

ICN Conglomerate Mergers Project Report

(2019-2020)

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Introduction and Project Scope

Conglomerate Mergers Project

Following its work on vertical mergers in the last several years¹, the ICN Merger Working Group (MWG) selected conglomerate mergers as the final topic for its series examining aspects of non-horizontal mergers. For purposes of this project, conglomerate mergers were defined as mergers involving products or services that customers perceive as complementary, or for which customers may have independent demand. It is important to recognize that some jurisdictions may rely on vertical or horizontal theories of harm to address at least some of the competitive concerns raised by conglomerate mergers and/or mergers where the merging parties are not current competitors. As a result, their enforcement activities may not have been accounted for in the surveys or other aspects of this project. The project consisted of a brief comparative survey of member jurisdictions in order to explore conglomerate merger theories and case studies, and webinars to enhance the members' understanding of the theory behind and to share experiences on conglomerate merger reviews and acquisitions of nascent competitors. This paper summarizes the results of the survey and outlines the webinars.

The survey

In October 2019, the MWG conducted a survey of the member authorities to understand better how conglomerate mergers are reviewed in practice. We received responses from just over half of the 62 MWG members.² The identity of the respondents can be found in ANNEX I, and a sample survey questionnaire can be found in ANNEX II.

The webinars

The MWG held two webinars as part of this project. The first, held in October 2019, focused on key issues involved in reviewing conglomerate mergers. The second, jointly hosted with the digital mergers webinar series, was held in January 2020, and focused on acquisitions of nascent competitors. Over 100 participants joined each webinar. The presentation slides used from the webinars can be found in ANNEX III.

Survey Results

System of law on conglomerate mergers review [Figure 1]

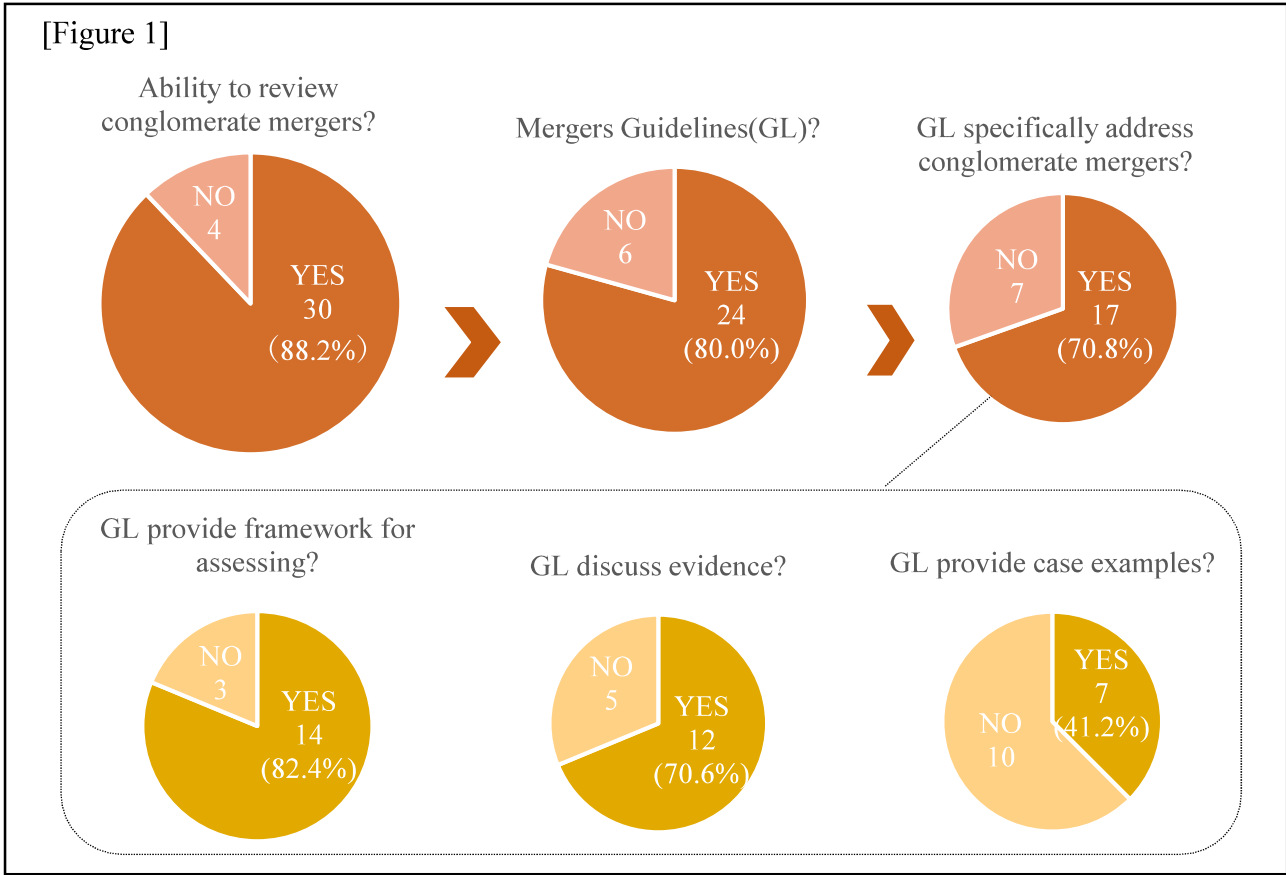
1. Thirty authorities out of 34 authorities (88.2%) have the ability to review conglomerate mergers (i.e.,

¹ See e.g. Vertical Merger Survey Report (2018) (hereinafter, "Vertical Mergers Survey") (https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/MWG_SurveyreportVerticalMergers2018.pdf) and Vertical Merger Comparison Study (2019) (<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Vertical-Mergers-Comparison-Study.pdf>)

² More than half of respondents were European authorities.

mergers involving complementary products or products for which customers have independent demand). Furthermore, 24 out of 30 authorities (80.0%) have public merger guidelines for reviewing mergers in general. Among the 24 authorities with public merger guidelines, 17 authorities (70.8%) specifically address conglomerate mergers in their guidelines. Furthermore, 6 out of 17 authorities, in addition to public merger guidelines, address the assessment of conglomerate mergers in their public statements or other public documents.

2. Most of the guidelines provide a framework for assessing conglomerate mergers (14 out of 17 authorities, 82.4%) and discuss what types of evidence needed to assess conglomerate mergers (12 out of 17 authorities, 70.6%). However, guidelines that provide examples of previously assessed or hypothetical conglomerate merger cases are less common (7 out of 17 authorities, 41.2%).
3. The prevalence of guidelines addressing conglomerate mergers appears to be similar to that addressing vertical mergers. The 2018 Vertical Mergers Survey showed that 77.8% of merger guidelines specifically address vertical mergers. Among them, 85.7% of the guidelines include a framework for analysis, 61.9% of the guidelines discuss what kind of evidence is needed to assess vertical mergers, and 38.1% of the guidelines provide examples of previously assessed or hypothetical merger cases.
4. Another survey question asked whether the approach to assess conglomerate mergers is well established/fixed or still evolving within the respondents' jurisdiction. Most authorities (20 out of 30 authorities, 66.7%) answered that it is still evolving. In many responding authorities, a broad framework for assessing conglomerate mergers is established in the merger guidelines, but the specific approach continues to evolve because of limited experiences in assessing conglomerate mergers or little legal precedent.



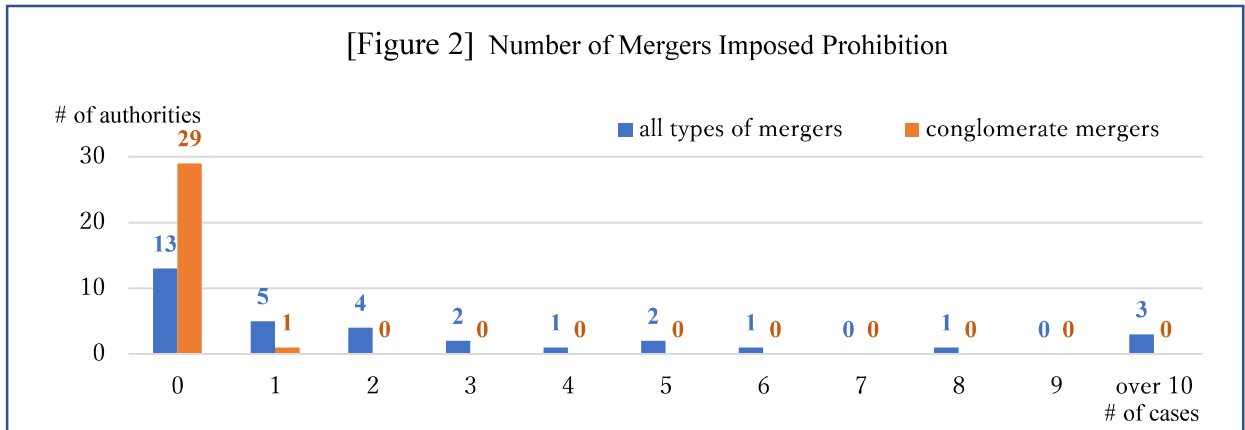
Statistics in the last 5 years³

A. Prohibition [Figure 2]

5. When looking at all types of mergers (horizontal and non-horizontal including conglomerate mergers), responding authorities prohibited mergers in 1.1 % of notified transactions over the past five years. Many of those authorities (13 out of 32 authorities, 40.6%) did not prohibit any types of mergers over that period. In addition, most of the authorities who had prohibited mergers (14 out of 19 authorities) did so in less than 5 merger cases over the past 5 years.

6. Furthermore, only a single responding authority prohibited a merger case raising competitive concerns including conglomerate aspects over the last 5 years. This is a relatively low rate compared with the number of horizontal or vertical merger cases that were blocked by member authorities.

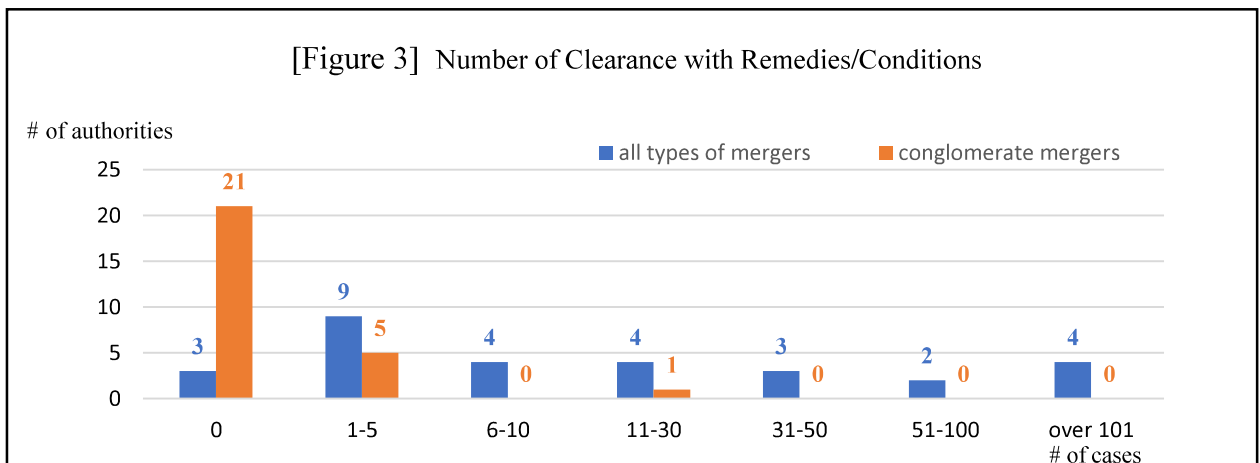
³ Regarding the comparison with the result of the Vertical Mergers Survey, note that the Vertical Merger Survey was based on the number of the remedies between 2015-2017, not the prior five years.



B. Remedies / Conditions [Figure 3], [Figure 4]

7. When we look at all types of mergers (horizontal and non-horizontal, including conglomerate mergers), 5.8% of notified mergers required remedies. Most of the authorities (26 out of 29 authorities, 89.7%) had cleared mergers with remedies/conditions in the last 5 years. Among the authorities that cleared mergers with remedies, the number of remedies each authority imposed varied from 1 to over 100 in the past five years, and the percentage of the number of remedies to the number of the notifications for each authority also varies from less than 1% to over 20%.

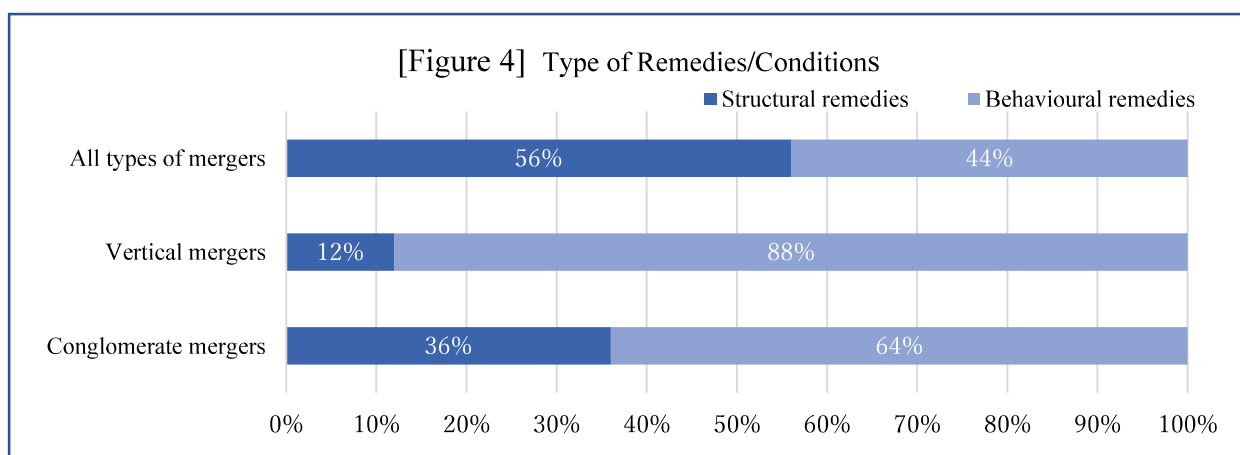
8. However, the number of authorities expressing concerns with conglomerate mergers was much smaller than the result above. The survey shows that only 6 out of 27 authorities (22.2%) found conglomerate concerns arising from a merger, and only 1 to 5 conglomerate mergers were cleared with remedies in the last 5 years.



9. Among remedies addressing all types of merger concerns (horizontal, vertical and conglomerate concerns) over the last 5 years, 56.2% (321 cases) of the remedies employed by responding authorities are structural remedies and 43.8% (250 cases) are behavioural remedies. Note that in some cases, the remedy

involved a combination of both types of remedies (so-called hybrid remedies), and those remedies are counted under both categories. The Vertical Survey Report showed that 88% of the remedies addressing vertical concerns are behavioural ones⁴.

When addressing conglomerate concerns over the past 5 years, responding authorities employed behavioural remedies 64.0% of the time. However, the number of remedies addressing conglomerate concerns is still small (16 cases in total from the survey), so the significance of this may be limited.



10. For all types of mergers, the parties abandoned the transaction or withdrew notification in 1.7% of the cases. Among them, only 4 abandonment/withdrawal cases from 2 authorities were conglomerate mergers.

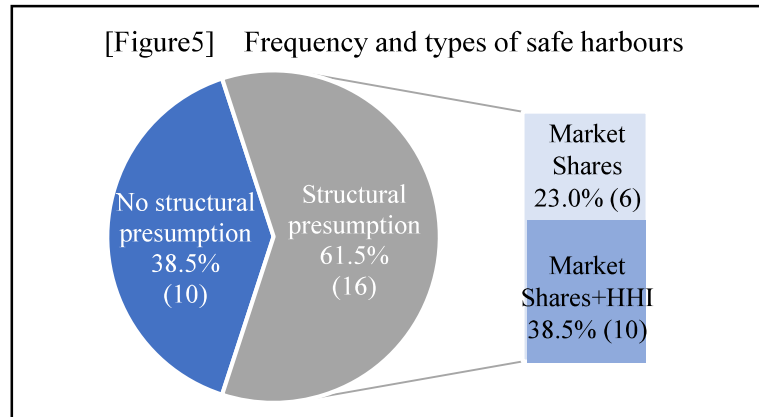
Assessment of conglomerate mergers

A. Safe harbours [Figure 5]

11. A majority of the responding authorities (16 out of 26 authorities, 61.5%) have structural presumptions to identify conglomerate mergers that are unlikely to generate any competition concerns. This contrasts with the result regarding vertical mergers that showed 75% of the authorities have such structural presumptions.
12. Among 16 authorities who have structural presumptions regarding conglomerate mergers, 10 authorities (38.5% of the whole respondents) rely on a combination of market share and the Herfindahl-Hirschman

⁴ See Page 23 of the Vertical Merger Survey showing that out of 48 remedies, the number of behavioral remedies was 42. https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/MWG_SurveyreportVerticalMergers2018.pdf

Index (HHI) for structural presumptions, and others (6 authorities, 23.0% of the whole respondents) rely exclusively on market share. For these authorities with structural presumptions, conglomerate mergers are usually considered not to raise competition concerns if the merging parties' market share is below 25-30% in each defined market and with an HHI below 2,000.



