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From:	General Secretariat of the Council
To:	Delegations
Subject:	AOB for the meeting of the Competitiveness Council of 28 May 2026 : Revision of the Merger Guidelines *- Information from the Commission*

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

DRAFT COMMUNICATION FROM THE COMMISSION

Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

PART I – INTRODUCTION AND GUIDING PRINCIPLES

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] ('EUMR') requires the Commission to assess whether concentrations[2] of a European Union ('EU') dimension and concentrations that are referred to the Commission are compatible with the internal market[3]. The Commission examines whether a merger results in a significant impediment to effective competition ('SIEC') in the internal market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position[4].

2. Mergers may enhance competitiveness and growth. They can contribute to innovation by enabling firms to enter new markets or drive activity on existing ones; generate synergies such as economies of scale or scope; combine complementary capabilities; and contribute to allocative efficiency of assets and resources. In practice, the Commission swiftly approves most mergers unconditionally, very often under a simplified procedure[5]. In those cases, a single and swift Commission approval ensures companies can reorganise and scale up across the internal market. Member States can only block or impose conditions on mergers with an EU dimension to protect legitimate interests other than competition, in the conditions and following the procedures established in Article 21(4) EUMR.

3. These Guidelines set out the analytical framework that the Commission applies to assess whether a merger may be declared compatible or incompatible with the internal market[6]. They supersede the 2004 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings[7] (the '2004 Horizontal Merger Guidelines') and the 2008 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the '2008 Non-Horizontal Merger Guidelines')[8]. These Guidelines further offer guidance on how Member States can exercise their prerogatives pursuant to Article 21 EUMR to block, or impose conditions, on mergers of EU dimension or that are referred to the Commission in a way that does not interfere with the

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1 OJ L 24, 29.1.2004, p. 1.

2 The term 'concentration' used in the EUMR covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In these Guidelines, unless otherwise specified, the term 'merger' will be used as a synonym for the term concentration and therefore cover all types of transactions reviewable by the Commission under the EUMR. 'Merging parties' relates to the parties to a merger, or the acquirer or target in an acquisition, or both, as the case may be, subject to further specifications in the text.

3 EUMR, Article 2.

4 EUMR, Article 2(2) and (3).

5 In 2023, the Commission further simplified its previous simplified framework to ensure even smoother processing of cases, among others by reducing the information requirements, introducing a super-simplified procedure and expanding the categories of cases that can be treated under the simplified and super-simplified procedures. See Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 160, 5.5.2023, p.1 ('Notice on Simplified Procedure').

6 EUMR, recital 28.

7 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2024, p. 5.

8 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 26, 18.10.2008, p. 6.

Commission's jurisdiction or breach general principles or other provisions of EU law. These Guidelines apply to mergers notified to the Commission as of [DD.MM.YYYY].

4. These Guidelines are based on the case law of the Union Courts[9] and the Commission's decisional practice. The Commission's interpretation of the EUMR is without prejudice to the interpretation that may be given by the Union Courts.

5. These Guidelines aim to increase legal certainty and predictability in the Commission's enforcement of the EUMR, thereby facilitating business and investment decisions within the internal market. Such clarity on how the Commission conducts its assessment, and on how its approach to such assessment has evolved in the light of experience and of the changing global economic landscape, is important to ensure that companies are incentivised to bring forward mergers that would enhance competitiveness and growth.

6. These Guidelines are binding on the Commission, which cannot depart from them without justification[10]. Nevertheless, these Guidelines may not cover all possible future scenarios: for example, new business models, markets or market dynamics due to technological and economic progress that affect the behaviour of firms. Since the Commission remains obliged to enforce the EUMR[11], it may depart from these Guidelines if necessary.

A. THE ROLE OF EU MERGER CONTROL

1. The importance of EU merger control for the internal market and competitiveness

7. EU merger control safeguards effective competition by approving transactions that do not raise competition concerns, and for transactions that do raise competition concerns by conditioning their approval on adequate remedies from the parties or by declaring them incompatible with the internal market. It also contributes to economic growth, investment and innovation, in open and competitive markets[12]. Procompetitive mergers strengthen the internal market by delivering tangible benefits, such as promoting innovation, quality, efficient production, affordable prices for consumers and a wide choice of goods and services to direct or indirect business customers and final consumers[13]. In this context, transactions that bring about increased scale and consolidation can thus be viewed positively[14].

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9 'Union Courts' refers to the Court of Justice of the European Union, comprising the Court of Justice and the General Court.

10 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 123 and Judgment of 2 July 2025, *Brasserie Nationale and Munhowen v Commission*, T-289/24, EU:T:2025:655, paragraph 184.

11 EUMR, Article 2.

12 See also the Treaty on the Functioning of the European Union ('TFEU'), Article 173.

13 Hereinafter, the term 'consumers' must be understood as including direct or indirect business customers and final consumers that may be affected by the reduction in effective competition as a result of a merger. This also applies to other trading partners where they are affected by a reduction in effective competition.

14 Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 52, *"where it has been notified of a proposed concentration, the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the notified concentration which is most likely to ensue"*. See also paragraph 48.

8. The EUMR also promotes the integration of the internal market by establishing a 'one-stop-shop' system with a unified set of rules[15] whereby mergers having an EU dimension are exclusively reviewed by the Commission[16]. This reduces regulatory fragmentation, streamlines procedures, reduces the administrative burden and associated costs, and increases legal certainty and predictability for the merging parties. The avoidance of parallel or staggered review procedures at Member State level thus promotes the creation of a seamless internal market and, overall, more competitive economy.

9. By fulfilling its legal mandate to prevent mergers that result in a SIEC, EU merger control supports the EU's broader policy objectives[17], including the competitiveness and resilience[18] of the internal market. Stronger competition generally not only delivers lower prices, but also tends to stimulate greater productivity, investment and innovation. EU merger control supports the capacity of the internal market to sustain and develop industrial and technological capabilities across all steps of relevant supply chains, to secure and diversify the sources of supply of critical technologies and inputs in the internal market. Through supporting diversified and strong supply chains, EU merger control strengthens the competitiveness and resilience of the EU economy in the face of shocks and geopolitical shifts, thereby reducing dependencies on a few suppliers or on specific regions of the world, by preventing further consolidation of leading firms that can exert market power on companies active in the internal market and by keeping markets open to allow smaller players to scale up. Further, it supports the ability and incentives of companies operating in the internal market to invest in and develop critical technologies in a manner that preserves consumer choice and ensures open and contestable markets. EU merger control protects innovation and investment competition which support resilience, economic growth and accelerates industrial capabilities and transformation, notably in critical technologies and inputs or in defence markets to reduce fragmentation and increase the EU's defence readiness[19]. It also allows for the preservation of green innovation competition, which supports sustainability and the transition to low carbon technologies. At the same time, EU merger control contributes to maintaining a balance of power that is essential to democratic societies. By limiting

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15 EUMR, recital 8.

16 Such one-stop-shop principle is without prejudice to the appropriate measures Member States may take in relation to mergers, including those reviewed by the Commission, to protect legitimate interests other than competition. As provided by Article 21(4) EUMR, such appropriate measures must nevertheless be compatible with the general principles and other provisions of EU law.

17 EUMR, recital 23.

18 Resilience refers to the readiness and ability of the internal market or part of it to continue servicing customers and to anticipate, withstand and recover from serious shocks. Examples of factors that are particularly relevant for the resilience of the internal market include the security and diversity of supply chains, the security and cyber security of physical and digital critical infrastructure, defence readiness and the ability and incentives of companies to invest in critical technologies. Mergers can have both positive and negative effects on resilience. They further include building capacity and capabilities in the internal market, including for instance at each step of the supply chain of digital technologies, to lead to the emergence of competition in highly concentrated sectors.

19 Defence readiness refers to the ability of Member States and the EU defence industry to anticipate, prevent and respond to defence-related crises. Defence readiness relies on the availability of defence industrial capacity necessary to acquire and maintain the resources, capabilities and infrastructure required to respond effectively and in an agile way to crises and Member States' related actions and to deter potential threats through credible preparedness.

concentration in the media sector, it supports diversity and plurality of information sources and choice for EU citizens[20].

10. Competition policy contributes to ensuring the undistorted functioning of the internal market and effectively protects European consumers and businesses against companies concentrating market power to undermine the competitive process and harm consumers and trading partners. At the same time, the global geo-political and trade context has changed. To reflect that reality, the approach to balancing different possible effects of a merger needs to be re-examined. Industrial scale and global competitiveness have become increasingly important. The economy has also shifted towards more innovation-heavy sectors and towards greater reliance on critical supply chains where scale, innovation and securing a reliable supply of critical inputs may be critical to compete. The assessment of mergers should therefore give adequate weight to scale, innovation, investment and resilience as procompetitive factors that can benefit from a degree of consolidation and should assess how the proposed concentration will affect future innovation potential. The assessment should consider dynamic aspects and long-term impact where appropriate.

2. Benefits from scale versus market power

11. The Commission regards positively mergers that increase procompetitive scale while maintaining effective competition in the internal market. The growth and scaling-up of firms in the internal market so as to reach the necessary size to compete in global markets can be procompetitive and have a positive impact on the EU economy and its competitiveness, including on innovation and investment. This is particularly important in markets where global firms play a significant role and exert significant competitive pressure. Competition can be also important for gaining scale, as rivalry drives firms to cut costs, improve products and invest in innovation.

12. Mergers can help companies to develop scale, which is necessary to compete in certain global industries, notably those with high capital intensity and rapid research and development ('R&D') innovation.

13. The Commission regards scale-enhancing mergers that combine complementary activities from different Member States without generating significant overlaps as positive, and as contributing to the further integration of the internal market[21]. Mergers increasing the competitiveness of European industry, particularly in global markets, improving the conditions for growth and raising the standard of living in the Union[22] are welcomed. Accordingly, the Commission takes into account their contribution to the

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20 Without impeding the ability of Member States to safeguard media pluralism in their review of the same merger as guaranteed by Article 22 of Regulation (EU) 2024/1083 establishing a common framework for media services in the internal market (the 'European Media Freedom Act'), OJ L 2024/1083 of 17 April 2024,, the Commission assesses media sector mergers according to the same principles as mergers in other sectors, taking into account parameters such as diversity of (information) supply where relevant for competition.

21 The rules set out in the EUMR are among the competition rules referred to in Article 3(1)(b) of the TFEU as necessary for the functioning of the internal market. The role of those rules is to prevent competition from being distorted to the detriment of the public interest and consumers, thereby ensuring the well-being of EU citizens.

22 EUMR, recital 4.

development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition[23].

14. Understanding the rationale of the merger and the business model or strategies that can be implemented following the merger are important when assessing the impact of the transaction.

15. Scale-enhancing mergers may contribute to European competitiveness, in particular, in the following circumstances[24]:

a) Innovation and technological progress

i. Mergers that combine complementary capabilities may drive technological and economic progress through new products[25], particularly when offering a new solution in the EEA where few global alternatives are available;

ii. Mergers that result in R&D synergies or enable projects of a magnitude that would not be feasible otherwise, may lower investment costs or enhance firms' overall capabilities, thereby strengthening their ability or incentives to compete on innovation and investment;

iii. Mergers that accelerate access to scarce talent or critical resources may enable innovation, increase investment and foster the development of new or sustainable technologies;

b) Market integration and expansion, and achieving the necessary scale to compete globally

i. Mergers that enable companies to enter other Member States where they are not yet active helping to remove barriers to trade in the internal market without resulting in significant overlaps or mergers enabling expansion to other countries outside the European Economic Area ('EEA') may enhance competition and competitiveness, as well as resilience;

ii. Mergers through which companies gain scale to be active in global markets where they face pressure from few global incumbents.

c) Security and resilience

i. Mergers combining complementary capabilities that increase the merging parties' ability and incentives to invest in the security of critical infrastructure;

ii. Mergers that secure access to critical inputs to the extent that they increase the resilience of the internal market;

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23 EUMR, Article 2.

24 Where such mergers also give rise to negative effects on competition, efficiencies will have to be balanced against such negative effects according to the principles set out in Section II.C.

25 For the purpose of these Guidelines, the term 'product' is used as shorthand to also comprise services, or technologies, where appropriate.

iii. Mergers that enable defence projects that strengthen the internal market for defence and European defence readiness, including security of supply, without creating excessive dependencies or resilience risks.

16. Mergers that involve acquisitions of start-ups[26] are unlikely to give rise to competition concerns, subject to the guidance provided in Section II.B.4.3.

17. Mergers that do not entail the loss of head-to-head competition between the merging firms in the same relevant market may also have a stronger potential to give rise to substantial benefits from integration (see Section II.C). However, when firms with significant market power are involved, such mergers may lead to a SIEC, for example through foreclosure of rivals or entrenchment.

18. The benefits of scale, particularly when it is relevant in a context of direct or potential pressure in the market from competitors active globally, or of firms increasing their presence in other markets, must be distinguished from increasing market power in a manner that would harm the competitiveness or resilience of EU businesses and ultimately consumers.

B. GUIDING PRINCIPLES

19. The EUMR prevents mergers resulting in lasting damage to competition in the internal market or a substantial part of it[27]. The Commission considers the specific facts and circumstances of each case, in light of the principles set out below.

1. Parameters of competition

20. In its assessment, the Commission identifies the business models of different market participants and the key price- and non-price parameters on which they compete, and examines how the merger affects such parameters negatively or positively[28]. Non-price competition can encompass a variety of parameters to the extent they are relevant for the competitive process in the markets at hand, including output and quality[29] in various aspects, also covering choice (which may include media and cultural diversity[30]), capacity, investment, innovation[31], privacy[32], sustainability[33], resilience (including security of supply[34]). A merger can have an impact on one or multiple parameters of competition, and that impact is subject to an overall assessment. Many non-price parameters are not readily subject to quantification. Some of them, among other things, may also reflect the

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26 See the definition of a 'start-up' in the Commission Recommendation (EU) 2026/720 of 18 March 2026 on the definition of innovative enterprises, innovative startups and innovative scale-ups, OJ L, 24.3.2026.

27 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 109.

28 The Commission's framework for the assessment of efficiencies is included in Section II.C.

29 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 189 et seq., 1324 et seq. and 1398 et seq.

30 See, e.g., Case M.10433 – Vivendi/Lagardère, paragraphs 1043-1044, 1076, 1126, 1156-1157 and 1024 et seq; M.11956 – UMG/Downtown, paragraphs 244-250, 277 and 544-546.

31 See, e.g., Case M.7932 – Dow/DuPont, paragraphs 1975 et seq.; Case M.8084 – Bayer/Monsanto, paragraphs 61 et seq., 1004 et seq.; and Case M.11177 – Pfizer/Seagen, paragraphs 18-20, 179-185.

32 See, e.g., Case M.8124 – Microsoft/LinkedIn, paragraph 350.

33 See, e.g., Case M.10658 – Norsk Hydro/Alumetal, section 9.1.3.3.7.

34 See, e.g., Case M.7967 – Ball/Rexam; and Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 1318 et seq.

objectives of EU policies recognised by the Treaties[35]. The Commission enjoys a margin of discretion in weighing such price and non-price parameters of competition in the balancing exercise in order to establish an overall assessment of the merger's effects on businesses and consumers[36].

2. Burden of proof, theories of harm and benefit

21. The Commission bears the burden of establishing whether a merger overall gives rise to a SIEC[37]. In its assessment, the Commission takes into account anticompetitive effects and procompetitive effects demonstrated by the merging parties (i.e., efficiencies). EU merger control does not aim at protecting competitors of the merging parties[38].

22. The Commission bears the burden of demonstrating any anticompetitive effects arising from the merger, i.e. if the merger significantly impedes the competitive process and, thus, is capable of harming consumers, without, however, having to specifically demonstrate or quantify such consumer harm[39] in every case.

23. If the Commission considers that the merger leads to anticompetitive effects, as part of its prospective analysis, it articulates and substantiates a 'theory of harm'. The theory of harm sets out how a merger may give rise to anticompetitive effects: describing how a merger would modify the competitive constraints faced by market participants allowing firms to profitably increase prices or reduce output or quality in various aspects, including choice, capacity, investment, innovation, privacy, sustainability, resilience, or otherwise negatively influence price or non-price parameters of competition, thereby decreasing consumer welfare.

24. The merging parties bear the burden of demonstrating any alleged efficiencies stemming from the merger that could counteract its anticompetitive effects[40].

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35 The Commission ensures that its merger decisions are not contrary to other provisions of the Treaty, See e.g. Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 106; Judgment of 26 September 2024, *Orlen S.A., v European Commission*, C-255/22 P, EU:C:2024:790, paragraphs 96-97.

36 *'[T]he Commission has a margin of discretion with regard to economic matters for the purpose of the application of the substantive rules of the [EUMR], in particular Article 2, since it carries out prospective economic analyses seeking to determine the likelihood of certain developments in the relevant market within a foreseeable time frame'*, See e.g. Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 82.

37 EUMR, Articles 2(2) and (3). See, e.g., Judgment of 10 July 2008, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, Case C-413/06 P, EU:C:2008:392, paragraph 52.

38 In particular, the fact that rivals may be harmed because a merger leads to efficiencies cannot in itself give rise to competition concerns.

39 As defined in footnote 13 above. In that sense, by analogy, see, e.g., Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others v AGCM and Others*, C-377/20, EU:C:2022:379, paragraphs 44, 47; Judgment of 21 December 2023, *European Superleague Company SL v Fédération internationale de football association (FIFA), Union of European Football Associations (UEFA)*, C-333/21, EU:C:2023:1011, paragraph 202; and Judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 63.

40 See Section II.C. See Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 238-239, 242-243. Moreover, the most relevant facts to substantiate these claims are typically in possession of the merging parties. See also Judgment of 9 March

25. If the merging parties consider that the merger gives rise to efficiencies, as part of their prospective analysis, they must articulate and substantiate, in due time, a 'theory of benefit'. A theory of benefit sets out how specific merger efficiencies occur and maintain or enhance effective competition, to the benefit of consumers. That is, it explains how the merger may lead to the merging firms profitably decreasing prices; increasing output, innovation, choice or quality; or positively influencing other relevant parameters of competition, such as investment intensity underpinning stronger competitive behaviour across multiple products or geographies, thereby offsetting, on a lasting basis, the harm to consumers brought about by the merger[41].

3. Evidence

26. The Commission assesses carefully and impartially all relevant aspects of the case[42]; examining both evidence that indicates, and counters, possible anticompetitive effects. The Commission supports its conclusions with a sufficiently cogent and consistent body of evidence[43]. The merging parties are subject to the same evidentiary standard when establishing the facts in support of their claimed efficiencies, which the Commission also assesses based on the claims put forward by merging parties.

27. The substantive rules of the EUMR, in particular Article 2, confer on the Commission a certain margin of discretion with regard to assessments of an economic nature, since it carries out forward-looking economic analyses seeking to determine the likelihood of certain developments in the relevant or closely related[44] market within a foreseeable time frame[45]. The Commission exercises its margin of discretion according to the same principles as regards the assessment of evidence underlying both a theory of harm and a theory of benefit. The Commission's assessment must be based on evidence that is factually accurate, reliable, consistent and capable of substantiating the conclusions drawn from it[46].

2015, *Deutsche Börse* v *Commission*, T-175/12, EU:T:2015:148, paragraphs 262, 361; Judgment of 6 July 2016, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 427.

41 The Commission's framework for the assessment of efficiencies is included in Section II.C.

42 Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19, EU:T:2022:296, paragraph 516.

43 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 75-77 and 87.

44 For instance, in the analysis of ecosystems dominated by the merging companies.

45 This includes a margin of discretion as to the weight given to diverging economic analyses in the Commission's assessment, which the Commission strives to reinforce with qualitative evidence, such as statements of third parties from the market investigation or internal documents of the merging parties. See, e.g., Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 82-84,124; Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 51.

46 Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraphs 51-54; Judgment of 18 December 2007, *Cementbouw Handel & Industrie v Commission*, C-202/06 P, EU:C:2007:814, paragraph 53; Judgment of 13 May 2015, *Niki Luftfahrt v Commission*, T-162/10, EU:T:2015:283, paragraph 85. While the standard of proof is the same for all mergers, the required quality of evidence may differ based on (the complexity of) the merger, see, e.g., Judgment of 15 February 2015, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 44; Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 76-77.

28. The Commission starts its assessment with the information provided by the merging parties, which must be complete, correct and not misleading[47]. The merging parties must substantiate their arguments and comply with investigative measures undertaken by the Commission in the exercise of its investigatory powers[48].

29. The Commission may rely on evidence of any kind and the evaluation of such evidence is unfettered[49]. The Commission takes into account only information that is available to it at the time of its assessment, drawing both on the information provided by the merging parties and on the evidence gathered through its own investigation[50]. It is therefore in the merging parties' own best interests to provide all relevant evidence without delay. Due to the expedited nature of the merger control procedure, the Commission can rely on the information it receives without having to verify in detail the credibility and reliability of all such information, unless there is evidence indicating that the information provided is incorrect[51].

30. The Commission decides on a case-by-case basis and is not bound by findings made in a previous case, even where the markets concerned are similar or identical[52]. Views of market participants, especially customers, and other third parties constitute an important source of information[53]. The Commission's investigation may be guided, in part, by concerns raised by such third parties. When evaluating such evidence, the Commission is mindful of the commercial incentives of the parties providing such information[54]. As part of its overall assessment, the Commission may adapt or refine its analysis in light of

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47 See, e.g., EUMR, Article 14. See also Annex I to the Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004, Form Relating to the Notification of a Concentration Pursuant to Council Regulation (EC) No 139/2004, paragraphs 13-14. See also judgment of 13 November 2024, *Tele Columbus AG v Commission*, T-69/20, EU:T:2024:816, paragraph 145.

48 EUMR, Articles 11-13, and Articles 3, 4 of Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004.

49 Judgment of 4 October 2024, *thyssenkrupp v Commission*, C-581/22 P, EU:C:2024:821, paragraphs 97-99.

50 Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19, EU:T:2022:296, paragraph 516. Therefore, it cannot be required to carry out investigative steps at the very late stages of the process after the deadline to provide such information, as set by the Commission, expired. See, in that regard, e.g., Judgment of 10 July 2008, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, C-413/06 P, EU:C:2008:392, paragraphs 90-91 and Judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraphs 175-176.

51 Judgment of 13 November 2024, *Tele Columbus AG v Commission*, T-69/20, EU:T:2024:816, paragraph 144.

52 Judgment of 13 November 2024, *NetCologne Gesellschaft für Telekommunikation mbH v Commission*, T-58/20, EU:T:2024:813, paragraph 164. The Commission is also not bound by findings made by other competition authorities.

53 The fact that the majority of respondents to a market investigation may have a certain opinion, while informative, is not binding, because the Commission's market investigation is not an 'opinion poll', see, e.g., Case M.4439 – Ryanair / Aer Lingus, para. 39; Case M.6314 – Telefónica UK/Vodafone UK/Everything Everywhere/JV, paragraph 23. Where responses evenly split, the Commission strives to assess them against further evidence. See, to that effect, Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraph 47. The Commission attaches lower probative value to third party submissions that are not substantiated.

54 Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraphs 616-617.

additional information provided to it in a timely manner during the administrative proceedings[55].

31. The Commission assesses mergers based on all available evidence, which may include, for example, economic evidence[56], extracts from internal documents prepared by the merging firms in the ordinary course of business[57], views of customers and competitors submitted in the Commission's market investigation, and reports by industry experts or public entities. Based on this body of evidence, the Commission conducts an overall assessment of the competitive situation in the relevant market. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted when adequately justified[58]. The Commission can even rely on a single item of documentary evidence provided that its probative value is undoubted[59]. The only relevant criterion for the purpose of assessing evidence lawfully adduced relates to its credibility[60]. There exists no hierarchy between non-technical (or qualitative)[61] and technical (or quantitative) evidence[62].

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55 Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19, EU:T:2022:296, paragraph 516. This applies in particular to 'contemporary' rather than 'new' evidence, such as internal documents drawn up in close connection with the events they relate to or by a direct witness of those events, rather than documents drawn up in connection with the merger under review, as such contemporary evidence is usually particularly credible; see Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraphs 117, 150.

56 Economic evidence may include quantitative data, see, e.g., Commission Staff Working Paper – Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, SEC(2011) 1216 final. Economic analyses and studies based thereon can often provide indirect evidence; see Judgment of 22 June 2022, *thyssenkrupp v Commission*, C-584/19 P, EU:T:2022:386, paragraph 246.

57 See Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraph 117.

58 Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 58, Judgment of 18 May 2022, *Wieland Werke AG v Commission*, T-251/19, EU:T:2022:296, paragraph 120; Judgment of 6 July 2010, *Ryanair v Commission*, T-342/07, EU:T:2010:280, paragraph 108.

59 See, to that effect, Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 59; Judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraph 460.

60 See Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraph 120; Judgment of 23 February 2023, *United Parcel Service v Commission*, T-834/17, EU:T:2022:84, paragraph 314, Judgment of 22 June 2022, *thyssenkrupp v Commission*, T-584/19, EU:T:2022:386, paragraph 104.

61 Internal documents drawn up in close connection with the events they relate to or by a direct witness of those events, and including statements running counter to the interests of the relevant party, should be regarded as particularly reliable and credible evidence, see Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19, EU:T:2022:296, paragraphs 116-118 and 150. Whereas internal documents addressing the theory of harm investigated have high probative value, the absence of such documents does not prove the absence of harm. Internal documents drawn up after the announcement of the merger, or close to such date, have generally limited value in terms of exculpatory evidence.

62 Judgment of 6 July 2010, *Ryanair v Commission*, T-342/07, EU:T:2010:280, paragraph 136. Econometric models are quantitative tools which the Commission may use in support of its forward-looking analysis, see, e.g., Judgment of 23 February 2023, *Commission v United Parcel Service*, C-265/17P, EU:C:2019:23, paragraphs 53-54; and Judgment of 22 June 2022, *thyssenkrupp v Commission,* T-584/19, EU:T:2022:386, paragraph 246.

4. Overall assessment of mergers' impact, including their benefits

32. On the basis of an overall assessment of the facts and evidence, including facts and evidence provided by the parties regarding any claimed efficiencies, the Commission concludes whether a merger's impact on the competitive process is 'more likely than not' to result in a SIEC[63]. This standard applies to all mergers reviewed by the Commission irrespective of the nature and the complexity of the theories of harm or benefit, the stage of the procedure or the ultimate result of the Commission's investigation[64].

33. In its overall assessment of a merger, the Commission takes into account any demonstrated efficiency claims, including the development of technical and economic progress brought about by the merger provided that it benefits consumers and does not form an obstacle to competition[65]. It will assess whether the efficiencies brought about by the merger counteract the established negative effects on competition and, in particular, the potential harm to consumers that a merger might otherwise have[66].

34. Demonstrated efficiency claims may refer to efficiencies in the form of sustainability or resilience benefits, innovations with a potential to disrupt or transform markets, or to the generation of scale effects that will reduce unit costs or facilitate the financing of necessary investments. If realised, such efficiencies may increase the competitiveness of European industry and deliver significant consumer benefits within the meaning of Article 2(1)(b) EUMR.

35. The level of competition remaining post-merger is important to ascertain whether any claimed efficiencies fulfil the criteria set out in Section II.C below. The greater, more certain and immediate the negative effects on competition, the more substantial and certain the efficiencies must be, and the more confident the Commission must be that they will be passed on, to a sufficient degree, to consumers[67]. The more market power the merged entity holds, especially in the case of a dominant position, the less likely efficiencies will be sufficient to outweigh competitive harm. It is highly unlikely that a merger leading to a market position approaching that of a monopoly or a similar degree of market power, will result in efficiencies that will sufficiently outweigh the harm caused by the merger[68].

36. The Commission carries out a balancing exercise to assess whether the efficiencies that fulfil the criteria counteract the harm to competition that might otherwise result from the merger. However, a preliminary finding of harm is not a condition for efficiency claims to be submitted and considered. Early engagement by merging parties on efficiencies

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63 EUMR, recital 6, and Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 87. The EUMR contains neither positive nor negative presumptions that a merger is compatible or incompatible with the internal market (*ibid.*, paragraph 71). For the avoidance of doubt, the balance of probabilities standard only applies to the overall conclusion on the SIEC, rather than its constituent parameters and underlying facts (*ibid.*, paragraph 78).

64 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 69, 73, 74, 79, 114. See also Judgment of 17 May 2023, *EVH v Commission*, T-312/20, EU:T:2023:252, paragraph 49.

65 EUMR, Article 2(1)(b).

66 See also EUMR, recital 29.

67 See Case M.6166 – Deutsche Börse/NYSE Euronext, paragraph 1139; Case M.7630 – FEDEX / TNT Express, paragraph 504.

68 See Section II.C.

during the merger review process, including during the pre-notification stage[69], is welcome as it can foster a timely discussion of the efficiency claims and related evidence, thus enabling the Commission to properly take the theory of benefit into account.

5. Causality between the merger and the competitive effects

37. In determining whether there is a SIEC, the Commission assesses whether there is a causal link between the merger and the effects on competition. The Commission therefore carries out a forward-looking analysis of the effects of the merger on competition in comparison with the counterfactual, i.e. comparing the expected future market situation with and without the merger, absent efficiencies, in line with the principles set out below.

5.1. Relevant counterfactual

38. The Commission examines a merger in light of the law and facts existing at the time of the notification, not hypothetical future events[70]. In most cases, pre-merger conditions[71] are an instructive benchmark to assess the expected effects of a merger on future competition[72].

39. However, pre-merger conditions may not be reflective of normal or foreseeable future market conditions – and therefore may not constitute the relevant counterfactual – where: (i) there is a sufficient degree of certainty on future changes in market conditions that are unrelated to the merger, (ii) the prevailing situation at the time of the merger is not representative of normal market conditions, or (iii) the target or the merging firms would have agreed to alternative merger(s) or agreement(s) absent the merger.

Adjustments for future market conditions unrelated to the merger

40. The Commission takes into account future events or market evolutions unrelated to the merger that can be predicted with a sufficient degree of certainty based on available evidence[73]. This may be the case, for instance, with sufficiently certain plans of entry, expansion[74], or exit of firms in or from the market, which can be expected to take place

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69 DG COMPETITION Best Practices on the conduct of EC merger control proceedings, paragraph 18, available at https://competition-policy.ec.europa.eu/document/download/a288a6d8-3962-4072-b6a1-93e2ba08d12e_en?filename=proceedings.pdf

70 Judgment of 19 May 1994, *Société Anonyme à Participation Ouvrière Compagnie National Air France v. Commission*, T-2/93, EU:T:1994:55, paragraph 70.

71 Pre-merger conditions are the conditions existing absent the merger, i.e., prior to the initiation, negotiation, or conclusion of the merger.

72 By analogy, in the case of a merger that has been implemented without having been notified, the Commission would assess the merger in the light of the competitive conditions that would have prevailed without the implemented merger.

73 Judgment of 17 May 2023, *EVH v Commission*, T-312/20, EU:T:2023:252, paragraph 234. See also, e.g., Case M.950 – Hoffmann La Roche/Boehringer Mannheim, paragraph 13; Case M.1846 - Glaxo Wellcome/SmithKline Beecham, points 70-72; Case M.2547 – Bayer/Aventis Crop Science, paragraphs 324 et seq.

