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The European Commission's Consultation on the Review of the Merger Guidelines: A Response by RBB Economics

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1. Introduction

The European Commission's ("the Commission's") consultation on the revision of the EU Merger Guidelines ("the Consultation") has opened a debate on the role of merger control.[1] This debate does not occur in a vacuum. It is informed by broader reflections on European competitiveness and industrial policy — as articulated in the Draghi and Letta Reports — as well as by recent shifts in the Commission's strategic direction, notably signalled by the Commissioner's new mission letter.[2, 3] Together, these developments suggest this is an opportune moment to reassess how merger control should evolve.

The Consultation poses a wide array of questions. In our view, it is essential to distinguish between questions that require primarily technical and economic analysis, and those that are inherently normative and political. This paper focuses on the former, i.e., the issues where economic reasoning should guide the development and application of merger control and competition policy.

We consider that competition policy should continue to be squarely grounded in a consumer welfare standard, appropriately defined. At the same time, we consider that the way the consumer welfare standard has been applied may have become overly narrow. A broader, more forward-looking interpretation of consumer welfare may be warranted, placing due weight on dynamic efficiencies and long-term productivity gains.

Mergers are one of the key mechanisms through which market economies reallocate resources and adapt to technological and structural shifts, generally to the benefit of consumers. Regulatory intervention should therefore remain limited to cases where there is a coherent and well-substantiated theory of harm ("ToH") that identifies a significant impediment to effective competition ("SIEC"). In our view, the current horizontal and non-horizontal merger guidelines ("the Current Guidelines", respectively "the HMG" and "the NHMG") generally provide an analytically sound framework for such assessments. Rather than overhaul this framework, we propose targeted modifications and clarifications aimed at ensuring that merger control in Europe continues to work to the benefit of consumers.

The sections that follow outline our views on key issues raised by the Consultation, including the treatment of scale and efficiencies, the role of structural indicators, mergers in dynamic industries, innovation effects, non-horizontal mergers, coordinated effects, and the treatment of specific issues such as digitalisation, sustainability-related effects, media plurality, and labour markets.

Across these topics, we support a merger control regime that remains based on economic evidence, focused on competitive effects, and adaptable to evolving market realities. In this context, we argue for keeping the core of the Current Guidelines, which we believe remains fit for purpose, while making the following overarching recommendations for the Commission's updated framework ("the Revised Guidelines"):

Benefits of mergers/efficiencies:

- The Revised Guidelines should reflect all the ways in which mergers can benefit consumers. This should, following the Draghi Report, include long-term consumer benefits through increased investment or innovation. Such benefits may arise from fixed cost reductions which improve returns on investment and innovation, and can make entry and expansion more attractive. Weight should therefore be given not only to reductions in variable costs, but also potentially to fixed costs. Credit should also be afforded to out-of-market efficiencies that benefit consumers, in particular where these are significant in relation to identified concerns and where no obvious remedies are available.
- Regarding verifiability: efficiencies should be assessed on the basis of the same *standard* of proof as applied to competitive harm, even if the *burden* of such proof continues to be placed on the merging parties.
- The assessment of merger-specificity should consider which efficiencies would likely be realised in the counterfactual (rather than focusing on scenarios which are unrealistic).

Structural indicators:

- The Revised Guidelines should not introduce (rebuttable) structural presumptions for finding an SIEC, because such an approach would fail to account for closeness-of-competition, entry, expansion, repositioning, efficiencies, innovation, and other pro-competitive effects. Used as a replacement for a coherent ToH, structural presumptions risk enforcement errors with outcomes detrimental to consumers. Merging parties, who lack access to competitor data, are moreover far less well-placed than the Commission to weigh up the available evidence and disprove harm.
- Structural indicators can continue to have a limited role in merger control – as preliminary screens to filter transactions and prioritise areas of a transaction on which to focus, or as indicative safe harbours in clearly unproblematic cases. The Revised Guidelines should recognise more explicitly that structural indicators cannot substitute for robust, market-specific analysis grounded in a coherent, well-founded and well-evidenced ToH.

1. See the Commission's "Review of the Merger Guidelines", available at: https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en.
2. See Draghi, M. (2024), "The Future of European Competitiveness. Part A | A Competitiveness Strategy for Europe" ("the Draghi Report, Part A"), Draghi, M. (2024), "The Future of European Competitiveness. Part B | In-depth Analysis and Recommendations" ("the Draghi Report, Part B") and Letta, E. (2024), "Much more than a Market. Speed, Security, Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens" ("the Letta Report"). We will use the general term "the Draghi Report" for collective references to either of Part A or Part B.
3. See Ursula von der Leyen's Mission Letter to Teresa Ribera Rodríguez dated 17 September 2024, available at: https://commission.europa.eu/document/5b1aaee5-681f-470b-9fd5-aee14e106196_en.

Mergers in dynamic settings:

- The established economic frameworks for assessing relevant ToHs as set out in the Current Guidelines are valid in dynamic markets characterised by uncertainty, and the Commission has applied these in such settings.
- The Revised Guidelines should clarify the role of evidence and ensure a balanced treatment of inculpatory and exculpatory factors, with the same standard of proof applied to both types of evidence.

Innovation:

- Merger policy should not presume that mergers harm innovation, nor treat innovation competition as a simple analogue to price competition. At the time of writing, the literature is still studying the several ways in which a merger can impact innovation (both positively and negatively), and remains largely inconclusive. A neutral, case-specific approach that is evidence-focused is required.
- Positive innovation effects should be assessed as part of the main competitive analysis, not under an efficiency defence.
- The Revised Guidelines should identify relevant empirical tools for assessing innovation competition and encourage their use in enforcement.

Non-horizontal mergers:

- Non-horizontal mergers should be assessed using a framework distinct from horizontal mergers, given their different economic characteristics. The existing ability-incentive-effects framework remains robust and is sufficiently flexible to accommodate a broad range of ToHs based on exclusionary behaviour. The Revised Guidelines should retain this framework.
- Nonetheless, within the ability-incentive-effects framework, there is scope for the Revised Guidelines to clarify the approach to certain ToHs, including: (i) partial foreclosure and partial degradations of interoperability; (ii) mixed bundling with complementary products; and (iii) defining and assessing ecosystems.
- Critically, the Revised Guidelines should emphasise that non-horizontal mergers can provide an intrinsic source of efficiencies. These should be assessed as part of the "effects" limb, not under a separate efficiency defence.

Coordinated effects:

- The Revised Guidelines should retain the *Airtours* criteria as basis for the assessment. They should also make clear that a coordinated effects ToH should: (i) provide a detailed specification of the alleged coordination strategy (including whether one has been attempted in the past) to permit evidence on each of the *Airtours* criteria to be gathered and weighed; (ii) substantiate how (and how likely it is that) the merger would make the coordination strategy more viable (or more stable); and (iii) assess whether (if coordination were successful) this would cause material harm to consumers.

Digital markets:

- Whilst certain theories of harm may be particularly important in digital markets, they are not unique to digital contexts. Existing analytical frameworks are fit for purpose and should apply equally in digital and non-digital markets.
- The Revised Guidelines should provide guidance on how to apply the existing frameworks to digital settings, rather than introduce novel approaches (such as blurring the distinction between horizontal and non-horizontal transactions to address entrenchment-related theories of harm) that would risk creating unjustified enforcement disparities between digital and non-digital mergers.

Sustainability:

- The Commission should primarily seek to achieve its sustainability goals using policy tools which are aimed specifically at solving market failures, rather than competition policy.

Media plurality:

- The Commission's competition interventions should remain limited to addressing media plurality concerns only where these arise from the creation or strengthening of market power. Mergers that reduce plurality need not be mergers which increase or maintain market power. Addressing plurality can be done on the basis of separate legislation outside of competition law.

Labour markets:

- Merger control should continue to apply the consumer welfare standard also in relation to labour markets, where workers are not consumers but suppliers of labour. Any departure from this standard would require the interests of workers and consumers to be balanced, which would give rise to considerable difficulties. Protecting worker rights is important but employment legislation, not competition policy, is the right instrument for this.

Over the last 20 years, the HMG and NHMG have provided a valuable steer for European merger control, firmly rooted in economic principles. The Revised Guidelines should aim to succeed in equal measure.

The structure of the remainder of this paper is as follows:

- Section 2 considers the benefits of mergers and the Commission's approach to assessing efficiencies;
- Section 3 discusses the role of structural indicators and the need for a coherent, facts-based ToH in various contexts (dynamic settings; innovation; non-horizontal mergers; and coordinated effects); and
- Section 4 deals with additional issues that the Consultation raises: digitalisation; sustainability; media plurality; and labour markets.

2. Benefits of mergers

The Commission and competition authorities in the EU are tasked with preventing mergers that would significantly impede effective competition. This mandate understandably places a strong emphasis on identifying and assessing the potential anti-competitive effects of mergers. In this context, it is unsurprising that, while the Commission is open to considering efficiency arguments in principle, efficiency defences remain underutilised and rarely determinative in practice. The hurdle to overcome – showing that efficiencies will give rise to short-term price effects that are verifiable, result directly from the merger, and benefit those customers that otherwise would face higher prices[4] – has, so far, proven to be insurmountable in most cases. Indeed, as the Consultation acknowledges, no merger has ever been cleared solely based on efficiencies.[5] Efficiencies have often been a mere afterthought, deliberately downplayed by merging parties fearful that detailed efficiency arguments may signal the existence of an underlying competition concern.

The Draghi Report contains an implicit invitation for the Commission to consider changing its approach. The Draghi Report has asked the question whether merger control can conflict with the need for European companies to invest and to obtain sufficient scale, including to be able to compete globally. In this context, the Draghi Report has proposed an "*innovation defence*", in combination with investment commitments. The Draghi Report considers that this would be justified by the need in certain sectors to pool resources and achieve the scale needed to compete at the global level, citing *Airbus* as an example. In this context, the Draghi Report proposes to adopt a "*long run*" perspective on consumer harm.[6]

The Draghi Report, as a whole, is concerned about the future of European competitiveness. We firmly believe that merger control should continue to be grounded in a consumer welfare standard, and not stray into other policy objectives, such as industrial policy. However, the questions that the Draghi Report raises are important also for the approach focused on consumer welfare. Can increased scale improve the ability and incentive of firms to invest or innovate? Will consumers benefit from this, and at what point in time? How to deal with the possible tension between short-term consumer harm and long-term consumer benefits that may arise in certain cases?

In Section 2.1, we specifically consider the questions that the Draghi Report raises regarding the possible impact of increased scale. We explain that increased scale can, but by no means always will, produce efficiencies through increased investment or innovation. A case-by-case analysis is required.

In Section 2.2, we then consider the Commission's approach to efficiencies more generally.[7] Merger investigations should systematically consider both pro- and anti-competitive effects resulting from the transaction, including longer-term effects and non-price effects, and ultimately assess the overall effect on consumer welfare based on symmetric standards of proof.

2.1 Benefits of increased scale

2.1.1 Can increasing scale allow firms to operate more efficiently?

Mergers that increase scale may allow firms to decrease their average costs and to operate more efficiently. In essence, the merger-scale effects described below occur when the merger allows more output to be produced using the same level of input. The greater the scale resulting from a merger, the greater the scope for and magnitude of these effects.

First, if a merged entity pays lower input prices due to its relatively larger scale, a merger may improve productivity. The merged entity may apply the lowest cost obtained from suppliers by one of the two firms pre-merger to the additional volumes of the new entity, or may negotiate better terms with input suppliers by purchasing larger volumes post-merger.[8]

Second, larger post-merger scale may facilitate a reduction in fixed costs. A combined entity will likely be able to save on duplicative costs such as administrative and management costs, research and development ("R&D") costs, or regulatory costs. As we explain in Section 2.2 below, there are many situations where fixed cost reductions can improve consumer welfare.

Third, a merged entity's larger scale may improve utilisation of existing assets, which results in lower costs and higher efficiency. This may take several forms, depending on the firms and industries. For example, a larger scale post-merger may foster output expansion by facilitating:

- Tech transfers between the merging parties, which facilitate the use of more efficient technology on a larger base/capacity;
- The combination of complementary assets, which may give firms the incentive to expand the production output from its existing assets;

4. See the HMG, para. 79.
5. See the Consultation, Topic F, para. 100.
6. See the Draghi Report, Part B, pages 298-299.
7. See the Consultation, Topic F.
8. The Commission may see the improved bargaining position of the merged entity as a harm resulting from increasing market power from buyers. However, harm could only arise if an output restriction resulted from the lower input prices. If output volumes are not restricted, then consumers would not be harmed from purchasing from a firm with lower costs.

- The combination of existing networks, which can improve efficiency, e.g., by integrating logistics networks such as in *FedEx/TNT*,[9] or by combining user bases, making the merged entity more competitive; and/or
- Production on the most efficient sites, which may be particularly important when capacity utilisation is low, as production can be more easily reallocated in those cases.[10]

Empirical studies show that larger firm scale may be associated with better asset utilisation, but conclusions are not clear-cut and will depend on the specific circumstances of firms and industries. In essence, the larger scale resulting from mergers does not necessarily lead to productivity gains but regularly does.[11] As explained by the OECD:

"In several countries, a fat tail of low-productivity firms - composed in large part of small firms – coexists with large firms that are highly productive and exposed to international competition. [...] Moreover, large firms tend to adopt new technologies more readily than small firms, although this is not necessarily the case for new or younger firms. Large firms also have easier access to finance and to foreign markets" [12]

2.1.2 Can increasing scale enhance investment and innovation?

Mergers that increase scale may also improve the conditions for the merged entity to invest or innovate, even if the effect of scale will depend on the specific industry and merger circumstances.[13] The incentives to invest or innovate may be affected because a larger scale may lower the cost of or increase the return to investment.

First, the incentive to invest may increase because scale may reduce the cost of capital. Larger firms may access capital at more attractive rates via internal financing or by obtaining funds from third parties on better terms.[14] Moreover, a merger may improve access to equity investment, as institutional investors may undertake greater investments into a merged business compared to what they would be willing to commit on a standalone target pre-acquisition (in case, for example, the target is operating under short-term financial pressure).

Second, the incentive to invest may also grow because scale may increase the returns on investment. For example, when a larger scale is associated with a larger user base, investment in a fixed size asset (e.g., a telecommunication backbone network) may be facilitated. This is because the larger user base would allow for the recovery of the investment with a lower per-user margin, or make the return larger, facilitating the case for the investment.[15] This may allow firms to engage in bigger or riskier projects, that smaller scale firms would not attempt. An important scenario in which this is relevant is when certain firms in an industry are operating at a smaller scale than rivals and are trying to overcome their scale disadvantage by merging. Another is where even larger firms in a relatively small geographic market are unable to justify investment into a particular technology that is being developed or rolled out in larger markets.

In addition, the incentive to invest may also increase for firms active in complementary/adjacent markets. This is because the same investment may be useful for multiple products and the merged entity can then achieve a greater return.

Mergers may also enhance the ability and incentive to innovate through technological and know-how complementarity that benefits from scale. We discuss the impact of mergers on innovation in detail in Section 3.3.

2.1.3 Conclusion

The two previous sub-sections have explained that increasing scale through mergers may lead to productivity gains, as firms may operate more efficiently and invest or innovate more. However, it is also clear that the gains from increasing scale cannot be presumed and must be evaluated on a case-by-case basis. To the extent that the increased efficiency or gains from higher investment are passed on, this may create consumer benefits. Any such benefits should be accounted for in the efficiency assessment. We turn to this next.

9. Case M.7630 – *Fedex/TNT Express*, Commission Decision of 8 January 2016. In this case, savings in pick-up and delivery costs were calculated by reference to cost differences between the merging parties pre-transaction (post-transaction the most efficient network in each country would be used). Savings in air network costs were estimated by reference to a cost model. The Commission accepted the efficiencies put forward by the merging parties in this case, but also found that the transaction did not give rise to concerns to begin with.
10. Existing capacity can be too high because of market decline or limited demand (e.g., firms limited to European demand because of regulatory/sovereignty concerns such as in defence/aerospace).
11. Kwoka, J. & Kilpatrick, S. (2018), "Nonprice Effects of Mergers: Issues and Evidence", *The Antitrust Bulletin*, Vol. 63(2), pages 169-182, indicates that 10 out of a sample of 26 studies of non-price effects showed that mergers gave rise to positive consumer outcomes. Further, Kwoka, J. (2018), "Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice", American Antitrust Institute White Paper, references a McKinsey study showing that 93% of mergers achieve at least 75% of the cost savings estimated by management and that 39% of mergers achieve more than 100% of estimated cost savings.
12. OECD (2025), "OECD Compendium of Productivity Indicators 2025", Paris: OECD Publishing.
13. See Symeonidis, G. (1996), "Innovation, Firm Size and Market Structure: Schumpeterian Hypotheses and Some New Themes", Paris: OECD Publishing.
14. This may be, for example, where larger firms are more diversified and thus subject to lower risk, or where an acquiring firm has market power in one market, and uses those profits to invest in the target's more competitive market.
15. When the user base expands because the merging parties overlap in a relevant market, this could result in higher prices. In such cases, merger control should balance the harm from higher prices against the benefit from increased incentive to invest. Such balancing is particularly relevant in cases where aggressive price competition has resulted in underinvestment. The telecom sector is a key example. See further the discussion in Section 2.2.1 below.

2.2 The Commission's approach to efficiencies

Mergers can give rise to efficiencies in a variety of ways, increased scale being one of them. The HMG and NHMG each contain relatively brief discussions of the efficiencies that horizontal and non-horizontal mergers can bring about.[16] We consider that it would be helpful for the Revised Guidelines to retain and indeed expand the discussion of the ways in which mergers can produce efficiencies, citing relevant literature as appropriate.

The HMG and NHMG identify three conditions for these efficiencies to be taken into account:

- Benefit to consumers;
- Merger-specificity; and
- Verifiability.

We do not propose that these conditions be changed, as they are consistent with a consumer welfare standard and remain conceptually sound. However, the Revised Guidelines should clarify their interpretation, align them with market realities and apply a more balanced approach. We focus our detailed discussion in the remainder of this section on the condition that efficiencies must benefit consumers. In respect to the other two conditions, we note the following:

- **Merger-specificity:** the Commission's current approach typically rejects efficiencies if any alternative mechanism for achieving them exists. For example, in *Deutsche Börse/NYSE Euronext*, the Commission interpreted paragraph 85 of the HMG as meaning that "*it should not be possible for [the efficiencies] to be achieved to a similar extent by less anti-competitive alternatives*".[17] This goes too far. The test should evaluate whether the claimed efficiencies are likely in the counterfactual. It is not appropriate to consider whether an alternative way of achieving efficiencies could exist, as that may not be a likely outcome.[18] Requiring absolute certainty that efficiencies cannot be achieved otherwise sets an unjustifiably high bar.
- **Verifiability:** the legal standard should be symmetric. If anti-competitive effects are judged on the basis of a balance of probabilities standard, then the same test should be applied to efficiencies. The current HMG state that the Commission must be reasonably certain that the efficiencies are likely to materialise.[19] But in practice, the Commission pursues a more stringent approach requiring near-certainty, whereas anti-competitive effects are judged on a "*more likely than not*" basis.[20] It would be helpful to include an explicit statement that the "more likely than not" criterion for anti-competitive effects also applies to efficiencies.

Regarding the condition that efficiencies must benefit consumers, the Commission's current approach tends to disregard:

- The (net) benefits that only accrue to consumers in the long run, because it tends to place weight only on immediate gains to consumers; and
- Benefits to consumers in other markets, because of a focus on within-market efficiencies.

We discuss these points in turn below.

2.2.1 (Net) benefits to consumers in the long run

The current merger control framework tends to focus on short-term price effects when assessing efficiencies. This approach is not economically sound and is ill-suited to capture the dynamic benefits that mergers can deliver, particularly in innovation-intensive and capital-intensive industries. Merger control should explicitly recognise the value of long-term consumer benefits, even where these are less certain than short-term effects or only materialise over time, as well as pay greater attention to consumer benefits stemming from non-price parameters.

In this context, it is important to note that the consumer welfare standard is a flexible concept that allows both short-term and long-term effects to be taken into account.[21] Since the Commission may object to mergers on the basis of consumer harm that will only arise in the long term,[22] there is no valid reason to disregard benefits that only occur in the long term. Furthermore, it is important to recognise that, in addition to price, the consumer welfare standard equally encompasses other non-price parameters, such as quality and innovation.

