POLICY ROUNDTABLES

Portfolio Effects in Conglomerate Mergers

2001

Introduction

The OECD Competition Committee debated portfolio effects in conglomerate mergers in October 2001. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt for the OECD, written submissions from Australia, Canada, the European Commission, Finland, Germany, Hungary, Ireland, Japan, Korea, the Netherlands, Spain, Switzerland, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

In the context of conglomerate merger review, portfolio effects refer to the pro- and anti-competitive effects possibly arising when: the parties enjoy market power but not necessarily dominance; and the products joined are complementary or have analogous properties.

When complementary products are merged, there is a potential for considerable synergies that could benefit buyers. There is also an increased potential for forced tying, pure bundling, or analogous practices (*e.g.* full line forcing) that could restrict buyer choice but also lower prices. Under certain strict conditions, consumers could gain in the short run but suffer long term harm from such practices if they eventually result in a sufficient reduction of competitors and capacity in a market.

The hypothetical nature of such harm has led some to conclude that instead of prohibiting mergers having potentially harmful portfolio effects, competition agencies should instead take a wait and see attitude. That would involve using abuse of dominance or monopolisation prohibitions to control negative effects should they actually materialise.

Related Topics

OECD Council Recommendation on Merger Review (2005)
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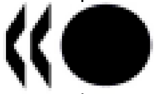

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Portfolio Effects in Conglomerate Mergers, which was held by the Competition Committee in October 2001.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les effets de portefeuille dans les fusions conglomérales, qui s'est tenue en octobre 2001 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegate submissions, and the background paper, a number of key points emerge:

(1) Portfolio effects in conglomerate mergers include potential pro- and anti-competitive effects that might arise due to a merger uniting complementary products in which one or more parties enjoy significant market power.

The complementarities featured in conglomerate mergers displaying portfolio effects extend beyond classic economic complementarity. They cover as well "technical" complementarities (products which, for technical reasons, must be consumed together) and "commercial" complements (products forming part of a range which distributors need to carry, such as spirits, soft drinks, etc.). They also extend to products for which the strength of demand for one is positively correlated with strength of demand for the other (e.g. consumers with the strongest demands for spread sheets might also have the strongest demands for database managers).

(2) Mergers uniting complementary products in which at least one of the parties have considerable market power could facilitate forced tying, pure bundling or analogous strategies (e.g. full line forcing) that restrict buyer choice. While such conduct may initially increase economic welfare, it could, under certain conditions, ultimately have the opposite effect if it eliminates a sufficient number of competitors and capacity from the market.

There are a number of possible welfare gains that forced tying and "pure" bundling (i.e. only the bundle, not its components, are offered for sale) could give rise to. They range from straightforward economies of scope (including the advantages of one-stop shopping for buyers), through savings related to quality control and customisation to improve complementarities, and on to more complex and uncertain welfare gains associated with efficient price discrimination and "Cournot effects" (discussed in the next section). On the other side of the ledger, it is possible that forced tying, pure bundling and closely analogous restrictive practices could, especially in the long term, have some negative effects on welfare. The probability of an overall *reduction* in welfare is greater:

- the higher the degree of market power in the "tying" product (or one of the bundled products);
- the weaker the efficiencies, if any, associated with the impugned practices;
- the greater the increase in rivals' costs induced by the post-merger tying/pure bundling strategy;
- the larger the number of buyers interested in purchasing only the tied product (or a subset of the bundled products);

- the more rivals find it unprofitable to match the tying/bundling strategy;

- the more certain are prices to rise above pre-merger levels due to foreclosure effects (i.e. the higher the probability that buyers will be unable to prevent such a price rise, firms will be unable to profitably enter or re-enter after prices have risen above pre-merger levels, and the tying firm will have an incentive to raise prices above pre-merger levels); and

- the more the expected long term price increases above pre-merger levels will be sufficiently large, quickly realised and durable that the tying/bundling firm will be able to re-coup any opportunity losses it might incur in reducing its rivals' sales.

The short term, generally favourable effects of practices such as tying and bundling may be more easily and accurately predicted than long term negative effects that might arise through foreclosure. In balancing the two, competition authorities will generally wish to assign greater weight to more certain as opposed to more speculative outcomes.

(3) Mergers uniting complementary products could produce lower prices or other buyer advantages because of various economies of scope, transaction economies, "Cournot effects", and strategic behaviour.

Complementary products could share common inputs, promotional needs, or distribution channels and therefore be associated with important producer economies of scope when brought under common control. Analogous to this are transactions economies that buyers reap when purchasing complements from the same seller, e.g. savings in receiving one instead of several deliveries per week of spirits or soft drinks.

In addition to efficiency effects there is a less obvious reason why a merger uniting complements could lead to lower prices. Such a merger could also internalise the effects of lowering the price of one complement on sales and profits earned on another. This Cournot effect will not exist or be significant unless pre-merger prices were above competitive levels in at least one of the complements. Another necessary condition is that the merged entity will either have a significant market share in at least one of the complements in which there were pre-merger supra-competitive pricing, or will engage in some form of tying, bundling or analogous practice having the effect of internalising a pricing externality in complementary products.

(4) Various transactional economies and lower post-merger prices, regardless of the cause, benefit buyers and normally count in favour of permitting a merger. There could be exceptions to that general rule in situations where it is strongly suspected that post-merger price reductions will end up causing such a large number of competitors to exit the market, that prices might eventually rise above pre-merger levels.

Although theoretically possible, there will likely be few mergers in which competition authorities acting to protect consumer surplus will be forced to balance short term gains against long term losses to buyers. This is because the long term losses will not materialise unless all of a number of strict conditions are met, namely:

- the merged firm will enjoy such significant efficiencies and/or internalised complementary pricing as a result of the merger that it finds it profitable to drop prices (quality adjusted, i.e.

accounting for non-price consumer benefits such as those associated with one-stop shopping) below pre-merger levels in at least one market whether or not it expects that price drop to induce competitors to exit (i.e. the price drop cannot be prohibited as predatory pricing);

- neither rivals nor new entrants can match the merged firm's tying/bundling strategy (including through mergers of their own) and cost levels;
- rivals will exit;
- buyers cannot use countervailing power to hold prices at or below pre-merger levels;
- firms will not enter or re-enter the market in response to price increases above pre-merger levels; and
- the merged entity finds it profitable to raise prices above pre-merger levels (this might not be the case if its costs have declined sufficiently or too few rivals exit).

(5) *In certain situations and jurisdictions it might make sense to apply an* ex post *rather than* ex ante *approach to suspected potential problems associated with conglomerate mergers involving portfolio effects.*

There may be mergers where the best response to suspected post-merger anti-competitive conduct is to rely on post-merger prohibitions and sanctions to deal with such conduct should it actually materialise.

There are two obvious advantages of employing an *ex post* instead of *ex ante* approach to mergers expected to produce behaviour having mixed pro- and anti-competitive effects, e.g. tying and bundling. First, in advance of the merger, one can never be certain that such behaviour will in fact occur. Second, waiting until after it arises means that it can be assessed in actual market conditions which should greatly facilitate determining its likely net competitive effect. These advantages grow more significant the more certain are the short term benefits and the more long term and speculative are the possible anti-competitive effects.

The wisdom of adopting an *ex post* instead of an *ex ante* approach to potential problems associated with conglomerate mergers involving portfolio effects could well vary from one merger to another. This is largely because of differences in the certainty anti-trust authorities may have concerning the short and long term effects of such mergers, and in the ease and speed with which post-merger anti-competitive behaviour can probably be detected, assessed and remedied in various specific markets.

There could also be systematic differences across jurisdictions in the general superiority of an *ex post* versus *ex ante* approach to problematic mergers involving portfolio effects. In particular, jurisdictions which authorise rather than merely refrain from prohibiting mergers, might be less well placed to challenge post-merger anti-competitive behaviour. This could happen if courts find that the impugned behaviour was reasonably certain to occur at the time the merger was approved. That could be taken to imply that the competition authority did not consider it to have anti-competitive effects. This problem could be aggravated if a merger approval amounts to certifying that it does not create a dominant position, and dominance is a necessary condition for taking action against certain anti-competitive behaviour. In any case, jurisdictions could also

differ significantly in the speed, certainty and deterrent power of public and private sanctions against anti-competitive post-merger conduct.

(6) *Some of the differences across jurisdictions in how conglomerate mergers involving complements are analysed could be due to differences in the two tests being commonly applied, i.e. some jurisdictions employ a substantial lessening of competition test ("SLC test"), while others use a create or strengthen a dominant position test ("dominance test").*

A number of countries that specifically commented on the SLC and dominance tests in their written contributions or interventions at the roundtable expressed the view that the SLC test offers greater flexibility in dealing with portfolio or analogous effects. At the roundtable itself, one delegate expressed the view that the dominance test fosters greater reliance on market shares in establishing the harmful effects of a merger, while the SLC test enables measuring market power more directly. Another delegate noted that the SLC test might foster a fuller consideration of efficiency effects. On the other hand, one delegate expressed the view that differences in tests were not likely as important as differences in economic approach, while another emphasised that market definition was a more critical issue.

Further to the market definition issue, discussion at the roundtable indicated that it might be fruitful to ask whether, in problematic mergers, the use of a dominance test pressures competition authorities to favour narrow market definitions in order to more easily establish dominance. It might also be asked whether in reducing market overlaps, overly narrow market definitions foster a need to develop portfolio effects concepts in order to discuss the anti-competitive effects of mergers uniting products which are weak substitutes. Otherwise put, is the dominance test tending to push jurisdictions to make greater use of the portfolio effects concept and to apply it beyond mergers joining strict complements?

(7) *Given the uncertainty surrounding it, jurisdictions explicitly applying the portfolio effects concept in merger review should seek to offer guidance concerning the specific factors they will consider in assessing such effects. Such guidance could significantly improve transparency and predictability for both the business community and for other competition authorities examining the same merger.*

Some delegations endorsed the portfolio effects concept as improving the coverage and flexibility of merger review. One delegation, however, characterised this doctrine as introducing considerable uncertainty into merger review and creating the possibility that efficiency enhancing mergers might be rejected on the basis of speculative fears revolving around possible harm to competitors. Publishing guidelines describing how portfolio effects will be assessed in future mergers might help assuage such concerns. Such guidance might usefully consider similarities between the foreclosure effects associated with conglomerate mergers uniting complementary products, and analogous effects arising in some vertical mergers. Several delegations noted that in many of the cases in which authorities examined portfolio effects, what they were really looking at were standard horizontal and vertical effects. Furthermore, many such merger reviews ended up concluding that portfolio effects did not provide a sufficient basis for blocking the merger.

(8) *Differences across jurisdictions in treatment of specific conglomerate mergers involving portfolio effects might be due more to differences in how facts are interpreted than to the application of divergent analytical approaches.*

In his summary remarks, the Chairman stressed what he found to be a fair amount of convergence in the analytical approach being cautiously applied to conglomerate mergers involving portfolio effects. He further remarked that all competition authorities emphasised the need to protect competition rather than competitors and were concerned to promote efficiencies. The Chairman urged competition authorities to continue working on developing the empirical procedures applied to conglomerate mergers involving portfolio effects, including clarifying the questions investigated and the order in which the questions are considered.

The Chairman also endorsed one delegation's proposal that competition authorities should do more in the way of re-visiting their merger decisions to determine the extent to which the assumptions they made in the course of their reviews turned out to be vindicated by market developments. Such analyses could help correct any systematic biases in assessing the ability of competitors and buyers to respond to post-merger changes in competitive behaviour including greater use of tying and bundling, or enhanced incentives to predate.

SYNTHESE

par le Secrétariat

Plusieurs points essentiels ressortent des débats de la table ronde, des contributions des délégués et du document de synthèse:

(1) *Les effets de portefeuille dans les fusions conglomérales comprennent les effets proconcurrentiels ou anticoncurrentiels pouvant résulter d'une fusion réunissant des produits complémentaires pour lesquels une ou plusieurs des parties disposent d'un pouvoir de marché substantiel.*

Les éléments de complémentarité qu'on rencontre dans les fusions conglomérales ayant des effets de portefeuille vont au-delà de la complémentarité économique classique. Ils incluent également la complémentarité "technique" (les produits qui, pour des raisons techniques, doivent être consommés ensemble) et la complémentarité "commerciale" (les produits font partie d'une gamme que les distributeurs doivent commercialiser, par exemple les alcools, les boissons non alcoolisées, etc.). Ils entrent en jeu également dans le cas de produits pour les lesquels l'intensité de la demande pour un produit est en corrélation positive avec l'intensité de la demande pour l'autre produit (par exemple, les consommateurs qui demandent le plus des tableurs peuvent également demander le plus des gestionnaires de bases de données).

(2) *Les fusions réunissant des produits complémentaires pour lesquels au moins l'une des parties dispose d'un très grand pouvoir de marché peuvent faciliter la vente liée forcée, la vente groupée sans possibilité de dissociation du lot ou des stratégies analogues (par exemple la vente forcée d'une gamme complète) qui limitent le choix des acheteurs. Ces pratiques peuvent au départ accroître le bien-être économique, mais elles peuvent sous certaines conditions avoir en définitive l'effet inverse si elles éliminent du marché un nombre suffisant de concurrents ou un volume suffisant de capacités.*

La vente liée forcée et la vente groupée sans possibilité de dissociation du lot peuvent avoir des effets bénéfiques sur le bien-être. Ces effets comprennent les économies directes de gamme (y compris les avantages qu'offre un point de vente unique pour les acheteurs) grâce aux économies liées au contrôle de la qualité et grâce à une adaptation aux clients qui améliore la complémentarité, ainsi que les gains de bien-être plus complexes et moins certains qui résultent d'une discrimination efficiente par les prix et d'"effets de Cournot" (voir la section suivante). En revanche, il est possible que la vente liée forcée, la vente groupée sans possibilité de dissociation du lot et les pratiques restrictives très similaires aient, surtout à long terme, des effets négatifs sur le bien-être. La probabilité de *réduction* globale du bien-être est d'autant plus grande que:

- le degré de pouvoir de marché pour le produit "liant" (ou l'un des produits groupés) est plus élevé;
- les éventuels éléments d'efficience dont s'accompagnent les pratiques litigieuses sont plus faibles;

- La majoration des coûts des concurrents résultant de la stratégie de vente liée ou de vente groupée sans possibilité de dissociation du lot est plus forte;

- les acheteurs souhaitant acheter uniquement le produit lié (ou un certain nombre seulement des produits groupés) sont plus nombreux;

- les concurrents jugeront moins rentable un alignement sur la stratégie de vente liée ou groupée;

- la certitude est plus grande que les prix montent au-dessus du niveau antérieur à la fusion à cause d'effets de fermeture du marché (c'est-à-dire la probabilité est plus forte que les acheteurs ne puissent pas empêcher cette hausse des prix, que les entreprises ne puissent pas entrer sur le marché ou y réentrer dans des conditions de rentabilité une fois les prix supérieurs au niveau antérieur à la fusion et que l'entreprise pratiquant la vente liée soit incitée à relever les prix au-dessus du niveau antérieur à la fusion) ;

- Les hausses de prix à long terme au-dessus du niveau antérieur à la fusion qui sont attendues sont susceptibles d'être suffisamment importantes, rapides et durables pour que l'entreprise pratiquant la vente ou groupée puisse récupérer les coûts d'opportunité qu'elle peut avoir à supporter pour diminuer les ventes de ses concurrents.

Les effets à court terme, généralement favorables, des pratiques telles que la vente liée et la vente groupée peuvent être plus facilement et plus précisément prévus que les effets négatifs à long terme pouvant découler d'une fermeture du marché. Lorsqu'elles mettent en balance ces deux types d'effets, les autorités de la concurrence souhaiteront généralement accorder plus de poids aux résultats plus certains qu'aux résultats plus spéculatifs.

(3) *Les fusions réunissant des produits complémentaires peuvent entraîner une baisse des prix ou d'autres avantages pour l'acheteur grâce à diverses économies de gamme, aux économies sur les coûts de transaction, aux effets de "Cournot" et aux comportements stratégiques.*

Les produits complémentaires peuvent avoir en commun des facteurs de production, des besoins de promotion et des circuits de distribution, en dégageant par conséquent d'importantes économies de gamme à la production lorsqu'ils sont placés sous un contrôle commun. De même, les acheteurs réalisent des économies sur les coûts de transaction lorsqu'ils acquièrent des produits complémentaires auprès d'un même vendeur, par exemple en se faisant livrer une seule fois par semaine, au lieu de plusieurs, des boissons alcoolisées ou non alcoolisées.

En dehors des effets d'efficience, une raison moins évidente explique pourquoi une fusion réunissant des produits complémentaires peut aboutir à une baisse des prix. Une telle fusion peut également internaliser les effets d'une baisse des prix d'un produit complémentaire sur les ventes et les bénéfices que permet d'obtenir un autre produit complémentaire. Cet effet de Cournot ne se produira pas ou ne sera guère sensible si, antérieurement à la fusion, les prix n'étaient pas supérieurs au niveau de concurrence pour au moins l'un des produits complémentaires. Il faut aussi que l'entité fusionnée, soit détienne une part de marché substantielle pour au moins l'un des produits complémentaires pour lesquels les prix étaient supérieurs au niveau de concurrence avant la fusion, soit pratique, sous une forme ou sous une autre, la vente liée, la vente groupée ou une formule analogue ayant pour effet d'internaliser une externalité dans la fixation du prix de produits complémentaires.

(4) *Les diverses économies sur les coûts de transaction et la baisse des prix après fusion, quelle qu'en soit l'origine, sont bénéfiques pour l'acheteur et militent normalement en faveur de*

l'autorisation d'une fusion. Il peut y avoir des exceptions à cette règle générale lorsqu'on suspecte fortement qu'une baisse des prix après fusion aura en définitive pour résultat de faire sortir du marché un si grand nombre de concurrents que les prix pourront se retrouver finalement à un niveau supérieur à celui antérieur à la fusion.

Bien que cela soit théoriquement possible, il y aura peu de fusions pour lesquelles les autorités de la concurrence, afin de préserver le surplus des consommateurs, seront contraintes de mettre en balance les gains à court terme et les pertes à long terme pour les acheteurs. En effet, les pertes à long terme ne se matérialiseront pas si toutes les conditions restrictives suivantes ne sont pas réunies:

- L'entreprise fusionnée bénéficiera, du fait de la fusion, d'effets d'efficience et/ou d'effets de fixation internalisée des prix de produits complémentaires d'une telle ampleur qu'elle jugera profitable de baisser les prix (compte tenu de la qualité, c'est-à-dire des avantages hors prix pour le consommateur, notamment ceux découlant de l'unicité du point d'achat) au-dessous du niveau antérieur à la fusion pour un marché au moins, qu'elle attende ou non que cette baisse des prix conduise les concurrents à sortir du marché (autrement dit, la baisse des prix ne peut être interdite car il n'y a pas prix d'éviction);

- Ni les concurrents, ni de nouveaux entrants ne peuvent s'aligner sur la stratégie de vente liée ou groupée de l'entreprise fusionnée (y compris en fusionnant eux-mêmes) et ses niveaux de coûts;

- Les concurrents sortiront du marché;

- Les acheteurs n'ont aucun pouvoir compensateur qui leur permettrait de maintenir les prix aux niveaux antérieurs à la fusion ou au-dessous de ces niveaux;

- Il n'y aura pas d'entrée ou de réentrée sur le marché à la suite d'une hausse des prix au-dessus du niveau antérieur à la fusion ;

- L'entité fusionnée juge profitable de relever les prix au-dessus du niveau antérieur à la fusion (ce ne sera pas toujours le cas si les coûts ont suffisamment baissé ou si trop peu de concurrents sont sortis du marché).

(5) *Dans certaines situations et pour certaines autorités de la concurrence, il peut être judicieux de recourir à une approche ex post et non à une approche ex ante pour traiter les problèmes qu'on peut suspecter en cas de fusion conglomérale ayant des effets de portefeuille.*

Pour certaines fusions, l'attitude optimale en cas de suspicion de pratiques anticoncurrentielles après fusion peut être de s'appuyer sur des mesures d'interdiction après fusion et des sanctions après fusion pour remédier à ces pratiques si elles se concrétisent.

En cas de fusion dont on peut attendre qu'elle ait à la fois des effets proconcurrentiels et des effets anticoncurrentiels, par exemple sous la forme de pratiques de vente liée ou groupée, l'approche ex post présente deux avantages manifestes par rapport à l'approche ex ante. Premièrement, on ne peut jamais être certain, avant la fusion, que ces pratiques se produiront effectivement. Deuxièmement, attendre qu'elles se produisent signifie qu'on peut les évaluer en situation réelle, ce qui devrait grandement faciliter la détermination de leur impact net probable sur la concurrence. Ces avantages sont d'autant plus grands que les effets bénéfiques à court

terme sont plus certains et que les éventuels effets anticoncurrentiels sont plus lointains et plus spéculatifs.

Il pourra être plus ou moins judicieux, en fonction de l'opération, d'adopter une approche ex post et non ex ante en cas de fusion conglomérale ayant des effets de portefeuille. Cela tient essentiellement au fait que les autorités de la concurrence peuvent avoir une certitude plus ou moins grande en ce qui concerne les effets de ces fusions à court et long terme et peuvent se trouver dans une situation différente quant à la probabilité de détecter, d'évaluer et de corriger plus ou moins facilement et plus ou moins rapidement sur les divers marchés spécifiques les pratiques anticoncurrentielles postérieures à la fusion.

D'une autorité de la concurrence à l'autre, il peut aussi y avoir des différences systématiques quant à la supériorité générale de l'approche ex post sur l'approche ex ante lorsqu'une fusion ayant des effets de portefeuille pose des problèmes. En particulier, les autorités de la concurrence qui autorisent les fusions, par opposition à celles qui, simplement, ne les interdisent pas, pourront être moins bien placées pour s'attaquer aux pratiques anticoncurrentielles postérieures à la fusion. Tel peut être le cas si les tribunaux jugent qu'il était raisonnablement certain, au moment où la fusion a été approuvée, que les pratiques en cause se produiraient. L'interprétation pourrait être alors la suivante: l'autorité de la concurrence n'a pas considéré que ces pratiques avaient des effets anticoncurrentiels. Ce problème peut être aggravé si l'approbation d'une fusion revient à certifier que la fusion ne créée pas une position dominante et si la position dominante est une condition nécessaire pour agir contre certaines pratiques anticoncurrentielles. Quoi qu'il en soit, il peut y avoir de profondes différences d'une autorité de la concurrence à l'autre sur le plan de la rapidité, de la certitude et du pouvoir dissuasif des sanctions d'ordre public ou privé qui peuvent être infligées en cas de pratiques anticoncurrentielles postérieures à la fusion.

(6) *Certaines des divergences entre les autorités de la concurrence en ce qui concerne la façon dont les fusions conglomérales faisant intervenir des produits complémentaires sont analysées pourraient tenir à des différences quant aux deux critères couramment appliquées, les autorités de la concurrence recourant tantôt au critère de la réduction sensible de la concurrence, tantôt au critère de la création ou du renforcement d'une position dominante.*

Plusieurs pays ayant commenté dans leur contribution écrite ou leur intervention à la table ronde le critère de la réduction sensible de la concurrence et le critère de la position dominante considèrent que le critère de la réduction sensible de la concurrence ménage plus de souplesse pour traiter les effets de portefeuille ou les effets analogues. Lors de la table ronde, un délégué a estimé que le critère de la position dominante contribue à ce qu'on s'appuie davantage sur les parts de marché pour établir les effets nocifs d'une fusion, alors que le critère de la réduction sensible de la concurrence permet de mesurer plus directement le pouvoir de marché. Un autre délégué a fait observer que le critère de la réduction sensible de la concurrence peut favoriser une prise en compte plus complète des effets d'efficience. En revanche, un délégué a considéré que les différences au niveau du critère n'étaient probablement pas aussi importantes que les différences au niveau de l'approche économique et un autre délégué a souligné que la définition du marché était une question plus fondamentale.

En dehors du problème de la définition du marché, les débats de la table ronde ont montré qu'il pourrait être judicieux de se demander si, dans les fusions qui posent des problèmes, l'utilisation du critère de la position dominante ne poussait pas les autorités de la concurrence à opter pour une définition étroite du marché afin d'établir plus facilement la position dominante. On pourrait aussi se demander si, en diminuant les recoupements des marchés, une définition trop étroite du marché ne contribue pas à rendre nécessaire la mise au point de concepts reposant sur les effets

de portefeuille pour l'examen des effets anticoncurrentiels des fusions réunissant des produits qui ne sont que faiblement substituables. Autrement dit, le critère de la position dominante n'a-t-il pas tendance à conduire les autorités de la concurrence à utiliser davantage la notion d'effets de portefeuille et à l'appliquer de façon plus large à des fusions autres que celles qui réunissent des produits strictement complémentaires ?

(7) *Vu l'incertitude qui entoure la notion d'effets de portefeuille, les autorités de la concurrence qui appliquent expressément cette notion pour l'examen des fusions devraient s'efforcer de donner des orientations quant aux facteurs précis qu'elles prendront en compte pour évaluer ces effets. Ces orientations pourraient améliorer nettement la transparence et la prévisibilité, tant pour les entreprises que pour les autres autorités de la concurrence examinant la même fusion.*

Certaines délégations sont favorables à la notion d'effets de portefeuille en ce qu'elle élargit le champ de l'examen des fusions et ménage plus de souplesse pour cet examen. Une délégation considère néanmoins que cette doctrine introduit une très grande incertitude dans l'examen des fusions et ouvre la possibilité qu'une fusion qui améliore l'efficience soit rejetée au nom de la crainte spéculative d'un préjudice éventuel pour les concurrents. En rendant publiques des directives sur l'évaluation des effets de portefeuille dans les fusions à venir, on pourrait remédier à cette préoccupation. Ces orientations pourraient utilement prendre en compte les similitudes entre les effets de fermeture du marché associés aux fusions conglomérales réunissant des produits complémentaires et les effets analogues résultant de certaines fusions verticales. Plusieurs délégations ont observé que dans de nombreux cas parmis lesquels les autorités examinaient les efforts de portefeuille, ce qu'elles regardaient vraiment étaient les effets standards horizontaux et verticaux. En outre, de nombreux examens de fusion de ce type se concluaient par le constat que les effets de portefeuille ne constituaient pas une base suffisante pour bloquer la fusion.

(8) *Les divergences observées d'une autorité de la concurrence à l'autre pour le traitement des fusions conglomérales ayant des effets de portefeuille pourraient être dues davantage à des divergences dans l'interprétation des faits qu'à l'application d'approches analytiques différentes.*

Dans son résumé, le Président a souligné ce qu'il juge être une grande convergence dans l'approche analytique appliquée prudemment aux fusions conglomérales ayant des effets de portefeuille. Il a en outre fait observer que toutes les autorités de la concurrence mettaient l'accent sur la nécessité de protéger la concurrence et non les concurrents et avaient en outre le souci de promouvoir l'efficience. Le Président a invité instamment les autorités de la concurrence à continuer d'affiner les procédures empiriques appliquées aux fusions conglomérales ayant des effets de portefeuille, notamment en clarifiant les questions examinées et l'ordre dans lequel elles sont examinées.

Le Président a en outre approuvé la proposition d'une délégation visant à ce que les autorités de la concurrence aillent plus loin dans le réexamen a posteriori de leurs décisions en matière de fusions, afin de déterminer dans quelle mesure les hypothèses qu'elles ont formulées lors de l'examen ont été validées par l'évolution du marché. De telles analyses pourraient contribuer à corriger les biais systématiques éventuels dans l'évaluation de la capacité des concurrents et des acheteurs de réagir aux modifications des pratiques concurrentielles après la fusion, notamment à une plus large utilisation de la vente liée et de la vente groupée ou à une plus forte incitation à appliquer des prix d'éviction.

BACKGROUND NOTE

By the Secretariat

1. Introduction

Conglomerate mergers, unlike certain horizontal and vertical mergers, do not conventionally raise competition concerns. Nevertheless, in recent years, several conglomerate mergers, especially those featuring "portfolio effects", have been opposed by some OECD competition authorities.

This paper investigates how "conglomerate mergers having portfolio effects" (defined below) could have important pro- and anti-competitive effects and based on that, contributes to developing sound policy towards such mergers.

In general terms, the paper finds that conglomerate mergers involving portfolio effects do not present new competition concerns. Rather they present traditional issues in new guises and combinations. To a considerable degree, the analysis applied in vertical mergers that are suspected of having exclusionary effects is found to be applicable to conglomerate mergers involving portfolio effects.

This paper's more specific key findings are:

A conglomerate merger uniting complements, and these probably account for a considerable proportion of conglomerate mergers involving portfolio effects, could facilitate tying, bundling, or closely analogous conduct. Such behaviour may increase overall welfare but it could also reduce it. Abstracting from merger specific efficiencies and analogous effects, the probability of a reduction is higher the more the following elements are present:

- a high degree of market power in the "tying" product (or one of the bundled products);
- rivals' costs are significantly increased;
- a large number of buyers interested in purchasing only the tied product (or a subset of the bundled products);
- rivals find it impossible or unprofitable to match the tying/bundling strategy;
- prices will eventually rise above pre-merger levels in the markets where rivals' costs are raised (i.e. buyers will be unable to prevent a price rise, firms will be unable to profitably enter or re-enter after prices have risen, and the tying firm will have an incentive to raise prices above pre-merger levels);
- price increases will be sufficiently large, quickly realised and durable that the tying/bundling firm will be able to re-coup any opportunity losses it might incur in reducing its rivals' sales; and

- buyers as a group will suffer a net loss despite any initial post-merger drop in prices.

As with other mergers, conglomerate mergers uniting complements could result in important efficiencies benefiting buyers. In addition, provided the parties have considerable market power and high market shares, such mergers could lead to price drops even absent merger related efficiencies. The reason is that under the hypothesised circumstances, uniting complements under common ownership gives the new entity an incentive to lower the price of one (or all) complements in order to realise larger sales and profits on the other complementary product(s) it sells. Such efficiencies and internalised complementary pricing factors could mitigate against the merged entity raising prices above pre-merger levels.

Merger specific efficiencies and the effects of joint pricing of complements (or analogous effects) would normally increase economic welfare, including benefits to buyers if prices drop post-merger. However, if prices do drop initially, it is also possible that they will later rise above post-merger levels. For reasons analogous to predatory pricing, it is possible that buyers will suffer net harm as a result. For that possibility to materialise, seven conditions must all be satisfied:

- the merged firm will enjoy such significant efficiencies and/or internalised complementary pricing (or analogous) effects from the merger that it finds it profitable to drop prices below pre-merger levels in at least one market whether or not it expects that price drop to induce competitors to exit (i.e. the price drop cannot be prohibited as predatory pricing);

- neither rivals nor new entrants can match the merged firm's new costs;

- rivals will exit;

- buyers cannot use countervailing power to hold prices at or below pre-merger levels;

- firms will not enter or re-enter the market in response to price increases above pre-merger levels;

- the merged entity finds it profitable to raise prices above pre-merger levels; and

- what buyers initially gain through prices set below pre-merger levels is less than what they later lose through paying higher than pre-merger prices.

A conglomerate merger not joining complements could also facilitate tying and bundling but the profitability, hence the probability of these practices emerging post-merger might be low unless there is a high correlation across consumers in the values they place on the products being united. In addition, in the case of bundling, low marginal costs could also be critical. These conditions could be satisfied in the case of certain information products such as computer software.[1] The welfare effects of such tying and bundling are broadly similar to the case involving complements.

Tying and bundling could be used as a type of price discrimination that could, but not necessarily would, reduce economic welfare, even if does not result in anti-competitive exclusion/restriction of competitors.

To the degree a conglomerate merger raises concerns about anti-competitive tying and bundling, these may be better resolved through an *ex post* rather than an *ex ante* approach, i.e. using abuse of dominance provisions to control anti-competitive behaviour, if it occurs, rather than merger provisions.

It is not possible to develop a simple checklist that would allow competition authorities to distinguish harmful from benign conglomerate mergers having portfolio effects. There are, however, some characteristics that would help in making preliminary decisions concerning the probability that such a merger would reduce economic welfare. That probability is likely to be significant if:

- the parties enjoy considerable market power in the products being united;
- the united products are "complements";[2]
- the marginal costs of producing united "complementary" products are low; and
- remaining competitors and new entrants are unlikely to be able to match any efficiencies and bundling advantages that the merging firm might reap.

Although the commonly accepted distinction between a vertical and conglomerate merger depends on whether or not there was a pre-merger customer-supplier relationship, the probability that tying or bundling facilitated by a merger will prove anti-competitive does not significantly depend on that distinction.

The remainder of this paper is presented in seven parts. We will begin with some definitions and then present some excerpts from three merger decisions chosen to highlight the kinds of competition concerns arising in conglomerate mergers involving what this paper will refer to as portfolio effects. In section four of the paper we will take a close look at tying and bundling, the two practices at the heart of concerns about conglomerate mergers involving portfolio effects. Following that, we will examine as well the possibility that such efficiencies could end up harming rather than benefiting buyers. The paper ends by considering whether an *ex ante* or *ex post* approach is best suited to addressing the competition concerns that may arise in some conglomerate mergers involving portfolio effects, and by providing some policy conclusions. As much as feasible, supplementary description and technical matters are confined to the paper's two Appendixes.

2 Definitions

In this section, we examine a standard definition of conglomerate mergers and argue that it may be unhelpful if it unduly constrains the analysis of a conglomerate merger involving complementary products. We then offer a definition of "portfolio effects" and describe some conglomerate mergers where such effects were apparently important.

2.1 The Definition of a Conglomerate Merger and the Need to Avoid giving it Undue Influence over Merger Review

For the purposes of this paper, a conglomerate merger is defined as one in which the parties to the merger "…are not actual or potential competitors and the parties do not have an actual or potential customer-supplier relationship."[3] This definition begs the question of exactly what constitutes a "potential" competitor or a "potential" customer-supplier relationship. The answer would probably vary from one jurisdiction to another, but the basic idea in the case of competitors would be that neither firm was exerting any competitive discipline on the other prior to the merger. As regards a potential customer-supplier relationship, we assume this refers to a situation where a party to a merger is presently competing with another party's current supplier or client. That assumption is intended to deal with the following definitional issue. If a merger unites two products, that are not substitutes, and the parties clearly intend to

bundle those products post-merger, were the parties in a potential buyer-supplier relationship at the time of the merger? Under our definition, they were not and the merger would consequently be classified as conglomerate. This points to the issue of whether the dividing line between vertical and conglomerate mergers is potentially unhelpful.

In terms of assisting in grouping and analysing pro- and anti-competitive effects, it makes sense to treat a merger of two firms actually or potentially producing substitute products as a horizontal merger. The same applies to mergers joining firms in actual or potential customer-supplier relationships, i.e. vertical mergers, although those would, arguably, be more helpfully defined as mergers of complements. The problem is that the remaining category is unhelpfully diverse. It fails to distinguish between conglomerate mergers uniting complements and those which do not.

Two products are complementary, in the traditional sense of that word, if they are more valuable to the buyer when consumed together.[4] This applies to a large range of products. Many products are not useful on their own but only when combined in some way. Left and right shoes are one example. Computer software and hardware are another. Even amongst computer hardware there are clear complementarities. A computer hard disk is useless without a working central processor. A central processor is useless without a working computer screen and so on. The same applies in the aircraft industry – aircraft engines are useless without airframes to mount them in. Aircraft avionics are useless unless the aircraft has engines to power it, etc.

In assessing the probability that a conglomerate merger will lead to welfare reducing price discrimination or welfare reducing exclusion/restriction of competitors, is the presence or absence of a pre-merger customer-supplier relationship always decisive? From the ultimate consumers' point of view, the answer is no. This point can be illustrated with a simple hypothetical example. Suppose firm *A* held the patent and was the only firm selling brake lights that customers installed in the back windows of their cars. Suppose further that before any of its competitors did so, car manufacturer believed it could install such lights while a car was being assembled at lower costs than consumers could after they purchased a new car. If it initially decided to purchase brake lights, but later merged with that firm, the merger would be treated as a vertical merger. If instead it had never purchased the lights, the merger would be a conglomerate merger. Despite the classification difference, the pro- and anti-competitive effects of the two mergers would be the same. More particularly, the firm's post-merger decision to refuse to offer the brake lights separately, or to offer them only at an increased price would have the same effects on economic welfare, whether or not the merging parties had a buyer-seller relationship.

We have been focusing on conglomerate mergers involving complements, but the points being made generalise to all conglomerate mergers involving portfolio effects (as defined below). From the ultimate consumer's point of view, the important issues are whether or not the merger will:

- result in some form of welfare reducing price discrimination; and/or
- tend to eliminate suppliers offering substitutes for one or both of the merged products.[5]

The probability of either of these results materialising depends a great deal on the production and demand side inter-relationships between the products being combined in a conglomerate merger.

2.2 Definition of Portfolio Effects

"Portfolio effects" is a somewhat vague term for which we could find no generally accepted definition. From a reading of a number of cases using the term, we deduce that portfolio effects in the

context of conglomerate mergers usually refer to the pro- and anti-competitive effects that may arise in mergers combining branded products:

- in which the parties enjoy market power, but not necessarily dominance; and
- which are sold in neighbouring or related markets.[6]

The concept of "neighbouring or related markets" is intended to describe a demand side linkage between markets, i.e. a significant degree of commonality in terms of buyers served. The clearest but not the only example of such a linkage would be complementary products.

In this paper, we will adopt the above deduction as a definition of portfolio effects, except that we will drop the reference to "branded". Our definition therefore extends to some conglomerate mergers joining intermediate products.[7] The reason for making this extension is that the potential pro- and anti-competitive effects we wish to concentrate on do not heavily depend on the presence or absence of strong brands.

3. Anti-competitive Effects Allegedly Arising in Conglomerate Mergers Involving Portfolio Effects

The principal antitrust concerns with regard to conglomerate mergers having portfolio effects seem to be that such mergers may indirectly solidify or magnify market power by facilitating various behaviours rather than directly by altering market structures. To illustrate what these behaviours consist of, and to demonstrate how they may inter-relate, we present some excerpts from a European Commission merger decision and from a description of a Swiss merger decision. We will also supply an excerpt from the European Commission's press release concerning its *General Electric/Honeywell* merger decision. Excerpts from two more European Commission conglomerate merger decisions can be found in Appendix A to this paper.

Before presenting the excerpts, we need to make three points. First, the excerpts are not intended to reflect all the competition issues arising in the cited cases. Second, the excerpts do not contain much if any of the evidence mustered to bolster the allegations/findings. Finally, the focus on the European Commission and Switzerland is not intended to imply that these are the only jurisdictions where portfolio effects in conglomerate mergers have been considered. We expect that the country submissions for the roundtable discussion on this topic will provide further examples that we are not yet aware of.

3.1 Guinness/Grand Metropolitan

In this merger, the European Commission determined that there were a number of different product markets. In the Greek market, those product classes were: whisky, gin, rum, brandy, the various liqueurs and the local ouzo aperitif.

The merging parties divested the distribution of Bacardi rum in Greece in order to address the Commission's tying concerns which were apparently rooted in the merger uniting a number of strong brands extending across all the major product categories typically offered in bars and other by the drink outlets. The Commission believed that Diageo (i.e. the new entity created by the merger) would have had the power to engage in full-line forcing having the effect of building up its weaker brands as well as further strengthening the position of its "must have" brands. This alleged tying power was described in terms that mixed it with more general concerns about other advantages Diageo would enjoy over competitors. Focusing on portfolio effects in the Greek market, the Commission decision stated:

> ….a deep portfolio of whiskey brands, spread out across the various quality and price segments, confers considerable price flexibility and marketing opportunities. Therefore, the supplier is shielded from market pressures, as he is able to face price competition from other suppliers' brands by positioning and pricing his various brands within the category. For instance, with its secure high market performance of the best-selling whisky brands, GMG will be able to devote as many resources as necessary in order to maintain its secondary brands in their position or to reposition the weaker brands upwards by expanding their share at the expense of competing brands, or in order to counter eventual competitive pressure coming from those brands. The parties have argued that such "pull-through" has not occurred in the past and is accordingly unlikely to occur in the future. However, this argument ignores the substantial increase in the parties' market shares and resources that the merger will create.

Moreover, a wide portfolio of categories confers major marketing advantages, giving GMG the possibility of bundling sales or increasing the sales volume of one category by tying it to the sale of another category. Both Guinness and GrandMet have made use of their portfolios of brands in bundling deals…. For instance, in 1995, GrandMet rewarded customers who collected and delivered [confidentiality deletion] bottle-caps of Smirnoff, Cuervo and J&B, by offering them a free [ ]. For the same number of caps, wholesalers received a credit note of [ ]. Moreover, Guinness made joint promotions of different categories and brands, whereby customers purchasing a 12-bottle pack containing Johnnie Walker Red Label (seven bottles), Gordon's gin (two bottles) and White Horse (three bottles) obtained a discount of [ ]. It should be noted that these promotional campaigns were run with the co-operation of wholesalers who supplied the various trade channels. Finally, in 1996 GrandMet carried a similar discount campaign for wholesalers, offering discounts for purchases of [ ] cases of a pre-selected mixture of the following GrandMet brands: J&B ([ ]), Smirnoff ([ ]), Cuervo ([ ]), Bailey's ([ ]), Grand Marnier ([ ]) and Malibu ([ ]).

In the on-trade [by the drink, e.g. bars and restaurants], where spirits producers build a brand's strength and image, GMG, through its broad portfolio of brands, would be able to influence what products are stocked or displayed in the limited space available behind the bar, (the so-called back-bar), thus further strengthening its market power. For small outlets which have smaller back-bars, or for Greek night-clubs which concentrate on whiskey, the combined entity would be an attractive solution for one-stop-shopping considerations. In addition, larger modern outlets, which usually stock a much broader variety of brands, may also become a target of the combined entity, should it attempt to gain more back-bar space or use the image of fashionable clubs in order to launch its brands. GMG could afford to make substantial offers, discounts and credits or organise and finance promotional events, that would also accrue to the outlet itself, and use its strength in leading brands, such as Johnnie Walker Red Label, Gordon's gin and Bacardi rum, in order to induce bars to list brands in the same or another category. Given that those premises could not afford not to stock the brands set out above, the negotiating power of GMG would be significantly strengthened. Therefore, it would be much easier for GMG to induce bar-tenders to adopt GMG brands as pouring brands (that is, the brand offered when a customer fails to specify a brand by name), thus increasing their sales volumes and public awareness.

In the off-trade, the elimination of competition between Guinness and GrandMet for in-store promotions will serve to enable GMG to plan jointly the timing of promotions, negotiate jointly the terms of promotions and co-ordinate any price changes. Moreover, through its variety of brands, GMG could also alternate branded products promoted over a period of time, thus occupying long promotion periods and excluding competitors from access to the promotion calendar for long periods.

By comparison, competitors have weaker portfolios and fewer strong brands, as stated in the preceding paragraphs, although those brands may have performed well, they lack the support of a strong

portfolio of brands. Indeed, in contrast to the complete GMG portfolio, the discontinuity of the competitors' portfolios would deprive them of price flexibility and make them more vulnerable to market pressures. For example, when their brands start losing sales volume, they will have to commit disproportionately stronger resources in order to avoid situations that could in the long run restrict their competitive scope.[8]

Some of the same types of portfolio effects can be found as well in the European Commission's decision regarding the *Coca Cola/Carlsberg* joint venture decision.[9]

3.2 Unilever/Best Foods

The following is an excerpt from the Swiss contribution to the OECD's Competition Law and Policy Committee roundtable on portfolio effects in conglomerate mergers. The Swiss Competition Commission's preliminary investigation in this case led to the conclusion that the merger was not illegal. During the preliminary investigation, no important product overlaps were found but there was concern about possible portfolio power effects because, "…the merger resulted in the union of a considerable number of products and brands within one single company…."[10] The submission continued with:

The following potential problems with portfolio power have been considered:

- increased pricing flexibility, including the possibility to offer promotions and discounts with a potential for abuse;
- increased scope for bundling (tying the provision of one product with others);
- increased credibility of implicit or explicit threats of a refusal to deal.

In the analysis of portfolio effects, the presence of a 'key brand' in at least one product market has been presumed to be a necessary condition for a potential abuse of portfolio power.

A key brand is a highly successful brand for which consumers find it difficult to find a substitute. Therefore, it had to be assessed whether UL or BF produced key brands.

Because retail customers seem to attach more importance to brands than business customers (hotels, restaurants) or institutional customers (hospitals, homes for the aged), the analysis focused on the retail sector.

According to the retailers interviewed, UL and BF both produced products, which were leaders in their sector. Nevertheless, it is difficult to assess whether these brands constituted key brands according to the definition provided above. According to the retailers, consumer preferences change rapidly in the food sector. Regularly, brands loose their position as number one and are replaced by other brands. In other words, according to the retailers, a well established brand today is no guarantee for success tomorrow in food markets.

Similarly, retailers doubted that bundling, by which retailers would be forced to purchase certain goods if they would like to be provided with leading brands, would raise important problems for them. The level of concentration in the retail sector and the resulting buying power of retailers (of Coop, in particular) seems to play a crucial role for the present merger, insofar as it has a disciplinary effect on producers.

In summary, the buying power of trading partners, which are highly concentrated, was considered to be sufficient to avoid abuse of portfolio power by UL and BF. In addition, the leading brands' life cycles seem to be limited as a result of rapidly changing consumer preferences. Moreover, strong actual and potential competition between producers reduces the scope for abuse of portfolio power. For instance, firms like Nestlé and Migros are strong actual and potential competitors.[11] Because of their global know-how in the foods sector and their financial resources, these firms are able to rapidly enter new product markets if they expect substantial benefits.[12]

3.3 General Electric/Honeywell

This is one of the European Commission's most recent decisions in a conglomerate merger involving what this paper classifies as portfolio effects.[13] The decision has not yet been published, so we can only present excerpts from the press release announcing the decision.

GE and Honeywell notified their merger agreement for regulatory clearance in Europe on 5 February this year. On March 1, the Commission started an in-depth investigation which demonstrated that GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Its strong market position combined with its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell is the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters (i.e., a key input in the manufacturing of engines).

The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices.[14]

Considering the preceding material (plus two case excerpts in Appendix A), the principal antitrust concern with regard to conglomerate mergers having portfolio effects seems to be that such mergers may facilitate anti-competitive tying, bundling or closely related behaviour. In the process of examining this concern we will also touch on how tying and bundling could effectively amount to price discrimination.

4. Tying and bundling

4.1 Preliminary remarks

In this paper tying will be taken to be the practice of "…requiring any person or class of persons to whom goods or services of any description are supplied to acquire other goods or services as a condition of that supply."[15] Ties are often implemented through contractual obligation, but they may also be arranged through the use of various discounts and rebates, or customisation tending to force a buyer to buy complementary products from the same supplier.[16]

"Tying" and "bundling" are sometimes used synonymously, but in this paper bundling will refer to situations where the seller determines the proportions in which two products are purchased. For examples, shoe manufacturers "bundle" rather than "tie" shoes with shoe laces, and automobiles are bundled with many components such as shock absorbers, exhaust systems, headlights etc.

Since tying and its variants tend to restrict consumer choice and with it competition, antitrust laws have generally been wary of the practice. In the United States, tying can be treated as *per se* illegal if four elements are satisfied:

- the tying and tied goods are two separate products;
- the defendant has market power in the tying product market;
- the defendant affords consumers no choice but to purchase the tied product from it; and
- the tying arrangement forecloses a substantial volume of commerce.[17]

In practice it is far from easy to prove all the required elements. In addition, both in the United States and generally in other jurisdictions, competition authorities increasingly recognise that tying can have a wide range of pro-competitive effects ranging from reduced production costs to ensuring appropriate quality. It could also, more controversially, improve economic welfare by permitting various forms of price discrimination. We return to this point below.

In theory, there is no need for a tying seller or a firm wishing to bundle products to own production facilities for the tied or all bundled products. In practice, however, there could be good reasons why a conglomerate merger uniting potential tying/tied or bundled products could increase incentives to engage in the practice. A merger will considerably reduce the costs and risks associated with negotiating with another firm the division of the expected gains from tying or bundling. Those costs and risks are considerably compounded in situations where both parties have some market power, and that is presumed to be the case in conglomerate mergers involving portfolio effects. Moreover, the risks are further increased if customisation involving high sunk costs is required in order to maximise the return from tying or bundling.[18] That too may be characteristic of conglomerate mergers involving portfolio effects because many of them involve uniting complementary products which might benefit from such customisation.

4.2 Analysis of tying/bundling - price discrimination aspects

Tying or bundling might be employed as a means of price discrimination in circumstances where a more straightforward approach to doing the same thing is illegal or infeasible. For example, it might be attractive to firms with market power that cannot distinguish high from low demand customers.[19]

Tying as price discrimination is often illustrated with IBM's early policy of tying leased mainframe computers, in which it had considerable market power, and punch cards used to feed instructions and data into the machines. The punch card market was considerably more competitive, or at least potentially so, than the market for leased computers. In imposing the tie and charging a supra-competitive price for the punch cards, IBM had found a way of effectively charging high use lessees more than low use lessees. This almost certainly increased IBM's profits. It may also have improved economic welfare if the result was:

- more efficient (i.e. cheaper) customisation at the interface between tying and tied products (somewhat unlikely in the IBM case);

- lower costs of quality control (i.e. avoiding the problem of consumers failing to appreciate the full effects of using cheaper but poorer quality complements);

- increased "output" in the tied product; and/or

- a more efficient spreading of the fixed costs of innovation across consumers (i.e. a better approximation to Ramsey pricing).

In the IBM case and other examples of "metering", the tying and tied goods are necessarily complements. In addition, tying can profitably and perhaps efficiently be used to price discriminate even when the tying and tied products are not complements as traditionally defined. Instead they may simply be related in the sense that if something is known about the strength of a buyer's desire for one good, this will reveal something about the buyer's strength of desire for the other good. This is sometimes referred to as "stochastic dependence" in demand. In particular, such dependence exists when there is a positive correlation across buyers in the strength of their demands for the tying and tied products.

Mathewson and Winter (1997) gave several examples of how tying could be explained by stochastic dependence. One of these involved the terms on which some US oil refineries used to sell gasoline to their franchisees. In addition to exclusive dealing, the petrol station operators were required to purchase tires, batteries and other automobile accessories from designated producers who in turn paid a ten percent commission on such sales to the tying oil companies. Although these are complements from the point of view of final buyers, that may not have been the reason oil refineries imposed tying on their gas station lessees. Mathewson and Winter observed:

It is reasonable to impute a positive correlation to the sale of gasoline and other automobile accessories at retail sites. For example, residential sites that have heavy traffic are likely sites where gasoline and tire sales are both high. Yet [it] is unlikely that tying the sale of accessories to gasoline is driven by price dependence in demand. That is, there is no reason to imagine that the sale of gasoline or tires at one site is conditioned on the price of the other good. Nor does the metering argument for tied sales appear to be applicable. Rather, it is reasonable to suggest that these tie-in arrangements were a contractual device to extract additional surplus from station owners because of the price-setting powers accruing to the oil companies through brand name and locational attributes. (571, reference omitted)

Mathewson and Winter also observed that the existence of stochastic dependence could explain why tied selling and two part pricing (a form of "second degree" price discrimination) could be found together:

Without tying, a monopolist using two-part pricing must collect rents through a fixed fee and only one variable price. Tying is profitable when the stochastic demands for two products are positively related across buyers, because it offers the monopolist an opportunity to extract increased rents from intensive users through a more efficient combination of variable prices. Tying leads to greater reliance on variable prices to collect rents, and the corresponding drop in the fixed fee is enough that a larger set of consumers purchases under tying. Tying is therefore never Pareto inferior, and it may be Pareto improving in our model. (576)

Stochastic dependence in demand could also explain why bundling may be used, in effect, to price discriminate, but in this case it is a *negative* rather than a positive correlation across buyers in terms of the strength of demand for both goods that is responsible for the profit enhancement. Stigler (1963)

illustrated this point in relation to the practice of block booking of films leased to cinemas and Varian (1989, 626-627), using slightly different numbers, described it as follows:

- Suppose that there are two theaters, A and B. A is willing to pay $9 000 for film 1, $3 000 for film 2, and $12 000 for the package. B is willing to pay $10 000 for film 1, $2 000 for film 2, and $12 000 for the package. Notice that the value of the bundle to each theater is simply the sum of the values of the two films; there are no "interaction effects" in the consumption of the two goods.

- Suppose that costs are zero, so that the movie rental company is only interested in maximising revenue. If the rental company rents each film individually, profit maximisation requires that it rent film 1 for $9 000 and film 2 for $2 000 making a total of $11 000 from each theatre. But if it rents only the bundled package it makes $12 000 from each theatre. Effectively the rental company has managed to price discriminate between the two theatres; it is renting film 1 to theatre A for $9 000 and to firm B for $10 000 and similarly for film 2.

This example illustrates an important point: bundling is most effective when there is a negative correlation between the consumers' valuations of the goods. In the case illustrated, theatre A's value for film 1 is less than theatre B's, but theatre A's value for film 2 is higher than theatre B's.

It is worth noting that although there is a negative correlation in buyer valuations of the goods in the example just described, the goods might still be traditional complements.

The film rental example illustrates what is usually referred to as pure bundling because only a seller determined bundle of films is being offered. In most markets it is more common to find mixed as opposed to pure bundling. With mixed bundling, the components are also sold separately. To make sense, however, the price of the bundle must be *less* than the total price of the components purchased separately. Restaurants offering fixed menus and offering the same dishes "à la carte" are practising mixed bundling. Even more than with pure bundling, the mixed variety allows a seller to charge, in effect, different groups of self-selecting buyers different prices for the same goods.

The welfare aspects of pure and mixed bundling were systematically explored in a seminal article by Adams and Yellen (1976). Their major contribution was to show that price discrimination through bundling can be profitable even without a negative correlation in buyer "reservation prices" for bundled goods, and also without expressly assuming that the goods are complements.[20] A description of their model and its implications can be found in Appendix B of this paper. It should be highlighted that their model assumed that the seller of the bundled products enjoyed a monopoly in both.

Adams and Yellen noted that bundling could produce a wide variety of effects on total economic welfare (i.e. the sum of consumers' and producers' surplus) depending on the levels of marginal costs and the distribution of reservation prices across consumers.[21] The level of marginal costs is important because even with mixed bundling there could be a loss in social welfare to the extent that some bundle buyers place a very high value on one of the bundled goods but value the other at less than its marginal costs of production.[22]

Although even mixed bundling could result in less social welfare than pure competition, Adams and Yellen make a very valuable point when they note that pure competition may not be the relevant benchmark. This is particularly pertinent to merger review where the comparison is necessarily between pre- and post-merger conditions. Prohibiting a merger in order to block bundling of products in which there is a high degree of pre-merger market power might make society worse off. As Adams and Yellen point out:

> …within the framework of our model, whenever mixed bundling is equivalent to pure price discrimination, it is Pareto optimal. Simple monopoly pricing never is. (495)

In the context of a reviewing a conglomerate merger involving portfolio effects, attention is necessarily devoted to whether the merger makes consumers worse off. Even if it were certain that such a merger would lead to a form of price discrimination through bundling and price discrimination would not be possible without the merger, that would not necessarily mean that the merger will harm buyers. This is another manifestation of the point that it is difficult to generalise about the effects of price discrimination.[23]

As already noted, the benchmark employed by Adams and Yellen was a situation where a single producer had monopoly power in the two bundled goods rather than one in which ownership of the two was initially separated. As such they did not have to mention an important point described by Nalebuff (2000, 1-2) and ascribed to Cournot. To the extent two products are complements, bringing them under common ownership will internalise the effect of a drop in the price of either on the sales of the other, i.e. without the merger, the firm that cuts the price would not reap the full benefits of the cut.[24] This should result in a lower price for both goods. This effect must be remembered when considering the welfare effects of an increased probability of tying or bundling occasioned by a conglomerate merger involving portfolio effects.

Appendix B describes some interesting extensions to the Adams and Yellen model presented in Schmalensee (1982) and Schmalensee (1984).

4.2.1 Summing up concerning the price discrimination related aspects of tying/bundling

Insofar as a conglomerate merger involving portfolio effects facilitates tying and bundling it could affect how existing market power is exercised. Both tying and bundling could make it possible to transfer more surplus from consumers to producers through an indirect kind of price discrimination in situations where more straightforward price discrimination might otherwise be infeasible. Tying is most profitably employed where there is a positive correlation across consumers in the value they place on the tying and tied products. Bundling might instead be favoured in cases where that correlation is negative *and* marginal costs of producing the bundled products are low.

It is difficult to analyse the total welfare effects of tying and bundling in cases where there is no change in market power. Tying involving complementary products and employed as a metering device facilitating price discrimination could result in a larger output, hence tend to increase total welfare beyond what it would be without the practice (i.e. assuming nothing can be done to reduce market power in the tying product). It could also have positive effects in terms of fostering production efficiencies or in ensuring improved complementarity among goods. Bundling, especially pure bundling, may be less likely than tying to increase total welfare because it could result in sales to individuals who value one of the bundled goods at less than its marginal costs of production. In general, all one can say is that the total welfare effects of bundling used to effect price discrimination depends on the marginal costs of producing the bundled products and the nature of any correlation across consumers in the values they place on those products.

Whether or not it facilitates tying/bundling, something more might need to be said concerning the total welfare effects of a conglomerate merger involving portfolio effects. To the extent the merging parties enjoyed large market shares and market power in complementary goods, there will be a tendency for prices to decline post-merger because the effects of price drops in one complement on profits in the other will be internalised instead of being ignored.

In short, fears that a conglomerate merger involving portfolio effects would lead to a welfare reducing type of price discrimination involving tying or bundling could be a thin reed to lean on as the *sole* rationale for blocking the merger. This is especially so if it can be shown that the elements necessary for price discrimination were already present pre-merger.

4.3 Analysis of tying and bundling - market power aspects

In this section we will examine some of the ways in which tying and bundling can solidify or increase market power.

4.3.1 Tying as a means of excluding or restricting competitors in the tied product market

As a general rule a monopoly producer of good *A* cannot increase its profits by tying the sale of *A* to product *B* (tied product); a monopoly profit can only be taken once. However, Whinston (1990) demonstrated an important exception to this general proposition. If there are significant economies of scale in the tied product, then tying raises unit costs for tied product competitors. That in turn would tend to foreclose the market for the tied product competitors or at least reduce their ability to constrain price rises in their market. The result would presumably be higher prices in the tied product market and increased total profits for the tying firm, especially if there are buyers interested in buying only the tied good.[25]

To have the effects Whinston envisaged, the tying firm must find a credible means of pre-committing itself to tie. With such a credible commitment, the tying firm becomes a more aggressive competitor in the tied product. In other words, potential entrants into the tied product would not expect the tying firm to accommodate their entry. Rather it would vigorously defend its sales of the tied product since if it loses sales there, it also loses sales of the tying product. Whinston thought a credible pre-commitment to tie would be achievable in a wide range of circumstances.[26]

Whinston's models include the assumption that because of significant economies of scale the tied product market is initially a duopoly. Most of the models also have two more things in common. First, in all but one case, the tying and tied products are not purchased in fixed proportions.[27] Second, and considerably more important, Whinston assumed an unassailable monopoly in the tying product. In that context, there is no need to explain why a disadvantaged tied good producer does not defend itself by entering the tying goods market. Such a counter strategy has been addressed, however, in closely related articles dealing with foreclosure through vertical integration. Two of those are presented in Appendix B. It is also addressed in the next sub-section of this paper where we discuss ideas presented in Nalebuff (2000).

The European Commission review of the merger between Boeing and the Hughes Space and Communications Company ("Boeing/HSC") illustrates how close analysis will sometimes reveal that the power to tie is more apparent than real.[28] The European Commission found some overlap between the parties' satellite product lines but was also concerned about the potential interaction between satellites and launch services. It was feared that the merged entity would be able to use various tactics to tie satellite sales to the use of Boeing launch services.[29] After canvassing consumers, the European Commission concluded that it would not be profitable for the merged entity to institute such a tie, because buyers put a high premium on being able to employ a number of launchers rather than risk depending on just one.[30]

There may not be many conglomerate mergers involving portfolio effects which present serious risks of market power leveraging from a tying to a tied product. The seriousness of such risks depends on

a number of elements. Before listing those, we note that despite our focus on tying, the analysis in this sub-section of the paper applies as well to mixed bundling (i.e. a situation where components as well as a discounted bundle are offered for sale). The elements tending to increase the risk that tying/bundling will reduce welfare through market power leveraging are:

- a high degree of market power in the "tying" product (or one of the bundled products);
- rivals' costs are significantly increased;
- a large number of buyers interested in purchasing only the tied product (or a subset of the bundled products);
- rivals find it impossible or unprofitable to match the tying/bundling strategy;
- prices will eventually rise above pre-merger levels in the markets where rivals' costs are raised (i.e. buyers will be unable to prevent a price rise, firms will be unable to profitably enter or re-enter after prices have risen, and the tying firm will have an incentive to raise prices above pre-merger levels);
- price increases will be sufficiently large, quickly realised and durable that the tying/bundling firm will be able to re-coup any opportunity losses it might incur in reducing its rivals' sales;[31] and
- buyers as a group will suffer a net loss despite any initial post-merger drop in prices.[32]

Concerning the fifth element, there are several reasons why the tying/bundling firm might wish to lower prices following a merger, at least initially. To begin with, tying/bundling could induce various efficiencies in both production and distribution. In addition there is the earlier mentioned effect of internalising the impact of a price drop in one of a number of complementary products. That effect would be reinforced in the case of a firm committing itself to tying/bundling. In fact, such a commitment would create its own price lowering tendency regardless of whether the products are complements or not.[33] The welfare impact of an initial post-merger price cut, whatever its cause, is hard to assess because it might contribute to an exit of competitors and a long run increase in prices above pre-merger levels. We return to that issue in Section VI.

4.3.2 Tying or bundling intended to consolidate market power

In the previous section we concentrated on how tying could be used to increase market power in a tied product, i.e. leveraging. Here the focus shifts to examine how tying or bundling facilitated by a conglomerate merger could consolidate market power.

Consider first the case of a company, "Firm 1", which is initially alone in the market for *A* but faces a more efficient competitor, i.e. Firm 2, in the market for complementary product *B*. One would normally expect Firm 1 to be content to allow Firm 2 to expand because that would help Firm 1 earn more profits in *A*. The game changes considerably though if Firm 1 faces the possibility of competition in *A* and there are significant economies of scale or network economies in *B*. In that case, Firm 1 might prefer to engage in practices having the effect of keeping Firm 2 small and inefficient. That would assist Firm 1 by denying a potential entrant in *A* the benefit it could derive through its customers having access to a high quality *B* complement. Carlton gave a "concrete example" which he also employed to register an important proviso:

> …suppose that a monopolist of operating systems initially ties application programs to its system to prevent new applications programs from developing. In subsequent periods, entry of new operating systems would occur if there existed a stock of independent application programs. But, by assumption, such programs don't exist because Firm 1 prevented their development by foreclosing the initial market to them. For such models to have empirical relevance, the disadvantage that Firm 1 can impose on Firm 2 should be large relative to the time it takes Firm 2 to overcome the disadvantage. (670)

The recent *Microsoft* case involving the bundling of an Internet browser with the "Windows" operating system has important similarities to Carlton's example.[34]

We have so far implicitly dwelt on the possibility that a conglomerate merger involving portfolio effects that facilitates tying of complementary goods could create problems for competition essentially through raising the costs of actual or potential rivals. It is also possible that tying, or more likely, bundling could harm buyers by reducing the profitability of entry into any one of a number of products sold together. This is the focus of two articles by Barry Nalebuff.[35]

Nalebuff (1999) considers the incentives a monopolist in two products would have to bundle them. The two products need not be complements. Nalebuff argues that the profits obtained through bundling as a type of price discrimination may pale in significance compared with the benefits of deterring new entry into presently monopolised products. Implicitly then, Nalebuff is relaxing the assumption that the sellers enjoy unassailable market power in any of the bundled products.

Nalebuff stresses that in contrast to its use as a type of price discrimination, bundling as an entry deterrent works best when there is a positive rather than a negative correlation across consumers in their valuations of the bundled goods.[36] He points out as well that although a successful tying strategy requires some means of credibly committing to the practice, that issue may not arise in bundling, at least not under the circumstances explicitly treated. This is because bundling could prove to be the profit maximising strategy even if it fails to deter entry. Further detail concerning the Nalebuff (1999) model, which deals with both pure and mixed bundling, can be found in Appendix B.

In the concluding section of Nalebuff (1999) we read:

> Although creating a bundle doesn't stop competition, it forces competitors to play the game bundle against bundle. A firm that has only some components of a bundle will find it hard to enter against an incumbent who sells a package solution at a discount. This will be especially true when the consumers have positively correlated values for the components of the package *or* when the components are complements. Bundling also softens the harm done by a one-product (or limited line) competitor. The rival takes fewer customers away and prices don't fall as far. (20, emphases added)

Bundling as modelled in Nalebuff (1999) provides a possible explanation of why a conglomerate merger combining products in which there is already considerable market power could consolidate that power. That does not mean, however, that such a merger would be detrimental to ultimate consumers. After all, Nalebuff's model predicts a price drop at least for buyers purchasing the bundle. In addition, to the usual complexities of assessing the welfare effects of the implicit price discrimination, the Nalebuff model also involves a trade-off between reasonably certain immediate price drops and more hypothetical longer term price drops that might have occurred had bundling not been used to discourage new entry. Moreover, the significance of the entry discouraging effect critically hinges on how great a handicap is imposed by obliging new entrants to simultaneously enter several markets instead of being able to enter

just one, or just one at a time. The same is true, of course, as regards the entry deterring effects of tying hence the crucial welfare significance of the degree of durable market power in the tying product.

An example of the kind of analysis required to more fully explore the entry discouraging effect of tying/bundling was provided by Choi and Stefanadis (2001). Their model featured a monopoly supplier of two complementary component products. The assumption that entry was possible into either good but only through a process of costly, risky innovation led to the following observation:

> …the tying of two complementary components by a monopolist credibly makes entry in one component completely dependent upon success in the other. An entrant can gain access to consumers and earn a positive profit only if the entrant in the other product is also successful. Tying, thus, makes the prospect of investment less certain, reducing the entrants' incentive for investment and innovation.[37]

Nalebuff (1999) does not examine situations in which there is something less than monopoly power in each of the bundled products. This gap is partially filled in a "sequel" focusing on complements (i.e. a special case of positive correlation across consumers in the values they place on bundled goods). The model presented in Nalebuff (2000) is briefly described in Appendix B. Nalebuff (2000) concludes with:

> As powerful as bundling is to a monopolist, the advantages are even larger in the face of actual competition or potential competition. Selling products as a bundle can raise profits absent entry, raise profits even against established but uncoordinated firms, all the while lowering profits of existing or potential entrants and putting these rivals in the no-win position of not wanting to form a competing bundle. The only real disadvantage of bundling is the potential cost of inefficiently including items consumers don't desire. This is less important when the items are complementary and when the marginal cost is essentially zero, as with information goods. Thus, we can expect bundling to be one of the more powerful and prevalent tools, perhaps we should say weapons, in our information economy. (12)

This conclusion might require considerable modification if one abandons the assumption that each component is produced by no more than two firms. It is also worth pointing out that Nalebuff found that when the prospective bundle is reasonably small, consumers could be better off as a result of bundling. If this generalises beyond the specific circumstances of Nalebuff's model, the small numbers effect could be highly important in the context of thinking about actual conglomerate mergers involving portfolio effects. The potential bundles in such mergers might be quite small. It is also worth noting that Nalebuff did not consider efficiency gains that bundling might facilitate. Finally, Church and Gandall (2000) cast some doubt on the robustness of Nalebuff's deduction that once the first bundle of complementary products is on the market, it will not pay for rival complement producers to match that bundle.[38]

This is a good place to note that certain realities of retail distribution can effectively make products complements even when final consumers do not view them as such. Consider, in particular, the situation of a group of products typically sold in the same type of retail outlet. Let us assume that from the consumer's perspective these products are neither complements nor substitutes. Suppose further that for some reason (perhaps fixed costs), retail outlets must stock a broad range of products in order to stay in business. Specifically, let us assume that the typical retail outlet's break even sales volume cannot be reached unless the retailer has all or almost all of the range of certain best selling products, i.e. so-called "key" or "must have" products. One or more sets of such key products constitute groups of complements from the point of view of the retail outlets. That point may take on competition policy significance if a merger results in a considerable reduction in the number of competing sets of such complements, especially if there are also real economies in retailers concentrating their purchases on a single supplier.[39]

Under these conditions, a conglomerate merger uniting a sufficiently large number of key products could grant the merged company the power to engage in full line forcing and/or to require retailers to practice exclusive dealing.

Full line forcing and exclusive dealing do not always harm consumers, especially if the practices rest at least in part on real economic efficiencies. The probability of harm is significant, however, if the affected retailers have no effective competitors. In that case, consumers patronising the targeted retailers could be harmed by reduced variety and higher prices. It could also happen that rival suppliers lose a sufficient part of their business that they are forced to exit. *If* that happens to a sufficient number of the suppliers' rivals, consumers patronising other retailers could also eventually be harmed. The probability of such welfare reducing full line forcing and/or exclusive dealing could be important for certain strongly branded consumer goods.[40]

The models examined in this sub-section of the paper, and further described in Appendix B, point to the possibility that, through facilitating tying or bundling, a conglomerate merger involving portfolio effects could assist firms in foreclosing and/or discouraging entry not just in one market but in two or possibly more. In order to actually have such an effect, however, considerable market power in at least one of the affected markets appears necessary.[41] In addition, the entry deterring power of tying and bundling strategies depends on there being a strong positive correlation across consumers in the valuations they place on the affected products. Strong complementary relationships would satisfy that requirement but would also create an offsetting economic welfare benefit because the merger would internalise the positive effects of reduced prices in either of the complements. It would also internalise the advantages of improving the interaction of complements in ways that buyers could not easily realise for themselves, and perhaps lead to other economies of scale or scope ultimately benefiting consumers.

As with earlier concerns about the price discrimination aspects of tying and bundling, a highly fact intensive analysis is required to assess the risks to competition posed by potential tying/bundling facilitated by a conglomerate merger involving portfolio effects.[42]

We have now seen that a conglomerate merger involving portfolio effects could lead to post-merger tying/bundling that could possibly have anti-competitive effects by virtue of excluding or restricting potential (non-party) competitors. For that possibility to be a significant probability, it is first necessary that there be significant pre-merger market power in the united products and, in the case of bundling, low marginal costs. It is also necessary that the products being merged be either complements or the kind of products for which there is a high positive correlation across consumers in the values they assign to each. These necessary conditions might be satisfied, for example, in certain information product markets.[43]

Bundling facilitated by a conglomerate merger, could well mean that the bundled product would be sold at a lower price than the combined pre-merger prices for the component products. This is particularly probable in the case of mixed bundling, i.e. the typically more profitable, hence more likely form of bundling. Despite the clear benefit to buyers occasioned by an immediate drop in prices, competition authorities might still have the power and desire to block or condition the merger. This would only be the case, however, if the bundling is expected to lead to a rise in price of the unbundled components (i.e. assuming mixed bundling), and/or will result in excluding or restricting competitors to the point where buyers are eventually harmed by prices rising above pre-merger levels. A rise in the price of the unbundled components would exacerbate the price discriminatory effects of mixed bundling, but as already noted, price discrimination may or may not reduce economic welfare. To justify a decision to block or condition the merger because of its exclusionary/restrictive effects *vis à vis* competitors, all the following conditions should be satisfied:

- existing or potential rivals cannot offer a competing bundle;
- existing rivals must exit the stand-alone product markets;
- once rivals have exited, the bundling firm has the power (i.e. is unconstrained by new entry and/or countervailing buyer power) and incentive to raise the price of the bundle, for a considerable period of time, above the sum of the pre-merger prices of the products combined;[44] and
- what buyers initially gain through prices set below pre-merger levels is less than what they later lose through paying higher than pre-merger prices.[45]

In the absence of one or more of these conditions, bundling facilitated by a conglomerate merger involving portfolio effects should not have a net harmful effect on buyers even if it excludes/restricts competitors.

5. Efficiencies of conglomerate mergers involving portfolio effects

Just as the anti-competitive effects of a merger are necessarily bound up with actual or potential relationships between the merging parties, so are any efficiencies that could be counted as mitigating such effects. Although conglomerate mergers by definition do not involve vertical links or horizontal market overlaps, that does not mean they unite completely unrelated businesses. There is a potential for efficiencies in terms of raising capital but these are likely insignificant in the case of acquired companies that are already very large and enjoying favoured access to capital markets. There could also be economies of scale or scope in production. In addition, when a conglomerate merger combines complements, as frequently happens when portfolio effects are present, it could significantly lower the risks of making sunk cost investments to enhance complementarity through customisation. Separate entities, especially entities having considerable market power, might be reluctant to increase their dependence on one another through such sunk cost investments.

In many conglomerate mergers, the most important economies may well arise in regard to marketing, including distribution functions. This is particularly true of conglomerate mergers involving portfolio effects since these necessarily include some commonality in customers being served by the merging parties. Some commentators even equate portfolio effects with efficiencies arising from serving the same set of customers. For example:

> A wide range of products is not always an indicator of dominance. It should only be so when it allows the firm in question to obtain significant cost savings by exploiting economies of scope, or when there are consumers interested in purchasing the whole range of products. In this case, a company offering the full range will reduce the transaction and supply costs for the customers and will also be able to maximise its promotion campaigns (by, for instance, offering discounts across the range). This advantage for a firm offering a full range of products is sometimes referred to as a 'portfolio effect'. In cases where such effects do not exist, the fact that a company is present in different product markets does not say anything about its dominance in one of them.[46]

Efficiencies in conglomerate mergers involving portfolio effects sometimes take a special twist in that they are realised by customers rather than sellers. Such efficiencies are more likely to produce an increase rather than a decrease in prices, but such an increase should not necessarily be equated with anti-competitive effect in the sense of a reduction in consumers' surplus. In essence, the merger makes it

possible to offer a new type of product or at least a significantly higher quality product, and raises an issue as to what the benchmark pre-merger price ought to be in measuring anti-competitive effect. Such efficiencies can be illustrated with an excerpt from the European Commission decision relating to the *ATR/de Havilland* merger which had aspects of a conglomerate merger involving portfolio effects (referred to in the decision as "range effects"):

> It appears that, in the sector concerned, having a complete range of products would give ATR/de Havilland a significant advantage in itself. From the demand side, airlines derive cost advantages from buying different types from the same seller….

According to a study submitted by the parties, it is argued that the inability of a manufacturer to offer a full range of seating capacities under the same umbrella may harm the demand for other existing aircraft of that manufacturer. This logic flows from the fixed costs borne by the carrier for each aircraft manufacturer dealt with by that carrier. These costs include the fixed costs of pilot and mechanic training as well as the costs of maintaining different in-house inventories of parts and the fixed costs of dealing with several manufacturers when ordering parts stocked only by the individual manufacturers themselves….[47]

6. Protecting competition by protecting competitors?

It is possible that conglomerate mergers could harm consumers by increasing the probability of predatory pricing. For example, a concern about possible predatory pricing appeared to play a role in the European Commission's decision to block the *ATR/de Havilland* merger.[48]

It is true that through creating opportunities to cross-subsidise and lowering costs of capital, some conglomerate mergers, particularly those uniting firms of vastly different sizes, may increase abilities to predate. Those same mergers do not, however, necessarily increase incentives to do so. Incentives to predate depend critically on an ability to recoup any short term opportunity losses imposed by the strategy.

Scherer and Ross (1990, 190) noted that the US had seen some cases where conglomerate mergers were blocked because of predation concerns, but "…the predation doctrine was attenuated in later decisions under other sections of US antitrust law, and the so-called deep pocket challenge to conglomerate mergers has fallen into disuse."

Quite apart from predatory pricing, it is possible that a conglomerate merger could yield a price drop that initially helps consumers but eventually harms them. As earlier noted, such a price reduction could result either from efficiencies specific to the merger,[49] or from the effects of joint pricing of complements (or analogous effects arising from a commitment to tie/bundle).

The paradoxical result that internalised complementarities (or analogous effects) and/or increased efficiency associated with a conglomerate merger could actually have a net detrimental effect on consumers would only materialise under a number of highly restrictive conditions:

- the merged firm will enjoy such significant internalised complementary pricing (or analogous) effects and/or efficiencies from the merger that it finds it profitable to drop prices below pre-merger levels in at least one market whether or not it expects that price drop to induce competitors to exit (i.e. the price drop cannot be prohibited as predatory pricing);

- neither rivals nor new entrants can match the merged firm's new costs;

- rivals will exit;
- buyers cannot use countervailing power to hold prices at or below pre-merger levels;
- firms will not enter or re-enter the market in response to price increases above pre-merger levels;
- the merged entity finds it profitable to raise prices above pre-merger levels;[50] and
- what buyers initially gain through prices set below pre-merger levels is less than what they later lose through paying higher than pre-merger prices.

These seven points would probably be difficult to prove in relation to a conglomerate merger involving portfolio effects.

Some commentators have taken the view that the European Commission's prohibition in the *General Electric/Honeywell* merger turned in part on what the commentators considered to be ill-founded concerns about harm to competitors.[51] The European Commission's press release relating to this decision did not explicitly mention this issue.[52] Moreover, in a subsequent speech, Commissioner Mario Monti addressed the question: "Is it true that, in applying merger control, the Commission cares more about competitors than customers?" His answer, in part, stated:

> Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.

Our merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation.

Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced welfare.[53]

7. Alternative remedial approaches - *ex ante* versus *ex post*

Depending on a country's legal regime, it may be possible to apply an *ex post* rather than an *ex ante* approach (i.e. conditioning or re-structuring the merger) to address potential anti-competitive effects arising in conglomerate mergers involving portfolio effects.[54] By *ex post* we mean that a merger could be permitted despite some concerns about potential anti-competitive effects. The feasibility of using abuse of dominance provisions to catch various exclusive practices in situations where market power in one market is being used to strengthen market power in another has already been demonstrated in a number of European Commission decisions.[55]

Before comparing the *ex post* and *ex ante* approaches it is well to review the objectives of merger remedies. Parker and Balto (2000) identified three:

– The foremost obligation of antitrust enforcers is to make sure that a merger does not reduce competition to any significant extent….

- A second objective is to select a remedy that will preserve competition with as much certainty as possible. The risk of inadequate relief, or the burden of untimely relief, should not be borne by consumers.

- The third objective is to preserve the efficiency-enhancing potential of a merger, to the extent that is possible without compromising our obligation to preserve competition.

They also touched on what the objectives do not include, and admitted the need for tradeoffs:

The [US Federal Trade Commission] is not a market regulator. Apart from enforcing the prohibitions that are contained in the antitrust laws, our job is not to regulate or prescribe the market behaviour of firms. That is a function of the competitive process. Nor are we industrial planners. Our obligation is straightforward and simple -- make sure that the post-merger world is every bit as competitive as the one that existed before the merger. Of course, nothing in the real world is ever that simple. Tradeoffs and judgement calls need to be made.

These views are probably shared by most if not all OECD competition authorities.

An *ex post* approach has the distinct advantage of permitting a competition authority to assess anti-competitive effects of a merger in an actual rather than hypothetical setting. It may suffer, however, from two disadvantages which can be stated as questions: would the anti-competitive effects be detected; and would a satisfactory remedy be available post-merger?

Generally speaking there is a high probability that competitors could be relied on to bring anti-competitive effects to the attention of competition authorities whenever those effects depend on restricting or eliminating their power to compete. Such reductions in competition are at the heart of allegations that tying/bundling and a number of other exclusionary practices could be anti-competitive. Customers could also be expected to complain about anti-competitive effects of certain behaviour.

On the adequate remedy point, it must be noted that it may be difficult to undo a conglomerate merger involving portfolio effects. This is especially true if the merger united complementary products and there has been significant post-merger customisation to improve their complementary properties. Without an attractive structural option, a competition authority might be forced into the position of becoming a type of post-merger regulator should anti-competitive conduct appear. For example, where a firm is engaging in mixed bundling and rivals are relying on it in order to provide competing bundles, one can expect continuing allegations that rivals are being subjected to both overt and subtle discrimination. In such situations, a competition authority could find itself being pushed towards preserving competitors rather than protecting competition.

An *ex post* rather than *ex ante* approach was advocated in two critiques of the European Commission's decision in the *Guinness/Grand Metropolitan* merger case. After noting that it is difficult to distil the tying theory into practical policy guidance, Baker and Ridyard (1999, 183) state:

> This difficulty raises the question of whether tying is an abuse which is amenable to *ex ante* intervention through merger policy or whether it should be controlled *ex post* using other tools of competition law. The introduction of "portfolio power" theories into merger control certainly blurs the distinction between the control of market structure and the control of firms' behaviour.

Heimler (1999, 8) was more categorical in his critique:

> …a concentration should be prohibited only if the increase of market power that it creates is so widespread that only a prohibition could eliminate it. On the other hand, if the increase of market power is not structural, but it is related to a specific practice, then the merger should be let through and the abusive behaviour be addressed ex-post. Otherwise it is like banning the sale of Ferrari cars, because it is highly probable that drivers will not respect the speed limits.

The European Commission's more recent prohibition of the *General Electric/Honeywell* merger has elicited similar criticism.[56]

On the other side of the Atlantic, there is a recent case showing mixed support for at least acknowledging that an *ex post* remedy is available in cases where mergers raise potential exclusion concerns. The Federal Trade Commission, by a split vote, decided not to challenge PepsiCo's recent acquisition of Quaker Oats. The two Commissioners voting to allow the transaction declined to treat it as a horizontal merger and noted:

> While merger law may be the first line of defence, it is not the only line. The Commission still has the ability to address conduct in the post-merger world by all players in the industry. In light of the structure of the soft drink industry, the difficulty of entry into that business, and the presence of competitive practices that may tend to protect incumbent firms at the expense of newer rivals, we remain concerned about competitive conditions across the entire industry. We urge the Commission to continue to monitor the industry carefully, focusing not only upon the parties to the proposed transaction at issue, but on all industry participants. More specifically, we believe the Commission should assess current and future practices of industry participants including, among other things:
>
> - the extent and effects of any exclusionary practices that may handicap a rival firm's ability to enter into the soft drink business or to obtain highly coveted shelf or "cold vault" space in retail channels;
>
> - whether soft drink industry participants enter into exclusive contracts with retail outlets, restaurants, businesses, municipalities, or other institutions, and whether those contracts unreasonably foreclose competition; and
>
> - whether any of these or other soft drink industry practices have the effect of raising prices either at the wholesale or retail levels, reducing product variety and customer choice, or otherwise reducing the availability of such products to consumers.

If the Commission concludes that competition is threatened as a result of any such practices, it should seek appropriate relief against any firms engaged in anti-competitive conduct, including, if necessary, post-acquisition divestitures.[57]

When the anti-competitive concerns raised by a conglomerate merger involving portfolio effects turn on the possible exit of competitors, there are perhaps still stronger reasons for tilting towards an *ex post* approach. Kolasky and Greenfield (2001, 29) noted:

> …range effects theory denies customers certain and immediate lower prices and better products based on speculative, long-range concerns that competitors might someday leave the market if they cannot match the merged company's offerings, and that the merged company might then exercise market power if actual or threatened entry did not constrain it.

For good reason, both EC and US merger reviews have traditionally focused on likely short- or medium-term effects rather than distant possibilities. It is, for example, no answer to antitrust concerns to argue that entry in five or ten years will restore competition; consumers will suffer in the meantime and entry far down the road may prove a mirage. Similarly, it makes no sense to deny consumers immediate benefits from an efficiency-creating deal based on long-range concerns about competitor marginalization or exit that may never happen.[58]

In terms of supporting an *ex post* versus *ex ante* approach to the review of conglomerate mergers involving portfolio effects, the preceding pair of comments should be balanced with considering exactly what an *ex post* approach would involve should post-merger conduct appear to be pushing a less efficient competitor out of business. How many competition authorities would be confident about taking steps to protect such a competitor?

8. Policy Conclusions

Without repeating the main findings presented at the beginning of the paper, we wish to draw the reader's attention to some general policy conclusions concerning the portfolio effects concept applied to conglomerate mergers.

Conglomerate mergers involving portfolio effects deserve greater scrutiny than is normally devoted to other types of conglomerate mergers. This is primarily because the presence of portfolio effects increases the likelihood that a conglomerate merger might facilitate anti-competitive tying or bundling. This likelihood is particularly great if the merger unites products:

1. in which there was considerable pre-merger market power; *and*

2. which are either:

    1. complements; or

    2. display both low marginal costs and a high positive correlation across buyers in the values placed on the products.

Whether or not a jurisdiction explicitly applies the portfolio effects concept, conglomerate mergers having these two features merit something beyond a quick initial screening. Any subsequent analysis would have to consider barriers to entry, merger specific efficiencies, and the effects of internalising the pricing of complementary products or of products having the positive correlation we just referred to.

Conglomerate mergers involving the above two characteristics could also give rise to behaviour amounting to price discrimination. This should rarely constitute sole grounds for opposing a merger, particularly since price discrimination could increase instead of reduce economic welfare.

The portfolio effects concept arguably helps competition authorities to think in broader terms when assessing potential pro- and anti-competitive effects of certain conglomerate mergers. There are certain drawbacks, however, that should be borne in mind.

Because "portfolio effects" is an umbrella concept, there is a danger of it being invoked to justify blocking or conditioning a merger having a number of potential exclusionary effects, none of which can be convincingly enough established to be the sole justification for opposing a merger. The accent must

remain on establishing a high probability of harm to consumers rather than on demonstrating that there are several ways in which such harm might occur. And that probability needs to rest not just on ways the merger enhances ability to act in an anti-competitive fashion, but also on there being a sufficient incentive to do so.

Many of the anti-competitive effects allegedly arising from certain conglomerate mergers involving portfolio effects are more hypothetical and off in the future than the effects commonly cited as grounds for blocking or conditioning horizontal and vertical mergers. This raises a serious issue of whether an *ex post* remedial approach should be preferred to an *ex ante* approach in the case of conglomerate mergers involving portfolio effects. The best approach could well vary from case to case. It could also vary from one jurisdiction to another, i.e. depending on legal provisions and enforcement resources.

This paper has tangentially raised the following question. Would merger review be significantly clarified if vertical mergers were re-defined as mergers of complements? If that were done, most conglomerate mergers involving portfolio effects and raising significant competition issues would be classified as vertical mergers. That in turn might produce significant analytical synergies in screening and, if required, fully assessing mergers significantly raising the probability of anti-competitive exclusion/restriction of competitors. Perhaps this question merits further attention by the Competition Law and Policy Committee.

APPENDIX A

Excerpts from Two Additional European Commission Merger Decisions

1. Aerospatiale - Alenia/de Havilland ("ATR/de Havilland")

In this decision taken in October 1991, the European Commission found there were separate product markets for planes having 20 to 39 seats, 40 to 59 seats and 60 seats and over. The merger included some overlap in the 40 to 59 seat market and would have conferred on the combined entity strong market shares in all three markets. Although the decision does not use the term "portfolio effects", it makes extensive references to how the merged entity's larger product range could produce anti-competitive effects. The following excerpt comes from the part of the decision dealing with the "Impact of the Concentration":

> …unlike the competitors, the combined entity would have all the advantages of a family of commuters to offer. This may give rise to the ability, *inter alia*, of offering favourable conditions for a specific type of aircraft in mixed deals. It may be conceivable that, for example, where an airline wants to acquire a small commuter of around 30 seats and a commuter of around 60 seats, ATR/de Havilland could offer special conditions for the ATR 72 [66 seats] when it is ordered with a Dash 8-100 [36 seats] where more competition is likely. The parties state that in practice there is no chance of mixed deals taking advantage of market power in one segment to sell in another. However, in comments introduced by economic consultants on the parties' behalf, reference is made to the ability of the combined entity to package together regional aircraft. The parties themselves expect that the aggregation of ATR and de Havilland marketing and manufacturing forces 'will certainly lead to an improvement of their position in North America and Europe among the regional aircraft producers', so that the position of the combined entity would be stronger than that of ATR and de Havilland currently.

