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Campos do Jordão, São Paulo - Brasil

24 a 26 de outubro de 2018

Painel 4

Poder de Portfólio: Paradigmas Passados e Desafios Futuros

Portfolio Power: Past Paradigms and Futures Challenges

Proponente e Moderadora:
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Questions:

How is the EC considering conglomerate effects in recent cases?
How discussions about conglomerate effects may change in the future (from analysis of complementary products, to complementary products and related services and to integrated solutions). Would this view be a different in B2B market as oppose to B2C markets?

How CADE is considering conglomerate effects in recent cases?
How discussions about conglomerate effects may change in the future. Would digital markets/platforms change the way authorities should look at conglomerate effects? Could conglomerate effects be considered as a barrier to enter in new markets in such economies?

How economic studies and economic data have been used in discussions regarding conglomerate effects?
Should economics studies be different when it comes to more traditional conglomerate effects (complementary products) and analysis under new digital markets?

EC experience and practice on conglomerate mergers

Panel 4: PORTFOLIO POWER: PAST PARADIGMS AND FUTURE CHALLENGES

Eleonora Ocello

Case handler, Mergers – IT, media and telecoms
DG Competition – European Commission

The views expressed in this presentation are personal and do not necessarily reflect
the views of the European Commission



**A. FRAMEWORK OF
ASSESSMET**

**B. OVERVIEW OF RECENT
CASES**

C. CONCLUSION



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V. CONGLOMERATE MERGERS

91. Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in **closely related markets** ⁽²⁾ (e.g. mergers involving suppliers of **complementary products** or of products which belong to a **range of products that is generally purchased by the same set of customers for the same end use**).
92. Whereas it is acknowledged that conglomerate mergers **in the majority of circumstances will not lead to any competition problems**, in certain specific cases there may be harm to competition. In its assessment, the Commission will consider **both the possible anti-competitive effects** arising from conglomerate mergers and the possible **pro-competitive effects** stemming from **efficiencies** substantiated by the parties.

A. Non-coordinated effects: foreclosure

93. The main concern in the context of conglomerate mergers is that of **foreclosure**. The combination of products in related markets may confer on the merged entity the ability and incentive to **leverage** ⁽¹⁾ a **strong market position from one market to another by means of tying or bundling or other exclusionary practices** ⁽²⁾.

- **Conducts:**
 - **Tying:** Purchaser of a good is required also to also purchase another good
 - Technical tying vs. contractual tying
 - **Pure bundling:** Products are only available jointly in fixed proportions
 - **Mixed bundling:** Products are available separately, but discount for purchasing them jointly
- **Effect:** reduction of competitors' ability and incentives to compete



Framework of assessment

94. In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the **ability** to foreclose its rivals, second, whether it would have the economic **incentive** to do so and, third, whether a foreclosure strategy would have a significant detrimental **effect** on competition, thus causing harm to consumers ⁽³⁾. In practice, these factors are often examined together as they are **closely intertwined**.

Ability	Incentives	Effects
<ul style="list-style-type: none">• Significant market power in one market• Large pool of common customers• Legal framework and market structure	<ul style="list-style-type: none">• Costs of the foreclosure strategy• Benefits of the foreclosure strategy• Is it profitable overall?	<ul style="list-style-type: none">• Competitive landscape• Competitors' ability to replicate the foreclosure strategy• Customers' purchasing behaviour• Countervailing factors

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By sector

	Concern	Concern dismissed	Total
Chemicals		8	8
Civil engineering		2	2
Financial and insurance activities	1	1	2
Food		2	2
Healthcare	1	5	6
Healthcare / IT		1	1
IT	3	13	16
Manufacture of electrical equipment		4	4
Manufacture of machinery and equipment		3	3
Manufacture of transport equipment		5	5
Media		4	4
Mining and quarrying		3	3
Other manufacturing		7	7
Security and investigation activities		1	1
Telecoms		7	7
Telecoms / financial services / IT		3	3
Telecoms / media		1	1
Transport		5	5
Total	5	75	80



B2B vs B2C

	Concern	Concern dismissed	Total
B2B	4	63	67
B2B/B2C		1	1
B2C	1	11	12
Total	5	75	80

Products vs Services

	Concern	Concern dismissed	Total
Product	4	51	55
Product/services	1	9	10
Services		15	15
Total	5	75	80



