



Guidelines for Merger Analysis

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and Consumer Protection
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1. ELEMENTS OF MERGER REVIEW

Introduction

- 1.1 The merger review function of the Competition and Consumer Protection Commission ("Commission") covers mergers notified to it under section 18 of the Competition Act 2002, as amended (the "Act").¹ The word "merger" is used in these Guidelines to mean a merger or acquisition as defined in the Act (section 16(1)). The relevant test for the Commission's merger review function is the substantial lessening of competition ("SLC") test.
- 1.2 The remainder of this chapter sets out key elements of the Commission's merger review function, including the SLC test, the relevant counterfactual, and the evidence necessary for the Commission to perform its merger review function. Subsequent chapters elaborate further and cover:
- (a) Market Definition.
 - (b) Market Concentration.
 - (c) Horizontal Mergers.
 - (d) Non-Horizontal Mergers.
 - (e) Barriers to Entry and Expansion.
 - (f) Countervailing Buyer Power.
 - (g) Efficiencies.
 - (h) Failing Firms and Exiting Assets.
- 1.3 These guidelines² are intended to be accessible to specialists and non-specialists alike so wherever possible everyday language is used.

Substantial Lessening of Competition

- 1.4 Competition in the context of these Guidelines means rivalry between businesses to sell goods and/or services to

¹ Section 4 and/or section 5 of the Act can apply to mergers that are not notified to the Commission. Section 19(2) provides that a notified (or notifiable) merger that is put into effect without waiting for any required review and approval is void.

² This document replaces the "Guidelines for Merger Analysis" document that was published by the Competition Authority in December 2013 (Competition Authority Notice N/13/001, 20 December 2014). Note that while the present document has been adopted by the Commission and re-published as a Commission document it does not contain any amendments to the Guidelines for Merger Analysis published by the Competition Authority in December 2013 (other than the substitution of references to the Commission for references to the Competition Authority and the making of minor amendments to legislative references). The present Guidelines are published by the Commission as a notice pursuant to section 10(1)(e) of the Competition and Consumer Protection Act 2014.

consumers.³ Rivalry between businesses, together with the credible prospect of consumers switching from one business to another, provides an incentive for businesses to compete with each other to the benefit of consumers.

- 1.5 The strength (or weakness) of the incentive for business rivalry can depend not only on the presence of competitors, and the credible prospect of consumer switching, but also on the anticipated entry of potential competitors (which would further increase the switching options for consumers).
- 1.6 It is not the purpose of merger review to protect competitors from the effects of a merger. Rather, the purpose of merger review is to ensure that mergers that would result in an SLC are not permitted. The SLC test is incorporated in the relevant provisions of the Act (see, in particular, sections 20, 21 and 22). Thus, for example, section 20(1)(c) of the Act states that, in respect of a notification received by it, the Commission

“shall form a view as to whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State.”

- 1.7 Any Commission finding in relation to the presence or absence of an SLC will be based on all available information considered in the light of all credible theories of consumer harm arising from possible adverse competitive effects.
- 1.8 While certain quantitative measures can be used to assist in analysing whether a merger is likely to result in an SLC, there are no standard measures of competitive effects that can determine definitively, on their own, whether a given merger is likely to have such an effect. Each proposed merger needs to be assessed on its merits and in its own particular circumstances.
- 1.9 In applying the SLC test the Commission analyses not only the effect on the price of affected products but also other effects that can impact on consumers, such as changes to output (quantity), quality, consumer choice and innovation (e.g., development of new products or enhancements to existing products).⁴
- 1.10 In applying the SLC test the Commission will examine not only the competitive effects on the immediate customers of the merged entity but also effects on subsequent, intermediate and final customers. For example, retailers or final customers may be affected by a merger in the supply chain upstream from the retail level.

³ Note that the term consumer is not limited to the final individual consumer. Rather the consumer in this context is any individual or business that purchases goods or services regardless of whether the purchase is for a final good or service, or as an input for the production of another good or service.

⁴ Throughout this document references to price, and to competitive effects on prices, apply analogously to non-price competitive effects. Also, references to products refer to goods and/or services.

- 1.11 The Commission's analysis of a notified merger will also consider competitive effects that may arise where any one or more of the merging parties have non-controlling minority shareholdings in third parties prior to the merger.

The Counterfactual

- 1.12 The term 'counterfactual' refers to the state of competition without the merger or acquisition. In other words the "actual" situation is the merger being put into effect and the "counterfactual" is the situation in the absence of the merger being put into effect. The counterfactual provides the reference point, or the point of comparison, for assessing competitive effects arising from a merger.
- 1.13 To establish the relevant counterfactual, it is necessary to:
- (a) Establish the competitive situation that would prevail but for the merger being put into effect.
 - (b) Distinguish between:
 - (i) merger-specific competitive effects, and
 - (ii) non-merger-specific competitive effects, if any, that would occur irrespective of the merger being put into effect.
- 1.14 Identifying the relevant counterfactual is forward-looking and necessarily involves judgement on the part of the parties and the Commission. Usually the situation prior to the merger or acquisition will be the relevant counterfactual. However, this may not always be the case, e.g., non-merger specific competitive effects may in some circumstances occur irrespective of the merger or acquisition. One particular example where the pre-merger situation would not be the relevant counterfactual is where one of more of the parties to a merger is a "failing firm" (see discussion in Chapter 9).
- 1.15 The Commission will consider all available evidence to decide on the relevant counterfactual. In doing so the Commission will assess the credibility of a counterfactual proposed by the merging parties to ensure accurate identification of the relevant counterfactual. In particular, the Commission will expect the merging parties to substantiate any counterfactual they propose with objective evidence supported, where necessary, by independent expert analysis. Such evidence and analysis should obviously be consistent with the parties own internal pre-merger assessments of the likely counterfactual.

Actual and Potential Competition

- 1.16 In applying the SLC test, the Commission investigates the likely effect of a merger not only by reference to current competitors, but also by reference to potential competitors. The Commission's analysis of potential competitors, and the effects of potential competition on consumers, is similar to the analysis for current competitors.

- 1.17 Potential competitors can sometimes provide a credible competitive constraint on the behaviour of market incumbents. A proposed merger that removes an important potential competitor could adversely affect competition either by eliminating a competitive threat or by discouraging entry that might otherwise have occurred.

Market Definition

- 1.18 Although it is not always necessary to reach a firm conclusion on market definition, the Commission will normally identify the part of the economy most affected by the merger under review. As stated in section 22(3) of the Act, the Commission is required to make a determination to either clear, clear with conditions or prohibit a merger with reference to a market or markets within the State, i.e.,

"... on the ground that the result of the merger or acquisition will or will not, as the case may be, be to substantially lessen competition in markets for goods or services in the State or, as appropriate, will not be to substantially lessen such competition if conditions so specified are complied with."

Evidence

- 1.19 The Commission's review of a notified merger or acquisition is evidence-based. This means that the Commission requires sufficient reliable evidence from the merging parties regarding the likely competitive effects of the merger. This is particularly important when the parties wish to present merger defence arguments (i.e., arguments to counter competition concerns). The most common of such arguments include ease of entry, countervailing buyer power, efficiencies and the failing firm.
- 1.20 Sources of evidence relevant for merger review will include any or all of:
- Public reports prepared by or for the parties, e.g., annual reports, independent analyses or commentaries.
 - Market information (including confidential information) prepared by or for the parties, e.g., market research including sales and volume information – both levels and market shares.
 - Confidential information prepared by or for the parties concerning the rationale for the merger and the sales process.
 - Other confidential reports for Board Members and/or Senior Management prepared by or for the merging parties.



- Past behaviour by, and future intentions of, the merging parties and/or relevant third parties.

The above list is not exhaustive, and relevant evidence will vary case by case.

- 1.21 In addition to information from the Notification documents and from public sources the Commission can, under section 20 of the Act, formally require additional information from the parties. Also, under section 18 of the Competition and Consumer Protection Act 2014, the Commission can summons any of the merging parties and/or third parties to produce documents and answer questions under oath.

2. MARKET DEFINITION

Introduction

- 2.1 In assessing whether a merger will lead to an SLC, the Commission will examine the competitive impact in the part of the economy most likely to be affected by the merger. Whether or not the Commission precisely defines one or more markets, it will identify the products or services and geographic area in which competition may be harmed. Market definition is not an exercise in drawing a definitive line and then ignoring market realities on either side of that line. Market definition should not restrict the range of competitive effects to be assessed by the Commission in its merger review. The Commission may consider segmentation within the relevant product or geographic market or factors outside the relevant market which impose competitive constraints on firms in the relevant market.
- 2.2 Market definition, although not an end in itself, is a useful tool for evaluating a merger's likely competitive effects. Market definition enables the measurement of market shares and concentration levels in the relevant market. Where there is ambiguity or uncertainty about market definition, less weight may be attached to such measures. In some markets, market shares and concentration measures may overestimate or underestimate the market power of firms and the likely competitive impact of a merger. For example, in differentiated product markets,⁵ the intensity of competition and degree of substitution between products may be more important indicators of market power than market shares in assessing the competitive impact of a merger.
- 2.3 Market definition is not a mechanical tool for assessing the competitive impact of a merger. Many factors relevant to defining markets will also be relevant to analysing competitive effects, and vice versa. Market definition is a conceptual framework within which relevant information can be organised for the purpose of assessing the competitive effect of a merger. Identifying the precise relevant market involves an element of judgement. It is often not possible or even necessary to draw a clear line around the fields of rivalry. Indeed, it is often possible to determine a merger's likely impact on competition without precisely defining the boundaries of the relevant market.
- 2.4 Where no competitive harm is found if a merger is evaluated with respect to a narrowly defined market, the Commission may also find that no competitive harm may be found in a broader market in which the merging parties' market shares are further diluted. In other circumstances, expanding the market may lead to a finding of competitive harm in the wider market. However, if an SLC can be shown when a merger is evaluated with respect to a number of alternative markets, there is no need to choose between them; it will be sufficient to

⁵ See paragraphs 4.17-21 for a discussion of differentiated product markets.

show that the merger will result in an SLC regardless of the choice of market definition.

