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The European Commission's consultation on draft new Merger Guidelines: A response by AlixPartners

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1. Introduction

Following the European Commission's (the "**Commission**") consultation on its review of the 2004 Horizontal Merger Guidelines ("**2004 HMGs**") and the 2008 Non-Horizontal Merger Guidelines ("**2008 NHMGs**") (collectively the "**Previous Guidelines**")[1], on 30 April 2026, the Commission published its Draft Merger Guidelines (the "**Draft Guidelines**").[2] AlixPartners welcomes the opportunity to respond to the Commission's consultation on its Draft Guidelines.[3] AlixPartners advises clients on a range of competition economics matters, including in the context of merger investigations in the European Union, the United Kingdom ("**UK**"), and globally.

The Commission can be commended for drafting a comprehensive set of merger guidelines, accounting for the evolution in merger control since 2008. There are numerous welcome additions, and in this document we provide our thoughts on key areas where the Commission might provide additional clarity on how it will assess issues or the evidence that it will consider from merging parties (and their advisors).

Clarity – and consequently, predictability – regarding merger control matters: competition policy can have deterrent effects, including for pro-competitive mergers, if the outcome of the Commission's review is uncertain. Deterrence is likely to be of particular concern where efficiencies are important offsetting factors. The burden of proof to demonstrate offsetting merger-specific efficiencies is placed on the merging parties and, at least to date, such efficiencies have rarely been accepted as a sufficient offsetting factor to clear a merger.

We note that the Draft Guidelines set out how merger control requires a forward-looking assessment of the merger relative to a counterfactual (i.e., the expected future situation absent the merger and any resulting efficiencies). This includes some helpful detail on failing firm arguments, but could benefit from further detail on

1. The Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines, respectively published in 2004 and 2008, provide guidance on the Commission's practice when assessing the impact of mergers on competition, within the legal framework of the EU Merger Regulation.
2. See, Draft Guidelines.
3. Following our September 2025 submission on the Commission's general consultation ("**AlixPartners Consultation Response**"). See, AlixPartners Consultation Response.

additional counterfactuals such as a strategic exit and/or a general lessening of the competitive constraint posed by one or both of the merging parties. We include some suggestions for the Commission in Section 2 below.

How the Commission will consider dynamic theories of harm has also been greatly expanded, including adding specific sections on investment and expansion competition, innovation competition, and potential competition (again reflecting the different approach the Commission has used to assess dynamic mergers since the Previous Guidelines). The Commission has also introduced an "innovation shield" section, which provides a safe harbour for a category of transactions that previously operated under significant uncertainty. We include several suggestions for the Commission to consider on these topics in Section 3.

The Commission has now formalised the ecosystem theory of harm, now called "Entrenchment of a dominant position", including setting out the factors that will be used to understand when it might apply.[4] We include some further thoughts on this in Section 4.

The Commission has also introduced a new "theory of benefit" framework (addressing the asymmetry of the Previous Guidelines, which mainly focus on how mergers may be anti-competitive), which includes sections for direct and dynamic efficiencies and more guidance on the relevant time horizons for assessing efficiencies. The Commission has helpfully added detail on how scale-enhancing efficiencies may contribute to European competitiveness, including innovation and technological progress, market integration, expansion, and scaling globally, and security and resilience.[5] These are all welcome additions, but we include some further suggestions for the Commission to consider as regards efficiencies in Section 5.

We note that the Draft Guidelines do not cover the Commission's approach to remedies in merger review. In our view, this is an important area to consider, given the broader changes introduced in the Draft Guidelines compared with the Previous Guidelines. We set out our views on how the Commission might consider remedies in the context of the Draft Guidelines in Section 6.

2. The counterfactual

As set out in the Draft Guidelines, to determine whether there is a significant impediment to effective competition ("**SIEC**"), the Commission must assess whether there is a causal link between the merger and the effects on competition. This requires a forward-looking assessment of the merger relative to the counterfactual.[6] The Draft Guidelines contain a new section setting out the guiding principles for assessing the counterfactual, including a prominent example of a counterfactual that may be relevant to some mergers: the "failing firm".[7] This is a substantive improvement on the Previous Guidelines, which lacked structured treatment of when and how the counterfactual should depart from pre-merger conditions. However, this section sets out several suggestions and clarifications for the Draft Guidelines on this topic.

2.1 Strategic exit and a general weakening of competition

One topic that the Draft Guidelines could consider in more detail relates to counterfactuals that are neither the pre-merger conditions nor strictly

4 See, Section 4 of the AlixPartners Consultation Response. The Commission draws on experience from recent mergers including *Google/Fitbit* and *Booking/eTraveli*.

5 Likely in response to the Draghi Report.

6 Draft Guidelines, ¶37.

7 Draft Guidelines, Part I, Section B.5.

"failing firm" scenarios. These include: (i) the "failing division" scenario; (ii) a strategic exit of an ostensibly healthy business; and (iii) a general weakening of competition.

