



**INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION MERGERS WORKING GROUP**

**COMMENTS ON THE CANADIAN COMPETITION BUREAU'S
PROPOSED MERGER ENFORCEMENT GUIDELINES**

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I. INTRODUCTION

This submission is made to the Canadian Competition Bureau (the 'CCB' or '**Bureau**') on behalf of the Mergers Working Group ('**Working Group**') of the Antitrust Section of the International Bar Association ('**IBA**') in response to the public consultation on the review of the proposed Merger Guidelines that will update the 2011 Merger Enforcement Guidelines (the '**Consultation**').¹

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 80,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Section.²

The Working Group welcomes the Consultation and provides constructive comments below, which draw on the vast experience of the IBA's members in merger control law and practice within jurisdictions across the globe.

II. GENERAL COMMENTS ON THE PUBLIC CONSULTATION

The Working Group commends the CCB for undertaking a comprehensive review and updating of its Merger Enforcement Guidelines ('**MEGs**') to reflect recent legislative amendments as well as developments in jurisprudence and enforcement practice over the past 15 years. Transparency regarding the review of mergers is important to merging parties and other market participants as well as legal and economic advisors.

The Working Group provides comments below on key elements of the MEGs involving market definition, structural presumptions, vertical and conglomerate mergers, platforms, labour markets

¹ See <https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/public-consultation-updated-merger-enforcement-guidelines>. This submission does not necessarily reflect the views of the organisations with which individual members of the Working Group or officers of the Antitrust Section are engaged or employed.

² Further information on the IBA is available at <http://www.ibanet.org> and information about the Antitrust Section is available at <https://www.ibanet.org/LPD/Antitrust-Section/Default.aspx>.

and efficiencies. The comments reflect experience with similar issues in the EU, Germany, Mexico, Singapore, the United Kingdom and the United States.

III. SPECIFIC COMMENTS

1. Market Definition

1.1 Hypothetical monopolist test

The CCB indicates that it uses the Hypothetical Monopolist Test (**‘HMT’**) for product and geographic market definition. However, it acknowledges that it is often used as a conceptual framework and is rarely implemented quantitatively.

1.1.1 EU

In 2024, the European Commission (the **‘Commission’**) adopted a revised Market Definition Notice (the **‘Notice’**), marking the first update since its original adoption in 1997.³ The Notice clarifies the methodology for defining product and geographic markets under EU competition law and reflects both the Commission’s decisional practice and developments in EU case law over the past years. As before, product market definition is primarily based on demand-side substitution, with supply-side substitution considered to a lesser extent.

On the demand side, the HMT—and, in particular, the small but significant and non-transitory increase in price (**‘SSNIP’**) test—remains relevant for defining markets in appropriate cases. The theoretical benchmark is whether a hypothetical monopolist controlling the candidate market could profitably exercise market power. This can be evaluated by assessing whether such a monopolist would find it profitable to impose a SSNIP.

Consistent with the approach of the CCB, the Commission’s 2024 Notice describes the SSNIP as a conceptual framework for interpreting available evidence. In some cases, the Commission may also quantitatively assess whether a SSNIP would be profitable for a hypothetical monopolist through a “critical loss analysis.”⁴

A critical loss analysis begins by determining the maximum loss of sales volume (the **‘critical loss’**) that could be sustained while still making a SSNIP profitable. This figure is then compared with the likely loss of sales resulting from the SSNIP. If the critical loss exceeds the likely loss, the SSNIP would be profitable—indicating that the candidate market may constitute a relevant product market.⁵

³ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645.

⁴ Ibid., para. 59.

⁵ Ibid., para. 59.

Like the CCB, the Commission acknowledges the limitations of the SSNIP test in markets where suppliers primarily compete on non-price parameters—such as quality, innovation, or in contexts involving zero-monetary-price products.⁶

Given these practical constraints regarding the HMT, the Commission is not required to apply the SSNIP test empirically. A wide range of qualitative and quantitative evidence may also be used to inform market definition.

1.1.2 Germany

The HMT/SSNIP as such is no longer in regular use in Germany. In the 2020 Evaluation of the Commission Notice on the Definition of the Relevant Market, the Federal Cartel Office (*Bundeskartellamt*, or ‘FCO’) indicated that the HMT/SSNIP test should be deprioritised as it suffers from conceptual shortcomings.⁷

According to the FCO, HMTs correctly place demand substitutability (e.g. cross-price elasticities) at the core of market definition; however, they mingle other factors into the market definition exercise, such as supplier margins, non-consumption decisions as well as assumptions on test candidates, price increase thresholds, or price levels and elasticities under “sufficient” competition. These additional factors are considered a distraction from market definition and cause a number of problems.⁸

In addition, the FCO recognised that, in practice, the data needed to perform the test—notably cross-price elasticities for all product varieties concerned—typically is not available. And if these data were available, it would be straightforward to conduct a comprehensive effects analysis of the behaviour at stake so that it would be unnecessary to define the market in the first place. Moreover, the use of HMT/SSNIP tests also are not reliable if it is not clear that the initial price prevailed under competitive conditions.⁹

As a result, the FCO considers that the fundamental concepts for market definition are demand substitution and supply substitution, whereas the SSNIP test should be viewed only as a supplementary concept without decisive significance.

⁶ Ibid., para. 30.

⁷ 2020 evaluation of the commission notice on the definition of the relevant market for the purposes of Community competition law, Contribution of the FCO (*Bundeskartellamt*), p. 5; available at https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwil5_S0t7uSAXVd3QIHHbqfO84QFnoECBwQAQ&url=https%3A%2F%2Fwww.bundeskartellamt.de%2FSharedDocs%2FPublikation%2FEN%2FStellungnahmen_Opinion%2FEvaluation_Commission_Market_definition_dec_2020.pdf%3F__blob%3DpublicationFile%26v%3D3&usg=AOvVaw0Y8U0o-ZfyU4Bfatex2-FW&opi=89978449.

⁸ Ibid., p. 5.

⁹ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, para. 30 with footnote 55.

1.1.3 Mexico

In July 2025 the Federal Economic Competition Law (the ‘FECL’)¹⁰ was amended and in October 2025 the dual-competition authority system (i.e. the now extinct Federal Economic Competition Commission (‘COFECE’) and the Federal Telecommunications Institute (‘IFT’)¹¹) was replaced by a unitary competition authority, the National Antitrust Commission (Comisión Nacional Antimonopolio, or ‘CNA’). Due to this recent change, our comments are based on our experience with COFECE and IFT, but it is possible that the CNA may make changes from past practice.¹²

Both COFECE and IFT used the SSNIP test as part of their techniques for defining the relevant market¹³ and Mexican courts have recognised its utility.¹⁴ However, COFECE has acknowledged that its application relies on the availability of data and it should not necessarily be applied to define a relevant market because it is data-intensive. In addition, these tests assume that competition is based solely on price, without considering other variables such as quality and complementarity with respect to other goods. Therefore, the suitability of using the HMT/SSNIP tests depends on the data available, as well as the particularities of each case.¹⁵

1.1.4 Singapore

The HMT remains the academically-adopted conceptual test for market definition purposes in Singapore. However, it is recognised that defining a market in strict accordance with the test’s

¹⁰ Available at: <https://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf>.

¹¹ In charge of applying the FECL for the telecommunications and broadcasting sectors.

¹² Note that CNA’s regulatory provisions will be issued in April 2026 at the latest (according to the transitory provisions of the aforementioned amendment to the FECL), which could affect these comments.

¹³ See: [https://one.oecd.org/document/DAF/COMP/LACF\(2022\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2022)7/en/pdf) and https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/02/market-examinations-in-mexico_4a9e5bb5/edfebee6-en.pdf.

¹⁴ Available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2011156>.

