

## CHAPTER 3 - UNILATERAL EFFECTS<sup>1</sup>

### OVERVIEW

This Chapter examines the types of horizontal unilateral effects identified in the guidelines, analyses the use of safe-harbours, describes an emerging seven-strand approach for the appraisal of horizontal mergers falling outside any strong safe-harbours, and discusses the estimation of market shares and market concentration. The Chapter also identifies the grounds on which guidelines tend to contemplate prohibition of vertical or conglomerate mergers.

### I. INTRODUCTION

1.1 Unilateral effects arise when the merged group is able profitably to reduce value for money,<sup>2</sup> choice or innovation<sup>3</sup> through its own acts without the need for a co-operative response from competitors.<sup>4</sup> This Chapter examines the treatment of horizontal unilateral effects (i.e. unilateral effects arising when the merger occurs between companies actually or potentially active in the same economic market) and vertical and conglomerate unilateral effects (both of which involve the leveraging of market power from one market into a second; in the case of vertical effects those markets are vertically connected, and in the case of conglomerate effects they are not). In analysing horizontal unilateral effects, the opening parts of this Chapter examine: the types of unilateral effects identified in the guidelines; the use of safe-harbours within which mergers are immune from challenge or are presumed unlikely to be challenged; the methodology in cases falling outside any safe-harbours; and the approach of antitrust authorities to the estimation of market shares and market concentration.

1.2 Although the term "unilateral effects" is widely adopted, its use is not universal. In particular, the UK OFT Guidelines and the European Commission Guidelines use the term "non-coordinated effects" in place of "unilateral effects" to

emphasise that the issue in unilateral effects analysis is not simply whether the merged group will increase its prices following the transaction, but also whether other firms will find it profitable to raise their prices (because the higher prices of the merged group's products will cause some customers to want to switch to rival products thereby increasing rivals' demand).<sup>5</sup>

## **II. THE TYPES OF HORIZONTAL UNILATERAL EFFECTS IDENTIFIED IN THE GUIDELINES**

2.1 Most of the merger guidelines which have been surveyed provide that mergers will be challenged if they are likely to result in unilateral effects (although they vary in the types of unilateral effects identified).

(a) Market shares as a prima facie indicator of likely unilateral effects

2.2 The New Zealand Guidelines are reflective of a reasonable consensus in stating: "The greater the aggregation of market shares in the hands of parties to an acquisition, the greater the likelihood that the acquisition would lead to" competition concerns.<sup>6</sup> However, the guidelines generally<sup>7</sup> indicate that an analysis of market shares is not in itself determinative of whether unilateral effects will arise as a result of a transaction, and it is necessary also to carry out a broader examination of the way in which the market operates in the light of the factors detailed in section IV below.

(b) Differentiated products and capacity constraints

2.3 In cases involving the merger of smaller market participants in an oligopolistic market, the analysis of possible unilateral effects is more complex. Decisions to intervene in a merger on such grounds may also be more controversial, since potentially significant competitors will remain in the market following the merger. In these circumstances, the concern of the antitrust authorities is that the merger will eliminate a particularly important competitive constraint on the

merging parties, creating an incentive for the merged group to raise its prices, and that it will potentially reduce competitive restraints on other competitors. Such unilateral effects may arise through a variety of mechanisms, but the guidelines surveyed which discuss unilateral effects in detail tend to focus in particular on two circumstances.<sup>8</sup>

2.4 First, mergers of suppliers of close substitutes in markets for differentiated products (i.e. products which consumers perceive to have different attributes from rival products). One important part of an examination of such issues is to assess whether the competition between the two parties has been important and would be unlikely to be replaced. The guidelines surveyed tended to identify as factors relevant for consideration:

- (a) whether the merging parties' products are particularly close substitutes for one another, in terms of their product attributes, geographic location, or perceived quality or reliability;
- (b) whether the products supplied by rivals are close substitutes for the products supplied by the merging parties;
- (c) whether actual rival suppliers would have the incentive and ability to reposition their products as closer substitutes for the merged group's products following the transaction and whether potential rival suppliers would have the incentive and ability to enter the market as suppliers of close substitutes for the merged group's products; and
- (d) whether the merger results in efficiency gains of a magnitude which creates an incentive on the merged group to increase output (thereby reducing price).

