ICN RECOMMENDED PRACTICES FOR MERGER ANALYSIS

These recommendations on substantive merger analysis are derived from the ICN Merger Guidelines Workbook and common practices across member jurisdictions. They are intended to complement the detailed descriptions of merger analysis in the Workbook. For a description of effective investigative techniques to develop evidence to account for particular facts presented in merger investigations, see the ICN Investigative Techniques Handbook for Merger Review.

The ICN Recommended Practices for Merger Notification and Review Procedures address the procedural aspects of notification and review. Several topics covered in those recommended practices relate to the legal framework for substantive merger analysis. In particular, the practices that address transparency, agency powers, confidentiality, and the conduct of a merger investigation are relevant to the legal framework for substantive merger review.

Index of Recommended Practices (RPs)

I. Framework for Competition Merger Analysis

A. The purpose of competition law merger analysis is to identify and prevent or remedy mergers that may harm competition.

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (May 2025)

Comment 1: Competition incentivizes businesses to offer lower prices, increase output and innovation, and improve quality, among other benefits. A merger may remove a company that can act as a competitive constraint on other firms. A merger can change the competitive behaviour and/or incentives of the merging companies or their competitors in ways that harm competition.

Comment 2: Mergers harm competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, customers, or consumers, or reduce the intensity with which firms compete. Harm to competition can result in increased prices, reduced output, choice, quality, innovation, or otherwise worse terms, both to buyers and sellers, as a result of a lessening of competition.

Comment 3: Mergers that harm competition create, increase, extend, strengthen, or entrench market power and deprive customers, suppliers (which may include workers), and the wider public of the benefits of competition.

Comment 4: While the common focus of merger analysis is on harm to competition, jurisdictions use similar but different terminology to define the extent of harm that justifies intervention. This terminology recognizes that merger review seeks to halt harmful transactions before they occur (e.g., "may be substantially to lessen competition," "likely to substantially lessen competition," or "significant impediment to effective competition"). This recommended practice uses "harm to competition" to encompass the differing legal standards used by jurisdictions around the world.

B. Merger review rules and policies should provide a clear analytical framework for identifying and addressing mergers that may harm competition.

C. WORKING GROUP COMMENTS
D. Original Comments (April 2008)
E. Amended Comments (May 2025)

Comment 1: Merger review rules and policies should enable competition agencies to perform well- reasoned competition analysis and take appropriate and effective enforcement action against mergers that may harm competition.

Comment 2: Competition agencies should be provided with the sufficient powers, abilities, tools, and resources to identify, investigate, and prevent mergers that may harm competition.

Comment 3: The legal authority to analyse a merger should not be based on the form, title, or technicalities of a merger agreement. Merger review rules and policies should have broad application to combinations that may raise competitive concerns, regardless of how they are structured. In addition, merger review rules should make clear which mergers are subject to review by a competition agency[1].

Comment 4: Merger review rules and policies should be based on sound and robust economic principles and establish a framework for analysis that can address a mergers' likely harm to competition with sufficient flexibility to adapt to changes in market realities and developments in economic learning.

Comment 5: A determination of whether a merger is likely to harm competition should take place within established legal procedures, including an appropriate and transparent standard of proof. Agency intervention to prohibit or remedy a merger aims to maintain competition affected by the merger, not to enhance premerger competition or further non-competition goals.

Comment 6: The objective application of competition law in merger analysis promotes predictability. Merger review rules and policies should include a commitment to transparency (subject to appropriate confidentiality protections) in order to allow merging parties and the public to understand how the merger laws are enforced. Merger review rules and policies should articulate the analytical factors used for merger analysis. Many agencies promote transparency of merger review by publishing "merger guidelines" that describe their merger processes and enforcement practices. Publishing the results of merger reviews or explaining key points of analysis, where appropriate, may also promote the transparency of merger analysis.

C. Competition agency merger investigation and analysis should focus on market realities and seek to understand the practical ways that firms compete.

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (May 2025)

Comment 1: Merger review is a forward-looking exercise whereby competition agencies assess whether a merger presents risk of harm to competition. It does not require agencies to attempt to predict with certainty the future or calculate precise effects of a merger. Competition agencies should examine the evidence available to assess the risk the merger presents of harm to competition.

Comment 2: Merger investigation and enforcement does not require a rigid and formalistic checklist approach, but it does require a coherent theory of harm. Competition presents itself in many ways and transactions can raise multiple types of competition concerns. Agencies should aim to accurately capture how firms compete and use analytical, economic, and evidentiary tools that best assess the effect on competition in the markets under consideration. Depending on the market concerned, different kinds of evidence may be available and meaningful. Agencies

[1] For detailed information on the definition of a merger transaction and aspects of merger notification and process, see the ICN Recommended Practices for Merger Notification and Review Procedures.

examine factors such as direct evidence from the parties and market participants, econometric or behavioural analysis, or market dynamics to understand a transaction's risk to competition.

Comment 3: An agency should apply its merger analysis on a case-by-case basis, recognizing the broad range of possible industry-specific contexts, changes in market dynamics, or competitive effects that may arise in different transactions.

Comment 4: In reviewing a merger, an agency should conduct a facts-based assessment, drawing on available and relevant evidence, including qualitative and quantitative evidence where appropriate. Where possible and adequate, agencies should review, test, and confirm information and conclusions presented by merging parties or third parties, keeping in mind that their advocacy may present information in a manner that, while accurate, is not fully representative of market realities.

D. Competition agency merger analysis should take account of changes in competitive conditions in the relevant market that are likely to take place even if the merger does not occur, which some agencies call the counterfactual or 'with and without' test[2].

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (May 2025)

Comment 1: Agencies should assess competitive conditions in the relevant market existing before the merger and take into account any changes in those conditions likely to take place in the absence of the merger.
Comment 2: Competition agencies may make analysis of the counterfactual a distinct step of their merger review, while others may incorporate similar conceptual thinking into other steps of their analysis of competitive effects, entry or expansion, potential competition, market definition, market power, or other factors. The term 'counterfactual' refers to the hypothetical scenario where the merger does not happen and will often consist of the pre-merger conditions of competition. Only events that would likely have happened in the absence of the merger under review – and are not a consequence of it – can be incorporated into the counterfactual.

Comment 3: As mentioned above, merger review is a forward-looking exercise and assessing changed market conditions involves a degree of judgement on the part of the competition agencies relating to future developments absent the merger, based on the facts and the evidence of each case.

Comment 4: When assessing changing competitive conditions, agencies focus on significant changes affecting the markets in which the merging parties operate. For example, agencies should be cognizant of:

[2] Some agencies do not use this terminology. Unless otherwise specified, the singular also encompasses the plural.

a. entry or expansion by one of the merging parties or their competitors (discussed in Section A of the ICN Recommended Practices Chapter on Barriers to Entry and Expansion),

b. regulatory or structural changes within an industry,

c. the possibility of exit by one of the merging parties (considered in the ICN Recommended Practices Chapter on Failing Firm / Exiting Assets in further detail), or

d. markets that are prominently dynamic in nature, whether characterized by disruptive or incremental innovations.

Comment 5: In determining competitive conditions that either exist pre-merger or as an alternative to the merger, agencies should not take into account any market conditions that are the result of anticompetitive practices, such as coordination, cartels or the abuse of a dominant position.

Comment 6: The appropriate time horizon agencies consider when examining changing market conditions may vary according to the characteristics of the affected markets. In some markets, relevant developments may not take place for some years while in others the relevant time horizon for the counterfactual may be shorter.

Comment 7: Agencies should treat with caution pre-merger agreements between the merging parties when assessing changed market conditions, as interactions between the merger parties could have been affected by the merger, including since the merger was in contemplation.

II. Market Definition

A. Agencies generally should assess the competitive effects of a merger within economically meaningful markets. A relevant market consists of a product or group of products and a geographic area in which it is produced or sold that could be subject to an exercise of market power.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: The purpose of market definition in merger analysis is to identify an appropriate frame of reference for assessing whether a merger may create or enhance market power. Market definition is not an end in itself but is rather an exercise designed to inform the analysis of competitive effects of a merger by identifying which goods or services (collectively referred to herein as "products") in which geographic locations significantly constrain the competitive behaviour of the merging firms. Where available, rigorous empirical proof of effects on competition may not only directly inform the analysis of competitive effects but may also be useful in determining the relevant market.

Comment 2: The term "market" in merger analysis has a distinct, precise meaning that may differ from the use of the term "markets" in other contexts. An economically meaningful market is one that could be subject to an exercise of market power that likely would result in significant harm to competition, rather than anticompetitive effects that are insignificant or transient in nature. While reference to "markets" in business documents and other contexts may provide important insights that may be highly relevant to market definition, businesses and customers often do not use the term "market" in the same sense used in merger analysis. Therefore, agencies should be careful to distinguish between the technical term "market" used in merger analysis and how the term "market" may be used in other contexts.

Comment 3: Mergers may have potential effects in more than one relevant product market or geographic market[3] and require an independent competitive assessment for each market of potential competitive concern. Agencies should examine the relevant markets potentially impacted by a merger to determine whether significant harm to competition in their jurisdiction is likely to occur in any of them.

Comment 4: Agencies should assess market definition within the context of the particular facts and circumstances of the merger at issue. Competitive conditions change over time and may vary in different geographic areas. While relevant markets identified in past investigations in the same industry, or in investigations by agencies in other jurisdictions, may be informative, they may not be applicable to an agency's assessment of the merger in question when, for example, market conditions differ (or have evolved) over time or across geographic areas.

Comment 5: Market definition provides the basis for market share calculations and

[3] Some agencies refer to a relevant "product market" and a relevant "geographic market," while others consider a relevant market to consist of a product and geographic "dimension." The same analysis applies under either framework.

concentration levels, and more generally a framework for the analysis of competitive effects.[4] Market shares and concentration levels are meaningful in merger analysis only when they are based on properly defined markets. Therefore, agencies should exercise particular care in defining markets where the choice among possible market definitions may have a significant impact on market shares. In such cases, agencies may seek to develop more direct evidence regarding likely competitive effects. In other cases, it may be clear that a merger will not create or enhance market power under any plausible market definition, or that competitive harm would be predicted under all plausible market definitions. In such circumstances, agencies may not need to reach a firm conclusion on the scope of the relevant market.

B. The "hypothetical monopolist" or "SSNIP" test is an appropriate test to determine the relevant market(s) in which to analyse the competitive effects of a merger.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: An exercise of market power is feasible only when customers would not sufficiently reduce their demand for the relevant product(s) or divert sufficient demand to other products or to other locations, so as to make a price increase (or other lessening of competition) unprofitable. Market definition depends primarily upon demand-side substitution, which focuses on the extent to which customers likely would switch from one product to another, or from a supplier in one geographic area to a supplier in another area, in response to changes in prices, quality, availability, or other features. In addition, supply considerations also are relevant to understanding the competitive constraints on the merging firms. The identification of the relevant product market and relevant geographic market are interrelated. Thus, for example, the extent to which buyers would shift to other products must be evaluated in the context of the relevant geographic market.

Comment 2: The hypothetical monopolist or "SSNIP" test generally identifies an area in product and geographic space within which a hypothetical monopolist would profitably exercise market power. Under this test, agencies generally identify the relevant market as a product or group of products and a geographic area in which it is produced or sold for which a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of the product(s) in that area, would impose at least a "small but significant and non-transitory increase in price" (commonly referred to as a "SSNIP"), assuming the terms of sale for all other products remain constant.[5] In practice, there often may not be sufficient data available to apply the SSNIP test quantitatively. Nevertheless, the conceptual framework of the test in most cases provides a useful methodological tool for gathering and analysing available evidence relevant to market definition.

Comment 3: In most cases, agencies use the prevailing prices of the products of the merging firms and possible substitutes as a starting point for application of the SSNIP test. However,

[4] Merger Analysis RP III addresses the use of market shares. Merger Analysis RPs IV, V, and VI address the analysis of competitive effects.

[5] Agencies may characterize the test in different terms as to whether a hypothetical, profit-maximizing monopolist "would," "likely would," or "could" profitably impose a SSNIP. The analysis is very similar under any of these formulations, and each generally will lead to the same results in the substantive assessment.

agencies may use likely future prices, absent the merger, when changes in the prevailing prices can be predicted with reasonable reliability. Furthermore, where pre- merger circumstances strongly suggest coordinated interaction or other evidence strongly indicates that current prices are above competitive levels, agencies may consider using a price more reflective of the competitive price. What constitutes a "small but significant and non-transitory increase in price" will depend on the nature of the industry, but a common benchmark is a price increase of between 5 and 10 percent lasting for the foreseeable future (e.g., one year). In some cases, the SSNIP test is applied to the value added by suppliers in the market rather than the final price.

Comment 4: Agencies generally apply the "smallest market principle" to identify a relevant product and geographic market that is no bigger than necessary to satisfy the SSNIP test. At times, however, it may be appropriate to define broader markets. In some cases, applying the smallest market principle may fail to detect a horizontal overlap of concern between the merging parties. In other cases, where the competitive effects analysis is the same for a broader market, it may be unnecessary to define the smallest market. Similarly, it may be appropriate as a matter of convenience to aggregate markets where the competitive effects analysis is the same across a group of products or geographic areas, each of which could be defined as a separate relevant market.

Comment 5: Evidence regarding the likely demand responses of customers to a SSNIP may be derived from several sources, such as customers, the merging firms, competitors, industry or trade associations, and intermediate sellers. In some cases, adequate reliable price, cost, and quantity data may exist that allow empirical analysis, such as estimation of the relevant elasticities of demand or estimates of sales that would be lost in response to a SSNIP. In addition, evidence directly related to a merger's actual or likely competitive effects, such as evidence derived from prior market events such as entry and exit or a prior merger (sometimes called "natural experiments"), is also relevant to market definition. Such evidence may identify potential relevant markets and reinforce or undermine other evidence relating to market definition.