- 2.5 It is not always necessary to reach a firm conclusion on market definition if more direct measures of market power are available. However, where there is significant horizontal and/or vertical overlap between the merging parties and competition concerns are likely to arise post-merger, the Commission will normally identify one or more relevant markets in which the merger may result in an SLC.
- 2.6 Market definition depends on the specific facts, circumstances, and evidence of the particular merger under investigation. Decisions relating to market definition in previous merger investigations by the Commission may provide only limited guidance.
- 2.7 When sellers can engage in price discrimination, markets may be defined with respect to particular customers or groups of customers and their locations.

Product Market Definition

- 2.8 The relevant product market is defined in terms of products rather than producers. It is the set of products that customers consider to be close substitutes. In identifying the relevant product market, the Commission will pay particular attention to the behaviour of customers, i.e., demand-side substitution. Supply-side substitution (i.e., the behaviour of existing and/or potential suppliers in the short term) may also be considered.

Demand-side Substitution

- 2.9 Whether or not a product is a close substitute of a product supplied by one or more of the merging parties will depend on the willingness of customers to switch from one product to the other in response to a small but significant and non-transitory increase in price (or an equivalent decrease in quality). This will involve an assessment of the characteristics and functions of the products in question. Comparable product characteristics and functionality are often indicative of demand-side substitution although they are not sufficient to draw a definitive conclusion. Both quantitative and qualitative information are used to examine demand-side substitution. The Commission applies the Small but Significant Non-transitory Increase in Price ("SSNIP") test (also known as the hypothetical monopolist test) as an analytical tool.
- 2.10 The process of applying the SSNIP test starts with one of the products supplied by one or both of the merging parties. The SSNIP test asks whether a hypothetical monopolist of this product, say product A, would find it profitable to impose a small but significant non-transitory increase in price (usually 5-10%). If a sufficient number of customers would respond to the price increase by purchasing another product, say product B, such that the hypothetical monopolist would find it unprofitable to impose such a price rise, then it is appropriate

to include product B in the same relevant product market as product A.

- 2.11 The SSNIP test is then reapplied to a hypothetical monopolist of both products A and B and asks whether a hypothetical monopolist of both products could profitably increase the price by a small but significant non-transitory amount. If a sufficient number of customers would switch to another product, say product C, the test is then reapplied by including product C with products A and B. The SSNIP test is thus iteratively applied until a hypothetical monopolist of some group of products could profitably increase the price of products in the group by a small but significant non-transitory amount. This group of products is thus defined as the relevant product market.
- 2.12 The SSNIP test usually consists of a price rise of at least 5% above prevailing prices. However, in cases where prevailing prices are not considered to be competitive (for example, where prices are the outcome of coordinated behaviour in the market), the Commission may conduct the SSNIP test using lower than prevailing prices as a benchmark.⁶
- 2.13 While the SSNIP test is a useful tool as an analytical framework, it is rarely applied in practice due to the absence of actual price data. However, when data on the prices and quantities of the relevant products and their substitutes are available, statistical measures and econometric techniques may be used by the Commission to contribute to defining relevant product markets.
- 2.14 The Commission will generally rely on both qualitative and quantitative information when defining the relevant product market. Examples of the type of evidence that will be considered by the Commission when evaluating demand-side substitution include (but are not limited to) the following:
- (a) Information about product characteristics and functionality that can indicate similarities between different products. It is important for the merging parties to provide a full and accurate description of each of their business activities by reference to the particular function (e.g., manufacturing, wholesale or retail sale, distribution, etc.) and the categories of products sold.
 - (b) Evidence that customers have previously switched purchases between products in response to relative changes in price, especially if the switching has not all been one way.
 - (c) The costs and timing of switching between the products and potential substitutes.
 - (d) Information about relative price levels and the extent to which the prices of products are correlated with each other.

⁶ Although the SSNIP is a useful analytical tool, it does not indicate a tolerance level for mergers that will raise prices.

- (e) Information about the closeness of substitution between products such as cross-price elasticities and diversion ratios which can indicate how customers change their consumption of a product in response to changes in the price of another product. While cross-price elasticities do not in themselves directly measure the ability of a firm to profitably raise prices, they are particularly useful when determining whether differentiated products are substitutes for one another and whether such products are part of the same relevant market.
- (f) Surveys of customers, competitors and relevant third parties about customer behaviour and the SSNIP test, and other evidence that customers would consider switching.
- (g) Documentation prepared by or for the merging parties before the merger was being considered such as marketing studies, consumer surveys, market analyses, and internal business analyses (e.g., business plans and strategy documents).
- (h) Other evidence such as information on products that are monitored by the merging parties or other market participants.

Supply-side Substitution

- 2.15 The boundaries of the relevant product market are generally determined by reference to demand-substitution alone. The reaction of suppliers to price changes is generally considered in the analysis of the competitive effects of the merger, either under rivalry or potential new entry, rather than as part of market definition. However, there may be circumstances where the Commission will consider the responses of suppliers to changes in price.
- 2.16 A product is a supply-side substitute for another in cases where the capacity for producing that product could profitably be switched to supply the other product quickly and without significant investment in response to a small price increase by the hypothetical monopolist. The precise period for determining whether suppliers would switch to supplying the relevant products will vary from market to market.
- 2.17 In circumstances where only a proportion of total supply capacity can feasibly be switched quickly and at minimal cost, the part of capacity that cannot be so switched will be examined under potential new entry in the competitive effects analysis rather than under market definition.
- 2.18 Examples of the type of evidence that will be considered by the Commission when evaluating supply-side substitution include, but are not limited to, the following:
- (a) Evidence that substitution by potential suppliers is technically possible.

- (b) Costs and time for switching production and distribution between products.
- (c) Evidence that suppliers have previously switched their production capacity in response to changes in price. (Evidence that suppliers have considered switching may also be considered, but would be given less weight.)
- (d) Evidence that potential suppliers are free to switch production (e.g., whether they have spare capacity).

Geographic Market Definition

- 2.19 The product market(s) affected by a merger may be geographically bounded if geography limits some customers' willingness or ability to switch products or some suppliers' willingness or ability to supply to customers. The relevant geographic market is usually defined in terms of the location of suppliers and it includes those suppliers that customers consider to be feasible substitutes. The relevant geographic market may be local, regional, national or wider.
- 2.20 The approach to defining the relevant geographic market is similar to that of product market definition. Both can use the SSNIP test as an analytical tool.
- 2.21 The relevant geographic market consists of all supply locations that would have to be included for the hypothetical monopolist to find it profitable to impose a small but significant non-transitory increase in price. Beginning with the location of each of the merging parties, the SSNIP test is applied by considering what would happen if a hypothetical monopolist of the relevant product at that location imposed a small but significant non-transitory increase in price. If a sufficient number of customers switch to suppliers in other locations, the next closest location where customers can purchase the relevant product is included. The SSNIP test is thus iteratively applied until a hypothetical monopolist could profitably increase the price of the relevant product in a location or group of locations by a small but significant non-transitory amount. This location or group of locations is thus defined as the relevant geographic market. As noted above in paragraph 2.13, the SSNIP test is rarely applied precisely in practice due to the absence of the necessary data. However, it provides an analytical framework that can be used in conjunction with relevant evidence to define a market.
- 2.22 The Commission will rely on both qualitative and quantitative information when defining the relevant geographic market. Examples of the type of evidence that will be considered by the Commission when assessing the geographic boundaries of the relevant market include (but are not limited to) the following:
- (a) Information about product characteristics such as perishability, weight and frequency of delivery.
 - (b) Information on differences in pricing, sales, advertising and marketing strategies by geographic area.



- (c) Information on costs (e.g., transportation) that customers may incur when switching to products that are currently supplied in other geographic areas.
- (d) Evidence that customers have previously switched between different geographic locations in response to relative changes in price. (Evidence that customers have considered switching may also be considered.)
- (e) Information on flows of products between geographic areas or into the State and on any barriers to entry, whether legal, natural or strategic.
- (f) Information on the costs of extending or switching production to supply customers in alternative geographic areas.
- (g) Information on regulatory or other practical constraints on suppliers selling to alternative geographic areas.
- (h) Surveys of suppliers regarding the likelihood of switching supply between different geographic areas.

2.23 The geographic market may be wider than the State. The willingness and ability of customers to switch to sellers located outside the State may be affected by customers' tastes and preferences, costs and by border-related factors. Customers may be less willing or able to switch to foreign substitutes when faced with factors such as a lack of information about foreign products and how to source them, exchange rate risk, local licensing and product approval regulations, industry-imposed standards, or domestic initiatives that focus on "buying local".

3. MARKET CONCENTRATION

Introduction

- 3.1 A central element in assessing the competitive impact of a merger is identifying its effect on market structure. One dimension to market structure is market concentration. Market concentration refers to the number and size of firms in the market. A concentrated market is one with a small number of leading firms with a large combined market share, and an un-concentrated market is one with a large number of firms with a small combined market share.
- 3.2 Market concentration provides a snapshot of market structure and is often a useful indicator of the likely competitive impact of a merger. It is of particular relevance to the assessment of horizontal mergers. A horizontal merger that has little impact on the level of concentration in the market under consideration is unlikely to lead to an SLC.
- 3.3 Market concentration, however, is not determinative in itself. A high level of market concentration post-merger is not sufficient, in and of itself, to conclude that a merger is likely to lead to an SLC. Other relevant factors (such as, for example, the closeness of competition between the merging parties, market dynamics, barriers to entry and expansion, etc.) will be examined by the Commission before any conclusion is reached concerning the likely competitive impact of a merger.

