

## Merger Guidelines Review

### Topic F – Efficiencies

#### I. EXECUTIVE SUMMARY

1. This Response to the European Commission’s Consultation on **Topic F** summarizes our views on possible reforms to the assessment of efficiencies in EU merger control.<sup>1</sup>
2. Most mergers will generate efficiencies. Merger control should therefore carefully review whether such efficiencies can fully or partly offset a merger’s potential anticompetitive effects, so as to warrant unconditional clearance or reduced remedies. The Commission’s traditional assessment of efficiencies is unduly restrictive, in particular as it:
  - focuses on short-term efficiencies in the form of price benefits, while discounting or ignoring longer-term efficiencies in areas such as innovation and sustainability;
  - applies a rigid standard of proof for efficiencies, which significantly exceeds the standard applied for identifying competitive harm; and
  - refuses to consider out-of-market efficiencies despite their potential impact on society and the European economy.
3. In practice, merging parties have been deterred from making detailed efficiency arguments – particularly during Phase 1 – given the very low probability that such arguments will succeed and the (perceived) risk that doing so will signal lack of faith in arguments on the absence of anticompetitive effects.
4. The Commission’s approach is at odds with the recognition in the EUMR that mergers may give rise to efficiencies.<sup>2</sup> It is also at odds with the Court’s finding that there should be no bias towards prohibiting or clearing a merger.<sup>3</sup> Notwithstanding, to date,

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<sup>1</sup> “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”).

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1–22, Recital 29. The NHMG (¶13) in turn recognize that vertical and conglomerate mergers provide substantial scope for significant efficiencies. While this Response agrees that non-horizontal mergers may particularly give rise to efficiencies, they can arise in other transactions as well. Response to question F.3.b.

<sup>3</sup> *EC v. CK Telecoms UK Investments* (Case C-376/20 P) EU:C:2023:561 (“CK Telecoms”), ¶71.

the Commission has not cleared any merger exclusively based on efficiencies and has only acknowledged the positive effects of efficiencies in few cases.<sup>4</sup>

5. As suggested by the Draghi Report, the Commission should increase the weight of efficiencies in merger control to avoid blocking or discouraging mergers in which significant efficiencies would outweigh any competitive harm.<sup>5</sup> This is in line with the growing recognition of efficiencies by other competition authorities.<sup>6</sup> Specifically, this Response submits that the established three-pronged test for assessing efficiencies – consumer benefit, merger-specificity, and verifiability<sup>7</sup> – should be maintained, as we do agree that efficiency claims require a robust assessment. The Revised Guidelines should, however, reflect the following:<sup>8</sup>
- The Commission should consider efficiency claims in parallel with the Commission’s assessment of a Significant Impediment to Effective Competition (“SIEC”) – not merely at a later stage after a SIEC has already been identified;
  - The Commission should align both the evidentiary threshold and counterfactual for assessing efficiencies with those applied by the Commission for identifying competitive harm;
  - The Commission should interpret and assess the conditions of the three-pronged test in a more balanced and pragmatic way. This should apply to the conditions themselves (*e.g.*, broadening the scope of relevant consumer benefits and allowing for the recognition of out-of-market efficiencies) as well as to the types of cognizable evidence (qualitative and not only quantitative) and metrics (extended time horizon); and
  - In cases where doubts remain with respect to efficiencies, the Commission should consider remedies to reduce the uncertainty of whether efficiencies will materialise.

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<sup>4</sup> See *e.g.* *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).

<sup>5</sup> See Mario Draghi, *The future of European competitiveness (the “Draghi Report”)*, Part B, September 9, 2024, p. 75.

<sup>6</sup> For example, the ACCC has recognized that likely public benefits (accelerated rollout of renewable energy infrastructure, contributing to a faster reduction in Australia’s greenhouse gas emissions) outweighed the potential competitive harm from the vertical integration of parties’ energy and gas activities. See *Origin Energy/Brookfield/MidOcean*, ACCC Decision of October 10, 2023 (Case MA1000024).

<sup>7</sup> HMG, ¶78.

<sup>8</sup> Response to questions F.1–F.2.

## II. RESPONSE PAPER

6. This Response is structured as follows. **Section A** sets out general suggestions to improve the assessment of efficiencies. Subsequent **Sections** discuss suggestions for each of the three prongs of the efficiency test.