¹⁵ File IO-002-2020, pp. 233-234. IFT’s Guidelines for Relevant Market Definition in Telecommunications and Broadcasting Sectors set forth three steps to perform a SSNIP test quantitatively. This methodology is part of FT’s internal analysis and is not available to the parties or generally to the public:

“Step 1. Calculate the critical loss associated with the focal product (the minimum loss in sales volume required for a SSNIP to be unprofitable), using the following formula: $Critical\ Loss = 100 \times (\Delta\%Price) / (\Delta\%Price + \%Initial\ Margin)$. Where: $\Delta\%Price$ is the percentage increase that would be applied to the price. $\%Initial\ Margin$ is the profit margin embedded in the initial price. Step 2. Estimate the expected actual loss that a hypothetical monopolist imposing an SSNIP would incur, taking into account, among other factors, the focal product’s own-price elasticity of demand; that is, what proportion of sales would be lost in response to a price increase? In this case, a higher price elasticity of demand (a stronger consumer reaction) would imply a larger loss of sales following a price increase and, therefore, a larger expected actual loss. Step 3. Compare the expected actual loss to the critical loss. If the expected actual loss exceeds the critical loss, the SSNIP would not be profitable, which implies that the set of products under analysis should be expanded to include additional candidate products. Repeat this exercise until the expected actual loss falls below the critical loss.”

assumptions is rarely possible, due to data limitations. The Competition Commission of Singapore (‘CCS’) Guidelines on Market Definition (‘CCS Guidelines’)¹⁶ make it clear that even precise application of the test provides no more than an appropriate frame of reference for competition analysis.¹⁷

1.1.5 United Kingdom

The UK Competition and Markets Authority (‘CMA’) issued revised Merger Assessment Guidelines (the ‘MAG’) in March 2021. The MAG note that the CMA is required to identify a market or markets within the United Kingdom for goods or services in which a substantial lessening of competition (‘SLC’) exists.¹⁸ An SLC can affect the whole or part of a market or markets.¹⁹ The MAG stress, however, that while market definition can sometimes “be a useful tool, it is not an end in itself”.²⁰ In effect, defining a relevant market is an “analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.”²¹

The MAG outline types of evidence that may be utilised in defining a relevant market. With regard to defining the relevant product market, evidence of “the response to customers to a small but significant increase in price [...]” is only one framework of demand-side factors that may help in defining the relevant product market.²²

In sum, while the SSNIP test (which is not referred to by name in the MAG) remains an analytical tool, it should be seen as one type of evidence used in a highly flexible analysis.

1.1.6 United States

The 2023 Merger Guidelines published by the Federal Trade Commission (‘FTC’) and Department of Justice (‘DOJ’) (‘Agency Guidelines’) list the HMT as one of the three ways to define a market.²³ In practice, US courts apply the HMT flexibly to reflect the practical nature of competition in the specific markets at issue in a particular case rather than implementing the HMT as a rote test with a set checklist of factors for consideration. The test depends on the specific

¹⁶ Competition and Consumer Commission of Singapore Guidelines on Market Definition, 1 February 2022. Available at: https://isomer-user-content.by.gov.sg/45/1654f332-1435-4dad-830b-dc4a1edbb961/CCCS%20Guidelines%202022_Interactive.pdf.

¹⁷ Ibid., para. 2.9.

¹⁸ CMA, Merger Assessment Guidelines, 18 March 2021, CMA 129, para. 9.1. Available at: https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_-__.pdf.

¹⁹ Ibid.

²⁰ Ibid., para. 9.4.

²¹ Ibid.

²² Ibid., para. 9.7.

²³ The Federal Trade Commission and Department of Justice, 2023 Merger Guidelines available at: <https://www.justice.gov/atr/merger-guidelines>, at §4.3.

contours of the proposed transaction, with courts analyzing different facts and sources of evidence to try to determine whether a hypothetical monopolist would be able to raise the price in the candidate market.

1.2 Qualitative factors

The CCB sets out several factors (e.g. buyer views, etc) that may be used to guide the conceptual as opposed to empirical application of the HMT or to define markets qualitatively.

1.2.1 EU

Aside from the SSNIP, the Commission focuses on various qualitative factors to define relevant markets. The Commission defines the relevant product market and the relevant geographic market independently from each other, albeit aligned on similar principles. Overall, the relevant factors are comparable to what the CCB proposes.

a) **Product Market**

As indicated earlier, when concerned with defining the relevant product market, the Commission primarily focuses on evidence relating to demand substitution.²⁴ In this context the most important evidence relevant for demand substitution are product characteristics (including product quality or level of innovation), prices, intended use and general customer preferences.

In some cases, the Commission may also use evidence of past substitution, hypothetical substitution, competitive constraints based on industry views, or barriers and costs associated with switching to potential substitutes. When assessing supply substitution factors, evidence of past substitution (existence of overcapacity and their ability and incentive to redeploy production in the short term, past redeployment of production, or supply to the products in question in response to exogenous changes in supply or demand conditions)²⁵ or barriers and costs associated with switching supply are important.

b) **Geographic Market**

With regard to the geographic market, factors such as identity of available suppliers market shares and prices, customer preferences and purchasing behaviour, barriers and costs associated with supplying customers in different areas, distance-related factors, transport costs and catchment areas, as well as trade flows and pattern of shipments play a role and are used as evidence in the assessment.²⁶

²⁴ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, para. 47.

²⁵ Ibid., para. 60.

²⁶ Ibid., para. 39.

1.2.2 Germany

The FCO follows an approach comparable to the EU when defining the relevant market, mostly focusing on demand substitution.

1.2.3 Mexico

Based on COFECE past practice, the CNA will likely also focus primarily on evidence relating to demand substitution. It may use additional qualitative information to complete the market definition assessment, particularly in complex transactions, including characteristics of the products or services involved, potential competitors, customers and the percentage each represent from their total revenues, production process, installed capacity, origin of the products and transportation costs, distribution channels, inputs, costs, imports and exports, duties, etc.²⁷

1.2.4 Singapore

The CCS generally approaches questions of market definition with reference to demand-side and supply-side substitutability assessments. The CCS Guidelines emphasise that assessment of various types of evidence and the exercise of judgment is key in the market definition exercise.²⁸

Similar to the approach of the EU the CCS approaches the issue of market definition having regard to the product market dimension and the geographic market dimension. It considers a range of qualitative factors including physical product characteristics, relative prices, relative quality, switching costs, buyer views, patterns in price changes, own or cross-price elasticities and price-concentration relationships.²⁹

1.2.5 United Kingdom

As set out above, the MAG stress that while market definition is a necessary part of its analysis, it is not an end in itself. While market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger firms' behaviour, captures the competitive dynamics more fully than formal market definition.³⁰ Apart from the various analytical tools used in defining a relevant market, the MAG state that the CMA "may also take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others."³¹

²⁷ COFECE's Merger Guidelines, available at: https://www.cofece.mx/wp-content/uploads/2021/06/GUIACON_2021.pdf

²⁸ CCS Guidelines, para. 2.10.

²⁹ Ibid., para. 3.9.

³⁰ MAG, para 9.2.

³¹ Ibid., para. 9.4.

In effect, the MAG set out a flexible approach, not constrained by market definition. However, when defining a relevant market, the CMA will identify the most significant competitive alternatives to the merging firms. In terms of relevant evidence, the MAG state that evidence gathered as part of the competitive assessment “capture the competitive dynamics more fully than formal market definition.”³²

1.2.6 United States

The Agency Guidelines do not prescribe a standardised formula for applying the HMT, rather, they outline the qualitative and quantitative evidence and tools available for the Agencies to use to assess the extent of competition among firms.³³ The Agency Guidelines also direct the Agencies to use these “generally applicable considerations” to apply the HMT to determine whether competition among a set of firms is likely to lead to better terms than a hypothetical monopolist would undertake.³⁴

1.3 Direct evidence of competitive effects

The CCB indicates that it may occasionally dispense with the market definition step and focus directly on evidence related to the existence of anticompetitive effects. However, it provides relatively limited guidance about when and how it will do so.

1.3.1 EU

The Commission describes market definition as “an intermediate tool to structure and facilitate the competitive assessment in appropriate cases,” while observing that it “is not a mandatory step in all assessments under Union competition law.”³⁵

Under the Notice, “the Commission is not obliged to reach a definitive conclusion on the precise scope of the market where the outcome of the Commission’s assessment would not change under various plausible definitions. The Commission may leave the market definition open both in cases where competition concerns arise regardless of the market definition applied and in cases where no competition concerns arise regardless of the market definition applied.”³⁶ It is useful to have this flexible approach confirmed in the published guidance.

³² Ibid., para. 9.2.

³³ Agency Guidelines, §4.3.C.

³⁴ Ibid., §4.3.A.

³⁵ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, para. 8.

³⁶ Ibid., para. 20.

1.3.2 Germany

The FCO generally assesses the relevant market definition and will typically reach a conclusive determination. However, where the definition is not decisive for the outcome, it may be left open.

1.3.3 Mexico

Defining the relevant market is a tool used to help assess whether a merger should be approved or blocked. In practice, COFECE (and now the CNA) typically sets out a market definition in its decisions only when it blocks a transaction or imposes remedies. Until recently, COFECE was willing to clear a case without internally defining the relevant market if the parties demonstrated that the transaction could not generate anticompetitive effects under any reasonable market definition (whether wide or narrow). The CNA, however, appears to be changing course and is now seeking to adopt a market definition in every case for internal purposes. This shift has increased the information requested and has delayed clearance in non-problematic cases.

