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Efficiencies in Merger Control – Summaries of contributions

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Austria

Efficiency considerations are taken into account at various stages of the Austrian merger review process. They are for instance assessed as countervailing factors in the evaluation of market dominance and the significant impediment of effective competition (SIEC) test, together referred to as "substantive tests". They are conducted during both phase 1 and phase 2 merger proceedings by the Austrian Federal Competition Authority (AFCA) and the Austrian Cartel Court. Furthermore, in exceptional cases, out-of-market efficiencies, may be considered a legitimate justification for approving mergers that would otherwise be prohibited (§ 12 (2) Austrian Cartel Act).

The AFCA recognizes that certain mergers can lead to improvements of competition. It is thus standard practice for the AFCA to examine efficiency claims in merger proceedings with close scrutiny. Merging parties may already indicate in their merger notification specific countervailing factors that would offset potential harms to competition assessed under the substantive tests. These can include countervailing buyer power, market entry, efficiencies or the existence of a restructuring merger. Such claims must be clearly substantiated and it must be specified when e.g. efficiencies are expected to materialise, the extent of their impact, and the probability of their realisation. It must also be detailed how the expected efficiency benefits will be passed on to consumers and why they are not achievable through alternative ways. It is furthermore worth noting that efficiency claims are weighted in the same manner under both the market dominance test and the SIEC test. The standard of proof to convincingly illustrate efficiency claims is correspondingly high which reflects the importance of these factors in the overall analysis.

In phase 2 proceedings, when a merger is submitted to the Cartel Court for review, it ultimately decides whether a merger should be prohibited. According to Austrian law, even if the conditions for prohibition are formally met, the Cartel Court may exceptionally approve a merger provided that one of the three legal justifications set out in § 12 (2) Austrian Cartel Act applies to the specific case: 1) the merger improves competitive conditions on a third market; 2) is necessary to maintain or improve international competitiveness of the undertakings; or 3) brings important economic advantages. It is important to note that these justifications do not explicitly constitute efficiency gains but rather "public interest" tests or "out-of-market efficiencies", where competitive harms to consumers are not entirely compensated but a balancing decision is made.

The first and third justifications are not concerned with improving the competitive conditions of the companies in question, but with structural improvements on a third market or general economic benefits. In contrast, the second justification focuses on strengthening the competitiveness of the merging undertakings as an economic unit.

For the improvement in competitive conditions criterion the merger needs to have a positive impact on the market structure on a third market, since improvements on the affected market of the merger are already considered under the substantive tests. For this justification to apply, the advantages of e.g. efficiency gains from the merger must outweigh the disadvantages for competition and there must be a causal link between the efficiency gains and the merger. Furthermore, these effects must be achievable with high probability within a reasonable period.

The second justification requires that the merger must be necessary to improve or maintain the international competitiveness of the undertaking on a durable basis. This must be

economically justified and aligned with broad economic objectives such as full employment, monetary stability, foreign trade balance and growth.

Lastly, mergers may be approved if they are justified by case-specific economic advantages. Relevant factors include national economic policy objectives such as growth, innovation and full employment, as well as societal and environmental goals.

To date the Austrian Cartel Court has invoked these justifications only in exceptional cases. This may be due to the high burden of proof, which requires the undertakings to clearly demonstrate that the anticipated efficiency gains will effectively materialise following the merger.

BIAC

Business at OECD (BIAC) appreciates the opportunity to make this written contribution to the roundtable on Efficiencies in Merger Review. In doing so, it builds on the OECD's previous discussions related to merger efficiencies.[1] *Business at OECD* has consistently stressed that the way efficiencies are assessed holds significant importance for the broader business community, particularly in the context of merger evaluations.

1 See OECD, Out-of-Market Efficiencies in Competition Enforcement – Note by BIAC, DAF/COMP/WD(2023)118 (Nov. 27, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)118/en/pdf; OECD, Theories of Harm for Digital Mergers – Note by BIAC, DAF/COMP/WD(2023)73 (June 5, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)73/en/pdf; OECD, Conglomerate Effects of Mergers – Note by BIAC, DAF/COMP/WD(2020)12 (May 28, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)12/en/pdf; OECD, Merger Control in Dynamic Markets – Contribution from BIAC, DAF/COMP/GF/WD(2019)41 (Nov. 20, 2019), https://one.oecd.org/document/DAF/COMP/GF/WD(2019)41/en/pdf; OECD, Vertical Mergers in the Technology, Media and Telecom Sector – Note by BIAC, DAF/COMP/WD(2019)73 (June 4, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)73/en/pdf; OECD, Non-Price Effects of Mergers – Note by BIAC, DAF/COMP/WD(2018)71 (May 28, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)71/en/pdf; OECD, Role of Efficiency Claims in Antitrust Proceedings, DAF/COMP(2012)23, at 197-206 (May 2, 2013), available at https://www.oecd.org/en/publications/the-role-of-efficiency-claims-in-antitrust-proceedings_ceaed16d-en.html; OECD, Dynamic Efficiencies in Merger Analysis, DAF/COMP(2007)41, at 248-260 (May 15, 2008), available at https://www.oecd.org/en/publications/dynamic-efficiencies-in-merger-analysis_df6017f9-en.html; and OECD, Efficiency Claims in Mergers and Other Horizontal Agreements, OCDE/GD(96)65, at 59-79 (1995), available at https://www.oecd.org/en/publications/efficiency-claims-in-mergers-and-other-horizontal-agreements_b08fdf87-en.html.

