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Efficiencies in Merger Control – Note by BIAC

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1. Introduction

1. *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.

2. Efficiencies play an important role in merger review, influencing competition policy and enforcement decisions. While some mergers can lead to increased market concentration, they also have the potential to generate significant efficiencies that enhance business performance, stimulate innovation, and improve consumer welfare. And although efficiencies are often a key driver for mergers, the recognition of efficiencies in merger assessments remains limited due to high evidentiary burdens, particularly the need to demonstrate that the efficiencies are merger-specific and that they will be passed on to consumers, as well as persistent skepticism from competition authorities.² This can be explained by the fact that the “evaluation of efficiencies, just like competitive effects, is an inherently predictive exercise.”³ Competition authorities generally view efficiencies as challenging to substantiate and measure, primarily because they involve inexact forecasts and the relevant information is exclusively held by the merging parties. This has led to some businesses deciding to avoid proposing efficiency defenses when seeking merger approval.

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](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](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](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](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](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](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.

² Rashid Baxter, *Merger Efficiency Defences Back On The Menu*, *CMA Chief Economist Says*, GLOBAL COMPETITION REV. (Mar. 11, 2025), <https://globalcompetitionreview.com/article/merger-efficiency-defences-back-the-menu-cma-chief-economist-says>. (“[A]ntitrust agencies have ‘historically’ been ‘absolutely rubbish’ at taking efficiency defences seriously during merger reviews.”).

³ *Business at OECD* Note on the Role of Efficiency Claims, *supra* note 1, at 199.

3. Recently, there has been a renewed focus on efficiencies in merger control. The UK Competition and Markets Authority (CMA) has signaled a need toward a more pragmatic approach to efficiency defenses, with its Chief Executive advocating for a reassessment of efficiency arguments.⁴ The *Vodafone/Three* decision further highlights a growing recognition of investment-led efficiencies, particularly in infrastructure-heavy industries.⁵ The European Commission's report *The Future of European Competitiveness* (Draghi Report) has emphasized the need for competition policy to support European industrial competitiveness by acknowledging (innovation) efficiencies in merger assessments.⁶ The Australian Competition and Consumer Commission (ACCC) has demonstrated openness to collective efficiencies that improve cost savings and market outcomes by authorizing joint renewable energy purchasing groups.⁷

4. The discussion around efficiency claims has become more prominent also due to calls for competition law enforcement to better reflect broader societal interests, as well as concerns that overlooking efficiencies arising beyond the defined relevant market could deter businesses from pursuing strategies aligned with sustainable development, ultimately to the detriment of overall societal welfare.⁸ The European Commission's Mission Letter to the Competition Commissioner suggests that merger reviews should incorporate resilience, investment intensity, and strategic competition concerns, particularly in sectors vital to European economic security.⁹

⁴ Suzi Ring, *UK Competition Regulator to Rethink Approach After Anti-Growth Criticism*, FIN. TIMES (Nov. 21, 2024), <https://www.ft.com/content/1346c70e-3a0f-471f-adb1-de204a41b89b>.

⁵ Francesca McClimont, *EU Set to Monitor Vodafone/Three Investment Remedy*, GLOBAL COMPETITION REV. (Mar. 20, 2025), <https://globalcompetitionreview.com/article/eu-set-monitor-vodafone-three-investment-remedy>. In fact, the *Vodafone/Three* case is not the only example. In the U.S., the FCC and the DOJ accepted investment-based efficiencies in the *T-Mobile/Sprint* merger, primarily due to the parties' commitment to nationwide 5G deployment. The agencies recognized substantial public interest benefits, including accelerated network roll-out, expanded coverage and capacity, and enhanced innovation and service quality – outcomes deemed less likely if the companies remained separate. These efficiencies were formalized through commitments to achieve 97% national 5G coverage within three years and 99% within six years, alongside pledges to deliver higher data speeds. See Press Release, Fed. Comm'n Comm'n, FCC Approves Merger of T-Mobile and Sprint (Nov. 5, 2019), <https://docs.fcc.gov/public/attachments/DOC-360637A1.pdf>; Press Release, Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/archives/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package?utm_source=chatgpt.com.

⁶ EUR. COMM'N, THE FUTURE OF EUROPEAN COMPETITIVENESS, PART B | IN-DEPTH ANALYSIS AND RECOMMENDATIONS 299 (Sept. 2024), available at https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en.

⁷ Press Release, Austl. Competition & Consumer Comm'n, ACCC Authorises Joint Renewable Energy Purchasing Group (Mar. 27, 2024), <https://www.accc.gov.au/about-us/news/media-updates/accc-authorises-joint-renewable-energy-purchasing-group?utm>.

⁸ See BIAAC Note on Out-of-Market Efficiencies in Competition Enforcement, *supra* note 1, ¶ 3.