### A. GENERAL

7. **Assess efficiencies in tandem with competitive effects.** The HMG (¶77) indicate that the Commission considers efficiencies “in the overall assessment of the merger”. In practice, however, the Commission typically considers efficiencies separately from the main competitive assessment, after a SIEC has been identified. The Revised Guidelines should make clear that efficiency considerations should in principle be assessed in tandem with competitive effects<sup>9</sup> when the parties present benefits and efficiency claims at an early stage, particularly where such efficiencies have a direct impact on whether a SIEC arises in the first place.<sup>10</sup> This would enable a more accurate assessment of a merger’s competitive impact<sup>11</sup> and encourage merging parties to incorporate efficiencies into their deal planning and transaction rationale.
8. **Align evidentiary standard between efficiencies and competitive harm.** Merging parties face a much higher burden for proving efficiencies that requires precise quantitative analysis, verifiability, and reasonable certainty of materialization compared to the standard applicable to anticompetitive harm (balance of probabilities). As set out in ¶¶19-21 below, this imbalance should be addressed in order to ensure that there is no structural bias against merger clearance, equal analytical rigour is applied, and similar types of evidence are accepted for both competitive harm and efficiency assessments.
9. **Extend the assessment timeframe for efficiencies.** The HMG (¶83) require that efficiencies are “timely”, stating that the “later the efficiencies are expected to materialise in the future, the less weight” is assigned to them. This impacts all limbs of the efficiency test, but in particular their verifiability and whether they benefit consumers. While it may generally be reasonable to place greater weight on efficiencies that are likely to occur sooner, by focusing excessively on “timely” efficiencies that arise in the short term, the Commission risks disregarding or downplaying benefits that materialize in the medium to long term.<sup>12</sup> In its decisional practice, the Commission

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<sup>9</sup> This would align with the Commission’s assessment of non-horizontal mergers. *See, e.g., EssilorLuxottica/GrandVision* (Case COMP/M.9569), decision of March 23, 2021, ¶¶325-337 (the Commission analyzed GrandVision’s incentives to increase retail prices post-merger. The analysis of efficiencies formed part of the overall assessment of the merger’s competitive effects by also considering the potential benefit of vertical integration stemming from the elimination of double marginalization, which could reduce the incentive to raise retail prices).

<sup>10</sup> As set out in our *Response to Topic C*, in markets where innovation is an important parameter of competition, the Commission should assess both the potential negative and positive effects on innovation. A SIEC should only be found if the overall balance of effects is negative.

<sup>11</sup> In *Korsnäs/AD Cartonboard* (¶¶36 and 57-64), for example, the Commission recognized the efficiencies put forward by the parties (input and cost savings, as well as product and R&D improvement), but found that these did not sufficiently address the identified competition concerns. Combined with the parties’ extended portfolio, however, the transaction was found not to result in a SIEC and was ultimately cleared.

<sup>12</sup> The NHMG (¶21) illustrate well how the Commission tends to value short-term efficiencies: “the more immediate and direct the pro-competitive effects of a merger, the more likely the Commission is to find that they counteract any anti-competitive effect.”

has rarely acknowledged efficiencies that were expected to arise more than three years after closing.<sup>13</sup> This approach risks ignoring important efficiencies achievable in capital-intensive and innovation-driven sectors, where genuine synergies such as fixed cost savings, R&D investments, and infrastructure integration may take years to materialize but can ultimately deliver substantial consumer welfare gains.<sup>14</sup>

10. This Response agrees with the Draghi Report's suggestion to increase the weight of efficiencies in the form of improved quality vis-à-vis price levels through extended assessment timelines.<sup>15</sup> Instead of a fixed timeframe, the Revised Guidelines should allow for industry-specific flexibility:<sup>16</sup> in industries with long-investment cycles, for example, the timeframe for efficiencies should be aligned.
11. The Commission should not pre-emptively dismiss medium / longer term efficiencies that do not materialise shortly after a merger to counter competitive harm,<sup>17</sup> but should allow greater flexibility to recognize such efficiencies, taking due account of their probability of arising and their time-lag. This would be in line with the approach of the Commission's 101(3) TFEU Guidelines.<sup>18</sup> In cases where, significant doubts remain, the Commission could consider a remedy to obtain sufficient certainty as to the ultimate realization of the claimed efficiencies (*see* ¶¶30-32 below).
12. **Investigate efficiencies in the Commission's market test.** While merging parties face the burden of proving efficiencies,<sup>19</sup> they can only do so to the extent that they have access to relevant information. For some efficiencies, *e.g.*, significant consumer cost savings, such access may be lacking, whereas the Commission might be better positioned to collect such information.<sup>20</sup> The Revised Guidelines should therefore provide that a *prima facie* demonstration to the best of the information available to merging parties should suffice for the Commission to then investigate the efficiency claims by using its investigative powers to retrieve relevant information from customers or other stakeholders (including sectoral regulators).