It appears that, in the sector concerned, having a complete range of products would give ATR/de Havilland a significant advantage in itself. From the demand side, airlines derive cost advantages from buying different types from the same seller….

According to a study submitted by the parties, it is argued that the inability of a manufacturer to offer a full range of seating capacities under the same umbrella may harm the demand for other existing aircraft of that manufacturer… This logic flows from the fixed costs borne by the carrier for each aircraft manufacturer dealt with by that carrier. These costs include the fixed costs of pilot and mechanic training as well as the costs of maintaining different in-house inventories of parts and the fixed costs of dealing with several manufacturers when ordering parts stocked only by the individual manufacturers themselves….[59]

Increased bundling capability was not the only concern in this merger. Intertwined with that was the expectation that the merged entity would be able to offer customers certain important advantages whose flip side would be higher future switching costs for buyers, and an increased probability of predatory pricing.[60] Later in the "Other general considerations" section of the decision, we read:

> The consumers will be faced with a dominant position which combines the most popular aircraft families on the market. Choice will be significantly reduced. There is a high risk that in the

foreseeable future, the dominant position of ATR/de Havilland would be translated into a monopoly. Both British Aerospace and Fokker, the two principal competitors in the markets of 40 seats and above, have stated that the concentration would seriously jeopardise the survival of the ATP and Fokker 50 aircraft. These two competitors expect that the proposed concentration would lead to ATR/de Havilland pursuing a strategy of initially lowering prices so as to eliminate the competitors at least in the key markets of 40 seats and above. Neither Fokker nor British Aerospace consider it possible for them to withstand such a price war. Consequently, both would leave the markets. In evaluating these statements, it is noted that such conduct could be rational since the proposed concentration would mean that ATR/de Havilland would exceed the threshold of market shares which would make such a pricing policy likely given that it would be the optimal profit-maximising strategy. Having established a monopoly, ATR/de Havilland would be able to increase prices without any competitive check.

With this perspective, the proposed concentration would become even more harmful to the customers over time as the dominant position translates to a monopoly.[61]

2. Boeing and the Hughes Space and Communications Company ("Boeing/HSC")

This case involved the merger of a major firm active in the commercial aircraft, defence and space industries (including the production and launch of satellites) with an enterprise engaged in satellite-based services and satellite manufacturing. Despite the fact that the merger did not create overlaps in either satellites or satellite launch services, the Commission found it necessary to consider the possibility of anti-competitive effects arising out of combining these complementary products in which both companies enjoyed strong market positions. "Portfolio effects" were not referred to as such in the decision. The case is nevertheless a good illustration of portfolio effects as defined in this paper. The Commission identified six tying related potentially adverse effects of the transaction:

- Satellite makers seem to bid to customers with a mass margin. After the operation, HSC might design this mass margin so as to optimally fit with the payload capacity of Boeing's launchers. This might make the offers of other launch service operators less competitive than Boeing's.

- Some DIO contracts give the satellite prime contractor a certain flexibility as to the launch vehicle to be used. After the merger, HSC might try to have all those satellites launched on Boeing or Sea Launch vehicles.

- Launching a satellite requires prior integration work between the satellite and the launcher concerned. This integration may be performed on a case by case basis, but it appears to be also possible to develop general compatibility agreements between the launcher and the satellite family. After the proposed transaction, HSC might refuse to develop such compatibility agreements, which would increase the costs and time required for the integration of HSC satellites with launchers operated by third parties.

- HSC may refuse to provide third-party launch service operators with information relating to its next satellites or to satellite updates, so that those launch service operators cannot easily make their launchers compatible with those satellites.

- As a satellite manufacturer, HSC receives competitively sensitive information relating to the launch vehicles with which its satellites will be integrated. Although that information is

usually protected by confidentiality clauses, HSC might use it to the detriment of third party launch service operators.

- In the longer term, HSC might design its next generation of spacecraft so that they fit with Boeing's launchers better than with other launchers. For instance, HSC might impose unique and proprietary interfaces for its satellites, so as to favour Boeing launchers. HSC might also design its satellites so that they can be launched in such a way that they last longer than satellites usually do.[62]

Despite these concerns, the European Commission concluded, after canvassing buyers, that it would not be profitable for Boeing/HSC to induce satellite customers to use only Boeing launch services. Buyers simply put too high premium on being able to use a number of launchers rather than risk depending on just one.

APPENDIX B

Greater Detail Concerning Selected Economic Models Referred to in the Text

1. Adams and Yellen Model

Schmalensee (1984, S211) succinctly summarised this model as follows:

> [There is] a monopolist producing two goods with constant unit costs and facing buyers with diverse tastes. The marginal utility of a second unit of either good is assumed to be zero for all buyers [so a maximum of one unit is sold to each consumer]. The goods are independent in demand for all buyers, so that any buyer's reservation price for the first unit of either good is independent of the market price of the other. Thus the maximum amount any buyer would pay for a bundle consisting of one unit of each good is the sum of the two reservation prices, and buyers are completely described by the values of those two prices. Resale markets are assumed away.

Adams and Yellen identify three conditions which would be satisfied by "pure" price discrimination (presumably a situation where the monopolist sells each unit at a different price). Somewhat paraphrased, they are:

- complete extraction - no buyer realises any consumer surplus on his purchases;
- exclusion - no individual consumes a good if the cost of that good exceeds his reservation price for it; and
- nclusion - any individual whose reservation prices for a good exceeds its cost in fact consumes that good.

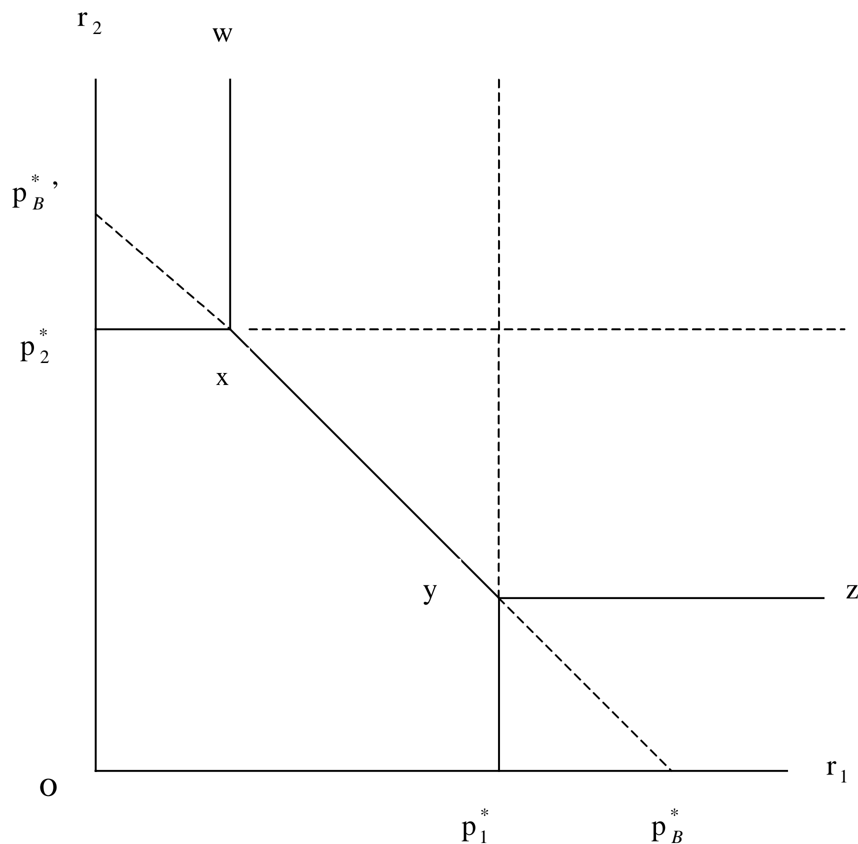
- Applying these labels, Adams and Yellen noted that:

The chief defect of pure bundling [i.e. only a bundle is offered] is its difficulty in complying with Exclusion. The greater the cost of supplying either good, the greater the possibility of supplying some individuals with commodities for which reservation price falls short of cost…. Thus pure bundling is preferred to simple monopoly pricing only if the greater profits accruing from more complete extraction or inclusion are not outweighed by the lower profits due to less complete exclusion. The more negligible are costs relative to reservation prices, the less of a problem this poses for pure bundling.

The mixed bundling strategy [selling components separately as well as bundled] is more profitable than its pure counterpart whenever Exclusion is violated in the pure bundling equilibrium…. In general, *whenever the exclusion requirement is violated in a pure bundling equilibrium, mixed bundling is necessarily preferred to pure bundling.* (482-3, footnote omitted)

Both pure and mixed bundling allow the monopolist seller to sort consumers according to their reservation prices and effectively charge different prices to them. Pure bundling sorts, however, into just two groups, those having a total reservation price greater than the price of the bundle and those who do not. Mixed bundling goes further in permitting sorting into four groups: those who buy the bundle, those who

buy nothing and those who buy just one or the other separately supplied goods. This was illustrated with the following diagram (i.e. Adams' and Yellen's Figure III at page. 480):



Assume that with mixed bundling, the prices for goods 1 and 2 sold as components are p_1^* and p_2^* respectively. Assume further that p_b^* is charged for the two goods bundled together. Consumers having combinations of reservation prices located to the Northeast of WxyZ would buy the bundle. Those to the Northwest of point "x" would buy only the second good and those to the Southeast of point "y" would buy only good 1.

2. Schmalensee's extensions of the Adams and Yellen model

Schmalensee (1982) extended the Adams and Yellen model by considering what would happen if there were competition in one of the bundled goods. His concluding paragraph read:

In the analysis of tying contracts as metering devices, it is usually assumed that the two products involved are complements and that buyers with higher reservation prices for the tying product demand more units of the tied product at any price. This positive association between demands is exploited by selling the tied product above cost, thus capturing more surplus from those who value the tying product more. Here, in contrast, a negative relation between reservation prices in the population is exploited, and

[the competitively supplied good] is accordingly sold below cost [in the sense that the bundled price minus the stand alone profit maximising price for the monopolised good, is less than marginal cost of the competitive good]. This permits extraction of more surplus from those who value it less and value [the monopolised good] more. (71)

Under these circumstances, Schmalensee pointed out that bundling could well produce complaints from competing producers that the monopolist is engaging in below cost selling in order to monopolise their market. The monopolist could counter, however, that it is indifferent to making the product itself or buying it at cost from the competitive industry and might be able to point out that the total output of the competitively supplied good has risen.

In a later article Schmalensee (1984) returned to the assumption of monopoly in both bundled goods, but further developed the Adams and Yellen model by assuming a particular type of stochastic dependence in demand, namely "…that buyers' reservation price pairs follow a bivariate normal distribution." (S212). Under that seemingly plausible assumption, pure bundling compared with pure component pricing is likely to increase not just profits but also total economic welfare. The probability of a favourable outcome increases as the willingness to pay for both goods grows larger compared to the marginal costs of producing them. Schmalensee speculated that under other demand distribution assumptions, it would remain true that "…bundling permits more efficient extraction of surplus by reducing effective buyer heterogeneity… " (S229, emphasis added)[63] He was not as sure, however, that this would hold if one relaxed assumptions concerning: monopoly in both products; independent demand for the two products; or consumers purchasing just a single unit of both products.[64]

3. Two models of foreclosure through vertical integration

Ordover et al. (1990) described foreclosure through vertical integration as follows:

Consider a market in which the supply of inputs is competitive before the merger and there are no production efficiency benefits gained from vertical integration. After the merger, suppose the upstream division of the now-integrated firm refuses to supply inputs to the rivals of its downstream division.

This foreclosure of rivals from these supplies means that remaining suppliers will face less competition. As a result, they may be able to increase their profits by raising their input prices to the unintegrated downstream firms. These higher prices benefit the vertically integrated firm. If rivals' costs of inputs are increased, they will be forced to reduce their production and raise the prices they charge in the downstream market. This reduction in competition allows the downstream division of the integrated firm to increase its market share and its price. Thus the profits of the vertically integrated firm can rise, even if there are no production efficiency benefits flowing from the vertical integration. (127-128, reference omitted).

Ordover et al. identified six criticisms levelled against this "leveraging" theory, and addressed them in a model that assumed initial upstream and downstream duopolies producing differentiated products. To abstract from the effects of merger induced gains in efficiency, Bertrand competition was assumed. Based on their model, Ordover et al. concluded that vertical foreclosure could be profitable, and welfare reducing, provided the unintegrated upstream firm's gain exceeded the unintegrated downstream firm's loss. Under those circumstances the effects of the first vertical merger could not profitably be undone by a second parallel merger.

Ordover et al. considered two ways in which the essential inequality in gains could be guaranteed. One was that the integrated firm could make a price commitment to the unintegrated

downstream firm in order to cap what the unintegrated upstream firm could charge. The other was the possibility that the upstream price could be kept below the critical threshold by pressure from "…an alternative (and inferior) competitive source of supply." (140)

Ordover et al. conceded that foreclosure would not necessarily be profitable and welfare reducing in a quantity-setting, homogeneous goods model. As for assuming an upstream oligopoly instead of a duopoly:

In that case, a single vertical merger would not confer complete monopoly power on the remaining upstream firms. While competition among them would naturally constrain the upstream price, reducing the profitability of foreclosure, such competition also would reduce the potential for an effective counterstrategy on the part of the foreclosed downstream firm. The necessary modelling is not entirely straightforward, however. (140)

The Ordover et al. model was criticised for its assumption that the integrated firm could make a credible commitment to supply the unintegrated downstream firm at a price sufficiently low to rule out a defensive counter-merger. To meet that critique, Choi and Yi (2000) presented a reformulated model in which the integrated firm advantaged its downstream subsidiary by supplying it with a customised input. Without the merger, the upstream firm would have had no incentive to grant such an advantage because it presumably would not share in the gains realised by the downstream firm. This customisation strategy has the critical additional effect of producing an upstream cost heterogeneity between the duopolists, which reduces upstream competition and increases the profits of both upstream suppliers.[65] Since it would eliminate that heterogeneity, a defensive counter-merger by the unintegrated downstream firm would not be profitable.

4. Nalebuff (1999)

Nalebuff first considers pure bundling and explains how it could have two important effects on the profitability of new entry in a situation where the incumbent firm enjoys a monopoly in two products, *A* and *B*. The first is what he calls the "pure bundling effect". This is explained in the context of an incumbent selling *A* and *B* only as a bundle, and wanting to prevent entry into both products (i.e. the incumbent does not know which of them a new entrant would choose to produce). Nalebuff begins with the simplifying assumption that the bundle price is simply set equal to the sum of the two profit maximising prices that would be charged were the products to be sold separately. He further simplifies by assuming marginal costs of zero for both goods, stochastic independence as regards the reserve prices across buyers, and some assumptions allowing for simpler calculation of prices and profits. Under these simplifying assumptions, bundling cuts the profits of new entry into either product in half.[66]

After demonstrating the "pure bundling effect", Nalebuff turns to the "bundling discount effect". This effect arises because with *A* and *B* sold as a bundle, the profit incentive to slightly lower the price grows because extra profits are realised on the increased sales of both goods. With the addition of the bundling discount, Nalebuff shows that the bundling induced drop in expected profits from entry is even larger than it would be with the pure bundling effect. He also demonstrates that were entry to occur, the incumbent's profits would be greater if it chose to continue to bundle than if it chose to discontinue the practice and compete product by product. That makes it unnecessary for the bundling firm to make a credible commitment to continue to bundle.

Nalebuff develops several important extensions to his model beginning with comparing mixed and pure bundling. Mixed bundling was found to increase profits for an uncontested dual monopolist but would not add much when a monopolist in one of the two goods has a rival in the other. In that case, it

must price the monopolised component high enough to prevent its competitor from constructing a rival bundle. Nalebuff also noted that if marginal costs were greater than zero, some inefficiency would result (i.e. some goods would be sold to consumers whose reservation prices fall below marginal costs), but that significant gains remain to bundling.

Concerning the impact of allowing bundles to grow beyond just two goods, Nalebuff concludes that:

The discrete gains that come from the act of bundling two goods do not continue to grow when more goods are added to the bundle. Eventually there is a gain from creating a very large bundle but that gain is due to a third effect, the law of large numbers.[67]

On the next page he added that:

Upon reflection, when the scope of bundling is modest, the strongest argument for adding another good to a bundle is to keep one step ahead of a potential entrant. An incumbent with a three-good bundle has less to fear from a potential entrant who can put together a two-good package. The third good prevents the incumbent from competing head-to-head and makes it harder for the entrant to gain share.

Nalebuff also explores the effects of positive and negative correlations in reservation values and deduced that positive correlations tend to increase the pure bundling effect while negative correlations tend to reduce it. He also considered the effects of complementarity, defined as arising when the utility of consuming *A* and *B* together exceeds the sum of the utilities experienced by consuming them separately. He found that the effects of such complementarity are separate from and potentially additional to any effects arising out of a positive correlation in reservation prices, i.e. complementarity tends to enhance the pure bundling effect. In contrast, if bundled *A* and *B* are substitutes, the pure bundling effect is reduced.

5. Nalebuff (2000)

The model in Nalebuff (2000) included the following assumptions: duopoly production of each of the complementary components (i.e. there are $2n$ firms where there are n complementary components; each pair of components is differentiated by something analogous to transportation costs; and perfect complementarity (i.e. the consumer must have one of each of the n complements). Within that framework, Nalebuff compares three possible forms of competition: component against component (no one bundles); bundle against bundle (everyone bundles); and bundle against components (only one bundle is offered). Nalebuff shows that bundle against bundle leads to lower profits than component against component competition. The intuition behind this is:

From the firms' perspective, the problem with bundle-versus-bundle competition is that the stakes are too high. Lowering the price of any one component increases the sale of all n components. The result is that the component prices fall down to such a low level that those incremental sales, all combined, are just enough to offset the loss in margin. (7)

Where a co-ordinator (this could, but need not be a single firm resulting from a conglomerate merger) offers a bundle competing with n unco-ordinated firms each selling a single component, Nalebuff shows that profits for all firms are higher than they would be with pure component competition. The big winners are the first firms to form a bundle. Not only are these first movers rewarded with high profits, they can be assured of keeping their winnings. Nalebuff shows that once a bundled product is on the market, profits would be reduced for all firms if the other n firms were also to bundle (i.e. thus introducing much less profitable bundle to bundle competition). The effects on consumers are ambiguous. As the

number of complements (hence the number of products in the co-ordinated bundle) grows, the price per good at first falls then rises for the bundled offering. It rises constantly for the single component sellers. So there comes a point at which even consumers purchasing the bundle lose compared to no bundling at all.

6. Comments based on Church and Gandall (2000)

As with Nalebuff (2000), Church and Gandal assume components supplied by just two firms, i.e. duopolies. Unlike Nalebuff, however, attention is restricted to just two complementary products, i.e. hardware and software, rather than *n* complementary products. Another key difference is that Nalebuff deals with a stronger form of foreclosure. The first firm to bundle presents consumers with the choice of consuming the bundle or constructing their own bundle from the unbundled components supplied by rival firms. In Church and Gandal, the foreclosure effect is accomplished by a hardware firm vertically integrating into software, and subsequently making that software incompatible with its rival's hardware. This is a type of mixed bundling that at first leaves consumers the choice of:

- buying the integrated firm's offerings;
- purchasing the integrated firm's hardware and the rival software; or
- buying hardware and software from the unintegrated rival firms.

Intuitively it would seem that the unintegrated firms would be better off at this point than they would be with Nalebuff style first mover bundling. Nevertheless, under certain circumstances, Church and Gandal find that the unintegrated firms might improve their profitability by merging and making their software incompatible with the first mover's hardware.[68] In other words, we are left with some doubt about the generality of Nalebuff's finding that bundle to bundle competition is inferior for all firms than bundle against unbundled components competition.

Before leaving Church and Gandal, it is worth noting that, within their model, whenever foreclosure is an equilibrium outcome (i.e. whenever retaliation is not a viable option for the foreclosed hardware firm), the result is reduced economic welfare. The foreclosure might even produce monopolies in both hardware and software.

NOTES

1. Computer software clearly has very low marginal costs. As for the correlation point, it may well be that, for example, the buyers who most value spreadsheet programs also rank highest among the buyers most valuing database managers. Note that these two products are likely neither substitutes nor complements for most buyers.

2. "Complements" includes both traditional complements and two products for which the buyers with the strongest demand for one member of the pair tend to be the same buyers having the strongest demand for the other.

3. American Bar Association, Antitrust Section (1992, 333).

4. This is sometimes referred to in terms of the products having a negative cross-elasticity of demand. That way of defining complements could, in the context of this paper be too restrictive. This is why we chose to focus on the concept rather than on how complementarity might be measured.

5. There is also the issue of the merger potentially increasing the probability of co-ordinated interaction. In the case of conglomerate mergers this potentiality is primarily bound up with whether the merger will increase multi-market contacts. Such effects do not appear to be more significant in conglomerate mergers involving portfolio effects than in the case of all other conglomerate mergers, which is why they are not further discussed in this paper.

6. Conglomerate mergers primarily motivated by a desire to reduce investor risk by smoothing earnings through the business cycle are excluded from this paper's notion of portfolio effects. Such mergers may be a means of overcoming certain imperfections in the capital market, but could also lead to other imperfections/inefficiencies of their own [see Scherer (1980)]. Discussion of those conglomerate mergers is outside of the scope of this paper.

7. The following extract from a 1998 European Commission report demonstrates the evolving nature of the portfolio and closely related "range effects" concepts, and shows as well that the concepts apply to both branded and industrial products:

   > The question of the potential impact of range effects on competition, which is particularly important with regard to daily consumer goods, such as drinks, arises in connection with the additional benefits that may accrue to the owners of dominant brand names. These advantages may be reflected in greater pricing flexibility and in a wide range of commercial strategy options. In the *Coca-Cola/Carlsberg* and *Guinness/Grand Metropolitan* cases, the Commission considered the inclusion in a range of drinks of strong brands belonging to separate markets. *It concluded that the impact of such inclusion could give each of the brands in the portfolio greater strength on the market than if they were sold individually, and strengthen the competitive position of the portfolio's owner on several markets.*
   >
   > In the second case, the consequences for potential competitors of owning a portfolio of high-profile brand names were also examined. The negotiating leverage resulting from ownership of dominant brands, which could, for instance, enable exclusive deals to be imposed, was deemed likely to raise additional obstacles to the market entry of new products.
   >
   > Other range-related effects can also be noted in the industrial sector. For example, in the *Boeing/McDonnell Douglas* case, leaving aside the previously existing monopoly in the wide body jet aircraft segment (Boeing 747), the merger resulted in an additional monopoly in the smaller narrow-body aircraft segment, thus making Boeing the only aircraft manufacturer offering a complete range of large commercial aircraft. This position could not be contested by new potential entrants, given the extremely high entry barriers on the market, which was highly capital intensive. [European Commission (1998b, 55-56, emphasis added)]

8. European Commission (1998a, paras. 99-103, deletions are in the original)

9. See European Commission (1997a).

10. Switzerland (2001, para. 8)

11. Migros and Coop are the most important retailers in the food sector in Switzerland with a combined market share between 40 percent and 50 percent. The reason that Nestlé and Migros are strong actual and potential competitors is that Migros produces most of the goods it retails.

12. Switzerland (2001, paras. 14-20, footnote in the original)

13. "Portfolio effects" are not expressly referred to in the press release relating to the decision. The European Commission apparently prefers to restrict that term to cases involving branded consumer goods. Published critiques of the decision refer to "range effects" [see Kolasky and Greenfield (2001)] and "conglomerate effects" [see Lexecon (2001)].

14. European Commission (2001).

15. Monopolies and Mergers Commission (1981, 5). The definition in American Bar Association, Antitrust Section (1992, 131) basically extends that definition to include arrangements where the buyer "…agree(s) that he will not purchase [the tied product] from any other supplier."

16. For further development of this point, see ibid., pp. 5-7 and Carlton (2001).

17. United States Court of Appeals…(2001, 70) [Microsoft] The cited judgement carved out an exception to this. It required (at pp. 85-86) a rule of reason approach to assess the legality of bundling involving platform software markets.

18. There are echoes here of the asset specificity arguments favouring vertical integration.

19. See Adams and Yellen (1976, 476-477).

20. A "reservation price" is the maximum a buyer would be willing to pay for a single unit of a product when either there is no option to purchase more than one unit, or it would be impossible to do so. For example, a consumer can be said to have a reservation price for attending the evening showing of a particular film on a particular night at the local cinema.

21. The concept of a distribution of reservation prices across consumers broadly corresponds to what we earlier referred to as stochastic dependence in demand.

22. Such social losses would usually be even higher, and the bundling firm's profits lower, if pure bundling were substituted for mixed bundling.

23. See Varian (1989) for a general review of the difficulties involved in assessing the welfare effects of price discrimination.

24. This is analogous to eliminating a double marginalisation problem through vertical integration.

25. To explain the importance of there being buyers only interested in the tied product, Carlton (2001, 667-668) gave the following example, which he attributed to Robert Gertner:

    Imagine a monopoly resort hotel on an island where hotel workers live. By requiring that hotel guests eat only in the hotel, the hotel may prevent other restaurants from developing that would otherwise serve both tourists and natives. Although the tourists were already subject to the monopoly power of the hotel (through the room rate), local residents were not, and hence are harmed by the reduction in competition.

In an earlier case, Carlton noted that tying could increase profits even in situations where all buyers purchase both tying and tied goods. Those are situations where price discrimination by the tying firm would not be possible without the tie, i.e. would be undone by arbitrage among buyers. See Carlton (2001, 665-666).

26. Specifically, he stated:

One of the primary ways in which this can be accomplished is through product design and the setting of production processes, both of which may involve significant sunk costs. By bundling components of its system together or by making interfaces between the separately sold components incompatible with their rivals' components, firms can precommit to their marketing strategy….

On the other hand, in a significant number of tying cases little more than an easily changed marketing decision seems to be involved. (839)

27. When the tying and tied products must be consumed in fixed proportions, the monopolist might make more profits by allowing a competitor to supply a differentiated complement whose availability increases demand for the monopolised tying product.

28. See European Commission (2000). Appendix A of this paper contains some excerpts from the Commission's decision in this case.

29. See ibid., paras. 81-82.

30. For a brief review of this case, which considers it to be a good application of criteria outlined in Whinston (1990), see NERA (2001).

31. As Whinston (1990, 850) noted in connection with discussing complementary products used in fixed proportions, it could happen that tying or bundling causes some firms offering differentiated products to exit. That could reduce the sales of the tying product (or one of the bundled products) if the tying/bundling firm is unable to replace those differentiated products.

32. Even if all these criteria are satisfied, the welfare effects of post-merger tying/bundling might be ambiguous if it is accompanied with welfare enhancing price discrimination. Whinston (1990, 839) stated that:

> The loss for consumers arises because, when tied market rivals exit, prices may rise and the level of variety available in the market necessarily falls. Indeed, in the models [presented], tying that leads to the exit of the monopolist's tied market rival frequently leads to increases in all prices, making consumers uniformly worse off. More generally, though, as is common in models of price discrimination, some consumers may be made better off by the introduction of tying. The effect on aggregate welfare, on the other hand, is uncertain because of both the ambiguous effects of price discrimination and the usual inefficiencies in the number of firms entering an industry in the presence of scale economies and oligopolistic pricing.

This seems to be another example of the theory of the second best, i.e. welfare does not automatically decrease when a distortion is introduced in a market that already is distorted.

33. See Appendix B's discussion of Nalebuff (1999), i.e. what he refers to as the "bundling discount effect".

34. See Fisher and Rubinfeld (2001). Microsoft was apparently concerned that Netscape's browser could interface with a number of operating systems. That created a potential problem for Microsoft because the Netscape browser supplied applications handles. If a sufficiently large share of personal computers had Netscape installed, applications writers could design their software to work from its handles rather than from handles supplied by the Windows operating system. That in turn would reduce incentives for

computer manufacturers and consumers to opt for Windows as their operating system since other operating systems, supplemented by Netscape, could also run the applications originally developed to work with Windows.

35. The key insight was foreshadowed in a model found in Katz (1989) which was essentially dealing with complementary products:

> There are two inputs to downstream production, *x* and *y*. Initially, both are supplied by an upstream multi-product monopolist. Entry into production of *x* is completely blocked, say by patent protection. There is a single potential entrant into production of *y*, however. If the potential entrant chose to come in, the two firms play a differentiated products pricing game. Absent a bundling arrangement, there may be no way for the incumbent to deter entry into this market; the entrant may rationally predict that the incumbent would accommodate entry into the production of *y*. Suppose, however, that the incumbent can engage in bundling and set a package price for one unit of *x* and one unit of *y* that is lower than the sum of the price of *x* and the price of *y*. Given the proper demand conditions, this bundling has the effect of shifting downward the incumbent's (price-space) reaction curve in the *y* market to the point that entry becomes unprofitable. Intuitively, bundling can make the incumbent more aggressive in the *y* market because every additional unit of *y* sold as part of a bundle leads to greater profits from the sale of *x* as well. The ability to bundle may thus give the incumbent a credible threat to use against a potential entrant. Hence, a manufacturer may, in fact use bundling to "leverage" his monopoly in one market into a monopoly in another one when the second market would otherwise have had a less-than-perfectly-competitive structure. (709)

36. With perfect negative correlation as regards products A and B: "…a one-product entrant has everything its consumers want…. The markets for A and B are essentially different groups of consumers. In contrast, when A and B are positively correlated, the same group of consumers are buying both A and B and, thus, a one-product entrant can't satisfy its customers." (2)

37. Choi and Stefanadis (2001, 52-53)

38. See comments on Church and Gandall (2000) in Appendix B.

39. For example, delivery costs plus the costs incurred in receiving and stocking new supplies could be significantly reduced by concentrating on a single supplier. This is actually a special case of a more general phenomenon that Ayers (1985) refers to as "transaction complementarities". There could also be "economies of aggregation" which could make it necessary to offer a minimum number of bundled goods in order to remain a viable competitor in things like internet service provision - see Bakos and Brynjolfsson (2000).

40. As our previous excerpt demonstrates, the European Commission cited such concerns as a reason for requiring the divestment of the Bacardi brand in the *Guinness/Grand Metropolitan* merger decision.

41. Baker and Ridyard (1999, 183) correctly point out that the theoretical models predicting "…harmful effects from tying typically assume that the product to which the competitive product is tied is a pure monopoly." (183) Whether bundling a group of "must stock" brands together would confer the requisite market power is an open issue, especially if the focus is on foreclosure rather than merely reinforcing existing market power.

42. Baker and Ridyard (1999, 183) observed that insofar as "portfolio power" refers to enhanced ability to engage in anti-competitive tying, such power cannot be lightly dismissed. Nevertheless, where tying is alleged, "…it should be described and analysed as such, and its likely effects should be evaluated in full recognition of the economic complexities in the tying literature."

43. See note 1, supra.

44. Even if merged products are neither complements nor substitutes, a merger may still engender sufficient efficiencies and/or produce joint pricing of complements (or analogous effects) that cause profit maximising prices to remain below pre-merger levels despite the other assumed conditions being met. This is why we note that the bundling firm must also have the "incentive" to raise prices above pre-merger levels.

45. This depends in part on how soon rivals actually will exit the stand-alone markets which in turn depends on their marginal rather than average costs.

46. Faull and Nikpay (1999, 134). Although this paragraph's context was the determination of dominance in abuse of dominance cases (i.e. Article 82), in the next paragraph the authors point out that the same ideas have been applied in merger cases (which are blocked if they create or strengthen a dominant position).

47. European Commission (1991b), para. 32. For other pertinent excerpts from this decision, see Appendix A.

48. See ibid. paras. 69-70 - these are included in the excerpt in Appendix A.

49. A variant of this would apply when a merger allows consumers to enjoy some "efficiencies" taking the form of a higher quality product, i.e. consequent on customisation to improve product complementarities. In this case, price may actually go up but the quality adjusted price might fall, especially where customisation adds only minimally to marginal costs.

50. The first five conditions listed refer to the ability to raise prices above pre-merger levels. The last addresses the possibility that due to the efficiency gains and or joint pricing of complementarities (or analogous effects), the profit maximising price could nevertheless be below pre-merger levels.

51. See Nils von Hinten-Reed (2001), Kolasky and Greenfield (2001), and Lexecon (2001). It should be noted that Kolasky and Greenfield had previously represented GE and Honeywell, and counselled the companies in the final stages of the European Commission's investigation of GE's proposed acquisition of Honeywell. Lexecon Ltd. was one of General Electric's economic advisers.

52. See the excerpt from this press release in Part III of this paper.

53. Monti (2001, 2)

54. In the interests of simplifying exposition, we omit discussing a mixed *ex ante* - *ex post* approach. A mixed approach would be one in which a merger is permitted conditional on the parties agreeing not to engage in certain practices having exclusionary effects. See Church and Gandal (2000) for a number of examples taken from some US vertical mergers.

55. See for example, European Commission (1991a), upheld in the decision of the Court of First Instance, Case T-83/91 *Tetra Pak International v. Commission* [1994] ECR II-755. See as well European Commission (1988) (*BPB Industries Plc and British Gypsum Ltd.*).

56. See von Hinten-Reed (2001, 3).

57. Swindle and Leary (2001). The two Commissioners who wished to block the transaction considered it to be horizontal in nature and stated:

> Moreover, in light of the market positions of PepsiCo and Gatorade products, and in particular the potential threat to innovation posed by this transaction, the only appropriate course of action was to seek to block the acquisition pending further analysis through administrative proceedings. Mere monitoring and supervision might be insufficient to guard against these anticompetitive effects. [Anthony and Thompson (2001)]

58. This is taken from an article criticising the European Commission's merger decision in *General Electric/Honeywell*. As noted above, Kolasky and Greenfield previously represented GE and Honeywell, and counselled the companies in the final stages of the European Commission's investigation of GE's proposed acquisition of Honeywell.

59. European Commission (1991b), paras. 30 & 32. Some of the same kind of customer savings derived from dealing with a single airplane manufacturer were also mentioned in *Boeing/McDonnell Douglas* which the Commission analysed as a conglomerate merger:

 …where a large fleet in service is combined with a broad product range, the existing fleet in service can be a key factor which may often determine decisions of airlines on fleet planning or acquisitions. Cost savings arising from commonality benefits, such as engineering spares inventory and flight crew qualifications, are very influential in an airline's decision-making process for aircraft type selections and may frequently lead to the acquisition of a certain type of aircraft even if the price of competing products is lower. [See European Commission (1997b, 41)]

60. See ibid., para. 33.

61. Ibid., paras. 69 & 70.

62. European Commission (2000, paras. 81-82)

63. According to Varian (1989, 629): "[Schmalensee (1984)] demonstrates that, in the Gaussian case [reservation prices are bivariate normal distributed], the standard deviation of the valuation of the bundles is always less than the sum of the standard deviations for the individual components. By reducing the dispersion of buyers' valuations, the monopolist is better able to extract the surplus from the population."

64. Concerning relaxing the monopoly assumption, McAfee et al. (1989) showed that in their version of the Adams and Yellen model, bundling would be remain optimal from a profit maximising point of view for a pair of duopolists. Anderson and Leruth (1993) appear to question that view. They note that duopolists might suffer from the greater degree of price competition that could result from mixed bundling. This is better appreciated when it is noted that the profit maximising price for a bundle would usually be lower than the total of the prices of the components sold separately. See Nalebuff (1999).

 Stigler's block booking example and some of the discussion in Adams and Yellen leave the impression that a negative correlation across consumers regarding reservation prices for bundled products is necessary for bundling to be a profitable strategy. Under conditions closely resembling the Adams and Yellen model, McAfee et al. (1989) have instead shown that bundling could be an optimal strategy for a monopolist even if there were no correlation at all in reservation prices across consumers. However, a perfect positive correlation would seem to rule this out [see Nalebuff (1999, 2)]. This is because such a correlation means that bundling would not reduce what Schmalensee referred to as "buyer heterogeneity".

65. The Choi and Yi model turns critically on their observation that:

 For a variety of oligopoly models, competition is more intense when firms are more symmetrically positioned in terms of costs. Therefore, firms are collectively better off when their cost structure is asymmetric across firms. (719)

66. The intuition behind this is as follows. Assuming the total market is normalised to a maximum of one unit sold and a uniform distribution of reservation prices (normalised to extend from zero to a price of one), the profit maximising prices for the goods were they to be sold individually are Pa = Pb = 0.5. At those prices, a half unit of each is sold and the total profit would equal, 0.25 + 0.25 = 0.5. A new entrant into B (it could just as well be A) would charge just below 0.5 and earn a total profit of 0.25. Anticipated profits would be much lower, however, if A and B were initially bundled, even assuming they sold for a price of one. In that case, a new entrant into good B choosing to charge something just below 0.5 would not obtain sales of

0.5 units of B. Instead, the new entrant would only sell to buyers who simultaneously value good B above 0.5 and good A at less than 0.5 (i.e. roughly one quarter of all buyers). It would succeed in selling just ¼ unit and making a profit of 1/8. People who value A at more than 0.5 (for example, 0.6) would consider the price of B obtained in the bundle as being something significantly less than 0.5 (e.g. 1 - 0.6 = 0.4) and prefer to buy both A and B.

Concerning the assumption that reservation prices have a uniform distribution, Nalebuff comments that: "Over the entire class of symmetric, quasi-concave densities, the uniform density is the *least* favourable to bundling." (13)

67. Nalebuff (1999, 14). For further development of this or a related point see Bakos and Brynjolfsson (2000) which discusses bundling in the context of "economies of aggregation".

68. The circumstances appear to be that both hardware and software differentiation are sufficiently important to consumers. Church and Gandal note, at pages 28-29, that "…when the hardware products are *very* differentiated and the marginal value of software variety is small…, "foreclosure but not monopoly in hardware is the expected equilibrium outcome. They also note that when hardware differentiation is "very small" monopoly in both hardware and software is expected "…regardless of the marginal benefit of software…." (45).

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NOTE DE RÉFÉRENCE

par le Secrétariat

1. Introduction

Les fusions conglomérales, à la différence de certaines fusions horizontales et verticales, ne soulèvent pas habituellement de problèmes de concurrence. Toutefois, ces dernières années, plusieurs autorités de la concurrence de la zone de l'OCDE se sont opposées à des fusions conglomérales, surtout lorsqu'elles avaient des « effets de portefeuille ».

Ce document a pour objet d'étudier comment les « fusions conglomérales ayant des effets de portefeuille » (voir la définition ci-après) pourraient avoir d'importants effets proconcurrentiels ou anticoncurrentiels et, sur cette base, de contribuer à la définition d'une politique optimale à l'égard de ces fusions.

Le constat général est que les fusions conglomérales ayant des effets de portefeuille ne posent pas de nouveaux problèmes de concurrence. Elles posent des problèmes classiques qui se présentent sous de nouvelles apparences et combinaisons. Dans une très large mesure, l'analyse appliquée en cas de fusion verticale suspectée d'effets d'exclusion est jugée applicable aux fusions conglomérales ayant des effets de portefeuille.

Les principaux résultats sont plus précisément les suivants :

Une fusion conglomérale faisant intervenir des produits complémentaires -- ce type de fusion représentant probablement une très forte proportion des fusions conglomérales ayant des effets de portefeuille -- pourrait faciliter la vente liée, la vente groupée ou des pratiques très similaires. Ces pratiques peuvent accroître le bien-être global, mais aussi le diminuer. Si l'on fait abstraction des effets d'efficience spécifiques à une fusion et des effets analogues, la probabilité de diminution du bien-être global est d'autant plus grande que les éléments suivants sont davantage présents :

- un degré élevé de pouvoir de marché pour le produit « liant » (ou l'un des produits groupés) ;
- les coûts des concurrents sont nettement majorés ;
- un grand nombre d'acheteurs souhaitent acheter uniquement le produit lié (ou un certain nombre seulement des produits groupés) ;
- pour les concurrents, il est impossible ou il n'est pas rentable de s'aligner sur la stratégie de vente liée ou de vente groupée ;
- les prix monteront en définitive au-dessus du niveau antérieur à la fusion sur les marchés où les coûts des concurrents sont majorés (c'est-à-dire que les acheteurs ne pourront pas empêcher une hausse des prix, les entreprises ne pourront entrer sur le marché ou y ré-entrer dans des

conditions de rentabilité après la hausse des prix et l'entreprise pratiquant la vente liée sera incitée à relever les prix au-dessus du niveau antérieur à la fusion) ;

- les hausses de prix seront suffisamment importantes, rapides et durables pour que l'entreprise pratiquant la vente liée ou groupée puisse récupérer les coûts d'opportunité qu'elle peut avoir à supporter pour diminuer les ventes de ses concurrentes ;
- les acheteurs considérés dans leur ensemble subiront une perte nette, même s'il y a eu au départ une baisse des prix après la fusion.

Comme pour les autres fusions, les fusions conglomérales faisant intervenir des produits complémentaires peuvent se traduire par des effets marqués d'efficience, bénéficiant aux acheteurs. En outre, dès lors que les parties détiennent un grand pouvoir de marché et une forte part de marché, ces fusions peuvent aboutir à une baisse des prix, même en l'absence d'effets d'efficience liés à la fusion. En effet, dans les conditions posées en hypothèse, le regroupement de la propriété de produits complémentaires incite la nouvelle entité à baisser le prix d'un des produits complémentaires (ou de tous ces produits) pour accroître ses ventes et ses bénéfices pour l'autre produit complémentaire qu'elle vend (ou tous les autres produits complémentaires). Ces éléments d'efficience et les facteurs de fixation internalisée des prix des produits complémentaires peuvent militer à l'encontre d'un relèvement des prix par l'entité fusionnée au-dessus des niveaux antérieurs à la fusion.

Les effets d'efficience spécifiques à la fusion et les effets de la fixation conjointe des prix de produits complémentaires (ou les effets analogues) augmentent normalement le bien-être économique, et notamment les avantages pour les acheteurs si les prix baissent après la fusion. Toutefois, si les prix baissent effectivement au départ, il est également possible qu'ils augmentent plus tard au-dessus des niveaux antérieurs à la fusion. Pour des raisons qui rappellent les mécanismes des prix d'éviction, il est possible que les acheteurs subissent au total une perte nette. Pour que cette possibilité se concrétise, les sept conditions suivantes doivent être cumulativement réunies :

- l'entreprise fusionnée bénéficie, du fait de la fusion, d'effets d'efficience et/ou d'effets de fixation internalisée des prix de produits complémentaires (ou d'effets analogues) d'une telle ampleur qu'elle juge profitable de baisser les prix au-dessous du niveau antérieur à la fusion sur un marché au moins, qu'elle attende ou non que cette baisse des prix conduise les concurrents à sortir du marché (autrement dit, la baisse des prix ne peut être interdite car il n'y a pas prix d'éviction) ;
- ni les concurrents, ni de nouveaux entrants ne peuvent s'aligner sur les nouveaux coûts de l'entreprise fusionnée ;
- les concurrents sortiront du marché ;
- les acheteurs n'ont aucun pouvoir compensateur qui leur permettrait de maintenir les prix aux niveaux antérieurs à la fusion ou au-dessous de ces niveaux ;
- les entreprises n'entreront pas sur le marché ou n'y réentreront pas à la suite d'une hausse des prix au-dessus des niveaux antérieurs à la fusion ;
- l'entité fusionnée juge profitable de relever les prix au-dessus du niveau antérieur à la fusion ;

- le gain obtenu au départ par les acheteurs grâce aux prix fixés au-dessous du niveau antérieur à la fusion est inférieur à la perte qu'ils subissent ultérieurement en devant payer des prix supérieurs à ceux antérieurs à la fusion.

Une fusion conglomérale ne faisant pas intervenir des produits complémentaires peut également faciliter la vente liée et la vente groupée, mais la rentabilité de ces pratiques -- et donc la probabilité de les voir apparaître après la fusion -- sera sans double faible, sauf si l'on observe une forte corrélation entre les consommateurs en ce qui concerne la valeur qu'ils attribuent aux produits réunis à l'occasion de la fusion. En outre, en cas de vente groupée, de faibles coûts marginaux peuvent également être déterminants. Ces conditions pourraient être remplies pour certains produits de l'informatique comme les logiciels.[1] Les effets d'une telle vente liée ou groupée en termes de bien-être sont très similaires à ceux observés en cas de fusion faisant intervenir des produits complémentaires.

La vente liée et la vente groupée pourraient être utilisées comme instrument de discrimination par les prix de nature à réduire le bien-être économique -- mais pas nécessairement -- même s'il n'en résulte pas une exclusion anticoncurrentielle des concurrents ou des restrictions anticoncurrentielles à leur égard.

Dans la mesure où une fusion conglomérale fait craindre des pratiques anticoncurrentielles de vente liée ou groupée, le meilleur moyen de régler ces problèmes pourrait être de procéder ex post et non ex ante, c'est-à-dire de s'appuyer sur les dispositions relatives aux positions dominantes pour contrecarrer les pratiques anticoncurrentielles, s'il y en a, et non sur la réglementation des fusions.

Il n'est pas possible d'établir une liste simple de critères qui permettrait aux autorités de la concurrence de distinguer les fusions ayant des effets de portefeuille qui sont préjudiciables et celles qui ne le sont pas. Toutefois, un certain nombre de caractéristiques sont utiles pour les décisions préliminaires concernant la probabilité de la nocivité d'une telle fusion pour le bien-être économique. Cette probabilité risque d'être élevée si :

- les parties disposent d'un grand pouvoir de marché pour les produits faisant l'objet de la fusion ;

- les produits faisant l'objet de la fusion sont « complémentaires » ;[2]

- les coûts marginaux de production des produits « complémentaires » faisant l'objet de la fusion sont faibles ;

- les concurrents qui subsistent et les nouveaux entrants ne pourront pas probablement obtenir les effets d'efficience et les avantages de subordination de vente que les entreprises qui fusionnent sont à même d'obtenir.

Bien que la distinction généralement admise entre une fusion verticale et une fusion conglomérale dépende de l'existence ou de l'absence de relations client/fournisseur avant la fusion, la probabilité que les ventes liées ou groupées facilitées par une fusion se révèlent anticoncurrentielles ne dépend pas substantiellement de cette distinction.

Ce document sera subdivisé en sept sections. On commencera par les définitions et des extraits de trois décisions concernant des fusions, choisies pour mettre en lumière les problèmes de concurrence qui se posent lors de fusions conglomérales faisant intervenir des effets dits « de portefeuille ». On examinera ensuite de près la vente liée et la vente groupée, ces deux pratiques étant principalement à l'origine des préoccupations que suscitent les fusions conglomérales ayant des effets de portefeuille. On verra ensuite également comment ces effets d'efficience pourraient en définitive être préjudiciables, et non bénéfiques

pour les consommateurs. On se demandera enfin si l'approche ex ante ou l'approche ex post est la plus adaptée pour régler les problèmes de concurrence qui peuvent se poser dans certaines fusions conglomérales ayant des effets de portefeuille et on formulera à cet égard une série de conclusions. Dans toute la mesure du possible, les informations complémentaires et les questions techniques sont regroupées dans les deux annexes.

2. Définitions

76. Nous examinerons dans cette section la définition classique de la fusion conglomérale et nous montrerons qu'une telle définition risque d'être de peu d'utilité si elle limite de façon excessive l'analyse d'une fusion conglomérale faisant intervenir des produits complémentaires. Nous proposerons ensuite une définition des « effets de portefeuille » et nous présenterons des cas de fusions conglomérales où ces effets étaient visiblement importants.

2.1 Définition de la fusion conglomérale et nécessité de ne pas lui accorder une influence excessive pour l'examen des fusions

Aux fins du présent document, on entend par « fusion conglomérale » une fusion dans laquelle les parties « …ne sont pas des concurrents effectifs ou potentiels et n'ont pas de liens client/fournisseur effectifs ou potentiels ».[3] Cette définition conduit à s'interroger sur la signification exacte du concurrent « potentiel » ou des liens « potentiels » client/fournisseur. La réponse sera probablement différente d'une autorité de la concurrence à l'autre, mais l'élément fondamental dans le cas des concurrents est qu'aucune des entreprises n'exerce une contrainte concurrentielle sur l'autre avant la fusion. En ce qui concerne les liens potentiels client/fournisseur, la situation censée être visée est celle dans laquelle une partie à une fusion est actuellement en concurrence avec un fournisseur ou client actuels d'une autre partie. Cette hypothèse permet de régler le problème suivant de définition. Si une fusion réunit deux produits qui ne sont pas des substituts et si les parties ont clairement l'intention de grouper ces produits après la fusion, y-avait-il au moment de la fusion un lien potentiel acheteur/fournisseur entre les parties ? Avec notre définition, il n'y avait pas un tel lien et la fusion serait donc classée dans la catégorie des fusions conglomérales. Cela conduit à se poser la question suivante : la ligne de démarcation entre la fusion verticale et la fusion conglomérale ne risque-t-elle pas d'être de peu d'utilité ?

Pour l'analyse et la qualification des effets proconcurrentiels et anticoncurrentiels, il paraît judicieux de traiter comme une fusion horizontale une fusion entre deux entreprises produisant effectivement ou potentiellement des produits substituables. De même, on considérera comme verticales les fusions entre entreprises ayant des liens client/fournisseur effectifs ou potentiels, bien qu'on puisse plus utilement définir ces fusions comme des fusions faisant intervenir des produits complémentaires. Le problème est qu'on a une catégorie résiduelle qui, de par sa diversité, n'est pas d'un grand secours, parce qu'elle ne distingue pas entre les fusions conglomérales réunissant des produits complémentaires et celles qui ne réunissent pas de tels produits.

Deux produits sont complémentaires au sens classique de ce terme s'ils ont plus de valeur pour l'acheteur lorsqu'ils sont consommés ensemble.[4] Cela vaut pour un large éventail de produits. Un grand nombre de produits ne sont pas utiles en eux-mêmes, mais seulement parce qu'on les combine d'une manière ou d'une autre. Le pied droit et le pied gauche d'une paire de chaussures en sont un exemple, et les logiciels et matériels informatiques un autre. Même entre les matériels informatiques, il existe des complémentarités manifestes. Un disque dur d'ordinateur n'est d'aucune utilité sans processeur central. Un processeur central n'est d'aucune utilité sans écran, etc. Il en est de même dans l'aéronautique : un moteur

d'avion n'est d'aucune utilité sans la cellule sur laquelle il sera monté ; l'avionique ne servira à rien si l'avion n'a pas de moteur, etc.

Pour évaluer la probabilité qu'une fusion conglomérale aboutisse à une discrimination par les prix qui diminue le bien-être ou à une exclusion/limitation de la concurrence qui diminue le bien-être, la présence ou l'absence de liens client/fournisseur avant la fusion est-elle toujours décisive ? Du point de vue du consommateur final, la réponse est négative. Un exemple hypothétique simple permettra d'illustrer ce point. Supposons que l'entreprise *A* soit le titulaire du brevet pour les feux stop installés sur la vitre arrière des automobiles et qu'elle soit la seule entreprise à vendre ce produit. Supposons en outre qu'avant qu'aucun de ses concurrents ne le fasse, le constructeur *B* pense qu'il peut installer ces feux stop au moment de l'assemblage du véhicule pour un prix inférieur à celui que devra acquitter le consommateur en cas d'installation après l'achat du véhicule. Si *B* décide au départ d'acheter à *A* les feux stop, puis fusionne avec cette entreprise, la fusion sera considérée comme verticale. Mais si *B* n'a jamais acheté de feux stop à *A*, la fusion sera conglomérale. Malgré la différence de classification, les effets proconcurrentiels et anticoncurrentiels des deux fusions seraient identiques. En particulier, la décision que prendrait l'entreprise après la fusion de ne pas proposer ces feux stop séparément, ou de ne les proposer qu'à un prix majoré, aurait les mêmes effets sur le bien-être économique, qu'il y ait ou non un lien acheteur/vendeur entre les parties à la fusion.

Nous avons mis l'accent sur les fusions conglomérales faisant intervenir des produits complémentaires, mais les observations que nous faisons valent d'une façon générale pour toutes les fusions conglomérales ayant des effets de portefeuille (telles que définies ci-dessous). Du point de vue du consommateur final, l'élément important est de savoir si, oui ou non, la fusion :

- entraînera, sous une forme ou sous une autre, une discrimination par les prix diminuant le bien-être ; et/ou

- aura tendance à éliminer les fournisseurs offrant des produits de substitution pour l'un des produits faisant l'objet de la fusion ou les deux.[5]

La probabilité de l'un ou l'autre de ces résultats dépend pour une large part des interrelations au niveau de la production et de la demande entre les produits combinés lors d'une fusion conglomérale.

2.2 *Définition des effets de portefeuille*

L'expression « effets de portefeuille » est assez vague et on ne peut en trouver une définition qui soit généralement acceptée. De l'analyse d'un certain nombre d'affaires utilisant cette expression, nous déduisons que les effets de portefeuille dans le contexte des fusions conglomérales se réfèrent habituellement aux effets proconcurrentiels et anticoncurrentiels qui peuvent se produire dans les fusions combinant des produits de marque :

- pour lesquels les parties disposent d'un pouvoir de marché, sans être nécessairement dominantes; et

- qui sont vendus sur les marchés voisins ou connexes.[6]

La notion de "marché voisin ou connexe" vise un lien, au niveau de la demande, entre les marchés, c'est-à-dire un degré marqué d'éléments communs du point de vue des acheteurs desservis. L'exemple le plus net d'un tel lien est celui des produits complémentaires, mais ce n'est pas le seul.

Dans ce document, nous adopterons comme définition des effets de portefeuille la déduction qui a été faite ci-dessus, à cette réserve près que nous prendrons en compte les produits d'une façon générale et pas uniquement les produits "de marque". Par conséquent, notre définition vaut également pour certaines fusions conglomérales regroupant des produits intermédiaires.[7] Si nous avons ainsi élargi la définition, c'est parce que les effets proconcurrentiels et anticoncurrentiels auxquels nous voulons nous attacher ne dépendent pas dans une large mesure de la présence ou de l'absence de marques fortes.

3. Effets anticoncurrentiels censés résulter d'une fusion conglomérale ayant des effets de portefeuille

La principale préoccupation que suscitent, du point de vue de la concurrence, les fusions ayant des effets de portefeuille, semble être que ces fusions peuvent indirectement conforter ou amplifier le pouvoir de marché en facilitant divers comportements, plutôt que modifier directement les structures du marché. Pour illustrer ces comportements et mettre en lumière leurs interrelations, nous présenterons ci-après plusieurs extraits d'une décision de la Commission européenne et d'un compte rendu d'une décision suisse. Nous reprendrons également un extrait du communiqué de presse de la Commission européenne concernant la décision *General Electric/Honeywell*. On trouvera à l'annexe A des extraits de deux autres décisions de la Commission européenne concernant des affaires de fusion conglomérale.

Avant de présenter ces extraits, nous formulerons trois observations. Premièrement, le but n'est pas d'illustrer toutes les questions de concurrence qui se sont posées dans les affaires citées. Deuxièmement, les extraits ne reprennent guère les éléments de preuve rassemblés pour appuyer les allégations ou les conclusions. Enfin, le fait qu'ils concernent la Commission européenne et la Suisse ne veut pas dire que les autorités de la concurrence en question sont les seules qui aient eu à examiner des effets de portefeuille lors de fusions conglomérales. Les contributions des pays pour la table ronde sur ce thème devraient attirer notre attention sur d'autres exemples.

3.1 Guinness/Grand Metropolitan

Dans cette fusion, la Commission européenne a conclu à l'existence de plusieurs marchés de produits. Sur le marché grec, ces catégories de produits étaient les suivantes: le whisky, le gin, le rhum, le brandy, les diverses liqueurs et l'apéritif local, l'ouzo.

Les parties à la fusion ont renoncé à la distribution du rhum Bacardi en Grèce pour remédier aux préoccupations de la Commission en matière de subordination de vente, qui tenaient apparemment au fait que la fusion regroupait plusieurs marques fortes couvrant toutes les grandes catégories de produits habituellement proposés dans les bars et autres débits de boissons. La Commission considérait que Diageo (la nouvelle entité créée par la fusion) aurait eu des possibilités de vente forcée d'une gamme complète de produits, ce qui lui aurait permis d'améliorer la position de ses marques les plus faibles et de renforcer encore ses marques "incontournables". Ce pouvoir allégué de vente liée était décrit dans des termes tels qu'il se trouvait associé à des préoccupations plus générales quant aux avantages dont bénéficierait Diageo par rapport à ses concurrents. S'attachant aux effets de portefeuille sur le marché grec, la décision de la Commission indiquait que:

> …un portefeuille complet de marques de whisky couvrant l'ensemble des différents segments, tant pour la qualité que pour les prix, offre à son détenteur une très grande souplesse en matière de prix et de multiples possibilités en termes de stratégie commerciale. Le fournisseur est ainsi protégé des pressions du marché puisqu'il est capable de lutter contre la concurrence par les prix exercée par les marques d'autres fournisseurs et par la façon dont il positionne ses diverses marques dans la catégorie et en fixe les prix. Par exemple, le fait pour GMG d'être assuré des

bons résultats de ses marques de whisky les plus vendus lui permettra de consacrer toutes les ressources nécessaires pour maintenir le positionnement de ses marques secondaires ou repositionner à la hausse les marques moins demandées, en accroissant leur part de marché aux dépens de marques concurrentes, ou pour s'opposer à d'éventuelles pressions concurrentielles émanant de ces marques. Les parties ont fait valoir que cela ne s'était pas produit dans le passé et ne se produirait sans doute donc pas à l'avenir. Cet argument ne tient toutefois pas compte de l'augmentation substantielle des parts de marché et des ressources des parties que produira la concentration.

En outre, le fait que son portefeuille couvre tant de catégories est un atout majeur pour GMG en termes de marketing, puisqu'il lui permet de grouper ses ventes ou d'accroître le volume des ventes d'une catégorie en les liant à celles d'une autre catégorie. Tant Guiness que GrandMet ont usé de cette possibilité dans des opérations de ce genre. En 1995, par exemple, GrandMet offrait à ses clients, sur présentation de […] bouchons de Smirnoff, de Cuervo et de J&B, […]. Pour ce même nombre de bouchons, les grossistes recevaient un crédit de […]. De son côté, Guiness a procédé à des promotions conjointes de différentes marques et catégories, dans le cadre desquelles les clients achetant une caisse de 12 bouteilles, dont 7 de Johnnie Walker Red Label, 2 de Gordon's et 3 de White Horse, bénéficiaient d'une remise de […]. Il convient de noter que ces campagnes de promotion ont été réalisées en collaboration avec les grossistes approvisionnant les divers circuits de distribution. Enfin, en 1996, GrandMet a organisé une autre de ces campagnes à l'intention des grossistes, auxquels des ristournes ont été proposées pour l'achat de […] caisses d'un assortiment préétabli comprenant les marques suivantes: J&B ([…]), Smirnoff ([…]), Cuervo ([…)], Bailey's ([…]), Grand Marnier ([…]) et Malibu ([…]).

Grâce à l'ampleur de son portefeuille de marques, GMG serait capable d'influer, dans les établissements servant des boissons à consommer sur place (là où se construisent la puissance et la réputation d'une marque), sur les produits qui sont stockés dans l'espace limité disponible à l'arrière du bar et, partant, de renforcer encore son pouvoir de marché. Pour les établissements de petite taille, dans lesquels cet espace est encore plus restreint, ainsi que pour les boîtes de nuit grecques qui servent surtout du whisky, l'entité combinée offrira une solution séduisante, car ils pourront s'approvisionner auprès d'un seul fournisseur. En outre, l'entité combinée pourrait également s'intéresser aux établissements modernes plus grands qui stockent en général un assortiment de marques beaucoup plus large, soit pour tenter d'y accroître la présence de ses marques sur l'espace d'exposition à l'arrière du bar, soit pour se servir de la réputation des clubs à la mode pour les lancer. GMG aura les moyens de proposer des offres, des remises et des crédits importants, ou d'organiser et de financer des opérations de communication, dont bénéficiera également l'établissement lui-même; de même, elle pourra utiliser la puissance des marques dominantes, telles que Johnnie Walker Red Label, le gin Gordon's et le rhum Bacardi, pour persuader les bars de référencer les marques dans la même catégorie ou dans une autre. Etant donné que ces établissements ne pourront pas se permettre de ne pas stocker les marques susmentionnées, le pouvoir de négociation de GMG s'en trouvera sensiblement renforcé. Il sera de ce fait beaucoup plus aisé pour GMG de convaincre les tenanciers de bar de servir d'office les marques de GMG lorsque le client commande un alcool sans autre précision, ce qui aura pour effet d'accroître le volume de ses ventes et la notoriété de ses marques auprès des consommateurs.

Dans le secteur des points de vente de vente de boissons à emporter, la suppression de la concurrence entre Guinness et GrandMet en matière de promotions en magasin permettra à GMG de planifier conjointement le calendrier des promotions, de négocier ensemble les conditions de ces actions et de coordonner les changements de prix, quels qu'ils soient. En outre, grâce à la diversité de ses marques, GMG sera également capable d'alterner les cycles de promotion sur ses produits de marque, permettant ainsi à ces derniers d'occuper le créneau des promotions sur de longues périodes, au détriment des concurrents, qui en seront exclus.

Par comparaison, les portefeuilles concurrents apparaissent moins puissants, avec peu de marques importantes. Comme indiqué aux points précédents, ces marques, malgré leurs bons résultats, ne bénéficient pas du soutien que procure un portefeuille de marques puissant. Contrairement à GMG, qui dispose d'un portefeuille complet, les concurrents, en raison du caractère fragmentaire de leur portefeuille, auront une marge de manœuvre moindre en matière de prix et seront davantage exposés aux pressions du marché. Si, par exemple, les ventes de leurs marques commençaient à diminuer, ces concurrents devraient réagir en engageant des moyens extrêmement importants, de manière à éviter des situations susceptibles de restreindre, à long terme, leur capacité concurrentielle.[8]

On trouve les mêmes effets de portefeuille dans la décision de la Commission européenne concernant l'entreprise commune *Coca Cola/Carlsberg*.[9]

3.2 Unilever/Best Foods

On trouvera ci-après un extrait de la contribution de la Suisse à la table ronde du Comité du droit et de la politique de la concurrence de l'OCDE sur les effets de portefeuille dans les fusions conglomérales. La Commission suisse de la concurrence, menant une enquête préalable dans cette affaire, a conclu que la fusion n'était pas illégale. Cette enquête préalable n'a mis en évidence aucun recoupement important de produits, mais on pouvait craindre un éventuel pouvoir de marché dû à des effets de portefeuille parce que, "…la fusion aboutissait au regroupement d'un très grand nombre de produits et de marques dans une seule société…"[10] La contribution suisse continuait ainsi :

Les problèmes potentiels suivants sous l'angle du pouvoir de marché lié aux effets de portefeuille ont été examinés :

- une plus grande souplesse pour la fixation des prix, notamment à travers la possibilité d'offrir des promotions et des réductions susceptibles d'être abusives ;

- des possibilités accrues de vente groupée (liant la fourniture d'un produit à celle d'autres produits) ;

- une plus grande crédibilité en cas de menace tacite ou expresse de refus de vente.

Dans l'analyse des effets de portefeuille, la présence d'une marque "clé" sur au moins un marché de produits a été considérée comme une condition nécessaire pour qu'il puisse y avoir abus de "pouvoir de portefeuille".

Une marque clé est une marque remportant un très grand succès pour laquelle les consommateurs ont des difficultés à trouver un produit de substitution. Il fallait donc déterminer si Unilever ou Best Foods produisaient des marques clés.

Parce que les clients au stade du commerce de détail semblent attacher plus d'importance aux marques que les clients industriels ou commerciaux (hôtels, restaurants) ou les clients institutionnels (hôpitaux, établissements pour personnes âgées), l'analyse a été centrée sur le secteur du détail.

Selon les détaillants interrogés, Unilever et Best Foods produisaient l'un et l'autre des produits qui étaient des leaders dans leur secteur. Il est néanmoins difficile de déterminer si ces marques étaient bien des marques clés selon la définition donnée ci-dessus. Selon les détaillants, les préférences des consommateurs évoluent rapidement dans le secteur des produits alimentaires. Périodiquement, une marque perd sa position de numéro 1 et est remplacée par d'autres marques. Autrement dit, selon les

détaillants, une marque bien établie aujourd'hui n'offre aucune garantie de succès demain dans le secteur alimentaire.

De même, les détaillants ne pensaient pas que la vente groupée, par laquelle ils seraient forcés d'acheter certains produits pour pouvoir être approvisionnés en certaines grandes marques, leur poserait de sérieux problèmes. Le degré de concentration dans le secteur du détail et le pouvoir qui en résulte pour les détaillants au niveau des achats (cas de Coop en particulier) semble jouer un rôle crucial dans cette fusion, dans la mesure où elle a un effet de discipline sur les producteurs.

En résumé, le pouvoir d'achat des partenaires commerciaux, très concentrés, a été jugé suffisant pour éviter un abus de pouvoir de portefeuille de la part d'Unilever et de Best Foods. En outre, le cycle de vie des grandes marques semble être limité en raison de l'évolution rapide des préférences des consommateurs. Par ailleurs, la concurrence vigoureuse, effective et potentielle, entre les producteurs limite les possibilités d'abus de pouvoir de portefeuille. Par exemple des entreprises comme Nestlé et Migros sont de puissants concurrents effectifs et potentiels.[11] En raison de leur expérience mondiale du secteur alimentaire et de leurs moyens financiers, ces entreprises peuvent rapidement entrer dans de nouveaux marchés de produits si elles en attendent de substantiels bénéfices.[12]

3.3 General Electric/Honeywell

Il s'agit de l'une des décisions les plus récentes de la Commission européenne dans une affaire de fusion conglomérale ayant des “effets de portefeuille” au sens de ce document.[13] Cette décision n'ayant pas encore été publiée, nous ne pourrons que présenter des extraits du communiqué de presse qui l'annonce.

Le 5 février 2001, GE et Honeywell ont notifié leur accord en vue d'obtenir l'autorisation de leurs opérations de concentration en Europe. Le 1er mars, la Commission a ouvert une enquête approfondie qui a démontré que GE occupait déjà à elle seule une position dominante sur les marchés des réacteurs pour avions commerciaux de grande capacité et pour gros porteurs régionaux. La solidité de sa position sur le marché, conjuguée à sa puissance financière et à l'intégration verticale dans l'exploitation en crédit-bail d'aéronefs, figure parmi les éléments qui ont permis de conclure à l'existence d'une position dominante de GE sur ces marchés. L'enquête a également montré que Honeywell est le principal fournisseur de produits avioniques et non avioniques ainsi que de moteurs pour avions d'affaires et de dispositifs de démarrage de moteur (c'est-à-dire un composant clé dans la fabrication des moteurs).

Le regroupement des activités des deux sociétés aura entraîné la création de positions dominantes sur les marchés de la fourniture de produits avioniques, non avioniques et de réacteurs pour avions d'affaires, ainsi que le renforcement des positions dominantes existantes de GE en matière de réacteurs pour avions commerciaux de grande capacité et gros porteurs régionaux. La conjonction de plusieurs facteurs pourrait entraîner cette création ou ce renforcement de positions dominantes: les chevauchements horizontaux sur certains marchés ainsi que l'extension de la puissance financière de GE et son intégration verticale aux activités de Honeywell et, enfin, le regroupements de leurs produits complémentaires respectifs. Une telle intégration permettrait à l'entité issue de l'opération de concentration de démultiplier la puissance de marché respective des deux sociétés concernant leurs produits respectifs. Ceci aurait pour effet d'exclure les concurrents, éliminant ainsi la concurrence sur les marchés et ayant au bout du compte une incidence négative sur la qualité des produits, le service et les prix appliqués aux consommateurs.[14]

A en juger par les citations qui précèdent (plus les deux extraits d'affaires de l'annexe A), la principale préoccupation dans le cas des fusions conglomérales ayant des effets de portefeuille semble être que ces fusions peuvent faciliter les ventes liées ou groupées anticoncurrentielles ou des pratiques

connexes. Nous nous attacherons maintenant à cette préoccupation, en nous demandant également comment la vente groupée et la vente liée peuvent effectivement constituer une discrimination par les prix.

4. Vente liée et vente groupée

4.1 Observations préliminaires

Dans le présent document, la vente liée est la pratique qui consiste « … à imposer à toute personne ou catégorie de personnes auxquelles des biens ou services d'une désignation quelconque sont fournis d'acquérir d'autres biens et services pour pouvoir obtenir cette fourniture. »[15] La vente liée est souvent mise en œuvre au moyen d'obligations contractuelles, mais elle peut aussi reposer sur l'utilisation de rabais et réductions sous diverses formes, ou sur des formules personnalisées ayant tendance à forcer l'acheteur à acheter les produits complémentaires au même fournisseur.[16]

On utilise parfois de façon interchangeable les termes « vente liée » et « vente groupée », mais dans ce document on emploiera l'expression « vente groupée » pour les situations où le vendeur détermine les proportions dans lesquelles deux produits sont achetés. Par exemple, un fabricant de chaussures pratique la vente groupée et non la vente liée dans le cas de chaussures et de lacets et il y a vente groupée pour l'automobile dans le cas d'un grand nombre de composants comme les amortisseurs, l'échappement, les phares, etc.

Puisque la vent liée et ses variantes ont tendance à limiter le choix des consommateurs et, partant, la concurrence, les réglementations de la concurrence sont généralement très méfiantes à l'égard de cette pratique ; aux Etats-Unis, la vente liée peut être illicite en soi si quatre conditions sont réunies :

- le produit liant et le produit lié sont deux produits distincts ;
- le défendeur dispose d'un pouvoir de marché sur le marché du produit liant ;
- le défendeur ne laisse au consommateur aucun autre choix, sinon lui acheter le produit lié ;
- le dispositif de vente liée empêche un volume commercial substantiel.[17]

Dans la pratique, il est loin d'être facile de démontrer l'existence de tous les éléments nécessaires. En outre, aussi bien aux Etats-Unis que dans les autres pays, les autorités de la concurrence reconnaissent de plus en plus que la vente liée peut avoir tout un éventail d'effets proconcurrentiels, en permettant notamment de réduire les coûts de production ou d'assurer une qualité adéquate. Elle pourrait également -- ce point étant plus controversé -- améliorer le bien-être économique en rendant possibles diverses formes de discrimination par les prix. Nous reviendrons sur ce point.

En théorie, il n'y a aucune nécessité pour qu'une entreprise pratiquant la vente liée ou une entreprise souhaitant grouper des produits possède les installations de production du produit lié ou de tous les produits groupés. Mais, dans les faits, il pourrait y avoir de bonnes raisons pour qu'une fusion conglomérale réunissant des produits potentiellement liants/liés ou groupés incite davantage à se livrer à cette pratique. Une fusion diminuera considérablement les coûts et les risques qui ont trait à la négociation, avec une autre entreprise, de la répartition des gains attendus d'une vente liée ou d'une vente groupée. Ces coûts et ces risques sont bien plus élevés lorsque les deux parties ont un pouvoir de marché, situation présumée dans le cas d'une fusion conglomérale ayant des effets de portefeuille. De plus, les risques sont encore plus grands si une personnalisation se traduisant par des coûts irrécouvrables élevés est nécessaire

pour optimiser le rendement de la vente liée ou de la vente groupée.[18] Cet élément peut être lui aussi caractéristique des fusions conglomérales ayant des effets de portefeuille, parce qu'un grand nombre de ces fusions se traduisent par le regroupement de produits complémentaires susceptibles de bénéficier d'une telle personnalisation.

4.2 Vente liée/groupée et discrimination par les prix

La vente liée ou la vente groupée peut être utilisée à des fins de discrimination par les prix lorsqu'une méthode plus directe pour obtenir ce résultat est illégale ou n'est pas réalisable. Par exemple, elle pourrait être intéressante pour les entreprises disposant d'un pouvoir de marché qui ne sont pas en mesure de distinguer entre les clients à forte demande et ceux à faible demande.[19]

Comme exemple de vente liée en tant que moyen de discrimination par les prix, on cite souvent la politique ancienne d'IBM qui consistait à lier la location d'ordinateurs centraux, pour lesquels elle avait un pouvoir de marché considérable, et la vente de cartes perforées alimentant les machines en instructions et en données. Le marché des cartes perforées était beaucoup plus concurrentiel -- ou, au moins, pouvait l'être -- que le marché des ordinateurs loués. En imposant cette vente liée et en pratiquant pour les cartes perforées un prix supérieur au niveau de concurrence, IBM avait trouvé un moyen de faire payer en fait plus cher les locataires gros utilisateurs que les locataires petits utilisateurs. Il était quasi certain que cela augmentait les bénéfices d'IBM. Cela aurait pu également améliorer le bien-être économique si le résultat avait été :

- une personnalisation plus efficiente (c'est-à-dire moins coûteuse) à l'interface entre le produit liant et le produit lié (ce qui n'était guère probable dans le cas d'IBM) ;

- des coûts plus faibles de contrôle de la qualité (en évitant le problème qui réside en ce que les consommateurs ne se rendent pas pleinement compte des conséquences de l'utilisation de produits complémentaires moins chers, mais de moins bonne qualité) ;

- une « production » accrue du produit lié ; et/ou

- une répartition plus efficiente des coûts fixes d'innovation entre les consommateurs (c'est-à-dire une meilleure approximation de la tarification à la Ramsey).

Dans le cas d'IBM et dans d'autres cas de systèmes de comptage, le produit liant et le produit lié sont nécessairement complémentaires. En outre, la vente liée peut être utilisée, de façon rentable et éventuellement efficiente, pour opérer une discrimination par les prix, même si le produit liant et le produit lié ne sont pas complémentaires au sens traditionnel. Ils peuvent tout simplement être connexes en ce sens que, ce qu'on peut savoir sur le degré auquel un bien est souhaité par un acheteur sera révélateur du degré auquel l'acheteur souhaite l'autre bien. C'est parfois ce qu'on appelle la « dépendance stochastique » de la demande. Cette dépendance existe en particulier lorsqu'il y a corrélation positive entre les acheteurs du point de vue de l'intensité de leur demande pour le produit liant et pour les produits liés.

Mathewson et Winter (1997) donnent plusieurs exemples d'explication de la vente liée par la dépendance stochastique. L'un de ces exemples concerne les conditions de vente appliquées par certaines raffineries de pétrole américaine à leurs franchisés. Les exploitants de stations-service étaient astreints à une obligation de distribution exclusive, mais devaient aussi acheter des pneus, des batteries et d'autres accessoires automobiles à des producteurs désignés, lesquels versaient une commission de dix pour cent pour ces ventes aux sociétés pétrolières pratiquant cette vente liée. Bien qu'il s'agisse de produits complémentaires du point de vue de l'acheteur final, ce n'est peut-être pas pour cette raison que les

raffineries de pétrole imposaient la vente liée aux exploitants de stations-service. Mathewson et Winter font observer à cet égard :

On peut raisonnablement considérer qu'il existe une corrélation positive entre la vente d'essence et celle d'accessoires automobiles au niveau des points de vente au détail. Par exemple, pour les points de vente des zones résidentielles à forte circulation, les ventes seront probablement élevées aussi bien pour l'essence que pour les pneus. Or, il est improbable que ce soit la dépendance de la demande à l'égard des prix qui explique qu'on subordonne la vente d'accessoires à la vente d'essence. Autrement dit, il n'y a aucune raison d'imaginer que la vente d'essence ou de pneus à un point de vente soit conditionnée par le prix de l'autre produit. L'argument du comptage en volume pour la vente liée ne paraît pas non plus applicable. L'explication raisonnable est que ces formules de vente liée étaient un moyen contractuel d'obtenir un surplus additionnel des exploitants de stations-service, grâce au pouvoir de fixation des prix dont bénéficient les sociétés pétrolières, via la notoriété de la marque et les avantages de localisation (571, référence omise).

Mathewson et Winter notent également que l'existence d'une dépendance stochastique pourrait expliquer pourquoi la vente liée et la tarification binôme (forme de discrimination par les prix « au second degré ») peuvent coexister :

Sans vente liée, un monopoleur utilisant une tarification binôme doit extraire la rente par un tarif fixe et un seul prix variable. La vente liée est profitable lorsque les demandes stochastiques pour deux produits sont en corrélation positive entre les acheteurs, parce qu'elle offre au monopoleur la possibilité d'extraire une plus forte rente des gros usagers grâce à une combinaison plus efficiente de prix variables. La vente liée conduit à s'appuyer davantage sur les prix variables pour extraire la rente et la baisse correspondante du tarif fixe est suffisante pour qu'un plus grand nombre de consommateurs achètent les produits dans le cadre de la vente liée. Dans notre modèle, la vente liée n'est donc jamais inférieure à l'optimum de Pareto et elle peut constituer une amélioration au sens de Pareto (576).

La dépendance stochastique de la demande pourrait également expliquer pourquoi la vente groupée peut être utilisée en fait pour opérer une discrimination par les prix, mais dans ce cas c'est une corrélation négative et non positive entre les acheteurs du point de vue de l'intensité de la demande pour les deux biens qui est à l'origine de l'augmentation du profit. Stigler (1963) a illustré ce phénomène dans le cadre de la pratique de la réservation en bloc pour la diffusion de films et Varian (1999, 626-627), s'appuyant sur des chiffres légèrement différents, a décrit comme suit cette pratique :

- Supposons qu'il y ait deux cinémas, A et B. A est prêt à payer 9 000 $ pour le film 1, 3 000 $ pour le film 2 et 12 000 $ pour l'ensemble. B est prêt à payer 10 000 $ pour le film 1, 2 000 $ pour le film 2 et 12 000 $ pour l'ensemble. On notera que la valeur de l'ensemble pour chaque cinéma est simplement la somme de la valeur des deux films ; il n'y a pas d'« effets d'interaction » pour la consommation des deux biens.

- Supposons que les coûts soient nuls, c'est-à-dire que le distributeur de films ait pour seul objectif la maximisation de ses recettes. Si le distributeur loue chaque film individuellement, il lui faudra, pour maximiser son bénéfice, louer le film 1 à 9 000 $ et le film 2 à 2 000 $, ce qui fera un total de 11 000 $ pour chaque cinéma. Mais s'il ne loue que l'ensemble groupé, il obtiendra 12 000 $ de chaque cinéma. En fait, le distributeur a réussi à opérer une discrimination par les prix entre les deux cinémas ; il loue le film 1 au cinéma A pour 9 000 $ et au cinéma B pour 10 000 $, la situation étant similaire pour le film 2.

Cet exemple illustre un élément important : la vente groupée a une efficacité maximale lorsqu'il y a corrélation négative entre les évaluations des biens par les consommateurs. Dans l'exemple, la valeur

attribuée par le cinéma A au film 1 est inférieure à celle que lui attribue le cinéma B, mais la valeur attribuée par le cinéma A au film 2 est supérieure à celle que lui attribue le cinéma B.

On notera que, bien qu'il y ait corrélation négative entre les évaluations, par les acheteurs, des biens retenus dans cet exemple, les biens peuvent néanmoins être complémentaires au sens traditionnel.

Cet exemple de la distribution de films illustre ce qu'on appelle habituellement la « vente liée pure », parce que c'est le vendeur qui détermine le lot de films offert. Sur la plupart des marchés, on rencontre plus couramment la « vente groupée mixte ». Dans ce dernier cas, les composants du lot sont également vendus séparément. Pour que cette formule ait un sens, il faut néanmoins que le prix du lot soit *inférieur* au prix total des éléments achetés séparément. Un restaurant qui propose à la fois un menu et les mêmes plats à la carte pratique la vente groupée mixte. Plus encore qu'en cas de vente groupée pure, la vente groupée mixte permet au vendeur d'appliquer en fait pour les mêmes biens des prix différents à plusieurs catégories d'acheteurs qui choisissent eux-mêmes la catégorie dont ils relèvent.

Adams et Yellen (1976) ont étudié de façon systématique dans un article fondateur la vente groupée pure et mixte dans l'optique du bien-être. Leur principal apport est d'avoir démontré que la discrimination par les prix au moyen d'une vente groupée peut être profitable sans qu'il y ait corrélation négative entre les « prix de réserve » pour les produits groupés, et également sans qu'on ait à formuler expressément l'hypothèse de complémentarité des biens.[20] On trouvera à l'annexe B la description de leur modèle et de ses conséquences. On soulignera que ce modèle repose sur l'hypothèse que le vendeur des produits liés bénéficie d'un monopole pour les deux produits.

Adams et Yellen font observer que la vente groupée peut avoir toute une série d'effets sur le bien-être économique global (c'est-à-dire le surplus total des consommateurs et des producteurs), selon le niveau des coûts marginaux et selon la distribution des prix de réserve entre les consommateurs.[21] Le niveau des coûts marginaux est important parce que même en cas de vente groupée mixte, il pourrait y avoir perte de bien-être social dans la mesure où certains acheteurs en cas de vente groupée attribuent une très forte valeur à l'un des biens groupés, mais attribuent à l'autre bien une valeur inférieure à son coût marginal de production.[22]

Même si la vente groupée mixte peut se traduire par un bien-être social moindre qu'en cas de concurrence pure, Adams et Yellen remarquent judicieusement que la concurrence pure n'est peut-être pas l'élément auquel il faut se référer. Cette remarque est particulièrement pertinente pour l'examen des fusions, la comparaison portant nécessairement sur la situation avant fusion et après fusion. Interdire une fusion afin d'empêcher la vente groupée de produits pour lesquels il existe un fort pouvoir de marché avant fusion peut être préjudiciable à l'ensemble de la collectivité. Comme Adams et Yellen le font observer :

> …dans le cadre de notre modèle, chaque fois que la vente groupée mixte est équivalente à une discrimination pure par les prix, elle est optimale au sens de Pareto. La tarification monopolistique simple ne l'est jamais (495).

Dans le contexte de l'examen d'une fusion conglomérale ayant des effets de portefeuille, il faut nécessairement se demander si les consommateurs ne vont pas pâtir de la fusion. Même s'il était certain que la fusion aboutisse à une forme de discrimination par les prix au moyen d'une vente groupée et si la discrimination par les prix n'était pas possible sans la fusion, cette fusion ne serait pas nécessairement préjudiciable pour les acheteurs. On voit donc là encore qu'il est difficile de généraliser quant aux effets de la discrimination par les prix.[23]

Comme on l'a déjà indiqué, la situation de référence utilisée par Adams et Yellen est une situation dans laquelle un producteur unique a un pouvoir de monopole pour les deux biens groupés et non

une situation dans laquelle la propriété des deux biens était au départ séparée. C'est pourquoi ces auteurs n'ont pas évoqué un aspect important dont rend compte Nalebuff (2000, 1-2) et qu'on attribue à Cournot. Dans la mesure où deux produits sont complémentaires, regrouper leur propriété internalisera l'effet d'une baisse du prix de l'un des produits sur les ventes de l'autre ; autrement dit, en l'absence de fusion, l'entreprise qui baisse le prix ne tirera pas tous les avantages de cette baisse.[24] Il devrait en résulter un prix plus bas pour les deux biens. Il faut garder à l'esprit ce phénomène lorsqu'on examine l'incidence, sur le bien-être, d'une probabilité accrue de vente liée ou groupée à l'occasion d'une fusion conglomérale ayant des effets de portefeuille.

On trouvera à l'annexe B plusieurs extensions intéressantes du modèle d'Adams et Yellen qui sont présentées dans Schmalensee (1982) et Schmalensee (1984).

4.2.1 Vente liée/groupée et discrimination par les prix : résumé

Dans la mesure où une fusion conglomérale ayant des effets de portefeuille facilite la vente liée et la vente groupée, elle peut avoir une incidence sur la façon dont s'exerce le pouvoir de marché existant. La vente liée et la vente groupée peuvent permettre de transférer davantage du surplus du consommateur au producteur, via une discrimination par les prix de type indirect, lorsqu'une discrimination par les prix plus directe serait impossible. La vente liée assure un maximum de profit lorsqu'il y a corrélation positive entre les consommateurs pour la valeur qu'ils attribuent au produit liant et aux produits liés. On peut en revanche préférer la vente groupée lorsque cette corrélation est négative *et* les coûts marginaux de production des produits groupés sont faibles.

Il est difficile de déterminer l'effet global, sur le bien-être, de la vente liée et de la vente groupée lorsqu'il n'y a aucune modification du pouvoir de marché. La vente liée, lorsqu'elle porte sur des produits complémentaires et qu'elle est utilisée comme instrument de comptage facilitant la discrimination par les prix, peut se traduire par une augmentation de la production et a donc tendance à accroître le bien-être total, au-delà de ce qu'il aurait été sans cette pratique (à supposer qu'on ne puisse rien faire pour réduire le pouvoir de marché pour le produit liant). Elle peut aussi avoir des effets positifs en favorisant une production plus efficiente ou en assurant une meilleure complémentarité entre les biens. La probabilité qu'une vente groupée, et plus particulièrement une vente groupée pure, accroisse le bien-être total est plus faible qu'en cas de vente liée, parce que la vente groupée peut entraîner des achats par des individus qui attribuent à l'un des produits groupés une valeur inférieure à son coût marginal de production. En général, tout ce qu'on peut dire est que les effets, sur le bien-être total, de la vente groupée lorsqu'elle est utilisée pour opérer une discrimination par les prix dépendent du coût marginal de production des produits groupés et de la nature de la corrélation entre les consommateurs du point de vue de la valeur qu'ils attribuent à ces produits.

Qu'une fusion conglomérale ayant des effets de portefeuille facilite ou non la vente liée ou la vente groupée, il faut tenir compte d'un autre aspect en ce qui concerne les effets d'une fusion de ce type sur le bien-être total. Dans la mesure où les parties à la fusion détenaient une forte part de marché ou exerçaient un grand pouvoir de marché pour des biens complémentaires, les prix auront tendance à baisser après la fusion, parce que les effets d'une baisse des prix d'un produit complémentaire sur le profit tiré de l'autre produit seront internalisés au lieu d'être ignorés.

En résumé, la crainte qu'une fusion conglomérale ayant des effets de portefeuille aboutisse à une discrimination par les prix via des ventes liées ou groupées réduisant le bien-être pourrait être un argument très faible lorsque cet argument est l'unique raison pour bloquer la fusion, et ce d'autant plus s'il s'avère que les éléments nécessaires pour la discrimination par les prix préexistaient à la fusion.

4.3 Vente liée/groupée et pouvoir de marché

Nous nous demanderons dans cette section comment la vente liée et la vente groupée peuvent conforter ou accroître le pouvoir de marché.

