ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

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COMMENTS OF ITIF

to the

European Commission

Brussels, Belgium

In the Matter of: Consultation on the review of the Mergers Regulation	))))))))	Public Comment

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REVIEW MERGER GUIDELINES - Targeted Consultation

Fields marked with * are mandatory.

INTRODUCTION - Table of Contents

Background and aim of the targeted consultation

1. In line with the objectives of the EU Treaties, the **EU merger rules aim to enable a dynamic and functioning internal market**; by making sure all businesses are able to compete effectively, and to **prevent market distortions that can harm consumers** – and ultimately damage productivity and economic growth. While companies combining forces through mergers can generate efficiencies, and bring benefits to the EU economy, some mergers may reduce competition. This is why the EU has had a **system for reviewing mergers** of an EU dimension since 1990 (with Regulation 4064/89) to check their compatibility with a properly functioning internal market, known as the "EU Merger Regulation" – a regulation that was updated in 2004 (Regulation 139/2004) and remains in force today.

2. Over the 20 years and more, since the updated 2004 EU Merger Regulation and its accompanying guidelines, there have been significant **market trends and geopolitical developments** that have led to transformational shifts in many markets, putting the existing merger control framework to the test.

3. Article 2 of the EU Merger Regulation requires the European Commission to assess whether a merger would, or would not, "*significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position*". Where the Commission finds no such impediment the merger is to be approved; if, alternatively, the Commission concludes that the merger would lead to such an impediment, unless the merging parties submit measures remedying this impediment, the merger is to be declared incompatible with the internal market.

4. Mergers that may impact competition can involve companies that are actual or potential competitors on the same market ("**horizontal mergers**") or instead firms that are active on different levels of the supply chain or in neighbouring markets ("**non-horizontal mergers**"). To provide guidance on how it assesses these different types of mergers under the EU Merger Regulation and their compatibility with the internal market, the Commission issued guidelines: the Horizontal Merger Guidelines*[1]* ("**HMG**") (published in 2004) and the Non-Horizontal Merger Guidelines*[2]* ("**NHMG**") (published in 2008) (jointly the "**Guidelines**"). These Guidelines reflected, at the time of publication, the principles underpinning the Commission's evolving experience

appraising horizontal and non-horizontal mergers under the EU Merger Regulation (that of 1989 as well as 2004) as well as the case-law of the European Court of Justice.

5. Like all competition tools, **EU merger control needs to remain sharp and up-to-date**, as market realities change around it. The objective of merger control, in accordance with the EU Merger Regulation, remains valid and unchanged – ensuring mergers do not distort competition in the internal market. However, in the respective twenty-one and sixteen years since the adoption of the Guidelines there have been significant market trends and developments that have changed the dynamics of competition, leading the Commission's assessment of mergers under the Merger Regulation to evolve to capture those new realities and protect competition within them. There has also been case law of the Court of Justice which has informed the Commission's interpretation of the Merger Regulation and its Guidelines.

6. In light of these factors, which apply equally to both the Horizontal and Non-Horizontal Merger Guidelines, **the Commission is proposing to adapt both sets of guidelines in a holistic exercise**. The goal is to ensure that the revised Guidelines are up-to-date and flexible enough to allow the Commission to protect competition under the Merger Regulation in evolving modern market realities, while always respecting the overarching legal framework. In addition, the revised Guidelines should provide increased transparency and predictability to the business community as to how the Commission assesses mergers.

7. **We welcome your input** on how the Commission should assess mergers within the framework of the Merger Regulation and the principles that should underpin its revised Guidelines. The Commission's consultation of the general public with questions of relevance to these issues is available here (the 'Public Consultation').

8. **The present consultation runs in parallel to that general Public Consultation**, and focusses on in-depth and technical parameters related to EU merger control (the 'In-depth Consultation'). You will find here 7 specific topics that are relevant for the Commission's assessment, as well as accompanying technical questions. The technical backgrounds included in each of the topic papers recalls how merger control carried out by the Commission so far has assessed specific topics. These 7 topics are:

Topic A: Competitiveness and resilience
Topic B: Assessing market power using structural features and other market indicators
Topic C: Innovation and other dynamic elements in merger control
Topic D: Sustainability & clean technologies
Topic E: Digitalisation
Topic F: Efficiencies
Topic G: Public policy, security and labour market considerations

We very much appreciate your contributions on both consultations.

Submission of your contribution

Please reply to this targeted consultation by responding to the questionnaire here online. You may include documents and URLs for relevant online content in your replies.

You are not obliged to complete the questionnaire all at once; you have the option of saving your responses as a "draft" and finalising them later. To do this you should click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access your questionnaire again to continue working on your response.

If you have any questions, you can contact us via the following functional mailbox: COMP MG REVIEW.

In case of technical problems, please contact the Commission's CENTRAL HELPDESK.

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[1] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004.

[2] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008.

* **Contribution publication privacy settings**

The Commission may publish the responses to this targeted consultation. You can choose whether you would agree to make your details public or wish to remain anonymous.

- ○ **Anonymous**
  Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.
- ◉ **Public**
  Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions.

Introductory questions

* 1. Language of my contribution

One option possible.

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English

- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* 2. First name of respondent

Lilla

* 3. Surname of respondent

Kiss

* 4. Email (this will not be published)

kiss.lilla.nora@outlook.com

* 5. I am giving my contribution as

One option possible.

- (x) Academic/research institution
- Business association
- Company/business
- Consumer organisation
- EU citizen
- Environmental organisation
- National Competition Authority
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority

- ○ Trade Union
- ○ Other

* 5.a If you are giving your contribution for the company / organisation / authority / union / business for which you work, please specify for this entity:

5.a.i Name

Information Technology and Innovation Foundation

5.a.ii Transparency register number

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

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* 5.b If you are giving your contribution for the company / organisation for which you work, or on behalf of a client, please indicate in which sector it is active (multiple options possible). More details on digital, deep tech innovation, clean and resource efficient technologies, biotechnologies are available in the Commission Guidance Note concerning certain provisions of Regulation (EU) 2024/795 establishing the Strategic Technologies for Europe Platform (STEP):

You can tick more than one reply, below.

- [ ] Agriculture / agri-food
- [ ] Automotive
- [ ] Clean and resource efficient technologies
- [ ] Consumer goods
- [ ] Defense
- [x] Digital
- [x] Energy
- [ ] Finance and banking
- [ ] Medias
- [x] Pharmaceuticals
- [ ] Space
- [x] Telecommunications
- [ ] Transport
- [ ] Deep tech innovation
- [ ] Biotechnologies
- [ ] Construction
- [ ] Other basic industries (i.e., supplying raw materials to industries which manufacture other goods)
- [x] Other

5.b i. Please further specify the sector if needed, as well as the main function/activity of your company / organisation.

Text of 1 to 3000 characters will be accepted

Competition / Antitrust

* 6. Please indicate the geographic scope of your (client's) activities:

One option possible.

- (x) International
- ( ) Regional
- ( ) National
- ( ) Local

* 7. Please indicate the countries where your main business is based:

You can tick more than one reply, below.

[ ] Austria	[ ] Finland	[ ] Lithuania	[ ] Slovenia
[ ] Belgium	[ ] France	[ ] Luxembourg	[ ] Spain
[ ] Bulgaria	[ ] Germany	[ ] Malta	[ ] Sweden
[ ] Croatia	[ ] Greece	[ ] The Netherlands	[ ] Other in Europe
[ ] Cyprus	[ ] Hungary	[ ] Poland	[x] Other outside of Europe
[ ] Czechia	[ ] Ireland	[ ] Portugal	
[ ] Denmark	[ ] Italy	[ ] Romania	
[ ] Estonia	[ ] Latvia	[ ] Slovakia	

* 7.a If others in or outside of Europe, please specify.

United States

* 8. Has your company/business been the addressee of a Commission decision under Article 6 or Article 8 of Council Regulation (EC) No 139/2004, or has it been another involved party (such as the target or seller) in a merger for which an Article 6 or 8 decision was issued, or has your company/business organisation acted as external counsel or economic consultant of an addressee of such decision in the last 10 years?

You can tick more than one reply, below.

- [x] No
- [ ] Yes, Article 6.1.(a) decision
- [ ] Yes, Article 6.1(b) decision (simplified procedure)
- [ ] Yes, Article 6.1(b) decision (normal procedure)
- [ ] Yes, Article 6.1(b) in conjunction with Article 6.2 decision
- [ ] Yes, Article 8.1 decision
- [ ] Yes, Article 8.2 decision
- [ ] Yes, Article 8.3 decision

9. Please indicate for which topics you would wish to read the papers and reply to the technical questions. **Please note that this choice will determine which topics you will see and be able to reply to in this targeted consultation. Note that all papers can also be consulted on DG COMP's website, though we accept replies only via this online questionnaire.**

You can tick more than one reply, below.

- [x] Topic A: Competitiveness and resilience
- [x] Topic B: Assessing market power using structural features and other market indicators
- [x] Topic C: Innovation and other dynamic elements in merger control
- [x] Topic D: Sustainability & clean technologies
- [x] Topic E: Digitalisation
- [x] Topic F: Efficiencies
- [x] Topic G: Public policy, security and labour market considerations

Topic A: Competitiveness and resilience

A description and technical background for this topic is included below. The same text can also be found [here](). Questions on this topic are included after the text.

Topic Description

9. **Competition stimulates productivity, investment, and innovation.** Since its inception, the purpose of EU merger control has been linked to the proper functioning of the Single Market and the productivity of its operators. As explained in recitals 4 and 5 and Article 2 of the EU Merger Regulation, mergers are to be welcomed *"to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the [Union]"*. Accordingly, the Commission reviews concentrations considering *"the development of technical and economic progress"*, provided that it is to *"consumers' advantage"* and does not *"result in lasting damage to competition"*.

10. One of the **Commission's key priorities** is spurring productivity and competitiveness in the EU. Productivity concerns the efficiency in producing goods and services. The ability of firms to invest, innovate, and grow are among the key drivers of productivity growth. By protecting competition, merger control protects the incentives to increase firms productive and dynamic efficiency (investment and innovation). **The Competitiveness Compass** emphasises that rigorous and effective merger enforcement in the Single Market is crucial to enhance the EU's competitiveness by ensuring fair competition and incentivising companies to innovate and become more efficient. At the same time, the **Competitiveness Compass** also underlines that *"in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets and tech innovation. This needs a fresh approach, better geared to common goals and allowing companies to scale up in global markets – while always ensuring a level playing field in the Single Market."*

11. Mergers are a way to restructure markets, and according to the 2024 EU Industrial R&D Investment Scoreboard it appears that companies based in the EU are more likely to engage in mergers than elsewhere in the world, also thanks to a predictable framework for merger control. A reflection is nevertheless warranted on whether, in order to keep pace with global technological advancements, competition policy – notably merger control – must adapt its approach with a view to support start-ups, scale-ups, and medium-sized companies **to**

scale up in global markets, while safeguarding a level-playing field in the Single Market.

Scaling up

12. **Productivity tends to increase scale**: in competitive markets, productive firms grow organically and gain scale at the expense of less productive ones, if not prevented by distortive subsidies, regulation (which may constitute barriers to the Single Market) or anticompetitive behaviour by rivals. Vice versa, productivity in the EU economy grows when **productive companies grow or innovate** and less productive or innovative firms lose market share and exit the market.

13. **Scale achieved through mergers and acquisitions may in some cases help firms become more productive.** Larger companies may benefit from economies of scale or scope for example because of network effects, the ability to spread the cost of intangibles over a larger cost base, or better access to financial markets. The acquisition of existing businesses may also be a means for a company to expand into other Member States or increase its global outreach to compete with large global rivals. A fast-paced merger control system that approves the vast majority of cases under the simplified and super-simplified procedures helps firms in the EU to gain scale when they do not attain market power.

14. At the same time, **the productivity of the EU economy may be hindered if companies accumulate market power,** damaging other companies active in their value chains. Market power resulting from mergers can lead to price increases, diminished quality or innovation, and a reduced number of suitable suppliers, all of which can negatively impact the competitiveness of other businesses. These negative effects may be particularly substantial in the case of small and medium-sized companies (“SMEs”), which are not necessarily publicly listed but may nevertheless have global leadership positions in their respective sectors. All these companies depend on a well-functioning Single Market for sourcing their inputs and distributing their products.

Resilience and value chains

15. Europe’s competitiveness also depends on the **resilience of its economy and of its value chains.** Effective competition does not only improve an economy’s potential to grow, but also contributes to its resilience to shocks. Having a variety of businesses active in the Single Market is a way to support the ability of firms to multi-source and to be dynamic and resilient to shocks. By contrast, less competition risks making an economy ‘brittle’ and thus less resilient.

16. As many markets are becoming more globalised, events like the Covid-19 pandemic, the Russian war of aggression in Ukraine and the subsequent energy crisis have highlighted the **importance of robust, reliable and diversified (in other words, resilient) supply sources** to businesses active in the Single Market. Likewise, the green and digital transitions involve an unprecedented demand for certain critical raw materials and other inputs (e.g., chips). A diverse, competitive supply base ensures not only that those businesses active in the Single Market benefit from competitive prices and innovation, but also that they have sufficient alternative sources of supply to overcome challenges and seize new opportunities. This is why resilience is one of the points of attention in the **Competitiveness Compass,** in particular for certain strategic sectors.

17. Mergers may have a negative or positive impact on resilience. On the one hand, **mergers can secure the access of companies to inputs they need to compete**, including through the integration of activities at different levels of the value chain. A **diversity of competitive suppliers integrated in the Single Market**, which can be achieved also through acquisitions, **may reduce dependencies from external sources**. Mergers may also enable companies to **enhance certain capabilities**, including leading to increased security or capacity, or relocation of assets, that may make them less prone to external shocks and risks and benefit their customers. On the other hand, mergers may result in less competitively priced inputs, less innovative or lower quality products or reduced number of suitable suppliers. These **harmful effects may trickle down the value chain**, with negative effects on the competitiveness and resilience of these companies not only in Europe but also in global markets. Market power at one level of the value chain can thus have negative impact on an entire industrial ecosystem.

Enhancing investment and innovation

18. **Scale might provide companies with benefits** such as lower costs, better access to capital markets or R&D&I capabilities that increase their ability to invest and innovate. As identified in the Draghi Report, **the EU must make substantial investments** in essential infrastructure, including for telecommunications, connectivity, and the energy grid. These investments are crucial for enhancing the EU's competitiveness. At the same time, **company size does not typically reflect the ability to invest and innovate**, as many of the most innovative firms in sectors such as pharma, biotechnology, digital or high-tech are SMEs. While the scaling up of companies with disruptive technologies can help disseminate important innovations across the economy, the acquisition of nascent competitors by large established players to protect their market power (so-called "killer acquisitions") might harm innovation. Moreover, as explained in Topic C on Innovation and other dynamic elements in merger control, mergers may reduce the **incentives to invest and innovate** absent efficiencies (e.g. in the form of R&D complementarities or spill-overs).

19. **Competitive markets play a crucial role in driving investment and innovation.** This is important also in digital and high-tech markets, which generate significant spillovers across all economic sectors. A dynamic and innovative digital economy ensures that businesses active in the Single Market remain competitive at a global scale, particularly at a moment in time when AI and other high-tech solutions including cloud and quantum computing, and the Internet of Things, become major drivers of the economy.

Merger control and globalisation

20. **In some markets, competition takes place at the global level** or, at least, imports into Europe from other parts of the world are significant and constitute real alternatives, constraining companies active in the Single Market, as explained in the Market Definition Notice. Moreover, some players may benefit from subsidies by third countries or other competitive advantages.

21. **In other cases, there are (still) too many barriers for competition to take place at a global or even European level.** For some goods this is to a certain extent inevitable, for example products with high transport costs or the need to have local infrastructure. But there are also goods and services where competition takes place within regional or national boundaries only due to various reasons such as regulatory

differences, continuing geo-blocking, or sticky consumer preferences.

22. The completion of the Single Market and the elimination of regulatory barriers might therefore contribute to expanding the geographic scope of competition across local, regional, and national borders, and support the capability of efficient players to grow in scale, including through acquisitions.

Technical background

Scaling up

23. Merger control does not take issue with scale as such, rather it focuses on market power. Market power is defined in the Horizontal Merger Guidelines ("**HMG**") and the Non-Horizontal Merger Guidelines ("**NHMG**") as the "*ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition*".*[3]* The conditions to assess whether a transaction may lead to market power are discussed, in particular, in Topic B on Assessing market power using structural features and other market indicators and Topic C on Innovation and other dynamic elements in merger control.

24. Merger control, more specifically, should not prevent companies from acquiring scale by combining complementary products, offers or technologies that result in positive synergies or from seeking access to new geographies. For example, the Commission approved the four cross-border mergers that it has reviewed in the telecom sector since 2015.*[4]* It approved mergers allowing the merged entity to expand its presence and gain scale globally for instance on services and products for semiconductor manufacturers.*[5]* It also reviewed and approved transactions between companies active through different technologies in the supply of inputs such as aluminium, a significant lever for industrial sectors to reduce their carbon emissions, while factoring in non-price sustainability-related considerations.*[6]*

25. Even in situations where a merger leads to a significant loss of competition, increased scale may generate merger efficiencies that offset the competitive harm, such as enabling start-ups or SMEs to scale up and bring new products to the market or generate economies of scale and scope, as discussed in Topic F on efficiencies. The EU Merger Regulation states that "*[i]n order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned*".*[7]* The NHMG also recognise that the integration of complementary activities or products may be pro-competitive, as these mergers *"may produce cost savings in the form of economies of scope (either on the production or the consumption side)".[8]* Examples of cases where cost savings related to economies of scale were assessed can be found in Topic F on efficiencies. Other potential efficiencies linked to scale, such as better access to equity or network effects to compete in global markets may also be relevant.

Resilience and value chains

26. In recent years, resilience has been a concern of particular relevance in the areas of security and defence, as well as other critical industries (e.g., chips manufacturing), critical inputs (e.g., certain raw materials) and critical infrastructure (e.g., broadband submarine cables).

27. Merger control can take resilience into consideration as long as it is relevant for competition on the markets concerned. Mergers can for example help companies secure access to inputs from outside the Single Market they need to compete effectively, which may be considered if it translates to benefits in the market at large. The Commission traditionally also assessed to what extent a merger may reduce dependable sources of supply, thereby exposing customers to more dependencies. In markets characterised by imports, the assessment has also considered whether sources of supply located outside the Single Market may be less dependable and expose businesses located in the Single Market to shocks and uncertainties, overall reducing their resilience. This can result from, e.g., currency risks, lead times, just-in-time supply chains, quality considerations, or general geopolitical and trade uncertainty.*[9]*

28. Mergers of companies that produce critical inputs or have access to critical raw materials can increase the dependency of the industrial ecosystem in Europe on a few companies, potentially concentrated in a certain region or country outside the Single Market. Such interdependencies can expose the industrial ecosystem in Europe to systemic risks, such as supply shocks in other jurisdictions resulting from natural events or geopolitical developments. In addition, there may be vertical mergers in which a company based outside the Single Market acquires critical infrastructure located in Europe (e.g., terminals in a port) and plans to continue using this infrastructure at preferential terms following the merger to the detriment of other companies that need access to this infrastructure. Potential effects of this nature may be relevant for merger control and may have an impact on the EU strategic autonomy.

29. Mergers may also enable companies to build on their joint capabilities (e.g. in terms of security, capacity, assets location) to reduce their exposure to external shocks and risks, that may also translate into benefits for the market.

30. A resilience risk assessment can, at least in principle, be undertaken using qualitative and quantitative tools analogous to those used to assess market power of suppliers, possibilities of switching suppliers, foreclosure risks, or coordination risks resulting from a merger. A resilience efficiency assessment may rely on similar tools as the assessment of non-price merger efficiencies (see more details in Topic F on efficiencies). There may be merit in further exploring how qualitative and quantitative competition assessments and tools can be usefully applied or extended to incorporate analyses of strategic resilience, and resistance to external shocks.

Enhancing investment and innovation

31. Increased scale may bring some benefits like better access to equity, finance or scarce talent in specific sectors. This may include a decreasing average cost curve, network effects, intangible capital, access to equity investment, increased ability and incentives to invest (e.g., in network infrastructure) or to innovate (i.e., R&D). In some markets, network effects and access to data that can be achieved with increased scale are also important to develop new products. At the same time, market power typically reduces the incentives to invest and innovate in the long term. The interplay between mergers and innovation is discussed in more detail in Topic C on Innovation and other dynamic elements in merger control and Topic F on efficiencies.

Merger control and globalisation

32. In past decisions, the Commission has taken account of changing geographic market dynamics in the context of a global economy that has become increasingly interdependent over the last decades. In Siemens /Alstom,*[10]* the Commission considered that competition for the supply of high-speed trains could take place at the global level and therefore considered a potential worldwide market, excluding China, Japan, and South Korea. In many manufacturing cases, the Commission has defined EEA-wide markets, while it has also taken account of competitive pressure from outside the EEA (e.g., in the form of imports) in its competitive assessment. For example, in Tata Steel/Thyssenkrupp/JV,*[11]* the Commission found that competitive conditions for the production and supply of several steel products across the EEA were sufficiently similar when considering an EEA-wide market. In the competitive assessment, the Commission considered in detail the role of imports from outside the EEA. Finally, markets in some industries, notably telecoms, have so far been considered by the Commission as national in scope, but this is due to existing regulatory barriers.

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[3] HMG, paragraph 8 and NHMG, paragraph 10.

[4] Cases M.9963 – Iliad / Play Communications, M.9370 – Telenor / DNA, M.8883 – PPF Group / Telenor Target Companies, and M.8736 – Toohil Telecom / Eircom.

[5] Case M.11559 – Exyte / Kinetics.

[6] Cases M.10702 – KPS Capital Partners / Real Alloy Europe and M.10658 – Norsk Hydro / Alumetal. For more details, see Topic D on Sustainability & clean technologies.

[7] EU Merger Regulation, recital 29.

[8] NHMG, paragraphs 13 and 118.

[9] See, e.g., cases M.8713 – Tata Steel / Thyssenkrupp / JV and M.8444 – ArcelorMittal / Ilva.

[10] Case M.8677 – Siemens / Alstom.

[11] Case M.8713 – Tata Steel / Thyssenkrupp / JV.

Questions

General

A.1 In your/your client’s view, do the current Guidelines provide clear, correct and comprehensive guidance on how merger control reflects the objective of having a productive and competitive economy?

- ○ Yes fully
- ○ Yes to some extent
- ◉ No, to an insufficient extent
- ○ Not at all
- ○ I do not know

A.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the objective of having a productive and competitive economy, or what you consider is missing from the Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

The focus of the guidelines is to help assess whether a merger would significantly impede effective competition or create or strengthen a dominant position. Unfortunately, this structural understanding of competition differs from a conception of competition as either a dynamic process or a consumer welfare proscription, both of which are far better suited to having a productive and growing economy. For example, there are numerous cases where transactions may impede effective competition or create a dominant position but drive the process of innovation competition—the greatest driver of long run-economic growth—or result in static efficiencies that far outweigh any de minimis competitive harms that result from a loss of rivalry.

A.2 In your/your client's view, should the revised Guidelines better reflect the objective of having a productive and competitive economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [x] a. Ability and incentives of SMEs and mid-sized companies to scale up
- [x] b. Benefits of companies' gaining scale
- [ ] c. Companies' resilience
- [x] d. Ability and incentives of companies to invest and innovate
- [ ] e. Ability and incentives of companies to compete at global level
- [ ] f. The revised Guidelines should not better reflect any of these areas

Scaling up

A.3 How should the Commission take into account situations where absent the merger the target company would not have the ability or incentives to scale-up? Please explain in particular:

A.3.a How should the Commission assess the counterfactual scenario, i.e. what would the situation be absent the merger, in particular when it comes to alternative buyers or sources of financing.

