

# Comments on ACCC's Merger Assessment Guidelines

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## 1. Introduction

On March 20, the ACCC released draft Merger Assessment Guidelines for public consultation. The proposed guidelines classify mergers into three categories: mergers between direct competitors (horizontal mergers), mergers involving businesses that are not direct competitors (non-horizontal mergers). We will focus here on the second type, and more particularly on conglomerate mergers, drawing on our research on this topic.<sup>3</sup>

We begin with a brief overview of antitrust enforcement practices on conglomerate mergers, followed by a discussion of existing theories of harm. We conclude with some implications for the analysis of conglomerate mergers.

## 2. Overview of Conglomerate Mergers

Recent years have witnessed a new wave of mergers between firms operating in "adjacent" markets, where the merging companies target the same customer base by offering either complementary or independent products. These mergers are referred to as "Conglomerate Mergers" according to the 2008 European Non-Horizontal Merger Guidelines:

"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)."

The trend of conglomerate mergers is especially pronounced in the digital sector, with notable examples including:

- Facebook's \$22 billion acquisition of WhatsApp in 2014;
- Google's \$12.5 billion merger with Motorola Mobility in 2014;
- Dell's \$67 billion purchase of data storage company EMC in 2015;
- AT&T's \$48.5 billion acquisition of DIRECTV in 2015;
- Microsoft's \$26.2 billion acquisition of LinkedIn in 2016;
- Qualcomm's \$47 billion acquisition of NXP in 2018;

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<sup>3</sup> See Chen, Zhijun, and Patrick Rey (2023), "A Theory of Conglomerate Mergers", TSE Working paper n° 1447. Available at <https://www.tse-fr.eu/publications/theory-conglomerate-mergers>.

- Nvidia's \$6.9 billion merger with Mellanox in 2019;
- Google's \$2.1 billion merger with Fitbit in 2020;
- Microsoft's \$19.7 billion acquisition of Nuance in 2021;
- Amazon's \$8.5 billion purchase of MGM in 2022.

Outside the digital realm, significant conglomerate mergers include:

- Airbus Safran Launchers (ASL)/Arianespace (2016, €150 million, space launchers and services),
- Luxottica/Essilor (2018, €46 billion, eyewear frames and lenses),
- Kinetics/Exyte (2024, design and construction for high-tech industries).

These mergers often involve market leaders in highly concentrated markets, raising competition concerns. However, competition authorities on either side of the Atlantic have long held differing views on the assessment of conglomerate mergers.

In the U.S., the influential critique of the Chicago School has significantly shaped perspectives on market foreclosure, leading to the belief that conglomerate mergers are generally efficiency-driven and unlikely to harm competition.<sup>4</sup> Consequently, no conglomerate merger has been challenged in the U.S. since the 1970s.

Reflecting on the U.S. Department of Justice's approval of the General Electric/Honeywell merger, then Deputy Assistant Attorney General William Kolasky remarked that competitive harm theories from the 1960s had "faded away." He noted, "After fifteen years of painful experience with these now long-abandoned theories, the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. The U.S. agencies simply could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise prices and restrict output."<sup>5</sup>

In contrast, the European Commission (EC) voiced concerns that conglomerate mergers may create or reinforce a dominant position through "portfolio effects." The EC was particularly concerned about the potential for a merged entity to exploit a broader product range through practices like tying or bundling. This concern led the Commission to block the Aerospatiale-Alenia and de Havilland merger in 1991, marking its first prohibition decision following the adoption of a merger regulation in 1989. Similar concerns resulted in the prohibition of two other major mergers: GE/Honeywell in 2000 and Tetra Laval/Sidel in 2001.

In the absence of alternative theories of competitive harm, competition authorities often rely on traditional foreclosure theories. However, in many instances, it has proven difficult to demonstrate conclusively that the merging firms had both the incentive and the capacity of excluding competitors. In GE/Honeywell, the Court of First Instance (CFI) upheld the EC decision but on non-conglomerate grounds. And in Tetra Laval/Sidel, the CFI, confirmed by

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<sup>4</sup> The Chicago School's argument, often referred to as the "single monopoly profit" theory, posits that a monopolist has no incentive to extend its market power into a competitive complementary market---be it vertical or adjacent---as it can already capture all available profit in the monopolized market. See the influential statement by Robert Bork (1978), "The Antitrust Paradox", New York: Free Press, page 246.