16. See the HMG, paras. 80-82; NHMG paras. 13-14; 55-57 and 117-118.
17. Case M.6166 – *Deutsche Börse/NYSE Euronext*, Commission Decision of 1 February 2012, para. 1140.
18. See Ignjatovic, B. & de Solà-Morales, J. (2023). "Efficiencies in Horizontal Mergers: The White Whale of EU Merger Control?", in "Research Handbook on Global Merger Control", Kokkoris, I. & Levy, N. (eds.), Northampton, MA: Edward Elgar Publishing, Chapter 8, pages 190-215.
19. See the HMG, para. 86.
20. See Ignjatovic, B. & de Solà-Morales, J. (2023). "Efficiencies in Horizontal Mergers: The White Whale of EU Merger Control?", in "Research Handbook on Global Merger Control", Kokkoris, I. & Levy, N. (eds.), Northampton, MA: Edward Elgar Publishing, Chapter 8, pages 190-215.
21. For a discussion, see Majumdar A. & Williams, I. (2020), "Anchoring Competition Policy: Keep Consumer Welfare and Carry On", in "Taking Competition Law Outside the Box – Liber Amicorum", Whish, R. QC (Hon), Charbit, N. & Ahmad, S. (eds.), New York, NY: Concurrences.
22. See the Commission's Press Release "Mergers: Commission Prohibits Acquisition of GRAIL by Illumina", 6 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

Variable versus fixed costs

A central reason for ignoring long-term efficiencies is the overly rigid distinction between variable and fixed costs in efficiency assessments. The prevailing assumption is that only variable cost reductions (e.g., marginal cost savings) directly impact prices and are therefore relevant to consumer welfare.

However, this assumption is not generally valid, as the distinction between cost savings that will affect pricing and those that will not is far more complex than a simple split between fixed and variable costs.[23] Fixed costs often feature in business decisions to invest, innovate, and enter or exit markets. They are therefore a key determinant of market structure, which in turn determines competitive outcomes, including price effects.[24] For example, suppose that a merger gives the new entity improved technical knowledge that allows it to build a new production plant at a lower capital cost than either party could have done beforehand. Even though capital costs would typically be considered as "fixed" costs, the greater efficiency in this cost element could allow the post-merger firm to embark on investments in capacity and output expansion that would not otherwise have been viable, and as such these cost reductions should truly fall in the "marginal" (i.e., output expanding) category for the purposes of the assessment of the firms' pricing and output decisions.[25]

Furthermore, the HMG's dismissal of fixed cost savings as a route to consumer welfare-enhancing efficiencies unduly focuses on price setting and largely ignores the fact that fixed cost savings can also be a route to (directly) improving non-price competitive parameters, such as quality and innovation.[26] In particular, fixed cost savings can lead to a freeing up of capital, which (assuming a competitive environment) is likely to be deployed by a merged entity to compete in terms of quality or to innovate and develop new products – all to the benefit of consumers.

Rather than considering whether cost savings relate to variable or fixed costs, and narrowly focusing on price effects, the assessment should consider whether plausible long-term benefits to consumers will arise.

The Commission's own passing-on guidelines acknowledge that fixed costs, while not influencing short-run price setting, may shape strategic decisions on capacity and output in the long run.[27] This implies that the Commission already recognises that fixed costs savings affect market dynamics and are prone to improve consumer welfare. For example:

- A merger that lowers capital costs (a fixed cost) may make a new investment viable that would otherwise have been uneconomical.
- Access to new intellectual property ("IP") or technical expertise (intangible fixed assets) may allow the merged firm to produce at a larger scale or at higher efficiency.

In other words, fixed cost savings also affect marginal incentives and should not be disregarded in efficiency assessments.

Balancing short-term harm and long-term gains

Whilst taking longer-term consumer benefits into account in the assessment may as such not be overly controversial, particular challenges will arise if a transaction is likely to produce both short-term consumer harm (for example, from higher prices) and longer-term efficiencies (from increased investment or innovation, which may eventually drive prices down, and/or increase quality).

Generally speaking, the Commission's assessment has in such cases tended to focus on the short-term harm. Up to a point, this is understandable: short-term harm is both more immediate and more certain to arise than longer-term gains. But to the extent longer-term gains derive from increased investment or innovation, the potential benefits from this can be significant.

The UK CMA has recently dealt with such issues by imposing a novel remedy package, including investment remedies as envisaged by the Draghi Report. In *Vodafone/Three*, the CMA concluded that the proposed merger would boost long-term competition, provided the merged entity would first invest in its new combined network. Whilst the CMA found that the merger would likely have produced certain network roll-out efficiencies, these were not deemed sufficient. To address this, the CMA imposed investment remedies in combination with certain temporary price caps.[28]

23. Moreover, often some costs that in accounting terms are deemed fixed may well affect marginal incentives.
24. This is especially relevant in industries with high fixed costs and economies of scale.
25. See RBB Brief 41, "Do Efficiencies Ever Deliver? Lessons from the UPS/TNT Case", March 2013, available at: https://www.rbbecon.com/publication/article/do-efficiencies-ever-deliver-lessons-from-the-ups-tnt-case/.
26. The HMGs briefly mention consumer benefits from new or improved products or services in paragraph 81. However, these are driven by "*efficiency gains in the sphere of R&D and innovation*", rather than a reduction in fixed costs in the overall business.
27. See the Commission, "Guidelines for National Courts on how to Estimate the Share of Overcharge which Was Passed on to the Indirect Purchaser", 9 August 2019, para. 52.
28. See Case ME/7064/23 – Anticipated Joint Venture between Vodafone Group PLC and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited, CMA Final report of 5 December 2024.

Continuing the telecoms example: the Draghi Report suggests that many telecommunication operators fail to earn their cost of capital, thereby undermining their ability to finance network investments.[29] Merger cost efficiencies, including in respect of fixed costs, may in such cases enable the capital expenditure necessary to unlock investment. But this observation also raises a more fundamental question. Can higher prices resulting from consolidation in certain cases be *necessary* to unlock investment, and will consumers ultimately benefit from this in the longer term?

Whilst this is a difficult question, we believe the Commission should be prepared, against the background of the Draghi Report, to face it. The Commission should consider not only novel remedies (as the CMA has done) but also ask novel questions. Is the current number of firms operating in the market optimal from a consumer welfare perspective? Is the industry earning sufficiently high margins to enable efficient investment? In markets where firms do not earn their cost of capital and where indications exist that this has given rise to underinvestment, consolidation may be in consumers' long-term interests even if this results in higher prices.

Ultimately, when a transaction is expected to give to rise to both short-term consumer harm and longer-term consumer benefits, the correct approach (if no short-term remedies can be imposed) is to properly balance the short-term and long-term effects, taking account of uncertainty and the time value of money. If a transaction is expected to give rise to large long-term consumer benefits as well as moderate short-term consumer harm, it should be allowed to go ahead. Conversely, transactions resulting in clear and substantial short-term harm but limited and questionable long-term benefits should be blocked.

2.2.2 Benefits to consumers in other markets

The merger control framework is also focused on within-market efficiencies, requiring that consumers benefitting from efficiencies must be in the same market where anti-competitive effects arise. This approach is becoming increasingly misaligned with economic reality, for example in the context of multi-sided platforms and innovation-driven sectors. We consider that the Revised Guidelines should embrace a broader framework that recognises out-of-market efficiencies, where these are substantial, likely, and, importantly, relevant to consumer welfare.

The Commission's practice is to treat out-of-market efficiencies with considerable scepticism. The current approach likely stems from the Mastercard judgment, which is often cited as requiring that consumer benefits be demonstrated in the same market where harm is alleged:

"the very existence of the second condition of Article 81(3) EC necessarily means that the existence of appreciable objective advantages attributable to the MIF must also be established in regard to them [i.e., the affected customer group]." [30, 31]

This has led to a strict market-by-market balancing approach, which is economically problematic in cases where the merger produces harms in a small, narrowly defined market, while delivering substantial benefits elsewhere.

It is important to maintain a sense of perspective and not to let the *Mastercard* case law stand in the way of sensible competition enforcement. The *Mastercard* case was one where the two customer groups (cardholders and merchants) were each highly significant. But situations can be imagined where the interests of a small group of customers need to be balanced against the interests of a much larger group of customers. For example, a merger may raise minor competition concerns in a localised market segment but unlock major cost efficiencies or innovation potential at a much greater scale.

Several jurisdictions and frameworks already offer more flexible and economically coherent approaches to assessing out-of-market efficiencies:

- The UK distinguishes between "*rivalry-enhancing efficiencies*", which may offset a significant lessening of competition ("SLC") in the relevant market; and "*relevant customer benefits*", which arise in other relevant markets or from other mechanisms.[32] While relevant customer benefits may not negate an SLC, they can be considered in the overall assessment, particularly at Phase 1, to determine whether a Phase 2 investigation is warranted. While the relevant customer benefits have not often been invoked, the framework is there and allows the flexibility to consider those.
- In Germany, the Bundeskartellamt may clear a merger if the companies prove that the merger will also have pro-competitive effects on a different market – referred to as an "*improved market*".[33]

The Commission should signal a willingness to embrace out-of-market efficiencies where these are important in relation to identified competition concerns (assuming these cannot easily be remedied). The Commission may in practice already be using its discretion, at times, not to raise serious doubts in certain cases involving small overlaps in much larger deals where these have a compelling deal rationale and where the overlaps are not easily solvable through remedies. It would be helpful for the Revised Guidelines to make this possibility more explicit.

29. See the Draghi Report, Part B, pages 69-71.
30. Case T-111/08 – Mastercard, Judgment of the General Court of 24 May 2012, para. 228.
31. This approach is also consistent with the HMG, para. 79, which state that: "*[t]he relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, 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*".
32. See the CMA's "Merger Assessment Guidelines", March 2021, paras. 8.3 and 8.5.
33. See the Bundeskartellamt's "Guidance on Substantive Merger Control", March 2012, Section F.

2.2.3 Conclusion

Our conclusions regarding the benefits of mergers and efficiencies are the following:

- The Revised Guidelines should reflect all the ways in which mergers can benefit consumers. This should, following the Draghi Report, include long-term consumer benefits through increased investment or innovation. Such benefits may arise from fixed cost reductions which improve returns on investment and innovation, and can make entry and expansion more attractive. Weight should therefore be given not only to reductions in variable costs, but also potentially to fixed costs. Credit should also be afforded to out-of-market efficiencies that benefit consumers, in particular where these are significant in relation to identified concerns and where no obvious remedies are available.
- Regarding verifiability: efficiencies should be assessed on the basis of the same *standard of proof* as applied to competitive harm, even if the *burden* of such proof continues to be placed on the merging parties.
- The assessment of merger-specificity should consider which efficiencies would likely be realised in the counterfactual (rather than focusing on scenarios which are unrealistic).

3. The need for a coherent, facts-based theory of harm, anchored in protecting consumer welfare

On the basis of the description of Topic B "*Assessing market power using structural features and other market indicators*", it seems that the Commission is considering a possible greater role for structural indicators in the Revised Guidelines. In particular, the Commission notes that with the exception of the 50% market share threshold indicating possible dominance, the HMG does not contain any rules of thumb for when a merger can be presumed to be harmful.[34] The Consultation raises the question whether the Revised Guidelines should include stricter indicators or rebuttable presumptions, possibly resulting in the burden of proof being shifted to merging parties in some circumstances.[35]

Structural indicators can be useful as a first filter. However, any increased role for structural indicators should not become a substitute for developing and testing a proper ToH. Section 3.1 explains this in general terms. Sections 3.2 to 3.5 then expand on the role of, and need for, a ToH in a number of specific contexts: dynamic elements; innovation; non-horizontal mergers; and coordinated effects.

3.1 Structural indicators cannot replace a theory of harm

The core strength of EU merger control lies in its effects-based, analytical approach, informed by a well-defined ToH. The SIEC test marked a deliberate shift away from the dominance test of the 1990s, replacing arbitrary dominance thresholds with a focus on how a transaction changes price-, quality- and innovation-setting incentives and other competitive dynamics, and how these changes affect consumers. This approach is rightly grounded in a transparent, administrative process that offers a strength that more adversarial or litigation-based systems often lack. When applied properly, it allows the Commission to test hypotheses and economic evidence openly and constructively, drawing on market feedback and substantive engagement with the merging parties to reach robust conclusions.

Proposals to rely more heavily on structural indicators or rebuttable presumptions in place of a well-defined ToH would reverse that progress, replacing economic substance with simplistic "box-ticking" exercises around notional concentration thresholds. Structural indicators do have their place: they can be useful for preliminary screening in unproblematic cases. But they are not a substitute for a substantive analysis. Merger assessment must remain anchored in a case-specific and well-founded ToH – whether the merger is horizontal, vertical or conglomerate. This approach ensures that EU enforcement remains targeted and proportionate, as well as analytically rigorous – to the benefit of consumers.

We expand on the above points in the remainder of this section. Section 3.1.1 comments on the role and value of a well-defined ToH. Section 3.1.2 discusses the limits of structural presumptions. Section 3.1.3 concludes.

3.1.1 The role and value of a well-defined theory of harm

A clear, case-specific ToH provides the foundation of modern merger assessment. It sets out a coherent causal framework explaining how and why a transaction may significantly impede effective competition. This framework provides the analytical structure to guide the authority's investigation: it facilitates the formulation and testing of hypotheses, structures the gathering and assessment of evidence, and – most importantly – allows for the quantification and balancing of pro- and anti-competitive effects.

A well-defined ToH also informs the design of proportionate and effective remedies, ensuring that they are narrowly targeted to address the competitive concerns. It keeps enforcement focused and efficient, enabling authorities to clear low-risk cases swiftly and focus detailed assessment on the issues that genuinely warrant scrutiny.

By contrast, structural indicators – market shares, HHIs[36] or other concentration metrics – cannot perform this role unless used as initial filters. By conflating concentration with harm, such metrics fail to capture the complexity of real-world competition. This weakness is most evident in differentiated, dynamic or multi-sided markets, where such metrics often are poor proxies for market power or unilateral effects. Overreliance on such metrics risks costly enforcement errors – deterring mergers that could enhance efficiency or innovation or waving through below-threshold mergers that could be anti-competitive (as set out in more detail below).

3.1.2 The limits of structural presumptions

Structural indicators can have a limited role in merger control, as preliminary screens to filter transactions. But such thresholds must remain indicative only: they cannot replace substantive analysis or shield a transaction from scrutiny where other evidence suggests plausible harm.

Beyond that narrow role, overreliance on them – particularly in the form of rebuttable structural presumptions raises fundamental concerns. Crucially, these indicators fail to account for closeness-of-competition, contestability (entry, expansion, and repositioning), efficiencies, innovation, and other pro-competitive effects. Used as a replacement for a coherent ToH, they risk enforcement errors with outcomes detrimental to consumers.

34. See the Consultation, Topic B, para. 34. The Commission notes that the only structural indicators in the HMG are safe harbour thresholds indicating that competition concerns are unlikely.

35. Ibid., para. 35.

36. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. See the HMG, para. 16.

More specifically, reliance on structural indicators raises the following conceptual and practical issues:

- **Weak proxies of market power and harm:** structural indicators are overly simplistic – they equate greater concentration with anti-competitive effects. In reality, however, high shares need not imply significant market power, just as low shares do not preclude close competition. In differentiated product markets, for instance, firms may be close rivals despite modest shares (potentially giving rise to unilateral effects and an SIEC) – or they may be distant rivals despite high shares (and the likelihood of an SIEC is correspondingly low). There is no economically "correct" level of market share or HHI beyond which harm (or an SIEC) necessarily occurs or below which it cannot, although experience can be informative when defining safe harbours or market structures that merit closer scrutiny.
- **Incomplete picture of competitive effects:** market shares are meaningful only if the relevant market is defined correctly and, even then, they only tell part of the story. While we acknowledge that resource constraints and a desire to reduce administrative burdens may add to the appeal of structural presumptions, we emphasise the importance of looking beyond such simplistic indicators of harm. Moreover, much of the relevant evidence on demand- and supply-side substitutability, and competitive effects more generally, is gathered relatively late in the process as part of the substantive competitive assessment. The Commission should therefore keep an open mind during pre-notification and the early stages of Phase 1 in respect of the competitive effects of a transaction, even if it appears to increase concentration substantially, until a complete set of substantive evidence is available.
- **Oversimplification of market dynamics:** structural indicators are static by nature, while markets are not. Such indicators often fail to reflect how competition works in practice. There are many well-known reasons for this, which include: (i) customer behaviour (e.g., the degree of buyer willingness to switch or sponsor entry); (ii) the ease of entry and strength of potential competition (including the plans of the merging parties and their rivals to expand in the market in question); (iii) current and future innovation trajectories; and (iv) evolving business models or fluid market boundaries (as may emerge in evolving digital ecosystems).
- **Inflexibility in small or unique markets:** in small market economies or sectors where a certain level of concentration is necessary for efficiency, rigid application of structural tests can be inappropriate, preventing firms from achieving the minimum efficient scale to compete globally or to sustain investment.[37]
- **Neglect of efficiencies and innovation:** structural approaches tend to undervalue (or even ignore) potential efficiencies, such as economies of scale or integration benefits, and so may stifle innovation by penalising mergers that could strengthen competitiveness and consumer welfare.

These points show that structural indicators alone do not provide a good guide to the likely effects of a transaction. Heavy reliance on them invites two types of errors: false negatives (clearing anti-competitive mergers) and false positives (blocking or remedying neutral or pro-competitive mergers). False negatives can cause harm to competition whilst false positives prevent transactions that could have generated consumer benefits.

These concerns become even more acute where proposals involve a reversal of the burden of proof (i.e., require merging parties to demonstrate their mergers to be benign or pro-competitive once certain structural thresholds have been reached).[38] Merging parties are hindered in their ability to do this, as they lack much of the relevant information – especially competitor information. In contrast, the Commission has investigative powers and can obtain important market feedback. This means the merging parties are far less well-placed than the Commission to weigh up the available evidence and disprove harm (presumed or otherwise). Shifting the burden of proof to the merging parties would further deter potentially pro-competitive transactions and undermine the SIEC test's logic that only transactions creating an SIEC should be blocked.

3.1.3 Conclusion

In summary:

- The Revised Guidelines should not introduce (rebuttable) structural presumptions for finding an SIEC, because such an approach would fail to account for closeness-of-competition, entry, expansion, repositioning, efficiencies, innovation, and other pro-competitive effects. Used as a replacement for a coherent ToH, structural presumptions risk enforcement errors with outcomes detrimental to consumers. Merging parties, who lack access to competitor data, are moreover far less well-placed than the Commission to weigh up the available evidence and disprove harm.
- Structural indicators can continue to have a limited role in merger control – as preliminary screens to filter transactions and prioritise areas of a transaction on which to focus, or as indicative safe harbours in clearly unproblematic cases. The Revised Guidelines should recognise more explicitly that structural indicators cannot substitute for robust, market-specific analysis grounded in a coherent, well-founded and well-evidenced ToH.

37. See Section 2.1.

38. See the Consultation, Topic B, para. 35.

3.2 Theories of harm in the presence of dynamic elements

Having discussed the (limited) role of structural indicators in merger control, we now turn to the importance of a coherent, facts-based ToH in various settings, starting with dynamic elements. In the Consultation, dynamic elements are part of the topic "*innovation and other dynamic elements in merger control*".[39] The Consultation introduces that topic by noting that firms compete not only through short-term pricing decisions but also by investing in their long-term competitiveness.[40]

An impact of a merger on price is a "static" effect: an immediate change caused by a merger. For example, a price pressure test (e.g., GUPPI) is a static analysis because it considers how pricing incentives may change but does not go further to consider reactions by customers (e.g., strategic responses to sponsor entry) and rivals (e.g., new entry, product repositioning and counter-strategies, such as further mergers or long-term agreements triggered by the initial merger). The latter reactions are "dynamic" as they take a longer-term perspective. Dynamic elements may also refer to industries moving from one equilibrium to another, e.g., in response to fundamental shifts in demand or technology shocks. A further aspect of dynamic competition relates to innovation (a topic we address in detail in Section 3.3).

Almost every significant merger involves dynamic elements. This is because it may cause reactions from buyers and rivals, because the merger is a reaction to demand or supply shocks, or because innovation is a dimension of competition. A competitive assessment must fully take all relevant dynamic elements into account. Whilst the Commission often does try to do this, it has not done so consistently. For example, the Commission has on occasion established competition concerns on the basis of static models that do not take dynamic rival responses (such as entry or product repositioning) into account.[41]

A key question in the context of the assessment of dynamic elements is how to deal with uncertainty. We discuss this in Section 3.2.1. Section 3.2.2 considers the timeframe for the analysis. In Section 3.2.3, we highlight the importance of applying equal weight to exculpatory and inculpatory evidence on entry and expansion. Section 3.2.4 discusses the role of evidence. Section 3.2.5 concludes.

3.2.1 Assessments in the context of uncertainty

An important challenge when dealing with mergers involving dynamic elements is how best to deal with uncertainty. When future competitive conditions are likely to be different from today, a problem arises in that currently available market data may be of limited relevance for the forward-looking assessment of the merger, yet there may be limited data as to the future path of the industry. Indeed, when a merger relates to products that are yet to be developed, no data may be available at all.