74 Including expansion of relevant ecosystems and service portfolios.

independently of the merger[75], technological changes[76], changes of customer behaviour and demand[77], declining markets, legal and regulatory changes[78], upcoming products or services and future capabilities, or similar future evolutions. A firm's financial situation may be relevant only to the extent that its impact on the firm's market position going forward can be predicted with a sufficient degree of certainty based on available evidence[79]. In carrying out such assessment, the Commission may consider all financial means at the firm's disposal[80]. The expected deterioration of market circumstances cannot be integrated into the counterfactual if it is the effect of future actions under the control of a party to the merger, or is caused by the merger[81].

41. Where the Commission takes into account future events or evolutions, it bases its analysis on matters of fact and law existing at the time of its merger review[82].

42. Future events or market evolutions may lead the Commission to consider that the current market position of the merging parties or its competitors does not reflect, but rather under- or overestimates, their competitive potential going forward.

Adjustments for non-representative market conditions

43. The Commission bases its assessment on an adjusted benchmark in cases where the prevailing situation at the time of the merger cannot be said to be representative of normal market conditions. This may be the case, for instance, for:

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75 See, e.g., Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraphs 247-263. Competitors' plans to enter a market that are conditional on the implementation of the merger should not be taken into account for the assessment of the counterfactual scenario; see Judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, EU:T:2020:471, paragraph 570. See also Section II.A.4.1 below.

76 See, e.g., Case M.11602 – SES/Intelsat, paragraphs 331 et seq., Case M.11515 – Veolia Environnement/Uniper Hungary Energetikai, paragraphs 73 et seq., 153 et seq.

77 By analogy, see e.g., Case M.10658 – Norsk Hydro / Alumetal, paragraphs 44-94.

78 Case M.11515 – Veolia Environnement/Uniper Hungary Energetikai, paragraphs 133 et seq.

79 See EUMR, Article 2(1) lit. b. See also Judgment of 7 June 2013, *SPAR Österreichische Warenhandels AG v Commission*, T-405/08, EU:T:2013:306, paragraph 91, and see, e.g. Case M.8792 – T-Mobile NL/Tele2 NL, paragraphs 485 et seq.; Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business), paragraph 1153. The Commission does not adjust the counterfactual if the financial situation is influenced by the anticipation of the merger or by actions or decisions of any of the merging parties.

80 See, e.g. Case M.5440 – Lufthansa/Austrian Airlines, paragraph 85. If the relevant firm belongs to a group of companies, the merging parties must prove the firm's financial difficulties against the background of the group's overall financial situation. In such case, the criteria set out at paragraph 50 below apply *mutatis mutandis*. For the specific case of a 'failing division', see Section II.5.2 below.

81 This includes the deterioration of competitive conditions due to a merging party's deteriorating financial situation, which would not have occurred in the absence of the merger, see, e.g., Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business), paragraphs 1201 et seq., as well as deteriorations of competitive conditions of any other type due to actions or omissions by the merging parties that would not have occurred in the absence of the proposed merger.

82 Judgment of 19 May 1994, *Société Anonyme à Participation Ouvrière Compagnie National Air France v. Commission*, T-2/93, EU:T:1994:55, paragraph 70. See also, e.g., Judgment of 17 May 2023, *EVH v Commission*, T-312/20, EU:T:2023:252, paragraphs 233-234, Judgment of 13 September 2010, *Editions Odile Jacob v Commission*, T-279/04, EU:T:2010:384, paragraph 327, and see e.g., Case M.7932 – Dow/DuPont, paragraph 137. Therefore, the Commission has no duty to carry out a forward-looking analysis on the basis of elements of which it is not able to envisage, within a reasonable margin of error, the long-term effects, see Judgment of 17 May 2023, *EVH v Commission*, T-312/20, EU:T:2023:252, paragraph 234.

a) temporary market distortions or shocks due to cyclical peaks, downturns or crises, such as war, trade conflict, health emergencies and other temporary disruptions, in which case the Commission may compare the merger-specific effects with market conditions that existed prior to the temporary peak or disruption or that can reasonably be expected with a sufficient degree of certainty to exist once demand and supply will have settled following a temporary peak or recovered from a distortion[83],

b) effects due to the initiation, negotiation, or conclusion of a merger or a merger's announcement, in which case the Commission may use the conditions prevailing before the initiation, negotiation, conclusion or announcement as the relevant benchmark[84], and

c) pre-existing agreements between the merging parties, in which case the Commission may use the conditions prevailing before the conclusion of such agreements, if they were not concluded irrespectively of the merger[85], or if such cooperation was contrary to Article 101 TFEU[86]. The Commission accepts existing agreements between the merging parties as a relevant benchmark, unless the agreement is related to the merger, such that, for example, the terms of the agreement are informed by the prospects of the merger, the agreement was not entered into on commercial terms or was not intended to be in place in the long term.

Adjustments for alternative mergers or agreements to the merger

44. In its assessment of various chains of cause and effect, the Commission may consider potential alternatives to the merger – that is alternative merger(s) or agreement(s) that the target or merging parties may pursue should the merger not go through – based on available evidence[87]. However, the Commission only exceptionally considers a specific alternative merger as part of the prevailing situation without the merger[88].

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83 Where short-term effects are present, the Commission may request data related to the years prior to the shock/start of the crisis; as well as relevant internal documents, third party reports and similar evidence assessing the timing for recovery of demand and supply.

84 See, e.g., Case M.7746 – Teva/Allergan, paragraphs 87, 89, 96.

85 See, e.g., Case M.5181 – Delta Air Lines /Northwest Airlines, paragraphs 32-33; Case M.5403 – Lufthansa/BMI, paragraphs 42-44; Case M.5335 – Lufthansa/SN Airholding, paragraphs 283-298; Case M.5440 – Lufthansa/ Austrian Airlines, paragraphs 60 et seq.; Case M.5889 – United Airlines/Continental Airlines, paragraphs 36-42; Case M.10615 – Booking Holdings/eTraveli Group, paragraphs 619 et seq.

86 Case M.5889 – United Airlines / Continental Airlines, paragraph 37.

87 In the context of a bid, the assessment of whether an alternative to the notified transaction would exist in a counterfactual scenario should be justified by objective and verifiable criteria at the time the choice between alternative bids is made. See e.g., Case M.8444 – ArcelorMittal/Ilva, paragraph 424.

88 See, e.g., Case M.5440 – Lufthansa / Austrian Airlines, paragraphs 60, 62, 85-106. An alternative acquisition of the target company (Haldex) was also assessed e.g., in Case M.8222 – Knorr Bremse/Haldex, abandoned by the merging parties during the Commission's phase 2 investigation. The Commission's assessment of alternatives to the merger – should it not go through – is different from the assessment of other realistic and attainable alternatives for the merging parties in the context of a failing firm or efficiencies claim. This is because in the case of the latter, that assessment does not relate in itself to the causality between the merger and the competitive effects, but to the absence of less harmful alternatives than the merger.

5.2. Failing firm

45. The Commission may decide that an otherwise problematic merger is nevertheless compatible with the internal market if one of the merging parties is a failing firm[89]. This is because, in the event of a failing firm, the harm to competition that follows the merger cannot be said to be caused by the merger[90].

46. The Commission considers the following three cumulative criteria necessary to find that one of the merging parties is a 'failing firm'[91].

47. *First*, the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another firm or successfully reorganised[92]. Temporary financial problems or short-term liquidity constraints are insufficient to qualify as a failing firm.

48. *Second*, there is no less anticompetitive alternative than the notified merger[93]. Alternatives may include business reorganisations (such as obtaining external funding) or credible alternative acquirers. The realistic and attainable prospect of such alternatives within a reasonable period of time is assessed at the time the notified merger has been initiated, negotiated, concluded or announced[94].

49. *Third*, absent the merger, the assets of the failing firm would inevitably exit the market, cease to play a competitive role, or the market share of the failing firm would in any event accrue to the acquirer[95].

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89 As a general rule, 'firm' refers to the entire group. Regarding the specific scenario of a 'failing division', see paragraph 50 below.

90 Judgment of 31 March 1998, *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission (Kali+Salz)*, Joined Cases C-68/94, C-30/95, EU:C:1998:148, paragraphs 110, 114. See also e.g., Case M.2314 – BASF/Pantochim/Eurodiol, paragraphs 157-160; Case M.6360 – NYNAS/Shell/Harburg Refinery, paragraphs 312-327; Case M.6796 – Aegean/Olympic II, paragraphs 682-833.

91 The Commission applies these criteria also in cases where the merging parties do not claim that the target is a failing firm but put forward a market scenario without the merger that is in essence tantamount to a 'failing firm' situation. See to this effect, e.g., Case M.8444 – ArcelorMittal/Ilva, paragraphs 414-415.

92 See, e.g., cases in which the criterion was met: Case M.308 – Kali+Salz/MdK/Treuhand, paragraphs 70-77; Case M.890 – Blokker/Toys"R"Us, paragraphs 109-111; Case M.2314 - BASF/Pantochim/Eurodiol, paragraphs 144-145; Case M.4381 – JCI / FIAMM, paragraphs 712-721. See also cases in which the criterion was not met: Case M.5830 – Olympic/Aegean Airlines I, paragraphs 1991-2070; Case M.9287 – Connect Airways/Flybe, paragraphs 245-263.

93 See cases in which the criterion was met: Case M.308 – Kali+Salz/MdK/Treuhand, paragraph 70-77; Case M.2314 – BASF/Pantochim/Eurodiol, paragraphs 146-148; Case M.4381 – JCI / FIAMM, paragraphs 722-736; Case M.6796 – Aegean/Olympic II, paragraphs 806-817. See also cases in which the criterion was not met: Case M.774 – Saint-Gobain/Wacker-Chemie/NOM, paragraphs 225-259; Case M.5830 – Olympic/Aegean Airlines I, paragraphs 2071-2087; Case M.8444 – ArcelorMittal/Ilva, paragraphs 416-424.

94 See e.g., Case M.8444 – ArcelorMittal/Ilva, paragraph 424.

95 Judgment of 31 March 1998, *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission (Kali+Salz)*, Joined Cases C-68/94, C-30/95, paragraphs 115-116. See, e.g., cases in which the criterion was met: Case M.6360 – NYNAS/Shell/Harburg Refinery, paragraphs 312-362; Case M.6796 – Aegean/Olympic II, paragraphs 738-805; Case M.4381 – JCI / FIAMM, paragraphs 737-752. See also cases in which the criterion was not met: Case M.5830 – Olympic/Aegean Airlines I, paragraphs 2088-2119; Case M.6447 – IAG/ BMI, paragraphs 608-633; Case M.8444 – ArcelorMittal/Ilva, paragraphs 404-444.

50. In exceptional circumstances, the Commission may assess these criteria at the level of the subsidiary of a larger firm or affiliate of a group of companies ('failing division'). In such cases, as part of the *first* condition above, the Commission assesses whether (i) the allegedly failing division would, absent financial support from the parent company, in the near future be forced out of the market because of financial difficulties if not taken over by another firm and (ii) the parent company is (a) no longer financially capable of continuing to offset the subsidiary's losses in order to prevent its insolvency[96] or (b) has no strategic, financial or other incentives to continue supporting the subsidiary[97]. The second condition, i.e. condition (ii), is aimed at ascertaining that the ceasing of operations of the failing division is not solely a management decision to discontinue an underperforming business[98]. In assessing failing division claims, the Commission may also consider that (i) the parent company's accounting practice does not unduly create the appearance of a failing division when the division is not actually failing, (ii) a division may be temporarily operating at a loss without failing, and (iii) an unprofitable division may be unlikely to exit the market if it serves an important purpose other than financial for the group to which it belongs.

51. The merging parties bear the burden of demonstrating any failing firm claim, and they must provide sufficient evidence in due time to the Commission[99].

PART II – COMPETITIVE ASSESSMENT

52. The Commission assesses different ways through which a merger may result in a SIEC. These Guidelines set out the main metrics and parameters relevant for this assessment. The relevance and relative weight assigned to these metrics and parameters depends on the facts of the case.

53. The Commission considers a merger's effects on competition based on what can be reasonably expected at the time of the merger review. While in most cases current competitive conditions are the relevant benchmark for the analysis, the Commission takes a forward-looking and dynamic view of competition, considering not only the short-term constraints that firms impose on one another but also their capabilities and incentives to compete for future business.

54. In principle, the competitive assessment is done separately for each relevant market[100]. However, sector-specific features and the broader competitive landscape may also be relevant. In some industries, individual markets are closely related through demand or supply links, such as complementary products, networks, shared technologies, bundling, multi-sided platforms, ecosystems of related services or the dynamic capabilities of

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96 The incapacity to sustain its subsidiary's losses does not require proof of financial failure of the larger firm or the entire group of companies, see e.g., Case M.6796 – Aegean/Olympic II, paragraph 688.

97 See e.g., Case M.6796 – Aegean/Olympic II, paragraphs 752 et seq., 765 et seq.

98 For cases in which a failing division claim was accepted, see e.g., Case M.6796 – Aegean/Olympic II and, by analogy, Case M.6360 – NYNAS/Shell/Harburg Refinery.

99 See, e.g., Case M.8444 – ArcelorMittal/Ilva, paragraph 413; Case M.5830 – Olympic/Aegean Airlines I, paragraph 1987. Due to the nature of the relevant facts typically underlying this claim, such as information on financials and viability of the firm, the relevant facts to substantiate these claims are typically in possession of the merging parties.

100 Commission Notice on the definition of the relevant market for the purposes of Union competition law ('Market Definition Notice'), OJ C/2024/1645, 22.2.2024, paragraph 8.

different providers to expand across markets. Such links may give rise to broader pro- or anticompetitive effects that the Commission considers in its competitive assessment by evaluating the overall impact of the merger on competition within and across markets[101]. This also allows to take into account general trends and evolutions on a broader geographic scale than when examining solely through the prism of individual geographic markets. As emphasised above, the Commission carries out its assessment based on a sufficiently cogent and consistent body of evidence.

A. MARKET POWER

55. Market power relates to the ability of one or more firms to profitably maintain prices above competitive levels or to reduce quality, choice, capacity, output, investment, innovation, privacy, sustainability or resilience below competitive levels for a period of time[102]. The analysis of market power existing at the time of the merger and how the weakening or removal of competitive constraints through the merger may increase market power is central to the assessment of the possible anticompetitive effects that a merger may have.

56. Market power is a matter of degree, with dominance referring to a specific type of market power (see Section II.A.5). While firms may acquire market power legitimately through internal growth and competition on the merits, for instance by developing superior products or realising cost efficiencies, the Commission is required to closely assess mergers that lead to the creation or increase of market power through external growth, as such mergers may harm the competitive process.

57. Market power is assessed using a combination of factors, none of which is individually decisive. Structural indicators, including the number of credible competitors, market shares and concentration levels, provide useful first indicators of the competitive importance of the merging firms and their competitors (see Section II.A.1). The Commission also considers additional factors, including, when appropriate, customers' and competitors' price sensitivity, profit margins and the existence of barriers to competition (see Section II.A.2). These factors may be assessed using both quantitative and qualitative evidence.

58. In specific dynamic settings, a static assessment of market power may be less appropriate. The Commission may therefore also assess firms' dynamic competitive potential (see Section II.A.3). Under its forward-looking approach to identifying market power, the Commission may adjust market power indicators, such as market shares and profit margins, to account for changes in the competitive environment that can be reasonably predicted with a sufficient degree of certainty (see Section I.B.5.1).

59. Finally, the Commission assesses whether countervailing factors may constrain the exercise of market power (see Section II.A.4).

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101 See, e.g., Case M.8084 – Bayer/Monsanto, Section VI; Case M.7932 – Dow/DuPont, Section V.1;, and Case M.11071 – Lufthansa/MEF/ITA, Sections 7.5-7.7.

102 Both suppliers and buyers may have market power. In these Guidelines, market power will usually refer to a supplier's market power. However, the same concepts for the assessment of market power can apply *mutatis mutandis* to a buyer's market power (see Section II.B.2.4 on 'buyer power' on purchasing markets – also referred to as monopsony or oligopsony power).

1. Structural indicators of market power

60. The analysis of the structure of the relevant market seeks to understand how many companies effectively compete with and thus constrain the merging parties. In principle, a larger number of credible competitors make it less likely that one or more firms hold market power. A fringe of small firms operating on the periphery of a relevant market, however, may not sufficiently constrain the exercise of market power by larger firms.

1.1. Large market shares

61. Market shares reflect the position and competitive strength of firms on the relevant product and geographic markets[103]. The higher a firm's market share, the greater the degree of market power it is likely to possess. Moreover, the wider the gap in market share between the share of the leading firm and that of its main competitors, the greater the degree of market power it is likely to possess.

62. While market shares can be qualified differently, in these Guidelines the Commission describes market shares as follows: 'low' for shares under 10 %, 'moderate' for shares ranging from 10 % to just under 25 %, 'material' for shares ranging from 25 % to just under 40 %, 'high' for shares ranging from 40 % to just under 50 %, and 'very high' for shares of 50 % or more.

63. The Commission applies market share metrics that best reflect the competitive constraints faced by the merging firms. In most cases, market shares are calculated by dividing the relevant suppliers' sales by the total sales in the relevant market. As further outlined in Section 5 of the Market Definition Notice, market shares may be calculated using different metrics and computed over reference periods of one year or more. The merged firm's post-merger market share is typically calculated as the sum of each merging firm's pre-merger market shares.

64. Market shares – especially those based on the previous year – may not fully reflect a firm's market power. This may be the case, for instance, in the following circumstances:

a) Where market shares alone do not capture the intensity of competition on the overall market: In some industries, firms' offerings are easily substitutable (e.g., if they are homogenous), so competition may be vigorous even when markets are relatively concentrated. In others, customers may find it difficult to change suppliers (e.g., because of barriers to switching, see Section II.A.2.3), so firms may face limited pressure and can increase prices even when markets are not overly concentrated. In addition, market shares may not reflect the relative degree of competitive interaction between the merging firms and their rivals (see Section II.B.2.2)[104]. The Commission therefore typically assesses market shares alongside other indicators of market power and competitive interaction (see Section II.A.2).

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103 In addition to market shares, the Commission also takes account of competitive constraints that firms outside the relevant market may represent (see Section II.A.4.2). See Market Definition Notice, paragraph 17.

104 For guidance on market definition in the presence of significant differentiation, see Market Definition Notice, Section 4.1.

b) Where a firm's dynamic capabilities are not reflected in its static capabilities: A firm may be an 'important competitive force' having more influence on the competitive process than its market share or similar measures would suggest (see Section II.B.2.3) or have a particular 'dynamic competitive potential' (see Section II.A.3). The Commission may assess the competitive relevance of an 'important competitive force', including its market power, using evidence other than market shares (e.g., perceptions of its competitive strength in internal documents or in replies to market investigation questionnaires, or diversion ratios).

c) In highly dynamic or volatile markets, where market shares can change frequently and significantly over time, market shares may provide a less reliable indicator of current and future market power: This includes, for instance, markets that are nascent, fast-growing or characterised by short innovation cycles[105]. The same might be true in volatile markets, where entry, expansion or exit of suppliers occurs often, or those undergoing important structural transitions (e.g., regulatory or technological changes).

   In such markets, in addition to considering metrics other than market shares, the Commission may find it useful to (i) assess several years of historic market share data to identify underlying trends, (ii) adjust current market shares to reflect reasonably certain future changes (e.g., exit, entry, or expansion)[106] or (iii) consider future market share estimates (reflecting expected changes such as from firms' internal projections).

d) In markets characterised by a small number of infrequent and high-value transactions, market shares at a given date can be less meaningful (see Section II.B.2.4)[107]: The assessment of (i) historic annual market share data from several years and (ii) market share data computed across periods of time longer than a year may be particularly useful to obtain a more stable view of suppliers' relative strength in these cases[108]. In markets characterised by lumpy orders, the fact that a firm can maintain or increase its market share over longer periods may be a particularly strong signal of market power (e.g., as a result of specific skills or customer switching costs).

1.2. High market concentration

65. To assess the overall level of market concentration, the Commission may apply concentration measures such as the Herfindahl-Hirschman Index ('HHI')[109]. The higher the HHI, the more concentrated the market is and the more likely it is that the largest firms in the market will possess market power. Generally, markets with an HHI below 1 000 are

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105 Judgment of 11 December 2013, *Cisco Systems and Messagenet v Commission*, T-79/12, EU:T:2013:635, paragraph 69.

106 See., e.g., Case M.9706 – Novelis/Aleris, paragraphs 498-503.

107 Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraphs 149-151.

108 See, e.g., Case M.10507 – Hitachi Rail/Ground Transportation Systems Business of Thales, paragraph 44, and Case M.9779 – Alstom/Bombardier Transportation, paragraphs 274-278, where market shares were calculated over a ten-year period.

109 The Commission is not obliged to assess the HHI in each of its merger decisions. See Judgment of 26 June 2025, *EVH and Others v Commission*, Joined Cases C-464/23 P, C-465/23 P, C-467/23 P, C-468/23 P and C-470/23 P, EU:C:2025:478, paragraph 214, and Judgment of 7 June 2013, *SPAR Österreichische Warenhandels AG v Commission*, T-405/08, EU:T:2013:306, paragraphs 66 and 69.

considered unconcentrated. Markets with an HHI above 2 000 are considered highly concentrated.

66. The HHI is the sum of the squares of each firm's individual market shares. For example, in a market with two firms each holding 50 %, the HHI equals $50^2 + 50^2 = 5\,000$[110]. The HHI ranges from 0 (perfectly atomistic) to 10 000 (monopoly). The HHI may also be expressed as a percentage, with its inverse denoting the 'effective number of firms' in the market[111]. Because the HHI is calculated based on individual market shares, the HHI can have the same limitations as those described in Section II.A.1.1.

67. Where appropriate, the Commission may also use other concentration measures such as concentration ratios, which measures the aggregate market shares of the (usually three or four) leading firms in a market.

2. Other indicators of market power

2.1. Low sensitivity to price

68. When purchasers lack sufficient alternatives, they typically become less sensitive to price increases, which gives rise to market power. Insensitivity to price changes can thus be evidence of market power. The Commission may therefore examine the past propensity of customers to switch suppliers, especially following deteriorations of purchasing conditions. For example, it may estimate customer churn rates, switching patterns following price increases or firms' elasticity of demand from natural experiments.

69. When rivals' output is not responsive to increases in market prices, for example due to capacity constraints or increasing marginal costs, this can also be evidence of market power. The Commission may therefore examine the past propensity of firms to increase production, especially when market conditions for suppliers have improved. Relevant evidence may include the frequency of capacity adjustments, production increases following price increases, or estimates of rivals' elasticity of supply from natural experiments.

2.2. High profit margins

70. Profit margins (the difference between prices and costs) are typically higher in markets where firms have market power. They are therefore indicative of the degree to which merging firms hold market power. On the other hand, high margins may be less likely to indicate market power if they are temporary, including where they reflect the outcome of research, innovation and risk-taking, in markets characterised by a fast pace of innovation.

71. When assessing a firm's market power, the Commission typically focuses on incremental costs[112]. The lower customers' ability to switch suppliers or rivals' ability to expand

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110 The HHI gives proportionately greater weight to the market shares of larger firms. Although it is best to include all firms in the calculation, lack of information about small firms may not be important because such firms do not affect the HHI significantly.

111 The HHI can be expressed as a percentage by dividing the HHI level by 10 000 (i.e., HHI/10 000). The result represents the weighted average market share of firms in the market. The inverse of that number (i.e., 10 000/HHI) can therefore be interpreted as the 'effective number of firms' in the market.

112 In practice, incremental costs are usually approximated by (average) variable costs or direct production costs computed from accounting data.

output, the higher the incremental profit margins a firm can sustain[113]. When assessing whether a firm is protected by barriers to entry and expansion (see Section II.A.2.3), the Commission may also examine broader profitability measures[114].

72. To assess the extent to which profit margins are indicative of market power, the Commission may compare these against profit margins in more competitive settings. When profit margins materially exceed those in more competitive comparable markets or those of peers within the same market, this may constitute evidence of market power – especially when a firm displays high profitability across different indicators.

73. However, the fact that other firms in the industry also have high profit margins does not necessarily indicate that the merging firms lack market power, nor does the perception among market participants that high profit margins are 'normal' in the industry. Instead, where profit margins are high across the industry, this may suggest that this is an industry with significant barriers to competition.

74. Some firms hold market power even when profit margins are low. This is the case, for example, when they reflect strategic pricing (e.g., to build scale) rather than competitive pressure, or when firms earn profits through complementary products or indirect monetization (e.g., multi-sided platforms, see Section II.B.2.4).

2.3. High barriers to competition

75. Barriers to competition are specific market features that give incumbents advantages over their actual and potential competitors. On the demand-side, the Commission typically assesses whether customers are limited in their ability to switch, while on the supply-side, it typically assesses whether there are barriers to the entry and expansion of rivals. Certain factors can be barriers both to customers' switching ability as well as to rivals' ability to enter and expand. Where such barriers to competition are high, incumbents are more likely to have market power.

Limited switching possibilities

76. Where customers of firms are limited in their ability to switch to alternative suppliers, the firms in question are more likely to have market power. Customers that face obstacles to switch are particularly vulnerable to price increases or reduced output or quality. Some of the market characteristics that may make switching difficult include:

a) Product differentiation: when products are highly differentiated, customers find it harder to switch as the alternative products may lack the same attributes as the ones they currently purchase[115].

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113 Incremental profit margins are calculated using incremental costs as the relevant cost measure. In practice, incremental profit margins are usually approximated from accounting margins that are based on variable costs (such as contribution margins) or direct production costs (gross margins).

114 These may include earnings before interest and taxes ('EBIT') margins, earnings before interest, taxes, depreciation, and amortization ('EBITDA') margins, return on capital employed ('ROCE') or return on equity ('ROE').

115 See, e.g., Case M.9076 – Novelis/Aleris, paragraphs 952-956; Case M.10078 – Cargotec/Konecranes, paragraph 1617; and Case M.10663 – Orange/VOO/Brutélé, paragraph 374. Products may be differentiated in various ways. There may, for example, be differentiation in terms of geographic location,

b) High switching costs or delays: in many markets, switching suppliers can be associated with significant costs or delays because of, e.g., product customisation, expensive qualification procedures[116], technological barriers to switching or the need to remain compatible with legacy software[117].

c) Customer lock-in: situations where customers are particularly dependent on certain suppliers can give rise to lock-in effects[118]. This can be the case in markets with network effects (see Section II.B.2.4, particularly where interoperability and multi-homing[119] are limited), when products have been developed jointly with the supplier[120], when customers require their suppliers to have the same geographic presence as themselves[121], when suppliers hold important customer data, or when incumbents have built ecosystems of complementary products from which customers find it difficult to switch.

d) Multi-sourcing: customers that source from multiple suppliers may be able to switch faster by shifting orders between their current suppliers. However, genuine switching possibilities can be limited where customers place significant value on sourcing from multiple suppliers (e.g., to ensure security of supply), especially in concentrated markets[122].

e) Non-resilient supply chains: the ability to switch to alternative suppliers may be more limited where supply chains are volatile or may be subject to shocks. Supply chains may be less resilient to disruptions for example where supply is concentrated among suppliers in a particular region of the world (whether within or outside the EU). This may make supply from certain geographies a less reliable alternative.

f) Highly complex products or terms: asymmetry of information available to suppliers and customers can limit switching abilities. In particular, in markets involving highly complex products or purchasing terms where customers have limited information about important competitive parameters, customers may find it more difficult to make informed choices about switching suppliers.

g) Regulatory requirements: regulatory requirements which, for example, limit the number of market participants, may limit customers' ability to switch suppliers.

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quality, service level, technical specifications, brand image, or sustainability considerations (see Section II.B.2.2).

116 See, e.g., Case M.5529 – Oracle/Sun Microsystems, paragraphs 136-138.

117 See, e.g., Case M.10806 – Broadcom/VMware, paragraph 572-588.

118 For a discussion on the absence of lock-in effects, see, e.g., Case M.9716 – AMS/Osram, paragraphs 165-170.

119 Multi-homing refers to a situation in which customers use multiple competing platforms or providers at the same time, rather than committing exclusively to one (e.g., consumers with checking accounts with multiple banks). For multi-homing as a factor enabling customer switching, see, e.g., Case M.7217 – Facebook/WhatsApp, paragraph 133, and Case M.8994 – Microsoft/GitHub, paragraph 100.

120 See, e.g., Case M.9076 – Novelis/Aleris, paragraph 968.

121 See, e.g., Case M.10078 – Cargotec/Konecranes, paragraph 1621.

122 See, e.g., Case M.6461 – Outokumpu/Inoxum, paragraphs 496-510.

High and durable barriers to entry and expansion

77. Firms may hold market power where markets are not easily contestable due to the existence of high and durable barriers to entry and expansion. The Commission therefore assesses whether such barriers meaningfully inhibit competition.

78. Historical examples of entry and expansion in the industry may provide useful insights into the magnitude of these barriers. For instance, in concentrated markets where incumbents earn substantial profits and where there have only been few instances of significant entry and expansion in the past, the Commission may conclude that barriers to entry and expansion are high. Conversely, where frequent entry, exit and expansion provide evidence that a market is dynamic, the Commission may conclude that barriers to entry and expansion are low.

79. Barriers to entry and expansion can take many forms, including[123]:

a) Structural, technological and financial advantages of incumbents, such as economies of scale and scope, large sunk cost requirements for potential competitors (e.g., production assets, distribution, marketing, brand development, or talent acquisition)[124], easier or cheaper access to financing[125], established distribution networks, superior innovation capabilities that are difficult to replicate, privileged access to key inputs (e.g., facilities, data, software, algorithms, intellectual property rights)[126], or possession of scarce means of production (e.g., essential inputs, production capacity, key personnel)[127].

b) Product- and demand-side frictions, such as strong product differentiation, customer switching costs, network effects (particularly where interoperability and multi-homing are limited)[128] established brand reputation and track records[129], and customer loyalty[130].

c) Ecosystems and portfolio effects, such as ecosystems built around a core service with multiple complementary offerings, giving incumbents the ability to provide integrated or bundled solutions that smaller rivals cannot replicate[131].

d) Regulatory or administrative barriers, such as licencing restrictions limiting the number of market participants, trade barriers (e.g., tariffs)[132], or imposed capacity restrictions[133].

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123 Judgment of 23 February 2006, *Cementbouw Handel & Industrie BV v Commission*, T-282/02, EU:T:2006:64, paragraph 219.
124 See, e.g., Case M.4439 – Ryanair/Aer Lingus, paragraph 623.
125 See, e.g., Case M.2978 – Lagardere/Natexis/VUP, paragraphs 539-542.
126 See, e.g., Case M.6944 – Thermo Fisher Scientific/Life Technologies, paragraphs 245-247.
127 See, e.g., Case M.4180 – Gaz de France/Suez, paragraphs 208-270.
128 See, e.g., Case M.9660 – Google/Fitbit, paragraphs 459-461, and Case M.10615 – Booking/eTraveli, paragraphs 217-251.
129 See, e.g., Case M.9376 – Siemens/Alstom, paragraphs 463-466, and Case M.9343 – Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering, paragraphs 1059-1079.
130 See, e.g., Case M.10896 – Orange/Masmovil/JV, paragraph 780.
131 See, e.g., Case M.10615 – Booking/eTraveli, paragraph 919.
132 See, e.g., Case M.5153 – Arsenal/DSL, paragraphs 40 and 57.
133 See, e.g., Case M.5830 – Olympic/Aegean Airlines, paragraphs 542-552.

e) Persistent strategic conduct hindering entry or expansion, such as strategic entry deterrence (e.g., through limit pricing[134], excess capacity, aggressive IP rights enforcement, or loyalty rebates) or the ability to credibly threaten to foreclose or raise rivals' costs[135].