1.3.4 Singapore

The CCS recognises that precise definition of the relevant market is secondary to the ability to properly assess effects robustly within the competition analysis. The CCS Guidelines indicate that it may not be necessary to define a market uniquely where there is strong evidence that the relevant market is one of a few plausible market definitions, and the assessment on competitive impact is shown to be largely unaffected whichever market definition is adopted.³⁷

1.3.5 United Kingdom

The MAG note that the CMA is required to identify a market or markets within which an SLC exists.³⁸ In doing so, the CMA places greater emphasis on competitive assessment “as opposed to static market definition.”³⁹ As a practical matter, the CMA may dispense with defining a precise relevant market, for example, when the CMA’s conclusions would not change regardless of the market definition applied and where no competition concerns arise regardless of the relevant market definition.

1.3.6 United States

The Agency Guidelines state that “[d]irect evidence of market power can demonstrate the existence of a relevant market in which that power exists.”⁴⁰ The US courts have long held that direct evidence of anticompetitive effects can establish market power.⁴¹

³⁷ CCS Guidelines, para. 2.10.

³⁸ MAG, para. 9.1.

³⁹ *Ibid.*, para. 9.2.

⁴⁰ Agency Guidelines, §4.3 at 41.

⁴¹ *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986).

2. Structural Presumptions

2.1 Application of the presumptions

The Competition Act expressly states that a merger will be presumed to be anticompetitive, unless the merging parties can demonstrate that it is not anticompetitive, when the parties have a 30% market share or the market HHI is at least 1800, and the merger causes the HHI to increase by at least 100. The MEGs provide very little detail on how merging parties can meaningfully engage on the market share and HHI calculations in situations where the CCB gathers confidential data from other market participants that is not available to the merging parties (absent a litigated proceeding before the Competition Tribunal).

2.1.1 EU

Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors. However, they do not give rise to a structural presumption of either the existence or the absence of such concerns.

The Horizontal Merger Guidelines employ HHI thresholds as screening indicators rather than legal presumptions. According to the Guidelines, the Commission is unlikely to identify concerns where the post-merger HHI is below 1,000, and such markets do not normally require extensive analysis. In horizontal mergers where the post-merger HHI is between 1,000-2,000 with a delta below 250, or above 2,000 with a delta below 150, the Commission is unlikely to identify horizontal concerns unless certain factors are present (e.g., one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct).

The Commission clarifies in its Horizontal Merger Guidelines that each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.⁴²

Correspondingly, there is no presumption of competitive harm based on market share or concentration in the EU. Conversely, the guidelines on the assessment of horizontal mergers specify the market share of 25% to serve as an indication that concentrations remaining below this market share are not liable to impede effective competition.⁴³ Evidence of anticompetitive behaviour may result from especially large market shares of 50% or more, although this is not conclusive.⁴⁴

While the current Horizontal Merger Guidelines do not include any structural presumptions, the ongoing “EU Review of the Merger Guidelines” includes a suggestion to adopt stricter indicators

⁴² European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para. 21.

⁴³ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, Rn. 18.

⁴⁴ Ibid., Rn. 17.

or rebuttable presumptions to identify mergers with anticompetitive effects more easily.⁴⁵ The IBA Mergers Working Group strongly disagrees and made a submission recommending that market shares and other structural indicators should continue to serve only as a useful first screen for market power, but should not give rise to structural presumptions.⁴⁶

The rationale behind this recommendation is to avoid creating overly rigid frameworks that may not accurately reflect the complexities and nuances of individual cases. Stricter indicators or rebuttable presumptions could lead to a one-size-fits-all approach, which may not be suitable for all situations and could potentially stifle innovation and competition.⁴⁷ The Working Group also opposes structural presumptions because they would operate contrary to established ECJ jurisprudence which requires case-by-case assessment and places the onus on the Commission to demonstrate a significant impediment to effective competition ('SIEC') with convincing evidence. In this context it should be noted that the forward-looking nature of merger analysis means parties may lack the evidence needed to rebut such presumptions—since the relevant economic modelling and documents may not yet exist—creating an unfair “inequality of arms” and exposing parties to potential infringements of their procedural rights of defence.

The Working Group believes that flexibility and case-by-case assessment that takes into account the specific circumstances and context of each situation produce better merger decisions. This approach allows for a more balanced and fair evaluation, ensuring that decisions are made based on a comprehensive understanding of the relevant factors and evidence.

2.1.2 Germany

A structural presumption does exist in German statutory law. The presumption states that a merger will be presumed anticompetitive when the parties have a 40% market share (which represents the statutory threshold for single firm dominance).⁴⁸ This presumption remains rebuttable and focuses on market dominance rather than concentration metrics.

German law also contains a structural presumption for oligopolies. A merger will be presumed to be anticompetitive when a group of companies consisting of three or less companies together have a market share of 50 %, or a group of companies consists of five or less companies that together have a market share of two thirds.⁴⁹

⁴⁵ European Commission, Review of the Merger Guidelines, Topic B: Assessing market power using structural features and other market indicators, para 35.

⁴⁶ IBA Antitrust Committee Mergers Working Group, Feedback on the public consultation on the review of the EU Merger Guidelines, submission of 3 September 2025, p. 8; accessible at <https://www.ibanet.org/antitrust-working-groups-and-submissions>.

⁴⁷ Ibid., pp. 5, 8.

⁴⁸ Section 18(4) of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – ‘GWB’).

⁴⁹ Section 18(5) GWB.

2.1.3 Mexico

Like the EU, there is no presumption of competitive harm based on market share or concentration in Mexico. Rather, the Technical Criteria for the Calculation and Application of a Quantitative Index to measure Market Concentration issued by COFECE establishes first indications to consider that a transaction will have reduced probabilities to generate anticompetitive effects when one of the following conditions are met: (i) The delta (HHI increase) is less than 100 points; (ii) the HHI post-merger is less than 2000; **or** (iii) The HHI post-merger is between 2000 and 2005, the delta is between 100 and 150, and the merged economic agent post transaction is not one of the four economic agents with the largest market shares in the relevant market.⁵⁰

2.1.4 Singapore

There is no presumption of anticompetitiveness of a transaction based on market share in Singapore. Instead, there is a soft presumption to the contrary in the relevant CCS guidelines: a transaction will not likely have an appreciable adverse effect on competition unless: (i) the merged entity will have a market share of 40% or more; or (ii) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.⁵¹

2.1.5 United Kingdom

The CMA does not apply structural presumptions to determine whether an SLC arises.⁵² Instead, its merger assessments develop a general understanding of the competitive process, including of the competitive parameters that are most important to the process of competition in the relevant industry. The nature of competition may influence the theories of harm the CMA considers, or the assessment frameworks it applies.⁵³ As such, the CMA will consider the characteristics of each notified transaction on a case-by-case basis.⁵⁴

It is important to note that merger control notifications are almost always voluntary in the United Kingdom,⁵⁵ unless a transaction is “called-in” for review by the CMA. A comparatively smaller

⁵⁰ Technical Criteria for the Calculation and Application of a Quantitative Index to measure Market Concentration, COFECE. Available at: https://www.cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracin_del_mercado.pdf.

⁵¹ CCS Guidelines, para. 5.15.

⁵² MAG, para. 2.2.

⁵³ Ibid., para 2.3.

⁵⁴ Ibid., para. 2.17.

⁵⁵ Companies designated with Strategic Market Status under Chapter 2 of the Digital Markets Competition and Consumers Act 2024 (“DMCC Act”) are mandated to report qualifying mergers to the CMA before they close, under Chapter 5, Part 1 of the DMCC Act.

number of transactions are notified to the CMA,⁵⁶ which have also met a threshold for notification, based on Target UK turnover of at least £100 million, or meeting combined share of supply thresholds (25%) or a new threshold involving one party with a share of supply of 33% and UK turnover of at least £350 million.⁵⁷ In effect, presumptions are to some extent built into the notification thresholds, pursuant to which merger control remains voluntary.

Against that background, while there are no structural presumptions, the MAG notes circumstances in which an SLC is likely to arise.⁵⁸

2.1.6 United States

The Agency Guidelines set out a rebuttable structural presumption for horizontal mergers which has effectively been copied by the Canadian Parliament. Specifically, the Agency Guidelines state that a merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly. The Agencies may also presume that a merged firm with a market over 30% is presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.⁵⁹

In practice, however, courts look more closely at the evidence and facts of the specific case in front of them, rather than relying on market share presumption as dispositive. Neither DOJ nor FTC has relied solely on the 2023 structural presumption in litigation in any merger that it has attempted to block.

2.2 Refuting the presumption

The MEGs provide relatively limited guidance on the manner in which the CCB (which is an enforcement agency; cases that are challenged are brought before the Competition Tribunal) will determine whether the structural presumption that a merger is anticompetitive may be refuted.

2.2.1 EU

There are no presumptions to be refuted in the EU regime.

2.2.2 Germany

The structural presumptions of market dominance under German law may be rebutted using any generally permissible evidence.

⁵⁶ For example, in 2025, 39 transactions were formally notified to the CMA, see <https://www.gov.uk/government/publications/merger-investigation-outcomes/annual-merger-investigation-outcomes#merger-outcomes-in-2025>.