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<sup>13</sup> *See Vodafone Italia/TIM/INWIT JV* (Case COMP/M.9674), decision of March 6, 2020, ¶1391; *UPS/TNT Express* (Case COMP/M.6570), decision of January 30, 2013, ¶906 (where the assessment of efficiency claims extended so far as three years).

<sup>14</sup> Innovation- and sustainability-related efficiencies are also inherently more difficult to quantify during the review of a transaction. *See Response to Topic C*, ¶14. On sustainability, *see Response to Topic D*, question D.7.

<sup>15</sup> Draghi Report, Part B, ¶75. The report suggests five years.

<sup>16</sup> Response to question F.6.

<sup>17</sup> Response to question F.7.

<sup>18</sup> The Commission's Article 101(3) Guidelines confirm that "a certain period of time may be required before the efficiencies materialise. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article [101](3)." The Guidelines suggest that such efficiencies should instead discount the value of future gains to consumers. *See* Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/08, ¶¶87-88.

<sup>19</sup> *CK Telecoms*, ¶242.

<sup>20</sup> *Deutsche Börse/Euronext* (¶¶1166–1187) (the merging parties supported claims of user reductions in IT and access costs by evidence extrapolated from interviews with users. The Commission dismissed these as unverifiable and dismissed the parties' suggestion to send information requests to users on the basis that this was not a reasonable justification to waive their obligation to substantiate the claims). *See also* François-Charles Laprèvote, "Abandon all hope, ye who enter here? Efficiencies in European Merger Control: A Few Lessons From Recent Decision Practice" [2014] 2 – Concurrences, ¶57.

## **B. BENEFITS TO CONSUMERS**

13. The HMG (¶79) require that efficiencies benefit consumers, that they are “substantial and timely”, and ensure that consumers are “not worse off” post-merger, with benefits expected to accrue in the markets where competition concerns would otherwise arise.
14. **Broaden the scope of relevant consumer benefits.**<sup>21</sup> The HMG recognize that efficiencies can benefit consumers through lower prices and other benefits such as new or improved products or services.<sup>22</sup> In practice, however, the Commission primarily focuses on short-term price reductions or other direct consumer benefits as these are typically quantifiable and easier to verify. This approach can undervalue efficiencies of mergers that involve technological innovation, sustainability, or capacity rationalization, that arise over years instead of months. Moreover, even the Commission’s assessment of price reductions is overly restrictive as it ignores fixed cost reductions. This fails to recognize that fixed costs – especially when considered over a longer timeframe – can also lead to price reductions for consumers.<sup>23</sup>
15. The Revised Guidelines should therefore broaden the types of consumer benefits cognizable as efficiencies and the circumstances in which they may be accepted. For specific suggestions related to innovation, *see* our *Response to Topic C*,<sup>24</sup> and for sustainability, *see* our *Response to Topic D*.<sup>25</sup> Additionally, the Revised Guidelines should also be open to considering fixed cost reductions, or any other cost reductions as long as these would ultimately be passed onto consumers.<sup>26</sup>
16. **Recognize out-of-market efficiencies.** The Commission only recognizes efficiencies if they would counteract harm in the same relevant market – excluding broader, cross-market effects.<sup>27</sup> This approach is more restrictive than the HMG, which are phrased in an open-manner, and only “in principle” require in-market efficiencies, leaving

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<sup>21</sup> Response to question F.3.a.

<sup>22</sup> HMG, ¶¶80-81. The NHMG (¶¶55-57) also mention cost reductions related to the internalisation of pre-existing double mark-ups, inventory cost savings due to better coordination of the production and distribution process, and increased incentive to investments in new product, new production processes, and in the marketing of products.

