPAN

### 1. Introduction

During the course of an investigation, hearing or trial, enterprises often claim that their activities improve efficiency and therefore do not violate the Antimonopoly Act (hereinafter referred to the “AMA”). Although there are no provisions for efficiency, the guidelines regarding merger and private monopolization demonstrate the basic viewpoints on efficiency.

We will describe below the basic viewpoints on efficiency stated in the guidelines, and the case examples regarding mergers (Part II) and private monopolization (Part III). In addition, we will introduce the stage where we consider efficiency; the evidence submitted by enterprises and ex-post evaluation of mergers in Part II. Furthermore, we will also introduce the burden of proof of efficiency regarding private monopolization in Part III.

### 2. Efficiency claim regarding merger<sup>1</sup>

#### 2.1 *The basic viewpoints on efficiency stated in the “Guidelines to application of the Antimonopoly Act Concerning Review of Business Combination” (hereinafter referred to as the “Merger Guidelines”)*

The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) considers the efficiency of mergers as one of “the factors for judging whether competition would be substantially restrained or not” in the review of horizontal mergers, and states basic viewpoints in the Merger Guidelines as described below. These basic viewpoints will be applied to vertical mergers and conglomerate mergers. In addition, although Merger Guidelines state that unilateral conduct by the company group<sup>2</sup> and coordinated conduct between the company group and its competitors will be distinguished when reviewing whether the merger will restrain competition or not, the aforementioned viewpoints will be applied mutatis mutandis to both types of conduct.

When the parties concerned claim efficiency improvement, the JFTC reviews their claim in accordance with such views.

##### 2.1.1 *Efficiency*

When efficiency improvement, whether through economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs or efficiency in research and development, is deemed likely to make the company group take competitive action after the business combination, this factor will also be considered to determine the impact of the business combination on competition.

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<sup>1</sup> [http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/110713.2.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/110713.2.pdf)

<sup>2</sup> “Company group” means that all companies that would form, maintain, and strengthen the joint relationships by mergers which are subject to merger review.

Efficiencies to be considered in this case are determined from three aspects: (i) efficiencies should be improved as effects specific to the business combination; (ii) efficiency improvement should be feasible; and (iii) efficiency improvement contributes to the users' welfare.

Business combinations that create a state of monopoly or quasi-monopoly are hardly ever justified by their efficiency.

- Efficiency Improvement Should Be Specific to the Business Combination

Efficiency improvement should be specific to the business combination. Therefore, such factors related to the expected efficiency as economies of scale, integration of production facilities, specialization of factories, reduction of transportation costs, or efficiency in research and development such as next-generation technology and environmentally friendly capabilities cannot be achieved by other means that are less restrictive of competition.

- Efficiency Improvement Should Be Feasible

Efficiency improvement should be feasible. This is analyzed, for example, using documents of internal procedures leading to the decision of the business combination, explanatory materials for shareholders and financial markets regarding the expected efficiency, and studies by external specialists concerning the improvement in efficiency.

- Efficiency Improvement Contributes to the Users' Welfare

The outcome of efficiency improvement from the business combination must be returned to users through reduced prices of products and services, an improvement in product quality, a supply of new products, or efficiencies in research and development, such as next-generation technology and environmentally friendly capabilities. In this regard, in addition to the materials listed in (ii), these are to be analyzed, for example, as information related to improved capabilities that will bring effects such as a price reduction and the history of actual price reductions, quality improvement and supply of new products being realized through competitive pressure from the demand and supply side.

## **2.2 *Practical issues in claiming efficiency improvement from mergers***

Merger Guidelines mention efficiency as one of the factors for judging whether competition would be substantially restrained or not. In addition, "Policies Concerning the Procedures for the Review of Business Combinations", which indicates the JFTC's policies in relation to the process of merger review, mentions the following material as examples referred to by the JFTC in merger reviews: descriptions of plans to rationalize and improve efficiency in accordance with mergers and bases for calculating economic effects; documents about the process of internal decision that led to the merger; explanatory material on efficiency for shareholders and financial markets; and material describing track records in price reductions, quality improvements, the amount of new products offered and other matters that were a result of the efficiency improvement.

As indicated in section 3 below, when faced with the cases in which the parties concerned asserted that their mergers mainly brought about cost reductions and enhanced users' welfare, the JFTC reviewed them based on the Merger Guidelines.

## 2.3 Cases in which parties claimed efficiency

### 2.3.1 Establishment of a joint venture for producing iron ore by BHP Billiton PLC and BHP Billiton Limited and Rio Tinto PLC and Rio Tinto Limited<sup>3</sup>

#### 2.3.1.1 Outline of the case and progress of the review

BHP Billiton PLC and BHP Billiton Limited (hereinafter referred to as “BHP Billiton”) and Rio Tinto PLC and Rio Tinto Limited (hereinafter referred to as “Rio Tinto”), each engaged in the business of mining and sales of iron ore, etc., and planned to establish a joint venture to produce iron ore in Western Australia (hereinafter referred to as the “JV”). The provision applied to this case is Article 10 of the AMA.

In response to a prior consultation on the establishment of a JV with both parties concerned, the JFTC commenced its review. On 27 September 2010, after finishing the primary review and while in the process of the secondary review, the JFTC highlighted its concerns to both parties. Thereafter, the JFTC closed the review concerning prior consultation following the withdrawal of the planned JV, which was publically announced by both parties on 18 October 2010<sup>4</sup>.

#### 2.3.1.2 Judgment regarding efficiency

In this case, the parties concerned alleged that if they were to establish the JV and integrate iron ore production businesses in West Australia, this integration would allow them to achieve efficiency in excess of 10 billion U.S. dollars. In response to this allegation, the JFTC made a judgment on “lump ore” and “powder ore” which are defined as relevant markets as follows:

- Lump Ore.

The JFTC assumes that the JV would bring about a situation similar to monopoly, and consequently, achieving efficiency as alleged by the both parties would not cause competitive behavior by both parties. For this reason, the alleged does not justify the JV.

- Powder Ore

The JFTC scrutinized the potential for efficiency alleged by both parties from the following three viewpoints: (i) whether or not improved efficiency is specific to a proposed business combination (particularity); (ii) whether or not improvements in efficiency are feasible(feasibility); and (iii) whether or not improvements in efficiency contribute to users’ welfare (possibility of increasing users’ welfare).The results revealed that none of the above viewpoints could be identified due to the following reasons.

- *Particularity.* Although both parties concerned alleged that efficiency is achieved by sharing and integrating infrastructure through establishment of a JV, it is believed that such efficiency can be achieved by alternative measures which do not restrain competition in comparison to the JV.
- *Feasibility and possibility of increasing users’ welfare.* The parties concerned not only alleged that an increase in iron ore production and reduction in operational costs would allow them to achieve efficiency in excess of 10 billion U.S. dollars, but also alleged that

<sup>3</sup> <http://www.jftc.go.jp/en/pressreleases/%EF%BD%90%EF%BD%84%EF%BD%86110621MajorBusinessCombinationCasesFY2010.pdf>

<sup>4</sup> The view described in the paragraph b is what expressed by the JFTC at the time when the concerns were pointed out to the parties. Therefore, the following view is not the final judgment by the JFTC in response to the submission of their counter opinion.

standardization of iron ore quality through iron ore blending would achieve an increase in users' welfare. However, the feasibility of reducing capital expenditures and operational costs through establishing the JV is not necessarily clear. In addition, even if a reduction in capital expenditures was achieved, such expenditures are basically associated with fixed costs and are thereby not directly profitable for users. Similarly, the JFTC cannot completely identify the feasibility and possibility of increasing users' welfare in other claims made by both parties.

### 2.3.2 *Proposed Business Combination between Tokyo Stock Exchange Group, Inc. and Osaka Securities Exchange Co., Ltd.*

#### 2.3.2.1 *Outlines of the case*

Tokyo Stock Exchange Group, Inc., which owns subsidiaries including Tokyo Stock Exchange Inc., is establishing a financial instrument market with a license granted by the Prime Minister under the provisions of the Financial Instruments and Exchange Act. Tokyo Stock Exchange Group, Inc. planned to acquire shares in Osaka Securities Exchange Co., Ltd., which is also establishing a financial instrument market with a license, and to acquire more than half the voting rights (hereinafter referred to as "Business Combination"). The provision applied to this case is Article 10 of the AMA.

#### 2.3.2.2 *Judgment regarding efficiency*

In this case, the parties argued that the Business Combination could improve efficiency given that an annual cost reduction of around seven billion yen is expected in all fields of trade which are subject to review, as a result of the integration of systems following the Business Combination.

However, the JFTC judged that it could not take efficiency improvement into consideration, from the following three viewpoints: (i) whether or not improved efficiency is specific to a proposed business combination (particularity); (ii) whether or not improvements in efficiency should be feasible (feasibility); and (iii) whether or not improvements in efficiency contribute to users' welfare (possibility of increasing users' welfare). In this case, the parties concerned had not decided the time frames in which they would integrate the systems and achieve the cost reduction related to the systems. Their explanations about particularity, feasibility and the mechanisms for increasing user's welfare were also insufficient. In addition, as a result of the Business Combination, there would be an extreme increase in the market share of the parties concerned in services related to listing stocks on the emerging markets, which would lead to a state of quasi-monopoly. Consequently, the parties concerned were not expected to take competitive action such as price reduction, even if the improvement of efficiency could materialize as the parties had argued. Therefore, the JFTC decided that efficiency improvement could not be taken into consideration.

## 2.4 *Ex-post analysis of mergers*

The Competition Policy Research Center (CPRC) of the JFTC has examined the effects of mergers, and published research reports entitled, *Economic Analysis of the Efficiency of Mergers and their Impact on Markets*, in September 2003, and *Ex-post Examination of Business Combinations*, in November 2011.

### 2.4.1 *Economic Analysis of the Efficiency of Mergers and their Impact on Markets (September 2003)*

- Focus points in the research

This research focuses on efficiency brought about by mergers, and seeks to undertake demonstrative analyses of the degree of efficiency achieved through mergers and changes in the post-merger market outcomes.

- Analysis methods

For each of the major merger cases between enterprises that listed on the stock exchange between 1980 and 1999, the following research analyses were conducted: (1) analysis and study of how efficiency had been achieved, using financial data; (2) price analysis of how market prices were affected by mergers, using an econometric model that attempts to explain price changes based on demand and cost factors; and (3) analysis of how the stock market predicted how efficiency would be achieved and how prices would fluctuate as a result of the merger, applying event study methodology of stock prices.

- Analysis results

The analysis of financial data revealed that although partial cost reductions were observed in some cases, based on changes in the cost indices and profit ratio indices, there was no case that clearly showed cost reductions.

The price analysis showed that in some cases, there was a significantly greater rise in post-merger prices than the expected price level that would have been increased if the pre-merger conditions had remained the same. On the other hand, there were cases where the post-merger prices remained the same as the pre-merger prices, and even cases where post-merger prices fell significantly below the expected price level that would have been increased if the pre-merger conditions had remained the same. However, these results may be attributed to factors other than efficiency improvements and the revitalization of competition brought about by the merger.

In Japan, the crossholding of shares among corporations can be observed to a significant extent. In addition, the actions of institutional investors can affect stock price changes. Therefore, the effectiveness of event study methodology of stock prices, which is based on changes in prices that are brought about by announcements regarding a merger, may be restricted to a certain degree. However, in many of the cases analyzed, a significant and abnormal return was observed in the stock prices of the merging party and competitor companies on the day of the event.

See [DAF/COMP/WD\(2007\)56](#) for details of the analysis results.

#### 2.4.2 *Ex-post Examination of Business Combinations (November 2011)*

- Focus points in the research

In order to verify whether merger cases to date have achieved efficiency, including profitability enhancements, the research empirically verifies the outcomes of mergers since 2000 based on the data on profit ratios, stock prices, research and development costs, number of published patents and product retail prices.

- Analysis methods

- *Analysis of profit ratio.* The propensity score matching and difference-in-difference method were used together to analyze whether the ROE and other business management indexes showed improvements after the merger.
- *Stock price analysis.* Event study methodology of stock prices was used to analyze whether stock prices rose after the merger.
- *Analysis of research and development.* An analysis was carried out to determine whether the ratio of research and development costs to sales and the number of patents increased after the merger.

- *Analysis of product retail prices.* A regression analysis was conducted using POS data to analyze whether retail prices of products fell after the merger.
- Analysis results
  - *Analysis of profit ratio.* It was confirmed that the merger had no significant effect regarding the profit ratio, and there were rather more cases in which the profit ratio worsened.
  - *Stock price analysis.* The stock price analysis showed a rise in stock prices on the day of the announcement of the merger, and the excess profit ratio moved positively in many cases. However, in most cases, the stock price also fell after a few days and the effects of the cumulative abnormal return ratio are close to zero.
  - *Analysis of research and development.* The analysis of research and development showed a post-merger decline in the accumulation of research and development efforts and the number of patents, in many cases. When it comes to knowledge-intensive enterprises, the research and development costs increased in many cases. However no similar trend was observed regarding the number of patents.
  - *Analysis of product retail prices.* The analysis of product retail prices showed a rising trend in the average post-merger market prices for seasonings and sugar, and the post-merger stock prices of the enterprises showed a further rising trend. In some cases, enterprises adjusted the product retail price to differentiate between the product groups sold by the merging parties.

See CPDP51-E (2011.7)<sup>5</sup> for details of the analysis results.

### **3. Efficiency claim regarding private monopolization**

#### **3.1 *The basic viewpoints on efficiency stated in “The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act” (hereinafter referred to as “Exclusionary Private Monopolization Guidelines”)***

The JFTC considers the efficiency of private monopolizations as one of the deciding factors regarding “the substantial restraint of competition” of private monopolizations, and states basic viewpoints in the Exclusionary Private Monopolization Guidelines as described below.

Where the alleged enterprise is expected to take competitive actions owing to the improvement of productivity, technological innovation, and the improvement of the efficiency of business activities—which are caused by the economies of scale, integration of production facilities, specialization of factories, reduction of transportation costs, and improvement of the efficiency of research and development systems that are incidental to exclusionary conduct of said enterprise, such circumstance may be taken into account to assess whether or not competition is substantially restrained.

In such a case, the efficiency improvements will be taken into account when: (i) it is deemed that efficiency improvement is specific to the conduct, and cannot be achieved by other means that are less restrictive of competition, and (ii) it is deemed that outcomes such as a decline in the product prices, an improvement in product quality, and a supply of new products are returned to users due to the improvement of efficiency and users welfare..

For example, in some cases of Tying, the economics of scale may work in the tied products, and the demand for the tied products cannot be increased by means other than selling the tied products together

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<sup>5</sup> "The Impact of Mergers on Profits, Share Value, Innovation, and Product Prices in Japan in the 2000s" [http://www.jftc.go.jp/cprc/DP/abstract/CPDP-51-E\\_abstract.html](http://www.jftc.go.jp/cprc/DP/abstract/CPDP-51-E_abstract.html)

with the tying products. In this situation, where the supply of the tied products is deemed to have increased, resulting in the supply of the products to users at the lower price, and the improvement of users' welfare as a result of promoting competition within the market, the JFTC will consider such circumstances to assess whether or not competition is substantially restrained.

However, where exclusionary conduct causes monopoly or a monopolistic situation, it would normally be concluded that competition is substantially restrained.

### **3.2 *The burden of proof of efficiency claims regarding private monopolization***

Efficiency claims are related to whether a substantial restraint of competition can be found or not. When enterprises claim that their activities do not fall under private monopolization and do not violate the AMA because of efficiency improvement, the burden of proof of a substantial restraint of competition will fall on the investigator in hearings and on the JFTC in lawsuits to rescind decisions.

In cases where efficiency seems to have been improved to some extent, the investigator or the JFTC has to bear the burden of proof of a substantial restraint of competition in consideration of efficiency. By contrast, the enterprises which are subject to administrative orders would rebut the finding-fact or the JFTC's evaluation regarding efficiency. They would also try to prove the facts that have not been proven by the JFTC. Although distribution of the burden of proof is not ruled clearly in the law provisions, hearing trials or lawsuits usually proceed based principles such as those described above.

### **3.3 *The case in which the offender claimed efficiency (Tokyo High Court decision on NTT East case)***

When NTT East provided a telecommunication service to the user's residences using optical fiber equipment (hereinafter referred as to the "FTTH service"), it set a lower fee for users than the fee charged to specific telecommunication enterprises for using optical fiber equipment (They had to use such equipment in order to provide a service similar to the FTTH service.). The JFTC found that NTT East's activity fell under private monopolization (Paragraph 5 of Article 2 of the AMA) and violated Article 3 of the AMA, and they issued a hearing decision against NTT East, on March 26, 2007.

Although NTT East filed a suit to rescind the decision described above, the Tokyo High Court made the decision to dismiss this appeal on May 29, 2009. Following the Tokyo High Court's decision, the Supreme Court refused NTT East's final appeal on December 17, 2010; consequently this decision was final and binding.

NTT East's claim and the Tokyo High Court's decision are briefly discussed below. It should be noted that the plaintiff's claim involved efficiency improvement with regards to the issue of exclusivity of NTT East's actions. While the Exclusionary Private Monopolization Guidelines consider the efficiency of private monopolizations as one of the deciding factors regarding "the substantial restraint of competition," as previously mentioned, the plaintiff's claim was made prior to the announcement of the guidelines.

#### **3.3.1 *Plaintiff's claim regarding efficiency***

The price reduction of the FTTH services helped to suppress consumer prices and enhance efficiency. As a result, low price setting is a competitive activity, and would only become anti-competitive in rare exceptional cases, such as the continuous provision of services at prices far below the required costs for the services. The activity in this case is a justifiable act of competition that promotes competition in price and quality efficiency, and does not come under the category of exclusive conduct.

### 3.3.2 *Court decision*

The Tokyo High Court initially confirmed the JFTC's hearing decision, which stated that NTT East's activity had made it difficult for other telecommunications carriers lacking optical fiber equipment to enter the FTTH services market, and consequently excluded them from the market.

Subsequently, in response to the plaintiff's claim, the Tokyo High Court stated, "The plaintiff has made it extremely difficult for other telecommunications carriers to enter the FTTH services market, while attempting to gain users. Such an act is inevitably recognized as an anti-competitive activity, which is prohibited in the market of FTTH services for users' residences." In conclusion, the Court denied the plaintiff's claim that its activity is justified because it is competitive and enhances efficiency.

## 4. **Conclusion**

### 4.1 *Comparison of efficiency claim between mergers and private monopolizations*

When the JFTC reviews the efficiency claim in mergers and private monopolizations, it takes both static and dynamic efficiency into account.

Merger Guidelines list the following three viewpoints for reviewing efficiency: particularity, feasibility and the possibility of increasing the users' welfare. Exclusionary Private Monopolization Guidelines also state that the "particularity" and "possibility of increasing the users' welfare" is considered when evaluating efficiency. By contrast, since the enforcement against private monopolization is ex-post regulation to the enterprises' activities, "feasibility" will not be considered when evaluating efficiency.

### 4.2 *Cases in which parties or offenders claimed efficiency*

Parties concerned and offenders have often claimed efficiency improvement, and the JFTC considered efficiency in some recent merger cases.

However, all efficiency claims by parties concerned and offenders have been refused by the JFTC or the courts.

We consider that such claims will continue to be made in the future.

### 4.3 *Ex-post evaluation of efficiency*

Although we have never conducted ex-post evaluations of private monopolizations, the CPRC conducted two ex-post evaluations regarding the efficiency of mergers in 2003 and 2011, as described above. These reports concluded that there was no clear link between the mergers and efficiency improvement.

## REFERENCE

Hiroyuki Odagiri (2007), "Mergers and Economic Performance: Do Efficiency Gains Justify Horizontal Mergers?" <http://www.jftc.go.jp/cprc/DP/CPDP-27-E.pdf>

## KOREA

### 1. Introduction

Corporate M&As or concerted acts, etc. by enterprises can be both competition-restrictive and economic-efficiency simulative. Through an M&A, enterprises, for instance, can integrate production facilities, optimize procedures and reduce production costs while merging mutually complementary knowhow to expedite new product or production facility development. Their combined production, purchase, transportation and retailing systems realize the economy of scale, which cuts production cost further. Enhanced efficiency leads to price cut, quality improvement, new product development, and many other benefits to increase merger-involved enterprises' competitive edge and market-wide competition in a way after all. Whereas in some cases, M&As can also reinforce the market dominance of involved firms and result in price rise or supply reduction. With this understanding, most competition authorities in the world take into consideration both efficiency gains and anti-competitiveness estimated to occur from a merger in question to see if such a corporate behavior constitutes competition violation.

The followings examine key issues in Korea under this subject including in what areas efficiency claims matter more and what are the requirements for a valid efficiency claim.

### 2. Competition areas subject to efficiency claim & its validity

#### 2.1 *Competition areas subject to efficiency claim*

Talks on efficiency claim are most frequently heard in a corporate M&A area among all competition areas. The current fair trade act of Korea prohibits anti-competitive mergers in principle, but allows some exceptions if efficiency gains of the merger in question, which are hardly won by other means, are expected to exceed its harms on competition. In such a case, the burden of proof whether corresponding requirements are met lies on the involved enterprisers. From the fair trade act introduction to the year 2000, a total of 10 cases were excused in Korea for their efficiency claims despite potential anti-competitiveness. After 2001, the KFTC has accepted no efficiency claim. In most of the potentially competition-restrictive mergers, involved companies have made the efficiency claim.

Mergers are not the only area where efficiency claims are made. The guidelines for concerted acts stated to look into efficiency gains after analyzing anti-competitiveness of a concerted act. If its efficiency gain and competition restriction occur together, the guideline directs to compare those two to judge any illegality. A seemingly unfair trading practice can be also viewed not to harm competition if it has a justifiable reason. The law acknowledges that such a conduct done based on a just ground can improve efficiency or consumer welfare far greater than it restricts competition. So it can be viewed that diverse areas of Korea's competition law take into consideration efficiency gains.

The following, however, looks mainly at corporate merger reviews since efficiency gain is a frequently visited issue in merger reviews. Our discussions will be on the types of efficiency for a valid claim, requirements for a valid claim, efficiency measurement methods, claim acceptance procedures, etc.

## 2.2 *Types of valid efficiency*

The current corporate-merger-review guideline recognizes efficiency gains as one of the elements considered in the review and defines it as increased efficiency in production, sales, research and development, etc. or in the national economy as a whole.

Increased efficiency in production, sales, research and development, etc. is measured by taking the following into consideration.

- whether production cost could be reduced through economy of scale, production facility integration, production procedural optimization, etc.
- whether sales cost can be lowered, or sales or export can be expanded through sales unit integration or its collective use
- whether sales or export can be expanded through market information sharing
- whether logistical cost can be saved through collective use of transportation/storage facilities
- whether production technology and research capacity are improved through technological exchange, or collective or effective use of technological professionals, organizations, and funds
- whether other costs could be considerably saved

These signal that currently, not just production cost saving, sales amount increase and other production efficiency are accepted as a valid efficiency claim, but production technology and research capacity upgrade and other dynamic efficiency aspects are also duly recognized. In line with this, the Supreme Court<sup>1</sup> has overturned the Seoul High Court ruling<sup>2</sup> on Samic Musical Instrument-Young Chang (2004) case<sup>3</sup> which was focused only on production efficiency. In its ruling, the Supreme Court said that in making a decision regarding efficiency gains, a company's production, sales, research and development as well as the balanced development of the national economy should all be considered in a comprehensive manner.

In many cases, examinees insist cost saving by joint input purchase to be recognized too. However, this would be hardly regarded as a well-grounded claim enough to offset anticipated competition restriction. The benefit of collective purchase refers to the saving of input material buying cost such as raw materials thanks to company size increase. This is a kind of cost saving by redistribution supported by merger participants' bargaining power increase. In this sense, it can be said that the involved firms enjoy cost saving but the society as a whole sees only the transfer of wealth from raw material suppliers to those firms and any other downward efficiency gain is uncertain. So rulings accepting this claim are only hard to find even without any applicable specific regulations being in place as of now.

The Supreme Court also mentioned on the Samic-Young Chang case (2004) that benefits from their collective raw material purchase are a mere income redistribution between seller and buyer created by

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<sup>1</sup> Supreme Court May 29, 2008 Announcement 2006-두6659 Ruling.

<sup>2</sup> The Seoul High Court stated in the ruling that efficiency referred to productive efficiency meaning cost saving of a company who used less production inputs to produce more amount or higher quality of goods (Seoul High Court March 15, 2006 announcement 2005-두3174 Ruling).

<sup>3</sup> KFTC September 24, 2004 Full Commission Resolution No. 2004-271.

merger participants' bargaining power increase that, in turn, cuts buying cost. The Court added that this is not related to the efficiency of the entire economy.<sup>4</sup>

In addition to efficiency gains in production, sales, research and development, etc. the review guidelines specified other examples of national economy-wide efficiency gains such as employment increase, regional economy development, neighboring industry development, sustainable energy supply and others for economic stability of people's lives or environmental conservation.

This broader recognition seems to be made from a higher perspective of public policy beyond competition policy with an understanding that it could be more desirable to pursue long-term public interests than short-term economic efficiency sought after by competition policy. Yet, so far, merger-involved firms making their case mainly based on any of such examples have only been very rare and so are rulings approving an anti-competitive merger based on such types of efficiency. Before February 1999, in fact, the fair trade act used expressions other than efficiency. If the KFTC regards it necessary, the act allowed it to approve anti-competitive mergers in some exceptional cases such as unavoidable industrial or organizational restructuring for industry rationalization or national competitiveness enhancement or for the public interests, etc. Rulings approving such an exception under the provision reflected in the mixture of considerations over production, sales and R&D efficiency and economy-wide efficiency.

### 2.3 *Efficiency claim & Merger characteristics*

Efficiency gains claimed by firms are closely related to the characteristics of a behavior in question. When it comes to corporate mergers, in particular, what the involved firms aimed at with the deal determines its type and this will, in turn, change the scope of efficiency to be examined.

As for horizontal mergers, efficiency talks are mostly about production optimization, economy of scale, technological advancement, cost saving by collective purchase, management efficiency upgrade, etc.

In vertical mergers, transactional efficiency is a most frequently visited issue. Transactional efficiency is enhanced when transactional costs are reduced or removed in a market including information expenses, contract signing expenses, opportunistic behaviors of trading counterparts, etc. Market transactional cost goes up together with transactional uncertainty and frequency as well as transaction-specific investment. So companies facing this usually try to minimize their cost by forming a strategic partnership or vertical combination with upper or lower stream enterprisers. In this situation, transactional efficiency gain easily becomes the topic for most discussions.

In the case of conglomerate corporate combination, claims can be made regarding production cost saving by economies of scope, externality resolution, superior financing ability, etc.

In the case of Hyundai Motor Company's Hyundai Auto Net stock acquisition (2005)<sup>5</sup>, for example, which was a vertical merger between a finished automobile maker and an automobile electronic controlling device maker, claims were about transactional cost cut, quality control efficiency gain along with R&D expense saving by joint R&D efforts, cost saving by collective advertisement, etc. Such vertical and conglomerate mergers run slimmer changes to restrict competition than horizontal combinations for its own nature. Thus they do not make a frequently discussed topic for efficiency claim.

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<sup>4</sup> The Court said that efficiency gains would be acknowledged if firms can prove their collective raw-material buying leads to purchasing cost cut and further to more production of finished goods and price fall. The Court rejected the claim, saying that it could not find enough evidence to support such flow in this case.

<sup>5</sup> KFTC August 24, 2005 Full Commission Resolution No. 2005-231.

### 3. Efficiency claim verification

#### 3.1 Requirements for valid efficiency claim

In the process of examining and analyzing efficiency gains for a corporate merger review, we see diverse issues being raised. The current review guidelines specified 5 different preconditions for valid efficiency claims.

The guidelines found that it should be (1) in the near future that (2) efficiency gain obviously takes place (3) in a way that is hardly achieved by means other than the merger in question (4) excluding efficiency gains from production reduction, lower service quality or other anti-competitive methods. And lastly, (5) efficiency gains must exceed negative effects from anti-competitiveness of the deal in question.

Concerning '(1) in the near future', it is not very clear how long is 'the near future' and how to reflect efficiency gain if it takes place in the future. One example on this is the Korea Cable Television & Telecommunications Association and Habit I&B case (2004)<sup>6</sup>. Despite examinees claimed their deal would generate efficiency gains for the next 10 years, the KFTC looked out 5 years for efficiency gain and anti-competitiveness estimation and calculated their present value to compare and decide penalties. The present value here was calculated by using the discount rate gained from the Bank of Korea's corporate bond yield (3 year, AA-).

The guidelines also say that the gaining of efficiency should be obvious; otherwise, if a company in question fails to prove its existence or its occurrence is uncertain, the guideline does not accept any efficiency claim in such cases. There are many of the previous KFTC decisions<sup>7</sup> which did not approve efficiency gain claims, citing efficiency gain realization was uncertain or presented details were insufficient.

The third requirement is regarding a merger-specific nature that the efficiency gain under discussion should be hardly achievable by means other than the merger in question. In this case, to check if other alternative exists or not, we should look further than just a theoretical possibility, and into the practical feasibility of such alternatives, if any, in the real world. As regards, in the Samic-Young Chang musical instrument firm case (2004), the examinees claimed their factory relocation to a foreign country could save more cost. To this, the Commission viewed that such cost saving could also be possible through individual restructuring without involving any merger efforts and found the claimed efficiency gain not merger-specific.

Valid efficiency gain claims should prove that the expected gains are not coming from cost saving by competition-restrictive measures and such gains exceed the reduced velocity of competition. Actually in many cases, efficiency claims are being rejected because, though some efficiency increase is partly recognized, its scale is not deemed greater than the harmful effect on market competition. For instance, in the Oriental Chemical Industries' stock acquisition of Columbia Chemicals Company in 2006<sup>8</sup>, the KFTC and the Supreme Court<sup>9</sup> recognized only KRW 8.8 billion-worth of efficiency gain effect among the entire KRW 19.7 billion gains claimed by the firms and decided that amount of gain did not exceed the deal's anti-competitiveness and declined the claim.

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<sup>6</sup> KFTC July 24, 2004 Full Commission Resolution No. 2004-254.

<sup>7</sup> Yongsan Chemical's proposed M&A, CJ CableNet YangCheon Broadcasting's proposed M&A (2004), etc.

<sup>8</sup> KFTC May 29, 2006 Full Commission Resolution No. 2006-173.

<sup>9</sup> Supreme Court September 10, 2009 Announcement 2008두9744 Ruling.

The current merger review guidelines do not specify which criteria among those for general welfare, producers' welfare and consumer welfare to adopt to assess efficiency gains. Some KFTC decisions and court rulings require such efficiency increase benefit consumers in the end through price drop or other ways.

Some examples are the Incheon Steel-Sammi Steel case in 2000, and the Samic-Young Chang musical instrument firms case in 2004. In these cases, the KFTC did not accept the firms' claims on cost saving effect for they did not benefit consumers after all. Regarding the letter case, the High Court<sup>10</sup> and the Supreme Court mentioned the possibility of increased consumer interests as a requirement for a valid efficiency gain.

### **3.2 *Efficiency measurement***

As previously discussed, for any valid efficiency claim, we need to compare the scales of efficiency gains and restricted competition and the former should prove to be larger than the latter. This means that the amount of efficiency must be measured. The fair trade act and merger review guidelines, however, have no specific provisions on how to do this. The academia also has no consolidated views in this regard.

Against this backdrop, economic evidence has recently emerged as a key to merger efficiency evaluation. To make a better case, merger-involved enterprises actually have relied much on such economic evidence as, for examples, reports by accounting firms or economists. But even though firms present economic evidence to establish their efficiency claims, evidence's probative power itself can be refused in the first place if analyzed data were already distorted or analysis methods were erroneous.

In the Samic-Young Chang case (2004), companies formulated a piano demand function and calculated price elasticity of demand to measure the strength of post-deal price-increasing factors. And they argued the strength of such factor was smaller than that of price-dropping drivers calculated from their piano production function.

The court, however, did not acknowledge these claims, citing that the firms set a demand function with arbitrarily-selected dependent variables of piano demand, the Cobb-Douglas production function used to gain the piano production function did not represent diverse production relations, Samic and Young Chang had too wide gap in capital intensity to use the same production function, etc.

It is true that economic decisions on the existence and scale of efficiency gain are open to different interpretations depending on used data, applied empirical analysis model, etc. So in each case, empirical analysis or economic evidence for efficiency claims can be limited, at best. This is why who takes the burden of proof largely determines the validity of efficiency claims.

## **4. Procedural issues**

### **4.1 *Efficiency claim & Burden of proof***

Mostly in cases found to be anti-competitive in the end, merger-involved firms tend to exaggerate their efficiency gain effects to the maximum level. And the information asymmetry between these companies and a competition authority hinders the latter to rebut enterprise efficiency claims effectively.

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<sup>10</sup> Article 7 of the Act says...the purpose of defining as an exception...even if anti-competitive harm could take place, efficiency gain can be greater than that to bring merger participating firms cost saving which could lead to price cut or production increase, etc. for facilitated competition and ultimately enhanced consumer welfare.

Considering these, we may see the merger-involved firms are the most qualified party to find out the gain or no-gain of efficiency, measure efficiency change, collect and interpret evidence to prove it.

In line with this, the fair trade act of Korea clarified that it is the enterpriser in question that should prove if its efficiency claim satisfies required conditions. This has been supported by many Supreme Court rulings. So it is safe to say there is no doubt the burden of proof lies on involved companies.

The KFTC, to clarify economic analysis submission procedures, established the Guidelines for Economic Analytical Evidence Submission in 2010, offering outlines of basic principles and detailed examples.

#### **4.2 *Relationship between efficiency claim and merger review***

Korea's fair trade act does not explicitly say whether efficiency claim evaluation should be carried out in parallel with or after a merger review of the related firm.

The review guidelines, however, offer assessment criteria in each stage of corporate merger including market definition and anti-competitiveness assessment. Following the review order, the guidelines placed the criterion for efficiency gain assessment after anti-competitiveness assessment and anti-competitiveness-easing elements. It also instructs to view if the proposed merger under review is anti-competitive or not first, and then check efficiency gain effects after it is deemed harmful to competition.

This is because the purpose of corporate merger review by an antitrust agency itself is to prohibit anti-competitive deals plus, it is always very rare for efficiency claims to be accepted to the extent of earning the whole deal a permission notwithstanding its anti-competitiveness. Plus considering the fact that most of the deals under review are not anti-competitive, thus presenting no practical interests in checking efficiency gains at all, it is much desirable and efficient to do the efficiency assessment selectively for competition-restrictive mergers.

### **5. Conclusion**

How to take an efficiency claim varies according to what is viewed as the purpose of competition law and what is adopted as the definition of competition itself and anti-competitiveness. If economic efficiency increase is taken as the sole purpose of competition law, for instance, and competition is regarded identical to economic efficiency, efficiency assessment matters more than anti-competitiveness evaluation. But then, if competition law's purpose is understood as increasing consumer welfare by competition protection, anti-competitiveness and efficiency gains stemming from the same behavior are to be measured for comparison. Korea is categorized into this second theoretical background.

As regards what to recognize as efficiency gains and how to assess them are still under discussion in Korea as well. The matters of how to calculate efficiency gain and how to compare it with anti-competitiveness, in particular, need to be further explored by studying more actual cases in order to set up a standardized assessment criterion.

## MEXICO

### 1. Introduction

The following document outlines the main differences in the analysis of efficiencies in merger and abuse of dominance cases undertaken by the Mexican Federal Competition Commission (Commission or CFC for its acronym in Spanish). Although from an economic standpoint, the analysis undertaken in each case could be similar, the competition law (Federal Law of Economic Competition, FLEC) does establish distinct elements to be considered in the analysis of each.

In the case of mergers, the FLEC simply mentions that efficiencies are to be considered in the analysis of a merger, while the standard is set out in the regulations of the FLEC (bylaws). In the case of abuse of dominance, the possibility of evaluating efficiencies and the elements to be considered in the analysis are set out in the competition law itself (Article 10). Furthermore, the FLEC makes reference to the welfare standard that needs to be taken into account when evaluating these claims: consumer surplus.

A final element to highlight is the differential burden of proof in efficiency claims for merger and abuse of dominance cases. In the former case, the competition law makes it clear that elements that show efficiencies need to be provided by interested parties. In the latter, the Commission must analyze efficiency gains brought about by the conduct that companies accredit. Although it is neither an explicit obligation of the Commission to show these efficiencies nor an obligation of the companies to accredit them, it has been generally interpreted to mean that the Commission “may” consider efficiencies in its analysis of abuse of dominance, without it being a requisite efficiency defense by the party under investigation.

### 2. The welfare standard for analysis of efficiencies in merger review and abuse of dominance investigations

An important element to note regarding efficiencies in the FLEC is the fact that the law establishes as its object “...to protect the process of competition and free market access, through the prevention and elimination of monopolies, monopolistic practices and other restrictions to the **efficient functioning of markets** for goods and services...” [Emphasis added] Article 2, FLEC. In other words, the Commission is charged with ensuring that total welfare is attained.

Nevertheless, the reforms to the competition law in 2006 introduced for the first time an explicit bias in favor of the consumer when considering efficiency gains brought about by potentially anticompetitive conduct in its analysis of abuse of dominance, namely:

*“To determine whether the practices referenced in this article should be remedied in terms of this law, the Commission will analyze efficiency gains claimed by the companies as arising from the conduct and whose overall effect is favorable to the process of competition and free market access. ... that these do not result in significant price increases, or a significant reduction in the choices available to the consumer, or a similar reduction in the degree of innovation in the relevant market; as well as others that **demonstrate that net improvements to consumer welfare arising from these practices exceed their anticompetitive effects.**”* [Emphasis added] Article 10, final paragraph, FLEC.

The reforms of 2006 also explicitly introduced, for merger review, the possibility of reviewing

*“... those elements provided by companies to accredit greater market efficiencies that could be attained through the merger and that would favorably affect the competition process and free market access.”* Article 18, Section, FLEC.

Although the competition law does not explicitly state that the standard of review is consumer surplus, the 2007 reformed bylaws do state that

*“... it shall be considered that a merger will attain greater market efficiency and favorably influence the competition process and free market access, when parties show that the merger will result in contributions to consumer welfare that will permanently offset its anticompetitive effects.”* [Emphasis added] Article 16, FLEC bylaws.

### 3. Merger and abuse of dominance efficiency analysis

There are two moments when the CFC evaluates efficiency claims:

- Merger review
- Abuse of dominance investigations

Although the types of efficiencies evaluated in each of these cases should be the same—allocative, productive/technical, dynamic, transactional—in reality the FLEC makes a distinction between the types of efficiencies that will be analyzed in a merger and those that may be considered in abuse of dominance investigations.

In the case of mergers, parties must demonstrate any of the following efficiency gains at any time during the merger review, *“up to one day after the matter has been listed for the Plenum’s session”*:

- I. Obtaining permanent resources savings that permanently allow them to produce the same amount of goods at lower cost or a greater quantity of the good at the same cost;*
- II. Realizing lower costs if two or more goods or services are produced together rather than separately;*
- III. A significant reduction in administrative expenses;*
- IV. The transfer of production technology and market know-how, and*
- V. The reduction of cost of production or sales arising from the expansion of an infrastructure or distribution network.”* Article 16, FLEC bylaws.

Thus the competition law puts the burden of showing efficiencies on the parties to the merger, while allowing them to be weighed into the analysis at any point in time.

In contrast, the rule of reason analysis in abuse of dominance cases, establishes that an infringement of the FLEC requires (1) that firms under investigation undertake acts, contracts, agreements, procedures or combinations, (2) whose actual or potential object or effect are any of the following: unduly displacing other firms from the market, substantially foreclosing their access or establishing exclusive advantages in favor of one or various persons, (3) that these behaviors fit one of eleven conducts established in the competition law, (4) that the analysis comply with Articles 11, 12 and 13 (that it occurs in a relevant market by a firm wielding substantial market power; that it follows a relevant market analysis, and a substantial market power determination), and finally (5) that efficiency claims are considered. Thus, efficiency claims come as a final filter of overall harm to the market, without it being explicit as to whether these are a competition defense or elements that the Commission may review in its analysis about the object or effect of the allegedly anticompetitive conduct:

*“To determine whether the practices referenced in this article should be penalized in terms of this law, the Commission will analyze efficiency gains resulting from the conduct as evidenced by firms and whose overall effect is favorable to the process of competition and free market access. These efficiency gains may include the following: the introduction of new products; the use of production leftovers or byproducts, or of defective or perishable products; reductions in costs that arise from applying new techniques and methods of production, the merging of assets, **increases in the scale of production and the production of different goods or services with the same factors of production; the introduction of new technological advances that result in the production of new or improved goods or services; the combination of productive assets or investments and their recovery through improvements in quality or increases in attributes for goods and services; improvements in quality, investments and their recovery, timeliness and service, whose incidence over the distribution chain is positive; that these do not result in significant price increases, or a significant reductions in the choices available to the consumer, or a similar reduction in the degree of innovation in the relevant market; as well as those [gains] that demonstrate that net improvements to consumer welfare arising from these practices exceed their anticompetitive effects.**” [Bolded text includes elements that are also included as efficiencies listed for merger review in the bylaws] Last paragraph of Article 10, FLEC.*

Thus, a superficial reading of the competition law, suggest that efficiencies considered in merger review are a subset of efficiencies considered in abuse of dominance investigations, since the latter also includes new product introduction, and better use of remnants and byproducts during the manufacturing process. In addition, efficiencies considered in abuse of dominance cases include a longer, more specific list of examples including reductions in costs that arise from applying new techniques and methods of production, as well as the merging of assets.

#### **4. Analysis of the differing standards of review for mergers and abuse of dominance in Mexico’s competition legislation**

##### **4.1 The type of efficiencies considered in merger review: static and/or dynamic?**

Efficiencies claimed in merger review, which must be provided by the parties, seem geared towards production/technical efficiencies, with the exception perhaps of the first efficiency mentioned in the bylaws. The first paragraph of Article 16 of the bylaws, addresses permanent savings obtained through permanent increases in productivity. In this case, the first efficiency considered by the CFC in merger review cases is a dynamic consideration, which highlights the importance placed by the Commission on the possibility of productivity growth brought about by a merger. Productivity increases are thus seen as important counterweight to potential concerns that the merger can bring about.

The other efficiencies considered in Article 16 of the bylaws exemplify reductions in costs—administrative costs, costs of learning reduced through the transfer of market know-how—and reductions that relate to the form of the firm’s cost function: the possibility of attaining economies of scope by a multiproduct firm, the possibility of technical change, and the possibility of exploiting economies of scale through expansions in infrastructure or a distribution network.

In sum, although the bylaws make no direct or indirect reference to static or dynamic efficiencies, the wording of Article 16 is sufficiently broad to accommodate possible defenses based on the latter type of efficiencies, such as Section I, which refers to permanent resources savings or permanent production increases, and even Section V, which refers to expansion of infrastructure and distribution networks.

##### **4.2 The type of efficiencies considered in merger review: do they vary by type of merger?**

In any merger review, analysis of efficiency claims differs between horizontal, vertical and conglomerate mergers. The efficiencies contained in the bylaws make no explicit reference about the type

of transactions that more commonly give rise to them and this gives the Commission much more flexibility when reviewing them.

As occurs in all jurisdictions, horizontal transactions are scrutinized more closely. In these cases, efficiency claims generally include economies of scale and possible redundancies. In the case of vertical mergers, efficiency claims are more easily recognized and generally include cost reductions, improvements in the supply or distribution chains, or reduced transaction costs. In these cases, the Commission needs to consider as a counterweight the ease with which, potential exclusionary behavior can take place and the likelihood of possible foreclosure in the market. Finally, potentially efficiency claims in conglomerate mergers may include economies of scope

As can be seen, all efficiencies mentioned above are considered within Article 16 of the bylaws of the FLEC.

#### **4.3 *The type of efficiencies reviewed in abuse of dominance cases***

It is important to highlight the fact that efficiencies in abuse of dominance cases are considered within the context of a structured rule of reason analysis. This means that anticompetitive effect is likely to be suspected and that, once this stage has been reached, the CFC is in a position to consider potentially pro-competitive effects. It is interesting to note that all pro-competitive effects according to the law can be subsumed in the last sentence of Article 10 of the competition law: “...those [gains] that demonstrate that net improvements to consumer welfare arising from these practices exceed their anticompetitive effects.” This is the first explicit reference in the law to consumer welfare. Thus, efficiencies claims in abuse of dominance cases must have a bias in favor of the consumer. One could reason, then, that technical efficiency and allocative efficiency claims that do not make a case for improvements in consumer surplus are, by law, not relevant as efficiency defenses on the part of an economic agent under investigation.

So far, however, there has not been made a clear-cut distinction between merger and abuse of dominance efficiency claims.

### **5. Conclusions**

This note contrasts the elements required under the competition law to analyze efficiencies derived from mergers and those associated with abuse of dominance conduct. It notes the different emphasis placed by the legislation on the types of efficiencies to be analyzed in each case and notes that, from the CFC’s decisions, it is unclear whether this distinction truly exists.

Unfortunately, there has been little opportunity for them to clarify any distinction since efficiency arguments have not been the basis for mergers and abuse of dominance cases.

In either case, of course, there are different incentives by firms to provide or disclose information about their efficiencies, even if in both cases it is clearly in the interest of economic agents to do so. The timeliness of a decision in a merger review, however, generally leads parties to more quickly and more fully provide evidence of efficiencies, including—in some case—to fully disclose their business case for a merger, including the buyer’s analysis of synergies and benefits resulting from the potential operation (both qualitative and quantitative information on efficiency claims).

The pressure to produce information quickly may not exist in abuse of dominance investigations, where, at least during the investigative phase, firms have scant interest in cooperating with the Commission and a business plan with this type of information will rarely exist or perhaps even produced. Nonetheless, this may change in the future with a maturing agency, that has managed to obtain more enforcement powers through changes to its law, has increased technical expertise and is pushing to develop this expertise both within and outside the CFC.

## NEW ZEALAND

### 1. Purpose

This paper sets out the New Zealand Commerce Commission's views on the role of efficiencies in antitrust proceedings.

### 2. Structure of this paper

We start by briefly setting out the legislative framework for mergers, agreements, and monopolisation and dominance. Following that, we answer the questions set out in the OECD call for country contributions where relevant to New Zealand.

### 3. New Zealand's competition law

The purpose of the Commerce Act 1986 (the Commerce Act) is to promote competition in markets for the long term benefits of New Zealanders. In particular, the Commerce Act prohibits:

- acquisitions of assets of a business or shares (mergers) if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market;<sup>1</sup>
- contracts, arrangements, or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market, and price fixing between competitors (agreements);<sup>2</sup>
- a firm with a substantial degree of market power from taking advantage of that power for the purpose of preventing, deterring or excluding competition (monopolisation and dominance);<sup>3</sup> and
- resale price maintenance.<sup>4</sup>

#### 3.1 *There is a voluntary clearance regime for mergers*

New Zealand has a voluntary clearance regime for mergers. Businesses can apply to the Commerce Commission (the Commission) for a clearance if they are in doubt about whether their proposed acquisition substantially lessens competition, or where they feel sure there is no substantial lessening of competition, but want the immunity provided by a clearance. Where the Commission is satisfied that an acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market it can clear the acquisition.<sup>5</sup> The clearance provides businesses with immunity from prosecution by the Commission or other parties provided the merger is carried out within one year of clearance being granted.

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<sup>1</sup> Section 47 of the Commerce Act 1986.

<sup>2</sup> Sections 27 and 30 of the Commerce Act 1986.

<sup>3</sup> Section 36 of the Commerce Act 1986.

<sup>4</sup> Sections 37 and 38 of the Commerce Act 1986.

<sup>5</sup> Section 66 of the Commerce Act 1986.

### **3.2 *The Commission can also authorise mergers and agreements where the benefits outweigh the detriments***

The Commission can grant an authorisation for a merger<sup>6</sup> or agreement<sup>7</sup> if it is satisfied it likely results in net benefits to New Zealanders.<sup>8</sup> This process allows not only an assessment of the competitive detriments from an acquisition or agreement, but also any countervailing public benefits.

In general, a public benefit is any gain to the public of New Zealand that would result from the proposed conduct,<sup>9</sup> and a detriment is any loss to the public arising as a result of a substantial lessening of competition. Section 3A of the Commerce Act makes clear that, when considering public benefits, the Commission is to have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct. The emphasis is on gains and losses that affect economic efficiency.

### **3.3 *Changes are proposed to the cartel provisions of the Commerce Act***

There is a Bill currently before the New Zealand parliament to criminalise cartel conduct.<sup>10</sup> The bill also proposes new collaborative activity exemption and clearance regime for cartel conduct. There seems to be a clear legislative intention to deter cartel conduct via criminalisation on the one hand, but to allow pro-competitive and efficiency-enhancing activities.

A collaborative activity is defined as where:

- two or more parties to the agreement carry on an enterprise, venture or other activity in trade in co-operation; and
- that enterprise, venture or other activity is not carried on for the dominant purpose of lessening competition between the parties;

The proposed clearance regime allows the Commission to give clearance to parties to enter into an agreement containing a cartel provision, where it is satisfied that:

- the applicant and any other party to the proposed agreement are or will be involved in a collaborative activity;
- the cartel provision in agreement is reasonably necessary for the purpose of the collaborative activity; and

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<sup>6</sup> Section 67 of the Commerce Act 1986.

<sup>7</sup> Section 58 of the Commerce Act 1986.

<sup>8</sup> Section 67(3)(b) of the Commerce Act: The Commission will authorise the acquisition if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. Section 61(6) of the Commerce Act 1986: The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(1) to (4) unless it is satisfied that— (a) the entering into of the contract or arrangement or the arriving at the understanding; or (b) the giving effect to the provision of the contract, arrangement or understanding; or (c) the giving or the requiring of the giving of the covenant; or (d) the carrying out or enforcing of the terms of the covenant— as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom.

<sup>9</sup> *Air New Zealand and Qantas Airways Limited v Commerce Commission* [2004] 11 TCLR 347 at [319].

<sup>10</sup> Commerce Act (Cartels and Other Matters) Amendment Bill 2011.

- the collaborative activity will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

We expect that in assessing whether there is a dominant purpose of lessening competition we are likely to consider whether there is an efficiency rationale for the collaborative activity.

#### **4. Taxonomy of efficiency claims and the scope for considering efficiencies under different areas of competition law**

##### **4.1 *What types of efficiency claims do you usually face when assessing a merger? Do they vary depending on the nature of the transaction, eg whether it is a horizontal, vertical or conglomerate merger?***

We rarely receive detailed quantitative efficiency claims in merger clearance applications. The clearance application process is primarily focused on assessing whether a transaction is likely to result in enhanced or preserved market power, rather than assessing efficiencies. In this context, merging parties' submissions about efficiencies in the clearance process tend to be qualitative, giving a sense of the business rationale for the transaction.

But, in principle, we can consider efficiencies balanced against any anti-competitive impacts.<sup>11</sup> In the clearance context, we have interpreted "efficiencies" as being merger and market-specific efficiencies that are likely to be passed through to consumers. These efficiencies could be variable cost savings that are likely to impact the pricing decisions of the merged entity, or dynamic efficiencies that are likely to result in increased demand for the merged entity's product. We are currently reviewing both our merger and authorisation guidelines, including our approach to efficiencies.

We do receive efficiency claims in merger authorisation applications, and we can consider any efficiency that is merger-specific; it need not be market-specific. The typical types of efficiency claims that are made are productive and dynamic efficiencies in the market in which the merger is taking place. Productive efficiencies are those cost savings that allow the merged entity to produce the same amount of output for a reduced amount of inputs. These can be either fixed or variable cost savings. They do not include any cost savings to the merged entity that are strictly redistributive (such as lower labour costs due to a relative increase in the use of lower cost labour).

For example, in 2011 the Commission authorised the acquisition by Cavalier Wool Holdings of all of the wool scouring assets of New Zealand Wool Services International.<sup>12</sup> This acquisition would result in only one wool scourer in New Zealand. The Commission found that there were likely to be considerable cost savings in wool scouring from rationalisation, lowering production and administration costs, freeing up industrial sites, and lower ongoing capital expenditure.<sup>13</sup>

Dynamic efficiency claims are less common, but also regularly made. These claims tend to take the form of an improved product with higher associated demand produced with the same amount of inputs as the pre-merger product. Claims that a new, lower-cost production technology will be developed post-merger have also been made. For example, the applicants in the Cavalier Wool Holdings authorisation

<sup>11</sup> *Fisher & Paykel v Commerce Commission*, [1990] 2 NZLR 731, 740; *Shell (Petroleum Mining) Company Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463, 531.

<sup>12</sup> Cavalier Wool Holdings Ltd and New Zealand Wool Services International Ltd (Commerce Commission Decision 725, 28 September 2011).

<sup>13</sup> This determination was appealed by Godfrey Hirst, a carpet manufacturer and customer of Cavalier, but was dismissed by the High Court.

claimed that the merger would improve the quality of their product (brighter scoured wool) through access to a superior wool scouring technique.<sup>14</sup>

Outside the market in which the merger is taking place, benefit claims can range from improved productive and dynamic efficiencies in related markets to public benefits such as reductions in pollution. For example, in Cavalier Wool, the Commission also found that cost savings in wool handling, a related but separate market from wool scouring, were likely.

The type of efficiency claim does not generally vary according to the nature of the transaction but vertical mergers raise the possibility of reducing allocative inefficiencies that arise as result of double-marginalisation. Such efficiency claims are not often made.

#### **4.2 *What kind of efficiency claims are you presented with in agreements?***

Conceptually, efficiency claims in investigations of agreements that substantially lessen competition would be similar to those made in merger clearance applications. The type of efficiency claims the Commission is presented with in applications to authorise agreements are generally similar those made in the case of merger authorisations: for the most part, productive and dynamic efficiencies. However, there is also scope for claims of public benefits that fall outside the market in which the agreement is to take place. Such claimed benefits must still be agreement-specific, in that they are unlikely to arise but for the agreement. For example, in the New Zealand Rugby Football Union authorisation<sup>15</sup> the applicants claimed that the proposed salary cap arrangement and player movement regulations would result more balanced competition and increase greater spectator enjoyment.

#### **4.3 *To what extent can efficiency claims be taken into account in dominance and monopolisation investigations? Do you have experience of such claims? Are the efficiency arguments put forward in such cases different from those you face in mergers and agreements?***

In New Zealand, monopolisation and dominance investigations focus on whether a business:

- possesses a substantial degree of market power; and
- is taking advantage of that power for a proscribed anti-competitive purpose.

Efficiencies are primarily taken into account when we assess whether a firm has taken advantage of its market power for a proscribed anti-competitive purpose. For a business to be “taking advantage” of its market power there needs to be a causal relationship between its substantial degree of market power and its alleged anti-competitive behaviour.

We test whether there is a causal relationship by asking whether the business would have behaved the same way if it did not have substantial market power, but was otherwise in similar circumstances. If it would have behaved the same way, there is no causal relationship and therefore the business has not taken advantage of its market power. This is sometimes referred to as the counterfactual test.

For example, a new entrant may decide to enter into an exclusive dealing arrangement with customers because it improves its productive or dynamic efficiency. If, over time, it acquires a substantial degree of

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<sup>14</sup> Cavalier Wool Holdings Ltd and New Zealand Wool Services International Ltd (Commerce Commission Decision 725, 28 September 2011).

<sup>15</sup> New Zealand Rugby Football Union Incorporated (Commerce Commission Decision 580, 2 June 2006).

market power and continues to exclusively deal with customers, then it would be unlikely to be taking advantage of its market power.

## 5. Assessing efficiency claims

### 5.1 *What kind of criteria do you apply when assessing efficiency claims? Are they specified in law, regulations or guidelines? Do they differ depending on whether the claims under consideration are prospective (such as in mergers and agreements) or are used to justify past or continuing conduct (such as in dominance cases)?*

For merger clearance applications and investigations into whether agreements substantially lessen competition, we assess whether claimed efficiencies are merger or agreement-specific, verifiable, and will be passed on to consumers. For authorisation applications for mergers or agreements, we assess whether claimed efficiencies are transaction-specific and verifiable.

The Commerce Act does not specify criteria the Commission use to assess efficiency claims for mergers, agreements and dominance cases, although various principles have been established by New Zealand courts. The criteria we apply (consistent with the case law) are set out in a combination of guidelines and application forms. For mergers, the criteria are set out in our merger clearance and authorisation application form, and guidelines. And for agreements the criteria are set out in our authorisation application form.

For example, our merger clearance application form specifically requests information about efficiencies.<sup>16</sup> It asks:

- If applicable, provide a description of any efficiencies that you believe the acquisition could bring. Would such efficiencies enhance rivalry, or offset the impact of a lessening of competition? Please include a full discussion on:
  - how the merger would facilitate the realisation of efficiency improvements. Specify the steps the combined entity anticipates it would take, and the timeframe needed, to achieve the efficiencies. Where relevant, include a discussion of the risks and costs involved;
  - the magnitude of the efficiencies, whether the impact would be on fixed, variable or other costs, and generally how the cost structure of the merged entity would change;
  - whether such efficiencies could be realised without the merger, or over a longer timeframe; and
  - whether, and the extent to which, such efficiencies would be passed on to the customers of the merged entity.”

For both clearances and authorisations, claimed efficiencies and other benefits must be merger-specific, meaning that they are not likely to be obtainable by some other means. This does not mean that the Commission normally second-guesses the business decisions of the parties. But it must be the case that the claimed efficiencies would not have likely arisen absent the transaction, or would not be achieved through some other obvious means that do not raise competition issues.

In addition, the claimed efficiencies must be established on the balance of probabilities. To make this assessment, the Commission requires comprehensive, detailed submissions and corroborating evidence in every case. The more distant claimed future benefits, the less weight the Commission will tend to attach to

<sup>16</sup>

<http://www.comcom.govt.nz/clearances/>

them as uncertainty about their magnitude will tend to increase over time. Future benefits are discounted to present day value.

In all authorisation cases, claimed benefits are counted on a net basis, meaning that any costs incurred to achieve the claimed benefits are netted out.

As previously noted, any claimed productive efficiency must involve a real cost savings, meaning that, relative to pre-merger, fewer inputs are used to produce a set amount of output. More generally, transfers between suppliers and buyers across the various supply and purchase chains are treated as neutral. The possible exception to this is for benefits that flow overseas.

Since the focus of the authorisation process is the effect on the New Zealand public, items such as profits paid to overseas shareholders resulting from increased market power over sales made to New Zealanders may be regarded as detriment to the public. Similarly higher prices to non-New Zealanders such as tourists may be seen as a benefit. The Commission considers possible negative feedback (and so countervailing) effects of such as decision in deciding whether to treat transfers to non-New Zealanders as non-neutral. For example, in the case of non-neutral treatment of transfers to foreign shareholders, a possible consideration may be the impact of such a decision on overseas investment in New Zealand. Similarly, higher prices to tourists as a result of an agreement may result in fewer tourists coming to New Zealand, suggesting that such a transfer is not necessarily beneficial.

As previously noted, in dominance cases efficiencies are considered by way of the counterfactual test.

**5.2 *How do the criteria you apply affect how you assess efficiency claims? Does the welfare standard you apply lead to a narrower or larger set of permissible efficiency claims than would otherwise be the case?***

We use a net benefits standard that is wider than total surplus for authorisations. We are able to consider benefits outside the directly-affected market, but only detriments in the directly-affected market. This is because the courts have interpreted the test to confine detriments to those losses arising from any lessening of competition in the directly-affected market. As a result, there is a larger set of permissible efficiency claims for authorisations for mergers or agreements. We are able to consider efficiencies that are not passed through to consumers both in and outside the directly-affected market.

**5.3 *What kind of evidence do you use to validate efficiency claims? What kind of evidence would you ideally like to be presented with when analysing efficiency claims?***

We consider a wide range of evidence when assessing efficiency claims, and the evidence varies depending on the case. For example, in the recent Cavalier Wool Holdings authorisation we assessed claims that the merger would result in dynamic efficiencies from the ability of the merger entity to produce scoured wool with greater brightness, using the superior scouring techniques of Cavalier Wool Holdings. We considered evidence from industry experts, internal documents including testing data, evidence from customers on wool quality, and whether the claimed benefits would be achieved absent the merger.

The best evidence of efficiency claims will often be internal company documents prepared in the ordinary course of business. This includes plant and firm-level accounting statements, internal studies, strategic plans, integration plans, management consultant studies and other available data. Firms' previous experience with achieving similar efficiencies in case of, for example, a past merger can also be relevant to the Commission's assessment. Evidence can be quantitative and qualitative.

**5.4 Do you usually carry out a quantitative assessment, eg in merger cases, about whether the size of the efficiencies that are claimed is large enough to balance anti-competitive effects (such as higher prices)? Or do you rely on a more qualitative assessment? What is the time horizon you consider?**

We have not, to date, carried out quantitative assessment of efficiency claims in merger clearance applications, as efficiency claims are usually only made qualitatively as part of the business rationale for the merger.

But for authorisations, the court has said that we should carry out a quantitative assessment where we can.<sup>17</sup> As such we do carry out a quantitative assessment for authorisations (both for mergers and agreements). But the claimed efficiencies need not always be measurable. The Commission recognises that efficiencies and other benefits to the public do not always lend themselves to quantification. The Commission considers non-quantifiable benefits in its overall assessment of benefits. As with quantifiable benefits, the Commission also assesses whether the claimed non-quantifiable benefits are merger or agreement-specific, whether there any costs to achieve such benefits, and whether any resulting savings are real and not merely re-distributional.

There is not a set time horizon over which efficiencies are considered. For merger clearance applications we would probably consider a two year time horizon. In the case of authorisations, the timeframe tends to be bound by the life of the agreement. More generally, as previously noted, the Commission discounts future efficiencies claims to present day value, and the more distant claimed future benefits, the less weight the Commission will tend to attach to them.

**5.5 To what extent are you allowed (or willing) to consider efficiencies that can materialise in a market other than the one that is directly affected by a specific transaction, eg a merger? Can such efficiencies offset any anti-competitive effects (such as higher prices) in the directly-affected market? Would you consider efficiencies that only benefit some, but not all, consumers?**

We can consider efficiencies in other markets in applications for authorisations. While the claimed efficiencies and other benefits must be transaction-specific, the benefits arising from the merger need not take place in the same market as the transaction. These efficiencies can offset any anti-competitive effects in the directly-affected market. For example, as already noted, in the New Zealand Rugby Football Union authorisation<sup>18</sup> the applicants claimed that the proposed salary cap arrangement and player movement regulations would result more balanced competition and increase greater spectator enjoyment.

Where the claimed benefits are only indirectly linked to the transaction, the Commission will consider:

- whether clear causal links exist between the provisions and the claimed benefits, including all stages or steps that must occur for the provisions to result in the claimed benefit;
- information on the likelihood of, and the factors that give rise to, each necessary stage or step;
- information on possible alternative outcomes, including possible costs or benefits associated with these alternative outcomes; and
- information on other possible indirect outcomes of the arrangements.

<sup>17</sup> *Telecom Corporation of New Zealand v Commerce Commission* [1992] 3 NZLR 429 at [447].

<sup>18</sup> *New Zealand Rugby Football Union Incorporated* (Commerce Commission Decision 580, 2 June 2006).

In general, the more indirect a claimed benefit, the more likely it is to be speculative and so the greater the requirement for substantiation.

We would consider efficiencies that benefit only some but not all consumers. In the case of authorisation these efficiencies (and other benefits) would need to outweigh the detriment to competition. Given the need to be satisfied that a substantial lessening of competition is unlikely before clearance can be granted, it is unlikely that we would grant a clearance on the basis of efficiencies flowing only to some consumers if that was at the expense of lessened competition for other consumers.

## **6. Process issues**

### **6.1 *If the burden of proof is put solely on the parties, is there not a risk that competition authorities may block a transaction (eg a merger or joint venture) or punish a conduct that possibly brings about sizeable gains for consumers and society, only because firms have either not identified or provided sufficient evidence for the efficiency claims they make?***

Clearly, it is important to balance risk of chilling efficiency-enhancing transactions or conduct against the risk of allowing anti-competitive transactions or conduct.

Our parliament has decided that the onus should fall on applicants where they seek clearance or authorisation. Where they do not, the onus falls on us to prove a merger or an acquisition substantially lessened competition. However, even in that context, the evidential onus would be on defendant to establish an efficiencies justification (defence) to our claim.

The policy position taken appears sensible. Given that there is an information asymmetry between competition authorities and businesses, it seems appropriate to place the burden of proof on the parties. They are best placed to be able to identify, and provide evidence of, efficiencies.

However, we strongly encourage parties to use the pre-notification discussions for clearance and authorisation applications to discuss what evidence would be useful to provide. In addition, our merger guidelines explain how we can take efficiencies into account. And both our clearance and authorisation application forms specifically request information about efficiencies.

### **6.2 *Should efficiencies be considered at the stage when the competitive effects of the transaction or practice under consideration are assessed? Or should they be taken into account at a later stage, ie once anti-competitive effects have been established? Does such a procedural choice make any difference?***

We would consider efficiencies as part of the competition analysis in merger clearance applications, as they may mean that the merger does not in fact substantially lessen competition.

When considering applications for authorisation, the Commission must first determine whether the practice would result, would be likely to result, or is deemed to result, in a lessening of competition<sup>19</sup> in the relevant market(s). Only if this threshold is met do we then determine whether the practice will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening of competition. If it is not satisfied that this is the case, then it will decline the application.

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<sup>19</sup> The threshold is different depending on whether we are considering a merger or agreement. We consider whether there would be a substantial lessening of competition for merger authorisations, and lessening of competition for agreement authorisations.

In practice, we are flexible in our approach to authorisations. For merger authorisations we often consider efficiencies early on as it can improve the speed with which we make determinations, and enable businesses to proceed swiftly with proposed mergers or agreements. But we have often taken a staged approach for authorisations of agreements. If there is no lessening of competition then we do not jurisdiction. The staged approach enables us to focus resources on those cases that are likely to raise competition concerns and reduce the burdens on business.

## **7. Ex-post assessment of efficiency claims**

### **7.1 *Have you ever carried out (or commissioned from an external organisation) any ex-post assessment of whether efficiency claims in specific cases eventually materialised. What were the main motivations to carry out or commission such an assessment?***

We do regularly conduct ex-post evaluations of merger clearance cases. The purpose of these evaluations is to test our analytical frameworks for merger analysis, and whether our decision to clear a merger was correct. However, the cases we have reviewed have not involved efficiency claims, as we never had to consider these in detail as part of a clearance application.

We use the following criteria to select a case for review:

- the merger clearance occurred at least two years ago, to allow sufficient time to elapse to enable us to assess the competition effects from the merger
- the merger clearance occurred no more than five years ago, due to potential difficulties in tracking people down if they have moved to other employment
- there is no ongoing competition inquiry into the market
- the merger raised significant competition issues, so as to maximise opportunities for lessons learnt.

We certainly would consider efficiencies under the final criterion.

### **7.2 *What methodology was used for that assessment? What evidence? What was the source of your data? To what extent were the methodology and evidence used in the ex-post assessment of efficiency claims different from those you used in assessing an ‘efficiency defence’ in dominance cases.***

The Commission’s approach to ex-post reviews involves interviewing industry participants, particularly customers, to determine any significant changes to the market since the merger and the reasons for those changes. We assess whether there has been any loss of competition in the market since the merger, and, if so, how the market had responded to this. We also explore with interviewees what, in their view, were the most important competitive constraints in the market. We compare these with the reasons cited by the Commission for clearing the merger.



## RUSSIAN FEDERATION

The Russian competition legislation provides for a possibility of using “efficiency claims” or “efficiency defense” and application of the effect based approach to most of the restraints to competition except cartel agreements. The latter are considered as illegal per se. The legal provisions related to the efficiency claims are described below in more detail.

The federal law of 26.07.2006 No. 135-FZ «On Protection of Competition» (further – the Law on protection of competition) defines institutional and legal foundations of protection of competition, including prevention and restriction of monopolistic activity and unfair competition; prevention, restriction, elimination of competition by federal executive authorities, public authorities of subjects of the Russian Federation, local governments, other bodies or organizations carrying out functions of the specified bodies, and also state off-budget funds, the Central bank of the Russian Federation.

With a purpose of protection of competition and creation of conditions for effective functioning of commodity markets the Law on protection of competition establishes prohibition of certain actions (lack of action), agreements, concerted actions, transactions, other actions limiting the competition.

At the same time Article 13 of the Law on protection of competition establishes criteria of permissibility of actions (lack of action), agreements, concerted actions, transactions, other actions restriction of which is established by the antimonopoly legislation. Establishment of such criteria of permissibility corresponds to provisions of the antimonopoly law of the European Union.

*According to part clause 1 of Article 13 of the Law on protection of competition actions (lack of action) of economic entities provided for in part 1 of Article 10 of this Federal Law (except actions (lack of action) stated in clauses 1 (except fixing or maintaining price of the goods, which are the results of innovative activities), 2, 3, 5, 6, 7 and 10 of Part 1 of Article 10 of this Federal Law), agreements and concerted actions provided for in Parts 2 – 4 of Article 11, Article 11(1) deals, other actions provided for in Articles 27-30 of this Federal Law can be recognized as permissible if such actions (lack of action), agreements and concerted practices, transactions, other actions do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of these actions (lack of action), agreements and concerted practices, transactions, other actions on the participants or third persons and also if they result or can result in:*

- 1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market*
- 2) obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (lack of action), agreements and concerted practices, transactions, other actions.*

*According to part 1.1 of Article 13 of the law on protection of completion agreements of economic entities about joint activities that can lead to the consequences specified in Part 1 Article 11 of this Federal Law, can be allowed, if such agreements do not create possibility for certain persons to eliminate competition on the relevant goods market, do not impose restrictions upon third parties, and such agreements result or can result as a whole:*

*1) improving production, sales of goods or stimulating technical, economic progress, or direct investments by participants within the territory of the Russian Federation (particularly, introducing new production capacities, upgrading the current production capacities);*

*2) buyers obtaining advantages (benefits) comparable with advantages (benefits), advantages (benefits) obtained by economic entities as a result of actions (lack of action), agreements and concerted practices, transactions.*

It is necessary to note that agreements of economic entities (including actual or potential competitors in the commodity market), including the agreements concerning creation of joint venture, and other agreements concerning joint activity of economic entities, with or without launching a legal entity within the territory of the Russian Federation, realization which can lead to the consequences listed in points 1 and 2 of part 11 of Article 13 of the Law on protection of competition and concluded in accordance with the Russian or foreign law can be corresponded to agreements about joint activity.

Provisions of agreements which don't correspond to the nature of joint activity from the point of view of the product and territory on which these restrictions extend can't be admitted as permissible.

In particular, provisions of agreements that mean the following can't be admitted as permissible:

- Joint establishment/coordination by the parties of the agreement of prices for any production, except production made within joint activity or on capacities of joint venture. In case realization of such production is carried out by the parties not jointly but independently, the coordination of prices for it also can't be recognized as permissible;
- Division of the commodity market among parties of the agreement beyond the territorial boundaries of the commodity market where the joint venture operates;
- Restriction of volume of production and realization if it doesn't concern the production made by means of capacities of the joint venture (production made in the frameworks of joint activity), and also those territorial boundaries of the commodity market within which the joint venture operates;
- Exchange of information on costs of production, profitability or prices for production which is made independently by participants of the agreement outside the limits of joint activity (including information on planned values of these indexes);
- Accrual by the parties of the agreement of obligations performance of which can lead to violation of Article 10 of the Law on protection of competition;
- Refusal of the parties of the agreement (and/or of the joint venture) from participation in other (investment and other) projects connected with production or sale of goods, the agreement made or realized by the parties within the joint activity or joint venture, except the obligation previously to notify the second party of the agreement on intention to participate in such projects or obligations not to take independent part in such project if only the second party didn't refuse to participate previously in it in common.

In the analysis of the agreements on joint activity, involving refusal of their parties from the competition, it is necessary to evaluate potential positive and negative consequences arising as a result of their conclusion and implementation for subjects operating in the market. Only those agreements could be recognized valid, as a result of which:

- possibility to eliminate the competition in the relevant commodity market is not created for the parties of the agreements;
- restrictions are not imposed on third parties;
- improvement of production, realization of goods or promoting technical and economic progress, or the implementation of direct the investments on the territory of the Russian Federation by its participants take place.
- customers receive the advantages (benefits), proportionate to the advantages (benefits) obtained by the parties as a result of agreements implementation.

The above-mentioned conditions must be observed in the aggregate, otherwise the agreement on joint activity cannot be recognized as eligible in accordance with part 11 of article 13 of the Law on Protection of Competition.

In order to recognize agreements specified in part 11 of article 13 of the Law on Protection of Competition eligible, it is necessary, that considered agreement resulted in or could result in the aggregate in:

First, improvement of production, realization of goods or promoting technical and economic progress, or the implementation of direct the investments on the territory of the Russian Federation by its participants (including the introduction of new production capacities, modernization of the existing production capacities).

Thus, only that agreement could be recognized eligible, which contains requirement to both parties of the agreement on implementation of:

- either direct investments in new production facilities;
- or investments in modernization of the existing production facilities;
- or investments in research and development activities with further joint application of the such work products.
- or investments in the introduction of new advanced technologies of production and / or distribution of goods;
- or investment in marketing and promotion of new products.

Investments could be made in the form of cash, securities, equipment and other tangible assets, as well as intangible assets, if such intangible assets could be estimated at market value. If one party of the agreement carries out investments in the form of intangible assets (patents, trademarks, etc.), and the second part - in the form of tangible assets, the value of such investments should be comparable. It is possible to use as a criterion the ratio of shares in the authorized capital of the joint venture, which will be in possession of each of the parties of the agreement. If investments of each of the parties correlated in the same proportion as they own shares in the authorized capital of the joint venture, then this agreement can be considered as an agreement on joint activities, which can be recognized eligible in accordance with part 11 of article 13 of the Law on Protection of Competition.

Improvement of production and realization of goods can be achieved through:

- avoiding duplicative costs;
- achieving savings from scale or diversity;
- combination of complementary assets and know-how;
- introduction of new technologies.

Criterion that allows to distinguish between modernization of facilities and current repairs or reconstruction, should be considered as the ratio of the volume of investments made to the current value of the modernized equipment. The current value of the equipment, depending on the availability of relevant data, can be estimated on the basis of one of the following indicators:

- market value;
- replacement cost;
- initial value (adjusted for inflation);
- residual value, if currently not more than half of the useful life of the equipment is over.

Data on the cost of equipment can be found, in particular, from the inventory cards.

Modernization of production capacity indicates the ratio of investment to the current cost of equipment in excess of 30%.

Second, benefits which are received by consumers and which are proportionate to the benefits obtained by the economic entities in the result of actions (inaction), agreements, and concerted practices and transactions.

There may be the following positive results from agreements on joint operations for consumers:

- improvement of the goods distribution system;
- price decrease (as a consequence of production costs reduction and goods distribution);
- saturation of the market with goods;
- diversification;
- improvement of the quality of goods;
- entry of new products;
- reduction of time needed to gain access to the goods;
- provision of the necessary information about the goods, which allows consumers to make informed choices, etc.

If the benefits resulting from the implementation of an agreement on joint operations, which contains the provision for restriction of competition, are received only by the Parties of such agreement, the agreement may not be considered valid in accordance with paragraph 11 of Article 13 of the Law on Protection of Competition.

In order to assess the comparability of benefits of the buyers and the agreement's parties, the parties of the agreement on joint operations submit explanations and feasibility studies, including calculations, (along with the application to verify the draft agreement in written form with the antimonopoly legislation in accordance with Article 35 of the Law on Protection of Competition or at request of the competition authority) allowing the competition authority to assess the proportionality of the benefits that are received by customers, to the benefits of the parties to the agreement as a result of its implementation.

Part 2 of Article 13 of the Law on Protection of Competition establishes the right of the Government of the Russian Federation to determine the cases of permissibility of agreements meeting the conditions stated in Clauses 1 and 2 of Part 1 of Article 13 of the Law on Protection of Competition (general exemptions). General exceptions in relation to agreements and concerted practices stated in Parts 2-5 of Article 11 of the Law on Protection of Competition are provided for by the Government of the Russian Federation on proposal of the federal antimonopoly authority are introduced for a specific period of time and provide for:

- type of agreement;
- conditions which cannot be considered as permissible in regard to such agreements;
- obligatory conditions for ensuring competition which should be contained in such agreements.

Besides, general exemptions can provide for other conditions which agreements should meet, alongside with the conditions indicated in Part 2 of Article 13 of the Law on Protection of Competition.

In accordance with the above provisions of the Law on Protection of Competition the Decree of the Government of the Russian Federation of April 30, 2009 No.386 "On Cases of Permissibility of Agreements between Credit and Insurance Companies" and the Decree of July 16, 2009 No.583 "On Cases of Permissibility of Agreements between Economic Entities" (hereinafter - the Decree No.583), which approve the general exemptions for certain agreements, as well as the right of the parties to these agreements to apply to the antimonopoly authority with the application for verification of compliance of the draft agreement with the general exemptions.

General exemptions to agreements between buyers and sellers, approved by Decree No.583, provides, in particular, for the following.

The agreement made between economic entities, by which one of the parties gets the goods or is a potential purchaser (buyer), and the other one provides a product or is a potential vendor (seller), is permissible in accordance with the above general exceptions, if all of the following conditions are met:

- the seller sells the product to 2 or more customers and has a market share of less than 35% or in accordance with an agreement, it sells the goods to a single buyer, whose share of the market for this product is less than 35%;
- the buyer and the seller do not compete with each other or compete in the goods market in which the buyer purchases the goods for its subsequent sale;
- the buyer does not produce goods, that are interchangeable with respect to the goods that are the subject of an agreement.

The conditions of the agreement between the buyer and seller which may not be considered valid are the following:

- the conditions restricting the buyer to determine the price at which it sells the product to other persons, including the condition of minimum resale price or a fixed price of resale;
- the conditions providing for the waiver of the buyer to sell the goods at a location determined in the agreement, and (or) to customers, related to a particular category in the agreement, except for:
  - conditions prohibiting the buyer (except for retail organizations) to promote and sell goods in the territory, which is an agreement between the seller and the buyer otherwise identified as the area within which only a buyer has the right to sell the goods;
  - conditions prohibiting the buyer to advertise and sell goods in the territory in which the seller carries out the sale of the goods in accordance with the agreement;
- terms that restrict the vendor to sell by retail goods (that are spare parts or components of the product produced by the purchaser and correspond to the requirements of technical regulations or was assessed according to the laws of the Russian Federation) and to sell such goods to the specialized repair or service units inclusive of the units that are not authorized by the purchaser to repair or service the produced goods;
- terms that prohibit the purchaser to produce, buy and (or) sell goods that are interchangeable or substitutes to the goods the purchaser buys or can buy in accordance to the agreement (substitute goods), exclusive of the following cases:
  - if such terms were prescribed in the agreements concluded prior to entry into force of the Resolution № 583 (in this case such terms are considered permissible until the agreement end date, but no longer than the period of 3 years since entry into force of the Resolution);
  - if such terms are prescribed for the period less than 3 years since the date of conclusion of the agreement between the purchaser (exclusive of the retail units) and the seller and in case if previous agreements between them did not have such terms;
  - prohibition of substitute goods sale on land plot and (or) the premises that was transferred to the use of purchaser by the seller on the legitimate grounds;
- terms imposing the purchaser to buy from the seller more than 50% (in cost terms) of the total quantity of goods inclusive of substitute goods that the purchaser buys per annum exclusive of the following cases:
  - if such terms were prescribed in agreements concluded prior to entry into force of the Resolution № 583 (in this case such terms are considered permissible until the agreement end date, but no longer than the period of 3 years since entry into force of the Resolution);
  - if such terms are prescribed for the period less than 3 years since the date of conclusion of the agreement between the purchaser (exclusive of the retail units) and the seller and in case if previous agreements between them did not have such terms;
  - prohibition of substitute goods sale on land plot and (or) the premises that was transferred to the use of purchaser by the seller on the legitimate grounds;
- terms imposing the purchaser to include in agreements of further sale of goods clauses that prohibit the resale of goods.

Having in mind ensuring of competition protection in agreement between the purchaser and the seller (which determine the territory where only the purchaser have the right to sell goods) the terms determining purchaser's rejection to conclude agreements with vendors of substitute goods that prescribe geographically equal or partly equal territory.

In case after the agreement conclusion between the purchaser and the seller the market share of the purchaser is over 35%, the Resolution № 583 is applicable to the above mentioned agreement for the duration of 6 month after the end of the calendar year in which the share increased the threshold of 35 %.

The legal provisions described above have been used in the practical competition law enforcement in Russia. The cases described below can serve as examples of using the efficiency defense in the Russian competition law enforcement.

## 1. Efficiency claims practice

Application of CJSC MMVB (MICEX) to acquire the rights that permit to determine conditions of activities by JSC "RTS", to acquire 100 % of the "RTS" voting shares, to acquire 100 % of the non-commercial organization CJSC "RTS Clearing House" voting share, 100 % of the CJSC "RTS Coordination center" voting shares, 97,76% of the JSC "DCC" voting shares, on restructuring of the CJSC "MICEX" by acquisition of JSC "RTS".

September 9<sup>th</sup>, 2011 the FAS Russia satisfied the application of CJSC MMVB (MICEX) to acquire the rights that permit to determine conditions of activities by JSC "RTS", to acquire 100 % of the "RTS" voting shares, to acquire 100 % of the non-commercial organization CJSC "RTS Clearing House" voting share, 100 % of the CJSC "RTS Coordination center" voting shares, 97,76% of the JSC "DCC" voting shares, on restructuring of the CJSC "MICEX" by acquisition of JSC "RTS".

CJSC "MICEX" in the process of restructuring was planning to do the following:

- to acquire the rights that permit to determine conditions of activities by JSC "RTS";
- to acquire 100 % of the "RTS" voting shares (the size of the pack of hare depend on the intention of "RTS" share holders to sell such shares);
- acquisition by CJSC "MICEX" of shares that are in possession of JSC "RTS" of the following legal entities:
  - JSC«Deposit Clearing Company» (97,76%);
  - the non-commercial organization CJSC "RTS Clearing House" (100%);
  - 100 % of the CJSC "RTS Coordination center" (100%);
- restructuring of the CJSC "MICEX" by acquisition of JSC "RTS".

The objective of the transaction in question was to develop the market of financial derivatives in Russia, to increase the number of investors through creating a unified infrastructure for the exchange market, the central settlement depository and the central counteragent.

When the application was submitted, the MICEX Group and the RTS OJSC were competing on the market of services of organizing a trade of securities and financial derivatives, the National Settlement

Depository (hereinafter “NSD”) and the Depository Clearing Company (hereinafter “DCC”) were competing on the depository market.

Taking into account all the aforementioned, to make a decision the Department analyzed the following commodities markets:

- market of services of organizing a trade of securities and financial derivatives;
- market of depository services.

During the analysis, it was found that after the MICEX acquired the rights that give possibility to influence terms and conditions for entrepreneurship of the RTS, the level of concentration on the market of services of organizing a trade of securities and financial derivatives will increase significantly.

The transaction at issue will result into 99,999% of the accumulated share of the MICEX and the RTS, the level of concentration on the market of services of organizing a trade in the securities segment will increase.

Thus, the transaction in question might cause restriction of competition on the market of services of organizing a trade in the securities segment in Russia as a result of strengthening of dominance of the MICEX group of persons.

After the MICEX acquires the rights giving opportunity to influence terms and conditions of entrepreneurship of RTS, the level of concentration on the market of services of organizing a trade of financial derivatives will increase significantly.

The transaction at issue will result into 99,60% of the accumulated share of the MICEX and the RTS, the level of concentration on the market of services of organizing a trade in the financial derivatives segment will increase.

Thus, the transaction in question might cause restriction of competition on the market of services of organizing a trade in the derivatives segment in Russia as a result of strengthening of dominance the MICEX group of persons.

After the MICEX acquires 97,76% of voting shares of DCC the level of concentration on the market for depository services in the segment of settlement depositories will increase significantly.

After the transaction the accumulated share of the MICEX and the RTS will amount to 99,94%, the level of concentration on the market of services of organizing a trade in the securities segment will increase.

So, the transaction in question might cause restriction of competition on the market of depository services in the segment of settlement depositories in Russia as a result of strengthening of dominance of the NSD.

Alongside with that the MICEX Group and the RTS were the biggest exchanges in Russia. The MICEX Group’s main activity was organizing a securities trade, and the main activity of RTS was organizing a financial derivatives trade. So, in the opinion of the Department, the merger of the MICEX and the RTS will allow to launch a single exchange for trading both securities and financial derivatives. Moreover, due to the integration of the settlement depositories and the clearing centers of the MICEX Group and the RTS Group it is possible to create a unified infrastructure to render services to the participants of the securities market.

Unifying the MICEX and the RTS will allow to involve new participants of tenders, and issuers willing to list their stocks at the stock market, which could affect the liquidity of the traded instruments.

Increasing liquidity will allow to interest investors, and to provoke the issuers to list their securities in Russia, and to interest the participants of the securities market to trade and to attract money to the Russian stock market. The aforementioned benefits will allow the Russian stock market to become a leader in the CIS, and to compete with global stock exchanges in the sphere of attracting customers and financial resources to the Russian stock market.

Taking into account all the aforementioned and the provisions of Part 1 Article 13 of the Law on Protection of Competition, the FAS Russia decided both to satisfy the application and to issue an order, in accordance with which MICEX, Stock Exchange MICEX CJSC, RTS OJSC, NSD CJSC and DCC CJSC are entitled to change the effective tariffs for their services and to set the new ones only subject to their prior approval by the customers.

Thus, the MICEX, the Stock Exchange MICEX CJSC and the RTS OJSC (before the reorganization in a form of accession to the MICEX) were ordered:

- to establish consultative bodies to render services of organizing a trade of shares, equity interests, bonds (excepting state bonds), financial derivatives, repurchase agreements with participation of consumers of the respective services;
- to include into the body not fewer than 15 representatives of the consumers of each of the aforementioned service, which the trade circulation is not less than 50% of the overall annual volume of the concluded transactions with the respective financial instruments. Alongside with that there to be not fewer than  $\frac{3}{4}$  of the overall number of members of such a body;
- to decide on increase and/or fixing of the tariffs on services of organizing a trade of shares, equity interests, bonds (excepting state bonds), financial derivatives, repurchase agreements upon the prior approval of such decisions by the respective consultative body by the majority of  $\frac{3}{4}$  of votes.

Alongside with that, the NSD and the DCC were ordered to:

- to establish consultative bodies with participation of the representatives of consumers of depository services in ratio not less than  $\frac{3}{4}$ , which ensure not less than 55% of the annual income from the depository transaction of the respective organization;
- to decide on increase and/or fixing of the tariffs on depository services upon the approval of such decisions by the respective consultative body by the majority of  $\frac{3}{4}$  of votes.

These measures will allow to eliminate the abuse of dominance by the MICEX, the Stock Exchange MICEX CJSC and the NSD and will not allow to fix unreasonably high prices for services.



## SOUTH AFRICA

### 1. Introduction

This submission seeks to demonstrate the approaches that are employed by South African competition authorities<sup>1</sup> when assessing efficiencies in both merger control and enforcement cases. The South African Competition Act (no. 89 of 1998) (“the Act”) addresses efficiencies within a total welfare standard framework. The jurisprudence in this regard has largely been developed through mergers, the most recent and significant of which being the Pioneer-Pannar transaction which we discuss extensively below. This case is particularly interesting because the claimed efficiencies occurred in an innovation market involving both static and dynamic efficiencies, and these arguments put forward by the parties were tested at the Tribunal and the Competition Appeal Court. We also briefly look at what is a relatively limited jurisprudence on efficiency claims in enforcement cases in South Africa, as well as efficiency justifications in exemption applications.

### 2. Efficiencies in merger cases

Section 12A of the Act requires the authorities to determine whether a merger that is likely to result in a substantial prevention or lessening of competition could result in any technological, efficiency or other pro-competitive gains that would not likely result absent the merger, which will be greater than, and offset, the effects of that prevention or lessening of competition.

The Tribunal’s decision in October 2000 on the merger between Trident Steel (Proprietary) Limited and Dorbyl Limited<sup>2</sup> (“Trident/Dorbyl”) developed the framework to be applied in mergers that turn on efficiency claims. This merger was approved based on the finding that the efficiency gains that were likely to arise from the merger outweighed the anti-competitive effects that the Tribunal ruled would result from this merger to monopoly in the market for Improved Surface Finish (ISF) steel products. The central findings of the Tribunal were as follows:

- The burden of proof lies with the merging parties, who have the most information in this regard, to show that efficiencies could not occur through some other agreement or arrangement;
- Efficiencies fall along a continuum with innovation or R&D efficiencies as the most beneficial; production efficiencies lying between innovation and pecuniary efficiencies; and pecuniary efficiencies which are not ‘real’ cost savings at the other end<sup>3</sup>;

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<sup>1</sup> The Competition Commission (“Commission”) is primarily mandated with investigating both merger cases and enforcement cases. The decisions of the Commission in small and intermediate mergers are immediately reviewable by the Competition Tribunal (“Tribunal”), which is a specialist adjudicating court. The Commission takes a decision to either refer or non-refer an enforcement matter for adjudication at the Tribunal based on the merits of the case. Beyond the Tribunal, there are three layers of appellate courts namely, the Competition Appeal Court (“CAC”), the Supreme Court of Appeal (“SCA”) and ultimately the Constitutional Court (“ConCourt”).

<sup>2</sup> Case Number: 89/LM/Oct00. Also see “Impact Evaluation of Merger Decisions: Submission of South Africa for Competition Committee Roundtable, 29-30 June 2011”.

<sup>3</sup> In another transaction, the *Tongaat-Hulett Group Ltd and Transvaal Suiker Bpk & Others* Case Number: 83/LM/Jul00), the Tribunal also suggested that the types of efficiencies considered would be those that, for

- Efficiency gains are sometimes not capable of measurement. Where quantifiable, they may also not be measurable on the same scale and there is no formulaic approach that can be applied. Authorities are required to exercise their discretion; and
- The Tribunal’s interpretation accounts for consumer pass through even within a total welfare framework by arguing that there is an inverse relationship between real economies and benefits to consumers in the form of lower prices.<sup>4</sup> However, the argument presented invokes a broad proportionality test in which showing evidence of a pass through to consumers is not necessary when there are real efficiencies. This approach seems to rank real efficiencies and total welfare above consumer surplus gains, although they are certainly still considered.

## 2.1 *Types of efficiencies*

In *Trident/Dorbyl*, dynamic and static production efficiencies are seen as “real” efficiencies and these pertain to plant efficiencies, distribution, procurement or capital cost economies, cost-reducing specialisation, and research and development, whereas the third category of pecuniary efficiencies such as tax or input cost savings are not real economies.<sup>5</sup> Importantly, the Tribunal noted that only efficiencies that are “significant or enduring” are of importance to the assessment of efficiencies in merger cases.

## 2.2 *Total welfare or consumer welfare standard*

The South African Act broadly applies a total surplus or welfare standard for assessing merger efficiencies. The Tribunal has suggested that, although important, evidence of consumer pass through is perhaps less critical than establishing real economies which would generally accrue directly to consumers. It is only when the dynamic and production efficiencies put forward achieve only “less compelling economies” that firms must show benefits to consumers, which must be non-trivial even if they are not wholly passed on.<sup>6</sup>

The emphasis in South African cases has therefore been on merger-specific real efficiencies which are of course more difficult to verify and thus imply more uncertainty on the part of both authorities and parties. In balancing these efficiencies claimed against the anti-competitive effects, the approach generally adopted by the Tribunal (and the Commission) is not formulaic, but rather relies on applying discretion in relation to the factors discussed in this section.

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example, evidence new products or processes that will flow from the merger of the two companies, or that identify new markets that will be penetrated as a consequence of the merger, markets that neither firm on their own would have been capable of entering, or that significantly enhance the intensity with which productive capacity is utilised.

<sup>4</sup> Case Number: 89/LM/Oct00, at page 21.

<sup>5</sup> According to the Tribunal, production efficiencies are described as those which allow firms to produce more or better quality output with the same amount of input. These types of efficiency are generally considered static (allocative and productive efficiencies) as they enable improvements that occur only once, i.e. economies of scale. Dynamic efficiencies are processes associated with innovation and learning by doing, that occur over time and which improve product or service quality, introduce new products, and lead to lower costs. It was also noted that although these efficiencies are seen as the most beneficial, they are also the hardest to quantify in practice.

<sup>6</sup> Case Number: 89/LM/Oct00, page 21.

### 3. Pioneer-Pannar transaction

This transaction was an intermediate merger between Pioneer Hi-Bred International (“Pioneer”, the acquiring firm) which is a US-based, vertically-integrated commercial seed company and Pannar Seed Limited (“Pannar”) which is a South African seed company. The parties’ activities largely overlap in the breeding and commercialisation of hybrid maize seed (and to a lesser extent soya bean seed) in South Africa. The maize seed market accounts for over 80% of the annual turnover for the South African seed industry. The transaction was prohibited by the Commission and the parties appealed the Commission’s decision at the Tribunal, which upheld the Commission’s decision and also prohibited the merger. The parties further appealed the decision at the Competition Appeal Court (“CAC”), which overturned the Tribunal’s decision and conditionally approved the merger. In June 2012, the Commission applied for leave to appeal at Supreme Court of Appeal (“SCA”) against the CAC decision. The SCA has dismissed the application.

The breeding of new hybrid seed varieties essentially requires three major components namely access to a locally adapted seed germplasm (a collection or pool of hereditary genetic material specific to an organism); advanced breeding technologies (“ABTs”) and biotech traits (also known as GM traits). ABTs typically develop naturally occurring characteristics within plants while biotech traits are synonymous with the genetic modification of plants by adding genes from other organisms into the maize seed. In combination, these components work to increase the harvestable yield from hybrid maize seed.

The adoption of hybrid maize seeds with biotech traits by farmers in South Africa was over 70%, according to the parties. Therefore, the primary rationale for the transaction was to combine Pioneer’s strong ABTs with Pannar’s germplasm pool that is adapted to the South African environment in order to improve yields. The market leader in South Africa is Monsanto<sup>7</sup> with approximately 50% sales-based market share, Pioneer is second with around 30% and Pannar third with around 15%.<sup>8</sup> The Commission prohibited the merger arguing that it was a three-to-two merger (in a market that is central to food security and livelihoods, especially in low income households) where there would be minimal constraining influence on these two entities, with a high likelihood that maize seed prices would increase in future. The Commission and Tribunal generally agreed in terms of the approach on efficiencies, hence, the discussion below will only highlight the debate between the CAC and the Tribunal.

#### 3.1 *The merging parties’ arguments*

The merging parties’ efficiency arguments were split into two main categories. Firstly, in terms of cost savings, the parties argued that Pioneer had a global trait fee agreement with Monsanto which has significantly lower fees than those Pannar was paying to Monsanto for biotech traits. Benefits would result through the reduced incremental licensing costs that Pannar would pay to Monsanto after the merger for licensing these traits. The parties included this cost saving into the merger simulation model, showing that the trait fee saving would reduce the modelled average price increase.

Secondly, the claimed dynamic efficiencies would arise from: (i) the combination of germplasm to improve diversity and complementarity of the parties’ combined pool, and that (ii) the merged entity would be better placed to apply Pioneer’s ABTs and global access to biotech traits to this larger and broader germplasm pool. Overall, this would enable substantial gains in the performance of maize seeds through

<sup>7</sup> Internationally, Monsanto is the leading global seed company and holds the dominant position in terms of biotech trait development and licenses these traits to both Pioneer and Pannar.

<sup>8</sup> Pannar used to be the leader but its market has steadily declined from highs of 50% in 2000 to around 15% in 2010 arguably due to its lack of ABTs to effectively exploit its germplasm resources in an innovative market.

accelerating the process of discovery, testing and commercialisation. The parties quantified this yield gain benefit accruing from the above.

The parties further argued that the claimed yield gains (and their benefits to farmers) would dwarf any potential 'short-term' pricing effects that may arise, based on either a total welfare standard or a consumer welfare standard.

### **3.2 *The Tribunal's approach***

The Tribunal split the types of efficiencies into two categories, pecuniary efficiencies and dynamic efficiencies.

#### **3.2.1 *Pecuniary efficiencies***

The Tribunal considered the cost savings arising from Pioneer's bargaining position, or volume discounts, as pecuniary efficiencies not arising from any saving in resource even though the parties had taken the view that a lower profit maximising price could be achieved. The Tribunal was unconvinced by the pricing benefit results arising from the simulation model. Firstly, the parties had used forecasted GM penetration rates instead of applying current penetration rates in the regions in which GM-traited seed was being used. The Tribunal argued the forecasted penetration rates were overstated and therefore overstated the price benefits from the model.<sup>9</sup> If current GM penetration rates were used in the merger model, the pricing benefits would have been significantly reduced such that the cost savings were not as beneficial as postulated by the parties.

Further, the Tribunal found that the cost efficiencies were not merger-specific. This is so because Pannar had already signed other trait fee arrangements with Syngenta which were also significantly lower than the Monsanto GM trait fees so such cost benefits (at least in part) were also obtainable outside of the merger.

#### **3.2.2 *Dynamic efficiencies***

There was substantial debate on this aspect of efficiencies, particularly in terms of the magnitude, likelihood and timing of the claimed dynamic efficiencies as well as extent of merger-specificity. Since Pioneer and Pannar had already entered into an agreement to test their combined parental seed lines prior to the merger, the parties presented trial results of these crossed parental lines to demonstrate how a combination of the two firms would improve the maize seed yields to farmers.

