ase goods and services, they enjoy certain rights m general consumer protection legislation and also, om industry-specific regulations. These various nsumers to make effective purchasing decisions, srepresentation.

afforded to business customers is substantially esses ought to be in a position to look after *mptor* or ‘buyer beware’ is typically considered customers, other than in extreme circumstances.

wever, that smaller business customers, and in usinesses, are likely to face many of the same when making purchasing decisions, especially for ked to their particular trade. This gives rise to an ections provided for individual consumers be customers?

arguments for and against such an extension, protections to smaller business customers relative conclude that there is a strong argument for ated sectors, where significant concerns arise and argeted to address them.

rent position within both general consumer law he UK. We find a mixed picture. The

broadly follows a consistent policy of extending all sinesses. The Financial Conduct Authority and the nd provisions in some cases, but in others they do ences in approach have been fully thought

water regulator Ofwat, meanwhile, makes no tections to micro businesses. The same is true for n the UK, under which small businesses are businesses and receive substantially less

umers. The UK differs in this respect from a number her EU Member States.

1.1.1.1. InInInInttttrrrroooodddduuuuccccttttiiiioooonnnn

1.1. When individual consumers purc and protections. These derive fro in the important utility sectors, f provisions are designed to help c without fear of exploitation or m

1.2. In general, the level of protectio lower, reflecting a view that bus themselves. A culture of *caveat* sufficient protection for business

1.3. There is increasing recognition, h particular sole traders and micro problems as individual consume purchases that are not directly li obvious question: Should the pro extended to such smaller busine

1.4. In this report, we first review the which would effectively give ext to larger business customers. W extension at least within the reg regulations can be relatively wel

1.5. We then go on to consider the c and also the regulated sectors in communications regulator Ofco consumer protections to micro b energy regulator Ofgem also ext not, and it not clear that the diff through. The England and Wales provision to extend consumer pr general consumer protection la treated no differently from large protection than individual cons of other jurisdictions including o

h

r o i

n in *e*

o b rs n t ss

ra e ul l t

ur t m u e er

o w r

t

**Geo**

**in**

*A*

**Am**

*C*

*Uni*

i



**graphic Market Definition European Commission**

**Merger Control**

*Study for DG Competition by*

**elia Fletcher and Bruce Lyons**

*entre for Competition Policy, versity of East Anglia, Norwich*

**January 2016**

**Table of Contents**

[Executive Summary 2](#_TOC_250027)

1. [Introduction 7](#_TOC_250026)
2. [Guidance on Market Definition 8](#_TOC_250025)
   1. [Concepts 8](#_TOC_250024)
   2. [Process 9](#_TOC_250023)
   3. [Evidence 10](#_TOC_250022)
   4. [Detailed guidance on supply substitution 11](#_TOC_250021)
3. [General Observations on the Commission’s Approach to Geographic Market Definition 12](#_TOC_250020)
   1. [Geographic market definition appears to matter more than is appropriate 12](#_TOC_250019)
   2. [The role of imports in geographic market definition is unclear 13](#_TOC_250018)
   3. [There is insufficient assessment of ‘rapid entrants’, swing capacity and capacity shares 16](#_TOC_250017)
   4. [There is duplication of evidence between market definition and competitive assessment 17](#_TOC_250016)
   5. [Member States seem to be treated as the smallest unit of geographic market definition 17](#_TOC_250015)
   6. [Access to local distribution can be crucial for geographic market definition 18](#_TOC_250014)
   7. [There is clear evidence of parties and the Commission prioritising their resources in respect of quantitative analysis 19](#_TOC_250013)
   8. [We found no evidence that the Commission’s approach to geographical market definition is leading to poor merger decisions. 19](#_TOC_250012)
4. [The Case Studies 20](#_TOC_250011)
   1. [General comment on the selection of case studies 21](#_TOC_250010)
   2. [Preliminary review of findings in the ten case studies 22](#_TOC_250009)
5. [Analysis of the Case Studies 26](#_TOC_250008)
   1. [Current geographic pattern of purchases 26](#_TOC_250007)
   2. [Basic demand characteristics 28](#_TOC_250006)
   3. [Trade flows/patterns of shipments 31](#_TOC_250005)
   4. [Barriers and switching costs associated with the diversion of orders to companies located in other areas 33](#_TOC_250004)
   5. Price-related evidence: qualitative, statistical and economic 37
   6. [Views of customers and competitors 43](#_TOC_250003)
   7. [The analysis of competitive constraints from outside the market 48](#_TOC_250002)
   8. [Evidential role of internal documents 53](#_TOC_250001)
6. [Conclusions and Recommendations 54](#_TOC_250000)

1

**Executive Summary**

This report was commissioned by DG Competition with a view to evaluating the Commission’s recent practice of geographic market definition in merger cases. We were asked to do this through reviewing a sample of ten recent merger cases in which geographic market definition had been a key issue.

Specifically, for these cases, we were asked to comment on:

1. The Commission’s geographic market analysis in terms of the methodology used and the conclusions reached on the basis of the available evidence;
2. How the Commission incorporated constraints from outside the geographic market in its competitive assessment; and
3. Whether a more flexible approach to supply-side substitution could have been considered, and whether such an approach might have changed the outcome of the case.

It is important to note that the ten cases chosen for review constitute a severely, but deliberately, biased sample of the Commission’s merger cases. Nine involved remedies (either at Phase I or Phase II), and in eight of these the parties argued for wider geographic market definition than the Commission in fact adopted. Perhaps unsurprisingly, given the adverse findings in these selected cases, the Commission also rejected arguments relating to constraints from outside the geographic market within its competitive assessment in the majority of the cases. The deliberate element of bias was to focus on contentious cases which might better reveal any weaknesses in the Commission’s practice.

In order to gain a more rounded view of the Commission’s practice, we therefore considered – across these ten cases – not only those markets for which remedies were required but also those markets in which no merger concerns were found. In some of these unproblematic markets, we found examples where the Commission did accept arguments for wider geographic markets or alternatively accepted that constraints from outside the geographic market were sufficient to eliminate any merger concerns.

The detailed results of our analysis of these ten case studies are set out in Section 5 of this Report. Although we make a number of detailed, mostly technical, recommendations for improvement in geographic market definition (see below for a summary), these proposals should be seen in the context of a broadly positive set of findings in relation to Commission practice. In particular:

* We find no evidence that the Commission’s approach to geographical market definition is leading to poor merger decisions. We did not attempt to reach our own overall assessment of the various cases reviewed, but we believe the Commission’s definition of geographic markets, taken together with its analysis of external competitive constraints, has broadly set an appropriate framework within which to analyse mergers.
* We find that the Commission’s practice in respect of geographic market definition is generally well-evidenced and broadly in line with its own 1997 Notice on market definition. Where geographic markets are drawn relatively narrowly, we find that the Commission typically gives careful consideration to evidence of competitive constraints from outside the market.

2

* We find that the Commission typically draws on a wide range of evidence for its findings, rarely relying on one single piece of evidence or analysis. For several of the cases, responses to the Commission’s market investigation appear to provide the bulk of the evidence base for its decision. While such responses have the potential to be biased, due to the interests of responding parties in the success (or not) of the merger, we found no examples where the Commission seems to have been persuaded by obviously self-serving opinions.
* We find that the statistical and quantitative evidence, while valuable in several of the basic industrial goods mergers, was not the sole decisive evidence for the Commission’s decision in any case. We fully support this rounded and holistic approach to merger assessment. In those cases where we observe relatively less quantitative evidence and analysis presented, this can reasonably be explained by the Commission and parties choosing to focus their limited resources and attention on those areas of evidence and analysis that are most likely to be decisive in the competitive assessment of the merger.
* In response to the third of the questions set out above, we do not find that the Commission should take a more flexible approach to supply-side substitution in market definition. There will always be caveats around the weight that can be placed in market shares as an indicator of competitive harm. However, we believe that market shares within geographic markets that are defined on the basis of the Commission’s current Notice on market definition are likely to be more meaningful than would be shares within geographic markets which are widened – in contravention of the Commission’s Notice - on the basis of supply substitution by imports.

We do, however, find a number of areas in which we believe improvements could be made.

1. *Greater clarity that market definition provides a useful framework for competitive analysis, but is not an end in itself*

In our view, geographic market definition should not be seen as an end in itself, but rather as providing a useful framework for the competitive analysis of the merger. It should be used to identify a geographically coherent group of customers whose purchases are competed for by suppliers located in the same geographic area (and possibly also by suppliers located at a greater distance). Where market definition is relatively clear-cut and can be drawn to include those competitors, and only those competitors, that genuinely impose a significant competitive constraint on one another, then market shares and concentration indicators can be useful indicators of the likely competitive effects of a merger. This is especially likely to be the case in homogeneous goods markets.

We would be concerned, however, if the Commission’s decision on a particular geographic market definition automatically determined a particular competitive assessment. In practice, it should not be of substantial concern if geographic markets are drawn relatively narrowly, so long as the competitive assessment fully considers the competitive discipline provided by firms located outside the geographic market. Likewise, parties that successfully argue for a wider geographic market should not expect a guaranteed merger clearance, especially if they are close competitors within this wider market.

The evidence from some of the unproblematic markets in the decisions reviewed here suggests that the Commission fully recognises this intermediate and non-decisive role of market definition. Nevertheless, parties still put substantial effort into arguing for wider

3

geographic markets. The apparent expectation is that a merger is less likely to give rise to concerns in a wider geographic market in which the merging parties’ shares are lower. This suggests that there is at least a perception that market shares are disproportionately important in the competitive assessment, irrespective of the wider competitive context. In fact, we do find that the combined market shares of the merging parties are relatively high across all of those markets found to give rise to merger concerns in our reviewed cases. In such a context, it is perhaps hardly surprising that parties perceive that market shares, and by implication market definitions, matter disproportionately.

We conclude that greater clarity about the intermediate and non-decisive role of market definition within the merger assessment process would reduce the attention paid to this issue, allowing for a greater focus by both parties and the Commission on what really matters: the competitive assessment.

1. *Greater clarity that supply substitution by imports will not typically be accepted as an argument for widening the relevant geographic market*

Under the Commission’s Notice on market definition, supply substitution should be used to widen geographic markets only where most suppliers are active across geographical areas and are able to switch production across them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

This is consistent with the US and UK merger guidelines, which are if anything even firmer that markets should be aggregated on the basis of supply substitution only as ‘a matter of convenience’ and where to do so will not affect the competitive assessment of the merger.

In our view, the Notice does not envisage a situation in which the potential for imports to come into a geographic area and constrain competition would result in the geographic market being widened to include the source of such imports. Nor should it. A wider geographic market would include within it sales to foreign customers located in the same region as where the foreign suppliers are located, even though the conditions of competition facing those customers may be very different. The competitive conditions in a market are better understood by adopting a narrower market definition whilst giving fully appropriate weight to imports as a competitive constraint.

Nevertheless, we note that imports are used to argue for a wider market by the parties in several of the mergers reviewed. In none of these cases does the Commission in fact accept the argument, but the decisions do devote considerable space to assessing the evidence on this point in some detail. We also identify some wording within the cases that appears to indicate the Commission might be willing to accept the argument if the evidence was strong enough. Moreover, the Notice identifies certain evidence associated with imports as being relevant to geographic market definition.

Greater clarity about its approach would allow the Commission more easily to reassign the arguments and evidence received in this area and place them alongside other relevant evidence in the competitive assessment. This would also reduce some duplication between the market definition and competitive assessment sections of the written decisions.

4

1. *Consideration to the approach of calculating capacity shares to include ‘swing capacity’ and ‘rapid entrants’ including from outside the geographic market*

While we believe the Commission is right not to widen geographic markets on the basis of supply substitution by imports, we note that the US merger guidelines propose the inclusion of both rapid (potential) entrants and more general swing capacity within the calculation of capacity market shares. This does not appear to be the practice of the Commission, at least on the basis of the cases reviewed. The Commission should give further consideration to the way it can incorporate capacity shares from outside the geographic market in its competitive assessment.

1. *Greater willingness to define geographic markets on the basis of isochrones or isodistance frontiers*

On the basis of the cases reviewed, we observe that the Commission’s geographic market definition is nearly always a Member State, or a group of Member States or wider. It is very rarely smaller than a Member State and we have not seen (and are not aware of) any examples of a cross-border but sub-Member Stage region. On the other hand, where transport costs are a significant determinant in constraining the size of the geographic market, we should naturally consider that markets might be defined on the basis of isochrones or isodistance frontiers.

We note that it is common practice for a National Competition Authority investigating a retail merger to draw a boundary around a merging firm’s location which encloses, say, 80% of its customers, and then consider competition between firms within this boundary.

The Commission’s approach may be pragmatic from a legal or process perspective, not least because firms may not hold their data in a format that would allow market shares to be calculated on an isochrone or isodistance basis. However we have concerns about it from an economic perspective, at least in those cases where isochrones more properly represent the true geographic market. We would urge the Commission to give further consideration to employing isochrones for geographic market definition, where justified.

1. *A more formal methodology for the treatment of transport costs*

Transport costs are clearly relevant in a number of the cases reviewed, and indeed are found to be important in limiting geographic market definition in several. However, the way in which transport costs are discussed and analysed differs significantly across cases. They are compared variously with average selling price, gross margin, total cost or the difference in costs between domestic suppliers and potential imports.

To a large extent these varying approaches to assessing transport costs may reflect the evidence available. However, it also seems evident that there is no agreed economic framework being used for this analysis. For example, transport costs are not compared with the 5-10% increase in price that might be used in respect of a hypothetical monopolist test. Further thinking around a suitable methodological framework may be merited in this area.

5

1. *Greater care in defining separate upstream manufacturing and downstream distribution markets, and greater clarity about the role of vertical integration in geographic market definition*

Distribution systems are often national, rather than multinational, and cater for local demand idiosyncrasies and customer requirements for reliability, frequency and flexibility of delivery and payment terms. They can also be subject to economies of scale and scope and are not easily replicated. The importance of such local distribution systems is a key factor in defining geographic markets in a number of the mergers reviewed. We found two issues worth highlighting in this context.

First, the potential for substitution between upstream suppliers – and even the understanding of who these suppliers are – may be very different between end customers and distributors. We recommend that the Commission is careful, wherever possible, to consider competition at the various different levels of the supply chain separately when assessing mergers. It often does this, but not in every case. Second, the Commission could usefully be more explicit in how the extent of vertical integration fits into its assessment of geographic market definition.

Based on specific issues arising in some of the individual cases examined, we also make a small number of further recommendations in our concluding section.

6

1. **Introduction**

Market definition has long been a core element of competition policy. Market shares and concentration are the two most commonly used indicators in competition policy enforcement to establish the likelihood of anticompetitive concerns, and market definition is an essential first step before these indicators can be calculated. It is illustrative of the primary importance of market definition that the first substantive guidance on merger regulation provided by the European Commission was on market definition in its 1997 Notice.1 The Notice remains unchanged after nearly two decades that have seen very major changes in the European and global economies and in other aspects of competition enforcement.

Since 1997, there has been considerable debate and academic research on *product* market definition, or more correctly on ways to conduct a competition analysis without having to go through the process of product market definition. This reflects a general concern, which is especially pronounced in differentiated goods markets, about drawing a strict binary (1,0) line between products that are in the market and those that are out, and then placing weight on market shares based on where this line is located. New analytical methods, which overcome the need for market definition include merger simulation and the assessment of upwards pricing pressure (UPP).

By contrast, there has been little academic focus on *geographic* market definition in recent decades. However, we should expect the spirit of the discussion around differentiated products to flow over to products which are differentiated geographically.

Despite these developments, market definition – along both the product and geographic dimensions

- remains an important part of antitrust analysis, including for mergers. As is stated in the Commission’s 2004 Horizontal Merger Guidelines:

*“The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power… Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment”* (Para 27)2

In recent years, the business community and some Member States have questioned the Commission's current geographic market definition practice from a different perspective. Rather than questioning the rationale for market definition per se, they instead criticise the Commission for defining geographic markets too narrowly and failing to take due account of increasing globalisation. In particular, they stress that in a business environment where companies operate on a global scale and compete with various rivals in different corners of the world, competition should be defined on a global level.

1 ‘Commission Notice on the definition of relevant market for the purposes of Community competition law’

Official Journal C 372, 09.12.1997, p. 5.

2 The US 2010 Horizontal Merger Guidelines make a similar point, although they are more circumspect about

the weight that can be placed on market share figures: *“Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post- merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects.”* (Section 5.3)

7

It is partly in the light of such criticisms that DG Competition has asked us to evaluate its approach to geographic market definition, through reviewing a sample of ten recent merger cases. The sample covers a broad range of cases in the sense that it includes decisions where the Commission delineated markets globally, at the EEA level, regionally or nationally. The sample also includes both Phase I and Phase II decisions, as well as a range of different types of product. It particularly includes some basic industrial sectors for which the Commission has received most criticism regarding geographic market definition. As will be seen, some of the cases involved relatively sophisticated economic analysis as regards definition of the relevant geographic market, while in others the Commission relied mostly on qualitative evidence.

In this report, we set the scene by summarising the guidance provided by the 1997 Commission Notice (section 2). We then set out some general issues in geographic market definition which we have identified in the process of our review (section 3). Section 4 introduces the ten case studies before section 5 provides our core analytical review of geographic market definition as practiced by the European Commission. This section also examines the extent to which competitive constraints that lie outside the defined geographic market are taken into account by the Commission within its competitive assessment. Our conclusions and recommendations are contained in the above Summary and Conclusions section.

1. **Guidance on Market Definition**

As useful background for our analysis in this report, we summarise the key guidance around the concepts, process and evidence employed for geographic market definition provided in the 1997 “Notice on the definition of relevant market for the purposes of Community competition law” (henceforth, the Notice). We also provide a more detailed review of the guidance on the role of supply substitution in market definition and make comparisons with the US and UK guidance on this issue.

* 1. ***Concepts***

The relevant geographic market is defined in the Notice by quoting from the Court of Justice in Hoffmann-La Roche:3

*“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”* (Notice #8)

This focus on the ‘conditions of competition’ implies that market definition is about identifying various alternative sources of supply that could be chosen by customers of the merging firms if the latter tried to raise price. This is closely linked to two other concepts in market definition:

* *‘demand substitution’* relates to the position of customers to switch easily to available substitute products or to suppliers located elsewhere in response to a change in the ‘prevailing conditions of sale, such as prices’

3 ECJ judgment of 13 February 1979 in Case 85 /76, Hoffmann-La Roche [ 1979] ECR 461

8

* *‘supply substitution’* relates to the ability (and incentive4) of suppliers located elsewhere to switch production or supply into the relevant geographic in the short term without incurring significant additional costs or risks, in response to small and permanent changes in relative prices.

If such substitution possibilities are credible, the market can potentially be widened to include the demand or supply substitutes. The latter possibility is discussed further below.5

* 1. ***Process***

The Notice #28 summarises how the Commission goes about geographic market definition:

*“it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.”*

Thus, prima facie evidence of different geographic markets could be where a proposed rival has a much larger market share in its own locality while the merging parties have a larger share near their own production facilities. Similarly, if prices are set independently in different territories or if they are substantially different, this would indicate that each territory is a separate market. However, “The reasons behind any particular configuration of prices and market shares need to be explored” (Notice #28). This is because there can be alternative explanations for either similar shares or prices, or differences, other than geographic market definition. The prima facie case must be checked against demand characteristics which might impede substitutability for customers; for example, national or local preferences, current patterns of purchases by customers, product differentiation, brands, etc. The focus is on ‘whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.’ (Notice #29).

The Commission may also check on supply factors, including the importance of a local presence in order to access distribution channels, costs of establishing a distribution system and any barriers to trade, including regulations and other non-tariff barriers. The Notice states that transport costs and the pattern and evolution of trade flows will also be considered where appropriate.

The ‘continuing process of market integration’ is given its own paragraph (Notice #32). In particular, a *“process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market”*. In the context of 1997, this is clearly a reference to the high ambitions of creating a single European market, but with the realistic proviso of ‘in the short term’.

4 In fact, the Notice focuses primarily on ability, not incentive. Indeed the word ‘incentive’ does not appear

once within the Notice. However in our view incentives are highly relevant to a firm’s decision to switch production, and thus we include them here.

5 See footnote 11 below for the hypothetical monopolist test, which provides a precise economic test for what

we call ‘credible’ substitution.

9

* 1. ***Evidence***

Evidence is gathered from the parties through the notification Form CO, and - where appropriate - customers and competitors are then approached in the form of a market investigation.6 The questionnaires that go to customers and competitors are designed to elicit their qualitative perceptions about the relevant market. They are also typically asked a question about their likely reactions to a hypothetical price increase of say 5-10%.7 This latter question is designed to provide subjective insight into the hypothetical monopolist test, a standard test for market definition.8

The Notice (#45-50) identifies six types of evidence which provide a natural framework for our analysis in section 5 below (though we do not follow this order of presentation).

1. *Past evidence of diversion of orders to other areas.* This is particularly helpful if there have been changes in prices between areas that can be shown to result in customer reactions. Econometric techniques can be used for demand estimation (to estimate elasticities and cross-elasticities of demand), price correlations, statistical causality tests and tests for the similarity of price levels and/or their convergence.
2. *Basic demand characteristics.* These include national preferences, such as for national brands, language, culture and life style, and the need for a local presence.
3. *Views of customers and competitors.* They may also provide factual evidence.
4. *Current geographic pattern of purchases.* Similarly, there is a consideration of the location of companies that are effective in tender processes.
5. *Trade flows/patterns of shipments. The* Notice #49 indicates that this is less helpful than direct evidence from customers because it is open to interpretation. Data on trade may also not be available at the appropriate product level.
6. *Barriers and switching costs associated with the diversion of orders to companies located in other areas.* These most obviously include transport costs and transport restrictions but may also include tariffs, quotas and regulations. Transport costs are particularly important for bulky, low-value products. Switching costs may depend on product characteristics.

Finally, in markets where transport costs are substantial, the Notice (#57) highlights that there may be chains of substitution between products or areas that are not directly substitutable, in that there are products or areas between them with overlapping ‘conditions of competition’. In this case a broader geographic market may be defined. This argument requires evidence if it is to be taken into account. For example, prices at the extremes of a chain of substitution should be shown to be of a similar magnitude and to be inter-dependent.

6 Professional associations and upstream firms may also be approached.

7 This is often referred to as a small but significant, non-transitory increase in price, or ‘SSNIP’.

8 As is set out #17 of the Notice “The question to be answered is whether the parties' customers would switch

to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.”

10

* 1. ***Detailed guidance on supply substitution***

The guidance on supply substitution within the Notice is of particular interest for this report, and as such is worth considering in further detail. The Notice states that:

*“supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.”* (#20)

The ‘short term’ is defined as ‘a period that does not entail a significant adjustment of existing tangible and intangible assets’. The guidance goes on to state that:

*“These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the Potential competition suppliers are able to offer and sell the various qualities immediately and without significant increases in costs. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.”* (#21)

Supply substitutability is not considered if this would require additional investments, time delays or strategic decisions (Notice #23). Examples of the latter include establishing a brand, product testing or a new distribution system.

The US Guidelines are very similar in substantive terms, but the emphasis is arguably rather different. Instead of allowing for supply substitution as an element in market definition, the US guidelines in fact state explicitly that:

*“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”* (US 2010 Horizontal Merger Guidelines, Section 4, page 7)

While the US guidelines recognise that ‘the responsive actions of suppliers are also important in competitive analysis’, such responses are to be considered within the competitive assessment of the merger, not within market definition. The guidelines then go on, however, to provide for an exception to this rule:

*“If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.”* (US 2010 Horizontal Merger Guidelines, footnote 8, page 17)

This exception is in practice very similar to the Commission’s approach as set out in the Notice. However, it is made very clear in the US guidance that any such aggregation of markets on the basis of supply side considerations will be done only ‘as a matter of convenience’. The corollary of this is presumably that it will only be done where it makes no substantive difference to the competitive analysis.

11

The UK Merger Assessment Guidelines take a very similar approach to the US, but make this latter point more explicit:

*“The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the Authorities may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. They may do so when:*

* + - *production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each; and*
    - *the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product; in this case aggregating the supply of these products and analysing them as one market does not affect the Authorities’ decision on the competitive effect of the merger.”*9 [Emphasis added]

The UK Merger Assessment Guidelines then go on to mention bidding markets as an example in which such supply substitution may be appropriate: *“Aggregating a range of contracts where the same set of firms would have been credible bidders can provide more useful information about the competitive constraints on each firm than is available from focusing on just one bespoke product.”*10

Overall, then, there is substantial consistency across the European, US and UK guidance on the use of supply substitution in market definition, but the US and UK guidelines arguably provide a slightly different emphasis and tighter conditions around its relevance for market definition.

1. **General Observations on the Commission’s Approach to Geographic Market Definition**

In this section, we highlight some general observations on the Commission’s approach to geographic market that we have identified through our Review.

* 1. ***Geographic market definition appears to matter more than is appropriate***

Geographic market definition serves two functions. First, it facilitates an initial screen by allowing the construction of market shares. Second, and ultimately more importantly, it should reflect the economic model of competition by identifying the core players within the market, who may reasonably be expected to constrain the competitive behaviour of the merging parties.

It is inherent within the process of market definition that it draws a distinction between those producers who exert a more direct competitive constraint on merging firms (i.e. those located within the defined geographic market) and those exerting a lesser constraint (i.e. those located outside the defined market). As highlighted in the Notice (#8), the separation reflects differences in strategic response and the idea that ‘the conditions of competition are sufficiently homogeneous’ within the market, and are ‘appreciably different’ with respect to firms located outside the defined market.

9 UK Merger Assessment Guidelines, Para 5.2.17. 10 UK Merger Assessment Guidelines, Para 5.2.18.

12

As is increasingly well recognised, requiring a clear dichotomy to be drawn in this way between firms which are inside and outside of the market can be misleading. In particular, the precise geographic market definition adopted should not necessarily affect the final merger decision:

* If markets are defined relatively broadly, to include a wide set of types of supplier, then the competitive assessment should consider the merger on the basis not only of simple market shares but also how closely the merging parties compete, such that the right assessment is made in respect of the merger overall.
* Likewise, where markets might appear to be defined relatively narrowly, with strong competitive constraints from outside the market apparently given limited weight, then these constraints should be considered within the competitive assessment, such that the right assessment is again made in respect of the merger overall.

This latter point is not just a theoretical possibility. In a number of individual markets affected by the mergers we have reviewed, the Commission does draw the geographic market relatively narrowly, but then considers that competitive constraints from outside the market will be sufficient to overcome any potential merger concerns.

Nevertheless, it is clear from the mergers we have reviewed that the merging parties still put substantial effort into the market definition process. This is typically to argue for wider markets, presumably on the basis of an expectation that a merger is less likely to be found to give rise to merger concerns in a wider geographic market in which the merging parties’ shares are lower. This suggests that there is at least a perception that market shares can be determinative in the competitive assessment, irrespective of the wider competitive context and Commission practice.11

It is beyond the scope of this report to comment on the Commission’s approach to competitive assessment in detail. We agree that, holding other conditions of competition, including external constraints, constant, market shares are highly relevant for the competitive assessment. We also note that the combined market shares of the merging parties are relatively high across all of those markets found to give rise to merger concerns in the cases reviewed.12 These are exactly the markets that attract most attention. In such a context, it is perhaps hardly surprising that parties may not notice the high market share markets that do not raise concerns, and perceive that the Commission gives determinative weight to market shares and thus that market definition is paramount.

* 1. ***The role of imports in geographic market definition is unclear***

In several of the cases reviewed, there is some discussion as to whether the relevant geographic market should be widened on the basis of supply substitution. There are two core sets of arguments for this.

* The first is where it is clear that competition occurs on a wide geographical basis, such that the same suppliers compete on a broadly similar basis in every narrower sub-area, with no evidence of price discrimination across these sub-areas.

11 See #27 of the Commission’s Guidelines on the Assessment of Horizontal Mergers quoted in the Introduction

to this report.

12 At least [30-40]% (in the case of external HDDs in Western Digital/Hitachi), and significantly higher in most of

the other SIEC markets/cases.

13

* The second is where it is clear that competition effectively occurs within a particular geographic area, but where there is potential for suppliers outside of that area to sell into that area, in the form of imports, and so constrain prices.

The first of these is relatively well accepted and fits with the Commission’s Notice on market definition described in Section 2 above. In this situation it seems reasonable to say that the ‘conditions of competition’ are broadly the same across the different areas and therefore to draw the market widely. In the mergers we have reviewed, this is the Commission’s rationale for drawing wide market definitions in respect of HDDs (Western Digital/Hitachi), zinc concentrate (Glencore/Xstrata) and across the markets assessed in Alstom/Areva.

It is the second approach that is more controversial. As set out in Section 2, supply substitution of this sort is not envisaged to play a role in widening market definition across any of our reviewed guidelines. Yet the parties argue for wider markets on this basis across several of our sample mergers, and the Commission appears to consider these arguments seriously.13 This has the potential to be a serious concern if the geographic source of imports is brought into the market definition despite having different conditions of competition.

It is not totally clear what Commission policy is in respect of this second form of supply substitution. In our view, there is significant merit in the approach of excluding the option of widening geographic markets on grounds of supply substitution by imports, at least to the extent that weight is placed on market shares within the competitive assessment. To see why, consider the following example.

Suppose that there are two large EEA firms and one major Chinese competitor, all selling to European customers on an equal footing. Suppose also that the Chinese firm sells to Chinese customers, where it faces a different set of local rival producers and different competitive conditions. If a geographic market were defined widely to include China alongside Europe, then this would substantially reduce the market shares of the two EEA firms. However, in our view these market shares would not provide a true view of the competitive situation faced by EEA customers, because it would combine customers who purchase from largely different firms, and firms, most of which do not compete with each other. It would give a more meaningful frame for competitive analysis to define a European market, but then to include supply from the major Chinese firm into the European market when it comes to constructing market shares.14

13 If valid as a form of argument, it is this second form of supply substitution that we would expect parties to

push for most strongly, since it is in this situation that widening the geographic market - on the basis of imports - will potentially have the greatest impact in reducing market shares.

14 There is a subtle distinction to be made between *demand substitution* by domestic customers to foreign

suppliers and *supply substitution* to domestic customers by foreign suppliers. The former occurs where customers actively and successfully seek out new supplies from outside their core area. If they can easily and cost-efficiently source product from suppliers in an alternative geographic area in the face of a local price, and thus defeat such a price rise, then the geographic market might reasonably be widened. But this is on a *demand substitution* basis. Supply substitution occurs where customers effectively stay put but imports are sold into the domestic market by foreign suppliers which take a strategic decision to export into that market. While these two alternative forms of argument may appear very similar, there is a subtle difference, which the example in this paragraph can help illuminate. In the case of *demand substitution*, where customers take the lead in widening the market, we would not expect to see any difference between the various Chinese suppliers in terms of the competitive constraint they play within the EEA. As such, market shares in the wider market

14

In practice, the Commission rejected the second form of supply substitution argument in all of the cases reviewed here.15 That is, it did not accept any of the parties’ arguments for widening geographic markets on the basis of imports to include the area which is the source of those imports (typically China or Asia).

