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Out-of-Market Efficiencies in Competition Enforcement – Note by the European Union

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement.htm.

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1. Introduction

1. Efficiencies, and the pro-competitive effects they bring to the market, are important considerations in the enforcement of competition rules. They may contribute to the exemption of an agreement that otherwise would be declared incompatible with competition law,[1] or allow competition authorities to authorise concentrations that – absent the demonstration of such efficiencies – would have raised competition concerns.

2. In light of this role, it is crucial that competition authorities provide legal certainty to market operators and define clearly what constitutes an efficiency and under which conditions they can be taken into account in the competitive assessment. In this regard, the European Commission ("Commission") notes that efficiencies are generally defined in the Treaty on the Functioning of the European Union ("TFEU") as improvements to the production or distribution of goods or advancements of technical and economic progress.[2] In particular, efficiencies create additional value in the market by lowering the cost of producing an output, by improving the quality of the product and/or by creating new products.[3]

3. Another issue is whether a competition authority may take into account efficiencies generated outside the relevant market, meaning efficiencies that benefit economic agents (including consumers) in other markets than the market in which the agreement or practice or the concentration causes the anticompetitive effects. This type of efficiencies has been defined as "out of market efficiencies", as they accrue to economic agents that are not part of the relevant market.

4. Both scholars and competition authorities take different positions on whether out of market efficiencies should be taken into account and weighed against the anti-competitive effects caused in the relevant market, with some arguing that all or some out of market efficiencies should be considered[4] while others rejecting this proposition.[5]

5. In this context, the Commission notes that the debate on out of market efficiencies is related to, but different from, the "standard" that competition authorities apply in their enforcement of competition law. Standards such as "consumer welfare", regardless of how broadly defined (e.g., how broadly a jurisdiction interprets the notion of "consumer" or "welfare"), relate to the category of economic agents that should benefit from the efficiencies at stake. The assessment of out of market efficiencies does not relate to the type of economic agent to be considered under the applicable welfare standard. It rather determines whether efficiencies that benefit economic agents not operating in the relevant

[1] Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU").

[2] *Ibid*.

[3] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty (2004), PB C-101/08, para 35.

[4] See for example Francesco Ducci, Out-of-Market Efficiencies, Two-Sided Platforms, and Consumer Welfare: A Legal and Economic Analysis, 12 J. Comp. L. & Econ. 591 (2016).

[5] See for example Maarten Pieter Schinkel and Leonard Treuren, Green Antitrust: (More) Friendly Fire in the Fight against Climate Change, Amsterdam Law School Research Paper No. 2020-72; and Luc Peeperkorn, Competition Policy is not a Stopgap!, 12 J. Eur. Comp. L. & Pract.6, 415–418.

market(s) can be taken into account to offset the harm to those economic agents that operate in the relevant market and are affected by the conduct or concentration in question. This distinction is pertinent regardless of which category of economic agents are "protected" by the applicable standard.

6. Against this background, the following sections will (a) illustrate the EU legal framework in relation to efficiencies and out of market efficiencies, with a particular focus on efficiencies generated by sustainability agreements (Section 2), (b) present the Commission's antitrust enforcement practice in this regard together with the relevant case law of the Union Courts (that is, the General Court and the Court of Justice of the European Union) (Section 3) and (c) explain the approach taken on out of market efficiencies when enforcing the EU merger rules (Section 4).

2. EU legal framework on the assessment of efficiencies in antitrust

7. In the EU legal framework, in which the "consumer welfare" standard applies, companies that restrict competition by way of agreements or unilateral conduct are able to defend themselves by demonstrating that their practice leads to efficiency gains that outweigh the anticompetitive harm suffered by consumers as a result of the same practice. In particular, Article 101(3) TFEU sets out the conditions under which such a defence can be successfully invoked by the parties to a restrictive agreement. These conditions are discussed below.

8. In this respect, it is important to note that the Court of Justice of the European Union has affirmed the existence of an efficiency defence based on similar conditions also for the conduct of dominant companies that restricts competition.[6] While in this contribution we focus on the defence for restrictive agreements, the same considerations apply *mutatis mutandis* to a defence for unilateral conduct.