B. Theories of harm [Figure6]

13. Possible theories of harm applicable to conglomerate mergers identified by surveys responses include:

(a) Market foreclosure on competitors or third parties by limiting access to inputs or distribution in each defined market or by exploiting market power (including an increase of economies of scale, financial resources, etc.), through:

(a-1) tying or bundling of products/services

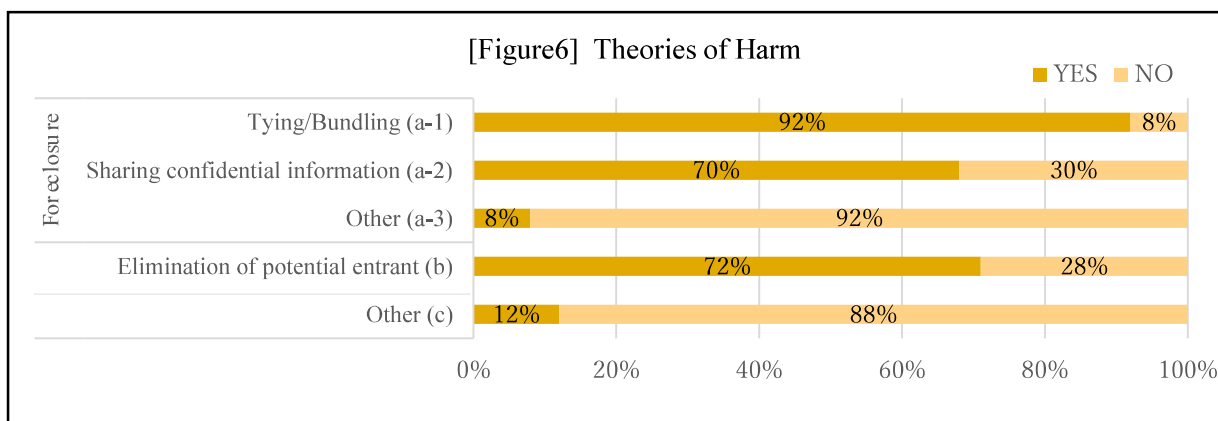
(a-2) sharing confidential information between merging parties

(a-3) other measures identified by respondents to the survey, i.e., creating/increasing barriers to entry for competitors having to enter more than one market at the same time

(b) Elimination of potential entrants (entry by one of the merging parties or third parties), which reduces competition or innovation;

(c) Other theories of harm from the response of the survey, including portfolio effects if the markets' customers prefer one-stop-shopping, or coordinated effects by increasing the markets exposure.

14. From the survey results, almost all responding authorities (23 out of 25 authorities, 92.0%) consider (a-1) the likelihood and possible effects of tying/bundling, however, slightly fewer authorities consider (a-2) sharing of confidential information (14 out of 20 authorities, 70.0%) or (b) the elimination of a potential entrant (18 out of 25 authorities, 72.0%). Theories of harm other than (a-1), (a-2) and (b) are rarely considered.



C. *Assessment of [a] market foreclosure*

15. All responding authorities (22 authorities) who consider market foreclosure in assessing conglomerate mergers consider the ability and incentive of merging parties to do so, as well as potential effects of the conduct to determine whether the market foreclosure will occur.

16. To assess foreclosure, respondent authorities typically rely on internal documents or data from the merging parties, and documents, data or interview results from third parties (customers, suppliers, competitors, analysts, etc.). Some authorities also use empirical analyses to assess the incentive to foreclosure.

According to the survey responses, authorities rely upon similar types of evidence and framework to assess foreclosure in both conglomerate merger cases and vertical merger cases.

(1) Evidence identified by survey respondents to assess the ability and likelihood that the merged firm would tie/bundle and/or share confidential information include:

- Degree of market power of the merging parties in each market,
- Degree of the links between products/services (i.e., complementarity of products/services (synergies), customer overlaps, customer preferences for variety and willingness to purchase bundled products/services, etc.),
- Degree of competitors' abilities to adopt effective and timely counter strategies,
- Possibility and extent that the merged entity could gain access to sensitive information about competitors, customers or suppliers, etc.

(2) Evidence identified by survey respondents for determining incentives to foreclose

- Costs and benefits from tying/bundling to determine whether such practices would be profitable for the merging party,
- Strategies/business plans of the merging parties to market and sell the products/services,
- Past behavior of industry participants to help predict future conduct.

(3) Evidence identified by survey respondents for determining the overall effects of foreclosure

- The impact of foreclosure on competitors – whether it puts rivals in the position to face production scale below the scale required to remain in business, or whether the merging party is able to achieve significant scale economies (low marginal costs), etc.
- Proportion and significance of competitors who are foreclosed as a result of the merger, and who are still able to constrain the merging party from exercising market power,
- Potential increases in the ability of the merged firm to raise barriers to entry by foreclosure, or potential threats of foreclosing rivals,
- Importance of the input to downstream rivals,
-

D. Assessment of [b] elimination of potential entrants

17. All the responding authorities (18 out of 18 authorities, 100%) assess whether a conglomerate merger could harm entry by considering (b-1) the possibility of entry by one of the merging parties into the market where the other party is active, and after that, (b-2) the effect of the elimination of potential entrants as a result of the merger⁵.

18. Many responding authorities assess both (b-1) and (b-2) in the same way they assess those effects in other types of mergers.

19. For (b-1), the possibility of entry, responding authorities often consider the following factors for assessment of potential entry, depending on each case:

- Entry costs/risks and profitability (i.e., barriers to entry with regard to legal, technical or financial conditions, economies of scale, network effects, market growth, the number of players in a market, spare market capacity, etc.),
- Specific entry plan, resource availability, capabilities of the entrant, etc.

20. For (b-2), the elimination of a potential entrant, responding authorities usually consider:

- the number of competitors or the number of other potential entrants into the market,
- the potential entrants' presence in the relevant market,
- whether entry would increase competitions in the market,
- the potential entrants' costs

⁵ These include the authorities who assess an elimination of potential entrants from the aspect of competitive effects of horizontal mergers.

21. Responding authorities rely on different types of evidence to assess whether the merger could harm entry, including:

- internal documents from the acquired party (e.g., business plans, strategic documents, e-mails, etc.),
- internal documents from the acquiring party (e.g., competitive assessments of the acquired party),
- documents or interview results from market participants (e.g., competitors, customers, etc.),
- third-party industry reports and research.

E. Coordinated effects

22. A majority of the responding authorities (17 out of 26 authorities, 65.4%) also consider the possibility of coordinated effects as a potential theory of harm when assessing conglomerate mergers. When doing so, most use an approach that is similar to the one they use in examining vertical merger reviews. Some authorities indicated that conglomerate mergers make it easier for firms to agree on terms of coordination. This may occur because the merger enhances market transparency by increasing the structural links between the merging parties in a way that may increase the ability to detect deviations from coordinated conduct.

F. Quantitative methods

23. In conglomerate merger review, a few responding authorities (4 out of 26 authorities, 15.4%) have used quantitative methods of analysis. These 4 authorities have done the following:

- merger simulations,
- defined markets using quantitative methods similarly employed in the analysis of horizontal mergers,
- forecasts of competitors' profitability from lost scale resulting from customers switching to the merged entity
- profitability analysis (analysis of margins and diversion ratio) to assess the incentives of the merging party to engage in tying

G. Efficiencies

24. Overall, conglomerate mergers can yield significant efficiencies because of the integration of complementary products or services within a single party, and 84.6% of the responding authorities (22 out of 26 authorities) consider efficiencies as a part of their assessment of conglomerate mergers. In their assessment, those authorities consider the balance between the possible efficiencies benefiting consumers and the possible anti-competitive effects arising from the merger.

25. Only one of 25 responding authorities (4.0%) stated that the balance of efficiencies in conglomerate merger review may be different from that in other types of merger review, e.g., by possible economies of scope.

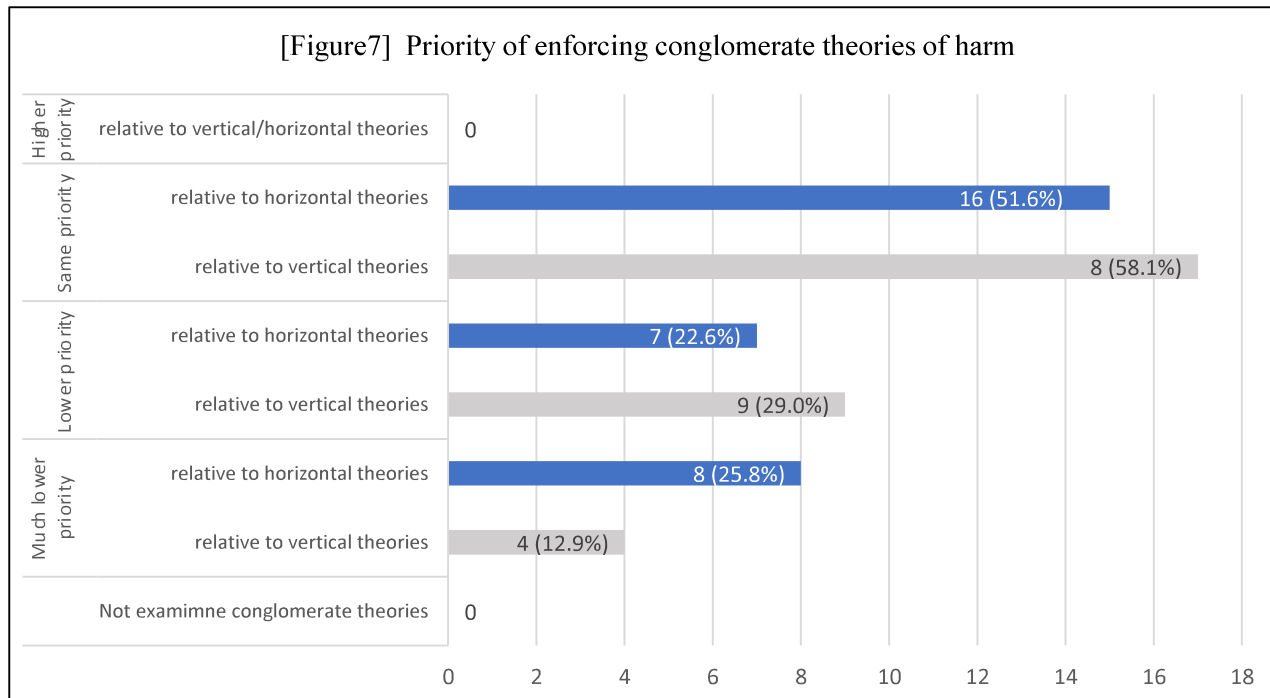
Views

A. Importance of conglomerate assessment relative to horizontal or vertical mergers [Figure7]

26. Half of the authorities responding to the survey (16 out of 31 authorities, 51.6%) have given the same priority to horizontal theories of harm as conglomerate theories, but 22.6% of the respondent authorities (7 out of 31 authorities) have given lower priority and 25.8% of the respondent authorities (8 out of 31 authorities) have given much lower priority relative to horizontal theories of harm.

27. As above, almost half of the authorities that responded to the survey (18 out of 31 authorities, 58.1%) have given the same priority to conglomerate theories of harm that they give to vertical theories of harm, and 29.0% of the respondent authorities (9 out of 31 authorities) have given lower priority to conglomerate theories compared to vertical theories of harm. However, fewer authorities (4 out of 31 authorities, 12.9%) have given much lower priority compared to vertical theories of harm.

28. Half of the responding authorities have given lower or much lower priority to conglomerate theories of harm compared to horizontal or vertical theories of harm (7 out of 13 authorities, 53.8%), but those authorities noted that when the conglomerate concerns are the only theories of harm for a case, such theories of harm gain in relative importance.

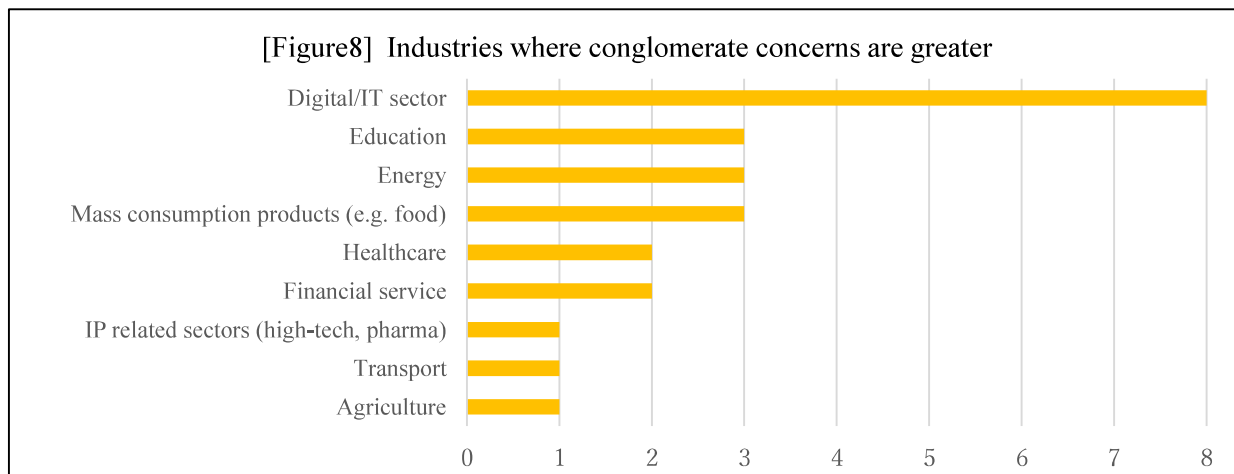


B. Industries where conglomerate concerns have been greater

29. The survey asked authorities to identify industries in which conglomerate concerns may be

greater or seem to arise more often. The most commonly identified industry (8 of 29 authorities, 27.6%) was the digital/IT sector, including platform, media, and communication services [Figure8].

Other industries identified by the respondents where conglomerate concerns may be greater are shown in the following graph.



C. Addressing conglomerate merger harm through conduct enforcement

30. In the survey, authorities were asked whether they have considered bringing a separate conduct or abuse of dominance case against a merged entity after not pursuing theories of harm such as tying/bundling as part of their review of a conglomerate merger. Out of the 30 authorities that responded to this question, only one authority has done so. Specifically, after this authority concluded its review of a merger in the financial sector, they subsequently received complaints regarding price discrimination, tie-in sales, and refusal to contract among others, as a result of the entry of the merging party in several financial markets. They found that the merged entity was able to limit the performance of current or potential competitors, resulting in a behavioral remedy.

International cooperation

31. The survey responses indicate that half of the authorities (16 out of 32 authorities, 50.0%) have never cooperated with another competition authority on a merger raising conglomerate concerns while 43.8% (14 out of 32 authorities) indicated they have only occasionally cooperated on such mergers. Only a few authorities (2 out of 32 authorities, 6.3%) responded that they have frequently or quite often cooperated with other authorities.

32. Comparing those responses to those from the vertical merger survey, responding agencies are much less likely to have cooperated on conglomerate mergers. For vertical mergers, the percentage of the authorities who have never cooperated on vertical mergers concerns was 34.1%, while 27.3% of the

respondent authorities have frequently or quite often cooperated with other authorities⁶.

33. When cooperating with other authorities on the review of international mergers, only 2 responding authorities (6.9%) noted they have faced challenges that are specific to conglomerate mergers. They pointed out that the approach toward conglomerate merger assessment might depend on the jurisdiction and the result of the reviews might differ from those in other jurisdictions, rendering it potentially more important to coordinate on remedies with other competition authorities in conglomerate cases.

Case studies

A. Case examples

34. Some responding authorities provided examples detailing cases where they considered whether the conglomerate element of a merger could harm competition. Many of those case examples involved digital platforms and the media sector, with the most common theories of harm involving bundling and sharing confidential information. Some of the case examples follow. You can also find the Broadcom/Brocade case study that includes a discussion of conglomerate theories of harm in the [ICN Vertical Mergers Comparison Study](#) (2018-2019).

[Cases on Digital/IT/Platform Sector]

Case 1: Rockaway Capital / Heureka Shopping (2016) - Office for the Protection of Competition (Czech)	
Merging Parties	Rockaway Group (RG) is active in the Czech Republic mainly in the segment of the online retail sale of consumer goods. the acquired company, Heureka Shopping, mainly operates in the field of price comparison tools focused on finding, comparing and mediating the sale of consumer goods via the Internet, most notably through its comparison tool - platform Heureka.cz.
Defined market	National market of online retail sale and operation of price comparison tools for consumer goods
Theory of harm	Sharing confidential information
Assessment	The Office for the Protection of Competition (the Czech NCA) examined the impact of the concentration on the markets of price comparison tools and retail sale of consumer goods via the Internet. In the administrative proceeding, it was found that within its services, Heureka Shopping gathers a range of information about e-shops,

⁶ Note that the number of conglomerate mergers cases which the competition authorities reviewed is smaller than other types of merger cases as shown in paragraphs 5-10 above, and therefore, it is not possible to conclude whether the result is related to the nature of the conglomerate theories of harm.