However, it is not as clear as one might expect that this is the Commission’s established policy on the issue. While the Notice is fairly straightforward on the issue and broadly consistent with the US and UK guidelines, it is clear from a variety of the cases reviewed that the Commission does consider supply substitution arguments on the basis of imports seriously within its analysis of relevant geographic markets. Moreover, in the case of Arsenal/DSP, it states explicitly:

*“While it is accepted large international trade flows of benzoic acid are consistent with a hypothesis that there may be a global market for benzoic acid, the key question is whether these trade flows can discipline the EEA producers in the event of price increases.”* (Para 49)

Likewise, in both INEOS/Solvay and Glencore/Xstrata, the Commission considers empirical evidence on the relationship between imports and the relative prices in different geographic areas within its analysis of geographic market definition.16

This sort of wording and use of evidence suggests that, if imports were sufficient to keep EEA prices down, the Commission would be open to defining a global market. This would in turn mean that all global suppliers would be included as competitors, even if most of these global suppliers were in fact unwilling to supply EEA customers.

We were unable to conclude – on the basis of the mergers reviewed – whether the Commission has in fact ever agreed to the widening a geographic market on the basis of imports in this way.

However, the available evidence suggests that it has not necessarily ruled out doing so, even though this is inconsistent with the Notice (and US and UK merger guidelines) and, as we have argued, potentially misleading.

would indeed be meaningful indicators of competition. In the case of *supply substitution*, however, it is immediately obvious that, if the other Chinese suppliers do not have the same export strategy, the market shares in the wider market will be misleading as a measure of competition. In this context, it is noteworthy that the discussion of the evidential role of ‘past evidence of diversion of orders to other areas’ in the Notice focuses specifically on customers’ reactions to relative price differences, not those of suppliers.

15 The only exception is the case of sodium benzoate (Arsenal/DSP), for which the Commission in fact leaves

market definition open, and in doing so accepts that there are relatively high levels of imports.

16 For example, in the geographic market definition section of Glencore/XStrata, the Commission draws on

evidence that *“only a minority of customers considered that imports of zinc metal would be able to mitigate or eliminate a hypothetical 5-10% increase in the EEA total zinc metal price, or that competitors outside the EEA would be able to effectively constrain an attempt by the Merged Entity to increase price post-merger”* (Para 124). Note the contrast with Outokumpu/Inoxum, in which the same type of evidence is considered primarily within the competitive assessment (albeit it is also mentioned briefly within the geographic market section).

15

**c. *There is insufficient assessment of ‘rapid entrants’, swing capacity and capacity shares***

While neither the US nor UK guidelines allow for the widening of geographic markets on the basis of imports, both do allow for the additional inclusion within the market of ‘rapid entrants’ who would supply into the market if there was a small price incentive.17 The US is careful then to restrict the use of this concept:

*“In markets for relatively homogeneous goods where a supplier’s ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available “swing” capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm’s possession of idle or swing capacity alone does not make that firm a rapid entrant.”*

This discussion indicates that the analysis of rapid entrants, and more generally the analysis of swing capacity, is more relevant for the competitive assessment of the merger than for widening the geographic market definition itself.

The US approach is to include both rapid entrants and more general swing capacity within its calculation of capacity market shares. As part of our review, we examined the ten case studies to see whether and how capacity shares were used. We found that capacity shares were presented in three cases: Outokumpu/Inoxum, INEOS/Solvay and SSAB/Rautaruukki. However, in none of these cases was potential swing capacity from imports included. Indeed, even the capacity lying outside the relevant geographic market that was *currently* being used to supply imports was not included.

In the first of the cases listed above, the Commission did carry out an econometric analysis of the supply response by imports into the relevant market. This arguably allows for greater analytical precision in the competitive assessment than a simple inclusion of swing capacity within capacity shares, although elasticities are likely to depend on capacity utilisation which can change over time. More generally, though, and especially where such econometric analysis of import supply response is not available, we consider that the Commission could usefully consider the possibility of presenting capacity shares on this basis. The best way to do this requires further work and may depend on, for example, production technology, whether imports are independent or controlled by local distributors or producers, whether independent importers are few or fragmented, and whether their European sales are considered marginal or central to their core interests. While capacity shares excluding imports may tell us something about the competitive position of the merging parties vis-à-vis other local suppliers within the narrowly defined geographic market, they do not tell us anything about the extent of competitive constraint arising from potential (or actual) imports.

17 *“Firms that are not current producers in a relevant market, but that would very likely provide rapid supply*

*responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants.”* (US Merger Guidelines, Section 5.1). The UK Merger Assessment Guidelines refer to ‘rapid entrants’ at Para 5.3.6.

16

***d. There is duplication of evidence between market definition and competitive assessment***

As will be clear from the above, we believe there is substantial merit to the approach of considering the effectiveness of imports as a competitive constraint only at the competitive assessment stage, rather than through applying the rather loose concept of supply substitution at the market definition stage.

A further argument for this approach relates to the process of analysing evidence for merger assessment. Within the current EU process, which at least appears to allow for supply substitution arguments on the basis of imports to influence geographic market definition, there is potential for duplication between the analysis of geographic market definition and the competitive assessment. In several of the cases reviewed, supply substitution arguments are considered, but rejected, at the geographic market definition stage. Whilst we do then observe new evidence being presented within the competitive assessment sections of the decision, we also observe some repetition of evidence between the market definition and competitive assessment sections, and cross-referencing between the two.18

We recognise that the Commission is required to respond to all arguments put to it by the merging parties. As such, if it receives representations in respect of supply substitution and market definition, it does need to address them. However, if the Commission were to exclude clearly the option of widening geographic market definition on the basis of import evidence, we believe it would be in a better position to dismiss any such arguments more easily, and then consider the related evidence fully within the competitive assessment.

1. ***Member States seem to be treated as the smallest unit of geographic market definition***

European Member States vary enormously in their size, and their borders are sometimes not a good guide to economic boundaries (e.g. Maastricht is geographically closer to Bonn and Brussels than it is to Amsterdam or Rotterdam). However, we note that the Commission’s geographic market definition is nearly always a Member State, or a group of Member States or wider. It is very rarely smaller than a Member State and we have not seen (and are not aware of) any examples of a cross- border but sub-Member State region.

On the other hand, it is common practice for a National Competition Authority (NCA) investigating a retail merger to use isochrones (i.e. measures of distance or travel time) to draw a boundary around a firm’s location which encloses, say, 80% of its customers, and then consider competition between firms with overlapping markets. Where there is potential for firms to price discriminate across large

18 For example, in the Arsenal/DSP decision, the geographic market definition section contains 44 paragraphs

(##41-84) on why US and Chinese imports do not provide a sufficient competitive constraint to justify a geographic market definition wider than EEA. Reasons given are that transport costs and tariffs are high while at the same time EEA customers have concerns over the quality of (in particular Chinese) imports. The competitive assessment section of the decision later includes 11 paragraphs (##222-232) on why Chinese imports do not provide a sufficient competitive constraint to overcome a post-merger price rise in the EEA. These refer back to the reasons given in the market definition section before going on to provide evidence that Chinese production does not have a significant cost advantage over EEA producers that might outweigh these other barriers to imports. In passing, we note that it is far from clear why this latter point is considered relevant only to the competitive assessment section if the former points are considered relevant for market definition. Our key point, however, is all of this evidence would be better presented in the competitive assessment section.

17

customers, isochrones can potentially also be drawn around those customers to define the set of realistic competitors for that customer’s business.

We recognise that isochrones are going to be of more natural relevance in the local sub-national markets that are often the focus of NCAs. We also note that the international companies that are more usually investigated by the Commission may not hold their data in way that would allow isochrones to be calculated or market shares to be calculated within them. Member States may then provide the best available approximation in order to progress to the competitive assessment. As is discussed below, however, the Commission appears to reject the use of isochrones in the case of INEOS/Solvay, despite consistent evidence from both competitors and customers about the extent to which both S-PVC and bleach might reasonably be transported. Instead, the Commission adopted geographic boundaries which very roughly approximated the isochrones but in fact followed national boundaries.

While this may be pragmatic from a legal or process perspective, we have concerns about it from an economic perspective if isochrones more properly represent the true geographic market. That said, we understand that Commission practice in this area may already be changing, and that it has recently employed isochrones for its geographic market definition in a number of recent mergers in the cement industry.19

1. ***Access to local distribution can be crucial for geographic market definition***

In a number of the mergers reviewed, a key factor in defining geographical markets relates to the importance of local distribution for providing customers with the reliability, frequency and flexibility of supply and payment terms that they require. This can act as a major impediment to imports acting as a substantial competitive constraint, unless they have access to local distribution themselves. In the cases of SAAB/Rautaruukki and Inoxum/Outokumpu, the Commission addressed this issue directly and carefully defined and upstream market for steel production and a downstream market for steel distribution.20 Indeed, in the former case, the upstream steel production merger was cleared subject to a remedy which focussed on freeing up access to the downstream distribution network for suppliers located outside the relevant market (the Nordic cluster).

The sometimes crucial role of distribution networks raises two issues for Commission practice in geographic market definition. First, it would be useful for the Commission to be clearer about its approach to how geographic market definition can potentially be affected by barriers created by vertical integration.21 Second, we were not clear that every case we reviewed was so precise on distinguishing separate manufacturing and distribution markets. In particular, weight was put by the Commission on customer’s responses which emphasised the need to gain their supplies locally, yet in some cases customers might not even know if product was sourced locally, only that they received

19 See Case No COMP/M.7009 *Holcim/Cemex West*, Case No COMP/ M.7054 *Cemex/Holcim Spain*, Case No

COMP/M.7252 *Holcim/Lafarge* and Case No COMP/ M.7408 *Cargill/ADM*.

20 The Commission has in fact been consistent in approaching steel markets in this way, distinguishing between

steel distribution and steel production and defining the former markets as national. (See ECSC 1351; COMP/M. 2382 *Usinor/Aceralia/Arbed*.)

21 For example, while not stated explicitly by the Commission, we presume that the SAAB/Rautaruukki vertical

remedy would result in the Commission defining a wider upstream geographic market, because it would enable non-Nordic producers to compete on a broadly even basis with the merged upstream firm. See Section

5.IV for further development of this point.

18

it from a local distributor. We would recommend that the Commission is careful, wherever possible, to consider competition at the various different levels of the supply chain separately when assessing mergers.

***g. There is clear evidence of parties and the Commission prioritising their resources in respect of quantitative analysis***

We have reviewed the quantitative analysis carried out in the ten case studies in terms of geographical market definition and the assessment of competitive constraints from outside the market. We observe substantial variation in terms of both the extent of quantitative analysis carried out and the statistical sophistication of that analysis. This ranges from saying nothing on prices at all (e.g. Alstom/Areva), through reliance on qualitative price evidence from the market investigation (e.g. Western Digital/Hitachi and Refresco/Pride), to more detailed and sophisticated data analysis such as correlation coefficients, stationarity tests on relative prices, and regressions of imports on relative prices.

In respect of the ten cases reviewed, we find that the more detailed data analysis is exclusively carried out for the basic industrial goods mergers. This may be partly because the data is more readily available and analysable for these broadly homogeneous products. However, we believe it is more likely to reflect the extent to which such analysis might be expected to change the Commission’s decision.22 In the context of a merger inquiry, both the parties and Commission will necessarily be constrained in terms of both time and resources. As such, they should rightly allocate these scarce resources to those forms of analysis which might be expected to illuminate understanding of either the relevant market or more generally the competitive impact of the merger.23

On this basis, we do not consider that the observed variation demonstrates any inconsistency of approach or inadequate analysis on the Commission’s part.

**h. *We found no evidence that the Commission’s approach to geographical market definition is leading to poor merger decisions.***

We have not sought to try and reach our own overall assessment of the various cases reviewed. However, we have found no evidence that the Commission’s approach to geographic market definition is leading to poor overall merger assessments. In fact, despite our general observations above, and a number of other more detailed comments that follow in Section 5, we believe the Commission’s definition of geographic markets, taken together with its analysis of external competitive constraints, has broadly set an appropriate framework within which to analyse mergers.

22We are aware that the Commission has also carried out detailed data analysis in a number of consumer

goods markets, albeit these are out of scope for this review.

23 We also note that the cases reviewed were decided during 2008-2014, and the data used was mostly from

the few years previous to the merger proposal. The extreme macroeconomic conditions of the last ten years, with exceptional boom and bust, mean that particular care is needed to extract the truth from data from this period, given the potential for these macroeconomic conditions to be driving results. This was indeed a significant concern in the Commission’s analysis of the impact of the INEOS/Kerling merger, and the Commission eventually chose not to place reliance on evidence on the effects of that merger in its competitive assessment of the INEOS/Solvay merger.

19

1. **The Case Studies**

For the purposes of this project, the Commission asked us to review ten recent merger decisions from the period 2008-2014. These are set out in Table 1 below. The ‘SIEC product markets’ are those in which the Commission found a likely ‘Significant Impediment to Effective Competition’ and therefore required remedies in order for the merger to proceed.

For each of the ten cases, we were asked to provide the minimum necessary background and then assessments of:

1. The Commission’s geographic market analysis in terms of the methodology used and the conclusions reached on the basis of the available evidence;
2. How the Commission incorporated constraints from outside the geographic market in its competitive assessment; and
3. Whether a more flexible approach to supply-side substitution could have been considered, and whether such an approach might have changed the outcome of the case.24

In order to best achieve the aims of this project, we adopt the approach of discussing the cases together, for the most part, rather than sequentially. At some points below, we have found it useful to divide cases into three groupings relating to the type of industrial sector, as set out in Table 2.

**Table 1: Ten merger decisions selected for review: summary details**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Case** | **Year** | **Case no.** | **Decision** | **SIEC product market** |
| Alstom/Areva | 2010 | M5751 | Phase I Clearance | N/A (Parties active in power systems and components |
| Friesland/Campina | 2008 | M5046 | Phase II – Art 8(2)  Divestments | Several (all dairy products) |
| Arsenal/DSP | 2009 | M5153 | Solid benzoic acid25 |
| Western Digital/Hitachi | 2011 | M6203 | Hard Disc Drives |
| Outokumpu/Inoxum | 2012 | M6471 | Cold-rolled stainless steel |
| INEOS/Solvay | 2014 | M6905 | S-PVC and bleach |
| Glencore/Xstrata | 2012 | M6541 | Phase I – Art 6(2)  Commitments | Zinc metal |
| Refresco/Pride Foods | 2013 | M6924 | Bottling of Non-Carbonated Soft Drinks (NCSDs) in Aseptic PET |
| SSAB/Rautaruukki | 2014 | M7155 | Flat carbon steel, and its distribution |
| Chiquita/Fyffes | 2014 | M7220 | Bananas |

24 The Commission asked us to note that in some of the cases in the sample imports and potential entry might

have been considered in the definition of the relevant geographic market, instead of only at the stage of the competitive assessment, which is what the Notice suggests.

25 For simplicity, we refer hereafter to solid benzoic acid simply as benzoic acid. Benzoic acid also comes in

liquid form, but no SIEC was found for liquid benzoic acid, as the parties did not overlap for this product.

20

**Table 2: Ten case studies: grouped by type of industrial sector**

|  |  |  |
| --- | --- | --- |
| **Grocery-related products** | **Technological products** | **Basic industrial goods** |
| Friesland/Campina (2008)  - Dairy products | Alstom/Areva (2010)  - Power systems and components | Arsenal/DSP (2009)  - Benzoic acid and sodium benzoate |
| Refresco/Pride Foods (2013)  - Bottling of non- carbonated soft drinks | Western Digital/ Hitachi (2011)  - Hard disc drives (HDDs) and external HDDs | Glencore/Xstrata (2012)  - Zinc metal and zinc concentrate |
| Chiquita/Fyffes (2014)  - Bananas |  | Outokumpu/Inoxum (2012)  - Cold-rolled stainless steel |
|  | | SSAB/Rautaruukki (2014)  - Flat carbon steel (and its distribution) |
| INEOS/Solvay (2014)  - S-PVC and bleach |

We adopt these groupings because it turns out that the analytical approach taken differs significantly across them. Without carrying out a wider project, however, we are not in a position to conclude whether this will always be the case, or whether it just happens to be the case for these ten case studies.

We provide general comments on the selection of case studies, before turning to the analytical approach adopted in these decisions.

* 1. ***General comment on the selection of case studies***

In selecting these case studies, we understand that the Commission thought carefully about which recent cases had attracted particular attention in respect of geographic market definition or the extent of competitive constrains from outside the geographic market. The Commission also sought to provide a set of cases in which a variety of different geographic market definitions were adopted and across a range of different types of industry.

As such, in considering these cases, we have been alert to the fact that this is in no way a random sample of the Commission’s merger decisions. Indeed, in nine out of the ten cases, clearance was subject to significant remedies, with only one of the cases an unconditional clearance.

This point is important. As discussed above, a key concern highlighted by external parties is that the Commission fails to consider markets as sufficiently wide, and then fails to give sufficient weight to competitive constraints from outside the market. This self-selected sample of cases inherently fails to include many examples of non-SIEC cases in which the Commission might have drawn the market widely or, if not, might have accepted constraints from outside the relevant market as sufficient. As

21

such, it effectively provides a particularly strong and severe test of the Commission’s decision- making, at least in relation to whether markets are defined too narrowly.

***b. Preliminary review of findings in the ten case studies***

Table 3 below shows the market definition adopted by the Commission for those markets in which remedies were required, as well as what the parties argued, and also the findings on the extent of constraints from outside the geographic market. The focus is on those products for which SIECs were found. Alstom/Areva (which was an unconditional Phase I clearance) is included in Table 4 instead.

The first key point to note from Table 3 is that, for the vast majority of the SIEC findings, the parties argued for a wider geographic market than the Commission adopted. There are only two noteworthy exceptions.

* In the case of the procurement and collection of conventional raw milk in Friesland/Campina, the parties in fact argued for narrower geographic market definitions, on the basis that the parties had non-overlapping regional networks of milk suppliers and thus did not compete head to head. The Commission rejected this narrower regional market definition in favour of a national market definition, primarily on the basis that other competitors were active, and priced identically, across the purported geographic market boundaries.
* In Outokumpu/Inoxum, the parties seem to have appreciated that there might be more to be gained by accepting an EEA-wide market definition and focussing their arguments around whether competitive constraints from outside the market were sufficient to avoid an SIEC.

It should also be highlighted that, while parties typically argued for a wider market definition, they didn’t always put substantial work into trying to demonstrate this. As such, in at least some of these cases, it can be presumed that the parties didn’t really expect to win on the point but felt there was nothing to be lost by arguing it.

A second key point to note from Table 3 is that, for the vast majority of SIEC findings, the Commission also concluded that competitive constraints from outside its chosen geographic markets were insufficient, despite the parties arguing otherwise.

The only noteworthy exception here is Chiquita/Fyffes, where the Commission did accept that buyers of bananas would be able to foster entry from outside their national territory. The Commission’s residual SIEC concern in this case related to the possibility that the parties’ ‘accrued market influence’ due to merger might enable them to place exclusivity restrictions upon upstream banana shippers, thus limiting such national entry. The Commission cleared the merger subject to a remedy that addressed this point.

22

**Table 3: Findings on geographic market definition and competitive constraints from outside26**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Parties argued** | **Constraints from outside as decided by Commission** |
| Friesland/Campina | Several dairy products27 | National | Wider28 | Insufficient |
| Refresco/Pride Foods | Bottling of NCSDs in Aseptic PET | National | Wider | Insufficient |
| Chiquita/Fyffes | Bananas | National | Wider | Sufficient (SIEC related to specific issue of buyer power with shippers) |
| Western Digital/Hitachi | Hard Disc Drives | Global | N/A | N/A (SIEC found on global basis) |
| External Hard Disk Drives | EEA | Wider | Not discussed (potential SIEC solved by remedies for global HDD market) |
| Arsenal/DSP | Benzoic acid | EEA | Wider | Insufficient |
| Glencore/Xstrata | Zinc metal | EEA | Wider | Insufficient |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Same | Insufficient |
| SSAB/Rautaruukki | Flat carbon steel | Nordic cluster | Wider | Insufficient |
| Distribution of FCS | National | Wider | Insufficient |
| INEOS/Solvay | S-PVC | NW Europe | Wider | Insufficient |
| Bleach | Benelux | Wider | Insufficient |

26 It should be noted that, for those cases resolved in Phase I, the Commission does not always reach a final

view on geographic market definition, but rather frames its conclusions in terms of there being “at least a serious possibility that the market is […]”. However, it is not fully consistent in this respect, since in Chiquita/Fyffes and Refresco/Pride Foods it does appear to reach a firm conclusion (on a national market definition).

27 Specifically, in respect of the Netherlands market: basic dairy products (fresh milk, fresh buttermilk, and

plain yoghurt), Dutch-type nature cheese, value-added yogurt and quark in the Netherlands supplied to the Out Of Home (OOH) segment, fresh custard and porridge. Since much of the evidence adduced in respect of these different markets is similar, we analyse them together below, but highlight where specific markets involved specific pieces of evidence. In addition, but not analysed further here, SIECs are found for branded non-health fresh flavoured dairy drinks in the Netherlands and in various national long-life flavoured dairy drinks markets.

28 An interesting exception is the market for the procurement and collection of conventional raw milk,

discussed in the text. We do not analyse this element of the case further below, but instead focus on those markets for which the parties argued for wider markets. Note also that the parties do accept that that the market for porridge may be national.

23

As discussed above, these findings should be viewed through a lens that recognises how these cases were selected, and in particular the focus on choosing cases that gave rise to SIEC findings. In order to consider this point further, we also reviewed a selection29 of the product markets in those cases in which competitive constraints across geographical areas were at issue, but SIECs were *not* found.

These are set out in Table 4 below.

Combined with the findings in Chiquita-Fyffes, described above, these potentially provide evidence in support of the view that the Commission will accept the parties’ arguments for wider geographic markets, and/or for sufficient competitive constraints from outside the market, where this is empirically justified.

It is also worth highlighting some differences between our three industrial sector groupings, bearing in mind of course that this is a highly selective set of cases and thus all such differences may or not be significant:

* The Commission draws markets narrowly – at the national level - in the case of the grocery- related products decisions. This finding broadly reflects the fact that consumers have localised demand preferences as well as the fact that most grocery retailers purchase on a national basis. (The exceptions here are long-life milk and butter, for which wider geographic markets are accepted. This is on the basis that these products are relatively homogeneous and easily transportable.)
* The Commission appears relatively more willing to accept wider market definitions in those technological products markets where negotiations with suppliers occur on a global level (such as for Hard Disk Drives) or where products are sold through large, lumpy tenders, for which potential bidders are geographically dispersed (such as for the markets analysed in Alstom-Areva).
* For the basic industrial goods analysed in the last five cases in Table 3, the parties’ arguments around geographic market definition are primarily framed in terms of the role of trade/imports across boundaries.30 Where the Commission considers these to be no better than an imperfect constraint on firms located in the EEA, or on firms in a region within the EEA, it defines a relatively narrow market and finds a SIEC. By contrast, where sales are truly arranged on a global level, such as for zinc concentrate, the Commission accepts a worldwide (or close to worldwide) market definition.

29 A number of these cases in fact involved a wide range of non-SIEC markets. We have focussed on a selection

that seemed to us to provide helpful additional evidence.

30 In the case of INEOS/Solvay, the parties also make a ‘chain of substitution’ argument in favour of a wider

geographic market. This is the only example of such an argument being made across the ten case studies.

24

**Table 4: Geographic market definition and finding on competitive constraints in a selection of non- SIEC product markets**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Parties argued** | **Constraints from outside as decided by EC** |
| Friesland/Campina | Organic milk | National | Same | Sufficient |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | Same | N/A. No concerns on wider geographic market |
|  | Bulk butter | EEA-wide | Same | N/A. No concerns on wider geographic market |
| Refresco/Pride Foods | Bottling of NCSDs in cartons | National | Wider | Sufficient |
| Alstom/Areva *(NB No SIEC found for this merger)* | Various power systems and components | Left open, but at least EEA | Broadly same (EEA or Global) | *If* markets drawn narrowly, *then* yes, constraints from outside found sufficient |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | Wider | *If* market EEA-wide *then* constraints from outside EEA found sufficient |
| Glencore/Xstrata | Zinc concentrate | Either worldwide or WW excluding intra-China sales | Same | N/A. No concerns on wider geographic market |

25

1. **Analysis of the Case Studies**

In this section, we examine the analysis of geographic market definition carried out by the Commission in these various cases, with a particular focus on those key products for which SIEC findings were reached, but also drawing on the selection of non-SIEC markets listed in Table 4 above. We also consider the Commission’s assessment of competitive constraints from outside the relevant geographic market.

We start by looking in turn at each of the six core types of potential evidence set out as relevant in the Notice on Market Definition (see Section 2 above).31

* 1. ***Current geographic pattern of purchases***

There is a clear link between the concept of ‘current geographic pattern of purchases’ and that of ‘conditions of competition’, as referred to in Hoffman/La Roche. Where shares of supply are similar across geographical areas, or (for lumpy bids) where the same players are typically engaged in competing for business, then we might expect conditions of competition to be sufficiently similar to justify including the areas in the same geographic market.

Evidence on this point was examined in all of the cases we reviewed, and is presented in Table 5 (SIEC markets) and Table 6 (non-SIEC markets) below. These tables suggest that geographic pattern of purchases plays a fundamental role in geographic market definition, given that in almost all cases the evidence on this point is congruent with the Commission’s final conclusions.

The only exceptions to this pattern relate to three non-SIEC markets:

* + - For packet butter, in Friesland/Campina, the Commission accepts a market definition that is wider than national, despite the fact that sales are predominantly made on a national level. This appears to be on the basis of the response to the market investigation, in which almost all customers stated that they *would* source from neighbouring Member States, should the price increase by 5-10% in their home market.32
    - For sodium benzoate, in Arsenal/DSP, the Commission leaves the market definition open despite the finding that the EEA market is primarily served by EEA producers. This suggests that the Commission believes a relatively high level of Chinese imports *could* be evidence for a wider market in this case. (See further below).
    - For zinc concentrate in Glencore/Xstrata, the Commission also leaves the market open despite the finding that most Chinese production is used within China and not exported. This again suggests that the Commission believes the high level of Chinese exports *could* justify including China within the market, despite the distinct pattern of purchases within China.

31 We have, however, reordered these, to enable us to set out our key findings more effectively.

32 It is noteworthy that the Commission incorporates this evidence within market definition for packet butter

when it uses similar evidence within Chiquita/Fyffes only within the competitive assessment section, having previously concluded that markets are national. It is not entirely clear that these two approaches are consistent, although it is possible that they could be if there are clear differences between the two cases in terms of the speed and cost involved in sourcing from outside the home market.

26

**Table 5: Evidence on geographic pattern of purchases: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on geographic pattern of purchases** |
| Friesland/ Campina | Several dairy products | National | Substantial variation in market shares across Member States |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | Substantial variation in market shares across Member States. Most supply is within 500km of plant. Tenders usually following national boundaries, with most retailers active in max. 1-2 countries. Little systematic cross-border bidding and local bottler usually wins |
| Chiquita/ Fyffes | Bananas | National | Substantial variation in market shares across Member States. Several smaller suppliers are present primarily in their own country |
| Western Digital/Hitachi | Hard Disc Drives | Global | Sales prices negotiated on a worldwide basis and do not differ by shipment destination |
| External HDDs | EEA | Significant differences in market shares across different regions of world |
| Arsenal/DSP | Benzoic acid | EEA | EEA customers primarily buy from EEA suppliers |
| Glencore/ Xstrata | Zinc metal | EEA | Clear majority of EEA customers purchase at EEA, or even national, level, close to their own facilities |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | EEA customers primarily buy from EEA suppliers. Even where they do buy from non-EEA suppliers, they do this via EEA distributors |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Parties have very heavy focus on Nordic cluster, with supplier shares very different in rest of EEA |
| Distribution of FCS | National | Distribution centres locally focussed and each country has different pattern of supply |
| INEOS/Solvay | S-PVC | NW Europe | NWE customers primarily buy from NWE suppliers. Suppliers located outside NW Europe have very little presence.33 |
| Bleach | Benelux | Customers buy very locally, typically within 300km |

33 In fact, shares also vary significantly across national boundaries. For example, the merging parties have an

[80-90]% market share in the UK, but just [40-50]% in Germany. However, the Commission does not appear to give serious consideration to the possibility of national relevant geographic markets for S-PVC.

27

**Table 6: Evidence on geographic pattern of purchases: non-SIEC product markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on geographic pattern of purchases** |
| Friesland/ Campina | Organic milk | National | National markets mostly supplied by local producers |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | For long-life milk: Significant penetration of the Netherlands market by Belgian and German suppliers  For packet butter: Currently national markets mostly supplied by local producers |
| Bulk butter | EEA-wide | Sourcing patterns do not differ across EEA |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | Evidence as for aseptic PET (see above) |
| Alstom/Areva | Various power systems and components | Left open, but at least EEA | While market shares differ significantly across Member States, this is due to lumpy projects. Competing bidders lie across EEA and potentially worldwide |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | EEA market primarily served by EEA producers *but*, relative to benzoic acid, import levels from China higher (30-35%). |
| Glencore/ Xstrata | Zinc concentrate | Worldwide or WW excl. intra-China | Purchases and sales typically organised at worldwide level. However, most Chinese production used within China and not exported. |

* 1. ***Basic demand characteristics***

A second important form of evidence for geographic market definition identified in the Notice is basic demand characteristics. These can include national preferences, such as for national brands, language, culture and life style, and the need for a local presence. It is immediately obvious that there are some similarities here to product market definition.

Evidence on this point within the cases reviewed is presented in Table 7 (SIEC markets) and Table 8 (non-SIEC markets) below.