Brazil

Mergers may generate several efficiencies for the companies involved in the transaction, such as the reduction of production costs, improvement of technology, or the increase in productivity, among others. In some cases, these efficiencies can also benefit consumers and market competition by improving the quality or contributing to price reduction of the final product, for example.

However, the same merger can also harm competition by eliminating competitors, strengthening dominant position, and abusing market power. The efficiencies generated may be sufficient, in theory, to offset the anticompetitive effects of the transaction. In these cases, the mergers must be approved by the antitrust authority.

Thus, it is the duty of antitrust authorities to evaluate if the efficiencies are, at least, equal to the anticompetitive effects identified in the merger review. In cases when the effect is non-negative, the transaction may be approved without restrictions.

In Brazil, the requirements to approve the efficiencies are detailed in the Guide for Horizontal Mergel Review[2] and in the Guide for Non-Horizontal Merger Reviews[3]. In brief, the guide states that, to be taken into consideration, efficiencies must be merger specific, likely, verifiable, and obtained in a time limit of up to two years, in addition to being passed on to consumers.

The criteria described in the guidelines are rigorous and difficult to be fulfilled by the parties, especially the obligation to pass on the efficiencies to consumers. In fact, according to the data gathered for this article, no transaction was approved by CADE from 2012 to 2023 without restrictions based only on the efficiencies presented.

However, in some cases, CADE recognised that the transaction could benefit competition, which was relevant to clear the merger without restrictions, such as in the Vessel Sharing Agreements case and the RAN sharing agreement between Telefônica and Tim. In other cases, the analysis of transaction efficiencies was relevant to establish the antitrust remedies to be applied, like in the merger between BM&FBovespa S.A. and CETIP S.A., as well as in the sale of Oi's assets to Tim, Claro, and Telefônica.

Thus, even if CADE has not approved any transaction based solely on efficiencies, they helped the agency decide for the clearance without restrictions of some transactions and to establish appropriate remedies to avoid potential competition issues identified while keeping the efficiencies created by the merger.

2 Available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf

3 Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/V+%20Guide%20in%20English%20-%20Final%20version%202.pdf.

Chile

While concentrations between companies could raise competition concerns, they may also be pro-competitive, in the form of efficiencies achieved by the merging companies. If certain standards are met, these efficiencies may even offset the potential adverse effects on competition resulting from a merger.

Since the implementation of mandatory merger control in Chile in 2017, the treatment of efficiency claims has evolved in line with international standards. The following summarizes the legal framework, assessment process, and role of efficiencies in merger reviews conducted by the National Competition Authority (Fiscalía Nacional Económica or "**FNE**").

Chilean legal framework for competition analysis, established under Decree Law No. 211 ("**DL 211**")[4], allows merging parties to submit efficiency claims during the merger review. The FNE's 2022 Horizontal Merger Guidelines[5] establish the key criteria for the assessment of such claims. To be taken into account, efficiency claims must meet three cumulative conditions: they must be (i) verifiable, (ii) merger-specific, and (iii) timely and beneficial to consumers. Out-of-market efficiencies are accepted under very limited circumstances and only as indirect offsets to potential competitive harm in the relevant markets. The Chilean Competition Court ("**TDLC**") has also developed case law on efficiencies in a number of cases applying a similar analysis[6].

The FNE evaluates efficiencies only after identifying anticompetitive effects[7], as mitigating factors that need to be claimed by the merging parties. The burden of proof lies entirely with the merging parties and the FNE does not assess efficiencies on its own initiative. To be considered, efficiency claims must be formally submitted and supported by verifiable evidence. Claims must clearly demonstrate the expected timing, magnitude, and impact on consumers of the efficiencies. The FNE's 2022 Horizontal Merger Guidelines distinguish between *productive efficiencies* (e.g., cost savings) and *dynamic efficiencies* (e.g., innovation and new products). The relative weight given to each type depends on the nature of the market. Dynamic efficiencies are more relevant in markets characterized by innovation, while productive efficiencies are more significant in static markets.

4 Available at: <https://www.fne.gob.cl/wp-content/uploads/2018/09/DL_211_English.pdf> [last viewed 02.06.2025].

5 Efficiencies treated from paragraphs 148 to 169. Available at: <https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-ingles.pdf> [last viewed 02.06.2025].

6 Cases in which the TDLC assessed efficiency claims are: (i) Resolution No. 43/2012; (ii) Resolution No. 54/2018; (iii) Sentence No. 166/2018; and (iv) Sentence No. 182/2022.