Text of 1 to 5000 characters will be accepted

If the target company having the ability or incentives to scale-up is a merger-specific benefit of a transaction, that may count as a prime facie efficiency gain that could be weighed against any competitive harms that transaction may pose. Analyzing the "but-for world" where the merger does not occur should, in general, analyze the sorts of financing and contractual relationships a firm would be likely to enter upon analysis of internal business documents and relevant historical industry behavior (e.g., a similar firm being unable to enter a contract that would have achieved the merger benefits). In general, the Commission should not treat a merger with another company as a likely result in a but-for world: like the post-merger world (e.g., efficiencies) to which the but-for world is compared, the but-for world should be based on reliable and verifiable evidence, and alternative mergers may only in very rare cases satisfy these criteria (e.g., the Commission is considering two proposed mergers of the same company).

A.3.b Should the Commission in such cases assess whether the criteria of a failing-firm defence are met, including the exit of the company's assets from the market, and why/ why not. If so, how should the Commission assess this.

Text of 1 to 5000 characters will be accepted

The failing-firm defense is a legitimate justification for approving mergers that may result in some short-run competitive harms and the grounds that, but-for the merger, the firm will ultimately exit the market, making current conditions unpredictive of future competitive effects. To make the failing-firm defense, it is typically required that the firm be unable to meet its financial obligations in the future, be unable to reorganize successfully using bankruptcy, and that the merger reflects the least restrictive way to keep its assets productive relative to other transactions. Importantly, even if a firm may not be failing, a prima facie case showing that a merger present a risk of short-run harm can also be rebutted if a firm is sufficiently weak that it would unlikely be able to compete as vigorously in the future.

A. 4 What are the characteristics of markets where scale is necessary to compete effectively? Please be as specific as possible on the level of scale needed and why.

Text of 1 to 5000 characters will be accepted

Increased scale is generally important for any firm that faces a downward sloping average cost curve: the more output there is, the cheaper production becomes on a per unit basis. Increased scale is often also particularly important in markets that have high fixed costs, which decrease on an average basis for each unit produced.

A.5 What are the benefits that merged companies' increased scale might bring to competitiveness:

A.5.1 In a scenario where the increased scale does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased competitiveness of the merged entity.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity investment
- [x] d. Ability and incentives to invest (e.g. in network infrastructure)
- [x] e. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- [x] f. Ability and incentives to derive value from aggregation of data
- [x] g. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)
- [x] h. Ability to procure products more competitively from large suppliers?
- [x] i. Ability to compete in global markets outside the EU
- [x] j. Ability to use countervailing market power vis-à-vis infrastructure providers
- [x] k. Other factors (please list)
- [ ] l. No benefits are relevant

A.5.1 a For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect.

A.5.1.b For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies.

A.5.1.c For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital that, for example, can be used to fund innovation.

A.5.1.d For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that increase a firm's incentive and ability to invest, such as increasing the incentive to protect its market position through innovation, or by increasing its ability to recoup the costs of R&D.

A.5.1.e For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that increase a firm's incentive and ability to innovate, such as increasing the incentive to protect its market position through innovation, or by increasing its ability to recoup the costs of R&D.

A.5.1.f For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in scale and scope driven data efficiencies that benefit consumers.

A.5.1.g For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that improve market access.

A.5.1.h For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in countervailing buyer power that lower supplier costs and benefits consumers with lower prices.

A.5.1.i For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

The Commission should focus its competitive analysis within the relevant geographic markets at issue.

A.5.1.j For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in countervailing bargaining power that counteracts inefficiencies in markets with powerful or monopsony buyers.

A.5.1.k For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

There are countless examples of how mergers can result in these and other types of efficiency benefits. Guidelines should attempt to specify an exhaustive list of which types of benefits count as efficiencies.

A.5.2 In a scenario where the increased scale creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased competitiveness of the merged entity, and comment on whether it may damage the competitiveness of other companies or the economy.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity investment
- [x] d. Ability and incentives to invest (e.g. in network infrastructure)
- [x] e. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- [x] f. Ability and incentives to derive value from aggregation of data
- [x] g. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)
- [x] h. Ability to procure products more competitively from large suppliers?
- [x] i. Ability to compete in global markets outside the EU
- [x] j. Ability to use countervailing market power vis-à-vis infrastructure providers
- [x] k. Other factors (please list)
- [ ] l. No benefits are relevant anymore

A.5.2.a Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect.

A.5.2.b Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies.

A.5.2.c Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital that, for example, can be used to fund innovation.

A.5.2.d Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that increase a firm’s incentive and ability to invest, such as increasing the incentive to protect its market position through innovation, or by increasing its ability to recoup the costs of R&D.

A.5.2.e Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that increase a firm’s incentive and ability to innovate, such as increasing the incentive to protect its market position through innovation, or by increasing its ability to recoup the costs of R&D.

A.5.2.f Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in scale and scope driven data efficiencies that benefit consumers.

A.5.2.g Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies that improve market access.

A.5.2.h Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in countervailing buyer power that lower supplier costs and benefits consumers with lower prices.

A.5.2.i Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

The Commission should focus its competitive analysis within the relevant geographic markets at issue.

A.5.2.j Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Mergers can result in countervailing bargaining power that counteracts inefficiencies in markets with powerful or monopsony buyers.

A.5.2.k Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

Efficiency benefits may flow from a merger even if it creates or strengthens market power or a dominant position. Indeed, in one important U.S. study which analyzed 130 transactions across various industries where the average combined market share was over 20%, the average HHI over 3,300 and the average delta HHI over 120, the data showed that "merging parties are more likely to lower prices drastically than non-merging parties, while the probability of substantial price increases is similar across the two groups," with one explanation being "cost synergies that are large enough to induce the merging parties to lower prices." Bhattacharya et al., Merger Effects and Antitrust Enforcement: Evidence From U.S. Consumer Packaged Goods (2023).

A.6 How should the Commission assess the benefits of companies' gaining scale through mergers when they create or strengthen market power? Please explain in particular:

A.6.a Under which conditions could such benefits be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

In cases where a transaction results in both prima facie competitive harms and scale-driven efficiency benefits, the Commission should attempt to determine the net effect in deciding whether a transaction should be approved. Evaluating whether scale-driven efficiency benefits do or not outweigh possible competitive harms must be assessed on a case-by-case basis. For example, if competitive harms are de minimis, it is likely that they will be outweighed by a transaction's efficiency benefits. By contrast, if efficiency benefits are not merger-specific or verifiable, it is unlikely that they will outweigh the competitive harms posed by a transaction.

A.6.b Under which conditions would such benefits be passed on to business customers /consumers? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

Efficiencies that result in variable cost savings will typically be passed on to consumers through lower prices or increased output in the short-run. Indeed, efficiency benefits can still accrue to consumers in a way that outweighs competitive harms even if they are only partially passed on. However, even efficiencies that may not be immediately passed on to consumers substantially or in part should not necessarily be discounted if they result in other short-run benefits, such as an increased incentive and ability to innovate.

A.6.c What are the elements, including evidence and metrics, that the Commission could use to assess whether the benefits of scale outweigh competitive harm, and will likely be passed on to business customers/consumers.

Text of 1 to 5000 characters will be accepted

To determine whether efficiencies are sufficiently substantial enough to outweigh any competitive harms, data-driven economic modeling of a merger's future effects can be particularly helpful. To be sure, calculating which efficiencies will be passed on to consumers can be difficult to measure in practice and is one reason why analyzing a merger's effects on total welfare, rather than consumer welfare, can lead to a more administrable enforcement regime. As such, it is inadvisable to apply strict or rigid tests that risk over-excluding efficiency benefits on the grounds that they will not be passed on to consumers. Typically, here as well the use of economic models will be important to confirm which efficiency benefits will likely be passed on to consumers.

A.6.d How can productivity improvements of a firm be balanced appropriately against price increases that can harm productivity of other firms?

Text of 1 to 5000 characters will be accepted

In markets defined by economies of scale, a firm that procompetitively increases its efficiency will increase sales and gain economies of scale, which can result in higher costs to competitors who lose scale as a result. This, however, is a procompetitive outcome that benefits consumers and competition, even if competitors may be harmed.

A.7 Under which conditions can scale that brings benefits but creates or strengthens market power be achieved only through a merger, as opposed to other means, i.e. organic growth or cooperation? Please be as specific as possible, also pointing to potential differences between markets/sectors with different characteristics as relevant.

Text of 1 to 5000 characters will be accepted

The question of whether a merger results in merger specific benefits should be treated as independent from the issue of whether it also results in harm to consumers and competition. For example, a merger may be necessary to achieve the benefits of scale, while also resulting in potential harm to competition. By contrast, in other cases a merger may not yield substantial merger-specific efficiency benefits but pose little risk to competition or consumers.

A.8 To what extent can scale that brings benefits be achieved through expansion into new geographic or product markets, rather than consolidation within the same product and geographic market? Please explain your answer being as specific as possible.

Text of 1 to 5000 characters will be accepted

Expansion into a different geographic or product market can generate economies of scope and scale, and whether they are viable alternatives to a merger to achieve scale benefits must be assessed on a case-by-case basis. Typically, however, geographic economies of scale and economies of scope are not interchangeable with the benefits achieved from economies of scale in a given market.

Resilience and value chains

A.9 How should the Commission take into account the negative effects of a merger on competitors', suppliers' or business customers' resilience when assessing its impact on competition?

Text of 1 to 5000 characters will be accepted

Merger enforcement should focus on consumer welfare and competition by analyzing price, output, quality, and innovation effects. To the extent that reduced resiliency negatively affects consumer welfare and competition, it may indirectly factor into merger analysis.

A.9.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

The extent to which a merger's effects on resilience can result in unilateral, coordinated, or vertical harms should be assessed on a case-by-case basis.

A.9.b Under which conditions could this theory/these theories of harm occur? Please explain in particular whether the number of remaining suppliers, supply concentrated in a certain region or country outside the Single Market or other metrics would be relevant.

Text of 1 to 5000 characters will be accepted

A merger that results in a substantial increase in concentration may lessen resilience (e.g., reduced number of suppliers) and at the same time result in anticompetitive effects (e.g., increased coordination).

A.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the negative impact on competitors' resilience post-merger?

Text of 1 to 5000 characters will be accepted

The same sorts of elements that the Commission uses to assess coordinated, unilateral, and vertical effects should be used in cases where resiliency is a relevant factor toward determining whether these effects will occur.

A.10 From your/your client's perspective, how can the revised Guidelines contribute to the security of supply and resilience of the EU economy against outside shocks and dependency on third country input?

A.10.1 In a scenario where the merger does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for the companies' increased resilience.

You can tick more than one reply, below.

- [x] a. Vertical integration
- [x] b. Better access to input through new contracts
- [x] c. Diversification of sources of supply
- [x] d. Better conditions of purchase of inputs
- [x] e. Access to critical infrastructure
- [x] f. Other (please list)
- [ ] g. No benefits are relevant

A.10.1 a Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Vertical integration may be a way to increase resiliency in a way that results in procompetitive efficiencies.

A.10.1.b Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better access to input through new contracts in a way that results in procompetitive efficiencies.

A.10.1.c Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote diversification of supply in a way that results in procompetitive efficiencies (e.g., acquisition of a supplier that allows for expanded production in another jurisdiction).

A.10.1.d Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better conditions of purchase of inputs in a way that results in procompetitive efficiencies (e.g., increased buyer power).

A.10.1.e Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better access to critical infrastructure in a way that results in procompetitive efficiencies.

A.10.1.f Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

As the economist Joseph Schumpeter recognized long ago, increased concentration can enhance the ability for innovation by giving firms greater resilience in managing the risks associated with engaging in R&D. As such, enhancing innovation through increased resilience can constitute an efficiency benefit of a merger.

A.10.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased security of supply and resilience of the merged entity.

You can tick more than one reply, below.

- [x] a. Vertical integration
- [x] b. Better access to input through new contracts
- [x] c. Diversification of sources of supply
- [x] d. Better conditions of purchase of inputs
- [x] e. Access to critical infrastructure
- [x] f. Other (please list)
- [ ] g. No benefits are relevant anymore

A.10.2.a Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Vertical integration may be a way to increase resiliency in a way that results in procompetitive efficiencies.

A.10.2.b Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better access to input through new contracts in a way that results in procompetitive efficiencies.

A.10.2.c Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote diversification of supply in a way that results in procompetitive efficiencies (e.g., acquisition of a supplier that allows for expanded production in another jurisdiction).

A.10.2.d Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better conditions of purchase of inputs in a way that results in procompetitive efficiencies (e.g., increased buyer power).

A.10.2.e Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers may promote better access to critical infrastructure in a way that results in procompetitive efficiencies.

A.10.2.f Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

As the economist Joseph Schumpeter recognized long ago, increased concentration can enhance the ability for innovation by giving firms greater resilience in managing the risks associated with engaging in R&D. As such, enhancing innovation through increased resilience can constitute an efficiency benefit of a merger.

A.11 When assessing its impact on competition, how should the Commission take into account the benefits of a merger on companies' resilience in situations where such merger also creates or strengthens market power?

Text of 1 to 5000 characters will be accepted

In cases where a transaction results in competitive harms and efficiency benefits that derive from a merger's effect on resilience, the Commission should weigh harms and benefits to determine the merger's overall likely net competitive effect.

A.11.a Under which conditions could such benefits be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

See response to Question A.6.a.

A.11.b Under which conditions would such benefits be passed on to business customers /consumers, and how? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

See response to Question A.6.b.

A.11.c What are the elements, including evidence and metrics, whether at firm or industry level, that the Commission could use to assess whether the increased resilience outweigh competitive harm, and will likely be passed on to business customers/consumers.

Text of 1 to 5000 characters will be accepted

See response to Question A.6.c.

A.12 From your/your client's perspective, what are the characteristics of markets or sectors where resilience is particularly important to compete effectively? Please be as specific as possible e.g. on the number of suppliers needed or on the gravity of the impact in case of shocks or shortage and why.

Text of 1 to 5000 characters will be accepted

Transactions that may affect resiliency in a way that results in efficiency benefits can occur throughout the economy. However, to the extent that increased resiliency leads to a greater ability to innovate by economizing upon the risks associated with research and development, it may be particularly important in industries where innovation competition is a key parameter of competition.

Enhancing investment and innovation

A.13 What are the benefits that mergers might bring to competition in terms of increased innovation:

A.13.1 In a scenario where the merger does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased innovation.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity or debt capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input

- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant

A.13.1.a For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect, that enhance innovation.

A.13.1.b For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies, that enhance innovation.

A.13.1.c For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital that, for example, can be used to fund innovation.

A.13.1.d For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that enhance innovation.

A.13.1.e For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that enhance innovation.

A.13.1.f For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can combine know-how, data, and patents in a way that enhances innovation.

A.13.1.g For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in vertical integration that enhances innovation.

A.13.1.h For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can enhance innovation by increasing a firm's incentive to innovate in order to protect its market position and facilitate its ability to recoup the costs associated with research and development.

A.13.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased innovation of the merged entity.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity or debt capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input
- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant anymore

A.13.2.a Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect, that enhance innovation.

A.13.2.b Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies, that enhance innovation.

A.13.2.c Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital that, for example, can be used to fund innovation.

A.13.2.d Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that enhance innovation.

A.13.2.e Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that enhance innovation.

A.13.2.f Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can combine know-how, data, and patents in a way that enhances innovation.

A.13.2.g Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in vertical integration that enhances innovation.

A.13.2.h Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can enhance innovation by increasing a firm's incentive to innovate in order to protect its market position and facilitate its ability to recoup the costs associated with research and development.

A.14. What are the benefits that mergers might bring to competition in terms of increased investment:

A.14.1 In a scenario where the merger does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased investment.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)

- [x] c. Access to equity or dept capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input
- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant

A.14.1.a Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect, that spur investment in innovation.

A.14.1.b Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies, that spur investment in innovation.

A.14.1.c Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital.

A.14.1.d Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that spur investment in innovation.

A.14.1.e Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that spur investment in innovation.

A.14.1.f Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can combine know-how, data, and patents in a way that spurs investment in innovation.

A.14.1.g Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in vertical integration that spurs investment in innovation.

A.14.1.h Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can spur investment by increasing a firm's incentive to innovate in order to protect its market position and facilitate its ability to recoup the costs associated with research and development.

A.14.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased investment of the merged entity.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity or dept capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input
- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant anymore

A.14.2.a Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect, that spur investment in innovation.

A.14.2.b Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies, that spur investment in innovation.

A.14.2.c Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital.

A.14.2.d Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that spur investment in innovation.

A.14.2.e Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in economies of scope that spur investment in innovation.

A.14.2.f Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can combine know-how, data, and patents in a way that spurs investment in innovation.

A.14.2.g Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can result in vertical integration that spurs investment in innovation.

A.14.2.h Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Mergers can spur investment by increasing a firm's incentive to innovate in order to protect its market position and facilitate its ability to recoup the costs associated with research and development.

A.15 From your/your client's perspective, in which type of markets/sectors smaller or larger firms are typically more innovative? Please provide supporting data and evidence.

Text of 1 to 5000 characters will be accepted

It has long been documented how the relationship between market structure and innovation can take the form of an inverted-U, whereby increased concentration can increase innovation up until concentration reaches so high a level that innovation decreases. See Philippe Aghion at al., Competition and Innovation: An Inverted-U Relationship, 120 Q. J. Econ. 701 (2005); Michael R. Peneder & Martin Woerter, Competition, R&D and Innovation: Testing the Inverted-U in a Simultaneous System, 24 J. of Evolutionary Econ. 653 (2014) (Switzerland); Michael Polder & Erik Veldhuizen, Innovation and Competition in the Netherlands: Testing the Inverted-U for Industries and Firms, 12 J. of Ind. Competition and Trade 67 (2012) (Netherlands); Chiara Peroni & Ivete Gomes Ferreira, Market competition and innovation in Luxembourg, 12 J. of Ind, Competition and Trade 93 (2012) (Luxembourg). There is some evidence that, in certain industries, smaller entrants may be more likely to engage in disruptive innovation large incumbents may be more likely to engage in incremental innovations that constitute the greatest share of overall innovation driven gains to economic growth. See, e.g., Garcia-Macia et al., How Destructive Is Innovation? (May 2018).

A.16 From your/your client's perspective, how do different market structures, such as tight oligopolies or markets with a leading company followed by smaller firms, influence the ability and incentives to innovate and invest?

Text of 1 to 5000 characters will be accepted

Consistent with the inverted-U framework, mergers that result in an industry moving from a market structure defined by effective or monopolistic competition to one that reflects an oligopoly or has a dominant firm can result in an increased incentive and ability to innovate and invest. For example, large firms may have a greater incentive and ability both to appropriate the costs of R&D as well as have more to lose from disruptive innovation such that they will invest more in innovation than an upstart rival. However, mergers that create a monopoly market structure may not increase incentives to innovate and invest—in this scenario, incentives for the monopolist to avoid cannibalization and an "exit competition" effect may dominate.

A.17 How should the Commission factor in that competition to invest and innovate may take place at global level while markets for consumers may be of significantly narrower geographic scope?

Text of 1 to 5000 characters will be accepted

In defining innovation markets to assess a transactions effect on innovation, geographic markets may be defined more broadly than in existing product markets if the R&D programs in different countries are reasonably interchangeable and pose competitive constraints on one another.

A.17.a In which circumstances a merger may lead to competitive harm due to the reduction of competition at global level, even when pre-merger the companies were not competing in the same narrower geographic markets, and how that would be taken into consideration.

Text of 1 to 5000 characters will be accepted

Mergers may regularly have competitive effects globally but not in the relevant geographic market the Commission may be analyzing. Indeed, even if the geographic market is global (i.e., firms from around the world compete for European consumers), the Commission should nonetheless focus on the effects on European consumers and competition.

A.17.b Vice versa, in which circumstances a merger may lead to competitive harm due to the reduction of competition at the narrower geographic level (e.g. national), while at the same time bring benefits to competition at global level, and how that could be taken into consideration.

Text of 1 to 5000 characters will be accepted

Antitrust analysis typically seeks to identify the narrowest relevant product and geographic markets for assessing a merger's effects on competition. As such, it is not uncommon that a merger may reduce competition in a more narrow geographic market (and thus be deemed unlawful) even if it results in efficiencies on a global basis.

Merger control and globalisation

A.18 What are the benefits companies may enjoy due to their global presence that can give them a competitive advantage in markets (with)in Europe? Please select the advantages that you believe are relevant.

You can tick more than one reply, below.

- [x] a. Less regulation in markets outside of Europe
- [x] b. Less costs in markets outside of Europe
- [x] c. Better access to raw materials and/or manufacturing capacity
- [x] d. Better access to financing or equity investments
- [x] e. Lower standards of environmental protection, social rights or similar
- [x] f. Other
- [ ] g. No benefits are relevant

A.18.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Less regulation outside Europe may give a company a competitive advantage in Europe, for example, by providing them with a better environment to innovate and ultimately market those new products in Europe.

A.18.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Lower costs outside Europe may give a company a competitive advantage in Europe, for example, by more resources to innovate and ultimately market those new products in Europe.

A.18.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Better access to raw materials/manufacturing outside Europe may give a company a competitive advantage in Europe, for example, allowing it produce at a cheaper cost including for European products.

A.18.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Better access to finance/equity outside Europe may give a company a competitive advantage in Europe, for example, helping them to fund R&D and scale more quickly and ultimately market new products in Europe.

A.18.e Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Avoid the costs of regulation may give a company a competitive advantage in Europe, for example, by avoiding the costs associated with regulation and having more resources to invest in innovation.

A.18.f Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

There are myriad reasons why a company may benefit from a global presence in ways that give it a competitive advantage in Europe.

A.19 How should the Commission factor in that some companies, including merging parties or competitors, benefit from competitive advantages linked to their global presence when assessing the impact of a merger on competition (with)in Europe?

Text of 1 to 5000 characters will be accepted

A merger resulting in increased competitive advantages linked to a global presence does not constitute cognizable antitrust harm. However, the Commission should evaluate whether a merger can result in efficiencies that benefit European consumers through increased geographic scale, such as by more efficiently moving production facilities to lower cost areas.

A.19.a In this context, please explain whether such competitive advantages would (not) be reflected already in the level of market shares, and why/why not.

Text of 1 to 5000 characters will be accepted

Whether a firm obtains efficiencies from operating globally cannot be discerned by analyzing its market share alone. However, a firm that benefits from economies of scale by operating globally may as a result have a competitive advantage against rivals that increases its market share.

A.19.b In this context, please explain how and in which circumstances benefits linked to e.g. subsidies in other markets can be considered as a competitive advantage in the relevant market.

Text of 1 to 5000 characters will be accepted

Subsidies in other markets can be a competitive advantage to the extent they allow a firm to reduce prices, increase output, or better innovate in the other relevant market.

A.19.c In this context, please explain in which circumstances, and based on which evidence, such benefits can be considered as part of the long term and structural counterfactual, i.e. the situation absent the merger.

Text of 1 to 5000 characters will be accepted

See response to Question A.19.a.

A.20 What would be pro-competitive consolidations in global strategic sectors, such as digital and deep-tech markets (e.g., IoT, advanced connectivity, cybersecurity, cloud, quantum, and/or AI), clean and resource efficient technologies or biotechnologies that would benefit competition in the Single Market? Please explain why in particular in terms of harm and benefits to competition.

Text of 1 to 5000 characters will be accepted

Consolidations and partnerships in global strategic sectors can be critical to driving innovation that benefits the Single Market. These can include transactions between large American technology firms and European AI startups that provide the latter with the scale, resources, and know-how they need to innovate more quickly and effectively—benefiting competition in the Single Market.