C. In applying the SSNIP test to identify a relevant product market, agencies generally should identify a product or group of products for which a hypothetical, profit-maximizing monopolist would impose profitably at least a SSNIP, assuming the terms of sale of all other products were held constant.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: In determining the appropriate product market(s) in which to assess the competitive effects of a merger, agencies should assess the extent to which products are substitutable from the point of view of customers. Agencies should consider not only whether products are functional substitutes, but also whether they are good economic substitutes for sufficient numbers of customers so as to make a SSNIP unprofitable. Own price or cross price elasticities of demand, and diversion ratios, where they can be reliably calculated, are highly relevant in assessing whether products are close substitutes for one another and part of the same relevant market. In practice, the data necessary to calculate reliable demand elasticities often are not available.

Comment 2: A single firm may participate in a number of product markets. Agencies generally should begin the process of product market definition by applying the SSNIP test to a candidate market of each product produced or sold by each of the merging firms, assessing what would happen if a hypothetical monopolist of that product imposed at least a SSNIP on that product, while the terms of sale of all other products remained constant. If the hypothetical monopolist would not profitably impose such a price increase because of substitution by customers to other products, the candidate market is not a relevant product market by itself. Agencies then should add to the product group the product that is the next- best substitute for the merging firm's product and apply the SSNIP test to a candidate market of the expanded product group. This process continues until a group of products is identified such that a hypothetical monopolist supplying the product(s) would be able to exercise market power, and profitably impose a SSNIP in the candidate market. The relevant product market generally will be the smallest group of products that satisfies this test. In practice, sufficient data are usually not available to implement this sequential process as described. Nevertheless, the conceptual framework of the test in most cases provides a useful methodological tool for gathering and analysing available evidence relevant to market definition.

Comment 3: The boundaries of relevant product markets may not be precise, particularly in differentiated products where substitutes may exist along a continuum. In such cases, some products may be in the same market yet may be much closer substitutes for each other than they are for other products that are also in the market. The degree of product differentiation and customer substitutability may vary over time and across geographic areas. Agencies should recognize that the simple dichotomy of classifying products as either "in the market," and therefore a close substitute for other products within the product market, or "out of the market," and therefore offering little or no competitive constraint on products in the market, does not adequately capture the competitive interaction either of particularly close substitutes or of relatively distant substitutes. In some cases, it may be appropriate to draw a market boundary around a subset of possible substitutes that is narrower than the full range of functional substitutes from which customers choose, to the extent that a hypothetical monopolist over such a segment of the possible substitutes profitably would raise prices significantly.

Comment 4: In considering the likely reaction of customers to a price increase, agencies should consider the available evidence relevant to the likelihood of product substitution by customers in response to a SSNIP. Relevant evidence often includes, but is not limited to:

- the characteristics, prices, functions, and customer usage of the product(s) in question;
- evidence that customers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables. In some instances, agencies may be able to derive such evidence from empirical analysis of quantitative data, such as through calculation of own price or cross price elasticities of demand;
- the margins between price and marginal or incremental cost, as higher margins as a fraction of price may imply that consumers are less price sensitive;
- evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- evidence regarding the strength and nature of customer preferences among products (*e.g.*,

brand loyalty, preferences for certain product performance or compatibility standards, etc.);

- relative price levels and price movements of the products compared to costs and to potential substitutes;
- legal or regulatory requirements (*e.g.,* product certification standards, regulatory compliance standards, etc.) that may impact the substitutability of products from the standpoint of customers; and
- the time and costs required to switch products, as high switching costs relative to the value of a product tend to make substitution less likely.

D. In applying the SSNIP test to identify a relevant geographic market, agencies generally should identify an area in which a hypothetical profit- maximizing monopolist would impose profitably at least a SSNIP, assuming the terms of sale of all products at all other locations were held constant.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: In determining for each product market, the appropriate geographic market, absent price discrimination, agencies should consider the extent to which customers, in response to a SSNIP by a hypothetical monopolist within a geographic area, would shift to products produced or sold outside the geographic area. Agencies should consider not only whether customers could shift to suppliers in other geographic areas, but also whether sufficient numbers of customers would shift so as to make a SSNIP unprofitable.

Comment 2: A single firm may operate in a number of geographic markets. Agencies should typically begin the process of geographic market definition by applying the SSNIP test to a candidate market of each location in which each merging firm produces or sells the relevant product, assessing what would happen if a hypothetical monopolist in that location imposed at least a SSNIP on sales of the product in that location, while the terms of sale at all other locations remained constant. If the hypothetical monopolist would not profitably impose such a price increase because of substitution by customers to products from other geographic areas, the candidate market is not a relevant geographic market by itself.

Agencies then should add the location that is the next-best substitute for the merging firm's location and apply the SSNIP test to a candidate market of the expanded area. This process will continue until an area is identified such that a hypothetical monopolist would achieve market power, and profitably impose at least a SSNIP in the candidate market. The relevant geographic market generally will be the smallest area that satisfies this test.

Comment 3: A relevant geographic market may be local, regional, national, multinational, or global in nature, and may not correspond to political or jurisdictional boundaries. In considering whether a market may be multinational or global in nature, agencies should assess the extent to which imports, or the potential for imports, would constrain the ability of a hypothetical domestic monopolist to impose a SSNIP by constituting a competitive threat that would make such a price increase unprofitable. As part of this assessment, agencies should consider evidence regarding the extent to which customers currently view imported products as acceptable substitutes, the potential and likelihood for substitution to imports to increase in response to a SSNIP imposed by a hypothetical domestic monopolist, and whether imports would occur on a sufficient scale, and sufficiently quickly, to constrain an exercise of market power by a hypothetical domestic monopolist.

Comment 4: In considering the likely reaction of customers to a price increase, agencies should consider the available evidence relevant to the likelihood of substitution by customers to suppliers outside the geographic area in response to a SSNIP. Relevant evidence often includes, but is not limited to:

- the cost and difficulty of transporting the product in relation to the value of the product (the higher the value of a product relative to its transportation costs, the more likely customers are to seek suppliers in more distant locations and the more likely suppliers located in other areas are willing to supply customers in that area);

- product characteristics (e.g., product perishability or fragility, the nature and requirements of offered services, etc.), geographic features, or other circumstances impacting the ability of customers to obtain products from sellers outside the geographic area;

- evidence that customers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables. In some instances, agencies may be able to derive such evidence from empirical analysis of quantitative data;

Comment 5: In assessing whether a hypothetical monopolist would price discriminate to impose a SSNIP profitably on particular groups of customers or customers in particular locations, relevant factors include, but are not limited to:

- whether price discrimination is feasible in the market at issue;

- whether a hypothetical monopolist could successfully identify transactions subject to successful price discrimination;

- whether customers or third parties could undermine price discrimination through some form of arbitrage in which a product sold at lower prices to some customer groups is resold to customer groups intended by the firms to pay higher prices; and

- whether price discrimination would permit or enhance the successful exercise of market power against particular buyer groups or customers in particular locations.

E. Agencies should consider the potential for supply-side substitution, and whether to include as participants in the relevant market not only all firms that currently produce or sell in the relevant market, but also firms that likely would, in response to a SSNIP in the relevant market, produce or sell in the relevant market within a short time frame and without incurring significant sunk costs.

Comment 1: Supply-side substitutability focuses on the extent to which, in response to a SSNIP, suppliers that do not currently produce or sell the relevant product likely would profitably switch their existing production facilities, in whole or in part, to produce or sell the relevant product in the relevant geographic market within a short time frame (e.g., within one year), and without incurring significant sunk costs of entry or exit. Firms that meet these conditions are capable of making such quick supply responses that they likely influenced the market pre-merger, would influence it post-merger, and accordingly are appropriately considered as market participants at both times. Some agencies consider supply-side substitution as part of market definition, while other agencies consider it in identifying market participants. The same analytical results should apply regardless of the particular method used.

Comment 2: If a firm has existing assets that could be shifted or extended quickly into production or sale of the relevant product in the relevant geographic market, it does not necessarily mean that (a) the firm would have the incentive to produce or sell the relevant product, (b) the firm would entirely switch or extend its production or sales of the relevant product, and (c) all firms producing the other product would do so. The relevant question for analysis is not whether a firm has the capability to produce or sell the relevant product, but whether it would likely make such sales profitably in response to a SSNIP.

Comment 3: In determining the extent to which supply-side substitution is likely, relevant factors include, but are not limited to:

- the extent to which obtaining new tangible or intangible assets, or switching or extending existing assets, to enter into production or sale in the relevant market is technically feasible;

- the extent to which customers would be willing to switch to products offered by the firm in the relevant market;

- the time it would take to enter into production or sale, including the time necessary to comply with any applicable legal or regulatory requirements;

- the costs of shifting or entering into production or sale relative to the profitability of sales at the elevated price; and

- whether the firm's capacity is elsewhere committed or elsewhere so profitably employed that such capacity likely would not be made available to respond to an increase in price in the relevant market.

Comment 4: Agencies should assess the competitive significance of probable supply responses that will not meet the requirements for quick supply-side substitution in their analysis of entry.[6]

[6] Merger Analysis RP VII addresses the analysis of entry and expansion.

III. Use of Market Shares: Thresholds & Presumptions

A. Market shares and measures of market concentration play an important role in merger analysis but are not determinative of possible competition concerns. Agencies should give careful consideration to market definition and the calculation of market shares and market concentration.

WORKING GROUP COMMENTS
Original Comments (April 2008)

Comment 1: Market shares are an indication of the competitive significance of each merging firm in the relevant market. They provide an indication of a firm's incentives to coordinate its actions with rivals and its ability unilaterally to exercise market power. The significance of market shares and measures of market concentration is specific to the analytical context presented in each investigation. They are not determinative of possible competition concerns in themselves, as they may, for instance, either underestimate or overestimate the future competitive significance of a firm or the impact of a merger.

Comment 2: In general, agencies should pay greater attention to a merger that significantly increases market concentration than to one that does not or does so only marginally.

Whatever the existing level of concentration, the change in concentration caused by a merger is a useful, although imperfect, indicator of the loss of direct competition between the parties and of the potential for competitive harm.

Comment 3: Market shares and measures of concentration are useful in merger analysis only when they are based on properly defined product and geographic markets. Particular caution is needed in markets involving differentiated products, as market definition itself is more complex in these cases. Market share calculations should be based on reliable data and sources and sound assumptions.

Comment 4: Market shares should be based on a measure of economic strength (e.g., sales, production, or capacity) that is appropriate to the circumstances of the market. Market share and concentration estimates used for a merger analysis should reflect the best available indication of the firms' future competitive significance. Market characteristics and changes in market conditions should be considered in interpreting market shares and market concentration data. Before drawing any conclusions from market share and concentration data, agencies should consider imminent or reasonably certain changes to the market, such as the entry or exit of a firm or the introduction of additional capacity. To gain a better insight into the competitive dynamics of some markets, it may also be relevant to analyse changes in market shares and concentration over time.

B. **Market shares and measures of market concentration can provide useful initial guidance to help identify mergers that may raise competitive concerns requiring further analysis**.

WORKING GROUP COMMENTS
Original Comments (April 2008)

Comment 1: The purpose of initial guidance based upon market shares or measures of concentration is to help differentiate mergers that are unlikely to have anticompetitive consequences from those that require more detailed analysis. Such guidance can enhance predictability and allow for a better allocation of agency resources.

Comment 2: The absence of high market shares or post-merger concentration ordinarily supports a conclusion that a given transaction requires no further analysis. Similarly, a transaction that does not significantly increase post-merger market shares or concentration ordinarily requires no further analysis, as the premerger competitive conditions are unlikely to be significantly altered by the merger. However, there may be exceptions. For example, when at least one party to the merger has substantial market power, even small increases in market share may be indicative of possible competition concerns. Evidence that the merged firm would have a high market share or that the market is highly concentrated can be significant to a decision to initiate an in-depth investigation.

Comment 3: Many agencies identify thresholds based on market shares and levels of concentration to give initial guidance as to the likely need for an in-depth investigation. An agency can set threshold levels of market shares and measures of concentration under which it commits itself not to, or is generally unlikely to, challenge a merger or over which it is likely to continue an in-depth analysis of the merger's effects on competition.

C. **High market concentration and significant increases in market shares brought about by a merger are useful, but generally are not conclusive indicators that a merger is likely to harm competition significantly. Jurisdictions that use market concentration and/or market shares to presume competitive harm should ensure that any such presumption may be overcome or confirmed by a detailed review of market conditions.**

WORKING GROUP COMMENTS
Original Comments (April 2008)

Comment 1: Mergers that lead to high market share for the merging firms and that result in significant increases to concentration levels are in general the mergers most likely to raise competition concerns.

Comment 2: In some jurisdictions, high market share or market concentration gives rise to a presumption of competitive harm, whereas in others they do not. When agencies use presumptions of competitive harm based on market shares or market concentration, the investigatory process should take into account evidence that may overcome or confirm the presumption. Agencies should be transparent about the meaning and use of any presumptions, including any quantitative standards used to evaluate market shares or concentration.

Comment 3: Agencies should not make enforcement decisions to prevent or remedy a merger solely on the basis of market shares and concentration. Thus, agencies should not automatically reach a final conclusion that a merger is likely to be anticompetitive because the merger increases concentration above a certain level or reduces the number of remaining firms below a certain level. A detailed analysis of other market factors and of theories of unilateral and/or coordinated effects should always be required before definitive conclusions are drawn regarding the likely competitive effects of a merger.

IV. 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.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended Comments (May 2025)

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.[7] 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.[8]

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.[9]

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

[7] 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 VI on Non-Horizontal Mergers.
[8] Coordinated effects are discussed in Merger Analysis RP V on Coordinated Effects.
[9] For more guidance on market definition, see Merger Analysis RP on Market Definition.

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 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.[10]

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.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended Comments (May 2025)

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.

[10] 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.

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 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.[11]

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

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 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[12] 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

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

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.[13] 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.[14]

- *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 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

[13] 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.

[14] 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).

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.[15]

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.

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

[15] 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.

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).

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended Comments (May 2025)

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.[16] 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.[17]

- *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 customers would be picked up by several competitors.[18]

[16] For further details, please see Merger Analysis RP on Entry and Expansion.
[17] For further details, please see Merger Analysis RP on Efficiencies.
[18] For further details, please see Merger Analysis RP on Failing Firm / Exiting Assets.