7 The FNE has assessed efficiencies as part of its analysis in a number of mergers and acquisitions, such as: (i) Case No. F90-2017, Ideal S.A. / Nutrabien S.A.; (ii) Case No. F178-2019, Clínica Iquique S.A. / Redinterclinica S.A.; (iii) Case No. F216-2019, Inmobiliaria y Administradora CGL Limitada / Compañía de Petróleos de Chile COPEC S.A.; (iv) Case No. F217-2019, Cornershop / Uber Technologies, Inc.; (v) Case No. F233-2020, Fiat Chrysler Automobiles N.V. / Peugeot S.A.; (vi) Case No. F250-2020, OK Market S.A. / Cadena Comercial Andina SpA y Comercial Big John Limitada (Oxxo); (vii) Case No. F295-2021, Liberty Latin America Ltd. / América Móvil, S.A.B de C.V.; and (viii) Case No. F340-2023, Entel S.A. / OnNet Fibra.

If the FNE identifies a risk of a substantial lessening of competition, merging parties may propose remedies[8]. The FNE then assesses both the proposed remedies and any claimed efficiencies altogether. The assessment of the sufficiency of remedies proposed by the parties must consider the analysis of the efficiencies that a merger may produce. However, in all cases reviewed so far, no efficiency claims have met the verification standards set out in the FNE's 2022 Horizontal Merger Guidelines.

The FNE's approach remains firmly grounded in protecting competition, excluding broader public interest considerations[9]. The FNE conducts its evaluation of efficiencies solely on a prospective basis. It does not perform *ex-post* reviews. The focus remains on whether the merger is likely to harm competition in the future and whether the claimed efficiencies are sufficient to counteract that harm.

8 The general conditions for the analysis of remedies are laid out in the FNE's 2017 Remedies Guidelines. Spanish version available at: <https://www.fne.gob.cl/wp-content/uploads/2017/10/Guia-de-remedios-.pdf> [last viewed 02.06.2025].

9 Regarding the focus of the merger analysis conduct by the FNE, see the FNE's 2022 Horizontal Merger Guidelines, Opening Remarks: "Specifically, the merger control regime is not intended to correct potential market failures in which the operation takes place or has an impact, nor to improve their competitive structures. This is because the DL 211 provides for other legal and/or regulatory mechanisms to address such matters. Furthermore, the institutional design of this regime does not grant the FNE legal powers to rule, within the context of a merger, on legal matters other than the promotion and defense of competition in the markets […]".

Chinese Taipei

This report explains various approaches and the development through which the Chinese Taipei Fair Trade Commission (hereinafter "the CTFTC") incorporates efficiency considerations in merger review—covering the types of efficiencies considered and the standards applied.

The CTFTC promulgated the *Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings* (hereinafter "the Merger Guidelines") in 2006. Over the years of implementation, competitive conduct has kept evolving with changing industries, rapid developing technologies, and diversification and functionality of products and services have continued to increase. In 2012, the amendment to the Merger Guidelines clarified that economic efficiencies are one of the elements that will be taken into consideration in determining the "overall economic benefit" of the merger.

A further review in 2014 of the Merger Guidelines added factors and approaches for assessments of the overall economic efficiencies: mergers may enhance productive, allocative, transactional, and innovative efficiencies through expanding production scale, integrating economic resources, or coordinating economic activities, ultimately contributing to positive effects of promoting competition or consumers' interests. The aforementioned "synergy" resulting from mergers also belongs to the "overall economic benefit," and "economic efficiencies" are incorporated into Point 13(1) of the Merger Guidelines as a factor to be considered in determining the "overall economic benefit." Point 13(2) of the Merger Guidelines provides for the factors to be considered in determining the economic efficiencies, which must satisfy the following criteria: (1) They can be proved to be realizable in the short term; (2) They are unattainable by any means other than the merger; and (3) They can be reflected in consumers' interests. This report then provides a concise description for key considerations in assessments of the CTFTC when reviewing merger filings in recent years.

The efficiencies brought by mergers, sometimes referred to as the "merger synergies", usually result from "economies of scale" achieved through expanding production scale, "economies of scope" achieved through integrating complementary resources of the merging parties, or "dynamic efficiencies" such as enhancing the incentive or capability of the merged enterprises to engage in research and development and speeding innovation of products, production processes or business models. In addition, the greater the anticompetitive effects caused by the merger, the more significant the efficiencies created must be for further assessment to be conducted regarding whether the efficiencies are sufficient to outweigh the anticompetitive effects.

Costa Rica

The contribution analyzes the treatment of economic efficiencies in the process of evaluating economic concentrations in the Costa Rican telecommunications sector, under the legal framework established by the General Telecommunications Law (Law 8642) and the Law on the Strengthening of Competition Authorities (Law 9736).

In this context, the possibility of approving an operation with potentially anticompetitive effects is conditional on the efficiencies generated exceeding such effects (art. 101 of Law 9736), provided that these are attributable, not achievable by less restrictive, verifiable and quantifiable means (art. 148 of the Executive Regulations).

