Merger Guidelines Review

Topic B – Assessing Market Power Using Structural Features and Other Market Indicators

I. EXECUTIVE SUMMARY

1. This Response to the European Commission's Consultation on **Topic B** summarizes our views on possible reforms to the assessment of market power using structural features and other market indicators.[1]

2. The Guidelines provide a valuable framework for assessing mergers' impact on effective competition, and have served their purpose well over the last two decades. Similar to the Commission's approach in antitrust cases and the Vertical Block Exemption Regulation,[2] the Guidelines focus on structural indicators – namely market shares and concentration levels – as "useful first indications" to assess market power and competitive dynamics.[3]

3. As part of its Consultation, the Commission seeks to understand whether market power should play a larger role in the Revised Guidelines. In particular, the Consultation seeks feedback on how market power should be assessed through structural features and other market indicators and how it should fit into the Commission's efforts to "reflect the risks resulting from mergers in a situation of rising levels of concentration and profit margins in EU markets."[4]

4. This Response cautions against undue reliance on the existence of market power – and the structural features and other indicators used to assess it – in the substantive appraisal of mergers without a holistic assessment of whether such market power could harm consumer welfare. As the *Deutsche Telekom* judgment confirms, the creation or strengthening of market power – even if it results in dominance – "is not, in itself, sufficient for [the] concentration to be regarded as incompatible with the internal market, provided that it does not significantly impede effective competition."[5] Instead, the Commission is "required to carry out a prospective analysis consisting of an examination of how such a concentration might alter the factors determining the state

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1 "Consultation" refers to the public consultation launched by the Commission on May 8, 2025 concerning the review of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/5 ("HMG"), and the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C 265/6 ("NHMG") (together "the Guidelines").

2 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

3 HMG ¶14, and NHMG ¶24.

4 Consultation, Topic Paper B, ¶34.

5 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶192–193.

of competition on a given market in order to establish whether it would give rise to a [significant impediment to effective competition]".[6]

5. Instead, the Consultation provides a welcome opportunity for the Commission to codify its nuanced, flexible, and effects-based decisional practice in the Revised Guidelines. Specifically, in line with the Commission decisions and EU Courts' precedents, the Revised Guidelines should:

- **Set out a comprehensive framework that relies on alternative approaches to assessing market power beyond structural indicators.** Market shares and concentration levels are useful starting points, but should not be treated as determinative. A holistic assessment framework – combining structural indicators with market-specific metrics – would provide clearer guidance, sharper assessments, and greater legal certainty.

- **Refrain from adopting stricter indicators (or rebuttable presumptions) on market power.** Structural indicators of market power provide a helpful steer for allocating procedural resources, but should not determine the Commission's substantive appraisal without a holistic assessment of effects. As the *Deutsche Telekom* judgment confirms, market power alone, even when it amounts to dominance, is not sufficient to establish a significant impediment to effective competition ("SIEC") without a prospective analysis of effects.[7] Using stricter indicators (or rebuttable presumptions) of market power as part of the substantive appraisal of mergers – *i.e.*, to more readily identify mergers that are likely to result in a SIEC – without an effects-based analysis would increase Type I errors, multiply the burden on merging parties, and disincentivize investments.

- **Avoid an undue reliance on structural features when assessing the exceptional cases where a SIEC may arise even without the creation or strengthening of dominance.** Instead, they should codify the Commission's robust effects-based and evidence-backed assessment while acknowledging the exceptional nature of these gap cases.

- **Refrain from materially departing from the Guidelines' nuanced approach to coordinated effects.** The existing framework for the assessment of coordinated effects is still fit for purpose but it can benefit from further streamlining to: (i) align the evidentiary burden on merger specificity with EU case law; (ii) codify the cumulative application of the *Airtours* criteria; and (iii) clarify the exceptional application of the coordinated effects theory in non-horizontal cases.

- **Continue to uphold the ability-incentive-effect ("AIE") framework for non-horizontal mergers, subject to additional clarifications.** The NHMG's AIE framework remains fundamentally sound and provides a coherent basis for evaluating a SIEC in non-horizontal settings. The Revised Guidelines provide a welcome opportunity to streamline the application of the AIE framework in practice to increase legal certainty, improve procedural efficiencies, and mitigate

6 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶195.

7 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶192–195.

unnecessary burdens on the Commission and merging parties alike. In particular, the Revised Guidelines should: (i) distinguish between the mere *theoretical* ability to foreclose (which is insufficient to discharge the Commission's burden of proof) and the ability to *realistically implement* foreclosure strategies in a given market; (ii) adopt a robust, scenario-based, and timely assessment of incentives, emphasizing the importance of non-price considerations, past practice, and internal documents; and (iii) comprehensively qualify and quantify the degree of foreclosure that amounts to a SIEC in non-horizontal mergers in line with case law of the EU Courts.

6. This Response is structured as follows. **Section II** sets out the relevant background and identifies the five key themes the Commission seeks to address in its consultation on Topic B. **Section III**, in turn, explains how the five themes are reflected in the Guidelines and details how the Revised Guidelines could provide further clarity on these themes.

II. BACKGROUND AND THE CONSULTATION FRAMEWORK

7. At the outset, the Consultation states that the primary goal of EU merger control is to preempt distortions to effective competition and the creation or strengthening of market power that leads to consumer harm.[8] This Response shares the Consultation's view. Merger control should be fundamentally grounded in the prevention of consumer harm. Intervention is only justified in cases where a robust and cogent assessment of evidence indicates that a proposed merger would result in a SIEC.