<sup>23</sup> This includes, for example, where “in the long run, fixed costs may affect a firm’s strategic decision analysis too, *e.g.*, the production capacity, which, in turn, might impact the subsequent (short run) price formation mechanism. In such a scenario, fixed costs may also be passed on”. *See* Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, OJ 2009 C 267/4, ¶52. *See also* Lau Nilausen, “Lessons from the life and death of merger efficiency claims”, November 7, 2023, available here and the EC’s recognition of fixed cost savings on prices in dynamic innovative markets in *Western Digital/Viviti* (Case COMP/M.6203), decision of November 23, 2011, ¶1015.

<sup>24</sup> Response to question F.5: all metrics, evidence and factors mentioned are relevant for assessing innovation benefits. For more information *see Response to Topic C*.

<sup>25</sup> *See* our *Response to Topic D*, question D.7.

<sup>26</sup> Response to question F.4.a. For a more specific discussion on the passing on of scale-related and companies’ resilience-related benefits *see our Response to Topic A*.

<sup>27</sup> *See, e.g., Booking Holdings/Etraveli Group* (Case COMP/M.10615), decision of September 25, 2023, ¶¶1142, 1151, and 1170 (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).

flexibility to consider out-of-market efficiencies as well.<sup>28</sup> The EUMR also leaves some scope to consider out-of-market efficiencies as it requires the Commission to take account of “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition” in its assessment.<sup>29</sup>

17. **There is no legal requirement to limit cognizable efficiencies to consumers in the affected market.** The EUMR does not restrict the scope of consumers relevant to an efficiencies analysis. To the contrary, the EUMR directs the Commission to conduct a holistic assessment of a merger’s effects on the single market in its entirety – encompassing both markets where the merger raises potential concerns, as well as markets where the merger could have positive effects, *i.e.*, efficiencies. Under Article 2(1) EUMR, the Commission’s essential task is to assess the compatibility of a merger “with the common market”, by taking into account “the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned” (emphasis added). Article 2(3) EUMR directs the Commission to prohibit a transaction if it significantly impedes effective competition “in the common market or in a substantial part of it” (emphasis added).
- 18.
19. Moreover, EU case law, and in particular the ECJ’s *Mastercard* judgment, does not prevent consideration of out-of-market efficiencies. The ECJ has recognized that where customer harm is found in one market and beneficial efficiencies are found in another, the benefits in the second market can be taken into account where, in particular, both customer groups are “substantially the same.” However, the judgment recognizes that benefits may also be taken into account in other circumstances, for instance where such “appreciable objective advantages” also flow to consumers in the relevant market if “taken together, those [in-market and out-of-market] advantages were of such a character as to compensate for the restrictive effects”.<sup>30</sup>
20. The Revised Guidelines should therefore also consider efficiencies that benefit EU consumers outside the directly affected markets. These may include macroeconomic spillovers (*e.g.*, increases in sector-wide productivity, industry-wide technological advancements),<sup>31</sup> strategic autonomy and sustainability benefits. Such mostly out-of-market benefits can constitute “appreciable objective advantages” to in-market consumers, and are especially relevant given the Commission’s 2024-2029 Priorities which include safeguarding and boosting European growth and innovation.<sup>32</sup>

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<sup>28</sup> 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”).

<sup>29</sup> EUMR, Article 2(1)(b). The reference to ‘consumers’ advantage’ is not limited to ‘intermediate and ultimate consumers’. The reference to “all the markets concerned” and “common market” in Article 2 EUMR could also be read to suggest flexibility to consider out-of-market benefits.

<sup>30</sup> *MasterCard Inc. and Others v. Commission* (Case C-382/12 P) EU:C:2014:2201 (“*MasterCard*”), ¶¶241–242.

<sup>31</sup> See our *Response to Topic C*, ¶14.

