European Commission Draft Merger Guidelines under EUMR 139/2004

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Oxera Response to the Public Consultation

26 June 2026

1 Introduction

This document presents Oxera's response to the public consultation on the draft text of the Merger Guidelines under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the 'Draft Guidelines').[1]

At the outset, we note that Oxera is currently conducting an Economic Study on the Dynamic Effects of Mergers, contracted by the European Commission as part of the ongoing review of the Merger Guidelines.[2] The Study examines, among other things, the effects of mergers on investment, innovation, and potential competition, and the potential trade-offs between dynamic and static effects. The Study is expected to be published by the European Commission by September 2026. In order not to prejudge the results from the Study, we do not comment in our response on the dynamic aspects of the Draft Guidelines. In particular, we do not address issues relating to innovation competition, potential competition, dynamic foreclosure, dynamic efficiencies, and entrenchment (even though these of course represent some of the most significant and welcome developments in the Draft Guidelines).

As a result, this submission does not seek to provide a comprehensive assessment of all aspects of the Draft Guidelines. Instead, it focuses on a number of observations and recommendations concerning the structure, organisation and analytical framework of the text, with a view to improving its clarity, usability and predictability.

The remainder of this note is organised as follows:

- Section 2 summarises the main themes and recommendations;

[1] Oxera is a European economic consultancy with a long track record in competition policy. We have acted as advisers and experts in a range of cases before the European Commission, national competition authorities, and courts involving mergers, restrictive agreements, abuse of dominance and state aid. We act for corporate clients involved in these cases and, at times, for competition authorities or as court-appointed experts.
[2] European Commission (2025), 'DG Competition launches a call for tender for an economic study on the dynamic effects of mergers', News, 25 March.

- Section 3 considers the Commission's approach to defining the applicable standard and the counterfactual;
- Section 4 sets out our observations on the assessment of theories of harm and anticompetitive effects;
- Section 5 discusses the framework for the 'theory of benefits' and the related assessment of efficiencies.

2 Summary of recommendations

The Draft Guidelines represent a substantial and impressive piece of work, reflecting more than two decades of decisional practice, developments in economic thinking, and the evolution of EU case law since the adoption of the existing Horizontal and Non-Horizontal Merger Guidelines (in 2004 and 2008 respectively). We particularly welcome the Commission's efforts to structure and reflect the increasing use of advanced economic analysis and techniques in complex merger assessment over the past two decades, across a range of settings and industries. We also welcome the growing importance given to non-price dimensions of competition (in line with decisional practice over the past decade or so), and greater prominence of a 'theory of benefits' and of efficiencies in the overall assessment.

Overall, we consider that the Draft Guidelines move in the right direction and provide a solid foundation for future merger enforcement. At the same time, given their intended role as a comprehensive reference of the Commission's approach to merger control, there are some areas where additional clarification would improve predictability and facilitate their practical application by stakeholders (including national competition authorities, courts, and businesses).

The principal themes developed in this submission are summarised below.

- **Standard of proof and counterfactual**. We welcome the clarification that the balance of probabilities standard set out in the case law applies to the overall significant impediment to effective competition (SIEC), and governs both harms and efficiencies symmetrically. However, we consider that three issues require attention. First, in situations where the competitive effects of a merger are uncertain, the draft does not address explicitly how to evaluate the relative magnitude and probability of the possible effects of a merger. We recommend adopting an expected consumer welfare approach for both harm and benefits, ensuring a symmetric and consistent treatment. Second, the requirement to show that a merger is 'capable' of harming consumers risks diluting the required evidentiary threshold and should be clarified. Third, the draft applies different standards of certainty across different counterfactual analyses, including the failing firm defence and efficiencies. We recommend adopting a consistent standard throughout.

- **A more explicit distinction between the different analytical frameworks would improve transparency and predictability.** The Draft Guidelines provide a useful overview of possible anticompetitive effects but could provide more clarity regarding the underlying economic mechanisms through which competitive harm may arise and the analytical frameworks appropriate to different settings. For example, the section

on loss of head-to-head competition is implicitly framed around the standard unilateral effects framework for differentiated product markets in which firms post their prices. While this is a relevant setting, it is not the only or primary one. We would suggest providing a more general description of the impact of a loss of competition between merging parties, before turning to specific applications (e.g. posted prices, bargaining markets, and markets with capacity constraints). A more systematic presentation of the different analytical frameworks would assist in understanding the lens through which the Commission is likely to assess a particular transaction.

- **More clarity around the use of structural indicators and their applicability**. The Draft Guidelines outline a number of thresholds relating to market shares, concentration measures and other structural indicators. While this is welcome, it is not always clear how these indicators are intended to operate across the different theories of harm discussed in the draft. In particular, clarifications would be welcome regarding the scope of application of the innovation shield, the continued relevance (if any) of a safe harbour for non-horizontal mergers, and the relationship between the market share thresholds discussed in the Draft Guidelines and existing screening mechanisms elsewhere, including the Simplified Procedure Notice.