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.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended Comments (May 2025)

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 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.

IV. Coordinated Effects

A. Merger enforcement is important to prevent the risk of coordination.

Comment 1: Merger enforcement plays an important *ex ante* role of preventing changes in market conditions that would make coordinated outcomes more likely or more effective and can be an effective tool to avert coordination. Mergers, in certain circumstances, can increase the likelihood that firms coordinate their behaviour or make existing coordination more stable or more effective.

B. Coordination can take place across any or all dimensions of competition and take many forms.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended comments (May 2025)

Comment 1: A merger can change market conditions to make coordination more attractive or more durable than it would be without the merger. If conditions allow, firms can coordinate on one or several dimensions of competition, such as: price; capacity; output; product features; delays in the introduction of new technologies or products; or reduced efforts on innovation or investment. Firms can also coordinate by dividing the market, for instance by geographic area or customer characteristics, or by allocating contracts in bidding markets. Such coordination effectively limits competitive interaction as if the firms had agreed not to compete. Coordination among competitors lessens competition when it occurs explicitly - through inherently unlawful collusive agreements not to compete or to compete less aggressively - or tacitly, through observation of and response to competitors' behaviour that otherwise might be lawful. Coordination among buyers for goods, services, wages, working conditions or other input factors may also in certain circumstances result in harm to competition.

Comment 2: Mergers of competitors or potential competitors ('horizontal' mergers) can increase the likelihood that the firms remaining in the market could coordinate their behaviour, by affecting their ability and/or incentive to coordinate or by making their existing coordination more stable or more effective. For example, mergers can reduce the number of market participants; increase the similarities among firms; eliminate a maverick (i.e., a firm with a disruptive presence); increase market observability of the strategies and the behaviour of market participants; create structural or commercial links between competitors such as minority shareholdings, cross-directorships or commercial agreements; reduce their incentives to innovate or invest in capacity expansion; or increase multi-market interaction.

Comment 3: Mergers between firms active in different product or geographic markets, including at different levels of the value chain ('non-horizontal' mergers), can also allow firms to coordinate their behaviour, increase possibilities to coordinate, or make their existing coordination more stable or more effective. For example, such mergers can increase similarity among firms; eliminate or materially change the incentives of a maverick; increase access to sensitive information; increase barriers to entry; increase multi-market interaction; or increase the ability to punish deviation from the coordination as a deterrent including through targeted foreclosure strategies to raise competitors' input prices.

Comment 4: In assessing whether the merger may increase the risk of coordination, agencies should conduct a holistic case-by-case assessment based on available evidence, considering that no single factor or group of few factors is determinative.

C. Agencies should assess whether conditions conducive to coordination are present.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended comments (May 2025)

Comment 1: A merger can raise concerns about coordinated effects even without explicit agreements among competitors or communications among them. In the case of tacit coordination, firm conduct does not rise to the level of an agreement but can still lessen competition in a particular market. Coordination need not involve all firms active in the market, include all products or customers in the market, relate to all dimensions of competition, nor lead to perfect alignment between the firms. Coordination can occur even with some degree of uncertainty about the exact terms of coordination. When assessing whether a merger changes the market conditions in a way that increases the likelihood of coordination, important factors to consider may include, but are not limited to:

- **The number of firms in a market** since it is easier to coordinate among a few firms than among many. Highly concentrated markets can be more susceptible to coordination and coordination becomes more likely when mergers increase concentration. An increase in concentration in the market may itself increase the risk of coordination. At the same time, the existence of more firms, such as a fringe of small firms, may not reduce the likelihood of coordination, for example if coordination is sustainable among a subset of firms or if small players face capacity constraints. A reduction in the number of significant players in the market may give rise to coordinated effects, particularly if other factors that make a market vulnerable to coordination are present.

- Whether the merger eliminates or changes the incentives of a **maverick**, i.e., a firm with a disruptive presence in the market that may hinder the remaining firms from coordinating. Accordingly, a merger involving a maverick or a merger that significantly changes the incentives of a remaining maverick may increase the likelihood of coordination.

- The **homogeneity of the products**, or increased homogeneity as a result of the merger, may increase the risk of coordination since the market observability is higher and it is easier to coordinate on terms such as price when competing products are substantially the same. However, firms may be able to reach a coordinated outcome even in markets with complex product characteristics or terms of trade. For instance, in a market with many differentiated products, firms may still be able to coordinate on prices by establishing simple pricing rules that reduce the complexity of coordination. Coordination can also be achieved using a homogenous input or product base as the focal point. Competitors may also use similar tools such as price algorithms or Artificial Intelligence ("AI") to support their commercial strategies, including on pricing, which may ease coordination. Moreover, if a firm's behaviour can easily be followed by competitors, it may be easier to coordinate even on a large number of prices or features.

- The **similarities of the firms** across key parameters, especially cost structures, degree of vertical integration, aligned incentives, activities in the same or other markets, or changes to similarities. However, there can be coordination between competitors with asymmetries, including when the mechanism of coordination consists of following the market leader.

- The **degree of market observability** and access to commercially relevant information, including monitoring via public communication or common service providers, such as information concerning prices, output, capacity, identity of customers served, territories served, discounts, new product introductions, or any other competitive actions. Information exchange arrangements among market participants, such as public exchange of information through announcements or publications or private exchanges through trade associations, increase market observability. Firms may also simply follow the market leader for example by matching its prices, eliminating the need to exchange information or make public announcements.

- **Cross-shareholdings, minority interests and other structural or commercial links**, including via industry associations, that may make it easier for competitors to exchange competitively sensitive information, enhance firms' ability to coordinate or reduce their incentives to compete. Even if a transaction does not reduce the number of competitors, it may lead to coordinated effects if it creates links, such as by creating a joint venture, establishing cross-shareholdings, or resulting in common board members.

- The stability of **demand and supply conditions.** It is easier to coordinate on price when conditions are **stable and predictable** (e.g., because of frequent, regular orders) than when they are frequently changing (e.g., because of the ease of entry by new firms or frequent and significant product innovations, significant increases or decreases in demand). However, coordination may still exist including in growing or innovative markets, especially when barriers to entry are high, including coordination for example on delayed launch or reduced investments. The existence of frequent and regular orders, which increases predictability of demand and the frequency of interactions among competitors, may make it easier to coordinate.

Comment 2: Evidence that competitors have previously engaged in explicit or tacit coordination to lessen competition or that the conditions of coordination are met pre-merger, can serve as strong evidence that a market is susceptible to coordination. Even if previous attempts were not successful, a merger may tend to make coordination more likely, more stable or more effective, or remove the specific reason it failed. Past breakdowns in cooperation may also provide an indication of the firms' ability to coordinate, and these failures do not demonstrate that the merger will not increase the likelihood of more enduring cooperation in the future. However, evidence of previous coordination is not a necessary condition for finding coordinated effects.

Comment 3: Evidence of competition between some or all market participants, including in the assessment of the post-merger situation, is not inconsistent with also finding evidence of existing or likely coordination. Firms may not coordinate over all competitive parameters or in all regions, coordination may not include all firms in the market(s), and coordination may be characterised by periods during which the coordinating group competes.

Comment 4: The availability of large datasets and the use of automated algorithms, AI, and machine learning may make coordination easier, more efficient, or more prevalent. Pricing algorithms, the use of AI and advanced analytical or surveillance tools that track or predict competitor prices or actions may significantly increase the risk of coordination between competitors and may facilitate coordination. AI or algorithms may substantially enhance market transparency and increase the frequency with which firms interact. Furthermore, the use of a common third-party advisor for algorithmic pricing may facilitate coordination.

Comment 5: The level of evidence required to show that a market is conducive to coordination post-merger depends on the legal framework. Some agencies use rebuttable structural presumptions, relying on the relationship between high market shares and concentration and the likely anticompetitive effects of a merger. For these agencies, the anticompetitive effects of a merger are presumed to follow from the change in market shares. Such agencies typically 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 likely effects on competition.

Comment 6: Multi-market interactions between firms increase transparency and insights into competitors' behaviour and may increase the risk of coordination. Multi-market interactions may also reduce asymmetries that arise in individual markets, when looking at the firms' aggregate activities over all different products and geographies concerned. Moreover, firms that compete in multiple markets might compete less aggressively in some markets in anticipation that others may reciprocate by competing less aggressively in other markets, thus allowing both to exchange gains from reduced competition in different markets. Rather than having to agree on a market-sharing agreement in one market that may not have obvious criteria on how to share it, the competitors have several separate markets for potential allocation among them. Therefore, agencies should understand not only whether the firms are active in the same or vertically related (geographic and product) markets, but also if they are active with the same products in different geographies, or in the same geographies with different products, as it may increase multi-market interaction and hence the risk of coordination.

Comment 7: Agencies may infer risk of coordinated behaviour from qualitative evidence, such as market characteristics, internal documents, past behaviours, or the deal rationale. The extent to which firms are or will be engaged in conduct that facilitates coordination may be discussed in a firm's internal communications (e.g. emails, collaborative spaces etc.) and strategic planning documents. For example, an executive may signal the firm's expectation of matching competitors' prices to avoid a price war. Documents justifying a price increase may disclose a price leadership strategy supported by pre-announcing prices in the expectation that others will follow. Agencies may also rely on empirical analyses, including modelling of possible price increases. Such analyses should be case-specific and may depend on the availability of relevant data and suitable methods. However, quantitative evidence is not a pre-requisite to find a risk of coordination, and any modelling can raise difficulties considering the many different methods that may be employed to reach coordinated outcomes.

D. Agencies may assess incentives of firms to follow rather than deviate from coordination, including whether participants may detect and deter deviations from coordination.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended comments (May 2025)

Comment 1: Although coordination may be in the collective economic interest of participants, it may be in a firm's individual interest to deviate from the terms of coordination in order to take advantage of the profit opportunity created when other firms raise their prices or otherwise coordinate their behaviour. Agencies may assess the extent to which firms would have the ability to monitor the terms of coordination and to detect and respond to deviations from the terms of coordination. A lack of explicit terms of coordination may not be determinative of a lack of coordinated effects. For some agencies the lack of the ability of firms to detect and respond to deviations may not be determinative of a lack of coordinated effects.

Comment 2: For some agencies, the assessment of whether participants may detect and deter deviations from the terms of coordination may be part of their legal framework of analysis and hence may be carried out in all cases where a coordinated effects theory of harm is assessed. Other agencies do not require an assessment of merging parties' ability to detect and deter deviations since tacit coordination can occur even when firms cannot detect and deter coordination. These agencies may assess these criteria only as necessary under their respective frameworks, e.g., when brought and substantiated by the merging parties.

Comment 3: When assessing the potential detection of deviations from the coordinated behaviour, important factors include, but are not limited to:

- The degree of **market observability** or access to information necessary to verify compliance by other firms with the terms of coordination, such as information concerning other firms' pricing, output levels, capacity, innovation, or individual transactions. The necessary information depends on the proposed terms of coordination. For example, information necessary for detecting deviation from price coordination is different from the information needed for detecting deviation from coordination based on market division. For instance, if orders for the relevant products are uniform both in terms of frequency and size, it may be difficult for a firm to deviate (by expanding its output) without being detected. Also, if there is little fluctuation in demand or costs, deviations may be easier to detect.

- If **orders for the relevant products are infrequent and large**, firms may have a greater incentive to deviate to secure orders as deviations may be very profitable and the threat of deferred punishment during the future procurement may not serve as effective deterrence.

- More **homogeneity** of products and firms may make monitoring of compliance with the terms of coordination and detection of deviations easier.

Comment 4: Coordination will be sustainable where the incentive to coordinate is higher than the incentive to deviate from the coordinated outcome for each coordinating firm. The size of the gain from deviation will depend on the characteristics of the markets. For example, the gains from deviating may be low where there is strong customer loyalty or where many customers are already committed to long-term contracts. However, in markets where customers are price sensitive, deviating with a small reduction in price could be sufficient to induce customers to switch. Anticipating the risk of a credible and effective retaliation can lower the incentive to deviate. It may take many forms, including temporary abandonment of the terms of coordination by other firms in the market reverting to competition, or targeted punishment of the deviating firm for example by offering discounts or better terms to their customers. Sanctions are especially effective if they can harm the deviating competitor without causing high costs for the punishing firm. A targeted punishment may be more effective where contracts are not typically concluded on a long-term basis and there is little price transparency for customers. While targeted retaliation may be relatively more efficient to implement than a generalised price war, the latter can nonetheless be an effective retaliation strategy. In assessing whether firms may be able to punish a deviation by one of the firms when it is detected, and whether potential deviators can anticipate the punishment, important factors include, but are not limited to:

- The **timeliness** with which the deterrent mechanism can be implemented, given that reprisal that manifests itself after a significant time lag may be less likely to offset potential benefits from deviating.

- The **credibility and foreseeability of the deterrent mechanism**: e.g., the threat of expanding output to punish a deviating firm may not be credible or effective if coordinating firms have no or little excess capacity.

Comment 5: Some factors that increase the likelihood of strong or rapid responses to a deviation from the terms of coordination by competitors include low customer switching costs, use of algorithmic pricing, or use of meeting-competition clauses (also referred to as ‘price matching’ or ‘most-favoured-nation (MFN) clauses’). The more predictable or observable competitors’ responses to strategic actions or changing competitive conditions are, and the more interactions firms have across multiple markets, the greater the likelihood of coordination. For instance:

- The **availability of large datasets and the use of automated algorithms and AI** may increase the predictability of a competitor’s responses, making it easier to infer a departure from tacit coordination.

- Retaliation need not necessarily take place in the same market as the deviation. If the coordinating firms have **multi-market interactions**, these may offer additional opportunities for retaliation and punishing deviations from a coordinated scheme, and thus make deviations less likely.

Comment 6: Agencies can infer the incentives not to deviate from coordination from qualitative evidence, such as market characteristics, internal documents, past behaviours, or the deal rationale. It is rarely possible to quantify the incentives of competitors to adhere to, rather than deviate from, the terms of coordination.