8. The Consultation references recent reports establishing that the EU has experienced rising levels of industry concentration and companies' markups over the last 25 years.[9] It asks whether the Revised Guidelines offer "a chance to adequately reflect the risks resulting from mergers in a situation of rising levels of concentration and profit margins in EU markets".[10]

9. This Response cautions against simplistic correlations between the presumed anticompetitive price effects of mergers and increased markups without a holistic economic assessment of causality. Economic literature – including the very report the Consultation quotes – confirms that higher markups or concentration levels alone are not necessarily indicative of decreased competition. In some markets, higher concentration is simply the result of more rivalrous behavior, where more efficient firms gain market shares at the expense of others that are marginalized or forced to exit. Likewise, increased fixed costs for high-tech firms – often taking the form of additional R&D and innovation investments – could explain an increase in markups.[11] Evidence suggests that merger control has been working well. A recent *ex-post* study of mergers in the EU (involving a sample of 4,482 targets between 2007-2021) found that on average, (i) horizontal mergers did not result in a statistical impact on markups (once

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8 Consultation Topic Paper B, ¶33.

9 Consultation Topic Paper B, ¶33.

10 Consultation Topic Paper B, ¶34.

11 European Commission: Directorate-General for Competition, De Simone, L., Nava, S. *et al.*, *Exploring aspects of the state of competition in the EU – Final report*, Publications Office of the European Union, 2024, available here.

controlled for cherry-picking by acquirers), whereas (ii) vertical mergers resulted in lower markups and increased scale (indicated by a proportional increase in sales and variable costs).[12] And scale is necessary to finance innovation and green investments and to safeguard EU firms' resilience.

10. To understand the role market power – and the structural features and other indicators used to assess it – should play in the Revised Guidelines, the Consultation asks 15 questions that can be grouped under five critical themes:

- **Theme 1:** whether the Revised Guidelines should set out a more comprehensive framework that relies on alternative approaches to assessing market power beyond market shares and concentration levels;
- **Theme 2:** whether the Revised Guidelines should adopt stricter indicators (or rebuttable presumptions) on market power to more easily identify mergers that are likely to result in a SIEC;
- **Theme 3:** whether the Revised Guidelines should reflect the criteria for the assessment of cases that do not result in the creation or strengthening of a dominant position;
- **Theme 4:** whether the framework for the assessment of coordinated effects is still fit for purpose; and
- **Theme 5:** whether the AIE framework for the assessment of non-horizontal effects is still fit for purpose.

11. **Section III** of this Response addresses each Theme in turn.

III. RESPONSE PAPER

Theme 1. Whether the Revised Guidelines should set out a more comprehensive framework that relies on alternative approaches to assessing market power beyond market shares and concentration levels (Questions B.1 – B.3).

12. Yes, the Revised Guidelines should set out a more comprehensive framework that relies on alternative approaches to assessing market power. Market shares and concentration levels are useful starting points, but should not be treated as determinative. A holistic assessment framework – combining structural indicators with market-specific metrics – would provide clearer guidance, sharper assessments, and greater legal certainty.

13. As the Guidelines set out, market shares and concentration levels "provide useful first indications" of competitive dynamics.[13] These structural indicators serve as a valuable starting point but they are not always suitable to adequately assess market power:

12 Bellucci, C., and Rungi, A., *Procompetitive effects of vertical takeovers: Evidence from the European Union [Working paper]*, arXiv, November 19, 2024, available here.

13 HMG ¶14, and NHMG ¶24.

- *First*, structural indicators are only meaningful if the relevant markets have been correctly defined in line with economic principles. In practice, this can be difficult, particularly in dynamic or emerging sectors where traditional market boundaries may be fluid or contested.

- *Second*, structural indicators are inherently static. An analysis based on market shares or concentration levels may work well for stable markets but it can overlook real sources of competitive pressure in fast-moving, innovation-driven sectors. In renewable energy, digital services, or life sciences for example, competition often comes from new or disruptive players whose potential may not be captured by static indicators.

- *Third*, structural indicators provide no indication of a firm's ability to scale or invest to capture demand. A merged entity may hold a substantial market share whilst still facing intense competitive pressure from (i) international players with more efficient business models, cost advantages, or greater ability to scale up their activities and/or (ii) customers with the ability and scale to self-supply. These competitors may be better positioned to capture additional demand than their market shares might suggest.

- *Fourth*, market concentration does not necessarily imply reduced competition. In some markets, higher concentration is simply the result of more rivalrous behavior, where more efficient firms gain market shares at the expense of others that are marginalized or forced to exit. The result is increased concentration without a reduction of competitive intensity – the "selection effect" of competition.[14]

14. As the Commission's submission to the OECD confirms, the reliability of market shares "depends on the specific characteristics of the markets under investigation", which is why "the Commission adopts an open approach to empirical evidence, aimed at making effective use of all available information [in the case], and it makes an overall assessment based on that evidence as a whole".[15] Yet, the Guidelines provide limited alternatives to assessing market power beyond market shares and concentration levels. While the Guidelines' references to countervailing buyer power and likelihood of entry are helpful,[16] they fall short of the comprehensive and market-specific framework established in the Commission's own decisional practice and the case law of the EU Courts. Among others:

    - **Bidding markets.** Where markets are characterized by lumpy and infrequent demand, the Commission examines bidding dynamics rather than static shares. In such markets, competition occurs "for the market" through tenders rather than "in the market", and purchasers – often large governmental or industrial buyers – can rapidly shift business between suppliers. To capture these competitive

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14 Peltzman, S., *The gains and losses from industrial concentration,* Journal of Law and Economics, 20(2), 1977, available here, pp. 229–263.