Importantly, such data limitations do not render the underlying economic principles invalid. Uncertainty itself is not a reason to intervene (and neither is it a reason for a laissez-faire approach). Rather, interventions must be based on a well-defined, economically coherent ToH so that any concerns are set out transparently and can be tested against whatever evidence is available. To give some examples:

- An important part of the ToHs considered in *Adobe/Figma* related to future horizontal unilateral effect concerns. While Figma was not yet present in Adobe's core markets (Adobe's digital asset creation tools), the Commission set out a ToH that the merger could prevent Figma's potential growth into an effective competitor in these markets.[42]
- The ToH in *Illumina/GRAIL* was (future) input foreclosure. Whilst the market for blood-based early cancer detection tests was an emerging one, the Commission was concerned that Illumina would have an incentive to foreclose GRAIL's would-be rivals despite only benefiting from this action at a later stage.[43]

In other words, the established economic frameworks for assessing relevant ToHs as set out in the Current Guidelines are valid in dynamic markets characterised by uncertainty (and indeed have been applied by the Commission in such settings). However, they can be harder to test with data, in particular where concerns relate to future products that are yet to be developed – we discuss this further in Section 3.2.4 below.

39. Ibid., Topic C.

40. Ibid., para. 50.

41. See, for example, Case M.9569 – *EssilorLuxottica/GrandVision*, Commission Decision of 23 March 2021, where the Commission relied on vGUPPI (a theoretical model that extends the principles of Upward Pricing Pressure ("UPP") tests for use in vertical merger settings) to find an SIEC. For a discussion, please see RBB Brief 66, "Seeing Vertical Mergers Through a Different Lens? Implications from EssilorLuxottica/GrandVision", November 2022, available at: https://www.rbbecon.com/publication/article/seeing-vertical-mergers-through-a-different-lens-implications-from-essilorluxotti/. See further the discussion in Section 3.4.3.1 below.

42. See the Commission's Press Release "Mergers: Commission Opens In-Depth Investigation into the Proposed Acquisition of Figma by Adobe", 7 August 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4082, regarding the opening of an in-depth investigation. See also the Commission's Competition Merger Brief, Issue 2/2024, pages 1-5.

43. See the Commission's Press Release "Mergers: Commission Prohibits Acquisition of GRAIL by Illumina", 6 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

3.2.2 Timeframe for the analysis

The Consultation raises the question what timeframe should be used for the analysis.[44] Here, it is necessary to strike a balance between overly short-term assessments (which may fail to capture situations where a target with a low market share could emerge as a significant competitive force) and overly-speculative forward-looking assessments (which may risk blocking efficiency-generating combinations based on unrealistic future scenarios).

A more forward-looking assessment can meaningfully inform the competitive evaluation in certain contexts. However, this flexibility should be balanced against the inherent uncertainty involved in predicting future competitive scenarios. Assessments over extended time horizons open up multiple possible scenarios. For example, while one possibility may involve the target emerging as a significant competitive force beyond what its current market share suggests, other alternative outcomes can be equally plausible, including: (i) entry or expansion by other competitors; (ii) development of disruptive technologies or services that undermine the market position of the target (or the acquirer); or (iii) fundamental shifts in consumer preferences.

Any conclusion that a particularly forward-looking outcome is sufficiently likely to influence current merger assessment must be grounded in solid evidence demonstrating that such a scenario is more plausible than alternative scenarios.

3.2.3 Applying equal weight to exculpatory and inculpatory evidence on entry and expansion

When it comes to assessing the scope for entry and expansion, as well as the role of other countervailing factors (such as potential efficiencies), it is important to avoid double standards. A risk exists that the analysis will rely on potential future developments to identify potential overlaps but fails to acknowledge that this very same dynamism could address these issues. *Inter alia*, if the merging parties are expected to overlap in (multiple) additional areas in the future, this could provide an initial indication that there are low barriers to entry.

For example, consider a ToH that relates to a "killer acquisition". The Consultation draws specific attention to such cases: a firm acquiring an innovating firm that is not yet active but may become a key rival in the counterfactual absent the merger. Acquisitions which discontinue the target's innovation can be harmful but can also be benign or pro-competitive.[45, 46] This is particularly the case in markets where several other firms are also innovating (or likely to do so). It is important to weigh the post-merger possibilities consistently. If the evidence in support of the target successfully entering the acquirer's market is weak (but nonetheless treated as inculpatory) then the same standard should be applied to evidence of countervailing factors which are exculpatory.

To illustrate, suppose the target is likely to successfully enter a market with a probability of (only) 20% (and fail with a probability of 80%): successful entry by the target is very unlikely. Suppose further that a rival is likely to enter the same market with a probability of 40% (so the rival is, despite having a better prospect at success than the target, still more likely to fail than to succeed). If a ToH focuses on the fact that the target may successfully enter (with 20% likelihood), it would not be appropriate to disregard the possibility of successful entry by the rival on the grounds of the rival being more likely to fail than to succeed. This is because the likelihood for the rival to successfully enter is greater than that of the target.[47]

The Revised Guidelines should clarify how each of the required conditions for entry to offset any competitive harm should be interpreted when dealing with competition concerns that themselves will only materialise in the future, and/or with a certain probability. The HMG require entry to be: (i) timely: typically requiring the constraint to arise within 2 years of the merger; (ii) likely: more likely than not; and (iii) sufficient: strong enough to offset any anti-competitive merger effects.[48] But a requirement that entry would need to occur within two years of the merger would clearly not be appropriate for any overlaps that would only materialise after a few years. Likewise, a requirement that entry is "likely" or "sufficient" would be too restrictive for overlaps that may not even be likely or material themselves.

3.2.4 The role of evidence

To the extent that changes are required to the Current Guidelines insofar as they relate to dynamic ToHs, we consider it would be to expand on the evidence that would be relied on to apply these economic frameworks/principles (and the acceptance of inherent uncertainty with such analysis). We discuss some examples below, covering:

- Products with clear pipelines;
- Evidence of competitive responses to future entry;
- Probability analysis to attach weight to future possible outcomes; and
- Internal documents.

44. See the Consultation, Topic C, Question C.16.

45. The Consultation notes that such mergers can result in faster commercialisation of the innovative products (Ibid., para. 52). In addition, the possibility that successful innovators will eventually be acquired can contribute to the incentives to innovate in the first place.

46. The same applies to "reverse killer acquisitions", which end the acquirer's own innovation efforts.

47. For a further discussion, see RBB Brief 59, "A Question of Balance: Comments on a Proposed New Test for UK Merger Control", April 2019, available at https://www.rbbecon.com/publication/article/a-questions-of-balance-comments-on-a-proposed-new-test-for-uk-merger-contro/.

48. See the HMG, paras. 68-75.

Products with clear pipelines: in certain sectors, such as pharmaceuticals, information may be readily available due to the long-term (and public) nature of the clinical trial process. After a certain stage of the R&D process, it is thus possible to identify which rivals are seeking to launch which products, which originator product they will compete with (for generic products), or at least which conditions they will seek to treat (for originator products) and thus which other (prospective) products will treat the same conditions.

Evidence of competitive responses to future entry: in other cases, the prospect of future entry may already have generated a competitive response, which can be investigated. In *Adobe/Figma*, the Commission considered whether the threat of Figma's entry may have influenced Adobe's product development priorities and innovation efforts.[49] In such cases, it is important to ask the question whether any such reaction is specific to the rival in question. Product development and innovation may be undertaken due to the threat of entry more generally. In the case of a ToH regarding a possible future overlap between Firms A and B and where Firms C and D are also contemplating entry, it would be necessary to show that the threat of entry by Firm B had a unique impact on Firm A's product development efforts that is important relative to the impact of the threat of entry by each of Firms C and D.

Probability analysis: in a dynamic market characterised by rapid innovation, it may not be possible to infer (future) closeness-of-competition from current data. But it may be possible to attach probabilities to this question. Businesses routinely deal with uncertainty this way, for example when it comes to major investment decisions, and there is no reason why merger control should not do the same. What is the probability of firms becoming close competitors once particular R&D trajectories are completed? How likely is entry? An analysis suggesting that the likelihood of entry is "80%" is more informative than an analysis that merely concludes that entry is "likely".

Internal documents: an analysis of internal documents, which the Commission already undertakes in many cases, can be useful in this regard. However, care is required to avoid reaching a biased view in terms of the merging parties' strength vis-à-vis rivals. In particular, it is important to account for the context in which the documents were prepared, and any biases that may result from this. For example, internal board documents sometimes present a positive "spin" on decisions that have been taken. They may overstate the prospect of success in a market the firm is about to enter. Likewise, documents on the deal rationale of a merger may be unlikely to describe a target as having poor potential, even if an objective view would in fact suggest that to be the case. On the other hand, claims in merging parties' documents that rivals will enter or grow may not be accurate if such plans are not public and known only to those rivals.

One way of obtaining a more balanced view is to obtain not only internal documents of the merging parties but also internal documents of rivals. As rivals' documents may have been written from a different perspective, a combined assessment of both the merging parties' and rivals' documents is more likely to produce reliable insights than if only one set of internal documents is considered. An analysis of rivals' internal documents is likely to be more informative than simply asking rivals whether they would be likely to enter. As the OECD has explained, "*market participants may have few incentives to reveal their true intentions to competition authorities, especially if the merger is likely to affect them*".[50, 51]

3.2.5 Conclusion

To conclude:

- The established economic frameworks for assessing relevant ToHs as set out in the Current Guidelines are valid in dynamic markets characterised by uncertainty, and the Commission has applied these in such settings.
- The Revised Guidelines should clarify the role of evidence and ensure a balanced treatment of inculpatory and exculpatory factors, with the same standard of proof applied to both types of evidence.

3.3 Theories of harm linked to innovation

Following our general discussion of dynamic elements, we now turn to the specific questions and issues raised in Topic C regarding the impact of mergers on innovation.[52] This can be the pivotal concern in a competitive assessment, distinct from and sometimes overriding traditional effects on price, quality, or consumer choice. Against a backdrop of increasingly frequent and sophisticated innovation reviews by the Commission, the proper framework for this analysis remains a subject of intense debate.[53]

This debate reflects, *inter alia*, a classic economic trade-off expressed in the opposing views of Kenneth Arrow and Joseph Schumpeter:

49. See footnote 42 above.

50. See OECD (2020), "Merger Control in Dynamic Markets", Paris: OECD Publishing, pages 19-20.

51. An example of rivals' stated intentions not matching their actual plans is given by Ryanair in the context of *Aegean/Olympic II*. In its decision of October 2013, the Commission concluded, based on statements from Ryanair, that Ryanair's entry on routes from Athens did not seem likely; see Case M.6796 – *Aegean/Olympic II*, Commission Decision of 9 October 2013, paras. 370-384. In January 2014, only three months later, Ryanair then announced the opening of a base in Athens as well as the launch of a number of routes from this airport (see, for example: https://aviationweek.com/air-transport/airports-networks/ryanair-open-two-additional-greek-bases-summer-2014).

52. See, for example, the Consultation, Topic C, paras. 51, 54 and 56 and Questions C.3 and C.7

53. The Commission has investigated innovation concerns in a series of mergers, with notable examples including: Case M.7275 – *Novartis/GlaxoSmithKline Oncology Business* (2015); Case M.7278 – *General Electric/Alstom* (2015); Case M.7559 – *Pfizer/Hospira* (2015); Case M.7932 – *Dow/DuPont* (2017); Case M.8084 – *Bayer/Monsanto* (2018); Case M.8851 – *BASF/Bayer Divestment Business* (2018); and Case M.9461 – *AbbVie/Allergan* (2020).

- **Arrow:** market power *reduces* incentives to innovate since powerful firms are already earning high profits and so the incremental return from innovation is low. By comparison, a firm in a competitive market stands to win more of the market and dramatically increase profits from innovating successfully and undercutting its rivals ("the replacement effect").[54]
- **Schumpeter:** market power *increases* incentives to innovate since competitive markets compete away the profits from innovating. As such, firms with relatively greater market power can better reap the rewards to innovating and more effectively fund/manage the costs of doing so (e.g., via technological efficiencies).[55]

While the HMG acknowledge this dual potential of mergers to both stifle and spur innovation, the Commission's enforcement has historically focused more on potential harms to innovation, often treating innovation as a simple analogue to price competition.[56] The prevailing concern has been that, similar to unilateral price effects, a merger's sales cannibalisation will reduce the incentive to innovate. This stance has prompted a rich academic discussion and calls, echoed in the Draghi Report, for a more balanced and case-specific approach.[57]

This section contributes to that debate.[58] We argue that a robust framework must:

- **Account for appropriability:** an assessment must look beyond cannibalisation to pro-competitive mechanisms like enhanced appropriability and R&D synergies, which are crucial drivers of innovation incentives. See Section 3.3.1.
- **Adopt a neutral, case-specific stance:** merger policy should avoid a presumption of harm, recognising that innovation competition is far more complex than price competition. See Section 3.3.2.
- **Assess innovation incentives holistically and based on case-specific evidence:** pro-innovation effects, which directly shape the incentive to innovate, must be evaluated within the main competitive assessment, not relegated to a separate "efficiencies" silo, and must be grounded in a portfolio of rigorous, case-specific evidence. See Section 3.3.3.

3.3.1 Cannibalisation versus appropriability

While the relationship between horizontal mergers and innovation competition is complex, robust economic principles can guide a sound enforcement policy.[59] A practical way to structure the analysis is to focus on two opposing mechanisms that jointly determine the net incentive to innovate: cannibalisation (the internalisation of lost sales) and appropriability (the ability to capture the gains from successful innovation). We discuss each in turn.

3.3.1.1 Cannibalisation: internalisation of lost sales

Cannibalisation describes how a merger can reduce incentives to invest in R&D by eroding the incremental gains from innovation.

The intuition mirrors unilateral price effects. A standalone firm deciding whether to invest weighs the R&D costs, the probability of success, and the profits stemming from launching the innovation. If the innovation wins customers from rivals, the standalone firm captures those gains without internalising rivals' losses – indeed, such "business stealing" is a benefit.

Post-merger, the calculus changes. The merged entity now internalises the impact that its innovation would have on the sales of its new affiliate. This internalisation acts as a "*cannibalisation tax on the fruits of R&D investments*", potentially making previously profitable projects unattractive.[60]

A simple numerical example illustrates the logic:

- **Pre-merger:** Firm A considers investing €50 in R&D for a product expected to generate €100 in sales (assuming, for simplicity, no other production costs). The €100 is generated as follows: €20 from cannibalising its own products, €40 at the expense of Firm B and €40 from Firm C.[61] Net of the R&D cost (€50) and cannibalisation of its own products (€20), the project yields €30 in profit (€100 - €50 - €20).
- **Post-merger (A + B):** the value of sales remains €100 but cannibalisation rises to €60 (€20 from Firm A's products and €40 from Firm B). The project now yields a €10 net loss (€100 - €50 - €60).

54. See Arrow, K. (1962), "Economic Welfare and the Allocation of Resources for Invention", in "The Rate and Direction of Inventive Activity: Economic and Social Factors", National Bureau of Economic Research, Princeton, NJ: Princeton University Press, pages 609-626.
55. See Schumpeter, J. (1942), "Capitalism, Socialism, and Democracy!", New York, NY: Harper & Row, Chapter VII "The Process of Creative Destruction", pages 81-86.
56. See the HMG, para. 38. We note that the NHMG primarily reference a negative relationship between market power and innovation, see the NHMG, para. 10.
57. As noted further in the sections below, the Draghi Report, Part B, page 299, recommends that the Commission's guidelines "*should explain what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate, allowing for an 'innovation defence'*".
58. Our discussion is focused on horizontal mergers. We discuss non-horizontal mergers, including potential innovation-related efficiencies that these may give rise to, in Section 3.4.
59. See, for example, Shapiro, C. (2012), "Competition and Innovation: Did Arrow Hit the Bull's Eye?", in "The Rate and Direction of Inventive Activity Revisited", Lerner, J. & Stern, S. (eds.), Chicago, IL: University of Chicago Press, pages 362-365 ("Shapiro (2012)").
60. See Farrell, J. & Shapiro, C. (2010), "Antitrust Evaluation of Horizontal Mergers: an Economic Alternative to Market Definition", *The B.E. Journal of Theoretical Economics*, Vol. 10(1), page 33.
61. We assume for illustrative purposes that costs of production are equal to zero and that the innovation would only cannibalise existing sales.

This logic was central to the Commission's ToH in cases such as *Dow/DuPont* and *Novartis/GlaxoSmithKline Oncology Business*. In the latter decision, the Commission stated that the internalisation of future sales is "*very similar*" to the unilateral effects that lead to a price increase, simply applied to R&D investment instead of price.[62]

Such findings have drawn notably on economic models that predict reduced innovation post-merger.[63] These models, however, often rely on restrictive assumptions (as discussed below),[64] and their application has sparked sustained debate in academic and policy circles.

Importantly, cannibalisation is not a given. For instance, unlike price competition, R&D activity can expand product differentiation, increasing — rather than reducing — rivals' sales. In such cases, the merged entity's incentives to innovate may strengthen. This underscores why careful case-specific analysis, rather than blanket presumptions, is essential.[65]

3.3.1.2 Appropriability: monetising the gains from innovation

Appropriability describes the extent to which a firm can capture the profits from its own innovation. In contrast to cannibalisation, stronger appropriability can *increase* post-merger incentives to innovate.

The intuition is straightforward. When rivals operate in the same innovation space or can imitate new products, competition erodes the returns to a successful innovation. This "profit leakage" dampens pre-merger innovation incentives. By internalising a close innovation-competitor or imitator, a merger can reduce such leakage, making it easier for the innovator to monetise the returns from its R&D and hence strengthening innovation incentives.

As above, we can illustrate this mechanism with a simple numerical example. Consider an innovation opportunity that requires a €50 investment in R&D and is expected to generate €100 in total new sales for the entire market.

- **Pre-merger:** three firms, A, B and C, compete in the market. If any one of them develops the innovation, it anticipates that rivals will imitate it and launch competing products. This competition response leads to profit leakage. The innovator cannot appropriate the full €100 in sales. Instead, the value is split evenly across the three firms. The innovating firm's anticipated revenue is therefore only €33.3 (€100/3). Since this (€33.3) is less than the R&D cost (€50), proceeding with the project would result in a loss of €16.7. Consequently, no firm has the incentive to innovate.
- **Post-merger (A + B):** the combined firms re-evaluate the same R&D project. The merged firm still expects competition from Firm C, meaning the market-wide sales will be split three ways. However, Firm A+B can now capture two thirds of the incremental sales, amounting to €66.7 (€100 x [2/3]). This anticipated revenue now exceeds the €50 cost, yielding a profit of €16.7. By reducing profit leakage, the merger has turned an unprofitable project into a profitable one, and the project is undertaken.[66]

62. See Case M.7275 – *Novartis/GlaxoSmithKline Oncology Business*, Commission Decision of 28 January 2015, footnote 59, which states that: "*[t]he cannibalisation effect on expected sales in competition in innovation is very similar to the mechanism by which internalisation of cannibalisation effects on sales lead merging firms to unilaterally increase prices on existing products. Here firms internalise an expected effect on sales that will materialise in the future, and modify their conduct today by reducing R&D investments instead of raising prices*". See also Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, Annex 4, para. 145, where the Commission stated that: "*[t]he innovation competition effect follows the basic logic of unilateral effects, which is equally applicable to product market competition and to innovation competition*". Petit (2019) notes that the Commission's cannibalisation-based ToHs were formulated most explicitly around the time of *Novartis/GlaxoSmithKline Oncology Business* and *Dow/Dupont*. See Petit, N. (2019), "Innovation Competition, Unilateral Effects and Merger Control Policy", *Antitrust Law Journal*, Vol. 82(3), pages 883-884.
63. Several contributions are often noted, each highlighting that, by internalising negative sales externalities post-merger, the merged entity is likely to reduce innovation efforts compared to pre-merger. The first is Motta, M. & Tarantino, E. (2021), "The Effect of Horizontal Mergers, when Firms Compete in Prices and Investments", *International Journal of Industrial Organization*, Vol. 78(102774) ("Motta & Tarantino (2021)"). A previous version of this paper was published as a Centre for Economic Policy Research Discussion Paper (#11550) in 2016. The second are a series of papers co-authored by the Commission's former Chief Economist Tomasso Valletti and colleagues from the Commission's Chief Economist teams: (i) Federico, G., Langus, G. & Valletti, T. (2017), "A Simple Model of Mergers and Innovation", *Economic Letters*, Vol. 157, pages 136-140 ("Federico et al. (2017)"); and (ii) Federico, G., Langus, G. & Valletti, T. (2018), "Horizontal Mergers and Product Innovation", *International Journal of Industrial Organization*, Vol. 59, pages 1-23 ("Federico et al. (2018)").
64. See Section 3.3.2.2, in particular footnote 85.
65. A merger can directly alter innovation incentives. For instance, it can encourage horizontal differentiation (innovating to increase product distinctness) over simple vertical differentiation (innovating to improve quality). Post-merger, the firm internalises a positive externality that was previously ignored: by investing in R&D to reposition one product, it can relax price competition and boost sales for its partner product. The ability to capture these gains provides a direct, pro-competitive incentive to innovate in this way, acting as a counterbalance to the potentially innovation-blunting effect of internalising sales cannibalisation.
66. For ease of illustration, we assume that sales are shared equally between Firms A, B and C post-innovation. However, the same underlying logic holds under alternative ways of sharing sales between these competitors provided that: (i) no individual firm achieves sales in excess of innovation costs (€50) pre-merger; and (ii) the merged entity achieves sales in excess of innovation costs post-merger.

