

Merger Guidelines Review

Topic E – Digitalization

I. EXECUTIVE SUMMARY

1. This Response to the European Commission’s Consultation on **Topic E** summarizes our views on possible reforms to the assessment of mergers in the digital sector.¹
2. Digitalization of the economy has been a major development over the past few decades, and the digital and tech sectors are key drivers of innovation and growth in Europe and globally. It is therefore important that the Commission’s merger control framework remains apt to assess proposed transactions in a way that properly takes into account the competitive dynamics in these markets.
3. At the same time, recent enforcement trends in digital mergers both within and outside the EU have created considerable uncertainty, notably because the existing Guidelines have not always been applied consistently.² Enforcement should be effective but based on reliable, tested, and evidence-based principles. In our view, the existing Guidelines provide for such principles and so we do not think significant revisions are necessary. There are, however, aspects of the Commission’s practice in digital markets that could be clarified or codified. Clarifications could, for instance, cover the Commission’s approach to valuing the competitive relevance of datasets in specific cases. We identify instances where this may be accretive below.
4. This Response is structured by reference to the sub-sections in Topic Paper E of the Commission’s Consultation, each of which picks up a topic-area relevant to assessing digital mergers – and we agree that these topic areas provide a comprehensive *tour d’horizon* of the issues that merit discussion.

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

² See also Mario Draghi, “The future of European competitiveness,” September 2024, available [here](#), Part B, p. 304, fn. 22.

A. SUB-SECTIONS E.1-4 – GENERAL CONSIDERATIONS AND COMPETITIVE DYNAMICS AND PARAMETERS OF COMPETITION

5. The Commission questions whether some features and theories of harm are specific to digital markets and/or novel, and whether its current Guidelines enable it to properly review transactions that involve these features and concerns. Our view is that there is, in fact, no gap in the Guidelines: since their adoption, the Commission has repeatedly and successfully applied the assessment framework set out in its Guidelines to review all types of transactions, including in the digital sector.
6. In fact, the features and theories of harm that the Commission describes as “linked to the digitalization of the economy” are generally either:
- Not specific to digital markets in that they arise in much the same way in non-digital cases and have been assessed in digital cases under the existing Guidelines successfully – both under the HMG³ and the NHMG.⁴ Concepts such as portfolio effects – sometimes referred to as “ecosystems” in the digital context – are relevant in both digital and non-digital markets with no clear difference between the two. Likewise, the idea that foreclosure can be “targeted” is also in no way new or specific to digital markets. Other features that the Commission listed in questions E.2 and E.3 of its Consultation have also been assessed in transactions beyond digital markets, including so-called chilling effects,⁵ customer “inertia”,⁶ and entrenchment theories of harm.⁷
 - A known effect that exists outside of digital markets but is potentially stronger in the digital space. The usual example is network effects. Network effects exist

³ For example, see *Apple/Shazam* (COMP/M.8788) decision of 6 September 2018, in which the Commission found no anticompetitive horizontal effects in an hypothetical overall market encompassing both music charts data (licensed by Shazam) and music charts (compiled by Apple). The Commission also applied its HMG to assess whether transactions could prevent the entry of a potential competitor in e.g. *Google/Fitbit* (Case COMP/M.9660) decision of December 17, 2020, and *Google/DoubleClick* (COMP/M.4731) decision of 11 March 2008.

⁴ For example, see *NVIDIA/Run:ai* (COMP/M.11766) decision of 20 December 2024; *Microsoft/Activision Blizzard* (COMP/M.10646) decision of 15 May 2023; *Google/Photomath* (COMP/M.10796) decision of 28 March 2023; *Amazon/MGM* (COMP/M.10349) decision of 15 March 2022; *Microsoft/Nuance* (COMP/M.10290) decision of 21 December 2021; *HP/Apogee* (COMP/M.9060) decision of 22 October 2018; *Microsoft/Github* (COMP/M.8994) decision of 19 October 2018; *Microsoft/LinkedIn* (COMP/M.8124) decision of 6 December 2016; *Dell/EMC* (COMP/M.7861) decision of 29 February 2016; and *Microsoft/Nokia* (COMP/M.7047) decision of 4 December 2013. The only exception is *Booking/ETG* (COMP/M.10615) decision of 25 September 2023, which is currently being reviewed – including specifically with respect to this issue – by the General Court in *Booking Holdings Inc. v. Commission* (Case T-1139/23).

⁵ For instance, see *Telefónica/Liberty Global JV* (COMP/M.9871) decision of 9 November 2020 in the telecommunications sector, and *Bayer/Monsanto* (COMP/M.8084) decision of 21 March 2018 in the agricultural sector.

