Merger Guidelines Review

Topic C – Innovation And Other Dynamic Elements In Merger Control

I. EXECUTIVE SUMMARY

1. This Response to the European Commission's Consultation on **Topic C** summarizes our views on possible reforms to the assessment of innovation and other dynamic elements in EU merger control.[1]

2. The EU has identified innovation and investment as key to its competitiveness,[2] with the Draghi Report calling for a revised merger control framework that "incentivises companies to innovate and become more efficient."[3] The current Guidelines offer limited guidance on assessing the impact of mergers on innovation and investment, creating a gap between the EU's policy goals and its merger control guidance.[4]

3. This Response proposes four modernizations to align EU merger control with the EU's competitiveness objectives:

   - **Innovation and investment framework.** The current Guidelines and Commission decisional practice provide little guidance on how to assess innovation and investment, focusing instead principally on short-term price effects. When the Commission has considered innovation in merger reviews, it has largely focused on potential anti-competitive effects resulting from overlaps in R&D, while giving little weight to pro-competitive effects such as enabling new product development, avoiding duplication, spreading risk, or strengthening incentives to invest. Indeed, the existing efficiencies framework is poorly suited to capture innovation- and investment-related gains, as it focuses on short-term price effects, applies a rigid quantification standard

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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").

For ease of reference, please refer to the Table at the end of this Response providing an overview of which paragraphs respond to which questions of the Consultation.

2 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Competitiveness Compass for the EU, COM(2025) 30 of January 29, 2025 ("Commission's Competitiveness Compass"), p. 6, available here.

3 Mario Draghi, The future of European competitiveness (the "Draghi Report"), Part B, September 9, 2024. *See* Commission's Competitiveness Compass, p. 6.

4 In response to Question C.1, this Response considers that answer C.1.c ("No, to an insufficient extent") characterizes the level of guidance provided in the Guidelines. This Response addresses all elements listed under Question C.2(a)–(g).

shifting the burden to prove pro-competitive innovation effects and other efficiencies to the parties, and excludes out-of-market benefits. As a result, merging parties have been discouraged from submitting innovation- and investment-related evidence, and no merger has ever been cleared on the basis of innovation- or investment-related efficiencies.

This Response proposes two principal improvements:

- In markets where the Commission identifies potential concerns in innovation competition, the Commission should be required to assess and balance a transaction's potential pro- and anti-competitive effects on innovation – notably weighing short-term effects against longer-term developments in innovation. The Commission should find a significant impediment to effective competition ("SIEC") – at least as it relates to innovation competition – only if it can demonstrate that the overall balance of effects on innovation is negative.[5]

- More generally, where the parties provide plausible evidence of a transaction's pro-competitive impact on innovation or investment, even where there are no potential innovation concerns, the Commission should weigh the presented positive innovation and investment effects against other identified potential anti-competitive effects (such as potential short term pricing effects) in making its SIEC assessment. This may include weighing longer term or out of market innovation efficiencies against short term potential price effects in a market.

▪ **Unified potential competition assessment.** The HMG suffer from two important shortcomings: (i) they lack a precise analytical framework for assessing whether and when a potential competitor is likely to exercise a significant constraint (on the merged entity or one of the merging parties)and (ii) they suggest a separate standard for assessing potential competition when, on the one hand, determining whether the transaction will eliminate potential competition and, on the other hand, determining whether a third-party potential competitor is likely to serve as a 'significant'[6] or 'sufficient'[7] competitive constraint on the merged entity going forward. This risks creating an asymmetry in the Commission's approach that is not supported by economic evidence. The Commission should apply the same rigor and standard to investigating whether one of the merging parties is or is likely to become a potential competitor as to whether third-party potential competitors are likely to exert a significant competitive constraint on the merged entity. This Response proposes establishing a unified analytical framework for assessing potential competition using a 'more likely than not' standard of proof, applied consistently whether

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5 Response to Questions C.5, C.6.a, C.6.d, C.7, C.7.a, and C.8.

6 HMG, ¶60.

7 HMG, ¶68.

raised as a theory of harm or used as an argument by merging parties.[8] This would eliminate current legal uncertainty and economic asymmetry.[9]

- **Reformed failing firm framework.** The HMG criteria for a failing firm defense are almost impossible to meet, making the legal framework unfit for purpose, with only one case cleared based on a failing firm defense in over 20 years. This Response proposes replacing the current three-limb failing firm test with a unified two-stage counterfactual analysis: (i) assess evidence for the most likely counterfactual scenarios; and (ii) compare merger outcomes against those scenarios. [10] This would eliminate the current 'inevitability' standard that departs from the established 'balance of probabilities' test and is impossible to meet in practice.

- **Predictable assessment timeframes.** The Guidelines lack guidance on appropriate timeframes for evaluating future market developments. This Response proposes preserving the established evidentiary standards,[11] without lowering the burden for cases involving "more significant" but "more distant" future effects, as doing otherwise would create legal uncertainty and could deter M&A and investment.[12] It also recommends that assessment timeframes should not exceed periods over which events can be predicted "with a sufficient degree of certainty."[13] Because timeframes may vary by industry (longer periods may be justified in traditional sectors while shorter-term predictions may be more appropriate in fast-moving technology sectors), we recommend against applying rigid predetermined periods.

4. These reforms would shift merger control from a short-term focus on price to a forward-looking assessment of innovation and investment, ensuring EU merger control reflects

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8 *Commission v. CK Telecoms UK Investments* (Case C-376/20 P) EU:C:2023:561("CK Telecoms"), ¶¶86–87.

9 In response to Questions C.9.b, C.9.c, C.10.a, C.10.b, and C.10.c.

10 Response to Questions C.13, C.13.a and C.13.b.

11 This involves, in particular, the "more likely than not" standard of proof set out in CK Telecoms (¶¶86-87), and that the Commission must provide "robust" evidence "in order to establish convincingly the merits" of its case, and that its decisions must rely on a "sufficiently cogent and consistent body of evidence." *See Commission v. Tetra Laval* (Case C-12/03 P) EU:C:2005:87 ("*Tetra Laval ECJ*"), ¶¶27, 39, 41, and 45; and *CK Telecoms*, ¶87.

More complex theories in turn require more convincing evidence, *see ibid*., ¶78 (the "complexity of a theory of competitive harm […] is a factor which must be taken into account when assessing the plausibility of the various consequences [that] a concentration may have, in order to identify those which are most likely to arise."). *See also France v. Commission* (Joined Cases C-68/94 and C-30/95) EU:C:1998:148, ¶228 ("The more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission."). *See also CK Telecoms*, ¶111.

12 Response to Question C.15.

13 Otherwise stated, with a "reasonable margin of error." *See EVH v. Commission* (Case T-312/20) EU:T:2023:252 ("*EVH GC*"), ¶¶233–234. Response to Questions C.15, C.16, and C.17.

the dynamics of modern markets while maintaining rigorous competition standards. It would ensure a holistic competitive assessment in which the Commission fully balances its identified potential competitive concerns against the likely pro-competitive effects of a transaction to assess the transaction's overall impact on competition and consumer welfare.

II. TOPIC 1: INNOVATION AND INVESTMENTS

A. SHORTCOMINGS WITH THE GUIDELINES AND THE COMMISSION'S DECISIONAL PRACTICE

5. The revision of the Guidelines offers a well-timed opportunity to update the Commission's framework for the assessment of mergers' effects on innovation and investments.

6. The EU has identified innovation and investment as key to its competitiveness, as highlighted by the Draghi Report and the Commission's Competitiveness Compass.[14] The Competitiveness Compass calls for a new competitiveness model for Europe based on "innovation led-productivity" and, as part of it, a revised merger control framework that "incentivises companies to innovate and become more efficient."[15] The Draghi Report identifies an "innovation gap" in Europe and recommends adapting the merger control framework to "[e]mphasise the weight of innovation."[16] The importance of accounting for innovation effects in merger control has also been recognized in EVP Teresa Ribera's Mission Letter, which states that the "review of the Horizontal Merger Control Guidelines […] should give adequate weight to the European economy's more acute needs in respect of […] innovation."[17]

7. The Guidelines currently offer limited guidance on assessing the impact of mergers on innovation and investment, creating a gap between the EU's policy goals and its merger control enforcement. This Response highlights key shortcomings with the Commission's current approach and formulates recommendations to update it.

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14 Competitiveness Compass, p. 6.

15 Competitiveness Compass, *ibid*.

16 Draghi Report, Part B, p. 299.

17 Commission, "Mission Letter, Teresa Ribera Rodriguez" [2025] p. 6.

1. The Guidelines give limited weight to innovation and investment[18]

8. The Guidelines give limited weight to innovation[19] and investment.[20] They recognize the key principle that "[e]ffective competition brings benefits to consumers, such as […] innovation,"[21] and that "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."[22] Similarly, the Guidelines recognize that vertical mergers may "align the incentives of the parties with regard to investments,"[23] thereby acknowledging the positive effects that mergers can have on investment.

9. However, the Guidelines factor incentives to innovate and invest into the merger assessment only marginally. The term 'innovation' is mentioned only nine times in the HMG and only four times in the NHMG.[24] The Guidelines do not explain how to assess post-merger innovation in any way. References focus primarily on potential negative impacts of mergers on innovation.[25] Investment is considered even more marginally, with no indication of how the Commission assesses the ability and incentives to invest in merger control.[26]

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18 Response to Questions C.5, C.6.a, C.7, C.7.a, and C.8.

19 In this Response, 'innovation' is broadly viewed as an "essential driver of economic progress that benefits consumers, businesses, and the economy as a whole. Innovation efforts range from incremental technological progress to more radical changes in how markets function." Commission Competition Policy Brief 1/2024, "Non-Price Competition: EU Merger Control Framework and Case Practice," April 17, 2024, p. 2.

20 In this Response, 'investment' is broadly viewed as the allocation of resources by an undertaking with a view to realizing an economic gain. As R&D expenditure is frequently a precursor to innovation, the analysis developed here generally applies to both concepts. For example, a merger that strengthens the merged entity's incentives and ability to invest in R&D will often also enhance its capacity to innovate. Where the analytical framework does not apply equally to both investment and innovation, this will be explicitly indicated.

21 HMG, ¶8; NHMG, ¶10.

22 HMG, ¶38.

23 NHMG, ¶57.

24 HMG, ¶8 (general benefits of effective competition); HMG ¶8 (market power assessment); HMG, ¶15 (interpretation of market shares); HMG, ¶38 (non-coordinated effects); HMG, ¶45 (coordinated effects); HMG, ¶71(b) (barriers to entry); HMG, ¶81(consumer benefit); NHMG, ¶10 (general benefits of effective competition); NHMG, ¶10 (market power assessment); NHMG, ¶13 (benefits of integration); NHMG, ¶26(a) (market power assessment).

25 HMG, ¶38 ("In markets where innovation is an important competitive force, [...] 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."); NHMG ¶10 ("the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An 'increase in market power' in this context refers to the ability of one or more firms […] diminish innovation").

26 Investment is not mentioned in the HMG. The NHMG note the benefits of vertical mergers on investments (¶57) ("a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products") and the negative impact

10. In its decisional practice, the Commission has developed a framework to assess innovation-related concerns, particularly in chemicals and pharmaceutical cases.[27] This approach has faced substantial criticism due to a perceived 'presumption' by the Commission that horizontal mergers inherently reduce innovation.[28] Several authors have argued that "horizontal mergers may increase the merging parties' incentives to invest in innovation under a variety of circumstances",[29] including "in the absence of efficiencies",[30] and that concentrations may in fact yield a variety of positive effects on innovation (resulting from *e.g.*, economies of scale and scope, elimination of wasteful duplication, and reduction of financial risks).[31] A presumption that horizontal mergers always hamper innovation risks blocking many procompetitive mergers.[32]

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that vertical foreclosure may have on incentives to invest (¶73) ("The negative impact on consumers may take some time to materialise when the primary impact of customer foreclosure is on the revenue streams of upstream rivals, reducing their incentives to make investments in cost reduction, product quality or in other competitive dimensions so as to remain competitive.").

27 The framework was developed in several decisions, including cases *Dow/Dupont* (Case COMP/M.7932), decision of March 27, 2017, *Abbvie/Allergan* (Case COMP/M.9461), decision of January 10, 2020, *Elanco Animal Health/Bayer Animal Health Division* (Case COMP/M.9554), decision of February 5, 2021, and *Pfizer/Seagen* (Case COMP/M.11177), decision October 19, 2023. *See* Consultation Topic C, p. 27.

28 *See* Jorge Padilla, Revisiting the Horizontal Mergers and Innovation Policy Debate, [2019] Journal of European Competition Law & Practice, Volume 10, No. 7, p. 463, observing that critics "blame the alleged change in policy to the theoretical work of members of the Commission's Chief Economist team". *See*, for example, Giulio Federico, Horizontal Mergers, Innovation and the Competitive Process [2017] Journal of European Competition Law and Practice, 8:10, and Giulio Federico, Gregor Langus, and Tommaso Valletti, Horizontal Mergers and Product Innovation [2018] 59 International Journal of Industrial Organization.

