ICN RECOMMENDED PRACTICES FOR MERGER ANALYSIS

[V.] Unilateral Effects in Horizontal Mergers

A. In analysing the potential for a horizontal merger to significantly reduce competition, or create or strengthen a dominant position, agencies should assess whether the merger is likely to result in anticompetitive unilateral effects on competition.

Comment 1: Competition between firms is a process of rivalry that incentivises businesses to offer lower prices, increase production, improve quality and resilience, innovate, or expand choice, among other benefits. Horizontal mergers involve the combining of actual or potential competitors in the same relevant market and eliminate any existing competitive constraint that the merging firms would exert upon one another absent the transaction.[1] The elimination of competition between the merging firms in itself can reduce competition and harm outcomes for consumers, even if other rivals continue to act independently. This effect on competition is referred to as a unilateral effect. In contrast, coordinated effects can arise when, as a result of a transaction, other firms start to coordinate with the merged firm rather than acting independently.[2]

Comment 2: Unilateral effects and coordinated effects are broad analytical frameworks designed to encompass the range of anticompetitive effects that may result from horizontal mergers. While anticompetitive effects of a merger within a particular market are often characterised as either unilateral or coordinated, a merger may result in both unilateral and coordinated effects in the same or in different markets and these effects can in some cases reinforce each other.

Comment 3: Market definition is a useful step in the analysis of competitive effects and assists agencies in determining whether a merger is likely to create, enhance, or entrench market power or lead to a significant reduction of competition.[3]

Comment 4: Agencies should consider a merger's effect on competition. This may include price and non-price dimensions. Examples include increased incentives of the merging firm to increase prices to customers, or the fact that the merging firm might have a reduced incentive to continue or begin developing new products or maintain quality of services that would have competed with the other merging firm's products or services – given that the merger would remove this competitor from the market. Agencies may therefore consider whether the merger is likely to lead to negative effects on prices or output, or negative non-price-related effects such as a loss of innovation, lower quality in various forms, less variety of products or services supplied by the merged firm, decreased availability or less choice of products and services in the market, or a negative impact on privacy to the extent these parameters are relevant in the competitive process.

Comment 5: The market shares of the merging firms and their competitors are one of the relevant factors for the assessment of unilateral effects as well as market concentration levels and changes in market concentration levels due to the merger. These may be useful indicators of the merger's risk of

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1 These Recommended Practices (RP) focus on the assessment of unilateral effects stemming from mergers between firms that compete in the same market. For a discussion on unilateral effects of a horizontal nature stemming from mergers between firms that do not compete in the same market, please see the Merger Analysis RP on Non-Horizontal Mergers.

2 Coordinated effects are discussed in Merger Analysis RP on Coordinated Effects.

3 For more guidance on market definition, see Merger Analysis RP on Market Definition.

significantly harming competition. When evaluating market shares, agencies should also examine the specific features of the market that affect the merged firm's ability to exercise market power, including the evolution of market shares over time. For example, in fast-moving or innovative markets, market shares may not accurately reflect the competitive significance of other firms in the market. Moreover, closeness of competition is at times a particularly relevant assessment and market shares may not accurately reflect closeness of competition.[4]

Comment 6: Depending on the applicable legal framework, some agencies use rebuttable structural presumptions to presume that a merger will likely significantly reduce competition, relying on economic confidence in the relationship between high market shares and concentration and the likely anticompetitive consequences of a merger. For these agencies, the anticompetitive effects of a merger, such as the elimination of substantial competition between the merging firms, are presumed to follow from the elimination of a competitor. In jurisdictions with such structural presumptions, competition agencies usually bear the burden of producing evidence that establishes a presumption that can then be rebutted by the merging firms, usually by a showing that the market shares give an inaccurate portrayal of the merger's probable effects on competition.

B. Agencies should consider a credible theory (or theories) of harm when assessing the risk of unilateral effects of a horizontal merger while taking into account the relevant market context and the available evidence.