⁶ For instance, see *Hutchison 3G UK/Telefonica Ireland* (COMP/M.6992) decision of 28 May 2014 in the telecommunications sector.

⁷ For instance, see *Deutsche Lufthansa/MEF/ITA* (COMP/M.11071) decision of 3 July 2024, in the aviation sector, and *Vodafone AirTouch/Mannesmann* (COMP/M.1795) decision of 12 April 2000, in the telecommunications sector.

outside of digital markets but are, arguably, more marked or powerful in the digital context. But if the effect is more pronounced in digital markets than in others, that makes the effect easier – not harder – to identify and assess. And if the effect that the existing Guidelines already account for has become easier to detect and assess, then the existing Guidelines account for it all the more easily.

7. While some of the features and theories of harm identified by the Commission may be more specific to digital contexts – such as data and privacy-related considerations – these do not in themselves justify a wholesale revision of the Guidelines as they already enable the Commission to review transactions that involve these features and concerns.
8. As such, some of these features and theories of harm could potentially usefully be clarified within the Guidelines – for instance by explaining when data may be of competitive relevance in a transaction and how that relevance should be assessed (a topic we discuss further below) – but do not justify a wholesale departure from the Guidelines’ existing framework of assessment.

B. SUB-SECTIONS E.5-8 – GENERAL FRAMEWORK OF ANALYSIS AND ENTRENCHMENT

9. **The distinction between horizontal vs non-horizontal effects remains unaffected by digital competitive dynamics.** The distinction between horizontal and non-horizontal effects remains relevant – in fact, unchanged – in digital and tech markets. Whether a merger is horizontal or non-horizontal is a straightforward determination that turns on the competitive dynamics between the merging parties: if the parties compete or may compete then the merger is horizontal in nature; if they do not, then it is not.⁸ Characteristics typical of digital mergers identified by the Commission – such as stronger network effects and data-driven competition – do not undermine the ability to distinguish between horizontal and non-horizontal relationships. These features may be relevant to assessing the competitive relevance of such a relationship, but they do not alter the relationship’s nature.
10. For example, digital mergers that result in product portfolios that can be cross-sold to the same set of customers do not make that merger a horizontal merger. Conglomerate transactions often lead to the integration of sales and distribution channels – indeed, a hallmark of a conglomerate merger is that the merging parties share a customer basis, which the NHMG expressly call out.⁹ So, if the ability to cross-sell were greater in the

⁸ The Commission clearly set out that test in *NVIDIA/Mellanox*, stating that “[h]orizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. Non-horizontal effects are those deriving from a concentration where the undertakings concerned are active in different relevant markets”. See *Nvidia/Mellanox* (COMP/M.9424) decision of 19 December 2019, ¶126.

⁹ See NHMG, ¶¶14, 91, and 104. The NHMG explain that conglomerate transactions typically involve “suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use” and that “[c]ustomers may have a strong incentive to buy the range of products concerned from a single source (one-stop-shopping) rather than from many suppliers” and, therefore, “[t]he fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns”.

digital space than on main street, that may make the competitive effect of the cross-sell more marked. But, it does not magically make the merging parties competitors.

11. And the distinction between the two types of merger is deeply significant:
 - Horizontal mergers generally imply that – all else equal – customers will face a reduction in choice. This reduction may be insignificant, or it may be outweighed by benefits – such as the creation of a more viable offering – and so will often not result in a competition concern, but the mechanical effect of the merger in the product market where the merging parties compete is still a reduction in choice. This fact makes horizontal mergers particularly deserving of close attention.
 - Non-horizontal mergers, on the other hand, do not inherently involve a reduction of choice for consumers. Quite the opposite: they involve a significant potential that consumers will enjoy new options and/or better prices. Absent specific anticompetitive elements, such mergers are therefore likely to be good for consumers – who face no reduction in choice while enjoying potential new benefits. The NHMG recognize this throughout their discussion of non-horizontal mergers, observing, for instance, that they are “less likely to significantly impede effective competition” and “provide substantial scope for efficiencies” (NHMG, ¶ 11, 13). The General Court also found in *General Electric* that, “as a general rule” conglomerate mergers “do not produce anti-competitive effects”.¹⁰

In practice, the NHMG formulate a framework for identifying the instances where the “general rule” does not hold and a specific merger could result in anticompetitive effects through the ability-incentive-framework. Namely, the Commission looks into whether the merged entity would have (i) the ability; and (ii) the incentive to foreclose rivals; and (iii) whether such a strategy would have appreciable adverse effects on competition.