<sup>32</sup> European Commission, “Commission’s Priorities 2024–2029 – Competitiveness”, available [here](#). See also, Lars-Hendrik Röller, former DG COMP Chief Economist (15<sup>th</sup> Annual Competition Law and

### C. MERGER-SPECIFICITY

21. The HMG (¶85) require that efficiencies are a direct consequence of the notified merger and could not be achieved to a similar extent by less anticompetitive non-concentrative (e.g., cooperation or licensing agreements) or concentrative alternatives (e.g., alternative transactions). These alternatives must be “reasonably practical” given the parties’ business situation and considering “established business practices” in the relevant industry and cannot be ruled out “just because they might be more cumbersome or expensive.”<sup>33</sup>
22. **Align the counterfactual for efficiencies and anticompetitive effects.**<sup>34</sup> The Commission currently applies 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<sup>35</sup> – *i.e.*, where the merging parties would typically act unilaterally – efficiencies are compared against a scenario in which the parties would pursue an alternative option such as a cooperation agreement.<sup>36</sup> This approach is too formalistic, lacks pragmatism, and ignores the business context and reality of corporate transactions by treating entirely different forms of business cooperation as equivalent alternatives. This raises two principal issues:
- it constrains the merging parties’ freedom to determine the most efficient structure for achieving legitimate economic objectives and other efficiencies. Although merging parties could in principle govern their relationships by contract, there are practical limitations to contractual relationships that could make a merger a better solution;<sup>37</sup> and
  - it implicitly treats mergers as inherently more harmful<sup>38</sup> than cooperation agreements, although such cooperation may produce equal or comparatively

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Policy Workshop, Florence, November 12, 2010): “While EU competition policy has an explicit consumer orientation, it is important that synergies from mergers, such as cost efficiencies, investment and innovation play a proper role in merger control, as they are in the end main drivers of economic growth.”

<sup>33</sup> *Hutchinson 3G Austria/Orange Austria* (Case COMP/M.6497), decision of December 12, 2012, ¶417.

<sup>34</sup> Response to questions F.8 and F.9.

<sup>35</sup> HMG, ¶9. The Commission compares the competitive conditions that would result from the merger with the conditions that would have prevailed without the merger. Typically, the competitive conditions existing at the time of the merger make up the relevant counterfactual.

<sup>36</sup> 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”

<sup>37</sup> For example, it is virtually impossible to draft complete contingent contracts, as this would require (i) anticipating and documenting every possible future scenario; and (ii) ensuring sufficient monitoring for effective enforcement. This practical impossibility leaves significant gaps that can lead to inefficiencies in contractual relationships. Other limitations include agency problems (e.g., incentives to underperform in agreements between competitors) and information asymmetries, which pose a barrier in particular to innovation agreements. See Louis Kaplow, “Efficiencies in Merger Analysis” (2021), *Antitrust Law Journal* (Volume 83, n. 3), pp. 570, and 583–586.

<sup>38</sup> This is at odds with the 2023 *CK Telecoms* judgment in which the ECJ found that “no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred from [Regulation 1/2003]” (¶71).

worse anticompetitive effects,<sup>39</sup> as well as being less well suited to achieving many efficiencies.

23. The Revised Guidelines should align its counterfactual approach for efficiencies with the counterfactual approach for assessing competitive effects.

**D. VERIFIABILITY**

24. The HMG (¶86) require that efficiencies are verifiable, meaning that they must be “likely” to materialize and “substantial enough to counteract potential competitive harm”, so the Commission can be “reasonably certain” of their realization.<sup>40</sup>

25. **Align the evidentiary standard for efficiencies and anticompetitive effects.**<sup>41</sup> The forward-looking nature of merger control creates inherent uncertainty that affects both the assessment of competitive harm and efficiencies. However, there is a significant asymmetry between the evidentiary standards for demonstrating anticompetitive effects and efficiencies. The former is based on a balance of probabilities, requiring the Commission to show that a merger is “more likely than not” to result in a SIEC.<sup>42</sup> The evidentiary burden for efficiencies is much more exacting: efficiencies must benefit consumers, be merger-specific, and be verifiable. The HMG require a “precise quantitative analysis” of the efficiencies and their benefits to consumers or a “clearly identifiable positive impact on consumers”: the Commission must be “reasonably certain that efficiencies are likely to materialise”.<sup>43</sup> Merging parties have a high evidentiary burden to prove that efficiencies are verifiable.<sup>44</sup> Even quantified efficiency claims are often rejected.<sup>45</sup>

26. This asymmetry places a significantly higher evidentiary burden on merging parties to prove efficiencies than the Commission faces when demonstrating harm. It also suggests an institutional conservatism whereby the market impact of wrongly blocking a merger with efficiencies is considered less significant than that of approving an anticompetitive merger.<sup>46</sup> Such imbalance creates a structural bias against clearance and risks incorrectly blocking efficiency-enhancing transactions.<sup>47</sup>

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<sup>39</sup> Contracts between competitors could, for example, raise concerns related to the exchange of competitively sensitive information or could soften competition by aligning incentives. See, Louis Kaplow, “Efficiencies in Merger Analysis”(2021), *Antitrust Law Journal* (Volume 83, n. 3), p. 586.

