CONTRIBUTION OF THE APDC IN THE CONTEXT OF THE TARGETED CONSULTATION ON THE MERGER CONTROL GUIDELINES LAUNCHED BY THE EUROPEAN COMMISSION

3 September 2025

INTRODUCTION

1. The French *Association des Avocats Pratiquant le Droit de la Concurrence* ("**APDC**") welcomes the European Commission's (the "**Commission**") consultation on the Horizontal Merger Guidelines ("**HMG**") and the Non-Horizontal Merger Guidelines ("**NHMG**") (together, the "**Guidelines**")[1] published by the Commission on 8 May 2025 (the "**Consultation**") and the opportunity to comment.

2. The Consultation comes at a pivotal time, for at least two reasons. First, global integration and trade have increased spectacularly since the Guidelines were adopted in 2004 and 2008 respectively,[2] which for European Union ("**EU**") companies has resulted in additional sources of competition (whether actual or potential) on multiple markets. Second, while globalisation also creates opportunities for EU companies, protectionist and/or industrial policies have also developed in certain non-EU regions,[3] thereby creating roadblocks for EU companies. In this increasingly challenging landscape, competition policy must not prevent EU companies from achieving the scale and efficiency needed to remain competitive at global level.

3. This constraint applies not only to competition policy, *i.e.*, to the setting of enforcement priorities, but also and probably more fundamentally to the design and implementation of competition rules. In this regard, the Draghi Report recommended to "[a]*ccelerate the decision-making processes and increase the predictability of*

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1 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004, C 31, p. 5), and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008, C 265, p. 6).

2 Trade as a percentage of the World's Gross Domestic Product ("**GDP**") increased from 46% of GDP in 1999 to 63% of GDP in 2022 (See World Bank, https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS).

3 "*WTO report shows increase in trade restrictions against backdrop of unilateral policies*", 11 Dec. 2024 (https://www.wto.org/english/news_e/news24_e/trdev_11dec24_e.htm)

decisions" in relation to competition cases.[4] During her confirmation process, Executive Vice-President Ribera herself made it clear that any review of merger control rules would aim to avoid "*any unnecessary additional administrative burden or legal uncertainty for companies*."[5]

4. On 17 June 2025, Commissioner Kubilius added that EU merger control rules would not constitute an obstacle to the consolidation of the EU defense industry, and that the Commission was committed to "*'particularly assess the overall benefits from enhanced defense and security' when scrutinizing planned takeovers or joint ventures in the sector*."[6]

5. While this certainly goes in the right direction (as the APDC will further explain in its replies to the questions concerning the "efficiencies defense"), there is no reason to limit this approach to one specific sector, provided that legal certainty is nonetheless guaranteed.

6. Against this background, the APDC welcomes the Commission's renewed objective to improve EU merger control rules. It also supports the aims of the Consultation, *i.e.*, its wish to modernise the analytical framework for merger assessments; to reflect evolving market realities; to incorporate broader considerations such as competitiveness, supply chain resilience, innovation, sustainability, digitalisation, and efficiencies, and to enhance legal certainty.

7. At the same time, the APDC notes a strong tension between the ambition displayed through these objectives and the legal means by which the Commission proposes to achieve them. The Consultation does not envisage a legislative reform of the EU Merger Regulation ("**EUMR**"), but mere changes to the Guidelines. Any revisions will therefore remain constrained by the current legislative framework and related case-law. While such updates can refine the interpretation and application of existing legislative rules, they cannot override or substantially reshape them.

8. In addition, the Consultation is focused only on substantive rules and therefore does not address a structural concern which also affects the competitiveness of EU

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4 Mario Draghi, "*The future of European competitiveness, Part B – In-depth analysis and recommendation*", September 2024 (the "**Draghi Report**"), p. 304.

5 Questionnaire to the Commissioner-Designate Teresa Ribera 22 October 2024, question 4.

6 Mlex, 17 June 2025, "*EU defense industry won't see merger rules stop consolidation, EU Commission says*".

companies, *i.e.*, the growing complexity and administrative burden of EU merger control.

9. Admittedly, this burden also affects the competitiveness of non-EU companies when they act as acquirers. However, beyond the fact that procedural inefficiencies cannot be justified by their equal application to all companies, protracted merger control proceedings also affect targets, which are overwhelmingly established in the EU.[7] These targets generally see their margin of manoeuvre limited between signing and closing, and with the very rare exception of hostile transactions they must assist acquirers to comply with what can be an exacting review process. Accordingly, the efficiency (or inefficiency) of EU merger control procedures has a direct impact on the Union's competitiveness.

10. The APDC acknowledges the Commission's efforts in this regard, as reflected by the adoption of the 2023 Merger Simplification Package.[8] However, severe challenges remain. The number of notifiable transactions has grown significantly (from an average of 280 in 2000–2004 to 377 in 2020–2024),[9] and merger review procedures have become increasingly burdensome, requiring ever more extensive information and longer timelines, which themselves have become less predictable due to the increased use of stop-the-clocks. This places a growing pressure on both the Commission and companies. Against this backdrop, there is still room for more proportionate and less resource-intensive proceedings, including for transactions justifying more than a quick review. Our perception is that too often EU merger case teams unnecessarily consume their and merging parties' resources to leave no stone unturned. For instance, when a case team examines the possibility of vertical effects and has everything in hand to find that the merging parties have no ability to foreclose access to inputs or downstream markets, it often strives to also exclude the merging parties' incentive to do so and the lack of impact on effective competition, two

7 Based on figures published by the Commission in relation to the adoption of the Foreign Subsidies Regulation, approximately 75% of the targets subject to EU merger control proceedings in 2019 were established in the EU (Commission Staff Working Document – Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final, 5 May 2021, p. 51).

8 Commission implementing Regulation (EU) No 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 (OJ L 119, p. 22).

9 2000–2004 average of 280 notifications; 2005–2009 average of 337 notifications; 2010–2014 average of 289 notifications; 2015–2019 average of 375 notifications; 2020–2024 average of 377 notifications; statistics calculated using Commission's figures available at: https://competition-policy.ec.europa.eu/mergers/statistics_en

additional steps that are not needed to conclude that the transaction does not significantly impede effective competition.[10]

11. The situation is not necessarily more favourable for many parties to non-reportable transactions, due to the proliferation of "call-in" mechanisms by national competition authorities ("**NCAs**") following the *Illumina/GRAIL* case,[11] as well as the revival of *ex post* review in the wake of the *Towercast* judgment.[12] As a result, safe harbours such as notification thresholds, originally designed to offer legal certainty and avoid unnecessary filings, are becoming less dependable.

12. This increasingly complex landscape calls for a more systemic and coordinated approach to streamlining procedures. Ambitious procedural reforms that would include for instance limitations to the duration of the pre-notification period (as the British Competition and Markets Authority ("**CMA**") now seeks to do)[13] or harmonised national referral mechanisms would alleviate the burden weighing on the EU economy and enhance procedural clarity. The APDC calls for a **pragmatic and ambitious reform** of EU merger control rules to restore the block's competitiveness.

13. Coming now to the questions raised in the Consultation, our main conclusions, which are further detailed in our specific replies to these questions, are as follows:

A. <u>Competitiveness and resilience</u>

14. ***Scaling-up.*** The APDC considers that the Commission's counterfactual analysis should reflect dynamic factors such as the need for critical scale to invest and innovate. In the APDC's view, scale may be an important competitive factor in capital-intensive or innovation-driven sectors. The traditional failing firm criteria are too narrow to capture situations where long-term viability is threatened by the lack of scale, even if a firm is not imminently failing. The APDC therefore advocates for a forward-looking assessment of scale needs within the competitive analysis, rather than confining them to the efficiency stage. Sectors where scale is key typically involve high fixed costs, rapid innovation, strong network effects, or require global competitiveness. The APDC lists benefits of scaling up – including improved investment and innovation

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10 NHMG, paras 29 *et seq*.

11 Cases C-611/22 P and C-625/22 P, *Illumina* v *Commission*, 3 September 2024, EU:C:2024:677.

12 Case C-449/21, *Towercast*, 16 March 2023, EU:C:2023:207.

13 Sarah Cardell, "*New CMA proposals to drive growth, investment and business confidence*," 13 February 2025, available at: https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and-business-confidence/

capacity, better access to capital, enhanced ability to compete globally, and network effects – which can be relevant even if market power is created or strengthened as a result. The APDC believes that these benefits should be assessed prospectively and in light of sector-specific characteristics, supported by robust economic evidence such as cost structure analysis and forward-looking investment plans, including parties' internal documents and assessments prepared in the context of the transaction.

15. ***Resilience and value chain.*** The APDC is sceptical about the relevance of introducing market resilience as a standalone criterion under the EUMR. The APDC believes that merger control should remain limited to competition-based concerns as required by Article 2 EUMR, and resilience, which is at this stage a vague and undefined concept, does not currently meet the legal or analytical standards required under EU law. The APDC highlights that resilience lacks a clear definition and encompasses a wide range of unrelated concepts (e.g. sustainability, robustness, financial stability), complicating its operationalization within merger assessments. It also warns that balancing short-term competitive effects against long-term, uncertain resilience outcomes may lead to speculative and inconsistent decision-making, which would be incompatible with established legal standards.

16. In any event, the APDC argues that resilience concerns are often better addressed through other legal frameworks, such as prudential regulation, foreign direct investment ("**FDI**") control, trade policy, or existing theories of harm under the EUMR (e.g. horizontal or vertical foreclosure). It considers that any inclusion of resilience in the Guidelines would require a clear definition, strong empirical support, and evidence of systemic relevance in past merger cases. The APDC concludes that while resilience is important across all sectors, it should not become a distinct theory of harm under the EUMR, and suggests that sector inquiries or other policy tools would be more appropriate for addressing supply dependency or systemic fragility concerns.

17. ***Investment and innovation***. The APDC considers that mergers can bring significant pro-competitive benefits in terms of investment and innovation because pooling resources, including research and development ("**R&D**") staff, capital, infrastructure, and know-how, enhances the ability and incentives to innovate. In sectors such as life sciences, defense, or telecoms, mergers may be essential to reach the critical size and profitability required to support long-term innovation. In other sectors, like some digital markets, scale may be more relevant for accessing users or capital, while access to know-how or infrastructure may be secondary, though this differs in areas like cloud or AI, where inputs are costly or scarce.

18. According to the APDC, the same innovation drivers remain relevant even when market power increases, provided that the merged entity continues to face competitive pressure. However, if innovation incentives disappear post-merger (e.g., the target was the main innovator), harm may arise.

19. In terms of investment, the APDC notes that mergers allowing for margin improvements through efficiencies (not price increases) can boost investment capacity, particularly in capital-intensive sectors. Where doubts exist about post-merger investment incentives, the APDC suggests the Commission could consider targeted behavioural commitments, drawing inspiration from cases like *Vodafone/Three*.

20. The APDC emphasizes the need for the Commission to adopt a case-by-case approach that balances quantitative and qualitative evidence, including forward-looking documents prepared for the transaction. Market structure is not determinative: both tight oligopolies and asymmetric markets with a dominant leader may still foster innovation.

21. Finally, the APDC also urges the Commission to account for global competition dynamics, particularly where EU players compete globally but lack access to protected home markets (unlike US or Chinese rivals). In such cases, mergers may provide the scale needed to compete in innovation internationally, even if the immediate geographic market appears narrow.

22. ***Globalisation.*** The APDC highlights that globally active firms may benefit from structural competitive advantages, such as looser regulation, lower costs, privileged access to raw materials or capital, and regulatory arbitrage, which can distort competition within the EU. The APDC is in the view that the Commission's merger assessment should take such advantages into account, based on both qualitative and quantitative evidence, including third-party reports, internal documents, or merger-specific materials.

23. The APDC recommends that the Guidelines allow flexibility for parties to submit diverse forms of evidence to substantiate how global advantages alter the competitive landscape, and to assess their impact on the merger's effects.

24. In strategic sectors (*e.g.,* semiconductors, clean tech, AI, biotech), the APDC notes that consolidation may enhance global competitiveness, innovation, and supply chain

resilience, particularly where EU firms lack access to protected home markets or face subsidized foreign rivals. Consolidations may facilitate capital investment, access to critical inputs, and scale necessary to compete globally. The APDC calls for the Guidelines to explicitly recognize that mergers in such sectors may generate efficiencies alongside potential harms, and that both qualitative and quantitative factors, such as HHI changes, switching costs, R&D overlaps, and global dynamics, should be integrated into the assessment.

B. <u>Assessing market power using structural features and other market indicators</u>

25. While a revision is welcome to reflect 20 years of decisional practice and case law, the APDC considers that, with respect to the assessment of market power, the current Guidelines serve their purpose of presenting a useful and relatively stable and reliable framework used by the Commission to assess concentrations.

26. The APDC firmly opposes the introduction of presumptions that would shift the burden of proof from the Commission to the notifying parties in contradiction with the EUMR and established case law. Experience over the past two decades shows no need for such a change. Likewise, general thresholds should not be established to characterize "gap cases" that would most probably result in substantial impediment to effective competition ("**SIEC**").

27. The APDC also considers that there is no reason to introduce prescribed types of evidence or differentiated legal standards between dominance and non-dominance cases. The Commission must prove the existence of a SIEC to the legal standard set by the European Court of Justice ("**ECJ**") and should rely on a balanced mix of qualitative and quantitative evidence, the relevance of which should be assessed in light of the specific theory of harm.

28. Finally, the APDC considers that coordinated effects theories of harm in NHMG are unusual and that, as a consequence, the Commission could explore ways to simplify the existing framework for assessing potential foreclosure effects.

C. <u>Innovation and other dynamic elements in merger control</u>

29. ***Innovation and investments.*** The Commission's current approach often emphasises short-term, price-based efficiencies rather than dynamic and qualitative innovation benefits. To address this, the Commission should consider the following.

30. First, clarify the types of efficiencies relevant in innovation-driven mergers and explicitly recognise innovation gains, even where these are realised over a medium- or long-term period. Furthermore, guidance should be provided on acceptable forms of evidence for innovation-related efficiencies, including, for example, patent activity, R&D investment metrics, and measures of staff and output quality.

31. Second, acknowledge the heterogeneity of market features. The Commission's analysis should account for sector-specific dynamics, considering factors such as network effects, entry barriers, and the strategic intent behind transactions, especially in rapidly evolving markets and for nascent, innovative firms.

32. Third, adopt a more pragmatic and forward-looking analytical framework. The new guidelines should promote a balanced assessment of both potential positive and negative effects of mergers on innovation, thus ensuring that merger control fosters competition while supporting long-term investment in innovative capacity. This includes balancing the speculative nature of innovation benefits with the required standards of evidence.

33. ***Elimination of potential competition and potential entry as a countervailing factor.*** The current Horizontal Merger Guidelines provide for an asymmetric approach towards potential competition: the European Commission applies different criteria when assessing the likelihood of market entry (i) by one of the merging parties, on the one hand, and (ii) of a third party on the other hand. To address these asymmetries, the Commission should consider the following.

34. First, redefine the notion and framework of potential or nascent competition by one of the merging parties. The framework defining potential competition could take into account the recent decisional practice by distinguishing between actual potential competition and perceived potential competition and by applying both tests solely in highly concentrated markets, as it is only in highly concentrated markets that actual or perceived potential competition can exert a meaningful disciplinary effect on incumbent firms.

35. Second, harmonize the criteria of establishing potential competition, particularly in relation to timeframe, while applying a case-by-case and sector-specific approach. Currently, when the Commission analyses potential competition stemming from the merging parties, it uses a long/flexible time frame - up to ten years - whereas potential competition stemming from third parties is only considered if the time frame is relatively short, i.e. two to three years. The Commission should not analyse the threat

of entry differently when it stems from a third-party competition, as opposed to one of the merging parties.

36. Third, address information asymmetries. In situations where potential competition stems from a third party (as opposed to one of the merging parties) there is an inequality of arms between the Commission and the parties. The latter do not have any investigation powers and thus no access to non-public market information. Therefore, the Commission should investigate third party potential competition raised by the merging parties in the same way as potential competition by the merging parties.

37. ***Counterfactual and failing firm defense.*** The determination of the precise counterfactual framework is of decisive importance and is eminently a case-by-case assessment. It is not necessarily the pre-merger status quo, especially for mergers involving significant innovation or requiring heavy investments. In particular, it should not exclude, as a matter of principle, cooperation agreements or market developments after the announcement of a transaction on the grounds that they would be necessarily influenced by the merger as this would be incompatible with the standstill obligation and the prohibition of early implementation.

38. In times of uncertainty, crises cannot be ruled out from the counterfactual analysis on the grounds that they are anticipated to be temporary and short-term. The effects of these events must be analysed on a case-by-case basis and there should not be a predefined set of circumstances or conditions under which the effects of crises may be considered structural. In such a context, maintaining the capacity of companies to innovate and invest is crucial and should be factored in the counterfactual assessment.

39. In cases of acquisitions of firms in financial difficulties, the right counterfactual should not be limited to the Failing Firm Defense but should correspond to the Flailing Firm Defense, which refers to situations where a merging party may not exit the market entirely, but its future ability to compete will nonetheless decline such that its present market power does not accurately reflect its competitive capacity in particular in terms of capacity to invest and innovate. Long-term effects on competition should therefore be taken into account.

D. Sustainability & clean technologies

40. The APDC recognises the importance of ensuring that the competition framework remains aligned with the EU's broader public policy objectives, in particular the transition to a sustainable and climate-neutral economy as set out in the European Green Deal.

41. The APDC considers that merger control must evolve to reflect the growing relevance of sustainability considerations in market dynamics. While the primary objective of merger control remains the preservation of effective competition, the assessment framework should be capable of capturing how certain concentrations may either support or undermine environmental objectives. To that end, revised Guidelines should provide clarity on the circumstances under which sustainability factors are taken into account, while respecting the legal limits of the Commission's mandate under Article 2 of the EUMR.

42. In APDC's view, it is both possible and desirable to incorporate sustainability considerations within the existing analytical framework, particularly in the context of efficiency defenses. Sustainability-related efficiencies (such as reductions in greenhouse gas emissions, improved energy or resource efficiency, or contributions to circular economy models) can be relevant if they are verifiable, merger-specific, and likely to benefit consumers. The revised Guidelines should offer clearer guidance on how such efficiencies may be substantiated and balanced against potential competition harms.

43. The APDC also notes that sustainability considerations may be relevant at other stages of the merger analysis. For example, the definition of relevant product markets may need to consider emerging clean technologies that are not yet fully substitutable with conventional alternatives. Similarly, counterfactual assessments could take into account evolving regulatory and market trends driven by environmental policies.

44. However, the APDC cautions against the adoption of rigid or prescriptive criteria. Given the evolving nature of sustainability policy, the Guidelines should maintain a flexible and principle-based approach, allowing for the development of decisional practice over time. A balanced and legally sound integration of sustainability objectives should avoid undermining legal certainty or distorting merger enforcement.

45. In APDC's view, the revised Guidelines should therefore: (i) acknowledge the relevance of sustainability considerations within the established legal framework; (ii) identify the points in the merger assessment where such considerations may arise; and (iii) provide high-level guidance on the conditions under which sustainability-related efficiencies can be recognised.

46. By doing so, the Commission can promote legal predictability, ensure consistency of decision-making, and contribute to the EU's long-term sustainability and competitiveness goals without departing from the core principles of merger control.

E. Digitalisation

47. The APDC welcomes the Commission's objective to update its assessment of mergers in light of the evolution of the digital markets over the past 20 years. The importance of competition drivers such as data access, the existence of ecosystems or privacy, could indeed be reflected in the revised Guidelines.

48. Whilst such an update is important for the Commission to carry out an assessment that reflects how digital markets work in practice, the APDC stresses that predictability and competitiveness are key for European players, large or small. This could have three main consequences.

49. Firstly, while digital markets do present some specificities, the tools generally available to assess whether a SIEC exists should fundamentally be similar across all sectors of the economy. These tools are well established and practitioners can advise companies as to how the European Commission applies them. By contrast, sector-specific rules risk creating additional complexity and fragmentation in the EU merger control rules.

50. From this perspective, the APDC suggests that any notion specific to the digital sector should be developed only where there is clear evidence that the by-default tools are inadequate. Beyond that, illustrations as to how the Commission would apply the by-default tools to digital markets could suffice.

51. Secondly, the European Commission should strive to ensure its rules are clear and predictable. For instance, the Commission wishes to reconsider whether the divide between horizontal and non-horizontal mergers is justified in digital markets. The APDC considers that different reasons could justify either introducing a new category of cases (e.g., "ecosystem cases") or not. What is key is that the Commission explains clearly why it considers that ecosystem cases are neither vertical nor conglomerate (i.e., why a new category is needed) and how it will apply this in practice.

52. Thirdly, no European tech ecosystem could emerge without access to capital. Venture and early-stage investors that invest in tech start-up and scale-ups do so in the hope of a successful exit, i.e., being able to sell their stake. Investment in European start-ups or scale-ups could be deterred if there are undue or unpredictable roadblocks to such exit strategies, such as unforeseeable "call-ins" of below-threshold mergers or an unpredictable application of the substantive rules.

53. Finally, the APDC would like to draw the European Commission's attention to the influence of the various sector-specific rules it has introduced on digital markets. Such is the case of the Digital Markets Act (DMA). When assessing player's incentives and

ability to engage in foreclosure strategies, it is essential to take these rules into account in light of the existing ECJ case law[14]. In this respect, gatekeepers' incentives to foreclose should be significantly curtailed by the application of the DMA. Given the ex-ante nature of the obligations it introduces, and the adjustments to business practices the Commission has already secured under this framework, the risk of detection and sanction is in principle much higher than under Article 102 TFUE alone. In a nutshell, the DMA deter players from engaging in foreclosure activity.

F. Efficiencies

54. The APDC welcomes the Commission's objective to update its assessment of mergers in light of the evolution of the digital markets over the past 20 years. The importance of competition drivers such as, data access, the existence of ecosystems or privacy, should indeed be reflected in the Commission's Guidelines.

55. Whilst such an update is important for the Commission to carry out an assessment that fully reflects how digital markets work in practice, the APDC stresses that predictability and competitiveness are key for European players, large or small. This could have three main consequences.

56. Firstly, while digital markets do present some specificities, the tools generally available to measure market power, to assess the risk of a degradation in price or quality of services, or to anticipate competitive constraints from outside a relevant market, etc., should fundamentally be similar across all sectors of the economy. These tools are well established and practitioners can advise companies as to how the European Commission applies them. By contrast, sector-specific rules risk creating additional complexity and fragmentation in the EU merger control rules.

57. From this perspective, the APDC would consider that any notion specific to the digital sector should be developed only where there is clear evidence that the by-default tools are inadequate. Beyond that, illustrations as to how the Commission would apply the by-default tools to digital markets could suffice.

58. Secondly, the European Commission should strive to ensure its rules are clear and predictable. For instance, the Commission wishes to reconsider whether the divide between horizontal and non-horizontal mergers is justified in digital markets. The APDC considers that different reasons could justify either introducing a new category of cases (e.g., "ecosystem cases") or not. What is key is that the Commission explains

[14] See p. 85: As recalled in the *Tetra Laval* judgment (C-12/03 P), the likelihood of foreclosure conduct must be examined comprehensively, considering both the incentives to adopt such conduct and the factors that may reduce or even eliminate those incentives, including the prospect that such conduct is unlawful.

clearly why it considers that ecosystem cases are neither vertical nor conglomerate (i.e., why a new category is needed) and how it will apply this in practice.

59. Thirdly, no European tech ecosystem could emerge without access to capital. Venture and early-stage investors that invest in tech start-up and scale-ups do so in the hope of a successful exit, i.e., being able to sell their stake. Investment in European start-ups or scale-ups could be deterred if there are undue or unpredictable roadblocks to such exit strategies, such as unforeseeable "call-ins" of below-threshold mergers or an unpredictable application of the substantive rules.

60. Finally, the APDC would like to draw the European Commission's attention to the influence of the various sector-specific rules it has introduced, such as the Digital Markets Act, on digital markets. These sector-specific rules should be taken into account when assessing players' incentives and ability to engage in alleged foreclosure strategies, based on the existing ECJ case-law. It should also be considered that, due to the ex-ante nature of such rules, the risk of detection and sanction should in principle be much higher than that of Article 102 TFEU.

G. <u>Public policy, security and labour market considerations</u>

61. ***Security and defense***: In June 2025, the Commission announced that it would not oppose the consolidation of the EU defense industry under EU merger control rules but emphasized the need to preserve industry competitiveness. The Commission highlighted the importance of balancing defense readiness, competitiveness, and innovation, stating that competitive markets are essential for delivering cutting-edge technology and ensuring agile production capacity.

62. The APDC supports this balanced approach, aligning with the general principles of the EUMR. The APDC questions whether the definition of harmful market power should differ for the defense sector and who should define it. It does not necessarily support sector-specific assessment principles, insofar as such changes would require EUMR reform. The APDC therefore recommends applying general EUMR principles to defense sector mergers, with defense policy considerations assessed similarly to efficiency arguments and invites the Commission to give concrete examples of such efficiencies. The APDC also suggests insisting in the guidelines on factors such as significant countervailing buyer power from Member States and the nature of defense procurement in merger assessments. With respect to Article 21(4) EUMR and Article 346 of the Treaty on the Functioning of the European Union ("**TFEU**"), due to limited past experience and potential inconsistencies, the APDC supports a case-by-case

application but would recommend providing guidance on defining dual-use products and their impact on assessments.

63. ***Media***: The APDC believes that democracy and media plurality considerations should not be given greater weight in EU merger control without legislative reform. In the APDC's view, these topics are better handled by sectorial regulators. The current framework works well, as seen in the *Vivendi/Telecom Italia* case. The APDC argues that the impact of mergers on democratic accountability and lobbying is outside the EUMR's scope and is addressed by national regulations and upcoming EU Regulation No. 2024/1083. The APDC is also of the view that media plurality reviews and competitive assessments differ. For the APDC, more clarity would be needed as to the objective before considering its inclusion in the Guidelines.

64. ***Labour markets and workers***: the APDC submits that it is not necessary either to specifically address the issue of labour markets and workers in the Guidelines. There is a risk the Commission would exceed its mandate under the EUMR if it were to review the impact of mergers on labour markets. Additionally, such intervention would not be justified by any regulatory or enforcement gap and would create unnecessary complexity and legal uncertainty in merger reviews, without delivering clear benefits for consumers.

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REVIEW MERGER GUIDELINES - Targeted Consultation

Fields marked with * are mandatory.

INTRODUCTION - Table of Contents

Background and aim of the targeted consultation

1. In line with the objectives of the EU Treaties, the **EU merger rules aim to enable a dynamic and functioning internal market**; by making sure all businesses are able to compete effectively, and to **prevent market distortions that can harm consumers** – and ultimately damage productivity and economic growth. While companies combining forces through mergers can generate efficiencies, and bring benefits to the EU economy, some mergers may reduce competition. This is why the EU has had a **system for reviewing mergers** of an EU dimension since 1990 (with Regulation 4064/89) to check their compatibility with a properly functioning internal market, known as the "EU Merger Regulation" – a regulation that was updated in 2004 (Regulation 139/2004) and remains in force today.

2. Over the 20 years and more, since the updated 2004 EU Merger Regulation and its accompanying guidelines, there have been significant **market trends and geopolitical developments** that have led to transformational shifts in many markets, putting the existing merger control framework to the test.

3. Article 2 of the EU Merger Regulation requires the European Commission to assess whether a merger would, or would not, "*significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position*". Where the Commission finds no such impediment the merger is to be approved; if, alternatively, the Commission concludes that the merger would lead to such an impediment, unless the merging parties submit measures remedying this impediment, the merger is to be declared incompatible with the internal market.

4. Mergers that may impact competition can involve companies that are actual or potential competitors on the same market ("**horizontal mergers**") or instead firms that are active on different levels of the supply chain or in neighbouring markets ("**non-horizontal mergers**"). To provide guidance on how it assesses these different types of mergers under the EU Merger Regulation and their compatibility with the internal market, the Commission issued guidelines: the Horizontal Merger Guidelines*[1]* ("**HMG**") (published in 2004) and the Non-Horizontal Merger Guidelines*[2]* ("**NHMG**") (published in 2008) (jointly the "**Guidelines**"). These Guidelines reflected, at the time of publication, the principles underpinning the Commission's evolving experience

appraising horizontal and non-horizontal mergers under the EU Merger Regulation (that of 1989 as well as 2004) as well as the case-law of the European Court of Justice.

5. Like all competition tools, **EU merger control needs to remain sharp and up-to-date**, as market realities change around it. The objective of merger control, in accordance with the EU Merger Regulation, remains valid and unchanged – ensuring mergers do not distort competition in the internal market. However, in the respective twenty-one and sixteen years since the adoption of the Guidelines there have been significant market trends and developments that have changed the dynamics of competition, leading the Commission's assessment of mergers under the Merger Regulation to evolve to capture those new realities and protect competition within them. There has also been case law of the Court of Justice which has informed the Commission's interpretation of the Merger Regulation and its Guidelines.

6. In light of these factors, which apply equally to both the Horizontal and Non-Horizontal Merger Guidelines, **the Commission is proposing to adapt both sets of guidelines in a holistic exercise**. The goal is to ensure that the revised Guidelines are up-to-date and flexible enough to allow the Commission to protect competition under the Merger Regulation in evolving modern market realities, while always respecting the overarching legal framework. In addition, the revised Guidelines should provide increased transparency and predictability to the business community as to how the Commission assesses mergers.

7. **We welcome your input** on how the Commission should assess mergers within the framework of the Merger Regulation and the principles that should underpin its revised Guidelines. The Commission's consultation of the general public with questions of relevance to these issues is available here (the 'Public Consultation').

8. **The present consultation runs in parallel to that general Public Consultation**, and focusses on in-depth and technical parameters related to EU merger control (the 'In-depth Consultation'). You will find here 7 specific topics that are relevant for the Commission's assessment, as well as accompanying technical questions. The technical backgrounds included in each of the topic papers recalls how merger control carried out by the Commission so far has assessed specific topics. These 7 topics are:

Topic A: Competitiveness and resilience
Topic B: Assessing market power using structural features and other market indicators
Topic C: Innovation and other dynamic elements in merger control
Topic D: Sustainability & clean technologies
Topic E: Digitalisation
Topic F: Efficiencies
Topic G: Public policy, security and labour market considerations

We very much appreciate your contributions on both consultations.

Submission of your contribution

Please reply to this targeted consultation by responding to the questionnaire here online. You may include documents and URLs for relevant online content in your replies.

You are not obliged to complete the questionnaire all at once; you have the option of saving your responses as a "draft" and finalising them later. To do this you should click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access your questionnaire again to continue working on your response.

If you have any questions, you can contact us via the following functional mailbox: COMP MG REVIEW.

In case of technical problems, please contact the Commission's CENTRAL HELPDESK.

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[1] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004.

[2] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008.

* **Contribution publication privacy settings**

The Commission may publish the responses to this targeted consultation. You can choose whether you would agree to make your details public or wish to remain anonymous.

- ○ **Anonymous**
  Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.
- ● **Public**
  Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions.

Introductory questions

* 1. Language of my contribution

One option possible.

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ● English

- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

*2. First name of respondent

Association des Avocats Pratiquant le Droit de la Concurrence

*3. Surname of respondent

N/A

*4. Email (this will not be published)

Charlotte.Colin-Dubuisson@freshfields.com

*5. I am giving my contribution as

One option possible.

- Academic/research institution
- (selected) Business association
- Company/business
- Consumer organisation
- EU citizen
- Environmental organisation
- National Competition Authority
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority

- ○ Trade Union
- ○ Other

* 5.a If you are giving your contribution for the company / organisation / authority / union / business for which you work, please specify for this entity:

5.a.i Name

N/A

5.a.ii Transparency register number

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

* 5.a iii. Size

One option possible.

- ○ Micro (1 to 9 employees)
- ○ Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ◉ Large (250 or more)

* 5.b If you are giving your contribution for the company / organisation for which you work, or on behalf of a client, please indicate in which sector it is active (multiple options possible). More details on digital, deep tech innovation, clean and resource efficient technologies, biotechnologies are available in the Commission Guidance Note concerning certain provisions of Regulation (EU) 2024/795 establishing the Strategic Technologies for Europe Platform (STEP):

You can tick more than one reply, below.

- ☐ Agriculture / agri-food
- ☐ Automotive
- ☐ Clean and resource efficient technologies
- ☐ Consumer goods
- ☐ Defense
- ☐ Digital
- ☐ Energy
- ☐ Finance and banking
- ☐ Medias
- ☐ Pharmaceuticals
- ☐ Space
- ☐ Telecommunications
- ☐ Transport
- ☐ Deep tech innovation
- ☐ Biotechnologies
- ☐ Construction

- [ ] Other basic industries (i.e., supplying raw materials to industries which manufacture other goods)
- [x] Other

5.b i. Please further specify the sector if needed, as well as the main function/activity of your company / organisation.

Text of 1 to 3000 characters will be accepted

Lawyer association

* 6. Please indicate the geographic scope of your (client's) activities:

One option possible.

- ( ) International
- ( ) Regional
- (•) National
- ( ) Local

* 7. Please indicate the countries where your main business is based:

You can tick more than one reply, below.

[ ] Austria	[ ] Finland	[ ] Lithuania	[ ] Slovenia
[ ] Belgium	[x] France	[ ] Luxembourg	[ ] Spain
[ ] Bulgaria	[ ] Germany	[ ] Malta	[ ] Sweden
[ ] Croatia	[ ] Greece	[ ] The Netherlands	[ ] Other in Europe
[ ] Cyprus	[ ] Hungary	[ ] Poland	[ ] Other outside of Europe
[ ] Czechia	[ ] Ireland	[ ] Portugal	
[ ] Denmark	[ ] Italy	[ ] Romania	
[ ] Estonia	[ ] Latvia	[ ] Slovakia	

* 8. Has your company/business been the addressee of a Commission decision under Article 6 or Article 8 of Council Regulation (EC) No 139/2004, or has it been another involved party (such as the target or seller) in a merger for which an Article 6 or 8 decision was issued, or has your company/business organisation acted as external counsel or economic consultant of an addressee of such decision in the last 10 years?

You can tick more than one reply, below.

- [x] No
- [ ] Yes, Article 6.1.(a) decision
- [ ] Yes, Article 6.1(b) decision (simplified procedure)
- [ ] Yes, Article 6.1(b) decision (normal procedure)
- [ ] Yes, Article 6.1(b) in conjunction with Article 6.2 decision
- [ ] Yes, Article 8.1 decision
- [ ] Yes, Article 8.2 decision
- [ ] Yes, Article 8.3 decision

9. Please indicate for which topics you would wish to read the papers and reply to the technical questions. **Please note that this choice will determine which topics you will see and be able to reply to in this**

targeted consultation. Note that all papers can also be consulted on DG COMP's website, though we accept replies only via this online questionnaire.

You can tick more than one reply, below.

- [x] Topic A: Competitiveness and resilience
- [x] Topic B: Assessing market power using structural features and other market indicators
- [x] Topic C: Innovation and other dynamic elements in merger control
- [x] Topic D: Sustainability & clean technologies
- [x] Topic E: Digitalisation
- [x] Topic F: Efficiencies
- [x] Topic G: Public policy, security and labour market considerations

Topic A: Competitiveness and resilience

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

9. **Competition stimulates productivity, investment, and innovation.** Since its inception, the purpose of EU merger control has been linked to the proper functioning of the Single Market and the productivity of its operators. As explained in recitals 4 and 5 and Article 2 of the EU Merger Regulation, mergers are to be welcomed *"to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the [Union]"*. Accordingly, the Commission reviews concentrations considering *"the development of technical and economic progress"*, provided that it is to *"consumers' advantage"* and does not *"result in lasting damage to competition"*.

10. One of the **Commission's key priorities** is spurring productivity and competitiveness in the EU. Productivity concerns the efficiency in producing goods and services. The ability of firms to invest, innovate, and grow are among the key drivers of productivity growth. By protecting competition, merger control protects the incentives to increase firms productive and dynamic efficiency (investment and innovation). **The Competitiveness Compass** emphasises that rigorous and effective merger enforcement in the Single Market is crucial to enhance the EU's competitiveness by ensuring fair competition and incentivising companies to innovate and become more efficient. At the same time, the **Competitiveness Compass** also underlines that *"in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets and tech innovation. This needs a fresh approach, better geared to common goals and allowing companies to scale up in global markets – while always ensuring a level playing field in the Single Market."*

11. Mergers are a way to restructure markets, and according to the 2024 EU Industrial R&D Investment Scoreboard it appears that companies based in the EU are more likely to engage in mergers than elsewhere in the world, also thanks to a predictable framework for merger control. A reflection is nevertheless warranted on

whether, in order to keep pace with global technological advancements, competition policy – notably merger control – must adapt its approach with a view to support start-ups, scale-ups, and medium-sized companies **to scale up in global markets, while safeguarding a level-playing field in the Single Market.**

Scaling up

12. **Productivity tends to increase scale**: in competitive markets, productive firms grow organically and gain scale at the expense of less productive ones, if not prevented by distortive subsidies, regulation (which may constitute barriers to the Single Market) or anticompetitive behaviour by rivals. Vice versa, productivity in the EU economy grows when **productive companies grow or innovate** and less productive or innovative firms lose market share and exit the market.

13. **Scale achieved through mergers and acquisitions may in some cases help firms become more productive.** Larger companies may benefit from economies of scale or scope for example because of network effects, the ability to spread the cost of intangibles over a larger cost base, or better access to financial markets. The acquisition of existing businesses may also be a means for a company to expand into other Member States or increase its global outreach to compete with large global rivals. A fast-paced merger control system that approves the vast majority of cases under the simplified and super-simplified procedures helps firms in the EU to gain scale when they do not attain market power.

14. At the same time, **the productivity of the EU economy may be hindered if companies accumulate market power,** damaging other companies active in their value chains. Market power resulting from mergers can lead to price increases, diminished quality or innovation, and a reduced number of suitable suppliers, all of which can negatively impact the competitiveness of other businesses. These negative effects may be particularly substantial in the case of small and medium-sized companies ("SMEs"), which are not necessarily publicly listed but may nevertheless have global leadership positions in their respective sectors. All these companies depend on a well-functioning Single Market for sourcing their inputs and distributing their products.

Resilience and value chains

15. Europe's competitiveness also depends on the **resilience of its economy and of its value chains.** Effective competition does not only improve an economy's potential to grow, but also contributes to its resilience to shocks. Having a variety of businesses active in the Single Market is a way to support the ability of firms to multi-source and to be dynamic and resilient to shocks. By contrast, less competition risks making an economy 'brittle' and thus less resilient.

16. As many markets are becoming more globalised, events like the Covid-19 pandemic, the Russian war of aggression in Ukraine and the subsequent energy crisis have highlighted the **importance of robust, reliable and diversified (in other words, resilient) supply sources** to businesses active in the Single Market. Likewise, the green and digital transitions involve an unprecedented demand for certain critical raw materials and other inputs (e.g., chips). A diverse, competitive supply base ensures not only that those businesses active in the Single Market benefit from competitive prices and innovation, but also that they have sufficient alternative sources of supply to overcome challenges and seize new opportunities. This is why resilience is

one of the points of attention in the **Competitiveness Compass,** in particular for certain strategic sectors.

17. Mergers may have a negative or positive impact on resilience. On the one hand, **mergers can secure the access of companies to inputs they need to compete**, including through the integration of activities at different levels of the value chain. A **diversity of competitive suppliers integrated in the Single Market** , which can be achieved also through acquisitions, **may reduce dependencies from external sources**. Mergers may also enable companies to **enhance certain capabilities**, including leading to increased security or capacity, or relocation of assets, that may make them less prone to external shocks and risks and benefit their customers. On the other hand, mergers may result in less competitively priced inputs, less innovative or lower quality products or reduced number of suitable suppliers. These **harmful effects may trickle down the value chain**, with negative effects on the competitiveness and resilience of these companies not only in Europe but also in global markets. Market power at one level of the value chain can thus have negative impact on an entire industrial ecosystem.

Enhancing investment and innovation

18. **Scale might provide companies with benefits** such as lower costs, better access to capital markets or R&D&I capabilities that increase their ability to invest and innovate. As identified in the Draghi Report, **the EU must make substantial investments** in essential infrastructure, including for telecommunications, connectivity, and the energy grid. These investments are crucial for enhancing the EU's competitiveness. At the same time, **company size does not typically reflect the ability to invest and innovate**, as many of the most innovative firms in sectors such as pharma, biotechnology, digital or high-tech are SMEs. While the scaling up of companies with disruptive technologies can help disseminate important innovations across the economy, the acquisition of nascent competitors by large established players to protect their market power (so-called “killer acquisitions”) might harm innovation. Moreover, as explained in Topic C on Innovation and other dynamic elements in merger control, mergers may reduce the **incentives to invest and innovate** absent efficiencies (e.g. in the form of R&D complementarities or spill-overs).

19. **Competitive markets play a crucial role in driving investment and innovation.** This is important also in digital and high-tech markets, which generate significant spillovers across all economic sectors. A dynamic and innovative digital economy ensures that businesses active in the Single Market remain competitive at a global scale, particularly at a moment in time when AI and other high-tech solutions including cloud and quantum computing, and the Internet of Things, become major drivers of the economy.

Merger control and globalisation

20. **In some markets, competition takes place at the global level** or, at least, imports into Europe from other parts of the world are significant and constitute real alternatives, constraining companies active in the Single Market, as explained in the Market Definition Notice. Moreover, some players may benefit from subsidies by third countries or other competitive advantages.

21. **In other cases, there are (still) too many barriers for competition to take place at a global or even European level.** For some goods this is to a certain extent inevitable, for example products with high

transport costs or the need to have local infrastructure. But there are also goods and services where competition takes place within regional or national boundaries only due to various reasons such as regulatory differences, continuing geo-blocking, or sticky consumer preferences.

22. The completion of the Single Market and the elimination of regulatory barriers might therefore contribute to expanding the geographic scope of competition across local, regional, and national borders, and support the capability of efficient players to grow in scale, including through acquisitions.

Technical background

Scaling up

23. Merger control does not take issue with scale as such, rather it focuses on market power. Market power is defined in the Horizontal Merger Guidelines ("**HMG**") and the Non-Horizontal Merger Guidelines ("**NHMG**") as the "*ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition*".*[3]* The conditions to assess whether a transaction may lead to market power are discussed, in particular, in Topic B on Assessing market power using structural features and other market indicators and Topic C on Innovation and other dynamic elements in merger control.

24. Merger control, more specifically, should not prevent companies from acquiring scale by combining complementary products, offers or technologies that result in positive synergies or from seeking access to new geographies. For example, the Commission approved the four cross-border mergers that it has reviewed in the telecom sector since 2015.*[4]* It approved mergers allowing the merged entity to expand its presence and gain scale globally for instance on services and products for semiconductor manufacturers.*[5]* It also reviewed and approved transactions between companies active through different technologies in the supply of inputs such as aluminium, a significant lever for industrial sectors to reduce their carbon emissions, while factoring in non-price sustainability-related considerations.*[6]*

25. Even in situations where a merger leads to a significant loss of competition, increased scale may generate merger efficiencies that offset the competitive harm, such as enabling start-ups or SMEs to scale up and bring new products to the market or generate economies of scale and scope, as discussed in Topic F on efficiencies. The EU Merger Regulation states that "*[i]n order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned*".*[7]* The NHMG also recognise that the integration of complementary activities or products may be pro-competitive, as these mergers *"may produce cost savings in the form of economies of scope (either on the production or the consumption side)".[8]* Examples of cases where cost savings related to economies of scale were assessed can be found in Topic F on efficiencies. Other potential efficiencies linked to scale, such as better access to equity or network effects to compete in global markets may also be relevant.

Resilience and value chains

26. In recent years, resilience has been a concern of particular relevance in the areas of security and defence, as well as other critical industries (e.g., chips manufacturing), critical inputs (e.g., certain raw materials) and critical infrastructure (e.g., broadband submarine cables).

27. Merger control can take resilience into consideration as long as it is relevant for competition on the markets concerned. Mergers can for example help companies secure access to inputs from outside the Single Market they need to compete effectively, which may be considered if it translates to benefits in the market at large. The Commission traditionally also assessed to what extent a merger may reduce dependable sources of supply, thereby exposing customers to more dependencies. In markets characterised by imports, the assessment has also considered whether sources of supply located outside the Single Market may be less dependable and expose businesses located in the Single Market to shocks and uncertainties, overall reducing their resilience. This can result from, e.g., currency risks, lead times, just-in-time supply chains, quality considerations, or general geopolitical and trade uncertainty.*[9]*

28. Mergers of companies that produce critical inputs or have access to critical raw materials can increase the dependency of the industrial ecosystem in Europe on a few companies, potentially concentrated in a certain region or country outside the Single Market. Such interdependencies can expose the industrial ecosystem in Europe to systemic risks, such as supply shocks in other jurisdictions resulting from natural events or geopolitical developments. In addition, there may be vertical mergers in which a company based outside the Single Market acquires critical infrastructure located in Europe (e.g., terminals in a port) and plans to continue using this infrastructure at preferential terms following the merger to the detriment of other companies that need access to this infrastructure. Potential effects of this nature may be relevant for merger control and may have an impact on the EU strategic autonomy.

29. Mergers may also enable companies to build on their joint capabilities (e.g. in terms of security, capacity, assets location) to reduce their exposure to external shocks and risks, that may also translate into benefits for the market.

30. A resilience risk assessment can, at least in principle, be undertaken using qualitative and quantitative tools analogous to those used to assess market power of suppliers, possibilities of switching suppliers, foreclosure risks, or coordination risks resulting from a merger. A resilience efficiency assessment may rely on similar tools as the assessment of non-price merger efficiencies (see more details in Topic F on efficiencies). There may be merit in further exploring how qualitative and quantitative competition assessments and tools can be usefully applied or extended to incorporate analyses of strategic resilience, and resistance to external shocks.

Enhancing investment and innovation

31. Increased scale may bring some benefits like better access to equity, finance or scarce talent in specific sectors. This may include a decreasing average cost curve, network effects, intangible capital, access to equity investment, increased ability and incentives to invest (e.g., in network infrastructure) or to innovate (i.e., R&D). In some markets, network effects and access to data that can be achieved with increased scale are also important to develop new products. At the same time, market power typically reduces the incentives to

invest and innovate in the long term. The interplay between mergers and innovation is discussed in more detail in Topic C on Innovation and other dynamic elements in merger control and Topic F on efficiencies.