3. Dynamic competitive potential

80. In some industries or markets, a static assessment of market power does not fully capture a firm's competitive strengths and weaknesses from a dynamic perspective[136]. This includes markets where innovation or investment in new products, services or processes is an important parameter of competition[137]. In these cases, the Commission also considers various other factors to assess the influence on the competitive process that a firm may have ('dynamic competitive potential').

81. *Innovation-related factors*. As set out in Section 5 of the Market Definition Notice, market shares in the relevant innovation spaces[138] or at industry level can be calculated based on R&D expenditure, the number of patents, patent citations or any other metrics used internally[139]. More generally, innovation-related factors that can be relevant when assessing a firm's competitive strength may include the number, competitive potential and time-to-market of the products in development or R&D projects[140], track record of bringing to market novel or innovative solutions[141], investment or technological capabilities[142], past, current and/or expected R&D spending in the relevant market or industry[143], size of the R&D organisation (in terms of headcount and infrastructure)[144], patent citations[145], internal innovation output targets, access to a competitively significant input (e.g., data, technology, user traffic), dynamic capabilities arising from a given

134 Strategic conduct by which a firm sets a price that is still profitable but low enough to discourage firms from entering the market.

135 Judgment of 23 February 2006, *Cementbouw Handel & Industrie BV v Commission*, T-282/02, EU:T:2006:64, paragraphs 223-224, and Case M.11071 – Deutsche Lufthansa/MEF/ITA, paragraphs 665-693.

136 For instance, a static assessment of market power may not capture competitive strengths when the products are not yet commercialised, when competitive characteristics of the market change rapidly, or the merging firms' market shares are not fully representative of their dynamic competitive potential (see, e.g., Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business) and Case M.9461 – Abbvie/Allergan). Similarly, a static assessment of market power may not capture competitive weaknesses of firms that may have relatively high market shares but lack sufficient dynamic competitive potential.

137 Market Definition Notice, paragraphs 90-92.

138 The exact definition of the relevant innovation spaces in which innovation competition takes place is industry- and case-specific. See Market Definition Notice, paragraphs 90-93.

139 See Market Definition Notice, paragraph 108.

140 See, e.g., Case M.9461 – Abbvie/Allergan, paragraphs 57,60 and footnote 58, and Case M.11177 – Pfizer/Seagen, paragraphs 74 and 77.

141 See, e.g., Case M.7932 – Dow/DuPont, paragraphs 2402 et seq.

142 E.g., regarding access to efficient technology and ability and incentive to expand capacities.

143 See, e.g., Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business), Section 8.7.3 and Case M.11177 – Pfizer/Seagen, paragraph 183.

144 See, e.g., Cases M.7932 - Dow/DuPont and Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business), paragraph 387 and Section 8.7.4.

145 See, e.g., Case M.7932 – Dow/DuPont, paragraph 389.

business model[146], complementarities to the company's other products/services, synergies between intangible assets, and ability to exploit network effects across products, including if one of the parties has a wider ecosystem of products and/or services. The high valuation of a target by the purchaser, especially compared to its turnover, may also provide an indication regarding the significance of the company's dynamic competitive potential.

82. *Investment-related factors*. The assessment of the firms' dynamic competitive potential encompasses how the business models shape the firms' ability and incentive to invest and expand within and across markets. Relevant factors include organisational structures (including manufacturing processes or degree of vertical integration), the extent to which firms develop complementary product or service portfolios, or their geographic scope of operations (such as national versus local operators).

83. Barriers to entry or expansion can limit the dynamic competitive potential of companies in dynamic markets. For example, in markets where innovation is an important parameter of competition, the need to make significant investments, obtain intellectual property protection, have access to scarce inputs or skilled labour or go through lengthy regulatory processes can prevent firms from entering or expanding in the market in a timely manner (see Section II.A.2.3).

4. Countervailing factors

84. The merging firms' market power may be limited by entry or expansion of competitors, out-of-market constraints and buyer power.

85. As part of its consideration of countervailing factors, the Commission assesses, in line with the parameters described below and with the criteria it applies to the assessment of harm, whether competitors with promising pipeline products or innovation capabilities or offerings, potential competitors, or firms with a high expansion and investment potential, will enter or remain in the market and constrain the merged entity's activities.

4.1. Dynamic entry or expansion of competitors

86. Entry or expansion of competitors may limit the merging firms' market power and countervail a merger's increase in market power. This includes entry from global firms from outside of the internal market. The Commission considers the entry and expansion plans of rivals, which have to be predicted with an equivalent degree of certainty, just like other forward-looking elements. By contrast, the assessment of barriers to entry and expansion can instead be done irrespective of plans by specific rivals (see Section II.A.2.3).

Types of entry or expansion

87. Entry refers to rivals that were not active in the relevant market pre-merger but for which it can be predicted with a sufficient degree of certainty that they will become active in the relevant market following the merger. Expansion refers to rivals already active in the

[146] Some business models are particularly conducive to growth in a given industry, resulting in firms with such business models having more dynamic competitive potential than others. This may in particular relate to business models combining activities across related markets, such as vertical integration, large portfolios of otherwise closely related products, combinations of hardware and software capabilities, activities across related geographic markets, or business models allowing for network effects.

relevant market pre-merger for which it can be predicted with a sufficient degree of certainty that they increase their existing capacity and sales following the merger.

88. Entry or expansion can occur (i) independently of the merger or (ii) as a result of the post-merger competitive situation (e.g., induced by post-merger price increases), and thus only happen if the merger takes place.

89. For cases in which entry or expansion is expected to take place independently of the merger, the Commission considers such entry and expansion as additional or improved competitive constraints that exist in the counterfactual. As part of the overall competitive assessment, the Commission considers whether these additional future competitive constraints may limit the merging firms' market power going forward (e.g., where reliable estimates are available, by including sales or capacity of rivals that plan to enter or expand in forward-looking market share estimates)[147].

90. Merger-induced entry or expansion would, by definition, not occur in the counterfactual. As a result, it may soften the anticompetitive effects of a merger, for example by restoring the number of competitors.

91. Imports into the relevant market from firms operating from outside the relevant geographic market may be assessed by the Commission as either an existing competitive constraint or, when their competitive relevance may be expected to increase post-merger (either induced by the merger or in the counterfactual), as a form of countervailing entry or expansion. In both cases, the Commission considers factors that impact the competitiveness of imports, including trade restrictions (e.g., anti-dumping measures and tariffs)[148], customer preferences[149] (including in terms of security of supply[150]), transport costs relative to the value of the products in question[151], lead times[152], need for local sales presence[153], and regulatory and certification requirements[154].

92. To assess if imports are an effective countervailing factor, the Commission typically considers the broader strategic incentives of firms operating from outside the relevant geographic market to increase sales in the market impacted by the merger rather than to focus on their home or other export markets[155]. Opportunistic small-scale increases in imports, e.g., observed in reaction to previous large increases in market price, may exert some competitive pressure on incumbents, but will typically not suffice to countervail the increase in market power resulting from the merger[156]. Further, in some cases an increased reliance on imports may negatively impact supply chain security and harm the internal market's resilience. Where these are relevant parameters of competition on a market, the Commission takes such effects into account.

147 See, e.g., Case M.9076 – Novelis/Aleris, paragraphs 450-468.
148 See, e.g., Case M.8444 – ArcelorMittal/Ilva, paragraph 682-715.
149 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraph 1003.
150 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 1318-1321.
151 See, e.g., Case M.6296 – Triton/Compo, paragraph 26.
152 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 985-996 and 1306-1311.
153 See, e.g., Case M.10078 – Cargotec/Konecranes, paragraphs 1493-1539.
154 See, e.g., Case M.8677 – Siemens/Alstom, paragraph 469.
155 See, e.g., Case M.8444 – ArcelorMittal/Ilva, paragraphs 655-672, and Case M.9076 – Novelis/Aleris, paragraph 876.
156 See, e.g., Case M.8444 – ArcelorMittal/Ilva, paragraphs 673-680.

Countervailing effects of entry or expansion

93. For entry and expansion by competitors to limit the merging firms' market power going forward and countervail the increase in market power resulting from the merger, the Commission assesses, as cumulative criteria, whether entry or expansion is (i) sufficiently likely, (ii) timely and (iii) of sufficient magnitude. These criteria are assessed in view of the Commission's theory of harm in a specific case, considering the overall scope, timing and likelihood of anticompetitive effects resulting from the merger.

Likelihood

94. The Commission examines whether entry or expansion by rivals is sufficiently likely. To do so, the Commission assesses the broader market dynamics and firms' overall ability and incentives to enter and expand, taking into account the specific barriers to entry and expansion (see Section II.A.2.3) faced by each firm. The Commission may also assess the existence of potential competitors that have real and concrete possibilities to enter or expand. However, while the existence of such potential competitors may be sufficient to countervail a loss of potential competition (see Section II.B.5), for entry or expansion to be considered sufficiently likely to countervail a loss of existing competition, the Commission typically requires evidence that rivals have concrete plans to enter or expand at the relevant scale[157]. Such plans may be contingent in character (e.g., conditioned on the merger going ahead and creating, in the rival's view, a market opportunity), insofar as they are supported by clear, verifiable and contemporaneous evidence.

95. Entry or expansion is considered more likely where potential or existing competitors already possess, or can readily acquire, the necessary assets, capabilities, or regulatory approvals required to compete effectively in the relevant market[158].

Timeliness

96. The Commission examines whether entry or expansion would be sufficiently swift and sustained to countervail the increase in market power otherwise resulting from the merger. Entry or expansion are normally considered timely if they occur within two years. However, what constitutes an appropriate period depends on the characteristics and dynamics of the market, the theory of harm considered[159], as well as the capabilities of future entrants[160]. Therefore, the Commission remains open to consider longer time periods where appropriate in specific cases.

97. The Commission may consider longer time frames when entry or expansion is expected to be particularly substantial, likely and where it already impacts competition today[161]. This may be the case, for example, where entry requires upfront investments or

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157 See, e.g., Case M.5830 – Olympic/Aegean Airlines, paragraphs 736-776.

158 See, e.g., Case M.5830 – Olympic/Aegean Airlines, paragraphs 553-776 and Case M.7559 – Pfizer/Hospira, paragraphs 54 and 55.

159 For example, in cases where the competitive harm is likely to arise only several years after the merger, including if the merger leads to a loss of future competition, the Commission may consider entry and expansion that are likely to occur within longer timeframes in the foreseeable future.

160 See, e.g., Case M.1693 – Alcoa/Reynolds, paragraphs 38 and 39.

161 See, e.g., Case M.10807 – Viasat/Inmarsat, paragraph 223. See also, e.g., Case M.8677 – Siemens/Alstom, paragraphs 489-496, for a discussion of the conditions that limit the possibility of a very long-term assessment of entry.

construction works that have already been initiated at the time of the merger investigation, indicating a high likelihood of eventual entry already affecting competition today.

Magnitude

98. Entry or expansion must be of sufficient scale and scope to countervail the increase in market power otherwise resulting from the merger. Small-scale entry, such as entry into only a market segment, may not be considered sufficient[162].

99. Where entry or expansion is merger-induced, the Commission examines carefully the incentives of firms to enter or expand in response to the merger, and in particular whether such incentives depend on the expectation that post-merger prices will remain above pre-merger levels, even following market entry and expansion.

100. While the perceived threat of entry or expansion by rivals may exert some competitive pressure on the merged firm, it is unlikely to be sufficient to offset the negative impact on competition from the loss of existing competition between two firms unless it is predicted to occur at a relevant scale, for example by one or more firms operating at major scale and with notable cost, technology or other advantages in other regions[163]. In cases involving the loss of potential competition (see Section II.B.5), the perceived threat of entry or expansion of other rivals can more often be a sufficient countervailing factor.

4.2. Out-of-market constraints

101. In its competitive assessment, the Commission considers all competitive constraints faced by the merged firm irrespective of whether they arise from inside or outside the relevant market. Products that do not exert a sufficient competitive constraint on the merging firms' products to belong to the same relevant market (out-of-market constraints) may still play an important role in the assessment of market power (due to, for example, their overall popularity or evolving customer preferences).

102. However, because they are not effective and immediate competitive constraints, out-of-market constraints often constrain the merged entity only to a limited degree. Where (a subset of) customers remain dependent on the merging parties, out-of-market constraints are typically insufficient on their own to limit the merging firms' market power.

103. The following can under certain circumstances be examples of out-of-market constraints: (i) firms that produce inputs for internal consumption only and that are not active on the input merchant market (when they have the ability or are perceived as having the ability to supply the merchant market)[164], (ii) similar products that are not functionally interchangeable[165], (iii) private label on branded products[166], (iv) products or services offered through different sales channels[167], (v) suppliers located outside of a catchment

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162 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 1331-1340.
163 Judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 239.
164 See, e.g., Case M.9316 – Peab/YIT's Paving and Mineral Aggregates Business, paragraphs 199-201, and Case M.9383 – ZF/WABCO, paragraphs 204-206.
165 See, e.g., Case M.7523 – CMA CGM/OPDR, paragraph 139.
166 See, e.g., Case M.4533 – SCA/P&G, paragraphs 111-119.
167 See, e.g., Case M.11793 – Mytheresa/YNAP, Section 6.2.7, and Case M.10615 – Booking/eTraveli, Section 6.4.6.3.

area that are able to address some of the merging firms' customers[168] and (vi) pressure from global firms which may have an impact on the relevant market dynamics.

4.3. Countervailing buyer power

104. Firms may not hold market power when customers possess significant countervailing buyer power. This power refers to the bargaining strength that the buyer has *vis-à-vis* the seller in commercial negotiations due to its size, commercial significance to the seller and ability to switch to alternative suppliers.

105. It is not sufficient that buyer power exists prior to the merger, it must also exist and remain effective following the merger. This is because a merger of suppliers may reduce buyer power, for example by removing a credible alternative[169]. As buyer power typically already exists pre-merger, it should be reflected in the merging firms' pre-merger profit margins. Large profit margins of the merging firms may suggest that their customers do not possess significant countervailing buyer power.

106. For buyer power to act as a countervailing factor, it is not necessary for all the merging firms' customers to be able to switch all their sourcing to other suppliers. The possibility for customers to transfer a substantial part of their sourcing to other suppliers may be a sufficient threat to prevent the merging firms from exercising market power[170]. However, buyer power does not offset potential adverse effects of a merger if it only ensures that a segment of customers, with bargaining strength, is shielded from higher prices or deteriorated conditions after the merger[171].

107. The ability to credibly threaten to switch to alternative sources of supply within a reasonable timeframe should the supplier decide to increase prices or deteriorate quality is an indicator of countervailing buyer power[172]. This would be the case if the buyer could, for example, (i) immediately switch to other suppliers[173], (ii) credibly threaten to vertically integrate into the upstream market, (iii) sponsor upstream expansion or entry (e.g., by persuading a potential entrant to enter by committing to place large orders with this company) or (iv) stop or threaten to stop buying other products sourced from the same supplier (or, particularly in the case of durable goods, delay purchases).

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168 Market Definition Notice, paragraph 75.

169 See, e.g., Case M.8677 – Siemens/Alstom, paragraphs 549-557.

170 Judgment of 9 July 2007, *Sun Chemical Group et al. v Commission*, T-282/06, EU:T:2007:203, paragraph 171.

171 See, e.g., Case M.6455 – SCA/Georgia-Pacific Europe, paragraphs 239-242, and Case M.8797 – Thales/Gemalto, paragraphs 386-393. Price discrimination between customers may be relevant in some cases in the context of market definition (see Market Definition Notice, paragraphs 88 and 89).

172 Judgment of 23 February 2006, *Cementbouw Handel & Industrie BV v Commission*, T-282/02, EU:T:2006:64, paragraph 230.

173 See, e.g., in the agri-food sector, Case M.7565 – Danish Crown/Tican, paragraphs 51-55, and Case M.5046 – Friesland Foods/Campina, paragraph 358. Even a small number of customers may not have sufficient buyer power if they are to a large extent 'locked in' because of high switching costs.

108. A small number[174] of large and sophisticated customers is more likely to possess countervailing buyer power than smaller firms in a fragmented industry[175] or a large group of individual consumers[176]. In particular, a customer is more likely to possess countervailing buyer power where demand for the relevant product is concentrated among a small number of firms, making suppliers' total sales sensitive to the purchasing decisions of any one customer. Buyer power is also more likely where suppliers have broader commercial relationships with those customers, such that purchases of the relevant product represent only a small share of the customers' overall procurement from those suppliers. Customers in less differentiated markets are more likely to have countervailing buyer power as they can more easily threaten to switch[177].

109. In some sectors, certain customers may be considered market makers because they are the only customer of a given product or because they are closely involved in the development of the product. This can be the case in certain military goods markets featuring monopsonist customers. However, even in such markets that feature only one or very few customers, specific requirements like the need to maintain multiple potential suppliers to ensure supply resilience, can limit countervailing buyer power.

110. In some cases, customers may not have the incentives to use their buyer power. For example, a downstream firm may not wish to invest in sponsoring new entry of an upstream supplier if the benefits of such entry in terms of lower input costs could also be reaped by its competitors. In such a case, buyer power is unlikely to countervail the merging parties' market power.

5. Dominance and other types of market power

111. Dominance is a specific type of market power. It describes the situation whereby one or more firms – typically, the market leader(s) – have the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of consumers on the relevant market.

112. A dominant position generally derives from a combination of factors – including those described in the previous sections – that, taken separately, are not necessarily determinative. However, very high market shares of 50 % or more over a sustained period of time are in themselves — save in exceptional circumstances — evidence of a dominant position. Dominance may also be found in cases where a firm has a market share below 50 %. In such cases, factors other than market shares, such as the strength and number of competitors, are particularly relevant. Based on the Commission's experience, dominance is generally unlikely if the firm holds a market share below 40 %. However, dominance can still be found in case of market shares below 40 %, for example where customers are

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174 Judgment of 23 February 2006, *Cementbouw Handel & Industrie BV v Commission*, T-282/02, EU:T:2006:64, paragraph 232.

175 It may also be appropriate to compare the concentration existing on the customer side with the concentration on the supply side (see, e.g., Case M.9343 – Hyundai Heavy Industry Holdings/Daewoo Shipbuilding & Marine Engineering, paragraphs 1244-1245).

176 See, e.g., Case M.10663 – Orange/VOO/Brutélé, paragraphs 400-402.

177 In contrast, high product differentiation may limit customers' ability to exercise countervailing buyer power. See, e.g., Case M.9343 – Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering, paragraphs 1252-1260.

generally dependent on the firm concerned or where competing firms face serious capacity limitations.

113. A firm may possess substantial market power without being dominant. This is the case, for example, in certain oligopolistic markets[178] where a small number of competitors have substantial market power[179].

B. ANTICOMPETITIVE EFFECTS

1. Introduction: direct and dynamic effects

114. In its assessment of the anticompetitive effects of a merger, the Commission undertakes a holistic assessment. A merger may result in both direct and dynamic effects and there may be links between these two types of effects.

115. In the assessment of direct effects, the Commission considers the direct impact of the merger on competition within current product markets, considering existing and foreseeable products, costs and market structure. In the assessment of dynamic effects, the Commission considers the impact of the merger on the merging firms' and their (actual or potential) rivals' ability and incentives to invest and innovate and on future product market competition. Some anticompetitive effects and the underlying theories of harm are more focused on the direct effects of the merger, such as the loss of head-to-head competition between merging firms active in the same relevant market, while others are more focused on the dynamic effects of the merger, such as the loss of investment, expansion and innovation competition. The analysis of the effects of a merger is however undertaken in a continuum whereby anticompetitive effects based on a theory of harm that is focused on the merger's direct effects may feature elements related to dynamic effects and vice-versa.

116. In the following sections, the Commission sets out guidance in relation to the following types of anticompetitive effects[180]. The Commission may assess one or more types of effects, depending on the facts of the case.

a) **Loss of head-to-head competition (Section II.B.2),** leading to direct effects arising from the loss of actual competition between merging firms active in the same relevant market.

b) **Loss of investment and expansion competition (Section II.B.3)**, through the elimination of investment and expansion rivalry between the merging firms.

c) **Loss of innovation competition (Section II.B.4)**, through the elimination of innovation rivalry between the merging firms.

d) **Loss of potential competition (Section II.B.5)**, through the elimination of the actual or future constraint by a competitor not yet active in the relevant market.

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178 An oligopolistic market refers to a market structure with a limited number of sizeable firms. Because the behaviour of one firm has an appreciable impact on the overall market conditions, and thus indirectly on the situation of each of the other firms, oligopolistic firms are interdependent.

179 See EUMR, recital 25, and Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 107.

180 Except for 'Coordination', all the effects listed in this paragraph involve non-coordinated (or 'unilateral') effects within the meaning of recital 25 of the EUMR.

e) **Foreclosure (Section II.B.6)**, through a deterioration of access to inputs or customers which rivals need to compete effectively with the merged entity.

f) **Entrenchment of a dominant position (Section II.B.7)**, by structurally creating or reinforcing existing barriers to entry and expansion resulting in reduced market contestability.

g) **Coordination (Section II.B.8)**, by increasing the risk of tacit or explicit collusion between companies or by making existing collusion more stable or effective.

h) **Other anticompetitive effects (Section II.B.9)**, by giving the merged entity access to commercially sensitive information of rivals or by increasing the merged entity's market power over a portfolio of products.

117. The Commission may find that a merger would lead to a SIEC based on one or more theories of harm[181] and factors, which are outlined in the following sections. Not all factors need to be present for the Commission to establish that a merger would lead to SIEC. The Commission may also develop theories of harm based on other types of effects in light of evolving market realities and the specific circumstances of each merger.

118. Different anticompetitive effects of a merger may mutually reinforce each other, and the combined effect may result in more significant harm to the competitive process than each of them added separately.

2. Loss of head-to-head competition

119. Mergers between firms operating in the same market may result in direct effects that give rise to a SIEC by removing competition between the merging firms, which in turn may reduce the competitive pressure on the remaining competitors active in the market. When competitors merge, the merged firm no longer risks losing customers to its former rival. Without that constraint, it may have an incentive to worsen key parameters of competition (see Section I.B.1), particularly where customers have few credible alternatives or where customer switching is more difficult. In reaction to this, rivals of the merged firm may also find it profitable, without coordination between them or with the merged firm, to worsen key parameters of competition[182].

120. The Commission's assessment of head-to-head competition therefore focusses on the merging firms' existing market power in the relevant market (assessed using the criteria set out in Section II.A) and the degree of competitive interaction that would be lost due to the merger. Together, these elements determine the merger's direct effects on competition.

121. When the degree of competitive interaction is large, even firms with limited market power can place important competitive constraints on each other. When at least one of the merging firms has a high degree of market power, even a limited degree of competitive interaction can lead to a SIEC if removed. Hence, in mergers that would create or strengthen a dominant position, the Commission does not need to show that the merging

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181 Judgment of 4 October 2024, *thyssenkrupp v Commission*, C-581/22 P, EU:C:2024:821, paragraph 204.

182 Rivals' reactions are typically weaker compared to the impact of the merger on the behaviour of the merged firm.

firms are close competitors or that one of the merging firms is an important competitive force to conclude that the merger results in a SIEC[183].

122. The Commission accounts for the following factors when assessing head-to-head competition. These factors are neither cumulative nor exhaustive.

2.1. Structural market features

123. Structural indicators are useful and often important first indicators of whether a loss of head-to-head competition may result in a SIEC[184]. In cases where the merging firms are competitors, the Commission focuses on the level of the merging firms' combined market share and on the size of the market share increment. Combined market shares reflect the merged firm's market power, whereas the increment captures the degree of the merging firms' competitive interaction.

124. A loss of head-to-head competition is likely to be more harmful the higher the market shares of the merging firms and the more important the reduction in number and strength of competitors caused by the merger. The larger the market share increment, the more significant the increase in concentration brought about by the merger, and the greater the likelihood that the merger will give rise to a SIEC[185].

125. Similarly, the Commission may assess the level of HHI and change in HHI (known as the 'delta')[186]. The higher the HHI level and delta, the more likely it is that the loss of head-to-head competition is harmful.

126. However, other factors aside from market shares and HHI are typically necessary to support the Commission's findings of a SIEC. The Commission has also identified competition concerns in cases where the merged entity had moderate market shares[187] and has not opposed mergers where combined shares were high or very high[188].

127. The Commission typically relies on substantial additional corroborating evidence to establish a SIEC where the merged entity's market shares are low or moderate. On the other hand, it requires substantial evidence pointing away from a SIEC (e.g., on lack of market power or meaningful competitive interaction between the merging firms) to conclude on the compatibility with the internal market of mergers in markets where the merged entity has high or very high combined market shares or when the markets are

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183 Article 2(3) EUMR identifies the creation or strengthening of a dominant position as giving rise to SIEC.

184 See Section II.A.1.1 on the circumstances where market shares have limited evidentiary value as indicators of market power.

185 Judgment of 9 July 2007, *Sun Chemical Group et al. v Commission*, T-282/06, EU:T:2007:203, paragraph 138. The larger the increase in the sales base on which to enjoy larger margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.

186 The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ((30 × 15) × 2) = 900).

187 See, e.g., Case M.8658 - UTC/Rockwell Collins, Section 8.1.3.2.

188 See, e.g., Case M.11793 – Mytheresa/YNAP, Case M.11085 – Arcelik/Whirlpool EMEA MDA, and Case M.10876 – BSA (Lactalis)/Ambrosi.

highly concentrated (i.e., post-merger HHI above 2 000), and the merger results in non-negligible increases in concentration levels.

128. When one merging firm already has a significant degree of market power, even a limited market share increment or HHI delta may give rise to competition concerns[189]. Where a firm is dominant pre-merger, even a very limited market share increment may give rise to competition concerns.

129. The following market structures may be indicative that a merger between competitors does not give rise to a SIEC[190]:

a) The merging parties have a combined market share below 25 %[191];

b) The merging parties have a combined market share below 50 % and the HHI delta is below 150[192];

c) Post-merger HHI is below 1 000; or

d) Post-merger HHI is between 1 000 and 2 000 and the HHI delta is below 250.

2.2. Closeness of competition

130. The assessment of whether the merging firms are close competitors is one of the factors that can determine whether a merger resulting in a loss of head-to-head competition gives rise to a SIEC[193]. Closeness of competition depends on the extent to which customers regard the products of the merging firms and their rivals as substitutable. Mergers between close competitors are more likely to result in a SIEC, as customers of the merged firm are less likely to switch to more distant alternatives in response to price increases (or other deteriorations of competitive parameters), making price increases more profitable.

131. The Commission is not required to establish that the merging firms are each other's 'closest competitors' or that they compete 'particularly closely'[194]. However, the closer the merging firms compete, the stronger the evidence that the merger will result in a SIEC. If the merging firms are distant competitors, this may be evidence to the contrary[195].

132. As market shares may not fully capture the degree to which customers' substitute between different suppliers, the Commission may rely on additional types of qualitative and quantitative evidence when assessing whether the merging firms are close competitors. Closeness of competition may be inferred from ordinary course of business documents

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189 See, e.g., Case M.11506 – Parker/Meggitt, Section 4.2.2. and paragraphs 163, 164, 217, 218, 290 and 291.

190 As detailed in Section II.C of the Notice on Simplified Procedure, even certain cases with these market structures may nevertheless warrant a detailed investigation, e.g., where market definition poses challenges, or one of the merging firms is a recent entrant or an important competitive force.

191 EUMR, recital 32. See also Judgment of 7 May 2009, *NVV et al. vs Commission*, T-151/05, EU:T:2009:144, paragraphs 149 and 151.

192 Notice on Simplified Procedure, paragraph 5(d)(bb).

193 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 187.

194 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 189. See also Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19, paragraphs 129 and 130.

195 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 188.

benchmarking one firm's products or services against those of the other merging firm, as well as from qualitative elements such as market investigation responses or third-party reports[196]. Overlaps in geography or customer characteristics can also be indicative of closeness. Documents showing that the merging firms closely monitor each other's competitive actions or take strategic decisions in response to them may provide particularly strong evidence of closeness of competition.

133. Similar product characteristics[197] or content[198] can be indicative of closeness of competition. Other relevant parameters may include pricing, reputation[199], customer characteristics, production and supply capabilities[200], technological capabilities, sustainability considerations, workforce qualification, geographic proximity[201] and resilience (including security of supply). The relative importance of different parameters ultimately depends on the overall preferences of customers.

134. Important factors of differentiation may also exist in markets of otherwise homogenous products, such as geographic location[202], availability of spare capacity or reliability of supply. In certain cases, firms may compete closely although their products differ appreciably. For example, a firm that competes aggressively on price may be a close competitor to another firm despite differences in product characteristics if price is an important parameter of competition. In certain cases, integrated suppliers may compete closely with suppliers of standalone products even though they are not active on individual component markets[203].

135. Firms compete more closely, the larger the proportion of their customers that view the other firm as their preferred alternative. Diversion ratios are a direct way of estimating such customers choices, including relevant out-of-market constraints (if any)[204]. Where reliable data are available, the Commission may use estimates of diversion, such as win/loss data (e.g., bidding data), switching data (e.g., number portability data), customer surveys, event studies (e.g., evidence from past entry or expansion) or empirical estimates of demand shifts following changes in purchasing terms. The Commission may illustrate the diversion ratios between the merging firms by displaying them as 'implied market shares', which indicate the market share levels that would correspond to the observed diversion[205]. The Commission may also draw on other quantitative evidence to establish closeness of competition, including shares in subsegments of differentiated markets,

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196 See, e.g., Case M.10433 – Vivendi/Lagardère, Section 8.3.3.2.

197 For the assessment of closeness of competition, it is irrelevant whether the differences in product characteristics are only perceived or actual. For example, customers may consider some products of higher quality than others, even though these products have very similar characteristics.

198 See, e.g., on closeness in press content, Case M.10433 – Vivendi/Lagardère, Section 8.3.3.2.

199 See, e.g., Case M.5830 – Olympic/Aegean Airlines, paragraph 526.

200 Judgment of 22 June 2002, *thyssenkrupp v Commission*, T-584/19, EU:T:2022:386, paragraph 514.

201 Judgment of 22 June 2002, *thyssenkrupp v Commission*, T-584/19, EU:T:2022:386, paragraph 514.

202 See, e.g., Case M.7567 – Ball/Rexam, paragraphs 346-352, and Case M.7054 – Cemex/Holcim Assets, paragraph 134.

203 See, e.g., Case M.7995 – Deutsche Börse/London Stock Exchange Group, paragraphs 800-802.

204 See, e.g., Case M.10896 – Orange/MásMóvil, paragraphs 533-551. The diversion ratio from product A to product B seeks to measure the proportion of the sales of product A lost due to a price increase of A that are captured by product B.

205 See, e.g., Case M.9730 – FCA/PSA, Economic Annex, paragraph 45.

customer overlaps, participation in the same tenders or analyses of customer purchasing patterns.