28

**Table 7: Evidence on basic demand characteristics: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on basic demand characteristics** |
| Friesland/ Campina | Several dairy products | National | Strong consumer preference for Dutch origin products. For some products, freshness is important, which is hard for imports. For value- added yoghurt and quark, OOH customers also value timely, flexible delivery of local suppliers. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | Consumer preferences differ across Member States in regard to preference for aseptic PET versus carton (but not within each) |
| Chiquita/ Fyffes | Bananas | National | Differences in preferences, e.g. in terms of size, quality, origin, brand, package size and certification |
| Western Digital/Hitachi | Hard Disc Drives | Global | Global standards and specifications. No regional differences. |
| External HDDs | EEA | End-customer preferences and consumer habits differ significantly across regions. Also differences in the marketing and sales channels used. |
| Arsenal/DSP | Benzoic acid | EEA | Quality is a major concern, and Chinese imports seen as poor. Frequency and reliability of supply also a concern in respect of Chinese imports. |
| Glencore/ Xstrata | Zinc metal | EEA | For imports, customers highlighted importance of flexible supply, including costs involved in adjusting product to required specifications and quality standards. These favour local supply, as do concerns on security of supply and shipment times. |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Majority of customers do not consider imports a satisfactory alternative due to lead time, quality, payment conditions and product range |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Local supply network crucial for reliable, timely, and flexible supply. |
| Distribution of FCS | National | Customers value reliable, timely and flexible supply that their local (national) distributors can provide |
| INEOS/Solvay | S-PVC | NW Europe | Limited focus, but mention of need for reliable, timely and flexible supply, plus technical support, for which local operations helps. Also concerns about lower quality, payment options, and weak financial position of some non-NWE suppliers. |
| Bleach | Benelux | Complexity of logistics and product degradation exponentially increase if shipped above 300 km |

29

**Table 8: Evidence on basic demand characteristics, non-SIEC product markets.**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on basic demand characteristics** |
| Friesland/ Campina | Organic milk | National | No national preferences with regard to origin. |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | Long-life milk is a largely homogeneous product, and there are no national preferences with regard to origin. [No discussion for packet butter]. |
| Bulk butter | EEA-wide | No national preferences with regard to origin. |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | See above – as for aseptic PET. |
| Alstom/Areva | Various power systems and components | Left open, but at least EEA | Reputation and track record of suppliers more important than geographic location. Various EU packages of legislation and initiatives that have encouraged interoperability of rail networks. |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | Quality of Chinese imports is seen as a concern, but less so than for benzoic acid. Frequency and reliability of supply also a concern. |
| Glencore/ Xstrata | Zinc concentrate | Worldwide or WW excl. intra-China | Not discussed explicitly, but zinc concentrate appears to be a totally homogeneous product. |

A number of points are worth drawing out from these tables:

* + - It would appear that *horizontal* differentiation in preferences tends to be more important in the grocery-related products cases reviewed here and can have a geographical dimension, either because consumers simply have differing preferences (as for bananas in Chiquita/Fyffes) or because they prefer a product that is local in origin (as in Friesland/Campina). That said, there are also a number of grocery-related products over which there is no significant differentiation and/or no material differences across national preferences. Vertical quality concerns (for example around freshness) can also be relevant.
    - For the basic industrial goods, *vertical* quality concerns (especially around quality of imports) are more relevant. These concerns relate both to a product’s innate quality, and to various service aspects of supply such as flexibility, timeliness, reliability and payment conditions. Local production and/or distribution can be important for these latter aspects, and this can play a key role in limiting long-distance imports to playing a fringe role in the market rather than acting as a core source of supply.
    - In Western Digital/Hitachi, the evidence on end-customer preferences and purchasing habits seems to underpin the difference in market definitions adopted for HDDs and external

30

HDDs. The former are essentially homogeneous, but the latter vary significantly. There are also different marketing and sales channels used in different regions.

* + - While the products at stake in the Alstom/Areva merger are highly bespoke to specific tender requirements, there is little geographical differentiation in terms of the suppliers that can potentially provide these products. Reputation and track record are considered to matter far more than location.
  1. ***Trade flows/patterns of shipments***

There is a clear link between ‘trade flows/patterns of shipments’ and the ‘geographic pattern of purchases’ discussed above. Indeed the Notice itself frames them as alternatives: *“When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products.”* (Notice #49)

Given the importance of the discussion around the role of imports in some of these cases, however, we have chosen to set out the evidence on imports separately and in addition. This is done in Table 9 (SIEC markets) and Table 10 (non-SIEC markets) below. We see immediately that trade flows appear to be given limited consideration in the grocery-related products cases reviewed, other than noting that such trade flows are limited,34 but are given substantially more attention in the basic industrial goods mergers.

That said, and despite the attention that imports are given within these cases, we note that the Commission does not, in any of the markets reviewed here, reach a wider market definition on the basis of imports. This raises an interesting question. Would high levels of imports ever be sufficient to widen the geographic market? The non-SIEC case of sodium benzoate (Arsenal/DSP) is interesting in this context. The Commission notes that Chinese imports into the EEA are relatively high at [30- 35]% and have been growing. Given its competitive assessment, the Commission does not need to reach a firm conclusion on geographic market definition, but it does make the following statement in respect of the relatively high level of Chinese imports:

*“While this is consistent with the hypothesis that the market for sodium benzoate may be wider than the EEA, it does not rule out that the Chinese competitors are only pricing to the market (that is to say, that the Chinese competitors follow the price increases of the EEA competitors rather than put downward price pressures on the EEA competitors). Thus, the evidence of the increased market share over time must be interpreted in combination with the pricing evidence.”* (Arsenal/DSP, #111)

In terms of the overall merger assessment, this is in our view a sensible approach. The strategic behaviour of EEA firms may be qualitatively different to that of Chinese firms selling into the EEA, with the latter acting passively, for example as a ‘competitive fringe’ with an upward sloping supply curve, leaving EEA firms with potential market power. It is the elasticity of imports that matters for the analysis of competition, not the level.

34 In Chiquita/Fyffes, the Commission did examine the trade flows of bananas into Northern Europe, and

indeed these were relevant for its SIEC finding in respect of the risk of the merged party engaging in exclusive arrangements with banana shippers. However, in terms of geographic market definition, it found limited potential for arbitrage between Member States, following the initial shipping process, from which it concluded that markets for the supply of bananas were national.

31

However, the quote does suggest that, if imports were genuinely sufficient to constrain prices, then the Commission would consider it appropriate to widen the geographic market to include China.

Drawing on the discussion in Section 3, we would argue, against this approach, that any such arguments are best considered within the competitive assessment of the merger, rather than when defining geographic markets.

Finally, we note that, even where imports are relatively high, the merging parties may themselves have substantial control over these imports, as for zinc metal in Glencore/Xstrata, for example.

**Table 9: Evidence on trade flows: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on trade flows** |
| Friesland/ Campina | Several dairy products | National | Imports very low and primarily to hard discounters. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | Rarely more than 500km from supplier to customer |
| Chiquita/ Fyffes | Bananas | National | All bananas imported, but no significant trade between states after import. |
| Western Digital/Hitachi | Hard Disc Drives | Global | All HDDs imported from Asia |
| External HDDs | EEA | --- |
| Arsenal/DSP | Benzoic acid | EEA | Low and steady imports from China (1%). Low and decreasing imports from US. |
| Glencore/ Xstrata | Zinc metal | EEA | Majority of customers do not import from outside EEA at all. Imports consistent at 14-20% (and around half of these due to Glencore itself). |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Not mentioned in market definition section, but imports into EEA are quite high: [20-30]% of market. |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Imports from rest of EEA into Nordic cluster low: [10-20]% for Hot Rolled (HR) steel and [20-30]% for Cold Rolled (CR) steel and Organic Coated (OC).  Imports falling for HR/CR. Rising for OC but mainly due to integrated within-firm imports into Sweden. |
| Distribution of FCS | National | --- |
| INEOS/Solvay | S-PVC | NW Europe | Flows from NW Europe into rest of Europe, but not vice versa |
| Bleach | Benelux | Very little product transported further than 300km. |

32

**Table 10: Evidence on trade flows: non-SIEC product markets.**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on trade flows** |
| Friesland/ Campina | Organic milk | National | No current imports |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | Long-life milk: Several Belgian and German producers already supply Netherlands, and even the merging parties supply Dutch customers from their production facilities in Belgium or Germany.  Packet butter: No current imports |
| Bulk butter | EEA-wide | Approximately half of the customers participating in the market investigation source from EEA Member States other than Belgium, the Netherlands and Germany, or have indicated that they consider the market to be EEA. |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | Rarely more than 500km from supplier to customer |
| Alstom/Areva | Various power systems and components | Left open, but at least EEA | --- |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | Chinese imports account for [30-35]% of EEA sales, and this share has been growing over time |
| Glencore/ Xstrata | Zinc concentrate | Worldwide or WW excl. intra-China | No info given on imports (but recall that purchases and sales of zinc concentrate are organized at the worldwide level – see above). |

* 1. ***Barriers and switching costs associated with the diversion of orders to companies located in other areas***

The Notice highlights that a lack (or low level) of trade across geographic boundaries does not necessarily mean that a market should be defined narrowly if there are no barriers to prevent such trade occurring if prices were to rise. As such, it is useful to consider the extent of any such barriers. Evidence in respect of the cases reviewed is presented in Table 11 (SIEC markets) and Table 12 (non- SIEC markets) below.

33

**Table 11: Evidence on barriers and switching costs for importing: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on barriers and switching costs for importing** |
| Friesland/ Campina | Several dairy products | National | Shipments over longer distances would impact freshness. Supply-substitution also limited by need for a local logistics network and specific local retailer requirements. Transport costs mentioned as barrier to imports for value added yoghurt and quark to OOH customers. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | Transport costs are an important barrier to intra- EEA exports and provide a significant competitive advantage for local suppliers. Competitors confirmed that they supply within the country of production or within 500km from the plant. There is a benefit to be gained from having more than one plant within a single Member State. |
| Chiquita/ Fyffes | Bananas | National | The perishable nature of bananas, which cannot be stored for long periods, greatly limits scope for cross-border arbitrage, as do need for local logistics network and access to ripening facilities. |
| Western Digital/Hitachi | Hard Disc Drives | Global | Transport costs do not play a significant role and there are no significant barriers to trade. |
| External HDDs | EEA | --- |
| Arsenal/DSP | Benzoic acid | EEA | The parties have a competitive advantage within the EEA, in relation to transportation and tariffs, of around 10-15% of average selling price, relative to their Chinese and US competitors. This exceeds any cost advantage these competitors may have. |
| Glencore/ Xstrata | Zinc metal | EEA | Total transport costs (including import duties of 2.5%) represent a significant portion of gross refining margin realised by zinc metal smelters. |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Transport costs from Asia to EEA are lower than price differences frequently observed between EEA and Asia, so do *not* explain lack price convergence. |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Transport costs from continental Europe account for approx. 10% of final prices and constrain imports from EEA. Most important barrier, though, is access to local distribution networks. |
| Distribution of FCS | National | Local distributors have lower transport costs. |

34

|  |  |  |  |
| --- | --- | --- | --- |
| INEOS/Solvay | S-PVC | NW Europe | Transport costs are important, and strongly favour local supply where available. Also important are issues around logistics, security and flexibility of supply and technical service, which are difficult to deliver from a long distance. |
| Bleach | Benelux | The limited stability, high water content and  corrosiveness of the product limit the distance it can be transported to around 300km. There are no relevant trade barriers across Member States. |

**Table 12: Evidence on barriers and switching costs for importing: non-SIEC product markets.**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Evidence on barriers and switching costs for importing** |
| Friesland/ Campina | Organic milk | National | --- |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | Long-life milk is not a perishable product and can be shipped in an ambient environment, which facilitates transport across Member States. |
| Bulk butter | EEA-wide | Transport costs not considered to be a significant issue by suppliers. |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | See above – as for aseptic PET |
| Alstom/Areva  *(NB No SIEC*  *found for this merger)* | Various power systems and components | Left open, but at least EEA | No significant barriers. Many of the downstream markets are characterised by infrequent large orders, with major EEA players (and in some cases global players) participating in tenders. For the upstream markets, there are few trade barriers, technical standards or customer certification issues. Transport costs are low relative to products’ overall value. |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | As for benzoic acid, the parties have a competitive advantage within the EEA, in relation to transportation and tariffs, of around 10-15% of average selling price, relative to their Chinese and US competitors. In this case, however, the parties argue that this is less than the cost advantage of Chinese competitors. |
| Glencore/ Xstrata | Zinc concentrate | Worldwide or WW excl. intra-China | Transport costs do not represent a significant proportion of the total cost of zinc concentrate. |

35

Transport costs are clearly relevant in a number of the cases reviewed, and indeed are found to be important in limiting geographic market definition in several. It is noteworthy, however, that the way in which transport costs are discussed and analysed appears to vary across cases. In some, transport costs are not quantified at all, but rather highlighted within the market investigation as important barriers to imports or as generating an important competitive advantage for local suppliers. In others, transport costs are quantified, but then might be set against average selling35 price, gross margin, total cost or the difference in costs between domestic suppliers and potential imports.

These varying approaches to assessing transport costs primarily appear to reflect the evidence available. However, it also seems evident that there is no agreed economic framework being used for this analysis. For example, transport costs are not compared with the 5-10% increase in price that might be used in respect of a hypothetical monopolist test. Further thinking around a suitable methodological framework may be merited in this area.

A particular form of transport costs that arises in some of these cases relates to product degradation with travel over longer distances. This is true for fresh dairy products in Friesland/Campina, bananas in Chiquita/Fyffes and bleach in INEOS/Solvay.

The tables below highlight the importance of local distribution systems, particularly for the basic industrial goods mergers. To some extent this is the corollary of the demand-side preferences discussed above: customers who want timely, reliable, and flexible supply typically value local distribution. This in turn means that suppliers without access to such local distribution systems will not be able to compete effectively. The case of SSAB/Rautaruukki is illuminating here. In this case, the Commission defined distinct national markets for the distribution of flat carbon steel. In the Nordic countries, these were vertically integrated with the merging parties’ steel production. The Commission concluded that that access to distribution was so important for entry into the Nordic cluster that the remedy required for clearance was that the merged party should divest a self- standing distribution network, which could in turn foster entry into the Nordic cluster by alternative upstream steel producers.

In a previous carbon steel merger (Mittal/Arcelor; M.4137) the Commission had found that the market was EEA-wide and the idea of a Nordic cluster did not arise. In SSAB/Rautaruukki, these two Nordic suppliers were also vertically integrated across the Nordic countries (and were the major Nordic producers). As a Phase I clearance with commitments, no formal market definition needed to be adopted, but the Commission argued that there is at least a serious possibility that the geographic scope of carbon steel flat product markets is not wider than the Nordic countries (i.e.

Finland, Sweden and Norway). This raises an interesting issue. The spirit of the Commission’s findings seems to be that distribution is national, carbon steel is EEA-wide, and vertical integration by the parties was across the Nordic countries. If the agreed remedy works by introducing competition by non-Nordic suppliers, what is the post-remedy market for carbon steel? Presumably it is EEA-wide, with the Nordic cluster market for carbon steel having resulted entirely from the specific pattern of vertical integration that was in place pre-merger. This raises the question of whether upstream market definition should depend on vertical integration in this way, which also makes it dependent on the identity of the merging parties. The real competition problem was in the

35 The exception is Outokumpu/Inoxum, for which transport costs are found to be lower than the price

differences typically observed between EEA and Asia and are thus viewed as insufficient to explain the continued existence of such price divergence.

36

distribution market, which would have been monopolised by the merger. The Commission understood the competition issues and agreed the appropriate remedy. Arguably, it did not have to (temporarily) redefine the geographic dimension of the carbon steel market to get there.

A final point to highlight is that geographic markets defined on the basis of transport costs do not necessarily lend themselves to Member State national boundaries. An interesting case in this context is the bleach market analysed in INEOS/Solvay. The Commission makes the following statement:

*“[…] the Commission considers that a supply radius of 300 km is an appropriate dimension to assess the market for sodium hypochlorite. This distance therefore covers a Benelux region which includes Belgium, the Netherlands and Luxembourg.”*

The Commission concludes that the relevant market is Benelux, but this seems to us to involve a slight leap of logic. We note that the bleach market was not the core focus in the INEOS/Solvay merger, and that the precise geographic market chosen may not have affected the Commission’s competitive assessment.36 Nevertheless, it is not clear why the Commission switches from a 300km radius market to a Benelux market, given that there appear to be no relevant cross-border trade barriers. One possible rationale is that, notably due to data availability, the Commission has a preference for defining geographic markets as Member States or sets of Member States rather than on the basis of isodistance or isochrone analysis.37

* 1. ***Price-related evidence: qualitative, statistical and economic****38*

The Notice states that where there have been changes in prices between areas that can be shown to result in customer reactions, econometric techniques can be used for demand estimation (to estimate elasticities and cross-elasticities of demand), price correlations, statistical causality tests and tests for the similarity of price levels and/or their convergence.

In this section, we look slightly more widely at all qualitative, statistical and economic evidence in respect of prices or margins. In general, we would only expect to observe detailed analysis being carried out and submitted for the more finely balanced decisions, on which it has the potential to have a significant effect. For this reason, we have focussed in this section on the SIEC markets only. We have, however, included relevant evidence on both geographic market definition and the assessment of competitive constraints from outside the geographic market. The relevant evidence presented is summarised in Table 13.

We note that the extent of evidence and analysis varies hugely across the cases reviewed. This largely seems to reflect of the need of both Commission and parties to prioritise their resources and

36 The parties themselves argued that suppliers based in neighbouring areas of Germany and France should

also be included. The Commission did in fact consider carefully the responses of these specific suppliers, before concluding that they were not realistic competitors for the merging parties for Benelux customers.

37 See the discussion in Section 3. We note that the Commission has more recently adopted an isochrones

approach in respect of a number of recent cement mergers, see footnote 19.

38 In the Notice, the heading which covers statistical and economic pricing evidence is in fact titled ‘Past

evidence of diversion of orders to other areas’. However, the types of evidence covered are wider than this heading suggests.

37

attention on what is really likely to matter for the final decision. Thus we observe the most detailed quantitative analysis where this is considered most likely to be decisive on the case outcome:

* + - At one end of the spectrum are the technological product mergers reviewed here. For these, the pricing evidence is either essentially qualitative, in that it comprises purely the views of respondents to the market investigation, as for HDDs in Western Digital/Hitachi, or non-existent, as for external HDDs in Western Digital/Hitachi and for Alstom/Areva.

In the case of Alstom-Areva, pricing evidence would arguably be of limited value due to the large and lumpy bespoke nature of the business. In Western Digital/Hitachi, there was very little dispute across both customers and consumers that the HDD market was global, and thus the lack of any basic pricing evidence seems reasonable. Moreover, while there was more dispute about the regional market definition adopted by the Commission for external HDDs, it is again unsurprising that only limited resources went into assessing this issue, given that any possible concerns in this market were addressed through the remedies required in the HDD market.

* + - For the grocery-related product mergers reviewed here, there is usually some pricing evidence, but it is typically very limited, focusing on just a few price points. The (slight) exceptions are Chiquita/Fyffes in which a chart showing national prices over time was included, and demonstrated clear differences in pricing levels and patterns across countries, and the case of Dutch-type cheese in Friesland/Campina, for which a cross-country price correlation coefficient was presented.
    - At the other end of the spectrum, are the basic industrial goods mergers reviewed here. In all of these, there is extensive data analysis carried out (for the SIEC markets at least) and detailed debate between the Commission and parties about this analysis.

The remainder of this section focusses on these basic industrial goods cases only, and examines the various types of analysis carried out. We note that price correlations and stationarity tests are used solely in the assessment of geographic markets, while the other techniques identified are referenced within both the geographic market definition and competitive assessment sections.

*Price correlations and stationarity tests*

Price correlations and/or stationarity tests, of one form or another, were carried out as part of the assessment of geographic market definition in all of the basic industrial goods cases reviewed. Price correlations show the extent to which prices move together, while stationarity tests examine the extent to which they diverge over a prolonged period. The rationale for using such measures is effectively that they test for the existence of some sort of arbitrage mechanism across EEA countries or across different geographic areas which tends to lead to equalisation or co-movement of price levels.

Despite the prevalence of their use, it is worth noting that in SSAB/Rautaruukki, the Commission correctly states that *“in general evidence on price correlation can only provide indirect evidence of market definition, given that it is not directly informative about the outcome of the demand substitution test as set out in paragraphs 15 to 18 of the Notice on Market Definition”* (para 95). The Commission makes a very similar point in Glencore/XStrata (para 145). The same could be said of stationarity tests.

38

Such tests are more compelling and direct in the negative, as evidence against wider markets if price are found to be poorly correlated or diverge over time. The findings in these cases fit with this. In Arsenal/DSP (and also Chiquita/Fyffes), the Commission draws upon evidence of poor correlation to justify its conclusion that geographical areas comprise different markets, but it appears less likely to accept evidence of strong correlation as compelling evidence for different candidate geographic areas being the same relevant geographic market.

The Commission’s scepticism around price correlation analysis is reasonable, in at least some of these cases, because such correlation can be driven by common costs and demand factors. A significant element of the discussion in several of the cases where correlation analysis is done is thus how to deal with common costs. For example:

* + - In the case of Glencore/Xstrata, the Commission found that, while the notifying party was correct to state that total zinc metal prices have moved closely across regions in the recent past, this correlation has been largely driven by the impact of the common element in these prices (i.e. the London Metals Exchange price). If this common element is accounted for, the correlation across regional prices becomes substantially lower.
    - In the case of SSAP/Rautaruukki, the removal of certain common cost elements, i.e. iron ore, scrap metal and coking coal, reduced the correlation between EEA and Nordic prices. Moreover, the Commission carried out a further analysis, which removed monthly time fixed effects from the price series and repeated the conditional correlation exercise on the resulting residuals. As the Commission states *“The advantage of this method is that it controls for both common cost and demand trends. It will, however, also remove on average the price movements due to substitution. Therefore, this method works as a one sided test for geographic clustering: for common markets it produces low or even negative correlations and generates positive correlations only for clusters that are more correlated with each other than the average.”* The results shows a clear Nordic cluster, a clear EEA cluster, and very little correlation between the two areas. Overall, the Commission considers that the correlation analysis carried out for this merger is inconclusive but if anything supports the existence of a separate Nordic cluster.

Another issue that arises in respect of the stationarity analysis carried out in at least one of the cases reviewed (Arsenal/DSP) is that the parties do their calculations of stationarity based on the existence of ‘structural breaks’ in the data, which are identified using the Max Chow39 test. The commission clearly finds this problematic: *“stationarity tests of relative prices with a number of structural breaks may result in misleading findings”* (Arsenal/DSP para 80). We agree with this concern, since such an approach can bury true evidence of non-stationarity. Indeed, since the key aim of a stationarity test is to identify whether prices have diverged systematically over time, we would argue that finding a structural break in the relative price data effectively involves accepting that there has been a systematic divergence. In some cases there may be a very good explanation for a structural break which might be acceptable, but this was not the case here; it was simply identified statistically and no rationale was provided.

39 See Footnote 8 of the US Merger Guidelines.

39

*The relationship between imports and relative prices*

As mentioned above, the shape of the import supply curve is important in assessing the likely overall impact of a merger. If enough imports would be supplied at a cheap enough price in response to an attempted price increase by the merging firms, then such a price increase will be defeated and no SIEC should be found.

As such, examining the relationship between imports and relative prices is potentially one of the most powerful pieces of evidence that can be developed for overall merger assessment provided the parties are able to supply the relevant data. In fact, it is done, in some form at least, in three of these cases (INEOS/Solvay, Glencore/Xstrata, and Outokumpu/Inoxum).

* + - In the case of INEOS/Solvay, the Commission does not carry out econometric analysis in respect of this relationship, but simply observes, drawing on a Figure that represents the relevant data, that “during a period of increasing prices in NWE [North-West Europe] relative to the RoE [Rest of Europe], the sales of EEA S-PVC suppliers located outside NWE overall remained stable.” (para 300) The Commission also highlights that this was true despite the non-NWE suppliers having spare capacity available over this period.
    - In Glencore/XStrata, the notifying party provided two examples to illustrate the response of the absolute level of imports into the EEA to relative price differences (measured in terms of differences in the full zinc metal price). In response, the Commission used econometric analysis to develop a more systematic assessment of the statistical relationship between total imports into the EEA and the absolute price differences between the US and the EEA (accounting for differences in delivery terms), from 2002-2011. On the basis of its preliminary work (recall this case was concluded at Phase I), the Commission does find a statistically significant relationship between the level of imports and EEA-US price differentials, but this is of insufficient magnitude as to make a 5-10% price increase by EEA suppliers unprofitable.
    - In Outokumpu/Inoxum, the notifying party carried out the econometric regression of imports and relative prices, with a view to using this to demonstrate that imports would constrain the merging parties from raising prices post-merger. In fact, however, the Commission finds that the party’s approach to this latter analysis is flawed (correctly, in our view). When the Commission applies the appropriate analysis, it finds that the estimated elasticity of imports is insufficient to prevent a hypothetical monopolist of the EEA from raising prices post-merger.

It is, however, noteworthy that the analysis described above was carried out within the analysis of geographic market definition in the first two cases, but primarily within the competitive assessment in the third case.40 This is linked to the apparent confusion in the Commission’s practice as to whether constraints from imports should be used to (i) consider whether geographic markets should be widened or (ii) examine the impact of competitive constraints from outside the market.

As will be clear from our discussion in Section 3, we advocate the latter - that is employing this powerful form of evidence only within the competitive assessment.

40 Albeit there is, within the geographic market definition section in Outokumpu/Inoxum, a reference forward

to the implications of this analysis for the competitive assessment.

40

*Ex post analysis of past mergers*

A novel aspect of the INEOS-Solvay merger was the use of *ex post* analysis of the price impact of previous mergers in the sector, within the context of an ongoing merger investigation. The Commission considered two previous mergers, INEOS/Kerling (2008) and INEOS/Tessenderlo (2011), and analysed them using difference-in-difference analysis and a more novel triple-differences approach.41

In the case of INEOS/Kerling, the Commission was unable to establish a sufficiently robust price effect due to the proximity of this merger to the 2008 Global Financial Crisis, which created a substantial demand shock in the market. For INEOS/Tessenderlo, however, the Commission found that the merger resulted in significant price rises in NWE.42 This analysis was primarily focussed on assessing the competitive effects of the merger. However, the Commission also highlights (in #312) that the findings are consistent with a NWE market definition.

Where this sort of evidence is available, it can be powerful if properly analysed. However, it does rely on there having been past mergers within the sector that are both relevant and possible to analyse within the available time frame. If the results are to be used to justify a narrower market definition, or an adverse finding on competitive effects, this technique also relies on those mergers having been wrongly allowed by the Commission in the past (which is not a great recommendation for the Commission’s approach to merger control!).

41 The ‘Diff-in-Diff’ analysis relies on a common trend in cost and demand movements in two geographic areas

(e.g. NWE and RoE) and an event (e.g. merger) that disproportionately affects one area. The analysis compares the difference in Ineos prices in the two areas before and after the merger. If the difference in price difference is significant, this suggests a causal effect between the merger and the higher prices (unless there were other events at the same time that might have had a differential effect on the two areas). This Diff-in- Diff approach underestimates the price effects of the merger inasmuch as this merger also enhanced market power in RoE. The ‘Triple Diff’ approach substitutes the difference in prices between Ineos and Solvay for the level of Ineos prices in the ‘Diff-in-Diff’ analysis. This is likely to underestimate any price effects of the merger inasmuch as Solvay also benefitted from market power created by the Ineos/Tessenderlo merger. However, great care is needed to identify an appropriate ‘control’ area (e.g. RoE) for both types of analysis to be valid.

These techniques are described in Sections 4.2 and 4.3 of the INEOS/Solvay decision.

42 We note that the parties, while not disputing that prices in NWE did rise (relatively) following the

INEOS/Tessenderlo merger, argued that this was not informative about causality, in terms of what, if any, effect the merger had on these prices. They challenged the validity of the control area and argued that the results are reliant on the price offered to a specific Greek customer, with these prices reflecting the very specific circumstances of the Greek market. (Note that it is beyond the scope of this paper to assess the overall robustness of the Commission’s analysis in this (or any) particular merger.)

41

**Table 13: Price-related evidence on geographic market definition and the assessment of competitive constraints from outside the geographic market**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Case** | **Evidence on prices/ margins** | **Visual review of price levels/co- movement** | **Correlation coefficients for prices**  **/margins** | **Station- arity test on prices**  **/margins** | **Regression of imports on relative prices** | **Ex post analysis of past mergers** |
| Friesland/ Campina | Some price data  & views from market investigation |  | * (Dutch- type cheese) |  |  |  |
| Refresco/ Pride | Views of customers & competitors only. No data. |  |  |  |  |  |
| Chiquita/ Fyffes | Price data & views of customers & competitor43 |  |  |  |  |  |
| Alstom/ Areva | No evidence presented on prices/margins |  |  |  |  |  |
| Western Digital/ Hitachi | Only views of customers & competitors44 |  |  |  |  |  |
| Arsenal/DSP | Price & margin data | * (Not in decision) |  |  |  |  |
| Glencore/ Xstrata | Price, margin & imports data | * (Not in decision) |  | (Not in decision) |  |  |
| Outokumpu/ Inoxum | Price data & evidence of different pric- ing systems |  | (But only across MS within EEA) |  |  |  |

43 The majority of both customers and competitors agreed that prices differed across Member States.

Competitors active in more than one country adopted differing pricing strategies in each country.

44 The only qualification here is that the parties did present some analysis of tender data. This was primarily

targeted as assessing the closeness of competition between the merging parties, and the Commission anyway had some concerns with its robustness and coverage. As such, it does not seem to have been drawn on to examine the extent of tendering by suppliers outside national boundaries.

42

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| SSAB/  Rautaruukki | Price data, including controlled for common costs |  |  |  |  |  |
| INEOS/  Solvay | Price, margin & imports data | * (In Annex) | 45 | 45 | 46 |  |

1. ***Views of customers and competitors***

In all of the cases reviewed, evidence from third parties – primarily competitors and customers, but in some cases also upstream suppliers47 - was gathered through the market investigation and considered as part of the Commission’s decision. In several of the cases, and in particular those in the grocery-related products markets and in the technological products markets, responses to the Commission’s market investigation appear to have provided the bulk of the evidence base for its decision.

The evidence presented in the mergers reviewed is summarised in Table 14 (SIEC markets) and Table 15 (non-SIEC markets) below. The tables focus on the relative weight placed by the Commission on more qualitative evidence from the market investigation (and from different types of respondents) as distinct from quantitative evidence.

It is well understood by competition authorities that such evidence should be treated carefully. The various parties responding may have a private interest in the success or otherwise of the merger, or at least in the analysis carried out by the Commission in respect of the merger. This in turn may lead them to provide biased evidence or views in response to the market investigation. These concerns are typically strongest in respect of the views of competitors. That said, the direction of any such biases is not always obvious. For example:

* + We might expect competitors to argue for *wider* markets, if these are more likely to allow the merger to be permitted, given that competitors might expect to benefit from softened competition post-merger, or indeed may have their own merger ambitions for which the precedent would be useful.
  + On the other hand, we might expect competitors to argue for *narrower* markets, if they believe this will result in divestments that they may be in a position to acquire.

45 In INEOS/Solvay, while not a standard stationarity test or correlation, the regression used was effectively testing for the same thing – that is, any significant change in the divergence of prices over time. In practice, increased divergence in prices was found between NWE and each of the other three regions.

46 Likewise, in INEOS/Solvay, while the Commission does not estimate the relationship between relative prices and imports, it does examine visually the sales levels of non-NWE suppliers within NWE during the period while relative NWE prices were increasing.

47 For example, in Chiquita/Fyffes, the shipping companies involved in transporting bananas to Northern

Europe also took part in the market investigation.

43

In practice, we found that much of the evidence provided through the market investigation, from both customers and competitors, is essentially factual. Such evidence, despite being largely qualitative, appears valuable for strengthening the evidence base. However, some of the evidence collected involves opinion, to a greater or lesser extent. For example, across the cases reviewed, parties – both customers and competitors – may be asked:

* + - explicit questions as to what they think the relevant geographic market is,
    - questions around likely reactions to a permanent 5-10% price rise in a specific geographic area48, and
    - questions which may appear factual but implicitly involve opinion, such as how important it is to have local distribution in a particular market, or what barriers there may be to imports.

In many cases, such opinions can still be highly valuable. Indeed, views on such questions seem to have been decisive in at least some of these cases:

* + - For example, in the market for packet butter (Friesland/Campina), customers’ response to the SSNIP question seems to have been decisive in the Commission’s decision to widen the geographic market beyond the Netherlands. This is despite the fact that almost all packet butter is currently sourced within the Netherlands.