Merger control and globalisation

32. In past decisions, the Commission has taken account of changing geographic market dynamics in the context of a global economy that has become increasingly interdependent over the last decades. In Siemens /Alstom,*[10]* the Commission considered that competition for the supply of high-speed trains could take place at the global level and therefore considered a potential worldwide market, excluding China, Japan, and South Korea. In many manufacturing cases, the Commission has defined EEA-wide markets, while it has also taken account of competitive pressure from outside the EEA (e.g., in the form of imports) in its competitive assessment. For example, in Tata Steel/Thyssenkrupp/JV,*[11]* the Commission found that competitive conditions for the production and supply of several steel products across the EEA were sufficiently similar when considering an EEA-wide market. In the competitive assessment, the Commission considered in detail the role of imports from outside the EEA. Finally, markets in some industries, notably telecoms, have so far been considered by the Commission as national in scope, but this is due to existing regulatory barriers.

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[3] HMG, paragraph 8 and NHMG, paragraph 10.

[4] Cases M.9963 – Iliad / Play Communications, M.9370 – Telenor / DNA, M.8883 – PPF Group / Telenor Target Companies, and M.8736 – Toohil Telecom / Eircom.

[5] Case M.11559 – Exyte / Kinetics.

[6] Cases M.10702 – KPS Capital Partners / Real Alloy Europe and M.10658 – Norsk Hydro / Alumetal. For more details, see Topic D on Sustainability & clean technologies.

[7] EU Merger Regulation, recital 29.

[8] NHMG, paragraphs 13 and 118.

[9] See, e.g., cases M.8713 – Tata Steel / Thyssenkrupp / JV and M.8444 – ArcelorMittal / Ilva.

[10] Case M.8677 – Siemens / Alstom.

[11] Case M.8713 – Tata Steel / Thyssenkrupp / JV.

Questions

General

A.1 In your/your client’s view, do the current Guidelines provide clear, correct and comprehensive guidance on how merger control reflects the objective of having a productive and competitive economy?

- ○ Yes fully
- ○ Yes to some extent
- ● No, to an insufficient extent
- ○ Not at all
- ○ I do not know

A.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the objective of having a productive and competitive economy, or what you consider is missing from the Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

As shown in the APDC's submission with respect to competitiveness and resilience, the APDC considers that the current Guidelines do not provide to a sufficient extent comprehensive guidance on how merger control reflects the objective of having a productive and competitive economy. The APDC's responses to the following questions show that the future merger control guidelines should give a better view on how scale, incentives to invest and innovate, resilience and globalization should be taken into account within the Commission's merger control framework.

A.2 In your/your client's view, should the revised Guidelines better reflect the objective of having a productive and competitive economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [ ] a. Ability and incentives of SMEs and mid-sized companies to scale up
- [x] b. Benefits of companies' gaining scale
- [ ] c. Companies' resilience
- [x] d. Ability and incentives of companies to invest and innovate
- [x] e. Ability and incentives of companies to compete at global level
- [ ] f. The revised Guidelines should not better reflect any of these areas

Scaling up

A.3 How should the Commission take into account situations where absent the merger the target company would not have the ability or incentives to scale-up? Please explain in particular:

A.3.a How should the Commission assess the counterfactual scenario, i.e. what would the situation be absent the merger, in particular when it comes to alternative buyers or sources of financing.

Text of 1 to 5000 characters will be accepted

In reviewing mergers under the EUMR, the assessment of the counterfactual scenario should rely not only on static market structures but also on dynamic factors such as the need of a critical size in order to invest and innovate. As stated in the Draghi report, a "backward-looking" merger appraisal, focused solely on existing market power and potential short-term competitive harm, may sometimes fail to encompass the broader dimensions of transactions that aim to improve global competitiveness, including the need for scale in certain industries. In particular, in many capital-intensive or innovation-driven sectors, the counterfactual may not simply be the status quo but instead result in underinvestment, stalled growth, or even market exit, due to several factors including insufficient access to alternative sources of funding. In such cases, the Commission should not assume that the merging parties could achieve the same scale and competitiveness absent the transaction, unless there is credible and concrete evidence of viable alternative sources of funding capable of achieving the same strategic outcomes. It is important to assess whether, in practice, such alternatives exist and could be timely and effective. The Commission should also not assess whether other transactions with alternative buyers would have been possible in theory. More generally, the counterfactual analysis should not be limited to the short-term preservation of market structure, but also take into account the long-term consequences of failing to scale such as lost innovation and reduced investment incentives, or reduced competitiveness. Accordingly, merger control should consider whether the merger represents a necessary opportunity to overcome scale barriers and unlock future competitive dynamics. This implies adopting a more prospective framework, where the Commission assesses whether the likely alternative to the merger is a scenario of stagnation or decline, rather than assuming that the market would otherwise remain effectively competitive. In addition, the assessment should also take into account the necessity of scaling up in order to preserve long-term competition, against the possible short-term competitive impacts of reaching that scale.

A.3.b Should the Commission in such cases assess whether the criteria of a failing-firm defence are met, including the exit of the company's assets from the market, and why/ why not. If so, how should the Commission assess this.

Text of 1 to 5000 characters will be accepted

The failing firm criteria provide that a transaction which may otherwise be considered anticompetitive is acceptable if the following criteria are met: (i) the target firm would exit the market in the near future if not acquired, (ii) there is no less anti-competitive alternative purchaser, and (iii) in the absence of the merger, the assets would not remain in the market. Although the lack of critical size can be one of the reasons why a firm is failing, limiting the assessment of the necessity to scale-up to failing firms would be overly restrictive. Even if a firm is not failing, the counterfactual absent the merger may be stagnation or decline due to underinvestment or lost innovation. Moreover, the failing firm criteria are mostly backward looking (i.e., the situation pre-merger and the immediate consequences absent the merger) whereas the assessment of the need for scale should be forward looking, based on a dynamic analysis of the companies' specific needs in the relevant sector. In some markets, inability to scale up represents a form of market exit in the longer term due to lack of competitiveness, including when the company is operationally sound from a short-term/static perspective. It stems from the above that the traditional failing firm analysis framework applied to the ability to gain scale, or lack thereof, seems overly restrictive to accurately encompass such situations requiring a forward looking and dynamic approach.

A. 4 What are the characteristics of markets where scale is necessary to compete effectively? Please be as specific as possible on the level of scale needed and why.

Text of 1 to 5000 characters will be accepted

Markets in which the gain of scale is crucial for competitiveness typically have at least one of the following characteristics: • High fixed costs. In markets characterised by high fixed costs, achieving critical scale is often essential to ensure sustainable profitability, cost competitiveness, and quality of final product or services. Due to the large upfront investments required, companies must reach a critical output or customer base to spread these fixed costs over a sufficiently large volume of sales. On the other hand, insufficient scale results in higher per-unit costs, reduced pricing flexibility, lower margins and, consequently, lack of further investments. For example in telecommunications, operators must invest heavily in infrastructure, which involves large costs that only marginally vary with the numbers of users served. Rapid innovation cycles and high levels of investments. Technology-intensive sectors, characterized by rapid innovation cycles, with significant requirements in R&D and/or other investments often require a critical size. This may include technology or pharmaceutical markets, but also the defense or aeronautic sectors. Sectors in which broad domestic markets can be effectively leveraged at the global level. While scale requirements differ substantially depending on geographic scope of the market considered, size of domestic market has a significant impact on global scale achieved. Some firms may need to reach scale in order to compete on the global market against other players able to rely on a protected domestic market. • Sectors with significant network effects. The inability to reach critical scale may result in competitive irrelevance due to the fundamental importance of network effects in some markets, including in the digital sector. In markets subject to network effects, fragmentation often leads to subscale competitors being outcompeted or acquired by global players with existing scale. Mergers that enable firms to combine user bases or complementary services to achieve critical mass should be appraised in light of their realistic perspective of achieving sufficient scale in the absence of consolidation.

A.5 What are the benefits that merged companies' increased scale might bring to competitiveness:

A.5.1 In a scenario where the increased scale does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased competitiveness of the merged entity.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity investment
- [x] d. Ability and incentives to invest (e.g. in network infrastructure)
- [x] e. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- [ ] f. Ability and incentives to derive value from aggregation of data
- [ ] g. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)
- [x] h. Ability to procure products more competitively from large suppliers?
- [x] i. Ability to compete in global markets outside the EU
- [ ] j. Ability to use countervailing market power vis-à-vis infrastructure providers
- [ ] k. Other factors (please list)
- [ ] l. No benefits are relevant

A.5.1 a For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Introduction In the absence of market power, mergers are typically not problematic and therefore a detailed assessment of the size effect would not typically be required. However, in principle, the pro-competitive benefits of scale can be relevant irrespective of whether the merger strengthens market power. In cases where the merger does not generate significant horizontal overlaps, such as vertical or conglomerate mergers or those involving geographic complementarity, there may be significant pro-competitive benefits resulting from increased scale. In particular: A. Network effects (i.e., whereby a product or service gains additional value as more people use it) In digital or multi-sided markets, scale unlocks both direct and indirect network effects. The value of the product or service increases with the number of users, enabling stronger competitive positioning and enhanced service quality.

A.5.1.b For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Scaling up enables the consolidation of IP portfolios, talent, data, and know-how, all critical for innovation and long-term competitiveness in high-tech and knowledge-driven sectors. The importance of scale may however often depend on the level of fixed costs required.

A.5.1.c For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Scale is perceived by investors as a factor of reduced risk, improved governance, and return potential. As a result, achieving sufficient scale enables improved access to capital markets, lower cost of capital, and greater investor confidence – which are especially crucial in Europe given its fragmented capital landscape.

A.5.1.d For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Investment capabilities are often a direct function of ability to achieve sufficient operational scale and spread high fixed costs over a larger revenue base. Increased scale can therefore significantly enhance both the ability and the incentive to invest in long-term, high-capex assets that are essential for competitiveness.

A.5.1.e For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Scaling up may enable higher level of investments in R&D. In addition to combining the merging parties' knowledge, scale may allow a better access to financing that is essential to making R&D projects viable.

A.5.1.h For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Size can allow the merging parties to gain countervailing power and procure more competitively from larger suppliers. This could have immediate pro-competitive effects, including the reduction of marginal costs which can be passed-on to the consumers.

A.5.1.i For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Scaling up may increase the ability to compete in global markets in particular when facing global players that already enjoy a critical size and/or can rely on a protected domestic market. Conclusion for all topics selected So far, those benefits have regularly been overlooked. In particular, the Commission's analytical framework has historically placed significant emphasis on the marginal cost analysis, largely overlooking the importance of fixed costs. Yet, in many sectors, business models are characterized by high fixed costs and low marginal costs. In such cases, the traditional focus on short-term price effects or direct pass-on to consumers may fail to capture the dynamics of the markets and the benefits of scale - in particular the incentives to invest or to innovate. A more forward-looking, dynamic analysis of a transaction's effects on the parties fixed costs, could allow to recognize that enhancing scale and reducing fixed costs can support higher levels of investment, innovation, and service quality. Indeed, while the reduction of fixed costs does not directly translate into immediate price decreases, it can nonetheless have meaningful pro-competitive implications in the medium to longer term. A fixed costs analysis could for instance show that critical investments cannot be made and be profitable unless a merger party achieves a certain level of scale. More specifically, such analysis can demonstrate that each company individually would be unable, or would not have the incentive, to undertake significant investments on its own. By merging and achieving greater scale, however, the combined entity would be in a stronger position to commit to larger investments – particularly in areas such as R&D, infrastructure, or innovation – thereby enhancing its long-term competitiveness and potential consumer benefits.

A.5.2 <u>In a scenario where the increased scale creates or strengthens market power</u>, please indicate which of the benefits identified in the previous question are still relevant for increased competitiveness of the merged entity, and comment on whether it may damage the competitiveness of other companies or the economy.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity investment
- [x] d. Ability and incentives to invest (e.g. in network infrastructure)
- [x] e. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- [ ] f. Ability and incentives to derive value from aggregation of data
- [ ] g. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)
- [x] h. Ability to procure products more competitively from large suppliers?
- [x] i. Ability to compete in global markets outside the EU
- [ ] j. Ability to use countervailing market power vis-à-vis infrastructure providers
- [ ] k. Other factors (please list)
- [ ] l. No benefits are relevant anymore

A.5.2.a Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

General response for all topics selected Scaling up often goes with more market power. It is precisely when a merger increases market power that a forward-looking, dynamic analysis of the need for scale should be taken into account as part of the competitive assessment. The benefits listed in response to Q.A.5.1 remain fully relevant, even where a merger increases market power. In fact, in many cases, the creation or reinforcement of market power is a functional requirement to achieving such benefits. For example, mergers that allow merging firms to gain countervailing power vis-à-vis global suppliers necessarily increase market power. Likewise, scale may facilitate investment/innovation because investment/innovation costs will be easier to recoup as a result of market power. The counterfactual analysis should determine whether – in the medium term – customers are better off in the post-merger situation given the benefits that are expected from an increased scale.

A.5.2.b Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.5.2.c Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.5.2.d Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.5.2.e Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.5.2.h Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.5.2.i Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements. Lastly, please comment on whether it may damage the competitiveness of other companies or the economy.

Text of 1 to 5000 characters will be accepted

A.6 How should the Commission assess the benefits of companies' gaining scale through mergers when they create or strengthen market power? Please explain in particular:

A.6.a Under which conditions could such benefits be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

The Commission could then assess the benefits of scale against the possible anticompetitive effects in two ways: • In a first scenario, the Commission could assess whether the potential benefits outweigh the possible anticompetitive effects (so-called "theorie du bilan"). The Commission would first assess the possible anticompetitive effects of the merger, and then determine whether those anticompetitive effects could be compensated by the potential benefits. The benefits of scale would be assessed at the same time as the efficiencies. • In a second scenario, the Commission could take into account the potential benefits of scale as part of the competitive assessment – rather than after the competitive assessment. The Commission would determine based on a dynamic and forward-looking counterfactual analysis whether consumers/customers would be better off absent the merger in the medium term. Scenario 2 is preferable in the APDC's view as it allows a more systematic assessment of the potential benefit of scaling up early in the process – before any preliminary finding of anticompetitive effects. Indeed, the benefits of achieving scale through mergers should no longer be confined to the efficiency analysis stage. In industries where fixed costs are high and marginal costs are low, scale is not merely a source of internal efficiency, but a structural condition for investment innovation and competitiveness. Failing to consider these parameters within the competitive assessment itself risks overstating the short-term potential harms of a merger (such as immediate price effects), while underestimating its potential benefits for competition. A more integrated framework would allow the Commission to weigh scale-driven competitiveness gains alongside traditional competition metrics. The Commission should also assess whether the benefits associated with increased scale are likely to materialise. This will likely be the case for example where (i) the sector is characterized by high fixed costs, and (ii) absent the merger each party individually would not be able, or would not have the incentive, to undertake certain investments/innovations. Under these conditions, pro-competitive benefits, such as improved ability to invest and enhanced innovation capacity, could offset potential short-term harm, including short term price increase risks and the reduction in competitive pressure between close rivals. For instance, in the pharmaceutical sector, the ability to spread high R&D costs across a larger market/volume of sales may determine whether a firm can invest in breakthrough therapies. A merger that enables this scale can accelerate the development of innovative treatments, ultimately benefiting consumers in both access and quality of care.

A.6.b Under which conditions would such benefits be passed on to business customers /consumers? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

Benefits should ultimately be passed on to business customers or consumers, but not necessarily in the short term. In particular, increased scale may enable the merging parties to undertake investments and innovations that will not result in immediate price reductions or increased quality, but will benefit business customers or consumers in the longer term.

A.6.c What are the elements, including evidence and metrics, that the Commission could use to assess whether the benefits of scale outweigh competitive harm, and will likely be passed on to business customers/consumers.

Text of 1 to 5000 characters will be accepted

The benefits of scaling up should be supported by robust economic evidence, including cost structure analyses (e.g., fixed-cost analysis), financial modelling, and credible forward-looking investment plans and business case projections. In particular, the range of acceptable documents should be expanded beyond pre-merger internal documents to include internal and external documents prepared in the context of the transaction. Such documents would provide for a more adapted and focused assessment since the benefits of scale are usually not analysed in pre-merger internal documents). The standard of proof required by the Commission should also reflect the inherent uncertainty of predictive analysis in fast-moving sectors.

A.6.d How can productivity improvements of a firm be balanced appropriately against price increases that can harm productivity of other firms?

Text of 1 to 5000 characters will be accepted

The assessment of the Commission should determine whether the productivity improvements resulting from increased scale will translate into longer-term benefits for customers and other business partners. In the longer term, these improvements should benefit not only the merging parties, but also the broader market ecosystem, including customers. They may also create positive spillover effects, such as industry-wide efficiency improvements, acceleration of technological diffusion, or standard-setting dynamics. For example, in telecoms, consolidation may unlock investments in next-generation broadband infrastructure.

A.7 Under which conditions can scale that brings benefits but creates or strengthens market power be achieved only through a merger, as opposed to other means, i.e. organic growth or cooperation? Please be as specific as possible, also pointing to potential differences between markets/sectors with different characteristics as relevant.

Text of 1 to 5000 characters will be accepted

In sectors requiring massive capital investment and high-risk R&D, mergers may be the only viable means to achieve necessary scale within competitive timeframes. Time to market is an important parameter in that respect. For example, organic growth may be too slow and costly to achieve competitive scale before market opportunities disappear. These time-sensitive dynamics must be assessed by the Commission to establish whether market consolidation may outweigh any possible harm to competition.

A.8 To what extent can scale that brings benefits be achieved through expansion into new geographic or product markets, rather than consolidation within the same product and geographic market? Please explain your answer being as specific as possible.

Text of 1 to 5000 characters will be accepted

When the parties have complementary geographical presence, consolidation can be a way to scale up while minimizing the additional market power resulting from the merger. However, scaling up expansion into new geographic markets is not always possible, in particular in sectors in which competition effectively takes place at the global level. Moreover, depending on the sector, the benefits of scaling up could be more reduced if scale is not achieved in the same geographic market (e.g., in telecom, infrastructure investments are usually undertaken at the national level and therefore the benefits of scaling up are more important if the merger takes place in the same national market). Likewise, it is uncertain whether scaling up through expansion into new product markets can generate the same level of benefits, in particular if the required fixed costs are product-specific.

Resilience and value chains

A.9 How should the Commission take into account the negative effects of a merger on competitors', suppliers' or business customers' resilience when assessing its impact on competition?

Text of 1 to 5000 characters will be accepted

While the APDC welcomes the effort to contribute to the reflection on the relation between resilience and competition, it is sceptical of the need for the Commission to consider market resilience concerns when assessing concentrations under the EUMR. The reasons are explained below. 1. Limiting principes. First of all, the EUMR does not empower the Commission to intervene against concentrations on grounds other than the protection of competition (EC, M.8084, Bayer/Monsanto, paras. 3005-3029). Therefore, any market resilience consideration would have to come under the legal criteria of article 2 of the EUMR (which aims only at preserving competition), and not go beyond it. In other words, the Commission could not prohibit a transaction based on resilience concerns in the absence of a SIEC. Secondly, the assessment of resilience concerns is not necessarily compatible with the time frame of analysis under the EUMR. Indeed, as pointed by the GC in EVH (GC, T-53/21, EVH v. Commission, paras. 232-234), the Commission cannot base its decisions on facts not known to it at the time of the notification, nor on hypothetical factors the long-term effects of which it cannot properly assess during its review, bearing in mind that "the further into the future the event to be foreseen, the greater the uncertainty that it will occur". The combination of these two principles will make it difficult for the Commission to intervene on resilience-related grounds. Even assuming that the SIEC criteria is malleable enough to accommodate resilience considerations (a view the APDC does not necessarily oppose, subject to the observations provided below), striking the balance between short term effects on competition in the traditional sense and long term effects on resilience will likely lead the Commission to a very hypothetical exercise over a long period of time, which might be at odds with the standard of proof under the case-law of the ECJ and the degree of likelihood it requires (ECJ, C-376/20, Commission v. CK Telecoms UK Investments, para. 81.). 2. Need for a clear definition. The concept of resilience, commonly understood as the ability to withstand shocks, has only recently entered public debate and is often used as a synonym for a variety of other concepts such as sustainability, financial/operational robustness, risk management, etc., which may have very different, and possibly diverging, implications for competition. It is not a legal concept and has not yet been defined by the Commission or the EU courts. The term remains vague and may cover a range of concerns relating to competition law or the public interest. Consequently, should the Commission decide to introduce the concept in its Guidelines, it is necessary to define it in a clear and precise way to ensure legal certainty. 3. Need for robust and consistent evidence calling for further action by the Commission. While there have been commendable efforts by some competition authorities to provide a framework for thinking about resilience and competition (CMA, Market resilience: Discussion paper, 27 March 2023), such efforts are limited in number and exploratory in nature, such that they do not appear to constitute a solid theoretical basis for new action by the Commission. In addition, such exploratory thinking tends to indicate that there is not a clear relation between concentration and resilience, neither theoretically nor empirically. Admittedly, some features which are typical of concentrated markets have been identified as potential causes or amplifiers of low market resilience (lack of supplier diversity, existence of barriers to entry and expansion, etc.). But at the same time, larger firms may be better equipped to withstand shocks and crises than smaller firms, notably because they have more financing options or more robust supply chains. Likewise, fierce competition may also undermine resilience where it causes companies to focus on short term price competition at the expense of financial stability or long-term investment. The APDC thus suggests that any attempt to incorporate market resilience into the Commission's assessment of concentrations under the EUMR should be based on (i) established economic literature, (ii) empirical evidence, and (iii) experience drawn from the application of the EUMR since its entry into force. To that effect, it would be interesting to know if (and how often) the Commission has received serious complaints from third parties based on market resilience concerns, and whether such complaints were addressable under the existing theories of harm and the corresponding classes of remedies. [See rest of response under A.9.a below]

A.9.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

4. Overlap with other areas of law. In its Discussion paper on market resilience, the CMA identifies (i) causes of market fragility (namely lack of diversity and financial risk) and (ii) potential amplifiers of harm to resilience (namely vulnerable consumers, barriers to entry or expansion, and supply criticality). In the APDC's view, many of these market resilience concerns are already addressed by areas of law other than competition law, or by competition law enforcement tools other than merger control, or by the theories of harm currently in use under the EUMR. For instance : • The protection of vulnerable consumers is achieved through both competition law in general and consumer law in particular; • Concerns over financial risk are addressed through prudential regulation. In that respect, article 21.4 of the EUMR makes a clear distinction between the protection of

competition, for which the Commission has exclusive jurisdiction, and prudential rules which are legitimate interests on the basis of which member states (only) can act against a specific transaction; • Concerns related to foreign ownership or the reshoring of certain activities have more to do with FDI control or industrial policy than with traditional competition law; • Concerns over dependence on supplies concentrated outside the Single market relate to trade openness and, therefore, trade policy; • In the context of merger control, if resilience merely supposes a variety of businesses and a diversity of sources of supply, as suggested in the consultation document, current theories of harm already address this concern. Indeed, the assessment of horizontal effects ensures that customers have access to different sources of supply, while the assessment of vertical effects helps identify possible input foreclosure effects. • In the APDC's view, a transaction that would not raise a SIEC under the existing theories of harm should not raise a resilience concern based on diversity of supply either. • Finally, if the Commission considers that it should investigate specific markets displaying certain features such as input criticality, barriers to entry or expansion, lack of supplier diversity, sector enquiries would appear as an appropriate tool allowing for extensive data collection and lengthy investigations. 5. Difficulty of designing a unified and consistent framework for review. Given the breadth, vagueness and plasticity of the concept, it appears difficult to have a unified and consistent framework for review. First of all, the variety of shocks that can be imagined is potentially endless (extreme weather conditions, war, pandemic, commercial retaliation, etc.), with different implications for competition. Furthermore, the probability of occurrence and the time horizon of these shocks are very difficult, if not impossible, to predict. Secondly, resilience can be assessed at market level or at company level, and at company level the reinforcement of one company's resilience can come at the expense of the resilience of its competitors, suppliers or customers. The Commission would have to define the type of resilience it seeks to preserve. Thirdly, there may be different ways to cope with a specific shock or crisis (financial robustness, industrial choices, R&D investment, etc.) and it is precisely the role of companies to make this type of judgment call in the ordinary course of business.

A.9.b Under which conditions could this theory/these theories of harm occur? Please explain in particular whether the number of remaining suppliers, supply concentrated in a certain region or country outside the Single Market or other metrics would be relevant.

Text of 1 to 5000 characters will be accepted

A.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the negative impact on competitors' resilience post-merger?

Text of 1 to 5000 characters will be accepted

For the reasons mentioned above, in the views of the APDC, this analysis should be conducted along the same lines as that of an horizontal merger or of an input or customer foreclosure.

A.10 From your/your client's perspective, how can the revised Guidelines contribute to the security of supply and resilience of the EU economy against outside shocks and dependency on third country input?

A.10.1 In a scenario where the merger does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for the companies' increased resilience.

You can tick more than one reply, below.

- [x] a. Vertical integration
- [x] b. Better access to input through new contracts

- [x] c. Diversification of sources of supply
- [x] d. Better conditions of purchase of inputs
- [x] e. Access to critical infrastructure
- [ ] f. Other (please list)
- [ ] g. No benefits are relevant

A.10.1 a Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A transaction may entail any of the benefits A to E for the parties, and each of them might strengthen their resilience, benefit A potentially encompassing benefits B to E.

A.10.1.b Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.1.c Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.1.d Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.1.e Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased security of supply and resilience of the merged entity.

You can tick more than one reply, below.

- [x] a. Vertical integration
- [x] b. Better access to input through new contracts
- [x] c. Diversification of sources of supply
- [x]

d. Better conditions of purchase of inputs

- [x] e. Access to critical infrastructure
- [ ] f. Other (please list)
- [ ] g. No benefits are relevant anymore

A.10.2.a Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

General response for all topics selected Where a merger creates or strengthens market power, it still may entail benefits A to E for the parties. As mentioned in response to question A.9.b above, the APDC considers that considerations relating to dependency on third country input would be better tackled through the control of foreign investment or trade policy, rather than merger control but merger control theories of harm should be exercised regardless of the nationality of the parties or of their assets.

A.10.2.b Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.2.c Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.2.d Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.10.2.e Please comment on whether it may damage the security of supply and resilience of other companies or the economy against outside shocks and dependency on third country input. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.11 When assessing its impact on competition, how should the Commission take into account the benefits of a merger on companies' resilience in situations where such merger also creates or strengthens market power?

Text of 1 to 5000 characters will be accepted

Resilience can be seen as an efficiency gain, to be assessed like the others.

A.11.a Under which conditions could such benefits be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

A.11.b Under which conditions would such benefits be passed on to business customers /consumers, and how? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

A.11.c What are the elements, including evidence and metrics, whether at firm or industry level, that the Commission could use to assess whether the increased resilience outweigh competitive harm, and will likely be passed on to business customers/consumers.

Text of 1 to 5000 characters will be accepted

A.12 From your/your client's perspective, what are the characteristics of markets or sectors where resilience is particularly important to compete effectively? Please be as specific as possible e.g. on the number of suppliers needed or on the gravity of the impact in case of shocks or shortage and why.

Text of 1 to 5000 characters will be accepted

The APDC does not identify any specific market where resilience would be of particular importance, as it matters for all companies in all markets.

Enhancing investment and innovation

A.13 What are the benefits that mergers might bring to competition in terms of <u>increased innovation</u>:

A.13.1 <u>In a scenario where the merger does *not* create or strengthen market power</u> (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased innovation.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity or debt capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input
- [ ] h. Other factors (please list)
- [ ] i. No benefits are relevant

A.13.1.a For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

General response for all topics selected As a preliminary remark, the APDC would like to stress that pulling together resources for R&D, including tangible and intangible assets, capital, infrastructures, know-how and human resources, should generally be beneficial to innovation. When the merger does not result in an increase in market power, it should therefore be assumed that its impact on innovation will be positive, except in very exceptional circumstances (e.g., when the target is the only incentive for other market players to innovate). All factors listed here are relevant to assess the positive impact of the merger on innovation. In markets characterized by higher barriers to entry for R&D – e.g., the pharmaceutical or defense and space industries, which require significant investments for the development of new, innovative products –, concentrations may allow undertakings to reach the critical size and/or level of profitability necessary to commit the resources required to pursue new/additional lines of research in terms of capital, infrastructure, intangible assets and dedicated personnel. Mergers can allow generics companies, for instance, to enter the princeps market by allowing them to build the expertise and devote sufficient resources to pursue the development of innovative products. On the other hand, in markets where barriers to innovation may be lower, including large parts of the digital industry, the impact of the concentration on innovation may be best assessed having regards to access to (i) the base of users necessary to reach a critical size (including through network effects) and (ii) the capital necessary to support the development of innovation until it reaches the threshold for profitability. Other factors (infrastructure, access to know-how and patents – as lots of the resources are available on an open-source basis –, human resources) may be less relevant, at least for the initial stages of the development. This, however, may not apply to some of the newer part of the digital sector, including cloud and AI, which rely on rare and/or costly inputs, including computing power and data, for innovation – in which case concentrations may facilitate or, on the other hand, hinder access to these inputs. The Commission's assessment must therefore take into account the specific structure of the market(s) at stake in order to evaluate the importance of each criteria listed A to G above. With respect to the metrics that may be used to assess the relevant criteria, the APDC notes that all elements of proof submitted to the Commission should be analyzed on their own merits, without any preconceived ideas. In particular, quantitative elements should not necessarily be given more weight than qualitative evidence, and the Commission should not by principle dismiss documents created by the parties for the purpose of the transaction or filing. Documents created specifically for the purpose of assessing commonalities and synergies that will result from the transaction in terms of innovation may include additional elements that pre-existing documents would have missed – this is especially the case in terms of R&D, where pipeline developments are generally highly confidential and the merging parties may not have a good understanding of the other's activities until their discussions are pretty advanced.

A.13.1.b For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.1.c For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.1.d For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.1.e For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.1.f For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.1.g For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased innovation of the merged entity.

You can tick more than one reply, below.

- [x] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [x] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [x] c. Access to equity or debt capital
- [x] d. Integration of complementary R&D capabilities
- [x] e. Integration of complementary R&D staff
- [x] f. Access to new know-how, data and patents
- [x] g. Access to infrastructure or other critical input
- [ ] h. Other factors (please list)

- [ ] i. No benefits are relevant anymore

A.13.2.a Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

General response for all topics selected Unless the merger results in the disappearance of the incentives to innovate – e.g., in situations where the market power of the merge entity is such that it does not face significant competition anymore or where the target was the only innovator in the market –, the assessment methodology outlined in response to question A.13.1.a above should remain valid and criteria A to G should remain relevant to analyze the impact of the concentration on innovation.

A.13.2.b Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2.c Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2.d Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2.e Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2.f Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.13.2.g Please comment on whether it may damage the ability and incentives to innovate of other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

A.14. What are the benefits that mergers might bring to competition in terms of increased investment:

A.14.1 In a scenario where the merger does *not* create or strengthen market power (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you believe are relevant for increased investment.

You can tick more than one reply, below.

- [ ] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [ ] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [ ] c. Access to equity or dept capital
- [ ] d. Integration of complementary R&D capabilities
- [ ] e. Integration of complementary R&D staff
- [ ] f. Access to new know-how, data and patents
- [ ] g. Access to infrastructure or other critical input
- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant

A.14.1.h Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

The APDC would like to point out two elements that the Commission should consider in its assessment of the impact that a concentration may have on investment. First, in sectors characterized by a very high level of required investments (e.g., investments in infrastructures – telecoms, cloud, energy, railroads, etc.), concentrations that allow the parties to extract higher margins may result in increased investments. The Commission should obviously distinguish between cases where the margins would increase as a result of a price increase, in which case additional investments may not be sufficient to counterbalance the negative impact of the merger, and the cases where margins would increase post-transaction due to economies of scale and synergies. In that second hypothesis, the increased ability to invest of the merging parties may bring significant benefits to consumers, through innovation and access to state-of-the-art, additional infrastructures. If necessary, should the Commission have a doubt about the incentive of the parties to actually convert increased margins into additional investment, accepting commitments to increase their level of investment while capping prices. While the APDC acknowledges that behavioural commitments may in some cases be more difficult to monitor, this should not be the case if the parties are able to identify precisely the scope and timing of their investment. The experience of the CMA in the Vodafone/Three case can provide additional guidance to the Commission as to the feasibility and effectiveness of such commitments. Second, in sectors where innovation is particularly high-risk and resource-intensive, mergers may lead to a better allocation of resources for R&D /innovation. In that case, even if the overall level of investment remains flat, the output may bring additional benefits to consumers post-merger. For instance, in a situation where the parties to the proposed concentration have pipeline products in development designed to treat the same condition (market A), the merger may result in the abandonment of one of the developments, but allow the parties to use the freed resources to invest a new area of R&D where there may not be a therapy yet (market B). Provided that the new entity will continue to face competition post-merger in market A (i.e., there are competing pipeline products for the same condition), the merger will result in this case, with the same level of investment, in a better outcome for consumers/patients, who will have the opportunity to see their medical needs met in two areas instead of one. The Commission should therefore refrain from looking only at very narrowly defined pipeline markets, as a decrease of competition in one specific pipeline may actually result in more innovation overall. Finally, with respect to the metrics that may be used to assess investments, the APDC notes that they should not, by principle, be limited to quantitative evidence only. Qualitative evidence, when sufficiently compelling, can be relevant to assess the effects of the merger on innovation. Such qualitative evidence may include experience from past development projects or adjacent innovation spaces, integration plans – including if they have been prepared specifically in view of the transaction/filing.

A.14.2 In a scenario where the merger creates or strengthens market power, please indicate which of the benefits identified in the previous question are still relevant for increased investment of the merged entity.

You can tick more than one reply, below.

- [ ] a. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- [ ] b. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- [ ] c. Access to equity or dept capital
- [ ] d. Integration of complementary R&D capabilities
- [ ] e. Integration of complementary R&D staff
- [ ] f. Access to new know-how, data and patents
- [ ] g. Access to infrastructure or other critical input
- [x] h. Other factors (please list)
- [ ] i. No benefits are relevant anymore

A.14.2.h Please comment on whether it may damage the ability and incentives to invest in other companies. Please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Text of 1 to 5000 characters will be accepted

Unless the merger results in the disappearance of the incentives to innovate – e.g., in situations where the market power of the merge entity is such that it does not face competition anymore on innovation and therefore has no incentives to continue to invest and innovate –, the assessment methodology outlined in response to question A.14.1 above should remain valid to analyse the impact of the concentration on investment.

A.15 From your/your client's perspective, in which type of markets/sectors smaller or larger firms are typically more innovative? Please provide supporting data and evidence.

Text of 1 to 5000 characters will be accepted

In markets where R&D is very resource-intensive and requires significant investments (including life sciences, defense and space, infrastructure markets, etc.), larger firms may be better-equipped to innovate. By contrast, in markets with low barriers to entry in terms of innovation, smaller firms may be effective innovators, even though they may still at some point need to reach a critical size. This assessment is however highly dependent on the specific characteristics of the market(s) at stake and should be analyzed on a case-by-case basis by the Commission.

A.16 From your/your client's perspective, how do different market structures, such as tight oligopolies or markets with a leading company followed by smaller firms, influence the ability and incentives to innovate and invest?

Text of 1 to 5000 characters will be accepted

Market structure is an important element to take into account to assess the impact of a merger on innovation but does not necessarily have a direct correlation with R&D or investments. Tight oligopolies may have a very high level of competition on innovation, as seen in the aircraft or mobile devices industries. On the other hand, in markets characterized by the presence of a clear leading player, smaller competitors may be incentivized to try to dislodge the leader through disruptive innovation rather than compete based on the same technology as the leading firm. Beyond the existing degree of concentration on the market (as also developed in response to questions A.13 and A.14 above), the APDC invites the Commission to also take regard to the geographic scope of the markets at stake. In case of national (or even smaller) markets, a merger that allows the parties to gain access to customers beyond their original customer base may have a strong positive impact on investment and innovation, as it will give the parties an opportunity to recoup their investments more easily and therefore encourage them to spend more on R&D/infrastructure.

A.17 How should the Commission factor in that competition to invest and innovate may take place at global level while markets for consumers may be of significantly narrower geographic scope?

Text of 1 to 5000 characters will be accepted

Some very innovation-driven markets have asymmetric geographic scopes, meaning that customers in a national market will only purchase from suppliers of the same nationality (effectively making the market inaccessible to competitors from other regions), but national suppliers may still compete in other parts of the world. This is especially frequent in markets that have a national security component, where the United States and China may only purchase from US/Chinese suppliers respectively, but US/Chinese players may still compete for business in Europe. In such cases, the Commission should take into account this asymmetry in its assessment of the merger and should not necessarily limit its analysis to the European market only. In some cases, the protected markets from which non-EU players benefit may allow them to reap benefits that will finance their R&D in a way that is not accessible to other players worldwide. Mergers may in those situations allow companies that do not have access to a protected market to reach the critical size necessary to effectively compete with these players in terms of investment and innovation.

A.17.a In which circumstances a merger may lead to competitive harm due to the reduction of competition at global level, even when pre-merger the companies were not competing in the same narrower geographic markets, and how that would be taken into consideration.

Text of 1 to 5000 characters will be accepted

A.17.b Vice versa, in which circumstances a merger may lead to competitive harm due to the reduction of competition at the narrower geographic level (e.g. national), while at the same time bring benefits to competition at global level, and how that could be taken into consideration.

Text of 1 to 5000 characters will be accepted

Merger control and globalisation

A.18 What are the benefits companies may enjoy due to their global presence that can give them a competitive advantage in markets (with)in Europe? Please select the advantages that you believe are relevant.

You can tick more than one reply, below.

- [x] a. Less regulation in markets outside of Europe
- [x] b. Less costs in markets outside of Europe
- [x] c. Better access to raw materials and/or manufacturing capacity
- [x] d. Better access to financing or equity investments
- [x] e. Lower standards of environmental protection, social rights or similar
- [ ] f. Other
- [ ] g. No benefits are relevant

A.18.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Jurisdictions with less stringent environmental, health and safety, or labour regulations enable producers to avoid the substantial capital and operational costs that EU-based firms are required to bear (for instance, in the textile sector: Financial Times, Is red tape strangling Europe's growth? 9 September 2024; in relation to energy-intensive industries: Boulamanti, A. and Moya, J. A., Production costs from energy-intensive industries in the EU and third countries, Publications Office, 2016; in relation to the chemical sector: Organisation for Economic Co-operation and Development ("OECD"), Saving Costs in Chemicals Management, 2019). Looser regulatory regimes can also significantly accelerate time to market. In the EU, for instance, the REACH authorization process for new chemical substances typically takes 18 to 24 months. By contrast, companies operating in less regulated markets can bring new formulations to market in under six months, allowing them to secure international contracts ahead of their EU-based competitors (See for instance, Commission Staff Working Document, Annual Single Market Report 2021, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery {COM(2021) 350 final} - {SWD(2021) 352 final} - {SWD(2021) 353 final}). Additionally, global firms often engage in regulatory arbitrage by conducting R&D or product testing, such as in AI, biotechnology, or novel foods, in jurisdictions with more permissive rules. They may then import these products into the EU, effectively bypassing certain upfront EU regulatory requirements. For example, companies may test artificial intelligence ("AI") products in Singapore or the United States to avoid early-stage compliance with the General Data Protection Regulation ("GDPR") (See for instance, OECD AI Observatory, 2023).

A.18.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Production facilities located outside the EU often benefit from significantly lower labour and energy costs, which can translate into substantial competitive advantages over EU-based companies. For example, recent studies show that solar photovoltaic modules manufactured in China in 2023 were 35% less costly than equivalent products produced in Europe, with the gap increasing due to a combination of scale, cheaper inputs, and less stringent regulatory compliance (See Smarter European Union industrial policy for solar panels, Bruegel, 2024 and IEA, Solar PV Global Supply Chains, 2022). Similarly, battery cell manufacturing facilities outside the EU are frequently constructed without the same environmental safeguards and emission controls required in Europe. As noted in the Draghi Report (The future of European competitiveness, p. 46.), this allows Chinese EU producers to achieve per kilowatt-hour production costs significantly lower than EU producers, placing considerable price pressure on emerging EU battery factories and increasing the incentive to develop manufacturing outside the EU. These cost advantages affect competition in markets traditionally defined as regional or national, such as the manufacture and supply of passenger cars and light commercial vehicles, where price differentials driven by lower production costs outside the EU can distort competition even within the internal market.

A.18.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Global firms with the ability to establish operations directly at the source of critical raw materials, such as minerals, electronic components, or biotechnology infrastructure, can benefit from significant cost and supply advantages. This is particularly relevant in resource-intensive sectors. For example, since 2011, China has invested over USD 50 billion in its solar photovoltaic (“PV”) supply chain and now controls more than 80% of global capacity across key segments. Easy access to raw materials is an important incentive to locate manufacturing capacities (See IEA, Solar PV Global Supply Chains). As stated in the Draghi report (The future of European competitiveness, p. 46) although EU players may retain technology advantages in certain clean energy sectors, they are incentivized to locate their manufacturing capacity outside the EU. For instance, electrolyser production requires at least 40 raw materials, the EU currently producing just 1% to 5% of these domestically.

A.18.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Companies operating in jurisdictions with deep and liquid capital markets, particularly in the United States and parts of Asia, benefit from superior access to equity financing, public grants, and strategic state-led investments. These financial ecosystems allow firms to raise capital at scale and redeploy it flexibly across global operations, including within the EU, where they may under-price European competitors. This is particularly impactful in high-investment, high-risk sectors such as semiconductors, biotechnology, and clean technologies. For instance, the European Investment Bank estimates that access to financing is one of the main reasons for EU firms to relocate outside the EU, with about 30% of EU firms in software, 23% in tech and 17% in biotech/pharma that have moved abroad (EIB, The scale-up gap, Financial market constraints holding back innovative firms in the European Union). The Draghi report further highlights that “61% of total global funding for AI start-ups goes to US companies, 17% to those in China and just 6% to those in the EU. For quantum computing, EU companies attract only 5% of global private funding compared with a 50% share attracted by US companies” (The future of European competitiveness, p. 30.)

A.18.e Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

As stated above, lower standards of environmental protection, social rights and regulatory requirements translate into lower capital and operational costs which lead to competitive advantages for companies located outside the EU. For instance, 28% of EU Small and Medium-sized Enterprises (“SMEs”) report that more than 10% of their staff are employed to assess and comply with regulatory requirements and standards (Commission, The 2025 Annual Single Market and Competitiveness Report, COM (2025) 26 final), such cost not being supported by their non-EU competitors. Similarly, a study assesses that the estimated average annual total direct cost borne by EU woodworking companies from EU regulation and was around 4.7% of their added value, representing almost 1.3% of their turnover and 13.7% of their gross operating surplus (Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Technopolis Group, Van Brusselen, J., Ettwein, F., Aggestam, F. et al., An assessment of the cumulative cost impacts of specified EU legislation and policies on the EU forest-based industries – Final report, Publications Office, 2016).

A.19 How should the Commission factor in that some companies, including merging parties or competitors, benefit from competitive advantages linked to their global presence when assessing the impact of a merger on competition (with)in Europe?

Text of 1 to 5000 characters will be accepted

A.19.a In this context, please explain whether such competitive advantages would (not) be reflected already in the level of market shares, and why/why not.

Text of 1 to 5000 characters will be accepted

Traditional reliance on market share metrics provides only a static and territorially bounded snapshot of competitive dynamics. While useful for initial screening, such metrics may understate the latent competitive strength of firms that benefit from global economies of scale, non-market advantages such as subsidies, or privileged access to low-cost inputs. These capabilities may exert a profound and immediate impact on competition within the internal market. For instance: • Firms' financial scale can enable market entry independent of EU-based assets, revenues or market-shares. • Firms with access to public subsidies or state-supported ecosystems may deploy aggressive pricing strategies, including cross-subsidization, that distort price competition and undercut EU-based rivals. These strategies confer pricing leverage may not be reflected in backward-looking market share data. • Firms' global dominance may create a "chilling effect" on actual or potential competitors. In NVIDIA/ARM, the CMA raised concerns that NVIDIA's worldwide reach, despite ARM' s limited market shares, would deter rivals from relying on ARM's technology, due to fears of foreclosure or self-preferencing. These examples demonstrate that market power and competitive pressure often derive from capabilities that transcend traditional geographic or market-based boundaries. As such, the Guidelines should provide that, were relevant, the parties may rely, in addition to market-share evidence, on qualitative evidence, including based on third-party reports, internal documents, both prepared on the ordinary course of business or merger specific to demonstrate the competitive conditions on the relevant markets.

A.19.b In this context, please explain how and in which circumstances benefits linked to e.g. subsidies in other markets can be considered as a competitive advantage in the relevant market.

Text of 1 to 5000 characters will be accepted

State-backed advantages, such as subsidies, preferential financing, and guaranteed public procurement, have emerged as key determinants of competitive asymmetry. These benefits, while originating outside the EU, can exert significant influence on competitive dynamics within the internal market. Subsidies granted in third countries, particularly in strategic sectors such as semiconductors, clean technologies, and biotechnology, often take the form of direct grants, concessional loans, tax breaks, or below-market input access. These instruments reduce marginal costs, enable scale-up beyond normal market-power, and insulate firms from ordinary financial discipline. This, in turn, allows beneficiaries to engage in aggressive pricing strategies, expand capacity at lower capital cost, or cross-subsidise loss-leading activities within the EU. Where they exist, such competitive advantages should be considered as a structural and enduring feature of the competitive landscape, particularly when: • The subsidized firm is a merging party or a significant third-party competitor in the relevant market. • Subsidies materially alter cost structures, enabling below-market pricing, predatory behaviour, or accelerated innovation cycles that cannot be replicated by EU-based rivals. • The beneficiary has a credible market entry pathway, either via existing supply chains, acquisition, or expansion plans evidenced through internal documents or market intelligence. • Subsidies may magnify the merged entity's post-transaction market power or affect the counterfactual scenario by enabling a third-party rival to discipline competition independently of the merger. While the Foreign Subsidies Regulation ("FSR") introduced a dedicated tool to address such distortions, it operates in parallel to merger control and does not cover all cases where subsidy-induced advantages are competitively relevant. Indeed, the FSR (i) does not tackle all mergers, (ii) aims at investigating companies benefitting from foreign subsidies, where, in the merger control process, it may be possible that the parties are confronted with competitors that benefit from foreign subsidies. Therefore, merger control must retain the flexibility to consider foreign subsidies as part of the competitive assessment, particularly when these advantages shape pricing power, innovation potential, or barriers to entry in the EU. Considering the difficulties to obtain actual and complete data on such benefits, the Guidelines should provide the possibility for the parties to rely on various quantitative and qualitative evidence, including third-party reports, internal documents, both prepared on the ordinary course of business or merger specific. The APDC notes that the Draghi report recommends incorporating foreign subsidy distortions into counterfactual modelling and competition simulations (The future of European competitiveness, p. 78-82) but considers that such modelling should not be required for all mergers but only in the relevant facts require it on a case-by-case basis.