While strong IP rights can enhance a firm's ability to appropriate returns from innovation, the protection they offer is rarely absolute.[67] Even in industries with robust IP regimes, rivals may innovate in ways that avoid infringement – for example, by developing differentiated products, designing around patents, or innovating in adjacent spaces.[68] These responses erode the innovator's returns, leaving room for a merger to raise appropriability and strengthen innovation incentives.

Beyond reducing profit leakage, mergers can also strengthen innovation incentives through other mechanisms, some of which operate by enhancing appropriability.[69] Many have been formalised in recent academic contributions and may be relevant in merger assessments:

- **Internalising technological spillovers:** spillovers occur when one firm's R&D unintentionally benefits a rival – a positive externality. Pre-merger, the innovator cannot capture this additional value, which dampens its incentive to invest.[70] Post-merger, the new entity internalises the spillover, allowing it to appropriate more of the innovation's full value.[71, 72]
- **Sharing knowledge and other assets:** post-merger, proprietary knowledge and technology that was previously siloed can be systematically shared across the new organisation.[73] Unlike unintentional technological spillovers, these benefits are deliberately shared and immediately appropriated – for example, by applying a superior production process across a larger output – thereby increasing the profitability of future R&D.[74]
- **Coordinating portfolio pricing:** after a merger, the combined firm can manage prices across its broader portfolio. This means it can launch a new, innovative product at a premium price while strategically adjusting the prices of its existing products (including those from the merger partner) to minimise sales cannibalisation. By coordinating prices in this way, the merged entity is able to capture more of the value created by its innovation. This greater ability to monetise innovation strengthens appropriability and, in turn, reinforces incentives to invest in R&D.[75]

67. Valletti (2025) has noted that innovation concerns often occur in industries with strong IP protection, reducing the likelihood of positive spillovers between firms. As further discussed below, spillovers are one channel via which appropriability can increase post-merger. See Valletti, T. (2025), "The Innovation Theory of Harm in Merger Control: Some Clarifications", *Economics Letters*, Vol. 255(112556), pages 1-2 ("Valletti (2025)"). However, IP protection is hardly the only way firms appropriate the returns from R&D investments. See for example, Levin, R., Klevorick, A., Nelson, R. & Winter, S. (1987) "Appropriating the Returns from Industrial Research and Development", *Brookings Papers on Economic Activity*, Vol. 1987(3), Special Issue On Microeconomics, pages 783-831. Based on a survey of executives across 100 U.S. manufacturing industries, Levin et al. (1987) show the importance of a variety of non-patent appropriability mechanisms, notably secrecy, lead times and learning curves, as well as the role of complementary assets.

68. See, for example, Jullien, B. & Lefouili, Y. (2018), "Horizontal Mergers and Innovation", *TSE Working Papers*, No. 18-892, page 21 ("Jullien & Lefouili (2018)").

69. Firms may appropriate the returns on their R&D investments through various mechanisms that are not simply related to minimising or limiting the ability of competitors to imitate innovations. Teece (1986) highlights that often innovators fail to capture the profits from their own inventions, while imitators or other firms controlling other assets succeed, notably when IP protection is weak. In particular, Teece argues that where innovations require additional assets to reach the market, these assets may be more critical than the invention itself. Such complementary assets, which are critical to capture the returns from R&D investments, include, *inter alia*, manufacturing capacity, distribution networks and after-sale service. See Teece, D. (1986), "Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy", *Research Policy*, Vol. 15(6), pages 285-305.

70. This positive externality results in weaker appropriability pre-merger. Indeed, the innovator generates knowledge that benefits rivals through reverse engineering, mobility of employees, publications etc. Post-merger, part of the external benefit is internalised by the innovator. Appropriability rises because the innovator captures a larger fraction of the value of that knowledge that would otherwise have leaked to a competitor.

71. Valletti (2025) proposes that technological spillovers are not helpful for guiding competition policy's initial assessment of potential harms and should be considered in a second stage dealing with efficiencies (pages 1-2). By contrast, Jullien & Lefouili (2018), pages 21-23, highlight the "*pervasive*" nature of technological spillovers in R&D, and that, given their relevance to innovation incentives, they should be considered in the main competitive assessment of merger policy. We discuss how merger policy should seek to assess pro-innovation effects in Section 3.3.3.

72. A practical example would be two firms in related but distinct product lines: one develops a manufacturing breakthrough that reduces defect rates; the other can incorporate this process into its own line at minimal cost, raising its margins. Pre-merger, the innovator gains nothing from the rival's improvement. Post-merger, the entire benefit flows to the merged entity, increasing the expected returns to innovation.

73. See, for example, Denicolò, V. & Polo, M. (2018), "The Innovation Theory of Harm: an Appraisal", *IFIE Working Paper Series*, No. 103, pages 12-22 ("Denicolò & Polo (2018)").

74. While this mechanism is different from IP law or secrecy, it still raises the private returns to R&D relative to the pre-merger situation. Appropriability is strengthened because the innovator extracts more value from each innovation, not by excluding rivals but by expanding the internal scope of use. For example, cost synergies in production arise when the merged entity applies the best processes or technologies from each party across the merged entity's full output, leading to lower production costs and higher margins. Also, with these cost advantages embedded across a larger scale of operations, there can be higher returns to future additional R&D, justifying greater investment.

75. See, for example, Jullien & Lefouili (2018), pages 14-16.

- **Consolidating R&D activities to eliminate duplication:** by streamlining overlapping R&D projects, a merged entity can concentrate resources on the most promising avenues and reduce wasteful overlap.[76] This is not merely cost cutting: by reallocating investments more effectively, the firm can increase the probability of success and raise the expected returns from innovation.[77] In some cases, the elimination of overlapping projects may also strengthen appropriability.[78]

A final issue is that the effect of mergers on innovation incentives depends on the nature of the innovation itself. A key distinction is whether the innovation is primarily cost-reducing (e.g. process innovation) or *demand-enhancing* (e.g., product improvements, new features, higher quality). Recent research suggests that when horizontal mergers give rise to a reduction in output, they almost always reduce incentives for cost-reducing innovation, absent offsetting effects. By contrast, for demand-enhancing innovation, a horizontal merger may either reduce or increase incentives depending on the circumstances.[79] As most real-world innovations contain elements of both, the net impact must be assessed case-by-case.

3.3.1.3 Summary

Cannibalisation and appropriability are the two primary, and opposing, forces determining a merger's net impact on innovation. An enforcement approach that focuses heavily on the former while downplaying the latter risks misdiagnosing a merger's true effect.

The central challenge in merger control is that these factors often operate simultaneously. The impact is not a simple "either/or" question but a matter of their relative magnitude in a specific market context. A credible and predictable assessment framework, therefore, cannot treat pro-innovative effects as a secondary consideration. It must weigh both sides of the innovation calculus together, in an integrated analysis, to determine the likely net outcome for innovation and, ultimately, for consumers. We expand on this below.

3.3.2 Rebalancing the assessment of innovation in mergers

The need to rebalance the assessment of innovation in mergers stems from a long-standing tendency in merger control to rely on a flawed analytical shortcut: treating innovation competition as a simple analogue to price competition.

3.3.2.1 The Commission's flawed analogy: treating innovation like price

For years, the Commission's framework for assessing innovation mergers has been grounded in a simple, yet problematic, analogy. Drawing from its analysis of static price competition, the Commission's ToHs in innovation merger cases have focused almost exclusively on post-merger cannibalisation.

As explicitly stated in decisions like *Dow/DuPont* and reaffirmed in recent policy briefs, the Commission's view is that a horizontal merger reduces the incentive to innovate because one merged entity will "*internalise*" the sales that a new product would have stolen from the other.[80] This logic, it argues, is the same as for standard "*unilateral effects*", simply applied to R&D instead of price.[81]

This narrow focus on cannibalisation – while consistently downplaying pro-innovative effects like improved appropriability – has created a *de facto* presumption that mergers between innovators are harmful.[82] This stance has drawn scrutiny in recent policy debates, including in the Draghi Report, which calls for a more agile and nuanced approach.[83]

76. See, for example, Denicolò & Polo (2018), pages 4-12. By doing so, the merged firm makes R&D more productive, which in turn gives the firm a greater incentive to increase investment as the expected payoff from each R&D euro spent is improved.

77. Notably, in *Dow/DuPont*, the Commission's ToH was partly evidenced by the potential "*discontinuation, deferment or redirection of competing lines of research and early pipeline products*". See, for example, Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, paras. 277, 1955 and 3285. However, this reasoning ignores whether such measures increase the overall returns from the remaining innovation efforts, as per the rationale above.

78. Eliminating duplicative projects may strengthen appropriability when IP law or secrecy is not an effective means to appropriate the private returns from innovation. Pre-merger two firms racing to the same innovation reduce each other's expected payoff since they can appropriate only part of the return from innovation. Post-merger, the combined entity can claim a larger share of the returns from innovation because it no longer has to share with a rival.

79. See Bourreau, M., Jullien, B. & Lefouili, Y. (2024) "Horizontal Mergers and Incremental Innovation", *TSE Working Papers*, No. 907. In their model, a horizontal merger causes output to fall and price to rise, which reduces the scale over which innovation is monetised. This reduces innovation incentives. However, when innovation is demand-enhancing, the merger internalises how one firm's innovation affects the other's demand. This includes both cannibalisation (innovation diversion effect) and demand expansion effect, which work in opposite direction.

80. See Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, Annex 4, para. 145, which states that: "*[t]he merger between [two firms] will result in internalization by each merging party of the adverse effect of the R&D projects on [...] the other merging party; hence, [...] it will reduce investment in the competing R&D projects. The innovation competition effect [of a merger] follows <u>the basic logic of unilateral effects</u>, which is equally applicable to product market competition and to innovation competition*" (emphasis added).

81. See the Commission's Competition Policy Brief, Issue 1/2024, page 2, which states that: "*[i]nnovation requires competition. [...] A merger may internalise this effect [capturing sales from rivals via innovation] and reduce the innovation incentive. In this case, <u>the effects can be thought of as standard unilateral effects</u>, applied in this case to innovation efforts rather than to prices or volumes. As a result, <u>mergers between rival innovators tend to reduce innovation incentives</u>, unless there are sufficient knowledge spillovers or other efficiencies*" (emphasis added).

82. *Novartis/GlaxoSmithKline Oncology Business* and *Dow/DuPont* are key cases as mentioned above. Further, see, for example: (i) Case M.8084 – Bayer/Monsanto, Commission Decision of 21 March 2018, paras. 75, 76 and 87; and (ii) Case M.8851 – *BASF/Bayer Divestment Business*, Commission Decision of 30 April 2018, paras. 63-67.

83. See, for example, the Draghi Report, Part B, page 299, which states that: "*this evaluation [how a proposed concentration will affect future innovation potential] <u>is more complex than the simple assessment of the price effect of a merger</u> [...] the regulatory apparatus must be made more agile and in tune with evolving economic thinking in the digital age*" (emphasis added).

3.3.2.2 The risks of a presumption of harm

While a rebuttable presumption of harm may seem like a practical benchmark for complex innovation assessments, this approach introduces significant risks to both innovation and overall economic welfare.[84]

A primary risk is the procedural hurdle it creates. By shifting the evidentiary burden to the merging parties, it requires them to prove a negative – that their merger will not harm innovation. This can create a strong chilling effect, deterring or causing the abandonment of mergers that could otherwise generate significant pro-innovative synergies and consumer benefits, simply due to the high legal uncertainty and cost.

A second, more fundamental risk lies in the analytical foundation for such a presumption. It rests on the premise that innovation competition is a simple analogue of price competition. However, a substantial body of economic literature demonstrates this is not the case. The models that emphasise cannibalisation – and which have heavily influenced the Commission – are highly sensitive to their assumptions. Plausible changes, particularly by accounting for appropriability mechanisms and other innovation-enhancing effects, can reverse the conclusion that mergers necessarily reduce innovation incentives.[85]

Relying on a presumption of harm, therefore, creates a substantial risk of systematically underweighting these pro-innovative effects, potentially leading to the blocking of welfare-enhancing mergers and stifling investment in R&D.

3.3.2.3 The way forward: a balanced, case-specific assessment

There is no "one-size-fits-all" answer to whether a merger helps or harms innovation. The question can only be answered on a case-by-case basis, grounded in the specific facts of the industry and the parties involved.[86]

Encouragingly, the Consultation acknowledges the need to "*adequately assess both elements, the positive and the negative impact on innovation.*"[87] This is a welcome shift in principle. However, crucial operational questions remain – most notably how the Commission will weight pro-innovation effects against potential harm. Given the Commission's historic treatment of countervailing efficiencies,[88] clarity on this point is essential. Doing so will not only improve the accuracy of merger reviews but also reduce uncertainty for businesses considering pro-competitive, innovation-enhancing transactions.

3.3.3 Innovation-enhancing effects should be part of the core competitive assessment, not siloed as "efficiencies"

As discussed in Section 2.2 above, the Commission traditionally assesses *merger-specific efficiencies* as a countervailing factor, separate from the main analysis of anti-competitive effects. However, assessing a merger's pro-innovative effects in this siloed manner poses a significant challenge. Given that the hurdle for a successful efficiency defence has been a very high one under the Commission's current approach, this approach also risks systematically underweighting a merger's potential innovation benefits.[89] An integrated approach is needed to ensure both the positive and negative impacts of mergers on innovation are adequately assessed – an objective in line with the Draghi Report.[90]

3.3.3.1 The core principle: an integrated assessment

Economics does not support separating the analysis of innovation incentives into "harm" and "efficiencies". Cannibalisation and appropriability are notably two sides of the same innovation-incentive calculus: firms will evaluate both, and at the same time, when considering the expected profitability of an investment in R&D. Conceptually, they enter a single expected return expression for an R&D project:

Innovation Return = success probability x (per-success payoff – internalised losses) – cost

84. See Shapiro (2012), page 365 which states that: "*a merger between two of a very few firms who are important, direct R&D rivals in a given area is likely to retard innovation in the area*". See also Valletti (2025), page 4, which states: "*[i]n models with competition both over innovation and final products, in the absence of synergies or positive spillovers, a merger is likely to be bad for consumers*".

85. See, for example, Denicolò & Polo (2018) and Jullien & Lefouili (2018). Specifically, each of these papers show how the conclusions of Motta & Tarantino (2021), Federico et al. (2017) and Federico et al. (2018) – that mergers tend to reduce innovation incentives – are reversed by plausibly relaxing various modelling assumptions.

86. Denicolò & Polo (2018) state: "*[w]hen all is said and done, the question [whether mergers are more likely to stifle or spur innovation] can be attacked only on a case-by-case basis, building on the facts of each specific case*". See Denicolò & Polo (2018), page 27.

87. See the Consultation, Topic C, para. 51.

88. See Section 2.2 above for more details.

89. As noted in Section 2 above, the Consultation acknowledges that no merger has ever been cleared solely based on efficiencies. See the Consultation, Topic F, para. 100.

90. See the Consultation, Topic C, para. 51. See also the Draghi Report, Part B, which states that: "*the lack of innovation in Europe is sometimes blamed on competition enforcement. Although stronger competition will in theory generally both lower prices and foster innovation, there are cases where it can be harmful to innovation*" (page 298), and that "*updated guidelines should explain what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate, allowing for an 'innovation defence'*" (page 299).

A merger affects multiple components of this calculus. For example, cannibalisation increases the internalised losses (more own-sales diversion once rivals become affiliates), while appropriability-enhancing effects (like internalising spillover and knowledge sharing) can increase the probability of success and/or the payoff. An analytically sound assessment must therefore weigh these channels together.[91] This integrated logic can be illustrated with another simple numerical example:

- **Pre-merger:** Firm A considers a €20 R&D investment. The innovation has a 30% chance of success, which would generate €100 in new profit, but also cannibalise its own sales, reducing profit by €30.[92] The net expected profit is therefore low, at just €1 (0.3 x (€100 - €30) - €20). The project is marginal.
- **Post-merger (A + B):** the merged firm consolidates R&D, increasing spend to €30. This focused investment, combined with knowledge sharing, raises the success probability to 80%. While the loss from cannibalisation also increases to €50 (€30 from Firm A and €20 from B), the pro-innovative effects dominate. The net expected profit is now €10 (0.8 x (€100 - €50) - €30). The project is now clearly attractive.

As the example shows, even if some factors worsen post-merger (higher costs and cannibalisation), the overall net incentive to innovate can increase substantially. This example could be further refined by adding other appropriability effects. For instance, if the merged entity can price the new product at a premium while protecting legacy lines, the €100 incremental profit could be higher post-merger, further increasing expected returns. Parking pro-innovation mechanisms in the efficiencies box (assuming the current approach to efficiencies analysis in merger control) therefore makes it more difficult to conduct this essential net calculation correctly.

3.3.3.2 Guiding principles for an evidence-based assessment

Adopting this integrated framework is the first step. The second is grounding it in a robust and balanced approach to evidence.[93] To this end, the Commission's empirical analysis should be guided by three key principles:[94]

- **Evidence must be case-specific:** the relative importance of appropriability, cannibalisation, and R&D synergies varies enormously by industry. A rigid, one-size-fits-all set of metrics is unworkable. The assessment must be tailored to the facts of the case and the specific "levers" of innovation at play.
- **Evidence must cover both positive and negative effects:** an integrated assessment is impossible if the evidence gathering process is one-sided. Empirical metrics used to assess the closeness-of-competition of innovation efforts,[95] for instance, are just as informative for potential synergies and appropriability. The Commission should evaluate evidence on both effects equally and in parallel.
- **Balancing backward- and forward-looking evidence:** no single metric can perfectly predict future innovation. Backward-looking data may not reflect future strategy while forward-looking evidence is inherently uncertain. The Commission should therefore rely on a portfolio of complementary evidence – drawing from both backward- and forward-looking evidence – to form the most complete picture of the merger's likely impact on innovation.

By adopting an integrated framework guided by these principles, the Commission can develop a more accurate, predictable, and analytically sound approach to assessing innovation in mergers.

3.3.4 Conclusion

Our conclusions can be summarised as follows:

- Merger policy should not presume that mergers harm innovation, nor treat innovation competition as a simple analogue to price competition. At the time of writing, the literature is still studying the several ways in which a merger can impact innovation (both positively and negatively), and remains largely inconclusive. A neutral, case-specific approach that is evidence-focused is required.
- Positive innovation effects should be assessed as part of the main competitive analysis, not under an efficiency defence.
- The Revised Guidelines should identify relevant empirical tools for assessing innovation competition and encourage their use in enforcement.

91. This view is echoed in academic literature. For example, Shapiro (2012) notes that the forces of cannibalisation and appropriability "*work in concert, weaving together and integrating the Arrow and Schumpeter perspectives*" (pages 363-364). Similarly, Jullien & Lefouili (2018) consider that: "*the potential positive effects of a merger on innovation are not of a fundamentally different nature from its potential negative effects*" and "*there should not be a hierarchical bias towards the diversion/cannibalization aspect when analyzing the effect of mergers on innovation*" (page 27).

92. As with other examples, we assume that the costs of production are zero.

93. For example, and as noted above, the Draghi Report, Part B recommends that "*updated guidelines should explain what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate, allowing for an 'innovation defence'*" (page 299).

94. See also Section 3.2.3 for recommendations on balancing evidence.

95. For example, an overlap in innovation efforts implies that, were one party to successfully introduce an innovative product, potentially it could steal a relatively large portion of a rival's sales (i.e., cannibalisation may be substantial). At the same time, by consolidating innovation efforts, thereby reducing the overlap, a merger can increase the appropriability of the merging parties' products which no longer have to compete with a key innovation rival or imitator.

3.4 Theories of harm in non-horizontal mergers

In this section, we provide our thoughts on the assessment of non-horizontal ToHs. We focus on three themes:

- First, the Commission has suggested that the dividing line between horizontal and non-horizontal mergers has become blurred and questions whether a separate framework to assess non-horizontal mergers is needed.[96] In our view, non-horizontal ToHs should be assessed using a distinct framework to horizontal ones, given the fundamental differences between them. See Section 3.4.1.
- Second, the NHMG's focus on foreclosure and the ability-incentive-effects framework used to evaluate it. We believe this approach remains fit for purpose. See Section 3.4.2.
- Third, the scope for the Revised Guidelines to make additional clarifications (within the ability-incentive-effects framework) in respect to certain ToHs, including: (i) partial foreclosure and partial degradations of interoperability; (ii) mixed bundling with complementary products; and (iii) defining and assessing ecosystems. See Section 3.4.3.