15 *See* the Commission's submission to the OECD on *The Use of Structural Presumptions in Antitrust* (the "Commission's OECD Submission"), DAF/COMP/WP2/WD(2024)27, September 21, 2024, available here, ¶¶13–17.

16 HMG, ¶¶64–72, and NHMG, ¶¶51, 76, and 114.

dynamics, the Commission conducts detailed tender data analysis, examining participation rates, win/loss outcomes, and econometric evidence, rather than relying on market shares alone.[17] Where tender data demonstrates that rivals remain capable of displacing the merging parties in future bids, the Commission may clear transactions even when parties hold substantial combined shares.[18]

- **Dynamic markets.** Market shares may not effectively capture the competitive dynamics in fast-moving sectors. As the General Court held in *Microsoft/Skype*, in recent and growing sectors characterized by short innovation cycles "large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power".[19] A supplier with a relatively small historical market share, but which has recently increased its activities and invested significantly in product development and customer relationships, may well be better positioned to succeed in future opportunities.

- **Forward-looking assessments.** The Commission routinely considers entry, expansion, and pipeline innovation as part of its competitive assessment, particularly in markets undergoing regular regulatory or technological changes. In pharmaceutical markets, for example, the Commission has recognized that "a full assessment of the competitive situation requires examination of the products which are not yet on the market but which are at an advanced stage of development".[20] The forward-looking assessment applies not only to the merging parties' own products and expansion plans but also to the likelihood of entry and expansion by rivals.

15. The Consultation provides a timely opportunity to codify the Commission's multi-faceted approach to assessing market power. The Revised Guidelines should adopt a holistic and balanced framework that combines structural indicators with market-specific metrics to provide clearer guidance and sharper assessments. It should provide legal certainty whilst avoiding reliance on indicators merely as a means to trigger presumptions.

Theme 2. Whether the Revised Guidelines should adopt stricter indicators (or rebuttable presumptions) on market power to identify more easily mergers that are likely to result in a SIEC (Questions B.4 – B.5).

16. No, the Revised Guidelines should not adopt stricter indicators (or rebuttable presumptions) on market power to identify more easily mergers that are likely to result in a SIEC. Focusing on the *existence* of market power provides a helpful steer for allocating procedural resources, but it should not prejudge the Commission's substantive appraisal on *effects*. As the *Deutsche Telekom* judgment confirms, market

17 *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering* (Case COMP/M.9343), decision of January 13, 2022, ¶¶414–485.

18 *See* for instance, *Lear/IG Bauerhin* (Case COMP/ M.10738), decision of April 24, 2023, ¶¶76, 144, and 148.

19 *Cisco Systems Inc and Messagenet SpA v. Commission* (Case T-79/12) EU:T:2013:635, ¶69.

20 *Hoffmann-La Roche/Boehringer Mannheim* (Case COMP/M.950), decision of February 4, 1998, ¶13.

power alone, even when it amounts to dominance, is not sufficient to establish a SIEC.[21] Using stricter indicators (or rebuttable presumptions) on market power as part of the substantive appraisal of mergers – *i.e.*, to more readily identify mergers that are likely to result in a SIEC – without a thorough assessment of effects would increase Type I errors, multiply the burden on the merging parties, and disincentivize investments.

17. The Guidelines include structural indicators such as market share and HHI (delta) levels, on market power.[22] These indicators help the Commission "focus its resources on those concentrations notifiable to the EU that could potentially raise competition concerns".[23] As explained in response to Theme 1 above, this Response advocates for a broad, holistic, and balanced framework on market power that combines structural indicators with market-specific metrics to provide clearer guidance, sharper assessments, and greater legal certainty.

18. Regardless of the exact market power framework adopted, this Response cautions against conflating *procedural efficiency* with the *substantive appraisal* of mergers. While a focus on market power may provide a helpful steer for allocating resources, it should not prejudge the Commission's substantive assessment on effects.

- ***First*, under EU Court precedent, the Commission has the burden to prove that the creation or strengthening of market power gives rise to a SIEC.** As the General Court judgment in *Deutsche Telekom* confirms, the creation or strengthening of a dominant position "is not, in itself, sufficient for the concentration to be regarded as incompatible with the internal market, provided that it would not significantly impede effective competition".[24] Even where dominance is confirmed, the Commission is "required to carry out a prospective analysis consisting of an examination of how such a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a SIEC".[25]

- ***Second,* the Commission's decisional practice confirms that market power is one of many factors relevant for establishing a SIEC.** As the NHMG explain, a significant degree of market power is a "necessary condition for competitive harm, but is not a sufficient condition".[26] The Commission's own decisional

21 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶192–193.

22 Under the HMG, combined market share not exceeding 25% is "an indication" that the transaction is not liable to significantly impede effective competition. To the contrary, shares of 50% or more, may in themselves be evidence of the existence of a dominant market position. The Commission is unlikely to identify horizontal competition concerns in a market with (i) a post-merger HHI below 1 000, (ii) a post-merger HHI between 1 000 and 2 000 and a delta below 250, or (iii) a post-merger HHI above 2 000 and a delta below 150, except where special circumstances are present. *See* HMG, ¶¶17-20.

