

Non-Horizontal Mergers

The merging of companies has become quite a common occurrence in the European Union. The EU currently regulates European undertakings involved in such transactions under the Merger Regulation of 2004, which enables the EU Commission to appraise proposed mergers in the light of the rules of the common market.

In regulating mergers and their effects on competition in the common market, the European Commission has created a clear distinction between horizontal mergers and non-horizontal ones. Such distinction has been created due to the different effects horizontal and non-horizontal mergers have on competition.

Horizontal mergers take place between companies operating on the same level of the market, such as two car-manufacturing companies, while mergers between companies operating on different levels of the market, such as a car manufacturer and a car distributor, are known as non-horizontal mergers. Horizontal mergers tend to represent a threat to competition because they have an effect of reducing competition on the market in which the merger takes place. By contrast, non-horizontal mergers do not have significant anti-competitive effects due to the fact that the merging companies are not in direct competition. Hence these types of mergers do not raise major competition concerns.

The Commission has recently issued its draft guidelines on the assessment of non-horizontal mergers in order to create a set of guiding principles which will enable it to assess mergers between companies active on distinct markets. The guidelines, when adopted, will give businesses a clear indication of the way the Commission will assess a proposed merger. This is a follow-up to the guidelines the EU Commission issued in 2004 on the assessment of horizontal mergers.

In assessing a merger the Commission weighs the positive and the negative effects a proposed merger will have on competition in the relevant market. It compares the competitive conditions prevalent on the market prior to the merger with the conditions that would prevail should the merger take place. This necessarily constitutes an exercise based on reasonable prediction. Such an exercise would involve an assessment of likely entries of potential competitors or likely exits of incumbent firms from the relevant market as a result of the merger.

In the draft guidelines the Commission outlines the benefits gained from non-horizontal mergers. One such benefit is the efficiency that results from these mergers without having a parallel negative effect on competition on the market. Nonetheless the Commission still envisages that non-horizontal mergers may be detrimental to competition, especially when they have the effect of foreclosing actual or potential rivals from entering the market in which the merger takes place.

Yet, generally speaking, the guiding principle set out in the draft guidelines is that non-horizontal mergers do not pose a threat to competition unless the merged entity has market power in at least one of the markets on which it operates. The Commission is proposing that a newly merged company holding over 30% of the share of the market constitutes market power. Thus a merged company enjoying a market share of less than

30% is unlikely to harm competition. Besides market power of the merged entity, the Commission will also be allowed to weigh up both the possible anti- and pro-competitive effects arising from the proposed vertical merger. Interested parties may submit their comments to the Directorate-General for Competition on the draft guidelines by May 12 2007. The adoption of the guidelines is expected to take place by the end of this year.

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