A.19.c In this context, please explain in which circumstances, and based on which evidence, such benefits can be considered as part of the long term and structural counterfactual, i.e. the situation absent the merger.

Text of 1 to 5000 characters will be accepted

The merger Guidelines should not limit the circumstances and evidence that the Commission may take into consideration when assessing the counterfactual. Instead, the Parties should be able to present the Commission any evidence that may have, based on both third-party reports and internal documents (prepared in the ordinary course of business or merger-specific documents) to present a credible counterfactual. In any case, the merger guidelines may include examples of credible evidence of counterfactuals, such as, for instance, assessment of upward pricing pressure to estimate net price effects (see Upward Pricing Pressure and Critical Loss Analysis: Response, Joseph Farrell & Carl Shapiro, 2010) or long-term simulation models including global R&D and subsidy parameters. The Guidelines should adopt a flexible approach on the circumstances in which the conditions under which benefits linked to global presence, such as foreign subsidies, access to cheaper inputs, or structural cost advantages, should be considered in the construction of a credible counterfactual in EU merger control. The following circumstances may warrant inclusion in the counterfactual. The Guidelines should not however limit the circumstances in which the parties may consider global benefits in the counterfactual. • Demonstrated intent of a competitor active globally to enter or expand in the single market; • Structural cost asymmetries: in markets in which competitors benefit from enduring cost advantages due to their global presence, such cost asymmetries may structurally alter price competition and capacity planning in the EU and should be taken into account in the counterfactual; • Foreign State Support: in markets in which competitors benefit from State support, either to protect them on their national markets or to expand on other markets, such support should be taken into account in the counterfactual; • Evidence of global competitive leverage: in markets in which firms with low EU market shares may exert significant indirect influence through global pricing strategies, cross-subsidisation, or supply chain leverage, such advantage should be taken into account in the counterfactual. The Guidelines should not provide for an exhaustive list of evidence and metrics on which the Commission can rely to determine the counterfactual. Rather, our recommendation is to provide some examples of evidence and metrics that may be taken into consideration while expressly allowing the parties to bring forward any evidence and metrics that may be relevant to the specific facts and circumstances of the case. In particular, parties should also be able to rely on evidence and metrics set out in public authorities' reports or in reports prepared by recognized academic organisations, in internal documents, including merger-specific documents and not exclusively on internal reports prepared on the ordinary course of business.

A.20 What would be pro-competitive consolidations in global strategic sectors, such as digital and deep-tech markets (e.g., IoT, advanced connectivity, cybersecurity, cloud, quantum, and/or AI), clean and resource efficient technologies or biotechnologies that would benefit competition in the Single Market? Please explain why in particular in terms of harm and benefits to competition.

Text of 1 to 5000 characters will be accepted

Strategic sectors, such as semiconductors, renewable energy, and advanced materials – are increasingly characterised by high entry costs, intensive innovation cycles, and complex global supply chains. In such sectors, consolidation may in some cases serve as a vehicle for enhancing global competitiveness, accelerating innovation, and strengthening economic resilience. For instance, such benefits include, but are not limited to: • Capital intensity and scale economies: Strategic sectors typically involve significant upfront capital investment. Consolidation may allow firms to pool financial resources, achieve economies of scale, and reduce duplication in infrastructure investment. This efficiency can enhance global competitiveness, particularly in sectors facing foreign rivals supported by scale-based or state-led advantages. • Access to critical raw materials and supply chain resilience: Supply chain resilience is increasingly a policy objective in sectors reliant on scarce or geopolitically concentrated inputs. Horizontal consolidation can enhance firms' purchasing power in global commodity markets, while vertical integration may allow internalisation of upstream production. Both mechanisms can improve security of supply and reduce vulnerability to external shocks, aligning with the EU's strategic autonomy objectives. • Geographic asymmetries: Markets in strategic sectors often exhibit asymmetric geographic structures, where EU firms must compete globally against rivals benefitting from protected home markets, industrial policy support, or regulatory arbitrage. In such settings, consolidation may enable European firms to achieve minimum efficient scale and contest global tenders more effectively, thereby fostering long-term competition. The HMG should explicitly acknowledge that mergers in strategic sectors may produce both competitive harms and efficiencies. A robust assessment should: • Evaluate quantitative indicators, such as changes in market concentration (e.g., Herfindahl-Hirschman Index), price effects, or switching costs; • Incorporate qualitative evidence, including internal business documents (both merger-specific and on ordinary course of business), R&D portfolio overlaps, and global competitive dynamics; • Consider efficiency claims without assuming them to be incidental or immaterial, particularly in sectors characterised by systemic externalities and high fixed costs; • Examine whether claimed efficiencies are merger-specific, verifiable, and likely to benefit consumers within a reasonable timeframe. Such a balanced approach would ensure that merger control remains not only a tool of static efficiency but also an instrument for fostering innovation, resilience, and global competitiveness.

Topic B: Assessing market power using structural features and other market indicators

A description and technical background for this topic is included below. The same text can also be found [here](). Questions on this topic are included after the text.

Topic Description

33. **EU citizens care deeply about prices that are fair and affordable**. This was recently demonstrated by the reaction in Europe and across the globe to the inflationary period following the Covid-19 pandemic.[12] In competitive markets, companies strive to offer lower prices than their rivals, while keeping the quality of products and services high, boosting sales and increasing consumer savings. The primary goal of EU merger control is to **pre-empt distortions to effective competition and the creation or strengthening of market power** that lead to price increases harming consumers. Nevertheless, recent reports find that the EU has experienced rising levels of industry concentration and companies' markups over the last 25 years.[13]

34. At present, the Horizontal Merger Guidelines ("HMG") and Non-Horizontal Merger Guidelines ("NHMG") contain **structural indicators** relating to market shares and concentration levels that mostly provide guidance on where competition concerns are unlikely to arise (so-called "safe harbours"). With the exception of paragraph 17 of the HMG which states that market shares above 50% may be evidence of dominance, they do not offer rules of thumb for when a merger can be presumed to be harmful. This is because beyond those indicators, there can be situations where a merger will not harm competition, for instance because the Parties are not close competitors, because competition in the market is intense, or because large market shares may turn out to be only temporary, especially in recent and fast-growing sectors characterised by short innovation cycles.[14] The revision of the Guidelines offers a chance to adequately reflect the risks resulting from mergers in a situation of rising levels of concentration and profit margins in EU markets.

35. One means to achieve this would be the **adoption of stricter indicators** (or rebuttable presumptions) to identify more easily mergers that are likely to result in a significant impediment to effective competition. These stricter indicators may shift, under specific circumstances, the burden of proof: by introducing rebuttable presumptions, it would be upon the parties to provide particularly strong evidence showing that the transaction in question does not lead to anticompetitive effects despite certain indicators supporting the existence of likely anticompetitive effects. This burden shifting could be seen as the counterpart to the existing "safe harbours", which set out certain indicators that support the likely absence of anticompetitive effects. In practice, the presence of these "safe harbours" requires the Commission to produce particularly compelling evidence involving other qualitative and quantitative elements to demonstrate anticompetitive effects.

36.In addition, the Commission may set out a more comprehensive framework that relies on **alternative approaches to assessing market power**, and particularly those that emerged in its case practice. In addition to shares of sales, capacity shares are already frequently used structural indicators.[15] Further market features of relevance may be diversion ratios, profit margins, the distribution of spare capacities or a firm's pivotality.[16] Some of these market features may be especially relevant in cases that do not result in the creation or strengthening of a dominant position, or in cases involving highly differentiated markets.

37. Considering the recent CK Telecoms judgement of the EU Court of Justice, the revised Guidelines may also reflect on criteria for the assessment of **cases that do not result in the creation or strengthening of a dominant position**. For instance, the revised Guidelines may provide further guidance on when the merging firms can be considered close competitors or how to identify mergers that would result in the elimination of an important competitive force.

38. In some cases, even if the combined market shares or concentration levels are not particularly high, a

merger may still lead to anticompetitive effects, as it increases the risk of coordination among market participants. In this context and given the developments of market realities since the adoption of the current Guidelines (e.g., algorithmic pricing, in particular), a reflection on whether **the framework for the assessment of coordinated effects is still fit for purpose** is also appropriate. Finally, the Commission has for many years relied on the **"ability-incentive-effects" framework** to assess the likelihood of foreclosure of rivals as a result of non-horizontal mergers. As there has been a renewed academic and policy debate on the anticompetitive effects of non-horizontal, particularly vertical mergers, the review of the Guidelines is an opportunity to reflect on whether the current non-horizontal framework should be amended.

Technical Background

39. The current HMG state that "*market shares and concentration levels provide useful first indicators of the market structure and of the competitive importance of both the merging parties and their competitors"*.[17] Further, according to paragraph 24 of the HMG, a merger may *"significantly impede effective competition in a market by removing important competitive constraints on one or more sellers who consequently have increased market power"*. The HMG then list, from paragraph 27 onwards, several factors which may influence whether significant horizontal non-coordinated effects are likely to result from a merger. The factors listed include: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; the fact that the merged entity would be able to hinder expansion by competitors; and the fact that the merger would eliminate an important competitive force. Paragraph 26 of the HMG clarifies that, while none of these factors alone is decisive, *"not all of these factors need to be present for such effects to be likely"*. The relevance and application of these criteria for horizontal merger cases, particularly in cases below the dominance threshold, was recently confirmed in a judgment by the Court of Justice of the EU.[18]

40. In addition to the above criteria, the HMG and the NHMG contain several structural indicators to assess the likely competitive impact of a transaction.

41. **Market shares** are typically calculated by dividing the relevant operators' sales by the total sales within the previously defined relevant product and geographic market.[19] In the Commission's assessment of whether mergers may significantly impede effective competition in the internal market or a substantial part of it, market shares are "*important factors*". This is because "*the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher 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*". In this context, the Commission examines not only the combined share of the merging parties, but also the share increment contributed by the smallest merging firm, the shares of rivals, and the gap between the parties' combined share and the shares of their main competitors. These figures are regarded as "*useful first indications*" of the market structure and of the competitive importance of the merging parties.[20]

42. Market shares may be based on the volume of sales (e.g., units sold) or value (e.g., in EUR). In light of the specificities of each case, other metrics have been considered. Examples include shares based on production capacity, fleet size, number of passengers, new subscribers or active users, and even R&D expenditure.[21]

43. **Concentration levels** also provide useful information about the competitive situation in the relevant markets. The Herfindahl–Hirschman index ("HHI"), calculated by summing the squares of the individual market shares of the firms in the market, is often used by the Commission to measure concentration. While the absolute level of the post-transaction HHI may provide an initial indication of the competitive pressure remaining in the market, the change in the HHI (known as "delta") is a useful proxy for the change in concentration brought about by the merger.[22]

44. Both the HMG and NHMG contain **structural indicators** based on market shares and concentration levels, as follows:

a) Consistent with the EU Merger Regulation, the HMG indicate that a combined market share not exceeding 25% is "*an indication*" that the transaction is not liable to significantly impede effective competition.[23]

b) Very large shares, of 50% or more, may in themselves be evidence of the existence of a dominant market position.[24]

c) The Commission is unlikely to identify horizontal competition concerns in a market with (i) a post-merger HHI below 1 000, (ii) a post-merger HHI between 1 000 and 2 000 and a delta below 250, or (iii) a post-merger HHI above 2 000 and a delta below 150, except where special circumstances are present.[25]

d) Non-horizontal competition concerns are unlikely to arise if the combined entity's share in each relevant market is below 30% and the post-merger HHI is below 2 000.[26]

45. In the case of both market shares and concentration levels, the indicators mentioned in the current Guidelines are not shifting the legal burden of proof to the merging parties in the sense that merging parties with a combined share of more than 50% would have the legal burden of proving that they will not have a dominant position or that the transaction is not liable to significantly impede effective competition. Instead, large market shares and high concentration levels are indicators, inferred from prior experience and probabilities. The Commission has viewed market shares effectively on a sliding scale, where larger market shares mean a need for particularly convincing other evidence to clear a case (and conversely for smaller shares the Commission has had to show particularly convincing other evidence to find competitive concerns). Accordingly, in its comprehensive case-by-case reviews, which go beyond these indicators and include the examination of other relevant market features and competitive dynamics, the Commission has on several occasions concluded, by way of example, that mergers where shares are significantly below 50% significantly impede effective competition and that mergers where shares are significantly higher than 50% do not.[27]

46. In addition to market shares and concentration levels, the Commission has in its case practice used several **other market features** to assess the likelihood of anticompetitive effects resulting from a transaction. The Commission has used diversion ratios to evaluate the degree of substitutability between competitors' products, which is particularly important in highly differentiated markets.[28] In addition, the Commission has used profit margins to infer the degree of market power that firms hold prior to the transaction. In its case practice, the Commission has frequently used diversion ratios and margins as inputs to estimate the upward

pricing pressure resulting from a horizontal transaction involving differentiated products, for instance by calculating the Gross Upward Pricing Pressure Index (GUPPI) or related upward pricing pressure tests.[29] In a vertical context, the Commission frequently uses simple vertical arithmetic to estimate the incentives for total input foreclosure following the transaction or used vertical GUPPIs to estimate incentives for partial foreclosure.[30] Other market features that the Commission has relied on to assess market power and closeness of competition include capacity constraints, pivotality, bidding analyses as well as assessments of switching costs and barriers to entry. In addition to quantitative analyses, the Commission regularly relies on evidence from internal documents and from feedback from the market to assess these market features.

47. According to the HMG, the creation or strengthening of a dominant position is a primary form of a significant impediment to effective competition (SIEC). However, as confirmed by the Court of Justice of the EU, mergers can raise competitive concerns without leading to a dominant position. In all cases, the Commission is required to show, by balance of probabilities, that a transaction will "more likely than not" result in a SIEC.[31] It may also be useful to reflect on the type of evidence needed to support that a SIEC is "more likely than not" when mergers result in the creation or strengthening of dominance, compared to those that do not. For instance, the revised Guidelines could clarify the nature and level of evidence that would typically be required to conclude on the existence of a SIEC depending on the level of combined market shares, HHIs, and other structural indicators.

48. In oligopolistic markets, a transaction may give rise to **coordinated effects** by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour are now more likely to coordinate and raise prices. A merger may also make coordination easier, more stable, or more effective for firms which were already coordinating. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, according to the HMG, three conditions are necessary for coordination to be sustainable. First, coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated in case of deviation. Third, reactions of outsiders, such as competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected.[32] In practice, the Commission has relatively rarely intervened based on stand-alone coordinated effects theories of harm. It may be useful to clarify the nature and level of evidence needed to conclude on the possibility to monitor, detect, and deter deviations to coordination, especially in situations where a merger occurs in a market where conditions conducive to coordination are already present, or clarify when, in line with economic theory, coordination may arise even in the presence of non-symmetrical market structures.

49. Finally, structural indicators such as market shares and concentration levels are relevant to assess whether, in **non-horizontal mergers**, the combined firm would have the ability to engage in input or customer foreclose strategies post-transaction. Under the analytical framework set out in the current NHMG, vertical foreclosure may occur when actual or potential rivals' access to markets is hampered. Such foreclosure may take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered. For foreclosure to be a concern, three conditions need to be met post-transaction: (i) the merged entity needs to have the ability to foreclose its rivals, (ii) the merged entity needs to have the incentives to foreclose its rivals,

and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the relevant markets. In practice, these factors are often examined together since they are closely intertwined.[33] It may be appropriate to clarify the 'foreclosure' framework to provide more guidance on the appraisal of each of the criteria and how they interplay, also based on the case practice. Finally, more recently, the Commission has reviewed certain non-horizontal mergers in which the primary theory of harm did not easily fit within the existing foreclosure framework, as discussed in more detail in Topic E on Digitalisation.

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[12] According to a recent Eurobarometer study, rising prices and the cost of living were the main concern (for 42% of respondents) that motivated EU citizens to vote in the European elections of 2024. See: https://europa.eu/eurobarometer/surveys/detail/3292.

[13] European Commission: Directorate-General for Competition, De Simone, L., Nava, S., Salomone, E., Aigner, R. et al., Exploring aspects of the state of competition in the EU – Final report, Publications Office of the European Union, 2024.

[14] Case T-79/12, Cisco Systems Inc. v Commission, EU:T:2013:635, paragraphs 69 and 121.

[15] See, for example, M.8444 – ArcelorMittal/Ilva.

[16] Merging firms may be considered "pivotal" when competitors would jointly have insufficient capacity to supply the entire market demand, if the merging firms' capacities were to be withdrawn from the relevant market.

[17] HMG, paragraph 14.

[18] Judgment of 13 July 2023, Commission v CK Telecoms UK Investments, C-376/20 P, EU:C:2023:561.

[19] In purchasing markets, the Commission may rely on market shares based on (merchant) purchases.

[20] HMG, paragraphs 14 and 27, and NHMG, paragraph 24.

[21] Cases in which market share metrics other than value or volume of sales have been considered include M.8480 – Praxair / Linde, M.9062 – Fortress Investment Group / Air Investment Valencia / JV, M.5747 – Iberia / British Airways, M.8864 – Vodafone / Certain Liberty Global Assets, M.9660 – Google / Fitbit, and M.7932 – Dow / DuPont.

[22] HMG, paragraph 16.

[23] EU Merger Regulation, recital 32, and HMG, paragraph 18.

[24] HMG, paragraph 17. The paragraph further details that the Commission has in several cases also considered mergers resulting in firms holding market shares between 40% and 50%, and in some cases below 40%, to lead to the creation or the strengthening of a dominant position.

[25] HMG, paragraphs 19-20.

[26] NHMG, paragraph 25.

[27] For example, in M.10876 – BSA (Lactalis)/Ambrosi, the Commission did not identify any horizontal competition concerns on several markets where the Parties' combined market shares significantly exceeded 50%. Conversely, in M.8713 – Tata Steel / Thyssenkrupp / JV, the Commission identified horizontal competition concerns in a market where the Parties' combined market share was below 30%. The Commission's prohibition decision in that case was recently upheld in its entirety by the Court of Justice of the EU (Case C-581/22 P).

[28] HMG, paragraph 29.

[29] Recently, the Commission relied on GUPPIs as evidence in M.10896 – Orange/MásMóvil. In this decision, the Commission also estimated the related Compensating Marginal Cost Reduction ("CMCR"), which also relies on diversion ratios as an input. See for example paragraph 625ff.

[30] The Commission used vGUPPIs as evidence in M.9569 – EssilorLuxottica/Grandvision (see for instance paragraph 268).

[31] Judgment of 13 July 2023, Commission v CK Telecoms, C-376/20 P, EU:C:2023:561, paragraph 87.

[32] HMG, paragraphs 22 and 39-57.

[33] NHMG, paragraphs 20-32 and 58-79.

Questions

B.1 In your/ your client's view, do the current Guidelines provide clear, correct, and comprehensive guidance with regards to structural indicators / market features as well as the frameworks to assess coordination and foreclosure theories of harm?

- ○ Yes, fully
- ◉ Yes, to some extent
- ○ No, to an insufficient extent
- ○ Not at all
- ○ I do not know

B.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear, or what you consider is missing from the current Guidelines.

Text of 1 to 3000 characters will be accepted

The APDC is of the view that the current Guidelines to some extent provide clear, correct and comprehensive guidance with regards to structural indicators and market features, as well as the frameworks to assess coordination and foreclosure theories of harm. While a revision is welcome to reflect the decisional practice and case law of the past 20 years, the APDC considers that, with respect to the assessment of market power, the current Guidelines serve their purpose of presenting a useful framework used by the Commission to assess concentrations (in accordance with recital 28 of the EUMR). As a preliminary remark, it should be recalled that, pursuant to Article 2(2) and (3) of the EUMR, the Commission has to assess whether or not a concentration would significantly impede competition, in particular as a result of the creation or strengthening of a dominant position, and that the EUMR makes this clear "in the interests of legal certainty" (EUMR, recital 25). First, any structural indicators and market features used by the Commission for this purpose must be proportionate and should "not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition" (EUMR, recital 6). This precludes relying on rigid structural thresholds as standalone indicators of harm, especially where such thresholds do not accurately reflect the prevailing competitive dynamics or are not supported by evidence indicating likely anticompetitive effects. Similarly, imposing disproportionate burdens on the notifying parties in terms of information request is unwarranted, especially in cases where market shares are low, effective competitive constraints remain evident or there is a lack of market data available. Second, structural indicators and market features used to assess market power must be focused on competition. Under Article 2(1) of the EUMR, the Commission's appraisal shall take into account several indicators, such as the need to maintain and develop effective competition, market positions, alternatives available to suppliers and users, barriers to entry, etc. While this list is not limitative, any new structural indicators or market features considered by the Commission should be relevant to determine whether a concentration would significantly impede effective competition, in accordance with the Commission's mission recalled in Articles 2(2) and 2(3).
[End of response under B3 below]

B.2 Do you consider that the current structural indicators / market features involving market shares and concentration levels and/or the broad frameworks to assess coordination and foreclosure theories of harm should be substantially revised? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- ☐ a. Structural indicators / market features to assess likelihood of anticompetitive effects in horizontal mergers.

- [ ] b. Structural indicators / market features to assess dominance.
- [ ] c. Structural indicators / market features to assess likelihood of anticompetitive effects in non-horizontal mergers.
- [ ] d. Framework to assess likelihood of coordination in horizontal mergers.
- [ ] e. Framework to assess likelihood of coordination in non-horizontal mergers.
- [ ] f. Framework to assess potential foreclosure in vertical mergers.
- [ ] g. Framework to assess potential foreclosure in conglomerate mergers.
- [ ] h. The revised Guidelines should not better reflect any of these areas.

B.3 What should be the structural indicators / market features used by the Commission to assess the likelihood of anticompetitive effects in horizontal mergers? Please provide your view on the role and level of market share and concentration levels, as well as other structural indicators / market features you consider relevant.

Text of 1 to 5000 characters will be accepted

End of response to B.1.a Third, the revised Guidelines should clearly articulate the rationale for any new structural indicators and market features, the contexts in which they are likely to be applied, and, critically, the circumstances under which they are expected to carry particular weight in the competitive assessment. This is necessary to guarantee predictability for merging parties and legal practitioners, and ensure that the Commission's approach remains transparent and consistent with the EUMR. Fourth, the Commission must ensure that it does not depart from the analysis framework detailed in the revised Guidelines. This is indispensable to accelerate the decision-making process and increase the predictability of decisions called for in the Draghi Report. For instance, in Booking.com/Etraveli, the Commission considered that the transaction would have reinforced Booking's travel services ecosystem and thus strengthened its dominant position in the market for online hotel bookings. This ecosystem theory of harm created significant uncertainty: (i) it constituted a step backwards since the Commission seems to have applied the old dominance test in Regulation 4064/89 rather than the SIEC test of the EUMR and (ii) it raised questions on its consistency with the NHMG, according to which portfolio effects do not raise competition concerns as such and may give rise to customer benefits (NHMG, §§14 and 104). This led to a prohibition that was rather unpredictable based on a reading of the NHMG, which resulted in wasting significant time and resources. Businesses and their advisors need to rely on a stable set of analytical tools to plan transactions effectively and comply with EU merger control rules. As emphasized in the revised Market Definition Notice, increasing the predictability of the Commission's decisions will increase legal certainty for undertakings and their advisors (§5). This means that the Guidelines must not only be clearly articulated but also consistently followed in practice. Response to B.3 In the APDC's view, the current indicators / market features used by the Commission to assess the likelihood of anticompetitive effects as described in the current Guidelines are clear and relevant. These developments do not need to be modified as part of the contemplated reform.

B.4 Compared to the current Guidelines, should structural indicators be stricter or give rise to legal presumptions? Or should they be laxer/lower? Please provide supporting reasoning and evidence as to why stricter or laxer structural indicators should be used, based on economic and legal principles.

Text of 1 to 5000 characters will be accepted

First, the APDC advocates that the Commission cannot legally introduce presumptions modifying the allocation of the burden of proof under the EUMR. The EUMR, as interpreted by the Eu courts, clearly does not allow for the introduction of presumptions of anti-competitive effects. Quite to the contrary, pursuant to well-established case law, "no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred from [Regulation 139/2004]" (Case C-376/20 P CK Telecoms UK Investments Ltd, §71 ;

see also case C-413/06 P Bertelsmann and Sony vs Impala, §48). It is very clear from the 2023 CK Telecoms judgement that the ECJ considers that the EUMR is based on a balanced system for allocating the burden of proof between the Commission and the notifying parties. The Commission, for its part, must prove to the requisite legal standard either (i) the incompatibility of the concentration with the internal market ("It follows that it is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market" – Case T-87/05 EDP - Energias de Portugal SA, §61), or (ii) its compatibility "in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue" (Case C-413/06 P Bertelsmann and Sony, §§48 and 52). It is only when the Commission has demonstrated that the transaction may significantly impede effective competition that the merging parties are required to prove the existence of circumstances that could justify clearance, on the basis of the existence of efficiencies or of their eligibility to a failing firm defense. This balance, which guarantees the effectiveness of merger control under the EUMR, was forcefully reaffirmed in the CK Telecoms case, where the ECJ ruled that introducing presumptions would have the effect of calling into question the balance established by the regulation, and hence its effectiveness: "Such a reversal of the burden of proof is capable of reducing the effectiveness of merger control and, therefore, of calling into question the practical effect of Article 2(2) and (3) of Regulation No 139/2004. The objective of the effective control of concentrations which that regulation pursues, as recalled in paragraph 106 of the present judgment, in particular the objective of avoiding, first, the prohibition of concentrations which would not pose a risk of anticompetitive effects and, second, the authorisation of concentrations which would prejudice effective competition, is guaranteed, inter alia, by the allocation of the burden of proof in the field of merger control which has been established by the EU legislature." (§244). The same reasoning applies mutatis mutandis to the creation of a presumption of SIEC, which would shift the burden of proof from the Commission to the parties. It follows that any change to the current balance established by the EUMR could only be brought by the EU legislature through a modification of the EUMR. Second, in the light of experience in implementing merger control over the past 20 years, there seems to be no need to adopt even simple (rebuttable) presumptions of SIEC, which would have the effect of reversing the burden of proof onto the notifying parties. In fact, experience shows that the Commission, in the great majority of the cases, applies the EUMR effectively and efficiently. To the best of the APDC's knowledge, it has not encountered particular difficulties that would justify a major change in the system in order to re-allocate the burden of proof of the absence of SIEC on the requiring merging parties merely because of the attainment of market share thresholds. Third, the APDC does not share the Commission's view that the introduction of presumptions of SIEC would be the "counterpart" to the existing "safe harbours", which the Commission claims require that it produces "particularly convincing evidence, involving other qualitative and quantitative factors, to demonstrate the existence of anti-competitive effects" (§35 of the Consultation on Topic B). In fact, these 'safe harbours' are more of an informal rule of thumb used by the Commission to sort cases internally: they do not in any way shift the burden of proof under the EUMR, which rests on the Commission in any event, nor a presumption of compatibility with the internal market. In addition, in the APDC's experience, parties still have to go through a detailed review process below the thresholds concerned.

B.5 Based on which structural indicators / market features should the Commission assess the creation or strengthening of a dominant position? Please specify whether you believe that there should be a structural presumption of dominance, i.e., should certain thresholds be met, the burden of proof is on the merging parties to demonstrate the contrary. If so, should the presumption of dominance be based solely on market shares or combined with other indicators?

Text of 1 to 5000 characters will be accepted

As a preliminary comment, the Commission's attention is drawn to the fact that, in its Consultation on Topic B, it is unclear whether "structural indicators" relate to the presumptions thresholds it intends to use or to indicators used to establish the likelihood of a SIEC (e.g. market shares, degree of concentration, capacity constraints, countervailing buying power of clients, ...). This would need to be clarified. According to the APDC, experience and decision-making practice show that the level of market share is certainly an indicator to be taken into consideration, but one which often proves insufficient in itself to establish the existence of a dominant position and must be analyzed in combination with other criteria. Even if market shares of 50% or more may be "in themselves (...) evidence of a dominant position" (Case T-342/07, Ryanair, §336), this does not amount to a "structural presumption". The existence of a dominant position cannot presuppose a SIEC. Indeed, as the ECJ recently recalled, a concentration which creates or strengthens a dominant position does not automatically give rise to a SIEC: "Therefore, the fact that a concentration would create or strengthen a dominant position is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market, provided that it would not significantly impede effective competition in the internal market or in a substantial part of it, with the result that the applicant's argument - that if a dominant position is created or strengthened, that is sufficient for a finding of a SIEC - cannot succeed." (Case T-64/20, Deutsche Telekom AG vs Vodafone Group plc, §§193 and 217). In any case, as detailed in response to Question B4, in the APDC's opinion, the EUMR, as interpreted by case law, does not allow for the establishment of the structural presumption envisaged in the present question. It would be a lot more useful for companies across the internal market that the Commission provides indications in the revised Guidelines on what type of indicators are relevant, based on its experience, to identify a SIEC where post-transaction market shares are below 50 % (and ever more so below 40%).

B.6 Based on which structural indicators / market features should the Commission assess the existence of a SIEC, absent the creation or strengthening of a dominant position? Please specify whether you believe that there should be specific thresholds (or guidance) to identify mergers that may result in SIECs in cases where there is no dominant position.

Text of 1 to 5000 characters will be accepted

As Advocate General Kokott pointed out in her opinion delivered on October 20, 2022 in Case C-376/20 P, CK Telecoms UK, which concerned a transaction giving rise to a so-called "gap case", the Commission is "required to establish a 'significant impediment to effective competition', irrespective of whether or not that impediment was or is the consequence of a dominant position" (§49). In its judgement, the ECJ concluded that "the standard of proof, for the purposes of applying Article 2(2) and (3) of Regulation No 139/2004, does not vary either according to the type of concentration examined by the Commission or according to the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration". In other words, the standard of proof for a SIEC is the same whether the case involves a dominant position or is a gap case. That said, in the CK Telecoms case, the ECJ clarified that in "gap cases", the finding of a SIEC has to be based on a "cogent and consistent body of evidence" and cannot be limited only to scenarios where the two conditions set out in recital 25 of the EUMR are cumulatively fulfilled, i.e. (i) the elimination of an important competitive constraint that the merging parties had exerted upon each other and (ii) a reduction of competitive pressure on the remaining competitors. The ECJ also confirmed the key components of the Commission's analysis of gap cases in the HMG and the Commission's interpretation of the notions of "closeness of competition" and "important competitive force". In view of this analysis, confirmed by the ECJ, which is by its very nature detailed and dependent on the specific features of each case, the APDC considers that general thresholds cannot be established to characterize "gap cases" that would most probably result in SIEC.

B.7 What type and level of evidence should the Commission rely on to establish that a merger will significantly impede effective competition in horizontal merger cases leading to dominance and in cases that do not?

Text of 1 to 5000 characters will be accepted

First, the APDC advocates that there should be no required/prescribed type of evidence in these two types of cases. The Commission's duty is to adduce evidence that will withstand scrutiny before the EU Courts. In this regard, under EU law, the principle of unfettered evaluation of evidence applies in all situations, including in dominance and "gap" cases (Case C-348/20 P, Nord Stream 2, §129). This principle implies inter alia that the only relevant criterion for the purpose of assessing the probative value of evidence lawfully adduced relates to its credibility (Joined Cases C-239/11 P, C-489/11 P and C-498/11 P, Siemens and Others v Commission, §128). However, the APDC notes that as a whole the Commission tends to give too much credit to market test responses even when the allegations contained therein are not supported by concrete evidence and are often tainted by individual biased interests. The Commission should be cautious not to treat such unsubstantiated responses as determinative, particularly where they reflect the commercial interests of competitors or customers. Their probative value should be assessed critically and, where relied upon, corroborated by objective data or internal documents. The Commission should aim to base its decisions on a balanced mix of qualitative and quantitative evidence, including internal documents, economic analysis, and third-party views. No single type of evidence should be privileged over others in abstracto. Instead, the credibility and relevance of each piece of evidence should be assessed in light of the specific theory of harm. Internal documents can be particularly probative in merger control, as they often reflect the parties' own assessments of market dynamics, competitive constraints, and strategic intent. However, their interpretation must be contextual and not overly literal. Selective or decontextualized readings risk distorting the evidentiary picture. Second, the Commission must prove the existence of a significant impediment of competition to the legal standard set by the EU Courts. In this regard, the EU Courts have held that: • The Commission must provide evidence which (i) is factually accurate, reliable and consistent but also (ii) contains all the information which must be taken into account in order to assess a complex situation and (iii) is capable of substantiating the conclusions drawn from it (CK Telecoms, §125). • Decisions of the Commission as to the compatibility of concentrations with the internal market "must be supported by a sufficiently cogent and consistent body of evidence" (CK Telecoms, §75; Bertelsmann and Sony, §50). • In other words, the evidence must be "robust in order to establish convincingly the merits of an argument set out in a merger control decision", which presupposes that the factual accuracy, reliability and consistency of that evidence have been established (CK Telecoms, §60, referring to Case C-12/03 P, Commission v Tetra Laval, §§27, 39, 41 and 45). • The standard/level of proof applicable to merger control may therefore be summarized as follows: the Commission must "demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it" (CK Telecoms, §87). This standard of proof does not vary depending on the type of concentration concerned (e.g., depending on whether this is a dominance/gap case). What varies is the complexity of the theory of harm in a given case, which has an impact on the quality/credibility of the evidence required from the Commission: "the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required" (CK Telecoms, §78; Bertelsmann and Sony, §51). In this regard, dominance and gap cases may both be simple or complex, depending on the circumstances of each case. There is therefore no reason to distinguish them in the abstract. Given the inherently forward-looking nature of merger control and the uncertainty it creates, any serious doubt as to the likelihood of a SIEC – particularly where such a finding is contradicted by other credible evidence – should be resolved in favour of the notifying undertakings.

B.8 Which structural indicators / market features should the Commission use in the assessment of *coordinated effects*? Please detail the indicators and explain whether you believe this is an achievable standard to identify cases leading to coordinated effects.

Text of 1 to 5000 characters will be accepted

B.9 From your perspective, can non-horizontal mergers lead to coordinated effects? Please explain in which circumstances and under which conditions this may arise. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

The APDC notes that despite the significant development of market trends and realities since the adoption of the NHMG, including numerous decision-making practice and case law issued since 2008, the Commission has not assessed any vertical and/or conglomerate merger leading to coordinated effects. As a matter of fact, to the knowledge of the APDC, the Commission considered that non-horizontal mergers could lead to coordinated effects in only two vertical mergers dated 2001, for which a single analysis was carried out: the Shell/DEA COMP/M.2389 and BP/EON COMP/M.2533 cases. In fact, these two cases are currently mentioned in the NHMG in order to illustrate the fact that vertical mergers may increase the degree of symmetry between firms active in the market (NHMG, §84). These two cases were related exactly to the same market (the ethylene market in the ARG+ pipeline network area in Germany), resulted in a total vertical integration situation which apparently did not result in foreclosure, and raised similar competitive concerns, due to the very specific market structure (in particular, the ethylene market was already characterised by a high degree of concentration, the target companies were the only non-integrated suppliers and the main price settlers in the ethylene market). In this context and given the very few case precedents which are relatively old and not up-to-date, the APDC is of the view that coordinated effects' theory of harm is quite unusual for vertical or conglomerate mergers. Reference to this – unlikely – theory of harm could be removed from the NHMG to acknowledge that this theory is irrelevant in this context.

B.10 In which circumstances and under which conditions may a merger increase the risks of coordinated effects or otherwise make coordination more stable or more effective? Please detail in particular the market conditions conducive to coordination.

Text of 1 to 5000 characters will be accepted

B.11 In which circumstances and under which conditions will companies have the incentives to follow rather than deviate from the terms of coordination? Please explain in particular the role of monitoring and deterrence mechanisms in this context, and the level of evidence needed.

Text of 1 to 5000 characters will be accepted

B.12 In which circumstances and under which conditions could countervailing factors, such as the reaction of outsiders, defeat the risks of coordinated effects post-merger? Please detail what could be the countervailing factors and the level of evidence needed to prove that they will defeat the risks of coordination.

Text of 1 to 5000 characters will be accepted

B.13 Which structural indicators / market features should the Commission use in the assessment of *non-horizontal foreclosure effects*? Please detail such indicators / features, provide underlying evidence of their suitability, and specify whether they would support the ability, incentive, or effects of foreclosure. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

B.14 What should be the test and standard to be met to assess the risks of foreclosure effects of *non-horizontal mergers*? Please explain in particular whether you believe that (i) the "ability, incentives, effects" test is appropriate and effective in identifying cases leading to foreclosure effects; and (ii) there are overlaps in the standard for establishing ability-incentive-effects separately. Please clarify whether you think the test can be clarified/simplified. To the extent relevant, please differentiate between vertical and conglomerate mergers in your response.

Text of 1 to 5000 characters will be accepted

In the APDC's view, the "ability, incentives, effects" test is appropriate and effective in identifying cases leading to potential foreclosure effects. Depending on the specific circumstances of each case, having the ability to foreclose does not automatically entail having the incentive to do so nor that the foreclosure strategy will have any effect. In addition, this framework is applied by almost all competition authorities (Vertical Mergers in the Technology, Media and Telecom Sector, OECD Secretariat, 7 June 2019, §21). This alignment on a global standard for assessing non-horizontal mergers facilitates the merging parties' assessment of possible competition issues arising from their contemplated transactions and the cooperation of competition authorities. In practice, however, the NHMG acknowledge that "these factors are often examined together since they are closely intertwined" (§§32 for vertical mergers and 94 for conglomerate mergers). Yet, the NHMG then draw a detailed list of factors considered in the assessment of each limb of the test. Consequently, it is not always clear why some factors are listed under one category or the other while these factors may in fact have an impact on several categories, which sometimes makes the distinction rather artificial. In line with this remark, the ECJ ruled that "these are distinct conditions, even though the same point may often be relevant for the purposes of examining several of the necessary conditions" (Case T-691-18, KPN/Vodafone, §123). In the same vein, the CMA's revised Merger Guidelines state that, in practice, the assessment of effects "will build on the same evidence as the assessment of the ability and incentive to foreclose" (§7.21 for input foreclosure, §7.29 for customer foreclosure and §7.36 for conglomerate foreclosure). As a result, while the overall EU framework is stable and aligned with that of other authorities and therefore useful, the Commission could explore ways to simplify the framework of analysis. The assessment of the "ability, incentives, effects" strictly following the NHMG can indeed be repetitive and unnecessarily burdensome. In addition, as mentioned in the Introduction, when a case team examines the possibility of vertical effects and has everything in hand to find that the merging parties have no ability to foreclose access to inputs or downstream markets, it does not appear necessary to pursue the investigation to also exclude the merging parties' incentive to do so and the lack of impact on effective competition.

B.15 How should the Commission assess the merged entity's financial incentives to foreclose? Please specify the most relevant indicators and what can be, from your perspective, the role of quantitative economic analysis.

Text of 1 to 5000 characters will be accepted

Topic C: Innovation and other dynamic elements in merger control

A description and technical background for this topic is included below. The same text can also be found [here.](#) Questions on this topic are included after the text.

Topic Description

50. Firms compete not only through short-term pricing decisions but also by **investing in their long-term competitiveness. This is a dynamic process**, where firms expect future profits from investments into new production capacity, infrastructure, cost-reducing technologies, improved quality of products or R&D to innovate new products and services, all of which are drivers of economic growth and competitiveness.

51. As outlined in the Competitiveness Compass, **innovation plays a fundamental role in strengthening Europe's competitiveness and competition is a key driver of innovation**. The **Competitiveness Compass** also provides that the Commission in its merger control assessment should ensure that innovation is given adequate weight in light of the European economy's acute needs. Mergers can impact innovation competition in both directions – they may increase the ability of the merged firm to innovate but also harm innovation competition and thus the incentives to invest in R&D. It is important that the framework for merger assessments enables the Commission to adequately assess both elements, the positive and the negative impact on innovation. The effects of mergers on innovation are often more difficult to predict than effects on price and thus the challenge is to further develop a sufficiently accurate yet administrable framework for assessing dynamic merger effects on innovation.

52. Moreover, consumers should not be harmed following the **elimination of either existing or potential competition** that significantly constrains the behaviour of the firms active in the market. A merger with a potential competitor with a promising product in development or with notable R&D capabilities can accelerate commercialisation of improved products. However, it can also prevent future competition, delaying the expected benefits for certain products or the industry, e.g. if a merger leads to the discontinuation of a highly promising product or line of research, or if it increases barriers to entry or expansion. The potential for other competitors to enter the market in the future is therefore an important element in the overall competitive assessment.[34] The challenge is to identify the circumstances in which an acquisition of a potential competitor may increase or, on the contrary, stifle competition (including on non-price parameters such as innovation). In addition to effects on innovation stemming from mergers between head-to-head competitors, also non-horizontal mergers can lead to beneficial but also harmful effects on innovation. For instance, a merger where a dominant supplier acquires an innovative player downstream can lead to foreclosure of downstream rivals, stifling innovation going forward. When assessing both the positive and negative impacts of mergers on innovation and other dynamic effects, it is important to consider market-specific features.

53. Merger analysis is a forward-looking, predictive exercise. It deals with **inherent uncertainty**, particularly when dynamic factors are at play. Predicting market developments becomes more challenging and uncertain the further into the future the assessment goes. On the other hand, protecting innovation competition may entail protecting the uncertainty in the race to innovate that prevails on the market when there are several

competing innovators. Related to uncertainty and the standard of proof is the question of the correct counterfactual, i.e., the conditions that would have prevailed absent the merger, against which the Commission compares the competitive conditions that are likely to result from the merger. Challenges may arise in establishing the right reference point for the counterfactual but also in cases of failing or exiting firms, where alternative buyers may have existed earlier in the process when the financial situation was not yet critical. Another challenge can be the assessment of pre-existing agreements between the merging firms or agreements concluded 'in tempore suspecto', concomitant to the merger.

Technical Background

54. The current Horizontal Merger Guidelines ("HMG") and Non-Horizontal Merger Guidelines ("NHMG") recognise **innovation** as one non-price parameter of competition that is considered when assessing the effects of a transaction. The Commission has also developed a four-layer framework for assessing the competitive effects of horizontal mergers on innovation, which assesses the effects of a merger throughout the lifecycle of innovation including the risk of harm arising from (a) overlaps between existing products, (b) overlaps involving advanced pipeline products, (c) a discontinuation, delay or redirection of early-stage pipelines, or (d) a loss of innovation competition from a structural reduction in the overall level of innovation.[35] Innovation effects can also be relevant in non-horizontal mergers. For instance, an acquisition of an innovative downstream player by a dominant upstream supplier can result in potential foreclosure of downstream rivals leading to stifling of innovation downstream.

55. An impact of a merger on dynamic competition and innovation is highly relevant when companies engage in defensive acquisitions of nascent or emerging innovative competitors, also known as '**killer acquisitions**'. Assessments of such acquisitions should take into account the specific economic and technological features of the sector and of the individual case – for instance, in pharma markets some acquisitions may lead to the discontinuation, delay or reorientation of one of the overlapping pipeline projects (also referred to as 'reverse killer acquisitions' in case of discontinuation of the acquirer's own pipeline project) and in the IT, digital or other markets, an incumbent may defensively acquire a firm or project which either alone or in the hands of a competitor could in the future threaten the incumbent's position in one of its core businesses.

56. Various **metrics** can be relevant in assessing the level of concentration in a market characterised by innovation competition. When innovative products are at the development stage and not yet commercialised, the number of existing and potential suppliers can be particularly informative. In markets where there are frequent and significant investments in R&D, firm-level R&D expenditures, the number of patents or patent citations may be used as relevant metrics for measuring market power and knowledge diffusion.[36] Furthermore, market dynamism may be reflected in churn rates and market share fluctuations, and innovation diversion ratios and evidence of technological spillovers can be useful in assessing closeness of innovation competition between the merging parties.

57. Mergers can also have a positive or negative impact on other **dynamic non-price parameters** of competition, such as quality, variety, the firms' incentives to **invest**, sustainability (see topic D on Sustainability & clean technologies) or privacy and data protection (see Topic E on Digitalisation). For instance, a merger may reduce the incentives to invest in R&D, e.g., if the merger removes competitive

pressure given that the parties are strong innovators while rivals spend less on R&D, if the benefits of investment are recouped only in a more distant future following the merger or when output reductions make investments less profitable. As a result, consumers are deprived of the benefits from the investment. A merger may also lead to degradation of **quality** in various forms (e.g. degradation of interoperability) in different industries,[37] which may also impact the **variety** of products available to consumers long-term. On the other hand, in specific cases a merger can also enhance innovation, investment or improve the quality of products, for instance if it combines complementary lines of research or product lines, in which case the rationale of the transaction is based on increasing/improving innovation or certain product offering. Positive effects of mergers are covered in more detail in Topic F on Efficiencies.

58. Further, the HMG provide for a **dynamic assessment by considering the companies' future conduct** such as entry and expansion following a merger, or the elimination through a merger of potential competitors representing a competitive threat. **Future entry** by competitors may constitute a countervailing factor to potential anti-competitive effects of mergers between actual competitors if such entry is likely, timely and sufficient.[38] Dynamic assessments may also consider the future conduct as to investments (e.g. in infrastructure, new technologies or quality upgrades and improvements) as well as the direction of innovation following discontinuation or reorientation of efforts after a merger.