Again the Tribunal rejected these claims for a number of reasons. Evidence led during the proceedings showed that the estimated minimum yield gain benefit across all hybrids was unrealistic.<sup>10</sup> Furthermore, these claimed yield gains were unsupported by realities in the maize industry where evidence led during trial indicated the normal yield gains were generally less than half of the claimed rate from the merger, and the parties had conceded that returns were lower in South Africa than other leading countries. In any event, the Tribunal argued that the yield benefits were not merger-specific since if they were, it

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<sup>9</sup> There was also no evidence led during the proceedings which demonstrated the GM penetration rates used in the simulation model were estimated during Pannar's ordinary course of business, rather, the penetration rates were estimated solely for the purposes of the merger simulation. On such important inputs into the model, the Tribunal's approach would be to rely on evidence that would be determined during the normal course of business rather than in preparation for trial. The Tribunal heavily discounted the modelled results.

<sup>10</sup> The Tribunal considered it an extreme exaggeration (see para 318 of judgment on page 71).

would have meant that the merger had been implemented without the competition authority's approval. The material exchange had occurred long before the merger was consummated in 2009.

On the timeframe upon which the claimed efficiencies would be realised, the Tribunal borrowed the reasoning from European Merger Guidelines where: “[i]n general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about”.<sup>11</sup> In the hearing, it was argued that even with Pioneer's ABTs, the creation of new parental lines alone would take 18 months, and the new parental lines would still have to be crossed to generate a new flow of hybrids which then must be subjected to a five-year testing process in order to reach the final stage of commercialisation. Therefore, any efficiency benefits accrue beyond a five-year period which falls beyond the counterfactual period identified. The Tribunal concluded that the efficiencies were distant and not associated with a high probability of off-setting the competitive harm.

Since the dynamic efficiency claims were determined to be less compelling, evidence of pass through to consumers had to be shown as determined in *Trident/Dorbyl*. When the harm to consumers is significant, the gains to consumers became even more important and it was found that the likely significant unilateral price effects were not offset by cognisable efficiencies.

### 3.3 *The CAC approach*

The CAC took a different approach altogether in analysing the parties' efficiency arguments and subsequently overturned the Tribunal's decision and approved the merger with conditions.<sup>12</sup> The CAC (following the US Merger Guidelines) emphasised the importance of verification of the existence of such efficiencies rather than their quantification. The CAC adopts the views of Thomas Barnett, that:

*“.....antitrust enforcers must be careful not to pursue immediate, static efficiency gains at the expense of long term, dynamic efficiency improvements, since the latter are likely to create more consumer welfare than the former”.*<sup>13</sup>

The CAC also borrowed the views of Katz and Shelanski,<sup>14</sup> who argue that for merger policy maintaining competition for innovation is as important as the 'static' consideration of maintaining price competition. The CAC therefore criticised the Tribunal for its approach which they argued illustrates the dangers of pursuing immediate static efficiency gains, at the expense of long term dynamic efficiency improvements that benefit consumers, in a market dominated by innovation competition. In their view, the case is one where innovation is a force that, to a degree, renders static measures of market structure unreliable. The CAC accepted evidence that new hybrids will be commercialised by the 2015/2016 year with more to follow in six to eight years.

The CAC rejected the exclusion of the joint trial results arguing that the pace and nature of new innovation will bring new hybrids to the market implying increased consumer welfare. Accordingly,

<sup>11</sup> European Merger Guidelines on the Assessment of Horizontal Mergers (2004/C31/03) at para 86.

<sup>12</sup> Along with a three-year pricing cap to address short-term price effects, the merged entity is also required to establish a maize breeding research hub in South Africa. Further, the merged entity is required to maintain the breeding of all non-genetically modified maize seeds that some non-governmental organisations that were interveners in the merger proceedings were advocating for.

<sup>13</sup> In a presentation- George Mason University Law Review, 11<sup>th</sup> Annual Symposium on Antitrust), Thomas Barnett the Assistant Attorney General, Antitrust Division, U S Department of Justice on 31<sup>st</sup> October 2007.

<sup>14</sup> Michael L Katz and Howard A Shelanski, Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?, *Innovation Policy and the Economy* (2005).

neither Pioneer nor Pannar will achieve the same level of innovation in South Africa without the other. In their view, the merger results in a more competitive adversary for Monsanto, the market leader, in the long term.

### **3.4 Conclusion on the Pioneer – Pannar case**

There are a number of questions that arise in relation to future merger cases particularly those in innovation markets that raise efficiency arguments. Firstly, the CAC did not identify the specific types of efficiencies arising from the merger. It is not clear whether there is a need to separate the efficiencies into different types or whether they must be considered as a combination in cases where more than one type arises.

Secondly, and even more importantly, should the Commission only emphasize the verification of efficiencies and not place more energy into the quantification of those efficiencies? The Tribunal interrogated the claimed efficiencies and disputed their quantification. On the other hand, the CAC adopted a different approach, of not critically interrogating the quantification, but rather emphasising verification.

Thirdly, what kinds of time frames are acceptable for dynamic efficiencies? Typically, the competition authorities consider a short-term period for the assessment of mergers as in many other jurisdictions. In this case, it was accepted that this time period needed to be longer in the case of innovation markets. The Tribunal came to a view that the claimed dynamic efficiencies were only realisable in the distant future (even exceeding a broader time-horizon) and therefore not associated with a high probability of off-setting the harm. Conversely, the CAC accepted the same time frames, even criticising the Tribunal for its approach which was deemed to illustrate the dangers of pursuing immediate static efficiency gains, at the expense of long term dynamic efficiency improvements.

The only point of congruence between these decisions regarding the approach to efficiencies in innovative markets appears to be that once dynamic efficiencies are deemed quantifiable and verifiable, the need to demonstrate pass-through the consumers is less compelling.

## **4. Approach in enforcement cases**

Section 4(1)(a), 5(1), 8(c) and 8(d) of the Act all require the Commission to consider whether there are any technological, efficiency or other pro-competitive gains resulting from conduct that outweigh the anti-competitive effect of that conduct. Section 4(1) (a) relates to prohibited horizontal practices, section 5(1) (a) relates to prohibited vertical practices whilst section 8(c) and 8(d) relate to abuse of dominance conduct. Whether in terms of consumer harm or likely foreclosure, the evidence can then be weighed against any efficiency gains.

The jurisprudence on efficiencies in enforcement cases in South Africa is limited and most cases have turned on the anti-competitive effect (or lack thereof) of the conduct. The approach to efficiency assessment in abuse case cases was largely established in the Commission vs. South African Airways (Pty) Ltd (“SAA”)<sup>15</sup>, the country’s largest domestic airline. The Commission alleged (through a complaint that was brought by a rival airliner, Nationwide Airlines Group (“Nationwide”)), that the incentive scheme offered by SAA to travel agents constituted an abuse of dominance designed to exclude or impede SAA’s rivals in the domestic airline market. In this case, the Tribunal concluded that the achievement of the efficiencies claimed by SAA did not warrant the way the incentives were structured. The same approach

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<sup>15</sup> Case Number: 18/CR/Mar01.

was further endorsed in cases such as the *JT International SA (Pty) Ltd vs. British American Tobacco SA (Pty) Ltd* (“*JTI-BATSA*”)<sup>16</sup>, and repeated in the more recent SAA cases.<sup>17</sup>

The approach is as follows: first examine whether the conduct in question is exclusionary in nature in terms of the definitions of the relevant section, and then secondly, to enquire as to whether there is an anti-competitive effect. In the first SAA case, the Tribunal ruled that after having established anti-competitive effects, provision should be made for efficiencies that are likely to arise out of these practices. However, it is critical that:

- given the conduct that is required for the realisation of those efficiencies, there should not be other no-less anti-competitive alternatives by which the same efficiencies could be realised; and,
- the efficiencies outweigh the likely negative effects on competition and consumer welfare.

Importantly, in terms of the allocation of the burden of proof in abuse cases, section 8(c) of the Act places a more considerable burden on the complainant than section 8(d). Section 8(d) conduct is specific whilst section 8(c) is more general anti-competitive conduct. The Tribunal has ruled that the burden of proof for efficiency justification under section 8(d) is on the respondent, whereas the onus of proof on section 8(c) is on the complainant. Notwithstanding, the complainant is not obliged to show the proof of the efficiencies under section 8(d), the Commission has proceeded in its analysis to evaluate claimed efficiencies.

The Tribunal has also in some cases placed considerable weight on whether efficiencies are passed on to customers, especially in the context of retailer arrangements in category management, such as in the *JTI-BATSA* case.<sup>18</sup>

## 5. Approach in exemptions

In 2010, the South African Petroleum Industry Association (“*SAPIA*”) applied to the Commission, in terms of Section 10(1) (b) of the Act, for exemption from the provisions of Section 4 of the Act which the Commission found to be anti-competitive.<sup>19</sup> *SAPIA* sought an exemption for a category of information exchange agreements and practices which ensure the continuity and stability of liquid fuel supply to various sectors of the economy and geographic locations.

In many jurisdictions, information exchange agreements or practices are not prohibited “per se”. Agreements or practices of this nature are subjected to a “rule of reason” test, allowing companies to justify their conduct by providing efficiencies or pro-competitive gains. Under the Act, a firm can be exempted if it can prove that the agreement or practice contributes towards an objective as set out in Section 10(3) (b). The burden of proof would lie with the firm in question to show that the efficiency or pro-competitive gains outweigh and in fact justify the anti-competitive exchanges.

*SAPIA* argued that these agreements and practices were pro-competitive and argued that their practices contribute towards maintaining the economic stability of their industry. In its investigation, the Commission considered the importance of the industry in the broader South African economy. By granting

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<sup>16</sup> Case Number: 55/CR/Jun05.

<sup>17</sup> *Nationwide Airlines (Pty) Ltd, Comair Ltd vs. South African Airways (Pty) Ltd* – Case Number: 80/CR/Sep06.

<sup>18</sup> Case Number: 55/CR/Jun05.

<sup>19</sup> Case Number: 2010Apr5041.

this exemption, the industry would be able to deal with issues of capacity and infrastructure that have put it under significant strain over the years.

## **6. Conclusion**

The South African authorities have developed a body of jurisprudence on the assessment of efficiency claims in the context of mergers, enforcement cases and exemptions. Though there is consensus on the relative value to be assigned to different kinds of efficiencies in merger cases, the subject remains a vexed one as demonstrated by the recent Pioneer-Pannar merger. The CAC's reasons in that matter appear to set a rather low threshold for ascertaining the veracity of claimed efficiencies and for balancing these against anti-competitive effects. In the abuse of dominance arena, in which the authorities have limited experience, there has been less disjuncture between the courts. This is possibly aided by the retrospective nature of the conduct under examination under such cases.

## SWEDEN

### Introduction

In the last 5-10 years Sweden has seen increased use of formal economic theory and quantitative methods in its competition law enforcement. The shift towards economics has in turn resulted in increased attention to efficiency rationales, both in the area of merger control and in antitrust enforcement. This contribution will discuss the role that efficiency claims have played in some recent Swedish merger cases.

#### 1. Efficiencies that offset incentives to raise prices

With increased emphasis on merger simulations and first-order approaches such as UPP (Upward Pricing Pressure), the balancing of some types of efficiencies vis-à-vis competitive harm has in principle become more straightforward. The role of marginal cost efficiencies is for example quite transparent in the unilateral effects models commonly used for merger simulations and UPP-calculations. As shown by Gregory Werden in his 1996 paper “A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products”,<sup>1</sup> information about current margins and diversion ratios is enough to calculate the marginal cost efficiencies required to offset the increase in market power resulting from a merger. These offsetting efficiencies are sometimes called the Compensating Marginal Cost Reduction (the CMCR).

As a rule of thumb, the CMCR can be approximated by  $m \times d$ , the merging parties’ percentage markup ( $m$ ) multiplied by the diversion ratio between the parties ( $d$ ).<sup>2</sup> In the fully symmetric case, the CMCR can be expressed exactly as  $\frac{m \times d}{1-d}$ .<sup>3</sup> In either formulation, efficiencies expressed as CMCRs are relatively straightforward to calculate. Moreover, they circumvent a major difficulty traditionally associated with evaluating efficiencies, which is that of determining the degree of pass-on to consumers. In order to calculate the CMCRs, there is no need to estimate pass-through by determining the curvature of demand, since the merging parties by construction keep to their original pricing.<sup>4</sup> Nor is there a need to estimate how non-merging competitors would react to price changes.

#### 2. The evaluation of efficiency claims in a recent merger

The Competition Authority has applied the UPP-approach and calculated CMCRs in the context of four recent merger assessments: *Office Depot/Svanströms* (2011), *Arla/Milko* (2011), *Cloetta/Leaf* (2012)

<sup>1</sup> Werden, Gregory J., 1996, “A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products”, *The Journal of Industrial Economics*, Vol. 44, No. 4 (Dec., 1996), pp. 409-413.

<sup>2</sup> The CMCR used here is the marginal cost reduction, as a percentage of the *price* (and not as a percentage of the marginal cost), which results in the same price pre- and post-merger. The approximation of CMCR is accurate when diversion ratios are low and when there is symmetry between merging firms in terms of markups and diversion ratios. It is an exact measure of CMCR when the efficiency is one-sided, i.e. when the marginal cost reduction only accrues to one firm.

<sup>3</sup> This requires symmetry between the merging firms in terms of markups, diversion ratios, and marginal cost reductions.

<sup>4</sup> If the CMCRs are greater than the claimed efficiencies, which implies that there is upward pricing pressure, pass-through and demand curvature could become relevant in order to determine the size of the price increase however.

and *Eniro/Teleinfo* (2012). The *Office Depot* and *Cloetta* mergers were cleared in phase I, whereas the assessment in *Arla* focused on a complicated counterfactual analysis due to insolvency issues. In the case of *Eniro* however, the question of merger efficiencies and CMCRs played a more central role.

The *Eniro/Teleinfo* merger involved the acquisition by Sweden's largest directory enquiry service provider of a maverick competitor focused solely on directory services via telephone and sms. The Competition Authority obtained data on diversion in that segment from second-choice questions posed in a survey commissioned by the Authority, and obtained margins from the parties themselves. For a more detailed discussion of this merger, see the Swedish contribution to the OECD 2012 Roundtable on Market Definition.<sup>5</sup>

Having presented sparse information of efficiency gains in the notification, the merging parties submitted more evidence and more detailed calculations at a late stage in phase II. The claimed efficiencies were of the same magnitude as the CMCRs and consequently, if accepted in their entirety, could have had the potential to offset the static incentives to raise prices.

Merger control in Sweden is adjudicative rather than administrative. In order to block a merger the Competition Authority has to make an application for summons to the Stockholm City Court requesting that the transaction be prohibited. A decision to leave the merger without further actions may not be appealed however. In its assessment of efficiencies the Authority applies the EU's horizontal merger guidelines, meaning that in order to take efficiencies into account they need to benefit consumers, be merger-specific and be verifiable. The first criterion, benefitting consumers, is integrated with the consumer welfare standard of the UPP-approach, so the same method that is used to evaluate costs in the UPP-analysis can be used to evaluate the efficiency claims. In practice this amounts to identifying what constitutes marginal cost with respect to the relevant product-offering decisions (normally the pricing decisions).

The second and third criteria however - specificity and verifiability - are much more difficult to evaluate in a short amount of time. In the *Eniro* case, the detailed efficiency calculations presented did not form part of the original filing, nor were they backed up by internal documents. This implied that the Competition Authority had to evaluate the calculations without access to underlying source evidence. In the end, the Authority therefore concluded that the criteria of merger-specificity and verifiability had not been met. When the Competition Authority announced its intention to issue an application for summons requesting that the transaction be prohibited, the parties decided to abandon the merger.

### **3. Incorporating different types of synergies in the assessment**

More generally, the experience of the Competition Authority in many of its merger assessments is that marginal cost efficiencies tend to be presented to the Authority as an afterthought, and do not appear to constitute the primary business rationale behind the merger. Instead, the pro-competitive business rationale, as it is presented in internal documents, tends to center on synergies that are more difficult to quantify and to incorporate in the standard models, such as marketing synergies and complementarities in R&D.

Since the Competition Authority weighs the results from its quantitative analysis with all the other evidence obtained in the investigation in order to make a comprehensive assessment, this potential discrepancy need not result in over-enforcement, but it puts the burden on the merging parties to show, using cogent and convincing evidence, how any such non-standard efficiencies would counterweigh incentives to raise prices.

In order to reach its enforcement objectives the Competition Authority looks carefully at efficiency rationales, but at the end of the day the burden of proof has to rest with the merging parties – as they alone have access to all the information concerning the rationale of the merger.

<sup>5</sup> [DAF/COMP/WD\(2012\)23](#).

## SWITZERLAND

### 1. Introduction

Competition policy is more than to ensure that competition is not restricted by private actors. It is generally viewed as a public policy to promote effective competition. In this sense, competition policy should contribute to achieve economic efficiency and to maximize social welfare. In particular for smaller economies it is sometimes argued that competition policy should put a special focus on promoting efficient economic behavior. This is due to the fact that small economies may be characterized by substantial market entry and exit barriers, high market concentration etc. which can create a special problem with achieving efficiency. Whether Switzerland, as pertaining to competition policy, must be considered as a small economy is debatable.<sup>1</sup> By all means, for Switzerland, neither being part of the European Union nor the European Economic Area (EEA), efficiency considerations should play an important role in competition policy.

The contribution is organized as follows: Section 2 contains two general remarks concerning the applied welfare standard and the burden of proof for efficiency claims in Switzerland. In section 3 the concrete treatment of efficiency claims in the different antitrust proceedings is explained and several examples are discussed. Section 4 concludes.

### 2. General remarks

#### 2.1 Welfare standard

In the economic literature, two welfare standards are discussed: the *total surplus* and the *consumer surplus standards*. While the consumer surplus standard is defined as the aggregate measure of the surplus of all consumers, the total surplus standard additionally comprises producer surplus, i.e. the sum of all profits made by the producers in the economy. In general, economists favor the total surplus standard since – from a theoretical point of view – the maximization of total surplus implies an efficient market allocation. In the context of competition policy, several arguments in favor of the consumer surplus standard can however be found in the literature. These arguments primarily take a political economy perspective and – taking into account factors such as missing countervailing power of consumers or rent-seeking activities of firms – often rely on the assumption of market imperfections.<sup>2</sup>

On the other hand, strong arguments can be brought forward for the adoption of a total surplus standard in competition policy, since a consumer surplus standard tends to inhibit the ability of firms to realize economies of scale and scope. In particular in the case where scale economies can mainly be achieved by exporting, the gain of a merger or another commercial practice may primarily lie in a producer surplus. In an export-oriented economy, focusing solely on consumer surplus therefore runs the danger of compromising incentives for investment and innovation or, in other words, to adversely affect dynamic efficiency.<sup>3</sup>

<sup>1</sup> For a discussion of this question see, e.g., Rutz S. (2011), Applying the Theory of Small Economics and Competition Policy: The Case of Switzerland, *Journal of Industry, Competition and Trade* (in press), DOI: 10.1007/s10842-011-0113-6.

<sup>2</sup> See, e.g., Neven D. and Röller L.-H. (2005) Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control. *International Journal of Industrial Organization*, 23, pp. 829-848.

<sup>3</sup> See, e.g., Evans L. (2004) The Efficiency Test Under Competition Law Regulation in a Small Distant Open Economy that is New Zealand. *New Zealand Economic Papers*, 38(2), pp. 241-264.

In practice it seems often not entirely clear which welfare standard is applied by the different competition authorities. While the EU and the USA seem to accept consumer welfare as a legitimate objective of competition policy, other countries (e.g. Canada, Australia or New Zealand) tend to orientate themselves on a total surplus standard. The question which welfare standard is applied in Switzerland also cannot be answered unambiguously. Neither the Swiss Cartel Act itself nor the pertinent jurisprudence explicitly deals with this issue. There seems however to be a consensus that consumer protection is not the primary goal of the Swiss Cartel Act which may suggest that the welfare standard leans towards total surplus.

## 2.2 *Burden of proof*

In Switzerland the so called *Offizialmaxime* applies, i.e. in proceedings before the Competition Commission (ComCo), the burden of proof is on the authority. The principle of investigation applies, so that ComCo and the Federal Administrative Tribunal have to investigate the facts *ex officio*. This obligation to investigate extends to any justifications based on economic efficiency. Nevertheless, the parties to the proceeding are obliged to cooperate in assessing the facts and circumstances. In a decision concerning a price fixing agreement in the market for books in German language where ComCo extensively discussed possible efficiency justifications<sup>4</sup>, the Supreme Court further clarified that ComCo does not have to prove the non-existence of efficiencies.<sup>5</sup> In other words, if there is no convincing evidence for efficiencies, this is interpreted to the disadvantage of the parties, i.e. the commercial practice is deemed unlawful.

## 3. Efficiency claims in proceedings

### 3.1 *Mergers*

According to Art. 10 Para. 2 of the Swiss Cartel Act (CartA) ComCo may prohibit a merger or clear it subject to conditions and obligations if the investigation indicates that the concentration (a) creates or strengthens a dominant position liable to eliminate effective competition and (b) *does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed*. In other words, in the Swiss merger control regime, efficiencies that materialize in a market other than the one directly affected by a specific transaction may be taken into account.

In practice, this provision proved however of minor importance and is hardly ever used. The only merger case in the recent past where efficiencies in other markets were considered was *Swissgrid*.<sup>6</sup> In this case several regional electric power companies planned to merge their power grids into a new nationally operating company called *Swissgrid*. When considering efficiencies created by the merger in other markets, ComCo acknowledged that post-merger third party access to the new national power grid may be facilitated. However, for these efficiencies to materialize, ComCo deemed it necessary to impose remedies. The decision was appealed and the Supreme Court eventually revoked the imposed remedies, i.e. the merger was cleared without remedies. The Supreme Court was of the opinion that, in the first place, the merger did not create or strengthen a dominant position in the sense of the CartA which superseded a discussion of efficiency claims.

The reason for the lack of consideration of efficiency claims in affected markets in the Swiss merger control regime may be explained as follows: As mentioned above, under the Swiss Cartel Act, a merger

<sup>4</sup> *Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz*, LPC 2005/3, pp. 269-311.

<sup>5</sup> Decision 2A.430/2006, LPC 2007/1, pp. 129-136.

<sup>6</sup> *Swissgrid*, LPC 2005/2, pp. 347-357.

may only be prohibited if it is likely that competition in the concerned markets will be *eliminated*. In other words, in Switzerland a merger may only be blocked if it leads to an extremely high concentration in a market. As a result only the most anti-competitive mergers may be prohibited in Switzerland.<sup>7</sup> As a countervailing mechanism to this permissive merger policy regime the legislator seems to have – consciously or unconsciously – renounced on the introduction of an efficiency defence: there is a (implicit) presumption that the class of mergers qualifying for prohibition under the CartA never create enough efficiencies to outweigh the potentially resulting anti-competitive effects.

In practice, the lack of a “proper” efficiency defence in merger control has sporadically been an issue, in particular in cases where, on the one hand, a merger raised serious competitive concerns but, on the other hand, potential efficiencies were (more or less) obvious. For example the retail merger case *Migros/Denner* raised serious concerns as pertaining to post-merger joint dominance between *Migros* and *Coop*, the two largest retailers in Switzerland which jointly held a market share of roughly 80% at the time.<sup>8</sup> With respect to pro-competitive effects it was however highly plausible that the merger would create certain efficiencies, e.g. due to the complementarity of the product lines of *Migros* and *Denner* or possible scale economies in the procurement processes. Although such efficiency claims were widely discussed by experts and in the public, ComCo was legally simply not allowed to account for such arguments. The merger was finally cleared after an in-depth (*phase II*) investigation, subject to remedies.

A similar situation arose in the merger case *France Télécome/Sunrise Communications AG*: as mentioned above (see footnote 7), although this merger was blocked on the grounds of impending post-merger joint dominance since the transaction would have created a duopoly between the historical telecom operator *Swisscom* and the merged entity. Again, although it was obvious that merging the mobile networks of the two smaller companies contains a substantial potential for scale economies<sup>9</sup>, such arguments were – due to the lack of an efficiency defence – largely irrelevant in the decision process.

This rather unsatisfactory situation has been recognized and in the currently discussed revision of the Swiss Cartel Act it has been proposed to amend the Swiss merger control regime. In particular it has been recommended to abolish the present-day *dominance test* and to introduce a *SIEC test*, including an efficiency defence, instead.

### 3.2 Dominance/Abuse cases

The Swiss Cartel Act does not explicitly specify an efficiency defence for abuse cases. In practice it is however unanimous acknowledged that abuse cases are analysed statutorily for possible efficiency reasons, i.e. a *rule of reason approach* is applied. There is however a certain lack of definition in the jurisprudence as to the type of efficiencies which may be considered. There is wide consensus that so called *legitimate business reasons* can constitute a justification for the behaviour of a dominant company which – *prima facie* – appears abusive.<sup>10</sup> Dogmatically it is however less clear whether a behaviour which is deemed abusive, i.e. indeed results in anti-competitive effects, can be justified by the claim that the behaviour is

<sup>7</sup> In the whole history of Swiss competition law only one merger was effectively blocked so far: in 2010 ComCo blocked a „three to two merger“ in the Swiss telecommunication market on the grounds of impending post-merger joint dominance (*France Télécom/Sunrise Communications AG*, LPC 2010/3, pp. 499-561).

<sup>8</sup> *Migros/Denner*, LPC 2008/1, pp. 129-212.

<sup>9</sup> Less obvious was however in this case whether potentially resulting efficiencies would be passed on to the consumers, e.g., in the form of lower prices for telecommunication services.

<sup>10</sup> Conceptually, a legitimate business reason is a logical explanation why a suspect behaviour is in fact not abusive.

overall welfare enhancing. So far, this question never had to be answered conclusively in practice. Yet, certain statements in the case law seem to suggest that ComCo would be willing to consider such an efficiency defence.

Thus, as mentioned above, whenever ComCo finds an abusive behaviour of a dominant firm, the question of potential efficiencies will be considered. Typically such an analysis of efficiency justifications is of a qualitative nature and in many cases rather short. Often it is simply mentioned that the parties did not claim any efficiency gains (and that such gains are not obvious) or that the efficiency claims were not credible. There seems to be no final decision of ComCo where an efficiency defence was fully accepted so far. This is however not to exclude that ComCo may in certain cases have accepted efficiency justifications in preliminary investigations, i.e. closed a preliminary investigation *inter alia* on the grounds of efficiency claims. In particular, it is not unusual to find formulations such as “*even if the investigated behaviour would have been deemed abusive, it could have been justified by efficiency reasons*” in ComCo’s case law.

### 3.3 Agreements

#### 3.3.1 Horizontal agreements

Concerning horizontal agreements the Swiss Cartel Act distinguishes between hard-core and other agreements. For hard-core agreements (price/quantity fixing and territorial agreements) the Swiss Cartel Act presumes an elimination of effective competition. Practice shows however that, due to the very high requirements of the courts, this presumption is in most cases rebutted. This implies that for most hard-core cartels only a substantial impediment of competition can be proved, which opens the door for an efficiency defence. However, since hard-core agreements are only exceptionally welfare enhancing, they hardly ever pass an efficiency defence and are normally banned and sanctioned.<sup>11</sup> In contrast, for “soft” agreements (such as R&D or distribution agreements) there is no presumption of illegality and they are always analysed according to a rule of reason approach, i.e. on a case-by-case basis. This is in line with international best practice and seems reasonable since such soft cartels are often efficiency enhancing.

The Swiss Cartel Act explicitly enumerates in Art. 5 Para. 2 the categories of efficiencies which may be taken into account. Agreements affecting competition are deemed to be justified on grounds of economic efficiency if they are necessary in order to (1) reduce production or distribution costs, (2) improve products or production processes, (3) promote research into or dissemination of technical or professional know-how, or (4) exploit resources more rationally. Moreover, an agreement must under no circumstances enable the parties involved to eliminate effective competition. Further, when assessing efficiency reasons in practice ComCo checks whether the agreement is suited to achieve the claimed effects and whether it is proportionate. Typically, the assessment of efficiency justifications is a qualitative exercise.

In contrast to abuse cases, one finds a number of final decisions concerning horizontal agreements where ComCo – in one or another way – accepted efficiency claims. For example in the case *Swico/Sens*<sup>12</sup>, two companies operating in the market for the recycling of electronic products agreed to split the market according to different product categories. ComCo, although leaving the question open whether the agreement led to a substantial impediment of competition, accepted that this agreement allows the companies involved to decrease transaction costs and to realize economies of scale. In the decision *Kreditkarten – Interchange Fee*<sup>13</sup>, ComCo explicitly acknowledged that a multilateral approach to fix

<sup>11</sup> In the currently discussed revision of the Swiss Cartel Act it has been proposed to introduce *per se* illegality for horizontal hard-core agreements unless suitable efficiency reasons are provided. It is expected that such an amendment simplifies and expedites the proceedings.

<sup>12</sup> *Swico/Sense*, LPC 2005/2, pp. 251-268.

<sup>13</sup> *Kreditkarten – Interchange Fee*, LPC 2006/1, pp. 65-130.

interchange fees in the credit card market is efficient, due to the avoidance of negotiation costs caused by bilateral negotiations, lower market entry barriers for new companies etc. Based on these considerations ComCo agreed to an amicable settlement with the parties involved, which *inter alia* specified a multilateral and cost-based fixing of the interchange fee. A further case worth mentioning is *Tarifverträge Zusatzversicherung Kanton Luzern*<sup>14</sup> where the question as to whether health insurance companies may jointly negotiate tariffs with public or state-financed hospitals (which typically have considerable market power) had to be answered. In its decision ComCo voiced the opinion that such an agreement between health insurance companies may – under certain circumstances – be efficient to build up countervailing power.

### 3.3.2 Vertical agreements

The above-described presumption of elimination of effective competition also applies to vertical agreements concerning prices and territories.<sup>15</sup> For all other vertical restraints there is no such presumption and they are statutorily analysed for efficiency justifications. In principle also for vertical agreements the categories of efficiencies listed in Art. 5 Para. 2 CartA apply although this provision was at the time introduced with a clear focus on horizontal agreements. In its *Notice regarding Competition Law Treatment of Vertical Agreements*<sup>16</sup> ComCo therefore (exemplary) clarifies what types of efficiencies may be accepted in the case of vertical agreements. In particular, the following efficiency justifications are mentioned in the notice:

- temporary protection of entry investments in new geographical or product markets;
- assurance of the uniformity and quality of products;
- avoidance hold-up problems;
- avoidance of free-rider problems;
- advancement of the transmission of essential know-how;
- protection of financial engagements which are not provided for by the capital markets;
- avoidance of double marginalization.

As for horizontal agreements, a vertical agreement must under no circumstances enable the parties involved to eliminate effective competition, should be suited and proportionate to achieve the claimed effects.

So far, in practice, ComCo has never in a final decision accepted an efficiency justification for a vertical restraint. There are however two cases where ComCo clarified in a final decision under what circumstances a certain behaviour could be justified: In the case *Feldschlösschen*<sup>17</sup>, ComCo deemed exclusive contracts with a duration of more than 5 years between a large Swiss brewery and restaurants unlawful, unless the exclusivity concerns new products or involves a financial engagement (i.e. a credit) of the brewery. The latter seemed appropriate since in Switzerland it is often difficult for restaurant owners to get credit from banks. Therefore larger breweries historically assume the role of credit grantors. In this

<sup>14</sup> *Tarifverträge Zusatzversicherung Kanton Luzern*, LPC 2008/4, pp. 544-592.

<sup>15</sup> Also for these two types of agreements the current revision proposes the introduction of a *per se* illegality with the possibility of an efficiency defence.

<sup>16</sup> Available at <http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de>

<sup>17</sup> *Feldschlösschen Getränke Holding/Coca Cola AG/Coca Cola Beverages AG*, LPC 2005/1, pp. 114-127.

context ComCo stated that exclusive contracts are acceptable if latest after 5 years such contracts (in settlement of the residual debt) can be cancelled by the creditor.

In another recent final decision (*Behinderung des Online-Handels*<sup>18</sup>) ComCo furthermore gave guidance regarding the treatment of internet sales. In this case a large producer of electric home appliances (so called “white goods”) intended to prohibit internet sales of its products on the retail level. ComCo clearly stated that it is generally not allowed to *per se* prohibit internet sales and that restrictions concerning online-trade prices are illegal. ComCo – in accordance with the new EU *Guidelines on Vertical Restraints* – however also acknowledged that certain restrictions, e.g. a “brick and mortar” requirement or quality standards for the online-presentation of products, may be efficient and justified.

#### 4. Summary and conclusions

For Switzerland, neither being part of the European Union nor the European Economic Area (EEA), it is particularly important not to impede welfare enhancing economic behavior. Therefore, efficiency considerations are an important issue in competition policy for a country like Switzerland. In merger control Switzerland does not know a “proper” efficiency defense to date. It can however be argued that – due to the permissive Swiss merger control regime – the risk of prohibiting efficiency enhancing mergers is minimal. With respect to agreements and dominance cases, efficiency claims are regularly considered in the practice of ComCo. As in other countries, such efficiency claims are however only very rarely accepted in final decisions. This is *inter alia* due to the severe difficulties to proof the existence of efficiencies – if the realization of efficiencies is ambiguous, this will be to the detriment of the parties. Furthermore, there is a potential selection bias: before opening an investigation ComCo conducts typically a preliminary investigation. In case that in the course of such a preliminary investigation convincing efficiency arguments are brought forward, the case will be closed without proceeding. In other words, once ComCo deems it necessary to conduct an official investigation, the chances that a certain behavior can be justified by efficiency claims are inherently lower. Thus, although efficiency arguments appear to be accepted only exceptionally in final decisions, they may play a decisive – however sometimes less discernible – role in the triage process whether or not to pursue a certain case.

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<sup>18</sup> *Behinderung des Online-Handels*, LPC 2011/3, pp. 372-399.

## CHINESE TAIPEI

### 1. Introduction

The term “efficiency” is not defined in Chinese Taipei’s Fair Trade Act, Guidelines on Handling Merger Filings, or other guidelines, but the concept is already embedded in related laws and guidelines. For competition authorities, the evaluation of an anticipated efficiency improvement is a highly difficult task. The role of efficiency claims in the assessment of different types of antitrust cases varies from case to case. Taking the example of a merger, the competition authority should grant approval for mergers that are not likely to significantly increase the market concentration. In the case of mergers that are likely to significantly increase market concentration with unilateral effect, however, the efficiency defense presented by the applicants need not to be taken into consideration.

This paper will illustrate the issues related to efficiency analysis for a merger review, efficiency analysis in concerted actions, as well as law enforcement activities by the Fair Trade Commission (hereinafter “the FTC”).

### 2. Efficiency analysis for a merger review

Pursuant to Article 12 of the Fair Trade Act, the FTC may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulting from the competition restraints. In practice, the focus of the FTC merger review is to measure whether a proposed merger is likely to result in a substantial lessening of competition. The FTC’s standard for a merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulting from its restraints on competition. Thus, the net effect between the economic benefit and the disadvantages of the competition restraints resulting from the merger is the basis of the substantive test. If there is no suspicion of obvious competition restraints in the merger filing, then it can be reviewed by means of a simplified procedure. Otherwise, the overall economic benefits shall be further examined to determine whether the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraints.

#### 2.1 *Guidelines on handling merger filings*

##### 2.1.1 *Factors affecting competition restraints in a merger*

The FTC, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulting from a merger:

- Horizontal Merger: unilateral effects, coordinated effects, degree of entry, countervailing power and other factors affecting the result of competition restraints.
- Vertical Merger: the probability that other competitors could choose their trading counterparts after the merger, the degree of difficulty for an enterprise not participating in the merger to enter the relevant market, the possibility of merging parties abusing their market power in the relevant market and other factors that may result in market foreclosure.

- Conglomerate Mergers: the impact of regulation and control being lifted on the merging parties' cross-industry operations, the probability of cross-industry operations by the merging parties because of technology advancements, the original cross-industry development plan of the merging parties besides the merger and other factors that affect the likelihood of material potential competition.

### *2.1.2 Horizontal merger that has obvious suspicions of competition restraints*

In principle, the FTC deems that the horizontal merger filing of a general procedure that meets any of the following conditions raises suspicions of obvious competition restraints and the overall economic benefits shall be examined further:

- The combined market share of the merging enterprises reaches 50 percent.
- The market share of the two largest enterprises in the relevant market reaches two-thirds.
- The market share of the three largest enterprises in the relevant market reaches three-fourths. For circumstances stated in the above-mentioned second or third paragraph, the combined market share that enterprises participating in the merger have to reach to 15 percent.

### *2.1.3 Considerations of overall economic benefits*

With regard to merger filings that raise suspicion of obvious competition restraints, the filing enterprises shall submit information regarding the following factors with respect to the overall economic benefits to the FTC for deliberation:

- Consumer interests.
- The merging parties were originally in a weaker position when trading.
- One of the merging parties is a failing enterprise.
- Other concrete results related to the overall economic benefits.

## **2.2 The FTC issued some policy statements for particular industries or sectors**

Point 6 of the Policy Statements on the Telecommunications Industry states that, "The key considerations in the evaluation of pre-merger notifications from telecommunications enterprises.....The factors taken into account in the assessment of the "overall economic benefit" include: (1) the influence of the merger on the improvement of production efficiency, allocation efficiency and dynamic efficiency;....."

Point 6 of the Policy Statements on the Business Practices of Cross-Ownership and Joint Provision among 4C Enterprises states that, "In evaluating the economic advantages, the FTC focuses on the following matters: (1) How will the merger affect productive efficiency, allocation efficiency and dynamic efficiency?..."

Point 9 of the Guidelines for the Reviewing of Cases Involving the Civil Aviation Industry Engaging in Mergers and Concerted Actions specifies the factors to be considered when the FTC assesses the effect on economic efficiency of a merger filed by civil aviation enterprises. The Guidelines also stipulate that efficiency justifications for a merger claimed by merging parties must satisfy the "merger-specific," but for

efficiency gains that cannot be achieved by the parties through other means. Efficiency claims will not be considered as a justification if they cannot be the result of the merger or can otherwise be achieved by other means without causing competition restraints. Nevertheless, the merging parties could use “efficiency defense” to justify anti-competitive effects. Pursuant to Point 10 of the same Guidelines, if the competition restraints resulting from the merger are not obvious, or there are sufficient efficiency justifications for a merger even though competition restraints exist, then the FTC may deem that the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraints.

### **3. Efficiency analysis in concerted actions**

Article 14 of the Fair Trade Act provides that no enterprise shall have any concerted action, unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and in the public interest, and the application with the FTC for such concerted action has been approved:

4. unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency (so-called standardization cartels);
5. joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency (so-called rationalization cartels);
6. each developing a separate and specialized area for the purpose of rationalizing operations (so-called specialization cartels);
7. entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports (so-called export cartels);
8. joint acts in regards to the importation of foreign goods for the purpose of strengthening trade (so-called import cartels);
9. joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand in an orderly manner while in a economic downturn, where the market prices of products are lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction (so-called recession cartels); or
10. joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium-sized enterprises (so-called small and medium-sized enterprise cartels).

Subparagraphs 1, 2, 3 and 7, Paragraph 1, Article 14 of the Fair Trade Act specifically exempt concerted actions where they consider the element of efficiency.

Pursuant to Articles 16, 17 and 21 of the Enforcement Rules to the Fair Trade Act, an applicant filing for approval of a concerted action exemption should present the concerted action assessment report that sets out in detail the anticipated concrete results in terms of cost reduction, quality improvement, increased efficiency, or rationalization of operations. Since the FTC can only evaluate and presume where the implementation of such a concerted action is beneficial to the economy as a whole and in the public interest based on the materials in hand and its past enforcement experience, the burden with respect to a complete assessment report resides with the applicants for the concerted actions. Hence, if the applicants have either not identified or provided sufficient evidence for their applications that enables the FTC to make an adverse decision about the applicants, the applicants will bear the risk.

#### 4. Cases studies

##### 4.1 *Case 1: Merger between Yieh United Steel Corp. & Tang Eng Iron Works Co., Ltd.*

In 2009, the merger was one through which Yieh United Steel Corp. (hereinafter Yieh United) intended to acquire 34% of the shares of Tang Eng Iron Works Co., Ltd. (hereinafter Tang Eng) under the type of merger set forth in Articles 6 (1)(ii) of the Fair Trade Act. As the overall economic benefits of such a merger would not outweigh the disadvantages resulting from the competition restraint caused by the merger, the FTC decided to prohibit the merger in accordance with Article 12(1) of the Fair Trade Act.

After investigating the total sales values of the relevant market, the FTC found that their market share would increase from 39.08% to 57.25% in the stainless steel market after merging. With regard to the domestic sales volumes, the market share would increase from 35.53% to 55.29%. According to the data provided by the merging parties, the market share would increase from 37.52% to 58.73%.

In addition, the FTC found that the stainless steel industry is a globalized market, that stainless steel products circulate around the world, and that the raw material price fluctuates according to the international price movements. In addition, the raw material imports of stainless steel products are still affected by some factors, including geographic areas, long delivery time, international raw material prices, foreign exchange risk, the floating supply of imported materials and uncontrollable quality.

After merging, their market share would reach more than one half of the relevant market and the competition in the relevant market would diminish. As a result, they would have more discretion to adjust prices unilaterally, to be more influential in raising product prices and, furthermore, create coordinated effects of coordinated price or concerted actions in raising prices.

In addition, the production technology in the stainless steel industry is rather mature. Due to 2-3 years being required to build a factory and factory costs and investments in hot mills/cold mills ranging from about NT\$4.5 billion to NT\$6.8 billion, such factories cannot be easily converted for use in other industries. Entry requires a huge amount of capital that leads to the possibility of it being unlikely that potential competitors will enter the relevant market. Besides this, there is insufficient evidence to prove that other competitors could achieve greater scales on their own after the merger. Therefore, the barriers to entry into the relevant market as a result of this merger could not be ruled out.

Besides, Yieh United and Tang Eng have the largest and the second largest market shares in the stainless steel market prior to the merger, respectively. Due to the lack of alternatives for domestic and imported materials supplies, after merging, the market concentration and market share of the two merging parties will increase, in which case trading counterparts or potential competitors will not have the countervailing power to prevent the two merging companies from engaging in raising the market price or services charges. This would affect the downstream enterprises in the stainless steel products market and lessen the competition in the domestic market.

The two merging parties contended that Tang Eng had no hot-rolled coil process and had to outsource the work. As a consequence, the merger could reduce production and operation costs, expand economies of scale, achieve high utilization rates for equipment and resources, and upgrade the levels of technologies and so on. The FTC was of the opinion that whether or not the efficiency they claimed could be materialized depended on the post-merger operations strategy and operational practices. Besides, there was a lack of effective competition in the market and there was also no effective mechanism to ensure that the merging parties could improve the economic benefits to a certain degree effectively.

After merging, the combined market share of the merging parties would have reached 50%. Thus, the FTC concluded that the overall economic benefits of such a merger obviously did not outweigh the

disadvantages resulting from the competition restraints in the Yieh United and Tang Eng merger case and rejected the application for a merger filing.

Yieh United disagreed with the FTC's decision and thus tried all proceedings for administrative remedies. It appealed to the Taipei High Administrative Court and then to the Supreme Administrative Court. In the Supreme Administrative Court's judgment, the court discarded the original ruling and remanded the case to the original court for retrial. The outline of the reasons given was: (1) The original judgment regarding the obvious likelihood of competition restraints in this case is debatable. (For example, the stainless steel products are internationalized commodities, stainless steel products can be imported without any restriction or import duty, the price difference between the domestic markets and overseas markets is marginal, and the downstream enterprises have no difficulty obtaining such products. Therefore, there is no evidence supporting the view that the merged parties would have more discretion to adjust prices unilaterally after the merger.) (2) With regard to the efficiency claims made by the appellant, the original disposition of the FTC was not given concrete reasons.

After the retrial, the Taipei High Administrative Court dismissed the appellant's appeal. In the court's judgment on September 5, 2012, the court upheld the FTC's decision, based on the evidence of competition restraints that resulted from the merger and efficiency analysis. The Court also asserted that the overall economic benefits of the merger were merely limited to reducing the appellant's production costs and improving its own competitive advantages. Therefore, the overall economic benefits of the merger did not outweigh the disadvantages resulting from the competition restraints in the stainless steel market.

#### **4.2 Case 2: Concerted actions on the joint application of tickets transferable without endorsement taken by four airlines**

Far Eastern Air Transport Corporation, TransAsia Airways Corporation, Mandarin Airlines Corporation and UNI Air Corporation sought to implement the use of tickets that would be transferable without endorsement on the four airlines' Taipei-**Kaohsiung** routes, which would allow passengers holding a ticket issued by any of the four airlines to board flights operated by any of the other three airlines on that route without the endorsement of the original issuing airline. Such a practice would have constituted a concerted action provided in Article 7 of the Fair Trade Act and required that the airlines apply for approval for the said concerted action in accordance with Subparagraph 1 of the proviso to Paragraph 1 of Article 14 of the Fair Trade Act.

The reasons for the benefit to the overall economy and the public interest include: (1) according to application documents and statistics compiled by the Ministry of Transportation and Communications (MOTC), the implementation of the "tickets transferable without endorsement" could help reduce the time spent by passengers waiting for flights and enhance customer welfare; (2) raising the airlines' seat occupancy rates and helping enhance operating efficiency; (3) reducing flying costs and improving the resources utilization ratio; (4) the MOTC was of the opinion that the implementation of the "tickets transferable without endorsement" would increase the convenience for passengers flying on the route, and would also help increase passenger occupancy, especially as the overall airline market was in recession and competition from the high speed rail was imminent. The implementation of the "tickets transferable without endorsement" would thereby effectively improve the airlines' utilization of resources and help stabilize the environment for the development of the domestic civil aviation industry.

The assessment factors for the negative effects resulting from restricted or unfair competition include: the entry barriers concerned caused by the concerted actions would be insignificant, the potential effect of fixing ticket prices would be limited, the incentives for airline operators to provide innovative services

would not be diminished, the impact on the downstream ticketing services market would also be negligible, and consumers' interests would not be affected.

The FTC decided at its Commissioners' Meeting on October 26, 2006 that this concerted action was beneficial to the overall economy and the public interest, and did not give rise to potential restrictions on competition or unfair competition. Consequently, approval was granted.

## TURKEY

The assumption that promoting economic efficiency and thus ensuring efficient allocation of resources is one of the basic objectives of competition policy is generally accepted by both academicians and by competition authorities. In recent years, as the role of economic analysis in competition law enforcement is increasing in importance, efficiency claims have become of considerable magnitude. As a result of that, an increasing number of jurisdictions are referring to efficiency assessments in larger number of regulations. However, a general consensus in methodology of the assessment of efficiencies has not been reached yet and different approaches still exist. The vague nature of efficiencies in economic terms and the tension between economic efficiency and protecting the competitive structure of markets are the core issues in this ongoing debate. Despite these different approaches about how to deal with efficiency claims, it is a fact that efficiency claims are taken into account in antitrust enforcement.

Parallel with these developments and similar to other competition authorities, Turkish Competition Authority (The TCA) is also giving increasing importance to assessment of efficiencies in recent years especially in mergers and acquisitions and abuse of dominance cases. As the TCA is closely following the developments in modernization of competition enforcement in the European Union and is well aware of “effect based” arguments in this field, it has taken noteworthy steps in the assessment of efficiencies in its proceedings.

The leading field in efficiency assessments of the TCA is mergers and acquisitions. Rules on merger control in Turkey are set forth in the Act on the Protection of Competition (the Competition Act) on the Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 2010/4) which came into force in 2011. Prior to Communiqué No 2010/4, remedies in mergers and failing firm defenses have been used as an analytical tool for efficiency assessments in merger regime in Turkish jurisdiction. Additionally, in recent years, with introducing new regulations, The TCA is trying to encourage firms to actively carry out efficiency defenses in merger and acquisition proceedings. In terms of efficiency defense, Communiqué No 2010/4 which was replaced with Communiqué No 1997/1, obviously has more room for efficiency claims compared to Communiqué No 1997/1.

According to the former legislation (the Communiqué No 1997/1), “the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors” were to be taken into consideration while assessing mergers. But with the new communiqué, (the Communiqué No 2010/4), “developments in the technical and economic process, which are not in the form a barrier to competition” clause was replaced with “efficiencies that ensure benefits to consumers” clause. Considering the critiques claiming that the clause of “developments in the technical and economic process, which are not in the form a barrier to competition” makes it difficult to defend efficiencies; the elimination of that clause clearly creates a new playing field and more advanced era for efficiency assessments. The Application Form annexed to the Communiqué No 2010/4 also includes questions asking detailed information about possible efficiency gains. In other words the Application Form, by its composition,

necessitates an assessment that must consider the efficiency claims. Moreover, it is obvious that efficiency considerations are more important than then they are before, but they are still only one of the factors that are considered during the overall assessment of the mergers and acquisitions. The wording of Communiqué 2010/4 requires that efficiencies should ensure benefits to consumers. In other words, efficiency gains which are advantageous for consumers should outweigh the restriction in competition.

A careful examination of Turkish case law clearly shows that efficiency defenses have been taken into account prior to Communiqué No 2010/4 as well. In Privatization of İGSAŞ (Toros Gübre)<sup>1</sup> case, the TCA stated that the merger would lead to some efficiency gains that stem from a broader distribution network and cost savings due to efficient use of harbors by the acquirer parties. However, despite the potential efficiency gains, the TCA concluded that the acquisition would create and strengthen a dominant position which may lead to exclusion of rivals, thus prohibited the transaction. A similar approach was taken in Privatization of Samsun Gübre, an undertaking operating in agricultural fertilizers market<sup>2</sup>. The TCA took into account that the parties could create important efficiencies in purchasing, marketing, distribution functions and efficiencies in means of decreasing fixed cost. The TCA also stated that the potential efficiency gains would pioneer an increase in market share of the merged entity. However, considering the competitive structure and actual competition in relevant market, the TCA approved the merger. Similarly in Mey İçki/Burgaz<sup>3</sup> case, scale and scope economies and cost advantages were counted as topics that need to be considered in the assessment of barriers to entry to the market. These three cases clearly establish that static efficiency gains, especially allocation efficiencies such as cost savings are taken into account by the TCA, yet these efficiency assessments are made in the light of market structure and potential and actual competition in the relevant market. Efficiencies which lead to creation or strengthening of a dominant position and are not beneficial to consumers are not considered in a way favorable to the claimants. For example, in GıdaSa/MGS<sup>4</sup> case, the TCA explicitly stated that all of the factors mentioned in Communiqué No 1997/1 must be considered during the overall assessment and that even if there were efficiency gains peculiar to mergers and acquisitions the priority should be given to protection of competitive structures of the markets.

In Antalya Airport<sup>5</sup> case, the TCA agreed that the management of two separate international arrivals terminals by single firm could generate some efficiency gains in security planning and cost savings. The TCA concluded that this efficiency gains would outweigh negative effects on competition that could arise because of the existence of sector specific tariffs and other issues. In Schering/Merck<sup>6</sup> case, the TCA stated that the negative effects of increasing market shares of merging parties on competition would be compensated by potential efficiency gains which were not directly mentioned in the decision. These two decisions point out that the TCA applies a balance test between potential efficiency gains on the one hand and potential negative effects of the merger on the other.

Additionally, there are two merger cases in which efficiency defenses are explicitly stated and analyzed in detail. In Lafarge/OYAK<sup>7</sup> cement case, the TCA stated that efficiency gains should be taken into account as well as buying power and barriers to entry in the assessments. However, the TCA concluded that when considering the characteristics of cement markets, it was less likely to have

<sup>1</sup> Decision dated 03.11.2000 and numbered 00-43/464-254.

<sup>2</sup> Decision dated 05.05.2005 and numbered 05-30/373-92.

<sup>3</sup> Decision dated 18.11.2009 and numbered 09-56/1325-331.

<sup>4</sup> Decision dated 07.02.2008 and numbered 08-12/130-46.

<sup>5</sup> Decision dated 16.05.2007 and numbered 07-41/452-174.

<sup>6</sup> Decision dated 21.10.2009 and numbered 09-48/1203-304.

<sup>7</sup> Decision dated 18.11.2009 and numbered 09-56/1338-341.

efficiencies related with scope and scale economies that cause cost savings after the merger transaction was consummated. Besides, there were no efficiency claims offered by the merging entities for the cement market but only some claims related with cost-savings were raised in the ready mixed concrete market, so the TCA did not evaluate the efficiency claims related to a different market.

The case related with the Privatization of Çamlıbel Electricity Distribution<sup>8</sup> also includes one of the most comprehensive efficiency claim assessment in merger cases. In this case, an efficiency defense related to converging markets was raised by the firms operating both in electricity and natural gas market. By mentioning that natural gas market was in an early stage of investment, and that although being a mature market, electricity market would also require additional investments in distribution channels, the TCA paid special attention to efficiency claims. In the decision, efficiency claims related to cost savings were taken into consideration by referring to clause in Communiqué No 1997/1 of “interests of intermediaries and end consumers”. By implicitly referring to requirement that efficiency gains should be conduct specific, the TCA claimed in this case that 2-4 % of total cost savings would be directly related to synergies originating from the convergence. It is understood from the decision that the efficiency gains through cost savings were interpreted as advantageous for the end consumers and that assessment had an important role in the approval of the merger. Together with the clause in Communiqué No 2010/4 which favors “efficiencies that ensure benefits to consumers”, this decision shows that the standard applied in merger analyses is “consumer welfare standard”<sup>9</sup>.

As mentioned above, abuse of dominance is another field where efficiency claims are taken into account. In Turkish practice, it is generally accepted that being in a dominant position cannot prevent an undertaking from protecting its own legitimate commercial interest by behaviors compatible with the proportionality principle. In other words, if he can provide objective justifications for its conduct, an undertaking will not be deemed to abuse his dominant position under Article 6 of the Competition Act<sup>10</sup>. The relevant provision includes a general prohibition of abuse of dominant position with a non-exhaustive list of examples considered as abuse. Together with objective necessity and meeting competition defenses, efficiency claims are the most common considerations as objective justifications. The courts also consider objective justification –efficiency claims in particular- assessments in their decisions. For example in a predatory pricing case, Council of State stated that “the consistent price reductions from 2003 to 2005 could not be legitimized through objective justifications” and that “there were no objective justifications

<sup>8</sup> Decision dated 08.04.2010 and numbered 10-29/437-163. For similar assessments, please see the decisions dated 08.04.2010 and numbered 10-29/438-164, 10-29/439-165, 10-29/440-166; dated 11.03.2010 and numbered 10-22/296-106, 10-22/297-107, 10-22/298-108.

<sup>9</sup> For similar assessments, please see the decisions dated 03.01.2008 and numbered 08-01/12-9 *Canan Kozmetik /Loreal*; dated 08.10.2001 and numbered 01-48/486-121 *Legrand/Schneider*; dated 21.08.2007 and numbered 07-65/804-299 *Demirdöküm/Vaillant*; dated 08.07.2010 and numbered 10-49/929-327 *Lafarge/OYAK*.

<sup>10</sup> Article 6 of the Competition Act is as follows: The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abusive cases are, in particular, as follows: a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market, b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts, c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price, d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market and e) Restricting production, marketing or technical development to the prejudice of consumers.

such as cost saving, efficiency or productivity growth for the price cuts, besides, the price reductions were applied only in lines which rivals were operating”<sup>11</sup>.

When decisions of The TCA in abuse of dominance cases are examined, it is seen that significant number of cases include efficiency assessment. Refusal to deal (RTD) cases are leading cases that include efficiency analysis. In most of RTD cases, TCA stated that even if it is prima facie abusive, behaviors having objective justification, which by majority refers to efficiency gains, which outweigh the negative effects on competition do not infringe Article 6 of the Competition Act. For example, in Cable TV decision<sup>12</sup>, in which the dominant undertaking refused the demands of its rivals to access to the cable infrastructure, The TCA mentioned that efficiency gains and cost savings that lead to an increase in revenue can be defended as objective legitimate interest but refused that defense by stating that such defenses can not be favored if they lessen the competition in the relevant market. Sanofi-Aventis decision<sup>13</sup> is another case where efficiency claims were examined. In this case, Sanofi-Aventis, a dominant undertaking in pharmaceuticals market was accused of distorting competition in distribution market by refusing to deal with and of implementing discriminatory business practices to small scaled pharmaceutical warehouses. The TCA examined whether the objective necessity claims mentioned by the dominant undertaking could be explained by efficiencies through cost reductions. The TCA established that, dealing with small scaled pharmaceutical warehouses did not carry any financial risks and did not cause additional costs in ordinary distribution costs. Having applied a balancing test, the TCA concluded that potential efficiency gains in means of cost saving were negligible comparing to negative effects of exclusion of pharmaceutical warehouses in distribution market. The TCA reminded that, objective justification defense were to be accepted on the condition that competition in respect of a substantial part of the products concerned was not eliminated. These cases clearly establish that, the TCA pay special attention to proportionality principle. Just like in merger cases, in abuse of dominance cases the TCA carries out a balance test between the efficiency gains and its negative effects on the market, and accepts efficiency defenses if the practices in question do not eliminate competition in substantial part of the relevant market.

On the other hand, in some other cases the TCA welcomed obvious efficiency gains and the Coca Cola predatory pricing case<sup>14</sup> was one of those. The TCA examined whether there were economic efficiencies that would justify the dominant undertakings’ prima facie abusive pricing practices. The TCA mentioned that during the economic crisis, decline in households’ income would also lead to a decrease in carbonated drinks demand that have high price elasticity. In this sense the TCA stated that price reductions of dominant undertakings intended to compensate the decreases in demand during economic crisis could be regarded as legitimate business justification. Considering also that the exclusion of rivals was a low possibility and there were no signal for exclusionary intent, TCA concluded that the pricing practices were not deemed abusive under Article 6 of the Competition Act.

A more comprehensive efficiency assessment was made in Frito Lay<sup>15</sup> decision in which Frito Lay, the dominant undertaking in packed chips market was accused of exclusionary conducts. In the decision, the TCA established that “even if it distorts competition to the detriment of the rivals, the behavior of a dominant undertaking can not be abusive if the dominant undertaking has objective justifications related with internal efficiency of the firm.” This pro-efficiency approach was balanced with proportionality principle in the decision. According to the TCA, proportionality would constitute the second stage of the

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<sup>11</sup> Decision dated 24.01.2006 and numbered 06-03/51-11.

<sup>12</sup> Decision dated 10.02.2005 and numbered 05-10/81-30.

<sup>13</sup> Decision dated 20.04.2009 and numbered 09-16 /374-88.

<sup>14</sup> Decision dated 23.01.2004 and numbered 04-07/75-18

<sup>15</sup> Decision dated 06.04.2006 and numbered 06-24/304-71.

analysis and there needed to be acceptable relations between behaviors of the dominant undertaking and consequences of it on the competition in the market. In its decision, the TCA paid special attention to differentiate abusive behavior and competition on the merits. Although the TCA accepted that the behaviors of the dominant undertaking had restrictive effects on the rivals, it concluded that compared to effective business model of the dominant undertaking and its efficiency outcomes, these restrictions had limited and negligible effect on the competition, thus did not find any infringement.

In sum, an overall assessment of the TCA's abuse of dominance decision indicates that, static efficiency gain claims such as allocative efficiencies are mostly considered. As mentioned above, increasing revenues by cost reductions (Cable TV decision), cost efficiencies (Sanofi-Aventis decision), marketing efficiencies (Frito Lay decision) are some of those factors considered in efficiency assessments.



## UNITED KINGDOM

### Summary

The paper is submitted jointly by the Office of Fair Trading and the Competition Commission (together the Authorities). The paper summarises the circumstances in which the Authorities may take account of efficiencies in merger and market investigations under the Enterprise Act 2002 and when applying the anti-trust prohibitions under the Competition Act 1998 and the Treaty on the Functioning of the European Union. It also illustrates their experiences in relation to a selection of recent cases in which efficiencies were taken into account.

In Merger and Market investigations it is not uncommon for the Authorities to receive submissions from parties of claimed efficiencies for consideration as rivalry enhancing efficiencies and/or relevant customer benefits. Both Authorities have experience of accepting some of the efficiency claims made while reviewing mergers either as part of the competitive effects analysis or in the form of relevant customer benefits that fall to be considered at the remedies stage. In one merger case the OFT concluded that the reference test was not met in respect of one of the markets it was assessing after taking pro-rivalry efficiencies into account.<sup>1</sup> The CC has no experience of having accepted pro-rivalry efficiency claims in merger investigations but has acknowledged that relevant customer benefits would be expected to accrue in two merger cases and taken account of these when designing an appropriate remedy.<sup>2</sup> In one of these it was highly pertinent that the market was regulated. In a market investigation, while it recognised the existence of relevant customer benefits, the CC did not adjust its selected remedy.<sup>3</sup>

In respect of antitrust cases, the experience of reviewing efficiency arguments is limited, although in the case where they have been considered in detail, the OFT acknowledged that objective efficiency gains in some of the agreements might make them better placed to be exempt from UK competition law.<sup>4</sup>

For both mergers and market investigations Guidance published by the Authorities is available to assist parties when presenting their case, but in practice even when parties claim efficiencies, the quality of the evidence is seldom well developed and lacks detail. This may have contributed to the fact that in only a relatively small number of cases have the Authorities accepted efficiency arguments. For anti-competitive agreements the UK regime is based on undertakings self-assessing their own agreements. However the OFT has issued an opinion which, although in the context of one particular case, can provide guidance to the wider business community on the efficiency claims.

### 1. Background and introduction

In the UK efficiencies are potentially relevant in the assessment of three types of competition case:

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<sup>1</sup> See Global Radio UK and G Cap Medial plc.

<sup>2</sup> See Macquarie UK Broadcast Ventures and National Grid Wireless Group and Deutsche Börse AG and London Stock Exchange plc and Euronext NV and the London Stock Exchange plc.

<sup>3</sup> See Market Investigation of Payment Protection Insurance.

<sup>4</sup> See Newspapers and Magazine Distribution.

- Mergers investigations under the Enterprise Act 2002 (EA02);
- Market investigations under the EA02; and
- Antitrust cases under the Competition Act 1998 (CA 98) and the Treaty on the Functioning of the European Union (TFEU).

The Office of Fair Trading (OFT) is the relevant authority for phase 1 of merger and market investigations and also antitrust cases. The Competition Commission (CC) is the relevant authority for phase 2 merger and market investigations.

In the first part of our contribution we set out the framework for the assessment of efficiencies and our experience of analysing these in merger and market investigations. In the second part we set out the framework for the assessment of efficiencies and our experience of analysing these in antitrust cases. We conclude in the final part.

## **2. Part 1: Mergers and market investigations**

### **2.1 *The framework for the assessment of efficiencies***

The Authorities take account of efficiencies at two stages during merger and market investigations due to the legislation which specifically provides for the consideration of “relevant customer benefits” after the Authorities have made a competition assessment (see para 20 to 23). In practice this means that first, the Authorities take account of *rivalry enhancing efficiencies* during the substantive analysis of whether a merger is expected to result in a substantial lessening of competition (SLC) or whether a feature of the market would cause an adverse effect on competition (AEC). Secondly, and following the competition assessment the Authorities take account of *relevant customer benefits* when deciding what action to take.

Relevant customer benefits are limited by the EA02 to “lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom... or greater innovation in relation to such goods or services” resulting either from the merger or from the features that cause the AEC.<sup>5</sup> The benefits may be to existing customers or future customers. Relevant customer benefits are not limited to efficiencies affecting rivalry. In merger and market investigations, the statutory definition of relevant customer benefits enables the Authorities to take into account benefits to customers arising in markets other than where the SLC or AEC is found.

Efficiency and relevant customer benefit claims in mergers can be difficult for the OFT and CC to verify because most of the information is held by the merging firms. The Authorities therefore encourage the merging firms to provide evidence to support any efficiency claims whether as part of the SLC analysis or the consideration of relevant customer benefits. Similarly in respect of market investigations, the CC encourages parties to provide evidence supporting any efficiency or relevant customer benefit claims.

In the following paragraphs we set out the test and analytical framework that the Authorities apply when considering each type of efficiency in merger inquiries and market investigations.

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<sup>5</sup> Section 30 EA02 (mergers) and section 134 (8) EA02 (markets).

### 2.1.1 *Rivalry enhancing efficiencies*

#### 2.1.1.1 *The competition assessment*

The Authorities consider that competition is a process of rivalry and that some mergers may give rise to efficiencies that enhance rivalry. In a merger inquiry these “rivalry enhancing efficiencies” are relevant when assessing whether there has been or may be, an SLC.<sup>6</sup>

Similarly, in a market investigation, the CC will consider whether there are positive effects of rivalry enhancing efficiencies resulting from a market characteristic that outweigh the harmful effects of the market characteristic that would otherwise cause an AEC.

#### 2.1.1.2 *Types of efficiencies*

When assessing the effects of mergers, the Authorities broadly characterise efficiencies as supply-side efficiencies or demand-side efficiencies.

Supply-side efficiencies arise if the merged firm can supply its products at lower cost as a result of the merger. Common examples of supply-side efficiencies are:

- Cost reductions;
- The removal of double marginalization in vertical mergers;
- Solving the “investment hold-up” problem; and
- Product repositioning.

Demand-side efficiencies arise if the attractiveness to customers of the merged firm’s products increases as a result of the merger. Common examples of demand-side efficiencies include:

- Network effects;
- Pricing effects in conglomerate mergers; and
- Customer benefits of “one-stop shopping”.

In a market investigation, the CC characterises rivalry enhancing efficiencies in a similar way. For example, while restrictions on entry (e.g. as a result of protection of intellectual property rights) may restrict rivalry, they may sometimes increase incentives to innovate because they may increase the incentives for incumbents to create new products and services.

#### 2.1.1.3 *Criteria for assessment of claimed efficiencies*

To form a view that the claimed efficiencies will enhance rivalry so that a merger does not result in an SLC, the OFT must be satisfied and the CC must expect, that the following criteria will be met:

- The efficiencies must be timely, likely and sufficient to prevent an SLC from arising (having regard to the effect on rivalry that would otherwise result from the merger); and

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<sup>6</sup> See paragraph 5.7.2 *Joint OFT and CC Merger Assessment Guidelines*, (CC2Rev, OFT1254).

- The efficiencies must be merger specific, i.e. a direct consequence of the merger, judged relative to what would happen without it.

Similarly, in a market investigation the CC will normally disregard possible efficiencies which are purely speculative, might only arise at some time in the distant future or are otherwise uncertain or unsubstantiated. Should the CC decide that, notwithstanding there are some efficiencies, there is an AEC in a market, those efficiencies that result from the features that cause the AEC may be taken into account as relevant customer benefits when the CC considers possible remedies.

### 2.1.2 *Relevant customer benefits*

In the following paragraphs we set out the test and analytical framework for relevant customer benefits that the Authorities take into account and we explain the criteria for their assessment.

#### 2.1.2.1 *The assessment of relevant customer benefits*

When reviewing mergers the OFT is under a duty to refer a relevant merger situation to the CC where the OFT believes that it is or may be the case that the situation has resulted, or may be expected to result in a SLC within any market or markets in the UK. The OFT may, however, decide not to make a reference if any relevant customer benefits in relation to the merger situation outweigh the SLC and adverse effects of the SLC. The OFT may also decide to accept undertakings in lieu of a reference and when considering whether to accept the undertakings have regard to their effect on the relevant customer benefits.<sup>7</sup>

Where the OFT makes a merger reference, the CC must, if it decides that the merger has resulted or may be expected to result in an SLC, decide whether, and if so what, action should be taken by it or others for the purposes of remedying, mitigating or preventing the SLC. When doing so the CC may in particular have regard to the effect of any action on any relevant customer benefits in relation to the creation of the merger situation.<sup>8</sup>

In merger investigations a benefit is only a relevant customer benefit if it has accrued or is expected to accrue within a reasonable period and be unlikely to accrue without the creation of the merger situation, or a similar lessening of competition.<sup>9</sup>

In considering whether to make a market investigation reference, the OFT can accept undertakings instead of making a reference to the CC and, as with mergers, may have regard to the effect of the possible undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.<sup>10</sup>

In a market investigation a benefit is only a relevant customer benefit if the OFT or CC (as appropriate) believes that:

- The benefit has accrued or may be expected to accrue within a reasonable period of time as a result (whether wholly or partly) of the feature or features that give rise to the; and,
- The benefit was, or is, unlikely to accrue without the feature or features concerned.

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<sup>7</sup> Section 73(4) EA02.

<sup>8</sup> Sections 35(5) and 36(4) EA02.

<sup>9</sup> Section 30 EA02.

<sup>10</sup> Section 154 EA02.

### 2.1.2.2 *Types of relevant customer benefits*

In practice, those efficiency claims that are not considered to be rivalry-enhancing efficiencies may be taken into account at phase 1 when the OFT decides whether or not to refer a merger for in-depth investigation by the CC and also at phase 2 when the CC decides on appropriate remedies.

Given that the OFT is a first phase body which will not have carried out an in-depth investigation into a merger, in order for it to consider exercising its discretion not to refer the merger to the CC, it requires that any claimed relevant customer benefits must be clear and the evidence in support of them must be compelling. In other words, the parties should be able to produce detailed and verifiable evidence of any actual or anticipated price reductions or other benefits.

The OFT's guidance<sup>11</sup> provides illustrations of situations where such relevant customer benefits might be weighed against the identified loss of competition, including:

- Lower prices. A merger may, despite leading to an SLC, give clear scope for large cost savings through a reduction in marginal costs of production. In these circumstances, the merged firm – even if it is a monopolist – may therefore pass on some of this reduction in the form of lower prices to its customers such that it might outweigh the SLC.
- Greater innovation. A merger might, in rare cases, facilitate innovation through research and development that could only be achieved through a certain critical mass, especially where larger fixed (and) sunk costs are involved. Exceptionally, the benefits likely to be passed through to customers from such innovation might outweigh the SLC.
- Greater choice or higher quality. One situation in which benefits of this kind might arise is where a merger increases the size of a network, and thus its value to customers. Where services are provided over an infrastructure network, for example in public transport, an increase in the number of access points to the network may result in an increase in the value of the network to customers and may thus outweigh the SLC. A merger may result in enhanced network benefits through, for example, improving the reach or service provided by a network.

For cases that are taken to a second stage investigation, the CC will normally take relevant customer benefits into account, as permitted by the Act (see paragraph 22), once it has decided on the existence of an SLC by considering the extent to which alternative remedies may preserve such benefits. In essence, relevant customer benefits that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy by the CC. The CC may modify a remedy to ensure retention of a relevant customer benefit or it may change its remedy selection, for instance it may decide to implement a remedy other than prohibition or, in rare cases, it may decide that no remedy is appropriate.

The CC's merger remedies guidance provides the following examples of possible relevant customer benefits arising from a merger:<sup>12</sup>

- A merger may lead to economies of scale, for example, in production or distribution.
- A merger in an industry where services are provided over an infrastructure network may, for example, improve the reach or service provided by a network.

<sup>11</sup> See Chapter 4 *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

<sup>12</sup> Paras 1.18 – 1.20 *Merger Remedies* (CC8).

- Vertical mergers may result in benefits to customers, such as lower prices, improved quality or greater innovation, even when the merger also substantially lessens competition. Examples include improved coordination, for instance in marketing and product design, between firms at different stages of the supply chain, lower transaction and inventory costs and removal of possible ‘double marginalization’.

Similarly, in a market investigation the CC may assess supply-side relevant customer benefits, such as scale economies that result in cost economies being passed on to customers as lower prices, improved quality, greater innovation or more choice) and demand-side benefits, (such as network effects that enable customers to participate in a larger and/or better integrated network.

## **2.2 *OFT and CC experience in merger and market investigations***

In this section we describe our experience of analysing efficiency claims in a selection of merger and market investigations. In this context, it should be noted that the OFT has not, to date, under the EA02, exercised its discretion not to refer a merger to the CC on the basis of the existence of relevant customer benefits (although it has taken account of rivalry-enhancing efficiencies, see below).

- OFT review of Global Radio UK Limited/GCap Media plc
- OFT review of Asda Stores Limited/Netto Foodstores Limited
- CC review of Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group
- CC review of the acquisition by Dräger Medical AG & Co KGaA of Air-Shields
- CC review of the proposed acquisitions by Deutsche Börse AG or Euronext NV of the London Stock Exchange plc
- CC Market Investigation of Payment Protection Insurance

### **2.2.1 *OFT review of the acquisition by Global Radio UK Limited/GCap Media plc***

#### **2.2.1.1 *The merger***

Global Radio UK Limited (Global)’s acquired GCap Media plc (GCap) on 6 June 2008.

The OFT decided<sup>13</sup> that the merger created a realistic prospect of an SLC in relation to the supply of regional radio advertising campaigns in each of the East Midlands and West Midlands on the basis that:

- Global offered a single regional 'play' known as “Heart” in both areas (as well as Galaxy in West Midlands) while in each region GCap sold a regional bundle of some or all of its local stations.
- evidence, including customer concerns, indicated that the parties were the top two competitive choices for a very substantial proportion of advertising customers running regional radio advertising campaigns in the East and/or the West Midlands.

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<sup>13</sup> The OFT’s decision on reference was published on 27 August 2008 (<http://www.of.gov.uk/OFTwork/mergers/decisions/2008/globalradio>).

- the OFT found that this competition eliminated by the merger would not be replicated by the remaining or new rival radio stations or other media sources.

The OFT considered that the divestments offered were sufficient to address both competition concerns at the regional level and also any potential competition issues that arose out of the merger at the national level (through the creation of market power in the East Midlands and West Midlands)

#### 2.2.1.2 *Rivalry enhancing efficiencies*

The OFT's consideration of the effects of the merger in London involved the consideration of efficiencies. Although the merger was horizontal in London, because the parties' products were substitutes, they were nevertheless not close substitutes. In fact, the parties' products were purchased as complementary parts of a London package, because they offered customers different London audience demographics.

The OFT found that the prospect that the merger substantially reduced rivalry was much weaker than in the Midlands, where the parties are the top two competitive choices for regional campaigns. For London campaigns, Bauer's Magic and Kiss radio station brands provided a more direct competitor to each of the merger parties, and arguably GMG's Smooth, as well as Virgin Radio, were equally close substitutes to either merger party as the parties were to each other. For a substantial proportion of radio advertising revenue booked on London stations, the revenue was derived from national multimedia advertising campaigns, where the purchasing agencies had significant leverage to adjust radio spend, although this demand-side constraint did not appear to apply to customers running London-wide campaigns only. The OFT found that, ignoring efficiencies, it was a finely balanced question as to whether supply-side constraints alone were sufficient to rule out the realistic prospect of an SLC reference test being met.

However, the OFT found that there were merger-specific efficiencies in London which meant that, overall, the merger would not be anti-competitive so that the reference test was not met. First, there was compelling evidence that Global would have the profit incentive to bundle together former GCap and Global stations at a lower package price than the equivalent mix-and-match bundled price pre-merger, when the stations were not commonly-owned. The price-lowering incentive counteracted any price-increasing incentive gained from internalising competition between the parties' stations. Unlike certain other types of efficiency, this did not require pressure from rivals to ensure pass-on to customers, as it was profit maximising for the merged firm to lower prices of bundles independent of any rivalry.

Second, Global would reposition its commonly-owned stations to attract listeners, in a way designed to increase total audience size for all stations combined, and increase the demographic focus of the respective station audiences. While directly benefiting end-consumers – who were at no risk of price effects – advertisers also benefited: not only from the ability to reach a greater audience, but also to better target their advertising towards more focused demographics (because many product advertisements are targeted, to greater or lesser degree, towards certain age, gender and income groups), which meant less wastage of the message and better value-for-money for the advertising customer.

The OFT found that both types of efficiencies would improve the Global/GCap station offer to listeners and advertisers. Moreover, London radio rivals like Bauer, Virgin and GMG would be obliged to respond if they wished to retain and grow both classes of customer. These efficiencies could therefore properly be characterised as rivalry-enhancing because rivals remain in the market who will need to match or better respond to the merged firms' improved offer if they were to win and retain customers made better off by the merger, and the net effect of the merger was that it would enhance – or in any event not substantially reduce – overall rivalry notwithstanding the loss of rivalry between the parties themselves.

## 2.2.2 *OFT review of Asda Stores Limited/Netto Foodstores Limited*

### 2.2.2.1 *The merger*

On 27 May 2010, Asda Stores Limited (Asda) entered into an agreement to acquire Netto Foodstores Limited (Netto). Both parties overlapped in the retail of groceries. At the time of acquisition, Netto operated 194 mid-size stores in the UK.

The OFT decided<sup>14</sup> that there was a realistic prospect that the merger would or may result in an SLC in 47 local areas. Asda offered to divest the Netto stores in all of the areas in which the OFT identified competition concerns and the OFT accepted from Asda undertakings in lieu of a reference.

In reaching its assessment, the OFT considered a range of evidence including customer surveys undertaken by the parties. Specifically, the survey evidence provided estimates of the likely diversion of sales between the parties in the event of a hypothetical store closure. When combined with variable gross margin data for the branches, the OFT was able to calculate measures of upward pricing pressure.

### 2.2.2.2 *Rivalry enhancing efficiencies*

The parties argued that post-merger, they would be able to harmonise their buying terms with suppliers and negotiate better terms for the combined volume of sales compared to the volumes each party bought separately. This was corroborated by an examination of a sample of purchasing contracts for the merger parties and contemporaneous board papers, which took into account potential purchasing synergies as part of the commercial logic for the transaction.

However, the OFT was not persuaded that the full extent of the efficiencies claimed by the parties would be realised. Therefore the OFT accepted only part of the argument made by the parties in respect of efficiencies and applied an efficiency 'credit' to branch variable margins to take account of the likely purchasing synergies which would arise post-merger. These revised variable margins were then used in upward pricing pressure calculations to assess the potential pricing pressure in local overlap areas.

## 2.2.3 *CC review of the acquisition by Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group*

### 2.2.3.1 *The merger*

The OFT referred the completed acquisition by Macquarie UK Broadcast Ventures Limited (MUKBV) of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited (collectively National Grid Wireless or NGW) to the CC for investigation and report.<sup>15</sup>

The parties (in the case of MUKBV through its subsidiary Arqiva Limited (Arqiva)) overlapped in the provision of Managed Transmission Services (MTS) and Network Access (NA) to sites and associated facilities to terrestrial television and radio broadcasters. MTS is a package of services including some or all of network design, procurement and installation of transmitters, network monitoring, quality assurance of the signal and maintenance of transmission equipment. The provision of NA by Arqiva and NGW is

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<sup>14</sup> The OFT's decision on reference was published on 20 October 2010 (<http://www.oft.gov.uk/OFTwork/mergers/decisions/2010/Asda>).

<sup>15</sup> The CC's report was published on 11 March 2008 (<http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/macquarie-uk-broadcast-ventures-national-grid-wireless-group>)

regulated by the Office of Communications (Ofcom). The parties also overlapped in the provision of infrastructure systems and services to Mobile Network Operators (MNOs) and other wireless communication service providers, including access to sites and masts, and the provision of ancillary services, such as site installation and rigging and portfolio management and site-marketing services. Arqiva was also involved in the distribution of signals via satellite and the provision of multiplexing services, and NGW operates two Digital Terrestrial Television (DTT) multiplexes, but the parties did not overlap in these areas.

The CC found that the merger was expected to lead to an SLC as a result of the loss of rivalry between Arqiva and NGW, leading to a worsening in the price and non-price factors on which the parties competed in the provision of MTS and NA to television broadcasters and to radio broadcasters.

### *2.2.3.2 Rivalry enhancing efficiencies*

In the course of the inquiry the parties provided estimates of efficiency gains which they believed would arise from the merger. Arqiva submitted detailed arguments setting out the efficiencies that it believed it would achieve as a result of the merger and integration of its business with NGW. These efficiencies included operational synergies, capital expenditure synergies, and the benefit of significantly reducing the level of risk inherent in the digital switch over (DSO) process. In the CC's view, none of the claimed efficiency gains were such as to enhance competition and therefore were not relevant to whether the merger leads to an SLC. Therefore, the context within which the CC considered these efficiencies was within its consideration of relevant customer benefits, which arise as a result of the merger and which may be affected by the proposed remedies.

### *2.2.3.3 Relevant customer benefits*

The parties submitted that the merger would give rise to significant relevant customer benefits, which would not be achieved if the CC imposed a substantial structural remedy. The parties submitted that these benefits would arise as a result of various cost savings, including operational synergies, capital expenditure synergies and savings with regard to the roll-out of DSO. The CC considered detailed evidence which indicated how much of these savings would be passed through to customers following the merger due to the existing arrangements for the regulation of NA and due to pre-existing gain-share agreements between Arqiva and some of its customers. Although many of the financial benefits of the merger were difficult to quantify, the CC believed that significant relevant customer benefits would result from the merger and took account of them in its consideration of possible remedies.

In deciding on appropriate remedies, the CC considered the adverse effects arising from the merger, the relevant customer benefits and the potential costs on third parties from imposing a substantial divestment remedy, and the risks associated with a package of behavioural remedies which might address the adverse effects of the loss of competition but not the SLC itself.

The CC concluded that the context of this merger, within the critical time frame of the DSO programme, was unique and that the market was well suited to detailed regulation. The CC concluded that a package of behavioural remedies, similar to that proposed by Arqiva, had a high probability of being effective in addressing the adverse effects of the merger and recognized that Arqiva's proposed package of behavioural remedies would pass back to customers a significant proportion of the relevant merger synergies and substantial compensation in lieu of the loss of future competition. Consequently, and unusually, the CC decided to implement a package of behaviour remedies rather than a structural remedy, which, while also effective would have resulted in the loss of the relevant customer benefits identified.

An ex-post CC evaluation of the initial impact of these remedies published earlier this year concluded “[this] evaluation has shown that, if properly designed and monitored, introduced into a suitable industry environment, and provided the parties are suitably incentivized to comply, behavioural remedies can be reasonably effective in the short term in protecting customers from the main adverse effects of an SLC. However, the circumstances in which behavioural remedies are appropriate are likely to be unusual.”<sup>16</sup>

## 2.2.4 *CC review of the acquisition by Dräger Medical AG & Co KGaA of Air-Shields*

### 2.2.4.1 *The merger*

The OFT referred the proposed acquisition by Dräger Medical AG & Co KGaA (Dräger) of certain assets representing the Air-Shields business of Hill-Rom Inc. (Hill-Rom), a subsidiary of Hillenbrand Industries, Inc. (Hillenbrand) to the CC for investigation and report.<sup>17</sup>

This case concerned the supply of neonatal warming therapy products to UK hospitals which are used in the care of newborn and premature babies, often referred to by the medical term ‘neonates’. Both Dräger and Air-Shields manufactured a full range of neonatal warming therapy products and sold them worldwide, including in the UK through their owned distributors.

The CC concluded that the merger was expected to give rise to an SLC in the markets for certain neonates (closed care incubators, open care warming beds and transport incubators) but not for others (phototherapy products).

### 2.2.4.2 *Rivalry enhancing efficiencies and relevant customer benefits*

While analysing the effects of the merger on competition the CC explored whether efficiencies deriving from the merger might have a positive effect on rivalry which would offset the loss of rivalry in the market caused by the merger. For legal reasons, Dräger had not been able to examine Air-Shields’ operational and financial data until the merger was cleared, and the CC considered that its estimates of efficiencies were somewhat speculative. Dräger had told the CC that the combined entity might be able to secure economies of scale through concentrating research, development and manufacturing in a single location. The parties also told the CC that some economies should be possible in distribution in the UK market. In the absence of data, the CC had no means of judging the merits of these arguments. The CC stated that it had no reason to doubt that some efficiencies could be achieved. However, it had no basis to conclude that they were likely to have a positive effect on rivalry which would offset the loss of rivalry in the market caused by the merger.

At the remedies stage the main parties cited two categories of relevant customer benefits, namely:

- price reductions as a result of the economies of scale (primarily in production) achievable through the merger; and
- improvements in innovation.

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<sup>16</sup> This evaluation is part of the CC summary of merger remedy evaluations ([http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/governance/understanding\\_past\\_merger\\_remedies\\_september\\_2012.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/governance/understanding_past_merger_remedies_september_2012.pdf)).

<sup>17</sup> The CC’s report was published on 19<sup>th</sup> May 2004 (<http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/drager-medical-ag-co-kgaa-air-shields>).

The CC accepted that there may be economies of scale achievable through the merger which could not have been achieved otherwise (though neither the parties nor the CC were able to quantify them). However, the CC did not expect that the benefits of reduced costs would be passed to UK customers in the form of lower prices, because the merged entity would have less incentive to do so because of the SLC. The CC therefore concluded that it did not consider price reductions to be a relevant customer benefit.

The CC identified both positive and negative potential effects of the merger in relation to innovation. However, such evidence as the CC received did not lead it to expect either the positive or the negative effects of the merger on innovation would outweigh the other. The CC therefore concluded that it did not expect an increase in innovation and did not identify innovation as a relevant customer benefit.

## 2.2.5 *CC review of the proposed acquisitions by Deutsche Börse AG or Euronext NV of the London Stock Exchange plc*

### 2.2.5.1 *The merger*

The OFT referred the proposed acquisitions of the London Stock Exchange (LSE) by Deutsche Börse AG (DBAG) or Euronext NV (Euronext) to the CC for investigation and report.<sup>18</sup>

The case concerned the supply of exchanges, which are centralized marketplaces where investors buy and sell securities, either directly or through intermediaries, and the supply of post-trade clearing and settlement services,

The CC concluded that the proposed acquisitions by DBAG would be expected to result in an SLC within the market for the provision of on-book equities trading services within the UK because of the ability and incentive to foreclose entry or expansion to other providers of trading services; and that the proposed acquisition of LSE by Euronext would be expected to result in an SLC within the market for the provision of on-book equities trading services because of the ability and incentive to foreclose entry or expansion to other providers of trading services. Neither the parties nor the CC identified any rivalry-enhancing efficiencies to offset either SLC finding.

### 2.2.5.2 *Relevant customer benefits*

The CC identified three effective remedies for the proposed acquisition by DBAG and two effective remedies for the proposed acquisition by Euronext. In assessing which of these effective remedies would be the most appropriate for implementation, the CC considered the extent to which each of these would impact on the realization of relevant customer benefits. The CC considered two relevant customer benefits: cost savings in trading services; and DBAG's proposed reduction in clearing prices.

Both DBAG and Euronext argued that the proposed mergers would result in relevant customer benefits due to major cost savings in trading services, mostly arising from the adoption of a common IT platform, which would be passed on to customers in the form of lower charges. The CC assessed these arguments and found that it was reasonable to assume that a proportion of these savings would be passed on within an appropriate period in the case of either proposed merger provided that competitive constraints on trading services are preserved. The CC considered that this proportion was likely to constitute a relevant customer benefit. The CC found that prohibition of the proposed mergers was the only one of the possible effective remedies that would prevent the realization of this benefit.

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<sup>18</sup> The CC's report was published on 1 November 2005 (<http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/london-stock-exchange-plc>).

DBAG also argued that a reduction in price for central counterparty (CCP) services of 50 per cent compared with the current provider, as a result of appointing its own CCP service provider, was a relevant customer benefit. Trading firms, however, raised concerns that the reduction in clearing prices would be offset by the cost of switching and were also concerned that any price reductions for clearing might only be offered for a limited time. DBAG argued that the favourable terms reflected, in part, the interest it would have after the merger in minimizing the total cost of trading on LSE as well as the benefit of having a UK presence. As part of its assessment of whether these benefits were relevant customer benefits, the CC considered whether this benefit was merger specific or whether it could be achieved by competitive tendering of the service and DBAG's submissions indicated that this benefit might not necessarily be fully retained. The CC concluded that a small proportion of the price reduction constituted a relevant customer benefit and assessed the extent to which the proposed effective remedies would prevent the realization of this benefit. The CC concluded that, to the extent that there was such a relevant customer benefit, prohibition of DBAG's proposed acquisition of LSE would prevent the realization of this benefit.

The CC decided that:

- for DBAG, a remedy combining structural measures, including limits on DBAG's shareholding and board representation in any clearing provider that DBAG sought to appoint to LSE, together with behavioural commitments was, subject to prior CC approval, the most appropriate remedy to the identified SLC and the resulting adverse effects.
- for Euronext a remedy combining structural measures, including limits on Euronext's shareholding and board representation in LCH.Clearnet or any other clearing provider that Euronext sought to appoint to LSE, together with behavioural commitments, was the most appropriate remedy to the identified SLC and the resulting adverse effects.

Both remedies would be effective in addressing the SLC while preserving the identified relevant customer benefits.

## 2.2.6 *CC Market Investigation of Payment Protection Insurance*

### 2.2.6.1 *The market investigation*

The OFT referred the supply of all Payment Protection Insurance (PPI) (except store card PPI) to non-business customers in the UK to the CC for investigation and report.<sup>19</sup>

PPI covers repayments on the insured credit product if the borrower suffers an insured event—usually accident (A), sickness (S), unemployment (U) or death (referred to as life (L) cover). PPI is sold to cover a variety of credit products, but nearly 95 per cent of PPI sold in the UK in 2007 was either personal loan PPI (PLPPI), credit card PPI (CCPPI), mortgage PPI (MPPI) or second-charge mortgage (also known as secured loan) PPI (SMPPI).

The CC found that each distributor and intermediary faced little competition for the sale of PPI when it was sold in combination with the credit it insures. The CC found that there were features of relevant markets for PPI products including the products described in paragraph 70 and PPI for retail credit accounts (Retail PPI) which led to an AEC in these markets and in turn resulted in consumers facing higher prices and less choice than they would if there was effective competition between PPI providers.

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<sup>19</sup> The CC published its report on 14 October 2010 (<http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ppi-market-investigation-and-remittal>).

As a result of this lack of competition the CC found that it was highly profitable for distributors to sell PPI, although the CC found that some of the resultant profit was used to subsidise credit prices. The CC concluded that there were serious deficiencies in the competitive process for selling PPI policies, and, in order to remedy the adverse effects identified, a package of remedies would be required which included some significant restrictions on what parties selling both PPI and credit could do (and also imposed some burden on parties that offer only PPI to consumers). The CC concluded that such an intervention in these markets would enhance overall consumer welfare, and that the scale of the problem identified warranted a significant intervention.

### 2.2.6.2 *Relevant customer benefits*

The CC considered whether there were any relevant customer benefits which it should take into account. The parties argued that there were several relevant customer benefits arising from aspects of the current market structure, including that PPI and credit prices were lower than they otherwise would be and that there were benefits arising from selling PPI as single-premium policies.

The CC concluded that credit prices, and credit cut-off scores, were lower than they otherwise would be because of PPI income generated at the credit point of sale. For credit cards the effect was small and for mortgages the effect was very small. The CC concluded that these lower prices were a direct result of the distributors' anticipation of high profit margins on PPI. Lower credit prices were therefore a direct result of the features of the sale of PPI that resulted in an AEC in the markets for PPI.

The CC concluded, therefore, that there was a relevant customer benefit of lower credit prices for personal loans (unsecured and secured), mortgages and credit cards. The only credit products on which the CC thought that there might be an appreciable reduction in credit prices were unsecured and secured personal loans, and it stated that it could not be confident that the scale of the relevant customer benefit that it observed in the period up to December 2006 would persist at that level in the future. The CC did not find any other relevant customer benefits.

The CC considered whether it should exercise its discretion with regard to relevant customer benefits and modify its remedies to preserve the relevant customer benefit of lower credit prices. The CC concluded that it should not modify the remedies to preserve the relevant customer benefit of lower credit prices or cut-off scores.

## 3. **Part 2: Antitrust**

### 3.1 *The framework for the assessment of efficiencies*

The Chapter I prohibition of the CA98 and Article 101(1) of the TFEU (collectively 'the prohibitions') prohibit all agreements between undertakings, decisions by associations of undertakings and concerted practices (hereafter 'agreements' for ease of reference) which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition. Agreements which affect trade within the UK are subject to the CA98, whereas agreements which affect trade between member states of the European Union are subject to Article 101 TFEU.<sup>20</sup>

However, Section 9 of the CA98 and Article 101(3) TFEU (the exemptions), which are in identical terms, provide that the prohibitions may be declared inapplicable (or that an agreement is exempt from them) in relation to an agreement where certain criteria (the exemption criteria) are met which mean that the pro-competitive effects of an agreement outweigh its anti-competitive effects.

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<sup>20</sup> Agreements may be subject to both the CA98 and Article 101 of the TFEU.

The exemption criteria provide that an agreement is exempt from the prohibitions where it:

- contributes to –
  - improving production or distribution, or
  - promoting technical or economic progress,while allowing consumers a fair share of the resulting benefit; and
- does not –
  - impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;
  - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

The burden of proving that the exemption criteria are met falls on the undertaking claiming the benefit of the exemption. The regime is therefore based around undertakings self-assessing their own agreements, rather than the OFT completing such an assessment.<sup>21</sup>

Efficiency claims can also be considered under the Chapter II prohibition of CA98 and Article 102 TFEU which prohibit the abuse of a dominant position within the UK and within the EU respectively. The OFT's experience in this area is limited, however, and will not be covered further in this contribution.

### **3.2 OFT experience in anti-trust investigations: Newspapers and Magazine Distribution**

The OFT has limited experience of applying the Chapter I/Article 101 exemption criteria in practice in the light of the obligation on parties to self-assess their own agreements. In recent years, the only occasion when the OFT has considered, in significant detail, the application of the exemption criteria was in relation to the newspaper and magazine distribution sector.<sup>22</sup> This followed a request from the industry that the OFT provide it with guidance (known as an Opinion) to facilitate its own self-assessment of the agreements between national newspaper/consumer magazine publishers on the one hand and their wholesalers on the other (the Distribution Agreements).<sup>23</sup>

A key feature of the Distribution Agreements was that the publishers, following a competitive tender process (competition for the market), granted their wholesalers exclusive territories for distribution of their products from which all competing wholesalers were excluded (that is, there was absolute territorial protection, 'ATP'). This meant that no retailer had a choice as to which wholesaler supplied it with newspapers and magazines (that is, there was no 'competition in the market').

The parties considered that ATP in the Distribution Agreements gave rise to a number of efficiency benefits, particularly that they secured the wide availability of newspapers and magazines to consumers.

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<sup>21</sup> Further details of the framework for assessing the exemption criteria can be found at: Commission Notice, *Guidelines on the application of Article 81(3) of the Treaty* (2004) OJ C 101/97. The OFT also has regard to these guidelines when assessing the applicability of section 9 of the CA98 to an Agreement.

<sup>22</sup> Although it has considered the exemption criteria in less detail in other cases.

<sup>23</sup> Further information on the background to this industry request can be found in chapter 1 of the OFT's Opinion of October 2008 ([http://www.ofg.gov.uk/shared\\_ofg/reports/comp\\_policy/ofg1025.pdf](http://www.ofg.gov.uk/shared_ofg/reports/comp_policy/ofg1025.pdf)).

To evaluate the arguments from industry participants, the OFT engaged in extensive consultation with parties<sup>24</sup> and conducted a detailed analysis of the highly distinctive features of the sector.<sup>25</sup> In doing so, a key factor in the OFT's consideration was how the market was likely to develop in the absence of ATP in the Distribution Agreements, particularly the extent to which competition in the market was likely to emerge. In this regard the OFT considered that there was a significant difference between national newspaper distribution and magazine distribution. In relation to:

- *newspaper distribution* – The tight distribution timescales required for newspapers (no more than a few hours from the publishers to retailers across the UK) meant that wholesalers were limited in the areas that it was feasible for them to serve from their depots. In addition, economies of scale, scope and density meant that it was unlikely that wholesalers would have wished to establish a large number of small depots that compete to serve areas. As a result, it appeared that relatively limited 'competition in the market' may have emerged in relation to newspaper wholesaling in the absence of ATP.
- *magazine distribution* – The timescales for distribution were typically longer than those for newspapers (often several days), suggesting that the potential geographic reach of wholesaler depots would be considerably greater for magazines than for newspapers. In addition, the longer timescales may also have made it feasible for new entrants to join the wholesaling market, or for new methods of wholesaling to have developed. This meant that there was more likely to be scope for 'competition in the market' to develop for magazine wholesaling in the absence of ATP.

The OFT's detailed assessment against each of the exemption criteria can be found in the Opinion.<sup>26</sup> In summary, the OFT considered that there were a number of factors that may have been relevant to demonstrate that ATP in the newspaper Distribution Agreements generated potential objective efficiency gains. The main potential efficiency benefits discussed were that ATP may make 'competition for the market' more effective by enabling publishers to achieve reduced margins and improved service quality from wholesalers and by providing a stimulus to wholesalers to innovate; and may support the wide availability of newspapers and magazines, in particular by enabling publishers to have included in their contracts with wholesalers an obligation to supply all retailers (within reason) in an area. However, in relation to magazine Distribution Agreements it appeared likely that the potential objective efficiency gains regarding ATP in magazine Distribution Agreements were not as significant as for newspaper distribution given the greater scope for 'competition in the market' to emerge in the absence of ATP.

In the light of this assessment of the objective efficiency gains, the OFT provided guidance to the industry that ATP in newspaper Distribution Agreements may be better placed to benefit from competition law exemption than ATP in magazine Distribution Agreements.

#### 4. Conclusions

In Merger and Market investigations it is not uncommon for the Authorities to receive submissions from parties of claimed efficiencies for consideration as rivalry enhancing efficiencies and/or relevant customer benefits. Both Authorities have experience of accepting some of the efficiency claims made while reviewing mergers either as part of the competitive effects analysis or in the form of relevant customer benefits that fall to be considered at the remedies stage. In one merger case the OFT concluded that the reference test was not met in respect of one of the markets it was assessing after taking pro-rivalry

<sup>24</sup> Including the issue of two draft Opinions for public consultation.

<sup>25</sup> Further information on the specific features of this sector can be found in chapter 3 of the Opinion.

