EXPERT PAPER

ERT Contribution to the Review of the Merger Guidelines on the Legal Criteria and Standard of Proof for Efficiencies

INDUSTRIAL & COMPETITION POLICY

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I. PURPOSE OF THE PAPER

The purpose of the paper is to present a targeted, legally grounded proposal for the review of the Horizontal Merger Guidelines (the "Merger Guidelines")[1] with respect to the legal criteria and standard of proof applicable to the assessment of efficiencies. The paper operates on the premise that revisions are permissible if they remain consistent with Regulation (EC) No 139/2004 ("EUMR")[2] and the case law of the Court of Justice of the European Union ("CJEU", together with the General Court the "EU Courts"). It examines whether the current treatment of efficiencies under the Merger Guidelines imposes requirements that go beyond what EU law mandates, and identifies the scope for revision that preserves effective enforcement while restoring internal coherence, legal symmetry, and procedural fairness in merger assessment within the framework of the EUMR and the jurisprudence of the EU Courts. The paper (i) sets out the legal framework for efficiencies under the EUMR, as well as the criteria for assessing efficiencies under the current Merger Guidelines (**Section II**), (ii) analyses the case law of the EU Courts and assesses the extent to which that case law constrains or permits revisions to the (application of the) efficiency criteria in the Merger Guidelines (**Section III**), and (iii) taking into account the shortcomings of the current approach to assessing efficiencies develops specific proposals to reform the current approach with respect to the application of the legal criteria and the standard of proof, within the analysed limits of the EUMR and the case law of the EU Courts (**Section IV**).

II. LEGAL FRAMEWORK & CRITERIA

1. LEGAL FRAMEWORK FOR EFFICIENCIES UNDER THE EUMR

Article 2(1)(b) EUMR states that, in appraising a concentration, the European Commission (the "Commission") shall take into account "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*".

Recital 29 EUMR further provides that "*it is appropriate to take account of any **substantiated and likely efficiencies** put forward by the undertakings concerned. It is **possible that the efficiencies brought about by the concentration counteract the effects on competition**, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The **Commission should publish guidance on the conditions** under which it may take efficiencies into account in the assessment of a concentration*".

The legislative history confirms that efficiencies were deliberately incorporated into the EUMR to invite merging parties to advance any efficiency claims,[3] without imposing excessive evidentiary burdens.[4]

2. CRITERIA FOR ASSESSING EFFICIENCIES UNDER THE CURRENT MERGER GUIDELINES

The Merger Guidelines – which on this point apply equally to non-horizontal mergers[5] – provide that efficiencies may be taken into account only where they **benefit consumers**, are **merger-specific** and are **verifiable.** This cumulative "three-prong" efficiencies test does not appear as such in the EUMR itself, but is a Commission-developed operational test inspired by economic literature on efficiencies, international merger control practice (in particular the U.S. Merger Guidelines' concept of "*cognisable efficiencies*" requiring efficiencies to be merger-specific, verifiable and to benefit consumers), and the internal logic of Article 101 (3) TFEU, which similarly require a "*fair share to consumers*" and "*indispensability*". It was first articulated in EU merger control in the 2002 Draft Horizontal Merger Notice (which later became the 2004 Horizontal Merger Guidelines).[6]

In practice, the Commission has implemented these criteria through:

- an in-market pass-on requirement (i.e. the **consumer benefit requirement** is operationalised by requiring that efficiencies "*benefit consumers* ***in those relevant markets where it is otherwise likely that competition concerns would occur***"[7]),
- a demanding '*no less anticompetitive alternatives*' test (i.e. the **merger-specificity** criterion is implemented through a requirement that the parties demonstrate the **absence of** "*less anticompetitive, realistic and attainable alternatives*"[8]), and
- a high evidentiary threshold approaching reasonable certainty (i.e. the **verifiability** criterion is operationalised by requiring the Commission to be "*reasonably certain*" that efficiencies will materialise, and that efficiencies **be timely and quantified**, while placing the evidentiary burden on the merging parties to substantiate their claims with internal documents, expert studies and concrete data)[9].

This operationalisation of the three-prong test reflects policy choices rather than explicit requirements flowing from Article 2(1)(b) or Recital 29 EUMR.

III. WHAT ARE THE LEGAL BOUNDARIES SET BY THE CASE LAW OF THE EU COURTS?

1. HAS THE CJEU CONFIRMED THE CRITERIA SET IN THE MERGER GUIDELINES? / WHICH MARGIN OF CHANGE TO THE MERGER GUIDELINES DO THE CJEU PRECEDENTS LEAVE?

The EUMR and the case law of the CJEU do not prevent the Commission from revising the Merger Guidelines, even though they set certain legal boundaries. Crucially, the existing case law does not validate the efficiency criteria as currently formulated in the Merger Guidelines as such, but rather reviews whether the Commission has correctly applied and interpreted them in accordance with EU law. Accordingly, those boundaries do not in any manner prevent the Commission from revising the present wording of the Merger Guidelines or from adopting a less restrictive interpretation of the efficiency criteria, provided that any such revision remains within the boundaries of EU law, in particular the EUMR and the CJEU's case law.

In the recent *CK Telecoms* judgment, the CJEU did not validate the content of the Merger Guidelines, nor did it endorse the three-prong test as such. The CJEU merely recalled, by reference to Recital 29 EUMR, that the Commission should publish guidance on how it assesses concentrations, including the conditions under which it takes efficiencies into account, and that where it does so (here the Merger Guidelines), it binds itself to apply those guidelines and may not depart from them without justification.[10] Accordingly, if the Commission wishes to adopt a different approach, it must simply revise its guidelines.[11]

At the same time, the Court emphasised that the Merger Guidelines are not rules of law and cannot bind the EU Courts. As a result, the Courts retain full jurisdiction to review the Commission's interpretation and application of them in the light of EU law.[12] Moreover, the CJEU confined itself to defining the allocation of, and standard applicable to, the burden of proof in relation to efficiencies exclusively on the basis of the EUMR and its implementing regulation, and not on the basis of the Merger Guidelines, which again demonstrates that this judgment does not endorse the manner in which the standard of proof is formulated in the current Merger Guidelines.[13]

Accordingly, it follows that EU case law does not confine the Commission to the efficiencies criteria as presently set out in the Merger Guidelines or to their current interpretation. Within the limits laid down by the EUMR and the Implementing Regulation in particular, the Commission retains discretion to revise those criteria and to recalibrate the standard and modalities for the assessment of efficiencies.

2. EU CHARTER OF FUNDAMENTAL RIGHTS (ART. 41) AND CASE LAW SUPPORTS "PROCEDURAL EQUALITY OF ARMS" INCLUDING FOR THE STANDARD OF PROOF

In *CK Telecoms*, the CJEU addressed the standard of proof in merger control, rejecting asymmetric evidentiary thresholds. The Court held that Articles 2(2) and 2(3) of the EUMR are symmetrical and do not impose a higher standard of proof for prohibiting a concentration than for clearing one.[14] This symmetry implies that efficiencies, when weighed against competitive harm, cannot be subjected to a more stringent standard of proof (particularly regarding the degree of certainty required), than that applied to the establishment of harm.