3.4.1 Is there a case for ending the distinct treatments of horizontal and non-horizontal mergers?

The Consultation asks whether the analysis of non-horizontal ToHs requires a distinct framework to horizontal ToHs, suggesting that such a distinction may no longer be necessary.[97]

While the Consultation suggests that some mergers present both horizontal and non-horizontal aspects, it does not elaborate as to why this fact would mean that the ToHs arising from both aspects should not continue to be treated separately (accounting, where relevant, for the possibility that one effect may reinforce another).[98] We note that the possibility of transactions presenting both horizontal and non-horizontal aspects is already recognised in the NHMG, which state, correctly in our view, that in such cases each relationship should be assessed via application of the relevant guidelines.[99]

3.4.1.1 Non-horizontal mergers are fundamentally different (to horizontal mergers)

There is no reason why a given merger cannot involve both horizontal and non-horizontal aspects, and raise both horizontal and non-horizontal competition concerns. However, that does not mean that the assessment of these different concerns requires, or would even benefit from, a common analytical framework.

Non-horizontal mergers, whether vertical or conglomerate, entail the combination of firms selling non-substitute goods. That contrasts markedly with horizontal mergers, which involve the bringing together of actual or potential suppliers of substitute goods.[100]

This provides a clear basis for distinguishing horizontal and non-horizontal aspects of mergers. As a very simple example, consider a merger between two firms that hold a 25% share in the markets where they are active. It is evident that the assessment will be very different depending on whether the goods sold by these firms are substitutes (i.e., it is a horizontal merger leading to a 50% combined share) or if the firms are active in different, yet related, markets (i.e., it may be that neither firm has a material degree of market power such that it provides no basis for concern).

The NHMG recognise that non-horizontal mergers (or the non-horizontal dimensions of mergers) are fundamentally different to horizontal mergers. Crucially, from a competition perspective, non-horizontal mergers "*do not entail the loss of direct competition*".[101] Moreover, they "*provide substantial scope for efficiencies*".[102] As a result, importantly, "*non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers*".[103] This overall conclusion remains relevant in our view and justifies a distinct approach to the assessment of non-horizontal mergers.

It is also recognised that non-horizontal mergers can lead to anti-competitive effects. Critically, however (and in contrast to the primary, direct mechanism at work in horizontal merger settings), these anti-competitive effects arise *indirectly*, with the merged entity's potential conduct adversely affecting competitors' ability to secure important inputs or access markets – i.e., resulting in input or customer foreclosure.

96. See the Consultation, General Questionnaire, Question 2.1.7.

97. *Ibid.*

98. *Ibid.*, option number three. For example, in the context of a merger raising both horizontal and vertical overlaps, it is possible for the horizontal overlap to make vertical effects more likely. However, this does not mean that the vertical effects are the same as a horizontal effect, they are not.

99. See the NHMG, para. 7.

100. A merger may involve firms that are currently active on different relevant markets, but where the concern is that one could become active in the same market as the other, however, these concerns are straightforwardly handled within the existing horizontal merger assessment framework.

101. See the NHMG, para. 12.

102. *Ibid.*, para. 13.

103. *Ibid.*, para. 11.

Since the mechanisms through which non-horizontal mergers affect competition and consumers are different in nature to those of horizontal mergers, competitive assessments of the former require a distinct analytical framework to the latter. Whether that distinct framework is set out in a separate document or not is, in our view, a secondary issue. Indeed, given that some of the topics covered in the Consultation affect both horizontal and non-horizontal mergers, a single consolidated set of guidelines recognising the fundamental differences may be appropriate.

3.4.1.2 An intrinsic source of efficiencies

As the NHMG note, a key characteristic of non-horizontal mergers is that the products concerned are often complementary to each other.[104] Two products can be considered complements when they are worth more to a customer when used or consumed together than when used or consumed separately.[105]

Integrating complementary activities within a single firm can create efficiencies that often directly benefit consumers. Perhaps most familiarly, these mergers may result in pricing efficiencies – notably, the elimination of double mark-ups ("EDM"), incentivising reduced prices and expanded output on the part of the merging parties.[106]

However, non-horizontal mergers are also a source of a range of non-pricing efficiencies. These possibilities involve (but are not limited to) the following broad themes:[107]

- **Reducing inefficiencies from market transactions subject to transaction costs and incomplete contracts:** since almost all contracts are incomplete (in the sense that some possible outcomes are not covered by the contract), a party may be able to exploit contractual loopholes to the disadvantage of its partner(s).

  For instance, consider a subcontractor contemplating whether to undertake costly and risky R&D expenditure on behalf of a buyer. It may not be possible to write an enforceable contract that fully specifies: (i) the effort undertaken by the subcontractor (e.g., because if a research project fails, it may be hard to prove whether the cause is lack of effort or bad luck); and (ii) the quality of a successful product (e.g., due to the absence of an objective measure of success). In this case, a subcontractor may be unwilling to undertake a risky R&D investment on behalf of a purchaser. If the project fails, the purchaser may not cover the subcontractor's costs, claiming that failure was due to lack of effort. If the project succeeds, the purchaser may falsely claim the product is sub-standard and demand a discount. Moreover, if the project is specific to the purchaser, the subcontractor would have limited scope to sell the product to (or monetise the knowledge via) another buyer. Thus, fearing opportunistic behaviour, the subcontractor may refuse to undertake the investment for the purchaser.[108] However, integration can solve this "trust issue" by bringing both parties within the same firm.

  Furthermore, at a general level, all contractual relationships are subject to transaction costs, such as those incurred in drawing up contracts or searching for an appropriate partner, as well as monitoring and enforcing the contractual terms. Vertical and conglomerate mergers allow external market transactions to be replaced with intra-firm arrangements which may eliminate or reduce such contractual problems, thereby giving rise to an efficiency gain.

- **Increasing appropriability:**[109] under certain conditions, a firm may not be able to appropriate the full benefits of its investments, because these can be partly reaped by competitors. This can result in sub-optimal levels of investment. Non-horizontal mergers can help to overcome such issues, leading to more investment or innovation.

  For example, in non-patented markets, vertical integration can protect a product innovation by making reverse-engineering more difficult, e.g., by embedding the upstream division's innovation in the downstream division's product. This may also allow the upstream division to keep its innovation confidential until the downstream division's product (containing the innovation) is ready to be released on the market, thus improving the time-to-market advantage. More generally, the downstream division of the merged entity may provide guaranteed demand for the upstream division, thereby making innovation less risky.

104. *Ibid.*, para. 13.

105. *Ibid.*, footnote 3.

106. As the NHMG explain: "*In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits*". See the NHMG, para. 13.

107. See the report prepared by RBB Economics for the Commission (2005), "The Efficiency-Enhancing Effects of Non-Horizontal Mergers", available at https://ec.europa.eu/docsroom/documents/3667/attachments/1/translations/en/renditions/native.

108. Such opportunistic behaviour is an example of the "hold-up" problem. The hold-up problem arises when an investment which is specific to the relationship between the two firms is required. This may make the investing party highly dependent on the acquiring party not acting opportunistically once investment has been made. If this "ex-post hold-up" cannot be contracted upon, it may not occur at all via a market transaction. Vertical integration may solve this by bringing both parties within the same firm.

109. See Section 3.3.1.2 for a more detailed discussion of this concept.

- **Combining production complementarities:** firms that do not compete directly but that are active in related markets often have complementary assets or production processes. This is the case, for example, of upstream DNA sequencing suppliers and downstream cancer test suppliers (as was the case in *Illumina/GRAIL*).[110] Bringing together these complementary production processes or assets under common ownership may lower production costs or increase the probability of innovation.[111]

The efficiency and welfare-enhancing effects of non-horizontal mergers and the mechanisms giving rise to foreclosure concerns are often two sides of the same coin, involving consideration of the same issues. Indeed, the gain from (i) "raising rivals' costs" ("RRC"), which may produce a foreclosing effect, and (ii) EDM (which is pro-competitive) both depend on/result from the willingness of customers to switch.[112] This strongly suggests, more than is currently recognised in the NHMG, that the potential benefits and the potential anti-competitive effects of non-horizontal mergers should be evaluated on an integrated, holistic basis (as opposed to considering benefits under a separate efficiency defence).

We note that the Commission has followed this approach, at least to an extent, in the assessment of a number of cases. In *EssilorLuxottica/GrandVision*, the Commission's quantitative analysis evaluated EDM alongside partial input foreclosure concerns and its conclusions were based on an assessment of their combined effect (without relying exclusively on the merging parties to put forward and substantiate EDM benefits, for instance).[113] In some other cases, the Commission considered and rejected the scope for EDM as part of the competitive assessment.[114] The Revised Guidelines provide an opportunity to set out formally the importance of weighing potential anti-competitive and pro-competitive effects at the same time and to the same standard of proof.

3.4.2 The ability-incentive-effects framework remains appropriate

The assessment framework set out in the NHMG is grounded in the idea of foreclosure. It identifies three cumulative conditions to evaluate if non-horizontal mergers give rise to anti-competitive foreclosure:

- **The merged entity must have the ability to foreclose:** this can be an ability to (substantially) withhold access to inputs[115], or, in the case of customer foreclosure, to limit access to downstream markets. By way of example, the NHMG explain that an ability to foreclose access to inputs (respectively, markets) may exist if: (i) substantial market power exists; (ii) the input (or customer) is important; (iii) limited or no efficient alternative input suppliers (or routes to market) are available; (iv) rivals have no effective counterstrategies at their disposal.[116]
- **The merged entity must have the incentive to foreclose:** the strategy must be profitable. This evaluation must take all relevant gains and losses into account, including both short-term and longer-term effects.
- **A foreclosure strategy must have a significant adverse effect on competition:** consumers must be overall worse off. This must be evaluated by considering the likely market outcomes, e.g., including reactions from rivals and – as an integral part of the effects assessment – taking account of efficiencies and other output (or innovation) expanding synergies arising from integration.

In our view, and as we explain in what follows, this framework remains appropriate, and a major overhaul is not justified. Our view is based on two key observations:

- The existing framework serves a useful purpose in terms of structuring the practical assessment of non-horizontal transactions that may be capable of lessening competition (although the framework would benefit from a relatively minor clarification emphasising the importance of assessing anti-competitive foreclosure); and
- The framework is sufficiently flexible to accommodate a range of ToHs, and so does not prevent intervention against potentially anti-competitive transactions.

110. See the Commission's Press Release "Mergers: Commission Prohibits Acquisition of GRAIL by Illumina", 6 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

111. See Section 2.1 for a more detailed discussion of gains from increasing scope.

112. The incentive to raise rivals' cost increases with the willingness of customers to switch. Consider input foreclosure; if customers do not switch, then RRC would lower sales in the upstream market with no corresponding downstream sales growth. The same logic applies to EDM. If customers do not switch, then there is no volume expansion from moderating the merged entity's downstream price, and therefore no gain from EDM.

113. See Case M.9569 – *EssilorLuxottica/GrandVision*, Commission Decision of 23 March 2021, Section 8.2.2 and Annex 1. For a further discussion, see RBB Brief 66, "Seeing Vertical Mergers Through a Different Lens? Implications from EssilorLuxottica/GrandVision", November 2022, available at: https://www.rbbecon.com/publication/article/seeing-vertical-mergers-through-a-different-lens-implications-from-essilorluxotti/.

114. For a discussion, see Zenger, H. (2020), "Analysing Vertical Mergers", available at https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/4-Analyzing-Vertical-Mergers-By-Hans-Zenger.pdf.

115. See the NHMG, para. 32.

116. *Ibid.*, paras. 33-39 (for input foreclosure) and 60-67 (for customer foreclosure).

3.4.2.1 The existing framework provides a robust structure for the competitive assessment

Our first observation is that the ability-incentive-effects framework is a useful structure for the assessment of non-horizontal transactions. While there is some overlap between the three limbs, the framework imposes useful discipline on the competitive assessment and evidence gathering by separately identifying the elements necessary for a transaction to give rise to an SIEC.

If a transaction is not likely to give a merged entity an ability to pursue a strategy that might lessen competition, or the incentive to do so, then it follows that competition concerns can already be ruled out. For example, if the merged entity has no material degree of market power, e.g., because the merging parties each face vigorous rivalry in their respective markets, then no ability to foreclose exists, and no concern arises.

It is only if the ability and incentive conditions are met that the NHMG then moves on to an assessment of effects. In that sense, the ability and incentive steps can be thought of as useful screens. Under an effects-based approach, the key part of the assessment should examine the overall likely impact of the merged entity's behaviour on effective competition. This (when properly applied) is the role of the third limb of the framework: effect. It highlights the distinction between transactions that will potentially produce harm to rivals (including by increasing the competitive pressure they will face) from those that may bring about harm to *competition and consumers*.

The NHMG make clear this important distinction. Foreclosure as applied in the first two limbs of the ability-incentive-effects framework refers to "*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*".[117] By contrast, anti-competitive foreclosure arises only when such foreclosure results in worse terms for consumers, for instance through increases in price.[118]

The concept of *anti-competitive* foreclosure is critical, and the Revised Guidelines should maintain this. It allows the Commission to distinguish transactions that may make life harder for some rivals (a central and beneficial element of the competitive process) from transactions that may impair effective competition. The NHMG explicitly, and correctly, recognise this, stating 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*".[119] Put differently, a transaction that creates an ability and an incentive for a merged firm to pursue a particular form of conduct cannot give rise to an SIEC if the evidence shows that this conduct will not have an impact on effective competition.

Within this context, we consider that the framework would benefit from a relatively minor clarification that further emphasises the importance of assessing anti-competitive foreclosure.

Our experience is that the ability and incentive limbs are not always applied consistently. Sometimes, these limbs are applied *narrowly* ("is there an ability or incentive to weaken a certain rival's ability to compete?") as opposed to *broadly* ("is there an ability or incentive to pursue a strategy that has the potential to give rise to anti-competitive foreclosure?").

This in part arises from the way the Current Guidelines are drafted. Taking input foreclosure as an example, does "ability" relate to the ability to withhold access to inputs[120] (a narrow view) or to the ability to *pursue a potential anti-competitive input foreclosure* strategy (a broad view)? Indeed, in certain cases, for the exact same leveraging product, the Commission has reached different conclusions on the meaning of ability, depending on the particular foreclosure strategies that were being investigated.[121]

Under the narrow view, there may be many scenarios where: (i) the merged entity could have an ability and incentive to limit inputs supplied (or market access) to *certain rivals to some degree*; but (ii) the merged entity would nonetheless not have an ability or incentive to bring about *anti-competitive* foreclosure leading to an SIEC. As such, under the narrow view, the critical step is the *effects* stage, where it is essential to distinguish between foreclosure (harm to rivals) and anti-competitive foreclosure (harm to competition and consumers).

One clarification that the Commission could consider making in the Revised Guidelines would be to confirm whether what is relevant for the ability and incentive assessment is the narrow view or the broader one. Under the broader view, the key questions for this assessment are whether *there is either the ability or incentive to pursue an anti-competitive input foreclosure strategy*. If a narrow approach is adopted, it will be all the more important for the Revised Guidelines to emphasise the role of the effects limb in distinguishing between harm to competitors as opposed to harm to competition and consumers. Otherwise, we believe that the vital distinction between "foreclosure" and "anti-competitive foreclosure" risks becoming blurred in practice.

117. *Ibid.*, para. 18. It is worth noting that impact on the ability of the affected firm(s) to compete is built into this definition of foreclosure.

118. *Ibid.*

119. *Ibid.*, para. 16.

120. *Ibid.*, para. 32.

121. See, for example, Case M.9569 – *EssilorLuxottica/GrandVision*, Commission Decision of 23 March 2021, para. 388.

3.4.2.2 The framework is sufficiently flexible to accommodate a range of theories of harm

Our second, and related, observation is that the ability-incentive-effects framework is sufficient to accommodate the range of circumstances in which anti-competitive non-horizontal transactions might arise. The Consultation has asked whether there could exist "non-traditional" ToHs that might fall outside the existing definition of foreclosure and the ability-incentive-effects framework for the assessment. This raises the question of whether maintaining the existing framework might prevent the Commission from intervening against anti-competitive non-horizontal transactions. In other words, is there an enforcement gap?

We argue that there is no substantive enforcement gap within the existing ability-incentive-effects framework in respect of addressing *exclusionary behaviour* that may arise following a non-horizontal merger. While we have no objection to the Revised Guidelines being updated to reflect more modern day examples of exclusionary behaviour in theory and practice, our view is that whether the concern is RRC, "reducing rivals' benefits" ("RRB"), denying scale economies or network effects to rivals, or some other form of alleged exclusionary behaviour, these are all forms of foreclosure that fall squarely within the current analytical framework:

- **Ability:** where each of the merging firms has no material degree of market power, a non-horizonal merger is not likely to cause harm (there is no ability to harm competition[122]). This is a fundamental point that differentiates non-horizontal mergers from horizontal mergers (since, in the latter case, two firms without market power can merge to create market power).
- **Incentive:** it may be that one (or each) of the merging parties has the ability to act in a way that benefits the other merging party. It may also be that so doing would potentially harm rivals of the merging parties (e.g., via RRC, RRB, etc.). However, if the merged entity has no reason to engage in the conduct that is the subject of the ToH, then there is no reason to intervene – the merged firm has no incentive to harm competition. For example, a merged entity may have the ability to refuse to interoperate with its rivals but have no incentive to act that way because it would be a departure from its current business model that would harm its profits.
- **Effects:** whatever the ToH under investigation, the critical question is whether the post-merger conduct in question is likely to harm competition and consumers (that is, whether there are any adverse effects on competition). If not, then it follows that there is no scope for an SIEC requiring regulatory intervention.

As such, if the ability, incentive and effect criteria are found to be met, on the basis of robust and reliable evidence, a transaction can be concluded liable to impair competition. Conversely, if the evidence indicates any of these three conditions is absent, a non-horizontal transaction cannot be considered likely to impair effective competition.

Likewise, consider the "new" non-horizontal ToHs that have been put forward, including the "non-traditional" ToHs referred to in the Consultation, namely "*increased barriers to entry or elimination of potential competition linked to digital ecosystems, data accumulation, interoperability degradation, targeted foreclosure*".[123]

In our view, where these mergers involve genuinely non-horizontal aspects, the ability-incentive-effects framework underpinning the NHMG is capable of addressing these broader concerns. This can be seen when analysing the examples cited in the Consultation.

First, elimination of potential competition is horizontal in nature and is covered in the Current Guidelines.[124] There does not seem to be a need for a significant update regarding this ToH.

Second, in relation to raising barriers to entry (i.e., exclusionary behaviour):

- Data accumulation (if by this the Consultation means reducing rivals' access to useful data) and interoperability degradation, in our view, fall directly in the foreclosure framework if they are important for rivals to provide their own services. Furthermore, we note that the Commission analysed input foreclosure related to interoperability in its analysis of *Telia/Bonnier* and *Microsoft/Activision*.[125]
- Targeted foreclosure is (by definition) a type of foreclosure that falls within the definition in the NHMG. The Commission analysed targeted foreclosure in *Telia/Bonnier*.[126]
- Digital ecosystems and related ToHs should be assessed using the ability-incentive-effects framework (as explained below using *Booking/eTraveli* as an illustration). Importantly, applying this framework to ecosystem cases would not prevent the Commission from identifying transactions giving rise to competitive harm by RRC, RRB, or otherwise diverting sufficient sales to the merged entity at the expense of rivals. The key point is that the Commission must engage in a proper assessment of not only: (i) the merged entity's ability and incentive to gain sales from rivals; but also (ii) a thorough fact-based assessment of how doing so would impact competition (whether positively or negatively). This would prevent over intervention that prohibits transactions that are pro-competitive or would not have sufficient impact on the market to impair competition.

122. We acknowledge that market power is a matter of degree and that, as the degree of market power increases for one or both of the merging parties, there is greater scope for harm. However, if neither party has a material degree of market power, exclusionary effects are most unlikely to arise from an NHM.

123. See the Consultation, General Questionnaire, Question 7.3.

124. See the HMG, paras. 58-60.

125. See Case M.10646 – *Microsoft/Activision Blizzard*, Commission Decision of 15 May 2023, Section 7.4 and Case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, Commission Decision of 12 November 2019, Section 8.5.

126. See Case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, Commission Decision of 12 November 2019, Section 8.5.1.4, inter alia.

Third, we note that, as a safeguard, the NHMG also acknowledge, at least in abstract terms, the potential role of "*other exclusionary practices*".[127] The Revised Guidelines should maintain this.

In summary, the ability-incentive-effects framework as applied to non-horizontal mergers remains fit for the purpose of assessing exclusionary practices. To the extent that the Commission were to consider that there are non-horizontal ToHs that could not be addressed by this framework, it should clearly set out the difference and the consequent enforcement gap. Specifically, it should identify such ToHs explicitly and to establish robustly: (i) that they are coherent competition concerns that are truly non-horizontal; (ii) why the current analytical framework cannot address the concerns; and (iii) how the impact on competition of these types of mergers should be assessed, carefully distinguishing between harm to competitors versus substantial harm to competition and consumers (and hence an SIEC).

3.4.3 Theories of harm where additional clarification would be useful

While the ability-incentive-effects framework remains fit for purpose, there is nonetheless scope for the Revised Guidelines to make additional clarifications (within this framework) in respect of certain ToHs, including those not covered (or covered only lightly) in the NHMG. Specifically, we consider that more guidance could usefully be provided on the Commission's approach to:

- Partial input foreclosure and partial degradations of interoperability;
- Mixed bundling with complementary products; and
- Defining and assessing ecosystems.