The document distinguishes between productive efficiencies (cost reduction, economies of scale, scope or network) and dynamic efficiencies (innovation, technological modernization), and points out that in telecommunications these can arise from the integration of networks, national coverage, technological improvements such as the deployment of fiber optics, or the multi-service offer.

It is noted that, although the Parties notifying a concentration usually invoke efficiencies in their applications, SUTEL has rejected many of them for not complying with the legal requirements of accreditation and quantification. However, the authority has recognized positive indirect effects for consumers in several cases, such as in resolutions RCS-284-2018, RCS-331-2019 and RCS-106-2021, where it identified operational improvements, coverage expansion, economies of scope and greater competitive rivalry.

Finally, it is pointed out that the burden of proof if the Parties notifying a concentration to assess efficiencies falls. In cases where concentration significantly hinders competition, the nature, magnitude, and probability of materialization of efficiencies become decisive in deciding whether or not to approve the operation.

Croatia

This paper is a written contribution to the Competition Committee's call for country contributions to be discussed at the Roundtable on "Efficiencies in Merger Control" in June 2025.

In 2025, Croatian Competition Agency (the CCA) conditionally approved the concentration in the form of acquisition of direct controlling interest over the undertakings Sunčani Hvar and Sunčani Hvar Nekretnine by the undertaking Eagle Hills. In its decision on conditional approval of the concentration concerned Croatian Competition Agency also accepted the proposed commitments, ordered their implementation and defined the monitoring of the implementation of the remedies concerned.

In 2022, Croatian Competition Agency conditionally approved the concentration between Grand Automotive LLP/Grand Automotive RD Ltd. and Renault Nissan Hrvatska. Grand Automotive LLP is an authorised distributor of Hyundai, Nissan and Ford new motor vehicles in the Republic of Croatia. In the post-merger period Grand Automotive LLP was to transfer its shares in Renault Nissan Hrvatska to a special purpose vehicle under its control – Grand Automotive RD Ltd.

Egypt

The Egyptian ex-ante merger control regime (EMCR) entered into force on 1 June 2024. Despite being a relatively new framework, ECA has accumulated substantial experience in merger review and the assessment of efficiency claims through referrals of mergers from the Ministry of Health and Population and the Egyptian Drug Authority and from the COMESA Competition Commission.

In order for efficiency claims to be accepted by ECA, they must meet three cumulative conditions; such that the economic efficiency must be verifiable, merger-specific, and it must be passed on to the consumers. The concerned persons may submit efficiency claims at various stages of the merger review process: at the time of notification, during the investigation phase, or after ECA submits a statement of objections identifying potential theories of harm.

The paper illustrates ECA's experience in assessing efficiency claims through three major transactions, in different sectors. The mergers raised major competition concerns in the different Egyptian markets, since they led to strengthening the acquirer's market power, which would lead to higher prices, increase the prices of adjacent services, degrade service quality, limit consumer choice, and slow innovation. Accordingly, the parties submitted efficiency claims in an attempt to demonstrate that the transaction would generate procompetitive benefits that outweigh the harm on competition. These claims were rejected by ECA on the basis that they failed to meet the cumulative criteria of verifiability, merger-specificity, and pass-through to consumers.

National competition authorities in emerging economies often face distinct challenges in the assessment of economic efficiencies. For ECA, these challenges are particularly evident in the context of merger review, mainly given the lack of reliable data, in addition to the widespread presence of informal markets, which can obscure the actual competitive landscape, making it challenging to assess the true market dynamics and the likely impact of a transaction on competition and consumer welfare.

In conclusion, despite facing significant challenges, ECA has developed a robust approach to assessing economic efficiencies in merger control, which has evolved significantly, particularly with the implementation of Egypt's new merger control regime.

European Union

Efficiencies are important considerations in the enforcement of competition rules. When assessing whether a merger would significantly impede effective competition, the European Commission performs an overall competitive appraisal of the merger that takes into account substantiated and likely efficiencies.

The assessment of efficiencies is embedded in the EU merger control framework. The Commission's Horizontal Merger Guidelines specify three cumulative conditions that must be met for an efficiency claim to be taken into account – the efficiencies have to **benefit consumers, be merger-specific and verifiable.** This test, which has been confirmed by the European Courts, also applies for the assessment of efficiencies in non-horizontal mergers. It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies meet the test.

First, as regards benefits to consumers, the relevant benchmark is that intermediate and ultimate consumers will not be worse off as a result of the merger. The efficiencies must 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 investment or innovation. Where efficiencies arise outside of the affected markets, these efficiencies can only be accepted by the Commission if the benefits cover substantially the same customers otherwise harmed by the merger. In addition, efficiencies need to be timely. Furthermore, the more significant the loss of competition, the more substantial the expected efficiencies need to be in order to outweigh the likely harm arising from a transaction.

Second, as regards merger specificity, efficiencies are relevant to the competitive assessment if they (i) are a direct consequence of the notified merger, and (ii) cannot be achieved to a similar extent by less anticompetitive alternatives. Less anticompetitive alternatives can be of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) and must be reasonably practical given established business practices in the industry concerned.