Market Shares

- 3.4 Market shares are important when measuring concentration. The market shares of firms in the market can give an indication of the extent of a firm's market power. The combined market share of the merging parties, when compared with their respective market shares pre-merger, can provide an indication of the change in market power resulting from the merger. Competition concerns are more likely to arise when the merger creates a merged entity with a large market share.
- 3.5 In addition to examining market shares and concentration, the Commission will also consider the distribution of market shares across market participants and the extent to which market shares have changed or remained the same over a significant period of time. The Commission will give more weight to market concentration when market shares have been stable over time, particularly in the face of historical changes in relative prices or costs, or when they have been increasing, depending on the reason for the increase. Furthermore, any recent changes in market conditions (e.g., technological developments) will also be considered as they may indicate that current market shares either understate or overstate the competitive significance of one or more of the market participants.
- 3.6 Market shares can be measured by sales revenue, sales volume, production volume, or capacity as measured by the

maximum possible volume. The Commission attempts to use the measure that best indicates a firm's future competitive significance; most commonly the Commission will calculate market share by reference to sales data. Sales can be measured by value or volume. The Commission's preference for market share data calculated by reference to sales by value or sales by volume will depend on the specific characteristics of the industry in which the merger is taking place. Where the product is non-homogeneous or pricing is non-uniform, the Commission generally has a preference for value market shares.

- 3.7 The most recent data available is used to calculate market shares. However, historic market share data may also be considered, particularly if there is volatility or change in market shares.
- 3.8 Any market share data provided to the Commission by the merging parties should be supported by details of how the data was compiled, the source of the data, and any assumptions used to calculate market share data. Where actual market share figures are unavailable, estimates will be considered by the Commission but should be supported by details of how the estimates were compiled.

Herfindahl-Hirschman Index ("HHI")

- 3.9 The HHI is a measure of market concentration that takes account of the differences in sizes of firms in the market.⁷ The HHI is calculated by adding the sum of the squares of the market shares of each firm in the market. This measure gives proportionately greater weight to the market shares of the larger firms. A fully defined HHI requires the market shares, or estimates of them, for all the firms in the market. Full market share data is rarely available, but HHI calculations are still broadly reliable guides to market concentration levels if the market shares of firms accounting for a large proportion of the market are known.
- 3.10 The post-merger HHI gives an indication of the level of market concentration while the change in the HHI (or 'delta') reflects the change in market concentration resulting from the merger. Together, the post-merger level and the change in the HHI are used to form a threshold of market concentration. The Commission will have regard to the following thresholds:
 - A post-merger HHI below 1,000 is unlikely to cause concern.
 - Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.

⁷ Concentration ratios measure the aggregate market share of a small number (usually three or four) of the biggest firms in the market. Thus, the four-firm concentration ratio shows the proportion of the market supplied by the four biggest firms. Concentration ratios are absolute in value and do not take into account differences in the relative size of the firms included in the measure.



- Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern.

3.11 The purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger.

3.12 The lower the post-merger HHI and the smaller the increase in the HHI, the less likely it is that the Commission will deepen its assessment of the competitive effects of a merger. However, a merger that falls below the HHI thresholds set out in paragraph 3.10 may still raise competition concerns in certain circumstances such as, for example, where one or more of the following factors are present:

- If the products of the merging parties are considered by customers to be close substitutes.
- Where one of the merging parties is a maverick firm or has recently experienced a rapid increase in market share, has driven innovation or has been charging lower prices than its competitors in the market under review.
- If a merger involves a significant potential entrant or recent entrant.
- Where there are particularly significant regulatory barriers to entry.
- Where there are high customer switching costs.
- Where indications of past or ongoing coordination are present.
- Where one of the merging parties has a pre-merger market share of 50% or more.

3.13 The HHI thresholds may also be a useful guide for merging parties who are considering a voluntary notification where the merger falls below the thresholds for compulsory notification set out in section 18(1) of the Act.

4. HORIZONTAL MERGERS

Introduction

- 4.1 Mergers involving competitors in the manufacture, distribution and/or supply of substitute products or services are referred to as “horizontal” mergers. In the majority of horizontal mergers there is no SLC because competition remains sufficiently strong after the merger to ensure that consumers are not harmed. Consumers may also benefit from mergers from, for example, reduced production costs, lower prices, increased product quality and/or increased innovation.
- 4.2 Less benign outcomes are also possible from horizontal mergers. Consumer harm may arise from increased prices and/or adverse non-price effects, e.g., reductions in product quality, reduced range of products, less innovation, poorer product distribution, reduced after-sales service, etc.
- 4.3 Horizontal mergers normally involve actual competitors (i.e., competing firms present in a market) but, as noted below in paragraphs 4.34-36, they may also involve potential competitors. This will be the case where a merger involves one or more firms whose entry to the market in question would have occurred (or would have been sufficiently likely to occur) in the absence of the merger.
- 4.4 The Commission will examine various market-based and firm-specific evidence including, but not limited to, market shares and concentration measures, entry and exit from the market, pricing behaviour of the merging parties and competitors, and customer switching patterns.
- 4.5 The Commission will examine both qualitative and quantitative evidence:
 - (a) Qualitative evidence relevant to merger analysis includes documents prepared by the merging parties in the ordinary course of business and information provided by third parties including competitors, customers, and independent bodies (regulators, industry experts, representative bodies, etc.).
 - (b) Quantitative analysis relevant to merger analysis includes, but is not limited to, calculation and review of concentration measures, diversion ratios, critical loss measures, measures of elasticities, and upward pricing pressure measures.
- 4.6 The Commission’s analysis is evidence based and focuses mainly on two types of effects:
 - (a) Unilateral effects arise where, as a result of the merger, the merged firm finds it profitable to raise price, irrespective of the reactions of its competitors.

- (b) Coordinated effects arise when a merger facilitates coordinated interaction by competitors to raise price. Coordination is profitable for each firm only as a result of accommodation by other firms. In essence, each firm decides not to compete aggressively (thereby foregoing presumably profitable sales) in the expectation that others will do likewise. This results in less vigorous competition with the net result that prices remain higher than they would in a normally functioning competitive market.

- 4.7 A merger may give rise to either or both unilateral and coordinated effects. Accordingly, the Commission's analysis of any proposed merger may cover both unilateral and coordinated effects.

Unilateral Effects

- 4.8 Unilateral effects occur when a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors.
- 4.9 The ability of a merged entity to set prices is most obvious in the instance of a merger to monopoly or near monopoly. The ability to set market price and/or market output is not, however, limited to a monopoly or near monopoly situation. The ability to set prices and/or output can arise, for instance, in markets with a small number of firms (also referred to as oligopolistic markets) and/or markets where products or services are imperfect substitutes. In these types of markets, to varying degrees, firms can exert market power and set, or at least materially influence, market prices.
- 4.10 The incentive to increase prices arises whenever the merged entity can increase profits by doing so. In a merger to monopoly the merged entity faces no competitive constraints from other firms and therefore has the strongest possible incentive to maximise profit by increasing prices and/or reducing output.
- 4.11 Competitive constraints on a merged entity will be weaker to the extent that (i) there is an absence of substantial competition from other firms in the market or firms likely to enter in a timely manner, (ii) competitors have insufficient productive capacity to increase output, or (iii) competitors do not have a strong incentive to compete (for example, if they might also benefit from increased prices), also referred to as price accommodation.
- 4.12 In addition, competitive constraints will be weakened to the extent that customers are not willing and/or able to switch from one competitor to another. This might occur for example in the case of strong consumer preferences (including brand loyalty) and/or non-trivial switching costs.
- 4.13 The Commission's analysis of unilateral effects, and any consequent finding of an SLC, focuses on the most applicable

theories of harm based on all available information in relation to the factors discussed below.

Homogeneous Product Markets

- 4.14 Homogeneous product markets are characterised by the similarity of the products or services on offer to consumers. Consequently, in a homogeneous product market, competitors' products are readily substitutable and hence there is little reason for consumers to show a preference for product A over product B other than on grounds of price. In such circumstances, a unilateral price increase by the merged entity will not be sustainable if sufficient competitors have the ability and incentive to attract customers by charging a price sufficiently less than the price charged by the merged entity (e.g., the pre-merger price).
- 4.15 Competitive constraints may not, however, be sufficient to constrain the merged entity's ability and incentive to raise prices. For example, competing firms may face capacity constraints and not be able to increase their production, particularly in the short run, to counter price increases by the merged entity. In such circumstances the merged entity may have the ability and incentive to increase profits by raising prices and/or reducing output.
- 4.16 In a homogeneous product market, all things being equal, a merger involving firms with large market shares which would result in a significant increase in market concentration will be more likely to give rise to competition concerns than if the parties have small market shares and the merger would result in only a small increase in concentration. Also, in a homogeneous product market, the sustainability of a price increase by the merged entity is likely to be greater where (i) competitors and potential competitors lack the productive capacity to respond to merged entity price increases, (ii) consumers are relatively price insensitive, and/or (iii) switching costs are relatively high.