12. It therefore remains important to maintain the distinction between horizontal and non-horizontal relationships to ensure that the competitive assessment is tailored to the specific nature of the effects at issue, particularly considering that non-horizontal mergers provide substantial scope for efficiencies.¹¹
13. From a practical perspective, we are also unable to conceptualize what it would actually mean to do away with the distinction since the nature of the analysis of a non-horizontal

¹⁰ *General Electric v. Commission* (T-210/01), EU:T:2005:456, ¶65.

¹¹ While it is not uncommon for mergers to “entail both horizontal and non-horizontal effects”, this is neither new or specific to the digital and tech sector. This may occur, for instance, “where the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned”. See NHMG, ¶¶6 and 7. The Commission assessed transactions with such concerns in in the electricity and gas sector, *EDP/ENI/GD* (COMP/M.3440) decision of 9 December 2004, and in the liquid packaging sector, *TetraLaval/Sidel* (COMP/M.2416) decision of 13 January 2003. In any event, it does not warrant disregarding the distinction between horizontal and non-horizontal effects. All it means is that the same transaction may involve different types of effects, not that these effects should be assessed under the same framework.

merger and of a horizontal one are intrinsically different. We do not understand how a single framework of analysis could cover both exercises.

14. **The “ability-incentive-effects” framework remains the appropriate tool for assessing the competitive effects of non-horizontal mergers.** In its Consultation, the Commission also asks about the appropriate framework to assess non-horizontal mergers in the digital and tech sector, where a “leading” company seeks to acquire “a complementary business” and “entrench its market power” as a result (E.6). The response is straightforward: as explained above, the same framework should apply as in any other sectors as there is nothing inherently unique or novel about the characteristics and concerns that arise in digital markets. So, in digital and tech markets as in any others, the Commission should apply its ability-incentive-effects framework, which is built upon well-established economic principles and is designed to identify and block anticompetitive transactions – those that cause anticompetitive foreclosure – while clearing procompetitive ones.¹²
15. This framework is essential to prevent the Commission from prohibiting deals on the basis of what would otherwise essentially be “efficiency offenses”, which may well expose rivals to more competition and compel them to invest or innovate, but benefit consumers.
16. **Theories of harm other than foreclosure and related to increased barriers to entry and expansion should also be addressed under the well-established framework of the NHMG.** The Commission’s Consultation then invites a discussion of what theories of harm may be relevant outside of foreclosure (E.7) and how to analyze mergers that could result in increased barriers to entry or expansion (E.8). We understand these questions to go – perhaps amongst other things – to the concept of “entrenchement” referenced in the Consultation’s sub-section title.
17. To consider possible expansions beyond foreclosure, it may be useful to recall how the term has previously been defined and interpreted. The NHMG provide such a definition at ¶ 18 as: “any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete.” Foreclosure as assessed by the existing Guidelines is thus not the elimination of competition. The foreclosure concept in the NHMG already captures the idea that rivals are “hampered” (though not necessarily eliminated) so long as such hampering is sufficient to constitute a Significant Impediment to Effective Competition – a standard established by the EUMR and the appropriateness of which is therefore not in debate.
18. The answer to question E.7 cannot therefore be that merger review should now concern itself with anticompetitive effects that result in rivals of the merging parties being “hampered” but not excluded. European merger review already concerns itself with precisely this and the Commission could prohibit a merger on this basis under the existing NHMG. Likewise, the concern covered in question E.8 – namely that rivals would face

¹² For a more detailed analysis of why the ability-incentive-effects framework is still fit for purpose and provides a coherent basis for evaluating a SIEC in non-horizontal mergers, please see our response to Topic B of the Consultation on “Assessing Market Power Using Structural Features and Other Market Indicators”.

increased barriers to entry or expansion – is also covered by the idea of rivals being “hampered”. Foreclosure is the hampering of rivals to a significant degree.

19. What the Commission could not do within the framework of the existing Guidelines is to preclude a merger that hampers rivals – or, indeed, even excludes them – where that hampering results from competition on the merits. The NHMG observe that “the fact that a merger affects competitors is not in itself a problem. It is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain” (NHMG, ¶16). Put simply: if rivals suffer because a merger has resulted in their facing sterner competition from the merging parties than they did before, that is a good thing and no grounds to prohibit a transaction.
20. To summarize, our view is that the answers to E.7 and E.9 should be “the Commission should assess these theories within the framework of the NHMG”. This is because this framework already fully covers situations where the merger would result in rivals being anticompetitively hampered by the transaction. The only type of harm to rivals that is not covered by the NHMG’s definition of foreclosure arises, in our view, from rivals being harmed due to their facing stronger competition. But harm of this nature should not result in a prohibition and is therefore no basis for revisiting the Guidelines.
21. As an additional observation: some of the debate in this space appears to use the term “foreclosure” interchangeably to refer to the *mechanism* through which harm can occur (e.g., a foreclosure strategy through bundling or tying) and the *extent* or degree of the harm that is likely to result from that mechanism. This creates a serious risk of analytical confusion: even if it were the case that digital mergers create new *mechanisms* through which harm could occur, that would not justify a change to the *extent* or degree of harm that is required to prohibit a merger. The extent of harm that is required to justify a prohibition is that of a “significant impediment to effective competition” (“SIEC”). This standard is enshrined in the EU Merger Regulation and has been interpreted through the jurisprudence of the EU Courts as being the hampering of rivals to an extent liable to significantly impede effective competition.¹³ This is the standard reflected in the definition of foreclosure in the existing Guidelines. In our view, it is hard to conceptualize what quantum of competitive harm would be significant enough to qualify as a SIEC but too insignificant to qualify as foreclosure under the NHMG. Labelling a theory of harm as “entrenchment” does not change this. And so, whatever changes may be made to the Guidelines to describe potential new *mechanisms* of harm, clearly foreclosure must remain the ultimate standard in non-horizontal merger control.