4.3.1 La vente liée comme moyen d'exclusion ou de limitation de la concurrence sur le marché des produits liés

En règle générale, le producteur monopolistique d'un bien *A* ne peut accroître son profit en liant la vente du produit *A* au produit *B* (produit lié) ; en effet, on ne peut tirer qu'une fois un profit de monopole. Toutefois, Whinston (1990) a démontré l'existence d'une exception importante à cette règle générale. S'il existe des économies d'échelle substantielles pour le produit lié, la vente liée augmente les coûts unitaires pour les concurrents commercialisant le produit lié. D'où une tendance à fermer le marché aux concurrents commercialisant le produit lié ou, au moins, à restreindre leur possibilité de limiter les hausses de prix sur leur marché. Cela aboutira probablement à des prix plus élevés sur le marché des produits liés et à une augmentation du profit total de l'entreprise pratiquant la vente liée, surtout si des acheteurs ne sont intéressés que par l'achat du produit lié.[25]

Pour obtenir les résultats que Whinston envisage, il faut que l'entreprise pratiquant la vente liée trouve un moyen crédible de s'engager par avance à lier la vente d'un produit à celle d'un autre. Sans cet engagement crédible, l'entreprise pratiquant la vente liée devient un concurrent plus agressif pour le produit lié. Autrement dit, les entrants potentiels sur le marché du produit lié n'attendront pas de l'entreprise pratiquant la vente liée qu'elle les laisse entrer sur le marché. Au contraire, elle défendra vigoureusement ses ventes du produit lié, parce si elle perd des ventes pour ce produit, elle perd également des ventes pour le produit liant. Whinston considère que de nombreuses circonstances se prêtent à un engagement préalable crédible de vente liée.[26]

Dans ses modèles, Whinston retient également l'hypothèse selon laquelle, du fait d'importantes économies d'échelle, le marché du produit lié est au départ un duopole. La plupart des modèles ont également en commun deux autres éléments. Premièrement, dans tous les cas sauf un, le produit liant et le produit lié ne sont pas achetés en proportions fixes.[27] Deuxièmement, et c'est beaucoup plus important, Whinston suppose que le monopole pour le produit liant est hors d'atteinte. Dans ce contexte, on n'a pas besoin d'expliquer pourquoi un producteur désavantagé du produit lié ne se défend pas en faisant son entrée sur le marché du produit liant. Néanmoins, cette contre-stratégie a été traitée dans des articles étroitement apparentés traitant de la fermeture du marché par intégration verticale. Deux de ces articles sont présentés à l'annexe B. Nous y reviendrons dans la prochaine sous-section de ce document à propos des idées formulées par Nalebuff (2000).

L'examen de la fusion entre Boeing et Hughes Space and Communications Company (« Boeing/HSC ») par la Commission européenne illustre comment une analyse approfondie révèle parfois que le pouvoir de vente liée est plus apparent que réel.[28] La Commission européenne estimait qu'il y avait certains chevauchements entre les lignes de produits satellitaires des parties et craignait également des interactions possibles entre les satellites et les services de lancement. On redoutait que l'entité résultant de la fusion soit en mesure, par diverses tactiques, de lier la vente de satellites à l'utilisation des services de lancement de Boeing.[29] Après avoir procédé à une enquête auprès des usagers, la Commission européenne a conclu qu'il ne serait pas rentable pour l'entité résultant de la fusion de pratiquer une telle vente liée, parce que les acheteurs attachent beaucoup d'importance à la possibilité d'utiliser plusieurs lanceurs, de manière à diversifier les risques.[30]

Il n'y a peut-être pas beaucoup de fusions conglomérales ayant des effets de portefeuille qui comportent de graves risques d'accroissement du pouvoir de marché par effet de levier entre un produit liant et un produit lié. L'ampleur de ces risques dépend d'un certain nombre d'éléments. Avant de les énumérer, nous noterons que, tout en mettant l'accent sur la vente liée, l'analyse qui est conduite dans cette sous-section du présent document s'applique également à la vente groupée mixte (les composants d'un lot et le lot à prix réduit sont offerts à la vente). Les éléments qui ont tendance à accroître le risque qu'une vente liée ou groupée diminue le bien-être via un renforcement du pouvoir de marché par effet de levier sont les suivants :

- un degré élevé de pouvoir de marché pour le produit « liant » (ou l'un des produits groupés) ;

- les coûts des concurrents sont nettement majorés ;

- un grand nombre d'acheteurs souhaitant acheter uniquement le produit lié (ou un certain nombre seulement des produits groupés) ;

- pour les concurrents, il est impossible ou il n'est pas rentable de s'aligner sur la stratégie de vente liée ou de vente groupée ;

- les prix monteront en définitive au-dessus du niveau antérieur à la fusion sur les marchés où les coûts des concurrents sont majorés (c'est-à-dire que les acheteurs ne pourront pas empêcher une hausse des prix, les entreprises ne pourront entrer sur le marché ou y ré-entrer dans des conditions de rentabilité après la hausse des prix et l'entreprise pratiquant la vente liée sera incitée à relever les prix au-dessus du niveau antérieur à la fusion) ;

- les hausses des prix seront suffisamment importantes, rapides et durables pour que l'entreprise pratiquant la vente liée ou groupée puisse récupérer les coûts d'opportunité qu'elle peut avoir à supporter pour diminuer les ventes de ses concurrentes ;[31]

- les acheteurs considérés dans leur ensemble subiront une perte nette, même s'il y a eu au départ une baisse des prix après la fusion.[32]

En ce qui concerne le cinquième élément, on notera que, pour plusieurs raisons, l'entreprise pratiquant la vente liée ou groupée peut avoir intérêt à diminuer les prix après une fusion, du moins au départ. Tout d'abord, la vente liée ou groupée peut se traduire par divers gains d'efficience au niveau de la production et de la distribution. De plus, on observe l'effet mentionné précédemment d'internalisation de l'impact d'une baisse des prix de l'un des produits complémentaires. Cet effet se trouvera renforcé lorsqu'une entreprise s'engage à pratiquer la vente liée ou groupée. De fait, cet engagement créera en lui-même des tendances à la baisse des prix, que les produits soient complémentaires ou non.[33] L'effet, en termes de bien-être, d'une baisse des prix initiale après fusion, quelle que soit sa raison, est difficile à évaluer, parce qu'il *pourrait* contribuer à la sortie de concurrents et à une hausse à long terme des prix au-dessus du niveau antérieur à la fusion. Nous reviendrons sur cette question à la section VI.

4.3.2 La vente liée ou groupée dans le but de consolider le pouvoir de marché

Nous nous sommes attachés dans la section précédente à la façon dont la vente liée peut être utilisée pour étendre au marché d'un produit lié le pouvoir que l'entreprise détient sur le marché du produit liant (effet de levier). Nous examinerons maintenant comment la vente liée ou groupée facilitée par une fusion conglomérale peut consolider le pouvoir de marché.

Considérons tout d'abord une société, « l'entreprise 1 », qui est seule au départ sur le marché d'un produit *A*, mais a un concurrent plus efficient, « l'entreprise 2 », sur le marché d'un produit complémentaire *B*. Normalement, on attendrait que l'entreprise 1 laisse l'entreprise 2 se développer parce que cela lui permettra de dégager plus de bénéfices sur le produit *A*. La donne change énormément si l'entreprise 1 doit faire face à une possibilité de concurrence pour le produit *A* et s'il y a d'importantes économies d'échelle ou de réseau pour le produit *B*. Dans ce cas, l'entreprise 1 pourra préférer se livrer à des pratiques ayant pour effet de limiter la taille de l'entreprise 2 et de la rendre inefficiente. L'entreprise 1 y trouvera son compte si elle refuse à un entrant potentiel pour le produit *A* l'avantage qu'il pourrait obtenir du fait de l'accès de ces clients à un produit complémentaire *B* de haute qualité. Carlton donne à cet égard un « exemple concret », qu'il utilise également pour formuler une réserve importante :

> … supposons qu'une entreprise en situation de monopole pour des systèmes d'exploitation lie au départ des programmes d'application à son système pour empêcher le développement de nouveaux programmes d'application. Ultérieurement, il y aurait entrée de nouveaux systèmes d'exploitation si il y avait un certain nombre de programmes d'application indépendants. Mais, par hypothèse, ces programmes n'existent pas parce que l'entreprise 1 a empêché leur développement en fermant le marché au départ. Pour qu'un modèle de ce type soit empiriquement pertinent, il faut que le désavantage que l'entreprise 1 peut infliger à l'entreprise 2 soit important par rapport au temps qu'il faut à l'entreprise 2 pour surmonter ce désavantage. (670)

L'affaire récente *Microsoft*, avec la vente liée d'un navigateur Internet et du système d'exploitation Windows, est très similaire à l'exemple de Carlton.[34]

Jusqu'à présent, nous avons implicitement évoqué surtout la possibilité qu'une fusion conglomérale ayant des effets de portefeuille qui facilite la vente liée de biens complémentaires puisse soulever des problèmes de concurrence essentiellement en majorant les coûts des concurrents effectifs ou potentiels. Il est également possible que la vente liée ou, plus probablement, la vente groupée soit préjudiciable aux acheteurs en rendant l'entrée moins rentable pour un des produits vendus ensemble. C'est à cet aspect que sont essentiellement consacrés deux articles de Barry Nalebuff. [35]

Nalebuff (1999) examine l'intérêt qu'un monopoleur pour deux produits peut avoir de grouper ces produits. Les deux produits ne sont pas nécessairement complémentaires. Nalebuff fait valoir que les bénéfices obtenus au moyen d'une vente groupée comme mode de discrimination par les prix peuvent être faibles par rapport à ceux obtenus en dissuadant l'entrée sur le marché des produits monopolisés au moment considéré. Donc, Nalebuff relâche implicitement l'hypothèse selon laquelle les vendeurs disposent d'un pouvoir de marché inattaquable pour l'un quelconque des produits groupés.

Nalebuff souligne que, contrairement à ce qui se passe lorsqu'elle est utilisée comme mode de discrimination par les prix, la vente groupée, quand on y recourt pour empêcher l'entrée, a son efficacité maximale dans le cas d'une corrélation positive, au lieu de négative, entre les consommateurs pour la valeur qu'ils attribuent aux biens groupés.[36] Il souligne également que, pour réussir, une stratégie de vente liée exige un engagement crédible à l'égard de cette pratique, mais que ce problème peut ne pas se poser pour la vente groupée, du moins dans les circonstances expressément prises en compte. En effet, la vente groupée peut être la stratégie qui maximise le profit, même si elle ne parvient pas à empêcher l'entrée. On trouvera à l'annexe B des informations complémentaires sur le modèle de Nalebuff (1999), qui traite à la fois de la vente groupée pure et de la vente groupée mixte (avec possibilité de dissociation du lot).

Nalebuff (1999) conclut à cet égard :

> Introduire une vente groupée ne met pas fin à la concurrence. Cela oblige les concurrents à jouer le jeu "lot contre lot". L'entreprise qui n'a que certains éléments du lot aura des difficultés à entrer sur le marché face à une entreprise en place qui commercialise une solution groupée à prix réduit. Tel sera le cas, en particulier, lorsque la valeur accordée par les consommateurs aux éléments de l'ensemble est positivement corrélée ou lorsque les éléments sont complémentaires. La vente groupée atténue également les dommages infligés par un concurrent à un seul produit (ou à gamme de produits limitée). Le concurrent soustrait moins de consommateurs et les prix ne baissent pas autant. (20, italiques ajoutées)

La vente groupée telle que modélisée par est conçu le modèle de Nalebuff (1999) permet d'expliquer pourquoi une fusion conglomérale réunissant des produits pour lesquels il existe déjà un grand pouvoir de marché peut consolider ce pouvoir. Cela ne veut pas dire pour autant qu'une telle fusion soit préjudiciable au consommateur final. Après tout, le modèle de Nalebuff prédit une baisse des prix au moins pour les consommateurs qui achètent le lot. De plus, en dehors des difficultés habituelles auxquelles on se heurte pour évaluer les effets, en termes de bien-être, de la discrimination implicite par les prix, le modèle de Nalebuff met en balance les baisses de prix immédiates suffisamment certaines et les baisses de prix plus lointaines et plus hypothétiques qui auraient pu se produire si la vente groupée n'avait pas été utilisée pour dissuader de nouveaux entrants. En outre, l'ampleur de l'effet de dissuasion des nouveaux entrants est essentiellement fonction de l'importance du handicap que subissent les nouveaux entrants en ce qu'on les oblige à entrer simultanément sur plusieurs marchés au lieu de pouvoir entrer sur un seul marché ou sur un marché à la fois. Il en est de même, bien entendu, pour les effets de dissuasion des nouveaux entrants en cas de vente liée ; d'où le rôle crucial, en termes de bien-être, du degré de pouvoir de marché *durable* pour le produit liant.

Choi et Stefanadis (2001) donnent un exemple du type d'analyse nécessaire lorsqu'on veut étudier de façon plus approfondie les effets dissuasifs de la vente liée ou groupée sur l'entrée. Dans leur modèle, une entreprise est en situation de monopole pour la fourniture de deux produits composants complémentaires. Ils formulent l'observation suivante à propos de l'hypothèse de possibilité d'entrée pour l'un ou l'autre produit uniquement au moyen d'une innovation coûteuse et risquée :

> … la vente liée de deux composants complémentaires par un monopoleur fait qu'on peut raisonnablement penser que l'entrée pour un composant est totalement fonction de la réussite de l'entrée pour l'autre composant. Un entrant ne pourra avoir accès aux consommateurs et dégager un bénéfice que si l'entrant pour l'autre produit réussit lui aussi son entrée. Par conséquent, la vente liée rend moins certaine la perspective qu'offre un investissement, ce qui diminue l'incitation des entrants à investir et à innover.[37]

Nalebuff (1999) n'examine pas les cas où le pouvoir de marché pour chacun des produits groupés n'atteint pas le stade du monopole. Cette lacune est partiellement comblée dans une "suite" axée sur les produits complémentaires (c'est-à-dire un cas particulier de corrélation positive entre les consommateurs pour la valeur qu'ils accordent aux produits groupés). On trouvera une brève description du modèle de Nalebuff (2000) à l'annexe B. Nalebuff (2000) conclut ainsi :

> La vente groupée est un instrument puissant pour un monopoleur, mais ses avantages sont encore plus grands dans une situation de concurrence effective ou potentielle. La vente groupée de produits peut augmenter les profits en l'absence d'entrée et même augmenter les profits face à des entreprises établies, mais qui ne se coordonnent pas, en diminuant les profits des entrants effectifs ou potentiels et en faisant en sorte que ces concurrents ne proposent pas une vente groupée, situation à laquelle ils ne gagneront rien. Le seul véritable inconvénient de la vente groupée est

> qu'on risque d'inclure dans la vente des biens que les consommateurs ne souhaitent pas. Cela est moins important lorsque les produits sont complémentaires et lorsque le coût marginal est quasiment nul, comme pour les biens informationnels. Par conséquent, on peut penser que la vente groupée est l'un des instruments (on pourrait peut-être même parler d'arme) les plus puissants et les plus répandus dans notre société de l'information. (12)

Cette conclusion devra sans doute être considérablement modifiée si l'on abandonne l'hypothèse que chaque composant est produit par seulement deux entreprises. On notera également que, selon Nalebuff, lorsque le lot envisageable est d'assez faible dimension, la vente groupée peut être bénéfique pour les consommateurs. Si cela est valable d'une façon plus générale, au-delà des conditions particulières du modèle de Nalebuff, l'effet de petit nombre pourra être très important dans le contexte des fusions conglomérales ayant des effets de portefeuille qui sont observées dans la réalité. Les possibilités de vente groupée à l'occasion de ces fusions peuvent être très faibles. On notera également que Nalebuff ne prend pas en compte les gains d'efficience que la vente groupée peut faciliter. Enfin, Church et Gandall (2000) mettent en doute la validité de la déduction de Nalebuff selon laquelle une fois que le premier lot de produits complémentaires est sur le marché, il ne sera pas rentable pour les fabricants concurrents de produits complémentaires d'offrir eux aussi un lot.[38]

On fera remarquer à cet égard que certaines réalités de la distribution au stade du détail peuvent effectivement rendre complémentaires les produits, même si le consommateur final ne les considère pas comme tels. Prenons le cas d'un groupe de produits généralement vendus dans le même type de point de vente au détail. Supposons que, du point de vue du consommateur, ces produits ne soient ni complémentaires, ni substituables. Supposons également que pour une raison quelconque (peut-être les coûts fixes), les points de vente au détail doivent stocker une large gamme de produits pour être rentables. Supposons, plus précisément, que le chiffre d'affaires auquel le point de vente au détail type atteint son seuil de rentabilité ne peut être réalisé que si le détaillant offre la totalité ou la quasi-totalité de la gamme de certains produits les plus vendus, les produits phares. Un ou plusieurs ensembles de ces produits phares sont des groupes de produits complémentaires du point de vue du détaillant. Cet élément peut devenir important sur le plan de la politique de la concurrence si une fusion réduit considérablement le nombre des ensembles concurrents de ces produits complémentaires, surtout si, en concentrant leurs achats auprès d'un seul fournisseur, les détaillants dégagent de véritables économies.[39] Dans ces conditions, une fusion conglomérale réunissant un nombre suffisamment élevé de produits phares peut conférer à la société résultant de la fusion le pouvoir de pratiquer la vente forcée d'une gamme complète de produits et/ou d'obliger les détaillants à pratiquer la vente exclusive.

La vente forcée d'une gamme complète de produits et la distribution exclusive ne sont pas toujours préjudiciables aux consommateurs, surtout si ces pratiques s'appuient, au moins en partie, sur de véritables gains d'efficience économique. Mais la probabilité de préjudice est élevée si les détaillants concernés n'ont pas de concurrents effectifs. Dans ce cas, les consommateurs clients de ces détaillants peuvent subir un préjudice du fait d'une moindre variété de produits et de prix plus élevés. Il se peut aussi que les fournisseurs concurrents perdent une telle part de leur activité qu'ils soient forcés de sortir du marché. Si tel est le cas pour un nombre suffisant de concurrents des producteurs, les consommateurs clients d'autres détaillants peuvent également subir en définitive un préjudice. La probabilité d'une telle diminution du bien-être par vente forcée d'une gamme complète de produits et/ou par distribution exclusive pourrait être élevée pour certains produits de consommation à forte notoriété.[40]

Les modèles que nous avons examinés dans cette sous-section et sur lesquels nous reviendrons dans l'annexe B font apparaître la possibilité que, en facilitant la vente liée ou groupée, une fusion conglomérale ayant des effets de portefeuille aide les entreprises à empêcher et/ou décourager l'entrée, pas seulement sur un marché, mais sur deux ou davantage. Mais, pour que cet effet se produise réellement, il faut un très grand pouvoir de marché sur au moins l'un des marchés concernés.[41] De plus, le pouvoir de

dissuasion des nouveaux entrants que confèrent les stratégies de vente liée et de vente groupée est fonction de l'existence d'une forte corrélation positive entre les consommateurs pour la valeur qu'ils attribuent aux produits concernés. Une étroite relation de complémentarité remplirait cette condition, mais créerait également un avantage compensateur en termes de bien-être économique, parce que la fusion internaliserait les effets positifs d'une baisse des prix pour l'un ou l'autre des produits complémentaires. Elle internaliserait en outre les avantages d'une meilleure interaction entre les produits complémentaires - avantages que les acheteurs ne pourraient pas facilement obtenir eux-mêmes - et elle permettrait peut-être d'autres économies d'échelle ou de gamme dont bénéficient en définitive les consommateurs.

Comme dans le cas des préoccupations que nous avons évoquées précédemment à propos de la discrimination par les prix en cas de vente liée ou groupée, une analyse factuelle très approfondie s'impose lorsqu'on veut évaluer les risques que font courir à la concurrence les possibilités de vente liée ou groupée facilitées par une fusion conglomérale ayant des effets de portefeuille.[42]

Nous avons vu qu'une fusion conglomérale ayant des effets de portefeuille peut aboutir après la fusion à des pratiques de vente liée ou groupée susceptibles d'avoir des effets anticoncurrentiels par exclusion de concurrents potentiels (autres que les parties à la fusion) ou limitation de leur activité. Pour que cette possibilité ait une forte probabilité de réalisation, il faut tout d'abord un grand pouvoir de marché avant la fusion pour les produits réunis et, en cas de vente groupée, de faibles coûts marginaux. Il faut en outre que les produits faisant l'objet de la fusion soient des produits complémentaires ou soient des produits pour lesquels il existe une forte corrélation positive entre les consommateurs pour la valeur qu'ils attribuent à chacun des produits. Ces conditions pourraient être remplies, par exemple, pour certains marchés de produits du secteur de l'information.[43]

Une fusion conglomérale peut faciliter la vente groupée en ce sens que le produit faisant l'objet de la vente groupée pourra être vendu à un prix inférieur au prix total des composants avant la fusion. Cela est particulièrement probable en cas de vente groupée mixte, mode de vente groupée généralement le plus rentable, et donc le plus probable. Bien que les acheteurs tirent clairement avantage du fait de la baisse immédiate des prix, les autorités de la concurrence pourront et voudront peut-être bloquer la fusion ou la subordonner à certaines conditions. Mais ce ne sera le cas que si la vente groupée est appelée à aboutir à une hausse du prix des composants dissociés (dans l'hypothèse d'une vente groupée mixte, avec possibilité de dissociation du lot) et/ou à l'exclusion de concurrents ou à une limitation de leur activité à un point tel que les acheteurs subissent en définitive un préjudice à cause d'une hausse des prix au-dessus du niveau antérieur à la fusion. Une hausse du prix des composants dissociés accentuera les effets de discrimination par les prix d'une vente groupée mixte, mais, comme on l'a noté précédemment, la discrimination par les prix ne diminue pas obligatoirement le bien-être économique. Pour justifier la décision de bloquer la fusion ou de la subordonner à certaines conditions en raison de ses effets d'exclusion ou de ses effets de limitation de la concurrence, les conditions suivantes doivent être cumulativement réunies :

- les concurrents existants ou potentiels ne peuvent pas offrir une vente groupée concurrente ;
- les concurrents existants doivent sortir des marchés indépendants de produits ;
- une fois que les concurrents sont sortis du marché, l’entreprise pratiquant la vente groupée a le pouvoir (aucune contrainte ne s’exerce sur elle du fait de nouvelles entrées et/ou d’un pouvoir compensateur de la part des acheteurs) de relever le prix de l’ensemble groupé ou est incitée à relever ce prix, et ce pour une longue période, au-dessus de la somme des prix appliqués avant la fusion pour les produits réunis ;[44] et

- le gain réalisé au départ par les acheteurs du fait que les prix sont fixés au-dessous du niveau antérieur à la fusion est inférieur à ce qu'ils perdent ultérieurement en devant acquitter des prix supérieurs à ceux antérieurs à la fusion.[45]

A défaut de l'une ou plusieurs de ces conditions, la vente liée facilitée par une fusion conglomérale ayant des effets de portefeuille ne devrait pas avoir un effet net préjudiciable sur les acheteurs, même si elle exclut ou limite la concurrence.

5. Eléments d'efficience des fusions conglomérales ayant des effets de portefeuille

Tout comme les effets anticoncurrentiels d'une fusion sont nécessairement fonction des relations effectives ou potentielles entre les parties à la fusion, les éléments d'efficience qui peuvent être considérés comme atténuant ces effets le sont également. Par définition, une fusion conglomérale ne comporte pas des liens verticaux ou un recoupement horizontal des marchés, mais cela ne veut pas dire qu'elle regroupe des activités qui n'ont aucun lien entre elles. Des gains d'efficience sont possibles pour la levée de capitaux, mais ils seront probablement faibles lorsque la société acquise est déjà de très grande dimension et bénéficie d'un accès privilégié aux marchés de capitaux. Il peut y avoir également des économies d'échelle ou de gamme au niveau de la production. En outre, lorsqu'une fusion conglomérale réunit des produits complémentaires, ce qui est souvent le cas en présence d'effets de portefeuille, elle peut diminuer sensiblement le risque d'avoir à faire des investissements sous la forme de coûts irrécupérables pour parvenir à une meilleure complémentarité par adaptation à l'usager. Des entités distinctes, surtout lorsqu'elles exercent un grand pouvoir de marché, peuvent se montrer réticentes à devenir davantage dépendantes l'une de l'autre à cause de tels investissements en coûts irrécupérables.

Dans un grand nombre de fusions conglomérales, les économies les plus importantes peuvent fort bien intervenir au niveau de la commercialisation, et notamment de la distribution. C'est le cas en particulier pour les fusions conglomérales ayant des effets de portefeuille, puisque ces fusions comportent nécessairement des éléments communs pour ce qui est de la clientèle desservie par les parties à la fusion. Certains commentateurs assimilent même les effets de portefeuille aux éléments d'efficience découlant du fait qu'un même ensemble de clients est desservi. Par exemple :

> L'existence d'une large gamme de produits n'est pas toujours un indicateur de domination. Elle ne le sera que si elle permet à l'entreprise de dégager des économies importantes par économies de gamme, ou si l'on se trouve en présence de consommateurs prêts à acheter toute la gamme des produits. Dans ce cas, une entreprise offrant toute la gamme de produits diminuera les coûts de transaction et de fourniture pour les consommateurs et elle pourra également maximiser les effets de ses campagnes de promotion (par exemple, en offrant des rabais sur toute la gamme des produits). Cet avantage dont bénéficie une entreprise offrant une gamme complète de produits est parfois qualifié d'« effet de portefeuille ». En l'absence de tels effets, le fait qu'une entreprise est présente sur différents marchés de produits ne donne aucune indication quant à sa domination sur l'un d'entre eux.[46]

Les éléments d'efficience dans les fusions conglomérales ayant des effets de portefeuille revêtent parfois un caractère particulier en ce qu'ils bénéficient aux clients et non aux vendeurs. Ils se traduiront plus probablement par une hausse que par une baisse des prix, mais cette hausse ne doit pas être nécessairement assimilée à un effet anticoncurrentiel au sens d'une diminution du surplus des consommateurs. Fondamentalement, la fusion permet d'offrir un nouveau type de produits ou, au moins, un produit de qualité nettement améliorée, le problème se posant alors de savoir quel est le prix de référence avant fusion qu'il faut retenir pour mesurer l'effet anticoncurrentiel. On peut illustrer ces éléments d'efficience par un extrait de la décision de la Commission européenne concernant la fusion

ATR :de Havilland, qui comportait certains aspects de fusion conglomérale ayant des effets de portefeuille (ces effets sont dénommés dans la décision « effets de gamme ») :

> Il apparaît que, dans le secteur concerné, le fait de disposer d'une gamme complète de produits donnerait à ATR/de Havilland un avantage significatif en lui-même. Du côté de la demande, les compagnies aériennes réalisent des économies de coûts en achetant différents types d'avions à un même vendeur…

Selon une étude présentée par les parties, le fait pour un constructeur de ne pas pouvoir offrir une gamme complète de capacités en sièges dans une même série d'appareils est susceptible d'affecter la demande d'autres avions existants de ce constructeur… Cela tient aux frais fixes que le transporteur doit supporter avec chaque constructeur avec lequel il traite. Ces coûts comprennent les coûts fixes de formation des pilotes et des mécaniciens, le coût des stocks de pièces détachées dont il doit disposer et les frais fixes liés à la passation de commandes à plusieurs constructeurs lorsqu'il s'agit de pièces détachées que ceux-ci sont les seuls à avoir en stock…[47]

6. Protéger la concurrence en protégeant les concurrents ?

Il est possible que les fusions conglomérales portent préjudice aux consommateurs en augmentant la probabilité de prix d'éviction. Ainsi, cette crainte d'éventuels prix d'éviction paraît avoir joué un rôle dans la décision qui a été prise par la Commission européenne de bloquer la fusion *ATR/de Havilland*.[48]

Il est vrai qu'en créant des possibilités de subventions croisées et en réduisant le coût du capital, certaines fusions conglomérales, en particulier celles qui réunissent des entreprises de dimension très différente, peuvent accroître les possibilités de prix d'éviction. Mais ces mêmes fusions n'incitent pas nécessairement davantage à pratiquer des prix d'éviction. L'incitation à une telle pratique dépend essentiellement de la capacité de récupérer les pertes d'opportunité à court terme qu'impose cette stratégie.

Scherer et Ross (1990, 190) font observer que les Etats-Unis ont connu certaines affaires où des fusions conglomérales ont été bloquées pour des questions de prix d'éviction, mais « …la doctrine des prix d'éviction a été atténuée dans des décisions ultérieures au titre d'autres articles de la législation antitrust américaine et on n'utilise plus l'argument des moyens financiers pour s'opposer à une fusion conglomérale. »

En dehors de la question des prix d'éviction, il est possible qu'une fusion conglomérale entraîne une baisse des prix bénéficiant au départ aux consommateurs, mais leur portant finalement préjudice. Comme on l'a noté précédemment, une telle baisse des prix peut résulter soit d'éléments d'efficience spécifiques à la fusion,[49] soit des effets de la fixation conjointe des prix de produits complémentaires (ou d'effets analogues découlant d'un engagement de vente liée ou groupée).

Le résultat paradoxal en vertu duquel l'internalisation de complémentarités (ou des effets analogues) et/ou le supplément d'efficience associé à une fusion conglomérale peuvent en fait avoir un effet net préjudiciable sur les consommateurs ne se concrétisera que si plusieurs conditions très restrictives sont réunies :

- l'entreprise fusionnée bénéficie, du fait de la fusion, d'effets de fixation internalisée des prix de produits complémentaires (ou d'effets analogues) et/ou d'effets d'efficience d'une telle ampleur qu'elle juge profitable de baisser les prix au-dessous du niveau antérieur à la fusion sur un marché au moins, qu'elle attende ou non que cette baisse des prix conduise les

concurrents à sortir du marché (autrement dit, la baisse des prix ne peut être interdite, car il n'y a pas prix d'éviction) ;

- ni les concurrents, ni de nouveaux entrants ne peuvent s'aligner sur les nouveaux coûts de l'entreprise fusionnée ;
- les concurrents sortiront du marché ;
- les acheteurs n'ont aucun pouvoir compensateur qui leur permettrait de maintenir les prix aux niveaux antérieurs à la fusion où au-dessous de ces niveaux ;
- les entreprises n'entreront pas sur le marché ou n'y réentreront pas à la suite d'une hausse des prix au-dessus des niveaux antérieurs à la fusion ;
- l'entité fusionnée juge profitable de relever les prix au-dessus du niveau antérieur à la fusion ;[50]
- le gain obtenu au départ par les acheteurs grâce aux prix fixés au-dessous du niveau antérieur à la fusion est inférieur à la perte qu'ils subissent ultérieurement en devant payer des prix supérieurs à ceux antérieurs à la fusion.

Il sera probablement difficile de démonter que ces sept conditions sont réunies dans le cas d'une fusion conglomérale ayant des effets de portefeuille.

Selon certains commentateurs, l'interdiction, par la Commission européenne, de la fusion *General Electric/Honeywell* s'est appuyée sur une crainte infondée de préjudice pour les concurrents.[51] Le communiqué de presse publié par la Commission européenne à l'occasion de cette décision ne mentionne pas expressément ce point.[52] Dans une allocution ultérieure, le Commissaire Mario Monti a traité cette question : « Est-il vrai que, pour l'application du contrôle des fusions, la Commission se soucie davantage des concurrents que des clients ? ». Sa réponse est en partie la suivante :

> En fait, le but de la politique de concurrence, sous tous ses aspects, est de préserver le bien-être des consommateurs en maintenant un degré élevé de concurrence dans le marché commun. La concurrence est appelée à faire baisser les prix, à élargir le choix des produits et à promouvoir l'innovation technologique, tout cela dans l'intérêt du consommateur.

Notre politique de la concurrence vise à empêcher la création ou le renforcement de positions dominantes par voie de fusion ou d'acquisition. Un tel pouvoir de marché porte à la concurrence un préjudice qui se manifeste soit directement par des prix supérieurs après la fusion ou par une moindre innovation, soit, indirectement, par l'élimination de concurrents, ce qui aboutit en définitive aux mêmes résultats négatifs du point de vue des prix ou de l'innovation.

Je serai clair sur ce point : nous ne sommes pas contre les fusions qui créent des entreprises plus efficientes. Ces fusions sont généralement bénéfiques pour les consommateurs, même si les concurrents peuvent pâtir d'une intensification de la concurrence. Mais nous sommes contre les fusions qui, sans accroître l'efficience, peuvent créer des barrières pour les concurrents et aboutir, en définitive, à une diminution du bien-être.[53]

7. Approche des mesures correctrices : ex ante ou ex post ?

Selon le régime juridique en vigueur, il sera possible d'appliquer plutôt des mesures ex post ou ex ante (c'est-à-dire subordonnant la fusion à certaines conditions ou la restructurant) pour remédier aux effets anticoncurrentiels qui pourraient résulter de fusions conglomérales ayant des effets de portefeuille.[54] Avec l'approche ex post, une fusion peut être autorisée bien qu'elle suscite certaines préoccupations quant à ses effets anticoncurrentiels potentiels. Plusieurs décisions de la Commission européenne montrent qu'on peut parfaitement utiliser les dispositions contre les positions dominantes pour s'attaquer à diverses pratiques d'exclusion dans des situations où le pouvoir de marché sur un marché est utilisé pour renforcer le pouvoir de marché sur un autre marché.[55]

Avant de comparer l'approche ex post et l'approche ex ante, il est utile d'examiner les objectifs des mesures correctrices en cas de fusion. Parker et Balto (2000) en identifient trois :

- L'obligation première des autorités de la concurrence est de faire en sorte qu'une fusion ne réduise pas sensiblement la concurrence…

- Le deuxième objectif est de choisir une mesure correctrice qui préservera la concurrence avec autant de certitude que possible. Le risque d'une mesure correctrice inadéquate ou n'intervenant pas au bon moment ne doit pas être supporté par les consommateurs.

- Le troisième objectif est de préserver le potentiel d'amélioration de l'efficience d'une fusion, pour autant que cela soit possible sans compromettre l'obligation de préserver la concurrence.

Ces auteurs examinent également les éléments qui ne constituent pas un objectif et ils admettent que des arbitrages sont nécessaires :

> Nous [la Commission fédérale du commerce des Etats-Unis] ne sommes pas un régulateur des marchés. En dehors de la mise en œuvre des interdictions énoncées dans le droit de la concurrence, notre tâche est de réguler ou de prescrire le comportement des entreprises sur le marché. C'est une fonction inhérente au mécanisme de la concurrence. Nous ne sommes pas non plus là pour planifier les activités industrielles ou commerciales. Notre obligation est directe et simple : faire en sorte qu'après la fusion il y ait tout autant de concurrence qu'avant. Bien sûr, dans la réalité, rien n'est jamais aussi simple. Il faut opérer des arbitrages et porter des jugements.

Cette position est probablement celle de la plupart des autorités de la concurrence de la zone de l'OCDE, sinon toutes.

L'approche ex post a le net avantage de permettre à l'autorité de la concurrence d'évaluer les effets anticoncurrentiels d'une fusion concrètement et non de façon hypothétique. Elle peut néanmoins souffrir de deux inconvénients, qu'on peut formuler en deux questions : détectera-t-on les effets anticoncurrentiels ? Disposera-t-on d'une mesure correctrice satisfaisante après la fusion ?

D'une façon générale, on peut très probablement compter sur les concurrents pour attirer l'attention des autorités de la concurrence sur les effets anticoncurrentiels, lorsque ces effets limitent ou éliminent leurs possibilités de concurrence. C'est sur cette réduction de la concurrence qu'on se fonde pour faire valoir que la vente liée ou la vente groupée, de même qu'un certain nombre d'autres pratiques d'exclusion, peuvent être anticoncurrentielles. On peut en outre s'attendre à ce que les clients se plaignent des effets anticoncurrentiels de certaines pratiques.

En ce qui concerne les mesures correctrices satisfaisantes disponibles après la fusion, on notera qu'il peut être difficile de défaire une fusion conglomérale ayant des effets de portefeuille. Cela est vrai, en particulier, si la fusion a regroupé des produits complémentaires et si, après la fusion, les produits ont fait l'objet de nombreuses adaptations à l'usager afin d'améliorer leur complémentarité. Si elle n'a pas la possibilité de prendre une mesure structurelle satisfaisante, l'autorité de la concurrence risque d'être contrainte de jouer en quelque sorte un rôle de régulateur après fusion en cas d'apparition de pratiques anticoncurrentielles. Par exemple, lorsqu'une entreprise se livre à la vente groupée avec possibilité de dissociation des produits composants et que les concurrents se reposent sur cette entreprise en offrant des lots concurrents, on peut s'attendre à des accusations récurrentes de discrimination à la fois ostensible et subreptice. En pareil cas, l'autorité de la concurrence peut être poussée à protéger les concurrents et non à préserver la concurrence.

Une approche ex post et non ex ante a été préconisée dans deux critiques de la décision de la Commission européenne dans l'affaire de fusion *Guinness/Grand Metropolitan*. Après avoir noté qu'il est difficile de transposer la théorie de la vente liée en directives pratiques, Baker et Ridyard (1999, 183) indiquent :

> Cette difficulté soulève la question de savoir si la vente liée est un abus qu'il faut traiter par une intervention ex ante au moyen de mesures mises en œuvre lors d'une fusion ou s'il faut s'y attaquer ex post au moyen d'autres instruments du droit de la concurrence. L'introduction des théories du « pouvoir de portefeuille » dans l'examen des fusions estompe assurément la distinction entre le contrôle de la structure du marché et le contrôle du comportement des entreprises.

Heimler (1999, 8) est plus catégorique dans sa critique :

> … il ne faut interdire une concentration que si le renforcement du pouvoir de marché qu'elle entraîne est si marqué que seule une interdiction pourrait l'éliminer. En revanche, si le renforcement du pouvoir de marché n'a pas un caractère structurel, mais est lié à des pratiques précises, il faut autoriser la fusion et traiter ex post le comportement abusif. Autrement, cela revient à interdire la vente d'automobiles de marque Ferrari parce qu'il est très probable que le conducteur ne respectera pas les limites de vitesse.

L'interdiction plus récente, par la Commission européenne, de la fusion *General Electric/Honeywell* a suscité des objections similaires.[56]

De l'autre côté de l'Atlantique, une affaire récente révèle une attitude nuancée reconnaissant au moins qu'une mesure correctrice ex post peut être utilisée lorsque la fusion soulève des problèmes potentiels d'exclusion. La Commission fédérale du commerce a décidé, avec partage égal des voix, de ne pas contester l'acquisition récente de Quaker Oats par PepsiCo. Les deux membres ayant voté en faveur de l'autorisation de l'opération ont refusé de la traiter comme une fusion horizontale et ont fait observer à cet égard :

> Le droit des fusions peut être la première ligne de défense, mais ce n'est pas la seule. La Commission conserve la possibilité de s'attaquer après la fusion aux pratiques de tous les acteurs du secteur. Vu la structure du secteur des boissons non alcoolisées, la difficulté d'entrer dans cette activité et l'existence de pratiques de concurrence qui peuvent avoir tendance à protéger les entreprises en place aux dépens des concurrents relativement récents, nous demeurons préoccupés face à l'état de la concurrence dans l'ensemble du secteur. Nous demandons instamment à la Commission de maintenir un étroit suivi du secteur, en ne s'attachant pas uniquement aux parties à l'opération projetée en question, mais à tous les acteurs du secteur. Plus

précisément, nous considérons que la Commission pourrait évaluer les pratiques actuelles et futures des acteurs, et notamment les éléments suivants :

- l'ampleur et les effets de toute pratique d'exclusion pouvant nuire à la capacité, pour une firme concurrente, d'entrer dans le secteur des boissons alcoolisées et d'obtenir dans les circuits de distribution le référencement et le linéaire réfrigéré si recherchés ;

- les participants au secteur des boissons non alcoolisées concluent-ils des contrats d'exclusivité avec les points de vente au détail, les restaurants, les entreprises, les communes ou d'autres institutions et ces contrats font-ils déraisonnablement obstacle à la concurrence ?

- ces pratiques dans le secteur des boissons non alcoolisées, ou d'autres pratiques, ont-elles pour effet de majorer les prix au niveau du gros ou du détail, en limitant l'éventail des produits et le choix des consommateurs, ou en limitant de toute autre manière l'offre de ces produits aux consommateurs ?

Si la Commission conclut que la concurrence est menacée du fait d'une de ces pratiques, il faudrait qu'elle prenne des mesures adéquates à l'encontre des entreprises qui se livrent à des pratiques anticoncurrentielles et notamment, si nécessaire, des mesures de cession d'actifs après acquisition.[57]

Lorsque les problèmes de concurrence que soulève une fusion conglomérale ayant des effets de portefeuille concernent la sortie possible de concurrents, les motifs qui militent en faveur d'une approche ex post sont peut-être encore plus convaincants. Kolasky et Greenfield (2001, 9) font observer à cet égard :

> … la théorie des effets de gamme refuse aux usagers un bénéfice certain et immédiat de prix plus bas et de produits meilleurs en invoquant la crainte spéculative et à long terme que les concurrents puissent quitter un jour le marché s'ils ne peuvent pas s'aligner sur l'offre de l'entreprise fusionnée et que cette dernière puisse alors exercer un pouvoir de marché si elle n'est pas soumise à une entrée effective ou à une menace d'entrée.

C'est légitimement que la Commission européenne et les autorités américaines s'attachent traditionnellement, dans l'examen des fusions, aux effets probables à court ou moyen terme et non aux possibilités lointaines. A titre d'exemple, on ne répond pas aux problèmes que peut poser une concentration en faisant valoir que l'entrée dans cinq ou dix ans restaurera la concurrence ; dans l'intervalle, ce sont les consommateurs qui seront perdants, et une entrée très lointaine peut n'être qu'un simple mirage. De même, il est absurde de refuser aux consommateurs les avantages immédiats d'une fusion ayant des effets d'efficience en invoquant des problèmes à long terme de marginalisation ou de sortie des concurrents qui, peut-être, ne se poseront jamais.[58]

Du point de vue de l'argumentation en faveur de l'approche ex post par rapport à l'approche ex ante dans le domaine de l'examen des fusions conglomérales ayant des effets de portefeuille, il faut mettre en balance les deux commentaires précédents et une prise en compte exacte de ce qu'impliquerait l'approche ex post s'il advenait que le comportement après fusion paraisse évincer du secteur un concurrent moins efficient. Combien d'autorités de la concurrence seraient persuadées qu'il faut prendre des mesures pour protéger un tel concurrent ?

8. Conclusions

Sans reprendre les principaux constats présentés au début de ce document, nous tenons à attirer l'attention du lecteur sur un ensemble de conclusions générales concernant l'application de la notion d'effets de portefeuille aux fusions conglomérales.

Une fusion conglomérale ayant des effets de portefeuille justifie un examen plus approfondi que celui auquel on procède normalement pour les autres types de fusions conglomérales. Cela tient essentiellement au fait que l'existence d'effets de portefeuille augmente la probabilité qu'une fusion conglomérale facilite des pratiques anticoncurrentielles de vente liée ou de vente groupée. Cette probabilité est particulièrement élevée si la fusion réunit des produits :

1. 1. pour lesquels il y avait un grand pouvoir de marché avant la fusion ; et

2. 2. qui sont :

   1. complémentaires ; ou

   2. se caractérisent à la fois par des coûts marginaux faibles et une forte corrélation positive entre les acheteurs pour ce qui est de la valeur attribuée aux produits.

Qu'une autorité de la concurrence applique ou non expressément la notion d'effets de portefeuille, les fusions conglomérales présentant ces deux caractéristiques justifient qu'on aille un peu plus loin qu'un rapide filtrage initial. Dans toute analyse ultérieure, il faudra examiner les barrières à l'entrée, les éléments d'efficience spécifiques à la fusion et les effets d'internalisation de la fixation des prix de produits complémentaires ou de produits présentant la corrélation positive qu'on vient de mentionner.

Les fusions conglomérales présentant les deux caractéristiques ci-dessus peuvent également susciter des pratiques assimilables à une discrimination par les prix. Ceci ne doit que rarement constituer l'unique motif de rejet d'une fusion, étant donné en particulier que la discrimination par les prix peut accroître le bien-être économique et non le réduire.

La notion d'effets de portefeuille aide sans doute les autorités de la concurrence à raisonner dans une optique plus large pour l'évaluation des effets potentiels, proconcurrentiels et anticoncurrentiels, de certaines fusions conglomérales. Elle comporte néanmoins plusieurs inconvénients, qu'il faut bien garder à l'esprit.

La notion d'« effets de portefeuille » étant très générale, on court le risque qu'elle soit invoquée pour justifier le blocage ou l'autorisation sous conditions d'une fusion ayant un certain nombre d'effets potentiels d'exclusion dont aucun ne peut être établi de façon suffisamment convaincante pour justifier à lui seul le rejet d'une fusion. Ce qu'il faut privilégier, c'est établir une forte probabilité de préjudice pour les consommateurs et non démontrer qu'un tel préjudice pourrait se produire de diverses manières. De plus, cette probabilité ne doit pas se fonder uniquement sur la façon dont la fusion accroît la possibilité d'agir anticoncurrentiellement ; elle doit reposer également sur l'existence d'une incitation suffisante à agir ainsi.

Un grand nombre des effets anticoncurrentiels qui sont censés résulter de certaines fusions conglomérales ayant des effets de portefeuille sont plus hypothétiques et éloignés dans le futur que les effets auxquels on fait couramment référence pour justifier le blocage ou l'autorisation sous conditions de fusions horizontales et verticales. D'où la question essentielle de savoir si une approche correctrice ex post est préférable à une approche ex ante en cas de fusion conglomérale ayant des effets de portefeuille.

L'approche optimale pourrait fort bien être différente d'un cas à l'autre. Elle pourrait également être différente d'une autorité de la concurrence à l'autre, en fonction des dispositifs juridiques et des ressources disponibles pour l'application des lois.

On a abordé indirectement dans ce document la question suivante : L'examen des fusions serait-il nettement clarifié si les fusions verticales étaient redéfinies comme des fusions faisant intervenir des biens complémentaires ? Si l'on procédait ainsi, la plupart des fusions conglomérales ayant des effets de portefeuille et soulevant des questions importantes de concurrence seraient classées dans les fusions verticales. On pourrait ainsi obtenir de fortes synergies analytiques pour le filtrage et, si nécessaire, l'évaluation approfondie des fusions qui augmentent sensiblement la probabilité d'exclusion anticoncurrentielle de concurrents ou de restrictions anticoncurrentielles à leur égard. Cette question mérite peut-être d'être étudiée de plus près par le Comité du droit et de la politique de la concurrence.

ANNEXE A

Extrait de deux autres décisions de la Commission européenne en matière de fusions

1. Aérospatiale - Alenia/de Havilland ("ATR/de Havilland")

Dans sa décision d'octobre 1991, la Commission européenne a considéré qu'il existait des marchés de produits distincts pour les avions de 20 à 39 sièges, de 40 à 59 sièges et de 60 sièges et plus. La fusion en question présentait certains recoupements pour le marché des avions de 40 à 59 sièges et aurait donné à l'entité fusionnée une forte part de marché sur les trois marchés. Bien que cette décision n'emploie pas l'expression "effets de portefeuille", elle se réfère abondamment à la manière dont l'élargissement de la gamme de produits de l'entité fusionnée aurait pu avoir des effets anticoncurrentiels. Le passage suivant est extrait de la partie de la décision qui traite de "l'incidence de la concentration" :

> … contrairement à ses concurrents, l'entité combinée aurait tous les avantages liés à la possibilité d'offrir une famille d'avions de transport régional. Elle pourrait ainsi offrir des conditions favorables pour un type donné d'appareil dans des contrats mixtes. En d'autres termes, dans le cas où une compagnie aérienne souhaiterait acquérir un petit appareil de transport régional d'environ 30 sièges et un autre d'environ 60 sièges, ATR/de Havilland pourrait offrir des conditions spéciales pour l'ATR 72 [66 sièges] lorsqu'il est commandé avec un Dash 8-100 [36 sièges] pour lequel une concurrence plus forte est probable. Les parties affirment qu'en pratique il n'existe aucune probabilité que, pour les contrats mixtes, elles puissent tirer avantage de leur puissance de marché dans un segment pour vendre dans un autre. Toutefois, dans les observations présentées par des experts économiques pour le compte des parties, il est fait allusion à la capacité de l'entité nouvelle de faire une offre combinée pour des avions de transport régional. Les parties elles-mêmes prévoient que la combinaison des forces de vente et de production d'ATR et de Havilland "entraînera certainement une amélioration de leur position en Amérique du Nord et en Europe parmi les producteurs d'avions régionaux", de sorte que la position de l'entité combinée serait plus forte que celle d'ATR et de Havilland actuellement.

Il apparaît que, dans le secteur concerné, le fait de disposer d'une gamme complète de produits donnerait à ATD/de Havilland un avantage significatif en lui-même. Du côté de la demande, les compagnies aériennes réalisent des économies de coûts en achetant différents types d'avions à un même vendeur…

Selon une étude présentée par les parties, le fait pour un constructeur de ne pas pouvoir offrir une gamme complète de capacités en sièges dans une même série d'appareils est susceptible d'affecter la demande d'autres avions existants de ce constructeur. Cela tient aux frais fixes que le transporteur doit supporter pour chaque constructeur avec lequel il traite. Ces coûts comprennent les coûts fixes de formation des pilotes et des mécaniciens, le coût des stocks de pièces détachées dont il doit disposer et les frais fixes liés à la passation de commandes à plusieurs constructeurs lorsqu'il s'agit de pièces détachées que ceux-ci sont les seuls à avoir en stock…[59]

Dans cette affaire, les possibilités de vente groupée n'étaient pas la seule préoccupation. En effet, on pouvait également s'attendre à ce que l'entité fusionnée soit en mesure d'offrir à la clientèle certains avantages importants, dont la contrepartie serait un coût plus élevé de changement de fournisseur à l'avenir pour l'acheteur et une plus grande probabilité de prix d'éviction.[60] On peut lire plus loin ce qui suit dans la partie "Autres considérations générales" de cette décision :

> Les utilisateurs seront confrontés à une position dominante qui combine les familles d'avions les plus populaires sur le marché. Le choix sera considérablement réduit. Il existe un risque sérieux que, dans un avenir prévisible, la position dominante d'ATR/de Havilland se transforme en une position de monopole. Tant British Aerospace que Fokker, les deux principaux concurrents sur les marchés des 40 sièges et plus, ont déclaré que la concentration compromettrait sérieusement la survie de l'ATP et du Fokker 50. Ils s'attendent à ce que, une fois la concentration envisagée réalisée, la stratégie d'ATR/de Havilland consiste à baisser les prix dans un premier temps de manière à éliminer la concurrence, au moins sur les marchés clés des 40 sièges et plus. Ni Fokker ni British Aerospace ne se considèrent en mesure de soutenir une telle guerre des prix. Par conséquent, ils se retireraient tous les deux de ces marchés. En appréciant ces déclarations, il est remarqué qu'une telle conduite pourrait être économiquement rationnelle ; en effet, à la suite de la concentration envisagée, ATR/de Havilland dépasserait en termes de part de marché le seuil au-delà duquel une telle politique des prix serait probable, étant donné qu'elle constituerait la meilleure stratégie de maximalisation du profit. Après avoir établi une position de monopole, ATR/de Havilland serait en mesure d'augmenter les prix sans que la concurrence puisse le freiner en aucune façon.

Dans cette perspective, la concentration envisagée deviendrait même de plus en plus néfaste pour la clientèle au fur et à mesure que la position dominante se transformerait en monopole.[61]

2. Boeing et Hughes Space and Communications Company ("Boeing/HSC")

Cette affaire concernait la fusion d'une grande entreprise du secteur de l'aviation commerciale, de la défense et de l'espace (y compris la production et le lancement de satellites) avec une entreprise fournissant des services satellitaires et fabriquant des satellites. Bien que la fusion n'ait pas créé de recoupements pour les satellites ou le lancement de satellites, la Commission a jugé nécessaire d'examiner la possibilité d'effets anticoncurrentiels découlant de la combinaison de ces produits complémentaires pour lesquels les deux entreprises avaient une forte position sur le marché. Cette décision ne fait pas référence à des "effets de portefeuille", mais cette affaire constitue néanmoins une bonne illustration des effets de portefeuille tels qu'on les a définis dans le présent document. La Commission a identifié six effets négatifs éventuels de cette opération ayant trait à des possibilités de vente liée :

- La politique des constructeurs de satellites vis-à-vis de leurs clients semble être de jouer sur une marge de masse. Après l'opération, HSC pourrait concevoir cette marge de masse de façon à correspondre au mieux à la charge utile des lanceurs de Boeing. Ainsi, les offres des autres opérateurs de services de lancement pourraient être moins concurrentielles que celles de Boeing.

- Certains contrats de livraison en orbite ménagent au maître d'œuvre du satellite une certaine souplesse quant au lanceur à utiliser. Après la fusion, HSC pourrait s'efforcer que tous ces satellites soient lancés sur des lanceurs Boeing ou Sea Launch.

- Le lancement d'un satellite nécessite des travaux préalables d'intégration entre le satellite et le lanceur. Cette intégration peut se faire au cas par cas, mais il est également possible de mettre au point des accords de compatibilité entre le lanceur et la famille de satellites. Après l'opération envisagée, HSC pourrait refuser de mettre au point de tels accords de compatibilité, ce qui augmenterait le coût et le temps nécessaires pour l'intégration des satellites HSC avec des lanceurs exploités par des tiers.

- HSC pourrait refuser de fournir aux opérateurs tiers de services de lancement des informations concernant ses prochains satellites ou ses prochaines versions de satellites, de façon que ces opérateurs ne puissent pas assurer facilement la compatibilité de leurs lanceurs avec ces satellites.

- En tant que constructeur de satellites, HSC reçoit des informations sensibles sur le plan de la concurrence pour les lanceurs avec lesquels ces satellites seront intégrés. Bien que ces informations soient généralement protégées par des clauses de confidentialité, HSC pourrait les utiliser au détriment d'opérateurs tiers de services de lancement.

- A plus long terme, HSC pourrait concevoir la prochaine génération d'engins spatiaux de façon qu'ils soient mieux adaptés aux lanceurs de Boeing qu'aux autres lanceurs. Par exemple, HSC pourrait imposer des interfaces exclusifs pour ces satellites, de manière à favoriser les lanceurs de Boeing. HSC pourrait également concevoir ses satellites de telle sorte qu'ils puissent être lancés de façon à avoir une durée de vie plus longue que la normale.[62]

Malgré ces préoccupations, la Commission européenne a conclu, après une enquête approfondie auprès des acheteurs, qu'il ne serait pas rentable pour Boeing/HSC de faire en sorte que pour les services de satellites les clients n'utilisent que les services de lancement de Boeing. En fait, les acheteurs sont très soucieux de pouvoir utiliser plusieurs lanceurs afin de ne pas être dépendants d'un seul d'entre eux sur le plan des risques.

ANNEXE B
Informations complémentaires concernant certains modèles économiques auxquels il est fait référence dans le texte

1. Modèle d'Adams et Yellen

Schmalensee (1984, S211) résume brièvement ce modèle comme suit :

> Un monopoleur produit deux biens à coûts unitaires constants en présence d'acheteurs à préférences diverses. L'utilité marginale d'une deuxième unité de l'un ou l'autre des biens est censée être égale à zéro pour tous les acheteurs [de sorte qu'un maximum d'une unité est vendu à chaque consommateur]. Les biens sont indépendants du point de vue de la demande pour tous les acheteurs, de sorte que le prix de réserve d'un acheteur pour la première unité de l'un ou l'autre des biens est indépendant du prix de marché de l'autre bien. Par conséquent, le montant maximum qu'un acheteur paiera pour l'ensemble consistant en une unité de chaque bien est égal à la somme des deux prix de réserve et les acheteurs sont totalement décrits par les valeurs de ces deux prix. Il n'y a pas par hypothèse de marché de la revente.

Adams et Yellen identifient trois conditions qui seraient remplies en cas de discrimination "pure" par les prix (probablement une situation dans laquelle le monopoleur vend chaque unité à un prix différent). Ces conditions, que nous avons quelque peu paraphrasées, sont les suivantes :

- extraction complète -- aucun acheteur ne réalise sur son achat un surplus du consommateur ;
- exclusion - aucun individu ne consomme un bien si le coût de ce bien est supérieur à son prix de réserve ; et
- inclusion - tout individu dont le prix de réserve pour un bien dépasse son coût consomme en fait ce bien.

Utilisant ces critères, Adams et Yellen font observer que :

Le principal défaut de la vente groupée pure [seul le lot est offert] est la difficulté à laquelle on se heurte au regard de l'exclusion. Plus le coût de fourniture de l'un ou l'autre bien est élevé, plus la probabilité est forte de fournir à certains individus des biens pour lesquels leur prix de réserve est inférieur au coût… Par conséquent, la vente groupée pure est préférée au simple prix de monopole uniquement si les bénéfices plus élevés découlant d'une extraction ou d'une inclusion plus complètes ne sont pas compensés par les bénéfices inférieurs découlant d'une exclusion moins complète. Plus les coûts sont négligeables par rapport aux prix de réserve, moins il y a de problème pour une vente groupée pure.

La stratégie de vente groupée mixte [vente du lot et, également, des composants] est plus rentable que la vente groupée pure lorsque la condition d'exclusion n'est pas respectée à l'équilibre pour la vente groupée pure… En général, chaque fois que la condition d'exclusion n'est pas respectée à l'équilibre pour la vente groupée pure, la vente groupée mixte est nécessairement préférée à la vente groupée pure. (482-3, note de bas de page omise)

La vente groupée pure et la vente groupée mixte permettent au vendeur monopoleur de sélectionner les consommateurs en fonction de leur prix de réserve et de leur appliquer effectivement des

prix différents. Toutefois, la vente groupée pure ne sélectionne les consommateurs qu'en deux groupes : ceux qui ont un prix total de réserve supérieur au prix du lot et ceux qui ont un prix de réserve inférieur au prix du lot. La vente groupée mixte va plus loin en ce qu'il est possible de sélectionner quatre groupes : ceux qui achètent le lot, ceux qui n'achètent rien et ceux qui achètent uniquement l'un ou l'autre des biens offerts séparément. Cette répartition est illustrée par le diagramme suivant (Adams et Yellen, figure III, page 480) :

r_2 w

p_B^* ,

p_2^*

x

y z

O r_1

p_1^* p_B^*

Supposons qu'en cas de vente groupée mixte les prix des biens 1 et 2 vendus séparément soient p_1^* et p_2^*. Supposons également que p_b^* soit le prix pratiqué pour les deux biens groupés. Les consommateurs ayant des combinaisons de prix de réserve situées au nord-est de WxyZ achèteront le lot. Ceux qui se situent au nord-ouest du point "x" achèteront uniquement le deuxième bien et ceux qui se situent au sud-est du point "y" n'achèteront que le premier bien.

2. Extension par Schmalensee, du modèle d'Adams et Yellen

Schmalensee (1982) élargit le modèle d'Adams et Yellen en examinant l'hypothèse de concurrence pour l'un des deux biens groupés. Sa conclusion est la suivante :

Dans l'analyse des contrats de vente liée comme instrument de comptage, on suppose habituellement que les deux produits considérés sont complémentaires et que les acheteurs ayant un prix de

réserve plus élevé pour le produit liant demandent plus d'unités du produit lié à un prix quelconque. On tire parti de cette association positive entre les demandes en vendant le produit lié au-dessus de son coût de revient, de façon à obtenir un surplus plus élevé des acheteurs qui attribuent une plus grande valeur au produit liant. Dans le cas présent, en revanche, on tire parti d'une relative négative entre les prix de réserve de la population et [le bien fourni concurrentiellement] est vendu en conséquence au-dessous du coût de revient [en ce sens que le prix de vente groupé moins le prix séparé du bien monopolisé qui maximise le profit est inférieur au coût marginal du bien concurrentiel]. On peut ainsi extraire davantage de surplus des acheteurs qui lui attribuent moins de valeur et qui attribuent plus de valeur [au bien monopolisé]. (71)

Dans ces conditions, Schmalensee souligne que la vente groupée pourrait fort bien susciter des plaintes des producteurs concurrents, accusant le monopoleur de pratiquer la vente au-dessous du coût de revient pour monopoliser leur marché. Mais le monopoleur pourrait répliquer qu'il lui importe peu de fabriquer lui-même le produit ou de l'acheter à prix coûtant auprès de la concurrence et il pourrait souligner que la production totale du bien fourni dans des conditions concurrentielles a augmenté.

Dans un article postérieur, Schmalensee (1984) revient sur l'hypothèse du monopole pour les deux biens groupés, mais développe le modèle d'Adams et Yellen en retenant une forme particulière de dépendance stochastique de la demande, à savoir « …que les couples de prix de réserve des acheteurs suivent une distribution normale bivariée. » (S212). Dans cette hypothèse, qui semble plausible, la vente groupée pure, si on la compare à la vente séparée de chaque composante, augmentera probablement non seulement les bénéfices, mais aussi le bien-être économique total. La probabilité de résultats favorables s'accroît à mesure qu'augmente le consentement à payer pour les deux biens par rapport au coût marginal de production de ces biens. Schmalensee considère que dans les autres hypothèses de distribution de la demande, il resterait vrai que « …la vente groupée permet d'extraire plus efficacement le surplus en *réduisant l'hétérogénéité effective des acheteurs…* » (S229, italiques ajoutés)[63] Mais il n'a pas autant la certitude que cela serait encore valable si l'on relâchait l'hypothèse concernant le monopole pour les deux produits, l'indépendance de la demande pour les deux produits ou l'achat, par les consommateurs, d'une seule unité des deux produits.[64]

3. Deux modèles de fermeture du marché par intégration verticale

Ordover et autres (1990) décrivent comme suit la fermeture des marchés par intégration verticale :

Soit un marché où la fourniture d'intrants est concurrentielle avant la fusion et où l'intégration verticale ne s'accompagne d'aucun effet bénéfique sur le plan de l'efficience de la production. Supposons qu'après la fusion la division amont de l'entreprise maintenant intégrée refuse de livrer les intrants aux concurrents de sa division aval.

L'impossibilité, pour les concurrents, d'avoir accès à ces livraisons signifie que les autres fournisseurs auront à faire face à une moindre concurrence. En conséquence, ils pourront accroître leurs bénéfices en relevant les prix des intrants livrés aux entreprises aval qui ne sont pas intégrées. Cette hausse des prix bénéficiera à l'entreprise verticalement intégrée. S'il y a augmentation du coût des intrants des concurrents, ceux-ci seront contraints de réduire leur production et de relever les prix qu'ils appliquent sur le marché aval. Cette diminution de la concurrence permet à la division aval de l'entreprise intégrée d'augmenter sa part de marché et ses prix. Dès lors, les bénéfices de l'entreprise verticalement intégrée peuvent s'accroître, même si l'intégration verticale n'a aucun effet bénéfique sur le plan de l'efficience de la production. (127-128, référence omise)

Ordover et autres recensent six objections à cette théorie de l'« effet de levier », prises en compte dans un modèle où des duopoles initiaux, en amont et en aval, sont censés produire des biens différenciés. Pour faire abstraction des effets des gains d'efficience dus à la fusion, la concurrence est censée être de type Bertrand. A partir de leur modèle, Ordover et autres concluent que la fermeture verticale du marché peut être rentable et réduire le bien-être dès lors que le gain de l'entreprise amont non intégrée est supérieur à la perte de l'entreprise aval non intégrée. Dans ces conditions, les effets de la première fusion verticale ne peuvent pas être neutralisés de façon rentable par une deuxième fusion parallèle.

Ordover et autres examinent deux façons permettant d'assurer l'inégalité fondamentale des gains. Premièrement, l'entreprise intégrée peut prendre un engagement de prix à l'égard de l'entreprise aval non intégrée pour limiter le prix pouvant être pratiqué par l'entreprise amont non intégrée. Deuxièmement, il est possible que le prix amont soit maintenu au-dessous du seuil critique en raison des pressions émanant « …d'une autre source (inférieure) concurrentielle d'approvisionnement. » (140)

Ordover et autres concèdent que la fermeture du marché ne sera pas nécessairement rentable et ne réduira pas nécessairement le bien-être dans un modèle de concurrence en quantité avec des biens homogènes. Qu'en est-il s'il y a oligopole en amont au lieu d'un duopole :

Dans ce cas, une seule fusion verticale ne donne pas un pouvoir complet de monopole sur les autres entreprises en amont. Certes, la concurrence entre ces entreprises limite naturellement le prix en amont et diminue donc la rentabilité de la fermeture du marché, mais cette concurrence diminue également les possibilités de contre-stratégie efficace de la part de l'entreprise en aval qui est empêchée d'entrer sur le marché. Toutefois, la modélisation nécessaire n'est pas des plus simples. (140)

Le modèle d'Ordover et autres a été critiqué pour l'hypothèse selon laquelle l'entreprise intégrée peut s'engager de façon crédible à approvisionner l'entreprise aval non intégrée à un prix suffisamment bas pour exclure une contre-fusion défensive. Pour répondre à cette objection, Choi et Yi (2000) présentent un modèle reformulé dans lequel l'entreprise intégrée avantage sa filiale aval en lui fournissant un intrant personnalisé. Sans la fusion, l'entreprise amont n'aurait pas eu intérêt à accorder un tel avantage, parce qu'elle n'aurait probablement pas eu sa part des gains réalisés par l'entreprise aval. Cette stratégie de personnalisation a un effet supplémentaire essentiel : elle entraîne une hétérogénéité des coûts en amont entre les duopoleurs, ce qui réduit la concurrence en amont et accroît les bénéfices des deux fournisseurs en amont.[65] En éliminant cette hétérogénéité, une contre-fusion défensive de la part de l'entreprise aval non intégrée ne serait pas rentable.

4. Nalebuff (1999)

Nalebuff examine d'abord le cas de la vente groupée pure et explique comment elle peut avoir deux effets importants sur la rentabilité d'une nouvelle entrée lorsque l'entreprise en place dispose d'un *monopole* pour deux produits *A* et *B*. Le premier effet est ce que Nalebuff appelle « l'effet pur de la vente groupée ». Cet effet est décrit dans le contexte d'une entreprise en place vendant uniquement en lot *A* et *B* et voulant empêcher l'entrée sur le marché des deux produits (elle ne sait pas quel est celui que le nouvel entrant choisira de produire). Nalebuff commence par l'hypothèse simplificatrice selon laquelle le prix de vente groupée est égal à la somme des deux prix maximisant le profit qui seraient appliqués si les produits étaient vendus séparément. Autres simplifications : les coûts marginaux sont nuls pour les deux biens, il y indépendance stochastique pour les prix de réserve des acheteurs et diverses hypothèses permettent de simplifier le calcul des prix et de bénéfices. Sous ces hypothèses simplificatrices, la vente groupée réduit de moitié les bénéfices du nouvel entrant pour l'un ou l'autre produit.[66]

Après avoir démontré l'existence de « l'effet pur de la vente groupée », Nalebuff traite de « l'effet de rabais de la vente groupée ». Cet effet tient à ce que, *A* et *B* étant vendus en lot, il y a davantage intérêt à diminuer légèrement le prix parce qu'on réalise des bénéfices supplémentaires du fait de l'augmentation des ventes des deux biens. En prenant en compte également le rabais résultant de la vente groupée, Nalebuff montre que la diminution, du fait de la vente groupée, des bénéfices attendus de l'entrée sur le marché, est même plus importante que celle qui serait observée si l'on tient compte uniquement de l'effet de vente groupée pure. Il démontre également que, s'il y a entrée, l'entreprise en place dégagera davantage de bénéfices si elle choisit de poursuivre la vente groupée que si elle choisit d'y renoncer et de livrer concurrence produit par produit. Par conséquent, il n'est pas nécessaire pour l'entreprise pratiquant la vente groupée de prendre un engagement crédible de poursuite de la vente groupée.

Nalebuff procède à plusieurs extensions importantes de son modèle, en commençant par comparer la vente groupée mixte et la vente groupée pure. La vente groupée mixte accroît les bénéfices pour un double monopoleur dont la position n'est pas contestée, mais ne les accroît guère lorsqu'un monopoleur pour l'un des deux produits a un concurrent pour l'autre produit. Dans ce cas, le monopoleur doit fixer le prix du composant monopolisé à un niveau suffisamment élevé pour empêcher son concurrent de constituer un lot concurrent. Nalebuff fait également observer que si les coûts marginaux étaient supérieurs à zéro, un phénomène d'inefficience se produirait (des biens seraient vendus aux consommateurs dont le prix de réserve est inférieur aux coûts marginaux), mais que la vente groupée procure encore des gains substantiels.

A propos des effets observés si la vente groupée porte sur plus de deux biens, Nalebuff conclut que :

Les gains à caractère discret qui résultent de la vente groupée de deux biens ne continuent pas à augmenter lorsqu'on porte à plus de deux le nombre des biens faisant l'objet de la vente liée. En définitive, on y gagne à pratiquer la vente groupée d'un grand nombre de biens, mais ce gain est dû à un troisième effet, la loi des grands nombres.[67]

Il ajoute à la page suivante que :

Après réflexion, lorsque la vente groupée porte sur un petit nombre de produits, l'argument le plus décisif pour ajouter un autre bien est de conserver une avance sur l'entrant potentiel. Une entreprise en place pratiquant la vente groupée de trois biens a moins à craindre d'un entrant potentiel qui peut pratiquer la vente groupée de deux biens. Le troisième bien évite à l'entreprise en place d'avoir à livrer concurrence face à face et fait qu'il est plus difficile pour l'entrant de conquérir une part de marché.

Nalebuff étudie également les effets d'une corrélation positive ou négative des prix de réserve et en déduit qu'une corrélation positive a tendance à amplifier l'effet pur de la vente liée, alors qu'une corrélation négative a tendance à l'atténuer. Il examine en outre les effets de complémentarité, définis comme les effets qui se produisent lorsque l'utilité de la consommation combinée de *A* et de *B* est supérieure à la somme des utilités d'une consommation séparée des deux biens. Il considère que les effets de cette complémentarité sont distincts des effets découlant d'une corrélation positive des prix de réserve et peuvent s'y ajouter ; autrement dit, la complémentarité a tendance à amplifier l'effet pur de la vente liée. En revanche, si les biens *A* et *B* faisant l'objet d'une vente groupée sont substituables, l'effet pur de la vente liée est moindre.

5. Nalebuff (2000)

Le modèle de Nalebuff (2000) repose sur les hypothèses suivantes : production duopolistique de chacun des composants complémentaires (il y a $2n$ entreprises lorsqu'il y a n composants

complémentaires ; chaque paire de composants est différenciée par un élément analogue aux frais de transport ; il y a complémentarité parfaite (le consommateur doit avoir chaque fois l'un des *n* composants complémentaires). Sous ces hypothèses, Nalebuff compare trois formes possibles de concurrence : composant contre composant (personne ne pratique la vente groupée) ; lot contre lot (chacun pratique la vente liée) ; lot contre composants (une seule entreprise pratique la vente groupée). Nalebuff montre que la concurrence lot contre lot permet de dégager des profits moindres qu'en cas de concurrence composant contre composant. Le raisonnement est le suivant :

Dans l'optique de l'entreprise, le problème avec la concurrence lot contre lot est que l'enjeu est trop élevé. Abaisser le prix de l'un quelconque des composants augmente les ventes de la totalité des *n* composants. Le résultat est que les prix des composants tombent à un niveau si faible que ces ventes supplémentaires, cumulées, sont tout juste suffisantes pour compenser la perte de marge. (7)

Lorsqu'un coordinateur (ce pourrait être, mais pas nécessairement, une entreprise résultant d'une fusion conglomérale) offre un lot, en concurrence avec *n* entreprises non coordonnées (chacune vendant un seul composant), Nalebuff démontre que les bénéfices pour toutes les entreprises sont supérieurs à ceux qu'on observerait si la concurrence se faisait uniquement entre composants. Les grandes gagnantes sont les premières entreprises qui offrent un lot. Non seulement les entreprises ayant le bénéfice de l'antériorité obtiennent des bénéfices élevés, mais elles sont en outre assurées de conserver leurs gains. Nalebuff démontre que, dès lors qu'un produit en vente groupée est sur le marché, les bénéfices diminueront pour *toutes* les entreprises si les *n* autres entreprises pratiquent elles aussi la vente groupée (en créant ainsi une concurrence lot contre lot bien moins rentable). Les effets sur les consommateurs sont ambigus. Lorsque le nombre de produits complémentaires (et donc le nombre des produits figurant dans le lot coordonné) augmente, le prix par produit diminue tout d'abord, puis augmente pour l'offre groupée. Il augmente constamment pour les vendeurs de composants séparés. A un certain point, on en arrive même à ce que les consommateurs achetant le lot perdent par rapport à la situation dans laquelle il n'y a pas du tout de vente groupée.

6. Commentaires s'appuyant sur Church et Gandal (2000)

Comme Nalebuff (2000), Church et Gandal retiennent l'hypothèse où les composants ne sont offerts que par deux entreprises (duopole). Mais, à la différence de Nalebuff, Church et Gandal se limitent à deux produits complémentaires, en l'occurrence un matériel et un logiciel informatiques, au lieu de *n* produits complémentaires. Autre différence importante, Nalebuff examine une forme plus marquée de fermeture du marché. La première entreprise qui pratique la vente groupée offre aux consommateurs le choix suivant : consommer le lot ou constituer leur propre lot à partir des composants non groupés fournis par les entreprises concurrentes. Dans Church et Gandal, l'effet de fermeture du marché s'opère de la façon suivante : l'entreprise productrice de matériel s'intègre verticalement dans la production de logiciel et fait en sorte par la suite que le logiciel soit incompatible avec le matériel de ses concurrentes. Il s'agit d'un type de vente groupée mixte qui laisse au départ au consommateur le choix :

- d'acheter l'offre de l'entreprise intégrée ;
- d'acheter le matériel de l'entreprise intégrée et le logiciel concurrent ; ou
- d'acheter le matériel et le logiciel aux entreprises concurrentes non intégrées.

Il semblerait apparemment que les entreprises non intégrées soient à ce stade dans une meilleure situation qu'elles ne le seraient en cas de vente groupée avec antériorité de type Nalebuff. Mais, dans certaines circonstances, Church et Gandal observent que les entreprises non intégrées pourraient améliorer

leurs bénéfices en fusionnant et en faisant en sorte que leur logiciel soit incompatible avec le matériel de l'entreprise qui a été la première à pratiquer la vente groupée.[68] Autrement dit, nous restons quelque peu dans le doute quant à la généralisation de Nalebuff selon laquelle la concurrence lot contre lot est moins intéressante pour l'ensemble des entreprises que la concurrence lot contre composants non groupés.

On notera enfin que, dans le modèle de Church et Gandal, chaque fois que la fermeture du marché est une solution d'équilibre (c'est-à-dire chaque fois que les représailles ne constituent pas une option viable pour l'entreprise productrice de matériels qu'on empêche d'entrer sur le marché), le résultat est une diminution du bien-être économique. La fermeture du marché pourrait même aboutir à un monopole aussi bien pour les matériels que pour les logiciels.

NOTES

1. Les coûts marginaux sont manifestement très faibles pour les logiciels. En ce qui concerne la question de la corrélation, il se peut fort bien que, par exemple, les acheteurs qui apprécient le plus les tableurs apprécient également le plus les gestionnaires de bases de données. On notera que ces deux produits ne sont la plupart du temps ni substituables ni complémentaires pour la plupart des acheteurs.

2. On entend par « produits complémentaires » les produits traditionnellement complémentaires et deux produits pour lesquels les acheteurs les plus demandeurs d'un des deux sont généralement les plus demandeurs de l'autre.

3. American Bar Association, Antitrust Section (1992, 333).

4. Souvent, on se réfère à cet égard à une élasticité croisée de la demande négative pour ces produits. Cette façon de définir les produits complémentaires pourrait être trop restrictive dans le cadre de ce document. C'est pourquoi nous avons choisi de mettre l'accent sur la notion de complémentarité et non sur la manière dont elle pourrait être mesurée.

5. Autre problème, la fusion pourrait accroître la probabilité d'interactions coordonnées. Dans le cas d'une fusion conglomérale, cette éventualité est essentiellement fonction des possibilités de multiplication des contacts multimarchés. Ces effets ne paraissent pas être plus marqués dans les fusions conglomérales ayant des effets de portefeuille que dans les autres fusions conglomérales ; c'est pourquoi on ne les approfondira pas dans ce document.

6. Dans ce document, on exclut de la notion d'effets de portefeuille les fusions conglomérales dont la motivation essentielle est de réduire le risque de l'investisseur en lissant les gains sur le cycle conjoncturel. Ces fusions peuvent être un moyen de remédier à certaines imperfections sur les marchés financiers, mais peuvent également entraîner d'autres imperfections ou inefficiences qui leur sont spécifiques [voir Scherer (1980)]. L'examen de ces fusions conglomérales n'entre pas dans le cadre de ce document.

7. L'extrait suivant d'un rapport de 1998 de la Commission européenne fait bien apparaître la nature évolutive de la notion d'effets de portefeuille et de la notion étroitement liée d'« effets de gamme », et montre également que cette notion s'applique aussi bien aux produits de marque qu'aux produits industriels :

> La question de l'incidence potentielle et des effets de gamme sur la concurrence, qui revêt une importance particulière dans le secteur des produits de consommation courante, comme les boissons, se pose notamment au travers des avantages supplémentaires dont peut bénéficier le détenteur de marques dominantes. Ceux-ci peuvent se traduire, par exemple, par une plus grande souplesse en matière de prix et de multiples possibilités en termes de stratégie commerciale. Dans les affaires *Coca-Cola/Carlsberg* et *Guinness/Grand Metropolitan*, la Commission a pris en considération l'inclusion, dans une gamme de boissons, de marques fortes de produits appartenant à des marchés distincts. *Elle a conclu que l'effet résultant d'un tel regroupement peut conférer à chacune des marques du portefeuille une puissance sur le marché plus grande que si elle était vendue individuellement, et renforcer la puissance concurrentielle du détenteur du portefeuille sur plusieurs marchés.*
>
> Dans la seconde affaire, les conséquences de la possession d'un portefeuille de marques difficilement contournables ont également été appréhendées dans leurs effets sur la concurrence potentielle. La possibilité accrue de négociation résultant de la détention de marques dominantes, qui peut par exemple permettre d'imposer des contrats d'exclusivité, a ainsi été considérée comme susceptible de renforcer les obstacles à l'entrée de nouveaux produits sur le marché.

D'autres effets de gamme se rencontrent également dans le secteur industriel. Dans l'affaire *Boeing/Mc Donald Douglas*, par exemple, outre le monopole préexistant dans le segment des plus grands avions à fuselage large (Boeing 747), la concentration a ajouté un autre monopole dans le segment des plus petits avions à fuselage étroit, faisant le Boeing le seul construction aéronautique offrant une famille complète de grands avions commerciaux. Cette position ne pouvait être remise en cause par de nouveaux entrants potentiels, étant donné les barrières extrêmement élevés à l'entrée sur ce marché, qui nécessite une énorme intensité capitalistique. [Commission européenne (1998b), 55-56, italiques ajoutés)].

8. Commission européenne (1998a, paras. 99 à 103, les passages supprimés le sont dans l'original).

9. Voir Commission européenne (1997a).

10. Suisse (2001, para.8).

11. Migros et Coop sont les détaillants les plus importants dans le secteur alimentaire en Suisse, leur part de marché totale se situant entere 40 et 50 pour cent. Si Nestlé et Migros sont de puissants concurrents effectifs et potentiels, c'est parce que Migros fabrique la plupart des produits qu'il commercialise au détail.

12. Suisse (2001, paragraphes 14 à 20, note en bas de page figurant dans l'original).

13. Le communiqué de presse concernant cette décision ne vise pas expressément les « effets de portefeuille ». La Commission européenne préfère apparemment n'utiliser cette expression que dans les affaires portant sur des produits de consommation de marque. Les commentaires de cette décision utilisent des termes « effets de gamme » [voir Kolasky et Greenfield (2001)] et « effets conglomératux » [voir Lexecon (2001)].

14. Commission européenne (2001).

15. Monopolies and Mergers Commission (1981, 5). La définition de l'American Bar Association, Antitrust Section (1992, 131) élargit cette définition aux accords par lesquels l'acheteur « … s'engage à ne pas acheter [le produit lié] à un autre fournisseur. »

16. Sur ce point, voir *ibid.*, pp. 5-7 et Carlton (2001).

17. United States Court of Appeals … (2001, 70) [Microsoft]. Le jugement cité prévoit une exception. Il prescrit (pp. 85 et 86) l'application de la règle de raison pour se prononcer sur la légalité d'une vente groupée mettant en cause les marchés des systèmes d'exploitation.

18. Cela fait écho aux arguments de spécificité des actifs avancés en faveur de l'intégration verticale.

19. Voir Adams et Yellen (1976, 476-477).

20. Le « prix de réserve » est le prix maximum que l'acheteur est prêt à payer pour une unité du produit lorsque soit il n'y a pas de possibilité d'acheter plus d'une unité, soit il serait impossible de le faire. Par exemple, on peut dire d'un consommateur qu'il a un prix de réserve pour voir un certain film un certain soir au cinéma local.

21. La notion de distribution des prix de réserve entre les consommateurs correspond en gros à ce que nous avons appelé antérieurement la « dépendance stochastique de la demande ».

22. Ces pertes sociales seront en général même plus élevées, et le profit de l'entreprise pratiquant la vente groupée sera plus faible, si on remplace la vente groupée mixte par la vente groupée pure.

23. Voir Varian (1989) pour un aperçu général des difficultés rencontrées lorsqu'on veut évaluer les effets de la discrimination par les prix en termes de bien-être.

24. Cas analogue à l'élimination du problème de double marginalisation par intégration verticale.

25. Pour expliquer l'importance de l'existence d'acheteurs uniquement intéressés par le produit lié, Carlton (2001, 667-668) donne l'exemple suivant, qu'il attribue à Robert Gertner :

    Imaginons un grand hôtel en situation de monopole sur une île où vivent les employés de cet hôtel. En exigeant que les clients prennent uniquement leurs repas à l'hôtel, cet hôtel peut empêcher de se développer d'autres restaurants qui serviraient les intérêts des touristes et de la population locale. Les touristes subissent déjà le pouvoir de monopole de l'hôtel (par le tarif des chambres), mais les habitants de l'île ne subissaient pas ce pouvoir, de sorte que la limitation de la concurrence leur porte préjudice.

    A propos d'une autre affaire, Carlton note que la vente liée peut accroître le profit, même lorsque tous les acheteurs achètent aussi bien le produit liant que les produits liés. C'est le cas lorsque la discrimination par les prix de la part de l'entreprise pratiquant la vente liée ne serait pas possible sans le lien, c'est-à-dire serait neutralisée par arbitrage entre les acheteurs. Voir Carlton (2001, 665-666).

26. Il indique plus précisément :

    L'une des principales manières d'y parvenir est de s'appuyer sur la conception du produit et des procédés de production, qui peut se traduire par des coûts irrécouvrables élevés. En groupant des éléments de son système ou en faisant en sorte que les interfaces entre les composants vendus séparément soient incompatibles avec les composants de leurs concurrentes, les entreprises peuvent préengager leur stratégie de marketing…

    En revanche, un grand nombre de cas de vente liée ne paraissent guère impliquer plus qu'une décision de marketing facile à modifier (839).

27. Lorsque le produit liant et le produit lié doivent être consommés en proportions fixes, le monopoleur peut dégager un plus grand profit en laissant un concurrent fournir un complément différencié, dont l'existence accroît la demande pour le produit liant monopolisé.

28. Voir Commission européenne (2000). On trouvera à l'annexe A du présent document des extraits de la décision rendue par la Commission dans cette affaire.

29. Voir *ibid.*, paragraphes 81-82.

30. Pour un bref examen de cette affaire, considérée comme une bonne application des critères exposés dans Whinston (1990), voir NERA (2001).

31. Comme Whinston (1990, 850) le note à propos des produits complémentaires utilisés en proportions fixes, il peut arriver que la vente liée ou groupée fasse sortir du marché certaines entreprises offrant des produits différenciés. Cela peut diminuer les ventes du produit liant (ou d'un des produits groupés) si l'entreprise pratiquant la vente liée ou groupée n'est pas en mesure de remplacer ces produits différenciés.

32. Même si tous ces critères sont remplis, les effets d'une vente liée ou groupée après fusion peuvent être ambigus en termes de bien-être si la vente liée ou groupée s'accompagne d'une discrimination par les prix améliorant le bien-être. Whinston (1990, 839) précise à cet égard :

    > Il y a perte pour les consommateurs parce que, en cas de sortie de concurrents sur le marché du produit lié, les prix peuvent augmenter et le degré de variété disponible sur le marché diminue nécessairement. De fait, dans les modèles [présentés], une vente liée qui conduit à la sortie du concurrent du

monopoleur sur le marché du produit lié entraîne fréquemment une hausse de tous les prix, ce qui porte uniformément préjudice aux consommateurs. Mais, plus généralement, comme on l'observe couramment avec les modèles de discrimination par les prix, la situation de certains consommateurs peut s'améliorer du fait de la mise en place d'une vente liée. L'impact sur le bien-être global est malgré tout incertain en raison des effets ambigus de la discrimination par les prix et des éléments habituels d'inefficience qui affectent les entreprises entrant dans un secteur en présence d'économies d'échelle et d'une fixation des prix oligopolistique.

C'est là, semble-t-il, un autre exemple de la théorie de l'optimum de second rang ; le bien-être ne diminue pas automatiquement lorsqu'on introduit une distorsion sur un marché où il existe déjà des distorsions.

33. Voir, à l'annexe B, ce que Nalebuff (1999) appelle « l'effet de rabais de la vente groupée ».

34. Voir Fisher et Rubinfeld (2001). Microsoft craignait manifestement que le navigateur de Netscape puisse s'interfacer avec plusieurs systèmes d'exploitation. D'où un problème potentiel pour Microsoft, étant donné que le navigateur de Netscape fournissait des pointeurs pour applications. Si une proportion suffisamment forte d'ordinateurs personnels avait été équipée de Netscape, les programmeurs d'applications auraient pu concevoir leur logiciel de façon à ce qu'il fonctionne avec les pointeurs de Netscape et pas avec ceux du système d'exploitation Windows. Cela aurait diminué l'intérêt de Windows pour les fabricants d'ordinateurs et pour les consommateurs, puisque d'autres systèmes d'exploitation, avec l'aide de Netscape, auraient pu également faire fonctionner les applications conçues au départ pour Windows.

35. L'élément essentiel d'analyse était préfiguré dans un modèle qu'on trouve chez Katz (1989) et qui traitait essentiellement des produits complémentaires :

> Soit deux intrants pour la production en aval, x et y. Au départ, ces deux intrants sont fournis par un monopoleur en amont multiproduits. L'entrée pour la production de x est totalement bloquée, par exemple grâce à un brevet. Il y a néanmoins un seul entrant potentiel pour la production de y. Si l'entrant potentiel décide de faire son entrée, les deux entreprises jouent un jeu de prix avec produits différenciés. En l'absence de vente groupée, l'entreprise en place risque de n'avoir aucune possibilité de dissuader l'entrée sur ce marché ; l'entrant peut rationnellement escompter que l'entreprise en place admettra l'entrée pour la production de y. Mais supposons que l'entreprise en place puisse pratiquer la vente liée ou groupée et fixer un prix global pour une unité de x et une unité de y, ce prix étant inférieur au total du prix de x et du prix de y. Si la situation au niveau de la demande est celle voulue, cette vente liée a pour effet de déplacer vers le bas la courbe de réaction de l'entreprise en place (prix-espace) sur le marché du produit y à un point tel que l'entrée n'est plus rentable. De façon intuitive, on voit que la vente liée peut rendre l'entreprise en place plus offensive sur le marché du produit y, parce que toute unité supplémentaire de y écoulée dans le cadre de la vente liée augmente également les bénéfices résultant de la vente du produit x. Par conséquent, l'entreprise en place, si elle est en mesure de pratiquer la vente liée, peut opposer une menace crédible à un entrant potentiel. Dès lors, un fabricant peut en fait utiliser la vente liée pour étendre son monopole sur un marché à un autre marché lorsque le deuxième marché aurait eu autrement une structure de concurrence moins que parfaite (709).