	<p>some of which is of sensitive nature.</p> <p>Furthermore, the Czech NCA noticed that services provided by Heureka are important for consumers, who can compare prices of goods and also reliability and/or reputation of a particular e-shop, both based on a score determined by customer reviews. Also, Heureka is important partner for e-shop operators because Heureka’s business oriented services are considered to be a key marketing tool to approach potential customers.</p> <p>Therefore, it was essential to maintain a possibility to use these services at least in the same scope as at the pre-merger level also after the implementation of the concentration. This gained importance especially considering the fact that RG (through another simultaneously realized transaction) intended to acquire an e-shop Mall, a major online retail sale operator, that was at the time of the Czech NCA’s assessment No. 2 in the Czech online retail market.</p> <p>In this respect, the Czech NCA received a number of complaints expressing concerns about possible distortion of competition. According to these complaints, RG would be able to abuse business sensitive information gathered by Heureka for the benefit of RG’s own e-shops including a newly acquired e-shop Mall. Potential restrictive behaviour of RG in respect to the access of e-shops to services of Heureka, that are by many e-shop operators considered as a very important or even crucial channel for marketing activities and advertisement in their respective businesses, was also mentioned by many complainants as a possible negative effect of the assessed merger.</p>
Result of review	Clearance with behavioural commitments (Phase I review)
Remedy /condition	<p>(i) RG is obliged to publish on the Heureka website the information about all online stores and price comparison tools that are operated by companies controlled by the Rockaway group.</p> <p>(ii) RG is obliged to enable any e-shop to receive the most important services of Heureka without the obligation to provide sensitive information other than information strictly related to the service offered.</p> <p>(iii) RG shall ensure the same scope of advertising options to independent e-shops through Heureka as before the implementation of the merger.</p>
Details	https://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-13810.html

	(Czech language only)
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Case 2: Apple / Shazam (2018) – European Commission	
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Merging Parties	Apple sought to acquire Shazam. Apple designs, manufactures and sells mobile communication, media devices, portable digital music players and PCs, and also sells and delivers digital content online and offers the music and video streaming service. Shazam is a developer and distributor of music recognition applications for smartphones, tablets and PCs.
Defined market	Markets for digital music streaming services (EEA or national) and automatic content recognition (“ACR”) software solutions, including music recognition applications (at least EEA wide)
Theory of harm	Foreclosure
Assessment	<ul style="list-style-type: none"> - Music streaming and music recognition application are complementary services - The Commission found that: <ul style="list-style-type: none"> (i) The merged entity would not be able to shut out competing providers of digital music streaming services by accessing commercially sensitive information about their customers. In particular, access to Shazam's data would not materially increase Apple's ability to target music enthusiasts and any conduct aimed at making customers switch would only have a negligible impact. As a result, competing providers of digital music streaming services would not be shut out of the market; (ii) The merged entity would not be able to shut out competing providers of digital music streaming services by restricting access to the Shazam app. This reflects the fact the app has a limited importance as an entry point to the music streaming services of Apple Music's competitors; and (iii) the integration of Shazam's and Apple's datasets on user data would not confer a unique advantage to the merged entity in the markets on which it operates. Any concerns in that respect were dismissed because Shazam's data is not unique and Apple's competitors would still have the opportunity to access and use similar databases. - The Commission concluded that the transaction would raise no competition concerns in the EEA or any substantial part of it.
Result of review	Clearance (Phase II review)
Details	https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf

Case 3: MIH eCommerce Holdings / WeBuyCars (2019) – South Africa Competition Commission	
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Merging Parties	MIH, which is part of the largest e-commerce business in South Africa, Naspers, sought to acquire WeBuyCars, which is the leading wholesale buyer of used cars in South
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	Africa.
Defined market	National market of operating online auto trader platform, and wholesale sales of used cars
Theory of harm	Bundling (portfolio)
Assessment	<p>- The Commission considered vertical and conglomerate theories of harm.</p> <p>- Much of the debate in the merger related to the breadth of the used car market, specifically whether traditional used car dealers sufficiently constrain this new guaranteed wholesale way of buying used cars. The merging parties argued that the market is broad, encompassing all used car dealers in the country such that WeBuyCars is not in a position to exercise market power. However, the CCSA observed that WeBuyCars business model was relatively new and typified by characteristics and features which would render the traditional dealers (more than 2 000 in the country) as non-effective competitors especially on the buying side of the market. Virtually every dealer competes directly on the selling side of used cars.</p> <p>- The Commission found there were several factors which rendered it unlikely that the applicable market is as wide. There were numerous factors pointing out to a narrower market comprising only the guaranteed wholesale way of buying used cars which is not sufficiently constrained by the traditional used car dealers. Some of the features of this model which are not typical of traditional dealers are noted below as follows:</p> <ul style="list-style-type: none"> (i) There is a core focus on purchasing cars from individuals (rather than from auctions or other dealers) (ii) A focus on wholesaling cars to other dealers in order to turn stock quickly (iii) A strong focus on marketing to attract sellers of used cars (high marketing spend directed towards buying) (iv) Using pricing models to accurately price a wide variety of cars (v) Providing inspection services to prospective sellers (which requires personnel and infrastructure) (vi) The need for working capital to finance the wholesale purchasing of stock (vii) Network effects (the value increases to customers on one side from the growth of the other side) (viii) Scale benefits, certain costs do not increase in proportion to the number of cars purchased, and the ability to price cars accurately increases with the number of cars purchased (ix) The importance of building brand awareness, augmenting the importance of first mover advantages (x) Spreading into adjacent markets, such as offering finance and insurance to customers.

	<p>(xi) The model does not serve to trade-in customers, who are principally served by traditional dealers</p> <p>(xii) The car is bought ‘as is’ and the transfer and cash payment is immediate.</p> <p>- The Commission found that WeBuyCars effectively pioneered this model of guaranteed cash buying of used cars in South Africa and is effectively a monopoly at this layer of the market, whereas Naspers had intended to introduce its own version of this similar guaranteed wholesale buying of used cars through FCG, to compete head-on against the incumbent WeBuyCars. There was recognition that the bundling would generate significant synergies that would likely create formidable competition against the incumbent WeBuyCars, which virtually has a monopoly position. Therefore, the merger removed potential competition, thus unilateral concerns were likely to result in the market for guaranteed wholesale purchase of used car</p>
Result of review	Prohibition
Details	http://www.compcom.co.za/wp-content/uploads/2019/08/Commission-recommends-Naspers-purchase-of-WeBuyCars-be-prohibited-1-1.pdf

Case 4: M3 / Nihon Ultmarc (2019) – Japan Fair Trade Commission	
Merging Parties	M3, which operates a drug information platform, proposed an acquisition of Nihon Ultmarc, which provides a medical database (MDB) consisting of doctor information etc.
Defined market	National market for operating drug information platforms for doctors/pharmaceutical companies, and providing MDB
Theory of harm	Bundling, sharing confidential information
Assessment	<p>The merger raised competitive concerns, including those under vertical and conglomerate merger theories. In the assessment of conglomerate theories of harm, the Japan Fair Trade Commission (JFTC) found:</p> <p>(i) The merged party has an ability to foreclose the relevant market for the following reason. In the Japanese pharmaceutical industry, MDB is used as a de-facto standard, and there was no company that could provide the same level of database in its coverage and quality of information on doctors as Nihon Ultmarc’s MDB. If the merged party bundled the provision of doctors’ data via Nihon Ultmarc’s MDB and the supporting services of advertising drug information to doctors via M3’s drug information platform, pharmaceutical companies would have to accept it. As a result of the bundling, there is a high possibility that the competitors of M3 will be excluded from the market of drug information platform.</p> <p>(ii) The merged party has an incentive to foreclose the defined market because they are able to increase profit by eliminating their competitors.</p>

	<p>(iii) There was no entry pressure on the market for the operation of drug information platform, and no other effective measures to provide drug information to doctors/pharmaceutical companies than MDB.</p> <p>(iv) As a result of the above, the competition on the defined markets will be substantially lessened.</p>
Result of review	Clearance with behavioural remedies
Remedy /condition	In providing MDB to customers (pharmaceutical companies), the merged party shall not require customers to use M3's services or prevent them from using a competitors' services. In addition, the merged firm was prohibited from discounting the price or setting advantageous conditions for providing MDB content or quality.
Details	https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html

[Cases on Media/Communication Services Sector]

Case 5: Axel Springer / Pro SiebenSat (2006) – Bundeskartellamt (Germany)	
Merging Parties	Axel Springer, which is engaged in publishing newspapers and magazines, proposed to acquire Pro SiebenSat. Pro SiebenSat and RLT TV group, which belongs to the Bertelsmann group, together hold a dominant position in the TV advertising market.
Defined market	National market for TV advertising and newspapers advertising
Theory of harm	Significant impact on the structure of the relevant market
Assessment	<p>According to the Bundeskartellamt's findings, the merger would lead to a degree of market power which was unacceptable under competition law on the TV advertising market, reader market for over-the-counter newspapers, and the national advertising market for newspapers.</p> <p>(i) A constant market share of approx. 40% over the last years was determined in the TV advertising market (so-called uncompetitive duopoly of ProSiebenSat.1 and the RTL TV group, without any substantial competition from outsiders). The merger would have led to a further assimilation of the corporate structures of the two conglomerates in the neighbouring markets for newspapers and magazines and would have resulted in a number of interlocks between Springer/ProSiebenSat.1 and Bertelsmann. In addition, with the merger, the newspaper BILD would lose its substitute function as the only economic alternative to national TV advertising for advertising customers at the time of the decision.</p> <p>(ii) Furthermore, in the national reader market for over-the-counter newspapers Springer held a market share of approx. 80% in this market with its newspaper BILD. Thus, the merger would have strengthened its already dominant position.</p> <p>(iii) Finally, Springer held a market share of approx. 40% in the national advertising market for newspapers as well. The merger would have enabled Springer to offer from</p>

	<p>one source coordinated product advertising campaigns in several media channels and to launch cross-media advertising campaigns for third parties. Also, Springer would be enabled to promote its TV channels in their printed newspapers and vice-versa, thus strengthening their relevant market positions.</p> <p>Some of the evidence relied upon was the following:</p> <ul style="list-style-type: none"> - Eighth annual report of the Commission on concentration in the media sector – for example regarding the estimated percentage of the ProSieben and Sat.1 (the two main TV channels of ProSiebenSat.1) audience shares - Investigation of the decision division plus market study by ZAW – regarding the revenue from television advertising - Letter from e.g. ARD (30 November 2005) about the elimination of competitive pressure regarding the audience share after 8 pm - The uniform pricing strategy of the RTL marketer IP Germany and the ProSiebenSat.1 marketer SevenOne Media
Result of review	Prohibition
Details	https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2006/24_01_2006_Springer_Untersagung_eng.html

Case 6: Magyar RTL Televízió / IKO Television Kft (2011) – GVH (Hungary)	
Merging Parties	Magyar RTL Televízió Zrt. (M-RTL) is the Hungarian member of the RTL Group, which is an international undertaking-group engaged in operating RTL channels. M-RTL owns the broadcasting and advertising rights of RTL Klub channel which is the leading commercial channel in Hungary. IKO Television Kft (IKOT) is the owner of the broadcasting and advertising rights of Cool, Sorozat+, Prizma, Muzsika, Reflektor, Film+ and Film+2 channels. The Transaction consists of the acquisition of sole control over IKOT Broadcasting by M-RTL.
Defined market	National market of television broadcasting and the market for advertising
Theory of harm	Bundling
Assessment	<p>- Within the framework of the investigation, the GVH evaluated the markets that could possibly be relevant and the competition related relationship of the parties in the Hungarian television channels from the point of the viewers, broadcasters and advertisers and moreover, the envisaged changes that could take place on the market due to the transaction, having regard to the two-sided market feature of television (and generally media services).</p> <p>- In its investigation, the GVH aimed to clarify whether the conglomerate relationships between M-RTL's RTL Klub channel, which is a commercial channel with a nationwide audience and a significant role in advertising, and IKOT's seven</p>

	<p>thematically programmed channels would lead to conglomerate effects -- thus whether it would be possible to leverage the strong market power from one market to the other or to conclude restrictive practices (mainly by tying). In the current case, it would mean using RTL Klub's market power to influence the market power of IKOT channels.</p> <p>- The main competition concerns that arose regarding broadcasting were (i) cross-promotion of RTL Klub and the acquired channels, (ii) transmission of the obligatory programmes to channels with small audiences, (ii) being induced to sell channels by tying them to each other.</p>
Result of review	Clearance with commitments
Remedy/Condition	<p>The commitments specified by the GVH were the following;</p> <p>- M-RTL is obliged to make possible the independent purchasing of the commercial times of RTL Klub and IKOT-channels for a period of two years after the conclusion of the contract. The form of the purchasing has to comply with the requirements of reasonable, fair condition making without discrimination compared to the prices and conditions of tied purchasing, especially in order to enable the independent purchasing to be economically reasonable for the advertisers/agencies on its own, or together with other channels outside of M-RTL.</p> <p>- M-RTL is obliged to inform advertisers/agencies of the prices and other conditions within the framework of general terms and conditions, and moreover, M-RTL should justify the specified prices and conditions to the GVH.</p>
Details	https://www.gvh.hu/pfile/file?path=/en/resolutions/resolutions_of_the_gvh/resolutions-documents/resolutions_2011/Vj065_066_2011_a_sz.pdf&inline=true

Case 7: BT / EE (2016) – Competition and Markets Authority (CMA) (UK)	
Merging Parties	BT/EE was a merger concerning the acquisition by the largest supplier of fixed communication services of the largest supplier of mobile communication services in the UK
Defined markets relevant to conglomerate theory of harm	<p>The conglomerate theory of harm related to the issue of fixed-mobile bundling (ie the bundling of retail mobile telecommunication services with a type of 'fixed' service (such as broadband, fixed phone, or pay TV) in the UK).</p> <p>The CMA defined - in the context of other theories of harm considered in its final decision - a national (UK) market for the supply of retail mobile telecommunication services. It also considered regional markets for the supply of retail fixed broadband services (and left open the question of whether standard broadband and superfast broadband should be defined together in one market).</p>
Theory of harm	Bundling

Assessment	<ul style="list-style-type: none"> - The CMA considered various theories of harm in this case, including horizontal (arising from a loss of both existing and potential competition), vertical, coordinated and conglomerate effects. - The CMA concluded in relation to its conglomerate theory of harm that any conglomerate effects would be closely linked with the issue of fixed-mobile bundling. For conglomerate effects to exist, there would need to be an incentive to foreclose in one market to harm a rival primarily active in a different product market, on the basis that an increased propensity for bundling will lead to some additional conversion of sales to the merged entity. - The CMA ultimately concluded, however, that to the extent such an effect existed, this would have been covered by its assessment of its other theories of harm and that, in light of the lack of material evidence on conglomerate effects received from third parties, the transaction was not expected to result in a substantial lessening of competition in this respect.
Result of review	Clearance (Phase II review)
Details	https://www.gov.uk/cma-cases/bt-ee-merger-inquiry

Case 8: Vodafone / Sky Network Television (2017) – New Zealand Competition Commission	
Merging Parties	The proposed merger would combine Sky’s pay TV business with Vodafone’s broadband and mobile services businesses. The merged entity would be majority owned and controlled by Vodafone Group.
Defined market	National market for the provision of mobile services/ fixed-line broadband services and the broadcast of New Zealand premium live sports content
Theory of harm	Bundling
Assessment	<p>The proposed merger would be a vertical/conglomerate merger.</p> <p>Around half of all households in New Zealand have Sky TV and a large number of those are Sky Sport customers. The Commission was concerned that the merged entity would be in a position to leverage its control over premium live sports content to foreclose competition in telecommunications markets. The merged entity would have been able to bundle its pay TV and telecommunications services in a way that rivals could not match at a critical time during the UFB roll out, when many consumers were likely to be open to switching service providers. The consequent loss of scale for key third players in the supply of fixed and mobile telecommunications could undermine their ability to provide an effective competitive constraint on the merged entity, and consumers would be less likely to switch back to those rivals once on bundles with the merged entity and following the UFB rollout window.</p>

Result of review	Prohibition (Sky and Vodafone filed an appeal with the High Court. This appeal was withdrawn and the merger agreement terminated.)
Details	https://comcom.govt.nz/_data/assets/pdf_file/0026/76922/2017-NZCC-1-and-2-Vodafone-Europe-B.V.-and-Sky-Network-Television-Limited-Clearance-determination-22-February-2017.pdf

[Cases on Other Sectors]

Case 9: Coca Cola Amatil / Berri (2003) - ACCC (Australia)	
Merging Parties	Coca Cola Amatil (CCA) proposed acquisition of Berri. CCA was Australia's largest manufacturer of non-alcoholic beverages and Berri was Australia's largest manufacturer of fruit juice
Defined market	National market of manufacture and sale of carbonated soft drink (CSD), and manufacture and sale of fruit juice/fruit drink (FB)
Theory of harm	Bundling
Assessment	<ul style="list-style-type: none"> (i) CSD and FB are complementary products (ii) CCA possesses market power in the national market for CSD (iii) CCA would have the ability and incentive to leverage its market power in CSD to increase distribution of Berri's FB product to the exclusion of rivals in the non-grocery trade channels (iv) Non-grocery retailers would have commercial incentives to bundle Berri's FB products with CCA's existing portfolio of beverages themselves (v) The merged firm would gain significant cost savings from the likely effects of the proposed acquisition (vi) The combined effect of the above would: foreclose a substantial amount of the non-grocery channel to competing FB suppliers; raise rivals' costs; and lead to the exit of a number of competitors (vii) Imports are unlikely to provide a competitive constraint upon the merged firm; (viii) The proposed acquisition would be likely to substantially raise structural and strategic barriers to entry and expansion (ix) It is unlikely that customers of the merged firm would have any significant ability to by-pass the merged firm due to the brand strength of Coca-Cola and its use by retailers as a 'traffic builder'
Result of review	Prohibition (the parties abandoned the transaction)
Details	https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/acquirer-coca-cola-amatil-ltd-target-berri-ltd

Case 10: Kroton Educational / Estacio Participacoes (2017) - CADE (Brazil)
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Merging Parties	Kroton proposed acquisition of Estacio. Kroton and Estacio are the two Brazilian biggest private higher education institutions.
Defined market	National market for onsite education modality and distance education modality (EAD)
Theory of harm	Elimination of potential entrant
Assessment	<p>CADE concluded that the merger raised competitive concerns, including horizontal and conglomerate, related to education markets, due to the lack of sufficient rivalry in eight Brazilian municipalities. Furthermore, Kroton held already 37% of EAD, which would have increased to 46% after the transaction. CADE considered that Kroton had strong brands in the on-site modality, which leverage EAD.</p> <p>As the most important pieces of evidence and analysis, the authority assessed:</p> <p>i) the information given by competitors and third parties that provided evidence leading to significant concentration in the on-site and EAD markets;</p> <p>ii) the data collected from the Ministry of Education (MEC) which showed that the companies presented the largest increase in market share in the previous years and the largest number of requests to increase market share in the following years;</p> <p>iii) the record of acquisitions of both companies in the last years showing that Kroton and Estácio were each other's main competitors and presented the most significant percentages of entry in these markets;</p> <p>iv) the financial position of both companies allowing them to offer special conditions to clients – loans, grants, etc - attracting a greater number of students in comparison to their competitors.</p>
Result of review	Prohibition (the remedies presented by the parties did not satisfactorily address the concerns identified, especially when considering the conglomerate effects)
Details	http://en.cade.gov.br/press-releases/cade-blocks-estacio2019s-acquisition-by-kroton

Case 11: Concept Multimédia and Axel Springer (2018) - Autorité de la concurrence (France)	
Merging Parties	Axel Springer, which owns the companies SeLoger (online property ads, online advertising, online advertising intermediation) and Car&Boat Media (online ads for cars and boat classifieds),boats) proposed to acquire Concept Multimédia (or “Logic-Immo”), which is the only company, active in the markets for in online property ads, online advertising, property ads in the print media , IT services for real estate professionals, and media buying services).
Defined market	The online property ads market and the online advertising market
Theory of harm	Bundling
Assessment	- The undertakings concerned by the operation are simultaneously active in online property ads and online advertising markets. Logic-immo is also active in the property ads in the print media market.

