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CRA response to Draft EU Merger Guidelines

Prepared by

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1. SUMMARY OF VIEWS

1. We welcome the opportunity to comment on the European Commission's Draft Merger Guidelines ("the guidelines").[1] The guidelines are an important and timely attempt to modernise the framework for merger assessment and reflect the economic changes of the last 22 years. We particularly welcome the prominence given to efficiencies and theories of benefit, as well as the effort to provide more explicit guidance on the assessment of dynamic competition and innovation.

2. That said, in this report we lay out important refinements that would help to ensure these guidelines stand the test of time. Our focus is on ensuring that: i) the guidelines have balanced and robust economic foundations; ii) any presumptions reflect true economic consensus; and iii) the wording is as clear and unambiguous as possible and provides as much clarity as possible on how issues will be assessed in practice.

3. **Efficiencies: a welcome attempt to break the efficiencies "chicken and egg problem", but refinements are needed to maximise chances of success.** We welcome the more central role given to efficiencies, the recognition that the standard of evidence to assess efficiencies should be symmetric to that used to assess competitive harm, the inclusion of a detailed taxonomy of static and dynamic efficiency mechanisms, and the discussion of how costs and benefits occurring on different timeframes can be balanced.

4. However, there are areas where this efficiencies framework could be improved:

   - The taxonomy of efficiencies should be expanded to capture additional mechanisms, including internalising externalities and knowledge spillovers, dynamic demand effects, and the faster commercialisation of new technologies.
   - The text should be tweaked to underline that the principles of verifiability and quantification will be applied in a balanced way. The final guidelines should make clear that the objective is to test rigorously the likelihood and size of efficiencies that benefit consumers, not to create an evidentiary bar that is practically impossible to meet.

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1 This document was prepared by Ugur Akgun; Svend Albaek; Matthew Bennett; Romain Bizet; Raphaël De Coninck; Dan Donath; Laurent Flochel; Matteo Foschi; Mikaël Hervé; Diana Jackson; Elina Koustoumpardi; Oliver Latham; Michael Muehlbradt; Christoph von Muellern; and Lars Wiethaus. CRA economists have worked on a large number of the cited cases. This includes: Alstom/Bombardier Transportation, ASL/Arianespace, Ball/Rexam, Boeing/Spirit, Broadcom/VMWare, Connect Airways/Flybe, CVC/Ethniki, Deutsche Börse/LSEG, EDF/Segebel, Fox/Sky, General Electric/Alstom (Thermal Power), Google/Fitbit, Hutchison 3G Italy/WIND/JV, Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering, INEOS/Solvay/JV, JCI/FIAMM, Liberty Global/De Vijver, Liberty Global/Ziggo, LSEG/Refinitiv, Lufthansa/Austrian Airlines and Lufthansa/SN Airholding, Lufthansa/BMI, Mars/Kellanova, Microsoft/ActivisionBlizzard, Microsoft/GitHub, Microsoft/LinkedIn, Novelis/Aleris, Novo Holdings/Novo Nordisk/Catalent, Orange/Jazztel, Outokumpu/Inoxum, Pfizer/Hospira, Praxair/Linde, Qualcomm/NXP, Ryanair/Aer Lingus, Siemens Healthineers/Varian Medical Systems, Syniverse/BSG, Thales/Gemalto, Three UK/Telefónica UK, T-Mobile NL/Tele2 NL, TomTom/Tele Atlas, Tronox/Cristal, Universal Music Group/EMI Music, UPS/TNT, and Wieland Aurubis Rolled Products/Schwermetall.

- Merger specificity should be tied more directly to the counterfactual: the standards that apply to the theory of harm when constructing a counterfactual from hypotheticals, rather than from observed pre-merger outcomes, should also apply to efficiencies.
- While we welcome the recognition of out-of-market and collective benefits, we consider the guidelines current approach to the "substantially the same consumers" principle too restrictive. This is particularly so in multi-sided markets and vertical supply chains, as well as cases where a transaction produces substantial benefits across related markets.

5. **Non-horizontal mergers: we have significant concerns with changes in tone and approach that lose the key economic insight that non-horizontal mergers are generally less likely to be problematic than horizontal ones.**

- The guidelines remove statements from the previous guidelines that non-horizontal transactions were generally more likely to generate efficiencies and less likely to harm competition relative to horizontal transactions. The guidelines should reinstate the acknowledgment that there are differences between horizontal and non-horizontal mergers. This would reflect economic reality and case law, and can be done without losing sight of the fact that non-horizontal transactions can be anticompetitive.
- The guidelines also remove the previous guidelines' statement that market shares below 30% upstream and downstream are unlikely to be problematic in non-horizontal mergers. This creates an inconsistency between the guidelines and the affected market threshold within the EU merger regulation. The fact that there is a soft safe harbour for horizontal mergers, but not non-horizontal ones, risks giving the erroneous impression that non-horizontal mergers are viewed as more problematic.

6. **The guidelines rightly increase the emphasis on dynamic considerations, including investment and innovation considerations. However, they also introduce presumptions which in our view go further than the economic literature suggests.** The discussion of innovation and investment theories of harm could and should better reflect the state of the economic literature. Mergers are generally expected to reduce innovation incentives when the *replacement effect* dominates, that is when each merging party internalises the risk that its individual innovation effort cannibalises the other party's profitable sales. However, mergers may also increase incentives to innovate where they generate synergies, internalising spillovers between the merging parties, e.g., by reducing duplication, improving appropriability or allowing resources to be redirected to more promising projects. The guidelines should therefore avoid language that could be read as a quasi-presumption that overlaps in innovation projects or capabilities are harmful and should instead articulate a more balanced framework for assessing incentives and ability across investment, innovation and potential competition theories of harm.

7. **The guidelines would benefit from underlining that the goal of competition law is to protect competition and consumers, not competitors.** The guidelines indicate in footnote 38 that *"the fact that rivals may be harmed because a merger leads to efficiencies cannot in itself give risk to competition concerns"*, but other areas of the draft suggest the opposite view (e.g., the entrenchment theory, theories of harm based on rent extraction, and some discussion of the distinction between the effect on merger parties' innovation incentives vs. the market overall).

8. The guidelines should make explicit that harm to a competitor is not sufficient for a significant impediment to effective competition, unless it reduces the competitor's ability to constrain the merged entity and thereby harms competition and consumers. As well as being the right economic benchmark, this would promote early and rigorous submissions on efficiencies, as merging parties would have less worry that evidence on efficiencies would be seen as problematic or even anticompetitive.

9. **Entrenchment theories need clear limiting principles that identify transactions that generate merger-specific consumer harm.** We recognise that a merger might harm competition by increasing entry barriers around an existing position of market power. We also recognise that the addition of complementary offerings to an existing ecosystem might have this effect without a need for an explicit tying strategy or for the foreclosure/exit of competing complementary players.

10. However, we do not see an economic basis for presuming that the addition of an important customer acquisition channel to an already dominant firm necessarily implies a significant impediment to effective competition. Rather, one needs to ask whether this strengthening is due to the realisation of efficiencies (which may benefit consumers) or whether the net effect of the transaction is ultimately to harm consumers.

11. **Other specific comments on the guidelines.** We have sought to provide detailed comments on the entire draft, not all of which merit inclusion in this introduction. But some highlights of our comments include:

- Merger efficiencies which result from a change in incentives (e.g., due to the internalisation of knowledge spillovers or elimination of double marginalisation) rather than supply-side changes (e.g., due to cost reductions) should be considered as part of the competitive assessment.
- The guidelines should allow some possibility of accepting out-of-market efficiencies which do not fully compensate all consumers in all relevant markets and explain the criteria where this would be so (e.g., when there are very large social benefits that accrue across the single market in which affected consumers also have a stake). This would better reflect the policy objectives in the guidelines' pre-amble and would be preferable to the current approach which appears to give the Commission a discretionary override when such objectives are deemed incommensurable.[2]
- Some of the language on concentration levels risks creating structural presumptions that go beyond current theory or practice and could place excessive weight on market definition and market shares rather than on substantive competitive effects.

2 Paragraph 300.

- We welcome the inclusion of an innovation shield, but the precise formulation should be refined to provide both clear safe harbours and a more principles-based understanding of categories of acquisition that will not be concerning. We find that the utility and application of the innovation shield is limited as most mergers that fall under the shield would not, in any event, be reviewable by the Commission. To achieve its legitimate objectives of fostering innovation, we invite the Commission to reconsider the criteria to more broadly grant the innovation shield to acquisitions of start-ups by non-dominant firms.
- The structure of the new section on foreclosure has lost much of the simplicity and clarity that the old non-horizontal guidelines had regarding the differences between input, customer, and tying/bundling foreclosure. Whilst we appreciate that the guidelines have cut down on the repetition between different practices, the process of aggregating all the practices under a single ability, incentive, and effects framework has made the guidelines much more technical and less accessible to non-experts. This makes it much more difficult for a non-expert to know what is most important for a tying and bundling case, for example. We would suggest that the Commission continues to provide separate discussions of each type of foreclosure.
- We welcome clarification that ability to foreclose depends both on technical possibility and significant market power, but suggest that the guidelines should more clearly explain that both conditions are necessary.
- The discussion of direct and dynamic incentives to foreclose should be clarified, including how those incentives are weighed when they point in different directions, how input substitution affects incentives, and why bringing supply in-house to realise vertical efficiencies is not in itself evidence of incentive to engage in customer foreclosure.

12. While we have important technical suggestions to improve the draft, we welcome the ambition of the guidelines and look forward to continuing to engage with the Commission as the guidelines are finalised and as the economic toolkit is developed through future case practice.

13. The rest of this document is structured as follows: Section 2 comments on the guidelines' approach on efficiencies; Section 3 sets out general comments on the competitive assessment section of the guidelines; Section 4 focuses on comments on the market power, head-to-head competition and dynamic competition sections of the guidelines; and, Section 5 comments on foreclosure, entrenchment and portfolio effects.

2. COMMENTS ON EFFICIENCIES

2.1. We overall welcome the guidelines' approach to efficiencies and see this as the start of a process to develop appropriate economic tools

14. We welcome the greater role that efficiencies play in the revised guidelines, the inclusion of a taxonomy of efficiency mechanisms, the acknowledgment of potential out-of-market efficiencies and collective benefits, and the general principle that the "*merging parties are subject to the same evidentiary standard when establishing the facts in support of their claimed efficiencies*".[3] Further, we appreciate that the Commission is accompanying this signal of openness to efficiencies with safeguards to avoid an "anything goes" situation.

15. The biggest potential contribution of the guidelines would be to end the current "chicken and egg" problem, whereby: efficiencies arguments are seen as a "last refuge" and admission that a merger is otherwise anticompetitive; efficiencies are, as a result, often only presented in detail at a late stage in the most problematic mergers; these efficiencies are then dismissed as insufficiently evidenced; and this has the effect of reinforcing the original view that efficiency arguments are not worth developing. We hope the guidelines will permit a rigorous assessment of efficiencies to become a standard part of merger assessment.