136. The Commission assesses how closely the merging firms compete in light of their market power. The more difficult it is for customers of the merging firms to switch to adequate alternatives, the more likely a merger causes competitive harm. Moreover, the more significant the merging firms' margins, the greater their incentive to soften competition post-merger to avoid 'cannibalizing' own sales. As a result, when one or both merging firms hold substantial market power, they may place an important competitive constraint on each other even if their products are not close substitutes (e.g., in markets with significant product differentiation).

137. Depending on the availability and quality of data, the Commission may quantify the loss of head-to-head competition using pricing pressure tools[206] or merger simulations. Such tools often account for the degree of the merging firms' market power through margins and for the degree of their competitive interaction through market shares or diversion ratios. Combining these metrics may indicate the magnitude of the loss of competition caused by a merger[207]. Such quantitative analyses can be a complementary piece of evidence that should be seen in the context of the other evidence in the overall assessment of a case.

2.3. Important competitive force

138. The assessment of whether one of the merging firms is an 'important competitive force' is one of the factors that can determine whether a merger resulting in a loss of head-to-head competition gives rise to a SIEC[208]. One or multiple firms[209] act as important competitive forces if they have more influence on the competitive process than their market share or similar metrics would suggest[210]. Some of the tools used to determine whether the merging firms are close competitors can also be used to assess whether a firm constitutes an important competitive force[211].

139. A merger between competitors involving an important competitive force[212] may result in a SIEC, particularly when the market is highly concentrated[213]. This, however, does not

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206 Commonly used pricing pressure tools include the Gross Upward Pricing Pressure Index ('GUPPI') and the Compensating Marginal Cost Reduction ('CMCR'). See, e.g., Case M.10896 – Orange/MásMóvil, paragraphs 625 and 626.

207 When the Commission performs such quantitative analyses, it does not account for any efficiencies that the merging parties have failed to demonstrate. Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 241.

208 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 149.

209 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd, C-376/20 P, EU:C:2023:561*, paragraph 163.

210 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 167, and Judgment of 4 October 2024, *thyssenkrupp v Commission, C-581/22 P, EU:C:2024:821, paragraphs 242.*

211 For instance, diversion ratios may be used both to assess whether the merging firms are close competitors as well as whether a firm is an important competitive force.

212 Both the acquirer and target firms can be an important competitive force. See, e.g., Case M.10438 – MOL/OMV Slovenija, paragraphs 133 and 134.

213 See, e.g., Case M.9343 – Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering, paragraphs 528-529.

mean that mergers that do not involve an important competitive force cannot give rise to a SIEC[214]. While the merged firm may itself be constrained by an important competitive force, the presence of such rivals does not in itself dispel competition concerns.

140. A firm may qualify as an important competitive force in instances where it:

a) engages in particularly aggressive price competition[215];

b) is a credible recent entrant or has significant expansion plans and is therefore expected to exert substantial additional competitive pressure on other firms[216];

c) otherwise acts as a 'maverick', for example by having a business model that challenges those of other firms in the market;

d) has capabilities or products that are increasingly demanded by customers, for example due to preferences for sustainability or for regulatory reasons[217];

e) provides products or services that are of a particular high quality[218];

f) allows customers to multi-source from different geographic locations, for example when other suppliers are concentrated in a specific region of the world, to the extent that this is important for their security of supply; or

g) has other characteristics or capabilities that are valued by customers and distinguish it from some or all its rivals.

141. A firm with a relatively small – or even zero – market share may nonetheless be an important competitive force if it has promising R&D projects, innovation capabilities or R&D organisations[219]. However, the Commission is unlikely to regard such a firm as an important competitive force where, post-merger, a sufficient number of firms with comparable innovation capabilities or offering will remain (see Section II.B.3).

142. The Commission may assess the competitive relevance of an 'important competitive force' using evidence such as perceptions of its competitive strength in internal documents or in replies to market investigation questionnaires, or diversion ratios.

2.4. Specific market aspects

143. This section addresses specific market aspects that may require additional considerations in the competitive assessment.

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214 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 162.

215 See, e.g., Case M.7758 – Hutchison 3G Italy/WIND/JV, paragraph 568, and Case M.8444 – ArcelorMittal/Ilva, paragraphs 585-597.

216 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 883-966.

217 See, e.g., Case M.10658 – Norsk Hydro/Alumetal, paragraphs 323-380.

218 See, e.g., Case M.7612 – Hutchison 3G UK/Telefonica UK, paragraphs 764-775, and Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 165, and Case M.4525 – Kronospan/Constantia, paragraphs 67.

219 See e.g., Case M.7932 – Dow/DuPont, paragraphs 1518, 2701, 2801, 2803 and 2843.

Bidding markets

144. In bidding markets, contracts are awarded through an auction or tender process in which firms compete by submitting bids. The mechanism through which mergers in bidding markets may affect competitive outcomes is similar to mergers in other markets. By eliminating the competitive constraint that the merging firms exert on each other, a merger can lead the merged entity to bid less aggressively. The precise mechanism depends on the design of the tendering process and the information available to bidders[220].

145. A feature of bidding markets is that prices are determined individually for each customer. This means that the adverse effects of a merger may be targeted at a subset of customers that are particularly dependent on the merging firms. However, when suppliers do not know the number of chances they will have to improve their offer, and when there is uncertainty over the number and value of competing bids, the effects of a merger are typically spread over all customers of the merging firms[221].

146. As described in Section II.A.1.1, in bidding markets characterized by lumpy orders, market shares[222] at a given date may be less meaningful than in markets characterized by fast turnover. In such markets, historic tender data is particularly useful to determine the number, the identity and the post-merger competitive strength of likely credible bidders.

147. In bidding markets, historic tender data may also be used to assess whether the merging firms are close competitors[223]. In this respect, the Commission may assess (i) frequency data[224], (ii) win/loss data[225], and (iii) pricing and margin analyses[226].

Capacity constraints

148. In markets with capacity constraints, the Commission may consider capacity shares, alongside sales-based market shares, as a relevant structural indicator when assessing whether a transaction leads to a SIEC[227]. This is because in such markets, a producer with relatively limited sales but a substantial share of capacity may exert competitive pressure that is greater than what its sales-based market share would suggest.

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220 See, e.g., Case M.7278 – General Electric/Alstom (Thermal Power - Renewable Power & Grid Business), Annex I.

221 This is because bidding incentives will change for all tenders where the merging firms affect each other's probability of winning, instead of being targeted to only those customers for which they are the two preferred bidders. See, e.g., Case M.7278 – General Electric /Alstom (Thermal Power - Renewable Power & Grid Business), Annex I.

222 When calculating market shares, the Commission typically uses shares of competitive tenders with at least two participants, thus excluding tenders where there was no competition.

223 See, e.g., Case M.9343 – Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering, paragraphs 414-485.

224 Frequency data can be used to determine how often the merging firms have competed against each other in tenders over a given period. See, e.g., Case M.10507 – Hitachi Rail/Ground Transportation Systems Business of Thales, paragraphs 165-167.

225 Win/loss data can be used to determine how one merging firm typically ranks in tenders won by the other. See, e.g., Case M.4297 – Nokia/Siemens, paragraphs 83-87.

226 Prices and profit margins can be used to assess how these change in tenders where both merging parties participate, compared to those where only one participates. See, e.g., Case M.4662 – Syniverse/BSG, paragraphs 74-78, and Case M.7278 – General Electric /Alstom (Thermal Power - Renewable Power & Grid Business), Annex I.

227 See, e.g., Case M.8713 – Tata Steel/thyssenkrupp/JV, paragraphs 474-481.

149. The Commission may also assess the level of independent spare capacity that will remain in the market to compete with the merged firm. When the merging firms' competitors operate near full capacity (or if their output can only be expanded at significant cost), they may not be able or willing to compete fiercely for additional business. The merged firm may therefore hold market power even if it faces multiple sizeable rivals. On the other hand, in markets characterised by substantial over-capacity, or where firms with substantial over-capacity in other regions have the ability and incentive to divert production towards entry or expansion on the market where the merging parties are active, this may constitute a countervailing factor.

150. However, even when there is some spare capacity in the market, firms may have so-called pivotal capacity over which they hold market power. A firm is 'pivotal' if a portion of market demand cannot be met without its capacity[228]. In some cases, the Commission may therefore quantify the effect of capacity constraints on market power via the degree of pivotality of the merging firms[229]. A firm's degree of pivotality is the proportion of market demand for which it is pivotal. The market's overall pivotality is the sum of individual pivotalities and ranges from 0 to 100 %.

151. Where a merger materially reduces independent capacities, this may weaken the competitive constraints acting on the merged firm's pricing. The Commission may examine the change in the degree of pivotality as an indicator of the increase in market power caused by the merger. A given increase in pivotality is likely to be more problematic, the higher the merging firms' margins, market shares and the lower the ability or incentive of rivals to respond to price increases by investing in capacity expansions.

152. Where the merging firms and their rivals have significantly different variable costs – as is common, for example, in electricity markets – capacity shares and pivotality levels may be less reliable in identifying where a merger may harm competition[230]. For example, even abundant spare capacity may fail to constrain the merged entity if that capacity stems from inefficient high-cost assets. In such a scenario, a merger involving firms with substantial 'price-setting' capacity – that is, production assets whose costs lie relatively close to the market price – may result in a SIEC. To assess this risk, the Commission may examine firms' production portfolios (e.g., the merit-order curve in electricity markets) as well as concentration or pivotality levels across different segments of production[231].

Network effects

153. Network effects arise when the value of a product or service to a customer depends on the number of other customers using the same or a related product or service. These effects can be direct, where value depends on the number of customers of the same product or service, or indirect, where value depends on the number of customers of a complementary

228 This is calculated by comparing total market demand with the aggregate capacity of the firm's rivals. The share of total market demand that cannot be met by the aggregate capacity of the firm's rivals is the share of demand for which the firm is pivotal.

229 See, e.g., Case M.9706 – Novelis/Aleris, paragraphs 528-533.

230 Variable production costs are costs that depend on how much a firm produces, including costs for materials or energy used to make each additional unit of output.

231 See, e.g., Case M.4180 – Gaz de France/Suez, paragraphs 758 and 759, and Case M.5549 – EDF/Segebel, paragraph 60.

product or service (as in multi-sided platforms)[232]. Network effects can be positive, when user value increases as the customer base grows (e.g., social networks), or negative, where user value declines as the customer base grows (e.g., congested public transportation).

154. The presence of positive network effects can exacerbate competition concerns in mergers involving a loss of head-to-head competition for several reasons:

a) A worsening of parameters of competition, such as a price increase, not only causes an initial loss of customers but triggers further reductions in sales. This feedback dynamic can amplify the degree of competitive interaction between the merging firms and hence increase the scope for anticompetitive effects.

b) A merger may cause customers to converge to a single dominant supplier if the supplier reaches a critical scale as a result of the merger (a phenomenon known as 'market tipping'). This can significantly reduce market contestability.

c) They may make it more difficult for smaller competitors to expand their customer base, since such effects favour larger incumbents[233] and they may make it costlier and riskier for new rivals to enter the market (see Section II.A.2.3).

155. However, the presence of network effects does not in itself indicate that a loss of head-to-head competition will result in a SIEC. It is assessed alongside other factors, such as closeness of competition. In addition, if a significant proportion of customers use multiple competing platforms or services for the same purpose at the same time, instead of committing exclusively to one (i.e., multi-home), this may reduce market power by lowering switching costs and enabling smaller rivals to compete more effectively.

156. Market power arising from network effects may also be mitigated by the degree of interoperability[234] and data portability[235] in the market. If products are interoperable or if it is easy to obtain and reuse data across different products, this may make it easier for a customer to switch to a rival who does not (yet) benefit from significant scale.

157. When assessing the competitive effects of mergers involving multi-sided platforms, the Commission can examine different sides of the platform either separately or together[236]. This choice depends on the nature of competitive interaction between the platforms and on the similarity of competitive conditions across the sides. In instances where indirect network effects are pronounced, competitive actions on one side influence other sides, making a holistic assessment preferable. Conversely, if platforms primarily compete by enhancing their offerings on one side without affecting the other sides, analysing each side separately is more appropriate.

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232 Multi-sided platforms facilitate interactions between different groups of users, creating a situation where the demand from one group of users has an influence on the demand from the other groups. An example of a two-sided platform is an online app store which connects developers and users and becomes more valuable to each group as the other side grows.

233 See, e.g., Case M.8124 – Microsoft/LinkedIn, paragraphs 341-343.

234 Interoperability describes the ability of different products to work together and exchange information effectively.

235 Data portability describes the ability of customers to obtain and reuse their personal or business data across different services without incurring additional costs.

236 See Market Definition Notice, Section 4.4.

Purchasing markets

158. In some cases, mergers may also lead to a loss of head-to-head competition on upstream purchasing markets and result in a SIEC. This may, in particular, be the case where purchasing markets are highly concentrated while sellers are fragmented and do not have countervailing seller power[237]. In such cases, a merger that increases the monopsony or oligopsony power of a buyer may significantly impede effective competition, including by creating or strengthening a dominant position. The exercise of monopsony or oligopsony power would harm sellers and may lower their incentives to invest and innovate or reduce the number of sellers who offer their products or services on the market. The merging firms' downstream customers may in particular be harmed where the exercise of monopsony or oligopsony power leads to an anticompetitive reduction in output.

159. Conversely, where the merging firms face few and powerful sellers, or in markets in which the internal market is facing dependencies on few suppliers of a strategic input, a merger is unlikely to lead to buyer power that results in anticompetitive effects on purchasing markets. In such cases, an increase in the buyer power of the merging firms may have a positive impact on competition and downstream consumers by increasing resilience, reducing production costs, and increasing buyers' incentive to expand output.

160. A specific scenario of a loss of head-to-head competition in purchasing markets is where a merger between employers leads to a SIEC on a market for the purchase of labour[238]. Companies can be understood to be buyers of labour; workers can be understood as sellers of labour[239]. In its assessment of the impact on competition of a merger on labour markets under the EUMR, the Commission considers solely how the merger impacts market power on labour markets. It does not consider effects that may impact workers but that are unrelated to the loss of competition resulting from the merger, such as corporate restructuring following a merger.

161. Specifically, to determine whether a merger significantly impedes effective competition on a labour market, the Commission establishes to what extent the merger creates or strengthens monopsony or oligopsony power for the merged entity. A significant impact on effective competition in labour markets may lead to lower wages or worse working conditions, including lower mobility for workers, and may reduce the incentive of workers to enter a given labour market. Where mergers enable anticompetitive worsening of workers' conditions or wages through the exercise of monopsony or oligopsony power and the restriction of demand upstream, the merged entity's downstream customers may be harmed, for example through higher prices or lower quality or choice.

162. Such anticompetitive effects are more likely to occur where workers have access to few alternative employment options that are comparable to those offered by the merging firms. This may for example be the case where the merging firms rely on a specialised workforce

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237 See, e.g., Case M.9409 – Aurubis/Metallo, paragraph 376.

238 The Commission applies the principles laid out in the Market Definition Notice also for the purposes of defining relevant markets for the purchase of labour.

239 Workers is to be interpreted in a broad sense, irrespective of the contractual conditions. See, e.g., on the impact of a book publishing consolidations on authors, Case M.10433 – Vivendi/Lagardère, Section 7.4.5.1.2.4.

for which a merger critically reduces employment options, or where the merging firms are among a very small number of employers offering jobs with certain features (e.g., high flexibility). An important factor that may limit employers' market power on labour markets is the countervailing power of workers which may be more pronounced where effective collective bargaining agreements are in place. The Commission also takes account of relevant social and labour regulations which may limit the impact a given merger has on labour markets.

Minority shareholdings and common ownership

163. Where one of the merging firms holds a non-controlling minority shareholding in a company that competes in the same market as the other merging firm, the merger may reduce competitive pressure between the merged firm and that competing firm[240]. This may occur where the minority shareholding gives rise to financial interests, influence, or information flows that weaken the incentives of the merged firm and the competing firm to compete with each other. Minority shareholdings may be assessed as a contributing factor to other theories of harm or as a stand-alone factor giving rise to a SIEC.

164. In assessing whether such effects may arise, the Commission assesses, in line with other mergers involving the loss of head-to-head competition, the market power of the merging firm and the minority-owned competing firm in the relevant market as well as the degree of competitive interaction between them (e.g., by considering how closely they compete). In addition, the Commission considers the following factors related to the relevant minority shareholding: (i) the size and nature of the minority shareholding, (ii) the formal rights attached to it (such as board representation, veto rights, or access to commercially sensitive information) and (iii) the overall degree of influence the shareholding confers (e.g., to be assessed by looking at past influence exerted by the relevant merging party). In general, the higher the percentage of the shareholding and the stronger the associated rights, the more likely it is that the merger may result in a SIEC. Mergers involving non-controlling minority shareholdings in a competitor may give rise to a SIEC even if they do not confer any additional rights or influence on the shareholder[241]. Links through non-controlling minority shareholdings may also give rise to foreclosure (see Section II.B.6) and coordination (see Section II.B.8).

165. In principle, the Commission does not consider minority shareholdings of the merging firms below 5 % to be relevant for the competitive assessment as a potential stand-alone theory of harm, unless accompanied by additional rights or links that could give rise to competition concerns.

166. As a contributing factor to a SIEC arising from a loss of head-to-head competition, the Commission may also consider the impact of common ownership over the merging firms and their rivals on the incentives to compete in the relevant markets[242]. If the merging firms and their rivals are minority-owned by the same legal or individual persons (e.g., institutional investors), this may lessen the incentives to compete among these firms. In

240 See, e.g., Case M.8465 – Vivendi/Telecom Italia, paragraphs 48-52 and 60.

241 See, e.g., Case M.8465 – Vivendi/Telecom Italia, paragraph 60. This may be the case where the minority-shareholding is sufficiently high to lower the incentives to compete substantially, even absent any additional rights or influence on the shareholder.

242 See, e.g., Case M.7932 – Dow/DuPont, paragraphs 2337–2352 and Annex 5.

such circumstances, market shares and concentration measures tend to underestimate the expected effects of the merger and may be adjusted accordingly[243].

Non-structural links

167. When assessing a loss of head-to-head competition resulting from a merger, the Commission may consider as a contributing factor the existence of non-structural links between any of the merging firms and other competitors. These links may include, for example, distribution agreements[244], licensing agreements[245], cooperative agreements (e.g., consortia and alliances)[246], asset-sharing agreements (e.g., intellectual property- and network-sharing)[247] and swap agreements.

168. The Commission assesses whether these links reduce competition, such that the participating companies represent a more limited competitive constraint on each other than fully independent rivals[248]. In cases where the links remove most of the competitive constraint that companies impose on each other (e.g., when cooperative agreements include revenue-sharing mechanisms), the Commission may aggregate the market shares of these firms as an indicator of their combined market position[249].

3. Loss of investment and expansion competition

169. Firms can compete on future product offerings within and across relevant markets, based on their dynamic capabilities. Investments enable firms to develop new or improved products or to expand their presence within a relevant market or across product and/or geographic markets. Investment and expansion competition may be relevant for instance in industries where firms compete through investments in infrastructure[250], networks, capacity[251] or technologies[252]. If merging firms compete in an existing product market, removing that competition may also remove investment or expansion competition between them.

170. A merger may lead to a SIEC if it significantly alters investment or expansion competition processes through the discontinuation, downsizing, delay or redirection of investment projects[253]. Investment competition may be adversely impacted even if the merged entity were to proceed with its investment projects as planned pre-merger because the merged

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243 See, e.g., Case M.7932 – Dow/DuPont, Annex 5, Section 6.

244 See, e.g., Case M.7881 – AB InBev/SABMiller, Section VI.5.1.1.

245 See, e.g., Case M.5865 – Teva/Ratiopharm, paragraphs 408-420.

246 See, e.g., Case M.5096 – RCA/MAV Cargo, paragraphs 88-94, and Case M.7908 – CMA CGM/NOL, paragraphs 48-52.

247 See, e.g., Case M.5650 – T-Mobile/Orange, paragraphs 81-105.

248 See, e.g., Case M.4150 – Abbott/Guidant, paragraphs 46-65.

249 See, e.g., Case M.6447 – IAG/bmi, paragraphs 158–166, and Case M.9221 – CMA CGM/CEVA, paragraphs 61 and 62.

250 See, e.g., Case M.8792 – TMNL/Tele2, Section 'Network based competition'.

251 See, e.g., Case M.9076 – Novelis/Aleris, Section 8.3.9.

252 For instance, infrastructure competition between telecommunications operators, network competition between airlines, capacity competition, or the development of bundled services that compete with standalone products in digital markets.

253 A merger may increase the incentive to discontinue, downsize, delay, or redirect an investment project even when it is in its early stages, as higher investment costs would be required to bring the asset to market.

entity's incentive to compete and invest in the future would be likely to decrease after removing a competitive pressure.

171. To assess the loss of investment and expansion competition, the Commission may consider several factors such as the merging firms' market power with respect to existing tangible assets, their dynamic competitive potential, the degree of dynamic competitive interaction, closeness of competition, the number and dynamic competitive potential of remaining competitors with investment capabilities, and entry or expansion by rivals.

172. The Commission assesses the dynamic competitive potential of the merging firms with respect to investment and expansion activities in line with Section II.A.3. The Commission may also apply principles similar to those set out in Section II.B.2 when relevant.

173. Relevant factors to assess the degree of dynamic competitive interaction between the merging parties' investment and expansion activities include the magnitude and impact of planned investments in tangible assets, deployment timelines, the potential to enhance capacity and quality of assets, the merging parties' track record in executing investments, their access to key inputs, their ability to leverage investments across markets and the potential for cross-market expansion through strategic investments.

174. To assess closeness of competition between overlapping investment projects, as well as between such projects and existing assets of the merging parties and their rivals, the Commission assesses factors such as the characteristics of the investment strategies of the merging parties and rivals, and the target customer segments and applications of their respective relevant investment plans and assets, including whether such investments have the potential to disrupt or transform the market.

4. Loss of innovation competition

175. The assessment of the loss of innovation competition is not focused on a specific future outcome, which may be uncertain, but on whether the merger significantly impedes the process of innovation rivalry, which has the potential to generate innovation and therefore has competitive value in the present. A merger may result in a SIEC either if it significantly (i) impedes the innovation competition process by eliminating competition between the merging firms, (ii) impedes the overall innovation capabilities and efforts in the industry or (iii) alters the parameters of competition in future product markets. This would be particularly the case if the merger reduces or eliminates incentives to initiate research or continue developing innovative products or projects ('R&D projects')[254] that would 'steal' customers from one another[255] absent the merger[256]. This may be weighed

[254] R&D projects refer to (i) innovation that follows a structured development process and can be classified into early or late stage development pipelines, and (ii) plans of future development that can quickly materialise, such as those typical for dynamic and fast-moving markets where investment decisions may be made quickly and more informally than in industries with long innovation cycles requiring additional plants, assets, regulatory permits or licenses.

[255] Innovation may expand total demand by attracting new customers but may also increase sales by diverting demand from rivals.

[256] A merger that reduces innovation competition between rivals may also, in some situations, negatively affect the resilience of customers that rely on the outcomes of innovation competition among their suppliers. When the loss of innovation competition between rivals leads to decreases in future product

against evidence from the parties that the merged entity would have incentives to use resources liberated by a reduction in overlapping R&D workstreams to pursue other promising innovation paths of relevance to the market or customer groups in question (see further Section 4.2).

176. In its assessment of effects of a merger on innovation competition, the Commission considers the following factors:

a) the dynamic competitive potential of the R&D projects, the innovation capabilities or R&D organisations of each of the merging firms (see Section II.A.3),

b) the degree of dynamic competitive interaction between the merging parties in terms of R&D projects, innovation capabilities or R&D organisations, and

c) the number of remaining competitors that have products or R&D projects with similar characteristics, applications and competitive potential, or similar innovation capabilities and R&D resources.

177. When the degree of dynamic competitive interactions between the merging firms is large and the merging firms compete closely with each other, even firms with limited dynamic competitive potential can place significant competitive constraints on each other. Indeed, the closer the merging firms' innovation projects and capabilities and the larger the expected market position and margins, the weaker the merged entity's incentive will be to innovate post-merger because doing so would cannibalise the other merging party's profitable sales. Conversely, when at least one of the merging firms has strong dynamic competitive potential, even a limited degree of dynamic competitive interaction between the merging firms can lead to a SIEC. Although anticompetitive price increases may increase the merged entity's expected return on innovation, this is unlikely to offset the harm to consumers.

178. In industries characterised by a structured product development process[257], innovation competition may arise through competitive overlaps at different stages of the innovation and product life cycle, for example, between existing products and R&D projects, between R&D projects, as well as within R&D efforts (such as discovery targets and lines of research).

179. The guidance on market power and loss of head-to-head competition set out in Sections II.A and II.B.2 above therefore applies *mutatis mutandis* to cases of innovation competition set out below.

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market competition, e.g., in the form of higher prices or less choice as to the critical technologies or infrastructure that customer rely on, this may hamper the customers' own ability to innovate and invest and make them less resilient.

257 E.g., in the pharmaceutical sector, R&D typically follows a well-defined sequence from discovery to pre-clinical development and sequentially to clinical trials from Phase I to Phase III. In such industries, competitive interaction may be examined at specific innovation stages instead of a given product market, and the final indication, mode of action or commercial application may remain uncertain. The Commission typically follows a four-layer framework to assess overlaps at different stages of innovation, e.g., in the agrochemical (see, e.g., Case M.7932 – Dow/DuPont and Case M.8084 – Bayer/Monsanto), and pharmaceutical sectors (e.g., Case M.9294 – BMS/Celgene; Case M.9461 – Abbvie/Allergan; Case M.9554 – Elanco Animal Health/Bayer Animal Health Division and Case M.11771 – Pfizer/Seagen).

4.1. Loss of specific innovation competition

180. A merger giving rise to overlaps between R&D projects or between R&D projects and existing products may lead to a SIEC if it significantly alters innovation competition or future product market competition processes. This may result from the discontinuation, delay or redirection of one or both of the R&D projects or existing products[258]. The dynamic competitive process may be adversely impacted even if the merged entity were to bring the R&D project(s) to market because it would make pricing decisions for both overlapping products and would have less incentives for the products to compete aggressively, thus potentially resulting in delayed market entry or lower quality or less competitively priced products.

181. The Commission assesses the dynamic competitive potential of R&D projects in line with Section II.A.3.

182. In determining whether a merger that involves overlaps between existing products and R&D projects leads to a SIEC, the Commission assesses the degree of market power that a merging firm has with respect to the existing products.

183. The Commission also assesses whether there is a sufficient number of alternative R&D projects under development by other firms and whether the competitive potential of these R&D projects is similar to that of the merging firms. The Commission may apply the factors listed in paragraph 81 to determine the competitive potential of the R&D project and, depending on the stage of development, assess if the R&D project is aimed at the same end use or customers and whether it could pose a competitive constraint on the merged entity in a timely manner. Internal documents of the merging firms may provide indications on how the merging parties perceive the competitive potential of competitors' R&D projects.

184. To assess the degree of dynamic competitive interaction[259] between overlapping R&D projects or between R&D projects and existing products, the Commission considers closeness between each of the merging firms and other companies in the relevant market. The Commission's assessment may include the characteristics, target customer segment and use or applications of the R&D projects (and existing products)[260], and whether the R&D project involves an innovation with a potential to disrupt or transform the market[261]. It is typically easier to identify competitive interaction for R&D projects that are closer to commercialisation[262]. Notwithstanding this, a merger may increase the incentive for the merged entity to discontinue, delay or redirect an R&D project also when the R&D project is in its early stages (or is a mere plan), as in this case R&D costs that can be avoided by not bringing the product to market are larger.

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258 The R&D project to be discontinued or withdrawn may be that of either the target (also referred to as 'killer acquisition') or the acquirer (also referred to as 'reverse killer acquisition').

259 The Commission may consider that an R&D project already constrains an existing product or an R&D project when one of the merging parties has the perception of such a constraint by another merging party and is already reacting accordingly.

260 See Section II.B.2.2.

261 See Section II.B.2.3.

262 Depending on the circumstances of the case, the Commission's assessment of overlaps between existing products and R&D projects in late-stage development may be similar to that in Section II.B.5.

185. In assessing whether a merger involving R&D projects, or R&D projects and existing products, leads to a SIEC, the Commission may also consider the merging firms' post-merger plans. Such plans may concern, in particular: incentives to continue the development of the R&D projects or sale of existing products, plans to pursue new R&D projects in the same field, any relevant commercial arrangements with third parties[263], past evidence of innovation suppression, discontinuation, delay, repositioning or reorientation by any of the merging firms following a previous merger, closure of plants, reduction of innovation targets, or a cut in R&D budgets[264].

4.2. Loss of general innovation competition

186. A merger between firms that have overlapping innovation capabilities[265] or R&D organisations[266] may lead to a SIEC if eliminating such a rival significantly impedes early-stage innovation competition processes. By reducing the dynamic competitive process between the merging firms as well as by reducing the pressure to innovate on the few remaining competitors with similar innovation capabilities or R&D organisations, the merger may ultimately significantly alter the competitive process in future product markets by reducing the likelihood that consumers will benefit from new or improved products and processes. In such cases, innovation competition may take place at the level of overlapping innovation capabilities and early innovation efforts within innovation spaces[267] prior to the identification of the relevant product market[268]. Beyond innovation spaces, innovation competition between firms with large innovation capabilities can also take place at the industry level if the R&D organisations operated by the merging firms compete with only few other significant R&D organisations in the relevant industry.

187. The Commission assesses the dynamic competitive potential of the merging firms in the relevant innovation space and at the industry level in line with Section II.A.3.

188. The Commission assesses whether a sufficient number of competitors with innovation capabilities or R&D organisations that have similar dynamic competitive potential than those of the merging firms will remain after the merger. It also considers the

263 See, e.g., Case M.8401 – J&J/Actelion, paragraphs 40-42.

264 See, e.g., Case M.7932 – Dow/DuPont, paragraphs 277-278, 283, 1955, 2014-2037.

265 For the purpose of this section, references to innovation capabilities include both innovation capabilities *stricto sensu* and innovation resources. Innovation capabilities *stricto sensu* are assets such as know-how, intellectual property rights, and specialised technologies. Innovation (or R&D) resources are assets such as general-purpose technologies, specialised laboratories, pools of skilled workers, natural resources and infrastructure that are fundamental to develop new products and processes in the industry.

266 The composition of an R&D organisation may vary based on the specific industry, but typically includes the resources, personnel, facilities, and other assets dedicated to research, development and registration of new innovations, and includes lines of research, field testing facilities, and registration capabilities. See, e.g., Case M.7932 – Dow/DuPont, paragraph 1957.

267 See Market Definition Notice, paragraphs 90-93. The exact definition of the relevant innovation spaces in which innovation competition takes place is industry-specific and case-specific. See, e.g., Case M.8084 – Bayer/Monsanto, paragraph 1015, and Case M.7932 – Dow/DuPont, paragraphs 342-361.

268 Early-stage research and development activity may serve multiple purposes and, in the longer term, feed into various products; see Market Definition Notice, paragraph 92. Even if the relevant product markets cannot be identified at the early stage of the innovation process, the fact that the firms have overlapping innovation capabilities that are used to develop products or services that serve similar customer needs means they can be expected to be competitors in some future product market.

characteristics of the relevant innovation space, including innovation cycles and any barriers to entry and expansion in R&D.