B.1 Unilateral Effects Theories of Harm

Comment 1: When assessing the potential unilateral effects of mergers, agencies can rely on one or more theories of harm, based on the facts of the case and available evidence, to assess whether the merger will have negative effects on competition in any relevant market. Sections B.1.i – B.1.vi include examples of common theories of harm, which agencies can rely on in the assessment of unilateral effects. In some cases, unilateral effects from non-horizontal relationships may reinforce unilateral effects theories of harm of horizontal mergers.

B.1.i Mergers may lead to the creation of a monopoly or the creation, strengthening or entrenchment of a dominant position.

Comment 1: A merger creates a monopoly if it combines the only two rivals in a defined market. Even when there are other rivals that remain active in the market post-merger, mergers may lead to the creation of a dominant position or the strengthening of an already dominant position of one of the merging firms, giving the merged firm an incentive to offer worse terms to its customers. Some agencies take into account the level of market power in the market prior to the merger, as well as the level of market power acquired through the merger, to determine the risk of negative effects on competition. In some cases, even small increments in market power may give rise to competition concerns. Where one of the merging firms has a strong position in the market pre-merger, the loss of competition from the merger can be enough to confer or strengthen a dominant position even if its merger partner is a weak or small competitor. When examining whether a merger may lead to a monopoly or the creation or strengthening of a dominant position, agencies may also consider whether any of the competitive

[4] For further details on the relevance of market shares in merger reviews, please refer to the Merger Analysis RP on the Use of Market Shares.

constraints discussed in Section C would preclude the unilateral exercise of market power by the merged firm.

Comment 2: In the context of a horizontal merger, entrenchment of a dominant position may occur when the merger involves the acquisition of a nascent or potential competitive threat. Dominant firms may face nascent competitors active in complementary or neighbouring markets, which are likely to develop into a long-term threat to the core product or service of the dominant company or its overall ecosystem. A merger that removes a potentially disruptive firm as a competitive threat to the dominant firm, or a firm that provides a key or scarce complementary functionality to the dominant firm's product or service, may prevent opportunities for dynamic competition and innovation (both from the disruptor firm and the dominant firm), as the dominant firm's incentives to innovate may also be reduced as a result of the removal of the competitive threat. Through the merger, the dominant firm retains and entrenches its dominant position to shape the market as it wishes instead of having to respond to the threat of the nascent firm, which may lead to negative effects on competition.

Comment 3: Entrenchment of a dominant position may also occur if the merger creates or raises barriers to entry or expansion for rival firms, or otherwise restricts the ability of rival firms to compete and constrain the merged firm, to the detriment of customers in the long term. This may occur where a firm already has an entrenched dominant position in one defined market, which was already difficult to contest pre-transaction (e.g., due to network effects), and the transaction involves (i) a product or service (in a vertically linked or closely related market) on which its competitors rely, or (ii) an 'ecosystem' of products or services which may be interrelated and sometimes interconnected through interoperability. As a result of the merger, competitors may not be able to find alternatives they can use to compete post-transaction. Such entrenchment may also arise in cases that involve a combination of dynamic horizontal and non-horizontal effects.[5]

_B.1.ii_ Mergers in concentrated markets may lead to significant unilateral negative effects on competition even if none of the merging firms is dominant pre- or post-merger.

Comment 1: Horizontal mergers that do not lead to a monopoly, or the creation or strengthening of a dominant position, may still have significant negative unilateral effects on competition. When reviewing mergers in concentrated markets and mergers that create concentrated markets, agencies should assess the extent to which the removal of the competitive constraints between the merging firms is likely to significantly reduce competition in the market. Agencies should consider the impact of the reduction of competition on the merged firm as well as on the remaining rival firms, even without coordination involving the remaining firms.

B.1.iii Mergers may lead to unilateral effects on competition through the elimination of competition between close competitors in differentiated product markets.