Moreover, the CJEU in *CK Telecoms* confirmed that the inherently prospective nature of merger review requires a standard of proof lower than that used in *ex post* antitrust investigations.[15] The Commission must demonstrate, based on a "***sufficiently cogent and consistent body of evidence***", that a given outcome is "***more likely than not***".[16] A requirement to demonstrate a "*strong probability*" of harm would be incompatible with the forward-looking character of merger assessment and would unduly constrain the Commission's discretion. This reasoning applies equally to countervailing factors under Article 2(1)(b) of the EUMR. As the CJEU has affirmed a "more likely than not" standard for merger control, applying a higher standard to efficiencies would contradict the Court's holding and upset the symmetry between Articles 2(2) and 2(3) of the EUMR.

This requirement for symmetry is reinforced by the procedural guarantees in Article 41 of the EU Charter and the case law on rights of defense. In *UPS II*, the CJEU affirmed that the Commission may rely on probabilistic and model-based evidence to substantiate theories of harm, provided that such evidence is disclosed and subject to adversarial scrutiny in order to ensure "***that the procedure is fair, in accordance with the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union***".[17] By symmetry, the Commission cannot exclude efficiency claims merely because they are forward-looking or probabilistic. To tolerate probabilistic reasoning for harm while rejecting it for efficiencies would undermine the procedural equality of arms and fairness enshrined in the EU Charter that the Court expressly sought to protect in *UPS II*.

This approach is also consistent with *Tetra Laval*, where the CJEU acknowledged that in a prospective analysis, "***the chains of cause and effect are dimly discernible, uncertain and difficult to establish***", and that therefore, "*the quality of the evidence produced […] is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.*"[18]

The principles from *UPS II* and *Tetra Laval* confirm that probabilistic, evidence-based forecasting is unavoidable in merger control; uncertainty does not disqualify an analysis but heightens the evidentiary discipline required. This same logic must apply not only to harm but also to efficiencies. This is already what the Commission is doing for harm and there is no reason not to apply the same standard to efficiencies. Where efficiency claims concerning long-term innovation, technical progress, or dynamic investment effects are by nature uncertain, they cannot be dismissed simply because they are probabilistic, provided they are substantiated by coherent evidence and economic reasoning.[19]

The aforementioned EU case law confirms that the strict criteria for efficiencies currently embedded in the Merger Guidelines – in particular the "**reasonably certain**" standard, the limitation to "timely" **short-term materialisation** of efficiencies, and the requirement to demonstrate the **absence of any less anticompetitive alternatives** to the proposed merger – are neither required nor suggested by the EUMR. On the contrary, the Courts have consistently emphasised that merger control is inherently prospective, probabilistic and effects-based, and that all relevant factors in the appraisal of a concentration must be assessed under a symmetrical evidentiary framework. EU case law further supports the reincorporation of a genuinely balanced, two-sided assessment into merger analysis, in which predicted harms and countervailing considerations must be assessed under the same evidentiary discipline, rather than subject to structurally asymmetric thresholds. Where the Commission may rely on forward-looking, model-based and probabilistic evidence to substantiate theories of competitive harm, it cannot, consistently with Articles 41 and 47 of the EU Charter, discount efficiency claims merely because they involve uncertainty or unfold over longer time horizons.

3. CASE LAW DOES NOT REQUIRE AN EXCLUSION OF OUT-OF-MARKET EFFICIENCIES

The current operationalisation of efficiencies under the Merger Guidelines is not mandated by the case law of the EU Courts, also as regards the Commission's categorical exclusion, in practice, of any out-of-market efficiencies.

First, there is, to date, **no judgment of the EU Courts, in particular in the field of merger control, that addresses – let alone excludes – the relevance of efficiencies arising in markets other than those in which the competitive harm is identified.** This has been confirmed by the Commission itself.[20]

Second, even the case-law pertaining to the consumer-benefit requirement[21] in Article 101(3) TFEU is not limited to benefits arising in the relevant market where the restriction occurs. On the contrary, the EU Courts have expressly recognised in the context of Article 101(3) TFEU (including, in particular, the *Mastercard* judgment, on which the Commission has relied to justify its restrictive approach to out-of-market efficiencies in merger control) that one need to look at the "***overall** effect on consumers in the relevant **markets***"[22] and that **appreciable objective advantages may arise not only on the relevant markets but also on other markets.**[23] This suggests that efficiencies should be assessed across all relevant markets. While the EU Courts have also held that advantages arising on other markets cannot "*in themselves*" compensate for competitive disadvantages in the affected market **in the absence of any** appreciable objective benefit there, particularly where the consumers on those markets are not substantially the same,[24] they have not excluded out-of-market efficiencies as such, nor specified the weight they may carry once some (at least minimal) in-market benefit is established. The Commission has nevertheless invoked that case law to argue that, "*in line with the Mastercard case law, where efficiencies arise outside of the affected markets, these efficiencies can only be accepted by the Commission if the benefits cover substantially the same customers otherwise harmed by the merger*"[25]. However, as demonstrated above, a careful reading of this case law does not sustain the restrictive interpretation attributed to it by the Commission, whose reading overstates the judgments' restrictive implications and extends it beyond what the Courts in fact held.[26]

In the absence of any case law of the EU Courts confining cognisable efficiencies in the merger context to in-market efficiencies, given that even under Article 101(3) TFEU the EU Courts have accepted that efficiencies may arise outside the affected market (albeit not in the absence of any in-market benefit where the consumers are not substantially the same on those markets), and in light of the fact that Article 101(3) TFEU operates in a structurally different and more restrictive legal setting (as a derogation from a Treaty-level prohibition that must therefore be narrowly construed), it is questionable whether the limitations developed in the Article 101(3) case law can be transposed by analogy to the balanced assessment under the EUMR at all. At a minimum, however, a comparable openness to the consideration of out-of-market efficiencies must also apply in a merger assessment, so that out-of-market efficiencies which materialise in markets where there is an overlap amongst consumers can also be taken into account.

IV. CONCRETE REVISIONS OF THE MERGER GUIDELINES WITHIN THE BOUNDARIES OF THE EUMR AND EU CASE LAW

1. SHORTCOMINGS OF THE STATUS QUO

While the three-pronged test set out in the current Merger Guidelines remains valid in principle, the Guidelines should be revised, within the limits of the EUMR and the EU Courts' case law analysed above, so as to address the shortcomings of the current approach to assessing efficiencies, which are addressed below and warrant a less restrictive approach to efficiencies.

a. SHORTCOMINGS RESULTING FROM THE HIGHER STANDARD APPLIED TO EFFICIENCIES (CONCERNING BOTH THE MERGER-SPECIFICITY AND VERIFIABILITY REQUIREMENTS) VERSUS HARM

Standard of proof. The current approach subjects efficiencies to a systematically more demanding evidentiary standard than theories of harm, thereby creating asymmetry in the standards applied to these two assessments. While competitive harm is assessed under a forward-looking, probabilistic framework, under which the Commission must show that anticompetitive effects are more likely than not to materialise, efficiencies are subject to a "reasonably certain" and "timely" short-term materialisation standard, and a requirement to exclude any less anticompetitive alternatives to the proposed merger. This asymmetry is difficult to reconcile with the structure of Article 2 EUMR and with fundamental principles of procedural fairness, including equality of arms to expressly provide that the "more likely than not" standard applies symmetrically to both competitive harm and efficiencies.

