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Comments on draft EC Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Undertakings Between Undertakings

Prepared by the Commission on Competition[1]

I. Introduction

The issuance of Non-Horizontal Merger Guidelines by the European Commission constitutes a major development in the Commission's merger control policy and the International Chamber of Commerce (ICC) greatly appreciates the opportunity to provide comments on the draft Guidelines. The observations below complement and build on (a) the comments that ICC provided to the Commission on November 30, 2005 on the report prepared by Professor Jeffrey Church (hereafter the "Church Report"), and (b) the report that was prepared by and on behalf of ICC Taskforce on Non-Horizontal Mergers. The November 30, 2005 presentation and ICC's comments on the Church Report are attached hereto for your convenience[2].

As described in our presentation and discussion paper, the view of ICC is that the EC should draft a set of Guidelines that can bridge the gap between public policy and economic theory in a manner that would not create unnecessary uncertainty, thereby deterring pro-competitive transactions. In this regard, we expressed our concern that, because the "post-Chicago" literature generally focuses more on the competitive harm associated with non-horizontal mergers, rather than on their potential to enhance competition, there might be a risk that the theories of competitive harm that are articulated in the Guidelines are over-inclusive. This concern is particularly relevant as (i) many of the key models are not robust in the sense that changes in the underlying assumptions can lead to very different conclusions, (ii) there are many models whose practical relevance has not been proven, (iii) models of raising rivals' costs are still subject to considerable criticism, (iv) many of the economic models of foreclosure do not fully capture the static and dynamic efficiency effects of non-horizontal mergers, or do not explicitly address

[1] These comments have been drafted under the auspices of the International Chamber of Commerce (ICC) and include observations of the ICC members. The members of the ICC Taskforce on Non-Horizontal Mergers that have prepared these comments are Paul Lugard (Royal Philips Electronics), John Taladay (Partner, Howrey LLP) and Lawrence Wu (Economic Consultant NERA).
[2] ICC submitted its report to the Commission in November 2005. A slightly revised version dated September 13, 2006 is attached hereto and is available at
http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/CommentsChurchReport13Sept06.pdf

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counterstrategies, (v) many of the economic models of vertical foreclosure depend on parameters for which data are not likely to be available and, finally (vi) there exists a lack of empirical research on the ultimate impact of non-horizontal transactions generally.

As written, the draft Guidelines recognize the importance of recent economic insights in the treatment of non-horizontal mergers and attempt to provide the business community with a clearer and more rational framework of analysis for these types of mergers. We are gratified that the current draft of the Guidelines takes into account many of the comments that ICC previously identified in connection with its comments on the Church report, particularly in discussing potential efficiencies, and we greatly appreciate the Commission's efforts in this regard. We note, however, that the published draft of the Guidelines at times struggles to maintain focus on the key evaluative concepts. We believe that the draft Guidelines would benefit from being more concise, with a targeted focus on instruction to business as to the structural circumstances that are likely to give rise to concern and the conditions under which anticompetitive harm can reliably be predicted to occur. This will serve what ICC believes to be the key objective of administrative guidelines: to weed-out anticompetitive mergers ex ante while allowing efficient or benign transactions to proceed by enabling businesses to consistently and accurately predict the outcome of regulatory review.

ICC notes that a detailed analysis of the draft Guidelines reveals a number of minor shortcomings, as well as a number of issues of a fundamental nature. Therefore, ICC respectfully requests that the Commission consider issuing a second draft of the Guidelines for consultation. Naturally, in the event the Commission would do so, ICC would be pleased to comment on that draft.

Our additional comments fall in the following categories: (a) the treatment of efficiencies in the short term and the risk of foreclosure in the long term, (b) the analysis of vertical mergers, (c) the analysis of conglomerate mergers, (d) the suggested safe harbour and (e) the significance of counterstrategies.

