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

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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.

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

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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*)*.

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.

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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).

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]

Questions

General

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? [One option possible]

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

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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.

F.1.1. [If 'Yes, fully', 'Yes, to some extent' or 'No, to an insufficient extent' or 'Not at all'] 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.

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 [Multiple options possible]

a. Benefits to consumers [Free text]
b. Merger-specificity of efficiencies [Free text]
c. Verifiability of merger efficiencies [Free text]
d. Other [Free text]
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? [Free text]
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? [Free text]
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? [Free text]
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? [Free text]
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)? [Free text]

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. [Free text]
F.4.b Empirical assessment of pass-on from past cost changes. [Free text]
F.4.c Remaining competitive pressure (either from existing rivals or potential entry) on the merged entity. [Free text]
F.4.d Other (please specify). [Free text]

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. [Free text]
F.5.b Consumers' willingness to pay as measured by consumer surveys. [Free text]

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). [Free text]

F.5.d Other. [Free text]

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.

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.

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.

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

F.9.a In particular: 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)? [Free text]

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

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.

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.

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?

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. [Multiple options possible]

a. Internal documents, including those used by management to decide on the merger [Free text]
b. Statements from management, owners and financial markets about expected efficiencies. [Free text]
c. Historical examples of efficiencies and consumer benefit. [Free text]
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. [Free text]
e. Economic models, including those investigating the merging parties’ and their rivals’ ability and incentives to invest and innovate. [Free text]

f. Other.

F.13.f If you have indicated ‘Other’, please specify.