The disconnect between the legal framework and the Commission's enforcement practice is illustrated by the fact that **no merger has been approved solely – or even predominantly – on the basis that efficiencies outweighed anticompetitive effects.** Although the Commission has occasionally acknowledged the existence of efficiencies, clearances have invariably been based on the absence of significant impediments to competition, the failing-firm defence, or remedies, rather than on efficiencies outweighing competitive harm. Examples include *Orange/Jazztel*[27], *FedEx/TNT Express*[28], *Orange/MásMóvil*[29], *TomTom/Tele Atlas*[30], *Nynas/Shell*[31], and *Aurubis/Metallo*[32]. Efficiencies were sometimes acknowledged – but to a very limited extent and in any case they were never determinative (in part or in full) for a full clearance.[33] This suggests that the efficiency assessment, as currently applied, does not function as the balancing mechanism envisaged by Article 2(1)(b) and Recital 29 EUMR, as well as the CJEU's interpretation thereof, but as a rigid and constraining structure that effectively precludes efficiencies from exerting meaningful influence on the substantive assessment, rendering the efficiency assessment largely non-functional in practice.

Additionally, an empirical analysis of EU merger decisions between 2012 and 2023 confirmed that efficiency claims most often fail not because they are irrelevant in principle, but because they are considered insufficiently verifiable, particularly where they concern dynamic, long-term or innovation-related efficiencies.[34] The study's findings further indicate that efficiencies are frequently rejected due to the absence of robust evidence demonstrating that they are likely to materialise within a short timeframe, rather than because they lack economic plausibility or potential consumer relevance.[35] This reinforces the conclusion that efficiency claims remain largely non-functional in practice, because the verifiability threshold applied by the Commission operates as a decisive filter that efficiency claims rarely overcome. It further highlights the lack of clarity for merging parties as to the level of detail and certainty required, pointing to the need for the Commission to specify more clearly the quantitative and qualitative evidence expected.

Time horizon. In dynamic markets, however, most important efficiencies materialise over extended time horizons, yet the Merger Guidelines accept only those which are short-term and static and therefore by default disregarding longer-term, dynamic efficiencies.

Conversely, when assessing harm, the Commission's increasingly explicit willingness to rely on innovation theories of harm further illustrates the "one-sided visibility" concern of the current approach: in *Dow/DuPont*, the Commission treated reduced innovation incentives and diminished innovation competition (*e.g.*, regarding the reduction of innovation competition for pesticides) as a central harm mechanism and required extensive divestments of R&D capabilities as a condition of clearance,[36] reflecting an approach that recognises dynamic effects as competitively relevant even where they are forward-looking and complex. In this regard, if innovation can serve as a basis for prohibiting mergers, it should likewise be taken into account as a factor supporting their clearance.

The existing approach risks undervaluing precisely those efficiencies most relevant to innovation-driven and investment-intensive sectors and creating the upmost consumer welfare in long run thereby biasing enforcement against dynamic, investment-driven mergers and entrenching a static focus on short-term efficiencies. Furthermore, EU policy priorities on the green and digital transition, competitiveness, and security of supply require a merger control framework capable of capturing dynamic efficiencies, rather than focusing predominantly on short-term efficiencies.[37] A merger framework that systematically ignores efficiencies materialising in the long term therefore **risks disincentivising precisely the forms of long-term investment and industrial scale** that EU policy identifies as critical to competitiveness and strategic autonomy.[38]

b. SHORTCOMINGS RESULTING FROM THE NEAR-CATEGORICAL EXCLUSION OF OUT-OF-MARKET EFFICIENCIES (BENEFIT TO CONSUMERS REQUIREMENT)

The near-categorical exclusion of out-of-market efficiencies under the Merger Guidelines is increasingly difficult to reconcile with economic logic and the EU's policy priorities. As emphasised in the **Letta**[39] and **Draghi**[40] Reports, Europe's competitiveness, productivity and resilience depend on scale, innovation and long-term investment, many of which generate efficiencies across markets. There may therefore be cases in which the net outcome for EU consumers is clearly positive, even if a subset of customers experiences limited or temporary detriment. Yet the Merger Guidelines continue to privilege in-market efficiencies.

In some markets, however, **efficiencies commonly arise across markets and along supply chains** (*e.g.,* shared data infrastructure, multi-product R&D, joint cloud/compute optimisation, interoperability improvements, transport, storage, recycling), meaning they are not restricted in a single relevant market. Yet, the Merger Guidelines' conditions for efficiencies are applied in a way that is limited to in-market efficiencies. At the same time, the competitive-harm is increasingly considered at cross-market and ecosystem levels (*e.g.,* access degradation/foreclosure through key inputs, leveraging data advantages, and ecosystem expansion/entrenchment),[41] i.e., the Commission takes a broader cross-market lens when formulating theories of harm than when crediting efficiencies. However, the same industrial realities, and multi-sided business models can generate both cross-market harms and cross-market efficiencies; treating only the former as analytically "visible" may result in a distorted effects-based assessment. This concern is also expressed by Walckiers et al.,[42] who observe that limiting the efficiency assessment to in-market efficiencies systematically undervalues efficiencies where mergers generate positive externalities, particularly in innovation, sustainability and resilience. According to the authors, this uneven balancing leads to an over-weighting of competitive harm and increases the risk that welfare-enhancing mergers are prohibited or cleared subject to remedies that undermine the very efficiencies and broader socio-economic benefits the transaction could deliver.

Existing legislation in other areas of EU competition law, as well as at national level, already demonstrate a trend towards recognizing out-of-market – in particular sustainability-related – efficiencies. At EU level, the **revised antitrust Horizontal Guidelines** introduced a dedicated chapter on **sustainability agreements**, recognising efficiencies such as cost reductions, innovation, product variety, and process improvements, and distinguishing between individual use value benefits, individual non-use value benefits, and collective benefits accruing to **a wider section of society beyond consumers in the relevant market**.[43] Although these Guidelines do not yet go far enough, they represent an important step towards acknowledging out-of-market sustainability efficiencies. This trajectory is further reinforced by recent national developments, including in the Netherlands[44] and Belgium[45], which demonstrate an increasing willingness to recognise collective benefits and, to take account of efficiencies extending beyond the relevant market. Additionally, the **Foreign Subsidies Regulation ("FSR")** also expressly requires a broader **balancing test** in which the Commission weighs the negative effects of a foreign subsidy (i.e., distortion of the internal market) against positive effects.[46] Importantly, those positive effects are not confined to relevant markets where the foreign subsidy may have negative effects, but include effects linked to the development of any subsidised economic activity on the internal market and may extend to "***broader positive effects in relation to the relevant policy objectives, in particular those of the Union.***" The FSR Guidelines further specify that "*in the context of the balancing test, relevant policy objectives could include for instance policy objectives which are recognised in Union law, such as those established by the Treaties and policy objectives aiming at promoting or protecting rights guaranteed by the Charter of Fundamental Rights. They can concern, in particular, a high level of environmental protection and social standards, and the promotion of research and development.*"[47]

Lastly, several national competition authorities already apply more flexible and context-sensitive approaches to assessing efficiencies in their merger control enforcement, showing a greater willingness to accommodate cross-market efficiencies, including quality-related, investment-driven, and rivalry-enhancing[48] efficiencies.