II. Treatment of Efficiencies in the Short Term and the Risk of Foreclosure in the Long Term[3]

It is undisputed that most non-horizontal mergers are efficiency enhancing and do not merit any antitrust scrutiny or enforcement. In fact, the Chicago "single profit theorem" indicates that an upstream monopolist cannot increase its profits by integrating downstream, which in turn suggests that non-horizontal mergers are motivated by efficiency considerations. While we appreciate that the "single profit" theorem conditions may not hold in specific circumstances, we do believe that in light of the "efficiency presumption" that applies to non-horizontal mergers, the prediction of competitive harm in a given case requires a particularly rigorous assessment of the facts as well as a convincing explanation of (a) why negative effects are sufficiently likely to occur in the near future in the case at hand, together with (b) an assessment of the likelihood

[3] It is noted that many efficiencies may not only be "short-term, "but "long-term" too. The analytical framework should take account of the period during which efficiency gains continue to produce effects.

and magnitude of the expected harm, particularly if the consequences are not expected in the near term. The methodology of analysis should also adequately rule out procompetitive and competing explanations for the observed or expected behaviour of the combined entity. This observation is reminiscent of the EAGCP recommendation with respect to the Article 82 reform that the Commission must identify the precise mechanism that brings about the competitive harm[4].

ICC believes that it is particularly important for the Commission to spell out and credit the positive aspects of non-horizontal mergers – particularly vertical integration – in the context of the Guidelines. As the Commission has recognized on numerous occasions, over-enforcement can result in undesirable "chilling effects" with respect to potentially efficiency-enhancing mergers. The Commission should also recognize that the issuance of Guidelines, in itself, has the potential to chill such transactions. It reflects the commitment of resources and signifies that the area is one that the Commission believes is worthy of regulatory attention. In essence, it suggests that the Commission is concerned about non-horizontal mergers. This message, which is warranted since a small fraction of cases give rise to competitive harm, must however be tempered with the equally strong countervailing message that the Commission accepts, and indeed, applauds non-horizontal combinations that lead to more efficient use of resources.

ICC takes the view that the required analysis should not focus primarily or solely on negative effects, but must incorporate the likely price and non-price efficiencies from the beginning. Moreover, the Guidelines should – again in line with the presumption that these types of mergers only exceptionally give rise to negative effects – clearly articulate the notion that compelling non-price merger specific efficiencies strongly militate in favour of a negative finding of consumer harm, even if those non-price effects are difficult to quantify.

As further set out below, ICC is also of the opinion that, since the competitive impact of a non-horizontal merger may not be obvious or "subtle," there is a strong need for the reviewing agency to go beyond the mere assumption – or conclusion – that the merger at hand may give rise to "foreclosure" or "anticompetitive foreclosure," or that post- merger "prices may rise." Instead, in their definitive form, the Guidelines should make it clear that there should be convincing evidence that following the merger prices will over time go up with a certain, substantial percentage "X" and will remain so for a sustained period of time[5]. As presently drafted, the draft Guidelines (in particular paragraphs 18 and 28) suggest that the Commission may summarily dismiss a specific merger by demonstrating some unquantified measure of "anticompetitive foreclosure," without demonstrating why, how and by how much the expected long-term harm to competition would outweigh the claimed short-term benefits to consumers.

In this respect, the methodology set out in the draft Guidelines is in sharp contrast with the views of many economists who have noted that the potential for foreclosure rests on a number of conditions that affect the state of competition in both the short- and long-term. For instance,

[4] See Report by the EAGCP, "An Economic Approach to Article 82," July 2005, in particular page 49. See also EAGCP, "Non-Horizontal Mergers Guidelines: Ten Principles," August 2006, point 8.
[5] A greater appreciation of the concrete future effects would also be in line with the rigour which the Community Courts require with regard to the prospective analysis that the Commission is to undertake in these type of cases.

in the case of bundling, Professor Nalebuff suggests a framework of analysis that involves an estimate of the immediate gain to consumers in terms of lower prices, the impact on competitors in terms of price decreases and shifts in market share, the length of the period during which lower prices would persist, an analysis of competitors' costs structure to determine whether their exit from the market is sufficiently likely, the potential discipline that large buyers can exert on the merged entity, entry of other firms and, finally, a quantification of the expected damage if prices are indeed likely to rise[6].