<sup>26</sup> See, in particular, chapter 4 of the Opinion.

efficiencies into account.<sup>27</sup> The CC has no experience of having accepted pro-rivalry efficiency claims in merger investigations but has acknowledged that relevant customer benefits would be expected to accrue in two merger cases and taken account of these when designing an appropriate remedy.<sup>28</sup> In one of these it was highly pertinent that the market was regulated. In a market investigation, while it recognised the existence of relevant customer benefits, the CC did not adjust its selected remedy.<sup>29</sup>

In respect of antitrust cases, the experience of reviewing efficiency arguments is limited, although in the case where they have been considered in detail, the OFT acknowledged that objective efficiency gains in some of the agreements might make them better placed to be exempt from UK competition law.<sup>30</sup>

For both mergers and market investigations Guidance published by the Authorities is available to assist parties when presenting their case, but in practice even when parties claim efficiencies, the quality of the evidence is seldom well developed and lacks detail. This may have contributed to the fact that in only a relatively small number of cases have the Authorities accepted efficiency arguments. For anti-competitive agreements, the UK regime is based on undertakings self-assessing their own agreements. However the OFT has issued an opinion which, although in the context of one particular case, can provide guidance to the wider business community on the efficiency claims.

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<sup>27</sup> See Global Radio UK and G Cap Medial plc.

<sup>28</sup> See Macquarie UK Broadcast Ventures and National Grid Wireless Group and Deutsche Börse AG and London Stock Exchange plc and Euronext NV and the London Stock Exchange plc.

<sup>29</sup> See Market Investigation of Payment Protection Insurance.

<sup>30</sup> See Newspapers and Magazine Distribution.

## UNITED STATES

### 1. Introduction

The antitrust enforcement agencies in the United States (the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”), collectively the “Agencies”) have long recognized that consideration of efficiencies in the analysis of both mergers and non-merger conduct is an important part of proper competition analysis. In both types of cases, efficiencies may offer an explanation for the activity, and may show how it will benefit consumers and increase consumer welfare. The Agencies therefore consider efficiencies when evaluating whether a merger or conduct on balance harms competition.

With respect to mergers, demonstrating efficiencies allows the merging companies to provide the Agencies with a legitimate rationale for the proposed transaction that does not involve increased profitability through exercising additional market power obtained through the merger. Efficiencies from the transaction may increase the firm’s ability to compete, and may benefit consumers through lower prices, improved quality, enhanced service, or new products.<sup>1</sup>

With respect to non-merger conduct, the company or companies involved may present efficiencies as a procompetitive justification for the conduct that is being evaluated for its anticompetitive effects. Agreements between competitors may allow the companies to deploy assets more efficiently, bringing products to market more quickly, at lower cost, or with higher quality. Agreements may also provide incentives to make output-enhancing investments.<sup>2</sup> Such agreements may, however, have anticompetitive effects in some circumstances. Thus, as explained in Section III/C. of this note, the Agencies consider both the efficiency justifications and the anticompetitive effects of the conduct to determine whether the conduct is procompetitive or harms competition.

Although the Agencies consider procompetitive efficiencies with respect to many types of agreements, U.S. law does not allow for the consideration of procompetitive efficiencies for certain agreements that always or almost always raise price or reduce output, such as price- or output-fixing agreements, agreements to allocate markets, and bid-rigging agreements.<sup>3</sup> Such agreements are treated as *per se* illegal, and courts evaluating such conduct will not consider arguments that such agreements may provide efficiencies.

For single-firm conduct, efficiencies also may offer a procompetitive justification for the conduct that is being evaluated. Various forms of unilateral conduct, including exclusive dealing, tying, and loyalty discounts, may have procompetitive benefits, such as obtaining economies of scope, improved product quality or functionality, or lower prices for consumers. On the other hand, such conduct can also, in

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<sup>1</sup> See U.S. Dep’t of Justice and Federal Trade Comm’n, *Horizontal Merger Guidelines* (hereinafter *Merger Guidelines*) § 10 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

<sup>2</sup> See U.S. Dep’t of Justice and Federal Trade Comm’n, *Antitrust Guidelines for Collaborations Among Competitors* (hereinafter *Competitor Collaboration Guidelines*) § 2.1 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>3</sup> See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. FTC*, 435 U.S. 679, 692 (1978).

certain circumstances, harm competition. Accordingly, as with agreements, the Agencies, as well as U.S. courts, evaluate such conduct by considering both the anticompetitive effects and the procompetitive justifications offered by the company.

Typically evidence of potential efficiencies is in the hands of the merging parties or companies being investigated for anticompetitive conduct.<sup>4</sup> Accordingly, the Agencies expect that the merging parties will bring forward evidence of efficiencies. Similarly, in a case involving unlawful conduct, the companies charged with anticompetitive conduct are expected to advance any procompetitive justifications for the conduct.<sup>5</sup>

The Agencies do not consider efficiencies that are vague, speculative, or cannot reasonably be verified.<sup>6</sup> Thus, generic predictions of cost savings or increased output generally will not suffice to establish efficiencies.<sup>7</sup> Rather, a company must establish through concrete evidence that the efficiencies are likely to be realized.

## 2. Types of efficiency claims

### 2.1 Mergers

At the broadest level, mergers (or integrated joint ventures) may result in efficiencies that allow the merging firms to lower their costs, to offer a new or improved product, or to offer increased innovation.<sup>8</sup> All of these efficiencies benefit consumers and are taken into account by the Agencies when attempting to assess a merger's likely impact.<sup>9</sup> Efficiencies achieved by the merging parties may in turn induce their competitors to attempt to achieve their own efficiencies.<sup>10</sup>

Firms can reduce their costs by (1) combining complementary assets, (2) eliminating duplicate activities, or (3) achieving scale economies.<sup>11</sup> Cost savings may accrue to the firm's variable costs or fixed costs. Variable costs are those costs which vary with a firm's change in output (*e.g.*, raw materials are typically a variable cost), whereas fixed costs are those borne by a firm regardless of its level of output (*e.g.*, a fixed-term lease for the firm's office space). Variable cost savings, once achieved, do not in turn spur other cost savings and so they are often called "static efficiencies."

A firm's level of output is set at the point at which its marginal cost equals its marginal revenue. Reductions in a firm's marginal cost will lead to a higher level of output which, all else equal, leads to a lower price. Because marginal costs are affected by variable (but not fixed) costs, variable cost savings are more likely to result in a reduction in price than fixed cost savings. Therefore, efficiencies gained from variable cost reductions are generally more likely to immediately result in lower prices than efficiencies

<sup>4</sup> See, *e.g.*, U.S. Dep't of Justice and Federal Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* (hereinafter *Commentary*) at 50 (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

<sup>5</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

<sup>6</sup> Merger Guidelines § 10.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also *Commentary*, at 49.

<sup>9</sup> Merger Guidelines § 10.

<sup>10</sup> *Commentary*, at 49.

<sup>11</sup> *Id.*

gained from fixed cost reductions.<sup>12</sup> However, some fixed cost savings may in fact result in short-term price reductions (e.g., when selling prices are determined on a cost-plus basis that incorporates fixed costs).<sup>13</sup> Additionally, fixed cost savings may also result in lower prices, but in the longer term.<sup>14</sup>

Mergers may also allow the merging firms to combine complementary assets or capabilities in order to offer new or improved products or processes, or to increase the level of innovation. For example, the FTC closed its investigation of Genzyme Corp.'s acquisition of Novazyme Pharmaceuticals, Inc. because the merger accelerated the development of drugs that treated Pompe disease.<sup>15</sup> In particular, each firm had unique capabilities and technologies, and it was the combination of the capabilities and technologies that would accelerate innovations in the treatment of Pompe disease.<sup>16</sup> Because a given product improvement or increase in innovation can in turn spur further product improvements or increases in innovation, these sorts of efficiencies are often called "dynamic efficiencies."<sup>17</sup>

## 2.2 *Non-merger agreements and conduct*

Outside the merger context, procompetitive justifications and efficiency claims vary greatly, depending on the conduct or competitor relationship at issue. Arrangements that are identified as *per se* illegal (i.e., those that "always or almost always tend[] to raise prices or reduce output") are illegal regardless of any claimed business purpose or procompetitive justification.<sup>18</sup> Nonetheless, the Agencies recognize that many collaborations between competitors, such as professional associations, licensing arrangements and strategic alliances, have procompetitive benefits, usually stemming from the pooled resources of two or more otherwise competing entities.<sup>19</sup>

Benefits from competitor collaborations are specific to the nature of the relationship itself; they may include lower production costs through the combined achievement of economies of scale, quality improvements generated through complementary capabilities between two firms, or accelerated innovation through combined research activities.<sup>20</sup> Courts, also, have acknowledged efficiencies and procompetitive benefits stemming from horizontal agreements between competitors, including reduced transaction costs, increased consumer choice, and increased quality of care.<sup>21</sup>

In addition, courts have long recognized that efficiencies may result from non-price vertical restraints, whether they result from unilateral conduct or pursuant to a vertical agreement. For example, exclusive

<sup>12</sup> *Id.*, at 57.

<sup>13</sup> *Id.*, at 58.

<sup>14</sup> *Id.*

<sup>15</sup> FTC Press Release, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), available at <http://www.ftc.gov/opa/2004/01/genzyme.shtm>. See also Commentary, at 53.

<sup>16</sup> See Commentary, at 53.

<sup>17</sup> Statement of Steven C. Salop, "Efficiencies in Dynamic Merger Analysis," Hearings on Global and Innovation Based Competition, Nov. 2, 1995, available at <http://www.ftc.gov/opp/global/saloptst.shtm>.

<sup>18</sup> See Competitor Collaboration Guidelines, at § 3.2.

<sup>19</sup> *Id.*, at § 2.1.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145 (9th Cir. 2003) (holding that five-year assignments of natural gas transportation between competitors had sufficient procompetitive benefits, including reducing transaction costs and increasing consumer choice).

dealing arrangements have been held to, among other things, create a stable supply and predictable prices for retailers, allowing them to reduce costs.<sup>22</sup> In *Continental T.V. v. GTE Sylvania Inc.*, the Court found that non-price vertical restraints can reduce or eliminate free-riding, which, in turn, may encourage benefits such as retailer investment in services and promotional efforts and more options for consumers.<sup>23</sup>

### 3. Assessing efficiency claims

#### 3.1 Evidence and proof issues

The bulk of the information necessary for the Agencies to accurately assess parties' efficiency claims is in the hands of the parties themselves. Therefore, the burden of production on efficiencies rests with the parties to the merger, both in the investigation and the litigation context.<sup>24</sup>

Once the parties have supplied the Agencies with the information they believe substantiates their projected efficiencies, the Agencies will integrate their assessment of the projected efficiencies into their analysis of the merger's likely competitive effects. The Merger Guidelines note that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."<sup>25</sup> Additionally, "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."<sup>26</sup>

If the Agencies elect to challenge a matter in court, the parties may offer evidence of the merger's likely efficiencies to establish that the merger is procompetitive, and that the Agencies' evidence offers an inaccurate prediction of the merger's likely effect.<sup>27</sup> However, if the Agencies make a strong *prima facie* showing of likely competitive harm, one court has said that the parties must offer "proof of extraordinary efficiencies."<sup>28</sup>

#### 3.2 Specific criteria for assessment in merger cases

According to the Merger Guidelines, "[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive."<sup>29</sup>

<sup>22</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (citing *Cont'l T.V. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)) (noting that non-price vertical restraints on trade have "real potential to stimulate interbrand competition"); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (noting that "because [exclusive dealing] agreements can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today."). More recently, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court held that vertical price restraints may also have procompetitive justifications. 551 U.S. 877, 907 (2007).

<sup>23</sup> 433 U.S. at 54-55.

<sup>24</sup> See Merger Guidelines § 10; see also Commentary, at 59.

<sup>25</sup> Merger Guidelines § 10.

<sup>26</sup> *Id.*

<sup>27</sup> *FTC v. Staples*, 970 F.Supp. 1066, 1088 (D.D.C. 1997).

<sup>28</sup> *FTC v. Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001).

<sup>29</sup> Merger Guidelines § 10.

“Cognizable” efficiencies are (1) merger-specific, (2) verified, and (3) “do not arise from anticompetitive reductions in output or service.”<sup>30</sup>

Although the Merger Guidelines do not explicitly require cost savings be passed on to consumers, they do note that “[t]he greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.”<sup>31</sup> Accordingly, the Agencies focus on ultimate effects on consumers.

Merger-specific efficiencies are “likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of . . . the proposed merger.” Alternative means of accomplishing the efficiency (*e.g.*, a joint venture or a contractual arrangement) must be “practical in the business situation” and not “merely theoretical.”<sup>32</sup> The Commentary to the Merger Guidelines provide an example of an efficiency that was not merger-specific in the case of merging firms that proposed achieving cost savings by consolidating their packaging facilities.<sup>33</sup> One of the merging firms planned to close some of its packaging facilities and shift the volume to other packaging facilities that it currently owned, and not to a packaging facility then owned by the other party to the transaction.<sup>34</sup> Because this cost saving could occur without the merger, it therefore did not meet the merger-specificity requirement.<sup>35</sup>

Verification of efficiencies means the Agencies must be able to verify “by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm’s ability and incentive to compete.”<sup>36</sup> Efficiencies are most likely to be substantiated when they are analogous to past experiences.<sup>37</sup> The Agencies will not consider efficiency claims that are “vague, speculative, or otherwise cannot be verified by reasonable means.”<sup>38</sup> Since cost savings are both quantifiable and under the control of the merging parties, they are less likely to be vague and speculative. On the other hand, the realization of dynamic efficiencies often depends in part on events out of the control of the merging parties, and likely to be achieved further into the future. Therefore, dynamic efficiencies are likely to be more speculative than cost savings.

Achieving some efficiencies may require up-front expenditures. Such efficiencies are assessed net of any cost required to achieve them.

Projections of cost savings may include savings that are not expected to be realized immediately. Such delayed cost savings are less likely to be realized, because the assumptions underlying the projections may change with time. Therefore, delayed cost savings are given less weight than cost savings that are projected to be achieved in the near term.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* Commentary, at 52-53 (citing *Fine Look—Snazzy*, Disguised FTC Matter).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Merger Guidelines § 10.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Additionally, efficiencies that are achieved by a reduction in output or service are not considered cognizable.<sup>39</sup> For instance, cost savings achieved by eliminating sales staff are likely to result in a reduction in customer service, and therefore are less likely to qualify as cognizable efficiencies.

Generally, the Agencies will challenge a merger that has anticompetitive effects in any relevant market.<sup>40</sup> However, the Agencies reserve the discretion to “consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).”<sup>41</sup> The Agencies will be more likely to credit such “out-of-market” efficiencies “when they are great while the anticompetitive effect in the relevant market(s) is small.”<sup>42</sup>

### 3.3 *Specific criteria for assessment in non-merger cases*

The Agencies will consider efficiencies claims and procompetitive justifications for competitor collaborations that are found to cause, or are likely to cause, competitive harm, but are not *per se* illegal.<sup>43</sup> The evaluation of efficiencies parallels the Agencies’ approach to efficiency claims in merger cases. The efficiencies must be “cognizable,” that is: verified, not resulting from a restriction in output or services, and unable to be achieved through practical, less restrictive means.<sup>44</sup> The cognizable efficiencies are also net of the costs of achieving them and of the competitor agreement itself.<sup>45</sup>

An important element of the Agencies’ analysis is that the competitor agreement be “reasonably necessary” to achieve the asserted efficiencies.<sup>46</sup> In evaluating whether the agreement is overbroad or unnecessary, the Agencies generally consider whether there are practical, realistic business alternatives that can achieve the same benefits.<sup>47</sup> Factors that may be relevant are the duration of the agreement and its necessity to prevent opportunistic conduct that may thwart procompetitive aims.<sup>48</sup>

Courts rely on a “rule of reason” analysis to evaluate competitor agreements that are not *per se* illegal. Although the specific formulations vary, courts usually apply some version of a burden-shifting framework: after a plaintiff has established an anticompetitive effect, the defendant may rebut with evidence of the agreement’s procompetitive virtues; in response, the plaintiff may offer evidence that there are less restrictive means of achieving the asserted benefits or that the agreement is not reasonably necessary.<sup>49</sup> Some courts apply a fourth “balancing” factor to the analysis, weighing the overall harm

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<sup>39</sup> *Id.*

<sup>40</sup> Merger Guidelines § 10, n. 14.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Competitor Collaboration Guidelines, at § 3.36.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at § 3.36(b).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *County of Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148 (9th Cir. 2001); *CDC Techs., Inc. v. IDEXX Labs. Inc.*, 186 F.3d 74, 80 (2d Cir. 1999); *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998).

against the gain.<sup>50</sup> However, courts will reject a procompetitive justification for anticompetitive conduct that is pretextual (*i.e.*, that did not actually motivate the business to act the way it did).<sup>51</sup>

Importantly, the procompetitive justifications of efficiencies must depend on the challenged conduct itself, and not simply be permissible or desirable goals that can be achieved through other means.<sup>52</sup> Courts may also reject claims that fail to demonstrate that consumers genuinely benefit from the conduct, for example, where a restraint is justified solely by the need to preserve a firm's profitability or reduce its costs.<sup>53</sup>

In unilateral conduct cases, some courts have used a similar burden-shifting analysis, as in *United States v. Microsoft*.<sup>54</sup>

#### 4. Ex-post assessment of efficiency claims

31. In reviewing mergers, the Agencies evaluate efficiency claims made by the parties that may counter or outweigh the anticipated anticompetitive effects from the merger. In most investigations, the mergers under scrutiny are proposed, not consummated, so that claimed efficiencies are conjectural. In a relatively small proportion of investigations, the mergers under scrutiny have been consummated, making it possible to take into account at least some of the actual effects of the merger, including efficiencies, in an overall assessment of its consequences.

Under certain conditions, ex-post evaluations of efficiency claims may be possible, and such evaluations may even be relevant to the prospective assessment of efficiency claims in investigations of proposed mergers. The use of ex-post evidence of efficiencies occasionally becomes possible in situations in which the parties to a merger under review are making efficiency claims which, if valid, might be expected to have resulted from other mergers between similarly situated parties in the same or similar industries as in the merger under review. If parties to a proposed merger are claiming that the merger would generate efficiencies of the type that could be expected to have been generated by previous mergers, then retrospective evidence bearing on whether past mergers did in fact generate efficiencies like those now being claimed by the parties may be relevant to an assessment of the parties' claims.

While ex-post evaluations have been made in a number of cases, the most extensive retrospective studies of merger efficiencies in the United States have been conducted in connection with hospital

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<sup>50</sup> *Wellnx Life Sciences Inc. v. Iovate Health Sciences Research Inc.*, 516 F. Supp. 2d 270, 289 (S.D.N.Y. 2007). Courts have also approved a burden-shifting framework that assumes that certain types of "inherently suspect" conduct are anticompetitive. See *Polygram Holding, Inc. v. Federal Trade Commission*, 416 F.3d 29 (D.C. Cir. 2005) (affirming Federal Trade Commission decision holding that distribution and marketing agreement between record companies was inherently suspect and not justified by need to enhance long-term profitability); see also *Realcomp II v. Federal Trade Commission*, 635 F.3d 815 (6th Cir. 2011) (affirming Federal Trade Commission decision holding that restrictive policies of real estate broker association were inherently suspect lacked adequate procompetitive justifications).

<sup>51</sup> *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9<sup>th</sup> Cir. 1997).

<sup>52</sup> *North Texas Specialty Physicians v. Federal Trade Commission*, 528 F.3d 346 (5th Cir. 2008) (finding that physician organization failed to demonstrate that asserted efficiencies were dependent on its price-fixing activities).

<sup>53</sup> *Polygram Holding, Inc.*, 416 F.3d at 38 (holding that "a restraint cannot be justified solely on the ground that it increases the profitability of the enterprise introducing [a] new product").

<sup>54</sup> *U.S. v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (requiring four-part burden-shifting framework for conduct allegations).

mergers. Parties to hospital mergers have often claimed that an important efficiency resulting from those mergers would be enhanced clinical quality.

Economists and medical clinicians have developed methods by which to measure the clinical quality of hospital services from available data. Several recent studies have used these methods to measure the effects of mergers on the quality of clinical services provided by US hospitals.<sup>55</sup> The studies show mixed effects on clinical quality from hospital mergers. In other words, there is no basis to presume that a particular hospital merger will improve quality of care. In fact, some studies observe the opposite effect. Similarly, one recent FTC challenge to a consummated hospital merger in the Chicago metropolitan area was based, in part, on direct evidence that clinical quality had either deteriorated or shown no improvement after the acquisition.<sup>56</sup> Given this evidence, the Agencies will not rely on generic claims that mergers between competing hospitals are likely to lead to improved clinical quality. Rather, parties asserting such clinical quality-related efficiency claims should base such arguments on persuasive, case-specific evidence demonstrating how and why such claimed improvements in clinical quality are likely to be achieved through the merger, and are not likely to be achieved in the absence of the merger.

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<sup>55</sup> See, e.g., Mutter R.L., Romano P.S., Wong H.S., *The Effects of US Hospital Consolidations on Hospital Quality*, 18 INT'L J. ECON. BUS. 30 (2011); Town R., *The Effects of US Hospital Consolidations on Hospital Quality: A Comment*, 18 INT'L J. ECON. BUS. 30 (2011); W.B. Vogt and R. Town, "How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?" Robert Wood Johnson Foundation Research Synthesis Report No. 9 (Feb. 2006), available at <http://www.rwjf.org/files/research/15231.hospitalconsolidation.report.pdf>; M. Gaynor and R. Town, "The Impact of Hospital Consolidation – Update", Robert Wood Johnson Foundation Research Synthesis Project Update (Jun. 2012), available at <http://www.rwjf.org/content/rwjf/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html>.

<sup>56</sup> *In the Matter of Evanston Northwestern Healthcare Corp.*, Dkt. No. 9315, available at <http://www.ftc.gov/opa/2008/04/evanston.shtm>. See also, e.g., Romano P.S. and Balan D.J., *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT'L J. ECON. BUS. 45 (2011).

## BIAC

BIAC appreciates the opportunity to comment on the Roundtable on the Role of Efficiency Claims in Antitrust Proceedings. The treatment of efficiencies by enforcement agencies is an issue of great importance to the business community at large, not least of all in the evaluation of proposed mergers. Mergers often offer firms the ability to gain synergies that they otherwise would not be able to achieve, or would be able to achieve only through the investment of significant amounts of capital over long periods of time. The pursuit of such synergies or efficiency gains is often, therefore, a key driver of merger activity.

This submission focuses on the current state of evaluation and acceptance of efficiency claims by competition agencies. Without question, there is greater willingness by most agencies to entertain efficiency claims now than there was even a decade ago. Indeed, in hindsight, the controversy surrounding the proposed GE-Honeywell merger cast the issue of efficiencies into the spotlight and (putting aside the case itself) has had at least some salutary benefit in advancing the discussion of efficiencies in a way that has been productive for agencies, the business community and consumers.

Despite this progress, the treatment of efficiency claims by competition agencies remains inadequate. Below we highlight some of the reasons for this state of affairs. In doing so, BIAC does not place the entirety of the blame on the agencies themselves. Further advancements in the economic literature with respect to efficiency claims in the merger context would provide substantial assistance in resolving these issues, as would intensive study on the proper procedural framework for the analysis of efficiency claims. Absent these tools, however, competition authorities have defaulted to a mechanism that is unduly fatalistic to efficiency claims. The agencies, therefore, are positioned to establish the institutional structures and lead the reforms necessary to improve the analysis of efficiency claims, which in turn will result in better outcomes for consumers.

Companies may seek to make acquisitions for many reasons, but gaining efficiencies is a significant objective in many horizontal mergers among competitors – i.e., in the types of mergers that are most likely to attract antitrust scrutiny. In this context, the extremely small number of cases in which the agencies squarely address efficiencies as part of the analysis is therefore notable and surprising.

The antitrust authorities have shown reluctance to embrace efficiency analysis. As Former FTC Chairman Pitofsky observed in 2007:

*Both the United States and the European Union appear to have accepted, in recent years, that mergers can contribute to efficiency . . . and these efficiencies may occur in markets where they are likely to be passed on to consumers to an extent that the efficiencies outweigh any likely anticompetitive effects. Both jurisdictions have been slow to reach this conclusion and formally to introduce efficiency considerations into merger analysis.... **In both jurisdictions, the efficiency defense is deliberately described in a way that makes it difficult to establish.**<sup>1</sup>*

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<sup>1</sup> Robert Pitofsky, Efficiency Considerations and Merger Enforcement: Comparison of U.S. and EU Approaches, 30 *FORDHAM INT'L L.J.* 1414, 1423 (2006-07) (emphasis added).

BIAC is of the view that the evaluation of efficiencies generally continues to be given short shrift by antitrust enforcement agencies. This stems from numerous factors, including asymmetrical treatment of efficiency analysis as compared to competitive effects analysis, systemic procedural biases that are built in to the merger review mechanism, and an insufficiency of analytical tools and trained agency staff to evaluate efficiency claims. Because of these deficiencies, the agencies, by and large, have concluded that the standard of proof for efficiency claims should be exceptionally high and entirely upon the parties, and in addition viewed as inherently suspect. Applying such a presumption is unfair to merging parties, distorts the merger review process, and is potentially detrimental to consumers.

### **1. Agencies apply an asymmetrical analysis of efficiencies and anticompetitive effects**

If the objective of the enforcement agencies is to promote consumer welfare, then the current approach which treats efficiency claims as inherently suspect is also giving short shrift to consumers. It is now universally accepted, in theory, that efficiencies have the ability to counter anticompetitive harms that may arise from a merger. “That antitrust should promote efficient business practices – once hotly debated – is now widely accepted. Economists have documented numerous ways in which mergers can increase efficiency.”<sup>2</sup>

In theory, therefore, if the objective of merger review is to protect against net competitive harm to consumers, an agency should consider efficiencies on an equal footing with competitive effects. In practice, however, it would be the rare case indeed where a level analysis of efficiencies and competitive effects was applied.

Merger review is an inherently predictive analysis. Agencies are called upon to judge the impact of events that have not yet occurred. It entails both the “art” of assessing facts and the “science” of placing those facts within a sound economic construct. Even when perfectly executed, the outcome of the analysis deals in probability principles rather than in certainty.

The predictive tools used in merger analysis have evolved significantly in recent decades. Previous tools – or the absence thereof – resulted in inconsistent and in some cases confounding outcomes. Because of this, the focus of merger analysis has been to develop tools that would more reliably identify those mergers where indicia of anticompetitive effects, in the first instance, are present. Agencies have gained confidence in the use of these tools and cases that present indicia of anticompetitive effects rarely, if ever, escape agency opposition.

This does not imply, however, that the science has advanced to the point of optimizing consumer welfare in the context of merger analysis. That exercise entails a balancing of potential anticompetitive effects against potential efficiency gains and measuring the net impact on consumer welfare. While great strides have been made in the tools used to assess anticompetitive effects, there has been little development of the tools required to assess the impact of efficiencies, or to balance these efficiencies against anticompetitive effects. Indeed, the U.S. *Horizontal Merger Guidelines*<sup>3</sup> specifically reject this premise: “In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies.”<sup>4</sup> Instead, the

<sup>2</sup> Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729 (1999).

<sup>3</sup> DEP’T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (hereinafter U.S. Merger Guidelines).

<sup>4</sup> *Id.* at 31.

U.S. agencies weight the scale in favor of competitive effects analysis: “In the Agencies’ experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.”<sup>5</sup>

The evaluation of efficiencies, just like competitive effects, is an inherently predictive exercise. But because the evaluation of efficiencies is deemed by the agencies to be a prediction beyond their immediate grasp, it is considered not worthy of equivalent treatment. The U.S. Merger Guidelines state that “[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms,”<sup>6</sup> and therefore place the full burden of proof on the parties to substantiate efficiency claims. The EC Horizontal Merger Guidelines<sup>7</sup> echo the U.S. position clearly putting the burden of proof on the parties and demanding verifiability<sup>8</sup> as well as insisting that the efficiencies benefit consumers,<sup>9</sup> which is inevitably the most difficult to predict. The authorities in the United Kingdom also “encourage the merger firms to provide evidence to support any efficiency claims whether as part of the SLC analysis or the consideration of relevant customer benefits.”<sup>10</sup> But evidence of efficiencies is no more uniquely in the hands of the parties than data underlying, say, price-cost margins, or innovation strategies, or intended competitive responses, all of which the agencies feel more than equipped to verify and quantify. Viewed in this light, the asymmetrical treatment of efficiency claims is difficult to understand let alone justify.

The U.S. authorities have made efforts in recent years to provide some transparency into their evaluation of efficiencies. In certain of the more visible merger matters that they elect not to challenge, the FTC and DOJ have issued “closing statements” that sometimes reflect the role of efficiencies in their evaluation. For example, the DOJ issued a Statement on its decision to close the investigation of Delta Airlines merger with Northwest Airlines, stating that it had “determined that the proposed merger between Delta and Northwest is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition.”<sup>11</sup> It noted items “such as cost savings in airport operations, information technology, supply chain economics, and fleet optimization that will benefit consumers. Consumers are also likely to benefit from improved service made possible by combining under single ownership the complementary aspects of the airlines’ networks.”<sup>12</sup>

This and other similar statements<sup>13</sup> are helpful in explaining the rationale for approving individual transactions and provide some guidance to parties. In most cases, however, these statements are subsidiary

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<sup>5</sup> Id.

<sup>6</sup> Id. at 30.

<sup>7</sup> Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5 (hereinafter EC Guidelines).

<sup>8</sup> Id., ¶¶ 86-88.

<sup>9</sup> Id., ¶¶ 79-84

<sup>10</sup> COMPETITION COMM’N & OFFICE OF FAIR TRADING, MERGER ASSESSMENT GUIDELINES ¶5.7.5 (Sept. 2010), available at [http://www.offt.gov.uk/shared\\_offt/mergers/642749/OFT1254.pdf](http://www.offt.gov.uk/shared_offt/mergers/642749/OFT1254.pdf) (hereinafter UK Guidelines).

<sup>11</sup> Press Release, Dep’t of Justice Antitrust Div., Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), available at [http://www.justice.gov/atr/public/press\\_releases/2008/238849.pdf](http://www.justice.gov/atr/public/press_releases/2008/238849.pdf).

<sup>12</sup> Id.

<sup>13</sup> See, e.g., Press Release, Dep’t of Justice Antitrust Div., Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool’s Acquisition of Maytag (Mar. 29, 2006), available at [http://www.justice.gov/atr/public/press\\_releases/2006/215326.pdf](http://www.justice.gov/atr/public/press_releases/2006/215326.pdf); Press Release, Dep’t of Justice Antitrust

to the core competitive effects analysis, which concludes in all such cases that the potential anticompetitive harm was non-existent or de minimis.

## 2. Procedural biases impact the evaluation of efficiencies

There are several procedural biases which auger an asymmetrical treatment of efficiencies. These include an agency process that promotes the consideration of competitive effects to near-exclusion of efficiency analysis, a reluctance to credit efficiencies in those cases determined to pose some harm to competition, and a bias by the courts against crediting efficiencies.

As one example of procedural bias, agencies have been critical of efficiency analysis that has been advanced by the parties after the initiation of the agency's review, presumably on the basis that the involvement of antitrust counsel may cause the results to be purpose-driven.<sup>14</sup> Pre-announcement or pre-notification assessments of efficiencies, however, may inherently underestimate the potential for efficiency gains. Mergers are often announced well before a comprehensive study of efficiencies can be completed. In the normal course, parties to a merger reach a tentative agreement (e.g., a letter of intent) that will confirm the good faith intent of the parties to consummate the transaction. Securities laws often dictate that the parties publicly announce an intended transaction when a letter of intent is executed.

This tentative agreement will almost always indicate a price for the shares or assets being acquired. The price and other terms of a letter of intent are subject to confirmation or further negotiation based on the results of the buyer's due diligence efforts. From the buyer's perspective, the price offered for the target company reflects a prediction about the likely efficiencies that can be achieved through the acquisition. But the prediction typically is based on a general understanding of the complementarity of the acquired business with the buyer's existing business, and perhaps on some preliminary level of due diligence. Full due diligence, however, may allow a properly constrained group of the buyer's employees and experts to examine the seller's property, plant and equipment, customer relationships, assess production methodologies and techniques, evaluate distribution methods, consider supplies of raw materials and explore other facets such as the level of technology innovation that may allow the buyer to identify the potential for dynamic advancements or to eliminate duplicative costs in products or services. Thus, until the due diligence is completed, the buyer's ability accurately to predict the expected efficiency benefits is not fully informed. Agencies that would ignore or discount efficiency analysis merely because it occurs after a transaction is announced or notified are, in essence, revealing an institutional bias against the recognition of efficiencies.

BIAC would not exclude the potential for some merging parties to overestimate the efficiencies attributable to a potential transaction. That does not suggest, however, that the agencies should be predisposed to view the parties' efficiency claims as overblown. Indeed, if the agencies must concede that the parties have superior access to the information necessary to evaluate efficiencies,<sup>15</sup> then to the contrary there should be a presumption that the parties' efficiency claims generally are properly based. As with

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Div., Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger With Sirius Satellite Radio Inc. (Mar. 24, 2008), available at [http://www.justice.gov/atr/public/press\\_releases/2008/231467.pdf](http://www.justice.gov/atr/public/press_releases/2008/231467.pdf); Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>.

<sup>14</sup> See, e.g., *id.* at 30 ("Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process.")

<sup>15</sup> "Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms." *Id.*

anticompetitive effects, there should be an effort to test and verify the value of efficiencies as part of the overall competitive effects assessment.

Another reason for the asymmetrical treatment of efficiency claims is the nature of the merger review process which places a principal focus on the determination of competitive effects. Perhaps this is understandable, since the merger schemes outlined in most jurisdictions consider efficiencies only as a counterbalance to anticompetitive effects. Thus, efficiency analysis is unnecessary if there are no anticompetitive effects.

This procedural bias is revealed in the 2009 survey conducted of the treatment by FTC staff of efficiency claims advanced by parties over a 10 year period.<sup>16</sup> The survey found that the Bureau of Competition considered 342 efficiency claims over that period, rejecting 109, accepting 29 and *reaching no conclusion* on 204.<sup>17</sup> In other words, the parties' efficiency claims largely were disregarded in roughly 60% of all cases in which it was raised as an issue.

Once the staff concludes that a merger is likely to create a risk of competitive harm, its incentive to credit efficiencies from a procedural standpoint may well diminish. If the staff believes that a merger should be challenged, then crediting efficiency claims may well undermine the staff's case. This is true both in "prosecutorial" jurisdictions such as the U.S. where the agencies must be prepared to convince a court to enjoin the transaction, as well as "regulatory" jurisdictions such as the EC where a reasoned opinion must be issued that would thereafter be subject to judicial review even though the merger might effectively have been prevented.<sup>18</sup> In cases of a merger challenge by the agencies, there is a strong incentive by the agencies to discount efficiency claims. As former FTC Chairman Muris noted, "the Agencies' attitude in court remains one of unrelenting hostility toward claims of lower costs."<sup>19</sup>

For the same reasons, courts also may have a bias against accepting efficiency claims. For example, in *U.S. v. Oracle Corp.*<sup>20</sup>, Judge Vaughn Walker ruled in favor of Oracle and against the government on virtually every facet of merger analysis – market definition, competitors, effects, entry, etc. – reflecting a clear belief that the merger should be allowed to proceed. The only area in which he ruled against Oracle was with respect to their asserted efficiencies. Why? Because the standard of review on the findings of fact is one of "abuse of discretion,"<sup>21</sup> one could speculate that if Judge Walker had ruled in Oracle's favor on efficiencies, it would have exposed his decision to being overturned on appeal in a way that otherwise was avoided. Moreover, once he found a lack of substantial anticompetitive effects, no finding of efficiencies was necessary to support the ruling. One could observe that a court ruling the other way (i.e., finding in favor of the government) likewise would have an incentive generally to reject efficiency claims,

<sup>16</sup> Malcolm B. Coate & Andrew J. Heimert, *Economic Issues: Merger Efficiencies at the Federal Trade Commission 1997-2007* (Feb. 2009), available at <http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>.

<sup>17</sup> The Bureau of Competition was somewhat more likely to credit the parties' efficiency claims, accepting 84 and rejecting 37, but also failed to reach a conclusion in 190 instances, roughly 55% of all cases

<sup>18</sup> Case T-464/04, *Impala v. Comm'n*, 2006 E.C.R. II-2298.

<sup>19</sup> Muris, *supra* note 2 at 751.

<sup>20</sup> 331 F.Supp 2d 1098 (N.D. Cal. 2004).

<sup>21</sup> See *FTC v. Whole Foods Market, Inc.* 548 F.3d 1028 (D.D.C. 2009) ("We review a district court order denying preliminary injunctive relief for abuse of discretion. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C.Cir. 2001). However, if the district court's decision 'rests on an erroneous premise as to the pertinent law,' we will review the denial de novo 'in light of the legal principles we believe proper and sound.'" *Id.*").

lest an appellate court determine that the efficiencies should have been sufficient to permit the deal to proceed.<sup>22</sup>

Unlike merger control regimes in other jurisdictions, Canadian merger control law provides for an explicit “efficiency defence,” which is essentially a benefit-cost analysis for mergers. On one side of the ledger are the gains in efficiency that (i) will likely result from the merger and (ii) will not likely be attained if an order against the merger were made against the merger by the Competition Tribunal. On the other side of the ledger are the “effects of any prevention or lessening of competition” that likely would result from the merger. Balancing these costs and benefits against each other, the Competition Tribunal essentially asks whether the order necessary to address the anti-competitive effects of the merger would, in fact, do more harm than good to the Canadian economy. If the answer is yes, the order would do more harm than good, the Competition Tribunal does not have the statutory authority to issue the order and the merger is allowed to proceed, in spite of any consumer harm in affected markets. This is true in all circumstances, including in respect of a merger to monopoly.

A comprehensive evaluation of the reasons for asymmetrical treatment of efficiencies vis-à-vis competitive effects is contained in “Rethinking Merger Efficiencies” by University of Michigan Law Professor Daniel Crane.<sup>23</sup> In this article, Professor Crane argues that:

*A potential merger efficiency should be given weight equal to an equally likely anticompetitive risk of the same magnitude. To put it more formally, the probability-adjusted net present value of merger risks should be treated symmetrically with the probability-adjusted net present value of merger efficiencies.*<sup>24</sup>

Professor Crane concludes that if efficiencies were properly valued, the result would *not* be that *fewer mergers* would be challenged by the agencies, but rather that, at the margins, *different mergers* would be challenged by the agencies, leading to better net outcomes for consumers.<sup>25</sup>

### 3. Fixed cost efficiencies should be credited

Fixed cost savings that result from a merger often can be substantial. Elimination of overlapping administrative and back-office functions, inefficient equipment or machinery, duplicative sales offices, and other such savings can carry significant cost reductions and make a company more competitive. This is particularly true in some technology-heavy sectors where fixed costs often heavily outweigh variable costs.

Agencies have often discounted fixed cost savings, either explicitly or implicitly, in evaluating parties’ efficiency claims. The EC Horizontal Merger Guidelines, for example, explicitly describe variable costs as more likely to result in lower prices to consumers.<sup>26</sup> In fact, the EC considers that fixed cost reductions result from a reduction in output though in reality it is unusual for mergers to result in a

<sup>22</sup> U.S. v. H & R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011) (“Considering all of the evidence regarding efficiencies, the Court finds that most of the defendants’ claimed efficiencies are not cognizable because the defendants have not demonstrated that they are merger-specific and verifiable.” Id. at 92.)

<sup>23</sup> 110 MICH. L. REV. 347 (2011).

<sup>24</sup> Id. at 349.

<sup>25</sup> Id. (“Rebalancing the weighting of efficiencies and anticompetitive effects could have a significant effect on the overall mix and distribution of merger challenges.”)

<sup>26</sup> Id., ¶ 80.

reduction of business activity except in cases of significant industry consolidation.<sup>27</sup> The United Kingdom also indicates the greater likelihood of the authority taking account of marginal/short run variable cost savings than fixed cost savings.<sup>28</sup> But it is inappropriate to make a presumption of significance without a more detailed assessment of the facts of a particular case.

Professor Pitofsky has noted this irony and disagreed with the premise:

*Since in the long run all fixed costs become marginal costs, the position advocated in the economic community that marginal cost savings are more valuable than fixed cost savings, and more likely to be passed on to consumers, is of questionable validity. It is difficult to believe that a major reduction in the cost of fixed assets as a result of a merger would not be likely to reduce costs to consumers – certainly in the long run – just as would a major reduction in the cost of ingredients.<sup>29</sup>*

The current approach by the EC to discount fixed cost synergies also reflects a disconnect between their evaluation of mergers and their approach to dominance. In mergers, the EC favors the evaluation of variable costs, and there is no indication that the Commission has incorporated any meaningful assessment of fixed costs into its assessment. By contrast, in evaluating dominance of firms – and specifically in evaluating the relevant pricing metric by which a firm's pricing behaviour is to be gauged, the Commission has applied a “long range average incremental cost” (LRAIC) test<sup>30</sup> or an average avoidable cost (AAC) test that incorporates fixed cost elements such as salaries.<sup>31</sup> These two approaches are irreconcilable.

Both tests are designed to evaluate the basis for competitive pricing offered by a company, and the extent to which fixed versus variable costs are to be weighed. In the case of mergers, the Commission essentially assumes the standard model that “price equals variable cost,” and therefore discounts the extent to which a merger would reduce non-variable (i.e., fixed) costs. In the case of dominant firms, the Commission implicitly concludes that some element of fixed cost must be recovered over time and is properly included in determining the competitive price. In other words, the LRAIC test concedes that in the long run “all fixed costs are marginal costs.”

The economic literature supports the consideration of fixed cost savings as part of efficiency evaluation of mergers. This is particularly true in situations where firms first choose quality levels and then compete on price. In such cases, there is a strong relationship between fixed costs and price, indicating that a decrease in the fixed cost of producing a given level of quality due to a merger will decrease prices on a quality-adjusted basis and increase consumer welfare.<sup>32</sup>

<sup>27</sup> Id. (“Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.”)

<sup>28</sup> UK Guidelines, supra note 10, ¶ 5.7.9.

<sup>29</sup> Pitofsky, supra note 1, at 1421.

<sup>30</sup> Submission by European Comm'n, Roundtable on Bundled and Loyalty Discounts and Rebates, OECD Competition Comm., [DAF/COMP/WP3/WD\(2008\)48](http://ec.europa.eu/competition/international/multilateral/2008_june_rebates.pdf) (May 19, 2008), available at [http://ec.europa.eu/competition/international/multilateral/2008\\_june\\_rebates.pdf](http://ec.europa.eu/competition/international/multilateral/2008_june_rebates.pdf), at ¶ 18.

<sup>31</sup> See Case COMP/C-3 /37.990—Intel, Comm'n Decision (May 13, 2009) (summary at 2009 O.J. (C 227) 13), available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37990/37990\\_3581\\_18.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf), at ¶ 1135 (“Professor [...] proposes to exclude the basic salaries from the avoidable costs and then to treat only commissions and bonuses as avoidable. . . . This is manifestly incorrect.”).

<sup>32</sup> Dr. Robert N. Rubinovitz, *New Thinking on the Role of Fixed Cost Savings in Merger Analysis*, ANTITRUST SOURCE, Apr. 2008, available at <http://www.antitrustsource.com>.

#### 4. There is no adequate mechanism for recognizing dynamic efficiencies

Dynamic efficiencies differ significantly from static or cost-based efficiencies. Josef Schumpeter described growth from dynamic efficiencies as

*[C]ompetition from the new commodity, the new technology, the new source of supply, the new organization...competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their very foundations and their very lives.<sup>33</sup>*

The work of Nobel Prize winning economist Robert Solow determined that dynamic efficiency gains were to be credited for a remarkable share – fully seven-eighths -- of economic growth in the U.S. from 1909 to 1949. From this perspective, competition policy should aggressively recognize the potential for dynamic innovation in mergers.

The OECD is in accord with this view. In its report on a 2007 roundtable on dynamic efficiencies in merger review, the OECD Secretariat noted:

*The OECD has likewise concluded that innovation is responsible for most of the increase in material standards of living that has taken place since the industrial revolution. It seems likely that dynamic efficiencies have a considerably greater potential to benefit consumers than static efficiencies have. Therefore, it would be desirable – in an ideal world – for dynamic efficiency considerations to feature more frequently and more prominently in merger decisions.<sup>34</sup>*

But the current evaluative model does exactly the opposite. Without a word as to the potential magnitude of dynamic efficiencies, the U.S. Guidelines, for example, state that

*When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation.<sup>35</sup>*

Similarly, the EC Guidelines on the treatment of horizontal mergers apply an overly strict requirement with regard to the verifiability of dynamic efficiencies, thereby creating a significant hurdle in practice.<sup>36</sup>

And while the United Kingdom recognizes dynamic efficiencies,<sup>37</sup> they are all but rendered theoretical by requirements such as that the agency be satisfied by "compelling evidence" that the efficiencies are sufficient to prevent a SLC.<sup>38</sup>

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<sup>33</sup> JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (1942).

<sup>34</sup> OECD, DYNAMIC EFFICIENCIES IN MERGER REVIEW, [DAF/COMP\(2007\)41](http://www.oecd.org/competition/mergers/40623561.pdf) (2007), available at <http://www.oecd.org/competition/mergers/40623561.pdf>.

<sup>35</sup> U.S. Guidelines, supra note 3, at 10.

<sup>36</sup> EC Guidelines, supra note 7, ¶ 86 (“Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about.”)

This construction places little emphasis on the potentially dramatic benefits of dynamic change. Rather it focuses on its lack of effect on short-term pricing (i.e., implications on competitive effects) and the share of the benefit “appropriated” by the producer. Both of these points reflect a bias against the recognition of dynamic efficiencies and their potential value to consumers.

To properly evaluate the potential for dynamic efficiencies, the agencies should apply a probability-weighted factor to the dynamic efficiency and a coefficient to value the potential contribution of the dynamic efficiency. Although the probability of dynamic efficiencies may be lower than static efficiencies, they should not be ignored. The 2007 Roundtable recognized the practical problem that still needs to be addressed. *“When competition agencies assess efficiencies, they typically consider several factors to determine how much weight to assign to them, including whether the efficiencies are quantifiable. Due to their complexity, it appears that dynamic efficiencies will rarely be quantifiable.”*<sup>39</sup> So long as agencies rely on strict requirements of quantifiability, dynamic efficiencies, including those that could be seen as having a reasonable probability of coming to fruition, are destined to be fully discounted thereby potentially blocking the realisation of such dynamic efficiencies.

## 5. The merger specificity requirement should be practically applied

The merger specificity requirement as it is applied also presents a nearly insurmountable hurdle. The EC Guidelines provide that “[e]fficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives.”<sup>40</sup> Carried to its literal conclusion, this would prevent the acceptance of an efficiencies defense in virtually every case. Theoretically, parties could nearly always enter into a joint venture to combine resources and extract synergies, *if* they were willing to accept the negotiation risk of doing so in the absence of a merger. But as a practical matter, these negotiation risks are a serious inhibition.

A fine example is the EC's decision in the unconsummated merger of Inco and Falconbridge, two producers of nickel and other primary metals. The parties argued that the optimization of their production facilities in Canada's Sudbury basin would de-bottleneck operations and substantially increase output. In that case the Commission held that “while the efficiencies presented by the parties are quantified and well-supported by several studies prepared by Inco and are likely to effectively materialize, the parties did not demonstrate to the requisite standards that the efficiencies could not have been achieved by other means. . . .”<sup>41</sup> The Commission concluded that the efficiencies could have been achieved by a joint venture between the parties.<sup>42</sup> This conclusion was reached despite the fact that over the 80-year history of their operations in Sudbury, not such agreement had ever been achieved because each party was concerned about getting the worst of the deal. It is notable that the Commission had accepted remedies in that case (the divestiture of a downstream refinery) and that the acceptance of efficiencies arguments may have called into question the need for the divestiture.

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<sup>37</sup> UK Guidelines, supra note 10, ¶ 5.7.12-14; see also Enterprise Act 2002, § 30(1) which defines relevant consumer benefits to include greater innovation.

<sup>38</sup> UK Guidelines, supra note 10, ¶ 5.7.4.

<sup>39</sup> OECD, supra note 34, at 10 (emphasis in original).

<sup>40</sup> EC Guidelines, supra note 7, ¶ 85.

<sup>41</sup> Case COMP/M.4000 - Inco/ Falconbridge, Comm'n Decision, ¶ 536 (July 4, 2006), available at [http://ec.europa.eu/competition/mergers/cases/decisions/m4000\\_20060704\\_20600\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4000_20060704_20600_en.pdf).

<sup>42</sup> Id., ¶ 542.

In evaluating merger specificity, it is fundamental that the mere possibility of achieving the efficiencies through alternative means should not be the standard. Rather, because the counterfactual is that there would be no integration of assets and resources, this condition should assess whether it is likely that the efficiencies would be achieved in the absence of the merger. Mere speculation on the possibility of alternative means of achieving the efficiencies would create a condition that swallows the rule.

## **6. Better tools are needed**

The problem with respect to evaluation of efficiencies is a simple one: efficiencies do not fit neatly into the paradigm of competitive effects analysis. Indeed, they interfere with the orderly evaluation of effects like the proverbial fly in the ointment. Despite a near-universal acceptance of the theory that efficiencies should be credited and may counteract anticompetitive harms, there is no practical approach to their assessment.

Better tools for the assessment of efficiencies are needed. These include not only better models for the economic evaluation of efficiencies, but also better institutional mechanisms that remove the asymmetries and procedural biases against efficiencies and allow them to be regarded on equal footing with potential competitive harms. Competition authorities have fought to overcome the “efficiencies offense” moniker that was levied in the past and have issued Guidelines which purport to credit efficiencies, but have not removed the institutional biases which continue to weigh against the acceptance of efficiency claims.

## DOMINANT AND EFFICIENT– ON THE RELEVANCE OF EFFICIENCIES IN ABUSE OF DOMINANCE CASES

*Note by Hans W. Friederiszick and Linda Gratz\**

The European Commission's policy on the relevance of efficiency considerations in abuse of dominance cases (Article 102 TFEU) is not well settled. In an attempt to give guidance on that matter we address that topic from two different angles: First, we review EC soft law provisions and recent decisions. Based on this review we find that efficiency defences are of limited importance under the current practice. They are of relevance in the growing number of IT related cases but not in others. Second, for the example of low price strategies, we then explore business practitioners' views on the relevance of pro- and anticompetitive motives. Based on a survey among EMBA students we find that low price strategies are indeed frequently used. The motives are diverse though, often procompetitive and in line with antitrust compliance, i.e. low price strategies are rarely considered advisable for leading firms. Policy conclusions are drawn.

### 1. Introduction and summary

Article 102 of the Treaty on the Functioning of the European Union (hereafter "Article 102 TFEU") is aimed at preventing abusive exclusionary and exploitative conduct by dominant undertakings. In 2005, the European Commission began a review process on the policy underlying Article 102 TFEU and the way in which it should enforce that policy, focussing on exclusionary abuses. In line with the advice given by the Economic Advisory Group on Competition Policy (EAGCP), the EU Commission rejected in a comprehensive staff discussion paper the former legalistic approach for assessing abusive exclusionary conduct by dominant undertakings in favour of an effects-based approach.

The subsequent Guidance Paper, which was adopted in 2009, is however less explicit about the role of economic analysis in the EU Commission's practice. Nevertheless, the Guidance Paper acknowledges the relevance of actual or likely effects for the overall assessment. Most importantly for the topic at hand, it explicitly foresees a balancing of anti- and procompetitive effects (i.e. efficiencies and other objective justifications), comparable to the approach taken under the EC merger guidelines or under Article 101 (3) TFEU.<sup>1</sup> This approach has also been endorsed by the European Court in the case *Post Danmark*.<sup>2</sup>

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<sup>1</sup> In the Background Note by the Secretariat of the OECD the view is taken that Article 102 TFEU „*appears to establish an absolute prohibition of an abuse of dominance, thereby depriving dominant firms of a possibility to justify their conduct*“ (paragraph 161). However, in Europe „*this restrictive approach has started to gradually relax*“; [t]he European Commission's Guidance of 2009 on its enforcement priorities in applying Article 102 also recognises efficiencies as a possible defence [...]“ (paragraphs 170 and 176).

In this paper, we discuss the actual relevance of efficiency considerations in the EC practice of Article 102 TFEU cases. We first review final Commission Decisions published since 2009 as well as investigations opened during that period to identify enforcement priorities and the actual relevance of efficiency considerations and other objective justifications in the EU Commission's practice. Thereafter, we contrast this practice with the business view on the actual relevance of pro- and anticompetitive motives, with a focus on low price strategies.

We come to the following conclusions:

**Regarding current EU enforcement priorities** we identify four main enforcement clusters. First, a focus is on refusal to supply/ margin squeeze abuses in regulated network industries, that is, in the energy, transportation and telecommunication sectors. Here the EU Commission takes the role of a regulator of last resort. Second, a significant number of cases relate to the IT software industry and to the financial data service industry. Here the main focus is on interoperability issues, that is, on tying and bundling and/or refusal to supply. Third, we find a significant number of cases in which Intellectual Property Rights (IPRs) play an important role. The main concern here is exploitation of downstream customers. With respect to the manufacturing industries, the EU Commission focuses on aftermarket or exclusive dealing concerns.

By comparing the EU Commission's closing and opening decisions it can be inferred that these enforcement priorities will persist. The high percentage of cases related to the IT sector, in which innovation plays a decisive role, is remarkable.

**Regarding the relevance of efficiency considerations** for final Article 102 TFEU Commission Decisions since 2009 the review shows that in 42 percent of these decisions (in five out of 12) an efficiency defence or another objective justification was put forward and reported. We consider this number to be low given that in Article 102 TFEU cases anticompetitive behaviour and objective justifications are intrinsically linked.

By reviewing past EU decisions, we also observe that in the majority of cases in which efficiencies or other objective justifications were put forward by the dominant companies, the companies were active in the IT sector, whereas in the majority of cases in which no objective justifications were put forward, the dominant companies were active in the energy sector.

Overall, the review of past Article 102 TFEU cases shows that efficiency defences are of limited importance under the current practice. They played a role mainly in cases related to the IT sector but not in others. The shift in emphasis towards cases related to the IT sector implies a growing importance of a well-conceived approach towards efficiency considerations within Article 102 TFEU.

**Regarding low price strategies** we explore the motives behind these strategies from a business perspective to assess to what extent competition authorities should take a negative presumption once a low price strategy is robustly established. We find that low price strategies are frequently used. The motives are diverse, often procompetitive and in line with antitrust compliance as low price strategies are rarely considered advisable for leading firms.

The paper is structured as follows: Section 2 reviews the EU Commission's overall approach to dominance cases and explores enforcement priorities with respect to industries affected and theories of harm put forward. Section 3 discusses the EU Commission's practice with respect to efficiencies and other objective justifications in Article 102 TFEU cases. A business perspective on efficiencies and other objective justifications is offered in Sections 4 and 5. The existing empirical literature is discussed and the

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<sup>2</sup> ECJ 27 March 2012 – Case C-209/10 (Post Danmark A/S/ Konkurrencerådet).

results of a survey on low price strategies among EMBA students are presented. Section 6 summarizes several issues that require further considerations.

## 2. The EU Commission's approach to dominance cases and recent trends

In the following we briefly describe the standard practice of assessing an Article 102 TFEU case in the EU, focusing on efficiencies and other objective justifications.

### 2.1 *Dominance assessment and balancing*

The objective of Article 102 TFEU is the protection of competition on the market as a means of enhancing consumer welfare. To achieve this objective Article 102 TFEU prohibits abusive exclusionary and exploitive conduct by dominant undertakings.

The first step in the application of Article 102 TFEU is the assessment of dominance. Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it “*to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*”,<sup>3</sup> a definition which can only hardly be reconciled with economic thinking as also a firm with significant market power will keep a strong customer orientation and will price in accordance to external rivalry.

Despite this conflict in legal and economic notion there is a common understanding between law and economics of the factors which need to be assessed in a dominance assessment. It is necessary to look *inter alia* at the market position of the allegedly dominant company, the market position of competitors, barriers to expansion and entry, and the market position of buyers.

The second step in the application of Article 102 TFEU is an assessment of the abusive conduct. As established under Community law, dominant undertakings may not “*recourse to methods different from those which condition normal competition*”.<sup>4</sup> The focus of the EU Commission is on the effect on competition and consumer welfare. If the EU Commission finds that a practice is likely to exclude an equally or more efficient competitor or to result in anticompetitive exploitation of consumers, the dominant undertaking can rebut by putting forward explanations of why the conduct in question is efficient and justified by procompetitive considerations. That is, the positive and negative effects of the conduct are balanced against each other in order to come to an overall assessment.

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<sup>3</sup> Case 85/76 *Hoffmann-La Roche & Co. v Commission* (1979) ECR 461, paragraph 38.

<sup>4</sup> Case 85/76 *Hoffmann-La Roche & Co. v Commission* (1979) ECR 461, paragraph 38.

### **Judgement on Post Danmark**

In a recent judgement the European Court endorsed the approach set out in the Commission's Article 102 Discussion and Guidance Paper. It acknowledged the relevance of actual or likely effects for the overall assessment. Moreover, it acknowledged the necessity of a balancing of anti- and procompetitive effects (i.e. efficiencies and other objective justifications). In the following we briefly summarize the underlying case and the judgment.

In Denmark, Post Danmark and Forbruger-Kontakt are the two largest undertakings in the unaddressed mail sector (brochures, telephone directories, guides, local and regional newspapers etc.). Post Danmark has a monopoly in the related addressed mail sector. It therefore maintains a distribution network covering the entire national territory.

Until 2004, Forbruger-Kontakt had established a distribution network itself, which covered almost the entire national territory. Forbruger-Kontakt also had major customers in the supermarket sector, namely the SuperBest, Spar and Coop groups.

The Coop group entered contract negotiations with both, Post Danmark and Forbruger-Kontakt, in 2003. Post Danmark offered marginally lower prices than Forbruger-Kontakt and thus won the Coop group as customer. Moreover, Post Danmark won the SuperBest and Spar groups as customers.

In what follows, Forbruger-Kontakt complaint to the Danish competition council Konkurrencerådet that Post Danmark had abused its dominant position by not putting its customers on an equal footing in terms of rates and rebates and charging Forbruger-Kontakt's former customers rates different from those it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs.

In the following decisions it was found that Post Danmark had priced to the Coop group below its "average total costs" but above its "average incremental cost". Notably, Post Danmark argued that the contract concluded with the Coop group enabled it to achieve economies of scale, leading to cost reductions of DKK 0.13 per item.<sup>1</sup> The authorities assessed that the prices offered to the Spar and SuperBest groups were higher than average total costs. It could not be established that Post Danmark had intentionally sought to eliminate competition.

The European Court was addressed with the following questions:

1. Is Article 102 TFEU to be interpreted as meaning that selective price reductions on the part of a dominant postal undertaking that has a universal service obligation to a level lower than the postal undertaking's average total costs, but higher than the provider's average incremental costs, constitutes an exclusionary abuse, if it is established that the price was not set at that level for the purpose of driving out a competitor?
2. If the answer to question 1 is that a selective price reduction in the circumstances outlined in that question may, in certain circumstances, constitute an exclusionary abuse, what are the circumstances that the national court must take into account?

The European Court pointed out that Article 102 TFEU "prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits." It made clear that "to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term." The European Court also pointed to the fact that Forbruger-Kontakt had not been foreclosed; Forbruger-Kontakt managed to maintain its distribution network and won back the Coop and the Spar groups as customers in 2007.

Further, the European Court emphasized that a dominant undertaking is open to provide justification for an alleged exclusionary conduct under Article 102. A dominant undertaking “may demonstrate, for that purpose, either that its conduct is objectively necessary (see, to that effect, Case 311/84 CBEM [1985] ECR 3261, paragraph 27), or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (Case C 95/04 P British Airways v Commission [2007] ECR I 2331, paragraph 86, and TeliaSonera Sverige, paragraph 76).” Further, the European Court stressed that an efficiency defence is also valid even if the considered efficiencies did not appear in the schedules of prices.

In conclusion the court establishes that “In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and thereby, of consumers’ interests.” Hence, the European Court endorsed the approach set out in the Commission’s Article 102 Discussion and Guidance Paper. It acknowledged the relevance of actual or likely effects for the overall assessment. Moreover, it acknowledged the necessity of a balancing of anti- and procompetitive effects (i.e. efficiencies and other objective justifications).

## 2.2 *Types of conduct under Article 102 TFEU*

A distinction is made between exclusionary and exploitative conduct. Exclusionary conduct describes conduct whereby a dominant company prevents or hinders competition in the market, whereas exploitative conduct means conduct whereby a dominant company takes advantage of its market power to exploit its customers.<sup>5</sup> Both types of conduct are linked as exclusion is pursued with the motive of exploitation once the exclusionary objective is achieved. The opposite is not true though, as the root of exploitation may also rest in procompetitive behaviour. In fact, as is pointed out by Röller (2007) “*if there was no possibility to ever exploit ones market power, there would be no incentive to compete. Thus, pro-competitive behavior must also involve exploitation (‘positive effects’).*”

Regarding exclusionary conduct, the EU Commission gives priority to the most commonly encountered forms: exclusive purchasing agreements and conditional rebates, tying and bundling, refusal to supply, margin squeeze and predatory pricing. The EU Commission defines these forms of exclusionary conduct as follows:<sup>6</sup>

- **Exclusive purchasing agreements and conditional rebates, together referred to as exclusive dealing:** An exclusive purchasing obligation requires a customer to purchase exclusively or to a large extent only from the dominant undertaking. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour.<sup>7</sup>
- **Tying:** refers to situations where a supplier makes the sale of one product (the tying product) conditional upon the purchase of another distinct product (the tied product). Only the tied product can be bought separately.
- **Bundling:** refers to situations where a package of two or more goods is offered. Cases where only the bundle is available, and not the components, are referred to as pure bundling. Cases where both the bundle and the components are available on the market are referred to as mixed bundling if the bundle is sold at a discount to the sum of the prices of the components.

<sup>5</sup> A comprehensive overview on excessive pricing and competition policy is offered in OECD (2012a).

<sup>6</sup> Discussion Paper paragraphs 93, 96, 135–137, 177, 209 and Guidance Paper paragraphs 33 and 37.

<sup>7</sup> In contrast, unconditional rebates differentiate the purchase price between customer groups or comprise unconditional volume rebates.

- **Refusal to supply and margin squeeze:** Refusal to supply refers to situations where a dominant company denies a buyer access to an input. The concept covers a broad range of practices, such as the refusal to supply products to existing or new customers, refusal to license intellectual property rights, including when the licence is necessary to provide interface information, or refusal to grant access to an essential facility or a network. A particular behaviour, which can amount to a refusal to supply, is a “margin squeeze”. This may occur when a dominant company that is vertically integrated charges a price for the product in the upstream market which, compared to the price it charges in the downstream market, does not allow an equally efficient downstream competitor to trade profitably.
- **Predatory pricing:** refers to situations where a dominant company lowers its price and thereby deliberately incurs losses or foregoes profits in the short run so as to eliminate or discipline rivals or prevent their entry in the long run.

The types of conduct can be distinguished as being price vs. non-price-based,<sup>8</sup> leading to exclusion of an upstream vs. a downstream rival (see

	Horizontal foreclosure	Vertical foreclosure
<b>Non-price-based exclusion</b>	Exclusive purchasing agreements	Refusal to supply
	Tying	
<b>Price-based exclusion</b>	Conditional rebates	Margin squeeze
	Bundling	
	Predatory pricing	

Source: DG Comp Discussion Paper, Table 1.

For the assessment of alleged price-based exclusionary conduct the EU Commission examines economic data relating to cost and sales prices in order to infer whether an *as efficient competitor* can compete with the dominant company. If the EU Commission finds that the dominant company is not engaging in below-cost pricing, that is, that the price is above the average total costs of an as efficient competitor (typically the incumbent’s costs are taken), it will reach the conclusion that the dominant company’s conduct is not abusive (safe harbour). If, on the other hand, the as efficient competitor test suggests that the price-based conduct causes non-negligible concern for anticompetitive foreclosure effects, the EU Commission will initiate case-by-case considerations and will also take other relevant quantitative and/or qualitative evidence into account.<sup>9</sup>

<sup>8</sup> Note that specific forms of price conduct can have comparable effects than non-price related conduct. For instance, a so-called ‘English clause’, requiring the buyer to report any better offer and allowing it only to accept such an offer when the supplier does not match it, can *de facto* also result in concentrating the purchases with one supplier as a single branding obligation does. See Lear (2012) for a comprehensive discussion of these kinds of pricing policies, linking its own price to prices charged by others for the same product.

<sup>9</sup> Guidance Paper, paragraphs 25–27, 43, Discussion Paper, paragraph 66 and ECJ 27 March 2012 – Case C-209/10 (Post Danmark A/S/ Konkurrencerådet), paragraphs 40-43. For the price being below average total costs (or long-run incremental costs for business operations comprising common costs), but above average variable costs (average avoidable costs for business operations comprising common costs) the burden of proof is with the EU Commission to show that the behaviour is anticompetitive; for prices below average variable costs (average avoidable costs) it is for the incumbent to disprove this concern.

For the assessment of alleged non-price-based exclusionary conduct the EU Commission makes use of similar principles. To assess tying it will inquire whether (i) the tying and tied goods are two distinct products and (ii) whether the tying practice is likely to have a market distorting foreclosure effect. To infer whether the conduct has a market distorting foreclosure effect the EU Commission will investigate which customers are “tied” in the sense that competitors to the dominant company cannot compete for their business. Then, it will inquire whether these customers “add up” to a sufficient part of the market being tied.<sup>10</sup>

With regard to exclusive purchasing agreements the EU Commission focuses on cases where the number of customers, that is, the degree of downstream competition, is high as in these cases the likelihood of a market distorting foreclosure effect is high.<sup>11</sup> For the assessment of a potential foreclosure effect it will take into account *inter alia* the competitive constraint exercised by competitors, whether competitors can compete on equal terms for each individual customer’s entire demand and the duration of the exclusive purchasing agreements.<sup>12</sup>

Finally, for the assessment of refusal to supply, as a first step the EU Commission will inquire whether the refusal relates to a product or service that is objectively necessary to be able to compete effectively in a downstream market.<sup>13</sup> As a second step, the EU Commission will determine a vertical foreclosure effect, taking into account the market share of the dominant undertaking in the downstream market, the capacity of the dominant undertaking relative to that of competitors in the downstream market, the substitutability between the dominant undertaking’s output and that of its competitors in the downstream market, the proportion of competitors in the downstream market that are affected, and the demand that is diverted away from the foreclosed competitors to the advantage of the dominant undertaking.<sup>14</sup>

### 2.3 *Recent trends in EU enforcement priority*

In this section, we review Article 102 TFEU cases for which the EU Commission opened an investigation or came to a final decision between 2009 and 2012. Overall, 28 cases are examined; some of which are closely linked.<sup>15</sup>

We distinguish between three broad industries: first, regulated network industries, including energy, transportation and telecommunications; second, manufacturing industries, particularly IT hardware manufacturing; third, service industries, including financial services as well as IT software provision. Regarding classification of conducts, we follow the nomenclature of the EU Commission in its Discussion and Guidance Paper. We add exploitative abuses as a further category.

When classifying the cases, the problem arises that single cases may comprise several theories of harm. For instance, refusal to supply often inheres tying/ bundling elements and margin squeeze often inheres predatory pricing elements. This applies, for instance, to the MathWorks case, where MathWorks,

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<sup>10</sup> Discussion Paper, paragraph 183 and 188.

<sup>11</sup> Guidance Paper, paragraph 34.

<sup>12</sup> Guidance Paper, paragraph 36.

<sup>13</sup> Guidance Paper, paragraph 81.

<sup>14</sup> Guidance Paper, paragraph 85.

<sup>15</sup> There are three Google cases which address the same conduct in different niche markets, two IP cases related to Motorola and two Microsoft cases. The latter Microsoft case relates to non-compliance with the remedies imposed in the earlier Microsoft case.

a specialised software provider, allegedly refused to provide competitors with certain software licenses and/ or interoperability information in relation to its Simulink and MATLAB product families, thereby potentially hindering competition. Preventing interoperability can be seen as a refusal to supply as interoperability is essential for competitors to be able to compete in the market. At the same time, by preventing interoperability MathWorks tied its flagship products to its own applications. Suppressing interoperability is also the key issue in Reuters Instrument Codes and has been dealt with in an earlier Microsoft case.

Multiple theories of harm may also arise for conduct related to aftermarkets. Aftermarkets comprise complementary products (or “secondary products”) that are purchased after the purchase of another product (the “primary product”) to which it relates.<sup>16</sup> Examples include after-sales services and spare parts. A company may abuse its dominant position by excluding competitors from the aftermarket, either through tying or refusal to deal.

Further, the problem of multiple theories of harm may arise for cases concerning exploitative conduct as exploitation is often a consequence of exclusion.

For the classification of cases we focussed on what we considered to be the main theories of harm; some ambiguity remains though. The classification of cases by industry and type of conduct is provided in **Error! Reference source not found.**

Before discussing the insights of **Error! Reference source not found.** we briefly describe the substantial issues of the cases classified therein:

- **EDF (2007; 2010)** – The EU Commission was concerned that the scope, duration, and exclusive nature of EDF’s supply contracts with large electricity consumers hindered the entry and expansion of EDF’s competitors in the French electricity market.
- **ENI (2007; 2010)** – The EU Commission’s main concern was that the Italian energy company ENI abused its dominant position on the Italian gas supply markets by refusing to grant competitors access to capacity available on the transport network (capacity hoarding), by granting access in an impractical manner (capacity degradation) and by strategically limiting investment (strategic underinvestment) in ENI’s international transmission pipeline system.
- **RWE Gas (2007; 2010)** – The EU Commission was concerned that RWE abused its dominant position on its gas transmission network through refusal of access to its network and through a margin squeeze strategy aimed at lowering the margins of RWE’s downstream competitors in gas supply.
- **Gaz de France (2008; 2009)** – The EU Commission’s concern was that GdF Suez abused its dominant position by foreclosing access to gas import capacities in France. In particular, the EU Commission was investigating whether GdF Suez’s long term reservations for most of France’s gas import capacity, as well as its behaviour relating to investment and capacity allocation at two liquefied natural gas import terminals in France might have closed off access to the French gas market to other potential gas suppliers.
- **E.ON Gas (2010; 2010)** – As in the Gaz de France case the EU Commission was concerned that E.ON abused its dominant position in the gas transport markets in several market areas in Germany by foreclosing access to entry capacity into its gas transmission grid.

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<sup>16</sup> Discussion Paper, paragraph 243.

- **ČEZ (2011)** – The EU Commission’s concern was that ČEZ restricted entry by excessive capacity reservations on electricity transmission networks in the Czech market for the generation and wholesale supply of electricity.
- **Swedish Interconnectors (2009; 2010)** – The EU Commission’s concern was that Svenska Kraftnät, the state-owned Swedish electricity grid operator, limited transmission capacity at Swedish interconnectors for exports to the benefit of domestic consumption, thereby discriminating between different network users and segmenting the internal market.
- **ARA (2011)** – The EU Commission was concerned that ARA was refusing to supply access to waste collection infrastructure, which would put pressure on customers not to contract with ARA’s competitors.
- **Deutsche Bahn (2012)** – The EU Commission is investigating whether the German railway incumbent Deutsche Bahn AG and several of its subsidiaries are operating an anticompetitive pricing system for traction current in Germany. Traction current is a type of electricity used by trains on the railway network. In particular, the EU Commission is investigating whether the volume discounts applied by Deutsche Bahn’s infrastructure subsidiary lead *de facto* to higher electricity prices for its downstream competitors in the rail freight and passenger markets relative to its own downstream subsidiary.
- **TP (2008; 2010)** – The alleged anticompetitive conduct of TP, Telekomunikacja Polska, consisted of refusing to supply its wholesale broadband products, hindering alternative operators from efficiently accessing its network and using its wholesale broadband products.
- **Slovak Telekom (2009)** – The EU Commission investigated into Slovak Telekom’s behaviour in broadband Internet access markets. The suspected infringements concerned a possible refusal to deal, margin squeeze and other exclusionary behaviour with respect to wholesale local loop access, other wholesale broadband access services and retail broadband access services.
- **Reel/ Alcan (2008)** – The EU Commission investigated whether Alcan acted abusively by tying its aluminium smelting technology (primary market) with handling equipment for aluminium smelters (secondary market).
- **Honeywell/ DuPont (2011)** - The EU Commission is investigating, among others, whether Honeywell engaged in deceptive conduct during the evaluation of a new refrigerant known as 1234yf, which is intended for use in future car air conditioning systems. It is claimed that Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed as a suitable global replacement for the previous refrigerant R134a and then failed to grant licences on fair and reasonable (so called "FRAND") terms.
- **IBM (2010; 2011)** – The maintenance subsidiary of IBM, IBM Maintenance Service, allegedly imposed unreasonable supply conditions with regard to certain spare parts (secondary market product) required for maintenance of IBM mainframes (primary market product) on its competitors in the maintenance market, thus putting them at a competitive disadvantage.
- **Intel (2007; 2009)** – The EU Commission was concerned that Intel abused its dominant position in the market for CPUs (x86 central processing units) by incentivising computer manufacturers and a European retailer to exclusively purchase Intel’s CPUs through a conditional rebate scheme. The EU Commission also objected to other measures which allegedly aimed at preventing or delaying the launch of competing products.

- **Rambus (2007; 2009), Samsung (2012) and Motorola (2012), (2012)** – The Commission concerns that the companies abuse their dominant position by charging excessive licencing fees for the use of standard essential patents (SEPs). In the Rambus case, this was preceded by a so-called patent ambush, which describes a strategy where an ex ante non-dominant member of a standards setting organisation (SSO) intentionally conceals a patent that reads on the ultimate standard, thereby becoming ex post dominant, and subsequently in a position to apply unfair license terms.
- **Microsoft (2008; 2009) and (2012)** – The Microsoft case concerns Microsoft’s allegedly illegal tying of its web browser Internet Explorer to its dominant client personal computer operating system Windows. Microsoft submitted commitments in 2009. In 2012, the EU Commission opened new proceedings against Microsoft to investigate possible non-compliance with these commitments.
- **S&P (2009; 2011)** – The EU Commission held that S&P, Standard & Poor’s, abused its dominant position by charging excessive licensing fees for the supply of US International Securities Identification Numbers (“ISINs”) within the EEA.
- **Foundem/ Ciao/ 1plusV vs. Google (2010)** – Following several complaints, the EU Commission investigated whether Google abused a dominant position in general online search by discriminating against specialised search engine providers – so-called vertical search engines – in its unpaid and sponsored search results, while favourably placing its own vertical search services.
- **Servier (2009)** - In this case the main theory of harm concerns pay-for-delay settlements between the French pharmaceutical company Servier and several of its generic competitors. Pay-for-delay settlements are usually dealt with under Article 101 TFEU (see also Lundbeck (2010), Johnson & Johnson and Novartis and Sandoz (2011) and Cephalon and Teva (2011)). In addition, the EU Commission is concerned that Servier's acquisition of key competing technologies were aimed at delaying or generic entry, in violation of Article 102 TFEU.

**Table 1: Recent EU decisions (opened investigations and final decisions), 2009–2012**

	Regulated network industries			Manufacturing		Services		Pharma
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services	
<b>Exclusive dealing</b>	EDF (2007; 2010)				Intel (2007; 2009)			
<b>Tying/ bundling</b>						Microsoft (2008; 2009)	Reuters (2009)	
						Microsoft (2012)		
						Foundem/ Google (2010)		
				Reel/ Alcan (2008)		Ciao/Google (2010)		
<b>Refusal to supply/ margin squeeze</b>	ENI (2007; 2010)	Deutsche Bahn (2012)	TP (2008; 2010)		IBM (2010; 2011)	MathWorks (2012)		
	RWE Gas (2007; 2009)	ARA (2011)	Slovak Telekom (2009)					
	Gaz de France (2008; 2009)							
	E.ON Gas (2010; 2010)							
	ČEZ (2011)							
<b>Predatory pricing</b>								
<b>Exploitative abuses</b>				Honeywell, DuPont (2011)	Rambus (2007; 2009)		S&P (2009; 2011)	
					Samsung (2012)			
					Motorola (2012)			
<b>Others</b>	Swedish Interconnectors (2009; 2010)							Servier (2009)

Source: Authors' review of past EU decisions.

Notes: In brackets are the opening dates of the investigations and the final decision dates, given the case has already been decided.

Table 2 identifies four main enforcement clusters (marked in different grey tones):

First, a focus is on refusal to supply/ margin squeeze abuses in regulated network industries, that is, in the energy, transportation and telecommunication sectors. Here, the EU Commission takes the role of a regulator of last resort.

Second, a significant number of cases relate to the IT software industry and to the financial data service industry (which are closely related, as financial data providers supply data which feeds into financial analytics software). Here the main focus is on interoperability issues, that is, on tying and bundling and/ or refusal to supply.

Third, we find a significant number of cases in industries in which Intellectual Property Rights (IPRs) play an important role. The EU Commission's main concern here is exploitation of downstream customers.

Fourth, with respect to manufacturing industries the EU Commission focusses on aftermarkets or exclusive dealing.

By comparing the EU Commission's closing and opening decisions it can be inferred that these enforcement priorities will persist. The high percentage of cases in the IT sector, in which innovation plays a decisive role, is remarkable.

### 3. Efficiency defences and other objective justifications in the EU Commission's practice

In the following we briefly describe efficiency defences and other objective justifications according to EU soft law provisions and in past EU decisions.

#### 3.1 *Efficiency defences and other objective justifications according to EU soft law provisions*

If the EU Commission finds that the conduct causes non-negligible concern for anticompetitive effects, the dominant company can rebut by proving objective justifications for its conduct, for instance, by demonstrating that its conduct produces substantial efficiencies or is objectively necessary and proportionate so that the positive effects outweigh the negative effects. These dominant companies' explanations of why the conduct in question is efficient and justified by procompetitive considerations are referred to as *objective justifications*.

O'Donoghue and Padilla (2006) distinguish between three types of objective justifications:<sup>17</sup>

- **Defences of objective necessity:** In a case of refusal to supply, examples would be capacity limitations or concerns about quality, security, or safety at a facility.<sup>18</sup>
- **Meeting-competition defence:** Applies to situations in which a dominant firm takes reasonable steps to protect its commercial interests.
- **Efficiency defence:** Applies to situations in which the dominant firm's conduct is justified by market expanding or other efficiencies.

For an efficiency defence to be accepted, the dominant undertaking must show that the following cumulative conditions are fulfilled:<sup>19</sup>

<sup>17</sup> See O'Donoghue and Padilla (2006) Section 4.5.

<sup>18</sup> See FAG-Flughafen Frankfurt/Main AG, OJ 1998 L 72/30.

<sup>19</sup> Guidance Paper, paragraph 30.

- Efficiencies are realised or are likely to be realised as a result of the conduct;
- The conduct is indispensable to realise these efficiencies;
- The likely efficiencies outweigh any likely negative effects on competition and consumer welfare;
- The conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

Table 3 summarises objective justifications which the EU Commission points out to be of relevance in its Discussion and Guidance Papers regarding exclusionary conduct. To the extent that the exploitative abuse is a consequence of a specific exclusionary conduct, the efficiencies and other objective justifications mentioned for such kinds of exclusionary conduct may be considered relevant also for the related exploitative abuses.

**Table 2: Potential objective justifications and efficiencies mentioned by the EU Commission**

	<b>Objective necessity and meeting-competition defence</b>	<b>Efficiencies</b>
<b>Exclusive purchasing obligations or conditional rebates</b>	The EU Commission points out that meeting-competition can in general not be used as a justification.	The exclusive purchasing obligation or conditional rebate may be indispensable <ul style="list-style-type: none"> <li>• to obtain <b>cost advantages</b> (economies of scale and scope, network effects or learning curve effects);</li> <li>• to provide the supplier with an incentive to make a <b>relationship-specific investment</b> necessary to supply a particular customer;</li> <li>• to <b>avoid double marginalisation</b>.</li> </ul>
<b>Refusal to supply and margin squeeze</b>	<ul style="list-style-type: none"> <li>• The undertaking seeking access will <b>not be technically able to use the facility</b> in a proper manner.</li> <li>• The undertaking being terminated is not able to provide the appropriate <b>commercial assurances</b>.</li> <li>• In the case of access to an essential facility <b>access will lead to a substantial increase in cost</b> that will jeopardise the economic viability of the facility holder.</li> </ul>	Access may be denied if <ul style="list-style-type: none"> <li>• thereby adequate returns on investment and thus <b>continuing investment incentives</b> will be assured;</li> <li>• otherwise <b>the dominant undertaking's level of innovation</b> will be impacted negatively (e.g. through the development of follow-on-innovation by competitors);</li> <li>• the dominant undertaking wants to <b>integrate downstream</b> and perform the downstream activities itself (it then has to show that consumers are better off with the refusal to supply).</li> </ul>
<b>Tying and bundling</b>	It may be an objective necessity to tie products for reasons of quality or good usage of the products necessary <b>to protect the health or safety of the customers</b> .	<ul style="list-style-type: none"> <li>• Tying and bundling may help to produce <b>savings in production, distribution and transaction costs</b>.</li> <li>• Combining two independent products into a new, single product may be an <b>innovative</b> way to market the product(s), enhancing the ability to bring such a product to the market to the benefit of consumers.</li> </ul>

	Objective necessity and meeting-competition defence	Efficiencies
<b>Predatory pricing</b>	<p>Predatory pricing may be objectively necessary</p> <ul style="list-style-type: none"> <li>• for the dominant company to minimise its losses in the short run as <b>market conditions changed</b> <ul style="list-style-type: none"> <li>○ due to dramatic fall in demand leading to excess capacity or</li> <li>○ due to entry by a rival;</li> </ul> </li> <li>• as there is a <b>need to sell off</b> perishable inventory or phased out or obsolete products or the costs of storage have become prohibitive;</li> <li>• due to <b>re-start-up costs</b> or <b>strong learning effects</b>.</li> </ul>	<ul style="list-style-type: none"> <li>• In general, the EU Commission considers the creation of <b>efficiencies</b> through predatory pricing <b>unlikely</b>.</li> <li>• It mentions, though, that the low pricing may enable the dominant undertaking to achieve economies of scale or <b>efficiencies related to expanding the market</b>.</li> </ul>

Source: Authors' review of the EU Commission's Discussion and Guidance Paper.

### 3.2 *Efficiency defences and other objective justifications in past EU decisions*

In the following we examine whether the EU Commission took in its recent Article 102 TFEU decisions efficiency considerations or other business justifications into account and discussed them transparently. Table 3 provides an overview of Article 102 TFEU cases which the EU Commission has decided since 2009 and in which objective justifications were raised by the dominant companies.

**Table 3: Article 102 TFEU Commission Decisions since 2009 in which objective justifications were raised**

Case/ Conduct/ Sector	Objective justification raised by the dominant undertakings
<b>Microsoft (tying)</b> (COMP/C-3/39.530; Commitment Decision); <b>Tying of Internet Explorer to Windows;</b> <b>IT sector</b>	<p>In the earlier Microsoft case of the tying of Windows Media Player to Windows, Microsoft argued:</p> <ol style="list-style-type: none"> <li>1. The tying lowers <b>transaction costs</b> for consumers.</li> <li>2. The <b>economies</b> made by a tied sale of two products save resources otherwise spent for maintaining a separate distribution system for the second product.</li> <li>3. The tie-in makes it easier for third-party software producers to implement functionality. Consequently, the third-party software producers are able to focus on their areas of expertise, which leads to an <b>increase in the value of the operating system package for end-users</b>.</li> </ol>
<b>Intel</b> (COMP/C-3 /37.990; under appeal)/ <b>Exclusive dealing;</b> <b>IT sector</b>	<ol style="list-style-type: none"> <li>1. By using a rebate, Intel only <b>responded to price competition from its rivals</b>.</li> <li>2. The rebate system used vis-à-vis each individual OEM was necessary in order to achieve <b>efficiencies</b> that are pertinent to the CPU industry (lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies). Intel claimed that conditions attached to the rebates were indispensable to attain these efficiencies.</li> </ol> <p>Furthermore, Intel argued that the impact of the rebates on competition was minor since its competitor, AMD, grew during the investigation period.</p>

Case/ Conduct/ Sector	Objective justification raised by the dominant undertakings
<b>Telekomunikacja Polska (TP)</b> (COMP/39.525; under appeal); <b>Refusal to supply;</b> <b>Telecommunications</b>	The difficulties the alternative operators were facing “ <i>were not linked to a strategy but can be explained by the technical works and internal reorganisation which TP had to undergo in a very short period of time to adjust to the new regulatory environment.</i> ” In particular, <b>TP had difficulties</b> <ul style="list-style-type: none"> <li>• simultaneously managing several projects on many various wholesale services,</li> <li>• developing proper IT systems which would support the new processes for the wholesale services and</li> <li>• finding human resources to perform certain projects.</li> </ul>
<b>Standard &amp; Poor’s</b> (COMP/39.592; Commitment Decision); <b>Excessive pricing;</b> <b>Financial Services</b>	<b>Intellectual property rights</b> over US ISIN databases and on US ISIN numbers for the use of which it is entitled to claim licensing fees.
<b>IBM Maintenance Service</b> (COMP/C-3/39692; Commitment Decision); <b>Refusal to supply (after-markets);</b> <b>IT sector</b>	<b>Intellectual property rights</b> with regard to some inputs required to provide maintenance service to IBM mainframes.

Source: Authors’ review of past EU decisions.

While the firms tried to bring in objective justifications in the above mentioned Article 102 TFEU cases they almost always failed to convince the EU Commission. Only in IBM Maintenance did the EU Commission indicate that the exercise of an exclusive intellectual property right (IPR) may justify an exclusionary conduct. The EU Commission pointed out, though, that “*the exercise of an exclusive intellectual property right may not justify the arbitrary refusal to supply spare parts to independent repairers*”. Finally, IBM submitted commitments.

In Standard & Poor’s (S&P) S&P asserted that copyrights in respect of US ISINs served as a justification for the excessive pricing. However, the EU Commission took the view that S&P did not own copyrights as “*the intellectual effort invested in selecting and arranging its content has been made by the international financial community as a whole, that is to say, ISO and the Association of National Numbering Agencies (‘ANNA’), and not by S&P in particular.*” S&P committed to abolishing the licensing fees.

The Microsoft case on the tying of Internet Explorer (IE) to Windows was very much influenced by the earlier Microsoft case on the tying of Windows Media Player (WMP) to Windows. In the earlier case, objective justifications were brought forward by Microsoft. Microsoft was, however, unsuccessful in convincing the EU Commission. The EU Commission argued that the potential transaction efficiencies experienced by consumers do not require that the pre-installation be undertaken by Microsoft. Furthermore, it was argued, that cost savings made by a tied sale of two products could not possibly outweigh the distortion of competition because distribution costs in software licensing would be

insignificant; a copy of a software programme can be duplicated and distributed at no substantial effort. In contrast, the importance of consumer choice and innovation regarding applications such as media players would be high. With respect to Microsoft's argument that the tie-in made it easier for third-party software producers to implement a functionality, the EU Commission noted that Microsoft failed to supply evidence that the tying was indispensable for the alleged procompetitive effects to come into effect. The EU Commission imposed a fine on Microsoft. It seems that as a consequence Microsoft did not bring forward objective justifications in the subsequent tying case but submitted commitments straightaway.<sup>20</sup>

In Telekomunikacja Polska (TP) the defences raised by TP basically consisted of the EU Commission having too-high expectations regarding TP's business skills and that the refusal to supply was just a result of TP's improper business practice. Apparently, this argument did not qualify as objective justification in the EU Commission's view, regardless of the evidence TP would have submitted to support it. The EU Commission stated in paragraphs 880–883 of its decision that TP's "justifications" could not be accepted on objective grounds. It imposed a fine of €127 million on TP. TP has appealed the decision.

Intel's defence contained objective justifications which the EU Commission points out to be of relevance (see Table 3). However, the EU Commission was reluctant to actually consider Intel's defence as it would "*relate more generally to conduct to which the Commission did not object (i.e. discounting/provision of rebates), and not to conduct to which the Commission did object (i.e. conditions associated with the discounts/rebates).*"

With regard to the cost efficiencies brought forward by Intel, the EU Commission concluded that even if these were relevant, Intel did not provide enough supportive evidence for them. For instance, the EU Commission took the view that Intel failed to demonstrate why conditionality of the rebate would lead to lower prices compared to a rebate that would not be conditional upon exclusivity or quasi exclusivity.

In addition, Intel brought forward a meeting-competition defence. In particular Intel argued that "the intense price competition between Intel and AMD, and the discounts granted by Intel in response to competition, produced very substantial consumer benefits in the form of lower consumer prices".<sup>21</sup> The meeting-competition defence was also rejected by the EU Commission.

What makes the case special is that Intel's main competitor, AMD, was apparently not foreclosed but growing during the investigation period. The EU Commission, however, held: "*The Intel conducts directly harmed competition. A product which a supplier had been actively planning to release was delayed or constrained from reaching the market. Consumers therefore ended up with a lesser choice than they otherwise would have had.*" Finally, the EU Commission imposed a fine of €1.06 billion on Intel and obliged Intel to cease the identified illegal practices. Intel has appealed this decision.

Overall, the review shows that in 42 percent of recent 102 TFEU cases (in five out of 12 final decisions) an efficiency defence or another objective justification was put forward and reported in the decisions. We consider this number to be low given that in Article 102 TFEU cases anticompetitive behaviour and objective justifications are intrinsically linked (see also the following section).

The finding is consistent with the result of a recent survey in which we asked competition lawyers – mostly working in Brussels – about their perception of how often efficiency considerations are brought forward in Article 101 and 102 TFEU cases. According to the respondents, in 31 percent of these cases

<sup>20</sup> On 17 July, 2012, the Commission opened proceedings against Microsoft in order to investigate whether the company has failed to comply with its 2009 commitments.

<sup>21</sup> Intel Reply to the 26 July 2007 SO, paragraphs 709–713; the quote is in paragraph 711.

efficiency considerations played a significant role, but were often not reported transparently.<sup>22</sup> The finding is also consistent with a finding by Geradin and Petit (2011) that in only 40 percent of Article 102 TFEU judgments by the General Court between 2000 and 2010 the economic concept “efficiency” was cited.

It is striking that in the majority of cases in which efficiencies or other objective justifications were put forward by the dominant companies, the dominant companies were active in the IT sector, whereas in the majority of cases in which no objective justifications were put forward by the dominant companies, the dominant companies were active in the energy sector. The latter cases are EDF S.A. (exclusive dealing), ENI (refusal to supply), E.ON Gas (refusal to supply), Gaz de France (refusal to supply), RWE Gas (refusal to supply and margin squeeze) and Swedish Interconnectors (curtailing of capacity).

A further interesting insight is that all decisions that do not contain objective justifications are commitment decisions. It seems that commitment decisions shift the focus of the assessment on eliminating the anticompetitive concern raised by the EU Commission and move it away from a broader more integrated balancing of the pros and cons of the specific behaviour. Due to that practice a transparent evaluation of efficiency considerations in the EU Commission’s decision is not achieved. From a policy perspective this is a lost opportunity for providing more guidance to the business community on what justifications are acceptable and what are not.

In sum, the review of past Article 102 TFEU cases shows that efficiency defences played a role only in cases related to the IT sector but not in others. The shift in emphasis towards these cases implies a growing importance of a well-conceived approach towards efficiency considerations within Article 102 TFEU.

#### **4. Business perspective on efficiency defences and objective justifications for the example of low price strategies**

One of the most aggressive strategies a firm can take vis-à-vis its competitors is a predatory pricing strategy. The EU Commission points out that efficiencies delivered through predatory pricing are unlikely (see Section 3). The identification of a predatory strategy rests on a cost based standard though. That is, the competition authority is *screening for low price strategies*. In the following we explore the motives behind low price strategies from a business perspective in order to give orientation to what extent a competition authority should take a negative presumption once a low price strategy is robustly established.

We address the question from several angles: First, we describe potential objective justifications for low pricing. Second, we take a glance at the potential negative effects of low price strategies from a business angle. Third, we review the theoretical literature on predatory pricing and the empirical evidence on the incidence of predatory pricing in the laboratory and in real business life. Finally, we report the results of a unique and novel online survey, in which we asked current and former EMBA students, i.e. experienced and well trained managers, about the relevance of pro- and anticompetitive motives for low price strategies in business practice.

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<sup>22</sup> This online survey was conducted during the first two weeks of October 2012 and was addressed to antitrust lawyers advising clients on European competition matters. In this survey it was asked whether analyses of efficiencies in 101 and 102 TFEU cases... a) have played an important role and were presented transparently in the Decisions, b) have played an important role but were not presented transparently in the Decisions, c) have not played an important role or d) whether the respondent holds no opinion on that question. We received 55 answers. 10 respondents held no opinion on that question. 2 respondents chose answer a), 12 respondents answer b) and 31 respondents answer c).

Before we explore the motives behind low price strategies from a business perspective, we summarize the European Court's recent judgement in the predatory pricing case Post Danmark<sup>23</sup> and briefly touch upon conceptual issues that are of relevance for the discussion.

#### **4.1 *The problem of non-separability for the example of low price strategies***

The efficiency defence as it is outlined in the Article 102 Discussion and Guidance Paper is broadly in line with the approach taken within EU merger control.<sup>24</sup> In particular, it foresees a balancing of the negative and positive effects of a conduct.

There are several differences between the two policy areas.<sup>25</sup> The central difference concerns the ability to conceptually separate pro- and anticompetitive effects of a conduct. Such a conceptual separation seems to be practical in merger control where the relevant objective justifications mainly consist of efficiencies in terms of marginal cost savings, resulting in some downward pressure on prices. The increase of market power due to the merger, to the opposite, results in an upward pricing pressure. While the combination of the two price effects serves as a prediction on consumer welfare effects of the merger, the two price effects can be analysed separately and only finally combined in a single price prediction.<sup>26</sup>

In contrast, in abuse of dominance cases the objective justification is often inseparably linked to the exclusionary conduct. For instance, a low price strategy unambiguously will result in lower prices. The question here is rather whether these low prices are due to e.g. lower costs, providing a pro-competitive business justification. If that is the case an as efficient competitor will also not be foreclosed. Hence, the answer to the objective justifications is also the answer to the likely anticompetitive effects. This evaluation is not a balancing exercise but requires an "either-or-decision" by the competition authority. Accordingly, the two-step approach of first assessing anticompetitive effects and then pointing to procompetitive effects seems to be less tractable in abuse of dominance cases than in mergers.

To be more precise, one can distinguish between three scenarios: (1) conducts that only have anticompetitive motives and effects, (2) conducts that have anticompetitive and procompetitive motives and effects and (3) conducts that only have procompetitive motives and effects (see Table 4).

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<sup>23</sup> ECJ 27 March 2012 – Case C-209/10 (Post Danmark A/S/ Konkurrencerådet).

<sup>24</sup> See Röller (2010) for an assessment of the relevance of efficiency considerations in EU merger proceedings.

<sup>25</sup> The literature identifies the following additional differences between those two policy areas: First, a higher diversity of conduct in abuse of dominance cases has to be expected. This is so because Article 102 TFEU cases focus on behaviour and not on market structure as merger cases. Moreover, business behaviour is more diverse resulting in more diverse theories of harm and potential efficiencies. Second, different types of analysis can be carried out in Article 102 cases as those cases often are backward looking, while merger cases are typically forward looking. Third, different presumptions (negative vs. neutral) do exist. See Riziotis (2008) and Bellis and Kasten (2010).

<sup>26</sup> We speak of conceptual separation to distinguish this property from the element of merger specificity. Merger specificity requires that the two effects can only be achieved jointly through the merger. The property of conceptual separability allows analysing the two effects separately without making a major judgement error. It has to be pointed out that also in merger cases a complete separability of the pro- and anti-competitive effects cannot be taken as granted. For instance the pass-on of cost efficiencies to end consumer depends on the level of market power held by the merging parties post merger, i.e. the pro- and anti-competitive effects depend on each other.

**Table 4: Types of conduct according to motives and effects**

Types of conduct	Anticompetitive motives/ effects	Procompetitive motives/ effects
(1)	x	
(2)	x	x
(3)		x

Source: The authors' assessment.

In merger cases pro- and anticompetitive effects typically come together, that is, in merger cases scenario (2) typically holds. In these cases one can, however, also separate positive effects, usually due to a marginal cost decrease, from negative effects, usually due to increased market power. Both these effects are reflected in the price, so that it is possible to measure the combined effect, i.e. the overall price change.

In dominance cases, by contrast, the conduct is often driven by either pro- or anticompetitive motives, that is, in dominance cases an antitrust authority focuses in its assessment on whether scenario (1) or (3) holds. For instance, for a low price strategy the immediate effect is undisputed and can be described by low prices. The central question is whether this strategy is pursued for anticompetitive reasons and has the likely effect to foreclose as efficient competitors (scenario 1) or whether it is pursued for procompetitive reasons and is likely to be beneficial for consumers (scenario 3).

Moreover, market effects are often non-linear in dominance cases in the sense that a low price strategy is beneficial up to some extent, beyond a specific threshold (that is, when as efficient competitors are foreclosed) it is, however, detrimental to consumer welfare. Market effects also depend on the efficiency of the dominant firm. This becomes visible by the *as efficient competitor test*, which is applied in cases concerning price-based exclusionary conduct (see Section 2.2.). High efficiency translates into a less restrictive legal standard (i.e. very aggressive price strategies are still acceptable); low efficiency translates into a more restrictive legal standard (i.e. only non-aggressive price strategies are acceptable).

Further complications in balancing positive and negative effects in Article 102 cases arise because efficiencies are often dynamic, that is, they often involve fix cost savings or incentives to innovate. A balancing of those dynamic efficiencies against mid or long term price increases is often vague.

With this conceptual background we will now analyse the pros and cons of low pricing from a business perspective and the theoretical and empirical literature on low price strategies.

#### **4.2 Business justifications for low price strategies**

We consider the following objectives of low price strategies as plausible:

- To facilitate learning and awareness of a product among consumers
- To sell off perishable inventory or a phased out product
- To react to a fall in demand leading to excess capacity
- To reduce unit costs by producing large quantities
- To achieve network effects
- To improve the firm's positioning as a low price company
- To compete against an existing or new rival

Those business justifications are mostly also considered by the EU Commission.<sup>27</sup> The exceptions are “to improve the firm’s positioning as a low-price company” and “to facilitate learning and awareness of a product among consumers”. We will briefly describe the different objectives in the following.