59. The HMG recognise that a merger with a **potential competitor**[39] can generate anti-competitive effects under two conditions: (i) if the potential competitor significantly constrains the behaviour of the firms active in the market, and (ii) if there is not a sufficient number of other potential competitors who could constrain the merged entity post-merger.[40] The first condition can be met in two alternative ways: the potential competitor, either (i) already exerts a significant constraining influence albeit not being active in the market or (ii) has a significant likelihood to grow into an effective competitive force. In a recent case, under the first leg, the Commission investigated whether the incumbent firm reacted to a mere threat of potential entry by adapting its market behaviour accordingly.[41] Under the second leg, the Commission relied on objective evidence to show the likelihood of entry and a significant likelihood that in the event of entry, the potential competitor would grow into an effective competitive force.[42] One can thus distinguish between situations where the potential competitor is an actual potential competitor and where it is a perceived potential competitor, and the revised Guidelines should clarify the framework and conditions for the assessment of each scenario.[43]

60. While both frameworks concern entry as a competitive threat, the HMG do not distinguish clearly between future entry as a countervailing factor and the elimination of a potential competitor as a theory of harm, and whether and how the conditions for one may or may not apply to the other. For instance, when entry is analysed as a countervailing factor to the loss of actual competition, its "sufficiency" implies the capacity to replace the loss of the actual competitor, i.e., to thwart potential anticompetitive effects brought about by the horizontal concentration. Conversely, mere 'potential competition' usually has a different role and effect. In cases where the loss of potential competition is at stake, actual competition is often ineffective, as is the case, e.g., in highly concentrated markets. In such a market environment, it is possible that even a perceived (as opposed to an actual) threat of entry exerts competitive constraints on the incumbent player. Therefore, sufficiency and timeliness of entry are then not determining factors.[44]

61. Merger control is forward-looking and, hence, inherently **uncertain**, in nature. In particular when assessing

dynamic effects of mergers, a certain level of uncertainty is inevitable as many factors come into play when assessing for instance impact on innovation or investments. In recognition of this, the European Court of Justice has repeatedly held that the Commission has a margin of discretion with regard to the prospective economic analyses it carries out to determine the likelihood of certain developments in the relevant market as a result of a given concentration.[45] It also confirmed that (i) the relevant **standard of proof** in merger cases, whether clearance or prohibition decisions, is that it is 'more likely than not' that the merger would or would not have anti-competitive effects and (ii) the standard of proof does not vary according to the type of merger or according to the complexity of a theory of competitive harm in a given case, but it must be met by means of a sufficiently cogent and consistent **body of evidence**.[46]

62. According to the HMG, the Commission makes the ex-ante assessment by comparing the competitive conditions that are likely to result from the merger with the conditions that would have prevailed absent the merger, i.e., the **counterfactual**. Whereas in most cases the relevant reference point is the competitive conditions existing at the time of the merger, the Commission may also take into account future changes to the market that can reasonably be predicted.[47] For this aim, there exists no strict 'checklist' of factors that would apply mechanically in each case. Rather, given the particularities of each case, the Commission bases its assessment on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions.[48] The relevant time frame within which the Commission may take such future changes into account may vary also depending on the industry sector.

63. In past cases, the Commission has used different benchmarks when the circumstances of the case so required. For example, in the aviation mergers that were notified during the Covid-19 pandemic and/or Russia' s war of aggression against Ukraine,[49] the assessment distinguished between possible structural changes in the market (e.g., lasting entry or exit of competitors) and short-term shocks on supply and demand that remained temporary.

64. A different benchmark is also required when the target is in such financial difficulties that it would ultimately leave the market even absent the merger. The '**failing firm defence**' under the current Guidelines is aimed at identifying this type of situations with three cumulative criteria.[50] So far only one case has been cleared on this basis under the current Guidelines.[51] The Commission has found problems to accept that the target would exit the market (prong 1) when losses are considered temporary and not indicative of the unsustainability of the target in the near future,[52] or that there is no less anti-competitive alternative purchaser (prong 2) when the merger is a result of a competitive tender procedure where more than one bidder submitted a bid.[53]

65. More recently, the Commission has accepted to assess the financial difficulties faced by the target firm as part of the counterfactual as long as the same arguments were not put forward by the parties, unsuccessfully, for a failing firm defence.[54] The assessment considered whether its current financial situation indicates that the target would likely remain in the market, and whether this would impact its future competitive strength absent the merger.[55]

66. Finally, the Commission has not accepted as counterfactual pre-existing agreements between the merging parties that were illegal (e.g., a cartel) or concluded 'in tempore suspecto', that is agreements which were

entered into in preparation of or are otherwise informed or affected by the merger.[56] [57]

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[34] The Draghi report recognises the importance of dynamic competition stating that EU merger control should "emphasise the weight of innovation and future competition […], enhancing progress in areas where the development of new technologies would make a difference for consumers" and not be "too backward-looking, focusing on existing market shares, [because] in multiple sectors what matters much more is future potential competition and innovation."

[35] See e.g., cases M.7932 – Dow / Dupont, M.9461 – Abbvie / Allergan, M.9554 – Elanco Animal Health / Bayer Animal Health Division, and M.11177 – Pfizer / Seagen.

[36] See, for example, case M.7932 – Dow / DuPont, Annex 1 of the decision, M.8084 – Bayer / Monsanto, and M.11177 – Pfizer / Seagen.

[37] See for example case M.9945 – Siemens Healthineers / Varian Medical Systems, M.9660 – Google / Fitbit, M.7612 – Hutchison 3G UK / Telefónica UK, and M.9019 – Mars / AniCura.

[38] HMG, paragraphs 68 et seq.

[39] The concept of "potential competition" intends to determine the degree of competitive constraints exercised by undertakings which do not operate on the same product or geographic markets, especially in situations of ineffective actual competition (e.g., in concentrated or dominated markets).

[40] HMG, paragraphs 58-60.

[41] See Competition Merger Brief No 2/2024, M.11033 – Adobe / Figma.

[42] See Competition Merger Brief No 2/2024, M.11033 – Adobe / Figma. It is unclear whether the Court's requirement of "real and concrete possibilities" of entry, see e.g., C-307/18 Generics (UK) and Others, EU:C:2020:52, C-201/19 P Servier and Others, EU:C:2024:552, C-331/21 EDP – Energias de Portugal and Others, EU:C:2023:812, could and should apply in merger cases.

[43] Other cases where the Commission assessed elimination of a potential competitor include, for instance, M.6166 – Deutsche Börse / NYSE Euronext, M.7276 – GSK / Novartis Vaccines Business, and M.9547 – J&J / Tachosil.

[44] The Commission has also reviewed potential competition in situations where (i) the undertakings are active on the same, although geographically distinct, product markets ('geographic potential competition') and (ii) they are present on different product markets ('product potential competition'). See, e.g., cases M.11043 – Novozymes / Chr Hansen Holding, M.11033 – Adobe / Figma and Opinion of AG Rantos in Case C-331/21 EDP – Energias de Portugal and Others, EU:2023:153.

[45] E.g., judgments Bertelsmann and Sony Corporation of America v Impala, C-413/06 P, EU:C:2008:392, paragraph 144; and Commission v CK Telecoms, C-376/20 P, ECLI:EU:C:2023:561, paragraph 82.

[46] Judgment of 13 July 2023, Commission v CK Telecoms, C-376/20 P, EU:C:2023:561, paragraphs 79 and 87.

[47] HMG, paragraph 9.

[48] HMG, paragraph 13.

[49] M.11071 – Lufthansa / MEF / ITA, para. 434 et seq; M.10149 – Korean Air / Asiana; see also M.9489 – Air Canada / Transat (abandoned), and M.9637 – IAG / Air Europa (abandoned).

[50] HMG, para. 90: First, the target would in the near future be forced out of the market if not taken over by another undertaking. Second, there exists no less anti-competitive alternative than the proposed merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.

[51] M.6796 – Aegean/Olympic II.

[52] M.5830 – Olympic / Aegean Airlines (Aegean/Olympic I), para. 1999.

[53] M.8444 – ArcelorMittal / Ilva.

[54] M.8444 – ArcelorMittal / Ilva. The Commission concluded that the conditions for a failing firm defence were not met. The Commission rejected the parties' submission to take into account market exit as a relevant counterfactual, because that would "in essence be tantamount to the acceptance of a FFD".

[55] M.7278 – GE / Alstom, para. 1133 et seq.; M.11071 – Lufthansa / MEF / ITA.

[56] M.10615 – Booking Holdings / eTraveli Group.

[57] This is in line with the Commission's approach in relation to evidence prepared after the opening of infringement proceedings. In M.8181 – Merck / Sigma, the Commission did not take into consideration witness statements made 'in tempore suspecto'.

Questions

General

C.1 In your /your client's view, do the current Guidelines provide adequately clear, correct and comprehensive guidance on how the Commission considers dynamic criteria in its assessment of the impact of mergers on competition (dynamic merger effects are linked to firms' forward-looking behaviours, particularly their ability and incentives to invest and innovate, as well as to enter or exit a market in the mid-to-long term. Dynamic merger effects can be either positive, leading to efficiencies, or negative, leading to harm)?

- ( ) Yes
- ( ) Yes, to some extent
- (•) No, to an insufficient extent
- ( ) Not at all
- ( ) I do not know

C.1.a Please explain and mention in particular which provisions of the current Guidelines (if any) do not provide adequately clear, correct and comprehensive guidance on dynamic criteria to assess the impact of mergers on competition.

Text of 1 to 5000 characters will be accepted

The current horizontal guidelines rightly acknowledge, in paragraph 38, that in innovation-driven markets, mergers may enhance firms' capacity and incentives to introduce new products or processes, thereby increasing competitive pressure on other market participants. However, the guidelines fall short of providing a clear framework for assessing when such pro-innovation effects will be recognised by the Commission. In practice, the Commission has tended to approach claims of innovation-related efficiencies with considerable scepticism, often discounting the potential for mergers to generate positive innovation outcomes. The APDC is of the view that the updated guidelines should specify the types of evidence that merging parties may submit to demonstrate enhanced innovation capabilities and incentives — thus enabling the consideration of an "innovation defence".

C.2 In your/your client's view, should the revised Guidelines better reflect dynamic criteria in the assessment of the impact of mergers on competition? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [x] a. Innovation
- [x] b. Investments
- [x] c. Potential competition
- [x] d. Entry as countervailing factor
- [x] e. Counterfactual

- [ ] f. Failing firm defence
- [x] g. Standard of proof and evidence on future market developments
- [ ] h. other

Innovation and investments

C.3 In what circumstances can mergers negatively impact the ability and incentives of the merged company to innovate (e.g. a merger between strong innovators, acquisition of an innovator, acquisition of an input critical for other companies to innovate)?

Text of 1 to 5000 characters will be accepted

It is widely understood that innovation is an essential driver of economic progress benefiting consumers, businesses and the economy as a whole. Most industries depend significantly on R&D investments to foster innovation and bring new products to the market. Against this background, innovation has long been recognized by the Commission as an important competition parameter. However, its relevance in merger control cases has significantly grown over the past ten years, notably in R&D driven sectors, such as the pharmaceutical industry or tech sector. Despite the EC's assertion that its merger analysis framework values innovation as much as price and output effects, the APDC considers that the current Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines do not comprehensively address innovation issues. Innovation-driven markets have indeed increasingly attracted attention and present new challenges and questions for competition authorities that are currently not reflected in the guidelines. In particular, the shift in the Commission’s assessment of innovation mergers, from a limited approach essentially focused on potential reduction of competition between existing and late-stage pipeline products, to a broader assessment of potential harm to innovation at industry level (see the Commission decision COMP/M.7275 of 28 January 2015, Novartis GSK Oncology Business, §§ 89, 108, 112) should be reflected in the new guidelines. The new guidelines should also establish an expansive framework adopting a refined approach to traditional theories of harm and incorporate the extensive decisional practice developed over the last decade to reflect the dynamic of rapidly evolving sectors like pharmaceuticals and technology, striking the right balance between over-enforcement that could stifle innovation and under-enforcement that could lead to excessive market concentration, harming consumer welfare and potentially reducing long-term incentives to innovate and invest. Finally, the revised guidelines should correct the imbalance between the current low intervention threshold for establishing dynamic concerns and the high degree of certainty that is required from the merging parties to demonstrate dynamic efficiencies. As recommended in the Draghi Report, EU merger control could in that respect benefit from switching the backward-looking approach that currently focuses on existing market shares to a more forward-looking approach by assessing the efficiency claims in light of future potential competition and innovation, where parties can pool resources to achieve the scale needed to compete and innovate at a global level (the Draghi Report proposed changes to the guidelines to provide for a new “innovation defense” that would allow the Commission to approve otherwise anticompetitive mergers that are expected to increase investment, innovation, and the scale needed for European companies to compete at a global level).

C.3.a What theory/theories of harm could the Commission consider (i.e. that would impede a company’s innovation post-merger, including due to the reduction of the incentives to innovate going forward or reduce access to IP licences)? Please distinguish between theories of harm applicable to mergers between head-to-head competitors (horizontal mergers) and mergers between companies active in related markets (vertical or conglomerate mergers).

Text of 1 to 5000 characters will be accepted

The APDC recognizes that several scenarios may give rise to concerns that a merger could negatively affect the ability or incentive of the merged company (or of third parties) to innovate and invest. Although the Commission has long followed a rather static approach to analyzing theories of harm in innovation markets, the APDC believes this rigid methodology fails to adequately account for the dynamic nature (Commission Press release, available here “Dynamic merger effects are linked to firms’ forward-looking behaviours, particularly their ability and incentive to invest and innovate, as well as to enter or exit a market in the mid-to-long term. Dynamic merger effects can be either positive (leading to efficiencies) or negative (leading to harm). Merger static effects refer to the immediate, short-term impacts of mergers on a market, such as changes in prices, output, and market concentration.”) of innovation-driven mergers. Indeed, the Commission should not be disincentivized to adopt creative approaches beyond traditional parameters when analyzing innovation. Notably, the Commission’s evolving focus on earlier stages of the development pipeline and even the early stages of discovery should be reflected in the updated guidelines. Accordingly, it is the APDC’s opinion that the revised merger guidelines should provide a clearer framework for this refined approach to innovation, in order to better capture the complexity between competition and innovation. As the Commission’s decisional practice exemplifies, many theories of harm have been developed around innovation-driven mergers, depending on (i) the characteristics of the parties to the transaction, (ii) their positioning in the supply chain (i.e. whether the merger involves competitors or potential competitors, or whether the parties are in a vertical situation) and (iii) sector specificities. As regards horizontal mergers, the HMG should distinguish between (i) mergers between two strong innovators in the same space and (ii) acquisitions of a particularly innovative target, generally by an incumbent operator. (i) Mergers between two strong innovators: Reduction of competition by elimination of “duplicative projects” (In Novartis/GSK Oncology Business (COMP/M.7275 of 28 January 2015, Novartis / GlaxoSmithKline’s oncology business), the Commission pointed out that the innovation process in the pharma sector is structured in a way that it is already possible at an early stage to identify substitutable products by reference to their product characteristics and their intended therapeutic use (§ 90)): Where the merged parties are developing projects of a similar nature, the merger may create a risk to cancel, downgrade or postpone projects to avoid internal competition. Such a strategic decision is likely to be made to prevent one product from cannibalizing the profits of another within the same company / group and/or to rationalize in-house resources by focusing on one specific R&D project rather than several at the same time (which is often not possible, including for financial reasons). Reduction of consumer choices (i.e. by enhancing niche markets): Merged entities could have the incentive to consolidate their strengths and focus, for instance in the pharmaceutical sector, on specific therapeutic areas where they see the most potential for profitability. The risk is that post-merger, the combined entity may allocate more resources to niche markets where they have a competitive advantage. While this can lead to advancements in those areas, it may also result in reduced investment in other therapeutic areas, limiting the development of a broader range of treatments, at the expense of broader consumer needs. Barriers to entry (COMP/M.1088 of 6 September 2022, Illumina/Grail, COMP/M.9343 of 202): Where mergers raise barriers to entry, they can weaken competition and deter new entrants, leading to reduced innovation, higher costs, and limited access to key resources. While concerns about barriers to entry frequently arise in vertical mergers —where integration across different levels of the supply chain may restrict access to essential inputs or customers—such concerns are also relevant in horizontal contexts. For example, the merger of two competitors in the same market may consolidate valuable technologies, data, or R&D capabilities, making it significantly more difficult for innovative new players to enter and compete effectively. [End of response under C. 3.b below]

C.3.b Under which conditions could this theory/these theories of harm materialise?

Text of 1 to 5000 characters will be accepted

[Continuation of response under C.3.a] Reduction in dynamic rivalry (COMP/M.8677 of 6 February 2019, Siemens / Alstom: The Commission blocked the merger due to concerns over future innovation reductions, particularly in rail signaling and high-speed trains): Mergers and acquisitions can significantly impact dynamic rivalry, which may pose a significant risk in innovative markets due to their reliance on continuous R&D to develop new products. In this case, mergers could lead to a loss of the number of post-merger independent companies with sufficient R&D abilities to innovate in the market. (ii) Acquisitions of a particularly innovative target, especially at an early stage, generally by an incumbent: Acquisition of a nascent competitor (COMP/M. 7425 of 13 December 2024, Medtronic/Covidien: Medtronic, a leading US firm in the market for drug-coated balloons announced its acquisition of Covidien, an Irish med-tech firm whose Stellarex-brand drug-coated balloons were in the development stage with promising first-stage clinical trials, in 2014. The Commission required Medtronic to divest Covidien's Stellarex business, including manufacturing equipment, related intellectual property (IP) rights, and scientific and regulatory materials, as well as all other assets necessary to "bring Stellarex to the market and remedy the identified competition concerns – see Eur. Comm., press release IP/14/2246 of 28 November 2014): Transactions involving the acquisition of a potential nascent rival with typically non-existing or low revenues are high on the agenda, as exemplified by the Commission's failed attempt to catch these operations through Article 22 EUMR. The theory of harm in such acquisitions is the risk of discontinuation or reorientation of an on-going R&D project, either of the acquired company (killer acquisition) or of the acquirer's own pipeline (reverse killer acquisition). This type of acquisition reduces the overall level of innovation and competition in the market. While the term of killer or reverse killer acquisitions has often been used in the pharmaceutical sector, the concern is slightly different in the digital sector where the risk is more the acquisition by an incumbent operator of a nascent rival that develops an offering that could ultimately compete with that of the acquirer. In such case, the acquisition does not aim at killing the new offering but at acquiring at an early stage and pursue its development, consolidating the acquirer's market position in the long-term, to the detriment of the emergence of new competing offerings. As regards non-horizontal mergers, the main concern arises from increased barriers to entry through access degradation and interoperability restriction (COMP/M.1088 of 6 September 2022, Illumina/Grail: In Illumina / Grail, the Commission considered Illumina would have had the incentive to foreclose GRAIL's competitors from its high-thoughput NGS systems (by refusing to supply its NGS systems, increase of prices, degrade quality etc.), which would have had severe and negative effects on the innovative capabilities of early cancer detection test developers and the emerging industry as a whole. The Commission considered that the open licencing of a some of Illumina's intellectual property rights and the commitment to conclude agreements with Grail's rivals under a standard contract would not effectively address all potential foreclosure strategies. See also COMP/M. 8314 of 12 May 2017, Broadcom/Brocade: The Commission assessed the innovation impacts of a potential interoperability degradation between networking products (upstream) for communications and data centre infrastructures and applications (downstream) , and COMP/M.10262of 13 October 2022, Meta/Kustomer): The merged entities may control critical inputs or distribution channels, potentially foreclosing competitors' access. This can hinder competitors' ability to innovate if they cannot access essential inputs or reach customers effectively. The risk that merging parties might implement interoperability degradation strategies and thus negatively impact innovation is higher in fast-developing and fast-growing markets. Another, more recent, concern that has emerged in the Commission's Booking/eTraveli decision (COMP/M.10615 of 25 September 2023, Booking Holdings / Etraveli Group) is the ecosystem theory of harm. In this case, the Commission's theory was that Booking could strengthen its existing strong position in the market for hotel online travel agencies by expanding its activity to another market, the market for flight online travel agencies, which was seen as an important acquisition channel for hotel online travel agencies. To enhance legal certainty for merging companies, the Commission is invited to clarify in the NHMG in which cases it is likely to apply this new theory and how it fits in the NHMG with the traditional analysis of conglomerate effects.

C.3.c What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the potential reduction of the companies' ability and incentives to innovate post-merger? Please explain in particular whether metrics such as patent portfolio (patents' share and citations), R&D spending, R&D staff and contribution to industry standards can be relevant, and whether metrics should apply at firm level or market level.

Text of 1 to 5000 characters will be accepted

In the APDC's view, the current guidelines do not provide sufficient guidance on the analytical framework of innovation-driven mergers, thus failing to provide undertakings with an appropriate level of legal certainty. The introduction of qualitative and quantitative evidence and metrics in the merger guidelines, alongside traditional tools and metrics (i.e. internal documents, third-party opinions, industry benchmarks, overlaps in pipeline products etc.), should be relied upon when assessing the effects of such mergers and would greatly contribute to the legal certainty to which the Commission is bound to contribute. The APDC considers that the relevance of each metric / evidence should be assessed on a case-by-case basis, based on the information provided by the parties and third-party sources including sector authorities. Any other way would risk failing to capture all possible scenarios. Particular focus could be put on the following (non-exhaustive) metrics: •R&D input: R&D investments of a company can provide useful insights into a company's innovation strength and importance, though it does not automatically translate into a guaranteed number of new products. oFirm Level: The amount of money each party spends on R&D (% of turnover). Post-merger reductions in R&D spending can signal decreased innovation efforts. oMarket Level: Overall R&D spending in the market. A significant reduction post-merger can indicate a broader impact on industry innovation. •R&D staff: oFirm level: Number of qualified employees dedicated to R&D activities. Changes in R&D staffing levels post-merger can reflect shifts in innovation priorities. oMarket level: Total number of R&D staff in the industry. A decline can suggest reduced innovation capacity across the market. •R&D output: Can provide an indication of a company's innovative strength and the firms' capabilities to develop and bring new offerings on a large scale in the market based on their past performance: oNumber of active patents, subsequent patents, pending patent applications, product launches and pipeline projects. Example: In Dow/DuPont, the Commission calculated the number of patents adjusted by their quality. The quality was itself measured by the number of citations accumulated in subsequent patents (COMP/M.7932 of 27 March 2017, Dow/DuPont, § 389). oNumber of patent citations as a proxy for innovation quality and technological leadership. oOn-going and past clinical trials for the pharmaceutical sector. •Previous historic developments / Contribution to industry standards: oFirm Level: Involvement of the merging parties in setting industry standards. Active participation can indicate leadership in innovation. oMarket Level: Overall contribution to industry standards by all firms. A reduction in contributions post-merger can signal a negative impact on innovation. •History and research plans: Have the companies revealed successful attempts to bring new products into the market? Calls for reviewing intellectual property and R&D dynamics (both past and present). •Market demand and growth potential: Growth forecasts. •Time to market: Average development cycles and speed of commercialization of new products. •Access to Data: Volume and uniqueness of user data controlled, particularly in digital or AI-related markets. •Venture Capital and Start-up Acquisition Activity: Level of acquisition of early-stage innovative firms by the acquirer, with a distinction between private equity transaction and industrial M&A. •Market shares: Market shares of the companies with regards to the same existing contract products or contract technologies. When pipeline products are involved (though not yet competing in the market), the Commission could consider elements such as projections of market shares which could either be present in the companies' business plans or be estimated using history of the companies' successful attempts to bring innovations into markets, or estimates based on other reliable market information, including expenditure on research and development. Importantly the revised guidelines shall take into account that not all merger scenarios fit into a single template. For instance, when a buyer dominant in one market acquires a target to position itself against a large incumbent in another market, the competitive impact and innovation dynamics may differ. As illustrated by the hypothetical example of Amazon acquiring a promising European social network to compete with Meta's Instagram, the strategic intent behind such transactions must be rigorously analysed. A merger may be blocked if it is intended to pre-empt future competition but should in principle be cleared if it enhances rivalry and facilitates entry. [End of response under C4 below]

C.4 In what circumstances can mergers negatively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger will likely harm investment?

Text of 1 to 5000 characters will be accepted

[Continuation of response to C3] 220. In addition, it should be taken into account that, as an alternative to a merger, the parties may consider licensing a product, which would fall under the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU). However, such a licensing arrangement is often less attractive from an economic standpoint compared to a straightforward acquisition of the company. Therefore, the underlying economic rationale—without which the transaction would not take place—should be considered by the European Commission when assessing the transaction.

C.5 How should the Commission account for the incentives to invest and innovate post-merger depending on the specific market features? Please explain which market characteristics are relevant and should be considered when assessing the companies' incentives to invest and innovate. Please also explain the type of investments and the type or location of assets that can give rise to efficiencies.

Text of 1 to 5000 characters will be accepted

The Commission explains in its current HMG that "it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers". The Commission requires that efficiencies must be "substantiated" and "are likely to enhance the ability and incentive of the merged entity to act pro-competitively". In practice, the Commission requires that any such efficiencies i) benefit consumers, ii) are merger-specific, and iii) are verifiable. The Commission only considers efficiencies pro-competitive if these benefit customers in the specific market(s) in which it has identified competition concerns. In relation to innovation, the HMG provides that "Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation. A joint venture company set up in order to develop a new product may bring about the type of efficiencies that the Commission can take into account" (Horizontal Merger Guidelines, § 81). The assessment of possible efficiencies related to innovation and investment remains a relevant, yet highly challenging, aspect of merger control. Innovation is widely acknowledged as a key driver of economic progress; yet approaches for analysing innovation-related efficiencies are insufficiently developed by the Commission case law. To date, the standard of proof required to substantiate efficiency claims is extremely stringent. Because innovation benefits are, by their nature, highly speculative and difficult to quantify ex ante, they are rarely taken into account in merger assessments. The current prevailing approach favours short-term, price-based efficiencies, which can be easily demonstrated to the detriment of dynamic or qualitative efficiencies. As a result, the current analytical grid prevents a practical and meaningful recognition of innovation-driven benefits, and non-price or forward-looking claims are not given adequate consideration. In practice, the inherent uncertainty and long development cycles associated with R&D projects is hardly reconcilable with the criteria currently applied by the Commission to accept efficiency claims. There is also an inconsistency between the fact that increasingly longer timeframes are considered when analyzing the potential negative effects of a merger, while at the same time efficiencies are dismissed on the grounds that they are too remote in time. Against this background, first, the new merger guidelines should provide further guidance on the type of efficiencies that it considers relevant in innovation driven mergers. The APDC has identified various potential efficiencies which may arise in different cases. One, the Commission could consider (i) economies of scale (In the Aurubis/Metallo decision (see footnote n°9) the Commission accepted that greater scale post-merger could enable more cost-effective R&D, reflecting a more constructive recognition of potential innovation synergies. The parties submitted that the transaction would improve quality of metal scrap recovery by combining the parties' know-how and technologies. The Commission accepted this. However, it rejected R&D related efficiencies On the basis that i) the party gaining access to IP/know-how could develop an alternative independently ii) the parties could have reached a licensing agreement, iii) the parties provided insufficient evidence as to what innovation might occur, iv) elimination of duplicative research efforts may hurt consumer choice, and v) there would be a lack of passing-on of innovation to consumers) (to achieve lower per-unit development costs, which can in turn lead to improved innovative output, costs savings and efficiencies allowing the merged entity to allocate more resources to additional investments), (ii) synergies, which can result in the acceleration of innovation cycles by enhancing research performance regardless of changes in R&D inputs, and (iii) technology transfers and asset complementarity, as a single firm controlling complementary assets can lead to optimal investment levels and increase incremental innovation because the acquired firm internalizes the acquiring firm's higher value from innovation and can eliminate double marginalization, resulting in lower prices, higher demand and increased revenue. Merging overlapping lines of research can also help rationalise R&D by eliminating unnecessary duplication, while consolidating parallel innovation streams may enhance project viability. [End of response under C6a below]

C.6 In what circumstances can the elimination of a (small) but particularly innovative player with a large competitive potential (e.g., in the case of nascent and emerging market or rapidly developing sectors) harm competition?

Text of 1 to 5000 characters will be accepted

The Commission has traditionally considered that the elimination of a (small) but particularly innovative player with a large competitive potential can, under certain circumstances, strengthen an existing dominant position and therefore damage a whole ecosystem. Although the framework for examining the unilateral effects of a nascent acquisition is not radically different from that of any other merger (i.e., evaluating the merged entity's incentive and ability to raise prices or reduce quality and innovation), acquisitions targeting innovative players with promising innovation pipelines can raise specific questions about potential loss of innovation. In practice, an in-depth analysis of the parties' incentives is essential to assess whether the merger actually creates a potential risk of discontinuation of innovation efforts by the acquiring firm. First, the updated guidelines should provide clarity on the appropriate counterfactual in such scenarios, as well as on the type of evidence to consider when assessing whether a nascent acquisition could eliminate a credible potential competitor (i.e. strategic intent, competitive landscape, market structure and dynamics). While the current emphasis appears to be on immediate competitive constraints and innovation loss, the analysis should also account for the long-term impacts on dynamic competition. Second, the guidelines should, as mentioned in question C.5., provide a new analytic grid focused on qualitative efficiencies and synergies merging parties might present in the context of a nascent acquisition (i.e. the prospect of a merger can induce potential target firms to differentiate their products from the acquirer's products to better satisfy consumer's preferences for broader product choice, economies of scale, combination of complementary lines of research or product lines, etc.). As mentioned above, smaller firms facing active takeovers have greater incentives to invest in R&D, as they stand to benefit from the takeover; the possibility of a future acquisition by a major player serves as an appealing exit strategy, thereby fostering early-stage investment (E. Djik, J.L. Moraga-Gonzalez and E. Motchenkova, “How do start-up acquisitions affect the direction of innovation?”, Vol. 72, No. 1, 2024, The Journal of Industrial Economics), which should be reflected in the updated guidelines.

C.6.a How should the Commission account for the ability and incentives of nascent innovative companies to scale up when assessing the impact of a merger on competition?

Text of 1 to 5000 characters will be accepted

[End of response to C5] Two, the Commission could further consider financial constraints, as mergers can provide access to the acquirer's internal funds and boost innovation by reducing the target's cost of investing, while smaller firms with variable and uncertain cash flows usually tend to reduce investments in innovation. In this respect, small firms sometimes need the prospect of a future acquisition to bring their product to life, because they lack the necessary financial resources to complete a development on their own. Small firms can therefore have greater incentives to invest in R&D when facing an active takeover market, as they will benefit from the acquisition. In the specific case of nascent firms, the prospect of a future acquisition by a major player can catalyse innovation within the start-up community, as it signals an attractive exit strategy and encourages early-stage investment (E. Djik, J.L. Moraga-Gonzalez and E. Motchenkova, “How do start-up acquisitions affect the direction of innovation?”, Vol. 72, No. 1, 2024, The Journal of Industrial Economics). Three, it is essential to consider the importance of scale - particularly in markets where entry barriers are high and where competition is for the market rather than merely in the market. For example, in sectors with strong network effects or where large data volumes are crucial, meaningful entry may only be achieved through a two-stage strategy: building a user base in an adjacent market before launching new services. Four, in relatively concentrated markets, the removal of a competitor through a merger can actually strengthen incentives for non-merging firms to invest and innovate, as the potential rewards of innovation increase when fewer rivals remain to erode returns through imitation. Second, the lack of analytical framework in the current Guidelines for innovation efficiencies complicates the assessment for all stakeholders. It is important that clear guidelines be set out in the revised merger guidelines, both to promote the effective integration of innovation into merger analysis and to ensure predictability for market participants. In conclusion, even though the Commission already acknowledges the significance of efficiencies related to innovation and investment, these benefits are rarely credited in practice due to the prevailing standards of evidentiary rigor. Moving forward, a more pragmatic and forward-looking analytical framework is required, integrating the unpredictability inherent to innovation. Only then will merger control both preserve competition and foster long-term investment in innovative capacity. Other incentives that could be given consideration by the commission also include optimal project selection, enhanced market position, enhanced market reach and even increased innovation and investment in technological fields with low levels of pre-merger innovation activity. In relation to efficiencies, the APDC thus recommends that the new merger guidelines: • Clarify that innovation gains qualify as efficiencies even when realized over a medium-to long-term horizon; • Lower the evidentiary threshold for assessing innovation synergies, especially in dynamic markets; • Provide guidance on acceptable forms of evidence for innovation-related efficiencies; • Develop a balancing test between innovation harm and innovation-related efficiencies. [Response to C.6.a] See question C.6. above.

C.6.b What theory/theories of harm could the Commission consider (i.e. that would impede a company's scaling up post-merger, e.g. due to the downgrading or discontinuation of its activities - so called "killer acquisition"; or that would erect barriers to entry and expansion or entrench a dominant position preventing other nascent competitors to scale-up)?

Text of 1 to 5000 characters will be accepted

See question C.6. above.

C.6.c Under which conditions could this/these theory/theories of harm materialise?

Text of 1 to 5000 characters will be accepted

See question C.6. above.

C.6.d What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the potential reduction of the nascent innovative companies' ability and incentives to scale-up post-merger? Please consider the evidence and metrics for assessment of innovation in different industries, for instance pharma, digital and tech etc.

Text of 1 to 5000 characters will be accepted

See question C.3.c. above.

C.7 In what circumstances can mergers positively impact the ability and incentives of the merged company to innovate? Based on which evidence and metrics can the Commission conclude that a merger advances innovation? Please distinguish between mergers creating or strengthening market power and those that do not, as relevant.

Text of 1 to 5000 characters will be accepted

See question C.3. above.

C.7.a What elements, evidence and metrics can the Commission consider when balancing the potential positive benefits and spillovers of enhanced R&D capabilities against the potentially anticompetitive effects of a merger?

Text of 1 to 5000 characters will be accepted

See question C.3.c. above.

C.8 In what circumstances can mergers positively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger advances investment? Please distinguish between mergers creating or strengthening market power and those that do not, as relevant.

Text of 1 to 5000 characters will be accepted

See question C.3. above.

On benefits of mergers on investment and innovation, including linked to scale, please refer to Topic A on Competitiveness and resilience.

Elimination of potential competition and potential entry as a countervailing factor

C.9 In what circumstances can the elimination of a potential competitor (that is likely to enter the market in a near future or already exert competitive constraints even if not in the market) harm competition?

Text of 1 to 5000 characters will be accepted

C.9.a How should the Commission assess competition risks linked to situations where a merger eliminates a potential competitor, i.e., the target is likely to enter in a foreseeable future and become a competitor, or despite not yet being in the market already exerts competitive constraints due to its capabilities to enter? What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

The frameworks for assessing potential competition as part of the competitive assessment are outlined in the HMG and NHMG. On horizontal concentrations more specifically, the APDC highlights the asymmetric approach towards potential competition, as the Commission applies different frameworks between the elimination of a potential competitor as a theory of harm on the one hand, and future entry of a potential competitor as a countervailing power on the other hand. Therefore, the APDC recommends revising both frameworks to align with decisional practice and to address the information asymmetry between the Commission and the notifying parties. The APDC is of the view that the Commission should harmonize the timeframe used to assess potential competition in both contexts of the elimination of a potential competitor and the evaluation of potential entry as a countervailing factor. To achieve this, the Commission should determine - on a case-by-case and sector-specific basis through market testing - the most appropriate timeframe for a given industry / market segment and clarify the meaning of "foreseeable future". This timeframe should then be used regardless of whether it is applied to the merging parties or third parties. Such a unified approach would enhance legal certainty, ensure analytical consistency, and support a more balanced assessment of competitive dynamics. Under the current framework, the elimination of a potential competitor is assessed based on whether the target already exerts a significant constraining influence or is likely to become an effective competitive force (HMG, §§58-60). In its assessment, the Commission applies a relatively flexible and extended timeframe, which may span over several years, depending on the likelihood of entry and the nature of the assets held by the potential entrant. In Dow/Dupont for instance, the Commission stated that the assessment of potential competition should take into account pipeline products with a significant likelihood of being launched on the market in six to eight years (case M.7932 Dow/Dupont, §302). Similarly, in Bayer/Monsento, in assessing pipeline-to-pipeline competition, the Commission concluded that "the assessment of innovation competition takes into account traits in discovery or in early development, where market launch is less certain and further away in time" (case M. 8084 Bayer/Monsento, §60). By contrast, when evaluating potential entry as a countervailing factor, the Commission applies a more rigid standard. Entry must be shown to be likely, timely, and sufficient to deter or defeat any anti-competitive effects of the merger (HMG, §68). In particular, the Commission specifies that the “timeliness” criterion is generally satisfied only if entry occurs within two years (ibid., §74). This divergence may lead to analytical inconsistencies, particularly in concentrated or innovation-driven markets where credible entry may require longer lead times. For example, in Ineos/ Solvay/JV, the Commission assessed "whether Bayer could [...] start producing sodium hypochlorite within a time-frame of two years." In response to the market investigation, Bayer stated that "the high investment and the lead times needed between the eventual decision of the board and the production of the first volumes (more than 24 months due to the administrative and regulatory requirements and construction time involved), make that the issue is completely outside Bayer's current medium term planning." (case M.6905 Ineos/ Solvay/ JV, §1277). Similarly, in Cargotec/Konecranes, while the market investigation showed that it takes approximately five years for straddle and shuttle carriers to be developed and thus for a potential entrant to become a credible supplier, the Commission still applied its strict two-years' timeframe (case M.10078 Cargotec / Konecranes, §§1060, 1066). The APDC contests the Commission's view that "the time periods considered may be different when the potential entrant is one of the merging Parties compared to the situation where a third party entry may be considered as a constraining factor on the merged entity’s market power. As such, the two-year period referred to in the HMG as the normal threshold relates to situations where the Commission has to assess whether entry by a third party would be sufficiently swift and sustained to deter or defeat the exercise of market power by the merged entity." (case M. 7801 Wabtec/Faiveley Transport, §§111, 172). This discrepancy in temporal standards creates an asymmetry in the treatment of potential competition: the timeframe is more permissive when used to support a theory of harm than when used to rebut it.

C.9.b Under which conditions could this theory/these theories of harm occur? In particular, (a) do the conditions for the elimination of potential competition vary depending on whether the potential competitor is threatening to enter into (i) a new product market or (ii) a new geographic market, and (b) can the first leg of the legal test as described at paragraph 60 of the HMG (the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force) be fulfilled by the mere threat of potential competition, whether real or perceived by the incumbent? Which factual elements would be required for such finding?

Text of 1 to 5000 characters will be accepted

As a preliminary remark, the APDC considers that the doctrine of potential competition should be applied solely in highly concentrated markets, where the risk of eliminating future competitive pressure is most acute. In fact, in highly concentrated markets, the number of active competitors is limited, and actual competition may be weak or ineffective. In such markets, even the threat of entry - whether actual or perceived - can exert a meaningful disciplinary effect on incumbent firms. First, as outlined by the Commission, potential competition can be assessed in situations where (i) the undertakings are active on the same, although geographically distinct, product market ("geographic potential competition") (see case M. 8677 Siemens/Alstom) and (ii) they are present on different product markets, while active in the same geographical market ("product potential competition") (see, e.g., Adobe/Figma) (footnote 44 on §60 of the Consultation on Topic C). In the APDC's opinion, the conditions and standard of proof under which the elimination of potential competition may give rise to a theory of harm should not vary depending on whether the potential entrant is targeting a new product or geographic market. In fact, and as detailed below, in both cases, the Commission should assess whether the potential entrant to the market (either product or geographic) is a credible potential competitor, based on a case-by-case and sector-specific approach and taking into account actual and perceived potential competition indicators, including, inter alia, concrete and developed entry plans. Second, and as detailed below, the APDC recommends that the Commission adopt a more structured and balanced approach to potential competition than paragraph 60 of HMG, applying both actual and perceived potential competition doctrines, with a primarily focus on actual potential competition, and grounding its analysis in robust factual evidence, particularly concrete and developed entry plans within a sector-specific approach. The first prong of the legal test under paragraph 60 of the HMG requires that the potential competitor either (i) already exerts a significant constraining influence or (ii) is significantly likely to grow into an effective competitive force. We note that based on its decisional practice, the Commission distinguishes between two concepts: (i) perceived potential competition ("PPC"), where the potential competitor, albeit not yet active in the market, already constrains the competitive behaviour of the incumbent firms, and (ii) actual potential competition ("APC"), where the potential competitor is significantly likely to grow into an effective competitor to the incumbent firms through future entry (case M.11033 Adobe/Figma, Competition merger brief n°2/2024, Commission, p.4). Although the HMG cites both concepts as alternative ways to satisfy the first prong of the test, they have been used cumulatively by the Commission. For example, in the contemplated Adobe/Figma acquisition eventually dropped in 2023, the Commission applied both PPC and APC assessments (Adobe/Figma, Competition merger brief n°2/2024, p.4). The APDC is of the view that the Commission should rely on both APC and PPC when assessing potential competition by one of the merging parties, with a primarily focus on APC, as PPC alone is insufficient to establish a viable long-term constraint. In fact, the disciplining effect of perceived entry is inherently time-bound: if the potential entry does not materialize within a reasonable timeframe, incumbents currently adapting their behaviour due to perceived market entry are likely to revert to their original conduct. In other words, current competition could be impacted by the perceived threat of entry, but the effect is not indefinite and could indeed be short lived. Therefore, the Commission must consider the likelihood of entry as a first indicator, before considering the incumbents' perception of the competition threats. US authorities and courts are primarily relying on APC doctrine, as shown by 2023 U.S. Merger Guidelines which newly define APC and PPC doctrines (US Merger Guidelines, 2023, pp. 11-12). A notable illustration is the Meta/Within case, where the federal court conducted a comprehensive analysis of whether Meta qualified as a potential competitor to Within, a developer of virtual reality ("VR") fitness apps (Order denying FTC's challenge in Meta / Within deal, US District Court for the Northern District of California). While its assessment under the APC framework was thorough and extensive, by incorporating both objective and subjective evidence (ibid., pp. 39-60), it briefly addressed the question of PPC (ibid., pp. 60-64). [End of response under C.10.c below]

C.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the competition risks linked to the elimination of potential competition?

Text of 1 to 5000 characters will be accepted

To support a theory of harm of elimination of potential (or nascent) competition, the Commission should rely on documentary evidence, such as internal documents by the parties, and extensive market feedback, to establish whether a certain pipeline product / concrete entry plans would have any realistic chance of succeeding in the absence of the merger. The Commission, should - to the extent feasible - assess the probability (and timeframe) of realistic market entry and success of such market entry in the absence of the merger. Under the US Merger Guidelines, to determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition, the agencies examine (i) whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (ii) whether such entry offered a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects. The agencies' starting point for assessment is looking at objective evidence regarding the firm's available feasible means of entry, including its capabilities and incentives. Relevant objective evidence include, for example, evidence (i) that the firm has sufficient size and resources to enter; (ii) of any advantages that would make the firm well-situated to enter; (iii) that the firm has successfully expanded into similarly situated markets in the past or already participates in adjacent or related markets; (iv) that the firm has an incentive to enter; or (v) that industry participants recognize the company as a potential entrant (US Merger Guidelines, 2023, page 12). In the Meta/Within case, while looking at objective evidence to consider whether it was reasonably probable that Meta would have entered the VR dedicated fitness app market de novo if it was not able to acquire Within, the court found that Meta lacked (i) the capability to create fitness and workout content, a necessity for any fitness product or market and (ii) the necessary studio production capabilities to create and film VR workouts. It further found that Meta had no incentive to enter the relevant market because it is not clear from the evidence that Meta’s readily apparent excitement about fitness as a core VR use case would necessarily translate to an intent to build its own dedicated fitness app market if it could enter by acquisition. The court ultimately concluded “that Meta did not have the available feasible means to enter the relevant market other than by acquisition.” In considering the subjective evidence, the court gave little weight to the testimony of executives and relied more on contemporaneous statements in their documents. (Order denying FTC's challenge in Meta / Within deal, US District Court for the Northern District of California, pages 43-49; Article FTC Loses Challenge to Meta-Within Deal, but Court Accepts Viability of Potential Competition Theories, Paul Weiss, 2023).

C.10 How should the Commission assess situations where the presence of a potential competitor (i.e., a company likely to enter in a foreseeable future and become a competitor of sufficient scope or magnitude) will exert sufficient competitive constraints to countervail the merging parties’ market power?

Text of 1 to 5000 characters will be accepted

The APDC is of the view that the Commission should depart from its rigid tripartite framework of verifiable, quantifiable and timely (HMG, §68) and align its standard of proof with the recommended potential competition theory of harm one detailed in response to question C.9.b. above. In fact, the Commission should treat potential competition harm and efficiencies in a similar manner by applying the same evidentiary threshold. In addition, the revised guidelines should address the asymmetry of information by clarifying that the Commission will use its investigation tools equally to situations of establishing potential competition by a merging party and by a third party. Given the asymmetry of investigative powers - where the Commission has access to market information and enforcement tools, while the parties do not - the APDC considers that merging parties may be expected to provide preliminary evidence, such as their internal assessments or perceptions of competitive threats. However, it is ultimately for the Commission to substantiate the existence and relevance of countervailing entry through objective evidence, applying the same level of scrutiny as it does when establishing a potential competition theory of harm.

C.10.a Under which conditions could this countervailing factor be sufficient? Please explain in particular how the likelihood, timeliness and sufficiency of such entry should be assessed, and based on which evidence and metrics.

Text of 1 to 5000 characters will be accepted

As a preliminary remark, and as already mentioned above, the Commission's current decisional practice reveals an asymmetry in the treatment of potential competition depending on whether it is invoked as a theory of harm or as a countervailing factor, which discrepancy undermines analytical coherence and legal certainty. Therefore, the APDC considers that the same standard of proof must be applied. To that end, the Commission should (i) establish the finding of a potential competitor as a countervailing power on a case-by-case and sector-specific basis, (ii) considering both actual and perceived potential competition doctrines, (iii) applying similar likelihood, timeframe and sufficiency indicators as to the theory of harm assessment, and (iv) taking into consideration objective evidence such as concrete and developed entry plans, as well as subjective factors evidencing the incumbents' perceptions of the competition threats. More specifically, the APDC considers that two asymmetrical aspects should be notably taken into account in the revised guidelines. First, and as stated in response to question C.9.a., the Commission should harmonize the standard of proof, particularly in relation to timeframe. In fact, pursuant to paragraph 74 of the HMG, when examining timeliness of entry as a countervailing power, the Commission assesses whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power, specifying that "entry is normally only considered timely if it occur within two years." In Western Digital Irland/Viviti Technologies, the Commission considered that a timeframe of two and a half years was "uncertain" to be considered as sufficiently swift for entering a market to credibly deter or defeat the exercise of market power by the merged entity (case M.6203 Western Digital Irland/Viviti Technologies, §§664-668). In Cargotec/Konecranes, the Commission considered that potential competitors' entry in three and five years' timeframes were unlikely to be a source of sufficient competitive constraints in a timely manner (case M.10078 Cargotec/Konecranes, §§1091, 1093, 1095, 1096, 1100, 1128). The APDC notes, from the decisional practice, that the two years criterion was generally applied in a strictly manner by considering that "potential entry [...] not expected to occur within the next two years [...] would thus not be timely" (case M.5611 Agilent/Varian, §116. See also case M.8947 Nidec/Whirlpool (Embraco business), §251 and case M.6796 Aegean/ Olympic II, §243). In contrast, the Commission applied a more flexible and extended timeframe when assessing the elimination of a potential competitor, considering for example a four to six year timeframe as a "relatively short period of time" (Wabtec/Faiveley Transport, §§111, 117, 172). Second, the Commission should depart from applying its concepts of "likelihood and "sufficiency" which are broad, vague and thus undermine legal certainty. Instead, the Commission should apply, with the same level of scrutiny, both (i) actual potential competition and (ii) perceived potential competition. The APDC would like to emphasize that the Commission should particularly consider internal documents submitted by the parties evidencing perceived potential competition. For example, the submission by merging parties of internal documents proving that a third party participated in a tender offer should be of strong probative value, and the Commission should substantiate this preliminary evidence with objective evidence such as RFIs to the relevant third parties and market participants.