16. In this light, the guidelines are best seen as the start of a process: while the guidelines provide a non-exhaustive taxonomy of potential sources of efficiencies, they (understandably) provide limited detail as to what evidence will be deemed sufficiently compelling and the methodological approach that should be used to quantify efficiencies in practice. Work will be needed to refine the economic toolkit through actual cases.

17. This is consistent with the seminal 1968 work of Oliver Williamson, who first identified the effects of market power and efficiencies as the key trade off at issue in merger control. He argued that *"[o]nce economies are admitted as a defense, the tools for assessing these effects can be expected progressively to be refined. Such refinements will permit […] enforcement agencies to make more precise evaluations".*[4]

18. We look forward to working with the Commission to help refine the economic toolkit to assess efficiencies and hope that the guidelines can be supplemented going forward with learnings from analysis implemented in actual cases. We think the guidelines would benefit from acknowledging that a "learning by doing" process is likely to be necessary in the coming years and that there is likely to be value in further guidance in the future.

19. That said, while we are supportive of the overall tenor of the guidelines and the signal it sends, we have important comments on the more technical aspects which we set out below. These relate to the taxonomy of efficiencies (Section 2.2),[5] issues around standards of

3 Paragraph 26.

4 Williamson, O. E. (1968), *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58(1) American Economic Review.

5 Paragraphs 302 and 325.

evidence (Section 2.3),[6] and particularly the required standard of verifiability and quantification and how this compares to the equivalent standard for identifying anticompetitive effects, and issues around out-of-market and collective benefits (Section 2.4).[7]

2.2. The taxonomy of efficiencies is a welcome addition but should be adjusted to reflect other relevant sources of efficiency

20. The guidelines' inclusion of a taxonomy of potential efficiency mechanisms is welcome, even if it inevitably cannot be fully exhaustive (e.g., particular industries may raise novel categories of efficiency that do not quite fit existing lists. This is especially so if the guidelines are intended to remain in place for decades). We set out below some thoughts of how the list could be further improved following the guidelines' distinction between "direct" (paragraph 302) and "dynamic" (paragraph 325) efficiencies.

21. **Additions to the list of direct efficiencies.** The list of direct efficiencies is relatively comprehensive, but could acknowledge some additional channels:

- The economies of scale, scope or density discussed at paragraph 302(b) can manifest through channels other than cost reductions. For example, a denser logistic network may facilitate faster, more reliable and lower cost deliveries, while a denser marketplace or advertising platform may facilitate better quality matches or more precise targeting.
- We agree with the discussion at paragraph 302(g) regarding the potential benefits of combining complementary products or services. However, the discussion would benefit from more generally acknowledging that benefits can arise from the internalisation of externalities.

22. **Additions to the list of dynamic efficiencies.** Similarly, the taxonomy of dynamic efficiencies is comprehensive, but there are some additional points that could be added:

- **Knowledge spillovers and free riding.** The guidelines acknowledge the scope for efficiencies through the prevention of hold-up between merging parties at paragraph 325(e). But they should also acknowledge the scope for efficiencies when a merger internalises knowledge spillovers and increases the appropriability of the benefits of an innovation in the presence of imitation or free-riding (especially if such free-riding is more likely between the merging partners).

6 See, for example, paragraphs 26 and 304.

7 See, for example, paragraphs 352-357.

- **Dynamic demand effects.** There will be markets where investment is needed to "educate" customers as to the merits of a new technology. In such markets there is scope for "dynamic demand spillovers" where the benefit of investment by one firm in educating customers will partly accrue to competitors and, by internalising these spillovers, a merger can promote investment.[8]
- **Commercialising new technologies.** The guidelines should acknowledge that there is scope for efficiencies when a purchaser is able to commercialise or productise a new technology more rapidly.[9]

23. **Other comments on the taxonomy.** We also have some more granular comments on the text of the guidelines:

- Paragraph 302b states that *"[t]he merging parties have to demonstrate that scale efficiencies cannot be achieved by growing organically, for example because necessary inputs cannot be purchased through normal market transactions or developed internally".*[10] This should be clarified to acknowledge the question of timing: if a merger generates valuable scale economies more rapidly than is achievable via organic means this should be taken into account.
- Footnote 373 states that *"[a] mere reallocation of output across plants is usually not sufficient to expand the merging firms' joint production possibilities and to outweigh harm to consumers".* In our view, this statement suggests that an economic theory result obtained under specific modelling assumptions applies more broadly.[11] The relevant result is based on homogenous product Cournot competition where firms' market shares are determined only by their marginal costs. This seems too narrow of a basis to form a general policy presumption. A more neutral phrasing would be that *"if efficiencies are claimed to arise from reallocation of output across plants, the parties will need to show that this reallocation of output can benefit consumers".*

8 See, for example: Moresi, S. 2021. "Market definition in industries with dynamic demand", Competition Law & Policy Debate.

9 To give a case study, the modern recipe for chocolate based on "conching" was developed by Lindt in 1879, but production was limited and modern chocolate was only mass produced after Lindt, and its technology, was acquired by Sprüngli. See https://www.lindt.co.uk/history. Other industries (e.g., pharmaceuticals) will provide examples where transactions can accelerate the commercialisation of new technologies.

10 Paragraph 302(b), citing M.7630 – FEDEX/TNT Express paragraphs 516 et seq. – although we note that the relevant section of the Decision does not refer at all to organic growth as a counterfactual to economies of scale, but rather to the degree of geographic granularity required to provide an acceptable basis for accepting a network synergy.

11 See Farrell, J. Shapiro, C. 1990. "Horizontal Mergers: An Equilibrium Analysis", *American Economic Review*.

2.3. Comments on the guidelines' framework

2.3.1. Verifiability must be applied to a symmetric standard across potential harms and benefits

24. We welcome the principle, referenced at several points, that there should be symmetry in the standard of evidence for the theory of harm and theory of benefit.[12]

25. However, there are places in the text where this core principle does not seem to be followed through. For example, when it comes to quantification there is a strong emphasis on the need to quantify synergies,[13] but in relation to theory of harm, the guidelines state:[14]

> *"The Commission bears the burden of demonstrating any anticompetitive effects arising from the merger, i.e. if the merger significantly impedes the competitive process and, thus, is capable of harming consumers, without, however, having to specifically demonstrate or quantify such consumer harm in every case".*

26. We of course recognise that some theories of harm are by their nature less certain, but may still be sufficiently likely and serious that they merit proper consideration, and in turn may form sufficient grounds for remedies or a prohibition. However, in these cases the potential synergies must also be judged to a comparable standard, and it would be useful if the guidelines could set this principle out more clearly and consistently.

2.3.2. The guidelines should provide some more comfort about the level of quantification/analysis required to achieve verifiability

27. We mentioned above that the guidelines should hopefully start to resolve the "chicken and egg issue" and help move towards a common toolkit for assessing efficiencies. If this is to be realised, however, it would be useful to more clearly specify the level of evidence required.

28. Paragraph 329 is welcome in making clear that *"precise quantification may not be available"* and that, in such instances, *"the merging parties should detail the nature and magnitude of the expected efficiencies showing how they would counteract a merger's adverse effect on competition."* However, other passages including references to *"concrete evidence"* (paragraph 327) could be read as implying a stricter and more quantitative approach to assessing efficiencies than assessing anticompetitive effects.

29. We think the guidelines would benefit from a further signal that the goal is to have a rigorous testing of efficiency claims, not to create a bar that makes such claims impossible to verify. They would also benefit from a signal that the Commission is willing to discuss efficiency claims at an early stage on a without prejudice basis, where they could provide an outline as to the sort of evidence that would be satisfactory in a specific case.

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12 See, for example, paragraphs 26 and 304.

13 See, for example, paragraphs 306-308.

14 Paragraph 22.

2.3.3. Merger specificity should be based on the same counterfactual standard as the theory of harm

30. Although merger specificity is clearly important, the current language in the guidelines on merger specificity falls short. Requiring that the parties provide evidence that less anticompetitive arrangements *"would not be realistic and attainable",* or that similar cost savings "*could not be achieved to a similar extent"* absent the merger, is overly restrictive.[15] Although the guidelines also set out that such alternative arrangements should not be merely hypothetical, they do not set out the benchmark for considering them as the appropriate counterfactual.

31. More broadly, it would be beneficial for the guidelines to link merger specificity more directly to the counterfactual. There is a clear tension between considering the pre-merger outcomes as the relevant counterfactual when assessing the theory of harm, but also relying on a hypothetical arrangement (that is not observed pre-merger) when assessing merger specificity of cost savings.[16] To the extent that the cost savings have not already been achieved, but the Commission believes that they would be absent the merger, it will be important for the Commission to set out why those efficiencies were not achieved in the past, but could nonetheless be expected to happen in the future.

32. This clear link to the counterfactual is necessary to ensure a balanced and symmetric assessment of the merger, weighing potential benefits and harms equally (and therefore obtaining the best possible expected outcome for consumers).

2.3.4. Benefits to consumers

33. The guidelines require that both direct and dynamic efficiencies "*must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger*".[17] In paragraph 340, the guidelines further clarify that "*[i]t is sufficient for the Commission to establish that efficiencies compensate the harm caused to consumers in the relevant market, and not to each individual consumer*". However, according to the guidelines, "*consumer benefits that accrue only to a small share of the consumers harmed by a merger are unlikely to offset the harm*".[18]

34. A standard that would allow intervention in a merger on the basis that a certain *share* of consumers would be worse off when considering the net effects in the relevant market would not only risk preventing transactions that are conducive to overall consumer

15 See paragraphs 311 and 310 respectively.

16 For example, the reference to INEOS/Solvay at footnote 385 suggests that certain benefits were not merger-specific if each merging party *could* individually develop an equivalent know-how. However, in our view this is not the case simply on the basis that they "could" have done so, but only if they actually "would" have done so (to the same standard of likelihood as the assessment of harm).

17 See paragraphs 315 and 334, emphasis added by CRA.

18 Paragraph 340.

welfare,[19] but it would also raise the inherently contentious question of how harm and benefits must be *distributed* for a merger not to give rise to an SIEC. It would therefore be useful for the guidelines to explicitly clarify that it is sufficient for the Commission to establish that, in the relevant market, *total consumer benefits* outweigh *total consumer harm* without requiring that the efficiencies accrue to a certain share of the harmed consumers.

35. Furthermore, it would be helpful if the Commission could clarify what it means by requiring that *"[f]or direct efficiencies to bring benefits to consumers, the improved conditions should not only relate to the merging parties' activities but to the conditions in the relevant market overall, including rivals' activities".*[20]

36. We infer that the Commission may be referring to a situation in which an increase in performance by the merged firm is offset by declining performance by others. Our view is that evidence of direct efficiencies that unilaterally improve the merging parties' offering (e.g., lower prices, higher product quality) should generally be regarded as sufficient to benefit consumers, and that it is not realistic to expect the merging parties to disprove that they might be offset by changes in third-party behaviour. More generally, the guidelines should clarify that the guiding principle of the Commission's assessment is the merger's impact on consumers, rather than on competitors. Of course, if the Commission found evidence that third parties would adjust their behaviour in a way that resulted in a net detriment to consumers, that should be considered as part of the assessment.