29 Horizontal mergers have been identified as having four main effects on innovation: "a margin expansion effect, which decreases innovation incentives; a demand expansion [or 'appropriability'] effect, which increases such incentives; and an innovation diversion effect, which is ambiguous. When the three effects are in operation, the merger can have a positive or negative impact on incentives". Finally, "the spillover effect: investment in R&D by one firm may not only benefit the firm but also its rivals through technological spillovers." *See* Jorge Padilla, Revisiting the Horizontal Mergers and Innovation Policy Debate, [2019] Journal of European Competition Law & Practice, Volume 10, No. 7, p. 466-467, citing articles by Bourreau, Jullien, and Lefouili.

30 *Ibid*., p. 467 ("even when a merger creates no production or innovation synergies, i.e., even in the absence of efficiencies, a horizontal merger can have a positive effect on innovation. The merger may increase innovation incentives and, therefore, be rivalry enhancing".)

31 *Ibid*., p. 467-468 ("On the innovation side, a horizontal merger may also reduce the cost of innovation due to economies of scale and scope, since R&D costs can be defrayed over a greater total volume or a greater number of products. It may also save R&D costs by avoiding the duplication of investment and facilitate that the combined investment of the merged entity exceed investment in the no merger counterfactual. The merger may also combine the complementary R&D assets of the merging parties. A horizontal merger between a financially constrained firm (e.g., a start-up) and a firm with unfettered access to capital markets may also result in greater innovation […] More generally, mergers may facilitate investment by lifting credit constraints").

32 *See* Vincenzo Denicolò and Michele Polo, The Innovation Theory of Harm: An Appraisal, [2018] Bocconi University Working Paper N. 103., p. 27. *See also* Jorge Padilla, Revisiting the Horizontal Mergers and Innovation Policy Debate, [2019] Journal of European Competition Law & Practice, Volume 10, No. 7, p. 471 ("there is no justification for the adoption of a structural presumption [that

11. The Commission's approach has also been criticized for occasionally relying on unsound proxies for innovation incentives, such as the number of patents,[33] and for applying an efficiencies counterfactual that diverges unjustifiably from the counterfactual approach for assessing a merger's competitive effects. While the latter compares against a scenario absent the merger (HMG, ¶9) – *i.e.*, where the merging parties would typically act unilaterally – efficiencies are compared against a scenario in which the parties would cooperate with rivals.[34] In addition, the approach developed for chemicals and pharmaceutical cases is not directly transposable to other industries such as telecommunications, where innovation is predominantly infrastructure-driven (*e.g.*, large-scale investments in 5G and fiber rollout), standards-based (with progress shaped by international standard-setting rather than firm-specific pipelines), and incremental (manifesting in gradual improvements in network speed, latency, and service quality rather than discrete product launches).[35] Yet, such mergers can also have (positive or negative) effects on incentives to invest and innovate.[36]

12. Overall, the framework developed in the Commission's decisional practice fails to provide general guidance regarding the Commission's approach for assessing post-merger innovation and investment (positive and negative) effects in the scope of merger reviews, including in which circumstances the Commission recognizes that a merger

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horizontal mergers cause a loss of innovation] because horizontal mergers do not always reduce the merging parties' incentives to invest in process and/or product innovation. They only do so, when the innovation externality is negative.").

33 *See*, *e.g.*, Cornerstone Research, Evaluating Innovation Theories of Harm in Merger Review: Economic Frameworks and Difficulties, [2021], The National Law Review, Volume XV, No. 244 ("While investigating patents, weighted by some measure of their importance, such as citations, may have some probative value, […] patents cover a variety of different types of innovation—production processes and new products, for example—which should not enter any model homogeneously. Second, the relationship between patents and true innovation or its welfare consequences is indirect and, in some cases, non-existent. Patenting is not an inevitable manifestation of innovation but rather a strategic choice.")

34 *See, e.g.*, Jorge Padilla, "Revisiting the Horizontal Mergers and Innovation Policy Debate" (2019), *Journal of European Competition Law & Practice* (Volume 10, n. 7):"[a]s a matter of economics, it would be wrong to use different counterfactuals for the assessment of competitive effects and efficiencies" and "[s]ince such limited cooperation may nonetheless produce anti-competitive effects, merger control is necessarily biased in favour of intervention". For more information *see* our *Response to Topic F*.

35 The cases that the Commission cites in support of this framework concern a limited number of sectors, primarily chemicals and pharmaceuticals, where the Commission performed highly industry-specific assessments. *See* Consultation Topic C, p. 27. For example, in *Dow/DuPont*, the Commission's assessment was centered on assessing innovation in the agrochemical sector, where companies compete to discover and develop new active ingredients for crop protection and seeds. The decision noted that "in order to assess innovation competition, the Commission will both consider metrics of innovation taking place at industry level, as well as innovation taking place in spaces consisting of groupings of crop/pest combinations." *Dow/Dupont* (Case COMP/M.7932), decision of March 27, 2017, ¶352. Similarly, in *AbbVie/Allergan*, the Commission closely analyzed the specifics of the industry in question, arguing that "*[i]n the pharmaceutical industry, the process of innovation is structured in such a way that it is typically possible to identify competing research programmes (or "pipeline" programmes) at an early stage of clinical trials.*" *Abbvie/Allergan* (Case COMP/M.9461), decision of January 10, 2020, ¶18.

36 For instance, investment in new technologies, and thus innovation, is a key driver of competition in mergers in the telecommunication industry. *See* Raphael De Coninck, Innovation in EU Merger control: in need of a consistent framework, [2016] Competition Law and Policy Debate, Volume 2, Issue 3, pp. 41–51.

may impact innovation and investment, and which elements the Commission will consider in its assessment.

2. *The current efficiencies framework insufficiently accounts for postmerger innovation and investment*[37]

13. Innovation and investment benefits may in principle be taken into account as efficiencies under the HMG.[38] However, the HMG primarily consider price and cost reductions as efficiencies.[39] Moreover, the HMG do not describe the circumstances in which a merger can generate innovation or investment benefits that may counteract the harm to consumers that a merger may otherwise have, or the type of innovation or investment gains that may qualify as efficiencies other than the development of new products or services. In its decisional practice, the Commission has generally taken a restrictive approach to innovation, and never cleared a merger on the grounds of innovation or investment benefits.[40]

14. The legal standard for efficiencies set out in the HMG makes it particularly difficult for parties to establish innovation and investment benefits as efficiencies.[41]

- **Limits of the Commission's efficiencies test in an innovation and investment context.** For the Commission to conclude that efficiencies outweigh alleged anti-competitive effects, the efficiencies have to (i) benefit

[37] Response to Questions C.5, C.6.a, C.7, C.7.a, and C.8.

[38] HMG, ¶81 ("Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation.") (emphasis added).

[39] HMG, ¶80 ("Mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. For example, cost savings in production or distribution may give the merged entity the ability and incentive to charge lower prices following the merger. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs (106) are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers (107). Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.") and ¶81 ("Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation.") (emphasis added).

[40] To date, the Commission has not cleared any merger exclusively based on efficiencies and has only acknowledged the positive effects of efficiencies in a few cases. *See Deutsche Börse/NYSE Euronext* (Case COMP/M.6166), decision of February 1, 2012 ("*Deutsche Börse/Euronext*"); *Ineos/Solvay/JV* (Case COMP/M.6905), decision of May 8, 2014; *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business)* (Case COMP/M.7278), decision of September 8, 2015. *See also Orange/Jazztel* (Case COMP/M.7421), decision of May 19, 2015; and *Hutchison 3G Italy/WIND/JV* (Case COMP/M.7758), decision of September 1, 2016 (Commission recognized efficiencies but these ultimately did not counteract all harm). *See too Korsnäs/AD Cartonboard* (Case COMP/M.4057), decision of May 12, 2006 ("*Korsnäs/AD Cartonboard*") and *FedEx/TNT Express* (Case COMP/M.7630), decision of January 8, 2016 (Commission took into account efficiency claims as part of its competitive assessment or remedies).

[41] For general feedback on the Commission's approach to the assessment of efficiencies, *see* our *Response to Topic F*.

consumers, (ii) be merger-specific, and (iii) be verifiable.[42] Specifically, with respect to the verifiability criterion, the Commission must "be reasonably certain that the efficiencies are likely to materialize, and be substantial enough to counteract a merger's potential harm to consumers,"[43] on the basis of a "precise quantitative analysis" of the efficiencies and their benefits to consumers or otherwise an analysis showing a "clearly identifiable positive impact on consumers."[44] The HMG consider that "[i]n 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."[45] These requirements are not well-suited to innovation and investment gains as "merger-induced innovation effects are difficult to verify immediately, as the success of innovative efforts is highly uncertain and usually only becomes apparent in the medium or long term."[46]

- **The time horizon is too short to properly account for postmerger innovation and investment efficiencies.** According to the HMG, "the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them."[47] However, innovation benefits typically materialize over a longer time horizon than short-term price reductions. Firms that invest in research, development, scaling of new technologies, or building or upgrading infrastructure do so with an expectation of delivering future improvements. From a consumer perspective, these dynamic gains are significant even though they are inherently more difficult to quantify at the moment of the merger review. Accordingly, in reviewing mergers promoting innovation, "a purely static analysis can result in enforcement errors. In those cases, the assessment of the effects of the merger within a longer timeframe might reduce the risk of under enforcement and over enforcement."[48]

- **A precise quantification of consumer impact may be inappropriate for innovation or investment effects.** Innovation-driven efficiencies and investments in R&D or infrastructure generate value that may be more complex to quantify with precision than short-term price effects. As has been observed,

42 HMG, ¶78.

43 HMG, ¶86.

44 HMG, ¶86.

45 HMG, ¶86.

46 Reinhilde Veugelers, Innovation in EU Merger Control: Walking the Talk [2012] Bruegel Policy Contribution, p. 5; *See also* Justus Haucap, Merger effects on innovation: A rationale for stricter merger control? [2017] DICE Discussion Paper No. 268, Heinrich Heine University Düsseldorf, Düsseldorf Institute for Competition Economics (DICE), p. 1.

47 HMG, ¶83.

48 OECD (2020), Merger Control in Dynamic Markets, p. 8.

"analyzing the effect of a proposed merger on innovation is a predictive exercise involving a considerable amount of uncertainty."[49]

- First, innovation leads to the development of new or improved products and services that expand consumer choice, enhance quality, and create entirely new markets or segments. These benefits may not be captured by static price comparisons, since the very nature of the offering is altered, but they should nevertheless be accounted for. For instance, a new service or technology may command a higher nominal price, yet provide consumers with substantially greater utility, safety, convenience, or sustainability.

- Second, investment-driven efficiencies often spill over beyond the merging parties themselves. Knowledge transfers, ecosystem development, and complementary innovations by competitors and suppliers can amplify the benefits for consumers across an entire industry. Such spillover effects are rarely reflected in price-based metrics, yet they are central to the EU's policy objective of fostering innovation-led growth.

- Third, unlike straightforward cost savings or price reductions, efficiencies from increased innovation and investment inevitably involve uncertainty. Firms may devote greater resources to R&D or infrastructure, yet the success of these initiatives and their eventual impact on consumer welfare – cannot be guaranteed. The Commission should nonetheless encourage such risk-taking, recognizing that even uncertain innovation-driven efficiencies can yield transformative breakthroughs that justify their consideration in merger assessments.

▪ **No consideration of cross-market efficiencies.** The Commission has required in its decisional practice that positive gains must counteract the negative effects on competition in the same relevant markets where those negative effects are likely to occur.[50] Doing so, the Commission's framework for assessing efficiencies overlooks the broader, cross-market impact of innovation and investment, to which the HMG appear to leave room by requiring only "in principle" that efficiencies be 'in-market',[51] and which EU case law has not ruled out either.[52] Economic literature stresses that by mistakenly focusing on

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49 Giulio Federico, Fiona Scott Morton, Carl Shapiro, Antitrust and Innovation: Welcoming and Protecting Disruption [2020] NBER, p. 137.

50 *Booking Holdings/Etraveli Group* (Case COMP/M.10615), decision of September 25, 2023, ¶¶1142, 1151, and 1170: the Commission determined that Booking's arguments about efficiency were not convincing, partly because the purported benefits would have helped users of online flight booking services, while the Commission's concern about harm was specifically related to online hotel booking services; *Tronox/Cristal* (Case COMP/M.8451), decision of July 4, 2018, ¶¶383–384; and *Orange/Jazztel* (Case COMP/M.7421), decision of May 19, 2015, ¶¶704–705.