C.10.b What are the elements, including evidence and metrics, that the Commission could use to alleviate the competition risks due to the existence of potential competition?

Text of 1 to 5000 characters will be accepted

To alleviate the risks associated with potential competition, the APDC identifies several types of evidence and tools that the Commission should rely on. First, the Commission should consider concrete and verifiable evidence. To assess the credibility of the merging party as a potential competitor, the Commission may rely on (i) internal documents from the merging parties or third parties (e.g., business plans, strategic presentations, investment decisions) proving the existence of intent or capacity to enter the market; (ii) responses to RFIs from customers, competitors, and other market participants; and (iii) market tests results proving whether the merging party would effectively exert significant competitive pressure. To demonstrate the presence of other credible potential entrants able to countervail competition risks, the Commission may consider (i) concrete and developed entry plans from third parties showing imminence and likelihood of market entry; and (ii) strategic documents or investment signals from third parties indicating readiness to compete effectively. Second, the Commission should also take into account perceptions and strategic behaviours reflecting the market's view of the potential entrant. This includes (i) internal perceptions of market participants regarding the likelihood and impact of entry by the potential competitor; and (ii) strategic reactions by incumbents, such as the absence of pricing responses, innovation efforts, or defensive investments, which may indicate whether the potential entrant is seen as a meaningful constraint. Third, to ensure the reliability and fairness of the evidence-gathering process, the APDC recommends several procedural safeguards. This includes addressing the asymmetry of information by clarifying that the Commission will use its investigation tools equally to situations of establishing potential competition by a merging party and by a third party. The processing of third-party contributions should follow the confidentiality procedures outlined in Article 17 of the Commission's Implementation Regulation and the Best Practices on merger control proceedings (DG Competition, §§34–37). Furthermore, the Commission should make use of its legal authority to impose fines on third parties who (i) provide incorrect or misleading information in response to RFIs made by simple letter, or (ii) refuse to supply information within the required time limit in response to RFIs made by decision (Article 14(1)(b) and (c) of Regulation 139/2004). These enforcement tools should be used to secure the necessary evidence to assess the credibility and impact of potential competition.

C.10.c Should the conditions for entry as a countervailing factor be the same as the conditions for the elimination of a potential competitor as a theory of harm?

Text of 1 to 5000 characters will be accepted

[End of response to C.9.b] To establish an APC finding, the Commission should rely on objective evidence, and more specifically on concrete and developed entry plans. To this regards, the APDC does not share the Commission's view that "the finding of potential entry does not require the existence of concrete or extensively developed entry plans" (Adobe/Figma, Competition merger brief n°2/2024, p.4). In fact, the APDC would like to recall that the HMG themselves state that in order to prove the first prong of the legal test, "evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion" (HMG, §60) and that "the Commission's assessment of potential competition must be based on objective evidence rather than mere theoretical possibilities" (Adobe/Figma, Competition merger brief n°2 /2024, p.4). Other objective evidence such as (i) internal documents from the parties, (ii) market tests and (iii) RFIs from customers and competitors should be taken into account. To prove PPC, subjective evidence should be relevant such as (i) market participants' internal perceptions of the potential entrant and (ii) strategic reactions by incumbents to the threat of entry. As regards pipeline products more specifically, the APDC is of opinion that early-stage pipeline products should not be considered credible potential competitors in the absence of concrete plans to enter, as this should be addressed on a sector-specific basis. In fact, in some sectors, the time between early development and market entry is short and the success rate is relatively high—making it more reasonable to consider early-stage pipelines. However, in other sectors such as pharmaceuticals, the development timeline is long and the failure rate is substantial: more than 80% of early-stage pipeline products do not reach the market. For example, products in Phase I of pharmaceutical development (i.e., start of clinical testing on humans) takes approx. eight to ten years to be marketed, and statistically, such product would have no more than 10% chance of success (Dow/Dupont, §289 citing case M. 1846 Glaxo Wellcome/Smithkline Beecham, §70). Therefore, in the APDC's view, Phase I pipeline products in the pharmaceutical sector should not be considered potential competitors if they have no sufficient advanced plans for market entry, as the uncertainty surrounding development, regulatory approval, and commercialization is too high to justify their inclusion as credible future constraints. While the Commission's decisional practice appears to increasingly consider early-stage pipelines (Phase I and II) as potential competitors through the evolution of its framework, from its innovation theory of harm (see cases M. 7275 Novartis/GSK's oncology business, §§112, 113 and M.8401 Johnson & Johnson/Actelion, §§11, 36 in the pharmaceutical sector) to a more formal and stable four-layer competitive assessment (see Dow/Dupon; Bayer/Monsanto in the agricultural sector; cases M. 10165 AstraZeneca/Alexion Pharmaceuticals, §12 and M.9294 BMS/Celgene, §22, in the pharmaceutical sector), this approach risks overstating the competitive significance of products that may never reach the market. The Commission even went further by assessing an overlap involving a drug in preclinical stage, i.e., before Phase I – human clinical trials (BMS/Celgene, §78). The APDC would like to recall that at this very early stage, the indication and therapeutic use of the pipeline may not even be determined. Taking into account early-stage pipelines without concrete entry plans as potential competitors could give rise to a situation in which the Commission may act to protect a competition which would never materialize. The APDC therefore advocates for a sector-specific and case-by-case approach when considering early-stage pipeline products as potential competitor, with a prerequisite to show a concrete and developed entry plan. [Response to C.10.c] See response to question C.9.a., b. and C.10.a. and b. Yes, the APDC considers that the conditions for assessing entry as a countervailing factor should be the same as those applied to the elimination of a potential competitor. Applying different standards - particularly regarding timeframe and evidentiary thresholds - creates analytical inconsistencies and undermines legal certainty. A harmonized, case-by-case and sector-specific approach would ensure a more balanced and coherent merger assessment framework of potential competition.

Counterfactual and failing firm defence

C.11 How should the Commission consider the pre-merger situation in the counterfactual assessment, i.e. when assessing what would have been the situation prevailing absent the merger? In particular, how should the Commission treat companies' decisions, including cooperation agreements, or market developments after the announcement of the deal that may have been influenced by the deal's perspective, and could already be merger-specific?

Text of 1 to 5000 characters will be accepted

First, the APDC would like to emphasize at the outset that the analysis of the counterfactual situation is an important step in assessing the effects of the merger on competition and that, consequently, the determination of the precise counterfactual framework is of decisive importance. This determination is eminently a case-by-case assessment. According to the CJEU's case law, the assessment of whether a concentration gives rise to a significant impediment to effective competition pursuant to Article 2 EUMR is a prospective analysis which requires envisaging "various chains of cause and effect with a view to ascertaining which of them are the most likely" (case C-12/03, Tetra Laval, §43). From this perspective, the APDC considers that it cannot be assumed that the situation prevailing in the absence of the merger should exclude, as a matter of principle, cooperation agreements or market developments subsequent to an announcement of a transaction on the grounds that they would be necessarily influenced by the merger and could be merger specific. In the APDC's view such an approach would be incompatible with the EUMR standstill obligation and the prohibition of early implementation, even partial, of the transaction before its notification and clearance by the Commission. During the review process, the parties must operate their business as usual. Consequently, as a matter of principle, such cooperation agreements and market developments should not be merger-related and therefore be taken into consideration in the counterfactual assessment unless there is clear evidence that they are merger driven. In this respect, the parallel drawn by the Commission in footnote 57 of the Topic description between, on the one hand, excluding of the counterfactual scenario agreements concluded "in tempore suspecto" and, on the other hand, discarding evidence prepared after the opening of infringement proceedings (such as witness statements) is ineffective. Unlike witness statements, which are made on the spot, most agreements require serious preliminary thinking and negotiations which may have been initiated well before or independently of the transaction and may or may not be affected by the deal's perspective. Second, with respect more specifically to innovation, the counterfactual assessment should factor in parties' long-term investments and capacities to innovate pre- and post-merger. As explained in response to question C3, several mechanisms can, in some cases, result in a merger increasing the incentive to innovate and benefiting customers, even if it creates a near-monopoly. Forward-looking economic analyses of the effect of a merger on innovation take greater account of the dynamic dimension than those focusing on "traditional" effects on prices: (i) Extended time horizons: unlike traditional price analyses, the assessment may cover periods of 5 to 10 years. In Dow/Dupont for instance, the Commission concluded that the assessment should take into account active ingredients with a significant likelihood of being launched on the market in 6 to 8 years (case COMP/M.7932, §302). Similarly, in Bayer /Monsanto, the Commission considered that "the assessment of innovation competition takes into account traits in discovery or in early development, where market launch is less certain and further away in time" (case COMP /M.8084, §60); (ii) Dynamic modeling: use of econometric models that incorporate development trajectories and changing incentives; (iii) Exogenous drivers for innovation such as the prospect of being acquired by a big established company at a later stage, the evolving nature and increasing complexity of the product concerned or changing regulatory requirements. In Aurubis/Metallo for instance, the Commission considered that innovation in the copper scrap refining industry was "to a large extent driven not by competition between refiners but by the dynamic evolvement of the copper scrap supply and the changing regulatory landscape" (case COMP/M.9409, §780); (iv) Future innovation/investments scenarios: in Bayer/Monsanto, the Commission considered different scenarios for the evolution of digitally enabled agronomic prescriptions (case COMP/M. 8084, §§2612 et seq.). Similarly, in EDF/Segebel, the Commission envisaged 4 counterfactual scenarios to assess EDF's project to develop two sites in Belgium for the construction of combined cycle gas turbine generation units, which had been initiated prior to the merger but the final investment decision had not been taken yet (case COMP/M.5549, §§43-44-71). It results from all the above that the counterfactual must be assessed on a case-by-case basis and is not necessarily the pre-merger status quo, especially for mergers involving significant innovation or requiring heavy investments.

C.12 What constitutes the right counterfactual for the Commission where crises, such as the COVID 19 pandemic, wars, or trade measures may have led to short-term shocks of potential temporary rather than permanent nature?

Text of 1 to 5000 characters will be accepted

Although a prospective analysis may be particularly challenging when there is uncertainty as to how markets will respond to the crisis and which of the numerous counterfactual scenarios would be the most credible, the APDC is of opinion that such a crisis cannot be ruled out from the counterfactual analysis on the grounds that it is anticipated to be temporary and short-term. In fact, it is impossible to predict with certainty that the consequences of a crisis will be temporary. Only time and hindsight allow to grasp the implications and provide a clearer view of where the market is heading following a crisis. Moreover, whether in the case of COVID-19 or the war in Ukraine, the facts have shown that these crises are long-lasting and have long-term structural effects. Concerning COVID-19, the Commission acknowledged it for instance in case COMP/M.9677 (§105 "the Commission acknowledges the scale and importance of the very serious disruptions the COVID crisis created in the automotive industry as well as the printing industry, and estimates that in all likelihood this crisis may indeed have lasting consequences in these industries"). As indicated in response to question C11, the counterfactual scenario is determined on the basis of a detailed case-by-case analysis. On the basis of information to be provided by the parties, who are required to build their business plans in an uncertain environment, and the information available to national or sectoral authorities, it would be possible for the Commission to construct a plausible counterfactual scenario or, as the case may be, several alternative scenarios. In such a context, maintaining the capacity of companies to innovate and invest is crucial and should be factored in in the counterfactual assessment. Consequently, the Commission may approve transactions that would otherwise not be cleared where notably the crisis undermines the target's capacity to innovate.

C.12.a Please explain in particular under which circumstances and conditions such events should be considered structural and based on which evidence.

Text of 1 to 5000 characters will be accepted

There should not be a predefined set of circumstances or conditions under which the effects of crises may be considered structural. Crises, by their nature, are unpredictable and unprecedented in both timing and form. History demonstrates that no two crises are alike: the 2008 global financial crisis, the COVID-19 pandemic, and the energy and inflation shocks following the war in Ukraine, each present fundamentally different causes, dynamics, and economic impacts. While the 2008 financial crisis primarily affected the banking sector, the COVID-19 pandemic affected a diverse range of industries such as the travel, hospitality, arts and brick-and-mortar retail sectors and the Ukraine war disrupted energy-intensive industries in the first place. The relevant factors for assessing the impact of such events depend not only on the event itself but also on the sector concerned. Some sectors may not be affected, others may be affected for a short period only, or, on the contrary, may be resilient in the short term and collapse in the medium to long term. Accordingly, any attempt to define in advance which crisis effects are deemed “structural” would risk either failing to capture the relevant impact of future shocks or unduly constraining the Commission’s flexibility in responding to novel circumstances which are difficult to predict today. As explained in the answers to questions C11 and C12, the effects of these events must be analysed on a case-by-case basis, based on the information provided by the parties and third-party sources including sector authorities. Several factors, such as the scale of the event in terms of the impact on the economy, its systemic nature or not, the degree of reversibility, the anticipated timeframe for returning to the pre-event situation if relevant, whether the merging parties will be disproportionately affected compared to their competitors, etc., should be taken into consideration.

C.13 What should be the right counterfactual in cases of acquisitions of firms in financial difficulties?

Text of 1 to 5000 characters will be accepted

The APDC considers that the right counterfactual should not be limited to the Failing Firm Defense but should correspond to the Flailing Firm Defense, which refers to situations where a merging party may not exit the market entirely, but its future ability to compete will nonetheless decline such that its present market power does not accurately reflect its competitive capacity in particular in terms of capacity to invest and innovate. Long-term effects on competition should therefore be taken into account. A transaction involving a flailing firm might foster a considerably better competitive situation compared to a similar transaction completed only after one of the parties is about to exit the market. The Olympic/Aegean example provides an interesting perspective in this regard. The Commission first prohibited the transaction in January 2011, while the parties had claimed that “in view of a prospective analysis they carried out, the pre-transaction situation is unlikely to be sustainable in the near future” and that “at least one of the two airlines would exit all of the routes where they had overlapping activities” (case COMP/M.5830, §379). The Commission admitted that it was “particularly difficult to undertake a prospective analysis of the likely development of the market with a view to establishing a counterfactual” and considered it “reasonable and prudent to base the competitive assessment of a proposed merger on the current competitive conditions” (§§380-381), eventually prohibiting the transaction. Yet, in October 2013, the Commission cleared the same acquisition under the failing firm defence, highlighting notably that Olympic had not once been profitable since 2009 (COMP/M.6796, §669), i.e., 2 years before the prohibition decision. As a result, Aegean Airlines acquired a significantly less performing company pursuing downsizing efforts and staff cuts, which could probably have to some extent been avoided. Applying the Flailing Firm Defense in the first place would have allowed Aegean Airlines to acquire a better performing firm, possibly avoiding subsequent downsizing and staff cuts and saving significant administrative burden on both the parties’ and the Commission’ s sides. In such a situation, the Commission must approve a merger if competition would deteriorate to at least the same extent in the absence of the merger. The Commission has already applied such a counterfactual analysis to approve a merger either that did not meet all the conditions of the Failing Firm Defense (see for instance case COMP/M.6360, Nynas/Shell/Harburg Refinery, §525) or where the target’s ability to compete aggressively was impaired, even if it was not expected to exit the market. In KLM/Martinair, the Commission considered that Martinair’s specific situation (i.e., the loss-making nature of its long-haul passenger business, the need to restructure it to make it sustainable and Martinair’s difficulty to raise finance for this purpose) made it likely that the competitive constraint exerted by Martinair would be eroded in the foreseeable future (case COMP/M.5141, §§163-175). In T-Mobile NL/Tele2 NL, the Commission examined two scenarios envisaging Tele2 NL's maintaining on the market or its exit, which it considered less likely (case COMP/M.8792, §488). Still, the Commission concluded that Tele2 NL could not be considered an important competitive force, notably given that its competitive strength would likely deteriorate (case COMP/M.8792, §443). A similar reasoning could have been applied in the first place in the Olympic/Aegean case.

C.13.a Under which conditions should a failing firm defence be accepted? In particular, what factors should the Commission take into consideration to assess whether the acquisition of a failing firm /exiting assets would bring any efficiencies or otherwise counterbalance the market power brought by the concentration?

Text of 1 to 5000 characters will be accepted

The APDC considers that this should be applicable in situations where the target firm is not in imminent danger of insolvency but is unlikely, in the future, to represent a significant competitive constraint due to its financial or economic weakness. Particular focus should be put on the assessment of the improvement post-transaction of the acquired firm's access to capital, capacity to invest and scale, exposure to risk associated with long-term innovation. In this respect, the financial difficulties have to be serious and durable, adversely affecting the long-term competitiveness, that can be addressed by the merger in the less restrictive way.

C.13.b Absent a failing firm defence, how may financial difficulties of the target impact the Commission's assessment of the company's competitive constraints going forward and based on which evidence, in particular where alternative buyers exist or may have existed before the announcement of the acquisition at a time where the financial situation was not yet critical, or where the firm in financial difficulties is owned, at least in part, by public entities that may have an interest in keeping the relevant firm afloat?

Text of 1 to 5000 characters will be accepted

See response to question C.13.

C.14 What should be the right counterfactual in cases of acquisitions of firms in declining markets where there is clear evidence that the market size or total demand in a market is shrinking on a permanent basis (e.g. due to technological changes or a lasting shift in consumer behaviour)?

Text of 1 to 5000 characters will be accepted

In such a situation, a dynamic analysis of the anticipated market development must be taken into account in the counterfactual analysis, since the pre-transaction market positions cannot, in principle, be representative of the merging parties' competitive capacity. In such market conditions, the ability to invest and the incentive to innovate also decline, as companies are unable to recoup their financing due to the decreasing number of opportunities. Therefore, mergers between competitors may improve the competitive environment, particularly if the merger enables the merging parties to invest in the long term and innovate in order to meet the challenges of technological changes and better respond to consumer's needs and expectations.

Type and quality of evidence on future market developments

C.15 According to the Court of Justice, the further into the future the effects of a merger are likely to materialise, the more persuasive and stronger the supporting evidence should be.[58] Please explain whether you would consider justified to counterbalance the higher level of uncertainty related to the assessment of more distant future market developments also with a more significant impact of the expected effects.

[58] Judgment of 15 February 2005, Commission v. Tetra Laval, C-12/03 P, EU:C:2005:87, para. 44. See also judgment of 13 July 2023, Commission v CK Telecoms UK Investments, C-376/20 P, EU:C:2023:561, paras. 76-77.

Text of 1 to 5000 characters will be accepted

This questions touches upon two different elements: (i) the likelihood of certain market developments and their associated effects happening (which typically decreases the more forward-looking the assessment becomes) and (ii) the magnitude of the expected effects of these developments on the market. The APDC considers that any effect should be sufficiently likely to materialize and sufficiently significant to be taken into account in the Commission's assessment: the Commission cannot assert innovation theories of harm on the basis of speculative developments, irrespective of their potential impact on the market should they ultimately materialize. In other words, as per the case law of the Court of Justice, the greater uncertainty inherently associated with a more distant development should be counterbalance by more persuasive and stronger evidence, rather than by the assertion of the magnitude of the potential effects.

C.16 How far in the future should the Commission look at when assessing the impact of a merger on competition (e.g., whether companies will invest or innovate post-merger, or whether prices will increase because of the merger)? How and under what circumstances should the Commission’s assessment consider long investment cycles in a given industry?

Text of 1 to 5000 characters will be accepted

The timeframe over which the Commission assesses potential effects of a merger should be determined on a case-by-case basis, taking account of the specific industry (e.g., price variations over time, investment cycles) and evidence (e.g. internal documents). Long investment cycles in a given industry should be considered in light of the fact that where the typical period between early stage R&D and the successful commercialisation of products that result from that R&D is particularly long, there is a correspondingly greater probability that (i) the parties' innovation efforts may fail and/or (ii) there will be other game-changing innovations by third parties that render the merging parties’ innovation efforts redundant. The general premise should be that the potential effects are assessed within a timeframe that is sufficiently short to limit uncertainty about new market entrants, innovative breakthroughs, impact of geopolitical events (e.g. tariffs, supply chain disruptions), etc.

C.17 How should the Commission’s assessment take into account systemic trends and developments unrelated to the merger (e.g., technological developments such as AI, critical or strategic nature of technologies) that may (indirectly) impact the relevant product market and thus the competitive assessment within that market? Please explain how forward-looking the Commission can be and based on which evidence and metrics.

Text of 1 to 5000 characters will be accepted

Such market and industry trends are relevant to the overall assessment of the effect of a merger and should be taken into account based on the likelihood of such trends to materialise in the foreseeable future depending on the strength, reliability and quality of evidence in line with responses to questions C15 and C16.

Topic D: Sustainability & clean technologies

A description and technical background for this topic is included below. The same text can also be found [here](). Questions on this topic are included after the text.

Topic Description

67. The transition to a clean and sustainable economy is one of today's key societal challenges. The EU's ambition of becoming the first climate neutral continent is vital for the future of our planet and for generations to come. The Commission has presented a **Clean Industrial Deal** for competitiveness and decarbonisation in the EU, a business plan bringing together climate action and competitiveness under one overarching growth strategy for Europe's economy.[59] As businesses across Europe strive to adjust to the clean transition, it is crucial to accompany decarbonisation efforts by supporting the investment in innovative clean tech and decarbonised production processes, stimulating a circular economy to extend the lifespan of resources, fostering the resilience of supply chains, and facilitating the access to affordable energy.

68. In this context, merger control has a role to play in allowing procompetitive mergers that have the potential to deliver on and/or support these objectives, while ensuring that **mergers bearing negative effects on competition and clean innovation, also impacting sustainability goals**, do not materialise.

69. In particular, **some mergers may be harmful to the clean transition or hamper climate and sustainability objectives**. That may be the case when, for example, an incumbent acquires a disrupting innovator offering a green product to slow it down or cannibalise it ('green killer acquisitions'), or when a merger has a chilling effect on competition, **reducing incentives to invest and innovate in green products or clean and decarbonised technologies**. Mergers between companies present at different levels of the supply chain may also have a negative impact, for instance when they remove or reduce access to products or services that are less carbon or energy intensive (including key green technologies and materials, such as batteries, renewable components, and recycling infrastructure), generate less waste, or require less raw materials, negatively impacting the affordability of sustainable products or green technologies.

70. To the contrary, other **mergers may support climate and sustainability objectives** and the clean transition and have a positive impact on clean innovation, for example on the deployment of cleaner/greener technologies or manufacturing processes that are in line with the EU Taxonomy and the Do No Significant Harm principle.[60] Mergers can provide companies the leverage needed to invest in the decarbonisation of their activities, cleaner products and technologies, and more energy-efficient solutions and infrastructure. **Verti cal integration** may also enhance the circular use of raw or recycled materials and allow companies to adopt a more innovative, efficient and clean resource management across larger segments of the supply chain. Some mergers may also generate sustainability benefits, that, in some instances, including in terms of innovative clean technologies, could offset negative effects on competition ('green efficiencies'). At the same time, a careful assessment will be necessary to avoid greenwashing attempts and to ensure that claimed benefits materialise post-merger. Mergers should not make 'clean' products or services, related for example to renewable energy, sustainable waste management and recycling, resource-efficient (digital) solutions, electric vehicles etc., less affordable or inaccessible to businesses and citizens.

71. More generally, the clean transition is resulting in the emergence of **new demand and supply patterns and is having a transformative effect on the economy**. Customer preferences for sustainable and green tech products are driving companies' incentives to invest and innovate in clean solutions, which, in turn, could amount to a competitive advantage for innovating companies.

72. While merger control primarily aims at preserving competition, the **growing interplay between competition, innovation and sustainability** considerations across industries and the benefits they could unlock for businesses and citizens should trigger a reflection on merger control's contribution to European sustainability objectives. In this regard, the methodology and parameters to be included in the competitive assessment to take due account of sustainability considerations, as well as the quantification and verification of 'green' incentives and efficiencies, will be key questions.

Technical background

73. In the context of merger control, the Commission may consider environmental and sustainability concerns as long as they are linked to the competitive dynamics and market realities at play.[61] In fact, competitive markets support and often go hand-in-hand with green tech efforts to invest and innovate. Consequently, in the past few years, the Commission has increasingly taken into account sustainability aspects, in various forms and at various stages of its merger review, from market definition[62] to the assessment of the potential effects arising out of the relevant merger.

74. In the Commission's recent case practice, sustainability considerations have played a role, in the context of horizontal mergers, as a **non-price parameter of competition**, e.g., where firms' offerings differ based on customers' preferences for recycled products or the use of green technologies;[63] in the assessment of whether the parties to the transaction are **close competitors**, which can be the case, e.g., when the merging firms are both innovators on cleaner or more sustainable products or in green technologies;[64] or in the assessment of whether one of the merging parties is an **important competitive force**.[65] In these settings, the Commission has to rely on different types of evidence to assess, for instance, whether the acquisition by a leading player of a smaller key competitor offering cleaner technology at competitive prices is a potential opportunity to extend the sustainability benefits of the technology, or could result in a total or partial 'killer' acquisition, i.e. to make them less competitive to preserve the larger company's role. As part of this assessment, the Commission has developed new metrics to quantify and illustrate differentiation among low-carbon offerings, calculating shares of saved CO2 emissions, representing how many emissions a supplier saved compared to the EEA average carbon emissions by producing low-carbon solutions (using renewable energy or relying on recycled inputs).[66]

75. Sustainability considerations may also be part of the **theories of harm** related to the loss of 'clean' R&D and **'green innovation'** competition. In one case, the Commission assessed a theory of harm based on the fact that the combination of two important innovators would likely result in a **decrease of innovation incentives** in the field of crop protection products, where innovation is key to deliver new products which are better suited to avoid potentially *'harmful consequences (…) for the environment'*.[67] In another recent case, the Commission assessed how certain innovative vessel technologies, including those allowing for lower fuel consumption and lower emissions, could represent **barriers to entry** or expansion.[68] In the market for

concrete admixtures, the Commission found that product innovation had grown in importance due to the transitioning to a clean and circular construction industry, and that the combination of two powerful innovators could cause competitive harm.[69]

76. The Commission has also dealt with sustainability-related market shifts in the context of non-horizontal mergers. The potential of the **circular economy** to drive cleaner and more competitive sourcing of inputs also resulted in a tendency to vertically integrate, as companies try to secure key inputs or recycling capabilities. While such transactions can enhance efficiency and competitiveness, to the benefit of consumers, they could also result in market power at key junctures of the supply chain, reducing access by other companies to key assets in a circular economy, ultimately leading to overall worse outcomes. In such cases, the Commission accepted remedies that preserved access to key 'circular' inputs for the market at large.[70]

77. Finally, sustainability may also be relevant in the assessment of whether the potential anticompetitive harm of a merger may be offset by **efficiencies** resulting from it. Positive effects resulting from a merger may compensate the anticompetitive harm if they benefit consumers, are merger-specific, and are verifiable.[71] Under the Horizontal Merger Guidelines ("HMG"), efficiencies should in principle occur within the markets where competition concerns are found. As discussed in more detail in Topic F on Efficiencies, the Commission has assessed efficiencies related to innovative green products and technologies, but thus far, there have been no cases where the Commission has accepted 'green efficiencies' and no specific guidance is currently provided in the current HMG on such efficiencies.[72]/[73]

[59] The Clean Industrial Deal aims at turning decarbonisation into a driver of growth for European industries, focusing on the transition to a low-carbon economy and increased demand in the clean-tech sector, as well as strengthening the circular economy in particular for critical raw materials. See Communication from the Commission 'The Clean Industrial Deal: a joint roadmap for competitiveness and decarbonisation', February 2025. This is also acknowledged in, e.g., Mario Draghi's report 'The future of European competitiveness', September 2024: 'Decarbonisation must happen for the sake of our planet. But for it to also become a source of growth for Europe, we will need a joint plan'.

[60] The EU Taxonomy is a classification system establishing a list of environmentally sustainable economic activities, to facilitate sustainable investment (see Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, pp. 13–43).

[61] The Commission cannot intervene solely on public policy grounds unrelated to competition (see, e.g., reasoning included in case M.8084 – Bayer / Monsanto, Section XIV: Non-Competition Concerns).

[62] By way of example, recent cases have shown shifts in demand patterns triggered, for instance, by regulation requiring the production and marketing of cleaner end-products (in case M.9076 – Novelis / Aleris, the Commission found that regulatory requirements for CO2 emission reduction for cars and the fact that lighter vehicles mean lower emissions increased demand by car manufacturers for aluminium – instead of steel – body sheets) or by consumer preferences (in M.10047 – Schwarz Group / Suez Waste Management Companies, environmental costs were a relevant parameter for the assessment of geographic market definition for the sorting of lightweight packaging in the Netherlands, as customers try to avoid transports over long distances to minimise the ensuing CO2 emissions). For further aspects relating to market definition, see the Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/165.

[63] Customers' preferences for recycled (aluminium) products played a role in cases M.10658 – Norsk Hydro / Alumetal and M.10702 – KPS Capital Partners / Real Alloy Europe. See also case M.10047 – Schwarz Group / Suez Waste Management Companies for customers' valuation of recycling.

[64] Cases M.9343 – Hyundai Heavy Industries / Daewoo Shipbuilding & Marine Engineering, M.10560 – Sika / MBCC, M.7278 – GE / Alstom, and M.10078 – Cargotech / Konecranes, paragraph 1416.

[65] Case M.10658 – Norsk Hydro / Alumetal, section 9.1.3.3.7.

[66] Case M.10658 – Norsk Hydro / Alumetal, section 9.1.3.3.7. The Commission based its analysis on 'saved emission' shares representing how many emissions a supplier has saved by producing aluminium foundry alloys with a carbon footprint lower than the EEA average.

[67] See case M.7932 – Dow / DuPont, paragraph 1980.

[68] Case M.9343 – Hyundai Heavy Industries / Daewoo Shipbuilding & Marine Engineering.

[69] Case M.10560 – Sika / MBCC.

[70] In case M.10702 – KPS Capital Partners / Real Alloy Europe, the Commission's investigation showed that the parties would be able to restrict access to recycled aluminium, as well as dross and salt slag recycling services post-transaction. To remedy the concerns, KPS offered to divest some of Real Alloy's facilities active in recycled aluminium production, dross recycling, and salt slag recycling. In case M.10249 – Derichebourg / Groupe Ecore, the Commission's investigation showed that, post-transaction, the parties would have had a strong market position and faced limited competitive constraints in the markets for the collection and recycling of metal scrap, as well as the recycling of electrical and electronic equipment scrap, among others. To remedy the concerns, Derichebourg offered, among others, to divest four recycling plants in France.

[71] HMG, paragraph 78.

[72] For example, a merger may result in improved quality products, generate less waste, require the use of less raw materials, or lead to the development of new technologies, green products, and other green innovations.

[73] In case M.9490 – Aurubis / Metallo, concerning access to copper scrap in Europe, the Commission considered that there was at least a possibility that one of the alleged efficiencies advanced by the merging parties, concerning a better valorisation of copper scrap through the combination of the parties' complementary know-how and technologies, would materialise. If that was the case, i.e., if such efficiencies were to materialise to a significant extent, the Commission further concluded that they would at least partly be passed-on to customers, thus potentially partly offsetting any adverse price effect stemming from the transaction.

Questions

D.1 In your/your client's view, do the current Guidelines provide clear, correct, and comprehensive guidance on how merger control reflects the transition to a climate neutral, clean, and sustainable economy with clean and resource-efficient technologies and solutions?

- ○ Yes, fully
- ○ Yes, to some extent
- ◉ No, to an insufficient extent
- ○ Not at all
- ○ I do not know

D.1.a Please explain which provisions of the current Guidelines (if any) do not adequately reflect the evolutions linked to the transition to a climate neutral, clean, and sustainable economy.

Text of 1 to 5000 characters will be accepted

The APDC considers that the Guidelines do not sufficiently reflect the legal, economic, and policy developments linked to the European Union's transition towards a climate-neutral, clean, and sustainable economy While certain existing provisions in the current Guidelines may be interpreted to accommodate sustainability considerations, they were not designed with such issues in mind and thus lack the clarity and structure needed to ensure consistent application. In particular, APDC notes that several concepts - including: (i) the treatment of dynamic market characteristics (HMG, para. 15); (ii) the analysis of closeness of competition (HMG, paras. 17, 28–30); (iii) the role of maverick firms and the elimination of competitive constraints (HMG, paras. 20, 37–38; NHMG, para. 85); (iv) the assessment of barriers to entry (HMG, paras. 71–73; NHMG, paras. 49, 74–75); and

(v) the evaluation of efficiencies (HMG, paras. 76–88; NHMG, paras. 52–57) - could be relevant in the context of sustainability-driven transactions. However, these references remain too general and do not incorporate the Commission's emerging decisional practice or policy in relation to climate and environmental objectives. They also do not provide any specific guidance on how sustainability-related factors - such as innovation in clean technologies, environmental resilience, or alignment with regulatory trajectories - will be assessed under the current legal framework. In the absence of such guidance, undertakings face legal uncertainty when evaluating how potential sustainability benefits or risks may influence the Commission's competitive assessment. This uncertainty is particularly acute in markets where environmental considerations are driving structural changes, including rapid innovation, regulatory disruption, or shifts in consumer demand.

D.2 In your/your client's view, should the revised Guidelines better reflect the evolutions linked to the transition to a climate neutral, clean, and sustainable economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should address.

You can tick more than one reply, below.

- [x] a. Sustainability as a parameter of competition
- [x] b. Ability and incentives to innovate in clean and decarbonised products, technologies and services
- [x] c. Risks of discontinuation of or reduced innovation in clean and decarbonised products, technologies and services
- [ ] d. The revised Guidelines should not reflect any of these areas
- [ ] e. Other

D.3 How should the Commission factor in sustainability as a parameter of competition in its assessment of a merger's effects? In particular, please explain in which circumstances and based on which metrics (e.g., shares of saved CO_2 emissions) and evidence the Commission could consider the development of sustainable products or services as an important parameter of competition.

Text of 1 to 5000 characters will be accepted

The APDC supports the Commission's efforts to consider sustainability as a parameter of competition where relevant. However, in line with the case law and the Commission's own position in Bayer/Monsanto (Case M. 8084, paras. 3017 ff.), the APDC recalls that the purpose of the EUMR is limited to ensuring that effective competition is not significantly impeded. Merger control is not a general-purpose policy instrument and must remain anchored in a competition-based analysis. Accordingly, sustainability should be factored into the Commission's assessment only when it constitutes a key parameter of competition in the market at issue – based on product characteristics, market structure, regulatory context, or demonstrable consumer preferences. In the APDC's view, the development of sustainable products, technologies, or services can be relevant to the competitive assessment at several stages: (i) Market definition: As recognised in the 2024 Market Definition Notice, sustainability may influence product substitutability and geographic market scope where consumer preferences or regulatory frameworks differentiate sustainable offerings. For example, consumers or procurement authorities may view "low-emissions" alternatives as imperfect substitutes for conventional products. (ii) Assessment of competition conditions: • Closeness of competition: Sustainability features (such as emissions reduction, recyclability, or energy efficiency) can help identify whether the merging parties are close competitors in markets where such factors are important to purchasing decisions. • Market power: In certain sectors, sustainability credentials can increase market power independently of market share, for instance through eligibility for green procurement, access to sustainable finance, or tax advantages aligned with the EU Taxonomy. • Barriers to entry: Sustainable innovation may require substantial up-front investment, depend on scarce inputs, or involve protected intellectual property, all of which can raise entry barriers and affect the Commission's forward-looking analysis. (iii) Theories of harm and efficiencies: As discussed in our responses to Questions D.4–D.8, sustainability may be relevant both to theories of harm (e.g., loss of innovation) and to claimed efficiencies that benefit consumers or align with EU climate goals. Metrics and evidence: The main challenge is the availability and robustness of sustainability-related indicators. There is currently no harmonised framework for measuring certain sustainability impacts (see, e.g. the work of the Science Based Targets initiative on the establishment of standards, tools and guidance to allow companies to set greenhouse gas emissions reductions targets and the Science Based Targets Network on the establishment of science-based targets to address environmental impacts across biodiversity, land, freshwater and ocean and climate). As recognised in the HMG (para. 589), it may not always be possible to conduct a purely quantitative analysis. In such cases, qualitative evidence must also be permitted. The APDC recommends that the revised Guidelines avoid prescribing an exhaustive list of metrics or methodologies. Instead, they should provide illustrative examples of acceptable evidence, such as: (i) emissions reduction data (e.g., CO_2 equivalent saved); (ii) alignment with EU Taxonomy screening criteria; (iii) reports by public bodies or academic institutions (HMG, para. 588), (iv) and merger-specific internal and external documents. The Commission should explicitly allow flexibility in evidentiary sources, including forward-looking metrics and sector-specific benchmarks. This would ensure that sustainability is meaningfully and proportionately integrated into merger control.

D.4 What type of harm to competition on the development and supply of clean and decarbonised products, technologies and services and the circular economy can a merger do? Please select the harm that you believe is relevant for mergers' assessment.

You can tick more than one reply, below.

- [x] a. Reduced ability and incentives to invest and develop clean and decarbonised products, technologies and services
- [x] b. Risks of discontinuation of clean and decarbonised products', technologies' and services' R&D
- [x] c. Foreclosure of access to critical inputs for clean and decarbonised products, technologies and services
- [x] d. Increased prices and lower quality of critical inputs for clean and decarbonised products, technologies and services
- [x] e. Foreclosure of access to clean and decarbonised products, technologies and services
- [x] f. Increased prices and lower quality of clean and decarbonised products, technologies and services
- [ ] g. Other factors (please list)

D.4.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

The APDC considers that mergers may give rise to specific risks of harm to competition in the development and supply of clean and decarbonised products, technologies, and services, as well as in the circular economy. These markets are typically innovation-driven, capital-intensive, and shaped by evolving regulatory and consumer preferences. As such, they are particularly sensitive to changes in market structure that affect firms' ability or incentive to innovate. (i) Reduced ability to innovate First, mergers can negatively affect the ability of firms to innovate in sustainability-related markets. Consolidation may weaken existing competitive constraints and reduce the number of independent innovation centres. Where firms with overlapping R&D pipelines or early-stage clean technologies combine, the likelihood of reduced parallel innovation increases. In some sectors, mergers can lead to the internal reallocation of resources away from high-risk sustainable projects, particularly if they are not immediately profitable. In addition, concentration may raise entry barriers (particularly relevant in sustainability-focused markets that require large upfront investments, specialised expertise, or access to protected intellectual property). By reducing the number of viable players, a merger may disincentivise new entrants or smaller firms from engaging in long-term sustainable innovation. These risks are especially acute in markets where innovation cycles are long or success is uncertain (e.g., hydrogen, carbon capture, circular resource use). (ii) Weakened incentives for sustainable innovation Second, mergers can reduce firms' incentives to invest in clean technologies or circular economy solutions. Competition is a key driver of innovation

– particularly where sustainability is a meaningful dimension of consumer choice or regulatory compliance. In more concentrated markets, firms may feel less pressure to differentiate on environmental performance or invest in longer-term innovation strategies. Moreover, sustainability often operates as a reputational or non-price parameter of competition. In a more concentrated market, the strategic value of corporate reputation (often linked to sustainability performance) tends to decline. Sustainability, while a critical non-price differentiator, may lose its strategic weight when firms feel less pressure to stand out. Moreover, competition often promotes transparency, which helps to prevent free-riding and supports accountability. Elinor Ostrom's theory of virtuous cooperation emphasizes that transparent and competitive environments are essential for collective commitment to sustainability. Reduced competition can erode these conditions, weakening the drivers of responsible behaviour. A relevant example is the AEB/AVR merger assessed by the Dutch Authority for Consumers and Markets. AEB (Afval Energie Bedrijf Amsterdam) and AVR (Afvalverwerking), two major Dutch waste management firms, sought to merge in a market already characterised by limited alternatives. The authority blocked the transaction, concluding that the merged entity would face weaker incentives to invest in sustainability due to its increased market power and reduced customer choice. The APDC therefore encourages the Commission to pay particular attention to innovation-related theories of harm in sustainability-driven markets. These concerns should be fully integrated into the revised Guidelines and assessed on a case-by-case basis using both quantitative and qualitative evidence, including R&D pipelines, market structure, barriers to innovation, and competitive dynamics.

D.4.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

The APDC considers that mergers can give rise to specific risks of discontinuation of R&D activities in the field of clean and decarbonised products, technologies, and services, as well as in the broader circular economy. These markets are often characterised by long innovation cycles, high R&D intensity, and growing but still nascent consumer and regulatory demand. The competitive landscape remains fragile and particularly susceptible to structural changes that alter firms' innovation strategies. (i) "Green killer acquisitions" The most salient manifestation of this risk is the so-called "green killer acquisition" - where an incumbent acquires a disruptive, sustainability-focused innovator with the result, if not the intent, of halting or deprioritising the target's R&D. This may occur where the acquired firm represents a nascent competitive threat to the incumbent's core (and potentially more carbon-intensive) business model. To date, there has not been a widely recognized or officially documented empirical case of a "green killer acquisition" in academic or regulatory literature – at least not in the same well-evidenced way that killer acquisitions in pharma or tech have been documented. This is more indicative of detection challenges than of absence of risk. The current analytical tools under the EUMR may be insufficiently tailored to detect such cases. This reinforces the need for updated guidance capable of capturing the specific innovation dynamics in sustainability-driven markets. The Norsk Hydro/Alumetal merger (Case M.10658) illustrates these concerns. While the Commission ultimately cleared the transaction unconditionally, it initially launched an in-depth investigation, citing concerns that Norsk Hydro might eliminate a growing competitor in aluminium foundry alloys – particularly in the market for advanced recycled aluminium products, which are more sustainable and cost-effective. The case highlights how sustainability-related innovation potential can be threatened even in traditional industrial sectors. (ii) Internal resource reallocation and loss of innovation diversity Beyond green killer acquisitions, mergers may also lead to the discontinuation of overlapping or parallel R&D pipelines post-transaction. Where clean technologies require long-term investment and uncertain returns, merged firms may rationalise R&D expenditures and concentrate resources on the most immediately profitable avenues. While this may be consistent with internal efficiency objectives, it reduces innovation diversity (especially problematic in early-stage green technology sectors where multiple approaches may need to be explored in parallel). Moreover, the exercise of market power post-merger may reduce firms' incentives to pursue or maintain sustainability-related R&D. In the absence of competitive pressure, firms may deprioritise riskier or longer-term projects with sustainability benefits in favour of more commercially secure ones. The loss of such innovation efforts may not be easily reversible and could set back technological progress in areas essential to achieving the Union’s climate goals. The APDC therefore encourages the Commission to explicitly recognise these risks in the revised Guidelines, including through clearer reference to innovation-based theories of harm in markets relevant to the green transition.

D.4.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

The APDC considers that mergers may significantly harm competition by foreclosing access to critical inputs essential to the development of clean and decarbonised products, technologies, and services. This concern is particularly salient in markets central to the green transition, where supply is often limited, alternatives are scarce, and demand is growing. Two recent merger cases illustrate this risk: • In KPS Capital Partners/Real Alloy Europe (Case M.10702), the Commission found that the transaction, absent remedies, could restrict access to recycled aluminium, a crucial input in circular manufacturing. The Commission concluded that the transaction could harm the circular economy by reducing availability of this input for downstream rivals. • In Aurubis/Metallo (Case M.9409), the Commission opened a Phase II investigation due to concerns that the merged entity could strengthen its buyer power in copper scrap markets (another essential input in sustainable manufacturing). The concern was that post-merger, the combined firm could reduce purchase volumes, exert downward pressure on prices, and undermine upstream incentives to invest in green recycling capacity. These are classical forms of input foreclosure or buyer power. However, in sustainability-driven markets, input foreclosure may also arise in less conventional forms that require careful consideration under a revised Guidelines. In particular, the APDC highlights the risk of structural or indirect foreclosure, where merger-related synergies in conventional (non-green) production could shift market dynamics against greener inputs. For instance, a merged entity might achieve efficiencies that make carbon-intensive processes more cost-competitive, thereby reducing demand for green alternatives. Even without explicit exclusionary conduct, this may distort input markets by making sustainable inputs less viable or attractive, especially for smaller or sustainability-focused competitors. Such foreclosure risks are compounded when green inputs are not easily substitutable. Many environmentally sustainable materials, technologies, or services rely on scarce resources, specific know-how, or underdeveloped supply chains. In these cases, the merged entity’s control over a critical input could allow it to foreclose access entirely or partially – by increasing prices, prioritising internal use, or limiting supply to rivals. This is especially problematic in early-stage markets where competition and supply diversity are still developing. Furthermore, where customer demand is not strongly responsive to sustainability criteria, non-green inputs may gain a disproportionate commercial advantage post-merger, even if greener alternatives exist. This can entrench unsustainable market structures and disincentivise innovation in green supply chains. The APDC therefore encourages the Commission to explicitly recognise these risks in the revised Guidelines. Input foreclosure theories of harm should account for the specific dynamics of sustainability-oriented inputs, including cases where competitive harm results not from exclusion, but from shifts in market structure that undermine the viability, accessibility, or attractiveness of green alternatives.

D.4.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

The APDC considers that mergers may result in higher prices and reduced quality of critical inputs essential to clean and decarbonised products, technologies, and services. These risks are particularly acute in nascent or concentrated markets where sustainable supply chains remain under development and switching options are limited. (i) Higher prices for green inputs Where mergers reduce the number of independent suppliers of green inputs (such as recycled materials, low-emission components, or clean energy inputs) they can lead to the emergence or strengthening of market power. This may enable the merged entity to raise prices unilaterally or coordinate with remaining competitors. Buyers, including manufacturers of clean technologies or providers of circular economy services, may face higher input costs with limited ability to pass them on or switch suppliers. Such effects are most pronounced where: (i) the merging parties are close competitors in input markets; (ii) input suppliers have significant bargaining power relative to downstream users; and (iii) the market for green alternatives is immature, with limited substitution possibilities. (ii) Decline in quality and innovation Mergers may also reduce competitive pressure to maintain or improve quality in critical inputs. In the absence of strong rivals, firms may deprioritise investment in product development, sustainability certifications, or technological upgrades. The resulting stagnation can have serious downstream consequences, undermining the pace and quality of green innovation across the value chain. This is particularly damaging in sustainability-driven sectors where progress depends on cumulative improvements in input quality (e.g., lighter materials, lower embodied emissions, recyclability, or durability). Weak input competition can slow or reverse gains in these areas. Therefore, the APDC encourages the Commission to clearly reflect these concerns in the revised Guidelines. Input-related theories of harm should not only consider exclusionary conduct but also encompass the risk of deterioration in price, quality, or innovation incentives in upstream markets that are essential to sustainable production. A forward-looking, market-specific assessment is critical, particularly where green inputs are scarce or substitutability is low.