Comment 1: Firms compete when independent actions by one firm to compete less aggressively, for example by offering worse terms to customers, would significantly increase the profits of the other. A merger between close competitors can have unilateral effects on competition because the merged firm captures the additional profits from the reduced competitive pressure. A merger of close

5 See also Merger Analysis RP on Non-Horizontal Mergers, Section B, Comment 2.

competitors may or may not lead to the creation or strengthening of a dominant position (and, hence, may or may not be relevant also for the previous point, B.1.ii).

Comment 2: In differentiated product markets, product similarity and close substitutability are important factors affecting the intensity of competition between firms. Similarity can be gauged along dimensions of differentiation in particular product characteristics or geographies that are important determinants of customers' willingness to switch between them prior to the merger. If many customers consider the products of one merging firm to be a close substitute for the products of the other merging firm, then when both sets of products are under common ownership there is a profit incentive to increase the price or degrade the quality of at least some products. This occurs because the merged firm can recapture some of the lost sales from customers who switch to alternatives after a given product's price increases or its quality is degraded. Thus, unilateral effects are more likely to occur when the products offered by the merging firms are relatively close substitutes.

Comment 3: Agencies should assess the closeness of competition between the merging firms and their products (and those of their rivals) based on the specific market characteristics. The parameters of competition, and therefore the elements that are most relevant for an assessment of closeness, can vary. Competitively relevant parameters can include, without limitation, the characteristics, quality in various forms, pricing, and positioning of products; similarities in production and capacity; geographic reach[6] and commercial focus of the merging firms; their business model and strategy; level of investments; innovativeness; product range; level of service; brand perception; access to data and data protection; and network effects. Agencies may take into account specific requirements of sub-groups of customers when assessing closeness of competition.

Comment 4: Evidence on how customers view and switch between the merging firms, and on how the merging firms impact each other's strategy or sales, may be particularly informative to determine how closely the firms compete. Sources of evidence may depend on the factual context and relevance of the evidence available.[7] Two common settings are:

- *Price setting*. In some markets, firms set prices and customers choose between the various offers in the marketplace. Evidence on the degree of substitutability among differentiated products in this context can include marketing surveys and customer views, analysis of purchasing patterns, switching data, cross-price elasticities, and information contained in normal course of business documents from market participants.[8]
- *Bidding markets*. Some markets rely on bidding processes. Bidding markets typically involve customers reaching out to multiple potential suppliers for specific goods or services with the

6 Especially where products are sold locally. In this case, the mere distance may also attenuate competitive constraints on each other.

7 Agencies may analyse exogenous past events or natural experiments that may be appropriate to represent the competitive effects of a transaction. Thus, depending on the circumstances, it may be relevant to inquire into the impact of recent transactions, entries, expansions, contractions, exits (definitive or temporary), legal or regulatory changes, and/or stock shortages within the relevant market or within other similar markets. Agencies may consider giving more weight to events motivated by a worsening of supply conditions.

8 Agencies should consider whether prices already reflect a monopolised market or the presence of a super dominant firm before the merger. If price response functions (elasticities) are estimated from such cases these would likely imply customer switching to competitors that would wrongly reject pre-merger market power by the merging firms (cellophane fallacy).

view of ultimately selecting one supplier. Winning suppliers then are awarded the supply of the product or service. In the context of bidding markets where there are only a few credible bidders, any two of those bidders would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, unless proven otherwise. Indicators that firms are close competitors in this context can include: (i) the frequency of head-to-head competition between the merging firms in the past, (ii) winning or losing probabilities of one merging firm depending on the presence or absence of the other firm, (iii) the offered bids or margins, and their evolution during the tender process, depending on the presence or absence of one or the other merging firm, (iv) the number of remaining credible bidders, (v) the supply duration covered by the bids, (vi) multi-homing strategies by customers, (vii) production capacities, entry or expansion, or (viii) transparency in the bidding process, including informal contacts and tendering. In order to capture the competitive constraint of all relevant bidders, agencies may assess tenders over extended periods of time.

B.1.iv Unilateral effects on competition may arise if a merger eliminates an important competitive force.