189. To assess the degree of dynamic competitive interaction between the merging firms, the Commission considers: (i) the closeness between the merging firms and other competing innovators as regards their innovation capabilities and R&D organisations and (ii) whether one of the merging firms is an important innovative force in that it has more influence on the innovation process than its relative strength of the innovation capabilities and/or R&D organisations in the relevant innovation space and at the industry level overall or similar measures would suggest[269].

190. For the assessment of closeness, relevant sources of evidence may include: (i) the past, ongoing or planned responses by one of the merging firms to the investment or innovation efforts of the other merging firm[270] based on, e.g., internal documents and industry reports, (ii) R&D expenditures and budgets, (iii) the size and experience of the research teams, engineers or other key personnel employed in the relevant R&D organisations, (iv) the proven track record or capability to bring innovations to the market, (v) in industries where intellectual property rights are relevant, the size and quality of the firms' patent portfolios, (vi) in clean tech, the type, quality and utilisation levels of clean energy or other clean resources, (vii) in digital industries, similar capabilities to exploit direct or indirect network effects (e.g., from access to data or broad user base), and (viii) the innovation capabilities arising from a given business model.

191. For the assessment of an important innovative force, including in fast-moving industries or new industries (e.g., digital and clean tech), relevant sources of evidence may include: (i) the company's scarce or unique capabilities, (ii) the fast pace and significance of its past innovations and developments, (iii) its capabilities and track record of disruptive rather than incremental innovation, (iv) the potential significance of its future R&D projects, and, (v) where relevant, its ability to exploit network effects.

4.3. Innovation shield

192. In cases where a transaction involves a small innovative company[271], including a start-up[272], or an R&D project with a dynamic competitive potential, the Commission in principle does not find a SIEC in relation to any theory of harm, including the loss of innovation competition[273], potential competition[274], entrenchment[275] and foreclosure[276] in the following circumstances:

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269 See also Section II.B.2.3.

270 Such evidence may also be relevant to assess the effects of the merger on future prices because a firm reacting to each other's innovation efforts indicates that they will compete for the same customers in a future product market.

271 The exact definition of what constitutes a small company may vary and depends on the characteristics of the relevant industry.

272 See the definition of a 'start-up' in the Commission Recommendation (EU) 2026/720 of 18 March 2026 on the definition of innovative enterprises, innovative startups and innovative scale-ups, OJ L, 24.3.2026.

273 See Section II.B.4.

274 See Section II.B.5.

275 See Section II.B.7.

276 See Section II.B.6.

a) None of the merging parties are currently active or, through their R&D project(s), expected to become active in the same relevant market, in the same innovation space, or in a relevant market or innovation space that is vertically or otherwise closely related;

b) If the transaction leads to an **overlap between one party's R&D project and another party's existing activities**, (i) the merging parties do not have a market share (individually or combined) of more than 40 %[277] in the relevant market, and (ii) there are at least three other firms with R&D projects that are independent from the merging parties with competitive potential similar to those of the merged entity.

   In the specific case of an **acquisition of a start-up with an R&D project, and the acquirer being an existing firm with market presence**, even if the criteria in (b) above are not met, the acquisition can still benefit from the innovation shield if the acquirer is not the largest firm in the relevant market or a gatekeeper[278];

c) If the transaction leads to an overlap **between the merging parties' R&D projects**, there are at least three other firms with R&D projects that are independent from the merging parties with competitive potential similar to those of the merged entity;

d) If the transaction leads to an overlap **between the merging parties' R&D capabilities**, the merging parties do not have a combined market share of more than 25 % in the innovation space and not have a combined share of more than 25 % with respect to their R&D activities at the industry level[279];

e) If the transaction leads to the combination of **one merging party's R&D project and another party's activities in an upstream, downstream or otherwise closely-related market** to the one where the R&D project is expected to become active, the merging parties do not have a market share (individually or combined) of more than 40 %[280] in the upstream, downstream or otherwise closely-related market.

   In the specific case of an **acquisition of a start-up having an R&D project and the acquirer being an existing firm with market presence in vertically or otherwise closely related market**, even if the criteria above in (e) are not met, the acquisition can still benefit from the innovation shield if the acquirer is not the largest firm in the relevant market or a gatekeeper[281].

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277 For calculation of market shares in innovation spaces or at innovation industry level, see Section II.A.3 of these Guidelines and Section 5 of the Market Definition Notice.

278 See Article 2 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, pp. 1-66 ('Digital Markets Act').

279 For calculation of market shares in innovation spaces or at innovation industry level, see Section II.A.3 of these Guidelines and Section 5 of the Market Definition Notice.

280 For calculation of market shares with respect to existing products, see Section II.A.1.1 of these Guidelines and Section 5 of the Market Definition Notice.

281 See Digital Markets Act, Article 2.

5. Loss of potential competition

193. A merger between a firm with market power (incumbent) and a potential competitor can eliminate an actual or future constraint on the incumbent. A potential competitor is a firm which meets either of the criteria under paragraph 194194(b) below.

194. A merger between an incumbent and a potential competitor may lead to a SIEC if three cumulative conditions are fulfilled:

a) Actual competitors in the relevant market do not exert or will likely cease to exert, either individually or collectively, effective competitive constraints on the incumbent; and

b) The potential competitor, despite not yet being active on the relevant market: (i) already significantly constrains the competitive behaviour of the incumbent firm(s) (actual constraint by potential competitor) or (ii) has the potential to significantly constrain the incumbent firm(s) in the foreseeable future (future constraint by potential competitor)[282]; and

c) After the merger, no other potential competitors could sufficiently constrain the competitive behaviour of the incumbent firm(s)[283].

Lack of effective competitive constraints from actual competitors

195. The elimination of competitive constraints exerted by potential competitors may lead to a SIEC in markets where actual competitors do not exert, either individually or collectively, effective competitive constraints. In oligopolistic or dominated markets or markets with otherwise limited competition, even the removal of an attenuated source of competitive constraint[284], such as a potential competitor, may lead to a SIEC[285].

Removal of actual constraint

196. The potential competitor already significantly constrains the competitive behaviour of the incumbent firm(s) in the relevant market where there is objective evidence that the

282 A potential competitor may exert actual and future constraints at once, in which case they may mutually reinforce each other. Evidence supporting one type of constraint may be probative also for the other.

283 See, e.g., Judgment of 21 September 2005, *EDP v Commission*, T-87/05, EU:T:2005:333, paragraph 189.

284 See also Market Definition Notice, paragraph 23(c).

285 The loss of a potential competitor differs from the assessment of entry as a countervailing factor to mitigate the loss of actual competition. This latter concept concerns a separate issue: whether the likely entry by a new rival is sufficient to counteract anticompetitive effects resulting from the merger from the loss of an *actual competitor* and, hence, a stronger competitive constraint than the constraint emanating from a potential competitor (see Section II.A.4.1).

incumbent firm is already competitively reacting (or is seriously contemplating a reaction)[286] to the threat exercised by the potential competitor[287,288].

197. The competitive reaction of the incumbent is more likely to be caused by the threat exercised by the potential competitor where there is evidence of such threat, such as, for example, (i) the fact that the potential competitor possesses feasible means of entry or expansion, (ii) public communication by the potential competitor about potential entry or expansion, (iii) successful past entry or expansion in adjacent markets, (iv) internal documents showing the perception by the incumbent of the potential competitor as a threat, and (v) third-party market reports on such potential entry. This is less likely, however, where there is evidence showing that the potential competitor is objectively unable to enter or expand.

198. When the degree of the incumbent's market power is large, even a limited degree of actual constraint exerted by the potential competitor on the competitive behaviour of the incumbent firm(s) may be considered significant.

199. Given that it already poses an actual competitive constraint, the impact of a potential competitor on the incumbent firm's behaviour in the market is likely observable from existing market data or internal documents.

Removal of future constraint

200. The potential competitor has the potential to significantly constrain the incumbent firm in the foreseeable future if it has the ability and incentive to do so[289].

201. The potential competitor has the ability, i.e., real and concrete possibilities, to enter if it already possesses, or can readily acquire, the necessary assets, capabilities, or regulatory approvals required to compete effectively in the relevant market[290,291]. The presence of the potential competitor in a related market may form part of the body of evidence supporting the ability to enter the relevant market. In the event of potential competition in a different *geographic* market, the potential competitor is already active in the relevant product market as such and, therefore, has proven product or service capabilities but may need to overcome geographical entry barriers of, e.g., legal or regulatory nature. On the

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286 Such reaction can take the form of head-to-head competition (e.g., by lowering prices, adapting product quality, repositioning products) and/or innovation competition (e.g., by starting to innovate to improve their own offering).

287 Whether the mere existence of a firm involved in the merger and the resulting possibility of market entry would have posed a competitive threat to the other depends on the specific circumstances and evidence. See, e.g., Judgment of 13 November 2024, *Tele Columbus AG v Commission*, T-69/20, EU:T:2024:816, paragraph 186.

288 Loss of innovation competition and loss of future competition may be interrelated where both involve the constraint from potential entrants competing on innovation and/or the incumbent's efforts to innovate in reaction to a potential competitor. The Commission's assessment of each may to an extent rely on overlapping evidence and it may consider both losses together, or separately.

289 See, e.g., Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 135, and Judgment of 4 July 2006, *easyJet Airline Co. Ltd v Commission*, T-177/04, EU:T:2006:187, paragraph 116.

290 See, e.g., Judgment of 26 October 2023, *Energias de Portugal SA & Others v Autoridade da Concorrência*, C-331/21, EU:C:2023:812, paragraphs 60 et seq.

291 Factual elements that corroborate the potential competitor's particular potential to grow into an effective competitor may also constitute factual elements that support its ability to enter.

other hand, in the event of potential competition in a different *product* market, the potential competitor may need to overcome product-related entry barriers such as, e.g., intellectual property rights, R&D capabilities, specific know-how, barriers related to brand image or customer preferences, and others.

202. The incentives to enter depend on whether market entry is economically viable. This is not a mere measure of profitability. It depends also on the commercial or economic interest for the potential competitor in entering[292]. Although specific entry plans or a firm decision by the company to enter may evidence potential entry, they are not necessary for such finding[293].

203. The relevant time period for the potential competitor's potential to significantly constrain the incumbent firm depends on the specific circumstances and market characteristics of each case, including innovation and development cycles[294].

204. A potential competitor has the potential to significantly constrain the incumbent firm(s) upon entry especially if it has scarce or special capabilities or value propositions compared to incumbents and other potential entrants, such as (i) particular market knowledge, (ii) a particularly strong brand image, (iii) a particularly strong customer base in adjacent markets, (iv) particular know-how or R&D capabilities, (v) well-established products in adjacent markets that could be integrated with or used to increase the attractiveness of the future product in the relevant market, (vi) access to substantial financial resources, or a (vii) track record of successful product launches in the past. In that regard, it is not required that the potential competitor becomes a strong competitor of the incumbent firm immediately upon entry. Rather, the potential competitor must be significantly likely to grow gradually but steadily into a firm able to effectively compete against the incumbent firm(s) over time[295].

205. The larger the degree of the incumbent's market power, the more important it becomes to preserve the possibility for a potential competitor to challenge the incumbent in the future. Therefore, where the degree of the incumbent's market power is high, the Commission is more likely to consider the competitive constrains on the incumbent which the potential competitor may exert in the foreseeable future to be significant.

206. The Commission assesses the potential entrant's ability and incentive to enter as well as its potential to significantly constrain the incumbent in the future based on what can be predicted with a reasonable degree of certainty based on available evidence. The

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292 Such interest may be expressed, e.g., through internal investment and profitability criteria. See, e.g., Judgment of 13 November 2024, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 136.

293 This is particularly relevant in dynamic and fast-moving technology markets, where investment decisions may be made quickly and rather informally, especially if new product development does not require long lead times, such as, for instance, for additional plants or other tangible production assets, building stock, or the application for regulatory permits and licenses.

294 See, e.g., Judgment of 13 November 20224, *Deutsche Telekom AG v Commission*, T-64/20, EU:T:2024:815, paragraph 137.

295 See, e.g., Case M.1630 – Air Liquide/BOC, paragraphs 206-207.

appropriate time period for the relevant foreseeable future depends on the characteristics and dynamics of the market[296].

Lack of sufficient competitive constraints from other potential competitors

207. Other potential competitors are more likely, individually or jointly, to sufficiently constrain the incumbent firm(s) post-merger if, based on objective grounds: (i) the incumbent feels equally threatened by the other potential competitor(s) and is already competitively reacting (or is seriously contemplating a reaction) to that other threat or (ii) the other potential competitor(s) equally have the ability and incentives to enter and capabilities to overcome existing entry barriers in the foreseeable future due to, e.g., scarce or special capabilities or value propositions equivalent to those of the target firm.

6. Foreclosure

208. Foreclosure occurs when the merged firm leverages its market power from one market into a related one, for example by restricting rivals' access to inputs or customers, or by engaging in tying or bundling.

209. Foreclosure may also arise in partial form, where the merged firm raises rivals' costs without completely denying their access, or uses bargaining leverage to negotiate higher prices or otherwise less favourable terms to rivals. Foreclosure may affect competition across the entire market or be targeted at specific competitors. It can be particularly damaging where it deprives rivals the scale or network effects needed to operate efficiently.

210. There are different plausible foreclosure mechanisms. In particular, the merged firm may refuse to deal with some firms[297], restrict access to products, services, or data[298], or employ tactics such as price increases, quality reduction[299], information withholding, interoperability[300] restrictions, delayed product releases, preferential access, degraded post-sale services, impeding pipeline products developed by rivals from reaching the market, tying/bundling or other conducts.

211. The most common forms of foreclosure include:

a) *Input foreclosure*: arises in vertically related markets where the merged firm may restrict or degrade access to the products or services that it would have supplied absent the merger, raising rivals' costs or making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. Input foreclosure can

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296 The appropriate time period for entry of the potential competitor is not limited to a specific number of years. Contrary to entry as a countervailing factor, where entry must be timely enough to limit the period during which consumers are exposed to the increased market power resulting from the merger, the harm from the loss of a potential competitor arises from the permanent loss of the possibility that the potential competitor may enter and increase actual competitive pressure in the future.

297 See, e.g., Case M.8480 – Praxair/Linde, paragraphs 1191-1198, and Case M.9728 – Altice/Omers/Allianz/Covage, paragraphs 504-508.

298 See, e.g., Case M.9674 – Vodafone Italia/TIM/INWIT JV, paragraphs 276-294.

299 See, e.g., Case M.10262 – Meta/Kustomer; Case M.9019 – Mars/Anicura; and Case M.10806 – Broadcom/VMware.

300 Foreclosure by degrading interoperability requires that the merged entity can restrict or degrade the way its products interoperate with others see, e.g., Case M.9660 – Google/Fitbit; Case M.10262 – Meta/Kustomer; and Case M.10806 – Broadcom/VMware.

be directed at leveraging upstream market power into the downstream market or at extracting higher profits upstream.

b) *Customer foreclosure*: takes place when a supplier integrates with an important customer in the downstream market and either restricts or degrades access to a critical customer base to its actual or potential rivals in the upstream market or increases the upstream competitors' cost to access downstream.

c) *Conglomerate foreclosure*: occurs when the combination of products in related markets gives the merged firm the incentive to leverage a strong market position from one market to another, typically by means of tying or bundling:

   i. 'Bundling' occurs when two offerings are sold and priced jointly as a single package[301]. Bundling can be pure or mixed. In the case of pure bundling, the products or services are only sold jointly in fixed proportions. In the case of mixed bundling, the products or services are also available separately, but the sum of the stand-alone prices is higher than the bundled price[302]. When volume rebates are made contingent on the purchase volume of other goods, they constitute a form of mixed bundling.

   ii. 'Tying' consists of offering a specific product or service (the tying offering) only together with another product or service (the tied offering). Tying can take place on a technical[303] or contractual[304] basis. For instance, technical tying occurs when the tying offering is designed to interoperate only with the tied offering, or when the tying offering and the tied offering are physically or technically integrated. Contractual tying occurs when the customer who purchases or uses the tying offering is required to also acquire or use the tied offering.

212. Foreclosure is also possible in an indirect vertical or conglomerate relationship. For example, this is the case where an entity enjoying upstream market power may expect to gain market share not only on the level immediately downstream, but on one or several levels of the value chain further downstream[305].

213. To establish foreclosure, the Commission examines the (i) ability to foreclose, (ii) incentive to foreclose, and (iii) whether the conduct would significantly impede effective competition in the internal market. These conditions are cumulative and often examined

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301 Whether the products or services are typically bought simultaneously and by the same customers are relevant considerations for bundling strategies. See, e.g., Case M.8306 – Qualcomm/NXP, paragraphs 546 and 554; Case M.10860 – Advent/GfK, paragraphs 155-161, 164, 168, 176 and 205-209; and Case M.9945 – Siemens Healthineers/Varian Medical Systems, paragraphs 125 et seq.

302 See, e.g., Case M.8306 – Qualcomm/NXP, paragraphs 541-581.

303 See, e.g., Case M.9660 – Google/Fitbit, paragraphs 716-817; and Case M.9945 – Siemens Healthineers/Varian Medical Systems, paragraphs 84-116.

304 See, e.g., Case M.10792 – Philip Morris International/Swedish Match, paragraphs 215-217.

305 See, e.g., Case M.10712 – Apollo Management/Tenneco, paragraphs 92-94, and Case M.8674 – BASF/Solvay, paragraph 852.

together as they are closely intertwined. For example, elements proving a strong ability to foreclose can at the same time inform about the incentives or effects of foreclosure[306].

6.1. Ability to foreclose

214. The ability to engage in a foreclosure strategy requires that the merged entity has the technical possibility to foreclose and a significant degree of market power. Ability may not occur if competitors can deploy effective and timely counterstrategies.

Technical possibility

215. The merged firm must have the technical possibility to implement a foreclosure strategy. This may involve the outright denial of access to a key input, infrastructure or interface, or the degradation of the terms on which access is provided. The technical possibility is particularly relevant in relation to foreclosure strategies that concern the setting of contractual terms, the degrading of quality, interoperability or compatibility between products or services[307], preferential access to downstream entity, degraded post-sale services, impeding pipeline products developed by rivals from reaching the market, (mixed) bundling or tying, or discrimination between customers.

216. The merged entity may implement a foreclosure strategy by improving the interoperability or functionality available to its own affiliates while withholding equivalent improvements from rivals. Where, absent the merger, rivals could reasonably have expected to benefit from such improvements on equivalent terms, the failure to extend those improvements constitutes a degradation of rivals' access relative to the counterfactual.

217. The characteristics of the products or services and the customers' purchasing behaviour may be relevant factors for assessing the technical possibility to foreclose. Notably for conglomerate foreclosure, whether products or services are typically bought simultaneously or by the same customers are important factors to consider.

218. As contracts can be renegotiated and are of a temporary nature, the Commission is unlikely to place significant reliance on contractual safeguards when evaluating whether the merged entity can technically foreclose rivals[308].

Significant degree of market power

219. The merged firm must have a significant degree of market power in at least one of the markets concerned in order to have the ability to foreclose its rivals.

220. Countervailing factors such as the presence of buyer power or the likelihood of entry may mitigate the merged entity's market power (see Section II.A.4).

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306 Judgment of 23 May 2019, *KPN BV v European Commission*, T-370/17, EU:T:2019:354, paragraph 119. See, e.g., Case M.10301 – CVC/Ethniki, paragraphs 63-93.

307 See e.g., Case M.10262 – Meta/Kustomer, paragraphs 273-293; Case M.10806 - Broadcom/VMware, paragraphs 397-403; Case M.9660 – Google/Fitbit, paragraphs 751-762; Case M.10646 – Microsoft/ActivisionBlizzard, paragraphs 386-391; and Case M.11766 - NVIDIA/Run:ai, paragraphs 159-193.

308 To be effective, such constraints would require (i) that the contracts in question specify in an unambiguous way all practically relevant ways in which foreclosure may occur, (ii) that the violation of those terms would be observable by the target, (iii) that the violation would be verifiable in front of a court of law, (iv) that the court would have the power to rectify the behaviour within a sufficient time.

221. The ability to foreclose requires that the merged firm could negatively affect the overall availability of inputs, access to customers, or market opportunities for rivals[309]. This is more likely the case where the alternative sources of supply are less attractive or where the remaining suppliers lack the capacity or capability to expand sufficiently to replace the merged firm as a trading partner. The presence of exclusive contracts between the merged firm and independent firms may also increase the ability to foreclose.

222. Effective and timely counterstrategies by rivals may limit the ability of the merged firm to foreclose. Such counterstrategies include the possibility of rivals to change their production process or business model so as to be less reliant on the input, customer base, related product or service concerned. Rivals may also sponsor entry of new firms or compete more aggressively to maintain their market share in the relevant market.

223. Especially in the context of input foreclosure, the Commission investigates whether the merged entity's decision to rely more on its own assets could potentially free-up capacity from independent firms, making it easier for rivals to find alternative sources. Alternative sources that are less resilient to unexpected market or supply shocks are given less weight in the assessment. For instance, a concentration of suppliers in a particular region of the world, whether within or outside the internal market, can make supply chains less resilient to trade disruptions provoked by exogenous reasons.

224. To counter bundling strategies, single-product companies may combine their offers so as to make them more attractive to customers.

6.2. Incentive to foreclose

225. The incentive to totally or partially foreclose normally depends on whether foreclosure would be profitable for the merged entity overall, taking into account losses arising from the foreclosure strategy and gains accruing to the merged entity across its operations. Even in the absence of direct gains, foreclosure may generate dynamic gains by securing future sales. This can occur by discouraging investments of rivals, depriving them the scale needed for efficient operations or creating other strategic advantages such as securing critical inputs. The Commission is not limited to carrying out a comparative quantitative assessment of profitability under a foreclosure strategy, but may take account of current or past behaviour of the acquirer or similar undertakings in the relevant market(s) and/or qualitative evidence supporting an incentive to engage in foreclosure for strategic reasons.

226. The Commission may also take into account financial or reputational costs associated with breaching or terminating arrangements when assessing the merged entity's incentives to foreclose[310]. However, arguments that reputational concerns will limit the incentive to foreclose generally carry limited weight absent verifiable evidence. A targeted restriction of access, such as a degradation of technical interoperability affecting only a few firms or new entrants, would likely entail less reputational harm, as it would be less visible and harder to detect.

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309 See, e.g., Case M.8480 – Praxair/Linde, paragraphs 1191 – 1192; Case M.9449 – VAG/Varta, paragraphs 57-59; Case M.9064 – Telia/Bonnier, paragraph 494-510; Case M.9728 –Altice/Omers/Allianz/Covage, paragraphs 504-508; and Case M.8677 – Siemens/Alstom, paragraphs 1226-1235.

310 See, e.g., Case M.8314 – Broadcom/Brocade; Case M.9660 – Google/Fitbit; and Case M.10262 – Meta/Kustomer.

227. Existing competition rules or other regulatory frameworks at EU or national levels may reduce the merged entity's incentive to foreclose[311]. In assessing the impact of such rules on the merged entity's incentive to foreclose, the Commission examines, notably, whether such rules are long-lasting, bind the merged entity and address competitively relevant conduct (e.g., access or non-discrimination obligations, prohibition of self-preferencing). The Commission considers, on the basis of a summary assessment[312]: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under EU law[313], without prejudice to any assessment by the competent authority under the regulation itself, (ii) the likelihood that this illegal conduct could be detected[314], and (iii) the penalties or measures which could be imposed.

228. When assessing the incentives for the merged entity to foreclose, in cases where commercial interests favour a certain course of conduct, simple economic and commercial realities may constitute sufficient evidence[315]. Evidence that is particularly relevant for showing foreclosure incentives include internal documents and prior actions or transactions suggesting that the merged entity may pursue such conduct. Internal documents and other qualitative evidence are also important in understanding unquantifiable gains or losses from foreclosure.

Direct incentives

229. The Commission assesses direct foreclosure incentives by investigating the trade-off between the sales lost by the division implementing the foreclosure strategy and the gains from recapturing those lost sales within the operations of the merged entity. These gains depend on the degree to which the merged entity is able to recoup lost sales from its trading partners and how profitable those recouped sales are.

230. The Commission may assess direct incentives based on quantitative or qualitative evidence. For example, the Commission may use departure rates and diversion ratios to quantify the degree to which the merged entity is able to recapture lost sales from its trading partners. The departure rate measures the share of rivals' customers leaving them in response to foreclosure, whereas the diversion ratio represents the percentage of those

311 See e.g., Case M.9564 – LSEG/Refinitiv, paragraphs 1045-1058.

312 The Commission is not required to do an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them (see Judgment of 15 February 2005, *Commission v Tetra Laval BV,* C-12/03 P, EU:C:2005:87, paragraphs 74-76, and Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraph 73). There is no need to determine the extent to which the incentives to adopt illegal conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, and the financial penalties which could ensue (Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraph 72, and Judgment of 15 February 2005, *Commission v Tetra Laval BV,* C-12/03 P, EU:C:2005:87, paragraphs 75-77).

313 Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraphs 74-75 and 311-312.

314 See, e.g., Case M.3696 – E.ON/MOL, paragraphs 433 and 443-446, the Commission attached importance to the fact that the national Hungarian regulator for the gas sector indicated that in a number of settings, although it had the right to control and to force firms to act without discrimination, it would not be able to obtain adequate information on the commercial behaviour of the operators. See also Case M.3440 – EDP/ENI/GDP, paragraphs 424-425.

315 Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraphs 295-297.

departed customers that would switch to the merged firm[316]. Diversion ratios may be proxied by market shares or evidence on customer switching and substitutability. High profit margins on diverted sales, low profit margins on lost sales, support a greater incentive to foreclose[317].

231. Depending on the specifics of the case, such as the nature of the foreclosure concern and the commercial relationships involved, the Commission combines departure rates, diversion ratios and profit margins to assess whether the merged firm has a direct incentive to foreclose its rivals.

232. Assessing the direct profit effect from total foreclosure, where rivals are completely denied access to the products or customers controlled by the merged entity, provides a useful first indicator of foreclosure incentives. A simple comparison between the lost revenues from trade with affected counterparties and the gains from diverted sales can be informative in assessing those incentives. Total foreclosure is more likely when denying access triggers a large departure of customers, many of which switch to the merged entity, and the profit earned on each diverted sale is high. While low profits on lost volumes may indicate a small profit sacrifice, the Commission also considers that they may signal limited market power and therefore be associated with small departure rates. Moreover, as discussed below, the gains from total foreclosure are often not immediate but arise dynamically by depriving rivals the scale they need to be competitive.

233. Even if total foreclosure is not profitable, partial foreclosure may still be, as raising rivals' costs through higher prices allows the merged entity to adjust the degree of foreclosure to better balance lost revenues against recaptured gains[318]. Furthermore, when the merged entity earns profits from supplying its downstream rivals, those rivals may be more willing to accept higher upstream prices, so that the merged entity has less incentive to compete aggressively against them[319].

234. The incentives of the merged entity to partially foreclose its rivals by raising their costs can be measured by the margin gained from diverted customers multiplied by the diversion ratio. Where this measure is material, it provides an indicator that the merger creates a meaningful incentive to raise rivals' costs[320].

235. In some industries, prices are set via individual bargaining between firms. A merger may affect the bargaining positions of the merging parties when the terms of access are determined through negotiation. Prior to the merger, if negotiations between the upstream

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316 Where a value chain involves multiple layers, diversion ratios estimated at a single level may understate the share of customers ultimately diverted to the merged entity. In such cases, the Commission may account for substitution patterns across several layers of the chain, rather than between adjacent levels only.

317 See, e.g., Case M.9596 – Essilorluxottica/Grandvision, Annex I.

318 See, e.g., Case M.10108 – S&P Global/IHS Markit paragraph 568; Case M.10262 – Meta/Kustomer paragraph 316; and Case M.10796 – Google/Photomath, paragraph 120.

319 If a downstream rival refuses to buy from the merged entity, the merged entity no longer benefits from upstream sales, giving it an incentive to compete more aggressively downstream. Rivals may thus be willing to continue purchasing from the merged entity despite higher input prices. See, e.g., Case M.9596 – Essilorluxottica/Grandvision, paragraphs 226-227 and 325-337.

320 For the same reason as there is an incentive to raise rivals' costs, vertical mergers may also lead to an incentive to lower the prices of the integrated firms as it now has access to the input at a lower cost. See Section II.C for details.

firm and a downstream rival break down, the upstream firm bears the full cost of the lost trading relationship. The merger changes this position: a breakdown in negotiations with a rival diverts a share of that rival's customers to the merged firm's downstream affiliate, improving the integrated firm's fallback position. The extent to which the merger shifts bargaining leverage depends on the departure rate, the diversion ratio, and the profit earned on diverted sales. Where this shift is material, the merged firm can impose less favourable terms of access on rival downstream rivals, raising their costs[321].

236. If foreclosure can be targeted towards specific rivals, customer groups, or market segments, then the incentive to engage in foreclosure may be particularly strong. Such foreclosure can be designed to maximise gains while minimising losses from reduced trade with affected counterparties, for example, by focusing on market segments that compete closely with its own operations[322].

237. Inputs that can be used in several value chains may give rise to increased incentives for foreclosure. In that case, the merged entity may be more likely to foreclose its rivals without incurring significant losses upstream as it can redirect sales to customers active in other value chains that use the same input, reducing the economic costs of such a strategy.

238. The Commission assesses the incentive for customer foreclosure by examining whether the merged firm would find it profitable to shift its downstream purchases away from rival upstream suppliers and towards its own upstream affiliate. Prior to the merger, the downstream entity sources inputs on commercial terms and has no reason to favour one supplier over another. The merger changes this position: by redirecting purchases to its upstream affiliate, the merged firm can earn profits that would otherwise accrue to a rival supplier. The direct incentive to do so is measured by weighing the upstream margin gained against any cost or quality disadvantage the downstream affiliate incurs by switching.

Dynamic incentives

239. The merged entity may have an incentive to engage in foreclosure not to capture immediate gains but to strengthen, entrench or extend its market power over time. By degrading rivals' access to critical inputs, customers, or complementary products or services, the merged entity may progressively undermine rivals' ability to compete effectively, deter entry or expansion, or diminish rivals' incentives to invest and innovate. Such dynamic foreclosure incentives may be material even where an assessment based on current diversion ratios, departure rates, and margins would not identify a profitable foreclosure strategy.

240. Dynamic foreclosure incentives are particularly relevant in markets where competitive viability depends on achieving or maintaining a critical level of scale, data, or customer reach, and where competitive advantages tend to be self-reinforcing, for instance through network effects, data accumulation or control of bottlenecks. They are also material in

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321 The mechanism can be formalised in a game theory model known in economics as 'Nash bargaining'. See, e.g., Case M.7194 – Liberty Global/De Vijer; Case M.9064 – Telia/Bonnier; and Case M.8306 – Qualcomm / NXP.

322 See, e.g., Case M.10262 – Meta/Kustomer, paragraphs 430 et seq.

markets where innovation and investment are important parameters of competition. In a number of such markets, rivals do not challenge an incumbent's position directly but enter through adjacent markets to acquire the scale and network effects needed to compete effectively. The merged entity may therefore have an incentive to foreclose rivals or potential entrants at this earlier stage in order to eliminate competitive threats before they materialise. Where the merged entity already holds a significant degree of market power or dominant position, such dynamic incentives may further support a finding of entrenchment.