36. En cas de corrélation négative parfaite en ce qui concerne les produits A et B : « … un entrant à un seul produit a tout ce que veulent ses consommateurs … Les marchés de A et B correspondent à des groupes de consommateurs fondamentalement différents. En revanche, lorsque A et B sont positivement corrélés, le même groupe de consommateurs achète A et B, de sorte qu'un entrant à un seul produit ne peut satisfaire ses clients. » (2)

37. Choi et Stefanadis (2001, 52-53)

38. Voir les commentaires de l'annexe B à propos de Church et Gandall (2000).

39. Par exemple, il est possible, en faisant appel à un unique fournisseur, de diminuer très nettement le coût de livraison et le coût de réception et de stockage. Il s'agit en fait d'un cas particulier d'un phénomène plus général, ce qu'Ayers (1985) qualifie de "complémentarités au niveau des transactions". Il peut aussi y avoir des "économies d'agrégation" : il faut alors offrir un nombre minimal de produits groupés pour rester un concurrent viable ; tel est le cas notamment pour la fourniture de services internet ; voir Bakos et Brynjolfsson (2000).

40. Comme notre extrait précédent le montre, la Commission européenne a invoqué ce motif pour exiger la cession de la marque Bacardi dans la décision de fusion *Guinness/Grand Metropolitan*.

41. Baker et Ridyard (1999, 183), soulignent très justement que les modèles théoriques qui prédisent "… des effets dommageables du fait de pratiques de vente liée supposent généralement qu'il y a monopole pur et simple pour le produit auquel le produit concurrentiel est lié." (183) Il reste à savoir si la vente groupée de marques devant nécessairement figurer dans l'assortiment confère le pouvoir de marché nécessaire, surtout si l'on s'attache avant tout à la fermeture du marché et non au simple renforcement du pouvoir de marché.

42. Baker et Ridyard (1999, 183) font observer que, dans la mesure où le "pouvoir de portefeuille" vise une plus grande possibilité de pratiquer une vente liée anticoncurrentielle, on ne saurait écarter à la légère ce pouvoir. Malgré tout, lorsqu'on invoque l'argument de la vente liée, "… il faut décrire et analyser cette pratique en elle-même et évaluer ses effets probables en ayant pleinement conscience de la complexité économique des ouvrages sur la vente liée."

43. Voir la note 1 ci-dessus.

44. Même si les produits réunis ne sont ni complémentaires, ni substituables, une fusion peut créer suffisamment d'éléments d'efficience et/ou avoir des effets de fixation conjointe des prix de produits complémentaires (ou des effets analogues) qui font que les prix maximisant le profit restent inférieurs aux niveaux antérieurs à la fusion, bien que toutes les autres conditions posées en hypothèse soient réunies. C'est pourquoi nous indiquons que l'entreprise pratiquant la vente groupée doit être également « incitée » à relever les prix au-dessus des niveaux antérieurs à la fusion.

45. Cela dépend en partie de la rapidité avec laquelle les concurrents sortiront effectivement des marchés indépendants, élément lui-même fonction des coûts marginaux de ces concurrents, et non de leurs coûts moyens.

46. Faull et Nikpay (1999, 134). Le contexte de ce paragraphe était la détermination de la position dominante dans les affaires d'abus de position dominante (article 82), mais dans le paragraphe suivant les auteurs soulignent que les même arguments ont été utilisés dans les affaires de fusion (qui sont bloquées si elles créent ou renforcent une position dominante).

47. Commission européenne (1991b), para. 32. Pour d'autres extraits de cette décision sur ce point, voir l'annexe A.

48. Voir *ibid*. paragraphes 69-70 ; se reporter à l'extrait de l'annexe A.

49. On se trouve en présence d'une variante de cette situation lorsqu'une fusion permet aux consommateurs de bénéficier de certains éléments « d'efficience » sous la forme d'un produit de meilleure qualité, du fait d'une adaptation au client améliorant la complémentarité des produits. Dans ce cas, les prix peuvent augmenter, mais le prix corrigé en fonction de la qualité diminuera, surtout si l'adaptation au client n'accroît que très peu les coûts marginaux.

50. Les cinq premières conditions ont trait à la capacité d'augmenter les prix au-dessus du niveau antérieur à la fusion. La dernière vise la possibilité que, en raison des gains d'efficience et/ou de la fixation conjointe des prix de produits complémentaires (ou d'effets analogues), le prix maximisant le profit soit inférieur au niveau antérieur à la fusion.

51. Voir Nils von Hinten-Reed (2001), Kolasky et Greenfield (2001), et Lexecon (2001). On notera que Kolasky et Greenfied avaient auparavant représenté GE et Honeywell et les avaient conseillées au stade final de l'enquête de la Commission européenne sur l'acquisition envisagée d'Honeywell. Lexecon Ltd. était l'un conseillers économiques de General Electric.

52. Voir l'extrait de ce communiqué de presse dans la partie III du présent document.

53. Monti (2001, 2).

54. Pour simplifier, nous ne traiterons pas de l'approche mixte. Avec cette approche, la fusion est autorisée sous réserve que les parties ne se livrent pas à certaines pratiques ayant des effets d'exclusion. Voir Church et Gandal (2000) pour plusieurs exemples repris de fusions verticales américaines.

55. Voir, par exemple, Commission européenne (1991a), décision confirmée par le Tribunal de première instance, Affaire T-83/91 *Tetra Pak International v. Commission* [1994] CJCE II-755. Voir également Commission européenne (1988) (*BPB Industries Plc et British Gypsum Ltd.).*

56. Voir von Hinten-Reed (2001, 3).

57. Swindle et Leary (2001). Les deux membres de la Commission qui souhaitaient bloquer l'opération ont considéré qu'elle avait un caractère horizontal et ils ont indiqué à cet égard :

> De plus, vu la position que détiennent sur le marché les produits PepsiCo et Gatorade, et en particulier le risque potentiel que présente cette opération du point de vue de l'innovation, la seule mesure adéquate était de bloquer l'acquisition en attendant une analyse plus approfondie via la procédure administrative. Un simple suivi et une simple supervision risquent d'être insuffisants pour se prémunir contre ces effets anticoncurrentiels [Anthony et Thompson (2001)].

58. Cet argument est repris d'un article critiquant la décision de la Commission européenne dans la fusion *General electric/Honeywell*. Comme on l'a vu ci-dessus, Kolasky et Greenfield ont précédemment agi en qualité de représentant de GE et Honeywell et ont conseillé ces sociétés au stade final de l'enquête de la Commission européenne sur le projet d'acquisition de Honeywell par GE.

59. Commission européenne (1991b), paragraphes 30 & 32. Certaines économies du même type que les clients peuvent obtenir en traitant avec un seul constructeur sont également mentionnées dans *Boeing/McDonnel Douglas*, affaire analysée par la Commission sous l'angle d'une fusion conglomérale :

> … si, à une flotte en exploitation importante, s'ajoute une large gamme de produits, cette flotte en exploitation peut être un élément clé souvent à même de conditionner les décisions que doivent prendre les compagnies aériennes en matière de planification de leur flotte ou d'acquisitions. Les économies découlant de la similitude des caractéristiques techniques, telles que le stock des matériels techniques de rechange et les qualifications du personnel navigant technique, exercent une influence décisive sur les décisions d'une compagnie aérienne en matière de choix des types d'avions et peuvent fréquemment entraîner l'acquisition d'un certain type d'appareil, même si le prix des produits concurrents est plus bas [voir Commission européenne (1997b, 41)].

60. Voir *ibid*, para. 33.

61. *Ibid*, paras 69 & 70.

62. Commission européenne (2000, paras 81-82).

63. Selon Varian (1989, 629) : "[Schmalensee (1984)] démontre que, dans le cas gaussien [les prix de réserve ont une distribution normale bivariée], l'écart-type de la valeur accordée aux lots est toujours inférieur à la

somme des écarts-types pour les différents composants. En réduisant la dispersion des valeurs attribuées par les acheteurs, le monopoleur est mieux à même d'extraire le surplus de la population. »

64. En ce qui concerne le relâchement de l'hypothèse de monopole, McAfee et autres (1989) montrent que, dans leur version du modèle d'Adams et Yellen, la vente groupée resterait optimale, du point de vue de la maximisation du profit, pour des duopoleurs. Anderson et Leruth (1993), paraissent contester cette opinion. Ils font observer que des duopoleurs risquent de souffrir de la plus vive concurrence par les prix qui pourrait résulter d'une vente groupée mixte. On s'en rend mieux compte si on fait observer que le prix d'un lot maximisant le profit sera généralement inférieur au total des prix des composants vendus séparément. See Nalebuff (1999).

L'exemple de réservation en bloc proposé par Stigler et une partie des analyses d'Adams et Yellen donnent l'impression qu'il faut une corrélation négative entre les consommateurs en ce qui concerne leurs prix de réserve pour les produits groupés pour que la vente groupée soit une stratégie rentable. Dans des conditions qui rappellent beaucoup le modèle d'Adams et Yellen, McAfee et autres (1989) montrent, au contraire, que la vente groupée peut être une stratégie optimale pour un monopoleur, même s'il n'y a aucune corrélation entre les prix de réserve des consommateurs. Toutefois, une corrélation positive parfaite semblerait exclure ce résultat [voir Nalebuff (1999, 2)]. En effet, une telle corrélation signifie que la vente groupée ne réduira pas ce que Schmalensee appelle « l'hétérogénéité des acheteurs ».

65. Le modèle de Choi et Yi repose essentiellement sur l'observation suivante de ces auteurs :

Pour un grand nombre de modèles d'oligopole, la concurrence est plus vive lorsque les entreprises sont positionnées de façon plus symétrique du point de vue des coûts. Par conséquent, les entreprises voient collectivement leur situation s'améliorer lorsque la structure de coûts est asymétrique d'une entreprise à l'autre. (719)

66. Le raisonnement est le suivant. A supposer que le marché total soit normalisé à un maximum de une unité vendue et que la distribution des prix de réserve soit uniforme (distribution normalisée de 0 à 1), les prix des biens qui maximisent le profit si les biens sont vendus individuellement sont Pa = Pb = 0.5. A ces prix, une demi-unité de chaque bien est vendue et le profit total est de 0.25 + 0.25 = 0.5. Un nouvel entrant pour le bien B (ce pourrait être tout aussi bien le bien A) appliquera un prix légèrement inférieur à 0.5 et obtiendra un bénéfice de 0.25. Mais le bénéfice escompté pourrait être bien plus faible si les biens A et B étaient groupés au départ, même à supposer que leur prix de vente soit égal à 1. Dans ce cas, un nouvel entrant sur le marché du bien B choisissant d'appliquer un prix légèrement inférieur à 0.5 ne pourrait pas vendre 0.5 unité de B. Il ne vendrait qu'aux acheteurs qui, simultanément, attribuent au bien B une valeur supérieure à 0.5 et au bien A une valeur inférieure à 0.5 (ce qui représente environ un quart de l'ensemble des acheteurs). Il ne parviendrait qu'à vendre ¼ d'unité et à réaliser un bénéfice de 1/8. Les individus qui attribuent à A une valeur supérieure à 0.5 (0.6, par exemple) considéreront que le prix de B obtenu par la vente groupée est sensiblement inférieur à 0.5 (par exemple, 1 - 0.6 = 0.4) et ils préféreront acheter à la fois A et B.

En ce qui concerne l'hypothèse de distribution uniforme des prix de réserve, Nalebuff fait observer que « Pour l'ensemble des densités symétriques quasi concaves, la densité uniforme est la *moins* favorable à la vente groupée ». (13)

67. Nalebuff (1999, 14). Pour approfondir cet aspect ou un point connexe, voir Bakos et Brynjolfsson (2000), qui examinent la vente groupée dans le contexte des « économies d'agrégation ».

68. Il faut pour cela que la différenciation des matériels et des logiciels soit suffisamment importante pour les consommateurs. Church et Gandal notent, pages 28-29, que « … lorsque les matériels sont très différenciés et la valeur marginale attribuée à la variété des logiciels est faible … », il ne faut pas s'attendre à l'équilibre à un monopole pour les matériels, mais à la fermeture du marché. Ils notent également que lorsque la différenciation des matériels est « très faible », il faut s'attendre à un monopole à la fois pour les matériels et pour les logiciels « … quel que soit l'avantage marginal qu'offre le logiciel … » (45).

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QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

(Editor's note – this questionnaire was used to structure some of the country submissions)

1. Introductory Matters

In some conglomerate mergers, it may be possible that putting together a range of products generally purchased by the same buyers (which could be resellers) could create or strengthen a dominant position, or otherwise increase market power despite little or no change in initial market shares in properly defined markets. Such potential anti-competitive effects that might result from some, but certainly not all, conglomerate mergers will be referred to below as "portfolio power effects". We will reserve the term "portfolio effects" to refer to both the potential pro- and anti-competitive effects associated with acquiring a larger portfolio or range of products normally purchased by the same set of customers.

Portfolio effects have played an important role in the European Commission's review of several mergers bringing together leading brands of consumer products (e.g. beverages), and, in a smaller number of cases, industrial goods (most notably in the aeronautics sector). In its 1997 Competition Report, the European Commission stated:

> The question of the potential impact of range effects on competition, which is particularly important with regard to daily consumer goods, such as drinks, arises in connection with the additional benefits that may accrue to the owners of dominant brand names. These advantages may be reflected in greater pricing flexibility and in a wide range of commercial strategy options. In the *Coca-Cola/Carlsberg* and *Guinness/Grand Metropolitan* cases, the Commission considered the inclusion in a range of drinks of strong brands belonging to separate markets. *It concluded that the impact of such inclusion could give each of the brands in the portfolio greater strength on the market than if they were sold individually, and strengthen the competitive position of the portfolio's owner on several markets.*
>
> In the second case, the consequences for potential competitors of owning a portfolio of high-profile brand names were also examined. The negotiating leverage resulting from ownership of dominant brands, which could, for instance, enable exclusive deals to be imposed, was deemed likely to raise additional obstacles to the market entry of new products.
>
> Other range-related effects can also be noted in the industrial sector. For example, in the *Boeing/McDonnell Douglas* case, leaving aside the previously existing monopoly in the wide body jet aircraft segment (Boeing 747), the merger resulted in an additional monopoly in the smaller narrow-body aircraft segment, thus making Boeing the only aircraft manufacturer offering a complete range of large commercial aircraft. This position could not be contested by new potential entrants, given the extremely high entry barriers on the market, which was highly capital intensive. (paras. 176-178, pp. 55-56, emphasis added)

What is the definition of "conglomerate merger" in your jurisdiction? If it includes acquisitions of potential competitors, please explain the criteria used to determine whether an acquired company is a potential competitor.

Please give, if you have them, examples of conglomerate merger reviews in which your authority has considered portfolio effects or something analogous to it. If such reviews have referred to "portfolio effects" or a similar term, please define and illustrate what is meant by the concept.

Set forth below are some issues which could be useful in structuring your contribution. As always, illustrations from real cases are very welcome.

2. Anti-competitive Effects Associated with Portfolio Effects

What do you see as the conditions, if any, under which a conglomerate merger involving portfolio effects could give a firm enhanced ability and incentives to exclude competitors through the use of tying, bundling, full-line forcing, exclusive dealing, targeted discounts, or refusal to deal? What are the further conditions under which such exclusions would have a net harmful effect on consumers (remembering that the merger could also produce significant efficiencies)?

In what ways could conglomerate mergers involving portfolio effects, increase abilities and incentives to predate? In answering this question you might wish to address issues such as how a conglomerate merger might significantly enhance the "benefits" of a predatory reputation, and/or increase a firm's options in responding to sequential entry?

Do conglomerate mergers involving portfolio effects, when they increase the number of markets in which competitors meet, raise competitive concerns analogous to those found in cases in which multi-market contacts appear to increase the probability of anti-competitive co-ordination?

Could a conglomerate merger involving portfolio effects ever harm consumers through increased efficiencies? If so, what would be the necessary conditions?

3. Efficiencies Associated with Conglomerate Mergers Having Portfolio Effects

Do you believe that bringing together a portfolio or range of products purchased by the same set of buyers could generate important efficiencies for either the merged firm or its customers? Your contribution might discuss how such a merger could:

- enable the parties to better understand and apply existing technology or develop new technologies (including enhanced ability to exploit R & D findings internally); or

- help parties reap economics of scale or scope in production, marketing or distribution; and, or

- save customers time and expense by providing them with one stop shopping and/or fewer deliveries, or products which are easier to use in combination.

Although it is not usually thought of as an "efficiency", conglomerate mergers combining complementary products in which suppliers have significant market power might lead to lower prices for one or both goods (because such a merger internalises the demand augmenting effects of reducing the price of a complement). What are your views on this issue?

4. Barriers to Entry and Countervailing Power

What do you see as the various ways in which conglomerate mergers involving portfolio effects might raise or lower barriers to entry.

Do you have examples in which resellers or manufacturers having significant negotiating power have effectively shielded consumers from up-stream market power, but were at risk of losing that countervailing power because of an upstream conglomerate merger involving portfolio effects. If so, please describe those situations and any remedy you may have adopted.

5. Other pro- or anti-competitive effects

Please provide us with your views and experiences on other pro- or anti-competitive effects of “portfolio effects” conglomerate mergers not covered by the preceding questions.

6. Remedies

Most jurisdictions are willing to block or modify mergers they believe are sufficiently potentially anti-competitive, rather than rely on *ex post* control of anti-competitive agreements and various abuses of dominance. What are the pros and cons of adopting the same *ex ante* approach to mergers involving portfolio power effects?

7. Portfolio Effects - Is a new concept needed?

What if anything is gained or lost by introducing the concept of "portfolio effects" into the realm of conglomerate merger review? Would your answer be different if your jurisdiction applied a "substantial lessening of competition" test to mergers, instead of a "create or strengthen a dominant position" standard, or *vice versa*?

Should consideration of "portfolio effects" be confined to mergers involving branded goods and consumer products in general? What, if any, are the risks or advantages of extending the concept to apply to industrial goods?

QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT

(Note du rédacteur – quelques soumissions écrites font référence à ce questionnaire))

1. Introduction

Dans certaines fusions conglomérales, il est possible que la réunion d'un éventail de produits généralement achetés par les mêmes acquéreurs (qui peuvent être des revendeurs) puisse induire ou renforcer une position dominante ou accroisse par ailleurs le pouvoir de marché, malgré l'absence de modification ou la faible évolution des parts initiales détenues sur des marchés convenablement définis. Ces effets anticoncurrentiels potentiels qui peuvent résulter de certaines, mais en aucun cas de toutes, les fusions conglomérales seront désignés ci-après comme des « effets de portefeuille ». Nous réserverons le terme « effets de portefeuille » pour désigner à la fois les effets potentiels pro- et anticoncurrentiels associés à l'acquisition d'un portefeuille ou d'un éventail plus large de produits normalement achetés par le même ensemble de clients.

Les effets de portefeuille ont joué un rôle important dans l'examen par la Commission européenne de plusieurs fusions réunissant des enseignes phares de produits de consommation (par exemple, les boissons) et, dans un plus petit nombre de cas, de produits industriels (surtout dans le secteur de l'aéronautique). Dans son rapport de 1997 sur la concurrence, la Commission européenne déclare :

> La question de l'incidence potentielle des effets de gamme sur la concurrence, qui revêt une importance particulière dans le secteur des produits de consommation courante, comme les boissons, se pose notamment au travers des avantages supplémentaires dont peut bénéficier le détenteur de marques dominantes. Ces avantages peuvent se traduire, par exemple, par une plus grande souplesse en matière de prix et de multiples possibilités en termes de stratégie commerciale. Dans les affaires *Coca-Cola/Carlsberg* et *Guinness/Grand Metropolitan*, la Commission a pris en considération l'inclusion, dans une gamme de boissons, de marques fortes de produits appartenant à des marchés distincts. Elle a conclu que *l'effet résultant d'un tel regroupement peut conférer à chacune des marques du portefeuille une puissance sur le marché plus grande que si elle était vendue individuellement, et renforcer la puissance concurrentielle du détenteur du portefeuille sur plusieurs marchés.*
>
> Dans la seconde affaire, les conséquences de la possession d'un portefeuille de marques difficilement contournables ont également été appréhendées dans leurs effets sur la concurrence potentielle. La possibilité accrue de négociation résultant de la détention de marques dominantes, qui peut par exemple permettre d'imposer des contrats d'exclusivité, a ainsi été considérée comme susceptible de renforcer les obstacles à l'entrée de nouveaux produits sur le marché.
>
> D'autres effets de gamme se rencontrent également dans le secteur industriel. Dans l'affaire *Boeing/McDonnell Douglas*, par exemple, outre le monopole pré-existant dans le segment des grands avions à fuselage large (Boeing 747), la concentration a ajouté un autre monopole dans le segment des plus petits avions à fuselage étroit, faisant de Boeing le seul constructeur aéronautique offrant une famille complète de grands avions commerciaux. Cette position ne pouvait être remise en cause par de nouveaux entrants potentiels, étant donné les barrières

extrêmement élevées à l'entrée sur ce marché, qui nécessite une énorme intensité capitalistique. (§§ 176-178, pp. 55-56, souligné par nous)

Quelle est la définition de la notion de « fusion conglomérale » dans votre juridiction ? Si elle recouvre les acquisitions de concurrents potentiels, veuillez expliquer les critères utilisés pour déterminer si une société rachetée est un concurrent potentiel.

Veuillez donner, si vous en avez, des exemples d'examens de fusions conglomérales dans lesquels vos autorités ont pris en compte les effets de portefeuille ou des considérations analogues. Si ces examens ont fait référence à des « effets de portefeuille » ou à des termes analogues, veuillez définir et illustrer ce que l'on entend par ce concept.

Même si la réunion de produits généralement achetés par les mêmes clients peut, dans certaines conditions restrictives, produire des effets anticoncurrentiels, elle peut aussi aboutir à des gains d'efficience importants.

2. Effets anticoncurrentiels associés aux effets de portefeuille

Quelles sont les conditions éventuelles dans lesquelles une fusion conglomérale comportant des effets de portefeuille pourrait renforcer la possibilité et l'intérêt d'exclure des concurrents, au moyen de ventes liées, de subordination de vente, de ventes forcées sur toute la gamme de produits, de contrats d'exclusivité, de remises ciblées ou de refus de vente. Quelles sont les autres conditions dans lesquelles de telles exclusions peuvent produire des effets préjudiciables nets sur les consommateurs (tout en sachant que la fusion peut aussi produire des gains d'efficience significatifs) ? Veuillez illustrer votre réponse à l'aide d'exemples concrets.

Par quelles voies les fusions conglomérales comportant des effets de portefeuille peuvent-elles accroître la capacité et l'intérêt d'un comportement prédateur ? Dans votre réponse, vous êtes invité à aborder des questions comme la façon dont une fusion conglomérale risque de renforcer sensiblement les « avantages » d'une réputation de prédateur et/ou élargir les solutions offertes à l'entreprise pour réagir à une entrée ultérieure sur le marché ? Veuillez illustrer votre réponse à l'aide d'exemples concrets.

Les fusions conglomérales comportant des effets de portefeuille, lorsqu'elles accroissent le nombre de marchés sur lesquels se rencontrent les concurrents, posent-elles des problèmes de concurrence analogues à ceux que l'on observe dans des cas où des contacts multi-marchés semblent renforcer la probabilité d'une coordination anticoncurrentielle ? Veuillez illustrer votre réponse à l'aide d'exemples concrets.

Une fusion conglomérale comportant des effets de portefeuille d'une quelconque manière porter préjudice aux consommateurs par ses gains d'efficience ? Si oui, quelles seraient les conditions nécessaires ? Veuillez illustrer votre réponse à l'aide d'exemples concrets.

3. Efficience associée aux fusions conglomérales comportant des effets de portefeuille

Veuillez exprimer votre point de vue, en l'illustrant si possible par des exemples concrets, sur les différentes façons dont la réunion d'un portefeuille ou d'une gamme de produits achetés par le même ensemble de clients est de nature à générer d'importants gains d'efficience, pour l'entreprise résultant de la fusion ou pour ses clients. Vous êtes invités à envisager la façon dont une telle fusion pourrait :

- permette aux parties de mieux comprendre et appliquer des technologies existantes ou développer de nouvelles technologies (notamment une amélioration de la capacité à exploiter les découvertes de la R-D en interne) ; ou

- aider les parties à concrétiser des économies d'échelle ou de gamme dans la production, la commercialisation ou la distribution ; ou encore

- faire gagner du temps et de l'argent aux clients en leur offrant un point de vente unique et/ou un moins grand nombre de livraisons, ou encore des produits qui sont faciles à utiliser ensemble.

Même si elles ne sont généralement pas conçues comme des « facteurs d'efficience », les fusions conglomérales réunissant des produits complémentaires sur les marchés desquels les fournisseurs détiennent un pouvoir important sont susceptibles d'aboutir à une baisse des prix de l'un ou des différents produits (parce qu'une telle fusion internalise les effets d'augmentation de la demande produits par la réduction du prix d'un produit complémentaire). Veuillez décrire les éventuelles fusions dans lesquelles vous pensez que cela s'est produit.

4. Obstacles à l'entrée et contre-pouvoir

Veuillez exprimer votre point de vue, *en* l'illustrant si possible par des exemples concrets, sur les différentes façons dont les fusions conglomérales comportant des effets de portefeuille peuvent dresser ou abaisser des obstacles à l'entrée sur le marché.

Avez-vous des exemples dans lesquels les revendeurs ou fabricants disposant d'un pouvoir de négociation important ont effectivement protégé les consommateurs contre une puissance sur le marché s'exerçant en amont, mais ont risqué de perdre ce contre-pouvoir du fait d'une fusion conglomérale en amont comportant des effets de portefeuille. Si oui, veuillez décrire ces situations et les éventuelles mesures que vous avez pu adopter en réaction à de telles situations.

5. Recours

La plupart des juridictions entendent bloquer ou modifier les fusions dont elles estiment qu'elles risquent d'être anticoncurrentielles, au lieu de s'en remettre à des contrôles *ex post* d'accords anticoncurrentiels ou des divers abus de position dominante. Quels sont les arguments pour et contre l'adoption de la même approche *ex ante* des fusions comportant des effets de pouvoir de portefeuille ? Veuillez illustrer votre réponse à l'aide d'exemples concrets.

6. Effets de portefeuille – Faut-il un nouveau concept ?

Est-ce qu'il y a quelque chose à gagner ou à perdre de l'introduction du concept des « effets de portefeuille » dans le domaine de l'examen des fusions conglomérales ? Votre réponse serait-elle différente si votre juridiction appliquait un critère de « réduction sensible de la concurrence » aux fusions au lieu de la norme de « création ou renforcement d'une position dominante » ou *vice versa*? Veuillez expliquer votre position.

Les considérations relatives aux « effets de portefeuille » doivent-elles être réservées aux fusions concernant des produits de marque et des produits de consommation en général ? Quels sont les éventuels risques ou avantages d'étendre ce concept aux produits industriels ?

AUSTRALIA

1. Introductory Matters

1.1 What is the definition of conglomerate merger in your jurisdiction? If it includes acquisitions of potential competitors, please explain the criteria used to determine whether an acquired company is a potential competitor.

The Australian Competition and Consumer Commission (the ACCC) is responsible for administering the *Trade Practices Act 1974* (TPA). Section 50 of the TPA prohibits mergers and acquisitions that substantially lessen competition in a substantial market in Australia, in a state or in a territory or are likely to do so. However, it should be noted that pre-merger notification is not compulsory within Australia.

Australia accepts the definition that conglomerate mergers are those in which the parties to the merger are not actual or potential competitors and the parties do not have an actual or potential customer/supplier relationship. The TPA does not separately define conglomerate mergers. Conglomerate mergers are treated within the same analytical framework as other mergers, ie whether the merger would result or be likely to result in a substantial lessening of competition.

Market definition is an integral part of competition analysis. An appropriate definition of the market is the critical underpinning for the evaluation of 'substantial lessening of competition', the calculation of concentration ratios and the evaluation of import competition and barriers to entry. The merged firm is the starting point for delineating the relevant market. Market definition has a purposive tradition in Australian trade practices law.

The process of market definition can be viewed as establishing the smallest area of product, functional and geographical space within which a hypothetical current and future profit maximising monopolist would impose a small but significant and non-transitory increase in price above the level that would prevail absent the merger.

For any proposed merger there may be a number of relevant markets and each is evaluated using the substantial lessening of competition test. In this process, any factor may be taken into consideration and this includes any portfolio effects.

1.2 Please give, if you have them, examples of conglomerate merger reviews in which your authority has considered portfolio effects or something analogous to it. If such reviews have referred to "portfolio effects" or a similar term, please define and illustrate what is meant by this concept.

As mentioned above, while there is no formal review of portfolio effects, they will be considered as they arise in the process of an assessment of a merger.

1.3 Guinness Plc and Grand Metropolitan Plc

In 1998 the ACCC announced that it would not intervene in the worldwide merger between Guiness Plc and Grand Metropolitan Plc because the spirit industry was highly brand orientated and products tended to be marketed as individual brands rather than the brand name of the supplier. Further, each brand tends to be specific to a particular category, and brand extensions do not usually cross spirit categories.

The ACCC concluded that the merger was likely to increase market concentration only in the vodka and gin categories. It was determined that the effect of the merger on concentration in scotch, which is the largest spirit category, would be minimal.

Because of the worldwide nature of the merger the ACCC had discussions with competition regulators overseas including the New Zealand Commerce Commission, the United States Federal Trade Commission and the Canadian Competition Bureau.

1.4 Coca Cola and Cadbury Schweppes

In 1998 the Coca Cola Company proposed to acquire the soft drink brands of Cadbury Schweppes. In Australia, the major Cadbury Schweppes brands were the Schweppes international mixer brands (soft drinks such as soda water, tonic water, dry ginger ale used in combination with spirits). The Coca Cola Company had no well known brands in this product category.

Coca Cola was the major soft drink company in Australia with more than 60 percent of the market. Cadbury Schweppes with competing brands in the cola and fruit flavour segments and complementary brands in the mixer segment was the next largest with around 15 percent of the soft drink market.

The merger was opposed because it was considered that the acquisition was likely to have the effect of substantially lessening competition in the national market for the production and wholesale supply of carbonated soft drinks. Cadbury Schweppes had been a vigorous competitor to Coca Cola and there was concern that the combination of the Coca Cola brands with the international Cadbury Schweppes brands would enable Coca Cola to effectively control the Australian soft drink market. The combination would likely limit the ability of the remaining significant competitor, Pepsi Cola (with a market share of around eight percent) to achieve effective distribution to non supermarket outlets.

A revised proposal by Coca Cola was also opposed in 1998. This revised proposal sought to acquire only the international beverage brands of Cadbury Schweppes. Cadbury Schweppes' Australian subsidiary, Cadbury Schweppes Australia, would otherwise remain intact and would acquire ownership of all carbonated soft drink brands currently owned by Coca Cola Amatil and not licensed from the Coca Cola Company. One of the main reasons this merger was opposed was that the majority of the remaining Cadbury Schweppes Australia's portfolio would compromise primarily regional, price fighting brands that enjoy little or no brand equity or strength and have a low presence outside the supermarket channel.

2. Anti-competitive Effects Associated with Portfolio Effects

A conglomerate merger where portfolio effects were significant may give the merged firm the ability to engage in behaviour not otherwise available. Forms of exclusive dealing, such as full line forcing, are facilitated when the firm has a range of brands sufficient to cover all market segments.

In the case of soft drinks, the ACCC has been examining the nature and effect of Coca Cola's exclusive dealing arrangements with non supermarket outlets, arrangements facilitated by the dominance in Australia of the Coca Cola brand. Access to a wider portfolio of complementary brands would enhance the likelihood of this type of behaviour.

It may also be possible for the conglomerate to exercise market power by extracting a premium for the bundled services. The portfolio of brands may be a more attractive option than a set made up of the brands of a number of smaller competitors. The transactions costs to retailers for example in assembling a set of brands equal to those supplied by the merged party may disadvantage the smaller brand owners in gaining extensive distribution. At the extreme, smaller competitors may lose volume as they lose distribution and hence may lose scale economics.

Targeted discounts on particular brands in the portfolio linked by full line forcing may also significantly increase barriers to entry to firms with a limited portfolio of brands.

Conglomerate mergers with brand extension characteristics will likely increase multi-market contacts between firms which previously did not compete with each other. While it is possible that competition will intensify under such circumstances, it is also possible that firms, faced with increased competitive threat, might seek to engage in some form of anti-competitive co-ordination with their new rivals. Australia has no examples of such behaviour but recognises that it is possible.

3. Efficiencies Associated with Conglomerate Mergers Having Portfolio Effects

3.1 Do you believe that bringing together a portfolio or range of products purchased by the same set of buyers could generate important efficiencies for either the merged firm or its customers?

Where the conglomerate merger brings together a range of products which are purchased by the same set of buyers, both the firm and its customers might benefit. In Australia in recent years there has been considerable rationalisation in the clothing and textile industries as tariffs on imports have fallen. Mergers between producers have enabled the firms to supply a wider range of clothing products and brands presumably enabling greater opportunities to achieve economies of scale and scope in both production and distribution. It is likely that retailers have also gained benefits via lower transactions costs as fewer producers are able to provide a greater range of products.

The ACCC has not undertaken extensive analysis of such mergers in the clothing and textile industries, as very high levels of import penetration in the industry have meant that acquisitions and rationalisation and consequent brand extension do not generate competition issues.

3.2 Although it is not usually thought of as an "efficiency", conglomerate mergers combining complementary products in which suppliers have significant market power might lead to lower prices for one or both goods (because such a merger internalises the demand augmenting effects of reducing the price of a complement). What are your views on this issue?

This is possible, however it would depend on whether the merged entity has the market power to keep efficiency gains, rather than passing them on to consumers. This might lead to lower costs for the merged firm, but not necessarily lower prices for the end consumer. If a merged entity is powerful enough to keep efficiency gains all benefits will be internal.

3.3 Barriers to Entry and Countervailing Power

A conglomerate merger involving portfolio effects might, in theory, raise barriers to entry by filling all the available product space reducing the ability of entrants to enter even at a niche level. In a hypothetical example, suppose a major breakfast cereal supplier, dominant in the market for cold wheat and rice based cereal, acquired a competitor producing hot oats based cereal. The portfolio effects of the acquisition may be such that the scale economies in marketing and distribution give the merged entity considerable advantages over smaller rivals not supplying the entire cereal range. It may also be easy to the merged firm to extend its product range, limiting the ability of smaller competitors with a limited product range to gain economies of scale and scope sufficient to compete.

3.4 Other pro- or anti-competitive effects

3.4.1 Please provide us with your views and experiences on other pro- or anti-competitive effects of "portfolio effects" conglomerate mergers not covered by the preceding questions.

It is possible that a conglomerate merger with portfolio effects may stimulate competition via the revitalisation of a neglected but respected brand. For example, in many consumer goods industries, competition has been enhanced when a conglomerate has entered a related market via the acquisition of a minor or neglected brand.

3.5 Remedies/New concepts?

Most jurisdictions are willing to block or modify mergers they believe are sufficiently potentially anti-competitive, rather than rely on ex post control of anti-competitive agreements and various abuses of dominance. What are the pros and cons of adopting the same ex ante approach to mergers involving portfolio effects?

The ACCC may seek to minimise the anti-competitive portfolio effects of a conglomerate merger through the divestiture of brands and/or assets. The ACCC does not treat portfolio effects differently, the focus is always on whether a substantial lessening of competition will occur in the relevant market. When the ACCC has had concerns over the competitive implications of a proposal it has generally been receptive to the parties providing court enforceable undertakings addressing those concerns.

In some instances, conglomerate mergers involving portfolio effects do not generate anti-competitive concerns and in some instances they are pro-competitive. It would seem that an ex ante approach which does not make special distinctions for conglomerate mergers would be appropriate. In Australia, the relevant test is one of substantial lessening of competition but it is unlikely that a different test would lead to a different approach to the analysis of portfolio effects.

3.6 Portfolio Effects – Is a new concept needed?

3.6.1 What if anything is gained or lost by introducing the concept of "portfolio effects" into the realm of conglomerate merger review? Would your answer be different if your jurisdiction applied a "substantial lessening of competition" test to mergers, instead of a "create or strengthen a dominant position" standard, or vice versa?

The advantages of introducing a formal review factor of portfolio effects in conglomerate mergers would ensure that a review would assess this factor. However, some of the disadvantages of introducing such a factor is that it could add delay and costs to the assessment process. It may also be possible that the parties would be wary or unwilling to consider a merger, even if it is possible that such a merger would result in pro-competitive effects. Again this is difficult to test, as there is no requirement of compulsory pre-merger notification in the Australian system.

3.6.2 Should consideration of "portfolio effects" be confined to mergers involving branded goods and consumer products in general? What if any, are the risks or advantages of extending the concept to apply to industrial goods?

It is a goal that there is competition for all products, especially if it leads to undesirable results for the end consumer. Portfolio effects should apply to both consumer and industrial products as the competition issues are the same. It doesn't matter in which market the substantial lessening of competition occurs, but rather the fact that it does.

CANADA

Cournot (portfolio) effects in conglomerate mergers

1. Introduction

The purpose of this paper is to present some initial questions and observations with regard to the concept of portfolio effects in conglomerate mergers. This concept is not currently well understood in the economic literature. A search of a number of social science databases produced no references to recent articles on this subject. Thus, this paper asks: what are portfolio effects? Where does this concept take us? Does the concept contribute to our pool of antitrust analytical tools? What is unique, if anything, about this concept? These are important questions. At this stage, the paper can only offer initial thoughts.

This paper defines and discusses Cournot (portfolio) effects, describes how these effects relate to entry and exit decisions and focuses on how these mergers can affect specific interdependence or tacit collusion and anti-competitive practices. The last section discusses the difficulties in statistically measuring the effects.

2. Conglomerate Mergers

A conglomerate merger is often defined as any merger that is neither exclusively horizontal or vertical. Conglomerate mergers can be defined as mergers of companies operating in separate and distinct markets. Conglomerate mergers can take many shapes and forms. Scherrer (1970) distinguishes three main varieties: market extension mergers, in which the partners sell the same products in spatially isolated markets; product line extension mergers, which add to the acquiring firms product list new items related in some way to existing production processes or marketing channels; and "pure"conglomerate mergers, which have no discernable link with prior operations.

One of the most important concerns in assessing whether a conglomerate merger is anti-competitive is whether the transaction would reduce competition.

3. Recent References to Portfolio Effects

In at least two recent cases involving conglomerate mergers, the European Commission (EC) explicitly referred to the concept of portfolio effects. On July 3, 2001, the EC blocked proposed acquisition by General Electric Co. (GE) of Honeywell Inc. (Honeywell). This is of particular interest since the merger had gained approval from US and Canadian antitrust authorities. It could be assumed that as an integrated firm of complementary products, GE/Honeywell would have had an incentive to lower prices as it would have internalised its decisions to eliminate any externalities. This would not have been done by separate firms. That is, absent the merger, GE would not take into account that an increase in the sale of its products may also enhance the sales of Honeywell's products. Although the EC's objections to the merger was based on preserving a competitive environment, there seemed to be a concern that the

merged company, with such a portfolio of products in engines, avionics and financing, would be able to eliminate competitors.

The notion of portfolio effects was also raised in the EC's decision regarding the merger of Guinness PLC and Grand Metropolitan PLC.[1] While the merger of spirits was mostly composed of complementary products, (i.e. whiskey, vodka, and rum), the EC feared that the merged firm may gain additional market power from such a broad product line. This would be outside any market power already enjoyed by each product. This argument presents a departure from typical merger analysis, which deals mostly with horizontal mergers of firms producing substitutes, or with vertical mergers of upstream firms merging with downstream firms. With a horizontal merger, the removal of a firm producing a competing product may cause prices to increase. With vertical integration or a vertical merger, the merged entity may have an incentive to foreclose on their unintegrated competitors, but the anti-competitive issue remains unclear.

A closer examination of vertical mergers shows that these mergers involve firms with complementary products. In most vertical relationships, an upstream firm and a downstream firm are complementary in nature. Being upstream, a manufacturer produces its good but relies on the services of a seller downstream to market it. However, the complementarity is restricted to the nature of the market. For example, if the downstream firms are in exclusive dealing contracts, then the externalities caused by each downstream firm will only drive their supplier's sale, not that of every supplier. If vertical mergers are merely a subset of mergers involving complementary products, then this presents the following questions:

Can current merger analysis address a merger of complements? What are potential anti-competitive effects that result from these mergers? Do we need a new set of tools or a new analytical framework to analyse mergers between firms each of which possesses a variety of complementary products?

4. Definition

In order to distinguish portfolio effects as a unique concept, this paper proposes consideration of the following definition which flows or derives from the work of the french economist, Antoine Augustin Cournot in his seminal 1838 paper entitled, "Of the Mutual Relations of Products".

Cournot (portfolio) effects are the unilateral effects when there is an increase in market share due to a merger of firms in complementary markets. There is also an increase in market power if the merger causes competitors to exit from any of the markets. While these mergers may result in some economies in either the demand or production side, it does not necessarily follow that these effects are part of any Cournot (portfolio) effects since they can also be found in mergers of substitutable or independent goods[2].

This definition focuses on injury to competition. It is recognised that in a conglomerate merger both horizontal and vertical effects or externalities may be occurring simultaneously so that the market definition alone may be a slippery criterion. The definition also seeks to isolate the unique features of portfolio effects from a variety of other anti-competitive behaviour that may also be occurring. Moreover, it implies a concept of portfolio "power".

4.1 Cournot (Portfolio) Effects

A merger of complements results in an increase in the number of goods in a firm's portfolio. The addition of the extra good, while providing some synergy to the acquirer, puts pressure on competitors'

prices for that particular good. The increase in portfolio is a strategy merely to take advantage of any cross-market externality, not for foreclosure of independent competitors. While the effects are efficient in this sense, the lower prices may induce exit and allow the merged firm to increase its market power. Current merger analysis into unilateral effects can explain these types of mergers, assuming that price effects can be measured. By our definition and excluding any efficiency claims, prices will increase in the longer run if a merger, involving Cournot (portfolio) effects, induces exit. Hence, such a merger can still be assessed for its unilateral effects.

There are recent studies on the unilateral effects as a result of integration of firms among complementary industries. Tan and Yuan (2000) examine the incentives for competing conglomerates to divest various subsidiaries. Typically, these firms have a group of subsidiaries with each subsidiary producing a complementary product. Each conglomerate can benefit from internalising the decisions to produce a group of complementary products. However, competition among these conglomerates and social welfare can also be lessened if they divest some of their complementary producing subsidiaries.

Other developments in this area include studies that examine how firms can affect the cross-market externalities. Examples are Strauss (1999), Parker and Alstyne (2000), Lu and Tan (2001). In studying the consequence of a software monopolist entry into a competitive complementary software market, Parker and Alstyne also examine bundling decisions while Strauss includes production decisions. Lu and Tan provide a study of competitive complementary markets based on the markets for Internet services. In particular, they describe how web sites, especially those owned by internet service providers, can take advantage of being the first screen seen by subscribers in conjunction with the "stickiness" of their sites, to affect cross-market externalities. Hence, Internet access, content and service providers may have an incentive to merge in order to fully exploit their position.

4.2 Complements

In reality, it is not always clear whether or not goods are complementary. With branded goods the issue is even less clear. While for example, a branded cola is differentiated from a branded ginger ale, it is far from evident that the sale of one will drive the sale of the other. However, empirical estimates can be made on the relationship between the two goods.[3] If these estimates can be made, then antitrust authorities will have the ability to examine potential unilateral price effects by including effects from the joint production of complementary products. Thus, the potential anti-competitive effects of mergers of branded products, such as the attempted purchase of Cadbury Schweppes by Coca-Cola in 2000, can also be analysed.

4.3 Efficiencies

A merger of complementary goods may also have indirect effects that result in increased and valuable efficiencies. Economies of scope may exist as well. However, these indirect effects also occur in mergers involving independent goods or imperfect substitutes. Hence, the same merger analysis can be applied in calculating the cost savings from these effects.

4.4 Barriers to Entry

Entry and exit decisions are dependent on barriers. In August 2001, when the purchase of Quaker Oats by PepsiCo was approved, Pepsi, already with a small market share in sports drink, acquired a leading sport drink from Quaker. Even though Pepsi was willing to divest its own brand, it was not clear

how the divested brand could discipline the sport drink market without a parent that has the same size and scope as Pepsi. A multi-product firm can affect entry and exit decisions differently from a single product firm. For example, Schmalensee (1978) argues that firms may use brand proliferation to deter entry. Judd (1985) points out the possibility that a multi-product firm may exit from one of its product markets since competition from the entry may affect profits derived from other products. However, the results of both papers are related to substitutable goods and may not apply equally to complementary goods.

Hendricks, Piccione and Tan (1997) describe how a multi-product monopolist with complementary goods may have more incentive to deter entrants than a multi-product monopolist with substitutable goods. The hub-and-spoke networks maintained by airlines motivated their model. Since it is typical to have only one hub per airport, a hub operator can be considered as a multi-product monopolist with the connecting flights being treated as complementary products. Regional carriers are potential single-product competitors to these hub operators. Relative to a single product entrant, the multi-product hub operator has less incentive to exit when entry occurs into one of its product markets since its overall profits may drop due to the complementary nature of all its goods. Hence, entry into a market with multi-product firms will be relatively more difficult if the multi-product firms are producing complementary goods.

4.5 Interdependence or Tacit Collusion

Collusive behaviour does not appear to be more likely with mergers involving complements in comparison to mergers involving substitutes. There does not seem to be any clear a priori prediction that the incentives for interdependent behaviour will differ depending on whether the merger involves complementary or substitutes goods. It is when a merger induces price asymmetries between the merging parties and their independent competitors that the incentives to engage in interdependence or tacit collusion can be effected. Chamberlin (1929) distinguishes asymmetries between firms as a factor in hindering collusion. Schmalensee (1987) uses a bargaining model to illustrate that a low cost firm’s likely gains from collusion is small if its cost advantage is relatively higher than those of its competitors. The simple intuition is that if the monopoly price of the low cost firm is less than the marginal cost of its rivals, it has no incentive to collude. One can follow the same intuition for a merger involving complementary products. If the post-merger monopoly price is less than its rivals' marginal costs, there would be no incentive for collusion, especially when the rivals are driven out of the market.

The incentives for anti-competitive practices are likely to be the same in mergers of complements as for those with substitutes and independent goods. For example, vertical restraints are typically found in industries where upstream firms are attempting to eliminate externalities created by downstream firms. A simple example is the double marginalization problem where successive mark-ups are made as a good produced upstream are sold downstream.[4] Clearly, a vertical merger will eliminate the need for any vertical restraints. For upstream mergers with complementary products, the incentives for vertical restraints will not change since any pre-merger vertical externalities will still prevail post-merger.

4.6 Predatory Pricing

The concept of predatory pricing suggests how a firm may drop prices for a short period of time in order to drive competitors out of its market and raise prices in the future.[5] In a merger of complementary producers, the resulting joint decisions unambiguously enhances efficiency. However, the effects on the incentives to predate are ambiguous. Since its other products may benefit from a drop in price in one of its markets, it may become less costly for the firm to predate. At the same time, the merger has already expanded the merging parties' profit while lowering that of their competitors. The merger then

reduces any future profits that can be made by driving out competitors, which lowers the merging firm's incentives to predate.[6] Note also that for complementary goods producers, unilateral price setting behaviour may be mistaken for predatory pricing. Hence, a merger with Cournot (portfolio) effects may result in anti-competitive complaints from the remaining independent firms.

4.7 Leverage, Tying, and Bundling

Tying refers to the conditional purchase of one good based on the purchase of another good. Bundling is identical to tying except that the goods are in fixed proportions. An example of bundling occurs when a manufacturer sells more than one product as a package at a single price. Pure bundling involves products available only as a package while mixed bundling allows for products to be available as a package as well as individually. Integration then results in the ability to tie or to bundle products.

Another issue appears to be the question of disparate margins associated with the bundled products, which would, in theory, allow the merged entity to disguise predatory pricing of one product by taking the discount on another product in its portfolio. This was raised by the EC in its review of the Guinness PLC and Grand Metropolitan PLC merger. The EC stated that the "holder of a wide portfolio of products will...have greater flexibility to structure his prices, promotions and discounts, he will have greater potential for tying and he will be able to realise economies of scale and scope in his sales and marketing activities. Finally, the implicit (or explicit) threat of a refusal to supply is more potent."

The economic literature on this topic has focused mostly on vertical integration or vertical mergers. Earlier studies, mostly from the Chicago School (e.g. Bork, 1978, Posner, 1976), have argued that these mergers cannot be anti-competitive since forgone profit from one market is equivalent to the profit earned by leveraging into another market. Recent studies have shown that a vertical merger may be anti-competitive due to strategic effects. Ordover, Saloner, Salop (1990) provide a formal model to determine conditions where vertical foreclosure is possible. If downstream revenues are increasing in input prices, they show that integration can raise rivals' costs and generate higher downstream prices. Riordan (1998) explains how backward integration by a dominant downstream firm into a competitive fringe upstream market can result in higher input and output prices. Integration enables the dominant firm to eliminate the double marginalization problem as well as to shift output from an inefficient firm to the dominant firm. However, the dominant firm does not necessarily pass the cost savings on to consumers.

An analogy of Riordan's model to a horizontal merger is to suggest that the dominant firm is simply buying capacity from the fringe players. While there may be efficiencies, market power has also increased and consumers' surplus decreased. To provide a counter example to how vertical mergers among banks may be anti-competitive, McAfee (1999) uses a model in which vertical integration results in higher upstream competition, which leads to lower downstream rivals' costs. Choi and Yi (2000) describe how an input supplier may choose to produce a specialised product that only one downstream firm can use as opposed to a generalised product that all downstream firms can use. By integrating with the chosen downstream firm, the upstream firm can benefit from the raising costs of all other downstream rivals. However, in these papers the firm's merger decision and another strategy are combined to determine whether the vertical merger is anti-competitive.

All of these papers rely on the strategic elimination of any complementarity among competing firms, in the context of vertical mergers. While these studies may shed insights on issues involving merger of complementary producers, they do not account for the direct or unilateral effects that are necessary for competition analysis.

4.8 Measurement Problems

A major problem in assessing mergers involving multi-product firms is the measurement of the cross-market externalities. This is especially true when the markets include single product competitors. While Cournot (portfolio) effects involve the extension of product lines, mergers involving conglomerates provides some background to the issues at hand.

4.8.1 Definition of Product and Geographical Markets

With a single good, price movements provide some statistical inference regarding the product and geographic markets. However, with a bundle of goods, statistical tools are usually not sufficiently sophisticated to define product and geographic markets. Instead, industry experts may often be necessary to provide ad hoc market definitions. Thus, with regard to a bundle of products, measurement and definitional issues continue to be unresolved.

4.8.2 Toward a Statistical Approximation of a Bundle of Goods

In the retail sector, stores tend to carry a large assortment of goods. A statistical study into market definition would be difficult as potential competitors, large and small, would be numerous. While evidence is often introduced for defining the product and geographic markets, barriers to entry, and efficiencies, the data generally do not involve statistical analysis. In this regard there are recent advances.

The US Federal Trade Commission (FTC), in the proposed merger of Staples, Inc. and Office Depot, Inc. (1997), demonstrated that the prices of specific bundles of goods were lower when there were more office superstores competing within a defined geographic area. The defendants countered by arguing: the bundle of goods was not a good proxy for each store's sales; different areas may affect the price of each bundle; and the definition of the geographic area was incorrect. They countered the FTC case by offering an empirical study based on how each store's profit margin was affected after the entry of a competitor's store. The studies from both sides indicated that prices would go up with the merger, with the FTC's estimate being higher than the defendants' estimate. The judge ultimately ruled in favour of the FTC, but in his decision, he did not comment on the econometric studies submitted by the parties.[7] The important contribution from this case is that the statistical tools used may provide estimations for the upper and lower bounds of any price increase as a consequence of a merger.[8]

5 Conclusion

This paper provides some initial questions and observations on the concept of Cournot (portfolio) effects in the context of complementary products. By defining these effects, this paper endeavours to show that traditional merger analysis may be sufficient to analyse mergers between firms producing complementary products. Furthermore, the concepts flowing from presumed portfolio effects are already well incorporated into current theories and analysis of anti-competitive practices. Finally, while current statistical tools may not be sufficient to provide the evidence needed to establish portfolio effects, measurement capabilities are gradually improving.

NOTES

1. Case IV/M.938 *Guinness/Grand Metropolitan* [1998] O.J. L288.

2. Range effects include Cournot (portfolio) effects as well as these other effects.

3. For anti-competitive effects, Fisher and Neels (1997) estimate the profits made by the airlines by using their computer reservation systems to favour their flights over their competitors' flight.

4. See Spengler (1950) for a detailed description of the double marginalisation problem.

5. See Areeda and Turner (1975) for a standard to test predatory pricing. Due to data limitations, Baumol (1996) suggests the use of avoidable cost, or the cost that can be avoided by not producing, as proxy to the Areeda-Turner standard.

6. The same idea can be expanded to entry deterrence by using prices. See Milgrom and Roberts (1982) for an formal treatment of limit pricing.

7. The FTC also offered a stock market event study, which describes how the equity of the merging parties and non-merging parties increased after the merger announcement. In an efficient market, the stock prices of all firms will go up if future increase in profits is predicted. Given that all other economic factors had not changed except with the announcement of the merger, the market hypothesis is that future profits will increase since there will a lessening of competition from the merger. Neither the defendant nor the judge provided any comments in this area. However, even if the market is efficient, the use of an event study for this case was clearly flawed as the market failed to predict that the merger would be blocked.

8. In the area of vertical mergers, Hendricks and McAfee (2000) provides a new theory to analyse the merger of Exxon and Mobil for the California gasoline refining and retailing markets in 1999. In mergers involving substitute goods, the Hirschmann-Herfindahl Index (HHI), which yields the price-cost margins in Cournot competition, are often applicable in competitive markets. It is not clear how a merger of sellers may harm a monopsony buyer, especially with vertical integration. When markets are concentrated and the HHI may not be applicable. The authors develop an alternative measure, with similar data requirements as the HHI, for the markets with vertical relationships when the buyers and sellers have market power.

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FINLAND

1. Introductory Matters

What is the definition of "conglomerate merger" in your jurisdiction? If it includes acquisitions of potential competitors, please explain the criteria used to determine whether an acquired company is a potential competitor.

Commonly in Finland, a distinction has been made e.g. between conglomerate mergers expanding the range of products or markets and so-called pure conglomerate mergers. When acquisitions expanding the range of products are involved, the products offered by the parties do not compete with each other; instead, companies use parallel marketing channels or production processes. As for acquisitions expanding markets, the products are mutually competitive but the markets geographically separate. In pure conglomerate merger cases, the companies' products do not compete with each other and the business operations of the companies are not related to each other in other ways either.

The Finnish competition legislation does not provide for an explicit definition of a conglomerate merger. The legislative materials for the provisions on the control of concentrations (Government Proposal 243/1997) reveal that, in the assessment of mergers, several factors are considered, including the market position of the parties to the acquisition and their economic and financial strength i.e. the acquisition shall be assessed as an entity. Thus, one can argue that the legislator has identified portfolio aspects, too. In addition, in the decision by the Ministry of Trade and Industry on the Obligation to Notify a Concentration (499/1998), an obligation has been imposed to reveal the conglomerate markets.

Please give, if you have them, examples of conglomerate merger reviews in which your authority has considered portfolio effects or something analogous to it. If such reviews have referred to "portfolio effects" or a similar term, please define and illustrate what is meant by the concept.

The Finnish Competition Authority (hereinafter FCA) has considered portfolio effects in some cases. However, there have been relatively few pure conglomerate mergers wherein the importance of portfolio power would have been assessed. In most reviews, the FCA's assessment of portfolio power has been related to horizontal or vertical overlaps by the parties. The Competition Council, which has sole power to ban a merger, has issued one decision dealing with portfolio effects.

- In the Omya/Mondo decision (diary no 99/81/2001), the FCA held that the portfolio power of Omya, the acquirer of sole control, would become evident in the paper industry applications. In the arrangement under review, the object of acquisition Mondo was a company producing talc and selling the processed mineral primarily to the paper (cellulose and cardboard), paint and plastic industries. Omya's core business operations were composed of producing, processing and selling calcium carbonate. Industrial minerals produced and processed by the parties to the acquisition were substitutive with respect to some markets, which resulted in Omya's portfolio benefits. The FCA observed, however, that the considerable buyer power possessed by the domestic paper industry decreased Omya's possibility to exploit market power (portfolio power) e.g. through raising prices. Due to the customers buying power,

alternative suppliers and substitute minerals available to customers, the FCA cleared the transaction.

- At the end of 2000, an acquisition was notified to the FCA whereby the YIT Corporation operating in the construction industry business acquired the entire stock capital of the Swedish Calor AB (diary no 1025/81/2000). Both YIT and Calor's subsidiary Kalmeri operating in Finland sell pipeline installation and maintenance services to the processing and power industries. YIT is the market leader and Kalmeri among the biggest companies of the field in Finland. Hence, the parties' business operations contained clear overlaps, i.e. the case did not exemplify a conglomerate as such. The parties' joint product portfolio was extremely large: the product range covered pipeline installation, refurbishment and maintenance services to different industries. In addition to the above product and service solutions, YIT also offered investment services. The wide service range generated competitive advantage to the concentration in relation to smaller competitors and enabled the tying of different services to each other. YIT also had an operator network covering the entire country and considerable financial resources with respect to its rivals. Governing a wider service palette than the competitors did not bring a considerable competitive advantage, however, when e.g. the usual way of splitting contracts and potential foreign competition were considered. Hence, the FCA approved the arrangement as such at the second stage of the proceedings.

- The Competition Council's decision of 10 July 2000 (diary no 53/690/2000) in the Sonera/YLE/Digita case exemplifies a major Finnish decision involving conglomerate aspects. Before the transaction, Digita was entirely owned by YLE, the national broadcasting company. When it founded Digita in 1998, YLE transferred to it the infrastructure required by television and radio broadcasts such as radio towers and relay stations. Through the acquisition, Sonera shared joint control in Digita with YLE. Sonera is the leading Finnish telecom company producing mobile, Internet and data transmission services and traditional fixed line services and engaging in cable television operations. In a prior decision, the company was found to occupy a dominant position in mobile and fixed line services in its traditional geographical operating areas. Digita held an actual monopoly, with strong characteristics of a natural monopoly, in the market of terrestrial transmission services to radio and television broadcasters. A political decision had been made to digitalize radio and television operations by exploiting the existing terrestrial transmission network, which was governed by Digita. Sonera and Digita did not have actual overlapping operations and were not each other's customers. Hence, the acquisition was a conglomerate by nature. A vertical relation will be born between the companies when Sonera's services and content production would be available to consumers on digital television. The potential for a competitive horizontal relationship between the companies existed, with Digita's transmission network and e.g. Sonera's third generation mobile network becoming available for the transmission of similar information or other data from the point of view of the customer. Had the acquisition been implemented, a group of companies governing the transmission services of both sectors would have been born on the interface of telecom operations and media enterprises. It would have enabled Sonera to offer to its customers a total service package including transmission services, service platforms and other technical solutions for all digital networks and terminals. Due to the multiple uses of networks, Sonera would have obtained a benefit from commanding a full product palette in networks applicable to data transmission. On the other hand, Sonera's competitors were dependent on access to Digita's network and their technical R&D was dependent on cooperation with Digita. Hence, the Competition Council approved the acquisition as conditional. Several behavioral conditions were used to prevent favoring Sonera in Digita's transmission operations, R&D and acquisitions. The Council also ordered

Sonera to withhold from seeking a license for digital television operations as long as it was Digita's shareholder. As a result of the conditions, Sonera withdrew from the acquisition.

- In the Sonera/Loimaan Seudun Puhelin decision (diary no 1202/81/2000), the FCA held that the portfolio power related to Sonera's extensive ICT business service and product palette would be strengthened and likely to increase the possibilities for tying and cross-subsidization on several relevant product markets. The restrictive effects of the transaction appeared above all in the form of combined effects on the affected markets. Vertical integration, convergence and network effects had significant importance from a competition law perspective, and were considered in the assessment. To remove the competitive advantages rising as a result of the acquisition, both structural and behavioral conditions were imposed on the acquisition.

2. Anti-competitive Effects Associated with Portfolio Effects

What do you see as the conditions, if any, under which a conglomerate merger involving portfolio effects could give a firm enhanced ability and incentives to exclude competitors through the use of tying, bundling, full-line forcing, exclusive dealing, targeted discounts, or refusal to deal? What are the further conditions under which such exclusions would have a net harmful effect on consumers (remembering that the merger could also produce significant efficiencies)?

In concentrated markets where the lifespan of products is mature, exploiting on portfolio effects is easier in general. Lack of capacity constraints and the financial strength of the target company may promote the use of portfolio effects. However, in a case-by-case competitive assessment, the following considerations are also relevant: industry-specific features, the relative size of competitors, barriers to entry, pricing practices and trends, the replacability of products, buying power, the temporal development of market shares and other significant economic factors. Companies dominant in several fields are still forced to pay considerable attention to the threat of potential competition in their strategic thinking.

Of the forms of competitive conduct cited above, tying and discrimination may be harmful to competition particularly when the said conduct has exclusionary effects and e.g. reduces the number of operators in the field. The use of tying requires relevant information on both the nature of the product but also on the alternative brands, buying power and the transaction and switching costs related to the buying and consumer conduct of the end users. There exist several game theoretic models on the forms of competitive conduct, one of which is vertical foreclosure.

Do conglomerate mergers involving portfolio effects, when they increase the number of markets in which competitors meet, raise competitive concerns analogous to those found in cases in which multi-market contacts appear to increase the probability of anti-competitive co-ordination?

Our experience in the Carlsberg/Orkla case (diary no 573/81/2000), where certain portfolio effects were present, would imply an affirmative answer. Sinebrychoff, a Finnish brewery belonging to the Carlsberg group, and Hartwall, a brewery where Orkla has a 20 percent minority shareholding, were found to have joint dominance on the Finnish brewery market on e.g. the following grounds. The breweries encounter each other in several different beverage markets both in Finland and abroad. Hartwall has a joint venture BBH, operating on the rapidly growing Baltic and Russian markets, with Sinebrychoff's parent company Carlsberg. Additionally, the breweries engage in cooperation in e.g. the Federation of the Brewing and Soft Drinks Industry, through which e.g. the common bottle and can system is governed. The FCA held in its decision that the more markets the parties meet in when an oligopoly prevails, the better they are able to maintain anti-competitive pricing based on tacit collusion and other corresponding

strategies. If one member of the oligopoly deviates from the ”agreed” conduct in one market, the other members of the oligopoly may take counter-action - to impose sanctions - in several different markets. The threat of extensive counter-measures acts as a more forceful constraint in deviating from the ”agreed” conduct than counter-measures on individual markets.

3. Efficiencies Associated with Conglomerate Mergers Having Portfolio Effects

Do you believe that bringing together a portfolio or range of products purchased by the same set of buyers could generate important efficiencies for either the merged firm or its customers? Your contribution might discuss how such a merger could:

- enable the parties to better understand and apply existing technology or develop new technologies (including enhanced ability to exploit R & D findings internally); or
- help parties reap economics of scale or scope in production, marketing or distribution; and, or
- save customers time and expense by providing them with one stop shopping and/or fewer deliveries, or products, which are easier to use in combination.

4. Barriers to Entry and Countervailing Power

What do you see as the various ways in which conglomerate mergers involving portfolio effects might raise or lower barriers to entry?

Mergers in general, combined to other factors maintaining and promoting long-term competitive advantage, have the tendency to increase barriers to entry to some extent. However, conclusions should always be drawn on the basis of case-specific assessment. Depending on the time of observation, convergence trends and other affected market effects in dynamic fields in particular may rapidly trigger off potential portfolio effects at the time of observation. The experiences of the FCA indicate that portfolio effects preventing entry are caused by competitors having to enter the market with several products.

5. Portfolio Effects - Is a new concept needed?

What if anything is gained or lost by introducing the concept of "portfolio effects" into the realm of conglomerate merger review? Would your answer be different if your jurisdiction applied a "substantial lessening of competition" test to mergers, instead of a "create or strengthen a dominant position" standard, or vice versa?

Determining the existence of a dominant position is in general strongly linked to the definition of relevant markets and thus to the appraisal of market power in the specified relevant product markets. It seems evident that, by using the portfolio doctrine, one can reduce categorical market appraisal in a single specified market and focus attention on actual comprehensive effects. In this respect, the portfolio doctrine contributes to the overall appraisal of concentrations. Thus, the competition test seems to better take into consideration the total effects the concentration has on competition.

GERMANY

1. The term “conglomerate merger”

There is no statutory definition of the term conglomerate merger (also called diagonal or heterogeneous merger) in German law. Nor does the Bundeskartellamt base its decision-making practice in merger control on an exact definition. A negative definition is generally acknowledged, however: accordingly, mergers are conglomerate if previously independent participating parties neither operate in the same relevant market (then they would be horizontal mergers) nor are in a buyer/seller relationship (vertical merger). In practice, different definitions are made, particularly in the area where the products of the parties to the merger do not belong to the same product market but are nevertheless related to a certain degree. It is especially here that product range effects are most likely to occur.

Some German literature on conglomerate mergers distinguishes between product-diversifying, market-diversifying and pure conglomerates. Most mergers that may involve portfolio effects are classified as product-diversifying conglomerate mergers. A different view is that the term “conglomerate” should be limited to apply exclusively to mergers of undertakings operating in completely different areas. Accordingly, a horizontal merger is already assumed to exist if a “certain connection between the existing product range and previous technology” is maintained or if the product range is extended to include similar products. The similarity may then lie in the materials processed, the processes used, joint sales relations and the products themselves.

In the Bundeskartellamt’s practice, mergers in which “the acquirer and the acquired operate in neighbouring markets but in the same economic sector (example: brewery concern acquires fruit juice factory)” are considered to be “horizontal mergers with product extension”. The category of conglomerate mergers, however, is considered to include only mergers of undertakings that do not operate in the same economic sector.

2. Legal framework for assessing conglomerate mergers

Thus, whether mergers are classified as horizontal or conglomerate is not decisive for the competition law assessment and the Bundeskartellamt usually does not undertake such classification it in its decisions. The current version of the German Act against Restraints of Competition (ARC) does not contain any special regulations for assessing conglomerate mergers. Under Section 36(1) of the ARC[1], a merger is prohibited if it is expected to create or strengthen a dominant position. An undertaking is considered to be dominant, *inter alia*, if it has a paramount market position in relation to its competitors (Section 19(2) of the ARC). Whether a paramount market position exists is not evaluated simply by assessing one structural criterion, such as market share or actual and potential competition, but on the basis

[1]. For the text of the law, see Annex

of an overall appraisal of all the relevant circumstances in a particular case. The Act specifies market share, financial power, access to supply and sales markets, links with other undertakings, barriers to market entry, actual and potential competition, the ability to switch to other goods or commercial services and the ability of the opposite side of the market to resort to other undertakings as criteria for this overall appraisal. This list is not conclusive. Each one of these aspects, as well as other aspects not mentioned in the list, may lead to the strengthening of a dominant position and therefore to a prohibition.

In conglomerate mergers, the assessment of the creation or strengthening of a dominant position is usually based on the criteria of increased financial strength and improved access to sales markets. Since market share additions do not take place, at least in pure conglomerate mergers, this aspect is of minor significance. The Bundeskartellamt's principles of interpretation regarding the assessment of market dominance in German merger control therefore deal with conglomerate mergers on the basis of the financial strength and access to procurement and sales markets criteria. If the markets and products in question are related, assessing the loss of potential competition or marginal substitution becomes an important additional factor.

Until the amendment of the Act on 1 January 1999, however, the ARC contained a special regulation, which *inter alia* aimed at assessing conglomerate mergers. The Act presumed market dominance in mergers of undertakings with a combined annual turnover of at least DM 12 billion if as a further condition at least two of the participating undertakings reached turnovers of at least DM one billion (Section 23(1) (2) of the ARC, old version). This presumption could be refuted. The presumption made clear that the assessment of resources introduced into the ARC in the second amendment in 1973, created a principle of assessment equal to the market share assessment, which thus could replace it in cases of vertical and conglomerate mergers. The presumption was based on the experience that, at least in partial areas in which the undertakings participating in the merger operate, a paramount market position may be created or strengthened solely as a result of the accumulation of resources. The aim of this provision was to make it easier to prove the creation or strengthening of a dominant position in vertical and conglomerate mergers. The presumption was abandoned in 1999 in the 6th amendment of the ARC because it had been regularly disproved in practice and therefore had not gained any major significance.

The Bundeskartellamt takes into account in its decisions the aspect of an extended product range as a criterion in assessing whether a dominant position has been created or strengthened. The terminology used varies ("*product range extension*", "*production programme extension*" or "*establishing a comprehensive range on offer*"). The Monopolies Commission[2] dealt with this issue in its third main opinion and pointed out possible anticompetitive effects of product range extensions as a result of mergers. Accordingly, the term "product range" is used for different product groups in commercial jargon, above all the following:

- a full range of technically-similar products of a manufacturer which he wishes to sell to retailers as a package,

2. The tasks and the composition of the Monopolies Commission are laid down in Sections 44 and 45 of the ARC. It consists or five members who are appointed by the Federal President upon a proposal by the Federal Government. The appointment is limited to four years. The main task of the Monopolies Commission is to prepare an opinion assessing the level and foreseeable development of business concentration in the Federal Republic, to evaluate the application of the provisions concerning the control of concentrations and to comment on other topical issues of competition policy.

- a full collection of complementary products which the buyer purchases as a package from a supplier,
- a comprehensive range of substitute (equal) products from which the purchaser can make the choice that suits him best.

This applies regardless of whether the products belong to the same market or not.

3. Competitive assessment of portfolio effects in conglomerate mergers

3.1 Consequences of portfolio effects on competition

There are different views on the consequences for competition of product range extensions. Foreclosure effects resulting from reciprocal business relations, predatory strategies through increased resources and the loss of potential competition are seen as possible anticompetitive effects of conglomerate mergers. Possible procompetitive effects are largely considered to be the exception (for example, in situations where a certain form of understanding has developed in the market and where the emergence of a new undertaking may lead to new entrepreneurial initiative and new competitive advances). Overcoming high barriers to entry is also considered to be a possible procompetitive effect of conglomerate mergers.

Another view holds that it is impossible to make general statements on the competitive effects of diagonal mergers.

In assessing conglomerate mergers or mergers with portfolio effects, the Bundeskartellamt generally examines in each individual case whether a dominant position is created or strengthened by the merger. Product line extensions alone have so far never led to prohibition of the merger project. On more than one occasion, however, portfolio effects have been used as an argument alongside other factors. In the Bundeskartellamt's view, the general assumption that portfolio effects alone cannot cause the creation or strengthening of a dominant position is not to be deduced from this.

Experience with assessments so far has shown that supplying product ranges or complete systems contributes to the creation or strengthening of a paramount market position, in particular if it results in insurmountable competitive advantages relating to access to sales markets and predatory strategies to the disadvantage of less diversified undertakings. A precondition for improving access to the sales market is that a competitively significant number of buyers demand these product ranges (usually complementary or substitute goods or services) on a regular basis and that other undertakings do not come close to supplying a comparably complete product range. These preconditions also apply to the supply of complete (production) plants or so-called "integrated problem solutions" (systems demand). The same is true of the entry of a top brand producer with a strong market position into the retail brand business, for example with the possibility to develop a second marketing strategy for brand article innovations and with a better position in negotiating conditions.

When these conditions were met in the cases examined by the Bundeskartellamt, the supplier of a particular product range, in combining complementary products, had a number of advantages over competitors supplying only one or a few products. The supplier has a stronger position in relation to buyers since it is able to supply a complete product range and its products often make up a large share of the procurement market. It is also more flexible in setting prices or discounts and has greater opportunities for tied selling. It can also achieve economies of scale as well as the advantage of diversification in its sales

and marketing, and it can exert quite a powerful effect by implicitly or explicitly threatening not to supply. In the systems-market development phase in particular, a merger of component producers with strong or even dominant positions on their respective partial markets may result in considerable competitive advantages due to their better access to the sales market. This is because, in a growing systems market, smooth co-operation between component producers that is secured under company law will be even more significant than in the traditional purchase of individual components by the buyer. The opportunity to develop systems within a group of undertakings can lead to considerable competitive advantages. In markets that have already developed from component into systems markets, too, the merger of a systems supplier and a pure component supplier can create such a great competitive advantage that manufacturers of individual components cannot compete. Experience has shown that this effect is compounded when other systems suppliers are dependent on close co-operation with the component producer concerned and thus would have to reveal their technical and economic expertise to their competitor.

The Monopolies Commission is also of the opinion that the competitive significance of a product range extension as a result of a merger lies above all in improved access to sales markets, but also in the elimination of potential competitors and in the increased likelihood of financial strength being used.

If it is unlikely that a product range extension, either by itself or in combination with other aspects, will lead to the creation or strengthening of dominant positions in individual markets during the period covered by the prognosis, the merger is not prohibited. In such cases, anticompetitive conduct is dealt with after the merger under abuse control or by enforcing the ban on cartels. Criticism has been raised regarding this course of action with doubts being voiced as to whether the anticompetitive effects can be sufficiently grasped by assessing the undertakings' market position in individual markets. However, so far satisfactory results have been achieved by assessing individual markets prior to the merger in combination with controlling conduct after the merger.

4. Increased efficiency through portfolio effects?

There is no uniform answer either to the question of the extent to which conglomerate mergers, including mergers with portfolio effects, lead to increased efficiency. In some instances, empirical evidence in the field of conglomerate mergers is summarised to the effect that conglomerate mergers, in contrast to horizontal and vertical associations of undertakings, have hardly achieved any notable efficiency gains. This leads to the conclusion that while conglomerate mergers may have a potential for efficiency gains in individual cases, it cannot be assumed that such mergers generally achieve efficiencies. The only explanation for conglomerate mergers is seen by some as being a pointless endeavour to achieve growth. A different view is that conglomerate mergers usually result in cost savings, for example on purchases of credit, insurance, advertising and sometimes also transport services, as well as when pooling demand or buying in bulk, and easier transfer of know-how. Finally, it is argued that the advantages of conglomeration lie almost exclusively in the area of financing.

The Bundeskartellamt, on the other hand, does not consider it decisive whether product range effects as a result of a merger project go hand in hand with increased efficiency (for example in the automotive sector where the development of a market into a systems market may have efficiency-increasing and cost-reducing effects, both for the undertakings and the demand side) and it does not generally examine this question under merger control. It can only be taken into account if the increased efficiency simultaneously has positive effects on competition that outweigh the negative effects of a merger (balancing clause).

5. Examples of Cases

These examples of cases give account of decisions of the Bundeskartellamt in which portfolio effects were examined and which led to prohibitions or clearances with obligations and conditions. In the majority of cases, however, these do not concern conglomerate mergers.

5.1 Federal - Mogul/Alcan

Federal Mogul planned to acquire the piston works in Nuremberg of Alcan Deutschland GmbH. The planned concentration affected the markets for pistons, piston rings and complete pistons fitted with piston rings, which were assessed by the Bundeskartellamt as being non-interchangeable and therefore assigned to different product markets. The concentration proved problematic *inter alia* on the market for complete pistons. At the time the planned merger was being examined the automotive industry was having pistons and piston rings developed by ring or piston manufacturers and was buying pistons and rings separately. Furthermore, there was a tendency to concentrate the development and procurement of pistons and rings with one systems provider, which was commissioned with the development and manufacture of complete piston systems. Federal Mogul was the only supplier in Germany of piston rings for high-speed diesel engines. This unique position was based on specific technology used in the manufacture of piston rings, for which Federal Mogul had patents in Germany and abroad, which were valid for several more years. All piston suppliers and car manufacturers were dependent on Federal Mogul for the supply of piston rings. Alcan was the second-largest supplier of pistons for high-speed diesel engines for the domestic market.

The concentration led to the emergence of just one supplier, which was able to offer complete pistons for high-speed diesel engines from one source. In the view of the competent Decision Division those involved thus gained a competitive advantage which could not be matched by other suppliers of single components since they had no access to the necessary know-how for piston ring manufacturing. The Bundeskartellamt also saw a restraint of competition in the fact that all piston manufacturers were dependent on co-operations with the piston ring supplier Federal Mogul or its subsidiary if they wanted to develop and offer complete pistons. As a result they were forced to reveal their technical and economic expertise in the development and manufacture of pistons at an early stage to their rival Federal Mogul, which would have placed additional considerable restraint on competition between piston manufacturers.

The Bundeskartellamt cleared the planned merger on condition that Federal Mogul offered interested firms the right to use the patent for the manufacture and distribution of piston rings for diesel engines as parts for complete pistons by issuing them licences. By licensing the patent and passing on the necessary technical knowledge for its use the market for complete pistons for high-speed diesel engines was opened up to competition. The condition was to ensure that rivals, in particular those previously offering pistons without piston rings, were enabled to enter into the production of rings themselves or to collaborate with ring manufacturers in the development of complete pistons, which they could then offer.

5.2 Henkel/Luhns

Henkel KgaA, one of Germany’s leading chemical concerns, which has a large number of well-known branded articles in the detergents and cleaning agents sector, and Luhns GmbH, also in the same market, planned the establishment of a joint venture to pool their entire European retail brand business with detergents and cleaning agents.

The Bundeskartellamt prohibited the concentration as it would have further consolidated Henkel's existing position of dominance on the general detergents market. This consolidation was attributed both to the small increase in market share and to considerable synergetic effects and economies of scale in production, procurement and turnover (after the concentration Henkel was the only company operating in all price segments). However, the most significant consolidatory effect of the concentration lay in the massive extension of Henkel's scope of action vis-à-vis its rivals and the retailers on the opposite side of the market.

As a result of the planned joint venture with Luhns, Henkel, as the leading brand supplier, would have massively penetrated the retail brand business and thus a segment of the market in which both of Henkel's major rivals were not represented and which to that point had offered smaller suppliers of detergents and cleaning agents opportunities to compete, since this did not involve advertising expenditure. Henkel would have thus acquired the customer relations already established not only on the general detergent market but also on other markets.

In terms of product innovation relevant to competition, the concentration would have also meant that the joint venture would have gained access to Henkel's technology and expertise in the detergent business, which was not accessible to its rivals because of Henkel's patents and brands. As it is important, especially for operators in the retail brand business to be able to offer the innovations of leading suppliers of branded articles as quickly as possible themselves, this produced a considerable competition advantage for the joint venture. In addition, Henkel innovations could have been deployed with practically no additional expenditure in the retail brand business too, i.e. in the secondary marketing of innovations, as R&D investments in the branded goods business usually pay off in full or at least in part at the primary marketing stage. This produced a further consolidatory effect since Henkel was able to calculate its prices in the retail brand business at a correspondingly low level and consequently, in competition for sales to retailers had no problem in consistently undercutting other retail brand manufacturers, which first had to earn their R&D costs solely from this business.

The secondary marketing of innovative products brought Henkel significant competition advantages, not only within the retail brand business but also over its rivals in the branded article business, who had to forgo additional profits or marginal income from secondary marketing.

Finally, as a manufacturer of both branded articles and retail brands Henkel was able to pool its offers in the two areas in negotiating conditions with retailers. It was thus also able to exploit its dominant position in the branded article sector to the detriment of its rivals in the retail brand sector and, conversely, to increase its sales in the branded article sector by means of combined costing, to the detriment of its rivals on those markets. The Bundeskartellamt assumed that Henkel could, for instance, offer retailers price reductions on its branded articles which retailers must stock (e.g. the brand "Persil") if they in turn were to meet all or at least a large part of their retail brand requirements through purchasing from the joint undertaking. Conversely retailers could be encouraged to favour Henkel brands as opposed to rival branded articles by making particularly advantageous offers in the retail brand business, which gives retailers higher margins than the branded article business.

5.3 Pillsbury/Sonnen – Bassermann

The Pillsbury Company was planning to acquire all the shares in Sonnen-Bassermann-Werke GmbH and Co KG. As a leading international food concern Pillsbury's business included the manufacture and distribution of foodstuffs and agricultural produce and the operation of restaurants. Sonnen-Bassermann was a family-owned business operating in the food trade. The planned concentration was

prohibited because it was likely that it would have led to the emergence of a dominant position on the manufacturing market for fluid convenience foods

The Bundeskartellamt based its prohibition of this project not only on what would have been the large market share increase but also on the considerably improved access of the participating parties to the market. The concentration would have allowed the participating firms to offer a comprehensive range of fluid convenience foods covering all product variations, sizes and price ranges. At the same time the concentration would have led to a greater consolidation of Pillsbury's already strong position in the adjacent canned soups market.

The Bundeskartellamt also established that retailers increasingly used a selection strategy of keeping the selection of suppliers as small as possible in order to achieve more favourable purchase conditions and for cost reasons, while continuing to demand a complete product range. As part of retailers' concentration of demand on a few manufacturers, annual quantity targets were fixed between the central trading agencies and the suppliers. If these targets were achieved additional discounts or bonuses were to be granted. In the view of the Bundeskartellamt, this selection strategy by retailers, combined with the agreement on annual quantity targets, inevitably favoured undertakings with an extensive range of goods, making it more difficult for medium-sized or smaller firms to participate in the market or even barring them from the market.

5.4 WMF/Auerhahn

WMF Württembergische Metallwarenfabrik AG intended to acquire all the shares in Auerhahn Besteckfabrik GmbH. WMF's business included the manufacture and sale of cutlery, tableware, glasses, cooking utensils, kitchen and serving utensils, fancy goods and large-capacity coffee machines. Auerhahn manufactured stainless steel and silver cutlery as well as silver-plated cutlery.

The Bundeskartellamt prohibited the concentration as it was likely that it would have strengthened WMF's paramount market position in the domestic market for stainless steel cutlery in the high and medium price range. Already before the merger, WMF's paramount market position was based inter alia on Wm.'s ability to offer a complete product range of hotel supplies, which resulted in particularly good access to hotel and restaurant businesses, an important group of customers. In acquiring Auerhahn, WMF would have taken over an undertaking with one of the few other major brands in the market segment of high-priced and high-quality cutlery. The Decision Division also assumed that WMF, on account of the prominence and popularity of its products, might use its market power over specialised retail businesses to make them offer Auerhahn cutlery in addition to WMF cutlery, and to display it extravagantly, at the expense of other suppliers.

5.5 Messer Griesheim - Buse

Messer Griesheim GmbH intended to increase its participation in Buse Gase GmbH & Co. KG to gain a majority interest. Messer Griesheim operated world-wide in the manufacture and sale of gases of all types. It was also active in the manufacture and sale of machines, appliances, devices and filler materials. Buse Gase operated in the manufacture and sale of technical gases and in the sale of devices for their areas of application. Buse was one of the leading domestic carbonate suppliers.

The Bundeskartellamt prohibited the planned merger since it was likely to strengthen market dominance in the markets for nitrogen, mixed welding gases and carbonate. It was established that extending the product range by having carbonate as a substitute and complementary product for other

technical gases would improve Messer Griesheim's market position vis-à-vis competitors with an incomplete product range through improving its access to sales markets. This was because each customer would then be able to enquire here about all the alternatives for meeting a certain demand and would thus save information costs. The Decision Division's investigations also showed that those suppliers of technical gases that were able to supply the substitute solution on the basis of carbonate in addition to the technical solution on the basis of technical gases were regarded as more competent. In addition, Messer Griesheim's access to expertise in the carbonate sector and to Buse's customers would have been extended and secured. Finally, Messer Griesheim's market position would have been strengthened by Buse no longer being the only independent and significant supplier of carbonate for those suppliers of technical gases that either needed carbonate to complete their production programme or supplies for manufacturing mixed welding gases.

6. Summary

Conglomerate mergers or horizontal mergers involving a product extension are subject to the general rules for assessing the creation or strengthening of a dominant position in Germany. In the Bundeskartellamt's practice, conglomerate mergers are above all examined on the basis of the following criteria: increase of financial strength, improved access to sales markets (particularly through product range extension) and absence of competition from substitutes or potential competition.

Portfolio effects turned out to be problematic for competition mainly when they improved access to sales markets. Excellent access to a sales market through supplying product ranges or systems has contributed to the creation or strengthening of a dominant position in the past, in particular in connection with brands having a strong or even leading position in their (sub-) markets and the development of complete systems. Portfolio effects alone have therefore never created a scope of action within the meaning of the creation or strengthening of a dominant position.

ANNEX

Section 19 (2) of the ARC:

(2) An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services, it

3. has no competitors or is not exposed to any substantial competition, or

4. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions of sentence 1.

Section 23a (1) No. 2 of the ARC, old version:

Notwithstanding Section 22 (1) to (3), for merger control purposes a paramount position shall be presumed to be created or strengthened as a result of a merger, if

1.

2. the enterprises participating in the merger recorded a combined turnover of at least DM 12,000 million in the last completed business year preceding the merger and at least two of the participating enterprises recorded individual turnovers of at least DM 1,000 million; this presumption shall not apply, insofar as the merger also satisfies the conditions of Section 23 (2) No. 2 and the joint venture does not operate in a market with a turnover of at least DM 750 million in the last calendar year.

Section 36 (1) of the ARC:

(1) A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Federal Cartel Office unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.

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HUNGARY

The Hungarian competition authority, the Office of Economic Competition (OEC) has considered the conception of 'portfolio effect' only a few times. The reason of this moderate attitude is the fact, that the OEC has tended to adapt a relatively broad market definition. However there are some cases where the theory has already been considered by the OEC to a certain extent.

1. What is the definition of 'conglomerate merger' in your jurisdiction? If it includes acquisitions of potential competitors, please explain the criteria used to determine whether an acquired company is a potential competitor.

Up to now problems have only rarely arisen through conglomerate mergers before the Hungarian competition authority. However the OEC makes an exception to this rule, that is when the undertakings concerned in the concentration produce or distribute complementary goods. If any of the merging undertakings has a strong market position on any of the product markets, this could increase the possibility that the undertaking will be able to implement strategies that would impede competition (tying etc.).

2. Please give, if you have them, examples of conglomerate merger reviews in which your authority has considered portfolio effects or something analogous to it. If such reviews have referred to 'portfolio effects' or a similar term, please define and illustrate what is meant by the concept.

In conglomerate mergers featuring portfolio effects, the OEC has focused on the market shares of the undertakings to the concentration on each of the relevant markets. Thus the fact itself, that the concentration would have an increasing range of products is less alarming. The OEC does not consider that market shares below 30 percent would grant a concentration the opportunity to bundle or to otherwise restrict competition.

According to the Competition Council (the decision-making body of the OEC), the chance for limiting competition emerges mainly if the merging undertakings produce (distribute) complementary products. If any of the merging undertakings has a strong market position on one of the product markets, this might lead post-merger to the group of undertakings being able to implement strategies impeding competition.

So far the OEC has had the following cases, where 'portfolio effects' are at least mentioned:

- acquisition of control over Prodax Elektromos Szerelvénygyártó Rt. (hereinafter: Prodax) by Schneider Electric (hereinafter: Schneider) (Vj-176/2000):

  the Competition Council authorised the acquisition of Prodax by Schneider. Schneider bought up 100 percent of the shares of Prodax. The Schneider-group had already been present in several product markets such as high-amperage dividers, low-voltage dividers etc. These

products are complementary, whose buyers are usually the same persons. The electrical settings produced, or distributed by Prodax had not been included in the product portfolio of Schneider before the merger. This meant that the concentration on the market of electrical settings did not change due to the merger. Notwithstanding this, the Competition Council pointed out that the merger could have deleterious effects on competition if any of the undertakings concerned possessed a strong market position enabling it to implement strategies impeding competition. However according to the market shares of the merging undertakings, and to the other undertakings participating in the same product markets, it was not likely that such strategies would occur in this case.