2.5 Secondly, unilateral effects may arise in cases when the merging parties' rivals face important capacity constraints.<sup>9</sup> The merger may enable the merged group

profitably to reduce output, leading to increases in prices if entry or expansion would not be likely and sufficient to counteract any attempt by the merged group to implement such a strategy.

- 2.6 In such cases (involving product differentiation or capacity constraints), the value of market shares and measures of market concentration in predicting harm may be limited. In the context of differentiated products, market definition may become a more subjective exercise: any market may exclude products which are "close" substitutes or include products which are more "distant" substitutes. In particular, there is a concern that focusing on market shares can lead antitrust authorities into the "0/1 fallacy" under which all goods or services which are included in the market are treated as being of equal weight (as all count equally in the calculation of market shares) whereas all goods or services which are excluded from the market are treated as having no weight (as they do not count in the calculation of market shares).

(c) Scope for applying unilateral effects analysis

2.7 Unilateral effects analysis is most commonly applied in mergers involving existing competitors. In addition, some of the guidelines provide that unilateral effects analysis may also be applied:<sup>10</sup>

(a) in transactions involving acquisitions of potential, rather than existing, competitors; and

(b) in transactions which create or strengthen market power on a procurement market (i.e. transactions raising concerns about monopsony, as opposed to monopoly, power).<sup>11</sup>

### III. THE USE OF SAFE-HARBOURS

3.1 Any antitrust authority must determine whether there are certain categories of merger which are presumed not to raise substantive concerns and therefore merit clearance without the need for an in-depth analysis of the market and the effects of the transaction. There are three possible approaches. First, a "strong safe-harbour" arises when an antitrust authority adopts an absolute rule that transactions falling below certain thresholds will not be prohibited.<sup>12</sup> Secondly, a "weak safe-harbour" arises when there is a presumption that transactions falling below certain thresholds will not be prohibited, but the presumption may be rebutted.<sup>13</sup> Thirdly, several antitrust authorities make no use of safe-harbours.<sup>14</sup>

3.2 Safe-harbours are invariably constructed around market shares, the Herfindahl-Hirschmann ("HHI") concentration index,<sup>15</sup> or concentration ratios (e.g. CR4, which measures the proportion of the market which is supplied by the largest four companies). Safe-harbours may be set at a higher level in relatively smaller economies which are more prone to concentration.<sup>16</sup>

3.3 It is instructive to consider whether safe-harbours are advisable. Their benefits include conserving the resources of the authority for use in cases which are more likely to result in widespread and substantial consumer harm, reducing the notifying parties' costs, and increasing predictability in the merger control process. Further, it is impossible for antitrust authorities to predict the effects of mergers with certainty (suggesting that a very detailed appraisal of a merger may be no more reliable than a more simplistic approach using rules which are fairly simple and straightforward to administer). However, we are sceptical about the use of strong safe-harbours, conferring an absolute immunity from challenge, for two reasons. First, the safe-harbours we have identified have been based on market share or concentration data, both of which depend crucially on market definition, which is not an exact science and sometimes raises very difficult issues. The difficulty in granting an immunity based on market shares or concentration ratios is that an error in market definition cannot be remedied at the stage of appraising the merits of the case because the effect of granting an immunity is to remove the need for a detailed appraisal. Errors in market definition may therefore result in serious harm to consumers.<sup>17</sup> Secondly, the granting of an immunity from challenge deprives the antitrust authority of an opportunity properly to investigate issues which may cause substantial harm to consumer welfare. For example, as noted above, a merger between suppliers of differentiated products may result in substantial increases in price even if the merged group has relatively low market shares. It follows in our view that market shares and concentration ratios are not wholly reliable indicators of the competitive effects of a transaction and they are better used as indicators of the authority's likely response (i.e. as a weak safe-harbour) rather than as a source of immunity (i.e. a strong safe-harbour).<sup>18</sup>

#### **IV. METHODOLOGY IN CASES FALLING OUTSIDE ANY STRONG SAFE-HARBOURS**

4.1 In examining the treatment by the guidelines surveyed of unilateral effects in cases falling outside any strong safe-harbours, we detected, to an extent, an emerging consensus around the use of seven common "strands". The ordering

of the seven strands is not significant, except that the guidelines tend to contemplate that market definition is the first step in the analysis. Indeed, the remaining strands are generally considered together and in fact overlap.