2.3.5. Balancing harm and benefit

37. We appreciate the guidelines' systematic and careful approach to balancing the anticompetitive effects of a merger alongside its potential benefits. The guidelines recognise that harm and benefits may relate to different parameters of competition, arise over different timeframes, and differ in their likelihood of materialising. We welcome that the guidelines indicate how the Commission intends to balance such asymmetric effects.

38. However, the guidelines contain presumptions that are unwarranted and should not preclude a careful, case-by-case balancing exercise.

- The guidelines state that "*[w]hen the benefits are temporary or expected to decrease over time, it is less likely that they will be sufficient to counteract the harm*".[21] We do not see a clear justification for this presumption. A merger's harm may likewise be temporary or expected to diminish over time – for example, where the Commission expects entry to occur, albeit not sufficiently timely to fully offset the initial harm. Moreover, the guidelines themselves recognise that both harm and benefits can be assessed in net present value terms. Against this background, the guidelines should clarify that the balancing exercise is conceptually conducted on a net present value basis, taking into account the magnitude, timing, and likelihood of both harm and

19 This would be the case if the net benefits (i.e., benefits minus harm) for some consumers would outweigh the net harm for other consumers on the relevant market.

20 Paragraph 315.

21 Paragraph 351.

benefits, rather than relying on a presumption based on whether effects are temporary or expected to decline over time.

- The guidelines require the merging parties to establish the magnitude of the claimed efficiencies when their exact quantification is not possible. When benefits and harm are of the same magnitude, the guidelines state that "*it cannot be concluded that the benefits outweigh the harm without exact quantification*".[22] In cases in which an "exact" quantification of the efficiencies is not possible, the guidelines thus effectively presume that the merger's efficiencies do not counteract the harm even if the available evidence suggests that harm and benefits are broadly comparable in magnitude. The guidelines should clarify that the goal of the balancing exercise is not false precision but rather achieving sufficient confidence that the benefits of the merger are likely to offset the SIEC concern.

39. Furthermore, while it is for the Commission to establish a merger's anticompetitive effects and to carry out the balancing between the merger's likely harm and its benefits for competition and consumers, the guidelines appear to shift part of this exercise back to the parties where efficiencies cannot be precisely quantified. The guidelines provide that "*[w]here exact quantification is not possible, the merging parties have to detail the nature of the efficiencies and establish the magnitude of the expected efficiencies showing how they would counteract a merger's adverse effects on competition*".[23] However, it is questionable whether it should in fact fall to the merging parties to demonstrate "*how [the efficiencies] would counteract a merger's adverse effects on competition*".[24] While the parties' submissions should of course set out the nature of the efficiencies and explain how they translate into consumer benefits, the assessment of how, and to what extent, such efficiencies mitigate the Commission's concerns should form part of the Commission's overall assessment and balancing exercise. The guidelines should therefore clarify that the parties' role is to substantiate efficiencies and explain their relevance, without suggesting that they bear responsibility for conducting that balancing exercise.

40. Requiring the parties to demonstrate how efficiencies would counteract a merger's adverse effects on competition may also risk undermining the Commission's objective of encouraging early engagement by the merging parties on efficiencies. In practice, the ability to demonstrate how efficiencies respond to the Commission's concerns depends on those concerns having been sufficiently identified and articulated. This may limit the scope for meaningful engagement on efficiencies at an early stage and risks shifting substantive discussions to a later phase of the proceedings, thereby reducing the likelihood that such efficiencies are fully taken into account in the Commission's assessment.

2.3.6. Prioritisation of ordinary course/ex-ante evidence

41. The guidelines state that more weight will be placed on analysis that predates the contemplation of the merger. While we understand that there is a particular value to "normal

22 Footnote 395.

23 Paragraph 308.

24 Paragraph 329.

course" or "ex ante" evidence on efficiencies, we would urge the Commission not to be too absolutist in dismissing ex-post analysis.

42. The goal of merging parties ex-ante is likely to be assessing the commercial viability of their transaction and the value of the target including synergies. It is unlikely to be necessary as part of this process to analyse or verify efficiencies to the standard required to build an efficiencies defence. Further, the nature of a merger process is such that parties' access to data on each other's operations prior to concluding an agreement will be partial, and their advisors will often have access to data and evidence that is not available to the merging parties themselves (and certainly not in advance of pursuing the merger).

43. Therefore, a nuanced view will need to be taken. Evidence should of course have more weight when it is consistent with normal business practices, and the more grounded it is in real-world evidence more generally. However, that should not rule out the incorporation of synergies that were not calculated entirely on an "ex-ante" basis. For example:

- Basing a calculation of efficiencies on existing models and assumptions used in the normal course of business clearly has value – but populating those existing models with accurate data on the other merging parties' assets and volumes may not be possible to do until later in the merger process (and may only be possible to be implemented by the parties' advisors, rather than the parties themselves). The parties' advisors may also be in a position to provide greater granularity and precision to those estimates, which was not needed in the normal course of business (e.g., advisors may be able to undertake a more granular exercise in relation to country, customer category or timeframe than had commercial value/relevance to the parties ex-ante).
- In this case what benefits from being "ex-ante" (or, more broadly, consistent with normal business practice) is the basic modelling approach and assumptions – but there is value in using external consultants to apply these "normal course of business" approaches to the (confidential) data of the combined business, and to ensure that the calculations are consistent with the Commission's requirements on verifiability, consumer benefits, granularity, etc. (which may not be the same ones used in the normal course of business).
- Estimates of wholesale cost savings may be particularly convincing when they are based on evidence of savings achieved through earlier acquisitions: but this does not mean that such savings can be assumed to be zero in cases where there are no previous acquisitions on which to base real world evidence. In such cases, a reasonable best estimate will be better than an estimate of zero that is clearly incorrect.
- A distinction should be drawn between identifying *mechanisms* and building *quantified estimates.* We agree that it should require strong evidence to verify an efficiency that was not even contemplated by the merging parties at the time of entering the transaction, but we do not think it is realistic to expect precise quantification of these efficiencies ex-ante.

44. Finally, we note that merging parties will often be cautious about the extent to which they rely on efficiency estimates in making promises to shareholders on post-merger performance and returns. This natural caution (ensuring that investors can rely on estimates made when the deal is proposed as a lower bound on likely outcomes) should

not act as a "ceiling" on estimated synergies during the merger assessment process (still less as a reason to reject those synergies as "too uncertain", as was done in relation to certain categories of synergies calculated by the business prior to the merger in UPS/TNT Express, for example).[25]

45. Rather, efficiencies should be assessed with the same symmetric approach to uncertainty as the merger effects themselves (e.g., if merger effects are assessed on a "more likely than not" basis, so too should efficiencies, rather than requiring a higher degree of certainty).

46. Moreover, it should be recognised that the greater access to data afforded to the parties' advisors may well allow these estimates to be firmed up at a later stage in the process, allowing competition authorities to take account of a more precise (and often higher) assessment of anticipated likely synergies than was available to the parties' management at an earlier stage in the process.[26] This should be seen as a benefit to the merger assessment process, rather than an inherent source of suspicion, as has sometimes been the case.[27]

2.3.7. The guidelines should underline that harm to competitors due to increased efficiency is not in itself a competition problem

47. The guidelines indicate in footnote 38 that *"the fact that rivals may be harmed because a merger leads to efficiencies cannot in itself give risk to competition concerns"*, but other areas of the draft suggest the opposite view (e.g., the entrenchment theory, theories of harm based on rent extraction, and some discussion of the distinction between the effect on merger parties' innovation incentives vs. the market overall). We believe the guidelines should elevate footnote 38 to the main text and unambiguously state that the focus when evaluating efficiencies is the effect on competition and consumers and not the effect on competitors.

2.4. Out-of-market efficiencies and collective benefits

48. We welcome that the guidelines aim to clarify and provide guidance on the definition, role, and treatment of out-of-market and collective benefits in the Commission's merger assessment. While taking these effects into account allows for a more holistic assessment of a proposed merger, it may also reduce the predictability and consistency of decisions, and risks replacing rigorous, evidence-based assessments of a merger's efficiencies with wasteful lobbying efforts.

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25 See COMP/M.6570 – UPS/TNT Express, paragraphs 818-19 for example.

26 Of course, the *nature* of the synergies that are relevant to competition authorities (i.e. those that will be passed on to consumers) and investors (i.e. those that will result in a commercial return) are not identical, but will be overlapping: as synergies that allow firms to cut prices or improve services to consumers will also typically allow them to compete more effectively and profitably.

27 In UPS/TNT Express, differences between initial business estimates and later consultant estimates (based on additional data and granularity) were also given as a reason to reject verifiability of any figure above zero in relation to other categories of synergy (paragraph 867-868).

49. It is therefore essential that the guidelines set out a clear, consistent, and economically sound framework for how to assess and treat mergers that may raise competition concerns in a specific market but are likely to generate significant benefits to society as a whole.

50. **The guidelines need to specify how the standard for out-of-market and collective benefits specified in section 3.3 aligns with paragraph 300, which seems to grant the Commission a significant margin of discretion on how to account for these types of benefits.** In paragraph 357, the guidelines note that "*[o]ut-of-market and collective benefits should be the result of direct or dynamic efficiencies that are verifiable and merger-specific*", and, according to footnote 426, the Commission intends to apply the same principles for assessing verifiability and merger specificity to out-of-market and collective benefits as are applied to direct and dynamic efficiencies in markets where the merger is expected to give rise to harm. Furthermore, the merging parties must provide sufficient evidence that "*the share of the out-of-market or collective benefits accruing to harmed consumers, possibly together with the benefits accruing to these consumers in the relevant market where anticompetitive effects have been identified, are sufficient to fully compensate harmed consumers*". For out-of-market and collective benefits to be weighed against a merger's expected harm, they must therefore meet a standard comparable to that applied to other efficiencies and are only taken into account insofar as they accrue to the consumers who are harmed by the merger.

51. However, when referring to the fact that "*efficiencies may reflect advantages that also further the objectives of EU policies recognised in EU Treaties and bring benefits for customers, as well as the internal market and the society at large*", the guidelines assert that "*[t]he Commission has a margin of discretion with regard to economic matters, in weighing demonstrated efficiencies in the balance, against established harm to businesses and consumers as part of the overall competitive assessment*". To prevent a wasteful proliferation of vague claims regarding out-of-market and collective benefits that allegedly further other EU policy objectives, with a view to invoking the Commission's margin of discretion under paragraph 300, the guidelines should clarify that this margin of discretion concerns how – rather than whether – the Commission applies the standards set out for the assessment of such benefits.