- acquisition of control over CEMPACK Cementipari Csomagoló és Csomagolástechnikai Kft. (hereinafter: Cempack) by Frantschach Packaging Sack Beteiligungsholding B.V. (hereinafter: Franpack) (Vj-25/2001):

  the Competition Council authorised the acquisition of Cempack by Franpack. The applicant Franpack bought up 96 percent of the shares of Cempack. Franpack, a member of the so called Anglo-group, is represented in various parts of paper manufacturing. The sole activity of Cempack is producing paper-sacks, 80 percent of which are sold to Hungarian cement manufacturers. The Hungarian members of Anglo-group are active on several paper manufacturing product market. Because of the merger, the portfolio of this group is completed by a new paper manufacturing product. In this context the Competition Council emphasised that the merger would be considered harmful if the parties possessed complementary products. In this case the Competition Council did not find the above mentioned products complementary, because the consumers of industrial paper sacks, and the consumers of other paper manufacturing product were not the same.

- acquisition of control over Postabank Press Hirdetésszervező Reklámügynökség Rt. (hereinafter: Postabank Press) and KH Invest Befektetési Tanácsadó Kft. (hereinafter: KH Invest) by Axel Springer-Magyarország Kft. (hereinafter: AS) (Vj-48/2001):

  the Competition Council authorised the acquisition of control over Postabank Press and KH Invest by AS. AS acquired 100 percent of the shares of Postabank Press and KH Invest obtaining direct control over them, and indirect control over Világgazdaság. Among economic dailies Világgazdaság is the leader with approximately 60 percent of the 60 000 readers, which represents 0.2 percent of the printed media's consumers. On the Hungarian printed media market AS has a significant 29.6 percent market share. This total market share consists of different values of market shares on each of the paper types. Prior to the merger AS had had the most important role on the market of magazines, and it had been active on the market of every paper type, except economic dailies, where as a result of the merger AS obtained significant market share. Considering that the AS group was not a market player earlier the operation realises only a change in ownership rather than an increase in market concentration. However, due to the fact that the AS group had significant market shares regarding other types of newspapers, the concentration led to the expansion of the company's product portfolio, which could have harmful effects on competition. In this case however the undertaking's market share illustrated by the number of readers rose by 0.2 percent only, which did not enable any anticompetitive effects to be realised.

3. What do you see as the conditions, if any, under which a conglomerate merger involving portfolio effects could give a firm enhanced ability and incentives to exclude competitors through the use of tying, bundling, full-line forcing, exclusive dealing, targeted discounts, or refusal to deal? What are the further conditions under which such exclusions would have a net harmful effect on consumers (remembering that the merger could also produce significant efficiencies)?

There is a condition that was taken into account in each of the cases where the concept of portfolio effect' or something analogous was considered by the OEC. A conglomerate merger widening the range of products of the merging firms could give the ability of anticompetitive conduct if the relevant products are complementary. Complementary products means a greater opportunity to bundle or to impede competition some other way. Since the OEC hasn't had much experience in dealing with conglomerate mergers, it has not deliberated the harmful effects on consumers, and the efficiencies of these mergers.

IRELAND

1. Section 1:

3. At present, no formal definition of a "conglomerate merger" exists within the Irish jurisdiction. The Competition Authority does not currently undertake the merger function unless requested by the Minister, which happens on average once or twice a year, if at all. Merger reviews that have taken place have not yet adopted a taxonomy for differentiating between horizontal, vertical, and conglomerate mergers. However, the merger review process is presently undergoing a substantive change, which should see the Irish Competition Authority being given responsibility for the exercise of the merger function, and it plans to release procedures that will clarify the definition of, and expound criteria for assessing, conglomerate mergers.

4. Some mergers that have been reviewed are in essence conglomerate, and have been tacitly recognised as such within the decision, but there has been no distinct analysis of portfolio effects in any merger decision considered by the Authority.

2. Section 2:

5. The Irish Authority considers that, in the absence of market power (analogous to "dominance") by at least one of the participants in a merger, portfolio effects are unlikely to give that participant any substantive ability to exclude competitors in an anticompetitive manner.

6. Mergers of products that are complements in supply or demand can give rise to efficiencies due to improved strategic fit, greater economies of scope or better service to buyers in terms of one-stop shopping. In general, the use of mixed bundling might enable a firm to entice customers to use its products, thus placing their rivals at a disadvantage. In this case, the lower prices and increased product range that attract the consumer should be seen as a benefit of the merger, not a cost. In other words, improve efficiency should likely enter as a defence than as an offence.

7. Where one or more of the firms has market power in an individual product line, but there is no horizontal effect (i.e., no increase in market share in any properly defined relevant product market), there is strictly speaking no increase in market power. The products are not, by virtue of market definition, substitutes so an increase in the price of one will not benefit the sales of the other. In this scenario, the products could well be complements (e.g., the strategic fit type of merger) and, if so, then the merger might actually result in lower prices as double marginalisationis eliminated. In this sense, conglomerate mergers between complementary products resemble vertical mergers. In this case, as in the case where there is

no market power, such a merger may be efficient for the merging parties, detrimental to the competitors, and overall beneficial for consumers and economic welfare.

8. This is not to say that such a merger can never have anticompetitive effects. There are, as noted in the OECD's questionnaire, a number of important journal articles which indicate that a merger could lead to significant competitor exclusion. Whinston (1990) is probably the most well-known of these papers, dealing as it does with the issue of how dominance in, say, market A, can lead to the firm tying its product in that market to the sale of its product in market B, where it does not possess dominance. Other papers examine exclusionary effects in the cases bundling, exclusive dealing, and the other possible devices referred to in the question. We do not propose to examine any of these in detail, but would rather make the point that nearly all the papers exploring this topic obtain negative effects for consumers in very specific circumstances. In the Whinston paper, for instance, the welfare consequences of tying are uncertain, and will depend upon the parameters that obtain in any particular industry being studied.

9. The ideal approach is therefore one that focuses not on the damage to or possible exclusion of competitors, but rather directly on the possibility of anticompetitive harm to consumers. Because in so many instances, a merger that harms competitors is good for consumers, harm to a competitor should not be the feature that triggers concern with a merger. Instead, the test should be whether there is clear direct harm to the consumer or the competitive process.

10. The specific facts of the market will be of the utmost importance in the use of such a test. The recent European Commission decision on the proposed GE/Honeywell merger illustrates this point. The Commission relied upon a theory of mixed bundling as one of the main reasons for its doubts concerning the merger. The response of the parties was to argue that mixed bundling was unlikely to be an important factor, because of the specific features of the markets in question. In particular, they felt that the model relied upon by the Commission was in applicable due to the way in which prices were determined in the industry (by negotiation, rather than posted prices), and because of the highly infrequent nature of purchases. (The case was complicated by further disputes over whether GE and or Honeywell in fact enjoyed a dominant position in a number of markets in consideration.) We do not wish to take a position over who was right in this particular case, but would merely emphasise that when portfolio effect models – of whatever variety - are used in a case, there should be careful consideration of whether the theoretical conditions upon which the models are based actually obtain in the industry in question.

11. We are sceptical about whether conglomerate mergers involving portfolio effects have anything to contribute to the area of predatory behaviour, other than in the possible case of direct consumer harm outlined above. Admittedly, this is partly because the theoretical models that analyse "predation for reputation" (basically stemming from Kreps-Wilson, 1982) have proven difficult to apply to practical cases, relying as they do upon small irrationality's in a firm's behaviour. It is a practical possibility that mergers where the firm potentially faces sequential entry could lead to it playing an initially "tougher" strategy of fighting entry, but this is difficult to sustain theoretically due to the well-known "unravelling" effect. The " long-purse" story of predation may be of more use here, insomuch as it is possible that a large conglomerate merger may increase the financial resources of the firms involved, but it should be used with caution. In particular, any attempt to depict the type of simple portfolio effects referred to in question 1 above, as leading to rivals exit due to insufficient financial resources, should be resisted, unless it is firmly based upon a sound

theory of why rivals face a disadvantage in terms of gaining access to capital at the same rate as the merging parties.

3. Section 4:

1. Conglomerate mergers could raise barriers to entry, but the basic maxim should again be that any such theory must be carefully examined for the degree of congruity it has with the markets in question and whether there is consumer harm. One possible instance is that a conglomerate merger might give a firm the power to limit access to distributors. Another possibility is that a merging firm might be enabled to change basic standards in one or a number of markets, thus raising entry costs and making entry more difficult.

4. Section 6:

1. An initial impression might be that there is no reason why conglomerate mergers should be treated any differently than other mergers in deciding whether or not to apply *ex ante* attempts to prevent anti-competitive behaviour. If basic portfolio effects are deemed problematic, however, it might be difficult to limit their anti-competitive effects, insomuch as they would not by themselves legally constitute an abuse of a dominant position. As stated above, though, we do not feel that portfolio effects without dominance are likely to be of any real effect. When dominance is an issue, there is a possibility that, due to the number of markets involved, and the complexity of the theories being employed, it may be difficult to take a successful case against the merged firm for an abuse of dominance. However, against this, the relative paucity of case-law and the lack of empirical evidence as to how the theories involved work in practice, may imply that preventing a merger based purely on portfolio effects may be a somewhat speculative course of action.

5. Section 7:

1. The concept of portfolio effects should be something that a conglomerate merger review would consider. We believe that to imply that they should never be considered would be a mistake, but would re-iterate that any use of the theories should be carefully tested to ensure that they are relevant to the market in question. Our answer would be the same regardless of whether we used a "substantial lessening of competition" (SLOC) test or not (we should point out that Ireland is likely to introduce such a test next year), but would note that we feel the SLOC test would allow a more flexible approach to the issue of portfolio effects.

JAPAN

1. Introduction

In recent years, the trend has been for companies to try to improve management efficiency and competitiveness through mergers, divisions and business acquisitions (hereinafter "M&As"), which has resulted in brisk merger activity due to globalisation of the economy, and financial and other types of deregulation.

Conglomerate mergers accounted for 30 percent (FY2000) of all merger notifications submitted to the Japan Fair Trade Commission (hereinafter "JFTC"). "Conglomerate mergers" are mergers other than horizontal and vertical mergers.

2. The application of the Antimonopoly Act to conglomerate mergers

- This paper will clarify the application of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act) to conglomerate mergers in Japan.
- In accordance with the Antimonopoly Act, if a company of a certain scale carries out M&As, the company is under obligation to submit notification in advance to the JFTC.
- The JFTC determines whether or not a merger notified will substantially restrain competition in any particular field of trade. If it deems that the merger would restrict competition, the JFTC will order the company to dispose of a certain amount of their business.
- In order to clarify types of M&As that would substantially restrain competition in any particular field of trade, the JFTC prepared and publicly announced guidelines on M&As (published in 1998). It conducts an examination into M&As in accordance with the said guidelines.

3. Measures taken through the guidelines on mergers and business acquisitions for conglomerate mergers

(a) In conglomerate mergers, the status of the relevant company group or number of competitors does not change. According to the guidelines on M&As, it is generally not deemed that the effect may be substantially to restrain competition in conglomerate mergers, if the problems of foreclosure or exclusiveness of a market and overall business capability do not arise.

(b) As for the portfolio effect in conglomerate mergers, a close examination of overall business capability should be made.

(c) In the guidelines on M&As, "overall business capability" is listed as a matter to be considered when determining whether or not a merger will substantially restrain competition in any particular field of trade.

When determining "overall business capability", in addition to the market share of the company group after the M&As, the change in the overall business capabilities of the company group such as raw material procurement ability, technological resources, marketing capability, access to credit, brand power and advertising capability will be examined. For example, if the raw material procurement ability, technological resources, marketing capability, access to credit, brand power, advertising capability, and other business capabilities of the company group will increase after the M&As and the competitiveness of the companies increases substantially due to the M&As, it is possible that competitors will have difficulty in taking competitive actions.

4. Recent case study (FY1999)

4.1 Merger of Mitsui Petrochemical Industries Limited and Mitsui Toatsu Chemicals Incorporated

4.1.1 Case overview

This case involved the proposed merger of Mitsui Petrochemical Industries, Limited, a petrochemical manufacturer, and Mitsui Toatsu Chemicals Incorporated, an integrated chemical manufacturer for the purpose of ensuring cash flow for overseas expansion and strengthening research and development operations.

4.1.2 Problems with the case

Problems associated with the Antimonopoly Act were examined. One problem was a dispute over the expansion of overall business capability, and was described as follows.

Petrochemical products derived from ethylene and other basic product and derivatives flow through a single petrochemical complex. In general, petrochemical manufacturers that supply ethylene and other basic products produce an extensive line of petrochemicals ranging from ethylene and other basic products to their derivatives.

Under such circumstances, many other petrochemical products manufactured by the two companies required a close examination. Therefore, it was conceivable that the merger would increase the overall business capability of the new company within the petrochemical industry as a result of greater integration of mutually related products, and the significant impact of competition in individual petrochemical products.

4.1.3 Results of the examination

Since Mitsubishi Chemical Corporation ranked first in sales and ethylene production capacity, and other strong companies existed in the petrochemical industry, it was determined that expansion of overall business capability would not pose a serious threat to competition.

KOREA

Regulation of Conglomerate Mergers in Korea

1. Introduction

Under the strategy of government-led growth, Korea concentrated its productive resources on a limited number of large conglomerates in the process of economic development.

Those selected growth-drivers strategically used leverage to move into other business lines. The most frequently used method in the process was conglomerate merger or merger and acquisition.

To secure a competitive edge in the new market, mother groups have conducted a wide range of support activities such as reciprocal dealing and subsidisation, cross payment guarantees, circular investments, and performing marketing activities to build brand and enhance corporate image.

Samsung Group is a case in point. Samsung, one of Korea's leading companies, promoted its image as world-class enterprise and successfully implanted the desired corporate image into the perception of Korean consumers that Samsung never fails. Backed by this powerful image, Samsung expanded its business lines ranging from electronics to automobile.

On average, the top 30 Korean chaebol groups owned 20.8 subsidiary companies engaged in 15.7 business lines.

As a few controlling chaebols kept gobbling up market share through mutual support activities, economic power became concentrated on them and the market structure turned monopolistic in the Korean economy.

As such chaebol practices became common, non-chaebol companies found it more difficult to enter markets, which contributed to solidifying monopolistic structures with side effects.

Market Concentration Rate by Industry Sector*

	81	86	91	96	97	98
Number (%) of sectors whose CR_3 is greater than or equal to 75%	1534 (68.4)	1642 (62.9)	1861 (58.4)	1712 (53.0)	1855 (54.9)	1924 (57.9)
Number (%) of sectors items whose CR_3 is greater than or equal to 95%	1008 (45.0)	1051 (40.3)	1146 (36.0)	1037 (32.1)	1132 (33.5)	1148 (34.5)
Average CR_3	81.7	78.3	75.9	72.7	73.8	78.6
Average HHI	4691	4317	4007	3690	3810	3900

* There are more than 2000 sectors in the Korean Standard Industrial Classification applying to manufacturing, mining and quarrying.

The Korean competition authority (i.e. the Korean Fair Trade Commission - KFTC) has kept an eye on conglomerate mergers and diversification attempts of chaebol groups because it realised that without effective regulation of conglomerate mergers, reckless expansion through reciprocal subsidy, cross guarantee, circular investment, etc. will highly likely prevail in the chaebol-dominated economy and thus give rise to competition-restrictive market structures.

Also, the authority recognised that interdependency supported by complicated creditor-debtor relations through cross guarantees or other forms of financial support makes conglomerate groups vulnerable to external shocks and finally systemic risks because the financial weakness of a mother group structurally has a natural spillover effect on its subsidiary.

> "Case of Daewoo Group: Daewoo group has built its business fleet around the two flagships of Daewoo Corp. and Daewoo Electronics, but when foreign exchange crisis in the late 1997 hit the two flagship companies, other strong subsidiaries such as Daewoo Heavy Industries, Daewoo Motors, etc. became financially unstable due to the cross payment guarantees. Finally, 12 companies among all of Daewoo subsidiaries were separated from the mother group through a workout procedure".

With a view to minimising the negative effects of conglomerate mergers among chaebols, the KFTC has prepared and enforced diverse institutional devices based on consistent principles.

During the early stages of structural improvement, the prohibition of conglomerate mergers *per se* was enforced rather passively as active enforcement may impede business expansions.

Such passive enforcement led to the development of views that the competition law of Korea was unable to regulate conglomerate mergers. However, the recently revised competition guidelines clearly stipulate that conglomerate mergers are subject to normal merger review.

The view in Korea is that in response to globalisation and technological innovation, Korean industries need to conduct structural improvements in order to maintain their growth potential.

Structural improvement involves strengthening the competitiveness of businesses and expanding their size to reap economies of scale. As a means for achieving such economies, Korea primarily considered industrial rationalisation and business combinations.

The KFTC prepared diverse institutional devices to minimise the anti-competitive effects and systemic risks arising from conglomerate mergers or reckless expansions by the chaebols.

Those devices are broadly composed of preventive measures and remedial measures. The former includes restrictions on concentration of economic power pursuant to the Monopoly Regulation and Fair Trade Act (MRFTA) and prohibition of large enterprises' participation in businesses reserved for small-medium enterprises (SMEs). The latter includes prohibition of undue intra-group transactions.

These devices are ultimately aimed at minimising anti-competitive effects and systemic risks; however, they do not prohibit conglomerate mergers and business expansions *per se*. They restrict behaviours that harm the economy and expansions that exceed certain thresholds.

Institutional Devices to Minimise the Anti-competitive Elements of Conglomerate Mergers

	Objectives	Relevant Statutes
Regulation of conglomerate mergers	Prohibit corporate mergers to prevent anti-competitive effects stemming from conglomerate mergers	Articles 7 and 12 of the MRFTA Articles 11 through 14, 18 and 19 of the Enforcement Decree
Restrictions on undue intra-group transactions	Strengthen competitiveness by curtailing transaction costs. Regulate transactions that intend to, or result in, restraining competition. They include support for affiliates and driving out competitors.	Regarding undue intra-group transactions in goods and service: Article 23(1) of the MRFTA. The Attachment entitled *Types of and Criteria for General Unfair Business Practices* in Article 36(1) of the Enforcement Decree
Restrictions on economic concentration	Rectify reckless expansion through revolving equity investments in affiliates; deterioration of financial structure due to fleet-style management, and monopolisation of the market.	Article 2(2) of the MRFTA Article 3 of the Enforcement Decree Article 9 of the MRFTA Article 17 of the Enforcement Decree

2 Regulation of Anti-competitive Effects of Conglomerate Mergers

2.1 Empirical Research on the Anti-competitive Effects of Conglomerate Mergers

Conglomerate mergers have the effect of restraining competition in individual markets for the following reasons: *(1)* Market concentration due to management behaviour resulting from conglomerate mergers; *(2)* Elevation of entry barrier to the market of the merged company; and *(3)* Driving out pro-competitive market entry of potential competitors. Irrespective of the causes of the anti-competitive effects, conglomerate mergers influence, directly or indirectly, the market share of the merged company in the relevant market.

An empirical study was conducted to examine the impact that conglomerate mergers have on the market share of the merged company in individual markets. This study did not identify the causes and only focused on the aggregate effect (change in market share). The results show that the hypothesis that

conglomerate mergers increase market shares of merged companies is valid in Korea. It was also found that the hypothesis was statistically significant (at the one percent level of confidence).

However, a similar study in the US with respect to 44 merged companies belonging to 15 different industry sectors revealed that the changes in market share were not statistically significant, although they were on average positive. ('The Effect of Conglomerate Mergers on Competition', *The Journal of Law and Economics,* April, 1973)

There are several few explanations for the difference in the study results between Korea and the US:

First, Korea and the US have different management practices and corporate governance structures. In Korea, maximisation of profit is sought at the level of the business group rather than at the level of the individual businesses. Moreover, power is concentrated in a handful of people, including the CEO, rather than spread out among members of the board and the management. Therefore, once the conglomerate merger is complete, decisions relating to intra-group transactions and other support measures for the merged company can be made with ease and promptness.

Second, the role and function of the financial market differ in the two countries. The Korean financial market is underdeveloped relative to the US, and fails to effectively monitor and control the businesses. Hence, decisions that may undermine shareholder benefit, such as cross-support and reciprocal transactions through conglomerate mergers go unchecked. In contrast, in the US, it would be difficult to reach decisions that undermine shareholder value.

Third, Korea and the US differ in terms of degree of openness. Considering that the empirical study produced results based on data of time-series analysis from the 1970s to the 1980s, it is quite evident that the Korean market was less open than that of the US. Since closed economies are more conducive to monopolisation than open economies, and support for companies merged under conglomerate mergers are more effective, a merged company may more easily raise its market share through conglomerate mergers.

As described above, conglomerate mergers have generated much policy concern in Korea. That is precisely why Korea introduced diverse measures to regulate conglomerate mergers.

2.2 Regulation of Conglomerate Mergers in the Context of Restricting Business Combinations

2.2.1 Regulatory Schemes

Based on the perception that regulating mergers may hamper the improvement of industrial structures, the Price Stabilisation and Fair Trade Act (enacted in 1976), the law preceding the MRFTA, was mute regarding structural regulations such as restrictions on business combinations, and focused on behavioural regulations, including restrictions on monopolistic pricing.

It was in 1980 when the MRFTA was enacted that provisions regulating business combinations were adopted.

> Article 7 of the MRFTA states that the law prohibits business combination 'which substantially restricts competition in a given area of trade', and prescribes the following as falling under business combinations: *(1)* Acquire or own shares of another corporation; *(2)* Concurrently hold position as an officer of a corporation while being an officer or employee of another corporation;

(3) Merge with another corporation; *(4)* Take over or lease the whole or a substantial part of the business; and *(5)* Participate in the establishment of a new corporation.

Although the law was established earlier, it was only recently that the regulations on conglomerate mergers were enforced, especially when conglomerate mergers did not cause an immediate change in the market share or the number of companies.

Korea was of the opinion that when conglomerate mergers were between completely different types of companies with no rivalry pursuant to the traditional micro-economic theory, such mergers did not have a direct bearing on competitive conditions.

However, when multi-product firms are created as a result of conglomerate mergers, they could hinder potential competition or drive out competitors based on significantly enhanced business capabilities. Thus, the KFTC included restrictions on conglomerate mergers in its M&A Review Guidelines.

Even if there is no immediate change in the status of a merged company in a certain individual market, the KFTC examines whether there may be hindrance of potential competition. For example, will the merged company gain and wield market dominant power after the conglomerate merger?

2.3 Restrictions on Conglomerate Mergers in the M&A Review Guidelines

In determining whether or not a conglomerate business combination substantially restricts competition in a given area of trade by eliminating potential competition, the following conditions shall be comprehensively taken into account, with a particular focus on whether it undermines potential competition.

A. Hindrance of potential competition

A conglomerate business combination is deemed to substantially restrict competition in a given area of trade by hindering potential competition if it satisfies all of the following conditions.

(1) The acquiring party is a large-scale corporation

(2) The acquiring party is a potential entrant to the market and meets one of the following criteria:

1. (a) It is judged that had it not been for the concerned combination, because of producing products with similar production technology, distribution channels and stages of purchase, etc. the acquiring company would have entered into the given area of trade using other means with less competition-restrictive effects.

2. (b) It is deemed that the existence of the acquiring party and others, which have the possibility to enter the given area of trade, is deterring the enterprises in the given area of trade from exercising market dominance.

(3) There are significant gaps between the acquiring party and most of the competitors of the acquired company in terms of size and capital, etc.

B. Other Considerations

(1) A business combination is likely to substantially restrict competition if it results in a significant enhancement of the overall business capabilities of the firms concerned such as technology, sales power and the ability to mobilise capital and procure raw materials, to the point of eliminating competitors based on factors other than price and quality.

(2) A business combination is likely to substantially restrict competition if the concerned combination increases the barriers to entry, for example, by raising the minimum required capital to enter the market to the extent that it is difficult for other potential competitors to enter the market.

2.3.1 Case: Samsung Display Devices (SDD) acquisition of GE Lighting Korea (GE) shares

Samsung Display Devices Co., Ltd. was renamed 'Samsung SDI', and GE Lighting Korea was renamed 'GE Samsung Lighting'.

2.4 Circumstances

- in December 1997, SDD requested a pre-merger examination regarding competition-restrictiveness in SDD's plan to acquire GE shares (45 percent);

- the market that SDD wished to enter by acquiring GE shares was the compact-fluorescent lamp (CFL) market. This particular market was largely occupied by SMEs. Hence, SDD wished to know in advance whether or not its plan would be acceptable under the M&A Review Guidelines of the KFTC.

2.5 Situation of Relevant Market

- Lamp markets consisted of 4 segments: the CFL; the fluorescent lamp; the halogen lamp; and the metal halide lamp segment.

- The CFL market included incandescent lamp and CFL. SDD wished to make inroads into the CFL market through the planned conglomerate merger.

2.6 Rationale for Business Combination

- SDD wished to engage in a joint venture with GE—a world class lamp producer—to obtain GE's manufacturing know-how for CFL and build sales networks overseas.

- GE wished to use SDD's distribution network to raise its current Korean market share of merely five percent.

- SDD and Samsung Electronics entered into the lamp business by means of share participation in the Samsung-GE joint venture; therefore, that constituted a conglomerate merger.

3. Examination of Competition-Restrictiveness

3.1 Market Share

– SDD's acquisition of GE shares did not constitute presumptive conditions of competition-restrictiveness.

SME's Share of the CFL Market

	Incandescent Lamp	CFL	Total
SMEs	62.3%	61.9%	67.7%
GE	2.5%	2.2%	2.2%

- However, SDD was a new entrant into the CFL market, and there was no change in its market share following the merger; therefore, the merger did not constitute presumptive conditions of competition-restrictiveness.

3.2 Presumptive conditions pursuant to Article 7(4) of the MRFTA

- when small-medium enterprises account for two-thirds (2/3) or more of the share in a given market; and
- when a large enterprise gains five percent (five percent) or more of the market share as a result of said business combination.

4. Examination of other Competition-Restrictive Factors

4.1 Possibility of driving out competitors by a significant enhancement of the overall business capabilities

- When SDD, a top Korean firm, and GE, a top global firm, combined to form a joint venture, their business capabilities defined by strong capital, distribution network and brand power would make fair competition for SMEs practically impossible.
- However, an examination of the aspects discussed below helped to conclude that competition-restrictiveness stemming from Samsung's predominant business capabilities would not be so significant.
- The CFL market was a small-sized device industry that did not require much capital. Distribution has always been at the retail level; hence, large corporations' nation-wide network of distributors should not bring much competitive advantage.
- The price range was rather wide—between 4 500 KRW and 12 000 KRW—and low-priced SME products accounted for 60 percent of the market. Therefore, this was a market in which SMEs and large corporations could co-exist.

4.2 Hindrance of Potential Competition

- In the absence of the merger plan, SDD would have made new investments in the CFL market, stimulating competition with GE. Therefore, concerns of hindering potential competition were valid.

- However, the CFL market was one in which both large corporations and world class lamp makers were already operating. Therefore, the participation of Samsung could have stimulated effective competition. In this situation, the pro-competitive effect of effective competition outweighed the anti-competitive effect of hindering potential competition.

Large Corporations' Penetration of the CFL Market

Name of Corp.	Capital(KRW)	Major Products	Market Share
Kumho electronics	60 billion	Fluorescent lamp	22.8%
Osram Korea	6.5 billion	Fluorescent lamp	9.2%
Shinkwang Phillips	1.2 billion	Fluorescent lamp	0.5%
GE lighting Korea	8 billion	CFL	2.3%

4.3 Entry Barriers

- Since SDD-GE joint venture had Samsung Electronics' sales network of up to 2 000 agencies, new participants would in effect be confronted with a substantial entry barrier in securing distribution networks.

- At the same time, however, the CFL market was removed in 1995 from the list of markets reserved for SMEs and removed in 1997 from the list of items requiring import diversification. Hence, it was a competitive market with no institutional entry barriers, and Daewoo Electronics and LG Electronics could very well enter into the market at any time.

5. Conclusion

- Basically, this merger was a conglomerate merger that strongly stimulated competition with a new business making inroads into the market.

- There was little reason to judge that this merger restrained competition, as large corporations from both Korea and foreign countries were already participating in the market, and as lamps, including CFL, were mass-produced by large corporations in foreign countries.

- In this merger plan, however, large businesses with overwhelmingly superior positions in terms of capital, distribution network, brand power and marketing skills were merging and advancing into a market largely occupied by SMEs.

- That meant that the merged parties might drive out the existing SMEs and establish market dominance. Moreover, when large corporations with abundant capital and distribution network were competing with SMEs lacking in competitiveness, the situation could raise the issue of fairness in competition.

6. Remedial Measures for the Ills of Conglomerate Mergers (Undue Intra-group Transactions)

Korean chaebols are large business groups in which numerous businesses are intertwound through ownership and control relationships. Some of their features include: ①Most business groups have affiliated corporations operating in various types of industries; *a*) Many of the affiliated corporations command dominant power in their individual markets; and *b*) The internal share ratio (sum of family share ratio and affiliated corporations' share ratio) of the top 30 business groups averages above 45 percent (as of 2001). Hence, the business groups are characterised by severe concentration of ownership and group-oriented, fleet-like management structure with a single figure heading the entire group.

Under such structure, affiliates of a business group often engage in vast cross-support and reciprocal trade with other affiliates in the business group (affiliate trading or intra-group trading).

Cross-support and reciprocal trade among affiliated corporations help the affiliated corporations to gain competitive advantage over non-affiliated corporations by supporting and subsidising affiliates through monopolistic power and capital advantage. The resulting competitive advantage, devoid of efficiency, brings side effects such as distortion of the competition process and undermining of the efficient distribution of resources.

That is to say that undue intra-group transactions in business groups are recognised as the causes of the continued and aggravating economic concentration.

Article 23 of the MRFTA entitled Prohibition of Unfair Business Practices regulates the undue intra-group transactions in large business groups.

In July 1992, the KFTC prepared the Review Guidelines for Unfair Business Practices of Large Business Groups and outlined the types of and criteria for unfair business practices conducted by corporations belonging to large business groups. They include practices aimed at mutually supporting the affiliates of a business group.

"Types of and Criteria for Unfair Business Practices Aimed at Mutually Supporting Affiliates Belonging to a Large Business Group - Review Guidelines for Unfair Business Practices of Large Business Groups".

- Unreasonable refusal to transact with non-affiliated corporations for intra-group transactions.

- Discrimination in treating affiliated and non-affiliated corporations without justifiable reason.

- Affiliated corporations' reciprocal support to eliminate competitors (predatory pricing, cross support).

- Unreasonably coercing non-affiliated corporations to deal with affiliated corporations (reciprocal trade).

- Transactions unreasonably restricting dealing partners to eliminate competitors.

- Coercing sales to transaction corporations' officers and employees.

Restrictions on intra-group transactions in business groups have the effect of ensuring efficiency from and enhancement of vertical integration and business diversification on the one hand and regulating the abuse of vertical integration-structure and conglomerate power on the other.

That is why the KFTC prohibits competition-restrictive behaviours rather than vertical integration or conglomerate mergers per se. That is, the KFTC focuses on restricting acts aimed at eliminating competitors through predatory practices or disadvantaging competitors by raising expenses through interruptions.

7. Restrictions on Economic Concentration

7.1 Significance: Measures (preventive measures) aimed at preventing competition restraint and systemic risks arising from reckless expansion through conglomerate mergers.

Korean business groups' competitiveness comes from the ability to diversify businesses in line with the changing economic climate and market conditions at home and abroad. Also, a significant part of their competitiveness comes from the efficiency gained by organically integrating the management, people, capital and distribution resources among affiliates.

It is true that larger businesses incur more costs in terms of internal control, management, co-ordination, and so forth. However, the business group structures and their management policies may be an attempt to maximise the benefits of integration while minimising the costs associated with integration.

That is why the MRFTA refrains from fundamentally prohibiting business combinations or various forms of business expansion.

At the same time, however, chaebol businesses often engage in unbridled expansion due to the absence of supervisory function by the financial market and overbearing corporate governance by the CEO. Such expansions, which are unfathomable in any rational capital market, lead to severe concentration of economic power, restraint on competition and moral hazard epitomised by the thinking that business groups are too big to fail.

> The prevalent view is that the financial crisis of 1997 was the result of extremely fragile corporate financial structures stemming from reckless expansion by chaebols at home, coupled with sudden instability in the financial market abroad.

Against that backdrop, the competition law of Korea sets certain limitations on such limitless expansion by the chaebols and strives to prevent excessive concentration of economic power and the resulting restraint on competition as well as a systemic risk of the entire economy.

Fully aware of the defects in the Korean financial market and the distorted corporate governance due to concentration of ownership, the KFTC designates large business groups according to certain criteria. The groups designated as such are subject to limitations on cross equity investments, debt guarantees and total amount of equity investments.

8. Regulations

8.1 Application of Regulations Aimed at Easing Economic Concentration (Designation of Large Business Groups)

Every year, on the first day of April, the KFTC designates large business groups and large business groups subject to limitations on debt guarantees. Should there be any changes, the owner of the group and the relevant corporation are notified of the changes once every month.

The selection criteria for the large business groups is the combined total amount of assets in the balance sheet pertaining to the immediately preceding business year for Korean corporations belonging to the same business group. Based on that information, the KFTC selects 30 business groups showing the biggest amount of assets.

Corporations belonging to the designated business group are subject to restrictions on cross equity investment, cross debt guarantees and total amount of equity investment.

9. Restrictions on Economic Concentration

9.1 Ceiling on Total Amount of Equity Investment

Background

- It is difficult to restrict unreasonable business expansions, such as controlling of affiliates through indirect cross equity investments.
- They can easily reduce their debt equity ratio without actual increase in shareholders' equity.
- When an ailing affiliate is kept alive by having other affiliates purchase its new shares, the illness of that one affiliate spreads to the entire business group. That warrants concerns about the ills of a fleet-style management.

Ceilings

- No corporation belonging to a large business group shall acquire or own shares in other Korean companies totalling more than twenty-five percent of the net asset of that corporation.

Exemptions and Exceptions

- Corporations engaging in financial or insurance businesses or holding companies are exempt from the restrictions.
- Companies engaged in corporate restructuring, attraction of foreign capital, strengthening of co-operation with SMEs or venture companies, and transformation into holding companies shall be deemed as exceptions.

9.2 Prohibitions on Debt Guarantees for Affiliated Corporations

Background

- Debt guarantees between affiliated corporations have the effect of concentrating loans to large business groups, aggravating concentration of economic power along with cross equity investment.

- Moreover, cross debt guarantees hinder the liquidation of uncompetitive marginal affiliates, making the entire business group brittle and even making financial institutions vulnerable.

Restrictions

- With regard to loans from Korean financial institutions, corporations belonging to large business group subject to limitations on debt guarantees to affiliated corporations had to remove their debt guarantees by 31 March, 2000.

- At the outset (March 1993), the restriction on debt guarantees stood at 200 percent of shareholders' equity. That was reduced to 100 percent in April 1997 and to zero percent in April 1998.

However, the amount debt guarantees pertaining to corporations acquired under industrial rationalisation plans and the amount of debt guarantees required to strengthen international competitiveness are excluded from the total amount of debt guarantees.

9.3 Prohibition on Cross Equity Investment among Affiliated Corporations

Background

- Cross equity investment is used as a means to artificially increase capital (imaginary capital) without any investment or to expand affiliated corporations.

- Cross equity investment helps affiliates to avoid going public and allows a certain large shareholder to have control over multiple affiliates.

Restrictions

- No corporation belonging to a large business group shall acquire or own any shares of an affiliate belonging to the same group that owns shares of the corporation.

- By the way, the reason that cross equity investment in non-affiliates is not prohibited is that the decision to invest is made by a different decision-maker.

However, exception for a period of no more than 6 months shall be given to mergers or take-over of the entire business; exercise of security rights; or the receipt of accord and satisfaction (payment in substitutes).

10. Economic Efficiency Growth from Conglomerate Mergers: Information and Communications Venture Business

10.1 Economic Efficiency Growth from Conglomerate Mergers

The trends of business combination in Korea in 2000 reveals that the number of business combinations by the top 30 business groups have grown from 168 to 237, and most of them were in the form of stock purchases or conglomerate mergers.

The increase in the share of conglomerate mergers among the top five business groups (39.7 percent) is far above that of businesses in general (23.3 percent). That is probably the result of the rush toward investment in venture businesses last year.

Businesses involved in conglomerate mergers enjoy diverse effects of economic efficiency growth: advantage in procuring funds, spreading out risk, and technological and functional synergy effects are some of them.

10.2 Economic Efficiency Growth from Conglomerate Mergers

When surplus capacity arises from uncertainties in the world, companies formed by conglomerate mergers can easily adapt and raise profitability by adjusting the scope and direction of their activities.

Companies formed by conglomerate mergers operate in diverse markets; hence, they are at an advantage in securing resources. Such companies also have advantage over other companies in producing funds, since the abundant resources of the business group can be shifted randomly to particular markets.

As companies formed by conglomerate mergers engage in diverse businesses, they can reduce profitability declines and other losses arising from business fluctuations or decline in demands. By the same token, such companies can actively advance into high-risk, high-return businesses.

In particular, the effect of efficiency growth is greater in relatively less open and developing economies (as Korea was not too long ago) than in open and mature economies. That is because the underdevelopment of the capital market leaves internal capital market a big task for the management. Also, dispersion of risk through diversification is more effective in a less open economy.

However, when the economy is more open and the financial sector or the capital market matures, such economy may see technological and functional synergy effects, but the effect of efficiency growth is hardly felt. In fact, the growth in the size of businesses incurs management inefficiencies.

Following the financial crisis in 1997, Korea enforced strong corporate restructuring policies. Moreover, the financial market was rapidly liberalised. As a result, businesses' perception of conglomerate mergers and diversification gradually changed. Rather than building business empires that are too big to fail, businesses are increasingly choosing conglomerate mergers that bring technological and

functional synergy effects. The recent combinations of chaebols and IT venture companies would be a case in point.

10.3 Merger between Large Business Groups and IT Venture Businesses

Lately, Korean chaebols have been making active advancements into venture businesses by investing in information and communication venture businesses and engaging in strategic alliance with them.

Investments by those large business groups included: *(1)* securing strategic alliance with, or engaging in M&A with, front-runner venture corporations with strong, independent engines of growth; *(2)* incubating young venture corporations, and *(3)* cultivating in-house venture businesses and spinning them off.

Venture Capital by Top Four Business Groups
(Estimated value, Unit: Million KRW)

	SK	Samsung	LG	Hyundai
Existing Investments	258	1,226	600	1,720
New Investments	650	8,134	4,600	4,080
Period of Investment	(00-01)	(00-03)	(00-05)	(00-01)
Total Investment	908	9,360	5,200	5,800

Chabol mergers with IT businesses are aimed at raising efficiency and creating synergy effects from the combination of traditional industries with information and communication technology. It is also aimed at diversifying their business models and strengthening their competitiveness.

This is a big break from the past. In the past, businesses expanded recklessly based on debt financing. Now, they procure capital through direct finance (by issuing shares) and establish affiliates based on direct investments.

The IT venture companies have the effect of stimulating business start-ups and bringing vitality to industries by creating new opportunities. Further, they pressure the existing big businesses to innovate.

IT ventures may have abundant ideas and skills, but they lack capital and management know-how. The large businesses and IT ventures can co-prosper as the former can complement the shortcomings of the latter by providing the core competencies and management capabilities accumulated off-line. Also, the participation of the large businesses in the IT ventures is important in promoting digital economy and finding an alternative to the chaebol business composition of the past.

11. Policy Implications

The KFTC believes that the economic effect of conglomerate mergers varies by markets.

- Compared to a closed economy, in an open economy, it would be relatively difficult to gain market share or dominate the market through conglomerate mergers. Hence, the degree of openness of an economy may serve as a yardstick for judging the anti-competitive impacts of conglomerate mergers.

- Compared to an economy in which the board system is advanced and the audit system is tightly controlled, the anti-competitive impact of conglomerate mergers may be much more severe in economies where the corporate governance is centered around the group CEO or a handful of executives.

- In an economy where the financial market or the capital market lacks the ability to supervise businesses, the anti-competitive impacts of conglomerate mergers may become severe. That is because unfair trade practices (reciprocal trade, cross-support) that undermine shareholders' value will go unchecked by the capital market or the financial supervisory functions.

Strict regulation of conglomerate mergers in the early stages of economic development may hinder the industrial structure improvement effects of conglomerate mergers. At the same time, however, economies in the growth stage are relatively less open and their corporate governance and financial markets are underdeveloped. Under such circumstances, economies need to beware of the anti-competitive effects of conglomerate mergers.

Korea focused on preventing anti-competitive transactions among businesses (reciprocal trade) and reckless expansion of businesses by enforcing laws and policies to restrict concentration of economic power and undue intra-group trading.

For countries in the process of economic growth, it may be advisable to choose the Korean model in terms of benefiting from the structural improvement effect of conglomerate mergers.

The Korean model is designed to regulate conglomerate merger in phases and in accordance with the degree of economic development, degree of market openness, and changes in financial market and corporate governance.

Regulation of Conglomerate Mergers by Economic Development Stage

	1st stage	2nd stage	3rd stage
Main Policy	Deter concentration of economic power	Undue intra-group transactions restrictions on economic concentration	Restrictions on conglomerate mergers Undue group transactions restrictions on economic concentration not recommendable in the mid to long term
Market Situation	Period of economic growth Closed economy Underdeveloped supervisory functions of the financial market Lack of decentralisation in corporate governance structure	Transition from the 1st to the 3rd stage	Open market structure Well-functioning supervisory role of an advanced financial market structure Decentralisation in corporate governance structure
Policy Goals	Prevent reckless corporate Expansion	Prevent competition-restrictive reciprocal trade among affiliated corporations in a business group	Maximisation of functional effect of conglomerate merger

Since the financial crisis hit in 1997, Korea has seen an acceleration of decentralisation in corporate governance structure, and there is a growing momentum to reform the outdated structure of the financial market. Following the UR, Korea has made steady efforts to remove tariff and non-tariff barriers and to open the service sector. These movements will greatly enhance the openness of the Korean economy.

Such developments are expected to enable Korea to block in advance the anti-competitive effects and various side effects of conglomerate mergers.

SPAIN

1. Introduction matters

The Spanish legislation on Competition does not include any abstract or explicit definition of conglomerate mergers. Nevertheless, the common concept of conglomerate mergers is implicitly accepted by the Competition Authority. That is, it refers to those transactions involving “firms that are not actual or potential competitors and that do not have an actual or potential customer-supplier relationship”. This definition would correspond to the concept of pure conglomerate mergers.

But there are other kinds of conglomerate mergers. “The area of conglomerate mergers ranges from the pure conglomerate, in which there are no discernible economic relationships between the businesses of the acquiring and the acquired firm, through a variety of what may be called mixed conglomerates, involving horizontal or vertical economic relationships other than those characteristic of the simple mergers just described” (Conglomerate Mergers and Section 7 of the Clayton Act, Turner, Harv. L. Review 1313 (1968)). In this second case, firms are functionally related.

2. Anti-competitive effects associated with portfolio effects

Portfolio effects have appeared in mergers where the products being merged have a common customer who buys a range of goods. These are usually consumption goods whose main value for consumers is brand. For this reason, the firm that owns the brand has a near monopolistic power when bargaining with retailers, the middlemen between producers and consumers. Usually, the retailers that buy the products, which make up the portfolio, could optimise their purchase policy by acquiring the range of products of one provider.

At the same time, brands create barriers to entry due to the high expenditures in advertising and promotion that are required to introduce and sustain a brand in the market.

Thus, the portfolio effect is characterised by the following elements:

- The products of the portfolio, despite not being substitutes, are acquired usually by one customer – the retailer - that could optimise its purchase policy by acquiring the range to one provider.

- The products involved are branded consumption goods. The brand is the main determinant of demand.

- The portfolio is made up of must-stock brands, whose presence is essential in any retail premise.

As a result of the portfolio effect the firm is able to offer clients a larger range of goods, it would have a larger share of clients’ purchases, it would have a greater flexibility to set its prices, promotions and

discounts and an increased power to impose conditions. As a result of this, the threat of refusal to supply would be more important. So, all these factors may strengthen customers' incentives to increase their purchases from the same provider.

In addition, it would improve its position regarding competitors since it could attain scale and scope economies in sales and marketing.

This in itself could create or strengthen a dominant position even when market share does not increase. The market power deriving from a portfolio of brands exceeds the sum of its parts, according to the European Commission (EC).

The sources of this additional market power identified by the EC are the following:

- The merged firm would be more attractive because it would offer a larger range of products.
- Economies of scale and scope would be realised in sales and marketing.
- There would be greater potential for tying products.
- The threat of a refusal to supply would be more potent.

The first two possibilities should not harm the customers of the merged firms because they lower costs. Competitors might be worse off. The latter two possibilities are of particular concern when there is a chance that rivals will be excluded from the market.

The EC has pointed to three characteristics of the merged firm providing the mechanisms that could allow portfolio power to be exercised.

- Wide portfolios and must-stock brands. The range of must-stock brands under the control of a single company increases. The combination of a number of theses brands is thought to increase the bargaining power of the brand owner.
- Size. Growth in overall size of the merged firm would give it increased market power, simply through its greater importance as a trading partner for its customers.
- Deep portfolios and secondary brands. Control over a large number of brands would allow the supplier to pull-through secondary brands as a result of control over a strong brand.

Thus, the portfolio effect may create barriers to entry and increase the risk of tying. The closer products involved are, the more likely the risk of tying is and accordingly the risk of excluding competitors.

But, for these effects to take place, two conditions are required: first, the client must not have enough power to offset the increased power of the portfolio owner. Second, competitors must not have portfolios that could be alternative supply sources for clients.

Portfolio effects may strengthen market power of firms involved. In principle there is no reason to exclude the possibility of abuses through different ways, and among them through predation. This means that a dominant firm undertakes an unfair trade practice so as to eliminate, discipline or deter competition. This is the strategy of a dominant firm to monopolise the market. It can adopt different ways: price, brand

proliferation, investment in capacity, financial predation, aggressive advertising campaigns, long-term exclusivity contracts with customers or providers.

Portfolio effects may create or strengthen a dominant position through various ways, including the greater potential for tying products and threatening to refuse to supply. These effects may exclude competitors from the market as the merged firm may use its increased market power to leverage its secondary brands. If available space were limited, then the emergence of the secondary brands would mean the exit of other competitors' brands. At least in principle, the possibility that the merging firm's objective is to force competitors' exit cannot be excluded. In addition price predation may be even more likely when the merged firm has enough financial capacity to sustain a price decrease that causes a potential entrant to think that entry is not profitable.

In order to conclude what the net effects on consumers are, a case-by-case analysis is required. The effects on consumers depend on the size of merging firms, on the chances that portfolio effects emerge and on the efficiency gains. If as a result of a merger portfolio effects strengthen substantially the dominant position of the merged firm, no efficiency gains could offset these harmful effects.

3. Efficiencies associated with conglomerate mergers having portfolio effects

Conglomerate mergers involving portfolio effects could generate efficiencies. First for merging firms it allows them to realise scale and scope economies in sales and marketing. These effects increase efficiencies and are supposed to benefit consumers through lower production and distribution costs.

The merged firm may also provide some customers with a more convenient service, reducing their transaction costs since they can acquire the relevant range of products from one provider.

These are the positive effects of these kinds of mergers that must be compared to the potential anticompetitive effects of mixed conglomerate mergers.

4. Barriers to entry and countervailing power

Portfolio effects are more likely to emerge in mergers involving producers of close branded consumption goods. They are not perfect substitutes but are close in terms of their use. They are usually acquired by the same customer (the distributor).

Markets where products are differentiated through advertising are characterised by high barriers to entry. Consumers' loyalty to brands gives the producer a local monopoly power. Firms invest heavily in advertising and R & D to differentiate their products. This creates high barriers to entry since these investments could be considered as sunk costs. These barriers could be reinforced by other characteristics of the market, such as the absence of foreign supply through imports, the bargaining power of distribution and its degree of concentration, expected market growth, etc.

The portfolio effect may reinforce the existing barriers to entry if there are no compensating forces, since it increases the risk of tying and the threat of refusal to supply of the merging firm, besides allowing the owner of the portfolio to set discounts so as to incite customers to concentrate their purchases on the same provider. If this power is not offset by a powerful distributor and other competitors with a comparable portfolio do not exist, the merging firm may use its power to block entry.

5. Merger cases in involving portfolio effects

In the last five years, the Spanish Competition Authority has dealt with three cases of mergers involving portfolio effects. Only two of them are included in the present submission, because in the third case, the firms involved decided eventually not to merge. Both cases refer to mixed conglomerate mergers in which the firms involved had horizontal economic relationships. In fact, both cases are mergers of sellers of functionally closely related products that are not however, substitutes. In both transactions, portfolio effects were present.

5.1 The PROCTER & GAMBLE CO/TAMBRANDS INC

The first one refers to the acquisition of 100 percent of the capital of the firm TAMBRANDS INC. by THE PROCTER & GAMBLE CO. The transaction was notified in 1997 and the Council of Ministers took the final decision on May 14, 1998. The transaction had effects on Spain and on ten other countries. In Italy, Belgium and France the merger was authorised without conditions.

THE PROCTER & GAMBLE CO. is a leading multinational firm that produces and sells an ample range of consumption goods. In Spain it operates through PROCTER & GAMBLE ESPAÑA S.A. that commercialises cosmetics, pharmaceutical products and detergents and through ARBORA (THE PROCTER & GAMBLE CO owns 50 percent of its capital) that operates in the feminine personal hygiene products sector. In addition, THE PROCTER & GAMBLE CO. owns 25 percent of capital of AUSONIA through its participation in ARBORA.

TAMBRANDS S.A. is an American company whose main activity is the production and distribution of cosmetics and personal hygiene products. Its main product in Spain is TAMPAX tampons that are in fact distributed exclusively by ARBORA even though the exclusivity clause of the contract between ARBORA and TAMBRANDS was eliminated after the Council of Ministers' decision of 1993.

The merger raised some important issues from a competition point of view, since it could reinforce the dominant position of the firms involved, which were THE PROCTER & GAMBLE CO. and ARBORA. The first, because it became the owner of TAMBRANDS and the latter due to its condition of being the de facto exclusive distributor of TAMPAX.

The definition of relevant market was quite controversial since the Competition Authority had to decide whether various female hygiene products were substitutes or not. Finally, the relevant market for the transaction was defined as the tampons market in Spain. This is one of the most important features of this case. Defining the relevant market in this way, there was no addition of firms' market shares, as a result of the transaction; and so, the evaluation of the portfolio effect became extremely relevant.

This was a highly concentrated market. PROCTER & GAMBLE was the largest firm with a market share of roughly 80 percent and Johnson & Johnson, the second main competitor in the market had a market share of 18 percent. In addition, PROCTER & GAMBLE had the largest shares in all segments of the market of hygiene products.

The Spanish consumers showed a clear preference towards the type of products commercialised by ARBORA. In fact, TAMPAX was the leading brand with a market share of roughly 80 percent. There were no distributor brands that could potentially compete with TAMPAX. And the rest of competitors had gradually disappeared.

Due to its high market share, the TAMPAX brand was a must-stock brand for distributors. This gives the owner of the TAMPAX product an advantageous position vis à vis distributors that would allow it to negotiate better contractual terms, lineal space in stores and promotion opportunities. A competitor in

the market would on the contrary, have to convince stores of the need of having its products or pay a high cost for it or even commercialise some of its products through specialised channels.

Through the transaction PROCTER & GAMBLE would become the owner of all brands of its portfolio that, in addition, contained must-stock brands. This would increase its bargaining power *vis-à-vis* distributors.

In addition, the relevant market in Spain showed a low degree of contestability, due to the existence of significant barriers to entry that limited the development of competition.

First, this is a market of branded goods. Firms need to heavily invest in R&D and advertising to develop a new brand and to sustain it in the market. Barriers to entry related to advertising take two forms: first, the high initial investment required to entry the market which is characterised by the low price elasticity of demand and brand loyalty, since quality is more important than price for consumers when choosing a product. Second, firms such as the one resulting from the transaction, which operate in more than one market of personal hygiene products, enjoy a competitive advantage in being able to negotiate better terms with distributors.

Investments in advertising are not only used as a credible threat to deter entry but also as an actual threat to impede entry (this was the case when PROCTER & GAMBLE prevented FINAF in the United Kingdom from obtaining a sufficient market share to recoup its investments, incurring then sunk costs).

As quality is the main determinant of demand, firms try to link their brands to an image of quality. This fact explains brand loyalty that creates a new barrier to entry. Competitors have found it difficult to introduce their brands in the Spanish market. Even the notifying firm has preferred in other countries to buy brands to enter the market rather than developing a brand of its own.

In addition, the market was stagnant. Thus increases in one firm's market share imply decreases in other firms' shares. Moreover the development of new varieties and characteristics of products and aggressive price and discount policies carried out by incumbents limited profitable opportunities for competitors.

For the same reasons parallel trade was scarce, since the profits that producers may obtain through price discrimination were so high that they sought agreements with distributors by which they passed on part of profits to them on condition that they did not carry out parallel trade.

The financial power of the resulting group must be also born in mind (conglomerate effect) since it could reinforce the dominant position of the group in a market where firms need a large financial dimension to undertake investments required to operate.

There are other barriers to entry that would deter entry of new competitors. On the one hand, distribution had been concentrating and accordingly, the range of brands in the markets had been declining. On the other hand, the bargaining power of PROCTER & GAMBLE would increase as a result of the transaction, because it would gather in its portfolio a series of leading brands in female hygiene products (TAMPAX, EVAX and AUSONIA).

The above barriers are reinforced by the emergence of a portfolio effect.

According to the Tribunal, the portfolio effect appears when the same operator is able to offer a range of products, in which it has a high market share, in such a way that the market power stemming from this portfolio exceeds the market power deriving from the addition of the portfolio components.

The holder of a portfolio of leading brands enjoys a series of advantages: it is in better position *vis-à-vis* customers, it has more flexibility to design its price and discounts policy, it has more capacity to mark out the market, it can reap scale and scope economies in sales and marketing and the threat to refuse to supply and the risk of tying are more present, increasing its bargaining power.

Its effects on competition depend on a number of factors: the leading brands merging firms have in the markets, the market share of each brand, the relative importance of markets where brands have high shares in markets where the portfolio is present and the number of markets where the holder has a leading brand. But also on the relative importance of competitors' brands and portfolios.

The importance of the TAMPAX brand in the market along with low price-elasticity of demand, requirements of high investments in advertising campaigns and the efficacy of publicity when protecting a large-scale consumption product led the Tribunal to the conclusion that TAMPAX's share market would remain as high as it was then and that for retail distributors it would continue being a must-stock brand. In addition, the merger would reinforce the technological capacity of TAMBRANDS.

As a result of this transaction, PROCTER AND GAMBLE would gather in a portfolio the main brands in female hygiene products. PROCTER AND GAMBLE would have an ample portfolio that would allow it to set its discounts in a way that encouraged retailers to buy the largest volume possible and to offer retroactive discounts to retailers if they reached a certain volume during a certain period (targeted discounts) and to apply these discounts to each brand or to the whole range of brands. This practice incites customers to increase to the utmost their purchases from an individual provider and refrain from switching to other providers. In addition, distribution remained restricted to national markets, thus it could not offset the portfolio effect stemming from the transaction.

The Tribunal recommended imposing conditions on the merger so as to avoid its anticompetitive effects related to ARBORA's product portfolio. These conditions were the following:

- PROCTER & GAMBLE must provide these products through its subsidiary PROCTER & GAMBLE ESPAÑA S.A. on non-discriminatory terms. ARBORA will be able to acquire these products for its distribution on the same terms as other distributors.

- Neither PROCTER & GAMBLE nor its subsidiary PROCTER & GAMBLE ESPAÑA S.A. may exchange information on their management of the range of TAMPAX products with ARBORA.

- ARBORA is not allowed to apply in its commercial relations with clients any exclusivity clause, discounts depending on purchase volume and tying clauses. ARBORA must inform the Servicio of its contracts.

- These conditions will apply until a major change in competition conditions happens.

The Council of Ministers took its final decision on 1998. It authorised the transaction subject, in essence, to the following conditions:

- In three months time from the issue of this decision, PROCTER & GAMBLE will appoint at least one independent distributor for TAMPAX, which will obtain the product on the same terms as ARBORA.

- ARBORA is not allowed to apply in its commercial relations with clients any exclusivity clause, discounts depending on purchase volume and tying clauses for a period of three years from the moment an independent distributor is chosen.

- Both firms must provide the *Servicio* with all the needed information to meet these conditions. PROCTER & GAMBLE must provide the Servicio with information on the terms of distribution of TAMPAX, the volume of product commercialised by each distributor and the terms of distribution contracts.

5.2 SARA LEE DE ESPAÑA S.A./RECKITT & COLMAN P.L.C.

The second case refers to the acquisition by SARA LEE DE ESPAÑA S.A. of the NUGGET and KANFORT brands (these are brands of footwear cleaning products) owned by RECKITT & COLMAN P.L.C.

SARA LEE DE ESPAÑA S.A. is a subsidiary of DOUWE EGBERTS ESPAÑA S.A. It commercialises food, hygiene and home products (including footwear cleaning products).

RECKITT & COLMAN S.A. produces and commercialises pharmaceuticals, food and home products (including footwear cleaning products).

The transaction implied the disappearance of a competitor in this specific market and the increase of SARA LEE's share market. Thus, the transaction could change competition conditions in this market.

The relevant market of the transaction was the market for leather footwear cleaning products distributed through non-specialised shops in Spain. SARA LEE was the principal operator with a share market of 34.2 percent. It operated in all segments of the relevant market with the brand KIWI, a leading brand in one segment of market. RECKITT & COLMAN was the second main operator with its two brands NUGGET and KANFORT with a market share of 30.2 percent, which were leading brands in two other segments. There were other competitors with lower share markets. With the transaction, SARA LEE reinforced its dominant position in three segments of the relevant market.

The economic analysis was similar to the analysis in the previous case. The degree of concentration in the Spanish market was high and the acquisition was expected to increase it still more. However, given the existence of large competitive groups worldwide, potential competitors could be expected to enter the market, at least in theory. But this entry was deterred by the fact that this market was stagnant. The cost of entry with a brand of its own and unknown in the market deterred entry as the expected profit of entry is offset by uncertainty on the recovery of investments needed to promote brand.

This is a branded goods market, where quality is a key determinant of demand rather than price. Consumers are loyal to brands and price-elasticity of demand is low. Thus high investments in advertising are needed to introduce and sustain brands. These characteristics create significant barriers to entry. In addition, high R & D investments are required in some phases of production.

These barriers could be offset by the characteristics of distribution. The product is mainly distributed through hypermarkets. But bargaining with suppliers is carried out still at national level. This together with the presence of brands owned by SARA LEE in a large number of markets, where it has must-stock brands, increases the bargaining power of SARA LEE regarding distributors, exceeding the power stemming from the addition of the portfolio components (portfolio effects). The components of SARA LEE's portfolio after the merger were the following brands of leather footwear cleaning products: KIWI, KANFORT and NUGGET, which are leading brands in three segments of the relevant market.

On the other hand, incumbents and new entrants could see their access blocked not only by the reinforcement of the notifying firm's power but also by the growing degree of concentration in distribution. The range of brands supplied would diminish and the increases in prices or margins would benefit both producers and distributors.

In addition to the portfolio effect, there is the financial and technical capacity of SARA LEE, one of the largest holding companies of consumption products in the world. This capacity, along with the portfolio it holds, would offset the power of distributors.

Taking into account this analysis of market contestability, the Tribunal recommended declaring the transaction contrary to law. In this case, the Council of Ministers, in line with its decision in the previous case, decided to authorise the transaction, subject in essence, to the following conditions:

- The non-competition clause will be valid for a period of three years.
- SARA LEE renounces its options to buy stakes acquired by the group RECKITT & COLMAN in distributors of leather footwear cleaning products in Spain.
- RECKITT & COLMAN will be able to produce leather footwear cleaning products under brands other than NUGGET and KANFORT for third firms from 30 September 1998 on.
- During a period of three years, SARA LEE will refrain from applying in its relations with clients any exclusivity contract concerning distribution and commercialisation of the products involved in the transaction.

6. Remedies and some conclusions

The concept of portfolio effect is quite useful to capture some of the effects that could emerge in conglomerate mergers involving producers of branded goods in markets with the characteristics described. The Competition Authority must take into account these effects in its analysis of the effects on competition and of welfare effects of the transaction.

In Spain the test applied is based on whether the merger hinders the development of effective competition in the market concerned. In both cases included in the present submission, the conclusion was that portfolio effects emerging in these transactions could strengthen the dominant position of the firms involved in a market where there were significant barriers to entry. Thus, the transactions were authorised but subject to conditions.

There are no rules applicable to all cases of mergers involving portfolio effects. Decisions require a case-by-case analysis. Even when portfolio effects appear, the Competition Authority must take into account the characteristics of the market affected by the transaction. Anticompetitive effects of portfolio effects could be less important if there are no significant barriers to entry and therefore there is scope for competition to develop.

Merger control provides an ex ante control of market structure in order to prevent a dominant position from being created or strengthened. This ex ante control is especially appropriate when the transaction is expected to create or strengthen a dominant position and there are barriers to entry that the Competition Authority is not able to lower.

Certainly, the Competition Authority may also wait until the abuse of the dominant position has happened. However, the ex post control of conducts might be risky from a competition point of view, when

firms involved in the merger already have significant market shares and there are high barriers to entry and there is no scope for competition to develop.

When facing conglomerate mergers involving portfolio effects if there are significant barriers to entry, merger control could be a more appropriate option than relying on an ex post control of the dominant firm through competition legislation applicable to anticompetitive conducts such as abuse of dominance.

SWITZERLAND

1. Introduction: Swiss control of conglomerate mergers

The law governing merger control in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Acart), which was put into force on 1 July 1996. Further provisions concerning the control of concentration of enterprises are stipulated in the Ordinance on the Control of Concentration of Enterprises of 17 June 1996 (OCCE).

The law defines a concentration of enterprises as "the merger of two or more enterprises hitherto independent of each other" (merger by absorption or by formation of a new entity), or "any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity of interest or conclusion of an agreement, direct or indirect control over one or more hitherto independent enterprises or of a part of thereof" (article 4 par. 3 Acart).

According to the law, the Competition Commission may prohibit a concentration or authorise it subject to conditions or obligations if the investigation shows that the concentration creates or strengthens a dominant position liable to eliminate effective competition, and does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position (article 10 par. 2 Acart).

The above-mentioned criteria generally apply to any type of merger. In its message[1] concerning the Acart, the Federal Council indicates that, in case of a conglomerate merger, it may be necessary to evaluate pro- and anticompetitive effects on different product markets. Thereby, the government defines a conglomerate merger as a merger of formerly independent enterprises, which do not operate in the same product market and are not related vertically.[2]

It follows from the above that Swiss merger control also applies to conglomerate mergers and that portfolio effects may be considered in the analysis of a proposed merger. A proposed merger, however, can only be prohibited or be authorised subject to conditions or obligations if the merger results in the elimination of effective competition in at least one product market.

Until now, the Competition Commission has considered portfolio effects of a merger in only one case (Unilever/Bestfoods), explained below.

2. The Case Unilever/Bestfoods

The portfolio power theory has been considered in merger control by the Swiss competition authorities in its Unilever (UL) - Bestfoods (BF) decision. Even if in some markets (e.g. food), the merger led to additions of market shares, in most markets only one of the merging firms was operating (e.g. cleaning products, which only UL offered). The UL/BF merger is therefore not a conglomerate merger in the strict sense of a merger of firms operating only in distinct product markets. Nevertheless, the theory of portfolio power has been applied in the preliminary investigation of this merger.

The merger between Unilever N.V./PLC (with headquarters in Rotterdam and London) and Bestfoods USA (with headquarter in Englewood Cliffs, New Jersey) was notified to the Competition Commission on 25 September 2000. The preliminary investigation led to the conclusion that the merger did not create or strengthen a dominant position liable to eliminate effective competition. Therefore, the merger was authorised and a regular investigation was not undertaken. [3]

During the preliminary investigation, the question of portfolio effects was raised and the potential of the merged company to abuse portfolio power was analysed. The Competition Commission concluded that the merger did not lead to problems of portfolio power for three reasons: *a)* there is considerable buying power of retailers (strong concentration in retail distribution), *b)* there is considerable actual and potential competition between producers, and *c)* food markets are characterised by rapid change in consumer preferences.

In order to define the relevant product markets[4], a retail and a catering sector were distinguished in the distribution of food products. Analogous to the European Commission in the case Unilever France - Amora Maille[5], a narrow definition of markets based on product characteristics was chosen (mustard and mayonnaise for example form two distinct product markets). The geographic market[6] has been defined as being national.

In contrast to the situation in other countries, only two product markets were considered to be affected[7] in Switzerland by the addition of market shares. These were characterised by a high market share of one of the two merging companies before the concentration and only a small market share of the other company. Hence, the merger did not result in the creation or strengthening of a dominant position liable to eliminate effective competition according to Art. 10 par. 2 Acart.

As far as the retail sector is concerned, the two merging companies operated in distinct product markets. While UL produced sauces for salads, mustard, oils and ice cream, BL supplied none of these products. On the other hand, BF operated in markets where UL was absent (soups, dehydrated instant meals, cold and dehydrated sauces, bouillon, spices and starchy foods). Therefore, as mentioned above, in most product markets there were no additions of market shares. The situation was analogous in the catering sector.

However, the merger resulted in the union of a considerable number of products and brands within one single company, which raised the issue of "portfolio effects".

The following potential problems with portfolio power have been considered:

- increased pricing flexibility, including the possibility to offer promotions and discounts with a potential for abuse;

- increased scope for bundling (tying the provision of one product with others);

- increased credibility of implicit or explicit threats of a refusal to deal.

In the analysis of portfolio effects, the presence of a 'key brand' in at least one product market has been presumed to be a necessary condition for a potential abuse of portfolio power.

A key brand is a highly successful brand for which consumers find it difficult to find a substitute. Therefore, it had to be assessed whether UL or BF produced key brands.

Because retail customers seem to attach more importance to brands than business customers (hotels, restaurants) or institutional customers (hospitals, homes for the aged), the analysis focused on the retail sector.

According to the retailers interviewed, UL and BF both produced products, which were leaders in their sector. Nevertheless, it is difficult to assess whether these brands constituted key brands according to the definition provided above. According to the retailers, consumer preferences change rapidly in the food sector. Regularly, brands loose their position as number one and are replaced by other brands. In other words, according to the retailers, a well established brand today is no guarantee for success tomorrow in food markets.

Similarly, retailers doubted that bundling, by which retailers would be forced to purchase certain goods if they would like to be provided with leading brands, would raise important problems for them. The level of concentration in the retail sector and the resulting buying power of retailers (of Coop, in particular) seems to play a crucial role for the present merger, insofar as it has a disciplinary effect on producers.

In summary, the buying power of trading partners, which are highly concentrated, was considered to be sufficient to avoid abuse of portfolio power by UL and BF. In addition, the leading brands' life cycles seem to be limited as a result of rapidly changing consumer preferences. Moreover, strong actual and potential competition between producers reduces the scope for abuse of portfolio power. For instance, firms like Nestlé and Migros are strong actual and potential competitors.[8] Because of their global know-how in the foods sector and their financial resources, these firms are able to rapidly enter new product markets if they expect substantial benefits.

For these reasons, the Competition Commission authorised the merger without any conditions after the preliminary investigation.

NOTES

1. Message of the Federal Council concerning the Federal Law on Cartels and Other Restraints of Competition', (Message; SR 94.100), p. 118.

2. Message, p. 82.

3. The control of concentration of enterprises is a two-tier procedure: a preliminary and a regular investigation. The preliminary investigation starts on receipt of notification. Its duration is one month. The Secretariat of the Competition Commission first examines whether there are elements in the concentration, which may create or strengthen a dominant position liable to eliminate effective competition. If so, the Competition Commission initiates a regular investigation. The duration of the regular investigation is 4 months.

4. According to article 11 par. 3 a) OCCE, the relevant product market includes all products or services which are considered substitutable by potential trading partners based on the products' characteristics and their intended purpose.

5. Case IV/M. 1802, decision of March 3, 2000.

6. According to article 11 par. 3 b) OCCE, the geographic market includes the territory in which the potential trading partners supply or demand the products or services of the relevant product market.

7. According to article 11 par. 1 d) OCCE, in general only those product and geographic markets are to be analyzed more thoroughly in which the combined market share of the merging companies exceeds 20 percent or in which the market share of one of the merging companies exceeds 30 percent ('affected markets').

8. Migros and Coop are the most important retailers in the food sector in Switzerland with a combined market share between 40 percent and 50 percent. The reason that Nestlé and Migros are strong actual and potential competitors is that Migros produces most of the goods it retails.

THE NETHERLANDS

It is possible that joining a range of products by means of a conglomerate merger increases market power despite little or no change in initial market shares in the defined markets. The OECD refers to such potential anti-competitive effects that might result from some conglomerate mergers, as "portfolio power effects" in its questionnaire of 23 July 2001. "Underlying the basic notion of 'portfolio power' is the idea that the market power deriving from a portfolio of brands exceeds the sum of its parts." The Netherlands Competition Authority (hereafter: NMa) recognises this possible effect of mergers that at a first glance do not raise competitive problems because there are no defined markets affected due to the absence of any horizontally overlapping activities.

We will answer the questionnaire mostly in the order as set out in the letter of 23 July 2001.

1. Introduction

1.1 What is the definition of "conglomerate merger" in your jurisdiction?

The NMa has not explicitly defined the concept of a conglomerate merger in any case or in other situations. In the context of what will be written hereafter, we consider a conglomerate merger to be a case where two companies, that are engaged in a range of activities, merge.

1.2 Please give, if you have them, examples of conglomerate merger reviews in which your authority has considered portfolio effects or something analogous to it. If such reviews have referred to "portfolio effects" or a similar term, please define and illustrate what is meant by the concept

Although the concept of "portfolio effects" has never been defined explicitly in a NMa case, we mean by it:

- The joint disposal or ownership, by two or more merging companies, of a range of activities that are related or are complementary for reasons of product characteristics or for geographical reasons. The detrimental effects of creating or enlarging a portfolio of products can, for example, consist in the ability to exploit products or services in markets where there is no concern about a dominant position, in a way that enhances the companies' market power in markets where they do have or obtain a dominant position. The decision in case 1528/*Wegener Arcade -VNU Newspapers* contains a reference to such an effect.

- However, it is possible that if you find portfolio effects increase relevant market power without increasing market shares you should question your market definition.

- Portfolio aspects have been taken into account in mergers that for the reason of high market shares on one or more markets brought up concerns about market power. In practice,

portfolio effects have been treated as an 'additional' circumstance in case of already existing concerns about market power on individual markets.

In case 1528/*Wegener Arcade -VNU Dagbladen,* the parties owned a large number of advertising media in the regions where their activities overlapped. Among these were regional newspapers, free door-to-door weeklies, Internet job sites, folders and direct marketing. They also owned one of two distribution agencies with national coverage (the other one being the postal office). "By combining the different advertising media, parties can offer advertisers a whole range of complementary advertising media, a custom made reach, exact timing, an extensive coverage and significant rebates if different media are combined." A study by the NMa showed, for example, that the possibility to get a free or strongly rebated, extra placement of a newspaper ad in a door-to-door weekly is important for 60-70 percent of all regional and local advertisers. Several competitors observed that such extra placements are a means to block entry in the low-price segment of the advertisement market.

Parties asserted that portfolio advantages should not be weighted in the decision, because they concerned activities that do not belong to the defined market. It was judged however, that the mere fact that the degree of substitution between different media is too small for them to be included in the same product market, does not lessen the competitive advantage that is obtained, as this advantage is the result of the media's complementarity, not of their substitutability.

In case 2184/*Air Products - AGA*, it was considered whether the ability to sell a range of both bulk and cylinder gases constituted a portfolio effect. By selling large volumes of bulk gases in combination with smaller volumes of cylinder gases, parties might be able to offer targeted discounts that could render infeasible efficient provision by cylinder only suppliers.

In case 2141/Remy Cointreau - Bols, is mentioned: "Remy has a broad range of international leading brands such as Cointreau, Passoa, Galliano (likeuren), Famous Grouse (whiskey) and Heidsieck (champagne). Bols has more traditional domestic products such as jenever en vieux and some leading brands such as Harteveld, Bols, Bokma, Henkes en Hoppe. The merger will bring together a broad range of products with leading international brands; in combination with the high market share on the market for cognac this portfolio effect seems to enhance the position of parties in relation to their customers and competitors".

2. Anti-competitive effects associated with portfolio effects

2.1 What do you see as the conditions, if any, under which a conglomerate merger involving portfolio effects could give a firm enhanced ability and incentives to exclude competitors through the use of tying, bundling, full-line forcing, exclusive dealing, targeted discounts, or refusal to deal?

As set out under 1.1 we did not bring up considerations exclusively due to portfolio effects, but brought up considerations about high market shares in combination with portfolio effects. Typically, a conglomerate merger involving a party with a dominant position at one level, that leads to increase vertical integration, may create incentives to refuse to deal and opportunities for exclusive dealing. The use of bundling may be facilitated if a range of products, that are exposed to competitive conditions, is, for example, distributed through the same channel as a number of 'must have' products (or brands). A protective type of full-line behaviour in combination with targeted discounting may be exhibited when a product on a contested market displays Leontieff-like, i.e. fixed proportions, complementarities with a number of other products that are not supplied by any competitors. For example, in the above mentioned

Wegener - VNU case, it was observed that entry in the regional advertisement market was deterred by launching door-to-door weeklies that offered highly discounted or free advertisements if combined with an ad in a regional daily.

What are the further conditions under which such exclusions would have a net harmful effect on consumers (remembering that the merger could also produce significant efficiencies)?

As the Netherlands Competition Act does not allow for an efficiency defence, only gross detrimental market power effects are evaluated.

2.2 In what ways could conglomerate mergers involving portfolio effects, increase abilities and incentives to predate? In answering this question you might wish to address issues such as how a conglomerate merger might significantly enhance the benefits of a predatory reputation, and/or increase a firm's option in responding to sequential entry?

2.3 Do conglomerate mergers involving portfolio effects, when they increase the number of markets in which the competitors meet, raise competitive concerns analogous to those found in cases in which multi-market contacts appear to increase the probability of anti-competitive co-ordination?

Although most research on the effect of multimarket contact indicates that it increases the feasibility and sustainability of collusive behaviour, it is not unlikely that conditions do exist under which a conglomerate merger actually increases competitive incentives.

The sustainability of collusion will depend on the differences in cost structures and the degree of symmetry in market shares. As Bernheim and Whinston (1990) have shown, the existence of home market advantages (cost asymmetries) can increase the sustainability of collusion because players can accept the dominance of a competitor in his home market. Evans and Kessides (1994) provide empirical support for this theory. In a study of the American airline industry, they find that airline fares are higher in city-pair markets served by carriers with extensive interroute contacts. Airlines live by the Golden Rule: they refrain from aggressive pricing actions in a route that is important for their competitors out of fear that these competitors will do the same in other jointly contested routes. In a study of US mobile telephony pricing Parker and Röller (1997) find that multiple market contact has a strong effect on pricing. Jans and Rosenbaum (1996) get similar results for the US cement industry.

2.4 Could a conglomerate merger involving portfolio effects ever harm consumers through increasing efficiencies? If so, what would be the necessary conditions?

If a conglomerate merger creates efficiencies and (bigger) asymmetries in cost structure, then it could in principle increase the possibilities for tacit collusion between companies that each have a home market advantage. However, it appears difficult if not impossible to identify the exact conditions under which this would be the case.

Another possibility is that a company with a dominant position in (for example) its home market merges with a similar product company in another geographical market. If efficiencies are only realised through reductions in fixed cost/investment, then if marginal costs are increasing, it is most likely that the company will charge higher prices in its home market and charge lower prices in the neighbouring market, where it does not have a dominant position.

3. Efficiencies associated with conglomerate mergers having portfolio effects

3.1 Do you believe that bringing together a portfolio or range of products purchased by the same set of buyers could generate important efficiencies for either the merged firm or its consumers? Your contribution might discuss how such a merger could:

- enable the parties to better understand and apply existing technology or develop new technologies (including enhanced ability to exploit R&D findings internally) or;
- help parties reap economies of scale or scope in production, marketing or distribution; and/or;
- save customers time and expense by providing them with one-stop-shopping and/or fewer deliveries, or products, which are easier to use in combination.

We believe that each of the efficiencies as mentioned can be generated. Of course the question which of the efficiencies can be generated depends on the circumstances of the case. A problem is that our system does not have an efficiency-criterion. Our test is whether economic dominance will be created or will be strengthened.

3.2 Although it is not usually thought of as an "efficiency", conglomerate mergers combining complementary products in which suppliers have significant market power, might lead to lower prices for one or both goods (because such a merger internalises the demand augmenting effect of reducing the price of a complement) What are your views on this issue?

We can see that portfolio effects can lead to lower prices but not only in cases in which the suppliers have market power. Combining complementary goods can lead to lower prices for reasons of one-stop-shop advantages. We do not see that significant market power should be a condition for lower prices in this situation.

In practice, such an internalisation of demand may be both welfare improving and welfare reducing. In the above mentioned case 1528/*Wegener Arcade -VNU Dagbladen,* selling advertisement in free door-to-door weeklies at near marginal cost most likely generated extra demand for advertisement space in regional newspapers. However, the low rates also worked as an entry barrier at the lower end of the market for advertisements.

4. Barriers to entry and countervailing power

4.1 What do you see as the various ways in which conglomerate mergers involving portfolio effects might raise or lower barriers to entry?

A strong party is often able to raise barriers to entry. If there is a strong party that possesses a wide range of products with leading brands as well, it is logical that this situation creates higher entry barriers than in a situation where several parties possess the individual leading brands.

5. Remedies

5.1 Most jurisdictions are willing to block or modify mergers they believe are potentially sufficiently anti-competitive, rather than rely on ex post control of anti-competitive agreements and various abuses of dominance. What are the pros and cons of adopting the same ex ante approach to mergers involving portfolio power effects?

The same as the pros and cons of the *ex post* control of mergers in general. We do not see a conceptual difference.

6. Portfolio Effects: Is a new concept needed?

6.1 What if anything is gained or lost by introducing the concept of "portfolio effects" into the realm of conglomerate merger review? Would your answer be different if your jurisdiction applied a "substantial lessening of competition" test to mergers, instead of a create or strengthen a dominant position" standard or vice versa?

Portfolio effects refer to activities that are not part of the relevant market in question, but to activities on (possibly but not necessarily vertically) related markets. Therefore it is irrelevant for the existence of a dominant position on that market.

The concept of "substantial lessening of competition" may be easier to apply. As conglomerate mergers by definition involve important inter-market influences, it is less natural to conclude that a dominant position is strengthened or created on one specific market - despite the possible absence of any overlap. That competition is substantially lessened, however, is likely to be easier and more natural to show. This holds *a fortiori* in the case of multimarket contact: the competition reducing effects would have to be captured within the concept of collective dominance. Although it will sometimes be natural for some companies to live by the Golden Rule, it is difficult to conclude that these companies have a collective dominant position.

6.2 Should consideration of "portfolio effects" be confined to mergers involving branded goods and consumer products in general?

We can not see the reasoning for such a confinement, as there is no principal difference. Portfolio effects can also emerge from one-stop-shop advantages other than concerning branded goods. For example a portfolio effect regarding cable companies as UPC. There is no geographic overlap but there is an advantage for parties to control different geographic areas.

What, if any, are the risks or advantages of extending the concept to apply to industrial goods?

We do not see the risks regarding the application to industrial goods. Even in our current practice we do not limit the usage of portfolio arguments to consumer/branded goods.

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UNITED KINGDOM

1. Introduction

1.1 Definition of conglomerate merger

Under the United Kingdom's merger legislation (the Fair Trading Act 1973), all types of mergers, including conglomerate mergers, are potentially open to scrutiny provided that the gross assets acquired exceed £70 million. Smaller conglomerate mergers can also be investigated provided that the parties overlap in the supply of some good or service (which can be wider than the relevant economic market), and have a combined share of supply in excess of 25 percent. There is however no specific definition of what constitutes a "conglomerate merger".

1.2 Conglomerate merger reviews in which portfolio effects were considered

Although the term "portfolio power" is relatively recent, the underlying concept is well established and has been applied in a wide range of merger investigations, including mergers which are horizontal and vertical as well as conglomerate in nature. However, it is relatively rare for portfolio issues to be the primary focus of a merger investigation

The first UK merger in which the issue of "portfolio power" was explicitly considered was *SMG v Scottish Radio Holdings*, a merger between a company with a wide range of media interests including television, newspaper and outdoor advertising, with a company with complementary interests in radio advertising.

In this case, portfolio power was said to exist when "…the market power derived from a combined portfolio of brands...exceeds the sum of its parts so that power could be created or strengthened over and above the consequences of any increase in market share in individual markets" [1].

The "portfolio power" concept is a relatively wide one, and is arguably not restricted to mergers which create a broader or deeper portfolio of brands or other assets. In particular, "portfolio type" issues have arisen in mergers between firms producing complementary products, and mergers between firms in neighbouring markets where the products produced are close, but relatively weak substitutes.

The main "portfolio type" issues which have arisen in recent years are:

- mergers which have a direct impact on market structure;
- mergers which increase the feasibility of entry deterrence strategies;
- mergers which eliminate the competitive constraint imposed by firms in neighbouring markets.

1.2.1 Mergers which have a direct impact on market structure

The UK has considered a number of mergers that have resulted in a direct reduction in the number of actual or potential portfolio competitors in a market. Increases in market concentration have been regarded as potentially more significant where rivalry between portfolio firms is the primary driver of competition in the market.

For example, in the *Capital Radio/Virgin* merger[2], capital, the dominant commercial radio broadcaster in London, was seeking to acquire Virgin, a smaller, but important competitor. Previously advertisers had been able to reach their target audience either by advertising with Capital's stations, or by creating their own portfolio of smaller London radio stations, of which Virgin was a vital component. The Competition Commission's view was that the merger would eliminate the possibility of portfolio-to-portfolio competition, leaving Capital to compete with a series of smaller and weaker independent competitors.

A similar issue arose in the *Interbrew/Bass*[3] brewing merger. Here, the main competition concern was that the merger would lead to an essentially duopolistic market structure, with two brewers with very powerful portfolios of leading brands, competing against a number of weaker non-portfolio operators. Again, the assessment was that non-portfolio firms were essentially niche players who did not impose significant competitive constraints on portfolio operators.

1.3 Mergers which increase the feasibility of entry deterrence strategies

In the *Reed Elsevier/Harcourt*[4] publishing merger, the main competition issue concerned the joining together of two very wide portfolios of academic journals, and the subsequent risk that this would increase the incentives for the merged firm to deter entry by bundling their titles (in electronic form). However, the investigation did not regard bundling as a particularly feasible strategy due to the strong degree of product differentiation in the market (each title is almost a separate market). This suggests that customers would have a relatively low valuation of the bundle, as they would still desire to purchase titles from rival publishing houses.

In both the *SMG/Scottish Radio Holdings*, and *Capital Radio/Virgin* cases, the competition concerns centred on whether the creation of a larger portfolio would increase the feasibility of anti-competitive discounts targeted at non-portfolio rivals. In the former case, bundling, and other forms of targeted discounts, were viewed as infeasible due to the absence of economies of scope on the demand or the supply side, and the presence of significant buyer power from advertising sales houses (who compile their own portfolio). In contrast, in the *Capital Radio/Virgin* case, the Competition Commission was sufficiently concerned about the increased ability of the portfolio operator to target rivals through bundling and discounts for exclusivity that the divestment of a key radio station.

In certain types of industries incumbent firms are often only likely to face a competitive threat on one of their brands (or, equivalently, at one part of a geographic network) at a time. In markets with this type of localised competition, a conglomerate merger that expands a portfolio, or increases the geographic coverage of a network, can also increase the credibility of an aggressive response to entry by making it easier for the incumbent to target price cuts at the entrant. For example, in *NEG/MML*[5], the only rail operator and the only coach operator on a series of routes between London and the Midlands of England merged. MML held the exclusive rail franchise, but the coach market was potentially contestable. Although the primary concern was the loss of horizontal competition, concerns were also raised that the merger might increase the incentives for merged parties to charge discriminatory prices in order to deter entry.

Mergers between firms that sell complementary goods can also increase the feasibility of entry deterrence strategies. An interesting example is the airline industry where the two legs of a journey that requires a passenger to make a connection are essentially complementary products. One of the motivations for airline alliances is that by marketing the two legs of the journey as a single product they can offer the passenger "seamless travel" whilst internalising various pricing externalities. However, the bundling of complementary routes and networks can make it more difficult for a non-network airline to gain access to connecting passengers, which can deter entry or force market exit. Although such bundling often yields efficiency gains, it is also likely to be credible as a strategy for deterring entry.

1.3.1 Mergers which eliminate the competitive constraint imposed by firms in neighbouring markets

Many mergers that appear to be primarily about expanding a portfolio, and where there is no apparent overlap in the relevant economic market, may nevertheless restrict competition by eliminating a constraint imposed by firms (or brands) in a neighbouring market.

One example of this is where a merger between firms in neighbouring geographic markets results in a loss of potential competition. Many local bus mergers were opposed on this basis during the 1990's.

Another type of example is where the merging companies' brands are individually relatively weak substitutes for each other, but where the combined effect of bringing together a large number of cross-price elasticties is significant. For example, if a firm expands their portfolio from five to ten brands, the number of cross-price elasticities under their control increases from ten to 45. This was a potential issue in the *Reed Elsevier/Harcourt* merger which brought together a portfolio of over 1 000 titles, which individually tend to be poor substitutes for each other.

Arguably these effects represent straightforward horizontal merger issues rather than portfolio effects, but they are included because they are associated with portfolio type mergers.

1.4 Summary of Mergers Raising "Portfolio Power" Issues

Companies	Market	Type of merger/JV	Conglomerate Issue
Interbrew/Bass	Beer	Creation of a broad portfolio of brands	Reduced number of portfolio brewers
BA/AA	Airlines	Merger of complementary networks	Raising costs of non-network airlines
Scottish Media Group/Scottish Radio Holdings	TV, radio, newspapers and other media advertising	Creation of a broad portfolio of media interests	Possible increase in incentives to bundle and target non-portfolio firms
BA/City Flyer Express	Airlines	Merger of complementary networks	Loss of potential competition

National Express/MML National Express/Prism	Rail/Coach	Horizontal (weak substitutes)	Loss of competition in wider public transport market
Capital Radio/Virgin Radio	Commercial radio	Horizontal/increase in size of radio portfolio	Loss of portfolio-portfolio competition + increased incentives to bundle
Various	Buses	Merger of complementary products	Creation of "safe havens"
Reed Elsevier/Harcourt General	Academic journals	Creation of larger portfolio of journals	Bundling of journals in electronic format

2. Anti-Competitive Effects Associated with Portfolio Effects

2.1 Conditions under which a conglomerate merger involving portfolio effects could give a firm enhanced ability and incentives to exclude competitors through the use of tying, bundling, full-line forcing, exclusive dealing, targeted discounts, or refusal to deal, and further conditions under which such exclusions would have a net harmful effect on consumers

Broadly there are three conditions that must be met for a merger involving portfolio effects to have an adverse effect on competition. Firstly, it must increase the ability of the portfolio firm or firms to raise non-portfolio rivals' costs (or to reduce their revenues). Secondly, because only the costs of some firms in the market are being raised (non-portfolio firms), such conduct is only likely to be anti-competitive where either there is insufficient competition between the remaining portfolio firms in the market, or where non-portfolio firms were previously imposing a significant competitive constraint. Thirdly, any anti-competitive harm must be balanced against any efficiency gains resulting from the merger.