Comment 1: Agencies should consider the specific competitive pressure that the merging firms exert in the market, given that some firms have a greater impact on the competitive process than their market shares or other metrics would suggest. For example, a firm may be an important competitive force because it is a recent entrant that is expected to exert significant competitive pressure in the future, it has a particularly aggressive commercial strategy (in terms of pricing, investments, or innovation) that other firms must react to, its business has a particular scale and scope, or it has a promising pipeline of products. A merger involving such a disruptive firm may eliminate a vigorous and effective source of competitive pressure, in particular when the market is already concentrated. This theory of harm involving the elimination of an important competitive force can complement other theories of harm (for example, involving the creation or strengthening of a dominant position, the elimination of competition between close competitors, or innovation harm, see Sections B.1.i - iii and vi).

B.1.v Mergers may harm competition when they eliminate a potential competitor. [9]

Comment 1: A horizontal merger involving a potential competitor can have anticompetitive effects given the value that new entry or the threat of entry may bring to markets and consumers. This is the case if the potential competitor significantly currently constrains, or may significantly constrain in the foreseeable future, the behaviour of the firms active in the market. The level of concentration of the relevant market where one of the merging firms is a potential entrant may be an important factor in determining whether a merger that eliminates a potential competitor leads to a significant reduction in competition. The potential competitor can be the target, the acquirer, or firms setting up a joint venture, where at least one of the joint venture parents may have otherwise independently entered a market. While a potential competitor may be active in a vertically related or neighbouring market, a firm may still be a potential competitor even when it is not active in a related market.

[9] While some agencies will consider potential competition entirely within the competitive assessment, there are some others that may also take this into account in the counterfactual.

Comment 2: There are different ways in which elimination of a potential competitor can harm competition. First, the merger may eliminate a firm that is likely to enter the market within a relatively short period of time. Entry by a potential competitor is more likely where the firm has the ability and incentive to enter, has well-developed plans, or has a past history of entry in related markets.

Comment 3: If entry depends on successful innovation or product development, in many instances it is possible to identify the specific product market within which pipeline products at advanced stages of development will compete once launched. In such cases, agencies should assess the likelihood that the merged firm would discontinue the pipeline product, leading to a reduction of choice and innovation, in addition to assessing the impact on prices and other non-price dimensions. Agencies should also assess the impact of a merger on innovation in cases where the merging firms have overlaps in ongoing pipeline products, even if at early stages of development or before there has been any market entry. In such cases, agencies should assess the risk of harm to innovation competition resulting from the discontinuation, delay, or redirection of one or both of the overlapping pipelines, including pipelines at early stages.

Comment 4: Second, some agencies may assess whether harm to competition may occur through the elimination of a firm that is perceived by the incumbent firms as a potential entrant, thereby affecting the incumbents' (price and non-price) strategy and behaviour in the market in which the potential entrant may enter (perceived potential competition). The elimination of the perceived potential competition reduces the competitive pressure on the incumbent firms and may reduce their incentives to price competitively or invest in product development or innovation. This constraint may be significant even when actual entry is not imminent. To assess whether the acquisition of a perceived potential entrant may harm competition, agencies may consider whether the incumbent merging firm considers the other merging firm to be a potential entrant, whether a current market participant could reasonably consider one of the merging companies to be a potential entrant, or whether that potential entrant has a likely influence on existing competition.

Comment 5: Harm from mergers involving a potential competitor depends on the number of other perceived or actual potential competitors which could maintain sufficient competitive pressure after the merger. The impact of a potential entrant on competition is likely to be more significant when (i) there are fewer strong existing competitive constraints on the other merging firm, (ii) the other merging firm would already have market power absent the merger (with greater market power being associated with a greater likelihood of an entrant having a bigger impact on competition), (iii) the potential entrant would be a close competitor of the incumbent merging firm, or (iv) there are few other potential constraints.

B.1.vi A merger may result in a loss of innovation or dynamic competition, or otherwise have negative effects on non-price or output parameters of competition.