52. **The guidelines' requirement that out-of-market and collective benefits are relevant only to the extent that they accrue to harmed consumers is unduly restrictive and risks limiting the role of such benefits in merger assessment.** The guidelines only regard out-of-market and collective benefits as relevant "*to the extent that they are valued by and fully compensate substantially all harmed consumers*". Given that the guidelines further require that "*the share of the out-of-market or collective benefits accruing to harmed consumers, possibly together with the benefits accruing to these consumers in the relevant market where anticompetitive effects have been identified, are sufficient to fully compensate harmed consumers*",[28] out-of-market and collective benefits accruing to consumers which are not harmed by the merger are practically irrelevant in the balancing of the merger's harm and benefits.

28 Paragraph 357.

53. While the Commission leaves open the definition of "*substantially*", the requirement that almost all potentially harmed consumers must be compensated by efficiencies effectively implies that efficiencies must render the merger an almost perfect Pareto improvement for consumers.[29] This risks not only severely diminishing the role that out-of-market efficiencies and collective benefits can play in practice, but also leading to intervention in mergers that would, on balance, *increase* total consumer welfare.

54. Consider, for example, a merger that raises competition concerns in a specific market ("relevant market"). Suppose that consumers in this market ("group A") suffer harm of 20 units as a result of the merger, while direct or dynamic efficiencies generated in the same market yield benefits of 10 units for these consumers. At the same time, the merging parties provide sufficient evidence that the merger gives rise to verifiable and merger-specific consumer benefits of 35 units in a "related market". Consumer group A participates in these gains and receives 5 units of benefits, while the remaining 30 units accrues to another consumer group ("group B"). Finally, the merger is also expected to generate efficiencies in an "unrelated market", resulting in benefits of 20 units for group B. This is summarised in the table below.

Table 1: Illustrative example of merger resulting in consumer benefits across markets

Market	Group A		Group B	Total benefits
	Harm	Benefit	Benefit	
Relevant market	20	10	-	10
Related market	-	5	30	35
Unrelated market	-	-	20	20
Total	**20**	**15**	**50**	**65**

55. In this example, total consumer benefits across both groups and the three markets amount to 65, which significantly outweighs the consumer harm (20) in the relevant market. The merger would therefore result in a substantial net increase in overall consumer welfare. However, under the guidelines' approach, only the efficiencies accruing to harmed consumer group A in the relevant and related markets are taken into account in the Commission's balancing of harms and benefits. As these efficiencies amount to only 15, they would not fully compensate the harm imposed on group A (20) and would thus be insufficient to address the identified competition concerns. In the absence of suitable

29 A *Pareto improvement* denotes a change in the allocation of resources that increases the utility (welfare) of at least one economic agent without reducing the utility of any other agent. In the context at hand, a merger that generates efficiencies which make some consumers better off, while leaving the welfare of all other consumers unchanged, would qualify as a Pareto improvement.

remedies, such a welfare-enhancing merger would therefore be prohibited under the guidelines.

56. In our view, the guidelines should allow for greater flexibility in the application of the "substantially the same consumers" principle, particularly in cases where a merger generates substantial benefits to consumers across markets that significantly outweigh the harm to competition in a specific market. This would not require any relaxation of the rigorous evidentiary standards that merging parties must meet to substantiate such benefits. Indeed, in the example above, taking into account the benefits accruing to consumer group A in the related market already presupposes that these benefits are verifiable and merger-specific. Extending the same reasoning to consumer group B's share of these benefits in the balancing of the merger's harms and benefits would, in this case, not even require any material additional assessment.

57. Allowing out-of-market and collective benefits to play a more meaningful role in merger control does not necessarily imply a departure from the Commission's established market-by-market assessment or the "same consumers" principle. For instance, where a merger gives rise to significant efficiencies that outweigh the overall harm to competition, but not the harm in a specific market, the guidelines could still require that this harm be remedied, provided suitable remedies exist that do not undermine the efficiencies that make the merger welfare-enhancing overall. A similar principle is reflected in the US 2010 Horizontal Merger guidelines: "*The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).*"[30]

58. **The assessment of out-of-market efficiencies should be nuanced in the case of multi-sided markets or vertical supply chains.** From an economic perspective, the guidelines' approach to out-of-market benefits is particularly problematic in cases where a merger's harm and benefits occur on different sides of a multi-sided market or at different levels of a vertical supply chain. Given that consumers will typically not substantially overlap across the different sides of a multi-sided market or across downstream and upstream markets, the guidelines' standard for out-of-market benefits implies that efficiencies occurring on a different side of the market or at a different level of the supply chain would be irrelevant for the Commission's balancing of harm and benefit. This is misguided not least due to the economic interdependencies between different sides of a multi-sided market or the different levels of a supply chain.

59. Multi-sided markets typically involve the presence of distinct, yet economically interdependent groups of users. These markets are often organised in the form of platforms, which are characterised by indirect network effects across user groups. Platform operators' behaviour vis-à-vis one side of the platform and, more generally, the competitive condition on one side of the market not only have an impact on consumers' welfare on that

30 US Horizontal Merger guidelines 2010, footnote 14.

side but will, due to the presence of indirect network effects, necessarily also affect users on other side(s) of the market. Efficiencies realised on one side may therefore ultimately benefit consumers on other sides of the market. By focusing narrowly on benefits accruing directly to the harmed group of consumers, the guidelines' approach to out-of-market benefits disregards how benefits arising on one side can affect other sides and artificially focuses the assessment of consumer welfare on a single side of a multi-sided market**.**

60. A similar concern arises in vertical supply chains, where different levels of the market are closely linked and outcomes at one stage affect those at other stages. Moreover, the guidelines' theory of harm based on rent extraction at the upstream level implies that harm may be established even where it does not translate into downstream harm. Given the guidelines' "same consumers" principle, benefits accruing to downstream consumers would not be taken into account in balancing the expected harm on the upstream market. The guidelines' approach may therefore lead to undue intervention in mergers that give rise to some harm at the upstream level, but are expected to increase – or at least not reduce – end consumer welfare, thereby marking a clear departure from the traditional focus on the welfare of final consumers.

61. In our view, the guidelines should acknowledge the economic interdependencies between different sides of a multi-sided market and between different levels of a supply chain and, in these contexts, allow for efficiencies accruing to non-harmed consumers to be taken into account in the Commission's balancing of a merger's harms and benefits.

62. **The guidelines should clarify the definition of out-of-market and collective benefits.** Besides our concerns regarding the limited consideration of out-of-market and collective benefits in the merger assessment, the guidelines' definition of these benefits remain vague and should be further clarified.

63. Out-of-market benefits: Paragraph 355 appears to define out-of-market benefits as efficiencies achieved in separate but *related* markets (or on different sides of a multi-sided market), provided there is a *substantial overlap* between the group of consumers harmed by the merger and the group of consumers benefiting from these efficiencies. By contrast, efficiencies arising in *unrelated* geographic or product markets (or sides of a multi-sided market) do not appear to qualify as out-of-market benefits. However, the guidelines do not specify which characteristics a market must exhibit to be considered "related" to the market in which the competitive harm arises. It also remains unclear whether efficiencies in unrelated markets are deemed irrelevant solely because harmed consumers are unlikely to form a subset of the beneficiaries in those markets, or whether additional considerations underpin the distinction between related and unrelated markets. The guidelines should therefore provide further clarification of what constitutes out-of-market benefits, as well as the criteria that efficiencies and the markets in which they arise must meet in order to qualify as such.

64. Collective benefits: Paragraph 322 defines collective benefits as the "*potential benefits accruing to a wider section of society from addressing such consumption externalities, for example as regards sustainability and resilience*". The guidelines further note: "*Collective benefits can be taken into account to the extent they benefit the consumers harmed by the merger through the internalisation of consumption externalities. For example, consumers may consider that their own purchasing decisions are too small to have an impact on market*

resilience but may value a collective change brought about by the merger that leads to a tangible increase in supply chain resilience."

65. However, the economic mechanism through which such collective benefits are generated by a merger remains unclear. In particular, the guidelines do not explain how a merger would lead to the internalisation of consumption externalities, nor who internalises these externalities and on the basis of which incentives. Similarly, the notion of a "collective change" brought about by the merger is not specified. It remains unclear why and how consumers would collectively change their behaviour post-merger to give rise to collective benefits.

66. If collective benefits are intended to capture merger-specific improvements in product characteristics valued by consumers, but are otherwise underprovided due to consumption externalities (e.g., improvements in sustainability resulting from merging party A's use of merging party B's greener technology post-transaction), the guidelines should clarify the wording of paragraph 322 accordingly and articulate more clearly the underlying economic mechanism.

3. COMMENTS ON THE HOLISTIC APPROACH TO THE COMPETITIVE ASSESSMENT

67. **The market power and competitive assessment sections of the guidelines largely codify existing practice and provide a more detailed discussion of theories of harm (including innovation theories of harm and portfolio effects).** Even though many of these were part of the Commission's existing practice, they were not discussed in the same level of detail in the previous guidelines, so this is a positive development.

68. **We see the advantages of having a single set of guidelines, but the combination of horizontal and non-horizontal guidelines results in some loss of clarity.** We understand the Commission's desire to have a single set of guidelines applying the same framework across all types of mergers. This allows the guidelines to capture mergers that may not be possible to classify neatly into "horizontal" or "non-horizontal" because they present features of both groups.[31]

69. We understand the need for the guidelines to be more comprehensive and flexible to accommodate such complex cases, but we are also conscious that the vast majority of cases the Commission reviews are likely to be easily categorised as horizontal or non-horizontal. In this context, we feel that the guidelines have lost the simple framework that the previous non-horizontal guidelines had for navigating this space – which was particularly helpful for non-experts in this area.

31 See for example the Commission's decision in Booking/eTraveli where the Commission explains that the "horizontal effects" that the merger would have led to in Booking's home market by means of higher prices and higher barriers to entry (paragraph 194) "*would need to be assessed in light of some of the considerations that can be found in the Non-Horizontal Merger Guidelines as regards the circumstances that may make it unlikely that anticompetitive effects may arise from a transaction involving companies offering complementary goods or services. In particular, these include countervailing buyer power, potential entry and efficiencies"* (paragraph 195).

70. **Either intentionally or unintentionally (due to the combination of the two sets of current guidelines) the new guidelines show a significant, but unfounded change in tone towards non-horizontal mergers.** While we welcome the push towards establishing a clearer path to the assessment of efficiencies and their trading off with harm to competition, historically, there has been a recognition that non-horizontal mergers (and vertical ones in particular) would be less likely to bring consumer harm/harm to competition than horizontal mergers, and more likely to generate efficiencies. This aspect is lost in the guidelines, which departs from the previous non-horizontal merger guidelines in two substantial ways:

71. First, the previous non-horizontal merger guidelines explicitly stated that vertical mergers were generally likely to be non-problematic given the lack of direct competition and the greater likelihood of efficiencies.[32] This explicit recognition is gone from the guidelines and only mentioned within the context of the efficiency chapter (without an assessment of their likelihood). This leaves the reader with a general perception that there is no difference between the likelihood of anti-competitive outcomes from a horizontal and a non-horizontal merger. Whilst non-horizontal mergers can also generate harm, we believe it would not be appropriate for guidelines to consider them as equally likely to generate harm as a horizontal merger, which leads to a loss of direct competition. In our view, there is a significant danger that this may lead to a chilling of welfare enhancing vertical mergers.