Differentiated Product Markets

- 4.17 Differentiated product markets are characterised by differences in product characteristics such as product quality, branding, after sales service, geographical location and product availability. Consequently, products supplied in a differentiated product market are imperfect substitutes and consumer preferences for product A over product B will depend not only on price but on non-price factors such as those listed above.⁸
- 4.18 In a differentiated product market competitors may well exercise asymmetric competitive constraints on each other. That is, the intensity of competition between particular pairs or sets of competing firms, more than the presence and/or size of other firms within the market *per se*, establishes a competitive

⁸ Individual consumers may also differ in the relative importance they place on different product characteristics and hence have different preferences across the range of products available.

constraint on the merged entity. Consequently aggregate indicators such as market shares and changes in concentration can be ambiguous and may over-estimate or under-estimate the competitive effect of a merger involving two (or more) competitors. More detailed and disaggregated analysis is required including analysis of consumer switching behaviour, which provides a good indication of the intensity of competition. For example, if consumers switch to product B after a price rise in product A, more than to products C, D, etc., then B is a closer competitor to A than products C, D, etc.

- 4.19 All things being equal, a merger between close competitors (i.e., competitors engaged in intense competition)⁹ will remove a strong competitive constraint and hence be more likely to raise competition concerns than a merger between distant competitors.
- 4.20 Where switching data is available, diversion ratios can be calculated to provide a more accurate indication of possible competitive effects than relying on measures of concentration such as market shares. Diversion ratios for products A and B measure (i) the proportion of sales revenue lost by product A to product B after a rise in the price of product A and (ii) the proportion of sales revenue lost by product B to product A after a rise in the price of product B.¹⁰ The larger the proportion of diverted sales the larger the diversion ratio and hence the closer the competition between products A and B.
- 4.21 For example, where products A and B are close substitutes and are included in a merger, then the merged entity could have the ability and incentive to unilaterally increase prices to the detriment of consumers.¹¹ This unilateral price effect will be stronger to the extent that consumers are relatively price insensitive (as might occur in the case of high switching costs and/or brand loyalty).

Mavericks

- 4.22 So-called “maverick” behaviour involves competing more vigorously (e.g., in terms of price, quality, innovation etc.) relative to other firms. For example, maverick behaviour by a small firm may have a disproportionately large impact on competition and, as a consequence, that particular firm may be better able (in comparison to other firms) to constrain a merged entity from increasing prices. Therefore a merger involving a firm that acts as a maverick could imply a disproportionate reduction in competition, depending on (i) the significance of the maverick in the market and (ii) the extent to which the merged entity will compete less vigorously than the maverick firm prior to the merger. (Maverick behaviour is also relevant in the context of coordinated effects as discussed in paragraph 4.33, and also in the context of non-horizontal mergers as discussed in paragraph 5.9.)

⁹ In a differentiated product market the most intense competition will occur between the most substitutable products or services.

¹⁰ The diversion ratios for any two products, e.g., A and B, need not be symmetric.

¹¹ This will particularly be so in instances where products A and B are each other's closest substitute.

Coordinated Effects

- 4.23 There is an incentive for firms to compete less intensively if it is profitable for them to do so. Implementing coordinated behaviour depends on the opportunity afforded by weak competitive constraints from actual or potential competition. Competitive effects from coordinated behaviour can arise even if not all competitors in a given market are involved.¹²
- 4.24 The most extreme kind of coordination is cartel behaviour such as fixing prices, allocating market shares, bid rigging etc. Competition concerns are not, however, limited to the adverse effects of hardcore behaviour. Rather, competition concerns can also arise from tacit coordination, i.e., coordination through implicit understandings of competitors' behaviour derived without any overt agreements or communications between competitors. While there are various forms of coordinated behaviour, a common feature is predictable and sustainable "terms of coordination", i.e., a set of formal or informal rules by which each participating firm generally understands (i) how it should behave and (ii) how it can expect other participating firms to behave.
- 4.25 When reviewing a proposed merger for possible coordinated effects, the Commission's analysis focuses on the impact of a merger on the likelihood and severity of such effects. That is, the Commission will examine the extent to which a merger is likely to enable coordinated behaviour or exacerbate pre-existing coordinated behaviour, leading to an SLC. The Commission's analysis will focus principally on (i) the presence of and (ii) changes in any of the following:
- Conditions conducive to coordinated effects.
 - Incentives for coordinated behaviour by competitors.
 - Competitive constraints on coordinated behaviour.

Conditions Conducive to Coordinated Effects

- 4.26 Conditions generally conducive to coordinated behaviour include, but are not limited, to:
- (a) The number of firms in a market – it is easier to coordinate behaviour when there is a smaller rather than a larger number of competitors.
 - (b) Frequency and regularity of business – a regular pattern of transactions (e.g., in terms of timing and size) makes it easier to plan, monitor and detect deviations from the terms of coordination.

¹² The number and proportion of competitors sufficient to give rise to coordinated effects will vary according to the relevant circumstances. Furthermore, coordination can be explicit/overt or tacit. Overt coordination involves explicit agreement between the parties involved. In contrast, tacit coordination involves no explicit agreements but rather implicit understandings between the parties. Merger review can involve analysis of the risks of both overt and tacit coordinated effects.

- (c) Homogeneity of products or services – prices for close or perfect substitutes will be easier to coordinate than prices for imperfect substitutes.
 - (d) Homogeneity of firms – firms with similar characteristics (e.g., market shares, cost structures, levels of vertical integration) will be more likely to have similar, and hence sustainable, incentives to coordinate than dissimilar firms.
 - (e) Transparent focal points for coordination – coordination will be easier if there is unambiguous information upon which to plan, monitor and detect deviations from the terms of coordination (e.g., prices, output, capacity, customers served, territories served, discounts, new product introductions, etc.).
 - (f) Cross-shareholdings and/or other linkages which may facilitate coordination – the exchange of information will be easier for connected firms than for unconnected firms.
 - (g) Market stability – coordination will be facilitated by stable demand and supply conditions compared to more volatile market conditions (e.g., with respect to prices, innovation or ease of entry and exit in the market).
- 4.27 The presence (or absence) of market conditions, such as those listed above, may indicate scope (or lack of scope) for coordinated behaviour. The Commission's analysis will include an assessment of conditions conducive to coordination, including those listed above, and the impact of the merger on those conditions. Neither the presence nor the absence of one or more of the above conditions is conclusive as an indicator of coordinated effects and consumer harm.

Incentives for Coordination

- 4.28 The incentive for participating firms (i.e., participating in coordinated behaviour) to compete less intensively than in a competitive market is the prospect of increased profits as implied by the terms of coordination. The larger the increase in profit, the greater will be the incentive for coordination.
- 4.29 In addition to the incentive to participate, however, each participating firm will also be tempted to deviate from the terms of coordination, i.e., to "cheat", at the expense of other participating firms. For example, if Competitor A deviates and other competitors act in accordance with the terms of coordination, then Competitor A will benefit from increased sales revenue.¹³ In contrast, as a consequence of Competitor A's cheating, those competitors honouring the terms of coordination will lose sales revenue.¹⁴

¹³ The incentive to cheat will exist so long as increased sales also increase profits.

¹⁴ Further, if all other participating firms were to deviate similarly to Competitor A then Competitor A's expected additional sales revenue (and the expected increase to other cheating competitors) would not materialise.

- 4.30 The strength of the incentive to participate in coordination depends not only on the prospect of increased profits, but also on the credibility of the detection and punishment by the other participating firms of deviations from the terms of coordination.
- 4.31 The Commission will consider all available evidence, including internal documents, to determine the extent to which a merger increases the incentives of competitors to engage in coordinated behaviour. In the absence of credible contrary evidence, previous overt or tacit coordinated behaviour will be considered an indicator of possible or likely coordination post-merger.

Constraints on Coordination

- 4.32 The ability of participating firms to implement coordinated behaviour depends in part on the presence or otherwise of effective competitive constraints. The more conducive the conditions and/or the stronger the participating firm incentives, the stronger the constraints required to prevent coordinated behaviour.
- 4.33 Constraints on coordinated behaviour include:
- (a) Entry by potential competitors – the prospect of competitors entering the market and not participating in coordinated behaviour may deter coordination or mitigate its effects. For example, a new entrant pricing at a level below that set by participating firms may attract customers away from participating firms, subject to the new entrant's productive capacity and customers' willingness to switch from the participating firms to a new supplier. The sustainability of coordination will be weakened when entry barriers to potential competitors are low and conversely strengthened when entry barriers are high. (See discussion of entry and expansion in Chapter 5.)
 - (b) Expansion by non-participating competitors (i.e., by those not participating in coordinated behaviour) – increased supply of products by non-participating firms may deter coordination or mitigate its effects. As with new entrants, the effectiveness of expansion by non-participating competitors depends on their productive capacity and customers' willingness to switch from the participating firms to a new supplier. The sustainability of coordination will be weakened when there are low barriers to expansion by non-participating competitors and, conversely, strengthened when such barriers are high. (See discussion of entry and expansion in Chapter 5.)
 - (c) Maverick behaviour – a maverick firm by its nature, as described in paragraph 4.22, will be unlikely to engage in coordinated behaviour and will therefore act as a constraint on coordination if it can be expected to continue playing this role following the merger. Further,

a maverick firm may destabilise and/or restrict coordinated behaviour disproportionately to its size.¹⁵

- (d) Reductions in production costs and/or increased innovation – these may enhance a merged firm’s incentives not to honour the terms of coordination, either by cheating on participating firms or by not participating in coordinated behaviour in the first place. In either case consumers could benefit from lower prices and/or greater choice of products or services.
- (e) Buyer Power – as discussed in more detail in Chapter 6 powerful buyers may be able to undermine coordinated behaviour, by for example
 - (i) sponsoring entry or expansion of potential and/or non-participating firms, or
 - (ii) particularly in the context of long term contracts, offering attractive terms (e.g., large sales volumes relative to the firm’s output) that may encourage participating firms to deviate from the terms of coordination.