⁹ Mission Letter from Ursula von der Leyen to Teresa Ribera Rodríguez, at 6 (Sept. 17, 2024), https://commission.europa.eu/document/download/5b1aaee5-681f-470b-9fd5-ae14e106196_en?filename=Mission+letter+-+RIBERA.pdf. As evidence of the EC's renewed interest in efficiencies, the Commission recently released a call for an economic study on the dynamic effects of mergers, such as its impact on incentives to innovate and invest, where it admits that dynamic merger effects can be positive, i.e., leading to efficiencies. *DG Competition Launches a Call for Tender for an Economic Study on the Dynamic Effects of Mergers*, EUR. COMM'N (Mar. 25, 2025),

5. Despite this growing acceptance, skepticism toward efficiency claims in merger review has remained strong. Several policy developments, including the U.S. *Merger Guidelines* and the Canadian Competition Bureau’s approach, underscore this cautious stance and reflect a continued reluctance to place significant weight on efficiency claims.¹⁰ This skepticism has been evident in high-profile cases such as *Microsoft/Activision*¹¹ and *Amazon/Deliveroo*,¹² where authorities challenged whether claimed efficiencies justified alleged competitive concerns. The “hostile tone”¹³ to efficiencies is also felt in the 2023 U.S. *Merger Guidelines*,¹⁴ where consistent with the legal structure governing prima facie cases – which does not take efficiencies into account – efficiencies are addressed solely as part of the rebuttal stage of the analysis. In Canada, recent amendments to the Competition Act have downgraded efficiencies from a standalone defense to merely one of the factors to be considered in merger reviews.¹⁵ Regulatory skepticism toward efficiencies may sometimes be influenced by the authorities’ limited resources, and political and procedural factors rather than economic substance.

6. This paper highlights key obstacles to effectively recognizing efficiencies within merger review regimes. It addresses the allocation of the burden of proof, the criteria for evaluating efficiencies, the treatment of out-of-market effects, the integration of efficiencies in remedy design, and the relevance of broader industry interests. Furthermore, it examines how competition authorities can modernize their evaluative tools to ensure efficiency considerations more systematically and more meaningfully incorporated into merger assessments.

7. The analysis concludes that current approaches to efficiency analysis in merger review often understate the significance of dynamic efficiencies and overly emphasize short-term, static (price-based) effects. This narrow focus can lead to overly cautious or interventionist outcomes that may obstruct transactions with the potential to deliver substantial long-term innovation gains and consumer benefits. To counter this, the paper

https://competition-policy.ec.europa.eu/about/news/dg-competition-launches-call-tender-economic-study-dynamic-effects-mergers-2025-03-25_en.

¹⁰ This is in line with the earlier Joint Merger Control Statement by the CMA, ACCC, and Germany’s Bundeskartellamt stating that merging parties often overstate efficiency benefits and that competition authorities should be cautious when evaluating such claims. Competition & Mkts. Auth., Austl. Competition & Consumer Comm’n & Bundeskartellamt, Joint Statement on Merger Control Enforcement (Apr. 20, 2021), <https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control>.

¹¹ *Microsoft / Activision Blizzard (Ex-Cloud Streaming Rights) Merger Inquiry*, COMPETITION & MKTS. AUTH., <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-ex-cloud-streaming-rights-merger-inquiry>.

¹² *Amazon / Deliveroo Merger Inquiry*, COMPETITION & MKTS. AUTH., <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>.

¹³ Dennis W. Carlton, *The 2023 Merger Guidelines: A Critical Assessment*, 65 REV. INDUS. ORG. 129, 133 (2024), available at <https://doi.org/10.1007/s11151-024-09962-0> (“Efficiencies are not simply a rebuttal point. They are part of the competitive effects analysis. Indeed, all else equal, every horizontal merger—in the absence of efficiencies—typically creates upward pricing pressure.”).

¹⁴ U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, MERGER GUIDELINES (Dec. 18, 2023), <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

¹⁵ See *Guide to the December 2023 Amendments to the Competition Act*, COMPETITION BUREAU CAN. (Dec. 18, 2023), <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/guide-december-2023-amendments-competition-act>.

advocates for a more balanced, flexible, and forward-looking framework for assessing efficiencies. Competition authorities are encouraged to incorporate qualitative, industry-specific insights – particularly in innovation-driven sectors – by considering the specific characteristics of technological development, nature of innovation and the broader context of dynamic competition. A more contextual and forward-looking approach can support a better understanding of how efficiencies materialize over time and how they contribute to long-term competitive outcomes.