E. In conducting coordinated effects analysis, agencies may assess the extent to which existing competitive constraints and other factors may deter or disrupt coordination.

WORKING GROUP COMMENTS
Original Comments (June 2009)
Amended comments (May 2025)

Comment 1: For some agencies, the assessment of whether existing competitive constraints or other factors may deter or disrupt coordination may be part of their legal framework of analysis and hence may be carried out in all cases where a coordinated effects theory of harm is assessed. Other agencies may assess these criteria only as necessary under their respective frameworks, e.g., when brought and substantiated by the merging parties. In making this assessment, agencies should consider all available evidence, including the pre-merger market conditions that may constrain or facilitate coordination, and the impact of the merger on these conditions

Comment 2: Agencies may consider evidence suggesting that competitive constraints or other market conditions that will remain in the post-merger market may prevent coordination. If the coordination does not concern all the market participants, agencies may consider the degree of market power exerted collectively by the firms that are part of the coordination. Given that coordination becomes more likely as concentration increases, it is rare for factors that deter or disrupt coordination to prevent coordination in concentrated markets that are prone to coordination.

Comment 3: Actions of competitors not expected to participate in the coordination, the presence of a remaining maverick with sufficient disruptive incentives, or of potential competitors whose entry or competitive constraints are sufficient in time, scope, and likelihood may jeopardise coordination. For instance, the existence of competitors with the ability to expand output to take sales from coordinating firms may deter or disrupt coordination. Detailed guidance on how to assess potential entry and expansion can be found in the Merger Analysis Recommended Practices [VII] on Entry and Expansion. The presence of competitors, mavericks, and potential competitors, however, only reduces the risk of coordination so long as these market participants retain incentives to deviate from coordination and the ability to effectively discipline other market participants after the merger is completed. A merger that eliminates a maverick, competitor, or potential competitors or significantly changes its incentives increases the susceptibility of a market to coordination.

Comment 4: Agencies may also consider efficiencies and conduct a failing firm assessment in line with the framework set out in the respective Recommended Practices related to these matters.

V. Non-Horizontal Mergers

A. Non-Horizontal Merger Analysis

WORKING GROUP COMMENTS

Original Comments (May 2024)

A.1. A merger, even if it does not involve firms that directly compete, can change the merging companies' or their competitors' ability and incentive to compete, or otherwise diminish competitive constraints, in ways that harm the competitive process. The goal of merger review is to assess whether such a merger may substantially lessen competition.

Comment 1: Competition is a process of rivalry that incentivizes business to offer lower prices, enhance quality and resiliency, innovate, expand choice or improve wages and working conditions, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers that interfere with the process of rivalry by combining rivals or potential rivals (typically called "horizontal" mergers) are beyond the scope of this chapter.

Comment 2: A merger between firms that are not current or potential rivals can harm competition when it diminishes competitive constraints or reduces the intensity with which market participants compete. A wide range of non-horizontal relationships can give rise to these concerns, including when a merger involves complements or products or services in other related markets with a connection to competition in markets where the merging firms compete. Such relationships may be of a vertical nature, where the parties are active in markets that form part of a given supply- or value chain, or conglomerate, where the parties are active in otherwise related markets. It is not always possible to clearly identify whether products or services are vertically related or otherwise related to one another. In both cases however, the analyses described below can be applicable.

Comment 3: A merger can involve a combination of horizontal and non-horizontal dimensions. These simple descriptions of the geometry of the relation between the companies involved can sometimes help to understand the potential for anticompetitive effects, but the simple descriptions do not always fit market realities. The analysis of how a merger impacts competition focuses on the risk that a merger will lessen competition, and agencies should examine the available evidence and assess the plausible effects. The recommended practices that follow outline factors that agencies should consider in determining whether a merger may lessen competition.

Comment 4: Merger analysis is an exercise in evaluating if there is a risk that a merger may substantially lessen competition. Accordingly, when evaluating a merger agencies should consider whether there is a risk that the merger may reduce competition and create or extend market power, for example, by restricting access to products or services a rival uses to compete or to a customer base; raising rivals' costs; creating or extending market power; providing the merged firm access to competitors' commercially sensitive information; increasing barriers to -

or deterring - entry or expansion; leveraging a strong market position from one market to another via exclusionary practices; or blocking entry points in related markets or ecosystems.

Comment 5: An ecosystem brings together several categories of suppliers, customers, and consumers, and creates an environment for these groups to interact, such as a platform, for instance, in digital ecosystems. The products or services that make up that ecosystem may overlap or interact with each other in a variety of ways. Therefore, acquisitions by players with market power in related markets that add additional services, products, or functionalities to the ecosystem should be assessed in a way that captures the overall impact of a transaction on competition.

Comment 6: A non-horizontal merger may weaken horizontal competition or raise competition concerns that are ultimately horizontal in nature. For example, a merger of firms that are not currently direct competitors can raise concerns about potential competition, innovation competition, or entry deterrence in currently developing markets (for example by increasing barriers to entry or blocking entry points in adjacent markets). Such dynamic horizontal concerns can arise either in direct connection with foreclosure or independent of foreclosure concerns. Agencies should pay particular attention to dynamic markets, such as digital, high tech, life science or highly innovative markets or markets where network effects are pronounced.

Comment 7: An evaluation of the effects of a merger on competition should be grounded in the facts of the proposed merger. Agencies should use readily available evidence to assess these effects. Relevant factors that agencies can take into account when assessing mergers include market shares, diversion ratios, and the merging firms' profit margins. In some cases, economic analyses can be carried out with such data to assess the ability and incentive to engage in anticompetitive behaviour. Pricing data, capacity data, or tender (sales) data from the merging firms can be useful elements to assess the transactions' effects on competition. The views from customers, commercial associations, suppliers, or competitors on the relevant markets and on the transaction can also be important elements for the assessment. Internal documents addressing the theory of harm investigated have highly probative value, although the absence of such documents does not prove the absence of harm. Past conduct of the merging firms can also be an important element to be considered.

Comment 8: The risk of competitive harm may be identified on the basis of a credible theory of harm that is supported by relevant facts, which may be inferred from ordinary-course documents, statements from market participants, and other qualitative evidence. While quantitative analyses can, in certain cases, form an important part of such an analysis, an assessment of possible harm does not need to be quantitative in nature. Ultimately, a transaction should be assessed on the totality of the available evidence.

Comment 9: Parties may claim that their merger may generate efficiencies that reduce or eliminate the threat of a substantial lessening of competition. Efficiencies to be considered can include, for instance, complementarities between the merging firm's products that induce the merged firm to decrease prices, for example by eliminating double mark-ups, to boost the sales of these products or improve products through product integration. However, double mark-ups may not exist (for example because the merging firms, albeit active in vertically related markets, are not in a supply relationship) or there might be no incentive for pass-on to consumers (for example because prices are non-linear or downstream competition is limited). Agencies should consider whether a merger is needed to achieve these efficiencies (i.e., whether the efficiency is merger-specific).

Comment 10: A merger may cause anticompetitive effects that materialize in the long run, even when it does not substantially lessen competition in the short run. For example, a merger can eliminate a potential future competitor, subtract necessary resources from future rivals, erect barriers to future entry, or reduce innovation. If such long-run anticompetitive effects may materialise, then transactional short-term efficiencies may be unlikely to offset the long-run competitive damage resulting from the transaction.

B. Non-Horizontal mergers: Vertical effects

WORKING GROUP COMMENTS

Original Comments (May 2024)

B.1. In vertical mergers, foreclosure is the theory of harm most frequently investigated. Agencies should consider a wide range of foreclosure mechanisms and effects on all dimensions of competition (price and non-price), including partial and full foreclosure as well as static and dynamic effects.

Comment 1: Agencies should evaluate whether a merger may substantially lessen competition when the merged firm can limit access to a product, service, or route to market that its rivals may use to compete (hereafter referred to as "related product"). A merger involving products, services, or routes to market that rivals use to compete may substantially lessen competition when the merged firm has both the ability and incentive to limit access to the related product so as to weaken or exclude some of its rivals in the relevant market. The merged firm could limit access to the related product in different ways. It could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or technical assistance or information relevant to making efficient use of the product. All these ways of limiting access are sometimes referred to as "foreclosure."

Comment 2: Input foreclosure involves the merged entity limiting access to an input that rivals may use to compete, which may include products, services, or any route to market. Input foreclosure may involve denying access to the assets in their entirety to downstream rivals (total input foreclosure) or providing access to the input to downstream rivals on worse terms than pre-merger (partial input foreclosure). 'Worse terms' can include a variety of mechanisms, including higher prices, reduced volumes of supply, a lower quality or service, degraded interoperability, delays in delivery, delays on technical assistance or delays in the release of information on new technologies. For foreclosure to lead to harm, it is not necessary that the merged entity's rivals are forced to exit the market. The relevant benchmark is whether the worsened competitive conditions upstream would impair the ability of actual or potential rivals to compete, including by virtue of changes in their products or services or the term at which they are offered, lessening competitive constraints on the merged firm and threatening higher prices, lower quality or reduced innovation.

Comment 3: Customer foreclosure refers to limiting rivals' access to a customer base. The merged entity may use its control of a downstream firm to switch purchases from rivals to itself, thereby restricting its competitors' access to customers. This could, for example, be achieved by refusing to purchase products or inputs from rival upstream suppliers, which results in these rival suppliers becoming less effective competitors for other customers (for example by denying economies of scale or reducing their incentives to invest). In addition to explicit reductions in purchases, other actions may result in a loss of sales by its upstream rivals. For example, limiting interoperability of certain products resulting in reduced use of rivals' products, purchasing inputs from an upstream rival at a lower price to an extent that would harm the ability of the upstream rival(s) to compete, or increasing the price or degrading the quality at which products that incorporate the inputs supplied from upstream rivals are sold to consumers. Moreover, a distributor may stop offering rivals' products or sell them at higher prices. Self-preferencing strategies may also reduce rivals' access to customers.

Comment 4: While anticompetitive mergers that combine suppliers of complements can lessen competition due to a strategy of raising rivals' costs, agencies should not limit their assessment to price effects and instead assess whether the merger may negatively influence any parameter of competition. For example, reductions in choice, quality, and innovation are important considerations. Agencies should pay particular attention to the effect of mergers on investment and innovation. Reduced incentives to invest (for example, in innovation) can have significant harmful effects on the competitiveness of a market.

Comment 5: In addition to considering the static effects of a merger, agencies should also consider dynamic effects in their assessment. In certain markets, economies of scale and network effects may be important parameters of competition. Agencies should therefore assess whether foreclosure strategies may deny economies of scale or network effects to rival firms such as to hamper their future competitiveness. For instance, rivals' incentives to invest in the development of new or improved products may be reduced. Low customers' switching can be relevant in certain markets, as it is a factor that may reinforce network effects and contribute to deny sufficient scale to rivals.

Comment 6: Agencies should examine the merged entity's presence at all levels of the supply chain. Consolidation may increase the merged entity's incentive to foreclose rivals' access to inputs or a customer base at all levels of the supply chain. An entity enjoying market power on all levels of the value chain and pursuing a foreclosure strategy in one of the upstream levels of the value chain may expect to gain market share not only in the level immediately downstream, but on all levels of the value chain. Moreover, the effects of the merger should be assessed with respect to all market players and not only for the customers of the merging firms. In vertically related industries, when there are also horizontal overlaps between the activities of the parties, horizontal overlaps may reinforce vertical relationships and vice versa.

B.2 Input Foreclosure

B.2.i. General: when evaluating input foreclosure, agencies should assess the ability and incentives of the merged firm to substantially lessen downstream competition by limiting access to inputs that may be used by rivals to compete effectively.

Comment 1: In assessing the likelihood of anticompetitive input foreclosure, agencies should generally assess whether the merged entity will have the ability to lessen competition by limiting access to inputs that may be used by rivals to compete effectively, whether the merged entity will have the incentive to do so, and whether a foreclosure strategy may have a detrimental effect on competition downstream. In practice, these factors may sometimes be examined together since they can be closely intertwined. Some agencies will assess those elements sequentially, while other agencies may choose to assess them all together.

B.2.ii. Ability: Agencies should assess whether the integrated firm has the ability to substantially lessen competition by limiting access to an input rivals may use to compete.

Comment 1: The merged firm can foreclose downstream competitors if, by limiting access to its own upstream products or services, it could negatively affect competition on the downstream market in terms of price, quality, innovation, or other relevant parameters of competition. To assess this, agencies should consider the following factors.

- Whether there are insufficient substitutes available for an input that rivals may use to compete. For example, competitors to the supplier of an input may be less efficient, offer less preferred alternatives, or lack the ability to expand output in response to a supply restriction (for example, due to capacity constraints or decreasing returns to scale).
- Whether the input is important for downstream firms' competitiveness, such that they will be less able to exert a constraint on the merged firm if their access to the input is curtailed.
- Whether the group of downstream firms that use the input are important for competition in the downstream market.

Comment 2: Agencies should carry out a holistic assessment on the ability of the merged firm to affect the conditions of competition, including industry factors and, in some cases, market structure. Agencies may look at market shares and margins upstream as indicators of upstream market power, which is indicative of the ability to limit access to rivals. The market structure of the related product may inform the merged firm's ability to limit access to an input. If the firm has durable market power over an input that rivals use to compete, it indicates that the merged firm has the ability to weaken or exclude rivals. However, in differentiated product markets, upstream suppliers can sometimes have the ability to limit rivals' access even absent a high market or capacity share. In such cases, agencies assess the degree of the merged firm's ability lessen competition by limiting access in reference to other relevant indicators, for example, profit margins, network effects, barriers to entry, switching costs, brand strength, intellectual property, integration into wider ecosystems, or access to data. Other elements that can be considered are multi-sourcing strategies by customers and security of supply concerns.

Comment 3: When competition upstream is oligopolistic, a decision of the merged entity to restrict access to its inputs may reduce the competitive pressure imposed on the remaining input suppliers. This may allow them to raise the input price they charge to non-integrated downstream competitors, thus exacerbating the effect of foreclosure.