<sup>40</sup> See also *Ryanair v. Commission* (Case T-342/07) EU:T:2010:280, ¶406.

<sup>41</sup> Response to questions F.10–F.13.

<sup>42</sup> *CK Telecoms*, ¶¶86-87.

<sup>43</sup> HMG, ¶86. When the necessary data is not available, the HMG require foreseeability of “a clearly identifiable positive impact on consumers, not a marginal one”.

<sup>44</sup> HMG, ¶87.

<sup>45</sup> See, e.g., *Deutsche Börse/Euronext; Ryanair/Aer Lingus* (Case COMP/M4439), decision of June 27,2007; *Western Digital/Viviti*.

<sup>46</sup> OECD, “Efficiencies in Merger Control”, OECD Roundtables on Competition Policy Papers, No. 321, p. 22.

<sup>47</sup> Such an imbalance goes against the spirit of the CJEU’s consistent case law reiterated in, e.g. in *CK Telecoms*, ¶71, under which “no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred.”

27. The Revised Guidelines should align the evidentiary standard for demonstrating efficiencies with the “balance of probabilities” standard for anticompetitive effects<sup>48</sup> and treat both with the same analytical rigour. This applies both to the evidentiary standard and to the types of evidence that the Commission should consider: these should be similar for both the assessment of competitive harm and efficiencies.<sup>49</sup>
28. The current asymmetry risks being exacerbated by a potential reintroduction of the efficiency offence,<sup>50</sup> which would reinstate an uneven standard of proof between merger efficiencies and predicted anticompetitive effects.<sup>51</sup> In this context, while merging parties must satisfy a stringent three-pronged test to demonstrate the benefits of efficiencies, the Commission is not subject to a comparable evidentiary standard when alleging that efficiencies give rise to competitive harm. The Revised Guidelines should therefore ensure that the Commission’s evidentiary burden in establishing harm from efficiencies is aligned with the standard applied to parties when substantiating their benefits.
29. At the same time, it is essential that, where efficiencies are considered within the theory of harm, the Commission does not disregard their positive impact on the market and consumers. Accordingly, where efficiencies are shown to deliver a net benefit, their presence should not form the basis for finding a significant impediment to effective competition.
30. **Assess efficiencies more constructively.**<sup>52</sup> To fully assess efficiency claims, the Commission should consider both quantitative and qualitative evidence. While precise quantification would be probative, it should not be indispensable, particularly for dynamic efficiencies such as innovation and sustainability which are inherently more difficult to quantify. The Commission has acknowledged that determining the magnitude of efficiencies involves uncertainty and that “there is no absolute requirement that [claimed] efficiencies are exactly quantified to the utmost precision”.<sup>53</sup> The assessment should therefore remain flexible and open to various types of quantitative evidence, but also qualitative evidence such as internal documents, historical precedents, forward-looking assessments, expert reports, *etc.* Benefits should not be

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<sup>48</sup> See, e.g., François-Charles Lapr votte, “Abandon all hope, ye who enter here? Efficiencies in European Merger Control: A Few Lessons From Recent Decisional Practice” [2014], 2 – *Concurrences* (“there is no reason in principle why the standard of proof for efficiencies should be higher than the standard of proof for anti-competitive effects”).

<sup>49</sup> This applies both for mergers that give rise to short-term harm and long-term benefits, and the reverse where benefits arise short-term while harm could materialize in the longer run. In the latter case, the Commission should weigh short-term consumer gains against longer-term consumer harm by assessing both their scale and likelihood, using robust evidence to verify each. Where early benefits are tangible and substantial, they could justify accepting some risk, provided safeguards can mitigate future harm. Conversely, if long-term harm like market entrenchment is probable and significant, it should carry more weight unless distant benefits are credible, quantifiable, and clearly linked to consumer welfare. Response to question F.3.e.

