



THE EUROPEAN SCHOOL OF COMPETITION ECONOMICS

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# Vertical foreclosure as a theory of harm in merger control

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# Agenda

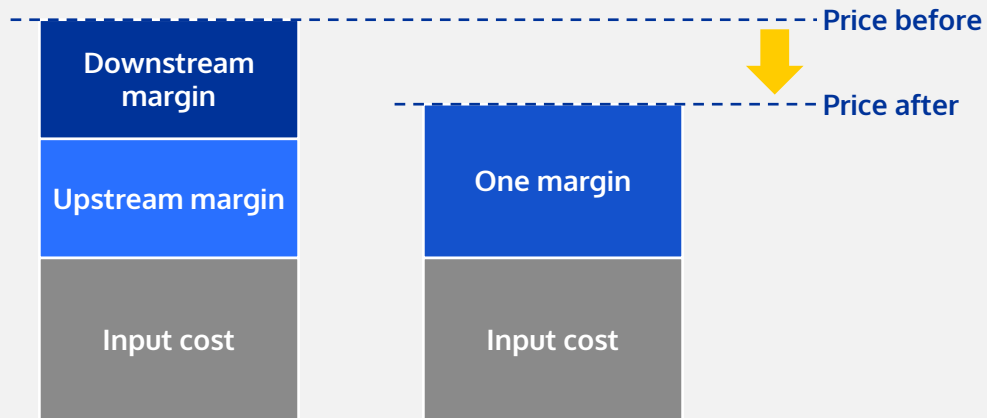
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- 1** Economics of vertical mergers and merger statistics
- 2** Developments under the 2026 Draft Merger Guidelines
- 3** Different forms of foreclosure
- 4** Foreclosure assessment: Ability, Incentive, Effect
- 5** Outlook: Risk of data-driven foreclosure

# Economics: why vertical mergers are *usually* pro-competitive

## 1 Elimination of double marginalization

Double marginalisation, Draft para. 302(d)



*Illustrative.* The merged firm obtains the input at cost, so cutting the downstream price pays off: lower price, higher output.

## 2 Complements, not substitutes

NHMG 2008, paras. 11-13

|                      | Horizontal merger | Vertical merger   |
|----------------------|-------------------|-------------------|
| Merging firms sell   | substitutes       | complements       |
| Direct rival removed | yes               | no                |
| Pricing pressure     | ↑ upward          | ↓ downward (EDM*) |

## 3 More efficiencies

Coordinated production and investment

Fewer hold-up problems (para. 325(e))

Lower transaction costs

Combined complements (para. 302(g))

**Evidence:** vertical concerns rarely stop mergers (ICN 2018, para. 54); EU vertical targets show lower mark-ups after the deal (-0.7%) (Bellucci & Rungi 2026)

## Starting point: vertical mergers are generally less likely to harm competition than horizontal mergers

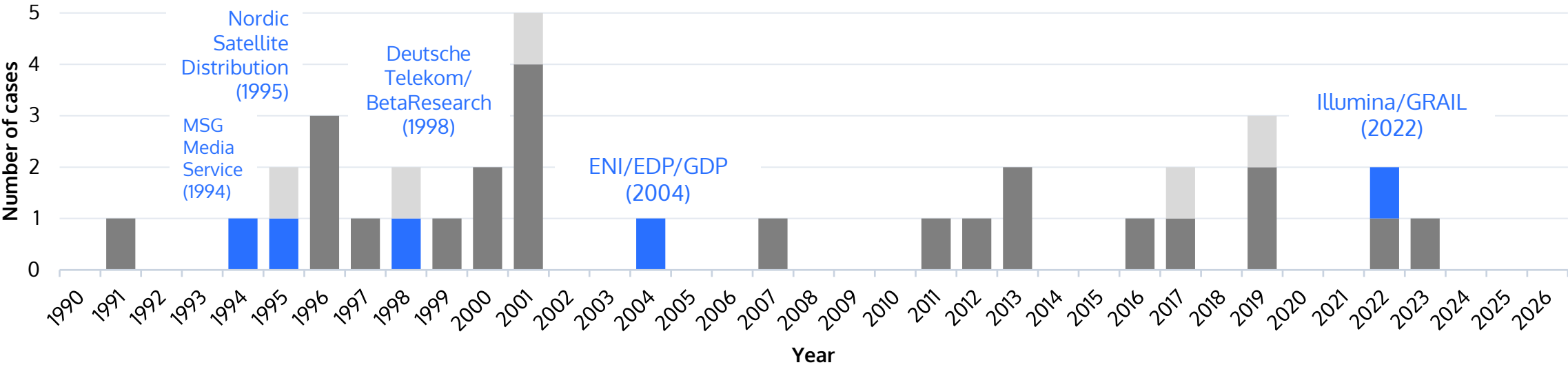
However, the 2026 Draft Merger Guidelines do not repeat the NHMG para. 11 statement that non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers

\*EDM = elimination of double marginalization

# Merger statistics: prohibitions and vertical foreclosure

**Figure 1: Prohibitions by year and theory of harm, 1990-2026**

(n = 33 of 9,802 decisions, 0.34%; vertical foreclosure as primary theory of harm in 5, i.e. 0.05%)



■ All other grounds   ■ Vertical foreclosure as primary theory of harm   ■ Vertical foreclosure as secondary theory of harm

**9,802**

EUMR decisions  
Phase I and II, 1990-2026

**258**

decided in Phase II  
2.6% of all decisions

**33**

prohibitions  
0.34% of all decisions

**5**

rest primarily on vertical  
foreclosure  
0.05% of all decisions

**About 1 in 2,000**

decisions ended in a prohibition resting primarily on vertical foreclosure; in 5 further prohibitions it was a secondary theory.

Source: Commission merger case statistics, 21.9.1990-31.8.2026; own classification of theories of harm. Vertical foreclosure (input or customer foreclosure) as primary theory: MSG Media Service (1994), Nordic Satellite Distribution (1995), Deutsche Telekom/BetaResearch (1998), ENI/EDP/GDP (2004), Illumina/GRAIL (2022; decision withdrawn on 6.9.2024 for lack of jurisdiction, still counted in the official statistics). Phase II was opened 310 times; 57 cases were withdrawn in Phase II. Conglomerate foreclosure and entrenchment count as other grounds, e.g. Tetra Laval/Sidel (2001) and Booking/eTraveli (2023).

# Something new, something old?

From 'type of transaction' to 'type of theory of harm'