2.1. Article 101(3) TFEU and out of market efficiencies

9. For an efficiency defence to be successful under Article 101(3) TFEU, four cumulative conditions need to be met: (i) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) consumers must receive a fair share of the benefits; (iii) the agreement must be indispensable for achieving the benefits; and (iv) competition must not be eliminated in respect of a substantial part of the products in question.[7]

10. For the purpose of this contribution, the Commission will focus on the second condition, namely the requirement that consumers receive a fair share of the benefits generated by the agreement at stake. Detailed guidance on the content and scope of this requirement is provided by the Commission in its Guidelines on the application of Article 101(3) of the Treaty ("Article 101(3) Guidelines").[8]

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[6] See for example Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 140.

[7] The burden of proving these conditions lies with the undertakings (see Article 2 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04.01.2003).

[8] See footnote 3.

11. In relation to this fair share condition, the Article 101(3) Guidelines explain that:

1. First, the definition of "consumers" under Article 101(3) is very broad and encompasses all direct and indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, regardless of whether these economic agents are companies or natural persons.[9]
2. Second, the requirement that consumers must receive a "fair share" of the benefits implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restrictive agreement. In practice, this means that consumers "directly or likely affected" by the agreement must enjoy benefits at least equal to the negative effects caused by the agreement. In other words, the net effect on the consumers of the products covered by the agreement must at least be neutral (full compensation).[10]
3. Third, it is not necessary that consumers affected by the agreement receive a share of each and every efficiency gain generated in the market by the agreement.[11] Therefore, the decisive factor is the overall impact of the agreement on consumers of the products in the relevant market and not the impact on each individual consumer in that group.[12]
4. Fourth, also efficiencies that will accrue to consumers in the future can be taken into account even if, before those efficiencies materialise, the agreement will have only negative effects. In that case, however, it will be necessary to discount the value of the benefits that will materialise in the future (to take into account the time lag during which consumers will not be able to enjoy the benefits) before weighing them against the immediate anticompetitive effects of the agreement.[13]

12. The Article 101(3) Guidelines also address the specific issue of out of market efficiencies, as they explain that the assessment of efficiencies under Article 101(3) is "in principle made within the confines of each relevant market to which the agreement relates".[14] Consequently, such out of market efficiencies are generally dismissed because "negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market".[15]

13. The Commission's approach to out of market efficiencies is a logical consequence of the way in which the "fair share" requirement is explained in the Article 101(3) Guidelines. Indeed, this framework requires in principle that the negative effects suffered by consumers of the product in the relevant market affected by the agreement must be fully compensated by the benefits generated by the agreement in that same market. Within such framework, out of market efficiencies – that generally would not provide benefits to the

[9] Art. 101(3) Guidelines, para 84.

[10] Art. 101(3) Guidelines, para 85. This means, conversely, that if such consumers are worse off following the agreement, the second condition of Article 101(3) is not fulfilled.

[11] Art. 101(3) Guidelines, para 86.

[12] Art. 101(3) Guidelines, para 87.

[13] Art. 101(3) Guidelines, paras 87 and 88. Note that also future harm needs to be discounted.

[14] Art. 101(3) Guidelines, para 43.

[15] *Ibid.*

same category of consumers – usually cannot fulfil the second condition of Article 101(3) as they benefit consumers in another geographic or product market.

14. An exception to this rule concerns the scenario in which the consumers enjoying the benefits of the restrictive agreement are situated on a *related* relevant geographic or product market and are substantially the same as those consumers suffering the anticompetitive harm *within* the relevant market.[16] In this particular situation out of market efficiencies can be convincingly expected to benefit the consumers that suffer the negative effects and therefore to contribute to the compensation of those same consumers.