Topic B: Assessing market power using structural features and other market indicators

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

33. **EU citizens care deeply about prices that are fair and affordable**. This was recently demonstrated by the reaction in Europe and across the globe to the inflationary period following the Covid-19 pandemic.[12] In competitive markets, companies strive to offer lower prices than their rivals, while keeping the quality of products and services high, boosting sales and increasing consumer savings. The primary goal of EU merger control is to **pre-empt distortions to effective competition and the creation or strengthening of market power** that lead to price increases harming consumers. Nevertheless, recent reports find that the EU has experienced rising levels of industry concentration and companies' markups over the last 25 years.[13]

34. At present, the Horizontal Merger Guidelines ("HMG") and Non-Horizontal Merger Guidelines ("NHMG") contain **structural indicators** relating to market shares and concentration levels that mostly provide guidance on where competition concerns are unlikely to arise (so-called "safe harbours"). With the exception of paragraph 17 of the HMG which states that market shares above 50% may be evidence of dominance, they do not offer rules of thumb for when a merger can be presumed to be harmful. This is because beyond those indicators, there can be situations where a merger will not harm competition, for instance because the Parties are not close competitors, because competition in the market is intense, or because large market shares may turn out to be only temporary, especially in recent and fast-growing sectors characterised by short innovation cycles.[14] The revision of the Guidelines offers a chance to adequately reflect the risks resulting from mergers in a situation of rising levels of concentration and profit margins in EU markets.

35. One means to achieve this would be the **adoption of stricter indicators** (or rebuttable presumptions) to identify more easily mergers that are likely to result in a significant impediment to effective competition. These stricter indicators may shift, under specific circumstances, the burden of proof: by introducing rebuttable presumptions, it would be upon the parties to provide particularly strong evidence showing that the transaction in question does not lead to anticompetitive effects despite certain indicators supporting the existence of likely anticompetitive effects. This burden shifting could be seen as the counterpart to the existing "safe harbours", which set out certain indicators that support the likely absence of anticompetitive effects. In practice, the presence of these "safe harbours" requires the Commission to produce particularly compelling evidence

involving other qualitative and quantitative elements to demonstrate anticompetitive effects.

36.In addition, the Commission may set out a more comprehensive framework that relies on **alternative approaches to assessing market power**, and particularly those that emerged in its case practice. In addition to shares of sales, capacity shares are already frequently used structural indicators.[15] Further market features of relevance may be diversion ratios, profit margins, the distribution of spare capacities or a firm's pivotality.[16] Some of these market features may be especially relevant in cases that do not result in the creation or strengthening of a dominant position, or in cases involving highly differentiated markets.

37. Considering the recent CK Telecoms judgement of the EU Court of Justice, the revised Guidelines may also reflect on criteria for the assessment of **cases that do not result in the creation or strengthening of a dominant position**. For instance, the revised Guidelines may provide further guidance on when the merging firms can be considered close competitors or how to identify mergers that would result in the elimination of an important competitive force.

38. In some cases, even if the combined market shares or concentration levels are not particularly high, a merger may still lead to anticompetitive effects, as it increases the risk of coordination among market participants. In this context and given the developments of market realities since the adoption of the current Guidelines (e.g., algorithmic pricing, in particular), a reflection on whether **the framework for the assessment of coordinated effects is still fit for purpose** is also appropriate. Finally, the Commission has for many years relied on the **"ability-incentive-effects" framework** to assess the likelihood of foreclosure of rivals as a result of non-horizontal mergers. As there has been a renewed academic and policy debate on the anticompetitive effects of non-horizontal, particularly vertical mergers, the review of the Guidelines is an opportunity to reflect on whether the current non-horizontal framework should be amended.

Technical Background

39. The current HMG state that "*market shares and concentration levels provide useful first indicators of the market structure and of the competitive importance of both the merging parties and their competitors*".[17] Further, according to paragraph 24 of the HMG, a merger may *"significantly impede effective competition in a market by removing important competitive constraints on one or more sellers who consequently have increased market power"*. The HMG then list, from paragraph 27 onwards, several factors which may influence whether significant horizontal non-coordinated effects are likely to result from a merger. The factors listed include: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; the fact that the merged entity would be able to hinder expansion by competitors; and the fact that the merger would eliminate an important competitive force. Paragraph 26 of the HMG clarifies that, while none of these factors alone is decisive, *"not all of these factors need to be present for such effects to be likely"*. The relevance and application of these criteria for horizontal merger cases, particularly in cases below the dominance threshold, was recently confirmed in a judgment by the Court of Justice of the EU.[18]

40. In addition to the above criteria, the HMG and the NHMG contain several structural indicators to assess the likely competitive impact of a transaction.

41. **Market shares** are typically calculated by dividing the relevant operators' sales by the total sales within the previously defined relevant product and geographic market.[19] In the Commission's assessment of whether mergers may significantly impede effective competition in the internal market or a substantial part of it, market shares are "*important factors*". This is because "*the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output*". In this context, the Commission examines not only the combined share of the merging parties, but also the share increment contributed by the smallest merging firm, the shares of rivals, and the gap between the parties' combined share and the shares of their main competitors. These figures are regarded as "*useful first indications*" of the market structure and of the competitive importance of the merging parties.[20]

42. Market shares may be based on the volume of sales (e.g., units sold) or value (e.g., in EUR). In light of the specificities of each case, other metrics have been considered. Examples include shares based on production capacity, fleet size, number of passengers, new subscribers or active users, and even R&D expenditure.[21]

43. **Concentration levels** also provide useful information about the competitive situation in the relevant markets. The Herfindahl–Hirschman index ("HHI"), calculated by summing the squares of the individual market shares of the firms in the market, is often used by the Commission to measure concentration. While the absolute level of the post-transaction HHI may provide an initial indication of the competitive pressure remaining in the market, the change in the HHI (known as "delta") is a useful proxy for the change in concentration brought about by the merger.[22]

44. Both the HMG and NHMG contain **structural indicators** based on market shares and concentration levels, as follows:

a) Consistent with the EU Merger Regulation, the HMG indicate that a combined market share not exceeding 25% is "*an indication*" that the transaction is not liable to significantly impede effective competition.[23]

b) Very large shares, of 50% or more, may in themselves be evidence of the existence of a dominant market position.[24]

c) The Commission is unlikely to identify horizontal competition concerns in a market with (i) a post-merger HHI below 1 000, (ii) a post-merger HHI between 1 000 and 2 000 and a delta below 250, or (iii) a post-merger HHI above 2 000 and a delta below 150, except where special circumstances are present.[25]

d) Non-horizontal competition concerns are unlikely to arise if the combined entity's share in each relevant market is below 30% and the post-merger HHI is below 2 000.[26]

45. In the case of both market shares and concentration levels, the indicators mentioned in the current Guidelines are not shifting the legal burden of proof to the merging parties in the sense that merging parties with a combined share of more than 50% would have the legal burden of proving that they will not have a

dominant position or that the transaction is not liable to significantly impede effective competition. Instead, large market shares and high concentration levels are indicators, inferred from prior experience and probabilities. The Commission has viewed market shares effectively on a sliding scale, where larger market shares mean a need for particularly convincing other evidence to clear a case (and conversely for smaller shares the Commission has had to show particularly convincing other evidence to find competitive concerns). Accordingly, in its comprehensive case-by-case reviews, which go beyond these indicators and include the examination of other relevant market features and competitive dynamics, the Commission has on several occasions concluded, by way of example, that mergers where shares are significantly below 50% significantly impede effective competition and that mergers where shares are significantly higher than 50% do not.[27]

46. In addition to market shares and concentration levels, the Commission has in its case practice used several **other market features** to assess the likelihood of anticompetitive effects resulting from a transaction. The Commission has used diversion ratios to evaluate the degree of substitutability between competitors' products, which is particularly important in highly differentiated markets.[28] In addition, the Commission has used profit margins to infer the degree of market power that firms hold prior to the transaction. In its case practice, the Commission has frequently used diversion ratios and margins as inputs to estimate the upward pricing pressure resulting from a horizontal transaction involving differentiated products, for instance by calculating the Gross Upward Pricing Pressure Index (GUPPI) or related upward pricing pressure tests.[29] In a vertical context, the Commission frequently uses simple vertical arithmetic to estimate the incentives for total input foreclosure following the transaction or used vertical GUPPIs to estimate incentives for partial foreclosure.[30] Other market features that the Commission has relied on to assess market power and closeness of competition include capacity constraints, pivotality, bidding analyses as well as assessments of switching costs and barriers to entry. In addition to quantitative analyses, the Commission regularly relies on evidence from internal documents and from feedback from the market to assess these market features.

47. According to the HMG, the creation or strengthening of a dominant position is a primary form of a significant impediment to effective competition (SIEC). However, as confirmed by the Court of Justice of the EU, mergers can raise competitive concerns without leading to a dominant position. In all cases, the Commission is required to show, by balance of probabilities, that a transaction will "more likely than not" result in a SIEC.[31] It may also be useful to reflect on the type of evidence needed to support that a SIEC is "more likely than not" when mergers result in the creation or strengthening of dominance, compared to those that do not. For instance, the revised Guidelines could clarify the nature and level of evidence that would typically be required to conclude on the existence of a SIEC depending on the level of combined market shares, HHIs, and other structural indicators.

48. In oligopolistic markets, a transaction may give rise to **coordinated effects** by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour are now more likely to coordinate and raise prices. A merger may also make coordination easier, more stable, or more effective for firms which were already coordinating. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, according to the HMG, three conditions are necessary for coordination to be sustainable. First, coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated in case of deviation.

Third, reactions of outsiders, such as competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected.[32] In practice, the Commission has relatively rarely intervened based on stand-alone coordinated effects theories of harm. It may be useful to clarify the nature and level of evidence needed to conclude on the possibility to monitor, detect, and deter deviations to coordination, especially in situations where a merger occurs in a market where conditions conducive to coordination are already present, or clarify when, in line with economic theory, coordination may arise even in the presence of non-symmetrical market structures.

49. Finally, structural indicators such as market shares and concentration levels are relevant to assess whether, in **non-horizontal mergers**, the combined firm would have the ability to engage in input or customer foreclose strategies post-transaction. Under the analytical framework set out in the current NHMG, vertical foreclosure may occur when actual or potential rivals' access to markets is hampered. Such foreclosure may take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered. For foreclosure to be a concern, three conditions need to be met post-transaction: (i) the merged entity needs to have the ability to foreclose its rivals, (ii) the merged entity needs to have the incentives to foreclose its rivals, and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the relevant markets. In practice, these factors are often examined together since they are closely intertwined.[33] It may be appropriate to clarify the 'foreclosure' framework to provide more guidance on the appraisal of each of the criteria and how they interplay, also based on the case practice. Finally, more recently, the Commission has reviewed certain non-horizontal mergers in which the primary theory of harm did not easily fit within the existing foreclosure framework, as discussed in more detail in Topic E on Digitalisation.

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[12] According to a recent Eurobarometer study, rising prices and the cost of living were the main concern (for 42% of respondents) that motivated EU citizens to vote in the European elections of 2024. See: https://europa.eu/eurobarometer/surveys/detail/3292.

[13] European Commission: Directorate-General for Competition, De Simone, L., Nava, S., Salomone, E., Aigner, R. et al., Exploring aspects of the state of competition in the EU – Final report, Publications Office of the European Union, 2024.

[14] Case T-79/12, Cisco Systems Inc. v Commission, EU:T:2013:635, paragraphs 69 and 121.

[15] See, for example, M.8444 – ArcelorMittal/Ilva.

[16] Merging firms may be considered "pivotal" when competitors would jointly have insufficient capacity to supply the entire market demand, if the merging firms' capacities were to be withdrawn from the relevant market.

[17] HMG, paragraph 14.

[18] Judgment of 13 July 2023, Commission v CK Telecoms UK Investments, C-376/20 P, EU:C:2023:561.

[19] In purchasing markets, the Commission may rely on market shares based on (merchant) purchases.

[20] HMG, paragraphs 14 and 27, and NHMG, paragraph 24.

[21] Cases in which market share metrics other than value or volume of sales have been considered include M.8480 – Praxair / Linde, M.9062 – Fortress Investment Group / Air Investment Valencia / JV, M.5747 – Iberia / British Airways, M.8864 – Vodafone / Certain Liberty Global Assets, M.9660 – Google / Fitbit, and M.7932 – Dow / DuPont.

[22] HMG, paragraph 16.

[23] EU Merger Regulation, recital 32, and HMG, paragraph 18.

[24] HMG, paragraph 17. The paragraph further details that the Commission has in several cases also considered mergers resulting in firms holding market shares between 40% and 50%, and in some cases below 40%, to lead to the creation or the strengthening of a dominant position.

[25] HMG, paragraphs 19-20.

[26] NHMG, paragraph 25.

[27] For example, in M.10876 – BSA (Lactalis)/Ambrosi, the Commission did not identify any horizontal competition concerns on several markets where the Parties' combined market shares significantly exceeded 50%. Conversely, in M.8713 – Tata Steel / Thyssenkrupp / JV, the Commission identified horizontal competition concerns in a market where the Parties' combined market share was below 30%. The Commission's prohibition decision in that case was recently upheld in its entirety by the Court of Justice of the EU (Case C-581/22 P).

[28] HMG, paragraph 29.

[29] Recently, the Commission relied on GUPPIs as evidence in M.10896 – Orange/MásMóvil. In this decision, the Commission also estimated the related Compensating Marginal Cost Reduction ("CMCR"), which also relies on diversion ratios as an input. See for example paragraph 625ff.

[30] The Commission used vGUPPIs as evidence in M.9569 – EssilorLuxottica/Grandvision (see for instance paragraph 268).

[31] Judgment of 13 July 2023, Commission v CK Telecoms, C-376/20 P, EU:C:2023:561, paragraph 87.

[32] HMG, paragraphs 22 and 39-57.

[33] NHMG, paragraphs 20-32 and 58-79.

Questions

B.1 In your/ your client's view, do the current Guidelines provide clear, correct, and comprehensive guidance with regards to structural indicators / market features as well as the frameworks to assess coordination and foreclosure theories of harm?

- ( ) Yes, fully
- ( ) Yes, to some extent
- (•) No, to an insufficient extent
- ( ) Not at all
- ( ) I do not know

B.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear, or what you consider is missing from the current Guidelines.

Text of 1 to 3000 characters will be accepted

In general, the Guidelines' focus on condemning transactions that impede effective competition or result in a dominant position will chill transactions that benefit consumers through either static or dynamic efficiencies that may outweigh anti-competitive harm.

B.2 Do you consider that the current structural indicators / market features involving market shares and concentration levels and/or the broad frameworks to assess coordination and foreclosure theories of harm should be substantially revised? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [x] a. Structural indicators / market features to assess likelihood of anticompetitive effects in horizontal mergers.
- [x]

b. Structural indicators / market features to assess dominance.

- [x] c. Structural indicators / market features to assess likelihood of anticompetitive effects in non-horizontal mergers.
- [ ] d. Framework to assess likelihood of coordination in horizontal mergers.
- [x] e. Framework to assess likelihood of coordination in non-horizontal mergers.
- [ ] f. Framework to assess potential foreclosure in vertical mergers.
- [x] g. Framework to assess potential foreclosure in conglomerate mergers.
- [ ] h. The revised Guidelines should not better reflect any of these areas.

B.3 What should be the structural indicators / market features used by the Commission to assess the likelihood of anticompetitive effects in horizontal mergers? Please provide your view on the role and level of market share and concentration levels, as well as other structural indicators / market features you consider relevant.

Text of 1 to 5000 characters will be accepted

> Structural evidence like market shares and industry concentration levels (e.g., HHIs) can be a starting point to assess the anticompetitive effects of mergers, especially when evaluating coordinated effects.

B.4 Compared to the current Guidelines, should structural indicators be stricter or give rise to legal presumptions? Or should they be laxer/lower? Please provide supporting reasoning and evidence as to why stricter or laxer structural indicators should be used, based on economic and legal principles.

Text of 1 to 5000 characters will be accepted

> Structural indicators should be stricter so as to ensure that any structural rebuttable presumption of anticompetitive harm avoids false positives. Specifically, low thresholds for structural presumptions may chill transactions that enhance dynamic competition given the inverted-U relationship that exists between market structure and innovation.

B.5 Based on which structural indicators / market features should the Commission assess the creation or strengthening of a dominant position? Please specify whether you believe that there should be a structural presumption of dominance, i.e., should certain thresholds be met, the burden of proof is on the merging parties to demonstrate the contrary. If so, should the presumption of dominance be based solely on market shares or combined with other indicators?

Text of 1 to 5000 characters will be accepted

> Structural indicators should only give rise to a rebuttable presumption of harm in cases where the transaction results in both very high HHI and delta-HHI levels (e.g., a merger that creates a duopoly or monopoly). Presumptions based on the market share of a single firm market should be disfavored, such as a presumption that a merger that results in an over 50% market share is prima facie anticompetitive. While this would imply a market HHI of over 2500, which is typically understood to be highly concentrated, it is possible that the delta HHI from the transaction could be very small and thus the effects on competition and consumers de minimis (e.g., a firm with a 49% share acquires a firm with a 1% share and three other firms with 20%, 17%, and 13% shares remain in the market).

B.6 Based on which structural indicators / market features should the Commission assess the existence of a SIEC, absent the creation or strengthening of a dominant position? Please specify whether you believe that there should be specific thresholds (or guidance) to identify mergers that may result in SIECs in cases where there is no dominant position.

Text of 1 to 5000 characters will be accepted

The analysis of whether a transaction may result in SIEC short of a dominant position should include an analysis of market structure, past industry behavior, intent, and future economic performance, particularly as it concerns the possibility of a merger resulting in oligopolistic collusion. In mergers that impede effective competition but where a dominant position does not exist, unilateral effects may be highly unlikely unless there is especially strong evidence that the merging parties are particularly close competitors.

B.7 What type and level of evidence should the Commission rely on to establish that a merger will significantly impede effective competition in horizontal merger cases leading to dominance and in cases that do not?

Text of 1 to 5000 characters will be accepted

While the Commission should rely on the same types of intent, structure, conduct, and performance evidence in all cases where it believes competition will be harmed, transactions that result in the creation or enhancement of dominance are ceteris paribus far more likely to be anticompetitive than those that merely impede effective competition.

B.8 Which structural indicators / market features should the Commission use in the assessment of *coordinated effects*? Please detail the indicators and explain whether you believe this is an achievable standard to identify cases leading to coordinated effects.

Text of 1 to 5000 characters will be accepted

The same sorts of intent, structure, conduct, and performance evidence that is generally used to evaluate a merger's effects are applicable to specific coordinated effects theory of harm.

B.9 From your perspective, can non-horizontal mergers lead to coordinated effects? Please explain in which circumstances and under which conditions this may arise. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

Non-horizontal mergers can result in coordinated effects in some cases. For example, the acquisition of a key upstream supplier can be used to prevent a maverick firm from disrupting downstream collusion vis-à-vis the threat of withholding upstream supply.

B.10 In which circumstances and under which conditions may a merger increase the risks of coordinated effects or otherwise make coordination more stable or more effective? Please detail in particular the market conditions conducive to coordination.

Text of 1 to 5000 characters will be accepted

There are a number of conditions that may affect whether a merger is likely to result in coordinated effects. These include the number of firms in a market and their market shares, the presence of maverick firms, whether firms can easily monitor one another's pricing, whether products in the market are homogeneous, whether sales are small and frequent, and whether the industry has a history of successful coordination.

B.11 In which circumstances and under which conditions will companies have the incentives to follow rather than deviate from the terms of coordination? Please explain in particular the role of monitoring and deterrence mechanisms in this context, and the level of evidence needed.

Text of 1 to 5000 characters will be accepted

In general, firms are more likely to engage in tacit collusion the easier it is to coordinate and the higher the costs associated with cheating. With respect to structural evidence, the more concentrated the market (except in the limit case of merger to monopoly), in general the more likely collusion will be. With respect to intent, internal documents showing an intent to engage in collusion post-merger will of course be highly probative. Natural experiments, such as a history of past successful collusion, can also shed light on whether coordinated effects are likely, as can evidence that there are no maverick firms. Price leadership models may also be a more quantitative way to assess the likelihood of collusion.

B.12 In which circumstances and under which conditions could countervailing factors, such as the reaction of outsiders, defeat the risks of coordinated effects post-merger? Please detail what could be the countervailing factors and the level of evidence needed to prove that they will defeat the risks of coordination.

Text of 1 to 5000 characters will be accepted

Even if a prima facie case that a merger may result in increased coordination, countervailing factors may exist that make coordination unlikely. These include entry as well as expansion by existing firms that greatly reduce the incentives and ability for the existing market players to coordinate.

B.13 Which structural indicators / market features should the Commission use in the assessment of *non-horizontal foreclosure effects*? Please detail such indicators / features, provide underlying evidence of their suitability, and specify whether they would support the ability, incentive, or effects of foreclosure. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

Non-horizontal merger enforcement should focus on proscribing vertical transactions that raise rivals costs, either through input or customer foreclosure, and create power over price in a way that harms consumers. This is broadly consistent with the ability, incentive and effect framework. Conglomerate mergers, by contrast, should not be a part of non-horizontal merger enforcement: to the extent that the merged firm is able to engage in, for example, anticompetitive bundling as a result of the merger, this can enforced post-merger using Articles 101 and 102.

B.14 What should be the test and standard to be met to assess the risks of foreclosure effects of *non-horizontal mergers*? Please explain in particular whether you believe that (i) the “ability, incentives, effects” test is appropriate and effective in identifying cases leading to foreclosure effects; and (ii) there are overlaps in the standard for establishing ability-incentive-effects separately. Please clarify whether you think the test can be clarified/simplified. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

In order for a vertical transaction to harm competition, the merged firm must have substantial market power it can use to foreclose rivals (i.e., ability), it must make economic sense to exclude rather than do business with rivals (i.e., incentive), and ultimately be likely to produce the anticompetitive effect of increased power over price in a way that harms consumers (effect). And, unlike horizontal mergers, structural presumptions of harm should not be applied, as any incentives to foreclose are concomitant with incentives to lower prices through the elimination double marginalization (EDM). As such, that structural indicators may indicate a firm has both upstream and downstream market power are not sufficient to demonstrate that a vertical merger will be anticompetitive.

B.15 How should the Commission assess the merged entity's financial incentives to foreclose? Please specify the most relevant indicators and what can be, from your perspective, the role of quantitative economic analysis.

Text of 1 to 5000 characters will be accepted

To weigh incentives to foreclose with incentives to lower prices, a case-by-case analysis is required, as the theoretical economic literature is unclear as to which incentives generally dominate. Most importantly, given the interrelation between foreclosure and EDM incentives, both must be evaluated together in evaluating the merged firms incentives, and which can typically be analyzed using empirics like margin and diversion data.

Topic C: Innovation and other dynamic elements in merger control

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

50. Firms compete not only through short-term pricing decisions but also by **investing in their long-term competitiveness. This is a dynamic process**, where firms expect future profits from investments into new production capacity, infrastructure, cost-reducing technologies, improved quality of products or R&D to innovate new products and services, all of which are drivers of economic growth and competitiveness.

51. As outlined in the Competitiveness Compass, **innovation plays a fundamental role in strengthening Europe's competitiveness and competition is a key driver of innovation**. The **Competitiveness Compass** also provides that the Commission in its merger control assessment should ensure that innovation is given adequate weight in light of the European economy's acute needs. Mergers can impact innovation competition in both directions – they may increase the ability of the merged firm to innovate but also harm innovation competition and thus the incentives to invest in R&D. It is important that the framework for merger assessments enables the Commission to adequately assess both elements, the positive and the negative impact on innovation. The effects of mergers on innovation are often more difficult to predict than effects on price and thus the challenge is to further develop a sufficiently accurate yet administrable framework for assessing dynamic merger effects on innovation.