Merger with Potential Competitor

- 4.34 A merger where at least one of the merging parties is not present in a given product or geographic market may nonetheless reduce competition, and could result in an SLC, by eliminating one or more potential entrants. The reduction in competition occurs where in the absence of the merger either one or more of the merging parties would have entered the market, or prior to the merger, one or more of the merging parties posed a credible threat of entry.
- 4.35 In the above cases, consumer harm would arise, depending on the circumstances, where the merger would have the effect of either preventing pro-competitive entry that would otherwise have occurred, or removing a party that had been a credible threat of entry.
- 4.36 In any of these situations, described in paragraphs 4.34 and 4.35, the Commission will consider all available evidence to determine whether the effect of the merger is to substantially lessen competition.

Monopsony

- 4.37 Monopsony effects can arise when an individual buyer, or group of buyers, has the ability and incentive to significantly influence product prices (or other factors such as terms and conditions of sales). The Commission’s analysis of monopsony is analogous to its analysis of monopoly.

¹⁵ Conversely, as in the case of unilateral effects, the acquisition of a maverick firm may eliminate a significant constraint to effective coordination.

- 4.38 It is possible that a merged entity may exercise both (i) its buyer power in relation to its suppliers and (ii) its market power in relation to its customers. In such situations the merged entity may have the ability and incentive to retain benefits from its monopsony power and not pass benefits through to its customers, in which case the Commission's merger review would include analysis of both monopsony and monopoly effects. The Commission will be concerned only about competitive effects stemming from increased market power rather than, for instance, from increased efficiency.

Number of Competitors – Bidding Markets

- 4.39 In some markets, particularly bidding markets, the number of possible suppliers can influence the intensity of competition. For example, in tendering processes the greater the number of firms able to tender for the supply of products or services, the more likely it is that there will be intense competition.
- 4.40 The number of suppliers may be particularly relevant to the intensity of competition if customers seek to have more than one supplier, e.g., a primary supplier and a secondary supplier, as might be the case if continuity of supply is important.

5. NON-HORIZONTAL MERGERS

Introduction

- 5.1 In contrast to horizontal mergers, a “non-horizontal” merger involves firms that do not supply substitutable products. The guidance in this chapter complements the guidance provided in Chapter 4 and concentrates on issues specifically relevant to non-horizontal mergers. There are two types of non-horizontal mergers:
- Vertical mergers.
 - Conglomerate mergers.
- 5.2 Vertical mergers involve firms operating at different levels of the supply chain as for example in a merger involving an ‘upstream’ manufacturer and a ‘downstream’ distributor or retailer.¹⁶
- 5.3 Conglomerate mergers are neither horizontal nor vertical, i.e., there is no vertical relationship and no overlap in the products or services supplied by the merging parties. For example, a merger between two firms selling non-substitutable products would be an example of a conglomerate merger.
- 5.4 Some mergers are both horizontal and non-horizontal in nature, e.g., where the merging firms are not only in a vertical relationship (or potential relationship), but are also actual or potential horizontal competitors at either the upstream or downstream level, or where there are overlaps in their activities in some but not all markets.
- 5.5 Non-horizontal mergers are generally less likely than horizontal mergers to generate competitive concerns as there is no direct loss of competition between firms in the same market. Many non-horizontal mergers are pro-competitive due to consumers benefiting from factors such as:
- Reduced production costs, e.g., reduced overhead and transaction costs, better production and distribution methods.
 - Increased innovation.
 - Lower prices and/or increased supply of products from a reduced profit margin – i.e., prices will no longer include the previous mark-up on purchases by the downstream firm from the upstream firm.
- 5.6 As with its analysis of horizontal mergers, the Commission’s analysis of non-horizontal mergers is conducted primarily in terms of unilateral and coordinated effects for both vertical and

¹⁶ Merging parties may or may not have an existing vertical relationship, e.g., the merger of a retailer and a distributor is a vertical merger even if the distributor is only a potential supplier of the retailer.

conglomerate mergers. Non-horizontal mergers may result in an SLC where

- (a) the merged entity having market power (i.e., the ability to unilaterally increase prices above what they would have been in a competitive market) is able to exercise this power to lessen competition by:
 - (i) foreclosing competitors (after a vertical merger) or
 - (ii) tying or bundling the purchase of one product to the purchase of another (after a conglomerate merger), or
- (b) the merger facilitates coordination between the merged entity and some or all of its competitors.

Vertical Mergers

Unilateral Effects

- 5.7 Unilateral effects in vertical mergers arise when a merged entity restricts the access of rival firms to upstream suppliers or to downstream customers. Restricting rivals' access is referred to as "foreclosure". There are two forms of foreclosure:
- Input foreclosure - restricted upstream access.
 - Customer foreclosure - restricted downstream access.
- 5.8 The Commission's analysis of foreclosure arising from a non-horizontal merger includes an examination of (i) the ability of the merged party to foreclose upstream or downstream competitors in spite of competitive constraints and/or consumer behaviour, (ii) the incentive for the merged entity to foreclose upstream or downstream competitors, and (iii) the likely effect on competition, particularly whether foreclosure would result in an SLC. The merged entity's ability and incentive to foreclose competitors does not depend on the existence of a vertical relationship pre-merger. Rather, the ability and incentive to foreclose depends on the scenario post-merger.
- 5.9 As in the case of horizontal mergers the reduction or elimination of maverick behaviour can reduce the vigour of price and non-price competition. Consequently, a vertical merger involving a firm acting as a maverick (either upstream or downstream) could imply a more significant reduction in competition, depending on (i) the significance of the maverick behaviour either upstream or downstream and (ii) the extent to which the merged entity will compete less vigorously than prior to the merger.

Input Foreclosure

- 5.10 Competition concerns may arise from input foreclosure only when the merged entity has market power in the upstream market. Input foreclosure can be complete or partial, i.e.:

- (a) Total input foreclosure, such as when a merged wholesaler-retailer entity refuses to supply a key product to a retail competitor.
 - (b) Partial input foreclosure, such as when a merged wholesaler-retailer entity increases wholesale prices or offers less attractive terms to a retail competitor.
- 5.11 The ability of a merged entity to harm a downstream competitor through input foreclosure depends on various factors. For example, harm to competitors is more likely if an input comprises a significant proportion of the downstream competitor's cost of production than if the input is of a small proportion of production costs. Similarly, foreclosure will be more likely to harm a downstream competitor if the input cannot be readily substituted with other inputs.
- 5.12 The incentive to foreclose downstream competitors depends, all things being equal, on the balance between (i) reduced profits from discontinued upstream sales of inputs to downstream competitors and (ii) increased downstream profits from the sale of the merged entity's products. There will be an incentive to input foreclose if customers switch to the merged entity downstream such that increased downstream sales and profits more than offset any loss in upstream sales and profits.
- 5.13 The Commission's principal concern when conducting such analysis is not with harm to a merged entity's downstream competitors. Rather the Commission's analysis focuses on the impact on consumers and, particularly in the context of input foreclosure, the effect on prices to consumers in the downstream market.

Customer Foreclosure

- 5.14 Customer foreclosure can be complete or partial:
 - (a) Total customer foreclosure, such as when a merged wholesaler-retailer entity refuses to purchase from a wholesale competitor.
 - (b) Partial customer foreclosure, such as when a merged wholesaler/retailer decreases the wholesale price it is willing to pay, or otherwise imposes less attractive terms on a wholesale competitor.
- 5.15 The ability of a merged entity to harm an upstream competitor through customer foreclosure depends on a number of factors. For example, harm to competitors is more likely if the merged entity is a significant customer and hence a significant source of sales revenue for the upstream competitor than if the merged entity is but one of many customers.
- 5.16 The incentive to foreclose upstream competitors depends, all things being equal, on the balance between (i) increased production costs, if any, from no longer purchasing inputs from the foreclosed upstream competitor and (ii) increased prices and profits from upstream and/or downstream transactions.

- 5.17 As with input foreclosure, the Commission's analysis focuses on the effect on customers in the downstream market. It should, however, be recognised that the full effects of customer foreclosure may take time to occur. For example, upstream competitors might exit the market as a result of lost sales revenues to the merged entity. This could result in the merged entity further increasing its market power in the upstream market and increasing rivals' input costs in the downstream market which could in turn lead to increased prices to downstream consumers.

Coordinated Effects

- 5.18 Most vertical mergers do not significantly increase the risk of coordinated effects. However, depending on the market circumstances a vertical merger may either facilitate or destabilise coordination between the merged entity and some or all of its competitors in either an upstream or a downstream market. For example, a vertically integrated merged entity may have less incentive, relative to the merging parties pre-merger, to participate in coordinated behaviour either upstream or downstream. In contrast vertical mergers may facilitate coordinated behaviour such as in instances where the merger:
- (a) Reduces the number of effective competitors through total or partial foreclosure.
 - (b) Increases the symmetry of firms effectively competing in a market, e.g., where the merger increases the prevalence of vertical integration across the same upstream and downstream activities.
 - (c) Increases barriers to entry to the market, e.g., if actual or potential entrants must also be vertically integrated to compete effectively.
 - (d) Increases market information available to firms participating in coordinated behaviour, including possibly information on non-participating firms.
 - (e) Increases the effectiveness and enforcement of coordination when for example the merged entity:
 - has upstream and/or downstream relationships with participating firms, or
 - competes in many markets for different products or services across multiple markets.
 - (f) Eliminates or reduces the incentives for maverick behaviour (e.g., through the vertical integration of the maverick firm) such that co-ordination may no longer be prevented.
- 5.19 The above is not an exhaustive list of factors relevant to the Commission's analysis of coordinated effects from vertical mergers. In addition to evaluating conditions conducive to coordination, listed above, the Commission will also focus on a

merger's impact on the incentives on the merged entity and its competitors to coordinate behaviour and the strength or otherwise of competitive constraints on coordinated behaviour.