3.4.3.1 Partial input foreclosure and partial degradations of interoperability

Much of the analytical framework is the same when assessing total foreclosure and partial foreclosure (because the former is, as explained below, a special case of the latter). Nonetheless, a distinction between the two types of foreclosure is increasingly made in the Commission's assessments of non-horizontal mergers. Examples include *Telia/Bonnier, EssilorLuxottica/GrandVision*, and *Microsoft/Activision*.[128] A similar issue arises in relation to ToHs relating to reduced interoperability (e.g., where the "input" can be thought of as an interoperable product or service), such as in *Synopsys/Ansys*.[129]

Total input foreclosure amounts to refusal to supply (or refusal to interoperate). In contrast, partial input foreclosure would amount to continuing to supply rivals but on worse terms than before (or by continuing to interoperate with rivals but to a lesser degree or more slowly). The "partial" nature of the ToH can mean it is harder to assess because there are a broad range of potential foreclosure scenarios ranging from "nearly total" (so very close to "total foreclosure") to "hardly at all".

Where rivals have effective alternative sources of supply, the degree of partial foreclosure is irrelevant (there is no ability to foreclose). However, where an ability to foreclose may exist, the Commission should explain how it will assess the likely degree of partial foreclosure.

For example, if the allegation is the degradation of interoperability, it should be incumbent on the Commission to substantiate: (i) why an incentive to degrade interoperability may be caused by the merger; (ii) how the alleged degradation would arise in practice; (iii) the degree of interoperability likely to be lost and how this would impact the ability of any affected rival to compete; and (iv) whether customers and consumers are ultimately worse off.

For cases involving price-based partial foreclosure, the Commission should consider offering guidance on the weight it will apply to price pressure tests (such as vGUPPI). In our view, such tests are (at best) just one potential (and static) indicator. It is well-known that they do not account for reactions by rivals and customers, i.e., dynamic features that must be taken into account (see Section 3.2 above). They are also a highly stylised representation of the underlying economic realities, which they may fail to take properly into account.[130] Moreover, to place material weight on such tests, the Commission should demonstrate that the tests are able to explain pre-merger outcomes satisfactorily. In our view, where data to conduct this check are not available, less weight can be placed on price pressure tests.

The Revised Guidelines could also offer guidance on other approaches that may be used to assess partial foreclosure in certain circumstances, such as Nash bargaining models.[131] In this regard, we consider that economic models of bargaining may provide a useful framework for understanding outcomes of negotiations, and how a merger may change them, at a conceptual level. However, before placing material weight on the predictions of bargaining models, it is important to ground the parameters in robust evidence, show that the models are able to explain pre-merger outcomes (as

127. See the NHMG, para. 93.

128. See Case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, Commission Decision of 12 November 2019, para. 486, Case M.9569 – *EssilorLuxottica/GrandVision*, Commission Decision of 23 March 2021, para. 230 and Case M.10646 – *Microsoft/Activision Blizzard*, Commission Decision of 15 May 2023, para. 268.

129. See Case M.11481 – *Synopsys/Ansys*, Commission Decision of 10 January 2025.

130. For a further discussion of these points, please see RBB Brief 66, "Seeing Vertical Mergers Through a Different Lens? Implications from EssilorLuxottica/GrandVision", November 2022, available at: https://www.rbbecon.com/publication/article/seeing-vertical-mergers-through-a-different-lens-implications-from-essilorluxotti/.

131. A Nash bargaining model can be used to assess how a vertical merger affects the balance of power between buyers and sellers in markets where prices are set on the basis of bilateral negotiations. This model was applied, for example, in Case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, Commission Decision of 12 November 2019.

with price pressure tests), and recognise that these models do not reflect important dynamic reactions or efficiencies which may be critical to understanding competitive effects of the merger.

Further, the Commission should not focus only on the alleged harmful effects. For example, if the outcome of a merger between Firms A and B is that Firm A prioritises developing complementary products for Firm B, such that third-party Firm C becomes (in relative terms) a lower priority (a form of RRC or RRB), this does not mean that final consumers would necessarily suffer. They may receive a better A+B combination than would be available pre-merger. In this case, the potential harm to Firm C is a side-effect of a merger synergy that benefits Firm B and consumers, and is an example where the harm and the benefit are two sides of the same coin.[132] It would be inappropriate to focus only on the former potential harm and ignore the latter scope for consumer gain (or to subject the latter to a higher standard of proof than the former).

3.4.3.2 Mixed bundling with complementary products

As regards conglomerate mergers, the focus of the NHMG is on leveraging of a strong market position from one market to another by means of tying or bundling.[133] Mixed bundling and similar conglomerate ToHs receive less attention. There is scope, therefore, for the Revised Guidelines to expand on how such ToHs will be assessed.

While there is no scope here to review the developments in the literature on bundling that have emerged since the NHMG were drafted, we instead emphasise the following simple point. Suppose that one merging party offers customers product A, and the other merging party offers the same customers a *complementary* product B. Suppose also that there is standalone demand for each product. In this case, the merged entity may offer a mixed bundle (i.e., A and B sold together at a discount to the sum of their "standalone" prices). This scenario may give rise to a concern that even if the A-B bundle is sold at a lower price than the sum of the pre-merger prices (i.e., EDM), one or both of the standalone prices could be higher than the pre-merger prices (i.e., potentially RRC).[134]

In our view, this raises some important conceptual issues that the Revised Guidelines could usefully confirm within the ability-incentive-effects framework.

First, if neither merging party had market power in the A or B market, then there can be no concern about higher standalone prices. There is no ability to harm competition (as before, this element of the ability step is an important one).

Second, if one or both of the merging parties did have some market power (such that a higher standalone price of either A or B would be possible post-merger), it is critical to note that any incentive to charge higher prices could not be detached from the incentive to set a *lower* bundle price. These issues would need to be weighed in the round when coming to an overall assessment of effects. Specifically, it would be inappropriate to focus only on the potential harmful effects because the lower price of the A-B bundle would be a pro-competitive feature that may give rise to lower prices overall (depending, *inter alia*, on the size of the demand for the A-B bundle versus A alone or B alone). This once again highlights the importance of weighing up beneficial and harmful effects *at the same time* in the case of non-horizontal mergers.

3.4.3.3 The need to anchor ecosystem theories of harm in the ability-incentive-effects framework

Turning to ecosystems,[135] in our view the Revised Guidelines should make important clarifications to rectify what we consider to be its current misconceived approach to:

- The definition of an ecosystem; and
- The assessment of ecosystem ToHs (as in the recent *Booking/eTraveli* case).[136]

First, the Commission's *Booking/eTraveli* prohibition defined the "*ecosystem*" in question as referring "*to Booking's wide range offer of services that cover multiple facets of the travel experience*".[137] However, starting from this definition it is not clear how an "ecosystem" differs from a standard conglomerate merger framework; the *Booking/eTraveli* case simply refers to a merger between companies that serve common customers with non-substitutable products, which is firmly within the definition of a conglomerate merger.[138]

A more useful definition of an ecosystem for the purposes of competition analysis may be a set of complementary products for which compatibility and technical interoperability is an important feature that increases that complementarity.[139] The presence of

132. See Section 3.4.1.2 above.

133. See the NHMG, para. 93.

134. See Choi, J. P. (2008), "Mergers with Bundling in Complementary Markets", *The Journal of Industrial Economics*, Vol. 56(3), pages 553-577. See also Case M.8306 – *Qualcomm/NXP Semiconductors*, Commission Decision of 18 January 2018.

135. On these, see also Section 4.1.2 below.

136. We have previously criticised the Commission's ecosystem harm analysis in *Booking/eTraveli* for failing to take account of the impact of the effect of the transaction on market structure and competition. See RBB Brief 68 "Flight of Fantasy? The European Commission's Booking/eTraveli Prohibition", September 2024, available at: https://www.rbbecon.com/publication/article/brief-68-the-ec-booking-eTraveli-prohibition/.

137. See Case M.10615 – *Booking Holdings/eTraveli Group*, Commission Decision of 25 September 2023, footnote 229.

138. See, for instance, the description of conglomerate mergers at para. 91 of the NHMG.

139. See, for instance, OECD (2021), "Executive Summary of the Hearing on Competition Economics of Digital Ecosystems", available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/10/competition-economics-of-digital-ecosystems_a605bce7/5145fce1-en.pdf.

such interoperability considerations may increase switching costs for customers, such that users may in practice need to choose a set of products rather than mixing and matching multiple standalone products.

Second, turning to the ToH itself, the Commission was concerned that a merger of firms producing non-competing goods or services, would (i) result in their products being sold jointly as a bundle, or part of an ecosystem, and thereby (ii) increase barriers to entry or degrade interoperability with other competitors, which may harm competition.[140, 141]

Specifically, the concern was that the merged entity might offer a product (the possibility of consumers purchasing hotel OTA from the same provider that they used to purchase flights) that would be sufficiently attractive to consumers to increase the merged entity's sales of accommodation. This would then increase barriers to entry and expansion in hotel OTA, exacerbated by the presence of network effects, and thereby "*hamper rival hotel OTAs' ability to compete on the merits*".[142] Despite the reference to raising entry barriers and degrading interoperability, the Commission evaluated the *Booking/eTraveli* ecosystem ToH outside of the foreclosure framework of the NHMG.[143]

We acknowledge the possibility of such theories of harm but we consider that they could (and should) be assessed under the ability-incentive-effects framework. For example, we note that, in principle, a conglomerate firm might be able to offer a multi-product package that reduced demand for single-product rivals, and that this reduced demand could impair those rivals' ability to compete (particularly if exacerbated by network effects). However, this concern would simply reflect one of denying scale economies to rivals, as single-product rivals would be denied the opportunity to compete for certain customers, to the detriment of those rivals and potentially also to customers.[144]

This type of concern can readily be assessed within the ability-incentive-effects framework. For example, in *Booking/eTraveli*, the evidence indicated that very few customers would choose to change their hotel OTA purchase choice as a result of Booking offering a flight and hotel ecosystem. Further, the lack of technical interoperability or compatibility between the products in question, and the mix-and-match behaviour of consumers indicated that the merged entity would not have the ability to foreclose rivals. Moreover, the evidence indicated that any effect on competition would likely be *de minimis* given the limited scope for Booking to grow its OTA accommodation share as a result of the transaction. As such, no concern would arise.

This highlights the risk of over intervention, which is particularly relevant in ecosystem conglomerate transactions given the pro-competitive potential of non-horizontal mergers involving complementary products. Specifically, insofar as a transaction drives additional sales by offering better product integration and interoperability, the choice of customers driving that diversion should be recognised as a pro-competitive benefit to be protected, not prosecuted.

3.4.4. Conclusion

Our key conclusions regarding non-horizontal mergers are as follows:

- Non-horizontal mergers should be assessed using a framework distinct from horizontal mergers, given their different economic characteristics. The existing ability-incentive-effects framework remains robust and is sufficiently flexible to accommodate a broad range of ToHs based on exclusionary behaviour. The Revised Guidelines should retain this framework.
- Nonetheless, within the ability-incentive-effects framework, there is scope for the Revised Guidelines to clarify the approach to certain ToHs, including: (i) partial foreclosure and partial degradations of interoperability; (ii) mixed bundling with complementary products; and (iii) defining and assessing ecosystems.
- Critically, the Revised Guidelines should emphasise that non-horizontal mergers can provide an intrinsic source of efficiencies. These should be assessed as part of the "effects" limb, not under a separate efficiency defence.

3.5 Theories of harm on coordinated effects

This section contains our views regarding the Consultation questions on coordinated effects.[145] We consider that:

- The *Airtours* conditions should be retained as framework for the competitive effects assessment (Section 3.5.1);
- The Commission should clarify the intervention threshold for when coordinated effects are material (Section 3.5.2); and
- The Commission should not rely on structural parameters to infer coordinated effects but particularise and substantiate the theory of coordination and how it is caused by the merger (Section 3.5.3).

140. Boyce, A. & Hirst, N. (2022), "Big Tech's Clout Should Prompt Rethink of EU Case Law on Conglomerate Mergers, says Loriot", *MLex*, available at: https://www.mlex.com/mlex/articles/2234967?scroll=1&related=1.

141. Menon, J. (2024), "Ecosystems are a 'Market Reality' for Merger Oversight, EU's Loriot says", *MLex*, available at: https://www.mlex.com/mlex/articles/2175174/ecosystems-are-a-market-reality-for-merger-oversight-eu-s-loriot-says.

142. See Case M.10615 – *Booking Holdings/eTraveli Group*, Commission Decision of 25 September 2023, para. 741.

143. *Ibid.*, paras. 188 et seq.

144. See further the discussion in Section 4.1.2 below.

145. See the Consultation, Topic B, Questions B.8-B.12.

3.5.1 The *Airtours* conditions should be retained as framework for the competitive effects assessment

The discussion of coordinated effects in the HMG is based on the *Airtours* framework.[146] This is the correct starting point to assess coordinated effects, grounded in well-established economic theory.[147] The key insight underlying the framework is that, when a group of firms agree to raise price to the level that maximises their joint profits, each firm still has an incentive to deviate from this agreement and ultimately sets its price at the competitive level.[148] To overcome this situation, firms must follow a strategy whereby they would punish firms that do not adhere to the (implicit) coordinated strategy.

There are three key conditions for coordination to be successful:

- Members must be able to reach and monitor the terms of coordination;
- Coordination needs to be internally sustainable among the coordinating group, and in particular there must be adequate deterrents to ensure there is no incentive to deviate from the agreement, and
- Coordination needs to be externally sustainable, in that there is little likelihood of coordination being undermined by competition from outside the coordinating group or customers.

The Revised Guidelines should retain the *Airtours* framework and continue to focus the discussion of coordinated effects on this.

3.5.2 The Commission should clarify the intervention threshold for when coordinated effects are material

The key question in merger control is whether coordinated behaviour becomes more likely, more stable or more significant through a merger. While the HMG spell out factors that may influence whether or not the four *Airtours* conditions are met, the HMG provide very limited guidance on: (i) when and how a merger would make it (materially) more likely that the conditions are met; (ii) how the Commission will consider the harm that would arise if the conditions for coordination were met; and (iii) what evidence the Commission would rely on to evaluate these questions. These are important points as the following examples explain:

- Consider a merger that makes coordinated behaviour more likely but still *unlikely* (for example, the probability of coordination may increase from 5% to 15%). We submit that because coordinated effects remain unlikely, the increase in the likelihood of coordination should not be deemed sufficient for intervention.
- Consider a merger that makes coordinated behaviour more likely but, if coordination were to arise, the effects would not likely be material. For example, suppose that coordination (if effective) would be unlikely to cause prices to increase by more than 5%. Further, suppose that a merger increases the probability of coordination by 10% (from 45% to 55%). The expected harm caused by the merger is no greater than 0.5% – is that an SIEC?

We acknowledge, of course, that it will be hard to estimate these probabilities and likely price increases precisely. However, the examples above demonstrate that loose statements along the lines of "*the probability of coordination will be increased by the merger*" are not sufficient, in our view at least, to demonstrate an SIEC.

The Consultation is therefore a welcome opportunity for the Commission to clarify its assessment of coordinated behaviour. Specifically, in determining whether the likelihood of coordinated behaviour is substantially greater post-merger (and whether any coordination, if it arose, would be likely to cause material harm), we consider that further guidance is required on the framework and (quantitative) evidence the Commission intends to use.

3.5.3 The Commission should not rely on structural parameters to infer coordinated effects

It is critical that any coordinated effects ToH sets out clearly how the coordination strategy that the Commission expects firms to adopt and why the merger makes it substantially more likely that the strategy will be adopted. This is important for the following reasons.

First, it is not possible to infer coordinated effects from structural market parameters alone. It is not unreasonable to claim that coordination is more likely to be found under certain conditions (e.g., where there is only a small number of broadly similar competitors or if there is no "maverick" likely to disrupt coordination). However, there is a fundamental difference between (i) identifying a market structure that may support coordination and (ii) demonstrating coordinated effects are likely. For example, even if a merger reduces the number of competitors (as would a horizontal merger), removes a maverick, and/or gives rise to a symmetric market structure, this is far from sufficient to demonstrate that coordinated effects are likely to arise from the transaction.

Second, by setting out the alleged form of coordination, this permits inculpatory and exculpatory evidence to be gathered and weighed. This is critical because coordinated behaviour can take different forms, *inter alia* price fixing, customer allocation, territorial market sharing, agreements not to compete on innovation and quality or other non-price parameters. Which form of coordination may be viable (if any) depends, however, on the specific competitive dynamics that prevail in the relevant market, and not only on the structure of the market.

146. Case T-342/99 - *Airtours v Commission*, Judgement of the Court of First Instance of 6 June 2002, para. 294. The four *Airtours* conditions are discussed in detail at paras. 44-57 of the HMG.

147. The economic literature starts with the seminal contribution by Stigler, G. (1964), "A Theory of Oligopoly", *The Journal of Political Economy*, Vol. 72(1), pages 44-61.

148. See the report prepared by RBB Economics for the Office of Fair Trading (OFT) (2011), "Conjectural Variations and Competition Policy: Theory and Empirical Techniques. A Report for the OFT by RBB Economics".

In turn, to guard against inferring coordinated effects from a simplistic assessment of market structure, we believe it is essential that a coordinated effects ToH does the following.

- **Specifies in an appropriate level of detail the coordination strategy the market participants may follow.**
  - The Revised Guidelines should indicate how the Commission will map features of the market and of competitive dynamics into specific candidate coordination strategies that may be viable in the market at hand.
  - For example, the Revised Guidelines could specify that the Commission will consider (implicit) price fixing strategies plausible only in markets where there is a sufficient degree of price transparency; and customer allocation strategies plausible only in markets where the evidence demonstrates the existence of an "obvious" allocation of customers to suppliers.
- **Presents robust empirical evidence that the proposed coordination strategy is likely not only to arise in the market at hand but also to cause material adverse effects on consumers.**
  - The Revised Guidelines should specify which sources of evidence the Commission will investigate to assess whether a candidate coordination strategy has scope to succeed in the market at hand, and how the Commission will assess whether coordinated effects are likely to cause a material degree of consumer harm.
  - For example, the Revised Guidelines could specify how it would investigate whether tacit coordination has been attempted in the past. *Inter alia*, it could be assessed if historic pricing is consistent with "punishment behaviour" that would be required to sustain coordination (i.e., situations where one market participant reacts to price cuts of a competitors with aggressive price cuts itself, in an attempt to "discipline" the competitor).
  - Further, the Revised Guidelines could identify factors which would be taken into account when assessing that coordination (if it arose) would be likely to have material effects (e.g., due to near market-wide coverage or the size of entry barriers to the market in question).
- **Spells out why the proposed coordination strategy may become viable or more effective through a concentration.**
  - The Revised Guidelines should explain how the Commission will assess, for each candidate coordination strategy, whether the concentration makes the coordination strategy more likely to be successful or more effective (and whether the change is sufficiently material in light of the significance criterion of the SIEC test).
  - For example, if the allegation is that the merger removes a maverick (i.e., a firm likely to disrupt coordination), the Revised Guidelines could specify: (i) the need for the Commission to provide convincing evidence why the acquired firm in question acted as a maverick pre-merger; and (ii) why the removal of that constraint on coordination would be sufficient to tip the balance in favour of coordinated effects.
  - Likewise, in the case of a market becoming more "symmetric", it should be incumbent upon the Commission to explain and substantiate: (i) why the asymmetric structure hindered coordination; and (ii) why the change in market structure would be likely to cause coordinated effects.

3.5.4 Conclusion

The Revised Guidelines should retain the *Airtours* criteria as the basis for the competitive assessment. They should also make clear that a coordinated effects ToH should: (i) provide a detailed specification of the alleged coordination strategy (including whether one has been attempted in the past) to permit evidence on each of the *Airtours* criteria to be gathered and weighed; (ii) substantiate how (and how likely it is that) the merger would make the coordination strategy more viable (or more stable); and (iii) assess whether (if coordination were successful) this would cause material harm to consumers.

4. Additional issues raised by the Consultation

Following our discussion of the role of a ToH in various settings, we turn in this section to a number of specific issues that the Consultation invites views on. In turn, we consider:

- Digitalisation (Section 4.1);
- Sustainability (Section 4.2);
- Media plurality (Section 4.3); and
- Labour markets (Section 4.4).

4.1 Digitalisation

Topic E of the Consultation discusses the trend of "digitalisation", rightly recognising that the digitalisation of the economy has the potential to reduce the productivity gap between the EU and the US.

The Consultation claims that a set of specific competitive features often arise in digital markets, which may reduce effective competition and hinder growth and innovation. These features include "*winner-takes-most*" and "*tipping*" dynamics, "*multi-sidedness of markets*" and "*network effects*", "*customer inertia*", and "*data-driven*" and "*privacy protection-driven*" competition.[149]

Key topics that the Commission seeks views on include the following:

- Whether the Revised Guidelines should explicitly recognise these specific features which the Commission considers to be associated with digitalisation;
- Whether the Revised Guidelines should reference any specific, non-traditional ToHs associated with these features – notably those not arising from foreclosure conduct by the merged entity – and how the current analytical framework should be adapted to assess these ToHs. In connection with this, the Commission also asks whether it remains appropriate to maintain distinct analytical frameworks for horizontal and non-horizontal mergers in the digital space;[150] and
- What would constitute an appropriate timeframe to assess the competitive impact of digital mergers, and whether there should be a distinction between markets before and after "tipping".[151]

The overarching issue is whether current merger policy has the tools to address the potential competitive concerns that mergers in the digital space may raise.