52. Moreover, consumers should not be harmed following the **elimination of either existing or potential competition** that significantly constrains the behaviour of the firms active in the market. A merger with a potential competitor with a promising product in development or with notable R&D capabilities can accelerate commercialisation of improved products. However, it can also prevent future competition, delaying the

expected benefits for certain products or the industry, e.g. if a merger leads to the discontinuation of a highly promising product or line of research, or if it increases barriers to entry or expansion. The potential for other competitors to enter the market in the future is therefore an important element in the overall competitive assessment.[34] The challenge is to identify the circumstances in which an acquisition of a potential competitor may increase or, on the contrary, stifle competition (including on non-price parameters such as innovation). In addition to effects on innovation stemming from mergers between head-to-head competitors, also non-horizontal mergers can lead to beneficial but also harmful effects on innovation. For instance, a merger where a dominant supplier acquires an innovative player downstream can lead to foreclosure of downstream rivals, stifling innovation going forward. When assessing both the positive and negative impacts of mergers on innovation and other dynamic effects, it is important to consider market-specific features.

53. Merger analysis is a forward-looking, predictive exercise. It deals with **inherent uncertainty**, particularly when dynamic factors are at play. Predicting market developments becomes more challenging and uncertain the further into the future the assessment goes. On the other hand, protecting innovation competition may entail protecting the uncertainty in the race to innovate that prevails on the market when there are several competing innovators. Related to uncertainty and the standard of proof is the question of the correct counterfactual, i.e., the conditions that would have prevailed absent the merger, against which the Commission compares the competitive conditions that are likely to result from the merger. Challenges may arise in establishing the right reference point for the counterfactual but also in cases of failing or exiting firms, where alternative buyers may have existed earlier in the process when the financial situation was not yet critical. Another challenge can be the assessment of pre-existing agreements between the merging firms or agreements concluded 'in tempore suspecto', concomitant to the merger.

Technical Background

54. The current Horizontal Merger Guidelines ("HMG") and Non-Horizontal Merger Guidelines ("NHMG") recognise **innovation** as one non-price parameter of competition that is considered when assessing the effects of a transaction. The Commission has also developed a four-layer framework for assessing the competitive effects of horizontal mergers on innovation, which assesses the effects of a merger throughout the lifecycle of innovation including the risk of harm arising from (a) overlaps between existing products, (b) overlaps involving advanced pipeline products, (c) a discontinuation, delay or redirection of early-stage pipelines, or (d) a loss of innovation competition from a structural reduction in the overall level of innovation.[35] Innovation effects can also be relevant in non-horizontal mergers. For instance, an acquisition of an innovative downstream player by a dominant upstream supplier can result in potential foreclosure of downstream rivals leading to stifling of innovation downstream.

55. An impact of a merger on dynamic competition and innovation is highly relevant when companies engage in defensive acquisitions of nascent or emerging innovative competitors, also known as '**killer acquisitions**'. Assessments of such acquisitions should take into account the specific economic and technological features of the sector and of the individual case – for instance, in pharma markets some acquisitions may lead to the discontinuation, delay or reorientation of one of the overlapping pipeline projects (also referred to as 'reverse killer acquisitions' in case of discontinuation of the acquirer's own pipeline project) and in the IT, digital or other markets, an incumbent may defensively acquire a firm or project which either alone or in the hands of a

competitor could in the future threaten the incumbent's position in one of its core businesses.

56. Various **metrics** can be relevant in assessing the level of concentration in a market characterised by innovation competition. When innovative products are at the development stage and not yet commercialised, the number of existing and potential suppliers can be particularly informative. In markets where there are frequent and significant investments in R&D, firm-level R&D expenditures, the number of patents or patent citations may be used as relevant metrics for measuring market power and knowledge diffusion.[36] Furthermore, market dynamism may be reflected in churn rates and market share fluctuations, and innovation diversion ratios and evidence of technological spillovers can be useful in assessing closeness of innovation competition between the merging parties.

57. Mergers can also have a positive or negative impact on other **dynamic non-price parameters** of competition, such as quality, variety, the firms' incentives to **invest**, sustainability (see topic D on Sustainability & clean technologies) or privacy and data protection (see Topic E on Digitalisation). For instance, a merger may reduce the incentives to invest in R&D, e.g., if the merger removes competitive pressure given that the parties are strong innovators while rivals spend less on R&D, if the benefits of investment are recouped only in a more distant future following the merger or when output reductions make investments less profitable. As a result, consumers are deprived of the benefits from the investment. A merger may also lead to degradation of **quality** in various forms (e.g. degradation of interoperability) in different industries,[37] which may also impact the **variety** of products available to consumers long-term. On the other hand, in specific cases a merger can also enhance innovation, investment or improve the quality of products, for instance if it combines complementary lines of research or product lines, in which case the rationale of the transaction is based on increasing/improving innovation or certain product offering. Positive effects of mergers are covered in more detail in Topic F on Efficiencies.

58. Further, the HMG provide for a **dynamic assessment by considering the companies' future conduct** such as entry and expansion following a merger, or the elimination through a merger of potential competitors representing a competitive threat. **Future entry** by competitors may constitute a countervailing factor to potential anti-competitive effects of mergers between actual competitors if such entry is likely, timely and sufficient.[38] Dynamic assessments may also consider the future conduct as to investments (e.g. in infrastructure, new technologies or quality upgrades and improvements) as well as the direction of innovation following discontinuation or reorientation of efforts after a merger.

59. The HMG recognise that a merger with a **potential competitor**[39] can generate anti-competitive effects under two conditions: (i) if the potential competitor significantly constrains the behaviour of the firms active in the market, and (ii) if there is not a sufficient number of other potential competitors who could constrain the merged entity post-merger.[40] The first condition can be met in two alternative ways: the potential competitor, either (i) already exerts a significant constraining influence albeit not being active in the market or (ii) has a significant likelihood to grow into an effective competitive force. In a recent case, under the first leg, the Commission investigated whether the incumbent firm reacted to a mere threat of potential entry by adapting its market behaviour accordingly.[41] Under the second leg, the Commission relied on objective evidence to show the likelihood of entry and a significant likelihood that in the event of entry, the potential competitor would grow into an effective competitive force.[42] One can thus distinguish between situations where the potential

competitor is an actual potential competitor and where it is a perceived potential competitor, and the revised Guidelines should clarify the framework and conditions for the assessment of each scenario.[43]

60. While both frameworks concern entry as a competitive threat, the HMG do not distinguish clearly between future entry as a countervailing factor and the elimination of a potential competitor as a theory of harm, and whether and how the conditions for one may or may not apply to the other. For instance, when entry is analysed as a countervailing factor to the loss of actual competition, its “sufficiency” implies the capacity to replace the loss of the actual competitor, i.e., to thwart potential anticompetitive effects brought about by the horizontal concentration. Conversely, mere ‘potential competition’ usually has a different role and effect. In cases where the loss of potential competition is at stake, actual competition is often ineffective, as is the case, e.g., in highly concentrated markets. In such a market environment, it is possible that even a perceived (as opposed to an actual) threat of entry exerts competitive constraints on the incumbent player. Therefore, sufficiency and timeliness of entry are then not determining factors.[44]

61. Merger control is forward-looking and, hence, inherently **uncertain**, in nature. In particular when assessing dynamic effects of mergers, a certain level of uncertainty is inevitable as many factors come into play when assessing for instance impact on innovation or investments. In recognition of this, the European Court of Justice has repeatedly held that the Commission has a margin of discretion with regard to the prospective economic analyses it carries out to determine the likelihood of certain developments in the relevant market as a result of a given concentration.[45] It also confirmed that (i) the relevant **standard of proof** in merger cases, whether clearance or prohibition decisions, is that it is ‘more likely than not’ that the merger would or would not have anti-competitive effects and (ii) the standard of proof does not vary according to the type of merger or according to the complexity of a theory of competitive harm in a given case, but it must be met by means of a sufficiently cogent and consistent **body of evidence**.[46]

62. According to the HMG, the Commission makes the ex-ante assessment by comparing the competitive conditions that are likely to result from the merger with the conditions that would have prevailed absent the merger, i.e., the **counterfactual**. Whereas in most cases the relevant reference point is the competitive conditions existing at the time of the merger, the Commission may also take into account future changes to the market that can reasonably be predicted.[47] For this aim, there exists no strict ‘checklist’ of factors that would apply mechanically in each case. Rather, given the particularities of each case, the Commission bases its assessment on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions.[48] The relevant time frame within which the Commission may take such future changes into account may vary also depending on the industry sector.

63. In past cases, the Commission has used different benchmarks when the circumstances of the case so required. For example, in the aviation mergers that were notified during the Covid-19 pandemic and/or Russia’ s war of aggression against Ukraine,[49] the assessment distinguished between possible structural changes in the market (e.g., lasting entry or exit of competitors) and short-term shocks on supply and demand that remained temporary.

64. A different benchmark is also required when the target is in such financial difficulties that it would ultimately leave the market even absent the merger. The ‘**failing firm defence**’ under the current Guidelines is aimed at

identifying this type of situations with three cumulative criteria.[50] So far only one case has been cleared on this basis under the current Guidelines.[51] The Commission has found problems to accept that the target would exit the market (prong 1) when losses are considered temporary and not indicative of the unsustainability of the target in the near future,[52] or that there is no less anti-competitive alternative purchaser (prong 2) when the merger is a result of a competitive tender procedure where more than one bidder submitted a bid.[53]

65. More recently, the Commission has accepted to assess the financial difficulties faced by the target firm as part of the counterfactual as long as the same arguments were not put forward by the parties, unsuccessfully, for a failing firm defence.[54] The assessment considered whether its current financial situation indicates that the target would likely remain in the market, and whether this would impact its future competitive strength absent the merger.[55]

66. Finally, the Commission has not accepted as counterfactual pre-existing agreements between the merging parties that were illegal (e.g., a cartel) or concluded ‘in tempore suspecto’, that is agreements which were entered into in preparation of or are otherwise informed or affected by the merger.[56] [57]

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[34] The Draghi report recognises the importance of dynamic competition stating that EU merger control should “emphasise the weight of innovation and future competition […], enhancing progress in areas where the development of new technologies would make a difference for consumers” and not be “too backward-looking, focusing on existing market shares, [because] in multiple sectors what matters much more is future potential competition and innovation.”

[35] See e.g., cases M.7932 – Dow / Dupont, M.9461 – Abbvie / Allergan, M.9554 – Elanco Animal Health / Bayer Animal Health Division, and M.11177 – Pfizer / Seagen.

[36] See, for example, case M.7932 – Dow / DuPont, Annex 1 of the decision, M.8084 – Bayer / Monsanto, and M.11177 – Pfizer / Seagen.

[37] See for example case M.9945 – Siemens Healthineers / Varian Medical Systems, M.9660 – Google / Fitbit, M.7612 – Hutchison 3G UK / Telefónica UK, and M.9019 – Mars / AniCura.

[38] HMG, paragraphs 68 et seq.

[39] The concept of “potential competition” intends to determine the degree of competitive constraints exercised by undertakings which do not operate on the same product or geographic markets, especially in situations of ineffective actual competition (e.g., in concentrated or dominated markets).

[40] HMG, paragraphs 58-60.

[41] See Competition Merger Brief No 2/2024, M.11033 – Adobe / Figma.

[42] See Competition Merger Brief No 2/2024, M.11033 – Adobe / Figma. It is unclear whether the Court’s requirement of “real and concrete possibilities” of entry, see e.g., C-307/18 Generics (UK) and Others, EU:C:2020:52, C-201/19 P Servier and Others, EU:C:2024:552, C-331/21 EDP – Energias de Portugal and Others, EU:C:2023:812, could and should apply in merger cases.

[43] Other cases where the Commission assessed elimination of a potential competitor include, for instance, M.6166 – Deutsche Börse / NYSE Euronext, M.7276 – GSK / Novartis Vaccines Business, and M.9547 – J&J / Tachosil.

[44] The Commission has also reviewed potential competition in situations where (i) the undertakings are active on the same, although geographically distinct, product markets (‘geographic potential competition’) and (ii) they are present on different product markets (‘product potential competition’). See, e.g., cases M.11043 – Novozymes / Chr Hansen Holding, M.11033 – Adobe / Figma and Opinion of AG Rantos in Case C-331/21 EDP – Energias de Portugal and Others, EU:2023:153.

[45] E.g., judgments Bertelsmann and Sony Corporation of America v Impala, C-413/06 P, EU:C:2008:392, paragraph 144; and Commission v CK Telecoms, C-376/20 P, ECLI:EU:C:2023:561, paragraph 82.

[46] Judgment of 13 July 2023, Commission v CK Telecoms, C-376/20 P, EU:C:2023:561, paragraphs 79 and 87.

[47] HMG, paragraph 9.

[48] HMG, paragraph 13.

[49] M.11071 – Lufthansa / MEF / ITA, para. 434 et seq; M.10149 – Korean Air / Asiana; see also M.9489 – Air Canada / Transat (abandoned), and M.9637 – IAG / Air Europa (abandoned).

[50] HMG, para. 90: First, the target would in the near future be forced out of the market if not taken over by another undertaking. Second, there exists no less anti-competitive alternative than the proposed merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.

[51] M.6796 – Aegean/Olympic II.

[52] M.5830 – Olympic / Aegean Airlines (Aegean/Olympic I), para. 1999.

[53] M.8444 – ArcelorMittal / Ilva.

[54] M.8444 – ArcelorMittal / Ilva. The Commission concluded that the conditions for a failing firm defence were not met. The Commission rejected the parties' submission to take into account market exit as a relevant counterfactual, because that would "in essence be tantamount to the acceptance of a FFD".

[55] M.7278 – GE / Alstom, para. 1133 et seq.; M.11071 – Lufthansa / MEF / ITA.

[56] M.10615 – Booking Holdings / eTraveli Group.

[57] This is in line with the Commission's approach in relation to evidence prepared after the opening of infringement proceedings. In M.8181 – Merck / Sigma, the Commission did not take into consideration witness statements made 'in tempore suspecto'.

Questions

General

C.1 In your /your client's view, do the current Guidelines provide adequately clear, correct and comprehensive guidance on how the Commission considers dynamic criteria in its assessment of the impact of mergers on competition (dynamic merger effects are linked to firms' forward-looking behaviours, particularly their ability and incentives to invest and innovate, as well as to enter or exit a market in the mid-to-long term. Dynamic merger effects can be either positive, leading to efficiencies, or negative, leading to harm)?

- ○ Yes
- ○ Yes, to some extent
- ● No, to an insufficient extent
- ○ Not at all
- ○ I do not know

C.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) do not provide adequately clear, correct and comprehensive guidance on dynamic criteria to assess the impact of mergers on competition.

Text of 1 to 5000 characters will be accepted

While the current horizontal mergers correctly note how merger efficiencies can include "new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation," there are a number of transactions which may enhance innovation and benefit consumers even if they result in dominance or a lack of effective competition. This is consistent with the long established "inverted-U" literature showing how increased concentration can result in greater innovation, including in oligopoly markets that may have a dominant firm or lack effective competition. Future guidelines should attempt to address this "innovation gap" by moving away from structural metrics like dominance and effective competition to a more direct focus on the competitive process and welfare effects.

C.2 In your/your client's view, should the revised Guidelines better reflect dynamic criteria in the assessment of the impact of mergers on competition? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [x] a. Innovation
- [x] b. Investments
- [x] c. Potential competition
- [x] d. Entry as countervailing factor
- [x] e. Counterfactual
- [x] f. Failing firm defence
- [x] g. Standard of proof and evidence on future market developments
- [x] h. other

Innovation and investments

C.3 In what circumstances can mergers negatively impact the ability and incentives of the merged company to innovate (e.g. a merger between strong innovators, acquisition of an innovator, acquisition of an input critical for other companies to innovate)?

Text of 1 to 5000 characters will be accepted

Mergers may harm innovation if they lead to a reduction in quality such as through reduced incremental product improvements. Mergers may also harm innovation to the extent that there are adverse coordinated or unilateral effects in a market for research and development for more disruptive innovations where the parties compete.

C.3.a What theory/theories of harm could the Commission consider (i.e. that would impede a company's innovation post-merger, including due to the reduction of the incentives to innovate going forward or reduce access to IP licences)? Please distinguish between theories of harm applicable to mergers between head-to-head competitors (horizontal mergers) and mergers between companies active in related markets (vertical or conglomerate mergers).

Text of 1 to 5000 characters will be accepted

The Commission should consider the same sorts of unilateral, coordinated, and vertical effects when evaluating reductions in quality or a loss of competition in an innovation market.

C.3.b Under which conditions could this theory/these theories of harm materialise?

Text of 1 to 5000 characters will be accepted

Whether a transaction is likely to lead to a reduction in incremental or more disruptive R&D competition must be assessed on a case-by-case basis, but are more likely to occur in markets that are defined by these types of quality or innovation competition.

C.3.c What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the potential reduction of the companies' ability and incentives to innovate post-merger? Please explain in particular whether metrics such as patent portfolio (patents' share and citations), R&D spending, R&D staff and contribution to industry standards can be relevant, and whether metrics should apply at firm level or market level.

Text of 1 to 5000 characters will be accepted

The same sorts of intent, structure, conduct, and performance evidence that are used to evaluate price and output effects are generally informative when assessing whether a transaction will result in a reduction in quality or incremental product improvements. However, in analyzing competition in an R&D market, structural presumptions are inappropriate given the inverted-U relationship between market structure and innovation, although mergers to monopoly will still likely be treated as unlawful unless entry or efficiencies considerations negate the likelihood of anticompetitive harms.

C.4 In what circumstances can mergers negatively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger will likely harm investment?

Text of 1 to 5000 characters will be accepted

See response to Question C.3.

C.5 How should the Commission account for the incentives to invest and innovate post-merger depending on the specific market features? Please explain which market characteristics are relevant and should be considered when assessing the companies' incentives to invest and innovate. Please also explain the type of investments and the type or location of assets that can give rise to efficiencies.

Text of 1 to 5000 characters will be accepted

See response to Question C.3.b.

C.6 In what circumstances can the elimination of a (small) but particularly innovative player with a large competitive potential (e.g., in the case of nascent and emerging market or rapidly developing sectors) harm competition?

Text of 1 to 5000 characters will be accepted

Horizontal mergers that eliminate a small competitor that poses a significant risk of dynamic expansion can result in harm to innovation competition are a particular concern in markets where either incremental or more disruptive innovation is a key dimensionality of competition.

C.6.a How should the Commission account for the ability and incentives of nascent innovative companies to scale up when assessing the impact of a merger on competition?

Text of 1 to 5000 characters will be accepted

The Commission should always consider dynamic expansion by competitors when assessing the potential for a merger to harm competition, both with respect to the merging parties, and with respect to third-party competitors who are able to expand in a way that limits the merged firm from exercising market power post-merger.

C.6.b What theory/theories of harm could the Commission consider (i.e. that would impede a company's scaling up post-merger, e.g. due to the downgrading or discontinuation of its activities - so called "killer acquisition"; or that would erect barriers to entry and expansion or entrench a dominant position preventing other nascent competitors to scale-up)?

Text of 1 to 5000 characters will be accepted

Horizontal mergers that eliminate a small competitor that poses a significant risk of dynamic expansion can result in harm to innovation competition if the small competitor is a particularly close competitor with the other firm (unilateral effects) or is poised to act as a maverick disrupting collusion (coordinated effects). However, fears about underenforcement in the form of failing to protect potential competition in technology markets from "killer acquisitions" appear to be overstated. In particular, concerns about killer acquisitions may be more well-founded in pharmaceutical markets characterized by drastic innovations, where innovation milestones are easy to observe, rather than in technology markets.

C.6.c Under which conditions could this/these theory/theories of harm materialise?

Text of 1 to 5000 characters will be accepted

Whether a transaction is likely to lead to a reduction in incremental or more disruptive R&D competition must be assessed on a case-by-case basis, but are more likely to occur in markets that are defined by these types of quality or innovation competition.

C.6.d What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the potential reduction of the nascent innovative companies' ability and incentives to scale-up post-merger? Please consider the evidence and metrics for assessment of innovation in different industries, for instance pharma, digital and tech etc.

Text of 1 to 5000 characters will be accepted

In assessing the competitive effects of mergers of firms that are poised to expand through innovation, market shares are typically not predictive by virtue of underemphasizing the competitive significance of the expanding firm. For this reason, intent, conduct, and performance evidence are in general more informative as to likely post-merger conditions.

C.7 In what circumstances can mergers positively impact the ability and incentives of the merged company to innovate? Based on which evidence and metrics can the Commission conclude that a merger advances innovation? Please distinguish between mergers creating or strengthening market power and those that do not, as relevant.

Text of 1 to 5000 characters will be accepted

Mergers can enhance innovation in two general ways. First, horizontal mergers may enhance innovation by providing firms with increased scale that increases their incentives and abilities to engage in R&D and innovation. Indeed, even mergers that result in a three firm oligopoly may in some cases improve consumer welfare by enhancing dynamic competition. Second, non-horizontal mergers can enhance innovation capabilities through the combination of complementary assets. An example would be an innovative pharmaceutical company being bought by a large incumbent who has the resources and know how to more efficiently bring new drugs to market.

C.7.a What elements, evidence and metrics can the Commission consider when balancing the potential positive benefits and spillovers of enhanced R&D capabilities against the potentially anticompetitive effects of a merger?

Text of 1 to 5000 characters will be accepted

Balancing the dynamic and innovation benefits of a merger with potential short run static harms like higher prices can be extremely difficult and may not admit of suitable quantitative evidence that can help predict the overall effect on market performance. With respect to structural evidence, the inverted-U analysis provides a useful starting point: mergers that create a monopoly are more unlikely to have dynamic benefits that outweigh short run harms than mergers that may create oligopoly where the risk of coordination is not low (e.g., not a duopoly with market characteristics that make collusion possible).

C.8 In what circumstances can mergers positively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger advances investment? Please distinguish between mergers creating or strengthening market power and those that do not, as relevant.

Text of 1 to 5000 characters will be accepted

See response to Question C.7.

On benefits of mergers on investment and innovation, including linked to scale, please refer to Topic A on Competitiveness and resilience.

Elimination of potential competition and potential entry as a countervailing factor

C.9 In what circumstances can the elimination of a potential competitor (that is likely to enter the market in a near future or already exert competitive constraints even if not in the market) harm competition?

Text of 1 to 5000 characters will be accepted

Mergers that reduce perceived potential competition (i.e., the acquisition of a firm that is perceived as a potential competitor) or actual potential competition (i.e., the acquisition of a firm that has the ability to be enter the market and compete) can under certain circumstances harm competition.

C.9.a How should the Commission assess competition risks linked to situations where a merger eliminates a potential competitor, i.e., the target is likely to enter in a foreseeable future and become a competitor, or despite not yet being in the market already exerts competitive constraints due to its capabilities to enter? What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

Relevant factors in analyzing competitive effects from acquisitions that involve a potential competitor would include the existence of a highly concentrated market, a clear perception or capability of the potential competitor to affect competition, as well as an already existing or likely procompetitive impact on the market. For acquisitions that involve actual potential competitors where the firm poses no existing constraint on the market, the Commission should take particular care to ensure that it does not chill procompetitive transactions based on speculative theories of harm, in part by focusing its enforcement on consummated transactions where there is direct evidence of anticompetitive harm (e.g., the potential competitor quickly develops what would have been a superior competitive product post-merger). Coordinated and unilateral effects theories would remain the central bases for demonstrating competitive harm.

C.9.b Under which conditions could this theory/these theories of harm occur? In particular, (a) do the conditions for the elimination of potential competition vary depending on whether the potential competitor is threatening to enter into (i) a new product market or (ii) a new geographic market, and (b) can the first leg of the legal test as described at paragraph 60 of the HMG (the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force) be fulfilled by the mere threat of potential competition, whether real or perceived by the incumbent? Which factual elements would be required for such finding?

Text of 1 to 5000 characters will be accepted

Transactions that are likely to harm consumers from a loss of potential competition can occur in any industry, but are of particular concern in markets where entry is a significant factor in ensuring competitive markets. Indeed, transactions that reduce perceived potential competition are typically more concerning than mergers which may reduce actual potential competition, as a perceived potential competitor is often already posing an existing competitive constraint on the market due to the perceived threat of entry.

C.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the competition risks linked to the elimination of potential competition?