Comment 1: Mergers may not only have a negative effect on static competition (current price, quantity, quality, or product variety) but also affect dynamic competition to bring new or substantially improved products, processes, and services to the market. Firms normally have an incentive to invest and innovate to gain a competitive advantage to capture new sales and protect their existing sales from each other. A merger between competitors (or potential competitors) may internalise this effect and reduce the incentive to innovate. Agencies should consider whether the merger might affect competition to innovate where at least one of the merging firms is an important innovator or where innovation is an important parameter of competition. Companies may direct innovation at outcomes beyond product features (product innovation). For example, innovation may be directed at reducing costs or adopting new technology for the distribution of products (process innovation).

Comment 2: The assessment of non-price effects of a merger, such as the impact on investment, innovation, and quality in various forms, may be particularly important when assessing dynamic competition. A loss of dynamic competition may relate to specific products already in the market or pipelines. It can also relate to the removal of capabilities for which the overlaps may not be clear at the time of the merger, for example in a merger of digital platforms with a pattern of launching similar new services. In such a case, a merger can reduce competition by eliminating competing strategies for future products and services.

Comment 3: Agencies should consider the impact of a merger on innovation. The elimination of future or dynamic competition may lead to a loss of innovation in different ways. For instance, as set out in Comment 3 in Section B.1.v above, a merger may lead to loss of innovation in cases where there are overlaps between (i) the merging firms' existing marketed products and pipeline products in development, or (ii) the merging firms' pipeline products at advanced stages of development.

Comment 4: Mergers may affect the overall degree of innovation in a market, which may affect early research and development ("R&D") efforts more than specific products. Agencies may consider whether there is a risk that a transaction could lead to a significant loss of innovation competition resulting from a reduction in the resources devoted to innovation. Such an assessment should take into account the merging firms' financial and other capabilities to innovate in the innovation spaces where they are both active. The assessment of competition in innovation spaces goes beyond examining specific potential products; it considers early R&D efforts related to technologies or products which are undefined or are several years away from reaching the market. A horizontal merger may lead to a reduction of the merging firms' R&D efforts if they are aimed at developing related technologies or substitutable products. In this case, these R&D efforts may be analysed in the same innovation space. The reduction of future R&D efforts encompasses the loss of capabilities to innovate or invest in innovation spaces, for instance through reductions in overall R&D spending, closing research centres, or cutting the number of researchers. Agencies may also analyse the underlying technologies of innovative products for a potential loss of innovation competition.

Comment 5: Agencies should consider whether a merger has a negative impact on quality in various forms where quality is an important parameter of competition. A merger can reduce the merged firm's incentives to provide high-quality products or services. The merged firm may have an incentive to drop competing products or services to avoid cannibalization and save fixed costs, reducing choice for customers. A merger may also lead to a degradation of quality in various forms, e.g. degradation of product features, service, lower interoperability and compatibility, or in the context of services, longer wait times and less skilled service providers.

B.2 Market Dynamics and Factors Relevant for the Assessment of Unilateral Effects

Comment 1: Agencies should understand and use the relevant commercial realities and market dynamics to assess whether a merger is likely to lead to harmful unilateral effects on competition. Sections B.2.i – B.2.iv include examples of market dynamics and factors that agencies should consider in the assessment of unilateral effects.

B.2.i Unilateral effects from eliminating competition between firms may arise in undifferentiated product markets if the likely response of rivals is insufficient to constrain the merging firms.

Comment 1: In markets for undifferentiated (i.e., homogeneous) products, customers are rather indifferent about the choice of supplier, and suppliers are generally distinguished primarily by capacity and other non-price factors like differences in location or quality of related services. Unilateral effects may arise if the merged firm can profitably remove capacity from a market or has less incentive to expand capacity in a growing market.