<sup>5</sup> Kolasky, William (2002), "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels," *George Mason Law Review*, 10: 533.

the European Court of Justice (ECJ), overturned the EC decision. In its ruling, the ECJ emphasized that "Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned [...] the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects" (Tetra Laval, 2002, E.C.R II-4381, p. 155). This ECJ judgment effectively prevented the European Commission from challenging conglomerate mergers for two decades.

Recently, however, policy shifts have brought the EU and U.S. agencies closer in their stance on conglomerate mergers, leading to increased scrutiny and several high-profile investigations. In 2023, the European Commission blocked the Booking/eTraveli merger, citing concerns that it would strengthen Booking's dominance in the hotel Online Travel Agency market, potentially raising costs for hotels and consumers. Meanwhile, the Federal Trade Commission has filed a complaint to undo Facebook's acquisition of WhatsApp and Instagram. This trend is also evident in the revised 2023 Merger Guidelines, which emphasize leverage and entrenchment theories of harm.

### **3. Conglomerate Effects: Theories of harm**

#### *3.1 Horizontal foreclosure*

Traditionally, conglomerate mergers between suppliers of complementary products have been seen as efficiency-enhancing in the economics literature,<sup>6</sup> building on Cournot's (1838) analysis of the monopoly supply of complements.<sup>7</sup> A merger between monopolies supplying complementary goods can eliminate double marginalization, leading to lower prices.

When the merging firms operate in oligopolistic markets, however, the merger confers a pricing advantage to the conglomerate and affects competition. Nalebuff (2000) and Choi (2008) study in this context the implications of pure and mixed bundling, respectively.<sup>8</sup> In both instances, the merger eliminates double marginalization for the bundle, which is priced more aggressively and gains market share at the expense of the rivals. This intensifies competition and results in lower prices both for the bundle and for the rivals' products, but may also raise stand-alone prices for the conglomerate. As a result, mix-and-matchers can be harmed. Furthermore, the reduction in rivals' market share may induce exit or weaken their investment incentives, thereby lessening competition in the future.

When evaluating the competitive harm of conglomerate mergers, competition authorities often focus instead on foreclosure theories, where a firm dominant in one market seeks to exclude rivals in adjacent markets through practices such as tying or degraded interoperability (in the

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<sup>6</sup> See, e.g., Church (2008) for a detailed survey of the economics of conglomerate mergers. Church, Jeffrey (2008), "Conglomerate Mergers," *Issues in Competition Law and Policy*, Chap. 62.

<sup>7</sup> Cournot, Antoine-Augustin (1838), *Recherches sur les principes mathématiques de la théorie des richesses*, Paris: Hachette.

<sup>8</sup> Nalebuff, Barry (2000), "Competing Against Bundles," in *Incentives, Organization, and Public Economics*, edited by P. Hammond and G. Myles. Oxford: Oxford University Press.

Choi, Jay-Pil (2008), "Mergers with Bundling in Complementary Markets", *Journal of Industrial Economics* Vol 56 (3): 553-577.

case of complements).<sup>9</sup> Whinston (1990) shows that tying independent products allows a monopolistic incumbent to commit to a more aggressive response to entry, thereby deterring potential competitors. Additionally, with heterogeneous preferences for the tying product, tying can also serve as an ex post optimal strategy in the event of entry.<sup>10</sup> Carlton and Waldman (2002) show that tying complementary products can be optimal for an incumbent if entry into a secondary market could facilitate future entry into the primary market.<sup>11</sup> Similarly, Choi and Stefanadis (2001) argue that tying can discourage rivals from investing and innovating.<sup>12</sup> In the above literature, however, the equilibrium outcome of foreclosure critically depends on the dominant firm's ability to commit to tying.