Conglomerate Mergers

- 5.20 Conglomerate mergers are not likely to lead to competition concerns unless at least one of the merging parties has market power in one or more of the markets prior to the merger. Possible competition concerns include:
- (a) Portfolio effects, i.e., where a merger that may not increase concentration in any one market creates a merged entity with a strong position in several markets.
 - (b) Tying or bundling of products, i.e., where the merged entity is able to tie the purchase of one product to the purchase of one or more other products.
- 5.21 The absence of effective competitive constraints in one or more of the product markets, may give rise to competition concerns. For example, this could occur if the price of one or more of the tied goods increases as a consequence of the merger, or if competitors, in order to compete, must expand to also sell the tied or bundled goods. The cost of establishing the capacity to supply both goods could be a barrier to entry and/or expansion.
- 5.22 Neither portfolio effects nor tying or bundling necessarily result in consumer harm. Depending on the circumstances, there may be no impact on consumers or there may be benefits to consumers. For example, consumers may benefit from the bundling of complementary products. Consumers may also benefit from efficiencies derived from economies of scope resulting from a conglomerate merger.
- 5.23 The Commission's analysis of unilateral effects, in the context of conglomerate mergers, includes an examination of (i) the strength of competitive constraints and/or consumer behaviour, (ii) the ability of the merged entity to bundle or tie products, (iii) the merged entity's incentive to bundle or tie products, and (iv) the effect on competition, particularly whether bundling or tying would result in an SLC.
- 5.24 In the case of conglomerate mergers, coordination may occur across non-substitutable products or services. Most of the facilitating factors listed in paragraph 5.18, in relation to vertical mergers, also apply to conglomerate mergers.

6. BARRIERS TO ENTRY AND EXPANSION

Introduction

- 6.1 Market power may be constrained by the occurrence or threat of new entry. A merger is unlikely to lead to an SLC if entry into the market is sufficiently easy such that market participants, post-merger, could not maintain a price increase above pre-merger levels.
- 6.2 In some cases, a credible threat or fear of new entry alone may prevent harm to competition resulting from a merger. The very possibility of profitable entry at current market prices or above may constrain market power. This can occur if entry would be relatively quick and would involve minimal cost such that a new entrant would profitably enter to exploit an opportunity afforded by increased prices. This is more likely when new entry does not entail substantial sunk costs.
- 6.3 In some markets, however, there are barriers to entry that either prevent firms from entering the market altogether or impede and delay entry to such an extent that incumbent firms are sheltered from the impact of new entry for a significant period. A barrier to entry is any factor that prevents or hinders effective new entry that might otherwise be capable of preventing an SLC arising from the merger. Barriers to entry are thus specific features of the market that give incumbents advantages over potential competitors. If the merger increases barriers to entry, the impact on competition is likely to be more severe since new entry that may have been possible pre-merger is likely to be prevented or impeded post-merger.
- 6.4 In assessing whether new entry will prevent an SLC, the Commission will consider whether such entry would be:
- (a) Timely.
 - (b) Likely.
 - (c) Sufficient.

Timeliness of Entry

- 6.5 In order to prevent a merger from harming competition, entry must have a significant impact in a timely period. In general, the longer it takes for potential entrants to become effective competitors, the less likely it is that market participants will be deterred from causing harm to competition. Furthermore, the longer the time horizon used for assessing entry the more difficult it becomes to predict with any degree of certainty that entry is likely to occur. While entry that is effective within two years is normally considered timely, the appropriate timeframe for effective new entry will depend on the characteristics and dynamics of the market under consideration.

Likelihood of Entry

- 6.6 The Commission will examine whether entry would be likely in response to an attempted exercise of market power. The likelihood of entry post-merger generally depends on the profitability of entering the market. The Commission will assess whether a new entrant would be likely to make a commercial return on its investment at or above current pre-merger market prices taking into account the entry costs involved (including sunk costs that would not be recovered if the new entrant later exited) and the likely responses of incumbent firms.
- 6.7 Other factors that would affect the likelihood of entry include the level of demand at existing prices, whether demand is growing, the output level the entrant is likely to obtain, the likely impact of entry on prices post-merger, and the scale at which the entrant would operate.

Sufficiency of Entry

- 6.8 Even where timely and likely, entry must also be of a sufficient scale and scope to prevent harm to competition. For entry to be sufficient, it must be likely that incumbents would lose significant sales to new entrants. Sufficient scale will depend in part on the characteristics of the market under review. In differentiated product markets, the sufficiency of entry will depend on the ability of entrants to successfully market sufficiently close substitutes to the products of the merged entity. Entry that is small-scale, localised, or targeted at niche segments is unlikely to be an effective constraint post-merger.
- 6.9 Sufficiency does not require that one new entrant alone duplicates the size and scale of the merged entity. Timely and likely entry by a number of firms may be sufficient if the combined effect would prevent harm to consumers.
- 6.10 The Commission's assessment of the timeliness, likelihood, and sufficiency of entry will depend on the circumstances of each merger under consideration. In each case, however, the key consideration is whether entry (or the threat of entry) provides an effective competitive constraint that will prevent an SLC post-merger.

Barriers to Entry

- 6.11 Barriers to entry can take many forms and fall into one of the following four broad categories¹⁷:
- (a) Legal or regulatory.
 - (b) Structural.
 - (c) Strategic.

¹⁷ Some types of barriers to entry can fall into more than one of these categories, depending on the particular facts of the case.

- (d) Other types of entry barriers.

Legal or Regulatory Barriers

6.12 Legal or regulatory barriers provide incumbents with absolute cost advantages over potential entrants which may make successful entry less likely. Examples include:

- (a) Government regulations that limit the number of market participants (e.g., restrictions on the number of licences granted) and apply different conditions to new entrants.
- (b) Legally enforceable intellectual property rights.
- (c) Tariff and non-tariff barriers to international trade.
- (d) Environmental regulations that raise the cost of entry.

Structural Barriers

6.13 Structural barriers arise from the technology and/or production methods or other factors required to establish an effective presence in the market. Examples include:

- (a) Sunk costs which are not recoverable if the firm exits the market. These include initial set-up costs associated with investment in specific assets, specialised facilities, product development, research, and advertising and promotion necessary to establish a reputation. Sunk costs may deter new entry since they raise the cost of failed entry.
- (b) Economies of scale which arise where average costs fall as the level of output increases. Significant scale economies may limit the viability of entry below a certain level of output with the consequence that small scale entry will be ineffective as a competitive constraint on the merged entity. Furthermore, entry into markets with significant scale economies often means substantial sunk costs which make entry even more risky.
- (c) Economies of scope which arise where average costs fall as a wider range of products is produced. Significant scope economies may limit the viability of entry below a certain range of products produced meaning that small scale entry will be ineffective as a competitive constraint on the merged entity.
- (d) High switching costs for customers such as search and transaction costs.
- (e) Difficulty in accessing key production or supply assets, important technologies, or distribution channels.

- 6.14 Structural barriers can sometimes arise in markets characterised by network effects.¹⁸ These markets may be prone to 'tipping' which occurs when customer choice gives one firm an advantage and the balance of power shifts in its favour, leaving it as the clear market leader. This may make customers reluctant to switch, thereby making it more difficult for new entrants to gain a sufficient customer base to be profitable.

Strategic Barriers

- 6.15 Strategic barriers arise from the actions that have been taken or threatened by incumbents (or that are likely in the future) and that deter new entry. Examples include:
- (a) Long-term exclusive contracts with customers or suppliers (particularly those containing automatic renewals, rights of first refusal, and/or termination fees) may raise switching costs thereby making it difficult for new entrants to gain a sufficient customer base to be profitable or to obtain essential inputs.
 - (b) A history of successful retaliatory action by incumbents against new entrants, such as price wars, below-cost pricing, and brand proliferation.
 - (c) The acquisition of a competitor by an incumbent in order to remove, or at least restrict, the possibility of a new competitor entering the market.

Other Types of Entry Barriers

- 6.16 Other cost advantages for incumbents that may deter entry include control over access to scarce resources such as land, natural resources, or technology. The level of market maturity may also deter entry. Entry may be less difficult when a market is growing in contrast to a more mature market where demand may be flat or declining.

Evidence for Assessing Entry

- 6.17 The onus rests with the merging parties to demonstrate that entry will be timely, likely and sufficient such that a merger will not lead to an SLC. The Commission will consider all reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood and sufficiency.
- 6.18 In assessing whether entry might act as an effective competitive constraint post-merger, the Commission will consider all relevant information including, but not limited to, the following:
- (a) The history of past entry. This will include consideration of the costs of such entry, the length of time previous

¹⁸ In markets where services are provided over a network or through a platform, network effects arise where customers value the network or platform more highly when it is used by a greater number of other customers.

new entrants traded in the market, and the effect of such entry on the intensity of competition in the market. In particular, the Commission will examine the extent to which past entry altered the pattern of behaviour of incumbents. Recent examples of attempted entry, whether successful or unsuccessful, provide an important starting point for assessing entry. An absence of successful and effective entry in the past suggests that entry may be difficult; conversely, successful entry is evidence that entry may be easy, although entry may be more difficult post-merger than it was before.