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First, the failing division scenario is where a subsidiary or affiliate business in financial distress may be at risk of closure absent a proposed merger.[8] In circumstances where a failing business is part of a larger, *profitable* group, while a parent company may continue to provide financial support, it does not mean the parent would do so in perpetuity. The financial distress of a division may not immediately lead to its exit, but shareholders and management would need good reasons to fund persistently loss-making activities.

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Second, there are multiple, non-financial reasons why businesses choose to exit markets or reduce their presence, particularly when the relevant business subject to a merger is part of a larger group (the "strategic exit" scenario). This scenario may include:[9]

- Strategic repositioning, including disposing of non-core businesses, so that management can focus on the core business. Management resources are finite, and logically should focus on their core business activities. Other firms may well be willing to purchase such non-core businesses, such that the merger counterfactual may be similar to the pre-merger situation if the assets continue to be used in the same market.
- Re-allocating capital to other activities of the wider group that are higher priority or achieve superior returns. In particular, there may be an opportunity cost in employing specific assets and skilled staff in one activity if they can be deployed more profitably in other activities. If, for example, the land required for a specific business activity can be used at high value for another activity, then it is not sufficient for this specific business to be profitable – it must generate returns that exceed those associated with the alternative use of the land. In this scenario, the counterfactual to the merger could simply be for a business to exit a line of business.
- Some markets are evolving or technology is changing consumer demand, such that continuing with a line of business is risky or will face declining demand: in these cases businesses may likely see declining sales and losses in the future. Making further investments in a business with uncertain or poor future returns may not be commercially sensible. In this scenario, a firm may make an exit decision when key fixed assets require replacement.

Where strategic reasons are a key driver of the exit decision, rather than financial underperformance, it will still be important to evidence that there is no realistic, less anti-competitive purchaser. However, firms may not actively and widely market a part of their business as being up for sale if they determine that exit is very likely to be preferable or if the seller is facing financial distress, particularly given the costs and risks of doing so (including that this may create customer, employee, and supplier uncertainty as to the business's operation, leading to a loss of customers, employees, and suppliers, worsening the position of the target business). In addition, a key difficulty is that often decisions to exit, even if independent of the merger, are contemplated at a similar time to potential mergers (thus raising questions about the link between exit decisions and mergers). Accordingly, internal documents should be interpreted carefully.

[8] As referenced in Draft Guidelines, ¶50.

[9] See, GLI – Merger Control 2020, Ninth Edition, "COVID-19: Avoiding the failure of the failing firm defence", pages 8-9.

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Third, there is a related scenario that falls short of a failing firm/division and full strategic exit, but in which competition would nonetheless weaken absent the merger. In particular, the relevant counterfactual may be one of generally weakening (rather than fully exiting) competition. Strategic exits may involve investment being switched away to other activities, thereby progressively weakening the competitiveness of a business over time. For example, a business may maintain existing supply relationships (and fulfil existing contracts, potentially over long time frames), but decline to bid for any new business.

The Draft Guidelines accept that pre-merger conditions may not be the right benchmark where "*there is a sufficient degree of certainty on future changes in market conditions that are unrelated to the merger*" and that the Commission will take into account "*future events or market evolutions unrelated to the merger that can be predicted with a sufficient degree of certainty,*" expressly including *"exit of firms in or from the market"* and *"declining markets*".[10] At a glance, these passages would accommodate a counterfactual in which the target exits or recedes from a market. However, the Draft Guidelines also note that "[t]*he expected deterioration of market circumstances cannot be integrated into the counterfactual if it is the effect of future actions* ***under the control of a party to the merger***" (emphasis added).[11]

A strategic exit is an action that is under the control of a party to the merger. It is therefore unclear whether the reference to excluding from the counterfactual actions under the control of a party to the merger, would override the reference to the Commission accounting for the exit of firms in or from the market.[12] Or whether the earlier reference to the "*exit of firms*" is only intended to capture third-party exit.[13]

The exit provisions that follow then focus on financial exit (i.e. the failing firm). The Draft Guidelines note under limb 1 that "*the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another firm or successfully reorganised*".[14] The failing-division test also asks whether the parent is "*no longer financially capable*" of supporting the subsidiary.[15] Notably, the words "strategic exit" do not appear, and there is no standalone basis for a profitable firm exiting a market for non-financial commercial reasons.[16]

We would therefore suggest that the Commission clarify the treatment of scenarios that fall short of the failing firm, but in which competition would nonetheless weaken absent the merger. In particular, the Draft Guidelines could:

- clarify the interaction between the references to account for the exit of firms, and excluding from the counterfactual actions under the control of the merger party;
- add an express statement, alongside the failing-firm section, that a firm (or division, or asset package) may exit a market for strategic as well as financial reasons, and that such exit may form part of the counterfactual where the