72. Second, the previous non-horizontal merger guidelines indicated a soft safe harbour for vertical mergers where neither party had more than 30% market share either upstream (for input foreclosure) or downstream (for customer foreclosure).[33] This has entirely disappeared from the guidelines. This is surprising, especially given that the guidelines do include a soft safe harbour for horizontal mergers (paragraph 129). Moreover, we note that 30% is the threshold for the identification of an affected market within the EU Merger Regulation. This gives the impression that non-horizontal mergers are more likely to be problematic than horizontal mergers given they do not qualify for any type of safe harbour threshold. This message would be very much counter to the economic literature, and we believe counter to the experience of past cases assessed by the Commission.

73. For the reasons above, we provide our comments on foreclosure, entrenchment and portfolio effects (section 5) separately from our comments on market power, head-to-head competition, and dynamic effects (section 4, below).

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32 This was recognised in the old non-horizontal guidelines. See non-horizontal merger guidelines paragraphs 11 ("*Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers*") to 14.

33 "*The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2,000*" Non-horizontal merger guidelines, paragraph 25. See also footnote 3 that says that the 30% should be seen "*in analogy to the indications given*" in the VBER, where there is a 30% "hard" safe harbour.

4. COMMENTS ON MARKET POWER, HEAD-TO-HEAD COMPETITION, AND DYNAMIC EFFECTS

4.1. Comments on market power

4.1.1. Dynamic competitive potential

74. The guidelines codify a dynamic assessment of market power in industries or markets where "*a static assessment of market power does not fully capture a firm's competitive strengths and weaknesses from a dynamic perspective*".[34]

75. Under this new dynamic assessment, we understand that the Commission will consider a firm's innovation and investment capabilities to determine whether it holds "*dynamic competitive potential*", even if its current market position is not consistent with market power.[35] While we welcome this dynamic approach, we have several suggestions below.

76. First, the current wording appears to cover cases where static shares are likely to understate dynamic market power.[36] There are also cases where a static market share assessment may *overstate* the competitive potential of a firm, e.g., because it obtained a strong position based on a legacy technology or has an installed base of legacy customers but is less effective at winning new customers, or because it holds large levels of debt that limit its ability to invest. This possibility is not currently covered in the guidelines, and it would be a welcome addition, as it also reflects the Commission's recent practice.[37]

77. Second, while we agree with the Commission that a firm's innovation and investment capabilities are crucial to assess its dynamic competitive potential, we note that the indicators listed in paragraphs 82 and 83 are likely to be imperfect indicators of a company's capabilities. In particular, market-wide metrics related to patent citations, R&D spend or R&D FTEs are likely to be only partially known by the parties or imperfect measures of innovation efforts, leading to imperfect measurements of market shares in terms of R&D spend or within innovation spaces.[38]

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34 Paragraph 58.

35 Paragraphs 81 and 82.

36 For example, paragraph 58 indicates that the Commission "*may […] assess"* a firm's dynamic competitive potential "*in specific dynamic settings*" where "*a static assessment of market power may be less appropriate*" and then references the Dynamic Competitive Potential section, which sets out the factors that may give rise to competitive strength in a dynamic setting.

37 In Veolia/Uniper Hungary, the Commission approved Veolia's acquisition of the Gönyű power plant in Hungary despite it then holding more that 50% of the market, on the basis that technological changes and concrete expansion plans by competitors would lower Veolia's share in the future. M.11515 - Veolia Environnement / Uniper Hungary Energetikai, 5 December 2024 (here).

38 For example, strategic patenting may lead to more citations by the same entity potentially limiting the informativeness of patent citations as an indicator of strong innovation capabilities. Further, because newer patents will have fewer citations, patent citations may underestimate the competitive significance of a new innovator.

78. A third and more minor point: we believe the Commission could clarify where one should draw the line between "*innovation-related factors*" and "*investment-related factors*". We note that such a distinction is provided in relation to Section II.C at footnote 364 and should in our view be extended to also cover Section II.B. Currently, the guidelines for instance indicate at paragraph 81 that the list of "*innovation-related factors*" includes a firm's "*investment capabilities*", which seems to overlap with the Commission's list of "*investment-related factors*" at paragraph 82.

4.1.2. Profitability as an indicator of market power

79. The Commission indicates that profit margins are "*typically higher in markets where firms have market power*".[39] The Commission then notes that it may assess whether high margins are indicative of market power by comparing them "*against profit margins in more competitive comparable markets*",[40] but "*the fact that other firms in the industry also have high profit margins does not necessarily indicate that the merging firms lack market power*".[41]

80. While we do not dispute that market power can lead to high profit margins, we worry that paragraphs 72 and 73 of the guidelines currently create a presumption that high margins are sufficient to indicate market power. In this context, we believe the Commission should spell out more clearly under what conditions it may find that high profit margins *do not* indicate market power, which for instance, could be the case in industries characterised by large upfront capital investments, or large costs of capital due to significant risks associated with the industry's underlying business model.

4.1.3. Pivotality as an indicator of market power

81. The guidelines include pivotality as one indicator of market power in mergers involving capacity constraints (paragraphs 150-151). Pivotality is measured by comparing total demand to rivals' capacity. The intuition is that if the merging parties' capacity is needed to meet total demand, this confers market power over the residual part of demand when all rivals supply at capacity.[42]

82. While pivotality may be associated with market power in some settings, such a simple structural indicator cannot be considered dispositive for establishing a theory of harm in capacity-constrained markets. Rather, the Commission should assess, based on case-specific evidence, how capacity constraints affect the merging parties' ability and incentives

39 Paragraph 70.

40 Paragraph 72.

41 Paragraph 73.

42 Pivotality, as a concept, has been typically used in electricity markets, where a single generator may become essential for meeting demand during peak hours and therefore can reduce output to increase prices. As guidelines acknowledge, where the merging parties and their rivals have significantly different variable costs, which is common in electricity markets, capacity and pivotality levels may be a less reliable indicator of when a merger may harm competition. See paragraph 152. Outside electricity markets it has only been used rarely – most prominently in M.9076 Novelis/Aleris, a merger between two aluminium suppliers that overlapped in the supply of aluminium to vehicle OEMs.

to significantly raise prices post-merger. Importantly, even where rivals lack sufficient capacity to meet *total* demand but consistently have some spare capacity pre-merger, the threat of losing *part* of their sales to rivals may, in some circumstances, render a significant price increase unprofitable for the merging parties. This should be acknowledged in the guidelines.

83. Pivotality is also a particularly weak indicator in dynamic settings. This is because, as recognised in paragraph 151 of the guidelines, rivals may have the ability and incentive to respond to price increases by investing in capacity expansions. Moreover, in markets where new contracts come up for tender or negotiation in a staggered manner, rivals' spare capacity may be sufficient to discipline the parties for the contestable demand.

84. For these reasons, we think it is correct for the guidelines to refer to pivotality as an indicator that can be used as part of the assessment of market power, but that it should be caveated to reflect the limitations set out above.

4.2. Comments on loss of head-to-head competition

85. The guidelines largely codify existing practice, but there are two areas where they appear to introduce presumptions that do not reflect the Commission's case practice, and which we do not consider justified from an economic perspective.

86. First, paragraph 127 introduces a form of structural presumption, noting that *"it requires substantial evidence pointing away from an SIEC (e.g., on lack of market power or meaningful competitive interaction between the merging firms) to conclude on the compatibility with the internal market in markets where the merged entity has high or very high combined market shares or when the markets are highly concentrated (i.e. post-merger HHI above 2,000), and the merger results in non-negligible increases in concentration levels"*. Paragraph 62 defines shares exceeding 40% as "high".

87. A structural presumption against mergers leading to shares above 40% would be a substantial change from current practice and would risk excessive focus on questions of market definition rather than a more substantive analysis of competitive effects and closeness of competition. We would therefore propose either reverting to the wording of the current HMG (paragraph 17)[43] or tightening the conditions under which paragraph 127 may apply and qualify that, even in such circumstances, an SIEC may not be found if other competitors act as a constraining influence or there is no meaningful competitive interaction between the merging parties.

43 Paragraph. 17 of the current HMG note: *"According to well-established case law, very large market shares — 50 % or more — may in themselves be evidence of the existence of a dominant market position (20). However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50 % after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40 % and 50 % (21), and in some cases below 40 % (22), to lead to the creation or the strengthening of a dominant position*."

88. Second, paragraph 128 notes that *"when one firm already has a significant degree of market power, even a limited market share increment or HHI delta may give rise to competition concerns. Where a firm is dominant pre-merger, even a very limited market share increment may give rise to competition concerns."* While we understand the concern about creeping acquisitions, removing the de minimis increment threshold for acquisitions by firms with a share of 50% or higher is likely to result in the Commission having to review transactions that have no significant impact on competition. There are industries, such as pharmaceuticals, where, because markets are defined very narrowly, shares of 50% or higher are not uncommon. We would therefore propose to either remove this paragraph or clarify the circumstances under which it is likely to apply (or not apply), including clear threshold criteria, and make clear that the countervailing factors discussed in Part II A.4 of the guidelines would be applicable here too.

4.3. Comments on dynamic horizontal effects

89. The guidelines set out three theories of harm that the Commission may consider during the assessment of mergers involving parties that hold market power or "*dynamic competitive potential*". These include the loss of *investment and expansion competition,* the loss of *innovation competition,* and the loss of *potential competition*.

90. While the guidelines' discussion of these theories of harm broadly codifies existing practice, we set out in section 3.3.1 below several comments regarding aspects of these theories of harm which we believe could be improved. We then comment on the specifics of the innovation shield in section 3.3.2.

4.3.1. Comments on dynamic theories of harm

91. **Impact of mergers on innovation incentives.** We worry that the following statement in paragraph 177 of the guidelines can be read as a presumption that mergers of firms that compete in innovation reduce innovation incentives:

> *"the closer the merging firms' innovation projects and capabilities and the larger the expected market position and margins, the weaker the merged entity's incentive will be to innovate post-merger because doing so would cannibalise the other merging party's profitable sales. Conversely, when at least one of the merging firms has strong dynamic competitive potential, even a limited degree of dynamic competitive interaction between the merging firms can lead to an SIEC. Although anticompetitive price increases may increase the merged entity's expected return on innovation, this is unlikely to offset the harm to consumers."*

92. We believe that this wording does not accurately reflect the state of the economic literature. While the economic literature does show that absent spillovers and efficiencies, mergers in concentrated industries will often reduce innovation incentives (or that, when innovation does increase due to anticompetitive price effects, this may be insufficient to offset the negative welfare effect on consumers), we think it goes too far to introduce a quasi-presumption of negative welfare effects of mergers in innovative industries. There is important scope for mergers to create synergies, internalise spillovers between the merging parties and enhance innovation incentives and, since studies on the impact of mergers on innovation incentives are still being developed (especially those considering the role of spillovers in mergers), we believe the guidelines should not adopt a wording that, further down the line, may be inconsistent with economic evidence.