- **Additional guidance on the role and limitations of economic tools would be welcome.** The Draft Guidelines refer to a wide range of analytical tools—including diversion ratios, pricing-pressure measures, merger simulation models and quantitative foreclosure analyses—sometimes in the main text and sometimes in the footnotes, without always explaining how these tools relate to one another, when each is most appropriate, or what their respective limitations are. Most of these tools can directly incorporate efficiency claims into the quantitative assessment, making them particularly relevant in light of the increased prominence the draft accords to efficiencies and balancing. The Commission may therefore consider providing clearer guidance on the conditions under which each tool is most informative, their respective data requirements, and how they can be deployed in the assessment of both harms and efficiencies.

- **The treatment of 'portfolio effects' could articulate the economic mechanism of this theory of harm more explicitly**. For a 'portfolio' theory of harm to hold, it must be found that the delisting of the combined portfolios of the merging parties effectively results in a number of switching customers that is greater than the sum of the customers that would have switched if the two portfolios were delisted separately. If this so-called 'super-additivity' condition holds, the merger increases the bargaining power of the merged entity, to the detriment of its trading partners. Our recommendation is that the Draft Guidelines articulate this potential theory of harm more carefully, by recognising that the extent of *incremental* customer switching required for portfolio effects to be at work needs to be sufficiently large compared to the level of customer switching expected absent the merger.

- **The treatment of sustainability and resilience is a welcome development but raises complex implementation questions**. Sustainability and resilience are integrated throughout the Draft Guidelines as relevant dimensions of non-price competition. The Draft Guidelines recognise that these factors may be relevant both to theories of harm and to efficiencies, and may therefore affect the competitive assessment on both sides of the ledger. However, uncertainty remains regarding the evidential

framework applicable to such effects, including questions of quantification, balancing, the treatment of collective benefits, and the interaction between merger control and other EU policy instruments pursuing similar objectives. Greater clarity on these considerations would be welcome.

- **Additional examples would enhance the practical value of the Guidelines.** In a number of areas, particularly where the Draft Guidelines introduce new concepts or approaches—such as the assessment of sustainability and resilience benefits, the application of new theories of harm, and the balancing of competitive harms and benefits in the overall assessment—the inclusion of additional practical examples would improve predictability and facilitate implementation.

3 Applicable standard of proof and choice of counterfactual

The Draft Guidelines state that the Commission must determine, on the basis of an overall assessment of the facts and evidence, whether a merger's impact on the competitive process is 'more likely than not' to result in a SIEC (para. 32). We welcome the clarification that the balance of probabilities standard applies to the overall SIEC conclusion, rather than to each constituent element of the assessment, and that it covers both harms and benefits. We also welcome the statement that the same evidentiary standard applies to harms and efficiencies (para. 26), and that effects of a merger capture the 'expected' future market situation with and without the merger (para. 37).

However, we think that the Draft Guidelines could be clearer on the need for a consistent treatment of uncertainty and magnitude of effects across relevant factual and counterfactual scenarios. We also suggest that the Commission clarify the concept of 'capability' when proving harm to consumers, and ensure that the same evidentiary standard is applied to harms and benefits within the SIEC test.

3.1.1 Accounting for uncertainty and for magnitude of merger effects under a balance of probabilities standard

The current discussion of the balance of probability standard (para. 32) could be expanded to provide more clarity on the treatment of uncertainty across the relevant factual (merger) scenarios and counterfactual (no-merger) scenarios.

In our view, under the substantive standard set out in the EU Merger Regulation (EUMR), the Commission should assess whether the merger reduces expected consumer welfare (comparing the situation with and without the merger). An expected consumer welfare standard can capture individual scenarios or events that may have a large impact on consumer welfare, even if they are uncertain. In addition to dealing with uncertainty, an expected consumer welfare approach can ensure symmetric treatment of harms and benefits, i.e. uncertain benefits should not be excluded merely because they are not the most likely outcome, just as uncertain harms should not be ignored where they may materially affect consumers in expected terms. The Draft Guidelines helpfully recognise

the validity of this approach for the case of efficiencies (para. 334), and could do so also in relation to the competitive harm.

3.1.2 Clarification of concept of 'capability'

The Draft Guidelines state that the Commission must demonstrate that the merger is 'capable' of harming consumers (para. 22), drawing on the draft guidelines on exclusionary abuse under Art. 102, and on the jurisprudence from Art. 102. We would encourage the Commission to clarify that this formulation is not intended to introduce a separate or lower evidentiary threshold for a finding of competitive harm under the EUMR, where the relevant question is whether the merger is more likely than not to result in a SIEC. Moreover, given the symmetry between harms and benefits (as clarified in para. 26 and elsewhere), the same 'capability' standard would need to apply to efficiencies, which the current draft does not recognise. It would also be helpful to ensure consistency between paragraph 22 and paragraph 23, where the substantive requirements for a 'theory of harm' are set out, suggesting the need for a finding of (likely) consumer detriment. The Draft Guidelines would be clearer if they simply used a single formulation throughout, based on whether the alleged harm or benefit is sufficiently substantiated to support the overall SIEC assessment.