10 Draft Guidelines, ¶¶39-40.
11 Draft Guidelines, ¶40.
12 Draft Guidelines, ¶39-40.
13 In contrast, the UK Competition and Market's authority guidance is much clearer on this point, explicitly inviting a graduated "weaker competition" counterfactual giving practitioners clearer direction between "no change" and "full exit".
14 Draft Guidelines, ¶47.
15 Draft Guidelines, ¶50.
16 As an example, the CMA Merger Guidelines at ¶3.29 state that "*A merger firm may exit for strategic rather than financial reasons absent the merger. The CMA would need to be satisfied that the business would have ultimately exited for strategic reasons unrelated to the transaction in question*".

parties show it would have occurred independently of the merger; and

- confirm that, where exit is not established, but the target would have become a materially weaker competitor, that weakening will be reflected in the competitive assessment.

2.2 Failing firm

There are many reasons why firms "fail", triggering a restructuring or sale process. The triggering events may include:[17]

- Financial covenant breach or other events of default in funding agreements, such that the banks may demand repayment of funding.
- Audit sign-off and challenges in persuading the auditor that the business can continue to trade as a "going concern".
- Short-term funding requirements, and an inability to secure additional funding to cover losses.
- Restriction of trade due to regulatory changes or other similar events that reduce revenues or increase costs.

The most common cause is declining profits, leading to a situation where a business has insufficient cash to meet its liabilities when they become due, or to fund the necessary investment in the business. Businesses may also fail when fixed assets come up for renewal if investors do not consider the expected profits justify further investment. Conversely, firms may retain loss-making divisions to avoid or delay restructuring costs or where such businesses are of wider strategic importance (e.g. as a source of key inputs or sales of closely related products).

Paragraphs 45 to 51 of the Draft Guidelines lay out a clear framework for the assessment of the failing firm. This includes articulating three limbs for testing whether a failing firm argument would be accepted: (1) financial difficulty, (2) no less anti-competitive purchaser, and (3) the assets would inevitably exit (or sales would accrue to purchaser in any event).[18] Our views on each of these limbs are provided below, and in particular, we note the difficulties which the third limb causes when considering a failing firm argument.

As regards the first limb (financial difficulty), the section does not describe what economic or forensic accounting evidence the Commission might find persuasive, and this may be an area where the Commission can go further. There is likely to be a range of pre-merger internal and external documents. These may include:

- Management documentation (e.g., presentations, board minutes and emails) highlighting stress/distress and any mitigation strategies considered or taken.
- Management documentation discussing strategic options or M&A, including any assessments of potential buyers of the business.
- Adviser reports.
- Audit discussions, including sensitivity analysis and going concern considerations.
- Correspondence and meetings with lenders.
- Finance function documents, including budgets and presentations.

As regards the second limb, there is no indication of the standard of proof for the "no alternative purchaser".

- For example, it might be important to understand why the purchaser is acquiring a firm or its assets in the context of claims that it

[17] See, GLI – Merger Control 2020, Ninth Edition, "COVID-19: Avoiding the failure of the failing firm defence", Mat Hughes & John Bruce, AlixPartners UK LLP, page 9.

[18] Draft Guidelines, ¶¶45-51.

would have exited the market.[19] For example, if the purchase price exceeds the liquidation value of the business, then it is legitimate to ask why this outcome has arisen in the absence of less anti-competitive purchasers, who would operate the business or use its assets in the relevant market. This might be the case if there are synergies for an in-market purchaser that other out-of-market purchasers would not enjoy. In a bargaining framework (which often best describes M&A sales), the merging parties' outside options may determine the ranges within which outcomes may lie (i.e., what the parties would do absent the merger in contemplation), but the actual outcome may depend on bargaining skill, the consequences of delay to either side, and the information available to both sides. Accordingly, a positive purchase price may not – depending on the facts – be clear evidence that there would have been alternative, less anti-competitive purchasers.

- It may also be important to know if and how the distressed business has been marketed to alternative, less anti-competitive purchasers and whether these processes generated (or failed to generate) credible alternative bids. However, the absence of a marketing process does not mean that there would have been alternative, less anti-competitive purchasers. In particular, the commercial reality of trying to market/sell a distressed business may dictate that a full marketing process is not undertaken if this is likely to prove futile, costly and/or cause delay (such that a distressed business requires further funding, and the risk of losing customers, employees and suppliers). Accordingly, whilst a failure to attract alternative bidders following a marketing process may be highly informative, the absence of such a process should not be determinative.
- Accordingly, in our view, the Draft Guidelines would benefit from more fully articulating the types of evidence that the Commission would consider when determining when the failing firm may apply to distressed firms, and what weight it may give to particular types of evidence.