Comment 4: Agencies should pay attention to mergers involving a company that may expand significantly in the near future, for example, because of a recent innovation or because it is developing an important pipeline product. The innovation may occur upstream (increasing the merged entity's ability to foreclose) or in the downstream market (increasing its incentives to foreclose). Moreover, innovation may create horizontal or vertical links that do not currently exist. Agencies should pay particular attention to the acquisition of firms developing an important pipeline in a downstream nascent market, as the merged entity may foreclose rivals downstream at the development stage from reaching the market with their pipeline products.

Comment 5: Agencies will not always give significant weight to contractual protections, for example, to continue supplying both the current version and future upgrades of the input, when assessing the ability of the merged firm to foreclose its rivals. This is because these protections may not completely remove a firm's ability to harm its rivals, given that not all rivals may be covered by these contracts, or these contracts may be renegotiated or terminated over time, or may not protect against all foreclosure strategies (for example, downgrading interoperability, prioritizing tailor-made solutions for its downstream division, reducing cooperation or support, etc), among other reasons.

Comment 6: When assessing ability, some agencies focus primarily on establishing the vertically integrated firm's market power over the assets that rivals may use to compete. Those agencies will then assess the harm to the competitive process primarily when assessing the impact on competition. Other agencies may assess directly the vertically integrated firm's ability to harm the competitive process, which may already encompass an assessment of the materiality of such impact.

B.2.iii. Incentives: Agencies should assess the merged firm's incentives to foreclose rivals. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division.

Comment 1: Agencies should evaluate whether there is an incentive to foreclose firms to the extent that the merged firm competes with them. If foreclosed rivals are less able to compete, the merged firm may benefit from diverted sales, or it may be able to profitably raise prices of inputs or outputs. Foreclosure may be more profitable if the merged firm can engage in price discrimination or targeted foreclosure. Artificial intelligence and algorithms can be used by the merged firm to identify price sensitive customers, and their use increases the ability to price discriminate.

Comment 2: The merger may change the trade-off faced by the upstream division when setting the price or other terms on which it sells its product to the downstream divisions' rivals. Prior to the merger, the upstream firm balanced the profit lost due to a potential reduction of input sales and the profit gained from increased input prices or lower marginal costs. After the merger, the merged firm will also take into account the benefit to the downstream division from higher downstream sales or prices. This is usually a static or short-term analysis. The greater the proportion of upstream units likely to be lost following a foreclosure strategy, the more upstream profits are harmed when attempting to foreclose downstream rivals. Other things equal, the lower the (absolute) margin upstream, the lower the loss from reduced input sales. However, different foreclosure strategies (for example, raising prices, slowing delivery or removing features) may have different diversion and cost effects in the short and long run. The incentive to engage in partial or targeted foreclosure strategies may be particularly large, as such strategies can be tailored so as to limit losses relative to gains from foreclosure. When assessing incentives, agencies should evaluate the overall effect on competition, and not just the profit arithmetic of one specific strategy.

Comment 3: It may be possible to assess the merged firm's incentives and likelihood that the merged firm may follow a course of behaviour directly from its past conduct, business strategy, and deal rationale. The merged entity may be more likely to pursue input foreclosure if the acquiring firm's business strategy involves this approach, it has a history of doing this with other products, or the deal rationale involves plans to do so post-merger, in which case it may not be necessary to infer behaviour from financial incentives. For example, if the merging firms' internal documents show that it would be strategically beneficial to stop supplying rivals, this would be highly informative about the incentive to foreclose.

Comment 4: The merged firm may have additional incentives to foreclose, for example, by eliminating a possible long-term competitive threat, increasing the switching costs of existing customers, positioning themselves prominently in high-growth markets, impeding pipelines being developed by rivals from reaching the market, gaining customers to obtain direct or indirect network effects, obtaining access to customer data, or enabling cross-selling within a broader ecosystem to strengthen market power. This may be particularly pronounced in dynamic markets. In such markets, agencies should pay attention to innovation in the downstream market, including pipeline products. The long-term gains from foreclosure often exceed the short-term costs of losing sales discussed above. For example, a merging firm may have an incentive to foreclose rivals in the future if it is developing an innovation downstream. If there is an innovation race downstream, a merging firm may have incentives to foreclose competitors even if it is not yet active downstream, for example, to gain a first mover advantage or to be the only company able to develop a product downstream for a new or nascent market.

Comment 5: Incentives for input foreclosure tend to be greater if downstream margins are high relative to upstream margins, while downstream rivals cannot switch to other upstream suppliers and customer switching from downstream rivals to the merged entity is high. These incentives might be affected by:

- diversion ratios upstream and downstream (i.e., evidence of switching behaviour),
- the share of the upstream product in the downstream product's costs;
- the ability to increase the effectiveness or profitability of foreclosure through price discrimination,
- the strength of scale or network effects (to gauge the likelihood that foreclosure may impede the competitive strength of actual and potential rivals upstream or downstream),
- share of the market subject to foreclosure,
- the quality and costs of products from competitors, and
- whether customers multisource, security of supply considerations and switching costs.

Some of these elements may be also useful in the analysis of the ability to foreclose. Some agencies may choose to do an overall assessment of the ability and incentive to foreclose instead of assessing them separately.

The purpose of the incentives analysis is to assess the likelihood that the merged firm may follow this course of behaviour, which may be possible to understand directly from its past conduct, business strategy, and deal rationale.

B.3 Customer foreclosure

B.3.i. General: To evaluate customer foreclosure, agencies should assess the merged firm's ability and incentive to harm competition by limiting access to customers that rivals may use to compete.

Comment 1: In assessing the likelihood of an anticompetitive customer foreclosure scenario, agencies should generally assess whether the merged entity will have the ability to harm competition by foreclosing access to a customer base, whether the merged entity will have the incentive to foreclose independent upstream suppliers, and whether such a strategy may have a detrimental effect on competition. In practice, these factors may sometimes be examined together since they can be closely intertwined. Some agencies will assess each of these elements sequentially, while other agencies may choose to assess them all together.

Comment 2: If the merged entity stops or reduces its purchases from rivals in the upstream market, this may negatively affect their ability or incentive to compete in the upstream market. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of independent upstream inputs. Moreover, customer foreclosure may hamper an upstream producer's ability to access customers in the downstream market (for example, if the downstream firm is a retailer, it may charge higher agency fees, or if it is a distributor, it may increase retail prices for rivals' products or stop distributing such products), thereby raising rivals' costs in the upstream market or reducing their sales. The merged entity may also implement self-preferencing strategies, which would reduce rivals' sales. These different foreclosure strategies may allow the merged entity to increase prices or reduce choice, quality, or innovation efforts along the vertical chain to the detriment of consumers. Moreover, the mechanism of customer foreclosure can sometimes be similar to input foreclosure. Indeed, in some cases, the definition of what is "upstream" and "downstream" can be difficult or even interchangeable.

B.3.ii. Ability: Agencies should evaluate whether the merged firm has the ability to limit access to rivals' customers and can exert influence on the conditions of competition upstream by reducing or eliminating its purchases from upstream rivals, implementing self-preferencing strategies or by limiting access to downstream distribution.

Comment 1: Agencies should consider whether upstream rivals would lose sales overall if the merged firm bought fewer units from them or limited their access to distribution. For example, the sales of upstream rivals might be largely unaffected if the downstream firm acquired an input maker whose capacity exceeded the merged firm's requirements, even if the merged firm stopped buying from rival input makers altogether, provided that the merged firm cannot expand its capacity downstream.

Comment 2: If customer foreclosure impacts the scale or profitability of upstream rivals, it may reduce the rivals' ability and incentive to compete in the short term and to invest in cost reduction, research and development, and product quality, reducing their ability and incentive to compete in the long run. The impact on competitors' scale or profitability can possibly hamper them to compete effectively or even cause their exit from the market especially in the long term, harming downstream rivals that depend on them.

Comment 3: Agencies should examine whether the merged firm's rivals will have adequate sales opportunities post-merger to maintain or improve their competitive strength. Customer foreclosure can lead foreclosed rivals to charge higher input prices or offer less attractive products in situations such as economies of scale or scope in the input market or when demand is characterised by network effects. If existing upstream rivals operate at or close to their minimum efficient scale, the corresponding loss of output for the upstream rivals increases their variable costs of production. This may result in an upward pressure on the prices they charge to accessible customers operating in the downstream market, which may allow the merged entity to increase its own upstream prices or to increase downstream prices as well. Moreover, when the integrated downstream firm has market power, limiting access to distribution for rival upstream producers may raise their costs of reaching customers on the downstream market, thus allowing the integrated upstream firm to face less competition.

Comment 4: Agencies should carry out a holistic assessment on the ability of the merged firm to affect the conditions of competition. An important element to consider in this analysis is the degree of downstream market power as evidenced by share of purchases of the upstream product, downstream margins, scope of alternative customers downstream, network effects, economies of scale, brand strength, control of intellectual property or the importance of access to large amounts of data.

Comment 5: When assessing ability, some agencies focus primarily on establishing the vertically integrated firm's ability to limit access to rivals' customers. Those agencies will then assess the harm to the competitive process primarily when assessing the impact on competition. Other agencies may assess directly the vertically integrated firm's ability to harm the competitive process, which may already encompass an assessment of the materiality of such impact.

B.3.iii. Incentives: Agencies should assess the degree to which it is profitable to engage in conduct leading to foreclosure. The vertically integrated firm will take into account how its strategy would affect the profits of both its upstream and downstream division.

Comment 1: The incentive to engage in foreclosure comes from the potential to weaken competitors in the upstream market or markets, the downstream market or markets, or both. Agencies should evaluate how closely the merged firm competes with the potentially weakened rivals, and whether it might benefit from diverted sales or higher prices if the rivals faced higher costs.

Comment 2: The merged firm likely will not have an incentive to increase the costs of upstream rivals if it cannot supply all its input needs from its own upstream division. If the merged firm relies on rival input providers for incremental output, then it will face the same increase in marginal costs as downstream rivals do if the costs of rival input makers are higher.

Comment 3: The costs of the foreclosure strategy from reduced purchases from rival upstream suppliers are higher when the upstream division of the integrated firm is less efficient than the foreclosed suppliers due to lower quality or higher prices. Such costs are also higher if the upstream division of the merged firm is capacity constrained or sales utilizing rivals' inputs are more attractive to some consumers due to product differentiation. Incentives can be particularly significant if foreclosure hampers the long-term competitiveness of upstream rivals (for example, if it reduces their ability to produce at an efficient scale, or if a reduced addressable market makes it less worthwhile to invest in product improvements or innovation), because this may allow the merged entity to raise prices and thus earn larger profit margins post-merger. The long-term effects are often more important than the short-term costs of losing sales discussed above.

Comment 4: It may be possible to assess the merged firm's incentives and likelihood that the merged firm may follow a course of behaviour directly from its past conduct, business strategy, and deal rationale. The merged entity may be more likely to pursue customer foreclosure if the acquiring firm's business strategy involves this approach, it has a history of doing this with other products, or the deal rationale involves plans to do so post-merger, in which case it may not be necessary to infer behaviour from financial incentives. For example, if the merging firms' internal documents show that it would be strategically beneficial to foreclose rivals' access to customers, this would be highly informative about the incentive to foreclose.

Comment 5: The merged firm will be more likely to pursue a customer foreclosure strategy if its broader strategy or deal rationale involves self-supply. The merged firm may pursue objectives such as self-preferencing, increasing the switching costs of existing customers of the upstream division, positioning itself strongly upstream, gaining customers to obtain direct or indirect network effects, or obtaining access to customer data.

Comment 6: When the merged firm is a distributor or retailer, it may have an incentive to raise the retail price of rival products, place them in less advantageous positions in the store, reduce the commissions paid to sales staff for selling rival products, or otherwise hamper rival retail sales through its stores. This incentive will be greater when customers are more loyal to the store and might switch to buying one of the merged firms' products in the store instead. The incentive will be smaller when customers are more loyal to the brand and might leave the store to buy their preferred brand elsewhere.

Comment 7: Incentives for customer foreclosure tend to be greater if upstream margins are high relative to downstream margins, while upstream competitors cannot switch to other downstream rivals and customer switching from the merged entity to other downstream rivals is low. These incentives might be affected by:

- diversion ratios upstream and downstream (i.e., evidence of switching behaviour),
- the ability to increase the effectiveness or profitability of foreclosure through price discrimination,
- the strength of scale or network effects (to gauge the likelihood that foreclosure may impede the competitive strength of actual and potential rivals upstream or downstream),
- share of the market subject to foreclosure,

- the quality and costs of products from competitors, and
- whether customers multisource, security of supply considerations and switching costs.

Some of these elements may be also useful in the analysis of the ability to foreclose. Some agencies may choose to do an overall assessment of the ability and incentives to foreclose instead of assessing them separately.

The purpose of the incentives analysis is to assess the likelihood that the merged firm may follow this course of behaviour, which may be possible to understand directly from its past conduct, business strategy and deal rationale.

B.4 Likely Impact of Input or Customer Foreclosure on Competition

B.4.i. A merger can raise competition concerns because of foreclosure when it may worsen the conditions of competition in the upstream or downstream market

Comment 1: Where the assessment of the ability to foreclose includes the ability to affect the competitive process, and incentive to foreclose derives from the reduction in competition, no separate analysis of the impact on competition is required. When it has been established that the merged entity may foreclose competitors, this will often directly imply a harm to overall competition, where the foreclosed firms play a role in the competitive process on the downstream market. The higher the proportion of rivals that would be foreclosed from access to the downstream market, the more likely the merger can be expected to result in negative effects in the downstream market. To assess the extent of the impact on the market, agencies should consider the number and importance of rivals being foreclosed and the importance of vertically integrated competitors. A small player can play a significant role in downstream competition if it is an important innovator, expected to expand, a maverick, or developing a pipeline to enter a nascent market. Moreover, the competitive effect of foreclosure will be larger, the larger it is the part of the market that is foreclosed, the more difficult it is for foreclosed rivals to substitute the foreclosed product or service with alternative offers, and the larger the impact of such foreclosure on rivals' overall ability to compete. For example, harm will be likely to be more significant in markets with scale or network effects, where access to a large customer base is critical for a competitive offering.