	<p>- In this decision, the French competition authority analyzed the risk of a conglomerate effect linked to a strategy of bundled offers in the online property ads market.</p> <p>- In general, such effects are analysed when a merger extends or strengthens the presence of a new entity in several distinct markets which are considered to be related (conglomerate type transactions). However, in this decision, the French competition authority examined such effects in a single market in which products were differentiated.</p> <p>- In order to demonstrate the existence of leverage effects in a single market for differentiated products, the French competition authority has applied a similar standard of proof to that applied to the analysis of conglomerate effects between different related markets.</p>
Result of review	Clearance
Details	https://www.autoritedelaconurrence.fr/sites/default/files/decision_seloger_en_def.pdf

B. Ex-post evaluation

35. Only one authority (the CMA in the UK) indicated that it has carried out ex-post evaluation that included a consideration of a case raising conglomerate concerns that could be shared with the ICN. The CMA published “Ex-post Assessment of merger Control Decisions in Digital Markets” (the Lear Report) in June 2019. Although the Lear Report considered digital mergers generally (and did not consider only conglomerate digital mergers), it included a discussion of the application of a conglomerate theory of harm in Priceline/Kayak (2013). This was a two-sided platform case regarding the hotel booking industry in which the Office of Fair Trading (OFT, the predecessor to the CMA) considered whether, given the merging parties’ increased market share in the hotel sector, Priceline could use Kayak to leverage its other brands through bundling or tying in order to force counterparties to sign up to one or more other Priceline brands. The OFT concluded that this was not a credible theory of harm, and the Lear Report agrees with the approach to its assessment of the conglomerate theory of harm in this respect.

Outlines of discussion in the webinars

The webinar on “conglomerate mergers”

1. Date: 29 October 2019
2. Moderator: Jonathan Gleklen (Arnold & Porter, US NGA)
 - Speakers: Aude Barthelemy (Case handler, EC DGCOMP)
 - Michele Casagrande (Case handler, EC DGCOMP)
 - Kyriakos Fountoukakos (Herbert Smith Freehills, EU NGA)

Hiroaki Ishigaki (NERA Economic Consulting, Japan NGA).
James Musgrove (McMillan, Canada NGA)

3. Discussion points

(1) Aude Barthelemy and Michele Casagrande

It was explained that in the European context, the **Non-Horizontal Merger Guidelines** (NHMG) adopted by the Commission in 2008 provide guidance on how the European Commission assesses non-horizontal mergers.

The NHMG defines **conglomerate mergers** as follows: i.e. mergers between firms that are in a neither purely horizontal nor vertical relationship. In practice, the focus is on mergers between companies that are active in closely related markets (e.g. suppliers of complementary products or products, which belong to a range of products that are generally purchased by the same set of customers for the same end use).

It is recognised that non-horizontal mergers, including vertical and conglomerate mergers, are less likely to have negative effects on competition and to meet the Commission's substantive test of a "**significant impediment to effective competition**". As is explained in the NHMG, this is because:

- Conglomerate mergers (and vertical mergers) do not entail the loss of direct competition between merging parties on the same relevant product market. Such loss of direct competition is the main source of anti-competitive effects in horizontal mergers;
- Conglomerate mergers provide scope for efficiencies, in particular economies of scope (i.e. lower total costs of production of a variety of goods) through the combination or bundle of products, and lower transaction costs from one-stop-shopping by customers.

While in a majority of circumstances there should be no competition problems from a conglomerate merger, there may, in certain specific cases, be harm to competition. The harm may take the form of either non-coordinated or coordinated effects. The main concern is that of foreclosure (non-coordinated effects). The combination of products in related markets, such as complementary products, may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of **exclusionary practices**, in particular tying or bundling.

Such practices often have no anti-competitive effects, and companies engage in them to provide their customers with better products in a cost-effective way. But they may also lead to the reduction of rival companies' ability and incentive to compete, which in turn may reduce the competitive pressure on the merged entity and allow it to raise prices.

Types of conduct leading to foreclosure

Bundling refers to the way products are offered and priced by the merged entity. A distinction is made between "**pure bundling**", where the products are only offered on the market jointly in fixed proportions, and "**mixed bundling**", where the products continue to remain available on the market also

stand-alone / separately, but are offered for a discount when purchased together, or in other words, the sum of the stand-alone prices is higher than the bundled price.

Tying refers to situations where customers that purchase one good are also required to purchase another good from the producer. Such tying can take place either on a technical basis (“**technical tying**”) or on a contractual basis (“**contractual tying**”). If technical, the tying product is designed in such a way as to only work with the tied product and not with alternatives offered by competitors. Contractual tying refers to situations where a customer purchasing a good undertakes to only purchase the tied product of the same producer rather than any alternatives by competitors.

By affecting the purchase options available to customers by practices such as bundling or tying, the merged entity may shift demand towards the bundles of the merged entity and away from products of rivals who only offer one of the two products in the bundle. Such practices may also make entry to the market more difficult. The specific characteristics of products may determine the availability of any of these practices to the merged entity. Pure bundling is for instance not likely if products are not bought simultaneously or by the same customers, while technical tying may only be an option in certain industries.

Assessing foreclosure – ability-incentive-effect framework

The NHMG set out a three-stage analytical framework, pursuant to which the Commission examines: (i) whether the merged firm would have the ability to foreclose its rivals; (ii) whether it would have the economic incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.

The NHMG acknowledge that these factors are often examined together as they are closely intertwined. The NHMG also make clear that any foreclosure effect must be merger specific.

There are several elements that the Commission takes into account in its assessment of the **ability** of the merged entity to foreclose rivals. The starting point is that one of the parties to the concentration has **market power** in one of the relevant markets. The effects of linking sales of the relevant products can only be expected to have a significant impact if one of the new entity’s products is viewed as particularly important and there are no sufficient alternatives. Here, the Commission looks at the merging parties’ **market shares** and whether **alternative products** by competitors are available and of similar quality. In some cases, one of the merging parties might enjoy a “first-mover” advantage which is taken into account to assess the degree of market power.

For foreclosure to be a potential concern, there must also be a **large common pool of customers** for the two products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. If products are technical complements (i.e. they cannot function without each other) or economic complements (i.e. they are sold together) it should be the case that there is a pool of common customers.

The Commission also looks at the **market structure**: tying and bundling are likely to be more

pronounced in industries with economies of scale and demand pattern has dynamic implications for conditions of supply in the future.

The NHMG also note that the **scope for foreclosure** tends to be smaller where merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through tying/bundling which is costly to reverse.

Importantly, the Commission will investigate whether **competitors can counter a conglomerate strategy**. For example, standalone suppliers of the tying and tied products may be able to join forces and combine their offers to make them more attractive to customers. In addition, single-product competitors may have an incentive to counter the merged entity's bundle by lowering their own prices and thus maintain their share of the market and mitigate the effects of the foreclosure.

As for the **incentive** of the merged entity to engage in foreclosing strategy, this depends on the degree to which such strategy would be profitable.

There is a trade-off between:

- the **costs of the foreclosure strategy**, i.e. the costs for the merged entity to bundle/tie the products; and
- the **expected benefits of the strategy**, i.e. the expansion of market share in the other market and the ability to raise prices.

The costs may be significant in markets where consumers have an interest in buying standalone products. Such customers would cease buying from the new entity if doing so would necessitate buying the two products from it. In this context, the new entity is unlikely to risk losing sales on one highly profitable market to increase its position on a less profitable market, because its overall profits may not offset its loss.

Finally, when assessing the **impact** on effective competition, the NHMG state that merely reducing rivals' sales doesn't in itself raise concern. Instead, there must be a sufficiently large reduction in competition to allow the merged entity to raise prices. That means that for a concern to arise, a conglomerate strategy needs to affect a large portion of the market. The following factors are important for such assessment, namely:

- First, the **ability of competitors to replicate the new entity's strategy**. That may be the case for competitors that have a similar range of complementary products, but also for a single-product competitors which may have an incentive to combine their offerings to counter the new entity;
- Second, the **ability of customers to fight a conglomerate strategy** and exercise countervailing power. This can take any form. For example, powerful customers may be able to divert demand to standalone suppliers and then mix-and-match. Alternatively, customers may sponsor the entry of certain single-product suppliers into the other relevant product market;
- Third, the NHMG state that the effects on competition need to be assessed in light of the **efficiencies** substantiated by the Parties.

Conclusion

The NHMG recognise the positive effects of conglomerate concentrations. While the Commission does not shy away from assessing conglomerate theories of harm, only a limited number of cases lead to intervention.

(2) Kyriakos Fountoukakos

It is important to put the EC's current policy and decision making on conglomerate mergers in context. Historically the EC did pursue a number of important conglomerate cases with two major cases of the early 2000s being GE/Honeywell and Tetra/Laval Sidel. Both of these cases were challenged before the EU courts with the courts criticising the EC's conglomerate analysis. The courts set a very high threshold for prohibitions based on conglomerate theories of harm.

The EC adopted non-horizontal merger guidelines in 2008, which include a section on conglomerate mergers. Since then, the EC has not prohibited a case solely on the basis of conglomerate theories of harm. However, it continues to analyse conglomerate effects closely. The majority of cases will result in no concerns. In a few instances, however, the EC has found concerns and remedial action was required before it could authorise a merger. More recent cases raising concerns focus on quasi-vertical concerns involving interoperability.

Essilor/Luxottica did not involve interoperability concerns but more traditional leveraging/tying theories. The case brought together the largest supplier of ophthalmic lenses with the largest supplier of eyewear. Both products are sold to opticians. The EC opened a Phase II investigation based on conglomerate concerns, primarily that merged entity might leverage its powerful eyewear brands to make opticians buy its lenses and exclude other lenses suppliers from the markets, or vice versa, through practices such as bundling or tying. The EC cleared the case unconditionally following a Phase II investigation. It applied the framework set out in the non-horizontal merger guidelines checking whether the merged entity would have the ability and incentive to engage in foreclosure strategy and whether such strategy would have negative effects on consumers. There was no ability given Luxottica did not have a must-have brand (even Ray-ban was not found to be must-have). There was also no incentive to engage in practices such as bundling and tying because of the risk of losing customers which would refuse such strategies. In any event such practices would be unlikely to marginalise competing suppliers of lenses which would continue to be able to sell lenses given the large majority of lenses are not sold together with sunglasses.

Microsoft/LinkedIn raised interoperability issues and leveraging of a strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position among professional social networks (PSNs). The EC again applied the framework in the non-horizontal merger guidelines. It found that Microsoft had the ability to foreclose given its strong market position in operating systems and productivity software and the technical feasibility of requiring that LinkedIn be installed by

computer manufacturers on their hardware. Microsoft could also integrate LinkedIn into its software but deny competing PSNs similar access. There were also incentives evidenced by internal documents and Microsoft was aware of the benefits of such strategies. The strategies could result in anticompetitive effects. The PSN market is characterised by network effects, the market could tip with competitors marginalised and consumers harmed.

Remedies were put in place to secure clearance in Phase I. These included Microsoft being obliged to: unbundle its PC products from LinkedIn, i.e. ensuring there is no requirement on PC manufacturers/distributors to preinstall LinkedIn on Windows and allow users to remove LinkedIn from Windows, if this is preinstalled; and to allow competing PSNs to maintain current levels of interoperability with Microsoft's Office suite of products.

All in a survey of recent cases shows that although it is rare for conglomerate mergers to be the main focus of the EC, it can happen in specific situations in particular where issues are akin to vertical (interoperability). If so, careful preparation would be required: plan strategy, analyse carefully including by using economists; review carefully internal documents; if serious, consider raising issues (in pre-notification contacts with the EC case team). Also suitable remedies might need to be considered early in the process, especially when timing is tight.

(3) Hiroaki Ishigaki

Conglomerate mergers are generally considered pro-competitive but may require careful antitrust review and raise some antitrust concerns. Conglomerate mergers do not entail the loss of direct competition, tend to have large number of benefits, including the elimination of double marginalization, cost synergies, and transaction cost reduction. On the other hand, they may result in the foreclosure of rivals, often by facilitating tying, coordinated effects, and the elimination of potential competition, resulting in diminished market competition.

Current Japanese antitrust regulation of conglomerate mergers is very similar to European regulation. The JFTC often reviews conglomerate mergers from the viewpoints of horizontal foreclosure, removal of potential competition, and coordinated effects. There have been several conglomerate merger cases in Japan requiring serious review: INTEL/ALTERA (2015), Higo Bank/Kagoshima Bank (2015), Abbott Laboratory/St Jude Medical (2016), Qualcomm/NXP (2017), and Broadcom/Brocade (2017).

In Broadcom/Brocade (2017), JFTC was concerned that the merging parties may have excluded Broadcom's rival company in the FCHBA business by using the superior quality of Brocade's FCSAN switch, which is used with FCHBA in Fiber Channel Storage Area Network. Brocade could refuse connectivity to Broadcom's rival's FCHBA for the purpose of exclusion. Users are unlikely to purchase Broadcom's rival's FCHBA without its connectivity to Brocade's FCSAN switches. The merging parties addressed this JFTC concern by proposing behavioral remedies: Ensuring the interoperability between the merged entity's FCSAN switches and FCHBAs made by competing companies as well as through

a prohibition on discrimination; Protection of confidential information of competing enterprises concerning FCHBA; and Regular reporting to the JFTC.

(4) James Musgrove

Conglomerate mergers have not been the focus of enforcement action in Canada. Canada's Merger Enforcement Guidelines note that non-horizontal mergers are generally less likely to prevent or lessen competition than are horizontal mergers. In the case of conglomerate mergers, the Guidelines indicate that the Canadian Competition Bureau will consider whether the combination of products in related markets will confer upon the merged firm the ability and incentive to leverage a strong market position from one market to another by means of tying, or whether it would increase the likelihood of coordinated interaction amongst firms.

The Guidelines suggest a number of possible theories of harm flowing from conglomerate mergers, including the prevention of entry, the restriction of access to distribution or inputs, leveraging of market power by tying, or coordination through increased cross market exposure. However, the Canadian Bureau has only publicly indicated an interest in conglomerate merger issues in one case, the 2018 acquisition of Monsanto by Bayer. While a remedy was ordered in the Bayer/Monsanto case, it was not specifically tailored to conglomerate issues and focused instead on divestiture in relation to horizontal overlap. In other cases where competition agencies in other jurisdictions have expressed interest in conglomerate issues, such as Essilor/Luxottica, the Canadian Bureau has not expressed such interest.

Finally, it is worth noting that the Canadian Competition Act contains an efficiencies exemption for transactions which bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition. Since conglomerate mergers may give rise to efficiencies of scale or scope or reduction of overhead costs, this exemption may be relevant to consideration of conglomerate mergers and provide another explanation why there has been relatively little enforcement interest with respect to conglomerate mergers in Canada.