Third, as regards verifiability of efficiencies, the Commission needs to be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers. Where reasonably possible, efficiencies should be quantified. If this is not possible, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.

Finally, regarding considerations of efficiencies in the assessment of remedies in EU merger control, structural commitments related to the divestiture of a standalone business are generally best suited to prevent competition concerns stemming from horizontal and non-horizontal mergers. The framework for the assessment of suitable remedies is set out in the Commission's Remedies Notice. Any commitment proposal can only be accepted if the Commission can determine with the requisite degree of certainty that the commitments will be fully implemented and that they are likely to maintain effective competition. On this basis, **investments that are insufficient to meet the efficiency threshold are equally unlikely to resolve competition concerns if assessed as a commitment.** If the claimed innovation and investment are not accepted as efficiencies due to their uncertainty and

questionable profitability, it is likely that they represent a source of inefficiency instead. Like other behavioural commitments, innovation and investment commitments would require continued monitoring and enforcement in contrast to divestitures. Moreover, investment decisions may depend heavily on market circumstances that may change as markets develop, which would reinforce the uncertainty of their effective implementation.

In conclusion, the assessment of efficiencies is an integral part of EU merger control. The case law of the European Courts has confirmed that the Commission's three-prong test (consumer benefit, merger specificity, and verifiability) for the assessment of efficiencies is in line with the EU Merger Regulation. Moreover, investments or innovations that are insufficient to meet the efficiency threshold are equally unlikely to resolve competition concerns if assessed as a commitment. Finally, as part of the ongoing review of the Merger Guidelines, the Commission will look at all aspects of efficiencies, including efficiencies in innovation and investment. The Commission will also review how the three-prong test should be applied in practice, including whether clearer guidance is needed on the type and quality of evidence required.

France

French merger control has long recognised the possibility of offsetting the competitive impact of a merger by the efficiencies it is likely to produce[10]. This possibility, recognised both by law and by the case law and doctrine to date of the French Administrative Supreme Court (*Conseil d'Etat*), was set out by the French authorities in a previous contribution to the work of the OECD Competition Committee, at a round table in June 2008 dedicated to taking dynamic efficiencies into account when analysing mergers[11].

A further contribution from the French authorities on this subject is justified for several reasons.

On the one hand, the institutional framework for analysing efficiencies in France has changed significantly since 2008. At the time of the previous contribution, merger control was the prerogative of the French Minister of Economy, in certain cases on the advice of the French competition authority. Since 2009, the *Autorité de la concurrence* (the "*Autorité*") has had sole jurisdiction over merger control, with the French Minister of Economy able to raise the case, in certain circumstances, following the *Autorité's* decision. It is therefore interesting to take a closer look at the *Autorité's* decision-making practice with regard to efficiencies, even though it has yet to authorise a merger that is problematic from a competitive point of view, on the basis of the efficiencies it would generate.

On the other hand, the theme of efficiencies is particularly relevant in the current European context, in which member States and the European Commission ("the Commission") are called upon to mobilise all their economic policies, including competition policy, to boost European competitiveness. In this respect, the Draghi report identifies several levers enabling competition authorities to better align their actions with the Union's strategic priorities. Better integration of innovation, sustainable development and resilience in their analyses is one of the levers identified.

Following on from the Draghi report, the mission statement by Commission Executive Vice-President Teresa Ribera, and the Competitiveness Compass[12] presented by the Commission in January 2025, reiterate the need for competition authorities' practices to evolve in line with current economic transformations, and in particular invite the Commission to revise its merger control guidelines.

The purpose of this contribution is to present the legal framework applicable to merger control efficiencies in France, their assessment in the competitive analysis carried out by the *Autorité*, and their consideration in the context of commitments and injunctions.

[10] The consideration of efficiencies in French merger control law is not a recent phenomenon. Developments in this area began in France with a law passed on 19 July 1977. Very early on, legislators envisaged the possibility that a merger might be authorised on the grounds of the economic or social progress it would generate. Since then, the legislative framework has evolved to a limited extent, in particular to divide responsibilities between the *Autorité de la concurrence* (formerly the French competition authority) and the French Minister of Economy. In 1986, when the French competition authority was set up, it was stipulated that it would confine itself to a purely economic analysis of efficiencies, while the Minister could carry out a broader analysis that incorporated social considerations, for example.

[11] Dynamic Efficiencies in Merger Analysis, Competition Committee, Series Roundtables on Competition Policy, OECD.

12 https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en

Germany

Under German competition law, the Bundeskartellamt can take into account claimed merger efficiencies which enhance the parameters of competition. Under German law, such efficiency claims must refer to improvements in the competitive conditions and meet strict criteria.

In the existing case law, claims related to efficiencies in the relevant market remain rare and have so far not affected any decisions by the Bundeskartellamt, as the claims were not sufficiently verifiable, merger-specific and likely to benefit consumers to an extent that could outweigh the harm caused by the merger. In dominance cases, it is usually especially difficult to demonstrate that the efficiencies of a merger would outweigh its harm since the market is typically more concentrated than in SIEC ("significant impediment to effective competition") cases without dominance. Dominant companies usually have little incentive to pass on possible merger-related cost savings to customers, or to invest in improving product quality or increasing R&D spending in the relevant market.