Comment 2: Even if current competitors are not immediately foreclosed, competition may be substantially lessened if the risk or threat of foreclosure raises barriers to entry to potential competitors. The mere likelihood that the merged entity could carry out a foreclosure strategy may create a deterrent effect on potential entrants. This is particularly so if foreclosure would entail for potential competitors the need to enter at both the downstream and the upstream levels to compete effectively on either market. The potential threat of foreclosure can also reduce incentives to innovate downstream for non-vertically integrated firms, in particular if it would be difficult for them to grow absent access to the input or customer base.

Comment 3: By limiting rivals' access to an input or customer base, the merger may also reduce their ability to compete in the foreseeable future or force them to exit the market. This may allow the merged entity to compete less aggressively, such as by profitably raising prices or reducing output, quality or innovation. The negative impact on consumers may take some time to materialise when the primary impact on the scale or profitability of upstream rivals reduces their incentives to make investments in cost reduction, product quality, innovation, or in other competitive dimensions to remain competitive in the long run.

B.5 Access to competitively significant information

B.5.i. Agencies should assess whether the merger will threaten competition by enabling the merged firm to gain or increase access to rivals' competitively sensitive information

Comment 1: New post-merger relationships among rivals may enable the merged entity to learn information such as competitors' pricing, sales volumes, or commercial strategy; a rival's intention to launch new or improved products; or information about the technical performance of products developed by competitors. The merged firm may use access to a rival's competitively sensitive information to adjust its competitive response to rivals' actions, which may result in a less competitive market. For example, this access may facilitate coordination among competitors or undermine incentives to compete. The risk of unlawful coordination may be especially pronounced in highly concentrated markets or where there is evidence of prior, actual or attempted attempts to coordinate in the relevant market.

Comment 2: The merged firm could use commercially sensitive information about its competitors to undermine or counteract its rival's actions and limit competitive opportunities. Access to rivals' competitively sensitive information may put rivals at a competitive disadvantage, which may dissuade them from investing, expanding, lowering prices or even entering a market in the first place.

C. Non-Horizontal mergers: Conglomerate effects

WORKING GROUP COMMENTS

Original Comments (May 2024)

C.1 General: Agencies, should assess whether the combination of products in different markets may confer on the merged entity the ability and incentive to leverage its market position from one market to another by exclusionary practices that substantially lessen competition.

Comment 1: In assessing the likelihood of a merger that combines products in related markets to lessen competition, agencies should generally assess whether the merged entity will have the ability to lessen competition, whether the merged entity will have the incentive to do so, and whether such a strategy may have a detrimental effect on competition. In practice, these factors may sometimes be examined together since they can be closely intertwined. Some agencies will assess those elements sequentially, while other agencies may choose to assess them all together.

Comment 2: When a merger combines products in related markets, a possible theory of harm is that the merged entity may foreclose its rivals in one market from accessing customers by leveraging its strong position in another market. This leveraging typically entails linking the sales of products belonging to separate markets to the detriment of competitors in a way that harms consumers. Foreclosure is also a mechanism that may deter entry or undermine incentives for future investments, meaning the effects of such foreclosure may only materialise in the future.

Comment 3: Different types of practices could lead to foreclosure effects.

- Technical tying: the tying product is designed in such a way that it only works, or works better, with the tied product, but not with the alternatives offered by competitors (for example, an interoperability issue).
- Contractual tying: customers are contractually obliged to purchase the two products together.
- Pure bundling: the merged entity would not sell products separately, but only jointly to customers in fixed proportions.
- Mixed bundling: the products are offered both separately and as a package deal, where the package price is lower than the sum of the stand-alone prices of the products.

Such potentially exclusionary practices can sometimes arise jointly with horizontal concerns (for example, the elimination of potential competition or dynamic competition).

C.2 Ability: Agencies should assess the merged entity's ability to foreclose its rivals via practices such as tying or bundling or other potentially exclusionary practices.

Comment 1: Agencies should assess whether the merged entity has the ability to lessen competition by foreclosing its rivals in a related market. This assessment can include the calculation of market shares, but also an analysis of the implications for related products if access to such products were to be eliminated, i.e. the competitive significance of the related product(s) and the effect on competition in the relevant market(s). Elements that should be considered as part of a holistic assessment of market power include brand strength, profit margins, the existence of network effects, the presence of barriers to entry, switching costs, the control of intellectual property, access to data, integration into wider ecosystems and market structure, the competitive landscape, customers' actual switching, or the ability of competitors to expand output.

Comment 2: The relationships between the markets should be assessed. Critical elements include whether customers have an incentive to buy the two products or services together, and whether there is a pool of common customers in the related markets.

Comment 3: The ability of the merged entity to engage in exclusionary practices could also depend on the economies of scale or network effects which prevail in the relevant markets. The ability to foreclose rivals via bundling or tying can be stronger in industries with economies of scale or network effects. Foreclosure into markets with scale effects can be particularly damaging if these are so pronounced that there is a risk that the market may "tip" (i.e., leading to an environment in which rivals of a dominant firm can no longer compete effectively due to lack of scale).

Comment 4: When assessing ability, some agencies focus primarily on establishing the firm's market power in the related market. Those agencies will then assess the foreclosure of rivals primarily when assessing the impact on competition. Other agencies may assess directly the firm's ability to foreclose rivals, which may already encompass an assessment of the materiality of such impact.

C.3 Incentives: The merged entity's incentives to foreclose depend on the profitability of the strategy. Therefore, the assessment considers the foreclosure strategy's potential costs and its likely benefits.

Comment 1: An incentive to foreclose companies active in a related market may exist if the merged firm competes with them. The assessment focuses on whether a potential gain in sales from foreclosing rivals in one market would be outweighed by a loss of sales in the related market(s). Agencies should undertake a holistic assessment of any relevant factors.

Comment 2: It may be possible to assess the merged firm's incentives and likelihood that the merged firm may follow a course of behaviour directly from its past conduct, business strategy, and deal rationale. The merged entity may be more likely to pursue a combined offering if the acquiring firm's business strategy involves this approach, it has a history of doing this with other products, or the deal rationale involves plans to do so post-merger, in which case it may not be necessary to infer behaviour from financial incentives. For example, if the merging firms' internal documents show that it would be strategically beneficial to foreclose rivals, this would be highly informative about the incentive to foreclose.

Comment 3: The analysis of incentives may include gains in sales, losses of sales in related market(s) and relative profits in both markets, similar to the case of vertical foreclosure.

Gains in sales may be greater if:

- the merged firm has a more attractive offering,
- it competes closely with the rivals that may be foreclosed, or
- the merged entity has a strong ability to foreclose, as this would likely result in a large volume of switching from the affected rivals.

Losses in sales in related market(s) are likely to be greater if:

- many customers have little interest in also purchasing the other product, and
- the merged entity would need to pursue an aggressive strategy to foreclose competitors.

However, losses may be lower if the merged entity can provide the combined offering on a targeted basis to only those customers who would be likely to accept it.

Foreclosure is more likely to be profitable if the sales diverted away to the merged entity have high margins. A successful foreclosure strategy may also increase the profit margins of the merging parties.

Comment 4: The analysis may include other costs and benefits including the extent the transaction leads to increasing the stickiness of existing or future customers; the merged entity benefitting from future market growth; gaining customers to obtain direct or indirect network effects; obtaining access to customer data; or enabling cross-selling within a broader ecosystem.

Comment 5: The analysis may also take into account other factors, including the ownership structure of the merged entity. Some of these elements may be also useful in the analysis of the ability to foreclose. Some agencies may choose to do an overall assessment of the ability and incentives to foreclose instead of assessing them separately. The purpose of the incentives analysis is to assess the likelihood that the merged firm may follow this course of behaviour, and it may also be possible and equally important to understand this directly from its past conduct, business strategy and deal rationale.

C.4 Likely impact on competition: Agencies should assess whether the foreclosure strategies may result in a reduction in rivals' ability or incentive to compete and ultimately affect competition

Comment 1: When assessing the impact on competition, agencies will build on similar evidence as in the assessment of the ability and incentive to foreclose. The assessment of the impact on competition focuses on the impact on the competitive process, including the materiality of this impact.

Comment 2: Foreclosure strategies may limit sales by rivals. This may lead to a reduction in rivals' ability or incentive to compete and allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good) or to maintain market power (in the market for the tying or leveraging good). When assessing the impact on competition, agencies will build on similar evidence as the assessment of the ability and incentive to foreclose. The transaction may impede competition only when a sufficient fraction of market output is affected by foreclosure resulting from the merger. Rivals can be impacted in their ability and incentive to compete on prices and quality, and the foreclosure practices may increase (actual or potential) competitors' barriers to entry and expansion or reduce their incentive to innovate, which in turn may impact effective competition.

Comment 3: Unlike its single-component competitors, the merged entity's pricing strategy may be tailored to the specific bundle to acquire or maintain market power. When complementary goods are priced independently, suppliers would not take into account the positive effect of a drop in the price of one product on the sales of the product in the related market(s). Depending on the market conditions, a merged firm may do so. By internalising this effect, the merged entity may have a certain incentive to lower margins if this leads to higher overall profits (this incentive is often referred to as the Cournot effect, which is the conglomerate equivalent of the elimination of double marginalisation in vertical markets). In most cases, the merged firm will make the most out of this effect by means of mixed bundling, i.e., by making the price drop conditional upon whether or not the customer buys both products from the merged entity. Conversely, the merged entity may have an incentive to increase standalone prices of its products, since these will be combined with rivals' products post-merger.

Comment 4: Besides harming existing competitors, foreclosure practices may also deter entry by potential competitors. They may do so by reducing sales prospects for potential rivals in a market to a level below minimum viable scale.

Comment 5: A merger that combines products in related markets may be of greater concern in markets where new customers may be easily diverted to the merged entity, scaling is particularly critical, competitors are easily marginalised, entry can be deterred, incentives for investment can be undermined, and the future benefits of controlling these markets are large. However, these anticompetitive effects may not emerge until after the market has reached maturity and entry has been limited. Therefore, the impact on the market and competition on those markets may need to be assessed over the longer term. For example, this is the case when foreclosure in a related market has the objective of protecting the acquiring firm's own strong market position against future entry or innovation from nascent rivals in another market.

D. Non-Horizontal mergers: Dynamic effects and potential competition beyond or around foreclosure

WORKING GROUP COMMENTS

Original Comments (May 2024)

D.1. Non-horizontal mergers may cause dynamic horizontal concerns or have dynamic effects, which can impact potential or future competition, or reinforce market power, including by raising barriers to entry or expansion, lessening innovation competition or blocking entry points in related markets.

Comment 1: A non-horizontal merger may raise concerns beyond foreclosure by eliminating potential competition from the target or from the acquirer, innovation competition or entry deterrence, in particular in currently developing markets or within ecosystems where at least one of the merging firms already has market power the merger may protect or entrench.

Comment 2: A merger can have additional dynamic effects, for example, by protecting or entrenching a dominant position through raising barriers to entry or expansion; raising customers' switching costs; or interfering with the use of competitive alternatives; by depriving rivals of economies of scale or by reinforcing network effects, beyond static exclusionary effects. These effects may deter entry by reducing the sales prospects for potential rivals in a market to a level below minimum viable scale or to a level that decreases incentives to innovate. When a competitor could be impacted due to the dynamic effects of the transaction, agencies should assess for example, whether the decrease of the competitor's scale of production or sales would lead to an increase of the average unit cost, resulting in a loss of economies of scale or a competitive disadvantage for the competitor relative to the merged entity (i.e., reinforcing network effects).

Comment 3: Agencies should consider in their analysis whether, irrespective of any foreclosure conduct, a merger potentially harms competition, for example as it—

- allows the acquirer to protect or entrench a core product with strong market power from future entry by blocking entry in related markets or by eliminating a potential competitor;

- allows the acquirer to leverage market power from one market into another market to expand market power (within its ecosystem);
- increases barriers to entry or expansion, for example, by increasing switching costs, interfering with the use of competitive alternatives, or depriving rivals of scale economies or network effects;
- decreases access to and interoperability with the ecosystem to block entry points and harm dynamic competitors;
- gives access to commercially sensitive information of competitors and consumers; or
- leads to an accumulation of data to the detriment of competition and consumers.

Comment 4: Data can be a material input or barrier to enter. In assessing the importance of data as an entry barrier agencies may take into consideration what kind of data is held or collected by the parties, how frequently the parties collect data, how relevant the data held or collected by one of the parties is for the improvement of the service provided by the other party, or how advantageous the data held or collected by one of the parties is compared to the data that is available to competitors.

D.2. Competition concerns can arise from the existence of at least one party being party of a group whose activities from a business ecosystem with complementary, or otherwise related activities.

Comment 1: When a firm with a business ecosystem acquires a target that is active in (a) related market(s), it may raise potential competition concerns in the market of the acquirer or of the target; it may raise dynamic competition concerns in existing or future markets; it may increase barriers to entry and expansion; or it may block entry points into the core market from related markets.

Comment 2: If the acquirer has a business ecosystem, agencies should consider whether the target has capabilities that are scarce; it has or would acquire a strong position in the related market; or whether the transaction strengthens network effects or increases customer switching costs. Such factors may protect, entrench or extend market power within an ecosystem through a dynamic combination of horizontal and non-horizontal effects.

Comment 3: Acquisitions in related markets to a digital ecosystem may allow the merging firm to add a large amount of traffic and customer access to their ecosystem. This consolidation may reinforce network effects. In markets where consumer switching is low, this may work to the benefit of large digital ecosystems. While increased traffic can be the result of an improved product offering, the additional traffic generated with such acquisitions in related markets may entrench a dominant position or increase barriers to entry. Such acquisitions may also block entry points into the core market from related markets. For example, absent the transaction, rivals may have grown in related markets to subsequently enter the market in which the acquirer has market power.

VI. Entry & Expansion

A. The assessment of firm entry and/or expansion by existing competitors can be an integral part of the overall analysis of whether a merger is reasonably likely to harm competition significantly (e.g., the merged firm could raise prices or reduce output, quality, or innovation).