¹³ For instance in *Tetra Laval v. Commission* (T-5/02), EU:T:2002:264, the Court held that the mere fact that the acquiring undertaking already holds a dominant position “does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position”. (¶312). This was most recently confirmed in *Deutsche Telekom v. Commission* (Case T-64/20), EU:T:2024:815, where the Court held that “the fact that a concentration would create or strengthen a dominant position is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market” unless it also results in a SIEC (¶193).

C. SUB-SECTION E.9 –ECOSYSTEM AND INTERRELATED PRODUCTS

22. Ecosystems and interrelated products are not new phenomena. Ultimately, an ecosystem is a way of referring to a set of complementary products that are of interest to a common set of users: an apt description of many conglomerate mergers. The NHMG already comprehensively address product “portfolios” of this nature. In fact, they note that product portfolios “may give rise to customer benefits such as one-stop-shopping” (NHMG, ¶14) and that “the fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns” (NHMG, ¶ 104).¹⁴
23. In fact, the Commission has reviewed a number of conglomerate transactions outside the digital and tech sector involving portfolio effects, including, for example, in *Nestle/Gerber*, *Posten AB/Post Denmark A/S*, *Crane CO/MEI Group*, and *IMS Health/Cegedim Business*.¹⁵
24. In sum, the NHMG framework already addresses product portfolios – and therefore already addresses “ecosystems” – and recognizes their common procompetitive benefits, such as one-stop-shopping and reduced transaction costs. Past Commission practice consistently confirms that such effects are, if anything, inherently procompetitive, unless proven otherwise. Accordingly, relabelling product portfolios as “ecosystems” should not warrant the creation of new analytical frameworks.
25. Ultimately, our view is that there is nothing new or, indeed, inherently bad about ecosystems – in fact, they tend to create efficiencies for their users. Of course, it is possible to conceive of ecosystems or product portfolios that could result in detriment to consumers but this requires extra ingredients (such as significant sunk costs for users that make them unable to leave the ecosystem). But the possibility of such harm does not stem from the existence of the ecosystem itself but rather from the additional conduct that gives rise to it – e.g., the buy-in cost. And such conduct could be assessed directly through the NHMG’s ability-incentive-effects test.

D. SUB-SECTIONS E.10-11 –DATA-RELATED CONCERNS AND AGGREGATION OF DATA

26. The next sub-section in the Commission’s Consultation inquires about competition concerns related to the accumulation of data, and the standard and criteria that the Commission should consider to assess the value of the target’s data in that context. There is a view that data can be a valuable asset and it therefore makes sense for an analysis of data to feature in the review of digital mergers.
27. The way we see it, there are three main categories of data-related theories of harm.
28. **First, a horizontal theory, where the merging parties are active in the same product market.** Here, the merger would remove the competitive pressure they exercise upon each

¹⁴ See NHMG, ¶¶14 and 104.

¹⁵ *IMS Health/Cegedim Business* (COMP/M.7337) decision of 19 December 2014; *Crane Co/Mei Group* (COMP/M.6857) decision of 19 July 2013; *Posten AB/Post Denmark A/S* (COMP/M.5152) decision of 21 April 2009; and *Nestle/Gerber* (COMP/M.4688) decision of 27 July 2007.

other. This is a classic horizontal effects theory of harm and it would apply in cases where two companies that compete in the market for the sale of data (that is, two data brokers) would merge. This could lead to the lessening of direct competition and the elimination of competitive pressure on the acquiring party, which, in turn, could lead to datasets of lower quality or sold at higher prices – or both.