IT	B2B	B2C	Product	Service
M.6773 - Canon/ I.R.I.S. (2013)				
M.6827 - Honeywell/ Intermecc (2013)				
M.6956 - Telefónica/ CaixaBank/ Banco Santander/ JV (2013)				
M.6967 - BNP Paribas Fortis/ Belgacom/ Belgian Mobile Wallet JV (2013)				
M.7005 - Schneider Electric/ Invensys (2013)				
M.7297 - DOLBY/ DOREMI/ HIGHLANDS (2014)				
M.7337 - IMS Health / Cegedim Business (2014)				
M.7678 - Equinix/ Telecity (2015)				
M.7686 - Avago / Broadcom (2015)				
M.7688 - Intel / Altera (2015)				
M.7813 - Sanofi / Google / DMI JV (2016)				
M.7861 - Dell / EMC (2016)				
M.8061 - IMS HEALTH / QUINTILES (2016)				
M.8124 - Microsoft / LinkedIn (2016)				
M.8251 - Bite/Tele2/Telia Lietuva/JV (2017)				
M.8306 - Qualcomm / NXP (2018)				
M.8314 - Broadcom / Brocade (2017)				
M.8315 - SIEMENS / MENTOR GRAPHICS (2017)				
M.8788 - Apple / Shazam (2018)				
M.9884 - Microsoft / GitHub (2018)				

Bold = intervention case



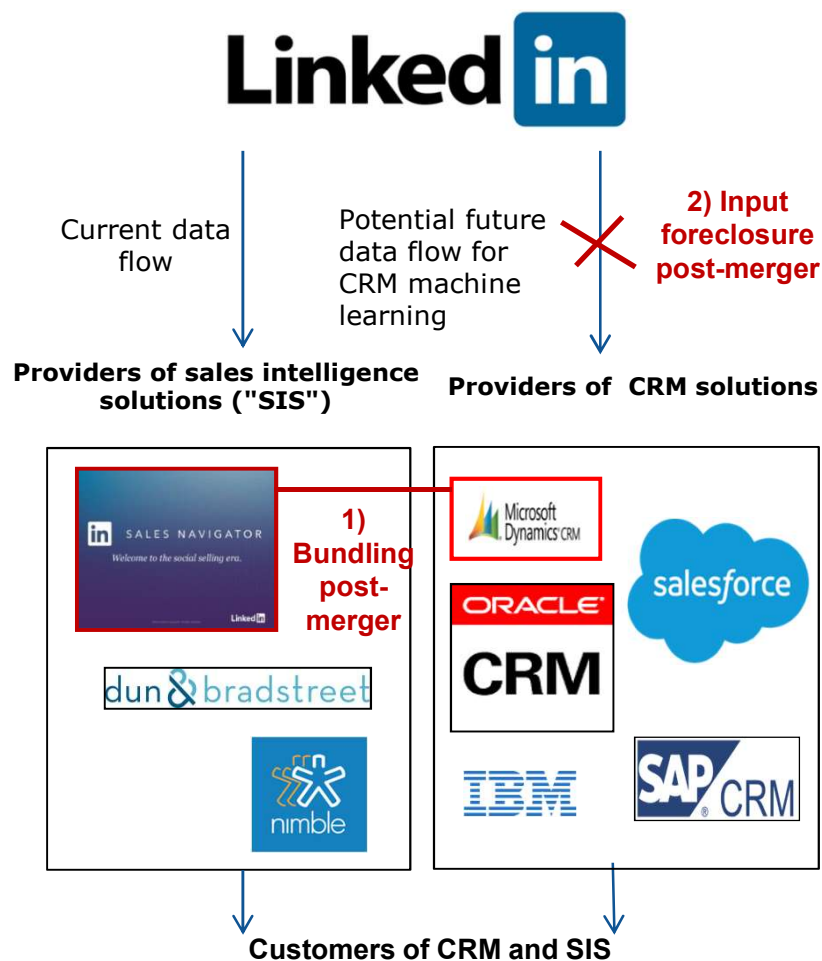
Microsoft/LinkedIn



- Leading supplier of **operating systems for desktops**
 - >90% market share (shipments)
 - 300 million active devices with Windows 10
 - Leading supplier of **productivity software**
 - >90% market share (revenue)
 - 1.2 billion users of Microsoft Office
 - Provides **Customer Relationship Management ("CRM")** software solutions – MS Dynamics ([0-5]% market share)
- Leading **professional social network ("PSN")**:
 - 433 million registered members
 - 107 million monthly active users
 - Turnover in 2015: EUR 2.7 billion, distributed as follows:
 - Premium subscriptions sold to consumers (18%) which includes **Sales Navigator** (a sales intelligence solution)
 - Talent and recruitment solutions (63%)
 - Marketing solutions (19%)