D.4.e Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

In line with concerns related to input foreclosure, the APDC considers that certain mergers can also restrict access to clean and decarbonised products, technologies, and services, with potentially significant adverse effects on competition, innovation, and sustainability outcomes. Such foreclosure may occur through two main channels: (i) Foreclosure driven by market power Where a merger strengthens the market power of one or both parties, the merged entity may become a gatekeeper to essential green products or services. This dominance can facilitate exclusionary practices (such as bundling, tying, discriminatory pricing, or exclusivity arrangements) that restrict market access for competitors or downstream customers committed to environmental objectives. Even in cases where these practices are not manifestly abusive under Article 102 TFEU, the structural outcome of the merger may reduce competitors' or customers' effective access to clean alternatives, thereby suppressing demand for green products or stalling their diffusion across the market. (ii) Foreclosure through strategic substitution and cross-market effects More subtly, mergers can induce foreclosure effects even where the green and non-green offerings are not in the same relevant product market. For example, in sectors where non-sustainable and sustainable products are partial substitutes (e.g., fossil fuels vs. renewables, conventional vs. plant-based foods), a merger that increases the competitiveness of non-sustainable options (through economies of scale, vertical integration, or innovation synergies) may indirectly undermine the viability of greener alternatives. Such effects are particularly problematic in nascent or vulnerable green markets where consumer uptake remains price-sensitive and margins are thin. By consolidating resources around non-sustainable product lines and deprioritising green offerings, a merged entity may discourage investment, reduce consumer choice, and raise effective barriers to entry or expansion for more environmentally sustainable firms. The Nestlé acquisition of Garden Gourmet (2017) illustrates this concern. While the transaction raised no initial competition issues, subsequent market developments highlight the strategic risks that mergers may pose to access to green products. In 2023, Nestlé withdrew its Garden Gourmet line (plant-based meat alternatives) and Wunda (a chickpea-based dairy alternative) from the UK and Irish markets, citing a strategic focus on core activities. Although other competitors remain active, the withdrawal significantly reduced consumer access to sustainable options and illustrates how market exits by dominant players can affect green market availability post-merger. Therefore, the APDC urges the Commission to reflect such foreclosure risks in the revised Guidelines. A merger should not be considered neutral or beneficial merely because it enhances efficiency or competition in a non-green segment if, in doing so, it results in the marginalisation of cleaner alternatives. The Commission should assess not only whether access is technically preserved but also whether market dynamics post-transaction would lead to the de facto withdrawal or weakening of green products, technologies, or services.

D.4.f Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

These concerns arise from familiar competition mechanisms, but their impact is amplified by the specific economic characteristics of green markets: (i) Market power enables price and quality deterioration Where a merger leads to increased concentration or eliminates close rivals, the merged entity may obtain the ability to profitably increase prices or reduce quality or innovation without losing substantial business. This is especially likely where few substitutes exist or switching costs are high - conditions frequently observed in emerging sustainability-driven markets. (ii) Control of scarce green alternatives In some sectors, only a limited number of credible providers offer environmentally sustainable solutions. If a merged entity controls one of these scarce green alternatives, it can exert disproportionate influence over the development, pricing, and accessibility of cleaner offerings. The absence of alternative suppliers weakens buyers' countervailing power and raises the risk of excessive pricing or strategic underinvestment. (iii) Weakened innovation incentives Empirical studies and merger decisions have shown that reduced competition often leads to stagnation in innovation and quality, particularly in highly concentrated markets. The effect is more pronounced in the green economy, where firms must undertake long-term, capital-intensive investments in unproven or fast-evolving technologies. Where competitive pressure fades, incentives to sustain such efforts diminish accordingly. (iv) Marginalisation of niche or higher-quality competitors Merged firms may focus on scaling profitable product lines, potentially sidelining niche or high-quality green alternatives that do not align with post-merger synergies. This may reduce market diversity, limiting options for environmentally conscious consumers and slowing progress toward climate neutrality goals. Moreover, environmental features of a product are often complements or add-ons, not core differentiators. A merger that improves efficiency in conventional offerings (e.g., cost-cutting in fossil-based operations) could render cleaner alternatives relatively less competitive, even if these green options remain technically available. As a result, mergers may skew competitive dynamics away from sustainability, despite not directly eliminating green products. The abovementioned AEB/AVR case (2020) illustrates such risks posed by reduced competition in sustainability-relevant markets. In this case, the ACM blocked the proposed merger between AEB and AVR, two major waste management firms, finding that it would significantly restrict competition. According to the ACM, the transaction would likely lead to higher prices, lower service quality, and reduced incentives to invest in sustainable solutions. The case highlights how diminished rivalry in essential service sectors can undermine both economic efficiency and environmental objectives. The APDC therefore recommends that the revised Guidelines explicitly consider how mergers can facilitate price increases, degrade quality, and depress innovation in clean and decarbonised markets. These risks should be assessed not only in terms of static consumer harm, but also in light of long-term sustainability impacts, in line with the EU's Green Deal objectives and the broader goal of supporting competitive, clean innovation ecosystems.

D.5 How should the Commission consider the ability and incentives to invest and develop clean and decarbonised products, technologies and services in its assessment of the impact of a merger on competition?

Text of 1 to 5000 characters will be accepted

The Commission should systematically take into account the impact of a merger on the ability and incentives of the parties to invest in and develop clean and decarbonized products, technologies, and services as part of its competitive assessment. The EU has made the green transition a strategic and legal priority, most notably through the European Green Deal, the Clean Industrial Deal, and the EU Climate Law. In this context, innovation in sustainable technologies is no longer a peripheral concern – it is a core driver of industrial competitiveness and long-term market efficiency. Accordingly, merger assessments that overlook the effects on green innovation risk distorting competition by failing to capture long-term market dynamics and policy-relevant harm. The ability and incentive to invest in clean technologies can be adversely affected in several ways. For example, a merger may eliminate an emerging rival that plays an outsized role in developing green alternatives ("green killer acquisition"). Alternatively, consolidation may reduce the competitive pressure that drives investment in more sustainable offerings, particularly in markets where environmental performance is a key non-price differentiator. Mergers may also lead to internal reallocation of resources away from more risky or longer-term sustainable R&D projects, particularly where such investments do not yield immediate commercial returns. Conversely, certain mergers may strengthen the ability or incentive to innovate sustainably, for instance by enabling larger R&D investments, facilitating technological integration, or unlocking efficiencies that improve the viability of green business models. Such effects should be assessed based on evidence, not assumed. For instance, where sustainability-related efficiencies are claimed, the Commission should examine whether these are merger-specific, timely, and verifiable. The integration of sustainability considerations must remain consistent with the Commission's legal mandate. Competition enforcement should not become an instrument for industrial or environmental policy per se. However, given that EU law and policy explicitly prioritize sustainability, a merger's impact on the green transition should be viewed as a relevant dimension of competition, particularly in markets where sustainability drives consumer choice, product differentiation, or innovation trajectories. In short, assessing the ability and incentive to innovate sustainably should not be treated as a separate or exceptional consideration. It should be fully embedded in the competitive analysis - whether in relation to innovation theory of harm, potential efficiencies, or dynamic market evolution. This approach both reinforces the integrity of merger control and ensures alignment with the EU's broader economic and environmental objectives.

D.5.a Having in mind both horizontal and non-horizontal mergers, please explain in particular: What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

The Commission should consider at least five interrelated theories of harm when assessing the competitive impact of mergers on sustainable innovation and the development of clean technologies. These theories are applicable to both horizontal and non-horizontal (vertical and conglomerate) mergers. (i) Unilateral effects on green innovation: A merger may reduce the merged firm's incentives to invest in sustainable R&D. Increased market power can weaken the competitive pressure to innovate, leading to slower or narrower green product development, delays in the launch of next-generation sustainable offerings, and a decline in innovation diversity. This is particularly concerning in nascent or concentrated green technology markets. Example: The merger of two firms developing zero-emission heavy-duty vehicle platforms could result in the merged entity shelving one of the innovation pipelines, delaying the availability of critical climate-friendly transport solutions. (ii) Foreclosure effects (vertical or conglomerate mergers): Merged entities may gain the ability and incentive to foreclose rivals' access to critical sustainable inputs, technologies, or distribution channels - either fully or partially (e.g., by raising rivals' costs). Such foreclosure can undermine downstream competition, delay the diffusion of green technologies, and reduce incentives for sustainable innovation across the value chain. Example: A major energy utility acquiring a smart grid software provider could restrict third-party access to real-time data, limiting independent innovation in energy efficiency applications. (iii) Market power effects: Mergers can reinforce or create dominant positions in markets for green products or services, leading to higher prices, lower quality, or reduced availability. Reduced competition may also blunt firms' incentives to improve or differentiate their environmental offerings. Example: A merger between two leading producers of biodegradable packaging could lead to price increases and reduced availability of sustainable options, especially for smaller buyers. (iv) Dynamic competition and green killer acquisitions: A merger may harm dynamic competition by eliminating a potential or nascent green competitor – particularly relevant in fast-moving innovation markets. So-called "green killer acquisitions" can neutralize emerging threats, stalling breakthrough innovation. Example: A legacy car manufacturer acquiring a startup specializing in solar-powered vehicles primarily to suppress a disruptive alternative may significantly hinder long-term innovation in sustainable mobility. (v) Ecosystem effects and strategic bundling: In digital, energy, and consumer tech ecosystems, mergers may distort competition by bundling green and non-green products, reducing interoperability, or leveraging dominance in one market to foreclose another. These effects can slow adoption of modular, open, and interoperable sustainable solutions. Example: A platform that combines smart home software and hardware may block compatibility with third-party solar inverters, reducing consumer choice and chilling innovation in renewable energy integration. Together, these theories of harm highlight the importance of a forward-looking, innovation-sensitive approach to merger control – one that reflects not only traditional price and output effects, but also sustainability and innovation dynamics in line with EU policy goals.

D.5.b Having in mind both horizontal and non-horizontal mergers, please explain in particular: Under which conditions could this/these theory/theories of harm occur?

Text of 1 to 5000 characters will be accepted

The likelihood of harm to competition and sustainability from mergers depends on a range of structural, strategic, and market-specific factors. The following conditions (non-exhaustive and context-dependent) help identify when the theories of harm outlined above are most likely to materialize. In some cases, a single factor may be sufficient to raise concern. Unilateral effects on green innovation: This theory of harm may arise where: • The merging parties are close competitors in sustainable innovation or R&D. • One of the parties is a first mover, challenger, or disruptive innovator in clean technologies or business models. • The merger combines strong incumbents with overlapping innovation trajectories, leading to the deprioritization of greener but commercially riskier or less mature product lines. • Innovation incentives are weakened due to reduced pressure to differentiate, especially in markets where green characteristics are an emerging or non-price dimension of competition. Foreclosure effects (vertical or conglomerate mergers): Foreclosure concerns are more likely where: • The merged entity gains control over essential inputs, infrastructures, platforms, IP, or data critical to green innovation or the rollout of sustainable solutions. • These assets are scarce, non-replicable, or highly specialised, and cannot be readily accessed by rivals. • The merged firm has the ability and incentive to restrict or degrade access to rivals, thereby undermining competition in downstream or adjacent sustainable markets. Market power effects: This theory of harm becomes more salient when: • The market is already concentrated, and the merger would significantly reduce competitive constraints. • There are structural barriers to entry, particularly affecting new or smaller players focused on sustainable alternatives. • Green substitutes are few or underdeveloped, and customers have limited supply-side options. • The merger results in a firm with the ability to raise prices, reduce output or degrade quality in sustainable product markets without facing effective discipline. Dynamic competition effects: Risks to longer-term innovation may occur where: • The merger involves a nascent or potential green competitor with realistic prospects of becoming a significant rival. • The transaction reduces forward-looking rivalry or disrupts the trajectory of emerging sustainable technologies. • High R&D costs, scale economies, and long innovation cycles make market re-entry or replacement of lost innovation difficult. Ecosystem effects: These effects are particularly relevant when: • The parties operate across adjacent or vertically related sustainable markets with strong interoperability requirements. • The merged entity is capable of bundling, tying, or technically restricting access to essential systems (e.g., through proprietary standards or closed architectures). • The firm can use dominance in one market to distort competition in another, especially in digital, data-intensive, or modular technology ecosystems where openness is key to sustainable innovation. Recognizing these conditions will help the revised Guidelines ensure that merger control supports (and not undermines) competitive sustainability and the EU's broader decarbonization objectives.

D.5.c Having in mind both horizontal and non-horizontal mergers, please explain in particular: What are the elements, including evidence and metrics, that the Commission could use to assess the competition risks beyond a foreclosure conduct?

Text of 1 to 5000 characters will be accepted

To assess mergers involving sustainability-related markets, the Commission should consider a broader range of competition risks beyond foreclosure, particularly those affecting innovation, quality, and long-term market dynamics. The following elements may be relevant: Market structure and rivalry: The Commission should assess concentration levels (e.g., HHI), the presence of active or emerging green competitors, and barriers to entry (particularly where green innovation depends on access to infrastructure, standards, or regulatory approvals). Innovation capacity and pipeline: Evidence such as R&D intensity, green patent portfolios, and ongoing pipeline projects can help assess the merger's impact on innovation incentives. Past innovation performance and engagement in sustainability-focused partnerships or consortia are also relevant. Strategic intent: Internal documents, R&D roadmaps, and post-merger plans may reveal a risk of deprioritizing or shelving green innovation. Past conduct, including acquisitions of green disruptors, may signal risks of "green killer acquisitions."

D.6 What are the competitive benefits, related to clean and decarbonised products, technologies and services, and the circular economy, that a merger can generate? Please select the advantages that you believe are relevant for supporting the climate and clean transition.

You can tick more than one reply, below.

- [x] a. Vertical integration involving critical inputs
- [x] b. Better access to, or better purchase conditions of, critical inputs through new contracts
- [x] c. Combination of complementary R&D capabilities and staff
- [x] d. Access to new know-how and patents
- [ ] e. Other factors (please list)

D.6.a Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Vertical integration involving critical inputs is a notable competitive benefit that a merger can generate, particularly in the context of sustainability, clean technologies, and the circular economy, for the main reasons set out below. (i) Enhanced coordination and information sharing across the supply chain. Mergers that result in vertical integration allow companies to better coordinate activities across various stages of the supply chain. This enables a strategic advantage in deploying sustainable practices and clean technologies. Data and information are critical inputs in the development and supply of clean and decarbonized products and services. Through vertical integration, merged entities can share data more effectively, facilitating better transport coordination, promoting resource reuse, and reducing overall waste. This holistic approach improves operational efficiency while supporting decarbonization goals and circular economy principles. Furthermore, integrating supply chain stages allows companies to align logistics, eliminate inefficiencies, and ensure consistent application of sustainability standards. The ability to control and manage each step in the chain ensures that environmental practices are not isolated but embedded systemically across the value chain. (i) Improved control, traceability, and local implementation. Another significant benefit is increased visibility and control over production and distribution processes. This enables companies to embed sustainability and circularity throughout their operations (ensuring traceability, efficient resource use, and the transfer of innovation and best practices). Vertical integration allows companies to make sustainability a systemic standard rather than a fragmented effort. Additionally, it enables investment in localized infrastructure. Local operations not only reduce carbon footprints and strengthen resource efficiency but also improve supply chain resilience. Local vertical integration further supports access to traditional or artisanal inputs, which can be crucial for developing innovative and genuinely sustainable products. By preserving and scaling local craftsmanship through integrated operations, companies can both uphold cultural value and expand the reach of clean technologies. For example, in the textile industry, vertical integration has proven key to securing high-quality materials while ensuring traceability, environmental stewardship, and social responsibility from raw material to finished product. (iii) Facilitation of industrial symbiosis and shared infrastructure. Vertical integration also facilitates industrial symbiosis – a circular ecosystem in which the by-products or waste of one process become inputs for another. This form of circular industrial cooperation promotes resource efficiency, reduces environmental impacts, and creates cost savings. Even on a smaller scale, vertical integration supports shared infrastructure, which can improve access to sustainable inputs and lower production costs. A relevant example is the Philips/Osram case (case IV/34.252), where the Commission highlighted the sustainability benefits of shared facilities. The merger enabled the companies to reduce emissions and air pollution through more efficient resource and infrastructure use, underscoring the potential of vertical integration to enhance circular economy outcomes.

D.6.b Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers in the clean and decarbonized technologies sector, as well as within the circular economy, can generate a range of competitive advantages. Among these, improved access to critical inputs – such as raw materials, specialized services, and innovative technologies – plays a key role. These benefits arise through mechanisms such as increased scale, enhanced bargaining power, and geographic expansion. (i) Enhanced scale and access to new contracts Mergers allow firms to increase their overall activity, scale, and market presence. This expansion often opens doors to new contracts and supplier relationships that were previously inaccessible to individual firms. A larger, combined entity is more attractive to partners and suppliers due to its increased operational capacity and financial strength. This scaling up not only improves purchasing power (through higher volumes and more diversified demand) but also enhances the visibility and credibility of the merged firm. This stronger market position can be critical in gaining access to critical inputs, particularly in sectors where suppliers prioritize reliability and long-term partnerships. A relevant example is the Marubeni / NAP / FMG / AquaGreen merger case (case M.11691). Marubeni, NAP, and FMG (major trading and investment companies) acquired AquaGreen, a cleantech engineering firm specializing in wastewater sludge treatment and biomass conversion technologies. This merger enabled AquaGreen to expand its operations, scale production, and access significant new contracts, making its technologies more widely available and commercially viable. (ii) Improved bargaining power Mergers can also result in significantly stronger bargaining positions. Larger firms typically hold more sway in negotiations with suppliers, who may offer better terms (such as discounted prices, priority access, or favourable payment schedules) to retain or expand business with a more influential client. This advantage is especially valuable in markets for rare or strategically important inputs required for clean technologies (e.g., critical raw materials or proprietary recycling solutions). (iii) Geographic expansion and local sourcing opportunities Mergers frequently allow firms to expand into new geographic regions, granting access to location-specific inputs such as regionally concentrated raw materials, specialized labour, or regulatory incentives. Local presence can also facilitate closer relationships with suppliers and stakeholders, improve logistical efficiency, and enhance resilience in the supply chain. In the context of the circular economy, localized operations can be particularly advantageous, enabling proximity-based resource recovery, recycling, and re-use strategies.

D.6.c Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers can play a transformative role in advancing sustainability by enhancing the development of clean and decarbonized products, technologies, and services. A key benefit lies in the combination of complementary R&D capabilities and staff, which can lead to meaningful innovation. This synergy contributes to greater competitiveness in sustainability-focused sectors and aligns with circular economy principles. (i) Enhanced knowledge integration and data synergies Merging entities gain access to each other’s proprietary data, research insights, and technical know-how, which improves the efficiency and direction of R&D efforts. Combining data systems and knowledge bases enables: • Better identification of technological challenges and sustainability opportunities; • Improved use of complementary skills and expertise; and • Accelerated innovation through coordinated and informed decision-making. In clean technology sectors, such synergies can be game-changing, enabling firms to reduce waste, optimize energy use, and improve environmental performance across the product lifecycle. (ii) Complementary expertise and innovation diversity Mergers (whether horizontal or vertical) bring together companies that may have: • Developed different but complementary R&D approaches; • Specialized in distinct yet synergistic fields (e.g., materials science vs. industrial applications). This diversity fosters cross-pollination of ideas, enabling merged firms to bridge knowledge gaps and develop innovative, sustainable solutions that neither could have achieved alone. For instance, combining a firm's deep expertise in environmental engineering with another's strength in high-performance materials may lead to the creation of novel, sustainable products. (iii) Greater financial and organizational capacity Post-merger, firms generally enjoy expanded financial and resource capacity, which is especially beneficial for sustainability-focused R&D since it: • Enables larger, riskier, and more ambitious projects in clean tech; • Reduces the financial burden of early-stage research in low-carbon or circular solutions; and • Encourages investment in R&D projects that may have been secondary to the core business. Given that sustainability features are often not the primary market driver, increased capacity and willingness to invest in such innovation is critical. (iv) Access to geographic and institutional strengths Each region may offer distinct advantages – such as specialized research institutions, local raw materials, skilled labor, or regulatory frameworks that encourage sustainable innovation. A merged entity can leverage these localized strengths by combining them. Cross-border or cross-regional mergers provide access to location-specific R&D capabilities, including: • Specialized research institutions and universities; • Local raw materials and energy sources; • Skilled labour and favourable regulatory environments. This geographic reach enhances competitive agility and helps adapt sustainable innovations to different markets and environments, including local markets, accelerating global progress toward decarbonization and circularity goals.

D.6.d Please provide concrete examples and underlying data.

Text of 1 to 5000 characters will be accepted

Mergers can facilitate access to new know-how and patents in various ways. (i) Access to new know-how and expertise Mergers can unlock access to critical know-how by combining complementary capabilities of the merging firms. When each party brings distinct expertise (such as one firm specializing in sustainable or circular practices and the other in conventional manufacturing) the resulting combination can enhance innovation in clean and decarbonized technologies.This pooling of know-how facilitates: • Cross-learning and integration of green expertise into larger industrial processes; • Technology diffusion, where more advanced firms transfer sustainable methods and skills to their counterparts; • Upscaling of traditional or local sustainable practices, allowing previously niche solutions to enter and compete in broader markets. For example, a firm experienced in circular economy practices may bring localized, low-impact production methods that, post-merger, can be scaled and standardized across a larger operation - enhancing competition in green products and services. (ii) Access to and consolidation of patents Mergers also enable the integration of complementary patent portfolios. This can: • Facilitate the broader application of proprietary sustainable technologies across more products and services; • Avoid duplication of R&D efforts and instead accelerate innovation through shared intellectual property; and • Enable the development of integrated clean technologies by combining patented solutions from each firm. The sharing of critical IP fosters more dynamic and competitive innovation in decarbonized solutions, making the merged entity a stronger market player with a wider technological reach. (iii) Creation of R&D synergies As noted above, mergers can generate powerful R&D synergies by combining financial and technical resources. These synergies support: • Joint development of new circular, clean, and low-emission technologies. • Standardization of sustainable practices and behaviours across the merged organization. • Reinforcement of a virtuous innovation cycle, where existing green technologies stimulate further R&D and knowledge creation. By aligning R&D priorities and capabilities, merged firms can increase both the pace and scope The German merger case Miba/Zoller illustrates these benefits. The German Competition Authority approved the merger citing significant positive environmental externalities. Specifically, the merger was seen as preserving critical know-how and innovation capacity related to clean energy and sustainable technologies. It exemplifies how mergers can not only preserve but enhance green innovation ecosystems, particularly when environmental objectives align with competitive dynamics.

D.7 How should the Commission assess the benefits that mergers can bring to the transition to a climate neutral, clean, and sustainable economy, and verify that those are not mere claims made by businesses gaining market power (e.g., 'greenwashing')? What are the metrics that could be used to measure this?

Text of 1 to 5000 characters will be accepted

The Commission should ensure that merger control robustly distinguishes genuine green efficiencies from unsupported or overstated claims – particularly when such claims are used to justify increased market power. This requires a framework that is both rigorous and aligned with the Union's climate objectives. A useful starting point is the framework outlined in the Commission's HMG (Chapter 9), which distinguishes three types of green benefit claims: (i) Individual use value benefits – Quantitative or qualitative benefits directly experienced by consumers (e.g. lower energy costs, reduced emissions from cleaner products). (ii) Individual non-use value benefits – Benefits valued by consumers for their positive external impact, even if not directly experienced (e.g. willingness to pay more for sustainably produced goods). (iii) Collective benefits – Positive environmental effects not tied to consumer preferences (e.g. reduced greenhouse gas emissions or air pollution), often benefitting society more broadly. To assess the credibility of green benefit claims in merger cases, it is essential to distinguish between different types of efficiencies, as their verifiability varies significantly depending on whether the benefits accrue directly to consumers or more broadly to society: • Individual value benefits (use and non-use) are generally easier to verify through standard merger control tools: internal data, pricing models, demand elasticity estimates, and customer surveys. These can help substantiate claims of improved quality, lower costs, or environmentally preferable consumer choices. • Collective benefits, however, pose greater challenges. Their materialisation may be delayed, indirect, or unquantifiable based on firm-level data alone. In such cases, the Commission should give strong weight to independent and verifiable sources - such as studies from regulatory agencies, scientific literature, or assessments by public institutions or academic bodies (as acknowledged in para. 588 of the HMG). To avoid "greenwashing," the Commission should require that any efficiency claim (especially one used as a counterweight to competition concerns) be supported by credible, objective, and externally validated evidence. Claims should not rely solely on the parties' internal projections. The Commission could also draw inspiration from the ACM, which developed clear rules of thumb to assess the legitimacy of sustainability claims. These include: (i) use clear and accurate claims; (ii) substantiate them with up-to-date evidence; (iii) ensure comparisons are fair; (iv) express ambitions in verifiable terms; and (v) avoid misleading visual cues or labels. Incorporating such principles into merger review would not only help assess green efficiencies but also promote clarity, accountability, and consistency in enforcement. Ultimately, the Commission's approach should reinforce the principle that green efficiencies must be verifiable, merger-specific, and passed on to consumers. This will help ensure that merger control supports the transition to a climate-neutral economy without becoming a vehicle for unfounded justifications of market concentration.

D.7.a Please explain: In which circumstances, and based on which evidence, benefits related to the transition to a clean and sustainable economy are likely to materialise post-merger?

Text of 1 to 5000 characters will be accepted

The Commission should assess green efficiencies on a case-by-case basis, while remaining open to credible and well-substantiated arguments from the notifying parties. For greater legal certainty and evidentiary clarity, however, the revised Guidelines could usefully highlight certain circumstances that are particularly conducive to the materialisation of green benefits post-merger. Vertical mergers often present favourable conditions for green efficiencies. As recognised in the NHMG, vertical integration can generate substantial efficiencies and is generally less harmful to competition. In sustainability-relevant sectors, such integration may reduce transaction costs, improve coordination along the value chain, and facilitate R&D cooperation. It may also support the localisation of supply chains by replacing imported inputs from jurisdictions with lower environmental standards – contributing to cleaner production processes and improved environmental performance. Horizontal mergers may also support sustainability objectives by enabling firms to achieve economies of scale more quickly. These efficiencies can lower unit costs and unlock the investment capacity required for the adoption of greener technologies, products, or production standards. In this context, the traditional reasoning (according to which higher market power correlates with a lower likelihood of efficiencies being passed on to consumers (HMG, para. 84)) may need to be re-evaluated. Notably, the HMG recognise that, for collective environmental benefits to materialise, a significant level of market coverage is often required (para. 586). This represents a welcome departure from the usual efficiency analysis under Article 101(3) TFEU, where high market shares are generally viewed with scepticism. The same logic should be applied in merger control. Where collective environmental benefits are at stake, scale may not only be necessary but beneficial (allowing firms to internalise externalities, implement cleaner technologies at scale, and accelerate the green transformation of their business models). In such cases, the Commission should be open to shifting its paradigm and acknowledging that, from a sustainability perspective, "big is (or at least may be) beautiful."

D.7.b Please explain: Under which conditions such benefits could be sufficient to outweigh competitive harm? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 5000 characters will be accepted

Under the current HMG (paras. 84 and 86), efficiencies must be substantial and produce a clearly identifiable positive impact on consumers to outweigh competitive harm. However, these concepts remain undefined, particularly when applied to environmental or sustainability-related efficiencies. In this context, the APDC considers that the Commission should clarify that collective environmental benefits (such as reduced greenhouse gas emissions, improved energy efficiency, or resource conservation) may, in some cases, be substantial enough on their own to offset competitive harm. These benefits are not always accompanied by immediate or direct consumer gains, yet their societal value can be significant and measurable. For instance, a merger enabling the shutdown of a highly carbon-intensive facility and the transition to a cleaner, more sustainable production process could deliver material reductions in CO_2 emissions. Even if prices rise slightly in the short term or product variety declines, such a merger may still yield long-term environmental gains that justify clearance, particularly where those gains align with EU climate goals. In addition, the standard typically applied under Article 101(3) TFEU – requiring that consumers receive a "fair share" of the benefits, equal to the competitive harm – may not be appropriate in the context of collective benefits. Since these gains accrue to society at large rather than just market-specific consumers, a more flexible approach is warranted. As already recognised in the HMG (para. 588), environmental benefits can justify broader consideration of societal impacts and the use of external evidence (e.g. public or academic studies). In short, the APDC considers that the Commission should recognise that, in some cases, collective green efficiencies may be sufficient to outweigh competitive harm, especially when the merger contributes meaningfully to EU sustainability objectives.

D.7.c Please explain: Under which conditions such benefits would be passed on to business customers/consumers. Please illustrate with the specific benefits you considered relevant?

Text of 1 to 5000 characters will be accepted

The APDC considers that the assessment of pass-on in the context of green efficiencies requires a tailored approach, given the specific nature of environmental benefits. Relying strictly on conventional standards – such as short time horizons, within-market effects, or strict dependence on residual competitive pressure – risks overlooking the way in which climate-related benefits materialise and diffuse. Several specificities should be taken into account: (i) Extended time horizons: Green efficiencies, especially those involving collective environmental benefits, often materialise over longer periods. While certain benefits (such as cost reductions from process integration) may arise within five years, others (e.g. CO_2 emission reductions or development of clean technologies) may require a longer time frame. The APDC recommends that the Commission explicitly accept projections beyond the five-year horizon, where credible evidence supports delayed but significant environmental impacts. For example, the development of a joint green innovation platform through the merger may require extended R&D and deployment phases. (ii) Out-of-market efficiencies: The Mastercard doctrine, which limits the acceptance of efficiencies to those that benefit the same group of consumers harmed by the merger, should not be applied rigidly to green efficiencies. Environmental benefits often arise: . in related or unrelated product markets (e.g. downstream benefits from greener inputs); . in different geographic markets (e. g. environmental gains in resource-producing regions); . or across a broader segment of society (e.g. reduced air pollution, improved biodiversity). . The APDC supports an approach in which out-of-market and collective benefits are taken into account, provided they are verifiable and linked to the merger. This approach is consistent with the Commission's own position in its 2023 note to the OECD (Note by the EU, "Out-of-Market Efficiencies in Competition Enforcement", 6 December 2023), recognising that sustainability efficiencies may occur wholly or partly outside the relevant market. (iii) Market structure and the role of scale: While competitive pressure typically supports pass-on, in green markets, scale effects can be essential. The merger may allow the parties to reach the critical mass necessary to achieve cost-effective green innovation or industry-wide standards. Thus, the Commission should be open to recognising pass-on even in more concentrated markets, where size enables material environmental gains that ultimately benefit end users or the broader public. In summary, the APDC urges the Commission to adopt a more flexible and forward-looking framework for assessing pass-on of green efficiencies – one that accounts for the distinctive time, scope, and market dynamics of climate-related benefits.

D.7.d Please explain: What are the elements, including evidence and metrics, that the Commission could use to assess whether the benefits of the transition to a climate neutral, clean, and sustainable economy outweigh competitive harm, and will likely be passed on to business customers /consumers?

Text of 1 to 5000 characters will be accepted

The APDC considers that while it is legitimate for the Commission to require parties to demonstrate that efficiencies are substantial enough to outweigh competitive harm (as per para. 87 of the HMG), the assessment of green efficiencies, especially collective environmental benefits, calls for an adapted and flexible approach. Given that such benefits are often difficult to quantify using only firm-level data, the Guidelines should clarify that merging parties can rely on a mix of internal and external evidence. The APDC recommends that the Commission explicitly recognise the following types of evidence and metrics: • Internal data and standard economic tools: For individual value benefits (e.g. cost savings, improved product quality, consumer preference for sustainable products), parties can use: o internal projections and pricing models; o demand elasticity estimates; o consumer surveys and satisfaction data; o benchmarking against comparable industry cases or mergers. • Independent and external sources: For collective environmental benefits (e.g. reduction in CO_2 emissions, lower resource consumption), parties should be encouraged to present: o reports from public authorities or environmental regulators; o academic studies or scientific publications; o recognised impact assessments (e.g. life-cycle analysis, avoided emissions data); o sector-specific data from NGOs or international bodies. • Monetisation of environmental benefits: Where feasible, environmental gains can be expressed in monetary terms, using tools such as: o carbon pricing or social cost of carbon estimates; o national valuation frameworks (e.g. the UK Treasury's Green Book); o cost-benefit analyses, where methodology is transparent and accepted. • Proportionality: The APDC supports a proportionate approach inspired by the CMA's guidelines on Green Agreements (para. 5.16 to 5.28): o Where competitive harm is limited and the environmental benefit is obvious, precise quantification should not be required. o Where both the harm and the benefits are significant, a balanced and reasoned comparison should be encouraged. In sum, the APDC invites the Commission to update its Guidelines to acknowledge that collective environmental benefits, although difficult to quantify precisely, may nevertheless be substantial and verifiable using a combination of internal evidence and reliable third-party sources. The overall approach should strike a fair balance between maintaining a high evidentiary standard and recognising the unique characteristics of sustainability-driven efficiencies.

D.8 How should the Commission make sure that such benefits cannot be achieved with less harmful means, including via cooperation agreements? Please explain how green benefits can be achieved through cooperation and in which circumstances only a merger may bring such benefits and why.

Text of 1 to 5000 characters will be accepted

The APDC notes that cooperation agreements and mergers represent fundamentally different modes of business integration, with distinct implications for the durability and scale of green benefits. Cooperation agreements between independent undertakings are by nature transitory and limited in scope. They may generate short- to medium-term sustainability efficiencies through joint initiatives (e.g., joint R&D projects, shared sustainability standards, coordinated supply chains), but these benefits are often temporary and dependent on continued collaboration and goodwill. Mergers, in contrast, result in durable and structural market changes that embed sustainability gains into the combined entity's long-term business model. This permanence allows for: • Acceleration and scaling of green innovation, including development of new low-carbon technologies and sustainable products. For example, a merger can enable a start-up with a promising green technology to access capital and synergies from a more established firm, speeding innovation and market adoption. • Stronger investment capacity in low-carbon solutions, circular economy initiatives, and eco-efficient processes. • Improved product quality and environmental performance, such as reducing product toxicity, minimizing waste, and optimizing raw material use. The UK Competition and Markets Authority acknowledges this in its 2021 merger assessment guidelines, noting that a merger "may lead to lower energy costs and benefits customers may value (such as a lower carbon footprint of the firm's products)" (para. 8.21). The Aurubis/Metallo case (M.9409) illustrates that while some claimed green efficiencies may require strong substantiation, mergers can create unique synergies - e.g., enhanced scrap valorisation through parties' combination of know-how and technologies - that cooperation alone might not fully realise or sustain, with potential benefits passed on to consumers. Furthermore, certain green benefits are inherently linked to the scale, integration, and control that only mergers can deliver, such as: • Structural investments in circular sourcing or recycling infrastructure, • Permanent alignment of corporate strategies towards sustainability goals, • Commitment to sustained green innovation that goes beyond the limited timeframe or scope of cooperation. The Commission should also recognise that companies may be reluctant to enter cooperation agreements solely to achieve sustainability benefits due to their temporary nature or coordination costs. Including sustainability explicitly in merger control incentives can encourage more ambitious sustainability-driven mergers that parties might otherwise forgot. In conclusion, the APDC recommends that the Commission carefully distinguishes between temporary green efficiencies achievable via cooperation and the durable, structural benefits unique to mergers. It should assess whether the same green objectives can be realistically achieved through less harmful means, but also acknowledge that in many cases, only a merger can deliver the scale, permanence, and investment capacity required to realise substantial sustainability gains.

D.9 Please provide examples of the types of mergers as well as of cooperation agreements (e.g., licensing, R&D sharing) that you/your client believe are beneficial to the transition to a climate neutral, clean, and sustainable economy, and explain whether your company has considered - or implemented - them and why /why not, as relevant.

Text of 1 to 5000 characters will be accepted

The APDC considers that both mergers and cooperation agreements can play a valuable role in supporting the green transition. Structural transactions, in particular, may unlock the scale and capabilities required for companies to invest in sustainable technologies and practices that would otherwise remain out of reach. (i) Mergers enabling substantial sustainability gains: Certain types of mergers may have a direct and positive environmental impact, for example by: • Facilitating decarbonisation: Concentrations (e.g. through the creation of greenfield JVs) that enable the development or roll-out of cleaner production processes, green energy sources, or low-emission transport and logistics. • Allowing the closure of polluting assets: In cases where the transaction enables the shutdown of carbon-intensive facilities, the environmental gains (e.g. reduced CO_2 emissions) can be significant. • Acquiring green targets: Acquisitions of companies active in renewable energy, circular economy, or low-carbon technologies support diversification into sustainable sectors and help achieve ESG goals. These transactions often involve minimal overlaps and are typically pro-competitive. • Promoting circular economy: Transactions supporting joint operations of infrastructure such as deposit return schemes contribute to better waste collection and recycling, thereby reducing environmental harm. Notable examples include: • Repsol / Viesgo (Spain, 2018): Repsol's acquisition of low-emission electricity assets from Viesgo reduced its carbon footprint and supported the energy transition. The transaction was cleared unconditionally by the Spanish competition authority (Case C/0975/18). • Brookfield / MidOcean / Origin Energy (Australia, 2023): Despite vertical integration concerns, the Australian Competition and Consumer Commission approved the deal, finding that the benefits to Australia's renewable energy transition outweighed potential competition risks. (ii) Green cooperation agreements: Voluntary cooperation between undertakings can also support environmental objectives, especially where full integration through merger is not feasible. Relevant examples include: • R&D cooperation: Agreements between competitors to jointly develop greener technologies (e.g. energy-efficient production processes), allowing for resource pooling and faster innovation. • Licensing arrangements: Allowing wider industry access to low-carbon technologies developed by one party, thus supporting broader dissemination and adoption. • Infrastructure sharing: Agreements to share production, logistics, or distribution assets can reduce duplication, improve energy efficiency, and lower the environmental footprint of operations. While cooperation agreements may achieve meaningful results, they are often limited in scope, duration, and enforceability compared to mergers. Structural transactions typically provide a more robust and durable pathway to achieving long-term sustainability goals. In conclusion, the APDC supports revised Guidelines that recognises the role of both mergers and cooperation agreements in facilitating the green transition, while taking into account the structural nature, scale, and permanency of the efficiencies likely to result from each.

D.10 How should the Commission make sure that such green competitive benefits would not have been achieved irrespective of the merger? Please explain how the Commission can, and based on which evidence and metrics, assess what would have been the situation absent the merger, and whether the green competitive benefits would not have been achieved in any case.

Text of 1 to 5000 characters will be accepted

The APDC considers that the Commission should apply a structured counterfactual analysis to attribute sustainability benefits to mergers, consistent with its approach to traditional efficiency claims under the HMG. Such green benefits must meet four cumulative criteria: • Verifiability: Benefits must be supported by clear, credible evidence. Environmental benefits often rely on projections of emissions reductions, future products, or behavioral changes, which are inherently uncertain. • Merger-specificity: Benefits must be shown to be achievable only through the merger and not by less restrictive alternatives such as cooperation agreements, licensing, or independent investment. • Timely realization: While traditional merger assessments expect benefits within 2–3 years, green efficiencies typically require longer time horizons (5–10 years). The Commission should accept longer periods where benefits are credibly substantiated. • Consumer pass-on: Benefits must ultimately be passed on to consumers or society at large. To assess whether green benefits are merger-specific, the Commission should: • Examine if the parties can realistically achieve the claimed benefits independently or through looser forms of cooperation (e.g., R&D partnerships, licensing). • Assess the economic incentives for parties to pursue these benefits absent the merger, considering market competition and regulatory context. The Commission's evaluation should integrate economic, regulatory, and environmental factors, including: • Review of business plans, R&D strategies, and ESG roadmaps demonstrating merger-specific green benefits. • Consideration of current or upcoming environmental regulations (e.g., EU Green Deal, EU ETS) that may compel similar investments without the merger. • Market testing to gauge competitive pressure and whether rivals achieve comparable sustainability outcomes independently. • Analysis of consumer demand for sustainable products and services. • Assessment of environmental subsidies or incentives influencing investment decisions. When uncertainty exists, the Commission could require environmental commitments with post-clearance monitoring to safeguard green benefits. In Miba/Zollern, the Bundeskartellamt initially blocked the merger over competition concerns. However, the German Minister of Economics approved it based on overriding environmental policy goals such as reducing fuel consumption and noise pollution. The counterfactual showed that absent the merger, Zollern might exit the market, risking loss of vital environmental know-how or acquisition by non-committed players. The merger was deemed the only viable way to preserve key green expertise domestically, satisfying merger-specificity. The APDC therefore urges the Commission to adopt a rigorous counterfactual framework tailored to the nature of green benefits, recognizing their longer time horizons and evidentiary challenges. This ensures that only green efficiencies truly enabled by mergers justify their approval despite potential competitive concerns, supporting a balanced and effective green transition.

D.11 How should EU merger control account for global competition dynamics when it comes to sustainability, in particular where certain players receive subsidies for clean tech solutions?

Text of 1 to 5000 characters will be accepted

The APDC acknowledges the increasing importance of global competition dynamics in the context of sustainability, particularly where certain international players benefit from subsidies for clean technology solutions. These factors inevitably affect the level playing field in the EU internal market and must be adequately considered in merger control assessments. The EU has developed a dedicated enforcement instrument – the FSR – aimed precisely at addressing distortive effects of subsidies granted by non-EU governments to companies active on the internal market. The FSR is a significant regulatory development, recently put into practice, and the Commission has demonstrated a strong willingness to apply it in clean technology sectors. Beyond the FSR, the Commission retains its powers under existing trade defense instruments, notably anti-dumping measures, to counteract unfair pricing practices by non-EU manufacturers who sell goods in the EU below their normal value. These measures contribute to preserving market fairness and protecting EU companies' capacity to compete sustainably. In merger reviews, the competitive landscape must be realistically assessed, including the presence and influence of non-EU players benefitting from subsidies or dumping practices. While the FSR and trade defense mechanisms are vital safeguards, they do not replace the need for merging parties to demonstrate how these global competitive pressures shape market dynamics. Companies should therefore be able to argue that competition from foreign-subsidized firms and dumping practices continues to exert meaningful competitive pressure in the relevant markets, potentially constraining market power and incentivizing sustainable innovation. The APDC therefore supports a merger control framework that acknowledges the evolving global competitive environment in sustainability-related sectors. The Commission's enforcement of the FSR, alongside traditional anti-dumping tools, strengthens the integrity of the internal market. At the same time, merger assessments should pragmatically reflect the realities of global competition, including the role of subsidized foreign competitors, to ensure balanced and effective evaluation of sustainability claims and market impact.

D.12 Have you/your client experienced chilling effects in your industry, in the sense that a merger that would boost investment or innovation in clean tech and resource-efficient or sustainable solutions was not pursued due to concerns related to merger control scrutiny?

- Yes
- No

Topic E: Digitalisation

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

78. As a key driver of innovation, digitalisation is closely linked to the competitiveness of industries in the EU [74] and has the potential to act as a powerful tool to close the productivity gap. Seizing the opportunities brought by digitalisation requires a level playing field enabling any company in the EU to innovate and grow without barriers.

79. The **Competitiveness Compass** stresses that *"in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets and tech innovation"*. The Competitiveness Compass also underlines that innovation and investment in certain strategic sectors should be given an adequate weight in merger assessments, in light of the European economy's acute needs.

80. Markets shaped by digitalisation or other fast-moving markets go through transformational changes quickly and therefore, an extended forward-looking assessment may be required in order to properly capture the effects of a transaction. This is particularly the case when the merger involves the **acquisition of a nascent player** or where the transaction takes place on a **nascent market** with emerging novel and innovative technologies with the potential of disrupting the established industry. In fast-moving markets, **killer acquisitions of complements** need a careful assessment because in such markets a complementary product or player of today may very quickly become a substitute, an element that should be taken into account in the analysis.

81. Digitalisation has brought about several significant challenges that may hinder growth and innovation across different industries in the internal market. Markets shaped by digitalisation are often characterised by **"winner-takes-most" dynamics** that benefit the leading companies with a certain degree of market power. They are **prone to "tipping"** in favour of the firm's technology that reaches critical mass adoption. Where dominant companies build **ecosystems** of interlinked products and services and where markets are prone to **network effects** making the value of the products and services depend on the number of buyers, sellers or users, existing competitors and new entrants face significant barriers to entry and expansion. As dominant players become more insulated against competition, smaller rivals and potential entrants find it difficult to reach the scale necessary to become attractive alternatives or even enter the market. These market characteristics are aggravated by **customer inertia**. Due to network effects, customers tend to stick with the incumbent because it is difficult to coordinate switching with other customers. With these market dynamics, the leading firm maintains and increases its customer base, and its market position becomes entrenched.

82. A common business strategy of leading companies in the digital and tech sectors has been to acquire complementary businesses or key inputs (e.g., data, technology, user traffic, but also talent, compute capacity and others) with the aim of strengthening their position in core markets. Such a strategy may contribute to increases in innovation (e.g., development of new products or services, including in the area of artificial intelligence). However, such a strategy could also have negative effects. By developing or expanding an ecosystem of related products and services, the incumbent may **entrench** its position, thus making it harder

for rivals to enter, expand, or innovate, as they are unable to replicate the breadth and scale of the predominant aggregated offering.

83. This type of business strategy does not easily fit into the traditional framework of analysis which distinguishes between horizontal and non-horizontal (vertical and conglomerate) mergers. This is largely because, in today's digital economy, **fewer transactions are *purely* horizontal** (merging competing activities), vertical (merging activities at different levels of the value chain, e.g., one party offering an input for the other party), or conglomerate (merging activities otherwise related to one another) in nature, and the lines between horizontally or non-horizontally linked product markets become increasingly blurred. For instance, in mergers that involve companies with activities across several product markets, products often need to interoperate with each other or are offered as part of an ecosystem of related services.