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (November 2023)

Comment 1: Competition agencies should consider whether entry and/or expansion would deter or offset the anticompetitive effects of a merger. However, competition agencies do not need to reach a conclusion on (or even consider) the evidence related to entry and/or expansion in those cases where other evidence establishes that there are no anticompetitive effects.

Comment 2: Entry, or the threat of entry from potential competitors, can be a relevant competitive constraint on the conduct of the merged firm. When assessing the likelihood of entry in concentrated markets, it must be borne in mind that, if barriers to entry were low, there would likely be many existing competitors already in the market. The mere threat of entry will only rarely defeat the ability of merging firms to raise prices, because the possibility to enter and exit a market in the form of 'hit-and-run' entry without cost is extremely rare.[19] Therefore, where there is a perceived threat of entry, the analysis should include an assessment of the likelihood that firms would enter the market and replace competition that would be lost due to the merger.

Comment 3: Claims that entry and/or expansion would deter or offset anticompetitive effects of a merger should be carefully scrutinized. In the competition agencies' experience, the likelihood of new entry or expansion is often overstated by merging firms and those cases in which entry and/or expansion would deter or offset anticompetitive effects of a merger are rare.

Comment 4: The ability of a sufficient number of rival firms to expand capacity in a timely manner or use existing spare capacity or switch capacity from one use to another, can also constitute an important competitive constraint on the merged firm's conduct.[20] Such claims should however be carefully checked against the available pre-merger evidence. If rival firms are indeed able and have an incentive to swiftly expand output in response to a price increase, then pre-merger profit margins in the industry should be low. If pre-merger margins are instead significant, then the alleged ease of switching and disciplining effect of spare capacity may not be a significant competitive constraint on the merged firm. Many of the factors that are used to assess entry are relevant to the analysis of expansion, including competitor expansion plans, barriers to expansion, and the profitability of expansion.

[19] Such hit-and-run entry would need a fully 'contestable' market with a large number of potential entrants facing zero barriers to entry and zero barriers to exit. However, the remainder of this Chapter focuses on actual entry and/or expansion, rather than the threat of entry and/or expansion

[20] If rival firms are able to switch production to the relevant products and market them in the short term in response to small and permanent changes in relative prices, whilst maintaining product quality and without incurring significant additional costs or risks, these shorter-term supply-side responses may be assessed as supply-side substitution.

Comment 5: When considering entry as a countervailing factor, competition agencies should focus on entry and/or expansion that would occur as a result of the post-merger competitive situation. Competition agencies should assess why the merger would induce entry that was not planned in pre-merger competitive conditions. However, competition agencies should be cautious in attaching weight to entry and expansion triggered by a merger, as a rational entrant will not consider pre-entry prices when making its decision whether to enter, but post-entry prices. Firms that have not entered and/or expanded prior to the merger may not have done so because they require prices to increase and remain above the prevailing pre-merger price for entry to become profitable.[21] In general, such entry is therefore unlikely to deter or offset the anti-competitive effects of the merger.[22]

Comment 6: For those cases in which entry and/or expansion is likely to take place absent the merger, competition agencies should treat likely entry or expansion as additional or improved competitive constraints that exist in the counterfactual[23] and take these constraints into account as part of the competitive assessment rather than as a countervailing factor.

Comment 7: It may not always be possible to make a clear distinction between entry that would have happened absent the merger and entry as a countervailing factor. For example, there might be merger cases where there is evidence that competitors have plans to enter, but these are still insufficiently concrete or **imminent** to be considered as part of the counterfactual assessment. The merger (and potential resulting price increases, or effects on non-price factors such as quality and innovation) might then make it sufficiently likely that entry will materialize. In such cases, competition agencies could consider entry as a countervailing factor.[24] Entry or expansion taking place absent, or as a result of, the merger should only be taken into account if there is concrete evidence of it being likely, timely and sufficient.

B. In assessing whether entry and/or expansion would effectively constrain the merged entity, competition agencies should consider whether entry and/or expansion would be: (a) likely; (b) timely; and (c) sufficient in nature, scale and scope. These three conditions must all be satisfied simultaneously.[25]

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (November 2023)

Comment 1: For entry and/or expansion to be likely, it should be profitable for competitors of the merged entity to expand output and/or for potential entrants to enter the market. In assessing

[21] Entry/expansion only when prices remain higher than pre-merger prices will normally be insufficient to offset the effects of the merger.
[22] The prospect of countervailing entry strong enough to address the anti-competitive effects of a merger will tend to weaken the incentives to merge in the first place (e.g., due to the entry reducing prices and the market share of the merged firm) which may explain why competition agencies do not often come across such mergers.
[23] Counterfactual' refers to the competitive situation absent the merger.
[24] Competition agencies may apply a different standard of proof depending on whether entry is considered as a countervailing factor or as part of the counterfactual, depending on their legal standard. The relevant standard of proof is not considered further.
[25] In other words, these conditions are cumulative in that entry and/or expansion must be likely and sufficient within a timeframe that meets the timeliness condition.

the likelihood of entry, competition agencies should consider establishing, if possible: evidence on any relevant history of entry and/or exit;[26] information about past and expected market growth; evidence of planned entry and/or expansion (e.g., in internal documents); evidence of the costs, risks and benefits associated with entry (also in the long term); and, information from firms identified as potential entrants.[27] A merger may also increase the ability or incentives to engage in exclusionary behaviours such as exclusive dealing arrangements or long-term contracts, which may decrease the likelihood of entry. Competition agencies should consider whether the merged entity or other incumbents are likely to discourage entry/expansion or make it more difficult, for example through the 'strategic actions' listed in comment 2 below.

Comment 2: In assessing the *likelihood* of entry and/or expansion, competition agencies should consider the existence and significance of barriers to entry and expansion to the relevant market (*i.e.*, the advantages enjoyed by incumbent firms over the potential entrants that may prevent or delay new firms from entering the market). Prior examples of successful or failed entry can be highly probative for their respective propositions and should be analysed closely. For example, the lack of prior successful entry or expansion could be an indicator that the barriers to entry are high. Before attaching weight to history of entry into or exit from the market, competition agencies should also consider whether present market conditions are comparable to those that existed in the past. In addition, the scale of barriers to entry should be considered in relation to the expected future profits of entering. For example, markets with barriers to entry that appear to be low might actually have barriers high enough to deter firms from entering, where the market size is small and therefore profits of entering or expanding do not sufficiently exceed the costs of entry. The further out in time that entry and/or expansion is expected to occur, the less certainty competition agencies can attach to whether such entry and/or expansion would occur and to its disciplining effect on the merged firm.

When assessing ease of entry, agencies should focus on whether potential entrants would consider entry to be profitable in light of factors including but not limited to:

- ✓ **legal or regulatory barriers**
  - government regulations that might, for example, limit the number of market participants or impose substantial regulatory approval costs, or create legal uncertainty;
  - tariff and non-tariff trade barriers;
- ✓ **structural, technological or financial barriers**[28]
  - sunk costs that could not be recovered if the entrant left the market including machinery that might be site specific or R&D that has not yet resulted in any marketable invention or innovation;
  - economies of scale and/or scope;
  - the availability of a scarce resource that is an essential input, infrastructure, technical capability and other skills or intellectual property rights (e.g., patents or know-how);

[26] Competition agencies may consider history of entry into and/or exit from the relevant market or markets that share sufficiently similar characteristics to those of the relevant market (e.g., different geographic markets for the same product).
[27] In addition, young, fast-growing markets may attract more entry than more established or less innovative markets.
[28] These barriers can also lead to early mover advantages. The weight put on such advantages may depend on the extent to which they irreversible.

    - availability of financial capital to make the investments required to enter or expand in a market (which may be particularly relevant in developing economies);
    - network effects;
    - switching costs faced by customers (or switching costs a firm would incur when taking on customers from an incumbent);
    - brand loyalty or stickiness demonstrated by existing customers;
    - the reputation of incumbent firms and the opportunities, time, and expenditure that would be required by entrants to establish the reputation needed to replace the lost competition;
    - incumbent firms' existing position in distribution and sales networks;
    - information advantages due to possession of customer or supplier data;
- ✓ **strategic actions (or potential actions) of incumbents**
    - incumbent firms' investment in excessive capacity;
    - duration, termination and renewal provisions in existing contracts;
    - risk of retaliatory action by incumbents against new entry, such as price wars, temporary low prices, or vexatious (sham) litigation;
    - lack of interoperability;
    - incumbent firms' use of exclusivity or bundling with other products, and the merger's impact on the firm's ability to increase its use of such terms.

Not being able to identify these factors does not suggest ease of entry, especially if there was no entry in the past.

Comment 3: In assessing whether entry and/or expansion is *timely*, competition agencies should consider whether entry and/or expansion would take place rapidly enough to offset the competitive harm from the merger and preserve long-term competition. The appropriate time horizon may vary according to the characteristics of the relevant markets. For example, in certain markets, where a reduction in competition is expected to be particularly significant and immediate, entry and expansion must therefore also occur quickly.

Comment 4: For entry and/or expansion to be *sufficient*, competition agencies should consider cumulatively whether entry and/or expansion would be:

- sufficient in scale, strength, and durability to compete effectively with the merged entity, replacing the competition eliminated by the merger. Competition agencies should examine evidence as to whether any entry or expansion would increase the competitive constraint that rivals exert on the merged entity (e.g., by introducing additional capacity, or new or better competitive offerings). This may come from a single entrant or firm expanding or from several, in aggregate. However, in certain cases competitive pressure exerted from several small players may be less effective than the competitive pressure exerted by a single strong competitor. Small-scale entry or expansion that has limited prospects of capturing significant sales from the merged entity may not be comparable to the competitive constraint eliminated by the merger and is less likely to prevent an anticompetitive effect from arising.
- in sufficiently similar products. Entry and/or expansion related to highly differentiated products which are not sufficiently close substitutes or niche entry might not counteract anticompetitive effects arising from the merger. However, entry may be sufficient even if products are differentiated, to the extent they are sufficiently close substitutes;

- able to counteract any anti-competitive effects resulting from the merger;
- able to counteract any localized effects of the merger (e.g., in markets differentiated by geographic areas or customer categories); and
- successful over a sustained period of time (i.e., enough to replace the competition eliminated by the merger).

C. The threat of entry from customers turning to in-house supply or sponsoring third-party entry can be a competitive constraint on the conduct of the merged firm. If relevant, agencies should evaluate instances in which, in response to a post-merger price rise or quality degradation, customers decide to start self-supplying, or a third party is encouraged and supported by customers to enter or expand (sponsored entry).[29]

WORKING GROUP COMMENTS
Original Comments (April 2008)
Amended Comments (November 2023)

Comment 1: In these circumstances, competition agencies should determine whether mitigating strategies by customers will be *effective* in offsetting adverse effects deriving from the merger. In particular, competition agencies should consider whether self-supply and/or sponsored entry will constrain the merged entity by meeting the three cumulative conditions discussed under section B above. It should be noted that even if self-supply or sponsored entry protects particular customers, it may not prevent the merged entity from raising prices or worsening quality of service for other customers. In many markets, customers who self- supply will not offer their proprietary systems commercially to others in the industry. Thus, their decision to self-supply may best be considered not as a countervailing factor, but in whether they are a participant in a market made up of commercially available products.

[29] This sub-section should be read in conjunction with and expands on the comments on 'Buyer Power' included at page 22 of the Recommended Practices, unilateral effects section. The ability of customers to turn to in-house supply in the short term could also be assessed as supply-side substitution, similarly to the approach described in footnote 22.

VIII. <u>Efficiencies</u>

A. The assessment of potential efficiencies should be part of a competition agency's overall analytical framework for merger review. In specific cases where the merging parties assert that a merger is unlikely to harm competition significantly because of expected efficiencies, agencies should carefully assess appropriate efficiency claims.

WORKING GROUP COMMENTS
Original Comments (May 2017)

Comment 1: Mergers can produce significant efficiencies for the merged firm and such efficiencies can be important business motivation for a merger. Merger efficiencies can include cost savings in production or distribution, economies of scale or scope, increased innovation leading to new or improved products, increased network size or product quality, among others. Some of these efficiencies (innovation, combination of complementary assets, etc.) may bring synergies on a potentially continuous basis, thus enhancing the potential performance of the merged entity and the potential benefit to competition and consumers.

Comment 2: Mergers can produce efficiencies that may counteract the potential for anti-competitive effects. The benefits of some merger efficiencies can be passed on to consumers, for example, in lower prices or gains in innovation that lead to new or improved products. To counteract likely anticompetitive harm, efficiencies need to increase rivalry by enhancing the ability and economic incentive of the merged firm to compete. Efficiencies can have such impact if they lower costs or increase output, innovation, or quality and there is sufficient competitive pressure remaining such that the merger is unlikely to harm consumers in the relevant market(s).

Comment 3: In order to determine the impact of a merger that potentially harms competition, agencies should take into account substantiated, likely, and merger-specific efficiencies put forward by the parties. Efficiency claims should be assessed in light of all other evidence. Agencies should not challenge a proposed merger if it is likely that the demonstrated efficiencies would be passed through to consumers and would counteract the anticompetitive effects in the relevant market(s). Efficiencies are most likely to impact merger analysis when the likely adverse competitive effects, absent the efficiencies, are not large. The evaluation of efficiencies commonly is part of an agency's competitive assessment, focusing on whether the claimed efficiencies counteract the harm in the market in which the lessening of competition occurs. In a few jurisdictions, efficiencies also are considered after a merger is determined to be anticompetitive, as a separate assessment of the offsetting relevant consumer benefits of a merger.

Comment 4: The assessment of efficiencies is not necessary in those cases in which a merger does not raise competition concerns because there are sufficient competitive constraints in the market to prevent significant harm regardless of whether the merger will enable efficiencies.

Comment 5: Efficiencies can be important to merger remedy design. When feasible, merger remedies should eliminate the likely anti-competitive effects of a merger in the relevant market without unnecessarily sacrificing substantiated efficiencies in the same or other markets or aspects of the transaction.