III. The Analysis of Vertical Mergers

ICC appreciates the practical approach that is articulated in the draft Guidelines. Although there are a number of potential theories of foreclosure, the Guidelines note that its approach includes in all cases a consideration of three critical issues: (i) the ability, (ii) the incentive to foreclose rivals from access to inputs or customers, and (iii) the overall impact on effective competition. ICC welcomes this approach as it is likely to contribute to the analytical rigour that is required in the field of non-horizontal mergers.

ICC's main observations with respect to the analysis of vertical mergers relate to (i) the necessary conditions that should be present for finding anticompetitive non-coordinated vertical effects, (ii) the insufficiently concrete meaning of "anticompetitive foreclosure" and the resulting low burden of proof for the Commission to demonstrate negative effects, coupled with an overly stringent treatment of efficiencies, (iii) the problematic treatment of efficiencies in general, and (iv) the over-inclusive scope of the section on coordinated effects.

[6] See Nalebuff, DTI Economics Paper No. 1, Bundling, Tying and Portfolio Effects, Part 1- Conceptual Issues, pages 63-64.

A. Conditions Necessary for Non-coordinated Effects

ICC is of the opinion that the draft Notice is insufficiently clear on the necessary preconditions for anticompetitive foreclosure to occur and urges the Commission to pronounce it more clearly on these conditions. A clear identification of all key conditions and indicators for a possible anticompetitive strategy would not merely enhance the practicability of the future Notice and contribute to a transparent enforcement policy in this field, but is a prerequisite for this important future policy document. ICC notes the following:

First, the current text of the draft Notice states that, for input foreclosure to result in negative effects, market power in the upstream market is a precondition. ICC suggests making it clear in paragraph 34 that there must be "significant" market power for any negative effects to occur as a result of input foreclosure. Moreover, the section on customer foreclosure is even less clear with regard to the minimum conditions needed for such foreclosure to result in anticompetitive effects and seems to suggest that the mere involvement in the merger of some –unquantified- “important” customer (paragraph 60), together with economies of scale and scope (paragraph 61) would be sufficient. See in this respect also paragraph 98 (“The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties’ products is viewed by many customers as particularly important and there are few relevant alternatives for that product… “). ICC suggests that these latter conditions for (customer) foreclosure be clarified. In particular, it would be helpful to know whether the Commission requires market power downstream in the conventional meaning of the notion, or whether “something less” than market power downstream could trigger any customer foreclosure concerns.

Second, the draft Notice does not contain any meaningful guidance with respect to necessary structural conditions of the "other" vertically related market that must be in place for foreclosure to result in anticompetitive effects. In particular, although the section on input foreclosure contains some wording suggesting that the structure of pre-existing downstream competition (and corresponding profit margins) is relevant, it fails to give any meaningful guidance in this respect and may, as a consequence, give rise to the impression that (in addition to a relatively low level of market power upstream) a minimal market position downstream (or some other unidentified circumstance downstream) is sufficient to raise competitive concerns. Similarly, the section on customer foreclosure may be interpreted as expressing the view that anticompetitive effects resulting from customer foreclosure may not require any market power or other specific condition pertaining to the upstream market.

ICC appreciates that the Commission might be reluctant to require that there should generally be significant market power in the "other" vertically related market. However, we believe that it would be highly desirable to clearly identify the limiting factors required in the "other" vertically related market for an anticompetitive foreclosure strategy to be implemented successfully. Thus, in our view, it would be appropriate - and in line with economic insights- to state in the definitive Notice that customer and input foreclosure occur under very specific circumstances and generally require, in addition to significant market power upstream (in the case of input foreclosure) or downstream (in the case of customer foreclosure), that the combined entity would either have a substantial market share in the other vertically related market, or that that “other" market would be conducive to the exercise of market power post-merger by the

combined entity[7]. ICC suggests that paragraphs 42 and 69 are modified accordingly. In addition, we would appreciate it if paragraph 42 would state that the incentive to foreclose "will," rather than "may" depend on these factors and suggest that a similar provision as paragraphs 42 and 69 (as modified) should be included in the corresponding paragraphs that deal with the incentive to foreclose in the context of conglomerate mergers, paragraphs 104-108. At present, that section does not seem to contain any explicit, unambiguous limiting factors with respect to the market for the tied product.