In force: HMG 2004 and NHMG 2008

## Horizontal mergers

HMG 2004

## Vertical mergers

NHMG 2008, paras. 28-90

## Conglomerate mergers

NHMG 2008, paras. 91-121



Draft Guidelines 2026 (consultation), para. 116

■ (a) Head-to-head competition

□ (b) Investment and expansion competition\*

■ (c) Innovation competition

■ (d) Potential competition

■ ■ (e) Foreclosure

□ (f) Entrenchment\*\*

■ ■ ■ (g) Coordination

■ ■ (h) Other effects

■ HMG 2004

■ NHMG 2008, Vertical

■ NHMG 2008, Conglomerate

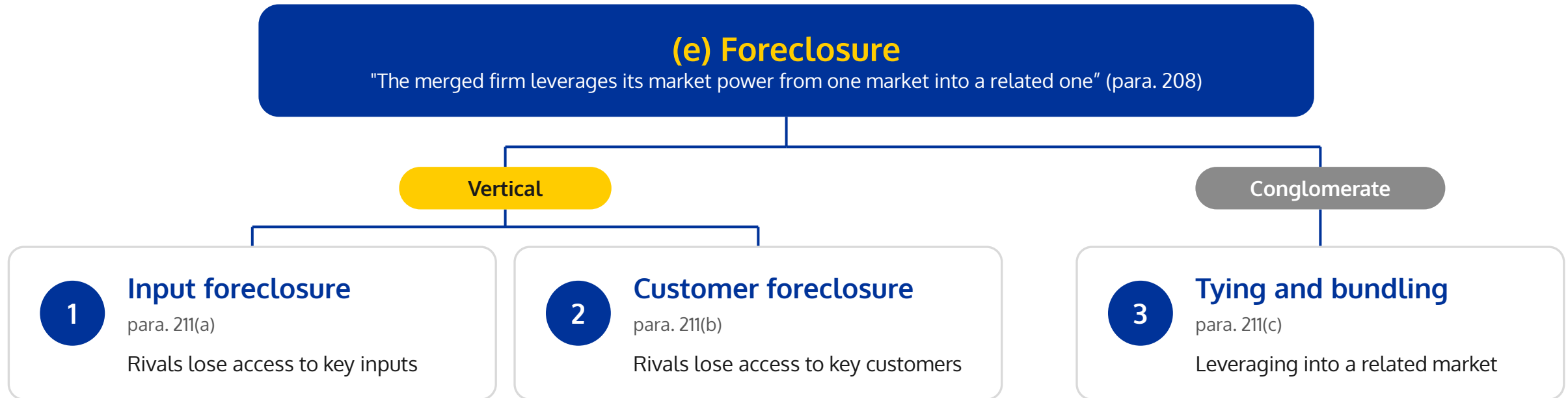
□ no predecessor

(e) covers both vertical and conglomerate foreclosure (Draft 2026, para. 211). \*Implicitly addressed under potential competition in the HMG 2004. \*\*Established in the Commission's decisional practice and case law.



New structure, familiar concepts

# Forms of foreclosure



**Related concerns in the Draft** - not separate forms of foreclosure

## Raising entry barriers

para. 247 = an effect of foreclosure

Entrants may need to enter several markets at once

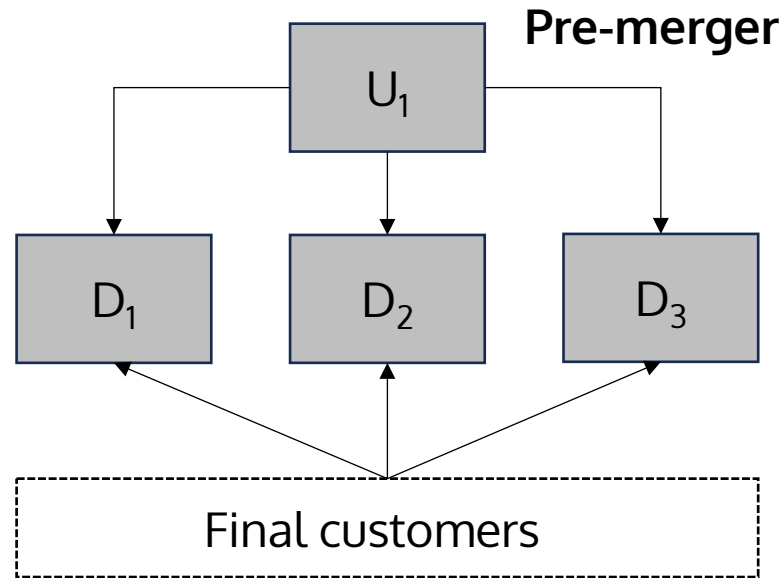
## Access to commercially sensitive information

paras. 282-286 = other effects (h)