Text of 1 to 5000 characters will be accepted

In assessing the competitive effects of mergers that involve a potential competitor, market shares are typically not predictive by virtue of potential competitors not yet having any actual market share. For this, intent, conduct, and performance evidence are in general more informative as to likely post-merger conditions.

C.10 How should the Commission assess situations where the presence of a potential competitor (i.e., a company likely to enter in a foreseeable future and become a competitor of sufficient scope or magnitude) will exert sufficient competitive constraints to countervail the merging parties' market power?

Text of 1 to 5000 characters will be accepted

Timely, sufficient, and likely entry by potential competitors is often reason for approving mergers that may pose a risk of prima facie competitive harm.

C.10.a Under which conditions could this countervailing factor be sufficient? Please explain in particular how the likelihood, timeliness and sufficiency of such entry should be assessed, and based on which evidence and metrics.

Text of 1 to 5000 characters will be accepted

Consistent with the focus of merger enforcement on short-run effects, timely entry should typically occur within 1-2 years. Whether entry is likely should be assessed by analyzing whether it is profitable for the merged firm to enter the market, and the extent to which entry barriers do or do not limit its ability do so. Sufficiency should be evaluated by analyzing, for example, the potential competitor's ability to compete at scale either as a maverick (coordinated effects) or with a product that is a particularly close substitute to those of the merging parties.

C.10.b What are the elements, including evidence and metrics, that the Commission could use to alleviate the competition risks due to the existence of potential competition?

Text of 1 to 5000 characters will be accepted

For firms identified as "rapid entrants," timeliness can effectively be presumed such that they already effectively fall within the relevant market. Similarly, for potential competitors that are already perceived as such, rigid evidence regarding sufficiency of entry need not be put forward due to already existing competitive pressures on the market. By contrast, firms that are would qualify actual potential competitors are by their very nature likely entrants, such that the emphasis should be on showing timeliness and sufficiency.

C.10.c Should the conditions for entry as a countervailing factor be the same as the conditions for the elimination of a potential competitor as a theory of harm?

Text of 1 to 5000 characters will be accepted

The same sorts of considerations about likelihood, timeliness, and sufficiency in determining whether entry can rebut a prima facie case of anticompetitive harm will apply in determining whether the acquisition of a potential competitor is anticompetitive.

Counterfactual and failing firm defence

C.11 How should the Commission consider the pre-merger situation in the counterfactual assessment, i.e. when assessing what would have been the situation prevailing absent the merger? In particular, how should the Commission treat companies' decisions, including cooperation agreements, or market developments after the announcement of the deal that may have been influenced by the deal's perspective, and could already be merger-specific?

Text of 1 to 5000 characters will be accepted

The same sorts of analysis that is used to assess the but-for world generally in merger analysis are applicable in cases where the but-for world involves a failing firm.

C.12 What constitutes the right counterfactual for the Commission where crises, such as the COVID 19 pandemic, wars, or trade measures may have led to short-term shocks of potential temporary rather than permanent nature?

Text of 1 to 5000 characters will be accepted

Because the focus of merger enforcement is on short-term effects, significant short-term temporary crises can significantly impact whether a firm is a flailing or even, in certain cases, a failing firm.

C.12.a Please explain in particular under which circumstances and conditions such events should be considered structural and based on which evidence.

Text of 1 to 5000 characters will be accepted

Whether an event is structural, and thus more conducive to a firm's failure, as opposed to temporary, and as such more potentially more likely to result in a flailing firm, should be assessed on a case-by-case basis.

C.13 What should be the right counterfactual in cases of acquisitions of firms in financial difficulties?

Text of 1 to 5000 characters will be accepted

> The same sorts of analysis that is used to assess the but-for world generally in merger analysis are applicable in cases where the but-for world involves a failing firm.

C.13.a Under which conditions should a failing firm defence be accepted? In particular, what factors should the Commission take into consideration to assess whether the acquisition of a failing firm /exiting assets would bring any efficiencies or otherwise counterbalance the market power brought by the concentration?

Text of 1 to 5000 characters will be accepted

> The failing-firm defence is a legitimate justification for approving mergers that may result in some short-run competitive harms and the grounds that, but-for the merger, the firm will ultimately exit the market, making current conditions unpredictive of future competitive effects. To make the failing-firm defence, it is typically required that the firm be unable to meet its financial obligations in the future, is unable to reorganize successfully using bankruptcy, and that the merger is the least restrictive way to keep its assets productive relative to other transactions.

C.13.b Absent a failing firm defence, how may financial difficulties of the target impact the Commission's assessment of the company's competitive constraints going forward and based on which evidence, in particular where alternative buyers exist or may have existed before the announcement of the acquisition at a time where the financial situation was not yet critical, or where the firm in financial difficulties is owned, at least in part, by public entities that may have an interest in keeping the relevant firm afloat?

Text of 1 to 5000 characters will be accepted

> In addition to the failing firm defense, a merger that involves a flailing firm may also obviate the risk of anticompetitive effects. This sort of defense applies if a firm is not able to compete effectively in the future due to, for example, steadily and substantially declining market performance, a lack of resources, and/or heavy financial difficulties.

C.14 What should be the right counterfactual in cases of acquisitions of firms in declining markets where there is clear evidence that the market size or total demand in a market is shrinking on a permanent basis (e.g. due to technological changes or a lasting shift in consumer behaviour)?

Text of 1 to 5000 characters will be accepted

> The same sorts of analysis that is used to assess the but-for world generally in merger analysis are applicable in cases where the but-for world involves a flailing firm.

Type and quality of evidence on future market developments

C.15 According to the Court of Justice, the further into the future the effects of a merger are likely to materialise, the more persuasive and stronger the supporting evidence should be.[58] Please explain whether you would consider justified to counterbalance the higher level of uncertainty related to the assessment of more distant future market developments also with a more significant impact of the expected effects.

[58] Judgment of 15 February 2005, Commission v. Tetra Laval, C-12/03 P, EU:C:2005:87, para. 44. See also judgment of 13 July 2023, Commission v CK Telecoms UK Investments, C-376/20 P, EU:C:2023:561, paras. 76-77.

Text of 1 to 5000 characters will be accepted

See response to Question C.16.

C.16 How far in the future should the Commission look at when assessing the impact of a merger on competition (e.g., whether companies will invest or innovate post-merger, or whether prices will increase because of the merger)? How and under what circumstances should the Commission's assessment consider long investment cycles in a given industry?

Text of 1 to 5000 characters will be accepted

The Commission should focus on the short-run competitive effects of a merger, typically within two years of consummation.

C.17 How should the Commission's assessment take into account systemic trends and developments unrelated to the merger (e.g., technological developments such as AI, critical or strategic nature of technologies) that may (indirectly) impact the relevant product market and thus the competitive assessment within that market? Please explain how forward-looking the Commission can be and based on which evidence and metrics.

Text of 1 to 5000 characters will be accepted

The analysis of longer-term historical industry trends can be helpful in understanding short-run competitive effects—for example, evidence that an industry is undergoing another cycle of disruptive economic change that makes anticompetitive effects unlikely.

Topic D: Sustainability & clean technologies

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

67. The transition to a clean and sustainable economy is one of today's key societal challenges. The EU's ambition of becoming the first climate neutral continent is vital for the future of our planet and for generations to come. The Commission has presented a **Clean Industrial Deal** for competitiveness and decarbonisation in the EU, a business plan bringing together climate action and competitiveness under one overarching growth strategy for Europe's economy.[59] As businesses across Europe strive to adjust to the clean transition, it is crucial to accompany decarbonisation efforts by supporting the investment in innovative clean tech and decarbonised production processes, stimulating a circular economy to extend the lifespan of resources, fostering the resilience of supply chains, and facilitating the access to affordable energy.

68. In this context, merger control has a role to play in allowing procompetitive mergers that have the potential

to deliver on and/or support these objectives, while ensuring that **mergers bearing negative effects on competition and clean innovation, also impacting sustainability goals**, do not materialise.

69. In particular, **some mergers may be harmful to the clean transition or hamper climate and sustainability objectives**. That may be the case when, for example, an incumbent acquires a disrupting innovator offering a green product to slow it down or cannibalise it (‘green killer acquisitions’), or when a merger has a chilling effect on competition, **reducing incentives to invest and innovate in green products or clean and decarbonised technologies**. Mergers between companies present at different levels of the supply chain may also have a negative impact, for instance when they remove or reduce access to products or services that are less carbon or energy intensive (including key green technologies and materials, such as batteries, renewable components, and recycling infrastructure), generate less waste, or require less raw materials, negatively impacting the affordability of sustainable products or green technologies.

70. To the contrary, other **mergers may support climate and sustainability objectives** and the clean transition and have a positive impact on clean innovation, for example on the deployment of cleaner/greener technologies or manufacturing processes that are in line with the EU Taxonomy and the Do No Significant Harm principle.[60] Mergers can provide companies the leverage needed to invest in the decarbonisation of their activities, cleaner products and technologies, and more energy-efficient solutions and infrastructure. **Verti cal integration** may also enhance the circular use of raw or recycled materials and allow companies to adopt a more innovative, efficient and clean resource management across larger segments of the supply chain. Some mergers may also generate sustainability benefits, that, in some instances, including in terms of innovative clean technologies, could offset negative effects on competition (‘green efficiencies’). At the same time, a careful assessment will be necessary to avoid greenwashing attempts and to ensure that claimed benefits materialise post-merger. Mergers should not make ‘clean’ products or services, related for example to renewable energy, sustainable waste management and recycling, resource-efficient (digital) solutions, electric vehicles etc., less affordable or inaccessible to businesses and citizens.

71. More generally, the clean transition is resulting in the emergence of **new demand and supply patterns and is having a transformative effect on the economy**. Customer preferences for sustainable and green tech products are driving companies’ incentives to invest and innovate in clean solutions, which, in turn, could amount to a competitive advantage for innovating companies.

72. While merger control primarily aims at preserving competition, the **growing interplay between competition, innovation and sustainability** considerations across industries and the benefits they could unlock for businesses and citizens should trigger a reflection on merger control’s contribution to European sustainability objectives. In this regard, the methodology and parameters to be included in the competitive assessment to take due account of sustainability considerations, as well as the quantification and verification of ‘green’ incentives and efficiencies, will be key questions.

Technical background

73. In the context of merger control, the Commission may consider environmental and sustainability concerns as long as they are linked to the competitive dynamics and market realities at play.[61] In fact, competitive

markets support and often go hand-in-hand with green tech efforts to invest and innovate. Consequently, in the past few years, the Commission has increasingly taken into account sustainability aspects, in various forms and at various stages of its merger review, from market definition[62] to the assessment of the potential effects arising out of the relevant merger.

74. In the Commission's recent case practice, sustainability considerations have played a role, in the context of horizontal mergers, as a **non-price parameter of competition**, e.g., where firms' offerings differ based on customers' preferences for recycled products or the use of green technologies;[63] in the assessment of whether the parties to the transaction are **close competitors**, which can be the case, e.g., when the merging firms are both innovators on cleaner or more sustainable products or in green technologies;[64] or in the assessment of whether one of the merging parties is an **important competitive force**.[65] In these settings, the Commission has to rely on different types of evidence to assess, for instance, whether the acquisition by a leading player of a smaller key competitor offering cleaner technology at competitive prices is a potential opportunity to extend the sustainability benefits of the technology, or could result in a total or partial 'killer' acquisition, i.e. to make them less competitive to preserve the larger company's role. As part of this assessment, the Commission has developed new metrics to quantify and illustrate differentiation among low-carbon offerings, calculating shares of saved CO2 emissions, representing how many emissions a supplier saved compared to the EEA average carbon emissions by producing low-carbon solutions (using renewable energy or relying on recycled inputs).[66]

75. Sustainability considerations may also be part of the **theories of harm** related to the loss of 'clean' R&D and **'green innovation'** competition. In one case, the Commission assessed a theory of harm based on the fact that the combination of two important innovators would likely result in a **decrease of innovation incentives** in the field of crop protection products, where innovation is key to deliver new products which are better suited to avoid potentially *'harmful consequences (…) for the environment'.*[67] In another recent case, the Commission assessed how certain innovative vessel technologies, including those allowing for lower fuel consumption and lower emissions, could represent **barriers to entry** or expansion.[68] In the market for concrete admixtures, the Commission found that product innovation had grown in importance due to the transitioning to a clean and circular construction industry, and that the combination of two powerful innovators could cause competitive harm.[69]

76. The Commission has also dealt with sustainability-related market shifts in the context of non-horizontal mergers. The potential of the **circular economy** to drive cleaner and more competitive sourcing of inputs also resulted in a tendency to vertically integrate, as companies try to secure key inputs or recycling capabilities. While such transactions can enhance efficiency and competitiveness, to the benefit of consumers, they could also result in market power at key junctures of the supply chain, reducing access by other companies to key assets in a circular economy, ultimately leading to overall worse outcomes. In such cases, the Commission accepted remedies that preserved access to key 'circular' inputs for the market at large.[70]

77. Finally, sustainability may also be relevant in the assessment of whether the potential anticompetitive harm of a merger may be offset by **efficiencies** resulting from it. Positive effects resulting from a merger may compensate the anticompetitive harm if they benefit consumers, are merger-specific, and are verifiable.[71] Under the Horizontal Merger Guidelines ("HMG"), efficiencies should in principle occur within the markets

where competition concerns are found. As discussed in more detail in Topic F on Efficiencies, the Commission has assessed efficiencies related to innovative green products and technologies, but thus far, there have been no cases where the Commission has accepted ‘green efficiencies’ and no specific guidance is currently provided in the current HMG on such efficiencies.[72]/[73]

[59] The Clean Industrial Deal aims at turning decarbonisation into a driver of growth for European industries, focusing on the transition to a low-carbon economy and increased demand in the clean-tech sector, as well as strengthening the circular economy in particular for critical raw materials. See Communication from the Commission ‘The Clean Industrial Deal: a joint roadmap for competitiveness and decarbonisation’, February 2025. This is also acknowledged in, e.g., Mario Draghi’s report ‘The future of European competitiveness’, September 2024: ‘Decarbonisation must happen for the sake of our planet. But for it to also become a source of growth for Europe, we will need a joint plan’.

[60] The EU Taxonomy is a classification system establishing a list of environmentally sustainable economic activities, to facilitate sustainable investment (see Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, pp. 13–43).

[61] The Commission cannot intervene solely on public policy grounds unrelated to competition (see, e.g., reasoning included in case M.8084 – Bayer / Monsanto, Section XIV: Non-Competition Concerns).

[62] By way of example, recent cases have shown shifts in demand patterns triggered, for instance, by regulation requiring the production and marketing of cleaner end-products (in case M.9076 – Novelis / Aleris, the Commission found that regulatory requirements for CO2 emission reduction for cars and the fact that lighter vehicles mean lower emissions increased demand by car manufacturers for aluminium – instead of steel – body sheets) or by consumer preferences (in M.10047 – Schwarz Group / Suez Waste Management Companies, environmental costs were a relevant parameter for the assessment of geographic market definition for the sorting of lightweight packaging in the Netherlands, as customers try to avoid transports over long distances to minimise the ensuing CO2 emissions). For further aspects relating to market definition, see the Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/165.

[63] Customers’ preferences for recycled (aluminium) products played a role in cases M.10658 – Norsk Hydro / Alumetal and M.10702 – KPS Capital Partners / Real Alloy Europe. See also case M.10047 – Schwarz Group / Suez Waste Management Companies for customers’ valuation of recycling.

[64] Cases M.9343 – Hyundai Heavy Industries / Daewoo Shipbuilding & Marine Engineering, M.10560 – Sika / MBCC, M.7278 – GE / Alstom, and M.10078 – Cargotech / Konecranes, paragraph 1416.

[65] Case M.10658 – Norsk Hydro / Alumetal, section 9.1.3.3.7.

[66] Case M.10658 – Norsk Hydro / Alumetal, section 9.1.3.3.7. The Commission based its analysis on ‘saved emission’ shares representing how many emissions a supplier has saved by producing aluminium foundry alloys with a carbon footprint lower than the EEA average.

[67] See case M.7932 – Dow / DuPont, paragraph 1980.

[68] Case M.9343 – Hyundai Heavy Industries / Daewoo Shipbuilding & Marine Engineering.

[69] Case M.10560 – Sika / MBCC.

[70] In case M.10702 – KPS Capital Partners / Real Alloy Europe, the Commission’s investigation showed that the parties would be able to restrict access to recycled aluminium, as well as dross and salt slag recycling services post-transaction. To remedy the concerns, KPS offered to divest some of Real Alloy’s facilities active in recycled aluminium production, dross recycling, and salt slag recycling. In case M.10249 – Derichebourg / Groupe Ecore, the Commission’s investigation showed that, post-transaction, the parties would have had a strong market position and faced limited competitive constraints in the markets for the collection and recycling of metal scrap, as well as the recycling of electrical and electronic equipment scrap, among others. To remedy the concerns, Derichebourg offered, among others, to divest four recycling plants in France.

[71] HMG, paragraph 78.

[72] For example, a merger may result in improved quality products, generate less waste, require the use of less raw materials, or lead to the development of new technologies, green products, and other green innovations.

[73] In case M.9490 – Aurubis / Metallo, concerning access to copper scrap in Europe, the Commission considered that there was at least a possibility that one of the alleged efficiencies advanced by the merging parties, concerning a better valorisation of copper scrap through the combination of the parties' complementary know-how and technologies, would materialise. If that was the case, i.e., if such efficiencies were to materialise to a significant extent, the Commission further concluded that they would at least partly be passed-on to customers, thus potentially partly offsetting any adverse price effect stemming from the transaction.

Questions

D.1 In your/your client's view, do the current Guidelines provide clear, correct, and comprehensive guidance on how merger control reflects the transition to a climate neutral, clean, and sustainable economy with clean and resource-efficient technologies and solutions?

- ( ) Yes, fully
- ( ) Yes, to some extent
- ( ) No, to an insufficient extent
- (x) Not at all
- ( ) I do not know

D.1.a Please explain which provisions of the current Guidelines (if any) do not adequately reflect the evolutions linked to the transition to a climate neutral, clean, and sustainable economy.

Text of 1 to 5000 characters will be accepted

The Guidelines should be focused on promoting competition through lower prices, increased output, improved quality, and greater innovation—not sustainability. However, promoting competition and innovation is consistent with sustainability goals: fostering innovation through merger enforcement will, ceteris paribus, lead to greater and greener energy innovation.

D.2 In your/your client's view, should the revised Guidelines better reflect the evolutions linked to the transition to a climate neutral, clean, and sustainable economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should address.

You can tick more than one reply, below.

- [ ] a. Sustainability as a parameter of competition
- [ ] b. Ability and incentives to innovate in clean and decarbonised products, technologies and services
- [ ] c. Risks of discontinuation of or reduced innovation in clean and decarbonised products, technologies and services
- [x] d. The revised Guidelines should not reflect any of these areas
- [ ] e. Other

D.3 How should the Commission factor in sustainability as a parameter of competition in its assessment of a merger's effects? In particular, please explain in which circumstances and based on which metrics (e.g., shares of saved CO2 emissions) and evidence the Commission could consider the development of sustainable products or services as an important parameter of competition.

Text of 1 to 5000 characters will be accepted

To the extent that, in certain markets, sustainability may be a parameter of competition (e.g., more innovative green products), it may factor into merger analysis. For example, if a merger risks reducing R&D competition for new and more sustainable technologies, that would constitute an actionable anticompetitive effect. However, that a merger may reduce sustainability does not by itself, as distinct from any reduction in quality adjusted prices, innovation, or other dimensionality of competition in a relevant market, constitute cognizable antitrust harm and can actually reflect efficiencies (e.g., a merged firm will more utilize less clean energy in production to lower costs).

D.4 What type of harm to competition on the development and supply of clean and decarbonised products, technologies and services and the circular economy can a merger do? Please select the harm that you believe is relevant for mergers' assessment.

You can tick more than one reply, below.

- [x] a. Reduced ability and incentives to invest and develop clean and decarbonised products, technologies and services
- [x] b. Risks of discontinuation of clean and decarbonised products', technologies' and services' R&D
- [x] c. Foreclosure of access to critical inputs for clean and decarbonised products, technologies and services
- [x] d. Increased prices and lower quality of critical inputs for clean and decarbonised products, technologies and services
- [x] e. Foreclosure of access to clean and decarbonised products, technologies and services
- [x] f. Increased prices and lower quality of clean and decarbonised products, technologies and services
- [ ] g. Other factors (please list)

D.4.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in a reduced ability and incentives to invest and develop clean and decarbonised products, technologies and services.

D.4.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in risks of discontinuation of clean and decarbonised products', technologies' and services' R&D.

D.4.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in foreclosure of access to critical inputs for clean and decarbonised products, technologies and services.

D.4.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in increased prices and lower quality of critical inputs for clean and decarbonised products, technologies and services.

D.4.e Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in foreclosure of access to clean and decarbonised products, technologies and services.

D.4.f Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may in some cases result in increased prices and lower quality of clean and decarbonised products, technologies and services.

D.5 How should the Commission consider the ability and incentives to invest and develop clean and decarbonised products, technologies and services in its assessment of the impact of a merger on competition?

Text of 1 to 5000 characters will be accepted

The same considerations about the general relationship between concentration and innovation are relevant to markets involving clean and decarbonized products, technologies and services. Consistent with the inverted-U relationship between market structure and innovation, a merger between competing providers of clean and decarbonized products, technologies and services may increase innovation and benefit consumers even if the transaction impedes effective competition or creates a dominant position. Similarly, vertical mergers in energy markets may result in economies of scope that foster innovation.

D.5.a Having in mind both horizontal and non-horizontal mergers, please explain in particular: What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

The same sorts of unilateral, coordinated, and vertical theories that the Commission generally considers should be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.5.b Having in mind both horizontal and non-horizontal mergers, please explain in particular: Under which conditions could this/these theory/theories of harm occur?

Text of 1 to 5000 characters will be accepted

The same sorts of conditions the Commission generally considers when assessing whether a merger will result in unilateral, coordinated, or vertical effects will be relevant in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.5.c Having in mind both horizontal and non-horizontal mergers, please explain in particular: What are the elements, including evidence and metrics, that the Commission could use to assess the competition risks beyond a foreclosure conduct?

Text of 1 to 5000 characters will be accepted

The same sorts of evidence and metrics the Commission generally considers when assessing whether a merger will result in unilateral or coordinated effects should be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services. Moreover, these markets do not provide an exceptional case where the Commission should pursue conglomerate theories of harm.

D.6 What are the competitive benefits, related to clean and decarbonised products, technologies and services, and the circular economy, that a merger can generate? Please select the advantages that you believe are relevant for supporting the climate and clean transition.

You can tick more than one reply, below.

- [x] a. Vertical integration involving critical inputs
- [x] b. Better access to, or better purchase conditions of, critical inputs through new contracts
- [x] c. Combination of complementary R&D capabilities and staff
- [x] d. Access to new know-how and patents
- [x] e. Other factors (please list)

D.6.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may result in efficiencies through vertical integration involving critical inputs.

D.6.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may result in efficiencies through better access to, or better purchase conditions of, critical inputs through new contracts.

D.6.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may result in efficiencies through combination of complementary R&D capabilities and staff.

D.6.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may result in efficiencies through access to new know-how and patents.

D.6.e Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in relevant markets for the development and supply of clean and decarbonised products, technologies and services may result in myriad other efficiencies just as is generally the case in other markets.

D.7 How should the Commission assess the benefits that mergers can bring to the transition to a climate neutral, clean, and sustainable economy, and verify that those are not mere claims made by businesses gaining market power (e.g., 'greenwashing')? What are the metrics that could be used to measure this?

Text of 1 to 5000 characters will be accepted

The Commission should conduct the same type of verifiability analysis it engages in generally to assess merger efficiency claims in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.7.a Please explain: In which circumstances, and based on which evidence, benefits related to the transition to a clean and sustainable economy are likely to materialise post-merger?