B. Definition of Anticompetitive Foreclosure

In paragraphs 18 and 29, the draft Guidelines introduces a vague notion of foreclosure, which is that the merging parties (and possibly other firms) "may" be able to profitably raise prices.

Paragraph 18 distinguishes "foreclosure" from "anticompetitive foreclosure." As noted in paragraph 16, the Commission rightly is not concerned with a merger's mere effect on a competitor. The definition of the term "foreclosure" in paragraph 18, however, is dangerously perched on "any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger. . . ." The definition of "anticompetitive foreclosure" is a derivative of the definition of foreclosure. The distinction between these terms needs to be re-evaluated and made more precise, focusing foremost on the impact on consumers, rather than premised on the impact on competitors.

We view the distinction between these two terms as critical. It must be scrupulously and consistently applied throughout the draft Guidelines and extreme care must be taken in any final version to qualify anticompetitive foreclosure in every instance where there is an intention to indicate a situation resulting in a potential challenge to a transaction. For example, paragraph 28 fails to utilise the term "anticompetitive foreclosure" once when it clearly should be used in some situations in that paragraph, but not in other instances.

ICC suggests that paragraphs 18 and 28 should be clarified by providing that anticompetitive foreclosure will be found in those circumstances in which the merging companies (or their competitors) "will have the incentive and ability profitably to increase prices" charged to consumers. The current draft, suggesting that anticompetitive foreclosure exists where the firms "may" be able to raise prices, suggests a level of theoretical speculation that is unwarranted and unwelcome in the context of enforcement Guidelines. ICC also suggests adding in paragraph 46 ("Overall likely impact on effective competition") that the Commission will, if reasonably possible, ascertain how much prices will go up and will seek, where appropriate, to evaluate the expected long-term harm that outweighs the short-term gains. ICC appreciates that this evaluation may be complicated, but is of the opinion that the nature of the transactions at hand, the chain of events that is required for negative effects to occur and, more generally, the uncertainty associated with these effects, warrants a particularly rigorous analysis.

[7] Obviously, if the vertical merger combines firms that have a substantial share in each of the respective upstream and downstream markets, the prospect for significant efficiencies is likely to be high. This must be considered as well.

C. The Treatment of Efficiencies

The treatment of efficiencies in the draft Guidelines gives rise to a number of related observations. The crux of the issue stems from the need to balance the acceptance of efficiencies with the acceptance of theories of competitive harm. If the Commission were to take a narrow view of the circumstances in which competitive harm could result from non-horizontal mergers, then a more stringent view toward the acceptance of efficiencies – akin to the acceptance of efficiencies in horizontal mergers – would be commensurate. The draft Guidelines, however, do not track a narrow set of possibilities for competitive harm. Thus, in order to remain balanced, they should permit an equally wide scope for the acceptance of efficiencies. This is particularly true since the scope for competitive harm cannot exist in the context of vertical mergers without an equivalent scope for efficiencies.

First, ICC acknowledges the statement in paragraphs 13 and 14 that vertical and conglomerate mergers provide substantial scope for price and non-price efficiencies. However, it believes that this section of the draft Guidelines could be improved upon, in particular by a much clearer articulation of dynamic efficiencies. The Commission may in this respect consider referring explicitly to the Notice on the application on Article 81(3).

Second, the draft Guidelines seem to be partly based on an implicit distinction between price and non-price efficiencies[8]. Arguably, the latter category lends itself less easily to an integrated analysis together with possible foreclosure effects. ICC takes the view that both types of efficiencies must be taken into account when assessing the overall likely effect of the merger. It also believes that the analysis of the likely resulting effect on prices to be charged by the combined entity must be a comprehensive one and that the possible negative effects can in many cases not be separated from the efficiencies. The draft Guidelines could be improved upon by making clear that the analysis should be structured in this manner. This could, for instance, be done in paragraphs 30 and 57. Alternatively, paragraphs 31 and 93 could be amended to this effect.