However, caution is certainly needed. In practice, in many of the cases reviewed, the views of customers and competitors were relatively well aligned, which will reasonably have given the Commission confidence in relying on this evidence.

* + - For example, in the case of SAAB/Rautaruukki, the economic evidence was inconclusive but customers and competitors provided a broadly consistent view, which supported the Commission’s conclusion that the market was relatively narrow (Nordic cluster). Customers indicated that the Nordic region was not a priority for continental EEA suppliers but rather an export market, and that the competitiveness of their offers deteriorated whenever demand conditions improve in continental Europe. EEA competitors confirmed this and – most importantly – confirmed that access to the Nordic market was very difficult without access to a local distribution network.

In general, across the cases reviewed here, we found no evidence of the Commission explicitly demonstrating a sensitivity to the potential for market participants to provide biased views.

However, we also found no examples where the Commission seems to have been persuaded by biased representations. There are however a few examples where competitors and customers seem to have had a different views, or where there were inconsistencies between different forms of qualitative evidence:

* + - In Western Digital/Hitachi, the vast majority of XHDD suppliers argued that market was global, despite indicating significant supply and demand-side differences between regions. The Commission adopted an EEA market definition.

48 It is noteworthy that, while customers are usually asked about their own likely reactions to a such a price

rise, competitors may be asked either about their own reactions or (more usually) about their view on the likely reaction of customers.

44

* + - In the market for zinc metal (Glencore/Xstrata), around half of customers and the vast majority of competitors considered that the market is wider than EEA. Yet almost all agreed that imports would not be able to mitigate or eliminate a hypothetical 5% rise in EEA prices. Again, the Commission adopted an EEA market definition.

**Table 14: Evidence on views of customers and competitors: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Views of customers and competitors** |
| Friesland/ Campina | Several dairy products | National | Almost all evidence qualitative and drawn from responses to market investigation. Very limited additional data/analysis. Fairly similar views on geographic market definition between customers and competitors, including (where asked) around potential for supply-substitution in response to a 5- 10% price rise. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | Almost all evidence qualitative and drawn from responses to market investigation. No additional data/analysis, other than parties did carry out some analysis of tender data. |
| Chiquita/ Fyffes | Bananas | National | Almost all evidence qualitative and drawn from responses to market investigation. Very limited additional data/analysis. Fairly similar views on geographic market. Majority of competitors would not expect to change their geographic scope of supply quickly in response to 5-10% price rise in one Member State. [NB Views of customers also very important under competitive assessment – see below]. |
| Western Digital/Hitachi | Hard Disc Drives | Global | All evidence qualitative and drawn from responses to market investigation. No additional data/analysis. |
| External HDDs | EEA | All evidence qualitative and drawn from responses to market investigation. No additional data/analysis. Vast majority of XHDD suppliers argued that market was global, despite indicating significant supply and demand-side differences between regions. |
| Arsenal/DSP | Benzoic acid | EEA | Market investigation responses play an important role in finding. Non-EEA competitors confirmed that transport costs were a significant barrier to supplying EEA. EEA customers stated that they would not be willing to switch to Chinese suppliers in response to a 5-10% price rise by EEA-based suppliers. |

45

|  |  |  |  |
| --- | --- | --- | --- |
| Glencore/ Xstrata | Zinc metal | EEA | Market investigation responses play limited role in finding. Responses somewhat confused. Half of customers and vast majority of competitors consider market is wider than EEA. Yet almost all agree that imports would not be able to mitigate or eliminate a hypothetical 5% rise in EEA prices. |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Market investigation responses from customers important in providing evidence on pattern of purchases and demand characteristics. However, pricing data and econometric/economic analysis plays a key role in this case. |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Qualitative market investigation responses important in this case, given that economic evidence is inconclusive. Customers and competitors provided a broadly consistent view of the Nordic region being hard to access without a local distribution network, and not a priority for continental EEA suppliers. |
| Distribution of FCS | National | Market investigation responses important. Customers confirmed that they source steel only or predominantly at national level. |
| INEOS/Solvay | S-PVC | NW Europe | Responses to market investigation important for providing qualitative evidence for NWE market. Most NWE customers clear that, even in the event of a 5-10% price rise, they would still consider players located outside NWE as unsuitable sources of supply. Major NWE competitors also support this view.49 |
| Bleach | Benelux | Qualitative market investigation responses very consistent and decisive in respect of a 300km maximum supply radius. Responses from suppliers in neighbouring areas important for decision not to widen market beyond Benelux. |

49 INEOS/Solvay was the only merger reviewed here in which the parties made a ‘chain of substitution’

argument for a wider geographic market (EEA) on the basis of considerable overlaps between the shipment areas of the principal S-PVC suppliers. This argument was summarily dismissed on the basis of the market investigation responses.

46

**Table 15: Evidence on views of customers and competitors: non-SIEC product markets.**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Views of customers and competitors** |
| Friesland/ Campina | Organic milk | National | Almost all evidence qualitative and drawn from responses to market investigation. Very limited additional data/analysis. |
| Long-life milk and packet butter | Netherlands, Belgium and Germany | Almost all evidence qualitative and drawn from responses to market investigation. Very limited additional data/analysis.  Packet butter: Almost all respondents have noted that they would source from neighbouring Member States, should the price increase by 5-10% in their home market. Seems to be the key decisive evidence in market definition. |
| Bulk butter | EEA-wide | Almost all evidence qualitative and drawn from responses to market investigation, with views broadly consistent across competitors and customers. Very limited additional data/analysis. |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | All evidence qualitative and drawn from responses to market investigation. No additional data/analysis, other than parties did carry out some analysis of tender data. |
| Alstom/Areva | Various power systems and components | Left open, but at least EEA | Almost all evidence qualitative and drawn from responses to market investigation. Very limited additional data/analysis. |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | Market investigation responses are overall very similar, if slightly less emphatic, to those for benzoic acid. In particular, competitors highlight constraint of transport costs and customers highlight quality concerns. |
| Glencore/ Xstrata | Zinc concentrate | Worldwide or WW excl. intra-China | Almost all evidence qualitative and drawn from responses to market investigation. No apparent additional data/analysis. Market participants confirmed that sales are generally organized at the worldwide level. Customers highlighted flexibility to redirect purchases to suppliers located in other regions in response to a potential price increase in EEA. Views mixed on competitive impact of intra- China sales. |

47

1. ***The analysis of competitive constraints from outside the market***

As discussed in Section 3 above, there is some overlap between the type of evidence that is examined in analysing whether a narrow candidate geographic market should be widened and that evidence which is examined to see whether there may be competitive constraints from outside the defined geographic market which would limit the possibility of detriment arising from a merger.

In this section, therefore, we focus not on what is repeated by way of the evidence in the competitive assessment section, but what additional evidence or argumentation is considered. The relevant evidence presented in the mergers reviewed is summarised in Table 16 (SIEC markets) and Table 17 (non-SIEC markets) below.

The first point to note is the number of cases in which, despite defining geographic markets relatively narrow, the Commission nevertheless considers that competitive constraints from outside the market are sufficient to prevent the merger giving rise to an SIEC:

* + For several of the grocery-related product markets – organic milk (Friesland/Campina), bottling of NCSDs in carton (Refresco/Pride), and for bananas (Chiquita/Fyffes) – the Commission accepted that customers would have sufficient supply options outside the narrow national market to overcome any risk of SIEC. This is true despite the merging parties having some very high market shares in these markets.

As such, a key conclusion in this section is that it is clearly not the case that a narrow geographic market is decisive in terms of the merger assessment. There are, however, a number of other interesting aspects that come out of examining the evidence base for the competitive assessment sections of these decisions.

*The potential for reduced exports to overcome any risk of SIEC*

There is an interesting discussion in Friesland/Campina about the potential for exports of ‘Dutch- type’ cheese from the Netherlands to be reduced to defeat a 5-10% post-merger price rise, as opposed to imports coming in to the Netherlands. This would seem a reasonable argument in theory. However, it has to be remembered that the merging parties will typically have control over their own exports, and thus these cannot be counted on to constrain a 5-10% price rise. As such, this sort of story would only really be compelling if there were other significant exporters within the relevant geographic market who could reduce exports and expand sales in response to a SSNIP. This was not in fact the case in Friesland/Campina. The merging parties were both the two main national suppliers and the two main exporters. Given this, the Commission did not accept the parties’ reduced exports argument in this case.

*Is there a critical level of exports to overcome any risk of SIEC?*

In Arsenal/DSP, the Commission reaches different conclusions in respect of benzoic acid (SIEC) and sodium benzoate (no SIEC) despite there being a number of notable similarities between these two markets. In the case of sodium benzoate, market definition is left open but ‘at least EEA’. Within the EEA, the merging parties have a [60-70]% share of sales. The competitive assessment is then crucial, and we highlight two aspects of the Commission’s assessment.

* + - First, it makes very clear what it sees as the differences between sodium benzoate and benzoic acid, specifically that the concerns about quality are lesser for sodium benzoate, the Chinese comparative advantage in terms of production costs is greater for sodium benzoate,

48

and thus the margins that can be earned by Chinese exporters of sodium benzoate are higher. This seems a sensible analysis.

* + - Second, it makes the following noteworthy statement (at para 257). *“The [25-45]% market share held by Chinese producers of sodium benzoate constitutes a constraint that would discipline the merged entity post-transaction should it intend to increase or increased prices above a competitive level. In previous merger cases, it has been considered that import market shares lower than 25% would already constitute a constraint on the entity resulting from the transaction.”* This is much more questionable.

Should we really take the second point to mean that, irrespective of geographic market definition, a competitive assessment will always reach a no SIEC finding if imports are at least 25% of the market? We would strongly argue that any such rule would be inappropriate. Just because imports are capable of serving a certain share of the market currently does not imply that they are necessarily capable of expanding further to overcome a post-merger SIEC. It is the elasticity of imports, not the level, which should matter.

Fortunately, the Commission itself does not appear to abide by such a rule. In the case of SSAB/Rautaruukki, the levels of imports of cold-rolled (CR) and organic-coated (OC) steel seemed to above 25%, albeit only slightly, yet an SIEC is found. This would seem to us to be an area where further thinking – and then public clarification – may be valuable.

*The ‘windows of time’ argument*

A novel piece of thinking occurs in the competitive assessment section of Outokumpu/ Inoxum. The Commission finds that the attractiveness of importing from Asia into the EEA depends on a variety of economic factors such as the nickel price and the currency exchange rate. As these fluctuate, there will be ‘windows of time’ within which imports cannot exercise a competitive constraint on European producers. This is interesting because the thinking seems powerful, but is presumably true of other markets too. Indeed all international trade is typically affected by currency fluctuations. Will the “windows of time” idea therefore become used more frequently, and if so will this mark a significantly more interventionist approach to merger analysis? More generally, it is far from clear how frequent such windows of time need to be, and how long they need to last, in order to be considered relevant.

*SIEC arising from access to core input*

Finally, it is noteworthy that, in a number of these cases, the identified SIEC relates to concerns about access to a key input.

* In Western Digital/Hitachi, the SIEC in external HDDs relates to concerns about access to 3.5” HDDs post-merger.
* In SAAB/Rautaruukki, the SIEC relates to concerns about access to local steel distribution networks post-merger.
* In Chiquita/Fyffes, the SIEC relates to concerns that the merged party might employ its ‘accrued market influence’ to impose exclusivity clauses within contracts with shipping

49

companies, thus limiting the ability of competitors to ship their bananas into Northern European markets, at least without incurring additional costs.50

**Table 16: Additional evidence on constraints from outside the market: SIEC markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Additional evidence on competitive constraints** |
| Friesland/ Campina | Several dairy products | National | Argumentation and evidence largely same, but some emphasis on lack of spare capacity amongst nearby neighbouring suppliers.  For “Dutch-type” cheese, the parties raise an interesting form of argument around exports to outside the Netherlands – see main text. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | For France, Germany and Belgium, the market investigation confirmed that suppliers in neighbouring countries were not realistic competitors, and SIECs were found. [For the specific case of the Netherlands, the Commission found that all substantial market participants, including the Parties, import their aseptic PET for the Dutch market from neighbouring countries. Thus, the Commission concluded that the competitive importance of imports is sufficiently strong in Netherlands that no SIEC was found.] |
| Chiquita/ Fyffes | Bananas | National | Retailers across all relevant Member States confirmed that they would be able to find alternative sources of bananas, including from outside the set of suppliers currently active in that Member State. As such, no SIEC was found in respect of the standard concerns. The Commission did, however, have SIEC concerns in respect of the potential ability of the merged firm to extract exclusivity conditions from shipping lines. See main text. |

50 This issue was sufficient for the Commission to find the Transaction to give rise to ‘serious doubts’ in both Finland (which is at the end of a particular shipping line) and Ireland (where Fyffes already had such exclusivity conditions in place). In addition, the Commission states that its findings of no concerns in Denmark, Sweden, Estonia, Latvia and Lithuania are contingent on the accepted commitments relating to shipping. While no explicit issues arise in respect of shipping in UK, Germany, Belgium or Netherlands, the Commission notes that ports in these countries serve as intermediary steps, for instance where bananas are unloaded from big containers and put onto feeder vessels to continue their journey towards Member States with ports located at more peripheral routes. As a result, the commitment extracted by the Commission as a condition of clearance therefore both terminates the agreement in Ireland and prohibits the merged party from putting in place any such clause for 10 years across Northern Europe.

50

|  |  |  |  |
| --- | --- | --- | --- |
| Western Digital/Hitachi | Hard Disc Drives | Global | Not relevant |
| External HDDs | EEA | No specific discussion about extent of constraint from outside EEA and worldwide market shares are never presented. However, competitive assessment does address potential for the parties to limit entry/expansion within EEA through its control over HDDs, a key input to XHDDs. |
| Arsenal/DSP | Benzoic acid | EEA | Argumentation mostly the same as in market definition section. However, there is additional interesting internal documentation presented about the response of main Chinese competitor, Wuhan, to tight EEA market conditions in April 2007 due to two plants being out of action. Far from imports flooding in to restore low prices, Wuhan increased its prices in EEA by 8%. |
| Glencore/ Xstrata | Zinc metal | EEA | No significant extra evidence in relation to competitive constraint from outside EEA. The parties present a pricing incentive analysis that assumes substantial diversion to non-EEA suppliers. However, as Commission highlights, there is no evidential basis for this assumed diversion ratio, and if it were valid it would be inconsistent with the Commission’s decision on relevant geographic market. |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | The analysis of import elasticity estimates is discussed above under economic evidence for market definition.  In addition to the various points made under market definition, the Commission highlights that the potential constraint of imports will be limited by the fact that the EEA is a net exporter of CR steel, and that importers are not a single competitor, but rather a fringe of suppliers, each with relatively small sales in the EEA.  Also, as the nickel price and currency exchange rate fluctuate, there will be “windows of time” within which imports cannot exercise a competitive constraint on European producers. |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Parties' control over local distribution constitutes a barrier to imports by depriving European suppliers of a route to market to reach small and mid-size ex-mill customers in the Nordic countries. |

51

|  |  |  |  |
| --- | --- | --- | --- |
| INEOS/Solvay | S-PVC | NW Europe | Much of the same sorts of arguments made, but more detail provided, for example in respect of the potential for each of the non-NWE suppliers located elsewhere in EEA to supply into NWE. |
| Bleach | Benelux | --- |

**Table 17: Additional evidence on constraints from outside the market: non-SIEC product markets**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Additional evidence on competitive constraints** |
| Friesland/ Campina | Organic milk | National | Customers felt able to switch to other sources. Dutch customers less concerned about the Dutch origin of organic milk, and the product is relatively high margin and can thus be transported over longer distances than basic milk. There is spare capacity available and more coming on stream. |
| Refresco/ Pride Foods | Bottling of NCSDs in cartons | National | For Belgium and Netherlands, by contrast with aseptic PET, German-based suppliers are already seen as alternatives to the merging parties by retailers, and have significant spare capacity, which is likely to be sustained over time. For the UK, retailers already source from the continent, and entry/expansion into the UK from (in particular) Spain was expected. As such, no SIEC found. |
| Alstom/Areva | Various power systems and components | Left open, but at least EEA | Limited discussion of constraints from outside EEA, given no concerns arise even on EEA basis.51 |
| Arsenal/DSP | Sodium benzoate | Left open, but at least EEA-wide | See main text. |

51 That said, we note that one part of this case for which the Commission’s competitive assessment does not

appear entirely compelling. This relates to the upstream market for traction transformers and the downstream market for high speed trains. In the downstream EEA market for high speed trains, Alstom has [40-50]% and Siemens has [20-30]%. In the upstream market, Areva only has [10-20]% in the upstream market, but ABB has [45-55]% and Siemens has [15-25]%, leaving 15% of the market served by smaller players. Given that Siemens is vertically integrated and effectively only supplies itself, the concern raised by other downstream competitors was that the merger would reduce the number of independent suppliers of traction transformers, leaving ABB in a very strong supply position, thus leading to price rises.

As part of its response to this concern, the Commission does highlight the potential competitive constraint from outside the EEA market: *“according to the Parties, a number of non-EEA traction transformers manufacturers could enter the EEA market”*. It is not, however, clear how much weight the Commission gives this information, or whether it carries out any independent verification of it.

52

1. ***Evidential role of internal documents***

One further potential form of evidence is that which is included within the parties’ own internal documents. This is not mentioned in the Notice, and indeed in many of the cases reviewed internal documents do not appear to play a significant role, at least in terms of the geographic market definition question, or the question of competitive constraints from outside the defined geographic market.

This may be because the Commission recognises that internal documents need to be read with a sceptical eye, given that parties are often loose with their wording, and sometimes make grand – but also unrealistic – claims within their internal documents. There is a useful discussion of the appropriate treatment of internal evidence in the INEOS/Solvay decision (paras 55-60).

Nevertheless, there are some cases in which internal documents are at least mentioned in respect of geographic market, or competitive constraints from outside the relevant geographic market, and in some cases these are fairly significant. The evidence presented for these is set out in the Table 18 below. It appears that internal documents are given the most weight in the basic industrial goods mergers reviewed.

**Table 18: Evidence on relevant geographic market from internal documents, where mentioned**

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Key products** | **Commission decision** | **Internal documents** |
| Friesland/ Campina | Several dairy products | National | Some reference to internal documents, for example mentioning that Dutch customer preferences are rather specific. But limited weight placed on this type of evidence. |
| Refresco/ Pride Foods | Bottling of NCSDs in Aseptic PET | National | For France, weight placed on internal documents of parties which did not identify players outside of France as serious potential competitors. |
| Western Digital/Hitachi | External HDDs | EEA | Some weight placed on internal documents of the Parties, which differentiate between regions. |
| Arsenal/DSP | Benzoic acid | EEA | Some weight placed on parties’ internal documents, which do appear to paint a consistent picture of Chinese and US imports having limited impact on the EEA market, and the importance of transport costs and tariffs as a barrier to imports. |
| Glencore/ Xstrata | Zinc metal | EEA | In the competitive assessment section, reference is made to an internal document on the potential revenue synergies associated with the transaction in EEA. The so-called “Zinc Synergy Paper” describes how the merged firm’s “enhanced negotiating power” will allow it to charge higher prices and push for improved contractual terms. |
| Outokumpu/ Inoxum | Cold-rolled stainless steel | EEA | Internal documents seem to have been important for the Commission in developing its “windows of time” idea. Specifically, the documents show that when the nickel price is lower than a certain |

53

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  | threshold, any possible appreciable advantage in production costs enjoyed by Asian suppliers disappears. As a result, Chinese producers lose their competitiveness vis-à-vis European players. |
| SSAB/  Rautaruukki | Flat carbon steel | Nordic cluster | Significant weight placed on parties’ internal documents, which do appear to paint a consistent picture of the parties viewing the Nordic cluster as a separate geographic market. (e.g. Strategy documents clearly distinguish Nordic “home” market, price benchmarking is carried out relative other Nordic suppliers. SSAB describes carbon steel shipped to Nordic countries from continental European mills as “imports”. The internal papers relating to the merger describe a key rationale as being to protect and further strengthen a "Nordic fortress".) |
| Distribution of FCS | National | Internal documents show that the parties have separate strategies for the different countries, and that their analysis of the competitive dynamics is carried out at national level |
| INEOS/Solvay | S-PVC | NW Europe | Significant weight given to a variety of internal documents, which tend to refer to a West European market, highlight the strong position of the parties in that market and even mention the high barriers to entry into that market. S-PVC pricing documents also refer to differing pricing strategies for West and East Europe. Internal pricing strategy documents following the INEOS/Tessenderlo merger also given weight in competitive assessment. |

1. **Conclusions and Recommendations**

In carrying out this work, the Commission asked us to comment on:

1. The Commission’s geographic market analysis in terms of the methodology used and the conclusions reached on the basis of the available evidence;
2. How the Commission incorporated constraints from outside the geographic market in its competitive assessment; and
3. Whether a more flexible approach to supply-side substitution could have been considered, and whether such an approach might have changed the outcome of the case.

Having reviewed the ten case studies in detail, we conclude that the Commission’s practice in respect of geographic market definition is generally well-evidenced and broadly in line with its own 1997 Notice on market definition. Where geographic markets are drawn relatively narrowly, we find that the Commission typically gives careful consideration to evidence of competitive constraints from outside the market.

54

We also find that the Commission typically draws on a wide range of evidence for its findings, rarely relying on one single piece of evidence or analysis. For several of the cases, responses to the Commission’s market investigation appear to provide the bulk of the evidence base for its decision. While such responses have the potential to be biased, due to the interests of responding parties in the success (or not) of the merger, we found no examples where the Commission seems to have been persuaded by obviously self-serving opinions.

We find that the statistical and economic evidence, while valuable in several of the basic industrial goods mergers, was not the sole decisive evidence for the Commission’s decision in any case. We fully support this rounded and holistic approach to merger assessment. In those cases where we observe relatively less quantitative evidence and analysis presented, this can reasonably be explained by the Commission and parties choosing to focus their limited resources and attention on those areas of evidence and analysis that are most likely to be decisive in the competitive assessment of the merger.

We do not consider that the Commission should take a more flexible approach to supply-side substitution in market definition. There will always be caveats around the weight that can be placed on market shares as an indicator of competitive harm. However, we believe that market shares within geographic markets that are defined on the basis of the Commission’s current Notice on market definition are likely to be more meaningful than would be shares within geographic markets which are widened – in contravention of the Commission’s Notice - on the basis of supply substitution by imports.

We do, however, find a number of areas in which we believe improvements could be made.

1. *Greater clarity that market definition provides a useful framework for competitive analysis, but is not an end in itself*

In our view, geographic market definition should not be seen as an end in itself, but rather as providing a useful framework for the competitive analysis of the merger. It should be used to identify a geographically coherent group of customers whose purchases are competed for by suppliers located in the same geographic area (and possibly also by suppliers located at a greater distance). Where market definition is relatively clear-cut and can be drawn to include those competitors, and only those competitors, that genuinely impose a significant competitive constraint on one another, then market shares and concentration indicators can potentially be useful indicators of the likely competitive effects of a merger, at least in homogeneous goods markets.

However, as is increasingly well recognised, requiring a clear dichotomy to be drawn in this way between firms which are inside and outside of the market can be misleading. Moreover, the precise geographic market definition adopted should not necessarily affect the final merger decision:

* + If geographic markets are drawn too narrowly, then this should not be a problem so long as the competitive assessment fully considers the competitive discipline provided by firms located outside the geographic market. This latter point is not just a theoretical possibility. In a number of individual markets affected by the mergers we have reviewed, the Commission does draw the geographic market relatively narrowly, but then considers that competitive constraints from outside the market will be sufficient to overcome any potential merger concerns.

55

* + Likewise, parties that successfully argue for a wider geographic market should not expect a guaranteed merger clearance, especially if they are close competitors within this wider market.

The evidence from some of the unproblematic markets in the decisions reviewed here suggests that the Commission recognises this intermediate and non-decisive role of market definition. Nevertheless, it is clear from the mergers we have reviewed that the merging parties still put substantial effort into the market definition process. This is typically to argue for wider markets, presumably on the basis of an expectation that a merger is in fact less likely to be found to give rise to merger concerns in a wider geographic market in which the merging parties’ shares are lower.

We also note that the combined market shares of the merging parties are relatively high across all of those markets found to give rise to merger concerns in the cases reviewed.52 In such a context, it is perhaps hardly surprising that parties may not notice the high market share markets that do not raise concerns, and perceive that market shares, and by implication market definitions, matter disproportionately.

We conclude that greater clarity about the intermediate and non-decisive role of market definition within the merger assessment process would reduce the attention paid to this issue, allowing for a greater focus by both parties and the Commission on what really matters: the competitive assessment.

1. *Greater clarity that supply substitution by imports will not be accepted as an argument for widening the relevant geographic market*

Under the Commission’s Notice on market definition, supply substitution should be used to widen geographic markets only where most suppliers are active across geographical areas and are able to switch production across them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. In the mergers we have reviewed, this is the Commission’s rationale for drawing wide market definitions in respect of HDDs (Western Digital/Hitachi), zinc concentrate (Glencore/Xstrata) and across the markets assessed in Alstom/Areva.

This EU approach is consistent with the US and UK merger guidelines, which are if anything even firmer that markets should be aggregated on the basis of supply substitution only as ‘a matter of convenience’ and where to do so will not affect the competitive assessment of the merger.

In our view, the Notice does not envisage a situation in which the potential for imports to come into a geographic area and constrain competition would result in the geographic market being widened to include the source of such imports. Nor should it. A wider geographic market would include within it sales to foreign customers located in the same region as where the foreign suppliers are located, even though the conditions of competition facing those customers may be very different. The competitive conditions in a

52 At least [30-40]% (in the case of external HDDs in Western Digital/Hitachi), and substantially higher in most

of the other SIEC markets/cases.

56

market are better understood by adopting a narrower market definition whilst giving fully appropriate weight to imports as a competitive constraint.

Nevertheless, we note that evidence on imports is employed by parties to argue for a wider market in several of the mergers reviewed. This is hardly surprising given that, in these cases, the shares of the merging parties would be substantially lower in a wider geographic market that included the source of the imports.

In none of these cases does the Commission in fact accept the argument, but the decisions do devote considerable space to assessing the evidence on this point in some detail.

Moreover, we also identify some wording within the cases reviewed that appears to indicate the Commission might be willing to accept the argument if the evidence was strong enough. For example, in Arsenal/DSP, the Commission states explicitly:

*“While it is accepted large international trade flows of benzoic acid are consistent with a hypothesis that there may be a global market for benzoic acid, the key question is whether these trade flows can discipline the EEA producers in the event of price increases.”* (Para 49)

Likewise, in both INEOS/Solvay and Glencore/Xstrata, the Commission considers empirical evidence on the relationship between imports and relative prices in different geographic areas within its analysis of geographic market definition.

This sort of wording and use of evidence suggests that, if imports were sufficient to keep EEA prices down, the Commission would be open to defining a global market. This would in turn mean that all global suppliers would be included as competitors, even if most of these global suppliers were in fact unwilling to supply EEA customers.

We were unable to conclude – on the basis of the mergers reviewed – whether the Commission has in fact ever agreed to the widening a geographic market on the basis of imports in this way. However, the available evidence suggests that it has not necessarily ruled out doing so. We also note that the Notice identifies certain evidence associated with imports as being relevant to geographic market definition, such as “past evidence of diversion of orders to other areas”. This potentially further reduces clarity on this issue.

In our view, greater clarity in the Commission’s approach would allow the Commission more easily to reassign the arguments and evidence received in this area and place it alongside other relevant evidence in the competitive assessment. This would also reduce the incentives of parties to make these sorts of arguments and in doing so reduce some of the existing duplication between the geographic market definition and competitive assessment sections of the written decisions.

1. *Consideration to the approach of calculating capacity shares to include ‘swing capacity’ and ‘rapid entrants’ including from outside the geographic market*

While we believe the Commission is right not to widen geographic markets on the basis of supply substitution by imports, we note that the US merger guidelines propose the inclusion of both rapid (potential) entrants and more general swing capacity within the calculation of capacity market shares. These are suppliers, or supply capacity, that would quickly come into the market if there was a small price incentive.

As part of our review, we examined the ten case studies to see whether and how capacity shares were used. We found that capacity shares were presented in three cases:

57

Outokumpu/Inoxum, INEOS/Solvay and SSAB/Rautaruukki. However, in none of these cases was potential swing capacity from imports included. Indeed, even the capacity lying outside the relevant geographic market that was *currently* being used to supply imports was not included. While capacity shares excluding imports may tell us something about the competitive position of the merging parties vis-à-vis other local suppliers within the narrowly defined geographic market, they do not tell us anything about the extent of competitive constraint arising from potential (or actual) imports.

We believe the Commission should give further consideration to the possibility of incorporating capacity shares from outside the geographic market, in the form of rapid entrants or swing capacity, within its competitive assessment. We recognise, however, that this is not necessarily a straightforward empirical exercise. It requires further thought and may depend on, *inter alia*, production technology, whether imports are independent or controlled by local distributors or producers, whether independent importers are few or fragmented, and whether their European sales are considered marginal or central to their core interests. In order to develop its thinking in this area, the Commission may be able to learn from existing practice in the US.

1. *Greater willingness to define geographic markets on the basis of isochrones or isodistance frontiers*

On the basis of the cases reviewed, we observe that the Commission’s geographic market definition is nearly always a Member State, or a group of Member States or wider. It is very rarely smaller than a Member State and we have not seen (and are not aware of) any examples of a cross-border but sub-Member Stage region. On the other hand, where transport costs are a significant determinant in constraining the size of the geographic market, we should naturally consider that markets might be defined on the basis of isochrones or isodistance frontiers.

We note that it is common practice for a National Competition Authority investigating a retail merger to draw a boundary around a merging firm’s location such that it encloses, say, 80% of its customers, and then consider competition between firms within this boundary.

Where there is potential for firms to price discriminate across large customers, isochrones can potentially also be drawn around those customers to define the set of realistic competitors for that customer’s business.

We recognise that isochrones are going to be of more natural relevance in the local sub- national markets that are often the focus of NCAs. We also note that the international companies that are more usually investigated by the Commission may not hold their data in way that would allow isochrones to be calculated or market shares to be calculated within them. Member States may then provide the best available approximation in order to progress to the competitive assessment. As is discussed above, however, the Commission appears to reject the use of isochrones in the case of INEOS/Solvay, despite consistent evidence from both competitors and customers about the extent to which both S-PVC and bleach might reasonably be transported. Instead, the Commission adopted geographic boundaries which followed national boundaries.

The Commission’s approach may be pragmatic from a legal or process perspective. However we have concerns about it from an economic perspective, at least in those cases where isochrones more properly represent the true geographic market. We would urge the

58

Commission to give further consideration to employing isochrones for geographic market definition, where justified. That said, we understand that Commission practice in this area may already be changing, and that it has recently employed isochrones for its geographic market definition in a number of recent mergers in the cement industry.

1. *A more formal methodology for the treatment of transport costs*

Transport costs are clearly relevant in a number of the cases reviewed, and indeed are found to be important in limiting geographic market definition in several. However, the way in which transport costs are discussed and analysed differs significantly across cases. They are compared variously with average selling price, gross margin, total cost or the difference in costs between domestic suppliers and potential imports.