3.1.3 Relevant counterfactual

We agree with the Draft Guidelines' general recognition that the relevant counterfactual is not necessarily the pre-merger situation (para. 39 and further). However, the Draft Guidelines use different standards and formulations for the relevant degree of certainty required in different counterfactual analyses:

- For future market developments unrelated to the merger, these must be predictable with a 'sufficient degree of certainty' (para. 40), and alternative mergers or agreements are said to be considered 'only exceptionally' (para. 44).
- By contrast, in the context of the failing firm defence, as well as in the assessment of the merger-specificity of efficiencies, the Draft Guidelines recognise alternatives that are 'realistic and attainable', and available 'within a reasonable period of time' (see in particular paras 48 and 311).[3]

More generally, the Draft Guidelines indicate that competitive effects capture the market situation with and without the merger, 'absent efficiencies' (para. 37).

This difference in wording and standards adopts an asymmetric treatment across counterfactual analyses, which may in turn lead to differences in the substantive assessment of the anti- and pro-competitive effects of a merger. A more consistent approach would be to apply the same underlying standard to counterfactual assessment

[3] Footnote 88 in the Draft Guidelines notes that, in the context of considering alternative mergers or agreements to the merger under the counterfactual, '[t]he Commission's assessment of alternatives to the merger – should it not go through – is different from the assessment of other realistic and attainable alternatives for the merging parties in the context of a failing firm or efficiencies claim. This is because in the case of the latter, that assessment does not relate in itself to the causality between the merger and the competitive effects, but to the absence of less harmful alternatives than the merger'. This statement introduces an asymmetry between the assessment of anticompetitive effects and the assessment of failing firm and efficiency claims.

across the Draft Guidelines—including failing firm and efficiencies. If differences in approaches are maintained (e.g. between a counterfactual analysis, and an assessment of merger specificity), the Commission should ensure that these do not lead to significant asymmetries in the substantive assessment of harm and of benefits.

We also suggest that the Commission clarifies the situations in which alternative scenarios may need to be considered. Where more than one realistic and attainable scenario exists, the analysis should not necessarily select a single counterfactual to the exclusion of all others. Instead, the Commission should take account of the relative likelihood and competitive significance of the relevant scenarios. This would be in line with an expected consumer welfare approach.

4 Anticompetitive effects

One of the most significant structural changes in the Draft Guidelines is the integration of horizontal and non-horizontal effects. The draft is structured around theories of harm that may arise across different transaction types—for instance, loss of head-to-head competition being primarily a horizontal concern,[4] foreclosure applying across vertical and conglomerate relationships,[5] and entrenchment of dominance arising in horizontal, vertical, or ecosystem contexts.[6]

This structure focuses the discussion on the mechanism leading to the competitive harm from a merger—the theory of harm—regardless of the form from which it arises. While this can foster a degree of consistency across theories of harm, in our view, the distinction between horizontal and non-horizontal effects retains considerable analytical and practical significance, as the loss of competition from non-horizontal mergers is typically less direct than the loss from horizontal mergers, and the scope for efficiencies is larger.[7] As such, our comments are structured according to the horizontal/non-horizontal split of the existing guidelines. In particular:

- Section 4.1 discusses the treatment of loss of head-to-head competition in the Draft Guidelines, with a focus on the analytical framework and available economic tools;
- Section 4.2 addresses key aspects of the assessment of non-horizontal mergers, focusing on foreclosure effects;
- Section 4.3 discusses the portfolio effects theory of harm.

[4] Draft Guidelines, Part II, Section B.2.
[5] Draft Guidelines, Part II, Section B.6.
[6] Draft Guidelines, Part II, Section B.7.
[7] This is recognised in the 2008 Non-Horizontal Guidelines, para. 17.

4.1 Loss of head-to-head competition

The Draft Guidelines identify the loss of head-to-head competition as one of the primary mechanisms through which a horizontal merger may give rise to a SIEC or what the Draft Guidelines also define as 'direct effects' on competition.[8]

In relation to the terminology adopted by the Commission, we note that dynamic theories of harm (e.g. loss of innovation competition) may also involve 'head-to-head' (or direct) competitors, so we would suggest using the terminology of 'head-to-head' competition in broader terms, to generally capture horizontal mergers. This seems to be the meaning of the term used by the Commission elsewhere in the Draft Guidelines (see para. 17), and we suggest that a consistent use of terminology is made across the text.

The draft provides a useful overview of the relevant structural parameters and concepts to analyse a loss of head-to-head competition, including closeness of competition. However, the Draft Guidelines are less clear regarding the underlying economic mechanisms through which harm may arise as well as the analytical frameworks and economic tools appropriate to different settings. Our comments aim to clarify these aspects.