The webinar on “acquisitions of nascent competitors”

1. Date: 21 January 2020
2. Moderator: Melanie Aitken (Bennett Jones LLP, Canada NGA)
Speakers: Florian Ederer (Yale School of Management, US NGA)
David Gonen (US FTC)
Alexander Baker (Fingleton, UK NGA)
Yuji Tanaka (Japan Fair Trade Commission)
3. Discussion points

(1) Florian Ederer

A “killer acquisition” is the most extreme form of an acquisition of a nascent competitor: it is the acquisition of a target firm and the subsequent elimination of an existing or future competing product. My theoretical and empirical work with Colleen Cunningham (LBS) and Song Ma (Yale) focuses on the latter, namely the termination of nascent products or technologies that could threaten the acquirer's dominant market position.

We look for the existence and prevalence of this phenomenon, particularly in the pharmaceutical sector. We find that (i) incumbents are four times more likely to acquire pharmaceutical projects that can develop into potential direct competitors to their existing or future products than other comparable targets, that (ii) they are twice as likely to discontinue or kill these projects, and that (iii) these effects are concentrated in already less competitive markets. Altogether, we estimate that as many as 50 acquisitions every single year are pure killer acquisitions. Perhaps most alarmingly, we document that many of these acquisitions escape antitrust scrutiny because they occur just below the HSR premerger notification thresholds.

Our research focuses on pharma for entirely methodological reasons because it has greater data availability before and after acquisitions; and clear market delineations. However, our theoretical analysis equally applies to other industries with concerns about acquisitions of nascent competitors. However, a few features of the pharma industry make killer acquisitions particularly prevalent in pharma:

- (i) Strong IP protection so that buying a patent really shuts down the potential competitor (less so for the case in tech where IP is not as well protected)
- (ii) No business idea pivoting so that technology cannot be used in some other way (more common in tech where companies pivot a lot with the same technology)
- (iii) Acquihires are rare in pharma and more frequent in tech, but acquihires could also be a competition concern if they allow incumbents to
- (iv) Greater data availability (i.e., the same reason that allows us to conduct our analysis) means that identifying nascent competitive threats is significantly easier in pharma than in tech

Finally, killer acquisitions bring significant welfare losses through the loss of quality, variety and higher prices. The standard counterargument is that this avoids a duplication of research effort and development costs a la Mankiw & Whinston (1986), but our paper shows that killer acquisitions only occur if there is little existing competition in which case there is little concern about the inefficient duplication. Another standard counterargument is that this will lead to more ex-ante innovation by new entrepreneurs or by existing incumbents, but we argue that innovation efforts will now be directed more towards killer areas leading to less novel and less original innovation. In addition, new work by Haucap et al (2019) provides evidence that pharma mergers have a negative effect on R&D efforts both of the merging parties as well as competing incumbents.

(2) David Gonen

The U.S. Federal Trade Commission has challenged the acquisition of a nascent competitor in several instances. Evaluating such a transaction requires assessing the future competitive significance of the acquisition target. The fact patterns presented by these transactions fall along a continuum.

At one end is a deal where the acquisition target has a clearly defined product in its development pipeline that has not yet launched commercially. The agency's task is to gauge the probability and magnitude of the competitive impact that this specific, known product could have in the future. The FTC's 2017 challenge to Mallinckrodt's (formerly Questcor's) acquisition of development rights to the drug Synacthen from Novartis is an example of this type of fact pattern. The Commission and Mallinckrodt settled the matter, with Mallinckrodt agreeing to divest a license to Synacthen in the United States and pay \$100 million in disgorgement.

At the other end of the continuum is a more dynamic fact pattern where the acquisition target already has a commercial offering, but that offering may not compete closely with the incumbent acquiring firm or presently serve as a price constraint. However, the target may have the potential to develop further and make a more significant competitive impact. The agency's task is to assess whether the target may add features or capabilities that make it a closer competitor to what the acquiring firm sells today, or innovate rapidly to develop a product that effects a paradigm shift from the acquiring firm's technology to the acquisition target's future technology. The FTC's challenge to Illumina's proposed acquisition of Pacific Biosciences in December 2019 is an example of this type of fact pattern. Following the Commission's administrative complaint, the parties abandoned the transaction.

The agency looks to several sources of evidence to assess the competitive significance of the target. Some of the most probative is evidence revealing the parties' own subjective views of each other and of other competitors. The main source for such evidence is the parties' internal documents. The parties' statements to third parties such as customers and investors is also informative. Finally, third parties such as customers, competitors, and industry analysts also may provide useful perspectives and information, particularly if corroborated by other sources.

(3) Alexander Baker

The phrase 'killer acquisitions' has been successful in raising awareness of the potential for anti-competitive effects from the elimination of potential competition. However, the phrase is now widely applied to mergers beyond those examined in the academic paper which gave us the phrase. In fact, the phrase invites us to adopt far too sceptical a starting position when reviewing such deals in the tech sector, and also invites us to take shortcuts in merger assessment rather than evaluate cases on the facts.

There are multiple potential drivers for tech mergers – some may be anti-competitive (e.g., strategic acquisition); some benign (e.g., strategic exit); and some beneficial to consumers (e.g., geographic expansion). Some drivers could be anti-competitive or pro-competitive depending on the context (e.g.,

acquires or securing access to a key input).

High deal valuations – often considered a leading indicator of a ‘killer acquisition’ in the tech sector – could have multiple drivers. These include: the value of incremental profits to the acquiring firm, which in turn may be driven by revenue synergies (e.g., cross-selling products); revenue preservation (e.g., responding to changes in consumer demand / product repositioning); cost synergies (which don’t have to be merger-specific to impact valuations); access to new markets or new geographies; and, the competitiveness of the sale process. A strategic premium could also be part of the deal value but it is not the only or even necessarily the most likely reason.

For agencies, the key question is whether the actual valuation is higher than any reasonable assessment of the net present value of incremental profit. Valuation is an art and not a science, and companies (and their advisors) may struggle with the same uncertainties that agencies may face when determining a reasonable valuation for a business. Value is an inherently subjective concept, and the value to the acquiring business may be higher than the valuation of the target on a standalone basis for reasons that are benign or pro-competitive.

On the substantive assessment, it is helpful to consider two different types of potential competition: “actual potential competition” and “potential potential competition”. Actual potential competition is a scenario in which there is evidence that one or both of the merger parties has or will enter or expand into the others’ existing market. Potential potential competition is a scenario in which there is some dynamic shift in the market structure, in consumer demand or in product positioning, to which both merger parties are responding. The type of pharma mergers labelled “killer acquisitions” in Florian Ederer’s academic paper tend to describe an actual potential competition scenario. Whereas, there are a number of features of tech markets that make potential potential competition scenarios more likely to occur – not least, the speed with which markets can evolve.

For agencies, the difference between the evaluation of merger impacts under actual potential and potential potential competition comes down to uncertainty. With actual potential competition, the ability to foresee what is likely to occur is challenging but not insurmountable – there is likely to be some shape to the uncertainty, and likely sufficient evidence to come to a reasoned view. With potential potential competition, there may be a number of different independent events that must occur in the future for the deal to raise competitive concerns (and such events may be as likely to have a pro-competitive explanation as an anti-competitive one).

In a number of jurisdictions, the debate is focused on ensuring merger thresholds allow agencies to examine acquisitions of nascent competitors in tech. It is less clear that competition authorities need new tools to evaluate the merger effects of such transactions: fast-moving markets, products with zero-price, and strategic premia in deal valuations are not features unique to tech. Existing tools can cope adequately with some creativity and more careful thought about how to apply those tools.

We ought to be careful of falling into the binary fallacy of believing tech deals are either “killer acquisitions” or benign – each case should be examined on the merits, and we should not discount the

potential for consumer benefits arising from such deals. Fast moving markets are not a sufficient condition to raise intervention thresholds – firms face the same uncertainties that agencies do, and the evolution of consumer demand and products may mean that parties which compete today do not in future (or that other firms offer similar products). Finally, the insights drawn from the examination of tech deals may have applications to deals in other sectors (e.g., high deal valuation), and agencies shouldn't neglect more traditional markets in favour of tech.

(4) Yuji Tanaka

In December 2019, the Japan Fair Trade Commission (JFTC) revised its Merger Guidelines (“Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination”) and Merger Procedures Policies (“Policies concerning Procedures of Review of Business Combination”). The revisions were aimed at addressing digital mergers, based on the Action Plan of the Growth Strategy (June 21, 2019 Cabinet Decision) and others. The explanation at the webinar focused on the parts of the revisions related to acquisitions of nascent competitors.

In the revised Merger Guidelines, theories of harm on vertical and conglomerate mergers were primarily organized by past review experiences. The additional parts addressed how to assess the importance of data for competition and views on eliminating the possibility of new entry into a market by an acquiring company, such as a start-up selling important inputs. Especially when assessing the importance of data for competition, the following points are taken into consideration: (i) What kind of data are held or collected, (ii) How much/how wide range of data are held or collected, (iii) How frequently data are collected, (iv) To what extent data held or collected by one of parties is related to improvement of the service, etc. provided by the other parties.

The revisions to the Merger Procedures Policies included a new policy for the review of certain mergers with a high purchase price, which included a way for companies planning such mergers to consult with the JFTC. Specifically, when the consideration for an acquisition exceeds 40 billion yen (about 360 million US dollars) and the merger is recommended for consultation with the JFTC when: the (i) Business or R&D base of acquired company, etc. is located in Japan, (ii) Acquired company extends sales activities targeting domestic consumers, for example, with Japanese websites or pamphlets, and (iii) Domestic sales of the acquired company exceed 100 million yen (about 9 thousand US dollars). In addition, the JFTC can legally review mergers that do not meet notification thresholds based on certain sales amounts. While the current notification thresholds did not change, the new policies for reviewing non-notifiable mergers were introduced through the revision.

ANNEX I: Competition authorities responding to the survey

Europe	North America	Central and South America	Africa	Asia	Oceania
Bulgaria	Canada	Argentina	Kenya	Japan	Australia
Croatia	USDOJ	Brazil	Mauritius		New Zealand
Czech	USFTC	El Salvador	South Africa		
Denmark		Peru	Zambia		
DG Comp					
Estonia					
Finland					
France					
Germany					
Hungary					
Ireland					
Italy					
Netherlands					
Norway					
Portugal					
Slovenia					
Spain					
Sweden					
Turkey					
UK					

ANNEX II: Survey questionnaire

ICN Merger Working Group Conglomerate Mergers Survey

Please note that this survey asks about your agency's experience of conglomerate mergers⁷ and horizontal and/or vertical mergers with conglomerate aspects that lead to substantial conglomerate concerns (e.g. including a stand-alone conglomerate theory of harm and/or conglomerate aspects that were the subject of analysis in their own right). In some transactions, the distinction between vertical and conglomerate issues is not that clear. When answering this survey, it is better to include these cases if there is any uncertainty (with any needed explanation).

Throughout this survey, the questions refer to technical terms. To minimize confusion over the meaning of terms used in the survey we have provided the definitions and/or examples of the technical terms in the **footnotes**.

You are kindly requested to complete the following survey and send it **by Friday, 22 November 2019** to: icn-mergers@jftc.go.jp

Contact details

1. Please state the agency's name, plus contact information for this survey.

Agency name	
Contact person(s)	
Contact e-mail(s)	

⁷ Conglomerate mergers may involve products that customers perceive as complementary, or for which customers have independent demands. In some cases, these products may involve complementarities on the supply side. It may also be the case that some customers are interested in only one, or a subset of the products. "Pure" conglomerate mergers occur when the products of the merging firms exhibit no complementarities on neither the demand nor the supply side, but simply face independent demands from the same customers.

Regarding your answer to this survey, would you mind if MWG co-chairs disclose your authority's name on the report presented at ICN events, ICN website, etc.?

- Yes
- No
- Other (please explain the condition)

Law

2. Does your agency enforce competition laws (including relevant regulations or guidelines) with respect to conglomerate mergers?

- Yes → Please explain how your competition laws define conglomerate mergers.

- No → If your agency is considering the introduction of enforcement for conglomerate mergers by reform of competition laws in the future, please describe the schedule.

(If No, you don't need to answer the following questions.)

Merger Guidelines

3. Does your agency have public Merger Guidelines?

- No → Please skip to question 4
- Yes → Please provide a link to your Merger Guidelines (if available, in English).

Link:	
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→ Please answer the following questions

A) Do your Merger Guidelines specifically address conglomerate mergers?

- Yes
- No

B) Do your Merger Guidelines provide a framework for assessing conglomerate mergers?

- Yes
- No

C) Do your Merger Guidelines discuss what evidence is needed to assess conglomerate mergers?

- Yes
- No

D) Do your Merger Guidelines provide examples of previous conglomerate mergers your agency assessed in the past or hypothetical examples?

- Yes
- No

4. Other than Merger Guidelines, does your agency have a public statement or other document that addresses the assessment of conglomerate mergers?

- Yes → Please provide a link to the statement / document (if available, in English).

Link:	
--------------	--

- No

Statistics

5. Please provide the numbers of merger cases reviewed (all types of mergers (i.e. horizontal, vertical, conglomerate, etc.)) and intervention cases (all types of mergers / conglomerate concerns mergers) in total across the last five years (2014-2018).

Number of mergers reviewed [<u>All types of mergers</u>]					
Number of intervention cases [<u>All types of mergers</u>]	Prohibition	Clearance with remedies/conditions ⁸			Abandonment/ Withdrawal
		Total	With structural remedies	With behavioural remedies	
Number of intervention cases [Due to <u>Conglomerate concerns</u>]	Prohibition	Clearance with remedies/conditions			Abandonment/ Withdrawal
		Total	With structural remedies	With behavioural remedies	

Is the annual number of merger investigations (including all types of mergers) cleared on the basis of remedies and/or conditions increasing or decreasing compared to 5 years ago?

- Increasing Decreasing Constant Uncertain

Is the annual number of merger investigations cleared on the basis of remedies and/or conditions as a result of a conglomerate concern increasing or decreasing compared to 5 years ago?

- Increasing Decreasing Constant Uncertain

⁸ The number of “Clearance with remedies/conditions” may be smaller than the total of the numbers of cases “With structural remedies” and those “With behavioural remedies”, because some cases may have both behavioural and structural remedies.

Assessment

Please answer the following questions if your agency has experienced assessing conglomerate mergers. Otherwise, please skip to Question 15.

6. When assessing conglomerate mergers, do you use any threshold determination (e.g., based on market shares or HHI measures) to identify or dismiss competition concerns?

Yes → Briefly explain the threshold determination

No

7. Which theories of harm does your agency consider in assessing conglomerate mergers?

Foreclosure (*please answer to question 8)			Elimination of potential entrant (*please answer to question 9)	Other (please explain) (*please answer to question 10)
Tying / Bundling ⁹	Sharing of confidential information ¹⁰	Other (please explain) ¹¹		
<input type="checkbox"/> Yes	<input type="checkbox"/> Yes		<input type="checkbox"/> Yes	
<input type="checkbox"/> No	<input type="checkbox"/> No		<input type="checkbox"/> No	

8. Regarding foreclosure, please answer the following questions (* if you don't assess foreclosure in conglomerate merger review, please skip to the next question).

8-1 Do you consider the ability, incentive and likely effect as part of your assessment of conglomerate mergers?

⁹ Tying/bundling occurs when the merged entity would foreclose its competitors for the sale of product A by tying/bundling product A with product B, on which the merged entity possesses significant market power. Tying commonly refers to the situation when the buyer of a product is contractually and/or technically required to purchase another product. Similarly, bundling refers to the situation when products are only sold together in fixed proportions (pure bundling) or are also available separately, but the sum of the standalone prices is higher than the bundled price (mixed bundling).

¹⁰ The sharing of confidential information occurs when the merged entity would foreclose its competitors by obtaining and sharing competitively sensitive information related to competitors' products.

¹¹ "Other" refers to theories of harm such as a "portfolio effect" where the merged entity would foreclose its competitors by taking advantage of its increased overall business capabilities (procuring raw materials, technical capabilities, brand popularity, advertising capability, etc.).

Yes

No → Briefly explain your agency's framework for assessing foreclosure in conglomerate merger review.

8-2 Briefly explain what evidence you use to assess foreclosure (e.g., tying, bundling, sharing of confidential information).

9. Regarding the elimination of a potential entrant, please answer the following questions (* if you don't consider the elimination of a potential entrant as part of your conglomerate mergers assessment, please skip to the next question).

9-1 When you assess the elimination of a potential entrant, do you consider (a) the possibility of entry by one of the merging party into the market where the other party is active, and after that, (b) the effect of the elimination of such potential entrant as a result of the merger?

Yes

No → Briefly explain your agency's framework for assessing the elimination of a potential entrant in conglomerate merger review.

9-2 Briefly explain how you assess the possibility of entry by one of the merging party (part (a) in question 9-1) in conglomerate merger review (the timing, the likelihood, etc. of the entry), and what types of evidence you use to assess the possibility of entry (e.g. hot

documents of a concrete plan for entry or data to show the ability of entry by one of the merging party, etc.).

9-3 Briefly explain how you assess the effect of the elimination of a potential entrant in conglomerate merger review (part (b) in question 9-2), and what types of evidence you use to assess the effect of the elimination of a potential entrant (e.g. hot documents of one of the merging party to eliminate the possibility of entry by the other, etc.).

10. Briefly explain what evidence you use to assess theories of harm other than foreclosure and elimination of a potential entrant (to the extent you assess these).