Under the NHMG, non-horizontal competition concerns are unlikely to arise if the combined entity's share in each relevant market is below 30% and the post-merger HHI is below 2 000. *See* NHMG ¶25.

23 *See* Commission's OECD Submission, ¶18.

24 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶192–193.

25 *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815, ¶¶195.

26 NHMG, ¶27.

practice – which is largely grounded in sound economic reasoning – confirms this for both horizontal and non-horizontal cases.[27]

- On numerous occasions, the Commission has unconditionally approved transactions giving rise to horizontal overlaps with combined market shares above 50% where: (i) the relevant market was small and declining in importance;[28] (ii) the increment was low;[29] (iii) market shares did not properly reflect the parties' competitive positions;[30] (iv) the merging parties were not close competitors;[31] (v) the merged entity would be constrained by competing suppliers with spare capacity;[32] (vi) the high post-transaction share was expected to be transitory, including because of likely market entry;[33] (vii) one of the merging parties was in poor financial shape (without amounting to a failing firm defense).[34] In doing so, it concluded that the market dynamics would preclude a SIEC.

- Similarly, the Commission has unconditionally approved non-horizontal mergers with market shares above 30% where: (i) the merging parties' faced credible upstream competitors;[35] (ii) suppliers active in neighboring countries could enter the relevant market;[36] (iii) downstream competitors could become vertically integrated in the same upstream/neighboring

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27 In addition, as explained in response to Theme 3 below, the Guidelines do not establish a legally binding presumption of compatibility with the common market for concentrations involving low market shares. In exceptional cases, the SIEC standard provides sufficient flexibility for the Commission to intervene even where a merger does not create or strengthen dominance.

28 *See*, *e.g.*, *Volkswagen/MAN* (Case COMP/M.6267), decision of September 26, 2011, ¶179; *Bekaert/Pirelli Steel Tyre Cord Business* (Case COMP/M.7230), decision of July 30, 2014, ¶39; and *Mylan/Perrigo* (Case COMP/M.7645), decision of July 29, 2015, ¶¶56–60.

29 *See*, *e.g.*, *Carnival Corporation/P&O Princess* (Case COMP/M.2706), decision of July 24, 2002, ¶¶257–270; *Synthomer/Omnova Solutions* (Case COMP/M.9502), decision of January 15, 2020, ¶¶77 and 82; and *Engie/EDP Renovaveis/EDPR Offshore España* (Case COMP/M.9587) decision of February 25, 2020, ¶¶35 and 39.

30 *See*, *e.g.*, *Sampo/Storebrand* (Case COMP/M.2491), decision of July 27, 2001, ¶26; *Johnson & Johnson/Synthes* (Case COMP/M.6266), decision of April 18, 2012, ¶467; and *Refresco Group/Pride Foods* (Case COMP/M.6924), decision of October 4, 2013, ¶¶153–164.

31 *See*, *e.g.*, *Koninklijke Philips Electronics/Saeco International Group* (Case COMP/M.5547), decision of July 17, 2009, ¶¶66–90; *Kraft Foods/Cadbury* (Case COMP/M.5644), decision of January 6, 2010, ¶¶53–70; and *Mylan/Perrigo* (Case COMP/M.7645), decision of July 29, 2015, ¶¶61–62.

32 *See*, *e.g.*, *Siemens/Bayer Diagnostics* (Case COMP/M.4321), decision of October 31, 2006, ¶¶50–58; *Arizona Chemical Gmbh/Abieta Chemie GmbH* (Case COMP/M.5358), decision of January 16, 2009, ¶¶48–56; and *CMA CGM/OPDR* (Case COMP/M.7523), decision of June 29, 2015, ¶¶128–133.

33 *See*, *e.g.*, *Alcatel/Telettra* (Case IV/M.42), decision of April 12, 1991, ¶47; *Cytec Industries/Umeco* (Case COMP/M.6561), decision of July 26, 2012, ¶¶72–77; and *BSA (Lactalis)/Ambrosi* (Case M.10876), decision of May 31, 2023, ¶¶196, 212, 238, 281, 308, 347, 390, 412, 610, and 622.

34 *See*, *e.g.*, *Arçelik/Whirlpool EMEA MDA* (Case COMP/M.11086), decision of October 23, 2023, ¶¶45–47, and *NewsCorp/Telepiù* (Case COMP/M.2876), decision of April 2, 2003, ¶221.

35 *See*, *e.g.*, *Outokumpu/Sogepar* (Case COMP/M.5211), decision of July 25, 2008, ¶¶24–48; *Siemens/Dresser-Rand* (Case COMP/M.7429), decision of June 29, 2015, ¶¶422–428; and *Schlumberger/Cameron* (Case COMP/M.7799), decision of February 4, 2016, ¶¶65–68.