4.1.1 The importance of distinguishing the different analytical frameworks and economic tools

Much of the discussion on loss of head-to-head competition prior to the sub-section on 'specific market aspect' (section B.2.4) appears to be framed around the standard unilateral effects framework applicable to differentiated product markets in which firms post their prices (notably in the discussion on closeness of competition, at paras 136 and 137). While this is an important and common setting, horizontal mergers occur across a wide range of market settings, each of which may require a somewhat distinct analytical framework. In particular, the considerations relevant to identifying competitive harm differ materially depending on whether prices are posted, determined through bilateral negotiation, or shaped by capacity constraints.

While this is implicitly recognised in the draft discussing specific market settings (in Section B.2.4), the Commission may consider introducing a short discussion on the overall nature of unilateral effects from a merger, independently of the specific market setting, and then outline the principal analytical frameworks applicable to the different market contexts.[9] In addition to this overarching point regarding the organisation of the section, we consider more specific points in the following sections.

[8] Draft Guidelines, paras 115 and 119.
[9] By analogy, see the approach followed in the 2023 US Merger Guidelines (e.g. Guideline 2 and Section 4.2, notably 4.2.B ('Considerations When Terms Are Set by Firms'), 4.2.C ('Considerations When Terms Are Set Through Bargaining or Auctions') and 4.2.D ('Considerations When Firms Determine Capacity and Output')).

Posted prices

In the context of the posted prices framework, the Draft Guidelines refer to a number of quantitative tools that may be used, including diversion ratios as evidence of closeness of competition, upward pricing pressure analysis, and merger simulation models.[10]

The discussion could usefully be expanded and clarified. While the Draft Guidelines refer to a number of quantitative techniques, they provide limited guidance on how these tools relate to one another, the circumstances in which each is most informative, and their respective limitations. Upward Pricing Pressure (UPP), the Gross Upward Pricing Pressure Index (GUPPI), and the Compensating Marginal Cost Reduction (CMCR) are closely related but distinct indicators. Although GUPPI and CMCR are mentioned in footnote 206, the draft does not explain their conceptual relationship to UPP, the types of questions these indices are designed to address, or the circumstances in which they may be appropriate. Similarly, paragraph 137 mentions merger simulation models but provides no guidance on the underlying data requirements, assumptions and evidentiary value of these approaches. Past merger decisions using these techniques could also be mentioned, as they represent important precedents and contain useful guidance.[11]

Bidding markets and bargaining

The section on 'specific market aspects' covers bidding markets, but does not explicitly identify the related setting in which prices or other commercial terms are determined through bilateral negotiation. While concepts related to bargaining power appear elsewhere in the Draft Guidelines—for example, in the discussion of countervailing buyer power in the market power (section 4.3), purchasing markets (para. 161), and foreclosure (para. 235)—and are related to aspects of the framework described in the section on bidding markets (paras 144–147), the draft provides limited guidance on the economic mechanisms underpinning theories of harm in bargaining markets. The Commission may therefore consider including a short discussion alongside the section on bidding markets, drawing on established practice.[12]

Capacity constraints

The Draft Guidelines' discussion of pivotality is welcome and reflects developments in the Commission's decisional practice in markets characterised by capacity constraints.[13] The Commission defines pivotality by reference to the share of demand that cannot be met without a firm's capacity and identifies a number of factors that may be relevant to the assessment. The discussion could, however, be further strengthened in two respects. First, the draft provides no indication of the thresholds whereby pivotality becomes problematic—for instance, at what level of the market's overall pivotality there is

[10] Draft Guidelines, paras 135–137, footnote 204.
[11] Including notably: Hutchison 3G UK/Telefónica Ireland (Case M.6992); Telefónica Deutschland/E-Plus (Case M.7018); Orange/Jazztel (Case M.7421); Hutchison 3G UK/Telefónica UK (Case M.7612); Hutchison 3G Italy/Wind/JV (Case M.7758).
[12] For example, see 2023 US Merger Guidelines, section 4.2.C.
[13] Draft Guidelines, paras 150–152.

potentially a concern. Second, the draft could include additional references to cases that developed and illustrated these principles in depth.[14]

Implications of the use of quantitative techniques for balancing harm and efficiencies

In light of the increased prominence given to efficiencies, the Draft Guidelines could expand on the use and relevance of quantitative techniques for unilateral effects for balancing anti- and pro-competitive effects. Quantitative approaches (e.g. CMCR, pricing-pressure measures, and merger simulations) allow efficiencies to be incorporated directly into the assessment of the overall impact of a merger, in an internally consistent manner. While the Commission recognises the possible use of these tools as part of the balancing exercise (footnote 414), more guidance on the conditions under which these indicators are most informative, as well as an explanation of how such tools can also be deployed to the assessment of efficiencies, would be beneficial. The Draft Guidelines could also recognise that this insight applies across market settings (see, for example, the balancing exercise performed by the European Commission in markets with capacity constraints,[15] bidding markets,[16] and posted prices).[17]