Text of 1 to 5000 characters will be accepted

The same sorts of circumstances and evidence the Commission generally considers when assessing whether a merger is likely result in dynamic efficiency benefits be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.7.b Please explain: Under which conditions such benefits could be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

The same sorts of conditions the Commission generally considers when assessing whether a merger will result in dynamic efficiency benefits that outweigh competitive harms should be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services. For example, to the extent that dynamic efficiency benefits are not-merger specific, they will not outweigh competitive harms resulting from a transaction. To be sure, weighing the innovation benefits of a merger in the energy space toward developing new sustainable technologies against short run harms to consumer welfare (e.g., higher energy prices prices) is a complex exercise that is unlikely to admit of any clear quantitative metrics for predicting post-merger market performance. However, and consistent with the inverted-U relationship between concentration and innovation, the innovation benefits are much more likely to outweigh short run competitive harms in cases where the merger does not involve the creation of a monopoly market structure.

D.7.c Please explain: Under which conditions such benefits would be passed on to business customers/consumers. Please illustrate with the specific benefits you considered relevant?

Text of 1 to 5000 characters will be accepted

The same sorts of conditions that are generally considered to assess when a merger's efficiency benefits are passed on to consumers should be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.7.d Please explain: What are the elements, including evidence and metrics, that the Commission could use to assess whether the benefits of the transition to a climate neutral, clean, and sustainable economy outweigh competitive harm, and will likely be passed on to business customers /consumers?

Text of 1 to 5000 characters will be accepted

The same sorts of evidence and metrics that are generally used to assess when a merger's efficiency benefits are passed on to consumers should be evaluated in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.8 How should the Commission make sure that such benefits cannot be achieved with less harmful means, including via cooperation agreements? Please explain how green benefits can be achieved through cooperation and in which circumstances only a merger may bring such benefits and why.

Text of 1 to 5000 characters will be accepted

The same sort of analysis that is generally used to assess when a merger's efficiency benefits are merger-specific should be conducted in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.9 Please provide examples of the types of mergers as well as of cooperation agreements (e.g., licensing, R&D sharing) that you/your client believe are beneficial to the transition to a climate neutral, clean, and sustainable economy, and explain whether your company has considered - or implemented - them and why /why not, as relevant.

Text of 1 to 5000 characters will be accepted

Mergers that enhance innovation in energy markets by increasing the incentive and ability for firms to develop clean and decarbonised products, technologies and services will be beneficial toward the transition to a climate neutral, clean, and sustainable economy.

D.10 How should the Commission make sure that such green competitive benefits would not have been achieved irrespective of the merger? Please explain how the Commission can, and based on which evidence and metrics, assess what would have been the situation absent the merger, and whether the green competitive benefits would not have been achieved in any case.

Text of 1 to 5000 characters will be accepted

The same sort of analysis that is generally used to assess when a merger's efficiency benefits are merger-specific should be conducted in markets that involve the sale or development of clean and decarbonised products, technologies and services.

D.11 How should EU merger control account for global competition dynamics when it comes to sustainability, in particular where certain players receive subsidies for clean tech solutions?

Text of 1 to 5000 characters will be accepted

The Commission should consider global competition dynamics when it comes to evaluating competitive effects in markets that involve the sale or development of clean and decarbonised products, technologies and services to the extent that the relevant geographic market is global.

D.12 Have you/your client experienced chilling effects in your industry, in the sense that a merger that would boost investment or innovation in clean tech and resource-efficient or sustainable solutions was not pursued due to concerns related to merger control scrutiny?

- Yes
- No (selected)

Topic E: Digitalisation

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

78. As a key driver of innovation, digitalisation is closely linked to the competitiveness of industries in the EU [74] and has the potential to act as a powerful tool to close the productivity gap. Seizing the opportunities brought by digitalisation requires a level playing field enabling any company in the EU to innovate and grow without barriers.

79. The **Competitiveness Compass** stresses that *"in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets and tech innovation"*. The Competitiveness Compass also underlines that innovation and investment in certain strategic sectors should be given an adequate weight in merger assessments, in light of the European economy's acute needs.

80. Markets shaped by digitalisation or other fast-moving markets go through transformational changes quickly and therefore, an extended forward-looking assessment may be required in order to properly capture the effects of a transaction. This is particularly the case when the merger involves the **acquisition of a nascent player** or where the transaction takes place on a **nascent market** with emerging novel and innovative technologies with the potential of disrupting the established industry. In fast-moving markets, **killer acquisitions of complements** need a careful assessment because in such markets a complementary product or player of today may very quickly become a substitute, an element that should be taken into account in the analysis.

81. Digitalisation has brought about several significant challenges that may hinder growth and innovation across different industries in the internal market. Markets shaped by digitalisation are often characterised by **"winner-takes-most" dynamics** that benefit the leading companies with a certain degree of market power. They are **prone to "tipping"** in favour of the firm's technology that reaches critical mass adoption. Where dominant companies build **ecosystems** of interlinked products and services and where markets are prone to **network effects** making the value of the products and services depend on the number of buyers, sellers or

users, existing competitors and new entrants face significant barriers to entry and expansion. As dominant players become more insulated against competition, smaller rivals and potential entrants find it difficult to reach the scale necessary to become attractive alternatives or even enter the market. These market characteristics are aggravated by **customer inertia**. Due to network effects, customers tend to stick with the incumbent because it is difficult to coordinate switching with other customers. With these market dynamics, the leading firm maintains and increases its customer base, and its market position becomes entrenched.

82. A common business strategy of leading companies in the digital and tech sectors has been to acquire complementary businesses or key inputs (e.g., data, technology, user traffic, but also talent, compute capacity and others) with the aim of strengthening their position in core markets. Such a strategy may contribute to increases in innovation (e.g., development of new products or services, including in the area of artificial intelligence). However, such a strategy could also have negative effects. By developing or expanding an ecosystem of related products and services, the incumbent may **entrench** its position, thus making it harder for rivals to enter, expand, or innovate, as they are unable to replicate the breadth and scale of the predominant aggregated offering.

83. This type of business strategy does not easily fit into the traditional framework of analysis which distinguishes between horizontal and non-horizontal (vertical and conglomerate) mergers. This is largely because, in today's digital economy, **fewer transactions are *purely* horizontal** (merging competing activities), vertical (merging activities at different levels of the value chain, e.g., one party offering an input for the other party), or conglomerate (merging activities otherwise related to one another) in nature, and the lines between horizontally or non-horizontally linked product markets become increasingly blurred. For instance, in mergers that involve companies with activities across several product markets, products often need to interoperate with each other or are offered as part of an ecosystem of related services.

84. Markets shaped by digitalisation carry a particular degree of **uncertainty** that raises questions about how forward looking the merger assessment should be, what kind of future changes it should take into account, and what kind of facts and evidence should be considered.[75] In markets characterised by network effects and "winner-takes-most" dynamics, it is essential not to intervene "too late" (thereby ensuring a level playing field amongst competitors, including potential new entrants), but also not "too soon", potentially stifling innovation. This is particularly challenging in nascent and fast-moving markets, where historical market shares may tell little about effects to competition in the future.

85. Finally, certain digital mergers also raise **privacy and data protection concerns**. Competition and privacy concerns can arise when a merger leads to the acquisition of data or the combination of datasets.[76] In some markets, companies compete to gain customers based on their privacy settings, which can therefore be considered a non-price parameter of competition and the merger would eliminate such competition. This would be particularly problematic if the target explicitly markets itself as prioritising customer data protection, especially when the data involved is sensitive, as the merger could reduce consumer choice for privacy-focused services. Privacy concerns can also be taken into account when evaluating the credibility of (alternative) suppliers for specific customers. When suppliers have access to sensitive data, customers might not find it feasible to work with suppliers processing data in servers outside the internal market as this poses a risk of sensitive data being transferred outside the EU. The question is whether these privacy and data

protection objectives enshrined in EU law play enough of a role in the market to be taken into account as a parameter of the Commission's competitive assessment.

Technical background

86. The role of merger control is amongst others to ensure that markets remain competitive and accessible to start- and scale-ups that want to make use of the digital transformation of markets to bring innovation and increase productivity. To address specific challenges stemming from the digitalisation of the economy, the Commission has in recent years departed in some instances from the dichotomy horizontal/vertical to focus on the merger's effects in line with the legal test stipulated in Article 2 of the EU Merger Regulation.

87. The Commission has investigated **non-horizontal types of competition concerns** in horizontal mergers by analysing whether the merged entity would have the ability and the incentives to foreclose competitors by engaging in certain conducts and whether such foreclosure would have an adverse impact on competition and harm consumers.[77] At the same time, the application of the traditional framework for vertical and conglomerate mergers under the Non-Horizontal Merger Guidelines ("NHMG") has been refined to adapt to the specificities of digital business models and investigate theories of harm where the acquirer may foreclose rivals by **leveraging its market power into a new market, thereby expanding its ecosystem**.

88. In some cases, in particular where non-price parameters of competition played a role, the assessment of foreclosure effects materialised in restrictions of access,[78] degradation of interoperability,[79] or self-preferencing strategies.[80] Furthermore, under the NHMG framework, the Commission also investigated **targ eted foreclosure strategies** where, for instance, only a certain category of competitors, e.g., close competitors, would be targeted, determining in addition whether the targets of foreclosure played a sufficiently important role in the competitive process to find consumer harm.[81]

89. The Commission also investigated **horizontal effects of non-horizontal mergers that are not necessarily based on a foreclosure "conduct"** but that, given the market structure and market dynamics, as well as the acquirer's market power, could nonetheless lead to the strengthening or entrenchment of the acquirer's position on the market.[82] This may be the case e.g. where companies are not direct competitors, but where the aggregation of their assets, such as data[83] or customers in complementary businesses,[84] would strengthen the acquirer's dominant position. Another fact pattern where market structure and dynamics could lead to the strengthening or entrenchment of the acquirer's market position was investigated in cases where acquisitions took place within the acquirer's overall **ecosystem** of interrelated products or services. In these cases, concerns included the possible entrenchment of the dominant company's position on the core product's market through the addition of a close complement to the core product of that company's ecosystem of products[85]; and possible effects on **potential competition**, for instance where the target would have been particularly well placed to enter the acquirer's markets or where the acquirer buys the target, abandoning its plans to develop the product itself (so-called reverse killer acquisitions).[86] The criteria for assessing effects on potential competition are discussed, in particular, in Topic C on Innovation and other dynamic elements in merger control.

90. In other cases, the Commission considered the **interconnectedness of markets** and the acquirer's

ecosystem of products and services as relevant market context in a foreclosure strategy. For instance, the Commission assessed the merged entity's incentives also by investigating the gains that could materialise beyond the directly impacted market, in other parts of the acquirer's ecosystem.[87]

91. The Commission also investigated competition concerns in the context of **nascent markets**, i.e., emerging novel and innovative technologies with the potential of disrupting the established industry, which by their nature often comprised only a small segment of the market.[88]

92. Finally, the Commission has assessed **privacy and data protection concerns** in previous digital mergers. In that respect, the use of data or access to data played an important role in the Commission's merger assessment. The Commission investigated data-related issues in the framework of horizontal effects resulting from data accumulation (combination of data sets) or vertical effects, where data is an important input and could lead to foreclosure of rivals. In addition, data privacy was considered a relevant non-price parameter of competition. For instance, in M.9660 – Google/Fitbit, the Commission considered whether the combination of the parties' datasets could impede effective competition by providing the merged entity with control over an asset that would make the expansion or entry of rival firms more difficult, as envisaged under paragraph 36 of the HMG. In M.8124 – Microsoft/LinkedIn, the Commission considered whether the merged entity would engage in input foreclosure such that Microsoft could restrict access to LinkedIn data. In its assessments, the Commission explicitly considered the limitations set to the merging parties' conduct by existing privacy regulations, including the GDPR and the e-Privacy Directive. While the report *"Competition policy for the digital era"* (2019) by Cremer et al. acknowledged the important role of privacy and data protection regulation, such as the GDPR, in protecting EU citizens' privacy and data online, it further explained that competition law can nevertheless *"have the effect to protect and promote the individuals' <u>choice</u> also with a view to privacy policies"* [emphasis added]. In M.8124 – Microsoft/LinkedIn, the Commission considered privacy protection as an important quality parameter in competition between the professional social networks, and assessed the risk that the transaction could restrict consumers' choice in this respect. The question therefore arises to what extent the revised Guidelines should explicitly list privacy and data protection as a relevant parameter of competition that EU merger control needs to protect and whether additional clarification should be provided on the interplay between privacy and data protection regulations and EU merger control.

93. Privacy concerns may restrict some customers from contracting with suppliers located outside the EU or in jurisdictions that lack sufficient data protection guarantees, especially when the customer-supplier relationship poses a risk of data leaks and the safeguards included in the GDPR may not eliminate the competition issues. This factor can be considered when assessing market power. This is particularly relevant for customers handling sensitive data, such as in the health or security sectors.

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[74] As also stated in the report by Mario Draghi "The future of European competitiveness", September 2024: "a weak tech sector will hinder innovation performance in a wide range of adjacent fields, such as pharma, energy, materials and defence" and the Competitiveness Compass (see headline 'Excelling in the technologies for tomorrow's economy').

[75] For example, in some cases, the Commission also assessed counterstrategies and potential retaliation by competitors and customers of the merged entity when assessing foreclosure concerns (for instance in M.9424 – Nvidia/Mellanox).

[76] To the extent the combination is possible in light of existing GDPR and DMA regulation.

[77] HMG, paragraph 36.

[78] In case M.10262 – Meta / Kustomer, the Commission was concerned that Meta would restrict access to its important messaging channels (Messenger, WhatsApp, and Instagram) to foreclose the target's competing software providers that rely on Meta's channels.
[79] The Commission assessed more subtle foreclosure forms, e.g. degradation of interoperability by removing certain features or functionalities or reserving superior functionalities for the merged entity's products (M.9660 – Google / Fitbit), as well as hampering or delaying access to inputs, such as an API (application programming interface) (M.10262 – Meta / Kustomer).
[80] In case M.10920 – Amazon / iRobot, the Commission assessed whether Amazon would have the ability and incentives to foreclose rival robot vacuum cleaners by reducing their visibility in the Amazon Stores through various mechanisms.
[81] In case M.10262 – Meta / Kustomer, the Commission considered that smaller players and recent market entrants were particular drivers of innovation and that foreclosure targeting such players would lead to lower quality and less innovation in the overall market.
[82] HMG, paragraph 36.
[83] In case M.9660 – Google / Fitbit the Commission investigated whether Google could combine its vast database with Fitbit's health and location data to further entrench its dominant position in online advertising markets. In case M.8788 – Apple / Shazam, the Commission assessed the increment of Shazam's data to Apple using the 'Four Vs' metrics: the type of data composing the dataset (variety); the speed at which the data is collected (velocity); the size of the data set (volume); the size of the data set (volume); and the economic relevance (value).
[84] In case M.10615 – Booking / eTraveli, the Commission found that the acquisition of a complementary business (flight online travel agency, "OTA", services) amounted to an important customer acquisition channel (i.e., additional customer traffic) for the acquirer's core business in hotel OTA services.
[85] In M.10615 – Booking / eTraveli, the strengthening of Booking's dominant position in its ecosystem's core market (hotel OTA services) resulted from adding a close complement (flight OTA services). The inclusion of flights would not only result in additional customer traffic, but also would allow Booking to leverage existing customer inertia thereby strengthening the existing network effects. In addition, rivals would have likely faced higher barriers to entry/expansion as they would find it even more difficult to use flights as a path to expand into hotel OTA services.
[86] These types of concerns were for example assessed in case M.11033 – Adobe / Figma. In this case, the Commission investigated concerns related to a possible strengthening of a dominant position in the main markets of a multi-product ecosystem, through the elimination of a potential new entrant that risked "eating into" this position from the fringe. This was analysed within the framework of the potential competition test.
[87] M.10262 – Meta / Kustomer.
[88] For example, in M.10646 – Microsoft / Activision Blizzard, the Commission found foreclosure concerns for the nascent cloud game streaming, a small but growing segment of the gaming market (around 1% of the market in the EEA).

Questions

General

E.1 In your/your client's view, do the current Guidelines adequately reflect the evolutions linked to the digitalisation of the economy?

- ○ Yes, fully
- ○ Yes, to some extent
- ○ No, to an insufficient extent
- ● Not at all
- ○ I do not know

E.1.1 Please explain, and mention in particular which provisions of the current Guidelines (if any) do not adequately reflect the evolutions linked to the digitalisation of the economy.

Text of 1 to 5000 characters will be accepted

> The Guidelines should be focused on promoting competition through lower prices, increased output, improved quality, and greater innovation—not digitalization per se. However, promoting competition and innovation is consistent with digitalization goals: sound merger enforcement in digital markets, ceteris paribus, lead to greater digitalization through innovation.

E.2 In your/your client's view, should the revised Guidelines better reflect the evolutions linked to the digitalisation of the economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should address:

You can tick more than one reply, below.

- [ ] a. "Tipping"/"Winner takes most" dynamics
- [ ] b. Network effects
- [ ] c. Chilling effects
- [ ] d. Customer inertia (de facto lack of switching)
- [ ] e. Data-driven competition
- [ ] f. Privacy protection-driven competition
- [ ] g. Market power entrenchment theories of harm
- [ ] h. Potential competition theories of harm
- [ ] i. Ecosystem and interrelated products or services' theories of harm
- [ ] j. Data accumulation theories of harm
- [ ] k. Targeted foreclosure theories of harm
- [ ] l. Degradation of interoperability theories of harm
- [ ] m. Future technological changes
- [x] n. Other

E.2.1.n Please provide a reasoning for the aspects you have selected and explain how the revised Guidelines should address these aspects.

Text of 1 to 5000 characters will be accepted

> There is no need for Guidelines to provide guidance that is specifically tailored to digital markets. Rather, the Guidelines should be industry-agnostic and set out general legal and economic principles that are applicable in digital markets. Indeed, phenomena like network effects, non-price competition, the use of data, and dynamic entry are not all unique to the digital space, even if they are often particularly relevant to analyzing competitive effects in these markets.

The questions below are inspired by the specific competitive dynamics observed in the context of the digitalisation of the economy, as described in the topic description. However, when replying, please consider that the questions do not relate to mergers in the digital and tech industries only. Many of the dynamics and concepts on which we seek your feedback below are relevant across industries.

Competitive dynamics and parameters of competition

E.3 How should the Commission take into account the following competitive dynamics in its assessment of the impact of mergers on competition?

E.3.a "Tipping"/"Winner takes most" dynamics

Text of 1 to 5000 characters will be accepted

"Tipping" or "winner takes most" dynamics in an industry are not evidence that a merger is more likely to result in anticompetitive harm, but only that barriers to entry may exist. Moreover, the incidence of tipping occurring is often overstated, as leading dominant firms are often not the first-movers in digital markets, which also often display multi-homing.

E.3.b Network effects

Text of 1 to 5000 characters will be accepted

Network effects, just like economies of scale more generally, are not evidence that a merger is more likely to result in anticompetitive harm, but only that barriers to entry may exist.

E.3.c Customer inertia

Text of 1 to 5000 characters will be accepted

Product stickiness may constitute switching costs that factor into the analysis of whether barriers to entry exist in a given market.

E.3.d Data-driven competition

Text of 1 to 5000 characters will be accepted

Guidelines can make clear that data can be a key dimensionality of competition in many industries. For example, the combination of data achieved through a merger can be an important efficiency that benefits consumers and competition.

E.3.e Privacy protection-driven competition

Text of 1 to 5000 characters will be accepted

Guidelines can make clear that quality and incremental product improvements can be a key dimensionality of competition in many industries.

E.3.f Multi-sidedness of markets

Text of 1 to 5000 characters will be accepted

Guidelines can make clear that in platform markets, it is proper to define relevant markets in ways that encompass all sides of the platform to take into account indirect network externalities.

E.3.g Other competitive dynamics you consider relevant

Text of 1 to 5000 characters will be accepted

The presence of dynamic entry and technological changes in digital market may often counteract the likelihood that a transaction will result in harm to competition.

E.4 What other elements linked to the digitalisation of the economy do you consider are highly relevant for the Commission's merger assessment? Please provide a reasoning for each element and explain how the Commission should take them into account.

Text of 1 to 5000 characters will be accepted

As a general matter, the continued digitalization of the economy should not be viewed with concern as it pertains to competition. For example, although some have expressed fears about increased concentration in the economy over the past two decades of digitalisation, these concerns are often overstated. Moreover, even where concentration or markups may have increased over the past several decades, that does not mean competition isn't working. On the contrary, studies continue to find that higher concentration and markups are not fueled by price increases, but instead cost reductions driven by the sort of efficiencies that bring lower prices for consumers—and which, for example, another AI wave of general-purpose technological innovation and digitalization would continue to empower.

General frameworks of analysis and Entrenchment

E.5 From your perspective and considering modern competitive dynamics, do you consider that having different frameworks of analysis for horizontal relationships (when merging companies are active on the same market) and for non-horizontal relationships (when merging companies are active on different markets) is still relevant?

- (x) Yes
- ( ) No
- ( ) I do not know

E.5.1 Please explain. Please also explain under what framework the Commission should assess potential counterstrategies or retaliation by competitors in the assessment of foreclosure strategies of the merged entity?

Text of 1 to 5000 characters will be accepted

Unlike horizontal mergers, vertical mergers do not involve the elimination of a competitor and instead entail inherent procompetitive incentives to increase output through EDM. Vertical mergers may in some cases result in harm to competition through foreclosure, but this can be mitigated to the extent that competitors can employ counterstrategies or retaliation that reduce the merged firm's incentive to foreclose (e.g., entry and expansion).

E.6 How should the current frameworks of analysis for horizontal and for non-horizontal relationships be adapted to assess the effects that digital and tech mergers can have on competition? In particular, please explain which framework of analysis you believe would capture adequately the effects of digital and tech mergers on competition when a leading company seeks to acquire a complementary business and may entrench its market power as a result.

Text of 1 to 5000 characters will be accepted

There is no need to adapt the frameworks for horizontal and for non-horizontal relationships to assess the effects that digital and tech mergers can have on competition, which are the same unilateral, coordinated and vertical effects theories that the Commission generally considers. What differs is only the facts and dynamics that define any particular industry, which in the case of digital markets often reflects scale driven innovation competition and disruptive changes that facilitate entry.

E.7 How should the Commission assess competition risks of non-horizontal mergers that are not based on a foreclosure conduct by the merged entity? In your reply, you may consider also mergers outside of the digital and tech industries.

Text of 1 to 5000 characters will be accepted

The Commission should not assess the competition risks of non-horizontal mergers that are not based on foreclosure conduct—conglomerate theories of harm should not be the object of merger enforcement. Rather, anticompetitive bundling or tying should be addressed post-merger through Articles 101 and 102 where applicable.

E.7.a Please explain in particular: What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

See response to Question E.7.

E.7.b Please explain in particular: Under which conditions or market circumstances could this/these theory/theories of harm materialise.

Text of 1 to 5000 characters will be accepted

See response to Question E.7.

E.7.c Please explain in particular: What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the competition risks of non-horizontal mergers beyond a foreclosure conduct.

Text of 1 to 5000 characters will be accepted

See response to Question E.7.

E.8 How should the Commission assess possible theories of harm to competition linked to increased barriers to entry and expansion of rivals, including on the application of paragraph 36 of the Horizontal Merger Guidelines (“HMG”)? What specific elements should the Commission focus on?

Text of 1 to 5000 characters will be accepted

Mergers that increase entry barriers may be anticompetitive to the extent they limit competition from a perceived potential or actual potential competitor. Mergers that reduce the ability of a rival to expand can harm actual competition, particularly if the rival was likely to be a particularly close competitor or maverick in a highly concentrated market.

Ecosystem and Interrelated products

E.9 How should the Commission assess competition risks of non-horizontal mergers linked to having a broad range or portfolio of products or services that are interrelated or part of an “ecosystem”? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.9.a What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

While relevant product markets are almost always comprised of substitutes, broader markets that cluster non-competing products and services may in some cases be defined. Alternatively, in the case of some multi-sided platforms, broader markets that take into account the network externalities across the platform should also be defined.