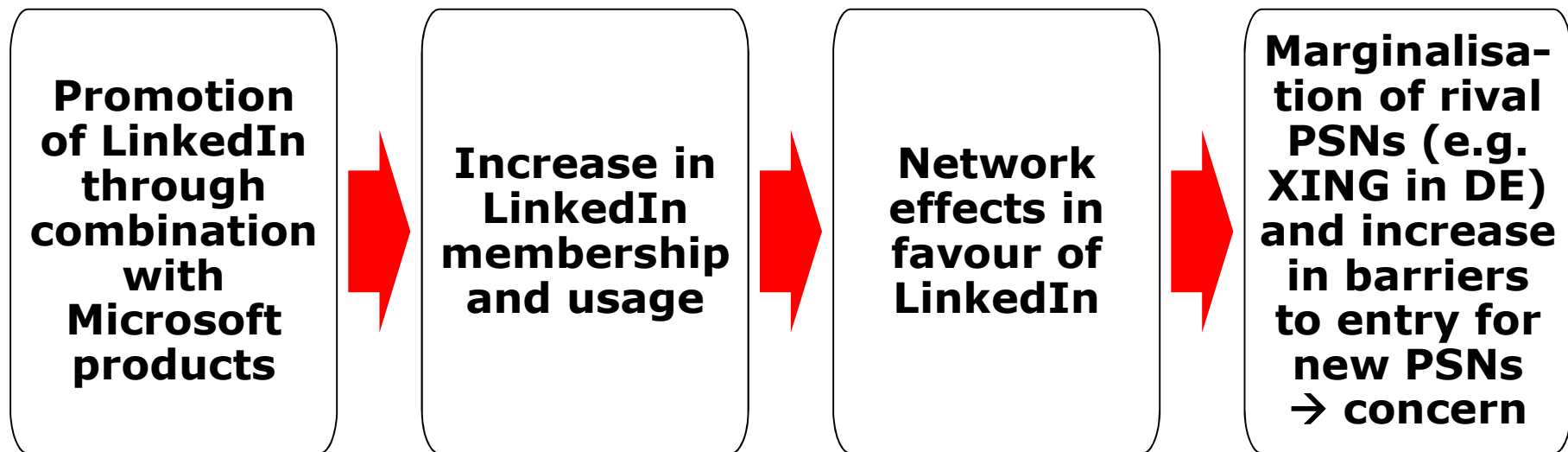


Foreclosure of CRM providers

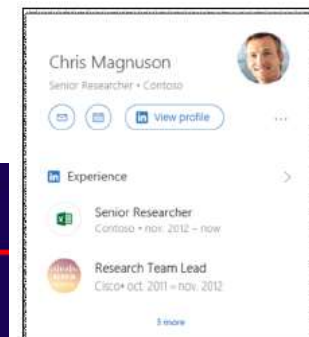


1. **Bundling** of LinkedIn Sales Navigator with Microsoft Dynamics CRM
→ concern dismissed
2. Denial to competing CRM providers of access to LinkedIn "full data" to develop CRM machine learning
→ concern dismissed

Foreclosure of PNS providers



1. **Preinstallation of LinkedIn application on Windows PC**
2. **Integration of LinkedIn features into Office**



Remedies

- **Remedies addressing Windows pre-installation concern**

- Microsoft shall allow OEMs and Microsoft PC distribution partners not to install the LinkedIn application/tile on Windows PCs.
- Microsoft shall not retaliate against or enter into exclusive agreements with OEMs and Microsoft PC distribution partners in order to prevent them from distributing a Windows PC application/tile for competing PSNs.
- Microsoft shall allow end users to remove LinkedIn application/tile entry point from Windows PC taskbar, "Start" menu or Windows OS.

- **Remedies addressing Office integration concern**

- Microsoft shall continue to make available the Office Add-in Program and the Office APIs to competing PSNs so as to enable them to build add-ins for Office (downloadable from the Office Store).
- Microsoft shall allow add-ins from other PSNs to run independently of any LinkedIn features to be integrated into Office.
- Microsoft shall allow Office end users to disable LinkedIn features integrated into Office.