Minority shareholdings and common ownership

Minority shareholdings and common ownership are factors that may be relevant to the competitive assessment. The inclusion of this topic is appropriate. The draft could distinguish more clearly between the competitive effects arising from purely financial ownership interests and those arising from the exercise of influence or control.[18] Paragraph 164 acknowledges that governance-related factors, such as board representation and veto rights, may be relevant to the assessment. However, these mechanisms are conceptually distinct. While financial ownership may affect competitive conduct through profit internalisation without necessarily altering the target undertaking's decision-making autonomy, governance rights or other forms of influence may directly affect the target firm's competitive conduct as well. As these mechanisms give rise to different theories of harm and may require different evidentiary approaches, the Commission may wish to distinguish them more explicitly.[19]

The Commission should also clarify and nuance the statement that 'market shares and concentration measures tend to underestimate the *expected effects* of the merger and may be adjusted accordingly' for the case of common ownership (para. 166, our emphasis). While it is true that common ownership tends to increase concentration pre-merger, it may

[14] For example, Outokumpu/Inoxum (Case M.6471) and Ineos/Solvay/JV (Case M.6905).
[15] Outokumpu/Inoxum (Case M.6471) and Ineos/Solvay/JV (Case M.6905).
[16] General Electric/Alstom (Case M.7278).
[17] See, for example, the mergers in mobile telephony markets listed in footnote 11.
[18] The draft could usefully refer to or rely on the survey of the economic literature previously carried out by the European Commission—see European Commission (2014), 'Towards more effective EU merger control', Annex I (Economic Literature on Non-Controlling Minority Shareholdings ('Structural links')).
[19] The Commission may also wish to note that some of the quantitative indicators can be adapted to account for minority shareholdings and common ownership, including ownership-adjusted concentration measures and modified pricing-pressure metrics, as is the case in the 2004 Horizontal Merger Guidelines (footnote 25). For more details see, for example, O'Brien, D. and Salop, S. (2020), 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control', *Antitrust Law Journal*, **67**:3, pp. 559–614.

correspondingly dilute the incremental impact of a merger (e.g. as captured by the Delta HHI).

4.1.2 Structural indicators and safe harbours

The Draft Guidelines introduce structural indicators—principally combined market shares and HHI levels—as 'useful and often important first indicators of whether a loss of head-to-head competition may result in a SIEC.'[20] Paragraph 62 sets out a five-band taxonomy of market share ranges,[21] while paragraphs 127–129 explain that a combined market share below 25% may indicate that a merger between competitors is unlikely to give rise to a SIEC and that low post-merger HHI levels and low changes in concentration similarly reduce the likelihood of competitive concerns.

However, it is not clear how the thresholds identified in the draft are intended to operate across the various theories of harm addressed elsewhere in the Draft Guidelines. The discussion of market shares and concentration measures is introduced in the context of head-to-head competition, but the draft does not explicitly explain whether, and if so how, the same indicators should be interpreted in relation to other theories of harm, including foreclosure, portfolio effects, or loss of innovation competition. The Commission may wish to clarify expressly the scope and significance of these indicators across the different theories of harm addressed in the Draft Guidelines.

The Draft Guidelines also introduce a safe harbour for investment and innovation competition, in the form of an 'innovation shield'. Without addressing the merits of this tool (as we are not discussing dynamic effects in this response—see Section 1), we note that the scope of the innovation shield is not entirely clear. While it is introduced within the section on loss of innovation competition,[22] the draft states that 'the Commission in principle does not find a SIEC in relation to *any* theory of harm' if the specific criteria are satisfied.[23] As such, it would be helpful for the Commission to clarify the precise boundaries of applicability of this screening tool.

4.2 Foreclosure

One of the main substantive changes of the Draft Guidelines is the integration of horizontal and non-horizontal effects into a single set of guidelines. While this approach is sensible in principle (and follows the precedent of the US and UK guidelines), it is also important to note that there is a substantive difference between the competitive effects of horizontal and non-horizontal mergers, with less scope for direct harm from non-horizontal mergers, and greater potential for benefits.

[20] Draft Guidelines, para. 123.
[21] In particular, the Commission describes market shares as 'low' for shares under 10%, 'moderate' for shares ranging from 10% to just under 25%, 'material' for shares ranging from 25% to just under 40%, 'high' for shares ranging from 40% to just under 50%, and 'very high' for shares of 50% or more.
[22] Draft Guidelines, Part II, section B.4.3.
[23] Draft Guidelines, para. 192.

The Draft Guidelines (implicitly) recognise that non-horizontal mergers have stronger potential to lead to benefits than horizontal mergers.[24] However, this statement is found in the introductory part of the text (Section I.A), and not in the more operational parts (notably Section II). This overarching message is also not clearly signposted in the Draft Guidelines and is dispersed across several sections of the draft. This can make it more difficult to discern how the various elements of the framework coexist in practice, and how they are intended to interact in the assessment of non-horizontal theories of harm.

In this section we address general points around the applicability of structural indicators and the presentation of the analytical framework for the assessment of foreclosure effects from non-horizontal mergers.

4.2.1 Structural indicators

The Draft Guidelines recognise that one of the parties must hold 'a significant degree of market power' in at least one of the affected markets to have the ability to engage in foreclosure, and lead to competitive harm.[25] However, the role of structural indicators in the assessment of non-horizontal mergers is not clear from the text.