Comment 6: Agencies should provide transparency with respect to their approach to evaluating potential efficiencies in merger control, including the weight the agency is likely to place on efficiency claims, the types of efficiencies that are likely to be taken into account, and any evidentiary requirements for substantiating efficiencies, including identifying the party that bears the burden of demonstrating efficiencies. Such guidance may be provided, for example, through public merger guidelines and other statements explaining merger analysis, as well as through decisions in specific cases in which parties have raised efficiency claims.

B. In assessing claims that a merger will not harm competition significantly because it will produce efficiencies, agencies should carefully review information provided by the merging parties on whether the claimed efficiencies are (a) merger specific, (b) sufficient enough to counteract the potential harm of the proposed merger, and (c) properly substantiated.

WORKING GROUP COMMENTS
Original Comments (May 2017)

Merger specificity

Comment 1: Agencies should credit only those efficiencies that are merger specific. Merger-specific efficiencies are those that are of direct consequence of the merger and unlikely to be accomplished either in the absence of the merger or by alternatives with similar or less anticompetitive effects. In many cases, efficiencies can be achieved without the proposed merger. Efficiencies that are achievable, for instance, via internal growth, modernizing equipment, or adoption of industry best practices are not merger specific. In assessing whether efficiencies can be achieved by alternatives other than the merger, only realistic and practical business alternatives should be considered. Timing and cost can be important factors to consider in the evaluation of alternatives.

Sufficiency

Comment 2: Agencies should evaluate whether the claimed efficiencies are sufficient to counteract the merger's potential anticompetitive harm in the relevant market(s), e.g., by likely enhancing the merged firm's ability and incentive to lower prices, increase quality, or otherwise compete in a way that is beneficial to consumers.

Comment 3: In many jurisdictions, this sufficiency requirement includes a showing that a significant share of the benefits expected to be realised from the efficiencies is likely to be passed on to consumers (or customers), usually in the form of lower prices or increased output, innovation, or quality. Efficiencies that reduce variable or marginal costs are more likely to be passed on to consumers in the form of lower prices and thus more likely to be relevant to the assessment than those that reduce fixed costs. Cost savings due to anticompetitive decisions to reduce input prices, innovation, output, or service should not be considered. For dynamic efficiencies, it can be important not only to consider benefits from lower prices or increased output, but also from innovation and quality improvements such as new products stemming from higher R&D investment or new combinations of know-how, experience, or technologies

Comment 4: When reasonably possible, efficiencies and resulting benefits should be quantified. Efficiency claims should be assessed net of the costs to achieve the expected efficiencies. While the quantification of claimed efficiencies is often complex and speculative, quantification can better inform the scope of possible benefits to consumers and facilitate a comparison of the efficiencies with the likely harm to competition.

Substantiation

Comment 5: Merger-specific efficiency gains are difficult to assess and verify both for merging parties and for competition agencies. Agencies should advise merging parties to submit efficiency claims very early in the process because verification by reasonable means typically requires significant time and resources. Crucial information about the claimed efficiencies is normally solely in the merging parties' possession. Therefore, the merging parties should be required to present evidence regarding the type, likelihood, size, and timing of any claimed efficiencies, including how they would be achieved, how they would enhance the firm's ability and incentive to compete, and why they are merger specific. Merging parties often claim efficiency gains but frequently fail to substantiate them with adequate evidence.

Comment 6: To verify efficiency claims, agencies typically review internal data and documents from the merging firms to determine how realistic the claims are. Evidence that agencies consider in evaluating efficiency claims typically includes internal documents that management used to decide on the merger, company statements about the expected efficiencies, business plans on how the company plans to achieve the efficiencies, examples of past efficiencies, and any studies on the type and size of expected efficiency gains. Proof that similar efficiencies were achieved in the past from similar actions can be among the most convincing evidence in evaluating efficiency claims. In evaluating the information submitted to substantiate efficiency claims and any conclusions, agencies should assess the accuracy of the parties' data and information, as well as the analytical methods and assumptions used.

Comment 7: The greater the likely adverse effects on competition, the greater the need to demonstrate clear, significant, and verifiable efficiencies and their likely impact on competition and consumers. When the potential adverse competitive effects of a merger are likely to be substantial, significant verifiable efficiencies likely to benefit consumers are necessary to prevent the merger from being anticompetitive. Likewise, the more uncertain and modest the likely harm to competition, the greater potential role for claimed efficiencies to outweigh the harm.

Comment 8: The stronger the evidence to substantiate the efficiency claims, the more confidence an agency is likely to have in relying on efficiencies as part of its analysis. Efficiency claims that are vague, speculative, and cannot be verified by reasonable means should not be credited.

Comment 9: The time horizon for claimed efficiencies can be an important consideration in evaluating efficiencies in light of potential anti-competitive harm. Efficiencies should have a timely impact on the merged firm's ability and incentives to compete. The more time projected for the efficiencies to be realised, the more uncertainty and difficulty predicting their effects.

IX. Failing Firm/Exiting Assets

A. A merger is not likely to create or enhance market power if one of the merging parties is likely to fail and its assets are likely to exit the market in the imminent future. In cases where the merging parties assert that a merger is unlikely to harm competition because one of the merging firms is failing, agencies should carefully assess the appropriate counterfactual in which to analyse the competitive effects of the merger.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: Agencies should carefully review claims by the merging parties that a merger will not harm competition because the acquired firm and its assets would have exited the market absent the merger in any event. In such cases, the basis for concluding that the merger will not harm competition is that the competition provided by a failing firm would be lost even without the merger and, consequently, the competitive situation post-merger may be no worse than the counterfactual, *i.e.*, the competitive situation absent the merger. In cases where one of the merging parties is an allegedly failing firm, agencies should carefully assess whether there is a causal link between the merger and any worsening of competitive conditions, or whether the competitive structure of the market would deteriorate at least to the same extent even without the merger.

Comment 2: Agencies should carefully consider the implications of an allegedly failing firm in the context of the counterfactual analysis. In this regard, agencies should be mindful that there might be more than one relevant counterfactual scenario (*e.g.*, the failing firm's assets exit the market or are bought by a less competitively significant incumbent or a potential new entrant). Consequently, the choice of the appropriate counterfactual could be a complex exercise. In addition, much of the evidence of exit of the allegedly failing firm is in the hands of the merging parties who may advance failing firm claims even when the productive assets would not leave the relevant market, in which case the failure and exit of the firm is not the appropriate counterfactual.

Comment 3: In many cases, a merger involving a failing firm will not in fact raise competition concerns because there are sufficient competitive constraints remaining in the market to prevent significant harm to competition regardless of whether the firm will fail and its assets exit the market in the imminent future. When there are no competition concerns, agencies need not consider whether the conditions of a failing firm have been established.

B. In assessing claims that a merger will not harm competition because one of the merging parties is failing, agencies should determine whether: (a) the firm is unable to meet its financial obligations in the imminent future; (b) there would be no serious prospect of reorganizing the business; (c) there would be no credible less anticompetitive alternative outcome than the merger in question; and, (d) the firm and its assets would exit the market in the imminent future absent the merger.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: In some jurisdictions, consideration of whether a firm is failing is included as part of the competitive effects analysis (for example as part of the counterfactual), while in other jurisdictions the imminent failure of the firm is a formal defence to an otherwise anticompetitive merger. Furthermore, some agencies may require a more exacting standard of proof, and some may place the burden on the merging parties to establish the conditions for a failing firm, but a similar substantive analysis applies regardless of the particular method used.

Comment 2: Where a failing firm claim is raised, agencies should carefully review whether the firm in question is truly failing. Many firms, despite temporary difficulties, are able to survive and continue competing. The fact that a firm has not been profitable does not necessarily mean that it is a "failing firm" since accounting losses do not necessarily reflect the true economic losses from ongoing operations, *i.e.*, its fundamental ability to compete effectively in the future. For instance, a firm with a substantial debt may be able to emerge from its financial trouble as an effective competitor through a new business strategy or new management because it possesses valuable assets.

Comment 3: To assess whether the firm is unable to meet its financial obligations, agencies should require merging parties to provide current and historic financial information about the business that is claimed to be failing. This information may include profit and loss and cash flow information, recent balance sheets and analysis of the most recent statutory accounts, the timing and nature of the firm's financial obligations, the relationship between the company's costs and its revenues, the likely ability of the firm to obtain new revenues or new customers, and the current and future availability of key inputs. Agencies should consider whether ordinary course of business documents indicate an imminent financial failure, or whether the claims of failure appear overstated to justify the merger. Prospective financial information should also be requested including forecast information for the current year, ideally forecasts produced either in advance of the proposed transaction or for another purpose and not produced solely for the agency. In most cases, agencies should seek the (in- house or outsourced) assistance of financial and accounting expertise.

Comment 4: To assess whether the failing firm is unable to re-organize itself successfully, agencies should require the merging firms to demonstrate that they have no reasonable corporate restructuring or re-financing options, since even firms in administration[30] often survive and

[30] The term "administration" is used here as shorthand for the various bankruptcy procedures in place in ICN jurisdictions whereby a company in financial distress is judged insolvent and its property sold or liquidated or is restructured. These procedures typically involve the appointment of a person to oversee the company's estate on behalf of creditors during the liquidation or the restructuring process, indicated here by the term "administrator." While it is not necessary for a firm to go into administration to qualify as a failing firm, the fact that a firm is in

recover. Such evidence might come from board papers or other strategy documents produced by the firm when considering various ways to improve its situation. If the firm is in administration, agencies should consider investigating with the administrator whether there was any serious prospect that the firm could emerge from administration, potentially in a re-organised form.

Comment 5: In assessing whether there is no credible less anticompetitive alternative to the merger, agencies should assess whether the failing firm has unsuccessfully sought in good faith any credible alternative offers of acquisition of the firm or its assets that would both retain the assets in the relevant market and pose less harm to competition than the merger in question. In this regard, agencies should require evidence that there is sufficient awareness regarding the sale of the firm or its assets to attract the attention of likely prospective purchasers. Agencies should consider any offer to purchase the assets of the failing firm above the liquidation value of those assets (net of the costs associated with the liquidation process). The fact that an alternative purchaser's offer is not commercially preferable to that of the merging parties should not lead agencies to disregard the alternative purchaser's offer so long as it is above the asset liquidation value. In addition, some jurisdictions consider whether the failure of the firm and the liquidation of its assets could be a less anticompetitive alternative to the merger since the remaining firms in the market would compete for the failing firm's market share and assets that otherwise would have been transferred wholesale to a single purchaser.

Comment 6: In considering a failing firm claim, agencies also should assess whether the failing firm's assets would exit the market in the imminent future but for the merger in question. If the firm owns important assets whose value is greatest in their current use, these assets are unlikely to exit the market, even if the firm cannot meet its financial obligations in the imminent future. On the other hand, assets that are not economically viable would not be expected to remain in the market unless the acquirer expects the acquisition to generate significant efficiencies that will make the assets economically viable. In such cases, the acquiring firm would acquire the failing firm to benefit from the resulting efficiencies, arising from the merger, rather than from a reduction in competition since the failing firm would leave the market in any event. Such a merger is likely to result in consumer benefits since the competitive outcome with the merger may be better than without the merger.

Comment 7: It may be that there will be more merger cases involving financially troubled firms and, as a result, more failing firm claims in difficult economic times. However, agencies should assess whether the conditions for a failing firm are met in the same way during difficult economic times as during a less challenging economic environment.

Comment 8: Merging parties may advance claims that a merger will not harm competition on the grounds that one of the merging parties is "flailing", *i.e.*, is in financial distress but does not meet the conditions of a failing firm. If the criteria to establish a failing firm are not met, agencies should appropriately consider these claims in the analysis of competitive effects since the financial weakness of the firm may still be a relevant factor in determining whether the merger is anticompetitive. In such cases, a firm's weakened financial condition may indicate that it is likely to compete less effectively in the future, such that the merger will not substantially lessen competition.

administration is relevant to whether to the firm is unable to meet its financial obligations in the imminent future. Laws governing administration vary across jurisdictions and may consequently restrict the options available to potential acquirers of all or part of a failing firm.

C. In assessing claims that a merger will not harm competition because a division of a firm is failing, agencies may assess whether the following conditions are met: (a) the division has a negative cash flow on an operating basis; (b) the division and its assets would exit the market in the imminent future absent the merger; and, (c) there is no reasonable less anticompetitive alternative outcome than the merger in question.

WORKING GROUP COMMENTS
Original Comments (April 2010)

Comment 1: In some instances, a merger may involve the acquisition of a failing division (or group of related assets) of an otherwise financially viable company. In such cases, in some jurisdictions the merging parties may claim that the merger will not harm competition significantly because the failing division and its assets will exit the market absent the merger. Such claims may be considered as part of the competitive effects analysis, or as a formal defence to an otherwise anticompetitive merger.

Comment 2: In jurisdictions that consider failing division claims, agencies should apply similar conditions to determining whether a division is failing as would be applied to failing firm claims. However, given factual differences between a failing division and a failing firm, agencies should also be aware that the conditions may need to be applied differently. In assessing failing division claims agencies should be aware of the possibility that, in some cases, the accounting practices of the parent company may create the appearance of a failing division when the division is not in fact failing. The fact that a business division is not currently profitable does not necessarily mean that the division is failing or necessarily that it will exit the market in the imminent future. A division may operate with temporary losses but be able to recover, and even an unprofitable division may be unlikely to exit if it serves an important purpose in the company, such as supporting or developing an important brand or other business line. In addition, it may be difficult to assess the amount of money that the parent company could be expected to invest in the division absent the merger. Therefore, agencies should seek from the merging parties clear evidence demonstrating that, absent the merger, the division is likely to fail, and its assets are likely to exit the market in the imminent future.

Comment 3: In assessing whether the failing division has a negative cash flow on an operating basis, agencies should ensure that the correct revenues and costs are considered. Given the ability of the larger firm to allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, agencies should require supporting evidence not based solely on documents that have been prepared by the merging parties for the purpose of demonstrating negative cash flow or the prospect of exit.

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