15. In line with the overall consumer welfare standard, this framework requires that the consumers that suffer from the anticompetitive agreement are properly protected and compensated. Indeed, unconditionally taking into account out of market efficiencies in the assessment of the fair share condition of Article 101(3) carries significant risks:

1. First, consumers in the relevant market may be harmed because all benefits could end up with the parties to the restrictive agreement or other beneficiaries that are not exposed to any harm. This would mean that a restrictive agreement could be considered legitimate under the EU antitrust rules even though consumers suffering the negative consequences receive none of the benefits.
2. Second, without full compensation of the harmed consumers, it is not clear under Article 101(3) if there should be a minimum level of "in-market" efficiencies to satisfy the "fair share" requirement, and what such level should be.
3. Third, also benefits that are produced in very "distant" or completely unrelated markets from the one where the negative effects occur, would need to be taken into account. This would risk not only that harmed consumers will not receive any meaningful benefits or no benefits at all, not even indirectly, but also that the assessment of antitrust cases will become increasingly complex and unpredictable, as the benefits and markets to be considered by companies and competition authorities would likely increase substantially.
4. Fourth, competition authorities may be called to balance competitive harm against an indefinite number of various societal goods, such as climate or environmental benefits, social benefits, freedom of expression, etc. Competition authorities do not have the expertise or the democratic mandate to balance these possible efficiencies for society as a whole.
5. Last, all of the above may lead to a divergent application of Article 101(3) across the EU Member States (and across different sectors), with various approaches and criteria being applied to the same type of agreements in different Member States. This will reduce legal certainty and hamper the consistent application of EU antitrust rules in general.

[16] This logic is explained in the Article 101(3) Guidelines, which says in paragraph 43 that "*where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same*".

2.2. Out of market efficiencies and sustainability agreements: the new chapter on sustainability agreements in the Horizontal Guidelines

16. The need to tackle climate change and the European Commission's priority of greening the economy[17] have triggered a wide debate as to how competition policy can support the European Green Deal and, more generally, address sustainability challenges. On the one hand, competition policy is only part of a more comprehensive EU response to sustainability and environmental challenges. Policy initiatives and regulation are in many cases the best solution to achieve sustainability objectives by boosting investments, preventing potential harm to the environment or other protected interests and by reflecting this in the way products and services are produced, priced and taxed. On the other hand, market players demand clarity and legal certainty as to how competition authorities assess cooperation agreements between competitors that want to contribute to the pursuit of such sustainability objectives.

17. Often the benefits that these agreements promoting certain sustainability goals bring are linked to qualitative improvements of the products or production processes. However, sometimes the efficiencies caused by such agreements may materialize in part or exclusively outside the relevant market(s).

18. In response to calls for guidance and legal certainty from various stakeholders, the European Commission included a new chapter on sustainability agreements in its revised Horizontal Guidelines.[18]

19. This new chapter provides general guidance on the competitive assessment of agreements between competitors that pursue sustainability objectives ('sustainability agreements').

20. It is important to highlight that the concept of sustainability covered by the Horizontal Guidelines is a broad one: it finds it roots in the concept of sustainable development, which is a core principle of the Treaty on the European Union and a priority objective for the Union's policies.[19] In broad terms, sustainable development refers to the ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs. It encompasses activities that

[17] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions, The European Green Deal (COM/2019/640 final), "The European Green Deal".

[18] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1 (referred to as the "Horizontal Guidelines").

[19] See Article 3 TEU. The European Commission has committed to implement the United Nations' sustainable development goals (2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015). The 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals (including, for example, Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 7: ensure access to affordable, reliable, sustainable and modern energy; Goal 9: build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; Goal 13: take urgent action to combat climate change and its impacts); and 169 targets (including, for example, Target 9.1: develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and Target 13.1: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries).

support economic, environmental and social (including labour and human rights) development.[20]

21. Sustainability agreements can take the form of one of the cooperation agreements covered by the Horizontal Guidelines (namely R&D, specialisation, purchasing, commercialisation or standardisation agreements) and need to be assessed in accordance with those specific chapters dealing with the relevant type of cooperation agreement while at the same time taking into account the sustainability objective(s) in line with the guidance provided in the sustainability chapter.

22. The chapter discusses the analysis of possible efficiencies in relation to sustainability agreements that restrict competition within the meaning of Article 101(1) TFEU, building on the approach set out in the Commission's general Article 101(3) Guidelines explained in section 2.a above. It explains the available flexibility under its normative framework to integrate sustainability considerations in its analysis.