8. *Business at OECD* further recommends that authorities consider merging parties’ strategic plans to leverage complementary or substitute technologies as indicators of future innovation potential. Adjusting evidentiary standards to better accommodate the unique characteristics of dynamic efficiencies, offering clearer guidance on the types of relevant evidence (e.g., internal documents, innovation roadmaps) and including a qualitative assessment model, would all contribute to more effective and credible merger review.

9. Examining past merger cases may help shed light on how dynamic efficiencies unfold in practice and offer valuable input for future decision-making. Highlighting positive outcomes from innovation-driven transactions could improve understanding of their long-term benefits. Such examples may also serve as useful references for companies when substantiating efficiency claims in future cases.

2. Assessing Efficiencies in Merger Analysis

10. Historically, courts and competition authorities often dismissed or even opposed efficiency claims in merger reviews, operating under the assumption that large mergers were inherently harmful. This began to shift in the 1970s as economic thinking evolved, leading to a broader recognition of the potential societal value of efficiencies. Today, efficiencies are generally considered legitimate factors that can support the approval of mergers.

11. However, despite this progress, in practice, efficiencies rarely play a decisive role in merger decisions. This is largely due to the practical and perceived challenges in evaluating them. Assessing whether a merger will produce static efficiencies – and whether these outweigh potential anticompetitive effects – remains a complex and uncertain task. Dynamic efficiencies may be even harder to measure, given their long-term and less tangible nature. As a result, competition authorities often sidestep such analyses when possible.

2.1. Types of Efficiencies Considered

12. Efficiencies in mergers can be categorized into different types. There is broad consensus that “static” or “production” efficiencies – that is, cost reductions enabling firms to generate more output or higher-quality output with the same level of input – could generally be accepted as valid under the efficiency defense.¹⁶ These include benefits such as economies of scale or scope, lower transportation costs, streamlined production across facilities, avoiding duplication of infrastructure and reducing energy consumption, the application of superior manufacturing methods, and efficiency gains in ancillary areas like distribution or R&D.

13. In contrast, “dynamic” efficiencies, such as enhancements in product quality, diversity, or service standards, are acknowledged less frequently. In technology-driven

¹⁶ OECD, *Efficiency Claims in Mergers and Other Horizontal Agreements*, *supra* note 1, at 6.

mergers, these efficiencies play a crucial role in shaping market evolution as they can foster long-term industry competitiveness and investment.¹⁷ While these improvements can offer substantial benefits to consumers and market players, they may be harder and more complex to quantify, which can complicate their inclusion in the cost-benefit balancing exercise required in order to consider efficiencies in merger control. Assessing dynamic efficiencies is complex due to several challenges. For instance, price increases may occur shortly after a merger, while benefits like innovation or product improvements may materialize later and are harder to quantify with the current analytical frameworks. This creates difficulties in comparing short-term price effects with long-term quality gains, often across different markets and consumer groups. Additional complications include the need for sophisticated economic analysis to address uncertainty around the cost, timing, and success of innovation, difficulties in measuring its impact on welfare, and information asymmetries between merging firms and competition authorities.

14. Despite these challenges, dynamic efficiencies can generally offer significantly greater and longer-term benefits to consumers than static ones, which are largely measured by accounting measures.¹⁸ Therefore, they should play a more prominent role in merger assessments. However, due to the challenges of evaluating dynamic efficiencies and resource constraints,¹⁹ competition authorities are likely to avoid considering them, even when they may be relevant, to steer clear of speculative analysis, and businesses avoid presenting such claims.²⁰ Indeed, the lack of reliable methods for assessing efficiencies often deters both competition authorities and merging parties from seriously considering them – particularly dynamic efficiencies. However, a more pressing issue, especially for smaller or mid-sized jurisdictions, is the lack of resources to conduct meaningful efficiency analyses. Firms are reluctant to invest in economic advice due to high costs relative to transaction value and skepticism that such arguments will influence outcomes when market concentration and entry barriers are evident. Simultaneously, many national competition authorities lack the capacity – especially qualified economists – to evaluate efficiencies rigorously. As a result, neither side is incentivized to break this cycle: firms see efficiency

¹⁷ For example, the Canadian experience has shown that recognizing dynamic efficiencies can foster long-term industry competitiveness. See OECD, *Dynamic Efficiencies in Merger Analysis*, *supra* note 1, at 77-122.

¹⁸ *Id.* at 10.

¹⁹ There is a “silent majority” of jurisdictions where both agencies and firms have one thing in common – a lack of resources to engage in any sophisticated economic analysis (including efficiencies). Indeed, it is not for nothing that the ECN+ Directive (Directive (EU) 2019/1) mandates that national competition authorities (NCAs) be adequately resourced – financially, technically, and in terms of personnel – to ensure they can effectively and independently enforce EU competition rules. When NCAs face resource constraints, their institutional capacity is weakened, often leading them to adopt overly cautious, defensive, and reactionary enforcement strategies. This not only limits proactive enforcement but also risks inconsistent application of competition law across Member States, ultimately undermining the internal market and the deterrent effect of EU competition policy. See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019 O.J. (L 11) 3, <https://eur-lex.europa.eu/eli/dir/2019/1/oj/eng>.