29. The question of the valuation of data is relatively straightforward in this case, as data would be the relevant product, and as such its value could be proxied with the parties’ respective market shares – and the same proxy could be used to assess the value of competing datasets. But, such cases are unusual in practice, and we are in fact not aware of any digital cases in which this classic horizontal concern arose.¹⁶ That is because mergers between data brokers are not common, and they typically are too small to meet the EUMR threshold. So, although this first theory of harm is traditional and would be straightforward to apply, it is unlikely to be of relevance in practice.
30. **Second, a non-horizontal theory whereby the merger could result in a classic input foreclosure concern.** The merged entity precluding its downstream rivals from accessing an upstream data source that is an “important input” for competition in the downstream market. This is the classic theory of harm of input foreclosure that could render a vertical merger anticompetitive. In this scenario, the data of one of the merging parties constitutes an important input to a downstream market in which the other merging party is active.¹⁷ Concern in such cases would arise if the merged entity has the ability and incentive to limit or degrade access to this data for rivals on the downstream market – for instance, by cutting off access entirely, or by making it more expensive or difficult – to foreclose them in a way that would constitute a SIEC. For this theory of harm, it is not particularly relevant that the input concerned is data: the same assessment framework can apply as in any other cases, in digital markets and beyond.
31. **Third, there is a notion that a concern could arise if one of the merging parties will get access to data from the other party, without decreasing any rival’s access to that data.**¹⁸ This theory of harm arises in cases where post-merger, one of the merging parties gets access to new datasets, without any third party losing access to such datasets. The merger does not lead to anyone *losing* anything (be it consumers losing choice or rivals

¹⁶ We are only aware of one case outside the digital sector in which this concern arose: in *IMS Health/Cegedim* (COMP M.7337) decision of 19 December 2014, the Commission assessed a horizontal overlap in the market for standardised primary market research services, where both IMS and Cegedim were active, and required structural remedies before approving the transaction to ensure that there would be no competition concerns post-merger.

¹⁷ While in theory, such concerns could also arise in conglomerate mergers, this would imply that the merging parties supply both data and other products to a common set of customers, and we are not aware of any examples of such commercial dynamics. The present analysis therefore focuses on vertical mergers and the notion of upstream and downstream markets.

¹⁸ See e.g., *Meta (Formerly Facebook)/Kustomer* (Case COMP/M.10262) decision of November 10, 2023; *Google/Fitbit*; *Apple/Shazam* (COMP M.8788) decision of 6 September 2018; *Verizon/Yahoo* (COMP M.8189) decision of 21 December 2016; *Microsoft/LinkedIn* (COMP/M.8124) decision of 6 December 2016.

losing access to input). The supposed harm lies solely in one of the merging parties *gaining* access to more data.

32. This sounds like an efficiency offense. Competitors would not be impacted by a *reduction* of competition on the market, but by the *increased competitiveness* of one of the merging parties. In the short term at least, the merger creates efficiency by offering consumers better products and services. Putative harm would result only if, at some point in the future, this improved offering could potentially lead to rivals exiting, after which the merged entity could raise prices or reduce the quality of its offering.
33. Under the traditional framework of assessment, for such a theory of harm to raise anticompetitive concerns, the Commission would in principle have to show that: (i) the data concerned is sufficiently valuable to improve the merged entity's offering and as a result, have an effect on the downstream market; (ii) that effect is sufficiently strong to foreclose competitors; (iii) there is evidence that, following such foreclosure, the merged entity would raise prices and/or reduce quality or innovation; and (iv) the negative effects under (iii) outweigh the positive effects under (i). And because this theory is speculative, a particularly high standard should be required to prove each of these steps.
34. But this is not the framework of analysis that the Commission applied in past cases that involved this theory of harm. Instead, the Commission approached these cases as involving quasi-horizontal concerns by looking into a "hypothetical" data market where the parties' activities would overlap, though without defining it as a relevant antitrust market.¹⁹ We remain unconvinced by the use of horizontal concepts to assess non-horizontal mergers for the reasons explained above.
35. In any event, however the issue is conceptualized, an essential element of the assessment needs to be the **valuation of the data** to which access would be granted following the merger. The value of the data is the competitive relevance it has on a specific downstream market – if of little value, getting access to this data would not lead to an improvement of the merged entity's offering on the downstream market, and as such, it could not risk foreclosing rivals or harming consumers, even in the long term.
36. The key question is therefore how to value data.
 - One way to do so could be to estimate the market shares that the merging parties and their rivals would respectively have on the "hypothetical market" considered – though not formally defined as a relevant antitrust market – in the Commission's decision. But, it is hard to see how to conduct that exercise on a hypothetical market for which there is no available quantitative data. Using the shares on the downstream market as a proxy would not work either because by definition, one of the merging parties is not active on that market, so that approach would only

¹⁹ *Google/Fitbit*, ¶454. In *Verizon/Yahoo* for instance, the Commission conducted its assessment on a "hypothetical market" for the supply of the specific data collected by the parties. The Commission conducted a comparable analysis in *Meta/Kustomer*, where it found that Meta's greater access to customer data could strengthen its position in online display advertising, even though the merger did not give rise to any horizontally affected market "in a traditional sense".

underline the absence of a horizontal overlap in the hypothetical market. So while using the market shares of the merging parties and their rivals as a proxy for the value of the data concerned works under a traditional horizontal theory of harm (see first theory above), it does not work under this third, somehow hybrid theory.