⁵⁷ Enterprise Act 2002, s. 23(4C) to s. 23(4G) introduced by the DMCC Act.

⁵⁸ MAG, para. 2.18.

⁵⁹ Agency Guidelines, §2.1.

Specifically, German merger control law provides that collective dominance can be refuted if the undertakings demonstrate either that the competitive conditions between them give rise to the expectation of substantial competition, or that the group of undertakings does not hold a superior market position relative to the remaining competitors.⁶⁰

Although the statutory presumption for single market dominance (40% combined market shares) does not expressly articulate a rebuttal mechanism, the presumption remains rebuttable in principle. The undertaking concerned may adduce evidence based on qualitative criteria, such as limited financial strength, low barriers to market entry, significant actual or potential competition, or the ability of customers to switch to alternative suppliers, to demonstrate that it does not in fact occupy a dominant position. The presumption for single market dominance can also be rebutted if it can be shown that a different undertaking occupies a dominant position within the meaning of Section 18 GWB.

2.2.3 Mexico

There are no presumptions to be refuted in the Mexico regime.

2.2.4 Singapore

There are no presumptions to be refuted in the Singapore regime.

2.2.5 United Kingdom

There are no presumptions to be refuted in the United Kingdom regime.

2.2.6 United States

The Agency Guidelines state that the structural presumption is rebuttable, and that “factors pertinent to rebuttal depend on the nature of the threat to competition or tendency to create monopoly resulting from the merger.” Rebuttal defenses include failing firm defenses, and arguments that a reduction in competition resulting from the merger would induce entry or repositioning in the relevant market, preventing the merger from substantially lessening competition or tending to create a monopoly in the first place.⁶¹

3. Vertical and Conglomerate Mergers

3.1 Foreclosure theories of harm

The Draft MEGs indicate that the primary focus in the review of non-horizontal mergers will be customer or input foreclosure theories of harm.

⁶⁰ Section 18(6) GWB.

⁶¹ Agency Guidelines, §3.

3.1.1 EU

Generally, vertical and conglomerate mergers are less likely to significantly impede effective competition than horizontal mergers, as no loss of direct competition is generated and vertical and conglomerate mergers are considered to be more prone to efficiencies.⁶² Where the market share post-merger is below 30% and the post-merger HHI is below 2000, the Guidelines on the assessment of non-horizontal mergers note that, in practice, the Commission will not extensively investigate such mergers, absent special circumstances.⁶³

Similar to the draft MEGs, the primary focus of the review of non-horizontal mergers in the EU is on customer or input foreclosure theories of harm.⁶⁴ Alongside foreclosure, the EU will also consider other non-coordinated effects such as facilitating access to commercially sensitive information, as well as coordinated effects.

3.1.2 Germany

Germany's and the EU's approaches are substantially aligned, reflecting the general convergence of EU and German merger control law. Germany also recognises that non-horizontal mergers typically pose fewer competition concerns than horizontal mergers but can still raise issues, particularly regarding foreclosure effects and leveraging market power.

3.1.3 Mexico

The CNA's Merger Guidelines do not indicate any theories of harm that are prioritised in the assessment of notified transactions, which gives rise to potential legal uncertainty. However, in practice when evaluating vertical and conglomerate mergers the CNA's primarily focuses on the customer or input foreclosure theory of harm.

Non-horizontal mergers are rarely found to be anticompetitive. While in several cases the CNA has identified potential vertical and/or conglomerate anticompetitive effects for investigation, it ultimately has concluded such anticompetitive effects were not likely after in-depth assessments.

3.1.4 Singapore

The CCS categorises non-horizontal mergers as generally comprising vertical mergers and conglomerate mergers. In vertical mergers, the primary theories of harm that the CCS will look for are: (i) market foreclosure (e.g. by restricting downstream rival's access to a necessary input; or restricting upstream rival's access to customers); and/or (ii) increasing the ability and incentive of parties to collude in a market.⁶⁵ In conglomerate mergers, the CCS will generally look for

⁶² European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, paras 12-14.

⁶³ Ibid., paras 25-26.

⁶⁴ Ibid., para 18.

⁶⁵ CCS Guidelines, para. 7.8.

theories of harm related to portfolio power, arising from the combination of complementary products or services.

3.1.5 United Kingdom

The MAG explain that the CMA has “frequently investigated vertical mergers, and in several cases found that these gave rise to competition concerns”.⁶⁶ In non-horizontal mergers, the CMA will focus on three main foreclosure-related theories of harm:⁶⁷

- input foreclosure (i.e. where a transaction involves one party that supplies an input to competitors of the other party and there is a risk that the party could restrict rivals’ access or offer it on worse terms);
- customer foreclosure (i.e. where a merger involves one party that buys inputs from rivals of the other party, and the merged entity may restrict these rivals’ access to the customer); and
- conglomerate effects (i.e. where a merger involves two parties in adjacent markets, the merged entity may link the sales of the two products and thus restrict its rivals’ access to customers).

3.1.6 United States

The Agency Guidelines are less clear about the preeminence of foreclosure as the main theory of harm in non-horizontal merger investigations. However, US case law regarding vertical mergers has consistently focused on this theory in practice.

3.2 Ability and incentive to foreclose

The Draft MEGs indicate that the CCB will assess foreclosure theories of harm by considering whether the merging parties have the ability and the incentive to engage in a foreclosure strategy (although there appear to be some inconsistencies in whether both are required).

3.2.1 EU

Similar to the approach described in the MEGs, the EU also uses an ‘ability and incentive to foreclose’ framework. Alongside ability and incentive, impact on effective competition also plays a role in assessing potentially anticompetitive effects of a vertical merger. The ongoing Review of the Merger Guidelines suggests that “it may be appropriate to clarify the ‘foreclosure’

⁶⁶ MAG, para. 7.7.

⁶⁷ Ibid., para. 7.8.

framework to provide more guidance on the appraisal of each criterion and on how they intersect, also based on the case practice.”⁶⁸

a) **Input Foreclosure**

The Commission’s Guidelines indicate that, when assessing the anticompetitive input foreclosure theory of harm, it will consider whether (i) the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, (ii) it would have the economic incentive to do so, and (iii) a foreclosure strategy would have a significant detrimental effect on competition downstream.⁶⁹ The Commission notes that these factors are intertwined and therefore often considered together.

The Commission’s Guidelines state that the merging companies have the ability to foreclose access to input if they can “negatively affect the overall ability of inputs for the downstream market in terms of price or quality”.⁷⁰ This is the case if the input relative to the downstream product carries a high cost, is a critical component necessary for the manufacture of the downstream product, represents a significant source of product differentiation, or the cost of switching to the alternative is high.⁷¹

When looking at the incentive to foreclose access to inputs the Commission will look at the profitability of doing so. This may include both short-term and long-term profitability.⁷² Likewise, it will also assess factors liable to reduce the incentive to foreclose. A factor reducing the incentive includes unlawful conduct.⁷³

Lastly, the impact on effective competition will be assessed considering the increase of costs of downstream rivals and raising barriers to entry to potential competitors. However, the Commission will also take into account buyer power and any efficiencies achieved by the merger.⁷⁴

b) **Customer Foreclosure**

Similar to input foreclosure, when assessing customer foreclosure the Commission considers the ability to substantially foreclose access to downstream markets by reducing its purchases from

⁶⁸ European Commission, Review of Merger Guidelines, Topic B: Assessing market power using structural features and other market indicators, para 49.

⁶⁹ European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, para 32.

⁷⁰ Ibid., para 36.

⁷¹ Ibid., para 34.

⁷² Ibid., para 40.

⁷³ Ibid., para 46.

⁷⁴ Ibid., paras 51-52.

upstream rivals whether (i) it would have the incentive to reduce its purchases upstream, and (ii) a foreclosure strategy would have a significant detrimental effect on competition downstream.⁷⁵

Overall, the Commission's concept is very similar to the one underlying the draft MEGs. Notably, the Commission's guidelines contain somewhat more detail and thus, a higher level of legal certainty.