To a large extent these varying approaches to assessing transport costs may reflect the evidence available. However, it also seems evident that there is no agreed economic framework being used for this analysis. For example, transport costs are not compared with the 5-10% increase in price that might be used in respect of a hypothetical monopolist test. Further thinking around a suitable methodological framework may be merited in this area.

1. *Greater care in appropriately defining separate upstream manufacturing and downstream distribution markets, and greater clarity about the role of vertical integration in geographic market definition*

Distribution systems are often national, rather than multinational, and cater for local demand idiosyncrasies and customer requirements for reliability, frequency and flexibility of delivery and payment terms. They can also be subject to economies of scale and scope and are not easily replicated. The importance of such local distribution systems is a key factor in defining geographic markets in a number of the mergers reviewed. We found two issues worth highlighting in this context.

First, the potential for substitution between upstream suppliers – and even the understanding of who these suppliers are – may be very different between end customers and distributors. In the cases reviewed, the Commission places weight on customer responses which emphasise the need to source their supplies locally. Yet in some cases, it is not obvious whether customers would even know if a product was sourced locally, only that they received it from a local distributor. We would recommend that the Commission is careful, wherever possible, to consider competition at the various different levels of the supply chain separately when assessing mergers. In the cases of SSAB/Rautaruukki and Inoxum/Outokumpu, the Commission did address this issue directly and carefully defined an upstream market for steel production and downstream markets for steel distribution.

However, this was not done in Arsenal/DSP despite distributors apparently playing a significant role in the relevant market.

Second, the Commission could usefully be more explicit in how the extent of vertical integration fits into its assessment of geographic market definition. In the case of SSAB/Rautaruukki, the Commission found the upstream geographic market to be the Nordic Cluster, effectively on the basis that this was the set of Member States where both merging parties were vertically integrated into downstream distribution, and into which non-Nordic producers were unable to compete due to lack of access to national distribution. This approach means that the geographic market depends on the vertical structure of the

59

merging firms and can change with merger remedies (e.g. divestment of a distribution system). An alternative approach would have been to accept a wider upstream market and focus the competitive assessment directly on the potential monopolisation of the distribution system.

Based on specific issues arising in some of the individual cases examined, we also make a small number of further recommendations for improvement should these issues arise in future cases.

1. *Greater clarity that there is no ‘magic number’ for existing import levels within a market to overcome merger concerns*

In one of the cases reviewed (Arsenal/DSP), we were surprised to find the Commission making the following statement within its decision.

*“The [25-45]% market share held by Chinese producers of sodium benzoate constitutes a constraint that would discipline the merged entity post-transaction should it intend to increase or increased prices above a competitive level. In previous merger cases, it has been considered that import market shares lower than 25% would already constitute a constraint on the entity resulting from the transaction.”*

While we have no reason to believe that the Commission has an established policy position on this, we are concerned that statements of this sort could be read as suggesting that the competitive assessment will always find that the merger raises no concerns if imports comprise at least 25% of the market.

We would strongly argue against any such rule. Just because imports are capable of serving a certain share of the market currently does not imply that they are necessarily capable of expanding further, at limited cost, to overcome any merger concerns. Greater clarity from the Commission that there is no such ‘magic number’ would be helpful.

1. *Greater clarity around the ‘windows of time’ concept*

In another of the cases reviewed (Outokumpu/Inoxum), the Commission finds that the attractiveness of importing from Asia into the EEA depends on a variety of economic factors such as the nickel price and the currency exchange rate. As these fluctuate, there will be ‘windows of time’ within which imports cannot exercise a competitive constraint on European producers, and thus within which the merger raises concerns.

This is an interesting concept because the thinking seems powerful, but this sort of argument could presumably hold in other markets too. Indeed all international trade is typically affected by currency fluctuations. However, the approach raises a number of questions. For example, how frequent do such windows of time need to be, and how long do they need to last, in order to be considered relevant? The Commission could usefully develop its thinking around this concept and provide greater clarity about when and how it might be expected to apply.

60

ADOPTED 8 November 2011

**EU Merger Working Group**

**BEST PRACTICES ON COOPERATION BETWEEN EU NATIONAL COMPETITION AUTHORITIES IN MERGER REVIEW**

1. **Introduction**
   1. The national competition authorities of the EU who have responsibility for merger review (“NCAs”) operate in compliance with different national legal systems. They believe, however, that it is desirable to cooperate in the review of some mergers which meet the requirements for notification or investigation in more than one Member State (“multi-jurisdictional mergers”), and have therefore decided jointly to publish an agreed set of Best Practices on Co-operation in Merger Review.
   2. This document, which has been drawn up by the EU Merger Working Group,1 sets out the Best Practices which the NCAs, to the extent consistent with their respective laws and enforcement priorities, aim to follow when they review the same merger transaction. It also sets out the steps that merging parties and third parties are encouraged to take in order to facilitate cooperation between NCAs. Cooperation extending beyond the existing ECA Notice system2 is limited to NCAs who are reviewing the same merger transaction (“the NCAs concerned”). It is not intended that cooperation should provide a forum whereby NCAs not concerned will be involved in the review of a specific case.3
   3. This document is intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is
2. The EU Merger Working Group (“the Working Group”) was established in Brussels in January 2010. It consists of representatives of the European Commission and the national competition authorities (“NCAs”) of the European Union (“EU”) together with observers from the NCAs of the European Economic Area (“EEA”). The objective of the Working Group is to foster increased convergence and cooperation between the EU merger jurisdictions in order to ensure effective administration and enforcement of merger control laws.
3. The European Competition Authorities ("ECA") Notice system is an information system among the

NCAs of the EU and EEA EFTA States (“ECAs”). An ECA Notice is a notice which is distributed to all other ECAs by the first NCA to be notified of a multi-jurisdictional merger. It sets out the names of the merging parties, the sector/industry concerned and/or products concerned, the date of the notification, the name of the case handler, and the other member states concerned. See *ECA procedures guide on the exchange of information between members on multi-jurisdictional mergers* (2001);

Available for example on [http://ec.europa.eu/competition/ecn/eca\_information\_exchange\_procedures\_en.pdf.](http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf)

1. Some cooperation may, however, be necessary in order to determine the NCAs concerned. NCAs

may also wish to consult non-involved NCAs about past experiences with similar mergers both as regards the substantive assessment and remedies, and these Best Practices do not preclude such discussions. For example, it may be helpful to exchange non-confidential information when assessing the effectiveness of a remedy, e.g. if the remedy concerns facilities or assets located in another Member State that is not reviewing the merger.

intended to create new rights or obligations which may fetter that discretion.

1. **Objectives of cooperation**
   1. Cooperation is beneficial for the NCAs concerned, for the merging parties themselves and for third parties. The Best Practices are intended to provide clarity on how cooperation among NCAs will operate in multi-jurisdictional merger cases. Where the merging parties provide full and consistent information to NCAs concerned, cooperation can reduce burdens on merging parties and third parties by facilitating, where possible, the alignment of timing and the overall efficiency, transparency, effectiveness and timeliness of the merger review processes.
   2. In cases where serious concerns or difficult analytical issues arise, cooperation can be invaluable in helping to reach informed and consistent or at least non-conflicting outcomes. In such cases, cooperation will ensure that NCAs are in a better position to exchange views on, for example, possible conceptual frameworks for the assessment of the transaction and theories of competitive harm, types of empirical evidence and so on.
   3. Cooperation is also beneficial both for the NCAs concerned and for the merging parties in relation to any remedial action which may be necessary. Remedies in a merger that is reviewable in more than one jurisdiction may differ across jurisdictions depending on the competition concern identified in each one; indeed, remedies may not be necessary in every jurisdiction. Nevertheless, where the merger affects a market or markets in more than one jurisdiction, a remedy accepted in one jurisdiction may have an impact in another jurisdiction (see section 3.2(iii)). Cooperation can therefore contribute to avoiding inconsistent remedies and obtaining those that are more coherent.
   4. These Best Practices are intended to promote the achievement of all these ends.
2. **Scope of application of Best Practices**
   1. These Best Practices address cooperation in multi-jurisdictional merger cases. While it is always useful for NCAs to provide basic case information4 to each other in merger cases which are notifiable in more than one Member State, further cooperation will not be necessary, or even efficient, in the case of every multi-jurisdictional merger. This is particularly the case where it is clear during the early stages of an investigation that the merger does not raise any significant competition or procedural issues in any Member State or that it does so only in one Member State, or where such issues are not decisive for the outcome of any of the different merger reviews. Close cooperation is not an end in itself: its benefits depend on the specific circumstances of each case.
   2. Where multi-jurisdictional mergers raise similar or comparable issues in relation to jurisdictional or substantive questions, the NCAs

4 See model ECA notice (cf. Fn 2 above) as agreed in the *ECA procedures guide on the exchange of information between members on multijurisdictional mergers* (2001); available for example on [http://ec.europa.eu/competition/ecn/eca\_information\_exchange\_procedures\_en.pdf.](http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf)

2

concerned will decide on a case-by-case basis whether cooperation may be necessary or appropriate5. For example:

1. Cooperation may assist the NCAs in forming a view as to whether a transaction qualifies for notification or investigation under merger control laws in their respective jurisdictions. It is noted that although jurisdictional rules and practices may differ across jurisdictions, cooperation may assist the NCAs in reaching an informed view.
2. Cooperation may assist the NCAs in relation to mergers which may have an impact on competition in more than one Member State, when markets affected by the transaction cover more than one Member State or when a merger affects national or sub-national markets in more than one Member State, if such national or sub- national markets are the same or similar from the product standpoint.
3. Cooperation may also be of value in relation to mergers where remedies need to be designed or examined in more than one Member State, such as in situations where the same remedy is designed to address competition issues in different Member States or where one remedy affects the effectiveness of a different remedy in another Member State.
   1. These Best Practices are without prejudice to the existing guidance on the system of reattribution of cases between the Member States and the Commission (see the Commission’s referral notice and ECA’s Principles on the application of Art. 4(5) and 22 of Regulation 139/2004).6 Nevertheless, the enhanced cooperation recommended in these Best Practices may also facilitate the smooth functioning of the reattribution mechanisms set out in Regulation (EC) 139/2004. In particular, where NCAs are contemplating an Article 22 referral request, contacts between them can facilitate the referral, and, if done before notification, can also assist merging parties in forming a view whether it is appropriate for them to speed up the referral process by themselves making an Art. 4(5) referral request (see further the description of pre-notification contacts in section 5.5).
4. **Role of National Competition Authorities**
   1. In all cases that relate to a merger transaction that is reviewable in more than one EU Member State, the NCAs concerned will inform the other NCAs by means of the existing ECA Notice system, which
5. Although the NCAs concerned will keep under review throughout the merger control process the need for cooperation, it will sometimes be possible for them to form a view in this regard at an early stage of the process, i.e. during pre-notification contacts (where such contacts take place) or following notification.
6. Article 4(5) provides for referral of cases from the Member States to the Commission **prior** to

notification with the purpose of providing a "one-stop-shop" review. Article 22 provides for referral from the Member States to the Commission **after** notification where it is considered that the Commission is better positioned to investigate a merger. See also Commission Notice on Case Referral in respect of concentrations (OJ C 56, 05.03.2005, p. 2-23). See ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the Merger Regulation (2005). Available for example on

<http://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf>

3

involves the exchange of basic non-confidential case information after a notification in such a multi-jurisdictional merger case has been received.7

* 1. To facilitate cooperation, the NCAs concerned will aim to update the information contained in the ECA notice by informing the other NCAs about any decision to commence second phase proceedings/in-depth investigations, and any final decision, including a decision with remedies.
  2. In cases where closer cooperation is necessary or appropriate (see paragraph 3.2 above), the NCAs, having due regard to confidentiality issues (see section 6 below), will aim to cooperate in particular in the following ways:
     1. The NCAs concerned will liaise with one another and keep one another appraised of their progress at key stages of their respective investigations. The key stages will vary depending on the procedural framework of each NCA concerned. The NCAs concerned will keep each other informed of the outcome of the first phase investigation, including, where relevant, the intention to open an in-depth investigation, and the outcome of the in-depth investigation. The NCAs concerned will also keep each other appraised of the launch and progress of any remedies discussions, if not conducted jointly.
     2. Where it is helpful to do so, the NCAs concerned may discuss their respective jurisdictional and/or substantive analyses. Where necessary, having regard to the possible effects of the transaction on the national territories of the NCAs concerned, such discussions may relate to issues such as market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories. NCAs concerned will also, where it is helpful to do so, exchange views on necessary remedial measures or submitted remedies.

1. **Role of Merging Parties**
   1. Effective cooperation between NCAs requires the active assistance of the merging parties at all stages of the review process, both as regards the jurisdictional and/or substantive review and, where required, the assessment of remedies.
   2. Parties to merger investigations play an important role with regard to cooperation between the NCAs concerned. They can contribute significantly to the alignment of the review proceedings in different Member States, taking into account, among other things, procedural requirements and review periods. Such alignment will be of benefit both to merging parties and to NCAs.
   3. Therefore, where a transaction is expected to fulfil the requirements for notification or investigation in more than one jurisdiction, the merging parties are encouraged, unless it is clear and obvious from the

7 See model ECA notice as agreed in the *ECA procedures guide on the exchange of information between members on multijurisdictional mergers* (2001); Available for example on [http://ec.europa.eu/competition/ecn/eca\_information\_exchange\_procedures\_en.pdf.](http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf)

4

outset that paragraph 3.2 above does not apply, to contact each of the NCAs concerned as soon as practicable and provide them with the following basic information:

1. The name of each jurisdiction in which they intend to make a filing;
2. The date of the proposed filing in each jurisdiction;
3. The names and activities of the merging parties;
4. The geographic areas in which they carry on business;8
5. The sector or sectors involved (short description and/or NACE code).
   1. It is important to note that the provision of this information by the parties will not of itself be a trigger for cooperation among the NCAs concerned. That will depend rather upon whether the case is one where cooperation is necessary or appropriate, as set out in paragraph

3.2 of these Best Practices. However, it will assist the NCAs concerned to decide at an early stage whether there might be a need for cooperation in the particular case.

* 1. Depending on the circumstances of the case it may be possible to provide much of this information at the pre-notification stage. For this purpose, and where it is permitted by law, it may be helpful for merging parties and the NCAs concerned to organize pre-notification contacts as early as possible. Such contacts can assist the parties and the NCAs concerned to align as far as possible the timing of parallel proceedings and can, ultimately, contribute to the reduction of the overall burden that falls on merging parties in the course of a multijurisdictional merger. It may at times, where circumstances permit, be useful for the merging parties and the NCAs concerned to engage in joint pre-notification contacts.
  2. Merging parties have a crucial role in helping NCAs to ensure that remedies in different Member States do not lead to inconsistent or untenable results. As already stated above, remedies in a merger that is reviewable in more than one Member State may differ across Member States depending on the competition concern identified in each one; indeed, remedies may not be necessary in every Member State. Nevertheless, a remedy accepted in one Member State may have an impact on the effectiveness of remedies targeted at competition problems in another Member State. It is therefore clearly in the interest of the merging parties to coordinate the timing and substance of remedy proposals to the NCAs concerned, so as to ensure coherent remedies and to avoid inconsistent remedies. In certain cases, where circumstances permit, it might be appropriate for merging parties and the reviewing NCAs to engage in joint discussions on proposed remedies.

1. **Confidential information**
   1. It will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. Therefore, while a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality

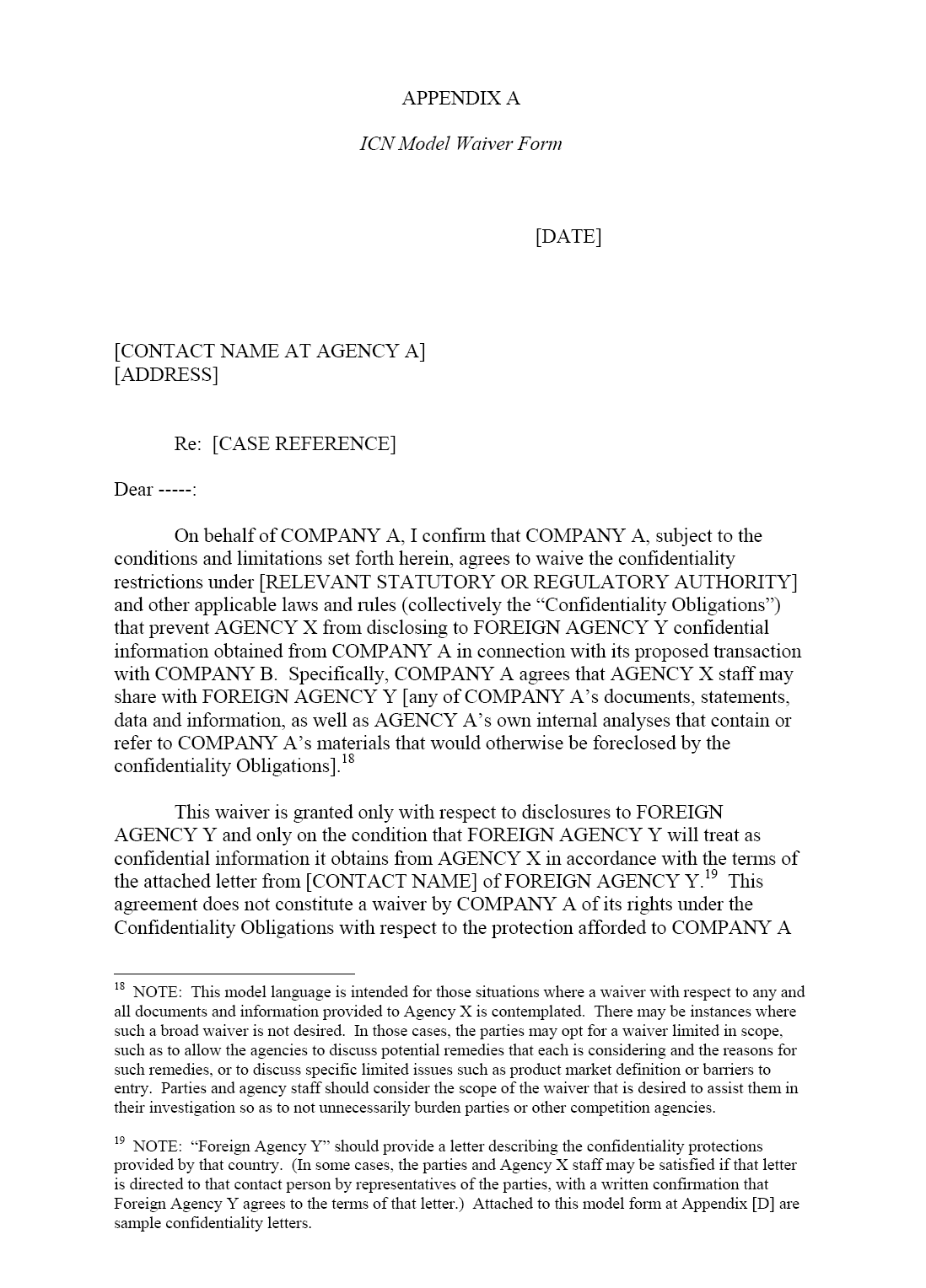
8 The phrase “carry on business” does not include a situation where an undertaking is merely registered in a particular place.

5

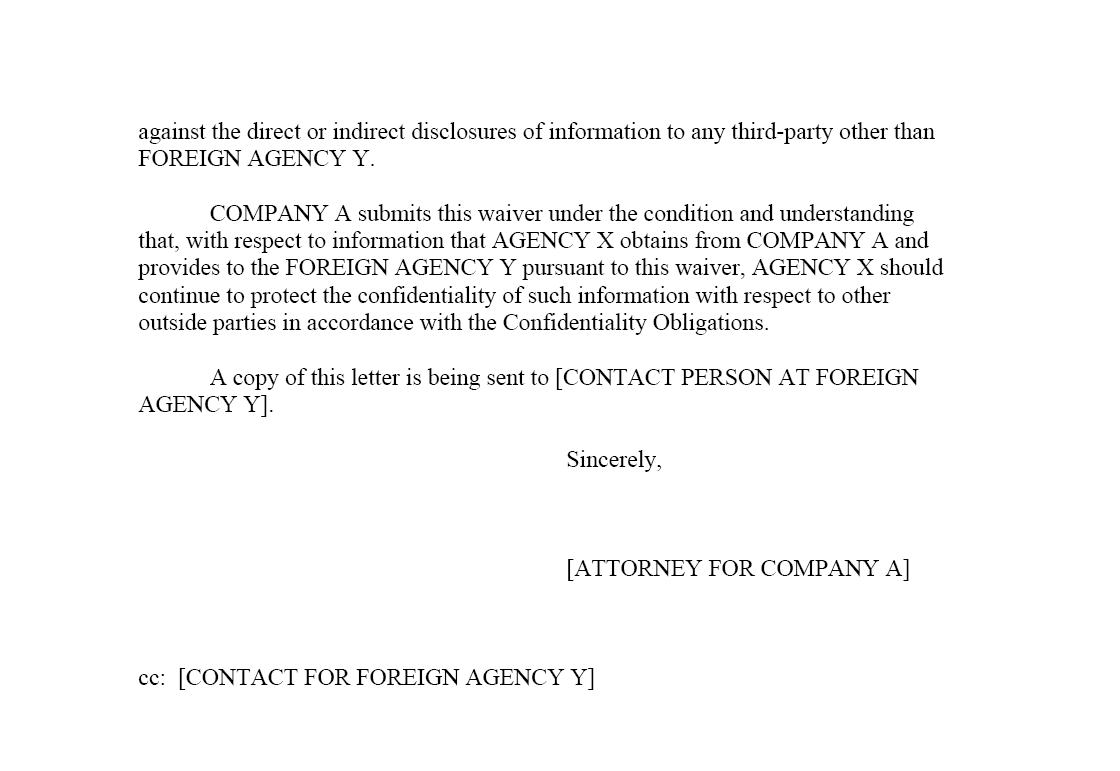
executed by merging parties can enable more effective communication between the NCAs concerned regarding evidence that is relevant to the investigation.

* 1. For that reason, the merging parties are encouraged to be proactive and to provide waivers of confidentiality to all NCAs concerned, including, where appropriate, at the pre-notification phase. The merging parties are encouraged to use the ICN model waiver provided in the Annex to these Best Practices.
  2. For the same reasons, where appropriate, third parties are also encouraged to provide waivers of confidentiality to all NCAs concerned. Third parties are also encouraged to use the ICN model waiver provided in the Annex to these Best Practices.
  3. NCAs are fully aware that it lies within the discretion of the merging or third parties whether to provide a waiver. The scope of the waiver to be provided may be adapted to the specific circumstances of the case, but is essential that the waiver should fulfil the purpose of allowing for an effective information exchange between the NCAs concerned.
  4. Where a waiver has been provided the NCAs concerned will share the information covered by the waiver without further notice to the parties. NCAs will discuss with each other, prior to any exchange of confidential information as provided for in Sections 4 and 5, how it may best be protected. Confidential information and business secrets are protected under national law in all Member States.
  5. Confidential information exchanged on the basis of a waiver will not be used for any purpose other than the review of the relevant merger, unless the national law provides otherwise (see paragraph 6.5).

6



7



8

**US-EU Merger Working Group**

**BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS**

This document sets forth best practices which the United States federal antitrust agencies and the Commission of the European Union will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they simultaneously review the same merger transaction.1 A number of these best practices already are routinely employed informally between the US and EU. With that in mind, this statement of best practices seeks to set out the conditions under which trans-Atlantic inter-agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice.

**Objectives**

1. In today’s global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.2 Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies’ respective remedial objectives.
2. These best practices are designed to further enhance cooperation in merger review between the United States Department of Justice (“DOJ”) or the U.S. Federal Trade Commission (“FTC”) (hereafter referred to as the "US"),3 on the one hand, and the European Commission (hereafter referred to as the “EU”), on the other. They are intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.
3. This document is intended to set forth an advisory framework for interagency cooperation. The agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.
4. Cooperation between the US and EU agencies is based primarily upon the 1991 US-EC Agreement on the Application of their Competition Laws, a principal purpose of which is to avoid conflict in the enforcement of their antitrust laws.
5. This document assumes that, consistent with past practice, only one US agency – either the DOJ or FTC – reviews each pertinent transaction and, accordingly, coordinates with the EU regarding that transaction.

- 1 -

1. Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties. In particular, cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, coordination between the agencies is most effective when the investigation timetables of the US and the EU run more or less in parallel so that the investigative staffs of each agency can engage with one another and with the parties on substantive issues at similar points in their investigations. The agencies intend, therefore, to work cooperatively with one another and with the parties, as appropriate, to promote such timetable coordination. At the same time, the EU and US agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies’ recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.

**Coordination on Timing**

1. Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. To that end, the agencies should endeavor to keep one another apprised of important developments related to the timing of their respective investigations throughout the course of their reviews of merger transactions subject to review by the US and the EU.
2. In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced. At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU, suggested timeframes for the submission of documents or other information, and, where appropriate, the prospect of a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement (in the EU). The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction.

**Collection and Evaluation of Evidence**

1. In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations and keep one another apprised of their progress. This may include sharing publicly available information and, consistent with their confidentiality obligations, discussing their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence

- 2 -

needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, also may be discussed. The agencies also may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdictions' laws and regulations.

1. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid divergent analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the announcement of a transaction that requires review by the US and EU, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers, providing sample waiver letters if necessary. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint EU/US agency interviews with party executives and joint conferences with the parties.
2. Similarly, waivers of confidentiality executed by third parties enable more complete communication between the reviewing agencies and with third parties and can reduce the investigative burden imposed on third parties. Where appropriate, the reviewing agencies may, therefore, request that third parties waive confidentiality, or simply request that third parties provide the same information divulged to one reviewing agency to the other. The agencies may also encourage joint interviews and conferences with third parties, where appropriate and feasible.

**Communication Between the Reviewing Agencies**

1. The reviewing agencies will, via liaison officers or otherwise, contact one other upon learning of a transaction that appears to require review by both the US and EU.
2. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables (see Section II above); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties.
3. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, the relevant DOJ Section Chiefs/FTC Assistant Directors and the EU Merger Task Force Unit Head (or their designees) should seek to agree on a tentative timetable for regular consultations between them on the progress of their investigations. The timetable for consultations will take into account the nature and timing of the transaction. Consultations normally should occur: (a) before the US closes its investigation without taking action; (b) before the US issues a second request; (c) no later than three weeks following the initiation of a Phase I investigation in the EU; (d) before the EU

- 3 -

opens a Phase II investigation or clears the merger without going to Phase II; (e) before the EU closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the EU anticipates issuing its Statement of Objections; (f) before the relevant US DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or the FTC Bureau Director; and (g) at the commencement of remedies negotiations with the merging parties. Discussions may also take place at any other point the DOJ Chiefs/FTC Assistant Directors and the EU Unit Head find useful.

1. In some cases, consultations may be appropriate between senior competition officials for the EU (the Competition Commissioner, Director General for Competition, or Deputy Director General for Mergers, as appropriate) and their counterparts at the Antitrust Division of the Department of Justice (the Assistant Attorney General for Antitrust or the relevant DOJ Deputy Assistant Attorney General (“DAAG”), as appropriate) or the Federal Trade Commission (the Chairman, Director of the Bureau of Competition, or Deputy Director of the Bureau of Competition, as appropriate). In such cases, consultations are likely to be particularly useful: (a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or FTC Bureau Director; and

(d) prior to a decision by the Antitrust Division or FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger. Consultations may also take place between their economic counterparts. These officials may find it useful to confer at other points in the investigation as well.

1. Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, the US and EU, as appropriate, may attend certain key events in the other’s investigative process. These include (a) the EU’s Oral Hearing and (b) the merging parties’ presentations to the Assistant Attorney General or Deputy Assistant Attorney General or to the Director or Deputy Director of the Bureau of Competition at which the parties present their arguments prior to the agency’s decision whether to take enforcement action.

**Remedies/Settlements**

1. The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties. The agencies should, therefore, advise that the parties consider coordinating the timing and substance of remedy proposals being made to the EU and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation.

- 4 -

1. Consistent with their confidentiality and/or non-disclosure obligations, the reviewing agencies should seek to keep one another informed of remedy offers being considered and of other relevant developments with respect to remedies to the extent they may impact the other jurisdiction’s review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers***,*** on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees.

- 5 -



**WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS**

1. **Introduction**

Pursuant to its mandate to examine procedural aspects of multijurisdictional merger review, the ICN’s Notification and Procedures Subgroup has undertaken a project concerning the use of waivers of confidentiality in merger investigations.

Confidentiality waivers are related to several provisions of the ICN’s Guiding Principles and Recommended Practices for merger review. The Guiding Principles provide that reviewing jurisdictions should maintain the confidentiality of information obtained in their investigations.1 Another Guiding Principle urges jurisdictions reviewing the same transaction to “engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.”2 A further, stated goal of coordination is consistent, or at least non-conflicting, outcomes.3 In furtherance of that goal, the Recommended Practices provide that “competition agencies should encourage and facilitate the parties’ cooperation in the merger coordination process,” through, *inter alia*, the use of voluntary confidentiality waivers and the development of a basic waiver model that may be modified to suit specific circumstances.4

Confidentiality laws typically limit the type of information that reviewing agencies can share with one another. When a merger is subject to review by more than one agency, the merging and other interested parties may conclude that it is in their interest to waive confidentiality protections because they believe this may increase the likelihood of consistent analyses and compatible enforcement decisions. Waivers typically allow the agencies to share parties’ information and to discuss the

* 1. ICN Guiding Principles For Merger Notification and Review, no. 8, [http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm.](http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm)
  2. ICN Guiding Principles For Merger Notification and Review, no. 6, [http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm.](http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm)
  3. ICN Recommended Practices for Merger Notification Procedures, X. A. Comment 2, [http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.](http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf)
  4. *Id.*, X.D. *See also* The United States’ International Competition Policy Advisory Committee’s Final Report in 2000 that recommended, *inter alia*, that “agencies should develop standardized (but not inflexible) and transparent templates for waivers.” The Report’s Appendix 2-D and E contained model waivers and a framework for policy statements it recommended to be issued by antitrust enforcement agencies regarding waivers of confidentiality. [http://www.usdoj.gov/atr/icpac/finalreport.htm.](http://www.usdoj.gov/atr/icpac/finalreport.htm)

1

information while maintaining its confidentiality with respect to other interested parties and the public.5

Confidentiality waivers can facilitate cooperation among the agencies and coordination of their investigations and enforcement decisions. Coordination is particularly appropriate and useful when the reviewing agencies have common enforcement interests, such as in cases in which their investigations focus on the same markets. Waivers of confidentiality enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. Waivers, however, are not appropriate in every case subject to concurrent review. In some cases, it is clear from the outset of an investigation that the case does not raise competition issues common to each reviewing agency.

In any case, the decision whether to grant a waiver is in the sole discretion of the parties and competition agencies should not pressure parties to provide a waiver.6

In recent years, merging and other interested parties have been increasingly willing to grant waivers. As more jurisdictions have adopted merger review regimes and transactions increasingly cross borders, agencies have had greater opportunities to cooperate. Experience with waivers is greatest among jurisdictions that have had the most opportunities to cooperate and coordinate merger investigations, particularly Canada, the European Commission, several EU Member States, and the United States. Several of the agencies in these jurisdictions have developed “model” waiver forms that provide flexibility as to scope and conditions, reflecting the voluntary nature of the instrument.