<sup>50</sup> See *Booking Holdings/Etraveli Group* (Case COMP/M.10615), decision of September 25, 2023.

<sup>51</sup> See Daniel A. Crane, “Rethinking Merger Efficiencies” (2011), *Michigan Law Review* (Volume 110).

<sup>52</sup> Response to questions F.10–F.13. All of the types of evidence suggested in F.13 should be taken into account.

<sup>53</sup> HMG, ¶86; *Olympic/Aegean Airlines* (Case COMP/M.5830), decision of January 26, 2011, ¶1779.

prematurely discounted simply because they cannot be modelled.<sup>54</sup> This is particularly relevant where the Commission’s SIEC findings themselves rely primarily on qualitative evidence.

31. **Consider efficiencies as part of remedy design.**<sup>55</sup> Even where the Commission has not accepted efficiencies, it has occasionally cited transaction-related benefits as a supporting factor for accepting remedies to address competitive concerns.<sup>56</sup> The Revised Guidelines should go further by including the explicit possibility to consider efficiencies at the remedy stage, including – as suggested by DG COMP’s Chief Economist at the time – to assess whether the efficiencies can “reduce the scope of remedies”.<sup>57</sup>
32. The Revised Guidelines should also allow for an efficiency-related remedy. Where – even after a more pragmatic and flexible approach advocated for in this Response – the Commission continues to have significant doubts about whether efficiencies will materialize to counteract short-term harm, merger approval could be tied to specific and verifiable outcomes by ongoing commitments. This is particularly important for innovation and sustainability benefits, which are long-term, inherently more uncertain, and depend on post-merger implementation. Rather than dismissing these outright, commitments can guarantee that they are delivered in practice.<sup>58</sup>
33. The CMA’s *Vodafone/Three* decision illustrates how innovation and investment commitments could – and do – work in practice. The parties claimed significant efficiencies from network integration that would lead to “significant and long-lasting quality improvements”,<sup>59</sup> higher capacity, and a faster 5G rollout. These claims faced two challenges that were resolved through commitments:
  - **Pricing cap.** The CMA was concerned that the claimed efficiencies – which were expected to materialize incrementally over an eight-year period but not in the early years – would not offset the transaction-related upward pricing pressure that was expected to harm consumers and wholesale suppliers in the short term. These concerns were addressed by a three-year pricing cap, after

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<sup>54</sup> OECD, “Efficiencies in Merger Control”, OECD Roundtables on Competition Policy Papers, No. 321, p. 14.

<sup>55</sup> Response to questions F.3.e, F.10 and F.12.

<sup>56</sup> See, e.g., *Microsoft/Activision Blizzard* (Case COMP/M.10646), decision of May 15, 2023, ¶¶886-887 (the Commission recognised that given Microsoft’s commitment to license Activision Blizzard’s video games for cloud streaming the Transaction meant that “the situation following the implementation of the Final Commitments exceeds the conditions that would have prevailed absent the transaction”).

<sup>57</sup> Lars-Hendrik Roller and Miguel de la Mano, “The Impact of the New Substantive Test in European Merger Control” (2006), *European Competition Law Review*. The UK CMA has the ability to consider relevant customer benefits during its assessment of remedy options. See CMA, Merger Assessment Guidelines (CMA129), ¶8.26.

<sup>58</sup> The Draghi Report (Part B, p. 299) suggests commitments tied to levels of innovation that can be monitored *ex post* can address verifiability concerns related to innovation efficiencies. See also, *Response to Topic C*.

<sup>59</sup> 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, ¶76.

which the CMA considered that the efficiencies would start impacting the company's pricing behavior.

- **Investment remedy.** The CMA was concerned that the parties might not implement the network integration in light of market dynamics. The parties committed to execute the network integration within eight years, agreeing to a number of sites and milestones.

34. A monitoring trustee or relevant regulatory authority could track whether claimed benefits emerge within defined periods, while the Commission could take measures if needed. In some sectors, delegation to national regulators with sector-specific expertise would improve the effectiveness of monitoring. Efficiency-related commitments should be imposed only where circumstances warrant, and not automatically.