

Unclassified

English - Or. English

20 May 2025

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**Efficiencies in Merger Control – Note by the European Union**

17 June 2025

This document reproduces a written contribution from the European Union submitted for Item 2 of the 141<sup>st</sup> meeting of Working Party 3 on 17 June 2025.

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**JT03566573**

## European Union

### 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 allow competition authorities to authorise mergers and acquisitions 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 and predictability 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.<sup>1</sup> 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.<sup>2</sup>

### 2. Assessment of efficiencies in EU merger control

#### 2.1. Legal Framework

3. When assessing whether a merger would significantly impede effective competition, the Commission performs an overall competitive appraisal of the merger that takes into account substantiated and likely efficiencies. In the past 20 years, merging parties have only brought forward sufficiently developed efficiency claims with respect to mergers in certain sectors (e.g., telecoms). 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.<sup>3</sup>

4. The assessment of efficiencies is embedded in the EU merger control framework. The EU Merger Regulation<sup>4</sup> 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. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers.”* Furthermore, it is for the Commission to *“publish guidance on the*

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<sup>1</sup> Ibid.

<sup>2</sup> Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty (2004), PB C-101/08, para 35.

<sup>3</sup> For instance, cases M.4267 – Deutsche Börse / Euronext, M.6905 – Ineos / Solvay / JV, M.7421 – Orange / Jazztel and M.7278 – GE / Alstom.

<sup>4</sup> 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’).

*conditions under which it may take efficiencies into account in the assessment of a concentration.*” This guidance is provided in the Commission’s Horizontal Merger Guidelines<sup>5</sup> and Non-horizontal Merger Guidelines.<sup>6</sup>

5. In line with the principles set out in the EU Merger Regulation, 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**.

6. 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.

7. The Commission has launched a review of the Merger Guidelines and the topic of efficiencies will be an important part of the review. As part of this initiative, the Commission will look at all aspects of efficiencies, including efficiencies in innovation and investment, and consider whether the current guidance for the assessment of efficiencies needs to be refined. The Commission will also review how the three-prong test (consumer benefit, merger specificity, and verifiability) should be applied in practice, including whether clearer guidance is needed on the type and quality of evidence required.<sup>7</sup>

## 2.2. Three-prong test for the assessment of efficiencies

8. In *CK Telecoms*, the Court confirmed that while certain concentrations may give rise to efficiencies which are specific to them, this does not imply that all concentrations give rise to such efficiencies. The burden of proof for demonstrating efficiencies is on the notifying parties. The criteria for taking such efficiencies into account are referred to in paragraphs 76 to 88 of the Horizontal Merger Guidelines (i.e. the three prong test).<sup>8</sup>

### 2.2.1. Benefit to consumers

9. In the assessment of efficiency claims under the EU merger control framework, the relevant benchmark is that **intermediate and ultimate consumers will not be worse off as a result of the merger**.<sup>9</sup> This requires that the efficiencies benefit consumers in those

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<sup>5</sup> 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’).

<sup>6</sup> 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’).

<sup>7</sup> See Topic F – Efficiencies at [https://competition-policy.ec.europa.eu/document/download/6fc7afe7-4c20-4922-94e9-200b46e230f0\\_en?filename=Topic\\_F\\_Efficiencies.pdf](https://competition-policy.ec.europa.eu/document/download/6fc7afe7-4c20-4922-94e9-200b46e230f0_en?filename=Topic_F_Efficiencies.pdf).

<sup>8</sup> *Commission v CK Telecoms*, C-376/20 P, ECLI:EU:C:2023:561, paragraphs 233 - 247.

<sup>9</sup> However, ‘[w]hen intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in itself a problem. It is the impact on effective competition that matters, not the mere impact on

relevant markets where it is otherwise likely that competition concerns would occur.<sup>10</sup> 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.<sup>11</sup>

10. **Cost efficiencies** are a classic example of an efficiency that – if passed-on to consumers – could result in lower prices. There is typically no incentive to pass-on fixed cost savings. Variable or marginal costs savings are more likely to be passed-on,<sup>12</sup> as long as there is competitive pressure (either from existing rivals or potential entry) on the merged entity. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.<sup>13</sup> Cost savings could arise from an elimination of double margins (EDM) when the merging parties are active at different levels of the supply chain or offer complementary products<sup>14</sup> and the merger generates an incentive to reduce mark-ups in order to increase sales and profits.<sup>15</sup> Further, cost savings arising from consolidation of the merging parties' respective orders have been considered when the increasing scale generates volume discounts from suppliers and that the merger would generate material additional volume discounts compared to the discounts already obtained by the merging parties absent the merger.<sup>16</sup> For cost savings to amount to efficiencies they cannot be the result of loss of competition<sup>17</sup> or loss of innovation<sup>18</sup> resulting from the merger.