²⁰ In fact, several competition authorities have never encountered a case where merging parties advanced a claim based on dynamic efficiencies. Moreover, some delegations have noted that even when such arguments are presented, efficiency claims – of any kind – seldom carry sufficient weight or credibility to reverse a conclusion that the merger would significantly lessen competition. OECD, *Efficiency Claims in Mergers and Other Horizontal Agreements*, *supra* note 1, at 11.

claims as futile, while authorities see no reason to develop expertise that is rarely called upon.

15. There is also an ongoing debate about whether broader social or industrial policy considerations should be weighed against the anticompetitive effects of a merger. If competition policy is strictly aimed at promoting economic efficiency, then such “non-efficiency” objectives fall outside its scope. However, in jurisdictions where competition law serves additional goals, the discussion often shifts to how best those objectives can be achieved – whether through competition enforcement or via alternative policy tools like tax systems or social welfare programs.

2.2. Weighing Efficiencies Against Anticompetitive Harm

2.2.1. Quantification and Qualification Issues

16. In many competition enforcement frameworks, it is acknowledged that a merger with potentially significant anticompetitive effects may still be allowed if it generates efficiency gains that outweigh those negative effects. In yet other frameworks, efficiencies generated by a proposed transaction are an important criterion to be considered. However, as mentioned, integrating static efficiencies into merger assessments remains challenging – and the task becomes even more complex when it comes to dynamic efficiencies. “[T]he efficiency defense is deliberately described in a way that makes it difficult to establish.”²¹ The current approach taken by competition authorities when assessing efficiencies lacks coherence, applying different standards of proof for harm and for efficiencies. Competition authorities often place a high evidentiary burden on efficiencies than on harm, which may lead to an underestimation of their procompetitive benefits while overemphasizing harm.²²

17. In merger reviews, efficiency considerations typically come into play only when there are indications that the transaction may harm competition. Competition authorities generally begin with a direct analysis of the merger’s potential anticompetitive effects. If those effects are found to be minimal or nonexistent, the merger is cleared without further scrutiny. However, if concerns arise, efficiency arguments are then assessed as potential counterbalances.

18. This two-step approach is grounded in two main reasons. First, predicting and measuring efficiencies before a merger takes place is inherently challenging, and authorities are reluctant to engage in that exercise unless absolutely necessary. Second, the merging parties are in a better position than the authorities to access and present the detailed information required to substantiate such claims. As a result, the obligation to produce supporting evidence – if not the entire burden of proof – rests primarily with the merging parties.

19. Indeed, in nearly all OECD jurisdictions, the obligation to demonstrate both the existence and sufficiency of efficiencies rests with the merging parties. Efficiencies must not only be demonstrated but also protected from potential claw-backs through post-merger pricing adjustments.²³ This cautious approach reflects the underlying concern that if projected efficiencies fail to materialize, it is consumers who ultimately bear the risk –

²¹ Robert Pitofsky, *Efficiency Considerations and Merger Enforcement: Comparison of US and EU Approaches*, 30 *FORDHAM INT’L L.J.* 1413, 1423 (2006)

²² Louis Kaplow, *Efficiencies in Merger Analysis*, 83 *ANTITRUST L.J.* 557 (2021).

²³ Case T-175/12 *Deutsche Börse v. EC*, ECLI:EU:T:2015:148 (Mar. 9, 2015). See also Martin Farley, *Deutsche Börse: Evaluating Efficiencies in Merger Investigations*, 6 *J. EUR. COMPETITION L. & PRAC.* 711 (2015).

through higher prices, reduced innovation, or lower quality. Unlike firms, which control the implementation of efficiency-related strategies and can better manage associated risks, consumers have no recourse if anticipated benefits do not arise. This asymmetry tries to justify a stringent evidentiary standard, especially for forward-looking claims such as dynamic efficiencies.

20. When evaluating efficiency claims, competition authorities typically examine whether the efficiencies are merger-specific – that is, whether there are no less anticompetitive but reasonable alternatives likely to achieve the same efficiencies. They also assess whether a portion of the efficiency gains will be passed on to consumers and whether the efficiencies result in reductions in fixed or variable costs, with a preference for the latter. Additional factors considered include the impact on other markets, as well as whether the claimed efficiencies are measurable, significant in scale, and achievable within a reasonable timeframe.

