

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Conglomerate effects of mergers – Note by Belgium

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This document reproduces a written contribution from Belgium submitted for Item 1 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

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Preliminary comment

1. The BCA does not qualify its decisions mergers as vertical, horizontal or conglomerate. Some decisions distinguish in the assessment of their effects between vertical or non-horizontal, horizontal and conglomerate effects, and one decision between non-coordinated effects/conglomerate, non-coordinated effects/vertical and non-coordinated effects/horizontal.
2. Market foreclosure has been identified as the major conglomerate concern. But the risk of market foreclosure has been assessed in a number of decisions as a unilateral effect without qualifying the effect as conglomerate.
3. In this contribution, for consistency, we only mention cases when the published decisions explicitly refer to conglomerate effects.
4. Because some conglomerate mergers are not referred to explicitly as conglomerate, we do not discuss these in the responses to the questions in this contribution. For instance, in the Telenet/DVM case, Telenet acquired the remaining 50% of De Vijver Media, which owns television channels (4, 5 & 6) and a production house. This acquisition was cleared with remedies (including remedies concerning access to data). None of the relations were explicitly referred to as conglomerate.
5. On the contrary, some conglomerate effects may be discussed in an essentially horizontal (or non-horizontal) merger. These second order effects will be captured under conglomerate effects, and therefore discussed hereunder.

1. Trends in conglomerate mergers

Has your authority experienced an increase in merger notifications with potential conglomerate effects? Does it expect to see an increase or decrease going forward?

6. We have not seen an increase. It is difficult to know what to expect.

Has your authority found that conglomerate effects arise more frequently in some sectors relative to others? Why?

7. We have since 2013 (the re-establishment of the BCA in its present form) not seen in a non-simplified procedure any merger that raised conglomerate concerns or concerns different from concerns caused by other unilateral or coordinated effects of the transaction and qualified as conglomerate in the decision of the College (one was qualified as such by the prosecution services, see hereunder).

8. Three out of six cases were concerned with the cable distribution sector but that may be a coincidence.

In the opinion of your authority, should there be changes to the assessment framework of conglomerate effects of mergers?

9. No.

Has your authority experienced pressure from the public or policymakers to address perceived conglomerate concerns (e.g. with respect to the concentration of corporate power)? How has your authority responded to this pressure?

10. No.

2. Conglomerate merger theories of harm

Has your authority assessed any mergers for conglomerate effects? If so, please provide the details of these cases, including evidence gathered and analytical tools used.

11. The Auditorat (Investigation and Prosecution Service) and the Competition College have in seven non-simplified procedures looked at possible conglomerate effects (qualified as such) without concluding that they raised specific competition concerns for the following reasons:

- in one case in the cable distribution sector¹, the authority concluded that it was unlikely that the merged entity had the ability foreclose competitors and an incentive to do so; the presence of a sector regulations enforced by a sector regulator offered guarantees against the risk that access to data of the target might enable the merged entity to foreclose competitors;
- relatedly, in one case concerning driving tests² it was decided that the sector regulations enforced by a sector regulator offered sufficient guarantees against the risk that access to data of the target might create conglomerate effects;
- in one case concerning the media sector³ conglomerate effects were deemed unlikely and hypothetical concerns, unlikely to be different from concerns caused by other unilateral or coordinated effects of the transaction (which required remedies);
- in two cases, also concerning the media sector⁴, the market share of the target was deemed unlikely to create an ability or an incentive to foreclose competitors;
- in one case concerning magazines⁵ in which there already existed structural links between the undertakings concerned, potential conglomerate concerns were not deemed to result from the notified transaction;
- in one case⁶, the Competition College retained concerns in the motivation of its decision and imposed remedies, but without reference to the qualification of the effects as conglomerate. The dominant mail distributor in Belgium (bpost) acquired the dominant logistics company that delivers daily papers and magazines to news agents. The acquisition was cleared with remedies. The transaction implied only a limited horizontal overlap. But the Authority also considered this limited overlap,

¹ Decision ABC-2014-C/C-03, of 26 March 2014, *Tecteo*.

² Decision BMA-2013-C/C-02 of 24 October 2013, *Koninklijke Belgische Touring Club VZW*.

³ Decision BMA-2013-C/C-03, 25 October 2014, *Mediahuis*.

⁴ Decision BMA-2017-C/C-17 of 26 April 2017, *Mediahuis* (2); and BMA-2018-C/C-14 of 22 May 2018, *Telenet/Telelinq*

⁵ Decision BMA-2018-C/C-21 of 29 July 2018, *Rouarta/Sanoma*.