As regards the third limb, the Draft Guidelines depart from both the US Horizontal Merger Guidelines and the UK CMA in maintaining such a limb (i.e., whether, absent the merger, assets of the failing firm would inevitably exit the market, cease to play a competitive role, or the sales would in any event accrue to the acquirer).[20] In our view, where limbs 1 and 2 are met, strong arguments can be made that the third limb should not be required.[21]

- First, it risks leading to paradoxical outcomes. If the exit of a firm/division would lead to all (or the vast majority of) the sales transferring to the merging party as it is the only competitor regardless of the merger, then the third limb would clearly be satisfied. However, it would not be satisfied if multiple competitors remained, such that sales would be distributed more widely. However, the post-merger outcome is clearly more competitive in the scenario where there are other competitors post-merger.
- Second, even if sales would otherwise be dispersed among multiple competitors, there is no general reason for exit to be more competitive than a merger, particularly as the reduction in the number of competitors is not a consequence of the merger.
- Third, a merger may also preserve the failing firm's output and capacity, thereby limiting

19 See, for example, the CMA Merger Assessment Guidelines, footnote 2, ¶3.24.
20 See, US Merger Guidelines, Section 3.1. See also, CMA Merger Guidelines, Section 3.
21 For a fuller discussion on this topic, see an article by AlixPartners economist Mat Hughes and restructuring expert John Bruce: COVID-19: Avoiding the failure of the failing firm defence, pages 5-6.

price increases and ensuring continuity of supplies and thus creating value for customers.

3. Framework for forward-looking assessment of dynamic competition

The Draft Guidelines' expanded treatment of dynamic competition is an important improvement on the Previous Guidelines, which treated dynamic considerations as exceptions to a fundamentally static framework anchored in price, output, and market shares.[22] Recent decisional practice has demonstrated that dynamic considerations can sometimes be central to the competitive assessment.

The Draft Guidelines also introduce a more structured counterfactual framework, as discussed above in Section 2, which is particularly relevant in dynamic markets, where pre-merger conditions do not typically represent future market evolution absent the merger.

Introducing the innovation shield at paragraph 192 is a welcome development that provides a safe harbour for a category of transactions that previously operated under significant uncertainty. Under the Previous Guidelines, acquisitions of small innovative firms by non-dominant acquirers were not formally distinguished from other transactions, creating significant uncertainty and potentially deterring firms from pursuing pro-competitive acquisitions. The innovation shield provides a structured framework with explicit thresholds. For practitioners, this means that the analytical work required for transactions within the shield's parameters will become substantially more tractable: deal teams can assess shield eligibility relatively early in the transaction process and structure the deal narrative accordingly. Importantly, introducing the shield, by providing increased legal certainty, should incentivise scale-enhancing, pro-competitive acquisitions of small innovative firms, in line with the Commission's wider policy objectives.

However, the shield's three-competitor threshold may exclude sectors where R&D capability is already concentrated for reasons unrelated to the merger. For instance, sectors where R&D requires economies of scale, where talent and critical resources are scarce, where regulatory barriers are high, or where addressable volumes are too small to fund multiple independent programmes keep the number of credible innovators structurally low. These are ostensibly also the sectors where the Commission's broader policy framing at paragraph 15 prioritises industrial scale, but for which the innovation shield may be unavailable.[23] This could create an internal inconsistency in the Guidelines. In such sectors, it would be useful for the Commission to clarify how it will balance the benefits from increased scale with a potential SIEC.

Separately from the innovation shield, the evidentiary challenges to the broader innovation

[22] 2004 HMGs, ¶15, 37-38, 74, and 76.

[23] To illustrate with three examples. First, in orphan-drug development, rare-disease innovation space may contain only three or four small biotech firms pursuing distinct therapeutic approaches. A merger between two of them may be driven by the need to combine scarce scientific talent and fund clinical programmes whose patient population may be too small to support multiple independent efforts – the rationales discussed in paragraph 15. Yet such a merger could lead to fewer than three independent innovators and would not benefit from the shield. Second, in 5G/6G radio access network infrastructure, the credible global frontier innovators appear to be few (Ericsson, Nokia, Huawei), thereby already at or below the threshold of independent innovators. A merger between the two European players to gain scale, would leave a single European innovator which paragraph 15 may supports (R&D scale, ability to compete against the global incumbents), yet the shield would be structurally unavailable. Thirdly, in extreme ultraviolet (EUV) lithography, Europe's ASML is the sole credible producer of the most advanced fabrication. ASML's EUV capability rests on a small number of specialised suppliers (e.g. Carl Zeiss's precision optics that EUV depends on), who themselves operate in concentrated innovator sectors. Any consolidation or vertical integration involving these critical upstream innovators would result in even fewer independent players. This would be at odds with the three-competitor threshold but such a transaction appears to be welcomed by paragraph 15.

theory of harm[24] are significant and could usefully be acknowledged.[25] Pre-merger innovation plans are frequently not in the public domain and may be business secrets even as between the merging parties. Much early-stage innovation fails, so optimistic internal documents prepared to secure internal funding are not necessarily a reliable guide to likely outcomes. And innovation – even more than capacity expansion – is often aimed at winning entirely new business, or responding to generic or unpatented competition, rather than cannibalising rivals' existing sales, which widens the relevant set of competitive constraints.