36 *See*, *e.g.*, *Ardian/Deli Home* (Case COMP/M.10263), decision of July 16, 2021, ¶¶77–78.

relevant market;[37] and (iv) purchasing patterns or the legacy nature of the markets precluded the merging parties' from exercising their market power.[38]

19. Undue reliance on market power in the substantive appraisal – including through stricter indicators (or rebuttable presumptions) – without a holistic assessment of effects would create an unreasonable hierarchy within the metrics relevant for the Commission's substantive appraisal, skew the balance against mergers without a thorough and context-specific assessment of the facts, and increase the risk of Type I errors (false positives) in merger review. It would contradict the Commission's suggestion that the Revised Guidelines should give "adequate weight" to "innovation, resilience and the investment intensity of competition […] in light of the European economy's acute needs".[39]

20. It would also unjustifiably increase the evidentiary, administrative, and financial burden on merging parties, contrary to the *Deutsche Telekom* judgment. In addition to establishing efficiencies – where the burden rests solely on the merging parties – the merging parties would also need to actually prove that the concentration does not give rise to anticompetitive effects. This increased burden coupled with the perceived risk of Type I errors, would disincentivize investment and risk harm to economic resilience.

Theme 3. Whether the Revised Guidelines should reflect the criteria for the assessment of cases that do not result in the creation or strengthening of a dominant position (Questions B.6 – B.7).

21. Yes, the Revised Guidelines should increase legal certainty by including criteria for the assessment of cases that do not result in the creation or strengthening of a dominant position. In doing so, the Revised Guidelines should not incorporate an undue and misleading reliance on structural features (*e.g.*, references to four-to-three or three-to-two mergers) and instead seek to codify the Commission's robust effects-based and evidence-backed assessment.

22. As the Guidelines clarify, "most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance",[40] and "that concept therefore provides an important indication as to the standard of competitive harm that is applicable when determining whether a concentration is likely to impede effective competition to a significant degree, and hence, as to the likelihood of intervention".[41] But the SIEC test enshrined in the EU Merger Regulation and the

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37 *See*, *e.g.*, *Total Produce/Dole Food Company* (Case COMP/M.8829), decision of July 30, 2018, ¶¶104–121.

38 *See*, *e.g.*, *Essilor/Luxottica* (Case COMP/M.8394), decision of March 1, 2018, ¶¶419–434; *Bayer/Monsanto* (Case COMP/M.8084), decision of May 29, 2018, ¶¶2911–2912; and *IBM/Certain Software AG Products* (Case COMP/M.11468), decision of June 21, 2024, ¶¶278–303.

39 *See* Communication from the Commission on A Competitiveness Compass for the EU, COM(2025) 30 final of January 29, 2025, available here, p. 6.

40 HMG, ¶4.

41 HMG, ¶4.

Guidelines provides the Commission with sufficient flexibility to – in exceptional cases – review unilateral effects even where the transaction does not create or strengthen a dominant position.

23. To date, the Commission's review of a SIEC in horizontal mergers not resulting in the creation or strengthening of dominance has largely followed a nuanced, market-specific, and effects-based assessment:

- The Commission's decisional practice confirms that not all mergers in oligopolistic markets give rise to a SIEC. The Commission has unconditionally cleared several "four-to-three" or "three-to-two" mergers in the absence of exceptional circumstances that could give rise to a SIEC.[42]

- Instead, oligopolistic markets face this exceptional scrutiny only if: (i) the merger eliminates a maverick or an important competitor that exerts considerable pressure on the market;[43] (ii) the remaining competitors do not have any incentive to constrain price increases;[44] (iii) the merger reduces the number of major service providers and results in high levels of concentration with predicted increases in prices;[45] or (iv) the merging parties' market position is unlikely to be challenged by existing or potential competitors due to high barriers to entry.[46]

24. Given the exceptional and context-specific nature of these gap cases, the Revised Guidelines should refrain from an undue and misleading reliance on structural features (*e.g.*, references to four-to-three or three-to-two mergers). Nor should they interpret the SIEC standard as a means to lower the intervention threshold. Instead, the Revised Guidelines should codify the Commission's effects-based criteria for assessing a SIEC in cases that do not result in the creation and strengthening of dominance. In particular, the Revised Guidelines should comprehensively set out the types of evidence the Commission could rely on to discharge its burden of proof (*e.g.*, diversion ratios, price concentration analysis, implied share data, bidding data, internal documents).

Theme 4. Whether the framework for the assessment of coordinated effects is still fit for purpose (Questions B.8 – B.12).

25. Yes, the existing framework for the assessment of coordinated effects is still fit for purpose, but it can benefit from some further streamlining to: (i) align the evidentiary

42 *See* for instance *T-Mobile/Orange Netherlands* (Case COMP/M.4748), decision of August 20, 2007, ¶35, where the Commission found that the combination of T-Mobile and Orange Netherlands did not give rise to competition concerns, despite similar combined shares as in *T-Mobile Austria/tele.ring*, because Orange Netherlands could not be considered a "maverick".

43 *See T-Mobile Austria/Tele.ring* (Case COMP/M.3916), decision of April 26, 2004, ¶125; *EDF/Segebel* (Case COMP/M.5549), decision of November 12, 2009, ¶¶66–72; *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497), decision of December 12, 2012 ¶88; *Orange/Jazztel* (Case COMP/M.7421), decision of May 19, 2015, ¶¶244–246 and 322–404; and *Orange/Masmovil/JV* (Case COMP/M.10896), decision of February 20, 2024, ¶¶590–608.

44 *BASF/CIBA* (Case COMP/M.5355), decision of March 12, 2009, ¶21.

45 *UTP/TNT Express* (Case COMP/M.6570), decision of January 30, 2013.