In **Germany,** for example, the wording of the Gesetz gegen Wettbewerbsbeschränkungen ("GWB") can accommodate a broader interpretation that is not limited to in-market efficiencies. While the primary competitive assessment under Section 36(1), sentence 1 GWB[49] focuses on effects in the affected market,[50] efficiencies arising in other markets may also be taken into account under the balancing clause in Section 36(1), sentence 2, no. 1 GWB[51].[52] Under the balancing clause, a merger is cleared if the companies prove that the merger will improve the conditions of competition in a different market ('improved market'); the improvements must outweigh the impediment to competition in the relevant competition market ('impaired market').[53] In addition, while efficiencies considered by the Bundeskartellamt must affect key parameters of competition such as price, quality or innovation, broader economic benefits and public interest considerations may be taken into account separately in the context of a ministerial authorisation under Section 42 GWB.[54] Examples of the Bundeskartellamt's case practice where the identified impediment to effective competition was outweighed by merger-specific out-of-market efficiencies within the framework of the balancing clause (Section 36(1), sentence 2, no. 1 GWB) include RheinEnergie/Westenergie[55], Medien holding:nord/Elmshorner Nachrichten[56], and Kabel Deutschland GmbH, Unterföhring (KDG)/Orion[57].

A further illustration can be found in the **Netherlands**, where the same core criteria for the assessment of efficiencies are applied, but in a less restrictive and more practicable manner than is currently the case at EU level, including a greater openness to **quality-related efficiencies**. In particular, the Dutch merger control practice shows a nuanced and evidence-based application of the **merger-specificity criterion** that goes beyond purely theoretical counterfactuals. Alternatives which would be implausible, excessively costly, or incapable of delivering the claimed efficiencies within a reasonable timeframe are acknowledged as irrelevant.[58]

2. REFORM PROPOSALS FOR THE THREE EFFICIENCY CRITERIA (PARAS 76–88)

As demonstrated in the analysis above, neither the EUMR nor the case law of the EU Courts precludes a recalibration of the way in which the three cumulative criteria for assessing efficiency claims are currently interpreted and applied in the Merger Guidelines. While the criteria – benefit to consumers, merger specificity and verifiability – may remain valid in principle, the manner in which they are operationalised in the current Merger Guidelines reflects overly restrictive policy choices rather than legal constraints.

Within the boundaries of the EUMR and EU case law, this section therefore proposes targeted revisions to each criterion to restore coherence with the symmetry principle, the prospective nature of merger control, as well as economic and business realities.

Those changes are not an exhaustive list of all modifications to be brought to the efficiency section and only address the legal criteria and standard of proof applicable to the assessment of efficiencies in compliance with EUMR and case law.

a. VERIFIABILITY/STANDARD OF PROOF REQUIREMENT

The Merger Guidelines should be revised to clarify that efficiencies are to be assessed under the same standard as harm – namely whether it is more likely than not that they will materialise – and over a time horizon aligned with investment cycles which allow longer-term and dynamic efficiencies to materialise, where relevant. In particular, efficiencies should not be subjected to a "reasonably certain" threshold, nor discounted simply because they materialise over longer timeframes, where the Commission itself relies on forward-looking assessments over comparable horizons when establishing competitive harm.

In line with the EUMR and the case law of the CJEU, in particular *CK Telecoms*, the revised Merger Guidelines should expressly confirm that the Commission will not require a higher or qualitatively different degree of certainty for efficiencies than for theories of harm. Within the overall balancing exercise, **efficiencies should therefore be accepted where they are more likely than not to materialise** and to offset the identified competitive harm, without being subjected to a "reasonably certain" or near-certainty threshold.

The revised Merger Guidelines should also explicitly recognise that, given the inherently prospective nature of merger control, efficiencies – particularly dynamic efficiencies relating to innovation, investment, quality and performance, R&D, sustainability, economic security and resilience – often materialise **over longer timeframes in line with investment and innovation cycles which are sector and case specific.**

Finally, where there remains some doubt as to the verifiability of certain efficiency claims, in particular in relation to long-term incentives regarding dynamic efficiencies, the Merger Guidelines should clarify that the Commission may rely on appropriate post-merger monitoring mechanisms or commitments to address *ex ante* verifiability concerns. Commitments are well-established tools of competition law and would allow the verifiability of efficiencies to be assessed and ensured over time.[59] Such commitments could, where appropriate, include investment commitments (for example relating to network rollout or energy-transition expenditure), innovation and R&D commitments (such as minimum R&D spending levels or the maintenance of development pipelines), quality-of-service commitments, sustainability commitments (including CO_2-reduction or energy-efficiency targets), or commitments aimed at strengthening resilience and security of supply.[60]

Synopsis – Proposed revision

Merger Guidelines (para. 83): *"~~In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely~~".*

Merger Guidelines (para. 86): *"Efficiencies have to be verifiable such that the Commission can ~~be reasonably certain~~ conclude, on the basis of the available evidence that the efficiencies are more likely than not to materialise ~~[...] In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about~~ Efficiencies that are expected to materialise in the nearer term may, in general, be easier to substantiate, quantify and assess. However, the fact that efficiencies are expected to materialise over a longer time horizon does not, in itself, preclude them from being taken into account. This may include, in particular, dynamic efficiencies such as those relating to innovation, R&D, investment, quality improvements, sustainability, resilience or security of supply, especially in markets characterised by long investment cycles or rapid technological change. For such longer-run efficiencies, the Commission shall accept a broader range of evidence – including qualitative evidence and internal business documents (e.g. business plans and board presentations) including quantitative modelling and projections prepared for the purposes of the transaction – recognising that these benefits cannot be verified with the same level of precision as short-run cost efficiencies. Where appropriate, the Commission may rely on monitoring mechanisms or commitments proportionate to the identified uncertainty to address residual uncertainty and to ensure that efficiencies will be materialised over time".*

b. MERGER SPECIFICITY REQUIREMENT

The Guidelines should replace the current application of the "no less anti-competitive alternatives" requirement with a more realistic and legally grounded standard.

Efficiencies should not be rejected merely because conceivable alternative courses of action can be hypothesized. Rather, in line with the symmetric "*more likely than not*" standard governing theories of harm, the assessment of efficiencies should be guided by the same most realistic and likely counterfactual used to assess potential harm. Applying a symmetrical counterfactual would also facilitate early engagement on efficiencies. That counterfactual may, in many cases, be the absence of the merger.

The current application of a the "*no less anti-competitive alternative*" requirement reflects an erroneous transposition of the indispensability logic of Article 101(3) TFEU into merger control. Requiring parties to demonstrate the non-existence of any less-anticompetitive alternatives imposes an unattainable evidentiary standard in practice (*probatio diabolica*) that is difficult to reconcile with the fundamental principles of proportionality and procedural equality of arms as enshrined in the EU Charter.