51 HMG, ¶76 ("efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur").

52 *MasterCard Inc. and Others v. Commission* (Case C-382/12 P) EU:C:2014:2201, ¶¶241–242.

the losses to one group of consumers and ignoring the gains by another consumer group outside the relevant market, competition law enforcement hinders a proper assessment of overall consumer welfare.[53] Innovation efficiencies often have benefits that extend well beyond the specific product or geographic markets under review: new technologies, platforms, or R&D breakthroughs can improve consumer welfare across multiple adjacent or downstream markets, sometimes even creating entirely new markets. If the Commission's assessment is limited to a market-by-market balancing of efficiencies against possible price increases, such broader benefits are disregarded.[54]

3. Lack of innovation- and investment-related remedies[55]

15. The Commission's reliance on a limited set of remedies, primarily structural divestitures, reflects its well-established preference for remedies that eliminate the identified source of competitive harm.[56] This preference also applies to cases raising innovation concerns. For instance, in *Dow/DuPont*, the Commission required the divestment of significant innovation capabilities by DuPont, with the ultimate goal of creating a new viable R&D competitor in the market.[57] Similarly, in *Bayer/Monsanto*, a transaction that would have significantly reduced competition on innovation, the Commission required a divestment package addressing the parties' overlaps in seeds, pesticides, and digital agriculture.[58]

16. Behavioral commitments have been accepted only exceptionally and under strict conditions. This structural preference is ill-suited for innovation-driven markets. Divestitures may disrupt ongoing R&D pipelines, break up synergies between complementary assets, or reduce the scale and scope necessary for sustained investment, thereby chilling the very innovation that merger control should aim to protect. In dynamic sectors, more flexible, forward-looking remedies – such as commitments ensuring access to key technologies, interoperability standards, or safeguards for continued R&D expenditure – may be better aligned with preserving incentives to innovate and thus maintaining competitive conditions and consumer welfare. As

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53 Francesco Ducci, Out of market efficiencies, two-sided platforms, and consumer welfare: a legal and economic analysis, [2016] Journal of Competition Law & Economics 12(3), p. 618.

54 For a more detailed discussion of out-of-market benefits, and the reasons why and circumstances in which the Commission should take these into account, *see* our *Response to Topic F*.

55 Response to Question C.7.a.

56 Commission notice on remedies acceptable under Council Regulation (Commission) No 139/2004 and under Commission Regulation (Commission) No 802/2004, OJ 2008 C 267/1 ("Remedies Notice"), ¶15.

57 Commission Press Release IP/17/772, "Mergers: Commission clears merger between Dow and DuPont, subject to conditions," March 27, 2017.

58 Commission Press Release IP/18/2282, "Mergers: Commission clears Bayers' acquisition of Monsanto, subject to conditions," March 21, 2018.

economists have noted, "a merger may increase both the pace of innovation and prices in the short run."[59]

17. This dynamic is particularly visible in infrastructure-heavy or R&D-intensive industries, such as telecommunications, where consolidation may be necessary to achieve the investment scale required for next-generation networks or breakthrough technologies. Mergers in the telecommunications industry resulting in price increases have even been associated with post-merger investment increases in economic literature.[60] In such cases, refusing to consider behavioral commitments risks blocking transactions that, while potentially generating some upward pricing pressure in the near term, are instrumental in delivering long-term innovation and investment benefits that substantially enhance consumer welfare.

B. RECOMMENDATIONS

18. This Response proposes a clear framework for assessing the effects of mergers on innovation and investment. The Commission should examine both positive and negative effects in cases where innovation is an important parameter of competition, before concluding to a SIEC.

19. Where a SIEC is found (whether or not due to innovation concerns), merging parties should be able to demonstrate that the merger is likely to generate longer-term innovation or investment gains that outweigh potential competitive harm, including in adjacent markets. Where such dynamic benefits are more likely than not, they should justify unconditional clearance or reduced remedies.

20. The framework should also allow for more flexible remedies, encouraging parties to propose behavioral or investment-based measures that address competition concerns while preserving incentives to innovate and invest. In particular, remedies could include dedicated R&D or infrastructure investment commitments that help restore effective competition.

1. Introducing an innovation and investment-based framework[61]

21. This Section sets out the elements and evidence that the Revised Guidelines should include to assess innovation and investment gains under this innovation framework.

22. **Circumstances where mergers can generate innovation or investment gains.**[62] Economic literature has consistently found that mergers can have positive or negative

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59 Ioannis Kokkoris and Tommaso Valletti, Innovation Considerations in Horizontal Merger Control [2020] Journal of Competition Law & Economics, p. 8.

60 Michał Grajek *et al*, Static or Dynamic Efficiency: Horizontal Merger Effects in the Wireless Telecommunications Industry [2019] Review of Industrial Organization, p. 377.

61 Response to Questions C.5, C.6, C.6.d, C.7, and C.8.

62 This section discusses effects on innovation and/or investment in R&D interchangeably. Please refer to ¶29 *et seq.* of this Response for an explanation for when the assessment of innovation or investment should be separated.

effects on innovation and investment depending on the market circumstances.[63] However, the primary motivation behind many mergers is to expand product portfolios and achieve groundbreaking innovation to realize growth in the market. The Revised Guidelines should precisely set out when potential benefits to innovation and investment may be taken into account and the typical circumstances where mergers can increase merging parties' ability and incentives to innovate and invest. The examples should be illustrative rather than exhaustive, allowing the Commission to consider additional scenarios on a case-by-case basis. The following examples set out how a merger may increase merging parties' incentives to innovate and expand:

- **By expanding demand**, thus allowing the merged firm to capture higher returns from R&D. This is more likely:
    - Where the combination enables demand-enhancing offerings (*e.g.*, complementary products bundled, improved quality/variety, or one-stop solutions) that attract new customers rather than merely reallocating existing ones;[64]
    - Where the merged firm gains materially broader market access (*e.g.*, into new geographies or customer segments, through stronger distribution or after-sales networks, or by enlarging the user base such that network effects increase the value of innovation);[65] and
    - Where appropriability of payoffs improves (*e.g.*, through stronger intellectual property rights, reduced spillovers between rivals, or enhanced pricing/monetization capabilities), making higher margins and expanded coverage translate into higher expected R&D payoffs. In this sense, Shapiro argues that "one cannot expect substantial innovation (from commercial firms, at least) if […] a successful innovator earns little profit."[66] This effect is also relevant to Aghion's 'inverted U-shape' theory according to which mergers increase innovation as long as the level of competition in the market is such to allow them to realize higher returns through innovation.[67]

63 *See*, for instance, Philippe Aghion *et al*., Competition and Innovation: An Inverted U Relationship [2002] NBER Working Paper, p. 43.

64 Marc Bourreau and Bruno Jullien, Mergers, Investments and Demand-Enhancing Innovation [2017] IDEI Working Paper.

65 Bruno Jullien and Yassine Lefouili, Horizontal Mergers and Innovation [2018] Journal of the European Economic Association, p. 380.

66 Carl Shapiro, Competition and Innovation – Did Arrow Hit the Bull's Eye? [2012] in Josh Lerner and Scott Stern (eds), *The Rate and Direction of Inventive Activity Revisited*, p. 364.

67 Philippe Aghion *et al*., Competition and Innovation: An Inverted U Relationship [2002] NBER Working Paper, p. 43.

- **By enabling the merged firm to internalize R&D spillovers.**[68] This effect materializes where the merged firm avoids duplication and can capture the full returns on its R&D, thereby making innovation more efficient (*i.e.*, freeing up resources and positively impacting its ability to innovate) and attractive (*i.e.*, increasing innovation and investment incentives). It is especially beneficial when marginal costs are increasing and firms have overlapping research lines.[69] For example, in pharmaceuticals or chemicals, where each additional project requires significant resource investment (*i.e.*, marginal costs for each project are still significant, due to *e.g.*, specialized scientists, lab capacity, clinical trials), internalizing spillovers between overlapping research lines allows the merged firm to avoid duplicating costly projects and ensures that the full benefits of each research effort are captured internally.

- **By enabling the merged firm to combine complementary R&D capabilities.** Innovation-enhancing R&D complementarities allow for pooling R&D assets or coordinating research activities.[70] The prospect of product development synergies increases the incentive to innovate while the consolidation of R&D lines frees up additional investment resources. For example, one firm's upstream discovery platform may be combined with another's downstream clinical development or manufacturing know-how, enabling projects that neither could have pursued as effectively alone. In such cases, synergies can generate entirely new or improved products, expanding innovation possibilities and strengthening incentives to invest.

- **Innovation and investment may increase post-merger in spite of elevated market shares if the market remains contestable** – *i.e.*, if incumbents face credible threats of entry or disruptive innovation. In dynamic, innovation-driven industries, high concentration is not inherently harmful: what matters is whether the prospect of being displaced continues to discipline incumbents' behavior. A merger can support innovation in such settings where it improves the merged firm's ability to appropriate the returns from risky R&D (for example by pooling complementary capabilities, as explained above), while the credible threat of entry ensures that those returns are not enjoyed passively but reinvested into innovation. In other words, contestability enhances the incentives to innovate because market leaders must keep investing to avoid being leapfrogged, and mergers may make such investment more worthwhile by raising the expected payoff.[71]

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68 Bruno Jullien and Yassine Lefouili, Horizontal Mergers and Innovation [2018] Journal of the European Economic Association.

69 This is called the "innovation sharing effect," which is distinct from potential R&D synergies. Vincenzo Denicolò and Massimo Polo, Mergers and innovation sharing [2021] Economics Letters.

70 Bruno Jullien and Yassine Lefouili, Horizontal Mergers and Innovation [2018] Journal of the European Economic Association, p. 366.

71 Jorge Padilla, Douglas Ginsburg and Koren Wong-Ervin, Mergers in Innovation-Driven Markets: The Role of Contestability [2024] Antitrust Law Journal.

- **Acquisitions of start-ups may enhance innovation and investment when incumbents are better positioned to scale up and commercialize early-stage technologies.** Start-ups are often well suited to the upstream stage of developing new ideas, but they frequently lack the assets needed for the downstream stage of bringing those ideas to market – such as distribution networks, integration with other products, regulatory expertise, or large-scale financing. A merger can therefore create value by matching these comparative advantages: the start-up focuses on invention, while the acquirer ensures deployment at scale. This dynamic requires a functioning market for exit mergers. That is the case when: (i) start-ups and their backers can reliably expect acquisition opportunities, which in turn sustains early-stage venture capital; (ii) potential acquirers compete to buy the most promising start-ups, so that the firm best placed to commercialize an innovation is the one that acquires it; and (iii) the acquirer has both the ability and the incentive to continue investing in development post-merger. Where these conditions hold, exit mergers can strengthen the innovation pipeline by aligning incentives between inventors, investors, and established firms. [72]

- **Acquisitions that enable the creation of a market.** Acquisitions involving nascent technologies not only unlock scale, they can lead to the creation of entirely new markets. An experienced buyer can take a novel invention, enable it to overcome regulatory hurdles, manufacture and commercialize it at scale, and, by creating awareness of and building trust in the product, create a demand for that technology – in a way that start-ups with limited financial and commercial resources and no brand reputation would not be able to. This opens a virtuous cycle, whereby experience with the technology (and, where relevant, data on its use), increases and becomes more widely available, enabling follow-on innovation and incentivizing market entry by other players.

23. **Adapt the evidentiary standard for the innovation framework.** When appraising innovation effects, the evidence brought forward cannot be assessed under the same evidentiary standard as price reductions. It should suffice for parties to show, on the basis of credible mechanisms and verifiable evidence, that a merger is 'more likely than not' to enhance innovation incentives or outcomes in a way that materially benefits consumers in the long term.

24. The Revised Guidelines should clarify how the Commission will conduct its balancing exercise, where there is a trade-off to be made between static and dynamic competition. Rigorous analysis remains essential, and economic approaches can provide guidance as to how innovation and price effects should be weighed. For instance, Jullien and Lefouili (2024) propose comparing innovation diversion ratios with price diversion ratios in merger review: if expected innovation gains are large enough relative to price effects, the merger should be cleared.[73] In plain terms, this means that authorities would

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72 Johan Hammarback *et al*, Innovation and Commercialization: The Case for Startup Acquisitions [2025] European Competition Review.

73 Marc Bourreau *et al*, Mergers and Demand-Enhancing Innovation [2024] HAL Working Paper hal-04548184.

weigh the benefits of more or better innovation against the risk of higher prices. Just as diversion ratios help quantify how much a firm's lost sales would be diverted to the other merging firm (and thus signal the risk of price increases), innovation diversion ratios try to measure how much one firm's reduced incentives to innovate would be offset by the other firm's greater incentive to innovate after the merger.

25. On this basis, where innovation arguments are raised, the Commission should proceed by evaluating the innovation-based efficiencies (such as synergies in research and development teams, obtaining sufficient capacity to make large investments, obtaining economies of scope in the application of innovations).[74] If these effects are assessed to be merger-specific, verifiable (*i.e.*, based on credible evidence), and likely to benefit consumers (even in the long term), a merger should be cleared, even if it results in price effects.

26. **Consider cross-market innovation- and investment-related benefits.** The Revised Guidelines should allow for innovation and/or investment gains across all markets to be considered in the Commission's balancing exercise when considering whether a merger will benefit innovation and/or investment 'on the balance of plausible effects'.[75] When the innovation or investment gains occur in other markets than the market(s) where concerns are identified, the Commission should relax the bar for remedies to be acceptable, and be more open to sets of remedies that, while not necessarily involving a divestiture, can address the competitive harm in the relevant market(s).

27. The Revised Guidelines should provide a framework for evaluating the nature and scale of cross-market benefits. Cross-market effects to be considered in this context should include, for instance:

- ***Technological spillovers***: a company with advanced expertise in one field combining with a firm in a different sector, leading to unexpected innovations in that new sector;

- ***Increased R&D efficiency***: two companies merging to combine their research teams and resources, accelerating the development of new solutions for various markets; and

- ***Improved access to complementary assets***: a small innovative company with a new technology merging with a larger firm that has established infrastructure, a skilled workforce, and extensive market knowledge.