It is perhaps useful to distinguish the benefits which can be derived from merging firms expanding the range of a portfolio into those that are "natural", e.g. economies of scope/scale/density, from those that are "strategic", e.g. increased ability to target a rival. Whilst both advantages may lead to the adoption of strategies such as bundling, if the advantages are derived naturally through greater efficiencies, bundling will often be a credible strategy, i.e. it will be adopted even if entry is not deterred. A possible implication of this is that "natural" advantages can often be more successful in deterring entry. However, as natural advantages represent an efficiency gain, this will have to be weighed against anti-competitive harm.

The UK does not have a detailed methodology for assessing whether a conglomerate merger is likely to lead to consumer detriment, but there are a number of factors that we are likely to take into account.

2.2 Reduction in the number of portfolio firms

If there are a number of competing firms with substantial portfolios, then competition is unlikely to be harmed, even if the merger makes it more difficult for non-portfolio firms to compete. The possible exception would be where the non-portfolio firms that are excluded from the market previously provided an important aspect of competition, e.g. discounted or innovative products.

2.2.1 Significance of the "natural" cost/demand advantages accruing to a portfolio firm

The advantages accruing to a portfolio operator are likely to be greater, the larger are the cost advantages from supplying a portfolio of products, or the greater the premium that customers are willing to pay for a one-stop shop, or a "seamless" product.

2.2.2 Credibility of a portfolio firm adopting exclusionary strategies

A portfolio firm is more likely to be able to target rivals where competition is localised, where entry is likely to be sequential or to occur on only one part of the portfolio.

Bundling is more likely to be a feasible strategy where the bundled products are complements rather than substitutes, and, more generally, where consumers place a relatively high valuation on the goods that are supplied in the bundle, and where the costs of supplying those additional products are relatively low. Conversely, if consumers are only likely to buy just one, or a limited number of products in the portfolio, or to have a strong preference for buying "best of breed", bundling is less likely to be a feasible strategy.

2.2.3 Ease of rivals or new entrants providing a competing portfolio

If the merged firm acquires or already posses a large number of must stock items, leading brands, or other products for which there are few good substitutes, then this increases the difficulty of entrants providing a competing bundle. Entering by providing a competing portfolio is also more difficult where it is relatively costly to create a brand, or where it takes considerable time to build brand awareness. Entering with a competing bundle will also be more difficult where a dominant firm controls an essential input into a bundle.

It may also be possible for intermediaries or powerful buyers to use their bargaining position to force the merging parties to supply elements of their bundle separately and then to create their own bundles. Strong buyers may also be able to sponsor the entry of a new portfolio firm.

2.2.4 Compensation by efficiency gains for anti-competitive harm

It is arguably more important to give careful weight to potential efficiency gains in mergers where portfolio issues are to the fore. The reason for this is that in many of these cases the anti-competitive effects arise from the "natural" benefits that a portfolio firm enjoys. In other words, if the merged parties discover that there are no cost or demand side economies to be reaped, then they will also often not gain a competitive advantage over non-portfolio firms. The important exception is where the advantages of a portfolio firm are more "strategic" in nature, e.g. by making it easier to target rivals.

2.3 How conglomerate mergers involving portfolio effects may increase incentives and abilities to predate

The UK experience in this area comes primarily from the local bus industry, where mergers of bus companies in non-overlapping territories can be viewed as a type of conglomerate merger.

A number of bus companies in the UK, have a reputation for aggressive if not predatory responses to entry. As these companies expanded by merger into new territories, in theory, not only did they export that predatory reputation into a new market, but, they increased the feasibility of future predatory conduct, as the benefits of excluding a rival would apply to a larger territory.

Although this issue was raised (usually by competitors), in practice no merger was ever challenged on these grounds. One reason for this is the simple one of proportionality – it is difficult to block a merger on such theoretical grounds where there is no loss of actual or potential competition. Moreover, the companies with a reputation for aggressive response to entry also tended to be more efficient than the companies they were taking over.

There has however been a concern regarding bus mergers in neighbouring areas. As bus companies are best placed to enter a rival's network where they have a depot and route network nearby, a merger of two neighbouring bus operators can lead to the creation of parts of a network which are no longer easily accessible from depots outside the territory. One concern about the creation of these "safe havens" was that it increased the feasibility of a bus company engaging in selective price cuts to deter entry, which in turn could lead to tacit collusion. This issue has led to objections being raised to a number of bus mergers.[6]

2.4 Conglomerate mergers involving portfolio effects which increase the number of markets in which competitors meet

There is certainly a theoretical possibility that such mergers may raise competitive concerns analogous to those found in cases in which multi-market contacts appear to increase the probability of anti-competitive co-ordination. The concern has occasionally been raised in mergers where competition is highly localised, for example buses, concrete. However, there are equally plausible theoretical models where such conglomerate mergers actually intensify price competition by reducing product differentiation. This, together with concerns over proportionality, would appear to make it very difficult to take action against this type of merger.

2.5 Possibility of harm to consumers through increased efficiencies from conglomerate mergers involving portfolio effects

If there are "natural" competitive advantages to being a portfolio firm, then, as explained above, a conglomerate merger that generates efficiency gains will of itself tend to raise the costs or reduce the revenues of non-portfolio rivals.

In general such mergers are unlikely to be anti-competitive, for if there are strong efficiency gains to be had by being a portfolio firm, it would be relatively unusual for non-portfolio firms to be capable of providing a significant competitive constraint. That is, whilst such conglomerate mergers may be capable of raising the costs of non-portfolio operators, price is likely to be determined by competition between portfolio players.

The most likely conditions under which efficiency enhancing conglomerate mergers are likely to anti-competitive therefore is where they succeed in reducing competition between portfolio firms. For example, in the Interbrew/Bass merger, the number of portfolio firms was reduced from three to two, whilst, in the Capital/Virgin radio merger, the acquisition of Virgin restricted the ability of smaller radio stations to offer a competing portfolio.

The Capital/Virgin case provides an illustration of many of the conditions that would generally need to be met for an efficiency-enhancing conglomerate merger to result in competitive harm:

- capital possessed a high market share of radio advertising;
- portfolio-portfolio competition was relatively weak;
- the merger significantly raised the costs of becoming a portfolio competitor;
- in contrast, although there were efficiency gains to being a portfolio firm, the incremental efficiency gains resulting from the merger were relatively small;
- barriers to portfolio entry were extremely high (entry limited by licensing);
- the marginal cost of adding another radio station to a package is relatively low;
- the merger provided Capital with an ability to target specific competitors.

3. Efficiencies

3.1 Efficiencies generated by bringing together a portfolio or range of products purchased by the same set of buyers

The UK has seen many examples of where bringing together a portfolio of products purchased by the same set of buyers has generated important efficiency gains. For example, in the brewing industry, the compilation of extensive portfolios of brewing and other drinks products has been motivated in part at least by a need to satisfy customers demands for a one-stop shop and to obtain economies of scope in distribution.

Airline alliances provide a good example of how, by linking complementary networks, and reaching agreements on scheduling and pricing, it is possible to provide an increased quality product at similar or lower cost. In particular, connection times can be minimised, customers can fly “seamlessly” on all legs of their trip with the same alliance, and vertical pricing externalities can be internalised.

The outdoor advertising (poster) industry provides an interesting example of where firms have sought to improve the quality of the product they offer consumers by compiling a portfolio of assets with a greater geographic coverage. As advertisers typically need to buy a number of poster sites in order to conduct an advertising campaign, poster sites in different towns and cities represent complementary products. By acquiring large portfolios of poster sites throughout the UK, the major poster firms have not only been able to reduce transaction costs (one-stop shop), but they have been better able to tailor a set of sites which meets the specific needs of the advertising campaign. This is also an example of where the supplier is more adept at compiling a bundle of products than the consumer.

3.2 Conglomerate mergers combining complementary products in which suppliers have significant market power and the effect on prices for one or both goods

This type of pricing externality, often referred to as the Cournôt effect, is a common feature of many network industries. For example, in the transport industry, passengers often need to travel across two complementary networks in order to complete their journey. The internalisation of this externality is one of the motivations for airline alliances, and also for multiple-operator travelcards.

Whilst a merger can allow such pricing externalities to be internalised, putting pressure on prices to fall, the merger of two firms with market power may itself give rise to externalities which have a tendency to push prices in the opposite direction. For example, if the companies producing the two complementary products are also competitors in another market, the resultant diminution of competition may outweigh any of the benefits from internalising the pricing externality. Moreover, even if the merger was purely conglomerate in nature, this could still lead to entry deterrence effects, which again would have a tendency to push prices upwards (although there are models where bundling can lead to lower prices, and entry still be deterred[7]).

4. Barriers to Entry and Countervailing Power

4.1 Ways in which conglomerate mergers involving portfolio effects might raise or lower barriers to entry

Conglomerate mergers involving portfolio effects will frequently raise barriers to small-scale or single brand entry, particularly if there are efficiency gains associated with the merger. There are two main ways in which this can arise.

Firstly, if the merger results in efficiency gains, for example, where consumers have a preference for one-stop shopping, then non-portfolio firms will need to discount their prices in order to attract the same level of customer demand (effectively their demand curve will shift inwards). This makes market entry less feasible where there are non-trivial sunk costs. Here, selling the portfolio as a bundle is a strategy whereby the merging companies earn higher profits through bundling than from selling the goods independently even if entry occurs.

Secondly, a conglomerate merger can increase the feasibility of a portfolio firm targeting a non-portfolio rival. In order for these strategies to deter entry, they do however need to be credible.

A conglomerate merger can also raise barriers to multiple product entry (or make it more difficult for companies to expand from supplying a single brand to providing a portfolio). The main mechanism for doing this would be if the merger results either in the control of a high proportion of all brands, or the control of all of the key brands in a particular product sector.

4.2 Cases in which resellers or manufacturers having significant negotiating power have effectively shielded consumers from up-stream market power, but were at risk of losing that countervailing power because of an upstream conglomerate merger involving portfolio effects

This was an issue in the Capital/Virgin case, where prior to the merger, advertisers could choose between Capital's radio stations, or could create their own package of radio advertising, using Virgin and some of the smaller London radio stations. However, the acquisition of Virgin, would have meant that it would have been almost impossible to buy radio advertising in London, without using Capital's, and that

this would have significantly weakened advertiser's bargaining position. The Competition Commission recommended a partial divestment, but the merger collapsed before this remedy could be implemented.

5. Remedies

5.1 The pros and cons of adopting an ex ante approach to mergers involving portfolio power effects

In general *ex ante* controls are the preferred remedy in mergers which are likely to lead to a substantial lessening of competition, irrespective of whether the merger is vertical, horizontal or conglomerate. Although the arguments in favour of an *ex post* approach are perhaps stronger for conglomerate mergers, they do not entirely convince.

The main argument used to support an *ex post* approach is that whilst a conglomerate merger might increase the feasibility of entry deterrence strategies, such behaviour is not an inevitable consequence of the merger. If the merged entity were to engage in anti-competitive conduct, then this could always be challenged as an abuse of a dominant position provision.

The above argument is based on a somewhat false premise because there are certain types of conglomerate mergers which do inevitably lead to the merging parties changing their behaviour in a way which can deter entry. For example, in the airline industry, because consumers are prepared to pay a premium for "seamless" travel, the formation of an alliance will always lead to them choosing to bundle routes together, irrespective of whether this also deters entry. In other words, the potentially anti-competitive strategy (i.e. bundling) will inevitably occur because it represents short-run profit maximisation behaviour.

In such a situation, it may be difficult, having allowed a merger to proceed, to describe such strategies as anti-competitive. There may also be a problem in obtaining legal vires in that the merging parties may not be technically dominant. Finally, the remedies under abuse of dominance legislation, principally fines, may not be appropriate to address what is essentially a structural problem.

It is also difficult to see what benefits an *ex post* approach would have for conglomerate mergers that lead to a direct reduction in the number of portfolio competitors or which raise barriers to entry to becoming a portfolio firm. Such mergers can potentially lead to a direct loss of horizontal competition, which again suggests a need for *ex ante* controls.

A perhaps better argument for *ex post* control is that it is often very difficult for competition authorities to judge whether a conglomerate merger is pro- or anti-competitive, not least because extending a portfolio will often only deter entry where it also leads to efficiency gains. However, this does not really obviate the need for *ex ante* control. If the adverse effects of a conglomerate merger are difficult to judge then it can rightly be allowed to proceed. If on the other hand a competition authority is confident that a conglomerate merger will lead to a substantial lessening of competition, then there seems little reason why it should not be modified or prohibited.

6. Portfolio Effects – is a new concept needed?

6.1 What is gained or lost by introducing the concept of "portfolio effects" into the realm of conglomerate merger review

The concept of "portfolio power" is a useful one, and has certainly had the effect of sparking a renewed interest in the potential adverse effects of conglomerate mergers. However, as the above answers perhaps illustrate, the definition of "portfolio power" can be interpreted relatively widely to incorporate almost any competition effect that can arise from a conglomerate merger. Indeed, as has been argued here, portfolio type effects can even occur in mergers that are more commonly thought of as horizontal or vertical.

Part of the confusion about what "portfolio power" means, or should mean is that when a portfolio is extended through merger, it is usually the case that both substitutes and complements are acquired. Whilst it could be argued that only the acquisition of complements should be seen as giving rise to portfolio effects, this ignores the fact that the adverse effect from a conglomerate merger can result from either range extension, or from denying rivals the ability to match that range. Whilst the former generally involves the acquisition of complements, the latter effect often arises with the acquisition of substitutes e.g. where a merger leads to the control of a large number of key brands in a particular sector.

The term "portfolio" is also perhaps confusing in that is tends to imply a collection of brands. As has been argued here, mergers of complementary products such as airline alliances, or poster advertising sites in different towns, are analytically similar to "portfolio effects", but a collection of such assets is not generally thought of as a portfolio.

6.2 Confining the consideration of "portfolio effects" to mergers involving branded goods and consumer products in general

Whilst it is much more likely that "portfolio effects" will be found in mergers of branded or consumer goods, in theory, "portfolio effects" could arise in any merger which results in the creation of an extended portfolio. As indicated in the answers in section 2, the circumstances necessary for a conglomerate merger to result in overall harm to consumers are relatively rare. In industrial goods, where consumers typically have lower search costs, greater buyer power, and often a preference to buy "best of breed", these circumstances are likely to be rarer still. There are however industrial markets where a conglomerate merger could potentially lead to "portfolio effects". The circumstances in which this is perhaps most likely are in mergers of complementary products.

NOTES

1 *SMG v Scottish Radio Holdings* (2001), http://www.oft.gov.uk/html/mergers/smg.htm

2 *Capital Radio plc and Virgin Radio Holdings Limited*, MMC Report Cm 3817, January 1998

3 *Interbrew SA and Bass PLC*, CC Report Cm 5014, January 2001

4 *Reed Elsevier plc and Harcourt General Inc*, CC Report, July 2001

5 *National Express Group PLC/Midland Mainline Ltd*, MMC Report, December 1996

6 For example, *First Bus plc and S B Holdings Ltd,* MMC Report, December 1996.

7 For example, Barry Nalebuff, "Bundling", Yale ICF Working Paper No. 99-14, November 1999.

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The antitrust laws protect competition not for its own sake, but as a means to promote allocative and productive efficiency and thereby enhance consumer welfare. They condemn mergers that will enable the merged firm to restrict output and raise prices because such mergers reduce efficiency, making life easier for the merged firm and its rivals. Sound antitrust policy should not, therefore, condemn a merger *because* it will make the merged firm more efficient. Such mergers will almost certainly enhance consumer welfare, in no small part by making life harder for the firm's rivals who will themselves have to become more efficient or perish.

We are very concerned that the "range effects" theory of competitive injury that is gaining currency in certain jurisdictions places the interests of competitors ahead of those of consumers and will lead to blocking or deterring pro-competitive, efficiency-enhancing mergers. We are also concerned that the theory, unless more clearly defined, will lead to less predictability in antitrust enforcement. We therefore welcome the opportunity the OECD has provided to examine "range effects" more closely.

1. Introduction

The United States has had over 40 years experience in evaluating the competitive effects of non-horizontal mergers, including so-called conglomerate mergers. During the ten-year period from 1965 to 1975, the United States experienced a wave of conglomerate mergers. During this period, the US antitrust agencies and courts experimented with a number of theories of competitive harm from conglomerate mergers, including one, entrenchment, that bears remarkable similarity to the "range effects" theories now gaining currency. Under this entrenchment doctrine, as embodied in the US Supreme Court's decision in *FTC v. Procter & Gamble*,[1] mergers could be condemned if they strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals.

The US antitrust agencies eliminated entrenchment as a basis for challenging non-horizontal mergers in 1982 when the Department issued its new Merger Guidelines and the Federal Trade Commission issued its Statement on Horizontal Mergers. We did so because we recognised that efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally "good deal" suffer loss of sales or market share. Mergers are one means by which firms can improve their ability to compete. It would be illogical, we concluded, to prohibit mergers *because* they facilitate efficiency or innovation in production. Unless a merger creates or enhances market power or facilitates its exercise -- in which case it is prohibited under Section 7-- it will not harm, and more likely will benefit, consumers.

As we understand it from the European Commission decisions we have reviewed, "range effects" appear to embody three related theories of competitive harm: (*1*) that the merger will create economies of scale and scope that other firms will not be able to match; (*2*) that the merged firm will gain a decisive advantage over its competitors by virtue of its greater size and financial resources; and (*3*) that the merger will facilitate the tying or bundling of complementary products.

The first two theories of competitive harm appear no different from those found in *Procter & Gamble* and should be rejected for the same reason they were in the United States a generation ago. Challenging a merger because it will create a more efficient firm through economies of scale and scope is at odds with the fundamental objectives of the antitrust laws. And there is no empirical support for the notion that size alone conveys any significant competitive advantage that is not efficiency-related.

The third theory, that a merger may harm competition by facilitating the bundling of complementary products, has more superficial appeal. Plainly, a forced tie by a firm with market power in the market for the tying product can, under some circumstances, serve as an anti-competitive exclusionary practice.[2] The problem with this theory, however, is that it has been used in some cases to block mergers, not because they may facilitate the type of tying that is unlawful under the antitrust laws — namely, forced ties imposed by firms with market power in order to foreclose rivals from the market without advancing any legitimate business purpose — but rather because they may facilitate efficient bundling — that is, voluntary bundling through discounts or otherwise that benefits customers by offering them the improved products, lower prices and lower transactions costs they desire. It does so, moreover, on the basis of a theory of competitive harm that depends on a highly attenuated chain of causation that invites competition authorities to speculate about what the future is likely to bring. As the Secretariat points out in its paper for this roundtable, merger specific efficiencies and the effects of joint pricing would normally increase economic welfare. For buyers to suffer net harm as a result of a merger that facilitates bundling, at least seven conditions must be met:

- the merged firm must enjoy such significant efficiencies and/or internalised complementary pricing (or analogous) effects from the merger that it finds it profitable to drop prices below pre-merger levels in at least one market;
- neither rivals nor new entrants can match the merged firm's new costs [or prices];
- rivals will exit;
- buyers cannot use countervailing power to hold prices at or below pre-merger levels;
- firms will not enter or re-enter the market in response to price increases above pre-merger levels;
- the merged entity finds it profitable to raise prices above pre-merger levels; and
- what buyers initially gain through prices set below pre-merger levels is less than what they later lose through paying higher than pre-merger prices.[3]

Proof that all these conditions have been met requires making guesses about the future conduct of the merged firm, its customers and its rivals that are beyond the capability of even the most prescient competition authority. Not surprisingly, therefore, most of the range effect decisions we have reviewed make no effort to determine whether these conditions are met.

We are concerned, therefore, that the range effects theory as applied will lead antitrust regulators to disapprove efficiency-enhancing mergers on the basis of highly speculative and unprovable theories of competitive harm. Without a high standard of proof, range effects theory runs the risk of becoming an ill-defined, catch-all theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of "dominance." Such an arbitrary policy stands both to increase uncertainty about antitrust enforcement and potentially deter a large class of efficient mergers. It would represent a step backward in

the evolution of antitrust policy, which has generally been moving towards more clearly defined, economics-based enforcement criteria. It also risks converting competition authorities into complaint bureaus for disgruntled competitors who find it easier to seek protection from government regulators than to compete in the market.[4]

The remainder of this paper develops these points more systematically. Part I reviews the US experience with similar entrenchment theories during the period from 1965 to 1975. Part II reviews the evolution of the range effects doctrine in EU merger decisions over the last five years.[5] Part III provides an economic analysis of the range effects doctrine as applied by the European Commission in recent cases, showing why we believe it is antithetical to sound competition policy. Part IV discusses the range effects issues we examined in *GE/Honeywell,* and shows why we concluded that the evidence did not support the theory in that case.

2. The United States' Experience with Entrenchment Theories

In the decade from 1965 to 1975, the United States experienced a wave of conglomerate mergers. When this wave first began antitrust enforcers and scholars were uncertain as to the likely competitive effects of these mergers, but there was considerable political concern about a "rising tide of concentration" resulting from them. In response, the US antitrust agencies challenged a number of these mergers under a variety of theories. In one of these cases, *FTC v. Procter & Gamble Co.*, 386 US 568 (1967), the United States Supreme Court embraced a theory of competitive harm -- now called "entrenchment" -- that was remarkably similar to the current "range effects." The *Procter & Gamble* decision led to a number of other cases invoking this entrenchment theory. These cases stimulated a critical examination of the theory by legal and economic scholars, which persuaded both the Department and the Federal Trade Commission in 1982 to abandon entrenchment as a basis for challenging non-horizontal merger cases.

2.1 The Procter & Gamble Decision

Procter & Gamble involved a product extension merger. The acquired firm, Clorox, was the leading manufacturer in the "heavily concentrated" household bleach market, with a 49 percent (and growing) share of national sales and higher shares in some local markets. Procter & Gamble (P&G), the acquiring firm, was a large, diversified manufacturer of other household products, primarily soaps and detergents, but did not produce bleach.

The Supreme Court agreed with the FTC's assessment that the acquisition might substantially lessen competition both because it would eliminate P&G as a potential entrant into the bleach market and because "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing." 386 US at 578. In this regard, the Court focused on the importance of advertising as "the major competitive weapon" in the bleach market. *Id*. at 579. According to the Court, P&G had a larger budget than Clorox and could use it to defeat "the short term threat of a new entrant"; it could also "use its volume discounts to advantage in advertising Clorox." *Id*. The Court was concerned, therefore, that the acquisition might lessen competition because new entrants -- whether new firms or small firms expanding geographically -- would be "much more reluctant to face the giant Procter than . . . the smaller Clorox." *Id*.[6]

2.2 Scholarly Commentary on, and Other Criticism of, the Entrenchment Doctrine

The *Procter & Gamble* decision quickly joined *Von's Grocery,*[7] *Schwinn,*[8] *Albrecht,*[9] and *Topco*[10] as one of the most frequently and heavily criticised of the Warren Court's antitrust decisions.[11] Two of the most influential scholarly critiques of the decision's entrenchment theory and the lower court decisions it spawned were by Phillip Areeda and Donald Turner in their influential *Antitrust Law* treatise[12] and by Robert Bork in *The Antitrust Paradox*.[13] Both are worth summarising briefly. In addition, a number of empirical studies of conglomerate mergers have found no evidence to support the theory.

2.2.1 Areeda and Turner

Areeda and Turner focused first on the *Procter & Gamble* decision's concern that a conglomerate merger might create or strengthen a dominant position by enabling the merged firm to capture cost savings and other efficiencies, especially in connection with product marketing or promotion, thereby giving it a competitive advantage over rival firms, which might then fail or be forced to seek similar mergers in order to survive. They showed that because resource savings are socially desirable, condemning mergers for this reason is contrary to sound antitrust policy:

> First, such economies would bring competition to an end only if substantial and not substantially available to most rivals -- a result seen in no conglomerate merger case of which we are aware. Second, rivals would expire only because they were unable or unwilling to meet the lower price or higher quality of the more efficient firm. The public would be realising the fruits of those efficiencies. The more efficient firm could seldom raise its prices to or above pre-merger levels without attracting new entry. Even if the more efficient firm were ultimately to become an exploitative monopoly, the public would enjoy the benefit of reduced resource use. Third, public policy cannot rationally seek to prevent the realisation of more efficient production modes out of the speculative fear that monopoly might result.... Fourth, even if greater concentration were certain to result, an insistence on continued inefficiency seems the antithesis of competition. Antitrust law promotes competition because it is efficient.
>
> V Areeda & Turner, *supra,* 1103c, at 9.

Turning to the related concern found in several other early cases "about the competitive advantage of a wider product line resulting from a conglomerate merger," Areeda and Turner argued that "apart from the 'leverage' possibility, there is unlikely to be any prejudice to rivals at all, for they too can usually arrange packages or one-stop service when buyers demand them. And if they cannot, then the merged firm's provision of those new services valued by customers is not a social evil but a contribution to their welfare." *Id.* 1109d, at 36. "Such savings are real benefits to buyers and are no basis for antitrust censure." *Id.* 1109d3, at 40. With respect to the "leverage possibility" -- that is, the concern that having a broad product line may provide increased opportunity for tying -- Areeda and Turner expressed "serious doubt that very substantial foreclosure would often come about via tying that is too vague to catch the eye or to be proved." *Id.* 1134, at 208. That being the case, the "positive prohibitions against tying in the concrete are probably powerful enough to prevent most of the tying that the law has cared about, quite without the necessity of preventing conglomerate mergers creating the potential for undetectable or unreachable tying." *Id.* They urged, therefore, that "[s]peculative" leverage concerns should be discounted because tying and full-line forcing can be controlled directly by the antitrust laws." *Id.* 1109d3, at 41.

2.2.2 *Bork, The Antitrust Paradox*

Robert Bork, in his classic work, *The Antitrust Paradox*,[14] similarly argued that "[t]he *Procter & Gamble* decision makes sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense, because small business is protected from Clorox's cost advantages only when they happen to be achieved through merger."[15] He concluded that "the effects the Court and the Commission attributed to the merger were manifestations of efficiency, and hence reasons to welcome the merger rather than condemn it."[16] Far from "frightening smaller companies into semiparalysis," Bork argued that conglomerate mergers that generate efficiencies will force smaller competitors "to improve, rather than worsen, their competitive performance," leaving consumers better off.[17]

2.2.3 *Empirical Evidence*

In addition to the scholarly criticisms of entrenchment theories, a number of empirical studies of conglomerate mergers found that experience did not bear out the types of concerns that underlay the entrenchment theory. In fact, the conglomerate mergers that made up the merger wave of the 1960s were found to have generally been unprofitable.[18] Later spinoffs from these conglomerates have been much more successful.[19]

2.3 Merger Guidelines

The Department's original merger guidelines, issued in 1968 shortly after the Supreme Court's *Procter & Gamble* decision, tentatively embraced the entrenchment theory, stating that the Department "may in particular circumstances bring suit" under Section 7 against a non-horizontal merger "where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market."[20] In its complete rewrite of the Merger Guidelines in 1982, the Department, influenced by the growing trend in the court decisions and by the critical scholarly commentary, eliminated entrenchment as a basis for challenging non-horizontal mergers. In so doing, the Department acted consistently with the recommendation of the American Bar Association Section on Antitrust Law. As the Section explained,

> The entrenchment doctrine is essentially based on three concerns: (*1*) the 'deep pocket' resulting from the merger will discourage entry; (*2*) the deep pocket will also permit the target firm to engage in predatory conduct, such as pricing below marginal cost, and (*3)* the merger will enable the target company to achieve certain economies not available to other firms. The first reason is ephemeral at best and is not supported by empirical evidence. The second reason requires an assumption that firms will engage in illegal acts which would be prohibited by other provisions of the antitrust laws in any event. The third reason is only viable if one concludes that certain economies are inherently anticompetitive, a conclusion for which there is little, if any support.[21]

By 1982, then, the entrenchment doctrine was thoroughly discredited in nonjudicial circles in the US, and the courts soon came to share that view.

2.4 Subsequent Developments in US Law

In the first few years following the Supreme Court's decision in *Procter & Gamble*, several courts of appeals applied the Court's reasoning to find conglomerate mergers illegal under Section 7 because they were likely to further "entrench" a dominant firm.[22] By the mid-1970s, however, the courts

and the FTC, influenced by the growing scholarly criticism of the Court's decision, began consistently rejecting these types of challenges, finding that the plaintiff had not proven that entrenchment was likely.[23]

Indeed, although the Supreme Court has never had occasion to revisit its *Procter & Gamble* entrenchment theory, developments in Clayton Section 7 and Sherman Act cases in the last 25 years make it extremely unlikely that a merger could be successfully challenged under the kind of range effects theories currently found in some recent European decisions. US law defines competition in terms of consumer welfare. Perhaps the single most quoted aphorism in US antitrust jurisprudence is that the antitrust laws "protect competition not competitors."[24] As the Supreme Court explained in *Spectrum Sports, Inc. v. McQuillan*:

> The purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. [The Supreme] Court and other courts have been careful to avoid construction of Section 2 which might chill competition rather than foster it [, recognising that] it is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects.[25]

Competitors, therefore, do not have a cause of action under the antitrust laws against a merger on that ground that it makes the merged firm more efficient, even if they fear they may as a result be forced from the market. In Brunswick v. Pueblo Bowl-O-Mat, 429 US 477 (1977), competitors challenged Brunswick's acquisition of several bowling centers that otherwise would have closed, claiming that they were injured because their profits would have increased if the acquired centers had closed instead. The Supreme Court held that the competitors lacked standing because they were not alleging antitrust injury. Quoting Brown Shoe, 370 US at 320, the Court emphasised that "the antitrust laws were enacted for 'the protection of competition not competitors,'" and it would be "inimical to the purposes of those laws" to award damages for injury resulting from enhanced competition.

In *Monfort of Colorado, Inc. v. Cargill, Inc.*, 479 US 104 (1986), the Supreme Court held more generally that competitors do not have standing to challenge a merger on the ground that the merger may enable the merged firm to realise efficiencies and thereby "lower its prices to a level at or only slightly above its costs." *Id.* at 114-17. Relying on *Brunswick*, the Court wrote that,

> [T]he antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. [C]ompetition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."[26]

Courts have interpreted Section 7 of the Clayton Act in a manner consistent with these standing decisions. Section 7 forbids only those mergers that are "likely to hurt consumers."[27] Rather than being a reason for condemning a merger, significant efficiencies benefiting consumers are relevant to "the acquisition's overall effect on competition"[28] because they may justify an otherwise anticompetitive merger.[29] Thus, a merger that would hurt rivals but otherwise benefit consumers will not violate Section 7.

Condemning a merger on the ground that it may enable the merged firm to drive rivals from the market through greater efficiency and lower, but nonpredatory, prices would also be inconsistent with the development of the US antitrust laws with respect to predation. The Supreme Court has emphasised that it

would be contrary to the purposes of the antitrust laws to condemn "low" pricing that is "above an appropriate measure of costs" as "predatory" simply because it injures a less efficient competitor:[30]

> [W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognisable under the antitrust laws. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.[31]

2.5 The Legal Status of Entrenchment Theory Today

As this brief review shows, US antitrust law has evolved well beyond the "big is bad" logic of *Procter & Gamble.* Informed by economic theory and empirical evidence, we now have a better understanding of the ways in which merger-related efficiencies are likely to benefit consumers and how competitors are likely to respond. Thus, we now understand that the *Procter & Gamble* entrenchment theory is at odds with the fundamental principle of US antitrust law that only conduct that is likely to reduce consumer welfare is barred. Because efficiencies are likely to benefit consumers, they are to be encouraged, even if they may strengthen a particular firm at the expense of its competitors. As we discuss in the following sections of this paper, there is no basis for presuming that the efficiency advantages a firm may gain from acquiring the producer of a complementary product will lead to market power detrimental to consumer welfare in the foreseeable future, and only under very limited conditions is this even a hypothetical possibility. Such hypothetical possibilities would not support a challenge under Clayton Section 7, which requires a showing of a substantial probability that the merger will lessen competition. This requirement is a sound one -- an effort to assess and weigh anticipated near term efficiency benefits against more speculative longer term market power possibilities would carry a high risk of enforcement errors and of deterring economically desirable transactions.

2.5.1. Range Effects as a Theory of Competitive Harm in Recent EC Merger Decisions

Over the last several years, the European Commission and other European antitrust agencies have been making increasing use of what they call "portfolio power," "conglomerate effects," or "range effects" as a theory of competitive harm in markets in which there is no direct horizontal overlap between the merging parties. As we read those decisions, the terms are used interchangeably to encompass a variety of different means by which a merger may allegedly create or strengthen a dominant position in non-overlap markets. These avenues of harm can be roughly organised into three categories: tying/bundling, efficiencies, and a general fear that as a firm becomes larger its very size will undermine effective competition (*i.e.*, "big is bad").

These three categories of harm are illustrated below with examples from some prominent EU cases addressing portfolio effects.

2.6 Guinness/Grand Metropolitan[32]

All three strands are present in *Guinness/Grand Metropolitan,* where the Commission required the merged firm to end its distribution agreement of Bacardi rum in Greece, despite no market share overlap. The Commission justified this relief on the grounds that a wide portfolio of leading brands "confers considerable price flexibility and marketing opportunities" and gives the merged firm "the

possibility of bundling sales or increasing the sales volume of one category by tying it to the sale of another category."[33]

2.7 Coca-Cola/Carlsberg[34]

Concerns about tying and enhanced efficiencies are present also in the Commission's *Coca-Cola/Carlsberg* decision, where it required the merged firm to divest its interest in a carbonated soft drink (CSD) bottling company as well as its interest in the third largest cola brand in Denmark. The Commission argued that "the inclusion of strong beer and packaged water brands, such as those of Carlsberg, in the beverage portfolio gives each of the brands in the portfolio greater market power than if they were sold on a 'stand-alone' basis."[35] The Commission also worried that economies of scale and scope were "key competitive factors" in the carbonated soft drink market and that the newly merged firm would take advantage of these efficiencies to the detriment of effective competition: "The distribution of CSDs is characterised by high economies of scale. In particular it is crucial to unload a sufficiently high volume at each truck stop to bring down the average cost of delivery to individual customers. Generally this means that companies with the highest volume and the broadest portfolio of beverages in their distribution system will have the lowest costs and be able to reach the highest number of customers."[36]

2.8 Boeing/McDonnell-Douglas[37]

In the *Boeing/McDonnell-Douglas* merger, the Commission again saw achieving both demand-side and supply-side economies of scope as leading to enhanced dominance by the merged firm: "Where a large fleet in service is combined with a broad product range, the existing fleet in service can be a key factor which may often determine decisions of airlines on fleet planning or acquisitions. Cost savings arising from commonality benefits, such as engineering spares inventory and flight crew qualifications, are very influential in an airline's decision-making process for aircraft type selections and may frequently lead to the acquisition of a certain type of aircraft even if the price of competing products is lower."[38]

In addition, the Commission feared that the sheer size and scope of the merged firm would lead to a strengthening of Boeing's dominant position in commercial airframe manufacture: "The doubling of governmental-funded military R&D and the tripling of Boeing's general revenues generated in the defence and space sector will increase the scope of cross-subsidisation of Boeing's sales in commercial aircraft in cases where Boeing wants to meet specific competition. It is clear that, as already stated, the addition of products from MDC (in particular the small-segment MD-95) and the large increase in its overall resources would enhance Boeing's opportunities to engage in such pricing practices, especially in view of its strong, and increasingly strengthening, cash-flow position as outlined above."[39]

2.9 GE/Honeywell[40]

The case that has brought the most attention to portfolio effects is, of course, the Commission's recent decision blocking the merger of General Electric and Honeywell. In that decision (which has not yet been published), the EC focused on all three economic avenues of harm: *(1)* That the merger would create opportunities for the merged firm to offer low-priced bundles of aircraft engines and systems to which narrow-line competitors would be unable to effectively respond; *(2)* That GE would leverage its existing dominance in aircraft engines into avionics and non-avionics systems markets by, among other things, bringing its "enormous financial means" to bear; *(3)* That GE's aircraft leasing arm (GECAS) would henceforth buy only (or at least heavily favour) Honeywell products, which would help create a dominant position for the merged firm in avionics and non-avionics systems markets in which Honeywell is currently active. The EC concluded that as result of these actions, revenue streams for GE and

Honeywell competitors in both engines and avionics/non-avionics systems markets would shrink in the event of a merger, leading to a reduction in their future investment and their competitive vigor.

2.9.1 An Economic Analysis of the Use of Range Effects as a Basis for Prohibiting Non-Horizontal Mergers

In this Part, we discuss each of the three theories of competitive harm that come under the "range effects" rubric. With respect to the first theory, tying/bundling, we would agree that there is a theoretical possibility that, in certain limited circumstances, a merger might give the merged firm the ability and incentive to tie complementary products in a manner that might foreclose rivals and reduce competition. We believe, however, that even this theory requires a much more nuanced analysis than a simple assertion that the "dominant" or near-dominant firm will be able to gain further competitive advantage by bundling. The economic literature on tying and bundling does not support a presumption either that firms would necessarily tie or bundle complementary products together, or that if they decided to do so this behaviour would reduce welfare. Indeed, there are a number of circumstances in which tying/bundling serves to benefit the consumer through lower prices and improved products.

The other two theories of competitive harm -- that the merger will make the merged firm more efficient than its competitors, and a more generalised concern that the merged firm's size alone will give it a decisive competitive advantage -- lack any sound economic foundation whatever. Indeed, the more the merging firm's decisive advantage over its competitors comes from merger-generated efficiencies, the more difficult it is to argue that the merger would be harmful to consumers. Consumer welfare is generally improved by allowing merging parties to realise efficiencies. Lower costs typically translate into lower prices and increases in output in the markets directly affected. Cost savings also economise on the use of society's scarce resources, thereby freeing up more of these for use in the production of additional goods and services economy-wide. If there are truly economies to be realised by an increased scope of operations, we can also expect competitors to try to replicate the cost reductions by either teaming arrangements or counter-merger. For these reasons, blocking mergers under either of these two theories is almost certain to do more harm than good.

2.10 Tying and Bundling Theories

The terms "tying" and "bundling" themselves refer to a variety of economic phenomena, distinct in both their motivations and their effects.[41] Most stories of tying and bundling are not foreclosure-motivated, and only some of them are even foreclosure-related, and even the foreclosure-related tying/bundling stories have ambiguous welfare effects.

In the most straightforward models, tying from a monopoly market to a competitive, constant-returns-to-scale market is pointless, since the rents that can be extracted are not increased by such a move -- there is only "one monopoly rent" to take on the combined package, and that can be extracted from the existing monopolised market.[42] This led some adherents of the so-called "Chicago School" to conclude that most tying arrangements are unlikely to harm consumer welfare, and, where observed, are more likely to enhance it. In recent years, however, economists have had the opportunity to examine tying and bundling more closely. They have identified a number of different strategic reasons for tying and bundling — some of which are likely to benefit consumers while others may reduce consumer welfare. Each strategy is discussed in turn below.

2.10.1 Efficiency

Bundling may be undertaken for genuine efficiency reasons, resulting in a superior product from the customer's point of view. If economies of scope mean that costs of producing and selling a bundle of complementary goods are lower than the costs of producing and selling individual components separately, a significantly lower bundled price may simply reflect these efficiencies. Even where there are no economies of scope, when two producers of complementary products merge they may offer a lower price for a bundle of those products because the merger solves a "double-marginalization" problem, thus enhancing allocative efficiency. (This is the so-called "Cournot effect" which arises because a merger of two firms making complementary products causes the merged firm to internalise the externalities associated with its pricing decisions). This pricing efficiency is all the more likely in those instances where the merging firms had been exercising a degree of market power before the merger. In addition to these supply-side efficiencies, bundling may also be desired by the customers because it serves to reduce transactions costs through so-called "one-stop shopping."

In the unusual event narrow-line firms are unable to replicate these efficiencies through teaming arrangements, internal growth, or counter-merger, they could contribute to the foreclosure of these firms. To the extent that rivals are foreclosed from the market due to efficiencies, it is conceivable that a merger creating these efficiencies could end up harming consumers. It is important to keep in mind, however, that the competitive process is largely about encouraging the more efficient to grow at the expense of the less efficient. This process generally inures greatly to the benefit of the consuming public. Firms are rewarded for cutting costs (thereby saving on society's scarce resources), lowering prices, and in the process displacing their less efficient rivals. Antitrust authorities should be appropriately cautious about intervening because of a fear that this may occur. Competition sometimes means that inefficient firms are driven out of business, and even if firms are foreclosed by a now more efficient rival, the post-foreclosure price charged by this more efficient (merged) firm could easily be lower than the pre-foreclosure, no-efficiencies price as the merged firm responds to its lower costs by offering consumers better terms.

2.10.2 Price Discrimination

Tying and bundling can also serve as a device for price discrimination. By offering a bundle as part of the overall mix of options offered to consumers, a firm may be able to smooth out variability in demand and capture more consumer surplus. This smoothing-of-demand effect is strongest when consumers' values of the products are negatively correlated, though it can also exist with no correlation or even positive correlation between consumers' valuations of the goods. Economists agree that price discrimination generally has ambiguous welfare consequences: on the one hand, it may increase output by serving consumers that would otherwise have been excluded from the market; on the other hand, consumers with relatively inelastic demand will likely face a higher price if price discrimination occurs.

2.10.3 Product Differentiation

A firm may bundle its product with a complement in order to soften competition in the market by increasing product differentiation between its product and those of its rivals. Bundling in this case increases the profits of all participants in the market relative to a component-by-component competition.[43] An easy way to detect whether softening competition is the motivation for bundling is to look at competitors' reactions to the bundle: If competitors are complaining about the possibility, we can be pretty sure that it is not serving to soften competition.

2.10.4 Tying as an Exclusionary Strategy

Whinston and others have shown that tying may serve an anticompetitive purpose if it changes the market structure of the tying product industry by inducing exit, deterring entry, or causing competitors to pull back their R&D spending.[44] By committing to a tie, the firm commits itself to compete aggressively, since in order to make any profits on its monopoly product, it must sell the bundle. This means it will be willing effectively to sell the tied product at a loss, which it would not do in component versus component competition. By committing itself to compete aggressively, the firm makes it less likely that rival firms will pay the fixed cost of entering or maintaining their market position. Even in the Whinston model, however, the welfare implications of tying are ambiguous, both for consumer and total welfare. Consumers are harmed both by the price effect of exclusion and by the loss of variety in the tied product market, but can possibly be made better off if the net price effect, even after exclusion, is still negative. Moreover, the most prominent version of Whinston's widely cited theory emphasises that the tying firm must be able credibly to commit not to "untie" or "unbundled" should entry occur (or should rivals remain), in order to achieve an anticompetitive outcome. This requirement presents yet another hurdle for those citing it in support of pre-merger intervention. Even the proponents of this theory of competitive harm caution, therefore, that:

> [T]rying to turn the theoretical possibility for harm into a prescriptive theory of antitrust enforcement is a difficult task. For example, the courts would have to weigh any potential efficiency from the tie with possible losses due to foreclosure which by itself is challenging due to the difficulty of measuring both the relevant efficiencies and the relevant losses. [O]ne reason this is difficult is that, as discussed in our various analyses, even focusing solely on foreclosure can yield ambiguous results concerning how tying affects social welfare. That is, there are some situations in which tying used for foreclosure can actually increase social welfare.[45]

Given the range of possible motivations for, and competitive consequences of, bundling, it is extremely hazardous to adopt a policy prohibiting mergers merely on the ground that the ability and incentive to engage in these practices might be increased by the merger. Were such a policy to be adopted, at a minimum two fundamental questions should be asked and answered affirmatively before blocking any merger on such a theory: *(1)* would the firm engage in bundling after the merger? and, if so, *(2)* would the bundling strategy harm consumer welfare? Answering each of these questions requires a careful identification of the economic theories involved and the examination of case-specific evidence on both sides of the ledger, including ways in which efficiencies will benefit consumers or motivate other firms to become more efficient.

The difficulty of answering these questions *ex ante* argues strongly in favour of waiting until after the tie has occurred to consider challenging this type of conduct, since waiting yields important advantages in investigating both of these questions -- the first question is already resolved at that point, and more evidence on the second question is available, even if it is not definitive. A decision about whether to prohibit a merger because of potential range effects must therefore weigh the costs and benefits of waiting until after the merger to prosecute any illegal behaviour. If the decision is made to stop tying/bundling behaviour at the point of incipiency, it makes sense to do so only when the facts clearly demonstrate a real likelihood of foreclosure of rivals due to tying or bundling behaviour that is not efficiency-enhancing.

2.11 The"Efficiencies Offence"

There is no sound basis for blocking a merger on the grounds that the merger will produce a more efficient competitor. Using an efficiency-based harm as the basis for a range effects case assumes that antitrust authorities have the knowledge to make the distinction between efficiencies that lead to consumer

benefit and the rare cases of efficiencies that upset the balance of competition to the ultimate detriment of most consumers. It is difficult to think of a historical example in which an efficiency-enhancing merger has actually led to consumer harm, and thus hard to imagine basing antitrust policy on an "efficiencies offence." While there is some small possibility that a combination that foreclosed rivals solely on the basis of merger-related efficiencies could have a net adverse effect on welfare, the vast majority of such mergers are likely to be welfare improving. It seems extremely unlikely that welfare (either total or consumer) could be promoted by a policy of barring such mergers based on the kind of evidence likely to be available while the merger is still incipient.

2.12 "Big is bad"

Many range effects cases seem to simply assume that the merged firm will gain a decisive advantage simply due to its size. While size may be an advantage in some circumstances, it is wrong and dangerous to assume that bigger equals more powerful or that access to "deep pockets" will necessarily allow a firm to outspend its opponents and win contests for market share.

Empirically, we know that the biggest firm — the one with access to the most internally generated funds — will not always, or even most of the time, win critical competitions. Counter-examples include the competition between IBM and Microsoft in developing a successor to the DOS operating system at a time when the market capitalisation of IBM dwarfed that of Microsoft. Another example is the case of General Motors' long, slow decline in market share relative to its US competitors, though it has always been much larger than Ford or Chrysler.

One reason that bigger does not necessarily equal more powerful is that capital is fluid, and flows to good opportunities. For instance, the personal computer hardware industry today is characterised by companies like Compaq, Dell, Gateway, IBM, and Apple. Only one of these firms existed 26 years ago, and it was a behemoth that dominated mainframe computer hardware, software, and service. Twenty-six years later, IBM is at best third in this group in worldwide PC market share, with only about seven percent of the total market.[46]

Certainly, there are advantages in particular industries to a firm being large. But generally there are disadvantages as well as advantages to being big, a fact that motivates many spinoffs. The disadvantages are less straightforward, and tend to be ignored when building a range effects case.

Finally, one should not forget that, to the extent there are economies of scale and scope in an industry, bigger means lower costs. Thus, often in the case where bigness does have an effect on competition, it will be for efficiency reasons, and not anticompetitive ones.

2.13 Conclusion

The basis for a "range effects" merger challenge is tenuous at best. If range effects are ever to become an effective basis for a merger challenge, the economic underpinnings of any tying/bundling theories must be carefully considered, and distinctions must be made between efficiencies-based and any non-efficiencies-based foreclosure. Without that, range effects theory runs the risk of becoming an ill-defined, catchall theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of "dominance." Such an arbitrary policy stands to both increase uncertainty about antitrust enforcement and potentially deter a large class of efficient mergers. It would represent a step backwards in the evolution of antitrust policy, which has generally been towards more clearly-defined, economics-based enforcement criteria aimed at enhancing consumer welfare.

3. A Case Study: Range Effects in the GE/Honeywell Merger

After conducting over 75 interviews of industry participants, deposing the executives of the merging parties, and reviewing the responses of numerous requests for documents and information from third-parties, the Department of Justice concluded that there was no evidence to support a challenge of the *GE/Honeywell* merger on the basis of range effects.[47] The European Commission decided otherwise. It is instructive to use the *GE/Honeywell* matter as a case study on range effects because the two antitrust agencies reached fundamentally different conclusions despite analysing the identical product and geographic markets, hearing the same arguments from parties and third-parties, considering the same theories of competitive harm, and largely having access to the same set of facts.

3.1 GE's alleged dominance in large aircraft engines

The theories of competitive harm relied heavily on the claim that GE was already dominant in the market for large aircraft engines. We found little support for that argument. Under US law, a firm must have "the power to control prices or exclude competition"[48] in order to be found to have market power or to be "dominant." While GE currently enjoys a large market share (due largely to its position through its CFMI joint venture with SNECMA as the exclusive supplier of engines for the Boeing 737), we concluded that the market for large aircraft engines is a bid market with three strong competitors — GE, Rolls Royce, and Pratt & Whitney. In such a market, historic market shares are only weakly indicative of future success, as illustrated by the fact that recent contract awards have been quite evenly divided among the three firms, with GE winning 42 percent, PW 32 percent, and Rolls Royce 27 percent (even including CFMI engines in GE's share).[49] We could see no basis, therefore, for finding that GE would be able impose restrictions on its engines customers (for example, by tying Honeywell avionics to its engine sales) without disadvantaging itself in its battle against Pratt & Whitney and Rolls Royce to have its engines selected on future platforms. And, in the case of CFMI engines, GE's ability to impose such restrictions would be further constrained by its joint venture partner, SNECMA, who would gain nothing from such restrictions.

3.2 The leveraging theory

We were also unpersuaded that GE would be able to leverage its strong position in engines to gain a decisive competitive advantage in the markets for avionics and non-avionics systems through either mixed bundling or technological tying. The mixed bundling theory of competitive harm used the so-called "Cournot effect" to predict that the merged firm would lower the price of complementary goods because it would internalise the external effects of its prices on sales of the complementary goods it now controls.[50] That is, the firm adjusts its pricing to reflect the fact that if it lowers the price of its product *A*, it will stimulate sales of product *B*, if B is a complement of A.

It is important to emphasise that this theory predicts that the merged firm's prices will go down post-merger, at least in the short run. Harm occurs only if competitors lose profits and are forced to withdraw from the market. Thus, while the benefits are certain and immediate, the predicted harm is much more distant and speculative.

The empirical evidence we examined convinced us that mixed bundling, to the extent it may be practised in aerospace markets, is unlikely to convey a decisive competitive advantage. We found little, if any, evidence that aerospace suppliers have been able to gain significant market share through bundling tactics in the past. With respect to technological tying, we could likewise see no way to determine, *ex ante*, whether physically integrating engines and avionics/non-avionics systems together would have any

foreclosure effect, much less whether any potential foreclosure effect would outweigh the efficiencies that might be produced by such integration.

Even assuming *arguendo* that bundling conferred a competitive advantage, we were unable to find any evidence suggesting that other firms would be unable to match the merged firm's offerings through teaming arrangements of the type that are common in this industry. This was exactly what the EC found when it examined the *AlliedSignal/Honeywell* decision just one year earlier: "There is scope for competitors to extend their product range, either via internal development of products or by "teaming" with other competitors," citing several examples where commercial teaming had been successful in the market for avionics.[51] We found a number of similar examples in the market for large commercial engines.[52] We also could not believe that large, sophisticated buyers, like Boeing and Airbus, would permit GE/Honeywell to monopolise the market for such important aircraft components as engines and avionics.

3.3 *Alleged Anticompetitive Effects of GECAS*

We also examined the claim that GE uses its aircraft leasing arm, GE Capital Aviation Services ("GECAS"), to gain an advantage in engine competitions and would be likely, post-merger, to use GECAS similarly to expand Honeywell's market share for avionics and non-avionics systems. This was characterised as vertical foreclosure by some involved in the matter, but it is really just a range effect because the claim was based on the fear that the merged firm would tie the availability of GECAS financing to the purchase of engines and avionics/non-avionics systems.[53] We concluded that GECAS's share of aircraft purchases — less than ten percent of all planes worldwide — was too small to give rise to a significant foreclosure effect. This being the case, to the extent GECAS is shifting share towards GE by offering more attractive financing deals than its competitors, GE is simply discounting its engines, and it is unclear why GE's competitors should not be able to match these discounts.[54]

3.4 *Likelihood that rivals will exit*

All of the theories of consumer injury from the *GE/Honeywell* merger were dependent on the argument that the merger ultimately would drive competitors from the market or would decrease their shares to a point where they could no longer effectively constrain GE's competitive behaviour. This argument was critical to consumer injury because prices could rise only after GE's competitors were either forced to exit or could no longer compete effectively.

We found no evidence supporting the notion that competitors would not be able to keep up or would be forced to exit as a result of the merger. GE's and Honeywell's rivals are mostly large, financially healthy companies with large shares in many of the relevant markets and ready access to capital. Since the engines and avionics and non-avionics systems have already been selected for all existing airframe platforms, and since very little or no new platform competition is expected in the near term, these competitors have an assured revenue stream for many years and any exit scenario seemed wholly implausible. We found no historical evidence of aerospace firms exiting or withdrawing from the market because they could offer only a narrow range of products, other than through mergers which kept their productive assets in the market.

3.5 *Conclusion*

In summary, we found no factual support for any of the key elements of the range effects theories of competitive harm with respect to the *GE/Honeywell* merger. To the contrary, we concluded that to the extent those theories were based on the argument that the merged firm would have the ability and incentive

to offer customers lower prices and better products, that meant the merger should benefit customers both directly -- through the lower prices and better products offered by the merged firm -- and indirectly -- by inducing rivals to respond with their own lower prices and product improvements. That, in our view, was a reason to welcome the merger, not condemn it.

NOTES

1. *FTC v. Procter & Gamble Co.*, 386 US 568 (1967).

2. *See, e.g.*, *United States v. Microsoft*, 253 F.3d 34, 87 (D.C. Cir. 2001).

3. Issues Paper by the Secretariat of the OECD Committee on Competition Law and Policy for Discussion at Roundtable on Portfolio Effects in Conglomerate Mergers 2 (Oct. 2, 2001) (on file with OECD).

4. *See* Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 Column. L.Rev. 835, 866 (1997).

5. While our paper's discussion of range effects focuses on EC merger decisions, it is important to note that the German and Spanish contributions to this Roundtable discuss those agencies' experiences in applying portfolio effects analysis to several recent mergers -- and, in the German case, to some not-so-recent mergers.

6. The Court also cited the Commission's findings that Clorox would become a more formidable competitor because "retailers might be induced to give Clorox preferred shelf space since it would be manufactured by Procter, which also produced a number of other products marketed by the retailers," and "Procter might underprice Clorox in order to drive out competition, and subsidise the underpricing with revenue from other products." 386 US at 575.

7. *United States v. Von's Grocery Co.*, 384 US 270 (1966).

8. *United States v. Arnold Schwinn & Co.*, 388 US 365 (1967).

9. *Albrecht v. Herald Co.*, 390 US 145 (1968).

10. *United States v. Topco Assocs.*, 405 US 596 (1972).

11. Some of these decisions have since been expressly overruled. *See Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 US 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 US 365 (1967)); *State Oil Co. v. Khan*, 522 US 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 US 145 (1968)).

12. Phillip E. Areeda & Donald F. Turner, *Antitrust Law* (1980).

13. Robert H. Bork, *The Antitrust Paradox* (1978).

14. Bork, *supra, at* 252-57 (1978).

15. *Id.* at 255.

16. *Id.*

17. *Id.* at 256-57.

18. *See, e.g.*, David J. Ravenscraft and F.M. Scherer, *The Profitability of Mergers*, Int'l J.of Indus. Org. 7, 101 (1989).

19. *See* P. Custatis, J. Miles, & J.R. Woolridge, *Restructuring Through Spin-offs: The Stock Market Evidence*, J. Fin. Econ. 33, 293 (1993).

20. *US Dept of Justice Merger Guidelines*, 33 Fed. Reg. 23,442 (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101.

21. Robert D. Joffe, Kolasky, McGowan, Mendez-Penate, Edwards, Ordover, Proger, Solomon, & Toepke, *Proposed Revisions of the Justice Department's Merger Guidelines*, 81 Column. L. Rev. 1543, 1569-70 (1981).

22. *See, e.g., Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 70 (10th Cir. 1972) (upholding FTC conclusion that Kennecott's acquisition of Peabody Coal would violate Section 7 in part because "Kennecott's deep pocket operating on a market which, though a loose oligopoly, is growing more concentrated" created "a likelihood of diminishing competition"); *Allis-Chalmers Mfg. Co. v. White Consol. Ind.*, 414 F.2d 506, 578 (3d Cir. 1969) (reversing denial of preliminary injunction on ground that the product extension merger at issue "may enable significant integration in the production, distribution or marketing activities of the merging firms" and that creation of "a company offering such a complete product line would raise higher the already significant barriers to the entry of others into the various segments of the metal rolling mill market"); *General Foods v. FTC*, 386 F.2d 936, 943-46 (3d Cir. 1967) (holding unlawful General Foods' acquisition of SOS, one of the two leading makers of steel wool soap pads, on the ground that the merger "has raised to virtually insurmountable heights entry barriers which were already high, changed the steel wool pad market [from] two substantially equal-sized companies and several smaller firms to one in which SOS is now dominant, and that the substitution of General Foods for SOS will paralyse any incentive to compete which might otherwise have existed").

23. For example, in *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975), the First Circuit found no Section 7 violation in the acquisition of USM, a shoe machinery business, by Emhart, a diversified manufacturing firm. The court specifically declined to "recognise per se entrenchment." *Id.* at 181. The court held that although "the entrenchment doctrine properly blocks artificial competitive advantages, such as those derived from certain promotional and marketing techniques," it does not apply to "simple improvements in efficiency." *Id.* at 182. The Second Circuit, in *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir. 1974), likewise declined to accept a "deep pocket" or "entrenchment" theory in a merger challenge. The court found the "'deep pocket' claim ... more theoretical than real": "Many of the companies in the business are controlled by economic giants already," but "smaller competitors have survived among those giant conglomerates in the past, [and] it seems unlikely that [the acquire] will pose an insuperable new obstacle simply because of itsacquisition by a wealthy stranger." *Id.* at 865. The last two entrenchment cases filed by the FTC in the mid-1970s likewise ended in decisions by the Commission that the mergers in question had not been shown to entrench the market position of the merging firms. *Heublein, Inc.*, 96 F.T.C. 385 (1980); *Beatrice Foods*, 101 F.T.C. 733 (1983).

24. *Brown Shoe Co. v. United States*, 370 US 294, 320, 344 (1962).

25. 506 US 447, 458 (1993). *Accord, e.g.*, *Eastman Kodak v. Image Technical Services, Inc.*, 504 US 451, 482-83 (1992) (aggressive competition serves consumers and therefore is not condemned by

the antitrust laws, even if it impairs rivals' opportunities, unless it is exclusionary, *i.e.*, without valid business justification); *see also*, Muris, *The FTC and the Law of Monopolisation*, 67 Antitrust L.J. 693 (2000).

26. *Monfort* at 116. Because Monfort had conceded it would *not* be driven from the market by "a cost-price squeeze," the Court did *not* reach the question whether "Congress intended the courts to apply §7 so as to keep small competitors in business as the expense of efficiency." *Id.* at 116 n. 11. It noted, however, that "there is considerable disagreement about this proposition." *Id.*

27. *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1282 (7th Cir. 1990)

28. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

29. *See US Dept of Justice & Federal Trade Common Horizontal Merger Guidelines*. 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992 and revised 1997).

30. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 US 574 (1986); *Brooke Group. Ltd. v. Brown and Williamson Tobacco Corp.*, 509 US 209 (1993). *See also*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 US 328 (1990) (lost sales resulting from non-predatory price reductions do not cause "antitrust injury.")

31. *Brooke Group* at 223.

32. *Guinness/Grand Metropolitan,* 1998 O.J. (L 288) 24-54 (Case No. IV/M. 938, October 15, 1997)

33. *Id.* at 99-100.

34. *Coca-Cola/Carlsberg,* 1998 O.J. (L 145) 41-62 (Case No. IV/M. 833, September 11, 1997).

35. *Id.* at 67.

36. *Id.* at 66, 68.

37. *Boeing/McDonnell-Douglas,* 1997 O.J. (L336) 16-47 (Case No. IV/M, July 30, 1997)

38. *Id.* at 92.

39. *Id.* at 78, 81.

40. *General Electric/Honeywell* (Case No. IV/M. 2220)(Decision not yet published.)

41. Generally, "tying" means making the purchase of one (desired) good conditional on purchase of another (less desired) good and therefore has an element of coercion. "Bundling," on the other hand, generally means offering a package of complementary goods at a discount from the prices for individual goods. If the individual components are also sold separately from the bundle, it is generally termed "mixed bundling," as opposed to "pure bundling," in which individual components are not offered separately. Bundling strategies sometimes can be distinguished from tying strategies by their lack of a substantial market power requirement. Bundling and tying may be either of the technological (complementary products are physically integrated) or contractual variety.

42. *See, e.g.*, Aaron Director & Edward H. Levy, *Law and the Future: Trade Regulation*, NW. UL Rev. 51 (1956).

43. Models of this variety are developed by Yongmin Chen as well as Jose Carbajo, David de Meza, and Daniel Seidman. Yongmin Chen, *Equilibrium Product Bundling*, J. Bus. 70(1), 85 (1997); Jose Carbajo, *et al.*, *A Strategic Motivation for Commodity Bundling*, J. Indus. Econ. 38(3), 283 (1990).

44. Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries* (December 1998) (unpublished manuscript available from National Bureau of Economic Research as working paper W6831); Michael Whinston, *Tying, Foreclosure, and Exclusion*, Am. Econ. Rev. 80(4), 837 (1990); *see also, United States v. Microsoft*, 253 F.3d 34, 87 (D.C. Cir. 2001).

45. Carlton & Waldman, *supra* note 40, at 33.

46. John G. Spooner, *Studies: PC Sales Down, But Could Be Worse*, CNETnews.com, July 19, 2001.

47. The Department did, however, require the parties to agree to divest Honeywell's military helicopter engine business and to authorise a third-party provider for heavy maintenance, repair and overhaul services for certain Honeywell aircraft engines and auxiliary power units, in order to resolve competitive concerns in those markets.

48. *United States v. E.I. duPont de Nemours & Co.*, 351 US 377, 391 (1956).

49. These figures are based on order information for the first half of 2001 contained on the following websites: active.boeing.com/commerical/orders/customquery.cfm and www1.airbus.com.

50. This competitive harm theory was based in large part on models derived from earlier work by Barry Nalebuff, professor of economics and management at Yale University. In a recent paper, Nalebuff has shown that those models do not apply in aerospace and avionics industry. Barry Nalebuff & Shihua Lu, *A Bundle of Trouble — Bundling and the GE-Honeywell Merger* (October 2001) (not yet published but on file with the authors).

51. *AlliedSignal/Honeywell*, (Case No. Comp/M.1601, January 12, 1999) 118.

52. Indeed, GE's leading market share in large aircraft engines is largely attributable to its successful CFMI joint venture with the French company, SNECMA. GE also has entered a joint venture with Pratt & Whitney to develop engines for Airbus' A3XX and the B747 that Boeing is considering launching. In addition, Rolls Royce and Pratt & Whitney have formed a joint venture — IAE — to develop, among other things, an engine which IAE has contracted to supply to Airbus for A319.

53. This theory also is reminiscent of cases brought in the 1960s challenging conglomerate mergers on the grounds that they would facilitate anticompetitive reciprocal dealing. *See, e.g.*, *FTC v. Consolidated Foods Corp.*, 380 US 592 (1965). Like entrenchment, this theory has been criticised and today would be pursued only where there would be a significant foreclosure effect.

54. The US briefly flirted with a theory that tying financing to the purchase of products could be anticompetitive but this theory was flatly rejected by the Supreme Court in *United States Steel Corp. v. Fortner Enterprises*, 429 US 610 (1977). *See also*, V Areeda & Turner, *supra,* 1105e, at

19 ("To make credit available to buyers who desire it is to offer a better product. To make it available at a lower cost is to sell that better product at a lower price, and that is clearly a social benefit.").

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REMARKS OF MR. WILLIAM KOLASKY

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October 19, 2001

Given the reaction to my remarks Wednesday, I must begin with a brief preface. We welcome the opportunity to engage in a public debate over the so-called range effects doctrine, and its application in particular cases, because we believe it raises an issue of fundamental importance to competition policy.

In our contribution, because we believe those who do not study history are condemned to repeat it, we have shared our experience with similar theories in the 1960s and 1970s and explain why we abandoned those theories when we rewrote our Merger Guidelines in 1982.

In our paper, we also explain briefly the reasons for our decision not to challenge the GE/Honeywell merger on a range effects theory. Given the importance of this issue, and the disparate results reached in the US and Europe, we felt we owed the global antitrust community a reasoned explanation for our decision.

Today, I would like to focus, not on this history or on the specifics of any one case, but rather on what we believe are the seven major areas of concern with respect to range effects. I will close with some suggestions for further work.

1. Should Proceed with Caution so as Not to Place Consumer Interests at Risk

We all share a common mission – to stop mergers that are anticompetitive and thereby harm consumer welfare. Sorting out good from bad mergers is difficult enough in straight-forward horizontal cases. It is considerably more difficult in vertical and potential competition cases, but over the years we have evolved an analytical framework that gives us sufficient confidence that our judgments are supported by solid economics and empirical evidence to take action.

When we move to mergers of complements we are moving into an area of much greater uncertainly. Especially when our theory of competitive harm proceeds from the premise that the merger will initially lead to lower prices and better products and that competitive harm will occur only if and when competitors are forced to exit the market, we are necessarily trading off short-term benefits against speculative long-term harm.

In such cases there is a very high risk that we will get this trade-off wrong. A century of antitrust enforcement has taught us that predicting long term effects of mergers is hazardous at best, especially when we discount as we must for time and uncertainty.

Before we bring such a case we should make sure we have a foreclosure theory that is built on solid economic theory and has a strong empirical basis. This is not to say that such cases might not exist. As our Standard Fashions case illustrates, a broad portfolio of products combined with exclusive dealing may raise barriers to entry, for example. Even in such cases, however, it is not at all clear that blocking the

merger creating the portfolio is necessary if prohibiting the anticompetitive practice would be sufficient to prevent the harm.

2. Tying and Bundling

A key part of the anticompetitive story in the range effects decisions we have studied is that the merger will facilitate the bundling of complements. We would certainly agree that there are circumstances in which forced tying by a firm with market power in the tying product can be anticompetitive and would therefore be unlawful under the antitrust laws. Our antitrust action against Microsoft is just such a case and we are very pleased with our victory in that case this summer, in which the court held that the manner in which MS bundled IE with Windows constituted illegal monopoly maintenance in violation of section 2 of the Sherman Act.

Our problem with the range effects decisions we have seen is that they extend well beyond forced tying of the type that would be unlawful under the antitrust laws to other types of bundling that would not be unlawful. It is not unlawful, for example, for a company to physically integrate two complementary products while continuing to sell the components separately. If it were, the introduction of Kellogg's frosted flakes might have violated the antitrust laws. Nor is it unlawful for a company to offer a bundle of products at a lower price than it charges for the individual components, so long as the price is not predatory. And it certainly is not unlawful for a company to discount the prices of its products because it recognizes that offering a lower price for one product will increase sales of other complementary products. If it were, Gillette would have to charge a much higher price for razors.

In all of these cases, the customer remains free to choose between buying the bundle or buying the components individually from different suppliers if she wishes. In these circumstances, the lower prices for the bundle usually reflect either economies of scale and scope, lower transactions costs, or the Cournot effect. They therefore promote allocative efficiency and enhance consumer welfare.

As we read the range effects decisions, they would prohibit a merger because it will facilitate this type of pro-competitive bundling. Given that this bundling, if it occurred, would not violate the antitrust laws, we cannot understand how it can serve as a basis for prohibiting a merger.

It may be true that if narrow-line firms are unable to replicate these efficiencies through teaming arrangements, internal growth, or counter-merger, this type of efficient, pro-consumer bundling could, theoretically at least, contribute to the foreclosure of those firms. We must keep in mind, however, that the competitive process is largely about encouraging the more efficient to grow at the expense of the less efficient.

3. Putting additional pressure on rivals benefits consumers

This brings us to our third concern. We believe that, to the extent a merger leads to lower prices and improved products, it will challenge rivals to work harder to compete. We believe that this is both pro-competitive and desirable. Competition enhances consumer welfare largely because it rewards success and punishes failure. Firms are rewarded for cutting costs, lowering prices, and in the process displacing their rivals. Such competition sometimes means that inefficient rivals are driven out of business, but even if they are, consumers are better off. Our experience, however, is that rivals rarely go quietly into the night. Instead, they typically respond by lowering their own costs and prices, competing harder to stay alive. By refusing to protect rivals from efficient conduct, US antitrust law sends a clear message to business that they must compete in the market, rather than seek protection from the government.

4. Creates perverse incentives

Our fourth concern is that the range effects doctrine creates perverse incentives for parties, as well as for complainants. The doctrine may cause the parties to feel they must try to minimize the benefits of the transaction to consumers while rivals seek to exaggerate them. The result would be to dissuade merging parties from talking candidly about the efficiencies they expect to realize, out of fear that such efficiencies -- even when they would clearly benefit consumers -- would be viewed negatively by some competition authorities.

5. Ex post remedies can adequately address any real competitive issues

Our fifth concern is that an *ex ante* remedy in the form of blocking a merger would often be overbroad. It will sacrifice efficiencies unnecessarily because truly anticompetitive tying can be effectively addressed under the antitrust laws if and when it is attempted. The availability of effective sanctions -- treble damages under US law; substantial fines under EU law -- should serve as a deterrent to such behavior so long as those sanctions are imposed with the certainty, severity, and celerity necessary to effective deterrence. As Alberto Heimler has pointed out, blocking a merger because the merged firm may engage in unlawful tying is like banning the sale of Ferrari cars because some owners will not respect the speed limit.

6. Will lead to greater uncertainty and over-deterrence

Our sixth concern is that the range effects doctrine will lead to greater uncertainty by giving agencies too much latitude to block mergers on the basis of claims that cannot be tested empirically and that are not soundly grounded in economic theory. It is likely to over-deter efficient transactions because firms will play it safe in close cases.

7. Risk eroding the broad political consensus supporting competition policy

Our seventh and final concern is that the range effects doctrine threatens to undermine the broad political consensus that now supports vigorous antitrust enforcement. If a fundamental difference in antitrust doctrine regularly leads mergers to be disapproved in Europe that would be approved in the United States, we will undermine the faith that competition law is soundly grounded in economics and that outcomes do not turn on which jurisdiction reviews a particular transaction. If the business community and the public lose confidence in the fairness and soundness of our decision-making, we will risk politicizing antitrust -- a result none of us desires.

8. Further work

We have two suggestions for further work.

First, there have probably been a large number of mergers, in both the United States and Europe, involving firms producing complementary products. We should study those mergers to see if they provide any empirical support for the concerns that underlie the range effects doctrine. For example, can we identify any rival that has been killed by a Cournot effect?

Second, we should continue to discuss range effects in fora like this one. I would particularly like to see the doctrine subjected to critical scrutiny by both the legal and economic academic community.

The paper by Barry Nalebuff we cited in our paper is a start in this direction. The public dialogue over our Microsoft case has been invaluable in testing the theories we advanced in that case. That debate helped to inform the court of appeals decision. We would like to see the same happen here.

EUROPEAN COMMISSION

Leveraging in conglomerate mergers

Conglomerate mergers are mergers between firms that have no existing or potential competitive relationship either as competitors or as supplier and customer. In this sense, conglomerate mergers may not give rise to horizontal or vertical issues. Under certain circumstances, conglomerate mergers may raise competitive concerns where the merging firms are suppliers of complementary, non-competing, but closely related products requested by the same set of customers, i.e., intermediate or final customers. Competitive concerns in conglomerate mergers may be reinforced in the case of the accretion to the merged firm of considerable financial strength. The underlying concern is the use of market power which, not being based on normal business performance or competition on the merits, may substantially reduce the amount of competition by excluding competitors from the market. Conglomerate analysis therefore distinguishes competition on the merits from exclusion based on anti-competitive aims.

The definition of the combined product range is a key element in the analysis of conglomerate mergers. Such mergers expand the product range of the merged firm, thus enabling it to offer a combination of products which downstream agents may be more willing to buy together than separately from the independent firms, before the merger. This may be the case because the combined products are technical complements (e.g., when one cannot function without the other, such as a computer operating system and a software, internet browser, etc.), economic complements (e.g., products which are consumed together like coffee and milk or produced together like petrol and diesel oil, etc.) commercial complements (e.g., when they form part of a range which downstream agents, such as multiple retailers, need to carry, such as spirits, soft drinks, etc.).

Under certain circumstances, the combination of such products may give the merged firm the ability and the economic incentive to change its commercial conduct thus altering the structure of the markets concerned. In particular, when a merging firm enjoys market power in one or more of the complementary products, a change in its conduct may be expected to result in the leveraging of its existing market power into one or more of the products that constitute the combined product range. Such leverage practices may translate into various types of product tying, which may be based on pressure or incentives *vis-à-vis* downstream agents: for instance, commercial tying in the form of a refusal to supply the products separately; mixed bundling based on the variation in the pricing structure of the merged firm; technical tying and so forth. In addition, when the merger also brings about an accumulation of financial strength, cross-subsidisation/predation enhance the ability to leverage market power. Some forms of this conduct may appear on the face of it to be in favour of downstream agents in the short term, in particular as far as mixed bundling based on incentives is concerned. However, they may result in competitive harm if they have as an object or effect to reduce competition in the markets concerned, notably as a result of the elimination or marginalisation of competitors.

To date, the European Commission has challenged the leveraging effects of conglomerate mergers only when market power has pre-existed before the merger in at least one of markets composing the combined product range.

1. Types of leveraging effects

1.1 As mentioned above, conglomerate mergers raise competitive concerns when they can afford the supplier of a range of complementary products the possibility and the economic incentive to leverage its market power in one of the complements into another. This leverage of market power may take one or a combination of the forms described below.

1.1.1 Commercial tying based on pressure to downstream agents

A conglomerate merger may enable the merged firm to pressure customers through the threat to refuse to supply one of the products in the range unless they also buy other products in the range or through the obligation imposed on customers to buy the whole range (i.e., full-line forcing). The possible anti-competitive effect of this type of product tying relies on the ability and the incentive of the merged firm enjoying market power in one market, the "tying market", to leverage this market power into another market, the "tied market".

The concept of the creation or strengthening of market power in non-horizontally or non-vertically related markets as a result of this type of product tying is not novel in EC antitrust analysis. Product tying has been analysed in the practice of the European Commission and the case law of the European Court of Justice on various occasions, either under Article 82 of the EC Treaty (abuse of dominant position) or under the EC Merger Regulation.

Article 82(d) provides that an abuse may consist in making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. This provision refers to situations where a firm which holds a dominant position in one product forces its customers to purchase this product together with other products in which it is not necessarily dominant. Its objective is to prevent the distortion of competition in the tied product market by reducing the competitive thrust of competing suppliers active in this market, eventually forcing them to exit that market. The classic example of product tying under Article 82 is found in the *Hilti* case.[1] The case concerned a company trading in nail guns and their accessories (cartridge strips and nails) which attempted to eliminate independent producers of nails compatible with its guns by, first, selling its cartridge strips only to those customers who agreed to buy its own nails. The Commission considered that this form of product tying constituted an anti-competitive exclusionary practice.

In another case (*Tetra Pak II*), the Court of First Instance[2] and the Court of Justice[3] confirmed the Commission's finding that Tetra Pak had committed abuses in the markets for non-aseptic packaging machines and non-aseptic cartons (the "tied markets"), through Tetra Pak's dominant position in the markets for aseptic packaging machines and aseptic cartons (the "tying markets"). The leverage of market power from the "tying markets" to the neighbouring "tied markets" through product tying was justified by a series of factors, such as for instance the fact that Tetra Pak held a leading position in the "tying markets", the strong links existing between the two markets, the fact that the products in both markets were used for the same purposes (i.e., packaging the same final products) and that a substantial part of Tetra Pak's customers and competitors operated in both markets.

Under the EC Merger Regulation the Commission has examined mergers on the basis of leveraging of market power through product tying in several cases concerning consumer goods. In *Coca-Cola/Amalgamated Beverages GB*[4], the Commission examined whether the constitution of a broad range or portfolio of soft drink brands would confer on the Coca-Cola Company the possibility to use its beverage portfolio to its advantage, for instance by leveraging its strong position in Coca-Cola (the "tying market")

into other products of the portfolio. In the same sector, the Commission examined whether the constitution of a portfolio of carbonated soft drinks, packaged water and beer might give "each of the brands in the portfolio greater market power than if they were sold on a stand alone basis" and subsequently concluded that such a portfolio would strengthen the existing dominant position of one of the firms in the "tying market".[5]

In *Guinness/Grand Metropolitan*[6] the merger analysis focused on the non-horizontal effects resulting from the formation of a wide portfolio of product brands across various categories of spirits, which constituted separate but closely-related product markets. The assessment was based on the finding that when elements of market power are combined, the whole may be greater than the sum of the parts. Therefore, although individual leverage possibilities might have existed prior to the merger, the combined leverage possibilities post-merger, through product tying, became greater than the sum of the individual possibilities pre-merger. The decision outlined some of the advantages that a comprehensive portfolio of goods may grant to the merged firm. For instance, the bargaining position of the merged firm in relation to customers would become stronger owing to the fact that the broader offering of its products would account for a substantial part of the customers' requirements, thus making the implicit or explicit threat of a refusal to supply more potent. The *Guinness* decision set out certain conditions under which a combined product portfolio may result in the creation or reinforcement of dominance, such as for instance, whether downstream agents purchased a range of products among which the combined portfolio accounts for a significant proportion; whether market power existed in one or more "tying markets" (i.e., leading brands of spirits, also referred to as "must stocks") among the products constituting the portfolio; the market shares of the various other products of the portfolio, in relation to the shares of competitors; the relative importance of the individual product markets in the portfolio in terms of sales in the total sales of spirits; the relative strength of competitors' individual products or portfolios; and finally, the prospects for the exercise of countervailing buyer power and for potential competition through entry or expansion.

In all these cases, the Commission considered the ability and incentive of firms to leverage power in one market to the benefit of a product in another complementary, non-competing but closely related market. The main criticism of product tying as a profitable exclusionary practice has been based on the theory developed in the so-called Chicago School of thought, i.e., that there is only one monopoly profit to be made and the firm active in the tying market can make this profit simply through its pricing in this market. This line of thinking is, however, based on theoretical assumptions that are not always met in real life, such as that the "tied market" is purely competitive or that the two products are used in fixed quantities. The most recent line of thinking is that if competition in both markets is imperfect, tying can under certain conditions change the market structure of the tied market by excluding or eliminating rivals.[7] These conditions have generally been met in the Commission's assessment of product tying under either Article 82 EC or the Merger Regulation. Thus the condition of the existence of market power in the tying market has been met in the finding of a dominant position (e.g., in nail guns in *Hilti* or in Classic Coca Cola in the Coca Cola cases) or in the existence of a must-stock brand (e.g., in *Guinness* and in the Coca Cola cases). Indeed, it can be reasonably argued that a firm which lacks market power in the tying market may not have the ability to leverage such market power to the tied market. Another condition is that the firm must have the economic incentive and ability to commit to a tying strategy. For instance, the Commission may assess the credibility of the threat to refuse to supply customers unless they buy both the tying and the tied products or to impose on them full-line forcing. In general, the refusal to supply the tied product separately from the tying product may not be credible where the firm faces a disproportionate risk of failing to sell both products, thus losing profits in both product markets. For instance, in the presence of "must-stock" products, the Commission considered that the inelasticity of demand of customers vis-à-vis such products makes that threat credible. In merger cases, the Commission also assesses whether tying has as a consequence the reduction of competition in the markets, as a result of the foreclosure, marginalisation or elimination, of competing suppliers. For instance, in *Guinness* and in the Coca Cola cases, the

Commission found that competing suppliers would be permanently foreclosed from a substantial amount of market outlets, as a result of tying practices on behalf of the merged firm.

1.1.2 Commercial tying based on pricing incentives

Conglomerate mergers may also change the pricing behaviour of the merged firm as a result of the constitution of a wide range of product offering. In such a case, complementary products may be sold together at a price which, owing to the flexibility of the merged firm in structuring discounts across the combined product range, is lower than the price charged when they are sold separately. As a result of the combination of a broad range of complementary products, the merged firm may have the financial ability and incentive to cross-subsidise discounts across the products of the range, thus granting rebates which are conditional on the purchase of all products of that range. The Court of Justice examined under Article 82 the grant of discounts which were conditional on the customer purchasing the whole range of the firm's products (i.e., vitamins) and considered them as constituting an exclusionary abuse when preformed by a dominant undertaking.[8] In the same spirit, in *Michelin*[9] the Court stated that "no discount should be granted (by a dominant firm) unless linked to a genuine cost reduction in the manufacturer's costs". The Court pointed out that competing suppliers of automobile tyres may be foreclosed as a result of such practices owing to the fact that customers would be unlikely to switch suppliers or deal with other suppliers at any point during the reference period (one year) for fear of not qualifying for the rebate. As in the case of product tying, the underlying concern of mixed bundling is that such a practice may have a tying effect on customers, thereby considerably foreclosing the market to competing suppliers.

This is particularly true in the case of conglomerate mergers, where competing suppliers of individual, stand-alone products are unable to replicate [what? "the post-merger competitive behaviour of the merged entity"?] due to the limited number of products in their portfolio. Thus, in *Guinness*, the Commission considered that the constitution of a broad portfolio of spirits would give the merged firm the flexibility to structure prices, promotions and discounts and have a reasonably greater potential for product tying.

Under this type of commercial tying, the general level of demand for the products in the product range may increase, in the sense that a decrease in the price of one of the complementary products may increase the demand for the other complements in the range.[10] For such an increase in demand to be profitable, the merged firm may render the price reduction contingent on customers taking the whole range of complementary products from it. This type of commercial tying may produce a short term welfare increase for those customers which chose to buy the range at a reduced price. However, in the long term, welfare may be adversely affected when competitors are foreclosed, marginalized or eliminated from the market and when subsequently the merged firm has the ability to raise prices.

Conglomerate mergers make this type of tying worse as a result of cross-subsidisation between the different products in the combined product range. In addition, where the merger brings about significant financial strength, the ability of the merged firm to cross-subsidise discounts across the complementary products in the product range may also come from profits made on products outside that range.

1.1.3 Technical tying

Conglomerate mergers may also produce anti-competitive effects when they enable the merged firm to engage in technical tying. Technical tying may become possible when, as a result of the merger, the complementary products become available only as an integrated system that is incompatible with competing individual components. Such a practice may be found in industries which manufacture

intermediate products which are subsequently assembled either by the final buyer or by intermediate downstream agents (e.g., in the automotive, aerospace, computer industry, etc.). When the merging parties enjoy market power in one or more of their complementary products, technical tying can have the effect of foreclosing competing suppliers of individual components, by denying them the possibility to sell their intermediate products alongside the other products of the merged firm. This can potentially reduce their profitability and adversely affect their incentives to compete. In a recent case, the Commission examined whether the merged entity could engage in technical tying by making its complementary products (i.e., satellite interfaces and launchers) incompatible with competing products.[11] The Commission found that in the absence of market power in either of the complementary products and in the presence of buyer power the merged firm would not have the ability to engage in technical buying.

2. Concluding remarks

On the basis of the above description of the various forms of leveraging practices, it can be concluded that conglomerate mergers may produce anti-competitive effects under certain well defined circumstances.

Conglomerate mergers may result in the creation or strengthening of a dominant position through the leverage of market power from one product market into another, closely related product market, where market power does not necessarily exist before the merger.

The extent of the competitive harm of conglomerate mergers depends on the industry concerned. Thus, conglomerate mergers in industries which display imperfect competition, high sunk costs, high entry or expansion barriers, imperfect capital markets and so forth, are more likely to lead to the permanent exclusion of competitors and the subsequent monopolisation of the market by the merged firm. Conversely, conglomerate mergers may not lead to competitive harm when the merging firms lack sufficient market power. Finally, conglomerate mergers may fall short of competitive harm when buyers possess significant amounts of countervailing power.

Some of the leveraging practices resulting from conglomerate mergers may take the appearance of efficiencies. This is in particular the case of commercial tying based on incentives to customers, whereby conditional rebates and discounts granted by the merged firm may benefit customers in the short term. However, such short-term strategic price reductions cannot be considered as efficiencies in the sense that they do not correspond to a sustainable reduction in the cost of production of the merged firm, likely to be passed on permanently to customers and consumers. On the contrary, to the extent that such short-term strategic behaviour has the ability to eliminate competitors, the claimed efficiencies cannot be realistically expected.

Conglomerate mergers, therefore, may bring about competitive harm, resulting from the commercial conduct of the merged firm altering the market structure prevailing after the merger. Structural remedial action may, in this case, become necessary in order to remove the anti-competitive effects, such as for instance the reduction of the extent of the combined product range. As is the case with other categories of mergers, behavioural remedies are not appropriate in addressing conglomerate concerns. Nor is the possibility of an *ex-post* control based on Article 82 capable of eliminating the creation or the strengthening of a dominant position resulting from conglomerate mergers. As is the case with all mergers, efficient application of Article 82 is an inadequate substitute for proper use of *ex-ante* merger control policy.

NOTES

1 Commission Decision in case Eurofix-Bauco/Hilti (1988) OJ L65/19 upheld by the Court of First Instance (Case T-30/89 (1991) ECR II-1439) and the European Court of Justice (Case C-53/92P (1994) ECR I-667)

2 Case T-83/91 *Tetra Pak International v Commission* (1994) ECR II-755

3 Case C-333/94P *Tetra Pak International v Commission* (1996) ECR I-5951

4 Case IV/M.794 (1997) OJ L218/15

5 *The Coca-Cola Company/Carlsberg A/S*, case IV/M.833 (1998) OJ L145/41

6 Case IV/M.938 (1998) OJ L288/24

7 *Beyond Bork: New Economic Theories of Exclusion in Merger Cases, NERA Competition Brief, August 2001*

8 *Hoffman-La Roche v Commission* (1979) ECR 461

9 *Michelin* (1983) ECR 3461

10 This depends on the elasticity of demand.

11 Case COMP/M.1879 - *Boeing/Hughes*, Commission Decision of 27 September 2000 (not yet published)

AIDE-MEMOIRE OF THE DISCUSSION

The **Chairman** opened the roundtable by noting the great deal of interest it had elicited. Fourteen written contributions were received. That number would probably have been larger had it not been for the fact, privately communicated to the Chairman, that in some countries there were divided views about what to say about portfolio effects in conglomerate mergers. The Chairman noted that this topic is highly interesting because we see a number of conglomerate mergers being reviewed using the portfolio effect theory, and also because there is obviously room for debate on how to do such assessments.

[Editor's note - the Chairman intended to begin by calling on the European Commission (EC) but due to some temporary difficulties, turned instead to Canada. This aide-mémoire nevertheless begins with the EC because the Canadian presentation fits better within the next section.]