46 *UTC/Rockwell Collins* (Case COMP/M.8658), decision of May 4, 2018, ¶¶237–242.

burden on merger specificity with EU case law; (ii) codify the cumulative application of the *Airtours* criteria; and (iii) clarify the exceptional application of the coordinated effects theory in non-horizontal cases.

- **Aligning the evidentiary burden on merger-specificity with the EU case law.** The *Airtours* judgment confirms that, to establish coordinated effects, the Commission must prove that "the concentration would have the direct and immediate effect of creating or strengthening a [collective dominance] position" and that "[i]f there is no substantial alteration to competition as it stands, the merger must be approved". In other words, the Commission must demonstrate that the proposed merger constitutes the sole and specific cause of any anticipated coordinated effects.[47] Simply making "coordination easier, more stable or more effective for firms that were already coordinating before the merger" – as set out by the Guidelines – does not meet the high evidentiary burden on merger-specificity the *Airtours* judgment sets.[48] The Guidelines should be revised accordingly.

- **Codifying the cumulative application of the *Airtours* criteria**. This Response commends the Commission's prudent, consistent, and cumulative application of the *Airtours* criteria in its decisional practice.[49] The Consultation provides a helpful opportunity to codify the Commission's application, and to highlight the importance of the cumulative application of the three conditions in the Revised Guidelines (for example in ¶41 of the HMG and ¶81 of the NHMG) to provide greater legal certainty.

- **Clarifying the exceptional application of coordinated effects in non-horizontal cases.** Mergers only exceptionally result in coordinated effects. Such effects are even rarer in non-horizontal mergers, which are fundamentally less likely to give rise to coordinated effects compared to horizontal mergers. The third limb of the *Airtours* criteria is particularly relevant for assessing coordinated effects in non-horizontal settings. In addition to being transparent and prone to correction through deterrence mechanisms, the coordinated behavior must be sustainable in the face of competitive constraints. In non-horizontal settings, the sustainability of competitive constraints extends beyond the mere reaction of outsiders. Other constraining factors, such as reputational risks and established industry standards may equally discourage firms from initiating coordinated behavior or undermine its long-term viability. For instance, in technology markets, industry standards such as open-source frameworks frequently serve as powerful competitive constraints, warranting their formal recognition in the Revised Guidelines.

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47 *Airtours plc v Commission* Case T-342/99) EU:T:2002:146, ¶¶58 and 82.

48 *See* HMG, ¶¶22(b) and 39, and NHMG, ¶¶19 and 79.

49 *See*, *e.g.*, *Energizer/Spectrum Brands (Battery and Portable Lighting Business)* (Case COMP/M.8988), decision of December 11, 2018, footnote 178; *Advent International Corporation/Evonik Methacrylates Business Division* (Case COMP/M.9353), decision of July 2, 2019, footnote 109; and *Telenor/DNA* (Case COMP/M.9370), decision of July 15, 2019, footnote 60.

Theme 5. Whether the "ability–incentives–effects" framework for the assessment of non-horizontal effects is still fit for purpose (Questions B.13 – B.15).

26. Yes, the NHMG's AIE framework remains fundamentally sound and provides a coherent basis for evaluating a SIEC in non-horizontal settings. The Revised Guidelines provide a welcome opportunity to streamline the application of the AIE framework in practice to increase legal certainty, improve procedural efficiencies, and mitigate unnecessary burdens on the Commission and merging parties alike. In particular, the Revised Guidelines should: (i) distinguish between the mere *theoretical* ability to foreclose (which is insufficient to discharge the Commission's burden of proof) and the ability to *realistically implement* foreclosure strategies in a given market; (ii) adopt a robust and timely assessment of incentives, emphasizing the importance of non-price considerations, past practice, and internal documents; and (iii) comprehensively qualify and quantify the degree of foreclosure that amounts to a SIEC in non-horizontal mergers, in line with the EU case law.

27. At the outset, this Response cautions against any changes to the interpretation or application of the AIE framework or the SIEC standard that deviates from the economic reality of non-horizontal mergers. The Revised Guidelines should continue to uphold the nuanced and principled approach to non-horizontal mergers evidenced in economic literature and enshrined in the NHMG and EU Courts's judgments:

- Economic literature continues to confirm that non-horizontal mergers are typically less likely to give rise to a SIEC compared to horizontal mergers, as they do not involve any direct loss of competition and provide substantial scope for efficiencies. Among others, a recent *ex-post* study of mergers (involving a sample of 4,482 targets in the European Union between 2007-2021) found that on average, vertical mergers resulted in lower markups and increased scale (indicated by a proportional increase in sales and variable costs).[50]

- The NHMG acknowledge that non-horizontal mergers are "generally less likely to significantly impede effective competition than horizontal mergers".[51] The NHMG explicitly uphold the link between the AIE framework and the SIEC standard by confirming that non-horizontal mergers may exceptionally give rise to a SIEC, "in particular as a result of the creation and strengthening of a dominant position", where they "change the ability and incentive to compete […] in ways that cause harm to consumers".[52]

28. In the same vein, the Revised Guidelines should not interpret the Commission's prerogative to apply and further develop these principles as a means to sidestep the

50 Bellucci, C. and Rungi, A., *Procompetitive Effects of Vertical Takeovers. Evidence from the European Union*, 2025, available here. This is consistent with the existing economic literature on non-horizontal mergers. *See also*, Rey, P., & Tirole, J., *A primer on foreclosure,* Handbook of Industrial Organization Ed. 1, Vol. 3, 2007, Chap. 22, pp. 2145–2220, and Riordan, M. H., *Competitive effects of vertical integration*, Antitrust Law Journal, 73(2), 2008, pp. 495–512.