Comment 2: Agencies should consider whether the merged firm would have an incentive to raise prices or reduce output below the level that would have prevailed absent the merger. In a competitive market, (i) if the merged firm decreases output, the remaining competitors have an incentive to expand output and (ii) prices will increase if on net aggregate output decreases. The exercise of market power in such markets is likely if competitors of the merged firm cannot, or will not, respond to the price increase and output reduction by the merged firm with increases in their own output sufficient in the aggregate to make the unilateral action of the merged firm unprofitable. Data on spare capacity from both merging firms and their competitors is helpful for this assessment.

Comment 3: The merged firm may be able to exercise market power if its competitors are unable, or have limited incentive to respond to its actions, for instance if (i) the merger creates or enhances a strong capacity advantage of one or both of the merging firms, (ii) competitors cannot easily expand output, (iii) existing excess capacity is significantly more costly to operate than capacity currently in use, or (iv) the market is already concentrated and, thus, firms have limited incentives to compete by expanding capacity. In such cases, competitors may have more incentives to raise price than to expand output, resulting in less competition, through restricting short-term price competition or long-term capacity competition or both.

Comment 4: Where demand for undifferentiated products is cyclical, agencies should consider capacity utilisation over time and not merely at one point in time when conditions might be exceptional (for example during a recession).

B.2.ii Mergers may harm competition in purchasing markets.

Comment 1: Horizontal mergers may lead to increased purchasing power. While such purchasing power can benefit customers by lowering purchasing costs and thereby lead to lower prices in output markets, increased purchasing power can also reduce the competitiveness of suppliers of the purchased products or services as well as their ability to innovate, ultimately raising downstream consumer prices for these products and services. Some jurisdictions may also assess how increased purchasing power can also occur in the context of labour markets, giving a merged firm, as a buyer of labour, the ability to depress wages or benefits.

Comment 2: Many of the other theories of harm described in these Recommended Practices could apply in analogous ways to purchasing markets. In considering the impact of mergers in purchasing markets, due consideration should be given not only to the direct increase in purchasing power resulting from the merger, but also to indirect increases resulting from any purchasing joint venture, alliance, or trade group of which the merging companies are members. An analysis of the upstream markets, including the degree of concentration therein and applicable sales modalities and frequency, may also be necessary in cases where mergers significantly increase the merging firm's purchasing power, to assess the impact of a merger on such purchasing markets.

B.2.iii Acquisition of a non-controlling minority interest, or the presence of an existing minority interest, in a competitor may contribute to unilateral effects.

Comment 1: An assessment of non-controlling minority interests may be a relevant consideration for the assessment of unilateral effects in the context of a reviewable merger. Acquisitions of a non-controlling minority interest, or the prior existence of a minority interest, in a competitor may contribute to unilateral effects. Minority investments or cross-shareholdings, i.e., a situation where one of the merging parties is also a (non-controlling) shareholder in a close competitor to the merging parties, may also increase the likelihood of unilateral effects on competition. The cross shareholding(s) may dampen the incentives of the merging parties to compete vigorously with the competitor (for example as they can recapture lost profits through their minority interest or access competitively sensitive information), leading to reduced competitive pressure in the market. Depending on the applicable jurisdictional framework, some agencies may also consider the impact of common ownership, where a shareholder may hold an interest in multiple competitors in the market.

B.2.iv When assessing mergers where privacy is an important parameter of competition, agencies should consider whether the merger may eliminate competition with respect to privacy.

Comment 1: Privacy and data protection may play a role in the competitive dynamics of a market, for instance because privacy is seen as an element of quality and is part of customers' preferences or requirements. Agencies should consider whether privacy is an important parameter of competition and the extent to which the merging firms compete with respect to privacy. For instance, in markets where the merging firms' competing products involve the collection of customer data and the firms compete on the degree of privacy offered to their customers over their data, agencies can assess whether the merger could affect the level of privacy and data protection offered to consumers post-merger.

C. In conducting unilateral effects analysis, agencies should assess the competitive constraints and other factors relevant to the ability of the merged firm to exercise market power in the relevant market(s).