E.9.b Under which conditions or market circumstances could this/these theory/theories of harm or concerns materialise.

Text of 1 to 5000 characters will be accepted

Cluster markets can be defined where customers and sellers find it significantly more efficient to respectively buy and distribute the services together. Broader platform markets can be defined in cases where markets are multi-sided, there are reciprocal indirect network effects across the platform, and that platform enables a simultaneous transaction between users on different sides of the platform, as in a transaction platform.

E.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the potential competition risks linked to having an increased portfolio of interrelated products and services.

Text of 1 to 5000 characters will be accepted

The Commission should consider the same types of quantitative and qualitative evidence for assessing whether a cluster market or platform market should be defined as it does to define relevant markets generally. Quantitative tests can include the hypothetical monopolist test (with modifications), and qualitative evidence can exclude evidence of past substitution and other relevant data regarding market realities.

Data-related concerns and Aggregation of data

E.10 How should the Commission assess competition risks linked to the merged entity’s accumulation of data? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.10.a What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

As distinct from data as a product offering, mergers that aggregate data do not in and of themselves raise any concerns about horizontal effects. However, data aggregation can under some circumstances enhance barriers to entry that limit the ability for a merger that otherwise presents anticompetitive effects to be mitigated. Moreover, to the extent data is an input, mergers that aggregate data can present vertical concerns under some circumstances.

E.10.b Under which conditions or market circumstances could this/these theory/theories of harm materialise.

Text of 1 to 5000 characters will be accepted

The same general considerations that apply when analyzing barriers to entry and input foreclosure should be evaluated in cases where data may constitute a barrier to entry or vehicle for input foreclosure.

E.10.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to the accumulation of data.

Text of 1 to 5000 characters will be accepted

The same sorts of evidence and metrics that apply when analyzing barriers to entry and input foreclosure should be evaluated in cases where data may constitute a barrier to entry or vehicle for input foreclosure.

E.11 How should the Commission assess the relevant standard and criteria determining the value of the target's data in the context of data aggregation? Please select and explain the relevant criteria in the context of data accumulation that would be determinative for assessing the value of the data:

You can tick more than one reply, below.

- [x] a. Velocity (i.e., speed at which the data is collected)
- [x] b. Variety (i.e., type of data composing the data set)
- [x] c. Value (i.e., economic relevance of data)
- [x] d. Volume (i.e., size of the data set)
- [x] e. Quality of data (e.g., completeness, cleanliness of a data set)
- [x] f. Uniqueness / difficult to replicate
- [x] g. Accessibility
- [x] h. Other

E.11.a Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the velocity of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.b Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the variety of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.c Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the value of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.d Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the volume of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.e Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the quality of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.f Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the uniqueness of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.g Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The Commission should analyze on a case-by-case basis the accessibility of data as a factor in determining whether data aggregation constitutes a potential entry barrier or means of possible foreclosure.

E.11.h Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The question of whether data constitutes a barrier to entry or means of input foreclosure should be determined on a case-by-case basis, and many factors may be relevant to that assessment. However, in order for data to constitute a barrier to entry or means of input foreclosure, typically data must have substantially high levels of value, volume, quality, uniqueness, and (limited) accessibility (i.e., excludable).

Targeted foreclosure

E.12 How should the Commission assess competition risks linked to targeted foreclosure conducts (e.g. conducts that lead to only some competitors being fully or partially foreclosed, or to partial restriction or degradation of access to key inputs or other products or services)? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.12.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

Foreclosure can either occur through input foreclosure (i.e., when a competitor is limited from accessing an input it needs to compete) or customer foreclosure (i.e., when a competitor is limited from accessing the customers to whom it sells).

E.12.b Under which conditions or market circumstances could this/these theory/theories of harm materialise?

Text of 1 to 5000 characters will be accepted

For both input and customer foreclosure to occur, there must be an incentive to foreclose, the ability to foreclosure, and likely effects in the form of increased power over price.

E.12.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to targeted foreclosure conducts?

Text of 1 to 5000 characters will be accepted

The Commission should evaluate the same types of intent, structure, conduct and performance evidence it generally uses to analyze the effects of mergers when it comes to vertical mergers that pose a risk of foreclosure. However, in the case of foreclosure, structural presumptions of harm should not be applied.

Interoperability issues and access issues

E.13 How should the Commission assess competition risks linked to access and interoperability concerns resulting from a non-horizontal merger? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.13.a What theory/theories of harm the Commission could consider?

Text of 1 to 5000 characters will be accepted

Limiting interoperability and access can be a way in which a firm engages in either input or customer foreclosure.

E.13.b Under which conditions or market circumstances could this/these theory/theories of harm materialise. In particular, not to impede effective competition, should the Commission establish that post-merger there will be sufficient interoperability and access for all companies to compete, or that the interoperability will be the same for all companies, so there is no competitive advantage for the merged entity's products and services?

Text of 1 to 5000 characters will be accepted

The same sorts of conditions that determine the incentives, ability, and effects associated with the merged firm's foreclosure incentives are relevant to cases where the vehicle for foreclosure is limiting interoperability or access.

E.13.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to access or interoperability issues.

Text of 1 to 5000 characters will be accepted

The same sorts of evidence and metrics that the Commission considers when evaluating incentives, ability, and effects associated with the merged firm's foreclosure incentives should be applied to cases where the vehicle for foreclosure is limiting interoperability or access.

Future market dynamics and technological changes

E.14 In markets driven by technological changes, what would be an appropriate timeframe for the Commission to adequately assess the impact of mergers on competition? Should there be a distinction between markets before and after “tipping” to a leading company?

Text of 1 to 5000 characters will be accepted

The Commission should generally focus on evaluating the short-term effects of mergers (approximately two years), including in markets driven by technological change. Moreover, the Commission should not attempt to distinguish between markets before or after “tipping,” but merely consider the extent to which barriers exist that limit entry in the short-run.

E.15 What metrics and evidence should be used to adequately assess likely future market trends and developments post-merger, including in terms of business models, technologies, and trade patterns?

Text of 1 to 5000 characters will be accepted

The same sorts of intent, structure, conduct, and performance evidence that the Commission generally considers to evaluate whether a merger will result in anticompetitive effects should be analyzed to consider likely future market trends.

Privacy and data protection

E.16 Do you consider that the Commission’s past case practice regarding privacy and data protection considerations (e.g., in M.8788 - Apple/Shazam, M.9660 - Google/Fitbit) was appropriate? If not, please outline in detail where you disagree with the approach taken by the Commission.

Text of 1 to 5000 characters will be accepted

The Commission’s decisions not to challenge that Apple/Shazam merger, and approve the Google/Fitbit merger with conditions agreed to by Google and which the Commission believed were needed to prevent harm to competition by limiting barriers to entry, were not inappropriate.

E.17 Please outline the framework within which the revised Guidelines should reflect privacy and data protection considerations, if at all. Please outline how this framework fits within the legal mandate set by the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

Mergers that may reduce user privacy are not, in and of themselves, anticompetitive. However, in cases where privacy is an important parameter of competition vis-à-vis product quality, a reduction in privacy may constitute anticompetitive harm.

E.18 Do you believe the revised Guidelines should provide guidance on the relationship between data protection and privacy considerations and the availability of sufficient alternatives and market power? If so, please outline the framework you would propose for addressing the interplay between privacy and data protection regulation (e.g., the GDPR) and the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

The revised Guidelines should not provide guidance on the relationship between data protection and privacy considerations and the availability of sufficient alternatives and market power.

Topic F: Efficiencies

A description and technical background for this topic is included below. The same text can also be found [here](). Questions on this topic are included after the text.

Topic Description

94. While most mergers are not harmful to competition and allow businesses to organise economic activity in the most efficient way, some result in the creation or strengthening of market power.[89] In the latter scenario, customers are deprived of the benefits brought by effective competition, and there is a real and tangible risk that the merger stifles innovation and results in higher prices, reduced output or a decrease in quality. These mergers may however also result in ‘efficiencies’, which may counteract the potential harm to consumers that the merger would otherwise have. Mergers can in particular generate cost savings that are passed-on to consumers in the form of lower prices, or may lead to improved products or services resulting, for example, from increased investment and innovation. These effects should be distinguished from synergies that only result in higher profits for the merged entity.

95. Compared to horizontal mergers, vertical and conglomerate mergers may provide more scope for efficiencies. The integration of complementary products between the merging parties can generate efficiencies e.g. in the form of an elimination of double margins (EDM) or through better coordination of efforts to increase sales.[90]

96. Efficiencies should be assessed against the clear legal mandate of the **EU Merger Regulation** to protect effective competition, and the clarification that any efficiencies should be to the advantage of intermediate and ultimate consumers. The guidance on the conditions under which the Commission may take efficiencies into account in the assessment of a concentration is provided in the Commission’s Horizontal Merger Guidelines (“HMG”) and Non-Horizontal Merger Guidelines (“NHMG”), which specify that the efficiencies have to **benefit consumers**, be **merger-specific** and be **verifiable**. Given the risks to effective competition brought by certain mergers, **efficiencies should materialise as a direct result of the merger and be substantive enough to outweigh** the anticompetitive harm. In other words, the assessment of efficiencies aims at ensuring that consumers will not be worse off as a result of the merger. Implementing this principle in practice has challenges. The balancing exercise between harm and efficiencies becomes increasingly complex when there is **asymmetry between the alleged anticompetitive effects and benefits arising out of the merger**. Another challenge arises when efficiencies relate to improvements of quality, as investments usually materialise over a long period of time, whereas the anticompetitive effects of the merger may materialise immediately after the closing of the transaction.

97. Efficiencies must be **demonstrated through evidence**, as it is not sufficient that they are simply claims by the merged entity. It is for the notifying parties to demonstrate that the claimed efficiencies are merger-

specific, likely to be realised and to counteract any adverse effects on competition. However, a question arises about which type of evidence or metrics are appropriate for the assessment of efficiency claims and the required likelihood of materialisation to accept efficiencies. For example, the assessment of efficiencies concerning improved quality of products or services is typically linked to consumers' willingness to pay for higher quality, and merging companies may find it difficult to submit reliable and robust evidence in support of the increase in quality.

98. Finally, **efficiencies have to be merger-specific**. The Commission must consider whether the same benefits could be achieved in a less harmful way, for example through a cooperation agreement. However, determining the existence and viability of an alternative may not be straightforward. For instance, an alternative option should be realistic, but this may be put into question if an acquirer has already made an unsuccessful attempt at it in the past. In such cases, it is challenging to verify whether and under what circumstances the less harmful alternative could have been achieved and whether the transaction is the only realistic option.

Technical Background

99. The Commission's assessment of efficiencies is embedded in the EU merger control framework. When assessing whether a merger would significantly impede effective competition, the Commission performs an overall competitive appraisal of the merger that takes into account substantiated and likely efficiencies.

100. In the past 20 years, merging parties have only brought forward sufficiently developed efficiency claims with respect to mergers in certain sectors (e.g., telecoms). While no merger case has so far been approved by the Commission exclusively on the basis that the merger-specific efficiencies would offset consumer harm, in some cases, the efficiency claims made by the merging parties were partially accepted by the Commission and balanced against the competition harm.[91]

101. The framework for the assessment of efficiencies claims is included in the HMG, and applies to both horizontal and non-horizontal mergers. There are three cumulative criteria: the efficiencies have to (i) benefit consumers, (ii) be merger-specific; and (iii) be verifiable.

Benefit to consumers

102. In the assessment of efficiency claims, the relevant benchmark is that intermediate and ultimate consumers will not be worse off as a result of the merger. This requires that the efficiencies benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. In its decisional practice, the Commission has considered different types of efficiency gains that can lead to lower prices or other benefits to consumers.

103. **Cost efficiencies** are a classic example of an efficiency that – if passed-on to consumers – could result in lower prices. There is typically no incentives to pass-on fixed cost savings. Variable or marginal costs savings are more likely to be passed-on,[92] as long as there is competitive pressure (either from existing rivals or potential entry) on the merged entity. It is highly unlikely that a merger leading to a market position

approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.[93] Cost savings could arise from EDM when the merging parties are active at different levels of the supply chain or offer complementary products and the merger generates an incentives to reduce mark-ups in order to increase sales and profits.[94] Further, cost savings arising from consolidation of the merging parties' respective orders have been considered when the increasing scale generates volume discounts from suppliers and that the merger would generate material additional volume discounts compared to the discounts already obtained by the merging parties absent the merger.[95] For cost savings to amount to efficiencies they cannot be the result of loss of competition[96] or loss of innovation[97] resulting from the merger.

104. Consumers may also benefit from **new or improved products or services** or their faster roll-out, which is often the result of investment and innovation ('innovation efficiencies'). Consumers' benefit derived from higher quality can be assessed in terms of their willingness to pay for higher quality.[98] The Commission has also assessed efficiencies dealing with **new 'green' products, technology or innovation** that result in improved sustainability,[99] and, under specific circumstances, **out of market efficiencies** claimed by the merging parties as part of the overall efficiencies assessment.[100] In line with the *Mastercard* case law, where efficiencies arise outside of the affected markets, these efficiencies can only be accepted by the Commission if the benefits **cover substantially the same customers** otherwise harmed by the merger.[101]

105. In addition, for the first prong of the current efficiency test to be met, efficiencies need to be **timely**. Less weight can be given to efficiencies materialising later in the future. However, even if the efficiencies were unlikely to arise immediately following closing of the merger, the Commission has in the past accepted these as long as they arose within a specific time period.[102] The exact horizon for efficiencies to be considered timely in these cases depended on the context of the industry in which the transaction was taking place, but was typically in the range of 3-4 years.

106. Finally, a consequence of the balancing test is that the more significant the loss of competition, the more substantial also need to be the expected efficiencies in order to outweigh the likely harm arising from a transaction. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

Merger-specificity

107. Under the current framework, efficiencies are relevant to the competitive assessment if they (i) are a direct consequence of the notified merger, and (ii) cannot be achieved to a similar extent by less anticompetitive alternatives.

108. Less anticompetitive alternatives can be of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) and must be reasonably practical given established business practices in the industry concerned. The Commission has considered sufficient that the relevant alternative brings positive added value

to the merging parties, taking into account the business case faced by each of them and having regard to established business practices in the industry concerned.[103] However, the Commission has not considered relevant how this added value is distributed between the merging parties, nor if the merging parties could achieve higher value through the transaction[104] or that the merging parties favoured the merger over the possibility to enter into a cooperation agreement.[105] The General Court has clarified that some agreements could constitute a reasonably ‘practical’ alternative when there is evidence that the agreements had been concluded in the industry, even though they may not be the prevailing type of agreement, or the merging parties lack the incentives to enter into such agreements.[106]

Verifiability

109. The Commission needs to be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers. Where reasonably possible, efficiencies should be quantified. If this is not possible, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. For example, cost synergies and the willingness to pay for quality improvements can be quantified and weighed against the incentives to increase prices.[107]

110. It is incumbent on the merging parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies result in benefit to consumers that outweighs the harm, are merger-specific and likely to be realised. In its decisional practice, the Commission has considered different types of relevant evidence, namely internal documents used by management to decide on the merger; statements from management to shareholders and financial markets about expected efficiencies; historical examples of efficiencies and consumer benefit; and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.[108]

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[89] Between 2014 and 2023, about 95% of mergers notified to the Commission were cleared unconditionally.

[90] NHMG, para 13. However, the presence of EDM alone does not imply that these cost savings are substantial enough to outweigh anti-competitive harm.

[91] For instance, cases M.4267 – Deutsche Börse / Euronext, M.6905 – Ineos / Solvay / JV, M.7421 – Orange / Jazztel and M.7278 – GE / Alstom.

[92] In telecom mergers, the Commission has considered wholesale costs as variable costs and has concluded that these are more likely passed on to consumers (see e.g., cases M.7421 – Orange / Jazztel, para 746, M.10896 – Orange / MásMóvil / JV, para 1679).

[93] HMG, para 84.

[94] However, this requires that non-linear pricing is not feasible and that margins are close to the monopoly level, see NHMG, paras 55, 117.

[95] Case M.8677 – Siemens / Alstom, paras 1256-1258.

[96] Case M.8677 – Siemens / Alstom, para 1261.

[97] R&D cost savings arising from the elimination of duplicate R&D projects could reflect a loss of innovation competition between the merging parties and were thus rejected (M.8677 – Siemens / Alstom, para 1263).

[98] Case M.10896 – Orange / MásMóvil / JV, para 1694.

[99] In M.9049 – Aurubis / Metallo, the Commission looked at two sets of alleged efficiencies that related to copper scrap. The second set concerned possible metal recovery and other environmental benefits, although the Commission found that they were not substantiated enough and were thus rejected (M.9409 – Aurubis / Metallo, paras. 835 et seq.).

[100] See e.g. M.9049 – Aurubis / Metallo (para. 844 et seq.), where the Commission assessed and rejected certain out-of-market efficiency claims. It was however not necessary for the Commission to opine on the out-of-market nature of the efficiency claim, as it was found not to be verifiable.

[101] T-111/08, Mastercard v Commission, paragraph 228. In case M.10615 – Booking / eTraveli (paras. 1152 and 1171), the efficiencies concerned consumers in the flight OTA market and were rejected, inter alia, because the harm brought by the merger related to a separate set of customers of Booking, the hotels.

[102] Case M.7630 – FedEx / TNT, paras. 568-581. When it was unlikely that efficiencies would materialise within a certain period following closing, these have been rejected (see cases M.6992 – Hutchison 3G UK / Telefónica Ireland, para. 765; M.10896 – Orange / MásMóvil / JV, para. 1597).

[103] Case M.7018 – Telefónica Deutschland / E-Plus, para. 1137.

[104] Cases M.7018 – Telefónica Deutschland / E-Plus, para. 1137; M.10896 – Orange / MásMóvil / JV, para. 1595.

[105] Case M.7758 – Hutchison 3G Italy / Wind / JV, para. 1573.

[106] Case T-175/12 Deutsche Börse AG v Commission, paras. 284-285.

[107] Case M.10896 – Orange / MásMóvil / JV, para. 1597, Annex A, para. 34.

[108] Case M.10896 – Orange / MásMóvil / JV, para. 1684.

Questions

F.1 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how the Commission assesses merger efficiencies?

- ○ Yes, fully
- ◉ Yes to some extent
- ○ No, to an insufficient extent
- ○ Not at all
- ○ I do not know

F.1.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the objective of assessing merger efficiencies, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

The Guidelines are correct that "[c]onsumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation." Future Guidelines could, among other things, make clear that that this can occur not just by scale that increases the incentive (e.g., a greater incentive to protect strong market position) and ability (e.g., greater ability to recoup investments in R&D), but also through vertical transactions that enhance dynamic capabilities through economies of scope.

F.2 In your/your client's view, should the revised Guidelines better reflect how the Commission is assessing merger efficiencies in the overall competitive appraisal of a merger in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address

You can tick more than one reply, below.

- [x] a. Benefits to consumers
- [x] b. Merger-specificity of efficiencies

- [x] c. Verifiability of merger efficiencies
- [x] d. Other
- [ ] e. The revised Guidelines should not better reflect any of these areas

Benefit to consumers

F.3 How should the Commission assess whether merger efficiencies will benefit consumers that would otherwise be harmed by the loss of competition resulting from the merger? In particular, please explain:

F.3.a For which types of efficiencies and under which conditions those efficiencies will likely be passed on to consumers?

Text of 1 to 5000 characters will be accepted

Efficiencies come in myriad forms and whether they will be passed on to consumers should be assessed on a case-by-case basis.

F.3.b Whether there are some types of transactions that, due to their nature, or the characteristics of the products or markets at hand, are more prone to efficiencies?

Text of 1 to 5000 characters will be accepted

In general, mergers (both horizontal and vertical) are a procompetitive form of business conduct.

F.3.c How should the Commission establish that the efficiencies (in-market and out-of-market) will benefit substantially the same consumers who might be harmed by the loss of competition resulting from the merger?

Text of 1 to 5000 characters will be accepted

The Commission should weigh in-market efficiencies with in-market competitive harms to determine the net effect of the merger. While out-of-market efficiencies are typically not considered in order to ensure an administrable merger regime, in platform contexts with network externalities markets should be defined broadly to ensure that they take into account efficiency benefits on all sides of the platform.

F.3.d How should the Commission trade-off benefits and harm between different consumers groups when efficiencies benefit only a certain group of consumers?

Text of 1 to 5000 characters will be accepted

In some cases, such as when price discrimination is possible, the Commission could identify targeted customer groups that may be particularly harmed by a merger, even if other groups of customers are not.

F.3.e How should the Commission trade-off benefits that may materialise already short-term (e.g., product improvements) and harm to consumers that could materialise in the longer run (e.g., entrenchment of an already strong or dominant market position, raising barriers to entry)?

Text of 1 to 5000 characters will be accepted

The Commission should not condemn mergers that result in short-term efficiency benefits on the speculative grounds that they will result in long-run consumer harms; both merger benefits and harms should be evaluated using the same time horizon (i.e., short run).

F.4 What metrics, evidence and factors should be used to assess whether cost efficiencies are likely to be passed on to consumers in the form of lower prices? Please explain.

F.4.a Assessment whether costs are variable costs or fixed costs.

Text of 1 to 5000 characters will be accepted

Typically, the use of economic modeling will be important to confirm which efficiency benefits may not be passed on to consumers. In general, variable cost efficiencies are more likely to be passed on to consumers in the short-run than relative to fixed cost efficiencies. However, the Commission should not categorically discount the possibility for fixed-cost efficiencies to benefit consumers, but rather make this assessment on a case-by-case basis.

F.4.b Empirical assessment of pass-on from past cost changes.

Text of 1 to 5000 characters will be accepted

There are countless examples of how mergers can result in these types of efficiency benefits. As one recent comprehensive study in the United States found, “There is zero basis to doubt the once-settled wisdom underpinning the basic framework for merger review: mergers can and do advance procompetitive business objectives....[T]here is evidence of mergers leading to efficiencies in a wide range of industries, including for both goods and services, and for both highly commoditized and highly differentiated products.” See Maureen K. Ohlhausen & Taylor M. Owings, Evidence of Efficiencies in Consummated Mergers, (June 2023).

F.4.c Remaining competitive pressure (either from existing rivals or potential entry) on the merged entity.

Text of 1 to 5000 characters will be accepted

Mergers that increase efficiency will ceteris paribus increase the incentives for rival firms to engage in their own efficiency enhancing behaviors to be able to better compete with the merged firm.

F.4.d Other (please specify).

Text of 1 to 5000 characters will be accepted

NA.

F.5 What metrics, evidence and factors should be used to assess whether consumers benefit from improved goods or services that may result from increased investment and innovation (‘innovation efficiencies’)? Please explain.

F.5.a Consumers’ willingness to pay as measured by actual purchasing behaviour.

Text of 1 to 5000 characters will be accepted

The Commission should analyze the same sorts of evidence it generally considers when examining whether efficiencies will be passed on to consumers in cases where those efficiencies concern increased investment and innovation. Consumers' willingness to pay as measured by actual purchasing behaviour can be a means to assess the cognizability of innovation efficiencies.

F.5.b Consumers' willingness to pay as measured by consumer surveys.

Text of 1 to 5000 characters will be accepted

Consumers' willingness to pay as measured by actual purchasing behaviour can be a means to assess the cognizability of innovation efficiencies.

F.5.c Benefits from improved zero-priced products/services measured by consumer engagement (e. g. trends in number of users or hours of engagement).

Text of 1 to 5000 characters will be accepted

Benefits from improved zero-priced products/services measured by consumer engagement (e.g., trends in number of users or hours of engagement) can be a means to assess the cognizability of innovation efficiencies.

F.5.d Other. Please specify.

Text of 1 to 5000 characters will be accepted

The fact that innovation efficiencies may not be easily quantifiable in some cases should not change the legal standards for assessing whether they are verifiable, merger-specific, passed on to consumers, and likely to outweigh competitive harms.