- 4.2 The first strand is to define the relevant product and geographic markets. This issue is addressed in Chapter 1.
  
- 4.3 The second strand of the analysis involves assessing the positions of the merging parties in such markets. In examining this issue, the guidelines tend to focus on the market share of the combined group, the increment in market share arising from the transaction, and the difference between the market share of the combined group and its next-largest competitor.<sup>19</sup> The German Guidelines identify a rebuttable presumption of anti-competitive harm arising from the merger if the post-merger market share exceeds 33 per cent.<sup>20</sup> In addition, the German Guidelines<sup>21</sup> provide that economies of scale or scope, product "range", privileged access to facilities, technologies or suppliers, financial or brand strength, and distributional advantages are all factors that may indicate that the merged group will hold a "paramount market position" and thus make a merger subject to challenge. As part of an examination of the positions of the merging parties, some of the guidelines also indicate that the authorities will consider whether qualifying efficiency gains will eliminate, or reduce the extent of, the merged group's incentive to raise prices. This issue is discussed separately in Chapter 5.
  
- 4.4 The third strand involves analysing the positions of competitors to the merged group. It is necessary to consider whether the competitors will be effective to prevent the merged group from raising price, which depends in particular on the extent to which competitors' products are regarded by consumers as substitutes for the merging parties', whether there are any constraints on substitution and the ability of competitors to expand output or reposition their products to win business from the merged group.

- 4.5 The fourth strand is to examine market dynamics. For example, markets in which contracts are awarded through competitive tenders may<sup>22</sup> be highly competitive, even if there are relatively few suppliers competing for the business.
- 4.6 The fifth strand involves examining new entry. Our review of the guidelines suggested that there is reasonable consensus that possible new entry ought to be taken into account as a factor pointing towards approving a transaction if the entry would be likely, timely and sufficient in magnitude and scope to counteract the anti-competitive effects which would otherwise result from the merger.<sup>23</sup> The principle underlying the consensus is that if attempts by the merged group to exercise market power would be defeated by new entry into the market, then the transaction will not result in long-term detriments to consumer welfare and ought therefore to be approved. This issue is dealt with in detail in Chapter 4 and is not considered further in this Chapter.
- 4.7 The sixth strand is to examine the role of buyer power. The issue is whether the merged group's customers will be able to take steps which have the effect of preventing the merged group from profitably raising its prices.<sup>24</sup> This is not a function of whether the customers are "large". Indeed, in the absence of credible alternatives to the merged group or other sources of leverage, a customer, no matter how large, may not enjoy buyer power. Rather, the question of whether customers have buyer power depends on whether they can credibly threaten to take steps which render increases in price unprofitable. Such steps typically involve switching or threatening to switch to other suppliers or other products, sponsorship of new entry, starting own production, delaying purchases or refusing to buy other products of the supplier.
- 4.8 The seventh strand is to determine whether any antitrust concerns are caused by the merger. This issue is commonly addressed by identification of a "counter-factual".<sup>25</sup> This involves predicting the way in which the market would have operated if the merger did not occur. Commonly, the counter-factual will

be the way in which the market operates prior to the merger. However, this is not inevitable, for example if suppliers are likely to enter or exit from the market if the merger does not occur. The counter-factual can then be compared with the predicted post-merger market operation. The differences between the two scenarios are caused by the merger.