- To facilitate learning and awareness of a product among consumers

The objective to facilitate learning and awareness of a product among consumers is relevant in case of a new product launch or when a company wants to capture new customer segments. The objective establishes a business justification for low pricing where a product requires consumer familiarity or awareness before consumers can appreciate it. In that case, consumers might become loyal during the low-pricing phase and might be willing to pay a higher price afterwards. Further, it might form a justification for low pricing when consumers communicate their views of product quality to other consumers by word-of-mouth. This defence may be particularly relevant for technology products.

- To sell off perishable inventory or a phased out product and/ or to react to a fall in demand leading to excess capacity

Those business justifications refer to loss-minimising strategies. A fall in demand may make losses inevitable for a dominant company. Still, the company may want to stay in the market when it expects market conditions to improve again. In that case, low pricing may be justified for a limited period of time.

- To reduce unit costs by producing large quantities and/ or to achieve network effects

Low price strategies can relate to market expansion. They may lead to a reduction of unit costs by producing large quantities (economies of scale and learning effects) or to an increase in demand (by achieving network externalities, by improving the firm’s positioning as a low-price company or by facilitating learning and awareness of a product among consumers).<sup>28</sup> They are closely intertwined in the sense that an increase in demand may help to reduce unit costs. For example, facilitating learning and awareness of a product among consumers may lead to larger sales and network externalities and this, on the other hand, may lead to economies of scale.

To achieve market expanding efficiencies serves as a relevant business justification for a low price strategy especially in new and emerging markets and network industries which are characterised by large up-front fixed costs. Under these circumstances, businesses often have to accept losses in the start-up period but may be able to recovery them by achieving greater scale and scope and learning over time.

- To improve the firm’s positioning as a low price company

To improve its positioning as a low-price company may also be considered a relevant business justification for a low price strategy, for instance, in the case of a repositioning or restructuring of a company. Such a low price repositioning may involve only specific products, where firms set low prices to few products but high prices to the majority of products. This strategy is also referred to as loss leading: *“Once the consumer is on the seller’s premises or committed to certain purchases anyway, the buyer will buy enough of other products to provide a profit*

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<sup>27</sup> See Table 3 and Guidance Paper, paragraph 74, and Discussion Paper, paragraphs 130 to 133.

<sup>28</sup> A network externality occurs when the benefit, or surplus, that a consumer derives from a good increases with the number of other consumers using the good.

*greater than the loss on the product used as the loss leader.*"<sup>29</sup> Losses on the leading products may be justified by higher profits on the following profits.

Bolton, Brodley and Riordan (2000) point out that similar efficiency gains may be achieved in the case of two-sided markets or second degree price discrimination.<sup>30</sup> For example, a publisher might sell newspapers below cost in order to expand circulation and sell more advertising; or an airline might cut prices on discount economy fare tickets in order to justify additional flights and sell more business class tickets.

- To compete against an existing or new rival

The objective "to compete against an existing or new rival" can mean both the objective of foreclosing a rival and the objective of meeting-competition. While the former objective needs to be rebutted by a dominant company in a predatory pricing case, the latter can be brought forward as a justification for a low price strategy. If a dominant company meets competition in the sense that it responds to aggressive competition by a rival, it is acting defensively. A pragmatic way to distinguish between the two objectives is to accept a meeting-competition defence as long as a dominant company meets but does not undercut a rival's price.<sup>31</sup>

#### **4.3 *A glance at the negative effects of low price strategies for deterrence purposes from a business angle***

In standard textbooks on competitive strategy a distinction is typically drawn between "the positioning effect", i.e. within market rivalry, and "the market effect", i.e. the choice of profitable market segments/ industries. It is the former effect, the positioning effect, which brings firms typically under the scrutiny of competition authorities as it is the face-to-face rivalry between firms in a given market segment, which potentially erodes towards anticompetitive forms.<sup>32</sup>

Within that context, predatory or entry deterring strategies are part of the strategic toolbox of firms, and are rationally evaluated with its pros and cons. Besanko et al. (2012, p. 214), for instance, describe predatory pricing as a risky strategy, which often fails in achieving its profit objective: *"Price wars harm all firms in the market regardless of who starts them, and are quintessential examples of wars of attrition. [...] If the war lasts long enough, even the winner may be worse off than when the war began because the resources it expended to win the war may exceed its ultimate reward."*

From a business perspective the value of predatory strategies might be limited for several reasons. First, companies might consider the strategy simply ineffective. They might fear that the foreclosure objective is not achieved, that it is too costly or that future price increases will result in new entry. To this effect, Besanko et al. (2012, p. 215) point out: *"Predatory pricing will not deter entry if the predator lacks the capacity to meet the increase in customer demand. Disappointed customers will simply turn to the entrant."*

<sup>29</sup> See O'Donoghue and Padilla (2006), p.296.

<sup>30</sup> See Bolton, Brodley and Riordan (2000), p. 51.

<sup>31</sup> O'Donoghue and Padilla (2006, p. 287) note that this approach has been taken by the Danish Competition Council in Berlinske Gratisaviser.

<sup>32</sup> Some commentators put more weight on the positioning effect, e.g. Hamel/ Prahalad, other on the market effect, e.g. Porter. This advice is built on empirical studies of intra- and intermarket firm profitability, suggesting within-industry profit variability to be slightly higher than between industry profit variability.

Second, firms might fear customer reactions which render recoupment ineffective. For example, firms might want to avoid price increases after the predatory price phase as price increases, that are not justified by cost increases, are usually perceived as unfair by consumers (see e.g. Kahneman, Knetsch and Thaler, 1986a/b).

Third, alternative strategies may be considered more effective. For instance, firms might find acquisitions or strategies such as signalling high quality via high prices more profitable.<sup>33</sup> Generally, non-price related predation strategies are considered more rewarding (see also Section 4.5.4). In comparison to marketing or R&D, low pricing is a rather inefficient tool to achieve foreclosure because it destroys industry profits for the time it lasts.

Finally, companies might not want to risk getting fined by an antitrust authority.

#### 4.4 *Evidence on anticompetitive low price strategies*

Empirical evidence on entry deterrence through low price strategies is scarce; naturally companies avoid revealing such sensitive information and the necessary data on cost and demand is usually not available. Some evidence can be inferred from antitrust cases. However, in the EU also the number of antitrust cases dealing with alleged predatory pricing is scarce: the EU Commission decided only upon four cases.<sup>34</sup> It therefore suggests itself to use experiments and surveys in order to receive insights on the incidence of predatory pricing. In the following, we will review the empirical evidence. Before that, we will describe theoretical models on the rationale of predatory pricing, which often form the basis for experiments and other empirical studies.

##### 4.4.1 *Theoretical results regarding the rationale of anticompetitive low price strategies*

The extensive theoretical literature on predatory pricing can be divided into three categories: asymmetric financial constraints, reputation based models and signalling models.<sup>35</sup>

The first category was addressed by Telser (1966) in a model of “deep pocket”. In his set-up, predation occurs because the predator has by assumption better financial resources and can outlast the prey. Specifically, the interest rate at which the prey can borrow money depends negatively on the prey’s financial resources. The prey has to pay a fixed cost each period in order to remain viable. Everything is common knowledge. Thus, the predator can calculate the number of periods it takes to outlast the prey, given that it sets predatory prices. If the predator can recoup the losses that it incurs through predatory pricing in the long-run, predation will be a rational strategy. However, as pointed out by Telser, predation does not occur in equilibrium since already the threat of predation deters entry or induces the companies to merge.

Telser’s model was criticized because it does not explain why the prey is financially constrained; in well-functioning capital markets predation would not occur. Fudenberg and Tirole (1986) suggested an alternative model of predatory pricing. In their model the prey is uncertain about the fixed cost that it has to raise each period in order to remain viable. The prey therefore decides based on its current profits whether to stay in the market or not. If the predator makes use of predatory pricing, the prey will believe

<sup>33</sup> Utaka (2008) shows that not only limit pricing but also high (“prestige”) pricing signals the incumbent’s quality type and may therefore serve to discourage entry.

<sup>34</sup> The four cases are **Wanadoo Interactive (2003), COMP/38.233**; Deutsche Post AG (2001), **COMP/35.141**; **Tetra Pak II (1992), Case C-333/94 P**; AKZO Chemie BV (1991), Case C-62/86.

<sup>35</sup> See Ordober and Saloner (1989), Bolton, Brodley and Riordan (2000) and Kobayashi (forthcoming) for a more in-depth description of these models.

that its cost is high, which will induce it to exit the market more readily. Hence, in Fudenberg and Tirole's model predatory pricing can be rational as it makes the prey believe that its cost is high and may thus induce it to exit the market.

Bolton and Scharfstein (1990) reason that the prey might be financially constrained because lenders take short-term performance as a signal for long-term agency cost. If predatory pricing causes the prey to perform poorly in the short-term, lenders will cut their financing, forcing the prey to exit. However, the prey will anticipate this and agree upon financial contracts that lower the threat of predation but are more costly.

In a second stream of literature reputational aspects of predatory pricing are taken up in multi-market settings. Multi-market settings are characterized by an incumbent monopolist being active in a number of identical markets, e.g. a "chain-store". In each market, the incumbent faces a potential entrant. Entrants can only enter sequentially. Intuitively, if the incumbent has successfully preyed once, subsequent entrants will be hesitant to enter. That is, predatory pricing in early periods might be rational if thereby the incumbent can establish a reputation for fighting, discouraging entry in later periods. However, in an influential paper Selten (1978) emphasized the "chain-store paradox", pointing out that under the logic of backwards induction predation would *not* be rational in a multi-market setting for the same reason that it would not be rational in a single-market setting. Selten assumes that entrants know that the incumbent is "weak" in the sense that the incumbent has such high marginal cost that its profit-maximizing price in a single period lies above the entrants' marginal cost.

Milgrom and Roberts (1982a), Kreps and Wilson (1982) and Kreps, Milgrom, Roberts and Wilson (1982) addressed the chain store paradox by developing models in which predation may occur in a multi-market setting. Like Selten (1978) they assume that the incumbent is weak. However, entrants attach some positive probability to the incumbent being irrational and preferring to fight entry instead of being rational and preferring to accommodate entry. Consequently, rational incumbents have an incentive to mimic the irrational types and fight entry. Rational incumbents then make use of predation in early periods in order to establish a reputation of irrationality and deter later entrants. These models are referred to as reputation models.

Milgrom and Roberts (1982b) also address the chain store paradox within another, so called signalling model, providing another convincing story of why predation might be rational in a multi-market setting. In the signalling model the incumbent can either be weak, as in the reputation model, or strong. Weak incumbents are rational, i.e. they prefer to accommodate entry in a single period. Strong incumbents, on the other hand, prefer to fight entry as they are so efficient that they can set prices below the entrants' cost without making losses. Hence, entrants prefer to stay out if an incumbent is strong. Decisively, entrants do not know whether the incumbent is weak or strong. They can only observe the incumbent's decision in earlier periods. Consequently, a weak incumbent will often find it profitable to mimic the strong type and fight instead of accommodate entry at the beginning of the game, trying to discourage entry in later periods.

Interestingly, Milgrom and Robert's (1982b) also look at the welfare effects of predatory pricing within the signalling model and come to an ambiguous result. The game has two possible equilibria: a separating equilibrium and a pooling equilibrium. In the separating equilibrium, a strong incumbent can distinguish itself from a weak incumbent by setting a low price that a weak incumbent would not like to set as it would make too high losses. Thus, entrants will be able to infer whether they face a strong or a weak incumbent. Because a strong incumbent sacrifices profits to signal its type, welfare effects are likely to be positive.

In the pooling equilibrium, on the other hand, there is no price that a strong incumbent can set in order to distinguish itself from a weak incumbent. Thus, a weak incumbent can mimic a strong incumbent by setting a lower price in earlier periods in order to deter entry. The welfare effect is more likely negative then.

Saloner (1987) provides a similar model, considering how predatory pricing can be used to induce the exit of an already active rival. Moreover, Roberts (1986) suggests a variant where entrants are unsure about market demand instead of the incumbent's type.

The strategies of rational incumbents in reputation models and weak incumbents in signalling models can be described as predatory as the incumbents are sacrificing profits in earlier periods in order to discourage entry and obtain higher profits in later periods.

Signalling models are reminiscent of the concept of "limit pricing", which was established by Bain (1949). Limit pricing refers to strategic behaviour of an incumbent that limits the (expected) payoff of entry. An incumbent can limit the expected payoff of entry, for instance, by setting a lower price. An entrant that observes such a lower price might expect lower profits and become hesitant to enter. Thus, by setting a lower price an incumbent might be able to deter entry.

In summary, in one stream of literature predatory pricing occurs due to financial constraints of the prey. In a second stream of literature, Kreps and Wilson (1982) and Milgrom and Roberts (1982b), among others, provide counterarguments to Selten's "chain-store paradox" within reputation and signalling models.

#### 4.4.2 *Experimental evidence on anticompetitive low price strategies*

The incidence of predatory pricing is a controversial issue. Addressing this issue through the use of experiments is a plausible research strategy as data interpretation in alleged cases of predation is non-obvious. As pointed out by Normann (2007) good cost information in order to analyze suspicious price-cutting is often not available. Moreover, there is often no coherent theory of how the losses incurred during the price-cutting can be recouped. In controlled laboratory experiments, cost schedules are induced directly. Therefore, it can be useful to explore under which conditions predatory strategies emerge in controlled laboratory experiments. Van Damme et al. (2009) summarize the available evidence.

In a first experiment by Isaac and Smith (1985) two companies (i.e. two subjects) compete in a market where they can sell up to a total of ten units and keep any profits they make. In each period the companies state their own prices and the maximum amount of units they are willing to sell at that price. Decisively, one company has lower cost than the other company and companies have to sell at least one unit in one period in order to stay in the market in the next period. Thus, a predatory strategy is feasible for the low-cost company; it only has to offer ten units at a price that is below its rival's marginal cost. In fact, such a pricing strategy must not even result in an actual loss for the low-cost company as it can still price above its own marginal cost. However, Isaac and Smith (1985) did not find evidence for predatory pricing within this experimental setting, even after they introduced several design variations (e.g., sunk costs) which they thought were progressively more favourable to a predatory pricing strategy.

Arguments were put forward why Isaac and Smith did not find evidence for predatory pricing. The main argument was that in their setting the high-cost rival has a strong incentive to match the low cost rival's predatory pricing, even if it makes losses in the short run, as it will have no opportunity to make money if it exits the market. That is to say that predatory pricing might fail in real business life because entrants have strong incentives to "fight back", given they lack reasonable outside options. In a follow on study Harrison (1988) allowed the high-cost rival to make profits in other markets, which indeed lead to an increase in the likelihood of predatory pricing.

The experiments of Goeree and Gomez (1998) replicate the experiments of Harrison (1988) but include further modifications of design. In particular, they no longer let subjects make entry, price and quantity decisions simultaneously but announce entry choices prior to the posting of prices. This design modification implies that low-cost rivals know whether they face entry or not. Further, Goeree and Gomez (1998) provide low-cost rivals with complete information about demand, the structure of which is simplified compared to that of Harrison (1988). As a result they find statistically significant pattern of predatory pricing.

Jung, Kagel, and Levin (1994) investigated explicitly whether the results by Selten's (1978) chain-store game, Kreps and Wilson's (1982) reputation game and Milgrom and Roberts' (1982) signalling game can be replicated in the lab (for a description of these games refer to Section 4.4.1). In their experiments an incumbent encounters subsequent entrants. In each period, the incumbent chooses to fight or to accommodate and the potential entrants choose to enter or to stay out. Prospective entrants can observe the incumbent's decision. In one setting, which is a replication of Selten's (1978) chain-store game and Kreps and Wilson's (1982) reputation game, entrants know that the incumbent is weak. In another setting, which is a replication of Milgrom and Roberts' (1982) signalling game, entrants have incomplete information about whether the incumbent is weak or strong. The payoffs are set in a manner that a strong incumbent's profit maximizing strategy in a single period is to fight entry and a weak incumbent's profit maximizing strategy in a single period is to accommodate entry. If the incumbent chooses to fight, potential entrants prefer to stay out.

Jung, Kagel, and Levin (1994) found that predatory pricing occurred in 85% of the cases if entrants knew that the incumbent is weak. Hence, they were able to confirm Kreps and Wilson's (1982) reputation argument. Further, they found that predatory pricing always occurred if entrants had incomplete information about whether the incumbent was weak or strong. Weak incumbents always fought entry in early periods. Thus, Jung, Kagel, and Levin (1994) could also confirm Milgrom and Roberts' (1982b) signalling argument.

In summary, in an early experiment Isaac and Smith (1985) failed to find evidence for predatory pricing in the laboratory. More recent research suggests that predatory pricing can be generated reliably in the laboratory but requires specific features like re-entry barriers, outside options, reputational effects and/or uncertainty. Still experimental research is scarce.

#### 4.4.3 *Evidence on anticompetitive low price strategies from case re-examinations*

Several authors have re-examined cases on alleged predatory pricing. As in the early experimental literature, they first reached the conclusion that predatory pricing was a rather rare phenomenon. Koller (1971), for instance, re-examined 31 alleged predatory pricing abuses and found only few instances of successful predation. More recent empirical studies have challenged this conclusion. Zerbe and Cooper, for instance, re-examined the cases that also Koller (1971) re-examined and found considerably more evidence of successful predatory pricing.<sup>36</sup>

Burns (1986) conducted a regression analysis, in which he estimated how predatory pricing affected the acquisition prices of 43 firms that the American Tobacco Company acquired between 1891 and 1906. He found statistically significant evidence that predation substantially reduced the cost of acquiring competitors. The effect was higher when the American Tobacco Company acquired smaller competitors - an observation consistent with the deep pocket argument (see Section 4.5.1).

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<sup>36</sup> For a detailed description of this literature see Kobayashi (forthcoming). Kobayashi criticizes that the studies do not reveal the methodology used. Thus, it is hard to infer which of the conclusions are reliable.

Moreover, Genesove and Mullin (2006) provide evidence that predation occurred in the sugar industry at the beginning of the twentieth century. They compared sugar prices to a direct measurement of marginal cost and concluded that *the price wars following two major entry episodes were predatory. They could calculate the marginal cost directly due to the simple technology involved. Interestingly, their results suggest that predation occurred only when its relative cost to the dominant firm was small, e.g., the episodes of predation were suspended during high demand periods. In line with Burns (1986) they found that the effect of predatory pricing was to lower the acquisition price of competitors.*

What is more, the UK Competition Commission (2011) finds that competition in the markets for local bus services has been diminished by operator conduct such as (signaling of) predatory pricing, leading to geographic market segregation. They observe that the sunk costs of bringing a route to profitability are variable and uncertain but can be substantial. Related to this, there is a risk arising from the expected intensity of post-entry competition. Incumbents may signal a predatory attempt or retaliation in case of entry. This gives rise to significant costs for potential entrants. Predation or retaliation might only be signaled but not realized. However, because potential entrants cannot predict in advance the extent to which costs will arise due to predation and retaliation, they perceive substantial risks of entry. In consequence, competition is unlikely to be sustained as one or the other party could be forced to exit. Thus, even though predation or retaliation might only be signaled but not realized, substantial barriers to entry and expansion are formed. The authors recognize that as a result operators would concentrate on serving their own territories while declining to challenge rivals in the latter's areas, anticipating that they are then less likely to be challenged by these rivals in their own territories.

#### 4.4.4 Survey evidence on the frequency of use of anticompetitive low price strategies

Survey evidence on anticompetitive low price strategies is also relatively scarce. This might be due to the fact that companies are supposedly reluctant to provide information on anticompetitive behaviour. One of the few studies that do provide survey evidence is Smiley (1988). He enquires the frequency of use of the following entry deterring strategies:

- **Limit price – static:** refers to the question of whether a firm would frequently set a lower price so that potential competitors would choose not to imitate the firm's product;
- **Limit price – dynamic:** refers to the question of whether a firm would frequently “decrease price below what would otherwise be the most profitable, but only to slow the rate of entry by new competitors, not to stop entry completely”;
- **Excess capacity:** refers to a strategy of building a large enough production plant, so that the firm will be able to meet all expected demand for the new product;
- **Advertising:** refers to a strategy of intensive advertising and promotion of a product for the purpose of increasing customers' brand loyalty;
- **R&D:** refers to a strategy of extensive patenting, e.g. acquiring patents for all similar product variants;
- **Reputation for predation:** refers to a strategy of giving the impression that the firm will compete especially rigorously against new rivals;
- **Learning curve:** refers to a strategy in which a firm uses aggressive price reductions to move down the learning curve, giving it a cost advantage that later entrants may only be able to match by investing themselves in learning.

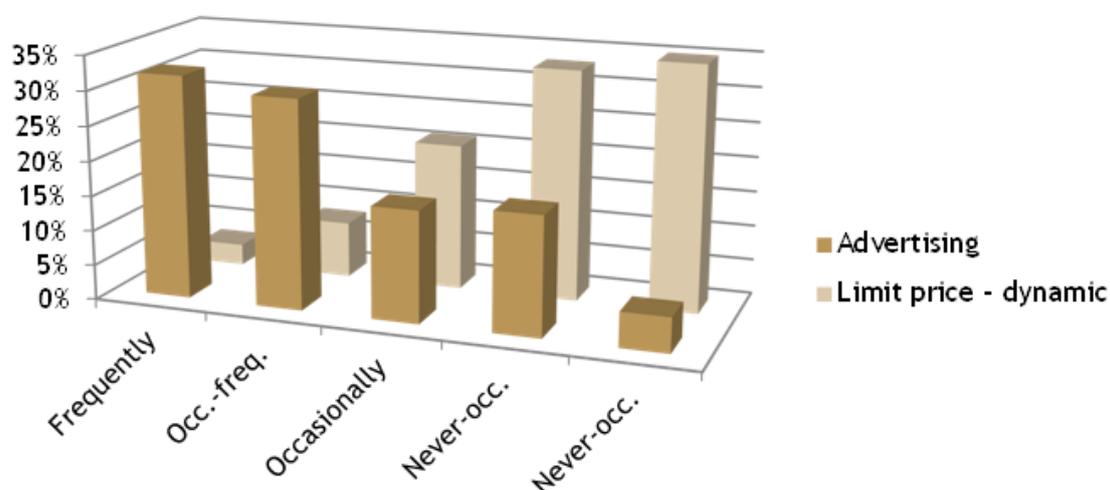
Smiley (1988) asked 293 product, brand or marketing managers about their frequency of use of these entry deterring strategies for “new products” and “existing mature products”. Possible ratings concerning the frequency of use of these strategies ranged from 1 “never” to 5 “frequently”. Smiley's survey results are computed in Table 6.

**Table 5: Entry deterrence strategies – Frequency of use (in percent)**

	Limit price – static	Limit price – dynamic	Excess capacity	Reputation for predation	Advertising	R&D	Learning curve
<i>New products</i>							
Frequently	2%	3%	6%	10%	32%	31%	9%
Occ.-freq.	4	8	16	17	30	25	17
Occasionally	17	21	20	27	16	15	29
Never-occ.	34	33	22	24	17	12	27
Never	44	35	36	23	5	17	18
<i>Existing products</i>							
Frequently	7	6	7	8	24	11	
Occ.-freq.	15	14	14	19	28	20	
Occasionally	21	21	17	22	26	16	
Never-occ.	32	32	32	31	14	31	
Never	25	27	30	21	7	23	

Source: Smiley (1988), Table 1. The percentages per strategy and kind of product add up to 100.

The first four strategies, including aggressive pricing and excessing capacity, change the entrant's expectation of post-entry competition, whereas the last three strategies, including advertising and R&D, create high entry cost. Roughly 10 to 20 percent of brand or marketing managers answered that they were *frequently* or *occasionally to frequently* using aggressive pricing and excessing capacity as entry deterring strategies for new and existing products. This number stands in stark contrast to the high percentage of brand or marketing managers (roughly 30 to 60 percent) who stated that they were frequently or occasionally to frequently using advertising and R&D as entry deterring strategies for new and existing products. The fact that aggressive pricing and excessing capacity are reported to be used rather infrequently compared to other entry deterring strategies (see also Figure 1) suggests that these strategies are rather unfavourable from a firm's perspective.

**Figure 1: Reported frequency of use of advertising and aggressive pricing as entry deterring strategies for new products**

Source: E.CA Economics based on survey results of Smiley (1988).

In another study, related to the UK market, Singh et al. (1998) confirm that aggressive pricing and the strategic use of capacity are used rather infrequently to deter entry. Singh et al. (1998) also find similar reliance on R&D as entry deterring strategy, but a weaker reliance on the use of advertising. The strategic use of distribution systems and the practice of signing long-term contracts with buyers are also considered to be important within this study.

In summary, the scarce survey evidence suggests that pricing is used rather infrequently to deter entry. Strategies that create high entry cost, e.g. R&D and marketing, are used more frequently.

#### 4.4.5 Summary

Summing up, from a business perspective low pricing can have several procompetitive motives. Low pricing for anticompetitive purposes is often viewed critically as it might not be a profitable strategy at all due to uncertainties or better outside options. In fact, the early experimental literature resulted in widespread scepticism regarding the incidence of low pricing for anticompetitive purposes. Above that, a number of legal scholars re-examined cases concerning predatory pricing and came to the conclusion that accusations of claimants were not well-grounded in many cases.<sup>37</sup> The US Supreme Court eventually resumed in *Matsushita vs. Zenith* (1986) and in *Brooke vs. Brown & Williamson* (1993) that “*there is a consensus that predatory pricing schemes are rarely tried, and even more rarely successful*”. However, the more recent experimental literature was able to find clear and statistically significant patterns of predatory pricing through further design modifications. Still, the existence of predatory pricing in laboratory experiments seems to depend on specificities of the market structure design. Also the more recent empirical evidence from case studies as well as survey evidence suggests that pricing is used occasionally for deterrence purposes. Survey evidence, however, also shows that other strategic variables such as marketing and R&D are used more frequently, implying that pricing is indeed often not regarded the most effective strategic variable that companies can use in order to deter entry.

#### 4.5 Survey among EMBA students on the relevance of pro- and anticompetitive motives behind low price strategies

In order to add to the limited survey evidence on anticompetitive motives behind low price strategies and to also empirically explore the relevance of procompetitive motives behind low price strategies we created an anonymous online survey among former and current EMBA students of the European School of Management and Technology (ESMT). Specifically, our goal was to provide evidence on whether foreclosure plays a stronger or weaker role than efficiencies and other objective justifications.

##### 4.5.1 Description of the survey

The survey was distributed to 173 former and current EMBA students of the European School of Management and Technology (ESMT) via e-mail and was available for completion from 15–19 October, 2012. We received 42 responses.

The main part of the survey consisted of four questions. The first two questions concerned pricing below average total cost, whereas the third and fourth question concerned pricing below average variable cost. Otherwise the questions were identical. In the first and in the third question the respondents were asked to indicate to what extent they regard pricing below average total cost/pricing below average variable cost advisable to achieve certain objectives. The objectives we proposed were presented in a random order and are presented in Table 7 (see also Section 4.3).

<sup>37</sup> For a recent survey of these issues, see Kobayashi (2010). Koller (1971) examined 31 alleged incidents of predation and found only few instances of successful predation.

**Table 6: Possible objectives of predatory pricing considered in the survey**

Rivalry	a. To compete against an existing or new rival
Efficiencies	b. To reduce unit costs by producing large quantities
	c. To achieve network effects
	d. To facilitate learning and awareness of a product among consumers
	e. To improve the firm's positioning as a low-price company
Objective necessities	f. To react to a fall in demand leading to excess capacity
	g. To sell off perishable inventory or a phased out product

Source: Authors' assessment.

Objective a. captures rivalry (meeting-competition defence or foreclosure), objectives b. to e. capture efficiencies and objectives f. and g. capture objective necessities.

In the second and fourth question respondents were asked to indicate which of the proposed objectives they regard as the two most relevant ones. They could drag and drop the relevant objectives into a box and position them with respect to relevance.

We varied the context of the four questions among respondents. Half of the respondents were asked about the objectives of low pricing as a business strategy *in general* and the other half were asked about the objectives of low pricing as a business strategy for a *leading company in a growing market*. Through this variation we wanted to find out whether predatory motives are seen more critically if the context explicitly reveals that the question concerns pricing of a leading or dominant company. A screen shot of the first question of the survey is provided in the appendix of this paper.

In questions 5 and 6 the respondents were asked whether they had heard about a company that was pricing below average variable cost and, if so, for what reasons the company was using this pricing strategy and whether the company was small, medium-sized or large. Finally, in questions 7 to 10 respondents were asked about their working background.

#### 4.5.2 Survey results

Overall, we received 42 answers from former or current MBA students of the ESMT. 40 respondents stated that they were working for, or that they had worked for, a large company with more than 500 employees. Thirteen respondents stated that their professional experience was 5–10 years; the other 29 respondents stated that their professional experience was more than 10 years.

The survey showed that very aggressive pricing, that is, pricing below average variable cost, had been observed by 64 percent of respondents.<sup>38</sup>

- **Result 1: Very aggressive pricing is a strategy that is widely observed.**

If the respondents confirmed that they had observed a company pricing very aggressively, we asked them what they thought the reasons were for the companies' very aggressive pricing. The

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We sent out the questionnaire on 15<sup>th</sup> of October receiving 27 responses. After a reminder on 18<sup>th</sup> of October we received 15 more responses. It showed that the first group of respondents had observed very aggressive pricing more often, suggesting that particularly those MBA students who were aware of the practice tended to answer the questionnaire in the first place.

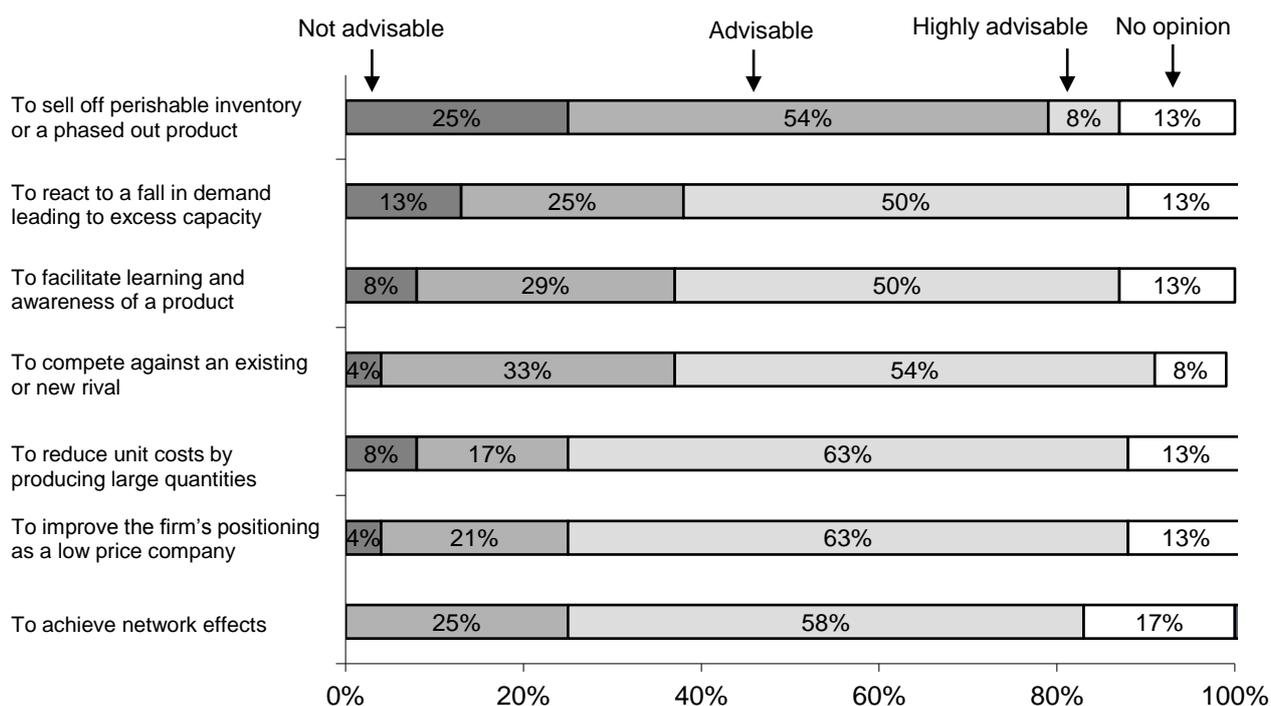
majority of respondents confirmed that the companies' motives were one of those we inquired about (see Table 6).

Next, we asked respondents about the size of the companies they had observed pricing very aggressively. Even though the majority of respondents were working for, or had worked for, large companies, only 70 percent stated that they had observed a large company pricing very aggressively. Seven percent stated that they had observed a medium-sized company pricing very aggressively and 22 percent stated that they had observed a small-sized company pricing very aggressively.<sup>39</sup>

- **Result 2: Very aggressive pricing is a strategy that is not only observed for large companies but also for small and medium companies.**

Central to the survey was an inquiry as to what extent the respondents thought very aggressive pricing as a business strategy in general was advisable to achieve specific objectives. The results are presented in Figure 2.<sup>40</sup>

**Figure 2: Respondents' rating of how advisable they regard very aggressive pricing as a business strategy in general in order to achieve specific objectives**



Source: Authors' assessment.

<sup>39</sup> We defined the size of companies by numbers of employees. According to our definition a small company has less than 50 employees. A medium-sized company has between 50 and 500 employees and a large company more than 500 employees.

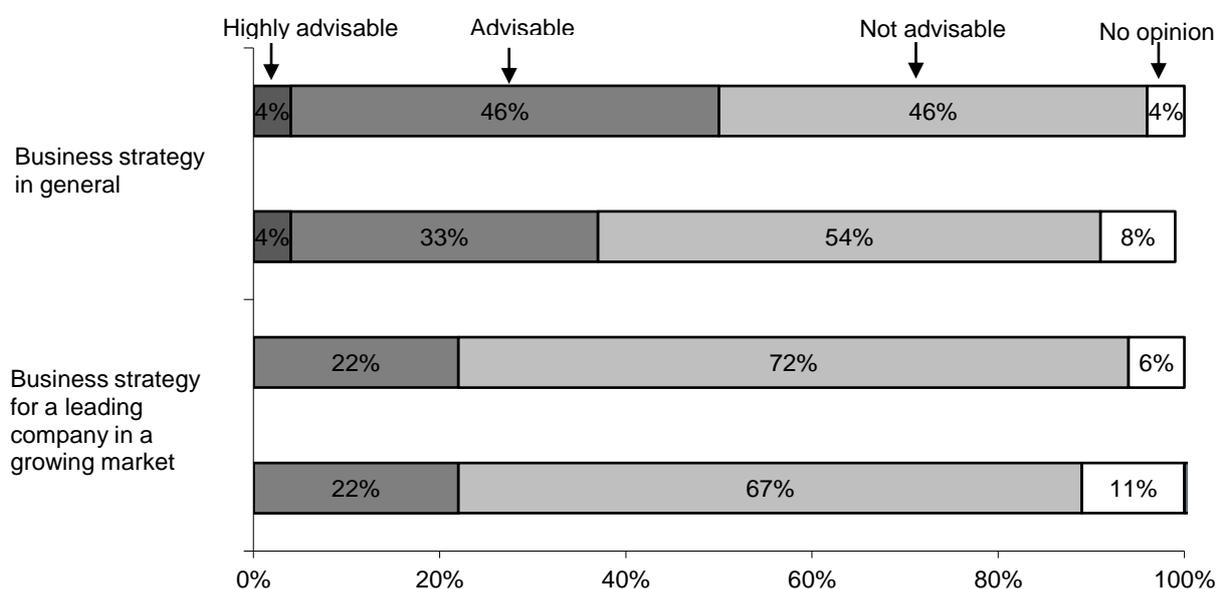
<sup>40</sup> We asked the same question with respect to aggressive (and not very aggressive) pricing and in the context of a leading company in a growing market. The additional results are presented in Figures 4 to 6 in the Appendix.

Figure 2 shows that respondents regard very aggressive pricing as being particularly advisable in order to sell off perishable inventory or a phased out product. To react to a fall in demand leading to excess capacity is also highly ranked. Interestingly, the marketing related efficiency defence “to facilitate learning and awareness of a product among consumers” is ranked higher than the more traditional efficiency defences “to reduce unit costs by producing large quantities” and “to achieve network effects”, which also the EU Commission mentions as being potentially of relevance. Generally, the efficiency defences seem at least as important as the rivalry motive.<sup>41</sup> Note, that the rivalry motive includes both anticompetitive and procompetitive behaviours. We come to the following conclusion:

- **Result 3: Very aggressive pricing has many motives. Rivalry is one of them but not the most relevant one.**

We examined the relevance of the rivalry motive in more detail. First, we explored whether the rivalry motive of aggressive pricing is perceived more or less relevant in the context of a leading company in a growing market compared to in a general context. Second, we inquired whether very aggressive pricing is perceived less advisable than aggressive pricing for a leading company in a growing market. By very aggressive pricing we referred to pricing below average variable cost and by aggressive pricing we referred to below average total cost. The survey results are computed in Figure 3.

**Figure 3: Advisability of aggressive pricing (first and third row) and very aggressive pricing (second and fourth row) as a business strategy in general and as a business strategy for a leading company in a growing market in order to compete against an existing or new rival**



Source: Authors' assessment.

<sup>41</sup> The answers to questions 2 and 4 on the rankings of the two most relevant objectives confirm these results: The objective „to sell off perishable inventory or a phased out product” is most often ranked as being one of the two most relevant objectives, followed by „to react to a fall in demand leading to excess capacity” ect. (the order is computed in Figure 1).

When comparing rows one and two with rows three and four, we can see that aggressive as well as very aggressive pricing to compete against an existing or new rival are ranked less advisable as a business strategy for a leading company in a growing market than as a business strategy in general. In fact, aggressive as well as very aggressive pricing to compete against an existing or new rival are not regarded “highly advisable” for a leading company in a growing market. Summing up, we come to the following result:

- **Result 4: Aggressive as well as very aggressive pricing in order to compete against an existing or new rival are ranked less advisable as a business strategy for a leading company in a growing market than as a business strategy in a general.**

Whether this result is due to the fact that managers consider aggressive price strategies conducted for rivalry reasons less effective for larger firms, or whether this result is due to the well-understood antitrust risk, cannot be answered based on the information available in this survey.

When comparing rows one and two and rows three and four of Figure 3, we can see that respondents do not regard very aggressive pricing significantly less advisable than aggressive pricing in order to compete against an existing or new rival.

## 5. Conclusions

In this paper, we explored the actual relevance of efficiency considerations in the EC practice and contrasted it with the actual relevance of efficiency considerations from a business perspective, thereby focusing on low price strategies. We conducted a survey among EMBA students which revealed that low price strategies are frequently used in business practice. The motives behind such strategies are diverse, often procompetitive and in line with antitrust compliance; low price strategies are less often considered advisable for leading firms than for firms in general. Given that the EU Commission currently focuses on cases in which efficiency defences are more common, antitrust policy should take the business perspective into account.

It would go beyond the purpose of this paper to draw final policy conclusions, but several issues require further considerations.

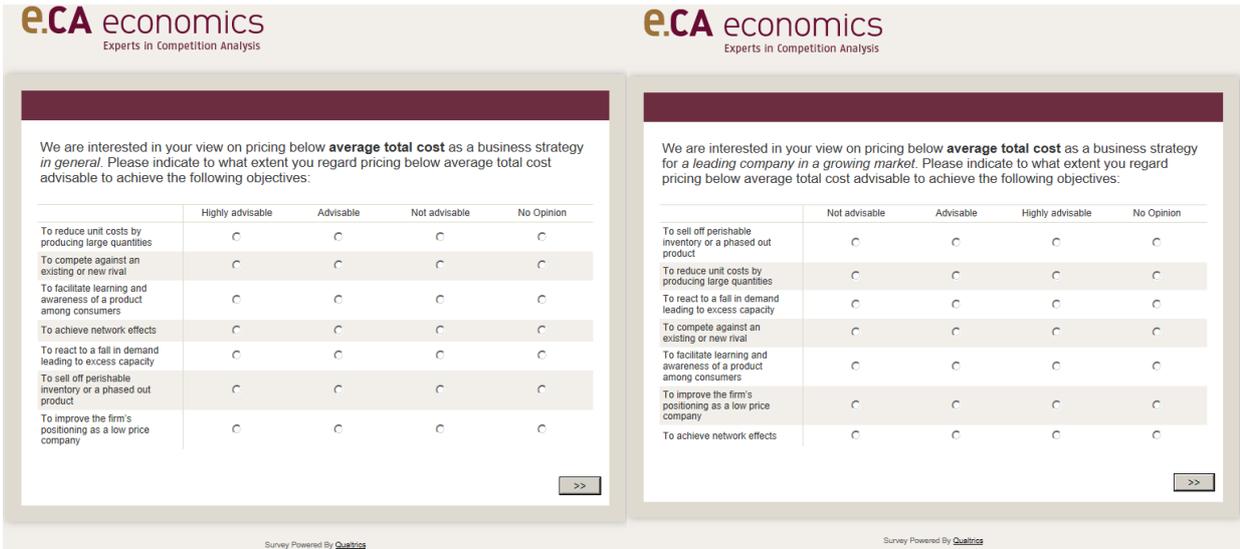
First, one reason why business justifications play only a minor role in Article 102 TFEU cases may be that positive and negative effects are deeply intertwined; a fact not sufficiently recognized in the EU Commission’s practice and in its Guidance Paper.

Second, firms could be obliged to put forward business justifications and the EU Commission could be required to discuss these business justifications more transparently - also in Commitment Decisions. This would facilitate an integrated assessment and produce further guidance to the business community regarding the kinds of justifications that are acceptable from an antitrust perspective.

Third, the empirical research on the relevance of rivalry aspects for low price strategies needs to be further developed; managerial and standard industrial organization literature needs to be developed in parallel.

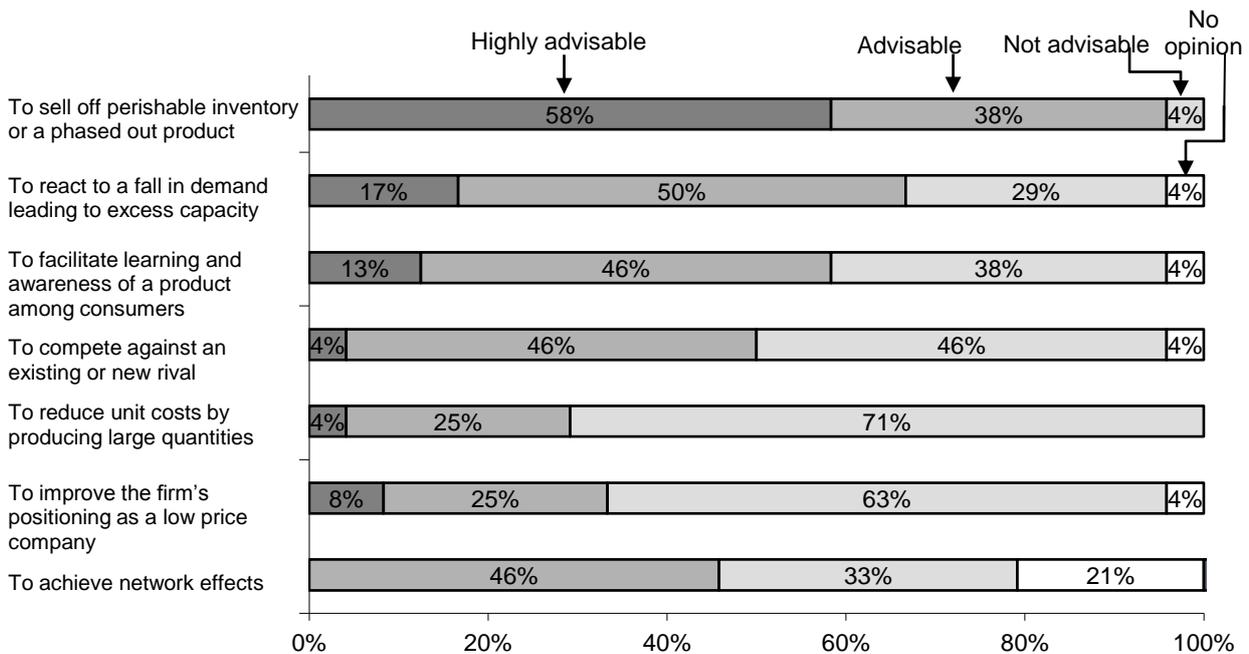
APPENDIX

Figure 4: Screen shot of first question of the survey with varying context



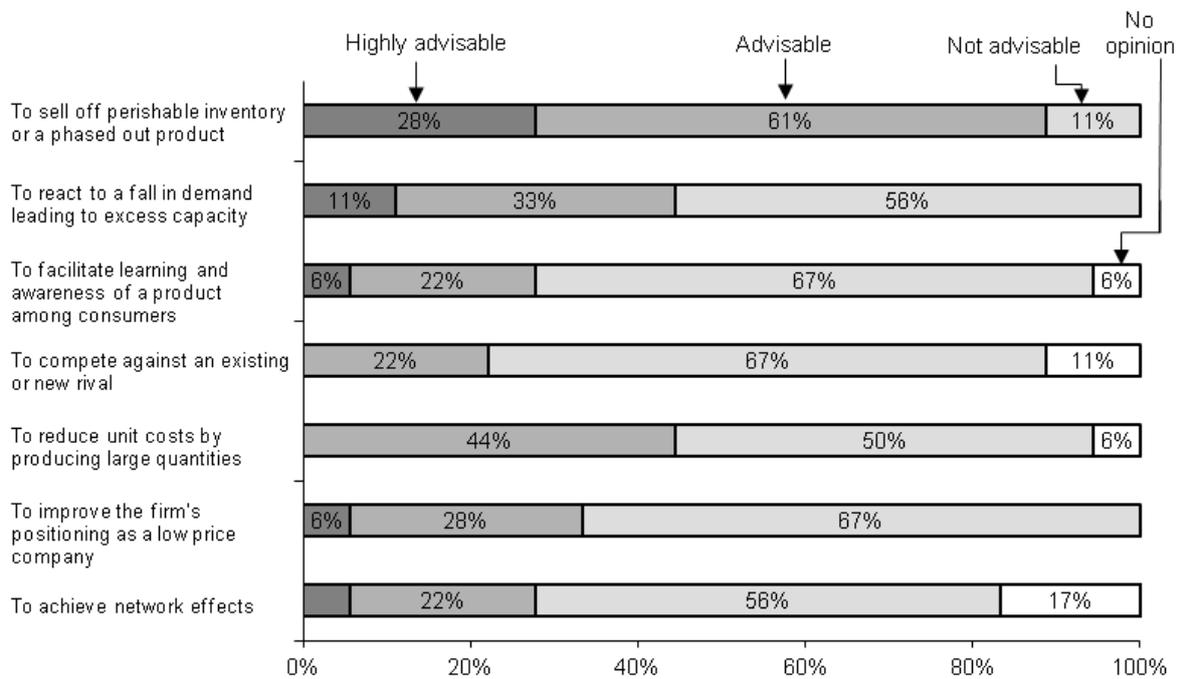
Source: Authors' assessment.

Figure 5: Respondents' rating of how advisable aggressive pricing as a business strategy in general is in order to achieve specific objectives



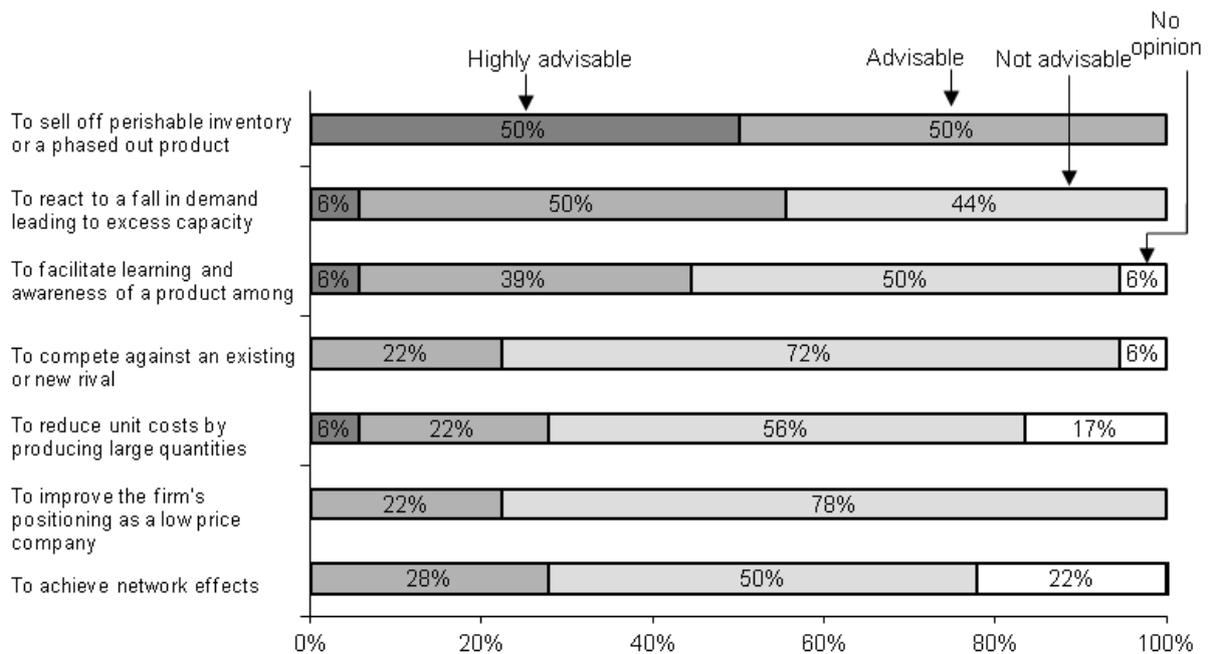
Source: Authors' assessment.

**Figure 6: Respondents' rating of how advisable very aggressive pricing as a business strategy for a leading company in a growing market is in order to achieve specific objectives**



Source: Authors' assessment.

**Figure 7: Respondents' rating of how advisable aggressive pricing as a business strategy for a leading company in a growing market is in order to achieve specific objectives**



Source: Authors' assessment.

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## EFFICIENCY ASSESSMENTS IN EUROPEAN COMPETITION POLICY AND PRACTICAL TOOLS

*Note by Ms. Helen Jenkins*

### 1. Introduction

Efficiency improvements are understood to be the heart of economic growth. Explaining that growth and supporting those improvements has been the subject of extensive economic research.<sup>1</sup> The link between efficiency gains and innovation has been explored through measures of R&D expenditure or intensity, human capital, management and organisational structure.<sup>2</sup>

The Lisbon Treaty identified that a strong competition policy for Europe would underpin the productivity growth necessary to continue to deliver good outcomes for European citizens and consumers. In general this is based on an assumption that more competitive outcomes lead to a more efficient, productive economy; however, the reality can be more subtle and competition policy should also embrace a good understanding of the efficiency implications of enforcement activity. Competition policy examines the impact of arrangements between, and practices of, firms to assess whether these are likely to distort competition in some manner. Where the rationale for the introduction of a new arrangement or practice may be to deliver a more efficient process, there may be a trade-off between enhancing rivalry and enhancing efficiency.

This paper discusses the issues that arise in considering the trade-off between efficiency gains and potential competitive distortions. In line with more effects-based analysis in many jurisdictions and for many aspects of competition policy, authorities are exploring the weight to give to efficiency assessments in judging the legality of an agreement, a merger or a practice. First, the current approach to efficiency assessment in Europe is set out, identifying that these considerations are relevant in most types of competition policy cases. Then the balance between these two important criteria is examined and how this differs depending on the area of competition law. Finally one of the standard techniques in efficiency analysis is described—data envelopment analysis (DEA)—and how it has been, or could be, used in competition assessments.

### 2. How are efficiency considerations incorporated into competition analysis?

There are three sources of efficiency used in economic welfare analysis—allocative, productive and dynamic efficiencies. Allocative efficiency relates to how well an economy's resources are allocated; that is, how close prices are to an appropriate (marginal) cost benchmark. Achieving allocative efficiency ensures that (scarce) resources are allocated to the areas where they are most valued. Productive efficiency relates to how close current resource use is to best practice; that is, whether there is scope to gain more output from existing inputs through adoption of existing technology. Dynamic efficiency relates to the

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<sup>1</sup> See the original work by Solow identifying the principle of total factor productivity. Solow, R.M. (1957), 'Technical change and the aggregate production function', *Review of Economics and Statistics*, 39:3, 312–320. Explanations of this change have been developed by many economists, both theoretically and empirically.

<sup>2</sup> For an overview of theoretical and empirical research into the drivers of growth, see Aghion, P. and Durlauf, S. (2005), *Handbook of Economic Growth*, Elsevier.

speed at which underlying technology improves; that is, the speed of innovation. In this, technology refers not only to physical investment, but also to organisational practices, skill transfer, etc.

Productive and/or dynamic efficiency considerations are relevant in every aspect of competition assessments. In mergers, the underlying rationale for many transactions is the efficiency gains that will be realised; hence most merger assessments will discuss the evidence for productive and/or dynamic efficiency. Similarly to mergers, most (non-hardcore) agreements or other arrangements between market participants will have an efficiency rationale that requires examination. State aid cases in Europe, particularly cases relating to subsidies for services of general economic interest (SGEI), need to assess whether the underlying operation of the SGEI recipient is efficient. Here it is productive efficiency that is of interest. A number of practices scrutinised under abuse of dominance legislation, while potentially exclusionary, may also have such efficiency benefits (for example, tying or bundling practices).

The tension underlying competition policy is effectively between the first type of efficiency and the second and third types. Rivalry and competitive markets yield pricing closely related to underlying costs (allocative efficiency), to the benefit of consumer welfare. Much of the intervention by competition authorities is to ensure that allocative efficiency is achieved and that firms are not able to earn excessive returns through exclusionary practices or through agreements or mergers that hamper rivalry. However, new market arrangements may yield lower-cost or higher-quality outputs (productive or dynamic efficiency), to the benefit of total welfare. Competition assessment (in general) weights consumer welfare and allocative efficiency highly, and is reluctant to give weight to efficiency benefits where they lead (at least in the first instance) to producer welfare, usually in the form of higher profits.<sup>3</sup> As we shall see below, the speed and certainty with which these latter benefits would filter through to consumers more generally has received little to no attention in competition analysis.

We start with an assessment of the way in which efficiency considerations are balanced in Europe, focusing on mergers and agreements. We also examine any differences that arise as a result of whether there is a horizontal or vertical link.

## **2.1 *Efficiencies in mergers and agreements***

Competition authorities generally require that the claimed merger efficiencies meet a number of conditions before they are weighed against a potential lessening of competition. For example, the European Commission requires merger efficiencies to ‘benefit consumers, be merger specific and be verifiable’, with these three conditions being cumulative.<sup>4</sup> The US agencies have a similar approach, namely to:

*consider whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm customers ...*

*credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects ...*

*verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.<sup>5</sup>*

<sup>3</sup> An exception to this is the competition regime in Norway, which has a total welfare standard and therefore gives weight to both consumer and product welfare.

<sup>4</sup> European Commission (2004), ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ 2004/C 31/03, para 78.

<sup>5</sup> Department of Justice and the Federal Trade Commission (2010), ‘Horizontal Merger Guidelines’, August 19th, p. 30.

Under Article 101 TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between European Union (EU) countries and that have as their object or effect the prevention, restriction or distortion of competition are prohibited.<sup>6</sup> In recognition of the efficiency rationale that may exist for certain agreements, there is the possibility to seek an exemption to this rule. Article 101(3) TFEU provides that the prohibition may be declared inapplicable in case of agreements that contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and that do not impose restrictions which are not indispensable to the attainment of these objectives. In addition, the arrangements must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

The treatment of efficiencies thus has similarities under mergers and agreements. Efficiencies must exist (ie, they must be verifiable under merger control and the agreement must contribute to technical progress); they must be passed on, at least in part, to consumers (ie, they must benefit consumers under merger control and any exemptible agreement must allow consumers a fair share); and they must be specific to the practice (ie, they must be merger-specific and the restriction must be indispensable to attaining the efficiencies).

There is, however, an important difference. Until relatively recently, European (and US) merger control did not give weight to efficiency considerations as a counterbalance to identified anti-competitive effects, whereas the analysis of agreements has had this feature (through Article 101(3) or a rule of reason approach in the USA). This difference in the weight given to efficiency considerations is still somewhat evident in terms of the burden in passing the identified hurdles.

European guidance sets out that efficiency claims can only tip the balance in favour of merger approval in the event of limited evidence of a lessening of competition.<sup>7</sup> The verifiability condition requires significant evidence that efficiencies must be substantial and timely. This condition can be challenging to establish where the nature of the efficiency may be linked to management or innovation and therefore be inherently longer-term in focus. Such longer-term considerations may be given greater weight in assessment of agreements. The requirement that merger efficiencies must benefit consumers has led to a focus only on relatively short-term marginal cost efficiencies, and that they should be realised in the markets where there are competitive concerns. Fixed-cost efficiencies can be taken into account in assessing an agreement, where there is a fair share for consumers, as can benefits accruing in related markets. Given that many fixed-cost savings will be passed on over time (as the fixed costs become variable), mergers will be blocked that may have valuable contributions to economic performance from which consumers would benefit over the longer term.

In assessing both mergers and agreements, there is a strong burden of proof on the parties to show that the efficiencies could not be attained in a different way. This may give insufficient weight to whether the gains would be achieved absent the arrangement being scrutinised. An example is efficiencies arising from simple scale economies. Such efficiencies can, in principle, be achieved unilaterally through organic growth, and consumers are likely to benefit if companies compete to gain scale rather than buy it. These efficiencies may therefore not be merger-specific and consequently would not be included as part of the balance in determining whether the merger should go ahead.<sup>8</sup> If the merger were to proceed, however,

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<sup>6</sup> Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (ex-Article 81(1) of the Treaty Establishing the European Community).

<sup>7</sup> European Commission (2004), *op. cit.*, paras 76–88.

<sup>8</sup> See Farrell, J. and Shapiro C. (1990), ‘Horizontal Mergers: An Equilibrium Analysis’, *American Economic Review*, 80, 107–26.

these benefits would arise and, where they affected marginal costs (for example, improved terms for procurement of inputs), would be likely to flow directly to consumers. In the absence of the transaction, neither firm may manage to grow organically to achieve the same scale, and the efficiencies would be lost.

One of the first cases in which the European Commission offered a review of efficiency analysis provided by the merging parties was Inco/Falconbridge.<sup>9</sup> The merging parties claimed that the merger would generate efficiency gains since they could optimise mining and processing operations benefitting from the proximity of their mines and processing facilities in the Sudbury basin. While the Commission acknowledged the potential for substantial synergies and efficiency gains, it concluded that the synergies were not merger-specific because the parties would have been able to capture many of these by creating a mining and processing joint venture (JV).<sup>10</sup>

The Commission also considered that the efficiencies would not have benefitted end-customers in the relevant markets where competition concerns had been identified since the efficiencies would materialise upstream and the merged entity would have significant market power in the relevant market. Hence, the merged entity would have limited incentives to share the benefits of the efficiencies with its end-customers.<sup>11</sup>

In contrast, there are two recent cases where the UK and Dutch competition authorities approved media mergers on the basis of substantial demand-side efficiencies. The UK case concerned a merger of two radio stations; the Dutch case concerned a merger of two door-to-door distributed directories.<sup>12</sup>

The Dutch case involved the merger of the only two national networks of door-to-door distributed directories, and was approved following an effects-based assessment which found that the merger would generate substantial efficiencies for the advertisers (customers of distributed directories). The Dutch competition authority, the NMa, found strong demand-side efficiencies for advertisers stemming from the integration of the two directories, as each advertiser would now need to advertise in only one directory and could access all households. This benefit was balanced against the loss of rivalry, given the constraints from other media (such as the Internet).

A similar efficiency defence was accepted in the clearance of a recent UK merger of two radio stations. The OFT found in this case that the demand-side efficiencies 'would tip the balance' in favour of clearing, as it would allow advertisers to reach consumers more effectively. The key benefits from the merger of the two radio stations were one-stop shopping transaction cost savings for advertisers (they could purchase bundles of advertising time across both stations); under common ownership, the stations would be able to differentiate their content offerings and thereby target different audiences. This meant a higher-quality, more convenient offering to advertisers. Again, the competitive constraints from other media options were important.

These two cases are in contrast to the European Commission's assessment in February 2012 of the Deutsche Bourse/NYSE case.<sup>13</sup> The Commission prohibited the proposed merger, arguing that prohibition

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<sup>9</sup> Case No. COMP/M.4000, July 4th 2006. The case was cleared with remedies, but the parties did not complete the deal.

<sup>10</sup> Ibid, paras 537–42.

<sup>11</sup> Ibid, paras 543–50.

<sup>12</sup> NMa (2008), 'Telefoongids/Gouden Gids', Decision by the NMa's board; and OFT (2008), 'Global Radio UK Limited/GCap Media plc', August 8th.

<sup>13</sup> European Commission (2012), 'Commission blocks proposed merger between Deutsche Börse and NYSE Euronext Brussels', press release, February 1st.

was warranted because the merging parties would have a combined market share exceeding 90% in the market for European financial derivatives and that entry was unlikely.<sup>14</sup> The efficiency defence put forward by the merging parties—greater liquidity from combining the two pools and collateral savings through cross-margining opportunities—was not taken into account since the Commission concluded that it could not verify the liquidity claim, and that the collateral savings claim was not merger-specific and would not compensate for the significant loss of rivalry that would arise from the transaction.

## 2.2 *Horizontal versus vertical arrangements*

Agreements or mergers between horizontal competitors will always need to consider the incentive to reduce rivalry, as the parties will directly benefit from each other's decisions to exercise (exploitative) market power. Competitor firms have a shared incentive to enter into horizontal arrangements which have the effect of increasing prices to consumers, enhancing their margins without losing sales to each other, and hence distorting competition. As discussed above, such arrangements may also deliver productive or dynamic efficiencies which need to be balanced against any potential allocative inefficiency that arises because of the reduced rivalry.

In contrast, economic theory suggests that vertical arrangements are likely to be pro-competitive, as is reflected in the Commission's recent guidelines on vertical restraints:

*Vertical restraints are generally less harmful than horizontal restraints...In vertical relationships...the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other.*<sup>15</sup>

This complementarity limits the incentive of two vertically related parties to enter into arrangements that enhance market power because, in so doing, the exercise of market power by one party to the agreement is likely to hurt the other. The aim of an upstream manufacturer is generally to encourage its retailers to sustain and increase sales of its product(s), and one of the main ways to do this is to sign agreements with retailers which provide for low retail prices. Vertical agreements can also be aimed at promoting a high quality of service; this is also consistent with promoting high volumes. Vertical mergers can resolve double-marginalisation or other coordination problems, thereby leading to incentives to lower prices. Thus, in general, the interests of buyers and sellers are aligned in expanding sales to end-customers rather than in seeking to restrict sales. There is less tension between allocative efficiency and productive or dynamic efficiency in the case of vertical arrangements, and, accordingly, competition authorities are more likely to give weight to the efficiency rationale for a practice.

In practice, this gives rise to a more lenient approach to vertical agreements and vertical mergers. While the tests and thresholds are similar, the presumption is different, as reflected, for example, in the 2010 European regulation on vertical agreements.<sup>16</sup>

<sup>14</sup> The European Commission defined distinct markets for trading on exchanges and over-the-counter (OTC) because of the differing product and customer characteristics.

<sup>15</sup> European Commission (2010), 'Commission Notice – Guidelines on Vertical Restraints', May 19th, para 98.

<sup>16</sup> European Commission (2010), 'Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU of the EU to categories of vertical agreements and concerted practices', Regulation, OJ L102/1 23.4.2010.

### 2.3 *Assessment of treatment of efficiency gains*

The rationale for scepticism about efficiency gains is rooted in concerns over the verifiability of these future benefits against any identified clear competitive harm. We discuss in the next section how efficiency measurement techniques can be used to increase the comfort of competition authorities in relying on efficiency evidence.

In addition, where efficiencies may initially accrue to producers because they are fixed-cost savings, or where allocative efficiency is worsened because of market power, the weight given to consumer welfare means that these types of gains are not valued. In relation to the latter, this may reflect an overly short-term approach to such questions. Fixed-cost savings may take more than two years to filter through to customers (depending on asset lives), but may be significant when they do. Consideration of long-run incremental costs (LRIC) as well as marginal costs may be of interest. In a capital-intensive industry, or a software/digital content industry, short-run marginal costs have limited meaning. Benefits in reducing costs that are fixed over the standard assessment period of merger cases are likely to flow through over a longer timeframe. If there are limited marginal cost savings, but large merger-specific LRIC savings, ignoring these benefits may overall be harmful for consumer welfare. The fact that efficiency savings cannot be used where there is a substantial reduction in rivalry may also be to the detriment of consumers. Even monopolists (facing linear demand) will pass through 50% of efficiency savings, as the monopolist is willing to trade off the loss in margin against the gain in sales that arises. Ignoring efficiency benefits where they are longer-term in nature, or where there are significant concerns about the competition effects, may not serve the interests of consumers.

Out-of-market efficiencies are defined in US Horizontal Merger Guidelines as merger efficiencies that are ‘not strictly in the relevant market, but are so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s)’.<sup>17</sup> In the presence of potential out-of-market efficiencies, competition authorities seek tailored remedies that preserve efficiencies while combating anti-competitive effects in the relevant market. In general, the motivation for requiring efficiency benefits to accrue in the same market where the harm to rivalry occurs is linked to a fairness concern and the welfare of specific consumers, as opposed to consumers overall. In terms of an overall consumer welfare standard, efficiencies that arise elsewhere are just as valuable as those that accrue within the relevant market. If there is a concern about fairness and a desire to make no one consumer worse off, this should perhaps be a separate requirement, rather than captured in the efficiency test.

Finally, requiring indispensability (or merger-specificity) may also harm consumer interests since this does not identify whether the gains would, in fact, be achieved absent the merger or new agreement. A comparison of the balance between the competitive harm and the efficiency benefits from the new arrangement against the counterfactual of the status quo would be more appropriate. That is, if a competition authority considers that a particular efficiency could be achieved through a JV arrangement rather than a full merger, it needs to assess how likely such a JV is to arise in the counterfactual of blocking the merger. If it is unlikely then ignoring these efficiencies in the merger assessment may not give the correct weighting to the consumer welfare benefits likely to be achieved from the merger.

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<sup>17</sup> Federal Trade Commission and Department of Justice (2006), ‘Commentary on the Horizontal Merger Guidelines’, joint commentary, March.

### 3. Practical tools for assessing efficiency gains

All of the above gives an overview of how efficiency considerations are currently factored into analysis of competition infringements. It also opens a debate about whether there is scope for more attention to, and balancing of, efficiency gains.

Merging parties and competition authorities do increasingly recognise that efficiency claims need to be evidence-based and quantifiable. Techniques that have been applied to assess firms' efficiency may offer some promise for understanding the likely benefits from new corporate arrangements.<sup>18</sup> Here we focus on data envelopment analysis (DEA), one of the best-developed, easily explained and well-understood efficiency assessment techniques.

DEA has a number of technical advantages but also some practical advantages, which mean that it can be considered for use in merger analysis (and indeed, other competition applications).<sup>19</sup>

- DEA can handle multiple inputs and multiple outputs in their natural units (even where these are not directly commensurate). It does not require data on prices, which may be missing in some service industries.
- DEA is also favoured where the assumptions of standard production theory are in question (for example, hospital behaviour may not be characterised as either profit maximisation or cost minimisation).<sup>20</sup>

In merger analysis, DEA can be used as a planning tool—ie, to assess the efficiencies to be realised by merging different-sized units within a firm or by merging two firms within a sector. It can also be used by competition authorities and merging parties to predict potential gains from a merger. For example, Lozano and Villa (2010)<sup>21</sup> developed a DEA-based pre-merger planning tool for estimating the likely cost and profit gains from a merger. Their tool has been developed to model the closure of existing firms, replicating a horizontal merger, and, as such, could be applied to proposed horizontal mergers. The model has not yet been applied to real-world data, but it is designed to decompose efficiency gains into technical, allocative and pure merger efficiencies. All may be merger-specific: pure merger efficiencies would include, for example, procurement gains, while the merger-specific technical efficiency gains could arise from the additional best-practice opportunities that emerge from the consolidation. To identify profit gains,

<sup>18</sup> These techniques have been often applied in regulated sectors. For insights into efficiency assessment in regulated industries See Oxera (2011), 'Encouraging efficiency in regulated sectors: Lessons from 20 years of RPI-X', report for BT, December.

<sup>19</sup> For example, DEA has been applied to estimate potential gains from mergers in the US hospital sector, the US banking sector and the Norwegian electricity distribution industry. See, Ferrier, G.D. and Valdmanis, V.G. (2004), 'Do Mergers Improve Hospital Productivity?', *Journal of the Operational Research Society*, 55:10; Bogetoft, P. and Gammeltvedt, T.E. (2006), 'Mergers in Norwegian electricity distribution : a cost saving exercise?', working paper, NVE, Norway; Sherman, H.D. and Rupert, T.J. (2006), 'Do bank mergers have hidden or foregone value? Realized and unrealized operating synergies in one bank merger', *European Journal of Operational Research*, 168, 253–68.

<sup>20</sup> For example, Gong and Sickles (1992) report that 'as mis-specification of functional form becomes more serious, DEA's appeal (vis-à-vis Stochastic Frontier Analysis) becomes more compelling.' See, Gong, B.H. and Sickles, R.C. (1992), 'Finite Sample Evidence on the Performance of Stochastic Frontiers and Data Envelopment Analysis Using Panel Data', *Journal of Econometrics*, 51, 259–84.

<sup>21</sup> Lozano, S. and Villa, G. (2010), 'DEA-based pre merger planning tool', *Journal of the Operational Research Society*, 61, 1485–97.

a good estimate of future output prices is necessary; this is generally not available prior to the merger. The Lozano and Villa tool may be useful for assessing mergers ex post.

We now describe the intuition of a DEA approach, both in cross-section and where data may be available over time. There is a significant literature available on these techniques. Potential application of DEA is discussed here in determining the potential gains of proposed mergers in the Danish hospital sector.

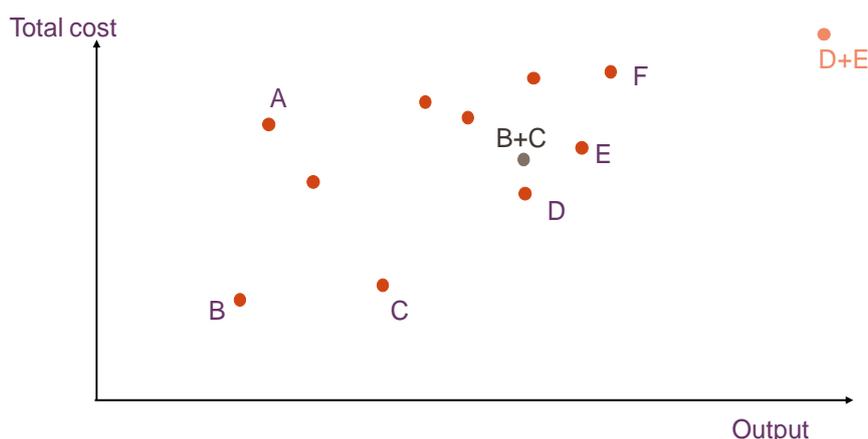
### 3.1 Data envelopment analysis

DEA is a frontier-based method<sup>22</sup> that is commonly used for measuring comparative efficiency and productivity when there are multiple inputs and outputs that cannot be readily reduced to a single input or a single output measure. It is widely used by regulators and academics, providing useful performance measurement information in a variety of application areas.<sup>23</sup> Its major advantage is that the efficiency estimates are based on realised performance observed in other, similar companies, implying that it is a relatively robust and transparent approach.

DEA measures efficiency by reference to an efficiency frontier, which is constructed as linear combinations of efficient (best-practice) companies—that is, companies producing the most output at the lowest cost. DEA assumes that two or more companies can be ‘combined’ to form a composite producer with composite costs and outputs—a ‘virtual company’. The actual companies are then compared with these virtual and actual companies. If another actual or a virtual company or their combination achieves the same output as the actual company at a lower cost, the actual company is judged to be inefficient.

Figure 1 is a graphical representation of ten units (for example, hospitals), with the y axis representing the total cost of service, and the x axis the total outputs produced (for example, patients satisfactorily discharged). Units (B+C) and (D+E) represent the merger of units B and C, and D and E respectively, where their total costs and total output are simply added together initially.

Figure 1. Graphical example of data envelopment analysis (I)



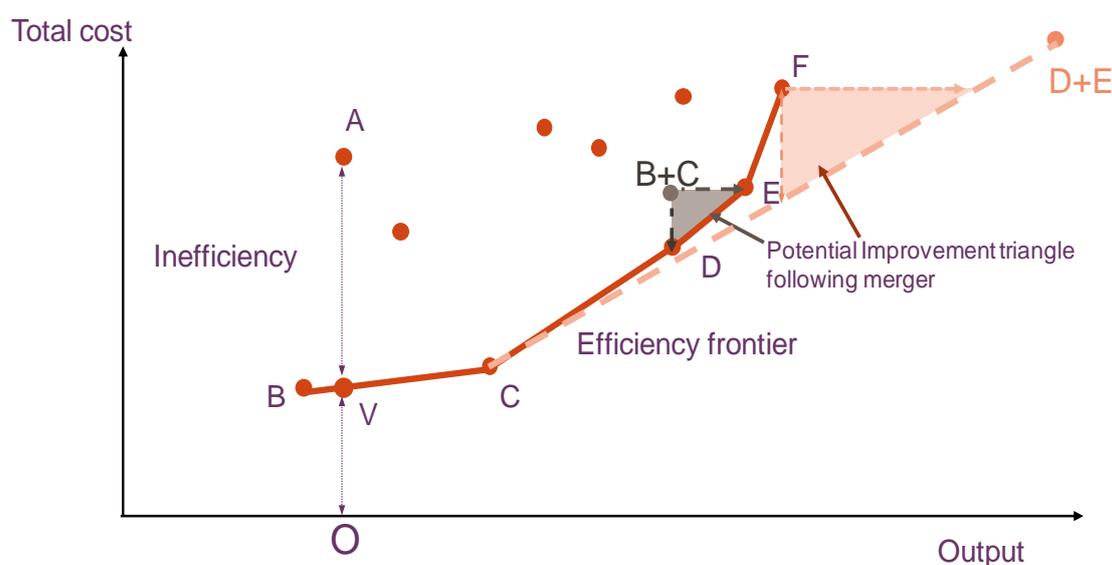
Source: Oxera.

<sup>22</sup> Frontier-based approaches attempt to estimate a minimum cost frontier for the industry. These approaches could use econometric analysis, as in the case of corrected ordinary least squares (COLS) and stochastic frontier analysis (SFA), mathematical optimisation, as in the case of data envelopment analysis (DEA).

<sup>23</sup> For empirical applications of DEA in transport, energy, finance and healthcare, see Cooper, W.W., Seiford, L, and Zhu, J. (2011), *Handbook on Data Envelopment Analysis*, second edition, Springer Science,.

Prior to the merger of units B and C or D and E, the DEA frontier is shown in Figure 2 by joining points B, C, D, E and F. These units expend the least cost to produce a given level of output; alternatively, they produce the maximum output, given the level of cost spent. Companies B, C, D, E and F are thus deemed efficient, as they are on the frontier. Under a cost-minimisation objective, the efficiency of company A is given by the distance from point A to point V.<sup>24</sup> Point V is a virtual company, made up of a weighted average of frontier companies B and C, such that V has the same quality as A.<sup>25</sup> Companies B and C are referred to as A's 'peers', with B having a higher weighting than C. DEA gives the following insight to the owners or managers of A: A could improve its productive efficiency by adopting best practice as exemplified by B and C.

**Figure 2. Graphical example of data envelopment analysis (II)**



Source: Oxera.

Suppose that efficient units B and C then decide to merge. DEA gives insight into the expected levels of synergy. If the businesses integrate without exploiting the potential new synergies (for example, the additional economies of scale from the increase in size), the outcome would be the point (B+C), shown to be inefficient under DEA. DEA could be used to estimate the additional cost savings (or improvement in output) that should be possible by the merger of two *already* efficient points B and C. The possibilities for improvement are shown in the shaded triangle, with the benchmark being determined by the efficient frontier connecting units D and E. If the merging parties are indicating efficiencies of this magnitude, DEA would confirm that this is consistent with two efficient firms remaining on the frontier. If the merging parties are suggesting significantly higher efficiency gains, this would take them beyond current best practice. A competition authority might require additional evidence to accept the verifiability of these savings, as this would be a shift in the industry efficiency frontier.

In an alternative scenario, suppose that efficient units D and E decide to merge, but again integrate without exploiting new merger synergies; this would be represented by point (D+E) which, owing to a lack of suitable comparators, could still be judged to be an efficient combination under a simple DEA

<sup>24</sup> 'A' will have a different efficiency challenge under an output-maximisation objective.

<sup>25</sup> For a more detailed discussion on DEA, see Thanassoulis, E. (2001), *Introduction to the Theory and Application of Data Envelopment Analysis: A Foundation Text with Integrated Software*, Springer.

approach.<sup>26</sup> However, in this instance, the industry frontier is shifted downwards as a result of the increased scale economies, and it could open up an efficiency challenge for other players in the industry. The unit F, previously judged to be efficient, now has a peer that provides it with a challenge that additional output growth can be achieved at lower unit cost (represented by the lightly shaded triangle). An impact of the merger here could be argued to arise through flagging the possibility of an improvement in the productivity of the industry as a whole.

### 3.1.1 *Performance over time*

Assessing performance over time using DEA is usually done by constructing a productivity index, commonly known as the Malmquist index. *Productivity indices* need to be constructed since productivity is an absolute measure, in contrast to the relative measures applied when measuring distance from an efficient boundary. The Malmquist index can capture the effects of changes in external conditions and the relative performance of the assessed unit in a way that is not possible by simply comparing the cross-sectional efficiency scores between two macro-periods. The Malmquist index can be computed using only measures of efficiency (estimated using DEA) without the need for functional assumptions or prices.

The productivity change over time can be broken down into two components. The first reflects the productivity gain or loss, attributable to a unit catching up or slipping behind in performance, compared with its contemporaneous benchmark units. The second reflects the extent to which benchmark performance has improved or worsened over time, known as ‘technology change’.<sup>27</sup> Productivity growth as measured by the Malmquist index is thus the product of efficiency change and frontier shift.

Where data is available to examine productivity changes over time, this allows for more detailed understanding of the drivers of efficiency benefits and the link to a merger or an agreement. Such an approach would be particularly valuable in assessing the outcomes after an enforcement decision has been taken, whether to prohibit or to allow a merger or agreement.

### 3.2 *Examples of applying DEA in competition assessments*

DEA can be usefully applied to predict the potential for efficiency improvements. It is suited to situations where the market comprises different units of varying size and scope. It has been used to analyse performance in a wide range of sectors (eg, insurance, banking, healthcare, energy, police forces), including in identifying opportunities where implementation of best-practice techniques could yield benefits.

As an example, the productivity impact of mergers over time has been examined. Ferrier and Valdmanis (2004) used the DEA-based Malmquist index approach to ascertain whether hospital mergers result in performance gains, at least in the short run. The authors concluded that hospital mergers in the USA in the late 1990s did result in an improvement in terms of technical (and scale) efficiency measures, although the merged hospitals did not sustain their performance; and, over time, performed poorly compared with others.<sup>28</sup> Cuesta and Orea (2002) used a panel data econometric approach to study the

<sup>26</sup> Under the additivity assumption maintained in Bogetoft and Wang (2005), the merger of units D and E would result in an infeasibly large unit for the reference technology, and the merger would not be considered advantageous.

<sup>27</sup> Indeed, if the units being assessed do not operate under constant returns to scale, but rather under variable returns to scale, then a third component can also be identified which captures the impact on productivity change attributable to changes in scale size.

<sup>28</sup> Ferrier, G.D. and Valdmanis, V.G. (2004), ‘Do Mergers Improve Hospital Productivity?’, *Journal of the Operational Research Society*, 55:10.

technical efficiency of Spanish savings banks over time and to test the differences in technical efficiency between merged and non-merged firms.<sup>29</sup> They found that merged firms had improved their technical efficiency.

The hospital sector offers good opportunities for performance assessment since there are units of varying size and scope, but often input and output prices are similar, as a result of regulation. Below we discuss in more detail the application of DEA by Kristensen, Bogetoft and Pedersen (2010) to assess both potential and realised efficiencies in advance of merger activity in the Danish hospital market.<sup>30</sup>

### 3.2.1 Application of DEA to proposed consolidation in the Danish hospital market

In 2007 the Danish government rolled out a substantial building programme centralising medical services in fewer hospitals, claiming that consolidation of hospitals would increase hospitals' efficiency.<sup>31</sup> By applying DEA, Kristensen et al. (2010) assessed ex ante the government's claim that the consolidations would deliver efficiency gains in the Danish hospital sector. The authors examined potential consolidations that would be consistent with the government's announced aims for the restructuring programme, and highlighted that this type of analysis can be used to plan such acquisitions and assess the likelihood of any stated benefits arising from a given consolidation.

The analysis followed a two-step approach: the cost frontier was identified using DEA analysis, and the efficiencies of existing and virtual hospitals were assessed, allowing potential efficiency gains to be established; and the estimated efficiency gains were then decomposed into the following sources:

- the **learning effect**, which measures the reduction in costs that arises where hospitals adopt best practice from the most efficient hospitals;
- the **scope effect**, which allows hospitals to focus on the services that they deliver most efficiently (ie, the ability to optimally exploit the mix of resources used and services provided by the merging hospitals);
- the **scale effect**, identifying the decline in the average cost of providing healthcare as the number of services delivered falls (ie, the additional gains that could come from the larger size of any merged hospitals).

As some of these potential gains could be realised absent a merger, decomposing the effects as above allowed identification of those efficiency gains that could only be realised through a merger. The results showed that sizeable cost reductions could be realised through learning effects and through improved economies of scope. Economies of scale could arise when smaller hospitals were merging, yet the evidence indicated that diseconomies of scale were likely to arise if larger hospitals were merged. This means that any consolidation programme would need to be assessed carefully if overall efficiency gains are a key rationale.

<sup>29</sup> Cuesta, R.A. and Orea, L. (2002), 'Mergers and technical efficiency in Spanish savings banks: A stochastic distance function approach', *Journal of Banking & Finance*, 26, 2231–47.

<sup>30</sup> Kristensen, T., Bogetoft, P. and Moeller Pedersen, K. (2010), 'Potential Gains from Hospital Mergers in Denmark', *Health Care Management Science*, 13:4, 334–45.

<sup>31</sup> The Danish government did not substantiate its claim. The international literature suggests that the performance of merged hospitals falls below expectations owing to higher-than-expected costs stemming from the integration of the merging hospitals.

#### **4. Conclusions**

Competition assessment already recognises the need to give weight to efficiency considerations when determining whether a new arrangement can go ahead. While rivalry is seen as a long-term driver of economic welfare, there are cases where a new approach could drive significant efficiencies, to the overall benefit of consumers in the medium to longer term. Without doubt, authorities need to be convinced that such efficiencies are genuine and likely to occur. In this regard, cross-sectional and panel modelling of performance analysis using techniques such as DEA can be helpful in order to identify and quantify efficiency gains. While much of the extant application has been in terms of understanding the scope for mergers to generate efficiency gains, the principles can be applied more widely. As competition authorities become more familiar with measuring and verifying these gains (including with ex post assessments), the more comfortable they are likely to be in giving weight to these. There lies a challenge for practitioners and competition authorities to explore the extent to which performance analysis can be usefully applied to substantiate efficiency gains.

## MERGER EFFICIENCIES AND COMPETITION POLICY

*Note by Professor F. M. Scherer*

Some OECD nations -- I do not know how many -- have incorporated an efficiencies defense into the evaluation of mergers that might otherwise be expected to reduce competition and raise prices. Adjudicating the tradeoff between efficiencies and anti-competitive effects is difficult. I address here some of the most important issues from the perspective of my own experience in actual U.S. cases. Efficiency defenses have at least in U.S. practice also been asserted against claims of excessive or abusive monopoly power -- e.g., in the 1911 Standard Oil case and the 1956 Cellophane case -- but brevity requires me largely to pass over the relevant experience.

### 1. The Williamson tradeoff

The tradeoff analyzed in 1968 by Oliver Williamson is well-known and will have been explicated by the conference organizers. I choose the risk of duplication here to highlight some caveats. The original Williamson analysis is summarized in Figure 1 below.<sup>1</sup> It is assumed that before merger the industry supply function, i.e., the envelope of individual producers' marginal cost curves -- is given by the curve  $S_1$ . Merger to monopoly reduces the marginal cost curve to  $MC_M$ , i.e., by \$15 per unit. A tradeoff is required only if the merger enhances monopoly power so much that e.g. the new profit-maximizing solution entails equation of the now-lower marginal cost with marginal revenue MR, precipitating an increase in the price from approximately \$139 to \$149 per unit, corresponding with an output reduction of approximately 16 percent. The social loss normally attributable to this output reduction is the dot-shaded deadweight loss triangle in Figure 1. The social gain from the monopoly-based cost reduction is the vertically shaded gap between the old, higher supply curve and the new marginal cost curve. As Figure 1 is constructed, the cost-reduction gain is about four times the deadweight loss, and so by Williamson's reckoning, the merger might be justified under welfare economic criteria. Evoking (but not citing) a result demonstrated as early as 1890 by Alfred Marshall,<sup>2</sup> Williamson argues that many realistic combinations of demand elasticities and monopoly-based cost reductions could entail a net welfare gain.

In 1984 the U.S. Department of Justice (DoJ) revised its merger guidelines to allow what appeared to be a Williamsonian efficiencies defense. The statement left important points unclear, however, and in an early case involving an already-consummated 1982 merger between Archer-Daniels-Midland (ADM) and Clinton (Iowa) Corn Processing Company, views on how the defense could be sustained clashed.<sup>3</sup> Department of Justice attorneys insisted that efficiencies could support a valid defense only if their cost-

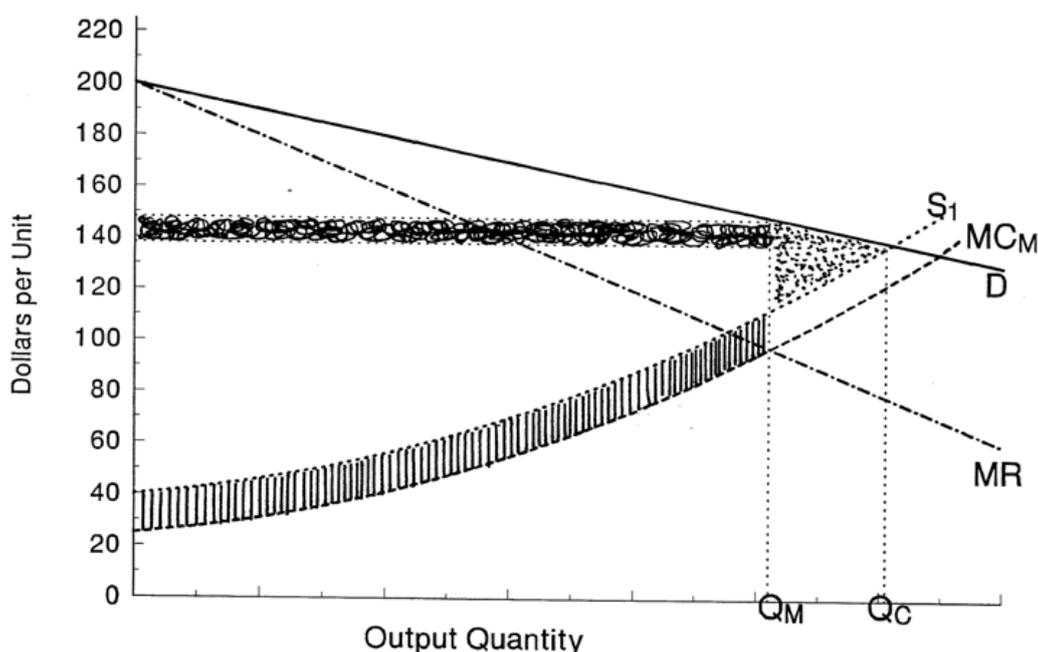
1. See Oliver Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs," American Economic Review, March 1968, pp. 18-36. Less than a year before publication Williamson completed a one-year assignment as the second-ever U.S. Department of Justice Antitrust Division chief economist -- although the formal title differed then.

2. Alfred Marshall, Principles of Economics (1890), p. 447, footnote 1.

3. U.S. v. Archer-Daniels-Midland Co. et al., CCH 1991 Trade Cases para. 69,647. When the case was initiated, it was believed to be the first test of the new merger efficiencies defense. However, other cases moved ahead because of procedural delays. The first successful litigated defense known to me was in a hospital merger case, U.S. v. Carilion Health Systems et al., CCH 1989 Trade Cases para. 68,451. Details of what was achieved operationally by ADM and the legal issues addressed are found in John F. Kennedy School of Government case study 1126.0, "Archer-Daniels-Midland and Clinton Corn Processing" (1992).

reducing effect led to a decrease in high-fructose corn syrup prices below the price that had prevailed (presumably, under more vigorous competition) pre-merger, or at least, to no price increase. In effect, the Williamson *tradeoff* between higher prices and lower costs was to be ignored. For the merging parties I submitted in 1987 a memorandum rebutting several points in the DoJ approach and strongly supporting the Williamson tradeoff. The memo is provided as a supplement to this report <sup>4</sup> (see Annexe 1). Extensive support was added in court, but the presiding judge, fearful of treading on unexplored precedential ground, chose to approve the merger on more traditional grounds, thereby dogging the efficiencies question.

**Figure 1. Illustration of Williamson Efficiencies Tradeoff**



Even though the Williamson tradeoff was originally advocated by the only competition enforcement agency chief economist to be honored with the Nobel Prize in economics, the U.S. agencies have continued to insist that no tradeoff be accepted. Rather, in the words of the joint agency Horizontal Merger Guidelines of August 19, 2010, section 10:

*... To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market...*

By the Williamson analysis and by the arguments I advanced in my May 1987 memorandum, this policy is wrong. However, I have more recently begun to have doubts. When Williamson published his 1969 article, civilian sector unemployment in the United States was 3.5 percent. It was 6.2 percent in 1987. At the time, most economists believed we had essentially conquered the business cycle and the scourge of unemployment. Now one is much less certain. The United States has experienced several years running with unemployment rates above 8 percent. For the Euro zone excluding Germany, the unemployment rate in 2012 averaged 12 percent, with youth (under age 25) unemployment rates of nearly 30 percent.

<sup>4</sup>. Originally reprinted in F. M. Scherer, Competition Policy, Domestic and International (Edward Elgar: 2000), Chapter 18.

Full employment can no longer be so readily assumed, and given this, two shortcomings of the Williamson tradeoff take on greater weight. First, the resources released through merger-based efficiencies -- the vertically shaded area of my Figure 1 -- enable social gains by releasing resources that will be used in other economic sectors to provide goods and services that enhance consumer welfare. At substantial levels of unemployment, this is no longer certain. Resource leakage is likely, and impact multipliers of less than unity are required. Second, the Williamson tradeoff analysis assumes in effect that Say's law operates. That is, in the first instance, monopoly price-raising adds profits at consumers' expense nearly equal to the curlicue-shaded rectangular area in Figure 1. Those profits are assumed to recirculate into effective demand for additional investment goods or, when distributed to shareholders, through incremental consumer demand. But in a world of liquidity traps, corporations are accumulating profits that they choose not to invest, and when the profits are distributed to typically wealthy shareholders, marginal propensities to consume are below unity in normal times and savings propensities are even stronger in troubled times. Ignoring stock ownership by operating corporations, nearly a third of all domestically-held U.S. common stocks are held by pension funds and insurance companies. Individuals increase their consumption little or not at all when the value of the securities held by their insurers rises. Thus, increased output is much less than equal to the resource savings achieved through mergers.

Another difficulty is acknowledged briefly by Williamson (pp. 27-28). The curlicue-shaded rectangle in Figure 1 represents a transfer of what before merger was consumers' surplus to profit or producer's surplus and ultimately to the merging company's share-holders. Common stockholdings are disproportionately concentrated among the most wealthy families. If one believes with Alfred Marshall (1890, Book III, Chapter III) that the marginal utility of money diminishes as wealth increases, the effect of monopoly price-raising is to redistribute income from consumers with relatively high marginal utilities to shareholders with lower marginal utilities, implying a welfare loss.<sup>5</sup> This is an immensely controversial proposition, and it is no longer fashionable for economists to propound it. But it has become all the more relevant as the inequality of wealth holdings has increased, as it has in many if not most OECD nations during the past two decades.

For these reasons, there is more force than I was once willing to admit for the argument that cost savings must be passed on to consumers if those savings are to be viewed as a justification for mergers. But the Williamson tradeoff could still work if a more sophisticated incidence analysis is appended. One must admit that such an analytic extension adds difficulty to the other challenges I will address shortly. Also, the less-than-full-employment problem that now plagues many (not all) OECD member nations is, one hopes, transitory. When it abates, the case for implementing a full Williamson tradeoff analysis gains strength.

## 2. The with-or-without question

We turn next to what operations researchers have long called the "with-or-without" question. That is, one attempts to compare performance with the intervention in question vs. what could be achieved using alternative feasible measures. In their August 2010 revised Merger Guidelines, the U.S. antitrust agencies stated the same concept as: "The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." Again, difficult "but for" analyses must be made.

Let me illustrate with the proposed 1998 merger between defense contracting companies Lockheed-Martin and Northrop-Grumman. I was part of the Department of Justice team addressing competitive

<sup>5</sup>. See also W. Blum and H. Kalven, The Uneasy Case for Progressive Taxation (University of Chicago Press, 1953); and F. M. Scherer, "A Note on Global Welfare in Pharmaceutical Patenting," The World Economy, July 2004, pp. 1127-1142.

effects and efficiency benefits. One benefit claimed by Lockheed was a consolidation entailing the closure of nearly 100 specialized research laboratories, with consequent cost savings. Analyzing the relevant data, I realized that nearly all of the laboratories proposed for closure had counterpart laboratories within the same company performing substantively similar research. So why was the merger needed? Why wasn't one laboratory in a field closed, with transfer if needed of critical personnel to a parallel laboratory? The surprising answer was that in 1993, perceiving that the United States was supporting more contractors than it could fully load with new programs in the future, Defense Secretary William Perry induced the U.S. Congress to pass a legislative loophole stating that contractors would be reimbursed for installation closure costs made in conjunction with a merger, otherwise, presumably not. So Lockheed-Martin waited for an appropriate merger to effect closures that it could have made, but at greater cost to itself, even if not to the public till, without merger. The question was, did these facts violate the "with or without" test? As events ensued, the efficiencies analysis was not needed, because decision-makers in the Department of Defense came to believe that they needed Northrop-Grumman as an independent center of technological initiative.<sup>6</sup>

Two other illustrations reinforce this example, which, because of the special legislative context, may have been anomalous.

In 1976 a U.S. Senate subcommittee held extensive hearings on a bill (S. 2387) proposed by its chairman, Senator Philip Hart, to initiate a divestiture program substantially reducing the vertical integration of market-dominating U.S. petroleum companies. Witnesses for the companies insisted that vertical disintegration would sacrifice substantial efficiencies. Drawing upon research I had done on the economics of multi-plant operation, including the petroleum industry, I then testified<sup>7</sup> that the principal advantages of vertical integration in petroleum stemmed critically from major imperfections in petroleum markets, including distortions imparted by a "percentage depletion" law for crude oil, the advantages integrated marketers drew from preferred access to gasoline supplies under the existing system of "two tier" price controls, and integrated company control of crucial pipelines. The bill was approved in subcommittee but died on the Senate floor. But the market distortions that gave integrated companies their main advantages were gradually eliminated, and more recently, several companies have verified the unimportance of integration in a more unrestrained market by voluntarily severing refining and marketing divisions from crude oil exploration and production.

Here too, the market failures that made multi-plant integration profitable stemmed in part from misguided government interventions. A case absent government distortion arose in the proposed 1978 merger between Jones & Laughlin Steel and Youngstown Steel, the seventh- and eighth-largest U.S. steel producers. Although the antitrust agencies had not yet adopted efficiencies defense guidelines, efficiency consequences and others were weighed in view of a crisis U.S. steel makers were experiencing at the time. Advising Attorney General Griffin Bell on the matter, I detailed the parties' claims that they would derive benefits from cross-shipment of their iron ore, coking coal, finished coke, and unfinished steel shapes.<sup>8</sup> I

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<sup>6.</sup> In a new paper, "Mergers and Innovation in the Pharmaceutical Industry," William S. Comanor and I have proposed that a similar test be applied to pharmaceutical mergers. The Defense Department's decision might have been an historical anomaly. For the first time in 1998, the Department had an Undersecretary for Acquisitions, Jacques Gansler, trained in economics (specifically, defense economics) rather than engineering or business. Gansler recognized, as engineers were unlikely to, the value of having diverse independent centers of technological initiative. Much to Lockheed's surprise, Gansler's view was strongly supported by the colonels who play a key role in defense acquisition decision-making, and so Lockheed voluntarily abandoned the merger.

<sup>7.</sup> The testimony is not reproduced as an OECD file, but can be found in Scherer, Competition Policy, Domestic and International, Chapter 20.

<sup>8.</sup> My memorandum has been reproduced and placed on the OECD web site. It was published in Scherer, Competition Policy, Domestic and International, Chapter 17.

asked, however, why those benefits could not also be realized by arm's-length purchase and sale transactions. The would-be acquirer replied that "Short of merger, J&L has no interest in YS&T's survival. Therefore, absent unusual circumstances ... J&L would not enter into contracts with YS&T because of competitive concerns." Viewing this attitude as an indicator of market failure, I responded that "it is a sad commentary on the US steel industry that its members are willing to cooperate in lobbying for governmental protection against imports but not to engage in mutually advantageous market transactions that reduce costs and improve their competitiveness against foreign producers."