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competitors at some level of the supply chain. In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns' (Non-Horizontal Merger Guidelines, paragraph 16).

<sup>10</sup> Horizontal merger guidelines, paragraph 79. See by analogy judgements C-382/12 P, Mastercard, paragraph 242, C-333/21 European Super League, paragraph 195; C-680/21 Royal Antwerp Football Club, paragraph 123.

<sup>11</sup> Horizontal Merger Guidelines, paragraphs 80 – 81.

<sup>12</sup> In telecom mergers, the Commission has considered certain wholesale costs as variable costs and has concluded that these savings are more likely passed on to consumers (see e.g., cases M.7421 – Orange / Jazztel, para 746, M.10896 – Orange / MásMóvil / JV, para 1679).

<sup>13</sup> Horizontal Merger Guidelines, para 84.

<sup>14</sup> In M.9409 – Aurubis / Metallo, (paras. 835 et seq) the Commission assessed claimed efficiencies related to the better utilization of copper scrap in the recycling process (valorization) through the combination of the parties' complementary know-how and technologies, which would lead to increased purchase of copper scrap and higher prices for scrap suppliers. While the Commission found the claimed efficiencies were not verifiable, it acknowledged that this type of efficiencies could in principle benefit suppliers harmed by an increase in buyer power in the relevant market.

<sup>15</sup> However, this requires that non-linear pricing is not feasible and that margins are close to the monopoly level, see NHMG, paras 55, 117.

<sup>16</sup> Case M.8677 – Siemens / Alstom, paras 1256-1258.

<sup>17</sup> Case M.8677 – Siemens / Alstom, para 1261.

<sup>18</sup> R&D cost savings arising from the elimination of duplicate R&D projects could reflect a loss of innovation competition between the merging parties and were thus rejected (M.8677 – Siemens / Alstom, para 1263).

11. Consumers may also benefit from **new or improved products or services** or their faster roll-out, which are often the result of investment and innovation (‘investment and innovation efficiencies’). Consumers’ benefit derived from higher quality can be assessed in terms of their willingness to pay for higher quality.<sup>19</sup> In *Orange/MásMóvil/JV*, the Commission assessed alleged efficiencies concerning additional roll-out of fibre and 5G networks, over-and-above their standalone roll-out plans. The Commission noted that the merging parties claimed roll-out plans would only benefit a small sub-set of consumers<sup>20</sup> and that consumers’ benefit from higher quality needs to be assessed in terms of their willingness to pay for higher quality.<sup>21</sup> In the end, it was concluded that the claimed roll-out would not be sufficient to outweigh the adverse effects brought about by the merger..<sup>22</sup>

12. The Commission has also assessed efficiencies dealing with **new ‘green’ products, technology or innovation** that result in improved sustainability, and, under specific circumstances, **out-of-market efficiencies** claimed by the merging parties as part of the overall efficiencies assessment. In the *Aurubis/Metallo* case, the Commission assessed out-of-market efficiencies related to environmental benefits from increased metal recovery, but eventually left open the assessment of benefits to consumers.<sup>23</sup> In line with the *Mastercard* case law, 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.<sup>24</sup>

13. In addition, for the first prong of the current efficiency test to be met, efficiencies need to be **timely**. Less weight can be given to efficiencies materializing later in the future. However, even if the efficiencies were unlikely to arise immediately following closing of the merger, the Commission has in the past accepted these as long as they arose within a specific time period.<sup>25</sup> The exact horizon for efficiencies to be considered timely in these cases depended on the context of the industry in which the transaction was taking place, but was typically in the range of 3-4 years.

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<sup>19</sup> Case M.10896 – Orange / MásMóvil / JV, para 1694.

<sup>20</sup> Case M.10896 – Orange / MásMóvil / JV, para 1695 and 1730 et seq.

<sup>21</sup> Case M.10896 – Orange / MásMóvil / JV, para 1694 and 1726 et seq.

<sup>22</sup> In addition, the Commission concluded that the claimed roll-out efficiencies were not verifiable and not merger-specific due to the existence of less-anticompetitive alternatives, see Case M.10896 – Orange / MásMóvil / JV, Sections 9.6.4.4 and 9.6.4.5.