51 NHMG, ¶11.

52 NHMG, ¶¶1 and 15.

application of the AIE framework and the SIEC standard.[53] Neither the case law of the EU Courts nor the Commission's decisional practice provide any meaningful indication of cases where the AIE framework and the SIEC standard would not be suitable for assessing non-horizontal effects.[54] To the contrary, the Commission's decisional practice is testament to the suitability of the AIE framework for assessing a SIEC in a wide variety of cases. The Commission has used the AIE framework to assess non-horizontal effects in both vertical and conglomerate settings, including through partial input foreclosure,[55] total input foreclosure,[56] customer foreclosure,[57] tying,[58] bundling,[59] interoperability degradation,[60] and ecosystem[61] theories of harm across a wide range of industries.

29. This is not to say that the AIE framework cannot be improved. This Response welcomes the Consultation's efforts to streamline the application of the AIE framework in non-horizontal mergers to increase legal certainty, improve procedural efficiencies, and mitigate unnecessary burdens on the Commission and merging parties alike. Taking each prong of the AIE framework in turn:

- **Ability.** In its application of the ability prong, the NHMG erroneously focus on the *theoretical* technical/commercial ability to foreclose – *e.g.*, by refusing to deal with actual or potential competitors, restricting supplies, raising prices, tying, bundling, or degrading interoperability. But these technical/commercial considerations are present in most – if not all – non-horizontal mergers: any upstream input supplier can *theoretically* decide to stop supplying downstream rivals. Likewise, any supplier of neighboring products can *theoretically* tie or

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53 NHMG, ¶8.

54 Since the entry into force of the EUMR in 2004, the Commission has departed from the AIE framework only in a single non-horizontal case. *See*, *Booking Holdings/Etraveli Group* (Case COMP/M.10615) decision of September 25, 2023, ¶¶200–203. This decision – including its departure from the NHMG and the AIE framework – is currently pending appeal and should continue to be treated as an outlier until the EU Courts rule on the merits of the case.

55 *See* for instance, *Meta/Kustomer* (Case COMP/M.10262), decision of January 27, 2022, and *CMA CGM/Bollore Logistics* (Case COMP/M.11143), decision of February 23, 2024.

56 *See* for instance, *LSEG/Refinitiv* (Case COMP/M.9564), decision of January 13, 2021; *Meta/Kustomer* (Case COMP/M.10262), decision of January 27, 2022; and *CMA CGM/Bollore Logistics* (Case COMP/M.11143), decision of February 23, 2024.

57 *See* for instance, *AGCO/Trimble/JV* (Case COMP/M.11382), decision of March 25, 2024.

58 *See* for instance, *Essilor/Luxottica* (Case COMP/M.8394), decision of March 1, 2018; *NVIDIA/Mellanox* (Case COMP/M.9424), decision of December 19, 2019; and *Synopsys/Ansys* (Case COMP/M.11481), decision of January 11, 2025.

59 *See* for instance, *Qualcomm NXP Semiconductors* (Case COMP/M.8306), decision of January 18, 2018; *Meta/Kustomer* (Case COMP/M.10262), decision of January 27, 2022; *Advent/GFK* (Case COMP/M.10860), decision of July 4, 2023; and *Synopsys/Ansys* (Case COMP/M.11481), decision of January 11, 2025.

60 *See* for instance, *Google/FitBit* (Case COMP/M.9660), decision of December 17, 2020; *Siemens Healthineers/Varian Medical Systems* (Case COMP/M.9945), decision of February 19, 2021; *Broadcom/VMware* (Case COMP/M.10806), decision of July 12, 2023; *Nvidia/Run:ai* (Case COMP/M.11766), decision of 20 December 2024; and *Synopsys/Ansys* (Case COMP/M.11481), decision of January 11, 2025.

61 *See* for instance, *Google/FitBit* (Case COMP/M.9660), decision of December 17, 2020, and *Siemens Healthineers/Varian Medical Systems* (Case COMP/M.9945), decision of February 19, 2021.

bundle its products. For instance, software vendors can, more often than not, *theoretically* stop making their software interoperable with third-party products.

But the question of whether there is a *theoretical* technical/commercial ability to foreclose is separate from whether the merging parties have the ability to *realistically implement* these foreclosure strategies in light of market dynamics.[62] The NHMG lists some considerations for assessing ability, including market power, the importance of the input in question, and the level of complementarity between neighboring products. These may limit the number of companies that could exercise the *theoretical* ability, but do not determine whether it is *realistic* to implement the foreclosure strategy in practice. But the Commission's decisional practice confirms that in many cases, the existence of long-term agreements,[63] market dynamics (such as commitment to open-source frameworks or interoperability),[64] and buyer power,[65] in the industry prevent the merging parties from *realistically implementing* the *theoretical* technical/commercial ability to foreclose rivals. This is the case even if the merging parties have market power, supply important inputs, or supply particularly complementary products (*e.g.*, products that have a large common pool of customers and that are bought together simultaneously).