Third, ICC believes that a clear statement is warranted indicating that the assessment of the overall likely effect of the merger must entail an assessment of all (price and non-price) efficiencies. Obviously, ICC would also welcome a statement to the effect that compelling non-price merger specific efficiencies would generally prevent any negative finding with respect to net competitive harm, even in the presence of some (minor and uncertain) likely negative effect on price. Even if quantification of those efficiencies is not entirely possible -although they are generally verifiable-, the draft Guidelines would benefit from a more detailed description of the variety of factors that would enter into such an analysis. These factors could, for instance, relate to the degrees of complementarity and substitutability between the products involved. The September 2006 ICC Report includes a number of additional suggestions to assess the magnitude of efficiencies that the Commission may consider to include in the final Notice (see, in particular pages 13 – 15).

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[8] See for instance the charts in paragraphs 30 and 57.

Fourth, while ICC acknowledges that the information with respect to the efficiencies can generally only be provided by the parties to the merger, it believes that the draft Guidelines should be refined in this respect. In particular, ICC believes that, while strict requirements for efficiencies (i.e. they must be substantial, verifiable, merger specific and passed-on to consumers) may be appropriate in the context of horizontal mergers, it believes that, because of the very nature of non-horizontal mergers, the suggested requirements for establishing efficiencies are too strict and would too easily allow the Commission to arrive at a negative conclusion, especially in view of the vague notion of "anticompetitive foreclosure" mentioned above. ICC therefore suggests that the draft Guidelines clearly stipulate that the Commission will consider the efficiencies advanced by the parties and that the type of information listed in paragraph 88 of the Horizontal Guidelines on the Assessment of Horizontal Mergers is highly relevant in its analysis.

Fifth, the draft Guidelines could be further improved upon in two ways: (i) by clearly stating that efficiencies as such do not give rise to concern in either a vertical or conglomerate context – this would alleviate the concern that there might be an "efficiency offence" – and (ii) by indicating that in the exceptional cases where the Commission has reason to believe that the (price) efficiency is the direct cause of significant negative effects, it will verify whether those "efficiencies" are indeed substantial and verifiable. This approach would be reasonable as it confirms that the Commission bears the burden of proving with sufficient certainty the applicable theory of harm and the resulting negative effects.

In short, ICC is of the opinion that the strict requirements imposed on the parties should be relaxed in order to remain proportionate with the Commission's perspective on potential competitive harm. At the same time, the onus on the Commission to establish "harmful efficiencies" should be increased. Wording to this effect could, for instance, be included in the sections that discuss the incentives and profitability of the various foreclosure theories.

Sixth, ICC is concerned that paragraph 56 conveys the wrong message in that it may give rise to an assessment on whether a specific positive market outcome could be achieved by transactions that fall short of a full merger. In our view, paragraph 56 should be amended to make it clear that the Commission will not prohibit any merger that is not likely to result in negative effects, even if it believes that the merger or some other potential transaction or contractual arrangement might be even more efficient. Any other approach would undermine the open market principle that is at the foundation of the Commission's mission.

D. Coordinated Effects

ICC believes that the two sections on coordinated effects are over-inclusive. While ICC appreciates that there might be theoretical circumstances where vertical mergers would make it easier for upstream or downstream firms to reach a common understanding on the terms of coordination, it believes that this scenario is extremely unlikely to materialize in practice. Paragraphs 82-84 of the draft Guidelines mention three general ways in which a vertical merger may facilitate coordination. Of these three mechanisms, the elimination of a maverick (paragraph 84) appears the least unlikely.

ICC suggests that the Commission include a general statement – for example in paragraph 78 – that makes clear that coordinated effects may only occur in exceptional circumstances. Next, it would also be reasonable to mention that, while it cannot be excluded that coordination would be made easier under the circumstances mentioned in paragraphs 82 (foreclosure in general) and 83 (increased symmetry), the Commission will in particular assess whether the vertical merger involves the elimination of a maverick firm (paragraph 84).

ICC submits that this approach would be reasonable and practical as it would reassure the business community that the Commission is unlikely to find coordinated effects in the context of vertical mergers. Moreover, even if the sections on coordinated effects are amended, the Commission would not "give up" any means of intervention. Indeed, the Commission would in any event be able to analyse the competitive implications – and if appropriate condemn a merger – based on the methodology laid down in the Guidelines for the assessment of horizontal mergers.