11. Do you consider the possibility of coordinated conduct¹² in conglomerate mergers assessment?

Yes → Briefly explain how you assess the possibility of coordinated conduct in conglomerate merger review.

No

12. Has your agency used quantitative methods of analysis (econometric models) to assess conglomerate mergers?

¹² e.g., “Coordinated conduct” refers to whether the merged entity and its competitors would facilitate anticompetitive coordination in the market since foreclosed rivals may choose not to contest the situation of coordination, but may prefer instead to live under the shelter of the increased price level.

- Yes → Briefly explain what kind of quantitative methods your agency has used.

- No

13. Do you consider efficiencies as part of your assessment of conglomerate mergers?

- Yes → Briefly explain how you take merger specific efficiencies into account when assessing conglomerate mergers.

- No

14. Is the balancing of efficiencies in conglomerate merger review different from that in other types of merger review?

- Yes → Briefly explain how it is or should be different.

- No

Views

15. How would you rate the priority of enforcing conglomerate theories of harm relative to horizontal and vertical theories of harm?

	Higher priority	Same Priority	Lower priority	Much lower priority	Don't examine conglomerates
Relative to <u>horizontal</u> theories	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relative to <u>vertical</u> theories	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



When the conglomerate effect is the only theories of harm for a case, will such theories of harm gain greater relative importance?

- Yes No

16. Is your agency's approach to the assessment of conglomerate mergers fairly well established and fixed, or has it/ is it still evolving? Please explain.

17. Please identify any industries in which conglomerate concerns may be greater or seem to arise more often.

18. Do you find conglomerate concerns more often in the digital economy?

- Yes → Please provide brief details of the case in Q20, if possible.
 No

19. Has your authority considered, after choosing not to pursue theories of harm such as tying/bundling in conglomerate merger review, to take measures against such conducts by the party from the perspective of conduct regulation (aside from merger regulation) of your antitrust law?

Yes → Briefly explain the case example.

No

Case studies

20. We are looking for case studies that can be used to show in more detail how different authorities have assessed and addressed conglomerate mergers.

We are primarily interested in cases where your investigation led you to conclude that the conglomerate element of the merger would cause harm. We would like these case studies to discuss the most important pieces of evidence and analysis, and the details and reasoning behind the remedies that were adopted.

However, we are also interested in cases where your initial analysis suggested the conglomerate merger would cause harm, but a more detailed subsequent stage of investigation concluded that there was no concern.

Please provide brief details of cases that you think may be relevant and we may contact you regarding a case study.

21. With regards to conglomerate mergers, have you carried out any ex-post evaluation, research, working papers or thinking that could be shared with the ICN? If so please provide a brief summary of this work or a link.

International cooperation

22. How often have you cooperated with other competition agencies in your assessment of international mergers raising conglomerate theories of harm?

Frequently	Quite often	Occasionally	Never
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

23. Has your agency faced any challenges that are specific to the nature of conglomerate mergers when cooperating on the review of international mergers?

Yes → Please briefly elaborate the challenges.

→ If possible, please tell us the content of the cooperation case.

No

Thank you very much for your cooperation!



International
Competition
Network



Merger Working Group Teleseminar on Conglomerate Mergers

29 October 2019



International
Competition
Network

MWG Teleseminar on Conglomerate Mergers

Moderator:
Jonathan Gleklen (Arnold & Porter, US NGA)

Speakers:

- Aude Barthelemy (Case handler, EC DGCOMP)
- Michele Casagrande (Case handler, EC DGCOMP)
- Kyriakos Fountoukakos (Herbert Smith Freehills, EU NGA)
- Hiroaki Ishigaki (NERA Economic Consulting, Japan NGA).
- James Musgrove (McMillan, Canada NGA)

NOTE to participants of the teleseminar: Please mute your line while you are not speaking. You can mute/unmute by pressing “ *6 “.

2



Conglomerate mergers

ICN MWG teleseminar

29 October 2019

Aude Barthélemy & Michele Casagrande

The views expressed in this presentation are personal and do not necessarily reflect the views of the European Commission.

3

Outline

1. What are conglomerate mergers?
2. Characteristics of conglomerate mergers
3. Type of foreclosing conducts
4. "Ability-incentive-effect" test
5. Conclusion

4



Definition of conglomerate mergers

- Commission's *Non-Horizontal Merger Guidelines* ("NHMG"):

"Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice the focus is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use)."

5



Characteristics of conglomerate mergers

- Usually, positive effects (efficiencies)
 - Economies of scope (combination or bundle of products)
 - One-stop-shopping for customers (lower transaction costs)
- However can lead to negative effects (i.e. *"significant impediment to effective competition"*, SIEC)
 - *Ability* and *incentive* for merged entity to leverage market power from one market to another
 - Main concern: foreclosure
 - Coordinated effects (Commission's Horizontal Merger guidelines)
- Thresholds for affected market in Form CO:
 - Higher than for horizontally affected markets
 - 30% market share

6



Type of conducts leading to foreclosure

- **Bundling**: way products are offered and priced by the merged entity
 - **"Pure" bundling**: Products are only available jointly in fixed proportions
 - **"Mixed" bundling**: Products are available separately, but discount for purchasing them jointly
- **Tying**: customer purchasing the "tying" good is required to also the "tied" good from the producer
 - **Technical tying**: tying product designed to only work with the tied product (and not with competitors' product)
 - **Contractual tying**: customer undertake to also purchase the tied product
- When companies merge and choose to bundle or tie their products, this affects the set of purchase options available to customers in the market. Demand may shift towards the bundle of the merged company, and away from the products of the single-product rivals (or make entry more difficult)

7



Assessing foreclosure: *ability, incentive, effects*

Ability: para. 95-104 NHMG

- Significant degree of market power in one market (but not necessarily dominance): one of the products viewed by customers as particularly important and few alternatives available to them
- Large pool of common customers for the individual products concerned (more common for complementary products)
- Market structure: foreclosure effects more pronounced in industries with economies of scale and demand pattern has dynamic implications for conditions of supply in the future
- Scope of foreclosure smaller where merging parties cannot commit to making their tying or bundling strategy a lasting one, i.e. commit to strategy which is costly to reverse
- Effective and timely counterstrategies of rivals?

8



Assessing foreclosure: *ability, incentive, effects (cont.)*

Incentive: para. 105-110 NHMG

- Incentive to foreclose rivals depends on degree to which the foreclosing strategy is profitable
 - Merged entity faces a *trade-off* between:
 - Possible costs of the foreclosure strategy (bundling or tying its products)
 - Possible gains of the foreclosure strategy (expanding market shares, ability to raise prices)
- For instance, if a significant number of customers are not interested in buying the bundle, but instead prefers to buy only one product (e.g. the product used to leverage), sales of that product (as contained in the bundle) may significantly fall.
- Is it profitable overall?

9



Assessing foreclosure: *ability, incentive, effects (cont.)*

Impact on effective competition: para. 111-118 NHMG

- Tying/bundling may result in a significant reduction in sales by single-component competitors, which may reduce rivals' ability or incentive to compete, and in turn result in market power to merged entity
- May deter entry by potential competitors
- Effect on competition to be assessed in light of:
 - countervailing factors: buyer power, new entry
 - efficiencies, including *Cournot* effect

10



Conclusion

- NHMG recognises the positive effects of conglomerate concentrations
- Only limited number of cases lead to intervention, e.g.:
 - **M.7822 – Dentsply / Sirona**
 - **M.8124 – Microsoft / LinkedIn**
 - **M.8306 – Qualcomm / NXP Semiconductors**
 - **M.8314 – Broadcom / Brocade**

11



ICN Teleseminar on Conglomerate Mergers

Recent EU Conglomerate mergers and case studies

29 October 2019

Kyriakos Fountoukakos, Partner, Brussels, +32 2 518 1840, kyriakos.fountoukakos@hsf.com

998344.03

Recent EU Conglomerate Mergers - Case Studies



EU Commission's Scrutiny of Conglomerate Mergers

GE/Honeywell (2001) and Tetra Laval/Sidel (2003) prohibitions (mainly) based on conglomerate issues

Both annulled with regard to conglomerate aspects on appeal in early 2000s – EU Courts set a high bar for prohibition based on conglomerate theories of harm

EC adopts Non-Horizontal Merger Guidelines in 2008
“whereas...in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition” (para.92)

EC did not abandon conglomerate theories of harm
Warning shot in 2011: M.5984 Intel/McAfee (Phase I with commitments)

A number of cases since 2016 (including Phase II investigations), most of which were cleared subject to remedies

Recent EU Conglomerate Mergers (2016-2019)

Phase II

- M.8306 *Qualcomm/NXP Semiconductors* (Phase II with commitments) (2018)
- M.8394 *Essilor/Luxottica* (Phase II) (2018)
- M.8084 *Bayer/Monsanto* (Phase II with commitments – however, bundling concerns were not proven during Phase II) (2018)

Phase I

- M.7873 *Worldline/Equens/Paysquare* (Phase I with commitments) (2017)
- M.8314 *Broadcom/Brocade* (Phase I with commitments) (2017)
- M.7822 *Dentsply/Sirona* (Phase I with commitments) (2016)
- M.8124 *Microsoft/LinkedIn* (Phase I with commitments) (2016)

A number of recent conglomerate cases faced an in-depth investigation and/or were cleared by the EC subject to remedies

Two main categories of conglomerate effects cases

Tying or bundling across a range of products

- Earlier cases focused on post-transaction tying or bundling across a range of products
- Less focus since 2004, but Commission continues to investigate this theory of harm (*Worldline/Equens*, *Qualcomm/NXP*)
- Recent example: *Essilor/Luxottica* (decision of 1 March 2018 Case M.8394)

“Interoperability” issues

- Concern that that merged entity might limit interoperability between its products and those available from rival suppliers, thereby foreclosing suppliers of complementary products
- Elements in common with vertical mergers
- Majority of recent cases based on interoperability concerns (*Dentsply/Sirona*, *Broadcom/Brocade*, *Microsoft/LinkedIn*)

Essilor/Luxottica (Case M.8394)

Complementary products

- Essilor: largest supplier of ophthalmic lenses (worldwide and in Europe)
- Luxottica: largest supplier of eyewear (worldwide and in Europe), with well-known brands including Ray-Ban and Oakley
- Both companies sell their products to opticians who sell finished spectacles and sunglasses to optical retailers

Commission's concerns

- The parties mainly sell complementary products which do not compete with each other but which are necessary inputs for opticians
- Concerns raised by competitors and customers on conglomerate effects
- Commission opened phase II investigation based on conglomerate concerns, primarily that merged entity might leverage its powerful eyewear brands to make opticians buy its lenses and exclude other lenses suppliers from the markets, or vice versa, through practices such as bundling or tying

Essilor/Luxottica (Case M.8394)

Commission's assessment

- Three-step framework: whether merged entity would have the ability and incentive to engage in foreclosure strategy and whether such strategy would have negative effects on consumers
- No **ability** to foreclose despite high market share levels
 - Strong preference by opticians for multi-sourcing from different lens suppliers
 - Luxottica's most important brand, Ray-Ban, not considered a 'must-have' brand
- **Incentive** to engage in foreclosure strategy
 - Limited incentives to engage in practices such as bundling and tying because of the risk of losing customers. Even if it followed such practices, this would be unlikely to marginalise competing suppliers of lenses
- **Effects**: no competition concerns due to elimination of emerging competition as Luxottica's limited activities in lenses and Essilor's limited activities in eyewear were unlikely to play an important role for competition in the foreseeable future
- Merger approved without remedies - Commission prepared to examine in detail concerns expressed by market participants but also to dismiss if not fully supported by evidence in its detailed investigation

Microsoft/LinkedIn (Case M.8124)

Complementary business

- LinkedIn operates a professional social networking platform, while Microsoft's flagship products include the Windows line of operating systems and the Microsoft Office suite of productivity software
- Microsoft and LinkedIn had complementary businesses in professional social network services and customer relationship management software solutions (there was also a minor overlap in the online advertising market)

Commission's concerns

- The Commission had concerns that Microsoft could use its strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position among professional social networks – in particular, it would be able to:
 - develop and pre-install a LinkedIn application on all Windows PCs
 - integrate LinkedIn features into Microsoft Office software and combine LinkedIn's and Microsoft's user databases
 - exclude LinkedIn's competitors by not providing them with technical information required to operate with Microsoft's products

Microsoft/LinkedIn (Case M.8124)

Commission's assessment

Ability to engage in foreclosure strategy:

- developing and pre-installing LinkedIn app was technically feasible for Microsoft
- OEMs are contractually required to install the applications determined by Microsoft on the Windows PCs they distribute
- Microsoft had developed application programming interfaces (APIs) that would make it possible to integrate LinkedIn features into Microsoft Office and could deny competing PSN providers access to the relevant APIs

Incentive to engage in foreclosure strategy:

- both the pre-installation on Windows PC and the integration of LinkedIn features into Office were specifically identified by Microsoft in the notification and in its internal documents
- internal documents contained indications of possible incentive to limit interoperability for competing PSNs
- Microsoft was well aware of the benefits that would result from these practices including increased user base and activity of LinkedIn and increased monetisation opportunities, and was unlikely to incur any significant losses from this strategy

Microsoft/LinkedIn (Case M.8124)

Commission's assessment (cont.)

Significant detrimental effects:

- PSN market is characterised by network effects which would enhance the effects of any foreclosure strategy
- Growth in size and usage of LinkedIn PSN platform would eventually tip the market in favour of LinkedIn's network, with competing PSNs unable to compete effectively and lack of incentive for new entrants to enter the market for PSN services
- Multi-homing (users choosing to be active on more than one PSN) seen as unlikely to mitigate these network effects as active usage of PSN platforms requires considerable time and dedication which could be expected to act as a disincentive to multi-homing
- Commission also considered that loss of consumer choice in relation to PSNs may restrict consumer choice regarding privacy impact, as some competing PSNs offer a greater degree of privacy protection to users than LinkedIn

Microsoft/LinkedIn (Case M.8124)

Remedies

- To address the Commission's concerns, Microsoft offered the following commitments (for a period of five years):
 - unbundle its PC products from LinkedIn, i.e. ensuring there is no requirement on PC manufacturers/distributors to preinstall LinkedIn on Windows and allow users to remove LinkedIn from Windows, if this is preinstalled
 - allow competing professional social network service providers to maintain current levels of interoperability with Microsoft's Office suite of products through the so-called Office add-in program and Office application programming interfaces
 - grant competing professional social network service providers access to 'Microsoft Graph', a gateway for software developers to build applications and services that can access data stored in the Microsoft cloud (e.g. contact information, emails), which can be used by software developers to drive subscribers and usage to their professional social networks

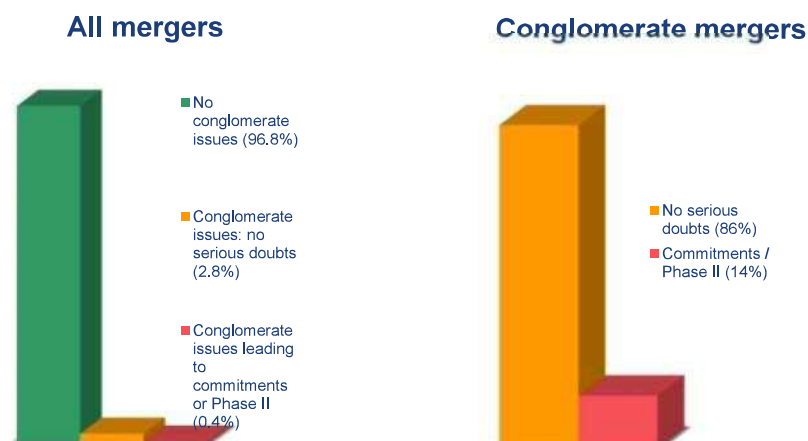
Key Takeaways – Is the Recent Focus on Conglomerate Theories of Harm Merely a ‘Coincidence’?