4.9 Some guidelines contain "materiality" thresholds which must be crossed before a transaction may be prohibited on the grounds that it is likely to give rise to unilateral effects.<sup>26</sup> For example, the Canadian Guidelines include an explicit requirement that harmful effects are "substantial" before the government will intervene. Price increases will be considered "substantial" when "the price of the relevant product is likely to be materially greater, in a substantial part of the relevant market ... and where this price differential would not likely be eliminated within two years."<sup>27</sup>

4.10 The guidelines vary in the extent to which they state clearly that:

- (a) unilateral effects may be a basis for challenging a merger involving potential, rather than current, competitors;
- (b) unilateral effects may be a basis for challenging a merger that creates procurement power (i.e. raises concerns about monopsony, as opposed to monopoly, power); and
- (c) a failing firm defence may apply.

The guidelines also vary in the extent to which they acknowledge that in markets for differentiated products, market shares may not accurately reflect the extent of market power and the extent to which the products of the merging firms are close substitutes.

## V. THE ESTIMATION OF MARKET SHARES AND MARKET CONCENTRATION

5.1 This section examines the best way of estimating market shares and market concentration, after relevant product and geographic markets have been defined. (For a discussion of the definition of relevant markets, see Chapter 1.) This is important because pre- and post-merger market shares and/or measures of market concentration are estimated in the vast majority of merger cases, are used in applying safe-harbours, and are often used as an important step in the analysis of the merged group's market power. The way in which market shares are estimated may have as much practical impact on the data obtained as the definition of the relevant market. However, whilst the majority of the guidelines surveyed deal with market definition in detail, there is relatively little discussion of the proper means of estimating market shares and concentration ratios.

5.2 The estimation of market shares and market concentration raises five issues.

- (a) What is the objective in estimating market shares or concentration ratios? (Once the objective is clear, it ought to be easier to choose between different options for the estimations.) The New Zealand Guidelines suggest that, other things being equal, when there is a choice of market share measurements, the criterion to be preferred is "the measure amongst those available that yields the highest level of market share for the combined entity."<sup>28</sup> An alternative view is that the objective of market share and concentration data is to provide the best initial indication of (respectively) the merged group's prospective market power (i.e. its ability following the transaction profitably to raise prices beyond the pre-merger prevailing level), the market power of competitors and the structure of the market, remembering that the information is no more than an indication and it is always necessary also to examine the other factors mentioned in section IV above in order to reach any concluded view on the way that the market operates.

- (b) What criteria should be used to measure market share? A wide range of criteria is available including<sup>29</sup> value (particularly for differentiated goods<sup>30</sup>), volume (particularly for homogeneous products) and capacity (particularly for homogeneous products when customers can readily switch supplier and suppliers compete on the basis of output<sup>31</sup>), but also the numbers of credible bidders (bidding markets<sup>32</sup>), uncommitted reserves (for cases involving finite resources), installed base and firm orders (when incumbency affects future sales, e.g. supplies of expensive durable goods such as aircraft) and combinations of two or more of these criteria. There are suggestions in the guidelines that the choice of criterion for measuring market shares will depend on which provides the best indication of the merged group's market power (i.e. the best indicator of its future competitive significance<sup>33</sup>) given the theory of competitive harm which is being investigated and the characteristics of the market.
- (c) What period should be used in calculating market shares? The consensus seems to be that a one year period is ordinarily appropriate, but that longer periods may be adopted in particular in the case of markets involving small numbers of transactions per year to ensure that the data are not distorted.<sup>34</sup>
- (d) Should captive production (i.e. production for consumption within the group<sup>35</sup>) be included in the market share calculations?<sup>36</sup> There are three options. The first is to adopt a general rule excluding captive production on the grounds that companies engaged in self-supply are generally unwilling to sell in the market because doing so may leave unsatisfied internal demand and may require investment in distribution and marketing systems.<sup>37</sup> The second is to include such sales to the extent<sup>38</sup> that they would be diverted to third party sales in the event of a SSNIP.<sup>39</sup> The third is to include self-supply in the market to the extent that such inclusion accurately reflects its competitive significance (which might arise if

captive production would be diverted to third party sales in the event of a SSNIP or if captive producers might influence market operation by increasing production both of the relevant product and the downstream output).