The section on coordinated effects in the context of conglomerate mergers (paragraphs117-119) raises similar, but even stronger, concerns. In fact, coordinated effects in such a setting seem rarely ever conceivable as the merger would not lead to a reduction of the number of competitors in a given market. However, paragraph 118 seems to suggest the opposite, incorrect view. In this light, ICC suggests to either thoroughly review and recast paragraphs 117-119 and, in the event it believes that it is indispensable to maintain a general proviso for truly exceptional circumstances, to simply refer to Section IV of the Guidelines for the assessment of horizontal mergers. In addition and in connection with these observations, ICC is concerned that the notion of "a more vulnerable situation" is unnecessarily vague and should be omitted. Moreover, it is suggested to significantly revise the broad wording of paragraph 119 which in its presents wording strongly suggests that the mere increase of "multi-market contacts" may give rise to the assumption that the conglomerate merger gives rise to coordinated effects. Indeed, the Guidelines should spell out to the additional evidence needed to arrive at that conclusion.

IV. Conglomerate Mergers

The section on conglomerate mergers (paragraphs 90-119) is essentially confined to a discussion under which circumstances tying and bundling may give rise to concern, without, however, ruling out the possibility completely that other mechanisms may bring about those effects. ICC welcomes this approach as it signals that the Commission is prepared to treat a number of the more "exotic" – and certainly less researched – foreclosure theories with scepticism.

ICC would nonetheless welcome a clearer statement, for instance in paragraph 97, that would expand on the importance of the nature of the products involved, as well as a statement that negative effects are generally not likely or expected in the event the merger combines independent products. This would be of practical importance as it would reassure many multi-product firms that the combination of various products would not, as such, suggest competitive harm.

We also believe that it is important for the Commission to identify these practices as also capable of contravening Article 82 EC, since the precondition for the exercise of any of these theories of harm is the presence of market power (see paragraph 98). We believe that this would relate two important messages. First, that the Commission has the authority to address these situations either in the course of merger review or after the merger has been consummated. Second, it would also signal to merging parties that the potential concern relating to conglomerate effects is largely a mainstream analysis of potential abuse of dominance.

For the discussion in paragraphs 117-119 on the circumstances that conglomerate mergers may facilitate coordination, we respectfully refer to our observations above. In addition, we would note that these paragraphs appear to focus on harm generated from horizontal merger theory rather than explicate any separate theory of competitive harm that arises in the context of conglomerate mergers. Indeed, ICC is unaware of any robust theoretical or empirical basis for expounding such a theory in the conglomerate context. Thus, we believe that the credibility of the draft Guidelines would be enhanced if the Commission were to reserve its position on this section entirely. A precedent for this approach exists in that the Horizontal Merger Guidelines adopted by the U.S. FTC and DOJ were initially issued without a discussion of efficiencies, which followed several years later.

V. The 30% Safe Harbour

ICC is of the opinion that the safe harbour threshold of 30% is too narrow. Moreover, the “exceptions” to the safe harbour are overly broad. While ICC appreciates that this threshold is motivated in part by (i) the Commission’s interpretation of economic theory that predicts potential negative effects in oligopolistic markets and (ii) its wish to prevent the safe harbour from applying to coordinated effects situations, it believes that the safe harbour could be significantly broadened by both increasing the suggested safe harbour market share, particularly for the analysis of non-coordinated effects and conglomerate mergers , and the HHI thresholds in paragraph 25.

A significant increase of the market share threshold would be consistent with the general condition that applies to the vast majority of economic models seeking to identify negative effects as a result of non-horizontal mergers. In other words, for those negative effects to occur, substantial market power or even monopoly power is required. It would be helpful if this insight would also be reflected in paragraph 23, by adding “substantial” before “market power.”

It would be appropriate to identify separate safe harbours for situations involving coordinated and non-coordinated effects. The suggested HHI and 30% threshold are understandable for their potential application to that rare number of situations involving potential coordinated effects, but neither the 30% threshold, nor the use of HHIs, finds much utility in the case of non-coordinated effects which rely on the unilateral exercise of substantial market power. Thus, applying a separate and presumably higher market share threshold for mergers involving potential non-coordinated effects is necessary to bring the draft Guidelines into conformity with the Commission’s practice on horizontal mergers and abuse of dominance.