- Another way to assess the value of the data concerned is to assign value to the data itself. The Commission took this approach in the *Apple/Shazam* case, using the so-called “Four V” analysis. This analysis seeks to determine (i) the variety of data composing the dataset (variety); (ii) the speed of data collection (velocity); (iii) the size of the dataset (volume); and (iv) its commercial relevance (value).²⁰ Based on these parameters, the Commission can then compare the dataset concerned to other datasets available to rivals to determine whether it is competitively valuable.
37. After a few years of implementing that “Four V” analysis, the Commission now asks in its Consultation whether it should take into account other criteria to assess the value of a given dataset, suggesting as examples the quality of the data (*e.g.*, completeness, cleanliness of a dataset), its uniqueness or difficulty to replicate, and its accessibility. It seems clear to us that the uniqueness of and accessibility to the data are relevant elements when considering its value. If the data concerned is not unique and rivals can replicate it or get access to an equivalent alternative from a third party, then surely the dataset cannot be valuable enough for the merged entity to significantly impede effective competition by withholding it.
38. In any event, the valuation of the data should also take into account evidence from market respondents and internal documents. In particular, the transaction valuation that the acquiring party conducted prior to the merger should be telling in that context. If that valuation, which was used by the company’s board of directors to sign-off on the transaction – assigns little-to-no value to the dataset, it is hard to conceive how the data could turn out to be an important input to a market in which that company was a strong player.
39. And once the value of the data has been established, it remains important to account for possible limitations on the usage of that data, which can significantly impact the value of the data concerned as the merged entity may well end up not being able to use it, at least not fully. Many of the potential concerns that can arise in data-driven markets are already addressed by regulatory tools outside merger control, including:²¹

²⁰ *Apple/Shazam*, ¶317 and accompanying footnote. The Commission also references a “Four V” analysis in *Google/Fitbit* at ¶418, but does not provide a detailed analysis of the outcome of this analysis.

²¹ The European Court of Justice recognised this in the *Asnef-Equifax* judgment where it stated that “any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection”. *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (Case C-238/05), ECLI: EU: C:2006:734, ¶63. The Commission has also consistently considered these limitations in its decisional practice, for instance in *Verizon/Yahoo* and in *Microsoft/LinkedIn*.

- If the acquiring party is a gatekeeper, the Digital Markets Act (“DMA”) sets out a variety of data-related obligations that limit the use of both personal and aggregate datasets.²²
- The General Data Protection Regulation (“GDPR”) may also impact how merging parties can engage with personal data post-merger.²³ A merger involving personal data will typically involve two separate data controllers. Migrating data from one controller to another is a complex process that involves delay and may require the user’s consent. This may further limit the availability of personal data for use by the merged entity post-merger.

40. It follows that the issue with this third theory of harm is that it revolves around concerns that do not immediately appear anticompetitive, as the Commission considers that efficiencies and overall positive effects in the short term are outweighed by more uncertain and less proximate potential adverse effects in the future. Such a theory should not be implemented lightly and should be governed by a sound and clearly-defined framework that would set out in particular how exactly the Commission defines relevant markets, how it values data and its competitive relevance on said markets, and how it takes into account limitations to the use of this data. The Commission should also carry out a robust balancing exercise of the immediate benefits of the merger on the relevant markets against its distant and uncertain potential adverse effects. Should the Commission want to pursue this type of theory of harm in the future, it is important to clarify and clearly define the relevant framework of assessment.

E. SUB-SECTIONS E.16-18 – PRIVACY AND DATA PROTECTION

41. Related to the questions around data accumulation are the questions on the assessment of privacy and data protection considerations, whether these considerations should feature in the Revised Guidelines, and whether the Commission should provide guidance on their relationship with market power.
42. When assessing privacy considerations in mergers involving the acquisition of datasets, the Commission should first establish both the price and non-price parameters of competition that are of importance to customers in a given relevant market. Just because a given transaction involves the acquisition of data does not mean that privacy will constitute an important parameter of competition. In *Google/Fitbit*, the Commission assessed concerns that the transaction would reduce competitive pressure on Google to compete on non-price parameters of competition such as privacy.²⁴ The Commission

²² Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828. See in particular Articles 5(2), 6(2), 6(9), and 6(10) DMA.