21. The “timeliness” criterion of efficiencies is particularly difficult in the context of dynamic efficiencies, which often take time to materialize and may only become apparent over the longer term. However, the further into the future the expected benefits lie, the more difficult it becomes for merging parties to substantiate them with credible evidence. Not only are such future benefits subject to discounting, but they are also generally viewed as increasingly speculative the longer the time horizon. This connects to another key issue – verifiability. Competition authorities usually assess whether there is adequate information to reasonably verify the likelihood and scale of the claimed efficiencies.

22. A more cautious view tends to prevail, especially regarding the quantification of dynamic efficiencies. Nevertheless, some agencies have found qualitative assessments to be more informative. For example, Canada’s Competition Bureau, noted that it typically considers dynamic efficiencies through a qualitative lens.²⁴ Useful insights can be gained by evaluating how well the merging firms have integrated past acquisitions, how effective they have been in translating R&D into innovation, and whether those innovations were linked to previous merger synergies.

23. Industry-specific factors are also highly relevant – particularly what drives innovation in that sector and whether the merger would enhance the combined entity’s ability to leverage those drivers. Furthermore, whether the firms are combining substitute or complementary technologies matters, as R&D efficiencies are often more significant when complementary assets are brought together. Given these considerations, and the inherent challenges in quantifying dynamic efficiencies in innovation-driven sectors, it follows that to help support the realization of efficiencies it would be desirable to achieve some form of loosening of the standard of proof in respect of efficiency claims.²⁵

24. *Business at OECD* submits that strict evidentiary standards designed for static efficiencies may not be well-suited to capture the full value of dynamic efficiencies, risking an overly narrow focus on short-term price effects. It encourages authorities to adopt a more flexible framework for assessing dynamic efficiencies, in particular by allowing a longer time horizon in which efficiencies can be considered, as the currently required

²⁴ COMPETITION BUREAU CAN., MERGER ENFORCEMENT GUIDELINES (Oct. 6, 2011), <https://competition-bureau.canada.ca/sites/default/files/attachments/2022/cb-meg-2011-e.pdf> (“To supplement quantitative information or where quantitative information is absent, the Bureau conducts a qualitative assessment.”).

²⁵ See David Cardwell, *The Role of the Efficiency Defence in EU Merger Control Proceedings Following UPS/TNT, Fed/Ex/TNT and UPS v Commission*, 8 J. EUR. COMPETITION L. & PRAC. 551, 552 (2017).

timeliness and direct consumer participation represent major obstacles. *Business at OECD* also recommends clearer guidance on acceptable evidence – such as strategic plans and internal analyses – and the weight such information would carry. Additionally, *Business at OECD* supports conducting retrospective studies to evaluate the long-term impact of dynamic efficiencies and improve merger policy over time.

2.3. Efficiencies and Public Interest Considerations

2.3.1. Balancing Competition and Broader Benefits

25. Merger efficiencies are increasingly being discussed in the context of a strategic tool for advancing broader policy objectives, including industrial competitiveness, sustainability, and national security. As highlighted in the Draghi Report, there is a growing recognition that competition policy must evolve to support Europe’s strategic autonomy and economic resilience. In this context, efficiency considerations – particularly dynamic efficiencies – can play a vital role in fostering innovation, accelerating green transitions, and enhancing technological capacity in key sectors such as telecommunications, artificial intelligence, and clean energy.

26. This shift raises important questions about whether competition authorities should adopt a more holistic analytical framework, one that integrates economic growth and industrial policy objectives as part of the overall consumer welfare alongside conventional antitrust concerns. A critical aspect of this debate is the relevance of competitiveness as a policy goal: if authorities begin assessing industry-level competitiveness, rather than focusing solely on firm-level effects, they may become more receptive to efficiency claims, especially where such claims support sectoral resilience or international competitiveness.

27. However, integrating these broader goals into merger review is not without challenges. Chief among them is the need to balance potential short-term harm to consumers – such as higher prices or reduced choice – against the longer-term, benefits of efficiencies, which may include enhanced productivity, innovation spillovers, investment capacity or supply chain security. These benefits can often be harder to quantify and verify, particularly when they involve dynamic efficiencies that materialize over extended timeframes. In other words, integrating competitiveness into merger review poses significant challenges, particularly when it comes to the need to balance short-term consumer harm with long-term efficiency gains – an assessment only feasible for well-resourced authorities. For others, introducing competitiveness as a review criterion risks increasing unpredictability and potential political influence, which can both benefit and harm merging parties. Moreover, such considerations may lack judicial support as courts may often be even less equipped to evaluate complex competitiveness claims. Another challenge might be the possibility of additional uncertainty in the merger review process if undue political influence or other factors unrelated to competitiveness are introduced.