28. **Including guidance on relevant evidence.** The Revised Guidelines should explicitly list the categories of evidence the Commission will consider when weighing innovation benefits against competitive harm. Such evidence should include: (i) business plans and integration strategies showing how the merger enhances the ability to innovate (*e.g.*, through R&D internalization, increased appropriability of returns, or broader market penetration); (ii) other types of internal documents, such as R&D roadmaps; (iii) track

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74 OECD, "Considering non-price effects in merger control – Background note by the Secretariat," May 4, 2018, p. 11, available here.

75 *See* Response to Topic Paper F.

record of successful innovation, including patenting, commercialization, or technological spillovers; and (iv) expert economic analyses, including diversion-based metrics, simulations of demand-enhancing innovation, or cost/efficiency studies.

29. **Acknowledging the link between innovation and investment.** The Revised Guidelines should recognize the close but not identical relationship between innovation and investment. In many cases, the assessment overlaps: since innovation requires substantial investment in R&D, analyzing the merged firm's incentives and ability to innovate will necessarily involve analyzing its incentives and ability to invest in innovation.[76] In this sense, the economic tools and evidence used to assess innovation efficiencies in the scope of the innovation/investment framework (*e.g.* R&D intensity, spillovers, appropriability, synergies, *etc*.) will be similar.

30. At the same time, investment efficiencies are broader than innovation efficiencies, and the assessment diverges where mergers affect investments that do not directly yield new products or processes but nevertheless strengthen competitive dynamics. In addition to strengthening competitive dynamics, credible investment claims could be assessed from the perspective of the EU's IPCEIs.[77] Examples of such investments include large-scale infrastructure commitments (such as telecom networks or energy grids), expansion of manufacturing capacity, or sustainability-related investments (such as green technologies, safer production processes, or improved working conditions). These types of investment may improve quality, reduce costs, or expand output without constituting innovation in the narrow sense. They should be considered valid grounds for clearing a merger under the new innovation/investment framework as well.

31. Specific types of investments and assets that can give rise to such investment efficiencies would depend on the competitive dynamic or IPCEI that they are meant to foster. Examples of post-merger investments to be taken into account should include, *inter alia*: (i) infrastructure assets (*e.g.*, mobile towers, logistics networks, energy grids), which generate economies of scale, reduce duplication, and improve service quality and reliability; (ii) capacity and production facilities (*e.g.*, new plants, laboratory space, data centers), which lower marginal costs, enhance utilization of resources, and enable faster or larger-scale deployment of goods and services; (iii) human capital and organizational resources (*e.g.*, specialized training, workforce development, or improved managerial structures), which strengthen operational efficiency; (iv) sustainability and quality-enhancing assets (*e.g.*, cleaner production technologies, safer working environments, environmentally friendly processes), which directly raise consumer welfare and long-term resilience, even if they do not yield new products; and (v) geographic expansion assets (*e.g.*, distribution networks, localized after-sales infrastructure), which broaden market reach, reduce transaction and transport costs, and improve appropriability of returns on investment.

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76 For instance Padilla *et al*. (2024) examine innovation from the perspective of R&D investment. *See* Jorge Padilla, Douglas Ginsburg and Koren Wong-Ervin, Mergers in Innovation-Driven Markets: The Role of Contestability [2024] Antitrust Law Journal.

77 Commission, Important Projects of Common European Interest (IPCEI), available here.

32. Therefore, when assessing such investment efficiencies, the Commission should consider metrics beyond those typically used in innovation analysis. Taken together, this framework of an innovation/investment framework ensures that efficiencies linked to investment are assessed consistently with innovation benefits where they overlap, but also with due regard to the distinct types of assets and metrics that matter when investment is broader than innovation.

2. *Introducing investment-based remedies*[78]

33. Where – despite the benefits advocated by merging parties – the Commission continues to have significant doubts about a merger's competitive effects, the Revised Guidelines should encourage a remedy-first approach. The Commission should work closely with the parties to design commitments that address the competition concern as far as possible while preserving the investment and innovation benefits. In doing so, the Commission should shift its focus from purely structural remedies to more creative, mixed packages combining investment remedies with targeted behavioral measures tailored to the identified theory of harm.

34. The commitments approved by the CMA in the *Vodafone/Three* merger review provide a pertinent example. The CMA found that the transaction would give rise to a substantial lessening of competition in both the retail and wholesale mobile markets, with risks of higher prices, weaker conditions for mobile virtual network operators (MVNOs), and reduced incentives to invest in network quality. To address these concerns, the CMA accepted a comprehensive package of undertakings consisting of three elements: (i) a binding Network Commitment requiring approximately £11 billion of investment over eight years, with enforceable site and spectrum deployment targets at years 3, 5 and 8; (ii) time-limited retail protections, including tariff caps and commitments to maintain social tariffs; and (iii) time-limited wholesale access terms guaranteeing fair access MVNOs through a Wholesale Reference Offer and roll-over commitments. The investment obligations were subject to detailed milestones, annual reporting, and oversight by an independent Monitoring Trustee, ensuring their credibility and verifiability. The CMA considered the package as sufficient because it simultaneously preserved incentives for large-scale network investment, protected consumers against short-term price and quality risks, and safeguarded wholesale competition. Overall, the commitment would "lead to significant and long-lasting quality improvements in a way that positively affects customer experience."[79]

35. Properly designed, investment remedies in EU merger control could serve to balance competition concerns with broader innovation and consumer benefits.[80] In particular, in cases where claimed innovation or investment efficiencies could outweigh potential harm, the Commission should assess the likely innovation and investment efficiencies

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[78] Response to Question C.7.a.

[79] CMA, Anticipated Joint Venture between Vodafone Group PLC and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited – Final Report, ¶76.

[80] CMA, Final Undertakings given by Vodafone Group Plc, CK Hutchison Group Telecom Holdings Limited and Vodafone UK Trading Holdings Limited to the Competition and Markets Authority pursuant to section 82 of the Enterprise Act 2002, ¶3.1.

in line with the framework explained under paragraphs 23-27 above. The remedies package should set measurable targets, provide for independent trustee monitoring and regular reporting, and be proportionate and time-limited so as not to entrench unnecessary constraints once market dynamics are restored.

C. CONCLUSION

36. Altogether, by broadening the efficiency framework to introduce an innovation and investment framework and encouraging investment-based remedies, the Commission would shift merger control from a narrow, short-term focus on price to a forward-looking assessment of innovation and investment. This would ensure that EU merger policy reflects the dynamics of modern markets and avoids blocking transactions that ultimately enhance growth and consumer welfare.

III. TOPIC 2: ELIMINATION OF POTENTIAL COMPETITION AND POTENTIAL ENTRY AS A COUNTERVAILING FACTOR

A. SHORTCOMINGS WITH THE GUIDELINES AND THE COMMISSION'S DECISIONAL PRACTICE

37. The concept of potential competition appears in two distinct but closely related contexts within the HMG: on the one hand, entry can be a defensive argument raised by merging parties, who contend that any anticompetitive effects of the merger would be constrained by the prospect of future entry and treat potential competition as a countervailing factor.[81] On the other hand, entry can be an offensive 'potential competition doctrine' theory of harm where the Commission challenges a merger on the grounds that it eliminates a firm that would have otherwise entered and increased competition on the market.[82] The HMG address these two instances separately:

- The HMG (¶¶58-60) provide little guidance on **potential competition as a theory of harm**, finding at a high level that "a merger with a potential competitor can generate horizontal anti-competitive effects, whether coordinated or non-coordinated, if the potential competitor significantly constrains the behaviour of the firms active in the market."

- In contrast, the HMG (¶¶68-75) set out a detailed framework for assessing **entry as a countervailing factor**. Market entry is a countervailing factor if it is likely, timely, and sufficient to deter or counteract a merger's potential anti-competitive effects. To be considered likely, entry must be profitable and face low barriers, which can be legal (*e.g.*, licenses), technical (*e.g.*, access to essential facilities or intellectual property rights), or related to the incumbent's established market position (*e.g.*, brand loyalty or reputation).[83] The profitability of entry is also influenced by market growth and the level of sunk

81 HMG, ¶¶68–75.

82 HMG, ¶¶58–60.

83 HMG, ¶71

costs.[84] For entry to be timely, it must occur within a period that can effectively deter the exercise of market power, typically considered to be within two years.[85] Finally, entry must be of sufficient scope and magnitude to compete effectively with the merging parties, and not just serve a small market niche.[86]

38. The Guidelines suffer from two important shortcomings, however. First, they leave open the precise analytical framework for assessing whether a firm exercises significant constraint on the other merging party (*see* sub-section 1 below). Second, the separation between the potential competition theory of harm and potential competition as a countervailing factor risks creating an asymmetry in the Commission's approach to assessing potential competition unsupported by economic evidence (*see* sub-section 2 below).

1. The Guidelines fail to provide a clear analytical framework for assessing mergers with potential competitors[87]

39. The HMG (¶60) set out that a merger with a potential competitor may raise a SIEC where (i) the potential competitor "already exert[s] a significant constraining influence," or there is a "significant likelihood that it would grow into an effective competitive force," and (ii) there are "not a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger."

40. With respect to the first criterion, the Guidelines provide examples of situations in which a firm may exert a 'significant constraining influence', such as when the potential competitor possesses easily deployable assets[88] or is likely to incur the necessary sunk costs to enter the market in a short time.[89] However, the Guidelines do not provide a comprehensive assessment framework and the Commission has applied different analytical approaches across cases, sometimes examining only the firm's ability to enter the market,[90] other times examining both ability and incentive.[91]

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84 HMG, ¶¶72–73.

85 HMG, ¶74.

86 HMG, ¶75.

87 Response to Question C.9.a.

88 HMG, ¶59.

89 HMG, ¶59.

90 In *Telia/Telenor*, the Commission considered that the merging parties were the strongest potential entrants into each other's national markets as a result of having a "situation of mutual dependence" that enabled them to negotiate more favorable charges for access to local loops in each other's national markets. The Commission found that the parties were "uniquely well placed" to 'trade access' to each other's networks and thus to enter their respective markets (*Telia/Telenor* (Case COMP/M.1493), decision of October 13, 1999, ¶150).

91 For example, in *Facebook/WhatsApp*, the Commission considered that, with regard to WhatsApp's potential to become a competitor in the online advertising space, the criteria in ¶60 of the HMG were not met because, even though WhatsApp had the *ability* to introduce targeted advertising on its messaging platform, it lacked the *incentive* to do so, given that this would deviate from WhatsApp's "no ads"

41. As to **incentives**, in some cases the Commission examined whether firms had any 'plans' [92] or 'concrete plans' [93] pre-merger to enter the market based on contemporaneous internal documents, while in others it only considered whether entry would be a 'profitable' or 'rational' move for the firm concerned – regardless of actual plans to enter the market[94] and sometimes even disregarding the firm's deliberate decision not to enter.[95]

42. In yet other cases, the Commission focused on the overall **likelihood** of potential entry, without specifically following an ability and/or incentive logic.[96] In the pharmaceutical and life sciences industry, it examined the likelihood of pipeline product success based

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product strategy and would likely cause customer dissatisfaction (*Facebook/WhatsApp* (Case COMP/M.7217), decision of October 3, 2014, ¶¶173–174). Similarly, in *Südzucker/St. Louis* the Commission stated that "to be considered a potential competitor, a company must have both an incentive to enter the market and the potential to penetrate the […] market" (*Südzucker/Saint Louis Sucre* (Case COMP/M.2530), decision of December 20, 2001, ¶85)

92 In *Amadeus/Navitaire*, for example, the Commission examined, among other things, the plans of both companies to expand into the market for hybrid Passenger Service Systems (PSS). However, it eventually dismissed potential competition concerns in this regard, finding that Navitaire's intention to make its PSS more suitable to enter this market segment were limited in scope, while Amadeus had abandoned its project of rewriting its PSS to address the hybrid segment (*Amadeus/Navitaire* (Case COMP/M.7802), Commission decision of January 19, 2016, ¶143 *et seq*).

93 For example, in *News Corp/Premiere*, the Commission found that there was no evidence that News Corp had actually any concrete plans to enter the pay-TV market in Germany or Austria other than through the proposed acquisition of Premiere, and therefore the Commission considered that News Corp did not exert a significant constraining influence and was not likely to grow into an effective competitive force in the pay-TV market in Germany or Austria (*NewsCorp/Premiere* (Case COMP/M.5121)*,*decision of June 25, 2008, ¶55). Similarly, in *Südzucker/ED&F MAN*, the Commission found that there was no evidence that ED&F MAN was likely to enter the Greek white sugar market(s) in the near future because only one internal document mentioned hypothetical plans to enter the Greek market. The Commission therefore concluded that ED&F MAN did not exert a significant constraining influence and was not likely to grow into an effective competitive force in Greece (*Südzucker/ED&F MAN* (Case COMP/M.6286), decision of May 16, 2012, ¶586).

94 For example, in its assessment of Lufthansa's acquisition of Brussels Airlines, the Commission found that entering the Brussels-Zurich route would be a "profitable and rational move for SN in the absence of the merger, or at least that it would be more profitable than entering many of the routes SN has entered since 2003." (*Lufthansa/SN Airholding* (Case COMP/M.5335)*,*decision of June 22, 2009, ¶314).