- Temporal / geographic scope: 5 years duration, EEA-wide.



Broadcom/ Brocade



- 2016 turnover: EUR 13 610 million
- Provider of semiconductor devices, including Fibre Channel ("FC") host bus adaptors ("HBAs"), adaptors to connect the server with the FC SAN switch



- 2016 turnover: EUR 2 115 million
- Provider of networking hardware, software, and services, including FC Storage Area Network ("SAN") products



Conglomerate concerns

- Foreclosure by degrading interoperability between the merged entity FC SAN switches and the FC HBAs of competing suppliers to favour the merged entity's HBAs
- Leaking/misusing confidential information of FC HBA competitors
- Other conglomerate concerns dismissed



Remedies

- **Interoperability commitments**

- The merged entity committed to closely cooperate with competing HBA card suppliers to maintain interoperability between competing FC HBAs and the merged entities' FC SAN switches
- The merged entity, moreover, committed not to discriminate against Cisco in favour of its own downstream FC SAN switch activities

- **Confidentiality commitment**

- The protection of confidential information obtained from competing FC HBA providers [and Cisco → vertical concern] was ensured



Qualcomm / NXP



- 2016 turnover: EUR 21 000 million
- Leading innovator in **cellular technology and wireless technologies**
- [50-60]% market share in sales of LTE baseband chips
- Holder of a large portfolio of standard essential patents (**SEPS**), which are necessary to manufacture smartphones



- 2016 turnover: EUR 8 600 million
- Global provider of **high-performance, mixed-signal semiconductor electronics**
- Leading provider of Near Field Communication (**NFC**) / Secure Element (**SE**) technology used for mobile payment applications:
[70-80]% share in NFC,
[60-70]% in SE
- Licenses MIFARE, a technology for transit and access applications



Conglomerate concerns

- Foreclosure by mixed bundling of Qualcomm's LTE baseband chipsets together with NXP's NFC/SE combined solution and MIFARE in conjunction with limitation of licencing
- Foreclosure by degradation of interoperability between the merged parties' LTE baseband chipsets, NFC and SE chips and third parties' standalone components
- Disproportionate increase in bargaining power in relation to IP licensing
- Other conglomerate concerns dismissed



Remedies

- MIFARE license (8 years)
- Interoperability between baseband/NXP products and third parties' NFC/SE products (and vice versa) (8 years)
- Carve-out of NXP's SEPs and system-level NFC patents, subject to a royalty-free license (3 years)
- Non-assertion of remaining NFC's NXP patents (security and chip-level), other than for defensive purposes, and royalty-free license



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Take-away

- The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive
- Commission's practice so far confirms the theory - limited enforcement, but case by case assessment
- Greater number of EC conglomerate cases, including enforcement cases, in mergers involving companies active in the B2B supply of complementary products, in particular in the IT sector (semiconductors), where the line between products and services is blurring





PODER DE PORTFÓLIO: PARADIGMAS PASSADOS E DESAFIOS FUTUROS

Conselheira Polyanna Ferreira Silva Vilanova

24.º Seminário Internacional de Defesa da Concorrência – IBRAC

Campos do Jordão, 25 de outubro de 2018

Agenda

1. Introdução e arcabouço teórico
2. Racionalidade e eficiências possíveis
3. Possíveis preocupações concorrenciais
4. Casos paradigmáticos na Jurisprudência do Cade
5. Entre paradigmas e desafios à autoridade antitruste

Disclaimer

As opiniões aqui apresentadas são pessoais e não refletem, necessariamente, o posicionamento institucional do CADE.

1. Introdução e arcabouço teórico

- Esclarecimentos terminológicos: o poder de portfólio é uma das **possíveis** consequências de operações envolvendo conglomerados.
- O Efeito portfólio ou Poder de Portfólio é uma concentração de direitos detidos por uma empresa/grupo capaz de gerar efeitos específicos no ambiente competitivo.
- Especialmente em cenários de economias de escopo, o poder de portfólio é responsável por reduzir os custos de transação.

2. Racionalidade e eficiências possíveis

- Redução dos custos de transação na produção, fornecimento e varejo dos produtos da companhia.
- A detenção de portfólios pode diminuir o custo de transação dos distribuidores e varejistas, pois esses passam a lidar com apenas uma empresa detentora de diversos produtos e marcas;
- Reduz o relacionamento com vários fornecedores, os quais – em tese, aumentariam os custos de transação (eficiência e bem-estar do consumidor).
- Essa eficiência pode ser repassada ao consumidor na forma de menores preços.