Synopsis – Proposed revision

Merger Guidelines (para. 85): *"Efficiencies are relevant to the competitive assessment when they […] cannot be achieved to a similar extent ~~by less anticompetitive alternatives~~ in the most likely and realistic counterfactual scenario. […] It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that ~~there are no less anticompetitive, realistic and attainable alternatives […] than the notified merger which preserve the claimed efficiencies~~ the claimed efficiencies cannot be achieved to a similar extent in the most realistic and likely counterfactual scenario. The Commission ~~only~~ considers ~~alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned~~ the same counterfactual for the assessment of the competitive harm and efficiencies."*

c. BENEFIT TO CONSUMERS (PASS-ON) REQUIREMENT

The Merger Guidelines should be revised so as to expressly clarify that efficiencies should be revised to expressly recognise that cognisable efficiencies are not limited to efficiencies arising strictly within the relevant market(s) where potential harm is identified and the customer subgroups which are affected by that harm. Where, on the facts of the case, efficiencies generated in related, upstream, downstream or otherwise connected markets are sufficiently linked to the merger and/or benefit consumers overall and society as a whole, they should be capable of being taken into account in the competitive appraisal. They should also integrate various types of efficiencies that support policy objectives recognised by Union law, including product quality and security, promotion of R&D and innovation, a high level of environmental protection and social standard, economic security (redundancies), etc.

This broader approach would allow efficiencies benefiting consumers overall to be taken into account in the competitive assessment, even where a limited subset of customers experiences partial or temporary detriment. This is particularly important in network, digital, ecosystem and other innovation-driven sectors, where efficiencies often arise across interconnected markets and cannot be captured within a single market definition.

Synopsis – Proposed revision

Merger Guidelines (para. 79): *"[…] efficiencies should, in principle, […] benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. Without prejudice to this principle, the Commission shall also take into account efficiencies that materialise outside those markets, including efficiencies arising in connected or related markets or along the value chain, where such efficiencies are significant enough to counterbalance consumer harm in the relevant market. To this end, the Commission shall assess consumer benefit on an aggregate basis that may entail accepting certain redistribution of benefits between* *customer groups or different markets to appreciate the impact of efficiencies on overall consumer welfare, which also includes collective benefits for society as a whole and broader positive effects in relation to the relevant EU policy objectives."*

Endnotes

1 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, February 5, 2004, pp. 5-18.

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22.

3 The evolution of the Commission's treatment of efficiencies closely follows the approach of the U.S. antitrust agencies. In the U.S., efficiencies were in the past rejected by both agencies and courts as a positive consideration in merger analysis, until the 1997 revision of the DOJ–FTC 1992 Horizontal Merger Guidelines, which were expressly designed to invite merging parties to advance efficiency claims. The Commission's position on efficiencies mirrors this evolution, as it integrated in its proposal of the EUMR , the provision now reflected in Recital 29 The Commission's December 2001 Green Paper on the review of the ECMR (the "Green Paper") noted that other jurisdictions explicitly allowed merger-specific efficiencies to be taken into account and that an efficiency defense permits a merger to proceed where *"the benefits to the economy resulting from the efficiencies are deemed to outweigh the harm to the economy resulting from reduced competition."* (Council Regulation 4064/89 of December 21, 1989, on the control of concentrations between undertakings, 1990 <https://eur-lex.europa.eu/eli/reg/1989/4064/oj/eng>, with amendments introduced by Council Regulation 1310/97 of July 7, 1997 <https://eur-lex.europa.eu/eli/reg/1997/1310/oj/eng> and corrigendum of January 7, 1998. <https://eur-lex.europa.eu/eli/reg/1997/1310/corrigendum/1998-01-07/oj/eng>). The Explanatory Memorandum of the EUMR proposal acknowledged the need to consider *"any efficiencies brought about by the merger."* , as ***"it is appropriate to take account of any substantiated likely efficiencies put forward by the undertakings concerned,"***, while leaving the Commission to publish guidance about the applicable conditions. Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation" , December 11, 2002, COM(2002) 711 final 2002/0296 (CNS), para. 60. <https://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2002/0711/COM_COM(2002)0711_EN.pdf>, p. 27.

4 In the context of the legislative debate, the European Parliament's position was that ***"the requirements applicable to evidence of the existence of efficiencies must not become excessive***. *It is* **future advantages** *which would have to be demonstrated, and these* ***cannot possibly be guaranteed 100%.*** *There is a need to clarify exactly when relevant information about efficiencies would have to be provided."* Thus, at an early legislative stage, the European Parliament emphasised that the application of the requirements for the assessment of efficiencies should not be too restrictive, and recognised that, it is in the nature of some efficiencies to be forward looking.

5 See Non-Horizontal Merger Guidelines, para. 53.

6 Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, December 31, 2002, OJ C 331/03, p. 18-31. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:331:0018:0031:EN:PDF&utm

7 See Merger Guidelines, paras. 76-79.

8 *Ibid.,* para. 85.

9 *Ibid.,* paras. 86-88.

10 Judgment of July 13, 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras. 121 – 122: *"in order to clarify and explain the Commission's appraisal of concentrations [...]* ***it is appropriate for the Commission to publish guidance*** *which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the internal market [...]* ***the Horizontal Merger Guidelines,*** *which establish the methodology* ***which the Commission has bound itself to use*** *for the purposes of its assessment".* This is in line with the case-law applicable to the Article 102 Guidance Paper - see Judgment of June 28, 2005, *Dansk Rørindustri and Others v Commission*, joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, para. 209: *"although those measures* ***may not be regarded as rules of law*** *which the administration is always bound to observe,* **they nevertheless form rules of practice from which the administration may not depart** *in an individual case*".

11 A good parallel can be drawn with the Article 102 TFEU enforcement, as illustrated by the *Intel* saga. With its 2009 Guidance Paper, the Commission bound itself to apply the As Efficient Competitor ("AEC") framework, when assessing (loyalty) rebates granted by dominant firms; notwithstanding previous case law (i.e., *Hoffman-La Roche*) treating such rebates as presumptively abusive. In its 2024 judgment, the CJEU held that, because the Commission had relied on the AEC test, the GC was required to examine Intel's arguments alleging errors in that test and ignoring them was an error of law (Judgment of October 24, 2024, *European Commission v Intel Corporation Inc*, C-240/22 P, paras. 144,145,181). The Commission subsequently revised its 2009 Guidance Paper and issued draft Article 102 Guidelines. This example illustrates that, where the Commission considers that its own guidance unduly constrain its ability to conduct a legally sound and economically coherent assessment, the appropriate response is not to rigidly apply that guidance beyond its rationale, but to revise it. The same logic applies in the merger control context: if the current application of the efficiencies criteria set out in the Merger Guidelines are excessively restrictive or misaligned with the EUMR and the Courts' case law, the solution lies in revising those Guidelines, rather than treating the existing formulation as legally immutable.