23. First, the categories of efficiencies taken into consideration by the Horizontal Guidelines is broad. In this respect, the Commission considers that benefits can consist of reductions in production and distribution costs, increases in product variety and quality, improvements in production or distribution processes, and increases in innovation. It also considers a broad range of sustainability benefits resulting from the use of particular inputs, technologies and production processes.

24. Second, in order to assess the condition of fair share for consumers (see paragraph 2 above), the Horizontal Guidelines consider three possible categories of benefits, including collective benefits, which traditionally were not taken into account in an antitrust analysis.

25. The three ways in which consumers can receive a fair share of the efficiencies from sustainability agreements infringing Article 101(1) TFEU are the following:

- Individual use value benefits: sustainability benefits can be assessed as traditional quantitative or qualitative efficiencies when they improve the quality of the product, product variety or lead to a price decrease. Consumers obtain such benefits through their consumption or use of the product covered by the sustainability agreement (for instance water or energy savings).
- Individual non-use value benefits: consumers may be willing to pay for a sustainability characteristic of a given product (for instance, green energy use in the production; production process without toxic pollutants; production without child labour) even if it is not strictly linked to their use or consumption of the product (the product may not in itself be of higher quality or result in lower costs/prices because of these characteristics). Such willingness to pay expresses the consumers' appreciation of sustainability benefits to others. These indirect qualitative benefits are from an economic point of view not different from direct qualitative benefits if appreciated by the consumers in the relevant market.

[20] See for example, UN Resolution 66/288 adopted by the General Assembly on 27 July 2012. For the purpose of the Horizontal Guidelines, the notion of sustainability objectives includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.

- Collective benefits: certain sustainability benefits may also accrue to a larger group of society, irrespective of the appreciation by individual consumers in the relevant market. They may be occurring at least partly outside the relevant market, for instance the reduction in soil pollution or the emission of toxic particles in the air which may benefit the health of all citizens in a given area, not just that of consumers of the products or services concerned.

26. The overarching principle relating to the fair share condition for all these categories of benefits is that they should ensure that the restrictive effects on competition are at least neutralised for consumers in the relevant market. Within that framework, out of market efficiencies can be accepted within certain limits in line with the Article 101(3) Guidelines (see paragraph 14 above). More specifically, collective benefits can only be taken into account to the extent that they also contribute to compensate the harm to consumers in the relevant market. This requires a substantial overlap between the larger group of beneficiaries and the consumers in the relevant market.[21]

27. In practice, this means that environmental, social or other sustainability benefits can be taken into account, just like any other type of efficiency, to justify a restrictive agreement as long as they also have a positive impact on consumers in the relevant market.

28. Taking into account sustainability benefits that do not benefit consumers in the market would imply allowing agreements or practices that harm the consumers concerned because there are benefits somewhere else.

29. It has been argued that environmental protection has a special status that may justify environmental benefits to be treated with priority. Reference is made to Article 11 TFEU[22] and Article 37 of the Charter of Fundamental Rights of the EU[23], which state that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. Similarly, it has been pointed out that Article 191 TFEU[24] expressly promotes measures combating climate change.

[21] This may be the case when the group of harmed consumers (in the relevant market) largely overlaps with the (larger) group of beneficiaries of the collective benefits.

[22] "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*."

[23] "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*."

[24] "Union policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where

30. Indeed, Article 11 and 191 TFEU specifically promote environmental protection, but these are not the only Treaty provisions supporting policy objectives different from the promotion of undistorted competition in the European Union: Articles 9, 10, 12 and 13 TFEU also require that, in defining and implementing its policies, the Union takes into account other public policy interests, namely the promotion of a high level of employment, the guarantee of adequate social protection, fighting discrimination, consumer protection, and animal welfare.

31. Therefore, although climate change concerns are those that triggered the sustainability debate and calls for urgent action, as recognised by the EU Green Deal, there are no legal grounds in the EU for singling out and providing special treatment to only some public policy considerations and the related out of market benefits (namely those related to combating climate change and the protection of the environment) while ignoring others that are also recognised in the Treaties.