Can lead to a SIEC even without foreclosure

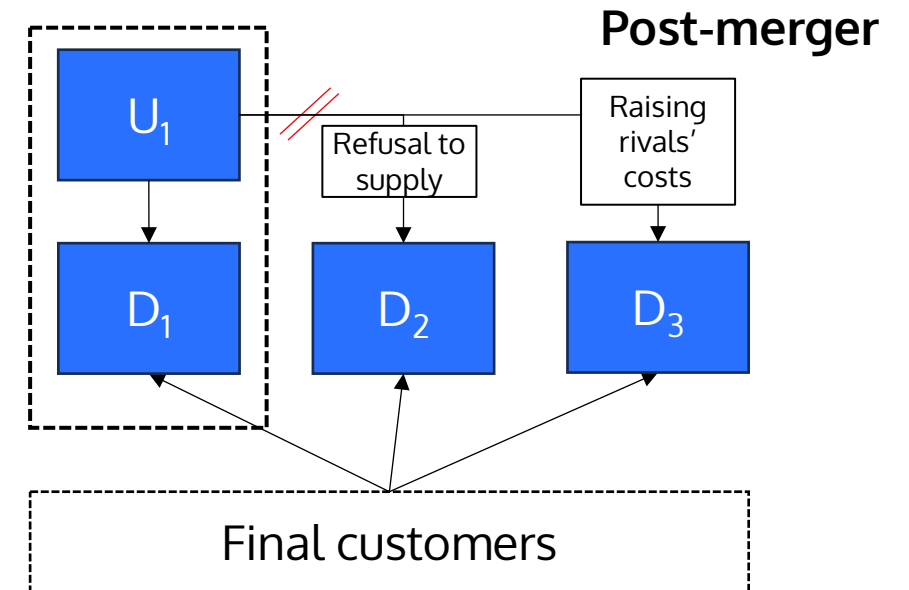
# Input foreclosure

- Pre-merger:  $U_1$  supplies all downstream firms  $D_1$ ,  $D_2$  and  $D_3$
- Post-merger: the merged firm may cause  $U_1$  to foreclose  $D_2$  and/or  $D_3$



**Problematic** if the merger impairs downstream rivals' ability or incentive to compete and thereby harms consumers

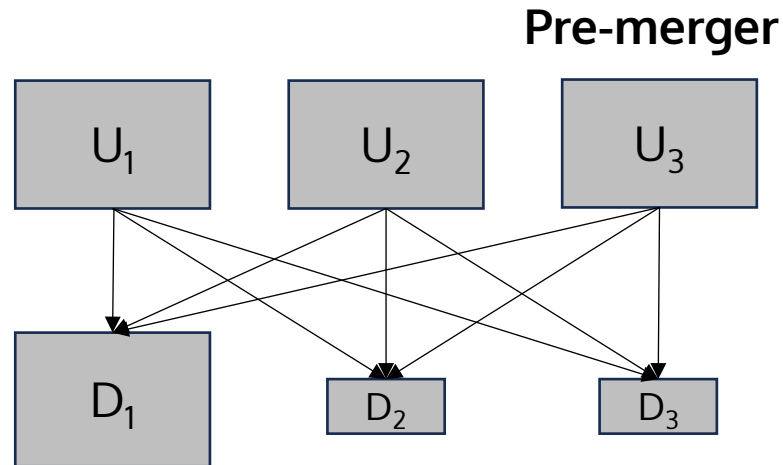
**Precondition (input market power):** the merged entity controls a competitively significant input.