When assessing the ability of the merging entities to foreclose access to downstream markets the Commission will consider sufficient economic alternatives for rivals in downstream market, the degree of market power of the merging entities in the downstream market and the entry deterrence to new companies in the upstream market. Furthermore, the Commission will take into account the existence of different markets for the upstream rival. Foreclosure may result in the reduction of the incentive to invest in cost reduction, R&D and product quality. If there are other markets available, the foreclosure of one market may not have as a significant impact on the rival upstream companies. The Commission will also consider counterstrategies of rivals.⁷⁶

The Commission will consider the degree of profitability that could be achieved from the foreclosure of access to downstream markets. Foreclosing upstream rivals may lead to the merging entity incurring higher costs. This may be the case for instances where the upstream rival is more efficient than the integrated firm. The Commission will also assess the possibility of benefiting from higher prices upstream as this could lead to higher prices downstream, depending on the downstream market share of merging entity. The bigger the market share is, the more there is to gain from higher prices downstream. The Commission will also assess factors that could reduce the incentive to foreclose such as the behaviour being unlawful.⁷⁷

Finally, the Commission will take into account the effect on the downstream market resulting from the foreclosure of upstream rivals.⁷⁸ The effect on the downstream market will only be significant if a large part of the upstream market is likely to be affected by the merging entities' conduct.⁷⁹ The consequences of the behaviour of the merging entities may take time to materialise on the market.⁸⁰ Additionally, the possibility of market entry will be considered by the Commission.⁸¹

⁷⁵ Ibid., para 59.

⁷⁶ Ibid., paras 60 et seq.

⁷⁷ Ibid., paras 36 et seq.

⁷⁸ Ibid., para 72.

⁷⁹ Ibid., para 74.

⁸⁰ Ibid., para 73.

⁸¹ Ibid., para 75.

3.2.2 Germany

In line with the Commission's approach, the FCO recognises that foreclosure effects may only create competition concerns if the parties have both the ability and the incentive to foreclose.

3.2.3 Mexico

As previously mentioned, CNA's Concentration Guidelines do not provide theories related to vertical mergers. However, when analysing foreclosure theories of harm in practice, the CNA has sought to identify both the ability and the incentive to engage in a foreclosure strategy.

3.2.4 Singapore

Theories of harm related to foreclosure in Singapore are generally assessed having regard to (i) the ability to foreclose competition, and (ii) the incentive to foreclose competition, and (iii) the effect of the foreclosure on competition (and whether this amounts to a substantial lessening of competition).⁸² All three factors are, arguably, necessary considerations in assessing foreclosure theories of harm.

3.2.5 United Kingdom

In determining whether input foreclosure, customer foreclosure or conglomerate effects, respectively, can be established as a theory of harm, the CMA will consider whether three cumulative conditions are satisfied:

- Would the merged entity have the ability to foreclose competition?
- Would the merged entity have the incentive to foreclose competition?
- Would the foreclosure of rivals substantially lessen "overall competition"?⁸³

The MAG provide detailed guidance concerning the conditions of ability, incentive and lessening of competition in the context of input foreclosure, customer foreclosure and conglomerate effects. It is clear that in all three contexts it is necessary to establish both ability and incentive, as well as the lessening of competition.

3.2.6 United States

The Agency Guidelines state that the Agencies will assess a merged firm's ability and incentive to substantially lessen competition by limiting access to any "related products." They include examples of foreclosure, such denying rivals access to the related product or service, worsening the terms on which rivals can access the related product or service, or delaying access to product improvements or information relevant to making efficient use of the product. In addition, the Guidelines indicate that foreclosure may include denying dependent rivals access to features of

⁸² CCS Guidelines, para. 7.16.

⁸³ MAG, para. 7.10.

the related product, limiting interoperability, degrading the quality of complements, providing less reliable access, and tying up or obstructing routes to market. Finally, the Guidelines state that a foreclosure share above 50% gives rise to an inference, rather than a presumption, that a merger may substantially lessen competition.⁸⁴

The Agency Guidelines also state that, given the “range of ways” that the merged firm could use its ability to limit access to the related product, the Agencies will focus on the “overall risk that the merged firm will do so” and will not necessarily identify which precise actions the merged firm would take to lessen competition. While the Agency Guidelines include an expansive set of non-traditional foreclosure theories related to vertical mergers, the DOJ and FTC have yet to successfully rely on these theories in practice in the two years since the Guidelines were published.⁸⁵

4. Platforms

4.1 Market definition

The Draft MEGs include new guidance on market definition for mergers involving platforms.

4.1.1 EU

The EU decisional practice relating to digital platforms has evolved quite considerably in the past years. However, the current Merger Guidelines (for both horizontal and non-horizontal mergers) predate the digital economy’s current prominence. For this reason, the IBA Mergers Working Group made a submission to the Commission’s consultation process recommending that the EU Merger Guidelines should be refreshed to properly reflect current practices related to platforms and digital markets.⁸⁶

The Commission can define the relevant product market for products offered by a multi-sided platform either as whole (encompassing all or multiple user groups) or separate relevant product markets for the products offered on each side of the platform. The Commission defines the relevant product market for the products offered by a platform separately when significantly different conditions exist on each side of the platform. These may include whether the undertaking offering substitutable products for each user group differ, the degree of product differentiation on each side, behavioral factors of each group and the nature of the platform.⁸⁷

⁸⁴ Agency Guidelines, §2.5.

⁸⁵ Ibid.

⁸⁶ IBA Antitrust Committee Mergers Working Group, Feedback on the public consultation on the review of the EU Merger Guidelines, submission of 3 September 2025, p. 18, accessible at <https://www.ibanet.org/antitrust-working-groups-and-submissions>.

⁸⁷ European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, para 95.

The Commission has further elaborated on the non-price parameters it may consider when assessing multi-sided platforms that supply a product to a user group at a zero monetary price. These include product functionalities, intended uses, evidence of past or hypothetical substitution, and barriers or costs of switching, such as interoperability with other products, data portability and licensing features.⁸⁸

The Commission pays particular attention to digital ecosystems. The market definition for such ecosystems follows a similar approach to that of after-markets. An after-market describes the consumption of the primary product which leads to the consumption of the secondary product. In these cases, the market definition can be defined in three ways: (i) as a system market comprising both the primary and secondary product; (ii) as multiple markets, namely a market for the primary product and separate markets for the secondary products associated with each brand of the primary product; or (iii) as dual markets, namely the market for the primary product on the one hand and the market for the secondary product on the other hand.⁸⁹ The Commission takes account of network effects, switching costs, and multi-homing in making these assessments.⁹⁰

4.1.2 Germany

The FCO has been at the forefront of developing analytical frameworks for assessing competition in digital platform markets, publishing a comprehensive Working Paper on Market Power of Platforms and Networks as early as 2016.⁹¹ Similar to the Commission, the FCO recognises that the traditional competition law assessment tools require adaptation for digital markets characterised by multi-sided platforms, network effects, and data-driven business models. The FCO's approach to market definition for platform cases is generally comparable to the Commission's; however, the FCO's approach has historically been less formalised in detailed guidelines and more dependent on case-specific analysis.

4.1.3 Mexico

The CNA has provided almost no guidance on market definition for mergers involving platforms. However, COFECE issued a non-binding study in 2018 called "Rethinking Competition in the Digital Economy" which recognised that market definition should be rethought, stating that although the price level is still relevant, the price structure (price relationship between the different sides of the market) also gains importance for the analysis. Therefore, considering all the users

⁸⁸ Ibid., para 98. The Commission also notes that in cases of supply of a product at a zero monetary price, it may consider alternatives to the SSNIP, such as the SSNDQ.

⁸⁹ Ibid., para 100.

⁹⁰ Ibid., para 104.

⁹¹ FCO, B6-113/15, Working Paper – Market Power of Platforms and Networks, June 2016, accessible at: https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiuzqP1seiSax-WZUqQEHRPCCvYQFnoECBUQAQ&url=https%3A%2F%2Fwww.bundeskartellamt.de%2FSharedDocs%2FPublikation%2FEN%2FBerichte%2FThink-Tank-Bericht-Langfassung.pdf%3F__blob%3DpublicationFile%26v%3D2&usg=AOv-Vaw2pCPvq6w8M_CEIaA46wXVQ&opi=89978449.

involved and understanding the indirect network effects that may occur among them is relevant for the definition of a market in these cases. Additionally, it might be necessary to understand the direct and indirect network effects, economies of scale, access to data and the potential for innovation.⁹²

4.1.4 Singapore

The CCS Guidelines explicitly discuss market definition considerations in the context of multi-sided platforms. In particular they indicate that such markets can have practical complexities that render the market definition exercise less informative in relation to the competitive constraints acting on the focal product. The CCS indicates that it will consider the interactions between the different sides of the platform having regard to the different potential theories of harm, and will then assess, on a case-by-case basis, whether the relevant market should be treated as a single multi-sided market including all sides of the multi-sided platform, or as multiple interrelated single-sided markets, when it carries out the HMT test.⁹³

When applying the test in the case of a multi-sided market, the CCS may consider factors such as indirect network effects and usage externalities (which occur due to costs and/or benefits accrued to users on one side of the platform as a consequence of usage on other side(s) of the platform), and the interaction between the various sides of the platform.⁹⁴

4.1.5 United Kingdom

As stated above, the MAG note that the CMA is required to identify a market or markets within which an SLC exists.⁹⁵ The CMA indicates that it places greater emphasis on competitive assessment “as opposed to static market definition.”⁹⁶ The MAG notes that a factor of non-price aspects of competition that firms may use to win customers is wide, and examples include the benefits to users of a platform being able to interact with a large base of other users actively using the same platform.⁹⁷

The MAG does not contain specific guidance with respect to market definition for platforms. However, the example it provides to illustrate its guidance on supply-side factors does reference

⁹² Available at: https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf. In 2024, COFECE also issued a non-binding study called “Basic Competition Concepts in the Digital Economy.” However, it did not provide further information about market definition. Available at: <https://www.cofece.mx/wp-content/uploads/2025/03/DatComDigEnv-eng.pdf>.