### 3. The tendency toward erroneous evaluations

The Jones & Laughlin - Youngstown merger also illustrates what is perhaps the most serious barrier to introducing efficiency defenses in proposed merger evaluations -- the difficulty of making accurate projections about necessarily uncertain future events, including both costs and, at least as hard, prices. My work on the cost implications of that merger provides a concrete example, since I revisited the facts several years later and learned that I had been excessively pessimistic in assessing the potential benefits.<sup>9</sup>

In my 1978 analysis for Attorney General Bell, (see Annexe 2) I observed that Youngstown's most modern plant, at Indiana Harbor on Lake Michigan, had been unprofitable. I observed that "What Indiana Harbor needs to serve the nation well is good management and an infusion of capital." I expressed doubts whether J&L's management, depleted as a result of turnover following previous mergers, was up to the task and noted that J&L, like Youngstown, was severely cash-constrained. My retrospective revealed that these were indeed the core of Youngstown's problems. However, I was wrong in my skepticism about J&L's ability to fill the gap. I failed to realize that the problem with Youngstown's conglomerate parent (ascertained in later interviews) was profound ignorance of how to operate a steel mill rather than unbreakable cash constraints. And relying upon paper documentation rather than face-to-face meetings with J&L managers, I underestimated their competence. I was probably biased in this judgment because four years earlier I had visited J&L's newest steel works and found it appallingly badly managed in comparison to a directly comparable Japanese plant I visited a month earlier. J&L reassigned able managers to Indiana Harbor and invested funds among other things in spare parts for the Indiana Harbor hot strip rolling mill -- a key bottleneck, raising its output from 68 percent of capacity pre-merger to nearly full capacity and thereby permitting a substantial expansion of ancillary product finishing mill output.

In the longer run, however, those measures proved insufficient. Further mergers by J&L experienced significant indigestion problems. The industry was plunged again into crisis by a severe recession and intensified import competition. J&L's parent filed for bankruptcy. A series of reorganizations followed. The remaining Youngstown, Ohio, plant was permanently closed. Youngstown's more modern Indiana Harbor plant operated under diverse ownership constellations until it was acquired by Arcelor-Mittal, which had also acquired what was once the Inland Steel Corporation. Since 2005, therefore, the two major Indiana Harbor works, separated by a canal's width, became an integrated entity owned by the Mittal interests.<sup>10</sup>

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<sup>9.</sup> The later analysis was one of 15 case studies presented in my book (with David Ravenscraft), Mergers, Sell-offs, and Economic Efficiency (Brookings 1987), especially pp. 275-279. My retrospective is included with permission as "Youngstown Sheet & Tube" on the OECD web site.

<sup>10.</sup> Note that in my 1978 report to Attorney General Bell, I recommended that, absent acquisition by a Japanese steel maker, an alternative superior to acquisition of Youngstown's Indiana Harbor works by LTV would be consolidation with Inland Steel (see Annexe 2 - DAF/COMP/WD(47)ANN2).

#### 4. Coping with uncertainty: I

For me, the Youngstown - J&L experience was humbling. I erred significantly in forecasting improvement prospects for an industry on which I had unusually deep insight. This raises the broader question, how should competition policy enforcement agencies cope with the uncertainties attending claims that mergers will yield significant efficiencies?

The Clinton Corn Processing acquisition, it must be reiterated, took place eight years before the government's challenge was resolved judicially. The lag was attributable in part to uncertainty over whether the transaction was a merger rather than a long-term lease and then to procedural delays. Archer-Daniels-Midland began implementing efficiency improvements on the day it took the Clinton, Iowa, plant over, and by the time a formal trial was held in late 1990, a clear performance record had been established and few relevant uncertainties remained. Among other things, it was possible to show that ADM made many investments that Clinton's prior management had not contemplated, had achieved productivity far superior to other industry members, and even that its average prices were lower than those of competitors.

Most merger challenges do not enjoy this historical luxury, in part, at least in the United States, because before the antitrust agencies were granted power under the 1976 Hart-Scott-Rodino Act to delay mergers pending settlement or judicial approval, it proved difficult to unscramble eggs that had already been scrambled.<sup>11</sup> Had divestiture been required eight years after the Clinton Corn Processing merger, the efficiencies achieved in that virtually free-standing plant could probably have been sustained, despite the absence of Archer-Daniels-Midland management's cost-sparing obsession. The main new costs would have come from the need for Clinton to develop its own field sales force, from cessation of access to the parent's operating know-how and specialized enzymes, and from the sacrifice of modest inter-plant peakload-balancing advantages. But for other mergers, especially those contemplating substantial multi-plant coordination and reorganization, restoring the status quo ante several years after a hold-separate order could be difficult. To the extent that this is true, a three-way tradeoff among ex ante prediction uncertainty, the delay of efficiency-increasing measures until legal uncertainty is achieved, and breakup costs if the merger is retroactively disapproved, must be faced.

One possible solution would be to weigh these tradeoffs in a preliminary judicial or administrative hearing. If substantial long-term reorganizations between acquirer and acquired firm operations are contemplated, it is probably necessary to accept the uncertainties of predicting efficiency consequences in a front-end "go - no go" decision. But if predicted operational changes are expected to occur mainly within the acquired entity with only modest multi-plant interaction, a two-stage approach might be adopted, with the enforcement authority allowing the merger for a limited (e.g., three-year) period and then revisiting the facts after experience has resolved remaining uncertainties. The emergence of companies that specialize in divesting segments of existing organizations, reorganizing them, and then offering new equity shares for them in public capital markets might add to the two-stage approach's feasibility.<sup>12</sup>

#### 5. Coping with Uncertainty: II

If efficiency claims must be evaluated ex ante, i.e., before a proposed merger is consummated, the question remains, who should analyze the claims on behalf of the enforcement agency?

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<sup>11.</sup> See Kenneth Elzinga, "The Antimerger Laws: Pyrrhic Victories," Journal of Law & Economics, April 1969, pp. 43-78.

<sup>12.</sup> During the 1980s, those firms were called leveraged buyout specialists. Their functioning is analyzed in Ravenscraft and Scherer, supra. More recently, private equity companies perform similar functions. Bain & Co., in which U.S. presidential candidate Mitt Romney gained most of his business experience, is one example.

My natural, possibly prejudiced, assumption is that economists on the enforcement agency's staff or retained by the agency as consultants would perform the necessary analyses. But on this, I have serious misgivings. Presumably, many of those staff economists focused their Ph.D. studies in the academic field known as "industrial organization." (Later) Nobel laureate Wassily Leontief once said in a Harvard University lecture that an industrial organization economist "is a person who has never been inside a factory." The remark was made in jest, but it reflected a touch of reality. And since Leontief uttered it in 1960, its truth has increased. Up to the 1960s, there was a tradition that students completing their Ph.D. studies in the field of industrial organization would submit as their thesis a book-length in-depth study of how some industry functioned. To the best of my knowledge, that tradition has almost totally ebbed. Now industrial organization dissertations emphasize econometric analysis of some data set or theoretical derivations, not hands-on industry analysis.<sup>13</sup> And the economist who hasn't wrestled with the recalcitrant facts of industry production processes is likely to have difficulty sorting out uncertain efficiency predictions.

Once upon a time, the ability of economists to deal with real-world industry production and marketing questions was strengthened through the completion of substantial industry studies by the staff of enforcement agencies. The Federal Trade Commission and its predecessor, the Bureau of Corporations, compiled a brilliant record of performing such studies, which among other things laid a foundation for major U.S. antitrust cases against Standard Oil of New Jersey (1911), the American Tobacco Co. (1911), the United States Steel Corporation (1920), and antibiotic manufacturers (1958), among others. But such efforts appear to have been abandoned in the 1980s and not resumed since then.<sup>14</sup> The United Kingdom Monopolies Commission published many excellent industry studies in earlier decades. Whether the U.K. tradition has continued, or been extended by other nations' competition agencies, I do not know. A resurrection of the industry study tradition, in academia or the enforcement agencies or both, would contribute significantly to the knowledge base on the basis of which merger efficiency claims are evaluated and also to the training of economists who understand in depth how cost savings are achieved in real-world industries. Also worth encouraging are new multi-industry comparative studies of the sources of industrial scale economies like those performed in the past by Joe S. Bain, Clifford Pratten of Cambridge University, Gunnar Ribrandt of Stockholm, and the collaborators in my study on The Economics of Multi-Plant Operation.<sup>15</sup>

If economists default in evaluating merger efficiency claims, an alternative solution might be for merger law enforcement agencies to contract with specialists in consulting firms or working as independent consultants. Here too there are problems. Management consulting firms in particular earn most of their bread through their continuing relationships with the firms making mergers. Bias could be difficult to avoid, and deep understanding of industrial processes is often lacking. My most recent litigation consulting experience, for example, has focused on the muddle left when a prominent company followed the erroneous production technology advice of a leading U.S. management consulting firm. Among other things, the staff of such firms is often recruited predominantly from top graduates of leading MBA programs. Most such programs provide relatively little exposure to complex problems of production management and emphasize training in the field of corporate finance. To the extent that this is true, serious biases can intrude. The finance literature stresses the stock market consequences of mergers, which are

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<sup>13.</sup> Studies of government regulation's impact on specific public utility industries may be an exception.

<sup>14.</sup> See F. M. Scherer, "Sunlight and Sunset at the Federal Trade Commission," Administrative Law Review, Fall 1990, pp. 461-487.

<sup>15.</sup> On Europe, see Commission of the European Communities, Research on the "Cost of Non-Europe" (the so-called Cecchini Report), especially volume 2, "Studies on the Economics of Integration" (1988).

correlated at best loosely with real operational efficiency effects.<sup>16</sup> If I were retaining a management consulting firm to assist in efficiencies claim evaluation, I would insist that the retained principals have their primary educational background in operations research or industrial engineering rather than business finance. Similarly, I would look to such academic specialists rather than traditional business school faculty in choosing individual merger evaluation consultants.

## **6. Conclusion**

In sum, solving the merger efficiencies question correctly is important. Some mergers -- from my own experience, a minority -- yield substantial efficiency gains that benefit consumers and advance economic growth. Separating the wheat from the chaff is difficult. Uncertainties are particularly great when predictions must be made before mergers are actually consummated. Inviting would-be merger makers to present an efficiencies defense is on balance a desirable policy not only to facilitate good enforcement agency decisions, but also to concentrate would-be merger makers' minds on the important operational consequences of their strategies -- a focus that in my experience is all too frequently absent when stock market arbitrage possibilities must be exploited quickly. Enforcement agencies need to work hard to ensure that they can perform the evaluation task competently and minimize error.

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<sup>16.</sup> My most recent of numerous writings on this theme is "A New Retrospective on Mergers," Review of Industrial Organization, June 2006, pp. 327-341.

## ANNEX 1

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[18]

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Affidavit on efficiency defenses in US v. Archer–Daniels–Midland Co. et al., May 1987

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1. I have been asked by the defendants to prepare this affidavit concerning the proper scope of an efficiencies defense in evaluating mergers and related transactions under Section 7 of the Clayton Act as amended. The questions at issue relate in large measure to an earlier memorandum, 'Efficiencies Realized through the Lease of Clinton Corn Processing Facilities by the Archer–Daniels–Midland Company', that I prepared in July 1986.
2. I am presently Joseph Wharton Professor of Political Economy at Swarthmore College. I have also taught economics at Northwestern University, the University of Michigan and Princeton University. Between 1974 and 1976, I was Director of the Bureau of Economics at the Federal Trade Commission, with supervisory responsibility for antitrust economics support and research. I have published numerous books and articles on antitrust, industrial economics, economies of scale, productivity growth, and other matters directly relevant to the current proceeding. A copy of my biography with listed publications is attached.
3. On 4 May 1987, plaintiff filed a proposed order and supporting memorandum proposing to limit the defendants' efficiencies defense in four main ways:
  - (a) Efficiencies shall be considered only to the extent that they benefit consumers by leading to higher output and lower prices.
  - (b) Only such efficiencies benefiting consumers in the alleged market for high-fructose corn syrup (HFCS) shall be considered.
  - (c) Efficiencies resulting from capital expenditures shall be considered case by case to determine whether each such expenditure was the unique consequence of the Archer–Daniels–Midland lease.
  - (d) Efficiencies resulting from respondent's superior managerial capabilities are not to be considered.

Each of these proposed limitations has serious problems from the standpoint of accepted economic principles and what one can feasibly accomplish in a Section 7 merger proceeding.

**Consumer benefit**

4. Plaintiff's proposal to limit efficiencies to those directly benefiting consumers reflects one particular interpretation within a broad-ranging debate over the goals of antitrust and the proper implementation of those goals. The heart of the debate involves the relative weight to be placed on 'efficiency' as distinguished from 'good wealth distribution' goals in evaluating practices or structural changes under antitrust scrutiny.

5. To illustrate, suppose a merger leads to a reduction in unit production and distribution costs of 10 percent. With possible exceptions not relevant to the discussion here, those unit cost reductions constitute an increase in the efficiency with which resources are used. On the wealth distribution side, three possible outcomes are possible: (a) the cost reductions are passed along more or less fully to consumers through reduced prices; (b) no change in prices occurs; and (c) the structural change attending merger leads to an increase in prices, despite the reduction in costs.
- (a) Case (a) is the only one plaintiff would allow in an efficiencies defense. With it, the efficiency of resource use is increased, and there has been a redistribution of wealth toward consumers.
  - (b) Because prices remain unchanged under case (b), wealth has not been redistributed in favor of consumers. Yet consumers are also no worse off. If consumer welfare is unchanged but the efficiency of resource utilization is improved, plaintiff must in rejecting case (b) as a valid case of merger-originated efficiencies be putting zero weight on efficiencies and full weight on wealth distribution goals.
  - (c) Case (c) is the most complex, posing the 'trade-off' identified in Oliver Williamson's article,<sup>1</sup> recognized by all commentators to be the pioneering statement of the problem. The increase in prices redistributes wealth away from consumers. In addition, it causes a kind of inefficiency – the 'dead-weight loss' associated with the market's failure fully to satisfy consumer demands. Williamson correctly argues that under an antitrust policy predominantly concerned with efficiency goals, the efficiency gain from merger-induced unit cost reduction should be 'traded off', i.e., weighed against, the efficiency loss from merger-induced output restriction. In refusing to consider unit cost reduction efficiencies in cases of type (c), even when those efficiencies might vastly outweigh the 'dead-weight loss' inefficiencies, plaintiff again implicitly imposes a bias away from the efficiency goal and toward the wealth distribution goal.
6. There are two main reasons for disagreement over the proper scope of an efficiencies defense in merger cases. Parties disagree over the relative weights to be placed on efficiency as contrasted to wealth distribution goals, as implied above. Or they may disagree on the feasibility of implementing alternative rules, given the evidentiary burdens and time constraints under which trial courts must operate. Some commentators in particular reject Williamson's 'trade-off' approach, even while accepting its logical correctness when efficiency is valued, because of the difficulty of making the relevant measurements and comparisons. Williamson was aware of this limitation, but urged that at least in strong cases, judicial error was unlikely because 'a relatively large percentage increase in price is usually required to offset the benefits that result from a 5 to 10 per cent reduction in average costs'.<sup>2</sup>

There are sharp differences of opinion among learned commentators over the relative weights to be attached to efficiency as contrasted to wealth distribution in antitrust. Congress has not spoken authoritatively on merger policy goals

since 1950. In its 4 May memorandum, plaintiff argues (correctly, I believe) that the Supreme Court has attached increasing positive weight to the efficiency goal in antitrust decisions beginning with the *Continental TV* case, 433 US 36 (1977). From my nearly 30 years of professional observation, I perceive that the courts have among other things been sensitive to changing national priorities in interpreting the antitrust laws. Real reductions in unit costs are equivalent to an increase in the amount of output secured per unit of input, i.e., increased productivity. Disappointing productivity growth during the past 15 years has led to an erosion of standards of living for US consumers. Had productivity continued to grow between 1970 and 1985 at the rate it grew between 1955 and 1970, the average US worker would have produced 23 percent more output per hour of work than he or she actually produced in 1985.<sup>3</sup> Disappointing productivity growth has not only retarded living standards, but made it more difficult for US producers to hold their own against international competition. The high national priority attached to improving productivity – efficiency increase in the most fundamental sense – is attested *inter alia* in President Reagan's economic report to the Congress in January 1987:

We must work to improve our international competitiveness through greater productivity growth ... Productivity growth provides the means by which we can strengthen our competitiveness while increasing income and opportunity. Since 1981, US manufacturing productivity has grown at a rate 46 percent faster than the postwar average. This is a solid accomplishment, but still more remains to be done. We must encourage continued productivity growth in manufacturing and in other sectors of our economy. (*Economic Report of the President*, January 1987, pp. 6–7.)

Improving our productivity growth is not merely a partisan goal. In his last (January 1981) economic report to the Congress, President Carter observed (p. 7):

Despite much progress in recent years, we are faced with some serious problems. An inflation that was already bad became worse after the 1979 oil-price increase. Productivity growth, which had been declining sporadically for a decade, virtually ceased in the last several years ... These problems are closely related to each other. Our inflation stems in part from our oil vulnerability and our slowing productivity growth. High and rising inflation, in turn, tends to cause economic reactions that depress productivity.

Good antitrust can scarcely ignore this important national goal. I believe, therefore, that an efficiencies defense is appropriate in merger cases, and that such a defense must place heavy weight on the efficiency goal of antitrust. If one accepts this set of values, it is logically indefensible to exclude my case (b) in paragraph 5 above as a valid case of merger efficiencies. And it is proper, though more difficult, to consider cost reduction or productivity growth efficiencies in case (c) (trade-off) situations.

7. It would also be quite wrong to infer that consumers do not benefit unless cost reductions are passed along in the form of price reductions. When real cost reductions are achieved, resources are freed to produce other goods and services

satisfying consumer demands in other economic markets. The benefit then to consumers is indirect rather than direct, but it is no less real.

8. A second reason given by some commentators for counting only cost reductions passed along to consumers in the form of lower prices is that such a rule supposedly simplifies adjudication. Specifically, it is said that measuring cost reduction efficiencies is difficult, and measuring the 'dead-weight loss' attributable to price-raising following a merger, as required for a case (c) 'trade-off' analysis, is even more difficult. It is much easier, the argument continues, to determine whether, because of efficiencies or for any other reason, a merger has a tendency to increase output and reduce prices. Therefore, instead of attempting to measure cost reductions and trade them off against the inefficiencies attributable to price-raising, the courts should simply determine whether the most unambiguously beneficial case – that in which price reductions ensue – is likely. Such a case cannot be found likely unless its obverse, price-raising, is deemed unlikely. The unlikelihood of price-raising is in turn to be inferred when the merger does not lead to significantly higher market concentration. Thus, the structural criterion that has been applied since the beginning of Celler–Kefauver Act enforcement, modified perhaps by a 'safe harbor' increment to concentration indices, becomes the heart of the new 'efficiencies' defense.
9. Apart from the element of paradox under which the new approach turns out to be the old approach in new clothing, this approach has serious practical difficulties, especially in its application to the instant case.
10. For one, it espouses adjudicative manageability and predictability as a goal, but in fact, the relationship between changes in market structure and the likelihood of increased or decreased prices is quite 'loose' statistically, with a high degree of unpredictability.<sup>4</sup> Thus, one error-prone relationship is substituted for another because of the other's alleged error-proneness.
11. It is true that estimating the magnitude of efficiencies and price-change effects in advance of a merger is very difficult. It is also harder to estimate the size of price-raising effects than to predict whether they will occur at all. But at least on the efficiencies side of the ledger, the estimation problem in the instant case is completely different from that on which the standard commentaries dwell. The lease commenced five years ago. One is not forced to speculate on what efficiencies will occur; they have occurred and can be measured with some precision. On the other hand, evidence on whether prices have risen or fallen as a result of the lease, or whether they will rise or fall in the future, is at best speculative. Implementing plaintiff's proposed test – a showing that efficiencies have led to price reductions – poses insurmountable evidentiary difficulties. The theory of demand states that if output increases, price must decrease. The direct result of Archer–Daniels–Midland's lease of the Clinton, Iowa, plant has almost surely been output-increasing. Before the lease, Nabisco Brands planned no expansion of capacity. ADM expanded capacity, grinding 32 percent more corn in calendar year 1985 and 68 percent more in 1986 than Nabisco Brands planned to grind (at full capacity) in 1982. If that were the whole story, one could state with some confidence that ADM's efficiencies, which among other things permitted, and were in part achieved through, capacity expansion,

increased output and reduced prices. But the reduction in prices may have discouraged other corn wet millers from capacity expansions they would have undertaken if prices remained higher. Obversely, the efficiencies ADM achieved at Clinton (and at its other plants) almost surely set an example for other corn wet millers to emulate, which quite plausibly may have induced them to redouble their own cost-cutting efforts, in turn leading to output expansions by the competitors. (See, e.g., the deposition of David W. Peart, pp. 52–7.) To determine whether the lease elicited output-reducing or output-increasing responses from competitors, the Court would have to take complex testimony from each of ADM's competitors. And given the highly dynamic character of the industry, it would be virtually impossible to disentangle the pricing effects of the lease from the many other events happening simultaneously. Thus, the rule urged by plaintiff would be impossible to adjudicate, and hence would in effect eliminate a defense that plaintiff favors in principle.

12. One of the most recent scholarly commentaries on the efficiencies problem urges that greater emphasis be placed on post-merger behavior:

The dilemma that has plagued efforts to introduce an efficiencies justification into antitrust law is that business decisions must be made *ex ante*, while courts and agencies can effectively assess efficiencies only *ex post*. To meet these problems antitrust law should utilize a two-stage procedure. The first stage would involve the use of threshold standards to screen transactions as presumptively efficient. The second stage would be an *ex post* inquiry to determine if in fact efficiencies have resulted.<sup>5</sup>

In the instant case, the Court is making an *ex post* inquiry. Desirable efficiencies have been achieved, and they can be measured. Price-reducing or price-raising effects will remain unpredictable and difficult to measure. If ease of enforcement is valued and efficiency is also valued, it would make little sense to adopt the plaintiff's proposed approach, rejecting concrete, solid evidence of desirable efficiencies because no conclusive evidence can be adduced on the lease's price effects.

#### **Corn syrup only?**

13. Plaintiff also proposes to exclude evidence on efficiencies relating to the production of ethanol, starches, dextrose, gluten meal and the like because those products lie outside plaintiff's proposed definition of the relevant market. The argument fails to recognize important economic truths. A corn wet milling plant is a classic example of joint product or by-product production. Corn enters the plant, and from its constituent ingredients, out flow a diversity of products: corn oil and germ meal from the germ, feed from the gluten, and HFCS, dextrose, industrial starches, and alcohol from the starch. To produce HFCS without the germ and gluten by-products would be grossly wasteful. More of a substitution relationship exists among the products derived from the corn starch, but even then, there are important cost-affecting complementarities. The Clinton plant in particular can direct its starch stream into either HFCS or alcohol production. But demand for HFCS is seasonal, peaking during the summer when consumers drink more carbonated beverages. HFCS cannot be

stored long, but alcohol can, and so the Clinton plant achieves a high level of capacity utilization by using parts of the starch stream for alcohol in the off-peak season and HFCS in the peak season. Absent this practice, capacity utilization would be lower, and unit costs would be higher. Again, joint production leads to lower costs than production of HFCS alone. Since the level of costs is determined jointly across all the products, any sensible assessment of efficiencies must consider the impact of the lease on the cost of all the products.

14. Attempting to identify efficiencies attributable to the lease solely for HFCS products would pose intractable accounting difficulties. In joint production or by-product situations, accounting for the costs of any particular product cannot avoid substantial, essentially arbitrary, cost allocations. It is literally impossible to determine the 'true' cost of a given product.<sup>6</sup> Under the accounting methods in use at Clinton, net revenue from the sale of corn oil and gluten by-products is deducted from total plant costs to determine the net cost of the starch stream products. This method means in effect that efficiencies achieved in-plant on the production of those by-products will be accounted for as accruing to the benefit of the starch stream products, notably, HFCS. Should those accounting data be used as a basis for efficiency estimates confined to HFCS alone, the Court's time would be taken by protracted bickering over the reasonableness of the underlying accounting allocations. That time would be wasted, because there is no non-arbitrary way of allocating common costs to by-products or joint products. The only economically meaningful way to examine efficiencies is to look at the whole multi-product picture, of which HFCS is just a part.

#### **ADM's capital investments**

15. Plaintiff recognizes that ADM has made substantial capital investments in the Clinton plant. It argues that the savings achieved through such investments should not be counted as lease-induced efficiencies unless ADM shows that it was uniquely capable of making the investments. Imposing such a burden of proof would greatly complicate and protract the presentation of an efficiencies defense, contrary to plaintiff's expressed desire to avoid 'a massive evidentiary presentation' (4 May 1987, Memorandum, p. 3). ADM has made more than 100 individual capital expenditure authorizations for the Clinton plant, involving individual dollar amounts ranging from \$1,000 to \$5.4 million. It would no doubt be possible to summon knowledgeable witnesses and examine, in court or deposition, what the nature of each project was, whether it was part of Nabisco Brands' much more limited 1982 capital expenditure plan, and whether the same project might have been undertaken by some unknown alternative acquirer of the Clinton facilities. Such an approach would be extremely costly and, at least with respect to last question, unavoidably speculative and inconclusive. The Nabisco Brands v. ADM question can be answered much more simply through an aggregative analysis comparing the total amount Nabisco planned to invest against the amount ADM actually invested. No confident answer can be given to the question of what an unknown alternative acquirer would have done.

16. Recognizing this, I approach the problem in a completely different and much more economical way. Instead of trying to identify the savings from individual investments, and given that many savings were achieved without any new capital investment at all, I compare in my July 1986 memorandum the total savings ADM actually achieved with the savings Nabisco Brands management hoped in May 1982 to achieve with the aid of a management consulting firm. I realize now that this approach was too generous to Nabisco, since the Peart deposition (pp. 52–72) reveals that Nabisco Brands management was shocked into setting ambitious cost reduction goals by visiting ADM's Cedar Rapids plant. Thus, comparing what Nabisco Brands hoped for against what ADM actually achieved is feasible and conservative and saves adjudicative resources.
17. The question of what savings some unknown alternative acquirer might have achieved is much more difficult. It is intrinsically speculative, and analysing each of more than 100 capital expenditure authorizations one by one in no way eliminates the speculative component. Again, recognizing the difficulties, I approach the problem in a different and, I believe, more sensible way. Conceding that no precise answer is possible, I focus mainly on what I believe is a demonstrable fact – that ADM has operated its own corn wet milling facilities more efficiently than rivals have operated theirs, and hence could be expected to operate Clinton in a similarly more efficient manner. This inference is then supported with evidence on the differing possibilities alternate would-be acquirers of Clinton saw in the operation. Among other things, if ADM in fact runs a tighter ship than its rivals, many capital investment projects, even those involving standard off-the-shelf machinery, will yield a stream of net benefits over time larger under ADM management than under alternate management. Therefore, investment projects profitable under ADM management might be unprofitable, and hence not receive approval, under less efficient management.

#### **Superior management**

18. Plaintiff asks the Court to bar respondents from offering 'evidence of ADM's superior management philosophy or skills, nor to offer evidence of efficiencies allegedly resulting only from the existence of such superior management philosophy or skills'. Its justification for this limitation bears quoting at length (4 May Memorandum, pp. 22–3):

The likelihood that any savings based upon management would be unique are [*sic*] extremely low, and any 'uniqueness' that does exist would be associated with individuals rather than the productive assets of the company. Other firms could hire away such individuals; such employees are therefore not unique to ADM. Management performance, good or bad, is less predictable and more subject to change than fundamental technical realities that underpin efficiencies like scale economies. Death, resignation, or firing can drastically affect a company's management. In addition, to the extent that others in the market might deem a firm's management approach superior, it can hardly be regarded as available only through the challenged transaction. If a particular management approach is recognized as enabling a firm to become a more successful competitor, it can be expected that other firms in the market will adopt that approach.

19. Plaintiff's argument is at odds with a vast literature on the law and economics of mergers and the behavior of business organizations.
20. There are many differences among scholars in their views concerning the costs and benefits of mergers. A point on which there is virtual unanimity of opinion, however, is that moving business organizations from less capable to more capable management can lead to important efficiencies. In the 1980 edition of my textbook, *Industrial Market Structure and Economic Performance*, I note the possibility that 'mergers infuse superior new management into companies suffering from talent or motivational deficiencies' (p. 137). I go on to observe that disappointments often occur, but the ADM lease of Clinton Corn Processing is clearly not one of the disappointments. To the contrary, it is an extraordinary success story. Henry G. Manne, an early theorist on the merger phenomenon, concludes that the advantages of mergers include 'more efficient management of corporations ... and generally a more efficient allocation of resources'.<sup>7</sup> He urges the courts adjudicating individual merger cases to consider *inter alia* 'the condition of the acquired firms in terms of both financial and managerial strength' (ibid.). Professor (now federal appellate judge) Richard A. Posner argues:

often the very reason the local firm is acquired is that its management is not doing a good job – it is this that makes the firm an attractive target for a takeover, friendly or unfriendly. When a takeover occurs and managerial changes result, the displaced management may be bitter. But the community will normally be a gainer from measures that increase the efficiency of the firm.<sup>8</sup>

In the same hearing, Professor William F. Baxter, soon thereafter to become Assistant Attorney General for Antitrust, testified (p.28) that 'Conglomerate mergers are one of the most important mechanisms, perhaps the most important mechanism, by which major chunks of industrial resources are moved from the hands of less efficient to those of more efficient managers.' Nor has the view of Baxter's Antitrust Division successors changed perceptibly. Thus, testifying before the Senate Committee on the Judiciary on May 1, 1985, Charles F. Rule, acting Assistant Attorney General for Antitrust, observed (in p.4 of his statement):

[T]akeovers help ensure the desirable movement of assets from lower- to higher-valued uses. The willingness to make a tender offer ... generally reflects an expectation that the assets will be more efficiently deployed in the hands of the new owners than they were in the hands of the old ones. These efficiencies can flow from, among other things, the redeployment of the firm's assets and the combination of that firm's assets with the assets, *including better management*, of the acquiring firms. (Emphasis added.)

Frederick Warren-Boulton, Director of the Antitrust Division's Economic Policy Office, listed among three specific examples of 'real' efficiencies from merger 'an improvement in management, particularly if a well-managed firm is acquiring a badly managed firm'.<sup>9</sup> At higher levels of government, the President's Council of Economic Advisers argued in its February 1985 *Annual Report* that mergers and acquisitions 'stimulate effective corporate management' (p.196), that

'Contests for corporate control are not, however, motivated solely by opportunities to improve management' (p. 189), and that 'restraints on takeover activity can protect inefficient managers from the discipline of the marketplace' (p. 199). Thus, from the statements of its own officials, Plaintiff can hardly deny that the infusion of superior management is an important potential source of merger efficiencies.

21. Organization theory and evidence are also inconsistent with Plaintiff's assumption that the existence of a superior management approach will set into motion a chain of events by which 'other firms in the market ... adopt that approach' (4 May Memorandum, p. 23). If other firms readily imitated superior producers' efficiency merely by hiring away individual managers or emulating their superior managerial approaches, there would be no management-linked rationale for mergers as an efficiency-enhancing mechanism. Achieving superior management is not merely a matter of hiring the right individual, or copying the approaches of palpably more successful companies. In addition, the patient cultivation of team skills and attitudes is important.<sup>10</sup> Peters and Waterman<sup>11</sup> find (p. 26) not only that some companies have superior management, but that their superiority is persistent: 'The excellent companies seem to have developed cultures that have incorporated the values and practices of the great leaders and thus those shared values can be seen to survive for decades after the passing of the original guru.' This finding, based upon qualitative case study observations, is supported by the statistical research of Dennis C. Mueller on some 551 US corporations over the period 1950–72. He found that differences in profitability between corporations persist 'into the indefinite future'.<sup>12</sup>
22. If Plaintiff has any basis for its proposal to preclude consideration of admittedly important managerial efficiencies, it must lie in the realm of judicial feasibility, i.e., in its assertion (May 4 Memorandum, p. 23 that: 'What constitutes "better management", however, cannot even be defined, let alone quantified or proven. An attempt to compare management approaches and philosophies would confront the courts with intractable issues ...' But no lengthy excursion into comparative managerial philosophies is necessary. The most compelling evidence of superior management is superior performance. As the Antitrust Division's chief economist wrote:

The efficiency story should be precise, detailed, and quantitative. For example, if the argument is that the merger will improve management or facilitate the transfer of technology to the acquired plants, it would be helpful to show that productivity is higher in the acquiring firm's plant than in the acquired firm's plants, or that in previous acquisitions the acquiring company has improved productivity by X percent. That is much more effective than just coming in and saying, 'I can do it better.'<sup>13</sup>

Or, as Dr Warren-Boulton wrote in an article jointly authored with John Kwoka:

A second source of evidence is cross-sectional, i.e., an examination of the comparative performance of different sized firms in the industry. While not all cross-sectional differences will accurately predict the changes caused by mergers, several characteristics may indicate efficiencies. For example, evidence that larger firms in the industry are more profitable or are growing more rapidly than smaller firms might

indicate that economies of scale are present. More directly, if cost data are available, evidence that larger firms have lower unit costs ... would help corroborate specific efficiency claims.

[A]n antitrust dilemma arises if the necessary managerial skills and information are claimed to be industry- or even firm-specific; the most efficient provider of such services is a competing firm; and the industry is already highly concentrated. Because the acquiring firm simply cannot describe its anticipated efficiencies with any precision, the antitrust authorities will necessarily be dubious. The more appropriate evidence in this case might be a proven track record of success by the acquiring firm in similar acquisitions.<sup>14</sup>

Although the authors go on to assert that such 'unquantifiable' efficiencies are best allowed for by raising permissible structural concentration thresholds, the quantification problem in the instant case is solved because enough time has passed to see that important, measurable efficiencies have resulted from ADM's superior management. The 'uniqueness' question will be addressed in part by means of cross-sectional performance evidence, specifically, defendants' November 1986 survey seeking productivity and profitability data from members of the wet corn milling industry. It is my expectation that the survey will show Archer-Daniels-Midland plants to have decidedly superior productivity performance compared to those of other industry members. If in fact ADM runs its plants more efficiently than its rivals operate theirs, that, in combination with evidence that ADM has done a superlative job in reducing Clinton Corn Products' costs, will support the inference that ADM was uniquely capable of realizing efficiencies through the lease that other would-be acquirers could not, or would not, achieve. In seeking to block the collection and consideration of such evidence, plaintiff is attempting to cut out the heart of defendants' efficiencies defense. If important national goals are served by allowing a meaningful efficiencies defense, such evidence must be given the fullest consideration.

I hereby declare that the foregoing affidavit of 23 paragraphs is true and correct to the best of my knowledge and belief.

Frederic M. Scherer

#### Notes

1. Oliver Williamson, 'Economies as an Antitrust Defence: The Welfare Tradeoffs', *American Economic Review*, vol. 58 (1968).
2. *Ibid.*, p. 34.
3. See Scherer, 'Antitrust, Efficiency, and Progress', forthcoming in the *New York University Law Review*.
4. See F.M. Scherer, *Industrial Market Structure and Economic Performance* (2nd edn, 1980), p. 279; and F.M. Scherer, 'On the Current State of Knowledge in Industrial Organization', in H.W. de Jong and W.G. Shepherd (eds), *Mainstreams in Industrial Organization* (de Jong and Shepherd, eds, Kluwer: 1986), pp. 6-9.
5. Brodley, 'What Is Efficiency and Technological Progress of the Sort That Antitrust Should Foster, and How Should Antitrust Measure and Promote It?', forthcoming in the *New York University Law Review*.
6. See William A. Paton, *Essentials of Accounting* (rev. edn, New York: Macmillan, 1947), pp. 521-2; and Clarence B. Nickerson, *Cost Accounting. Text, Problems and Cases* (New York: McGraw-Hill, 1954), pp. 139-48.

*Competition Policy, Domestic and International* 269

7. Henry G. Manne, 'Mergers and the Market for Corporate Control', *Journal of Political Economy*, vol. 73 (April 1965).
8. Senate Judiciary Committee, Hearings, *Mergers and Economic Concentration*, 96th Congress, 1st Session, (1979), Part 2, p. 11.
9. Frederick Warren-Boulton, 'Merger Policy and Enforcement at the Antitrust Division: The Economist's View', *Antitrust Law Journal*, vol. 54 (1985).
10. Armen A. Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization', *American Economic Review*, vol. 62 (December 1972).
11. Thomas J. Peters and Robert H. Waterman Jr, *In Search of Excellence: Lessons from America's Best-Run Companies* (New York: Warner, 1982).
12. Dennis C. Mueller, *Profits in the Long Run* (Cambridge University Press, 1986), p. 31.
13. Warren-Boulton, 'Merger Policy and Enforcement', p. 113.
14. Frederick Warren-Boulton and John Kwoka, 'Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis', *Antitrust Bulletin*, vol. 31 (Summer 1986).

ANNEX 2

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Memorandum to Attorney General Griffin Bell on  
the proposed merger of two steel companies, June 1,  
1978

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The Honorable Griffin Bell, Attorney General  
US Department of Justice Washington, DC

Dear Judge Bell

Your staff has asked me to review the documents concerning the proposed LTV-Jones & Laughlin (hereafter, J&L) merger with Lykes-Youngstown (hereafter, Youngstown) and provide my independent economic evaluation of the evidence.

Since the merger comes at a time of unusual difficulty for the American steel industry, it would not be unreasonable for the Justice Department to exercise its discretion and apply a somewhat broader set of criteria than those normally governing antitrust enforcement decisions. I have stressed three in my analysis. One is the traditional antitrust criterion: mergers should not be allowed if they tend substantially to lessen domestic competition. Second, in view of the severe human hardships major steel plant closures cause, the decision taken should not, if at all possible, aggravate structural unemployment. Third, because the US economy has suffered as domestic steel makers have fallen behind foreign producers, and especially the Japanese, in technological capability and productivity, the decision taken should if possible enhance the long-run prospect of achieving a modern, efficient, tough domestic industry able to hold its own in international competition.

On the traditional antitrust dimension, the evidence seems unusually clear-cut. The standard test has been one of structural effect. The domestic steel industry is moderately highly concentrated; it has a long tradition of price leadership and the avoidance of active price rivalry; and under both broad and narrow product market definitions, substantial market shares would be joined horizontally through the merger. But there is more. In nearly two decades as a student of antitrust economics, I have seen few modern cases with such clear and direct evidence that, as a consequence of the merger, a maverick firm's pricing behavior was expected to be brought into closer conformity with the industry line. I refer in particular to the minutes of a presentation by J&L's chief executive, Mr Graham, and others before staff of the First Boston Corporation, January 12, 1978. This combination of structural and behavioral evidence would, I believe, lead to a finding of anticompetitive effect if the merger were brought to trial.

This point has a further ramification. The pricing behavior of US steel makers has in recent history differed strikingly from that of foreign producers. Consistent with the law of competitive supply and demand, foreign firms have tended to reduce prices during steel demand recessions and raise them in booms. Abstracting from

254 *Competition Policy, Domestic and International*

inflationary trends, US producers have attempted to keep their prices more or less stable over the business cycle. This leaves the United States market extremely vulnerable to rising import penetration during worldwide recessions, as in the past three years, when foreign prices fell sharply while domestic prices were stable or rose. When firms such as Youngstown undercut the domestic price front during slumps, they help restrain the level of domestic prices and thereby reduce the lure the US market offers to foreign steel sources. To be sure, the Federal Government's establishment of reference prices and other protective measures has done much more to blunt the import threat than the pricing behavior of isolated maverick firms. But if the United States is ever to return to something approximating free trade in steel, it will be important to have independent domestic producers willing and able to break industry discipline and compete on a price basis with importers. According to the case evidence, Youngstown and (to a lesser degree) J&L exhibited such willingness as independent firms, but would be less likely to do so when merged. On their ability to engage in price competition I shall comment later.

The second relevant criterion involves unemployment effects. There is little likelihood that employment at Youngstown's Campbell Works will be *restored* through the merger. Either apart or together, Youngstown and LTV lack the capital needed to replace its ancient facilities. Counsel for the two companies states that the most likely consequence of merger would be the transfer of tube round production from the Youngstown complex to J&L's Aliquippa plant, with the rounds being shipped to Campbell-Youngstown for extrusion into tubes. This would add about 1,100 persons to the unemployment rolls at Youngstown. Of course, employment at Aliquippa would be increased. It is questionable too whether the inefficient tube round production operations at Youngstown could long survive, with or without the merger. On seamless tube extrusion, the merger could conceivably save what is apparently an efficient operation from being pulled under with the other less modern Youngstown complex activities. This is not certain, however. J&L is said to have sufficient tube extrusion capacity at Aliquippa to handle both firms' requirements. Shipping costs would be reduced by integrating both rolling and extrusion at Aliquippa. Also, as I shall indicate later, there are means other than merger of providing efficiently rolled tube rounds to Campbell-Youngstown. The most one can say is that the merger offers at best only modest and uncertain prospects for alleviating the tragic unemployment problems at Youngstown, Ohio.

Youngstown's Indiana Harbor plant poses a different set of factual issues. Its equipment is mostly modern, yet the plant has been unprofitable even at high levels of demand. There appear to be two or perhaps three reasons for this: weak management, scrimping on essential maintenance investment, and (less clearly) the possible shifting of some profits to ore supply profit centers. With good management and adequate financial backing, Indiana Harbor would be an attractive going concern. I do not feel qualified to speculate on whether Lykes-Youngstown will be plunged into bankruptcy. Assuming that worst case, the prudent course would be to put Indiana Harbor under trusteeship, holding its workforce together until a buyer with the necessary management and capital appears. I think it highly improbable that a bankruptcy court would permit as modern and well located a complex as Indiana Harbor to be lost to the nation. Even if bankruptcy of Lykes-Youngstown were

imminent without a merger, preventing the merger would not significantly aggravate unemployment problems for Indiana Harbor's workers.

Indiana Harbor's fate is also relevant with respect to the third criterion: developing a strong, efficient US steel industry. What Indiana Harbor needs to serve the nation well is good management and an infusion of capital. Lykes-Youngstown appears to have neither in sufficiency. LTV is only marginally different. J&L's management is probably better than Youngstown's. But I have seen no evidence that J&L offers management of truly superior quality, as McDonnell Aircraft did when its acquisition of the ailing Douglas Company in 1961 was not challenged by the Justice Department. J&L, like Youngstown, experienced heavy turnover of top executives after being acquired by a conglomerate. J&L's profitability and market position have declined relative to US steel industry leaders since its acquisition. J&L's parent, like Youngstown's, is saddled with an unusually heavy burden of long-term debt and preferred stock, causing LTV to demand higher dividends from J&L than free-standing steel companies had to pay. There is no basis in history for expecting that LTV would be able or willing to support a capital-spending program that could fully develop Indiana Harbor's potentialities. Indeed, the result of a merger between two financially and managerially weak companies might conceivably be not the needed strengthening of America's steel industry, but another Penn-Central.

Technologically, too, the merger offers deficient prospects for building a strong steel industry. My research showed the minimum efficient capacity of a blast-furnace-based integrated steel works to be 4 million ingot tons per year in 1965. The optimum has risen since then. J&L operates three hot metal works within 130 miles of one another, each too small to realize all scale economies, and with extensively overlapping small-scale processing units. J&L's decision to build a cold reduction works at Hennepin, 440 miles from its Cleveland supply source, is generally regarded to have been a serious mistake. Transportation costs are high in its current operating mode, J&L lacks the capital to consummate its original plan of building an integrated works at Hennepin, and even if it had the capital, it is doubtful whether enough workers could be attracted in that sparsely populated area. Supplying Hennepin from Indiana Harbor would reduce transportation costs. But separating cold rolling from hot rolling is inefficient unless the cold rolling mill is nearer one's customers than the hot mill, whereas in fact Hennepin has substantial shipments eastward as well as westward. What would result from the merger is a patchwork quilt of small-scale, badly located operations. It is not the stuff out of which the strongest possible steel industry will be formed.

I believe that goal would be better satisfied through either of two alternate merger scenarios. The best solution would be the acquisition of Indiana Harbor, related coal and ore operations, and possibly the Campbell-Youngstown tube operations by one of the leading Japanese steel makers. They are the world leaders in technology. They have greater depth of technical problem-solving talent than any leading American firm. They are adept at participatory management, which seems needed at Indiana Harbor, and by all accounts, they have integrated well in managing less ambitious US ventures. They have access to capital, and a flow of yen would have a favorable impact on the US balance of payments with Japan. And perhaps as important as any of these, the characteristically aggressive rivalry of a Japanese steel maker would

inject a fresh breath of competition into the US industry. Although the Japanese have recently become involved in overseas steel ventures elsewhere, I cannot be certain there would be active interest in a US operation. The prospect could be explored through the good offices of the State Department and Treasury.

If this proves infeasible and if Lykes-Youngstown goes into receivership, there is another acquisition alternative I consider superior to the J&L-Youngstown merger. Youngstown's steel, ore and coal operations could be acquired by Inland Steel, the fifth largest US steel producer, or failing that, by Republic or National, each of which has smaller steel operations on the southern end of Lake Michigan. It might seem odd to oppose acquisition of the eighth largest steel maker by the seventh largest on anti-trust grounds but to approve an acquisition by the fifth largest. There is, however, a compelling rationale for preferring a firm like Inland. From an antitrust standpoint, the horse is already pretty well out of the barn if acquisition by J&L dries up Youngstown's price-cutting proclivities, as predicted by Mr Graham. The pricing behavior effects could not be much worse under an Inland acquisition, and they might be better. Inland is one of the lowest-cost integrated US steel producers, and with one eye on its own costs and another on foreign competition, it would be less likely to lead or follow a price increase than higher-cost operators. From the standpoint of building an efficient domestic steel industry, acquisition by Inland would be unambiguously superior. It is generally considered to be one of the two best-managed integrated American steel enterprises. It is much less highly leveraged than LTV and would be more apt to spend the money to upgrade Youngstown's facilities. And its principal plant is located only a canal's width away from the Youngstown Indiana Harbor plant, so the opportunity for achieving economies of scale and physical integration is maximized. For example, Inland could, but J&L could not, help provide hot metal to sustain Indiana Harbor's operations during the 105 day period when Indiana Harbor's largest blast furnace is down for relining in 1981.

Less ideal but still close physical integration opportunities would come from a merger between Youngstown-Indiana Harbor and Republic or National Steel. However, I would recommend against acquisition by the United States Steel Corporation or Bethlehem, both of which also have major works on the south shore of Lake Michigan. They have in the past been the leading advocates of a high-price policy for the US industry, and merger would probably bolster their price-raising proclivities.

There remains the possibility that Youngstown could be transformed into a viable steel maker from within – e.g., by Lykes-Youngstown's bankers forcing a managerial shake-up and the liquidation of other properties to provide capital for investment at Indiana Harbor. Although there is a good chance that Youngstown could survive in this way, the odds of its achieving a great leap forward in efficiency under Lykes's wing seem slim. But from the standpoint of building a strong, efficient steel-making organization, merger with LTV is a poor substitute to any of several alternatives as yet unexplored or cursorily explored by Lykes-Youngstown.

A final efficiency issue concerns the benefits predicted from the J&L-Youngstown merger. Assuming that the merging parties can avoid managerial indigestion and cash flow crises reminiscent of Penn-Central, the merger presumably will yield cost savings. I believe, however, that the \$65–75 million estimates presented by counsel

for the companies is substantially overstated if one applies correct benefit–cost analysis criteria. There are three principal weak points.

Cost savings peaking at \$21 million per year are projected from shifting some 442,000 tons of hot band production for Hennepin from Cleveland to Indiana Harbor. Indiana Harbor's hot strip mill is currently operating at full capacity. As the joint proxy statement concedes (p. 17), it is uncertain that bottlenecks can be broken to add still another 442,000 tons of band output. Also, Youngstown has at Indiana Harbor a cold reduction mill similar to the Hennepin mill. Why ship bands to Hennepin for cold reduction if there is capacity to roll them at Indiana Harbor? Moreover, assuming that the production reallocations can be effected, most of the benefits would have to stem from freeing up Cleveland hot strip capacity to serve other demands; there is no evidence that production at Indiana Harbor has lower costs than Cleveland. To the extent that Cleveland efforts are in fact so redirected, the merged company will indeed benefit. But the business gained by Cleveland will normally be business lost by some other steel maker. In doing benefit–cost analyses, the government must adopt a broader perspective than individual companies. Deducting domestic business lost from business gained by J&L, the *net* domestic benefits will consist only of business won away from foreign steel makers.

Substantial savings are projected from the canceling out of imbalances in the two companies' iron ore, coal and coke supplies. Youngstown is long on ore and high volatile coal; J&L is at least temporarily short. Youngstown's polluting coke ovens at Indiana Harbor could be shut down and replaced in part from excess J&L capacity at Aliquippa or Pittsburgh. On superficial analysis, these imbalances do appear a basis for merger benefits. But one must ask why, since both parties stand to gain, the same benefits cannot be achieved through arm's-length buy-and-sell transactions without the much more drastic merger solution? The answer given by LTV's counsel in a 17 May 1978 letter is that 'Short of merger, J&L has no interest in YS&T's survival. Therefore, absent unusual circumstances which require such contracts in J&L's interest, J&L would not enter into contracts with YS&T because of competitive concerns.' This statement is contradicted in part by the fact that J&L has entered the market to buy ore, coal and intermediate steel products from Youngstown and other rivals. Similar transactions are made regularly in the more price-competitive, less integrated European steel industry. Still, it must be admitted that J&L's counsel might be right. If so, it is a sad commentary on the US steel industry that its members are willing to cooperate in lobbying for governmental protection against imports but not to engage in mutually advantageous market transactions that reduce costs and improve their competitiveness against foreign producers.

The story is only slightly different in the supply of tube rounds by J&L Aliquippa to Campbell's extrusion works. If Aliquippa can produce and deliver rounds at a lower cost than Youngstown's Brier Hill works, there is a basis for a mutually advantageous arm's-length transaction as well as a merger. The main difference is that greater coordination of technical specifications is required in the supply of semifinished steel for further fabrication, and such coordination is more difficult, although far from impossible, on an arm's-length basis. Nor is it necessary for J&L to be the supplier to doubt whether the merger yields unique benefits. As long as there is any steel maker able and willing to supply rounds to Youngstown-Campbell

*258 Competition Policy, Domestic and International*

at unit costs as low as those of J&L, net benefits to the steel industry in the aggregate will be as great as they would be under a J&L-Youngstown merger. Therefore, the merger would not uniquely contribute to the enhancement of steel industry efficiency, and its benefits are accordingly overstated.

To sum up, the merger would have anticompetitive effects as serious as alternative reorganization options with a better prospect for enhancing Youngstown's efficiency and hence the competitive strength of the American steel industry. The merger offers at best modest and uncertain prospects for alleviating structural unemployment. In view of these considerations, I recommend that the Department of Justice deny approval of the merger and take steps, in cooperation with Lykes-Youngstown and appropriate Federal Government agencies, to effect a reorganization of Youngstown that better satisfies national goals.

Respectfully submitted,  
F.M. Scherer

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### Youngstown Sheet & Tube

The Youngstown Sheet & Tube Company was the United States' eighth-largest steel producer during the 1970s. It had three main steel-making works: two at its headquarters city, Youngstown, Ohio, and one at the south end of Lake Michigan in Indiana Harbor, Indiana. It also owned coal mines, iron ore mining interests, and a subsidiary that manufactured and distributed oil well drilling equipment. In 1956 Youngstown sought to merge with Bethlehem Steel but was blocked under a precedent-setting 1958 antitrust judgment. Having lost momentum in anticipation of the merger, Youngstown's management resolved during the mid-1960s to modernize its operations in two stages, first at Indiana Harbor and then at the older Youngstown works. Through a half-billion-dollar investment program, new basic oxygen furnaces, a blast furnace, a cold strip mill, and what was still in 1984 one of the nation's most modern 84-inch hot strip mills were installed during the late 1960s. In the meantime, however, Youngstown lagged other industry members technologically, experiencing somewhat lower profits. Breaking-in problems on the new rolling mills combined with rising imports and lagging sales to depress profits even more. The stock market reacted unfavorably, driving the value of Youngstown's outstanding common stock to as

29. See Pennwalt Corporation, Annual Report, 1985, pp. 4-6.

little as \$308 million—less than half the book value of the company's net worth. Youngstown became a prime takeover candidate. After a failed takeover attempt by the Signal Companies, two offers from the Lykes Corporation rejected by Youngstown management, and the unsuccessful cultivation of a "white knight," Youngstown agreed in February of 1969 to be acquired by Lykes in a complex securities swap valued at the time of announcement at \$540 million.

Lykes was a Johnny-come-lately to the conglomerate merger business and remained one of the least diversified of our sample parent companies. It had a long-established position in ocean shipping. Prior to the Youngstown takeover, it had moved into insurance and (on a minor scale) into banking and electronics. It was much smaller than Youngstown at the time of the takeover. To finance the acquisition of Youngstown's common stock, it added \$237 million to its debt and roughly \$225 million of preferred stock. Their servicing obligations were \$32 million per year. In the years before the merger, Youngstown had been paying dividends of \$19 million per year.

In the years following the merger, Youngstown yielded almost consistently poor profits, averaging in 1970–73 no more before taxes than Lykes's acquisition finance servicing needs. There were several reasons for the poor performance. Following the merger, Youngstown experienced massive senior management turnover, partly because of age and partly because of disaffection lubricated by Lykes-approved "golden parachute" contracts. By 1974 only 2 of 1968's top 15 Youngstown executives remained on duty. Those who replaced them were said by interviewees, including some of the replacements, to be less experienced and able. Second, Lykes appointed as chief executive officer of Youngstown its own person who, except for a two-year period, attempted to run the company from Lykes's headquarters in New Orleans. The arrangement did not work well. Third, in part for these reasons, Youngstown's profits continued to be modest, but Lykes's financial demands were strenuous. Youngstown was forced to scrimp on capital expenditures. In the seven calendar years following the merger, Lykes paid to itself 80 percent of Youngstown's net income in dividends. Among other things, the previously planned modernization of the two Youngstown, Ohio, plants was never started. Finally and most importantly, as both effect and cause of these developments, Youngstown's operating efficiency deteriorated. The plant capital expenditure squeeze was so severe that, among other things, Youngstown was not allowed to maintain an

inventory of major spare parts adequate to cope with the repair problems of its complex new rolling mills at Indiana Harbor. When something broke down, the mill would be shut down until the part was repaired or replaced. This disrupted the operations of other upstream and downstream units. According to operating-level interviewees, such problems plus a top-down managerial philosophy instilled among production management and workers the attitude, “Top management doesn’t give a damn how we run this thing, so why should we care?”<sup>30</sup> As a result, the hot strip mill at Indiana Harbor—pacesetter for most of the plant’s other activities—operated in its best year at only 68 percent of rated capacity. A similar but older mill at Inland Steel’s adjacent plant averaged 21 percent more output per shift.

A weakened Youngstown was ill-prepared to cope with the continued sluggishness of steel demand after the 1975 recession and the resurgence of import competition. In 1976 the Youngstown operations lost \$7.3 million before-tax offsets. In 1977 they lost \$224 million on sales of \$1.5 billion. In September 1977 Lykes-Youngstown reacted by closing down most of one plant at Youngstown, Ohio, and laying off 5,000 workers—an action that precipitated the emergence of a powerful “steel caucus” in the U.S. Congress, whose demands led to the “trigger price” import control system. Two months later, Lykes announced its intention to merge with the LTV Corporation for common and preferred stock valued at \$188 million. LTV owned the Jones & Laughlin (J&L) Steel Company, the seventh-largest U.S. steel producer. After an antitrust review conducted personally by the attorney general, the merger was authorized, and it was consummated in December 1978.

LTV was a prominent actor in the late 1960s conglomerate merger wave. From a base in aerospace and electronics, it had diversified by making several large acquisitions, but antitrust and financial difficulties forced it to divest its holdings in airlines (Braniff), insulated wire and cable, sporting goods, and pharmaceuticals, among others. By 1978, it had largely concentrated its focus to aerospace, meat packing, and steel. The steel product lines of LTV’s J&L and Lykes’s Youngstown were similar, and the geographic locations of the two firms’ steel-making plants corresponded sufficiently closely that operating and raw materials procurement economies might be achieved through integration.

Even before the merger was formally consummated, J&L manage-

30. This contention was denied by one senior management alumnus but not by two others.

ment began a drive to improve Youngstown's operations and maximize integration economies. Youngstown's corporate headquarters and ancillary offices were closed, and the two firms' sales forces were combined and pruned by a third. J&L assigned some of its best operating executives to lead the Youngstown plants. A \$20 million–30 million commitment was made for rolling mill spare parts and other needed equipment. This plus managerial improvements (partly effected before the merger through the transfer of particularly able Youngstown executives from closed Ohio operations) plus an active program to bolster labor-management cooperation broke the capacity bottlenecks at Indiana Harbor. Youngstown's antiquated Ohio furnaces were closed down, and seamless tube production was specialized. Small diameter tubes were rolled at J&L's Aliquippa, Pennsylvania, works (later closed), and large-diameter tubes were rolled at Youngstown from tube rounds made with Aliquippa's more efficient basic oxygen furnaces. The output of iron ore mines was rerouted to minimize costs, and a pollution problem was solved by shipping coke from Pittsburgh to Indiana Harbor.

These and other changes moved the combined J&L-Youngstown operation from having steel output per manhour below the all-industry average in 1979 to 8 percent higher productivity in 1983. Counting only basic steel operations, that is, ignoring the oil well supply business Youngstown brought into the merger (which had remained profitable in 1977), combined operating profits were \$171 million in 1979, \$69 million in the 1980 recession year, and a record \$336 million in 1981. After this honeymoon, however, the company was hit by a series of severe shocks: the recession of 1982–83, intensified import competition, and the virtual collapse of demand for high-priced seamless oil well tube, which in 1981 accounted for 15 percent of the J&L-Youngstown steel tonnage but 30 percent of revenues. Steel segment operating losses were \$299 million in 1982, \$200 million in 1983, and \$217 million in 1984. The high profits of 1981 were attributable much more to strong demand for high-margin products than to operating efficiencies. Yet without the efficiencies achieved following the merger, the post-1981 picture would have been even worse.

Unlike Lykes, LTV also made major investments to improve the Youngstown remnants' operating efficiency. To enhance productivity and quality at the Youngstown, Ohio, large seamless tube mill, \$60 million was spent. A continuous slab caster costing \$190 million was completed at Indiana Harbor in late 1983. These and other investments

were financed by selling back the Lykes Brothers Steamship Company at a \$34 million pre-tax profit to a group including its original owners, selling off a coal mine (one of the few major steel-related investments made by Lykes), and issuing new common and preferred stock.

In 1984, LTV moved from third to second rank among U.S. steel producers by acquiring another large but ailing steel company, fourth-ranked Republic Steel. Although further cost-cutting measures like those that followed the Youngstown acquisition were undertaken, there were also serious post-merger indigestion problems.<sup>31</sup> These plus the additional debt obligations assumed in the Republic merger plus the continued depression of steel demand put LTV in a precarious financial position despite stringent cash conservation measures, including cutbacks in capital investment for steel operations. In July 1986 LTV filed a Chapter XI bankruptcy petition, and in subsequent weeks it closed significant parts of its steel-making facilities, including the modernized seamless tube mill at Youngstown and its bar-rolling operations at Indiana Harbor.

31. "Why LTV Is Stymied in Steel," *Business Week*, April 1, 1985, pp. 65-68; "LTV's Steel-Industry Gamble," *New York Times*, November 22, 1985; and "LTV, Dragged Down by Steel Subsidiary, Struggles To Survive," *Wall Street Journal*, January 6, 1986.

## SUMMARY OF DISCUSSION

*By the Secretariat*

### 1. Introduction to efficiency claims in antitrust proceedings

The Chair, Professor Frédéric Jenny, opened the roundtable discussion on the role of the efficiency claims in antitrust proceedings and thanked delegates for the contributions they had submitted to the Secretariat. The Chair then introduced the three experts on the panel: Frederic Michael Scherer, Aetna Professor Emeritus at John F. Kennedy School of Government, Harvard University; Dr. Helen Jenkins, Managing Director at Oxera; and, Dr. Hans W. Friederiszick, Managing Director at E. CA Economics and Faculty Professional at the European School of Management and Technology.

The Chair introduced the three specific themes to be addressed during the Roundtable: i) legal and procedural aspects of recognising the importance of efficiency defence; ii) practical tools and the *ex-post* evaluation of efficiencies; and, iii) efficiency claims in dominance and monopolisation cases. The Chair then gave the floor to the OECD Secretariat to introduce the issue of efficiency claims in antitrust proceedings.

First, the Secretariat observed that efficiency considerations have been progressively playing a more significant role in competition analysis since Oliver Williamson published his seminal article in 1968, in which the scholar noted that efficiency gains can outweigh the welfare loss caused by an increase in market power resulting from a merger. Since then, a growing number of jurisdictions have adopted and reviewed their legislation with a view to address the treatment of efficiency claims. The Secretariat clarified that this is an ongoing process and that, by way of example, the background paper describes the progress in the United States (the US) and the European Union (the EU).

Second, the Secretariat noted that, in spite of these developments, efficiency claims have rarely been discussed in detail in merger cases and even less frequently they have turned out to be critical in deciding the outcome of a case. Nonetheless, the background paper indicates some of the occasions where efficiency claims did play an important role, e.g.: Genzyme's acquisition of Novazyme in the US (2004), the *Global/GCap* radio merger in the United Kingdom (2008), a merger concerning door-to-door distributed directories in the Netherlands (2008), and a merger between two hospitals in the Netherlands (2009).

Third, the Secretariat highlighted the significance of the welfare standard and of the standard of proof in the assessment of efficiency claims. The welfare standard that an agency applies is relevant for the balancing of potential efficiency gains and anti-competitive effects resulting from a specific transaction or conduct. The standard of proof can be a controversial issue, especially in the case of dynamic efficiencies that are more speculative and difficult to verify.

The Secretariat then turned to the *ex-post* assessment of efficiency gains in mergers. In order to run such assessments, many jurisdictions require efficiency claims to be verifiable, and if possible also quantifiable. The paper asserts that even for dynamic efficiencies it is possible to determine whether efficiency claims occur after a merger, and in many cases it is also possible to quantify them. Further, the paper notes that there is a variety of tools and techniques to quantitatively assess whether the claimed efficiencies materialised after the merger. While some methods are sophisticated and data intensive, others

are easier to implement. Hence, they could be used by the merging parties to support their claims during an investigation or by the competition authorities to validate the accuracy of their analysis and to improve their treatment of efficiency claims.

The Secretariat subsequently introduced the issue of efficiency claims in dominance cases. First, in many jurisdictions legal provisions on abuse of a dominant position and monopolisation make no explicit allowance for an argument based on efficiency gains. This is for example the case of Article 102 TFEU and Section 2 of the US Sherman Act. Yet, a possibility to justify potentially anti-competitive conduct on efficiency grounds has been recognised by the EU and the US courts as well as in soft-law instruments of the European Commission (the Commission). Recently, the European Court of Justice (the ECJ) confirmed admissibility of efficiency claims in the *Post Denmark* case. Second, the evolution in the treatment of efficiencies in dominance cases to a significant extent resembles the process that has taken place in mergers. Nevertheless, even if efficiency claims are admissible in the assessment of dominance and monopolisation cases, in practice they are rarely successful. Hence, the Secretariat inquired whether this is due to: i) a higher standard of proof in dominance cases than in mergers; ii) a selection bias implying that cases in which an allegedly abusive conduct by a dominant firm is found to be justified on efficiency grounds are not opened and prosecuted in the first instance; or, iii) insufficient evidence as well as lack of clarity and detail by dominant firms in presenting such evidence.

## **2. Legal and procedural aspects of recognising the importance of efficiency defence**

The Chair opened the first section of the Roundtable and gave the floor to Professor Scherer who discussed merger efficiencies and competition policy.

Professor Scherer began his contribution by stating that not all mergers lead to efficiency gains and that in fact many mergers actually produce inefficient outcomes. Motives for mergers are complex. While some mergers are motivated by the opportunity to achieve efficiencies, others are motivated by the control they may give over a market. This is the area where the conflict arises. This conflict was for the first time addressed in a 1968 paper by Oliver Williamson, who proposed a total welfare approach. Williamson argued that even small efficiency gains may be sufficient to outweigh a loss in consumer welfare, which provides strong theoretical evidence in favour of mergers. In 1984 the US Department of Justice (DoJ) revised its merger guidelines to allow for a Williamsonian efficiency defence. An early test of the defence came in a merger between Archer-Daniels-Midland (ADM) and Clinton (Iowa) Corn Processing Company. In 1987 Professor Scherer submitted for the merging parties a memorandum supporting the Williamson trade-off and rebutting several points in the DoJ's approach, which focused on consumer welfare.

Professor Scherer admitted that recently he has begun to have second thoughts about his presentation in Archer-Daniels-Midland case. Those doubts are motivated by the current economic situation, in particular the widespread unemployment and the Keynesian liquidity trap.

In such circumstances two shortcomings of the Williamson trade-off take on greater weight. First, with high levels of unemployment, the resources released through merger-based efficiencies may not necessarily be usefully re-employed in other economic sectors, which may impede social gains. In fact, Williamson presumed full employment, but since this assumption does not hold now, the Williamson trade-off requires a reconsideration of the arguments. Second, the Williamson trade-off assumes that Say's law operates. That is, in the first instance, because of the monopoly power achieved through the merger, the price is raised and the consumer surplus is converted into higher profits or producers' surplus. Next, those profits are assumed to re-circulate into effective demand for additional investment goods or through incremental consumer demand when distributed to shareholders. But in the Keynesian liquidity trap, Say's law does not operate because firms tend to accumulate profits that they choose not to invest. Further, when

those profits are distributed to wealthy shareholders, their marginal propensities to consume are below unity in normal times and propensities to saving are even stronger in troubled times.

Another difficulty with the Williamson trade-off concerns a transfer of what before the merger was consumers' surplus to profit or producers' surplus, and ultimately to the merging company's shareholders. By and large, shares are disproportionately owned by individuals who are wealthier than average consumer. Thus, if one assumes after Alfred Marshall that the marginal utility of money diminishes as wealth increases, the transfer described above can be then considered as a redistribution of income from average-wealth consumers to very rich consumers with lower marginal utilities. This implies a welfare loss. Professor Scherer pointed out that, if one objected to such redistribution, the consumer welfare standard should be favoured over the total welfare standard.

Finally, Professor Scherer observed that the most serious barrier to introducing efficiency defences in proposed merger evaluations is the difficulty of making accurate projections about uncertain future events, including both costs and prices. A 1978 merger between Jones & Laughlin Steel and Youngstown Steel, the seventh- and eighth-largest US steel producers, illustrates this problem. Advising the Attorney General on the matter, Professor Scherer was sceptical that efficiencies would be realised through the merger. However, Professor Scherer acknowledged that, when he revisited the facts several years later, he learned that he had been excessively pessimistic when assessing the potential benefits of the merger. This raises the broader question of how competition agencies should cope with uncertainties regarding claims that mergers will yield significant efficiencies. Professor Scherer indicated that economists are seldom well trained to make such judgments. Therefore, impartial observers with substantial experience in the relevant industry would be best suited for the role. An alternative would be to assess mergers *ex post*, but, when one concludes that efficiencies were not realised, this raises further problems with the unscrambling of the assets that have been brought together through a merger.

Dr. Friederiszick commented that the consumer welfare standard might be better suited to the institutional setting within which competition policy operates. Dr. Friederiszick recalled that during a debate within the European Commission, the argument in favour of consumer welfare was that under total welfare there are deficits in the institutional setting. At that time Professor Röller suggested that consumers' interests are not as equally represented as firms' interests, therefore the welfare standard has to reflect this imbalance. Next, Dr. Friederiszick referred to Bruce Lyons' argument that merging parties have the right to propose the kind of a merger that will be assessed by the competition authority. Hence, the latter cannot pick the most welfare enhancing combination of firms. In such situations, consumer welfare can help achieve optimum or second-best equilibrium.

The Chair invited Switzerland to give account of the legislative proposal introducing an efficiency defence. The Chair asked how efficiencies were assessed in the past and what is going to change with the new law.

The delegate from Switzerland noted that the current test requires an extremely high threshold in order to prohibit a merger. Under Article 10 para. 2(a) of the Swiss Cartel Act (CartA) the Competition Commission (ComCo) may prohibit a merger or clear it subject to conditions and obligations if the investigation indicates that the concentration creates or strengthens a dominant position liable to eliminate effective competition. Therefore, pursuant to this provision a dominant position is not sufficient to block a merger, but it is crucial that the merger is liable to eliminate competition. As a result, in more than 20 years the competition authority has prohibited only one merger (in 2010). This was the case of *France Télécom/Sunrise Communications AG* merger, which was prohibited on the grounds of impending post-merger joint dominance since the transaction would have created a duopoly between the historical telecom operator, Swisscom, and the merged entity. The delegate suggested that the reason why the legislator has

implicitly renounced in the past the introduction of an efficiency defence in the Swiss merger control is that only the most anti-competitive mergers are prohibited.

Following the evaluation of the CartA this rather unsatisfactory situation has been recognised. The current revision recommends to abolish the dominance test and to introduce the SIEC test, including an efficiency defence. The delegate observed that the modernised test would leave more room to justify a merger, which otherwise would have been prohibited by the ComCo. This recommendation forms part of the reform package that is currently reviewed by the preparatory commission of the Parliament. Thus, the delegate concluded that it is still not certain whether the reform will be passed since there are topics that are politically more important, like the introduction of criminal sanctions against individuals or institutional reform of the ComCo.

Professor Scherer commented on the two most recent interventions. First, with regard to the welfare standard, Professor Scherer recognised the EU's pragmatic reasons for emphasising the consumer welfare standard. However, he recalled that Alexis Jacquemin, one of the Commission's first leading economists, argued for a total welfare standard in an article in the *European Economic Review* of 1990. Second, Professor Scherer referred to the modernisation of the Swiss CartA and pointed out that it reveals a more general issue. In a study published in 1975 on economics of multi-planned operations, Scherer et al. found that the ability to realise scale economies in large versus small markets differed significantly. In small markets it was difficult to achieve economies of scale, hence increases in market concentration, including through mergers, enhance the possibility to achieve economies of scale. While the size of the market is one variable, the degree of openness of the market is another. Professor Scherer pointed out that in an open market it is easier to realise economies of scale without a merger than in a closed market. This finding is corroborated by a study concerning Sweden, published in the 1960's, in which Scherer et al. observed that Sweden was a closed market, in which it was difficult to achieve economies of scale, and that mergers could help improve the situation. Finally, Professor Scherer underlined that mergers are expected to yield the greatest efficiencies in relatively small markets. Good examples are hospital mergers, because due to transportation costs hospitals operate in closed markets. This would explain why efficiency defences have been particularly prevalent in such mergers.

The Chair invited Germany to present its contribution and asked why the planned modification of the test in mergers does not include an efficiency defence.

The delegate from Germany explained that under the proposed 8th Amendment of the Act against Restraints of Competition (ARC) the substantive test in German merger control will switch from the established dominance test to the SIEC test. Market dominance will be maintained as the standard example. However, the 8th Amendment will indeed not introduce an explicit efficiency defence.

The delegate indicated that there is some scope for the consideration of efficiencies in the context of the balancing clause under para. 36(1) ARC and under the ministerial authorisation pursuant to para. 42 ARC. First, the balancing clause stipulates an exemption from the prohibition of a merger, which meets the dominance standard in one market. Under this exemption, a merger is cleared if the companies prove that the concentration will also have pro-competitive effects on a different market. Second, under the ministerial authorisation the Federal Minister of Economics and Technology can override the prohibition of a merger by the Bundeskartellamt on the grounds of overwhelming positive effects to the economy as a whole or public interest considerations.

Finally, the delegate underlined that, even if a legal system does not contain an explicit efficiency defence, it should not imply that efficiency considerations do not play a practical role in assessing individual cases. Basically, from an economic point of view, any efficiency consideration can be incorporated in the analysis of the effects of a merger and thus in the assessment of whether and to which

extent a merger may create or strengthen a dominant position. The delegate also noted that the switch from the dominance to the SIEC test will further promote a more effects-based assessment of merger cases in the future. In the delegate's view, given that efficiencies may be brought forward as mitigating the potentially anti-competitive effects of a merger, more efficiency claims seem to be likely under the SIEC Test, especially in cases that do not concern the standard of dominance or strengthening of dominant position, but which are classical unilateral effects cases.

The Chair gave the floor to BIAC and asked the delegate to comment on its contribution quoting the Former FTC Chairman Pitofsky, who declared that in the EU and in the US "the efficiency defence is deliberately described in a way that makes it difficult to establish".

The BIAC delegate stressed that the evaluation of efficiencies is given very little attention by antitrust enforcement authorities. This stems from numerous factors, which are both systemic and procedural. As a result, competition authorities have concluded that the standard of proof for efficiency claims should be exceptionally high and the burden of proof should be placed entirely upon the parties. BIAC asserted that applying such a presumption is unfair to merging parties and is also detrimental to consumers.

First, the delegate observed that in their decisional mechanisms agencies apply an asymmetrical analysis of efficiencies and anti-competitive effects. In theory, the objective of merger review is to balance a potential anti-competitive harm against synergistic gains, even if the latter are limited to gains for consumers under the consumer welfare standard. Thus, an agency should consider efficiencies on an equal footing with competitive effects. In practice, however, merger law and procedure is not designed to evaluate that balance on an even-handed basis.

The first reason for such imbalance lies in decisional mechanisms that are applied in prosecutorial jurisdictions, like the US, or regulatory review systems, like the EU, which in most cases discourage serious evaluation of efficiencies. In most jurisdictions merger schemes consider efficiencies only as a counterbalance to anti-competitive effects and place the main focus of the analysis on the determination of competitive effects. Thus, efficiency analysis is considered unnecessary if there are no anti-competitive effects. Another option is that once a competition authority finds that a merger is likely to produce significant anti-competitive effects, so that either a remedy or a prohibition is required, it has little incentive to credit efficiencies from a procedural standpoint. In cases of a challenged merger the authorities have a strong incentive to discount efficiency claims. Therefore, the delegate underlined that the only situation in which efficiencies may be decisive is when potential anti-competitive effects are minimal.

Another reason behind the unequal treatment of efficiencies and competitive effects emanates from the evaluation processes incorporated into most guidelines, which are biased against efficiencies. Both the US Merger Guidelines and the EC Horizontal Merger Guidelines declare that efficiencies are difficult to verify and quantify, in part because much of the information is solely in the possession of the merging firms, and therefore place the burden of proof to substantiate efficiency claims on the parties.

Second, the delegate noted that despite this high burden of proof, competition authorities have been critical of efficiency analysis advanced by the parties. BIAC advocates that there should be a presumption that firms' efficiency claims are well based given the financial risks they face and the fact that the parties have superior access to information. . The delegate also pointed out that producer-related efficiencies, which enhance producer value, also improve consumer value. Since the two are intertwined, if producer efficiencies are achieved, the consumer might also benefit. Moreover, the delegate contended that price increases due to a merger are unlikely, given the high likelihood that such a practice is going to be challenged by the competition authority which would impede the merger. The delegate acknowledged that while the parties might err in assessing efficiencies this should not imply that their judgment has to be substituted by a third party.

Third, the delegate submitted that fixed-cost efficiencies should also be credited. As Professor Pitofsky has noted, in the long run all fixed costs become marginal costs. Hence, it is questionable whether marginal-cost savings are more valuable than fixed-cost savings and more likely to be passed on to consumers. The delegate highlighted a contradiction in the EU law concerning the treatment of fixed costs in mergers and dominance cases. In evaluating dominance of firms the Commission has applied a long-run average incremental cost (LRAIC) or an average avoidable cost (AAC) test that incorporates fixed-cost elements. In mergers, the Commission favours the evaluation of variable costs, and it has not applied any meaningful assessment of fixed costs. The delegate stressed that these two approaches are irreconcilable and one of them must be wrong.

Next, the delegate suggested that there is no adequate mechanism for recognising dynamic efficiencies. The literature provides many examples supporting the view that dynamic efficiencies have a considerably greater potential to benefit consumers than static efficiencies. Yet, an overly strict requirement with regard to the verifiability of dynamic efficiencies, and their direct benefit to consumers, creates a significant hurdle in practice.

Finally, the delegate indicated that the merger specificity requirement should be applied with more pragmatism. Taken literally, the merger specificity requirement would prevent the acceptance of efficiencies defence in virtually every case. Theoretically, parties could nearly always enter into a joint venture to combine resources and extract synergies, if they were willing to accept the negotiation risk of doing so in the absence of a merger.

The delegate concluded by saying that better tools for the assessment of efficiencies are needed. These include not only better models for the economic evaluation of efficiencies, but also better institutional mechanisms that remove the asymmetries and procedural biases against efficiencies and allow them to be regarded on an equal footing with potential competitive harms. This would both improve decisions by the competition authorities and bring about benefits for consumers.

The delegate from the United States observed that the scope for analysis of efficiencies in mergers has been steadily expanding. In the US it is clearly illustrated by the express inclusion of efficiencies by amendments into the Merger Guidelines in the 1997, followed by the even broader discussion of efficiencies in 2010 guidelines, which show that the US competition authorities have every intention of taking efficiencies seriously in the merger review process. First, with regard to authority's distrust of efficiency analysis advanced by the parties, the delegate remarked that relatively few mergers are blocked. This implies that efficiencies are not ignored by the competition authorities. However, there is in fact still much room for improvement with regard to *ex-ante* analysis of some efficiencies which are hard to prove, but which occur after the merger. Hence, this tension has to be resolved by setting better standards for the evidence that would satisfy requirements for efficiencies. The problem with assessment becomes most acute for fixed-cost rather than marginal-cost efficiencies. In a number of transactions marginal-cost efficiencies tend to be easier to demonstrate and the competition authorities have very little difficulty accepting and weighing them against anticipated unilateral price increases when there is evidence of them. The problem essentially arises with respect to fixed-cost efficiencies, and for most mergers the synergies, the fixed-cost savings are the ones that are most readily identifiable. The delegate therefore highlighted the need to probe the reason why agencies do not readily accept that all costs are marginal in the long run and offer different treatment to fixed-cost and marginal-cost efficiencies, and to examine retrospectively what has actually happened with the fixed-cost efficiencies in the approved mergers.

Second, with regard to dynamic efficiencies the delegate observed that since 1991 they have been progressively taken into account in the US case law. *Genzyme/Novazyme* is one of many cases that have been accepted based on dynamic efficiencies. The delegate also pointed to a recent FTC matter *Thoratec/Heartware* (2009), in which the parties put forward only dynamic efficiencies and the FTC was

able to show through a rigorous analysis that the merged firms would have much less incentives to bring the new products to market than a stand-alone firm. On that ground the merger was blocked.

The delegate from Germany noted that enhanced investigation of efficiency claims might not necessarily result in better decision-making. The delegate noted that the decision how to deal with efficiency claims is also influenced by policy choices on whether to avoid type-1 or type-2 errors.

The Chair commented that dynamic efficiency has important effect over time and the dilemma extends beyond mere comparison of type-1 and type-2 errors. The Chair then moved the discussion on to whether only marginally anti-competitive mergers lead to treatment of efficiency and invited the delegate from Colombia to present a case of a merger to monopoly.

The delegate from Colombia explained that in the last ten years the Colombian competition law has been significantly modified with regard to the assessment of efficiency claims in mergers. Nowadays, Colombian legislation does not explicitly prohibit mergers leading to a market position near to monopoly. However, Article 51 of Decree 2153 of 1992 stated that efficiency claims had to be merger specific. Further, it stipulated that efficiencies: had to cut costs for the merging companies, had to be meaningful and could not be achieved by other means. Finally, the merger could not result in a restriction of supply in the market. Pursuant to this provision, in 2002 in the *ETERNIT* case the Superintendence of Industry and Commerce (SIC) blocked a merger between two companies in the market for the PVC production. The SIC found that the cost reduction claimed by the parties resulted from the dominant position created by the merger.

The delegate stressed that the law 1340 enacted in 2009 modified the provision related to efficiency claims in mergers. Currently, it requires proof that the benefit of the efficiencies: i) exceeds the anti-competitive effect; and ii) is transferred to consumers. In 2012 the SIC cleared a merger between six companies, which aimed to operate the port of Buenaventura, although the merging firms would attain 85.7 per cent market share. The competition authority based its decision on the operational model proposed by the firms, in which only one of them would manage the equipment essential for the functioning of the cargo port. Finally, the SIC had no concerns regarding potential price increase resulting from the merger since the port authority regulated prices of the cargo port services. Thus, the perspective of competition on that market was not based on the price of the service, but on the number of cargos handled at the port. It was found that the merger increased structural efficiency, improved consumer welfare and was in the national economic interest.

The Chair turned to the contribution of New Zealand and invited the delegate to present a merger to monopoly case that was accepted on the basis of efficiencies.

The delegate from New Zealand began her contribution by explaining the relevant legal framework. First, the Commerce Act 1986 (the Commerce Act) introduced a voluntary clearance regime for planned mergers. Second, the Commerce Commission can grant authorisation for a merger as long as it results in net benefits. The delegate noted that the Commerce Commission rarely receives detailed quantitative claims about efficiencies in merger clearance applications. However, it receives such claims in merger authorisation applications. The efficiencies have to be merger specific, but they need not to be market specific or passed through to consumers, which is a key difference with the clearance regime. The standard applied by the Commerce Commission is the net benefits standard. For authorisations, it carries out an assessment of both quantifiable and non-quantifiable benefits.

Next, the delegate moved on to the *Cavalier Wool Holdings* case that was decided in 2011. The Commerce Commission authorised the acquisition by Cavalier Wool Holdings of all of the wool scouring assets of New Zealand Wool Services International, despite the fact that it would result in only one wool

scourer in New Zealand. The efficiencies that the Commission took into account were mainly productive and linked with economies of scale and cost savings in wool handling. It also assessed claims that the merger would result in dynamic efficiencies. Having considered evidence from industry experts, internal documents, the counterfactual and evidence from customers, the Commission rejected those claims. An additional factor was that in the long term there was a possibility of entry by Chinese competitors.

The Chair invited the delegate from Australia to explain whether under the Competition and Consumer Act 2010 (the CCA) efficiencies have to be merger specific.

The delegate from Australia explained that only the Court can determine if mergers or conduct constitutes a breach of the CCA. However, merger parties have the option of seeking legal protection for mergers either through clearance (on the basis of no SLC) or authorisation (on the basis of net public benefit, primarily efficiencies). Other types of conduct, such as anti-competitive agreements, exclusive dealing and RPM can also be authorised, and in some cases notified. Authorisation is generally granted by the ACCC in the first instance, but subject to review by the Australian Competition Tribunal and appeal on matters of law to the Federal Court. However, in the case of mergers, applications for authorisation now go directly to the Competition Tribunal.

Secondly, the delegate clarified that the ACCC and the Tribunal compare the likely future with and without the conduct for which authorisation is sought. Under the authorisation procedure, the ACCC does not consider whether the conduct is necessary to achieve the likely net public benefits, or whether the proposed conduct is the best way to achieve the desired net public benefits. Consideration of any alternative solutions would only be relevant to the extent that those alternatives were likely in the foreseeable future, absent the proposed conduct. Whilst there may be better targeted and greater efficiencies achieved through some other means, the conduct will be authorised if: i) those other means are not likely to occur in the counterfactual because of lack of market incentives or other reasons; ii) the conduct would likely produce efficiencies as compared to the counterfactual.

The delegate from Belgium followed up and remarked that under the Belgium competition law it is not required that a merger is the only way of achieving given efficiencies. However, those efficiencies must be caused by the merger and not by some other market development that would take place anyway.

The Chair observed that in the United Kingdom (UK) efficiencies are considered at two stages, both in merger and in market inquiries, and asked the UK delegate to explain this issue.

The delegate from the United Kingdom confirmed that the Office of Fair Trading (OFT) and the Competition Commission (CC) have experience in accepting some of the efficiency claims made while reviewing mergers either as part of the analysis of competitive effects or in the form of relevant customer benefits that are considered at the remedies stage.

The delegate agreed with the argument put forward by BIAC concerning the imbalance in the assessment of anti-competitive effects and efficiencies, and observed that the Commission and the CC have never cleared a merger on the basis of efficiency argument. In the UK efficiencies have been given more weight at the remedies stage. However, the delegate noted that efficiencies arguments are not given the same weight as anti-competitive evidence since the former tend to speculate about market conduct, while the latter are often solidly based empirical data suggesting that there are anti-competitive effects.

The delegate turned to several cases where efficiencies were clear-cut, and where they were consequently given considerable weight as part of the remedies package. First, in *Macquarie UK Broadcast Ventures Limited/National Grid Wireless Group* the parties substantiated the argument that efficiencies included operational synergies, capital expenditure synergies and the benefit of reducing the

risk inherent in the digital switch-over process. The CC considered these within its analysis of customer benefits arising from the merger. Second, in *Deutsche Börse AG/Euronext NV/London Stock Exchange plc*, the CC found well-documented network-type externalities for consumers arising from the merger. Third, in *Payment Protection Insurance*, the CC considered efficiencies resulting from transfer pricing from one part of the market to the other.

The Chair turned to the contribution of the EU and asked the delegate from the Commission to present the Commission's analysis in the *Deutsche Börse/NYSE Euronext* decision.

The delegate from the Commission indicated that in *Deutsche Börse/NYSE Euronext* (2012) the Commission accepted that the proposed merger would have generated efficiencies but found that those efficiencies would not be enough to counteract the competitive harm. Hence, on balance, the merger raised competition problems and in the absence of sufficient remedies was ultimately prohibited. The proposed merger was a horizontal concentration, which would have created a near monopoly in the global markets for exchange-traded European derivatives (European interest rate, single stock equity and equity index derivatives). The parties submitted an efficiency defence based on three arguments. First, the merger would lead to savings and efficiencies in the information technology (IT) area. However, the Commission established that IT benefits were claimed based on undocumented e-mail exchanges with a handful of customers. Therefore, these benefits were simply not verifiable. Second, the merger would reduce the amount of collateral that is required from agents who want to contract via the two stock exchanges, as opposed to a single collateral requested by the clearing house of the merged entity. To substantiate their claim, the parties quantified this effect. However, the Commission observed that it is not the difference in collateral that should be considered as efficiency but rather the opportunity cost of holding the money or securities as collateral. The Commission quantified resulting efficiencies and found that they would be moderate and significantly lower than claimed by the parties. Next, the Commission compared the indicative magnitude of those efficiencies with the indicative magnitude of possible harm. The harm expected by the Commission concerned actual and potential competition. Finally, the parties asserted that the merger would increase the liquidity on the merging exchanges. The Commission noted that the claimed liquidity benefits could not be identified on the basis of the presented data and could therefore not be considered verifiable.

The delegate pointed out that the Commission examined the effects under the consumer welfare standard. The potential reduction in collateral requirements for trading derivatives on the merged platforms was compared against the expected increase in market power. The analysis showed that the amount of efficiencies would be moderate, and that trading demand would have to be implausibly elastic for the merged entity not to increase fees. Thus, the delegate highlighted that due to the absence of reliable quantifications for the expected harm and efficiencies, the decision ultimately involved a qualitative balancing based on the expected order of magnitude of the two opposing effects.

The delegate commented on the criticism advanced by BIAC concerning alleged contradiction in the EU law as regards the treatment of fixed costs in mergers and in dominance cases. The delegate noted that under the as-efficient-competitor test the question of whether pricing of the dominant firm would be anti-competitive relates to the possible foreclosure on the market. In mergers, on the other hand, the pricing power of the merging firms is assessed with respect to the merger's impact on demand curve and cost curve. The delegate noted that there is no contradiction between these two practices. Further, in evaluating dominance the Commission takes into account the AAC that is lower than the LRAIC since it does not incorporate the fixed-cost elements, which is an approach that is beneficial to the dominant company under investigation.

### 3. Practical tools to examine efficiency claims

The Chair then moved the discussion on to the identification of practical tools that serve to assess efficiency claims and invited Dr. Jenkins to introduce the topic.

Dr. Jenkins indicated that the quality of decisions issued by competition agencies depends on the merit of evidence provided by the parties and on their co-operation with the competition authority. Dr. Jenkins inquired how policy makers can elicit valuable evidence from the parties and noted that competition authorities' behaviour in decision-making may encourage firms to bring forward good evidence. Examples mentioned during the Roundtable where efficiencies were influential show that these are primarily demand-side efficiencies. It is a clear sign to the merging firms as regards preferences of competition authorities. Still, even though firms extensively assess efficiency of the operation before a merger, they tend to apply business-specific tools and do not focus primarily on benefits to consumers. There are examples that show how a change in policy by a competition authority changes firms' behaviour. A recent decision by the OFT, which concerned two software houses illustrates how a shift to the SLC or SIEC test has refocused businesses analysis on the closest competitors.

Next, Dr. Jenkins introduced the data envelopment analysis (DEA), one of the best-developed efficiency assessment techniques. It has been used to analyse performance in sectors like insurance, banking, healthcare, retailing, energy, telecommunications and postal services. It has also been used to assess efficiency of institutions like police forces or justice departments. The DEA has a number of advantages and it can be considered for use in merger analysis. It can handle multiple inputs and multiple outputs that cannot be readily reduced to a single input or a single output measure. For instance, it can serve to examine quality measures, which is useful in healthcare, banking or retail cases.

The DEA measures efficiency by reference to an efficiency frontier, which is constructed as linear combinations of efficient (best-practice) companies, i.e. companies producing the most output at the lowest cost. The DEA assumes that two or more companies can be combined to form a virtual company, with composite costs and outputs. The actual companies are compared with these virtual companies. If another actual or a virtual company or their combination achieves the same output as the actual company at a lower cost, the actual company is judged to be inefficient. Dr. Jenkins explained a graphical representation of the DEA for ten units (see Annex, Figure 1), with the Y-axis representing the total cost of service, and the X-axis the total outputs produced. Units (B+C) and (D+E) represent the merger of units B and C, and D and E respectively, where their total costs and total outputs are added together. The efficiency frontier is represented in Figure 2 (see Annex), where units B, C, D, E and F are linked with a line. Companies B, C, D, E and F are thus deemed efficient, as they are on the frontier. The efficiency of company A is given by the distance from point A to point V, which is a virtual company made up of a weighted average of frontier companies B and C. So, an owner or manager of A could use this type of analysis to understand how much more efficiency could be expected from A. Firm A could improve its productive efficiency by adopting best practice as exemplified by B and C.

Dr. Jenkins observed that in the context of a merger the DEA gives insight into the expected levels of synergy. Figure 2 represents *inter alia* a merger between B and C. If the businesses integrate without exploiting the potential new synergies, the outcome would be the point (B+C) shown to be inefficient under the DEA. Moreover, the DEA could be used to estimate the additional cost savings (or improvement in output) that should be possible by the merger between B and C. The possibilities for improvement are shown in the shaded triangle, with the benchmark being determined by the efficient frontier connecting units D and E. If the merging parties were indicating efficiencies of this magnitude, the DEA would confirm that this is consistent with two efficient firms remaining on the frontier. This would give the competition authority more comfort about the verifiability of the effects resulting from a merger. It also proves that the effect is merger specific. If D and E decided to merge, this would be represented by point

(D+E), which, owing to a lack of suitable comparators, could still be judged to be an efficient combination under a simple DEA. However, in this instance, the industry frontier is shifted downwards as a result of the increased scale economies, and it could open up an efficiency challenge for other players in the industry. As a result of this merger, firm F previously judged to be efficient, now has a peer that raises competitive pressure and gives opportunity for further growth. Dr. Jenkins noted that the DEA could help deliver evidence to the competition authority, provided that firms are ready to offer necessary data. Further, Dr. Jenkins indicated that extension of the DEA allows competition authorities to measure dynamic effects.

Dr. Jenkins pointed out that the DEA was applied to a proposed consolidation in the Danish hospital market. It served to break down likely efficiency gains into learning effect, scope effect and scale effect, which allowed the identification of those efficiency gains that were merger specific. The learning effect answers the question whether absent the merger these hospitals would have the incentive to learn from each other and to implement the best practices. Dr. Jenkins concluded that the DEA could better inform competition analysis and over time as competition authorities and businesses get more comfortable with this technique it could provide the parties with better information.

The delegate from Sweden explained the application of the Compensating Marginal Cost Reduction (the CMCR) tool. The competition authority calculated CMCRs in the context of four recent merger assessments. The idea behind this tool is that information about current margins and diversion ratios suffices to calculate the marginal cost efficiencies required to offset the increase in market power resulting from a merger. It is also closely related to UPP (Upward Pricing Pressure). The advantage of the CMCR is that it only requires data on pre-merger mark-ups, diversion ratios and the exact marginal-cost reductions. There is no need to estimate pass-through or cost reductions to consumers. Nor is there a need to estimate how non-merging competitors would react to price changes.

The delegate noted that the CMCR has been recently applied in the *Eniro/Teleinfo* merger that involved the acquisition by Sweden's largest directory enquiry service provider of a maverick competitor that was focused solely on directory services via telephone and sms. The competition authority calculated the range of marginal-cost efficiencies that would be required to offset the loss of competition. The delegate stressed that merging parties appreciate this tool because: i) it offered them a two-pronged analysis focused both on anti-competitive effects and on efficiencies; ii) it improved transparency on what is expected from merging firms. The adoption of such an approach increased the amount of submissions in terms of efficiencies both in *Eniro/Teleinfo* as well as in other cases as the merging parties now better understand how the competition authority will deal with efficiencies.

Professor Scherer followed up and expressed two concerns. First, that it is often difficult to obtain reliable and adequate data, which is crucial to estimate sound economic models. Second, economists can build different models and come to different conclusions. Professor Scherer illustrated this problem by referring to the merger proposal between Staples and Office Max. Since in that case results of economic models presented by the FTC and the merging parties conflicted, the judge turned to another evidence.

The delegate from Sweden agreed that with regard to complex economic models it is difficult to obtain robust and irrefutable results. That is why more basic economic models should be applied, with limited number of parameters.

The delegate from Italy referred to the presentation of Dr. Jenkins and agreed that a merger can lead not only to economies of scale but also diseconomies of scale. Hence, the delegate asked Dr. Jenkins whether assessment of a merger should also concern inefficiencies. If this was the case, the delegate inquired how to obtain data about potential inefficiency. The problem would in particular concern mergers between complex entities, like in the banking sector.

Dr. Jenkins took the opportunity to reply in the first place to a comment made by Professor Scherer. Dr. Jenkins observed that potential complexity of analysis should not imply inactivity and indifference to the problem. If there is a concern that important efficiency aims are not given sufficient weight in antitrust assessment, it is crucial to examine different techniques that may help address this issue. Further, Dr. Jenkins indicated that reasonable experts can reduce areas of conflict.

With regard to diseconomies of scale Dr. Jenkins noted that authors of the study cited in her presentation were able to define both economies and diseconomies of scale thanks to reliable evidence.

Dr. Friederiszick submitted that the landmark decisions where data are available and where economic methods are applied with rigour should not become the benchmark for every case. Dr. Friederiszick pointed out that the Danish hospitals merger and *Deutsche Börse/NYSE Euronext* decision are two opposite examples that show the importance of availability of sufficient data. However, when there is no sufficient evidence, competition authorities should work with a qualitative assessment and give their best judgment on that basis. Next, Dr. Friederiszick stressed that economic models do not always complicate a case, but often increase transparency.

#### **4. Efficiency claims in dominance and monopolisation cases**

The Chair gave the floor to Dr. Friederiszick to introduce the topic of efficiency claims in dominance cases.

Dr. Friederiszick highlighted that since 2009 the Commission has four main enforcement priorities in abuse of dominance cases. First, a focus is on refusal to supply/margin squeeze abuses in regulated network industries, like energy, transport and telecommunications. Here the Commission is acting as a regulator of last resort. Second, a significant number of cases relate to the IT software sector and financial data services. The main focus in those cases is on interoperability, tying and bundling and/or refusal to supply. Major cases in this field are *Microsoft* (2008, 2009 and 2012), *Google* (2010) or *Reuters* decisions (2009). Third, the Commission has also looked into the manufacturing sector where it has focused on aftermarket or exclusive dealing concerns. Finally, a significant number of cases deal with Intellectual Property Rights (IPRs), with the emphasis on the exploitation of downstream customers. The majority of cases concern the IT sector, with cases like *Rambus* (2007, 2009), *Samsung* (2012) or *Motorola* (2012). Dr. Friederiszick pointed out that efficiency defences have been most transparently communicated in the IT segment, in particular in cases like *Intel*, *IBM* or *Microsoft*. Dr. Friederiszick also stressed that the number of cases in this sector will increase, hence a sound regulatory environment is crucial to handle efficiency considerations appropriately.

Next, Dr. Friederiszick noted that there are differences in how efficiency analysis is undertaken in merger and in dominance cases. With regard to Article 102 TFEU these concern a higher diversity of conduct, backward or forward looking assessment and a negative presumption once dominance is established. However, the major difference is that the pro-competitive and anti-competitive effects are much more intertwined in dominance cases.