95 For example, in *Air Liquide/BOC,* the Commission found Air Liquide to be a potential competitor in the UK market even though Air Liquide claimed that it had "never tried to penetrate that market" and that this resulted from a "business decision." The Commission simply found that "no objective factors would have prevented Air Liquide from entering the United Kingdom market" (*Air Liquide/BOC* (Case COMP/M.1630), decision of January 18, 2000, ¶203).

96 For example, in *Teva/Cephalon*, the Commission found that, given that Teva had obtained market authorization for the main dosage forms of modafinil and secured a patent settlement with Cephalon allowing it to launch modafinil in the EEA without facing litigation, Teva's entry into the market was "very likely." The Commission therefore considered Teva to be a potential entrant in the market for modafinil. Conversely, the Commission found that it could not be established that "it is more likely than not" that other generics would be able to enter on a lasting basis. As a result, the Commission concluded that the transaction may lead to the elimination of the most significant potential competitor to Cephalon for modafinil-based products (*Teva/Cephalon* (Case COMP/M.6258), decision of October 13, 2011 ("*Teva/Cephalon*"), ¶¶114, 98, and 126).

on clinical trial stages,[97] consistent with CJEU jurisprudence requiring the Commission to determine whether the manufacturer of a pharmaceutical product (here: generic medicines) had taken "sufficient preparatory steps to enable it to enter the market concerned within such a period of time as would impose competitive pressure on the manufacturer of originator medicines."[98] For example, the Commission qualified pipeline products in Phase III as "sufficiently advanced to qualify as a concrete potential constraint" in *Teva/Cephalon*,[99] while dismissing Phase I products because they were "at the very early stages of development" in *AbbVie/Allergan.*[100]

43. Finally, the Commission has in some cases considered **timeliness of entry** as a crucial criterion,[101] but considered different timeframes – one or two years as prescribed in the Guidelines in the context of the "entry defense",[102] and up to three to five years in some cases.[103]

44. The absence of a clear framework for assessing potential competition creates legal uncertainty and could enable over-enforcement by allowing the Commission to stretch

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97 *See Dow/DuPont* (Case COMP/M.7932), decision of March 27, 2017 ("*Dow/DuPont")*, ¶¶288–289 explaining that, in the pharmaceutical sector, "Phase I marks the start of clinical testing on humans, currently some eight to 10 years before a product is marketed, with initial efficacy and toxicology screenings. Statistically, projects in Phase I generally have no more than a 10% chance of reaching the market. Phase II, some four to five years before the product is marketed, involves working out the proper dose for the patient and defining the areas of application. The success of Phase II is generally acknowledged to be approximately 30%. Phase III, starting approximately three years before the product is marketed, involves establishing the product's effectiveness on larger groups of patients. The risk of failure in Phase III is reported to be over 50%." (emphasis added).

98 *Generics (UK) Ltd. v. Competition and Markets Authority* (Case C-307/18) EU:C:2020:52, ¶43.

99 *Teva/Cephalon*, ¶81. In later cases, the Commission considered that, in principle, pipeline products in Phase II and III clinical trials are at a sufficiently advanced stage of development to constitute potential competition (*see*, for example, *BMS/Celgene* (Case COMP/M.9294), decision of July 29, 2019, ¶22).

100 *AbbVie/Allergan* (Case COMP/M.9461), Commission decision of January 10, 2020, footnote 68.

101 In *Dow/DuPont* (¶287)*,* the Commission noted "what constitutes such a significant constraining influence or a significant likelihood that a potential competitor would become an effective competitive force in a relatively short period of time will of course depend on the specific characteristics of each industry. In particular, key factors will be the time necessary to launch a new product on the market, as well as the point in that process where the likelihood of growing into an effective competitive force (and, a fortiori, of effectively entering the market) becomes significant."

102 HMG, ¶74.

103 In *Teva/Cephalon*, the Commission considered generic pipeline products to be launched in the EEA within two years to qualify potential competition (*Teva/Cephalon*, ¶81). In contrast, the Commission acknowledged in *Toshiba/Westinghouse* that entry would not be feasible within one or two years, but found that entry of a potential competitor within three to five years would still be "sufficiently timely to constitute a significant impediment of competition." (*Toshiba/Westinghouse* (Case COMP/M.4153), decision of September 19, 2006 ¶97). Similarly, in *Wabtec/Faiveley Transport*, the Commission regarded a time period of exceeding three years, finding that development periods for new products in the market are long and that the product life in the market spans a considerable number of years (*Wabtec/Faiveley Transport* (Case COMP/M.7801), decision of October 4, 2016, ¶¶174–176.).

the notion of potential competition in cases where entry would no longer be likely, timely, and sufficient.[104]

45. This unpredictable regulatory environment may have a chilling effect on M&A: when the outcome of a merger review is uncertain, companies may decide that the risk of a potentially lengthy, costly, and ultimately unsuccessful regulatory review is not worth the potential reward. This can lead to a decrease in overall M&A activity, which is an important driver of innovation and economic growth.[105]

46. In the spirit of creating a comprehensive and predictable analytical framework,[106] this Response proposes that the Revised Guidelines provide clear guidance to assess when a competitor constitutes a 'significant constraining' influence under ¶60 of the HMG. This is crucial as assessments involving nascent and potential competitors present analytical challenges exceeding traditional merger review complexity, requiring predictions about future market outcomes, product differentiation, and efficiency gains.[107] This is further complicated when target entities lack an established market presence and their long-term commercial viability and potential to emerge as a significant competitive constraint is uncertain.

47. Conversely, the Revised Guidelines should ensure that the Commission strikes the correct balance and avoids overenforcement which erroneously prohibits competitively beneficial transactions, undermining consumer welfare.[108] Acquisitions of potential competitors may generate substantial procompetitive efficiencies. Established firms may possess superior resources, expertise, and infrastructure that enable nascent competitors to achieve broader market penetration and accelerate product development more effectively than would be possible through independent growth. Prohibiting such transactions may deprive consumers of new and enhanced products or services that would otherwise reach wider markets more rapidly.

104 For example, in *EDF/Segebel*, the Commission raised competition concerns solely on the basis that there were "a number of plausible scenarios under which the incentive for EDF to develop [the products in question] appears borderline pre-merger," without showing that entry by EDF into the affected market was actually likely (the Commission simply noted that "the precise likelihood of market conditions leading to, on the one hand, EDF on a stand-alone basis developing one or both CCGT projects and, on the other hand, the merged entity not developing the same project(s), is difficult to assess.") (*EDF/Segebel* (Case COMP/M.5549, decision of November 12, 2009, ¶82). This sits at odds with the language of the Guidelines, which requires that there must be at least a "significant likelihood" that the firm in question would grow into an effective competitive force (*see* HMG, ¶60).

105 Dominic Long *et al*, "Merger control frustrates more M&A, but are the tides turning?", Global trends in merger control enforcement, available here (accessed on August 18, 2025).

106 *See* Commission, Review of the Merger Guidelines, available here (accessed August 25, 2025), setting out the aim of the present consultation, which is to "provide a comprehensive, predictable, and lasting framework" and "offer a refreshed legally and economically sound, predictable, and evidence-based analytical framework, for all types of mergers and all economic sectors."

107 John M. Yun, "Potential Competition, Nascent Competitors, and Killer Acquisitions" [2020] The Global Antitrust Institute Report on the Digital Economy.

108 Louis Kaplow, Entry and Merger Analysis [2023] Antitrust Law Journal, p. 154.

48. Additionally, buyout prospects provide critical investment incentives, offering a lucrative and predictable exit strategy for entrepreneurs and their investors absent which investments in innovation would diminish significantly.[109] Excessively restrictive merger enforcement may paradoxically undermine the very innovation and dynamic competition it seeks to protect.[110]

2. *The Guidelines risk creating an asymmetry in assessing potential competition as a theory of harm or as a defense*[111]

49. The HMG's separate discussion of the two aspects of potential competition suggests that separate legal standards apply to establish whether a 'sufficiently constraining' potential competitor exists in the context of the entry defense versus a potential competition theory of harm.

50. What is more, some cases seem to suggest that the demands of proving potential competition as a countervailing factor are higher than the standard for showing that a merger leads to the removal of a potential competitor. For example, in *RyanAir/AerLingus,* the Commission posited that, to constrain the incumbents activity on the market, "potential entry is not only a theoretical and remote possibility, but will be an immediate and actual threat for the Merging Parties," suggesting a burden that is significantly higher than entry being "likely, timely, and sufficient."[112]

51. However, both doctrines are rooted in the same economic principle: the role of future entry in constraining market power.[113] Both involve forecasting future competitive conditions evaluating potential competitors' influence on incumbents' market

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109 *See,* for example, Brett Hollenbeck, Horizontal Mergers and Innovation in Concentrated Industries [2019], available here (accessed on August 18, 2025). The article shows that permitting dominant firms to acquire smaller rivals can, under certain conditions, lead to a higher long-term rate of innovation and greater consumer welfare as the prospect of a lucrative buyout incentivizes new firms to enter the market and invest in innovation to become an attractive acquisition target.

110 *See ibid* and Igor Letina, Armin Schmutzler, and Regina Seibel, Start-up acquisitions and innovation strategies [2020], available here (accessed on August 18, 2025). The article shows that a strict enforcement policy against start-up acquisitions removes the incentive for start-ups to invest in costly, innovative projects that incumbents would otherwise not pursue. Such effects are therefore counterproductive in the pursuit of higher levels of innovation as expressed, *e.g.,* in the Draghi Report, p. 6.

111 Response to Question C.10.c.

112 *RyanAir/Aer Lingus* (Case COMP/M.4429), decision of June 27, 2007, ¶548 (emphasis added). A differential standard of assessment is also alluded to in the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European union to horizontal co-operation agreements, OJ 2023 C 259/1, footnote 14 ("When it applies the notion of a 'short period of time' for the purpose of assessing whether a party to an agreement should be considered a potential competitor of another party, the Commission will normally consider a longer period than it does when it applies that notion for the purpose of assessing the capacity of a third party to act as a competitive constraint on the parties to an agreement. For a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour.")

113 Sean Sullivan and Henry Su, Antitrust Time Travel: Entry & Potential Competition, [2023] Antitrust Law Journal.

behavior.[114] They go back to the core idea that incumbent firms' pricing is constrained by actual or feared entry and that, therefore "entry could and would inject substantial competition into a relevant market."[115] Whether future entry is likely depends on the prevailing market circumstances, particularly entry barriers, requiring an objective assessment of the likelihood, timelines, and sufficiency of entry.[116] A firm's constraining effect should not depend on its role in the transaction under consideration – a 50% probability of entry should yield identical conclusions regarding that firm's competitive role irrespective of whether the firm is an acquisition target or an independent potential entrant unrelated to the transaction.[117]

52. Accordingly, identical standards should apply whether potential entry is raised by the merging parties as an affirmative defense or by the Commission as a theory of harm. When invoking an elimination of potential competition, the Commission should meet the same evidentiary standards required of the merging parties seeking to counter allegations of anti-competitive effects.[118] Divergent approaches would create an illogical asymmetry, permitting the Commission to engage in speculative arguments about entry while requiring merging parties to demonstrate with greater certainty that a market entry would occur or that potential competitors currently constrain incumbents' behavior.[119]

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114 *Ibid*.

115 *Ibid,* p. 161. See also John Bates Clark, The Control of Trusts: An Argument in Favor of Curbing the Power of Monopoly by Natural Method [1901], p. 14 ("if a combination of producers raises its prices beyond a certain limit, it encounters the old check, which comes, not by any act of the government but from the new mills which spring into existence and bring the prices down. It is the fear of these new mills that still is effective enough to keep prices from rising beyond a certain height, although this fear alone cannot usually keep them from becoming somewhat extortionate. The mill that has never been built, but is ready to be built under certain conditions, is still a controlling power, though at present it holds the trusts with too long a leash and allows them too wide a range within which to work their will."); *see also* Sean Sullivan and Henry Su, Antitrust Time Travel: Entry & Potential Competition [2023] Antitrust Law Journal, p. 151 *et seq.*

116 *See, e.g.*, *Ibid.*, p. 174.

117 Darren Bush and Salvatore Massa, Rethinking the Potential Competition Doctrine [2004], Wisconsin Law Review, p. 1139.

118 *Ibid.*, p. 1138. In the words of Sean Sullivan and Henry Su: "whatever evidentiary standard is appropriate for an offensive implication of time travel must also be appropriate for a defensive implication, and vice versa. […] As different facets of the same underlying factual question, offensive and defensive implications of time travel should rise and fall together. They deserve and require the same degree of credulity in antitrust analysis. " Sean Sullivan and Henry Su, Antitrust Time Travel: Entry & Potential Competition [2023] Antitrust Law Journal, p. 187.

119 Darren Bush and Salvatore Massa, Rethinking the Potential Competition Doctrine [2004], Wisconsin Law Review, p. 1138.