The Draft Guidelines acknowledge the potential of a merger "*reducing pressure to innovate on the few remaining competitors with similar innovation capabilities or R&D organisations*".[26] It would be helpful for the Commission to add clarification that this can occur in other ways than the reduction in competitive pressure between the merging parties, subsequently leading to reduced competitive pressure for the "few remaining" competitors. For example, the merger may directly reduce the incentive to innovate/invest for a third party if the party cannot contest as much of the market as it could pre-merger.

One case where this mechanism was present was a 2022 proposed infrastructure sharing deal between two mobile network operators in Australia (Telstra/TPG). This deal was blocked by the Australian Competition and Consumer Commission ("ACCC") due to concerns around lower incentives that Optus would have to invest in the roll-out of 5G infrastructure if the deal were allowed to go forward.[27] Specifically, the ACCC's concern was that the deal would lead to mobile subscribers leaving Optus for Telstra/TPG. This would make investment in 5G infrastructure less profitable for Optus (as it would have fewer subscribers from which it could recoup its investment costs) and therefore decrease the incentive for Optus to invest. The decreased incentive for Optus to invest would, in turn, lead to lower competitive pressure on Telstra to invest in its network in the future.

Finally, the innovation theory of harm has a natural countervailing theory of benefit that the framework could acknowledge more explicitly: because R&D is itself a cost, merger-related savings or the elimination of duplicative workstreams may increase rather than reduce aggregate innovation output. The Draft Guidelines partly acknowledge this at paragraph 175, but the point applies generally to innovation cases.

4. Entrenchment

The Draft Guidelines set out a theory of harm relating to "entrenchment" of a dominant position.[28] This may occur in instances where complementary assets (that operate on different but related markets) are brought together through a merger in a way that bolsters or "entrenches" a firm that was already dominant in a market. This is an arguably broader version of what has sometimes been referred to as an "ecosystem" theory of harm. However, the entrenchment theory of harm is not a vertical foreclosure theory of harm – e.g., the leveraging of market power from an input market into a supply market – but instead concerns increasing pre-merger market power in the core supply market.

Three conditions are included in the Draft Guidelines that need to be met in order for this theory of harm to be a concern:

24 Draft Guidelines, ¶¶175-191.
25 Noting suggested sources of evidence regarding this theory of harm in Draft Guidelines, ¶¶190-191.
26 Draft Guidelines, ¶186.
27 For example see [ACCC blocks Telstra/TPG infrastructure agreement – Global Competition Review]
28 Draft Guidelines, ¶¶252-259.

- dominance in a core market;[29]
- acquired assets related to the core market;[30] and
- assets "important to effectively compete on the core market and their control restricts the ability and incentives of rival firms to enter or expand".[31]

In the AlixPartners Consultation Response, we addressed the entrenchment/ecosystem theory of harm, reflecting the potential pitfalls of this theory of harm and the importance of clear guidance on how it may be applied.[32] The framework set out in the Draft Guidelines to address this theory of harm is sensible (as summarised in the paragraph above). However, there are several key elements that should be addressed explicitly:

- A key question is whether the acquired assets outside of the core market can be replicated by competitors. If competitors can readily replicate these assets – or compete to access customers in other ways –the acquisition of assets *outside of the core market* is unlikely to lead to an SIEC. In other words, the issue could be expressed more precisely in terms of replicability rather than the vaguer notion of importance. In particular, do competitors to the dominant firm use other assets pre-merger, or could they readily do so?
- For an entrenchment theory of harm to be credible, the asset being acquired (outside of the core market) needs to be a material complement to the dominant firm's offering in the core market. Indeed, the Commission recognises that the asset may be a complement, but we would encourage a clearer explanation of the relationship between the two assets in the second condition for this theory of harm (assets "related" to the core market). Many assets (or, for that matter, products or services) may be related to the core market, but the relevant question is whether there is material complementarity such that pre-merger competition may be appreciably reduced and thus firms would acquire the ability and incentives to profitably worsen some competitive parameters.
- There is a tension between how the entrenchment theory of harm is set out and possible efficiencies that may be claimed by the merging parties. As the Commission recognises, there needs to be a connection between the products provided by the merging parties. This connection – within the framework set out in the Draft Guidelines, typically some form of complementarity – may well be the basis for the efficiencies claimed by the merging parties. For example, if an input (or integration with a customer acquisition channel) enables the merged business to attract more consumers to its core market, then this may enable it to increase its market share, but this generally should be treated as an efficiency, not a source of anti-competitive harm. Accordingly, we would encourage the Commission to explain more explicitly how the entrenchment theory of harm does not create an "efficiency offence" where efficiencies that benefit consumers strengthen a firm's position and restrict competition: without an explicit consideration, efficiency offence concerns could lead to mergers that are beneficial for consumers being blocked or deterred.
- The evidentiary hurdle for an entrenchment theory of harm versus an efficiencies claim differs in the Draft Guidelines. For example, if an entrenchment theory of harm is pursued, the Commission may rely on scale economies and integration as market dynamics conducive to