Dr. Friederiszick then contrasted the Commission's practice with an assessment of the relevance of anti-competitive motives for the real-world business behaviour related to low-price strategies. First, the speaker cited Professor Röller who noted that "if there was no possibility to ever exploit one's market power, there would be no incentive to compete. Thus, pro-competitive behaviour must also involve exploitation". This indicates that from a business perspective the focus is primarily on the profit. Dr. Friederiszick referred to the example of IBM, which as a producer of mainframe computers had 90 per cent market share. High technological entry barriers protected it, allowing the firm to exploit its customers in the after-market for maintenance and repair parts. However, to enter the Chinese market IBM had to

subscribe to discrimination-free third-party access in the after-market. Since technological entry barriers have diminished, in 2002 IBM reinvented itself, bought a major consulting company and focused on complex consulting services, which are protected by new entry barriers. Second, Dr. Friederiszick described results of a survey conducted among MBA students, which is based on 42 responses. 95 per cent of them stated that they were working for, or had worked for, a large company (with more than 500 employees). They had professional experience of at least 5 years. The questionnaire was drafted to find out about the motives behind low-price strategies and whether foreclosure plays a stronger role than efficiencies and other objective justifications. First, the survey showed that very aggressive pricing, (pricing below AVC), had been observed by 64 per cent of respondents. Second, 29 per cent declared that they had observed medium- and small-size companies pricing very aggressively. Third, very aggressive pricing has many motives; it is less often used for the purpose of rivalry against competitors, and more often for pro-competitive reasons. Finally, aggressive pricing was ranked as less advisable for a leading company in a growing market. This is either due to the fact that managers consider aggressive pricing strategies less effective for larger firms or because of a well-understood risk of breaking antitrust rules.

Dr. Friederiszick concluded with three open questions. First, how can a more integrated approach of efficiencies and anti-competitive effects be implemented in dominance cases? Second, how can firms and agencies be encouraged to bring more business justifications in decisions and discuss them more transparently? Finally, how to reconcile differing business and antitrust perspectives on potentially anti-competitive conduct?

The Chair invited the delegate from Turkey to give its perspective on the use of efficiency defence in abuse of dominance cases.

The delegate from Turkey indicated that the Turkish Competition Authority (TCA) is giving an increasing importance to the assessment of efficiencies, especially in mergers and acquisitions and abuses of dominance cases. The delegate observed that in the TCA's abuse of dominance decisions mostly static efficiency claims, such as allocative efficiencies, are considered. Increasing revenues by cost reductions (*Cable TV* decision), cost efficiencies (*Sanofi-Aventis* decision), marketing efficiencies (*Frito Lay* decision) or efficiencies in purchasing are most often taken into account. In predatory pricing cases (*Coca-cola* decision), the TCA also took into account static efficiencies, like cost efficiencies, and examined economies of scale and scope that resulted in lower prices that firms charge.

The delegate stressed that the TCA pays special attention to the proportionality principle. In abuse of dominance cases it carries out a balancing test between the efficiency gains and its negative effects on the market, and accepts efficiency defences if given practices do not eliminate competition in a substantial part of the market.

## **5. *Ex-post* evaluation of efficiencies in antitrust proceedings**

The Chair moved the discussion on to *ex-post* evaluations and gave the floor to the delegate from the US.

The US delegate underlined that *ex-post* evaluation of efficiencies *is useful since it indicates under what conditions and in the presence of which variables efficiency claims are likely to be credible and eventually occur in the market. The delegate noted that ex-post evaluation can be applied both for consummated and unconsummated mergers. In the US, the FTC did a retrospective study examining potential improvement in medical service quality resulting from a hospital merger and, in that particular case, found no improvement attributable to the merger.*

*The delegate from Japan introduced results of a report on "Ex-post Examination of Business Combinations" issued by the Competition Policy Research Centre (CPRC) of the Japan Fair Trade*

Commission (JFTC) in November 2011. *The aim of this research was to examine the extent of performance changes after mergers.* The study empirically verified the outcomes of mergers since 2000 based on the data on profit ratios, stock prices, research and development costs, number of published patents and product retail prices. The research indicates that mergers had not significantly improved performance of firms. First, analysis confirmed that mergers had no significant effect on the profit ratio, and that there were rather more cases in which the profit ratio worsened. Second, stock price analysis showed a rise in stock prices on the day of the announcement of the merger. However, in most cases, the stock price fell after a few days and the effects of the cumulative abnormal return ratio were close to zero. Third, analysis of research and development revealed that in most cases *the number of patents decreased.* Finally, analysis of product retail prices *showed a raising trend in the average post-merger market prices.* *The delegate concluded that since some data were not available, results of the research have to be assessed with caution.*

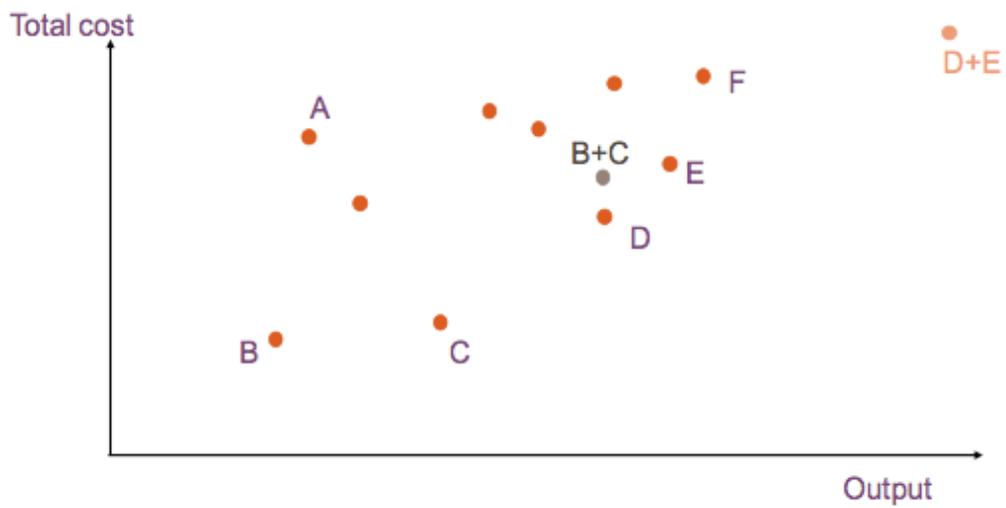
## **6. Final remarks**

*The Chair* closed the Roundtable concluding that there are clear signs that competition authorities do care for the considerations of efficiency in antitrust analysis. The Chair emphasised that the major difficulty in the efficiency analysis concerns adequate indicators. With regard to instruments, the Chair noted that some of them might be useful in spite of the criticism regarding the complexity of economic models and reliability of data. The Chair observed that *ex-post* evaluation of efficiencies is becoming widespread and took this as an indication of the fact that competition authorities want to understand how to improve their analysis. Finally, the Chair highlighted the innovative approach adopted in research presented by Dr. Friederiszick.

The Chair thanked both experts and delegates for their contributions and invited panellists to a roundtable on *ex-post* evaluation that will take place in February 2013.

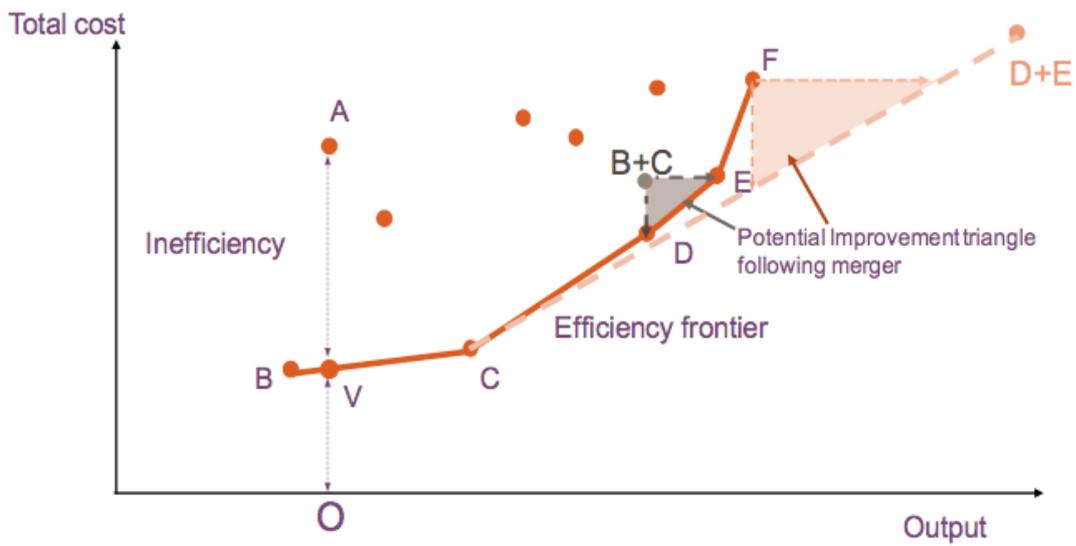
ANNEX

Figure 1. Graphical example of data envelopment analysis (I)



Source: Oxera

Figure 2. Graphical example of data envelopment analysis (II)



Source: Oxera



## SYNTHÈSE

*Par le Secrétariat*

Un certain nombre de points clés ressortent du débat organisé dans le cadre de la table ronde, des documents soumis par les délégués et des communications écrites soumises par les experts :

- (1) *L'économie du bien-être fait état de différentes sources de gains d'efficacité. Le conflit qui existe entre gains d'efficacité allocative et gains d'efficacité productive, mais aussi entre gains d'efficacité statique et gains d'efficacité dynamique, est pris en compte par l'arbitrage de Williamson qui se heurte à plusieurs contraintes dans le cadre du ralentissement de l'activité économique.*

Les sources d'efficacité qui sont examinées dans l'analyse du bien-être économique sont statiques (allocative et productive) ou dynamiques. La motivation sous-jacente d'une fusion peut être de générer des gains d'efficacité. La plupart des évaluations en matière de fusions s'intéressent donc aux gains d'efficacité productive et/ou dynamique. Les pratiques étudiées comme les abus de position dominante sont non seulement des sources potentielles d'exclusion, mais peuvent également s'accompagner d'avantages découlant des gains d'efficacité (ventes liées ou groupées).

La tension fondamentale qui existe au sein de la politique de la concurrence repose sur le conflit entre gains d'efficacité allocative et gains d'efficacité productive, ainsi qu'entre gains d'efficacité statique et gains d'efficacité dynamique. Le critère de bien-être en cours d'utilisation dans un régime de concurrence spécifique affecte également certains types de gains d'efficacité qui, en pratique, peuvent être plus facilement acceptés que d'autres. Les rivalités et les marchés concurrentiels se traduisent par une fixation des prix directement corrélée aux coûts sous-jacents (efficacité allocative), ce qui a des retombées positives pour le bien-être du consommateur. L'objectif des interventions des autorités de la concurrence est donc d'assurer que les gains d'efficacité allocative se matérialisent et que les entreprises ne dégagent pas de rendements excessifs au moyen de pratiques d'exclusion ou de fusions qui entraveraient la concurrence. Il est cependant possible que de certaines fusions se traduisent par une production à moindre coût ou de qualité supérieure (gains d'efficacité productive ou dynamique) au profit du bien-être total. L'une des difficultés dans l'évaluation de la concurrence est de peser le bien-être du consommateur et du producteur d'une manière équilibrée de façon à accepter les gains d'efficacité allocative quand ceux-ci augmentent le bien-être du producteur.

Ce conflit a été étudié par Oliver Williamson qui a proposé une approche fondée sur le bien-être total. Cet économiste a avancé que si des gains d'efficacité importants se matérialisent, ces gains ont tendance à primer sur la détérioration du bien-être du consommateur, ce qui fournit des preuves solides en faveur des fusions. M. Scherer exprime des doutes quant à la validité, dans la période actuelle, de l'arbitrage de Williamson, du fait du ralentissement actuel de l'activité économique et notamment du chômage de masse et de la trappe de liquidité keynésienne. En dehors des périodes de crise et en situation de plein emploi, les ressources dégagées par les gains d'efficacité liés aux fusions permettent d'obtenir des gains sociaux en mobilisant des ressources employées dans d'autres secteurs économiques afin de fournir des biens et des services

favorables aux consommateurs. Toutefois, lorsque les niveaux de chômage sont élevés, une fuite de ces ressources est possible et les gains d'efficacité peuvent ne pas avoir de retombées bénéfiques pour le consommateur. De plus, l'arbitrage de Williamson présuppose que la loi des débouchés de Say s'exerce. Cela tient au fait que, d'une part, la fusion permettant d'atteindre un pouvoir de monopole, les prix augmentent et le surplus du consommateur est transformé en une hausse des bénéfices ou en un surplus du producteur. D'autre part, ces bénéfices sont censés circuler à nouveau sous forme de demande effective en biens d'investissement supplémentaires ou bien en tant que demande progressive des consommateurs lorsqu'ils sont redistribués aux actionnaires. Cependant, en cas de trappe de liquidité keynésienne, la loi de Say n'est plus valable car les entreprises et les actionnaires ont tendance à accumuler les bénéfices qu'ils décident de ne pas investir. Enfin, il existe une certaine inquiétude s'agissant du transfert de ce qui constituait, avant la fusion, le surplus du consommateur vers un surplus du producteur et en dernier ressort, vers les actionnaires des entreprises parties à la fusion. Si l'on postule à la façon d'Alfred Marshall que l'utilité marginale de l'argent diminue avec l'augmentation des richesses, un transfert de l'argent aux riches actionnaires constitue une redistribution des revenus qui passent des consommateurs moyens aux consommateurs riches pour lesquels l'utilité marginale est moindre. Il s'ensuit une perte de bien-être et le critère de bien-être du consommateur devrait être privilégié au détriment du critère de bien-être total.

Le critère de bien-être du consommateur devrait peut-être être plus adapté au cadre institutionnel dans lequel est appliquée la politique de la concurrence. L'argument en faveur du bien-être du consommateur défend l'idée selon laquelle même en situation de bien-être total, le cadre institutionnel présente des lacunes. Les intérêts des consommateurs n'étant pas aussi bien représentés que ceux des entreprises, le critère de bien-être doit prendre en compte ce déséquilibre. Qui plus est, le bien-être du consommateur peut permettre d'établir un équilibre optimal, ou tout du moins aussi bon que les conditions le permettent, dans la mesure où les entreprises à la fusion sont celles qui amélioreraient le plus le bien-être.

- (2) *Même si tous les pays ne prennent pas en compte les allégations de gains d'efficacité, ces allégations occupent une place de plus en plus importante dans l'analyse de la concurrence. Les autorités de la concurrence qui autorisent le recours aux allégations de gains d'efficacité dans leurs procédures d'application du droit de la concurrence ont mis au point différentes approches sur le plan de la procédure et des dispositions de fond.*

Bien qu'un nombre non négligeable de pays aient explicitement reconnu les allégations de gains d'efficacité dans le cadre de fusions, l'insertion de dispositions à cet égard dans des textes n'est pas une pratique répandue à l'heure actuelle. Même si le moyen de défense fondé sur les gains d'efficacité n'est pas prévu dans certains systèmes juridiques, il est possible que la prise en compte des gains d'efficacité joue un rôle pratique dans l'évaluation d'affaires spécifiques grâce aux dispositions en la matière contenues dans le droit de la concurrence interne de certains pays. Ainsi, en Allemagne, il est possible de prendre en compte les gains d'efficacité en vertu de la clause de l'équilibre général ou sous réserve d'une autorisation ministérielle. Par ailleurs, le critère SIEC [*Significant Impeding Effective Competition* ou réduction substantielle d'entrave significative à une concurrence effective] permettra de promouvoir davantage l'évaluation des affaires de fusion en donnant davantage d'importance aux effets produits et une multiplication du nombre d'allégations de gains d'efficacité est susceptible d'arriver. Il est également possible que, jusqu'à maintenant, le législateur ait implicitement rejeté l'introduction du moyen de défense fondé sur les gains d'efficacité du fait que seules les fusions les plus anticoncurrentielles sont interdites (comme c'est le cas en Suisse).

Dans les pays où les allégations de gains d'efficacité sont introduites, de nombreux problèmes font surface. Tout d'abord, en ce qui concerne la procédure, il peut y exister une asymétrie dans l'analyse des gains d'efficacité et des effets anticoncurrentiels. Un moyen de défense fondé sur les gains d'efficacité pourrait faire partie d'un processus en deux temps : dans un premier temps la fusion est considérée comme anticoncurrentielle et dans un second temps elle est examinée en fonction des gains d'efficacité qui en découlent. En d'autres termes, il existe ici un risque que l'analyse d'efficacité devienne inutile en l'absence d'effets anticoncurrentiels. Dans une réfutation d'efficacité, au contraire, des preuves sur les allégations de gains d'efficacité s'inscrivent dans le cadre d'une analyse holistique des effets positifs et négatifs de la fusion à l'étude.

De plus, les parties à la fusion – sous lesquelles incombe la charge de la preuve – peuvent rencontrer des difficultés à ce faire. Cela tient au fait qu'il est difficile de fournir des preuves indiscutables et quantifiables des effets probables d'une fusion dans le cadre d'allégations de gains d'efficacité.

Par ailleurs, les gains d'efficacité en matière de coûts fixes doivent également être pris en compte dans le cadre de fusions. Lorsqu'ils évaluent la position dominante des entreprises, de nombreux pays appliquent le critère CMMLT ou le critère CEM qui prend en compte des éléments de coût fixe. Dans le cadre de fusions, l'évaluation des coûts variables est privilégiée. Ainsi, il est nécessaire d'étudier avec du recul les gains d'efficacité en matière de coûts fixes découlant des fusions autorisées. Cela permettrait de comprendre pourquoi les autorités de la concurrence ne veulent pas reconnaître que tous les coûts fixes deviennent des coûts marginaux à long terme, et pourquoi elles ne traitent pas de manière identique les gains d'efficacité en matière de coûts fixes et les gains d'efficacité en matière de coûts marginaux.

Un autre sujet concerne le traitement d'efficacité dynamique. Les travaux publiés sur ce sujet proposent de nombreux exemples qui soutiennent l'idée selon laquelle les gains d'efficacité dynamique sont davantage susceptibles d'avoir traduit des retombées bénéfiques pour les consommateurs que les gains d'efficacité statique. Ainsi, aux États-Unis, les gains d'efficacité dynamique ont été progressivement pris en compte comme le montre l'affaire *Genzyme / Novazyme*.

Un autre problème a trait au critère de spécificité en matière de fusions. Pris au pied de la lettre, ce critère empêcherait, dans un grand nombre d'affaires, l'acceptation d'un moyen de défense fondé sur les gains d'efficacité. En théorie, les parties pourraient presque toujours établir une relation contractuelle afin de combiner leurs ressources et de dégager des synergies. Dans certains pays (comme l'Australie), l'autorité de la concurrence ne se demande pas si l'action visée est indispensable à l'obtention des avantages nets qui en résulteront probablement, et l'étude de toute autre solution ne présenterait un intérêt que dans la mesure où ces solutions seraient applicables dans un avenir proche si aucune action n'avait été proposée. Ainsi, l'action est autorisée si : i) s'il est peu probable que ces autres solutions figurent dans le scénario contrefactuel faute d'incitations sur le marché ou pour d'autres raisons et ii) si l'action visée est de nature à produire des gains d'efficacité, contrairement au scénario contrefactuel.

Les gains d'efficacité peuvent également être pris en compte à différentes étapes de la procédure. Au Royaume-Uni, certaines allégations de gains d'efficacité sont retenues soit lors de l'analyse des effets concurrentiels, soit au moment où des mesures correctives, se présentant sous la forme d'avantages pour les consommateurs, sont imposées. Dans plusieurs affaires, les gains d'efficacité étaient indiscutables et ont pris une importance considérable lors de la définition des mesures correctives.

Enfin, dans certains cas, les considérations sur les gains d'efficacité ou sur d'autres justifications objectives ont autorisé l'approbation des fusions créant un monopole ou quasi-monopole. Ainsi, l'autorité de la concurrence colombienne a autorisé la fusion de six entreprises dont la part de marché cumulée était de 85.7 %. La décision était fondée sur le modèle opérationnel proposé par les entreprises à la fusion, le fait que les prix étaient régulés par une autorité publique et que l'opération servait l'un intérêt économique national. En Nouvelle-Zélande, l'autorité de la concurrence a également autorisé une fusion créant une situation de monopole en prenant en compte les gains d'efficacité en termes de production et qui étaient liés à des économies d'échelle et de coûts.

- (3) *Il existe une panoplie d'outils et de techniques pour évaluer quantitativement si les gains d'efficacité allégués se concrétiseront après la fusion.*

Les autorités de la concurrence et les parties à la fusion reconnaissent que les allégations de gains d'efficacité doivent s'appuyer sur des preuves et être quantifiables. Pour les autorités de la concurrence, il est difficile d'évaluer des gains d'efficacité attendus du fait que le type de gains allégués et le rôle que jouent les allégations dans l'évaluation diffèrent considérablement d'une affaire à l'autre. Il est largement admis qu'il est souvent difficile d'obtenir des données fiables et adaptées qui sont essentielles pour estimer des modèles économiques solides. Qui plus est, il y a un risque que les économistes ne procurent pas un modèle identique aux parties et que les parties n'aboutissent donc pas aux mêmes conclusions. Ceci, cependant, ne doit pas laisser entendre que les considérations d'efficacité ne sont pas assurées de manière appropriée dans le cadre d'évaluations de la concurrence. Avec le temps, les autorités de la concurrence vont se familiariser avec les outils permettant de mesurer et de vérifier les gains d'efficacité et seront plus à même de donner davantage de poids à ces allégations dans leurs procédures.

Les contributions soumises au Secrétariat font état de différentes techniques qui pourraient permettre de comprendre les avantages potentiels des dispositifs mis en place par les entreprises. M. Scherer indique dans ses travaux que des observateurs impartiaux ayant une expérience solide dans le secteur concerné sont les mieux placés pour évaluer les allégations selon lesquelles une fusion donnée engendrera des gains d'efficacité considérables. Mme Jenkins précise quant à elle que les analyses transversales et la modélisation des analyses de performance reposant sur des techniques telle que la technique DEA (*data envelopment analysis*) peuvent permettre d'identifier et de quantifier les gains d'efficacité dans les procédures en matière de fusions et de position dominante. Cette technique peut gérer une multitude de données en entrée et sortie qui ne sont réductibles à un indicateur unique d'entrée ou de sortie. La technique DEA mesure les gains d'efficacité en fonction d'une frontière d'efficacité qui repose sur des relations linéaires entre des entreprises efficaces. Cette méthode repose sur le postulat que deux entreprises ou plus peuvent être associées pour former une entreprise virtuelle dont les coûts et la production sont regroupés. Les entreprises réelles sont comparées à ces entreprises virtuelles. Si une autre entreprise réelle ou virtuelle, ou une combinaison réelle-virtuelle, a la même production, à moindre coût, que l'entreprise réelle, l'entreprise réelle est jugée inefficace. La technique DEA permet également de savoir si les effets allégués proviennent spécifiquement de la fusion. Par conséquent, cette méthode donne aux autorités de la concurrence davantage d'assurance sur le caractère vérifiable des allégations de gains d'efficacité.

L'outil de compensation des réductions de coûts marginaux [*Compensating Marginal Cost Reduction* ou CMCR] est un autre outil pratique qui pourrait également permettre d'évaluer les gains d'efficacité. Il a déjà été mis en œuvre en Suède pour évaluer des fusions. L'outil CMCR repose sur l'idée que les informations disponibles sur les marges courantes et les ratios de diversion sont suffisantes pour calculer les réductions de coût marginal nécessaires pour

neutraliser l'augmentation du pouvoir de marché découlant d'une fusion. L'avantage de cet outil est qu'il nécessite uniquement de disposer de données sur les marges commerciales avant la fusion, sur les ratios de diversion et sur les réductions exactes de coûts marginaux. Il n'est donc pas nécessaire d'estimer les répercussions sur les consommateurs ou les réductions de coûts dont ils bénéficient, ni sur la façon dont les concurrents réagiraient aux évolutions des prix.

- (4) *L'évaluation ex-post des gains d'efficacité permet aux autorités de la concurrence d'étudier les résultats des fusions et d'améliorer leur analyse de la concurrence. Certains résultats de l'évaluation peuvent être utilisés par les parties à la fusion afin de corroborer leurs allégations au cours d'une enquête.*

L'évaluation ex-post indique les conditions qui sont requises et les variables qui doivent être présentes pour que les allégations de gains d'efficacité soient crédibles, voire pour que ces gains se matérialisent sur le marché. Elle peut ainsi être utilisée pour évaluer quantitativement les gains d'efficacité allégués. L'évaluation peut également avoir une application pratique et permettre d'établir des critères de comparaison. Ainsi, aux États-Unis, une évaluation ex-post a permis de concevoir une méthode pour mettre au point et élaborer un indicateur de qualité afin d'évaluer les effets ex-post d'une fusion dans le secteur de la santé.

Certaines contributions à la table ronde montrent que les évaluations ex-post des fusions aboutissent à des conclusions ambiguës sur la matérialisation des gains d'efficacité allégués. Les contributions du Japon et des États-Unis font apparaître que les fusions n'améliorent pas systématiquement les performances des entreprises. Le document de référence examine un large éventail d'études et arrive à la conclusion que cela est peut-être lié au fait que de nombreux facteurs propres aux affaires et aux secteurs concernés influent sur les résultats. La fiabilité et les effets de l'étude ex-post de fusions existantes dépendent de l'échantillon et des variables examinés.

- (5) *Les questions liées aux allégations de gains d'efficacité se posent également dans les affaires d'abus de position dominante, notamment dans le secteur informatique, du fait que la législation ne donne pas autant d'orientations et que la jurisprudence n'est pas aussi fournie que pour les fusions. Une analyse plus poussée est nécessaire sur la façon dont une approche plus intégrée des gains d'efficacité et des effets anticoncurrentiels peut être mise en œuvre dans le cadre d'affaires d'abus de position dominante.*

Tandis que dans de nombreux pays et territoires (Canada, États-Unis, UE) des dispositions juridiques sur les abus de position dominante ne permettent pas explicitement de recourir au moyen de défense fondé sur les gains d'efficacité, la législation de certains pays (Mexique, République d'Afrique du Sud, Turquie) permet clairement aux entreprises dominantes de faire état de telles allégations. Malgré l'absence de dispositions explicites, la possibilité de justifier une conduite potentiellement anticoncurrentielle en invoquant des gains d'efficacité a été reconnue par les tribunaux de l'UE et des États-Unis, ainsi que par les instruments juridiques non contraignants de la Commission européenne. Toutefois, l'examen des décisions fondées sur l'article 102 du TFUE démontre que les gains d'efficacité ne sont pas employés comme moyen de défense dans la majorité des cas. Dans leurs travaux, Friederiszick et Gratz affirment que depuis 2009, les gains d'efficacité ou d'autres justifications objectives ont été invoqués dans 42 % des affaires, en particulier dans le secteur de l'informatique. En raison du nombre croissant d'affaires concernant ce secteur, il est admis qu'un environnement réglementaire solide est essentiel pour que les considérations relatives aux gains d'efficacité soient examinées comme il convient.

Qui plus est, le point de vue des entreprises diffère de celui des autorités de la concurrence en matière de conduite potentiellement anticoncurrentielle. Les analyses empiriques portant sur les motivations associées à des stratégies de prix réduits, menées par Friederiszick et Gratz, démontrent qu'une politique de prix en-deçà du coût variable moyen est une pratique courante. Les dirigeants d'entreprises considèrent qu'une politique de prix agressive est moins intéressante pour les entreprises de premier plan sur un marché en plein essor, ce qui peut s'expliquer ou bien par le fait que de telles pratiques sont considérées comme inefficaces pour les grandes entreprises, ou bien par le fait que celles-ci ont bien conscience des conséquences d'une infraction de leur part aux règles de concurrence.

En matière de procédure, les gains d'efficacité dans les affaires d'abus de position dominante sont pris en compte soit comme moyen de défense, soit comme facteur entrant dans l'analyse des effets de la concurrence sur une conduite donnée. Le premier scénario repose sur une analyse à deux temps dans laquelle l'existence d'un abus de position dominante est d'ores et déjà établie. Le second scénario évalue si les gains d'efficacité allégués l'emportent sur les effets anticoncurrentiels. Cette deuxième approche implique que les gains d'efficacité font partie intégrante de l'évaluation d'ensemble et sont donc plus étroitement liés aux préoccupations relatives aux effets anticoncurrentiels. Par conséquent, la conduite potentiellement abusive n'est pas interdite lorsque les gains d'efficacité l'emportent sur les effets anticoncurrentiels. Selon le document de référence, les difficultés pratiques pourraient être la principale raison pour laquelle les autorités de la concurrence sont tentées d'envisager les gains d'efficacité comme un moyen de défense plutôt que comme l'un des facteurs pris en compte dans l'évaluation globale d'une affaire d'abus de position dominante. Cela étant, certains pays (comme la Turquie) appliquent un critère de mise en balance des gains d'efficacité et des effets négatifs de l'abus de position dominante. Il est donc nécessaire de mener une analyse plus poussée de la façon dont une approche plus intégrée des gains d'efficacité et des effets anticoncurrentiels peut être mise en œuvre dans le cadre d'affaires d'abus de position dominante.

## NOTE DE RÉFÉRENCE

*Par le Secrétariat\**

### 1. Introduction

Bien que les gains d'efficacité et les allégations de gains d'efficacité fassent l'objet de vifs débats depuis plusieurs décennies déjà — du moins depuis que les considérations d'efficacité ont été (d'abord implicitement, puis explicitement) intégrées à l'évaluation des fusions et des accords entre concurrents — leur rôle dans le droit de la concurrence a récemment acquis plus d'importance, comme en témoigne le nombre de décisions récentes relatives aux fusions dans différents pays. De même, les allégations de gains d'efficacité sont de plus en plus souvent mises en avant dans les affaires d'abus de position dominante ou de monopole, bien qu'il faille reconnaître que jusqu'à présent, ces allégations n'ont pas vraiment eu d'incidence pratique sur ces affaires.

Ce rôle croissant des allégations de gains d'efficacité dans le droit de la concurrence est en partie lié à l'importance toujours grandissante de l'analyse économique, et notamment l'adoption d'une approche « par les effets » (par opposition à une approche « per se ») dans plusieurs pays. L'analyse économique a certainement le pouvoir d'améliorer de manière significative la qualité de l'analyse : d'une part, elle contribue à déterminer quels types de pratiques, accords et transactions sont susceptibles de soulever des problèmes de concurrence, et d'autre part, elle permet de comprendre quels types de justifications peuvent être utilisés pour contrebalancer les effets anticoncurrentiels éventuellement constatés.

Toutefois, le fait que les gains d'efficacité jouent un rôle plus important que jamais dans le droit de la concurrence ne signifie pas pour autant que leur appréciation est simple et dénuée de problèmes. Tout d'abord, l'efficacité économique n'a pas forcément le même sens pour les avocats et pour les économistes. Les professeurs Gifford et Kudrle (2005) ont lancé un avertissement : « *bien que les tribunaux, les décideurs politiques et les avocats parlent tous d'efficacité économique" ou d'efficacité", ils ne veillent pas toujours à utiliser ces termes avec autant de précision que les économistes.* » Par conséquent, même s'il existe un large consensus parmi les chercheurs et les spécialistes du droit de la concurrence, selon lequel l'une des premières finalités de la concurrence devrait être la promotion de l'efficacité économique, les autorités de la concurrence peuvent éprouver des difficultés à tenir pleinement compte des allégations de gains d'efficacité mises en avant par les entreprises, ou pire encore, sont susceptibles d'appliquer ce principe de la manière imprécise et incohérente.

En outre, un certain nombre de problèmes (dont plusieurs sont évoqués dans la présente note) doivent être réglés et peuvent être abordés différemment en fonction du pays. Par exemple, l'acceptation de certains types de gains d'efficacité (p. ex. économies de coûts fixes) dépend du critère de bien-être appliqué par une autorité de la concurrence spécifique. De même, les différents critères de preuve requis en ce qui concerne les allégations de gains d'efficacité détermineront si ces allégations sont permises. Autre thème associé, la manière de vérifier (et dans de nombreux cas de quantifier) les éventuels gains d'efficacité. Il existe plusieurs techniques quantitatives pour réaliser cette évaluation, soit dans le cadre

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\* La présente note de référence a été rédigée par Fiorenzo Bovenzi et Anna Pisarkiewicz, experts senior et junior de la politique de la concurrence au sein de la Division de la concurrence de l'OCDE, respectivement.

d'une enquête, soit *ex-post*. Cela s'avère particulièrement pertinent dans la mesure où l'un des axes de travail du Comité de la concurrence de l'OCDE vise précisément à évaluer l'impact des activités d'application et de défense du droit de la concurrence.

La section suivante de la présente note expose les principaux types de gains d'efficience (allocative, productive, dynamique et transactionnelle), puis propose de modifier la hiérarchie des objectifs du droit de la concurrence. Le chapitre suivant concerne le traitement des allégations de gains d'efficience dans le contexte des fusions. Il est suivi d'un examen approfondi de l'évaluation *ex-post* au chapitre 3 ; le rôle des allégations de gains d'efficience dans les affaires de position dominante est abordé au chapitre 4, suivi des conclusions au chapitre 5.

La présente note s'intéresse au rôle des allégations de gains d'efficience dans les fusions et les affaires de position dominante. Elle n'aborde pas la multitude d'accords autres que les accords de fusion susceptibles d'être conclus par des concurrents, comme les coentreprises de production et de recherche et développement (R-D), les accords d'achat groupé et les accords de licences technologiques. D'une part, ces accords nécessitent le même arbitrage fondamental que les fusions, ce qui signifie qu'il est nécessaire de mettre dans la balance les éventuels effets anticoncurrentiels découlant d'une diminution de la concurrence et les gains d'efficience bénéficiant aux consommateurs. Par conséquent, certains des problèmes évoqués dans la présente note s'appliqueront également aux accords horizontaux et verticaux. Dans le même temps, les parties disposent de directives et d'une jurisprudence considérables sur lesquelles elles peuvent s'appuyer pour structurer l'accord sans violer les règles du droit de la concurrence. C'est le cas, par exemple, de l'Union européenne, l'article 101(3) du Traité sur le fonctionnement de l'Union européenne (TFUE) et les divers règlements généraux d'exemption par catégorie abordant cette question.

## 1.1 *Types de gains d'efficience*

En politique de la concurrence, il est habituel de faire la distinction entre les gains d'efficience *statique* et *dynamique*. La principale différence entre ces deux types de gains concerne le délai dans lequel leurs effets se font ressentir, comme nous l'expliquons ci-dessous. Une autre catégorie de gains d'efficience, probablement plus vaste — les gains d'efficience transactionnelle — est également décrite.

### 1.1.1 *Gains d'efficience statique : les gains d'efficience allocative et productive (ou technique)*

Dans le cas des gains d'efficience statique, les entreprises (et les consommateurs) sont observés à un moment précis, à la manière d'un instantané. La technologie servant à produire les biens est également supposée être fixe, c'est-à-dire non sujette au changement.

Les gains d'efficience statique se divisent en deux sous-catégories :

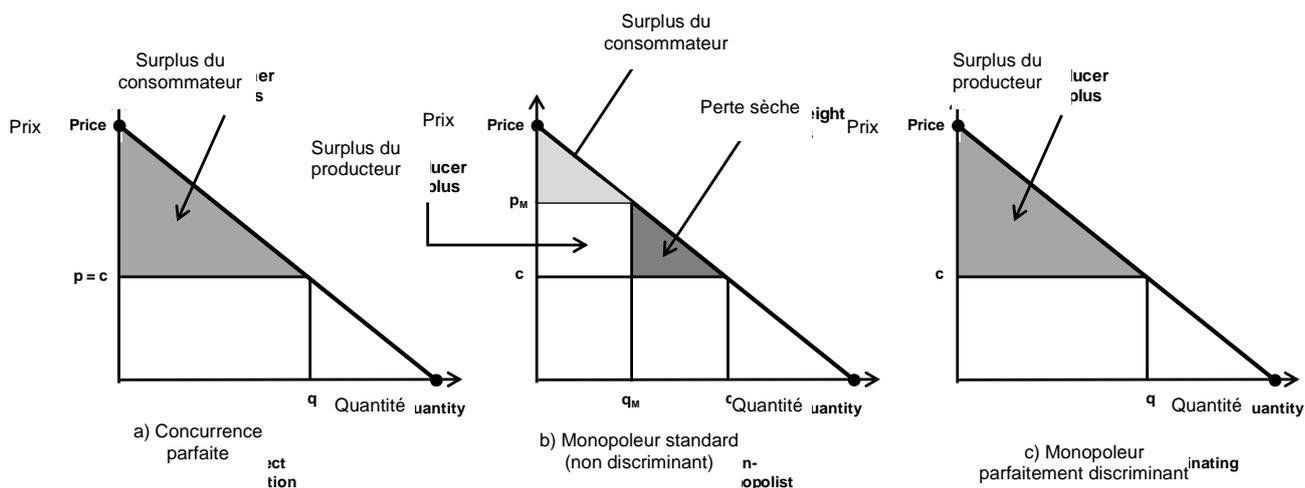
- les gains d'efficience allocative ; et
- les gains d'efficience productive (ou technique).

Un marché réalise des gains d'efficience allocative lorsque ses « processus conduisent à une répartition des ressources de la société selon leur valeur d'usage la plus élevée entre tous les usages concurrentiels » (Kolasky et Dick, 2003, p. 242) ou lorsque « tous les gains dérivant des échanges sont épuisés » (de la Mano, 2002, p. 11). Plus précisément, ces gains conduisent les entreprises à ajuster leur niveau de production de sorte qu'il se rapproche du point où le coût marginal est égal à la valeur que les consommateurs allouent à la dernière unité produite. Dans ce cas, les consommateurs acceptant de payer un prix au moins égal au coût marginal de production d'un bien sont approvisionnés. En outre, la quantité produite est optimale, et le bien-être social global (c'est-à-dire la somme du surplus du consommateur et du surplus du producteur) est maximisé.

Par exemple, sur un marché parfaitement concurrentiel, où les entreprises sont atomistiques et où leur conduite n'affecte pas le prix du marché, tous les consommateurs paient un prix exactement égal au coût marginal, et leur surplus est égal au bien-être social global (ce qui signifie que le surplus du producteur est égal à zéro).

Considérons plutôt un monopoleur incapable d'appliquer un traitement discriminatoire, qui facture donc le même prix à tous les consommateurs. Dans ce cas, les retombées sur le marché ne sont pas efficaces d'un point de vue allocatif, puisque certains consommateurs souhaitent payer un prix inférieur au prix fixé par le monopoleur, mais toujours supérieur au coût marginal du bien (de telle sorte qu'il est socialement efficace de produire une unité supplémentaire), mais ne sont toutefois pas approvisionnés. En d'autres termes, « *cette situation est inefficace d'un point de vue allocatif puisque des opportunités commerciales rentables persistent* » (de la Mano, 2002, p. 11). Il y a une raison à cela : si le monopoleur baissait son prix afin de vendre à ces consommateurs « marginaux » qui ne sont pas approvisionnés, il devrait faire de même pour tous les autres consommateurs « infra-marginaux », et une telle baisse ne serait pas rentable. Par conséquent, alors que les consommateurs comme le monopoleur bénéficient d'un surplus positif, le bien-être social global n'est pas maximisé et il existe une perte de bien-être dénommée « perte sèche ». En outre, la quantité de biens produits est inférieure à la quantité socialement optimale.

**Figure 1: Surplus du consommateur et du producteur dans trois scénarios de marché différents**



Toutefois, un monopole parfaitement discriminant est également un marché efficace d'un point de vue allocatif, puisque qu'il n'y a pas de perte de bien-être pour la société. Dans ce cas, le monopoleur est en mesure de facturer un prix différent à chaque consommateur. Plus particulièrement, chaque consommateur paie exactement le montant qu'il est prêt à payer pour le bien (même si ce montant est supérieur au coût marginal). Leur monopoleur extrait alors toute la rente de chaque consommateur, si bien que son surplus est égal au bien-être social global. La quantité de biens produite dans ce scénario est la même que dans le scénario de concurrence parfaite, bien que la répartition des richesses entre les consommateurs et le producteurs se trouve aux deux extrémités de la fourchette envisageable.

Ces trois scénarios de marché différents sont illustrés dans la figure ci-dessus. En particulier, le scénario b) fait apparaître la perte sèche, qui est égale à la surface du triangle gris foncé et mesure l'envergure de l'inefficacité allocative.

Comme nous le verrons dans le chapitre suivant, les fusions horizontales — entre des concurrents situés au même niveau de la chaîne d'approvisionnement — augmenteront le degré d'inefficacité allocative du marché en l'absence de réductions compensatoires des coûts ou d'autres types de gains

d'efficience. À l'inverse, les fusions verticales — entre des entreprises situées à différents niveaux de la chaîne d'approvisionnement — améliorent l'efficience allocative, p. ex. en évitant la double marginalisation.

L'efficience productive (ou technique) fait référence à la capacité d'une entreprise à produire une quantité *donnée* à un moment particulier à l'aide d'une combinaison des intrants nécessaires (p. ex. main-d'œuvre, capital, matières premières) qui minimise les coûts de production. En d'autres termes, si une entreprise est techniquement efficiente, il n'est pas possible de produire cette quantité donnée à un coût inférieur (même si plusieurs combinaisons d'intrants sont disponibles pour parvenir à ce résultat). On peut alors dire que l'entreprise fonctionne à la limite de ses capacités de production.

Encore une fois, il est généralement admis qu'un monopoleur est inefficent non seulement d'un point de vue allocatif, mais également technique. En effet, puisqu'un monopoleur n'est pas confronté à la concurrence d'entreprises rivales, ses dirigeants sont peu incités à minimiser les coûts de production — un principe connu sous le nom d'inefficience-X, introduit pour la première fois par Leibenstein (1966).

### 1.1.2 Gains d'efficience dynamique

Les gains d'efficience dynamique font référence à la capacité et aux incitations d'une entreprise à lancer de nouveaux produits ou processus de production (ou à améliorer ceux qui existent), c'est-à-dire à « repousser la frontière de l'efficience de production plus rapidement ou plus loin » (Motta, 2004, p. 55). Les gains d'efficience dynamique sont donc liés à l'innovation, à l'apprentissage par la pratique et à l'activité de recherche et de développement (R-D) ; ainsi, contrairement aux gains d'efficience statique, leurs effets se manifestent dans le temps.<sup>1</sup>

### 1.1.3 Gains d'efficience transactionnelle

Outre les gains d'efficience allocative, productive et dynamique, certains auteurs définissent une quatrième catégorie importante, les gains d'efficience transactionnelle.<sup>2</sup> Conformément aux principes de l'« économie des coûts de transaction », ces gains d'efficience permettent aux entreprises de réduire les coûts de transaction qu'elles supportent lorsqu'elles traitent avec leurs partenaires commerciaux, et favorisent ainsi la réalisation d'autres types de gains d'efficience.

Par exemple, les fusions et autres formes de coopération « approfondie » entre les entreprises (comme les coentreprises de recherche et de production) peuvent s'expliquer par la volonté d'obtenir des gains d'efficience transactionnelle. Cela se produit lorsque les entreprises préfèrent court-circuiter le marché et internaliser les transactions plutôt que de s'impliquer dans des contrats complexes, coûteux et difficiles à rédiger, exécuter et faire appliquer. En particulier, selon ce point de vue, la motivation sous-tendant la plupart des fusions verticales n'est pas seulement la recherche d'une meilleure efficience allocative (par l'élimination de la double marginalisation), mais plus souvent la réduction des coûts de transaction découlant du fait de ne plus avoir à se reposer sur des transactions de pleine concurrence. Comme le font remarquer Kolasky et Dick (2003, p. 251), « les coentreprises et la propriété commune peuvent contribuer à aligner les incitations des entreprises et à décourager le tirage au flanc, le parasitisme et les comportements opportunistes qui peuvent être très coûteux et difficiles à contrôler au moyen de transactions de pleine concurrence. »

<sup>1</sup> Pour un examen approfondi des gains d'efficience dynamique, voir OCDE (2007a), *Dynamic Efficiencies in Merger Analysis*, [DAF/COMP\(2007\)41](#).

<sup>2</sup> Voir Williamson (1977, section IV) et Kolasky et Dick (2003, pp. 249 - 251).

Plusieurs facteurs rendent impérieuse la recherche de gains d'efficacité transactionnelle. Par exemple, plus les interactions entre deux entreprises sont fréquentes (ou meilleure est la perspective qu'elles entretiendront une relation pérenne), plus l'éventualité de réduire les coûts de transaction par le biais d'une fusion est grande. De même, la présence d'actifs spécialisés, spécifiques à la transaction peut également pousser les entreprises vers une plus grande intégration afin d'éviter le risque de comportements opportunistes ou « hold-ups ». Il en va de même en cas d'incertitude ou d'informations incomplètes au sujet de la valeur des ressources dans le temps.

## **1.2 Arbitrages entre les différents types de gains d'efficacité**

Il est important de noter qu'il n'est pas possible de réaliser tous les types de gains d'efficacité en même temps. Plus particulièrement, de la Mano (2002) identifie les deux arbitrages suivants :

- Gains d'efficacité allocative contre gains d'efficacité productive ; et
- Gains d'efficacité statique contre gains d'efficacité dynamique.

Dans un contexte statique, il est fort possible que les fusions engendrant des économies (c'est-à-dire une hausse de l'efficacité productive) augmentent le prix payé par les consommateurs (ainsi, ces derniers sont dans une situation moins favorable et il y a accroissement de l'inefficacité allocative), bien qu'en même temps le bien-être augmente pour l'ensemble de la société (à savoir les consommateurs et les producteurs). C'est l'essence même du modèle d'arbitrage de Williamson (1968) (voir sous-section 2.2), qui montre qu'une fusion créant une situation de monopole peut améliorer le bien-être lorsqu'elle s'accompagne d'une réduction des coûts marginaux.

En ce qui concerne le second arbitrage (gains d'efficacité dynamique contre gains d'efficacité statique), il se peut que l'innovation soit plus importante dans certains secteurs ou industries lorsque les entreprises ont la possibilité d'acquérir une position monopolistique, temporairement du moins, et de facturer un prix supérieur au coût marginal pendant cette période.

Dans ces secteurs, la concurrence porte principalement sur les « courses » à l'innovation plutôt que sur la fixation des prix, dans le cadre d'un processus connu sous le nom de « rivalité schumpeterienne », d'après le nom de l'économiste Joseph Schumpeter, qui a cité l'innovation parmi les composantes essentielles des économies modernes. Dans le secteur pharmaceutique, par exemple, les entreprises sont en concurrence pour concevoir des médicaments innovants, qui peuvent ensuite être brevetés et protégés de la concurrence pendant plusieurs années. Pendant la période où le médicament est protégé par le brevet, les entreprises sont généralement en mesure de facturer un prix supérieur au prix de concurrence, ce qui leur permet de récupérer les coûts importants associés à la phase de recherche et de développement.

Par conséquent, une fusion créant une situation de monopole (ou susceptible de créer une position dominante) dans ces secteurs où la rivalité schumpeterienne prévaut, pourrait (du moins en principe) permettre aux entreprises parties à la fusion de rassembler des compétences et des actifs complémentaires (ou éviter un chevauchement des efforts de recherche), et de donner naissance à des produits innovants à long terme, bien que la concurrence par les prix puisse être étouffée à court terme. Dans ces situations, où les consommateurs peuvent être immédiatement affectés par les hausses de prix liées à la fusion, les autorités de la concurrence font face à une tâche difficile parce que les gains d'efficacité dynamique peuvent se produire avec un certain décalage, et sont difficiles à vérifier et à quantifier (voir sous-section 2.5). D'autre part, les gains d'efficacité dynamique ont le pouvoir de contrebalancer les réductions statiques de l'efficacité allocative et doivent donc faire l'objet d'une évaluation soignée.

### 1.3 *Objectifs en matière de droit de la concurrence : faut-il revoir les priorités ?*

Certains commentateurs — comme Porter (2001, 2002) — ont évoqué la nécessité de réévaluer la hiérarchie actuelle des objectifs en matière de droit de la concurrence. En particulier, Porter (2002) fait remarquer que bien qu'il soit important de préserver le bien-être des consommateurs à court terme, les avantages d'une concurrence saine sont en réalité bien plus importants.

La concurrence entraîne une croissance de la productivité par l'innovation et « la croissance de la productivité est essentielle car elle est le principal déterminant du bien-être des consommateurs à long terme, et du niveau de vie d'une nation » (Porter, 2002, p. 3). Toutefois, il affirme que cet élément manque dans l'analyse actuelle de la concurrence.

Si la croissance de la productivité doit être le nouvel objectif du droit de la concurrence, les considérations dynamiques devraient jouer un rôle plus prépondérant que les considérations statiques (comme les hausses du pouvoir de marché et les baisses d'efficacité technique), dont Porter (2002) affirme qu'elles ont dominé la politique antitrust des États-Unis jusqu'à présent. Par exemple, selon cette nouvelle perspective, la hausse des prix imputable à une fusion est problématique uniquement si elle n'est pas justifiée par des améliorations de la qualité et des services, parce que les améliorations de ce type augmentent également la productivité (malgré le niveau plus élevé des prix après la fusion).

À cet égard, citons l'exemple du marché de la santé (Coate, 2005). Les nouveaux traitements qui améliorent les résultats et sont appréciés des consommateurs survivants peuvent également accroître de manière substantielle le coût total du traitement. Pour l'analyste spécialiste du droit de la concurrence, une façon de concilier ces effets et d'évaluer correctement la création de valeur serait d'examiner le prix d'un produit ajusté en fonction de la qualité, plutôt que son prix seul.

Pour déterminer l'impact d'une fusion sur la croissance de la productivité, Porter (2002) suggère alors une approche dynamique fondée sur cinq « forces » : i) la menace de l'arrivée de nouveaux concurrents ; ii) la menace de produits ou services de substitution ; iii) le pouvoir de négociation des acheteurs ; iv) le pouvoir de négociation des fournisseurs ; et v) la rivalité entre les concurrents actuels. Dans la pratique, cette nouvelle approche s'attache moins à définir les marchés pertinents que l'analyse actuelle, et s'attaque directement à l'examen des effets concurrentiels. En outre, bien qu'elle prenne en compte la concentration du marché, elle accorde un poids égal à l'ensemble de ces cinq forces.

Fait peut-être étonnant, par rapport à d'autres stratégies de croissance des entreprises, l'adoption de la croissance de la productivité comme nouvelle norme de concurrence nécessite de faire preuve de plus de prudence lors du traitement des fusions. D'après Porter (2002), les raisons sont les suivantes : i) en éliminant les concurrents indépendants du marché, les fusions soulèvent inévitablement des problèmes de stabilité de la concurrence ; ii) une fusion n'améliore pas nécessairement la productivité, iii) certaines preuves empiriques montrent que les fusions tendent à échouer ; iv) les acquisitions ciblées, plus modestes, sont davantage susceptibles d'accroître la productivité que les fusions d'entreprises dominantes ; et v) de fortes pressions des marchés financiers favorisent les fusions au détriment des stratégies de croissance.

## 2. **Allégations d'efficacité dans les fusions**

### 2.1 *Introduction*

Les entreprises fusionnent pour diverses raisons. Le pouvoir de marché peut en être une : la fusion peut accroître la capacité des parties à augmenter les prix au-delà du coût marginal, soit de manière unilatérale, soit en coopération (explicite ou tacite) avec leurs concurrents. Certains dirigeants peuvent acquérir d'autres entreprises afin de servir leurs propres intérêts, p. ex. pour « fonder un empire » et améliorer leur réputation personnelle ou réduire le risque d'être évincés par des investisseurs extérieurs. Ou

parce qu'ils veulent tirer parti des imperfections des marchés de capitaux et y voient l'opportunité d'acheter des entreprises sous-évaluées. Toutefois, dans presque tous les cas, il est également suggéré que la fusion permet aux entreprises parties de réaliser certains gains d'efficacité, tels que des économies d'échelle et de gamme dans la production et la distribution, une rationalisation du personnel, des synergies financières (sous la forme d'une baisse du coût du capital) et autres synergies.<sup>3</sup>

Les gains d'efficacité peuvent jouer un rôle important dans les affaires de fusions non horizontales (c'est-à-dire verticales et conglomerates), ce qui est de nos jours explicitement reconnu par la plupart des organismes de contrôle de la concurrence.<sup>4</sup>

Une fusion verticale, c'est-à-dire entre des entreprises opérant à différents niveaux de la chaîne d'approvisionnement, permet, par exemple, l'internalisation de certaines externalités et l'alignement des incitations, en évitant le problème de « double marge ». <sup>5</sup> En outre, elle peut générer des gains d'efficacité productive, ainsi que des économies de coûts de transaction, p. ex. en améliorant la coordination entre les deux entreprises parties à la fusion et en éliminant le risque de comportement opportuniste. Dans une fusion conglomerate (où les entreprises n'entretiennent aucune relation horizontale ou verticale), les consommateurs peuvent bénéficier du « *one-stop shopping* », c'est-à-dire de la possibilité d'acheter une gamme ou un portefeuille de produits auprès d'un seul fournisseur plutôt que de les acheter en plusieurs fois chez différents fournisseurs.

Dans les fusions horizontales, l'accent est généralement mis sur la disparition de la concurrence directe entre les entreprises parties à la fusion sur le même marché pertinent, parce qu'elle est susceptible d'accroître le pouvoir de marché et de porter préjudice aux consommateurs. Ce n'est qu'après qu'Oliver Williamson a publié son article fondateur en 1968 qu'on a réalisé (comme expliqué dans la section suivante) qu'une baisse de l'efficacité allocative résultant d'un accroissement du pouvoir de marché pourrait parfaitement être compensée par une hausse de l'efficacité productive.<sup>6</sup> L'article de Williamson a alors ouvert la voie à une meilleure prise en compte des gains d'efficacité dans les procédures modernes de contrôle des fusions.

## 2.2 Arbitrage de Williamson

Williamson (1968) a été le premier à bousculer les idées de l'époque en suggérant que les gains d'efficacité (sous la forme d'économies) pourraient contrebalancer l'accroissement du pouvoir de marché découlant d'une fusion. Pour illustrer son propos, il a utilisé un exemple simple qu'il a qualifié de « modèle d'arbitrage naïf », décrit ci-dessous et par la figure 2.

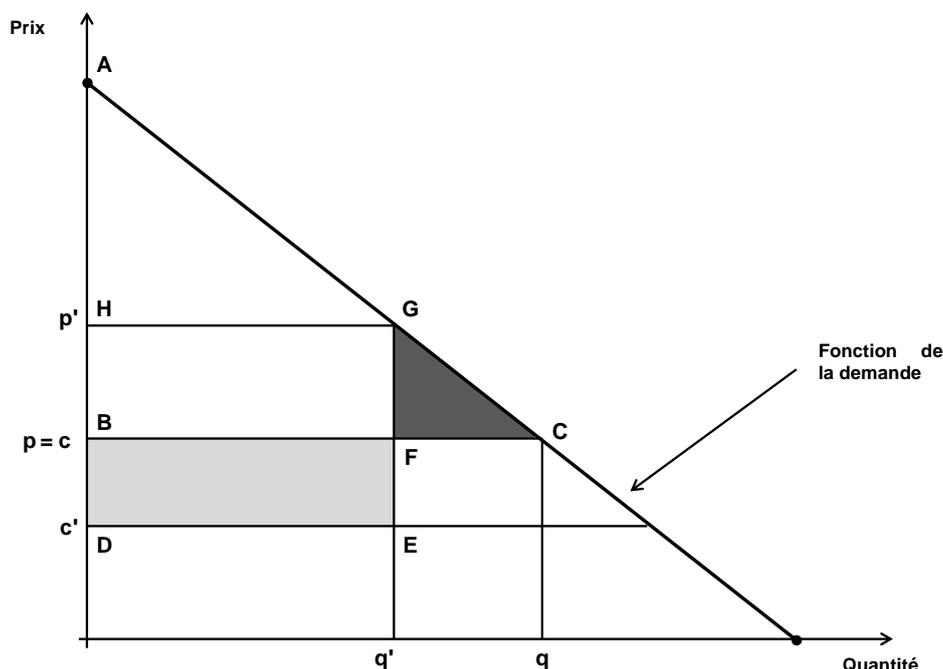
<sup>3</sup> Manifestement, les entreprises peuvent décider de fusionner pour un ensemble de raisons énumérées ci-dessus. Voir Trautwein (1990) et ses références pour une étude explicative des fusions, et Matsusaka (1993), qui examine les motifs des fusions ayant eu lieu pendant la vague de fusions conglomerates de la fin des années 1960 aux États-Unis. D'un point de vue plus général, les publications économiques ont également tenté d'expliquer deux faits stylisés concernant les fusions, à savoir pourquoi i) elles se produisent par vagues, le plus souvent en réponse à des chocs technologiques ou réglementaires, qui peuvent être difficiles à prédire ; et ii), au sein d'une vague, les entreprises se regroupent par secteur. À cet égard, voir Mitchell et Mulherin (1996) et la discussion dans Andrade, Mitchell et Stafford (2001).

<sup>4</sup> Voir, par exemple, le paragraphe 13 des Lignes directrices de la Commission européenne sur l'appréciation des concentrations non horizontales : « *les concentrations verticales et conglomerates permettent des gains d'efficacité substantiels.* »

<sup>5</sup> Voir OCDE (2007b).

<sup>6</sup> Cet arbitrage est purement statique. Pour le rôle des gains d'efficacité dynamique dans les fusions, voir OCDE (2007a).

Figure 2. Modèle d'arbitrage naïf de Williamson (1968)



Supposons qu'avant la fusion, le marché est dans une situation d'équilibre concurrentiel, le prix étant égal au coût marginal ( $p = c$ ). Dans ce cas, le bien-être social global correspond parfaitement au surplus du consommateur (parce que les bénéfices économiques des entreprises sont nuls) et est représenté par la surface du triangle ABC. Prenons maintenant pour hypothèse une fusion créant une situation de monopole. Imaginons qu'à la suite de cette fusion, le coût marginal tombe à  $c'$ ,<sup>7</sup> alors qu'au même moment, le prix augmente à  $p'$  (et la quantité produite baisse de  $q$  à  $q'$ ). Il convient de noter que, bien que le prix augmente effectivement, cette hausse est moindre que ce qu'elle aurait été en l'absence de diminution du coût marginal ; de même, la baisse de quantité est moindre que ce qu'elle aurait été en l'absence d'économies.

La fusion a deux effets opposés sur le bien-être, d'où l'arbitrage entre les gains d'efficacité et le pouvoir de marché.<sup>8</sup> La réduction du surplus du consommateur équivaut à la surface du trapèze HBCG, alors que le surplus du producteur passe de 0 à une somme équivalente à la surface du rectangle HDEG. Le bien-être social global qui en résulte correspond alors à la surface du trapèze ADEG, le rectangle HBFG étant un transfert des consommateurs vers les producteurs.

Pour savoir si la société dans son ensemble tire profit de la fusion, il convient alors de déterminer si le gain des producteurs est plus important que la perte subie par les consommateurs, à savoir si la surface du

<sup>7</sup> L'hypothèse standard du modèle set que ces coûts correspondent aux véritables coûts sociaux. En d'autres termes, les économies dues, par exemple, à un accroissement du pouvoir de monopsonie résultant de la fusion ne seraient pas considérées comme un gain social (Whinston, 2007).

<sup>8</sup> En théorie, même une fusion créant une situation de monopole peut engendrer une diminution des prix (et augmenter ainsi le bien-être social global) si les économies sont suffisamment importantes. Dans ce cas, il n'y aurait évidemment pas d'arbitrage entre les gains d'efficacité et le pouvoir de marché ; au contraire, la fusion entraînerait un gain net d'efficacité allocative. À cet égard, Williamson (1977, p. 707, note de bas de page n° 26) fait remarquer que « le pouvoir de marché apparaît comme une condition nécessaire mais non suffisante à l'existence d'effets indésirables sur les prix. » Demeure toutefois la question de savoir si un monopole est le meilleur moyen d'encourager les gains d'efficacité productive et dynamique.



### 2.3.1 Les États-Unis

À l'origine, la Cour suprême des États-Unis avait une opinion défavorable sur les gains d'efficience dans les affaires de fusion.<sup>9</sup> Par exemple, Williamson (1968, p. 19) fait remarquer qu'en 1962, « *la Cour a statué à l'unanimité dans l'affaire "Brown Shoe"*<sup>10</sup> *que non seulement les gains d'efficience ne constituaient pas une défense valable, mais que le fait de démontrer qu'une fusion avait engendré des gains d'efficience pouvait être utilisé pour la remettre en cause puisque les petits concurrents risquaient d'être désavantagés.* » En d'autres termes, il semble qu'à l'époque, on se préoccupait principalement du fait que les gains d'efficience engendrés par la fusion des entreprises pouvaient s'avérer désavantageux pour les petits concurrents (souvent inefficients). La Cour suprême a réaffirmé ce point de vue dans les affaires « *Philadelphia National Bank* » et « *Procter & Gamble* » de 1963 et 1967, respectivement.<sup>11</sup>

Toutefois, malgré ces précédents jurisprudentiels, les Lignes directrices sur les fusions publiées par le Département de la justice des États-Unis (DoJ) en 1968 ont autorisé les arguments de gains d'efficience pour justifier une fusion (*efficiency defence*), mais de manière restreinte.<sup>12</sup> Cela (ainsi que le fait que la Cour suprême ait autorisé les considérations d'efficience dans certaines affaires autres que les fusions, comme « *GTE Sylvania* »<sup>13</sup>) a encouragé les parties à la fusion à mettre en avant des allégations de gains d'efficience dans certains cas.

Autre étape importante vers l'intégration des gains d'efficience à l'analyse des fusions, la révision des Lignes directrices sur les fusions par le Département de la justice en 1984. Tout d'abord, les gains d'efficience sont devenus une composante à part entière de l'évaluation concurrentielle, ce qui signifie qu'ils ont cessé de servir de défense contre une présomption d'illégalité. Ensuite, les Lignes directrices sur les fusions de 1984 présentaient les critères qui allaient être utilisés pour évaluer les gains d'efficience, puis dressaient une liste exhaustive des types de gains d'efficience pris en compte par le Département de la justice.<sup>14</sup> Ces changements marquent une véritable rupture par rapport à l'approche adoptée par le

<sup>9</sup> La présente section s'appuie partiellement sur Kolasky et Dick (2003). Voir également Mueller (1996).

<sup>10</sup> *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

<sup>11</sup> *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963) ; *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>12</sup> Paragraphe 10 des lignes directrices de 1968 : « *sauf circonstances exceptionnelles, le Département n'acceptera pas comme justification d'une acquisition normalement susceptible d'être contestée en vertu de ses normes en matière de fusion horizontale l'allégation selon laquelle la fusion engendrera des économies (c'est-à-dire des améliorations de l'efficience) parce que, entre autres raisons, (i) le respect de ces normes par le Département se traduira généralement par une non-opposition aux fusions de nature à impliquer plus vraisemblablement des entreprises dont la taille est bien inférieure à celle nécessaire pour réaliser d'importantes économies d'échelle ; (ii) lorsqu'une entreprise est en mesure de réaliser des économies substantielles, ces dernières peuvent être normalement réalisées par le biais d'une croissance interne ; et (iii) il est généralement très difficile d'établir avec précision l'existence et l'ampleur des économies réputées découler d'une fusion.* »

Il convient de noter qu'en 1966 et 1967, Oliver Williamson était *Special Economic Assistant* auprès du Procureur général adjoint en charge de la division antitrust au Département de la justice.

<sup>13</sup> *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 35 (1977).

<sup>14</sup> Cf. section 3.5 des Lignes directrices sur les fusions de 1984 : « *les gains d'efficience vérifiables incluent, entre autres, la réalisation d'économies d'échelle, la meilleure intégration des installations de production, la spécialisation des usines, la baisse des coûts de transport et autres gains d'efficience similaires liés à des activités spécifiques de production, service ou distribution des entreprises parties à la fusion. Le Département peut également considérer que les gains d'efficience allégués résultent de la réduction des frais généraux de vente, d'administration et des coûts indirects, ou qu'ils n'ont pas de rapport avec les activités spécifiques de production, de service ou de distribution des entreprises parties à la fusion, bien que, dans la pratique, ces types de gains d'efficience puissent être difficiles à prouver.* »

Département de la justice seulement deux années auparavant (en 1982), lors de la publication d'une nouvelle série de Lignes directrices.<sup>15</sup> Dans le même temps, la *Federal Trade Commission* (FTC) s'est également appuyée sur les gains d'efficacité (et d'autres facteurs) pour autoriser (sous certaines conditions) une coentreprise de production entre General Motors et Toyota en 1984.

Les Lignes directrices de 1992 sur les fusions horizontales – qui pour la première fois ont été publiées conjointement par le DoJ et la FTC – ont laissé la section sur les gains d'efficacité quasi inchangée par rapport à la version de 1984, à une exception près, et non des moindres. En effet, la phrase stipulant que les gains d'efficacité ne seraient pas pris en compte à moins d'être prouvés par des « éléments clairs et convaincants » a été supprimée. Ce changement a contribué à une mise en avant plus fréquente des allégations de gains d'efficacité par les parties à la fusion.<sup>16</sup>

Toutefois, une révision majeure de la section relative aux gains d'efficacité a été effectuée en 1997, lorsqu'une approche cohérente avec celle de Williamson (1968) a été adoptée. En particulier, la révision de 1997 expliquait que les « gains d'efficacité générés par une fusion peuvent améliorer la capacité et l'incitation de l'entreprise partie à la fusion à entrer en concurrence, ce qui peut se traduire par une baisse des prix, une amélioration de la qualité, des services, ou de nouveaux produits » (article 4). Elle définit également les critères d'admission des gains d'efficacité en définissant les gains d'efficacité vérifiables comme des « gains d'efficacité directement liés à la fusion, qui ont été vérifiés et ne résultent pas d'une diminution anticoncurrentielle de la production ou des services. »

Enfin, la dernière version des lignes directrices, publiée en 2010, ne modifie pas de manière substantielle l'approche adoptée lors de la révision de 1997 (voir également la section 2.5). Toutefois, les lignes directrices de 2010 abordent les gains d'efficacité dynamique plus en détail et reconnaissent que « ces gains d'efficacité sont susceptibles d'encourager l'innovation mais pas d'affecter les prix à court-terme » (article 10). Elles avertissent également que « les économies de coûts de recherche et de développement peuvent être considérables et ne pas être pourtant considérées comme des gains d'efficacité vérifiables, parce qu'elles sont difficiles à vérifier ou résultent de réductions anticoncurrentielles des activités innovantes. »

En accord avec cette tendance, certaines affaires récentes examinées par le DoJ et la FTC concernaient dans une large mesure les gains d'efficacité.

En 2004, par exemple, la FTC a clôturé son enquête sur l'acquisition de Novazyme par Genzyme en 2001.<sup>17</sup> Ces entreprises étaient engagées dans la conduite d'études précliniques anticipées portant sur un

<sup>15</sup> Les Lignes directrices sur les fusions de 1982 avaient limité la prise en compte des allégations de gains d'efficacité aux « affaires extraordinaires » uniquement, un critère encore plus restrictif que les « circonstances exceptionnelles » utilisées dans les Lignes directrices de 1968. En outre, elles avaient « fait pencher la balance encore un peu plus en défaveur des gains d'efficacité en traitant ces derniers comme un moyen de défense affirmative, à l'instar de la doctrine de l'entreprise défaillante, et non comme une composante de l'analyse des effets concurrentiels menée par l'organisme de contrôle » (Kolasky et Dick, 2003, p. 203).

<sup>16</sup> Au fil du temps, les allégations de gains d'efficacité ont également été plus largement acceptées par les tribunaux ; voir, par exemple, *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Circuit 1991); *FTC v. Butterworth Health Corp.*, 121 F.3d 708 (6th Circuit 1997) ; *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Circuit 1999) ; et, pour une affaire n'impliquant pas le milieu hospitalier, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Circuit 2001).

<sup>17</sup> L'enquête s'est achevée par un vote 3-1-1, dont un vote dissident du Commissaire Thompson et une abstention du Commissaire Jones Harbour. Voir le communiqué de presse de la FTC en date du 13 janvier 2004 à l'adresse suivante : <http://www.ftc.gov/opa/2004/01/genzyme.shtm>.

traitement de la maladie de la Pompe — une maladie rare, souvent mortelle, affectant les nouveau-nés et les enfants, pour laquelle il n’existait pas de traitement efficace au moment de la fusion.

La principale inquiétude soulevée par la fusion était le risque qu’elle affecte négativement le rythme et la portée des recherches en vue de la mise au point d’un traitement contre la maladie de Pompe. Toutefois, la FTC n’a trouvé aucun élément prouvant que la fusion avait entraîné une réduction des dépenses de R-D dans le cadre du programme de Genzyme ou de celui de Novazyme, ou qu’elle avait ralenti la progression de la R-D. En fait, d’après (la majorité) des Commissaires de la FTC, tout portait à croire que la fusion engendrerait des bénéfices qui sauveraient la vie des patients. En particulier, le président de la FTC a fait remarquer que la fusion « *a rendu possible les expériences comparatives et a fourni des informations qui ont permis au programme Novazyme d’éviter de suivre des pistes infructueuses. En accélérant le programme Novazyme, la fusion est susceptible d’avoir amélioré ses chances de succès. En outre, la fusion a rendu possible des synergies qui permettront d’éviter que le programme Novazyme ne prenne du retard.* »<sup>18</sup>

De même, en mars 2008, le DoJ a décidé de ne pas s’opposer à la proposition de fusion entre XM Satellite Radio et Sirius Satellite Radio, deux opérateurs de radio par satellite.<sup>19</sup> L’autorité a noté que la fusion ne permettrait pas aux parties d’augmenter rentablement les prix, pour plusieurs raisons, parmi lesquelles : i) l’absence de concurrence entre les parties dans les segments importants (p. ex. la filière des constructeurs automobiles), même en l’absence de fusion ; ii) les autres services concurrents à disposition des clients, comme les traditionnels services AM/FM et HD ; iii) l’évolution technologique<sup>20</sup> attendue qui rendra ces autres services de plus en plus attractifs au fil du temps ; et iv) les gains d’efficacité susceptibles de découler de la transaction et de bénéficier aux consommateurs.

En ce qui concerne les gains d’efficacité, le DoJ indique que son enquête a confirmé que les parties étaient susceptibles de réaliser des économies substantielles de coûts variables et fixes par le biais de la fusion. Toutefois, il n’a pas été possible d’estimer avec précision l’ampleur de ces gains d’efficacité, faute d’éléments probants fournis par XM et Sirius. En outre, la plupart des gains d’efficacité allégués par les parties n’ont pas été validés ou n’ont pas été pris en compte parce qu’ils ne reflétaient pas les améliorations du bien-être économique, qu’ils auraient pu être obtenus même en l’absence de l’opération proposée, ou avaient peu de chances de se concrétiser dans les quelques années à venir.

Néanmoins, le DoJ a estimé que les économies de coûts variables — les plus susceptibles d’être répercutées sur les consommateurs sous la forme de baisses de prix — seraient substantielles. Par exemple, grâce à ces économies, les parties seraient en mesure de consolider leurs efforts de développement, de production et de distribution sur une seule gamme de radios, et donc d’éliminer les coûts faisant double emploi, et de réaliser des économies d’échelle. Selon le DoJ, ces gains d’efficacité peuvent suffire à eux seuls à remettre en question les soupçons d’atteinte à la concurrence.

Toutefois, dans une autre affaire en date de 2000-2001 (*FTC v. H.J. Heinz Co. et Milnot Holding Corporation*), les allégations de gains d’efficacité ont été rejetées.

<sup>18</sup> Déclaration du président Timothy J. Muris dans l’affaire « *Genzyme Corporation / Novazyme Pharmaceuticals* », disponible à l’adresse suivante : [www.ftc.gov/os/2004/01/murisgenzymestmt.pdf](http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf).

<sup>19</sup> Voir le communiqué de presse du DoJ en date du 24 mars 2008 à l’adresse suivante : [http://www.justice.gov/atr/public/press\\_releases/2008/231467.htm](http://www.justice.gov/atr/public/press_releases/2008/231467.htm)

<sup>20</sup> En effet, les réseaux sans fil de prochaine génération rendront possible la diffusion de la radio via Internet sur les appareils mobiles.

La fusion aurait réuni les deuxième et troisième plus gros producteurs de petits pots pour bébé, sachant qu'à l'époque de la proposition de fusion, Heinz et Beech-Nut – qui détenaient respectivement 17 et 15 % des parts de marché – étaient beaucoup plus petits que Gerber, numéro un avec plus de 65 % de parts de marché. La principale préoccupation de la FTC était que cette fusion de « 3 à 2 » aurait réduit la concurrence en gros et que cela aurait entraîné une hausse des prix tant au niveau des détaillants que des grossistes. En outre, l'entrée d'un nouveau concurrent susceptible de remettre en question le pouvoir de marché accru des parties après la fusion est apparue « difficile et improbable » en présence de barrières importantes.

À leur tour, les parties à la fusion ont affirmé que la transaction aurait engendré des économies directement liées à la fusion (principalement des gains d'efficacité productive) de l'ordre de 9.4 millions à 12 millions USD. En particulier, la consolidation de la production d'aliments pour bébé dans l'usine moderne de Heinz, à Pittsburgh, et la fermeture de l'usine obsolète de Beech-Nut à Canajoharie, dans l'État de New York, auraient permis une réduction des coûts variables d'environ 43 % (découlant principalement des économies de salaires et de coûts d'exploitation et de la réduction du coût de conversion des matières premières, de réduction des déchets et de consolidation des frais de gestion). Ce type de gains d'efficacité est explicitement reconnu dans les Lignes directrices des États-Unis sur les fusions horizontales, qui affirment à la section 4 que « *les gains d'efficacité résultant d'un transfert de production entre des installations appartenant auparavant à des propriétaires distincts [...] permettent à l'entreprise fusionnée d'abaisser ses coûts en produisant une quantité et une qualité données que l'une ou l'autre des entreprises aurait pu obtenir sans la transaction proposée.* » En outre, les parties ont mis en évidence des gains d'efficacité en ce qui concerne la distribution, notamment une réduction de 15 % de la distribution des produits Beech-Nut.

La FTC a avancé l'argument selon lequel les gains d'efficacité allégués étaient peu susceptibles de contrebalancer les effets anticoncurrentiels de la fusion. Par ailleurs, ils n'étaient pas vérifiables dans la mesure où ils auraient pu être obtenus par d'autres moyens. Toutefois, le tribunal fédéral de première instance (*District court*) s'est rangé du côté des parties en acceptant leurs allégations, et a rejeté la demande d'injonction préliminaire de la FTC.<sup>21</sup>

La FTC a fait appel de cette décision, et la Cour d'appel a annulé la décision du tribunal.<sup>22</sup> Plus particulièrement, la Cour d'appel a déclaré que les preuves acceptées par l'instance inférieure étaient insuffisantes puisqu'elles ne répondaient pas aux critères « nécessaires à une défense efficace fondée sur les gains d'efficacité dans les circonstances de cette affaire ». La Cour a identifié trois défaillances majeures. Tout d'abord, le tribunal fédéral aurait dû prendre en compte la réduction du coût variable total de production plutôt que de tenir simplement compte du coût de conversion variable, qui ne représente qu'un faible pourcentage du précédent. Une telle différence a des conséquences non négligeables puisqu'elle « divise par deux le gain d'efficacité estimé », de 43 à 22.3 %. Deuxièmement, le tribunal fédéral aurait dû prendre en compte la réduction par rapport à la production des deux entreprises fusionnées, plutôt qu'à la seule production de Beech-Nut. Enfin, le tribunal fédéral n'a pas expliqué pourquoi Heinz n'avait pas pu réaliser les gains d'efficacité allégués par d'autres moyens que la fusion. À la suite de ce jugement, les parties ont finalement décidé de renoncer à la fusion.

### 2.3.2 L'Union européenne

Le Règlement n° 4064/89 du Conseil en date du 21 décembre 1989, qui a réglementé l'appréciation des fusions par la Commission européenne jusqu'en 2004, ne contenait aucune disposition spécifique relative aux allégations de gains d'efficacité.

<sup>21</sup> *FTC v. H.J. Heinz Co. et al*, 116 F. Supp. 2d 190 (2000).

<sup>22</sup> *FTC v. H.J. Heinz Co. et Milnot Holding Corporation*, 246 F. 3d 708 (2001).

Par conséquent, l'option la plus viable (et probablement la seule) pour les entreprises parties à la fusion souhaitant mettre en avant des allégations de gains d'efficacité semble être de se référer à l'article 2(1)(b) du Règlement 4064/89, qui dispose que la Commission doit tenir compte (parmi d'autres facteurs) « *de l'évolution du progrès technique et économique pour autant que celle-ci soit à l'avantage des consommateurs et ne constitue pas un obstacle à la concurrence* » lorsqu'elle apprécie les concentrations.

Ce n'est pas une trajectoire aisée, et effectivement, la pratique décisionnelle de la Commission à cette période n'était pas favorable aux allégations de gains d'efficacité. Lors de ces premières décisions, la Commission a énuméré un certain nombre de conditions, p. ex. que les gains d'efficacité devaient être substantiels, découler directement de la fusion et être répercutés sur les consommateurs, la charge de la preuve revenant aux parties à la fusion.<sup>23</sup> Dans certains autres cas, toutefois, la Commission a adopté une attitude plus hostile en affirmant que les gains d'efficacité allégués contribuaient à créer ou à renforcer une position dominante et devaient donc être considérés comme une preuve que la proposition de concentration était anticoncurrentielle. Il est apparu à certains commentateurs que dans la pratique, la Commission avait tendance à retourner les arguments d'efficacité contre la fusion (« *efficiency offence* »).<sup>24</sup>

À l'inverse, dans le Règlement n° 139/2004 du Conseil, en date du 20 janvier 2004, qui annule et remplace le Règlement 4064/89, les gains d'efficacité jouent un rôle plus important, voire décisif, dans l'appréciation des fusions. En particulier, le considérant 29 du préambule dispose qu'« *il convient de tenir compte des gains d'efficacité probables démontrés par les entreprises concernées. Il est possible que les gains d'efficacité résultant de la concentration contrebalancent les effets sur la concurrence, et notamment le préjudice potentiel pour les consommateurs, qu'elle aurait sinon pu avoir et que, de ce fait, celle-ci n'entrave pas de manière significative une concurrence effective dans le marché commun.* »<sup>25</sup> De même, les Lignes directrices sur l'appréciation des concentrations horizontales publiées par la Commission à peine quelques semaines plus tard contiennent une section spécifique sur les gains d'efficacité (voir la section 2.5 pour un résumé des principales dispositions).<sup>26</sup> Plus récemment, en 2008, la Commission a confirmé une fois de plus le rôle des gains d'efficacité dans l'appréciation des fusions, dans le contexte des fusions non horizontales.<sup>27</sup>

Dans la pratique, la Commission européenne n'a approuvé à ce jour aucune fusion sur la seule base des gains d'efficacité. Ces derniers, toutefois, ont fait l'objet d'un débat dans un certain nombre de fusions ; et dans certaines affaires, les mesures correctives acceptées par la Commission peuvent avoir contribué à la réalisation de gains d'efficacité. Ci-dessous un résumé de l'approche de la Commission dans une affaire récente de fusion horizontale (« *Ryanair / Air Lingus* ») et deux affaires de fusion non horizontale (« *TomTom / TeleAtlas* » et « *Nokia / Navteq* »).

<sup>23</sup> Voir Fackelmann (2006, section 3.2) pour un tour d'horizon des premières décisions de la Commission, notamment : *Aerospatiale-Alenia / de Havilland* (affaire IV/M.053) en 1991 ; *ACCOR / Wagon-Lits* (affaire IV/M.126) en 1992 ; et *Saint-Gobain / Wacker-Chemie / NOM* (affaire IV/M.774) en 1997.

<sup>24</sup> Voir, par exemple : *AT&T / NCR* (affaire IV/M.50) en 1991, *MSG Media Service* (affaire IV/M.469) en 1994, *Nordic Satellite Distribution* (affaire IV/M.490) en 1996, *De Beers / LVHM* (affaire IV/M.2333) en 2003, et notamment *General Electric / Honeywell* (affaire IV/M.2220) en 2004, qui montrent bien l'ampleur des divergences entre les approches de l'Europe et des États-Unis à l'époque.

<sup>25</sup> Toutefois, comme Fackelmann (2006, p. 21) le fait remarquer, les gains d'efficacité en tant que tels ne sont pas mentionnés dans la partie juridiquement contraignante du Règlement 139/2004. En outre, la formulation de l'article 2(1)(b) est la même que dans le Règlement 4064/89.

<sup>26</sup> Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises, J.O. [2004] C 31/5.

<sup>27</sup> Lignes directrices sur l'appréciation des concentrations non horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises, J.O. [2008] C 265/6.

- Gains d'efficience dans l'affaire « Ryanair / Aer Lingus »<sup>28</sup>

Ryanair et Aer Lingus sont les principales compagnies aériennes opérant au départ de l'Irlande. Elles se livrent concurrence sur 35 lignes (au moment de la proposition de fusion). La Commission européenne a constaté que la fusion aurait abouti à une situation de monopole pour 22 de ces liaisons, et que l'entité issue de la fusion aurait détenu une part de marché supérieure à 60 % sur les 13 lignes restantes.

Ryanair a affirmé que la fusion permettrait des gains d'efficience significatifs, issus principalement d'une « réduction des dépenses d'exploitation », résultant : i) d'une augmentation de taille ; et ii) d'une rationalisation au sein d'Aer Lingus, une fois que le modèle commercial de Ryanair (et son expertise en matière de réduction des coûts et d'accroissement des gains d'efficience) lui serait appliqué (y compris par le biais d'une gestion améliorée et plus innovante). Ces économies seraient réalisées dans plusieurs domaines, tels que les coûts de personnel, les frais afférents à la propriété des appareils, les frais de maintenance, les frais d'aéroport et les coûts de l'exploitation au sol, les ventes accessoires et enfin, l'efficacité de la distribution.

La Commission a toutefois identifié des affirmations erronées et des imprécisions dans les estimations de Ryanair et a rejeté ses allégations, principalement parce qu'elles n'étaient pas vérifiables.

- Gains d'efficience dans les affaires « TomTom / TeleAtlas » et « Nokia / Navteq »<sup>29</sup>

À l'époque de la proposition de fusion, TomTom était l'un des principaux fournisseurs d'appareils de navigation portables (ANP) et de logiciels de navigation, et a décidé de procéder à une intégration en amont en rachetant un fournisseur de bases de données de cartographie numérique destinées à la navigation, TeleAtlas.

Les parties ont affirmé que la fusion les aiderait à éliminer les doubles marges, leur permettant ainsi d'augmenter de manière rentable les ventes d'ANP. Toutefois, les gains d'efficience associés à l'élimination des doubles marges posent problème : en effet, ils ne sont pas toujours directement imputables à la fusion. À cet égard, les Lignes directrices sur l'appréciation des concentrations non horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises expliquent que « *le problème de la double marge commerciale n'existe pas toujours ou n'est pas toujours lourd de conséquences avant l'opération de concentration, par exemple parce que les parties à la concentration avaient déjà conclu un accord de fourniture prévoyant un mécanisme de fixation des prix par lequel des remises sur volumes éliminent la marge commerciale*<sup>30</sup> ». Dans l'affaire « TomTom / TeleAtlas », toutefois, la Commission disposait d'éléments prouvant qu'il était improbable de générer les mêmes effets bénéfiques d'une autre manière, et a donc conclu que les gains d'efficience allégués étaient directement imputables à la fusion.

Des arguments similaires ont été examinés dans l'affaire « Nokia / Navteq », qui impliquait également une intégration en amont. Cette fois, Nokia, présente sur le marché en aval de la fourniture de téléphones mobiles, a acquis Navteq, un fournisseur de cartes numériques destinées à la navigation.

Comme dans l'affaire « TomTom / TeleAtlas », la Commission a considéré que les gains d'efficience résultant de l'internalisation des doubles marges sont directement imputables à la

<sup>28</sup> Affaire COMP/M.4439, *Ryanair / Aer Lingus* [2007].

<sup>29</sup> Affaire COMP/M.4854, *TomTom / TeleAtlas* [2008] et COMP/M.4942, *Nokia / Navteq* [2008].

<sup>30</sup> Note de bas de page n° 7 du para. 55.

fusion. Contrairement à l'affaire précédente, toutefois, la Commission n'a pas pu s'appuyer sur les contrats existants pour conclure que les mêmes effets n'auraient pas pu être obtenus en l'absence de fusion. C'est parce qu'à l'époque, la fourniture de services de navigation sur les téléphones mobiles était une activité nouvelle. Néanmoins, la Commission a considéré que la « *structure des prix en matière de ventes de bases de données cartographiques numériques pour applications mobiles n'est pas fondamentalement différente de celle pratiquée sur le marché des appareils de navigation portables* » (paragraphe 368).

Dans l'affaire « *TomTom / TeleAtlas* », les parties à la fusion ont également affirmé qu'en utilisant les données collectées par TomTom, le processus d'élaboration des cartes s'améliorerait après la fusion. Par conséquent, la nouvelle entité pourrait produire des « cartes de meilleure qualité— plus rapidement ». La Commission a convenu que le gain d'efficacité allégué profiterait aux consommateurs, mais ne savait pas s'il était directement imputable à la fusion et vérifiable. Une estimation précise des gains d'efficacité allégués, toutefois, n'a pas été nécessaire puisque la transaction proposée n'engendrait pas d'effets anticoncurrentiels.

### 2.3.3 *Tendances actuelles et affaires récentes dans d'autres pays*

Les allégations de gains d'efficacité n'ont jamais tenu une place de choix dans l'analyse des fusions, comme résumé ci-dessus. De nos jours, toutefois, un nombre croissant de pays intègrent des considérations d'efficacité dans les lignes directrices relatives aux fusions publiées par les autorités nationales de la concurrence, et les gains d'efficacité sont souvent explicitement reconnus dans les lois nationales sur la concurrence. Par exemple, la loi coréenne sur la réglementation des monopoles et l'équité des pratiques commerciales dispose qu'une fusion susceptible d'amoindrir considérablement la concurrence sur un marché pertinent spécifique peut néanmoins être autorisée lorsque « l'amélioration de l'efficacité susceptible d'être obtenue par le biais de la fusion est supérieure à l'effet anticoncurrentiel. »

En outre, même si le nombre d'affaires pour lesquelles une décision a été prise sur la base des gains d'efficacité continue d'être faible, les parties à la fusion mettent de plus en plus en avant les allégations de gains d'efficacité, et à quelques occasions les gains d'efficacité ont effectivement occupé une place importante dans le débat.

En outre, le plus souvent, les parties à la fusion affirmeront que la fusion génère des gains d'efficacité du côté de l'offre, c'est-à-dire des gains d'efficacité leur permettant de baisser les coûts de production et donc leur prix (voir également l'annexe). Ce type de gains d'efficacité est relativement difficile à prouver, comme nous l'avons vu.

Les gains d'efficacité du côté de la demande — associés aux produits complémentaires — peuvent à l'inverse être plus faciles à prouver, parce qu'il est dans l'intérêt même des parties de baisser les prix (ce qui leur permet de maximiser leurs profits). Le mécanisme est le suivant : la baisse du prix d'un produit augmente la demande de tous les produits proposés par l'entité fusionnée (puisque les produits sont des compléments), ce qui augmente les profits.

Cette logique a récemment été appliquée à une fusion de stations de radio au Royaume-Uni, comme évoqué dans l'encadré 1 ci-dessous.

**Encadré 1 : gains d'efficacité du côté de la demande dans le cadre de la fusion de stations de radio au Royaume-Uni**

En août 2008, l'Office of Fair Trading (OFT) du Royaume-Uni a approuvé l'acquisition de GCap Media par Global Radio UK pour l'agglomération londonienne (*Greater London Area*). Bien que les gains d'efficacité ne fussent pas la seule raison pour laquelle l'OFT a décidé d'approuver la fusion dans cette région, ils ont « fait pencher la balance en faveur d'une approbation à Londres ». C'est la première décision dans laquelle l'OFT s'appuie sur les gains d'efficacité pour conclure que l'acquisition ne portera pas préjudice aux consommateurs.

Au Royaume-Uni, les gains d'efficacité peuvent être pris en compte lorsque : i) ils évitent les effets indésirables liés à une réduction sensible de la concurrence (RSC) en augmentant la rivalité ; ou ii) ils n'empêchent pas une RSC mais seront néanmoins répercutés après la fusion sous la forme d'avantages pour les consommateurs, qui compensent les effets indésirables découlant de la RSC. Les critères pertinents sont essentiellement les mêmes que ceux de la Commission européenne, c'est-à-dire que les gains d'efficacité doivent être démontrables, directement imputables à la fusion et susceptibles d'être répercutés sur les consommateurs.

Dans l'affaire « *Global / GCap* », l'OFT a trouvé des éléments prouvant de manière incontestable un certain type de gains d'efficacité du côté de la demande, connus sous le nom d'effets Cournot. Ils se produisent lorsque les produits sont des compléments. Ainsi, la baisse du prix d'un des produits entraîne un accroissement de ses ventes mais également de celles des produits qui l'accompagnent (mais ne le remplacent pas). La propriété conjointe (p. ex. par le biais d'une fusion) permet alors d'internaliser l'effet positif de la baisse du prix d'un produit sur les ventes de ses compléments. En d'autres termes, comme dans les fusions verticales, la propriété conjointe résout le problème des doubles marges et favorise l'efficacité allocative.

Dans cette affaire spécifique, après la fusion, les parties seraient en mesure de fixer le prix des offres groupées de leurs stations de radio londoniennes complémentaires<sup>31</sup> plus efficacement (du point de vue des annonceurs) que si chacune des parties vendait de l'espace publicitaire indépendamment sur une ou plusieurs de ses radios.

L'OFT a également accordé un certain crédit à la proposition selon laquelle dans un marché dual comme celui de la radio, les gains d'efficacité supplémentaires du côté de la demande pourraient résulter d'un repositionnement du produit des stations de radio londoniennes après la fusion. En particulier, en changeant le format et/ou la programmation après la fusion, les stations de radio des parties parviendraient individuellement à une meilleure spécialisation démographique, et, au final, à une audience totale plus importante et plus ciblée. Ces effets de réseau indirects augmenteraient à leur tour la valeur du temps d'antenne pour les annonceurs. Cet argument, comme l'a souligné l'OFT, est soutenu à la fois par la théorie économique et par les preuves empiriques concernant le secteur de la radiodiffusion dans d'autres pays.

L'OFT a noté que les deux types de gains d'efficacité amélioreraient l'offre des parties destinée aux auditeurs et aux annonceurs, et que l'on pourrait considérer qu'ils accentuent la rivalité. Les concurrents des parties seraient en effet obligés d'améliorer leur offre commerciale pour gagner et fidéliser les clients ayant bénéficié de la fusion. Par conséquent, la fusion améliorerait la rivalité globale et profiterait aux clients dans l'agglomération de Londres, bien que les parties à la fusion ne soient plus concurrentes.

En conclusion, il convient de noter que bien que l'OFT ait accepté les allégations d'efficacité en ce qui concerne l'agglomération londonienne, elle a constaté que ces allégations ne correspondaient pas au niveau de preuve requis dans l'East Midlands. Elles ont donc été rejetées.<sup>32</sup>

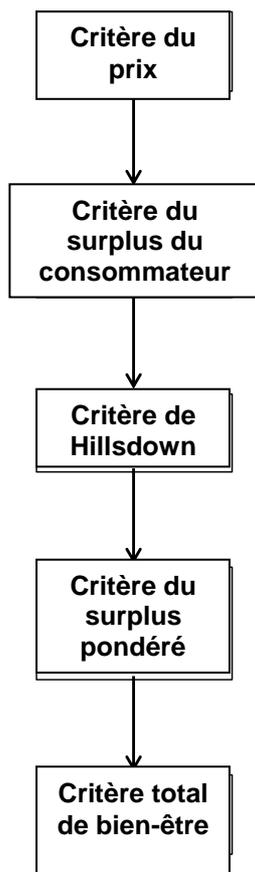
<sup>31</sup> L'OFT a noté que bien que la fusion entre Global Radio UK et GCap Media soit horizontale dans une certaine mesure (parce qu'il s'agit de la fusion de propriétaires de stations de radio de l'agglomération londonienne qui sont substituables les unes aux autres à un certain degré), les stations respectives des parties sont davantage complémentaires que substituables. Puisque les annonceurs achètent souvent du temps d'antenne auprès de plusieurs stations londoniennes dans le cadre d'une offre groupée pour assurer une couverture maximale de leurs campagnes, la fusion horizontale s'apparente donc davantage à une fusion conglomerale.

<sup>32</sup> Dans cette affaire, l'OFT a également pris en compte les gains d'efficacité renforçant la rivalité du côté de l'offre, à savoir les économies de coûts fixes et variables. Toutefois, elle a constaté que les économies de

## 2.4 Critères de bien-être et allégations de gains d'efficience

L'évaluation des gains potentiels d'efficience dans l'analyse des fusions est largement dépendante des critères de bien-être appliqués par une autorité spécifique de la concurrence. Les critères de bien-être les plus courants proposés dans les publications et utilisés sont décrits brièvement ci-dessous. Comme dans Renckens (2007), l'ordre (voir figure 4 ci-dessous) est croissant en fonction du poids accordé au surplus du producteur et du rôle joué par les allégations d'efficience.

**Figure 4. Critères de bien-être, classés en fonction du poids attribué au surplus du producteur**



### 2.4.1 Critère du prix

En vertu de ce critère, une fusion entraînant une augmentation des prix ne sera pas approuvée. Toutefois, il ne ressort pas toujours clairement des publications si les gains d'efficience peuvent être pris en compte. Par exemple, une distinction peut être faite entre un critère de prix *pur* (qui ne tient pas compte des gains d'efficience, même s'ils sont suffisamment importants pour contrebalancer toute hausse des prix imputable à la fusion), et un critère de prix *modifié*, en vertu duquel une fusion est approuvée si elle donne lieu à des gains d'efficience susceptibles de compenser une hausse des prix après la fusion.

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coûts variables n'étaient pas prouvées, alors que les importantes économies de coûts fixes alléguées par les parties ne pouvaient manifestement pas être répercutées sur les consommateurs.

#### 2.4.2 Critère du surplus des consommateurs (SC)

La différence entre ce critère et le critère de prix modifié évoqué ci-dessus n'est pas toujours bien définie dans les publications. Pour résumer, une fusion qui réduit le surplus du consommateur ne sera pas approuvée. Au sens large du critère, les gains d'efficacité ainsi que les considérations non liées au prix (p. ex. celles liées à la qualité, au choix des produits et à l'innovation) peuvent être pris en compte pour compenser une augmentation des prix consécutive à la fusion. Parmi les entités qui s'appuient sur ce critère, on trouve la Commission européenne, le Royaume-Uni, les États-Unis<sup>33</sup>, la Finlande et l'Irlande.

#### 2.4.3 Critère de Hillsdown

Contrairement aux critères précédents, ce critère – qui tire son nom d'une affaire canadienne du début des années 1990<sup>34</sup> – prend en compte à la fois le surplus du consommateur et le surplus du producteur. Selon ce critère, une fusion est approuvée uniquement si les gains d'efficacité qu'elle génère sont supérieurs à la baisse totale du surplus du consommateur.

En d'autres termes, bien que le surplus du producteur soit pris en compte, il a moins de poids que le surplus du consommateur. Ce critère est rarement appliqué dans la pratique, parce qu'il est difficile à mettre en œuvre et est également incohérent en interne puisque « *il autoriserait certaines fusions qui dégraderaient la situation des consommateurs, et ferait obstacle à certaines fusions positives pour la société* » (de la Mano, 2002, p. 23).

#### 2.4.4 Critère du surplus pondéré (SP)

Évoqué pour la première fois dans l'affaire canadienne « *Superior Propane* » (voir ci-dessous), ce critère nécessite que les autorités de la concurrence déterminent elles-mêmes le poids qu'elles accordent aux deux composantes du bien-être social global, à savoir le surplus du consommateur et le surplus du producteur, même au cas par cas. Une fusion n'est alors approuvée que si la somme pondérée du surplus du consommateur et du producteur est positive. Bien que ce critère reconnaisse explicitement les gains des producteurs (et que rien n'exige qu'ils soient répercutés sur les consommateurs), ils se voient généralement accorder moins de poids que les intérêts des consommateurs. Se pose également la question de la sécurité juridique eu égard aux poids devant être utilisés pour évaluer le surplus du consommateur et du producteur.

#### 2.4.5 Critère du surplus total (ST)

Le critère du surplus total attribue un poids égal au surplus du consommateur et du producteur. Cela signifie qu'une fusion entraînant une hausse des prix peut encore être approuvée si les gains d'efficacité profitant aux producteurs sont plus importants que la perte sèche subie par les consommateurs. En d'autres termes, non seulement les gains d'efficacité sont autorisés même s'ils ne sont pas répercutés sur les

<sup>33</sup> Bien qu'il y ait eu débat quant à savoir quel critère de bien-être est effectivement appliqué par les autorités de la concurrence aux États-Unis, il est aujourd'hui communément admis que les États-Unis s'appuient sur le critère du bien-être des consommateurs. Le juge Frank Easterbrook, par exemple, a observé que : « *le choix [qui s'est offert au Congrès] était soit de laisser les consommateurs à la merci des trusts, soit d'autoriser les juges à les protéger. Quelle que soit la période de l'histoire législative, le thème dominant est la protection des consommateurs contre les surcoûts* » (Easterbrook, 1986).

<sup>34</sup> Hillsdown Holdings Ltd. A acquis Ontario Rendering Company Ltd en juillet 1990. Le Commissaire de la concurrence a contesté la fusion en affirmant qu'elle entraînait une réduction sensible de la concurrence sur le marché non captif de l'équarrissage de la viande rouge dans le sud de l'Ontario. Le Tribunal, toutefois, n'a pas été convaincu et a autorisé la fusion en affirmant que l'article 96 de la Loi canadienne sur la concurrence suggère de prendre en compte les transferts de richesse ainsi que les pertes sèches dans l'analyse des arbitrages entre les gains d'efficacité et l'accroissement du pouvoir de monopole.

consommateurs (à l'instar du critère de Hillsdown et du surplus pondéré), mais les transferts de richesse des consommateurs vers les producteurs sont également complètement neutres (du fait que le surplus du consommateur et le surplus du producteur se voient attribuer le même poids).