This section offers our views on each of these questions. Our position can be summarised as follows.

1. We agree with the Commission that the identified competitive features may be, in certain contexts, important considerations in the review of mergers, and may be particularly significant in certain digital contexts. However, we observe that these features (as well as most of the related theories of harm) are neither specific to digital markets nor uniformly present across all digital markets.
2. The existing analytical framework is fit for purpose to address the competitive concerns the Consultation associates with digital and tech mergers. The Revised Guidelines should centre on providing guidance on how to apply the existing analytical frameworks to digital contexts.
3. Blurring the analytical distinction between horizontal and non-horizontal transactions to address entrenchment-related theories of harm (thus treating these as "horizontal" rather than "non-horizontal" in the digital sphere only) would create a presumptively stricter enforcement regime for digital mergers, undervaluing their efficiency potential. Digital mergers can generate substantial efficiencies through the combination of complementary assets, innovation synergies, and enhanced user experience. Moreover, especially in the digital space, the prospect of acquisition can drive innovation, by providing incentives for entrepreneurship and venture capital investment.
4. We share the Commission's view that adopting a more forward-looking assessment can be appropriate in certain cases. However, given the inherent uncertainty in predicting future outcomes, especially in digital markets, particular care should be taken to avoid speculative assessments. The analysis should: (i) ensure a balanced treatment of inculpatory and exculpatory factors, with the same standard of proof applied to both types of evidence; and (ii) consider only the most likely counterfactuals (as opposed to low-probability, unsubstantiated scenarios).

149. See the Consultation, Topic E, paras. 81 and 85 and Question E.3.

150. See the Consultation, Topic E, Question E.5. See also the General Questionnaire, Question 2.1.7, which raises this issue more generally, as well as our discussion in Section 3.4.1 above.

151. See the Consultation, Topic E, Question E.14.

4.1.1 The competitive dynamics that the Commission associates with digitalisation are neither specific to nor present across all digital markets

As explained, according to the Consultation, a set of particular competitive features often arises in digital markets, which may reduce effective competition.

While such features may be particularly significant in certain digital contexts, they are not specific to digital markets. They are also present in non-digital settings. Indeed, non-digital markets can be multi-sided, leverage customer data, exhibit network effects, or display ecosystem dynamics (when a set of complementary products' interoperability increases the value of products' complementarity).[152] The Commission seems to acknowledge this when posing its Consultation questions,[153] and the Revised Guidelines should explicitly reflect this recognition.

We also note that the term "digital markets" encompasses a wide range of distinct businesses, at least as diverse as the term "industrial markets" does. Therefore, competitive dynamics can vary significantly from one digital market to another. Importantly, many of the features identified by the Commission apply in some but not all digital markets, and, where present, demonstrate varying degrees of significance. Moreover, platform and ecosystem dynamics are increasingly shaping traditional industries (for example, banking and automotive) and will likely extend to additional sectors in the coming years. Consequently, there are limitations to the utility of – and significant risks associated with – such a broad categorisation.[154]

The existence and strength of the competitive features noted by the Commission depends on many idiosyncratic factors, including, among others:

- The firms' business models (e.g., whether they offer paid-for or ad-funded products that do not require the payment of a monetary fee) and pricing structure (fixed-fee vs. transaction-fee);
- The nature of the customer base (businesses, consumers or both);
- Customer behaviour and preferences (e.g., whether users are able and willing to multi-home and switch across different platforms);
- The strength of competitive pressures from adjacent markets (e.g., offline alternatives).

In this context, determining the significance of the competitive features identified in the Consultation for assessing any particular merger in the digital space is case-specific. It requires rigorous economic analysis grounded in empirical evidence – as would be required in any non-digital market. Competition limiting features certainly should not be presumed simply because a market is digital, nor should the standard to prove the significance of these features differ between digital and non-digital markets. Equally, it cannot be presumed that a feature of competition that may apply in one digital market (e.g., data access as an important determinant of competitive outcomes) applies in another.

For example, an assessment of whether network effects are sufficiently strong to constitute a barrier to entry for new entrants, or a barrier to expansion for existing competitors in a given market, should evaluate:

- What type of network effects are present (whether direct or indirect, and whether they work in one direction only or both);
- To what extent negative network effects can trigger negative feedback loops (where customer losses on one side of a platform trigger customer losses on other sides) that constrain platforms' ability to raise prices or degrade quality;[155]
- Whether customers are able and willing to multi-home;
- Whether firms' products are compatible/interoperable with those of rivals;
- The extent to which players offer differentiated services;
- Whether different platforms can grow in parallel; and
- The extent to which network effects tail-off such that the minimum efficient scale is small relative to the size of the market.

An analysis of this type will shed light on, for example, whether the market is susceptible to tipping, or whether there exist relevant countervailing factors.

152. The VHS versus Betamax format competition – with VHS achieving market dominance despite Betamax's technical superiority, leading to Betamax's eventual market exit – is a classic example of winner-takes-most and tipping dynamics in physical markets. Credit card networks such as Visa and MasterCard operate as multi-sided platforms with indirect network effects, where merchant acceptance and consumer adoption mutually reinforce each other. Stock exchanges can also exhibit tipping tendencies, as traders generally prefer exchanges with higher trading volumes, which tends to attract additional trading activity. The automotive industry provides examples of physical ecosystems where OEM's aftermarket parts and services create value through their combination. The Commission has recognised these parallels in its revised Notice on Market Definition, noting similarities between digital ecosystems, on the one side, and aftermarkets and bundle markets, on the other side. See, for example, the Commission's "Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law", 22 February 2024, Section 4.5.

153. The Commission recognises that the questions posed "*do not relate to mergers in the digital and tech industries only. Many of the dynamics and concepts on which we seek your feedback below are relevant across industries*". See the Consultation, Topic E, page 45.

154. By way of example, consider two hypothetical digital Markets, A and B, that exhibit market-level network effects. Consider that in Market A customers do not frequently multi-home across suppliers whereas in Market B they do. Also consider a third hypothetical non-digital Market, C, that also benefits from network effects and in which customers also multi-home across suppliers. In all cases, network effects are a relevant feature in the market to the Commission's assessment, but all else equal Market A, in which customers single-home, is more likely to exhibit the type of network effects that can lead markets to tip (if other conditions are conducive), whereas the prevalent multi-homing in Markets B and C will mitigate the impact of network effects as a source of potential tipping. It would be a distorted merger policy that assessed transactions in the (digital) Market B and the (non-digital) Market C to different standards based purely on a perception that some features may occur more frequently in digital markets.

155. See Evans, D. (2017), "Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights, but not Sleepy Monopolies", *SSRN*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

In conclusion, whilst we agree with the Commission that features such as network effects, data advantages, or ecosystem dynamics may reduce effective competition in certain contexts, and may be important considerations in the review of mergers, we observe that these features are neither exclusive to digital markets nor uniformly present across all digital markets.

Therefore, the weight given to these features must be grounded in empirical evidence rather than presumptions. We recommend that the Revised Guidelines explicitly recognise that: (i) the identified competitive features are not exclusive to digital markets; (ii) substantial heterogeneity exists within digital markets; and (iii) consistent evidentiary requirements should apply to digital and non-digital merger assessments.

4.1.2 Existing analytical frameworks can be applied to digital mergers

The Consultation seeks views on a number of ToHs that may arise from digital and tech mergers. Broadly, the Consultation distinguishes between: (i) "horizontal" effects stemming from non-horizontal mergers, including market power entrenchment and potential competition concerns; (ii) privacy and data protection concerns; and (iii) foreclosure effects involving non-price competition parameters, including access restrictions and degradation of interoperability, and targeted foreclosure.[156]

In our view, and based on our experience, the HMG and the NHMG already provide appropriate frameworks to address the ToHs identified in the Consultation in digital contexts. We explain this below.

Market power entrenchment

According to the Consultation, market power entrenchment ToHs refer to situations where a merger, although not involving direct competitors, could strengthen the acquirer's market power through aggregation of complementary assets (such as data) or customer bases across related businesses. The Consultation suggests that this concern can be particularly relevant when digital platforms, as a result of the merger, may entrench a pre-existing market dominance or deter entry by broadening their ecosystem of interrelated products.

The concern that, by acquiring a complementary business, a leading company may consolidate its market power is already addressed within the existing NHMG framework. The NHMG recognise that a conglomerate merger enabling a firm to expand its portfolio of products may disadvantage single-product rivals and reduce competition by means of tying or bundling. Crucially, this potential source of competitive harm must be balanced against competition-enhancing efficiencies, which can be substantial in conglomerate mergers – and should be, therefore, at the forefront of the Commission's assessment of these transactions.

As explained in Section 3.4.3.3, to the extent that the merger is genuinely non-horizontal in nature, ecosystem theories of harm in digital mergers are not fundamentally different from traditional portfolio effects theories of harm in conglomerate mergers. Even though digital ecosystems tend to be more complex, a concern that a merger may, through exclusionary behaviour (as opposed to acquiring a potential competitor, which we discuss below), eliminate a competitive threat within the same technological or user space is underpinned by the same fundamental mechanisms as foreclosure practices targeting rivals in the non-digital space. These concerns are expressly addressed within the NHMG. Therefore, we disagree with treating market power entrenchment concerns as horizontal effects not based on a foreclosure conduct. On the contrary, we consider these concerns to fall squarely within the category of foreclosure.

Accordingly, while we would welcome the Revised Guidelines providing specific guidance on how foreclosure may materialise in digital contexts (i.e., how foreclosure mechanisms in digital contexts may differ from conventional portfolio effects), no sound economic justification exists for introducing novel "digital ecosystem" theories of harm. Such an approach would artificially distinguish between mergers in digital and non-digital settings and establish presumptively stricter enforcement standards for digital transactions, potentially overlooking the efficiency benefits that the combination of complementary assets frequently generate (in digital markets as elsewhere).

Equally important, as outlined in Section 3.4.1, no compelling reason exists to abandon the established analytical framework that distinguishes between horizontal and non-horizontal mergers when assessing entrenchment-related concerns in digital markets. Indeed, the fact that a non-horizontal merger may consolidate the acquirer's market power in its relevant market does not convert the merger into a "horizontal" transaction, as the mechanism underlying the potential competitive harm of the transaction, as well as its efficiency potential, remains the integration of complementary businesses across different relevant markets. Blurring the distinction between horizontal and non-horizontal mergers would result in a presumptively stricter enforcement regime for non-horizontal digital transactions, which would ultimately harm innovation and reduce dynamic efficiency.

Mergers between digital firms with complementary offerings can generate substantial efficiencies. In particular, they can: (i) bring the target's services (or features) to a significantly wider user base; (ii) produce innovation spillovers across ecosystem components;[157] and (iii) enhance user experience through one-stop shopping and improved interoperability. This is acknowledged in the EU Special Advisors' report, which notes that "in many cases" acquisitions in digital markets will be "pro-competitive", and that:

156. See Consultation, Topic E, Question E.2.

157. As a broad generalisation, digital markets have a greater tendency than non-digital markets to be dynamic and fast-moving, with innovation being an important parameter of competition. Therefore, innovation efficiencies are arguably more likely to arise in digital mergers. For example, a digital merger can bring together a party with access to specific data which could potentially be used to develop new products and services and a party with the expertise or resources to do so.

"[i]n the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them".[158]

Moreover, especially in the digital space, the prospect of acquisition can drive innovation by providing incentives for entrepreneurship and venture capital investment.[159]

Potential competition

It is sometimes argued that, in digital markets, today's complement will become tomorrow's substitute. Accordingly, the concern is that a target firm currently offering complementary products represents a potential competitive threat with a realistic prospect of constraining the acquirer's competitive behaviour within its relevant market. While this adds a horizontal dimension to the analysis of a non-horizontal merger, the HMG already provides the analytical framework for assessing this concern. The HMG acknowledge that a merger may significantly impede effective competition in cases where:

- The target is likely to become an effective competitive force in a market served by the acquirer (e.g., the target has plans to enter the market or expand in a significant way);
- Threat of expansion/entry exerts (or can be expected to exert in the future) an important influence on the outcomes in that market; and
- Other potential competitors could not maintain sufficient competitive pressure after the merger.[160]

The concerns that a merger could eliminate potential competition has been effectively analysed in a number of Phase 2 transactions.[161] These precedents confirm that the Commission has the tools to intervene where it identifies a coherent ToH centring on a loss of potential competition.

Further, we emphasise that rigorous evidentiary thresholds must be met to substantiate potential competition concerns. As discussed in more detail in Section 3.2.3, the post-merger possibilities must be weighed consistently. If the prospect of the target developing into the acquirer's market is treated as inculpatory when this has low probability, then the same low standard should be used when assessing countervailing factors. Moreover, demonstrable short-term efficiencies from the combination of complementary assets should receive greater weight in the analysis than the possibility of lost competition in the medium- or long-term that inherently depends on uncertain market developments (i.e., complementors becoming competitors). Likewise, care should be taken to avoid speculative "efficiency offence" ToHs. That is, the Commission should not penalise firms for acquisitions that result in an improved offering to consumers, absent compelling evidence that so doing would give rise to medium- or long-term harm.

Relatedly, a balanced view should be adopted when evaluating the market power of established digital firms and the competitive constraints imposed by smaller actual or potential rivals. If a firm with market power is deemed to be constrained materially by small or potential entrants, it is incumbent on the Commission to substantiate why the acquisition of one such source of constraint would be an SIEC. This requires, *inter alia*, substantiating why the acquired potential entrant is an important constraint on the acquiring firm and, if so, why other small or potential entrants in a similar position to the acquired firm would not provide sufficient post-merger constraint (see Section 3.2.4).

Privacy and data protection concerns

The current HMG and NHMG frameworks can effectively evaluate welfare implications of mergers affecting data-related parameters of competition, including privacy, data security, and consumer control over personal information. For example, following the Commission's approach in *Microsoft/LinkedIn*, these parameters can be considered dimensions of overall product quality and, as such, factors influencing consumer choice.[162]

However, digital markets involve several non-price parameters that potentially influence consumer decisions (and thus are potentially relevant in merger assessment). These include various quality dimensions such as interface design and compatibility/interoperability. It can be practically difficult to identify which parameters materially affect consumer choice in the relevant market and to determine their relative importance. Further, the assessment of data-related considerations also requires accounting for possible positive welfare effects from data combination. Indeed, data combination may enable efficiencies such as more targeted products or advertising. Therefore, a case-specific analysis is warranted to determine whether use of combined data from the merged entity will enhance or reduce overall consumer welfare.

158. Crémer, J., de Montjoye, J.-A. & Schweitzer, H. (2019), "Competition Policy for the Digital Era", page 111, available at: https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en.

159. According to a survey conducted by Silicon Valley Bank, 58% of start-ups in the US and UK indicated in 2020 that acquisition represented the realistic long-term goal for their company. See Silicon Valley Bank (2020), "Global Startup Outlook 2020", available at: https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf, p. 7.

160. See the HMG, paras. 58-60.

161. See Case M.3440 – *ENI/EDP/GDP*, Commission Decision of 9 December 2004, Case M.3868 – *DONG/Elsam/Energi E2*, Commission Decision of 14 March 2006 and Case M.3796 – *Omya/Huber PCC*, Commission Decision of 19 July 2006.

162. Case M.8124 – *Microsoft/LinkedIn*, Commission Decision of 6 December 2016, footnote 330.

Foreclosure by other means

The likelihood that certain practices lead to foreclosure, such as data accumulation,[163] degradation of interoperability (conglomerate effects) and access restrictions (vertical effects),[164] as well as targeted foreclosure,[165] can be adequately assessed under the NHMG ability-incentive-effects framework. See the discussion in Section 3.4.2.

In conclusion, while we agree with the Commission that certain theories of harm may be particularly relevant in digital contexts, we note that fundamental modifications to the existing HMG and NHMG frameworks are unnecessary to address these competitive concerns. The Revised Guidelines should therefore centre on providing guidance on how to apply the existing analytical frameworks to digital contexts rather than relying on novel approaches that would risk creating unjustified enforcement disparities between digital and non-digital mergers which could reduce dynamic efficiency.

4.1.3 Evidentiary requirements to assess digital mergers

The Consultation asks under which conditions the identified ToHs could materialise and what evidence and metrics should be used when assessing these concerns.

Below, we provide an overview of the evidentiary requirements that, in our experience, the Commission should meet when evaluating the ToHs that the Consultation associates with digital and tech mergers, with particular focus on market power entrenchment and potential competition concerns.

Market power entrenchment

Conceptually, a leading digital platform/ecosystem expanding its offering may entrench its market power when rivals offering standalone products can no longer compete effectively and/or barriers to entry and expansion increase as a result of the merger. Against this background, consistent with the current ability-incentive-effects framework set out in the NHMG, substantiating entrenchment-related concerns requires clear evidence that:

- The acquirer possesses significant market power in its core market;
- Sufficient customer demand exists for the combined product offering;
- Rivals cannot replicate the merged entity's multi-product offering or deploy effective counterstrategies.

As discussed above, digital platforms and ecosystems can display complex features that differ from traditional conglomerate businesses. Accordingly, foreclosure mechanisms may operate differently from those traditionally considered in portfolio effects analysis. The Revised Guidelines would benefit from providing guidance on the plausible competitive mechanisms through which the integration of complementary assets in digital settings can significantly strengthen the acquirer's market power.

According to the Consultation, one mechanism through which a digital merger may give rise to entrenchment concerns is the strengthening of network effects resulting from the combination of user bases and/or data.

Where such theories of harm are put forward, they must be substantiated by compelling evidence on the actual significance of network effects in the affected market(s). Evidence and metrics relevant to assessing the strength of network effects may include customer switching costs, the extent of multi-homing, the degree of customer inertia, critical mass thresholds necessary for effective market entry or competitive integrated offerings, and the value and uniqueness of the data accumulated by the target firm. Where entrenchment concerns are specifically data-driven, the assessment should further examine whether data accumulation meaningfully reinforces network effects, by: (i) analysing the complementarity of the merging parties' data; (ii) determining whether additional data is subject to diminishing returns; and (iii) assessing the replicability of the insights derived from the merged entity data.

A potential source of additional complexity in the evaluation of entrenchment-related theories of harm lies in determining whether competition in the acquirer's market takes place within a well-defined product market or, instead, within a broader technological space or ecosystem. In the latter scenario, rivals' ability to counteract potential foreclosure will require evaluating whether alternative digital platforms or ecosystems of products and services, though not replicating in full the acquirer's offering, nevertheless exert a meaningful competitive constraint on the acquirer. Although defining relevant markets in the digital economy often presents practical challenges, in our experience, and as the revised EU Guidelines on Market Definition reflect,[166] it is generally possible to delineate relevant markets for most digital transactions, or at least to identify suitable reference markets for the purposes of competition assessment.

163. According to the Commission, a merged entity may raise barriers to entry and expansion through the accumulation or combination of data assets, even if the merger is non-horizontal in nature.

164. According to the Commission, the merged entity may foreclose rivals by degrading either the supply of assets (e.g., decreasing asset quality or delaying its supply) or the technical support necessary to ensure interoperability to the benefit of the merged entity's combined products offering.

165. According to the Commission, the merged entity may foreclose only a certain type of competitor, for instance the closest ones.

166. See the Commission's "Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law", 22 February 2024, Section 4.4 and 4.5.

Potential competition

Where concerns about the potential elimination of a future competitor are advanced, the assessment requires, at the very least, compelling evidence that:

- The target has plans to enter the acquirer's market;
- The target has realistic growth projections that could challenge the acquirer's market position; and
- The target's potential entry constrains (or would soon constrain) the acquirer's competitive conduct.

The above cannot rest on speculation or theoretical possibilities but must be grounded in objectively verifiable evidence. Relevant sources may include the merging parties' internal documents and business plans (e.g., strategy papers, board presentations), financial commitments already undertaken or planned (such as investments in physical or human capital), as well as financial forecasts and investor presentations demonstrating projected revenue and user growth trajectories.

4.1.4 Appropriate timeframe for merger assessment in digital markets

The Consultation raises the question of what timeframe the Commission should consider in assessing digital mergers, and whether different timeframes should be used depending on whether markets have already tipped toward a dominant player or not.[167] The Consultation also asks about the metrics and evidence that are appropriate to assess future market developments post-merger.[168]

As noted in Section 3.2.2, the underlying issue centres on striking the appropriate balance between overly short-term assessments (which may fail to capture situations where a target with a low market share could emerge as a significant competitive force) and excessively forward-looking assessments (which may be too speculative). The reference to tipping in the present context seems to suggest that the Commission may be considering favouring more forward-looking assessments in markets that have already tipped toward a dominant player.