- (e) What criteria should be used to estimate market concentration? The antitrust authorities whose guidelines have been surveyed invariably use HHI data or concentration ratios in estimating market concentration. HHI data arguably provides richer and less arbitrary information than concentration ratios, in particular providing information relating to the whole market (rather than just the largest firms), accounting for the relative sizes of the larger firms and avoiding arbitrariness (e.g. if CR4 is used then a merger between the fifth and sixth largest firms may result in no change in the index, whereas a merger between the fourth and tenth largest will do so).<sup>40</sup>

## VI. VERTICAL AND CONGLOMERATE EFFECTS

### (a) Introduction

- 6.1 This section considers the treatment of "vertical" and "conglomerate" effects in merger guidelines. Vertical mergers are those between undertakings operating at different functional levels of the supply chain, such as wholesale and retail (although one or more of the undertakings may, of course, operate at more than one such functional level). Conglomerate mergers are those between undertakings operating in different markets, when such markets are neither upstream nor downstream of one another.<sup>41</sup>
- 6.2 Many of the guidelines surveyed deal with vertical issues and some deal with conglomerate issues.
- 6.3 In general, the guidelines tend to recognise that the justification for intervening to prohibit vertical and conglomerate mergers is weaker than for horizontal mergers (because horizontal mergers generally<sup>42</sup> eliminate actual competition whereas vertical and conglomerate mergers do not).<sup>43</sup> For example, the UK Competition Commission Guidelines note that in general conglomerate mergers do not raise competition issues (whilst recognising several scenarios in which they could be problematic).<sup>44</sup> By contrast, the German Guidelines adopt a more conservative position, assuming, in the case of vertical mergers, that "foreclosure effects ... are likely, for example, when important competitors are dependent on the supply or demand from the vertically integrated undertaking".<sup>45</sup>
- 6.4 Further, several of the guidelines surveyed acknowledge that vertical mergers in particular may have benefits for consumers through efficiency gains, e.g. by reducing transaction costs, providing an assurance of supply of important inputs, preventing free riding, eliminating double marginalisation or eliminating market power.<sup>46</sup>

(b) Vertical issues

6.5 The guidelines focus on three main theories of harm which might arise from vertical integration through merger.<sup>47</sup>

- (a) Vertical integration may result in upstream or downstream foreclosure in certain circumstances.<sup>48</sup> Upstream foreclosure arises if the merger is likely to result in the merged group refusing to supply an input or raising its rivals' costs by increasing the price of an input, and such conduct is likely to lead to a significant impediment to effective competition in the downstream market. Downstream foreclosure arises if it is likely that the merger will result in the merged group refusing to purchase an input from rival upstream suppliers or offering to purchase such an input only at lower prices, and such conduct is likely to lead to a significant impediment to effective competition in the upstream market. The question of whether a merger ought to be prohibited on these grounds is a difficult one which in our view would benefit from more detailed analysis and exposition than in the guidelines surveyed.
- (b) Vertical integration may increase barriers to entry by requiring a new entrant to enter two markets rather than just one.<sup>49</sup> The US Non-Horizontal Guidelines limit the application of this theory to cases satisfying three criteria, namely that it is necessary for a new entrant wishing to enter the primary market also to enter the secondary market, the need to enter the secondary market makes entry into the primary market more difficult and less likely, and the structure and performance of the primary market is otherwise conducive to non-competitive performance.<sup>50</sup>
- (c) Vertical integration may facilitate the avoidance of regulatory constraints. For example, the US Non-Horizontal Guidelines identify a concern that vertical mergers can create transfer pricing issues, and may be entered to avoid price controls.<sup>51</sup>

(c) Conglomerate issues

6.6 A wide range of conglomerate effects has been identified,<sup>52</sup> but the guidelines which have been surveyed and which identify potentially harmful conglomerate effects have tended to focus on portfolio power. This arises when the merged group has market power in at least one market but is also active in one or more other markets which are connected, for example because the products are sold or consumed together. Some guidelines<sup>53</sup> suggest that the combination of activities in neighbouring markets may itself be a source of market power (on the basis that the whole is worth more than the sum of the parts). However, there is widespread disagreement about whether it is advisable to prohibit mergers on the grounds of portfolio power. For example, the Irish guidelines state that "anti-competitive harm from portfolio effect is extremely unlikely" and identify a number of important limitations on the application of the theory.<sup>54</sup>

(d) Is there a relevant distinction between vertical and conglomerate issues?