By contrast, efficiencies which improve the conditions of competition in different markets and outweigh the impediment to competition are of practical relevance and have already led to the approval of several mergers. Out-of-market efficiencies are – in contrast to efficiencies in the same market – expressly codified in Section 36(1) sentence 2 no. 1 of the German Competition Act (GWB). This provision sets out strict requirements for proving efficiencies in different markets.

Finally, mergers prohibited by the Bundeskartellamt can be approved by the Federal Minister for Economic Affairs and Energy in the context of ministerial authorisation if the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest.

Hungary

This contribution sets out the practice of the Hungarian Competition Authority (GVH) in relation to the assessment of efficiencies in a merger. Under the merger control provisions of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act, HCA) the GVH considers the advantages and disadvantages of a concentration when assessing it. Therefore, the assessment of benefits in general is part of every merger, but, as in EU competition law practice, the efficiencies quantified and substantiated by the merging firms are considered in the context of the so-called countervailing effects.

Based on the practice of the GVH, only a fact and circumstance that represent a favourable change to end consumers and which would not otherwise be achievable or whose realization is objectively more likely to occur in the market situation that would arise if the concentration were approved, may be considered as an efficiency gain resulting from concentrations.

Hungarian competition law practice is not replete with mergers that have been authorised specifically based on efficiency claim. There have been no recent decisions of the GVH in which a concentration has been cleared explicitly based on efficiencies. The lack of such cases is also largely due to the fact that the undertakings did not even make such arguments in the proceedings. In cases where the GVH has raised concerns with the parties, the undertakings have sought to mitigate the adverse effects of the merger by submitting commitment proposals. One of the latest cases where the GVH threatened to prohibit the merger, only a commitment was offered and not an efficiency defence, while challenging the merits of the analysis.

The only decision in which the GVH has assessed and rejected the parties' efficiency arguments on the merits was the merger between two fixed telecommunications service providers (Magyar Távközlési Rt./ JÁSZ-TEL Rt.) in 1998. This contribution summarises the GVH's findings on efficiencies through this case and provides insights into the GVH's approach to efficiencies in general.

Despite the limited experience of the GVH, we can say that the GVH has been open from the outset to considering the efficiency gains put forward by the parties and has applied the assessment principles set out above, although it is not quite recent that a case has arisen where efficiencies could actually be considered. Based on the GVH’s experience, the parties rarely use efficiency arguments in proceedings, as the outcome is uncertain. Therefore, if the competition concern can be remedied by commitments, the parties offer these instead of attempting to demonstrate or quantify the efficiency gains resulting from the merger.

Israel

Israeli case law has not produced a clear statement of whether an efficiencies defense can be recognized, nor has it produced a detailed statement of how – if at all – a claimed efficiencies defense should be evaluated. In no adjudicated case has an efficiencies defense actually been accepted. The Israel Competition Authority (ICA) has indicated its willingness to consider an efficiencies defense in appropriate merger cases, but it has made clear its position that out-of-market efficiencies will not be considered in this context.

In the past two years the ICA has issued two objections to mergers in which it rejected efficiencies defenses raised by the merging parties. In one merger, the ICA noted that the claimed efficiencies were out-of-market efficiencies, which as a rule the ICA will not consider; the ICA therefore did not reach any decision on the merits regarding the claimed efficiencies. In a second merger, the ICA found that the parties had not sufficiently demonstrated that the merger would lead to significant efficiencies and had not shown that any such efficiencies would be merger-specific; further, the parties had not shown that any such efficiencies would benefit the public.

The ICA currently is preparing new Merger Guidelines, which are expected – like its present Merger Guidelines – to express willingness on the part of the ICA to consider efficiency defenses provided that the claimed efficiencies are proven, substantial, merger-specific, relate to the same market in which the merger is expected to cause competitive injury, are sufficient to overcome any competitive injury expected to flow from the merger – and will benefit consumers and not only the parties to the merger.

Japan

In Japan, the Antimonopoly Act (AMA) prohibits a business combination that may substantially restrain competition in any particular field of trade, and the Japan Fair Trade Commission (JFTC) conducts review of business combinations in accordance with the provisions of the AMA.

The viewpoints of the JFTC's review are released as the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Business Combination Guidelines)". The guidelines state that factors such as the position of the concerned company groups and competitors, the state of competition in the market, imports, and entry are comprehensively considered in determining whether there may be a substantial restraint of competition for each of horizontal mergers, vertical mergers, and conglomerate mergers. "Efficiency" is listed as one of these determining factors.

When improvement in efficiency, whether through economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs or efficiency in research and development, is deemed likely to make the company group take competitive action after the business combination, this factor will also be considered to determine the impact of the business combination on competition.