[29] Draft Guidelines, ¶254.
[30] Draft Guidelines, ¶255.
[31] Draft Guidelines, ¶256.
[32] AlixPartners response to EC Merger Guidelines Consultation | AlixPartners

harm. If, however, the merging parties invoke those same dynamics as efficiencies, they then need to provide evidence to show that these are: verifiable, merger-specific, and benefit consumers (as discussed further in Section 5 below). We would encourage the Commission to consider including a more explicit statement of similar evidentiary thresholds for this type of theory of harm as for corresponding efficiencies that rely on the same dynamics. The burden of proof may be on different parties (the Commission as regards anti-competitive effects, and the merging parties as regards pro-competitive efficiencies), but there is a strong argument that the standard of proof should be the same/symmetrical.

5. Efficiencies

We welcome the developments and updates to the Commission's approach to considering efficiencies in merger review. The framework for a "theory of benefit" introduced in the Draft Guidelines should support pro-consumer mergers, which may otherwise have been deterred or blocked.[33] This framework corrects an analytical asymmetry that has constrained European merger control for two decades. In particular, the following elements of the Draft Guidelines regarding efficiencies are worth noting:

- Efficiency claims are now treated as part of the substantive analysis rather than as a defensive afterthought – which is often forgone due to a perception of low likelihood of success and risk of efficiency arguments being used to support efficiency offence reasoning.
- Setting out a clear explanation of direct efficiencies versus dynamic efficiencies is welcome. Introducing a framework on dynamic efficiencies is particularly relevant given the increased focus on forward-looking assessments throughout the Draft Guidelines, and in many recent merger cases.[34]
- The detailed taxonomy of possible direct and dynamic efficiencies, with an explicit statement that this is a non-exhaustive list, is also welcome, and will hopefully encourage mergers to be brought forward that will deliver these types of benefits to consumers.

The Draft Guidelines retain the three criteria that need to be met for efficiencies to be accepted as were present in the Previous Guidelines: verifiability, merger specificity, and the benefit to consumers. We consider each of these criteria in turn below.

5.1 Verifiability

We welcome the Commission's explicit statement that "*efficiency claims must be supported by a sufficiently cogent and consistent body of evidence, to the same evidentiary standard as the anticompetitive effects*".[35] This impetus for symmetry in the evidentiary standard between theories of harm and theories of benefit is well-placed. That said, some other parts of the Draft Guidelines leave the door open on what evidence would be probative, for example, as regards entrenchment theories of harm (as noted in Section 4 above). The Commission's decisional practice will be important in driving confidence that efficiencies will be seriously considered in merger review.

Relatedly, the Draft Guidelines helpfully reflect that the timing and impact of dynamic efficiencies may

[33] Draft Guidelines, ¶25.

[34] For instance, Case M.9987 – NVIDIA/Arm showed that in sectors like advanced semiconductors, large scale and capital deployment are vital inputs for breakthrough R&D rather than inherent competitive threats. Yet, assessing the long-term innovation benefits on the near-term direct benefits framework undermines the potential positive outcomes from a transaction.

[35] Draft Guidelines, ¶304.

be more uncertain and harder to quantify.[36] Indeed, it is unreasonable to expect that the same evidence will be available for dynamic efficiencies as for direct efficiencies, and the explicit mention of "*in the same way as for a theory of harm, a longer time frame for benefits to materialise may make them less predictable and quantifiable*" is welcomed.[37]

Likewise, regarding dynamic efficiencies, the Draft Guidelines distinguish the ability to invest or innovate from the incentive to invest or innovate. This is a sensible framework, but we note that the same evidentiary standard – "concrete evidence" – is applied to both.[38] Ability and incentive evidence differ in analytical character. Ability evidence concerns resources, capabilities, and complementary assets that the merged entity will hold post-transaction. This can be demonstrated through balance sheet evidence, capability inventories, historical investment patterns, and commercial integration plans. Incentive evidence, however, concerns whether the merged entity will choose to invest, which depends on profitability given future market structure, demand evolution, and competitive responses. Incentive evidence is therefore by its very nature more uncertain (and arguably, less "concrete"). Requiring documentary proof of future investment decisions at the same evidentiary standard as current capabilities is operationally demanding, unrealistic for many cases, and may put pro-consumer mergers at risk.