- (b) Evidence of planned entry by firms in adjacent or complementary markets or by other firms outside the market. It is not always necessary for the merging parties to identify the names of potential entrants in order to demonstrate that entry is likely. However, such evidence would be useful if available.
- (c) Evidence indicating the level of investment (particularly any sunk costs) required to enter the market and operate at the minimum efficient scale¹⁹ necessary to achieve a reasonably competitive level of costs.
- (d) Evidence indicating the time period over which entry costs would have to be recovered in order to assess whether entry would be profitable post-merger at competitive prices.
- (e) Evidence of the ability of producers that are not competitors to switch production to competing products or services and achieve success in the market.
- (f) Evidence of the extent of brand loyalty by customers.
- (g) Evidence of switching costs.
- (h) The length of contracts between suppliers and customers.
- (i) Evidence of the ability and incentive of customers to sponsor entry.
- (j) Evidence of any growth or decline in the market.
- (k) Evidence of a strategy to block or restrict entry through the acquisition of a competitor by an incumbent.
- (l) Evidence of network effects that impede entry.

Barriers to Expansion

6.19 Harm to competition threatened by a merger may also be constrained by the ability of rivals profitably to expand

¹⁹ This refers to the minimum size (typically in terms of output, capacity or customer base) that a firm requires in order to compete effectively with incumbent firms in a market.



production in response to higher prices. As with new entry, expansion by rivals must be timely, likely, and sufficient to prevent an SLC. While expansion that is effective within two years is normally considered timely, the appropriate timeframe for effective expansion will depend on the characteristics and dynamics of the market under consideration.

- 6.20 The ability and incentive of rivals to expand output and sales if competition is harmed post-merger will depend on a number of factors including but not limited to:
- (a) The number of rivals capable of expanding output and sales.
 - (b) The level of rivals' spare capacity.
 - (c) The cost of expanding output.
 - (d) The ability of rivals to source increased inputs and successfully market increased output to customers.
 - (e) The level of excess capacity held by the merged entity that could be deployed to prevent rivals from capturing sales.
- 6.21 If rivals are capacity constrained, the merger is more likely to lead to an SLC since rivals will have less ability to steal customers from the merged entity in response to an exercise of market power.
- 6.22 In assessing whether expansion might act as an effective competitive constraint, the Commission will consider all relevant information, including information similar to that listed in paragraph 6.18 (but with respect to possible expansion).

7. COUNTERVAILING BUYER POWER

Introduction

- 7.1 Countervailing buyer power refers to the ability of a customer or customers,²⁰ because of their position in the market, successfully to resist supplier price increases. In some circumstances, a customer may possess sufficient negotiating strength to enable it to constrain the ability of a supplier or suppliers to harm competition. The source of this negotiating strength may come from a customer's size; its commercial significance to the supplier; its ability to credibly threaten to switch, within a reasonable time frame, to alternative suppliers; its ability to sponsor a new entrant; and/or its ability to engage in self-supply (i.e., vertically integrate backwards and become a supplier itself). Where customers have countervailing buyer power post-merger, even after any reduction in buyer power caused by the merger, this may be sufficient to prevent competitive harm.
- 7.2 Mere size and commercial significance of customers does not, however, necessarily prove sufficient buyer power. Even large firms need to purchase certain products and a merger can easily reduce even a large buyer's bargaining power. There must be evidence that a customer, whatever its size, has the ability and incentive to prevent harm to competition – and that this ability and incentive will not be significantly diminished by the merger. If a merger eliminates a supplier whose presence contributed significantly to a customer's negotiating strength pre-merger, the customer may not be in a position to exercise effective countervailing buyer power post-merger.
- 7.3 For countervailing buyer power to prevent an SLC, it is not sufficient that it exists pre-merger. The merging parties must demonstrate that buyer power would be both present and effective post-merger, even after any reduction in buyer power caused by the merger.

Buyer Power and SLC

- 7.4 Even if the merging parties demonstrate that one or more customers will have significant countervailing buyer power post-merger, it does not necessarily follow that this will prevent an SLC. In a market where some but not all buyers possess significant countervailing buyer power, a merger may still result in increased prices (or other competitive harm) for those customers with little or no countervailing buyer power. For example, it may be that only large customers have the ability to exert countervailing buyer power and protect themselves from competitive harm. Small customers may not have sufficient negotiating strength to successfully exert countervailing buyer power. The Commission will examine whether the countervailing buyer power of some customers will benefit

²⁰ This includes resellers such as retailers who sell products to end consumers. It also includes firms that purchase a product to be used as an input in the production of a different product.

sufficient customers to prevent an SLC in the market post-merger.

- 7.5 In a market where customers resell the products they purchase, the Commission will examine whether there may be a “waterbed effect” which can arise when powerful customers negotiate better supply terms from suppliers which leads to a worsening of the supply terms for less-powerful customers. The waterbed effect may harm end consumers by reducing the effectiveness of countervailing buyer power to such an extent that it fails to prevent an SLC in the market post-merger.
- 7.6 The effectiveness of buyer power will depend on the characteristics of the market under review. For example, in markets where there are individual negotiations between suppliers and customers, the countervailing buyer power possessed by one or more customers will not typically protect other customers from any anti-competitive effects that may arise post-merger. In contrast, in markets where the price is transparent to all suppliers and customers and price discrimination is not possible, the buyer power possessed by one or more customers may protect all customers in the market by preventing the merged entity from raising its prices to any customer. The extent to which buyer power can prevent harm to competition also depends on the competitive threat posed by a merger. For instance, competitive harm through reduced innovation or consumer choice may not be prevented by buyer power.
- 7.7 If a customer resells the products it purchases, an additional consideration is required when analysing countervailing buyer power. The ability of a customer who is a reseller to exercise buyer power may be limited by the willingness of the reseller’s customers to buy the products of alternative suppliers. Even if a reseller is able to buy from alternative suppliers or engage in self-supply in response to an exercise of market power by its supplier, this may not be credible if the products of alternative suppliers are not considered by the reseller’s customers as a suitable replacement. In product categories where end consumers display a high degree of loyalty to leading brands, the extent to which even the largest resellers can exercise buyer power over a supplier(s) may be limited. Thus, brand loyalty may be an important factor when considering the role of buyer power in retail markets.
- 7.8 The analysis of countervailing buyer power may be different for mergers where customers are also competitors of the merging parties (e.g., retailers that sell private-label products which compete with the merging parties’ products). In general, a customer with buyer power will seek to obtain more favourable trading terms from its suppliers in order to improve or maintain profitability.
- 7.9 However, where customers are also competitors of the merging parties, the incentives of both parties may become aligned. A customer with buyer power who is also a competitor may not have the same incentive to resist an exercise of market power (e.g., a price rise) by the merged entity since such a price rise

may enable the customer to increase sales of its own private-label products.²¹ Ultimately, the dynamics of the market affected by the merger and the nature of the interactions between suppliers and customers will need to be examined carefully on a case-by-case basis to determine whether countervailing buyer power will prevent an SLC post-merger.

Evidence for Assessing Countervailing Buyer Power

7.10 The onus is on the merging parties to provide reliable evidence to the Commission to demonstrate that countervailing buyer power will prevent harm to competition post-merger. In assessing whether countervailing buyer power is likely to prevent an SLC post-merger, the Commission will consider all relevant information, including, but not limited to, the following:

- (a) Examples of switching by customers between the merging parties pre-merger.
- (b) Examples of switching by customers to alternative suppliers (other than the merging parties) pre-merger.
- (c) Documentation indicating that customers have regularly and successfully resisted attempts by a supplier(s) to raise prices or otherwise harm competition pre-merger, coupled with evidence that the merger would not change this.
- (d) Examples where customers have previously sponsored entry or vertically integrated.
- (e) Documentation indicating that customers have considered vertical integration or sponsoring new entry and that such a strategy is commercially viable.

7.11 The Commission will give much greater weight to evidence that pre-dates the announcement of the merger under review in comparison to post-merger announcement evidence, because the behaviour of the merging parties vis-à-vis each other and third parties (i.e., customers, competitors and suppliers) is likely to be heavily influenced by the announcement of the merger.

²¹ For example, if the merged entity raises the price of its products, there may be an incentive for a customer to also raise the price of its private-label products but by less than the price increase of the merged entity. This may lead to a customer increasing sales of its private-label products at the expense of the merged entity's products.

8. EFFICIENCIES

Introduction

- 8.1 A merger may generate various efficiencies for the merged entity. The Commission's analysis of efficiencies goes beyond the impact of efficiencies on the merged entity and focuses on whether verifiable efficiencies mitigate adverse competitive effects and prevent an SLC.
- 8.2 The onus rests on the parties to show that claimed efficiencies are (i) merger-specific, (ii) verifiable and (iii) benefit consumers sufficiently to prevent an SLC.
- 8.3 Various types of efficiencies can be grouped into three broad categories:
- a) Supply-side efficiencies.
 - b) Demand-side efficiencies.
 - c) Dynamic efficiencies.

Supply-Side Efficiencies

- 8.4 Supply-side efficiencies occur when the merged entity is able to supply products or services at a lower cost in comparison to the merging parties operating separately prior to the merger. Cost reductions include economies of scale and/or scope that involve reductions in marginal costs. (Reductions in fixed costs are less likely to be passed through to consumers, so less weight is given to them by the Commission.)

Demand-Side Efficiencies

- 8.5 Demand-side efficiencies occur if the benefits customers receive from the merged entity's products increase. Examples of demand-side efficiencies include:
- Network effects – when services are provided over a network or through a platform, a merger may improve the range of products or services available through the network.
 - Pricing effects from conglomerate mergers – e.g., a fall in the price of product A may also increase the quantity demanded not only of product A but also of any complementary products or services. It may be profitable for a merged entity to offer product A and complementary products or services at a lower combined price than the set of prices previously charged by different suppliers.
 - 'One-stop shopping' from conglomerate mergers – a merged entity with a broader range of products may be more attractive to consumers (e.g., by reducing transaction costs).