²³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

²⁴ *Google/Fitbit*, ¶452.

observed – having reviewed internal documents – that there was “no evidence in the file about the importance of privacy as a parameter of competition in wearables”.²⁵

43. In addition, should privacy indeed be an important parameter of competition, the Commission should again bear in mind other regulatory regimes that limit the use of data when assessing the hypothetical effects of a transaction on competition in privacy aspects. Indeed, many of the concerns that could arise in data-rich mergers are already addressed by specific regulatory tools outside merger control. These should also be borne in mind when assessing the impact of a merger on privacy aspects, as the Commission did in *Google/Fitbit*, where it observed “any decision or initiative (...) in relation to privacy and data protection, will have to be in compliance with the data protection rules set forth by the GDPR, which provides a high standard of privacy and data protection for the industry and leaves little room for differentiation”.²⁶
44. Our sense is that privacy and data protection aspects are just a type of non-price competition parameters, and there is no need to lay out a specific framework of assessment in the Revised Guidelines for these considerations.

F. SUB-SECTION E.12 – TARGETED FORECLOSURE

45. The Consultation also asks about the assessment framework for concerns that post-transaction, the merged entity may attempt to foreclose its competitors in a targeted manner. That is, the merged entity could either deploy strategies to (i) foreclose only certain competitors (*e.g.*, close competitors) while leaving other competitors unaffected, or (ii) only partially foreclose competitors, for instance by increasing the price of, delaying access to, or degrading interoperability with its products or services, without fully depriving its competitors from such products and services.
46. The difference between full foreclosure and targeted foreclosure is one of scope, not of nature. Put differently, the mechanisms and theories of harm underlying both types of foreclosure strategies are the same. There is therefore nothing inherently new or unknown about targeted foreclosure theories, and the same analytical framework can apply as in cases of foreclosure of all competitors. In fact, the NHMG already extensively cover the notion of foreclosure, as its sections on non-coordinated effects are entirely built around that theory of harm, and do not differentiate between full and targeted foreclosure strategies.
47. Not only is targeted foreclosure not fundamentally different from full foreclosure, it is also not specific to digital and tech markets. The Commission has successfully applied the

²⁵ *Google/Fitbit*, ¶300.

²⁶ *Google/Fitbit*,. ¶300.

assessment framework from its NHMG (*i.e.*, the ability-incentive-effects test) to all types of foreclosure strategies for decades, both in tech/digital markets,²⁷ and other industries.²⁸

48. There is therefore no need to adapt the current assessment framework or Guidelines to account for targeted foreclosure in digital and tech markets as this notion is already fully covered by the NHMG and has featured in Commission decisions for many years.

G. SUB-SECTION E.13 – INTEROPERABILITY ISSUES AND ACCESS ISSUES

49. Interoperability and access concerns are not novel, and the Commission has developed extensive expertise in assessing them. And while such concerns are prominent in digital and tech markets and at times involve specific challenges, they are not novel and have been assessed by the Commission in many decisions since at least the early 2000s.²⁹
50. Since the adoption of the NHMG, the Commission has applied its “ability-incentive-effects” framework in numerous digital and tech cases involving concerns of degradation of interoperability³⁰ or access to inputs,³¹ successfully identifying and addressing competition concerns. The Commission has also successfully applied its assessment framework to assess concerns of interoperability and access to inputs outside digital and tech markets,³² which indicates there is no need to review this framework to account for such concerns in these markets specifically.
51. Our view is that the Commission already has the tools it needs with the current assessment framework to assess complex issues arising in digital and tech markets, and its decisional practice is a testimony to this.
52. It is unclear how changing its assessment framework may help the Commission to more easily address some of the challenges it currently faces while assessing interoperability and access concerns in digital and tech markets. Some level of factual, case-by-case analysis would always be required regardless of the specific assessment framework implemented.

²⁷ See *e.g.*, *Google/Fitbit* (¶¶759, 802) and *Meta/Kustomer* (¶¶295-297), in which the Commission applied the same framework to analyse potential competitive concerns arising from both full and targeted foreclosure.

²⁸ See *e.g.*, in the pharmaceutical market *EQT/Dechra* (Case COMP/M.11186) decision of December 21, 2023 (¶¶78-79) and in the eyewear retail market *EssilorLuxottica/Grandvision* (Case COMP/M.9569) decision of March 23, 2021 (Annex 1 “Economic underpinnings of the commission’s GUPPI analysis”, especially ¶38).