28. A notable example of successful integration of these broader goals into merger review is the U.S. approval of the *Sprint/T-Mobile* merger.²⁶ Despite concerns over reduced competition, the approval was partly based on commitments to accelerate 5G deployment and enhance network capabilities, which were projected to deliver substantial long-term benefits to consumers and the economy. Another useful illustration of this approach can be found in the Bundeskartellamt’s 2008 *KFG/Orion* decision, where the German authority acknowledged industry-wide efficiency gains that could strengthen national

²⁶ *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations*, 34 F.C.C. Rcd 10578 (2019), available at <https://docs.fcc.gov/public/attachments/fcc-19-103a1.pdf>.

competitiveness, while maintaining safeguards to prevent excessive concentration of market power.²⁷ Such cases demonstrate that it is possible to incorporate broader efficiency arguments into competition assessments – especially in strategic sectors – provided that these claims are credible, measurable, and do not undermine the competitive structure of the market.

29. *Business at OECD* recommends that competition authorities adopt a more flexible framework for assessing dynamic efficiencies, particularly by allowing longer time horizons for their realization, given the increasing importance of strategic sectors for industrial competitiveness and resilience. Authorities should integrate broader benefits such as innovation, sustainability, and sectoral strength into merger assessments where credible and measurable. Clear standards are needed to ensure that such considerations do not undermine the core principles of competition policy or introduce undue political influence into the merger review process.

3. Out-of-Market Efficiencies and Global Considerations

30. There is growing recognition that efficiencies benefiting consumers outside the relevant market – including in foreign jurisdictions – can play a legitimate and meaningful role in merger assessments, even when some degree of domestic competitive harm may occur. The OECD Secretariat’s 2023 Background Note on Out-of-Market Efficiencies highlights this evolving perspective, noting that strict adherence to in-market benefit standards may overlook significant global welfare gains, particularly in cross-border or innovation-driven mergers.²⁸ This is especially relevant in sectors such as telecommunications, clean energy, digital, and artificial intelligence (AI) markets, where efficiencies may manifest across borders or ecosystems, rather than within narrowly defined product or geographic markets.

31. *Business at OECD* emphasizes that an overly rigid focus on in-market consumer benefits risks undermining economically efficient and innovation-enhancing transactions, particularly in globally integrated industries. *Business at OECD* calls for authorities to recognize broader economic effects and global efficiency gains, and to develop clearer guidance on the types of evidence they would accept to support out-of-market efficiency claims – such as internal strategic plans, global investment projections, and past innovation outcomes.

32. This issue is well illustrated by the divergent treatment of the *UPS/TNT* merger.²⁹ The European Commission rejected UPS’s efficiency claims, applying a narrow, in-market test with stringent evidentiary requirements. In contrast, *FedEx’s subsequent acquisition of*

²⁷ Bundeskartellamt, Antitrust Enforcement by the Bundeskartellamt – Areas of Focus in 2007/2008, at 14-15 (2007), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Taetigkeitsberichte/Bundeskartellamt%20-%20Activity%20Report%202008.pdf?__blob=publicationFile&v=3.

²⁸ OECD, Out-of-Market Efficiencies in Competition Enforcement – Background Note by Secretariat (2023), available at https://www.oecd.org/en/publications/out-of-market-efficiencies-in-competition-enforcement_2f181e49-en.html.

²⁹ Press Release, Eur. Comm’n, Mergers: Commission blocks proposed acquisition of TNT Express by UPS (Jan. 29, 2013), https://ec.europa.eu/commission/presscorner/detail/en/ip_13_68.

TNT was approved,³⁰ with other competition authorities placing greater weight on international efficiency gains and adopting a more pragmatic evidentiary approach. This case reflects the variation across jurisdictions and underscores the importance of convergence in analytical frameworks to provide clarity and consistency for globally operating firms.

33. Several jurisdictions have begun to acknowledge out-of-market efficiencies more openly in their merger guidelines or enforcement decisions.³¹ These systems recognize that broader efficiency gains – such as economies of scale, network synergies, or innovation spillovers – may justify mergers even when localized competitive concerns exist. The OECD Background Note urges further development of methodologies for assessing such claims and suggests that retrospective merger studies could help authorities better understand how dynamic and out-of-market efficiencies materialize over time.

34. *Business at OECD* strongly supports a shift toward more holistic and transparent merger analysis that considers both domestic and international efficiency gains, especially in complex, innovation-led sectors. Doing so not only improves the accuracy and relevance of competition assessments but also supports broader policy goals tied to growth, sustainability, and resilience in strategic industries.

4. Role of Efficiencies in Merger Remedies

35. Efficiencies may play an important role in shaping the design of remedies where competition concerns are identified. While structural remedies such as divestitures remain the traditional tool, there is growing recognition that efficiency-related commitments, especially those linked to innovation, investment, or infrastructure, can provide effective, proportionate alternatives. These behavioral remedies may be structured around the realization of specific efficiencies, such as technology deployment or improved service

³⁰ Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of small package delivery services provider TNT Express by FedEx (Jan. 7, 2016), https://ec.europa.eu/commission/presscorner/detail/en/ip_16_28.