- Commission continues to review conglomerate mergers and their effects on competition
 - Three cases were referred to Phase II between 2016-2019
 - A number of conglomerate cases between 2016-19 phased an in-depth investigation and/or were cleared subject to commitments (no recent prohibitions based on conglomerate theories)
- Non-Horizontal Merger Guidelines provide the framework of analysis
- Although it is rare for conglomerate mergers to be the main focus of the EC, it can happen in specific situations in particular where issues are akin to vertical (interoperability). If so:
 - careful preparation would be required: plan strategy, analyse carefully including by using economists; review carefully internal documents; if serious, consider raising issues (in pre-notification contacts with the EC case team)
 - suitable remedies might need to be considered early in the process, especially when timing is tight

The focus on bundling in recent merger cases is a ‘coincidence’ (Commissioner Vestager, 26 September 2017)



Mergers with conglomerate effects (2016 – present): statistics



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ICN MWG Teleseminar on Conglomerate Mergers: Economics of Conglomerate Merger and Recent Development and Experience in Japan

October 29, 2019

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Presentation Plan

- Economics of Conglomerate Mergers
- Japanese Antitrust Regulation to Conglomerate Merger
- A recent case: Broadcom and Brocade (2017)

Conglomerate mergers are generally considered pro-competitive, but may require careful antitrust review with a few antitrust concerns

Taxonomy of Merger

- Horizontal merger (between competitors, or substitutes)
- Vertical merger (between sellers and buyers, or complements)
- **Conglomerate merger (neither between competitors nor between sellers and buyers, or complements or no-relationship)**

Many of conglomerate mergers do not create any antitrust concerns

- Do not entail the loss of direct competition unlike horizontal merger
- Larger scope of efficiencies (than Horizontal merger)
 - Removal of double marginalization (Cournot effect)
 - Cost synergies
 - Reduced transaction costs

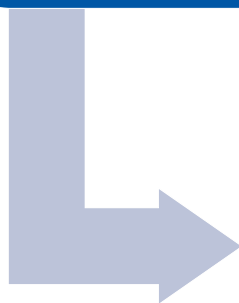
Conglomerate mergers may still be anti-competitive

- Exclude rivals in various forms of a sort of tying, resulting in diminishing the market competition
- Facilitate the coordinated effect
- Eliminate the potential competition

Japanese antitrust regulation of conglomerate mergers are more or less the same as European approaches

Non-horizontal merger assessment introduced in the Merger GL in 2004

- 2004 is the starting point of serious non-horizontal merger review in Japan
- No significant conglomerate/vertical merger cases known before 2004



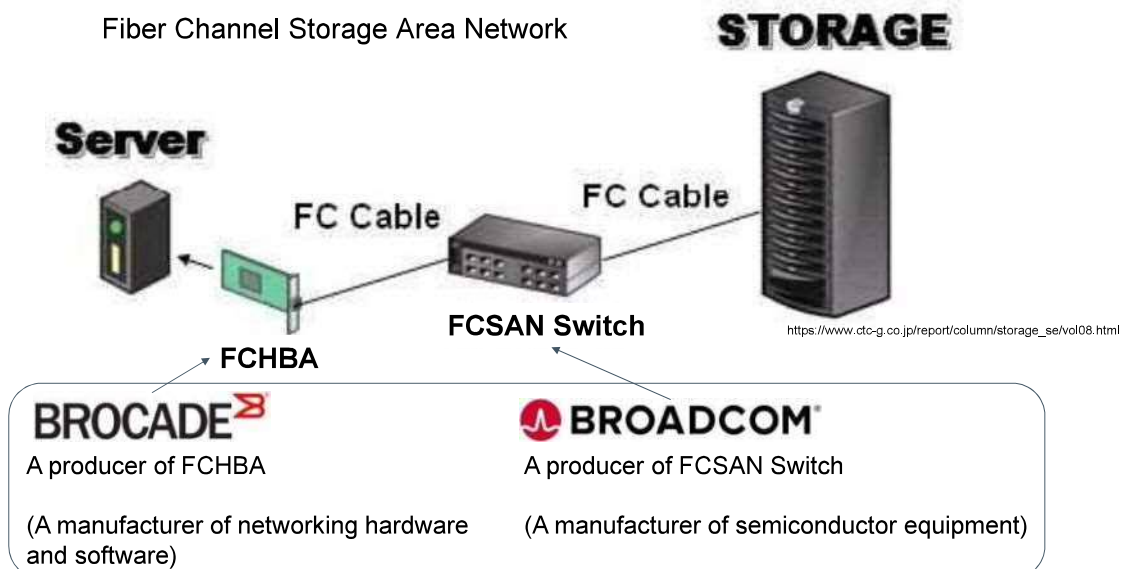
Revised and expanded explanation of non-horizontal merger assessment in Merger GL in 2019

- Merger GL in Japan will be revised in FY 2019, and the draft is disclosed for public comment
- JFTC's conglomerate merger review framework in the revised GL
 - ◆ Market Definition
 - ◆ Competitive Analysis
 - ✓ Safe Harbor Rule
 - ✓ Theories of harm
 - Horizontal Foreclosure
 - Ability to Foreclose
 - Incentive to Foreclose
 - Competitive Effect
 - Potential Competition
 - Coordinated Effects

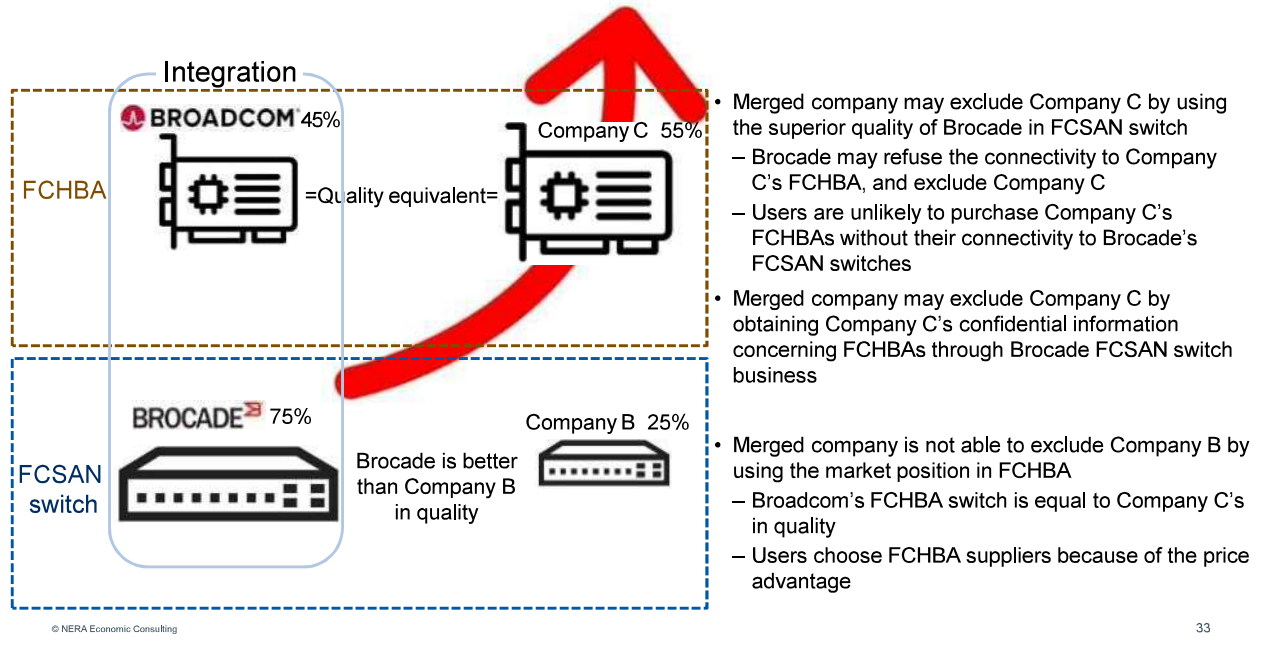
There are not many conglomerate merger cases in Japan, requiring serious review (in comparison to horizontal merger cases)

Name	Product/Service	Year	Information Exchange	Phase	Competition Issue	Remedy
INTEL / ALTERA	x86 CPU and FPGA	2015	EC	Phase I	Tying (compatibility to dominant product)	None
Higo Bank / Kagoshima Bank	Banking Services	2015	None	Phase I	Potential regional competition	None
Abbott Laboratory / St Jude Medical	TR Band and small-sized VCD	2016	KFTC	Phase I	Tying sales	None, based on the asset sales to resolve horizontal merger issue
Qualcomm and NXP	Baseband Chip and Felica NFC/SE Chip	2017	EC, KFTC	Phase I	Tying (compatibility to dominant product)	Secure Connectivity, Monitoring, Report
Broadcom / Brocade	FCHBA and FCSAN Switch	2017	USFTC, EC	Phase I	Tying (compatibility to dominant product)	Secure Connectivity, Protection of confidential information, Reporting

Broadcom / Brocade (2017)
The relationship between merging parties in Fiber Channel Storage Area Network (FCSAN)



Horizontal Foreclosure Effect



Remedies Proposed by the Company Group

Ensuring the interoperability between FCSAN switches of the company group and FCHBAs of competing companies, and prohibit of discrimination

- FCHBAs of competitors will be affected no more negatively than FCHBAs of the company group, provided that the remedy of this case is implemented.

Protection of confidential information of competing enterprises concerning FCHBA

- The measure is considered effective in preventing the company group's FCHBA business from gaining an advantage and preventing competitors in FCHBA business from being placed at a disadvantage.

Regular reporting

- Reporting every other year is considered effective in terms of monitoring implementation of the remedy of this case because developing a next-generation product of FCSAN switches or FCHBAs takes more than two years at least and it is impracticable for the company group to lower interoperability of products once they are released



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**Conglomerate Mergers: The Canadian
Perspective**

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I. The Substantive Merger Review Test

- A merger is **defined** as the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of **control over or significant interest in the whole or a part** of a business of a competitor, supplier, customer or other person may be challenged
- The **test** for a challenge is whether the merger is likely to result in a **Substantial Prevention or Lessening of Competition (SPLC)**
- Even if the merger is likely to result in a SPLC, there is an **efficiencies defence** (discussed below)

II. The Notification Threshold

- In Canada the **notification threshold and the review test are unrelated**. Transactions which meet the threshold requiring notification, regardless of substantive issues, and even if transactions do not meet the threshold they may be reviewed – for up to 1 year post closing
- Currently the threshold (for simplicity's sake taking a share transaction, and ignoring exceptions) is:
 - The parties and their affiliates, combined, have assets in Canada, or gross annual sales revenue in, from or into Canada, exceeding C\$400M
 - The target has an operating business in Canada, or controls an entity with an operating business in Canada
 - The target or its subsidiaries have assets in Canada, or gross annual revenue from sales in or from Canada, which exceed C\$96M (for 2019)

II. The Notification Threshold

- Consequently, **any transaction exceeding this threshold** – whether or not there is any horizontal or vertical relationship at all – **will trigger notification**
- Despite this, and despite the many notifications of conglomerate mergers which have occurred as a result, there are **no cases involving challenge** to a pure conglomerate merger in Canada

III. Private Equity Issues

- Conglomerate mergers are less popular than they once were in the equity markets – so that might suggest that fewer such cases exist
- However, **private equity can be, effectively, a kind of conglomerate** – involving holding interests in various, often unrelated, businesses
- The Canadian Competition Bureau has taken a fairly serious interest in understanding **who the beneficial owners are** in private equity transactions, even though those beneficial owners do not control the portfolio companies in most private equity structures. However, **the focus has been almost exclusively on potential horizontal issues**, not conglomerate effects

IV. The Merger Enforcement Guidelines

- Canada's most recent Merger Enforcement Guidelines (MEGs) were issued in 2011
- With respect to conglomerate mergers the MEGs have **relatively little to say**:

- 11.1 A conglomerate merger is a merger between **parties whose products do not compete, actually or potentially, and are not vertically related**. Conglomerate mergers may involve products that are related because they are complementary (e.g., printers and ink cartridges), or because customers buy them together owing to purchasing economies of scale or scope.

[Note: There is of course uncertainty in some cases as to whether products are competitive, complimentary or unrelated, given the need for market definition, particularly in developing technological products.]

- 11.2 Non-horizontal mergers are **generally less likely to prevent or lessen competition substantially** than are horizontal mergers...

IV. The Merger Enforcement Guidelines

- 11.4 A non-horizontal merger may harm competition if the merged firm is able to **limit or eliminate rival firms' access to inputs or markets**, thereby reducing or eliminating rival firms' ability or incentive to compete. The ability to affect rivals (and, by extension, competition) in this manner is referred to in these guidelines as "foreclosure."
- 11.6 When examining the likely foreclosure effects of a non-horizontal merger transaction, the Bureau considers three inter-related questions: (1) **whether the merged firm has the ability to harm rivals**; (2) **whether the merged firm has the incentive (i.e., whether it is profitable) to do so**; and (3) **whether the merged firm's actions would be sufficient to prevent or lessen competition substantially**.
- 11.8 In the case of a conglomerate merger, the Bureau considers whether the combination of products in related markets will confer upon the merged firm **the ability and incentive to leverage a strong market position from one market to another by means of tying products** together. For example, the merged firm may harm its rivals by refusing to sell one product to customers unless customers also buy a second product from it. Assuming that rivals do not sell the same range of products as the merged firm, such tying may foreclose rivals by reducing their ability to compete, thereby preventing or lessening competition substantially.
- 11.9 The Bureau also considers whether a non-horizontal merger **increases the likelihood of coordinated interaction among firms**:

A conglomerate merger may facilitate coordination by **increasing the degree of multi-market exposure among firms**

[Of course, this suggests that there may in fact be some overlap]

V. Theories of Harm

- As noted, the MEGs suggest a number of possible theories of harm which might apply to conglomerate mergers
 - a) Prevention of entry (either entry by the acquired party, the acquiring party, or (at least in theory) by some third party) (including, in theory, entry by innovation)
 - b) Possible exclusion by restricting access to distribution
 - c) Possible exclusion by restricting access to necessary inputs
 - d) Possible leveraging of market power via tying
 - e) Possible facilitation of coordination by increasing cross – market exposure

VI. Prevention of Competition Issues

- As noted, the **substantive test** for merger review is whether the transaction is likely to cause a substantial prevention or lessening of competition
- A leading theory of harm relevant to conglomerate mergers is the prevention of competition which would otherwise have occurred, but for the transaction – which, as noted, could include prevention of innovation
- **Proof of prevention of competition is difficult.** It is even harder to foresee prevention of competition than it is to foresee lessening of existing competition. The Supreme Court of Canada has weighed in on the matter in the Tervita¹ case
 - [The acquirer] argues that the intention of s. 92 is “to establish a merger test that provides certainty to Canadian businesses” (A.F., at para. 66). However, the term “likely” in s. 92 does not require certainty. **“Likely” reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.**

¹Tervita Corporation et al v. Commissioner of Competition [2015] 15 CR 161

VI. Prevention of Competition Issues

- [I]n order for s. 92 of the Act to be engaged, **the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition.** Mere possibilities are insufficient to meet this standard. And, as will be discussed, **as events are projected further into the future, the risk of unreliability increases** such that at some point the evidence will only be considered speculative
- Where **the evidence does not support the conclusion** that one of the merging parties or a third party would enter the market independently, **there cannot be a finding of likely prevention of competition** by reason of the merger. To the same effect, where **the evidence is only that there is a possibility** of the merging party entering the market at some time in the future, **a finding of likely prevention cannot be made.** In this respect, I agree with Justice Mainville that **the timeframe for entry must be discernible...** While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, **the farther into the future predictions are made, the less reliable they will be.** The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

[Note: Prevention of Competition Cases may be becoming a greater concern with increased focus on nascent competition issues]

VII. Cases

I. Bayer/Monsanto

- One case in which the Competition Bureau has publicly indicated a live interest in conglomerate merger issues was the 2018 acquisition of Monsanto by Bayer
- The **focus of the Canadian Bureau's review**, and of the Consent Agreement entered into, was in relation to **canola** and soybean seeds and traits, nematocidal seed treatments and the carrot seeds businesses – with primary emphasis on canola
- While the primary focus was on horizontal effects, the Bureau did look at a broader "conglomerate" theory of harm. As noted in the Bureau's June 2018 "Backgrounder"
 - The [Consent Agreement] represents the conclusion of an extensive review by the Bureau that assessed the likely impact of Bayer's proposed acquisition of Monsanto across a range of inputs to agricultural production including: canola, corn, soybean and wheat seeds and traits; seed treatments and agricultural biologicals; vegetable seeds; and digital agricultural products. Furthermore, **the Bureau also closely analyzed the likely conglomerate effects of the proposed transaction** resulting from the combination of the broad product portfolios and sophisticated R & D capabilities of the merging parties

VII. Cases

- The Bureau is **satisfied that the scope of the remedy package is sufficiently broad in terms of both products and R & D assets to address the concerns of certain stakeholders that Bayer and Monsanto would have been able to leverage the combined strength of their organizations to the detriment of competition.**

II. Essilor/Luxottica

- 2nd stage review
- No enforcement action or public statement

VII. Cases

III. Dow/Dupont

- The Bureau's concerns in this matter related to the loss of rivalry between the parties in:
 - a) Broadleaf herbicides for cereal crops;
 - b) Pre-seed burn-off additives for cereal crops;
 - c) Acid copolymers; and
 - d) ionomers

VII. Cases

- “The Bureau’s review also revealed that each of the parties has innovation efforts directed at expanding and enhancing their respective cereal broadleaf herbicide portfolios. In light of this, the Bureau also determined that competition would be harmed because the loss of innovation rivalry would reduce the incentive to innovate and to bring new and more effective products to market in a timely manner”
- “To address the Bureau’s concerns, **which are similar to those of foreign anti-trust authorities**, DuPont agreed to sell a significant part of its global herbicides business and research and development (R & D) branch to FMC Corporation, a United States based chemical technologies company. The sale includes DuPont’s Canadian activities in cereal crops herbicides, as well as PrecisionPac, a popular herbicide dispensing system among Canadian farmers.”

VIII. Efficiencies

- The Canadian *Competition Act* contains a unique “efficiencies defence”

“The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring **about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition** that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.”
- **Conglomerate mergers may well give rise to efficiencies** whether of scale or scope, removal of double marginalization or the reduction of costs such as duplicative overhead – particularly head office/public company type expenses
- In a case where proving anti-competitive effects may be uncertain, and where some efficiencies are likely to be demonstrable, such as conglomerate mergers, this may be another reason why conglomerate mergers have not attracted significant enforcement activity in Canada

IX. Conclusions

- Canadian concerns with respect to conglomerate mergers have proven, as a practical matter, to be quite limited
- Like US merger enforcement, Canadian merger enforcement has been overwhelmingly focused on horizontal mergers, with occasional interest in vertical issues, and **virtually no practical interest in conglomerate effects**
- While the Bureau has articulated possible theories of harm or concern in conglomerate mergers, with respect to prevention of competition, possible increased opportunity for multi market interaction and exclusion through portfolio effects, thus far there has been **no enforcement action exclusively based on these theories of harm**



Thank you for your participation.