B. RECOMMENDATIONS

1. *Factors relevant to assessing potential competition*[120]

53. Both in cases where the Commission assesses potential competition as a theory of harm and where it assesses potential competition as a countervailing factor, the Commission should closely scrutinize the: (i) likelihood; (ii) timeliness; and (iii) sufficiency of entry.

54. **Likelihood.** The likelihood of a firm entering the market, and thereby constraining the incumbent, should be assessed by reference to both the ability and the incentive of a firm to enter.[121] These two criteria are cumulative: a firm must have both the capacity to enter and a strong motivation to do so for entry to exert competitive pressure on the incumbent (except in exceptional cases where ability is sufficient for the incumbent to perceive entry as likely and thus be constrained by such potential entry).

- *Ability*: the Commission should measure the specific entrant's capabilities and resources against the barriers to entry existing on the market.
- *Incentive*: the Commission should consider, on the one hand, economic factors, such as expected profitability, risks associated with failed entry, as well as the future market development – in line with the approach already set out in the Guidelines.[122] To avoid speculative assessments, the Commission should also consider undertakings' own intentions and concrete plans to enter a given market as expressed, for example, in their internal documents and public communications as well as in the concrete steps taken to enter the market. Generally, the more difficult entry is in the relevant market (*e.g.*, in light of product testing and authorization requirements), the more concrete the steps should be to qualify entry as likely (*e.g.*, initiating authorization processes, conducting R&D and clinical trials, building up manufacturing and distribution facilities).

55. **Timeliness.** Entry must be considered timely to be a meaningful competitive constraint and the assessment should therefore be limited to a foreseeable timeframe.[123] What is 'timely' of course depends on market characteristics and the merger at stake. Generally, any assessment that extends beyond the two-year period prescribed at ¶74 of the HMG should be justified by the specificities of the market and the circumstances of the case, such as long development or purchasing cycles or regulatory approval processes.

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[120] Response to Questions C.9.b, C.9.c, C.10.a. and C.10.b.

[121] This was also confirmed by the Court which found that "the Commission cannot classify an undertaking as a potential competitor on the basis of general, abstract considerations without taking into account the commercial interests of that undertaking, its short-term and medium term development strategy and the profitability criteria which it has set for itself for that purpose" in *Deutsche Telekom AG v. European Commission* (Case T-64/20) EU:T:2024:815, ¶136.

[122] HMG, ¶¶69–73.

[123] *See* HMG, ¶9: "In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted" (emphasis added).

Moreover, the more forward-looking the potential entry, the higher the burden should be to provide "sufficiently cogent and consistent" evidence that entry is "more likely than not." A finding that a potential competitor whose market entry is further into the future exerts a significant constraint on firms active on the market should be backed by concrete and unequivocal evidence establishing that this firm is 'more likely than not' to enter in the relevant market in a sufficient timeframe to exert significant competitive pressure on the incumbent player.

56. **Sufficiency.** The potential entry must be of sufficient scope and magnitude to exert a 'significant competitive influence' on the incumbent player. Small-scale or niche entry that does not affect the core business of the merged firm should not be considered a significant competitive constraint.

2. Additional considerations with regard to the "entry defense"[124]

57. The assessment of potential competition as a countervailing factor should follow the same framework set out above. The Commission should avoid setting diverging standards.

58. **Consider how future M&A could impact competitive potential of smaller entrants.** When assessing potential competition as an 'entry defense,' the Commission should avoid prematurely dismissing smaller firms based solely on their limited resources or scale. As mentioned above, particularly in industries that are heavily reliant on R&D, acquisitions have become a primary strategy for larger companies to enter new markets and for the smaller firms to realize a return on their innovation. Therefore, the Commission should consider the possibility that a smaller firm could be acquired by a larger player with the resources to accelerate and scale up its market entry. The focus should be on the quality and disruptive potential of the smaller firm's products or technology, in addition to the firms current size or financial resources. If these hold the promise of posing a credible competitive challenge, the fact that the firm might not be able to commercialize its products in a stand-alone scenario should not *per se* negate its role as a competitive constraint on incumbents.[125] For instance, in the pharmaceutical sector, beyond the size and estimated capabilities of the potential competitors, indications by Key Opinion Leaders[126] regarding the prospects of success of a given (pipeline) product should inform the Commission's assessment of a given potential competitor, as well as recent or anticipated M&A activity in the sector.

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124 Response to Questions C.10.a and C.10.b.

125 In a similar spirit, the Commission noted in *Johnson & Johnson/Guidant* that, while some of the fringe players in the drug eluding stents space currently lacked the requisite assets to exert a significant competitive constraint towards the market leaders, those players may exert some competitive constraint on the merging parties in markets where these smaller players were more established (*Johnson & Johnson/Guidant* (Case COMP/M.3687), decision of August 25, 2005 ¶¶132–139).

126 Key Opinion Leaders ("KOLs") are individuals with significant influence and expertise within a specific field or industry that are generally trusted by their audience due to their established credibility and knowledge. The Commission occasionally includes such KOLs in its market investigation (*see*, *e.g.*, *Teva/Cephalon* (Case COMP/M.6258), decision of October 13, 2011, ¶¶88–89).

59. **Accounting for efficiencies created by the merger.** Second, the Commission's assessment must account for any efficiencies created by a merger that could increase the total demand for a product. Such efficiencies, which might include lower products costs, improved product quality, or enhanced distribution networks, can lead to lower prices and greater adoption. This expansion of the market makes it more attractive and profitable for new firms to enter. Therefore, the Commission's analysis must be dynamic and holistic, recognizing that a merger can positively reshape the competitive landscape and influence the incentives for future entry.[127]

C. CONCLUSION

60. The Guidelines currently lack a clear and consistent framework for evaluating mergers involving potential competitors. This ambiguity not only creates legal uncertainty, but also risks an illogical asymmetry in how potential competition is assessed, depending on whether it is raised as a theory of harm by the Commission or as a defense by the merging parties. To remedy this, the Revised Guidelines should adopt a unified, evidence-based approach that applies the same rigorous standards – regarding the likelihood, timeliness, and sufficiency of entry – in all cases. This would create a more predictable regulatory environment, striking a critical balance between preventing anticompetitive outcomes and preserving the pro-competitive benefits of mergers, such as accelerating innovation and providing incentives for R&D-driven ventures.

IV. TOPIC 3: COUNTERFACTUAL AND FAILING FIRM DEFENSE

A. SHORTCOMINGS WITH THE GUIDELINES AND THE COMMISSION'S DECISIONAL PRACTICE

1. *The Guidelines inadequately factor into financial difficulties of target companies, leading to suboptimal economic outcomes*[128]

a. The Guidelines set out overly strict criteria for the 'failing firm defense' and wrongly depart from the 'balance of probabilities' test

61. The Guidelines recognize that "an otherwise problematic merger [may be] nevertheless compatible with the common market if one of the merging parties is a failing firm."[129] This is typically referred to as the 'failing firm defense' (hereinafter, "FFD").

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127 For example, in *Access/PLG,* the market investigation suggested that the proposed transaction may have a positive impact on potential entrants ability to launch new music services by re-establishing a certain balance between the respective positions of the three incumbents (the Warner Music Group and its larger competitors Sony and Universal). The case concerned a merger between Access Industries, the Warner Music Group (WMG), and the Parlophone Label Group (PLG) and was cleared by the Commission for absence of competition concerns (*Access/PLG* (Case COMP/M.6884), decision of May 14, 2013, ¶62).

128 Response to Questions C.13, C.13.a and C.13.b.

129 HMG, ¶89.

62. The fundamental rationale underlying the FFD is that, when one of the merging parties is expected to exit the market, there will be a lessening of competition resulting from increased market concentration regardless of whether the transaction is cleared or prohibited.[130] In such instances, the Guidelines recognize that "the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger.".[131] Allowing the merger may create benefits such as economies of scale, economies of scope or other efficiencies that would be lost if the deal were blocked.[132] In addition, keeping distressed firms in the market distorts productive efficiency by crowding out resources and restricting growth opportunities for more productive firms.[133]

63. The criteria for establishing a FFD are virtually impossible for parties to meet, making the legal framework for FFD unfit for purpose. Since the Guidelines' adoption more than 20 years ago, "only one case has been cleared" based on a FFD.[134]

64. **Overly strict criteria and standard of proof.** The Commission considers three criteria "especially relevant" for the application of a FFD: (i) the allegedly failing firm would "in the near future" be forced out of the market because of financial difficulties if not taken over by another undertaking; (ii) there is "no less anti-competitive alternative purchase than the notified merger"; and (iii) in the absence of a merger, the assets of the failing firm would "inevitably" exit the market.[135]

65. This test is particularly difficult to meet. *First*, the requirement that the failing firm should exit the market "in the near future" creates a significant limitation, as it prevents the Commission from considering relevant mid-term market developments that could not only be reasonably foreseen but also affect the competitive assessment of the merger.

66. *Second*, the burden of proof on the merging parties is particularly high,[136] especially as they need to prove a negative proposition: that no less anticompetitive acquisition would be possible. The Commission has previously interpreted this as requiring merging parties to show that every potential purchaser that would give rise to a less anticompetitive merger than the proposed one has been contacted with sufficient

130 OECD Roundtable on the FFD, p. 94.

131 HMG, ¶89.

132 OECD Roundtable on the FFD, p. 94.

133 Jorge Padilla and Nicolas Petit, "Competition policy and the Covid-19 opportunity," [2022] 2 – Concurrences, pp. 2–6. This paper contends that the COVID-19 crisis presented a strategic opportunity to enhance long-term EU economic growth by facilitating the exit of distressed firms that otherwise constrain industries in cycles of low productivity, impeded technological diffusion and diminished economic dynamism. Realizing this opportunity requires a fundamental shift in competition policy away from its traditional emphasis on market rivalry.

134 Consultation, Topic C, ¶64. *See Aegean/Olympic II* (Case COMP/M.6796), decision of October 9, 2013, ("*Aegean/Olympic II*"), ¶833.

135 HMG, ¶90.

136 OECD Roundtable on the FFD, p. 35.

effort.[137] The Commission's decision in *ArcelorMittal/Ilva* clearly demonstrates the burdensome nature of this requirement. The Commission in fact determined that the second limb of the FFD test was not satisfied despite: (i) a comprehensive and competitive auction process having been conducted; (ii) only two consortia submitting binding bids, one of which had subsequently dissolved; and (iii) the inability of the Italian State to re-open the bidding process.[138]

67. *Third*, the last limb of the FFD further compounds these difficulties by demanding that merging parties prove that the target's assets would "inevitably" exit the market absent the merger. This condition departs from the 'balance of probabilities' test applied in merger cases, which requires the Commission to show that the merger is 'more likely than not'[139] to raise a SIEC to prohibit a merger.[140] Nothing justifies that merging parties be required to show that the target's assets would 'inevitably' exit the market, rather than it is 'more likely than not' that the assets would exit the market.

68. The Commission's stringent approach is geared towards minimizing 'Type II' errors (false negatives)[141] and may thus result in too many 'Type I' errors (false positives).[142] However, it is important to stress that "Type I errors are often considered more serious than type II errors in merger control. This is because the potential anti-competitive effects of a merger may be limited via ex-post intervention."[143]

137 *Kali+Salz/MdK/Treuhand*(Case IV/M.308), decision of December 14, 1993 ¶¶ 81–85. The Commission accepted the FFD after finding that the parties: (i) had made "a great effort" to interest as many firms as possible in the acquisition of the target; (ii) had sent "repeated reminders," even to firms that hesitated to express an interest; and (iii) had "followed up every reasonable possibility." *JCI/Fiamm* (Case COMP/M.4381), decision of May 10, 2007, ¶¶ 724 *et seq.* The Commission accepted that FIAMM had conducted extensive discussions with its main competitors. However, it initially rejected the FFD on the grounds that smaller competitors had not been approached, despite the fact that this was due to smaller players lacking the financial resources to acquire a business that was three to four times larger than their own operations.

138 *ArcelorMittal/Ilva*, ¶¶417 *et seq.*

139 *CK Telecoms*: "[T]he 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."

140 *See* Antonio Bavasso and Alistair Lindsay, Causation in Commission Merger Control [2007] Journal of Competition Law and Economics, pp. 181–202. This article argues against using an "inevitability" standard of proof in EU merger control, particularly in failing firm cases, as it departs from the general legal standard under the Commission Merger Regulation. Instead, the Commission should apply an objective and consistent standard – the balance of probabilities (*i.e.*, 'more likely than not') – rather than subjective or higher thresholds like inevitability. The article also critiques the Commission's suggestion that a stricter standard might be justified in failing division cases to avoid abuse. It concludes that the balance of probabilities is still sufficient to assess implausible claims and applying a higher standard would create inconsistencies and unfairly hinder mergers that meet the substantive criteria.

141 Clearance of mergers causing harm to competition.

142 Prohibition of mergers that would not have produced adverse competitive effects and may have actually fostered greater competition.