Comment 1: Agencies should assess whether competitive constraints or other market conditions that will remain in the market following the merger are adequate to prevent the creation, enhancement or entrenchment of unilateral market power. Some of these factors may only deter or offset anticompetitive effects for a limited group of customers and be insufficient to prevent an increase in market power vis-à-vis others. Subject to the applicable legal framework, factors that may be relevant to assess the likelihood of a unilateral exercise of market power as a result of a merger may include, but are not limited to:

- *Availability and Responsiveness of Alternative Suppliers:* If alternative suppliers (offering adequate substitutes and with sufficient available capacity) remain post-merger, and a significant number of customers are willing and able to turn to these alternative suppliers in the event of an anticompetitive effect of the merger (such as increase in price, loss of innovation, or decrease in quality or choice), the threat of losing such customers may be enough to deter the exercise of market power by the merged firm. However, the closer the merging firms are as substitutes in differentiated product markets, and the more distant the remaining competitors, the less relevant this factor becomes. Also, the alternative suppliers themselves may have the incentive to follow the price increase of the merged firm to some extent and, hence, may not be a sufficient deterrent to the merged firm. In cases where a merger may have an impact on innovation, the threat of losing market shares to innovative competitors may give the merged entity an incentive to maintain their pre-merger level of R&D and innovation. Conversely, alternative suppliers themselves may have the incentive to reduce efforts on R&D to some extent if they anticipate a decreasing innovative pressure post-merger and, hence, do not become a disciplining factor on the merged entity.

- *Switching costs and multi-sourcing:* Switching to alternative suppliers may be hampered by various factors. If the cost of changing to another supplier is high, for instance due to lengthy certification processes, or access to data or intellectual property, it may be difficult for customers to switch away from the merged firm. In some cases, when customers multi-source or multi-home, i.e., use several platforms in parallel, without incurring significant costs, a merger may be less likely to lead to anticompetitive effects. However, multi-sourcing by customers, when done because of security of supply reasons, can soften competition. Suppliers may not have to compete as hard if they anticipate that each of them will get a share of the demand, as opposed to a winner-takes-all market. In such a case, a merger may further soften or even eliminate competition.
- *Entry, Repositioning, or Expansion:* Entry by new competitors, or expansion or repositioning by existing competitors, may be sufficient in time, scope, and likelihood to deter or defeat any attempt by the merged firm to exercise market power.[10] The threat of entry or expansion, however, is rarely sufficient to prevent negative effects on competition. In some cases, a merger may lessen the potential for entry, expansion, or repositioning to act as a competitive constraint against the exercise of market power. Repositioning can also harm competition if the post-merger rivals reposition themselves further away from each other.
- *Buyer Power:* In rare circumstances, some agencies may consider whether customers may have the incentive and ability to defeat the exercise of market power through their bargaining strength against the seller because of their size, commercial significance to the seller, or ability to switch to alternative sources of supply. However, instances where some form of buyer power in itself would be sufficient to counteract the unilateral effects stemming from a merger are rare. To prevent significant anticompetitive effects, buyer power must constrain the exercise of market power in the market and not merely protect certain individual customers. Further, agencies should assess the merger's impact on the pre-merger existing bargaining strength of customers.
- *Efficiencies*: Where agencies examine any substantiated claims by the merging firms that a merger will generate efficiencies, they should carefully assess whether the claimed efficiencies are merger-specific, verifiable and sufficient to offset or prevent the harm to competition from the merger in that market.[11]
- *Failing firm/exiting assets*: Agencies should carefully assess claims by the merging firms and require evidence that the assets of the acquired firm would have exited the market (through failure or otherwise) absent the transaction, and that there would be no credible less anticompetitive alternative outcome than the merger in question. To this end, agencies should assess the existence of less anti-competitive alternative buyers, other options for reorganisation, or a scenario in which the failing firm's assets and/or

[10] For further details, please see Merger Analysis RP on Entry and Expansion.
[11] For further details, please see Merger Analysis RP on Efficiencies.

customers would be picked up by several competitors.[12]

D. In conducting unilateral effects analysis, agencies should assess the specific facts of the case, draw on available and relevant evidence, especially evidence created in the ordinary course of business, and apply the economic tools that best fit the characteristics of the market(s) and competitive dynamics at issue.