3. Possíveis preocupações concorrenciais

- A criação ou reforço do poder de portfólio pode:
 - i) Estimular a prática de condutas anticompetitivas, como *bundling e tying*;
 - ii) dificultar a entrada efetiva de novos agentes, com fechamento de mercado na cadeia de fornecimento e varejo; e
 - iii) Prejudicar a capacidade de rivalizar das concorrentes presentes no mercado, reduzindo a concorrência potencial.
- Requisitos: presença de poder de mercado e existência de complementaridade de produtos pela ótica de vista do consumidores.
- O poder de portfólio se materializa em situações nas quais os produtos ofertados não tem grandes substitutos.

Padilla e Renda (2003 – razões para fechamento de mercado)

- Ato de concentração deve estar inserido em mercados oligapolistas (elevadas barreiras à entrada);
- Ausência de condições aos concorrentes para ofertar portfólio semelhante e/ou incapazes de competir com portfólio mais enxuto;
- Ausência de poder de barganha dos compradores com a empresa fusionada;
- A expectativa de dano a longo prazo deve superar o ganho de bem-estar dos consumidores (eficiências da operação).

SÍNTESE

- Aplicação da regra da razão, uma vez que pode gerar efeitos benéficos e maléficos à concorrência.
- Faz-se necessário analisar as condições de entrada no mercado, *market share*, respostas dadas pelo mercado num eventual aumento de preço, se a eficiência repassada para o consumidor inicialmente é menor do que os custos gerados após a eliminação da concorrência.
- Análise de existência de “Key Brand” ou “Must Have Brand”
- Risco de ganhos de eficiência no curto prazo, mas com eliminação da concorrência futuramente e possibilidade de exercício de posição dominante.

4. Casos paradigmáticos na Jurisprudência do Cade

Hypermarcas/Reckitt (2016)

- Mercado de bem-estar sexual. Concentração de marcas.
- Prática de discriminação de preço devido ao amplo portfólio que permitiria a segmentação de marcas pelo perfil dos consumidores, prejudicando assim os concorrentes.
- Risco de fechamento de mercado na distribuição e varejo, incentivo à venda casada, *bundling* e contratos de exclusividade.

SG: “Além disso, a redução do custo de transação para distribuidores e varejistas, que contratando com uma só empresa teria acesso a diferentes e fortes marcas, com potenciais preços distintos, pode aumentar o custo dos rivais, gerando fechamento de mercado e criando um problema concorrencial.”

- Aprovada com celebração de ACC com remédios estruturais : alienação da principal marca em um dos segmentos do mercado relevante.

Kroton/Estácio (2017)

- A Kroton já possuía fortes marcas no mercado presencial: mais uma marca poderia dar uma vantagem competitiva ainda maior.
- Fatores: a) altas barreiras à entrada, b) necessidade do adquirente ser provável entrante no mercado complementar/relacionado, e c) a futura entrada hipotética teria significativo efeito pró-competitivo.
- A ampliação desse portfólio impediria concorrência potencial em um mercado já com pouca probabilidade de entrada em um prazo razoável.
- Reprovação (por maioria) fundamentada na ausência de remédios suficientes para afastar os riscos ao ambiente anticompetitivo.

Essilor/Luxottica (2018)

- Fusão internacional.
- Metodologia da Superintendência-Geral do Cade:
 - (i) a capacidade para adoção de práticas tendentes ao fechamento de mercado;
 - (ii) os incentivos para adoção de práticas tendentes ao fechamento de mercado e
 - (iii) a probabilidade de geração de efeitos negativos como resultado da adoção de referidas práticas.
- Conclusão pela ausência de risco de fechamento de mercado. Baixo incentivo para a formação de *bundles*.
- Conselheiro Relator (Paulo Burnier): “autoridades antitruste devem ter cautela ao considerar os chamados efeitos conglomerados como fundamento para a reprovação de atos de concentração ou mesmo a imposição de remédios”.

5. Entre paradigmas e desafios à autoridade antitruste

- Novos mercados e plataformas digitais: o efeito de portfólio pode representar uma barreira à entrada?
- Necessidade de análise dos efeitos de rede, que podem alavancar ainda mais o poder de mercado decorrente do efeito portfólio. Dupla barreira à entrada?
- Forte concorrência potencial: necessidade de inovação.
- Possibilidade de barreiras decorrentes da natureza dos ativos no mercado. Análise de incentivos para *bundling* e *tying*: caso concreto.