⁶ Decision BMA-2016-C/C-32 of 8 November 2016, *BPost/AMP*.

combined with the strong dominance in two related markets and the competitive pressure exerted by the potential entry/expansion of both players in each other's markets; this competitive pressure was sufficient to identify the potential horizontal effects of this transaction. Only the capacity and incentive to bundle products were explicitly referred to as conglomerate effects by the Auditorat.. The Competition College retained the horizontal concerns in the motivation of its decision and imposed remedies, but without reference to the qualification of the effects as conglomerate. It analyzed the effects within the framework of an assessment of the capacity to foreclose, the incentive, and the effect of potential foreclosure.

What types of conglomerate theories of harm would your authority consider when assessing mergers (e.g. tying and bundling, coordinated effects, bargaining power, others)? What is the limit in terms of the relationship between two products to justify an assessment of conglomerate effects?

12. In case they are deemed sufficiently serious and likely given the specific facts of a case, each of these conglomerate theories of harm can be considered, and in particular total and partial input/customer foreclosure.

13. It has applied with regard to foreclosure a triple test: ability to foreclose, incentive to foreclose, and consumer effects⁷.

Has any empirical or theoretical evidence regarding the conglomerate effects of mergers, either positive or negative, been useful to your agency in assessing mergers?

14. There has been no case in which effects qualified as conglomerate only were retained as requiring the imposition of remedies, or in which the absence thereof was the sole reason to justify an authorization of the merger.

What should the relationship be between the assessment of conglomerate effects and the effect on potential competition of a merger?

15. Either the expected conglomerate effects must be expected to have a significant negative impact on actual or potential competition, or they cannot by themselves justify a decision that the concentration has a significant negative impact on effective competition on the Belgian market or a significant part thereof, and must therefore be authorized (article IV.9, §3, Code of economic law).

16. In one case, both parties were seen as potential entrants in each other's markets. But this analysis is not discussed in this contribution, because these effects were not qualified as conglomerate effects⁸.

Has your authority identified any conglomerate theories of harm particular to digital sectors (e.g. gatekeeper firms, product ecosystems)?

17. No. Three out of six cases were concerned with one or more forms of electronic communication and possible concerns focused on access to data or other types of sensitive information. But these concerns were not conceptually different from concerns that might be raised in other sectors.

⁷ See e.g. Decision ABC-2014-C/C-03, of 26 March 2014, *Tecteo*.

⁸ Decision BMA-2016-C/C-32 of 8 November 2016, *BPost/AMP*.

3. Practical challenges

Are current notification thresholds sufficient to capture transactions that may have substantial conglomerate effects?

18. We think they are because a transaction between smaller undertakings is unlikely to have a significant effect on the behavior of market participants, and even less likely to have a significant impact on the market in general.

19. Article IV.66, §2, 2° CEL provides moreover that mergers must be authorized when the undertakings concerned do together not hold more than 25% market share on any market that is affected by the transaction, regardless whether their relationship is horizontal or vertical. The law therefore only considers horizontal and vertical effects, without referring to conglomerate effects.

Does your authority find that it has sufficient information to be able to identify potential conglomerate effects concerns from the notification process?

20. Yes.

If your authority has assessed conglomerate effects, what sources of information were used to identify the effects? What strategies were used in your requests for information from the merging parties?

21. We relied on information given in the notification or in response to RFIs when examining links between product or service markets. We apply a triple test with regard to foreclosure: ability to foreclosure, incentive to foreclose, and consumer effects⁹.

How does your authority consider the assessment of conglomerate effects relative to the potential for future enforcement cases?

22. We refer to our earlier response in respect of potential competition. Either the conditions to require remedies or to prohibit a transaction are fulfilled, or the transaction must be authorized. Given the principle of freedom of contract, Competition Colleges are likely to give notifying parties the benefit of the doubt when they consider the arguments of the auditeur insufficiently convincing, especially if a potential negative effect could be qualified as an infringement of other rules of competition.

What are the most appropriate remedies for dealing with conglomerate concerns?

23. We would examine the same range of structural and behavioural remedies as we do in respect of unilateral and coordinated effects.

4. Efficiencies

Has your authority assessed any efficiencies arising from conglomerate effects in a merger review?

24. No.

What types of efficiencies would your authority recognise in a merger involving conglomerate effects?

25. We would consider the same range of efficiencies as we do in respect of unilateral and coordinated effects and will be more inclined to retain a positive presumption.

⁹ See e.g. Decision ABC-2014-C/C-03, of 26 March 2014, Tecteo