Broadening the safe harbour would not in any way prevent the Commission from subjecting non-horizontal mergers to a detailed review. Indeed, paragraph 25 is qualified in at least two ways, by the observation that the Commission is "unlikely" to find concern and the "special circumstances" proviso. Moreover, broadening the safe harbour would be consistent with the observation that coordinated effects are unlikely to arise.

Reconsideration, however, is warranted for the exception based on the acquisition of a maverick firm (i.e., "a firm with a high likelihood of disrupting coordinated conduct"). It is difficult to identify a circumstance in which the acquisition of a maverick firm could reasonably be predicted to lead to an anticompetitive effect where at least one of the minimal preconditions (i.e., 30% share or >[2000] HHI) is not met in at least one of the affected upstream or downstream markets. Providing an exception for this situation undermines the well-recognized foundation on which the concept of coordination exists – that there must be a sufficiently small number of firms in order for tacit coordination to exist.

In sum, a significantly larger safe harbour – set at 40% for example – would be a strong signal that the Commission acknowledges that non-horizontal mergers are significantly less likely to cause harm and that it appreciates that these types of mergers are more likely to bring about efficiencies. Indeed, as discussed in ICC's September 2006 Report, the efficiencies are likely to be greater in situations where the merged entity has a larger market share, all else equal. As such, the draft Guidelines would send a much more balanced signal to the business community, without compromising the Commission's enforcement priorities. Identifying the appropriate exceptions ensures that companies must account for unusual circumstances before relying on the safe harbour.

Finally, the draft Guidelines should in ICC's view be improved upon by more clearly articulating which markets are to be considered as "markets concerned" within the meaning of paragraph 25. This applies both to the relevant up- and downstream markets in the case of vertical mergers and conglomerate mergers. For instance, that latter section should make clear that the market share in the market for the tying product is the relevant market for determining whether the safe harbour applies.

VI. Counterstrategies

ICC welcomes the Commission's acknowledgment that the (non) availability of counterstrategies is a key variable in the analysis of non- horizontal mergers. The September 2006 ICC Report contains a detailed account of the potential of counterstrategies undertaken by competitors to make a foreclosure strategy of the merging parties unprofitable, or undo any negative effects, and would, therefore, be unlikely. In a number of circumstances, counterstrategies may even lead to more competition. Nonetheless, ICC feels that the draft Guidelines would benefit from a number of amendments.

First, the final Guidelines should make clearer that the assessment of counterstrategies is indeed a key step in the analysis if non-horizontal mergers and that the Commission "will" (as opposed

to "may," as mentioned in paragraphs 38 and 66) undertake such an analysis. This modification would also bring those paragraphs in line with paragraph 102.

Second, it would be helpful if the text would reflect that the Commission will consider any type of possible or feasible counterstrategy, including counter mergers and non-structural cooperation, as well as entry into new markets and expansion. The current wording of paragraphs 36, 38, 66, 73, 75 and 102 does not contain an indication or catalogue of the various counterstrategies that the Commission would consider.

Finally, we suggest that the Commission add a qualitative statement that it will adopt a rigorous approach with respect to the absence of effective counterstrategies and that it will in particular ascertain whether specific counterstrategies are not feasible. In this context, it would be helpful if the Commission would add that it will concentrate on assessing technical, regulatory or other types of barriers to entry or expansion.

Final Observations

Paragraph 44 of the draft Guidelines states that the Commission will consider the deterrent effect of Article 82 in its analysis of the parties' incentive to adopt a foreclosure strategy. The Commission might consider adding a statement in this section indicating what the Commission will undertake in the framework of this analysis, i.e. conduct a "comprehensive analysis," as mandated by the Tetra Laval judgment.

In view of the evolving insights in the analysis of non-horizontal mergers, ICC would greatly welcome a statement that the operation of any future Guidelines on non-horizontal mergers will be re-evaluated in, for instance, five years from now. Such a commitment will be a valuable indication that the Commission proceeds in a cautious manner in this important field of the law.

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