⁹³ CCS Guidelines, para 5.14. The CCS Guidelines also indicate that when performing the HMT on a multi-sided market, CCS may consider how the price structure, or changes in the price structure, affects the ability of the hypothetical monopolist to sustain a “supra competitive” pricing strategy.

⁹⁴ *Ibid.*, para. 5.15.

⁹⁵ MAG, para. 9.1.

⁹⁶ *Ibid.*, para. 9.2.

⁹⁷ *Ibid.*, para. 2.5.

platforms.⁹⁸ The MAG notes that the boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, the CMA may aggregate several narrow relevant markets when firms routinely use their existing production assets to supply a range of different products that are not demand-side substitutes, and the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product.⁹⁹ The MAG notes that examples where these two conditions may be satisfied include a two-sided market between two social media platforms where the services provided to the two customer groups are different (and therefore not substitutable), but competitive conditions are very similar on both sides.

4.1.6 *United States*

Prior to the 2023, the Agencies did not provide guidance on how they analyse multi-sided markets. The Agency Guidelines include a discussion of the possibility that mergers involving multi-sided platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform. The Guidelines include specific metrics for evaluating mergers involving a multi-sided platform that consider “competition between platforms, competition on a platform, and competition to displace the platform.” The Guidelines also state that the Agencies may challenge a transaction involving a multi-sided platform even when the transaction harms competition only on one side of the multi-sided platform.¹⁰⁰

Courts have considered multi-sided markets but there is very limited case law on merger cases involving platforms.¹⁰¹ The Agency Guidelines have not yet been tested in court on this issue.

4.2 **Competitive effects**

The Draft MEGs include new guidance on dealing with competitive effects for mergers involving platforms.

4.2.1 *EU*

The General Court of the EU concluded in its 2022 *Google Android* judgment:

“in a digital ‘ecosystem’, which brings together several categories of supplier, customer and consumer and causes them to interact within a platform, the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. (...) Identifying the conditions of competition

⁹⁸ Ibid., para 9.9.

⁹⁹ Ibid., para 9.8.

¹⁰⁰ Agency Guidelines, §10.

¹⁰¹ See, e.g., *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2017).

relevant to the assessment of the position of economic strength enjoyed by the undertaking concerned may therefore require multi-level or multi-directional examination in order to determine the fact and extent of the various competitive constraints that may be exerted on that undertaking."¹⁰²

Mergers relating to digital markets often do not fit into the traditional merger framework and may need to be assessed differently.¹⁰³ The following potential theories of harm have become discernable in the Commission's decisional practice:

- **Interoperability degradation** refers to the reduction in quality of interaction of third-party products. Conduct will be seen as anticompetitive when the merged parties favour interoperability with their own products by making interoperability with third party products more difficult.¹⁰⁴ The legal framework for assessing this competitive effect is based on the ability and incentive to foreclose competitors by degrading interoperability, and on the competitive impact of this foreclosure.
- **Access degradation** refers to the reliance of a third party to access other products or services as inputs. The merging parties will need to have market power in relation to the input, and the input should be sufficiently important in order to raise concerns about competitive effects. Access degradation is assessed on the ability and incentive to foreclose competitors by degrading interoperability, and on the competitive impact of this foreclosure.¹⁰⁵
- **Data-related effects** can play a role in three ways: (i) as an important input, (ii) as a competitive product or (iii) data privacy settings as a non-price parameter of competition.¹⁰⁶ Whether data related effects are anticompetitive is assessed in the framework of potential horizontal non-coordinated effects.¹⁰⁷ Horizontal non-coordinated effects can arise when competitive constraints are reduced resulting an SIEC.¹⁰⁸ Within this horizontal assessment framework the Commission will focus on potential accumulation of data as a result of the merger.¹⁰⁹ Data issues may also be examined as a vertical effect and regulatory and data privacy rules also play a role in the assessment.¹¹⁰

¹⁰² General Court judgment of 14 September 2022 in case T-604/18, *Google v Commission*, paras 116 and 117.

¹⁰³ Review of the Merger Guidelines, Topic E: Digitalisation, para 83, 87.

¹⁰⁴ Competition policy brief, *Merger Enforcement in Digital and Tech Markets: an Overview of the European Commission's Practice*, Issue 02/2022 – December 2022, p. 3.

¹⁰⁵ *Ibid.*, p. 8.

¹⁰⁶ *Ibid.*, p. 9.

¹⁰⁷ *Ibid.*, p. 9.

¹⁰⁸ *Ibid.*, p. 9.

¹⁰⁹ *Ibid.*, p. 9.

¹¹⁰ *Ibid.*, p. 9.

- **Ecosystem-related effects** concern (i) conditions of access and interoperability, which may afford market power to the ecosystem’s owner, (ii) the negative impact on consumers and market entry of the closed functioning of competing ecosystems, and (iii) the risk that certain platforms may be able to accumulate vast amounts of data from the various components of their ecosystems.¹¹¹ Possible ecosystems-related anticompetitive effects could be assessed within the framework of a conglomerate theory of harm or under an assessment of dominance.¹¹² When considering the conglomerate theory of harm, the leveraging of market power will play a role. When assessing dominance, the Commission will take into account whether the merging entity is able to incentivise its customers to remain within its services.¹¹³
- **Killer/reverse killer acquisitions.** Where competitive effects are not necessarily based on foreclosure, the ongoing Review of the Merger Guidelines highlights that the possible effects on potential competition should also be assessed.¹¹⁴ These include so-called killer acquisitions (the acquisition of nascent potential competitors) and reverse killer acquisitions (i.e. where the acquirer discontinues its own competing innovation or pipeline product in favour of the target’s product). Many stakeholders have submitted that it would be beneficial to define ‘potential competitors’ more clearly.¹¹⁵
- **Privacy competition:** The Commission has also recognised that privacy may constitute a non-price parameter of competition, particularly in digital markets. In cases involving the combination of datasets or the accumulation of user data, the Commission has examined whether a transaction could lead to a reduction in consumer choice or welfare through a diminution of privacy standards. This approach was first considered in *Google/DoubleClick*,¹¹⁶ where the Commission assessed potential privacy-related concerns but ultimately found that data protection rules provided a sufficient regulatory framework. The issue was more explicitly addressed in *Microsoft/LinkedIn*,¹¹⁷ where the Commission approved the transaction subject to conditions, in part to address concerns that Microsoft could leverage its position to strengthen LinkedIn by combining user data across platforms.

¹¹¹ Ibid., p. 11.

¹¹² Ibid., pp. 11, 12.

¹¹³ Ibid., p. 12. Ecosystem effects can be assessed under paragraph 36 of the Commission’s Horizontal Merger Guidelines, by asking whether the proposed merger would significantly impede effective competition, leaving the merged firm with the ability and incentive to hinder the expansion of smaller firms and potential competitors, or otherwise restricting the rivals’ ability to compete.

¹¹⁴ Review of the Merger Guidelines, Topic E: Digitalisation, para 89.

¹¹⁵ DG Comp Working Document, Overview of the main trends in the replies to the general and in-depth consultations on the review of the Horizontal and the Non-Horizontal Merger Guidelines (together the ‘Merger Guidelines’), para. 28.

¹¹⁶ Case No COMP/M.4731 – *Google / DoubleClick*, 11 March 2008.

¹¹⁷ Case No COMP/M.8124 – *Microsoft / LinkedIn*, 6 December 2016.

The Working Group has previously advised against creating factors or elements that may suggest that mergers in the digital economy raise particularly unique implications for competition. It has suggested that the refreshed EU merger guidelines should be sector-agnostic.¹¹⁸

4.2.2 Germany

The FCO's approach is largely in line with the Commission's practice on dealing with competitive effects for mergers involving platforms. The FCO's practice is continuing to evolve.

4.2.3 Mexico

Not applicable.