Le critère de bien-être total est souvent défendu par les économistes, qui avancent que les autorités de la concurrence ne devraient pas prendre en compte les effets redistributifs des fusions du fait que : i) ces effets sont difficiles à évaluer ; et ii) les avantages des consommateurs et des producteurs méritent tout autant les uns que les autres d'être protégés. Dans la pratique, toutefois, quelques autorités de la concurrence, de la Norvège et du Canada notamment, recourent à ce critère aujourd'hui.<sup>35</sup>

#### 2.4.6 *Surplus pondéré et total au Canada : l'affaire « Superior Propane »*

Le Canada fournit un exemple de débat intéressant sur la question de savoir quel critère devrait être utilisé pour évaluer les fusions, et plus particulièrement, un critère de surplus pondéré ou total. Ce débat a été initié par l'affaire « *Superior Propane* ».

En décembre 1998, Superior Propane acquiert toutes les actions de son principal concurrent, ICG Propane, ce qui se traduit par la fusion des deux plus grandes entreprises canadiennes actives sur le marché de la distribution du propane et des équipements connexes. Suite à cette fusion, la part de marché de la nouvelle entité atteint environ 70 %.

Après l'acquisition, le Commissaire de la concurrence présente une demande au Tribunal de la concurrence afin d'obtenir une ordonnance de dissolution de la fusion ou toute autre mesure corrective visant à empêcher une « réduction sensible de la concurrence ». Le Tribunal a rendu sa première décision en août 2000, rejetant la demande du Commissaire et autorisant la fusion.

Dans sa décision, le tribunal était d'accord avec le Commissaire pour dire que la fusion était susceptible de réduire sensiblement la concurrence sur le marché. Toutefois, le tribunal a également accepté les allégations de gains d'efficacité soumises par les parties, et a conclu que ces gains seraient plus importants que les effets anticoncurrentiels et les compenseraient. En particulier, sur la base des preuves soumises, le Tribunal a constaté que bien que la hausse des prix entraînerait une perte sèche pour l'économie de l'ordre de 6 millions CAD par an environ, la fusion se traduirait par d'importantes économies liées aux gains d'efficacité, de l'ordre de 29.2 millions CAD par an. La plupart des gains d'efficacité allégués par Superior Propane étaient de nature productive. Les gains d'efficacité dynamique, en revanche, ont été rejetés, car ils ont été considérés comme trop spéculatifs.

Pour pondérer les effets anticoncurrentiels, le tribunal s'est appuyé sur le critère du surplus total. De l'avis du tribunal, ce critère est correct pour deux raisons. Tout d'abord, il est cohérent avec l'avis des économistes quant à la bonne méthode pour estimer les effets. Ensuite, il est conforme à l'article 96 de la loi, les lignes directrices du Commissaire pour l'application de la loi, en date de 1991, et les objectifs visés par le Parlement en ce qui concerne l'adoption des dispositions de la loi spécifiques aux fusions.

Le Commissaire a fait appel auprès de la Cour fédérale de la première décision du Tribunal, affirmant que le Tribunal avait eu tort d'appliquer le critère du surplus total (non pondéré) et refusait de prendre en compte les effets redistributifs du transfert de richesses des consommateurs vers les producteurs. La Cour a

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Le choix est motivé politiquement dans une certaine mesure. Voir, par exemple, Kokkoris (2010) : « *En réalité [...], le choix d'un critère de bien-être ne reflète pas les découvertes de la science économique, mais revêt plutôt un caractère de choix politique, qui va à l'encontre de l'adoption du critère du surplus total.* » Pour des débats théoriques sur les mérites des différents critères de bien-être, voir Besanko et Spulber (1993), Lyons (2002), et Neven et Röller (2005). Voir également Heyer (2006).

renvoyé l'affaire pour que le Tribunal l'examine de nouveau, parce que de son avis, le Tribunal avait échoué à « *garantir que tous les objectifs de la Loi sur la concurrence, et les circonstances de chaque fusion, puissent être pris en compte dans l'exercice de pondération prévu par l'article 96.* » En particulier, la Cour a déclaré que le tribunal avait commis une erreur en ignorant le transfert de richesse potentiel des consommateurs vers les producteurs. Toutefois, la Cour n'a pas formulé de directives quant au critère qu'elle jugerait approprié pour évaluer les effets anticoncurrentiels de la fusion, mais a souligné que la pondération proposée par la Commission semblait prendre en compte tous les objectifs de la Loi sur la concurrence.

Le Tribunal a rendu sa nouvelle décision en 2002, rejetant la demande du Commissaire pour la seconde fois. Le Commissaire a une nouvelle fois appelé auprès de la Cour, attaquant la seconde décision du Tribunal au motif qu'elle n'était pas conforme à la directive de la Cour, qui indiquait clairement que les effets redistributifs devaient être pris en compte lors de l'évaluation des effets potentiels de la fusion. Cette fois-ci toutefois, la Cour a rejeté l'appel du Commissaire, estimant que la seconde décision du Tribunal était conforme à ses directives.

## 2.5 *Critère de la preuve : quand les autorités de la concurrence acceptent-elles les allégations de gains d'efficience ?*

### 2.5.1 *Critères d'admission des allégations de gains d'efficience*

Puisque les informations relatives aux gains d'efficience potentiels dans le cadre de fusions sont en possession des seules entreprises parties à la fusion (ce qui place les autorités de la concurrence en position de faiblesse), voire sommaires ou complètement inexistantes dans certains cas, il n'est pas surprenant que la plupart des autorités se montrent prudentes lorsqu'elles évaluent les allégations de gains d'efficience.

La Commission européenne, par exemple, admet les gains d'efficience uniquement lorsque les trois conditions suivantes sont remplies<sup>36</sup> :

- *Les gains d'efficience doivent bénéficier aux consommateurs.* Cette condition exige qu'une partie au moins des gains d'efficience potentiels soient répercutés sur les consommateurs, sous la forme de baisses de prix par exemple. Cela s'inscrit dans le cadre de l'application d'un critère de bien-être des consommateurs (voir section 2.4 ci-dessus) qui, selon les Lignes directrices de la Commission européenne sur les fusions horizontales (paragraphe 79), implique de vérifier que « *les consommateurs ne seront pas dans une moins bonne situation si l'opération a lieu.* »<sup>37</sup> En outre, la Commission mentionne dans le paragraphe 81 de ses Lignes directrices que les consommateurs peuvent aussi tirer avantage de nouveaux produits ou services ou de produits ou services améliorés, qui seraient le fruit, par exemple, de gains d'efficience dans les domaines de la recherche et du développement et de l'innovation, reconnaissant ainsi explicitement le rôle que les gains d'efficience dynamique peuvent jouer dans les affaires de fusion.<sup>38</sup>

<sup>36</sup> Voir la section VII des Lignes directrices de l'Union européenne sur l'appréciation des concentrations horizontales. D'autres pays utilisent un cadre similaire, malgré des variations d'un pays à l'autre, bien entendu.

<sup>37</sup> Voir également le paragraphe 77 : « *les gains d'efficacité générés par l'opération seront à même d'accroître la capacité et l'incitation de l'entité issue de l'opération à adopter un comportement favorable à la concurrence au bénéfice des consommateurs et, par là même, de contrer les effets anticoncurrentiels que la concentration risquerait, dans le cas contraire, de produire.* »

<sup>38</sup> Voir, toutefois, Fackelmann (2006, section 3.4) pour une évaluation critique du rôle que les gains d'efficience dynamique sont susceptibles de jouer dans le dispositif européen de contrôle des fusions.

- Les gains d'efficience doivent être propres à la fusion. Les gains d'efficience allégués ne sont acceptés que lorsque : i) ils sont une conséquence directe de l'opération proposée ; et, ii) ils ne peuvent être obtenus dans une mesure similaire au moyen d'alternatives moins anticoncurrentielles, mais réalistes et réalisables, comme la croissance interne de l'une des parties ou des deux, des accords de licence, des entreprises communes ou une concentration structurée différemment. Si ces alternatives<sup>39</sup> existent, les gains d'efficience allégués ne peuvent pas être considérés comme propres à la fusion et ne sont donc pas pris en compte.
- Les gains d'efficience doivent être vérifiables. Pour que les gains d'efficience soient acceptés, les parties à la fusion doivent fournir la preuve que la concrétisation de ces gains est probable et qu'ils seront suffisamment importants pour contrebalancer l'effet dommageable potentiel de la concentration pour les consommateurs. Dans l'idéal, cette preuve devrait permettre aux organismes de contrôle de la concurrence de *quantifier* les gains d'efficience allégués et le bénéfice en résultant pour les consommateurs. Ou, si cela n'est pas possible, les preuves fournies devraient au moins leur permettre d'identifier clairement un effet positif et non marginal sur les consommateurs.<sup>40</sup>

Un certain nombre d'autres conditions s'ajoutent à ces trois-là, à savoir dans le cas de l'Union européenne :

1. Les gains d'efficience doivent être importants et se matérialiser en temps utile.

Comme nous l'avons remarqué ci-dessus, les gains d'efficience allégués doivent d'être d'une ampleur suffisante pour contrebalancer l'effet dommageable potentiel de la concentration pour les consommateurs. Il existe une corrélation entre ces deux mesures, à savoir que plus l'effet dommageable potentiel pour les consommateurs est important, plus les gains d'efficience doivent être élevés (et certains), du moins jusqu'à un certain seuil de concentration du marché.

Les gains d'efficience seront donc rarement utiles dans les cas extrêmes. Les Lignes directrices de la Commission européenne sur l'appréciation des concentrations horizontales (paragraphe 84) disposent qu'« *il est hautement improbable qu'une opération qui débouche sur une position proche du monopole, ou sur un niveau de pouvoir de marché comparable, puisse être déclarée compatible avec le marché commun au motif que les gains d'efficacité suffiraient à contrebalancer ses effets anticoncurrentiels potentiels.* » Les principes directeurs des États-Unis relatifs aux fusions horizontales font également une constatation similaire à la section 10 : « *d'après l'expérience des autorités, les gains d'efficience sont davantage susceptibles de faire une différence dans l'analyse des fusions lorsque les éventuels effets négatifs sur la*

<sup>39</sup> Dans son évaluation, la Commission européenne tient seulement compte des « *alternatives qui sont raisonnablement praticables dans la situation commerciale où se trouvent les parties à la concentration au regard des pratiques établies dans le secteur d'activité concerné.* » (Lignes directrices sur les fusions horizontales, paragraphe 85). Les autorités des États-Unis adoptent une approche similaire, à savoir que l'évaluation exclut les alternatives simplement théoriques.

<sup>40</sup> De la Mano (2002, p. 52) souligne la nécessité de ne pas accorder une importance démesurée à la nécessité de quantifier les gains d'efficience, notamment dans le cas des gains d'efficience dynamique : « *le risque est d'accorder un poids indu aux facteurs quantifiables, comme les gains d'efficience productive à court terme, au détriment d'effets difficiles à mesurer sur l'efficience dynamique. Les gains d'efficience dynamique sont la forme de gains d'efficience la plus difficile à quantifier, mais constituent toujours la composante la plus significative des gains d'efficience globaux d'un point de vue économique. Ainsi, dans la pratique, il convient d'accorder un poids suffisant au jugement qualitatif de la probabilité que ces gains d'efficience moins mesurables se concrétiseront effectivement.* »

*concurrence, en l'absence de gains d'efficience, ne sont pas importants. Les gains d'efficience ne justifient presque jamais une fusion aboutissant à une situation de monopole ou de quasi-monopole. »*

Toutefois, l'affaire de l'hôpital néerlandais résumée dans l'encadré 2 ci-dessous constitue une exception notable. La décision de l'autorité de la concurrence des Pays-Bas (NMa) est particulièrement intéressante pour les raisons suivantes : tout d'abord, c'est l'une des premières affaires en Europe concernant une fusion horizontale dans laquelle une défense fondée sur les gains d'efficience a fait la différence ; et ensuite, les considérations d'efficience ont joué un rôle important, même si les critères requis pour soumettre ces allégations n'étaient pas totalement satisfaits (initialement du moins).

En fait, ce n'était pas la première fois que la NMa avait examiné les gains d'efficience. En août 2008 notamment, les autorités néerlandaises avaient autorisé sans restriction une transaction entre les deux seuls annuaires distribués de porte à porte aux Pays-Bas, autorisant ainsi European Directories à acquérir Gouden Gids.<sup>41</sup>

À première vue, l'opération ressemblait à la fusion de deux entreprises pour n'en former qu'une, puisque les deux seuls annuaires imprimés nationaux prévoyaient de fusionner. Toutefois, les parties ont affirmé que ce point de vue ne reflétait pas la réalité du marché, puisque le développement des recherches et de la publicité sur Internet modifiait en profondeur le marché des annuaires.

La NMa a décidé d'autoriser la transaction principalement sur la base des gains d'efficience du côté de la demande. D'après les parties, la transaction génèrera des avantages tant pour les annonceurs faisant de la publicité dans les deux annuaires que pour ceux faisant de la publicité dans un seul.<sup>42</sup> Les annonceurs ne faisant de la publicité que dans un seul annuaire seraient en mesure d'augmenter leur pénétration, et le 'coût par visiteur unique' diminuerait. Pour les annonceurs faisant de la publicité dans les deux annuaires, d'autre part, le principal avantage découlerait du fait qu'ils n'auraient plus besoin de faire de la publicité que dans un seul annuaire, ce qui leur permettrait de profiter de prix plus bas. Dans l'ensemble, la transaction améliorerait le rapport qualité-prix pour les deux groupes d'annonceurs.

Ayant examiné les allégations mises en avant par les parties à la fusion, l'autorité de la concurrence a conclu qu'elles satisfaisaient aux trois critères. La répercussion sur les consommateurs serait immédiate, tandis que la fusion aurait un impact démontrable et spécifique, permettant aux annonceurs de toucher un public plus large.

Les gains d'efficience doivent également être opportuns, car plus ils risquent de se concrétiser tard dans l'avenir, moins on leur accorde de poids. En effet, les gains d'efficience se concrétisant dans un avenir plus lointain ont moins de chances de pouvoir compenser les éventuels préjudices subis par les consommateurs à court terme, et sont plus difficiles à vérifier.<sup>43</sup>

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<sup>41</sup> Décision n° 6246 du Conseil de l'autorité néerlandaise de la concurrence, *European Directories – Truvo Nederland*, disponible à l'adresse suivante : [http://www.nma.nl/en/images/6246BCV\\_ENG23-153892.pdf](http://www.nma.nl/en/images/6246BCV_ENG23-153892.pdf)

<sup>42</sup> Les utilisateurs des annuaires ont tendance à n'en consulter qu'un seul. Puisque Gouden Gids et Telefoongids (publiés par European Directories) possèdent chacun une part de marché importante, de nombreuses entreprises ayant recours aux annuaires pour accroître leur visibilité font de la publicité dans les deux.

<sup>43</sup> Ni les Lignes directrices de la Commission européenne, ni celles des États-Unis ne fixent de délai spécifique pour la réalisation des gains d'efficience. D'après Kocmut (2005, p. 33) « *il convient de saluer vivement le fait que la Commission [européenne] n'ait pas fixé de délai strict pour la concrétisation des gains d'efficience, malgré les propositions de certains universitaires qui estiment qu'un délai de quatre ans serait pertinent.* »

**Encadré 2 : Gains d'efficience dans le cadre d'une fusion aboutissant à une situation de quasi-monopole aux Pays-Bas<sup>44</sup>**

En 2009, la NMa a autorisé (après une enquête de phase II) la fusion de deux hôpitaux aux Pays-Bas. Cette fusion soulevait initialement d'importants problèmes de concurrence, à savoir : i) après l'opération, la nouvelle entité occuperait une situation de quasi-monopole, avec une part de marché de 84 et 88 % pour les soins généraux cliniques et non cliniques, respectivement ; et ii), du fait de cette situation, les patients de la région concernée auraient moins de choix. Toutefois, les parties à la fusion ont souligné que la fusion entraînerait des gains d'efficience, et la NMa, ayant accepté ces allégations (dans une certaine mesure), a finalement autorisé la fusion (sous réserve de mesures correctives importantes).

Les critères d'autorisation des gains d'efficience prévus par la Loi néerlandaise sur la concurrence dans les procédures de fusions sont les mêmes que ceux de la plupart des autres pays, à savoir que ces gains ne peuvent être acceptés que s'ils satisfont trois conditions : i) ils doivent être répercutés sur les consommateurs ; ii) ils doivent découler directement de la fusion et iii) ils doivent être vérifiables.

Dans le cas présent, la NMa a admis que les gains d'efficience allégués découlaient bien de la fusion, mais les parties ont dû proposer des mesures correctives pour satisfaire les deux autres critères.

Notamment, en ce qui concerne la répercussion des bénéfices sur les consommateurs, les parties à la fusion ont avancé qu'après la fusion, la qualité des soins dispensés dans les hôpitaux s'améliorerait, ce qui bénéficierait directement aux consommateurs. La NMa, toutefois, n'a pas été convaincue puisque que cette amélioration de la qualité compenserait une éventuelle hausse des prix. Les parties ont donc proposé de : i) fixer des prix maximaux, sur la base d'un plafond national, pour les soins médicaux spécialisés (qui ne sont pas inclus dans l'assurance maladie obligatoire de base); ii) de mettre sur pied une unité de soins intensifs et d'urgence de meilleur niveau dans un délai de trois ans ; et iii), de se conformer aux exigences concernant la taille minimale des services et les traitements proposés par spécialiste.

Pour satisfaire au critère de vérifiabilité, les hôpitaux parties à la fusion ont facilité l'accès au marché à d'éventuels nouveaux fournisseurs de soins médicaux spécialisés, dans l'objectif d'instaurer davantage de concurrence. Une telle mesure corrective impliquait effectivement que les spécialistes soient autorisés à travailler dans les hôpitaux parties à la fusion, ainsi que sur d'autres sites.

Ainsi, dans cette affaire, les trois conditions de prise en compte des gains d'efficience n'étaient pas remplies initialement. Toutefois, les mesures correctives imposées par la NMa ont permis de garantir la réalisation des allégations de gains d'efficience. Bien que l'issue de cette affaire eût pu être considérablement affectée par des considérations publiques<sup>45</sup>, cette affaire illustre néanmoins le lien entre les mesures correctives et les gains d'efficience.

2. Les gains d'efficience doivent *en principe* bénéficier aux consommateurs sur les mêmes marchés (de produit et géographiques) pertinents où les consommateurs risquent de subir des préjudices suite à la fusion proposée.

<sup>44</sup> Affaire n° 6424/427, *Ziekenhuis Walcheren/Oosterscheldeziekenhuizen*, 25 mars 2009.

<sup>45</sup> Renckens (2009), par exemple, souligne que c'est probablement un concours de circonstances qui a conduit la NMa à autoriser la fusion sous réserve de mesures correctives radicales qui n'auraient probablement pas été acceptées dans d'autres affaires. Tout d'abord, les autorités sanitaires néerlandaises (IGZ) ont joué un rôle fondamental dans cette affaire. Elles ont avancé qu'en l'absence de fusion, l'un des deux hôpitaux, voire les deux, risquait de faire faillite. Ensuite, l'IGZ a également souligné le caractère de bien d'intérêt public des services de santé de base, qui, d'après Renckens, peut avoir aidé les parties à la fusion à convaincre la NMa que la fusion devait être autorisée afin de garantir la fourniture de ces services sur le marché pertinent.

3. Les gains d'efficience conduisant à une réduction des coûts variables ou marginaux sont plus facilement admis que ceux entraînant une réduction des coûts fixes, puisque les premiers sont davantage susceptibles d'être répercutés sur les consommateurs sous la forme de baisses de prix.<sup>46, 47, 48</sup>

### 2.5.2 *La charge de la preuve et les preuves pertinentes dans l'évaluation des allégations de gains d'efficience*

L'appréciation des allégations de gains d'efficience par les autorités de la concurrence dans les affaires de fusion est difficile, principalement pour deux raisons. La première est qu'il existe généralement une asymétrie d'information, à savoir que les informations susceptibles d'être utilisées pour vérifier ces allégations sont seulement détenues par les parties à la fusion.<sup>49</sup> Par conséquent, la charge de la preuve repose entièrement sur les entreprises parties à la fusion, comme la Commission européenne l'indique explicitement (Lignes directrices relatives aux concentrations horizontales, paragraphe 87) :<sup>50, 51</sup>

<sup>46</sup> Chacun sait que les entreprises maximisent leurs profits lorsqu'elles décident de la quantité de biens à produire et dans cet exercice, les coûts fixes (c'est-à-dire ceux qui ne varient pas avec la production) ne jouent aucun rôle, du moins à court terme. La question devient plus compliquée à long terme (puisque tous les coûts deviennent variables) et lors de l'évaluation des gains d'efficience dynamique, où une réduction des coûts fixes (dérivant, par exemple, d'une combinaison de différents intrants ou de l'élimination de doublons) peut conduire à un accroissement de l'activité de R-D et de l'innovation, susceptible de bénéficier aux consommateurs.

<sup>47</sup> Estimer la mesure dans laquelle une réduction des coûts variables ou marginaux est répercutée sur les consommateurs est une tâche difficile qui peut nécessiter le recours à des techniques de quantification complexes. Röller, Stennek et Verboven (2001, section 3) en donnent un aperçu à l'aide d'exemples tirés de la littérature empirique sur l'incidence fiscale, la transmission des prix des biens intermédiaires (p. ex. dans l'économie agricole et énergétique) et la répercussion des fluctuations des taux de change. Ils font également la distinction entre la répercussion à l'échelle du secteur (qui résulte d'un choc affectant toutes les entreprises du secteur) et une répercussion spécifique à des entreprises (qui affecte seulement certaines entreprises, p. ex. des économies de coûts réalisées par les entreprises parties à la fusion).

<sup>48</sup> D'autre part, les baisses de coûts qui sont simplement la conséquence de réductions anticoncurrentielles de la production ne sauraient être considérées comme des gains d'efficience bénéficiant aux consommateurs (Lignes directrices de la Commission européenne sur l'appréciation des concentrations horizontales, paragraphe 80). De même, les baisses de coûts prenant la forme d'une baisse des coûts de production (obtenue parce que, par exemple, la fusion augmente le pouvoir de négociation de l'entité fusionnée vis-à-vis de ses fournisseurs) ne peuvent pas être admises puisqu'elles représentent simplement un transfert de richesses entre les fournisseurs et l'entité fusionnée (de la Mano, 2002, p. 44).

<sup>49</sup> Les autorités de la concurrence peuvent également éprouver des difficultés à vérifier les allégations de gains d'efficience des parties à la fusion auprès de tierces parties, comme des fournisseurs concurrents. Ces derniers ne sont pas en position de commenter les allégations des parties à la fusion, ou (pire encore), sont incités à les contredire s'ils estiment que la fusion leur portera préjudice.

<sup>50</sup> C'est également la position de nombreux économistes, tels que Fisher (1987, p. 36) : « *la charge de la preuve concernant les économies de coûts ou autres gains d'efficience compensateurs, toutefois, doit reposer uniquement sur les candidats à une fusion, et j'exigerais à cet égard des critères très stricts. Ces allégations sont faciles à faire, et j'en suis convaincu, souvent trop facilement prises pour argent comptant.* »

<sup>51</sup> Les autorités de la concurrence doivent également s'acquitter de la charge de la preuve en ce qui concerne les effets anticoncurrentiels d'une fusion, l'équilibre entre les autorités et les parties est donc précaire. Dans certains cas, des tensions peuvent naître. Dans l'affaire canadienne Commissaire de la concurrence v. CCS Corporation, en date de 2012, par exemple, CCS a avancé qu'elle avait été empêchée de s'acquitter de la charge de la preuve eu égard aux gains d'efficience dans la mesure où la Commissaire avait échoué à

*La plupart des informations qui permettraient à la Commission de déterminer si une concentration apportera le type de gains d'efficacité nécessaires pour qu'elle soit autorisée sont exclusivement entre les mains des parties à l'opération. Il appartient donc aux parties notifiantes de communiquer, en temps utile, toutes les informations nécessaires afin de prouver que les gains d'efficacité allégués sont propres à l'opération et ont des chances de se réaliser. De même, c'est à elles qu'il incombe de démontrer en quoi les gains d'efficacité sont susceptibles de contrer les effets négatifs que l'opération pourrait, à défaut, produire sur la concurrence, et donc de profiter aux consommateurs.*

Autre problème : bien que les autorités de la concurrence demandent des éléments de preuve, si ce n'est pour quantifier, mais au moins pour apprécier *qualitativement* les éventuels gains d'efficacité, ces éléments de preuve peuvent être incomplets, voire indisponibles. À cet égard, il convient de remarquer que les parties à la fusion – lorsqu'elles plaident en faveur des gains d'efficacité – ne sont pas soumises à un critère de preuve plus strict que celui en vigueur pour les autres aspects de l'évaluation concurrentielle, comme les effets de la fusion sur les prix ou la possibilité d'accès au marché. En outre, comme c'est le cas dans l'analyse de la fusion, les éléments de preuve pertinents pour évaluer les allégations de gains d'efficacité proviennent de sources très variées. La Commission européenne, par exemple, cite :

- les documents internes que les dirigeants des entreprises ont utilisés pour prendre la décision de lancer la fusion ;
- les déclarations de la direction aux propriétaires et aux marchés financiers concernant les gains d'efficacité escomptés ;
- des exemples de gains d'efficacité et d'avantages pour les consommateurs générés par le passé ; et,
- des études réalisées par des experts extérieurs avant l'opération de concentration et portant sur le type et l'ampleur des gains d'efficacité et sur l'importance des avantages que les consommateurs sont susceptibles d'en retirer.<sup>52</sup>

## **2.6 Les gains d'efficacité : instruments de réfutation ou défense ?**

Une question de procédure importante se pose dans l'analyse des fusions : comment faut-il aborder les allégations de gains d'efficacité, faut-il les utiliser dans le cadre d'une défense, ou d'une réfutation ?

Dans le premier cas, la défense fondée sur les gains d'efficacité s'inscrit dans le cadre d'une procédure formelle en deux étapes, dans le cadre de laquelle une fusion est d'abord jugée anticoncurrentielle, avant d'être justifiée sur la base des gains d'efficacité qu'elle génère. Dans le second cas (gains d'efficacité utilisés pour réfuter l'affirmation selon laquelle la fusion amoindrit la concurrence), les éléments prouvant les allégations d'efficacité sont pris en compte dans le cadre d'une analyse holistique des effets concurrentiels, avec d'autres éléments « à décharge », par ex. des éléments probants concernant l'entrée.

Il existe également un lien avec le choix du critère de bien-être appliqué. En effet, on utilise les gains d'efficacité comme moyen de défense pour justifier une fusion susceptible de porter préjudice aux

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s'acquitter correctement de sa charge de la preuve eu égard aux effets anticoncurrentiels de la fusion. Au final, le Tribunal de la concurrence a constaté que, malgré le manquement du Commissaire, CCS n'avait pas subi de préjudice, mais cette affaire montre clairement l'importance pour une autorité de la concurrence de s'acquitter de la charge de la preuve avec diligence.

<sup>52</sup> Paragraphe 88 des Lignes directrices de la Commission européenne sur l'appréciation des concentrations horizontales.

consommateurs. Ainsi, cette approche permet aux autorités de la concurrence de compenser les pertes encourues par les consommateurs par les gains des producteurs, et est cohérente avec l'application d'un critère de bien-être total. À l'inverse, l'approche consistant à utiliser les gains d'efficacité dans le cadre d'une réfutation est cohérente avec l'application d'un critère de bien-être du consommateur, parce que les gains résultant de la fusion doivent être suffisants pour que les consommateurs ne soient pas lésés, ce qui signifie que les prix ne doivent pas augmenter après la fusion.

Une question procédurale connexe concerne la façon dont les considérations d'efficacité sont intégrées à l'analyse de la fusion. Pour résumer, trois approches différentes ont été proposées dans la littérature (voir Röller *et al.*, 2001):

- l'approche de la présomption générale ;
- l'approche au cas par cas ; et
- l'approche séquentielle.

Dans le cadre de la première approche, si une fusion ne pose pas de problème (p. ex. la part de marché des parties est faible), aucune attention spécifique, explicite n'est accordée aux gains d'efficacité (bien que l'on présume parfois qu'ils compensent tout effet négatif résultant de la fusion). Selon la seconde méthode, les gains d'efficacité peuvent être complètement intégrés à l'analyse globale dans chaque cas.

La première approche économise les rares ressources et réduit la charge informationnelle pesant sur les parties. Toutefois, dans la mesure où elle repose des indicateurs structurels, indirects (comme les parts de marché ou les indices de concentration), elle risque d'aboutir à des conclusions erronées. Par ailleurs, l'analyse dans le cadre d'une approche au cas par cas est susceptible d'être plus précise, mais elle nécessite une quantité considérable d'informations qui ne sont pas toujours disponibles.

À la lumière des défauts des deux premières approches, il n'est pas surprenant que de nombreuses autorités de la concurrence appliquent (et que de nombreux auteurs recommandent) l'approche séquentielle.<sup>53</sup> Selon cette méthode, les autorités de la concurrence ont d'abord recours à des présomptions générales pour faire la distinction entre les fusions problématiques ou non. Lorsqu'une fusion donnée est jugée problématique, elle fait l'objet d'une enquête plus poussée, au cours de laquelle les gains d'efficacité peuvent être examinés. Naturellement, demeure la question de la prise en compte des gains d'efficacité simultanément avec d'autres facteurs (p. ex. l'entrée) ou de la réalisation d'une enquête moins poussée. Cela dépend évidemment d'un certain nombre de facteurs, y compris du temps disponible pour chaque enquête, de la qualité des éléments probants concernant les allégations d'efficacité et de la gravité des problèmes de concurrence. Les autorités de la concurrence doivent donc maintenir un équilibre délicat entre la précision et l'exactitude de leur analyse et ces contraintes.

## 2.7 Conclusions sur les allégations de gains d'efficacité dans les fusions

L'article que le lauréat du prix Nobel Oliver Williamson a publié en 1968 a ouvert la voie à une meilleure prise en compte des gains d'efficacité dans l'analyse des fusions. De nos jours, la plupart des pays font au moins mention de gains d'efficacité dans leurs lois sur la concurrence ou dans les lignes directrices sur les fusions des autorités de la concurrence. Dans certains cas, comme celui des États-Unis et de l'Union européenne, le traitement des gains d'efficacité dans les lignes directrices s'est affiné avec le temps.

Parallèlement à ces évolutions, les parties à la fusion font preuve de plus en plus d'assurance lorsqu'il s'agit de présenter les gains d'efficacité aux autorités de la concurrence. Par conséquent, le nombre de

<sup>53</sup> L'approche séquentielle est par exemple suivie par l'Union européenne, l'Australie et le Royaume-Uni.

fusions où les gains d'efficacité ont joué un rôle significatif (parfois en association avec un ensemble de mesures correctives) s'est accru, comme le montrent certaines fusions récentes approuvées par la Commission européenne et l'autorité de la concurrence danoise.

Toutefois, il convient de préciser que le nombre de fusions dans lesquelles les gains d'efficacité jouent un rôle décisif ou font l'objet d'un débat demeure restreint. Cela traduit certainement le fait que la plupart des fusions ne soulèvent pas de problèmes de concurrence, et en tout état de cause, les organismes de contrôle de la concurrence préfèrent consacrer leurs maigres ressources à des tâches autres que l'évaluation des allégations de gains d'efficacité.

Il peut également exister d'autres obstacles — plus importants — à l'évaluation des allégations de gains d'efficacité dans le contexte des fusions. Il serait intéressant, par exemple, de débattre de la question de savoir si l'application d'un critère de bien-être des consommateurs (utilisé dans de nombreux pays) rend par nature plus difficile l'acceptation des allégations de gains d'efficacité. À cet égard se pose également la question de savoir si les autorités de la concurrence ont fixé des critères trop stricts pour la prise en compte des allégations de gains d'efficacité. Et — d'un point de vue plus procédural — de savoir s'il est préférable d'examiner les allégations de gains d'efficacité en tant qu'instrument de défense (après qu'une fusion a été jugée anticoncurrentielle) ou de réfutation (c'est-à-dire en tant que partie intégrante de l'évaluation globale de la concurrence).

### **3. Les gains d'efficacité se concrétisent-ils à l'issue des fusions ? Tour d'horizon des évaluations *ex-post***

Comme nous l'avons vu dans le chapitre précédent, l'évaluation des allégations de gains d'efficacité par les organismes de contrôle de la concurrence pendant l'étude d'une fusion spécifique est un exercice difficile, notamment parce que les principaux éléments de preuve sont détenus uniquement par les parties à la fusion et sont difficiles à vérifier ou incomplètes, voire indisponibles.

Avec du temps, toutefois, il est possible de vérifier *ex post* si les gains d'efficacité allégués se sont réellement concrétisés. Dans ce contexte, le présent chapitre résume quelques-unes des méthodes utilisées dans la littérature empirique, et les conclusions correspondantes. Dans une large mesure, l'accent est mis sur des études visant à vérifier si les gains d'efficacité se sont concrétisés, et, le cas échéant, à les mesurer. Les nombreuses études empiriques examinant si les prix diminuent à la suite d'une fusion – qui peuvent également être interprétées comme une mise à l'épreuve des allégations de gains d'efficacité – ne sont donc pas prises en compte.<sup>54</sup>

En guise d'introduction, la section 3.1 ci-dessous présente des éléments de preuve tirés des études d'événement sur la question de savoir si les fusions créent de la valeur pour les actionnaires des entreprises

<sup>54</sup> De nombreuses études ont examiné les effets des fusions sur les prix dans un grand nombre de secteurs. Voir entre autres : Ashenfelter, Hosken et Weinberg (2011), Ashenfelter et Hosken (2010), Barton et Sherman (1984), Borenstein (1990), Hastings et Gilbert (2005), McCabe (2002), Prager et Hannan (1998), Taylor et Hosken (2007), et Vita et Sacher (2001). Weinberg (2007), Whinston (2007) et Pautler (2001) sont des études intéressantes, qui tendent toutes à conclure que les prix augmentent à la suite d'une fusion.

En général, ces publications examinent les effets d'une fusion sur les prix à court terme. Focarelli et Panetta (2003) font exception : ils examinent l'impact des fusions dans le secteur bancaire italien à court et à long terme. La raison est que les gains d'efficacité (tels que ceux résultant d'une réduction des coûts et de la fusion d'une main-d'œuvre disparate issue de cultures différentes) peuvent n'apparaître que quelque temps après. Ils constatent que les taux d'intérêt créditeurs (c'est-à-dire la rémunération versée par la banque aux déposants pour emprunter leur argent) des banques parties à la fusion baissent à court terme mais augmentent à long terme, par rapport à un groupe témoin de banques non parties à une fusion. Cela est cohérent avec la notion selon laquelle les fusions bénéficient aux consommateurs à long terme.

concernées. La section suivante évoque une série d'études utilisant la même approche, mais cherchant à répondre à la question spécifique de savoir si les fusions génèrent des gains d'efficacité. Ensuite, des études examinant diverses variables (comme les bénéfices, les ventes, les parts de marché, les coûts, les intrants et produits de la R-D, et les niveaux de productivité) sont présentées successivement.

Ce chapitre porte également sur d'autres documents publiés par la Division de la concurrence concernant l'évaluation *ex post* des interventions au titre de la politique de la concurrence. Il s'agit d'un thème stratégique du Comité de la concurrence de l'OCDE, qui fera l'objet de futures tables rondes.

### 3.1 *Fusions, valeur pour les actionnaires et gains d'efficacité*

Il existe de nombreux éléments de preuve – fondés sur des études d'événement à court terme examinant l'évolution du prix des actions au moment de l'annonce de la transaction – selon lesquels les fusions créent généralement de la valeur pour les actionnaires des entreprises concernées.<sup>55</sup>

La répartition des gains entre les acquéreurs et les entreprises cibles n'est toutefois pas uniforme. En particulier, les actionnaires de l'entreprise cible récoltent la majeure partie des gains, la prime de fusion (à savoir le rendement en excès par rapport au rendement de référence du marché dans son ensemble) étant comprise entre 16 et près de 24 %. Les actionnaires de l'acquéreur, eux, peuvent s'attendre à voir la valeur de leurs actions chuter de pas moins de 4 % (par rapport aux entreprises non participantes) et l'on pourrait dire qu'ils « *semblent dangereusement près de subventionner ces transactions* » (Andrade, Mitchell et Stafford, 2001, p. 111).<sup>56</sup> Enfin, pour la cible et l'acquéreur réunis, on peut dire sans se tromper que le rendement anormal moyen au cours de la période d'annonce est positif et égal à environ 2 %, ce qui suggère qu'en moyenne, les fusions ne créent pas de valeur nette pour les actionnaires.

La façon dont une fusion spécifique est financée joue également un rôle important dans la création de valeur, notamment pour les actionnaires des entreprises procédant à l'acquisition. En effet, en moyenne, ils obtiennent un rendement anormal négatif lorsque leur entreprise finance une fusion (même partiellement)

<sup>55</sup> Voir Andrade, Mitchell et Stafford (2001), qui utilisent les données des États-Unis pour la période comprise entre 1973 et 1998, et Betton, Eckbo et Thorburn (2008), qui utilisent celles de 2005. Ces résultats sont cohérents avec ceux présentés dans les études antérieures de Jensen et Ruback (1983) et Jarrell, Brickley et Netter (1988) ; voir également l'étude de Caves (1989). Malmendier, Opp et Saidi (2012) affirment toutefois que la création de valeur à la suite d'une fusion pourrait bien être nulle. Utilisant des données relatives à des offres de fusion ayant échoué aux États-Unis entre 1980 et 2008, ils démontrent que lorsque l'offre est financée par la trésorerie, la valeur des entreprises cibles demeure significativement supérieure à son niveau antérieur à l'annonce (net de l'évolution du prix des actions à l'échelle du marché) lorsque l'offre de fusion échoue, alors que cela ne se produit pas lorsque l'offre est financée par les fonds propres. En outre, ils constatent que les acheteurs payant en numéraire retrouvent leur niveau antérieur à l'annonce, tandis qu'en cas de rachat d'actions, les acquéreurs traitent à des prix inférieurs. Ils affirment, que dans l'ensemble, ces résultats suggèrent que les offres en numéraire sont « axées sur la cible » et indiquent que l'entreprise cible était sous-évaluée avant l'offre de fusion, tandis que les offres en actions sont « axées sur l'acquéreur » et révèlent une surévaluation de l'acquéreur avant l'offre. En d'autres termes, puisque les fusions ne semblent pas avoir d'impact (l'échantillon incluant uniquement des offres ayant échoué), la réévaluation de l'entreprise cible en cas d'offres en numéraire s'explique par une révision des certitudes concernant sa valeur intrinsèque.

<sup>56</sup> Moeller, Schlingemann et Stulz (2005), toutefois, rapportent que les actionnaires des entreprises procédant à l'acquisition ont subi des pertes bien plus importantes (environ 240 milliards USD) entre 1998 et 2001 que pendant toute la vague de fusions des années 1980 (la perte ayant atteint 4 milliards USD au total). Ces pertes importantes ne sont pas dues à un transfert de valeur vers les actionnaires des entreprises cibles. Au contraire, elles résultent d'un petit nombre d'acquisitions ayant généré des pertes extrêmement importantes. Pour comparaison, au cours de la même période, l'acquisition moyenne crée encore de la valeur positive pour les actionnaires des entreprises procédant à l'acquisition.

en émettant des actions supplémentaires, au lieu de financer la fusion par la trésorerie, par exemple. À l'inverse, les actionnaires des entreprises procédant à l'acquisition peuvent s'attendre à un rendement anormal faible et positif (bien que non statistiquement différent de zéro) lorsque la fusion n'est pas du tout financée par les fonds propres.<sup>57</sup> Les actionnaires des entreprises cibles bénéficient également de rendements plus importants lorsque la trésorerie est utilisée à la place des fonds propres. Enfin, il s'avère que les fusions financées par les fonds propres n'augmentent pas du tout la valeur totale pour les actionnaires. Au contraire, en l'absence de financement par l'émission d'actions supplémentaires, le rendement total (cible et acquéreur) est positif et statistiquement significatif.

### 3.2 *Évolution du prix des actions des concurrents, clients et fournisseurs*

Les publications fondées sur des études d'événement parviennent à la conclusion que les fusions augmentent la valeur pour les actionnaires, ce qui est rassurant. Mais elles ne permettent pas d'identifier la source de ces gains. En particulier, elles n'apportent pas la preuve que les fusions améliorent l'efficacité des entreprises participantes ; c'est-à-dire que la valeur supplémentaire créée par la fusion pour les actionnaires est le résultat (tout bien considéré) des gains d'efficacité plutôt que d'un accroissement du pouvoir de marché. Afin de répondre à cette question, une approche plus précise est nécessaire, comme expliqué ci-dessous.

Eckbo (1983), par exemple, a examiné un échantillon de 55 fusions horizontales contestées par la *Federal Trade Commission* ou le Département de la justice des États-Unis entre 1963 et 1978, et a montré que l'estimation des rendements boursiers anormaux pour les *concurrents* des entreprises parties à la fusion peut être utile pour répondre à la question de savoir si les fusions augmentent davantage le pouvoir de marché que l'efficacité.

En particulier, il a réalisé cette estimation au moment de deux événements publics importants, à savoir : i) l'annonce de la proposition de fusion ; et ii), l'annonce consécutive selon laquelle les autorités de la concurrence se sont opposées à la fusion en vertu de la section 7 du *Clayton Act*. La proposition testée est alors la suivante : si la fusion améliore davantage le pouvoir de marché que l'efficacité, les concurrents des entreprises parties à la fusion devraient obtenir des rendements anormaux positifs au moment de l'annonce de la proposition de fusion, parce que la fusion est susceptible d'accroître les prix, et les concurrents sont également censés bénéficier de ces rentes de monopole induites par la fusion.<sup>58</sup> En outre, si cette hypothèse est correcte, les entreprises concurrentes devraient bénéficier de rendements anormaux *négatifs* suite à la nouvelle importante selon laquelle la fusion est remise en cause par les autorités de la concurrence, parce que la perspective de rentes de monopole devient incertaine.

Les résultats concernant la séquence des rendements anormaux observée au moment où la fusion est annoncée puis remise en question semblent contredire la proposition selon laquelle les fusions ont pour effet net d'augmenter le pouvoir de marché. En particulier, Eckbo (1983) constate qu'en moyenne, les concurrents bénéficient de rendements anormaux faibles mais positifs (et statistiquement significatifs à partir de zéro) au moment de l'annonce de la proposition de fusion, puis de rendements anormaux nuls ou positifs suite à l'annonce consécutive de la plainte des autorités. D'après Eckbo (1983), ce schéma est cohérent avec l'hypothèse selon laquelle une fusion typique dans son échantillon pourrait améliorer l'efficacité.

<sup>57</sup> Voir tableau 4 dans Andrade, Mitchell et Stafford (2001).

<sup>58</sup> À noter qu'Eckbo (1983) centre son analyse autour de l'hypothèse de « collusion », à savoir qu'une fusion horizontale peut réduire les coûts de mise en place d'un accord de collusion tacite entre les concurrents d'un même secteur, plutôt qu'autour de l'éventualité d'un préjudice causé aux consommateurs du fait d'un comportement unilatéral. Cela est conforme à la pratique des organismes de contrôle de la concurrence des États-Unis à l'époque.

Eckbo et Wier (1985), qui examinent un échantillon d'affaires remises en cause par les organismes de contrôle de la concurrence des États-Unis après l'entrée en vigueur du *Hart-Scott-Rodino Act* en 1978, et Stillman (1983), parviennent à la même conclusion. En particulier, Stillman (1983) rejette l'hypothèse du pouvoir de marché en examinant un petit échantillon de 11 fusions horizontales remises en cause entre 1964 et 1972, et constate que les rendements anormaux moyens sont nuls pour les concurrents directs des entreprises parties à la fusion à la suite de l'annonce de la fusion et des plaintes des organismes.

Ces premières études d'Eckbo (1983), Eckbo et Wier (1985) et Stillman (1983) ont été suivies de nombreuses publications fondées sur la même méthodologie. Par exemple, Eckbo (1992) et Atkas, de Bodt et Roll (2007) constatent des rendements anormaux significativement négatifs pour les entreprises concurrentes suite à l'annonce de fusions horizontales au Canada et dans l'Union européenne, respectivement. Sur cette base, ces résultats rejettent également l'hypothèse du pouvoir de marché.<sup>59</sup>

Une variante intéressante est proposée par Fee et Thomas (2004), qui calculent les rendements anormaux des fournisseurs en amont et des clients (entreprises) en aval (ainsi que des concurrents) des entreprises parties à la fusion, suite à l'annonce d'une fusion.<sup>60</sup> Dans le cas des clients, son intuition est la suivante : si une fusion augmente le pouvoir de marché, les clients devraient bénéficier de rendements anormaux négatifs parce qu'ils risquent de subir une hausse des prix après la fusion. À cet égard, Fee et Thomas (2004) ne trouvent pas de preuve systématique de pertes pour les clients, même pour ceux qui sont particulièrement dépendants des entreprises parties à la fusion. En outre, il existe des preuves que les fusions générant les gains les plus importants pour les parties à l'opération engendrent des gains pour les clients.

En ce qui concerne les fournisseurs, Fee et Thomas (2004) font la distinction entre les fournisseurs qui entretiennent une relation avec la nouvelle entité après la fusion et ceux dont la relation avec elle s'achève, éventuellement à la suite d'un appel d'offres mettant en concurrence des fournisseurs de la nouvelle entité. Spécifiquement, Fee et Thomas (2004) montrent que seuls les fournisseurs ayant rompu toute relation subissent des rendements anormaux négatifs au moment de l'annonce de la fusion et une évolution importante de leurs flux de trésorerie négatifs après la fusion. À l'inverse, les fournisseurs retenus voient leur part de marché augmenter, mais ne constatent pas d'importants rendements anormaux ou de modification de leurs résultats d'exploitation. Il semblerait donc que les fournisseurs retenus vendent davantage d'unités à un prix inférieur. Fee et Thomas (2004) interprètent cet impact asymétrique des fusions sur les rendements des actions et les résultats d'exploitation des fournisseurs comme la preuve que les fusions sont effectivement en mesure d'accroître le pouvoir de l'acheteur des entreprises parties à la fusion, et de forcer les fournisseurs en aval à faire preuve de plus d'efficacité.

<sup>59</sup> Pour une remise en cause de cette méthode, toutefois, voir Schumann (1993). Il examine un échantillon de 37 affaires entre 1981 et 1987 (période pendant laquelle les fusions aux États-Unis avaient moins de risques d'être remises en cause que par le passé) et, bien que constatant un schéma de rendements anormaux identique à celui observé dans les études précédentes, il note que la répartition des entreprises par taille au sein du secteur, la mesure dans laquelle les gains d'efficacité générés par la fusion sont spécifiques à l'entreprise et l'effet de la fusion sur la concurrence ont tous un impact sur la structure des rendements anormaux des concurrents. Il conclut donc que « *presque toutes les structures de rendements anormaux des concurrents peuvent être compatibles avec certains antécédents de fusions principalement proconcurrentielle ou anticoncurrentielles. Dans la mesure où c'est le cas, il nous reste à conclure que l'examen des structures de rendement des actions des concurrents ne constitue pas une méthode efficace pour déterminer quelles fusions horizontales sont susceptibles d'affecter les prix des produits* » (Schumann, 1993, p. 694).

<sup>60</sup> Shahrur (2005) examine également l'impact de l'annonce d'une fusion sur le prix des actions des fournisseurs et clients, bien qu'il utilise une méthode de sélection différente de celle de Fee et Thomas (2004). Il conclut qu'en moyenne, les fusions sont guidées par des considérations d'efficacité plutôt que par la volonté d'augmenter le pouvoir de marché ou le pouvoir de l'acheteur.

### 3.3 *Analyse des bénéfiques des entreprises avant et après la fusion*

Une autre façon de déterminer si les fusions génèrent des gains d'efficacité consiste à comparer les bénéfices des entreprises avant et après la fusion, puis de comprendre les raisons d'une éventuelle évolution. Healy, Palepu et Ruback (1992) donnent un exemple de cette approche. Ils se fondent sur un échantillon regroupant les 50 plus importantes acquisitions effectuées aux États-Unis entre 1979 et 1984 pour examiner les performances des entreprises parties à ces fusions (mesurées en termes de flux de trésorerie d'exploitation) pendant les cinq années précédant et suivant la fusion, par rapport à une référence établie pour le secteur.

Ils constatent que les rendements des flux de trésorerie des entreprises parties à la fusion augmentent de manière significative après la fusion, et ils cherchent à comprendre les causes de cette amélioration, notamment s'il s'agit du résultat d'un ciblage managérial sur les performances à court terme susceptible de menacer la viabilité à long terme de la nouvelle entité.

Toutefois, contrairement à cette hypothèse, Healy, Palepu et Ruback (1992) montrent que l'amélioration des rendements des flux de trésorerie après la fusion découle d'une augmentation des marges d'exploitation. En outre, ils ne trouvent aucune preuve que cette amélioration se produit aux dépens des performances à long terme, puisque qu'après la fusion, les entreprises parties à l'opération maintiennent leurs investissements et leur intensité de R-D par rapport aux autres entreprises de leur secteur.<sup>61</sup>

Ce résultat, toutefois, diffère de celui obtenu quelques années auparavant par Ravenscraft et Scherer (1989), qui examinent les résultats financiers entre 1974 et 1977 d'entreprises cibles acquises entre 1950 et 1977. Ils constatent que la rentabilité des entreprises acquises a diminué après la fusion, ce qui contredit non seulement les résultats de Healy, Palepu et Ruback (1992), mais également les conclusions tirées par plusieurs publications sur la réaction du marché boursier, résumées à la section 3.2.

### 3.4 *Analyse conjointe des bénéfiques et du chiffre d'affaires des entreprises*

Plutôt que de s'intéresser uniquement aux bénéfiques, Gugler *et al.* (2003) suggèrent une analyse *conjointe* des bénéfiques et du chiffre d'affaires afin d'évaluer l'impact net d'une fusion, à savoir si les gains d'efficacité réalisés après une fusion sont plus importants que la hausse du pouvoir de marché, ou inversement. En particulier, le test réalisé par Gugler *et al.* (2003) est le suivant : si une fusion augmente davantage le pouvoir de marché que l'efficacité, les bénéfices des entreprises parties à la fusion devraient augmenter, alors que leur chiffre d'affaires devrait diminuer (parce que la hausse du prix est supérieure à la réduction du coût marginal, le cas échéant). À l'inverse, si la fusion a globalement pour effet d'augmenter l'efficacité des entreprises parties à la fusion, alors tant les bénéfices que le chiffre d'affaires devraient augmenter.<sup>62</sup>

<sup>61</sup> En outre, Healy, Palepu et Ruback (1992) montrent que l'amélioration des rendements des flux de trésorerie explique en grande partie la hausse de la valeur du cours des actions des entreprises parties à la fusion au moment de l'annonce de la fusion. On peut en déduire que la réaction des prix des actions aux fusions est liée à l'anticipation de gains économiques dans le sillage de la fusion.

<sup>62</sup> Il est bien entendu possible qu'après la fusion, les bénéfiques et le chiffre d'affaires diminuent si la fusion réduit l'efficacité, et que cette réduction l'emporte sur une éventuelle hausse du pouvoir de marché. Dans leur publication, Gugler *et al.* (2003) supposent également que dans le cadre d'une fusion, tous les gains d'efficacité découlent d'une réduction des coûts marginaux, qui se traduit par une baisse des prix et conduit ainsi à une hausse du chiffre d'affaires et des bénéfices. Ils ne testent pas séparément les gains d'efficacité découlant d'une réduction des coûts fixes (qui entraînerait une hausse des bénéfices et laisserait le chiffre d'affaires inchangé).

Se pose également la question de la contre-épreuve, à savoir comment estimer quelle aurait été l'évolution des bénéfices et du chiffre d'affaires si la fusion n'avait pas eu lieu, et déterminer ainsi si une fusion a amélioré les bénéfices et le chiffre d'affaires. Pour résoudre ce problème, Gugler *et al.* (2003) calculent le niveau de bénéfices dégagés par un groupe d'entreprises de référence du même secteur que celui des entreprises parties à la fusion, et le comparent avec les bénéfices réellement dégagés par les entreprises parties à la fusion. Puis ils appliquent la même méthode au chiffre d'affaires. En outre, la comparaison entre les valeurs prédites et les valeurs réelles est effectuée pour chacune des cinq années suivant l'année de la fusion. L'échantillon utilisé dans l'étude inclut jusqu'à 3 000 fusions pour chaque année d'observation, réalisées dans tous les principaux pays.

Gugler *et al.* (2003) constatent que dans la majeure partie des cas, les bénéfices réellement effectués par les entreprises parties à la fusion étaient supérieurs à ceux rapportés par leurs concurrents. Toutefois, l'inverse était vrai pour le chiffre d'affaires. Il semble alors difficile de juger si une fusion est une réussite en se fondant uniquement sur ces deux variables. Comme évoqué ci-dessus, Gugler *et al.* (2003) ont mesuré de résoudre cette ambiguïté et de déterminer l'impact des fusions sur le bien-être en examinant l'évolution des bénéfices *et* du chiffre d'affaires. Ils rapportent qu'en moyenne, les fusions *rentables* dans leur échantillon semblent augmenter le pouvoir de marché (ce qui signifie que l'impact sur le pouvoir de marché surpasse les gains d'efficacité éventuels). Dans l'ensemble, il s'est avéré que seuls 29 % environ du nombre total de fusions incluses dans l'étude ont abouti à une hausse tant du chiffre d'affaires que des bénéfices, c'est-à-dire ont amélioré l'efficacité. On obtient des résultats équivalents dans les différents pays, ce qui signifie que l'effet d'une fusion en termes d'efficacité et de pouvoir de marché ne semble pas dépendre du pays d'origine des entreprises parties à la fusion.

### **3.5 Utiliser les parts de marché pour évaluer les gains d'efficacité : le cas de l'industrie des semi-conducteurs**

Gugler et Siebert (2007) utilisent un test fondé sur les parts de marché pour évaluer les gains d'efficacité dans l'industrie des semi-conducteurs. Les semi-conducteurs (à savoir les puces mémoire, les microcomposants et autres composants comme les dispositifs logiques, discrets et optiques) sont principalement utilisés comme intrants pour la filière informatique, l'électronique grand public et les équipements de communication. C'est une industrie à forte intensité de capital et très innovante. Par exemple, le ratio dépenses de R-D/chiffre d'affaires, qui atteint 13 %, est supérieur à celui des secteurs pharmaceutique et informatique (Gugler et Siebert, 2007, p. 647).

L'indice Herfindahl-Hirschman de l'ensemble du secteur avoisinait 400 pour la période comprise entre 1989 et 1998 (période prise en compte par Gugler et Siebert (2007)), bien qu'il fût considérablement supérieur dans le segment microcomposants (plus de 2 000 en 1998 et 1999) que dans le segment mémoire. Cela est cohérent avec le point de vue selon lequel dans le segment mémoire, les produits sont moins différenciés et la concurrence par les prix est plus intense, bien que le segment des microcomposants possède des caractéristiques oligopolistiques.

Pour étudier si les fusions et les coentreprises de recherche génèrent globalement des gains d'efficacité dans ce secteur, Gugler et Siebert (2007) appliquent un test simple et intuitif fondé sur les parts de marché avant et après la fusion. Ils notent que, dans le cadre d'un certain nombre d'hypothèses concernant le comportement des entreprises et les caractéristiques du marché, la théorie économique prédit logiquement qu'après une fusion, la part de marché combinée des entreprises parties à l'opération diminuera si l'impact sur le pouvoir de marché (dû à une éventuelle réduction de la concurrence) surpasse les gains d'efficacité. À l'inverse, si les gains d'efficacité générés par la fusion sont suffisants pour surpasser l'impact sur le pouvoir de marché, la part de marché combinée des entreprises parties à la fusion augmentera.

Leurs résultats montrent qu'au niveau du secteur, les fusions et les coentreprises de recherche augmentent la part de marché des entreprises participantes, preuve que les gains d'efficacité sont supérieurs à tout effet anticoncurrentiel éventuel pour les deux types de coopération. Il en va de même à un niveau plus désagrégé, bien que les effets sur les gains d'efficacité se soient avérés plus importants dans le segment des microcomposants que dans le segment des mémoires. Gugler et Siebert (2007, p. 656) expliquent ces résultats sur la base des différences entre les deux segments : « *Une plus grande différenciation sur le marché des microcomposants est à l'origine de gains de pouvoir de marché inférieurs à la suite des fusions, et de moindres gains d'efficacité sont nécessaires pour surcompenser tout impact sur le pouvoir de marché. En outre, un plus grand nombre d'entrées nettes sur le marché des microcomposants entraîne une réponse accrue des outsiders, d'où un accroissement de la production du secteur et une baisse des prix. Ainsi, nous constatons un plus grand nombre de fusions/coentreprises de recherche améliorant l'efficacité nette dans le secteur des microcomposants que sur le marché de la mémoire.* »

Cette étude parvient à la conclusion que les fusions et les coentreprises de recherche améliorent l'efficacité dans l'industrie des semi-conducteurs. Toutefois, elle n'indique pas si les gains d'efficacité découlent directement de la fusion, et il semblerait en réalité que les coentreprises de recherche soient aussi bien adaptées que les fusions à cette fin, du moins dans ce secteur. En outre, les rares données disponibles ne permettent pas d'identifier la source des gains d'efficacité, et notamment si les gains d'efficacité dynamique sont plus courants que les gains d'efficacité statique. Cette question est également pertinente dans le secteur pharmaceutique, comme expliqué plus haut.

### 3.6 *L'impact des fusions sur l'activité de R-D : le cas du secteur pharmaceutique*

Une façon de tester si les fusions sont en mesure de générer des gains d'efficacité dynamique et d'encourager l'innovation consiste à examiner leur impact sur les intrants et produits de la R-D. C'est exactement ce qu'a fait Ornaghi (2009) pour le secteur pharmaceutique pour la période comprise entre 1998 et 2004. En particulier, il étudie l'impact de 27 fusions impliquant les principaux laboratoires pharmaceutiques sur les capacités et la volonté d'innovation des entreprises parties aux opérations.

Ornaghi (2009) montre que, par rapport à un groupe témoin composé d'entreprises non parties à une fusion<sup>63</sup>, les intrants et les produits de recherche des entreprises parties à une fusion (mesurée par les dépenses de R-D et le nombre de brevets majeurs déposés en un an, respectivement) diminuent l'année de la fusion ainsi qu'au cours des trois années consécutives. Il s'avère également que les fusions ont un impact négatif sur la productivité de la recherche, mesurée par le rapport nombre de brevets/dépenses de R-D. Dans l'ensemble donc, les résultats d'Ornaghi (2009) jettent le doute sur l'idée selon laquelle les fusions génèrent des gains d'efficacité dynamique capables de compenser d'éventuels effets anticoncurrentiels.<sup>64</sup>

<sup>63</sup> Ornaghi (2009) tente de prendre en compte la possibilité d'une corrélation entre la décision de l'entreprise de fusionner et ses activités de recherche (à savoir la possibilité que les décisions de fusion soient endogènes) de deux manières. Tout d'abord, il compare les résultats des entreprises parties à la fusion en matière d'innovation avec ceux d'un groupe témoin d'entreprises non parties à une fusion, possédant des caractéristiques observables préexistantes similaires à celles des entreprises parties à la fusion. Cela devrait permettre d'attribuer l'évolution des performances des deux groupes uniquement à la fusion. Ensuite, pour vérifier la robustesse de ses résultats, il forme un deuxième groupe témoin plus restreint, intégrant uniquement des entreprises non parties à une fusion menant des activités très proches de celles des entreprises parties à la fusion.

<sup>64</sup> Ce résultat contraste avec celui de Hall (1987), qui examine un ensemble de données portant sur la totalité des entreprises de production américaines cotées acquises entre 1976 et 1986, et ne prouve en rien que les fusions et les acquisitions entraînent une réduction des dépenses de R-D dans les entreprises parties à

Tandis qu'Ornaghi (2009) met l'accent sur l'intégration totale entre les entreprises par le biais des fusions ou acquisitions, Danzon, Nicholson et Sousa Pereira (2003) explorent le rôle des alliances de développement dans la réussite de l'activité de R-D dans le secteur pharmaceutique.

Les alliances de développement sont généralement formées par de petites entreprises de biotechnologie axées sur la recherche et de grandes entreprises pharmaceutiques. Les petites entreprises mettent au point des molécules « têtes de série », puis en accordent la licence aux grandes entreprises, qui endossent ensuite la responsabilité de leur optimisation et de leur développement dans le cadre d'études cliniques<sup>65</sup>, et à terme leur approbation par les autorités sanitaires. Ces alliances permettent ensuite aux entreprises de chaque catégorie de se concentrer sur leurs avantages comparatifs respectifs, à savoir la découverte de nouvelles molécules pour les petites entreprises, et le développement et la mise sous licence de médicaments pour les grandes, ce qui leur permet de tirer parti de la collaboration et du partage des risques et des coûts. Cela est confirmé par la tendance rapportée par Danzon, Nicholson et Sousa Pereira (2003), selon laquelle le codéveloppement est plus fréquent en phases II et III qu'en phase I, et recherché principalement par les petites et moyennes entreprises. En d'autres termes, il semble que les petites entreprises ont souvent les compétences et les ressources nécessaires pour réaliser des essais de phase I relativement modestes, mais tendent à chercher un partenaire plus important pour les essais plus complexes et coûteux de phases II et III.

Les résultats de Danzon, Nicholson et Sousa Pereira (2003) (qui utilisent des données relatives à plus de 900 entreprises pour la période 1988-2000) montrent que les alliances avec de grandes entreprises améliorent les chances de succès (à savoir le passage d'une phase à une autre dans les essais cliniques) des médicaments découverts par de petites entreprises se trouvant en phases II et III (à savoir les plus complexes et les plus coûteuses), mais pas pour les médicaments se trouvant en Phase I. L'expérience antérieure des entreprises acquérant et octroyant la licence (mesurée par le nombre de composés mis au point par une entreprise pendant une période donnée) semble également avoir un impact sur le taux de réussite des médicaments en phases II et III, mais une fois encore pas sur les médicaments en phase I. Sur la base de ces résultats, Danzon, Nicholson et Sousa Pereira (2003, p. 29) affirment que les alliances fonctionnent bien comme une « *source de financement et d'expertise pour les petites entreprises et une source de produits pour les grandes entreprises.* »

La mesure dans laquelle les entreprises parties à la fusion se chevauchent sur les marchés de la R-D et des produits semble également avoir de l'importance dans l'évaluation de l'impact d'une fusion. En particulier, Cassiman *et al.* (2005) constatent que lorsque les entreprises sont actives dans des secteurs technologiques complémentaires avant la fusion, elles augmentent leurs efforts de R-D et rapportent également de meilleures performances en matière de R-D après la fusion, parce que le processus de R-D leur permet de réaliser des synergies et des économies d'envergure. À l'inverse, lorsque les entreprises sont actives dans les mêmes secteurs technologiques, la fusion réduit tant leur activité que leurs performances en matière de R-D<sup>66</sup>, c'est-à-dire que les économies d'échelle (provenant, par exemple, de l'élimination des

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l'opération. Toutefois, ce résultat vaut pour l'échantillon agrégé ; au niveau individuel, les résultats sont mesurés de façon trop imprécise pour pouvoir tirer des conclusions définitives.

<sup>65</sup> Pendant la phase de développement, les nouvelles molécules chimiques sont soumises à trois tests : les essais de phase I vérifient si le nouveau médicament est bien toléré par les sujets sains ; les essais de phase II et III évaluent si le médicament est efficace sur de petits et de grands échantillons de patients atteints de la maladie ciblée, respectivement. Une fois que le médicament a passé avec succès les essais de phase III, l'entreprise qui l'a découvert peut demander une autorisation de mise sur le marché (Danzon, Nicholson et Sousa Pereira (2003, p. 2).

<sup>66</sup> Cassiman *et al.* (2005) sont également en mesure d'expliquer pourquoi les performances de R-D se détériorent après la fusion dans de tels cas : les employés clés tendent à quitter l'entité fusionnée, son

doubles emplois) sont inexistantes dans ces cas. En outre, au sein du groupe d'entreprises actives dans les mêmes secteurs technologiques, les entreprises parties à la fusion qui sont également concurrentes sur le marché des produits enregistrent des performances moins bonnes que les entreprises non concurrentes en matière de R-D.

### 3.7 *Mesurer l'efficience-X avant et après une fusion dans les secteurs de la banque, de l'électricité et du papier*

Une façon évidente (sous réserve de disponibilité des données) d'évaluer si les fusions peuvent profiter aux consommateurs consiste à mesurer l'efficience-X (ou technique) pour un groupe d'entreprises parties à une fusion et un groupe témoin d'entreprises non parties à une fusion, puis de voir comment cette mesure évolue à la suite d'une fusion.

Cela peut être effectué de différentes manières. Peristiani (1997), par exemple, estime une fonction de coût souple (une fonction « translog ») en utilisant des données relatives à l'ensemble des fusions bancaires (environ 4 900 transactions individuelles) aux États-Unis entre 1980 et 1990. Ses résultats suggèrent que les banques procédant à l'acquisition ont enregistré un déclin faible (mais significatif) de l'efficience-X après la fusion par rapport au groupe témoin, bien que les performances après la fusion aient considérablement varié entre les parties à la fusion. Les principaux déterminants de cette performance semblent être la hausse du risque de crédit de la banque après la fusion (mesurée par l'évolution du rapport emprunt/actifs), le nombre d'employés et le montant total des dépôts.

Kaur et Kaur (2010) utilisent une technique différente (*Data Envelopment Analysis* – DEA) pour étudier l'impact des fusions sur le rapport coût-efficacité des banques commerciales indiennes au cours de la période 1990-2008. Ils constatent qu'en moyenne, les fusions améliorent ce rapport, à une exception près, à savoir le cas de banques solides, saines, faisant l'acquisition de petits concurrents en difficulté. Bien que ces fusions – généralement encouragées par le gouvernement – contribuent à protéger les intérêts des déposants particuliers des banques affaiblies, elles ne contribuent pas à rendre l'entité fusionnée plus rentable.

Kwoka et Pollitt (2007) utilisent également la DEA pour comprendre comment les fusions entre les entreprises de distribution d'électricité aux États-Unis pendant la période 1994-2003 ont affecté le rapport coût-efficacité. Un point crucial de leur analyse est le suivant : bien que les fusions rassemblent des entreprises différentes sous propriété commune, les obligations de déclarations imposées par les autorités réglementaires sont demeurées inchangées et ont donc permis d'identifier les acheteurs et les vendeurs séparément, même après que la fusion a eu lieu. Kwoka et Pollitt (2007) obtiennent des résultats quelque peu surprenants. Tout d'abord, ils montrent que dans les années précédant la fusion, les acquéreurs n'étaient pas plus efficaces que les entreprises cibles (les vendeurs). En fait, les vendeurs étaient plus efficaces que les acquéreurs et les autres entreprises de distribution non impliquées dans la fusion. Plus remarquable encore, l'efficacité des vendeurs (mesurée par leurs dépenses d'exploitation) a diminué après la fusion, tandis que les acquéreurs ont enregistré un gain faible, voire nul, pour compenser ces pertes. Ainsi, les fusions dans le secteur de la distribution de l'électricité ne semblent pas augmenter le rapport coût-efficacité.

Toutefois, une autre approche visant à estimer le rapport coût-efficacité est illustrée par Pesendorfer (2003) dans le contexte de l'industrie du papier des États-Unis vers le milieu des années 1980. En particulier, Pesendorfer (2003) estime les coûts marginaux des entreprises à partir des données relatives à leurs décisions d'investissement, leurs capacités existantes et leur nombre d'usines. Il observe ensuite

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portefeuille de R-D devient plus ciblé, l'horizon de R-D se raccourcit et les fonds internes alloués à la R-D diminuent.

comment ces estimations varient tant pour les acquéreurs que pour les entreprises acquises dans le cadre d'une fusion. Ses résultats montrent que les acquéreurs et les vendeurs étaient relativement efficaces par rapport au groupe d'entreprises non parties à l'opération ; en outre, une majorité d'acquéreurs deviennent encore plus efficaces après la fusion en raison de capacités supplémentaires et d'un plus grand nombre d'usines.

Pesendorfer (2003) est également en mesure d'estimer les effets sur le bien-être total de la vague de fusions horizontales du milieu des années 1980 dans l'industrie du papier. En regroupant diverses catégories de produits, il calcule que le bien-être total a augmenté de près de 900 millions USD par an, la majorité de ces gains revenant aux consommateurs (600 millions USD) plutôt qu'aux producteurs (qui ont économisé un peu moins de 300 millions USD par an).

### **3.8 *L'impact des changements de propriétaire sur la productivité dans le secteur manufacturier des États-Unis***

Deux études différentes – Lichtenberg et Siegel (1987) et McGuckin et Nguyen (1995) – ont examiné de quelle manière la productivité d'une entreprise évolue après un changement de propriétaire dans le secteur manufacturier des États-Unis.

Lichtenberg et Siegel (1987) utilisent plus particulièrement les *Longitudinal Establishment Data* (LED) du *Census Bureau* sur plus de 20 000 usines de production relativement importantes pour la période comprise entre 1972 et 1981. Ils rapportent qu'environ 21 % des usines de cet échantillon ont changé de mains au moins une fois pendant la décennie prise en compte.

Leur étude se concentre sur l'impact (au niveau de l'usine individuelle) du changement de propriétaire sur la productivité totale des facteurs (PTF), qui correspond au taux de croissance résiduelle de la production une fois l'évolution de la quantité d'intrants (capital, main-d'œuvre, matières premières) utilisée prise en compte. Les auteurs constatent que les usines acquises sont moins productives que la moyenne du secteur avant l'acquisition, mais que leur productivité augmente après un changement de propriétaire. En particulier, les usines qui ont connu un changement de propriétaire ont enregistré une croissance de la PTF supérieure de 0.58 % à celle des usines du même secteur qui n'ont pas changé de propriétaire.

Toutefois, la base de données LED utilisée par Lichtenberg et Siegel (1987) porte principalement sur de grosses usines. Quelque 82 % des usines incluses dans le fichier LED ont employé 250 travailleurs ou plus, et près de 53 % des usines incluses dans l'échantillon comptaient plus de 500 employés. Cela n'est pas représentatif de la population des usines de production des États-Unis, puisque les chiffres correspondants rapportés par Lichtenberg et Siegel (1987) atteignent seulement 4 et 1.7 %, respectivement. En outre, Lichtenberg et Siegel (1987) utilisent un panel « équilibré » d'usines, parce que leur échantillon inclut des usines ayant fonctionné tout au long de cette période, en excluant celles qui ont été ouvertes ou fermées à un moment donné entre 1972 et 1981. Au vu de ces caractéristiques, il est possible que ces résultats soient invalides en raison d'un « biais de sélection ».

Cela a incité McGuckin et Nguyen (1995) à traiter la même question — l'effet d'un changement de propriétaire sur la productivité d'une entreprise — à l'aide d'une base de données différente. Ces auteurs utilisent notamment la *Longitudinal Research Database* (LRD) du *Census Bureau* et étudient les établissements transférés sur la période comprise entre 1977 et 1982. Leur approche vise à comparer l'évolution entre 1977 et 1987 de la productivité des usines qui ont été vendues à un moment donné pendant cette période et de celles qui n'ont pas changé de propriétaire.

En outre, McGuckin et Nguyen (1995) se concentrent uniquement sur les usines du secteur de l'industrie alimentaire (un secteur qui a enregistré une activité de fusion importante pendant la période considérée) et utilise un « panel déséquilibré », c'est-à-dire un échantillon qui inclut également des usines qui n'ont fonctionné que pendant une partie de la période. Par conséquent, l'étude de McGuckin et Nguyen (1995) inclut bien plus de petites usines que l'analyse de Lichtenberg et Siegel (1987).

Autre différence significative entre les deux études : pour mesurer la productivité des entreprises, McGuckin et Nguyen (1995) utilisent principalement la productivité de la main-d'œuvre (en particulier, le ratio productivité de la main-d'œuvre des usines/productivité moyenne de la main-d'œuvre du secteur) plutôt que la PTF, en raison du nombre restreint de données.

McGuckin et Nguyen (1995) mettent alors en évidence que les usines acquises enregistrent une productivité supérieure à la moyenne avant l'acquisition, bien que cela ne s'applique pas aux grandes usines (employant 250 ouvriers ou plus, la taille principalement prise en compte par Lichtenberg et Siegel (1987)). En outre, McGuckin et Nguyen (1995) montrent que les usines connaissant un changement de propriétaire enregistrent des taux de croissance de la productivité supérieurs à ceux des usines qui ne changent pas de propriétaire – un résultat robuste à différentes vérifications effectuées, et cohérent avec celui de Lichtenberg et Siegel (1987).

Ainsi, dans l'ensemble, ces deux études suggèrent que les synergies et les gains d'efficacité associés sont d'importants motifs de changement de propriétaire. Cela est rassurant, bien que certaines réserves — comme le fait qu'aucune des deux études n'aborde l'endogénéité lors de l'estimation de la productivité — soient de mise lors de l'interprétation des résultats.

### 3.9 Conclusions sur les évaluations *ex post*

Le présent chapitre a résumé plusieurs évaluations *ex post* traitant la question de savoir si les fusions améliorent ou non l'efficacité. Pour résumer, la réponse à cette question est équivoque. Certaines fusions (ou coentreprises) l'améliorent, d'autres non. Cela n'est pas surprenant, car de nombreux facteurs spécifiques à chaque cas et à chaque secteur influencent le résultat. En fait, dans le cas du secteur manufacturier des États-Unis (voir la sous-section précédente) la réponse semble dépendre de l'ensemble de données et des variables examinés.

Toutefois, ce résultat ne n'est pas nécessairement décourageant. Tout d'abord, les examens menés dans ce chapitre ont également montré qu'il n'est pas impossible d'évaluer *quantitativement* si les gains d'efficacité — même dynamique — allégués se sont concrétisés ou non après une fusion.

Au contraire, différentes méthodes — et variables — peuvent être utilisées par les autorités de la concurrence pour mener à bien cette tâche. Certaines méthodes sont plus sophistiquées et nécessitent plus de données, d'autres sont plus faciles à mettre en œuvre. Et certaines, p. ex. l'estimation d'une fonction de coût convenable, pourraient même être utilisées par les parties à la fusion pour valider leurs allégations au cours d'une enquête.

#### **4. Les allégations de gains d'efficacité et la justification objective dans les affaires de position dominante et de monopole**

##### **4.1 *Traitement juridique de la défense fondée sur les gains d'efficacité dans les affaires de position dominante***

###### **4.1.1 *Lois nationales sur la concurrence***

Dans de nombreux pays, les dispositions juridiques relatives à l'abus de position dominante et au monopole ne semblent laisser aucune place à une justification fondée sur les gains d'efficacité. C'est le cas, par exemple, de l'article 2 du *Sherman Act* des États-Unis, qui indique que « *toute personne monopolisant [...] toute partie des échanges ou du commerce entre plusieurs États [...] sera jugée coupable de crime.* » De même, l'article 102 du TFUE semble interdire de manière absolue tout abus de position dominante, privant ainsi les entreprises dominantes de la possibilité de justifier leur conduite.

Cela contraste avec d'autres secteurs du droit de la concurrence, où une défense fondée sur les gains d'efficacité est clairement possible de nos jours. Dans l'Union européenne, par exemple, les accords anticoncurrentiels, les décisions de groupements d'entreprises et les pratiques concertées, qui seraient interdits en vertu de l'article 101(1) du TFUE, pourraient néanmoins être légaux s'ils satisfaisaient aux conditions établies par l'article 101(3). En outre, comme noté dans le chapitre 2, le considérant 29 du règlement 139/2004 dispose clairement qu'une concentration susceptible d'être interdite dans d'autres circonstances peut être autorisée si les gains d'efficacité qu'elle génère contrebalancent les effets sur les concurrence, et notamment le préjudice potentiel pour les consommateurs.

Une situation similaire existe au Canada. L'article 96 de la Loi sur la concurrence du Canada dispose explicitement qu'une fusion ne pourra être bloquée si elle génère ou est susceptible de générer des gains d'efficacité supérieurs aux effets de l'empêchement ou de la diminution de la concurrence, et les compensant. À l'inverse, l'article 79 interdisant l'abus de position dominante ne prévoit pas d'exception liée aux gains d'efficacité dans l'évaluation de l'anticoncurrentialité d'un comportement.

Cela ne veut pas à dire que les dispositions autorisant la justification d'un abus allégué n'existent pas. La Loi sur la concurrence de l'Afrique du Sud, par exemple, dispose explicitement que les entreprises dominantes peuvent mettre en avant des gains d'efficacité pour justifier leur conduite potentiellement anticoncurrentielle par ailleurs. En particulier, conformément à l'article 8 de cette loi, une entreprise dominante ne peut s'engager dans des pratiques d'exclusion, sauf si elle peut mettre en évidence un gain d'efficacité technologique ou d'autres gains pro concurrentiels qui contrebalancent les effets anticoncurrentiels de sa conduite.

En France, l'article 420-4 du Code de commerce (qui s'applique tant aux accords qu'aux abus de position dominante) dispose qu'un comportement donné est légal si les entreprises impliquées peuvent prouver que leur comportement est conforme à un certain nombre de critères, à savoir : i) leurs pratiques ont pour effet d'assurer un progrès économique, y compris par la création ou le maintien d'emplois ; ii) n'éliminent pas la concurrence pour une partie substantielle des produits en cause ; et, iii) réservent aux utilisateurs une partie équitable du profit qui en résulte.

Une disposition similaire peut également être trouvée dans l'article 10 de la Loi sur la concurrence du Mexique amendée récemment, qui exige que la Commission mexicaine de la concurrence examine si les gains d'efficacité résultant du comportement affectent favorablement le processus concurrentiel.

#### 4.1.2 Tribunaux et lignes directrices

Même si la majorité des lois nationales sur la concurrence ne prévoient pas explicitement la possibilité de justifier une conduite anticoncurrentielle par n'importe quel motif (y compris celui des gains d'efficacité), cette possibilité a néanmoins été reconnue dans la pratique par les tribunaux et les instruments juridiques non contraignants, comme les lignes directrices.

Au Canada, par exemple, le Bureau de la concurrence et les tribunaux admettent que les entreprises dominantes peuvent avoir un argument commercial valide pour adopter un comportement spécifique. Une telle justification peut prévaloir si une entreprise peut apporter la preuve que les effets anticoncurrentiels raisonnablement prévisibles n'étaient pas en fait l'objectif majeur du comportement en question. D'après la Cour d'appel fédérale, « la justification commerciale doit être une raison fondée sur l'efficacité ou un raisonnement pro concurrentiel du comportement en question, raison attribuable au défendeur, qui se rapporte aux effets anticoncurrentiels et/ou à l'intention subjective de ce comportement et qui leur fait contrepoids ». <sup>67</sup> Cette approche est aujourd'hui clairement adoptée par les Lignes directrices pour l'application des dispositions sur l'abus de position dominante publiées récemment. Dans ce document, le Bureau explique qu'il doit « examiner la crédibilité de tout objectif de gains en efficacité ou de tout motif pro concurrentiel avancé par les entreprises visées par les allégations d'abus de position dominante, la relation des objectifs opérationnels avec la pratique anticoncurrentielle alléguée, et la probabilité que ces objectifs se concrétisent » lorsqu'il évaluera l'objectif prépondérant d'une pratique anticoncurrentielle alléguée. <sup>68</sup>

Aux États-Unis, il est reconnu depuis longtemps que les affaires de monopoles n'excluent pas l'appréciation des gains d'efficacité, malgré les termes de l'article 2 du *Sherman Act*. Par exemple, comme expliqué dans la section 4.5 ci-dessous, l'existence de gains d'efficacité (ou leur absence) a été mentionnée à plusieurs reprises par la Cour suprême des États-Unis dans sa décision sur le refus de contracter, dans l'affaire « *Aspen Skiing* ». <sup>69</sup> En outre, les considérations d'efficacité figuraient principalement dans le Rapport sur le comportement individuel des entreprises en vertu de l'article 2 du *Sherman Act* du Département de la justice des États-Unis, retiré ultérieurement. Ce rapport reconnaît explicitement que « *les connaissances juridiques et économiques ont révélé que de nombreuses pratiques des entreprises individuelles, autrefois présumées violer l'article 2, pouvaient générer des gains d'efficacité et profiter aux consommateurs.* » <sup>70</sup>

En Europe, tant la Commission européenne que les tribunaux communautaires étaient initialement réticents à reconnaître les justifications fondées sur les gains d'efficacité dans les affaires d'abus de position dominante. Avec le temps, toutefois, cette approche restrictive a commencé à se s'assouplir doucement.

<sup>67</sup> *Commissaire de la concurrence v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée*, 2006 FCA.

<sup>68</sup> Bureau de la concurrence [2012], Lignes directrices : Les dispositions sur l'abus de position dominante – Articles 78 et 79 de la Loi sur la concurrence, disponible à l'adresse suivante : [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-f.pdf/\\$FILE/cb-abuse-of-dominance-provisions-f.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-f.pdf/$FILE/cb-abuse-of-dominance-provisions-f.pdf)

<sup>69</sup> *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1513 (10<sup>th</sup> Cir. 1984).

<sup>70</sup> Département de la justice des États-Unis (2008), 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act', disponible à l'adresse suivante : <http://www.justice.gov/atr/public/reports/236681.pdf>

En 1988, par exemple, dans l'affaire « *Tetra Pak I* », <sup>71</sup> la Commission a confirmé implicitement que les gains d'efficience dynamique pouvaient représenter une justification objective. En 1999, la Cour de première instance (aujourd'hui la Cour) a invoqué pour la première fois les considérations d'efficience dans « *Irish Sugar* », déclarant que la légalité du comportement doit être fondée « *sur des critères d'efficacité économique et présenter un intérêt pour les consommateurs* ». <sup>72</sup>

Toutefois, certaines décisions suggèrent le contraire. Dans l'affaire « *Atlantic Container* », la Cour de justice de l'Union européenne (CJUE) a désapprouvé l'idée qu'une entreprise dominante puisse justifier sa conduite sur la base des bénéfices produits. Spécifiquement, elle déclare qu'« *il doit être souligné d'emblée qu'il n'existe aucune exception au principe de l'interdiction des abus de position dominante en droit communautaire de la concurrence. Contrairement à l'article 101 du TFUE, l'article 102 ne permet pas aux entreprises détenant une position dominante de solliciter l'octroi d'une exemption en faveur de leurs pratiques abusives. [...] En conséquence, les pratiques abusives commises par des entreprises dominantes sont interdites sans exception.* » En d'autres termes, « *dès lors que l'article [102] du traité ne prévoit pas la possibilité de l'octroi d'une exemption, les pratiques abusives sont interdites quels que soient les avantages auxquels elles donnent éventuellement lieu pour les auteurs de telles pratiques ou les tiers.* » <sup>73</sup>

Malgré ce rejet, les tribunaux communautaires ont néanmoins explicitement reconnu au cours des années suivantes l'admissibilité des défenses fondées sur les gains d'efficience en vertu de l'article 102.

La Cour a montré qu'elle était prête à accepter les allégations de gains d'efficience dans les affaires « *British Airways* » <sup>74</sup> et « *Michelin II* », <sup>75</sup> mais au final, les allégations ont été rejetées dans les deux cas. Pourtant, lors de l'appel dans l'affaire « *British Airways* », la CJUE a décidé qu'« *il importe de déterminer si l'effet d'éviction [...] peut être contrebalancé, voire surpassé, par des avantages en termes d'efficacité qui profitent également au consommateur* », confirmant ainsi de manière non équivoque que il a y a de la place pour les considérations d'efficience dans les affaires d'abus de position dominante. <sup>76</sup>

Plus récemment, la CJUE a confirmé l'admissibilité des allégations de gains d'efficience dans l'affaire « *Post Danmark* », maintenant qu'une entreprise dominante peut démontrer que « *soit que son comportement est objectivement nécessaire, soit que l'effet d'éviction qu'il entraîne peut être contrebalancé, voire surpassé, par des avantages en termes d'efficacité qui profitent également aux consommateurs.* » <sup>77</sup>

Les Orientations de 2009 sur les priorités retenues par la Commission pour l'application de l'article 82 reconnaissent également les gains d'efficience comme une défense possible, en affirmant que « *la Commission considère qu'une entreprise dominante peut aussi justifier des pratiques aboutissant à évincer les concurrents par des gains d'efficacité d'une ampleur suffisante pour qu'il soit peu probable que les*

<sup>71</sup> Décision de la Commission du 26 juillet 1988 - *Tetra Pak I*, J.O. [1988] L 272/27.

<sup>72</sup> Affaire T-228/97, [1999] ECR II-2969.

<sup>73</sup> Affaires jointes T-191/98 et T-212/98 à T-214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para. 1112.

<sup>74</sup> Affaire T-219/99, *British Airways plc v. Commission* [2003], ECR II-5917.

<sup>75</sup> Affaire T-203/01, *Manufacture Française des Pneumatiques Michelin v. Commission* (Michelin II) [2003] ECR II-4071.

<sup>76</sup> Affaire C-95/04 P, *British Airways plc v. Commission* [2007], ECR I-2331.

<sup>77</sup> Affaire C-209/10, *Post Danmark A/S v. Konkurrencerådet* [2012], pas encore publié.

*consommateurs en subissent un préjudice net.* »<sup>78</sup> Pour être admise, toutefois, cette défense doit satisfaire à certaines conditions, comme expliqué dans la section suivante.

#### 4.2 Norme et charge de la preuve

Ayant établi que les allégations de gains d'efficacité sont admissibles dans l'appréciation des affaires d'abus de position dominante et de monopole, la question se pose de savoir à quel moment ces allégations doivent être autorisées et de quelle manière elles doivent être prises en compte dans la pratique.

La Commission européenne adopte un ensemble de critères relativement stricts. En particulier, conformément aux exigences de l'article 101(3) du TFUE, une défense fondée sur les gains d'efficacité dans les cas d'abus de position dominante est acceptable lorsque l'ensemble des conditions suivantes sont réunies :

- les gains d'efficacité ont été ou sont susceptibles d'être réalisés grâce au comportement considéré ;
- le comportement prétendument abusif est indispensable à la réalisation de ces gains d'efficacité, c'est-à-dire qu'il ne doit pas y avoir d'autres pratiques moins anticoncurrentielles que le comportement considéré capables de produire les mêmes gains d'efficacité ;
- les gains d'efficacité susceptibles d'être produits par le comportement considéré l'emportent sur les effets préjudiciables probables sur la concurrence et le bien-être des consommateurs sur les marchés affectés ; et,
- le comportement n'élimine pas une concurrence effective en supprimant la totalité ou la plupart des sources existantes de concurrence réelle ou potentielle.<sup>79</sup>

Certains commentateurs, notamment Ahlborn et Padilla (2008), ont suggéré que ces conditions sont probablement trop strictes pour être satisfaites. Toutefois, le document de réflexion publié par la Commission pour stimuler le débat sur la mise en œuvre de l'article 102 a inclus un critère supplémentaire, à savoir que les gains d'efficacité doivent être répercutés sur les consommateurs. Ce critère semble désormais être dans une certaine mesure subsumé dans les troisième et surtout quatrième critères ci-dessous, puisque la Commission explique qu'en l'absence de rivalité entre des entreprises, « *l'entreprise dominante ne sera pas suffisamment incitée à continuer de créer et de répercuter les gains d'efficacité.* »<sup>80</sup>

En ce qui concerne les considérations procédurales, les gains d'efficacité peuvent être considérés soit comme un moyen de défense, soit comme un facteur dans l'analyse globale de l'impact concurrentiel du comportement en question. Le premier scénario comporte une analyse en deux étapes, dans laquelle un requérant (soit l'autorité de la concurrence, soit un plaignant privé) établit tout d'abord l'existence de l'abus. On évalue ensuite (par le biais d'un tribunal, par exemple) si les gains d'efficacité allégués contrebalancent les éventuels effets anticoncurrentiels. La seconde approche implique qu'une autorité de la concurrence considère les gains d'efficacité comme un facteur faisant partie intégrante de son évaluation

<sup>78</sup> Paragraphe 30, Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes, JO C 045 , 24/02/2009, pp. 7 – 20.

<sup>79</sup> Paragraphe 30, Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes, JO C 045 , 24/02/2009, pp. 7 – 20.

<sup>80</sup> *Ibidem.* Voir également Bellis et Kasten (2010).

globale. Par la suite, la disposition relative à l'abus de position dominante devient inapplicable lorsque les gains d'efficacité contrebalancent les effets anticoncurrentiels.<sup>81</sup>

Quelle que soit l'approche, la charge de la preuve de l'existence de gains d'efficacité supérieurs à ces effets incombe entièrement à l'entreprise dominante. Cela figure clairement dans les Orientations sur les priorités retenues par la Commission pour l'application de l'article 102 (paragraphe 31) :

*Il incombe à l'entreprise dominante de fournir toutes les preuves nécessaires pour démontrer que le comportement en cause est objectivement justifié. Il appartient ensuite à la Commission d'apprécier en dernière analyse si le comportement examiné n'est pas objectivement nécessaire et, sur la base d'une mise en balance des effets anticoncurrentiels apparents et des gains d'efficacité allégués et démontrés, est susceptible de porter préjudice aux consommateurs.*

Cela est cohérent avec la jurisprudence pertinente. Dans l'affaire « Microsoft », par exemple, le Tribunal a décidé que « si la charge de la preuve quant à l'existence des circonstances constitutives d'une violation de l'article 82 CE repose sur la Commission, c'est toutefois à l'entreprise dominante concernée, et non à la Commission, qu'il incombe, le cas échéant, et avant la fin de la procédure administrative, de faire valoir une éventuelle justification objective et d'avancer, à cet égard, des arguments et des éléments de preuve. Il appartient ensuite à la Commission, si elle entend conclure à l'existence d'un abus de position dominante, de démontrer que les arguments et les éléments de preuve invoqués par ladite entreprise ne sauraient prévaloir et, partant, que la justification présentée ne saurait être accueillie. »

Toutefois, il convient également de remarquer que certaines autorités ne peuvent ignorer les éventuels éléments à l'appui de gains d'efficacité pro concurrentiels, même s'ils ne sont pas directement rapportés par l'entreprise concernée.<sup>82</sup>

Les difficultés pratiques peuvent être la principale raison pour laquelle les autorités de la concurrence peuvent être tentées de considérer les gains d'efficacité comme un moyen de défense plutôt qu'un des facteurs dans une évaluation globale de l'abus lui-même. Toutefois, cela ne doit pas les conduire à reporter l'évaluation des gains d'efficacité s'ils veulent éviter le risque de trop sous-estimer le rôle des gains d'efficacité dans les abus de position dominante.

### **4.3 Les gains d'efficacité constituent-ils une justification objective ?**

Comme nous l'avons remarqué précédemment, dans l'affaire « Aspen Skiing », la Cour suprême des États-Unis a admis (du moins en principe) que le comportement d'une entreprise dominante peut se justifier, et s'est référée aux gains d'efficacité et raisons commerciales légitimes.

Cela soulève la question de la relation entre les différents concepts auxquels les législations nationales et la jurisprudence peuvent se référer lorsqu'elles évoquent les raisons sur la base desquelles les entreprises dominantes peuvent justifier leur conduite. En particulier, bien que la relation entre la justification

<sup>81</sup> On pourrait dire que cette dernière approche est plus cohérente avec la formulation de ces dispositions, qui ne prévoient pas explicitement la nécessité ou la possibilité de justifier le comportement une fois que l'autorité de la concurrence a déterminé qu'il y a effectivement abus de position dominante.

<sup>82</sup> D'après le rapport de l'ICN sur l'analyse des remises de fidélité en vertu de la législation applicable aux conduites unilatérales, la charge de la preuve des gains d'efficacité incombe à l'entreprise, notamment en République tchèque, au Danemark, dans l'Union européenne, en France, en Allemagne, en Corée, aux Pays-Bas, en Turquie et aux États-Unis. En Italie, toutefois, l'autorité de la concurrence doit prendre en compte les gains d'efficacité même si l'entreprise ne les a pas mentionnés, tant que les preuves nécessaires sont disponibles.

objective et les gains d'efficacité soit susceptible de varier d'un pays à l'autre, la question se pose de savoir si les gains d'efficacité entrent dans la catégorie plus largement définie des justifications objectives.

Dans l'Union européenne, par exemple, la Commission européenne, prévoit, dans les affaires entrant dans le champ d'application de l'article 102, qu'une entreprise dominante peut chercher à justifier son comportement en « *démontr[ant] soit que son comportement est objectivement nécessaire, soit qu'il produit des gains d'efficacité substantiels qui l'emportent sur les effets anticoncurrentiels produits sur les consommateurs.* »<sup>83</sup> Une telle déclaration semble conforme, du moins dans le cas de la Commission européenne, à l'opinion selon laquelle les gains d'efficacité et la justification objective sont deux motifs distincts sur lesquels une entreprise dominante pourrait chercher à s'appuyer pour justifier son comportement potentiellement anticoncurrentiel.

#### **4.4 Cohérence interne et traitement des gains d'efficacité dans les affaires d'abus de position dominante**

L'admissibilité des allégations de gains d'efficacité dans les affaires d'abus de position dominante est également liée aux objectifs alloués par les textes législatifs nationaux au droit de la concurrence.

Si les entreprises étaient autorisées à réfuter les présomptions et à justifier leur comportement dans les procédures concernant les fusions et les accords (mais pas les affaires d'abus de position dominante), l'exclusion d'une telle possibilité dans les affaires d'abus de position dominante remettrait en question la cohérence interne du système de concurrence dans son ensemble. Ce n'est pas simplement un risque spéculatif. Dans l'affaire « *Continental Can* », par exemple, la Cour européenne de justice a retenu que, puisque les articles 101 et 102 du TFUE poursuivent les mêmes objectifs, ils ne peuvent pas être interprétés d'une manière qui conduirait à des conclusions contradictoires.<sup>84</sup>

En outre, l'évaluation des gains d'efficacité dans les affaires d'abus de position dominante peut être compromise lorsque les autorités de la concurrence doivent remplir plus d'un objectif (*p. ex.* outre la maximisation de l'efficacité). Encore une fois, ce risque peut être réel. La Loi sur la concurrence de l'Afrique du Sud, par exemple, cite parmi ses objectifs l'efficacité économique et l'offre de prix compétitifs et d'un vaste choix de produits aux consommateurs. Toutefois, l'objectif de la Loi est également de promouvoir l'emploi et d'améliorer le bien-être social et économique des Africains du Sud ; [...] de garantir que les petites et moyennes entreprises ont les mêmes chances de participer à l'économie ; et de promouvoir une meilleure répartition de la propriété, en particulier d'accroître la propriété des personnes historiquement désavantagées » (article 2 de la Loi 89, 1998).

#### **4.5 Les allégations de gains d'efficacité dans la pratique : tour d'horizon des affaires d'abus de position dominante**

À ce jour, les gains d'efficacité n'ont jamais joué de rôle décisif dans les affaires d'abus de position dominante. Une certaine évolution peut néanmoins être observée, du moins dans l'Union européenne, où (tout comme dans les procédures de fusion) les entreprises dominantes soumettent de plus en plus souvent des allégations de gains d'efficacité pour ne pas engager leur responsabilité en vertu de l'article 102 du TFUE ; ces allégations sont examinées par la Commission et les tribunaux communautaires.

<sup>83</sup> Paragraphe 28, Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes, JO C 045, 24/02/2009, pp. 7 – 20.

<sup>84</sup> Affaire 6/72, *Continental Can v. Commission* [1973] ECR 215, paragraphe 25.

Des allégations de gains d'efficience ont été mises en avant, sans succès toutefois, dans les affaires « *Wanadoo* », <sup>85</sup> « *Telefónica* », <sup>86</sup> « *Microsoft* », <sup>87</sup> et « *Intel* ». <sup>88</sup> Dans l'affaire « *Wanadoo* », le Tribunal a déclaré qu'une « *entreprise qui pratique des prix prédateurs peut bénéficier d'économies d'échelle et d'effets d'apprentissage en raison d'une production accrue précisément grâce à cette pratique. Les économies d'échelle et les effets d'apprentissage obtenus ne sauraient donc exonérer l'entreprise de sa responsabilité au regard de l'article 82 CE.* » <sup>89</sup>

Outre une certaine méfiance envers les allégations de gains d'efficience, le manque de preuves à l'appui de l'existence des gains d'efficience allégués peut également poser problème en cas de défense fondée sur les gains d'efficience dans les affaires de position dominante. <sup>90</sup> Par exemple, dans l'affaire « *Intel* », l'entreprise a affirmé que toutes les conditions d'exclusivité de ses rabais débouchaient sur quatre types de gains d'efficacité différents: des prix plus bas, des économies d'échelle, d'autres réductions de coûts et gains de productivité, ainsi que des gains d'efficacité au niveau du partage des risques et de la commercialisation. <sup>91</sup> Ces derniers, d'après Intel, n'auraient pas été obtenus sans l'application de rabais conditionnels. Toutefois, la Commission a rejeté ces quatre types de gains d'efficience parce qu'Intel n'est pas parvenue à prouver quels seraient précisément ces gains ou pourquoi les conditions d'exclusivité créeraient de tels gains.

Alors que dans le présent cas, Intel n'est pas parvenue à présenter des preuves suffisantes et convaincantes, il se pourrait également qu'il soit difficile pour l'entreprise dominante de satisfaire au test prévu par la Commission. <sup>92</sup> Geradin (2009), par exemple, souligne qu'une entreprise dominante peut trouver difficile de prouver, souvent plusieurs années après la mise en œuvre de la pratique commerciale faisant l'objet de l'enquête, qu'il n'y avait pas « *d'autre solution efficiente [...] avec un effet moins restrictif ou moins exclusif* ».