Restricted input access → rivals' costs rise → downstream prices may rise

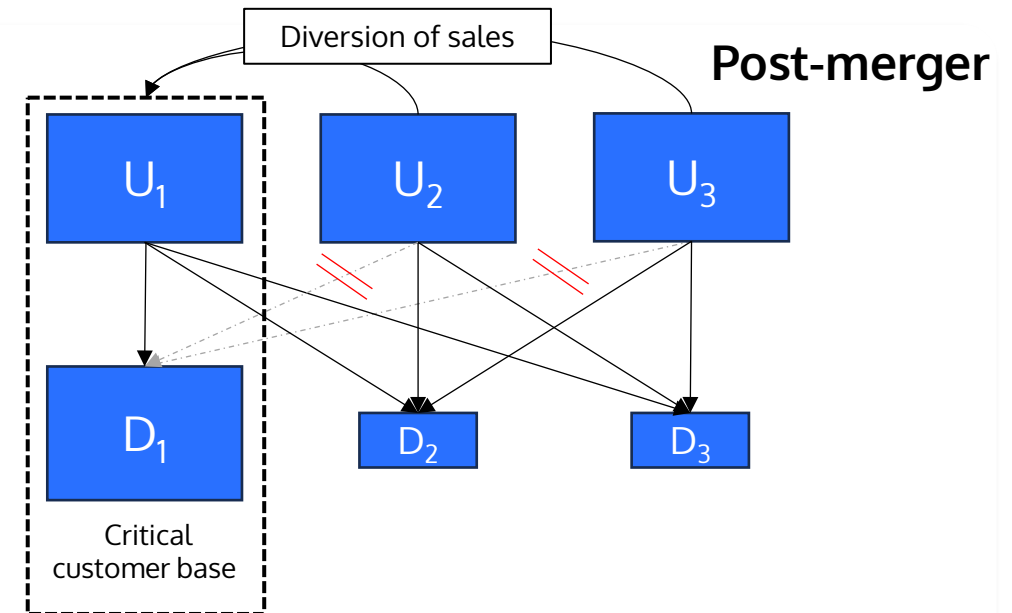
# Customer foreclosure

- Pre-merger:  $D_1$  buys from  $U_1$ ,  $U_2$  and  $U_3$
- Post-merger:  $D_1$  may stop buying from  $U_2$  and/or  $U_3$



**Problematic** if the merger impairs upstream rivals' ability or incentive to compete by restricting their access to a material share of downstream demand

**Precondition (customer base):** the merged entity controls a competitively significant share of downstream demand.



$D_1$  switches to  $U_1 \rightarrow U_2/U_3$  lose scale  $\rightarrow D_2/D_3$  may pay more  $\rightarrow$  consumer prices may rise

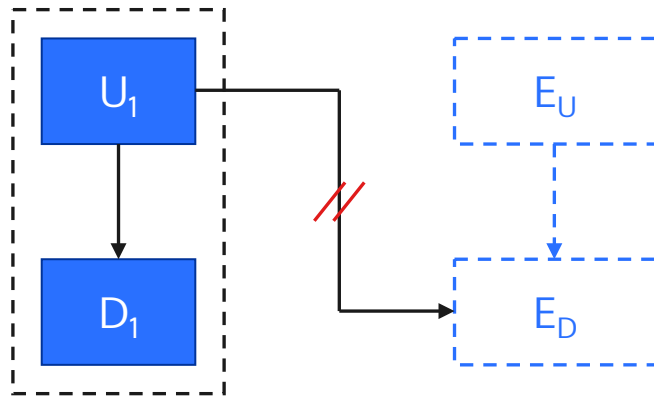
# Access to sensitive information, entry barriers and tying & bundling

## Effect of foreclosure

### Raising entry barriers

para. 247

Post-merger



*E: potential entrant, upstream ( $E_U$ ) and downstream ( $E_D$ )*

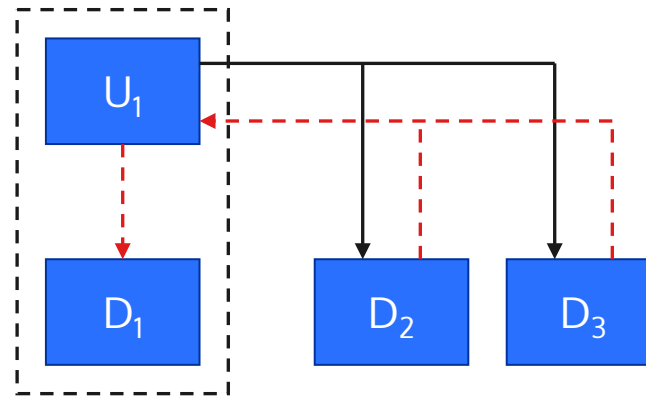
After the  $U_1/D_1$  merger an entrant may have to enter both levels at once - even a threat of foreclosure can deter entry

## Other effects (h)

### Sensitive information

paras. 282-286

Post-merger



*Red dashed: flow of rivals' information*

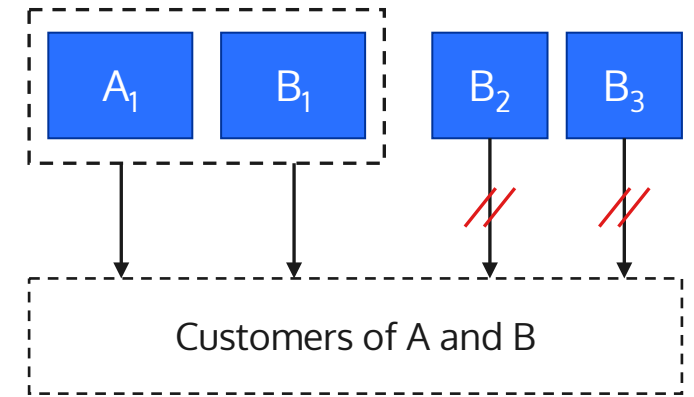
$D_1$  learns rivals' prices and input costs through  $U_1$  - harm is possible even without foreclosure (para. 286)