The Consultation provides a timely opportunity to distinguish between the *theoretical* technical/commercial ability to foreclose and the ability to *realistically implement* foreclosure strategies at the industry level (without needing to establish the same considerations for each relevant non-horizontal relationship). An isolated and inflexible focus on the former is unlikely to meet the high evidentiary standards set by the EU Courts for assessing a SIEC in non-horizontal mergers. Moreover, the Revised Guidelines should clarify that the burden of proof for establishing both tests necessarily lies exclusively with the Commission.

- **Incentive.** To limit overlaps in the application of the AIE framework, the incentive prong should focus on a quantifiable assessment of gains and losses. The Revised Guidelines' incentive assessment should provide a robust analysis, taking into account (i) the magnitude of expected gains from foreclosure (*e.g.*, market share shifts, customer acquisition), and (ii) the risks or costs, including loss of sales from multi-homing users or reputational damage.

  Traditional profit margin analysis and critical loss modelling may not always reflect how foreclosure works in practice – especially in dynamic, multi-sided, or

62 The ability to *realistically implement* a foreclosure strategy is, in turn, separate from the *effects* of the foreclosure strategy on the market, which focus on the overall impact on consumers in light of efficiencies.

63 *Google/Motorola Mobility* (Case COMP/M.6381), decision of February 13, 2012, ¶¶114–116; *Microsoft/Nokia* (Case COMP/M.7047), decision of December 4, 2013, ¶¶168–175 and 182; *ZF/Wabco* (Case COMP/M.9383), decision of January 23, 2020, ¶¶219–223; and *UTC/Raytheon* (Case COMP/M.9434), decision of March 13, 2020, ¶¶269–274.

64 *NVIDIA/Mellanox* (Case COMP/M.9424), decision of December 19, 2019; *Nvidia/Run:AI* (Case COMP/M.11766), decision of 20 December 2024; and *Synopsys/Ansys* (Case COMP/M.11481), decision of January 11, 2025.

65 *Bayer/Monsanto* (Case COMP/M.8084), decision of March 21, 2018, ¶¶2921–2967.

innovation-driven markets. The Revised Guidelines should therefore also account for strategic non-price incentives, such as the pursuit of market leadership, long-term ecosystem control, or exclusivity benefits that may not be immediately reflected in short-term profit calculations.

The Revised Guidelines would also benefit from additional clarity on the relevant timeframe for assessing incentives. The incentive analysis should be conducted within the "foreseeable future", understood as the short to medium term. It should, in any case, be limited to merger-specific effects, avoiding the overly extended – and therefore unforeseeable – time horizons. particularly in dynamic industries and those defined by short innovation cycles.

Finally, the incentives assessment should reflect the Commission's thorough review of internal documents and market feedback. There is room for the Revised Guidelines to give more weight to (i) contemporaneous evidence that predates the merger announcement, which can be more reliable than ex-post rationalizations or speculative or biased inferences, (ii) past practices in the relevant antitrust market (of the merging parties and their competitors), and (iii) public statements by executives (particularly those discussing reputation risks or long-term goals).

- **Effects.** Given the efficiencies associated with non-horizontal mergers, the assessment of a SIEC in non-horizontal settings requires a particularly close examination of all the relevant circumstances and imposes on the Commission both the burden of proof and the duty to conduct a rigorous analysis of a sufficiently cogent and consistent body of evidence.[66] Yet the NHMG fail to comprehensively qualify – let alone quantify – the degree of anticompetitive foreclosure that amounts to a SIEC in non-horizontal cases.

  The Revised Guidelines provide the Commission the opportunity to address this obvious gap in practice. As the OECD confirms, "it is widely agreed that the purpose of competition policy is to protect competition, not competitors".[67] Likewise, the Commission's guidance on Article 102 TFEU highlights that "what really matters is protecting an effective competitive process and not simply protecting competitors".[68] The same considerations apply to the assessment of a SIEC in non-horizontal mergers. In practice, this means that a mere increase in competitive pressure or unquantified impact on a given competitor would not meet the high evidentiary burden and duty to establish a SIEC in non-horizontal cases. To the contrary, the SIEC standard requires that the foreclosed firms play an important role in the competitive process – either as a result of their prominence in the markets (*e.g.*, product differentiation, or the rivals' fraction of market output) or through their ability to effectively and realistically enter/expand in the markets absent the merger.

[66] *Tetra Laval B.V. v. Commission* (Joined Cases T-5/02 and T-80/02) EU:T:2002:264; *BaByliss SA v. Commission* (Case T-114/02) EU:T:2003:100, ¶¶354–364; *General Electric Company v. Commission* (Case T-210/01) EU:T:2005:456.

[67] OECD Competition Committee, *Competition on the Merits*, Series Roundtables on Competition Policy n. 56, DAF/COMP(2005)27, March 30, 2006, available here.

[68] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009 C45/7, ¶6.

The Revised Guidelines should fully incorporate the benefits a non-horizontal merger generates, such as quality improvements, convenience, and cost reductions, into the assessment of effects, instead of assessing these separately under an efficiency defense. If customer benefits stem from procompetitive efficiencies rather than from conduct that harms rivals, they should weigh against any finding of a SIEC. Theories of harm must, therefore, demonstrate how competition would be materially weakened despite these efficiencies, and assessments should not focus narrowly on price but also account for non-price benefits.

Finally, given the cumulative nature of the three prongs of the AIE framework, a lack of demonstrable anticompetitive effects should alone be sufficient to dismiss concerns, without requiring the merging parties or the Commission to present detailed assessment and economic modelling on ability or incentive.