241. A merging firm may be motivated to foreclose rivals that are developing an innovative product or service downstream. An innovation race downstream may incentivise the merged entity to foreclose competitors even if it is not yet active downstream, for example, to gain a first mover advantage or to be the only company able to develop a product downstream for a new or nascent market.

242. Customer foreclosure may also result in reduced scale or innovation incentives of the merged entity's upstream rivals. For example, if the foreclosure limits the interoperability of certain products resulting in reduced use of rivals' products, this can lead to that rival deciding to not pursue further product improvements or new innovations. The merged entity may also purchase inputs from an upstream rival at a lower price to an extent that it would harm the ability of the upstream rivals to continue innovating. In addition, a merged entity's self-preferencing strategies may reduce rivals' access to customers and hamper their innovation efforts.

6.3. Effect on competition

243. In assessing the effects of foreclosure on competition, the Commission examines whether the conduct is liable to harm effective competition in one or several relevant markets. Foreclosure need not eliminate rivals entirely in order to give rise to such harm. Where the merged entity engages in total foreclosure, this may lead to the exit of the foreclosed rival or its inability to operate at viable scale, reducing competition. The Commission may equally find that partial foreclosure is sufficient to significantly harm competition[323].

244. Partial foreclosure may produce harm through two distinct mechanisms, which may arise independently or in combination. Where the foreclosure strategy is aimed at leveraging market power to a related market, the Commission assesses whether the degraded terms of access imposed on rivals are sufficient to materially weaken their competitive position in that market[324]. Where the foreclosure strategy is directed at extracting rent from rivals, the Commission assesses whether the merged entity uses its market power to obtain higher prices or otherwise less favourable terms on rivals, causing harm in the market for the foreclosed product irrespective of whether rivals are weakened in the market where they compete[325]. Where the foreclosure strategy has both elements, the Commission assesses harm in both markets.

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323 Judgment of 25 October 2002, *Tetra Laval v Commission*, T-5/02, EU:T:2002:264, paragraphs 270-336.

324 In a scenario of customer or conglomerate foreclosure, losing a significant number of customers or large volume of sales can be particularly damaging for the competitiveness of rivals when economies of scale or network effects are present or when customer data is critical for their business model, and there is no way to get similar volume elsewhere in the market.

325 See, e.g., Case M.9064 – Telia/Bonnier.

245. The weight the Commission attaches to the importance of the foreclosed product for rivals depends on the nature of the effects. For leveraging effects, the Commission considers whether the product is (i) important to the rival's ability to compete effectively (having regard to whether it is directly integrated into the rival's product or production process), (ii) constitutes a significant source of product differentiation or (iii) the degradation of the conditions of purchase resulting from foreclosure is sufficient to affect the rival's competitive position. A product may be important to effective competition even where it does not represent a significant share of the rival's costs[326]. For rent extraction effects, the Commission focuses on whether the merged entity holds sufficient market power over the foreclosed product to impose adverse terms on rivals, and the importance of that product to the rival's competitive offering is a less central consideration.

246. The Commission also assesses the proportion of rivals that would be foreclosed, whether the foreclosed firms play a sufficiently important role in the competitive process and the fraction of market output that would be affected. Foreclosing firms that play an important role in the competitive process will often directly lead to a SIEC in the market where they operate. The higher the proportion of rivals and their market share that would be foreclosed, the more likely it is that the merger can be expected to result in a SIEC. A firm that is a close or aggressive competitor to the merged entity can play a significant competitive role despite its smaller market share compared to other competitors. This is especially relevant when assessing the competitive effects of targeted foreclosure[327].

247. Foreclosure effects may also raise barriers to entry or expansion by depriving foreclosed firms of the scale or network effects they need to compete effectively in the market. A threat of foreclosure may be sufficient to deter entry or discourage investment by rivals or potential entrants, even if the foreclosure strategy is not ultimately implemented[328]. Dynamic harm to competition is more likely when potential competitors need to enter several markets to compete effectively in one of them. The concern of raising entry barriers is particularly relevant in nascent and digital markets, where scale and network effects are important for the ability and incentive to compete effectively.

248. Foreclosure effects can be exacerbated when they are combined with other anticompetitive effects arising from the elimination of direct, innovation or potential competition between the merging parties, entrenchment or with a finding of coordinated effects. A merger between firms operating in separate markets may lead to foreclosure of rivals in one of the markets but also eliminate potential competition the merging parties face from one another.

249. The Commission assesses foreclosure effects holistically, considering the competitive strength of the companies involved across the entire value chain, and not only on a

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326 See, e.g., Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraphs 216, 217, 287-290; Case M.9564 – LSEG/Refinitiv, paragraphs 913-914; Case M.8985 – Boeing/KLX, paragraph 67; Case M.5675 – Syngenta/Monsanto Sunflower Seed Business, paragraphs 347 and 350; Case M.4854 – TomTom/Teleatlas, paragraph 198; and Case M.4569 – GE/Abbott, paragraphs 30 and 36.

327 See, e.g., Case M.10262 – Meta/Kustomer; and Case M.9660 – Google/Fitbit.

328 Such harm is more likely when there is objective evidence of entry, such as public communication by a potential competitor about potential entry or expansion, or market reports or internal documents showing the perception of the foreclosure threat.

particular level or product within an isolated relationship. In vertically integrated industries, direct or dynamic effects on competition, and effects due to foreclosure may reinforce each other[329]. Foreclosure can also make rivals less resilient by exposing them to market power and potential unreliability of alternative sources of supply.

250. The Commission considers the impact of foreclosure on all market firms. For example, in a circular economy context (for example recycling), any product, by-product, or service may serve as an input within the broader value chain. Therefore, the impact of a merger on the value chain must likewise be assessed in a comprehensive and integrated manner[330].

251. The impact of foreclosure can be particularly damaging where there is little or no pre-merger commercial relationship between the merging parties, but one of them controls a product or customer base that is accessed primarily by the competitors of the other. Such diagonal mergers are unlikely to give rise to efficiencies typically associated with vertical integration, and the overall competitive assessment is therefore less likely to identify procompetitive benefits capable of offsetting the foreclosure harm[331].

7. Entrenchment of a dominant position

252. Entrenchment occurs when the merged firm gains control over certain assets[332] in a way that structurally creates or reinforces existing barriers to entry and expansion resulting in reduced market contestability. Entrenchment gives rise to dynamic anticompetitive effects by deterring the prospect of future entry, expansion or innovation by current or potential competitors. A merger may result in a SIEC when it leads to the entrenchment of a dominant position within a 'core market'[333] or across closely related markets, which may consist of one or several distinct but interconnected markets ('ecosystem')[334]. A merger may lead to entrenchment in the presence of the following factors.

253. First, at least one of the merging firms is dominant in one or several closely related markets[335]. The Commission assesses the merging firms' existing market power not only in individual markets but also in the context of an ecosystem. This evaluation will consider how the ecosystem reinforces or otherwise impacts the merged firm's market power in the

329 See, e.g., Judgment of 18 May 2022, *Wieland-Werke AG v Commission*, T-251/19 EU:T:2022:296, paragraphs 87-91.

330 See, e.g., Case M.10702 – KPS Capital Partners/Real Alloy Europe, paragraph 104.

331 See, e.g., Case M.9569 – EssilorLuxottica/GrandVision, paragraph 227.

332 In this Section, 'asset' refers also to products, services, capabilities that are being acquired through the merger.

333 The term 'core market' refers to a market where the merged entity has strong market power. The term may also refer to a market where a company's position is impacted and reinforced by complementary or otherwise closely related markets (e.g., in digital sectors the functioning of a hardware may be determined and reinforced by a surrounding software that is technically linked).

334 See Market Definition Notice, paragraph 104. For instance, (digital) ecosystems can, in certain circumstances, consist of a primary core product and several secondary (digital) products whose consumption is connected to the core product, e.g., by technological links or interoperability. See also Judgment of 14 September 2022, *Google and Alphabet v Commission*, T-604/18, EU:T:2022:541 for an example of a digital ecosystem encompassing products built around a mobile operating system, including hardware, an application store and software applications.

335 To determine the merging parties' market position, the Commission may consider its business models, investment or innovation strategies, organisational structures (including manufacturing processes or degrees of vertical integration) as well as broader competitive strengths and weaknesses. For instance, an ecosystem of complementary products or services may give the merging party significant structural and technologies advantages such as economies of scale and scope over its rivals. See Section II.A..

core market including how relevant the ecosystem is for effectively competing in the core market.

254. Entrenchment is more likely in the presence of market dynamics that reinforce or protect the merging firm's position, such as network effects, scale economies or customer inertia[336]. The higher the existing barriers to entry and expansion in the core and related market(s), the higher the likelihood of entrenchment[337].

255. Second, the acquired assets are related to the merged firm's core market(s). For instance, the asset may be an input or a complement with a degree of commonality between the customer bases or be otherwise commercially or technically related to the merged firm's activities in the core market(s). Assets that have no plausible connection to the core market cannot credibly reinforce the merged firm's position on it.

256. Third, the acquired assets are important to effectively compete on the core market and their control by the merged firm restricts the ability and incentives of rival firms to enter or expand. In its assessment, the Commission may consider whether the acquired assets are unique, scarce or otherwise strategically important for competition in the core market, such as data[338], IP[339], an important customer acquisition channel[340] or infrastructure[341]. For instance, the acquiring firm may commercially bundle or tie the acquired assets to create or extend its ecosystem and leverage market dynamics like network effects. As a result, single-product rivals may be impeded from gaining foothold in the core market(s) and from profitably investing or innovating or competition in the core market(s) may otherwise be further weakened. With scale economies and network effects, entry into the core market(s) often requires competing in related markets to build scale and a customer base. It is then also relevant to examine the extent to which the dominant merged firm controls key assets in those related markets, and how this limits future entry and innovation in the core market(s).

257. A merger may also eliminate a potential competitor[342] active in a related market with scarce or special capabilities or value propositions that effectively threaten the acquirer's market position. Such mergers may also affect rivals' ability and incentive to compete in the core market(s) as such potential competitors are often strongly incentivized pre-merger to facilitate entry and expansion of other firms to the core market(s), for example by combining their products to create an alternative offering to that of the merging parties in the core market.

258. In its assessment, the Commission also considers whether there are no effective and timely counterstrategies that rival firms could deploy to prevent the reduction in contestability. The effectiveness of rival's counterstrategies may be lower when the merger itself creates

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336 Specific pre-existing market dynamics may further contribute to the merging firm's market power, such as network effects, limited customer switching possibilities due to, e.g., customer inertia, high switching costs, lack of data portability or economies of scale or scope.

337 In its assessment, the Commission also considers countervailing factors to market power.

338 See, e.g., Case M.9660 – Google/Fitbit.

339 See, e.g., Case M.1671 – Dow Chemical/Union Carbide, paragraphs 107-114.

340 See, e.g., Case M.10615 – Booking Holdings/eTraveli Group.

341 See, e.g., Case M.11071 – Deutsche Lufthansa/MEF/ITA, Section 11.

342 See Section II.B.4..

or enhances specific market dynamics that protect or reinforce the merged firm's dominance such as network effects or customer inertia.

259. Entrenchment may arise independently of, or in addition to, a finding of input, customer or conglomerate foreclosure. Where evidence supports both a foreclosure concern and an entrenchment concern, the two may be assessed cumulatively, as the foreclosure strategy may simultaneously harm specific rivals and reinforce the merged firm's dominant position in the core market.

8. Coordination

260. A merger may lead to coordinated effects, that is, it increases the risk that firms act on a common understanding to reduce competition between them, either tacitly or explicitly, or make existing coordination more stable.

261. Firms can coordinate tacitly or explicitly on one or several parameters of competition. Coordination may involve keeping prices above the competitive level, limiting production or the amount of new capacity brought to the market, limiting products features, delaying innovation or reducing innovation or investment efforts. Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets. In addition, firms may follow the market leader in its commercial strategy, such as price increase or release of new products[343].

262. Mergers, and in particular mergers between actual or potential competitors, can enhance the likelihood that firms find it economically rational to coordinate their competitive behaviour. Mergers between firms active in different product or geographic markets, and mergers at different levels of the value chain, can also increase the likelihood of coordination. Mergers can make pre-existing coordination easier, more stable or more effective, for example by permitting firms to coordinate on even higher prices or other parameters of competition or on additional markets.

263. For coordination to occur, firms should be able to reach a mutual understanding on the terms of coordination and monitor deviations from the terms of coordination. It is necessary that firms have a sufficient deterrent mechanism not to deviate from the coordinated behaviour; and that non-coordinating market participants are not in a position to disrupt the coordination[344].

264. These conditions may either pre-date the merger or result from the merger. In this respect, the Commission considers the changes that the merger brings about. The Commission's assessment focuses on whether the changes in the market conditions are likely to create or strengthen an environment conducive to coordination, rather than on predicting the actual occurrence of such coordination.

265. The reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination. However, a merger may also increase the likelihood or significance of coordinated effects in other ways. For example, mergers can eliminate a firm with a disruptive presence, modify the incentives to invest and innovate by delaying innovation

343 See e.g., Case M.7881 – AB InBev/SABMiller, paragraphs 72-84, and Case M.8444 – ArcelorMittal/Ilva, paragraphs 1123 et seq.

344 Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraph 62.

or reducing investment, increase similarities among firms (e.g., in terms of cost structure, market presence, capacity levels, levels of vertical integration etc.), increase multi-market interactions on a product or geographic level, increase market observability of strategies and competitive behaviour, create structural or commercial links between competitors (such as minority shareholdings, cross-directorships, or commercial agreements), provide access to sensitive information, increase barriers to entry, or enhance the ability to punish deviations from coordination.

8.1. Reaching terms of coordination: market conditions that are conducive to coordination

266. Coordination is more likely if competitors can easily arrive at a common perception as to how the coordination should work. Coordination does not require all firms active on the market to participate or, when they do participate, fully align. Following the market leader in its commercial strategy, such as price increases or release of new products, is one the easiest ways to arrive at a common perception as to how the coordination would work[345].

267. Generally, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination. However, coordination may also be possible under complex economic conditions. Some of the most important factors or market characteristics to be considered are the following:

a) **The number of firms in a market**. A reduction in the number of significant firms in the market may give rise to coordinated effects, as it is easier to coordinate among fewer firms than among many. The existence of a fringe of small firms may not necessarily reduce the risk of coordination, as coordination may still be sustainable among a subset of firms.

b) **Elimination of a maverick.** A merger involving a firm that has a history of preventing or disrupting coordination or has characteristics that gives it an incentive to favour different strategic choices than its coordinating competitors would prefer[346].

c) **Similarities of the firms active in the market**. Similarities in terms of cost structure, market presence, capacity levels or levels of vertical integration can make it easier for firms to align incentives or reach an understanding on the terms of coordination. However, firms without such similarities can still reach an understanding on the terms of coordination, including situations where the mechanism of coordination involves following the market leader or through market sharing.

d) **Cross-shareholdings, minority interests and other structural or commercial links, including via industry associations or joint ventures.** These types of relationships can make the exchange of commercially sensitive information easier. They can align incentives across companies, thereby reducing their incentives to compete aggressively, or increase the incentives to coordinate (or to not deviate) from the coordination. Transactions that do not reduce the number of competitors but create such relationships can therefore increase the risk of coordination.

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345 See, e.g., Case M.7881 – AB InBev/SABMiller, paragraphs 72-84, and Case M.8444 – ArcelorMittal/Ilva, paragraphs 1123 et seq.

346 See, e.g., Case M.7758 – Hutchison 3G Italy/Wind/JV, paragraphs 972-981.

e) **Access to information.** Firms may need to have access to relevant commercial information to make coordination sustainable. The type of relevant information will depend on the market and terms of coordination. Relevant information may relate to prices, output, capacity, identity of customers served, territories served, discounts, or new product introductions. Access to information can be obtained through the exchange of information via public announcements or publications, through market intelligence or through private exchanges, for example those that occur through trade associations, cross-directorships or participation in joint ventures. When coordination consists in a 'following-the-leader' type of behaviour the need to access or exchange information is less relevant.

f) **Large datasets and artificial intelligence ('AI').** Reliance on big data, AI, advanced algorithms and machine learning technologies may facilitate coordination. These tools can be used to monitor or forecast firms' prices or strategies, enhancing market observability. Additionally, using a common external provider for automated pricing decisions or most-favoured nation clauses may facilitate coordination.

g) **Homogeneity or similar characteristics of the products or services.** It is easier to coordinate on terms such as price, features, delays in the introduction of innovations, or limitations on capacity when competing products or services present strong similarities. However, even in markets with differentiated or complex products, or where competition occurs across multiple parameters, coordination is still possible by establishing a common reference point, such as a standardized input or product base that serves as a baseline for coordination or a commonly agreed price rise. Homogeneity of products or services may be less relevant for certain types of coordination such as coordination based on geographic or customer allocation.

h) **Simple customer characteristics.** Coordination by way of market division will be easier if customers have simple characteristics that allow the coordinating firms to readily allocate them. Such characteristics may be based on geography, on customer type or simply on the existence of customers who typically buy from one specific firm.

i) **Stability in demand and supply conditions.** Frequent and regular orders, as well as stability in the number and identity of competitors, can enhance the risk of coordination. Inelasticity of demand exacerbates the risk and severity of coordinated effects of a merger. However, coordination can still exist in growing and dynamic markets, for example, to delay the launch of new products or to reduce investments.

j) **Multi-market contacts.** Firms that compete in several markets may compete less vigorously in certain markets, anticipating that their rivals will reciprocate in other markets. Therefore, mergers between firms active in the same product markets across different regions, or in the same region where after the merger their portfolio or level of vertical integration would be more similar to those of other rivals, may amplify the potential for multi-market interactions and consequently the risk of coordinated effects. Multi-market interactions can also increase the possibilities to retaliate or make information sharing and signalling easier.

268. A history of coordination among firms (such as a prior finding or a cartel in the industry) is a strong indicator that a market is vulnerable to coordination. A prior finding of

coordination, such as a cartel, in the relevant market suggests that the market characteristics are inherently conducive to anticompetitive coordination. A prior finding of coordination in similar markets, for example the same product market in other geographies, can also be an indication that the market is prone to coordination[347]. Other indicators such as price parallelism, high and stable margins and stable market shares over a long period of time can suggest existing coordination. A finding of prior coordination is not a prerequisite for determining that a merger may lead to coordinated effects. Even if past attempts at coordination were unsuccessful, a merger can still increase the likelihood, stability, or efficacy of coordination.

8.2. Deviation from coordination: monitoring and deterrence

269. While coordination may bring benefits to participants, it may also be beneficial to a firm to deviate from that coordination to gain market share.

270. Relevant factors for this assessment are the possibility for the coordinating firms to monitor the terms of coordination, detect deviations and respond to such deviations sufficiently and in a timely manner.

Ability to monitor adherence to the terms of coordination

271. For coordination to be sustainable, the market needs to present a sufficient degree of observability allowing coordinating firms to monitor adherence to the terms of coordination and deviations of coordinating firms.

272. The more observable a market or a firm's deviation is, the greater the risk of coordination[348]. If markets are transparent, observability is high. For example, transparency is likely to be high in a market where transactions take place on a public exchange or in an open outcry auction. Posted prices are typically easier to observe than negotiated prices. However, non-transparent markets can be observable by firms. For example, the use of AI and automatic algorithms based on large datasets improve market observability.

273. In some markets, firms may engage in practices which increase observability. These practices include voluntary publication of information, announcements, or exchange of information through trade associations, cross-directorships or joint ventures. Data from trade statistics, customer-supplier relationships between competitors, due diligence from multiple aborted transactions or available price-indices also increase market observability.

274. Relevant information to assess deviations will depend on the market and terms of coordination. It may concern other firms' pricing, output levels, capacity, innovation projects, or individual transactions. Such information may be compiled by firms from multiple sources. In certain types of coordination, such as those based on geographic or customer allocation, the limited scope of relevant information that is needed to assess deviations and its relative accessibility imply a very high degree of observability.

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347 See, e.g., Case M.10438 – MOL/OMV, paragraphs 291-302.

348 See, e.g., Case M.10438 – MOL/OMV, paragraphs 367-376.

Deterrence

275. Coordination may be sustainable where it is more advantageous for firms to coordinate than to deviate from that coordination.

276. The benefits from coordination may arise from the potential to maintain prices above normal market conditions or to secure other benefits, such as reduced investment requirements or pressure to innovate.

277. The size of the deviation benefits can differ depending on the market characteristics (e.g., size and regularity of orders as large and infrequent orders increase benefits from deviating, customer behaviour, switching costs, price sensitivity of customers, and use of meeting-competition clauses).

278. The losses from deviating relate to the risk and consequences of retaliation. The prospect of reverting to normal competitive conditions is, in most cases, a sufficient deterrent decreasing the coordinating firms' incentive to deviate from the coordination terms[349].

279. In assessing the retaliation mechanism, the Commission considers its timeliness and credibility. Retaliation that manifests itself after a significant time lag is less likely to offset the benefits from deviating. Retaliation is credible where there is sufficient certainty that some deterrent mechanism will be activated. Punitive measures are particularly credible when they can negatively impact the deviating firm without substantial expenses for the punishing firm[350]. While price reduction across all volumes or other broad action is a viable and credible means of retaliation, selective retaliation, such as special deals to certain customers, might be more practical to execute. Importantly, such retaliation does not need to occur in the same market as the deviation and can take many forms.

280. The mere existence of a credible deterrence mechanism suffices; there is no need to adduce proof of either a threat or the actual use of a retaliatory mechanism[351].

8.3. Disruption of coordination

281. Coordination may be sustainable if non-coordinating market participants cannot meaningfully disrupt the coordination or do not have an incentive to do so. Such market participants include actual competitors and potential competitors, as well as customers. For example, customers' switching or otherwise exercising buyer power may be disruptive for the coordination.

9. Other anticompetitive effects

9.1. Access to commercially sensitive information

282. The merged firm may gain access to commercially sensitive information about rivals' activities. This may give rise to a SIEC, for example, when it allows the merged entity to price less aggressively, to the detriment of consumers or when it undermines rivals'

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349 See, e.g., Case M.8451 – Tronox/Cristal, paragraphs 365-370 and Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 276.

350 See, e.g., Case M.10438 – MOL / OMV, paragraphs 377 et seq.

351 Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraph 195 and Judgment of 13 July 2006, *Impala v Commission*, T-464/04, EU:T:2006:216, paragraph 466.

incentives to compete, dissuading them from investing, expanding, lowering prices or entering a market[352].

283. Commercially sensitive information includes, for instance, information on pricing, sales volumes, contracting terms, product characteristics, production capacity, costs, commercial strategy, rivals' intention to launch new or improved products, information about the technical performance of rivals' products, customer data, user data, or other competitively relevant data[353].

284. The effect of the competitive advantage obtained through the access to commercially sensitive information may, for example, depend on the data increment brought by the merger[354], metrics such as data variety, velocity, volume and value[355], or other qualitative or quantitative parameters.

285. Regulatory or contractual restrictions do not as such preclude the ability to access commercially sensitive information. Nevertheless, legal limitations are considered in the competitive assessment[356]. Legal limitations that are not operative in the EU or that do not apply to all commercially sensitive information have limited, if any, impact on the ability to access commercially sensitive information.

286. Access to commercially sensitive information may lead to a SIEC even in the absence of foreclosure[357]. Access to commercially sensitive information may be assessed as a stand-

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352 See, e.g., Case M.11956 – UMG/Downtown; Case M.11578 – Boeing/Sprit; Case M.7724 – ASL/Arianespace; Case M.8314 – Broadcom/Brocade; Case M.11486 – Novo Holdings/Novo Nordisk/Catalent; Case M:11246 – Rolex/Bucherer; Case M.10301 – CVC/Ethniki; Case M.9660 – Google/Fitbit; Case M.9019 – Mars/Anicura; Case M.8900 – Wieland Aurubis Rolled Products/Schwermetall; Case M.8948 – Spirit/Asco; Case M.9424 – NVIDIA/Mellanox, Case M.8788 – Apple/Shazam; Case M.6765 – Precision Castparts/Titanium Metals; Case M.4854 – TomTom/Tele Atlas; M.3440 – EDP/ENL/GDP; Case M.2738 – Gees/Unison; Case M.2925 – Charterhouse/CDC/Telediffusion de France; Case M.2510 — Cendant/Galileo; and Case M.1879 — Boeing/Hughes.

353 See, e.g., Case M.11956 – UMG/Downtown (artist-label contract details to which UMG (i.e. competing label) would have gained access); Case M.11578 – Boeing/Sprit (design and specifications of Spirit's aerostructures supplied to Airbus, Airbus' purchases of aerostructures, processes, know-how and cost of production of Airbus' aerostructures); Case M.9660 – Google/Fitbit (digitally obtained data on Fitbit's customers use of third-party apps and customers' activity obtained through digital apps); Case M.8788 – Apple/Shazam (list of customers of Apple Music's rivals, including identifiers); Case M.10301 – CVC/Ethniki (patients' health data and doctor data); Case M.8900 – Wieland Aurubis Rolled Products/Schwermetall (sensitive information about Schwermetall's customers); Case M. 8948 – Spirit/Asco (technical and commercial information about bids); and Case M.4854 – TomTom/Tele Atlas (information about the future behaviour of downstream competitors).

354 See, e.g., Case M.9660 – Google/Fitbit, paragraphs 831-844.

355 See, e.g., Case M.11956 – UMG/Downtown, paragraph 482, and Case M.8788 – Apple/Shazam, paragraphs 317-328.

356 See, e.g., Case M.10301 – CVC/Ethniki, paragraphs 144-177; Case M.9660 – Google/Fitbit, paragraphs 411-412; Case M.8788 – Apple/Shazam paragraph 225. The Commission considers, on the basis of a summary assessment: (i) whether potential legal restrictions may apply – without prejudice to any assessment by the competent authority under the regulation itself–, (ii) the likelihood that a breach could be detected, and (iii) the penalties which could be imposed.

357 See, e.g., Case M.11956 – UMG/Downtown, paragraphs 371-373; and Case M.8788 – Apple / Shazam, paragraph 193.

alone theory of harm or as reinforcing other foreclosure or non-foreclosure effects[358]. In addition, access to commercially sensitive data may facilitate coordination among competitors. Such risk may be especially pronounced in highly concentrated markets or where there is evidence of prior coordination or of prior attempts to coordinate in the relevant market (see Section 8)[359].

9.2. Portfolio effects

287. Mergers between firms that supply products that are neither substitutes nor complements with limited customer overlap typically do not result in competition concerns. However, mergers that combine products belonging to different relevant markets, but which together form a portfolio of products sold to the same customers may give rise to a SIEC, even where these products are neither substitutes nor complements and where foreclosure is not a concern.

288. A broader portfolio can result in a SIEC if it increases the market power of the merged firm, leading to increased prices or worse conditions of supply for those customers. In cases involving potential portfolio effects, the Commission considers a theory of harm that could enable the merged firm to use its expanded portfolio in a way that increases its market power towards its customers.

289. For example, in mergers between manufacturers or wholesalers, a broader portfolio may strengthen the merged firm's bargaining position vis-à-vis retailers by increasing the cost for retailers of walking away from negotiations relative to the cost that the merged firm would incur from failed negotiations. This may be the case because, if negotiations fail and the merged firm's products are delisted, a proportion of consumers who previously shopped at the retailer may shift part of or all their purchases to competing retailers, thereby significantly harming the retailer, while the merged firm may recapture some of the lost sales through other retailers. The resulting strengthened bargaining position of the merged firm allows it to raise its prices vis-à-vis its retail customers. As another example, a broader portfolio may increase the bargaining power of patent holders by increasing the cost and risk of patent litigation for rivals[360].

290. The Commission considers a range of relevant factors when assessing the plausibility of such theories of harm, including (i) the pre-merger market power of the merging firms in individual product markets as well as the range of markets in which the merging firms hold market power, (ii) the degree of customer overlap between the merging firms, (iii) the demand relationships between the products (i.e., whether the products are substitutes, complements or sold independently), (iv) past negotiation behaviour, including whether the merging firms have in the past linked negotiations of different products, (v) countervailing bargaining power of customers, and, to the extent relevant, (vi) consumer purchasing behaviour. Typically, the larger the degree of pre-existing market power and

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358 See, e.g., Case M.8900 – Wieland Aurubis Rolled Products/Schwermetall; Case M.4854 – TomTom/Tele Atlas; Case M.3440 — EDP/ENL/GDP; Case M.2738 – Gees/Unison; Case M.2925 — Charterhouse/CDC/Telediffusion de France; Case M.2510 – Cendant/Galileo; and Case M.1879 – Boing/Hughes.

359 See, e.g., Case M.8948 – Spirit/Asco.

360 See, e.g., Case M.8306 – Qualcomm/NXP. In Case M.6458 – Universal Music Group/EMI Music, the Commission assessed portfolio effects in a horizontal setting where the merged firm's products were weak substitutes.

the wider the range of markets in which the merging firms hold market power, the more likely the merger will result in anticompetitive effects. However, a finding of significant pre-existing market power of the merged firm in a range of individual product markets is not in itself sufficient for the Commission to identify competition concerns.

C. BENEFITS FROM MERGERS (EFFICIENCIES)

291. Certain concentrations may give rise to efficiencies[361]. Such efficiencies can be an important driver of the parties' decision to pursue the transaction. Greater clarity regarding the role of efficiencies in the merger control assessment is important to avoid chilling effects on transactions that would be beneficial for customers and the internal market. Demonstrated efficiencies will play a key role in the assessment of mergers going forward.

292. Efficiencies have to be demonstrated by the merging parties on a case-by-case basis. The assessment of demonstrated efficiencies, and the balancing of those efficiencies against the identified anticompetitive effects created by the merger, is an integral part of the Commission's assessment of the compatibility of a merger with the internal market.

293. Scale and innovation are critical to compete in innovation-heavy sectors which are important for the competitiveness of the EU. The assessment of efficiencies therefore follows a forward-looking approach that gives adequate weight to innovation, investment and resilience of the internal market, taking into account the expected change that a merger may bring on the merging firm's ability and incentive to invest and innovate, as well as adjusting the time periods for the materialisation of benefits depending on the characteristics of the markets and the case at hand[362].

294. The Commission distinguishes between direct and dynamic efficiencies. To be taken into account in the assessment of the merger, both should fulfil three cumulative conditions: be (i) verifiable; (ii) merger specific; and (iii) benefit consumers.

295. **Direct efficiencies** result directly from the integration or combination of merging firms' assets and businesses. They are the most common type of efficiencies, typically deriving from cost savings or quality efficiencies, leading directly to lower prices, new and improved products, higher product quality or variety and improvements in other non-price parameters of competition.

296. **Dynamic efficiencies** confer the ability or increase the incentives[363] to invest or innovate[364] into new or improved products or services, improved distribution or

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361 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraphs 242-244.

362 Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 80 et seq.

363 The ability or incentive to invest may be limited absent the merger due to a market failure, such as spillovers that do not allow an inventor to fully appropriate the value generated by its invention. A merger may alleviate this market failure by improving the ability to appropriate and protect knowledge and make a better use of intangible assets. However, it may also create or increase other market failures, if it leads to the creation or an increase of market power.