6.7 The US Guidelines note that in some circumstances, the non-horizontal merger of a firm already in a market with a potential entrant to that market may adversely affect competition in the market. The guidelines comment that: "Under traditional usage, such a merger could be characterized as either 'vertical' or 'conglomerate,' but the label adds nothing to the analysis."<sup>55</sup> We agree with this analysis and have included mergers involving potential competitors in the discussion of "horizontal mergers" above. In the case of both vertical and conglomerate effects, the issue seems to us to be whether the merger creates an incentive and ability on the merged group to leverage market power from one market into a second market: on this view, the question whether those markets are vertically connected or not is relevant to an assessment of the merged group's incentives and abilities but not to the fundamental inquiry.

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<sup>1</sup> Alistair Lindsay (partner, Allen & Overy, UK; author, "The EC Merger Regulation: Substantive Issues", Sweet & Maxwell, 2003), Larry Fullerton (partner, Sidley Austin Brown & Wood, LLP, USA) and Andrew Matthews (partner, Minter Ellison Rudd Watts, New Zealand). The co-authors are grateful to Mauro Grinberg (Araújo e Policastro Advogados, Brazil) for his comments on an earlier draft.

<sup>2</sup> Value for money is a reflection of price and quality. In the remainder of this Chapter, we focus on the implications of the transaction for prices.

<sup>3</sup> This Chapter examines the effects of mergers on consumer welfare (comprising value for money, choice and innovation), reflecting an emerging international consensus.

<sup>4</sup> The guidelines which define unilateral effects do so in varying terms, but the gist of the definitions is that given in the text. (Co-ordinated effects are dealt with in Chapter 3.)

<sup>5</sup> See the UK OFT Guidelines, para. 4.7 and the European Commission Guidelines, paras. 22(a) and 24. See also the Overview Paper, para. 25.

<sup>6</sup> Section 5.2.

<sup>7</sup> See, e.g., the Irish Guidelines, section 4.

<sup>8</sup> See, e.g., the US Guidelines, section 2.2.

<sup>9</sup> It should be noted that, even if competitors do *not* face capacity constraints, they may have an incentive not to expand output if the merged group seeks to increase prices (because competitors in such a situation may benefit from the increases in price resulting from the merged group's conduct). See, e.g, the European Commission Guidelines, paras. 58 to 60 and paras. 61 to 63.

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11 Sellers in such markets may be potential entrants for the purposes of sub-para.  
(a) of the text.

12 The Brazilian Guidelines, paras. 48 and 50, come *closest* to the use of a strong  
safe-harbour, in the sense that, although there are three exceptions to the  
general rule that mergers will be cleared if they result in a combined market  
share of below 20 per cent., those exceptions do not clearly relate to horizontal  
unilateral effects. See also the Romanian Guidelines, section 3.

13 See, e.g., the Australian Guidelines, paras. 5.95 to 5.97 and the European  
Commission Guidelines, paras. 18, 19 and 20.

14 See, e.g., the OFT Guidelines, para. 4.4.

15 Calculated by summing the squares of the market shares held by the market  
participants.

16 See the New Zealand Guidelines, section 5.3.

17 Cf. the German Guidelines which contemplate the use of tolerance thresholds  
when there are uncertainties in market definition: see section B1.2. (In addition,  
it must be recognised that most jurisdictions with merger control also impose  
restrictions on anti-competitive conduct.)

18 Notably, the revised New Zealand Guidelines (which were effective from 1  
January, 2004) have moved away from a statement that acquisitions falling  
within the defined safe harbours are unlikely to breach the relevant provisions,  
save in exceptional circumstances to a weaker position that, while unlikely to  
contravene the provisions, the figures are indicative only and the New Zealand  
Commerce Commission reserves the right to intervene or decline clearance in  
instances of much lower market shares; see section 5.3.

19 The calculation of market shares is discussed in section V of the text below.  
20 Section B1.1.1 (reflecting the German legislation).