First, the Draft Guidelines no longer contain a market share safe harbour for the vertically integrated market (as in the current Non-Horizontal Merger Guidelines). Second, as noted in section 4.1.2, the wording in paragraph 62 suggests that the market shares taxonomy applies to the assessment of all theories of harm, *prima facie* indicating a hardening of the Commission's stance on the assessment of non-horizontal mergers.

This question is particularly relevant in light of the Commission's Simplified Procedure Notice, which continues to treat non-horizontal transactions with market shares below 30% as eligible for simplified review.[26] This suggests that the safe harbour from the previous non-horizontal merger guidelines may still apply. The Commission may therefore wish to clarify the role of structural indicators in the assessment of non-horizontal mergers, including the relationship between the market share indicators set out in the Draft Guidelines and the thresholds used elsewhere in the Commission's approach to merger control.

4.2.2 Analytical framework

The Draft Guidelines replace the separate discussion of input foreclosure, customer foreclosure and conglomerate foreclosure that was present in the 2008 Non-Horizontal Guidelines with a single discussion of the general framework of ability, incentives and effects, that is applied to all three types of foreclosure theories of harm. We generally

[24] Draft Guidelines, para. 17.
[25] Draft Guidelines, para. 219.
[26] European Commission (2023), 'Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings', *Official Journal of the European Union*, C 160, 5 May ('Commission notice on simplified procedure'), para. 5(d)(i)(aa).

welcome this approach, which provides a more concise description of the relevant economic mechanisms and avoids repetition.

On the other hand, the framework for the assessment of non-horizontal theories of harm presented in the Draft Guidelines gives less prominence to the role that efficiencies can play in this setting than the 2008 Guidelines, in particular in the assessment of effects. While efficiencies from non-horizontal transactions (including the elimination of double-marginalisation) are discussed in the section of the Draft Guidelines on efficiencies (e.g. para. 302(d)), the Draft Guidelines do not treat efficiencies as integral to the assessment of the impact of non-horizontal mergers, and do not mention them in the discussion of effect on competition (Section 6.3), in contrast to the approach taken in the 2008 Guidelines (e.g. paras 52–57, for the case of input foreclosure). It would be helpful if the Commission clarified its stance on this point.

On the quantitative techniques for the assessment of incentives to foreclose, paragraphs 232 and 233 hint implicitly at vertical arithmetic and vGUPPI, and footnote 321 refers to Nash bargaining. These methods could be presented more explicitly, with an upfront high-level discussion of their advantages and limitations. With particular reference to vertical arithmetic, for example, the Commission could address upfront the limitations identified by the economic literature concerning the use of pre-merger margins to predict post-merger incentives,[27] explain how it will evaluate evidence based on this method, and in what cases it would consider the limitations identified by the literature less problematic. On vGUPPI, this method could be introduced more explicitly, indicating clearly that the method can explicitly take into account efficiencies (in the form of elimination of double marginalisation), even though benefits are covered in more detail in other parts of the draft.

4.3 Portfolio effects

The Draft Guidelines include a discussion of 'portfolio effects' from non-horizontal mergers, in line with Commission practice, including the recent Mars/Kellanova decision.[28] Portfolio effects may arise where a merger leads to an aggregation of products, rights, technologies, or other assets that customers value jointly and may, under certain conditions, increase the merged entity's market power. Portfolio effects have been considered in various sectors, including FMCG and other consumer goods, music and media rights, semiconductors, software, telecoms, aerospace, and optical products. We expect that theories of harm involving portfolio effects will continue to be tested across industries, as the underlying economic principles are not sector-specific.

In a bargaining context, a central question for the assessment of portfolio effects is whether the merger creates a *merger-specific* and *asymmetric* shift in bargaining positions: in particular, whether the enlarged portfolio worsens the disagreement payoff of the merged entity's trading partners *relative to* that of the merging parties, in a way

[27] Inderst and Valletti (2011) explain that the endogeneity of margins to market structure and the reliance on pre-merger margins to predict incentives to engage in foreclosure post merger, may lead to incorrect conclusions. (Inderst, R. and Valletti, T. (2011), 'Incentives for input foreclosure', *Journal of Industrial Economics*, **59**:1, pp. 1–20).
[28] Oxera was the economic adviser to Mars in this transaction.

which leads to better trading terms for the merged entity to the detriment of their trading partner.

The Draft Guidelines could be more explicit in clarifying the economic mechanism behind this potential portfolio effect. For example, in the context where manufacturers bargain with retailers (as in the Mars/Kellanova example) a central question is whether the delisting of the merging parties' overall product portfolio from a given retailer in the case of a breakdown of negotiations would lead to a significant *increase* in the number of customers switching all or a significant part of their purchases to competing retailers (*over and above* the number of customers switching when the two product portfolios are delisted separately).