3. Antitrust enforcement practice and case law of the Union Courts

3.1. The enforcement practice of the Commission in antitrust cases

32. As explained before, the assessment of the claimed efficiencies flowing from an anti-competitive/restrictive agreement is in principle made within the confines of the relevant market. In other words, the anti-competitive effects of such agreement in a relevant market can in principle only be outweighed by efficiencies generated by that agreement in the same relevant market. However, the Commission will consider out of market efficiencies within the limits set out in the Article 101(3) Guidelines. In particular, where two markets are related, efficiencies achieved in separate markets can be taken into account provided that the groups of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same. The below case examples from the Commission’s case practice will illustrate this approach.

3.1.1. CECED

33. In 1999, the Commission exempted an agreement notified by the European Council of Domestic Appliance Manufacturers (CECED) from the application of Article 101

appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

— available scientific and technical data,

— environmental conditions in the various regions of the Union,

— the potential benefits and costs of action or lack of action,

— the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.”

TFEU.[25] The agreement among the main European producers and importers of washing machines aimed at reducing energy consumption of domestic washing machines thereby reducing polluting emissions from power generation. To achieve this, the parties, which at the time covered more than 95% of the EU market, agreed to stop production and import into the EU of the least energy-efficient washing machines.

34. At the time, it was the first formal decision of the Commission pursuant to Article 101 TFEU regarding a horizontal agreement between almost all EU manufacturers and importers aimed at phasing out products which did not meet certain environmental standards. The production and import stop of some categories of the most polluting washing machines covered 10-11% of the machines sold in the EU. These accounted for a considerable proportion of the sales of some manufacturers prior to the agreement. The investigation also showed that energy efficiency was an important purchase criterion, on which manufacturers focussed their advertising and, therefore, an important parameter of competition in the market. Finally, technical improvements were also considered to increase prices in the short run.

35. Nevertheless, the Commission concluded that the agreement could escape the prohibition of restrictive agreements in Article 101(1) as it fulfilled the four cumulative conditions of Article 101(3). Firstly, the exemption decision noted that the agreement objectively contributed to technical and economic progress, by focusing production on more efficient machines. Secondly, consumers received a fair share of the benefits as the likely higher purchase costs of more efficient washing machines were quickly compensated by savings in electricity bills. Thirdly, the restrictions of competition were indispensable to achieving those benefits. Consumers do not sufficiently take external costs into account in their purchasing decisions. The application of a minimum efficiency ratio mitigated this market failure. Alternatives such as public awareness campaigns or application of ecolabels would be complementary, rather than substitutable to the agreement. Fourthly, the agreement did not eliminate competition. Various technical means to improve energy efficiency of washing machines were available to all manufacturers and competition remained also on other important parameters of competition such as prices, technical effectiveness, brand image etc. And 90% of sales of washing machines were not directly concerned.

36. This part of the decision is uncontroversial. However, the part that is always referred to in the discussions about out of market efficiencies concerns a sort of *obiter dictum* in the decision where the Commission indicated, in the context of its combined analysis of the first and second condition, that the agreement also contributed to achieving environmental objectives under the Treaty. More specifically, the Commission made estimates of the savings in marginal damage from (avoided) carbon dioxide emissions and sulphur dioxide. These calculations led it to indicate in its decision that the environmental benefits to society brought about by the CECED agreement "*would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*".

37. The decision at the time did not explicitly clarify what weight was given to these collective environmental benefits, as opposed to the individual benefits for consumers of washing machines, for granting the exemption. Since the adoption of the Commission's more economic approach as set out in the Article 101(3) Guidelines, such collective benefits (for the environment) would be considered if they have a clear link or overlap with

[25] 2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718.CECED), OJ L 187, 26.7.2000, p. 47.

the consumers of the products in the relevant market (as also confirmed in the new chapter on sustainability agreements in the Horizontal Guidelines). In any case, the CECED decision also identified clear in-market efficiencies that on their own seemed to outweigh the negative effects (price increase and reduction in technical diversity and consumers choice) of the agreement.