<sup>23</sup> M.9409 – Aurubis / Metallo, paras. (844 et seq). The Commission found that the claimed efficiency was not verifiable, not timely and not merger specific and left open the assessment of benefits to consumers. However, in the context of sustainability agreements, the Commission has recognized the potential for ‘collective benefits’ to consumers that go beyond individual ‘use value’ and ‘non-use value’ benefits, see Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (Section 9.4.3).

<sup>24</sup> T-111/08, Mastercard v Commission, para. 228. In case M.10896 – Orange / MásMóvil / JV (paras. 1602 to 1604) the Commission also noted that (cost) efficiencies need to be allocated to those relevant markets where they accrue to avoid double counting.

<sup>25</sup> Case M.7630 – FedEx / TNT, paras. 568-581. When it was unlikely that efficiencies would materialise within a certain period following closing, these have been rejected (see also cases M.6992 – Hutchison 3G UK / Telefónica Ireland, para. 765; M.10896 – Orange / MásMóvil / JV, para. 1597).

14. Finally, a consequence of the balancing test is that 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.

### 2.2.2. *Merger-specificity*

15. Under the current framework for assessing efficiencies in EU merger control, 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.

16. Less anticompetitive alternatives can be of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture)<sup>26</sup> 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. The Commission has considered sufficient that the relevant alternative brings positive added value to the merging parties, taking into account the business case faced by each of them and having regard to established business practices in the industry concerned.<sup>27</sup> However, the Commission has not considered relevant how this added value is distributed between the merging parties, nor if the merging parties could achieve higher value through the transaction<sup>28</sup> or that the merging parties favoured the merger over the possibility to enter into a cooperation agreement.<sup>29</sup> The General Court of the EU has clarified that some agreements could constitute a reasonably ‘practical’ alternative when there is evidence that the agreements had been concluded in the industry, even though they may not be the prevailing type of agreement, or the merging parties lack the incentive to enter into such agreements.<sup>30</sup>

### 2.2.3. *Verifiability*

17. The Commission needs to be reasonably certain that the efficiencies are likely to materialize 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. For example, cost synergies and the willingness to pay for quality improvements can be quantified and weighed against the incentive to increase prices.<sup>31</sup>

18. It is incumbent on the merging parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies result in benefit to consumers that outweighs the harm, are merger-specific and likely to be realised. In its decisional practice, the Commission has considered different types of relevant evidence, namely internal documents used by management to decide on the merger; statements from management to shareholders and financial markets about expected efficiencies; historical

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<sup>26</sup> Agreements may be able to produce the desired benefit (e.g., sharing complementary resources) without having to coordinate on price, thus maintaining price competition.

<sup>27</sup> Case M.7018 – Telefónica Deutschland / E-Plus, para. 1137.

<sup>28</sup> Cases M.7018 – Telefónica Deutschland / E-Plus, para. 1137; M.10896 – Orange / MásMóvil / JV, para. 1595.

<sup>29</sup> Case M.7758 – Hutchison 3G Italy / Wind / JV, para. 1573.

<sup>30</sup> Case T-175/12 Deutsche Börse AG v Commission, paras. 284-285.

<sup>31</sup> Case M.10896 – Orange / MásMóvil / JV, para. 1597, Annex A, para. 34.

examples of efficiencies and consumer benefit; and *pre-merger* external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.<sup>32</sup>

### 3. Consideration of merger efficiencies in the assessment of merger remedies

19. Under the Merger Regulation, the notifying parties may offer commitments with a view to rendering a concentration compatible with the common market.<sup>33</sup> Commitments must enable the Commission to conclude that, following modifications by the parties, a concentration will not give rise to a significant impediment of effective competition, in particular through creation or strengthening of a dominant position.<sup>34</sup> To that end, the Commission may attach to its decision conditions and obligations ensuring compliance with the proposed commitments.<sup>35</sup>

20. Structural commitments related to the **divestiture** of a standalone business, are generally best suited to prevent competition concerns from horizontal and non-horizontal mergers.<sup>36</sup> The Commission needs to be able to conclude with the requisite standard of certainty, that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialize.<sup>37</sup>

21. **Access commitments** related to granting access to key infrastructure or inputs on non-discriminatory terms are only suitable if those commitments are equivalent to divestitures in their effects.<sup>38</sup> **Behavioural commitments** relating to the future behaviour of the merged entity require continued monitoring and enforcement and may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, reduce product ranges or remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps.<sup>39</sup>

22. Ultimately, the question of whether a specific type of remedy is suitable to eliminate the identified competition concerns is assessed on a case-by-case basis.<sup>40</sup> However, the Commission will accept only those commitments that eliminate the competition concerns entirely, which are comprehensive and effective from all points of view, and which can be implemented effectively within a short period of time.<sup>41</sup>

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<sup>32</sup> Case M.10896 – Orange / MásMóvil / JV, para. 1684.