Conceptually, this is linked to the 'sub-/super-additivity' framework developed by the Commission in the Universal/EMI precedent.[29] In Universal/EMI, the Commission considered whether the size of a music repertoire affected bargaining outcomes with downstream platforms, and found that a sub-additive value from additional repertoire in the utility of consumers could generate a "size effect" (and hence a merger effect), which could benefit larger repertoire owners in negotiations vis-à-vis online music platforms. In a FMCG retail context (as in Mars/Kellanova), the equivalent question is whether simultaneous unavailability of the products of the merged entity produces a 'super-additive' switching effect.[30] If this is the case, the merger would increase the bargaining power of the merged entity, and lead to worse trading terms for retailers.

Conversely, the mere fact that a transaction expands the parties' range of products is not sufficient to support a portfolio theory of harm. Similarly, the fact that some consumers would shift part or all of their purchasers to competing retailers in the event of failed negotiations and joint delisting, is not sufficient for adverse portfolio effects to materialise (contrary to what para. 289 of the Draft Guidelines appears to indicate). What is required instead is a sufficiently large increase in the number of consumers switching retailers post-merger, compared to the pre-merger situation.

Our main recommendation is therefore to articulate the potential theory of harm more carefully in the Draft Guidelines, by recognising that the extent of *incremental* customer switching required for portfolio effects to be at work needs to be sufficiently large (or 'disproportionate') compared to the level of customer switching expected absent the merger.

We generally agree that the factors listed in paragraph 290 (i.e. pre-merger market power, degree of customer overlap, linked negotiations, countervailing buyer power, and customer purchasing behaviour) are relevant for the assessment of portfolio effects. We note however that the reference to 'customer purchasing behaviour' remains relatively abstract,

[29] Universal Music Group/EMI Music (M.6458).
[30] For example: in a simple case of two symmetric firms offering a product each, where the individual delisting of each product would cause 3% of consumers to switch retailers, super-additivity implies that the simultaneous unavailability of both products causes more than 6% of consumers to switch (e.g. 7% > 3% + 3%).

and could benefit from reference to constituent factors such as the degree of one-stop-shopping, impulsiveness, frequency of purchase, brand loyalty, and other considerations.

Finally, a relevant practical question is whether portfolio effects, even if plausible in theory, are likely to have a material impact on post-merger bargaining outcomes in practice, and how to measure them in practice (this empirical question was a key focus in the Universal/EMI precedent). We would welcome further guidance from the Commission on the evidentiary framework expected for this analysis.

5 Theory of benefits and efficiencies

The introduction of a 'theory of benefit' framework in the Draft Guidelines is conceptually significant, placing pro-competitive arguments on a more equal footing with theories of harm. The corresponding clarification on symmetry of standard of evidence is also welcome (paras 26 and 304).

We see in particular two areas where additional guidance would be welcome:

- Compared to the economic toolbox available for the assessment of harm, **the economic methods for the assessment of efficiencies**, in particular non-price efficiencies, remain comparatively less developed and **largely untested in a merged control framework**.
- **The interaction between the assessment of sustainability and resilience collective benefits and other EU policy tools** designed to pursue the same objectives could be further clarified.

The remainder of this section expands on these two areas. While we acknowledge that the Commission cannot be overly prescriptive regarding the assessment of efficiencies and that greater clarity will emerge through future decisional practice, it would be helpful if the Draft Guidelines included some illustrative examples showing how different categories of efficiencies may be assessed in practice, similar to the examples provided in the 2023 Horizontal Co-operation Guidelines.[31]

5.1 Economic toolbox for efficiencies, including broader objectives

The analytical framework for the assessment of harm is well established, and the treatment of cost efficiencies is, at least in principle, relatively well developed within that framework. For example, as noted above, the quantitative tools commonly used in merger analysis can directly incorporate efficiency effects, allowing the assessment of efficiencies and competitive harm within a single and consistent analytical framework. More generally, the relationship between marginal cost reductions and incentives to reduce prices is well understood, and there is an established body of economic theory and

[31] European Commission (2023), 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', section 9.6.

empirical tools to assess the trade-off between upward pricing incentives arising from a merger and merger-specific cost efficiencies.[32]

By contrast, the analytical framework for assessing non-price efficiencies, including sustainability and resilience benefits, is novel in the context of merger control. The Draft Guidelines indicate that such benefits may be evidenced through consumers' willingness to pay, including by means of conjoint analysis and similar techniques. While such methods are well established in economics and are frequently used in other contexts, their application in merger proceedings is limited. This creates uncertainty as to how such evidence will be assessed in practice and how it will be weighed against the more established analytical tools used to assess competitive harm in merger analysis.

A related issue arises where the claimed benefits are uncertain or contingent on exceptional circumstances. Resilience benefits, for example, may materialise only in the event of significant supply disruptions, geopolitical shocks or other low-probability events. In such circumstances, consumers' stated preferences on willingness to pay for a more resilient supply chain estimated via conjoint analysis may be relatively small because the benefit is contingent on an unlikely event. However, supply-chain resilience in certain sectors may itself constitute an important EU policy objective, to the benefit of the consumers affected by a merger. The Draft Guidelines could benefit from additional clarification regarding how the Commission intends to assess and weigh wider consumer benefits such as sustainability and resilience benefits.