143 OECD Roundtable on FFD, p. 42. The OECD Roundtable argues that the current failing firm defense framework prioritizes minimizing Type II errors (false negatives) through stringent criteria requiring

b. The Commission has wrongly disregarded target companies' financial hardship when the FFD test is not met

69. When the Commission faces firms that – while not at the verge of market exit as required by the FFD test – are expected to exercise *diminished competitive pressure* in the future due to their financial difficulties ('flailing' firms), the Commission has wrongly refused to consider their financial hardships as part of the relevant 'counterfactual'.[144] Put differently, the Commission typically considers that absent the merger, a target company would continue to exert similar competitive pressure as before the merger, ignoring that its financial difficulties make it more likely than not that the target will exert diminished competitive pressure.[145]

70. **The Commission has prioritized procedural formalism over substantive economic analysis.** The Commission considers that treating a 'flailing' firm differently from a financially 'healthy' firm would "in essence be tantamount to the acceptance of a failing firm defence."[146] Thus, in order not to 'circumvent' the FFD test, the Commission has refused to take account of the target company's financial difficulties when the parties had failed to establish a FFD. [147]

71. This approach wrongly prioritizes procedural formalism over substantive economic evaluation, potentially leading to prohibiting mergers that would be more efficient than a status quo. The Commission's approach assumes that keeping distressed firms in the market is invariably preferable to consolidation.[148] This is fundamentally flawed, as it fails to account for the risk that this "is likely to distort productive efficiency and may crowd out relatively efficient firms to the ultimately detriment of long-run consumer

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extensive counterfactual analysis and demonstration of inevitable market exit. While this approach prevents potentially harmful mergers and maintains market discipline, it significantly increases the risk of Type I errors (false positives) by blocking transactions that could preserve capacity, enable dynamic pricing strategies, or provide superior alternatives to cartelization or state intervention. This imbalance reflects a policy choice that values competitive preservation over potential efficiency gains, but may ultimately harm consumer welfare by preventing beneficial rescue mergers during periods of economic distress (pp. 43–44).

144 The 'counterfactual' is the process whereby the Commission "compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger." HMG, ¶9.

145 In *ArcelorMittal/Ilva*, the Commission rejected the failing firm defense, *inter alia*, because it noted that Ilva's assets had been awarded as a result of a competitive procedure involving two bidders. The Commission therefore considered that, absent the notified transaction, the most likely counterfactual scenario would have been that Ilva's assets would have been sold to a different buyer. ArcelorMittal submitted evidence demonstrating that the degradation of Ilva's assets during the time from the submission of its bid to the Commission's assessment of the transaction meant that the alternative bidder – a consortium that had since been dissolved – was no longer a credible buyer. Nevertheless, the Commission refused to consider post-award developments, concluding that the relevant counterfactual should reflect the competitive circumstances prevailing at the time of the merger decision.

146 *ArcelorMittal/Ilva*, ¶415.

147 *ArcelorMittal/Ilva*, ¶415.

148 OECD Roundtable on the FFD, pp. 43–44.

welfare."[149] Conversely, allowing inefficient firms to merge with more efficient ones creates growth opportunities for more productive firms and, thus, "can play a role in mitigating Europe's productivity problem."[150] Moreover, this formalistic approach leads to the inconsistent outcome of refusing to account for the target company's financial difficulties when the FFD test failed, while accepting to account for those if the merging parties have not argued for a FFD.[151] The Commission has even accepted (rightly) to consider that the financial difficulties of a target company would likely erode its competitive influence in the market "in the long term,"[152] while the FFD legal test requires the target company's assets to exit the market "in the near future."

c. The current approach creates a barrier to exit

72. An overly restrictive approach to the failing and flailing firm defenses may impede natural market dynamics, by preventing inefficient firms from exiting and selling their assets to more efficient competitors, thereby creating a *de facto* 'barrier to exit' (or a 'lock-in effect') when investments fail.[153] This is an undesirable outcome, as exit barriers can diminish investment incentives if companies know that it will be difficult to recover their capital should the venture prove unprofitable. Like entry barriers, exit barriers prevent the emergence of competitive markets and should therefore be a concern for antitrust agencies.[154]

73. The Commission's compartmentalized methodology – strictly defining the bounds of the FFD and by consequence, of the relevance of 'flailing firm' counterfactuals – lacks objective justification and creates an artificial distinction that undermines sound economic analysis.

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149 OECD Roundtable on the FFD, p. 35.

150 Jorge Padilla and Nicolas Petit, "Competition policy and the Covid-19 opportunity," [2022] 2 – Concurrences, pp. 2–6.

151 *KLM/Martinair* (Case COMP/M.5141), decision of December 17, 2008, notably at ¶175 ("These specific circumstances constitute an important element of the counterfactual for the assessment of the proposed concentration. While the former evidence seems to indicate that the parties are competitors, Martinair's specific situation makes it likely that the competitive constraint exerted by Martinair will be eroded in the foreseeable future"); *T-Mobile NL/Tele2NL* (Case COMP/M.8792), decision of November 27, 2018, ¶443; and *Arçelik/Whirlpool EMEA MDA* (Case COMP/M.11086), decision of October 23, 2023, ¶¶133, 138, 145, 160, and 209.

152 *Deutsche Lufthansa/MEF/ITA* (Case COMP/M.11071), decision of July 3, 2024, ("*Deutsche Lufthansa/MEF/ITA*"), ¶425: "the Commission considers that the elements illustrated above indicate that ITA's long-term competitiveness in the provision of air passenger services may be significantly weakened absent the Transaction."

153 OECD, "Barriers to Exit," OECD Roundtables on Competition Policy Papers, 2019, No. 240, OECD Publishing, Paris, available here (accessed on 29 August, 2025), p. 29.

154 Nicolas Petit, State-Created Barriers to Exit? The Example of the Acquisition of Alstom by General Electric [2015] Competition Policy International, Vol 11(1), , p. 103. The paper discusses *General Electric/Alstom* (COMP/M.7278), decision of September 8, 2015. It argues that government intervention created exit barriers that potentially harmed the domestic firm by preventing Alstom from exiting energy markets it sought to abandon. It argues that barriers to exit are an "indirect form of barrier to entry" because high exit costs disincentivize entry. Further, it recalls that according to the 'contestable markets' theory for markets to be perfectly contestable, and, in turn, optimal, exit must be absolutely costless.

2. State intervention counterfactual[155]

74. Distressed firms may also be the beneficiaries of compatible State aid, in line with the relevant legislation.[156] Yet, the Guidelines do not include a framework describing how the possibility of public subsidies may influence the Commission's assessment of a concentration. In past merger decisions involving state-owned companies[157] and companies that had already benefitted from State aid,[158] the Commission did not consider whether the State was willing to support the firm in distress.

75. **The Commission may consider whether the notifying parties will receive State aid in a non-formalistic way**. In principle, there is a circularity between merger and State aid control:[159] in merger assessment, competition authorities may consider whether a target firm will receive public subsidies that prevent its failure, thereby making the FFD unavailable to the merging parties; however, governments deciding on subsidies may consider whether, without aid, the firm would exit or be acquired by more efficient competitors. As already discussed, consolidation may prove to be the most procompetitive solution, and the Commission should maintain no *a priori* position on this matter.

3. Crises and other market disruptions[160]

76. In the context of major crises and other market disruptions, historical market data may not be indicative of future competitive dynamics.[161] The Guidelines do not provide

155 Response to Question C.13.b.

156 *See, e.g.*, Article 107 TFEU and Communication from the Commission of July 31, 2014 on Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014 C 249/1.

157 *See, e.g.*, *Deutsche Lufthansa/MEF/ITA*.

158 *See, e.g.*, *Olympic/Aegean Airlines* (Case COMP/M.5830), decision of January 26, 2011 ("*Olympic/Aegean I*").

159 Matthew Johnson and Ilaria Fanton, The economics of merger control in a dynamic world: a focus on the relevant counterfactual, in Ioannis Kokkoris and Claudia Lemus (eds), *Research Handbook on the Law and Economics of Competition Enforcement*, , p. 298: "From a merger assessment perspective, when considering whether a target firm is failing, competition authorities will assess the likelihood that the firm will receive a state subsidy that will prevent it from failing. If the answer is yes, then the failing firm test is unlikely to be passed. From a state aid perspective, European governments considering whether to provide subsidies to struggling firms may consider whether, in the absence of the aid, the firm would exit the market or whether it would be purchased by a rival who may be able to run the failing firm's assets more efficiently, through better management, economies of scale or other reasons."

160 Response to Questions C.12 and C.12.a.

161 Nicole Kar and Josh Buckland, Is the approach to "failing" and "flailing" firms in merger control fit for purpose?, in Ioannis Kokkoris and Nicholas Levy (eds), *Research Handbook on Global Merger Control*, p. 189: "First, the review will be fundamentally misdirected unless flailing firm claims are investigated against one or more appropriately defined counterfactual scenarios. Naturally, these scenarios should be plausible in light of the available evidence, but merger review in a crisis-impacted economic environment must allow for alternative counterfactuals in addition to the standard status quo ante approach. This is natural in view of the fact that the economic environment is even less predictable than ordinarily."

guidance on how the Commission will take account of crises and other market disruptions in its competitive assessment.

77. In the context of crises, merger review must allow for counterfactuals other than the *status quo ante*. In its decisional practice, the Commission has typically refused to consider conjectural, temporary market disruptions in its merger assessment and only considered structural market developments such as permanent competitor entry or exit or fundamental shifts in competition. [162]

78. The Consultation asks under which circumstances and conditions crisis-led market disruptions should be considered structural and based on which evidence. However, attempting to draw strict distinctions between structural and temporary effects may prove overly simplistic and fail to capture the nuanced reality of crisis-driven market evolution, where conjunctural market development can have persistent effects that ought to be factored into competitive assessments.

79. The difficulty of making this distinction is exemplified by the contrasting outcomes in the *Olympic/Aegean* cases, where – within less than three years – the Commission first prohibited[163] and then cleared[164] a merger between the same parties. The Commission initially blocked the merger based on optimistic projections about Greece's economic recovery and the assumption that crisis-related market disruptions were temporary.[165] Three years later, it cleared the same merger once the crisis had fundamentally and permanently altered market conditions, leading the parties to "exit from several routes."[166] This case illustrates that relying solely on advance predictions of structural effects during volatile economic times creates significant risks of Type I errors. The emphasis on structural effects presupposes that competition authorities can accurately forecast market outcomes in volatile economic conditions, despite the fundamental uncertainty surrounding firm behavior, market evolution, and external economic shocks. Such an approach may lead to the prohibition of transactions that would not have caused anticompetitive harm and could have actually enhanced competitive dynamics by preserving market capacity.

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162 *Deutsche Lufthansa/MEF/ITA*, ¶¶436 *et seq*. In 2024, as part of its review of Deutsche Lufthansa's acquisition of Italia Trasporto Aereo S.p.A. ("ITA"), the Commission examined the effects of the Covid-19 pandemic and Russia's invasion of Ukraine on market dynamics in the passenger air transport sector.[162] Basing its evaluation on both recent post-pandemic and older pre-pandemic market data, the Commission considered that these developments were not structural in nature and refused to "take into account any short-term effects of the pandemic in making its assessment in this decision."

163 *Olympic/Aegean I.*

164 *Aegean/Olympic II.*

165 *Olympic/Aegean I*, ¶362.

166 *Aegean/Olympic II*, ¶143.

B. **Recommendations**

1. A unified two-stage framework for assessing mergers involving financially distressed firms[167]

80. As also stressed by the OECD Roundtable on the FFD,[168] this Response proposes that, where a merger raises competition concerns, the Commission adopt a unified two-stage framework that (i) assesses evidence to determine the most likely counterfactual scenario; and (ii) compares the anticipated merger outcome with the counterfactual scenario. The framework should not vary based on the type of counterfactual – including market exit (failing firm scenario) and decreased competition resulting from financial difficulties (flailing firm scenario) – the Commission needs to consider. This unified framework would eliminate the current inconsistencies that arise when the Commission applies different legal standards, and ensure that assessments better reflect the economic reality and prevent the creation of barriers to exit for financially distressed companies.

2. Inclusion of the possibility of State subsidies in the construction of the relevant counterfactual[169]

81. In line with this fact-based approach, this Response suggests that when a failing firm is likely to receive State subsidies, the Commission may incorporate this counterfactual scenario into its competitive assessment, but should at a minimum provide merging parties with the opportunity to demonstrate that consolidation represents the least anticompetitive solution in that case when compared to the granting of public subsidies. Consequently, public entities' willingness to maintain failing firms should be factored in together with the competitive effects of alternative outcomes, including the proposed consolidation.

3. Framework of assessment for crisis impacted environments[170]

82. Rather than focusing narrowly on whether crisis events (such as the COVID-19 pandemic, armed conflicts, or trade disruptions) create 'structural' or 'conjectural' market changes, the Commission should incorporate all types of risks into its forward-looking assessment and evaluate whether such events will occur or continue to have effects beyond a certain period "with a sufficient degree of certainty."[171] This time-frame may apply differently across various industries to account for their specificities: longer assessment periods may be justified in traditional sectors with established product cycles and capital investment patterns, while in others (*e.g.*, fast-moving technology sectors) shorter-term predictions may reveal to be highly speculative given the rapid pace of innovation and market disruption. In crisis-impacted economic

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167 Response to Questions C.13, C.13.a, and C.13.b.