12 Judgment of July 13, 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras. 123 – 125: "*although the* ***Commission cannot not depart from such guidelines without justification*** *[...] may not be regarded as rules of law which the administration is always bound to observe, and do not constitute the legal basis for the decisions taken by the Commission [...]* ***EU Courts nevertheless retain jurisdiction to interpret them,*** *inter alia, where, in its decision [...] the Commission has relied on those guidelines [...] the Commission enjoys a margin of discretion with regard to economic matters [...] does not mean that the* ***EU Courts must refrain from reviewing the Commission's interpretation*** *[...] the EU* ***Courts cannot be bound by the Horizontal Merger Guidelines as such".***

13 While the CJEU considered that the GC erred in requiring the Commission to take into account so-called "standard efficiencies", it did not endorse the efficiency criteria as set out in the current Guidelines, or the Commission's interpretation thereof. The CJEU simply held that *"neither Regulation No 139/2004, nor Regulation No 802/2004, nor the Horizontal Merger*

Guidelines refer to a category of 'standard' efficiencies, […] nor do they establish a presumption that all concentrations give rise to such efficiencies". While acknowledging that *"certain concentrations may give rise to efficiencies which are specific to them"*, the CJEU stressed that this *"possibility in no way implies that all concentrations give rise to such efficiencies. In any event, it is for the notifying parties to demonstrate those efficiencies so that the Commission can take them into account in its review"*. This *"would amount to creating a presumption, and therefore a reversal of the burden of proof, in respect of a particular category of efficiencies, whereas, as is apparent from [Recital 29 of the EUMR and Section 9 of Annex I to Regulation No 802/2004], that burden is borne by the undertakings"*. Significantly, in reviewing and defining the allocation of, and standard applicable to, the burden of proof, the CJEU expressly relied on the Regulations exclusively and not on the Guidelines. Accordingly, although the CJEU confirmed that the burden of proof rests with the notifying parties rather than with the Commission, it did not validate the specific manner in which the current Guidelines formulate the standard of proof for efficiencies. (Judgment of July 13, 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras. 241 – 243).

14 Judgment of July 13, 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras. 69-74: *"It therefore follows from the wording of both Article 2(2) and (3) of Regulation No 139/2004 and of Article 8(1) and (3) thereof that those provisions are symmetrical as regards the standards of proof imposed on the Commission in order to demonstrate that a notified concentration would or would not significantly impede effective competition and must therefore be declared incompatible or compatible with the internal market. In that regard, it should be noted, in the first place, that there is nothing in those provisions which states that Regulation No 139/2004 imposes different standards of proof in relation to decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other […]. In that context, no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred from that regulation […]. In those circumstances, it must be held that the Commission is not required to comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving concentrations […]. It follows that the requirements concerning the taking of evidence, including the standard of proof, do not vary according to the type of decision adopted by the Commission in merger control."*; see also Judgment of July 10, 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, para. 51.

15 *Ibid.* paras. 81 – 87: *"Those prospective analyses, which, more often, are complex, are necessarily more uncertain than ex post analyses. […] However, the prospective nature of the economic analysis which the Commission must carry out precludes a requirement for that institution to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition. In those circumstances, having regard, in particular, to the* ***symmetrical structure of Article 2(2) and (3) of Regulation No 139/2004*** *and to the* ***prospective nature of the Commission's economic analyses when conducting the review of concentrations,*** *it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is* ***more likely than not that the concentration concerned would or would not significantly impede effective competition*** *in the internal market or in a substantial part of it".*

16 *Ibid.* para. 87; see also Judgment of October 4, 2024, *thyssenkrupp v Commission*, C-581/22 P, paras. 126, 127; see also Judgment of July 10, 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, para. 50.

17 Judgment of January 16, 2019, *Commission v United Parcel Service*, C-265/17 P, paras. 33-34.

18 Judgment of February 15, 2005, *Commission v Tetra Laval*, C-12/03 P, para. 42.

19 See also Albæk, S. and De Coninck, R., "Dynamic Capabilities and EC Merger Control: A Difficult Match?", Network Law Review, Spring 2025, <https://www.networklawreview.org/albaek-coninck-merger-control/ >, who observe that efficiencies must typically be proven ex ante with a degree of precision that is unrealistic in a prospective assessment, particularly for dynamic efficiencies such as innovation, quality improvements, or sustainability investments, whereas harm may be inferred from structural indicators and modelling assumptions even in the presence of uncertainty. The commentary has echoed this concern more broadly, noting that EU merger control has evolved towards a system in which uncertainty is tolerated on the harm side, but largely disqualifying on the efficiency side, notwithstanding that both are subject to the same prospective and predictive constraints. From a legal perspective, this asymmetry is difficult to reconcile with the CJEU's insistence on a symmetrical standard of proof and a balanced assessment of all relevant factors under Article 2 EUMR.

20 Out-of-Market Efficiencies in Competition Enforcement – Note by the European Union, OECD DAF/COMP/WD(2023)110, 2 December 2023, para. 47.("*The issue of out of market efficiencies, and its relation to the principle of full compensation, has not been explicitly dealt with by the Union Courts. In particular, the Court of Justice has not provided specific guidance on whether (or how) out of market efficiencies should be taken into account.*"). *See* https://one.oecd.org/document/DAF/COMP/WD(2023)110/en/pdf

21 Article 101 (3) TFEU: *"The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, […] which contributes to improving the production or distribution of goods or to promoting technical or economic progress,* ***while allowing consumers a fair share of the resulting benefit****, and which does not: […]".*

22 Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, para. 72. Judgment of 11 September 2014, Mastercard and others v Commission, C-382/12 P, para. 236.

23 See Judgment of 28 February 2002, *Compagnie générale maritime and others v Commission*, T-86/95, para. 343, where the CJEU held that "*for the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty […] regard should naturally be had to the advantages arising from the agreement in question,* ***not only for the relevant market,*** *[…]* ***but also****, in appropriate cases,* ***for every other market on which the agreement in question might have beneficial effects****, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement*. See also Judgment of 27 September 2006, *GlaxoSmithKline Services v Commission*, T-168/01, para. 248; Judgment of 24 May 2012, *Mastercard and others v Commission*, T-111/08, para. 228: "*[…], it is indeed settled case-law that* ***the appreciable objective advantages*** *to which the first condition of Article 81(3) EC relates* ***may arise not only for the relevant market but also for every other market*** *on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement (Case T-86/95 Compagnie générale maritime and Others v Commission [2002] ECR II-1011, paragraph 343, and GlaxoSmithKline Services v Commission, cited in paragraph 196 above, paragraph 248). However, as merchants constitute one of the two groups of users affected by payment cards, the very existence of the second condition of Article 81(3) EC necessarily* *means that the existence of appreciable objective advantages attributable to the MIF must also be established in regard to them".*

24 Judgment of 11 September 2014, *Mastercard and others v Commission*, C-382/12 P, para. 242: "*Thus, where, as in the present case, restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot,* ***in themselves****, be of such a character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market,* ***in particular****, as is apparent from paragraphs 21 and 168 to 180 of the judgment under appeal,* ***where the consumers on those markets are not substantially the same.***". Judgment of 24 May 2012, *Mastercard and others v Commission*, T-111/08, para. 228: "*[...] However, as merchants constitute one of the two groups of users affected by payment cards, the very existence of the second condition of Article 81(3) EC necessarily means that the existence of appreciable objective advantages attributable to the MIF must* **also** *be established in regard to them".*

25 EC Consultation document "Topic F:efficiencies" (https://competition-policy.ec.europa.eu/document/download/6fc7afe7-4c20-4922-94e9-200b46e230f0_en?filename=Topic_F_Efficiencies.pdf)

26 Notably, there reference to "only" is not in line with the "in particular/notably" used by the Court and the use of the terms "substantially the same customers" by the Court is a reference to the Article 101 (3) Guidelines (para. 43), which was itself a construct of the Commission based on the facts of the CMB case, which in itself confirmed that "*Article 81(3) does not require that the benefits are linked to a specific market*" (see footnote 57).