Drawing on these agencies’ experiences, this paper identifies and discusses issues underlying the rationale, content, and use of waivers, and offers several model waivers of confidentiality. These forms are provided as a reference for parties and for agencies, especially agencies with little or no experience with waivers; and they are intended to be applied to particular cases with a degree of flexibility, reflecting the voluntary nature of the instrument. Appendix A is a model waiver form developed by the ICN Notification and Procedures Subgroup. Several of the agencies with experience using waivers also have developed model waiver forms for their own use that are attached at Appendices B-E as samples that illustrate how those agencies have dealt with certain issues discussed later in this paper in Section IV.B-E.

* 1. Except where explicitly stated otherwise, “sharing” means the transfer of parties’ information from one competition agency to another as well as discussions between the agencies concerning that information.
  2. ICN Recommended Practices for Merger Notification Procedures, X. D. Comment 2, [http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.](http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf)

2

1. **Rationales for Waiving Confidentiality**
2. **To facilitate information sharing among reviewing agencies**

Many cross-border mergers entail review of the same or similar competitive issues in more than one jurisdiction. Cooperation, including the sharing of information, among reviewing agencies permits more complete communication between the reviewing agencies and, where appropriate, the coordination of their respective investigations with the aim of avoiding conflicting outcomes.7

However, merger review laws typically require enforcement authorities to maintain the confidentiality of information obtained from the merging and other interested parties. Such provisions typically cover all information the merging parties submit, including their pre-merger notification form and appendices, written responses to inquiries, oral statements, documents, and voluntary submissions (such as settlement proposals). Confidentiality laws also typically protect information obtained from third parties. However, they may differ in the extent of the protection provided. For example, some laws provide more protection for business or trade secrets. Some statutes have been interpreted to require that confidentiality be maintained even as to the existence of certain information provided. Some statutes, however, also provide for disclosure of, or access to, such information in certain circumstances, such as when a reviewing agency initiates formal adjudicative or administrative proceedings;8 for the purpose of exercising the authorities’ functions;9 or to share with other law enforcement authorities or public bodies pursuant to reciprocal arrangements or when other conditions apply.10 This paper will refer to information protected by such rules as “confidential business information.”11

* 1. The OECD Recommendation of 1995 and formal inter-governmental enforcement cooperation agreements exhort the parties to, as the OECD Recommendation states, “supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose,” subject to the obligation to maintain the confidentiality of the information that is received. <http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/D486C0CC6E730755C1256F7F0071378>A?OpenDocument.
  2. *See, e.g.*, the U.S. Hart-Scott-Rodino Act, 15 USC 18a(h); the EC Merger Regulation (ECMR), Art. 18(1) & (3).
  3. For example, section 29 of Canada’s Competition Act enables its competition authority to share information, including confidential information, if this would advance its law enforcement mission. Similarly, the United Kingdom’s Enterprise Act 2002, §§ 241-242, permits the U.K. authorities to disclose such information for the purpose of exercising their own functions or for the purpose of facilitating the functions of other public bodies, subject, in either instance, to considering the effect of such disclosure on the public interest, individuals, or firms.
  4. Some jurisdictions have laws that permit sharing confidential information with other law enforcement authorities, subject to reciprocity and/or other conditions; *see, e.g.*, Australia’s Mutual Assistance in Business Regulation Act of 1992; the U.S. International Antitrust Enforcement Assistance Act of 1994 (IAEAA); the Netherlands’ Competition Act of 1997, Article 91; France’s Commercial Code of 2003, Article L462-9. This paper does not cover the circumstances under which provisions such as these might be used to share information in multijurisdictional merger investigations in the absence of a waiver.
  5. In addition to publicly-available information that the agencies are free to share, agencies possess, and develop during the investigation, relevant information that they are empowered, but not

3

A waiver of confidentiality enables an agency to share the submitter’s confidential business information with another reviewing agency, facilitating joint discussion and analysis. From the agencies’ perspective, sharing information can increase the quantity and quality of the information on which to base their decisions, leading to more informed decisions and effective coordination between the agencies, promoting convergence, minimizing the risk of conflicting outcomes, and expediting merger review. For the merging parties, waivers can enable each agency to benefit from the additional information and analytical insights of the other, avoid duplicative information production, and promote the adoption of efficient remedies.

1. **To expedite proceedings, avoid conflicts, and promote convergence**

Sharing merging parties’ information is not an end in itself, but rather part of a strategy and effort by the merging parties and the reviewing agencies to coordinate concurrent merger reviews. Sharing can enable reviewing agencies: to identify more quickly enforcement issues of mutual interest and to discard those that do not indicate a need for enforcement action; to evaluate the relative credibility of evidence relating to the principal issues in the case; to reach well-informed conclusions on the elements of the case (market definitions, assessment of competitive effects, and evaluation of other relevant factors such as efficiency claims, entry, etc.); and to aid coordination in choice of remedy as well as to avoid conflicting remedial measures. All of these factors can benefit both parties and agencies.

The free flow of relevant investigatory information among the jurisdictions considering the same merger transaction, including information provided by parties and the agencies’ tentative analyses and conclusions, reduces the risk of incompatible outcomes. Conversely, the inability to discuss critical information provided by a party to one jurisdiction in confidence precludes the antitrust agency in that jurisdiction from communicating clearly and persuasively with other antitrust agencies reviewing the same transaction, which in some cases might increase the potential for incompatible analyses and, hence, results.

Experience also suggests that such waiver-facilitated coordination in individual cases builds confidence and contributes to analytical and procedural convergence not only in the particular case -- as to the agencies’ respective approaches and analyses of the credibility of evidence, the definition of relevant markets, the validity of various theories of competitive harm, and the propriety and efficacy of certain remedial measures -- but also in their general merger enforcement policies. Successful coordination breeds further future cooperation and overall convergence.

mandated (as in the case of confidential business information), to keep confidential. Such “confidential agency information” can include the fact that an investigation is taking place, the subject matter, and the agencies’ analysis of the matter, including market definitions, assessments of competitive effects, and potential remedies. Agencies typically share such information while maintaining its confidentiality outside the agency-to-agency relationship.

4

1. **Concerns Regarding Waiving Confidentiality**

Merging parties and interested third parties (such as competitors, suppliers, or customers of the merging parties) may be reluctant to waive confidentiality for a variety of reasons. Their reluctance may reflect a lack of confidence in an agency’s ability to maintain confidentiality.12 In particular, they may be concerned about the potential for unauthorized disclosure, whether to the general public or to third parties such as competitors, suppliers, or customers who may be in a position to profit from such access to the information.13 Agencies can allay these concerns by providing credibly secure physical storage for confidential information and other measures to assure the accountability of those with access to shared information.14 Successful experience with an agency in the handling of confidential information in actual cases is probably the most effective confidence-building measure.

Other factors that parties may take into account before deciding whether to waive confidentiality protection may be based on differences in laws -- for example:

(i) whether the recipient jurisdiction’s confidentiality laws cover information obtained from the sending jurisdiction; (ii) differences in the scope of substantive laws, specifically where the merger law of a recipient jurisdiction contains a broader scope of potential liability than that of the sending jurisdiction; (iii) differences in the scope of information gathered -- for example, involuntary, sworn statements (depositions) that the U.S. agencies are authorized to take, but that other jurisdictions may not; (iv) differences in the scope of legal privileges, such as those that apply to in-house counsel in the United States but not in the EU and some Member States; (v) possible “downstream” use of the shared information by the recipient jurisdiction for another law enforcement purpose; and (vi) the possible disclosure and use of shared information in subsequent private litigation stemming from the transaction.

* 1. *See, e.g.*, 1998 Fordham Corp. L. Inst. (B. Hawk ed. 1999), at 295-96, 325-26 (remarks of Calvin S. Goldman), and 332 (remarks of Jacques Bourgeois).
  2. These concerns may be heightened in a case in which the enforcement authority is an agency of a government that also has ownership interests in a business in the affected market. Cf., IAEAA, 15 USC 6207(a)(3).
  3. Some statutes specifically prohibit the disclosure of information acquired during the course of an investigation; *e.g*, ECMR, Art. 17(2);, Section 10 of the U.S. Federal Trade Commission Act (15

U.S.C. §50).

5

1. **Nature and Terms of Confidentiality Waivers**

This section addresses the substance of confidentiality waivers through discussion of a number of essential issues that have arisen through the actual use of waivers. The attached ICN model waiver form, like the sample agency forms from which it is drawn, addresses the scope of the waiver, provides assurances of confidentiality outside the specific waiver, and sets out any conditions (*e.g.*, obligations on the agencies). In addition, where it is instructive to consider how an agency has dealt with certain issues, references are made to specific provisions in the sample agency waiver forms appended hereto. As noted in the Introduction, the model waivers are intended as a reference for parties and agencies, especially those with little or no experience with confidentiality waivers.

1. **Voluntary nature**

A party’s decision to waive its confidentiality protection is purely voluntary.

Consequently competition agencies should not draw an adverse inference from a party’s decision not to grant a waiver. As stated in the EC-U.S. Best Practices on Cooperation in Merger Investigations:

[T]he . . . agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.15

1. **Scope**

The scope of a waiver, *i.e.*, the information it covers, may be determined by the waiving party when the waiver is given. As the use of waivers has evolved, for example, in investigations coordinated by U.S., Canadian, and European agencies, merging parties have increasingly granted a broad waiver at the outset of the investigation. In most cases, parties have waived confidentiality as to any documents, statements, data, and information they submit to an agency in the merger investigation. The model waiver in Appendix A is of that scope.

There may be cases, however, in which parties are reluctant to grant such a broad waiver, for example, when (i) the investigation is at an early stage where specific issues have not yet been identified or (ii) there are limited issues left in the investigation. In those instances, waivers might be limited in scope to evidentiary materials pertaining to specific issues such as product market or barriers to entry; or, where the parties and agencies have entered settlement negotiations, the waiver may be limited to potential remedies including the parties’ settlement proposals.

Waiving parties also have considered limiting the scope of the waiver to address concerns noted in Section III. For example, where there is an asymmetry in the information-gathering powers of coordinating agencies, some parties have

15 U.S.-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, [http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.](http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm)

6

considered limiting the scope of their waiver to exclude information in the possession of one agency that is beyond the power of another agency to obtain. Another example is information protected by a legal privilege in one jurisdiction but not another. This issue has arisen in particular in the context of cooperation between the U.S. authorities and the European Commission, for example, because in-house counsel advice is privileged under U.S. law, but not under European Community law. Grants of waivers to the EC in cases coordinated with the U.S. agencies typically contain a specific exclusion for information that is privileged under U.S. law.16 Appendix D (the European Commission’s model waiver form), § 6.5, provides an example of language used in this situation.

1. **Duration**

The confidentiality waiver letters used in most cases have not included specific language defining the duration of the waiving party’s grant of the waiver. Although this does not appear to have caused problems for waiving parties or the agencies, it is appropriate to note the issue to avoid misunderstanding.

Commonly used waiver forms refer to materials submitted “in connection with the merger” or “during the course of [the agency’s] enquiry.” It is reasonable to interpret such language to mean that the duration of the waiver is at least as long as it takes for the reviewing agency to reach an enforcement decision - whether that decision is (i) to clear, or take no action to challenge, the merger; (ii) to prohibit or take an action to challenge the merger; or (iii) to enter an agreement that is based upon a negotiated settlement between the reviewing agency and the parties. In the event of a settlement -- particularly one that involved close coordination among, and the adoption of commitments to, the agencies -- parties and agencies typically have not questioned the continued validity of a waiver during the period in which the parties fulfill the settlement conditions. In one instance in the United Kingdom, to avoid misunderstanding the parties and the agency included language to clarify the duration of the confidentiality waiver granted.

1. **Maintenance of confidentiality outside the specific waiver**

A party typically waives confidentiality protections only to the extent that it allows the agency possessing the party’s information to share it with another agency and, therefore, not to share the information with third parties or disclose it to the public.17

A waiving party typically will seek assurances that the recipient agency can and will maintain the confidentiality of the information shared with respect to third

16 The May 9, 2003, United States submission to the OECD Competition Committee’s Working Party 3 (on international cooperation) concerning Information Sharing in Merger Control Procedures reported that this issue “has been discussed by EC and U.S. officials. The U.S. agencies have asked the EC not to send or discuss information that could be considered privileged under U.S. law and the U.S. agencies will refuse to consider and will return such information if it is provided inadvertently.” DAFFE/COMP/WP3/WD(2003)25.

17 See discussion in Section II.A., *supra* at notes 9 and 10 on the authority of some agencies to make certain non-public disclosure to other public bodies.

7

parties and the public. The agency sharing parties’ information pursuant to a waiver is not in a position to guarantee that the recipient agency can and will maintain confidentiality over the information shared. Accordingly, some waivers contain language reflecting the waiving party’s understanding that a recipient agency is able to, and will, protect the confidentiality of the information it receives from its counterpart agency to the extent possible under the confidentiality provisions governing the recipient agency.

Experience has demonstrated that parties and agencies have devised satisfactory means of dealing with this concern. Some waivers contemplate that the agencies sharing information will provide reciprocal letters describing the confidentiality protections provided by the agencies; see, for example, Appendix B, used by the U.S. Department of Justice. Appendices C (the U.S. Federal Trade Commission’s model waiver) and Appendix D, section 6.2 (the European Commission’s model waiver), address the concern by stating that the agency will treat the information as having been obtained from the waiving party under that agency’s own information gathering authorities. This provision goes on to state that if it is ever determined that the information is not entitled to such protection, the agency will treat the information as if it requested the information from the waiving party and the parties produced it voluntarily. The provision then sets out the protections the FTC provides to voluntarily produced information.

The ability of agencies to maintain the confidentiality of shared materials may be questioned in those jurisdictions whose agencies are subject to government information access laws such as the U.S. Freedom of Information Act and similar laws that apply to the European Commission and to agencies in the United Kingdom. These laws typically grant the agencies authority to withhold from public disclosure information that has been obtained for law enforcement purposes. But they also give requesters certain procedural rights to pursue an access request in the courts.

Although it does not appear from the collective experience of the ICN agencies that any authority has been ordered to release information shared in an investigation, some agencies have included language in the waiver addressing such a circumstance. For example the FTC’s model waiver in Appendix C provides for notice to the waiving party if a third party commences any action to obtain a judicial order requiring disclosure. Parties have also sought assurances that an agency will oppose any application made by a third party for access to information obtained through a waiver.

1. **Conditions**

Some parties have sought to condition their waivers to impose other obligations on the reviewing agency regarding the sharing and use of information within the scope of the waiver. For example, some parties have sought to require that they be notified by the sending agency before it shares the party’s information with the recipient agency. Agencies generally do not accept such a condition because it likely would interfere with the very goals of inter-agency candor and analysis that the waiver is intended to achieve. In addition, in the context of inter-agency conversations, it is unlikely that the agencies can predict exactly which information and documents they will reference, making a prior notice requirement impracticable.

8

Some parties might also seek to prevent the use of information shared pursuant to a waiver for purposes other than the merger review. Such a condition may be unnecessary to the extent that national law already precludes the agency either from using the information itself for other purposes or from sharing the information with other authorities for other purposes.18 Jurisdictions with laws permitting the reviewing agency to use the information for other law enforcement purposes are reluctant to accept such a condition.

1. **Conclusion**

Confidentiality waivers can facilitate cooperation and coordination of multijurisdictional merger review and, thereby, compatible, non-conflicting enforcement decisions and remedies.

Recent experience has shown that parties to most mergers that raised competitive issues in more than one jurisdiction have, upon request or even of their own initiative, granted a waiver. That experience has included, in some cases, a need to address certain issues, including, *inter alia*, differences in the scope of confidentiality protections among jurisdictions and in the rules governing how agencies can use shared information delimiting the use to which information gathered by a reviewing authority may be put.

It is hoped that this paper’s discussion of these issues will help both agencies and parties in considering whether and how to grant waivers of confidentiality in merger investigations.

18 *But see* Appendix D, the EC model waiver, section 6.(4).

9

APPENDIX A

*ICN Model Waiver Form*

[DATE]

[CONTACT NAME AT AGENCY A] [ADDRESS]

Re: [CASE REFERENCE] Dear -----:

On behalf of COMPANY A, I confirm that COMPANY A, subject to the conditions and limitations set forth herein, agrees to waive the confidentiality restrictions under [RELEVANT STATUTORY OR REGULATORY AUTHORITY]

and other applicable laws and rules (collectively the “Confidentiality Obligations”) that prevent AGENCY X from disclosing to FOREIGN AGENCY Y confidential information obtained from COMPANY A in connection with its proposed transaction with COMPANY B. Specifically, COMPANY A agrees that AGENCY X staff may share with FOREIGN AGENCY Y [any of COMPANY A’s documents, statements, data and information, as well as AGENCY A’s own internal analyses that contain or refer to COMPANY A’s materials that would otherwise be foreclosed by the

confidentiality Obligations].18

This waiver is granted only with respect to disclosures to FOREIGN AGENCY Y and only on the condition that FOREIGN AGENCY Y will treat as confidential information it obtains from AGENCY X in accordance with the terms of the attached letter from [CONTACT NAME] of FOREIGN AGENCY Y.19 This agreement does not constitute a waiver by COMPANY A of its rights under the Confidentiality Obligations with respect to the protection afforded to COMPANY A

18 NOTE: This model language is intended for those situations where a waiver with respect to any and all documents and information provided to Agency X is contemplated. There may be instances where such a broad waiver is not desired. In those cases, the parties may opt for a waiver limited in scope, such as to allow the agencies to discuss potential remedies that each is considering and the reasons for such remedies, or to discuss specific limited issues such as product market definition or barriers to entry. Parties and agency staff should consider the scope of the waiver that is desired to assist them in their investigation so as to not unnecessarily burden parties or other competition agencies.

19 NOTE: “Foreign Agency Y” should provide a letter describing the confidentiality protections provided by that country. (In some cases, the parties and Agency X staff may be satisfied if that letter is directed to that contact person by representatives of the parties, with a written confirmation that Foreign Agency Y agrees to the terms of that letter.) Attached to this model form at Appendix [D] are sample confidentiality letters.

10

against the direct or indirect disclosures of information to any third-party other than FOREIGN AGENCY Y.

COMPANY A submits this waiver under the condition and understanding that, with respect to information that AGENCY X obtains from COMPANY A and provides to the FOREIGN AGENCY Y pursuant to this waiver, AGENCY X should continue to protect the confidentiality of such information with respect to other outside parties in accordance with the Confidentiality Obligations.

A copy of this letter is being sent to [CONTACT PERSON AT FOREIGN AGENCY Y].

Sincerely,

[ATTORNEY FOR COMPANY A]

cc: [CONTACT FOR FOREIGN AGENCY Y]

11

APPENDIX B

*U.S. Department of Justice Antitrust Division Model Waiver Form*

[DATE]

BY FACSIMILE

[CONTACT NAME] [ADDRESS]

Re: [CASE REFERENCE]

Dear [CONTACT]:

As we have discussed, the U.S. Department of Justice would like to discuss information with officials of [FOREIGN AGENCY NAME] to facilitate our review of the proposed transaction. Therefore, we request that [NAME OF MERGING PARTY] waive the confidentiality restrictions that prohibit the U.S. Department of Justice’s Antitrust Division from sharing confidential information obtained from [NAME OF MERGING PARTY] in the course of our investigation.

The following language is modeled on waivers used in prior investigations:

On behalf of [NAME OF MERGING PARTY (“COMPANY”)], including its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing, Company hereby agrees to waive the confidentiality restrictions that govern the U.S. Department of Justice’s investigation of the proposed transaction [DEFINE] under the Hart-Scott-Rodino Act, the Antitrust Civil Process Act, and other applicable laws and regulations (collectively, “the Confidentiality Rules”) to the extent set forth in this letter. Specifically, Company agrees that the

U.S. Department of Justice may disclose to individuals investigating the proposed transaction on behalf of the [FOREIGN AGENCY NAME] written and oral information provided by Company, including Company’s documents, data, graphics, statements, testimony, and oral communications, and the Department’s own internal analyses that contain or refer to Company’s materials (collectively, the “information”), that otherwise would be foreclosed by the Confidentiality Rules. This agreement is conditioned on the understanding that 1) the U.S. Department of Justice will obtain the written agreement of the [FOREIGN AGENCY NAME] to protect the confidentiality of the information to the extent possible under confidentiality provisions governing that agency, and 2) the U.S. Department of Justice will continue to protect the confidentiality of the information in accordance with its normal practices and the Confidentiality Rules.

12

When you have reviewed the proposed waiver language, please contact me at [TEL NO.].

[DOJ ATTORNEY SIGNATURE]

13

APPENDIX C

*U.S. Federal Trade Commission Model Waiver Form*

MODEL WAIVER OF CONFIDENTIALITY (as to European Commission) Merging Company Alpha, Inc. (A) and To Be Merged Company Beta (B)

agree to waive the confidentiality restrictions under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.,* the Hart-Scott-Rodino Act, 15 U.S.C. § 1 8a, and other applicable laws and rules (collectively, “Confidentiality Rules”), to the extent necessary to permit the Federal Trade Commission (“FTC”) to disclose to the European Commission (“EC”) confidential documents and information obtained from A and B in connection with the merger of A and B. Specifically, A and B agree that FTC staff may share with the EC any of A’s and B’s documents, statements, data, and information, as well as the FTC’s own internal analyses that contain or refer to A’s or B’s materials, that would otherwise be foreclosed by the Confidentiality Rules. This letter does not constitute a waiver by A or B of their rights under the Confidentiality Rules with respect to the protection afforded to A and B against the direct or indirect disclosure of information to any third party other than the EC.

Additionally, with respect to any documents or information that the EC obtains from A or B and provides to the FTC pursuant to a waiver of EC confidentiality protections, it is understood that the FTC shall treat such documents as having been obtained from A or B pursuant to the Hart-Scott-Rodino Act. It is also understood that, in the event it is ever determined that any such documents or information are not entitled to confidentiality protection under the Hart-Scott-Rodino Act, the FTC has requested these documents and information from A and B and that the following protections shall apply: (1) such documents and information shall be treated as provided by A and B to the FTC voluntarily in place of compulsory process; (2) such documents and information are designated confidential under Section 4.10(d) of the FTC’s Rules of Practice, 16 C.F.R. § 4.10(d); (3) to the extent and at such times as such documents become subject to the FTC rule requiring the return of documents, 16 C.F.R. § 4.12, the FTC shall destroy such documents or, at A’s or B’s request, return them to the EC; and (4) the FTC shall notify A and B within 10 days if a requester under the Freedom of Information Act commences litigation to obtain these documents.

A copy of this letter is being sent to the Directorate General for Competition of the European Commission (DG-COMP).

14

FTC MODEL WAIVER OF CONFIDENTIALITY (as to European Commission)

*Non-HSR-reportable merger*

Merging Company Alpha, Inc. (A) and To Be Merged Company Beta (B) agree to waive the confidentiality restrictions under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.,* and other applicable laws and rules (collectively, “Confidentiality Rules”), to the extent necessary to permit the Federal Trade Commission (“FTC”) to disclose to the European Commission (“EC”) confidential documents and information obtained from A and B in connection with the merger of A and B. Specifically, A and B agree that FTC staff may share with the EC any of A’s and B’s documents, statements, data, and information, as well as the FTC’s own internal analyses that contain or refer to A’s or B’s materials, that would otherwise be foreclosed by the Confidentiality Rules. This letter does not constitute a waiver by A or B of their rights under the Confidentiality Rules with respect to the protection afforded to A and B against the direct or indirect disclosure of information to any third party other than the EC.

Additionally, with respect to any documents or information that the EC obtains from A or B and provides to the FTC pursuant to a waiver of EC confidentiality protections, it is understood that the FTC has requested these documents and information from A and B and that the following protections shall apply: (1) such documents and information shall be treated as provided by A and B to the FTC voluntarily in place of compulsory process; (2) such documents and information are designated confidential under Section 4.10(d) of the FTC’s Rules of Practice, 16 C.F.R. § 4.10(d); (3) to the extent and at such times as such documents become subject to the FTC rule requiring the return of documents, 16 C.F.R. § 4.12, the FTC shall destroy such documents or, at A’s or B’s request, return them to the EC; and (4) the FTC shall notify A and B within 10 days if a requester under the Freedom of Information Act commences litigation to obtain these documents.

A copy of this letter is being sent to the Directorate General for Competition of the European Commission (DG-COMP).

15

*The following provision has been used in certain waivers provided to the U.S. Federal Trade Commission in circumstances where Agency X receives information from Foreign Agency Y that may not be subject to the confidentiality protections under the laws or rules of Agency X*: *For example, a foreign jurisdiction’s laws or regulations may extend confidentiality protections to documents or information that would not be given the same amount of protection under the laws or regulations governing Agency X. In those circumstances, the merging parties may be unwilling to waive confidentiality unless Agency X agrees to treat such materials or information as confidential under its own laws or regulations. In those situations, the parties may wish to include a provision similar to that set forth below:*

With respect to the information that FOREIGN AGENCY Y obtains from COMPANY A and provides to AGENCY X pursuant to the attached waiver, it is understood that AGENCY X shall treat such information as having been obtained from COMPANY A pursuant to [THE MERGER REVIEW STATUTE OR RULE].

It is also understood that, in the event it is ever determined that any such information is not entitled to confidentiality protection under [THE MERGER REVIEW STATUTE OR RULE], AGENCY X will treat the information received as if it has requested such information from COMPANY A directly and AGENCY X agrees that the following protections shall apply to all such information received from FOREIGN AGENCY Y: (1) such information shall be treated as if provided by COMPANY A to AGENCY X voluntarily in place of compulsory process; (2) AGENCY X shall notify COMPANY A within 10 days if a requestor under [ANY APPLICABLE DISCLOSURE STATUTE OR RULE] commences any action to obtain a judicial order requiring the disclosure of such information; (3) such information shall be treated as having been designated as confidential under [AGENCY X’s] rules; and (4) to the extent and at such times as such information becomes subject to the regulation requiring the return of documents, AGENCY X shall destroy such information or, at COMPANY A’s request, return it to FOREIGN AGENCY Y.

16

APPENDIX D

*EUROPEAN COMMISSION CONFIDENTIALITY WAIVER*

***WAIVER***

1. On behalf of Company X and Company Y we confirm that each of X and Y agree to waive the confidentiality restrictions which govern the European Commission under EC Council Regulation 139/04 and other applicable laws (hereinafter referred to as “the confidentiality rules”) to the extent necessary to permit the European Commission to disclose, for the purpose of its enquiries and analysis into the proposed merger/acquisition between X and Y (hereinafter referred to as the “proposed transaction”), to [*competition authority B*] any information obtained from Company X and/or Y during the course of its enquiry into the proposed transaction.
2. A corresponding waiver has or will be submitted to [*competition authority B*], enabling that authority to share information, obtained from Company X or Y during the course of its enquiry into the proposed transaction and which would otherwise be subject to the confidentiality rules of that jurisdiction, with the European Commission.
3. Specifically Company X and Y agree that the staff of the European Commission may share with [*competition authority B*] any documents, statements, data and information, supplied by Company X and /or Y, as well as the Commission’s own internal analysis that contain or refer to X and Y’s materials that would otherwise be prevented by the confidentiality rules.

***CAVEAT***

1. This letter does not constitute a waiver by X or Y of their rights under the confidentiality rules with respect to the protection afforded to X or Y against the direct or indirect disclosure of information to any third party other than [*competition authority B*]. This waiver is limited to information obtained by the Commission in relation to its review of the proposed transaction and does not apply to information obtained in the course of any other review of any case either now or in the future.

***CONDITIONS***

* + *Use of Information by Receiving Jurisdiction (“Competition Authority B”)*

1. For the avoidance of doubt information transmitted pursuant to this waiver may be used by [*competition authority B*] only for the purposes of conducting its enquiry into the proposed transaction and for no other purpose. Disclosure is made openly on the basis and subject to the express condition that such information remains confidential to [*competition authority B*] and may not be

17

disclosed to any third party. It is understood and agreed that failure by [*competition authority B*] to comply with the foregoing does not engender any liability on the part of the European Commission

* + *Use of Information by Sending Jurisdiction (“Competition Authority A”)*

1. The waiver referred to in the first paragraph of this letter is subject to the following conditions:
2. that the European Commission shall itself maintain the confidentiality of the information and/or documentation provided to [*competition authority B* ] by X and/or Y and which is subsequently obtained from [*competition authority B*] and shall treat such information as if it had been obtained directly from X and /or Y;
3. that the European Commission shall consider all information and/or documentation obtained from [*competition authority B*] pursuant to this waiver as confidential information or business secrets unless it is clearly identified as having been obtained from a publicly accessible source;
4. that the European Commission shall not make any information and/or documentation obtained from [*competition authority B*] available to any third party including competitors, customers and suppliers of X and Y;
5. that the information and/or documentation obtained from [*competition authority B*] shall be used only for the purposes of the European Commission’s review of the proposed transaction under Council Regulation 139/04 and for no other purpose; and
6. that the European Commission shall not disclose to [*competition authority B*] any information or documentation obtained from X and /or Y in relation to which either X or Y has asserted a claim of legal privilege in [*the jurisdiction in competition authority B*] and that is clearly identified as being subject to such client/attorney privilege. It is understood and agreed that Company X or Y is responsible for informing the Commission of the existence of such privileged information.

Each of Company X or Y has obtained the consent of its affiliates to the sharing of their documents and information produced by each of Company X or Y respectively on the same conditions as outlined above.

If you wish to discuss any matter arising form this waiver, please contact [name of responsible representative(s)]. A copy of this letter has been sent to the [competition authority B].

(Signed by the duly authorised representative of ) (Signatures)

Company X Company Y

18

APPENDIX E

*From time to time the U.S. Department of Justice has provided letters to the parties describing the confidentiality protections provided by US laws and regulations.*

*Examples of such letters are included below.*

*Sample DOJ Letter Regarding Confidentiality of CID Documents*

Dear Mr./Ms. Lawyer:

In your letter of [Date] you requested additional assurances of confidentiality beyond those provided in the Civil Investigative Demand (“CID”) statute, 15 U.S.C. §§ 1311- 1314, and the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, for documents called for by the CID recently served upon [Company Name].

I cannot promise to notify you in advance if a document [Company Name] provided will be used in a CID deposition of a witness not affiliated with your client. The Division is authorized to use CID material without the consent of the producing party in “connection with the taking of oral testimony.” It is, however, rare that we disclose a document in such a manner. Although it is occasionally useful to use CID materials in a deposition of a third party where the third party has already seen the materials, or is at least generally aware of their substance, it is rarely necessary to use CID materials in connection with a deposition of a third party that is unfamiliar with the contents of those materials. Moreover, the Division has an interest in seeing that competitors do not receive access to each other’s confidential information, is sensitive to confidentiality concerns, and does not unnecessarily reveal such information.