84. Markets shaped by digitalisation carry a particular degree of **uncertainty** that raises questions about how forward looking the merger assessment should be, what kind of future changes it should take into account, and what kind of facts and evidence should be considered.[75] In markets characterised by network effects and "winner-takes-most" dynamics, it is essential not to intervene "too late" (thereby ensuring a level playing field amongst competitors, including potential new entrants), but also not "too soon", potentially stifling innovation. This is particularly challenging in nascent and fast-moving markets, where historical market shares may tell little about effects to competition in the future.

85. Finally, certain digital mergers also raise **privacy and data protection concerns**. Competition and privacy concerns can arise when a merger leads to the acquisition of data or the combination of datasets.[76] In some markets, companies compete to gain customers based on their privacy settings, which can therefore be considered a non-price parameter of competition and the merger would eliminate such competition. This would be particularly problematic if the target explicitly markets itself as prioritising customer data protection, especially when the data involved is sensitive, as the merger could reduce consumer choice for privacy-focused services. Privacy concerns can also be taken into account when evaluating the credibility of (alternative) suppliers for specific customers. When suppliers have access to sensitive data, customers might not find it feasible to work with suppliers processing data in servers outside the internal market as this poses a risk of sensitive data being transferred outside the EU. The question is whether these privacy and data protection objectives enshrined in EU law play enough of a role in the market to be taken into account as a parameter of the Commission's competitive assessment.

Technical background

86. The role of merger control is amongst others to ensure that markets remain competitive and accessible to start- and scale-ups that want to make use of the digital transformation of markets to bring innovation and increase productivity. To address specific challenges stemming from the digitalisation of the economy, the Commission has in recent years departed in some instances from the dichotomy horizontal/vertical to focus on the merger's effects in line with the legal test stipulated in Article 2 of the EU Merger Regulation.

87. The Commission has investigated **non-horizontal types of competition concerns** in horizontal mergers by analysing whether the merged entity would have the ability and the incentives to foreclose

competitors by engaging in certain conducts and whether such foreclosure would have an adverse impact on competition and harm consumers.[77] At the same time, the application of the traditional framework for vertical and conglomerate mergers under the Non-Horizontal Merger Guidelines ("NHMG") has been refined to adapt to the specificities of digital business models and investigate theories of harm where the acquirer may foreclose rivals by **leveraging its market power into a new market, thereby expanding its ecosystem**.

88. In some cases, in particular where non-price parameters of competition played a role, the assessment of foreclosure effects materialised in restrictions of access,[78] degradation of interoperability,[79] or self-preferencing strategies.[80] Furthermore, under the NHMG framework, the Commission also investigated **targ eted foreclosure strategies** where, for instance, only a certain category of competitors, e.g., close competitors, would be targeted, determining in addition whether the targets of foreclosure played a sufficiently important role in the competitive process to find consumer harm.[81]

89. The Commission also investigated **horizontal effects of non-horizontal mergers that are not necessarily based on a foreclosure "conduct"** but that, given the market structure and market dynamics, as well as the acquirer's market power, could nonetheless lead to the strengthening or entrenchment of the acquirer's position on the market.[82] This may be the case e.g. where companies are not direct competitors, but where the aggregation of their assets, such as data[83] or customers in complementary businesses,[84] would strengthen the acquirer's dominant position. Another fact pattern where market structure and dynamics could lead to the strengthening or entrenchment of the acquirer's market position was investigated in cases where acquisitions took place within the acquirer's overall **ecosystem** of interrelated products or services. In these cases, concerns included the possible entrenchment of the dominant company's position on the core product's market through the addition of a close complement to the core product of that company's ecosystem of products[85]; and possible effects on **potential competition**, for instance where the target would have been particularly well placed to enter the acquirer's markets or where the acquirer buys the target, abandoning its plans to develop the product itself (so-called reverse killer acquisitions).[86] The criteria for assessing effects on potential competition are discussed, in particular, in Topic C on Innovation and other dynamic elements in merger control.

90. In other cases, the Commission considered the **interconnectedness of markets** and the acquirer's ecosystem of products and services as relevant market context in a foreclosure strategy. For instance, the Commission assessed the merged entity's incentives also by investigating the gains that could materialise beyond the directly impacted market, in other parts of the acquirer's ecosystem.[87]

91. The Commission also investigated competition concerns in the context of **nascent markets**, i.e., emerging novel and innovative technologies with the potential of disrupting the established industry, which by their nature often comprised only a small segment of the market.[88]

92. Finally, the Commission has assessed **privacy and data protection concerns** in previous digital mergers. In that respect, the use of data or access to data played an important role in the Commission's merger assessment. The Commission investigated data-related issues in the framework of horizontal effects resulting from data accumulation (combination of data sets) or vertical effects, where data is an important input and could lead to foreclosure of rivals. In addition, data privacy was considered a relevant non-price

parameter of competition. For instance, in M.9660 – Google/Fitbit, the Commission considered whether the combination of the parties' datasets could impede effective competition by providing the merged entity with control over an asset that would make the expansion or entry of rival firms more difficult, as envisaged under paragraph 36 of the HMG. In M.8124 – Microsoft/LinkedIn, the Commission considered whether the merged entity would engage in input foreclosure such that Microsoft could restrict access to LinkedIn data. In its assessments, the Commission explicitly considered the limitations set to the merging parties' conduct by existing privacy regulations, including the GDPR and the e-Privacy Directive. While the report *"Competition policy for the digital era"* (2019) by Cremer et al. acknowledged the important role of privacy and data protection regulation, such as the GDPR, in protecting EU citizens' privacy and data online, it further explained that competition law can nevertheless *"have the effect to protect and promote the individuals' choice also with a view to privacy policies"* [emphasis added]. In M.8124 – Microsoft/LinkedIn, the Commission considered privacy protection as an important quality parameter in competition between the professional social networks, and assessed the risk that the transaction could restrict consumers' choice in this respect. The question therefore arises to what extent the revised Guidelines should explicitly list privacy and data protection as a relevant parameter of competition that EU merger control needs to protect and whether additional clarification should be provided on the interplay between privacy and data protection regulations and EU merger control.

93. Privacy concerns may restrict some customers from contracting with suppliers located outside the EU or in jurisdictions that lack sufficient data protection guarantees, especially when the customer-supplier relationship poses a risk of data leaks and the safeguards included in the GDPR may not eliminate the competition issues. This factor can be considered when assessing market power. This is particularly relevant for customers handling sensitive data, such as in the health or security sectors.

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[74] As also stated in the report by Mario Draghi "The future of European competitiveness", September 2024: "a weak tech sector will hinder innovation performance in a wide range of adjacent fields, such as pharma, energy, materials and defence" and the Competitiveness Compass (see headline 'Excelling in the technologies for tomorrow's economy').

[75] For example, in some cases, the Commission also assessed counterstrategies and potential retaliation by competitors and customers of the merged entity when assessing foreclosure concerns (for instance in M.9424 – Nvidia/Mellanox).

[76] To the extent the combination is possible in light of existing GDPR and DMA regulation.

[77] HMG, paragraph 36.

[78] In case M.10262 – Meta / Kustomer, the Commission was concerned that Meta would restrict access to its important messaging channels (Messenger, WhatsApp, and Instagram) to foreclose the target's competing software providers that rely on Meta's channels.

[79] The Commission assessed more subtle foreclosure forms, e.g. degradation of interoperability by removing certain features or functionalities or reserving superior functionalities for the merged entity's products (M.9660 – Google / Fitbit), as well as hampering or delaying access to inputs, such as an API (application programming interface) (M.10262 – Meta / Kustomer).

[80] In case M.10920 – Amazon / iRobot, the Commission assessed whether Amazon would have the ability and incentives to foreclose rival robot vacuum cleaners by reducing their visibility in the Amazon Stores through various mechanisms.

[81] In case M.10262 – Meta / Kustomer, the Commission considered that smaller players and recent market entrants were particular drivers of innovation and that foreclosure targeting such players would lead to lower quality and less innovation in the overall market.

[82] HMG, paragraph 36.

[83] In case M.9660 – Google / Fitbit the Commission investigated whether Google could combine its vast database with Fitbit's health and location data to further entrench its dominant position in online advertising markets. In case M.8788 – Apple / Shazam, the Commission assessed the increment of Shazam's data to Apple using the 'Four Vs' metrics: the type of data composing the dataset (variety); the speed at which the data is collected (velocity); the size of the data set (volume); the size of the data set (volume); and the economic relevance (value).
[84] In case M.10615 – Booking / eTraveli, the Commission found that the acquisition of a complementary business (flight online travel agency, "OTA", services) amounted to an important customer acquisition channel (i.e., additional customer traffic) for the acquirer's core business in hotel OTA services.
[85] In M.10615 – Booking / eTraveli, the strengthening of Booking's dominant position in its ecosystem's core market (hotel OTA services) resulted from adding a close complement (flight OTA services). The inclusion of flights would not only result in additional customer traffic, but also would allow Booking to leverage existing customer inertia thereby strengthening the existing network effects. In addition, rivals would have likely faced higher barriers to entry/expansion as they would find it even more difficult to use flights as a path to expand into hotel OTA services.
[86] These types of concerns were for example assessed in case M.11033 – Adobe / Figma. In this case, the Commission investigated concerns related to a possible strengthening of a dominant position in the main markets of a multi-product ecosystem, through the elimination of a potential new entrant that risked "eating into" this position from the fringe. This was analysed within the framework of the potential competition test.
[87] M.10262 – Meta / Kustomer.
[88] For example, in M.10646 – Microsoft / Activision Blizzard, the Commission found foreclosure concerns for the nascent cloud game streaming, a small but growing segment of the gaming market (around 1% of the market in the EEA).

Questions

General

E.1 In your/your client's view, do the current Guidelines adequately reflect the evolutions linked to the digitalisation of the economy?

- ○ Yes, fully
- ○ Yes, to some extent
- ● No, to an insufficient extent
- ○ Not at all
- ○ I do not know

E.1.1 Please explain, and mention in particular which provisions of the current Guidelines (if any) do not adequately reflect the evolutions linked to the digitalisation of the economy.

Text of 1 to 5000 characters will be accepted

The Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines were published at a period of time when digitalisation was still at an early stage and its competitive dynamics were not as significant as they are today. At that time, some key elements (such as network effects, the role of ecosystems, or how consumers behave when confronted with by-default choices, etc.) were not as documented or explored as they are today. Some changes may be necessary to ensure that the tools are used in a way that takes into account the specific characteristics of the digital sector. Yet, any such changes to the Guidelines could take into account that: o predictability of the rules is often key in the tech sector, so that investors and companies can invest in European start-ups or scale-ups with confidence regarding their exit strategies. For instance, the tech sector has been the focus of the Commission's attempt to rely on Article 22 of the EU Merger Regulation to assess mergers that are below thresholds. This has created uncertainty, which persists due to the ongoing litigation and the ambition of many national regulators to adopt call-in powers ; o the Guidelines already set out tools that can be used to assess the market power of companies regardless of the industry in which the parties operate (i.e., market shares, closeness of competition, network effects, etc.). Companies and their advisors know how these tools are applied, and this contributes to predictability and efficiency in merger control. By contrast, sector-specific tools risk creating fragmentations and inconsistencies in the application of the rules across sectors. From this perspective, the Commission should strive to ensure that any innovation it introduces in the Guidelines that is specific to the digital sector is fully justified by the specificities of that sector. In this regard, it is encouraging that the Commission's questionnaire notes "Many of the dynamics and concepts on which we seek your feedback below are relevant across industries".

E.2 In your/your client's view, should the revised Guidelines better reflect the evolutions linked to the digitalisation of the economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should address:

You can tick more than one reply, below.

- [ ] a. "Tipping"/"Winner takes most" dynamics
- [ ] b. Network effects
- [ ] c. Chilling effects
- [ ] d. Customer inertia (de facto lack of switching)
- [ ] e. Data-driven competition
- [ ] f. Privacy protection-driven competition
- [ ] g. Market power entrenchment theories of harm
- [ ] h. Potential competition theories of harm
- [ ] i. Ecosystem and interrelated products or services' theories of harm
- [ ] j. Data accumulation theories of harm
- [ ] k. Targeted foreclosure theories of harm
- [ ] l. Degradation of interoperability theories of harm
- [ ] m. Future technological changes
- [x] n. Other

E.2.1.n Please provide a reasoning for the aspects you have selected and explain how the revised Guidelines should address these aspects.

Text of 1 to 5000 characters will be accepted

The APDC notes that many of these aspects are indeed important in digital markets but share basic characteristics with other characteristics of more traditional characteristics. For instance: o customer inertia is certainly important when faced with by-default choices, but is fundamentally not different from for e.g. brand loyalty in fast-moving consumers goods, where for instance consumers automatically put their favourite soft drink brand in their trolley; o anticipating future technological changes is an important aspect of the Commission' s assessment of mergers. Such changes may come more or less rapidly in various sectors. Yet, the key tools that the Commission could use to try and anticipate them are likely to be similar across industries, based for instance on observations of past technological changes and recent advances in R&D; o privacy protection is an important part of consumers' daily life in digital markets. Yet, it does not appear fundamentally different from competition on other qualitative criteria. From this perspective, in updating the Guidelines to take stock of the evolution of digital markets, the European Commission should strive to rely on tools that are applicable across the board to all sectors of the economy. It may be more in how these tools are applied that the Commission should retain flexibility, so as to take into account the competition dynamics it observes on digital market. In addition, the assessment of a number of factors included in the list could be influenced by sector-specific regulation such as the DMA. For instance, a gatekeeper's ability to degrade interoperability or to leverage data accumulation is constrained by the DMA. The Commission should consider the impact of the DMA on the ability and incentives of gatekeepers to engage in such tactics, based on the Court's case law on the lawfulness of foreclosure conduct. In its 2005 judgement in the Commission v Tetra Laval case , the ECJ indeed confirmed that "the likelihood of [the leverage conduct] must be examined comprehensively, that is to say, taking account [...] both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful" . In other words, gatekeepers' incentives to foreclose should be heavily influenced by the application of the DMA, given its ex-ante nature, and the changes the Commission has already been able to secure as to their business practices. All in all, the Commission could address how it seeks to apply generic tools to the digital sector through concrete examples in its Guidelines, much like it has done in its antitrust guidelines, where "boxes" explain how abstract rules could be applied to specific, concrete, examples.

The questions below are inspired by the specific competitive dynamics observed in the context of the digitalisation of the economy, as described in the topic description. However, when replying, please consider that the questions do not relate to mergers in the digital and tech industries only. Many of the dynamics and concepts on which we seek your feedback below are relevant across industries.

Competitive dynamics and parameters of competition

E.3 How should the Commission take into account the following competitive dynamics in its assessment of the impact of mergers on competition?

E.3.a "Tipping"/"Winner takes most" dynamics

Text of 1 to 5000 characters will be accepted

Market tipping may indeed occur in certain digital markets, given the indirect network effects associated with some digital services. However, this notion is not unique to digital markets, as it can arise in more traditional sectors and may be influenced by consumer behaviour (bandwagon effect) that are common to various industries. Should the Commission wish to include specific assessment of market tipping for digital markets, it should explain - drawing on past concrete examples - the specific circumstances in which it would identify a risk of market tipping resulting from a concentration. A well-known example could be Facebook's acquisition of Instagram: what evidence do such cases provide that an acquisition is likely to affect the speed at which network effects take hold, and at what point does a market become prone to tipping as a result of a concentration?

E.3.b Network effects

Text of 1 to 5000 characters will be accepted

The Commission could take into account the pro-competitive and anti-competitive aspects of network effects. On the one hand, they may improve product quality; on the other hand, they can undermine competition by raising barriers to entry and increasing switching costs for consumers. An assessment of how a concentration could affect this balance would be key.

E.3.c Customer inertia

Text of 1 to 5000 characters will be accepted

The APDC understands that, according to the Commission, behavioural factors such as customer inertia can influence market outcomes. For instance, in the Booking/eTraveli case, the Commission observed strong customer inertia in the online travel agency sector, which led it to prohibit the transaction. Yet, the Commission should arguably always take consumer behaviour into account, regardless of the industry. For example, by-default choices in digital markets may not be fundamentally different from customer inertia in other sectors of the economy, such as brand loyalty in fast-moving consumer goods. The point is that while there may be a difference in degree between, on the hand, by-default settings in a browser and, on the other, the examples of consumer inertia observed in more traditional markets, this difference should not affect the nature of the analytical tools that competition authorities must rely upon to detect a potential harm to competition.

E.3.d Data-driven competition

Text of 1 to 5000 characters will be accepted

Control over large volumes of consumer data can provide a competitive advantage that is not easily replicated (as exemplified by the current race for data in the development of foundation models). At the same time, it may also generate efficiencies and enhance quality of services. Nevertheless, the underlying dynamic of securing access to a vast amount of a key input may not be specific to digital markets.

E.3.e Privacy protection-driven competition

Text of 1 to 5000 characters will be accepted

Competition authorities have increasingly emphasised non-price competitive factors such as privacy protection. While privacy is indeed a key dimension of quality in digital services, the so-called ‘privacy paradox’ is well documented and data protection authorities are best equipped to ensure compliance with GDPR and ePrivacy. In this context, privacy can be considered as any other quality parameter of the services provided by merging firms. There might not be specific features of this dimension that require distinct tools in the Commission’s merger assessment. If so, the Commission should be mindful not to overlap with the enforcement role of data protection authorities.

E.3.f Multi-sidedness of markets

Text of 1 to 5000 characters will be accepted

Multi-sided platforms create situations where the demand from one group of users affects the demand from others, thereby reinforcing or creating network effects. Specific examples of the circumstances in which the Commission would analyse such effects would be useful, going beyond what is already set out in its Notice on Market Definition (Commission Notice on the definition of the relevant market for the purposes of Union competition law, (C/2024/1645)).

E.3.g Other competitive dynamics you consider relevant

Text of 1 to 5000 characters will be accepted

E.4 What other elements linked to the digitalisation of the economy do you consider are highly relevant for the Commission’s merger assessment? Please provide a reasoning for each element and explain how the Commission should take them into account.

Text of 1 to 5000 characters will be accepted

General frameworks of analysis and Entrenchment

E.5 From your perspective and considering modern competitive dynamics, do you consider that having different frameworks of analysis for horizontal relationships (when merging companies are active on the same market) and for non-horizontal relationships (when merging companies are active on different markets) is still relevant?

- (●) Yes
- ( ) No
- ( ) I do not know

E.5.1 Please explain. Please also explain under what framework the Commission should assess potential counterstrategies or retaliation by competitors in the assessment of foreclosure strategies of the merged entity?

Text of 1 to 5000 characters will be accepted

The legal test remains the same for all concentrations: whether a concentration is likely to significantly impede effective competition (SIEC). The distinction between the horizontal and non-horizontal frameworks remains useful, as it allows the risk of significant adverse effects on competition to be assessed in different situations using appropriate criteria. These frameworks appear to cover most, if not all, areas where market power could be created or reinforced as a result of a concentration. The fundamental principle that acquiring a direct competitor creates a greater area of risk than acquiring a non-competitor continues to hold true.

E.6 How should the current frameworks of analysis for horizontal and for non-horizontal relationships be adapted to assess the effects that digital and tech mergers can have on competition? In particular, please explain which framework of analysis you believe would capture adequately the effects of digital and tech mergers on competition when a leading company seeks to acquire a complementary business and may entrench its market power as a result.

Text of 1 to 5000 characters will be accepted

The APDC wonders whether the current tools, such as conglomerate effects, cannot suffice to adequately capture the potential SIEC resulting from an acquisition of a complementary. Business. The assessment of vertical and conglomerate relationships have precisely been developed for such reasons. The APDC further notes that the Commission’s ‘ecosystem theory of harm’ has generated significant debate on this issue. Should the Commission ultimately consider that this type of cases requires a specific framework of analytical framework, it should explain very clearly why the current tools would not suffice, and how a new tool would differ, while remaining consistent with the legal test of Article 2 of the EU Merger Regulation.

E.7 How should the Commission assess competition risks of non-horizontal mergers that are not based on a foreclosure conduct by the merged entity? In your reply, you may consider also mergers outside of the digital and tech industries.

Text of 1 to 5000 characters will be accepted

The APDC is not convinced that there are risks arising from non-horizontal mergers that are not based on market foreclosure, as understood by the Commission (i.e., “any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete”). When the Commission focuses on foreclosure, it assesses whether actual or potential rivals of the merged entity can exert competitive pressure in the relevant markets. In doing so, it safeguards the competitive process. As long as markets remain competitive, market outcomes should remain optimum for consumers. Merger control rules, in this perspective, do not appear well-suited to address broader market failures. Within this context, the APDC considers that if the Commission believes there are competition risks beyond foreclosure, it should provide clear and convincing evidence of such risks and explain in detail why merger control rules could address them.

E.7.a Please explain in particular: What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

E.7.b Please explain in particular: Under which conditions or market circumstances could this/these theory/theories of harm materialise.

Text of 1 to 5000 characters will be accepted

E.7.c Please explain in particular: What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the competition risks of non-horizontal mergers beyond a foreclosure conduct.

Text of 1 to 5000 characters will be accepted

E.8 How should the Commission assess possible theories of harm to competition linked to increased barriers to entry and expansion of rivals, including on the application of paragraph 36 of the Horizontal Merger Guidelines (“HMG”)? What specific elements should the Commission focus on?

Text of 1 to 5000 characters will be accepted

The APDC wonders whether the Revised Guidelines should not indeed focus on the risk of market foreclosure. In this respect, the risk of increased barriers to entry and expansion, as described in paragraph 36 HMG are relevant. Providing illustrative examples of how the Commission would carry out this assessment in the context of digital mergers would be particularly useful. The factors listed above could for instance be relevant (i.e., ability of merged entity to influence consumers’ inertia, existence of network effects, role of data, etc.), as such illustrative examples. Beyond illustrative examples, the APDC is unsure whether the Commission should establish a rigid list of factors or circumstances specific to the digital sector, as this could act as a straitjacket limiting flexibility in merger analysis.

Ecosystem and Interrelated products

E.9 How should the Commission assess competition risks of non-horizontal mergers linked to having a broad range or portfolio of products or services that are interrelated or part of an “ecosystem”? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.9.a What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

As explained supra, the APDC wonders whether the existence of digital (or otherwise) complementary products cannot be tackled under the current concepts of foreclosure due to conglomerate links, or potentially due to vertical links (e.g., where an online travel agency is able to distribute other services to its end-users). If the Commission were to conclude that specific tools are needed to address products that are part of a single ecosystems, it should explain precisely (i) why the current tools at his disposal are insufficient to tackle mergers involving such type of circumstances; (ii) how any new tools would fill the gap, all within the limits set by Regulation n° 139/2004, as interpreted by the European Courts.

E.9.b Under which conditions or market circumstances could this/these theory/theories of harm or concerns materialise.

Text of 1 to 5000 characters will be accepted

E.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the potential competition risks linked to having an increased portfolio of interrelated products and services.

Text of 1 to 5000 characters will be accepted

Data-related concerns and Aggregation of data

E.10 How should the Commission assess competition risks linked to the merged entity’s accumulation of data? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.10.a What theory/theories of harm could the Commission consider.

Text of 1 to 5000 characters will be accepted

The APDC wonders whether the current rules do not already provide the tools to tackle such data accumulation and its competitive influence. For instance, paragraph 36 HMG to the possibility for the Commission to assess whether “the merged entity may have such a degree of control, or influence over, the supply of inputs or distribution possibilities that expansion or entry by rival firms may be more costly”. The Commission could usefully provide illustrative examples of how this would apply to data accumulation, focusing on the consequences on potential or actual rivals’ ability to compete on the markets, such as when these rivals do not have the ability to accumulate data to the same extent as the merging firms.

E.10.b Under which conditions or market circumstances could this/these theory/theories of harm materialise.

Text of 1 to 5000 characters will be accepted

E.10.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to the accumulation of data.

Text of 1 to 5000 characters will be accepted

E.11 How should the Commission assess the relevant standard and criteria determining the value of the target’s data in the context of data aggregation? Please select and explain the relevant criteria in the context of data accumulation that would be determinative for assessing the value of the data:

You can tick more than one reply, below.

- [ ] a. Velocity (i.e., speed at which the data is collected)
- [ ] b. Variety (i.e., type of data composing the data set)
- [ ] c. Value (i.e., economic relevance of data)
- [ ] d. Volume (i.e., size of the data set)
- [ ] e. Quality of data (e.g., completeness, cleanliness of a data set)
- [ ] f. Uniqueness / difficult to replicate
- [ ] g. Accessibility
- [x] h. Other

E.11.h Please explain the relevant criteria you have selected.

Text of 1 to 5000 characters will be accepted

The APDC wonders whether this should usefully be set out in the Revised Guidelines. By definition, the importance of data depends on a case-by-case assessment, as do the relevant metrics. For example, what was once regarded as a particularly large amount of data was later considered relatively small in the context of training foundation models. Moreover, data quality can depend from one market to the next. It may be of limited importance for training foundation models, but is crucial in digital advertising to assess the value of any given ad impression for a user. In other words, the Commission might run the risk of putting a straitjacket on its assessment of the role of data if its guidelines are too detailed.

Targeted foreclosure

E.12 How should the Commission assess competition risks linked to targeted foreclosure conducts (e.g. conducts that lead to only some competitors being fully or partially foreclosed, or to partial restriction or degradation of access to key inputs or other products or services)? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.12.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

The Commission's role in merger control is to prevent significant impediments to effective competition as a result of a concentration. In the absolute, it does not appear that foreclosure targeted at specific competitors would systematically create a risk of SIEC, for instance where other competitors continue to exert significant competitive pressure on the market. Similarly, a partial restriction of access could have no particular competitive significance, in particular where there are industrial reasons for such restriction. From this perspective, the Commission could indeed include in its Revised Guidelines the possibility of such targeted or partial foreclosure, to the extent that such foreclosure risks giving rise to a SIEC.

E.12.b Under which conditions or market circumstances could this/these theory/theories of harm materialise?

Text of 1 to 5000 characters will be accepted

The specific conditions for such assessment could remain open for a case-by-case assessment, which could include for instance the factors identified supra by the Commission (network effects, consumer bias, role of data, etc.).

E.12.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to targeted foreclosure conducts?

Text of 1 to 5000 characters will be accepted

The Commission could arguably rely on its standard evidentiary rules, and deploy the metrics most relevant to each individual case.

Interoperability issues and access issues

E.13 How should the Commission assess competition risks linked to access and interoperability concerns resulting from a non-horizontal merger? Please consider also mergers outside of the digital and tech industries and explain in particular:

E.13.a What theory/theories of harm the Commission could consider?

Text of 1 to 5000 characters will be accepted

The existing tools the Commission uses to assess foreclosure risks in non-horizontal mergers could remain relevant. In particular, the Commission should assess whether the merged entity would have both the ability and the incentive to engage in foreclosure, and what impact such conduct would have on competition. On digital markets, a degradation of access or interoperability can, in certain circumstances, have effects on competition on the market. Such issue can be fully examined under the third limb of the Commission's standard test (applied since 2008), considering the specific characteristics of each case and of the relevant markets.

E.13.b Under which conditions or market circumstances could this/these theory/theories of harm materialise. In particular, not to impede effective competition, should the Commission establish that post-merger there will be sufficient interoperability and access for all companies to compete, or that the interoperability will be the same for all companies, so there is no competitive advantage for the merged entity's products and services?

Text of 1 to 5000 characters will be accepted

This could be assessed on a case-by-case basis.

E.13.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to access or interoperability issues.

Text of 1 to 5000 characters will be accepted

This could be assessed on a case-by-case basis.

Future market dynamics and technological changes

E.14 In markets driven by technological changes, what would be an appropriate timeframe for the Commission to adequately assess the impact of mergers on competition? Should there be a distinction between markets before and after "tipping" to a leading company?

Text of 1 to 5000 characters will be accepted

As explained supra, this is typically the type of issue where the APDC would favour an objective, cross-sector approach: regardless of the market, assessing the likelihood of technological change is inherently difficult and case-specific. A good illustration is provided by recent advances in AI: the pace of innovation, unimaginable only a few years ago, has enabled new entrants to challenge well-established and very large tech players active on markets that had long since tipped. Moreover, certain markets may not be characterized by network effects until a technological shift creates the conditions for such effects to materialise. From this perspective, the Commission could provide guidance on the types of evidence it will consider, such as the frequency of technological changes in the past and recent advances in R&D, and apply these factors on a case-by-case basis, without setting rigid timeframes, or drawing artificial distinctions between types of markets.

E.15 What metrics and evidence should be used to adequately assess likely future market trends and developments post-merger, including in terms of business models, technologies, and trade patterns?

Text of 1 to 5000 characters will be accepted

See, above: this could be assessed on a case-by-case basis.

Privacy and data protection

E.16 Do you consider that the Commission's past case practice regarding privacy and data protection considerations (e.g., in M.8788 - Apple/Shazam, M.9660 - Google/Fitbit) was appropriate? If not, please outline in detail where you disagree with the approach taken by the Commission.

Text of 1 to 5000 characters will be accepted

The Commission's past approach generally appears to treat privacy and data protection issues as distinct from competition concerns, assigning enforcement of data privacy primarily to data protection authorities under laws such as the GDPR. For instance, in the Facebook/WhatsApp and Google/Fitbit cases, the Commission recognised privacy as a non-price quality parameter relevant to competition but concluded that privacy violations per se fall under data protection regulations. The APDC submits that the Commission was generally correct in deferring to data protection authorities. At the same time, privacy can indeed constitute a parameter of competition and should therefore be assessed like any other aspect of the quality of services provide to consumers. In markets where there is clear evidence that users do attach value to the respect of their privacy, and where this parameter of competition could be diminished as a result of a SIEC, the Commission should duly take it into account.

E.17 Please outline the framework within which the revised Guidelines should reflect privacy and data protection considerations, if at all. Please outline how this framework fits within the legal mandate set by the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

Arguably, given the sensitivity of certain users' data and the fact that privacy is a fundamental human right, the Commission could pay close attention to this parameter of competition. However, this should not justify departing from its standard framework for assessing competition on the basis of quality of service.

E.18 Do you believe the revised Guidelines should provide guidance on the relationship between data protection and privacy considerations and the availability of sufficient alternatives and market power? If so, please outline the framework you would propose for addressing the interplay between privacy and data protection regulation (e.g., the GDPR) and the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

The Commission could indeed consider the role of data protection and privacy rules, and cooperate with data protection authorities, within the mandate set by the Court of justice regarding the application of Article 102 TFEU (CJEU, 04.08.2023, Meta Platforms Ireland Ltd v Bundeskartellamt (Case C-252/21), ECLI:EU:C:2023:561). At the same time, when assessing the risk of a degradation in privacy protection, the Commission could also consider how existing data and privacy regulations affects the ability and incentives of the merging parties to engage in such conduct, in line with the ECJ case law referred to supra.

Topic F: Efficiencies

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

94. While most mergers are not harmful to competition and allow businesses to organise economic activity in the most efficient way, some result in the creation or strengthening of market power.[89] In the latter scenario, customers are deprived of the benefits brought by effective competition, and there is a real and tangible risk that the merger stifles innovation and results in higher prices, reduced output or a decrease in quality. These mergers may however also result in 'efficiencies', which may counteract the potential harm to consumers that the merger would otherwise have. Mergers can in particular generate cost savings that are passed-on to consumers in the form of lower prices, or may lead to improved products or services resulting, for example, from increased investment and innovation. These effects should be distinguished from synergies that only result in higher profits for the merged entity.

95. Compared to horizontal mergers, vertical and conglomerate mergers may provide more scope for efficiencies. The integration of complementary products between the merging parties can generate efficiencies

e.g. in the form of an elimination of double margins (EDM) or through better coordination of efforts to increase sales.[90]

96. Efficiencies should be assessed against the clear legal mandate of the **EU Merger Regulation** to protect effective competition, and the clarification that any efficiencies should be to the advantage of intermediate and ultimate consumers. The guidance on the conditions under which the Commission may take efficiencies into account in the assessment of a concentration is provided in the Commission’s Horizontal Merger Guidelines (“HMG”) and Non-Horizontal Merger Guidelines (“NHMG”), which specify that the efficiencies have to **benefit consumers**, be **merger-specific** and be **verifiable**. Given the risks to effective competition brought by certain mergers, **efficiencies should materialise as a direct result of the merger and be substantive enough to outweigh** the anticompetitive harm. In other words, the assessment of efficiencies aims at ensuring that consumers will not be worse off as a result of the merger. Implementing this principle in practice has challenges. The balancing exercise between harm and efficiencies becomes increasingly complex when there is **asymmetry between the alleged anticompetitive effects and benefits arising out of the merger**. Another challenge arises when efficiencies relate to improvements of quality, as investments usually materialise over a long period of time, whereas the anticompetitive effects of the merger may materialise immediately after the closing of the transaction.

97. Efficiencies must be **demonstrated through evidence**, as it is not sufficient that they are simply claims by the merged entity. It is for the notifying parties to demonstrate that the claimed efficiencies are merger-specific, likely to be realised and to counteract any adverse effects on competition. However, a question arises about which type of evidence or metrics are appropriate for the assessment of efficiency claims and the required likelihood of materialisation to accept efficiencies. For example, the assessment of efficiencies concerning improved quality of products or services is typically linked to consumers’ willingness to pay for higher quality, and merging companies may find it difficult to submit reliable and robust evidence in support of the increase in quality.

98. Finally, **efficiencies have to be merger-specific**. The Commission must consider whether the same benefits could be achieved in a less harmful way, for example through a cooperation agreement. However, determining the existence and viability of an alternative may not be straightforward. For instance, an alternative option should be realistic, but this may be put into question if an acquirer has already made an unsuccessful attempt at it in the past. In such cases, it is challenging to verify whether and under what circumstances the less harmful alternative could have been achieved and whether the transaction is the only realistic option.

Technical Background

99. The Commission’s assessment of efficiencies is embedded in the EU merger control framework. When assessing whether a merger would significantly impede effective competition, the Commission performs an overall competitive appraisal of the merger that takes into account substantiated and likely efficiencies.

100. In the past 20 years, merging parties have only brought forward sufficiently developed efficiency claims with respect to mergers in certain sectors (e.g., telecoms). While no merger case has so far been approved by

the Commission exclusively on the basis that the merger-specific efficiencies would offset consumer harm, in some cases, the efficiency claims made by the merging parties were partially accepted by the Commission and balanced against the competition harm.[91]

101. The framework for the assessment of efficiencies claims is included in the HMG, and applies to both horizontal and non-horizontal mergers. There are three cumulative criteria: the efficiencies have to (i) benefit consumers, (ii) be merger-specific; and (iii) be verifiable.

Benefit to consumers

102. In the assessment of efficiency claims, the relevant benchmark is that intermediate and ultimate consumers will not be worse off as a result of the merger. This requires that the efficiencies benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. In its decisional practice, the Commission has considered different types of efficiency gains that can lead to lower prices or other benefits to consumers.

103. **Cost efficiencies** are a classic example of an efficiency that – if passed-on to consumers – could result in lower prices. There is typically no incentives to pass-on fixed cost savings. Variable or marginal costs savings are more likely to be passed-on,[92] as long as there is competitive pressure (either from existing rivals or potential entry) on the merged entity. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.[93] Cost savings could arise from EDM when the merging parties are active at different levels of the supply chain or offer complementary products and the merger generates an incentives to reduce mark-ups in order to increase sales and profits.[94] Further, cost savings arising from consolidation of the merging parties' respective orders have been considered when the increasing scale generates volume discounts from suppliers and that the merger would generate material additional volume discounts compared to the discounts already obtained by the merging parties absent the merger.[95] For cost savings to amount to efficiencies they cannot be the result of loss of competition[96] or loss of innovation[97] resulting from the merger.

104. Consumers may also benefit from **new or improved products or services** or their faster roll-out, which is often the result of investment and innovation ('innovation efficiencies'). Consumers' benefit derived from higher quality can be assessed in terms of their willingness to pay for higher quality.[98] The Commission has also assessed efficiencies dealing with **new 'green' products, technology or innovation** that result in improved sustainability,[99] and, under specific circumstances, **out of market efficiencies** claimed by the merging parties as part of the overall efficiencies assessment.[100] In line with the *Mastercard* case law, where efficiencies arise outside of the affected markets, these efficiencies can only be accepted by the Commission if the benefits **cover substantially the same customers** otherwise harmed by the merger.[101]

105. In addition, for the first prong of the current efficiency test to be met, efficiencies need to be **timely**. Less weight can be given to efficiencies materialising later in the future. However, even if the efficiencies were unlikely to arise immediately following closing of the merger, the Commission has in the past accepted these

as long as they arose within a specific time period.[102] The exact horizon for efficiencies to be considered timely in these cases depended on the context of the industry in which the transaction was taking place, but was typically in the range of 3-4 years.

106. Finally, a consequence of the balancing test is that the more significant the loss of competition, the more substantial also need to be the expected efficiencies in order to outweigh the likely harm arising from a transaction. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

Merger-specificity

107. Under the current framework, efficiencies are relevant to the competitive assessment if they (i) are a direct consequence of the notified merger, and (ii) cannot be achieved to a similar extent by less anticompetitive alternatives.

108. Less anticompetitive alternatives can be of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) and must be reasonably practical given established business practices in the industry concerned. The Commission has considered sufficient that the relevant alternative brings positive added value to the merging parties, taking into account the business case faced by each of them and having regard to established business practices in the industry concerned.[103] However, the Commission has not considered relevant how this added value is distributed between the merging parties, nor if the merging parties could achieve higher value through the transaction[104] or that the merging parties favoured the merger over the possibility to enter into a cooperation agreement.[105] The General Court has clarified that some agreements could constitute a reasonably ‘practical’ alternative when there is evidence that the agreements had been concluded in the industry, even though they may not be the prevailing type of agreement, or the merging parties lack the incentives to enter into such agreements.[106]

Verifiability

109. The Commission needs to be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers. Where reasonably possible, efficiencies should be quantified. If this is not possible, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. For example, cost synergies and the willingness to pay for quality improvements can be quantified and weighed against the incentives to increase prices.[107]

110. It is incumbent on the merging parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies result in benefit to consumers that outweighs the harm, are merger-specific and likely to be realised. In its decisional practice, the Commission has considered different types of relevant evidence, namely internal documents used by management to decide on the merger; statements from

management to shareholders and financial markets about expected efficiencies; historical examples of efficiencies and consumer benefit; and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.[108]

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[89] Between 2014 and 2023, about 95% of mergers notified to the Commission were cleared unconditionally.

[90] NHMG, para 13. However, the presence of EDM alone does not imply that these cost savings are substantial enough to outweigh anti-competitive harm.

[91] For instance, cases M.4267 – Deutsche Börse / Euronext, M.6905 – Ineos / Solvay / JV, M.7421 – Orange / Jazztel and M.7278 – GE / Alstom.

[92] In telecom mergers, the Commission has considered wholesale costs as variable costs and has concluded that these are more likely passed on to consumers (see e.g., cases M.7421 – Orange / Jazztel, para 746, M.10896 – Orange / MásMóvil / JV, para 1679).

[93] HMG, para 84.

[94] However, this requires that non-linear pricing is not feasible and that margins are close to the monopoly level, see NHMG, paras 55, 117.

[95] Case M.8677 – Siemens / Alstom, paras 1256-1258.

[96] Case M.8677 – Siemens / Alstom, para 1261.

[97] R&D cost savings arising from the elimination of duplicate R&D projects could reflect a loss of innovation competition between the merging parties and were thus rejected (M.8677 – Siemens / Alstom, para 1263).

[98] Case M.10896 – Orange / MásMóvil / JV, para 1694.

[99] In M.9049 – Aurubis / Metallo, the Commission looked at two sets of alleged efficiencies that related to copper scrap. The second set concerned possible metal recovery and other environmental benefits, although the Commission found that they were not substantiated enough and were thus rejected (M.9409 – Aurubis / Metallo, paras. 835 et seq.).

[100] See e.g. M.9049 – Aurubis / Metallo (para. 844 et seq.), where the Commission assessed and rejected certain out-of-market efficiency claims. It was however not necessary for the Commission to opine on the out-of-market nature of the efficiency claim, as it was found not to be verifiable.

[101] T-111/08, Mastercard v Commission, paragraph 228. In case M.10615 – Booking / eTraveli (paras. 1152 and 1171), the efficiencies concerned consumers in the flight OTA market and were rejected, inter alia, because the harm brought by the merger related to a separate set of customers of Booking, the hotels.

[102] Case M.7630 – FedEx / TNT, paras. 568-581. When it was unlikely that efficiencies would materialise within a certain period following closing, these have been rejected (see cases M.6992 – Hutchison 3G UK / Telefónica Ireland, para. 765; M.10896 – Orange / MásMóvil / JV, para. 1597).

[103] Case M.7018 – Telefónica Deutschland / E-Plus, para. 1137.

[104] Cases M.7018 – Telefónica Deutschland / E-Plus, para. 1137; M.10896 – Orange / MásMóvil / JV, para. 1595.

[105] Case M.7758 – Hutchison 3G Italy / Wind / JV, para. 1573.

[106] Case T-175/12 Deutsche Börse AG v Commission, paras. 284-285.

[107] Case M.10896 – Orange / MásMóvil / JV, para. 1597, Annex A, para. 34.

[108] Case M.10896 – Orange / MásMóvil / JV, para. 1684.

Questions

F.1 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how the Commission assesses merger efficiencies?

- Yes, fully

- Yes to some extent
- **(selected)** No, to an insufficient extent
- Not at all
- I do not know

F.1.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the objective of assessing merger efficiencies, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

Efficiencies are an important topic to be considered in the revision of the Guidelines. It is welcome that the Commission addresses efficiencies in the current Guidelines as a way of counterbalancing the potential anti-competitive effects of concentrations. However, the current framework presented by the Commission to assess efficiencies appears largely theoretical, or at least to reflect a methodological issue. The APDC calls for an ambitious approach to efficiencies in the future. Indeed, to the best of the APDC's knowledge, merger control applicants have consistently failed to reach the standard of proof required by the Commission in order obtain the clearance of a merger solely on the grounds of efficiencies: market operators have never been able to justify to the Commission that their operation will generate enough efficiencies to completely offset consumer harm. Potential risks for competition always outweigh efficiency gains, even when they are certain, which has the potential to disincentivize companies from reaching deals producing efficiency gains for consumers. As a result, in the experience of APDC members, notifying parties often choose not to fill in the (optional) section on efficiencies provided for in the Form CO as they generally consider the cost/benefit ratio for engaging the Commission on this topic to be negative. This may result in suboptimal outcomes where mergers are prohibited or subject to disproportionate remedies despite the efficiencies they could have generated. The challenge of efficiency defenses is not unique to Europe, but the Commission's approach appears to be among the most restrictive globally. Other major jurisdictions have faced similar difficulties, with some adapting their frameworks over time based on practical experience. Canada's Superior Propane case is a rare but clear example of a successful efficiency defense. In Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), the merger of Superior Propane and ICG Propane – Canada's two largest propane distributors – created a near-monopoly in several regional markets, raising serious horizontal competition concerns. The Canadian Competition Bureau initially opposed the merger, but the parties invoked Section 96 of the Competition Act, which allows a merger to proceed if its associated efficiencies outweigh the anti-competitive effects. Ultimately, the Competition Tribunal concluded that the merger would generate substantial efficiencies, including economies of scale, streamlined distribution networks, and reduced administrative overhead. Although some price increases for consumers were expected, the Tribunal ruled that the total economic gains exceeded the losses in consumer welfare. On 17 June 2025, Commissioner Kubilius said that EU merger control rules would not constitute an obstacle to the consolidation of the EU defense industry, and that the Commission was committed to "particularly assess the overall benefits from enhanced defense and security' when scrutinizing planned takeovers or joint ventures in the sector." While this certainly goes in the right direction there is no reason to limit this approach to one specific sector. As a matter of public policy, the Commission should strive to maintain incentives for companies to also seek benefits consumers and the general interest through their consolidation deals. The APDC considers that the Commission should reconsider its conservative approach to efficiencies in merger control. Efficiencies can be credibly assessed and, under proper safeguards, can justify the clearance of mergers between competitors. The Superior Propane case demonstrates that, under rigorous analytical standards, such benefits can outweigh potential losses for consumers. Companies should be given the means and be incentivized to reach deals that will benefit consumers and the general interest and to present these benefits to the Commission. The conditions laid down by the Commission should therefore be clarified and be made more flexible. The APDC would like to suggest possible ways to adapt and make the assessment framework for efficiencies more practical and realistic. The Commission could usefully draw on its own experience in assessing efficiencies under Article 101(3) TFEU to improve its approach to such considerations in merger control. [End of response under F.3.a below]

F.2 In your/your client's view, should the revised Guidelines better reflect how the Commission is assessing merger efficiencies in the overall competitive appraisal of a merger in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address

You can tick more than one reply, below.

- [x] a. Benefits to consumers
- [x] b. Merger-specificity of efficiencies
- [x] c. Verifiability of merger efficiencies
- [x] d. Other
- [ ] e. The revised Guidelines should not better reflect any of these areas

Benefit to consumers

F.3 How should the Commission assess whether merger efficiencies will benefit consumers that would otherwise be harmed by the loss of competition resulting from the merger? In particular, please explain:

F.3.a For which types of efficiencies and under which conditions those efficiencies will likely be passed on to consumers?

Text of 1 to 5000 characters will be accepted

[End of response to F.1.1] In its significant 2023 revision of the Guidelines on horizontal cooperation agreements, the Commission notably introduced a methodological framework to assess efficiencies that account for broader public interest considerations, particularly through the addition of a comprehensive chapter on sustainability agreements. This ability to adapt the Article 101(3) framework to contemporary challenges provides a valuable precedent for enhancing the Merger Guidelines in a way that better acknowledges efficiencies, ultimately contributing to a more practical and predictable framework for assessing efficiency gains. It is all-the-more essential that merger control applicants are provided with indications on how to prove efficiencies that, in the context of the consultation, the Commission is pushing to adopt presumptions that a SIEC will exist beyond certain market share or market concentration thresholds. The APDC strongly advocates that the EUMR, as interpreted by the EU courts, clearly does not allow for the introduction of presumptions of SIEC (see APDC's answer to Questions B4 to B6 of the present consultation), based inter alia on the 2023 CK Telecoms judgment, in which the ECJ forcefully stated that "no general presumption that a concentration is compatible with, or incompatible with, the internal market can be inferred from [Regulation 139/2004]" (Case C-376/20 P of 13 July 2023 CK Telecoms UK Investments Ltd, para.71). Finally, the APDC considers that a more open approach by the Commission would also provide much-needed guidance and incentives to NCAs, many of which tend to follow the same rigid framework. Benoît Cœuré, president of the French NCA, stated that NCAs should encourage undertakings to propose efficiency defenses. He considers that the NCAs' reluctance to consider efficiencies is a "mistake" that keeps them from supporting broader industrial policy goals such as innovation and sustainability (R. Baxter, Cœuré: Agencies must encourage dealmakers to propose efficiency defenses, Global Competition review, 27 May 2025, link). [Response to F.3.a] The APDC notes that this question supposes that efficiencies must be passed on to consumers to be taken into account. The APDC notes that some efficiencies might have broader effects on welfare in Europe than on the direct consumers of the product or service in question. The Commission could consider a broader test (similar, for instance, to the Union interest test applied in trade defense proceedings) that would encompass but not be limited to consumers. To answer this question more specifically as far as consumers are concerned, important parameters that enhance the likelihood of passing on include (i) the intensity of competition (potential or actual, current or future) on the relevant market where the efficiencies materialize; (ii) demand elasticity on that same market; or (iii) whether the efficiencies take the form of a reduction of the combined entity's cost base or directly accrue to consumers or to other beneficiaries (through externalities or other externalities).