27 Commission decision of 19 May 2015, Orange/ Jazztel, case M.7421.

28 In *Orange/Jazztel* and *FedEx/TNT Express*, the Commission acknowledged efficiencies such as the elimination of double marginalisation, network synergies, cost savings, and economies of scale (in the case of the latter, for example, in pick-up and delivery and air network operations, which could benefit customers. However, these transactions were cleared either subject to remedies, or because the Commission found that the parties were not close competitors and the proposed entity would continue to face sufficient competition, with efficiencies not determining the final assessment. (Commission decision of January 8, 2016, Case COMP/M.7630 - *FedEx/TNT Express*, paras. 556, 561; Commission decision of 19 May 2015, Orange/ Jazztel, case M.7421).

29 In *Orange/MásMóvil*, the Commission acknowledged that certain efficiency claims based on cost synergies and EDM are verifiable, merger specific and likely to benefit consumers. However, the Commission emphasised that the efficiencies would not change the fact that the transaction would significantly impede competition. (Commission decision of February 20, 2024, Case M.10896, Orange/MásMóvil /JV, para. 1739(a).

30 In *TomTom/Tele Atlas*, the Commission examined efficiencies related to innovation (for example, the Commission accepted that the rationale of the merger is to allow the merged entity to produce "better maps – faster.". but ultimately cleared the merger on the basis that it did not give rise to significant anticompetitive effects even absent those efficiencies. (Commission decision of May 14, 2008, Case COMP/M.4854, TomTom/Tele Atlas, para. 250).

31 In *Nynas/Shell*, the Commission agreed that the transaction would generate efficiencies by expanding capacity and reducing reliance on higher-cost external supply, which would ultimately benefit consumers compared to a counterfactual involving capacity withdrawal and increased imports. However, clearance was based on the failing firm defense rather than on efficiencies. (Commission decision of September 2, 2013, Case COMP/M.6360 - Nynas/ Shell/ Harburg Refinery paras. 443, 444, 463, 465, 474).

32 In *Aurubis/Metallo*, the Commission acknowledged efficiencies (through the combination of the parties' know-how technologies). However, the Commission found that the transaction would not lead to negative effects due to the lack of close competition between the parties and the moderate purchasing share (Commission decision of May 4, 2020, Case M.9409 – Aurubis/Metallo, paras. 871).

33 In *GE/Alstom*, despite the very significant efficiency arguments brought forward by the parties, the Commission only accepted a fraction of those efficiencies, and the merger was cleared only under the condition that Alstom divest the "core components" of its heavy-duty gas turbine business. (Commission decision of September 8, 2015, Case COMP/M.7278 - General Electric/Alstom (Thermal Power – Renewable Power & Grid Business).

34 Nilausen, L. (2023), "Lessons from the life and death of merger efficiency claims: Merger rationales v merger efficiencies", Compass Lexecon Insights. <https://www.compasslexecon.com/insights/publications/lessons-from-the-life-and-death-of-merger-efficiency-claims-merger-rationales-v-merger-efficiencies>

35 *Ibid.*

36 Commission decision of March 27, 2017, Case M.7932, *Dow/DuPont*.

37 The EU Competitiveness Compass has expressly recognised that, in the global race for advanced technologies, "competition policy must keep pace with evolving markets and tech innovation" and that this "should be reflected in revised guidelines for assessing mergers so that innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight." The Competitiveness Compass further stresses that Europe's productivity challenge stems from insufficient innovation and scale, and that large, investment-intensive projects are essential to closing the innovation gap and strengthening economic resilience. (European Commission, "A Competitiveness Compass for the EU", COM(2025) 30 final, pp. 6-7. <https://european-research-area.ec.europa.eu/documents/competitiveness-compass-eu>)

38 Albæk and De Coninck observe that, at least in principle, the Merger Guidelines already display an openness to dynamic forms of analysis, particularly in relation to innovation. The authors point to paragraph 38 of the Guidelines, which explicitly recognises that, "in markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products." According to

Albæk and De Coninck, this language demonstrates that the Guidelines already accept forward-looking, innovation-based assessments and a dynamic approach to efficiencies.

39 Enrico Letta, "Much More than a Market – Speed, Security, Solidarity" (April 2024), pp. 19-24, 50-59. <https://european-research-area.ec.europa.eu/documents/letta-report-much-more-market-april-2024>

40 "Draghi report: The future of European competitiveness", Part B, September 9, 2024, p. 75. <https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf>

41 To that end, see Commission decision of December 17, 2020, Case M.9660 - *Google/Fitbit*, where the Commission assessed Google's ability to degrade the Android smart mobile OS's interoperability with competing wearable devices, para. 717. Also, see Commission decision of September 25, 2023, Case M.10615, *Booking/eTraveli* (paras. 926 et seq.), where the Commission found that the concentration would have reinforced Booking's travel services ecosystem and strengthened its dominant position in the hotel OTA market. The Commission relied on ecosystem and cross-market mechanisms for its competitive harm analysis, but did not credit the parties' proposed ecosystem or cross-market efficiencies which were rejected.

42 Walckiers et al., *"Can we afford to keep ignoring out-of-market efficiencies in the merger control Guidelines after the Draghi Report? Insights from Sustainability Agreements"*, Concurrences, November 3, 2025, paras. 10, 28. <https://www.concurrences.com/en/review/issues/no-11-2025/law-economics/can-we-afford-to-keep-ignoring-out-of-market-efficiencies-in-the-merger-control>

43 *Supra* note 28 , Ch. 9, para. 582. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2023_259_R_0001>

44 On October 4, 2023, the Dutch Competition Authority (ACM) published a document titled the "ACM's oversight of sustainability agreements" where it states: "*[…] if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages. It is important that consumers in the relevant market receive an appreciable and objective part of the advantages. This means in any case that the consumers should belong to the group that benefits from the agreement*". (ACM, Policy rule: ACM's oversight of sustainability agreements – Competition and sustainability, October 4, 2023, para. 9. https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf.

45 On October 6, 2025, the Belgian Competition Authority launched a consultation on its draft guidelines for sustainability agreements, which ran until November 20, 2025. In alignment with the (EU) Horizontal Guidelines, the Belgian draft guidelines also categorise "collective benefits for society as a whole (i.e. reduction in negative externalities)" as one of the types of efficiency gains. Furthermore, the draft guidelines recognise future efficiency gains, as some benefits by nature require more time to materialise (Autorité Belge de la Concurrence, "Lignes Directrices Relatives Aux Accords De Durabilité", para. 22. <https://www.belgiancompetition.be/sites/default/files/content/download/files/Autorite%20-%20Concurrence%20et%20accords%20de%20durabilit%C3%A9%20-%20Projet%20de%20lignes%20directrices%20-%2020251006.pdf>)

46 Specifically, Article 6 FSR states that "*the Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, […] against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy*"; see also Recital 21 FSR (Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02022R2560-20221223>)

47 Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal Market, January 9, 2026, C(2026) 42 final, para. 110.