F.6 What would be an appropriate timeframe for efficiencies to be considered *timely*? Please explain whether this would differ per industry, and indicate under what circumstances this timeframe should be longer or shorter.

Text of 1 to 5000 characters will be accepted

Timely efficiencies should be in the short-run (approximately 2 years).

F.7 How can competitive benefits and harms accruing in the near future be balanced with competitive benefits and harms accruing in the more distant future? Please explain in particular how to balance situations where the benefits of a merger would only materialise in the more distant future (and to establish that these distant events are likely), while the harm would materialise shortly after the merger.

Text of 1 to 5000 characters will be accepted

The Commission should not attempt to balance the net short-run effect of a merger with speculative net long-run effects of a merger. For example, mergers that present substantial short run harms to competition are not generally outweighed by the prospect of long-run product innovations in the future. However, even where innovation may only occur in the long-run, more upstream benefits in terms of greater R&D and invention may occur in the short-run and can be considered cognizable efficiency benefits.

Merger-specificity

F. 8 How should the Commission assess whether efficiencies are a direct consequence of the notified merger? Please explain in particular which evidence and metrics the Commission could use.

Text of 1 to 5000 characters will be accepted

To determine whether efficiencies are merger-specific, the Commission should ask whether the merger is reasonably necessary to achieve them.

F.9 How should the Commission assess whether efficiencies cannot be achieved to a similar extent by less anticompetitive alternatives?

Text of 1 to 5000 characters will be accepted

Conduct evidence is often highly probative in determining whether a merger is reasonably necessary to achieve efficiency benefits. For example, if efficiencies were unable to be obtained through a prior contract between the merging parties, that is strong evidence that the efficiencies may be merger-specific.

F.9.a In particular, please explain: How should the Commission take into account less anticompetitive alternatives of a non-concentrative nature (e.g. a licensing agreement, a cooperative joint venture or a network sharing) and a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger)?

Text of 1 to 5000 characters will be accepted

The Commission should evaluate whether the merger is reasonably necessary to achieve efficiencies relative to the alternatives that would have likely been pursued in absence of the merger.

F.9.b In particular, please explain: How should the Commission assess whether a less anticompetitive alternative is reasonably practical and what market circumstances might impact that assessment?

Text of 1 to 5000 characters will be accepted

Reasonably practicable alternatives are those which would have been likely to be attempted to achieve efficiency benefits without a merger.

Verifiability

F.10 How should the Commission make sure that the efficiencies claimed by the parties are verifiable and likely to materialise? Please explain in particular which evidence and metrics the Commission could use.

Text of 1 to 5000 characters will be accepted

Conduct evidence is often highly probative evidence in determining whether a merger is likely to result in efficiencies. Intent, as garnered through business documents, can also be instructive.

F.11 How can merger efficiencies, in particular when it comes to non-price efficiencies, be identified and quantified? Please explain to what extent merger efficiencies need to be quantified for the Commission to conclude that they will outweigh the competitive harm, and how.

Text of 1 to 5000 characters will be accepted

In some cases, non-price efficiencies, such as output expansion and quality improvements, can be sufficiently quantified and balanced against price harms. However, the Commission should not require quantitative evidence to justify efficiency claims as a general matter, even if it may require a greater amount of qualitative evidence to justify efficiency claims if quantitative evidence is absent.

F.12 Based on which evidence and metrics can the Commission alleviate uncertainties as to the implementation of efficiencies, in particular when they will not materialise in the very short term?

Text of 1 to 5000 characters will be accepted

In cases where it is unclear whether efficiencies are likely to materialize, economic tools like merger simulations are often the best and most objective way to determine the extent to which a merger is likely to result in efficiency benefits that offset competitive harms.

F.13 What evidence should be taken into account to verify efficiencies? Please select the evidence that you believe are relevant and substantiate your reply, especially pointing to specific challenges in the assessment of such evidence.

You can tick more than one reply, below.

- [x] a. Internal documents, including those used by management to decide on the merger
- [x] b. Statements from management, owners and financial markets about expected efficiencies.
- [x] c. Historical examples of efficiencies and consumer benefit.
- [x] d. Pre-merger external experts' studies on the type and size of efficiency gains and on the extent to which consumers are likely to benefit.
- [x] e. Economic models, including those investigating the merging parties' and their rivals' ability and incentives to invest and innovate.
- [x] f. Other

F.13.a Please explain.

Text of 1 to 5000 characters will be accepted

Internal documents, including those used by management to decide on the merger, often constitute important evidence in determining whether a merger will result in efficiency benefits.

F.13.b Please explain.

Text of 1 to 5000 characters will be accepted

Statements from management, owners and financial markets about expected efficiencies often constitute important evidence in determining whether a merger will result in efficiency benefits.

F.13.c Please explain.

Text of 1 to 5000 characters will be accepted

Historical examples of efficiencies and consumer benefit often constitute important evidence in determining whether a merger will result in efficiency benefits.

F.13.d Please explain.

Text of 1 to 5000 characters will be accepted

Pre-merger external experts' studies on the type and size of efficiency gains and on the extent to which consumers are likely to benefit often constitute important evidence in determining whether a merger will result in efficiency benefits.

F.13.e Please explain.

Text of 1 to 5000 characters will be accepted

Economic models, including those investigating the merging parties' and their rivals' ability and incentives to invest and innovate often constitute important evidence in determining whether a merger will result in efficiency benefits.

F.13.f Please explain.

Text of 1 to 5000 characters will be accepted

The above categories should not be viewed as exhaustive. Other types of evidence may arise that attest to the verifiability of efficiencies and should be evaluated on a case-by-case basis.

Topic G: Public policy, security and labour market considerations

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

111. The EU Merger Regulation sets a clear legal mandate: the prevention of significant impediments to effective competition, in the internal market or a substantial part of it. Merger control is primarily focusing on ensuring that mergers do not harm consumers. However, vibrant competition – indirectly – also contributes to other policy objectives and serves as a restraint on the market power of large businesses. Where companies become too powerful in their fields of activities, they may become too-powerful-to-care. Where companies become so large as to be essential – for example in the provision of a certain good or service – they can become too-big-to-fail, and therefore increasingly difficult to regulate for democratic institutions. Research further suggests that mergers can lead to an increase in lobbying activity by the merging firms.

112. By limiting market concentration and market power of firms, merger control enforcement helps to maintain a balance of public and private power, supports media plurality, fosters a competitive defence industrial ecosystem, and by promoting the competitiveness of businesses in the EU contributes to the availability of quality jobs for Europeans. Therefore, competitive and contestable markets not only serve business and consumer interests, but also benefit wider societal goals.

113. In addition, the Treaty on the Functioning of the European Union and the EU Merger Regulation includes certain specific provisions relating to security and defence. For instance, under Article 21(4) EU Merger Regulation, Member States may justify measures on public security grounds in relation to mergers which

would otherwise not be harmful to competition. Moreover, in light of a changed geopolitical environment and technological advances, the revised Guidelines may provide further guidance on how the Commission assesses cases related to this sector.

114. While the protection of competition generally contributes to the provision of good and well-paying jobs in Europe, the application of labour market theories of harm may enable the Commission to prevent negative effects on workers in certain specific merger cases.

Security and defence

115. The Political Guidelines of the Commission call for a new era for European Defence and Security, indicating the current Commission mandate will be focused on building a European Defence Union and creating a true Single Market for Defence. In the context of Russia’s war of aggression against Ukraine there have also been calls for further consolidation in the EU defence sector.

116. While it is undisputed that monopolies and monopsonies generally lead to higher prices, lower quality and less innovation, some sectors of the EU’s military supply base are currently rather fragmented. It appears that national autonomy considerations and hardware requirements specific to Member States have so far been the key factors in preventing integration and consolidation in these segments of the industrial defence sector in the EU.[109] Moreover, merger rules may also prevent harmful market power in non-European inputs relevant for EU defence.

117. The Commission has never prohibited a defence merger. In recent years, most deals involving defence players were cleared unconditionally. Where deals required remedies to obtain merger clearance, the Commission was often concerned with protecting European customers (e.g. in the case of two mergers between US defence contractors, *UTC/Raytheon and Harris Corporation/L3 technologies*, that also supplied military products to EU Member States) and European defence providers (e.g. GE/AVIO, where the transaction would have allowed GE to acquire a significant degree of influence in the Eurojet consortium and access strategic information of one of its main competitors in the international market for fighter aircraft – and specifically related to the Eurofighter).

118. Member States may consider legitimate national security interests to be impacted by a merger – and consequently seek to intervene on public security grounds. Already today, the EU Merger Regulation as well as the Treaty on the Functioning of the European Union provide for certain exceptions related to defence and security.[110] Measures adopted by Member States may in some instances affect mergers which would not otherwise affect competition in the internal market. In addition, the Treaty (in Article 346) provides that competition with respect to dual-use goods, namely goods also used for civil applications, should be protected. However, neither the current Horizontal Merger Guidelines (“HMG”) nor the Non-Horizontal Merger Guidelines (“NHMG”) include guidance specific to mergers relating to security or defence. Therefore, whereas security and defence considerations are generally the privilege of Member States, and not part of the Commission’s mandate under the EU Merger Regulation, we are seeking feedback from stakeholders whether further guidance on the interaction between Member States’ security and defence interests and the Commission's competition assessment under the EU Merger Regulation could be useful. Feedback is also sought on how to

undertake a potential balancing of interests between defence and competition objectives for cases that involve dual-use goods.

Media plurality

119. Mergers can also impact media plurality. Article 21(4) of the EU Merger Regulation allows for Member States to "*take appropriate measures to protect legitimate interests*" such as "plurality of the media". However also in cases where this provision is not invoked, the Commission may consider the impact of a loss of competition on media plurality in its assessment of mergers.[111] Media freedom and media pluralism are essential to our democracies and are enshrined in the Charter of Fundamental Rights. Free and pluralistic media are key to holding power to account and to helping citizens make informed decisions. By providing the public with reliable and trustworthy information, independent media play an important role in the fight against disinformation and the manipulation of democratic debate. In this regard, AI technologies, including generative AI, have the potential to profoundly shape public discourse and influence the perspectives of citizens on democratic issues, thereby having a significant impact on election outcomes. As a result of mergers and acquisitions in the AI and media industries, market concentration could reduce the diversity of choices available to consumers. In such a landscape, a few dominant companies could wield considerable power over democratic processes by influencing public opinion. Therefore, it is crucial to consider this dynamic, alongside traditional factors like price and quality, when evaluating the implications of mergers and acquisitions in the AI sector, as well as in more traditional media sectors.

Effects on labour markets and workers (monopsonies)

120. Mergers can significantly impede competition in labour markets by shifting the balance of power between employers and workers. A situation where a single or dominant employer controls the hiring of a group of potential employees is an example of a monopsony. Monopsonies in labour markets can lead to lower wages, higher unemployment, worse working conditions and also lower downstream output and higher prices.

121. While the existing HMG already consider the potential effects of mergers on buyer power more generally,[112] in practice, the Commission has only infrequently assessed the effects of a transaction on buyer power in upstream markets in detail.[113] In this regard, a report from the OECD concerning competition issues in labour markets states that, while "*the application of merger control laws to the undesirable effects of buyer's power is generally uncontroversial, competition authorities appear to not have devoted much attention to monopsony restricting competition in product markets*".[114] With regards to the effects of monopsony power on labour markets specifically, the current Guidelines do not provide any guidance and EU merger control assessments in the past have not explicitly considered the effects of mergers on labour markets in similar circumstances.[115]

122. A key question therefore is whether the revised Guidelines should provide some guidance on the assessment of the impact of mergers on labour markets. An important aspect that the revised Guidelines may provide clarity on is whether an expected significant loss of competition through the exercise of buyer power in upstream markets, including in labour markets, is, in itself, a sufficient theory of harm, or whether instead the Commission also needs to demonstrate that such a loss of competition can be expected to have negative

effects on downstream markets (e.g., via higher prices and/or lower output to consumers). In the potential assessment of labour markets, it needs to be kept in mind that labour markets are usually defined by occupation and narrow geographic area (e.g., city or "commuting zone"), resulting in a potentially very large number of markets to be assessed, which might greatly increase the complexity of certain merger reviews.

123. Finally, mergers often raise concerns about job losses due to restructuring and offshoring. These effects are not the result of a change in market power and not covered by the EU Merger Regulation, therefore they cannot be addressed in the revised Guidelines.[116] Cost savings resulting from restructuring or offshoring are generally reductions in fixed costs and therefore unlikely to be passed on to consumers. As a result, these cost savings should not be accepted as efficiencies. To the extent that job losses are a result of lower sales due to a reduction in competition, consumers would be harmed, and this should also not be considered an efficiency.

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[109] See for example Mario Draghi's report 'The future of European competitiveness', September 2024, page 164.

[110] Article 346 TFEU states: "no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security" and "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes". Article 21(4) EU Merger Regulation states that "[…] Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law", and further that "[p]ublic security, […] shall be regarded as legitimate interests […]".

[111] See case M.10433 – Vivendi / Lagardère.

[112] HMG, paragraphs 61-63.

[113] A relatively recent case in which the Commission has assessed the effects of a transaction on buyer power in more detail is M.9409 – Aurubis / Metallo. In addition, the Commission has assessed in more detail the effects of a transaction on buyer power in certain retail mergers, for example in mergers involving the retail supply of furniture (e.g., M.10969 – XXXLutz / Home24).

[114] OECD (2020), Competition in Labour Markets, page 32.

[115] The 2023 merger guidelines of the US DOJ and FTC include a dedicated section (2.10) that discusses the potential harmful effects that mergers can have on workers through reduced competition in labour markets.

[116] These job losses fall however under the remit of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Questions

Security and defence

G.1 In your/your client's view, should the revised Guidelines better reflect how the Commission assesses defence and security considerations in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address

You can tick more than one reply, below.

- [ ] a. Assessment of security interests under Article 21(4) EU Merger Regulation
- [ ] b. Defence exception under Article 346 TFEU
- [ ] c. Assessment of dual uses (both military and civil) products and services

☑ d. Other

G.1.1 If other, please specify.

Text of 1 to 5000 characters will be accepted

The Guidelines should focus on the Commission’s competition analysis. To the extent that defence and security considerations factor into its broader merger control regime, that should be addressed separately.

G.2 In your experience, have there been interventions by Member States (in particular in the context of an application of Art. 21(4) EU Merger Regulation) which resulted in mergers that would have otherwise happened, not taking place? Have such interventions thus preserved industry fragmentation? Please provide relevant examples.

Text of 1 to 5000 characters will be accepted

ITIF is not aware of any mergers that were explicitly approved on competition grounds that should have been denied on defence grounds or vice versa.

G.3 What specific parameters may be relevant when assessing the impact of mergers that involve markets for dual-use goods or services (i.e. goods or services used for military and civil applications) on competition?

Text of 1 to 5000 characters will be accepted

For purposes of analyzing competitive harm the effect of defence mergers on government customers should be analyzed in the same way that effects would be measured on civilian consumers.

Media plurality

G.4 In your/your client’s view, do the current Guidelines provide clear, correct and comprehensive guidance on how the EU merger control assessment takes into account democracy and media plurality considerations?

- ○ a. Yes, fully
- ○ b. Yes, to some extent
- ○ c. No, to an insufficient extent
- ◉ d. Not at all
- ○ e. I do not know

G.4.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting democracy and media plurality considerations in merger’s competitive assessment, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

The current Guidelines rightly do not provide guidance upon whether a transaction will harm democracy or media plurality, but instead focus on its effects on competition and consumers.

G.5 In your/your client's view, should the revised Guidelines better reflect how the Commission assesses democracy and media plurality considerations in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [ ] a. Assessment of plurality of the media as a legitimate interest under Article 21(4) EU Merger Regulation
- [ ] b. Assessment of the impact of mergers on democratic accountability and lobbying activity
- [x] c. Media diversity/plurality as a parameter of competition
- [ ] d. Other

G.6 In which circumstances and under which conditions can the Commission consider that a Member State is taking appropriate measures against a merger that is justified to protect its media plurality in the sense of Art. 21(4) EU Merger Regulation?

Text of 1 to 5000 characters will be accepted

The Commission should seek to foster a merger regime where enforcement is focused at the EU level and on the analysis of whether a transaction will harm competition.

G.7 How should the Commission take into account the consequences of increased market power not only vis-à-vis customers but also vis-à-vis public authorities that may also affect customers? Please explain your answer having in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

The claim that increased market power is a threat to democratic accountability does not bear scrutiny. Indeed, effective competition is neither a necessary nor sufficient condition for democracy: a small pharmaceutical company may have tremendous market power but have little to no political influence; by contrast, a small well-connected firm may, for various reasons, have exceptional levels of political influence. Indeed, market power can support democracy by fostering innovation that empowers citizens and disrupts the economic power of entrenched incumbents that dominate the political status quo.

G.8 Please outline in which sectors the competitive impact of a merger on democracy and media plurality is most likely to be highest? Please provide your view in particular on the generative AI sector.

Text of 1 to 5000 characters will be accepted

In media markets, protecting competition and consumer welfare may have direct second-order effects on protecting democracy and fostering media plurality, even if this should not be a goal of competition enforcement.

G.9 Under which circumstances and in which conditions should the Commission consider diversity, including in the sense of diversity of opinions, in its assessment of the impact of mergers on competition? Please explain your answer having in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

In media markets, protecting competition and consumer welfare may have direct second-order effects on protecting diversity of opinions, even if this should not be a goal of competition enforcement.

Labour markets and workers

G.10 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how the EU merger control assessment considers the impact of mergers on labour markets and workers?

- [ ] a. Yes, fully
- [ ] b. Yes, to some extent
- [ ] c. No, to an insufficient extent
- [x] d. Not at all
- [ ] e. I do not know

G.10.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the impact on labour markets and workers in merger's competitive assessment, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

The current Guidelines rightly do not provide guidance upon whether a transaction will harm labor markets and workers.

G.11 In your/your client's view, should the revised Guidelines better reflect how the Commission assesses the impact on labour markets and workers in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [ ] a. Impact of mergers on wages and working conditions as a result of the creation of monopsony power in labour markets specifically
- [ ] b. Impact of mergers on purchasing markets via the creation of buyer power more generally
- [x] c. Other

G.11.1 If other, please specify.

Text of 1 to 5000 characters will be accepted

Merger enforcement should focus on protecting competition, innovation, and consumers, not labor as a general matter.

G.12 How should the Commission assess the impact of a transaction on wages/working conditions through increased buyer power in labour markets? In particular, please explain:

G.12.a How should the Commission define and assess potentially numerous relevant "buying" markets for labour (which might be segmented by factors such as occupation/education and geography)?

Text of 1 to 5000 characters will be accepted

To the extent necessary to protect competition and consumers, the Commission should define buying markets for labor using the same tests used to define markets when analyzing sell side market power. However, the Commission should make clear that a firm having sell-side market or monopoly power does not all mean that it has buyer or monopsony power in a labor market, as labor markets are typically much broader than product markets. For example, a software engineer who works for a monopoly firm may find robust competition for their labor from firms in other high-tech markets.

G.12.b What theory/theories of harm could the Commission consider? Please keep in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

Unlike mergers that increase market power, mergers that create buyer power or a lack of effective competition in labor markets do not pose a prima facie risk of harm to consumers, as the former may result in both lower costs that are passed on to consumers in the form of lower prices and increased industry output. As such, mergers that increase employer power should not be condemned unless they also result in harm to consumers and competition. This typically occurs only in mergers that result in the creation of a monopsony labor market where both workers and consumers could be harmed.

G.12.c Under which circumstances and conditions can a monopsony theory of harm for labour markets occur?

Text of 1 to 5000 characters will be accepted

Mergers that create monopsony power for labor and will lead to consumer harm are rare and typically limited to circumstances involving a “company town” where one employer dominants a local community.

G.12.d Based on which evidence and metrics can the Commission assess the impact of a merger on wages and working conditions via the creation of monopsony power?

Text of 1 to 5000 characters will be accepted

To assess whether a merger that increases buyer power over labor is anticompetitive, the Commission analyze whether downstream output has decreased and avoid any attempt to weigh any harms to labor with benefits to consumers.

G.12.e How can the Commission demonstrate that the impact of a merger on wages and working conditions translates into harm to customers? Is it necessary under the legal mandate of the EU Merger Regulation to demonstrate harm to customers in addition to a negative impact on wages and working conditions?

Text of 1 to 5000 characters will be accepted

In order to condemn a transaction that harms labor, the Commission should have to show harm to customers, typically through reduced output.

G.13 How should the Commission assess mergers that result in increased buyer power more generally (i.e., not only in labour markets)?

Text of 1 to 5000 characters will be accepted

The Commission should define buying markets the same general tests (as modified appropriately) used to define markets when analyzing sell side market power.

G.13.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

Unlike mergers that increase market power, mergers that create buyer power or a lack of effective competition do not pose a prima facie risk of harm to consumers, as the former may result in both lower costs that are passed on to consumers in the form of lower prices and increased industry output. As such, mergers that increase buyer power should not be condemned unless they also result in harm to consumers and competition. This typically occurs only in mergers that result in the creation of a monopsony where both sellers and consumers could be harmed.

G.13.b Under which circumstances and conditions could this/these theory/theories of harm occur? Please explain what would be an appropriate and achievable framework to assess increased buyer power.

Text of 1 to 5000 characters will be accepted

Mergers that increase buyer power and harm consumers are most likely to occur in situations where there is a merger to monopsony between powerful buyers that have a demonstrated ability to obtain favorable terms from suppliers, such as through price discrimination.

G.13.c Based on which evidence and metrics can the Commission assess the impact of a merger on buyer power, and how can it assess whether buyer power translates into harm to customers?

Text of 1 to 5000 characters will be accepted

The Commission should analyze the same sorts of intent, structure, conduct and performance evidence that is typically evaluated to understand the competitive effects of a merger, principally to determine whether the merger will ultimately reduce output downstream.

G.13.d Is it necessary under the legal mandate of the EU Merger Regulation to demonstrate harm to customers in addition to a negative impact on upstream suppliers?

Text of 1 to 5000 characters will be accepted

In order to condemn a transaction that results in increased buyer power, the Commission should have to demonstrate harm to consumers.

Other sectors:

G.14 Do you/your client consider that mergers can positively or negatively impact strategic sectors' (other than clean tech, deep tech, digital and security and defence sectors) capabilities?

- [x] Yes
- [ ] No
- [ ] I do not know

G.14.1 Please explain under which circumstances mergers could improve or harm strategic sectors' (other than clean tech, deep tech, digital and security and defence sectors) capabilities. Please specify the strategic sector(s) and distinguish between mergers creating or strengthening market power, and those that do not, as relevant.

Text of 1 to 5000 characters will be accepted

By enhancing output and innovation in strategic sectors, mergers can improve their performance. By contrast, mergers that lead to a reduction in output or innovation can result in harm to strategic sectors. In its Hamilton Index, ITIF has identified 10 industries that are particularly strategic in the context of global competition with China: IT and Information Services, Computers and Electronics, Chemicals, Machinery and Equipment, Motor Vehicles, Basic Metals, Fabricated Metals, Pharmaceuticals, Electrical Equipment, and Other Transportation. See Rob Atkinson and Ian Tufts, The Hamilton Index, 2023: China Is Running Away With Strategic Industries (Dec. 2023).

G.15 Do you/your client consider that new or additional guidance regarding infrastructures that are critical for the EU economy (e.g., telecommunications networks, electricity distribution networks, etc.) should be included in the revised Guidelines?

- ○ Yes
- ◉ No
- ○ I do not know

Other

Please indicate whether aside of the seven topics covered in this targeted consultation, you/your client consider that any aspect of the current Guidelines deserve attention in the review process or require adaptation.

Text of 1 to 5000 characters will be accepted

Remedies.

Please feel free to upload any supporting document(s).

Contact

[Contact Form]