A credible commercial rationale for investment should satisfy the incentive requirement, without requiring contemporaneous documentary proof of future investment decisions that merging parties cannot credibly produce ex ante.[39]

5.2 Merger specificity

The threshold set for merger specificity in the Draft Guidelines is high – efficiencies must "*only occur because of the merger*" – and in our view, too high.[40] This appears to be a tightening of this criterion since the 2004 HMGs, which state that, for efficiencies to be merger-specific, they "*cannot be achieved to a similar extent by less anti-competitive alternatives*", as the mention of "similar extent" is no longer present.[41] We note that the CMA's new draft efficiencies guidelines have adopted a more practical threshold for merger specificity, namely whether "*efficiencies are reliant on the merger in question or whether they could realistically be brought about by other means*".[42]

In our view, the standard for demonstrating merger specificity should not be that the efficiency can *only* be realised via the merger. Rather, a practical assessment should be made, and if the merger is the most effective, most likely and/or most timely way to realise an efficiency that should carry weight. A useful sense-check on an assessment of merger specificity is the consideration of the counterfactual: if an efficiency is not likely enough to happen without the merger to form part of the Commission's counterfactual, or if it would be materially delayed in the counterfactual, then that should indicate that it is likely to be merger-specific. We note that there are already helpful statements in the Draft Guidelines that are consistent with this approach, for instance, regarding whether alternatives to a merger are

36 Draft Guidelines, ¶¶328-329.
37 Draft Guidelines, ¶328.
38 Draft Guidelines, ¶327.
39 This is consistent with the Commission's commitment at paragraph 308 to qualitative substantiation where quantification is not possible.
40 Draft Guidelines, ¶¶310 and 331.
41 Previous Guidelines, ¶85.
42 Draft Guidelines, ¶31.

"realistic", especially when considering dynamic efficiencies.[43]

We also note a tension between how contractual mechanisms are treated in considering foreclosure versus considering efficiencies:

- The Draft Guidelines state that the Commission is "*unlikely to place significant reliance on contractual safeguards"* when assessing whether the merged entity can foreclose, because contracts can be renegotiated.[44] Conditions are specified under which constraints would be effective: observability, enforceability, verifiability, and timely judicial remedy.[45]
- On the other hand, the Draft Guidelines require merging parties claiming efficiencies to demonstrate that "*less anticompetitive arrangements*", including licensing or cooperative joint ventures, could not substitute for the merger.[46]

The same contractual instrument is treated as unreliable on the harm side and as a potential efficient alternative on the benefit side. Treatment should instead be symmetric, applying the same economic principle that a contract's effectiveness depends on observability, enforceability, and incentive compatibility – the conditions articulated above. These conditions apply with equal analytical force to both contexts. The Commission could usefully clarify that these conditions apply both when assessing whether contractual safeguards prevent foreclosure and when assessing whether less anti-competitive contractual arrangements substitute for the merger. There does not seem to be any good reason to disregard contractual safeguards without considering the specific nature of such contractual provisions, including their enforceability. If the Commission's concerns relate to the sufficiency of such protections (e.g., they might suffice, but there are some detailed questions of scope or enforceability), then these issues may also be capable of being addressed by way of remedies (e.g., commitments reinforcing contractual protections).

Finally, we note the statement that incremental direct efficiencies from a merger will be recognised by the Commission (if only a part, but not all, of the claimed efficiencies are found to be merger-specific).[47] A similar explicit statement regarding dynamic efficiencies would be helpful to avoid implying that the same approach may not be taken as regards dynamic efficiencies.

5.3 Benefit to consumers

In line with the 2004 HMGs, the Draft Guidelines require that efficiencies need to lead to consumer benefits. The Draft Guidelines have added helpful detail and explanation of the types of consumer benefits that may be accepted. In particular, the discussion of quality benefits and evidence that would be considered in support of these is appreciated.[48] Additionally, the explicit recognition of "non-use value" benefits to consumers and that these can be claimed as efficiencies from a merger is also welcome.[49] These are important and helpful clarifications of what forms of consumer benefit the Commission will consider.

In practice, however, it will be important for the Commission to approach consumer benefits consistently across cases. Quality benefits and, in particular, non-use value benefits will in many

43 Draft Guidelines, ¶333.
44 Draft Guidelines, ¶218.
45 Draft Guidelines, footnote 308.
46 Draft Guidelines, ¶311
47 Draft Guidelines, ¶314.
48 Draft Guidelines, ¶¶319–323; ¶¶336–338.
49 Draft Guidelines, ¶¶321-322.

cases be difficult to robustly quantify. Nevertheless, some sense of the scale of these benefits will be needed in order for the Commission to be able to do the balancing exercise between benefit and harm that is set out in the Draft Guidelines.[50] The Commission has a "*margin of discretion with regard to economic matters*",[51] but as and when the Commission considers these types of benefits in mergers that are reviewed, consistency in treatment will be important to maintain predictability of the Commission's decision-making.