93. We therefore suggest the guidelines make clear that it is only under certain conditions, for instance assuming no merger synergies or innovation spillovers, that mergers tend to reduce innovation incentives.

94. Even though efficiencies are discussed in Section II.C of the guidelines, we consider it is important to include this qualification when discussing the theory of harm. In contrast with unilateral price effects where the upward incentive effect is more clear-cut and there is more need to identify specific cost savings or other such efficiencies to outweigh a presumption of upward price effects, there is in our view more general scope for mergers to create synergies, internalise spillovers, and enhance innovation incentives.

95. Recently published economic research focuses on a specific set of circumstances, where mergers can reduce the parties' incentives to innovate or increase these incentives in a way that is not sufficient to offset the merger's impact on product prices.[44]

96. In the context of incremental innovation, Bourreau et al. (2025) show that, absent merger synergies or innovation spillovers, mergers always reduce incentives to invest in cost-reducing innovation efforts and have ambiguous effects on incentives to invest in demand-enhancing innovation efforts. They conclude based on simulations that the impact of mergers on welfare is generally negative even if incentives to innovate increase, due to the impact of the merger on prices.[45] Moraga-Gonzalez & Motchenkova (2026) provide a generalisation of this result to some forms of disruptive innovation.[46]

97. However, these studies acknowledge that this result is valid under the strict conditions that there are i) no merger synergies (i.e., no reductions in R&D or production costs); and ii) no innovation spillovers (e.g., via limited appropriability of R&D outputs, knowledge spillovers across labs, duplication of R&D efforts or infrastructure, etc.). These findings in our view are not sufficiently general in scope to justify the current quasi-presumption at paragraph 177 of the guidelines.

98. Conversely, recent theoretical economic research has also shown that, when mergers generate synergies or allow the merging parties to internalise positive spillovers resulting from each other's investments, mergers can have a positive impact on both innovation incentives and welfare, for example:

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44 See e.g., Lefouili, Y., & Madio, L. (2026). Mergers and investments: Where do we stand? *International Journal of Industrial Organization* for a review.

45 Bourreau, M., Jullien, B., & Lefouili, Y. (2026). Horizontal mergers and incremental innovation. *The RAND Journal of Economics.*

46 Moraga-González, J. L., & Motchenkova, E. (2026). "Mergers and R&D investment: A unified approach". *Tinbergen Institute Discussion Paper.* At page 6, the authors argue that: "*In single-product settings without synergies, the micro-founded examples provide little support for a positive effect of mergers on consumer surplus, even when consolidation raises R&D investment. The intuition is that, in these environments, the price effects of the merger are typically strong enough to offset the gains from higher innovation effort.*"

- Moraga-Gonzalez & Motchenkova (2026) show that mergers can increase incentives to innovate and welfare in multi-product settings where the merging parties overlap in only a subset of their product portfolios. In this scenario, a merger can increase consumer welfare if its impact on prices is limited to overlapping products while innovation impacts all products produced by the merging parties.
- Das et al (2026) show that in industries where the outcomes of innovation efforts are highly uncertain, a merger between large rivals may reduce information free-riding and thereby increase incentives to innovate.[47]

99. Further, there is ongoing research to understand the conditions under which an innovation theory of harm arises when spillovers are present. For example, Pietola, Tarantino and Zenger (2026) consider markets in which suppliers invest in R&D before competing in buyer procurement tenders and show that while merger synergies and spillovers confined to the merging parties always increase total welfare, there are conditions under which this result can be reversed if there are also spillovers to non-merging firms. That is, a merger can reduce the merging parties' investments and buyers' welfare due to internalising the negative impact on the merger partner's profits from a spillover to outsiders.[48]

100. Recent empirical research into the impact of mergers on innovation and investment incentives also provides mixed results.[49] Gugler et al (2025) for instance document an increase in patenting activity combined with a reduction in venture capital investment in technology classes impacted by mergers.[50] Recent working papers by Alezra and Berquier (2024),[51] Eisfeld (2025),[52] and Berger et al. (2025)[53] also indicate that acquisitions of startups are correlated with lower innovation efforts post-merger but may incentivise entry.

101. The literature on the impact of mergers on innovation incentives is still nascent, and its recent contributions acknowledge that the impacts of mergers on innovation incentives vary with the characteristics of the markets at issue.[54] Since the guidelines are likely to guide merging parties and practitioners for many years, the Commission should more explicitly

47 Das, K., Mayskaya T., and Nikandrova, A. (2026). "The Effect of Mergers on Innovation." *American Economic Journal: Microeconomics*.

48 Pietola, M. Tarantino, E., Zenger, H. (2026), "Mergers, Innovation Efficiencies, and the Investment Channel", Working Paper.

49 For a more detailed review of the empirical literature see Lefouili, Y., & Madio, L. (2026). Mergers and investments: Where do we stand? *International Journal of Industrial Organization*.

50 Gugler, K., Szücs, F., and Wohak, U. (2025). Start-up acquisitions, venture capital and innovation: A comparative study of Google, Apple, Facebook, Amazon and Microsoft. *International Journal of Industrial Organization*.

51 Alezra, D, and Berquier, B. (2024). "Being Acquired and innovation: an empirical study." *Working Paper*.

52 Eisfeld, Luise (2025) "Entry and acquisitions in software markets." *Swiss Finance Institute Research Paper*.

53 Berger, M., Calligaris, S., Greppi, A., and Kirpichev, D. (2025). Acquisitions and their effect on start-up innovation: Stifling or scaling? OECD Working Paper.

55 See, for example, paragraph 170.

reflect these limitations and uncertainties in the guidelines until further research resolves some of these limitations.

102. **Redirections of R&D projects and/or investments.** We believe the Commission should clarify the types of circumstances in which redirections of investments or R&D projects may result in an SIEC.

103. The guidelines note on the one hand that *"a merger may lead to an SIEC if it significantly alters investment or expansion competition processes through the […] redirection of investment projects"*[55] and that "*a merger giving rise to overlaps between R&D projects or between R&D projects and existing products"* may lead to an SIEC if it results in the *"redirection of one or both of the R&D projects or existing products*".[56]

104. However, this seems to contradict other parts of the guidelines, which acknowledge that losses to innovation competition "*may be weighed against evidence from the parties that the merged entity would have incentives to use resources liberated by a reduction in overlapping R&D workstreams to pursue other promising innovation paths of relevance to the market or customer groups in question*".[57]

105. The economics literature also established that redirections of investments can be procompetitive. Denicolo & Polo (2018) for instance show that deduplication of R&D costs can be pro-competitive in some instances.[58] Redirection of R&D investments may also be pro-competitive if the merger allows the merged entity to invest in a broader portfolio of investments or R&D projects, e.g., when greater scale allows the merged entity to mitigate the risks of uncertain R&D projects over a broader portfolio (i.e. via a type of co-insurance mechanism), or if it allows the merged entity to better "*pick winners*" among a broader set of projects.

4.3.2. The innovation shield

106. We welcome the implicit recognition of the importance of exit strategies for innovative companies, including biotech and tech startups,[59] while also setting relevant guardrails so that it only targets startup acquisitions that are least likely to lead to an SIEC, e.g., those that occur in unrelated markets or innovation spaces, or those that occur in overlapping markets and vertically-or-otherwise-related markets but where there remains sufficient

55 See, for example, paragraph 170.

56 See, for example, paragraph 180.

57 Paragraph 145.

58 Denicolò, V., & Polo, M. (2018). "Duplicative research, mergers and innovation". *Economics Letters*.

59 See e.g., the working paper by Bourreau, Marc, and Axel Gautier. *Innovation and Startup Acquisition*. No. 11569. CESifo Working Paper (latest version dated March 2026) or Phillips, Gordon M., and Alexei Zhdanov. "R&D and the incentives from merger and acquisition activity." *The Review of Financial Studies* 26.1 (2013).

competition or innovation rivalry to ensure that the acquisition is unlikely to lead to an SIEC.[60]

107. This said, given that most deals that fall under the innovation shield are deals that would in any event not be reviewable by the Commission (below-threshold acquisitions), its utility and application in its current form remain, in our view, limited. To achieve its legitimate objectives of fostering innovation, we invite the Commission to reconsider the criteria so as to more broadly grant the innovation shield to acquisitions of start-ups by non-dominant firms. We set out below some additional comments on the thresholds and criteria, which in our view could be simplified.

108. **More clarity needed on the scope of the innovation shield.** We would welcome more guidance on the set of criteria or characteristics that the Commission may consider in determining whether a company that does not qualify as an innovative small company or start-up may still be covered by the innovation shield through this channel.[61] In particular, the thresholds of the innovation shield refer to overlaps between R&D projects and existing activities and to market shares in existing markets. It would be good to clarify whether the Commission intends to apply the innovation shield not only to cases involving start-ups or small innovative companies but also to cases involving merging parties that in addition to R&D projects are also active in the market more generally.[62]

109. Second, the guidelines leave the definition of "*a small innovative company*" open to determination on a case-by-case basis.[63] While we agree with the Commission's view that the precise definition of a small innovative company can be industry-specific and will likely evolve over time, we would welcome more guidance from the Commission on the key principles it may apply in practice.

110. Footnote 272 of the guidelines indicates that the thresholds defining a "*start-up*" will be based on the 2026 *Commission Recommendation on the definition of innovative enterprises, startups and scale-ups*,[64] according to which an innovative start-up should be

60 See for example, Cunningham, C., Ederer, F., & Ma, S. (2021). "Killer acquisitions". *Journal of political economy*; Latham, Oliver and Tecu, Isabel (2020) *Beyond Killer Acquisitions: are there more common potential competition issues in tech deals and how can these be assessed?* Competition Policy International: Antitrust Chronicles; Motta, Massimo, and Sandro Shelegia (2025) "The "kill zone": When a platform copies to eliminate a potential threat." *Journal of Economics & Management Strategy*; Berger, M., Calligaris, S., Greppi, A., and Kirpichev, D. (2025). Acquisitions and their effect on start-up innovation: Stifling or scaling? OECD Working Paper; Prado, Tiago S., and Johannes M. Bauer (2022) "Big Tech platform acquisitions of start-ups and venture capital funding for innovation." *Information Economics and Policy*.

61 Criterion (b) indicates that its conditions apply to "*the specific case of an acquisition of a start-up*" which implies the other conditions may also be relevant in cases of non-start up acquisitions.

62 For example, will the innovation shield also apply when considering an overlap between one merging party's R&D project and another party's marketed product in a pharmaceutical merger that may also involve other overlaps?