168 OECD Roundtable on the FFD, pp. 44 *et seq*.

169 Response to Question C.13.b.

170 Response to Questions C.12 and C.12.a.

171 *EVH GC*, ¶¶233–234. *See also* Section .

environments, the Commission should permit counterfactuals that depart from the standard *status quo ante* to better reflect prevailing market conditions. This approach is particularly warranted given that economic environments during crises are inherently less predictable than under normal circumstances.

C. CONCLUSION

83. By implementing the recommendations above, the Revised Guidelines would establish a more coherent and economically sound framework for assessing counterfactual scenarios. This enhanced methodology would enable more rigorous analysis that is properly tailored to the specific circumstances and economic reality of each case. The Commission would remove significant barriers to exit from the market to firms in financial distress, fostering in turn competition and productive efficiency.

V. TOPIC 4: TYPE AND QUALITY OF EVIDENCE ON FUTURE MARKET DEVELOPMENTS

A. SHORTCOMINGS WITH THE GUIDELINES AND THE COMMISSION'S DECISIONAL PRACTICE

1. Evidentiary Standards for "Significant Impact" Cases[172]

84. The Consultation confirms that the *standard of proof* is 'more likely than not' and that this "does not vary according to the type of merger or according to the complexity of a theory of competitive harm."[173] In question C.15 the Commission asks, however, whether it should consider setting in the Revised Guidelines a lower evidentiary burden for cases where the Commission predicts "more significant" but "more distant" future effects.

85. While the EUMR and the Courts' precedents do not prescribe a set (or maximum) period for the Commission's competitive assessment,[174] it is well-recognized in the case law that the Commission must provide "robust" evidence "in order to establish convincingly the merits" of its case[175] and its decisions must rely on a "sufficiently cogent and consistent body of evidence."[176] The analysis must be conducted "with great care" on account of its forward-looking nature.[177]

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172 Response to Question C.15.

173 Consultation, ¶61.

174 *EVH v. Commission* (Case C-464/23 P) EU:C:2025:478 ("*EVH ECJ*"), ¶151: "neither Article 2 of Regulation No 139/2004 nor the case-law […] defines a precise period for the purposes of the Commission's prospective analysis of the future effects of the notified concentration."

175 *Tetra Laval ECJ*, ¶¶27, 39, 41, and 45.

176 *CK Telecoms*, ¶87.

177 *Ibid.*, ¶42: "A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events […] or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted." *See also CK Telecoms*, ¶85.

86. Against this background, the Commission's tendency to consider timeframes of several years in the future – particularly in cases involving *complex or novel theories of harm* – lends itself to criticism.[178]

87. Indeed, the "complexity of a theory of competitive harm […] is a factor which must be taken into account when assessing the plausibility of the various consequences [that] a concentration may have, in order to identify those which are most likely to arise."[179] In other words: the more complex or uncertain a theory of harm is, or stems from cause-effect relationships that are difficult to establish, the more convincing evidence the Commission must rely on.[180]

88. Finally, where the theory of harm requires the consideration of a lengthy period of time into the future, the quality of the evidence that the Commission must produce to establish a SIEC is "particularly important."[181]

89. In these cases, "the more persuasive and stronger the supporting evidence should be" in order to "demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not" that it will give rise to a SIEC.[182]

90. As further outlined below, the Commission should refrain from implementing the Consultation's proposal at Question C.15, while allowing for qualitative assessment methods appropriate to innovation analysis (as discussed under Topic 1 above): doing so would risk creating legal uncertainty, deter M&A and investment, and undermine the EUMR's generally favorable approach to mergers.

2. Timeframe for Assessment of Future Market Developments[183]

91. Related to the above, the Consultation also queries about the appropriate timeframe for evaluating future market developments, including how and under which circumstances

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178 For example, *see* Jay Modrall, "The EU Commission prohibits the acquisition of a genetic and genomic analysis provider by a healthcare technology company focused on early cancer detection (Illumina / Grail)," 6 September 2022, e-Competitions September 2022. The Author observes that "The time period the Commission relies on to support its analysis of Illumina's incentive to discriminate against Grail's rivals – through 2035 – is also unusually long," suggesting that a likely ground of appeal would be "that the Commission's findings are speculative and that it failed to meet its burden of proof."

179 *See CK Telecoms*, ¶78.

180 *France v. Commission* (Joined Cases C-68/94 and C-30/95) EU:C:1998:148, ¶228 ("The more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission."). *See also CK Telecoms*, ¶111.

181 *Tetra Laval ECJ*, ¶44. *See also CK Telecoms*, ¶¶76–77, *General Electric v. Commission* (Case T-210/01) EU:T:2005:456 ("*General Electric*"), ¶66, and *Bertelsmann and Sony Corporation of America v. Impala* (Case C-413/06 P) EU:C:2008:392 ("*Impala*"), ¶50.

182 *CK Telecoms,* ¶87.

183 Response to Questions C.16 and C.17.

the Commission should take into account (i) long investment cycles (C.16), and (ii) systemic trends unrelated to the merger (*e.g.*, the impact of AI) (C.17).

92. These issues are not currently regulated in the Guidelines, nor are there specific explanations in the Commission's decisional practice.

93. As further explained below, absent a predefined timeframe for the Commission's prospective analysis, the main guiding principle formulated by EU Courts is that the Commission's appraisal should not exceed the timeframe within which, "based on the matters of fact and law existing at the time of notification" a given event may be predicted to occur "with a sufficient degree of certainty" (*i.e.*, with a "reasonable margin of error").[184]

B. Recommendations

1. No Lowering of Evidentiary Standard for "Significant Impact" Cases[185]

94. In relation to Question C.15, the Consultation fails to demonstrate a need for a lower evidentiary burden in cases where a merger's apparent impact is 'more significant.' Conversely, the implementation of such a suggestion would depart from the established case law requiring stronger evidence for more uncertain predictions—no matter the magnitude of potential harm— and raise serious issues of legal certainty, a fundamental principle of EU law.[186]

95. **Definitional uncertainty.** *First*, it is unclear what would meet the proposed bar of 'more significant impact.' No known Court precedent or economic literature provides guiding criteria in this sense, and the Consultation does not provide any details, either. Allowing the Commission to intervene more aggressively in cases of 'more significant impact' would thus create legal uncertainty, with a likely chilling effect on companies' willingness to engage in M&A. This is a particularly serious risk in markets characterized by strong innovation, where the future significance of a given innovation, or of a given competitor, is especially difficult to assess.

96. **Departure from EUMR's balanced approach.** *Second*, it would be ill-advised for the Guidelines to provide the Commission with an instrument to prohibit transactions on a precautionary basis – that is, in the absence of "persuasive" and "strong" evidence to demonstrate that the balance of probabilities points towards a SIEC.[187] Acting on

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184 *EVH GC*, ¶¶233–234. Upheld on appeal in *EVH ECJ*. *See also CK Telecoms* ¶82, observing that the Commission's prospective assessment in merger cases is an exercise aimed at "seeking to determine the likelihood of certain developments in the relevant market within a foreseeable time frame" (emphasis added).

185 Response to Question C.15.

186 The principle of legal certainty, which is one of the general principles of EU law, requires that the effect of EU legislation is clear and predictable for those who are subject to it. *See, e.g.*, *HeidelbergCement and Schwenk Zement v. Commission* (Case T-380/17) EU:T:2020:471, ¶130.

187 *CK Telecoms*, ¶87.

Question C.15's proposal would contradict the EUMR's 'symmetrical' and generally favorable approach when it comes to mergers.[188]

97. **Concerns about current enforcement practice.** Another reason to refrain from allowing a more aggressive approach to transactions of 'more significant' impact (however this is to be defined) is the Commission's current tendency, as endorsed by the General Court, to rely increasingly more on internal documents than on sound and exhaustive economic analysis (*i.e.*, qualitative evidence, as opposed to quantitative evidence).[189] In relation to this, the Commission has on occasion been criticized for using reviewed information selectively.[190]

98. In such circumstances, and in the absence of clear rules on the probative value of certain types of internal documents as opposed to others,[191] all elements militate against further weakening the Commission's evidentiary burden.

2. Assessment timeframes must be predictable[192]

99. In light of the significant clarifications that EU Courts have provided over the last c. 20 years, the Revised Guidelines should include more recent case law. Particularly, as regards the time dimension of the Commission's forward-looking assessment, the Guidelines ought to reflect the learnings that this must relate to a "foreseeable time frame"[193] and that the analysis must not exceed the timeline within which events would occur "with a sufficient degree of certainty" (*i.e.*, a "reasonable margin of error").[194]

100. This principle may admittedly apply differently across various industries: longer assessment periods may be justified in traditional sectors with established product cycles and capital investment patterns, while in others (*e.g.*, fast-moving technology

188 As Recital 4 of the EUMR states, mergers ought to "be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community." *See* Fernando Castillo de la Torre, Predicting the future: Evidential basis for prospective assessments in EU merger control December 2024 (Forthcoming in *Judging & (Re) Thinking European Union Law-Liber Amicorum in Honour of Nils Wahl*," L. Prete, L. Rezki (eds.), Springer 2025, p. 10: "Since the "standard of proof" is a balance of probabilities, it is inherent in the system that some mergers which are authorised will end up being harmful, since the system is not based on a "precautionary principle." Unlike regulatory environments that weigh some interests (health, for example) more than others (economic benefits, for example), the EU legislature does explicitly recognise the benefits of mergers and creates a symmetrical system.").

189 *Wieland-Werke v. Commission* (Case T-251/19) EU:T:2022:296, ¶306 and *Deutsche Börse v. Commission* (Case T-175/12) EU:T:2015:148, ¶132.

190 Nicholas Levy, Christopher Cook, and Isabel Rooms, Chapter 10 – Substantive Appraisal in *European Merger Control Law: A Guide to the Merger Regulation* [Chapter 10, p. 91]: "The Commission has on occasion been criticized by merging parties for not having reviewed internal documents "in the round."

191 *E.g.*, documents prepared by relatively low-ranking employees, as opposed to strategy documents reviewed by management.

192 Response to Questions C.16 and C.17.

193 *CK Telecoms*, ¶82

194 *EVH*, ¶ 234.

sectors) even shorter-term predictions may reveal to be highly speculative given the rapid pace of innovation and market disruption. As such, the Guidelines should not attempt to prescribe timeframes of assessment that apply *a priori*: in line with the learnings from *CK Telecoms* and *EVH*, assessment timeframes should, in all cases, not exceed periods over which events can be predicted "with a sufficient degree of certainty."

101. In particular, as with any future developments, longer investment cycles should be taken into account in the Commission's assessment so long as the information in the Commission's possession allows it to "take into consideration, with reasonable certainty, the development of the market during that period."[195] [196]

102. A similar reasoning can be applied in the context of prospective analyses concerning systemic trends and other developments unrelated to the merger under review. To the extent predictable "with a sufficient degree of certainty," and based on a "sufficiently cogent and consistent body of evidence,"[197] such developments ought to be part of the Commission's assessment – regardless of how forward-looking they may be.

C. CONCLUSION

103. The Commission should refrain from lowering the evidentiary standard established by EU Courts. While investment cycles and systemic trends are relevant to the competitive assessment and should thus be taken into account – assessment timeframes should not exceed periods over which events can be predicted "with a sufficient degree of certainty."[198]

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195 *EVH*, ¶245. While the applicant argued that the Commission had erred by using too short a timeframe for assessing the transaction's impact, in particular ignoring the fact that the energy sector "was characterized by long-term investment cycles" of 15–20 years, the General Court found that the Commission "did not have information allowing it to carry out a prospective analysis based on a period longer than the one which it chose." *Ibid.*, ¶258.

196 *See also* Fernando Castillo de la Torre, Predicting the future: Evidential basis for prospective assessments in EU merger control, December 2024 (Forthcoming in *Judging & (Re) Thinking European Union Law-Liber Amicorum in Honour of Nils Wahl*, L. Prete, L. Rezki (eds.), Springer 2025, p. 10:"In sectors with long cycles (e.g. between investment decisions and impact on the market) or where innovation is examined, the time frame may be longer. What is relevant is not the time as such, but whether the evidence is reliable enough to make the long-term prediction ("within a reasonable margin of error", as the GC now puts it).".

197 *EVH GC*, ¶¶233–234, *CK Telecoms*, ¶87.

198 *EVH GC*, ¶¶233–234.

Response	Question in the Topic Paper C Consultation
¶¶8–17	Response to questions C.5, C.6.a, C.7, C.7.a, and C.8.
¶¶19–32	Response to questions C.5, C.6, C.6.d, C.7, and C.8.
¶¶33–35	Response to question C.7.a.
¶39	Response to question C.9.a.
¶¶49–52	Response to question C.10.c.
¶¶53–56	Response to questions C.9.b, C.9.c, C.10.a. and C.10.b.
¶¶57–59	Response to questions C.10.a and C.10.b.
¶¶61–73	Response to questions C.13, C.13.a and C.13.b.
¶¶74–75	Response to question C.13.b.
¶¶76–79	Response to questions C.12 and C.12.a.
¶80	Response to questions C.13, C.13.a and C.13.b.
¶81	Response to question C.13.b.
¶82	Response to questions C.12 and C.12.a.
¶¶84-90	Response to question C.15.
¶¶91–93	Response to questions C.16 and C.17.
¶¶94–98	Response to question C.15.
¶¶99-102	Response to questions C.16 and C.17.