1. Leveraging in conglomerate mergers

The **Chairman** recalled that the EC has had a number of important cases involving portfolio effects both in terms of mergers and in the application of Article 82 (abuse of dominance). The EC contribution is entitled, "Leveraging in Conglomerate Mergers", and this is precisely what it treats. It looks at different types of tying that might be problematic: commercial tying based on pressuring down stream agents, commercial tying based on pricing incentives, and technical tying.

At the end of its contribution in paragraph 17, the EC states: "On the basis of the above description of the various forms of leveraging practices, it can be concluded that conglomerate mergers may produce anti-competitive effects under certain well defined circumstances." This led to three questions from the Chairman beginning with a request for a clear and precise picture of what the very well defined circumstances were and how one could establish their existence. Second, if those conditions were realised, what could one say about the likelihood that the leveraging practices will take place? And third, if those leveraging practices were clear, easily detected and presumably qualified as abuses of dominance under Article 82, why should one worry about them in merger cases? Might they be better addressed *ex post* rather than *ex ante*?

A **European Commission** delegate began with some introductory comments setting out three reasons why the *GE/Honeywell* merger was omitted from the EC's written contribution. First, the decision was not yet published when the paper was drafted. This means that only the member states of the European Union and the U.S. Department of Justice, who had received it from the parties, were aware of the text of the decision. The EC did not think it right to expose the argumentation in the required detail in the OECD roundtable when most delegations had not yet had a chance to study it. Second, the case is *sub judice*, i.e. it is before the European Court of First Instance. Of course being in court does not mean that one cannot discuss the main concepts, but it requires some restraint on the part of the EC. And finally, the heads of the U.S. Department of Justice (USDOJ), the Federal Trade Commission and the European Union had agreed, less three weeks before the roundtable, to set up a joint working group to analyse in detail the real or perceived differences in analysis and to work towards convergence.

Turning to the Chairman's three questions, the EC delegate began with the precise conditions under which conglomerate mergers may produce anti-competitive effects. The EC sees those anti-competitive effects arising if a sequence of conditions is met, namely when mergers enable leveraging of market power, thus foreclosing rivals, thereby reducing consumer choice and ultimately, importantly, leading to a loss of welfare. Therefore, as a starting point, the existence of market power is a necessary condition for the ability, the likelihood and the profitability of leveraging practices. He noted that the GE/Honeywell merger would have united the dominant firm in one and the leading (not necessarily dominant) supplier in another market. The complementary character of the product markets is also of significance. Complementary products or close substitutes, such as, for instance, in the spirits or drinks sectors, which are sold to the same customers and are viewed by such customers as constituting an essential part of their requirements are more likely to create leveraging opportunities.

Turning to foreclosure, there are various ways in which foreclosure of rivals can take place. One is through strategic pricing. For instance, if bundling over a large portfolio is a chosen action, this may force competitors to play the game bundle against bundle. A firm with only some components of a bundle may find it hard to compete. In particular, in industries displaying high entry barriers, high sunk costs, long payback or break-even periods, intensive R & D and high investment costs, the competitors may be insufficiently able to counter the ability of the merged firm to leverage its broad and powerful market position. The existence of significant financial strength on behalf of the merged firm may in such a case be an additional, sometimes important factor. However, financial strength has to be analysed on a case by case and industry by industry basis to determine whether it is an important element of the overall analysis. This has nothing to do with "big is bad", and the Commission has never followed such a policy. Finally, a critical analysis of possible efficiencies will have to be made. One has to ask whether efficiencies are real and likely to be structural - do they, for instance, reduce the marginal cost of producing and distributing the product in a sustainable way so that the benefits reach the consumer? In other words, the efficiencies must be merger related, real, durable and in case of doubt, must be demonstrable by the parties.

The Chairman's second question was, if these conditions are realised, what can one say about the likelihood that leveraging will actually take place?

The EC believes that once the ability to leverage market power is established, the required incentives to engage in leveraging practices will depend on whether the merged firm sees them as a profit maximising strategy, i.e. the best course of action from a company point of view in the circumstances. The abundant case law on such practices examined *ex post* under Article 82 suggests to the EC that when firms found themselves within the previously described market setting, they regularly have attempted and often succeeded in leveraging their market power from one market into another with a view to increasing profits by squeezing out rivals and ultimately extracting supra-competitive profits from consumers. However, there is no automatism from ability to incentives to action. For instance, in the *Boeing-Hughes* merger mentioned in the Secretariat's paper, competitors were concerned that the merged entity would use their powerful position in satellites to force customers to buy its launch services, a market in which the parties had a weaker market position. The Commission's investigation showed that buyers had their own preferences regarding launch vehicles and were not prepared to forego the possibility of choosing between a number of launchers. It would not therefore have been profitable for Boeing-Hughes to induce satellite customers to use only Boeing launch services, as they would have lost significant satellite sales on the way.

The Chairman's third question was if leveraging practices are clear and easily detectable abuses of dominant position prohibited under Article 82, why should one worry about them in merger cases?

The EC delegate considered this to be a false debate. While it is true that leveraging practices such as product tying, bundling and so forth, are *per se* abuses under Article 82, the same is true for abusive pricing behaviour resulting from market dominance. Would this mean that *ex ante* merger control

should not bother to prevent the creation of dominance because in any case a subsequent abuse of such dominance can be caught by the corrective and punishing mechanism of specific *ex post* legal provisions? The EC believes the answer is clearly no. Leveraging practices may result in foreclosure of rivals, i.e. their gradual marginalisation or exit from the market or segments of it. In this respect it is hardly conceivable that the punishing mechanism of *ex post* instruments can do anything to prevent such market foreclosure. In other words, the imposition of fines on the dominant merged firm, no matter how heavy these may be, cannot do anything to reinstate the competitive thrust and constraint of weakened or exiting rivals. Damage to competition will have already occurred and the legal system of prevention of the creation of market power, notably through an effective merger control policy, will have failed. In any event, the aim of *ex ante* merger control is to preserve competitive market structures with a view precisely to eliminating the need for more or less intrusive regulation of market behaviour with all its attendant evils.

2. Do we need a special treatment?

The **Chairman** pointed out that the Canadian submission focused on whether portfolio effects in conglomerate mergers are really a new issue or something that can be treated using traditional merger analysis. The Canadian contribution included the remark that: "…traditional merger analysis may be sufficient to analyse mergers between firms producing complementary products." Canada arrives at this conclusion by drawing a parallel between the treatment of conglomerate mergers on the one hand and the tools and treatment of horizontal and vertical mergers on the other. Canada observes, *inter alia*, that predatory pricing, leveraging, tying and bundling can also be issues in traditional vertical or horizontal mergers. The Chairman called for further comment on these points.

A **Canadian** delegate agreed that his country's paper aimed to provide some thoughts and observations on the question: can current merger analysis address a merger of complementary products? A very important part of merger analysis focuses on the impact the transaction will have on prices, and this brings up the matter of a possible Cournot effect arising from uniting complementary products. A merger of complementary products internalises the effect of a price reduction in one complementary good on sales of another. The result is that the merged entity may lower its prices post-merger and presumably increase its market share. This in turn could bring pressure to bear on competitors. In the longer run, it might even cause some of them to exit, and if there are high barriers to entry, one may well have a situation where the merged entity enjoys increased market power and an ability to raise prices. The same thing could apply to vertical mergers involving complementary products. There again a pricing externality is internalised. A double marginalisation problem is essentially solved by getting rid of the middleman and the mark up on the mark up. Once again the prediction could be that prices in the short term fall, but rise in the longer term if a sufficient number of competitors eventually exit and there are high barriers to entry.

Another area to examine in traditional mergers analysis is efficiencies, including the pricing efficiency associated with a Cournot effect. In addition, on the supply side in relation to mergers of both complements and substitute products, there could be economies of scale and scope in production, sales, marketing and distribution. In the case of complements there could also be some advantages on the demand side, i.e. the benefits of one stop shopping.

The Canadian paper also examines some other areas of traditional analysis, barriers to entry for example, and refers to a couple of papers. One paper points out that multi-product firms can affect entry and exit decisions differently than single product firms. One author suggests that brand proliferation, for example, may deter entry at least in the case of substitutable goods. Another paper talks about multi-product monopolists in complementary goods having an incentive to deter entry more than a monopolist in substitutable goods. The Canadian paper also discusses inter-dependence in terms of price and tacit

collusion, and deals as well with predatory pricing, and points out, essentially, that we can make no predictions based on whether a merger involves substitutes versus complements.

Turning to the area most often discussed in conglomerate mergers involving complements, i.e. monopoly leveraging, tying and bundling, the paper points out that the Chicago school initially produced a lot of scepticism about whether monopoly leveraging was actually rational and therefore something to be concerned about. More current thinking outlines conditions where vertical foreclosure is possible and can have anti-competitive effects due to strategic effects. Unfortunately, in this area there is not much literature on what to look for in relation to complementary goods. Most relates to substitute goods.

The Canadian delegate also drew attention to some measurement issues. These included determining whether goods really are complements. He also noted that in terms of bundling, sometimes it is hard to use current statistical techniques to define product and geographic markets, though the *Staples* case, for example, has produced some advances in this area.

The delegate closed by returning to the theme that the current framework of analysis in terms of pricing effects, barriers to entry, efficiencies and so on, can be incorporated into mergers involving complementary products. Moreover, anti-competitive practices such as predatory pricing, leverage, tying, bundling and so on can operate in any situation, not just post-merger, and in most jurisdictions there are explicit provisions to deal with those. In any event, these issues are not unique to mergers involving conglomerates and can be accommodated within existing merger analysis.

The **Chairman** noted that in contrast with the Canadian view, the Finnish contribution considers that a lot is gained by introducing the concept of portfolio effects into the realm of conglomerate merger review. The Finnish contribution states:

> It seems evident that, by using portfolio doctrine, one can reduce categorical market appraisal in a single specified market and focus attention on actual comprehensive effects. In this respect, the portfolio doctrine contributes to the overall appraisal of concentrations. Thus, the competition test seems to better take into account consideration of the total effects the concentration has on competition.

The Chairman found this to be an interesting approach which, if he understood it well, holds that there are some limitations in the traditional analysis of horizontal mergers or vertical mergers where one has to define markets, perhaps in a somewhat arbitrary way, and then look at the effects market by market. In contrast, in the case of conglomerate mergers and a portfolio approach one can have a wider scope of vision.

The Chairman drew attention to Finland's *Omya/Mondo* case, a merger involving two suppliers of processed minerals for the paper, paint and plastic industries. Concerns were raised about the portfolio effects which could develop in the case of a merger involving a firm producing substitute products. So that is a bit different from one of the conditions mentioned earlier by the EC, namely the complementarity in the products. Indeed, the Finnish contribution stated: "Industrial minerals produced and processed by the parties to the acquisition were substitutive with respect to some markets, which resulted in Omya's portfolio benefits." The Chairman also remarked that the case seems to show that minerals for the paper and paint industry are industrial products for which brand effects may have been relatively unimportant. He asked the Finnish delegation to explain, *a*) its views on the general utility of the portfolio approach to mergers, and *b*) in particular in *Omya/Mondo*, what was the particular concern about portfolio effects in a merger involving substitutable products?

A **Finnish** delegate noted that *Omya/Mondo* was not a very illustrative portfolio effects case. Nevertheless it was examined from that point of view because, as the Chairman mentioned, both companies in the transaction were involved in producing different kinds of minerals to different paper industries. The target company, Mondo, was one of the biggest producers and suppliers of talc to the paper industry, and Omya was involved or active in producing calcium carbonate which is also used in the paper industry. These products were sometimes used in combination to treat paper. And the idea was that probably buyers of these products would source primarily from the merged entity, purchasing both inputs as a bundle. The products were partly substitutes, but they were partly complementary products as well. It was obvious, though, that very strong portfolio effects did not arise, partly because the buyers were very big paper companies which purchased from world wide sources. It followed that the merged entity would not be able to use talc, where they had quite a big market share, to tie sales of calcium carbonate. In any case, the transaction restructured an existing joint venture in a way that tended to create more competition, which was another reason the transaction was approved.

Turning to the Chairman's point about Finland's belief that the portfolio effect doctrine may be quite useful in handling certain merger cases, the delegate thought this is true because Finland is applying quite a strict dominance test. Finland examines mergers by first making appropriate product and geographic market definitions, and then analysing market shares in order to define whether the parties have market power and so on. And these tools coupled with the dominance test are not always enough to decide what is really happening in the markets. Finland thinks the portfolio effects concept may have some positive impact on that. Its experience is that strict and categorical market definition and market share appraisal are not always convenient and appropriate to define whether the merger has a negative impact on competition.

Finland concluded that the portfolio doctrine is useful, but one should also analyse whether there is something wrong with the dominance test.

The **Chairman** changed the direction of the discussion somewhat by noting that when the Japanese Fair Trade Commission (JFTC) looks at the problem of portfolio effects in conglomerate mergers, the Japanese FTC closely examines, "…the overall business capability of the merged firms." He asked the Japanese delegation to explain more about the overall business capability concept and to indicate whether it is also applied in assessments of horizontal or vertical mergers. The Chairman believed it referred to something more than market power. He also sought a description of the *Mitsui Petrochemical/Mitsui Toastsu Chemicals* merger.

A **Japanese** delegate stated that the Japanese Antimonopoly Acts treats conglomerate mergers in the same manner as other types of mergers. The JFTC examines whether a notified merger will substantially restrain competition in any particular field of trade. In order to clarify what types of mergers would substantially restrain competition, the JFTC has published merger guidelines specifying the factors considered in examining mergers and acquisitions, for example, market share, entry, efficiency, overall business capability and so on. If one looks at portfolio effects in conglomerate mergers, a close examination of the over all business capability of the merged firm would be made. If the overall business capability will increase after a merger, it is possible that other companies will have difficulty competing. The concept of overall business capability is wide-ranging enough to include portfolio effects, and would be applied to vertical and horizontal as well as conglomerate mergers. When determining overall business capability, in addition to market share, changes in the company group such as its abilities to procure raw materials, technological resources, marketing capability, access to credit, brand power and advertising capability are also be examined.

Increased overall business capability may enhance the power to restrain competition including through leveraging. However, the JFTC has never taken any legal measures with regard to mergers based on portfolio effects, and overall business capability is not a principal point in a merger examination.

Turning to the 1999 *Mitsui Petrochemical Industries Limited/Mitsui Toatsu Chemicals Incorporated* merger, it was conceivable that the transaction might have increased the overall business capability of the new company within the petrochemical industry as a result of greater integration of mutually related products. It might also have had a significant impact on competition in individual petrochemical products. But, there exists another leading firm, Mitsubishi Chemical Corporation, which ranks first in sales and ethylene production capacity. It was expected that sufficient competition would remain in the market, so that it was determined that an expansion of overall business capability would not pose a serious threat to competition.

The **Chairman** next cited the Korean contribution where it was noted that: "The Korean competition authority [KFTC] has kept an eye on conglomerate mergers and diversification attempts of chaebols because it realised that without effective regulation of conglomerate mergers, reckless expansion through reciprocal subsidies, cross guarantees, circular investment etc. will highly likely prevail in the chaebol dominated economy and give rise to competition-restrictive market structures." The Korean contribution goes on to state that to minimise the negative effects of conglomerate mergers among chaebols, the KFTC has prepared and enforces various institutional devices based on consistent principles. He called on the Korean delegation to explain more about the competition problem ceated by the conglomerate nature of the chaebols, and also the nature of the instruments used to tackle this problem.

A **Korean** delegate welcomed the chance to explain what is going on in Korean chaebols, the problems they present and government responses to them. He began by noting that the Secretariat's background paper contains a misunderstanding or portrays a limited understanding of the range or definition of the portfolio effect. It describes the portfolio effect as the only source of anti-competitive problems in conglomerate mergers. But this description fails to do justice to the competition restraining impact of conglomerate mergers.

Even where neighbouring markets are not involved, conglomerate mergers can bring about competition problems. For example, in Korea the top 30 chaebols own an average of 21 affiliated companies and have effectively diversified into approximately 16 industries on average. Despite this fact, the chaebols have maintained strong monopolistic power in many markets including service and product markets. For example, as of 1998, the industries where the top three firms had more than 75 percent of sales account for some 60 percent of Korea's mine and manufacturing industries and markets. This means very highly concentrated markets in Korea. In addition, the top 30 chaebols account for 70 percent of the market dominant industries. The Korean market is therefore dominated by the top 30 chaebols. This has been facilitated by chaebol affiliates enjoying brand power flowing from sharing a well known name such as Samsung, and being able to tap significant advantages through financing within the group. The financial advantages are quite significant because the Korean financial market lacks an effective banking system and inadequate prudential supervision. Korea also lacks effective labour markets, distribution net works and know-how markets.

The Secretariat report ranged from the complementary goods to substitute goods as examples of neighbouring or related items. The delegate wanted to expand consideration to cover totally different industries and thereby deal with a wider set of problems.

The Korean policy approach to chaebol problems has important *ex ante* and regulatory features and in some ways has a more macro than micro aspect. It stems from concerns to reduce the systemic risk of chaebols. Korea has witnessed the failure, for example, of the Daewoo groups. Daewoo had about sixty

companies under its umbrella. After one or two companies failed, then the financially very healthy Daewoo Motors failed as well. This kind of systematic danger is very serious in Korea. Chaebols also create competition problems because they dominate Korean markets.

Chaebol groups exercise their own advantages or create competition problems by engaging in reciprocal subsidisation and by transferring money and man power from strong healthy affiliates to weak ones. This can communicate financial weakness to the group as a whole.

Korean chaebols can increase their market power through conglomerate mergers by: sharing a powerful brand; transferring capital, manpower and management skills (including sales forces); and by synergies coming from vertical or complementary relationships in chaebol products. The reason why Korean chaebols include anti-competitive effects going beyond straightforward portfolio effects is that Korea has a weak, very weak corporate governance, inadequate prudential supervision of the financial market, and a low level of openness to foreign investment.

The Korean contribution describes three kinds of policy tools applied to chaebols: regulation of conglomerate mergers; restrictions on undue subsidisation of intra-group transactions; and restrictions on economic concentrations. Korea's chaebol policies have been only partly successful. While the concentration of economic power has not been lessened, it has at least not increased. Importantly, Korea has recently fully opened its economy and has rebuilt its financial supervisory mechanisms. It also has introduced many kinds of institutional arrangements to improve corporate governance. Korea is now considering making changes in direct controls applied to chaebols.

The **Chairman** wrapped up consideration of general approaches to portfolio effects in conglomerate mergers by calling on the United Kingdom whose contribution basically argues that in some markets competition is led by portfolio based firms. In other words, it is the competition between portfolio firms which really counts. The UK derives from this observation a set of three conditions under which conglomerate mergers with portfolio effects would be anti-competitive. And those three conditions are a bit different from conditions cited by the EU at the beginning of this debate. The Chairman called on the U.K. to talk about both its general approach to the portfolio problem and the conditions under which it sees portfolio effects as possibly anti-competitive.

After drawing attention to problems in defining conglomerate or portfolio mergers, a **United Kingdom** delegate noted that his country's general approach in such cases has been to see first of all whether a merger in some way facilitates raising rivals' costs. If it has that potential, there is then a need to question whether such increases actually matter, i.e. do they affect infra-marginal or marginal firms. Raising the costs of non-portfolio players might not be important in markets where the significant competition takes place among portfolio firms. Finally, the UK also considers efficiency gains from a conglomerate merger in a positive light and weighs these against any anti-competitive detriments in the merger.

One example the UK looked at involved a conglomerate merger in the advertising industry where the owners of various television stations sought to expand into radio stations. The company was seeking to assemble a wide portfolio of television, radio and outdoor advertising posters businesses. In that case four things were carefully examined. First it was found that there were benefits to providing a portfolio of products. Consumers were prepared to pay a premium to buy products together. The merger provided a higher quality product which was actually good for consumers and good for competition. And similarly the merger gave rise to economies of scope and scale on the supply side which again was thought to be good for competition. Consideration was then paid to whether assembling a larger portfolio would increase the incidence of anti-competitive tying or enhance the credibility of refusals to supply. These

risks were seriously examined but rejected after a careful appraisal of the facts revealed that they were unlikely to materialise.

The only cases where the UK competition authorities took a dim view of conglomerate mergers involved situations where they led to a reduction in the number of portfolio firms in the market, i.e. there was, in a sense, a loss of horizontal competition. And a good example of that was cited in the UK's paper, again drawn from the radio industry. This case concerned a large radio operator in London that had a portfolio of radio stations and competed against a lot of small radio stations who collectively put together a portfolio. The merger "stole" one of the brands and made it more difficult for the smaller companies to provide a competing portfolio. So the merger had the effect of reducing the number of portfolio operators in the market from 2 to 1.

3. Market Definition

The **Chairman** opened this section of the roundtable by turning to Spain whose contribution contained, *inter alia*, a discussion of the *Procter & Gamble/Tambrands* merger. At paragraph 28 of its contribution, one reads:

> …the relevant market for the transaction was defined as the tampons market in Spain. This is one of the most important features of this case. Defining the relevant market in this way there was no addition of firms' market shares, as a result of the transaction; and so, the evaluation of the portfolio effect became extremely relevant.

This left two questions in the Chairman's mind. The first was whether when one arrives at a market definition that rules out finding the creation or strengthening of a dominant position, is a portfolio effect something used to try to evade the constraints of the law, i.e. to effectively change the standard? Is that what this paragraph means?

The second question concerned what would have happened if a wider market definition had been used and the merging parties had intended to tie or were likely to tie their products. Could that have been something that could have been picked up as a potential creation or enforcement of a dominant position under the Spanish law.

The Chairman noted a second interesting aspect to this merger. What happened was that Proctor & Gamble owned 50 percent of Arbora which was the *de facto* exclusive distributor of Tampax, the main product of Tambrands, and was also distributing the products of Proctor & Gamble. So Proctor & Gamble through its subsidiary was distributing the products of its competitors. If the tying of brands was expected after the merger, why did it not occur before the merger?

A **Spanish** delegate noted that her country did not have much experience with portfolio effects beyond the two main cases included in its written contribution, i.e. *Proctor & Gamble/Tambrands* and *Sara Lee De Espana/Reckitt & Colman*. The first one related to the market for feminine hygiene products and the second to the market for footwear cleaning products. In both cases, the portfolio effects took place in highly concentrated markets. The delegate also mentioned that the definition of markets was rather complicated because the affected products were partly substitutes and partly complements. The market definition was in a way independent of the portfolio effect as such. In both cases, the assessments were conducted assuming that the usefulness of *ex ante* merger control is to preserve competitive markets, i.e. to avoid having to address post-merger anti-competitive behaviour.

Another Spanish delegate continued by addressing the question about the relationship between market definition and the assessment of portfolio effects and offered a clarification of the paragraph cited by the Chairman. When it is said that market definition in the case was one of its most important features, this refers to the fact that the definition was highly controversial. The Spanish competition authority had to decide whether to define the relevant market as the whole feminine hygiene product or instead adopt a more restricted definition. After analysing the supply and demand substitutability relationships among the different feminine hygiene products, the Spanish competition authority concluded that the relevant market for this transaction was the tampons market. There was no intention in the written contribution to give the impression that the definition of the relevant market conditioned the assessment of the evaluation of portfolio effects. Given the relevance of brands in the relevant market, such effects would have appeared regardless of the market definition adopted. Therefore, the portfolio effects would not have been less important if the relevant market had been defined differently. The relevance of the portfolio effects in this case is given by the fact that, in the absence of horizontal overlapping of market shares, the existence of these effects was the only consideration that led the Spanish Competition Authority to authorise the transaction although subject to conditions.

Concerning the Chairman's second question, there was no evidence of Proctor & Gamble bundling or tying products before the transaction. Probably, it was not a profit maximisation strategy for Proctor & Gamble. But the absence of such practices, does not mean they are not going to appear in future. If such practices had existed, then the transaction would have been forbidden. Past events do not determine the decisions of the competition authority when it comes to merger control, which is by definition *ex ante* control. Through the transaction, Proctor & Gamble would become the owner of all brands of its portfolio, one that would contain must stock brands having the highest market shares in the feminine hygiene product groups. This would have increased its bargaining power *vis à vis* distributors. In addition, the relevant market showed a low degree of contestability due to the existence of significant barriers to entry. There were no alternative competing portfolios to counteract the situation, no powerful distributors. The importance of the Tampax brand in the market along with a low elasticity of demand, the requirement of high investment in advertising campaigns and the efficacy of publicity when protecting a large scale consumption product all led the Tribunal to the conclusion that Tampax's market share would remain at least as high as it was and that it would continue to be a must stock brand for retailers. As a result of the transaction Proctor & Gamble would gather in a portfolio the main brands in feminine hygiene products. It would have an ample portfolio that would allow it to set discounts so as to encourage retailers to buy the largest volume possible and to offer targeted discounts. All these considerations led the Tribunal to recommend conditioning the merger so as to avoid anti-competitive effects related to the portfolio created by the transaction.

The **Chairman** commented that one of the things the Spanish delegate had stated was that even if the market had been defined differently, the potential anti-competitive impact of portfolio effects would still have been considered. That contrasted with the Hungarian contribution's statements that:

> …the Office of Economic Competition (OEC) has considered the conception of 'portfolio effects' only a few times. The reason for this moderate attitude is the fact that the OEC has tended to adopt a relatively broad market definition.

This led the Chairman to again pose the question, why would there be a difference in concerns about portfolio effects depending on the market definition? He also expressed interest in the *Prodax/Schneider Electric/Prodax* transaction, a conglomerate merger apparently involving portfolio effects. The Chairman requested a description of that case and its outcome.

An **Hungarian** delegate stated that the OEC does not consider its product market definitions to be extremely broad. Product markets are defined through the standard analysis of supply and demand

substitutability. Complementary products are therefore never considered as substitutes. However, it is true that in recent cases the product markets were not narrowed down to special brands. This means the OEC examines possible post-merger exclusionary practices as potential abuses of a dominant position on a relatively broad product market.

Since January 2001, the OEC has considered portfolio effects in three cases one of which was *Schneider Electric/Prodax*. This merger, involving Schneider Electric acquiring 100 percent of Prodax, differed from the Schneider merger that took place in France, because in Hungary on both relevant markets there was a great deal of competition. Schneider and Prodax were respectively active on the Hungarian industrial and retail electric appliances markets. The OEC considered that these two markets did not involve substitute products. Instead, they were complementary. Therefore concentration levels did not rise. Despite that, the OEC examined the possibility of increased market power stemming from portfolio effects. It found that as both undertakings, and therefore the post-merger entity, faced fierce competition on both complementary product markets, there was no reason to block the merger.

Another Hungarian delegate added a comment related to the Chairman's first question. Hungary uses the standard market definition methodology and tries to avoid including complementary products in the same market. Portfolio effects are strongly connected to products which are sometimes complementary, sometimes substitutes for each other, or maybe complementary for distributors but substitutes from the point of view of consumers. Adopting narrow market definitions, for example different brands, would yield many markets, dominant positions in each and mergers leaving market shares unchanged. This may be why some authorities believe the portfolio effect concept is needed to get a fuller picture not so much of particular markets but of an industry as a whole. But the OEC takes a little broader picture on markets. So probably this is why the OEC does not need to use the portfolio effects concept, i.e. because it does not usually consider brands to constitute markets. With broader markets, mergers will more often lead to increased market shares. As those changes can be interpreted as a creation or strengthening of a dominant position, there is usually no need to bring in consideration of portfolio effects.

The next country the **Chairman** called upon was Switzerland whose contribution was devoted to discussing the *Unilever/Bestfoods* merger. It noted that in the agro-foods industry there may be well known brands which can nevertheless be easily displaced. In such a case, the portfolio effect of acquiring many different brands may not be so important. The Swiss contribution also introduced the importance of buyer power. The Chairman requested more information about *Unilever/Bestfoods*.

A **Swiss** delegate began by saying that in reviewing mergers, the Swiss competition authorities have only had one case involving portfolio effects, i.e. the Uniliver (UL)/Bestfoods (BL) merger. It is notable that these two enterprises were simultaneously active on similar agro-food markets, as well as in different markets such as those for cleaning products. This was not a strict case of a conglomerate merger in the sense of their being no market overlaps. Nevertheless, given the fact that in Switzerland UL and BF operated for the most part in different markets, the portfolio effect theory was applied in the preliminary analysis of the merger.

The principal potential problems that the Swiss competition authorities considered were frequently cited in the various contributions to this roundtable (the one from Spain for example). They are referred to as well in an article by Alberto Heimler. The latter identified two principal risks: the risk of tied selling, and new flexibility enjoyed by the merged entity in terms of marketing, setting prices, etc., which could create high barriers to entry, and the possible exclusion of rivals.

The concerns then were of two types. First, the effects on retail markets (i.e. on product buyers); and second, effects on competitors.

Analysis of the *UL/BF* situation showed that the risks associated with portfolio effects were limited for three reasons:

- Swiss distributors have considerable negotiating power. Coop and Migros are the principal Swiss distributors. Coop sells many products and brands, but also produces its own brands. As for Migros, the majority of its goods are self-produced and sold under its own brands.

- Present and potential competition from other producers, such as Nestlé, is very strong.

- In addition, even if UL and BF benefit from certain strong brands on certain markets, the power of a leading brand was found to be relatively weak since it could be rapidly eroded or even replaced by a private brand.

The competition authorities did not find in this case a portfolio related Cournot effect (i.e. leading to the exit of rivals), an effect well explained in the Canadian contribution. Risks of eliminating potential rivals, as mentioned in the German contribution, were also not found.

The preliminary examination in *UL/BF* led to the conclusion that the merger did not lead to a competition reducing creation or strengthening of a dominant position. Consequently the merger was authorised at that stage, i.e. a deeper examination was not initiated.

4. Pro-competitive and efficiency enhancing effects of portfolio effects

The **Chairman** believed that this next subject constituted the core of the topic. Portfolio effects may have both pro- and anti-competitive effects and competition authorities must make a distinction between the two. In addition, some of the portfolio effects may be efficiency enhancing and others may be both anti-competitive and not so efficiency enhancing and again there is a difficulty in trying to identify which category a merger falls in. He noted that a number of written contributions talked about the pro- and anti-competitive, or the pro-efficiency and efficiency reducing impacts of portfolio effects in conglomerate mergers. He cited the Australian contribution, for example, as stating: "In some instances, mergers involving portfolio effects do not generate anti-competitive concerns and in some instances they are pro-competitive." The Chairman noted that the Australian contribution focused on two mergers: *Coca-Cola/Cadbury Schweppes*, and *Guinness/Grand Metropolitan*. The former was prohibited on the basis of adverse portfolio effects, but the latter was permitted by the ACCC. Concerning *Guinness/Grand Metropolitan*, the ACCC states:

> …the spirit industry was highly brand oriented and products tended to be marketed as individual brands rather than [under] the brand name of the supplier. Further, each brand tends to be specific to a particular category, and brand extensions do not usually cross spirit categories.

The Chairman was left wondering whether this also applied to the carbonated soft drink industry. He asked the ACCC to comment on the difference between the two cases, and to discuss how one can distinguish between mergers creating or not creating competition problems.

An **Australian** delegate said that the short answer to the first question was that in *Coca-Cola/Cadbury Schweppes*, there were extremely high market shares after the proposed merger, but this was not so in the other case.

Concerning the Chairman's comment that the efficiency benefits of conglomerate mergers can in some countries be taken into consideration in evaluating them. Australia considers that some efficiency

benefits from a merger may have a positive effect on competition and therefore can be taken into account in the competition analysis. The circumstances under which that is possible are spelled out in Australia's merger guidelines, as they are as well in US merger guidelines. While there are certain instances where a merger will give rise to an efficiency gain likely to translate into increased competition, there are also cases where efficiencies do not have that result. For example, a merger might create a monopoly and its potential cost savings would not necessarily likely be passed on in lower prices to consumers. A merger of the latter type would only be possible in Australia if the parties decided to follow the special process of seeking authorisation of the merger on the ground that the efficiency benefits exceeded any harmful effect on competition. They would have a pretty difficult time getting authorisation on that particular fact scenario, but it is not ruled out.

As for *Guinness/Metropolitan*, it has already been noted that the spirit industry was highly brand oriented, i.e. products were marketed as individual brands rather than under the brand name of the supplier. In contrast, the Schweppes name for example is applied across a wide range of products and has some value and appeal to consumers. In addition in spirits, Australian market shares were generally low. This was certainly the case in Scotch, Australia's largest selling spirit. In that market, the effect on concentration was minimal. It was only in vodka and gin that market shares were of any great interest.

In *Coca Cola/Cadbury Schweppes*, the merger had several dimensions but did not involve Coke wanting to acquire well known Schweppes international brand mixers, and Coke did not have strong brands in this area. Coke was the major soft drink company and had more than 60 percent of the market. The next biggest competitor, in fact the only really serious competitor, was Cadbury Schweppes which had competing brands in the cola market and in the fruit flavour segments, plus some complementary brands in the mixer segment. Cadbury Schweppes had about 15 percent of the soft drink market. The merger was opposed because it was thought it would substantially lessen competition in the market for the production and wholesale supply of carbonated soft drinks. Cadbury Schweppes had been a vigorous competitor to Coca-Cola, and there was concern that the combination of the Coca Cola brands with international Cadbury Schweppes brands and some of the local brands would enable Coke to effectively control the Australian soft drink market. The combination would likely have limited the ability of the remaining significant competitor, Pepsi which only had an eight percent share, to achieve effective distribution to non-super market outlets. A great deal of time was spent analysing the distribution markets and the way in which buying decisions were made in that market. Coke put up a couple of revised proposals but under all of them they would still have acquired Cadbury Schweppes' major international brands. What would have been left was Coke with its 60 percent market share plus all the big Schweppes brands and another competitor having merely regional, low strength brands which were hardly distributed outside of the supermarket channel.

One might ask whether it was the exclusive dealing arrangements with Coke that were the concern, and if they had been removed would that have done the trick? The Australian delegate said no. Removal of exclusivity in distribution would have been insufficient because it would not have addressed the market dominance which emerged. The delegate added that subsequent to this merger being rejected or opposed, a better market outcome emerged that was not engineered by the ACCC. Pepsi and Cadbury Schweppes got together and this appears to have strengthened competition in this market.

The **Chairman** next noted that the German contribution states that there are different views on the consequences for competition of product range extension. It acknowledges that in some cases there may be pro-competitive effects, but the contribution gives the impression that this is considered to be the exception in Germany rather than the rule. The contribution also states that there may be efficiency enhancing properties of conglomerate mergers with portfolio effects, but notes that the Bundeskartellamt (BKA) generally does not examine the question of efficiency under merger control. What is left appears to be mostly the negative side of portfolio effects. This was illustrated in the *Henkel/Luhns* case in which two

firms planned to establish a joint venture to pool their European retail brand businesses in detergents and cleaning agents. The contribution tells us that the Bundeskartellamt prohibited the merger because:

> …it would have further consolidated Henkel's existing position of dominance on the general detergent market. This consolidation was attributed both to the small increase in market share and to considerable synergetic effects and economies of scale in production, procurement, and turnover ….However, the most significant consolidatory effect of the concentration lay in the massive extension of Henkel's scope of action vis-à-vis its rivals and the retailers on the opposite side of the market.

So the case featured a strong initial market position (i.e. Henkel), a portfolio effect, pro and anti-competitive effects, and efficiencies. The Chairman asked what would have happened in this case if the BKA had been able to factor in the efficiency benefits.

Before addressing the Chairman's question, a **German** delegate briefly referred to parts of the German Act against Restraints of Competition (ARC) before its amendment in 1992. The pre-1992 ARC contained a special regulation which applied, *inter alia*, to assessing conglomerate mergers. The Act presumed market dominance in mergers of undertakings with a combined annual turnover of at least 12 billion Marks, provided that at least two of the participating parties reached turnovers of at least one billion Marks. This provision was based on the experience that at least in partial areas in which the firms were active, a paramount market position may be created or strengthened solely as a result of the accumulation of resources. The clear aim of this provision was to facilitate proving a dominant position in conglomerate mergers. The provision was abandoned in 1999 because it was regularly disproved in practice and had not gained any practical significance.

Turning to *Henkel/Luhns*, the delegate noted that Henkel is one of Germany's leading chemical firms and sells a large number of well known branded detergents and cleaning sector products ("Persil" for example). Luhns is active in the same markets. The plan was to establish a joint venture to pool their European retail detergents and cleaning products businesses. The BKA determined that Henkel had a dominant position. Extensive market surveys carried out by the relevant Decision Division and investigations by market research institutes estimated market shares between 40 and 50 percent.

According to German competition law, the creation or strengthening of a dominant market position is the only criterion to be taken into account in assessing a merger. An undertaking is considered to be dominant, *inter alia*, if it has a paramount market position in relation to its competitors. Whether a paramount market position exists is evaluated on the basis of an overall appraisal of all the relevant circumstances of an individual case. The Act specifies a number of criteria: market share, financial power, access to supply and sales markets, links with other undertakings, barriers to market entry, actual and potential competition, the ability to switch to other goods or commercial services and the ability of the opposite side of the market to resort to other undertakings. This list is not exhaustive. Positive efficiency gains resulting from a merger are not taken directly into account. They are only included in the appraisal if they have effects on the creation or strengthening of a dominant market position.

In addition, the BKA analyses a merger with regard to the so-called balancing clause. That means a merger can be cleared despite the creation or strengthening of a dominant position if it will lead to improvements in competition in other markets and these improvements will outweigh the disadvantages of dominance. However, this consideration again is an assessment of the conditions of competition in various markets. Efficiency gains again can only be taken into account with regard to their significance for competition.

The last and only possibility to clear a merger on the basis of criteria that are not part of the assessment of market dominance is the ministerial authorisation. A merger prohibited by the BKA may be cleared by means of a ministerial authorisation if the relevant restraint of competition is offset by the overall economic advantages of a merger. However, this instrument has been very rarely used.

In *Henkel/Luhns* the BKA concluded that the cost and innovation advantages which would have been created by the merger contributed solely to further strengthening Henkel's dominant position. Furthermore since no positive effects on competition were found to exist in other markets, the aforementioned balancing clause was not employed. As a result, the BKA blocked the joint venture.

The **Chairman** next turned to the Netherlands noting that at paragraph 10 of their submission it is stated that: "Although most research on the effect of multi-market contacts indicates that it increases the feasibility and sustainability of collusive behaviour, it is not unlikely that conditions exist under which a conglomerate merger may actually increase competition incentives…." In addition, the contribution states that conglomerate mergers can generate static and dynamic efficiencies which, as in Germany, cannot be directly considered. The contribution also discusses the *Wegener Arcade-VNU Dagbladen* merger which arose in the advertising media sector. The Chairman found this case particularly interesting because the contribution states that it involved portfolio effects expected to produce better services for customers, an effect that could not apparently be treated as a positive effect in assessing the merger. The Chairman asked the Netherlands to present to its views with respect to taking account of efficiency gains linked to portfolio effects, and to provide details concerning *Wegener Arcade-VNU Dagbladen*.

A delegate from the **Netherlands** began by saying something about the definition of conglomerate mergers as described in the Secretariat's background paper, i.e. conglomerate mergers are considered to be those where parties are neither actual nor potential competitors, nor involved in a customer-supplier relationship. That paper also said that portfolio effects involved combining branded products in which parties have some market power that are sold in neighbouring or related markets.

The delegate remarked that much of the discussion to this point had focused on joining different products in one geographical market. The Netherlands believed that the definition should be expanded. One should not only look at joining different products in one geographical market but also consider identical products in different geographical markets. A possible example would be mobile telephone markets where big international companies buy identical franchises in different countries, even though they are not actual or potential competitors in those markets, for example because of the auctioning system. One could also think about airlines, or cable TV or electricity distribution. There is no overlap but the products are to some extent complementary because, for example, there is a subscription to a mobile telephone company that offers services in different countries. The delegate remarked that this is very much related to the literature on multi-market contact, which has mostly focused on over-lapping product markets and related geographical markets. This literature shows that companies meeting in multiple markets tend to charge higher prices than companies that do not meet in multiple markets. The Netherlands believes it would be interesting to see if similar effects exist in the case of companies offering multiple products in identical geographical markets. There seems to be no empirical literature on the effects of this kind of multi-market contact.

Considering the Chairman's question about increasing competitive incentives, it has been noted that uniting multiple products within one company could actually create some kind of home advantage thereby, for example, making collusive behaviour more sustainable. However, the Netherlands considers it very likely that the opposite may result. It is a very difficult question to decide *ex ante* what the effects of conglomerate mergers will be.

The *Wegner Arcade-VNU Dagbladen* case involved two newspapers and free door to door weekly paper publishers. In this case the Netherlands treated the portfolio enlarging effect of the transaction as an additional effect on top of the dominant position issue. The acquiring company already owned one of the two national distribution networks for newspapers and door to door papers. Its competitors did not own such a distribution network and would become more dependant on the post-merger entity. They would be left with just one distribution option even though nothing changed in terms of market power in this distribution network. Substitutability between advertisements in local free papers and daily regional newspapers was also considered in this case as was the bundling of such advertisements, considered to be imperfect substitutes, in free weekly newspapers and subscription daily newspapers. This could create advantages that could not be matched by the other publishers that only disposed of one or two regional newspapers or free door to door papers. So there was concern that bundling might prevent entry into the lower price/quality segment of the advertisement market, i.e. the free paper market, and therefore in the long run also to entry into the higher price quality segment, i.e. the daily newspaper market. However, in the end, portfolio effects were not decisive. It was the creation or the strengthening of the dominant position which was central here and the portfolio effect was a supporting element.

Summing up, the delegate noted that while the Netherlands believes that portfolio effects are important, it has yet to have a case where on their own they have led to a negative decision. The Netherlands also believes that multi-market contact, especially as regards multiple geographical markets, should be considered in addition to multiple product markets in one geographical market.

The **Chairman** registered a possible desire to return in the discussion to the fact that the barrier to entry effect was a consequence of advertisers really liking the bundle that would have been offered by the merging firm. *Wegner Arcade-VNU Dagbladen* seemed to be a case where it was very hard to distinguish between the efficiency effect and possible anti-competitive effects of the practice. That led the Chairman to the Irish contribution where the same issue is also discussed. He stated that this contribution makes two points: first, that market power has to exist before one should worry about portfolio effects because they are very unlikely to develop unless one of the merging firms has a very strong market position; and second, bundling may have efficiency enhancing as well as anti-competitive effects. The Chairman was eager to learn more about how one can distinguish between the two effects and how they can balanced against one another.

An **Irish** delegate drew attention to two types of mergers. He turned first to mergers involving complementary products. He considered these to be very much like vertical mergers for which there is already a good analytical framework available. Such mergers are presumptively efficient and feature strategic fits, economies of scope, and benefits from internalising externalities or providing one stop shopping. There can also be exclusionary effects from mergers involving complements, particularly if by restricting competition in one market, one is able to prevent it in another as well. There are a variety of theories about that. Whinston provides one. Another concerns preventing toe-hold entry into a primary market. These arguments are much more familiar to competition officials in the vertical context. If a competitor manages to get control of the distribution network, it can perhaps limit competition at the manufacturing level. The delegate was sceptical about the idea of introducing a doctrine of portfolio effects when the issues can be just as well be addressed within existing frameworks through analogy to vertical measures.

The delegate went on to stress the importance of realising that rival behaviour it is not exogenous. Rivals do not simply decide whether or not to enter or stay in a market. They have a range of choices that includes becoming more efficient in response to a merger that increases a rival's efficiency. This is a point that must be remembered in vertical mergers generally.

The delegate argued that, as with their vertical analogue, mergers involving portfolio effects and complementary products should be presumed efficient unless one can see a clear exclusionary effect. Things become different, however, if there is an element of substitutability involved. In the past, the Irish Authority very clearly stated that scotch whisky and other spirits exerted no competitive influence over Irish whiskey. The Authority was probably not alone in opting for such narrow market definition. It did this because it raised market shares to 75-95 percent. As a consequence of its dominance test and other factors, the Authority has adopted very narrow market definitions to get market shares up to comfortably high levels to deal with Article 81 and 82 cases and sometimes mergers. Narrow market definitions which are inculpatory in Article 82 cases become exculpatory in mergers because they reduce the incidence of market overlaps. Perhaps competition officials are seeking to avoid the effects of earlier overly narrow market definitions by introducing the portfolio effects concept, i.e. they are applying portfolio effects to mergers involving products that are more substitutes than complements.

The delegate's third point dealt with how the substantial lessening of competition (SLC) test might assist competition officials in dealing with problems explored in this roundtable. He believed there were three reasons for expecting it would. One is that an SLC test facilitates distinguishing between the vertical and horizontal analogy or between complements and substitutes. The dominance test rather simplistically focuses on market shares. Secondly, the SLC test enables measuring market power directly, reducing over-concentration on structural factors. And thirdly, one of the underlying concerns in this area is that efficient mergers usually will result in increases in market share in either the short or long run. That could be counter-balanced by reactions by competitors. Ironically, if there is such a helpful reaction, there is probably no increase in dominance.

In jurisdictions employing a dominance test, one should avoid blocking mergers which create efficiencies and simultaneously raise market shares. In the long run, the pressure generated by such mergers will drive rivals to become more effective competitors.

The delegate summed up by saying that the vertical/horizontal merger distinction is very useful. and that competition officials must move away from the constraint of very narrow market definitions. He also urged caution in the application of exclusionary theories in merger review.

At this point the **Chairman** returned to the United Kingdom this time focusing on the difference between natural and strategic advantages possibly conferred by conglomerate mergers involving portfolio effects. The natural advantages refer to things such as economies of scope, scale and density which may have both anti-competitive and efficiency enhancing characteristics. He again asked: "How can we empirically distinguish between those effects and weigh them against each other?"

A **United Kingdom** delegate confirmed that "natural advantages" is a kind of short hand description for all those things that lead to a merger offering customers a better deal. Such a development might also deter entry, but in the case of merger induced efficiencies it will be the inefficient which do not enter, which is exactly as it should be. With natural advantages the interests of customers and the merging parties coincide. They may be against the interests of the less efficient or now less efficient competitors, but that is just the way competition works. In contrast, the so-called strategic advantages refer to the greater capacity for anti-competitive behaviour, such as raising rivals' costs, which is generally more of a worry in vertical settings than in purely horizontal or conglomerate settings. There are also the well-known issues of bundling and tying.

As to the balancing of anti-competitive effects and efficiencies, the first question to ask is whether there is a well established, coherent theoretical possibility of anti-competitive behaviour, i.e. something which harms consumers as well as rivals. Is that coherent theoretical possibility realistic on the facts of the case? If it is, then a second issue is raised, namely whether that risk could be contained equally

well and equally efficiently *ex post* by the general application of competition law. There are often quite substantial difficulties in treating the same issues efficiently *ex post*. There can sometimes be problems, for example, in applying behavioural remedies to merger situations.

While the above questions must be asked there may also quite often be "plain vanilla" loss of horizontal competition issues that need addressing, such as those the Irish delegate touched on. In a sense these issues help keep one honest doing market definition.

Where a balancing is required, i.e. there is a serious possibility of an SLC, the OFT would generally advise referring the matters to a second stage investigation. At that stage one would determine whether despite the SLC, the merger was pro-consumer because of more than countervailing efficiency benefits flowing through to customers in the market in question. There are likely to be relatively few such cases.

The **Chairman** then turned to the last contribution, that of the United States Department of Justice (USDOJ), saying it addressed three related theories of competitive harm: first, the mergers will create economies of scale and scope that other firms will not be able to match; second, the merged firm will gain a decisive advantage over its competitors; and third, the merger will facilitate the tying or bundling of complementary products. In the view of the USDOJ, the first two effects are not really problematic because they are efficiency enhancing. As for the third effect, the submission states: "Most stories of tying and bundling are not foreclosure-motivated, and only some of them are even foreclosure-related, and even the foreclosure-related tying/bundling stories have ambiguous welfare effects."

Focusing on the third effect, the Chairman wanted to know how the USDOJ would have handled a hypothetical merger between a major computer firm with a very large market share in operating systems and another firm strong in browsers. Would there be no competitive problem in such a merger?

The Chairman also noted that the USDOJ contribution expressed concerns about the practice of other jurisdictions and wondered whether application of the range effects theories will lead anti-trust regulators to disapprove efficiency-enhancing mergers on the basis of highly speculative and unprovable theories of competitive harms. It also makes the point that without a high standard of proof, range effects theory runs the risk of becoming an ill-defined, catch-all theory that allows anti trust regulators to challenge virtually any merger on the basis of vague fears of dominance. The Chairman asked whether the discussion at the roundtable had alleviated some of the USDOJ's concerns about how other jurisdictions are applying the portfolio effects concept.

A delegate from the **United States Department of Justice (USDOJ)** noted that given the reaction to some of his remarks made earlier in the week, he wished to begin with a brief preface.

The delegate stated that the USDOJ very much welcomed the opportunity to engage in a public debate as well as private discussion over the range effects doctrine and its application to particular cases because of its belief that it raises an issue of fundamental importance to competition policy. The USDOJ has engaged in such a debate in the US over the last four years with respect to the theories advanced in the *Microsoft* case to which the Chairman alluded. That debate served importantly to help refine the issues, sharpen the dispute and to inform the Court of Appeal's excellent decision in that case.

The delegate said that the USDOJ paper seeks to explain the reasons for the USDOJ's decision not to challenge *GE/ Honeywell* on a range effects theory. The USDOJ felt it owed the global antitrust community a reasoned explanation for its decision especially since antitrust decisions are always so fact specific.

The delegate stated that competition authorities share a common mission - to stop mergers that are anti-competitive and thereby harm consumer welfare. Sorting out good from bad mergers is difficult enough, even in the case of pure horizontal mergers. It is even more difficult in the case of vertical and potential competition mergers. When we move to mergers of complements we enter an area of much greater uncertainty. Some of those mergers can be characterised as vertical mergers, as the Irish delegate mentioned, but the US delegate did not think that *GE/Honeywell* involved vertical relationships as such, except perhaps for the GECAS issue. Especially when a theory of competitive harm proceeds from the premise that the merger will initially lead to lower prices and better products and that competitive harm will occur only if and when competitors are forced to exit the market, one is necessarily trading off short term benefits against speculative long term harm. In such cases there is a risk that competition authorities will get the trade-off wrong. The delegate believed that a century of anti-trust enforcement has taught competition officials that predicting long term effects of mergers is hazardous at best, especially when discounting for time and uncertainty.

In response to the Chairman's question, the delegate said he was very reassured by the discussion at the roundtable. When parties raise portfolio or range effects with the USDOJ, such concerns are investigated, but in virtually every case they are found to be exaggerated and do not support a challenge. The delegate felt this was the conclusion most of the competition officials around the table also reached when they examined portfolio effects. The USDOJ bottom line is that before a case is brought on this kind of foreclosure theory, it has to be built on solid economic theory and a strong empirical basis. He then went on to comment on the EC delegate's remarks on leverage and foreclosure.

The delegate stated that the USDOJ would certainly agree that there are circumstances in which forced tying by a firm with market power in the tying product would be anti-competitive and therefore unlawful. The action against Microsoft was just such a case and the USDOJ is pleased with its victory there, but it is important to note that the Court of Appeals focused not on the fact of the bundling but on the way in which it was done and the lack of business justification for it.

With respect to the Chairman's question as to whether the USDOJ would challenge a proposed merger between Microsoft and Netscape in 1996, the delegate reiterated that merger investigation is very fact specific. The USDOJ would have examined horizontal and potential competition issues in that case. Its problem with the range effects decisions it has seen is that they appear to extend well beyond forced tying of the type that would be unlawful under US antitrust laws

It is not unlawful for example for a company to physically integrate two complementary products while continuing to sell the components separately. If it were, Kelloggs' introduction of frosted flakes would have been unlawful. Nor is it unlawful for a company to offer a bundle of products at a lower price than it charges for individual components so long as the price is not predatory. With respect to that, the delegate took a moment to address what he considered to be a false distinction between strategic pricing and real economies of scale and scope, i.e. cost savings. In cases dealing with predatory pricing, US courts have squarely held that even where a monopolist lowers its price for strategic purposes, for example to deter entry, that is not unlawful unless the resulting price is below cost. And finally, it is certainly not unlawful for a company to discount the prices of its products because it recognises that offering a lower price for one product will increase sales of other complementary products. If it were, Gillette would have to charge a much higher price for razors. In all of these cases, the customer remains free to choose between buying the bundle or buying the components individually. Consumer choice is maintained. The only way in which there is potential consumer harm is if rivals are foreclosed from the market, i.e. they are driven from the market. The problem there, however, is that the competitive process is all about encouraging the most efficient to grow at the expense of the less efficient as several of the other delegates have already said. Competition enhances consumer welfare because it rewards success and punishes failure.

With respect to *ex ante* versus *ex post* remedies, the only thing the delegate wished to add is that the discussion is not focused on the importance of deterrence. Where one has substantial fines or treble damages as the US does for anti-competitive behaviour, so long as those sanctions are imposed with certainty, severity and celerity they can be an effective deterrent. The delegate briefly noted that the USDOJ "Remarks…" document [see the room document accompanying the U.S. submission] contains some suggestions for future work.

The US intervention was continued by a delegate from the **United States Federal Trade Commission (USFTC)** addressing the Chairman's question about balancing. He began by noting that merger review is essentially an exercise in predicting future effects and proposed four operational steps to assist in that.

The first step is to focus on short and medium term effects by enquiring into whether there is substantial market power and plausible efficiency claims affecting price and quality. Step two is to peer into the future to look at long term effects through addressing four questions:

1. How will rivals respond?

Answering this question implicitly involves a judgement about the adaptability and resiliency of the market process.

2. How will purchasers respond, i.e. do purchasers have the capacity to adopt counter-measures to possible price raising or quality suppressing strategies?

This again requires making a basic decision about the adaptability of purchasers. The reviewer is working with a dynamic model requiring assumptions about the strategic interaction of all the players.

3. Will there by new entry either through *de novo* entry or the repositioning of other firms into the product market.

4. How adequate are *ex post* competition policy remedial solutions to restrictive practices or abuse of dominance?

The answer to this could be different across countries.

Addressing the above questions leads to the third step in the process. If one finds short term benefits to be plausible and significant, and if one has faith in the efficacy of the long term competitor and customer responses, one will emphasise the short term benefits and discount the potential long term harms. If one makes the contrary assumption, a different policy outcome will follow.

As the fourth operational step, the delegate proposed that assumptions about market adaptability be tested by competition authorities routinely conducting *ex post* assessments of the effects of their activities. He recognised that there was some hesitation to do *ex post* inquiries. Such assessments can lead to concluding that: one improved the situation; one had no effect at all; or one made things worse. Two of those three would be unwelcome results. The delegate nevertheless believed that *ex post* assessment was a necessary final element of the merger review empirical process. Empirical testing of actual outcomes provides a way to determine whether or not the assumptions one makes in the earlier elements of the inquiry require adjustment or should be left as they are.

After endorsing the last delegate's call for *ex post* review of merger decisions, and recalling that he has often advocated such a practice, the Chairman opened the general discussion by calling on the Business and Industry Advisory Committee delegation (BIAC).

A BIAC delegate began by noting that when the 1992 USDOJ and USFTC guidelines set forth market and firm conditions under which application of co-ordinated interaction and unilateral effects are appropriate in assessing the likely effects of a merger, it was recognised that even those standards were not themselves always amenable to quite certain, clear conclusions. The notion of undertaking an *ex post* analysis of whether the decisions were right or wrong would therefore be most welcome. To the extent that the application of a portfolio or range analysis adds a third element of anti-competitive effects, there is obviously an increase in complexity and uncertainty in merger enforcement although the agencies are attempting to clarify the conditions where anti-competitive portfolio effects are likely to occur. These conditions embody a somewhat more speculative framework than those applicable to other theories. Portfolio effects arise from the merger of complements or products that have a high positive correlation in value to consumers. With few exceptions, mergers of this kind should raise no anti-competitive concerns.

The Secretariat's background paper lists seven elements that signify the likelihood of adverse portfolio effects. According to that paper, a tying theory would require two elements: market power in the tying product; and a large number of buyers desiring to purchase only the tied product. These are structural elements that merger enforcers/officials can readily determine. The remaining elements in the paper require insight into future actions and market reactions which would seem difficult at best to predict *a priori*. First, rivals' costs must increase and the rivals must not be able to similarly engage in tying, bundling or other non-linear price strategies to offset the market advantage of the merged firms. Second, rivals' inability to effectively respond would then cause prices to rise or erect barriers to entry. Third, supra-competitive prices would enable the merged firm to recoup any losses in executing the exclusionary strategy to drive rivals from the market. Last, buyers would suffer a net welfare loss over time from such exclusionary behaviour. Courts and enforcement agencies are familiar with identifying and assessing the risk of exclusionary behaviour leading to complete or partial market foreclosure.

Determining whether one or more of the mentioned elements or conditions are present and would lead to anti-competitive portfolio effects requires knowledge of the economic incentives of the merged firm. Knowledge of the cost structure of the merged firm and its rivals and a relatively sophisticated knowledge of the reaction functions of market participants are needed to truly assess the likelihood of anti-competitive exclusionary conduct emerging from a merger of complements. The ease of doing this may have been underestimated. Even supporters of the portfolio theory of anti-competitive effects, for example Balto/Tom and others, have identified a number of limiting principles that are necessary for the efficacy of this theory. The delegate called on one of his colleagues to continue on that point.

The second delegate stated that there is an urgent and pressing need for continuing debate and early resolution and guidance from competition law enforcement authorities regarding the specific situations in which a conglomerate merger involving products sold to the same customer may be challenged under the portfolio or range theory. The current fundamental differences in views creates great uncertainty in the international business community, chills merger planning and undermines respect for law enforcement in the merger domain.

Pending some resolution of differences, BIAC urges that the portfolio effects theory be applied narrowly and cautiously. This is warranted given the immediate benefits that may arise to consumers from a price reduction and/or better integrated product offerings as opposed to the more speculative possibility of longer term harmful effects. BIAC further suggests that when enforcement authorities have other remedies available, i.e. prohibitions of restrictive practices or abuse of dominance, these should be depended on in preference to blocking mergers.

The delegate's final point concerned the portfolio effect theory's scope in relation to low pricing. One particular concern is that the theory assumes that the merged identity will be able to bundle several products and sell the bundle at a lower aggregate price than can be offered by competing suppliers. However, there does not appear to be any specific requirement that the bundle price be below a particular measure of cost. The question being asked, and one that BIAC hopes enforcement authorities will try to address, is whether one is talking about average total cost, average variable cost or marginal cost, or some other measure? And this is but one illustration of the difficulty that those planning mergers are facing at this stage given the fundamental differences that exist. In sum, BIAC urged enforcement authorities to be very cautious about challenging mergers based on portfolio effects in cases where a transaction is likely to generate immediate consumer benefits on the one hand and only speculative long term anti-competitive effects on the other, especially when a reviewing authority has recourse to other conduct directed remedies.

A **Mexican** delegate referred to his country's experience with the portfolio effects theory. He recalled three cases where portfolio effects had been a significant element in merger review, and noted that many of the issues discussed in the roundtable surfaced in those deliberations. The first was *Coca Cola/Cadbury Schweppes*. Although this merger was blocked, portfolio effects were not the reason for that even though the market share of Coca Cola in Mexico is probably larger than even in Australia and it was expected that increases in market share stemming from the merger would substantially increase the market power of Coca Cola. The rejection stemmed from the fact that Coca Cola did not address the problems raised precisely by portfolio effects in inter-related markets. Coca Cola had a record of engaging in very significant exclusionary behaviour through its agreements with different distributors across the country.

The second case was the merger between *Televisa* and a radio operator. Televisa had a very strong dominant position in the TV market and a significant position in the radio market, and the merger made post merger bundling very likely. Again past experience was examined and showed that Televisa had made extensive use of bundling and had engaged in exclusionary behaviour. Once more, this was a very important consideration in the merger review, especially when it was noted that other jurisdictions restrict cross-ownership of TV and radio situations.

The third case concerned Mexico's sole oil producer and gasoline distributor, Pemex, which entered into an exclusive agreement for the sale of lubricants in its gas stations. That agreement was prohibited because it implied complete foreclosure of competing lubricant producers in the gas stations.

The delegate felt comfortable with the three decisions described, and found himself in agreement with much of what he had heard in the roundtable. He endorsed caution in applying the portfolio effects theory. One must avoid speculation as to possible effects and try to find direct evidence on how foreclosure might occur and how tied selling would affect consumers. Efficiency aspects must also be considered. He also agreed with Ireland that a doctrine of portfolio effects is unneeded. Existing tools are adequate to deal with the issues.

A **French** delegate supplied a brief commentary on two *Coca-Cola/Orangina* merger decisions. In 1999, there were two notifications, two decisions and two rejections based on the portfolio effect theory. Unknowingly, the French authorities followed rather closely the Secretariat's analytical framework. The delegate therefore considered that framework and its seven points quite pertinent.

The competition authorities distinguished between two different markets, i.e. on premise consumption; and sales through large scale distributors. The delegate supported what the UK delegate said previously. A problem was found in the "on premise" sector but not in large scale distribution. Indeed, in the latter sector, distributors had considerable countervailing power which offset market power linked to portfolio effects.

It is fundamentally important to note that the portfolio effects theory was not applied in a totally isolated fashion. That theory was employed in a concrete case where there were other serious competition issues linked to market power, including high shares in defined markets.

The application of portfolio effects in the two *Coca Cola/Orangina* decisions attracted a good deal of critical attention. The two decisions had a lot in common with decisions taken by other competition authorities. The French authorities indeed applied the market definitions adopted by the European Union as well as by the Mexican and Australian authorities. The delegate therefore believed that the various competition authorities were applying fundamentally the same analysis.

The delegate concluded by saying that he was very interested in the methodology proposed by the US and notably the idea of doing post-merger evaluations.

A **German** delegate returned to the Chairman's remark regarding efficiencies and a point made by Ireland concerning the difference between the SLC and dominance tests. This seemed particularly interesting because in *GE/Honeywell*, the European Commission applied the dominance test while the United States used the SLC test. Germany uses the dominance test but that does not mean that it is completely market share oriented. In addressing the question of whether or not there is a paramount market position, the BKA has the opportunity to make an overall appraisal concerning market shares, financial power, access to supplier and distribution markets, and so on. So, the dominance test is not as market share oriented as Ireland remarked. Even efficiencies can be taken into account within this test, but only as regards their relation to competition. Differences in US and EC decisions, as in *GE/Honeywell*, may be more the result of two different economic approaches than of two different tests. As the BKA's former President Mr. Karte used to say, merger law and security of law are hostile brothers.

An **Italian** delegate noted that a pure conglomerate merger should have no effect on consumer prices, hence on the consumer welfare that competition authorities seek to advance in their merger reviews. In a complementary products merger the transaction should reduce prices thereby benefiting consumers. So where does the worry come from? It comes, in the delegate's opinion, from the threat of foreclosure, i.e. that the merged firm will be able to use techniques such as targeted discounts to exclude competitors with the effect of eventually raising prices. So there would be a short term benefit and a long term harm. Some cases, notably *GE/Honeywell*, are pure bundling cases. They also involve some demand effects having possible foreclosure impacts.

The delegate urged that a broader analysis be applied in order to recognise the complexities presented by some mergers because of the many inter-linkages, demand effects, etc. involved. For example, in the *Grand Met* case the problem might have been the possibility of target discounts being used post-merger. Guinness might have foreclosed rivals from competing and its targeted discounts could have resulted in below cost marginal prices. In that respect they could have threatened competition and indeed foreclosed rivals. Of course, competition officials have to assess whether such behaviour is probable and whether it will indeed have exclusionary effects.

A **Danish** delegate noted that portfolio effects are probably not the biggest problem competition authorities face given the continuing merger wave, especially since studies seem to show that conglomerate mergers are not an increasing proportion of mergers. Nevertheless, conglomerate mergers do occur from time to time and it is important to consider what to do with them. The delegate believed that nobody in the roundtable had really come up with good suggestions for balancing the pros and cons of such mergers. He had listened with interest to the US proposed classification, but found it paid insufficient account to the fact that some proposed remedies may have short term and others longer term effects. The US approach seemed better geared to simply saying yes or no to a merger. But if one is able to negotiate remedies, things are actually more subtle.

Denmark had a large bank merger that involved some portfolio effects. The partners in question had different banking, mortgage, insurance products, etc. The Competition Authority feared this portfolio merger would raise rivals' costs and therefore adopted a remedy to allay those fears.

Denmark believed there is really no need for a new doctrine on all this; present tools are adequate. The delegate agreed with Ireland and the United Kingdom that the dominance and SLC tests are more or less convergent and that differences should not be exaggerated. He nevertheless supported moving to the SLC test which seemed better able to cope with the issues the roundtable was focusing on.

A **European Commission** delegate underlined a point made by BIAC. He acknowledged differences existed between the EC and the US, but emphasised the need to resolve them. The EC is striving for more, not less convergence. The delegate also wanted to point out apparent agreement on two things. First, under more or less stringent conditions, a conglomerate merger can harm competition or lead to exclusionary effects just as the Italian delegate had noted. Second, delegates seem to agree that a conglomerate merger can give rise to various efficiencies. The delegate questioned the requirements for accepting such efficiencies, noting that the EC believes that in close call situations the parties should be requested to demonstrate and prove efficiencies.

A **Hungarian** delegate questioned whether the SLC test would be better than the dominance test in the context of mergers having portfolio effects. He did not believe there was much difference between the two and that in any event market definition is critical for both. If markets are defined narrowly, for instance to the point of being individual brands, an SLC will rarely be found as a result of a merger. He also noted that it would probably be useful to distinguish between the validity of the portfolio effect doctrine and the wisdom of frequently using it.

A **United States Department of Justice** delegate noted that with respect to remedies, acceptance or prohibition are not the only *ex ante* options. Imposing conditions on a merger is also a possibility. That is what the USDOJ typically does in vertical merger cases thereby permitting parties to realise expected efficiencies while at the same time preventing them from engaging in anti-competitive exclusive dealing, tying, and refusals to supply. As to the EC delegate's point about efficiencies, the US requires parties to prove claimed efficiencies. He thought it very important that competition authorities clarify that they will integrate efficiencies into competitive effects analyses and view them as something positive rather than negative.

The **Chairman** closed the roundtable with some summary remarks based on personal impression. He began by noting what he thought was an absolute consensus in the views expressed, i.e. that portfolio effects in conglomerate mergers should be handled in a cautious way. He was also sensitive to the fact that there appears to be a fair amount of analytical convergence, and that statements to the effect that there is a very deep divide in the theoretical considerations going into those analyses did not seem to have been reflected in the discussion. There was no question of whether one wanted to protect competitors or competition. Everyone wanted to protect competition and efficiency. The possible problems or differences lay elsewhere, perhaps in the design of laws. It was argued that the choice of test, SLC versus dominance, could affect what one could look at or how much freedom one had in looking at certain things.

The Chairman believed, although some downplayed it, that there is possibly a significant difference between jurisdictions. Those using the SLC test may have greater flexibility in looking at the various anti-competitive effects of a merger. This may also affect how efficiencies are considered. There are two times in merger review when one can look at efficiencies. One can consider them when trying to determine whether a dominant position is created. At that point efficiencies may usually be found to reinforce the dominance of whoever benefits from the efficiencies. Efficiencies therefore end up on the negative side of the ledger, not because efficiencies are negative *per se* but because efficiencies accruing to

firms will make them more powerful or dominant. But there is a second way to look at efficiencies which is not when one defines dominance or considers possible anti-competitive effects, but rather when assessing the countervailing effects of efficiencies, i.e. as part of the redeeming value, so to speak, of the merger. In that case, the same efficiencies seem to be quite on the positive side.

The Chairman also drew attention to something not much developed in the discussion, i.e. the transformation of the notion of products or services. Bundles were discussed as being something different, something which themselves may be demanded. This led directly to a question from BIAC, namely once one goes from products to bundles, what is the concept of pricing that one uses to establish whether there is pricing having anti-competitive effects? Maybe competition authorities should be clearer about how they look at those pricing problems in the case of mergers having portfolio effects.

A conglomerate merger having portfolio effects may increase competition in some respects while decreasing it in others, and even if it decreases competition may have positive effects on efficiencies. The only difference the Chairman saw which makes the problem of conglomerate mergers even a bit more complicated than vertical restraints is that there can be delayed reactions in conglomerate mergers with portfolio effects. When competition authorities look at vertical restraints such as exclusive distribution or selective distribution contracts, it is usually kind of a static thing. All the effects appear at the same time. If there are delayed effects, for example, the prevention of entry in the future or the expulsion of a competitor, then one gets into what the USFTC delegate was asking about, namely how does one assess those delayed effects compared to the more predictable immediate effects?

The Chairman thought that all this fell within the realm of normal discussion of a complicated issue in competition policy and amounted to an attempt to devise an empirical test to sort the issues as clearly as possible. This was proposed by the EC and UK in their papers and by the USFTC delegate orally. The Chairman thought it was a very useful thing because competition officials concentrate their efforts on interpreting facts and it was there that the differences appeared rather than on the level of theory or the bare facts.

The Chairman's parting suggestion was that competition authorities try to keep refining empirical procedures, questions, and the order in which questions will be examined. This may bring sufficient clarity and transparency so that the business community will feel there is predictability in the process even in merger cases involving complicated issues.

AIDE-MÉMOIRE DE LA DISCUSSION

Le **Président** ouvre la table ronde en constatant l'intérêt qu'elle a suscité. Quatorze contributions écrites ont été reçues. Il y en aurait eu probablement davantage si, comme on l'a indiqué au Président en privé, les points de vue n'étaient pas divergents dans certains pays quant au jugement à porter sur les effets de portefeuille dans les fusions conglomérales. Le Président note que cette question est extrêmement intéressante parce que, pour l'examen de plusieurs fusions conglomérales, on a utilisé la théorie des effets de portefeuille, et aussi parce qu'il y a manifestement place pour un débat sur la façon d'opérer ce type d'évaluation.

[Note du responsable de la publication -- le Président avait l'intention d'inviter la Commission européenne (CE) à s'exprimer en premier lieu mais, à cause de difficultés temporaires, c'est le Canada qui est tout d'abord intervenu. Cet aide-mémoire commence néanmoins par l'intervention de la CE, la présentation canadienne cadrant mieux avec la deuxième section.]

1. L'effet de levier dans les fusions conglomérales

Le **Président** rappelle que la CE a traité plusieurs affaires importantes mettant en cause des effets de portefeuille, aussi bien pour des fusions que pour l'application de l'article 82 (abus de position dominante). La contribution de la CE est intitulée "L'effet de levier dans les fusions conglomérales", sujet auquel elle est précisément consacrée. Elle examine différents types de vente liée qui peuvent poser des problèmes : la subordination de vente à caractère commercial reposant sur l'exercice de pressions sur les agents situés en aval, la subordination de vente à caractère commercial reposant sur les incitations de prix et la subordination de vente à caractère technique.

A la fin de sa contribution, au paragraphe 17, la CE indique : "Eu égard à la description qui a été faite ci-dessus des diverses formes de pratiques à effet de levier, on peut conclure que les fusions conglomérales peuvent avoir des effets anticoncurrentiels dans certaines circonstances bien définies". Le Président pose trois questions à ce sujet. Tout d'abord, il demande si on peut lui indiquer clairement et précisément quelles sont ces circonstances bien définies et comment leur existence peut être établie. Deuxièmement, si ces conditions sont remplies, qu'y-a-t-il à dire sur la probabilité que des pratiques à effet de levier se produisent ? Troisièmement, si ces pratiques à effet de levier sont claires, facilement détectées et vraisemblablement qualifiées d'abus de position dominante au titre de l'article 82, pourquoi doit-on s'en soucier dans les affaires de fusion ? Ne vaudrait-il pas mieux les traiter ex post et non ex ante ?

Un délégué de la **Commission européenne** formule tout d'abord une série d'observations préliminaires en exposant pourquoi la fusion *GE/Honeywell* n'a pas été prise en compte dans la contribution écrite de la CE. Il y a à cela trois raisons. Premièrement, la décision n'avait pas encore été publiée lorsque le document a été rédigé. Cela veut dire que seuls les Etats membres de l'Union européenne et le ministère de la Justice des Etats-Unis, qui l'avaient reçu des parties, avaient connaissance du texte de la décision. La CE a jugé qu'il n'était pas approprié de détailler l'argumentation au niveau nécessaire pour la table ronde de l'OCDE alors que la plupart des délégations n'avaient pas eu la possibilité de l'étudier. Deuxièmement, l'affaire est pendante devant le Tribunal de première instance de la Cour de justice des Communautés européennes. Bien entendu, cela n'empêche pas de débattre des

concepts, mais la Commission européenne a un devoir de retenue. Troisièmement, les responsables du ministère de la Justice des Etats-Unis, de la Federal Trade Commission et de l'Union européenne ont décidé, trois semaines avant la table ronde, de créer un groupe de travail conjoint pour analyser dans le détail les divergences d'analyse véritables ou perçues comme telles et d'oeuvrer en faveur de la convergence.

Répondant aux trois questions du Président, le délégué de la CE commence par les conditions précises dans lesquelles les fusions conglomérales peuvent avoir des effets anticoncurrentiels. La CE considère que ces effets concurrentiels se produisent si une certaine séquence de conditions intervient, à savoir la fusion rend possible une extension du pouvoir de marché par effet de levier, en fermant ainsi le marché aux concurrents, ce qui limite le choix des consommateurs et, pour finir -- et c'est là l'élément important -- entraîne une perte de bien-être. Par conséquent, au départ, l'existence d'un pouvoir de marché est une condition nécessaire pour ce qui est de la possibilité, de la probabilité et de la rentabilité de pratiques à effet de levier. Le délégué fait observer que la fusion *GE/Honeywell* aurait regroupé l'entreprise dominante sur un marché et le principal fournisseur (pas nécessairement dominant) d'un autre marché. Le caractère complémentaire des marchés de produits est également un élément important. Des produits complémentaires ou des produits qui sont de proches substituts -- par exemple, dans le secteur des boissons alcoolisées ou non alcoolisées -- et qui sont vendus aux mêmes clients et sont considérées par ces clients comme couvrant une partie essentielle de leurs besoins, ont une plus forte probabilité de créer des possibilités d'effet de levier.

Pour ce qui est de la fermeture du marché, celle-ci peut prendre diverses formes. L'une d'entre elles est la fixation stratégique des prix. Par exemple, si l'on choisit la vente groupée pour un large portefeuille, cela peut forcer les concurrents à jouer le jeu lot contre lot. L'entreprise qui n'aura que certains composants du lot aura des difficultés à livrer concurrence. En particulier, dans les secteurs caractérisés par de fortes barrières à l'entrée, des coûts irrécouvrables élevés, un long délai avant que les coûts soient récupérés et le seuil de rentabilité soit atteint, une forte intensité en R-D et de lourds investissements, les concurrents peuvent n'être pas à même de contrecarrer la possibilité, pour l'entreprise fusionnée, d'étendre la forte position qu'elle détient sur le marché. Une grande puissance financière de la part de l'entreprise fusionnée peut dans ce cas être parfois un facteur supplémentaire important. Il faut toutefois analyser la puissance financière au cas par cas et secteur par secteur, pour déterminer s'il s'agit d'un élément important de l'analyse globale. Cela n'a rien à voir avec l'idée que tout ce qui est grand serait mauvais et la Commission n'a jamais suivi une telle politique. Enfin, il faut procéder à une analyse critique des éventuels éléments d'efficience. On doit se demander s'il y a véritablement efficience et si cette efficience a des chances d'être structurelle ; par exemple, diminue-t-elle le coût marginal de production et de distribution du produit d'une façon durable, de sorte que les consommateurs en bénéficient ? Autrement dit, l'efficience doit être liée à la fusion, véritable, durable et, en cas de doute, il faut que les parties puissent en apporter la preuve.

La deuxième question du Président était la suivante : si ces conditions sont réunies, que peut-on dire de la probabilité d'exercice effectif de l'effet de levier ?

La Commission européenne considère que, dès lors qu'on a établi la possibilité d'extension du pouvoir de marché par effet de levier, l'incitation nécessaire à se livrer à des pratiques à effet de levier sera fonction de l'élément suivant: l'entreprise fusionnée voit-elle dans ces pratiques une stratégie de maximisation du profit, c'est-à-dire une meilleure possibilité d'action de son point de vue dans les circonstances données ? L'abondante jurisprudence concernant l'examen de ces pratiques ex post au titre de l'article 82 donne à penser à la CE que, lorsque les entreprises se trouvent dans la configuration de marché décrite précédemment, elles ont régulièrement essayé, et y sont souvent parvenues, d'étendre leur pouvoir de marché d'un marché à un autre, afin d'accroître leurs bénéfices en éliminant les concurrents et, finalement, en obtenant des consommateurs des bénéfices supérieurs au niveau de concurrence. Mais il n'y

a pas automatisme entre la possibilité d'agir et l'incitation à agir. Par exemple, dans la fusion *Boeing-Hughes*, à laquelle fait référence le document du Secrétariat, les concurrents craignaient que l'entité fusionnée tire parti de sa forte position dans les satellites pour obliger les clients à faire appel à ses services de lancement, marché sur lequel les parties détenaient une position plus faible. L'enquête de la Commission a montré que les acheteurs avaient leurs propres préférences dans le domaine des lanceurs et n'étaient pas prêts à renoncer à la possibilité de choix entre plusieurs lanceurs. Il n'aurait donc pas été profitable pour Boeing-Hughes de faire en sorte que les clients pour les satellites utilisent uniquement les services de lancement de Boeing, car elle aurait ainsi perdu de nombreuses ventes de satellites.

La troisième question du Président était la suivante : si les pratiques à effet de levier constituent de façon claire et facilement détectable un abus de position dominante interdit en vertu de l'article 82, pourquoi doit-on s'en soucier dans les affaires de fusion ?

Pour le délégué de la CE, il s'agit d'un faux débat. Certes, les pratiques à effet de levier comme la vente liée, la vente groupée et les pratiques similaires constituent un abus illicite en soi en vertu de l'article 82, mais il en est de même pour les comportements de prix abusifs résultant d'une domination du marché. Cela veut-il dire que le contrôle ex ante des fusions ne doit pas se préoccuper d'empêcher la création d'une position dominante parce qu'en tout état de cause on pourra s'attaquer à un abus ultérieur de position dominante grâce aux mesures correctrices et aux sanctions prévues par certaines dispositions qui s'appliquent ex post ? Pour la CE, la réponse est clairement négative. Les pratiques à effet de levier peuvent se traduire par la fermeture du marché aux concurrents, c'est-à-dire leur marginalisation progressive ou leur sortie du marché ou de certains de ses segments. A cet égard, on ne peut guère imaginer que les sanctions que comportent les instruments applicables ex post puissent en quoi que ce soit empêcher cette fermeture du marché. Autrement dit, infliger des amendes à l'entreprise dominante issue d'une fusion, même si ces amendes sont très lourdes, ne saurait en aucun cas rétablir les stimulations et contraintes concurrentielles alors même que les concurrents sont affaiblis ou sortent du marché. Il aura déjà été porté atteinte à la concurrence et le dispositif juridique visant à empêcher la création d'un pouvoir de marché, en particulier par une politique efficace de contrôle des fusions, aura échoué. En tout état de cause, l'objectif du contrôle ex ante des fusions est de préserver les structures concurrentielles d'un marché afin précisément de ne pas avoir à réguler de façon plus ou moins interventionniste les pratiques sur le marché, avec toutes les conséquences nocives d'une telle régulation.

2. Faut-il un traitement spécial?

Le **Président** souligne que la contribution canadienne s'attache avant tout à la question de savoir si les effets de portefeuille dans les fusions conglomérales constituent véritablement un nouveau problème ou peuvent être traités en s'appuyant sur l'analyse traditionnelle des fusions. La contribution canadienne fait notamment observer que : "… l'analyse traditionnelle des fusions peut être suffisante pour l'examen des fusions d'entreprises produisant des produits complémentaires." Le Canada arrive à cette conclusion en faisant un parallèle entre le traitement des fusions conglomérales, d'une part, et les instruments d'action et le traitement mis en œuvre dans le cas de fusions horizontales ou verticales, d'autre part. Le Canada note, entre autres, que les prix d'éviction, l'extension du pouvoir de marché par effet de levier, la vente liée et la vente groupée sont aussi des problèmes qui se posent dans les fusions verticales ou horizontales traditionnelles. Le Président invite le Canada à approfondir ces points.

Un délégué du **Canada** confirme que la contribution de son pays a pour but l'alimenter la réflexion sur le thème : l'analyse actuelle des fusions peut-elle traiter correctement une fusion faisant intervenir des produits complémentaires ? Pour une très grande part, l'analyse des fusions s'attache surtout à l'impact que l'opération aura sur les prix, ce qui soulève la question d'un éventuel effet de Cournot dû à la réunion de produits complémentaires. Une fusion de produits complémentaires internalise l'effet de la

baisse des prix d'un bien complémentaire sur les ventes de l'autre bien et le résultat est que l'entité fusionnée peut baisser ses prix après la fusion et vraisemblablement accroître sa part de marché. Il peut en découler des pressions sur les concurrents. A plus long terme, cela peut même provoquer la sortie de certains d'entre eux et, si les barrières à l'entrée sont fortes, on peut même avoir une situation dans laquelle l'entité fusionnée augmente son pouvoir de marché et est davantage à même de relever les prix. Le même phénomène peut se produire en cas de fusion verticale faisant intervenir des produits complémentaires. Dans ce cas étalement, une externalité au niveau de la fixation des prix est internalisée. Le problème de la double marginalisation est essentiellement résolu en se débarrassant de l'intermédiaire et de la marge sur la marge. Là encore, on peut s'attendre que les prix baissent à court terme, mais augmentent à plus long terme si suffisamment de concurrents sortent en définitive du marché et s'il existe de fortes barrières à l'entrée.

Un autre aspect à examiner dans l'analyse traditionnelle des fusions est celui de l'efficience, et notamment l'efficience de fixation des prix associée à un effet de Cournot. En outre, il peut y avoir au niveau de l'offre, aussi bien dans le cas d'une fusion de produits complémentaires que dans celui d'une fusion de produits substituables, des économies d'échelle et de gamme pour la production, la vente, le marketing et la distribution. Dans le cas de produits complémentaires, il peut y avoir également certains avantages du côté de la demande, sous la forme de l'achat auprès d'un même fournisseur.

Le document canadien traite également d'un certain nombre d'autres domaines de l'analyse traditionnelle, en particulier les barrières à l'entrée, et fait référence à plusieurs ouvrages. L'un d'entre eux souligne que les entreprises multiproduits peuvent influer sur les décisions d'entrée et de sortie d'une autre façon que les entreprises monoproduit. Un auteur considère que la prolifération des marques, par exemple, peut avoir un effet dissuasif sur l'entrée, au moins dans le cas des biens substituables. Un autre auteur considère qu'une entreprise multiproduits disposant d'un monopole pour des biens complémentaires est davantage incitée à dissuader de nouveaux entrants qu'une entreprise disposant d'un monopole pour des biens substituables. Le document canadien examine également l'interdépendance du point de vue des prix et de la collusion tacite ; il traite également des prix d'éviction et souligne fondamentalement que la distinction entre les fusions faisant intervenir des produits substituables et les fusions faisant intervenir des produits complémentaires n'est pas judicieuse pour prévoir les effets futurs.

A propos des aspects les plus souvent débattus dans le contexte d'une fusion conglomérale faisant intervenir des produits complémentaires, c'est-à-dire l'extension du pouvoir de marché par effet de levier, la vente liée et la vente groupée, le document canadien souligne que, sous l'influence des travaux de l'école de Chicago, on était au départ très sceptique sur le point de savoir si l'extension du pouvoir de monopole par effet de levier était effectivement rationnelle et s'il fallait donc s'en préoccuper. La doctrine plus récente met en lumière les conditions dans lesquelles une fermeture verticale du marché est possible et peut avoir des effets anticoncurrentiels par le biais d'effets stratégiques. Malheureusement, on n'a pas beaucoup écrit dans ce domaine sur ce qu'il faut rechercher dans le contexte de biens complémentaires. On s'est surtout attaché au cas des biens substituables.

Le délégué canadien attire également l'attention sur plusieurs questions de mesure, notamment lorsqu'il s'agit de déterminer si des biens sont véritablement complémentaires. Il note également que, pour la vente groupée, il est parfois difficile d'utiliser les techniques statistiques actuelles pour définir le marché de produit et le marché géographique, même si l'affaire *Staples*, par exemple, a permis de progresser quelque peu dans ce domaine.

Le délégué canadien termine son intervention en revenant sur l'idée que le cadre actuel d'analyse, en termes d'effets de prix, de barrières à l'entrée, d'efficience etc., peut être appliqué aux fusions faisant intervenir des produits complémentaires. De plus, des pratiques anticoncurrentielles comme les prix d'éviction, l'extension du pouvoir de marché par effet de levier, la vente liée et la vente groupée peuvent se produire dans toute situation, et pas seulement après une fusion, et dans la plupart des pays il existe des

dispositions précises pour faire face à ces pratiques. En tout cas, ces questions ne sont pas spécifiques aux fusions conglomérales et peuvent être prises en compte au moyen de l'analyse actuelle des fusions.

Le Président fait observer que, contrairement au document canadien, la contribution finlandaise considère qu'on y gagne beaucoup en introduisant la notion d'effets de portefeuille dans l'examen des fusions conglomérales. La contribution finlandaise indique à cet égard :

> Il paraît évident que, si l'on utilise la doctrine des effets de portefeuille, on peut accorder moins de poids à une évaluation catégorique d'un marché déterminé et centrer l'attention sur l'impact global effectif. Sur ce point, la doctrine des effets de portefeuille contribue à l'évaluation globale des concentrations. Par conséquent, le critère de concurrence ainsi utilisé semble mieux prendre en compte les effets que la concentration exerce au total sur la concurrence.

Le Président juge intéressante l'approche selon laquelle, s'il a bien compris, l'analyse traditionnelle des fusions horizontales ou verticales comporte certaines limites lorsqu'il s'agit de définir les marchés, parfois d'une façon un peu arbitraire, et d'examiner les effets marché par marché. En revanche, dans le cas des fusions conglomérales, on peut, avec la méthode des effets de portefeuille, avoir une vision plus large.

Le Président attire l'attention sur l'affaire finlandaise *Omya/Mondo*, fusion concernant deux fournisseurs de minéraux transformés pour le secteur du papier, des peintures et des plastiques. On pouvait craindre que des effets de portefeuille se produisent à l'occasion d'une fusion avec une entreprise fabriquant des produits substituables. On se trouve donc dans une situation un peu différente de celle évoquée précédemment par la CE, à savoir la complémentarité des produits. La contribution finlandaise note sur ce point : "Les minéraux industriels produits et transformés par les parties à l'acquisition étaient substituables dans le cas de certains marchés, ce qui procurerait à Omya des avantages de portefeuille." Comme le fait également observer le Président, cette affaire semble montrer que les minéraux destinés au secteur du papier et des peintures sont des produits industriels pour lesquels les effets de marque sont sans doute assez secondaires. Il demande à la délégation finlandaise *a*) de se prononcer sur l'utilité générale de la méthode des effets de portefeuille pour l'examen des fusions et *b*) dans le cas particulier de l'affaire *Omya/Mondo*, d'indiquer quels étaient les effets de portefeuille spécifiques redoutés lors d'une fusion faisant intervenir des produits substituables ?