As a preliminary note, we observe that the appropriate timeframe for the competitive assessment should not be determined based solely, or principally, on current market structure, regardless of whether the markets in question are digital or not. As the Commission has consistently recognised, a market where a single firm has a high share can be highly competitive if, for instance, barriers to entry and expansion are not significant. Thus, the likelihood of market tipping must be carefully evaluated based on evidence on the merging parties' business model (including the extent to which it interoperates with those of other firms), the nature of their customer base, the preferences and habits of their customers (including the extent to which they multi-home) and the specific sector in which the digital firms operate (including the strength of any network effects and the minimum efficient scale relative to market size).

Having said that, we share the Commission's view that adopting a more forward-looking assessment can meaningfully inform the competitive evaluation in certain contexts.[169] However, as discussed in Section 3.2.2, this flexibility should be balanced against the inherent uncertainty involved in predicting future competitive scenarios.

4.1.5 Conclusion

Our conclusions with respect to digital markets can be summarised as follows:

- Whilst certain theories of harm may be particularly important in digital markets, they are not unique to digital contexts. Existing analytical frameworks are fit for purpose and should apply equally in digital and non-digital markets.
- The Revised Guidelines should provide guidance on how to apply to the existing frameworks to digital settings, rather than introduce novel approaches (such as blurring the distinction between horizontal and non-horizontal transactions to address entrenchment-related theories of harm) that would risk creating unjustified enforcement disparities between digital and non-digital mergers.

4.2 Sustainability

The transition to an environmentally sustainable economy is amongst the key objectives of the current Commission.[170] In this context, Topic D of the Consultation seeks views on the assessment of mergers which may have positive or negative effects on the environment and, as such, affect the attainment of climate and sustainability objectives.

In what follows, we distinguish between sustainability impacts on direct consumers (Section 4.2.1) and environmental out-of-market efficiencies (Section 4.2.2). Section 4.2.3 discusses tools that can be used to empirically assess sustainability effects.

167. See the Consultation, Topic E, Question E.14.

168. *Ibid.*, Question E.15.

169. *Ibid.*, para. 80.

170. Under the European Green Deal, the Commission has, amongst others, agreed to reduce greenhouse emissions by at least 55% by 2030 (relative to 1990 levels), plant 3000 million new trees in the EU and achieve climate neutrality by 2050. Sustainability is also at the core of the EU Strategic Agenda and Commission priorities for 2024-2029 (https://european-union.europa.eu/priorities-and-actions/eu-priorities/european-union-priorities-2024-2029_en).

4.2.1 Sustainability effects of mergers on direct consumers

4.2.1.1 "Green" may be a parameter of competition

The current framework allows the Commission to assess the impact of mergers on sustainability in cases where direct consumers value sustainable products and/or production processes. In these cases, sustainability is a parameter of competition and sustainability attributes of a given product or service must be accounted for as part of the market definition exercise or as a relevant parameter of competition in the competitive assessment.

The current framework for merger control has allowed the Commission to consider sustainability in the past. For instance, the Commission's assessment has included a discussion of consumer preferences for more sustainable products in the following cases:

- As early as 2014, the Commission discussed the relevance of defining a distinct relevant market for more environmentally friendly bananas in *Chiquita Brands International/Fyffes* and coffee in *DEMB/Mondelez/Charger OpCo*.[171]
- The Commission took into account sustainability in its analysis of closeness-of-competition in *General Electric/Alstom* (2015) by assessing the emissions of the merging parties' gas turbines, and more recently in *Cargotec/Konecranes* (2022) by assessing whether the merging parties were the main developers of electric/hybrid vehicles and in *Norsk Hydro/Alumetal* (2023) by assessing whether the target was a particularly important competitive force for "*greener*" aluminum foundry alloys.[172]

Sustainability considerations should also be considered when assessing market definition, and closeness-of-competition, from a geographic perspective. Consumers can be concerned about the environmental cost of transporting goods, such that they can have a preference for products sourced locally or from neighboring regions. For example, in *Schwarz/Suez*, where the Commission defined a national market for the sorting of lightweight packaging on the basis that consumers were mindful of the environmental cost of transporting waste a longer distance.[173]

4.2.1.2 "Green" theories of harm

It follows from the above that, when sustainability is valued by direct customers, sustainability considerations may be relevant when articulating ToHs (as for any other "quality" attribute that customers value). These ToHs can be articulated within the current merger control framework, and may cover the following cases:

- When merging parties are considered particularly close competitors on the basis of the sustainability attributes of their products, the elimination of a competitive force post-merger could lead to increased prices or lower quality. However, this would require that "green" attributes are a critical element of customer choice. This will depend on the facts. Suppose, for example, there are four attributes that consumers care strongly about – one of which is "green-ness". It may be that the merging parties are very close in that respect but if they are distant as regards the other three, then, overall, they may not be particularly close competitors.
- A merger of two competitors could, under certain circumstances, lead to diminished incentives to invest in R&D/ developing sustainable products and production processes. However, it must not be assumed that reduced competition on one dimension (such as price) will necessarily lead to reduced incentives to innovate (see Section 3.3 above). Despite public statements by the Commission, "green" innovation ToHs have not yet been considered in past Commission decisions.[174]
- Producing an environmentally friendly product may require access to certain technologies which are not easily available to third parties, and which may act as a barrier to entry.[175]
- Foreclosure or increased prices of an input in the production of a "green" product can also be considered by the Commission in mergers involving firms at different stages of the supply chain. In such cases, the Commission should pay particular attention to whether: (i) the input at hand is vital for a more sustainable production process and/or producing a product with sustainable characteristics; and (ii) the importance to customers of procuring products from a "green" supply chain.

171. See Case M.7220 – *Chiquita Brand International/Fyffes*, Commission Decision of 3 October 2014, para. 61 and Case M.7292 – *DEMB/Mondelez/Charger OpCo*, Commission Decision of 5 May 2015, para. 57.

172. See Case M.7278 – *General Electric/Alstom*, Commission Decision of 8 September 2015, para. 512, Case M.10078 – *Cargotec/Konecranes*, Commission Decision of 24 February 2022, paras. 1416 and 2268 and Case M.10658 – *Norsk Hydro/Alumetal* – Commission Decision of 4 May 2023, paras. 299-321.

173. See Case M.10047 – *Schwarz Group/Suez Waste Management Companies*, Commission Decision of 14 April 2021, para. 61.

174. Although the Commission indicated in the *Dow/Dupont* and *Bayer/Monsanto* press releases (available at, respectively, https://ec.europa.eu/commission/presscorner/detail/en/ip_17_772 and https://ec.europa.eu/commission/presscorner/detail/en/ip_18_2282) that part of the rationale for intervention was to protect innovation for more sustainable products, it is clear from the reading of these decisions that the development of more sustainable products was not core to the assessment. Only one paragraph in each decision mentions this topic. See Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, para. 1980, and Case M.8084 – Bayer/ Monsanto, Commission Decision of 21 March 2018, para. 3011.

175. This type of concern was raised by the Commission in Case M.9343 - *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering*, Commission Decision of 13 January 2022, para. 1024, in which the merging parties' vessel technologies enabling more limited use of fuel were considered a barrier to entry/ expansion by third parties.

- Foreclosure or increased input prices may also be considered in the context of recyclable inputs. If products made from recycled materials are strongly preferred by consumers, then access to recyclable inputs may be key to competing in a given market. In such cases, the Commission should assess whether a merger can lead to increased prices or foreclosure of recyclable inputs.[176]

4.2.1.3 "Green efficiencies"

The effects of "green" efficiencies on direct consumers who value sustainability can also be assessed within the current merger analysis framework. Potential "green" efficiencies that could be considered by the Commission in its assessment of mergers include:

- Operational efficiencies from operation optimisation post-merger, that can lead to a reduction in the level of CO2 and other emissions that result from a firm's economic activity. These can include not only more efficient production processes, but also delivery network improvements, which can decrease CO2 emissions per delivery for instance.
- Increased innovation incentives and capabilities in respect of "green" products and production processes. As we explain in Section 3.3.1 above, a merger can lead to increased appropriability and hence greater innovation incentives under certain circumstances. Additionally, firms can increase their capacity to innovate in "green" products by merging their R&D skills, knowledge pool and investment capabilities. This can be driven by technological complementarity or by increased scale.
- Vertical integration may also enable firms to produce "green" products at a lower price, and/or may facilitate the use of recyclable materials in production processes, for example, when the scrap from a particular production process is an input to another.

Despite the possibilities for considering "green" efficiencies in merger assessment, there have been no instances where these have been accepted by the Commission.[177] A possible reason for this is that the standards applied to assess efficiencies presented by merging parties have been more stringent than those applied to assess anti-competitive effects (as discussed in Section 2.2 above, the Revised Guidelines should eliminate this asymmetry).

Another challenge for considering "green" efficiencies in merger assessment is the difficulty of constructing a counterfactual scenario. As noted in Section 2.2, the assessment of merger-specificity should consider which efficiencies would *likely* be realised in the counterfactual (rather than limiting itself to assessing what could theoretically be achieved). In those cases where consumers take into account the effects of producing/consuming a particular product on the environment, competitive forces could lead firms to produce more environmentally friendly products. It may however take a long period of time for this to happen: consumers may not value environmental attributes of products enough yet, or, absent the merger, firms may take a long time to adopt environmentally friendly production processes.

In our view, any benefits that arise in excess of what would have occurred in the likely counterfactual are merger-specific, including benefits arising earlier than they otherwise would have done. We suggest that this is established in the Revised Guidelines.

4.2.2 Out-of-market sustainability effects

Mergers can have positive and negative environmental effects that may affect individuals other than the consumers of the merging parties' products.[178] In particular, "green" efficiencies often stretch beyond direct consumers in the affected market. For example, reduced CO2 emissions from an improved production process post-merger will benefit consumers to the extent that they value environmental effects of the product, but they will also benefit other individuals and future generations because of the impact on climate change etc.

An issue that is not openly addressed by the Consultation is the extent to which out-of-market environmental effects should be considered in merger assessment. In our view, the Commission should primarily seek to achieve its sustainability goals using policy tools which are aimed specifically at solving market failures, such as regulation, taxation and subsidies, rather than competition policy. Competition policy has traditionally been aimed at safeguarding competition and direct consumers of a given product. Requiring competition policy to go beyond this aim is outside the area of expertise of competition authorities and, as such, could create uncertainty in expectations of authorities' assessments. In this context, using alternative policy tools to address externalities from consumption would allow competition policy to continue pursuing its traditional goal of safeguarding the interests of direct consumers, whilst in parallel using these other tools to pursue environmental objectives.

4.2.3 Tools for assessing sustainability effects

The consideration of sustainability effects in merger assessment is a complex issue that often requires assigning a value to such effects. This is likely to raise practical difficulties, although some tools that have been developed by economists can help here.

176. Past decisions involving the assessment of access to recyclable inputs include Case M.10702 – KPS Capital Partners/Real Alloy Europe, Commission Decision of 19 October 2022, paras. 147 and 162, where the Commission considered that the merger could lead to the decreased supply of recyclable aluminium.

177. See the Consultation, Topic D, para. 77.

178. Reduced greenhouse gases, more energy efficient production processes and distribution networks, the use of recyclable materials, and the development of environmentally friendly products, have positive and long-lasting effects on the environment that generally stretch far beyond the markets that are affected by a merger. The opposite holds for production processes and products that negatively affect the environment.

When customers value sustainable products more, the value of sustainability can be proxied by empirical techniques. These aim to measure the price increases that consumers would be willing to accept for a reduction in the negative environmental impact of a product.[179] In this context, there are mainly two types of methodologies that can be used to measure consumers' willingness to pay for sustainability: methods based on stated and revealed preferences.

Methods based on stated preferences are based on surveys, which are a tool commonly used by the Commission in its assessment of mergers. However, even if the survey is well designed, these remain stated and not revealed preferences. This could be problematic because, for environmental considerations in particular, a social desirability bias may exist, where respondents give answers that they believe will make them look good. As such, they may overstate their willingness to pay for sustainability.

Methods based on revealed preferences attempt to correct for this potential bias by assessing purchasing decisions made by consumers on products different from, but related to, the product of interest. Some of these methods include:[180]

- Hedonic prices, which allow the estimation of consumers' valuation of goods and services which are not sold directly in the market, but which have an impact on other markets in which related goods are sold. For example, by assessing the relationship between the prices at which houses are sold and attributes of houses such as the quality of air in the area, the level of noise, closeness to a highway, etc., it may be possible to determine consumers' valuation of each of these attributes.
- Defensive expenses, which consist in assessing the cost incurred by consumers to avoid a given harm, for example acoustic or air contamination. Costs included would be the cost of windows with double glazing, or even the cost of moving to a different area (relative to staying in the area where they currently live).

4.3 Media plurality

Topic G of the Consultation contains a brief discussion of media plurality, as well as some questions concerning this.[181]

We recognise the importance of media plurality and of preventing individual media players from holding too much "opinion power" (i.e., the power of a media provider to influence public opinion) for the well-functioning of democratic society. In our view, however, competition authorities only have a role to play in preventing opinion power and safeguarding media plurality to the extent that it is a "by-product" of their assessment of the impact of a concentration on market power. Protecting media plurality is important but competition policy is not the right instrument for this.

Put differently, competition authorities should intervene to prevent (i) the creation or enhancement or market power. By so doing, this may also prevent (ii) the creation or strengthening of opinion power or the reduction in media plurality. However, the goal of competition authorities is to prevent (i), not to guard against (ii). This is because there is not necessarily a direct relationship between (i) and (ii) – indeed, (ii) does not imply (i) – as the example in the following paragraph explains.

In principle, a merger may give rise to a significant decline in media plurality without causing an SIEC. This could be the case, for example, in a merger between two media outlets (Firms A and B) which are shown to not compete closely but where the acquirer has a desire to push a particular (not necessarily profit-driven) editorial agenda. Pre-merger, Firms A and B might target different audiences, and may face substantial competition by third parties on the advertising side. Post-merger, the new owner may wish to reposition the combined entity's focus on a single audience (e.g., that originally targeted only by Firm A). This may reduce plurality but would not be a cause for intervention on grounds of lost competition. Moreover, intervention under competition grounds would be harmful as it would lead the competition authority to diverge from its well-established framework, thereby risking the creation of poor precedent that would lead to inappropriate future interventions across other industries.

We therefore agree with the approach taken by the Commission in *News Corp/BskyB* which rightly notes that "*the purpose and legal frameworks for competition assessments and media plurality assessments are very different*", where a "*media plurality review has [...] a different scope and focuses on issues going beyond a competition assessment*".[182]

179. Note that it is not necessary that such estimations are conducted for all consumers – a representative sample should be enough, as long as the sample size is valid to obtain reliable estimates.

180. For details of these and other methodologies discussed in this section, see Van Dijk, T. (2021), "A New Approach to Assess Certain Sustainability Agreements under Competition Law", available at https://www.acm.nl/sites/default/files/documents/competition-law-climate-change-and-environmental-sustainability.pdf.

181. See the Consultation, Topic G, para. 119 and Questions G.4-G.9.

182. See Case M.5932 – *NewsCorp/BSkyB*, Commission Decision of 21 December 2010, paras. 307-308.

These two different objectives should not be balanced against each other but should be policed by different regulators. We note that such an approach would not be reinventing the wheel as many European Member States already have agencies in place which review the plurality implications of media mergers separately from the competition law assessment.[183] In addition, the European Media Freedom Act, which entered into force on August 8, 2025, includes a new test for mergers that have a significant impact on media plurality and editorial independence, with the European Board for Media Services having an advisory role.[184]

That does not mean that traditional merger control proceedings should never have a say in the impact of the concentration on media plurality – sometimes an increase in market power will be likely to cause a reduction in plurality. For example, the concept of media plurality can be related to traditional parameters of competition such as horizontal differentiation (different types of media or different views being presented) and vertical differentiation (free news outlets versus paid news outlets). Therefore, to the extent that a concentration changes the ability and incentive for horizontal and vertical differentiation, merger control is able to capture the relevant impact on media plurality.

Crucially, however, there should not be an ex-ante presumption that, should a merger control review raise concerns about an increase in market power, media plurality will be negatively affected as well. The relationship between concentration, market power and plurality will depend on the case at hand and will require a careful assessment of the economic incentives related to differentiation and hence media plurality. On the one hand, the merged entity may have economic incentives to reduce plurality, e.g., to realise cost savings on editorial staff. On the other hand, it is also possible that a merger would lead to more diversified content. For example, two firms may, prior to the merger, compete for the same audience, whereas the concentration may incentivise the merged entity to diversify the content offered to maximise reach.[185]

In summary, the Commission's role should remain limited to addressing media plurality concerns only where these arise from the creation of strengthening of market power. However, it is important to recognise that mergers that reduce plurality need not be mergers which increase or maintain market power. Plurality can, and should, be addressed on the basis of separate legislation outside of competition law.

4.4 Effects on labour markets and other suppliers of inputs

Topic G further discusses labour markets and raises the question whether the Revised Guidelines should better reflect how the Commission assesses the impact on labour markets and workers in EU merger control.[186]

Antitrust in labour markets on the European level has up until now focused almost exclusively on wage-fixing and no-poach agreements, the most blatant forms of anti-competitive conduct by employers, covered by Article 101.[187] The Commission has never considered how a merger impacts the buyer power of companies in the labour market.[188] Neither the HMG nor the NHMG directly mention labour markets. The more general theme of buyer power in upstream markets is currently dealt with in only three paragraphs in the HMG.[189]

Yet, the issue of whether some mergers might have adverse effects on labour markets has seen growing attention in recent years. The 2023 US Merger Guidelines explicitly address monopsony in labour markets, in a clear shift from the 2010 US Merger Guidelines. The approach of the US authorities is that market power in buying will be assessed in the same way as market power in selling. They write:

"A merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers. The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms."[190]

183. See Banake, M. & Wolters, S. (2025), "Merger Control and Media Plurality: Fitting a Square Peg into a Round Hole?", *The Thicket*, available at: https://thethicket.blog/2025/05/20/merger-control-and-media-plurality-fitting-a-square-peg-into-a-round-hole/: *"[F]ourteen Member States have a sector-specific media merger control regime separate from competition law designed to protect plurality, [which] suggests that competition law in isolation is not considered well suited to guarantee media plurality"*.

184. See European Commission, "Media Freedom and Pluralism", available at: https://digital-strategy.ec.europa.eu/en/policies/media-freedom, as well as European Board for Media Services, "About Us", available at: https://media-board.europa.eu/about-us_en.

185. In the latter instance, this dynamic could mitigate concerns that may arise from a static assessment of the concentration on the basis of closeness-of-competition pre-concentration. In order to empirically assess plurality, advanced techniques such as content similarity analysis are available which allow the automated assessment of a very large body of articles. Such analyses may also be useful to assess closeness-of-competition in its own right.

186. See the Consultation, Topic G, paras. 120-123 and Questions G.10-G.13.

187. Even these cases merit a thorough case-by-case assessment. See Alvim, N. & Mäkelä, P. (2025), "Coordination in Labour Markets: the Need for Case-by-Case Assessments", *Competition Law & Policy Debate*, 8(4), pages 184-189.

188. See Broulík, J. (2025), "European Labor Antitrust Has Reached a Defining Moment. How Far Will It Go?", *Promarket*, available at: https://www.promarket.org/2025/07/15/european-labor-antitrust-has-reached-a-defining-moment-how-far-will-it-go/.

189. See the HMG, paras. 61-63. Labour being an input for companies, the labour market is "upstream".

190. 2023 US Merger Guidelines, Section 2.10.

While this general statement may appear attractive, its implementation can raise substantial issues when it departs from the consumer welfare standard on which the Commission's competition policy is currently based. Under the consumer welfare standard, increased buyer power is generally seen positively, provided that downstream customers benefit. This approach can be contrasted with the "seller harm" approach whereby harm to sellers arising from buyer power, e.g., from a weakening of their previous bargaining position, is considered as problematic, irrespective of its impact on consumers downstream.[191]

We are of the view that the Revised Guidelines should continue to be squarely grounded in the consumer welfare standard, and not stray into other policy objectives. Any departure from the consumer welfare standard will raise considerable difficulties, not least because this almost invariably will imply difficult trade-offs between different interests that often will go beyond the remit of competition policy. This is certainly also the case in labour markets, where balancing consumer interests versus those of workers and other interest groups will give rise to substantial complexities (not least because the effects on consumers and workers are often intertwined – for example, lower wages can be passed on to consumers in the form of lower prices). Protecting worker rights is important but employment legislation, not competition policy, is the right instrument for this.

191. The seller harm approach appears to have been followed by the DOJ when it successfully blocked the Penguin Random House merger with Simon & Schuster in 2022 on the grounds that it would have negatively affected the bargaining position of authors and would have given the merged party closer to 50 percent share of the market for the biggest bestsellers, and the upstream authors. See Pan, F.Y. (2022), "Memorandum Opinion on case *United States of America vs Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*", available at: https://www.justice.gov/atr/case-document/file/1549941/dl?inline.