You have also represented that [Company Name] considers certain information requested in the CID to be proprietary and confidential. It is the Department’s policy to treat confidential business information that is produced as set forth below. “Confidential business information” means trade secrets or other commercial or financial information (a) in which (the company) has a proprietary interest, and (b) which (the company) in good faith designates as commercially or financially sensitive.

It is the Department’s policy not to use confidential business information in complaints and accompanying court papers unnecessarily. The Department, however, cannot provide assurance that confidential business information will not be used in such papers, and cannot assure [Company Name] of advance notification of the filing of a complaint or its contents.

If a complaint is filed, it is the Department’s policy to notify [Company Name] as soon as is reasonably practicable should it become necessary to use confidential business information for the purpose of seeking preliminary relief. It is also the Department’s policy to file under seal any confidential business information used for such purpose, advise the court that [Company Name] has designated the information as confidential, and make reasonable efforts to limit disclosure of the information to

19

the court and outside counsel for the other parties until [Company Name] has had a reasonable opportunity to appear and seek protection for the information.

It is the Department’s further policy to notify [Company Name] at the close of the investigation and give it the option of requesting that original documents, if produced, be returned. If copies were produced they will be destroyed unless: (1) they are exhibits; (2) they are relevant to a current or actively contemplated Department investigation or to a pending Freedom of Information Act request; (3) a formal request has been made by a state attorney general to inspect and copy them pursuant to Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15; or, (4) they will be of substantial assistance in the Department’s continuing law enforcement responsibilities.

Sincerely,

Pat Attorney

20

*Sample DOJ Letter Regarding Confidentiality of Voluntarily Produced Documents*

Dear Mr./Ms. Lawyer:

You have requested a statement regarding the United States Department of Justice’s (“Department”) treatment of sensitive information which it may receive from your client in response to our request for the voluntary production of information, including information provided in an interview and/or memorialized in voluntarily produced documents. It is in the Department’s interest to protect the confidentiality of sensitive information provided by its sources, and to prevent competitively sensitive information from being shared among competitors.

Accordingly, sensitive information will only be used by the Department for a legitimate law enforcement purpose, and it is the Department’s policy not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In the Department’s experience, the need to disclose sensitive material occurs rarely.

Sensitive information includes “confidential business information” which means trade secrets or other commercial or financial information (a) in which the company has a proprietary interest or which the company received from another entity under an obligation to maintain the confidentiality of such information, and

(b) which the company has in good faith designated as confidential. The Department’s policy with regard to confidential business information is to treat it, for ten years, in the manner set forth in this letter.

In the event of a request by a third party for disclosure of confidential business information under the Freedom of Information Act, the Department will act in accordance with its stated policy see 28 CFR § 16.8, a copy of which is enclosed) and will assert all applicable exemptions from disclosure, including those exemptions set forth in 5 U.S.C. §§ 552(b)(4), (b)(7)(A) and (b)(7)(D) (to the extent applicable). See also Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 880 (D.C. Cir.1992) (voluntarily submitted financial or commercial information not customarily released to the public is protected), cert denied, 507 U.S. 984 (1993).

In the event of a request by a third party for disclosure of any appropriately designated confidential business information under any provision of law other than the Freedom of Information Act, it is the Department’s policy to assert all applicable exemptions from disclosure permitted by law. In addition, the Department’s policy is to use its best efforts to provide the company such notice as is practicable prior to disclosure of any confidential business information to a third party who requests it under any provision of law other than the Freedom of Information Act.

Although it is the Department’s policy not unnecessarily to use sensitive information in complaints or court papers accompanying a complaint, which are publicly available documents, the Department cannot provide an absolute assurance that sensitive information will not be included in such documents. If a complaint is filed, it is the Department’s policy to notify your client as soon as is reasonably practicable of any decision by the Department to use confidential

21

business information for the purpose of seeking preliminary relief. Our policy is generally to file under seal any confidential business information used for such purpose and advise the court that your client has designated the information as confidential. Moreover it is the Department’s policy to make reasonable efforts to limit disclosure of the information to the court and outside counsel for the other parties to the litigation until your client has had a reasonable opportunity to appear before the court and, if your client appears, until the court has ruled on its application. To that end, it is the Department’s policy not to oppose a court appearance by your client for the purpose of seeking protection for the confidential business information used, or to be used, during the preliminary relief proceedings.

If confidential business information becomes the subject of discovery in any litigation to which the Department is a party, it is the Department’s policy to use its best efforts to assure that a protective order applicable to the information is entered in the litigation. In addition, our policy is to not voluntarily produce the confidential business information until your client has had a reasonable opportunity to review and comment on the protective order and to apply to the court for further protection. It is the Department’s policy not to oppose a court appearance by your client for this purpose.

Please do not hesitate to call me at (zzz) xxx-yyyy if you have any questions.

Sincerely yours,

Pat Attorney

22

XX/XX/XXXX

Case M. [*No…*] – [*Title…*] COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to [Article 6(2), *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] [Articles 8(2) and 10(2)*, if in Phase II Commitments prior to the sending out of the Statement of Objections*] of Council Regulation (EC) No 139/2004 (the “***Merger Regulation***”), [*Indicate the name of the undertaking or undertakings offering the Commitments*] (the “***Notifying Party/Notifying Parties***”) hereby enter into the following Commitments (the “***Commitments***”) vis- à-vis the European Commission (the “***Commission***”) with a view to rendering [*Description of the operation: e.g. the acquisition of…; the creation of a full-function joint venture between…*] (the “***Concentration***”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to [Article 6(1)(b) of the Merger Regulation, *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “***Decision***”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “***Remedies Notice***”).

**Section A. Definitions**

1. For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings**: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, including the joint venture [*Only in the case when the proposed operation is a creation of a joint venture*], whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "***Consolidated Jurisdictional Notice***").

**Assets:** the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 6 (a), (b) and

(c) and described more in detail in the Schedule.

**Closing**: the transfer of the legal title to the Divestment Business to the Purchaser.

**Closing Period**: the period of 3 months from the approval of the Purchaser and the terms of sale by the Commission.

Standard Model for Divestiture Commitments,Version 5 December 2013

**Confidential Information**: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest**: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

**Divestment Business**: the business or businesses as defined in Section B and in the Schedule which the Notifying Party/Notifying Parties commit to divest.

**Divestiture Trustee**: one or more natural or legal person(s) who is/are approved by the Commission and appointed by [*X*] and who has/have received from [*X*] the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Effective Date**: the date of adoption of the Decision.

**First Divestiture Period**: the period of [] months from the Effective Date.

**Hold Separate Manager**: the person appointed by [*X*] for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**Key Personnel**: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule, including the Hold Separate Manager.

**Monitoring Trustee**: one or more natural or legal person(s) who is/are approved by the Commission and appointed by [*X*], and who has/have the duty to monitor [*X*’s] compliance with the conditions and obligations attached to the Decision.

**Parties:** the Notifying Party/Notifying Parties and the undertaking that is the target of the concentration.

**Personnel**: all staff currently employed by the Divestment Business, including staff seconded to the Divestment Business, shared personnel as well as the additional personnel listed in the Schedule.

**Purchaser**: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**Purchaser Criteria**: the criteria laid down in paragraph 17 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

**Schedule**: the schedule to these Commitments describing more in detail the Divestment Business.

**Trustee(s)**: the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

**Trustee Divestiture Period**: the period of [] months from the end of the First Divestiture Period.

2

**[*X*]:** [*Indicate the name of the undertaking that will divest its business/es*], incorporated under the laws of [], with its registered office at [] and registered with the Commercial/Company Register at [] under number [].

**Section B. The commitment to divest and the Divestment Business**

Commitment to divest

1. In order to maintain effective competition, [*X*] commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 18 of these Commitments. To carry out the divestiture, [X] commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If [*X*] has not entered into such an agreement at the end of the First Divestiture Period, [*X*] shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 30 in the Trustee Divestiture Period.
2. [*The following sentence should be inserted in case of an “up-front buyer”:* The proposed concentration shall not be implemented before [*X*] or the Divestiture Trustee has entered into a final binding sale and purchase agreement for the sale of the Divestment Business and the Commission has approved the purchaser and the terms of sale in accordance with paragraph 18].
3. [*X*] shall be deemed to have complied with this commitment if:
   1. by the end of the Trustee Divestiture Period, [*X*] or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 18; and
   2. the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
4. In order to maintain the structural effect of the Commitments, the Notifying Party/Notifying Parties shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 44 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

3

Structure and definition of the Divestment Business

1. The Divestment Business consists of [*Provide a summary description of the Divestment Business*]. The legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business, in particular:
   1. all tangible and intangible assets (including intellectual property rights);
   2. all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
   3. all contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business; and
   4. the Personnel.
2. [*To be included in* cases *in which the Divestment Business needs an on-going relationship with the Parties in order to be fully competitive and viable:* In addition, the Divestment Business includes the benefit, for a transitional period of up to [*insert*] years after Closing and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which [*X*] or its Affiliated Undertakings supply products or services to the Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the [*insert the relevant business unit/division providing the product/service*] operations.]

**Section C. Related commitments**

Preservation of viability, marketability and competitiveness

1. From the Effective Date until Closing, the Notifying Party/Notifying Parties shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular [*X*] undertakes:
   1. not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
   2. to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;

4

* 1. to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to [*X's*] remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, *[X]* shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. [*X*] must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

Hold-separate obligations

1. The Notifying Party/Notifying Parties commit(s), from the Effective Date until Closing, to keep the Divestment Business separate from the business(es) it is retaining [*In an Upfront Buyer situation replace by:* to procure that the Divestment Business is kept separate from the business(es) that the Notifying Party /Notifying Parties will be retaining and, after closing of the notified transaction to keep the Divestment Business Separate from the business that the Notifying Party /Notifying Parties is retaining] and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by *[X]* have no involvement in the Divestment Business; (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by *[X]* and do not report to any individual outside the Divestment Business.
2. Until Closing, [*X*] shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the business(es) which [X] is retaining. Immediately after the adoption of the Decision, [*X*] shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by *[X].* The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in paragraph 8(c) of these Commitments. The Commission may, after having heard [*X*], require [*X*] to replace the Hold Separate Manager.
3. [*The following is to be inserted in cases in which a company or a share in a company is to be divested and a strict separation of the corporate structure is necessary:* To ensure that the Divestment Business is held and managed as a separate entity the Monitoring Trustee shall exercise [*X*’s] rights as shareholder in the legal entity or entities that constitute the Divestment Business (except for its rights in respect of dividends that are due before Closing), with the aim of acting in the best interest of the business, which shall be determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling [*X’s*] obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of [*X*]*.* Upon request of the Monitoring Trustee, [*X*] shall resign as a member of the boards or shall cause such members of the boards to resign.]

5

Ring-fencing

1. [*X*] shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by [*X*] before the Effective Date will be eliminated and not be used by [*X*]. This includes measures vis-à-vis [*X's*] appointees on the supervisory board and/or board of directors of the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. [*X*] may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to [*X*] is required by law.

Non-solicitation clause

1. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [] after Closing.

Due diligence

1. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, [*X*] shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
   1. provide to potential purchasers sufficient information as regards the Divestment Business;
   2. provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

1. [*X*] shall submit written reports in [*Indicate the language of the procedure or another language agreed with the Commission*] on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission’s request). [*X*] shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five days of their receipt.
2. [*X*] shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

6

**Section D. The Purchaser**

1. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
   1. The Purchaser shall be independent of and unconnected to the Notifying Party/Notifying Parties and its/their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
   2. The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
   3. The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
2. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission’s approval. When [*X*] has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. [*X*] must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

**Section E. Trustee**

1. Appointment procedure
2. [*X*] shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party/Notifying Parties commit(s) not to close the Concentration before the appointment of a Monitoring Trustee.
3. If [*X*] has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by [*X*] at that time or thereafter, [*X*] shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

7

1. The Trustee shall:
2. at the time of appointment, be independent of the Notifying Party/Notifying Parties and its/their Affiliated Undertakings;
3. possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
4. neither have nor become exposed to a Conflict of Interest.
5. The Trustee shall be remunerated by the Notifying Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

*Proposal by [X]*

1. No later than two weeks after the Effective Date, [*X*] shall submit the name or names of one or more natural or legal persons whom [*X*] proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, [*X*] shall submit a list of one or more persons whom [X] proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 21 and shall include:
   1. the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
   2. the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
   3. an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

*Approval or rejection by the Commission*

1. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, [*X*] shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, [*X*] shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission’s approval, in accordance with the mandate approved by the Commission.

*New proposal by the [X]*

1. If all the proposed Trustees are rejected, [*X*] shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 19 and 24 of these Commitments.

8

*Trustee nominated by the Commission*

1. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom [*X*] shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.
2. Functions of the Trustee
3. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or [*X*], give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

*Duties and obligations of the Monitoring Trustee*

1. The Monitoring Trustee shall:
2. propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
3. oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by [*X*] with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
   1. monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 8 and 9 of these Commitments;
   2. supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 10 of these Commitments;
   3. with respect to Confidential Information:
      * determine all necessary measures to ensure that [X] does not after the Effective Date obtain any Confidential Information relating to the Divestment Business,
      * in particular strive for the severing of the Divestment Business’ participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business,
      * make sure that any Confidential Information relating to the Divestment Business obtained by [X] before the Effective Date is eliminated and will not be used by [X] and

9

* decide whether such information may be disclosed to or kept by [X] as the disclosure is reasonably necessary to allow [X] to carry out the divestiture or as the disclosure is required by law;
  1. monitor the splitting of assets and the allocation of Personnel between the Divestment Business and [*X*] or Affiliated Undertakings;

1. propose to [*X*] such measures as the Monitoring Trustee considers necessary to ensure [*X*]’s compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non- disclosure of competitively sensitive information;
2. review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:
   1. potential purchasers receive sufficient and correct information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and
   2. potential purchasers are granted reasonable access to the Personnel;
3. act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
4. provide to the Commission, sending [*X*] a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;
5. promptly report in writing to the Commission, sending [*X*] a non-confidential copy at the same time, if it concludes on reasonable grounds that [*X*] is failing to comply with these Commitments;
6. within one week after receipt of the documented proposal referred to in paragraph 18 of these Commitments, submit to the Commission, sending [X] a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;
7. assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

10

1. If the Monitoring and Divestiture Trustee are not the same [legal or natural] persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

*Duties and obligations of the Divestiture Trustee*

1. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 17 and 18 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of [*X*], subject to the Notifying Party/Notifying Parties’ unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
2. In the Trustee Divestiture Period (or otherwise at the Commission’s request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in [*Please indicate the language of the procedure or a different language agreed with the Commission*] on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party/Notifying Parties.
3. Duties and obligations of the Parties
4. [*X*] shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of [*X’s*] or the Divestment Business’ books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and [*X*] and the Divestment Business shall provide the Trustee upon request with copies of any document. [*X*] and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
5. [*X*] shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. [*X*] shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. [*X*] shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the

11

selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.

1. [*X*] shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, [*X*] shall cause the documents required for effecting the sale and the Closing to be duly executed.
2. [*X*] shall indemnify the Trustee and its employees and agents (each an “***Indemnified Party***”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to [*X*] for, any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
3. At the expense of [*X*], the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to [*X’s*] approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should [*X*] refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard [*X*]. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 35 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served [*X*] during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
4. [*X*] agrees that the Commission may share Confidential Information proprietary to [*X*] with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17

(1) and (2) of the Merger Regulation apply *mutatis mutandis*.

1. The Notifying Party/Notifying Parties agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
2. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.
3. Replacement, discharge and reappointment of the Trustee
4. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
   1. the Commission may, after hearing the Trustee and [*X*], require [*X*] to replace the Trustee; or
   2. [X] may, with the prior approval of the Commission, replace the Trustee.

12

1. If the Trustee is removed according to paragraph 40 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 19-26 of these Commitments.
2. Unless removed according to paragraph 40 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section F. The review clause**

1. The Commission may extend the time periods foreseen in the Commitments in response to a request from [*X*] or, in appropriate cases, on its own initiative. Where [*X*] requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause**.** This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall [*X*] be entitled to request an extension within the last month of any period.
2. The Commission may further, in response to a reasoned request from the Notifying Parties showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

**Section G. Entry into force**

1. The Commitments shall take effect upon the date of adoption of the Decision.

……………………………………

duly authorised for and on behalf of

[*Indicate the name of each of the Notifying Parties*]

13

**SCHEDULE**

1. The Divestment Business as operated to date has the following legal and functional structure: [*Describe the legal and functional structure of the Divestment Business, including the organisational chart*].
2. In accordance with paragraph [6] of these Commitments, the Divestment Business includes, but is not limited to:
3. the following main tangible assets: [*Indicate the essential tangible assets, e.g. xyz factory/warehouse/pipelines located at abc and the real estate/property on which the factory/warehouse is located; the R&D facilities*];
4. the following main intangible assets: [*Indicate the main intangible assets. This should in particular include (i) the brand names and (ii) all other Intellectual Property Rights used in conducting the Divestment Business.*];
5. the following main licences, permits and authorisations: [*Indicate the main licences, permits and authorisations*];
6. the following main contracts, agreements, leases, commitments and understandings [*Indicate the main contracts, etc.*];
7. the following customer, credit and other records: [*Indicate the main customer, credit and other records, according to further sector specific indications, where appropriate*];
8. the following Personnel: [*Indicate the personnel to be transferred in general, including personnel providing essential functions for the Divestment Business, such as central R&D staff];*
9. the following Key Personnel: [*Indicate the names and functions of the Key Personnel, including the Hold Separate Manager, where appropriate*]; and
10. the arrangements for the supply with the following products or services by [*X*] or Affiliated Undertakings for a transitional period of up to [] after Closing: [*Indicate the products or services to be provided for a transitional period in order to maintain the economic viability and competitiveness of the Divestment Business].*
11. The Divestment Business shall not include:
12. …;
13. [*It is the responsibility of the Parties to indicate clearly what the Divestment Business will not encompass*].
14. If there is any asset or personnel which is not be covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

14

EUROPEAN COMMISSION

Competition DG

**DG COMPETITION**

## BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA

**COLLECTION IN CASES CONCERNING THE APPLICATION OF ARTICLES 101 AND 102 TFEU AND IN MERGER CASES**

STAFF WORKING PAPER

1. SCOPE AND PURPOSE 3
2. BEST PRACTICES REGARDING THE CONTENT AND PRESENTATION OF ECONOMIC AND ECONOMETRIC SUBMISSIONS 5
   1. Formulating the relevant question 6
   2. Data relevance and reliability 7
   3. Choice of empirical methodology 8
   4. Reporting and interpreting the results 10
   5. Robustness (non implemented proposal: place robustness before reporting) 12
   6. Further recommendations 12
3. BEST PRACTICES ON RESPONDING TO REQUESTS FOR QUANTITATIVE DATA 13
   1. General motivation for Data Requests 14
   2. Common elements of a Data Request 15
   3. Main criteria to consider when responding to a Data Request 16
      1. Completeness 16
      2. Correctness 17
      3. Timely submission 17
   4. Other Recommendations 18
      1. Cooperation in good-faith 18
      2. Early consultation with the Commission to inform about what

type of data is available 18

* + 1. Consultation on a Draft Data Requests and data samples 19
    2. Transparency regarding data collection, formatting and submission 19
    3. Direct access 20

2

1. **SCOPE AND PURPOSE**
2. Economic analysis plays a central role in competition enforcement. Economics as a discipline provides a framework to think about the way in which each particular market operates and how competitive interactions take place. This framework further allows formulating the possible consequences of the practices under review, whether a merger, an agreement between firms, or single firm conduct. In certain cases it may also provide tools to identify the direction and magnitude of these effects empirically, if appropriate and relevant. In a number of cases, economic analysis may involve the production, handling and assessment of voluminous sets of quantitative data, including, when appropriate, the development of econometric models1.
3. Economic analysis needs to be framed in such a way that the Commission and the EU Courts can understand and evaluate its relevance and significance. As an administrative authority the Commission is required to take a decision within an appropriate or sometimes a statutory time limit. It is therefore necessary to: (i) ensure that economic analysis meets certain minimum technical standards at the outset, (ii) facilitate the effective gathering and exchange of facts and evidence, in particular any underlying quantitative data, and (iii) use in an effective way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.
4. In order to determine the relevance and significance of an economic analysis for a particular case, it is first necessary to assess its intrinsic quality from a technical perspective, i.e. whether it has been generated and presented in a way that meets adequate technical requirements prevalent in the profession. This involves, in particular, an evaluation of whether the hypothesis to be tested is formulated without ambiguity and clearly related to facts, whether the assumptions of the economic model are consistent with the institutional features and other relevant facts of the industry, whether economic models are well established in the relevant literature, whether the empirical methods and the data are appropriate, whether the results are properly interpreted and robust and whether counterarguments have been given adequate consideration.
5. Second, one must assess the congruence and consistency of the economic analysis with other pieces of quantitative and qualitative evidence (such as customer responses, or documentary evidence)2.

1 The assessment of mergers and potential infringements "by effect" often requires a complex economic assessment by the Commission, as well as the use of statistical or econometric analysis.

2 Economic models or econometric analysis, as is the case with other types of evidence will rarely, if ever, prove conclusive by themselves. The Commission can always take into account different items of evidence. The General Court has held that “*It is the Commission’s task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation.*

3

1. The present document formulates best practices concerning the generation as well as the presentation of relevant economic and empirical evidence that may be taken into account in the assessment of a case concerning the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)3 or merger case4. These Best Practices are organised along two themes.
   1. First of all, it provides recommendations regarding the content and presentation of economic or econometric analysis. This is meant to facilitate its assessment and the replication of any empirical results by the Commission and/or other parties.
   2. Second, the document provides guidance to respond to Commission requests for quantitative data5 to ensure that timely and relevant input for the investigation can be provided.
2. The desire to ensure transparency and accountability, these Best Practices apply to all parties involved in proceedings concerning the application of Articles 101 and 102 TFEU and mergers, that is the parties to the case and interested third parties (including complainants), as well as the Commission.
3. These Best Practices do not create any new rights or obligations, nor alter the rights and obligations which arise from the TFEU, secondary EU law and the case-law of the Court of Justice of the European Union. The Best Practices also do not alter the Commission's interpretative notices and established decisional practice.
4. The principles contained here may be further developed and refined by the Commission in individual cases when appropriate in light of future developments. The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices. The recommendations contained in this document should be interpreted in light of procedural and resource constraints.

*It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted. That examination and the associated reasoning are subject to a review of legality which the Court carries out in relation to Commission decisions on concentrations*”. See Case T-342/07, Ryanair v Commission, [2010] paragraph 136

3 Proceedings before the European Commission concerning Articles101 and 102 TFEU, in accordance with Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1, as amended).

4 Proceedings under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

5 Quantitative data means, generally, observations or measurements, expressed as numbers. For the purposes of these Best Practices, this concept is used to refer to large sets of quantitative data submitted and/or obtained for the purposes of the conduct of an assessment of an economic (and often econometric) nature.

4

1. **BEST PRACTICES REGARDING THE CONTENT AND PRESENTATION OF ECONOMIC AND ECONOMETRIC SUBMISSIONS**
2. Economic reasoning is employed in competition cases notably in order to develop in a consistent manner or, conversely, to rebut because of its inconsistency, the economic evidence and arguments in a given case.
3. Any economic model which explicitly or implicitly supports a theoretical claim must rely on assumptions that are consistent with the facts of the industry under consideration. These assumptions should be carefully laid out and the sensitivity of its predictions to changes to the assumptions should be made explicit. While it is not necessary for economic submissions to actually formalize verbal arguments in a model, this will sometimes be helpful to clearly spell out the assumptions underlying an argument, to check its logic consistency, to assess effects of a high degree of complexity, or to use the model as the theoretical basis for an empirical estimation6.
4. An economic analysis may support an assessment of the anticompetitive or pro- competitive effects of a merger. Such analysis usually involves a comparison of the actual or likely future situation in the relevant market with the absence of the proposed merger.
5. By their very nature, economic models and arguments are based on simplifications of reality. It is therefore normally not sufficient to disprove a particular argument or model, to point out that it is "based on seemingly unrealistic assumptions". It is also necessary to explicitly identify which aspects of reality should be better reflected in the model or argumentation, and to indicate why this would alter the conclusions.
6. In many cases, economic theory is used to develop a testable hypothesis that is later checked against the data. In that case, the economic analysis makes predictions about reality that can be tested by observations and potentially rejected or verified. Thus, whenever feasible, an economic model should be accompanied by an appropriate empirical model - i.e. a model which is capable of testing the relevant hypotheses given the data available.
7. Very often simple but well focused measurement of economic variables (prices, cost, margins, capacity constraints, R&D intensity) will provide important insights into the significance of particular factors. Occasionally, more advanced statistical and econometric techniques may provide more useful evidence7. In any case, otherwise

6 If an economic submission is well-reasoned, then the fact that a particular argument is "theoretical" or "general" is often a strength rather than a weakness of the submission. This is the case when one has deduced a general conclusion (which holds irrespective of the precise magnitudes of the parameters of the analysis) from a set of assumptions that are considered consistent with the facts of the case. For instance, an economic submission may try to substantiate that irrespective of the size or existence of efficiencies, a particular conduct cannot possibly harm consumers.

7 For instance, an econometric analysis of the extent to which prices of an undertaking have been affected by the observed entry of a competitor may provide evidence of the competitive constraint exercised by that entrant. In turn this could provide insights with respect to the likely degree of harm, that would result if an incumbent dominant undertaking were to engage in practices resulting in anticompetitive foreclosure in that or related markets.

5

valid economic analysis may not always produce unambiguous results when applied to the facts of a competition or merger case. Contradictions may result from differences in the data, differences in the approach to economic modelling or in the assumptions used to interpret the data or differences in the empirical techniques and methodologies.

1. The following sections provide practical advice on the generation and communication of economic and econometric analyses. The goal of these recommendations is to ensure that every economic or econometric analysis developed by any party involved submitted for consideration in a case states to the largest possible extent the economic reasoning and the observations on which it relies and explains the relevance of its findings and the robustness of the results. This should allow the Commission and all interested parties to scrutinise the economic evidence submitted during the proceedings so as to avoid that empirical results that are not robust be disguised as such and key assumptions in theoretical reasoning be presented as innocuous. Economic or econometric analysis that does not strictly meet the standards set out in these Best Practices will normally be attached less probative value than otherwise and may not be taken into consideration.
   1. **Formulating the relevant question**
2. The first step in any economic analysis, theoretical or empirical, is the formulation of a question that is relevant to the case at hand.
3. The question of interest should be:
4. ) precisely formulated so that its answer can be interpreted without ambiguity,
5. properly motivated taking into account the nature of the competition or merger case, the institutional features of the markets under consideration and the relevant economic theory8.
6. An economic or econometric report should explicitly formulate not only the hypothesis to be tested (the “null hypothesis”9) but also the alternative hypothesis (or hypotheses) under consideration, so that rejection of the null hypothesis can be properly interpreted10.

8 Occasionally the parties might submit a literature survey or review regarding an economic question of particular relevance for the case. A literature review may be useful when it is accompanied by an explanation on the merits and shortcomings, of the existing studies and explains how the party's own reasoning or analysis relates to past research, academic or otherwise.

9 The null hypothesis is generally that which is presumed to be true initially. A null hypothesis is a hypothesis set up to be nullified or refuted in order to support an alternative hypothesis.

10 For example, consider an empirical project aimed at testing whether certain conduct would lead to higher prices. One could define as the null hypothesis that prices did not increase in which case a rejection of the null hypothesis would imply that the agreement had a positive price impact. Alternatively, one could have defined as the null hypothesis that prices did not change as a result of

6

1. Sometimes, an empirical exercise which is being carried out may provide only partial verification of an accompanying economic model or theory of competitive effects. This evidence may be nonetheless useful but should be properly qualified11.
   1. **Data relevance and reliability**
2. The intrinsic quality of an economic theory depends on the extent to which the underlying assumptions match the corresponding economic facts. Likewise, empirical analysis depends on the relevance and the reliability of the underlying data.
3. First, it is necessary to identify the relevant facts to validate the theoretical assumptions and employ data which is appropriate to respond to the empirical question under investigation12.
4. Second, not all facts can be observed or measured with high accuracy and most datasets are incomplete or otherwise imperfect. Hence, parties and/or the Commission should become familiar with the facts and data and acknowledge its limitations explicitly. As regards quantitative data, for example, this requires (i) a thorough inspection of the data, including summary statistics and graphs, and (ii) a sufficient understanding of how the data were gathered, the sample selection process, the measurement of the variables and whether they bear a close relationship with their theoretical counterparts. Quantitative data may contain anomalies because of miscoding or other errors, which should be discussed with the data providers to decide how to best adjust the data to address these problems.
5. Failure to observe and validate all key assumptions or deficiencies in the data should not prevent an economic analysis to be given weight, though caution must be exercised before relying on its conclusions13. Furthermore, statistical techniques have been developed to deal with measurement errors, missing observations and sample selection problems. While these techniques may not be able to improve the data, they may help to deal with some of its imperfections.

the agreement. A rejection of the null hypothesis in that case would be harder to interpret: did prices rise or fall as a result of the specific relationship between buyer and seller?

11 For example, the analysis of scanner data (retail prices and quantities) may provide valuable evidence in the context of a merger between producers of fast moving consumption goods, even when the direct impact of the transaction would be felt at the wholesale level and not at the consumer level.

12 For example when discounts are important, the analysis of the price impact of a merger, agreement or practice must focus on prices paid by consumers rather than on list prices.

13 For example, assumptions regarding firms’ expectations regarding the identity of the market leader may be inferred indirectly through observation of which firm first announces its future prices.

7

* 1. **Choice of empirical methodology**

1. The choice of methodology to empirically test a hypothesis or to validate the predictions of an economic model should be properly motivated, and its pros and cons should be made explicit, including potential identification problems14.
2. Identification can be understood as clarifying the basis upon which one theory can be preferred to another. Similarly, the term can be used to refer to any situation where an econometric model will invariably have more than one set of parameters which generate the same distribution of observations.
3. One should explain how the chosen methodology exploits the variation in the data, to at least partially discriminate between the tested (or null) hypothesis and the alternative hypotheses. At the very least, an economic model or argument should generate predictions that are consistent with a significant number of relevant observed facts.
4. The choice of methodology must take due account of (a) the dataset and its potential limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration — i.e., it should be designed to test the hypothesis of interest (see also section 2.1 above).
5. If statistical and/or econometric methods are used, it is strongly recommended that important methodological choices are explicitly justified, in particular:
   1. specification (what is the range of sensible general forms for the relationship under evaluation, including the relevant variables, the way they could interact, and the nature of errors or uncertainty?).
   2. observation (how well do the measurements approximate the variables they are intended to represent?).
   3. estimation (what do the data in the sample suggest as to the range of plausible relationships among variables?).
6. Moreover, a reasoned justification should be given when applying statistical techniques that deviate from generally accepted methods commonly used to assess the question of interest. In particular, one should motivate the changes, describe the modified technique or model, and document the likely biases, if any, that the new or adapted method is likely to introduce.
7. In general, it is recommended to follow a “bottom-up” approach. In the context of multiple regression analysis, this would mean estimating simple models first and then

14 Problems of inference can be separated into statistical and identification problems. Studies of identification seek to characterize the conclusions that could be drawn if one could use the sampling process to obtain an unlimited number of observations. Studies of statistical inference seek to characterize the generally weaker conclusions that can be drawn from a finite number of observations.