48 On October 16, 2025, the UK Competition and Markets Authority ("CMA") opened a consultation on its proposed revisions to the Merger Remedies Guidance. The Draft Guidance explains in more detail **how the CMA will evaluate rivalry-enhancing efficiencies and relevant customer benefits** when assessing merger remedies. According to the Draft Guidance, rivalry-enhancing efficiencies occur when a merger changes the parties' incentives in ways that make them more competitive. In particular, parties must show not only that such efficiencies exist, but also that a remedy would either undermine them to a disproportionate degree or, alternatively, preserve them for consumers' benefit. This also reflects recent CMA practice, namely the investment commitment in the *Vodafone/Three* case (see Section IV.2.c). On 15 January 2026, the CMA launched a call for evidence to for a review of its "*approach to the assessment of **rivalry-enhancing efficiencies in mergers**, as part of our ongoing **commitment to support growth, investment, and business confidence across the UK economy***". <https://www.gov.uk/government/calls-for-evidence/reviewing-our-approach-to-assessing-merger-efficiencies>

49 Section 36(1) of the GWB sets out the principles for the appraisal of concentrations as follows: "*A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This provision shall not apply if 1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or […]*".

50 See, for example, Bundeskartellamt decision of 19 September 2025, Case Summary of 8 October 2025, EP Group cleared to acquire Unit S of the Lippendorf power station - B8-83/25. <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2025/B8-83-25.pdf?__blob=publicationFile&v=2>.

51 "*A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This shall not apply if 1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or […]*"

52 Efficiencies in Merger Control – Note by Germany, OECD Working Party No. 3 on Co-operation and Enforcement, 17 June 2025, para. 7. <https://one.oecd.org/document/DAF/COMP/WP3/WD(2025)17/en/pdf>

53 *Ibid*, para. 15.

54 Efficiencies in Merger Control – Note by Germany, OECD Working Party No. 3 on Co-operation and Enforcement, 17 June

2025, para. 7. <https://one.oecd.org/document/DAF/COMP/WP3/WD(2025)17/en/pdf>

55 In 2022, the Bundeskartellamt cleared a merger between the two energy companies Westenergie (an E.ON subsidiary) and RheinEnergie, subject to the condition that RheinEnergie divests significant parts of its heating electricity business. Otherwise, the transaction would have significantly impeded competition in several local market areas around Cologne in the heating electricity sector and in the operation of normal charging stations for electric vehicles. The Bundeskartellamt found that the conditions of the balancing clause had been met, as the positive effects on the competitive conditions in the improved markets (in this case, the heating electricity markets) outweighed the proposed merger's negative effects on the competitive conditions in the remaining markets where the prohibition requirements were fulfilled under the balancing clause, finding that merger-specific efficiencies implemented through binding remedies in the heating electricity sector outweighed identified impediments to competition in several local market areas around Cologne in the heating electricity sector and in the operation of normal charging stations for electric vehicles. The decision was subsequently confirmed by the Düsseldorf Higher Regional Court. (Bundeskartellamt press release of 30 September 2022. <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/30_09_2022_Rhenag.html>)

56 In 2009, the Bundeskartellamt cleared the acquisition of the Elmshorner Nachrichten newspaper from Axel Springer AG by the publishing house SchleswigHolsteiner Zeitungsverlag under the balancing clause, finding that the improvements in the readership market structure in the Elmshorner Nachrichten distribution area resulting from the merger (improvement market) outweighed the deterioration in the advertising and readership markets in the Steinburg district (impaired markets). The authority concluded that the merger weakened Axel Springer AG's previously dominant position and enabled competition to emerge across the entire Elmshorner Nachrichten distribution area. (Bundeskartellamt press release of 9 July 2009. <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/09_07_2009_SHZ-Elmshorn.html>)

57 In 2008, the Bundeskartellamt cleared the acquisition of seven subsidiaries of Orion Cable GmbH, Augsburg, by Kabel Deutschland GmbH, Unterföhring (KDG), under the balancing clause, finding that the anticipated anti-competitive effects in the cable television market were outweighed by pro-competitive effects in other telecommunications markets. (Bundeskartellamt press release of 4 April 2008. <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2008/04_04_2008_Orion-Cabel_KDG.html>)

58 This approach is well illustrated by the 2009 hospitals merger Walcheren Hospital/Oosterschelde Hospitals , in which the Dutch Competition Authority conditionally cleared the transaction following an in-depth Phase II investigation. In that case, the authority explicitly and comprehensively assessed the claimed efficiencies as part of its overall competitive analysis, accepting that efficiencies primarily relating to quality of care, patient choice, and the availability of specialised treatments were merger-specific. This conclusion followed an extensive and context-sensitive examination of realistic alternative arrangements, leading the authority to find that there was no realistic, less competition-restrictive means of securing the efficiencies and that the identified benefits for patients could be achieved only through a full merger of the two hospitals (Decision of March 25, 2009, *Ziekenhuis Walcheren / Oosterscheldeziekenhuizen*, Case No. 6424/427, paras. 133 – 134. <https://www.acm.nl/sites/default/files/old_publication/bijlagen/3977_6424BCV_UK.pdf >

59 Comparable approaches have been applied in the UK and the US. In *Vodafone/Three*, the CMA cleared a 4-to-3 mobile merger subject to behavioral remedies, recognising that although the transaction raised competition concerns, it could generate efficiencies linked to major network investment. The CMA assessed the parties' £11bn standalone-5G investment plan and related spectrum arrangements, accepted that network improvements and faster 5G deployment could be efficiency-enhancing, but concluded these would not, on their own, offset the harm. Clearance was ultimately conditional on binding investment commitments over eight years and time-limited price protections. This reflects the CMA's recent recognition of "rivalry-enhancing efficiencies", whereby quality investments may stimulate longer-term competition [See CMA Final Report, December 5, 2024, ME/7064/23, paras. 7 – 9, 14.280. <https://assets.publishing.service.gov.uk/media/6751e18f6da7a3435fecbd87/1._Final_Report.pdf>]; Similarly, in *Sprint/T-Mobile*, the FCC accepted investment-based efficiencies and enforceable 5G deployment commitments, finding that the merger would enable a more robust nationwide 5G network, with particular benefits for rural and suburban areas, and treated these commitments as addressing verifiability concerns. [See FCC 19-103, November 5, 2019, *T-Mobile US, Inc., and Sprint Corporation*, paras. 175, 217, 241. <https://docs.fcc.gov/public/attachments/fcc-19-103a1.pdf>].

60 In addition, efficiencies should arguably also be considered as part of the remedies design assessment. Instead of requesting that "*the proposed remedies, once implemented, would eliminate the competition concerns identified*" (see Remedies Notice), the Commission should also account in its remedies assessment efficiencies , which even if they do not outweigh entirely the competitive harm, may allow to propose less stringent remedies than those required to eliminate the entire competitive harm.

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