In this context, the reference to 'incommensurable' advantages from corrections of market failures adds a further dimension of uncertainty (para. 300), and may lead to an undue amount of discretion for the Commission in the evaluation of mergers under the EUMR. We would instead suggest that the Commission adopt a clearer, competition-based, standard for balancing harm and efficiencies from mergers (including collective benefits from mergers—see further below).

5.2 Collective benefits and interaction with other policy measures

The notion of collective benefits aims at capturing positive externalities that may arise from a merger, such as reduction in CO2 emissions and resilient supply chains. However, for these types of public goods there are often regulatory tools already in place, such as the EU Emission Trading Scheme (ETS) to address the related market failures. The Draft Guidelines should therefore clarify the relationship between merger control and existing regulatory tools, and the residual role that merger control should play to address regulatory failures.

The 2023 Horizontal Co-operation Guidelines acknowledge explicitly the interplay with other regulatory schemes; they are clear that agreements cannot be considered necessary to achieve objectives set by existing regulatory frameworks that are binding for individual firms, but they acknowledge that agreements may help achieving some regulatory

[32] For example, efficiency effects can be incorporated directly into pricing-pressure measures such as GUPPI and vGUPPI through an efficiency adjustment, while elimination of double marginalisation is inherently reflected in vGUPPI-type frameworks.

objectives more efficiently, or that they may be necessary in the short term.[33] Combined with the examples provided in Section 9.6, these guidelines define a general but clear framework to identify the boundaries for the assessment of collective benefits in horizontal cooperation agreements and regulation, with a particular focus on ETS.[34]

In our view, the Draft Guidelines leave these boundaries more blurred and, particularly in relation to the assessment of the merger-specificity condition, it would be helpful if the Commission clarified, at least in general terms or with examples, in what settings it would consider collective benefits to be merger-specific when there is a regulatory scheme (e.g. ETS) designed to achieve the same objective.

Specifically in relation to sustainability, the cap-and-trade nature of the EU ETS system is such that a reduction in emissions enabled by the combination of capabilities of the merging parties would not translate in an overall reduction in emissions within the EU, unless the overall emission cap is reduced.[35] As such, the reduction in emissions may translate in a cost reduction for the affected customers (which can be measured and quantified), but the collective benefit in the form of lower emissions is not obvious. The Draft Guidelines could provide more explicit guidance on how the interaction with ETS will be treated in the assessment of sustainability collective benefits.

In addition, the Draft Guidelines could describe in more explicit terms some high-level conditions under which collective benefits are likely to be material, along the lines of what it has done in the 2023 Guidelines on Horizontal Cooperation Agreements. For example, the expected magnitude of the collective benefits is likely to be higher if the market coverage of the product(s) sold by the merged entity is large. However, if this is the case, the market position of the merged entity is likely to be stronger, presumably making it less likely that the benefits from the merger offset the harm. Similarly, if the benefits are dispersed across a large section of society, it is less likely that there will be an overlap with the consumers affected by the merger.

Finally, to set clearer boundaries on the framework for the assessment of efficiencies, the Draft Guidelines could include some limiting principles that identify what would and would not qualify as an efficiency. One such principle could be that effects based on anticompetitive output reductions should not qualify as efficiencies. This is recognised in relation to savings in input costs (in para. 302(c)), but it could apply more generally (e.g. clarifying that lower negative consumption externalities resulting from reduced output from a merger also do not qualify as efficiencies) to avoid unintended effects on broader policy objectives. For example, a reduction in the output of some unabated technology (e.g. coal-fired generation) following a merger, by definition, displaces a more efficient abatement technology (e.g. offshore wind) by reducing ETS prices, resulting in higher abatement costs for society as a whole, and therefore not resulting in a benefit in terms of

[33] 2023 Guidelines on Co-operation agreements, paras 565 and 566.
[34] It would generally be helpful if the discussion of collective benefits in the Draft Guidelines were to align more closely with the equivalent discussion in the Horizontal Co-operation Guidelines (since the underlying issues are similar), or any difference in approach were clearly justified.
[35] This is because the merged entity can sell the pollution credits it no longer needs to other polluting firms in the EU, with the result of just shifting emissions to other parts of the market. This so-called 'waterbed effect' is acknowledged explicitly in the 2023 Guidelines on Co-operation Agreements.

greater sustainability. The framework for the assessment of sustainability benefits under merger control should encourage instead *improvements* in abatement technology, rather than anticompetitive output reductions in activities with carbon emissions.

More generally, the Draft Guidelines could recognise more explicitly how a competition-focused framework for assessment can foster broader objectives such as sustainability, and act as an effective *complement* to other regulatory tools (e.g. as discussed in the Commission's recent Policy Brief on the subject).[36]

[36] European Commission (2021), 'Competition Policy in Support of Europe's Green Ambition', *Competition Policy Brief*.