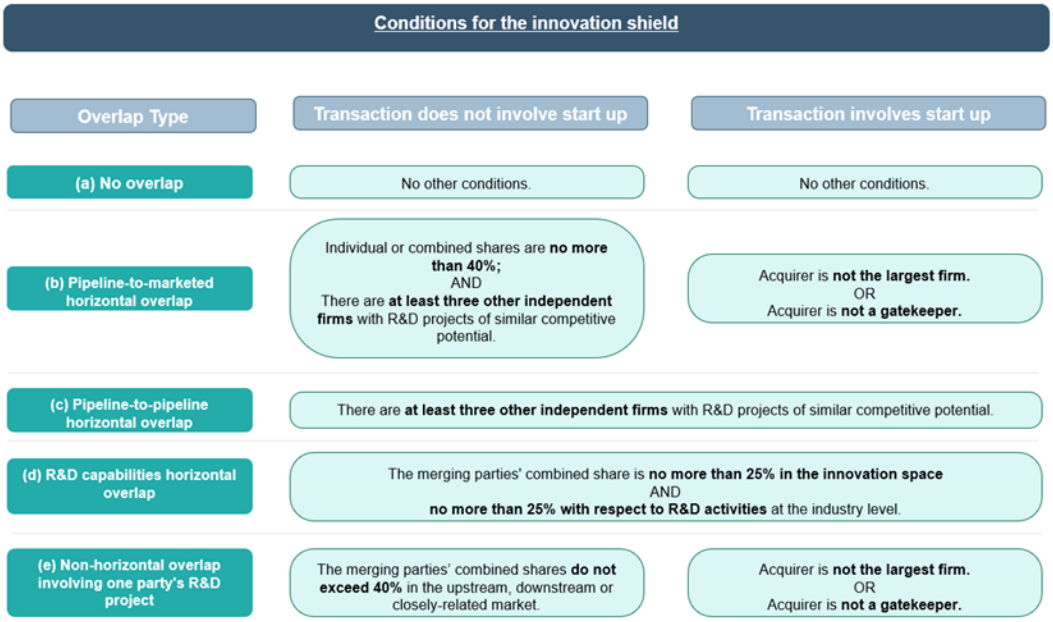
63 See footnote 271: "*The exact definition of what constitutes a small company may vary and depends on the characteristics of the relevant industry*."

64 See paragraph 14 of the 2026 Commission Recommendation on the definition of innovative enterprises, startups and scale ups available at: https://research-and-innovation.ec.europa.eu/document/download/4e3cd140-47ed-4de2-be02-af1f344a2990_en.

defined as an autonomous innovative company that employs fewer than 100 employees, whose turnover and balance sheet do not exceed EUR 10 million, and which has been operated for less than 10 years.[65] Given that the "*turnover & balance sheet criterion*" in the 2026 Recommendation has not been revised since the *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium sized enterprises*,[66] we wonder whether this criterion is still fit for purpose or whether it may effectively exclude most startup acquisitions from the scope of the innovation shield.

111. **More clarity is needed on the thresholds of the innovation shield**. The guidelines set out conditions for when the innovation shield will apply, which vary depending on i) the type of overlap (no overlap, horizontal pipeline-to-marketed overlap, horizontal pipeline-to-pipeline overlap, horizontal R&D capabilities overlap, non-horizontal overlap involving an R&D project), and ii) whether or not the merging party with the R&D project is a start-up. The figure below sets out the conditions in each scenario.

Figure 1: Conditions for the innovation shield by scenario



112. We have the following comments.

113. First, for mergers involving overlaps in R&D capabilities, the thresholds will be difficult to quantify and implement in practice. Computing shares of R&D spend in a given innovation space may require detailed data on competitors' R&D portfolio and activity, which may not be known to the merging parties. Given these difficulties, we would propose that the

65 See paragraph 2 of article 2 of the Annex of the *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361.

66 See https://eur-lex.europa.eu/eli/reco/2003/361/oj.

Commission includes additional metrics that the parties could bring forward to show that their position in the relevant R&D capability is not material, similar to the conditions set out in paragraph 81, without necessarily sticking to a numeric threshold (which will be hard to compute in any event).

114. Second, we were surprised to see the same share threshold (40%) applied to horizontal and non-horizontal mergers involving R&D projects. In the current guidelines, the share threshold under which the Commission is unlikely to find concerns is higher for vertical mergers (30%) than for horizontal ones (25%), reflecting the fact that vertical mergers do not entail the loss of direct competition and, as such, are less likely to impede competition. Given the uncertainty surrounding the success of R&D projects, we would propose relaxing the condition for non-horizontal mergers involving such projects.

115. Finally, when assessing the number of remaining competitors, if the merging parties do not have knowledge of their competitors' pipeline, will the burden fall on the Commission to elicit the R&D portfolio of rivals to determine whether sufficient innovation competition will remain post-merger? We would welcome more clarification on this point.

5. COMMENTS ON FORECLOSURE, ENTRENCHMENT AND PORTFOLIO EFFECTS

116. As explained in section 3, one of our main comments in relation to the guidelines' approach to the assessment of competitive effects is the complete removal of the soft safe harbour of 30% for non-horizontal mergers. This leads to a significant shift in posture towards mergers that have historically been considered as less likely to generate consumer harm and more likely to lead to pro-competitive efficiencies. In our view, the economic evidence, literature and case law does not support such a fundamental shift.

117. Aside from the above, and our view on the removal of the distinction between the assessment of horizontal and non-horizontal guidelines, we have the following comments.

5.1. Comments on Foreclosure

118. **The guidelines should reintroduce the distinction between different categories of foreclosure theory (e.g., input and customer foreclosure).** As an overarching comment, we note that the previous non-horizontal merger guidelines had clear and distinct discussions of input foreclosure, customer foreclosure, and conglomerate effects. It explained what each of them were, and then discussed the ability, incentive, and effects analysis for each separately. Whilst we appreciate that this may have been somewhat repetitive, they had the advantage of being simple to follow and extremely clear. The current guidelines are considerably denser and, in attempting to cover all types of foreclosure simultaneously regardless of whether input, customer or conglomerate, they are much harder to follow. We believe the advantages to having a single set of guidelines, can be preserved even if the three main theories of harm are split (as done in paragraph 211) more explicitly as well as running through the concepts of ability, incentive and effects for each of them as per the previous non-horizontal guidelines.

119. A clearer explanation of the basic types of theories of harm would help readers understand how to classify their deal. While we appreciate some matters cut across multiple theories

of harm, the vast majority of mergers – especially those not relating to tech – still fit traditional parameters of specific theories of harm which should remain clear to the reader.

120. **The ability section clarifies that the Commission will assess two factors with regards to ability: the parties' "technical possibility" to foreclose and the presence of significant market power. We welcome this clarification.** There has historically been an overlap in the assessment of the parties' ability to foreclose rivals and of the effects that a foreclosure strategy would have on rivals and competition. The new guidelines clarify the distinction between ability and effects. For example, paragraph 245 clarifies that assessing the relative importance of an input is part of the assessment of the *effects* of an input foreclosure strategy. This is a welcome change in our view.

121. Whilst we believe that it is implied in the phrasing, we suggest the Commission to bring out more explicitly that *both* the technical possibility and the existence of significant market power requirements are necessary for there to be an ability, with either of them not being sufficient on their own. It would also be useful if the guidelines could give examples of where the merging parties would not have the technical possibility to foreclose.

122. **The new guidelines place little weight on contractual evidence and reputational damages without providing adequate justification.** The Commission's discussion of contracts in paragraph 218 takes a highly dismissive view of contracts as evidence against foreclosing ability. Whilst we appreciate that contracts "*can be renegotiated and are temporary in nature*" we believe the Commission should recognise that contracts can still play a role in mergers in some cases.

- The renegotiation of contracts requires willingness from both parties. If a contract does not include a clause for renegotiation mid-term, it seems overly dismissive to assume that the foreclosing party would be able to unilaterally impose a renegotiation without incurring some sort of contractual financial penalty.
- The duration of a contract is a case specific matter. For example, if foreclosure is a concern due to the amount of time that downstream competitors would need to switch to a rival input supplier, a multi-year contract may offer them enough time to switch.

123. Furthermore, we note that the fact that the Commission has used contracts for remedies, shows that they consider that contracts are able to address the fact that contracts may be renegotiated and temporary in nature.

124. The guidelines' approach to reputational harm in paragraph 226 also requires further qualifications. The guidelines state that certain forms of restricting rivals' access would entail less reputational harm because they would be less visible and harder to detect. However, if a targeted access restriction or technical degradation of interoperability is so insignificant to be undetected by third parties, it is not immediately clear why it is significant enough to result in sufficient gains for the merged firm to have incentives. The guidelines should explain better how this works.

125. **The guidelines' references to "rent extraction effects" imply a significant widening of intervention compared to the previous guidelines.** We are concerned that this marks a significant departure from the previous guidelines and taken at face value, point towards the likelihood of mergers being blocked despite them having no adverse impact on competition.

126. In paragraph 244, the guidelines state "*[w]here the foreclosure strategy is directed at **extracting rent** from rivals, the Commission assesses whether the merged entity uses its market power to obtain higher prices or otherwise less favourable terms on rivals, causing harm in the market for the foreclosed product **irrespective of whether rivals are weakened in the market where they compete***" (emphasis added). This suggests that the Commission will find harm in cases where there is harm to a rival, even if there is no effect on competition – contrary to previous cases.[67] This is further reinforced in paragraph 245 where the guidance states: "*For **rent extraction effects**, the Commission focuses on whether the merged entity holds sufficient market power over the foreclosed product to impose adverse terms on rivals, and the importance of that product to the rival's competitive offering is a less central consideration*" (emphasis added).

127. We find the Commission's apparent move away from a harm to competition/consumers standard as advocated in the previous guidelines and towards a harm to competitors standard concerning. Whilst the existing non-horizontal guidelines did not deal directly with the concept of "rent extraction from rivals" as a problematic conduct, they do make it clear that extraction will only be a concern to the extent that it reduces downstream competition: "*When all available profits cannot be extracted, a vertical merger — even if it involves an upstream monopolist — may give the merged entity the incentive to raise the costs of downstream rivals, thereby **reducing the competitive constraint they exert on the merged entity in the downstream market.**"*[68] (emphasis added).

128. We would propose the guidelines make it explicit that harm to a rival in and of itself would not give rise to an SIEC. Any harm to a competitor that does not alter the downstream market and therefore does not result in downstream diversions from the rival to the merging parties will not have a negative impact to competition. For example, to the extent that an increase in the price of an input has no significant impact on the price that the rival charges (for example because it is only a small part of the rival's cost), then this will have minimal impact on customer decisions, and no impact on competition. As such we believe that the guidelines should make it clear that an SIEC will only be found where there is harm to the rival's *ability to compete downstream* and hence to competition/consumers more widely.