³¹ Several jurisdictions have begun to acknowledge out-of-market (OOM) efficiencies in competition enforcement, particularly in contexts such as sustainability. The Netherlands Authority for Consumers and Markets has shown greater flexibility, particularly where sustainability goals are involved, sometimes accepting OOM efficiencies without full consumer compensation in the affected market. See Netherlands Auth. for Cons. & Mkts., Policy Rule: ACM's Oversight of Sustainability Agreements – Competition and Sustainability, ACM/UIT/596876 (Oct. 4, 2023), <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>. Germany is also moving toward recognizing such efficiencies, especially in environmental cooperation cases. See *Part II – ESG and Antitrust Law – Future Prospects and Practical Guidance*, JD SUPRA (July 31, 2024), <https://www.jdsupra.com/legalnews/part-ii-esg-and-antitrust-law-future-9718965/?utm>. The UK has issued guidance supporting the consideration of OOM efficiencies, notably in sustainability-related agreements. COMPETITION & MKTS. AUTH., GUIDANCE ON ENVIRONMENTAL SUSTAINABILITY AGREEMENTS (Oct. 12, 2023), <https://www.gov.uk/government/publications/guidance-on-environmental-sustainability-agreements>. Australia's merger authorization process permits the consideration of out-of-market efficiencies under a net public benefit test. *Transition to a New Merger Control Regime*, AUSTL. COMPETITION & CONSUMER COMM'N, <https://www.accc.gov.au/business/mergers-and-acquisitions/transition-to-a-new-merger-control-regime>. While this reflects a broader trend toward more holistic competition assessments, the acceptance of OOM efficiencies remains limited and highly conditional.

quality, offering a way to preserve competitive outcomes without sacrificing the broader benefits of the merger.³²

36. In this context, efficiency-driven commitments, such as investment obligations, access guarantees, or R&D commitments, can address competition issues while ensuring that consumers and markets benefit from the proposed transaction. These types of remedies are particularly relevant in strategic sectors, including telecommunications, AI, and clean energy, where scale and integration can drive innovation and resilience.

37. A strong example of this evolving practice is the *Vodafone/Three* merger review by the UK's CMA.³³ In this case, the merging parties argued that the transaction would generate significant efficiencies through shared network infrastructure and faster 5G rollout. While the CMA identified potential harms from reduced competition, it showed openness to behavioral and investment-related remedies designed to preserve competition while enabling innovation. This case reflects a more nuanced and forward-looking remedy strategy, particularly when efficiencies are robust, verifiable, and aligned with public interest goals. The case also highlights the importance of evidence-based arguments, particularly regarding efficiencies. Another example is the *T-Mobile/Sprint* merger, where the U.S. Federal Communications Commission and Department of Justice accepted investment-based efficiencies tied to the parties' commitment to deploy 5G infrastructure. The agencies concluded that the merger would deliver substantial public interest benefits – such as faster network deployment, broader coverage and capacity, increased innovation, and improved service quality – that were less likely if the firms remained independent.

38. Incorporating efficiencies into remedies requires a careful balancing act. Efficiency claims must be supported by credible evidence, and remedies must include enforcement and monitoring mechanisms to ensure that promised benefits are delivered. BIAC suggests that when properly structured, efficiency-based remedies can offer a more flexible and effective procompetitive alternative to structural interventions, especially in fast-evolving, innovation-led markets.

5. Policy Recommendations for the OECD and Competition Authorities

5.1. Enhancing Transparency in Efficiency Evaluations

39. Efficiency assessments would benefit from clearer, more consistent methodologies and a broader evidentiary base:

- *Standardizing Quantification Frameworks*: The OECD should promote common principles or templates for evaluating efficiencies, helping reduce uncertainty for merging parties and improving cross-jurisdictional consistency.
- *Encouraging Flexible Analytical Frameworks*: Encouraging competition authorities to adopt a rigorous, yet more prospective, analytical framework when

³² John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, (2011) [https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf?utm](https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf?utm_source=antitrustinstitute.org). See also OECD, Merger Control in Dynamic Markets (2020), <https://web.archive.org/2020-03-10/546724-merger-control-in-dynamic-markets-2020.pdf>.