F.3.b Whether there are some types of transactions that, due to their nature, or the characteristics of the products or markets at hand, are more prone to efficiencies?

Text of 1 to 5000 characters will be accepted

Defensive mergers where a significant industrial rationalisation is at stake to address over-capacities could be one example of transactions that are prone to efficiencies. In sectors with overcapacities, the APDC believes that allowing two competitors to merge can be more beneficial to competition and consumers than maintaining the status quo. When excess capacity leads to unsustainable operations and declining profitability, there is a potential risk that firms engage in collusion to survive and coordination that can lead to reduced output, reduced innovation and higher prices over time. A merger would allow for economies of scale, better use of resources, and potentially more innovation. Crucially, the merger process is subject to ex ante regulatory oversight, enabling authorities to impose remedies that mitigate potential harms to competition / monitor the result via a trustee. Other transaction types may also be conducive to certain efficiencies - such as innovation, quality, or sustainability - but the Guidelines should avoid presumptions and ensure that any such assessment is based on the specific facts and evidence of each cases. Other examples could include (i) transactions generating externalities that directly accrue to certain beneficiaries as a whole or (ii) transactions that contribute to the resilience of the European economy, or to certain public policy objectives (such as the security of the continent) or to sustainability goals. This approach aligns with the principle that efficiency analysis should maintain the same rigor as competitive harm assessment.

F.3.c How should the Commission establish that the efficiencies (in-market and out-of-market) will benefit substantially the same consumers who might be harmed by the loss of competition resulting from the merger?

Text of 1 to 5000 characters will be accepted

The current HMG state that "efficiencies [...] should, in principle, benefit consumers in those relevant market where it is otherwise likely that competition concerns would occur" (pt. 79). The APDC takes the view that the Commission should take into account out-of-market efficiencies beyond those that could benefit those consumers who might be directly harmed by a drop in the intensity of competition as a result of the merger. The APDC advocates that the Commission's restrictive approach to the beneficiaries of the merger's efficiencies fails to adequately account for certain types of efficiencies, and especially sustainability or labour efficiencies. This leads the Commission to overvalue the subjective appreciation of consumers on the altruistic dimension of their purchase and to exclude taking into account the benefits on beneficiaries for whom direct consumers of the parties at the time of the merger are not ready to pay an additional price or to accept a reduction in the product offering. A few examples can illustrate this view: • Consider a transaction between two operators with significant market shares in Western Europe who notify a proposed merger, one of the (documented) objectives of which is to create production capacity in a depressed employment area in Slovenia. Within the EU, should a theoretical risk of higher prices for French or German consumers really take precedence over the benefits of reindustrialisation for Slovenian consumers, on the grounds that the former do not benefit from the efficiencies enjoyed by the latter? • Taking into account a benefit for sustainable development (pollution, greenhouse gases emissions, soil erosion, poor working conditions, animal welfare) requires in many cases taking into account efficiencies for beneficiaries other than the consumers of the products/services sold by the parties, whether it be future generations, people who benefit from the initiative within the EU territory where the sustainable product will be offered or the non-sustainable product phased out, or even animals in the case of animal welfare. The Commission should consider that consumers can be inclined to pay more for a product if it is manufactured in better conditions inside the EU. When the new production is more respectful of the environment or of workers, European citizens are sometimes willing to pay higher prices, which may be demonstrated via consumer studies or actual purchase behaviour for similar products.

F.3.d How should the Commission trade-off benefits and harm between different consumers groups when efficiencies benefit only a certain group of consumers?

Text of 1 to 5000 characters will be accepted

The APDC notes that the Commission may not necessarily have to trade off benefits and harm between different consumer groups if it considers the effects of the transaction on the Union economy as a whole. Indeed, the Commission could simply take the view that as long as the quantified efficiencies (regardless of the identity of their beneficiaries) outweigh their anti-competitive effects (again, regardless of their beneficiaries) the transaction should be cleared. This would make merger control as neutral as possible and leave the task of redistribution to other authorities (whether national or European) to authorities with a clear mandate to do so. Should however the Commission consider that it must trade off benefits and harms between different consumer groups, the APDC suggests that three approaches could be relevant for that assessment. Firstly, a possible method would be to adopt a quantitative approach, according to which the Commission could assess the sizes of the affected groups of consumers. Secondly, the Commission could also rely on a qualitative approach. Without considering the number of consumers affected by an operation, the Commission could focus on efficiencies, which, qualitatively and by their very nature, benefit the general interest and counterbalance potential anticompetitive effects. Thirdly, the APDC submits that the Commission should take into account the collective benefits that can arise from a concentration, even if certain categories of consumers are disadvantaged in favour of proven positive externalities outside the market. It argues that the Commission's assessment of a merger should be comprehensive and that there is no reason why a presumptive competitive harm to one group of consumers should outweigh the expected benefits to another group of consumers (or even to nature).

F.3.e How should the Commission trade-off benefits that may materialise already short-term (e.g., product improvements) and harm to consumers that could materialise in the longer run (e.g., entrenchment of an already strong or dominant market position, raising barriers to entry)?

Text of 1 to 5000 characters will be accepted

The APDC considers that the question of when benefits and harm will materialize should not be the primary focus of the analysis. Rather, the Commission should assess whether efficiencies are likely to offset hypothetical anticompetitive effects, considering the magnitude and likelihood of both positive and negative effects. If efficiencies are substantial and likely to materialize, they should be duly considered in all circumstances, and consumers should not be deprived of their benefits even if some anticompetitive effects are likely to materialize in the short term. Should the Commission wish to distinguish between long-term and short-term effects over a long period (whether for efficiencies or for price increases), it could simply apply a discount rate based on best market practices.

F.4 What metrics, evidence and factors should be used to assess whether cost efficiencies are likely to be passed on to consumers in the form of lower prices? Please explain.

F.4.a Assessment whether costs are variable costs or fixed costs.

Text of 1 to 5000 characters will be accepted

As a foreword, the APDC notes that, as per Superior Propane, efficiencies do not necessarily need to result in lower prices to outweigh consumer welfare losses resulting from a merger. The APDC considers that those factors are not necessarily relevant to the extent the assessment is extended over a long period of time during which fixed costs may become variable.

F.4.b Empirical assessment of pass-on from past cost changes.

Text of 1 to 5000 characters will be accepted

The APDC considers that this aspect is relevant to the assessment. For example, this assessment could include company and industry data, econometric analysis of price-cost relationships, and benchmarking against comparable markets and transactions.

F.4.c Remaining competitive pressure (either from existing rivals or potential entry) on the merged entity.

Text of 1 to 5000 characters will be accepted

The APDC suggests that considerations related to the remaining competitive pressure from rivals should be rather assessed at the stage of the evaluation of possible anticompetitive effects. If there is sufficient remaining competitive pressure from rivals (either actual or potential) on a market, this should lead to the conclusion that anticompetitive effects deriving from the merger are unlikely to arise. In such circumstances, there should be no need for an efficiency defense.

F.4.d Other (please specify).

Text of 1 to 5000 characters will be accepted

F.5 What metrics, evidence and factors should be used to assess whether consumers benefit from improved goods or services that may result from increased investment and innovation ('innovation efficiencies')? Please explain.

F.5.a Consumers' willingness to pay as measured by actual purchasing behaviour.

Text of 1 to 5000 characters will be accepted

Yes

F.5.b Consumers' willingness to pay as measured by consumer surveys.

Text of 1 to 5000 characters will be accepted

Yes

F.5.c Benefits from improved zero-priced products/services measured by consumer engagement (e.g. trends in number of users or hours of engagement).

Text of 1 to 5000 characters will be accepted

Yes

F.5.d Other. Please specify.

Text of 1 to 5000 characters will be accepted

F.6 What would be an appropriate timeframe for efficiencies to be considered *timely*? Please explain whether this would differ per industry, and indicate under what circumstances this timeframe should be longer or shorter.

Text of 1 to 5000 characters will be accepted

The APDC considers that a timeframe of three or four years is not necessarily the most adequate for assessing efficiencies. This restrictive timeframe could be likely to deprive consumers of long-term and lasting efficiencies. For instance, cost synergies can deploy their effects over periods that largely exceed the four-year timeframe. As a matter of principle, the Commission should be ready to consider efficiencies that are likely to materialize on the long run (or on a lasting basis). Relying on a predefined timeframe will be counterproductive, and risk rigidifying even more the approach to efficiencies. Such assessment should occur on a case-by-case basis.

F.7 How can competitive benefits and harms accruing in the near future be balanced with competitive benefits and harms accruing in the more distant future? Please explain in particular how to balance situations where the benefits of a merger would only materialise in the more distant future (and to establish that these distant events are likely), while the harm would materialise shortly after the merger.

Text of 1 to 5000 characters will be accepted

The APDC considers that the question of when the benefits and harm will materialize is not necessarily the most adequate. Rather, the APDC suggests assessing whether efficiencies are likely to offset hypothetical anticompetitive effects. If that is the case, efficiencies should be duly considered in all circumstances and consumers should not be deprived of their benefits even if some anticompetitive effects are likely to materialise shortly. As mentioned in response to F.3.e above ,the Commission could simply apply a discount rate for efficiencies that materialize over the long term.

Merger-specificity

F. 8 How should the Commission assess whether efficiencies are a direct consequence of the notified merger? Please explain in particular which evidence and metrics the Commission could use.

Text of 1 to 5000 characters will be accepted

Firstly, the APDC suggests taking into consideration among others a comprehensive set of internal documents from the parties or from third-party experts which assess the anticipated effects of a merger. These documents describe which synergies and benefits are contemplated by the merging parties. They will give indications regarding the links between the transaction and the anticipated efficiencies. As a side note, the APDC is not sure to comprehend the point raised by the Commission at point 94 of the questionnaire stating that "[efficiencies] should be distinguished from synergies that only result in higher profits for the merged entity". In the APDC's view, efficiencies and synergies are two closely interrelated concepts. It is only if parties to an operation create synergies together that they will be able to generate and to pass-on efficiencies to consumers. For instance, synergies will allow merging undertakings to generate cost savings that might then be passed-on on to consumers in the form of lower prices. If synergies can result in higher profits, they can also result in efficiencies (in terms of investments or innovation). Secondly, the Commission could assess whether reaching the contemplated efficiencies would be impossible or more difficult without the operation by using a counterfactual scenario where the transaction does not take place.

F.9 How should the Commission assess whether efficiencies cannot be achieved to a similar extent by less anticompetitive alternatives?

Text of 1 to 5000 characters will be accepted

The APDC considers that the notion of merger-specificity is one of the main reasons why operations are never authorized on the ground of efficiencies. The Commission tends to rely on the idea that the efficiency at stake can often be reached through an alternative deal of a non-concentrative nature based on highly speculative assumptions. However, undertakings are free to decide about the best way to achieve their economic objectives. Companies can choose their organizational structure to create value. In particular, they are free to decide to pursue external or organic growth. When companies make the decision to pursue external growth and when that operation generates efficiencies, there should be no need to conduct a comparison with hypothetical situations or scenarios. The reasoning should be only based on situations that do exist (i.e. the pre-transaction situation) or could exist (ie the post-transaction situation). It should not, however, be based on situations that do not exist. Therefore, the APDC believes that there is no need to look for purely hypothetical counterfactuals.

F.9.a In particular, please explain: How should the Commission take into account less anticompetitive alternatives of a non-concentrative nature (e.g. a licensing agreement, a cooperative joint venture or a network sharing) and a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger)?

Text of 1 to 5000 characters will be accepted

As stated above, the APDC suggests that there is no need to take into account theoretical and hypothetical scenarios. For the analysis of a given concentration, there is no reason to assess more lightly potential anticompetitive effects than possible efficiencies likely to counterbalance them.

F.9.b In particular, please explain: How should the Commission assess whether a less anticompetitive alternative is reasonably practical and what market circumstances might impact that assessment?

Text of 1 to 5000 characters will be accepted

The APDC is of the view that looking for this alternative or counterfactual scenario is one of the main issues of the current framework. Conducting such an analysis is difficult or even impossible as it relies on hypothetical scenarios that do not correspond to any reality for the merging parties.

Verifiability

F.10 How should the Commission make sure that the efficiencies claimed by the parties are verifiable and likely to materialise? Please explain in particular which evidence and metrics the Commission could use.

Text of 1 to 5000 characters will be accepted

The APDC considers that efficiencies should be assessed using the same standards as for anticompetitive effects. When the Commission deals with anticompetitive effects, it conducts a prospective analysis, relying on a body of evidence, including various economic tests about the likelihood of such anticompetitive effects. Theoretically, efficiencies must be able to counterbalance the potential anticompetitive effects. Therefore, anticompetitive effects and efficiencies should be assessed in a similar way, relying on the same standard of proof. There is no reason to apply a lower standard of proof for anticompetitive effects than for efficiencies. One crucial point with respect to the verifiability of efficiencies is the question of the burden of proof, which under the current guidelines systematically rests on the notifying parties. While there may be theoretical reasons (including asymmetry of information between the Commission and the notifying parties) for such allocation of the burden of proof for certain efficiencies (particularly those resulting from cost synergies expected by the parties), for other efficiencies (such as externalities directly generating cost decreases for consumers, or other externalities directly benefitting certain categories of stakeholders) there is no such asymmetry of information and the Commission might be better placed to assess and quantify the efficiencies. In such cases the Commission should bear some of the burden of proof and investigate if it intends to reject a credible prima facie case of efficiencies raised by the parties based on the (sometimes limited) information at their disposal.

F.11 How can merger efficiencies, in particular when it comes to non-price efficiencies, be identified and quantified? Please explain to what extent merger efficiencies need to be quantified for the Commission to conclude that they will outweigh the competitive harm, and how.

Text of 1 to 5000 characters will be accepted

F.12 Based on which evidence and metrics can the Commission alleviate uncertainties as to the implementation of efficiencies, in particular when they will not materialise in the very short term?

Text of 1 to 5000 characters will be accepted

One option could be to consider a mechanism comparable to remedies. Indeed, the Commission could accept commitments from merging parties to achieve alleged efficiencies in a given timeframe. The Commission could ask the merging parties to appoint a monitoring trustee for that purpose. The threat of administrative fines in case of failure to meet said efficiencies will strongly incentivise parties to achieve those.

F.13 What evidence should be taken into account to verify efficiencies? Please select the evidence that you believe are relevant and substantiate your reply, especially pointing to specific challenges in the assessment of such evidence.

You can tick more than one reply, below.

- [x] a. Internal documents, including those used by management to decide on the merger
- [x] b. Statements from management, owners and financial markets about expected efficiencies.
- [x] c. Historical examples of efficiencies and consumer benefit.
- [x] d. Pre-merger external experts' studies on the type and size of efficiency gains and on the extent to which consumers are likely to benefit.
- [x] e. Economic models, including those investigating the merging parties’ and their rivals’ ability and incentives to invest and innovate.
- [ ] f. Other

F.13.a Please explain.

Text of 1 to 5000 characters will be accepted

F.13.b Please explain.

Text of 1 to 5000 characters will be accepted

F.13.c Please explain.

Text of 1 to 5000 characters will be accepted

F.13.d Please explain.

Text of 1 to 5000 characters will be accepted

F.13.e Please explain.

Text of 1 to 5000 characters will be accepted

Topic G: Public policy, security and labour market considerations

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

Topic Description

111. The EU Merger Regulation sets a clear legal mandate: the prevention of significant impediments to effective competition, in the internal market or a substantial part of it. Merger control is primarily focusing on ensuring that mergers do not harm consumers. However, vibrant competition – indirectly – also contributes to other policy objectives and serves as a restraint on the market power of large businesses. Where companies become too powerful in their fields of activities, they may become too-powerful-to-care. Where companies become so large as to be essential – for example in the provision of a certain good or service – they can become too-big-to-fail, and therefore increasingly difficult to regulate for democratic institutions. Research further suggests that mergers can lead to an increase in lobbying activity by the merging firms.

112. By limiting market concentration and market power of firms, merger control enforcement helps to maintain a balance of public and private power, supports media plurality, fosters a competitive defence industrial ecosystem, and by promoting the competitiveness of businesses in the EU contributes to the availability of quality jobs for Europeans. Therefore, competitive and contestable markets not only serve business and consumer interests, but also benefit wider societal goals.

113. In addition, the Treaty on the Functioning of the European Union and the EU Merger Regulation includes certain specific provisions relating to security and defence. For instance, under Article 21(4) EU Merger Regulation, Member States may justify measures on public security grounds in relation to mergers which would otherwise not be harmful to competition. Moreover, in light of a changed geopolitical environment and technological advances, the revised Guidelines may provide further guidance on how the Commission assesses cases related to this sector.

114. While the protection of competition generally contributes to the provision of good and well-paying jobs in Europe, the application of labour market theories of harm may enable the Commission to prevent negative effects on workers in certain specific merger cases.

Security and defence

115. The Political Guidelines of the Commission call for a new era for European Defence and Security, indicating the current Commission mandate will be focused on building a European Defence Union and creating a true Single Market for Defence. In the context of Russia's war of aggression against Ukraine there have also been calls for further consolidation in the EU defence sector.

116. While it is undisputed that monopolies and monopsonies generally lead to higher prices, lower quality and less innovation, some sectors of the EU's military supply base are currently rather fragmented. It appears that national autonomy considerations and hardware requirements specific to Member States have so far been the key factors in preventing integration and consolidation in these segments of the industrial defence sector in the EU.[109] Moreover, merger rules may also prevent harmful market power in non-European inputs relevant for EU defence.

117. The Commission has never prohibited a defence merger. In recent years, most deals involving defence players were cleared unconditionally. Where deals required remedies to obtain merger clearance, the Commission was often concerned with protecting European customers (e.g. in the case of two mergers between US defence contractors, *UTC/Raytheon and Harris Corporation/L3 technologies*, that also supplied military products to EU Member States) and European defence providers (e.g. GE/AVIO, where the transaction would have allowed GE to acquire a significant degree of influence in the Eurojet consortium and access strategic information of one of its main competitors in the international market for fighter aircraft – and specifically related to the Eurofighter).

118. Member States may consider legitimate national security interests to be impacted by a merger – and consequently seek to intervene on public security grounds. Already today, the EU Merger Regulation as well as the Treaty on the Functioning of the European Union provide for certain exceptions related to defence and security.[110] Measures adopted by Member States may in some instances affect mergers which would not otherwise affect competition in the internal market. In addition, the Treaty (in Article 346) provides that competition with respect to dual-use goods, namely goods also used for civil applications, should be protected. However, neither the current Horizontal Merger Guidelines ("HMG") nor the Non-Horizontal Merger Guidelines ("NHMG") include guidance specific to mergers relating to security or defence. Therefore, whereas security and defence considerations are generally the privilege of Member States, and not part of the Commission's

mandate under the EU Merger Regulation, we are seeking feedback from stakeholders whether further guidance on the interaction between Member States' security and defence interests and the Commission's competition assessment under the EU Merger Regulation could be useful. Feedback is also sought on how to undertake a potential balancing of interests between defence and competition objectives for cases that involve dual-use goods.

Media plurality

119. Mergers can also impact media plurality. Article 21(4) of the EU Merger Regulation allows for Member States to "*take appropriate measures to protect legitimate interests*" such as "plurality of the media". However also in cases where this provision is not invoked, the Commission may consider the impact of a loss of competition on media plurality in its assessment of mergers.[111] Media freedom and media pluralism are essential to our democracies and are enshrined in the Charter of Fundamental Rights. Free and pluralistic media are key to holding power to account and to helping citizens make informed decisions. By providing the public with reliable and trustworthy information, independent media play an important role in the fight against disinformation and the manipulation of democratic debate. In this regard, AI technologies, including generative AI, have the potential to profoundly shape public discourse and influence the perspectives of citizens on democratic issues, thereby having a significant impact on election outcomes. As a result of mergers and acquisitions in the AI and media industries, market concentration could reduce the diversity of choices available to consumers. In such a landscape, a few dominant companies could wield considerable power over democratic processes by influencing public opinion. Therefore, it is crucial to consider this dynamic, alongside traditional factors like price and quality, when evaluating the implications of mergers and acquisitions in the AI sector, as well as in more traditional media sectors.

Effects on labour markets and workers (monopsonies)

120. Mergers can significantly impede competition in labour markets by shifting the balance of power between employers and workers. A situation where a single or dominant employer controls the hiring of a group of potential employees is an example of a monopsony. Monopsonies in labour markets can lead to lower wages, higher unemployment, worse working conditions and also lower downstream output and higher prices.

121. While the existing HMG already consider the potential effects of mergers on buyer power more generally, [112] in practice, the Commission has only infrequently assessed the effects of a transaction on buyer power in upstream markets in detail.[113] In this regard, a report from the OECD concerning competition issues in labour markets states that, while "*the application of merger control laws to the undesirable effects of buyer's power is generally uncontroversial, competition authorities appear to not have devoted much attention to monopsony restricting competition in product markets*".[114] With regards to the effects of monopsony power on labour markets specifically, the current Guidelines do not provide any guidance and EU merger control assessments in the past have not explicitly considered the effects of mergers on labour markets in similar circumstances.[115]

122. A key question therefore is whether the revised Guidelines should provide some guidance on the assessment of the impact of mergers on labour markets. An important aspect that the revised Guidelines may

provide clarity on is whether an expected significant loss of competition through the exercise of buyer power in upstream markets, including in labour markets, is, in itself, a sufficient theory of harm, or whether instead the Commission also needs to demonstrate that such a loss of competition can be expected to have negative effects on downstream markets (e.g., via higher prices and/or lower output to consumers). In the potential assessment of labour markets, it needs to be kept in mind that labour markets are usually defined by occupation and narrow geographic area (e.g., city or "commuting zone"), resulting in a potentially very large number of markets to be assessed, which might greatly increase the complexity of certain merger reviews.

123. Finally, mergers often raise concerns about job losses due to restructuring and offshoring. These effects are not the result of a change in market power and not covered by the EU Merger Regulation, therefore they cannot be addressed in the revised Guidelines.[116] Cost savings resulting from restructuring or offshoring are generally reductions in fixed costs and therefore unlikely to be passed on to consumers. As a result, these cost savings should not be accepted as efficiencies. To the extent that job losses are a result of lower sales due to a reduction in competition, consumers would be harmed, and this should also not be considered an efficiency.

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[109] See for example Mario Draghi's report 'The future of European competitiveness', September 2024, page 164.

[110] Article 346 TFEU states: "no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security" and "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes". Article 21(4) EU Merger Regulation states that "[…] Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law", and further that "[p]ublic security, […] shall be regarded as legitimate interests […]".

[111] See case M.10433 – Vivendi / Lagardère.

[112] HMG, paragraphs 61-63.

[113] A relatively recent case in which the Commission has assessed the effects of a transaction on buyer power in more detail is M.9409 – Aurubis / Metallo. In addition, the Commission has assessed in more detail the effects of a transaction on buyer power in certain retail mergers, for example in mergers involving the retail supply of furniture (e.g., M.10969 – XXXLutz / Home24).

[114] OECD (2020), Competition in Labour Markets, page 32.

[115] The 2023 merger guidelines of the US DOJ and FTC include a dedicated section (2.10) that discusses the potential harmful effects that mergers can have on workers through reduced competition in labour markets.

[116] These job losses fall however under the remit of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Questions

Security and defence

G.1 In your/your client's view, should the revised Guidelines better reflect how the Commission assesses defence and security considerations in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address

You can tick more than one reply, below.

- [ ] a. Assessment of security interests under Article 21(4) EU Merger Regulation
- [ ] b. Defence exception under Article 346 TFEU
- [x] c. Assessment of dual uses (both military and civil) products and services
- [x] d. Other

G.1.1 If other, please specify.

Text of 1 to 5000 characters will be accepted

For background, in the context of the announcement of the Defense Readiness Omnibus on 17 June 2025, the Commission expressed the political view that it does not intend to oppose to the consolidation of the EU defense industry on the basis of the EU merger control rules, but nonetheless confirmed the need to apply these rules to preserve competitiveness of the industry. The need to balance different objectives (i.e., defense readiness, competitiveness and innovation) is specifically highlighted in the Commission's communication to the European Parliament and Council: "the defense readiness of the European industry critically depends on competitive markets that can deliver cutting-edge technology and innovation, as well as adequate and agile production capacity, while ensuring that concentrations will not lead to levels of market power that will likely increase costs for Member State budgets". The mission letter sent by the President of the European Commission to Commissioner Ribera on 17 September 2024 also stressed that the review of the HMG "should give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defense and security environment." The APDC therefore understands that the political mandate of the Commission is to provide a balanced approach in the Guidelines, combining (a) the need to allow integration and consolidation of the European defense sector, and (b) set boundaries to such consolidation if it reaches levels of market power considered as harmful to Member State budgets, competitiveness, or innovation. The APDC considers that such an approach is sound and does not appear misaligned with the general principles of the EUMR applicable to all sectors. With regard to the defense industry specifically, the key question is whether there is a need to define the level of "harmful" market power in a different manner compared to other sectors (i.e., SIEC) and, if so, on what basis. In other words, what is the level of consolidation the defense industry shall reach and who shall define it? In the APDC's view, while it would be useful for the Guidelines to include some examples of efficiencies specific to the defense sector, the APDC does not support the adoption of sector-specific assessment principles. First, such a change would most likely require the reform of the EUMR instead of merely updating the Guidelines. The EUMR's mandate indeed focuses on the effects of mergers on the structure of competition in the internal market, in particular those mergers likely to lead to a SIEC. In addition, the EUMR, which was adopted by the Council (i.e. Member States ministers) on the basis of a specific legislative procedure, provides that sector-specific interests which go beyond the EUMR's mandate (such as public security) are dealt with by Member States. Second, defining specific levels of consolidation is a defense policy matter rather than a matter of competition policy. Notwithstanding Member States' powers under Art. 21 (4) of EUMR, such a policy objective presumably falls within the scope of Article 346 TFEU (at least for all products or services which are intended for specifically military purposes), on the basis of which a Member State may inter alia adopt measures (including prohibiting a merger in the defense industry). Accordingly, in the APDC's view, the review of merger Guidelines shall not provide for an EU equivalent of the US Defense's "Last Supper". Third, from a practical perspective, the defense and political guidelines are likely to follow different review cycles to merger Guidelines, hence the Guidelines would benefit from a rather technical approach that provides guidance and legal certainty independently of possible shifts in defense policy. As a result, in the APDC's view, the most appropriate approach would consist of applying the general principles of the EUMR when it comes to the assessment of mergers in the defense sector. Defense policy related considerations (e.g., there is a need to increase production or consolidate in certain markets to achieve a Single Market for Defense etc.) should be assessed in a manner similar to efficiencies arguments. We invite the Commission to provide specific examples in the Guidelines to assist businesses in building a convincing efficiency defense in this sector. [End of response below G.2]

G.2 In your experience, have there been interventions by Member States (in particular in the context of an application of Art. 21(4) EU Merger Regulation) which resulted in mergers that would have otherwise happened, not taking place? Have such interventions thus preserved industry fragmentation? Please provide relevant examples.

Text of 1 to 5000 characters will be accepted

[End of response to G.1.1] In view of the above, the APDC is not convinced that specific guidance shall be provided in the Guidelines with regard to the application of Article 21(4) EUMR and Article 346 TFEU. In the absence of sufficient past experience in applying these provisions in EU merger cases and considering the likely inconsistent definition of security interests by different Member States, the most relevant approach appears to be a case-by-case application of these provisions. This would also prevent possible contradictions between the revised Guidelines and potential future case law of the ECJ. It may be relevant, however, to provide additional guidance on the interpretation of the notion of dual-use products and services (which is key for predictability and legal certainty, as it determines the scope of application of the “defense exception” enshrined in Article 346 TFEU), both in terms of (a) the sources used to define dual-use items (e.g., reference to industry classifications, or export control list annexed to Regulation (EU) 2021/821) and (b) the potential impact of such determination on the substantive assessment (e.g., more market power acceptable). Finally, should the Commission decide to include specific developments on the assessment of mergers in the defense industry in the new HMG and/or NHMG, the APDC submits that the Guidelines should explain whether, and to what extent, the Commission may take into account specific features of competition in defense-related sectors and, in particular, the factors which counterbalance or otherwise mitigate the potential effects of mergers in this industry, e.g.: • The existence of a significant countervailing buyer power from Member States, the extent of which is specific to the defense industry: Member States are closely involved in all stages of defense procurement, whether they be customers or shareholders or partners of defense undertakings. Member States act as single buyers (monopsonists) of products which are designed to address their particular needs and specifications, which tends to alleviate horizontal effects. Cooperative procurement by two or more Member States in the field of defense is also encouraged by the Commission. Monopsony power from Member States could also be regarded as mitigating vertical effects, e.g. in cases where Member States decide to require defense undertakings to procure products from undertakings which are not vertically integrated; • In addition, defense procurement is often organized through lengthy and fastidious competitive tenders for long-duration contracts, which means that market shares do not reflect market power. [Response to G2] Considering the highly sensitive nature of the defense industry and the involvement of the States in it (either as direct or indirect shareholder of industrials, as their key customer, and/or as their partner in defining the current and future demand for defense products and services), we assume that it is highly unlikely that a concentration would be considered without a certain level of prior approval by the Member States concerned (typically under national foreign investment rules).

G.3 What specific parameters may be relevant when assessing the impact of mergers that involve markets for dual-use goods or services (i.e. goods or services used for military and civil applications) on competition?

Text of 1 to 5000 characters will be accepted

Against the background of the increasingly rapidly evolving international context, consideration shall be made of the possibility that there may exist in the future trade restrictions affecting dual-use products or services under consideration in a specific merger case. Such possible trade restrictions, and their impact on markets, are by definition unexpected and unforeseeable, but constitute nevertheless a parameter specific to the industry.

Media plurality

G.4 In your/your client’s view, do the current Guidelines provide clear, correct and comprehensive guidance on how the EU merger control assessment takes into account democracy and media plurality considerations?

- ( ) a. Yes, fully
- (•) b. Yes, to some extent
- ( ) c. No, to an insufficient extent
- ( ) d. Not at all
- ( ) e. I do not know

G.4.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting democracy and media plurality considerations in merger’s competitive assessment, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

G.5 In your/your client’s view, should the revised Guidelines better reflect how the Commission assesses democracy and media plurality considerations in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [ ] a. Assessment of plurality of the media as a legitimate interest under Article 21(4) EU Merger Regulation
- [ ] b. Assessment of the impact of mergers on democratic accountability and lobbying activity
- [ ] c. Media diversity/plurality as a parameter of competition
- [x] d. Other

G.5.1 If other, please specify.

Text of 1 to 5000 characters will be accepted

The APDC is not convinced that, in the absence of a legislative reform of the EUMR, the revised Guidelines should give greater weight to democracy and media plurality considerations in EU merger control. In the APDC’s view, doing so would go beyond the EUMR’s objective of “ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition” (EUMR, recital 6). These two factors are likely more relevant to sectorial regulators than to antitrust authorities. First, regarding point (a) on the assessment of media plurality as a legitimate interest under Article 21(4) EUMR, to the best of the APDC’s knowledge, since the entry into force of the EUMR, the Commission has only issued three decisions finding a violation of this Article by Member States, none of which concerned democracy and/or media plurality. On the contrary, the Vivendi/Telecom Italia case in 2017 (case M.8465), which was reviewed concurrently by the Italian’s Communications Authority (“AGCOM”) and the Commission, illustrates that the current mechanism works well and does not require further guidance with respect to media plurality. In this case, the AGCOM found that Vivendi’s position in the Italian markets for media and content violated Italian media plurality rules and imposed commitments on 18 April 2017. On 30 May 2017, the Commission cleared the transaction subject to divestments, highlighting in its press release that this decision was “without prejudice to the Italian media plurality review process”. This does not mean that concerns about democracy and media plurality cannot be raised by Member States in certain transactions, but overall, the interplay between the Commission and sectoral regulators appears suitable. That being said, insofar as the Commission has engaged in discussions with Member States regarding democracy and media plurality under Article 21(4), additional guidance on the interplay between democracy and media plurality as a legitimate interest and the EUMR would be welcomed. Second, regarding point (b) on the assessment of the impact of mergers on democratic accountability and lobbying activity, pursuant to Article 2(2) and (3) of the EUMR, the Commission assesses whether or not a concentration would significantly impede competition. The impact of mergers on democratic accountability and lobbying activity does not fall within this scope. Moreover, this is already addressed by specific national regulations applicable to the media sector. Furthermore, at the EU level, Regulation No. 2024 /1083, which will apply from 8 August 2025, establishes a common framework for media services while safeguarding the independence and pluralism of media services. In particular, Article 5 imposes a general obligation on Member States to "ensure that public service media providers are editorially and functionally independent and provide in an impartial manner a plurality of information and opinions to their audiences". Regarding concentrations more specifically, Article 22(1) states that "Member States shall lay down, in national law, substantive and procedural rules which allow for an assessment of media market concentrations that could have a significant impact on media pluralism and editorial independence". Article 22(1) specifies that this assessment is distinct from merger control rules. As a result, a parallel review by the Commission of the impact of mergers on democratic accountability and lobbying activity would be redundant and could create a risk of conflicting decisions. In the APDC's view, Member States are currently better placed than the Commission to undertake this responsibility, as they often have the legal authority and regulatory capacity to do so. For example, in 2022, 14 Member States had specific rules for the assessment of media mergers (OECD Study on media plurality and diversity online, p.218). Third, regarding point (c) on media diversity/plurality as a parameter of competition, what the Commission has in mind is not entirely clear based on the topic description. More clarity would be helpful before considering whether it should be included in the Guidelines. Although the ACM has recently considered media plurality in the context of its competitive assessment (see decision dated 27 June 2025, case ACM/24/189955), this decision was adopted in a very specific context. The Dutch government is currently working on the implementation of a specific regime for media mergers, and, at the time of this transaction, the ACM was the only regulator able to assess media mergers in the Netherlands. [End of response below G.6]

G.6 In which circumstances and under which conditions can the Commission consider that a Member State is taking appropriate measures against a merger that is justified to protect its media plurality in the sense of Art. 21(4) EU Merger Regulation?

Text of 1 to 5000 characters will be accepted

[End of response to G5] In any case, whether media plurality can be linked to parameters on which undertakings compete (e.g., price, quality, innovation) is unclear. This is due to the fact that a media plurality review and a competitive assessment have at their core different purposes. As the Commission explained in a 2010 decision, "the purpose and legal frameworks for competition assessments and media plurality assessments are very different. The focus in merger control is whether there is a "significant impediment to effective competition", including the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger. By contrast, a media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient" (case M.5932).

G.7 How should the Commission take into account the consequences of increased market power not only vis-à-vis customers but also vis-à-vis public authorities that may also affect customers? Please explain your answer having in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

G.8 Please outline in which sectors the competitive impact of a merger on democracy and media plurality is most likely to be highest? Please provide your view in particular on the generative AI sector.

Text of 1 to 5000 characters will be accepted

G.9 Under which circumstances and in which conditions should the Commission consider diversity, including in the sense of diversity of opinions, in its assessment of the impact of mergers on competition? Please explain your answer having in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

The APDC refers to its response to question G5. The APDC is not certain that the Commission should extend its review under EUMR to cover diversity of opinions in its assessment of the impact of mergers on competition since this is already covered by other EU and/or national legislations. In particular, Article 5 of Regulation No. 2024/1083 imposes a general obligation on Member States to "ensure that public service media providers are editorially and functionally independent and provide in an impartial manner a plurality of information and opinions to their audiences".

Labour markets and workers

G.10 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how the EU merger control assessment considers the impact of mergers on labour markets and workers?

- ( ) a. Yes, fully
- (x) b. Yes, to some extent
- ( ) c. No, to an insufficient extent
- ( ) d. Not at all
- ( ) e. I do not know

G.10.1 Please explain and mention in particular which provisions of the current Guidelines (if any) are not clear or correctly reflecting the impact on labour markets and workers in merger's competitive assessment, or what would be missing for the current Guidelines to address this objective.

Text of 1 to 5000 characters will be accepted

G.11 In your/your client's view, should the revised Guidelines better reflect how the Commission assesses the impact on labour markets and workers in EU merger control in relation to the following aspects? Please select the areas that you believe the revised Guidelines should better address.

You can tick more than one reply, below.

- [ ] a. Impact of mergers on wages and working conditions as a result of the creation of monopsony power in labour markets specifically
- [ ] b. Impact of mergers on purchasing markets via the creation of buyer power more generally
- [x] c. Other

G.11.1 If other, please specify.

Text of 1 to 5000 characters will be accepted

The current Guidelines do not provide guidance on how the EU merger control assessment considers the impact of mergers on labour markets and workers. However, this does not mean there is a blind spot in the current Guidelines. To date, and pending further clarity on the Commission's intentions, the APDC remains cautious about the need to specifically address this topic in the new Guidelines, for the following reasons. First and as a short reminder, EU merger control rules should not be a catch all tool designed to control any consequences arising from a concentration. Merger control rules are not designed to go beyond examining the impact on competition of a given concentration. On that basis, the APDC submits that there is a risk that the Commission would exceed its mandate under the EUMR if it were to review the impact of concentrations on labour markets and workers. Second, the extension of the scope of review of the Commission is not justified by any regulatory or enforcement gap. Indeed, the Commission is already capable of reviewing the impact of concentrations in markets where labour represents a key competitive parameter under the current Guidelines. There is already decisional practice available for instance in national markets for temporary employment services, permanent employment services, consultancy services, HR consultancy services and online job board services (see for instance case COMP/M.8201). The Commission can rely on the current Guidelines on the assessment of horizontal overlaps and on the review of buyer power. For instance, the situation of a solo-employed worker not protected by employment law is similar to that of a small supplier facing customers with strong buyer power (see for instance M.5046 – Friesland Foods / Campina). As regards the potential effects of mergers on wages or other working conditions, it should be borne in mind that EU competition law already offers a significant degree of protection to employees for the purposes of their negotiations with corporate employers. Indeed, the ECJ's well-established case-law holds that "agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU". The Commission also published specific guidelines to address these issues for solo self-employed persons, noting that "collective negotiation and bargaining between certain categories of "solo self-employed" and their counterparties is specifically allowed". These significant derogations from the application of Article 101(1) TFEU can thus already be used by groups of employees to try and offset any potential imbalance in bargaining power which would be expected to result from a merger, without it being necessary for the Commission to intervene for that purpose in merger reviews. In addition, employees throughout the EU are already protected by national employment laws and regulations setting a wide and often complex range of rules, such as minimum wages, notice periods, information rights, and, more specifically in the context of mergers, compulsory employee consultation processes, etc. The protection of employees is hence addressed by the frameworks already existing at national levels since employment conditions may vary significantly from one Member State to another, or sometimes even from one region to another within the same Member State. Under the current legal and regulatory framework, it is not the Commission's role to intervene in these country-specific laws and regulations. Third, APDC is of the view that incorporating labour market and working condition analyses into the Commission's substantive merger review would introduce unnecessary complexity and legal uncertainty, without delivering clear benefits for consumers. [End of response below G.12.a]

G.12 How should the Commission assess the impact of a transaction on wages/working conditions through increased buyer power in labour markets? In particular, please explain:

G.12.a How should the Commission define and assess potentially numerous relevant "buying" markets for labour (which might be segmented by factors such as occupation/education and geography)?

Text of 1 to 5000 characters will be accepted

[End of response to G.11.1] The notion of « labour markets » itself is complicated. In theory, such markets would exist if labour was considered as an input to firms and workers as suppliers of labour. Academics – mainly US-based – have worked on new economic tests and theories to define the boundaries of labour markets, but there appears to be to date no consensus over a “perfect method”. As a matter of example, from the product market’s perspective, some authors have suggested adopting a version of the small but significant and non-transitory increase in price (“SSNIP”) test adapted to labour markets: the small but significant and non-transitory decrease in wages (“SSNDW”) test, whereby if a significant number of workers were to continue working at the hypothetical monopsonist firm after such decrease, this would define the limits of the labour market. The same authors also pointed out the limits of such tests which fail to take into account non-monetary benefits. Other authors also pointed to the need for several factors including the workers’ skills, the overall price paid for labour or workers’ preference on non-price characteristics. From the geographic market’s perspective, it is also quite difficult to define labour markets as each worker may have different commuting requirements or different willingness to move in order to change work positions. It is therefore safe to say that opening the door to a review of labour markets would raise an array of difficult questions with no clear answering method. In addition, the number of markets under review by the Commission would be increased, potentially leading to longer merger reviews. In other words, the review of mergers by the Commission would be made more difficult with no clear benefit in terms of consumer welfare. Similarly, the APDC considers it premature to include labour-related theories of harm – such as job losses or poorer working conditions – in ex ante merger reviews, as this would increase legal uncertainty for notifying parties and raise concerns on how to evaluate such theories of harm. The APDC notes that the Commission’s scrutiny of labour market issues in antitrust enforcement (ex post) is still in its early stages, with the Commission’s first decision on "no-poach" agreements under Article 101 TFEU issued only in June 2025, and no decisions under Article 102 TFEU. Finally, the APDC is also concerned that extending EU merger control to labour markets would raise complex interactions between competition and labour law. For example, remedies agreed during merger reviews would need to comply with national employment laws, which often set out specific procedures for modifying working conditions.

G.12.b What theory/theories of harm could the Commission consider? Please keep in mind the legal mandate of the EU Merger Regulation.

Text of 1 to 5000 characters will be accepted

G.12.c Under which circumstances and conditions can a monopsony theory of harm for labour markets occur?

Text of 1 to 5000 characters will be accepted

G.12.d Based on which evidence and metrics can the Commission assess the impact of a merger on wages and working conditions via the creation of monopsony power?

Text of 1 to 5000 characters will be accepted

G.12.e How can the Commission demonstrate that the impact of a merger on wages and working conditions translates into harm to customers? Is it necessary under the legal mandate of the EU Merger Regulation to demonstrate harm to customers in addition to a negative impact on wages and working conditions?

Text of 1 to 5000 characters will be accepted

G.13 How should the Commission assess mergers that result in increased buyer power more generally (i.e., not only in labour markets)?

Text of 1 to 5000 characters will be accepted

G.13.a What theory/theories of harm could the Commission consider?

Text of 1 to 5000 characters will be accepted

G.13.b Under which circumstances and conditions could this/these theory/theories of harm occur? Please explain what would be an appropriate and achievable framework to assess increased buyer power.

Text of 1 to 5000 characters will be accepted

G.13.c Based on which evidence and metrics can the Commission assess the impact of a merger on buyer power, and how can it assess whether buyer power translates into harm to customers?

Text of 1 to 5000 characters will be accepted

G.13.d Is it necessary under the legal mandate of the EU Merger Regulation to demonstrate harm to customers in addition to a negative impact on upstream suppliers?

Text of 1 to 5000 characters will be accepted

Other sectors:

G.14 Do you/your client consider that mergers can positively or negatively impact strategic sectors' (other than clean tech, deep tech, digital and security and defence sectors) capabilities?

- Yes
- No
-

I do not know

G.15 Do you/your client consider that new or additional guidance regarding infrastructures that are critical for the EU economy (e.g., telecommunications networks, electricity distribution networks, etc.) should be included in the revised Guidelines?

- Yes
- No
- I do not know

Other

Please indicate whether aside of the seven topics covered in this targeted consultation, you/your client consider that any aspect of the current Guidelines deserve attention in the review process or require adaptation.

Text of 1 to 5000 characters will be accepted

Regarding Topic D, the APDC would like to emphasize the following in response to question D2. The APDC considers that the revised Guidelines should better reflect the implications of the EU's transition to a climate-neutral, clean, and sustainable economy. In markets where sustainability is an important dimension of product quality or a driver of innovation, sustainability can and should be treated as a relevant parameter of competition. Similarly, the assessment of the merging parties' incentives to innovate in decarbonised technologies (or the risk that a merger may suppress such innovation) must be integrated where appropriate into the competitive effects analysis, consistent with established principles of dynamic competition. That said, the APDC cautions against adopting an overly broad or open-ended definition of sustainability in the merger control context. While the revised Horizontal Cooperation Guidelines provide a comprehensive definition of sustainability – encompassing economic, environmental, and social dimensions, and referencing the UN 2030 Agenda for Sustainable Development (HMG, para. 516, fn. 361) – this is appropriate in a context where undertakings must self-assess under Article 101 TFEU. Merger control under the EUMR operates within a different legal and institutional framework, where the Commission applies an ex ante, administrative control centred on the likely effects of concentrations on competition. In the APDC's view, extending merger analysis to encompass wide-ranging policy objectives, including social or development-related goals not directly linked to competition or market functioning, would raise two main concerns: (i) Limits of the merger control framework: As emphasised by the Commission in Bayer/Monsanto (Case M.8084, paras 3017 ff.), the EUMR is not a general policy enforcement tool. Broadening its scope to address diffuse sustainability aims could divert merger control from its primary purpose – protecting effective competition and consumer welfare – and compromise its legal and economic coherence. (ii) Legal certainty and proportionality: Imposing on merging parties the burden of assessing and evidencing potential impacts across an expansive set of sustainability objectives would create uncertainty, increase complexity, and risk disproportionate procedural obligations. Instead, the APDC recommends that the revised Guidelines anchor sustainability-related assessments in a defined set of EU policy instruments – primarily the European Green Deal, the Clean Industrial Deal, and the six environmental objectives set out in Article 9 of the EU Taxonomy Regulation. These objectives (such as climate change mitigation and adaptation, the transition to a circular economy, and biodiversity protection) provide a clear and legally recognised reference framework. Grounding the Guidelines in these core EU priorities would enhance transparency and legal certainty while ensuring that sustainability considerations are meaningfully and proportionately integrated into merger assessment.

Please feel free to upload any supporting document(s).

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