21 Sections B2 and B3.

22 It does not follow that such markets *are* necessarily competitive, e.g. if the  
bidders do not have equivalent expertise / experience.

23 The formulation originated in the US Guidelines, section 3.1. See also, e.g., the  
New Zealand Guidelines, section. 6.3.

24 In this regard, it is important to examine the scope for suppliers to engage in  
price discrimination, charging higher prices to those customers which do not  
have buyer power.

25 See, e.g., the UK OFT Guidelines, paras. 3.23 and 3.24.

26 Commonly, such materiality thresholds are contained in national legislation.  
27 Canadian Guidelines, para 2.4. The Canadian authorities are currently consulting  
on proposed amended guidelines. The draft amended guidelines (see sections  
2.12 and 2.13) retain the threshold mentioned in the text, but explain that the  
two year period runs from when the market power is likely to be exercised and  
not necessarily the time of the merger reference; they also stress that the  
material price increase benchmark is not a numerical threshold but rather is the  
subject of market specific analysis.

28 Section 5.2

29 See also the Canadian Guidelines, section 4.2.2 (use of output of firms within  
the market, adjusted to take account of exports and certain imports) (and the  
proposed amended Canadian Guidelines, section 4.9).

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30 See, e.g., the Japanese Guidelines, section 3.B(1)a.(b).  
31 See, e.g., the Australian Guidelines, para. 5.100.  
32 US Guidelines, fn. 15.  
33 US Guidelines, section 1.41.  
34 See, e.g., the Brazilian Guidelines, para. 49 and the German Guidelines, section  
B1.1.3.  
35 i.e. a company, its parent companies and subsidiaries of the companies and its  
parents.  
36 One issue which requires further analysis is the extent to which the treatment of  
captive production should be determined at the stage of market definition or,  
instead, as part of the subsequent analysis of the market.  
37 Arguably, such an approach involves an arbitrary disapplication of the SSNIP test  
in cases involving self-supply.  
38 Assessing the extent to which production would be converted to third party  
sales creates quite a challenge.  
39 A small but significant, non-transitory increase in price: see the discussion in  
Chapter 1. See the UK OFT Guidelines, para. 3.21.  
However, calculation of HHIs may be very difficult when numerous suppliers are  
involved.  
41 Mergers which eliminate a potential entrant into a market are sometimes  
regarded as "conglomerate" mergers (see, e.g., the Canadian Guidelines, section  
4.12 (and the proposed amended Canadian Guidelines section 11.1)) although  
this Chapter follows the majority in treating them as a category of horizontal  
mergers.  
42 The statement in the text is not true of mergers which eliminate potential  
competitors. (Such mergers have been treated as horizontal mergers for the  
purposes of this Chapter, although they are sometimes regarded as  
conglomerate transactions.)  
43 See, e.g., the Canadian Guidelines, sections 4.11 and 4.12 (and the proposed  
amended Canadian Guidelines sections 10.6, 10.7, 11.1 and 11.2). In addition,  
the circumstances in which vertical and conglomerate mergers may harm  
consumer welfare are more limited and less well understood than those relating  
to horizontal mergers.  
44 Para. 3.69.  
45 Para. B3.1.  
46 See, e.g., the New Zealand Guidelines, section 10.1.  
47 Vertical mergers may also harm consumer welfare in particular by facilitating  
tacit co-ordination (see Chapter 3), facilitating price discrimination, providing  
access to confidential information held by the target company or facilitating  
cross-subsidisation.  
48 See, e.g., the Japanese Guidelines, section 3.B.(2)d.  
49 See, e.g., the Canadian Guidelines, section 4.11.1 (and the proposed amended  
Canadian Guidelines section 10.2).  
50 Section 4.2.1.  
51 Section 4.2.3.  
52 e.g. conglomerate issues may be said to arise from full-line forcing, cross-  
subsidisation, predatory pricing or control of information.

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<sup>53</sup> See, e.g., the German Guidelines, section B3.2.  
<sup>54</sup> Section 6.7.  
<sup>55</sup> Fn. 26.