³³ Press Release, Competition & Mkts. Auth., CMA Clears Vodafone / Three merger, subject to legally binding commitments (Dec. 5, 2024), <https://www.gov.uk/government/news/cma-clears-vodafone-three-merger-subject-to-legally-binding-commitments>.

assessing (dynamic) efficiencies, particularly regarding the standard of proof. BIAC highlights the promotion of a qualitative assessment of such efficiencies, as a useful starting point. In addition, BIAC emphasizes the importance of adopting a more forward-looking and flexible time horizon when evaluating efficiencies, recognizing that certain dynamic benefits may materialize over a longer period and should not be discounted prematurely.

- *Accepting Alternative Evidence:* Authorities should be encouraged to consider non-traditional forms of evidence, including internal business documents, sectoral case studies, expert evaluations, and qualitative insights – especially in innovation-driven or fast-evolving industries where conventional modeling may be impractical or incomplete. Additionally, agencies should provide clearer guidance on the types of evidence they consider relevant and how they intend to weigh such information in their evaluations.
- *Reflecting on Previous Cases:* In some instances, reviewing past merger outcomes may help identify how dynamic efficiencies have played out over time and reveal potential gaps between forecasts and real-world impact. Where relevant, such reflection could provide lessons to inform future assessments and support a more grounded understanding of innovation-related benefits that may only become visible in the longer term.

5.2. Adapting the Standard of Proof for Efficiencies Assessment

40. To ensure that merger review frameworks reflect a more realistic balance between potential harm and procompetitive benefits, the OECD and competition authorities should adopt a more flexible standard of proof for assessing efficiencies. This may include:

- *Balancing Harm and Efficiencies:* Authorities should weigh efficiency claims and potential anticompetitive effects using a symmetrical approach, recognizing that rigid harm presumptions may overlook longer-term consumer and innovation gains.
- *Addressing Inconsistencies in Counterfactuals and Time Horizons:* Greater consistency is needed in defining counterfactual scenarios and incorporating longer-term benefits, particularly where dynamic efficiencies or sectoral competitiveness are at stake.
- *Reevaluating Standards:* Adapting strict evidentiary standards – such as timeliness, verifiability, and merger-specificity – the current standard designed for static (cost) efficiencies may not adequately capture the full scope of dynamic efficiencies. This approach risks placing undue emphasis on short-term price effects while overlooking longer-term innovation gains.
- *Enabling Reform:* To enable meaningful change, legislative intervention should be considered where necessary, as many authorities lack both the mandate and incentive to depart from the current framework independently.

5.3. Facilitating Constructive Dialogue Between Businesses and Regulators

41. Efficient and cooperative engagement between firms and authorities can lead to more accurate, timely, and credible efficiency evaluations:

- *Promoting Early Engagement on Efficiencies:* Regulators should proactively invite discussion of efficiencies during the initial phases of merger review, avoiding procedural bottlenecks and late-stage dismissals of credible claims.

- *Co-Developing Thresholds and Expectations*: Encouraging firms to work with regulators to define sector-appropriate efficiency benchmarks and evidentiary thresholds would foster mutual understanding, better outcomes, and more success stories.

6. Conclusion

42. Efficiencies play a central yet underutilized role in merger review. While some mergers raise concerns about increased market concentration, they can also deliver significant gains in innovation, performance, and consumer welfare. However, competition authorities have traditionally been skeptical of efficiency claims, finding them difficult to predict and substantiate, especially since the relevant data is typically held by the merging firms. Dynamic efficiencies, which involve procompetitive longer-term innovation and market evolution, are particularly hard to measure, leading many companies to avoid relying on efficiency arguments during merger reviews altogether. Antitrust agencies have historically struggled to take efficiency defenses seriously, due in part to the inherently speculative nature of such evaluations.

43. Recently, however, there has been renewed attention on integrating efficiencies more meaningfully into merger assessments. Authorities are showing greater openness to efficiency arguments, including those tied to investment and collective outcomes. High-profile cases such as *Vodafone/Three* and policy documents like the Draghi Report have underscored the strategic value of innovation-led efficiencies, especially in sectors critical to economic resilience. Despite ongoing regulatory caution – highlighted in recent merger guidelines and joint agency statements – there is growing recognition that overly rigid approaches may discourage beneficial transactions.

44. *Business at OECD* notes that merger assessments often give insufficient attention to efficiencies, especially dynamic ones, focusing too narrowly on short-term, price-based effects. This limited approach may lead to interventionist decisions that block mergers with potential long-term innovation benefits. *Business at OECD* urges competition authorities to adopt more flexible and comprehensive frameworks that better integrate dynamic efficiencies into competitive analysis.

45. To support this shift, *Business at OECD* recommends clearer guidance on the types of evidence considered relevant – such as internal documents or strategic plans – and greater openness from authorities in evaluating such claims. It also highlights the Canadian model’s qualitative approach as a useful model. Finally, *Business at OECD* encourages retrospective reviews of past mergers to assess the real-world impact of efficiency gains, particularly those tied to innovation, which may take years to emerge.