<sup>33</sup> Art 2 EUMR 2(2) and (3), EUMR rec 30,

<sup>34</sup> Commission v Tetra Laval, C-12/03 P, ECLI:EU:C:2005:87, paragraph 86.

<sup>35</sup> Remedy notice, paragraph 1.

<sup>36</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ('Remedy notice'), paragraph 15, 17.

<sup>37</sup> Remedy notice, paragraph 10.

<sup>38</sup> Remedy notice, paragraph 17.

<sup>39</sup> Remedy notice, paragraph 17.

<sup>40</sup> Remedy notice, paragraph 16.

<sup>41</sup> Remedy Notice, paragraph 9.

23. As explained in section II above, investment and innovation efficiencies (as defined above), are sometimes rejected because they cannot be verified to the required evidentiary standard.<sup>42</sup> In this context, it has been argued that ‘**innovation and investment commitments**’ might be used to ensure that the claimed investments are implemented as planned,<sup>43</sup> as a form of a behavioural commitment.

24. However, any commitment proposal can only be authorized 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 (which are thereby likely to at least partially dispel competition concerns) 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. Imposing a commitment to such inefficient investments is unlikely to incentivize the merging parties to invest and innovate as they would have absent the transaction. Furthermore, like other behavioural commitments, innovation and investment commitments would require continued monitoring and enforcement in contrast to divestitures.<sup>44</sup> Moreover, as innovation and investment commitments are by definition long-term commitments, investment decisions may depend heavily on market circumstances that may change as markets develop, which would reinforce the uncertainty of their effective implementation. If the commitment is not implemented due to the evolution of market circumstances, it might be difficult to ensure the effective implementation of the remedy, or ultimately to order a revocation of the merger.<sup>45</sup>

25. In sum, concerns the Commission may have about the verifiability of a claimed investment as a source of efficiency would likely also translate to concerns that offering such investment as a type of commitment would not prevent a significant impediment to effective competition (and thus eliminate competition concerns) with the required degree of effectiveness and certainty.<sup>46</sup>

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<sup>42</sup> For example, in the recent Orange/MásMóvil/JV case mentioned above, the Commission considered that the claimed roll-out efficiencies were not verifiable. However, in this particular case, the Commission also concluded that the notifying party failed to demonstrate the claimed efficiencies were merger specific and benefited consumers.

<sup>43</sup> Draghi, *The future of European competitiveness*, 2025, p 75.

<sup>44</sup> A recent ex-post evaluation of EU antitrust remedies on behalf of the European Commission found that purely behavioral remedies were least likely to be fully implemented and fully effective, see Whelan et al (2024), *Ex post evaluation of the implementation and effectiveness of EU antitrust remedies*, Final Report, 2025

<sup>45</sup> For example, in cases M.2684 EnBW/EDP/CAJASTUR/HIDROCANTABRICO and M.5549 EDF/Segebel, the Commission accepted investment remedies, but the investments did not materialise for various reasons, such as regulatory and environmental issues. For instance, in EDF/Segebel the investments committed at the time of the merger became irrelevant at the time of the implementation deadline because renewables made gas investments redundant.

<sup>46</sup> For the evidentiary standard in EU merger cases, see *Commission v CK Telecoms*, C-376/20 P, ECLI:EU:C:2023:561, paragraph 87.

#### 4. Ex post analysis of merger efficiencies

26. Until now, there has been no work by the Commission on the ex-post analysis of merger efficiencies. One reason for this is that – as mentioned above – in the past 20 years, the efficiency claims made by the merging parties were partially accepted by the Commission and balanced against the competition harm in only a few cases.<sup>47</sup>

#### 5. Conclusion

27. The assessment of efficiencies is an integral part of EU merger control. The case law of the Court 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. As part of a review of the Merger Guidelines, the Commission will 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.

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<sup>47</sup> For instance, cases M.4267 – Deutsche Börse / Euronext, M.6905 – Ineos / Solvay / JV, M.7421 – Orange / Jazztel and M.7278 – GE / Alstom.