## Conglomerate foreclosure

### Tying & bundling

para. 211(c)

Post-merger



*A: strong market position B: related market*

Customers who need  $A_1$  get it only with  $B_1$  (tying) or cheaper in the bundle (bundling) →  $B_2/B_3$  lose sales and scale

# Foreclosure assessment: Ability, Incentive, Effect

## Ability

paras. 214-224

Technical possibility + a significant degree of market power in at least one market concerned

### 1a Mechanism

para. 210

Refusal to deal | access to products, services or data | price | quality | withholding information | interoperability | delayed release | preferential access | post-sale service | blocking rivals' pipeline products | tying and bundling

### 1b Form

Input 211(a) | Customer 211(b) | Conglomerate 211(c) | Indirect 212 | Diagonal 251

## Incentive

paras. 225-242

Would foreclosure be profitable for the merged entity?

### 2a Degree

209, 233-234

Total or partial, e.g. raising rivals' costs

### 2b Scope

209, 236

Market-wide or targeted at rivals or segments

### 2c Incentive route

229-238 | 239-242

Direct: loss vs departure × diversion × margin  
Dynamic: scale, data, customer reach

## Effect

paras. 243-251

Is effective competition significantly impeded?  
Partial or targeted foreclosure can suffice

### 3 Harm mechanism

244-245

#### Leveraging

Rivals are materially weakened in the related market.

#### Rent extraction

Rivals pay more for the foreclosed product, whether or not they are weakened.

Para. 213

**Cumulative, but often examined together:** strong ability evidence can also inform incentive and effects

Para. 239

**Dynamic incentives** may be material **even where** diversion, departure rates and margins show **no profitable strategy**

# Outlook: data-driven foreclosure in Phase I decisions

|  Serious doubts, removed by commitments |  No serious doubts on the data theory |                                                                               |
|-------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| <b>IMS Health/Cegedim</b> M.7337   19.12.2014                                                                           | <b>Art. 6(2) - access commitment</b>                                                                                   | Access to IMS brick structure for rival CRM and HCP-database providers        |
| <b>IMS Health/Quintiles</b> M.8061   12.8.2016                                                                          | <b>Art. 6(1)(b) - unconditional</b>                                                                                    | Real-world-evidence data: no ability to foreclose                             |
| <b>Microsoft/LinkedIn</b> M.8124   6.12.2016                                                                            | <b>Art. 6(2) - commitments (social networks)</b>                                                                       | LinkedIn data for rival CRM software: no ability to foreclose                 |
| <b>Microsoft/GitHub</b> M.8994   19.10.2018                                                                             | <b>Art. 6(1)(b) - unconditional</b>                                                                                    | GitHub repository data for DevOps and cloud rivals: no ability or incentive   |
| <b>S&amp;P Global/IHS Markit</b> M.10108   22.10.2021                                                                   | <b>Art. 6(2) - divestiture (LCD)</b>                                                                                   | Loan identifiers as input for leveraged-loan market intelligence              |
| <b>Microsoft/Nuance</b> M.10290   21.12.2021                                                                            | <b>Art. 6(1)(b) - unconditional</b>                                                                                    | Cloud and data analytics for rival transcription providers: no serious doubts |
| <b>Deutsche Telekom/Orange/Telefónica/Vodafone JV</b><br>M.10815   10.2.2023                                            | <b>Art. 6(1)(b) - unconditional</b>                                                                                    | Phone numbers and IP addresses as input for ad identifiers: no ability        |
| <b>Advent/GfK</b> M.10860   4.7.2023                                                                                    | <b>Art. 6(2) - divestiture (consumer panel)</b>                                                                        | Consumer panel data for rival retail-measurement providers                    |
| <b>Worldline/Crédit Agricole JV</b> M.11120   4.3.2024                                                                  | <b>Art. 6(1)(b) - unconditional</b>                                                                                    | Payment acceptance data: conglomerate foreclosure unlikely                    |