²⁹ Although this was not a merger case, the Commission already raised and assessed interoperability concerns against Microsoft in its 2024 decision concerning Microsoft’s restriction of the interoperability between its PCs and non-Microsoft work group servers, for practices that started in 1999. See *Microsoft* (Case COMP/C-3/37.792) decision of May 24, 2004. And the Commission had assessed interoperability earlier still with the IBM cases in the 1980s.

³⁰ See *e.g.*, *Broadcom/VMware* (Case COMP/M.10806) decision of July 12, 2023; *NVIDIA/Mellanox* (Case COMP/M.9424) decision of December 19, 2019; *Broadcom/Brocade* (Case COMP/M.8314) decision of May 12, 2017; *Microsoft/LinkedIn*; and *Intel/McAfee* (Case COMP/M.5984) decision of January 26, 2011.

³¹ See *e.g.*, *Microsoft/Activision Blizzard*; *Google/Fitbit*; and *Apple/Shazam*.

³² In relation to interoperability concerns, see *e.g.*, *Siemens Healthineers/Varian Medical Systems* (Case COMP/M.9945) decision of February 19, 2021 in the healthcare sector. In relation to concerns about degradation of access to inputs, see *e.g.*, *Vodafone/Certain Liberty Global Assets* (Case COMP/M.8864) decision of July 18, 2019 in the telecommunications sector.

And it is crucial for legal certainty that the Commission conducts such assessment based on a framework that remains sufficiently clear, predictable, and in line with precedents and the applicable legal test. This framework should also take appropriate account of market dynamics and of the consequences of the regulator’s interventions.

53. For example, in its Consultation, the Commission asks in question E.13 how to determine the appropriate interoperability standard to enable effective competition, *i.e.*, how much interoperability is enough interoperability (and the same considerations apply to degraded access to inputs). As the Commission puts it, there are broadly two possible standards. The Commission could require:
- That the merged entity offer third parties *sufficient* interoperability or access to input for them to compete effectively, or
 - That all third parties have the *same level* of interoperability and access to inputs as granted to the merged entity’s own products and services.
54. We have conceptualized these standards in our own thinking as being the standard of “First-Party Parity” – where the merged entity provides rivals the same interoperability standard it provides to its own offering – and “Third-Party Parity” – where the merged entity provides rivals with the same interoperability standard it provides to non-rivalrous third parties (but not necessarily the same standard it provides to its own offering).
55. Based on past cases and the way digital and tech markets operate, we believe that – were it appropriate in a given case to require the merged entity to maintain interoperability –³³ then the appropriate standard should generally be Third-Party Parity. First-Party Parity is a serious burden as it precludes the merged entity from developing proprietary integrations, instead requiring it to externalize all interoperability innovation. Imposing excessive interoperability obligations would create significant risks and challenges (in relation to, *e.g.*, intellectual property rights, integrity and security, and innovation), and often goes beyond what is necessary to ensure effective levels of competition. Fundamentally, it would also preclude some of the benefits one could usually expect to derive from a conglomerate merger by dampening the innovation such mergers can enable.
56. So going forward, we submit that the Commission should continue adapting to new and evolving market dynamics within the rigor of its current assessment framework, which has proven well-suited to follow the evolution of the markets due to digitalization. If the Commission considers it necessary to revise its Guidelines to more expressly cover the issues around interoperability and access to inputs in digital and tech markets, it should do so in line with the legal test and standard of proof in the EUMR, and with the rich set of precedents in this sector.

³³ It is by no means a given that such a requirement should arise: in many cases, interoperability will not be competitively relevant to begin with, in which case this discussion should not arise at all.

H. SUB-SECTIONS E.14-15 – FUTURE MARKET DYNAMICS AND TECHNOLOGICAL CHANGES

57. For these sub-sections, we generally refer to our responses to Questions C.15 to C.17 of the Consultation on Topic C (Innovation and other dynamic elements in merger control), as the topics overlap. In short, we consider that there are no universal timeframes and metrics that are relevant for the assessment of all cases, both across sectors and in cases on digital and tech markets. The Commission should be able to adapt its toolbox to fit the facts of each case, and at the same time should continue adhering to the time-tested and workable guidance provided by the Court of Justice, indicating that the Commission’s assessments cannot be speculative and fall out of a “foreseeable time frame”³⁴ where events would occur “with a sufficient degree of certainty”.³⁵ This approach is fully compatible with an ambitious yet rigorous enforcement agenda and ensures the Commission can focus on theories of harm based on sound evidentiary assessments and a clear likelihood of harm to consumers.

³⁴ See *Commission v CK Telecoms UK Investments* (C-376/20 P), EU:C:2023:561, ¶82.

³⁵ See *EVH v. Commission* (C-464/23 P), EU:C:2025:478, ¶234.