3.1.2. MasterCard

38. In 2007, the Commission adopted a decision prohibiting MasterCard's multilateral interchange fees (MIF) for cross-border card payments with MasterCard and Maestro-branded consumer credit and debit cards between Member States of the European Economic Area ('the cross-border MIF').[26] A MIF is a charge levied on each payment card transactions at a retail outlet involving two types of banks, namely, the cardholder's bank or 'issuing bank' and the retailer's bank or 'acquiring bank'. In the MasterCard system, the charge is paid by the acquiring bank to the issuing bank. The Commission concluded that MasterCard's cross-border MIF violated Article 101 TFEU as it inflated the cost of card acceptance for retailers and consumers, without leading to objective efficiencies for them.

39. The Commission prohibited MasterCard's cross-border MIF because it inflates the base on which acquiring banks charge prices to merchants for accepting payment cards, as the MIF accounts for a large part of the final price businesses pay for accepting MasterCard's payment cards. This restriction of price competition harms businesses and their customers.

40. The decision analyses whether MasterCard's cross-border MIF enhances the efficiency of the scheme to the benefit of consumers. In its analysis, the Commission applied the standard set out in its Article 101(3) Guidelines, which requires that efficiency claims must be substantiated based on empirical data and facts. MasterCard claimed that its cross-border MIF helped the scheme to maximise system output by balancing the demands of cardholders and merchants. Cardholders would be less willing to pay for card usage than merchants for card acceptance. Costs would, however, be incurred on the issuing side. By transferring revenues from the acquiring side to the issuing side, MasterCard's cross-border MIF would alleviate a cost inequality and achieve a balance between cardholder and merchant demand to maximise system output. This process would in turn lead to a number of objective efficiencies which MasterCard claimed represented the technical and economic progress of payment card systems as compared to cash and (at the time) cheque-based payment systems.

41. However, MasterCard's claim that the use of a MIF helped maximise its system output relative to a situation with no MIF was not supported by empirical evidence but only by abstract economic models. Statistics from the European Central Bank, on the contrary, indicated that in countries where domestic card schemes had operated without a MIF for decades, card usage per capita was among the highest in Europe. This raised the question whether a MIF can do more harm than good when it comes to spurring greater card usage in Europe.

42. Most importantly in this context, when setting a MIF the member banks of a card scheme must guarantee a fair share of the benefits to all customers, not only to those that are on the side of the scheme which receives the MIF. In MasterCard's scheme, where the MIF is paid by the acquiring bank to the issuing bank, the efficiencies must in particular outweigh the restrictive effects that disadvantage merchants (and subsequent purchasers).

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[26] Commission Decision of 19 December 2007 in case COMP/34.579 MasterCard, available at https://competition-cases.ec.europa.eu/cases/AT.34579

The Commission therefore reviewed how MasterCard factually established the maximum level of the cross-border MIF which was ultimately 'paid' by merchants and their customers. This 'cap' was in practice determined through regular cost studies which MasterCard undertook for most of its payment products. The decision states that some of the cost components of MasterCard's methodology should be discounted as they did not relate to services that appear to sufficiently benefit merchants. For instance, costs incurred by card issuing banks which are not technically necessary for executing a payment transaction and which are related to the provision of consumer loans should not be taken into account when setting a cap on the MIF. Hence, without further evidence — which MasterCard failed to submit — the Commission could not simply assume that by pursuing its aim of maximising system output MasterCard was also creating objective efficiencies that benefit all customers, including those that ultimately bear the cost of a MIF (here merchants and their customers). In order to satisfy the second condition of Article 101(3) TFEU, the methodology used to implement a model for setting a MIF must not only be objective and reasonable, but also allow those scheme customers that are ultimately 'paying' the MIF, namely merchants, to obtain a fair share of the benefits. This was not established for MasterCard's cross-border MIF. The Commission therefore concluded that MasterCard's cross-border MIF did not lead to objective efficiencies for all the customers concerned that could balance the negative effects on price competition between its member banks.