Obrigada!

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Conglomerate effects

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25 October 2018

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Conglomerate mergers are on the radar

Economic analysis is used, but also get your story straight and your internal documents in order

Digital markets: same tools new nuances?

- ◆ **Conglomerate mergers are generally pro-competitive**
 - More efficient to market some components together rather than separately
 - Bundling and tying can lead to:
 - Cost savings derive from some form of economy of scope
 - Internalization of externality which may lead to a price decrease
 - Value enhancements can result from better compatibility and quality assurance of complementary components
- ◆ **Sometimes, conglomerate mergers may have negative effects on competition**
 - Increased ability or incentive to:
 - Engage in exclusionary practices
 - Price discriminate

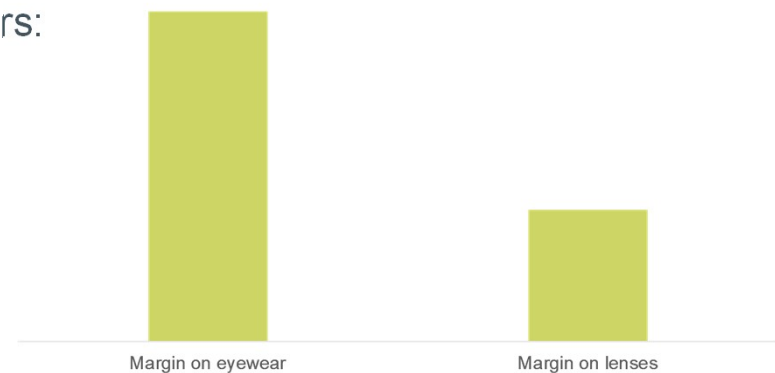
- ◆ EC's approach to assess conglomerate mergers (e.g. GE/Honeywell) was based to a large extent on abstract "theories of harm" rather than detailed empirical analyses
- ◆ Following *Tetra-Laval/Sidel* and *GE/Honeywell* Judgments, the EC changed this:
 - NHMG introduced the ability/incentive/effects framework as well as the term "anti-competitive foreclosure"
 - Approach to conglomerate mergers became less interventionist
- ◆ *Essilor/Luxottica* and *Qualcomm/NXP* signal a renewed appetite for conglomerate theories of harm
 - Broader trend of increasing enforcement on the basis of less conventional concerns: e.g. Innovation (*Dow/DuPont*), Data (*Apple/Shazam*)

- ◆ **Theories of harm proposed by the EC are related to the possibility of engaging in exclusionary practices**
 - Foreclosure through mixed bundling
 - Qualcomm/NXP: concern that baseband chipsets and proximity chipsets would be sold as a discounted bundle, reducing demand for rivals' components
 - Foreclosure through pure bundling/tying
 - Essilor/Luxottica: concern that frames/sunglasses would only be sold together with its lenses
 - Foreclosure through the degradation of the interoperability
 - Qualcomm/NXP: concern that the merged entity would reduce the support for software/hardware that allows third party products to operate with Qualcomm's chipsets

- ◆ **Ability. Firms must have the necessary market power and the practical ability to leverage it**
 - The EC’s approach remains based on high shares of supply and the notion of must have products.
 - EC analyzed Luxottica’s market share in both frames and **sunglasses**
 - EC argued that Ray-Ban was a “must-have” brand for opticians
 - EC found market power in baseband chipsets, proximity chipsets and also in MIFARE (Contactless security technology platform used in transit ticketing/fare collection)