4.2.4 Singapore

The merger guidelines in Singapore do not reference the assessment of competitive effects specific to platforms. However, the potential for such effects to arise are discussed within the guidelines related to market definition.¹¹⁹

4.2.5 United Kingdom

The MAG provides guidance on how the CMA will assess two-sided platforms (including social media platforms) when investigating horizontal unilateral effects. When assessing competitive effects in mergers involving platforms, the CMA may consider each side of the platform separately, or it may consider the overall competition between the platforms (incorporating both sides in one assessment).¹²⁰ The CMA's approach will depend on how competition works, the competitive conditions, and the extent of network effects.¹²¹

With respect to network effects, the MAG notes that mergers among platforms are more likely to give rise to competition concerns because network effects mean that mergers are more likely to induce a tipping effect, platform mergers are more likely to have a strong effect on incentives, larger platforms are more likely to exert a strong constrain on rivals, and barriers to entry are likely to be high.¹²²

4.2.6 United States

See the discussion of multi-sided platforms above.¹²³

¹¹⁸ IBA Antitrust Section Mergers Working Group, Feedback on the public consultation on the review of the EU Merger Guidelines, submission of 3 September 2025, p. 18; accessible at <https://www.ibanet.org/anti-trust-working-groups-and-submissions>.

¹¹⁹ Refer to section 4.1.4 above.

¹²⁰ MAG, para 4.24.

¹²¹ Ibid.

¹²² Ibid., para 4.25.

¹²³ See section 4.1.6.

5. Labour Markets

5.1 Analysis of competitive effects

Recent amendments to the Competition Act make it clear that when the CCB is reviewing mergers, it should consider whether there will be any anticompetitive effects in labour markets. The Draft MEGs include brief new guidance on market definition for markets that involve the purchase of labour services. The Draft MEGs also include brief new guidance on competitive effects for mergers involving labour markets.

5.1.1 EU

The EU Merger Guidelines do not provide specific guidance on competitive effects for mergers involving labour markets. They do contemplate analysis of the competitive conditions in upstream markets and an evaluation of the possible positive and negative effects arising from a transaction. However, in practice the Commission seems to have rarely assessed the effects of a merger in labour markets.¹²⁴

The consultation paper for the Review of the Merger Guidelines raises the question whether the revised Guidelines should provide clarity on “whether an expected significant loss of competition through the exercise of buyer power in upstream markets, including in labour markets, is, in itself, a sufficient theory of harm, or whether instead the Commission also needs to demonstrate that such a loss of competition can be expected to have negative effects on downstream markets (e.g., via higher prices and/or lower output to consumers).”¹²⁵

The Working Group pointed out in its submission in response to the consultation that, similarly to US merger control law in which the analysis of labour market impacts has been formally integrated, labour market issues can be approached not as a “*public policy*” consideration but as a core application of antitrust principles to input markets. The US approach demonstrates an evolution in thinking, where harm to workers is viewed as a direct competitive harm, on par with harm to consumers.¹²⁶

5.1.2 Germany

The FCO has not conclusively decided whether effects of a merger on labour markets are valid (competition-related) decision parameters. However, it recognises that the German merger control framework generally leaves room for interpretation and facilitates case-by-case decisions, taking into account different factors.

¹²⁴ Merger Guideline Review, Topic G: Public policy, security and labour market considerations, para. 121.

¹²⁵ Ibid., para. 122.

¹²⁶ IBA Antitrust Committee Mergers Working Group, Feedback on the public consultation on the review of the EU Merger Guidelines, submission of 3 September 2025, p. 21; accessible at <https://www.ibanet.org/antitrust-working-groups-and-submissions>.

5.1.3 Mexico

Labour markets had not been within the scope for the Mexican competition law until very recently. The first significant application to labour markets occurred in 2021, when COFECE fined several soccer teams and the Mexican Football Association (Federación Mexicana de Fútbol) for a non-poaching agreement to fix the maximum salary for female soccer players and the market segmentation that restricted labour mobility among male soccer players.¹²⁷

In the context of merger review, the CNA has expressed its interest to analyse more closely labour markets and is currently prioritizing non-solicitation clauses. While it is still evaluating how to address this matter, its initial approach has been to apply similar limitations to those currently applied to non-compete provisions (i.e., limits in scope, term (3 years), and obligated parties).

5.1.4 Singapore

Not applicable.

5.1.5 United Kingdom

The MAG do not provide specific guidance on competitive effects for mergers involving labour markets. The MAG sets out that the CMA will focus on theories of harm to consumers when undertaking a merger control assessment.¹²⁸ However, theories of harm are not exhaustive and the CMA may consider any theory of harm involving a potential SLC that could arise as the result of a merger.¹²⁹ Historically labour markets have not been an area of attention for the CMA. However, the CMA is required to assess all mergers on a case-by-case basis and would not be precluded from considering theories of harm related to labour markets.¹³⁰

5.1.6 United States

The Agency Guidelines confirm that labour considerations are integral to merger review investigations. Guideline 10 states that “a merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers,” and the Agencies will use the same tools to analyse the effects of a merger of buyers, including employers as buyers of labour.¹³¹ In addition to workers, the Agencies will consider whether a merger involving competing buyers will substantially lessen competition for creators, suppliers, or other providers. The Agency

¹²⁷ <https://www.cofece.mx/cofece-sanciona-a-17-clubes-de-la-liga-mx-a-la-federacion-mexicana-de-futbol-y-8-personas-fisicas-por-coludirse-en-el-mercado-de-fichaje-de-las-y-los-futbolistas/>.

¹²⁸ MAG, para 1.3.

¹²⁹ Ibid., para 2.16.

¹³⁰ Ibid., para 2.10.

¹³¹ Agency Guidelines, §10.

Guidelines explicitly reject potential efficiency arguments relating to labour cost reductions.¹³² In practice, the Agencies have yet to succeed on a stand-alone labour theory in a merger case.¹³³

6. Efficiencies

6.1 Consideration of efficiencies in the analysis of competitive effects

Recent amendments repealed the controversial efficiencies defence for mergers that had been contained in the Competition Act. The list of factors for assessing the competitive effects of mergers do not include efficiencies, but there is scope for them to be considered under the “any other relevant factor” heading. The Draft MEGs indicate that efficiencies may be considered as part of a competitive effects analysis if they make it likely that a substantial lessening or prevention of competition will not occur.

6.1.1 EU

Efficiencies are considered as part of a competitive effects analysis in the EU.¹³⁴ The Commission will consider “the development of technical and economic progress provided that it is to the consumers’ advantage and does not form an obstacle to competition.”¹³⁵ The Horizontal Merger Guidelines set out that:

“[f]or the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.”¹³⁶

¹³² Ibid.

¹³³ The FTC’s 2024 challenge to Kroger’s proposed US\$24.6 billion acquisition of rival grocery store chain Albertsons included an allegation that the transaction would negatively impact employee wages and benefits by concentrating the market for union grocery store workers. However, the District Court’s decision to block the transaction was not based on this theory of harm. Instead, the Court’s decision to block the deal relied on its finding that the proposed divestiture of certain stores to a competitor was “not sufficient” to maintain competition in the relevant market, and “the deficiencies in the divestiture scope and structure create a risk that some or all of the divested stores will lose sales or close.” Opinion & Order, *FTC et al. v. Kroger Company and Albertsons Companies, Inc.*, No. 24-cv-00347 (D. Ore. Dec. 10, 2024), ECF 521.

¹³⁴ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para 76; European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, para 53.

¹³⁵ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para 76.

¹³⁶ Ibid., para 78. The EU recognises variable cost reductions are more likely to result in consumer benefits than fixed cost savings.

While the EU merger control law recognises the possibility of efficiency claims, the Working Group's submission in response to the consultation regarding the Merger Guidelines noted that, to date, the Commission has never approved a merger based on efficiencies.¹³⁷ The Working Group advocated for a clear framework ensuring that there is a genuine prospect for the efficiency claims to be realistically available to notifying parties in cases that present an SIEC.¹³⁸ In line with its submission, the Working Group suggests that the MEGs should make an allowance for evidentiary hurdles and allow the notifying parties some 'benefit of the doubt' when legitimate, good faith, substantiated and well-supported (e.g. by reputable third-party experts) efficiencies claims are made.

Not strictly in relation to an efficiency defense, but rather as a general recommendation in relation to European competition policy, the "Draghi Report" proposed that the Commission should be more permissive in assessing concentrations involving European companies active in strategic sectors, effectively advocating for a more favorable treatment of mergers that could create "European champions". It recommended placing greater emphasis on "the weight of innovation and future competition in DG COMP decisions".¹³⁹ This could entail reforming the Horizontal Merger Guidelines to better accommodate innovation as a relevant efficiency capable of offsetting competitive harm.

6.1.2 Germany

German law provides the following framework for considering efficiencies:¹⁴⁰

- (i) **In-market efficiencies:** Efficiency gains within the relevant market can already be considered within the prohibition criterion itself.
- (ii) **Out-of-market efficiencies:** The 'balancing clause' opens the possibility to consider efficiencies in third markets—so-called "out-of-market efficiencies".¹⁴¹ This differs from EU law, where efficiencies can only be recognised if the benefits accrue essentially to the same customers who would otherwise be harmed by the merger.
- (iii) **Ministerial authorization:** For efficiencies of other kinds, German law provides the instrument of ministerial authorization, which allows approval when overall economic

¹³⁷ IBA Antitrust Committee Mergers Working Group, Feedback on the public consultation on the review of the EU Merger Guidelines, submission of 3 September 2025, p. 18; accessible at <https://www.ibanet.org/antitrust-working-groups-and-submissions>.