Dynamic Efficiencies

- 8.6 Dynamic efficiencies involve innovation to change the goods or services supplied by the merged entity relative to the pre-merger situation. Such efficiencies may arise, for example from technology transfer or an increase in the merged entity's research and development capacity.
- 8.7 Dynamic efficiencies generally have non-price impacts rather than necessarily reducing prices to consumers. Dynamic efficiencies may (i) be less certain to occur and (ii) take more time to occur than other efficiencies which makes them more difficult to assess. Hence the Commission is not likely to find that dynamic efficiency claims alone will prevent an SLC.

Evaluation of Efficiencies

- 8.8 The evidence provided to the Commission must demonstrate that efficiencies will be of sufficient size and/or scope and will occur in a sufficiently timely fashion to prevent an SLC. The Commission requires that a claimed efficiency meets all three of the following conditions, namely, the efficiency:
- (a) is merger-specific, and
 - (b) is verifiable, and
 - (c) benefits consumers.

Merger Specificity

- 8.9 The Commission's analysis of efficiencies distinguishes between efficiencies that are
- merger-specific - those that would occur only as a result of the merger and could not be attained by feasible alternative scenarios that raised less serious competition concerns, and
 - non-merger-specific – those that could practicably occur anyway in the absence of the merger.
- 8.10 Valid efficiency claims must refer only to merger-specific efficiencies. Efficiencies that are not merger-specific cannot be considered to mitigate adverse competition concerns (which are also specific to the merger).

Evidence for Efficiency Claims

- 8.11 The onus rests with the merging parties to provide reliable evidence to show that any efficiencies:
- (a) are directly achieved by the merger,
 - (b) cannot be achieved by another feasible means less restrictive of competition, and
 - (c) will be achieved within a reasonable timeframe.

8.12 Verification of efficiency claims requires that the Commission has access to accurate information concerning each of

- (a) the nature of the efficiency,
- (b) whether the efficiency is merger-specific, and
- (c) the magnitude, likelihood and timing of the efficiency.

8.13 Efficiency claims are necessarily prospective and hence subject to some degree of uncertainty, particularly with respect to dynamic efficiencies claims.²² It is also likely that most of the information supporting efficiency claims will be in the possession of the merging parties. It is therefore incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited. The Commission may require evidence from various sources including, but not limited to:

- All sources listed in paragraph 1.20 particularly as they relate to efficiencies.
- Statements by the managers and/or owners of the merging parties to external audiences (including financial markets and regulatory agencies).
- Relevant examples of efficiencies resulting in benefits to consumers.

Benefits to Consumers

8.14 The onus rests with the merging parties to provide reliable evidence to show that efficiencies will benefit consumers. The merging parties must show that efficiencies are of sufficient magnitude and also will be realised with sufficient likelihood and speed. The parties must also show that the benefits from claimed efficiencies will be passed through to consumers.

8.15 The incentive on the merged entity to pass through efficiencies to consumers will be stronger to the extent that the merged entity faces effective actual and/or potential competition and consumers face low switching costs. Accordingly, the Commission's analysis of efficiencies takes place in conjunction with its analysis of likely competitive effects in the absence of efficiencies. Also, the Commission does not consider as efficiencies any savings to the merged entity resulting from anti-competitive reductions in output.

8.16 The Commission's analysis requires that efficiencies, including dynamic efficiencies, are of at least sufficient magnitude, timeliness and certainty to ensure that an SLC will not arise as a result of a merger. The impact of claimed efficiencies

²² Merging parties can expect the Authority's evaluation of dynamic efficiency claims to include both qualitative and quantitative analysis particularly where there are claims of decreased production costs from innovation and/or an increase in consumer demand in response to product innovation via enhancement of current products or introduction of new products.



depends on the particular circumstances of the merger and the characteristics of claimed efficiencies including those below:

- (a) Cost reductions are more likely to occur in the short term and be passed through to consumers if the reductions are in marginal costs or short-run variable costs rather than in fixed costs.
- (b) Network effects may vary across platform users. For example, the more heterogeneous the preferences of network users, the more variable would be their individual benefits – some may benefit, others may not.
- (c) The impact of efficiencies may be diluted because of delays in their implementation or in the impact being less than originally estimated.
- (d) Input price reductions related to buyer power are not considered to be pro-competitive efficiencies.
- (e) Efficiencies that reduce prices in one market generally cannot compensate for price increases in another market and are not considered to be pro-competitive efficiencies.

9. FAILING FIRMS AND EXITING ASSETS

Introduction

- 9.1 The failing firm argument is a defence based on a counterfactual where the target firm and its assets exit the market. It provides a defence to a merger that would otherwise lead to an SLC.²³
- 9.2 The failing firm argument requires that both the firm and its productive assets will exit from the market unless the merger is put into effect. While the loss of a firm or brand will reduce consumer choice, the loss of productive assets, rather than the firm or brand *per se*, harms consumers through reduced quantity and/or increased prices for goods in a market. By keeping the otherwise failing firm's assets in the market any reduction in competition post-merger may be mitigated through a smaller reduction in output and/or a smaller increase in prices than would otherwise have occurred.
- 9.3 The acquiring firm itself is also relevant to assessing the merits of a failing firm argument. The pending exit of a firm and its assets from a market does not in itself imply anything about the merits or otherwise of a particular buyer. Furthermore, it may also be the case that a merger with an alternative buyer may be preferable (i.e., more pro-competitive through smaller reductions in output or smaller increases in price) than the proposed merger. Therefore, the merging parties must be able to show good-faith efforts to find alternative acquirers that would not lead to as significant a reduction in competition in comparison to the transaction involving the merging parties.
- 9.4 The failing firm test, set out below, covers both the seller and the buyer in order to test whether the proposed transaction is (i) the relevant counterfactual and (ii) the best possible outcome for consumers.

Failing Firm Test

- 9.5 The Commission's failing firm test has four elements – all of which must be met.
- (a) The firm must be unable to meet its financial obligations in the near future.
 - (b) There must be no viable prospect of reorganising the business through the process of receivership, examinership or otherwise.
 - (c) The assets of the failing firm would exit the relevant market in the absence of a merger transaction.
 - (d) There is no credible less anti-competitive alternative outcome than the merger in question.

²³ For convenience, this section refers to the target firm as the failing firm. It is possible, however, that the acquiring firm is the failing firm (i.e., that the acquiring firm and its assets would exit the market).



Evidence and Analysis

- 9.6 The onus rests with the merging parties to demonstrate that the firm meets the failing firm test above. Evidence in support of the target firm's financial distress includes documents, prepared by the parties and/or third parties, such as the following:
- (a) Audited financial statements, including notes and qualifications in the auditor's report.
 - (b) Projected cash flows, projected operating or losses, projected net worth.
 - (c) Credit status – including
 - (i) whether existing loans have been called or further loans/line of credit advances at viable rates have been denied,
 - (ii) whether credit from other sources is unobtainable, and
 - (iii) whether suppliers have curtailed or eliminated trade credit.
 - (d) Reductions in the firm's relative position in the market.
 - (e) The extent to which the firm engages in "off-balance-sheet" financing (such as leasing).
 - (f) Changes in the firm's share price or publicly-traded debt of the firm.
- 9.7 Evidence that reorganisation through receivership, examinership or otherwise would not be feasible would include any or all of:
- (a) Time lines of critical events and decisions.
 - (b) Internal documents prepared by staff such as briefing materials for the Board and/or senior management.
 - (c) Public documents prepared by third parties.
 - (d) Documents prepared by third parties such as briefing materials for the Board and/or senior management.
- 9.8 Similarly, all of the above sources of information will provide evidence in relation to the exit of the firm and its assets from the market. In particular, documents prepared prior to, or unrelated to, the proposed transaction will provide useful evidence of intentions to exit. Evidence of expressions of interest for part or parts of the target firm will also be relevant.
- 9.9 Evidence that there is no credible less anti-competitive alternative outcome than the merger in question must show that either (i) the proposed transaction is less anti-competitive

compared to other viable transactions with other buyers, or (ii) there are no other viable buyers. Such evidence would include:

- (a) Details of the sales process and time lines of critical events and decisions, e.g., the bidding processes, due diligence, final offer and acceptance.
- (b) The number of alternative bids, bid prices and expressions of interest for part of the assets.
- (c) Documents prepared by staff including briefing materials for the Board and/or senior management.
- (d) Documents prepared by third parties for the Board and/or senior management.
- (e) Evidence of the likely distribution of sales of the failing firm.

9.10 Implicit in all of the above, it must also be shown that the merger will not leave consumers worse off than if the firm and its assets had left the market.

Failing Division

9.11 The failing division argument (i.e., where the productive assets of part of a firm would exit the market but for a merger) is essentially analogous to the failing firm argument. However, a high level of scrutiny can be anticipated in testing a failing division argument given the potential unavailability of ambiguity in division-specific information. For example, cost allocation and accounting information within the firm overall may prove more difficult to obtain and may be less clear than similar information for a firm as a whole, given the ability of a parent company to allocate costs, revenues and intra-company transactions among itself and its subsidiaries and divisions.

Failing Acquirer(s) and Target(s)

9.12 The analysis of mergers where both the acquirer(s) and target(s) are allegedly failing firms, as might occur in a distressed industry or sector, would be the same as that described above. That is, the competition framework remains unchanged. Any such transaction, i.e., in which both the acquirer(s) and target(s) are allegedly failing firms, could be cleared by the Commission only on competition grounds – including the failing firm test as described above.



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