8

engage in more refined estimation exercises if necessary in order to avoid bias15. Large-scale surveys of final consumers may usefully supplement qualitative or other documentary evidence obtained from targeted requests of information to market participants. Whilst the evidential value of replies to information requests from market participants lies in the substance of the information provided by players with intrinsic industry or market knowledge, the specific purpose of large-scale surveys of final consumers is to obtain statistically relevant data in order to estimate the characteristics, behaviour and views of a larger group of final consumers from the responses received from a smaller sample. The objectives of a high quality sample survey should be specific, clear-cut and unambiguous. Further, the definition of the relevant population of consumers (and the associated sampling frame) is crucial because there may be systematic differences in the responses of various differentiated consumer segments. Identification of a survey population must be followed by selection of a sample that accurately represents that population. The researcher can apply probability sampling in large-scale surveys of final consumers to some aspects of respondent selection to reduce the likelihood of biased selection16.

1. The use of probability sampling techniques in large-scale surveys of final consumers enhances both the reliability and representativeness of the survey results and the ability to assess the accuracy of quantitative estimates obtained from the survey as regards the relevant population of consumers. Probability sampling in large-scale surveys of final consumers offers two important advantages over other types of sampling. First, the sample can provide an unbiased quantitative estimate of the responses of the relevant consumers from which the sample was drawn; that is, the expected value of the sample estimate is the population value being estimated. Second, the researcher can calculate a confidence interval that describes explicitly how reliable the sample estimate of the population is likely to be.
2. If possible, given time and data constraints, conducting multiple empirical analyses relying on different methodologies would help determine whether the conclusions of the empirical investigation are robust to different tests or models (see also section 2.5 below).

15 For example, it is sound practice to estimate an Ordinary Least Squares (OLS) regression first and then, to the extent endogeneity is suspected to be a problem in the case at hand, move on to an instrumental variable (IV) estimation.

16 Probability samples range from simple random samples to complex multistage sampling designs that use stratification, clustering of population elements into various groupings, or both. In simple random sampling, the most basic type of probability sampling, every element in the population has a known, equal probability of being included in the sample, and all possible samples of a given size are equally likely to be selected. In all forms of probability sampling, each element in the relevant population has a known, nonzero probability of being included in the sample.

9

* 1. **Reporting and interpreting the results**

1. The results of economic and econometric analysis must be presented clearly, taking the reader through each step of the reasoning17. All empirical analysis, even descriptive statistics of relevant variables (e.g. price series) should be accompanied by all the documentation needed to allow timely replication, as well as a deep understanding of the methodology of any prior data management efforts. Reports which do not allow for replication and in particular econometric analysis not including the code and data in electronic form will receive less consideration and are consequently unlikely to be given much weight.
2. An empirical submission should not only discuss the statistical significance of the results but also their practical relevance. In general, with very large samples coefficients may be statistically significant even if they are of trivial magnitude18. This creates the potentially misleading impression that certain variables are important. Therefore, the magnitude of the coefficients must always be examined and discussed. This requires interpreting the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation.
3. Commonly, results from economic analysis and statistical information are presented in tables. Although it is not necessary to comment on or restate every piece of information that a table contains an interpretation of the data in it must be provided.
4. The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report on the statistical significance19 of the parameter estimates by following the convention of reporting coefficients, p-values, standard errors and the size of the sample. Where the coefficient of interest is economically significant, the emphasis should be on statistically significant findings, for example to the 5% or 10% level (i.e. p-value<0.05 or 0.10). However, just because some hypothesis cannot be rejected in a statistical sense does not necessarily mean that the empirical analysis has no evidentiary value.

17 Any mathematical notation should either (a) follow the standard notation in the literature or (b) be very self-explanatory.

18 Statistical significance is determined, in part, by the number of observations in the data set. The more observations used to calculate the regression coefficients, the smaller the standard error of each coefficient. A smaller standard error reflects less random variability in the estimated coefficient (or estimate). Other things being equal, the statistical significance of a regression coefficient increases as the sample size increases. If the data set is sufficiently large, results that are economically significant are often also statistically significant. However, when the sample size is small it is not uncommon to obtain results that are economically significant but statistically insignificant.

19 A statistically significant result is one that is unlikely to have occurred by chance. In hypothesis testing, the significance level is the criterion used for rejecting the null hypothesis. The p-value is the probability of obtaining a test statistic at least as extreme as the one that was actually observed, assuming that the null hypothesis is true. If the obtained p-value is smaller than or equal to the significance level, then the null hypothesis is rejected and the outcome is said to be statistically significant.

10

1. It may be that a particular analysis can be criticized in terms of its accuracy. However, it is often possible to evaluate that inaccuracy, for example by providing confidence intervals around an estimate. Also, depending on the question of interest, an approximate economic or econometric result can be informative if, for example, it is the direction of the effects rather than its magnitude that are most relevant. Similarly a particular estimate may be criticized because some facet of the methodology introduces bias. However, it is often the case that an estimate is biased in a particular direction; if this is the case it may be known that the estimate is too large, or too small. This may not matter in the context of a particular case. If it is known that the estimate is too large, and yet it is insufficient in size to reach some critical value, then the bias does not invalidate the conclusion that the critical value will not be reached. Detailed information should also be provided on all other specification tests and statistical diagnoses (see also section 2.5 on robustness).
2. The results of any statistical or econometric analysis should also be assessed with respect to the relevant economic theory20. When discussing the results of a multiple regression analysis, this requirement includes assessing not only the coefficient(s) of direct interest, but also the coefficients of all other explanatory variables, as they often provide a signal on the reliability of the analysis. For example, a finding that the sign of a particular coefficient is counter to what would be expected by economic theory21 may be an indication of an omitted-variable problem22, a selection bias23, or some other identification problem24.
3. In the case of large-scale surveys of final consumers the report should disclose essential information about how the research was conducted to allow judging the reliability and validity of the results. All data must be fully documented and made available (subject to appropriate safeguards to maintain privacy and confidentiality). Non-sampling error, in particular the non-response rate and response bias25 should also be taken into account in the analysis. Conclusions from large-scale surveys of final consumers should be carefully distinguished from the factual findings.

20 For example, econometric estimates of the elasticity of demand for a given product implying an upward sloping demand curve should be discarded in almost all cases, unless the product in question can be shown to be a Giffen good—i.e., a product for which a rise in price of this product makes people buy even more of the product.

21 For example, a study showing that an increase in the marginal costs of production of a given good is associated with lower prices for that product should, ceteris paribus, be discarded automatically.

22 That is, when a relevant explanatory variable, which is correlated with the dependent variable has been omitted from the analysis, so that the coefficients of some or all other explanatory variables suffer from a bias of a priori unknown sign or magnitude.

23 The bias that arises when the selection process influences the availability of data in a way that is related to the dependent variable.

24 See note 13 *supra.*

25 Response bias refers to situations were, for a host of reasons, respondents fail to answer questions truthfully, fully and/or were influenced by the interviewer.

11

* 1. **Robustness (non implemented proposal: place robustness before reporting)**

1. Economic and econometric analysis should to the greatest possible extent be accompanied by a thorough robustness analysis, except where its absence is appropriately justified. In any event, any formal economic model or econometric analysis needs to be generally consistent and reasonably predict observed past outcomes and behaviour.
2. Other common robustness checks that may be appropriate include assessing whether empirical results are sensitive to changes in (a) the data, (b) the choice of empirical method, and (c) the precise modelling assumptions26. Similarly, the relevance and credibility of an economic model can be significantly enhanced if accompanied by a sensitivity analysis with respect to the key variables.
3. It is strongly recommended to address explicitly (i) to what extent, the results of the analysis are in line with past results using similar methods, and whether the results can be generalised27. Congruent and convergent results based on methods supported by academic and practitioners' are likely to be given greater significance than widely divergent results.
   1. **Further recommendations**
4. The credibility of an economic submission may be enhanced when the limitations with regards to accuracy or explanatory power of the underlying data and methodology are explicitly acknowledged. In this regard it is often advisable to address rather than minimize uncertainty.
5. The parties rely sometimes on data that they do not have the means to audit and verify. Hence, they should be careful not to misleadingly present economic opinions as statements of fact. The sources of information should be carefully acknowledged, and the facts properly documented and described without ambiguity. This applies whether the economic or econometric analysis is a stand alone report or part of a broader submission.
6. It is advisable that the parties consult DG Competition regarding the types of empirical analyses that they consider useful in testing the anticompetitive and/or efficiencies theories. In particular, the parties can suggest potential analyses which may be easier for DG Competition to conduct, given its access to data from third

26 For example, in a multiple regression analysis, one should indicate whether the results are severely affected by how the variables were defined, by the set of explanatory variables incorporated to the analysis, or the functional form.

27 For example, if the elasticity of demand for a given product has been estimated for a given country, where data is available, but the case at hand would require estimates of the elasticity of demand for various countries, one should consider whether or not, and under which assumptions, her results for one country apply to the others. Similarly, if an economic model assumes that firms make take-it-or- leave-it offers when interacting with intermediate buyers with certain characteristics, it may be necessary to assess whether such assumption extends to all types of intermediate buyers.

12

parties. DG Competition, in turn, may propose analyses it believes might be useful for the parties to conduct. Similarly, it is recommended that the parties consult the DG Competition regarding the most suitable robustness checks for a given methodology. Experience suggests that such consultation can be most effective if the parties are prepared to share any relevant preliminary results in advance of a formal submission.

1. Where economic submissions rely on quantitative data the parties should provide the data and codes timely, in an appropriate format and in accordance with the criteria laid down in section 3 of this document. In particular, the absence of all the necessary elements needed for replication and assessment of an economic submission can constitute grounds for not taking it further into consideration.
2. When granting access to the file, the Commission may provide upon request the data and codes underlying its final economic analysis or, to the extent that they have been made available to the Commission, that of third parties on which it intends to rely or take into account. Where necessary to protect the confidentiality of other parties' data, access to the data and codes will be granted only at Commission premises in a so-called data room procedure28, subject to strict confidentiality obligations and secure procedures29. Third parties or complainants are equally expected to submit all the underlying data used in the analysis. They are also expected to authorise the Commission, where appropriate, to offer data room access to the parties upon request.
3. When conducting large-scale surveys of final consumers to address a case-specific issue the parties might want to involve the Commission in the questionnaire development and design30. Subject to time and resource constraints it is often desirable to conduct a pre-test or pilot31.

**3 BEST PRACTICES ON RESPONDING TO REQUESTS FOR QUANTITATIVE DATA**

1. Pursuant to Article 18 of Regulation 1/2003 and Article 11 of the Merger Regulation, the Commission is empowered, in order to carry out its duties, to require undertakings and associations of undertakings to provide it with all necessary

28 See Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and102, paragraphs 97 and 98.

29 Similarly, the Commission will endeavour to organise access to a data room, normally to the parties’ economic advisors and external counsel, if necessary to ensure their rights of defence are fully respected.

30 Occasionally, the Commission may take the initiative to commission its own large scale consumer survey. In that case, it will normally consult the parties and interested third parties on the questionnaire design and instruments of data collection, subject to confidentiality safeguards and to the extent such consultation does not delay or otherwise jeopardize the investigation.

31 All questions should be pretested to ensure that (i) questions are understood by respondents, (ii) can be properly administered by interviewers, and (iii) do not adversely affect survey cooperation

13

information. It is the Commission that defines the scope and the format of requests for information.

1. Most competition or merger investigations involve (1) collecting data, (2) analyzing data, and (3) drawing inferences from data. In most antitrust and merger cases, the Commission will gather evidence by sending targeted requests for information pursuant to Article 11 of the Merger Regulation and Article 18 of Regulation 1/2003 to the main players in the market (e.g. competitors, direct customers and other parties with specific knowledge of the market). This document, however, provides specific guidance to respond to a request for quantitative data32. However, many of the principles here identified apply, more generally, to responses to any request for economic information, quantitative or qualitative.
2. Quantitative data may help the Commission to conduct statistical analysis to define markets, establish a counterfactual, assess the potential anti-competitive effects of a notified merger, validate efficiency claims or predict the impact of remedies. In order to do that the Commission needs to get accurate data, with sufficient time to analyze it.
3. The Commission is aware of the costs that its procedures may impose on undertakings. An important objective of this section is, therefore, to provide recommendations to reduce the burden on the involved parties and on the Commission posed by the production and processing of quantitative data, while at the same time ensuring and enhancing the effectiveness of the Commission's substantive review.
4. These best practices are intended as general guidance and do not supersede any specific instructions in any Data Request issued by the Commission in specific cases.
   1. **General motivation for Data Requests**
5. The primary objective of a Data Request is to obtain accurate information concerning quantitative variables such as prices, turnover, capacity and entry or exit decisions within the possible relevant markets over a reasonable period. Quantitative data may be necessary to understand current market conditions and competitive dynamics. In some cases, reliable quantitative data may allow to conduct statistical or econometric analysis to be submitted as evidence in an antitrust or merger investigation.
6. The Commission will endeavour to ask for the appropriate amount of data to carry out the required analyses. The Commission is mindful of time constraints and must balance the usefulness of each request against the time left before any legal or procedural deadline. In appropriate cases, DG Competition may discuss in advance with the addressees or other affected parties the scope and the format of the Data Request. DG Competition may also explain the analysis that it intends to perform

32 For statistical purposes, “quantitative data” means a series of observations or measurements, expressed as numbers. A statistic may refer to a particular numerical value, derived from the data. For example, an HHI measure and a correlation coefficient are statistics.

14

with the requested data in order to improve the efficiency of the data collecting process and to ensure the data is of adequate quality. This is particularly the case in the later stages of an investigation as early requests could be of a more general nature and aimed primarily at better understanding the functioning of the market in question.

1. The Commission will carefully consider what the proper sample to characterize a population is. Inferences from the part to the whole are justified only when the sample is representative33.
2. A further issue that may influence the scope of the Data Request is whether third party data will be necessary and available to conduct any meaningful analysis.
   1. **Common elements of a Data Request**
3. Examples of data necessary for a competition investigation include data on costs, output, sales, prices, capacity, product characteristics, delivery flows, customer characteristics, tender details, entry barriers, business strategies, and market shares of the parties involved and of the other participants in the relevant market.
4. The source of the information can be the parties involved in the procedure, third parties, trade associations, trade press, independent consultants, survey information or government sources.
5. Data may be costly to collect or hardly accessible in the relevant time frame. Often, however, requests for quantitative data in merger proceedings seek data that is readily available to the involved parties. Readily available data refers to data that is routinely collected and maintained for a reasonable period as part of the firm's normal business operations, for example to inform business strategy or for internal reporting. Readily available data also includes data that is regularly purchased from third parties, such as scanner data or survey data34. In any event, in its investigations, the Commission is not limited to request only data that is readily available to the parties (see point 77 below). Deadlines for submitting data which is difficult or costly to retrieve will be decided by the Commission on a case-by-case basis.
6. A Data Request often includes the following sections, but each request will be tailored to the specific information needs and circumstances of the case:
7. a glossary of terms, in particular key variables;
8. a list of the variables;

33 For example, in certain circumstances it may be appropriate to limit the data request to a certain representative subset of the involved firms' customers, or to a particular geographic market which stands out for a valid given reason.

34 Where econometric analyses are to be conducted, the sample needs to be of sufficient size for meaningful inference. For instance, in the absence of cross-section variability, requests would generally cover at least a three year period of monthly observations.

15

1. for each variable: the units of measurement; the level of aggregation over time (e.g. monthly); the time range (e.g. the last three fiscal years) and the geographic scope (e.g. countries, regions or cities);
2. the preferred electronic format (stata file, excel file, etc);
3. suggestions or specific requests on data formatting, variable classification and tests to detect data inconsistencies;
4. deadline for compliance with the request.
5. In some instances, particularly where data is requested from different parties, DG Competition may provide a template to ensure all submissions are compatible and can be efficiently combined with minimal risk of error.
   1. **Main criteria to consider when responding to a Data Request**
6. Responses to a Data Request must be: (i) complete, (ii) correct, and (iii) timely.
7. The Commission may impose on undertakings and associations of undertakings fines where, intentionally or negligently, they supply incorrect or misleading information or when, in response to a request made by decision, they supply incomplete information or do not supply information within the required time-limit35. Furthermore, in merger cases, the relevant time limits for initiating proceedings and for the adoption of decisions may exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision or to order an inspection36.
   * 1. *Completeness*
8. The parties should provide all data requested, in any of the stated formats and follow indications regarding presentation and consistency checks. Subsidiary data that is necessary to construct or to understand any variable requested should also be provided, except when adequately justified and with prior approval by the Commission.
9. It is strongly encouraged that problems of missing data are flagged to the Commission well in advance of the deadline for compliance with the Data Request to allow, if appropriate, for either a modification of the request or an extension of the deadline. Any data missing from the original Data Request must be adequately justified. In any event, a response to a Data Request may not be considered complete unless accompanied by a memo:

35 Article 23(1)(a) and (b) of Regulation 1/2003 and Article 14(1)(a), (b) and (c) of the Merger Regulation.

36 Article 10(4) of the Merger Regulation, but see also Article 8(6) thereof.

16

1. describing the data compilation process: from raw data through aggregation and merging operations to the final database submitted. How was the sample selected and was it necessary to eliminate certain kinds of observations;
2. identifying all relevant sources;
3. labelling and thoroughly describing all variables;
4. reporting on the reasons for potential measurement error such as missing information or any changes in the collection process;
5. describing any assumptions and estimations used to fill incomplete data; and
6. reporting on consistency checking and all data cleaning operations.
   * 1. *Correctness*
7. It is up to interested parties to ensure the correctness of the data submitted. Tests for accuracy of all variables should always be undertaken and reported37.
8. In order to detect incorrectness in data it will be expected that consistency checks are performed and documented prior to submission. In particular:
   1. Responses to the Data Request should be consistent with responses provided to other requests for information (e.g. turnover, market shares, etc);
   2. Individual values within a variable must be consistent with the economic reality38;
   3. When aggregation of raw data is necessary, one needs to ensure the aggregation algorithm is sensible and applied consistently;
   4. Coherence between different variables is necessary39;
   5. Over time consistency across and within variables must also be ensured.
      1. *Timely submission*
9. Deadlines for responses to Data Requests must be strictly respected. Where parties plan to submit data in connection with an empirical analysis conducted at their own initiative, it is useful to warn in advance DG Competition of the planned timing and scope of such a submission. Results that the parties intend to rely upon or discuss in a meeting with DG Competition should be submitted, including data and code to facilitate replication, at least 2 working days before the said meeting.

37 For example, negative sales volumes or zero transaction prices are normally inaccurate and are often indicative of data extraction errors, systematic measurement errors or inadequate accounting of rebates or taxes.

38 For example, transaction prices (net of discounts) should generally be positive, missing or unexpected values (i.e. sales not in line with historical levels) should be checked.

39 For example, shipments of one product must be related to shipments of any by-products. Also, charged prices should generally remain above transportation costs (i.e. ex-works negative prices cast doubts on either the correctness of the charged price and/or the transportation cost).

17

**3.4 Other Recommendations**

1. This section sets down further recommended best practices concerning responses to a Data Request.
   * 1. *Cooperation in good-faith*
2. Data production is an area where cooperation between the parties and the Commission is especially important. The parties will need to explain clearly the complexities that can be associated with requests that the Commission may regard as simple40. The Commission endeavours to define its requests as specifically and quickly as possible so the parties can understand what is being sought. This dialogue may help both sides deal more efficiently with data issues. In any event, it is for the Commission to decide the scope, format and timing of the Data Request.
3. It is important to emphasise in that regard that the integrity and efficiency of the process are undermined if, inter alia, the parties make representations about what data exist without reasonably diligent efforts to confirm their accuracy, if they ignore a carefully drafted and limited Data Request and produce large amounts of data points disregarding the submission format, scope, or data processing requirements, if they use non-obvious “definitions” of common terms in construing requests, or if they make unilateral and undisclosed inferences about what the Commission is effectively seeking.
   * 1. *Early consultation with the Commission to inform about what type of data is available*
4. In some cases, the burden of compliance with Data Requests may be significantly reduced if the parties inform the Commission at the earliest opportunity on the availability of quantitative data. Early consultation allows to determine not only what data is available and its suitability, but also in what form it can be provided, thereby making it easier and faster for the parties to provide the data, in the event the Commission makes a Data Request. However, the Commission is not limited to request only data that is readily available to the parties.
5. To make these early discussions fruitful, parties must be prepared to thoroughly explain their information management systems and should be prepared to discuss certain issues such as: every field of information captured, how the underlying data is collected and formatted, the frequency of collection, what software is used, the size of the data set, what reports are routinely generated from that database, etc. It is recommended that the involved firms provide any written documentation and/or training materials to the Commission in advance of any discussion. It is also generally useful that parties create a diagram to show how the relevant data is

40 Why, for example, it may be difficult, impossible or useless to simply “turn over” a “database,” or the burdens and costs associated with providing data in the manner the Commission seeks.

18

distributed throughout the organization. In any event, as a general rule, parties should provide relevant documents to support their contentions concerning the availability, scope and production time of quantitative data.

1. Preliminary meetings or telephone conversations with those responsible for data collection or analysis in the firms are often quite useful. Parties are advised to make such personnel available as early as possible. These discussions should involve descriptions of the type of electronic (or other) data that the parties maintain (both in the ordinary course of business and what is archived, and in what form).
2. In the case of mergers, pre-notification discussions should routinely deal with data issues. Although, the Commission will endeavour to identify all issues that may require a Data Request as soon as possible, certain issues may not be identified until later in the proceedings.
   * 1. *Consultation on a Draft Data Requests and data samples*
3. When appropriate and useful, DG Competition will send a “draft” Data Request for quantitative data in order to facilitate a better identification of the format, and to allow for basic consistency checks (see section 3.3.2). The purpose of the draft Data Request is to invite parties to propose any modifications that could alleviate the compliance burden while producing the necessary information. Any reduction on the scope of the Data Request can only be accepted if it does not risk harming the investigation and may trigger, particularly in merger cases, a reduction in the deadline for response initially anticipated.
4. In this connection, providing samples of the data is generally very helpful as it helps the Commission to determine what data is available and would be useful. As a result, on the basis of the sample it may be possible to draft a more focused Data Request, limiting the eventual burden on the parties.
   * 1. *Transparency regarding data collection, formatting and submission*
5. A transparent process allows for all parties involved to be aware of any incidences during the data collection process and thus react more rapidly and effectively.
6. The parties are advised to submit quantitative data in a format that minimises the time and manipulation required to process the data for analysis. Parties should always be able to answer all the following questions:
   1. How applicable is the data to the analyses under consideration;
   2. How reliable or “clean” is the data;
   3. Is it enough to conduct a meaningful analysis;
   4. What institutional factors specific to the industry setting and/or company may impact the proper interpretation of the data?

19

1. The involved parties should draw the Commission’s attention early on to any limitations in the data. They should make clear how raw data has been compiled and what steps have been taken to ensure its reliability41.
2. The involved parties are also strongly encouraged to conduct their own descriptive analysis to detect data problems before submitting the data to the Commission. Also the Commission may sometimes welcome efforts by the involved parties to deal with any remaining data imperfections using statistical analysis. In some cases statistics allow in various ways to average out errors in measurement and yield statistically sound estimates. All such statistical analysis should be adequately reported. In any event, raw data should be provided wherever possible because the aggregation and cleaning of data may have a significant impact on the outcome of statistical or econometric analysis. Also parties should provide the program files that manipulate, clean and complete the raw data in preparation for the analysis.
   * 1. *Direct access*
3. In some instances, the Commission will accept that as part of its response to a Data Request the involved parties provide direct electronic access to the underlying data. This alternative can provide an inexpensive and fast way to provide access to large amounts of data. Limited direct access can also provide a means to assess the value of certain corporate information.
4. The terms and conditions for direct access can be discussed in advance, addressing issues such as the availability of technical assistance, the ability to print or otherwise retrieve the data, the number of log-ins the company should provide, assurances that the activities of the services of the Commission will not be tracked, that underlying data will not be removed without agreement of the Commission and, most importantly, continued access throughout the entire course of the investigation. In limited instances, when providing direct access to corporate resources is unworkable, the Commission may submit a set of queries to the firm so that reports can be generated.

41 For example, if the raw data is based on a sample of individual customer accounts, an explanation of how these accounts have been chosen and why they are representative of all customers should also be provided.

20

ANNEX 1

STRUCTURE AND BASIC ELEMENTS OF A SOUND EMPIRICAL SUBMISSION

This Annex briefly describes how to structure an empirical submission in a competition or merger case according with the principles set out in the preceding sections (esp. section 2 above). A sound economic or econometric submission should contain the following sections and elements:

1. **The relevant question**

* The research question must be: (i) formulated unambiguously and (ii) properly motivated, taking into account both the nature of the competition issue, the institutional features of the markets and industries under consideration, and the relevant economic theory.
* The hypothesis to be tested (or null hypothesis) must be clearly spelled out as well as the alternative hypothesis or hypotheses under consideration.

1. **The data**

* A clear description of data sources must be provided as well as hard copies of the databases employed in the analysis. Normally, an accompanying memo would describe how previous intermediate data sets and programs were employed to create the final dataset as well as the software code employed to generate the final dataset. All efforts made to correct for anomalies in the data should be clearly explained.
* One should also report how the data were gathered, the sample selection process, the measurement of the variables and whether they match with their theoretical counterparts, etc.
* In addition, the data should be thoroughly described. This includes reporting the sample time frame and the statistical population under consideration, the units of observation, a clear definition of each variable, any data cleaning procedures, etc. This information should be accompanied by descriptive statistics (including means, standard errors, maximums, minimums, correlations, and histograms, residual plots, etc) of all relevant variables.

1. **Methodology**

* The choice of empirical methodology should be properly motivated. One should discuss their methodological choices in light of: (a) their data limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration (the relevant question).
* Alternative methodologies should also be discussed and if possible, given time and data constraints, employed to verify the robustness of the results to the choice of

21

model. An economic model or argument must generate predictions that are consistent with a significant number of relevant observed facts.

1. **Results and implications**

* Parties should explain the details of their models, and share any documentation needed to allow timely replication (e.g. the programming code used to run the analysis).
* The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report both the estimated coefficients and their standard errors for all relevant variables. They should also provide detailed information on all other specification tests and statistical diagnoses.
* One should discuss not only the statistical significance of their results but also their practical relevance. This requires interpreting the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation. The results of the statistical and econometric analyses should also be assessed with respect to the relevant economic theory.

1. **Robustness tests**

* All empirical work should be accompanied by a thorough robustness analysis that (i) checks whether the empirical results are sensitive to changes in the data, the choice of empirical method, and the precise modelling assumptions; (ii) tests whether the results of the analysis can be generalised; and (iii) compares the results of the empirical work in question with previous results in the relevant literature.
* An economic model should generally be accompanied by a sensitivity analysis with respect to the key variables, to the extent only the plausible but not the exact value of each variable can be determined. All results from the sensitivity analysis conducted should also be reported and not only those that support the argument.

22

European Commission - Directorate-General for Competition 11 December 2008

**MARKET SHARE RANGES IN NON-CONFIDENTIAL VERSIONS OF MERGER DECISIONS**

In order to prepare non-confidential versions of final decisions in merger cases the notifying party(ies) has/have to provide the Commission within seven days with a proposal for a non- confidential version of the decision by replacing all business secrets by […] and replacing market shares by ranges.

Save exceptional circumstances, DG Competition considers that the following market share ranges are suitable for protecting business secrets contained in a decision:

Ranges to be used in non-confidential version:

|  |  |
| --- | --- |
| Between 0 and 4.99% | [0-5]% |
| Between 5.0 and 9.99% | [5-10]% |
| Between 10.0 and 19.99% | [10-20]% |
| Between 20.0 and 29.99% | [20-30]% |
| Between 30.0 and 39.99% | [30-40]% |
| Between 40.0 and 49.99% | [40-50]% |
| Between 50.0 and 59.99% | [50-60]% |
| Between 60.0 and 69.99% | [60-70]% |
| Between 70.0 and 79.99% | [70-80]% |
| Between 80.0 and 89.99% | [80-90]% |
| Between 90.0 and 100% | [90-100]% |

<http://ec.europa.eu/competition/mergers/legislation/legislation.html>

**MERGER REGISTRY instructions for case allocation request**

**Case team allocation request - Mergers**

**To be sent by email to** [COMP-MERGER-REGISTRY@ec.europa.eu](mailto:COMP-MERGER-REGISTRY@ec.europa.eu)

**or by fax to +32-2-296.43.01**

**Please indicate the information below:**

* 1. **Your contact details: Name:**

**Company/law firm: Telephone number: Email:**

* 1. **Dossier type Pre-notification**

Form CO

Form CO simplified Form RS Art. 4(4) Form RS Art. 4(5) Consultation

* 1. **Extended level of confidentiality in the pre-notification phase**

Information submitted in pre-notification is protected by Article 17 of the Merger Regulation and pre-notification contacts are kept confidential. Nevertheless, some highly market sensitive transactions may require additional protection. If this is the case, please indicate this below providing a justification for the need for additional protection.

Only where requests for an extended level of confidentiality are considered justified, the Commission will use a code name for the transaction. Please indicate below the code name to be used.

**An extended level of confidentiality is requested because:**

* + 1. the transaction involves publicly traded companies, is not yet known to the market and is highly market sensitive
    2. other reason (please explain)

**Suggested code name:**

Page 1 of 2

**Return to** [COMP-MERGER-REGISTRY@ec.europa.eu](mailto:COMP-MERGER-REGISTRY@ec.europa.eu) **or by fax to +32-2-296.43.01**

**MERGER REGISTRY instructions for case allocation request**

* 1. **Companies involved country of origin, role and turnover1:**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Companies** | **Country** | **Role2** | **Turnover (million EUR)** | | **Year of turnover3** |
| **World** | **Community** |
| -  -  -  - |  |  |  |  |  |

* 1. **Name the main product(s) / Economic activities**

|  |  |
| --- | --- |
| **Name of product(s)/activities** | **NACE code** |
|  |  |
|  |  |
|  |  |
|  |  |
|  |  |

* 1. **Brief description of the parties, the transaction, the markets involved and complexity of the case**
  2. **Is case linked with or related to any other current or previous case?**

Yes, case number No

* 1. **Expected date of first draft :**
  2. **Expected date of notification :**
  3. **Proposed case language**

CS – DA - DE – ET - EL – EN - ES - FR - IT – LV – LT - HU – MT - NL – PL - PT – SK –

SL - FI - SV *(please choose)*

* 1. **Any other information you want to submit at this stage:**

**Date:**

1. For pre-notification, complete turnover if available.
2. A/P = Acquirer/Parent(s) A = Acquirer

T =Target

NC = Newly created company constituting a JV MP = Merging Party

1. If fiscal year does not fall together with calendar year, indicate end of fiscal year in full date format (dd/mm/yyyy)

Page 2 of 2

**Return to** [COMP-MERGER-REGISTRY@ec.europa.eu](mailto:COMP-MERGER-REGISTRY@ec.europa.eu) **or by fax to +32-2-296.43.01**