Un délégué **finlandais** remarque que l'affaire *Omya/mondo* n'est pas une excellente illustration des effets de portefeuille. Néanmoins, si elle a été examinée de ce point de vue c'est parce que, comme l'a indiqué le Président, les deux sociétés parties à l'opération produisaient différents types de minéraux pour différentes entreprises du secteur du papier. La société cible, Mondo, était l'un des plus gros producteurs et fournisseurs de talc destiné à l'industrie papetière et Omya produisait directement ou indirectement du carbonate de calcium, produit également utilisé dans le secteur du papier. Ces produits étaient parfois utilisés en combinaison pour le traitement du papier. Et l'idée était que, probablement, les acheteurs de ces produits s'approvisionneraient principalement auprès de l'entité fusionnée, en achetant les deux produits groupés. Les produits étaient en partie substituables, mais ils étaient également en partie complémentaires. Toutefois, il n'y avait manifestement pas d'effet très marqué de portefeuille, notamment parce que les acheteurs étaient de très grosses entreprises papetières qui s'approvisionnaient dans le monde entier. Dès lors, l'entité fusionnée ne serait pas en mesure d'utiliser le talc, pour lequel elle avait une forte part de marché, pour "lier" les ventes de carbonate de calcium. En tout cas, l'opération a été restructurée en une entreprise commune, d'une façon qui avait tendance à créer une plus vive concurrence, autre raison pour laquelle l'opération a été autorisée.

En ce qui concerne l'observation faite par le Président quant au jugement porté par la Finlande sur l'utilité de la doctrine des effets de portefeuille pour l'examen de certaines affaires de fusion, le délégué

finlandais pense que, si la Finlande attribue une grande utilité à cette doctrine, c'est parce qu'elle applique un critère de domination très strict. La Finlande examine les fusions en définissant tout d'abord comme il convient les marchés de produits et les marchés géographiques, puis en analysant les parts de marché pour déterminer si les parties ont un pouvoir de marché, etc. Ces instruments, en conjonction avec le critère de domination, ne suffisent pas toujours pour déterminer ce qui se passe vraiment sur les marchés. La Finlande considère que la notion d'effets de portefeuille peut être utile à cet égard. Comme le montre l'expérience finlandaise, une définition stricte et catégorique des marchés et une mesure de la part de marché ne conviennent pas toujours pour déterminer si la fusion a ou non un impact négatif sur la concurrence.

La Finlande conclut que la doctrine des effets de portefeuille est utile, mais qu'il faut également se demander si le critère de domination n'est pas déficient.

Le **Président** modifie quelque peu l'orientation des débats en faisant observer que, lorsque la Commission japonaise de la concurrence (la JFTC) s'attaque au problème des effets de portefeuille dans les fusions conglomérales, elle examine de près, "… la capacité globale des entreprises fusionnées." Il demande à la délégation japonaise de commenter cette notion de capacité globale et d'indiquer si elle s'applique également dans l'examen des fusions horizontales ou verticales. Le Président pense que cette notion va un peu au-delà du pouvoir de marché. Il demande également qu'on évoque la fusion *Mitsui Petrochemical/Mitsui Toastsu Chemicals*.

Un délégué **japonais** fait savoir que les lois antimonopoles japonaises traitent les fusions conglomérales de la même manière que les autres types de fusions. La JFTC examine si la fusion notifiée limitera sensiblement la concurrence dans un secteur. Pour préciser quels sont les types de fusions susceptibles de limiter sensiblement la concurrence, la JFTC a publié des directives indiquant les facteurs à prendre en compte pour l'examen des fusions et acquisitions, par exemple la part de marché, l'entrée, l'efficience, la capacité globale, etc. Si l'on s'attache aux effets de portefeuille dans les fusions conglomérales, on examinera de près la capacité globale de l'entreprise issue de la fusion. Si la capacité globale est appelée à s'accroître après la fusion, il est possible que d'autres entreprises éprouvent des difficultés à livrer concurrence. La notion de capacité globale est suffisamment large pour inclure les effets de portefeuille et on l'appliquera aussi bien aux fusions verticales et horizontales qu'aux fusions conglomérales. Pour déterminer la capacité globale, on prend en compte, outre la part de marché, les modifications qui interviennent au niveau du groupe d'entreprises, notamment les possibilités d'approvisionnement en matières premières, les ressources technologiques, les moyens de commercialisation, l'accès au crédit, la notoriété des marques et les moyens publicitaires, entre autres.

Une capacité globale accrue peut renforcer le pouvoir de restreindre la concurrence, notamment via une extension du pouvoir de marché par effet de levier. Toutefois, la JFTC ne s'est jamais fondée sur les effets de portefeuille pour prendre des mesures à l'égard d'une fusion et la capacité globale n’est pas un élément crucial dans l'examen des fusions.

Pour ce qui est de la fusion intervenue en 1999 entre *Mitsui Petrochemical Industries Limited* et *Mitsui Toatsu Chemicals Incorporated*, on pouvait imaginer que cette opération renforce la capacité globale de la nouvelle entreprise dans l'industrie pétrochimique, du fait d'une intégration plus poussée de produits connexes. Elle pouvait aussi avoir un impact sensible sur la concurrence pour les divers produits pétrochimiques. Mais il existe une autre entreprise de premier plan, Mitsubishi Chemical Corporation, qui se classe au premier rang pour le chiffre d'affaires et pour les capacités de production d'éthylène. On pouvait penser qu'une concurrence suffisante subsisterait sur le marché, de sorte qu'un renforcement de la capacité globale ne menacerait pas gravement la concurrence.

Le **Président** cite ensuite le passage suivant de la contribution coréenne : "L'autorité coréenne de la concurrence (KFTC) s'est intéressée de près aux fusions conglomérales et aux tentatives de diversification des chaebols parce qu'elle s'est rendu compte que, sans régulation efficace des fusions conglomérales, on assisterait probablement dans une économie dominée par les chaebols à une expansion débridée par voie de subventions réciproques, de garanties croisées, d'investissements circulaires, etc., créant des structures de marché qui limitent la concurrence." La contribution coréenne indique ensuite que pour réduire les effets négatifs des fusions conglomérales entre chaebols, la KFTC a élaboré et applique un ensemble de dispositifs institutionnels reposant sur des principes cohérents. Le Président invite la délégation coréenne à commenter les problèmes de concurrence dus à la nature conglomérale des chaebols et à préciser la nature des instruments utilisés pour traiter ces problèmes.

Un délégué **coréen** se félicite de l'occasion qui lui est donnée de commenter la situation des chaebols coréens, les problèmes qui se posent et les mesures qui sont prises par le gouvernement. Il note tout d'abord que le document de synthèse du Secrétariat n'appréhende pas correctement ou n'appréhende que partiellement la portée ou la définition des effets de portefeuille. Ce document n'envisage les effets de portefeuille que comme la seule source de problèmes de concurrence dans les fusions conglomérales ; de la sorte, on ne rend pas compte de l'effet de restriction de la concurrence qu'ont les fusions conglomérales.

Même lorsque des marchés voisins ne sont pas en cause, les fusions conglomérales peuvent poser des problèmes de concurrence. Par exemple, les 30 plus grands chaebols détiennent en Corée, en moyenne, 21 sociétés affiliées et se sont efficacement diversifiés dans environ 16 secteurs en moyenne. Malgré tout, les chaebols ont conservé un pouvoir monopolistique très marqué sur un grand nombre de marchés de produits ou de services. Par exemple, en 1998, les secteurs dans lesquels les trois plus grandes entreprises assuraient plus de 75 pour cent du chiffre d'affaires représentaient environ 60 pour cent des secteurs et marchés des industries extractives et manufacturières de la Corée. Autrement dit, les marchés sont très concentrés en Corée. De plus, les 30 premiers chaebols représentent 70 pour cent des entreprises dominant un marché. Le marché coréen est donc dominé par les 30 plus grands chaebols. Ce phénomène a été facilité par le fait que les entreprises affiliées à un chaebol disposent d'un pouvoir de marque par partage d'une marque de grande notoriété comme Samsung et qu'elles peuvent tirer parti d'importants avantages en se finançant au sein du groupe. Les avantages financiers jouent un grand rôle, parce que le marché coréen des capitaux ne comporte pas un système bancaire efficace et que la surveillance prudentielle est insuffisante. En outre, en Corée, les marchés du travail, les réseaux de distribution et les marchés du savoir-faire manquent d'efficacité.

Le document du Secrétariat a retenu les produits complémentaires et les produits substituables comme exemples de biens voisins ou connexes. Le délégué coréen souhaite élargir l'analyse de façon à prendre en compte des secteurs totalement différents et à pouvoir donc traiter des problèmes plus vastes.

La politique coréenne à l'égard des problèmes que posent les chaebols comporte des éléments importants ex ante et réglementaires et, d'une certaine manière, elle est davantage macroéconomique que microéconomique. Cela tient au souci de réduire le risque systémique que font courir les chaebols. La Corée a connu la faillite de grands groupes comme Daewoo. Daewoo regroupait environ soixante sociétés. Après la faillite d'une ou deux sociétés, la société Daewoo Motors, financièrement très saine, a fait elle aussi faillite. Le danger systémique de ce type est sérieux en Corée. Les chaebols créent également des problèmes de concurrence parce qu'ils dominent les marchés coréens.

Les chaebols obtiennent des avantages ou créent des problèmes de concurrence en pratiquant les subventions réciproques et en transférant des capitaux et de la main-d'œuvre de leurs filiales les plus saines à leurs filiales les moins saines. La fragilité financière peut ainsi se transmettre à l'ensemble du groupe.

Les chaebols coréens peuvent accroître leur pouvoir de marché par voie de fusion conglomérale en partageant une marque forte, en transférant des capitaux, de la main-d'oeuvre et des compétences de gestion (notamment pour la force de vente) et en tirant parti de synergies découlant des liens verticaux ou des liens de complémentarité pour les produits qu'ils fabriquent. Si les chaebols coréens sont à l'origine d'effets anticoncurrentiels qui vont au-delà des simples effets de portefeuille, c'est parce que le gouvernement d'entreprise est très faible en Corée, la surveillance prudentielle des marchés de capitaux est insuffisante et le pays est peu ouvert aux investissements étrangers.

La contribution coréenne décrit trois types d'instruments utilisés à l'égard des chaebols : la réglementation des fusions conglomérales ; les restrictions au subventionnement illégitime des opérations intragroupe ; les restrictions aux concentrations économiques. La politique coréenne à l'égard des chaebols n'a été qu'en partie couronnée de succès. La concentration du pouvoir économique n'a pas diminué, mais elle n'a pas augmenté. Elément essentiel, la Corée a récemment ouvert totalement son économie et a rénové ses dispositifs de surveillance financière. Elle a également mis en place un grand nombre de mécanismes institutionnels destinés à améliorer le gouvernement d'entreprise. Elle envisage actuellement d'apporter certaines modifications au contrôle direct des chaebols.

Le **Président** termine l'examen des approches générales des effets de portefeuille dans les fusions conglomérales en invitant à s'exprimer le Royaume-Uni, dont la contribution peut être résumée comme suit : sur certains marchés, la concurrence est dirigée par les "entreprises à portefeuille". Autrement dit, c'est la concurrence entre les entreprises à portefeuille qui compte véritablement. Le Royaume-Uni déduit cette observation d’un ensemble de trois conditions dans lesquelles les fusions conglomérales à effets de portefeuille seraient anticoncurrentielles. Et ces trois conditions sont un peu différentes de celles citées par la Commission européenne au début de ce débat. Le Président invite le Royaume-Uni à commenter son approche générale du problème des effets de portefeuille et les conditions dans lesquelles les effets de portefeuille lui paraissent pouvoir être anticoncurrentiels.

Après avoir attiré l'attention sur les problèmes qui se posent lorsqu'on veut définir les fusions conglomérales ou les fusions à effets de portefeuille, un délégué du Royaume-Uni fait observer que l'approche générale de son pays en pareil cas consiste à examiner tout d'abord si une fusion facilite, d'une manière ou d'une autre, une augmentation des coûts des concurrents. Si elle comporte cette possibilité, il faut alors se demander si cette augmentation des coûts des concurrents est un élément important ou non ; autrement dit, affecte-t-elle les entreprises inframarginales ou marginales ? Augmenter les coûts des acteurs autres que les entreprises à portefeuille peut n'être pas important sur les marchés où ce sont essentiellement les entreprises à portefeuille qui se livrent concurrence. Enfin, au Royaume-Uni, on envisage également d’une manière positive les gains d’efficience résultant d’une fusion conglomérale et on met en balance ces gains et les éventuels effets anticoncurrentiels de la fusion.

Par exemple, le Royaume-Uni a eu à connaître d'une fusion conglomérale dans le secteur de la publicité, les propriétaires de plusieurs chaînes de télévision cherchant à étendre leur activité à des stations de radio. L’opération envisagée devait constituer un large portefeuille d'activités dans la télévision, la radio et l'affichage publicitaire. Dans cette affaire, quatre éléments ont été soigneusement examinés. Premièrement, il est apparu que la constitution d'un portefeuille de produits pouvait avoir des effets bénéfiques. Les consommateurs étaient prêts à payer un supplément pour acheter les produits ensemble. La fusion offrait un produit de meilleure qualité, qui était en fait bon pour les consommateurs et bon pour la concurrence. De même, la fusion créait des économies de gamme et d'échelle du côté de l'offre, ce qui était également favorable à la concurrence. Deuxièmement, on s'est demandé si la constitution d'un portefeuille plus large augmentait les possibilités de vente liée anticoncurrentielle ou rendait plus crédible un refus de vente. Ces risques ont été soigneusement soupesés, mais écartés, les faits montrant qu’ils avaient peu de chances de se concrétiser.

Les seuls cas dans lesquels les autorités de la concurrence du Royaume-Uni se sont opposées à des fusions conglomérales sont ceux où une telle fusion aboutissait à une diminution du nombre d'entreprises à portefeuille sur le marché, c'est-à-dire les cas où il y avait en quelque sorte perte de concurrence horizontale. Un bon exemple est cité à cet égard dans le document du Royaume-Uni. Il est emprunté également au secteur de la radio. Cette affaire concernait un grand opérateur de Londres qui disposait d'un portefeuille de stations de radio et était en concurrence avec plusieurs petites stations de radio qui, collectivement, constituaient un portefeuille. La fusion aurait fait disparaître l'une des marques et il aurait été dès lors plus difficile aux petites sociétés de constituer un portefeuille concurrent. La fusion avait donc pour effet de réduire de 2 à 1 le nombre des entreprises à portefeuille sur le marché.

3. Définition du marché

Le **Président** ouvre cette partie de la discussion en s'adressant à l'Espagne, dont la contribution porte notamment sur la fusion *Procter & Gamble/Tambrands*. On peut lire au paragraphe 28 de cette contribution :

> … le marché en cause pour cette opération était défini comme le marché des tampons hygiéniques en Espagne. C'est l'un des éléments les plus importants de cette affaire. Avec une telle définition du marché en cause, il n'y avait pas addition des parts de marché des entreprises du fait de l'opération ; c'est pourquoi évaluer les effets de portefeuille devenait extrêmement pertinent.

Le Président se pose à ce sujet deux questions. Première question : lorsqu'on arrive à une définition du marché qui exclut qu'on constate la création ou le renforcement d'une position dominante, l'effet de portefeuille est-il un instrument utilisé pour essayer d'échapper aux contraintes de la loi, c'est-à-dire de modifier en fait le critère ? Est-ce bien la signification de ce paragraphe ?

Deuxième question : qu'est-ce qui se serait produit si l'on avait utilisé une définition plus large du marché et si les parties à la fusion avaient eu l'intention de pratiquer la vente liée ou avaient été susceptibles de le faire ? Aurait-on pu s'appuyer en droit espagnol sur un élément tel que la création ou le renforcement potentiels d'une position dominante ?

Le Président note également un autre aspect intéressant de cette fusion. Procter & Gamble détenait 50 pour cent de Arbora, qui était le distributeur exclusif de fait de Tampax, le principal produit de Tambrands, et qui distribuait aussi les produits de Procter & Gamble. Dès lors, Procter & Gamble, par l'intermédiaire de sa filiale, distribuait les produits de ses concurrents. Si l'on escomptait la vente liée de marques après la fusion, pourquoi cette vente liée n'est-elle pas intervenue avant la fusion ?

Une déléguée **espagnole** fait observer que son pays n'a pas une grande expérience des affaires à effets de portefeuille, en dehors des deux affaires évoquées dans la contribution ; il s'agit de *Procter & Gamble/Tambrands* et de *Sara Lee De Espana/Reckitt & Colman*. La première affaire concernait le marché des produits d'hygiène féminine et le deuxième le marché des produits de nettoyage d'articles en cuir. Dans les deux cas, les effets de portefeuille se situaient dans le contexte de marchés très concentrés. La déléguée indique également que la définition des marchés était très complexe, parce que les produits étaient en partie substituables et en partie complémentaires. La définition du marché était en quelque sorte indépendante des effets de portefeuille en tant que tels. Dans les deux affaires, on a procédé à l'évaluation en considérant au départ que l'utilité du contrôle des fusions ex ante est de préserver des marchés concurrentiels, c'est-à-dire que ce contrôle évite d'avoir à remédier à des pratiques anticoncurrentielles après la fusion.

Un autre délégué espagnol commente le lien entre la définition du marché et l'évaluation des effets de portefeuille et précise la signification du paragraphe cité par le Président. S'il est indiqué que la

définition du marché était dans cette affaire l'un des éléments essentiels, c'est parce que cette définition était très sujette à controverses. L'autorité espagnole de la concurrence devait soit définir le marché en cause comme l'ensemble des produits d'hygiène féminine, soit adopter une définition plus restreinte. Après avoir analysé les liens de substituabilité, au niveau de l'offre et de la demande, entre les différents produits d'hygiène féminine, l'autorité espagnole de la concurrence a conclu que le marché en cause était le marché des tampons hygiéniques. La contribution écrite ne voulait pas donner l'impression que la définition du marché en cause conditionnait l'évaluation des effets de portefeuille. Vu l'importance des marques sur le marché en cause, ces effets seraient apparus quelle qu'ait été la définition du marché retenue. Dans ces conditions, les effets de portefeuille n'auraient pas été moindres si le marché pertinent avait été défini différemment. La pertinence des effets de portefeuille dans ce cas résulte en réalité de ce qu'en l'absence de chevauchement horizontal de parts de marché, l'existence de ces effets était la seule considération qui a conduit l'autorité espagnole de la concurrence à autoriser la transaction quoique sous certaines conditions.

Pour ce qui est de la deuxième question du Président, aucun fait ne démontrait l'existence de pratiques de vente liée ou groupée de la part de Procter & Gamble avant l'opération. Ce n'était probablement pas la stratégie qui maximisait le profit pour Procter & Gamble, mais l'absence de ces pratiques ne signifie pas qu'elles ne vont pas apparaître à l'avenir. Si de telles pratiques avaient été en place, l'opération aurait été interdite. Les faits passés ne déterminent pas les décisions de l'autorité de la concurrence dans le domaine du contrôle des fusions, qui est par définition un contrôle ex ante. Par cette opération, Procter & Gamble aurait été le détenteur de toutes les marques de son portefeuille, lequel aurait comporté les marques incontournables ayant les plus fortes parts de marché dans les différentes catégories de produits d'hygiène féminine. Cela aurait accru son pouvoir de négociation vis-à-vis des distributeurs. En outre, le marché en cause se révélait peu contestable, du fait de l'existence de fortes barrières à l'entrée. Il n'y avait ni autre portefeuille concurrent pour contrecarrer cette situation, ni distributeurs puissants. L'importance de la marque Tampax sur le marché, la faible élasticité de la demande, la nécessité de lourds investissements publicitaires et l'efficacité de la publicité pour protéger un bien de très grande consommation, tous ces éléments ont conduit le Tribunal de la concurrence à la conclusion que la part de marché de Tampax resterait au moins aussi élevée et que cette marque demeurerait incontournable pour les détaillants. A l'issue de l'opération, le portefeuille de Procter & Gamble réunirait les principales marques de produits d'hygiène féminine. Procter & Gamble disposerait d'un vaste portefeuille qui lui permettrait de pratiquer des rabais, de façon à encourager les détaillants à acheter un volume maximum et à offrir des rabais ciblés. Eu égard à l'ensemble de ces considérations, le Tribunal de la concurrence a recommandé de subordonner la fusion à certaines conditions, de façon à éviter les effets anticoncurrentiels liés au portefeuille créé par l'opération.

Le **Président** fait observer que, comme l'a indiqué le délégué espagnol, même si le marché avait été défini différemment, on aurait considéré l'impact anticoncurrentiel potentiel des effets de portefeuille. Cela va à l'encontre de ce que l'on peut lire dans la contribution de la Hongrie :

> … l'Office de la concurrence économique n'a pris en compte les "effets de portefeuille", qu'à de rares occasions. La raison en est que l'Office a eu tendance à adopter une définition relativement large du marché.

Dans ces conditions, le Président est amené à poser une nouvelle fois la question suivante : pourquoi la définition du marché devrait-elle influer sur la prise en compte des effets de portefeuille ? Le Président se montre également intéressé par l'affaire *Prodax/Schneider Electric*, fusion conglomérale faisant apparemment intervenir des effets de portefeuille. Le Président demande des commentaires sur cette affaire.

Un délégué **hongrois** relève que l'Office de la concurrence économique (OCE) ne considère pas que sa définition des marchés de produits soit extrêmement large. Les marchés de produits sont définis par

une analyse classique de substituabilité au niveau de l'offre et de la demande. Par conséquent, on ne considère jamais les produits complémentaires comme substituables. Il est vrai, néanmoins, que, dans des affaires récentes, les marchés de produits n'ont pas été ramenés à des marques particulières. Cela veut dire que l'OCE examine les pratiques possibles d'exclusion après fusion en tant qu'abus potentiel de position dominante sur un marché de produits relativement large.

Depuis janvier 2001, l'OCE a examiné les effets de portefeuille dans trois affaires, dont *Schneider Electric/Prodax.* Cette fusion, par laquelle Schneider Electric acquérait 100 pour cent de Prodax, différait de celle qui a eu lieu en France, en ce que la concurrence était vive en Hongrie sur les deux marchés en cause. En Hongrie, Schneider et Prodax opéraient respectivement sur le marché industriel et sur le marché de détail dans le secteur des matériels électriques. L'OCE a considéré que ces deux marchés ne concernaient pas des produits substituables, mais des produits complémentaires, de sorte que les niveaux de concentration n'augmentaient pas. Malgré tout, l'OCE a examiné la possibilité d'un renforcement du pouvoir de marché par le biais d'effets de portefeuille. Il a conclu que les deux entreprises, et donc l'entité issue de la fusion, faisaient face à une très vive concurrence sur les deux marchés de produits complémentaires. Il n'y avait donc aucune raison de s'opposer à la fusion.

Un autre délégué hongrois fait une observation concernant la première question du Président. La Hongrie utilise la méthode classique de la définition du marché et s'efforce d'éviter d'inclure des produits complémentaires dans un même marché. Les effets de portefeuille sont étroitement liés à des produits qui sont parfois complémentaires, parfois substituables, ou qui peuvent être complémentaires pour les distributeurs, mais substituables pour les consommateurs. Si l'on adopte une définition étroite du marché, par exemple en retenant les marchés des différentes marques, on obtient un grand nombre de marchés, des positions dominantes sur chacun de ces marchés et des fusions qui ne modifient pas les parts de marché. C'est peut-être pourquoi certaines autorités de la concurrence considèrent que la notion d'effets de portefeuille est nécessaire pour avoir une image plus complète, non pas des marchés spécifiques, mais de l'ensemble d'un secteur. Or, l'OCE envisage les marchés dans une optique un peu plus large. C'est probablement pourquoi il n'a pas besoin d'utiliser la notion d'effets de portefeuille, en ne considérant généralement pas qu'une marque constitue un marché. Lorsqu'on envisage les marchés d'une façon assez large, les fusions aboutissent plus souvent à un accroissement des parts de marché. Ces changements pouvant être interprétés comme une création ou un renforcement d'une position dominante, il n'y a généralement pas besoin de prendre en compte les effets de portefeuille.

Le **Président** sollicite ensuite l'intervention de la Suisse, dont la contribution est consacrée à l'examen de la fusion *Unilever/Bestfoods*. Il note que, dans le secteur agro-alimentaire, on peut se trouver en présence de marques à forte notoriété, qui sont néanmoins susceptibles de perdre facilement leur place. Dans ce cas, l'effet de portefeuille qui résulte de l'acquisition d'un grand nombre de marques différentes risque de ne pas être très important. La contribution suisse met également en lumière le rôle du pouvoir d'achat. Le Président demande plus de détails sur l'affaire *Unilever/Bestfoods.*

Un délégué **suisse** indique tout d'abord que, dans le domaine des fusions, les autorités suisses de la concurrence n'ont eu à traiter que d'une affaire mettant en cause des effets de portefeuille, la fusion Unilever (UL)/Bestfoods (BL). On notera que ces deux entreprises opéraient simultanément sur des marchés similaires du secteur agro-alimentaire, ainsi que sur d'autres marchés comme celui des produits nettoyants. Ce n'était pas à strictement parler une fusion conglomérale, en ce sens qu'il n'y avait pas de recoupement des marchés. Mais, étant donné qu'en Suisse UL et BL exerçaient la majeure partie de leurs activités sur des marchés différents, la théorie des effets de portefeuille a été utilisée au stade de l'examen préalable de la fusion.

Les principaux problèmes susceptibles de se poser que les autorités suisses de la concurrence ont examinés sont ceux qui ont été souvent cités dans les diverses contributions à cette table ronde (la

contribution de l'Espagne, par exemple). Ces problè0mes sont également étudiés dans un article d'Alberto Heimler, qui a identifié deux risques principaux : le risque de vente liée et le gain de souplesse dont bénéficie l'entité fusionnée pour sa politique commerciale, la fixation de ses prix, etc. D'où la possibilité de création de fortes barrières à l'entrée et aussi d'exclusion de concurrents.

Les préoccupations étaient de deux types. Premièrement, les effets sur les marchés de détail (c'est-à-dire sur les acheteurs des produits). Deuxièmement les effets sur les concurrents.

L'analyse de l'opération *UL/BF* a montré que les risques liés aux effets de portefeuille étaient limités, et ce pour trois raisons :

- Les distributeurs suisses ont un très grand pouvoir de négociation. Coop et Migros sont les principaux distributeurs suisses. Coop vend un grand nombre des produits et de marques, mais fabrique également des produits sous sa propre marque. Quant à Migros, la majorité de ses produits sont autoproduits et vendus sous sa propre marque.

- La concurrence effective et potentielle de la part d'autres producteurs comme Nestlé est très vive.

- En outre, même si UL et BF peuvent s'appuyer sur des marques fortes sur certains marchés, on a considéré que le pouvoir d'une marque phare était relativement faible, car une marque de distributeur peut rapidement éroder ce pouvoir ou même y mettre fin.

Les autorités suisses de la concurrence n'ont pas observé dans cette affaire d'effet de portefeuille de type Cournot (c'est-à-dire aboutissant à la sortie de concurrents, effet qui est très bien commenté dans la contribution canadienne). On n'a pas non plus constaté de risques d'élimination de concurrents potentiels, aspect évoqué dans la contribution allemande.

L'examen préalable de l'opération *UL/BF* a débouché sur la conclusion que l'opération n'aboutissait pas à la création ou au renforcement d'une position dominante susceptibles de réduire la concurrence. C'est pourquoi la fusion a été autorisée au stade de l'examen préalable.

4. Les effets de portefeuille sous l'angle de l'amélioration de la concurrence et de l'efficience

Le **Président** est d'avis que ce thème a un caractère central. Les effets de portefeuille peuvent avoir un impact à la fois proconcurrentiel et anticoncurrentiel et les autorités de la concurrence doivent bien distinguer les deux types d'impact. En outre, certains des effets de portefeuille peuvent améliorer l'efficience et d'autres peuvent être à la fois anticoncurrentiels et peu bénéfiques sur le plan de l'efficience. Là encore, il peut être difficile de déterminer quelle est la catégorie dont la fusion relève. Le Président note que plusieurs contributions ont évoqué l'impact proconcurrentiel ou anticoncurrentiel des effets de portefeuille dans les fusions conglomérales, ou leur impact positif ou négatif sur l'efficience. Il cite à cet égard la contribution australienne : « Dans certains cas, les fusions ayant des effets de portefeuille ne sont pas anticoncurrentielles et, dans certains cas, elles sont même favorables à la concurrence. » Le Président note que la contribution australienne porte essentiellement sur deux fusions : *Coca-Cola/Cadbury Schweppes* et *Guiness/Grand Metropolitan*. L'ACCC a interdit la première opération en raison d'effets négatifs de portefeuille, mais elle a autorisé la deuxième. Dans l'affaire *Guinness/Grand Metropolitain*, l'ACCC note :

> …le secteur des boissons alcoolisées repose surtout sur l'existence de marques et, généralement, les produits sont commercialisés sous une marque spécifique et non sous la marque du

producteur. De plus, chaque marque est généralement spécifique à une catégorie particulière et une marque ne recouvre généralement pas plusieurs catégories de boissons alcoolisées.

Le Président se demande si cela est également valable pour les boissons gazeuses non alcoolisées. Il demande à l'ACCC de commenter les différences entre les deux affaires et d'expliquer comment on peut distinguer entre les fusions qui créent des problèmes de concurrence et celles qui n'en créent pas.

Un délégué **australien** fait savoir que, si l'on veut répondre brièvement à la première question, les parts de marché après la fusion envisagée étaient très fortes dans l'affaire *Coca Coca/Cadbury Schweppes*, ce qui n'était pas le cas dans l'autre affaire.

En ce qui concerne l'observation faite par le Président sur la prise en compte, dans certains pays, des effets bénéfiques des fusions conglomérales en termes d'efficience, l'Australie considère que certains gains d'efficience résultant d'une fusion peuvent avoir un effet positif sur la concurrence et peuvent donc être pris en compte dans l'analyse. Les circonstances dans lesquelles les gains d'efficience peuvent avoir un effet bénéfique sur la concurrence sont précisées dans les directives australiennes sur les fusions, tout comme elles le sont dans les directives américaines analogues. Dans certains cas, une fusion entraînera des gains d'efficience susceptibles d'intensifier la concurrence, mais dans d'autres cas les gains d'efficience n'auront pas ce résultat. Par exemple, une fusion peut créer un monopole et les réductions de coûts qu'elle rendra possibles ne se répercuteront pas nécessairement sur les consommateurs via une baisse des prix. Une fusion de ce dernier type ne sera possible en Australie que si les parties décident de suivre la procédure particulière qui consiste à demander l'autorisation de la fusion en justifiant l'opération par des gains d'efficience supérieurs aux effets nocifs sur la concurrence. Il leur sera très difficile d'obtenir l'autorisation dans de telles circonstances, mais cela n'est pas exclu.

Dans l'affaire *Guinness/Grand Metropolitan*, comme on l'a déjà indiqué, le secteur des boissons alcoolisées était caractérisé par la commercialisation des produits sous une marque individuelle et non sous la marque du fournisseur. En revanche, la marque Schweppes, par exemple, est utilisée pour une large gamme de produits et elle a une certaine valeur et un certain attrait pour les consommateurs. En outre, les parts de marché étaient généralement faibles en Australie pour les boissons alcoolisées. C'était absolument le cas pour Scotch, l'alcool le plus vendu en Australie. Pour ce marché, l'effet sur la concentration était minimal. C'est seulement pour la vodka et le gin que les parts de marché devaient retenir l'attention.

Dans l'affaire *Coca Cola/Cadbury Schweppes*, la fusion avait de multiples dimensions, mais on notera que Coke ne voulait pas acquérir les grandes marques internationales de boissons gazeuses pour cocktails de Schweppes et que Coke n'avait pas de fortes marques dans ce secteur. Coke était le principal producteur de boissons non alcoolisées et détenait plus de 60 pour cent du marché. Son seul concurrent véritablement sérieux était Cadbury Schweppes, qui avait des marques concurrentes sur le marché des colas et des boissons fruitées, plus quelques marques complémentaires sur le segment des boissons gazeuses pour cocktails. Cadbury Schweppes détenait environ 15 pour cent du marché des boissons non alcoolisées. La fusion a été refusée parce qu'on a pensé qu'elle limiterait sensiblement la concurrence sur le marché de la production et de la vente en gros de boissons gazeuses non alcoolisées. Cadbury Schweppes avait vivement concurrencé Coca Cola et on craignait que le regroupement des marques de Coca Cola et des marques internationales de Cadbury Schweppes ainsi que de certaines de ses marques locales ne permette à Coke de contrôler effectivement le marché australien des boissons non alcoolisées. La fusion aurait probablement restreint la possibilité, pour le concurrent important qui restait -- Pepsi, qui n'avait qu'une part de marché de 8 pour cent -- de se faire distribuer efficacement dans les points de vente autres que les grandes surfaces. Il a été procédé à une analyse approfondie du marché de la distribution et de la prise de décision d'achat sur ce marché. Coke a présenté deux projets révisés, mais dans les deux cas elle aurait acquis les grandes marques internationales de Cadbury Schweppes. Coke aurait conservé sa part

de marché de 60 pour cent, à laquelle il fallait ajouter toutes les grandes marques de Schweppes et un autre concurrent qui avait des marques régionales de faible notoriété distribuées essentiellement dans les grandes surfaces.

On peut se demander si c'est l'accord de distribution exclusive avec Coke qui a posé problème. S'il avait été supprimé, la fusion aurait-elle été acceptée ? Le délégué australien donne à cet égard une réponse négative. Supprimer la distribution exclusive n'aurait pas suffi, parce qu'on n'aurait pas réglé la question de la domination du marché. Le délégué australien ajoute qu'après le rejet de cette fusion, une solution qui n'avait pas été imaginée par l'ACCC a été mise en place. Pepsi et Cadbury Schweppes se sont regroupés, ce qui paraît avoir renforcé la concurrence sur ce marché.

Le Président note que la contribution allemande fait référence aux points de vue divergents quant à l'impact d'un élargissement de la gamme de produits sur la concurrence. Cette contribution reconnaît que, dans certains cas, il peut y avoir des effets proconcurrentiels, mais elle donne l'impression qu'en Allemagne on considère que c'est l'exception et non la règle. Le document allemand indique également que les fusions conglomérales ayant des effets de portefeuille peuvent améliorer l'efficience, mais que le Bundeskartellamt (BKA) n'examine généralement pas la question de l'efficience dans le cadre du contrôle des fusions. Au total, il semble qu'on retienne uniquement les aspects négatifs des effets de portefeuille. C'est ce que montre l'affaire *Henkel/Luhns*, dans laquelle deux entreprises se proposaient de mettre en place une société mixte pour regrouper leurs marques européennes de détail dans le secteur des détergents et agents nettoyants. Selon la contribution allemande, le Bundeskartellamt a interdit cette fusion parce que :

> …elle aurait consolidé la position dominante de Henkel sur le marché général des détergents. Cette consolidation résultait à la fois d'une faible augmentation de la part de marché et d'effets de synergie et d'économies d'échelle considérables au niveau de la production, des approvisionnements et du chiffre d'affaires… Toutefois, l'élément le plus important de consolidation de la position dominante était l'accroissement massif des possibilités d'action de Henkel vis-à-vis de ses concurrents et des détaillants.
>
> Il y avait donc dans cette affaire une forte position de marché au départ (Henkel), des effets de portefeuille, des effets proconcurrentiels et anticoncurrentiels et des éléments d'efficience. Le Président demande ce qu'il serait advenu dans cette affaire si le BKA avait pu prendre en compte les avantages en termes d'efficience.

Avant de répondre à la question du Président, un délégué **allemand** évoque plusieurs articles de la loi allemande contre les restrictions à la concurrence avant sa modification de 1992. Elle contenait alors des dispositions spéciales applicables entre autres à l'évaluation des fusions conglomérales. Il y avait présomption de domination du marché en cas de fusion d'entreprises ayant un chiffre d'affaires annuel cumulé d'au moins 12 milliards de marks, dès lors que deux des participants avaient un chiffre d'affaires supérieur ou égal à 1 milliard de marks. Cette disposition reposait sur l'idée qu'au moins dans une partie des secteurs où les entreprises exercent leurs activités, une position prépondérante sur le marché peut être créée ou renforcée uniquement du fait de l'accumulation de ressources. Le but était manifestement de faciliter la preuve d'une position dominante dans les fusions conglomérales. On a abandonné cette disposition en 1999, parce que dans la pratique elle était régulièrement réfutée et ne présentait donc aucun véritable intérêt.

A propos de l'affaire *Henkel/Luhns*, le délégué allemand note qu'Henkel est l'une des plus grandes sociétés chimiques allemandes et qu'elle commercialise un grand nombre de produits à forte notoriété dans le secteur des détergents et produits de nettoyage (la marque "Persil", par exemple). Luhns exerce ses activités sur les mêmes marchés. Le projet consistait à établir une société mixte pour regrouper les activités européennes de vente au détail de détergents et produits de nettoyage. Le BKA a constaté que Henkel était

en position dominante. Des études de marché approfondies effectuées par la division compétente du BKA et des enquêtes réalisées par des instituts de recherche estimaient la part de marché à un chiffre situé entre 40 et 50 pour cent.

Selon le droit allemand de la concurrence, la création ou le renforcement d'une position dominante est le seul critère à prendre en compte pour évaluer une fusion. Une entreprise est considérée comme dominante notamment si elle dispose d'une position prépondérante sur le marché par rapport à ses concurrentes. Pour déterminer s'il y a position prépondérante, on procède à une appréciation globale de tous les éléments du cas d'espèce. La loi indique un certain nombre de critères : la part de marché, les capacités financières, l'accès aux approvisionnements et aux points de vente, les liens avec d'autres entreprises, les barrières à l'entrée, la concurrence effective et potentielle, la possibilité de changer de produit ou de service et la capacité des concurrents de faire appel à d'autres entreprises. Cette liste n'est pas exhaustive. Les gains d'efficience résultant d'une fusion ne sont pas directement pris en compte. Ils le sont uniquement s'ils ont un impact sur la création ou le renforcement d'une position dominante.

En outre, le BKA analyse les fusions en mettant en balance ses avantages et ses inconvénients. Une fusion peut être autorisée malgré la création ou le renforcement d'une position dominante si elle améliore la concurrence sur d'autres marchés et si cette amélioration fait plus que compenser les inconvénients de la position dominante. Mais, là encore, on procède à une évaluation des conditions de la concurrence sur les divers marchés. Les gains d'efficience ne peuvent être pris en compte que dans l'optique de leur importance pour la concurrence.

La dernière et unique possibilité d'approbation d’une fusion en fonction de critères qui ne relèvent pas de l'évaluation de la position dominante est l'autorisation ministérielle. Une fusion rejetée par le BKA peut être approuvée par autorisation ministérielle si les restrictions à la concurrence qu'elle entraîne sont compensées par ses avantages économiques globaux. Cette mesure a toutefois été très rarement utilisée.

Dans l'affaire *Henkel/Luhns*, le BKA a conclu que les avantages sur le plan des coûts et de l'innovation qui auraient résulté de la fusion n'auraient contribué qu'à renforcer la position dominante de Henkel. De plus, en l'absence d'effets proconcurrentiels sur d'autres marchés, il n'y a pas eu de mise en balance des avantages et des inconvénients. C'est pourquoi le BKA s'est opposé à la création de la société mixte.

Le **Président** s'adresse ensuite aux Pays-Bas en faisant référence au paragraphe 10 de la contribution néerlandaise, qui indique : "Bien que la plupart des études consacrées aux effets des contacts multimarchés montrent que ces contacts accroissent les possibilités de comportement collusoire, il n'est pas improbable que, dans certaines conditions, une fusion conglomérale puisse en fait renforcer l'incitation à la concurrence…" La contribution néerlandaise évoque en outre les éléments d'efficience statique et dynamique dont peut s'accompagner une fusion et qui, comme en Allemagne, ne peuvent pas être directement pris en compte. Elle commente également la fusion *Wegener Arcade-VNU Dagbladen* dans le secteur des médias publicitaires. De l'avis du Président, cette affaire est particulièrement intéressante parce que, selon la contribution néerlandaise, elle mettait en cause des effets de portefeuille dont on attendait un meilleur service pour le client, effets qui ne pouvaient apparemment pas être pris en compte comme effets positifs pour l'évaluation de la fusion. Le Président demande aux Pays-Bas de s'exprimer quant à la prise en compte des gains d'efficience résultant d'effets de portefeuille et de commenter l'affaire *Wegener Arcade-VNU Dagbladen*.

Un délégué des **Pays-Bas** aborde dans un premier temps la question de la définition des fusions conglomérales au sens du document de synthèse du Secrétariat, c'est-à-dire les fusions dans lesquelles les parties ne sont pas concurrentes effectives ou potentielles et n'entretiennent pas une relation

client/fournisseur. Selon ce document, ces effets de portefeuille sont liés au regroupement de produits de marque pour lesquels les parties ont un pouvoir de marché et qui sont vendus sur des marchés voisins ou connexes.

Le délégué néerlandais fait observer qu'une grande partie du débat a concerné jusqu'à présent le regroupement de produits différents sur un même marché géographique. Les Pays-Bas considèrent qu'il faut élargir la définition. Il ne faut pas s'intéresser uniquement au regroupement de produits différents sur un même marché géographique, mais prendre en compte également les produits identiques sur des marchés géographiques différents. Comme exemple, on peut citer les marchés du téléphone mobile, où les grands opérateurs internationaux acquièrent des concessions identiques dans différents pays, même s'ils ne sont pas concurrents effectifs ou potentiels sur ces marchés, par exemple à cause du régime d'attribution des autorisations par enchères. On pourrait songer également aux compagnies aériennes, à la télévision par câble ou à la distribution d'électricité. Il n'y a pas de recoupement, mais les produits sont dans une certaine mesure complémentaires, parce que, par exemple, il y a abonnement à une société de téléphonie mobile qui offre ces services dans différents pays. Le délégué fait observer que cette situation s'apparente beaucoup à celles étudiées dans les ouvrages consacrés aux contacts multimarchés, axés essentiellement sur les recoupements des marchés de produits et sur les marchés géographiques connexes. Ces ouvrages montrent que les entreprises ayant des contacts multimarchés ont tendance à pratiquer des prix plus élevés que celles qui n'ont pas de tels contacts. De l'avis des Pays-Bas, il serait intéressant d'étudier si des effets similaires se produisent dans le cas des entreprises qui offrent des produits multiples sur des marchés géographiques identiques. Il ne semble pas y avoir d'études empiriques des effets des contacts multimarchés de ce type.

Pour ce qui concerne la question du Président sur le renforcement de l'incitation à la concurrence, il a été indiqué précédemment que le regroupement de plusieurs produits au sein d'une même société pouvait créer en fait un avantage interne en rendant par exemple plus réalisable une collusion. Les Pays-Bas estiment néanmoins qu'il est très probable que le résultat inverse puisse se produire. Il est très difficile de déterminer ex ante les effets d'une fusion conglomérale.

L'affaire *Wegener Arcade-VNU Dagbladen* concernait deux sociétés publiant deux journaux ainsi que des hebdomadaires gratuits distribués à domicile. Dans cette affaire, les autorités néerlandaises ont considéré que l'effet d'élargissement du portefeuille résultant de l'opération venait s'ajouter à la question de la position dominante. La société absorbante possédait déjà l'un des deux réseaux nationaux de distribution des journaux et des publications gratuites. Ses concurrents, ne possédant de réseau de distribution, seraient plus dépendants de la société issue de la fusion. Il ne leur resterait qu'une seule possibilité de distribution, même s'il n'y avait aucun changement du point de vue du pouvoir de marché sur ce réseau de distribution. Cette affaire a été également l'occasion d'examiner la substituabilité entre les publicités dans les publications gratuites et dans les quotidiens régionaux ainsi que le groupage de ces publicités, jugées imparfaitement substituables, dans les hebdomadaires gratuits et dans les quotidiens vendus sur abonnement. Il pouvait en résulter un avantage que ne pourraient pas contrecarrer les autres éditeurs ne disposant que d'un ou deux journaux régionaux ou d'une ou deux publications gratuites distribuées à domicile. On pouvait donc craindre que le groupage empêche l'entrée sur le segment à faible prix et faible qualité du marché de la publicité, c'est-à-dire le marché des journaux gratuits, et empêche donc à long terme l'entrée sur le segment à prix et qualité plus élevés, c'est-à-dire le marché des quotidiens. Mais en définitive les effets de portefeuille n'ont pas été jugés décisifs. C'est la création d'une position dominante ou son renforcement qui jouait un rôle central et les effets de portefeuille n'étaient que secondaires.

En résumé, le délégué fait observer que les Pays-Bas considèrent comme importants les effets de portefeuille, mais que, jusqu'à présent, aucune décision négative n'a été prise pour une fusion en raison des effets de portefeuille. Les Pays-Bas estiment également qu'il faut prendre en compte les contacts multimarchés, surtout dans le cas de marchés géographiques multiples, en plus de la présence de marchés de produits multiples sur un même marché géographique.

Le **Président** constate qu'il faudrait peut-être avoir à l’esprit dans ce débat le fait que l'effet de barrière à l'entrée résultait de ce que les publicitaires appréciaient véritablement le groupage qui aurait été offert par l'entité issue de la fusion. L'affaire *Wegener Arcade-VNU Dagbladen* semble être un cas où il est très difficile de distinguer entre l'effet d'efficience et les effets anticoncurrentiels éventuels. Le Président fait alors référence à la contribution irlandaise, qui aborde la même question. Cette contribution souligne deux éléments essentiels : premièrement, il doit y avoir pouvoir de marché pour qu’on ait à se soucier des effets de portefeuille, parce que ces effets ne se produiront très probablement pas si l'une des parties à la fusion n'a pas une position très forte sur le marché ; deuxièmement, la vente groupée peut améliorer l'efficience et avoir également des effets anticoncurrentiels. Le Président demande des détails sur la façon de distinguer ces deux effets et de les mettre en balance.

Un délégué **irlandais** attire l'attention sur deux types de fusions. Il s'intéresse tout d'abord aux fusions faisant intervenir des produits complémentaires. Il considère que ces fusions ressemblent beaucoup aux fusions verticales, pour lesquelles on dispose d'ores et déjà d'un bon cadre d'analyse. Il existe pour ces fusions une présomption d'efficience et elles comportent des éléments de positionnement stratégique, des économies d'échelle et des avantages liés à l'internalisation d'externalités ou à l'unicité du point de vente. Elles peuvent avoir aussi des effets d'exclusion, en particulier si, en limitant la concurrence sur un marché, on peut aussi l'empêcher sur un autre marché. On trouve diverses théories à ce sujet. L’une de ces théories est celle de Whinston. Une autre théorie a trait aux pratiques qui visent à empêcher l'implantation marginale sur un marché primaire. Ces idées sont bien plus familières aux autorités de la concurrence dans le contexte des opérations verticales. Si un concurrent réussit à prendre le contrôle du réseau de distribution, il pourra éventuellement limiter la concurrence au niveau de la production. Le délégué irlandais se montre sceptique quant à l’utilisation d'une doctrine des effets de portefeuille, alors même que les problèmes peuvent être également traités au moyen des outils actuels d'analyse par analogie avec les restrictions verticales.

Il souligne ensuite qu'il faut bien avoir conscience du fait que le comportement des concurrents n'est pas exogène. Les concurrents n'ont pas seulement à décider si, oui ou non, ils entreront sur un marché ou y resteront. Ils ont tout un éventail de choix, notamment celui d'améliorer leur efficience en réaction à une fusion qui accroît celle de leur concurrent. C'est là un aspect qu'il faut garder à l'esprit pour les fusions verticales d'une façon générale.

A son avis, comme pour les fusions verticales, les fusions qui font intervenir des effets de portefeuille et des produits complémentaires doivent être présumées efficientes, sauf si l’on peut observer un effet manifeste d'exclusion. La situation est toutefois différente lorsqu'on est en présence d'un élément de substituabilité. Dans le passé, l'autorité irlandaise de la concurrence a clairement indiqué que le whisky écossais et les autres alcools n'exerçaient aucune influence concurrentielle sur le whiskey irlandais. Elle n'est probablement pas la seule à avoir choisi une telle définition étroite du marché. Si elle l'a fait, c'est parce que cela portait les parts de marché à 75-95 pour cent. En conséquence de son critère de domination et d'autres facteurs, l'autorité irlandaise de la concurrence a adopté une définition très étroite des marchés pour que la part de marché atteigne un niveau suffisamment élevé, de manière à pouvoir prendre en compte les affaires relevant des articles 81 et 82 et, parfois, certaines fusions. Une définition étroite du marché qui fait tomber des pratiques restrictives sous le coup de l’article 82 n’a plus ce résultat en cas d’opération de fusion parce qu’elle réduit l’incidence des recoupements des marchés. Il se peut que les responsables de la concurrence cherchent à éviter les conséquences d’une définition auparavant trop étroite du marché en s’appuyant sur la notion d’effets de portefeuille, c’est-à-dire qu’ils appliquent les effets de portefeuille aux fusions faisant intervenir des produits qui sont davantage substituables que complémentaires.

La troisième observation du délégué irlandais a trait à la façon dont le critère de réduction sensible de la concurrence peut aider les responsables de la concurrence à résoudre les problèmes qui font l’objet de cette table ronde. Pour ce délégué, il y a trois raisons pour qu’il soit d’une telle utilité. La

première est qu'il facilite la distinction entre l'analogie avec une opération verticale et l'analogie avec une opération horizontale, ou la distinction entre produits complémentaires et produits substituables. Le critère de domination est quant à lui plus simpliste en ce qu'il est axé sur les parts de marché. Deuxièmement, le critère de réduction sensible de la concurrence permet de mesurer directement le pouvoir de marché et évite ainsi de trop s'attacher aux facteurs structurels. Troisièmement, l'une des grandes préoccupations dans ce domaine est qu'une fusion efficiente aboutit généralement à un accroissement de la part de marché à court ou long terme. Cet élément pourrait être contrebalancé par les réactions des concurrents. Paradoxalement, c'est lorsqu'une telle réaction se révèle efficace que la probabilité est faible de renforcement d'une position dominante.

Lorsqu'on utilise le critère de domination, il faut éviter de s'opposer aux fusions qui créent des éléments d'efficience et, simultanément, augmentent la part de marché. A long terme, les pressions exercées par ces fusions pousseront les concurrents à se montrer plus efficaces.

Le délégué irlandais termine son intervention en considérant que la distinction entre les fusions verticales et les fusions horizontales est très utile et que les responsables de la concurrence doivent renoncer à la contrainte qui représente une définition très étroite du marché. Il invite également à une grande prudence dans l'application des théories de l'exclusion lors de l'examen d'une fusion.

A ce point des débats, le **Président** s'adresse de nouveau au Royaume-Uni en évoquant cette fois la différence entre les avantages naturels et les avantages stratégiques que peut conférer une fusion conglomérale ayant des effets de portefeuille. Les avantages naturels visent des éléments comme les économies de gamme, d'échelle et de densité, qui peuvent avoir à la fois des effets anticoncurrentiels et des effets d'amélioration de l'efficience. Le Président pose une nouvelle fois la question suivante : comment pouvons-nous empiriquement distinguer entre ces deux types d'effets et les mettre en balance ? »

Un délégué du **Royaume-Uni** confirme que l'expression « avantages naturels » est en quelque sorte un résumé de tout ce qui fait qu'une fusion est favorable aux clients. Il peut y avoir effet de dissuasion à l'entrée, mais dans le cas d'une amélioration de l'efficience résultant d'une fusion, ce sera l'entreprise inefficiente qui n'entrera pas sur le marché, c'est-à-dire exactement ce qui devrait se produire. En présence d'avantages naturels, les intérêts des clients et ceux des parties coïncident. Les avantages naturels peuvent contrarier les intérêts des concurrents les moins efficients, ou actuellement les moins efficients, mais c'est justement comme cela que fonctionne la concurrence. En revanche, les avantages dits « stratégiques » concernent le renforcement des possibilités de comportement anticoncurrentiel, notamment l'augmentation des coûts des concurrents, laquelle est généralement plus préoccupante dans un contexte vertical que dans un contexte purement horizontal ou conglomérat. Il faut également citer à cet égard les problèmes bien connus que pose la vente liée ou la vente groupée.

Pour ce qui est de la mise en balance des effets anticoncurrentiels et des éléments d'efficience, la première question est de savoir si l'on se trouve en présence d'une possibilité théorique bien établie et cohérente de comportement anticoncurrentiel, c'est-à-dire de préjudice pour les consommateurs et pour les concurrents. Cette possibilité théorique cohérente est-elle réaliste dans le cas d'espèce ? Si elle l'est, il se pose alors une deuxième question, à savoir si ce risque peut être enrayé tout aussi bien et tout aussi efficacement ex post, par application générale du droit de la concurrence. Il est vrai que, souvent, on éprouve des difficultés à traiter les mêmes problèmes efficacement ex post. Il peut être parfois difficile, par exemple, d'appliquer à des fusions des mesures correctrices à caractère comportemental.

Tout en se posant les questions qu'on vient d'évoquer, il faut en outre souvent traiter le problème de diminution pure et simple de la concurrence horizontale, comme le délégué irlandais l'a signalé. Cela contribue à une définition correcte du marché.

Lorsqu'une mise en balance est nécessaire, c'est-à-dire qu'il y a de sérieuses possibilités de réduction sensible de la concurrence, l'OFT conseillera généralement d'effectuer une enquête approfondie. On déterminera alors si, malgré la réduction sensible de la concurrence, la fusion est favorable aux consommateurs parce que les effets d'efficience l'emportent sur le marché en question. Ces cas seront probablement assez peu nombreux.

Le **Président** évoque ensuite la dernière contribution, celle du ministère de la Justice des Etats-Unis (USDOJ). Elle fait référence à trois théories des effets anticoncurrentiels qui sont liées. Premièrement, la fusion créera des économies d'échelle et de gamme sur lesquelles les autres entreprises ne pourront pas s'aligner ; deuxièmement, l'entreprise fusionnée acquerra un avantage décisif sur ses concurrentes ; troisièmement, la fusion facilitera la vente liée ou groupée de produits complémentaires. De l'avis de l'USDOJ, les deux premiers effets ne posent pas véritablement de problème, parce qu'ils améliorent l'efficience. Quant au troisième effet, la contribution des Etats-Unis indique que « la plupart des cas de vente liée ou groupée n'ont pas pour motif la fermeture du marché, certains seulement ont un tel motif et, même dans cette hypothèse, ont alors des effets ambigus du point de vue du bien-être ».

S'attachant au troisième effet, le Président voudrait savoir comment l'USDOJ aurait traité une fusion hypothétique entre une grande société informatique détenant une très forte part du marché dans les systèmes d'exploitation et une autre entreprise en forte position dans les navigateurs. Une telle fusion ne poserait-elle aucun problème de concurrence ?

Le Président note également que la contribution de l'USDOJ exprime ses préoccupations quant à la pratique d'autres autorités de la concurrence et se demande si l'application des théories des effets de gamme conduira les autorités de la concurrence à rejeter une fusion qui améliore l'efficience en invoquant des théories du préjudice concurrentiel très spéculatives et indémontrables. Cette contribution souligne également que, sans règles de preuve très strictes, la théorie des effets de gamme risque de devenir une théorie mal circonscrite et passe-partout permettant aux autorités de la concurrence de contester pratiquement toute fusion au nom de vagues craintes de position dominante. Le Président demande si les débats de la table ronde ont apaisé les préoccupations de l'USDOJ quant à l'application de la notion d'effets de portefeuille par d'autres autorités de la concurrence.

Un délégué du **ministère de la Justice des Etats-Unis (USDOJ)** répond que, vu les réactions à certaines des remarques qu'il a faites au début de la semaine, il souhaite formuler une observation liminaire.

Il indique que l'USDOJ se félicite de pouvoir participer à un débat public et à des discussions privées au sujet de la doctrine des effets de gamme et de son application dans telle ou telle affaire, parce qu'il considère que cette question revêt une importance fondamentale pour la politique de la concurrence. L'USDOJ participe depuis quatre ans à un tel débat aux Etats-Unis, dans le contexte des théories avancées dans l'affaire *Microsoft*, à laquelle le Président a fait allusion. Ce débat a été très utile en ce qu'il a permis de mieux cerner les problèmes et le contentieux et de fournir à la Cour d'appel les éléments dont elle avait besoin pour rendre son excellent jugement dans cette affaire.

Le document de l'USDOJ vise à expliquer pourquoi il a été décidé de ne pas s'opposer à la fusion *GE/Honeywell* au nom de la théorie des effets de gamme. L'USDOJ se doit d'expliquer à l'ensemble des acteurs dans le domaine du droit de la concurrence les motifs de sa décision, eu égard en particulier au rôle essentiel que jouent toujours les faits dans ce type de décision.

Pour le délégué de l'USDOJ, les autorités de la concurrence ont une mission commune : s'opposer aux fusions qui sont anticoncurrentielles et qui nuisent donc au bien-être des consommateurs. Il est déjà difficile de faire un tri entre les bonnes et les mauvaises fusions lorsqu'elles sont purement

horizontales. Cela l'est encore plus pour les fusions verticales et celles qui posent des problèmes de concurrence potentielle. L'incertitude est encore bien plus grande en cas de fusion faisant intervenir des produits complémentaires. Certaines de ces fusions peuvent être considérées comme verticales, comme l'a indiqué le délégué irlandais, mais le délégué des Etats-Unis ne pense pas que la fusion *GE/Honeywell* mettait en cause des relations verticales proprement dites, sinon peut-être en ce qui concerne le GECAS. Surtout si l'on s'appuie sur la théorie selon laquelle la fusion aboutira d'abord à une baisse des prix et à une amélioration des produits et ne sera nocive pour la concurrence que dans la mesure où les concurrents seront contraints de sortir du marché, on met nécessairement en balance des avantages à court terme et un préjudice spéculatif à long terme. Dans ce cas, il y a un risque de mauvais arbitrage de la part des autorités de la concurrence. Le délégué des Etats-Unis considère qu'un siècle d'application du droit des concentrations a appris aux responsables de la concurrence que vouloir prédire les effets à long terme d'une fusion est extrêmement aléatoire.

En réponse à la question du Président, le délégué des Etats-Unis indique qu'il est tout à fait rassuré par les débats de la table ronde. Lorsque des entreprises concernées invoquent auprès de l'USDOJ des effets de portefeuille ou de gamme, ces effets font l'objet d'une enquête, mais dans pratiquement tous les cas ces préoccupations se révèlent exagérées et ne justifient pas une décision négative. Le délégué des Etats-Unis a le sentiment que c'est également à cette conclusion que la plupart des responsables de la concurrence qui sont réunis autour de cette table ont abouti lorsqu'ils ont eu à examiner des effets de portefeuille. Le minimum qu'exige l'USDOJ est que, pour pouvoir invoquer ce type d'argument reposant sur la théorie de la fermeture du marché, il faut s'appuyer sur de solides fondements théoriques et empiriques. Le délégué des Etats-Unis poursuit en commentant les observations du délégué de la CE sur l'effet de levier et la fermeture du marché.

Le délégué des Etats-Unis fait savoir que l'USDOJ considère certainement, lui aussi, que dans certaines circonstances la vente liée, lorsqu'elle émane d'une entreprise disposant d'un pouvoir de marché pour le produit liant, sera anticoncurrentielle et donc illégale. L'action intentée contre Microsoft est précisément une affaire de ce type et l'USDOJ se félicite de la victoire qu'il a remportée sur ce terrain, mais il est essentiel de noter que la Cour d'appel n'a pas axé ses motifs sur le fait même de la vente liée, mais sur la façon dont elle s'est exercée et sur l'absence de justifications industrielles ou commerciales.

En ce qui concerne la question du Président sur le point de savoir si l'USDOJ aurait contesté un projet de fusion entre Microsoft et Netschape en 1996, le délégué des Etats-Unis répète que les investigations en matière de fusions reposent avant tout sur des éléments de fait. L'USDOJ aurait examiné dans une telle affaire les problèmes de concurrence horizontale et de concurrence potentielle. Le problème que posent les décisions qui ont été rendues sur la base des effets de gamme réside en ce qu'elles paraissent aller bien au-delà de la vente liée forcée qui serait considérée comme illicite en vertu du droit américain de la concurrence.

Il n'est pas illicite, par exemple, pour une société d'intégrer matériellement deux produits complémentaires tout en continuant de vendre les composants séparément. Si tel était le cas, il aurait été illégal pour Kelloggs de commercialiser les céréales glacées au sucre. Il n'est pas non plus illégal pour une société de commercialiser un lot de produits à un prix inférieur à celui appliqué pour les divers composants, dès lors que le prix du lot n'a pas un caractère prédateur. Sur ce point, le délégué des Etats-Unis s'arrête sur ce qu'il juge être une distinction erronée entre la fixation stratégique des prix et les véritables économies d'échelle et de gamme, c'est-à-dire des réductions des coûts. Dans les affaires de prix de prédation, les tribunaux américains ont clairement jugé que, même lorsqu'un monopoleur baisse ses prix à des fins stratégiques, par exemple pour empêcher l'entrée, ce comportement n'est pas illégal tant que le prix n'est pas inférieur au coût de revient. Enfin, il n'est assurément pas illégal pour une société de pratiquer un rabais sur les prix de ses produits lorsqu'elle tire parti du fait qu'en offrant un prix inférieur pour un produit elle augmentera les ventes d'autres produits complémentaires. Sinon, il faudrait que

Gillette applique un prix bien plus élevé pour ses rasoirs. Dans tous ces cas, le client reste libre d'acheter le lot ou d'acheter ses différents composants. Le choix du consommateur est préservé. Il n'y a un préjudice potentiel pour le consommateur que si les concurrents se voient fermer le marché, c'est-à-dire en sont évincés. Mais le problème à cet égard est que le mécanisme de la concurrence, comme plusieurs autres délégués l'ont déjà indiqué, n'est rien d'autre qu'encourager les plus efficients à se développer aux dépens des moins efficients. La concurrence accroît le bien-être des consommateurs parce qu'elle récompense le succès et sanctionne l'échec.

En ce qui concerne la question des mesures correctrices ex ante ou ex post, le délégué des Etats-Unis souhaite seulement ajouter qu'on n'a pas mis suffisamment l'accent dans le débat sur l'importance de la dissuasion. Lorsqu'on a, comme aux Etats-Unis, en cas de pratiques anticoncurrentielles, de fortes amendes ou des dommages et intérêts triples, dès lors que ces sanctions sont infligées dans des conditions de certitude, de sévérité et de célérité, l'effet dissuasif peut être efficace. Le délégué des Etats-Unis note brièvement que le document de l'USDOJ intitulé « Observations… » [voir le document de séance accompagnant la contribution des Etats-Unis] contient à ce sujet plusieurs propositions de travaux futurs.

Un délégué de la **Federal Trade Commission des Etats-Unis (USFTC)** intervient ensuite au sujet de la mise en balance des différents effets. Il note tout d'abord que l'examen d'une fusion consiste essentiellement à prévoir les effets futurs et propose pour ce faire quatre phases.

La première consiste à s'attacher aux effets à court et moyen terme en se demandant s'il existe un grand pouvoir de marché et si les arguments d'efficience au niveau des prix et de la qualité sont plausibles. Dans la deuxième phase, on scrute l'avenir en examinant les effets à long terme et en répondant à cet effet à quatre questions :

1. Comment les concurrents réagiront-ils ?

Pour répondre à cette question, il faut implicitement se prononcer sur l'adaptabilité et la réactivité des mécanismes du marché.

2. Comment les acheteurs réagiront-ils ; autrement dit, les acheteurs sont-ils en mesure d'adopter des contre-mesures face à une stratégie éventuelle de hausse des prix ou de diminution de la qualité ?

Cette fois encore, il faut se prononcer sur l'adaptabilité des acheteurs, en s'appuyant sur un modèle dynamique nécessitant certaines hypothèses sur les interactions stratégiques entre tous les acteurs.

3. Y aura-t-il entrée sur le marché, qu'il s'agisse d'une nouvelle entrée ou du repositionnement d'autres entreprises sur le marché du produit ?

4. Les mesures correctrices ex post de politique de la concurrence conviennent-elles en cas de pratiques restrictives ou d'abus de position dominante ?

La réponse à cette dernière question peut être différente d'un pays à l'autre.

On en arrive alors à la troisième phase. Si les effets bénéfiques à court terme paraissent plausibles et marqués et si l'on peut tabler sur des réactions efficaces à long terme de la part des concurrents et des clients, on privilégiera les effets bénéfiques à court terme et pas le préjudice potentiel à long terme. Si l'on fait l'hypothèse contraire, le résultat sera inverse.

Pour la quatrième phase, le délégué propose que les hypothèses en matière d'adaptabilité du marché soient validées au moyen d'une évaluation régulière, par les autorités de la concurrence, de

l'impact de leurs activités. Le délégué reconnaît qu'on peut se montrer hésitant face à une évaluation ex post, car elle peut aboutir à trois conclusions : on a amélioré la situation, on n'a obtenu aucun résultat ou les choses se sont dégradées. Dans deux cas, l'issue n'est pas celle qu'on voulait. Le délégué considère néanmoins que l'évaluation ex post est un élément final indispensable du processus empirique d'examen des fusions. La validation empirique permet de déterminer si, oui ou non, les hypothèses formulées aux premiers stades de l'enquête doivent être ajustées.

Après avoir approuvé cet appel à un examen ex post des décisions en matière de fusion et rappelé qu'il a souvent préconisé cette mesure, le **Président** ouvre la discussion générale en invitant le délégué du Comité consultatif économique et industriel (BIAC) à s'exprimer.

Un délégué du **BIAC** note tout d'abord que lorsque les directives de 1992 de l'USDOJ et de l'USFTC ont fixé les conditions dans lesquelles les effets des actions coordonnées et des actions unilatérales doivent être pris en compte pour évaluer l'impact probable d'une fusion, on avait pleinement conscience que mêmes ces normes ne pouvaient pas toujours conduire à des conclusions claires et nettes. Entreprendre une analyse ex post des décisions, pour déterminer si elles étaient bonnes ou mauvaises, est donc extrêmement salutaire. Dans la mesure où la mise en œuvre d'une analyse des effets de portefeuille ou de gamme ajoute un troisième élément sur le plan des effets anticoncurrentiels, elle rend manifestement plus complexe et plus incertaine l'application de la réglementation des fusions, même si les autorités de la concurrence s'efforcent de clarifier les conditions dans lesquelles des effets de portefeuille anticoncurrentiels sont à attendre. Ces conditions s'inscrivent dans un cadre un peu plus spéculatif que celles applicables lorsqu'on fait appel à d'autres théories. Des effets de portefeuille se produisent lorsqu'une fusion fait intervenir des produits complémentaires ou des produits qui ont une forte corrélation du point de vue de leur valeur pour les consommateurs. A quelques exceptions près, les fusions de ce type ne devraient pas poser de problèmes de concurrence.

Le document de synthèse du Secrétariat énumère sept éléments rendant probables des effets préjudiciables de portefeuille. Selon ce document, deux éléments sont nécessaires au regard de la théorie fondée sur la vente liée: un pouvoir de marché pour le produit liant et un grand nombre d'acheteurs souhaitant acquérir uniquement le produit lié. Ce sont là des éléments structurels, que les autorités chargées de l'examen des fusions peuvent facilement déterminer. Les autres éléments énumérés dans le document du Secrétariat exigent un examen des agissements futurs et des réactions futures sur le marché, à tout le moins difficiles à prévoir a priori. Premièrement, il faut que les coûts des concurrents augmentent et que ceux-ci ne puissent pas pratiquer également la vente liée ou groupée ou mener à bien d'autres stratégies de prix non linéaires pour compenser l'avantage des entreprises fusionnées. Deuxièmement, l'impossibilité pour les concurrents de réagir efficacement entraînera ensuite une hausse des prix ou créera des barrières à l'entrée. Troisièmement, en étant à même de pratiquer des prix supérieurs au niveau de concurrence, l'entreprise fusionnée pourra récupérer ses pertes éventuelles par exclusion des concurrents du marché. Enfin, les acheteurs subiront à terme une perte nette de bien-être du fait de cette exclusion. Les tribunaux et les autorités de la concurrence peuvent fort bien identifier et évaluer le risque de comportement d'exclusion aboutissant à une fermeture totale ou partielle du marché.

Pour déterminer si un ou plusieurs des éléments ou des conditions qui viennent d'être mentionnés sont présents et créeront des effets de portefeuille anticoncurrentiels, il faut savoir quelles sont les incitations économiques de l'entreprise fusionnée. Il faut connaître la structure des coûts de l'entreprise fusionnée et de ses concurrentes, et aussi connaître de façon assez approfondie les fonctions de réaction des participants au marché, pour pouvoir évaluer correctement la probabilité de pratiques anticoncurrentielles d'exclusion en cas de fusion faisant intervenir des produits complémentaires. On a peut-être sous-estimé les difficultés à cet égard. Même les partisans de la théorie des effets de portefeuille anticoncurrentiels, par exemple Balto/Tom et autres, ont recensé un certain nombre de principes restrictifs indispensables pour que cette théorie soit efficace. Le délégué invite un de ses collègues à poursuivre sur ce point.

Le deuxième délégué considère qu'il est urgent d'approfondir le débat et d'obtenir rapidement des autorités de la concurrence des solutions et des orientations en ce qui concerne les situations précises dans lesquelles une fusion conglomérale faisant intervenir des produits vendus à un même client peut être contestée sur la base de la théorie des effets de portefeuille ou des effets de gamme. Les divergences de vue fondamentales qu'on observe actuellement créent une grande incertitude dans les milieux d'affaires internationaux, handicapent la planification des fusions et nuisent à la crédibilité de l'application du droit dans le domaine des fusions.

En attendant que ces divergences s'aplanissent, le BIAC invite instamment à une application rigoureuse et prudente de la théorie des effets de portefeuille. Une telle application se justifie vu les avantages immédiats que peuvent procurer aux consommateurs une baisse des prix et/ou une meilleure intégration des offres de produits, au regard de l'éventualité, plus spéculative, d'effets nocifs à long terme. Le BIAC considère également que lorsque les autorités de la concurrence ont d'autres moyens d'action, c'est-à-dire l'interdiction des pratiques restrictives ou de l'abus de position dominante, il faudrait s'appuyer sur ces mesures plutôt que de bloquer la fusion.

Le délégué fait une dernière observation à propos de la théorie des effets de portefeuille dans le contexte des prix se situant à un bas niveau. Le problème est en particulier que cette théorie suppose que l'entité fusionnée pourra pratiquer la vente groupée de plusieurs produits à un prix global inférieur à celui qui pourra être offert par les concurrents. Mais on ne semble absolument pas exiger que le prix du lot soit inférieur à un certain type de coût. La question qui se pose, et le BIAC espère que les autorités de la concurrence s'efforceront de la résoudre, est de savoir s'il s'agit du coût total moyen, du coût variable moyen ou du coût marginal, ou d'un autre type de coût. Et ce n'est là qu'un exemple des difficultés que les auteurs de projets de fusion rencontrent à l'heure actuelle étant donné les divergences fondamentales qu'on peut observer. En résumé, le BIAC invite instamment les autorités de la concurrence à se montrer très prudentes lorsqu'il s'agit de s'opposer à une fusion au nom des effets de portefeuille lorsqu'une opération créera probablement des avantages immédiats pour le consommateur, d'une part, et n'aura probablement, d'autre part, que des effets anticoncurrentiels spéculatifs à long terme, et ce surtout lorsque l'autorité qui examine la fusion peut utiliser d'autres mesures correctrices de type comportemental.

Un délégué **mexicain** commente l'expérience de son pays dans le domaine de l'application de la théorie des effets de portefeuille. Il rappelle trois affaires pour lesquelles les effets de portefeuille ont joué un rôle substantiel dans l'examen de la fusion et note qu'un grand nombre des éléments évoqués dans les débats lors de cette table ronde ont été pris en compte à cette occasion. La première est l'affaire *Coca Cola/Cadbury Schweppes*. Quoique cette fusion ait été bloquée, les effets de portefeuille n'en ont pas été la cause même si la part de marché détenue par Coca Cola au Mexique soit même probablement plus élevée qu'en Australie et bien qu'on ait pu attendre de la plus forte part de marché à la suite de la fusion un net accroissement du pouvoir de marché de Coca Cola. En effet, Coca Cola ne remédiait précisément pas aux problèmes que posaient les effets de portefeuille sur des marchés étroitement liés. Coca Cola avait des antécédents de pratiques marquées d'exclusion par voie d'accord avec divers distributeurs dans le pays.

La deuxième affaire est la fusion entre *Televisa* et une station de radio. Televisa détenait une forte position dominante sur le marché de la télévision et une position bien établie sur le marché de la radio. La fusion rendait très probables des pratiques de vente groupée. Là encore, l'expérience montrait que Televisa avait abondamment eu recours à la vente groupée et s'était livrée à des pratiques d'exclusion. Cet élément a joué dans ce cas également un très grand rôle dans l'examen de la fusion, eu égard en particulier au fait que d'autres pays limitent les participations croisées dans le secteur de la télévision et de la radio.

La troisième affaire concernait *Pemex*, unique producteur de pétrole au Mexique et également unique distributeur d'essence. Pemex avait conclu un accord d'exclusivité pour la vente de lubrifiants dans

ses stations-service. Cet accord a été interdit parce qu'il empêchait totalement l'accès des stations-service aux producteurs concurrents de lubrifiants.

Le délégué mexicain se montre satisfait des trois décisions qu'il vient d'évoquer et approuve en grande partie les observations qui ont été formulées à cette table ronde. Il considère lui aussi qu'il faut appliquer prudemment la théorie des effets de portefeuille. Il faut éviter de spéculer sur des effets éventuels et essayer au contraire de s'attacher aux éléments directs quant à la façon dont il pourrait avoir fermeture du marché et à l'incidence que pourraient avoir des pratiques de vente liée sur les consommateurs. Il convient également de prendre en compte les éléments d'efficience. Il estime également, comme le délégué irlandais, qu'il n'y a pas besoin d'une doctrine des effets de portefeuille. Les instruments actuels sont suffisants pour traiter les problèmes.

Un délégué français commente brièvement deux décisions concernant la fusion *Coca-Cola/Orangina.* En 1999, il y a eu deux notifications, deux décisions et deux rejets fondés sur la théorie des effets de portefeuille. Sans le savoir, les autorités françaises ont appliqué d'assez près le cadre analytique du Secrétariat. Le délégué français juge tout à fait pertinents ce cadre d'analyse et les sept points sur lesquels il s'articule.

Les autorités de la concurrence ont distingué deux marchés, la consommation à domicile après achat dans les magasins alimentaires et la consommation hors foyer. Le délégué français approuve à cet égard les observations précédentes du délégué du Royaume-Uni. Le problème concernait le secteur de la consommation à domicile, et pas la grande distribution. Dans ce dernier secteur, les distributeurs ont un pouvoir compensateur considérable, qui neutralise le pouvoir de marché lié aux effets de portefeuille.

La théorie des effets de portefeuille n'a pas été appliquée de façon totalement indépendante. C'est là un point fondamental. Elle a été utilisée dans un cas d'espèce où se posaient d'autres problèmes sérieux de concurrence se rattachant au pouvoir de marché ; il y avait notamment une forte part des marchés tels que définis.

L'application de la théorie des effets de portefeuille dans les deux décisions *Coca Cola/Orangina* a beaucoup retenu l'attention. Les deux décisions présentent de nombreux points communs avec celles prises par d'autres autorités de la concurrence. Les autorités françaises ont de fait appliqué la définition du marché adoptée par l'Union européenne ainsi que par les autorités mexicaine et australienne. Le délégué français estime par conséquent que les différentes autorités de la concurrence appliquent fondamentalement la même analyse.

Le délégué français conclut son intervention en se montrant très intéressé par la méthodologie proposée par les Etats-Unis et, en particulier, par l'idée d'une évaluation après la fusion.

Un délégué **allemand** revient sur l'observation du Président concernant l'efficience et sur les commentaires du délégué irlandais au sujet de la différence entre le critère de réduction sensible de la concurrence et le critère de domination. Ce point est particulièrement intéressant parce que, dans l'affaire *GE/Honeywell*, la Commission européenne a appliqué le critère de la position dominante, alors que les Etats-Unis ont appliqué celui de la réduction sensible de la concurrence. L'Allemagne utilise le critère de la position dominante, mais cela ne veut pas dire qu'elle soit totalement axée sur la part de marché. Pour répondre à la question de savoir s'il y a ou non position prépondérante sur le marché, le BKA peut procéder à une évaluation globale prenant en compte les parts de marché, les moyens financiers, l'accès aux fournisseurs et aux réseaux de distribution, etc. Par conséquent, le critère de la position dominante n'est pas autant axé sur la part de marché que le délégué irlandais le considère. Même l'efficience peut-être prise en compte avec ce critère, mais seulement en ce qui concerne ses liens avec la concurrence. Les décisions divergentes des Etats-Unis et de la CE, comme dans l'affaire *GE/Honeywell*, sont sans doute

davantage le résultat d'approches économiques différentes que de critères différents. Comme l'ancien Président du BKA, M. Karte, avait l'habitude de le dire, droit des fusions et sécurité juridique ne font pas bon ménage.

Un délégué **italien** fait observer qu'une fusion purement conglomérale ne devrait avoir aucun effet sur les prix à la consommation, et donc sur le bien-être des consommateurs, élément que les autorités de la concurrence s'efforcent de promouvoir dans le domaine des fusions. Dans le cas d'une fusion faisant intervenir des produits complémentaires, l'opération devrait faire baisser les prix et être ainsi bénéfique pour les consommateurs. Où est donc le problème ? Il tient, de l'avis du délégué italien, à la menace de fermeture du marché, c'est-à-dire à la possibilité, pour l'entreprise fusionnée, d'utiliser des techniques telles que les rabais sélectifs afin d'exclure les concurrents, ce qui aura en définitive pour résultat de faire monter les prix. Il y aura donc un avantage à court terme et un préjudice à long terme. Certaines affaires, en particulier *GE/Honeywell,* relèvent entièrement de la problématique de la vente liée. Elles comportent aussi des effets au niveau de la demande, qui peuvent avoir certaines répercussions en termes de fermeture des marchés.

Le délégué italien invite instamment à mettre en œuvre une analyse plus large pour tenir compte des aspects complexes de certaines fusions dus à un grand nombre d'interrelations, d'effets au niveau de la demande, etc. Par exemple, dans l'affaire *Grand Met,* ce qui posait problème, c'était la possibilité d'utiliser des rabais sélectifs après la fusion. Guiness aurait pu empêcher l'accès au marché de concurrents et ses rabais sélectifs auraient pu aboutir à des prix marginaux inférieurs au coût, ce qui pouvait représenter une menace pour la concurrence et empêcher des concurrents d'avoir accès au marché. Bien entendu, les autorités de la concurrence doivent déterminer si un tel comportement est probable et s'il aura en fait des effets d'exclusion.

Un délégué **danois** note que les effets de portefeuille ne constituent probablement pas le problème le plus grave dans le contexte actuel de vague persistante de fusions, les études réalisées démontrant, semble-t-il, que les fusions conglomérales ne représentent pas une proportion de plus en plus forte de l'ensemble des fusions. Il y a néanmoins de temps à autre des fusions conglomérales et il importe de savoir comment les traiter. Le délégué danois estime qu'aucun participant à la table ronde n'a véritablement avancé aucune proposition satisfaisante pour mettre en balance les avantages et les inconvénients de ces fusions. Il a pris connaissance avec beaucoup d'intérêt de la classification proposée par les Etats-Unis, mais considère qu'elle ne tient pas suffisamment compte du fait que certaines mesures correctrices envisagées peuvent avoir des effets à court terme et d'autres des effets à plus long terme. L'approche préconisée par les Etats-Unis semble plus adaptée à la décision même d'approbation ou de rejet d'une fusion. Mais si l'on peut négocier certaines mesures correctrices, le processus est en fait plus subtil.

Le Danemark a connu une affaire de fusion entre grandes banques qui comportait des effets de portefeuille. Les parties offraient toute une gamme de produits (banque, crédit hypothécaire, assurance, etc.). L'Autorité de la concurrence craignait que cette fusion à effets de portefeuille augmente les coûts des concurrents. C'est pourquoi elle a pris une mesure correctrice pour remédier à ces craintes.

Le Danemark considère qu'il n'y a pas véritablement besoin d'une nouvelle doctrine dans ce domaine ; les instruments actuels sont suffisants. Le délégué danois estime, comme l'Irlande et le Royaume-Uni, que les critères de position dominante et de réduction sensible de la concurrence sont plus ou moins convergents et qu'il ne faut pas exagérer leurs différences. Il se montre néanmoins en faveur de l'adoption du critère de la réduction sensible de la concurrence, qui semble mieux adapté pour traiter les questions traitées à l'occasion de cette table ronde.

Un délégué de la **Commission européenne** revient sur une observation faite par le BIAC. Il reconnaît les divergences entre la CE et les Etats-Unis, mais souligne qu'il faut les aplanir. L'objectif de la CE est une plus grande convergence. Le délégué de la CE tient à mettre en lumière un accord manifeste sur deux points. Premièrement, dans des conditions plus ou moins strictes, une fusion conglomérale peut être nocive pour la concurrence ou avoir des effets d'exclusion, comme le délégué italien vient de le noter. Deuxièmement, les délégués semblent convenir qu'une fusion conglomérale peut créer divers éléments d'efficience. Le délégué de la CE s'interroge sur les conditions qui doivent être réunies pour que ces éléments d'efficience soient acceptés ; il note à cet égard que, pour la CE, il incombe aux parties, dans les situations limites, de faire la preuve des éléments d'efficience.

Un délégué **hongrois** se demande si le critère de la réduction sensible de la concurrence est meilleur que le critère de la position dominante dans le cas d'une fusion ayant des effets de portefeuille. Selon lui, il n'y a guère de différence entre les deux critères et, en tout état de cause, la définition du marché est cruciale dans les deux cas. Si l'on définit les marchés étroitement, par exemple en retenant le marché des différentes marques, on ne constatera que rarement une réduction sensible de la concurrence du fait d'une fusion. Il fait également observer qu'il serait probablement utile de bien distinguer entre la question de la validité de la doctrine des effets de portefeuille et celle de savoir s'il est judicieux de l'utiliser fréquemment.

Un délégué du **ministère de la Justice des Etats-Unis** remarque que, dans le domaine des mesures correctrices, l'approbation ou l'interdiction ne sont pas les seules solutions ex ante. Subordonner la fusion à certaines conditions est également une possibilité. C'est ce que l'USDOJ fait généralement pour les fusions verticales, en permettant ainsi aux parties de concrétiser l'efficience escomptée, tout en les empêchant de se livrer à des pratiques anticoncurrentielles de distribution exclusive, de vente liée et de refus de vente. En ce qui concerne la remarque de la CE concernant l'efficience, les Etats-Unis demandent aux parties de faire la preuve de l'efficience alléguée. Le délégué des Etats-Unis considère qu'il est très important que les autorités de la concurrence fassent savoir clairement qu'elles prendront en compte l'efficience dans l'analyse des effets sur la concurrence et l'envisageront sous un angle positif et pas négatif.

Le **Président** clôture la table ronde en formulant quelques brèves observations à partir de ses impressions personnelles. Il note tout d'abord ce qu'il juge être un consensus total sur le point suivant : les effets de portefeuille dans les fusions conglomérales doivent être traités prudemment. Il a également le sentiment d'une assez grande convergence analytique, les débats ne paraissant pas avoir reflété les affirmations selon lesquelles les considérations théoriques intervenant dans les analyses sont extrêmement divergentes. Personne ne met en doute la volonté de protéger les concurrents ou la concurrence. Tout le monde veut protéger la concurrence et l'efficience. Les problèmes ou les divergences qui peuvent apparaître se situent sur un autre plan, peut-être dans la façon dont les lois sont conçues. Certains ont fait valoir que le choix du critère, la réduction sensible de la concurrence ou l'abus de position dominante, pouvait avoir une incidence sur les éléments qu'on peut examiner ou sur la latitude dont on dispose pour examiner certains éléments.

Le Président considère, bien que certains participants aient minimisé cet aspect, qu'il peut y avoir des disparités sensibles entre les autorités de la concurrence. Celles qui appliquent le critère de la réduction sensible de la concurrence peuvent avoir plus de latitude pour examiner les différents effets anticoncurrentiels d'une fusion. Cela peut aussi avoir une incidence sur la façon de prendre en compte l'efficience. Il y a deux moments où, lors de l'examen d'une fusion, on peut examiner les éléments d'efficience. On peut les prendre en compte lorsqu'il s'agit de déterminer s'il y a création ou non d'une position dominante. A ce stade, l'efficience sera généralement considérée comme renforçant la domination de celui qui en bénéficie. L'efficience finit donc par être un facteur négatif, non pas parce qu'elle est négative en elle-même, mais parce que l'entreprise qui en bénéficie accroît sa puissance où sa domination.

Mais il y a une autre façon de prendre en compte l'efficience, non pas lorsqu'on détermine s'il y a position dominante ou lorsqu'on envisage les effets anticoncurrentiels éventuels, mais lorsqu'on évalue les effets compensateurs de l'efficience, en quelque sorte la « valeur rédemptrice » de la fusion. Dans ce cas, l'efficience est envisagée du côté positif.

Le Président attire en outre l'attention sur un aspect qui n'a guère retenu l'attention lors des débats : la transformation de la notion de produit ou service. Un lot de produits ou services est considéré comme quelque chose de différent, qui peut faire l'objet d'une demande spécifique. On en arrive ainsi directement à une question du BIAC : dès lors qu'on passe d'un produit à un lot, quelle est la notion de fixation du prix qu'il faut utiliser pour déterminer si le prix a ou non des effets anticoncurrentiels ? Il faudrait peut-être que les autorités de la concurrence indiquent plus clairement comment elles envisagent ce problème de fixation des prix dans le cas d'une fusion ayant des effets de portefeuille.

Une fusion conglomérale ayant des effets de portefeuille peut renforcer la concurrence à certains égards tout en la diminuant à d'autres égards, et même si elle réduit la concurrence, elle peut avoir des effets positifs en termes d'efficience. Selon le Président, la seule différence qui rend le problème des fusions conglomérales même un peu plus complexe que celui des restrictions verticales est la possibilité de réactions différées dans les fusions conglomérales ayant des effets de portefeuille. Lorsque les autorités de la concurrence examinent des restrictions verticales comme des contrats de distribution exclusive ou sélective, on se trouve généralement en présence d'un phénomène statique. Tous les effets se produisent au même moment. S'il y a des effets différés, par exemple des pratiques visant à empêcher l'entrée future ou à éliminer un concurrent, on en vient à la question que se posait le délégué de l'USFTC, à savoir comment évaluer ces effets différés par rapport aux effets immédiats plus prévisibles ?

Le Président considère que tout cela s'inscrit dans le cadre d'un débat normal sur une question complexe de politique de la concurrence et que l'enjeu est d'essayer d'élaborer un critère empirique pour circonscrire du mieux possible les différents problèmes. C'est ce qu'ont proposé la CE et le Royaume-Uni dans leur contribution et le délégué de l'USFTC dans son intervention à cette table ronde. Le Président juge cela très utile parce que les autorités de la concurrence s'efforcent avant tout d'interpréter des faits et que les divergences se font jour à ce niveau et pas au niveau théorique ou au niveau des faits purs.

Le Président conclut en proposant que les autorités de la concurrence s'efforcent d'affiner encore les procédures empiriques, les questions et l'ordre dans lequel elles doivent être examinées. On pourra ainsi obtenir une visibilité suffisante, de manière que les entreprises aient un sentiment de prévisibilité, même dans le cas d'une fusion posant des problèmes complexes.