Aux États-Unis, les tribunaux ont depuis longtemps reconnu que les gains d'efficience ont droit de cité dans les affaires de monopole. Dans l'affaire « *Aspen Skiing* », dans son analyse visant à déterminer si le refus d'Aspen Skiing de traiter avec son partenaire commercial de longue date et concurrent, Aspen Highlands, allait à l'encontre de l'article 2 du *Sherman Act*, la Cour suprême a cité le juge Bork et les professeurs Professors Areeda et Turner, qui ont tous convenu que tant qu'une entreprise exerce une concurrence fondée sur ses mérites, son comportement doit être autorisé. En particulier, citant le juge Bork, la Cour a déclaré que « *si une entreprise a été tentée d'exclure des concurrents sur une base autre que*

<sup>85</sup> Décision de la Commission, COMP/38.233, *Wanadoo Interactive*.

<sup>86</sup> Décision de la Commission, COMP/38.784, *Wanadoo España v. Telefónica*.

<sup>87</sup> Décision de la Commission, COMP/C-3/37.792, *Microsoft v. Commission*.

<sup>88</sup> Décision de la Commission, COMP/37.990, *Intel*.

<sup>89</sup> Affaire 340/03, *France Télécom v. Commission* [2007] ECR 00107, paragraphe 217.

<sup>90</sup> Voir, par exemple, Tosza (2009), qui souligne que « la simple reproduction des arguments souvent cités dans les publications économiques n'est pas suffisante. L'entreprise dominante doit faire le lien entre ces arguments et sa situation individuelle, et fournir des preuves. »

<sup>91</sup> Décision de la Commission, COMP/37.990, *Intel*, paras. 1632-1639.

<sup>92</sup> Dans sa décision (paragraphe 1624), la Commission a expliqué que « *pour justifier de manière objective ses rabais conditionnels, Intel doit démontrer qu'il y a un gain d'efficacité [...], que son comportement peut permettre d'atteindre l'objectif légitime, qu'il n'avait pas d'autres moyens aussi efficaces d'atteindre cet objectif légitime avec un effet moins restrictif ou moins exclusif, et enfin que son comportement est 'proportionné', dans le sens que l'effet d'éviction pourrait l'emporter sur l'objectif légitime poursuivi par Intel.* »

*l'efficience, il est justifié de qualifier son comportement de prédateur.* »<sup>93</sup> Ayant répété que la conduite du défendeur n'était ni « *motivée par des considérations d'efficience* », ni justifiée par des « *raisons commerciales légitimes* », la Cour suprême a confirmé qu'un défendeur ne violera pas l'article 2 tant qu'il sera en mesure de justifier sa conduite.

Les gains d'efficience, par exemple, ont fait l'objet d'un débat assez approfondi dans l'affaire « *Microsoft* », résultant de plaintes déposées séparément par les États-Unis et des États individuellement. Tout d'abord, au début des années 2000, le Tribunal fédéral de première instance a décidé que Microsoft violait les articles 1 et 2 du *Sherman Act*. En particulier, l'entreprise avait maintenu illégalement un monopole sur le marché des systèmes d'exploitation des PC compatibles avec Intel, avait tenté d'établir un monopole sur le marché des navigateurs et avait lié deux produits séparés.<sup>94</sup> Microsoft a fait appel du jugement du tribunal en affirmant que l'intégration d'Internet Explorer à Windows était bénéfique et innovante, et en demandant par ailleurs le non-retrait du navigateur Internet. La Cour d'appel, toutefois, a décidé que l'entreprise avait échoué à préciser et à justifier ces allégations.

En ce qui concerne les ventes liées, les tribunaux américains considèrent généralement ce comportement comme invalide *en soi*.<sup>95</sup> Dans l'affaire « *Microsoft* », toutefois, la Cour d'appel a modifié cette règle et a adopté une approche fondée sur la règle de raison pour prendre en compte les effets allégués des ventes liées sur les gains d'efficience.<sup>96</sup> La Cour, en particulier, a souligné qu'« *en raison du caractère extrêmement innovant des marchés des logiciels de plateforme, les ventes liées sur ces marchés peuvent engendrer des gains d'efficience que les tribunaux n'ont jamais rencontrés auparavant* ». De l'avis de la Cour, ces gains d'efficience pourraient résulter, par exemple, d'économies sur les coûts de distribution et les coûts de transaction du consommateur, ainsi que de potentielles économies de gamme.

Outre le fait d'avoir expressément déclaré que l'article 2 du *Sherman Act* nécessite une approche fondée sur la règle de raison, la Cour d'appel a établi un test en quatre phases afin déterminer si l'article 2 avait été violé. Tout d'abord, le comportement allégué doit avoir un « effet anticoncurrentiel », qui entrave le processus concurrentiel et porte ainsi préjudice aux consommateurs. Ensuite, le plaignant doit démontrer que le comportement du monopoleur a effectivement un effet anticoncurrentiel. Troisièmement, si le plaignant réussit à prouver cet effet, le défendeur peut mettre en avant « *une justification proconcurrentielle – une allégation justifiée que sa conduite est effectivement une forme de concurrence fondée sur les mérites, parce qu'elle implique, par exemple, une plus grande efficacité ou une plus grande attractivité pour les consommateurs* ». <sup>97</sup> Enfin, si la justification elle-même n'est pas réfutée, le plaignant doit démontrer que le préjudice anticoncurrentiel causé par le comportement surpasse l'avantage proconcurrentiel.

## 5. Conclusions

Les considérations d'efficience ont joué un rôle croissant dans l'analyse de la concurrence depuis qu'Oliver Williamson a publié son article fondateur en 1968. Même si à ce jour les allégations d'efficience n'ont joué un rôle décisif que dans un petit nombre de cas, les entreprises parties à des fusions et les

<sup>93</sup> Ibidem, citant Robert Bork [1978], *The Antitrust Paradox*.

<sup>94</sup> *United States v. Microsoft Corporation*, 87 F. Supp. 2d 30 (2000).

<sup>95</sup> Voir, par exemple, *Jefferson Parish Hospital, Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-18 (1984).

<sup>96</sup> La Cour a considéré que la demande directe des consommateurs au regard de la règle d'illégalité en soi établie dans « *Jefferson Parish* » et les demandes indirectes de la clientèle sont un « *mauvais indicateur de l'efficience nette des produits nouvellement intégrés* » puisqu'elles sont généralement rétrospectives. *United States v. Microsoft Corporation*, 253 F.3d 34 (2001).

<sup>97</sup> Ibidem.

entreprises dominantes se montrent plus confiantes lorsqu'il s'agit de les exposer aux autorités de la concurrence.

Cela implique que les autorités de la concurrence doivent développer et actualiser leur expertise en matière d'évaluation des allégations de gains d'efficience.

L'évaluation des allégations de gains d'efficience par les autorités de la concurrence n'est toutefois pas facile, et plusieurs problèmes doivent être réglés. L'un d'eux concerne la mesure dans laquelle un organisme de contrôle de la concurrence peut mettre dans la balance les gains d'efficience potentiels (y compris en termes d'économies de coûts fixes, par opposition à la réduction des coûts marginaux) et les éventuels effets anticoncurrentiels résultant d'une transaction ou d'un comportement spécifique — une question liée de manière inhérente au critère de bien-être appliqué par les organismes de contrôle de la concurrence. Le critère de la preuve appliqué aux allégations de gain d'efficience peut également faire l'objet d'une controverse, notamment dans le cas des gains d'efficience dynamique, qui sont plus spéculatifs et donc plus difficiles à vérifier. D'un point de vue procédural, il est également important d'établir si les considérations d'efficience font partie intégrante de l'appréciation globale de la concurrence ou font plutôt office de défense contre la constatation qu'une transaction ou un comportement spécifique est anticoncurrentiel.

Si possible, ces questions sont encore plus importantes dans les affaires d'abus de position dominante, puisque la jurisprudence et les lignes directrices donnent moins d'orientations. En outre, en gardant à l'esprit les différences entre l'analyse de la concurrence dans les fusions et les affaires de comportement unilatéral, les agences doivent vérifier si des critères identiques ou différents concernant le critère et la charge de la preuve doivent guider l'évaluation des allégations de gains d'efficience.

Enfin, à mesure que les autorités de la concurrence acquièrent de l'expérience dans l'évaluation des allégations de gains d'efficience, elles peuvent envisager de conduire une évaluation *ex-post* de ces allégations. À cette fin, il existe différents outils et techniques pour évaluer de manière quantitative si les gains d'efficience allégués — même dynamique — se sont concrétisés ou non après la fusion. Cette connaissance permettrait aux organismes de contrôle de la concurrence de valider la précision de leur analyse et d'améliorer le traitement des allégations de gains d'efficience lors de futures affaires.

## ANNEXE.

### LES SOURCES DE GAINS D'EFFICIENCE

Les gains d'efficacité – statique, dynamique ou transactionnelle – peuvent avoir différentes origines. La présente annexe dresse une brève liste (non exhaustive) de ces origines, et indique leur pertinence dans le contexte de la politique de la concurrence. En général, le débat fait référence aux gains d'efficacité résultant des fusions, mais cela n'implique en aucun cas que les gains d'efficacité ne peuvent pas découler d'un accord entre des concurrents, ou du comportement d'une entreprise dominante.

#### 1. Rationalisation de la production entre les usines

Lorsque les usines (ou les entreprises) ont des coûts marginaux différents, des économies peuvent être réalisées en transférant la production d'une usine aux coûts marginaux élevés vers une usine aux coûts marginaux inférieurs, tout en maintenant le même niveau global de production. Ces économies résultent de la rationalisation de la production entre les usines (voir Röller, Stennek et Verboven, 2001, p. 43).

La rationalisation est complètement achevée lorsque le coût marginal de production est le même dans toutes les usines, c'est-à-dire lorsqu'aucun avantage supplémentaire ne peut être tiré en transférant la production d'une usine à l'autre. Il peut également exister un cas extrême dans lequel l'usine possédant le coût marginal le plus bas n'a pas de contrainte de capacité, auquel cas il est efficace de transférer toute la production vers cette usine et de fermer toutes les autres. Dans ce cas, des économies supplémentaires sont réalisées en évitant la duplication des coûts fixes.

Dans le cadre d'une fusion, une rationalisation de la production peut également avoir lieu lorsque les entreprises parties à la fusion produisent des produits différenciés, par exemple en concentrant la production de chaque bien dans l'une des usines (de la Mano, 2002, p. 65). La rationalisation des capacités de production peut revêtir une importance particulière dans les fusions impliquant des secteurs en déclin (Dutz, 1989).

#### 2. Économies d'échelle

Pour simplifier, les économies d'échelle se produisent lorsque les coûts moyens diminuent avec l'accroissement de la production, c'est-à-dire lorsque les coûts unitaires diminuent à mesure que la production augmente. En général, les économies d'échelle n'existent à court terme que jusqu'à un certain niveau de production (défini comme « l'échelle d'efficacité minimum » – EEM – dans les publications économiques). Au-delà de ce niveau, les coûts moyens recommencent à augmenter, p. ex. parce que certains intrants (comme la capacité des usines, le capital physique et les ressources de gestion) sont disponibles en quantités fixes, ce qui empêche une expansion supplémentaire de la production.<sup>1</sup>

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<sup>1</sup> La courbe de coût moyen est alors en forme de U. L'estimation du niveau auquel les économies d'échelle sont épuisées, c'est-à-dire l'échelle d'efficacité minimum d'un secteur, peut être compliquée, et l'EEM est susceptible d'évoluer au fil du temps et de varier d'un secteur à l'autre. Un secteur où les coûts moyens diminuent à tous les niveaux pertinents de la production porte le nom de « monopole naturel », parce qu'il est efficace qu'une seule entreprise approvisionne le marché entier.

Dans le cadre d'une fusion, les économies d'échelle à court terme sont généralement imputables à un accroissement de la production au sein de l'entreprise ou de l'usine fusionnée, ce qui abaisse les coûts variables ou marginaux et aide les entreprises à atteindre une taille plus efficiente.

Autre source possible de gains d'efficience, l'élimination des coûts fixes redondants, comme les ressources administratives, les dépenses de marketing, la location des installations et autres frais généraux. En d'autres termes, après une fusion, les parties à la fusion évitent de payer les mêmes coûts fixes deux fois. En outre, en associant la production des deux entreprises au sein d'une seule et même entité, la fusion permet de répartir ces coûts fixes sur une plus grande partie de la production. Toutefois, dans la pratique, les autorités de la concurrence tendent à accorder peu de considération à la réduction des coûts fixes, parce que même si ces économies découlent directement de la fusion, qu'elles sont vérifiables et souvent quantifiables, il y a peu de chances qu'elles soient répercutées sur les consommateurs sous la forme de baisses de prix (de la Mano, 2002, p. 63). Par exemple, les lignes directrices de l'Irlande relatives aux fusions mentionnent explicitement, parmi les gains d'efficience qui ne sont généralement pas pris en compte, « *les gains d'efficience liés aux économies d'échelle et de gamme, qui n'impliquent pas de réductions des coûts marginaux.* »<sup>2</sup> Cette question, toutefois, est liée au critère de bien-être appliqué par l'autorité de la concurrence. En particulier, lorsqu'un critère de bien-être est utilisé, les économies de coûts fixes sont généralement prises en compte.

Cette approche peut nécessiter d'être reconsidérée dans le contexte des gains d'efficience dynamique, où les coûts fixes inférieurs « *peuvent motiver les entreprises à entreprendre des projets de R-D qu'elles considéraient auparavant comme trop chers ou trop risqués* »,<sup>3</sup> ce qui peut tourner ensuite à l'avantage des consommateurs. L'*Antitrust Modernization Commission* des États-Unis a expressément reconnu cette possibilité en affirmant que « *les agences et les tribunaux devraient accorder davantage de crédit à certains gains d'efficience en matière de coûts fixes, comme les dépenses de recherche et de développement dans les secteurs dynamiques, axés sur l'innovation.* »<sup>4</sup> Katz et Shelanski (2004) ont également remarqué qu'« *il est important que les coûts fixes ne soient pas exclus de l'analyse des gains d'efficience lorsque l'innovation est en question.* »

À long terme, des économies d'échelle peuvent découler d'une spécialisation (les employés devenant de plus en plus spécialisés dans moins en moins de tâches) et de l'apprentissage par la pratique (les coûts unitaires diminuent à mesure que la production augmente). Outre la production, les économies d'échelle peuvent également être réalisées dans d'autres fonctions, comme le marketing, la distribution et la R-D.

### 3. Synergies

Farrell et Shapiro (2001) se montrent plus sceptiques vis-à-vis des économies d'échelle, notant que : i) en principe du moins, les économies d'échelle peuvent être obtenues de manière unilatérale, c'est-à-dire sans fusion (par le biais d'une croissance interne par exemple) ; et ii) elles peuvent ne pas profiter aux consommateurs (p. ex. si ces gains ne sont pas suffisamment importants ou pas répercutés).

Farrell et Shapiro (2001) définissent ensuite les « synergies » comme de véritables gains d'efficience directement imputables aux fusions, fondés sur l'intégration étroite d'actifs de base spécifiques, difficiles à échanger, en possession des parties à la fusion. Contrairement aux gains d'efficience ordinaires, ces synergies « *impliquent la coopération et la coordination des actifs des deux entreprises, qui permettent*

<sup>2</sup> Notification relative aux *Guidelines for Merger Analysis* (2002), paragraphe 5.10.

<sup>3</sup> Voir OCDE (2007a), p. 30.

<sup>4</sup> Antitrust Modernization Committee (2007), Report and Recommendations, chapitre I.B, p. 49. Disponible à l'adresse suivante : [http://govinfo.library.unt.edu/amc/report\\_recommendation/chapterI.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/chapterI.pdf)

*d'améliorer la fonction de production, par opposition aux différents choix à faire (quant à l'échelle de production par exemple) lorsque la fonction de production demeure inchangée. En d'autres termes, les synergies permettent des configurations production/coût qui ne seraient pas réalisables autrement ».*<sup>5</sup> D'après Farrell et Shapiro (2001), les synergies associées aux fusions horizontales sont les suivantes : coordination des opérations conjointes, p. ex. sur un champ de pétrole ; partage des compétences complémentaires en matière de fabrication et de distribution ; amélioration de l'interopérabilité entre les produits liés ; et amélioration de la configuration d'un réseau ferré.

#### **4. Économies de gamme**

Les économies de gamme se produisent lorsqu'il est moins cher de produire deux ou plusieurs produits conjointement que de produire chaque produit séparément. Si c'est le cas, il y a alors une incitation à privilégier des usines multi-produits plutôt que des usines spécialisées dans la production d'un seul produit. Une raffinerie produisant de l'essence et d'autres produits pétroliers est un exemple possible. Les économies de gamme peuvent dériver de l'utilisation plus efficace des matières premières communes, ainsi que des connaissances techniques pouvant être mises en œuvre pour fabriquer et vendre plusieurs produits.

#### **5. Progrès technologique**

Une fusion peut également permettre à deux entreprises de combiner des compétences et des actifs technologiques et managériaux complémentaires, dont peuvent découler de grandes innovations. Il en va de même pour les dépenses de R-D. En particulier, le regroupement des ressources de R-D peut conduire à des économies d'échelle plus importantes (les coûts fixes correspondants étant répartis sur une production plus large), mais également à une accélération de l'innovation et des gains d'efficacité dynamiques.

#### **6. Réduction de la marge de capacité non utilisée**

L'efficacité interne d'une entreprise peut être améliorée lorsque une fusion permet de remplacer une équipe de direction moins compétente par une équipe plus efficace, par exemple, bien qu'il y ait peu de preuves empiriques à l'appui d'un effet de « discipline de gestion » découlant des fusions (de la Mano, 2002, p. 68).

#### **7. Économies de coûts d'achat**

Les fusions peuvent permettre aux entreprises parties de réaliser des économies de coûts d'achat (ou économies d'achat ; voir Röller, Stennek et Verboven, 2001, pp. 46 – 47), par exemple en obtenant de meilleurs termes et conditions auprès des fournisseurs en raison d'un meilleur pouvoir de négociation. Ces économies, toutefois, sont généralement considérées comme des transferts de richesse des fournisseurs vers les entreprises parties à la fusion, c'est-à-dire qu'elles sont de nature pécuniaire, et ne sont donc pas considérées comme des gains d'efficacité.

Il existe des cas, toutefois, où les économies de coûts d'achat représentent de véritables économies. C'est ce qui se produit, par exemple, lorsque les entreprises parties à la fusion paient un tarif binôme, c'est-à-dire un tarif fixe qui ne varie pas avec la quantité achetée, plus une part variable qui dépend de la

<sup>5</sup> Farrell et Shapiro (2001), p. 673. Farrell et Shapiro (2001) est lié à leur précédent article (Farrell et Shapiro, 1990), où, utilisant un modèle de Cournot dans lequel les entreprises se livrent concurrence par les quantités, ils démontrent que — pour que les prix diminuent après une fusion — l'entité fusionnée doit obtenir un coût marginal significativement inférieur au coût marginal de l'une ou l'autre des parties avant la fusion.

quantité achetée. Dans ce cas, plus le volume d'intrants acheté est important, plus le prix unitaire payé par les entreprises parties à la fusion est bas.

## **8. Économies financières et économies d'impôts**

Une fusion peut permettre à la nouvelle entité d'avoir accès à davantage de sources de financement de meilleure qualité, ou de réduire son profil de risque, ce qui peut ensuite se traduire par une baisse des coûts de capitaux. Ces économies sont potentiellement vérifiables et peuvent être répercutées sur les consommateurs.

En outre, les entreprises peuvent dans certains cas décider de fusionner parce que la nouvelle entité bénéficiera ainsi d'économies d'impôts. Par exemple, l'acquéreur peut imputer ses obligations fiscales sur les crédits et pertes de l'entreprise acquise. Ces économies, toutefois, seront purement pécuniaires et ne constitueront pas de réelles économies de coûts. En tant que telles, elles sont difficiles à comptabiliser comme des gains d'efficacité.

## **9. Gains d'efficacité du côté de la demande**

Certains produits entraînent des effets de réseau, c'est-à-dire que pour les consommateurs, leur valeur augmente avec le nombre de personnes utilisant le produit en question sur un réseau ou une plateforme. C'est le cas, par exemple, des téléphones et de l'e-mail. Dans ce cas, une fusion combinant les bases clients des différentes entreprises permet de créer un réseau plus vaste et de profiter ainsi aux consommateurs. En particulier, cela pourrait être le cas lorsqu'une entreprise est relativement plus importante que ses concurrentes et que la fusion a juste accéléré le « basculement » de l'ensemble du marché en faveur de l'entreprise dominante. Lorsque deux entreprises ou plus sont encore en concurrence pour devenir la première entreprise du marché, une fusion peut toutefois ne pas être bénéfique pour les consommateurs.

Lorsque les produits sont complémentaires (p. ex. dans le cas d'une fusion conglomerale), des gains d'efficacité du côté de la demande peuvent également se produire parce que « *la diminution du prix d'un produit augmente sa demande et celle des autres produits utilisés avec lui* » (Lignes directrices d'appréciation des fusions du Royaume-Uni, 2010, paragraphe 5.7.17), un résultat rendu possible par la propriété commune de produits complémentaires. Un exemple de cet effet à la suite d'une fusion récente au Royaume-Uni figure dans l'encadré 1, dans le corps du texte de la présente note.

En outre, lorsque des produits ne sont pas des substituts et que les clients sont incités à acheter une gamme de produits auprès d'un seul fournisseur, des gains d'efficacité peuvent découler du « *one-stop shopping* » (approvisionnement auprès d'un seul fournisseur), p. ex. parce que l'achat auprès d'un seul fournisseur réduit les coûts de transaction ou, lorsque les produits sont complémentaires, garantit une meilleure compatibilité des produits ou constitue une assurance qualité (voir Lignes directrices d'appréciation des fusions du Royaume-Uni, 2010, paragraphe 5.7.18). Ces avantages pourraient, toutefois, être qualifiés d'économie de gamme à l'achat (plutôt qu'à la production).

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## COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

### 1. Introduction aux allégations de gains d'efficience dans les procédures d'application du droit de la concurrence

Le Président, M. Frédéric Jenny, ouvre la table ronde sur le rôle des allégations de gains d'efficience dans les procédures d'application du droit de la concurrence et remercie les délégués pour les contributions qu'ils ont soumises au Secrétariat. Le Président présente ensuite les trois spécialistes de cette table ronde : M. Frederic Michael Scherer, professeur émérite Aetna à la *John F. Kennedy School of Government*, Université d'Harvard ; Mme Helen Jenkins, directrice générale d'Oxera et M. Hans W. Friederiszick, directeur général de E. CA Economics et intervenant professionnel à la *European School of Management and Technology*.

Le Président présente les trois thèmes spécifiques qui seront traités pendant la table ronde, à savoir : i) les aspects juridiques et procéduraux de la reconnaissance de l'importance du moyen de défense fondé sur les gains d'efficience, ii) les outils pratiques et l'évaluation ex-post des gains d'efficience et iii) les allégations d'efficience dans les affaires d'abus de position dominante et de monopolisation. Le Président donne la parole au Secrétariat de l'OCDE qui aborde la question des allégations de gains d'efficience dans les procédures d'application du droit de la concurrence.

Dans un premier temps, le Secrétariat fait remarquer que la question de l'efficience occupe une place de plus en plus importante dans l'analyse de la concurrence depuis la publication de l'article précurseur d'Oliver Williamson en 1968, dans lequel cet économiste constatait que les gains d'efficience peuvent l'emporter sur la dégradation du bien-être induite par une augmentation du pouvoir de marché découlant d'une fusion. Depuis, un nombre croissant de pays ont adopté et révisé leurs législations afin de prendre en compte le traitement des allégations de gains d'efficience. Le Secrétariat précise que ce processus est toujours d'actualité et, qu'à titre d'exemple, la note de référence décrit les progrès accomplis aux États-Unis et dans l'Union européenne (UE) à cet égard.

Dans un second temps, le Secrétariat indique que, malgré ces évolutions, les allégations de gains d'efficience n'ont que rarement été prises en compte en détail lors de fusions, et qu'elles ont plus rarement encore joué un rôle décisif dans le dénouement d'affaires. Toutefois, la note de référence signale quelques cas dans lesquels ces allégations ont joué un rôle clé, notamment l'acquisition de Novazyme par Genzyme aux États-Unis (2004), la fusion *Global / GCap* de deux stations de radio au Royaume-Uni (2008), une fusion dans le domaine de la vente d'annuaires en porte à porte aux Pays-Bas (2008) et la fusion de deux hôpitaux néerlandais (2009).

Dans un troisième temps, le Secrétariat attire l'attention sur l'importance des critères de bien-être et de la norme de la preuve dans l'évaluation des allégations de gains d'efficience. Les critères de bien-être, tels qu'ils sont appliqués par une autorité de la concurrence, sont adaptés pour mettre en balance les gains potentiels d'efficience et les effets anticoncurrentiels découlant d'une opération ou d'une conduite spécifique. La norme de la preuve peut prêter à controverse, notamment lorsqu'il s'agit de gains d'efficience dynamique, par nature plus spéculatifs et difficiles à vérifier.

Le Secrétariat porte ensuite son attention sur l'évaluation ex-post des gains d'efficacité dans le cadre de fusions. Afin de mener de telles évaluations, de nombreux pays ont besoin que les allégations de gains d'efficacité soient vérifiables et, dans la mesure du possible, mesurables. La note de référence fait valoir que, même lorsqu'il s'agit de gains d'efficacité dynamique, il est non seulement possible de déterminer si les gains d'efficacité allégués sont survenus après une fusion, mais il est également possible, dans de nombreux cas, de les quantifier. Elle souligne en outre qu'il existe différents outils et techniques pour évaluer de manière quantitative si les gains d'efficacité allégués se sont concrétisés ou non après la fusion. Certaines méthodes sont sophistiquées et nécessitent un grand nombre de données, d'autres sont plus faciles à mettre en œuvre. Ces méthodes pourraient donc être employées par les parties à la fusion pour soutenir leurs allégations pendant une enquête, ou par les autorités de la concurrence pour valider la précision de leur analyse et pour améliorer le traitement des allégations de gains d'efficacité.

Le Secrétariat présente ensuite la question des allégations de gains d'efficacité dans les affaires d'abus de position dominante. D'une part, dans de nombreux pays les dispositions juridiques relatives à l'abus de position dominante et à la monopolisation ne semblent laisser aucune place à une justification fondée sur les gains d'efficacité. C'est notamment le cas de l'article 102 du TFUE et de l'article 2 du *Sherman Act* américain. Pourtant, la possibilité de mettre en avant des gains d'efficacité pour justifier une conduite potentiellement anticoncurrentielle est reconnue par les tribunaux de l'UE et des États-Unis, ainsi que par les instruments juridiques non contraignants de la Commission européenne. La Cour de justice de l'Union européenne (CJUE) a récemment confirmé la recevabilité des allégations de gains d'efficacité dans l'affaire « *Post Danmark* ». D'autre part, l'évolution du traitement des gains d'efficacité dans les affaires d'abus de position dominante ressemble, dans une large mesure, à la procédure établie dans le cas de fusions. Cela étant, même si les allégations de gains d'efficacité sont recevables pour évaluer les affaires d'abus de position dominante et de monopolisation, elles n'aboutissent que rarement dans la pratique. Le Secrétariat s'interroge sur les raisons de ce phénomène : cela pourrait s'expliquer par i) une norme de la preuve plus exigeante dans le cadre des affaires d'abus de position dominante que dans celui des fusions, ii) un biais de sélection qui implique de ne pas ouvrir ou poursuivre en première instance les affaires dans lesquelles le comportement abusif présumé d'une entreprise dominante s'avèrerait justifié sur la base des gains d'efficacité générés, iii) une insuffisance de preuves et un manque de clarté et de précision dans la façon dont les entreprises dominantes présentent de telles preuves.

## **2. Aspects juridiques et procéduraux de la reconnaissance de l'importance du moyen de défense fondé sur les gains d'efficacité**

Le Président ouvre la première partie de la table ronde et donne la parole à M. Scherer qui examine les gains d'efficacité résultant des fusions et la politique de la concurrence.

M. Scherer rappelle que les fusions ne s'accompagnent pas nécessairement de gains d'efficacité et qu'en pratique, nombre d'entre elles sont inefficaces. Les raisons d'une fusion sont complexes. Certaines sont motivées par la possibilité de réaliser des gains d'efficacité, d'autres par l'éventualité de prendre le contrôle d'un marché. C'est précisément là que le bât blesse. Le conflit entre gains d'efficacité et pouvoir de marché a été étudié pour la première fois en 1968 par M. Oliver Williamson, qui proposait une approche fondée sur le bien-être total. Williamson a fait valoir que même des gains d'efficacité de faible envergure pourraient suffire à contrebalancer la perte de bien-être pour le consommateur, fournissant ainsi des éléments de preuve théoriques solides en faveur des fusions. En 1984, le ministère de la Justice américain a procédé à la révision de ses lignes directrices sur les fusions pour autoriser le recours à un moyen de défense fondé sur les gains d'efficacité selon l'approche de Williamson. Ce moyen de défense a rapidement été mise à l'épreuve dans le cadre de la fusion *Archer-Daniels-Midland / Clinton (Iowa) Corn Processing Company*. En 1987, M. Scherer a présenté un aide-mémoire à l'intention des parties à l'opération, dans lequel il défendait la mise en balance des avantages et des inconvénients théorisée par

Williamson (« l'arbitrage de Williamson ») et réfutait plusieurs aspects de l'approche adoptée par le ministère de la Justice américain centrée sur le bien-être du consommateur.

M. Scherer a récemment commencé à avoir des doutes sur son intervention dans l'affaire *Archer-Daniels-Midland*. La situation économique actuelle et plus particulièrement le chômage généralisé et la trappe de liquidité keynésienne sont à l'origine de sa remise en question.

Dans de telles circonstances, deux lacunes inhérentes à l'arbitrage de Williamson prennent plus de poids. Premièrement, lorsque les taux de chômage sont élevés, les ressources dégagées grâce aux gains d'efficacité dans le cadre de fusions ne sont pas forcément réutilisées utilement dans d'autres secteurs économiques, ce qui peut entraver les gains sociaux. Williamson imagine une situation de plein emploi, mais étant donné que cette hypothèse n'est plus valable, les arguments à la base de son arbitrage sont à revoir. Deuxièmement, l'arbitrage de Williamson présuppose que la loi des débouchés de J.B. Say est vérifiée. Cela s'explique tout d'abord par le fait que, en raison du pouvoir de monopole découlant de la fusion, le prix augmente et le surplus du consommateur est converti en un surcroît de bénéfices ou en un surplus des producteurs. Ces bénéfices sont ensuite recyclés en demande effective de biens d'investissement supplémentaires, ou bien en une demande progressive des consommateurs lorsqu'ils sont distribués aux actionnaires. Cela étant, la loi des débouchés ne s'applique pas dans le contexte d'une trappe de liquidité keynésienne parce que les entreprises ont tendance à accumuler les bénéfices qu'elles décident de ne pas investir. Qui plus est, lorsque ces bénéfices sont distribués à de riches actionnaires, leur propension marginale à consommer est en-deçà de la moyenne en temps normal et leur propension à épargner est encore plus marquée en période de crise.

La seconde lacune de l'arbitrage de Williamson est celle du transfert de ce qui constituait avant la fusion le surplus des consommateurs vers les bénéfices ou vers le surplus des producteurs et en dernier ressort vers les actionnaires des entreprises parties à la fusion. D'une manière générale, les actions sont détenues de façon disproportionnée par des individus qui sont plus riches que le consommateur moyen. Ainsi, si l'on postule, à la façon d'Alfred Marshall, que l'utilité marginale de l'argent diminue avec l'accroissement de la richesse, le transfert exposé plus haut peut alors être décrit comme la redistribution des revenus des consommateurs moyens vers les consommateurs les plus riches pour lesquels l'utilité marginale est moindre. Il s'ensuit donc une perte de bien-être. M. Scherer fait observer que si une telle redistribution est contestée, il convient alors de faire primer le critère de bien-être du consommateur sur celui de bien-être total.

Pour terminer, M. Scherer constate que le principal obstacle à l'introduction du moyen de défense fondé sur les gains d'efficacité dans le cadre de l'évaluation de projets de fusion tient à la difficulté d'établir des prévisions précises sur des événements incertains à venir, comme l'évolution des coûts et les prix. La fusion, en 1978, de *Jones & Laughlin Steel* et *Youngstown Steel*, respectivement septième et huitième producteurs d'acier aux États-Unis, illustre bien ce problème. M. Scherer, qui conseillait l'avocat général à l'époque, doutait que des gains d'efficacité découleraient de la fusion. Cependant, M. Scherer reconnaît, portant un regard neuf sur les faits plusieurs années plus tard, qu'il avait été trop pessimiste dans son évaluation des potentielles retombées bénéfiques de la fusion. Cela soulève une question plus générale sur la façon dont les autorités de la concurrence doivent gérer les incertitudes liées aux allégations de gains d'efficacité significatifs qui découleraient d'une fusion. M. Scherer signale que les économistes sont rarement qualifiés pour porter de tels jugements. Des observateurs neutres ayant une expérience considérable dans le secteur concerné seraient les plus aptes à remplir ce rôle. Une autre possibilité serait d'évaluer les fusions ex-post, mais lorsqu'il s'avère qu'il n'y a pas eu de gains d'efficacité, cela pose de nouveaux problèmes car il serait alors difficile de désemmêler les actifs réunis par la fusion.

M. Friederiszick fait observer que le critère du bien-être du consommateur devrait peut-être être plus adapté au cadre institutionnel dans lequel est appliquée la politique de la concurrence. M. Friederiszick

rappelle qu'au cours de débats à la Commission européenne, l'argumentation en faveur du bien-être du consommateur défendait l'idée selon laquelle même en situation de bien-être total, le cadre institutionnel présente des lacunes. M. Röller intervient alors, précisant que selon lui les intérêts des consommateurs ne sont pas aussi bien représentés que ceux des entreprises, et que le critère de bien-être doit donc prendre en compte ce déséquilibre. M. Friederiszick reprend ensuite l'argument de Bruce Lyons selon lequel il appartient aux parties à l'opération de présenter la nature du projet de fusion qui sera évalué par les autorités de la concurrence. Par conséquent, ces dernières ne peuvent pas choisir la combinaison d'entreprises qui améliorerait le plus le bien-être. Dans de telles circonstances, le bien-être du consommateur peut permettre d'établir un équilibre optimal, ou tout du moins aussi bon que les conditions le permettent.

Le Président invite la délégation suisse à rendre compte du projet de loi qui introduit un moyen de défense fondé sur les gains d'efficacité. Le Président souhaite savoir comment les gains d'efficacité étaient évalués par le passé et quels changements apportera la nouvelle législation.

Le délégué de la Suisse indique que selon les critères actuels, il faut atteindre une limite très élevée pour qu'une fusion soit interdite. Selon l'article 10 § 2(a) de la loi fédérale suisse sur les cartels (LCart), la Commission de la concurrence (COMCO) peut interdire la concentration ou l'autoriser moyennant des conditions ou des charges lorsqu'il résulte de l'examen que la concentration crée ou renforce une position dominante capable de supprimer une compétition efficace. Dans ces conditions et en vertu de cette disposition, un abus de position dominante n'est pas une raison suffisante pour faire obstacle à une fusion mais le fait que la fusion soit capable de supprimer la concurrence est déterminant. Par conséquent, en plus de 20 ans, l'autorité de la concurrence suisse n'a interdit qu'une seule fusion (en 2010). Elle a rejeté la concentration *France Télécom / Sunrise Communications AG* au motif que cette opération aurait rapidement donné naissance à une position dominante conjointe avec la création d'un duopole partagé entre l'opérateur historique, Swisscom, et l'entité issue de la fusion. Le délégué suisse estime que, si le législateur a implicitement renoncé à introduire, par le passé, le moyen de défense fondé sur les gains d'efficacité lors du contrôle des concentrations en Suisse, la raison en est que seules les fusions les plus anticoncurrentielles sont interdites.

Après l'évaluation de la LCart, il a été reconnu que cette situation laissait à désirer. La révision en cours de ce texte recommande l'abolition du critère de position dominante et l'introduction d'un critère SIEC [*Significant Impeding Effective Competition* ou réduction substantielle de l'entrave significative à une concurrence effective] qui permettrait le recours au moyen de défense des gains d'efficacité. Le délégué suisse fait remarquer que ce critère modernisé laisserait une plus grande marge de manœuvre pour justifier une fusion qui aurait autrement été interdite par la COMCO. Cette recommandation est inscrite dans le programme de réformes actuellement examiné par la commission préparatoire du Parlement suisse. Le délégué suisse convient que l'on ne sait pas encore si cette réforme sera adoptée, notamment du fait que certains sujets sont plus importants d'un point de vue politique, tels que l'introduction de sanctions pénales à l'encontre des personnes physiques ou encore la réforme institutionnelle de la COMCO.

M. Scherer fait part de ses commentaires sur les deux dernières interventions. Tout d'abord, en matière de critères de bien-être, M. Scherer reconnaît les raisons pragmatiques pour lesquelles l'UE insiste sur le critère de bien-être du consommateur. Toutefois, il rappelle qu'Alexis Jacquemin, l'un des tout premiers économistes très influents de la Commission, défendait un critère de bien-être total dans un article publié en 1990 dans l'*European Economic Review*. M. Scherer se réfère ensuite à la modernisation de la loi suisse LCart et fait observer que cette modernisation met en lumière une problématique plus générale. Dans une étude publiée en 1975 portant sur les aspects économiques des opérations de fusion, Scherer *et al.* ont constaté que la possibilité de réaliser des économies d'échelle varie énormément entre un marché de grande taille et un marché de petite taille. Ainsi, sur les petits marchés, il est difficile de réaliser des économies d'échelle et donc une plus forte concentration du marché, y compris par le biais de fusions, y

améliore la possibilité de réaliser de telles économies. La taille du marché et l'ouverture du marché sont deux variables. M. Scherer fait observer qu'en l'absence de fusion, il est plus facile de réaliser des économies d'échelle sur un marché ouvert que sur un marché fermé. Une étude sur la Suède publiée dans les années 1960 vient à l'appui de cette conclusion. Dans cette publication, Scherer *et al.* ont constaté que la Suède était un marché fermé sur lequel il était difficile de réaliser des économies d'échelle et que les fusions pouvaient permettre d'améliorer la situation. Pour terminer, M. Scherer souligne que les fusions sont censées s'accompagner des gains d'efficacité les plus importants sur les marchés relativement petits. Les fusions hospitalières en sont un bon exemple du fait que les coûts de transports forcent les hôpitaux à exercer leurs activités sur un marché fermé. Cela permettrait d'expliquer pourquoi le moyen de défense des gains d'efficacité occupe une place prépondérante lors de ces fusions.

Le Président invite la délégation allemande à présenter sa communication et s'interroge sur les raisons pour lesquelles les modifications planifiées du critère utilisé lors de fusions ne prévoient pas la possibilité de recourir au moyen de défense fondé sur les gains d'efficacité.

Le délégué de l'Allemagne explique que dans le 8<sup>e</sup> amendement de la Loi allemande sur les restrictions de concurrence (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*), le critère de fond utilisé lors du contrôle des fusions en Allemagne sera modifié : le critère de position dominante en vigueur sera remplacé par le test SIEC. La position dominante de marché sera maintenue comme critère type. En revanche, le 8<sup>e</sup> amendement n'instaurera pas de moyen de défense explicitement fondé sur les gains d'efficacité.

Le délégué allemand indique qu'il est possible de prendre en compte les gains d'efficacité en vertu de la clause d'équilibre général prévue à l'article 36(1) de la GWB ou sous réserve de l'autorisation ministérielle prévue à l'article 42 de la GWB. En premier lieu, le critère d'équilibre général prévoit l'exemption d'interdiction d'une fusion qui répondrait au critère de position dominante sur un unique marché. Dans le cadre d'une telle exemption, la fusion est autorisée si les entreprises prouvent que la concentration se traduit également par une amélioration des conditions de concurrence sur un autre marché. En second lieu, et sous réserve d'une autorisation ministérielle, le ministre fédéral de l'Économie et de la Technologie peut aller à l'encontre d'une interdiction de fusion prononcée par le *Bundeskartellamt* au motif d'effets positifs très importants pour l'ensemble de l'économie ou de la prise en considération de l'intérêt général.

Pour terminer, le délégué souligne que, même si un système juridique ne prévoit pas explicitement le moyen de défense fondé sur les gains d'efficacité, cela ne signifie pas pour autant que les questions d'efficacité ne jouent pas un rôle pratique dans l'évaluation de des différentes affaires. En fait, d'un point de vue économique, toute considération d'efficacité peut être incorporée dans l'analyse des effets d'une fusion et donc dans l'évaluation de quelle mesure et si une fusion peut créer ou renforcer une position dominante. Le délégué indique également que le passage d'un critère de position dominante à un critère SIEC permettra à l'avenir d'évaluer davantage les affaires de fusion en donnant davantage d'importance aux effets qui en découlent. Selon le délégué, puisque l'efficacité peut être présentée comme facteur atténuant les effets anticoncurrentiels potentiels d'une fusion, les allégations de gains d'efficacité peuvent se multiplier avec cette approche, notamment dans les affaires classiques d'effets unilatéraux qui ne reposent pas sur le critère de position dominante ou de renforcement d'une position dominante.

Le Président donne la parole au BIAC et invite le délégué de ce comité à formuler des observations sur sa contribution en citant Robert Pitofsky, ancien président de la FTC, qui avait déclaré que « le moyen de défense fondé sur les gains d'efficacité est délibérément décrit de manière telle qu'il est difficile à mettre en œuvre » dans l'UE et aux États-Unis.

Le délégué du BIAC insiste sur le fait que les autorités chargées de mettre en œuvre le droit de la concurrence n'accordent guère d'attention à l'évaluation des gains d'efficacité. Cela est lié à différents facteurs, à la fois systémiques et procéduraux. En conséquence, les autorités de la concurrence ont décidé que la norme de la preuve en matière d'allégations de gains d'efficacité serait particulièrement exigeante et que la charge de la preuve incomberait aux parties. Le BIAC affirme que l'application de ce postulat est injuste pour les parties à la fusion et préjudiciable aux consommateurs.

Dans un premier temps, le délégué constate que les agences appliquent une analyse asymétrique des gains d'efficacité et des effets anticoncurrentiels dans leurs mécanismes décisionnels. En théorie, les examens de projets de fusion ont pour objectif de mettre en balance les effets anticoncurrentiels potentiels et les gains synergiques, même si ces derniers se limitent à des gains pour les consommateurs selon le critère de bien-être du consommateur. Ainsi, une autorité devrait placer, pour les examiner, les gains d'efficacité sur le même plan que les effets sur la concurrence. Toutefois, les procédures et les législations relatives aux fusions ne sont dans la pratique pas conçues pour évaluer de la même manière les avantages et les inconvénients des uns et des autres.

Un tel déséquilibre peut être imputé avant tout aux mécanismes décisionnels appliqués dans les pays qui engagent des poursuites, comme les États-Unis, ou dans les systèmes de contrôle réglementaires, comme celui de l'UE, mécanismes qui découragent dans la plupart des cas toute évaluation sérieuse des gains d'efficacité. Dans la majorité des pays, les gains d'efficacité sont uniquement examinés en tant que contrepoids aux effets anticoncurrentiels dans le cadre de projets de fusion dont l'analyse repose avant tout sur la détermination des effets de l'opération sur la concurrence. Ainsi, l'analyse des gains d'efficacité est considérée comme inutile en l'absence d'effets anticoncurrentiels. Ce déséquilibre peut également s'expliquer par le fait que, lorsqu'une autorité de la concurrence constate qu'une fusion s'accompagnera vraisemblablement d'importants effets anticoncurrentiels nécessitant des mesures correctives, voire une interdiction, l'autorité n'est guère incitée, du point de vue procédural, à reconnaître les aspects positifs des gains d'efficacité. Dans le cas des fusions contestées, les autorités ont tout intérêt à faire abstraction des allégations de gains d'efficacité. De ce fait, le délégué souligne que la seule situation dans laquelle les gains d'efficacité pourraient jouer un rôle décisif est celle où les effets anticoncurrentiels potentiels sont minimes.

L'évaluation inégale des gains d'efficacité et des effets de la concurrence s'explique également par les processus d'évaluation prévus par la plupart des lignes directrices en vigueur, qui défavorisent les gains d'efficacité. Les Lignes directrices américaines sur les fusions et les Lignes directrices de la Commission européenne sur l'appréciation des concentrations horizontales partent les unes et les autres du principe que les gains d'efficacité sont difficiles à vérifier et à quantifier, notamment du fait que la plupart des informations sont exclusivement entre les mains des entreprises parties à la fusion, ce qui signifie que la charge de la preuve pour étayer les allégations d'efficacité repose entièrement sur elles.

Dans un second temps, le délégué fait remarquer que malgré la lourdeur de la charge de la preuve, les autorités de la concurrence ont toujours porté un œil critique sur les analyses de gains d'efficacité proposées par les parties à l'opération. Le BIAC plaide en faveur d'une présomption de bien-fondé des allégations de gains d'efficacité avancées par les entreprises du fait des risques financiers que celles-ci encourent et du fait qu'elles ont un bien meilleur accès aux informations. Le délégué fait également observer que les gains d'efficacité réalisés par le producteur, qui génèrent un surplus de production, engendrent également un surplus de consommation. Ces deux surplus étant imbriqués, si les producteurs réalisent des gains d'efficacité, il est possible que les consommateurs puissent en tirer profit. De plus, le délégué affirme que les augmentations de prix découlant d'une fusion sont peu vraisemblables étant donné qu'une telle pratique serait très probablement remise en cause par l'autorité de la concurrence, ce qui ne ferait qu'entraver la fusion. Le délégué reconnaît qu'il est possible que les parties commettent une erreur

lors de l'évaluation des gains d'efficacité, mais que cela ne signifie pas forcément que leur avis doit être remplacé par celui d'une tierce partie.

Dans un troisième temps, le délégué fait valoir que les gains d'efficacité à coûts fixes doivent également être pris en compte. Comme le fait remarquer M. Pitofsky, à long terme, tous les coûts fixes deviennent des coûts marginaux. En conséquence, rien ne garantit que la valeur des économies de coûts marginaux soit supérieure à celles des économies de coûts fixes, ni qu'elle soit davantage susceptible d'être répercutée aux consommateurs. Le délégué met en évidence une contradiction de la législation européenne en matière de traitement des coûts fixes lors des fusions et des affaires d'abus de position dominante. Lorsqu'elle évalue la position dominante des entreprises, la Commission est susceptible d'appliquer le critère du coût marginal moyen à long terme (CMMLT) ou du coût évitable moyen (CEM) qui prend en compte des éléments de coût fixe. Pour les fusions, la Commission privilégie l'évaluation des coûts variables et n'a encore jamais eu recours à une évaluation significative des coûts fixes. Le délégué insiste sur le fait qu'il est impossible de concilier ces deux approches et que l'une d'entre elles est forcément inadéquate.

Dans un quatrième temps, le délégué estime qu'il n'existe pas de mécanisme adéquat qui permette d'identifier les gains d'efficacité dynamique. Les travaux publiés sur ce sujet proposent de nombreux exemples qui soutiennent l'idée selon laquelle ces gains sont davantage susceptibles de se traduire par des retombées bénéfiques pour les consommateurs que les gains d'efficacité statique. Néanmoins, le caractère vérifiable des gains d'efficacité dynamique et de leurs retombées bénéfiques pour les consommateurs s'avère extrêmement difficile à évaluer, ce qui constitue un obstacle de taille en pratique.

Pour terminer, le délégué indique que le critère de spécificité en matière de fusions devrait être appliqué avec davantage de pragmatisme. Pris au pied de la lettre, ce critère de spécificité empêcherait l'acceptation du moyen de défense fondé sur les gains d'efficacité dans quasiment toutes les affaires. En théorie, les parties pourraient presque toujours participer à une coentreprise dans le but de regrouper leurs ressources et de dégager des synergies si elles étaient prêtes à accepter le risque de négociation qui y est associé en l'absence de fusion.

En conclusion, le délégué déclare que de meilleurs outils sont nécessaires pour évaluer les gains d'efficacité. Ces outils comprendraient non seulement des modèles plus adaptés pour l'évaluation économique des gains d'efficacité, mais aussi de meilleurs mécanismes institutionnels qui supprimeraient les asymétries et les partis pris procéduraux à l'encontre des gains d'efficacité et qui permettraient que ces derniers soient autant pris en compte que les atteintes potentielles à la concurrence. Cela permettrait non seulement d'améliorer les décisions prises par les autorités de la concurrence, mais aurait aussi des retombées bénéfiques pour les consommateurs.

Le délégué des États-Unis fait remarquer que les possibilités d'analyse du rôle des gains d'efficacité lors des fusions se multiplient progressivement. Aux États-Unis, la preuve en est sans conteste donnée par le fait que les gains d'efficacité ont, en 1997, explicitement été intégrés au moyen d'amendements aux Lignes directrices sur les fusions et ont été encore plus largement traités dans la version 2010 de ce texte, ce qui montre la volonté des autorités de la concurrence de prendre sérieusement en compte les gains d'efficacité lors du processus d'examen des fusions. En réponse à l'argument avancé par les délégations selon lequel les autorités ne feraient pas confiance à l'analyse des gains d'efficacité, le délégué des États-Unis rappelle que seul un petit nombre de fusions sont interdites. Cela démontre donc que les autorités de la concurrence ne négligent pas les gains d'efficacité. De nombreuses améliorations pourraient néanmoins être apportées à l'analyse ex-ante de certains gains d'efficacité, difficiles à prouver, qui seront obtenus après la fusion. Il faut donc mettre un terme à ces dissensions en établissant de meilleurs critères de preuve qui répondraient aux exigences à avoir vis-à-vis des gains d'efficacité. La question de l'évaluation des gains d'efficacité devient particulièrement épineuse lorsque lesdits gains entraînent des coûts fixes et non

des coûts marginaux. Dans nombre de transactions, il est plus facile d'apporter la preuve de la réduction des coûts marginaux et les autorités de la concurrence n'ont guère de mal à les prendre en compte et à les comparer aux augmentations unilatérales de prix escomptées lorsque les preuves sont là. Le problème se pose surtout s'agissant des gains d'efficacité en matière de coûts fixes et dans la plupart des cas de fusions, les synergies et les réductions de coûts fixes sont les plus faciles à identifier. Le délégué fait donc remarquer qu'il est nécessaire d'élucider la raison pour laquelle les autorités n'acceptent pas facilement que tous les coûts soient marginaux à long terme et pourquoi elles ne proposent pas de traiter différemment les gains d'efficacité en matière de coûts fixes et les gains en matière de coûts marginaux et d'examiner a posteriori ce qu'il est advenu des gains d'efficacité en matière de coûts fixes dans le cadre de fusions approuvées.

Le délégué constate par ailleurs que, depuis 1991, les gains d'efficacité dynamique ont été progressivement intégrés à la jurisprudence aux États-Unis. La fusion de *Genzyme / Novazyme* fait partie des nombreuses affaires ayant été approuvées sur la base des gains d'efficacité dynamique. Le délégué fait également remarquer qu'une affaire récente de la FTC, *Thoratec/Heartware* (2009), a pu démontrer grâce à une analyse rigoureuse que les parties à la fusion seraient moins incitées à commercialiser de nouveaux produits après avoir fusionné en tant qu'entreprises indépendantes, alors qu'elles avaient uniquement mis en avant les gains d'efficacité dynamique. La fusion a été interdite pour ces motifs.

Le délégué de l'Allemagne fait remarquer qu'un examen plus approfondi des allégations de gains d'efficacité ne se traduirait pas forcément par de meilleures décisions. Le délégué fait valoir que la décision sur comment les allégations de gains d'efficacité doivent être traitées est également influencée par un choix stratégique visant à éviter les erreurs de type 1 ou de type 2.

Le Président fait observer que les gains d'efficacité dynamique ont un impact non négligeable sur la durée et que le dilemme va au-delà d'une simple comparaison entre les erreurs de type 1 ou de type 2. Le Président oriente ensuite les débats sur la question de savoir si seules les fusions qui ne sont que marginalement anticoncurrentielles se traduisent par un traitement des gains d'efficacité et invite la délégation colombienne à présenter le cas d'une fusion créant une situation de monopole.

Le délégué de la Colombie explique qu'au cours des dix dernières années, le droit de la concurrence colombien a été considérablement modifié concernant l'évaluation des allégations de gains d'efficacité dans le cadre de fusions. Aujourd'hui, la législation colombienne n'interdit pas explicitement les fusions qui créeraient un quasi-monopole sur le marché. Cela étant, l'article 51 du décret 2153 de 1992 énonce que les allégations d'efficacité doivent être propres aux opérations de fusion. De plus, cet article stipule que les gains d'efficacité doivent être efficaces, permettre de réduire les coûts pour les parties à la fusion et ne pas pouvoir être obtenus d'une autre façon. Enfin, la fusion ne peut pas se traduire par une restriction de l'offre sur le marché. En vertu de ces dispositions, la Surintendance de l'industrie et du commerce colombienne (SIC) a interdit une fusion en 2002 dans l'affaire *ETERNIT* portant sur la fusion de deux entreprises spécialisées dans la production de PVC. La SIC a considéré que la réduction des coûts revendiquée par les parties était la conséquence de la position dominante résultant de la fusion.

Le délégué met en avant le fait que la loi 1340 promulguée en 2009 a modifié la disposition concernant les allégations d'efficacité dans le cadre des fusions. À l'heure actuelle, il est nécessaire de prouver que les retombées bénéfiques des gains d'efficacité i) sont plus importantes que les effets anticoncurrentiels et ii) profitent directement aux consommateurs. En 2012, la SIC a autorisé la concentration de six entreprises ayant pour objectif la gestion du port de Buenaventura, malgré le fait que les parties à l'opération obtiendraient 85.7 % de part de marché. L'autorité de la concurrence a fondé sa décision sur le modèle opérationnel proposé par les entreprises à la fusion selon lequel seule l'une d'entre elles gérerait les équipements nécessaires au bon fonctionnement du port de commerce. Qui plus est, une augmentation potentielle des prix découlant de la fusion n'inquiétait pas la SIC car les autorités portuaires

régulent les prix des services portuaires. Ainsi, la concurrence sur ce marché ne s'opère pas au niveau des prix des services mais au niveau du nombre de marchandises prises en charge par le port. Il s'est avéré que la fusion augmentait l'efficacité structurelle, renforçait le bien-être du consommateur et servait l'intérêt national.

Le Président donne la parole à la délégation néo-zélandaise qui est invitée à présenter le cas d'une fusion créant une situation de monopole autorisée en raison des gains d'efficacité.

La délégué de la Nouvelle-Zélande présente le cadre législatif qui s'applique en la matière. En premier lieu, le *Commerce Act* de 1986 a instauré un dispositif d'approbation volontaire pour les projets de fusion. En second lieu, la Commission du commerce peut autoriser une fusion dans la mesure où elle se traduit par des avantages nets. Le délégué néo-zélandais fait remarquer que la Commission du commerce ne reçoit que rarement des allégations d'efficacité quantitative détaillées dans le cadre de demandes d'approbation de projets de fusion. De telles allégations sont en revanche formulées dans le cadre de demandes d'autorisation d'opérations de fusion. Les gains d'efficacité doivent spécifiquement découler de la fusion sans être pour autant propres à un marché donné ou sans avoir forcément de retombées pour les consommateurs, ce qui constitue la principale différence avec le dispositif d'approbation. Le critère appliqué par la Commission du commerce est celui des avantages nets. Elle réalise une évaluation des avantages quantifiables et non-quantifiables dans le cas des autorisations.

Le délégué présente ensuite l'affaire *Cavalier Wool Holdings* tranchée en 2011. La Commission du commerce a autorisé l'acquisition par Cavalier Wool Holdings de la totalité des actifs de New Zealand Wool Services International destinés au traitement de la laine malgré le fait qu'en raison de cette acquisition, il ne resterait plus qu'une seule entreprise spécialisée dans le traitement de la laine en Nouvelle-Zélande. La Commission a pris principalement en compte des gains d'efficacité en termes de production, qui étaient liés à des économies d'échelle et de coûts lors du traitement de la laine. La Commission a également évalué les allégations de gains d'efficacité dynamique. Après examen de preuves données par des experts du secteur, de documents internes, du scénario contrefactuel et des données recueillies auprès des consommateurs, la Commission a rejeté ces allégations. La possibilité à long terme d'entrée de concurrents chinois sur le marché a également été un facteur décisif.

Le Président invite la délégation australienne à indiquer si, selon le *Competition and Consumer Act* (CCA) de 2010, les gains d'efficacité doivent spécifiquement découler de la fusion.

Le délégué de l'Australie explique que seuls les tribunaux sont habilités à déterminer si une fusion ou une conduite spécifique constitue une infraction à ce texte. Cependant, les parties à la fusion ont la possibilité de demander la protection juridique soit par l'approbation (sur la base d'aucune existence de SLC) ou par autorisation (sur la base du bénéfice net public, principalement des gains d'efficacité). D'autres types de comportement, tels que les accords anticoncurrentiels, l'exclusivité et RPM peuvent également être autorisés, et dans certains cas, notifiés. L'autorisation est généralement accordée par l'ACCC en première instance, mais soumise au contrôle juridictionnel du Tribunal australien de la concurrence, et les appels sur les points de droit sont soumis à la Cour fédérale australienne. Toutefois, dans les affaires de fusions, les demandes d'autorisation maintenant vont directement devant le Tribunal de la concurrence.

Dans un second temps, le délégué précise que l'ACCC et le Tribunal comparent le futur probable avec et sans la conduite pour laquelle l'autorisation est demandée. Dans le cadre de la procédure d'autorisation, l'ACCC ne se demande pas si l'action visée est indispensable à l'obtention des avantages nets qui en résulteront probablement, ni si l'action proposée constitue le meilleur moyen d'obtenir les avantages nets souhaités. L'étude d'autres solutions ne présenterait un intérêt que dans la mesure où ces solutions seraient applicables dans un avenir proche si aucune action n'avait été proposée. S'il est possible que des gains

d'efficience plus importants et mieux ciblés soient obtenus autrement, l'action en question sera autorisée si i) s'il est peu probable que ces autres solutions figurent dans le scénario contrefactuel faute d'incitations sur le marché ou pour d'autres raisons et ii) si l'action visée est de nature à produire des gains d'efficience, contrairement au scénario contrefactuel.

Le délégué de la Belgique poursuit en faisant remarquer que le droit de la concurrence belge n'impose pas que la fusion soit le seul moyen d'obtenir certains gains d'efficience donnés. Toutefois, ces gains d'efficience doivent être le résultat d'une fusion et non d'une évolution du marché qui aurait eu lieu de toute manière.

Le Président constate qu'au Royaume-Uni, les gains d'efficience sont examinés en deux phases, lors des fusions mais aussi au stade des études de marché. Le Président invite donc le délégué britannique à présenter la situation.

Le délégué du Royaume-Uni explique en effet que l'*Office of Fair Trading* (OFT) et la *Competition Commission* (CC) ont acquis une certaine expérience en matière de prise en compte des allégations d'efficience à l'occasion de l'examen des fusions soit dans le cadre de l'analyse des effets concurrentiels soit lors de l'examen des avantages que procurent ces opérations aux consommateurs au moment où des mesures correctives sont imposées.

Le délégué britannique partage le point de vue du BIAC sur le déséquilibre qui existe lors de l'évaluation des effets anticoncurrentiels et des gains d'efficience et fait remarquer que la Commission européenne et la CC britannique n'ont jamais autorisé de fusion en fondant leur argumentation sur les gains d'efficience. Au Royaume-Uni, les gains d'efficience ont plus de poids au moment où des mesures correctives sont imposées. Toutefois, le délégué britannique constate que les argumentations fondées sur les gains d'efficience n'ont pas la même portée que les preuves de comportement anticoncurrentiel car les gains d'efficience ont tendance à reposer sur des hypothèses relatives au comportement du marché, tandis que les preuves s'appuient souvent sur des données empiriques solides conduisant à conclure à l'existence d'effets anticoncurrentiels.

Le délégué présente ensuite plusieurs affaires dans lesquelles les gains d'efficience ont été indiscutables et ont donc eu une importance considérable lors de la définition des mesures correctives. Tout d'abord, dans l'affaire *Macquarie UK Broadcast Ventures Limited / National Grid Wireless Group*, les parties ont fondé leur argumentation sur l'idée selon laquelle les gains d'efficience se composaient de synergies opérationnelles, de synergies en matière de dépenses d'investissement et d'avantages liés à la réduction des risques inhérents au processus de transition numérique. La CC britannique a examiné ces allégations dans son analyse des retombées bénéfiques pour les consommateurs qui découleraient de la fusion. De plus, dans l'affaire *Deutsche Börse AG / Euronext NV / London Stock Exchange plc*, la CC a estimé à partir d'une argumentation bien étayée que la fusion se traduirait par des externalités inhérentes au réseau pour les consommateurs. Enfin, dans l'affaire *Payment Protection Insurance*, elle a tenu compte des gains d'efficience, résultant des prix de transfert, qui passent d'une partie du marché à une autre.

Le Président aborde la contribution de l'Union Européenne et invite la délégation de la Commission européenne à présenter l'analyse de la décision *Deutsche Börse / NYSE Euronext* réalisée par la Commission.

Le délégué de la Commission européenne précise que dans l'affaire *Deutsche Börse / NYSE Euronext* (2012), la Commission a reconnu que le projet de fusion aurait généré des gains d'efficience mais considère que ces gains n'auraient pas pu contrebalancer l'atteinte à la concurrence. En conséquence, dans l'ensemble, cette fusion soulevait des problèmes de concurrence et en l'absence de voies de recours nécessaires fut finalement interdite. Ce projet de fusion était une concentration horizontale qui aurait

instauré un quasi-monopole sur le marchés mondiaux des actions cotées des produits européens dérivés aux d'intérêt européen, l'équité stock unique et des dérivés sur indice boursier). Le moyen de défense avancé par les parties à l'opération était fondé sur trois arguments. Le premier argument était que la concentration déboucherait sur des économies et des gains d'efficacité dans le secteur informatique. Cela étant, la Commission a établi que des gains dans le secteur informatique ont été demandés sur la base d'échanges non documentés de courriels avec quelques clients. Par conséquent, ces bénéfices n'étaient tout simplement pas vérifiables. Le second argument était que la fusion réduirait le nombre de garanties dont auraient besoin les agents souhaitant passer contrat par le biais des deux Bourses du fait que la chambre de compensation de la nouvelle entité n'exigerait qu'une garantie unique. Pour étayer cette allégation, les parties ont quantifié cet effet. Toutefois, la Commission a fait observer que c'était le coût d'opportunité lié à la détention de capitaux ou actions à titre de garantie, et non la différence en termes de garanties, qui devait être considéré comme un gain d'efficacité. La Commission a quantifié ces gains d'efficacité potentiels et conclu que ces derniers ne seraient que modérés et nettement inférieurs à ceux réclamés par les parties. La Commission a ensuite comparé l'ampleur indicative de ces gains d'efficacité et celle des préjudices possibles. Les préjudices prévus par la Commission portaient sur la concurrence réelle et potentielle. Le troisième argument avancé par les parties était que la fusion augmenterait la liquidité dans les marchés de fusion. La Commission a fait remarquer cette allégation sur les bénéfices de liquidité ne pouvaient pas être identifiés sur la base des données présentées et ne pouvait donc pas être considéré comme vérifiable.

Le délégué fait remarquer que la Commission a examiné les effets de la fusion sous l'angle du bien-être du consommateur. Elle a comparé la réduction éventuelle des exigences de garantie dans la transaction de dérivés sur les plates-formes parties à l'opération au renforcement escompté de la puissance sur le marché. L'analyse a révélé que les gains d'efficacité réalisés seraient modérés et qu'il serait nécessaire que la demande de transactions soit remarquablement élastique pour que l'entité fusionnée n'augmente pas ces prix. Le délégué attire donc l'attention sur le fait que dû au manque de quantifications fiables des problèmes et efficacités attendus, la décision finale inclut une évaluation qualitative basé sur les avantages et les inconvénients de l'opération.

Le délégué formule des observations sur les critiques avancées par le BIAC sur la contradiction alléguée contenue dans la législation européenne concernant le traitement des coûts fixes dans les fusions et dans les affaires d'abus de position dominante. Le délégué fait remarquer qu'en prenant comme critère celui de la présence d'un concurrent d'une efficacité équivalente, la question de savoir si les prix appliqués par l'entreprise dominante seraient anticoncurrentiels est liée à l'éventuel verrouillage du marché. En revanche, dans le cadre de fusions, le pouvoir de fixation des prix détenu par les parties à l'opération est évalué selon l'impact de la fusion respective sur la courbe de la demande et sur la courbe des prix. Le délégué ajoute que ces deux évaluations ne sont pas contradictoires. De plus, lorsqu'elle examine la question de la position dominante, la Commission prend en considération le CEM qui est moins élevé que le CMMLT puisqu'il ne tient pas compte des éléments de coûts fixes, ce qui s'avère une approche avantageuse pour l'entreprise faisant l'objet d'une enquête.

### **3. Outils pratiques pour examiner les allégations de gains d'efficacité**

Le Président oriente ensuite la discussion sur l'identification d'outils pratiques permettant d'évaluer les gains d'efficacité et invite Mme Jenkins à présenter cette question.

Mme Jenkins signale que la qualité des décisions prises par les autorités de la concurrence dépend de la qualité intrinsèque des preuves soumises par les parties à l'opération et de leur coopération avec l'autorité de la concurrence concernée. Mme Jenkins s'est intéressée à la façon dont les responsables publics demandent aux parties de leur fournir des éléments de preuve intéressants et fait remarquer que le comportement des autorités de la concurrence dans le cadre de la prise de décision peut encourager les

entreprises à avancer des preuves solides. Dans les exemples présentés lors de la table ronde, les gains d'efficacité ont avant tout eu une incidence lorsqu'ils se manifestaient du côté de la demande. Cela indique sans équivoque aux entreprises parties à une fusion les préférences des autorités de la concurrence. Cependant, même si les entreprises évaluent en détail les gains d'efficacité d'une opération avant la fusion, elles recourent généralement à des outils qui leur sont propres et souvent ne s'intéressent pas en premier lieu aux retombées bénéfiques pour le consommateur. Des exemples montrent comment une évolution de la politique suivie par l'autorité de la concurrence modifie le comportement des entreprises. Une décision récente de l'OFT dans le cadre de la fusion de deux éditeurs de logiciels illustre bien comment le passage au critère SLC ou SIEC a recentré l'analyse des entreprises sur leurs concurrents immédiats.

Mme Jenkins présente ensuite la technique DEA (*data analysis envelopment*), l'une des techniques les plus perfectionnées utilisées pour évaluer les gains d'efficacité. Cette technique est utilisée pour évaluer les résultats de secteurs comme ceux de l'assurance, de la banque, de la santé, du commerce de détail, de l'énergie, des télécommunications et des services postaux. Elle a également été utilisée pour évaluer l'efficacité d'institutions publiques telles que les forces de police ou les ministères de la justice. Cette technique présente de nombreux avantages et peut être employée dans le cadre de l'examen des fusions. Elle peut gérer de multiples données en entrée et sortie qui ne sont pas réductibles à un indicateur unique d'entrée ou de sortie. Ainsi, la technique DEA peut permettre d'examiner des indicateurs de qualité, ce qui s'avère utile dans le cadre d'affaires se rapportant au secteur de la santé, de la banque ou de la vente de détail.

La technique DEA mesure les gains d'efficacité en fonction d'une frontière d'efficacité qui repose sur des relations linéaires entre des entreprises efficaces (mettant en œuvre les meilleures pratiques), qui produisent le plus au moindre coût. Il est tenu pour acquis dans la technique DEA que deux entreprises ou plus peuvent être associées afin de créer une entreprise virtuelle dont les coûts et la production sont regroupés. Les entreprises réelles sont alors comparées à ces entreprises virtuelles. Si une autre entreprise ou une autre association d'entreprise, réelle ou virtuelle, a la même production, à moindre coût, que l'entreprise réelle, l'entreprise réelle est jugée inefficace. Mme Jenkins présente une représentation graphique de la technique DEA pour dix unités (voir graphique 1 en annexe) où l'axe des ordonnées représente le coût total des services et l'axe des abscisses la production totale. Les unités (B+C) et (D+E) représentent respectivement les fusions des unités B et C et des unités D et E, leurs coûts totaux et leur production totale étant additionnés. La frontière d'efficacité est représentée au graphique 2 (voir annexe) dans lequel les unités B, C, D, E et F sont reliées par une ligne. Les entreprises B, C, D, E et F sont ainsi jugées efficaces car elles sont positionnées sur la frontière. L'efficacité de l'entreprise A est représentée par la distance du point A au point V, V étant une entreprise virtuelle composée d'une moyenne pondérée des entreprises B et C qui se trouvent à la frontière. Ainsi, le propriétaire ou dirigeant de l'entreprise A pourrait utiliser une telle analyse dans le but d'évaluer l'ampleur des gains d'efficacité attendus de l'entreprise A. L'entreprise A pourrait améliorer son efficacité en termes de production en adoptant les meilleures performances illustrées par les entreprises B et C.

Mme Jenkins fait remarquer que, dans le contexte d'une fusion, la technique DEA permet de se faire une idée des niveaux de synergie attendus. Le graphique 2 représente notamment la fusion de B et C. Si les deux entreprises fusionnent sans exploiter les nouvelles synergies potentielles, le résultat serait le point (B+C) représenté comme inefficace selon la technique DEA. Qui plus est, la technique DEA pourrait être employée pour faire une estimation des réductions de coûts supplémentaires (ou de l'amélioration la production) qui découleraient de la fusion de B et C. Le potentiel d'amélioration est représenté par le triangle grisé, le repère étant déterminé par la frontière d'efficacité qui relie les unités D et E. Si les parties à la fusion faisaient état de gains d'efficacité d'une telle ampleur, la technique DEA confirmerait que cela correspond aux données disponibles pour les deux entreprises se situant à la frontière. Cela donnerait davantage d'assurance aux autorités de la concurrence sur le caractère vérifiable des effets qui découlent d'une fusion. Cela révèle également que les effets sont propres à la fusion. Si D et E décidaient de concentrer leurs activités, la concentration serait représentée par le point (D+E) qui, du fait du manque de

points de comparaison, pourrait être jugé efficace selon une technique DEA simple. Pourtant, dans ce cas précis, la frontière du secteur est décalée vers le bas du fait de l'augmentation des économies d'échelle, ce qui pourrait se traduire par un défi en termes de gains d'efficacité pour les autres acteurs du secteur concerné. À la suite de cette fusion, l'entreprise F qui était précédemment jugée efficace est désormais confrontée à un concurrent égal qui exerce une pression concurrentielle plus importante et qui lui donne l'occasion d'augmenter sa croissance. Mme Jenkins souligne que la technique DEA pourrait faciliter la remise d'éléments probants aux autorités de la concurrence, à condition que les entreprises soient prêtes à communiquer les données nécessaires. Qui plus est, Mme Jenkins indique que l'extension de cette technique permet aux autorités de la concurrence de mesurer les effets d'efficacité dynamique.

Mme Jenkins souligne que la technique DEA a été appliquée à un projet de concentration sur le marché hospitalier danois. Elle a servi à décomposer les gains d'efficacité comme suit : effets sur l'apprentissage, effets d'envergure et effets d'échelle, ce qui a permis d'identifier les gains d'efficacité propres à la fusion examinée. L'effet sur l'apprentissage permet de savoir si, en l'absence de fusion, ces hôpitaux auraient été incités à apprendre les uns des autres et à mettre en œuvre les meilleures pratiques. Mme Jenkins conclut que la technique DEA pourrait non seulement permettre de mieux nourrir l'analyse de la concurrence, mais aussi de fournir de meilleures informations aux parties concernées une fois que les entreprises et que les autorités de la concurrence seront plus à l'aise avec cette technique.

Le délégué de la Suède présente l'application de l'outil de compensation des réductions de coûts marginaux (« *Compensating Marginal Cost Reduction* » tool, ou CMCR). L'autorité de la concurrence suédoise a calculé le CMCR dans le cadre de quatre évaluations récentes de fusions. Cet outil repose sur l'idée que les informations disponibles en matière de marges courantes et de ratios de diversion sont suffisantes pour calculer les réductions de coût marginal nécessaires pour neutraliser l'augmentation d'un pouvoir de marché découlant d'une fusion. L'outil CMCR est également étroitement lié aux pressions à la hausse sur les prix (« *Upward Pricing Pressure* », ou UPP). L'avantage de l'outil CMCR est qu'il nécessite uniquement de disposer de données sur les marges commerciales avant la fusion, sur les ratios de diversion et sur les réductions exactes des coûts marginaux. Il n'est pas nécessaire d'avoir des estimations sur les répercussions ou les réductions de coûts pour les consommateurs, ni sur la façon dont les concurrents réagiraient aux évolutions des prix.

La délégué de la Suède souligne que l'outil CMCR a récemment été utilisé dans le cadre de la fusion *Eniro / Teleinfo* impliquant l'acquisition par un prestataire de services d'annuaire et de renseignements d'un concurrent franc-tireur dont les activités consistaient uniquement à commercialiser des services d'annuaire par téléphone et par SMS. L'autorité de la concurrence a calculé l'ensemble des gains d'efficacité en matière de coûts marginaux qui serait nécessaire pour compenser la perte de concurrence. Le délégué insiste sur le fait que les parties à la fusion apprécient cet outil qui i) leur propose une double analyse, focalisée à la fois sur les effets anticoncurrentiels et sur les gains d'efficacité et ii) améliore la transparence sur ce qui est attendu des entreprises à l'opération. L'adoption d'une telle approche a augmenté le nombre de notes relatives aux gains d'efficacité soumises à l'autorité de la concurrence, non seulement dans l'affaire *Eniro / Teleinfo*, mais aussi dans d'autres, car les parties à la fusion comprennent mieux comment l'autorité de la concurrence traitera la question des gains d'efficacité.

M. Scherer poursuit en faisant part de deux préoccupations. Premièrement, il est souvent difficile d'obtenir les données fiables et adéquates qui sont essentielles pour estimer les modèles économiques solides. Deuxièmement, les économistes peuvent tirer autant de conclusions différentes qu'ils auront mis au point de modèles différents. M. Scherer illustre ce problème en citant le projet de fusion *Staples / Office Max*. Dans cette affaire, parce que les résultats des modèles économiques présentés par la FTC et par les parties à l'opération étaient contradictoires, le juge s'est appuyé sur d'autres preuves.

Le délégué de la Suède convient qu'il n'est pas aisé d'obtenir des résultats solides et irréfutables avec les modèles économiques complexes. Il est donc important que des modèles économiques plus simples, ayant un nombre limité de paramètres, soient appliqués.

Le délégué de l'Italie fait référence à l'exposé de Mme Jenkins et convient qu'une fusion peut se traduire non seulement par des économies d'échelle, mais également par des déséconomies d'échelle. Ainsi, la délégation italienne demande à Mme Jenkins si l'évaluation des fusions devrait également prendre en compte les pertes d'efficacité. Le délégué s'interroge sur la façon dont les données sur les pertes d'efficacité potentielles seraient collectées le cas échéant. Les fusions d'entités complexes, comme celles qui ont lieu dans le secteur bancaire, poseraient notamment problème.

Mme Jenkins profite de cette occasion pour répondre à un commentaire de M. Scherer. Mme Jenkins fait remarquer que l'éventuelle complexité de l'analyse ne devrait pas se traduire par l'inaction ou l'indifférence face à ce problème. S'il s'avère que les gains d'efficacité importants ne reçoivent pas l'attention qu'ils méritent lors des évaluations réalisées par les autorités de la concurrence, il est essentiel de remédier à ce problème en envisageant différentes techniques. Mme Jenkins indique également que des experts avisés peuvent limiter les points de discorde.

En ce qui concerne les déséconomies d'échelle, Mme Jenkins souligne que les auteurs de l'étude citée dans son exposé ont pu définir, en s'appuyant sur des preuves solides, non seulement les économies d'échelle, mais également les déséconomies d'échelle.

M. Friederiszick émet l'opinion que les décisions phares pour lesquelles des données sont disponibles et des méthodes économiques sont appliquées de façon rigoureuse ne devraient pas devenir la référence pour chaque affaire. M. Friederiszick souligne que les décisions portant sur la fusion hospitalière danoise et sur la fusion *Deutsche Börse / NYSE Euronext* sont deux exemples qui s'opposent mais qui démontrent tous deux à quel point il importe que des données suffisantes soient disponibles. Cela étant, lorsque les preuves s'avèrent insuffisantes, les autorités de la concurrence devraient s'appuyer sur une évaluation qualitative pour donner leur appréciation la plus exacte. M. Friederiszick insiste ensuite sur le fait que les modèles économiques ne compliquent pas systématiquement les affaires et qu'ils s'accompagnent souvent d'une transparence accrue.

#### **4. Allégations de gains d'efficacité dans les affaires d'abus de position dominante et de monopolisation**

Le Président donne la parole à M. Friederiszick qui présente la question des allégations de gains d'efficacité dans les affaires d'abus de position dominante.

M. Friederiszick souligne que depuis 2009, la Commission européenne s'est fixé quatre priorités en matière d'application du droit de la concurrence dans le cadre d'affaires d'abus de position dominante. Premièrement, la Commission s'intéresse au refus d'approvisionnement et à la compression des marges dans les industries de réseau réglementées telles que l'énergie, les transports et les télécommunications. La Commission joue alors le rôle d'autorité de régulation de dernier recours. Deuxièmement, de nombreuses affaires concernent le secteur informatique et celui des services de données financières. Dans ces affaires, l'attention est essentiellement portée sur l'interopérabilité, les ventes liées ou groupées, ou le refus d'approvisionnement. Les décisions les plus importantes de la Commission dans ce domaine sont celles rendues dans les affaires *Microsoft* (2008, 2009 et 2012), *Google* (2010) et *Reuters* (2009). Troisièmement, la Commission s'est également intéressée au secteur manufacturier et s'est notamment penchée sur la question des marchés de l'après-vente et sur le problème de l'exclusivité. Enfin, un nombre non négligeable d'affaires relèvent du domaine des droits de propriété intellectuelle et plus précisément de l'exploitation des consommateurs en aval. Dans la majorité des cas, ces affaires concernent le secteur

informatique, comme notamment les affaires *Rambus* (2007, 2009), *Samsung* (2012) ou encore *Motorola* (2012). M. Friederiszick fait observer que c'est dans le secteur informatique, notamment dans les affaires *Intel*, *IBM* et *Microsoft* que le moyen de défense fondé sur les gains d'efficacités a été utilisé avec le plus de transparence. Il insiste sur le fait que le nombre d'affaires traitées dans ce secteur ne fera qu'augmenter et qu'il est par conséquent essentiel que l'environnement réglementaire soit solide pour que les considérations de gains d'efficacités soient prises en compte comme il convient.

M. Friederiszick fait ensuite remarquer que les analyses de gains d'efficacités ne sont pas réalisées de manière identique selon qu'il s'agit de fusions ou d'abus de position dominante. Ces différences sont dues, pour ce qui est de l'article 102 du TFUE, à la plus grande variété des comportements, au fait que les évaluations sont rétrospectives ou prospectives ainsi qu'à une présomption négative une fois que l'abus de position dominante a été établi. Cela étant, la différence principale tient au fait que les effets pro- et anticoncurrentiels sont étroitement liés dans les affaires d'abus de position dominante.

M. Friederiszick compare ensuite la pratique de la Commission à une évaluation portant sur la pertinence des motivations anticoncurrentielles des entreprises dans le monde réel pratiquant des stratégies de prix bas. Dans un premier temps, M. Friederiszick cite M. Röller qui a constaté que « s'il n'était jamais possible d'exploiter son propre pouvoir de marché, les entreprises ne seraient pas incitées à se livrer concurrence. Ainsi, tout comportement pro concurrentiel va automatiquement de pair avec une forme ou une autre d'exploitation ». Cela indique que du point de vue de l'entreprise, les profits constituent l'objectif prioritaire. M. Friederiszick donne notamment l'exemple d'IBM qui détenait 90 % de part de marché en tant que producteur d'ordinateurs centraux. Une barrière technologique élevée à l'entrée protégeait l'entreprise, ce qui lui a permis d'exploiter ses clients sur le marché de l'après-vente de services d'entretien et de pièces de rechange. Toutefois, pour pénétrer sur le marché chinois, IBM a dû jouer le jeu de l'accès non discriminatoire à un marché de l'après-vente ouvert à des tiers. Comme les barrières technologiques à l'entrée ont diminué, IBM s'est réinventé en 2002 en rachetant un cabinet de conseil renommé et en se concentrant ainsi sur des services de conseil complexes protégés par de nouvelles barrières. Dans un second temps, M. Friederiszick décrit les résultats d'une enquête, réalisée auprès d'étudiants en MBA, résultats qui s'appuient sur les 42 réponses obtenues. Il en ressort que 95 % des étudiants interrogés ont déclaré travailler actuellement ou avoir travaillé pour une grande entreprise (comptant plus de 500 employés). Ces étudiants avaient au moins cinq ans d'expérience professionnelle. Le questionnaire avait été établi pour comprendre les motivations qui sous-tendent les stratégies de prix bas et pour déterminer si le verrouillage d'un marché joue un rôle plus important que les gains d'efficacités ou que d'autres justifications objectives. L'enquête a révélé que 64 % des étudiants interrogés avaient constaté que les entreprises appliquaient une politique de prix très agressive (en-deçà du coût variable moyen). Selon 29 % d'entre eux, les petites et moyennes entreprises qui les ont employés pratiquaient des politiques de prix très agressives. La mise en œuvre d'une politique de prix agressive peut s'expliquer de plusieurs façons et elle est souvent moins motivée par la rivalité entre concurrents que par des raisons pro concurrentielles. Appliquer une telle politique n'est guère judicieux pour les entreprises de premier rang sur un marché en pleine expansion. Cela peut s'expliquer par le fait que les dirigeants d'entreprise considèrent que ce type de politique est moins intéressant pour les grandes entreprises ou par le fait que celles-ci sont davantage conscientes du risque qu'elles encourrent si elles contreviennent aux règles de concurrence.

M. Friederiszick conclut en laissant trois questions en suspens. Premièrement, comment peut-on mettre en œuvre une approche plus intégrée des gains d'efficacités et des effets anticoncurrentiels dans les affaires d'abus de position dominante ? Deuxièmement, comment peut-on encourager les entreprises et les autorités de la concurrence à formuler davantage de justifications lors du processus de décision et à examiner ces justifications de manière plus transparente ? Enfin, comment peut-on concilier les points de vue convergents des entreprises et des autorités de la concurrence sur le sujet des conduites potentiellement anticoncurrentielles ?

Le Président invite le délégué de la Turquie à donner son avis sur l'utilisation du moyen de défense fondé sur les gains d'efficacité dans les affaires d'abus de position dominante.

Le délégué de la Turquie indique que l'autorité de la concurrence turque accorde une place croissante à l'évaluation des gains d'efficacité, en particulier concernant les fusions et d'acquisitions et les affaires d'abus de position dominante. Le délégué indique que les décisions de l'autorité turque en matière d'abus de position dominante prennent avant tout en compte les gains d'efficacité statique, comme les gains d'efficacité allocative. Les gains d'efficacité qui sont le plus souvent pris en compte concernent l'augmentation du chiffre d'affaires liée à une réduction des coûts (décision *Cable TV*), les gains d'efficacité par les coûts (décision *Sanofi-Aventis*), les gains d'efficacité au niveau de la commercialisation (décision *Frito Lay*), ou encore les gains d'efficacité en matière d'achats. Dans les affaires relatives à la pratique de prix d'éviction (décision *Coca-Cola*, par exemple), l'autorité turque a également considéré les gains d'efficacité statique, tels que les réductions de coûts, mais aussi les économies d'échelle et d'envergure résultant dans des prix plus bas pratiqués par les entreprises.

Le délégué de la Turquie souligne que l'autorité de la concurrence de son pays porte une attention particulière au principe de proportionnalité. Dans les affaires d'abus de position dominante, l'autorité applique un critère de mise en balance des gains d'efficacité et des effets négatifs de l'abus sur le marché et accepte le recours au moyen de défense fondé sur les gains d'efficacité si les pratiques adoptées n'éliminent pas la concurrence sur une partie non négligeable du marché concerné.

## **5. Évaluation ex-post des gains d'efficacité dans les procédures d'application du droit de la concurrence**

Le Président oriente le débat sur les évaluations ex-post et donne la parole à la délégation des États-Unis.

Le délégué des États-Unis souligne que l'évaluation ex-post des gains d'efficacité est utile du fait qu'elle indique les conditions qui sont requises et les variables qui doivent être présentes pour que les allégations de gain d'efficacité soient crédibles, voire pour que ces gains se matérialisent tôt ou tard sur le marché. Le délégué note que les évaluations ex-post peuvent s'appliquer aux projets de fusion et aux fusions réalisées. Aux États-Unis, la FTC a mené une étude rétrospective portant sur une amélioration potentielle de la qualité des services médicaux après une fusion des hôpitaux et, dans ce cas particulier, aucune amélioration due à la fusion n'a pu être constaté.

Le délégué du Japon présente les résultats d'un rapport sur l'évaluation ex-post des regroupements d'entreprises publié par le Centre de recherche sur la politique de la concurrence (CPRC) de la Commission de la concurrence du Japon (JFTC) en novembre 2011. Ces travaux avaient pour objectif d'examiner les variations de la performance des entreprises après les fusions. Cette étude examine les résultats concrets des fusions depuis 2000 à partir de données sur les taux de marges, le cours des actions, les coûts de recherche-développement, le nombre de brevets déposés et le prix de détail des produits. Ces travaux révèlent que les fusions n'ont pas amélioré la performance des entreprises de façon significative. L'analyse a démontré que les fusions n'ont pas d'effet significatif sur les taux de marge et que ces taux se sont même dégradés dans un plus grand nombre de cas. De plus, l'analyse du cours des actions a révélé que le cours augmentait le jour où la fusion était annoncée, mais chutait après quelques jours dans la plupart des cas et que le rendement anormal cumulé se rapprochait de zéro. Par ailleurs, l'analyse portant sur la recherche et le développement a établi que, dans la plupart des cas, le nombre de brevets a diminué. Enfin, l'analyse du prix de détail des produits a fait ressortir une tendance à la hausse des prix moyens sur le marché à la suite des fusions. Le délégué du Japon conclut que les résultats des travaux présentés doivent être évalués avec prudence étant donné que certaines données n'étaient pas disponibles.

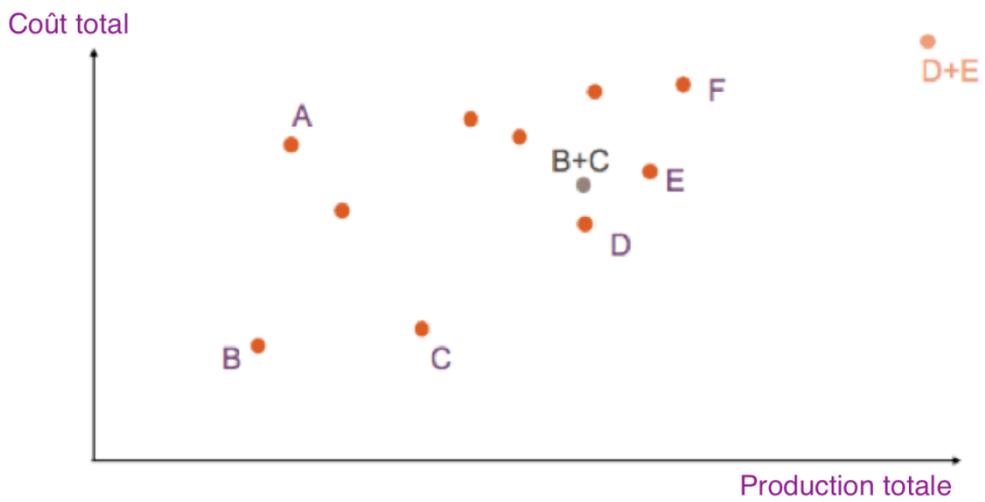
## 6. Conclusions

Le Président clôture la table ronde en concluant que les autorités de la concurrence semblent porter un réel intérêt à la question des gains d'efficacité dans l'analyse de la concurrence. La principale difficulté de l'analyse des gains d'efficacité est de trouver des indicateurs adéquats. En ce qui concerne les instruments employés, le Président note que certains pourraient s'avérer utiles, même si la complexité des modèles économiques et le manque de fiabilité des données leur sont reprochés. Le Président fait également remarquer que l'évaluation ex-post des gains d'efficacité se généralise, ce qui semble indiquer que les autorités de la concurrence souhaitent avoir les outils pour améliorer leurs analyses. Enfin, le Président attire l'attention sur l'approche novatrice adoptée dans les travaux présentés par M. Friederiszick.

Le Président remercie les experts ainsi que l'ensemble des délégués pour leurs contributions et invite les intervenants à participer à une table ronde sur les évaluations ex-post qui se tiendra en février 2013.

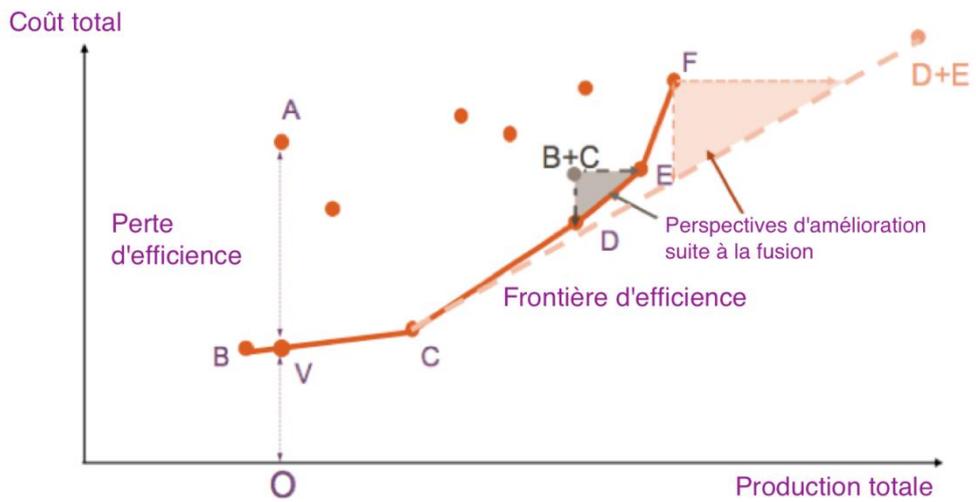
ANNEXE

Graphique 1. Représentation graphique de la technique DEA (I)



Source : Oxera

Graphique 2. Représentation graphique de la technique DEA (II)



Source : Oxera

## OTHER TITLES

### SERIES ROUNDTABLES ON COMPETITION POLICY

1	Competition Policy and Environment	OCDE/GD(96)22
2	Failing Firm Defence	OCDE/GD(96)23
3	Competition Policy and Film Distribution	OCDE/GD(96)60
4	Efficiency Claims in Mergers and Other Horizontal Agreements	OCDE/GD(96)65
5	The Essential Facilities Concept	OCDE/GD(96)113
6	Competition in Telecommunications	OCDE/GD(96)114
7	The Reform of International Satellite Organisations	OCDE/GD(96)123
8	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11	Competition Issues related to Sports	OCDE/GD(97)128
12	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14	Resale Price Maintenance	OCDE/GD(97)229
15	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21	Competition and Regulation in Broadcasting in the Light of Convergence	DAFFE/CLP(99)1
22	Relations between Regulators and Competition Authorities	DAFFE/CLP(99)8
23	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25	Oligopoly	DAFFE/CLP(99)25
26	Airline Mergers and Alliances	DAFFE/CLP(2000)1

27	Competition in Professional Services	DAFFE/CLP(2000)2
28	Competition in Local Services: Solid Waste Management	DAFFE/CLP(2000)13
29	Mergers in Financial Services	DAFFE/CLP(2000)17
30	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32	Competition in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34	Competition Issues in Road Transport	DAFFE/CLP(2001)10
35	Price Transparency	DAFFE/CLP(2001)22
36	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41	Communication by Competition Authorities	DAFFE/COMP(2003)4
42	Substantive Criteria Used for the Assessment of Mergers	DAFFE/COMP(2003)5
43	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44	Media Mergers	DAFFE/COMP(2003)16
45	Universal Service Obligations	DAF/COMP(2010)13
46	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48	Merger Remedies	DAF/COMP(2004)21
49	Cartels: Sanctions Against Individuals	DAF/COMP(2004)39
50	Intellectual Property Rights	DAF/COMP(2004)24
51	Predatory Foreclosure	DAF/COMP(2005)14
52	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56	Competition on the Merits	DAF/COMP(2005)27
57	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58	Barriers to Entry	DAF/COMP(2005)42
59	Prosecuting Cartels Without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18

61	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62	Access to Key Transport Facilities	DAF/COMP(2006)29
63	Environmental Regulation and Competition	DAF/COMP(2006)30
64	Concessions	DAF/COMP/GF(2006)6
65	Remedies and Sanctions in Abuse of Dominance Cases	DAF/COMP(2006)19
66	Competition in Bidding Markets	DAF/COMP(2006)31
67	Competition and Efficient Usage of Payment Cards	DAF/COMP(2006)32
68	Vertical Mergers	DAF/COMP(2007)21
69	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71	Public Procurement - The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72	Competition, Patents and Innovation	DAF/COMP(2007)40
73	Private Remedies	DAF/COMP(2006)34
74	Energy Security and Competition Policy	DAF/COMP(2007)35
75	Plea Bargaining/Settlement of Cartel Cases	DAF/COMP(2007)38
76	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77	Dynamic Efficiencies in Merger Analysis	DAF/COMP(2007)41
78	Guidance to Business on Monopolisation and Abuse of Dominance	DAF/COMP(2007)43
79	The Interface between Competition and Consumer Policies	DAF/COMP/GF(2008)10
80	Facilitating Practices in Oligopolies	DAF/COMP(2008)24
81	Taxi Services Regulation and Competition	DAF/COMP(2007)42
82	Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power	DAF/COMP(2006)35
83	Managing Complex Mergers	DAF/COMP(2007)44
84	Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations	DAF/COMP(2007)45
85	Market Studies	DAF/COMP(2008)34
86	Land Use Restrictions as Barriers to Entry	DAF/COMP(2008)25
87	Construction Industry	DAF/COMP(2008)36
88	Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates	DAF/COMP(2008)30
89	Fidelity and Bundled Rebates and Discounts	DAF/COMP(2008)29
90	Presenting Complex Economic Theories to Judges	DAF/COMP(2008)31
91	Competition Policy for Vertical Relations in Gasoline Retailing	DAF/COMP(2008)35
92	Competition and Financial Markets	DAF/COMP(2009)11

93	Refusals to Deal	DAF/COMP(2007)46
94	Resale Price Maintenance	DAF/COMP(2008)37
95	Experience with Direct Settlements in Cartel Cases	DAF/COMP(2008)32
96	Competition Policy, Industrial Policy and National Champions	DAF/COMP/GF(2009)9
97	Two-Sided Markets	DAF/COMP(2009)20
98	Monopsony and Buyer Power	DAF/COMP(2008)38
99	Competition and Regulation in Auditing and Related Professions	DAF/COMP(2009)19
100	Competition Policy and the Informal Economy	DAF/COMP/GF(2009)10
101	Competition, Patents and Innovation II	DAF/COMP(2009)22
102	Standard for Merger Review	DAF/COMP(2009)21
103	Failing Firm Defence	DAF/COMP(2009)38
104	Competition, Concentration and Stability in the Banking Sector	DAF/COMP(2010)9
105	Margin Squeeze	DAF/COMP(2009)36
106	State-Owned Enterprises and the Principle of Competitive Neutrality	DAF/COMP(2009)37
107	Generic Pharmaceuticals	DAF/COMP(2009)39
108	Collusion and Corruption in Public Procurement	DAF/COMP/GF(2010)6
109	Electricity: Renewables and Smart Grids	DAF/COMP(2010)10
110	Exit Strategies	DAF/COMP(2010)32
111	Standard Setting	DAF/COMP(2010)33
112	Competition, State Aids and Subsidies	DAF/COMP/GF(2010)5
113	Emission Permits and Competition	DAF/COMP(2010)35
114	Pro-active Policies for Green Growth and the Market Economy	DAF/COMP(2010)34
115	Information Exchanges between Competitors under Competition Law	DAF/COMP(2010)37
116	The Regulated Conduct Defence	DAF/COMP(2011)3
117	Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings	DAF/COMP(2010)11
118	Competition in Ports and Port Services	DAF/COMP(2011)14
119	Crisis Cartels	DAF/COMP/GF(2011)11
120	Horizontal Agreements in the Environmental Context	DAF/COMP(2010)39
121	Excessive Prices	DAF/COMP(2011)18
122	Cross-border Merger Control: Challenges for Developing and Emerging Economies	DAF/COMP/GF(2011)13
123	Competition in Hospital Services	DAF/COMP(2012)9
124	Procedural Fairness: Competition Authorities, Courts and Recent Developments	DAF/COMP(2011)122

125	Remedies in Merger Cases	DAF/COMP(2011)13
126	Economic Evidence in Merger Analysis	DAF/COMP(2011)23
127	Unilateral Disclosure of Information with Anticompetitive Effects	DAF/COMP(2012)17
128	Promoting Compliance with Competition Law	DAF/COMP(2011)20
129	Impact Evaluation of Merger Decisions	DAF/COMP(2011)24
130	Market Definition	DAF/COMP(2012)19
131	Competition and Commodity Price Volatility	DAF/COMP/GF(2012)11
132	Quantification of Harm to Competition by National Courts and Competition Agencies	DAF/COMP(2011)25
133	Improving International Co-operation in Cartel Investigations	DAF/COMP/GF(2012)16
134	Leniency for Subsequent Applicants	DAF/COMP(2013)11