3.1.3. Star Alliance

43. In 2013, the Commission made commitments offered by Air Canada, United and Lufthansa legally binding to address competition concerns pursuant to Article 101 TFEU regarding these airlines' cooperation agreement.[27] According to the Commission's preliminary assessment, this agreement, which took the form of a revenue-sharing joint venture relating to passenger air transport on routes between Europe and North America, could harm premium passengers on one route, namely between Frankfurt and New York. The Commission had concerns that the agreement may have eliminated competition between the parties on price and capacity and may have resulted in higher prices for premium passengers on the Frankfurt-New York route. In addition, due to considerable barriers to entry and expansion, new and existing competitors would be unable to challenge the market power of the parties.

44. Initially, the parties argued that their cooperation created efficiencies on both the Frankfurt-New York route and on other related routes (so-called "behind and beyond routes" such as Prague-Frankfurt-New York or Frankfurt-New-York-Seattle), leading to benefits for connecting passengers. However, the Commission found that the efficiencies produced would not outweigh the negative effects of the cooperation on the Frankfurt-New York route.

45. Therefore, the parties offered commitments aimed at facilitating the entry of new competitors on the Frankfurt-New York route. Since the main entry barrier remained the slot shortage at airports, the parties offered to make landing and take-off slots available at Frankfurt and/or New York airports. The parties also offered to enter into agreements allowing competitors to offer tickets on the parties' flights (reducing competitors' frequency disadvantage) and to get better access to the parties' connecting traffic. Finally, the parties

[27] Commission Decision of 23 May 2013 in Case AT.39595 Air Canada/United/Lufthansa (Star Alliance), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf

committed to submit data concerning their cooperation, which would facilitate an evaluation of the alliance's impact on the markets over time.

46. In accepting these commitments, the Commission considered it appropriate to broaden the existing test for assessing efficiencies, as set out in the Article 101(3) Guidelines, in view of the specific characteristics of the aviation industry and of the particular circumstances of this case. This broadened test includes taking into account efficiencies produced on routes related to the route of concern (namely, the "behind and beyond routes"), provided there is a considerable commonality between passenger groups travelling on the route of concern and these related routes. However, under this broadened test, the Commission still accepted only those efficiencies that accrued to the passengers also travelling on the Frankfurt-New York route. In other words, the broadened test does not weigh up the harm suffered by one customer group against benefits received by another customer group.

3.2. Relevant case law of the Union Courts

47. The issue of out of market efficiencies, and its relation to the principle of full compensation, has not been explicitly dealt with by the Union Courts. In particular, the Court of Justice has not provided specific guidance on whether (or how) out of market efficiencies should be taken into account.

48. That said, the Union courts have over the years consistently upheld the decisions adopted in antitrust cases by the Commission also in relation with the latter's analysis of efficiencies under Article 101(3).

49. For example, in the *Asnef-Equifax* case[28], the Court of Justice confirmed some of the principles that underlie the Commission's interpretation of the second condition of Article 101(3). Indeed, after having confirmed that it is not necessary that the efficiency deriving from the agreement benefits each and every consumer individually, the Court confirmed that the "***overall*** *effect on consumers* ***in the relevant markets*** *must be favourable*".[29]

50. In that judgment, the Court of Justice seems therefore to confirm that (i) consumers in the relevant markets should be the focus of the analysis of the efficiencies and that (ii) those consumers must enjoy an "overall effect" that is "favourable". It seems clear that, for an "overall effect" – i.e., taking into account both anti-competitive and pro-competitive effects – to be favourable, it needs to be positive or at least neutral for consumers, as required by the full compensation principle endorsed by the Article 101(3) Guidelines. A similar analysis was done by the Court in the Mastercard judgment, where the Court of Justice restated that "*under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration*".[30]

51. In conclusion, while the Union Courts have not explicitly clarified how out of market efficiencies should be treated for the purpose of Article 101(3), they have so far endorsed the Commission's practice on the point as reflected in the principles set out in the Article 101(3) Guidelines (see Section 2.a).

[28] Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, para. 72.

[29] *Ibid.*

[30] Judgment of 11 September 2014, *Mastercard v. Commission,* C-382/12 P, EU:C:2014:2201, para 236.