### 3.2 Potential effects of exploitation

An important challenge in merger assessment is to balance efficiency gains and competitive harm. Regarding the former, economic analyses of horizontal and vertical mergers typically focus on *supply-side* synergies. Although conglomerate mergers can also deliver such synergies (e.g., through the elimination of double marginalization), they can also yield substantial *demand-side* synergies, often referred to as "consumption synergies". These can arise from technological integration or commercial packaging, for instance, or from one-stop shopping, which reduces transaction costs for consumers. Unlike supply-side synergies, which are often uniform across consumers, consumption synergies are typically customer/consumer-specific.

For example, in *Aerospatiale-Alenia/de Havilland*, the European Commission noted that the merger would enable airlines to benefit from fleet commonality, thereby reducing costs associated with maintenance, spare parts, and pilot certification and training. In *AT&T/DIRECTV*, a submission by Michael Katz emphasized various consumption synergies (e.g., single installation for Internet and pay-tv services) and one-stop shopping benefits (e.g., single point of contact for billing and customer service), and another submission by Steve Berry and Philipp Haile emphasized the heterogeneity of these synergies across consumers.<sup>13</sup>

Building on these observations, Chen and Rey (2023) propose a new theory of harm, highlighting demand-side synergies over supply-side efficiencies, which focuses on exploitation rather than exclusion.

The simple intuition is that demand-side synergies generate efficiency gains but also create or exacerbate product differentiation between the merged firm's offer and its rivals'. This, in turn,

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<sup>9</sup> For a detailed survey of the foreclosure literature, see Rey and Tirole (2007). Rey, Patrick, and Jean Tirole (2007), "A Primer on Foreclosure," *Handbook of Industrial Organization*, vol. III, Mark Armstrong and Rob Porter eds, North Holland, 2145-2220.

<sup>10</sup> Whinston, Michael (1990), "Tying, Foreclosure, and Exclusion", *American Economic Review*, 80:837-859.

<sup>11</sup> Carlton, Dennis W., and Michael Waldman (2002), "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries", *Rand Journal of Economics* 33 (2):194-220.

<sup>12</sup> Choi, Jay-Pil, and Christodoulos Stefanadis (2001), "Tying, Investment, and the Dynamic Leverage Theory," *Rand Journal of Economics* 32(1):52-71.

<sup>13</sup> See Katz, Michael (2014), "An Economic Assessment of AT&T's proposed Acquisition of DIRECTV," available at <https://ecfsapi.fcc.gov/file/7521303307.pdf>, and Berry, Steven, and Philip Haile (2014), "Quantitative Analysis of an AT&T-DirectTV Merger: Additional Discussion of Modeling Choices, Data, and Results", available at <https://ecfsapi.fcc.gov/.le/7522909437.pdf>.

can weaken competition. This not only enables the conglomerate to sell the bundle at a premium, but may also allow rivals to raise the prices of their stand-alone offerings.

To see this, consider an admittedly stylised scenario with two markets, characterized by independent demands, in which fierce competition among multiple homogeneous firms initially drives prices down to the marginal cost. Suppose now that a conglomerate merger enables the resulting entity to offer a value-enhancing bundle (e.g., by allowing customers to benefit from a single installation, as in AT&T/DIRECTV). After the merger, Bertrand competition among the remaining stand-alone firms keeps prices at marginal cost. Consequently, the merger does not harm any consumers, while benefiting those favouring the bundle -- regardless of whether the conglomerate engages in any form of commercial tying or bundling.

When markets are initially concentrated so that post-merger the conglomerate faces a single rival, in the absence of pure bundling or tying, Bertrand competition for mix-and-matchers still drives stand-alone prices down to cost. By contrast, opting for pure bundling confers market power to the rival, who becomes the sole alternative for mix-and-match customers. This results in increased stand-alone prices, adversely affecting those not opting for the bundle and potentially diminishing the total consumer surplus.<sup>14</sup> It follows that a ban on tying and pure bundling constitutes an appropriate remedy in such scenario.<sup>15</sup> Finally, when markets are not only concentrated but also imperfectly competitive, due to product differentiation, the conglomerate has incentives to raise its stand-alone prices. This again gives additional market power to the rivals and harms mix-and-match consumers -- even in the absence of any commercial tying or bundling.<sup>16</sup> In that case, prohibiting the merger (and not only tying or pure bundling) appears to be the only way to prevent the competitive harm.

