Annex

Excerpt from the Commission Notice "Guidelines on the assessment of horizontal mergers under the EC Council Regulation on the control of concentrations between undertakings"; Section III (Official Journal, C 31/03, 05.02.2004).

III. MARKET SHARE AND CONCENTRATION LEVELS

14 Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

15 Normally, the Commission uses current market shares in its competitive analysis[13]. However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion[14]. Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares[15]. Historic data may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether firms have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth[16].

16 The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI)[17]. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market[18]. The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best

---

13 As to the calculation of market shares, see also Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997 OJ C 372/3, paragraphs 54-55.

14 See e.g. Case COMP/M. 1806 – Astra Zeneca/Novartis, points 150 and 415.

15 When relevant, market shares may be adjusted, in particular, to account for controlling interests in other firms (See e.g. Case IV/M.1383 - Exxon/Mobil, points 446-458; Case COMP/M.1879 – Boeing/Hughes, points 60-79; Case COMP/JV 55 - Hutchison/RCPM/ECT, points 66-75), or for other arrangements with third parties (See, for instance, as regards sub-contractors, Commission Decision 2001/769/EC in Case COMP/M. 1940 – Framatome/Siemens/Cogema, OJ L 289, 6.11.2001, p.8, point 142).

16 See, e.g. Case COMP/M. 2256 - Philips/Agilent Health Care Technologies, points 31-32, and Case COMP/M. 2609 - HP/Compaq, point 39..

17 See e.g. Case IV/M. 1365 – FCC/Vivendi, point 40; Case COMP/JV 55 - Hutchison/RCPM/ECT, point 50. If appropriate, the Commission may also use other concentration measures such as, for instance, concentration ratios, which measure the aggregate market share of a small number (usually three or four) of the leading firms in a market.

18 For example, a market containing five firms with market shares of 40%, 20%, 15%, 15%, and 10%, respectively, has an HHI of 2550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$). The HHI ranges from close to zero (in an atomistic market) to 10000 (in the case of a pure monopoly).

to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the "delta") is a useful proxy for the change in concentration directly brought about by the merger[19].

Market share levels

17 According to well-established case law, very large market shares - 50% or more - may in themselves be evidence of the existence of a dominant market position[20]. However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50% after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40% and 50%[21], and in some cases below 40%[22], to lead to the creation or the strengthening of a dominant position.

18 Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25%[23] either in the common market or in a substantial part of it[24].

HHI levels

19 The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1000. Such markets normally do not require extensive analysis.

20 The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:

---

19 The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30% and 15% respectively would increase the HHI by 900 ($30\times15\times2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by $2ab$.

20 Case T-221/95, Endemol v Commission, [1999] ECR II-1299, paragraph 134, and Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraph 205. It is a distinct question whether a dominant position is created or strengthened as a result of the merger.

21 See e.g. Case COMP/M. 2337 – Nestlé/Ralston Purina, points 48-50.

22 See e.g. Commission Decision 1999/674/EC in Case IV/M. 1221 – Rewe/Meinl, OJ L 274, 23.10.1999, p. 1, points 98-114; Case COMP/M.2337 – Nestlé/Ralston Purina, points 44-47.

23 The calculation of market shares depends critically on market definition. It must be emphasised that the Commission does not necessarily accept the parties' proposed market definition.

24 Recital 32 of the Merger Regulation. However, such an indication does not apply to cases where the proposed merger creates or strengthens a collective dominant position involving the “undertakings concerned” and other third parties (see Joined Cases C-68/94 and C-30/95, Kali & Salz, [1998] ECR I-1375, paragraphs 171 et seq; and Case T-102/96, Gencor v Commission, [1999] ECR II-753, paragraphs 134 et seq).

(a) a merger involves a potential entrant or a recent entrant with a small market share;

(b) one or more merging parties are important innovators in ways not reflected in market shares;

(c) there are significant cross-shareholdings among the market participants[25];

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;

(e) indications of past or ongoing coordination, or facilitating practices, are present;

(f) one of the merging parties has a pre-merger market share of 50% of more[26].

21 Each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.

---

25 In markets with cross-shareholdings or joint ventures the Commission may use a modified HHI, which takes into account such share-holdings (see e.g. Case IV/M.1383 - Exxon / Mobil, point 256).

26 See paragraph 17 above.