Comment 1: Agencies should use available and relevant evidence to assess the effects of a merger. Common sources of evidence include (i) the merging firms' internal documents (after assessing their context and timing), in particular those addressing the theory of harm and markets investigated, (ii) information, quantitative evidence, and economic analyses from the merging firms, (iii) market information and perspectives from customers, competitors, and other relevant third parties, (iv) statements, representations, and testimony from representatives of the merging firms and other industry participants, (v) past conduct of the merging firms, (vi) previous competition agency investigations and/or reports (after assessing any market changes), and (vii) industry studies, reports, and market data. Evidence relevant to the loss of future competition could include internal documents, business forecasts, and valuation models (among others).

Comment 2: While the positions of the merging firms and their competitors in the market will be assessed on the basis of historical evidence, agencies should pay attention to ongoing changes or recent developments which might indicate that current market positions may over- or understate the merging firms' competitive significance. Due to the forward-looking nature of merger investigations, an agency's analysis of the impact of a merger should include current or recent market changes as well as developments which are reasonably predictable.

Comment 3: Mergers may harm competition in a variety of settings. Economic theory informs and is integrated into the framework of recommended practices set out in the above sections of these Recommended Practices. The economic literature also provides economic models and econometric analysis to illustrate or even quantify these theories of harm. If used, these models and analysis should be applied in line with the specific factual settings of an investigation. The underlying economic reasoning and intuition need to be described in non-technical terms, as they will become part of the legal reasoning that may be subject to judicial proceedings. For any tools used, agencies should explain why these tools are suitable to analyse the case. While the specific tool or model used will vary depending on the characteristics of the market, all are generally designed to provide quantitative or economic evidence to assess whether there is material harm to competition as a result of the merger. Such models are used to give an indication of the scale and importance of the competitive effects of the merger, rather than to precisely predict outcomes.

Comment 4: Quantitative or economic evidence form an integral part of merger analysis and should be considered in conjunction with other evidence. Economic modelling techniques, including statistical methods, and estimation and/or calibration provide for a quantitative assessment of certain key aspects of a merger, but they typically cannot take account of all the features of the market and rely on a series of assumptions. Any assumptions should be explained. To the extent possible, evidence should be provided to demonstrate the validity of such assumptions and the results should be checked for

[12] For further details, please see Merger Analysis RP on Failing Firm / Exiting Assets.

sensitivity to any variations. Quantitative and economic evidence should not be considered in isolation from other types of evidence.

Comment 5: Quantitative or economic evidence useful for unilateral effects analysis can range from descriptive statistics (of market shares, prices, quantities, capacities, diversion ratios, margins, etc.), event studies and regression analysis (e.g., entry/exit events, past mergers, etc.), bidding analysis (simple participation or win/loss analysis, probability of participation regressions, etc.) to simulation modelling. To be useful, the particular model should be based on sound and robust economic principles, fit the characteristics of the market, and suitable reliable data must exist and become available to calibrate the model. Usually, analysis based on simpler methodologies is preferred over the use of more complex methodologies, all else equal, and robust techniques or models over methodologies that are more sensitive to their underlying assumptions.

Comment 6: The availability, reliability, and consistency of data is key to the validity and usefulness of economic evidence. Early in an investigation, agencies should engage potential data providers on the availability and quality of data. The design of the empirical methodology should be based on an assessment of what data will be available, the quality of the data, and the timeframe in which the investigation will need to be completed based on the interactions with data providers.

Comment 7: An agency's framework of analysis and applicable confidentiality rules and procedures will determine if certain evidence and information may be shared. When economic or empirical evidence is used in merger analysis, sharing such information may require particularly careful documentation, e.g., of the underlying data, the methodology, and even the computer scripts that replicate the relevant parts of the analysis, provided that confidentiality considerations allow.

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