129. **The guidelines discussion of direct and dynamic incentives would benefit from more clarity on (i) what evidence and fact patterns will the Commissions consider when assessing dynamic incentives and (ii) how the Commission intends to trade-off dynamic and direct incentives to foreclose when the two point in different directions.** In the context of explaining the Commission's approach to assessing the merged entity's incentives to foreclose, the guidelines explain how the Commission is going to evaluate "direct" and "indirect" incentives to foreclose. Direct incentives are defined as "*the trade-off between the sales lost by the division implementing the foreclosure strategy and the gains*

67 For example, this would be contrary to the Commission's recent finding in Agco/Trimble (2024). Specifically, the Commission found the merged firm to have ability and incentive but concluded in paragraph 118 that there was no effect given that the price increase would be narrow with only one firm seeing its price increase. *"This limited impact is unlikely to result in increased prices in the downstream Markets."* Under the proposed guidance our reading would be that such a finding is no longer possible.

68 Paragraph 44.

from recapturing those lost sales within the operations of the merged entity" (paragraph 229) while dynamic incentives are defined as incentives "*not to capture immediate gains but to strengthen, entrench or extend its market power over time*" (paragraph 239).

130. We agree that both direct and dynamic incentives are important in the context of a foreclosure strategy. However, we believe the guidelines should also recognise that in some cases direct and dynamic incentives may point in different directions. In some cases, the merged entity may be willing to experience short term losses from a foreclosure strategy if the strategy is capable of significantly hindering the merged entity's rivals' ability to compete. Conversely, sometimes the merged entity may have short-term financial incentives to foreclose its rivals but doing so may go against its long-term strategy and business model – such that it would have a dynamic incentive *not* to engage in foreclosure.

131. The guidelines would benefit from more clarity on how the Commission intends to trade off dynamic and direct incentives in similar circumstances.

132. **The guidelines would benefit from clarifying the relevance of input substitution in the assessment of direct incentives to foreclose.** The current guidance on direct incentives to foreclose have only a limited discussion on the role that input substitution plays within an incentives analysis. This is important given that the guidelines apply the rule of thumb that "*high [absolute] profit margins on diverted sales and low [absolute] margins on lost sales support a greater incentive to foreclose*". (paragraph 230). The concern is that in many cases where the input is a small part of the total costs, the absolute margins downstream will be much higher than the upstream margins. However, where this is the case, this raises a question on whether the input provides the ability to foreclose the downstream market. The fact that upstream margins are much lower than downstream suggest that downstream firms have a credible threat to substitute the merged firm's input, as otherwise, the total margin in the supply chain would not be split in a way that favours the downstream firms.

133. In such instances, an analysis of incentives that fails to incorporate this input substitution would be incomplete, because with input substitution diversion from lost upstream sales to downstream sales of the merged firm will be significantly lower than the downstream diversion (i.e. the rate at which the merged firm captures sales lost by downstream rivals) due to departure rates being low. Ignoring input substitution would therefore risk incorrect conclusions on incentives, this is especially relevant in cases where absolute upstream margins are low compared to absolute downstream margins.

134. Whilst the guidelines recognise that low profits on lost volumes may signal limited market power and therefore be associated with smaller departure rates (paragraph 232), it does not explain the impact that this will also have on the incentive analysis. Specifically, that input substitution implies significantly lower diversions and therefore lowers the direct foreclosure incentives.

135. Furthermore, in paragraph 232 there is a statement that refers to gains from total foreclosure mostly arising dynamically by depriving rivals of scale. This seems out of place as there is a separate section discussing dynamic incentives (starting in paragraph 239). Moreover, with respect to the statement on depriving rivals of scale, when the departure rates are small, the loss in scale will also be small, which makes dynamic gains less likely.

This discussion needs to be shifted to the dynamic section and made clearer to be useful as guidance.

136. **The guidelines need to clarify what is meant by direct incentives for customer foreclosure and how those will be assessed.** Whilst customer foreclosure is only mentioned in passing within the sections, paragraph 238 suggests that if post-merger, the downstream partner buys from the upstream partner (rather than a rival), this constitutes an incentive to foreclose. However, this logic seems to undermine the ability for vertical efficiencies to reduce downstream consumer prices. Specifically, post-merger the elimination of double marginalisation provides a direct incentive for the merged firm to buy the input internally, rather than from rival upstream suppliers, and is an efficiency (as stated in paragraph 302). To state that this is an incentive to foreclose appears to imply that the efficiency is a harm rather than a benefit.

137. The guidelines appear to present the cost savings from vertical integration, as direct incentives for customer foreclosure. We believe this would make no sense. Whilst we acknowledge that it is possible that no longer purchasing from a third-party supplier may, in the longer term generate gains if the upstream rivals become a weaker constraint - due to losing scale or investing less – this potential is not a direct incentive but is rather part of the assessment of dynamic incentives. We strongly suggest that the guidelines clarify that the mere bringing of supply in-house post-merger to take account of lower input prices should not be considered as generating a direct incentive to foreclose.

138. **The guidelines should be clearer that the concern with mixed bundling is not that the merged entity may provide a cheaper bundle, but that the standalone price(s) increase(s).** The guidelines refer to mixed bundling as a potential leveraging strategy relevant to conglomerate foreclosure but do not qualify when mixed bundling would amount to leveraging. If the merged firm's incentives lead to the same (or lower) standalone prices and to a bundled price that is lower than the sum of the standalone prices, this leads to lower prices for consumers. This is akin to a vertical merger where the merged firm has no incentives to increase the input price to downstream rivals but has incentives to reduce its downstream price due to elimination of double marginalisation. In this case, the mixed bundle may lead downstream rivals to lose sales to the merged firm, but this is due to the vertical efficiency rather than an outcome of leveraging.

139. Instead, when the standalone prices of complement products used in fixed proportions are increased compared to their pre-merger levels mixed bundling leads to leveraging. This has the same effect as increasing the input price to downstream rivals in the vertical context. That is, a consumer looking to buy a mix-match package with one product from the merger firm at a standalone price and one product from a rival would face a higher total price unless the rival lowers its margin. However, when the products are independent this effect on rivals does not arise because a consumer does not need to buy both products to realise value from the rival's product.

140. **The guidelines require further detail to explain some of the mechanisms described**. There are several places in which the guidelines are relatively brief, or oversimplistic, in describing instances that may impact foreclosure. As an example, the direct incentives section states that: "*Inputs that can be used in several value chains may give rise to increased incentives for foreclosure. In that case, the merged entity may be more likely to*

foreclose its rivals without incurring significant losses upstream as it can redirect sales to customers active in other value chains that use the same input, reducing the economic costs of such a strategy".[69] We believe this is oversimplistic, as this mechanism would likely require specific conditions to be satisfied. If a firm's product can be an input to industry A – where foreclosure may take place – and industry B, selling more to industry B would under normal conditions replace rival capacity supplying that industry, and logically one could assume that this could be directed to foreclosed rivals in industry A (which is similar to the point made around freeing up capacity from independent firms discussed in paragraph 223 of the guidelines). For alternative value chains to raise a concern there needs to be an asymmetric constraint, i.e., the firm's higher sales to industry B does not result in more volumes flowing into A from other suppliers to industry B whose sales were displaced. At a high-level, we consider that the more complex the value chains, the less clear cut are the incentives for a foreclosure strategy.

5.2. Comments on Entrenchment

141. **In our view the section on entrenchment of a dominant position needs to recognise more explicitly the trade-off between anticompetitive effects from entrenchment and the benefits of integrating complementary (or "closely related") products.** The guidelines explain that entrenchment of a dominant position occurs "*when the merged firm gains control over certain assets in a way that structurally creates or reinforces existing barriers to entry and expansion*"[70] and that "*entrenchment may raise independently*" of foreclosure strategies.[71] They also describe how theories of this type would likely be explored when an already dominant firm is acquiring an asset which is in some shape or form complementary to the service they offer in their "core market". Indeed, the guidelines present an example where "*the acquiring firm may commercially bundle or tie the acquired assets to create or extend its ecosystem and leverage market dynamics like network effects*" which suggests the merger involves complementary goods.[72]

142. While we understand that, in line with what is described in the context of head-to-head competition, the Commission does not apply a *de minimis* rule to increments in market shares, this risks being excessively strict in instances where consumers may also receive benefits from the combination of complementary products or the integration of one product into a wider platform. The current non-horizontal merger guidelines acknowledge specifically how *"[i]ntegration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold*."[73] This efficiency dynamic is only recognised later

69 Paragraph 237.

70 Paragraph 252.

71 Paragraph 259.

72 Paragraph 256.

73 Non-horizontal merger guidelines, paragraph 14.

in the guidelines.[74] This risks suggesting that the Commission views *any* increase to barriers to entry in the presence of a dominant firm as anticompetitive.

5.3. Comments on Portfolio Effects

143. We welcome the new guidance on portfolio effects, particularly given its recent prominence in the Mars/Kellanova case (in which CRA acted for Kellanova). However, we believe the section could benefit from an introduction that states that in many cases a merger is unlikely to change the relative bargaining power between manufacturers and wholesalers or retailers. Whilst a larger portfolio increases the cost of retailers walking away from suppliers, it also increases the cost for the supplier when retailers walk away. Hence, the key question is whether the merger changes the *relative* bargaining power between the parties.

144. In this context we consider that the guidance is in danger of over simplifying the issue in the statement that "*This may be the case because, if negotiations fail and the merged firm's products are delisted, a proportion of consumers who previously shopped at the retailer may shift part of or all their purchases to competing retailers, thereby significantly harming the retailer, while the merged firm may recapture some of the lost sales through other retailers".*[75] This statement could be interpreted to suggest that simply putting the two portfolios together could achieve this – however what is needed is that with post-merger joint delistings more customers switch to competing rival retailers relative to the sum of the pre-merger separate delistings. In other words, there are some consumers whom the retailer loses *only when both portfolios are unavailable simultaneously* (and to keep those consumers the two portfolios are substitutes). We suggest that the guidelines clarify this.

145. Second, one of the key findings in Mars/Kellanova was that for an adverse portfolio effect to be likely there needs to be market power in at least one product on both sides. The guidelines however do not make this explicit. Indeed, in the statement that "*Typically, the larger the degree of pre-existing market power and the wider the range of markets in which the merging firms hold market power, the more likely the merger will result in anticompetitive effects",*[76] the guidelines give the impression that it is sufficient for only one side to have pre-existing market power rather than both sides. Once again, a clarification that market power on both sides is necessary for there to be a portfolio effect would be welcome.

146. Finally, we note that whilst bringing two portfolios together can increase the relative bargaining power of a manufacturer versus retailers, it may also decrease relative bargaining power. This is because under separate delistings of the merging portfolios, the same consumers may be switching to rival retailers. Hence, they would be considered as switchers in both negotiations. However, when the portfolios are negotiated jointly, these consumers can only switch once – reducing the number of switchers under joint negotiations and therefore reducing the manufacturer's bargaining power. In other words,

74 Paragraph 302.

75 Paragraph 289.

76 Paragraph 290.

to keep some consumers the retailer needs both portfolios (and the two portfolios are complements to keep those consumers). We believe that a complete statement of the incentives should include this point, even if it is within a footnote.

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