Efficiencies to be considered in this case are determined from three aspects: (i) efficiencies should be improved as effects specific to the business combination; (ii) improvements in efficiencies should be materialized; and (iii) improvements in efficiency contribute to the interests of users.

In March 2023, the JFTC formulated and published the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act (Green Guidelines)." As part of efforts by enterprises, etc. toward the realization of green society, which aims to combine the reduction of environmental burdens and the accomplishment of economic growth, enterprises may engage in activities that require consideration from the perspective of business combinations. In relation to such activities the Green Guidelines explain the framework and factors for analyzing competition issues under the AMA, as well as views on efficiency in reviewing business combinations. It may be expected that a business combination toward the realization of green society is likely to generate pro-competitive effects such as the creation of innovations in technologies contributing to reduction of greenhouse gas, or the creation of new products that can contribute to reduction of greenhouse gas. The Green Guidelines show a perspective that the aspect of "efficiency" among the factors for determining the substantial restraint of competition will be considered in such cases.

Korea

The Korea Fair Trade Commission (hereinafter the "KFTC") prohibits anti-competitive mergers through merger reviews to protect competition and prevent consumer harm. While mergers can raise concerns about restricting competition by competition by strengthening market dominance, they may also bring positive effects such as improved management efficiency, technological innovation, and realization of economies of scale. Accordingly, the Monopoly Regulation and Fair Trade Act (hereinafter the "MRFTA") allows certain exceptions: even an anti-competitive merger may be permitted without corrective measures if an efficiency defense is recognized.

For an efficiency defense to be accepted, the efficiency gains must be both merger-specific and greater than the anti-competitive effects. The merging parties should prove these factors. These efficiency gains include not only productive efficiencies but also those contributing to national economy.

The KFTC typically considers the merging parties' efficiency defense when reviewing potentially anti-competitive mergers. For example, in 2019, the KFTC evaluated the efficiency gains related to a merger between food delivery apps and determined that there were significant concerns regarding competition in the Korean food delivery service market. The notifying party claimed that the merger would lead to increased consumer satisfaction, as well as higher revenues for restaurants and delivery workers, resulting in overall efficiency gains. However, following its review, the KFTC found that the notifying party's claims were not sufficiently substantiated, and that the same outcomes could be achieved through less anti-competitive means. In light of these findings, the KFTC did not recognize the claimed efficiency gains.

While reviewing online platform mergers, such as those involving food delivery apps, the KFTC recognized the need for its criteria to assess efficiency gains in light of the unique characteristics of the digital economy. Accordingly, in May 2024, the KFTC revised its merger review guidelines to add additional types of efficiency gains. The revised guidelines reflect key digital economy features—such as network effects, data utilization, and the potential to deliver innovative services—and call for consideration of the broader economic impact, including the promotion of the startup ecosystem.

Going forward, the KFTC will continue to refine its evaluation standards for efficiency gains, reflecting changes in the economic environment to ensure a thorough assessment.

New Zealand

The paper discusses the role of efficiencies in New Zealand's merger regime, in particular the approach of the New Zealand Commerce Commission (NZCC) in assessing efficiencies under the regime.

It provides background on New Zealand's merger clearance and authorisation regime, which both require NZCC assessment. It highlights an important distinction between the two assessments in terms of how they consider efficiencies:

- Under a merger clearance assessment, any merger-specific efficiencies must fall within the specific market(s) in which the substantial lessening of competition would otherwise arise. Each market must be assessed separately for efficiencies - it is not permissible to assess whether any lessening in competition in the relevant market might be "offset" by efficiencies in other, separate markets.
- Under the merger authorisation assessment, that assesses whether there is a sufficient public benefit to New Zealand from a merger that it should be permitted, efficiencies in related markets (being markets outside of which the substantial lessening of competition is likely to arise) can be considered.

The paper then outlines the NZCC's approach to assessing efficiencies under these two routes, including types of efficiencies typically considered.

It also describes two seminal cases in New Zealand relating to efficiencies. The first case is a recent supermarket merger clearance application, which gave the NZCC the opportunity to further clarify its approach to efficiencies in a merger clearance context. The second case involved an application for a merger authorisation in the media sector, where the Court of Appeal provided further insight into how New Zealand courts view the balance between efficiencies and competition concerns in merger authorisations.

Philippines

Section 21 of the Philippine Competition Act[13] explicitly recognizes efficiencies as exemption from prohibition of a merger or acquisition. The analysis of efficiency justification requires a thorough and comprehensive examination of the specific facts and circumstances to determine whether the transaction has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition. The Philippine Competition Commission (PCC) weighs the potential harm to competition against the claimed benefits, such as economies of scale, innovations in processes, or savings in the purchase prices of intermediate goods.

The PCC Rules of Merger Procedure require that efficiency claims be demonstrable, with verifiable proof of anticipated reductions in prices, improved quality, increased output, and innovation, among others. It must be shown that efficiency claims will be realized in a timely manner, not in the distant future.

Consumer welfare, the central tenet of the country's antitrust analysis, stays at the forefront as a crucial factor in evaluating efficiencies. Aside from the requirement that efficiency gains should be merger specific, consumers should also not be worse off as a result of the transaction.