**In 6 of the 9 Phase I cases, the data-foreclosure theory was rejected, mostly for lack of ability**

**3 raised serious doubts: two were resolved by divesting a data business, one by an access commitment**

# Outlook: data-driven foreclosure in Phase II decisions

  Concern upheld, resolved by remedies

  Theory of harm rejected

**Thomson/Reuters** M.4726 | 19.2.2008

[Art. 8\(2\) - sale of database copies](#)

Financial data (fundamentals, estimates, broker research): foreclosure found

**Google/DoubleClick** M.4731 | 11.3.2008

**Art. 8(1) - unconditional**

Combined search and ad-serving data: squeeze-out of rivals very unlikely

**TomTom/Tele Atlas** M.4854 | 14.5.2008

**Art. 8(1) - unconditional**

Map databases as input for rival navigation-device makers: no incentive

**Nokia/NAVTEQ** M.4942 | 2.7.2008

**Art. 8(1) - unconditional**

Map databases as input for rival handset makers: no incentive

**Deutsche Börse/NYSE Euronext** M.6166 | 1.2.2012

**Art. 8(3) - prohibited (horizontal)**

Equities data: no ability to foreclose, given MiFID access duties

**Telefónica UK/Vodafone UK/EE** M.6314 | 4.9.2012

**Art. 8(1) - unconditional**

Pooled customer and location data for mobile advertising: no foreclosure

**Bayer/Monsanto** M.8084 | 21.3.2018

**Art. 8(2) - digital farming divested**

Data-enabled bundling foreclosure “premature”; SIEC: lost potential competition

**Apple/Shazam** M.8788 | 6.9.2018

**Art. 8(1) - unconditional**

Shazam User Data for rival streaming apps: no ability to foreclose

**Vodafone/Liberty Global** M.8864 | 18.7.2019

**Art. 8(2) - commitments (other grounds)**

Foreclosure through data collection rejected

**Google/Fitbit** M.9660 | 17.12.2020

[Art. 8\(2\) - ten-year commitments](#)

Web API access to Fitbit users’ health data for digital health rivals

**LSEG/Refinitiv** M.9564 | 13.1.2021

[Art. 8\(2\) - ten-year access commitments](#)

LSE real-time venue data and WM/R FX benchmarks as inputs for rivals

**Meta/Kustomer** M.10262 | 27.1.2022

[Art. 8\(2\) - ten-year commitments](#)

API access to Meta’s messaging channels for rival CRM providers

**UMG/Downtown** M.11956 | 13.2.2026

[Art. 8\(2\) - divestiture of Curve](#)

Access to rival labels’ commercially sensitive royalty data

**Not decided:** NVIDIA/Arm (M.9987, Phase II opened 27.10.2021, abandoned 8.2.2022) and Amazon/iRobot (M.10920, Statement of Objections 27.11.2023, abandoned 29.1.2024). Not in the data set: Microsoft/Activision Blizzard (M.10646, 15.5.2023), input foreclosure in cloud game streaming, resolved by ten-year licensing commitments, focus was on the content, not the data itself, as the foreclosed input as well as a 10-year distribution agreement.

**In the cases shown: before 2020, 8 of 9 data-driven foreclosure theories were rejected**

**Since 2020, 4 of 4 ended in remedies, three of them with ten-year commitments**

Shift since 2020

## Conclusion: three key takeaways

1

### Usually good for competition

Vertical mergers mostly create efficiencies - real harm is the exception.

However, the 2026 Draft Merger Guidelines do not repeat the NHMG para. 11 statement that non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers

2

### Same test, probably harder proof for long-term effects

The Draft keeps ability, incentive and effect, while long-term theories will be hard to prove.

**Ability → Incentive → Effect**  
Unchanged = same concepts

3

### Data access has a tendency to imply remedies

Since 2020, every Phase II data-access case ended in commitments or a divestiture.

**4 of 4**

Phase II cases since 2020

**Bottom line:** vertical mergers are rarely blocked, while Phase II data-access cases have a high risk to end in remedies



# Thank you for your attention!

Tak for jeres opmærksomhed!

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