Stay tuned for the next teleseminar.

**Comments/suggestions are welcome at
icn-mergers@jftc.go.jp**

Merger Working Group Teleseminar Series on Digital Mergers: Acquisitions of Nascent Competitors

21 January 2020

MWG Second Teleseminar on Acquisitions of Nascent Competitors

Part 1: Discussion among diverse experts

Moderator:

Melanie Aitken, Bennett Jones LLP (NGA, Canada)

Speakers:

- * Florian Ederer, Yale School of Management (NGA, US)
- * David Gonen (US FTC)
- * Alexander Baker, Fingleton (NGA, UK)

Part 2: Recent revisions to merger guidelines to effectively review digital mergers

Speaker: Yuji Tanaka (Japan JFTC)

NOTE to participants of the teleseminar: Please mute your line while you are not speaking. You can mute/unmute by pressing “*6” (“star six”).

ICN Mergers Working Group

Acquisitions of nascent competitors

Alexander Baker
January 2020

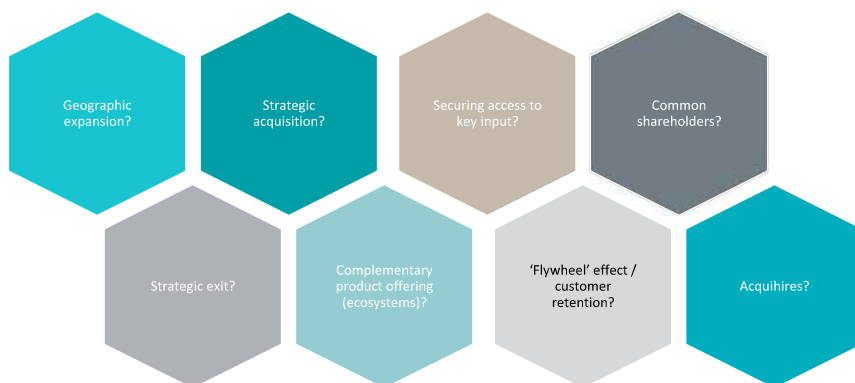
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Fingleton

ICN Mergers Working Group: Acquisitions of nascent competitors

POTENTIAL DEAL RATIONALES

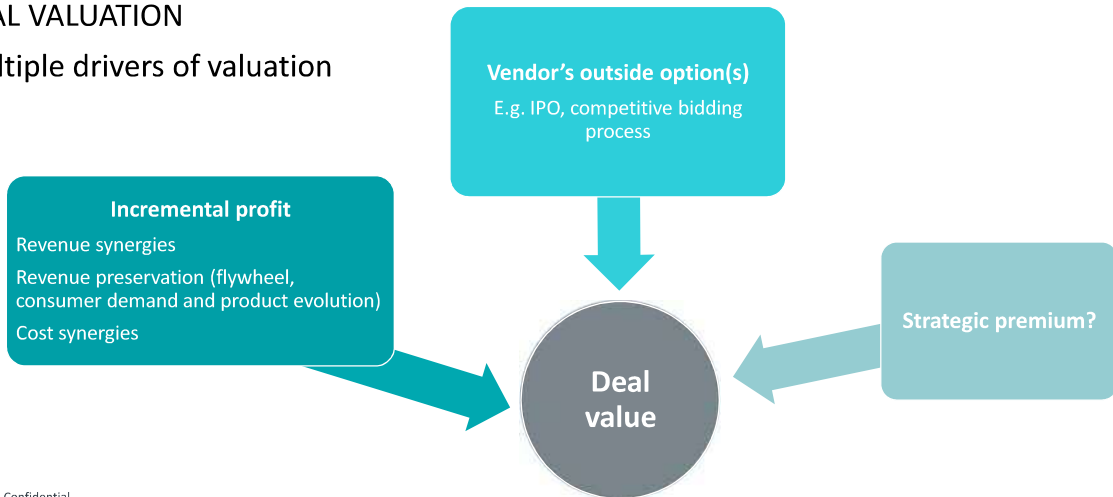
Multiple potential drivers for tech mergers



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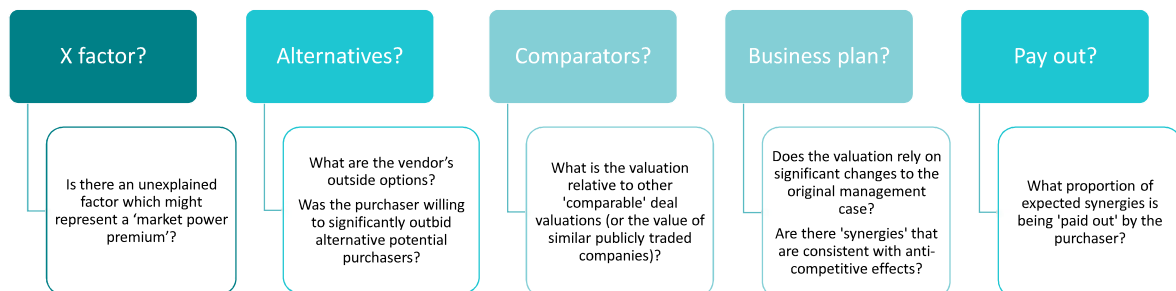
DEAL VALUATION

Multiple drivers of valuation



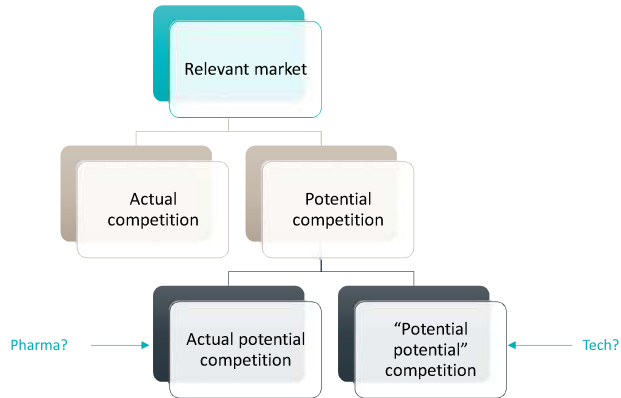
DEAL VALUATION

Is the actual valuation higher than any reasonable assessment of the net present value of incremental profit?

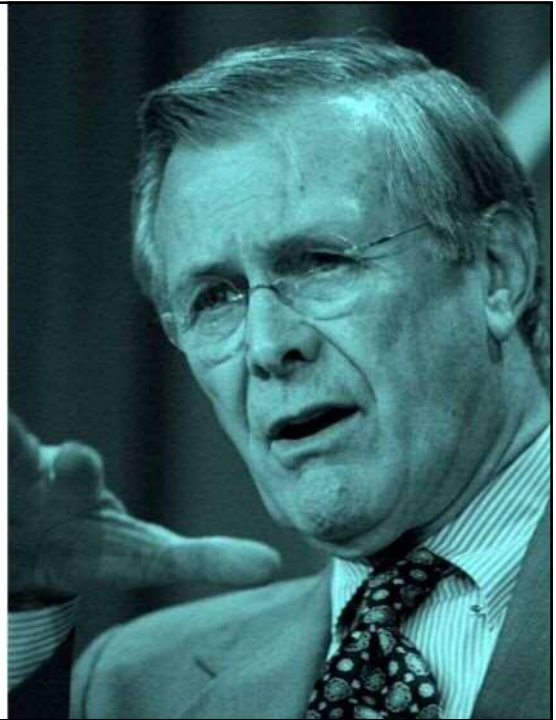


ACTUAL VS POTENTIAL COMPETITION

Known unknowns v unknown unknowns?



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ACTUAL POTENTIAL VS "POTENTIAL POTENTIAL" COMPETITION



ACTUAL POTENTIAL



POTENTIAL POTENTIAL

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DIFFERENCES IN TYPES OF POTENTIAL COMPETITION

	ACTUAL POTENTIAL	"POTENTIAL POTENTIAL"
Deal rationale	Higher likelihood of strategic acquisition, but other rationales possible	Multiple possible drivers, more likely to have plausible efficiency rationale
Valuation	High valuation more likely to involve 'strategic premium'	Valuation itself may be highly speculative, with multiple possible explanations for high valuation
Market definition	Clear(er) market definition	Less likely to fall within established market definition
Counterfactual	Less speculative - clear(er) innovation pathways	Requires more speculation about market developments, more focus on dynamic counterfactuals - no established innovation pathway
Theories of harm	More standard horizontal (or vertical) theories of harm	Horizontal theories more difficult as it is unclear whether products would compete - may rely on less conventional / conglomerate theories
Customer benefits	Less likely to result in customer benefits (that outweigh any lessening of competition)	Complementarity / integration into ecosystem more likely to result in customer benefits

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CASE EXAMPLE: PAYPAL / IZETTLE (2019)



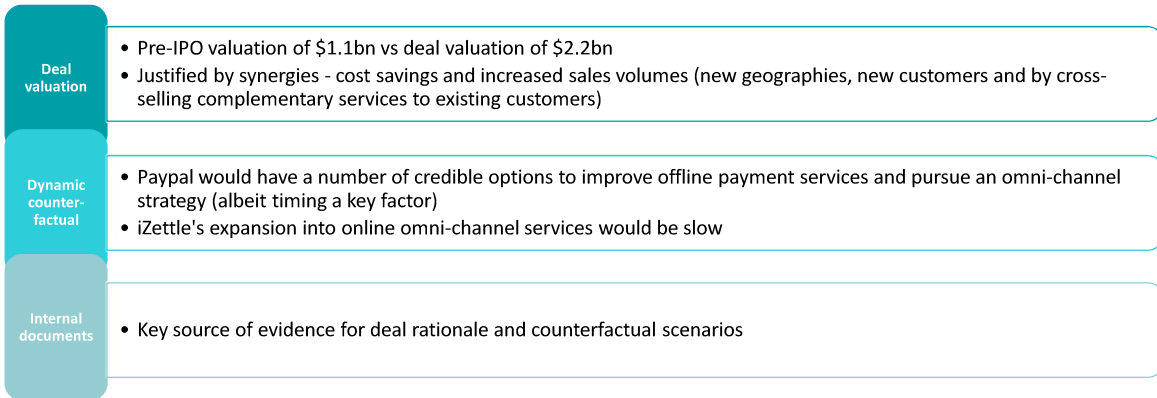
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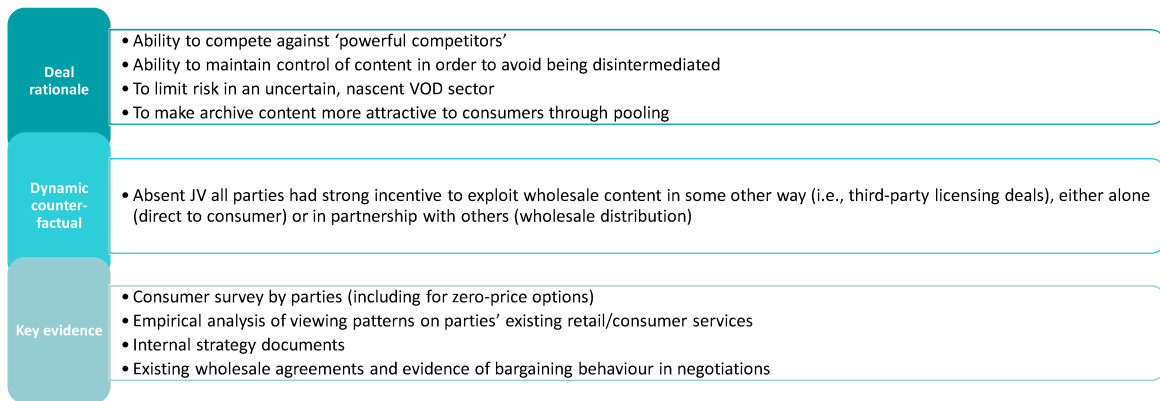
CASE EXAMPLE: PAYPAL / IZETTLE (2019)



CASE EXAMPLE: PROJECT KANGAROO (2009)



CASE EXAMPLE: PROJECT KANGAROO (2009)



WHAT DOES THIS MEAN?

No 'one-size-fits-all' framework for assessment of nascent acquisitions

A more nuanced approach is needed:

- **Deal rationale and valuation:** various potential drivers for this - not all deals that look like 'killer acquisitions' will necessarily result in harm to consumer (and, indeed, they may generate pro-consumer benefits)
- **Reliance on internal documents:** these need to be properly contextualised - statements may be highly speculative
- **Market testing:** comments by rivals and customers may require more robust evaluation
- **Counterfactuals:** greater focus on dynamic counterfactuals should also include a broader view of what new entry, expansion and product repositioning could look like.
- **Customer benefits:** ecosystem-driven deals may have more plausible efficiency rationales

Thank you

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ICN Mergers Working Group Acquisitions of Nascent Competitors January 21, 2020



The views expressed are those of the speaker and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

David Gonen
Bureau of Competition
Federal Trade Commission
Washington, D.C.

Nascent Acquisitions

- Transaction where key question is assessing future competitive significance of acquisition target
- Fact patterns fall along spectrum:
 - Target has clearly defined product in development pipeline
 - versus-
 - Target's commercial offering is evolving, exact future attributes unknown
- May implicate Section 7 of Clayton Act (merger statute) and/or Section 2 of Sherman Act (monopolization statute)

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FTC v. Mallinckrodt (2017)

- The FTC's complaint alleged that Questcor (Mallinckrodt's predecessor) held a monopoly over ACTH drugs with its drug Acthar, and illegally acquired the U.S. rights to develop the drug Synacthen Depot, in violation of Section 2.
- Product attributes were already known (Synacthen was synthetic ACTH drug used in Europe).
- Required assessing probability that Synacthen would make it through clinical trials and obtain FDA approval, and magnitude of impact it would have on Acthar.

Links: [complaint](#), [press release](#)

18

Illustrina / Pacific Biosciences (2019)

- The FTC’s complaint alleged that Illustrina held a monopoly in next-generation DNA sequencing (“NGS”), and sought to illegally acquire PacBio, in violation of Section 2.
- Complaint also alleged that the acquisition may substantially lessen competition in the NGS market by eliminating current competition and by preventing increasing future competition between Illustrina and PacBio, in violation of Section 7.
- PacBio already sells DNA sequencing platform; differentiated from Illustrina’s; exact specs of future iterations not set.
- Required assessing PacBio platform’s trajectory to compete with and impact Illustrina’s business in dynamic space.

Links: [complaint](#), [press release](#)

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Evidence

- Evidence that reveals the parties’ own subjective views of each other and of other competitors can be highly probative.
 - Parties’ internal documents
 - Parties’ statements to third parties (e.g., customers, investors)
- Evidence gathered from third parties is also useful.
 - Customers
 - Competitors
 - Analysts

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Amendments to Guidelines to Application of the
Antimonopoly Act concerning Review of Business
Combination and to Policies concerning Procedures of Review
of Business Combination

January 21, 2020

Yuji Tanaka

Japan Fair Trade Commission

21

- Amendments to “Application of the Antimonopoly Act concerning Review of Business Combination” (Merger Guidelines) and to “Policies concerning Procedures of Review of Business Combination” (Merger Procedures Policies) were published on December 17, 2019, after their public consultation procedures.
- The amendments were aimed for properly dealing with digital mergers in recent years.
- Today’s presentation is to focus on parts related to acquisitions of nascent competitors.
- The other parts of amendments and the tentative English versions of the Guidelines and policies are published on the following website.
<https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>

22

Effects of Competition on Vertical and Conglomerate Mergers

- **Views on Elimination of Possibility for New Entry into Market by Acquiring Company such as Start-up with Important Input Goods**

- Conglomerate merger between A and B with important input goods such as data
- B may be an important competitor for A if B enters a market where A conducts business solely or by a merger with other companies
- The conglomerate merger will eliminate possibility for B to enter the market and affect competition more greatly compared to a situation without such a merger

- **Views on Assessing Importance of Data for Competition**

In assessing importance of data for competition following points are taken into consideration.

- ① What kind of data are held or collected
- ② How much / how wide range of data are held or collected
- ③ How frequently data are collected
- ④ How much are data held or collected by one of parties related to improvement of the service, etc. provided by the other parties

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- **Review of Mergers with Large Consideration for Acquisitions**

Among certain mergers that do not meet notification standards, when consideration for acquisition is large and the merger will affect domestic consumers, JFTC reviews the merger.

- **Mergers Recommended to Consult with JFTC**

Among the above mergers to be reviewed, when the consideration for acquisition exceeds 40 billion yen (360 million US dollars) and the merger will affect domestic consumers such as satisfying one of the following ① to ③, the merger is recommended to consult with JFTC.

- ① business or R&D base of acquired company, etc. is located in Japan
- ② acquired company conducts sales activities targeting domestic consumers, for example, with Japanese websites or pamphlets
- ③ domestic sales of acquired company exceed 100 million yen (9 thousand US dollars)

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Thank you very much for your participation.

**Discussion on digital mergers continues in MWG
Workshop in Melbourne / Annual Conference in LA.
Look forward to seeing you there!**

**Comments/suggestions are welcome at [icn-
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