4. Out of market efficiencies in EU merger control

4.1. Framework for assessing efficiencies under the EU Merger Regulation

52. The assessment of efficiencies is embedded in the EU merger control framework. The EU Merger Regulation[31] acknowledges that the assessment of efficiency claims constitutes an integral part of the merger assessment in Recital 29, which states "*In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned.*" The Commission's Horizontal Merger Guidelines[32] and Non-horizontal Merger Guidelines[33] further elaborate on how efficiencies are assessed in merger cases.

53. As regards horizontal mergers, Section VII of the Horizontal Merger Guidelines sets out the framework for the Commission's assessment of efficiencies. Paragraph 78 of the Horizontal Merger Guidelines specifies the three cumulative conditions that an efficiency claim must meet for the Commission to take the efficiency claim into account – namely that the efficiencies have to benefit consumers, be merger-specific and be verifiable. As regards the benefit to consumers specifically, paragraph 79 of the Horizontal Merger Guidelines further specifies that "*The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.*" As to the benefits themselves, the EU merger control framework recognises that mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers, including benefits from new or improved products or services resulting from innovation.[34] Furthermore, in order to be considered as a counteracting factor capable of offsetting the negative effects of a merger, efficiencies must be timely.[35]

54. As regards non-horizontal mergers, paragraph 13 of the Non-horizontal Merger Guidelines acknowledges that vertical and conglomerate mergers also provide scope for efficiencies. Paragraph 52 of the Non-horizontal Merger Guidelines explains that the three-prong test for the assessment of efficiencies set out in Section VII of the Horizontal Merger Guidelines is also applicable to the assessment of efficiencies in the context of non-horizontal mergers.

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[31] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p.1 (the 'EU Merger Regulation').

[32] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p.5 (the 'Horizontal Merger Guidelines').

[33] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p.6 (the 'Non-horizontal Merger Guidelines).

[34] Horizontal Merger Guidelines, paragraphs 80 – 81.

[35] Horizontal Merger Guidelines, paragraph 82.

4.2. The Commission's enforcement practice on efficiencies and specific considerations related to out of market efficiencies

55. Thus, when appraising concentrations under the EU Merger Regulation the Commission also considers the positive effects of the merger at hand. While no merger case has so far been approved by the Commission exclusively on the basis that the merger-specific efficiencies would offset consumer harm, in some cases, the efficiency claims made by the merging parties were partially accepted by the Commission and balanced against the competition harm.[36]

56. As regards out of market efficiencies, there is demand from some stakeholders for the Commission to consider a longer time horizon and overall benefits to society when looking at whether the conditions for efficiencies are met. Stakeholders have expressed such demands in particular in relation to so-called 'green efficiencies' or benefits related to sustainability.

57. Recently, the Commission assessed alleged efficiencies advanced by the merging parties in the *Aurubis/Metallo* case,[37] which concerned access to copper scrap in the EEA. The first set of the alleged efficiencies concerned better valorisation of copper scrap through the combination of the parties' complementary know-how and technologies, while the second set concerned possible additional metal recovery and other environmental benefits. On the first one, while having initial doubts as to the verifiability, transaction-specificity and timeliness of the efficiencies, the Commission concluded that the evidence provided by the parties suggested that there was at least a possibility that such efficiencies would materialise. If that was the case, i.e., if such efficiencies were to materialise to a significant extent, the Commission further concluded that they would at least partly be passed-on to customers, thus potentially partly offsetting any adverse price effect stemming from the transaction. In any event, a mere possibility of efficiencies materialising is not sufficient to meet the legal standard for assessing and accepting efficiencies under the EU Merger Regulation. On the second one, the Commission found that the parties' claim was not substantiated enough to the requisite standard.

5. Conclusion

58. In relation to out of market efficiencies, the Commission applies substantially the same approach in its antitrust and merger enforcement. In particular, while the respective frameworks for assessment are different, out of market efficiencies will be taken into consideration in those situations where they benefit substantially the same consumers as those suffering the competitive harm in the relevant market. This is because the EU's legal framework focuses on protecting consumers against harm caused by agreements and concentrations affecting them.

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

[37] Case M.9409 *Aurubis/Metallo*, paragraphs 831 and ff.