#### **4. Comments on Guidelines**

In assessing mergers, competition authorities must consider both the possible pro-competitive effects stemming from efficiency gains and the potential anti-competitive effects.

Regarding possible efficiency benefits, the draft guidelines mention the elimination of double marginalization; they could clarify that this particular benefit may be relevant for both vertical and conglomerate mergers (and not for horizontal ones).

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<sup>14</sup> The impact on total consumer surplus depends on the distribution of synergies. For example, when the density distribution is weakly decreasing, the merger reduces total consumer surplus.

<sup>15</sup> For example, when Eurotunnel, the provider of rail transportation services between France and the UK through the Channel Tunnel, proposed to acquire Sea France, a provider of ferry transportation services across the Channel, the French Autorité de la Concurrence approved the merger but imposed an unbundling requirement. This stipulation prevented Eurotunnel from offering combined rail and ferry service packages. The British authorities---the Office of Fair Trading and the Competition Appeals Tribunal, subsequently followed by the newly established Competition and Markets Authority---disagreed with the clearance decision, but concurred on the necessity to prohibit bundling practices.

<sup>16</sup> As stand-alone products become increasingly differentiated, the conglomerate raises further its stand-alone prices and eventually ceases de facto to sell its products on a stand-alone basis, even without any formal commitment to tying or pure bundling.

In the specific context of conglomerate mergers, another commonly recognized type of efficiency gain involves demand-side (or consumption) synergies that directly benefit consumers. These synergies may arise from:

- technological integration or commercial bundling, and
- one-stop shopping benefits that reduce transaction costs for consumers.

Regarding potential anti-competitive effects, conglomerate mergers may give rise to three types of competitive harm.

#### *4.1 Non-coordinated effects: foreclosure*

A typical concern with conglomerate mergers is that they may allow the merged firm to leverage a strong position in one market to gain advantage in another. This can occur through various practices such as, for example:

- making products available only as a bundle (pure bundling),
- conditioning the sale of one product on the purchase of another (tying),
- integrating products within an ecosystem (technical integration), or
- degrading the compatibility with rivals' products (interoperability).

While tying and bundling are common business practices that often enhance efficiency and consumer value, under certain conditions they may reduce actual or potential competitors' ability or incentive to compete. To evaluate potential foreclosure effects, the competition authority should examine the merged firm's ability and incentive to foreclose rivals, using an analytical framework such as those mentioned in Section 3.1 above.

#### *4.2 Non-coordinated effects: exploitation*

Though demand-side synergies yield efficiency gains, they may also give the merged entity a competitive edge that weakens market competition and increases the risk of consumer exploitation. A cross-market merger forms a conglomerate capable of offering a bundled product, introducing consumption synergies that vary among consumers. These synergies allow the merged entity to sell the bundle at a premium, while the heterogeneity in consumption synergies introduces a product differentiation effect that reduces competition between the bundle and stand-alone offerings, ultimately resulting in higher prices.

To assess potential exploitative effects, the authority should examine the merged firm's ability and incentive to generate additional market power, using an analytical framework such as the one outlined in Section 3.2 above. This framework highlights several factors that may increase the likelihood of the merger resulting in substantial additional market power, including:

- when competition is already weak pre-merger (e.g., because markets are concentrated, or firms are substantially differentiated);
- when the value of consumption synergies is heterogeneous among consumers, which may further exacerbate product differentiation;
- when the merged entity either commits to pure bundling or *de facto* engages in pure bundling.

#### *4.2 Coordinated effects*

In some cases, conglomerate mergers may facilitate anti-competitive coordination, even absent any explicit agreement or concerted practice. For instance, conglomerate mergers may expand the scope of multi-market contact, increasing the effectiveness of coordination mechanisms and the ability to enforce tacitly agreed market outcomes.