364 For the purpose of this Section II.C, the phrase 'investment or innovation' will be used as a short-cut for investment in assets and investment in innovation. The Commission distinguishes between (i) investment in assets and (ii) investment in innovation. The incentives for investment in assets and investment in innovation may differ as outcomes of the innovation process may be more uncertain than investment in

production or other procompetitive parameters of competition. For instance, disruptive innovation can deliver significant benefits to consumers but typically requires large, sustained investments and involves uncertain returns in the future, which may have more chances of success the higher the level of investment in R&D, including the ability to pursue several R&D workstreams in parallel. These challenges may deter or hinder the merging parties from innovating absent the merger.

297. Both direct and dynamic efficiencies should preserve or enhance competition and positively affect parameters of competition such as price, output and quality in various forms, including choice, innovation, investment, resilience or sustainability, on a lasting basis, thereby contributing to technological and economic progress. Their effects must be sufficient to durably counteract, that is, with an equivalent degree of likelihood over time, the negative effects on competition and, in particular, the potential harm to consumers, that a merger might otherwise have[365].

298. Scale, resilience and sustainability may in some situations lead to verifiable, merger-specific benefits to consumers. A merger may allow companies to develop procompetitive scale when it combines complementary assets or capabilities or results in procurement synergies that result directly in new, improved or more affordable products, or confer the ability or increase the incentive of the merged firm to invest and innovate.

299. In the case of resilience, efficiencies may come from (i) a combination of complementary assets leading to increased security of supply, broader or reinforced infrastructures or other enhancement that reduces exposure to risks of external disruptions, (ii) access to critical inputs or increased purchasing power to reduce exposure to supply chain disruptions or (iii) the creation of new or improved products that are more resilient to external disruptions. Similarly, in the case of sustainability, efficiencies may come from (i) a combination of complementary assets that reduce the environmental pollution of production processes, (ii) improved access to sustainable inputs or (iii) the creation of new or improved products that are more sustainable.

300. Efficiencies may in some cases lead to cost reductions that can be predicted to affect prices, and which are thus apt to directly counteract price increases that might otherwise occur in a more concentrated market. In other cases, efficiencies may reflect advantages that also further the objectives of EU policies recognised in EU Treaties[366] and bring benefits for customers, as well as the internal market and the society at large. These advantages may be incommensurable and sometimes subject to market failures because customers do not attribute adequate value to them in their individual decisions (e.g., the failure to adequately price negative environmental externalities or security of supply

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assets. In addition, the outcome of innovation (knowledge) can be shared without being used up or preventing others from using it as well.

365 Recital 29 EUMR.

366 The Commission ensures that its merger decisions are not contrary to other provisions of the Treaty, See e.g. Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 106; Judgment of 26 September 2024, *Orlen S.A., v European Commission*, C-255/22 P, EU:C:2024:790, paragraphs 96-97.

risks). The Commission has a margin of discretion with regard to economic matters[367], in weighing demonstrated efficiencies in the balance, against established harm to businesses and consumers as part of the overall competitive assessment.

301. To be considered beneficial to consumers, direct and dynamic efficiencies should (i) lead to benefits that are valued by them and (ii) be assessed not with sole regard to the companies involved in the merger but having regard to competition as a whole.

1. Assessment of direct efficiencies

1.1. Taxonomy of direct synergies

302. This section provides a non-exhaustive list of examples of merger synergies[368] that may lead to direct efficiencies:

a) **Combining scarce complementary assets or capabilities** may allow the merging firms to lower the variable costs of production or distribution[369]. These efficiencies may be sufficient to outweigh harm to consumers, in particular if the merging parties can demonstrate that the merger improves their joint production possibilities[370]. The merging parties have to demonstrate that the complementary assets are specific to them and cannot be easily traded.

b) **Economies of scale, scope or density** ('scale efficiencies') are present if average costs[371] decrease with higher levels of output, joint production or a denser network. The merging parties have to demonstrate that scale efficiencies cannot be achieved by growing organically[372], for example because necessary inputs cannot be purchased through normal market transactions or developed internally. Scale efficiencies are more likely to improve joint production possibilities if they also involve a combination of scarce complementary assets or capabilities or technology transfer[373].

c) **Wholesale cost savings**. The merging firms may be able to save costs by switching to cheaper suppliers[374] or to in-house supply[375], benefit from higher quantity rebates

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367 The Commission's margin of discretion is in regard to economic matters to apply the substantive rules of the EUMR, in particular Article 2, since the Commission carries out prospective economic analyses seeking to determine the likelihood of certain developments in the relevant market within a foreseeable time frame, see Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, paragraph 82.

368 'Merger synergies' refers to the source of efficiencies, i.e., mechanisms that lead to efficiencies. Efficiencies may bring benefits to consumers in the form of lower prices, increased supply or higher quality.

369 Merging firms may have complementary assets in distribution. For example, access to 'nascent' innovative technologies of the acquired firm may lead to a reduction of the time between innovation and commercialisation.

370 See by analogy, Case M.6905 – INEOS/Solvay/JV, paragraph 1197, 1206.

371 Generally, only variable or marginal cost savings are passed on to consumers, see Section II.C.1.4.

372 See, e.g., Case M.7630 – FEDEX/TNT Express, paragraphs 516 et seq.

373 A mere reallocation of output across plants is usually not sufficient to expand the merging firms' joint production possibilities and to outweigh harm to consumers, see Case M.6905 – INEOS/Solvay/JV, paragraphs 1197 and 1206.

374 See, e.g., Case M.10896 – Orange/MásMóvil/JV, and Case M.7278 – General Electric /Alstom (Thermal Power - Renewable Power & Grid Business).

375 See, e.g., Case M.10896 – Orange/MásMóvil/JV.

and/or benefit from higher bargaining power vis-à-vis suppliers[376]. Where input cost savings are the direct result of the anticompetitive effects of a merger, they are not an acceptable efficiency defence. For example, price increases in the relevant market may reduce demand, resulting in less inputs having to be purchased. Input cost savings may also be achievable by less anticompetitive means, such as a procurement alliance or procurement joint venture.

d) **Direct changes to price incentives due to integration**. If the merging firms are in a vertical supply relationship, the merged entity may have an incentive to decrease price in order to increase sales because the merger allows to access the input at marginal cost. This effect is known as the elimination of double marginalization ('EDM'). Likewise, if the merging firms are selling complementary products pre-merger, the merged entity may have an incentive to lower prices to sell more of the complementary products. This is known as the Cournot effect.

   EDM[377] and Cournot effect are more likely to be substantial if wholesale and retail prices do not involve fixed payments or rebates[378] and if pre-merger margins are high. EDM is also more likely to be relevant when gaining access to the acquired input at marginal costs constitutes a significant cost advantage compared to purchasing the input on the market.

e) **Securing access to critical inputs**. A merger may improve access to critical or more sustainable inputs, thereby increasing resilience or sustainability to the benefit of EU consumers. Such a synergy may lead to efficiencies only if the merger does not foreclose the access of rivals who also serve directly or indirectly the internal market[379], and if contractual alternatives cannot be considered as bringing the same level of benefits.

f) **Voluntary technology transfer.** When intellectual property rights cannot be licensed in an effective way, only a merger may allow the merged entity to roll-out its know-how, intellectual property and technology over a larger customer base.

g) **Combining complementary products or services.** Reductions in transaction costs or increased interoperability between complementary products may increase demand for each product even if prices are unchanged. A merger may enable the creation of better products by combining complementary products or complementary technologies. For example, the sale of complementary products in a bundle may reduce consumers' shopping costs in purchasing the products and thereby increase demand. The native integration of complementary software at the source code level may increase interoperability, without degrading access for other software products.

303. Synergies that lead to direct efficiencies may also lead to dynamic efficiencies. It is for the merging parties to demonstrate whether synergies lead to direct or dynamic efficiencies (or both).

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376 See, e.g., Case M.6905 – Ineos/Solvay, and Case M.8677 – Siemens/Alstom.

377 See, e.g., Case M.10896 – Orange/MásMóvil/JV.

378 Fixed payments and rebates may allow the merging firms to extract and share consumer surplus pre-merger, thus reducing the scope for EDM and Cournot effect.

379 See Section II.B.6.

1.2. Verifiability

304. Efficiencies have to be verifiable to allow the Commission to assess whether they are likely to materialise, whether they are timely and whether they are substantial enough to counteract a merger's predicted anticompetitive effects. The efficiency claims must be supported by a sufficiently cogent and consistent body of evidence, to the same evidentiary standard as the anticompetitive effects.

305. To show that direct efficiencies are likely to **materialise**, the merging parties demonstrate that the merger synergies occur by integrating their businesses (see Section 2.1 for taxonomy of synergies) and how they may enhance effective competition in the internal market on a lasting basis.

306. Direct efficiencies are **timely** if the synergies and the resulting consumer benefits in principle occur without delay. However, the time horizon may be longer[380] if that is consistent with the characteristics and dynamics of the market[381] and the theory of harm. However, a longer time frame for benefits to materialise may make them less predictable and quantifiable[382].

307. To verify whether direct efficiencies are **substantial** enough to counteract a merger's adverse effects on competition, merger synergies and the resulting direct efficiencies should be quantified, where reasonably possible. Where a quantitative analysis of efficiencies is produced, this analysis must provide a reasonable estimate of the size of the efficiencies[383] and rely on a methodology that is sufficiently robust to be verified by the Commission.

308. Where exact quantification is not possible, the merging parties have to detail the nature of the efficiencies and establish the magnitude of the expected efficiencies showing how they would counteract a merger's adverse effects on competition. This is particularly applicable to merger synergies that are not related to cost savings such as voluntary technology transfer.

309. Evidence relevant to the assessment of direct efficiencies includes contemporaneous internal documents created in the ordinary course of business for or used by the management to decide on the merger, including business and integration plans detailing merger synergies and resulting direct efficiencies, as well as public announcements to

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380 A time horizon of 3-4 years has been accepted in past cases in some sectors such as the telecoms industry. See e.g., Case M.7758 – Hutchison 3G Italy/Wind/JV, paragraphs1391 and Case M.8792 – T-Mobile NL/Tele2 NL, paragraph 892.

381 In past cases, the Commission has considered that the time-horizon of efficiencies must be assessed in the relation to the industry in which the merger occurs and in light of its specific characteristics. For instance, some industries and markets are characterised by long investment and innovation cycles, the process of integration may take longer, or the sector is characterised by long duration of tenders. See, e.g., Case M.10896 – Orange/MásMóvil/JV, paragraph 1599, Case M.7630 – FEDEX/TNT Express, paragraph 579, and Case M.7278 – General Electric /Alstom (Thermal Power – Renewable Power & Grid Business), paragraph 1324.

382 See, e.g., Case M.7630 – FEDEX/TNT Express, paragraph 579.

383 Cost savings are typically expressed in monetary terms. Quality improvements may sometimes also be meaningfully expressed in terms of units (e.g., the amount of CO_2 reduction per car). In other cases, it may be more meaningful to measure the number of consumers benefitting from certain product attributes (e.g., a tastier sugar surrogate for beverages). In both cases, consumers' valuation of improved quality can be expressed in terms of willingness to pay.

investors by listed companies on expected efficiencies. Other relevant evidence may also include pre-merger studies by independent external experts on the type and size of efficiencies and on the extent to which consumers are likely to benefit from them. Such studies are more credible if they are drawn up by independent external experts *in tempore non suspecto,* prior to the start of negotiations of the merger agreement. The evidence submitted by the merging parties will be more persuasive if corroborated by market dynamics, views of market participants, or past examples of realised efficiencies in the same or similar markets, particularly if this can be established through evidence prepared by third parties, independently of the merging companies.

1.3. Merger specificity

310. The merging parties must show that the claimed efficiencies would only occur because of the merger and could not be achieved to a similar extent by either firm on a standalone basis or by less anticompetitive arrangements between the merging parties or other market participants.

311. For that purpose, the merging parties should provide evidence that such arrangements would not be realistic and attainable. Less anticompetitive arrangements between the merging parties or other market participants can be non-concentrative (e.g., a licensing agreement, or a cooperative joint venture) or concentrative (e.g., a concentrative joint venture, or a differently structured merger). The merging parties do not need to cover alternatives that are mere hypothetical possibilities but should address all arrangements that are reasonably practical, including all established practices in the industry concerned, detail the firms' economic incentives to collaborate, and take into account their business situation.

312. For instance, the merging parties may provide evidence that cooperation agreements do not exist or are very uncommon in the market[384]. In addition, the merging parties may provide contemporaneous evidence showing they had no viable plans for alternative arrangements that could lead to similar efficiencies[385]. Merging parties may also substantiate why there would be little commercial incentive for the merging parties or other companies active in the market to enter into an alternative arrangement, in particular because an alignment of interests may be very difficult[386].

313. The fact that the merging parties chose a merger over an alternative because it is the most profitable option does not imply that the alternatives are unrealistic or unattainable[387]. It is sufficient that the alternative brings added value to the merging parties. In principle, it is not relevant how such value is distributed between the merging parties[388], unless it makes the alternative unrealistic and unattainable.

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384 See, e.g., Case M.7421 – Orange/Jazztel, paragraph 744.

385 See, e.g., Case M.6360 – Nynas/Shell/Harburg Refinery, paragraphs 410-417, 460. See also, e.g., Case M.6905 – Ineos/Solvay, paragraph 1187, where the Commission concluded that synergies stemming from the sharing of know-how are not merger specific if each merging party could individually develop an equivalent know-how.

386 See, e.g., Case M.7630 – FEDEX/TNT Express, paragraph 547.

387 See, e.g., Case M.7018 – Telefónica Deutschland/E-Plus, paragraph 1137; Case M.7758 – Hutchison 3G Italy/Wind/JV, paragraph 1573; and Case M.10896 – Orange/MásMóvil/JV, paragraph 1594.

388 See, e.g., Case M.7018 – Telefónica Deutschland/E-Plus, paragraph 1137; Case M.10896 – Orange/MásMóvil/JV, paragraph 1595.

314. Where part of the claimed efficiencies could be achieved through an alternative or is required to adhere to a regulation, the Commission only recognises the incremental efficiencies attributable specifically to the merger.

1.4. Benefit to consumers

315. For direct efficiencies to bring benefits to consumers, the improved conditions should not only relate to the merging parties' activities but to the conditions in the relevant market overall, including rivals' activities. The Commission recognises that certain types of efficiencies can also bring benefits of much wider scope, including to society at large. For consumers to benefit from the efficiencies of the merger, the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger.

316. Where reasonably possible, benefits to consumers resulting from the efficiencies should be quantified by the merging parties. When the necessary data are not available to allow for a precise quantitative analysis, the merging parties have to detail the nature and establish the magnitude of the expected benefit, in the sense of showing whether it would support the expectation that the benefit would equal or exceed the harm. For such efficiency claims to be balanced against the identified anticompetitive effects of the merger, it is for the merging parties to adduce evidence enabling, with sufficient likelihood, the expected benefits to be quantified as far as possible, for the efficiency claims to be appraised and compared to the predicted competitive harm[389].

Price and output benefits

317. A merger may give rise to cost savings that are passed on to consumers in the form of lower prices. The pass-on is likely if it allows merging parties to profitably increase output, and if cost savings concern variable[390] or marginal costs, because these costs are relevant for the pricing decisions of the merged entity. However, in some markets, costs that would usually be considered fixed costs can vary with output and therefore become relevant for the merging parties' pricing decisions[391]. The Commission may quantify the net effect of harm and cost efficiencies on consumers by assessing the compensating marginal cost reduction required to offset harm[392].

318. When assessing the variable nature of costs, the Commission may consider, for example, contracts indicating that input costs increase with each unit of output[393] or documents

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389 Judgment of 23 February 2002, *United Parcel Service v Commission*, T-834/17, EU:T:2022:84, paragraphs 136, 138, 232.

390 Variable costs vary depending on the quantities produced, see Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 71. Marginal costs are the variable costs of the last unit produced. To the contrary, fixed costs are unaffected by the quantity produced and do not affect firms' pricing decisions, see, e.g., Case M.10896 – Orange/MásMóvil, paragraph 1605a.

391 For example, expanding output may require frequent expansions of capacity. See, e.g., Case M.7612 – H3G UK/Telefónica UK, Annex A, paragraphs 96-100 and Section 3.1. In this case, there might be (stepwise) fixed costs that are relevant for the merging parties' pricing decisions. These costs are more likely to be incremental if capacity expansion can be done in very small steps that are close to the relevant output increment considered in the merging parties' pricing decisions. Certain fixed cost savings may also increase the merging firms' ability or incentive to invest.

392 The CMCR asks what level of marginal cost reduction is required for the merging parties to exactly offset the incentive to raise price, see, e.g., Case M.10896 – Orange/MásMóvil, Annex A, paragraph 5 et seq.

393 See, e.g., Case M.10896 – Orange/MásMóvil, Annex B.

indicating how the merging parties take these costs into account in their pricing decisions in the ordinary course of business. In addition, the merging parties may submit quantitative evidence indicating that costs vary with output[394].

Consumers' valuation of quality

319. Quality benefits cover those that lead to an increase in quality, also including greater choice or any improvement in other non-price parameters of competition, including resilience and sustainability.

320. When direct efficiencies increase quality, consumers' valuation for quality has to be appraised and to the extent possible quantified[395]. Consumers' valuation can often be quantified in terms of consumers' willingness to pay[396]. Companies often assess willingness to pay in the ordinary course of business[397]. When sufficiently similar products are already sold or the same product is sold in similar geographic markets, willingness to pay can be derived from consumers' behaviour in these markets. Willingness to pay can also be derived from consumer surveys, notably from conjoint studies[398].

321. Consumers' valuation of quality should be understood broadly[399]. Consumers may derive benefits from product characteristics that affect the use value of the product ('use value benefits'), as well as from product characteristics that are unrelated to the use but are valued by consumers for other reasons, such as a concern for the environment, a concern for disruptions of future consumption (i.e., resilience) or a concern for the impact of their individual consumption on others ('non-use value benefits')[400]. For example, consumers may value that food is produced in a sustainable way because of their concern for the environment and/or an altruistic concern about the impact of their consumption on other people (a non-use value benefit), even if this does not affect the taste or nutritional quality of the food itself (such a change would be a use benefit).

322. Individual consumption decisions can have positive or negative effects that are not fully taken into account by the customers that cause them ('consumption externalities').

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394 For example, a 10 % change in the number of subscribers, see, e.g., Case M.7612 – H3G UK/Telefónica UK, Annex A, paragraph 93.

395 When exact quantification is not possible, the merging parties have to establish the magnitude of the claimed efficiencies. If it can be shown that the claimed benefits are of a higher magnitude than the harm, this may be sufficient to show that consumers are not harmed. If benefits and harm are of the same magnitude, it cannot be concluded that the benefits outweigh the harm without exact quantification.

396 See, e.g., Case M.10896 – Orange/MásMóvil, paragraph 1694b; Case M.7000 – Liberty Global/Ziggo, paragraph 373. See also Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ('Horizontal Co-operation Guidelines'), OJ C 259, 21.7.2023, paragraph 578.

397 See, e.g., Case M.10896 – Orange/MásMóvil, paragraph 1694b, and Case M.7000 – Liberty Global/Ziggo, paragraph 373, Horizontal Co-operation Guidelines, paragraph 578.

398 Conjoint studies measure consumers' valuation for different product attributes. This also allows to measure willingness to pay for products that are not yet on the market.

399 The merging parties may rely on any or all three types of consumer benefits (use value benefits, non-use value benefits and collective benefits) to demonstrate compensation of harmed consumers. The three categories of quality benefits may also include price related benefits valued by consumers beyond purchasing price, such as lower life cycle costs of product ownership, a lower exposure to price shocks or the valuation of cost savings accruing to others.

400 See, by analogy, Horizontal Co-operation Guidelines, Section 9.4.3.1 – 9.4.3.2.

Collective benefits are the potential benefits accruing to a wider section of society from addressing such consumption externalities, for example as regards sustainability and resilience[401]. Collective benefits can be taken into account to the extent they benefit the consumers harmed by the merger through the internalisation of consumption externalities. For example, consumers may consider that their own purchasing decisions are too small to have an impact on market resilience but may value a collective change brought about by the merger that leads to a tangible increase in supply chain resilience.

323. Efficiencies may induce the merged firm to charge a higher price in order to 'claw back' consumer benefits from higher quality. Therefore, only benefits that are actually passed on to consumers, after having deduced the part of the benefits that is clawed back, can be considered as consumer benefits rather than the full amount of the benefit[402]. The considerations relevant for the pass-on of cost efficiencies outlined in previous paragraphs are also relevant for the pass-on of quality efficiencies. The Commission may quantify the net effect of harm and quality efficiencies by assessing the quality benefit needed to offset the harm[403].

2. Assessment of dynamic efficiencies

324. The conditions set out in relation to verifiability, merger-specificity and benefits to consumers of direct efficiencies are equally applicable, mutatis mutandis, to dynamic efficiencies, unless specified otherwise.

2.1. Taxonomy of dynamic synergies

325. This section provides examples of merger synergies that may lead to dynamic efficiencies[404]:

a) **Combining scarce complementary assets or capabilities** may allow the merged entity to develop new or improved products, to improve quality to increase future sales or to lower the incremental costs of investment or innovation[405] and thereby increase the incentive to invest or innovate.

b) **Economies of scale, scope or density** may also decrease the incremental cost of investment or innovation and thereby increase the incentive to invest or innovate. As for direct efficiencies, the merging firms have to demonstrate that the same scale efficiencies cannot be achieved organically.

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401 See, by analogy, Horizontal Co-operation Guidelines, Section 9.4.3.3.

402 See, e.g., Case M.6166 – Deutsche Börse/NYSE Euronext, paragraph 1183.

403 See, e.g., Case M.10896 – Orange/MásMóvil, Annex A, paragraph 8.

404 This is a non-exhaustive list aimed at supporting the merging parties in identifying merger synergies that may lead to dynamic efficiencies. Specific conditions mentioned in the taxonomy of direct synergies also apply for dynamic synergies.

405 Marginal costs of innovation are the additional costs that accrue when producing more innovation. They are relevant for the incentive to invest even though they are fixed costs from the perspective of product markets and do not affect firms' pricing incentives (see Section 2.1). To the contrary, R&D cost savings coming from a reduction in R&D efforts (e.g., the termination of research projects or the firing of scientists) constitute a reduction in innovation that does not automatically translate into higher innovation elsewhere. This may still translate into higher innovation if the merging parties can demonstrate that the target is financially constrained, see above point e).

c) **Wholesale cost savings** and **direct changes to price incentives due to integration** may increase the incentive to invest or innovate by decreasing the incremental cost to invest or innovate, thus making it cheaper to invest or innovate. The incentive to develop new or improved products may also increase if wholesale cost savings reduce the costs of inputs used in the productions of these new products.

d) **Voluntary technology transfer.** The potential to roll-out technology over a larger customer base may, in addition to the direct benefits, also increase the incentive to innovate by increasing future sales.

e) **Elimination of hold-up** between the merging firms in a vertical supply relationship. When contractual arrangements are insufficient, one of the merging parties may fail to make relationship-specific investments because of freeriding from the other merging party.

f) **Securing access to critical inputs** may increase the ability to invest and innovate or reduce the incremental cost of investment or innovation and increase the incentive to invest or innovate.

g) **Access to finance to invest or innovate for financially constrained firms**. Firms that are financially constrained may be unable to finance otherwise profitable, procompetitive projects due to a structural lack of access to capital markets. In such cases, the acquisition by a larger, financially sound firm may increase the target's ability to invest and innovate. A merger may also increase the merged entity's ability to finance transformative investment projects that are too large relative to the size of the individual firms.

h) **Optimal allocation of scarce resources needed in the R&D process**. A merger may also increase the merged entity's ability to invest and innovate, if it enables it to optimally reallocate scarce resources between research projects of the merged entity so that it significantly increases the likelihood of successful innovation or significantly reduces its development time. This is more likely the case if the merged entity maintains parallel lines of research post-merger[406].

326. The merging parties need to demonstrate whether a synergy leads to direct or dynamic efficiencies (or both).

2.2. Verifiability

327. To show that dynamic efficiencies are likely to **materialise**, the merging parties should explain and substantiate with a sufficient degree of likelihood that the merged entity would invest or innovate in new or improved products or services, improved distribution or production or other procompetitive parameters of competition post-merger, such that the merger may enhance effective competition on a lasting basis. The merging parties should explain, based on concrete evidence, how merger synergies confer the ability and increase the incentives of the merged entity to invest or innovate compared to the situation without the merger such as to counteract anticompetitive effects in the relevant market post-merger. The merging parties cannot be limited to claiming the conferral of the ability or

406 To the contrary, in many situations the elimination of parallel research lines may reduce the probability of successful innovation, see, e.g., Case M.7932 – Dow/DuPont, paragraph 277.

the increase of incentives to invest or innovate in general but should explain as concretely as possible the nature of the investment or innovation in question. Moreover, the impact on the merged entity's ability and incentive must not be only temporary.

a) The **ability to invest or innovate** refers to the existence of economic and technical resources or capabilities required for the investment or innovation. The merger may confer the ability to invest if it alleviates financial constraints or frees up scarce inputs[407], while not diminishing the incentive to invest or innovate as a result of the merger.

b) The **incentive to invest or innovate** depends on the degree to which the investment or innovation would be profitable. The merger may increase the merging parties' incentive when it alters the trade-off they face between investment or innovation costs, on the one hand, and potential future profits, on the other.

328. Dynamic efficiencies are **timely** if the merger confers the ability or increases the merged entity's incentive to invest or innovate, and the investment or innovation in new or improved products or services, improved distribution or production or other procompetitive parameters materialises, in principle, shortly after closing. The sooner investment or innovation is expected to materialise after closing, the more likely that investment or innovation is considered timely. The benefits to consumers from dynamic efficiencies may materialise in a longer time horizon as long as it is possible to verify that they will be substantial enough to counteract the merger's anticompetitive effects. The appropriate time horizon will also depend on the characteristics and dynamics of the market and the theory of harm. However, in the same way as for a theory of harm, a longer time frame for benefits to materialise may make them less predictable and quantifiable.

329. To verify whether dynamic efficiencies are **substantial** enough to counteract a merger's adverse effects on competition, merger synergies and the resulting investment or innovation in new or improved products or services, improved distribution or production or other procompetitive parameters of competition post-merger (i.e., dynamic efficiencies) should be quantified, where reasonably possible. In some cases, precise quantification may not be available for instance because the investment or innovation may lead to the development of an entirely new product or technology with an entirely new demand. Where precise quantification of dynamic efficiencies is not possible, the merging parties should detail the nature and magnitude of the expected efficiencies showing how they would counteract a merger's adverse effects on competition in order to compare them to the predicted harm. This is particularly applicable to merger synergies that are not related to cost savings such as integration of complementary R&D capabilities that allow the development of new or improved products.

330. Evidence relevant to the assessment of dynamic efficiencies includes for instance contemporaneous internal documents created in the ordinary course of business for or used by the management to decide on the merger, including business and integration plans detailing the investment or innovation and expected returns, as well as public announcements to investors by listed companies on expected efficiencies. For dynamic

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407 However, in case of financial resources, a mere increase in access to capital for companies that are not financially constrained is not sufficient to establish an efficiency.

efficiencies related to the development of an entirely new product or technology, merging parties may also submit contemporaneous and detailed internal valuations including short-term and long-term forecasts produced by the merging or third parties, establishing the likely market developments and how they impact the investment or innovation, valuation by consumers and expected returns. Other relevant evidence may also include pre-merger studies by independent external experts on the type and size of efficiencies and on the extent to which consumers are likely to benefit from them, information on the merging parties' past transactions that included integrations of R&D assets, past innovation activities and historical data. Such studies carry more weight if they are drawn up by independent external experts *in tempore non suspecto,* prior to the start of negotiations of the merger agreement. The quality of evidence produced by the merging parties to substantiate dynamic efficiencies is particularly important and should support the conclusion that the expected dynamic efficiencies would likely materialise and be substantial enough to counteract a merger's anticompetitive effects. The more precise, concrete and consistent the evidence is, the more evidentiary value it will carry. The evidence is more persuasive if corroborated by market dynamics, market expectations, views of market participants, or past examples of achieved efficiencies in the same or similar markets, particularly if this can be established through documents prepared by third parties, independently of the merging companies.

2.3. Merger specificity

331. To demonstrate that dynamic efficiencies would only occur because of the merger and could not be achieved through less anticompetitive arrangements, the merging parties should provide evidence that no realistic and less anticompetitive arrangement would confer them the ability or increase their incentive to innovate in new or improved products or services, improved distribution or production or other procompetitive parameters of competition post-merger to a similar extent, including that they would not have the ability and incentive to invest or innovate standalone.

332. For instance, if they are reasonably practical in the relevant market, dynamic efficiencies could be achieved through formal agreements between the merging firms or joint ventures enabling companies that pool their R&D capabilities and assets, or through licensing of intellectual property right and know-how[408].

333. In some circumstances, agreements may not be a realistic alternative when the planned investment or innovation requires substantial integration that implies sharing confidential information and know-how and intellectual property between competitors[409]. The relevant investment or innovation may also require significant relationship-specific investments and sunk costs that create hold-up problems and impact incentives to cooperate[410].

2.4. Benefit to consumers

334. Dynamic efficiencies are likely to lead to consumer benefits only if investment or innovation is an important parameter of competition to which consumer demand is responsive. In addition to this, where the outcome of investment or innovation is

408 See, e.g., Case M.9409 – Aurubis/Metallo Group Holding, paragraph 851.
409 See, e.g., Case M.9730 – FCA/PSA, Economic Annex, paragraph 104.
410 See, e.g., Case M.4854 – TomTom/Tele Atlas, paragraph 249.

uncertain, the expected benefit to consumers depends both on the likelihood of success and the benefit conditional on success. Therefore, the merged entity should demonstrate the likelihood that the investment or innovation is successful and that if the investment or innovation is successful[411], consumers will likely benefit from lower prices, increased supply or higher quality, including from new or improved products or more secure supply. For consumers to be said to benefit from the efficiencies of the merger, the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger.

Price and output benefits

335. The assessment of price benefits derived from dynamic efficiencies is analogous to the assessment of price benefits from direct efficiencies. In general, efficiencies will only benefit consumers if the successful investment or innovation lowers variable or incremental costs at the product market level that will be passed on in the form of lower prices.

Consumer's valuation of quality

336. When dynamic efficiencies lead to quality benefits, this improved quality should be quantified, where reasonably possible. In the case of investment in tangible or intangible assets, the merging firms may be able to assess consumers' willingness to pay from the same product in other geographic markets that are sufficiently similar to the relevant markets in the merger. In the case of investment in innovation, it may be possible to derive willingness to pay from consumers' demand for similar products. In some instances, consumers might find it difficult to foresee their demand for new or improved products or they do not know the potential applications of new technologies, leading to a low stated willingness to pay. For example, a new technology may only be useful to consumers once other firms develop applications and use cases for this technology. However, if firms and investors are wary about consumers' low willingness to pay for such improved products, this may indicate that the expected consumer benefits may be low at the time of the merger and in the foreseeable future. Where consumers' valuation for improved quality cannot be quantified exactly, the merging parties at least have to establish the estimated magnitude of the expected consumer benefits.

337. As in the case of direct efficiencies, consumers' valuation of dynamic quality efficiencies has to be understood broadly. Consumers may derive benefits from the use of the product ('use value benefits') but may also derive benefits from product characteristics that are unrelated to use ('non-use value benefits') or from collective benefits.