In terms of balancing benefits and costs, the Draft Guidelines state that benefits that accrue outside of the relevant markets, both out-of-market and collective benefits, can be recognised as merger efficiencies to the extent that they affect "substantially the same" group of consumers as any SIEC that is found.[52] This is a practical and welcome statement, in particular for cases that consider multi-sided or related markets where benefits accrue to the same individuals (though linked to different activities those individuals may undertake).

Finally, as concerns dynamic efficiencies bringing about consumer benefit, we note the statement that these "*are likely to lead to consumer benefits only if investment or innovation is an important parameter of competition*".[53] The Commission should exercise care when considering dynamic efficiencies and whether investment or innovation are indeed important parameters of competition in these markets. In instances where dynamic efficiencies may create entirely new products, markets, or revolutionise competition, these may not be key parameters of competition at the point of merger review. In fact, the most pro-consumer mergers may indeed be those that unlock dynamic efficiencies in industries that are stagnant or in decline.

6. Remedies

The Draft Guidelines do not address merger remedies, which remain governed by the 2008 Commission Notice on remedies (the "**Remedies Notice**").[54] This is a significant omission. The Remedies Notice's practical guidance draws on experience with foreclosure, coordinated effects and unilateral effects, while the Draft Guidelines expand both the range of theories of harm the Commission may pursue and the weight it gives to efficiencies. As the analytical framework widens, the gap between the assessment and the remedies available to give it effect grows with it.

We propose that the Commission sets out indicative guidance on the remedies it considers suitable under the expanded framework, either in the Draft Guidelines or by revising the Remedies Notice. This would support the predictability that the Draft Guidelines are intended to deliver and give parties a clearer basis for developing remedy proposals early in the process.

We set out below three points that the Commission should consider in doing so, drawing, where relevant, on the CMA's approach in the revised Merger Remedies Guidance published on 19 December 2025.

01

First, behavioural and hybrid remedies are effective options, where appropriate. These remedies may be effective and proportionate solutions relative to business divestments, particularly as regards some of the novel theories of

50 As described in Draft Guidelines, ¶¶339-357.
51 Draft Guidelines, ¶300.
52 Draft Guidelines, ¶¶354-357.
53 Draft Guidelines, ¶334.
54 See. Remedies Notice.

harm set out in the Draft Guidelines. For example, where harm is associated with R&D pipelines rather than marketed products, i.e., harm is due to a loss of innovation competition, a remedy may involve the divestiture or licensing of a pipeline asset, subject to confirmation that the prospects for success of the R&D pipeline in the proposed purchaser's hands are similar to those of the relevant merging party (such that the Commission may wish to approve the specific purchaser acquiring the R&D pipeline/IPR). Such transfers may effectively be structural remedies. In addition, where harm arises from the combination of assets in an ecosystem rather than any single asset, as in entrenchment, access, or interoperability commitments may be equally or more effective. Where harm depends on the effects of conduct over long time horizons, as in dynamic foreclosure, behavioural commitments may be a practical response, with monitoring and enforcement of these commitments being assisted by the appointment of independent monitoring trustees and dispute processes. We therefore encourage the Commission to expressly recognise that behavioural and hybrid remedies can be effective responses to these theories of harm.

02

Second, dynamic efficiencies have implications for remedy design. As set out above, the Draft Guidelines recognise the role of dynamic efficiencies at paragraphs 296 and 325. Where dynamic efficiencies are identified, but they are viewed as insufficient to remove the SIEC, behavioural remedies may both prevent the identified anti-competitive harm and also preserve the efficiencies. We encourage the Commission to be open to remedies designed to lock in those efficiencies, and to recognise that remedies and efficiencies are best considered together rather than separately, because the design of the remedy should consider potential efficiencies. The recent update to the CMA's Merger Remedies Guidance moves in this direction, recognising that it might be possible for remedies that secure rivalry-enhancing efficiencies to resolve the CMA's concerns, and we would encourage the Commission to consider this as well.[55]

03

Third, partial divestitures can be effective in local markets. In mergers affecting local markets (such as those involving retailers, wholesalers and other service providers that compete to serve nearby, local customers), in our view, remedies are most effective when calibrated to specific competitive concerns rather than applied uniformly on the basis of fixed decision rules. Competition effects in these cases are localised and often vary across the affected areas. We therefore encourage the Commission to recognise, within its remedies' framework, the scope for partial and targeted divestitures where the competitive concern is localised or otherwise specific to a subset of the affected markets. The CMA's revised Merger Remedies Guidance reflects this approach: in transactions involving local overlaps, it may accept the divestiture of local sites sufficient to bring the merged entity below the relevant intervention threshold, even where this does not remove the entire local overlap, provided effectiveness is robustly evidenced.[56]

[55] CMA, Merger Remedies Guidance, 19 December 2025, ¶7.17.
[56] CMA, Merger Remedies Guidance, 19 December 2025, section on remedies in local markets.