¹³⁸ Ibid., p. 19.

¹³⁹ See the Draghi report on EU competitiveness, accessible at: https://commission.europa.eu/topics/competitiveness/draghi-report_en#paragraph_47059.

¹⁴⁰ See the Background Paper of the FCO's Working Group on Merger Control, 9 October 2025, pp. 28 et seqq. (available in German only, at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AKK_2025/AK_Kartellrecht_2025_Hintergrundpapier.html).

¹⁴¹ Section 36 Abs. 1 S. 2 Nr. 1 GWB.

advantages outweigh the competitive harm or when an overriding public interest justifies the merger.¹⁴²

6.1.3 Mexico

Mexico's Competition Law provides the possibility to demonstrate market efficiencies which will positively impact on competition, such as:

I. Achieving savings in resources that allow the same quantity of goods to be produced at a lower cost or a greater quantity of goods to be produced at the same cost, without reducing the quality of the goods;

II. Reducing costs if two or more goods or services are produced jointly rather than separately;

III. The transfer or development of production technology;

IV. The reduction in production or marketing costs resulting from the expansion of an infrastructure or distribution networks; and

V. Any other factors that demonstrate that the net contributions to consumer welfare resulting from the concentration outweigh its anticompetitive effects.”¹⁴³

The Working Group has not identified any case in which the CNA has accepted a merger based on efficiencies claimed by merging parties.

6.1.4 Singapore

Economic efficiencies can be specifically taken into account by the CCS and an assessment will be made as to whether such efficiencies are sufficient to outweigh the adverse effects arising from a substantial lessening of competition caused by a merger. The CCS Guidelines on the Substantive Assessment of Mergers sets out that the CCS may take into account: (i) supply-side efficiencies, (ii) demand-side efficiencies, and (iii) dynamic efficiencies.¹⁴⁴

6.1.5 United Kingdom

The CMA recognises that there may be countervailing factors that prevent or mitigate an SLC arising from a merger. There are two main ways in which this could occur: through merger efficiencies or through the entry and/or expansion of third parties in reaction to the effects of a merger. The CMA's experience is that it is uncommon for a merger to be cleared based on countervailing factors alone.¹⁴⁵

¹⁴² Section 42 GWB.

¹⁴³ Article 14 of the Regulatory Provisions of Mexico's Competition Law.

¹⁴⁴ CCS Guidelines, para. 8.4.

¹⁴⁵ MAG, para 8.1.

Cost and revenue synergies often form part of the rationale for mergers, and it is not uncommon for firms to make efficiency claims in merger proceedings. However, many efficiency claims by merging firms are not accepted by the CMA because the evidence supporting those claims is difficult to verify and substantiate.¹⁴⁶

The MAG notes that merger efficiencies fall into two categories: (i) rivalry-enhancing efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals; and (ii) relevant benefits to UK customers resulting from a merger, other than through improved competition in the market related to the SLC finding.¹⁴⁷

In line with the draft MEGs, in the UK rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects. The CMA will generally first consider whether there is scope for an SLC and, if there is, it will consider rivalry-enhancing efficiency claims from the merger firms. In some cases, the CMA may also consider efficiencies and the evidence for an SLC together.¹⁴⁸

In contrast, relevant customer benefits are not considered as preventing an SLC; they may outweigh an SLC and any adverse effects of the SLC.¹⁴⁹ The CMA does not take relevant customer benefits into account in its competitive assessment, but it may take them into account when considering whether to refer a merger for a Phase 2 investigation and the overall benefit to consumers of having such an investigation.¹⁵⁰

6.1.6 United States

The Agency Guidelines state that procompetitive efficiencies will be recognised as evidence that can rebut the structural presumption in certain circumstances. However, the Agencies “will not credit vague or speculative claims” that evidence of procompetitive efficiencies shows that no substantial lessening of competition is threatened by the merger. The Agencies also will not credit alleged benefits outside of the relevant market if they would not prevent a lessening of competition in the relevant market.¹⁵¹

Consistent with past practice, the Agencies consider evidence related to efficiencies that is developed prior to the commencement of merger proceedings to be “much more probative than evidence developed during the Agencies’ investigation or litigation.”¹⁵² In assessing whether procompetitive efficiencies are cognisable, the Agencies will evaluate whether: (i) the merger will

¹⁴⁶ Ibid., para 8.6.

¹⁴⁷ Ibid., para 8.3.

¹⁴⁸ Ibid., para 8.4.

¹⁴⁹ Ibid., para 8.5.

¹⁵⁰ Ibid.

¹⁵¹ Agency Guidelines, §3.3.

¹⁵² Ibid., n. 69.

produce competitive benefits that could not be achieved without the merger under review; (ii) the benefits are verifiable; (iii) within a short period, the benefits will prevent the risk of a substantial lessening of competition in the relevant market; and (iv) any benefits claimed result from the anticompetitive worsening of terms for the merged firm’s trading partner.¹⁵³

In addition, the Guidelines state that cognisable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly. The Agencies also will not credit efficiencies if they reflect or require a decrease in competition in a separate market.¹⁵⁴

6.2 Requirements for efficiencies to be considered

The Draft MEGs state that efficiencies are only eligible to be considered if they are verifiable, merger-specific, and do not result from reducing price or non-price competition.

6.2.1 EU

The EU follows a somewhat comparable approach to the Bureau’s draft MEGs. Potential benefits to customers can be considered as a countervailing factor. Benefits may include lower prices, new or improved products or services and a lower risk of coordinated effects in the relevant market. The efficiencies must also materialise with the customers in a timely manner.¹⁵⁵ If the merger will likely result in a very high market power it is less likely that efficiencies can outweigh these negative effects.¹⁵⁶

The efficiencies must be merger-specific. Furthermore, the merging parties must provide evidence that the efficiencies cannot be achieved through alternatives that have less impact on competitors.¹⁵⁷ Lastly the efficiencies must be verifiable. It is for the merging parties to provide evidence that their merger will lead to the claimed efficiencies.¹⁵⁸

6.2.2 Germany

The FCO applies a similar three-pronged test for efficiencies used by the Commission. The cumulative requirements—consumer benefit, merger-specificity, and verifiability—represent a relatively high threshold that explains why efficiency claims are rarely successful in practice.

¹⁵³ Ibid., §3.

¹⁵⁴ Ibid.

¹⁵⁵ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para 83.

¹⁵⁶ Ibid., para 84.

¹⁵⁷ Ibid., para 85.

¹⁵⁸ Ibid, para 87.

6.2.3 Mexico

Efficiencies have to be merger-specific, continuously exceed the possible anticompetitive effects in the market, benefit consumer welfare, and be verifiable.¹⁵⁹

6.2.4 Singapore

The merger parties bear the burden of demonstrating the claimed efficiencies. The parties must demonstrate that the efficiencies are: (i) demonstrable; (ii) merger-specific; (iii) timely, in that the benefits will materialise within a reasonable period of time; and (iv) sufficient in extent to outweigh the identified competitive harms.¹⁶⁰

6.2.5 United Kingdom

The CMA requires that merger efficiencies must: (i) enhance rivalry in the supply of those products where an SLC may otherwise arise; (ii) be timely, likely and sufficient to prevent an SLC from arising; (iii) be merger-specific; and (iv) benefit customers in the UK.¹⁶¹

The CMA has a duty to consider whether a merger will lead to an SLC in a market. As such, if merger efficiencies are to be relevant in its assessment, those efficiencies must be expected to affect competition to counter what would otherwise be an SLC finding.¹⁶²

The MAG sets out that the greater expected adverse effect of a merger, the greater the expected efficiencies must be. At Phase 1, the evidence must be sufficient to satisfy the CMA within the time available for the initial investigation that efficiencies would prevent the realistic prospect of an SLC. At Phase 2, the CMA must be satisfied that the evidence shows that the above-noted criteria are met.¹⁶³

6.2.6 United States

The Agency Guidelines state that cognisable efficiencies must be merger-specific, verifiable, not anticompetitive, and prevent a reduction in competition.¹⁶⁴

¹⁵⁹ Article 63 of Mexico's Competition Law.

¹⁶⁰ CCS Guidelines, paras. 8.9-8.16.

¹⁶¹ MAG, para 8.8.

¹⁶² Ibid., para 8.9.

¹⁶³ Ibid., para 8.15.

¹⁶⁴ Agency Guidelines, §3.3.