338. It is for the merging parties to establish to what extent quality efficiencies are passed on to consumers rather than being clawed back in the form of higher prices[412]. The factors relevant for the pass-on of cost efficiencies are also relevant for the pass-on of quality efficiencies.

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411 The outcome can be particularly uncertain for disruptive innovation.

412 See, e.g., Case M.6166 – Deutsche Börse/NYSE Euronext, paragraph 1183.

3. Balancing benefit and harm

339. In assessing whether a merger results in a SIEC, the Commission carries out a balancing exercise between the harm and benefit to competition likely to be brought by the merger. Where the demonstrated efficiencies result in benefits that, on a lasting basis, at least offset the identified harm to competition brought by the merger, the merger will be deemed compatible with the internal market.

340. It is sufficient for the Commission to establish that efficiencies compensate the harm caused to consumers in the relevant market, and not to each individual consumer[413]. However, consumer benefits that accrue only to a small share of the consumers harmed by a merger are unlikely to offset the harm.

341. In its balancing exercise, the Commission considers the parameter of competition affected by the harm and benefit, the timeframe and likelihood that the benefit and harm will materialise and their respective magnitude. Harm and benefit expected to accrue directly from the merger is inherently more certain than dynamic harm and efficiencies.

342. Where a merger results in both substantial consumer harm and benefit, a careful analysis is required. In its prospective analysis of concentrations, the Commission disposes of a margin of discretion and weighs up different, sometimes incommensurable price and non-price parameters of competition.

3.1. Balancing between symmetric benefit and harm

343. The consumer harm and benefit may concern the same parameter of competition and accrue over the same time period. In these circumstances, the two effects are directly comparable. The Commission may resort to quantification tools[414] based on evidence provided by the merging parties, where possible, to assess the net effect of the merger. For example, the increase in price from the reduction of competition may be at least offset by the incentive to decrease prices from direct cost efficiencies. The more a merger increases the merging parties' market power, the less likely it is that a certain level of cost savings is sufficient to ensure that consumers will not be harmed.

344. When exact quantification is not possible, the Commission considers the magnitude of the claimed efficiencies[415] and of the harm resulting from the significant impact on the competitive process. For example, the harm arising from a merger between two close competitors in a highly concentrated market will unlikely be offset by limited cost savings or small increases in product quality.

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413 Judgment of 23 November 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraphs 70, 72.

414 Where appropriate, the Commission computes the net effect on competition with the help of an economic model such as a merger simulation (see e.g., Case M.7018 Telefonica Deutschland/E-Plus, paragraph 756; Case M.7612 Hutchinson 3G UK/Telefonica UK, paragraph 1192). The Commission may also use pricing pressure tools like GUPPI, CMCR and vertical gross upward pricing pressure ('vGUPPI'). These models have particularly been used in Cases M.10896 – Orange/MásMóvil/JV, Annex A; and Case M.9569 – EssilorLuxottica/Grandvision, paragraph 268.

415 See Sections II.C.1.2 and II.C.2.2.

345. When balancing dynamic efficiencies against dynamic harm, the Commission also considers whether the dynamic efficiencies offset the dynamic price effects arising from the merger. For example, if a merger results in the discontinuation of an R&D project, dynamic efficiencies should be substantial enough to offset the loss in innovation and in future price competition between the merging parties.

346. Where a merger results in both substantial consumer harm and benefit, a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Hence, the lower the effective competitive constraint on the merging parties post-merger, the less incentive for the merging parties to maintain or build on the efficiencies and the more likely it is that consumers will suffer in the long run.

3.2. Balancing between asymmetric benefit and harm

347. Balancing requires that the effects of a merger are made comparable to the extent possible. For example, it may be possible to compare an increase in product quality with an increase in prices stemming from the merger by measuring how much consumers would be willing to pay for the increase in quality[416,417]. It may also be possible to compute the net present value[418] of a merger's effects in the future based on how consumers value present versus future effects in consumer surveys or existing studies on consumer's time preferences or behaviour[419].

348. When a comparison is not possible, the Commission considers the orders of magnitude of the harm and consumer benefits.

349. If consumer harm and benefits strictly concern different parameters of competition, a careful assessment must be carried out to assess whether the consumer benefits offset the harm.

350. With respect to harm and benefits accruing at different time periods, the Commission may assign less weight to either element the later the effect is expected to materialise in the future, having regard to the characteristics and dynamics of the market in terms of innovation cycles[420]. The greater, more certain and immediate the harm to competition, the larger and more likely the benefits expected to materialise in the future should be to offset harm. Conversely, where the harm is expected to only materialise in the future, the more immediate and certain the increased incentive and ability to innovate or invest brought by the merger is, the more likely it is that it may result in future innovations or increase competition that may be sufficient to offset future negative merger effects.

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416 This is referred to as consumers' willingness to pay, see Section C.1.4.

417 Where appropriate, this balancing can be done in an economic model, such as a merger simulation or a pricing pressure tool like CMCR.

418 Net present value is computed by summing up the net benefits accruing in each time period, weighted by the discount factors. See, e.g., Case M.10896 – Orange/MásMóvil/JV, paragraphs 1600 and 1601.

419 Consumers' time preference can be measured with a discount factor that decreases as time increases. This discount factor is used in the net present value calculations to understand the value that a future effect would have in the present and thus to compare it with the effects arising in the present.

420 See, e.g., Case M.7630 – FEDEX/TNT Express, paragraph 579.

351. When the benefits are temporary or expected to decrease over time, it is less likely that they will be sufficient to counteract the harm.

3.3. Balancing across different consumer groups/markets

352. The same efficiencies may benefit several consumer groups, or a wider section of society in the EU or the internal market in the form of collective benefits.

353. To carry out the balancing exercise, the consumer benefits should, in principle, accrue in all the markets where the merger results in harm[421]. Some benefits may accrue to different markets at the same time (e.g., the same innovation may benefit consumers in different geographic markets), while others may have to be split between different relevant markets (e.g., in the case of investment)[422], which then would be compared against the harm stemming from the merger in such relevant market.

354. Harm arising in one geographic or product market or one side of a multi-sided product market cannot be balanced against and compensated by benefits accruing in another unrelated geographic or product market or side of the multi-sided market.

355. However, where two markets are related, benefits achieved on separate markets (or sides of a multi-sided market) can be taken into account provided that the group of consumers negatively affected by the merger and benefiting from the efficiencies are substantially the same[423]. That is when there is a substantial overlap between both groups of consumers. These are referred to as 'out-of-market' benefits.

356. By analogy, collective benefits[424] can also be taken into account if harmed consumers substantially overlap with or form part of the group of beneficiaries[425].

357. Out-of-market and collective benefits should be the result of direct or dynamic efficiencies that are verifiable and merger-specific, and they are only relevant to the extent that they are valued by and fully compensate substantially all harmed consumers and improve parameters of competition in the relevant market(s) in the EU where they accrue[426]. The merging parties should define clearly the beneficiaries and provide sufficient evidence that harmed consumers substantially overlap with, or form part of the group of, the beneficiaries; and that the share of the out-of-market or collective benefits accruing to harmed consumers, possibly together with the benefits accruing to these consumers in the relevant market where anticompetitive effects have been identified, are sufficient to fully compensate harmed consumers[427].

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421 See, e.g., Case M.10896 – Orange/MásMóvil/JV, paragraph 1602.

422 See, e.g., Case M.10896 – Orange/MásMóvil/JV, Annex A Section 3.

423 See, by analogy, Horizontal Co-operation Guidelines, paragraph 583; see also Judgment of 27 September 2006, *GlaxoSmithKline Services and Others v Commission*, T-168/01, EU:T:2006:265, paragraphs 248 and 251; Judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 242.

424 See Sections II.C.1.4 and II.C.2.4.

425 This may include collective benefits accruing inside or outside the relevant market where consumers are harmed. However, if collective benefits are widely dispersed or only accrue to consumers in distant markets, it is less likely that the harmed consumers substantially overlap with the beneficiaries and are fully compensated, see, by analogy, Horizontal Co-operation Guidelines, paragraph 587.

426 The Commission applies the principles in Sections II.C.1 and II.C.2.

427 See by analogy Horizontal Co-operation Guidelines, paragraph 587(d) and 590.

PART III – MEASURES TO PROTECT LEGITIMATE INTERESTS

358. The Commission has exclusive competence to review mergers with an EU dimension. This principle and the 'one-stop-shop' system prevent the fragmentation of the internal market, increase legal certainty and reduce the administrative burden for companies. In turn, this bolsters the integration, competitiveness and resilience of the internal market, and companies' ability to grow.

359. Article 21 EUMR confers on the Commission this exclusive competence and enshrines the 'one-stop-shop' principle while safeguarding the ability of Member States to take appropriate measures to protect legitimate interests other than those taken into account by the EUMR.

360. Appropriate measures taken by Member States should (i) pursue a legitimate interest and (ii) be compatible with the general principles and other provisions of EU law, including by being suitable and proportionate to the interest pursued[428].

361. While the Commission has to respect their prerogatives, Member States bear the burden to prove that their measures comply with the substantive and procedural obligations of Article 21 EUMR and the Treaties including in relation to the exercise of fundamental freedoms. In this context, Member States must clearly identify the specific risks to a fundamental interest of society that their measures intend to prevent, or the overriding reasons in the public interest that justify the measures, and clearly state the exact reasons and provide specific evidence why they consider that their measures fulfil such objectives[429] and remain limited to what is strictly necessary.

362. In particular, if a Member State fails to prove that the measure complies with the substantive requirements of Article 21 EUMR, the Commission may issue a decision establishing that the measure infringes general principles or any other provision of EU law and conclude accordingly that it breaches that provision[430].

A. SUBSTANTIVE ASSESSMENT

1. Types of measures covered

363. The Commission may investigate all measures by Member States[431] that condition, prohibit or otherwise hinder the implementation of a merger with an EU dimension as defined by Article 1 EUMR[432].

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428 See, e.g., Case M.10494 – VIG/AEGON CEE, paragraph 79.

429 Judgment of 22 December 2008, *Commission v Austria*, C-161/07, EU:C:2008:759, paragraphs 36-37 and Judgment of 11 November 2010, *Commission v Portugal*, C-543/08, EU:C:2010:669, paragraph 87.

430 See, e.g., Case M.10494 – VIG/AEGON CEE, paragraphs 72 and seq.

431 The same applies in relation to measures by (non-EU) EFTA States which are parties to the EEA Agreement. Article 7(1) of Protocol 24 of the EEA Agreement essentially mirrors Article 21(4) of the EUMR. See, e.g., Case M.2491 – Sampo/Storebrand, paragraphs 38-39.

432 Since 1999, the Commission has adopted final decisions finding violations of Article 21(4) EUMR or its predecessor in five cases. See Case M.10494 – VIG/Aegon CEE; Case M.4685 – ENEL/Acciona/Endesa; Case M.4197 – E.ON/Endesa; Case M.2054 – Secil/Holderbank/Cimpor; and Case M.1616 – BSCH/Champalimaud. The Commission also adopted decisions approving measures that were notified to the Commission in two cases. See Case M.1346 – EDF / London Electricity; Case M.567 – Lyonnaise des Eaux / Northumbrian Water. The application of Article 21 EUMR has also been considered in a

364. Member States measures include all legislative and regulatory acts, as well as decisions and other administrative acts or practices, including omissions to act (e.g., failing to grant a necessary authorisation or administrative certificate to allow the completion of a merger). Such measures may be adopted at any level of governance within the Member State (e.g., national, state, regional or municipal levels) or by national courts.

365. Such measures may infringe Article 21(4) EUMR to the extent they are binding, or *de facto* binding, irrespective of their legal form.

2. Notion of legitimate interests

366. Public security, plurality of the media and prudential rules are expressly recognised as legitimate interests (together referred to as 'recognised interests'). Other than these three recognised interests, Member States may adopt measures pursuing any other legitimate interests than the maintenance and development of effective competition in the internal market pursued by the EUMR or other interests related to this objective[433].

367. Where Member States claim that interventions in mergers with an EU dimension are justified on the basis of a legitimate interest, the Commission carefully scrutinises these claims to ensure that such interest is the real reason underpinning the Member State's measure. Member States cannot adopt measures constituting a means of arbitrary discrimination or a disguised restriction of fundamental freedoms in the internal market, including freedom of establishment or the free movement of capital.

2.1. Recognised interests

Public security

368. Public security is a legitimate interest that may warrant a derogation from the application of EU law. Measures that would otherwise be unlawful under EU law may be justified on the ground of public security. This is explicitly recognised in relation to freedom of establishment or free movement of capital[434]. Member States are, in principle, free to determine the requirements of public security in the light of their needs[435].

369. According to the case law, the requirements to rely on public security must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Union's institutions. Public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society[436].

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number of other cases. This covers situation where a preliminary assessment indicating that a measure is in violation of Article 21 EUMR was adopted. See Case M.12052 – Unicredit / Banco BPM. This also covers situations in which the Commission decided not to act because the measures could be justified by plausible legitimate interests. See, e.g., Case M.5932 – News Corp / BskyB.

433 Article 2(1)(a) of the EUMR.

434 Articles 52 and 65 TFEU respectively.

435 Judgment of 22 May 2012, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, C-348/09, EU:C:2012:300, paragraph 23 and Article 4(2) TFEU.

436 See Judgment of 10 July 2014, *Commission v Belgium*, C-421/12, EU:C:2014:2064, paragraph 47; Judgment of 4 June 2002, *Commission v France*, C-483/99, EU:C:2002:327, paragraph 48; Judgment of 13 May 2003, *Commission v Spain*, C-463/00, EU:C:2003:272, paragraph 72; Judgment of 14 March 2000, *Association Église de scientologie*, C-54/99, EU:C:200:124, paragraph 17; Judgment of 18 June 2020, *Commission v Hungary*, C-78/18, EU:C:2020:476, paragraph 91 and Judgment of 13 July 2023, *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter*, C-106/22, EU:C:2023:568, paragraph 66.

Public security derogations must not be misapplied to serve purely economic ends, such as the promotion of the national economy or its proper functioning.

370. The EU is founded on common values and promotes solidarity among Member States. Member States or their nationals are thus *prima facie* not a threat to the public security of another Member State. To the extent a Member State claims that its public security would be impacted by a merger involving firms based in another Member State, or owned by nationals from other Member States, it should be able to adequately substantiate such claims upon request by the Commission.[437] This is without prejudice to the Member States' power to adopt measures in relation to acquisitions involving firms or nationals of third countries.

371. Public security may be particularly relevant in the context of sensitive sectors, particularly when (classified) state secrets are involved. Member States may be asked by the Commission to submit non-confidential versions of the relevant documents or information for the Commission to carry its assessment of the measures. Should Member States refuse to submit such non-confidential documents or information (or non-confidential summaries thereof), the Commission may be unable to find that the measures taken by the Member States genuinely aim at protecting public security and would thus be unable to conclude that such measures are compatible with Article 21(4) EUMR[438].

Media plurality

372. Media services refer to the provision of programmes or publications to the general public, by any means, in order to inform, entertain or educate. These primarily include audiovisual, radio and press services including purely digital media services. Media plurality relates to the possibility to have access to a variety of media services and media content which reflect diverse opinions, voices and analyses. Independent media services play an important role in the internal market. They strengthen the rule of law and democratic resilience, thereby fulfilling a general interest function.

373. While the Commission may factor in diversity or choice as part of its competitive assessment where it is a relevant parameter of competition in the relevant market[439], and the final outcome of the assessment by the Commission under the EUMR and a Member State's review may be identical (for instance an unconditional approval), the purpose and legal frameworks for competition assessments and media plurality review differ in practice. The aim of merger control is to assess whether a merger leads to a significant impediment to effective competition in the internal market, including by the ability of the merged entity to profitably increase prices, or reduce output or quality in various aspects, including choice, capacity, investment, innovation, privacy, sustainability or resilience on the relevant markets post-merger. By contrast, a media plurality review reflects the crucial role media play in a democracy, and aims at assessing whether the number, range and

437 Restrictions on the movement of capital to and from third countries may be assessed differently from restrictions to intra-EU capital movements. See Case C-446/04 Test claimants in FII Group litigation, para. 171. Public security risks which may be posed by an intra-EU merger should be considered as an exceptional situation, to comply with fundamental freedoms including free movement of capital.

438 See, e.g., Case M.10494 – VIG/Aegon CEE, paragraph 78 and footnote 89.

439 See, e.g., Case M.10433 – Vivendi/Lagardère, paragraphs 1924-1927.

variety of persons controlling media enterprises will be sufficient post-transaction, including across different media (e.g., TV, radio, or print).

374. A media plurality review may be warranted pursuant to EU law (e.g., national law implementing the European Media Freedom Act)[440]. Where such review takes place in parallel with the assessment of the Commission under the EUMR, the latter will be without prejudice to that assessment carried out by the relevant national authorities[441].

Prudential rules

375. Prudential rules are requirements which ensure the financial stability of firms active in the provision of financial services such as banks, insurers and investment firms. These are designed to ensure that firms in the financial sector remain stable, properly manage risks, and maintain sufficient capital and liquidity to absorb economic shocks. If a firm were to collapse, prudential rules help maintain confidence in the financial system by preventing individual failures from creating systemic risks[442].

376. Prudential rules (and more generally, the financial services sector) have become increasingly harmonised at EU level over the last decades, for example through the EU's capital requirements legislation[443], the Single Resolution Mechanism[444], the Bank Recovery and Resolution Directive[445], the Deposit Guarantee Schemes Directive[446], the Solvency II Directive[447] and the Investment Firms Regulation and Directive[448]. Prudential requirements also feature in EU legislation applying to financial conglomerates[449], providers of occupational pensions[450], payment services[451] and electronic money providers[452] and crypto asset service providers[453] as well as to financial markets

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440 Article 22 European Media Freedom Act requires that Member States set out rules in order to carry out assessments of media market mergers that could have a significant impact on media pluralism and editorial independence.

441 See, e.g., Case M.8354 – Fox / Sky, paragraphs 469-473, and Case M.5932 – News Corp / BSkyB, paragraphs 304-309.

442 Commission of the European Communities, *Community Merger Control Law*, Bulletin Supplement 2/90, Notes on Council Regulation 4064/89, p. 25.

443 Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

444 Regulation (EU) No 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

445 Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; Directive (EU) 2019/879 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms.

446 Directive 2014/49/EU on deposit guarantee schemes (recast).

447 Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast).

448 Regulation (EU) 2019/2033 on the prudential requirements of investment firms; Directive (EU) 2019/2034 on the prudential supervision of investment firms.

449 Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

450 Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs)).

451 Directive (EU) 2015/2366 on payment services in the internal market.

452 Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions.

453 Regulation (EU) 2023/1114 on markets in crypto assets.

infrastructure providers like central counterparty clearing houses[454] and central securities depositories[455]. This legislative framework has significantly decreased the scope for standalone Member State interventions in mergers and acquisitions on grounds of prudential rules, even though the application of some prudential rules is supervised by Member States' relevant authorities at national level. In the application of prudential rules, national or European regulators may conduct reviews of mergers between firms active in the financial services sector. These reviews can take place in parallel to the review of the transaction by the Commission under the EUMR[456]. In that context, the relevant authority shall liaise with the Commission[457].

2.2. Other public interests

377. Beside recognised interests, Member State can identify other public interests that may be considered legitimate. For instance, safeguarding the provision of a vital service (water distribution) and consumer protection have been considered by the Commission as legitimate interest[458].

3. Compatibility with the general principles of EU law

378. Measures adopted by Member States must comply with general principles of EU law, which include but are not limited to the principle of proportionality and the principle of non-discrimination.

379. Measures adopted by a Member State that directly derive from the application of provisions of EU law are presumed to be compatible with the general principles of EU law.

3.1. Proportionality

380. The principle of proportionality provides that institutions shall not exceed what is necessary to achieve the objectives they pursue[459]. Therefore, measures adopted by Member States should meet the following cumulative criteria of proportionality[460]:

a) *Measures must be suitable to achieve the desired end*; the measures must be capable of achieving in a consistent and systematic manner the legitimate interest pursued by the Member State.

b) *Measures must not impose a burden that is excessive in relation to the objective sought to be achieved;* no less restrictive measure should be available and should not go beyond what is necessary for ensuring the attainment of the legitimate public

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454 Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories.

455 Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories.

456 For instance, UniCredit's intended acquisition of Banco BPM was reviewed by both the European Central Bank and the European Commission's Directorate-General for Competition.

457 This was for instance the case in the insurance sector in Case M.759 – Sun Alliance / Royal Insurance, paragraphs 16-17.

458 See Case No IV/M.567 – Lyonnaise des Eaux/Northumbrian Water, paragraphs 7-8.

459 See Article 5(4) TEU.

460 See Judgment of 7 September 2002, *Boriss Cilevičs*, C-391/20, EU:C:2022:638, paragraph 65; Judgment of 15 December 2002, *Superleague v FIFA*, C-333/21, EU:C:2022:993, paragraph 251 and Judgment of 21 December 2023, *Royal Antwerp v URBSFA*, C-680/21, EU:C:2023:1010, paragraph 141.

interest pursued. This criterion implies, for instance, that measures prohibiting (legally or de facto) a merger, will be more likely to be found in violation of Article 21(4) EUMR than measures imposing conditions on it to achieve the same alleged legitimate interest. The same considerations apply to measures that have as their effect the abandonment of the transaction, such as unduly lengthy regulatory review processes or unjustified conditions.

3.2. Non-discrimination

381. The principle of non-discrimination forbids the application of different rules to comparable situations or the application of the same rule to different situations[461]. Article 18 TFEU prohibits express discrimination based on nationality between Member States within the scope of application of the Treaties[462].

382. In this context, the principle implies notably that acquisitions by companies from other Member States (or companies with owners from other Member States) cannot be treated less favourably than acquisitions by national companies (or companies owned by nationals). Member States cannot exercise their prerogatives to *de facto* practice favouritism, by encouraging acquisitions by specific firms or by firms of a specific nationality. Measures targeting a specific merger, as opposed to measures of general application incidentally affecting the merger, are also more likely to infringe the principle of non-discrimination.

383. Article 21 EUMR aims at safeguarding the internal market, by preventing its fragmentation by Member States. While this provision does not distinguish between mergers involving EU or foreign companies, the Commission has historically examined particularly closely measures by a Member State preventing or hindering the acquisition of a national firm by an EU company.

3.3. Other principles of EU law

384. Any other principle of EU law may be relevant for the assessment of the compatibility of measures adopted by Member States with Article 21 EUMR.

385. This includes for instance the principle of legal certainty, which provides that legal rules must be clear, precise and predictable in their effect, in particular where they may have negative consequences on individuals and firms, so that businesses and individuals are aware of their rights and obligations and may take steps accordingly[463]. This principle also

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461 See Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, C-341/05, EU:C:2007:809, paragraph 115.

462 The case law of the Union Courts clarify that this protection only applies within the European Union. See Judgment of 4 June 2009, *Vatsouras & Koupatantze v. ARGE Nürnberg 900*, C-22/08 and C-23/08, EU:C:2009:344, paragraphs 51-52: '*The first paragraph of Article [18 TFEU] prohibits, within the scope of application of the EC Treaty, and without prejudice to any provisions contained therein, any discrimination on grounds of nationality. That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries*'.

463 Judgment of 16 February 2021, *Costa and Cifone*, C-72/10, EU:C:2012:80, paragraph 74. Judgment of 3 June 2008, *Intertanko v Secretary of State for Transport*, Case C-308/06, EU:C:2008:312, paragraph 69.

prevents the retroactive application of laws and regulatory acts[464]. Member States should ensure that any measures aimed at protecting general interests not pursued by the EUMR are consistent with the principle of legal certainty.

386. National measures also need to respect the principle of primacy of EU law, from which it derives that where a conflict arises between EU law and the national law of a Member State, national measures must be disapplied[465].

4. Compatibility with other provisions of EU law

387. Member States measures need to comply with EU Treaty provisions, including those safeguarding the internal market[466]. Member States must also respect the areas of EU exclusive competence enshrined in Article 3 TFEU[467].

388. Member States must also respect EU secondary law provisions, including directives and regulations. Where such provisions aim at providing a comprehensive legal framework for the protection of certain public interests, Member States are normally prevented from intervening beyond the requirements laid down in these provisions by adopting more restrictive national provisions[468].

389. Measures imposed or recommended by European authorities in the context of a merger and pursuing the same legitimate interest as those claimed by a Member State shall be presumed compatible with the general principles and other provisions of EU law. These include, for instance: (i) measures imposed or recommended by the European Central Bank and EU authorities of the financial sector, ensuring the application of prudential rules, (ii) measures adopted for the protection of public security following a review under the EU FDI Regulation, based on the opinion of the Commission in relation to the specific transaction[469], and (iii) measures adopted for the protection of media plurality following the review established under Article 22 or Article 23 of the European Media Freedom Act, provided they are aligned with recommendations of the Media Board and the Commission in the same case[470].

B. PROCEDURAL FRAMEWORK

1. The notification and standstill obligation

390. Member States are free to take appropriate measures to protect genuine recognised interests without prior notification. Measures pursuing other public interests need to be

464 Judgment of 3 September 2015, *A2A v. Agenzia delle Entrate*, C-89/14, EU:C:2015:537, paragraph 37.

465 Judgment of 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, C-106/77, EU:C:1978:49, paragraph 17. Judgment of 6 October 2021, *Sumal SL v Mercedes Benz Trucks Espana SL*, C-882/19, EU:C:2021:800, paragraph 73.

466 See in particular Articles 28-37 TFEU (free movement of goods), Articles 49-55 TFEU (freedom of establishment) and Articles 63-66 TFEU (free movement of capital).

467 These include the customs union, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and the common commercial policy.

468 See by analogy Judgment of 10 July 2014, *Commission v Belgium*, C-421/12, EU:C:2014:2064 paragraph 50.

469 Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I of 21 March 2019, as amended or replaced. References to that Regulation are to be read as including any successor instrument adopted to replace or recast it.

470 Article 22 European Media Freedom Act.

notified to the Commission before their adoption and must not be implemented before they have been approved by the Commission. This enables the Commission to verify whether such measures are compatible with general principles and other provisions of EU law before the measures have been adopted, potentially with a negative impact upon the merger they apply to.

391. The exception to the notification and standstill obligation associated with the recognised interests is to be considered narrowly. In case a reasonable doubt exists whether a measure genuinely protects a recognised interest and/or complies with the general principles and other provisions of EU law[471], the notification and standstill obligation applies[472]. Without prejudice of the notification and standstill obligation, to allow the Commission to verify whether there is a reasonable doubt, it is appropriate that Member States inform the Commission when they adopt measures applicable to a merger with an EU dimension. This ensures the *effet utile* of Article 21(4) EUMR by ensuring that it is not possible to avoid the Commission's scrutiny by simply labelling a measure as pursuing a recognised interest.

392. In their notification, Member States must provide all relevant information to allow the Commission to assess the measure and its compatibility. Such information should notably: (i) describe the measures under consideration, (ii) identify the legitimate interest pursued, and (iii) explain why the measures comply with the general principles and other provisions of EU law, including specifically the principles of proportionality and non-discrimination.

393. Once the Commission declares the notification received to be complete, this triggers a 25-working day period for the Commission to assess the measure, adopt and communicate a decision on the compatibility of the measure with Article 21 EUMR.

394. In the absence of notification, the Commission has discretion to act and can still adopt a decision[473], either on its motion or following a complaint, on the basis of the information at its disposal[474]. In this situation, the Commission is not bound by the 25-working day deadline[475].

2. Possible Commission decisions

395. The Commission may adopt the following decisions:

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471 There may be a reasonable doubt that a measure genuinely protects a recognised interest when there is no clear link between the activities of the companies involved in the merger and the interest pursued by the measure, or when the measure imposes conditions unrelated to the interest pursued.

472 See the Commission's past practice in Case M.4197 – E.ON/Endesa (decision of 20.12.2006), paragraph 25; Case M.4197 – E.ON/Endesa (decision of 26.09.2006), paragraph 24; Case M.1616 – BSCH/Champalimaud (Article 21(3) decision of 20.07.1999), paragraphs 65-67; Case M.10494 – VIG/AEGON CEE, paragraph 32. In the context of an action for infringement in which the Commission sought to enforce a decision pursuant to Article 21(4) against a Member State, the Court of Justice considered that a Commission decision following this approach did not contain any manifest errors – see Judgment of 6 March 2008, *Commission v Spain*, C-196/07, EU:C:2008:146, paragraphs 35-36.

473 See Judgment of 22 June 2004, *Portugal v Commission*, C-42/01, EU:C:2004:379, paragraphs 56 and 57.

474 See Judgment of 22 June 2004, *Portugal v Commission*, C-42/01, EU:C:2004:379, paragraph 58.

475 EUMR, Article 21(4), third sub-paragraph.

a) Interim decisions: in case national measures are adopted in violation of the notification and standstill obligation, the Commission has the power to adopt interim decisions to suspend their effect pending their examination by the Commission[476].

b) Positive decision: where the Commission finds that a national measure is compatible with Article 21 EUMR, it will issue a positive decision declaring the measure compatible and allowing the Member State to implement it.

c) Negative decision: where the Commission finds that a national measure is not compatible with Article 21 EUMR, it will issue a negative decision declaring the measure incompatible with EU law and requiring the Member State to withdraw the measure. If a Member State fails to withdraw an incompatible measure as required by a negative decision or withdraws the measure only after it has already produced effects on a merger with an EU dimension, the Commission may initiate infringement proceedings against that Member State pursuant to Article 258 TFEU.

396. In case of reasonable doubt on the compatibility of a national measure with Article 21 EUMR, the Commission sends a preliminary assessment letter setting out its views to the Member State. This allows the Member State to submit its observations before the Commission adopts a final decision. The Commission has no duty to adopt a decision after a preliminary assessment letter in case the Member State failed to notify the measure[477]. The Commission also issues a preliminary assessment letter in case it contemplates the adoption of interim measures, granting the Member State a deadline to reply that will take into account the need of speed in these proceedings.

397. In case of reasonable doubt on whether a national measure falls under the notification and standstill obligation, or whether it is compatible with Article 21(4) EUMR, Member States can request the Commission to examine the national measure informally. The Commission may issue a comfort letter following such request, or close an investigation opened on its own motion or following a complaint, stating that there is no obligation to notify the measure or that it appears *prima facie* compatible.

3. Interaction with other EU law proceedings

398. Where individual measures are incompatible with Article 21 EUMR or are in breach of primary or secondary EU law, the Commission may also initiate infringement proceedings under Article 258 TFEU as a result[478].

399. In addition, procedures under Article 21(4) EUMR may partially or totally overlap, in scope, with procedures carried out by other EU institutions, including sector-specific regulatory agencies, on the basis of distinct legal provisions. In such instances, the Commission aims at maintaining regular contacts with the relevant authorities, including to ensure consistency whenever suitable.

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476 See Case M.1616 – BSCH/Champalimaud (Article 21(3) decision of 20.07.1999), Article 1.

477 See, e.g., Case M.4125 – Unicredito/HVB; Case M.4197 – E.ON/Endesa; Case M.10494 – VIG/AEGON CEE, and Case M.12052 – UniCredit/Banco BPM.

478 See Judgment of 6 March 2008, *Commission v Spain*, C-196/07, EU:C:2008:146.