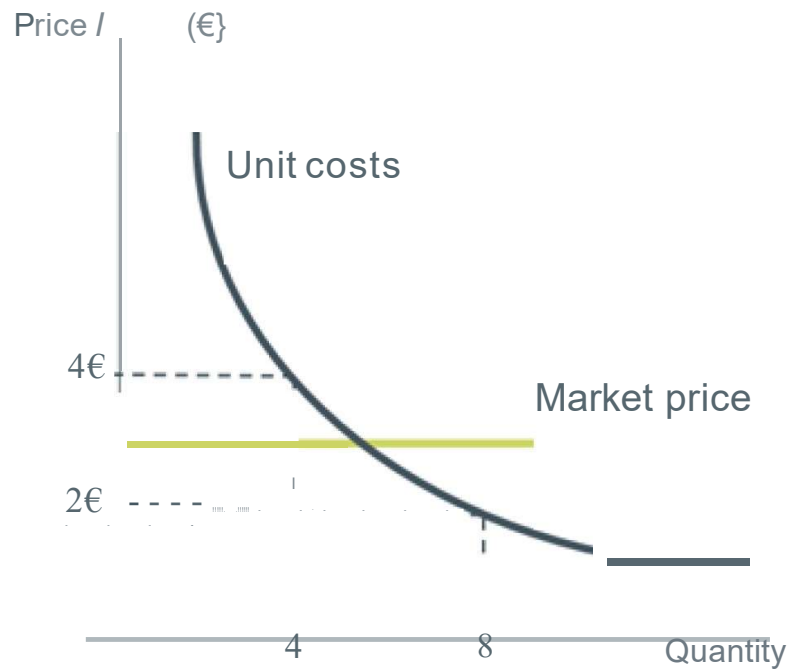
◆ **Incentives. Static and dynamic upsides of strategy must outweigh downsides.**

- Theoretical modelling of incentives is complicated and unlikely to be conclusive, and the EC has preferred to stay away from it
 - In Essilor/Luxottica, the EC nor RBB engaged in formal modelling exercise
 - In Qualcomm/NXP, economic modelling submissions by complainants were considered non-conclusive by the EC
- Analysis of incentives based on three main pillars:
 - Margin arithmetic
 - Internal documents
 - Past practices

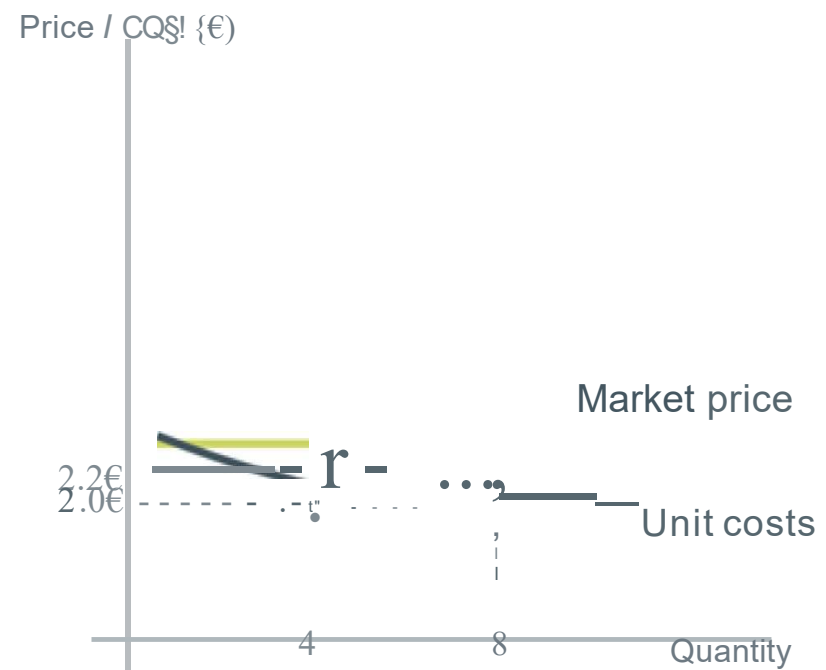


- ◆ **Effect. Rivals' ability to compete must be harmed (e.g. by denying them scale or reducing incentives to invest).**
 - The EC has recognized the “effects” condition to be key to determine whether the practice is pro or anti-competitive
 - Unlikely there is a risk of conglomerate effects without substantial scale economies
 - In Essilor/Luxottica, lenses production is not subject to significant economies of scale
 - No link between size and profitability: global players are choosing to have many small production plants rather than few big plants
 - Even the smallest players were generating similar net margins
 - In Qualcomm/NXP, also no obvious scale issues:
 - OEMs like Apple like to multisource and may promote alternative bundles
 - Small minimum viable scale for chipset production

Substantial scale economies



No substantial scale economies



- ◆ Recent investigations suggest that the EC is prepared to intervene on the basis of conglomerate concerns only
- ◆ Assessment of ability is open to discussion
 - What is a must-have?
 - High market shares in digital markets indicate usable market power?
- ◆ EC has shown no appetite for formal economic modelling of incentives
 - Reliance on internal documents and past behavior
- ◆ Significant emphasis on analysis of effects
 - Central part of the discussion
 - Negative findings highly unlikely in the absence of substantial scale economies