Across a number of cases, the PCC considers possible efficiencies in its merger review, regardless of whether these were specifically claimed by the parties as a defense or not. However, the Commission is yet to see the efficacy of its guidelines on evaluating efficiency claims as it has not yet cleared a transaction solely on the basis of efficiencies.

13 Republic Act No. 10667.

Saudi Arabia

The General Authority for Competition (GAC) in Saudi Arabia uses the concept of anticipated efficiency as a core criterion when reviewing economic concentration transactions. This approach, rooted in the Competition Law's aim to protect fair competition and consumer interest, means the GAC assesses economic benefits that arise directly from a merger, provided these benefits are verifiable, quantifiable, merger-specific, and achievable within a reasonable timeframe, and ultimately outweigh any potential harm to competition. The GAC categorizes efficiencies into productive, allocative, and dynamic, and employs a structured methodology to evaluate them, culminating in a balancing test to determine if the transaction's benefits justify any competitive constraints, thus aligning efficiency assessment with broader economic development goals.

South Africa

The assessment of efficiencies or pro-competitive gains in merger control is a requirement of the South African Competition Act, 89 of 1998, as amended (the Act). The Act also requires the Commission to consider mergers on public interest grounds irrespective of the findings on competition. Efficiency justifications are considered only after the Commission has determined that the merger is likely to result in a substantial prevention or lessening of competition (SPLC). The onus is on the merging parties to demonstrate that the efficiencies would not arise absent the merger and that such efficiencies are likely to outweigh the anticompetitive effects of the merger. The public interest assessment is conducted separately. This means that irrespective of the Commission's findings on whether a merger is likely or unlikely to result in SPLC or if an anticompetitive merger is justifiable on efficiency grounds, the Commission must still determine whether the merger is justifiable on substantial public interest grounds.

Competition Authorities in South Africa have developed detailed guidance on the assessment of both efficiencies and public interest in merger control. However, in practice efficiency justifications have rarely been successful in approving anticompetitive mergers. Some of the reasons for this in the South African context, may be that the legal standards for an efficiency defence, as developed through precedent, are arguably relatively strict. The Commission generally does, however, approve anticompetitive mergers with remedies and only prohibits mergers where there are no remedies. This enables the Commission to strike a balance between maintaining competition and allowing the potential efficiency gains that may result from the merger to be achieved. In this regard, over the years, although the Commission has prohibited a number of mergers and only a few have turned on efficiencies, several mergers have been approved with remedies.

With regards to public interest, the Commission has been very successful in implementing remedies to address the negative effects of mergers on public interest. However, the Commission has not approved any anticompetitive merger on substantial public interest grounds. This may be because the risks associated with approving an anticompetitive merger are very significant and likely to cause permanent harm. As such, both efficiency justifications and public interest gains are likely to only outweigh anticompetitive effects in very exceptional circumstances.

United States

The American economy depends in large part on an entrepreneurial spirit that embraces risk taking. American entrepreneurs and businesses fight to bring their ideas, goods, and services to the market. This entrepreneurial spirit has helped to create the largest and most innovative economy in the world. The competitive process typically drives firms to innovate and seek efficiencies on their own, but sometimes they engage in mergers or acquisitions to accomplish those goals. While the Agencies recognize that mergers are an important vehicle for the free flow of capital, they are committed to enforcing the antitrust laws. As the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission (together, "the Agencies") have recently explained, they will seek to block a merger when they believe it may substantially lessen competition, but if they do not, they will quickly "get out of the way" of the merger, allowing firms to develop new products and pursue whatever efficiencies can be generated by the merger. Under this approach, Americans can expect greater prosperity and growth throughout the economy.

Although no court has ever found that efficiencies justified an otherwise anticompetitive merger, merging parties sometimes assert that efficiencies will prevent a lessening of competition. Thus, defendants may point to efficiencies to rebut a plaintiff's evidence that a merger is *prima facie* unlawful. When defendants have raised efficiencies arguments, the Agencies—when they review transactions—and U.S. courts after the Agencies file suit to block the merger subject these efficiencies claims to rigorous scrutiny, requiring them to be merger-specific, verifiable, passed through to prevent a reduction in competition in the relevant market, and of sufficient magnitude and likelihood such that no substantial lessening of competition or tendency to create a monopoly would be threatened in any relevant market.

The Agencies' Merger Guidelines ("Guidelines"), most recently revised in 2023, describe the analytical framework and specific standards that the Agencies normally use in analyzing mergers. For decades, courts have relied on the Agencies' merger guidelines when reviewing mergers, although the Guidelines are not binding on the courts. Like previous versions of the Agencies' guidelines, the 2023 Merger Guidelines detail the criteria that must be met before the Agencies will recognize efficiency arguments. The approach described in the 2023 Merger Guidelines both reflect and incorporate longstanding case law as well as the Agencies' focus on transactions that pose the greatest risk to competition while avoiding interfering with transactions that are competitively neutral or may benefit competition.