GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS AND ACQUISITIONS

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1. INTRODUCTION

(1) Article 7(1)(d) of the Act no 4054 on the Protection of Competition (the Act no 4054) prohibits merger by one or more undertakings, or acquisition by any undertaking with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country. "Communiqué concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board" specifies mergers and acquisitions calling for the authorization of the Competition Board in order to be valid according to article 7 of the Act no 4054 and procedure and principles about the notification of such transactions.

(2) Within the framework of those regulations, the Board takes into account whether the transaction will lead to significant lessening of effective competition. As stated in Article 7 of the Act, creating a dominant position or strengthening a dominant position significant leads to lessening of efficient competition. The concept of dominant position is defined in article 3 of the Act no 4054 as the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers. For assessments about whether mergers and acquisitions violate article 7 of the Act, first, dominant position is considered; creating a dominant position or strengthening dominant position is one of the important indicators of the harm on competition, which will be taken as a basis for establishing whether mergers will lead to significant lessening of effective competition.

(3) The aim of this guideline is to demonstrate the general principles to be taken into account by the Board in preliminary assessments concerning mergers and acquisitions.

(4) In competition law, mergers and acquisitions between actual and potential competitors in the same relevant product markets are defined as *horizontal mergers and acquisitions.*[1]

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[1] In competition law, mergers and acquisitions between undertakings operating in different relevant product markets are defined as *non-horizontal mergers and acquisitions.*

(5) Hereafter, the term merger is used to cover the meaning of the term acquisition in order to avoid repetition and facilitate reading.

(6) Consumers benefit from efficient competition in several ways, some of which are low prices, high quality products and a wide selection of products and services. With merger control, the Board prevents mergers that may devoid consumers of those benefits by increasing undertakings' market power significantly. As a result of strengthening the market power significantly in markets, one or more undertakings may be able to profitably increase prices, reduce the amount of production, choice or quality of goods or services or diminish or delay innovations. Quality, which can be defined as product characteristics apart from price such as functionality, durability, reliability, design, performance or security can play a central role in consumers' purchasing decisions. Mergers can lead to price increases as well as lower product quality by means of unilateral effects. For the purposes of this guideline, "high price" is used to reflect all those possible negative effects. Effects on privacy and consumer data are separately discussed.

(7) Both suppliers and buyers may increase market power as a result of a merger. However, those guidelines analyze mainly increase of market power by suppliers. Where the assessment is particularly related to buyers, the term "buyer power" is employed. The analyses within the scope of the Guidelines are considered for an assessment to be made about a buyer.

(8) In assessing the competitive effects of a merger, pre-merger competitive conditions in relevant markets are compared with those that are expected to occur after the merger. In most cases, the situation existing at the time of the merger enables relevant comparison; however, in some circumstances some changes to the relevant market that are expected to occur in future are taken into account. A similar approach is adopted in the assessment of mergers realized without the authorization of the Board. In those assessments, the effects of likely entry to or exit from the market that are not related to the merger as well as regulations to be effective in near future are taken into account.

(9) The assessment of mergers by the Board mainly entails two phases: (a) defining the relevant product and geographic markets (b) assessing the effects of the merger on competition. The main purpose of defining the relevant market is to identify undertakings that can exercise competitive pressure on each other. Details on this issue can be found in "the Guidelines on the Definition of the Relevant Market", issued by the Board.

(10) This guideline covers an introduction and the following sections:

(a) The approach of the Board to market shares and concentration levels

(b) Anticompetitive effects that are likely to be created by the merger in the relevant market

(c) Buyer power as a countervailing factor against the anti-competitive effects created by the merger

(d) The role of market entry in maintaining effective competition in relevant markets

(e) Efficiency gains from the merger as a countervailing factor

(f) The conditions for a "failing firm defense".

(11) Beside anti-competitive effects of a merger, the Board considers countervailing factors such as buyer power, entry barriers and possible efficiency gains to be produced by the transaction. In exceptional circumstances, failing firm defense may also be taken into account.

(12) However, those factors should not be interpreted as a checklist. In other words, it is not necessary for the Board to analyze all of those factors separately in each assessment. Depending on the nature of the transaction subject to assessment, while some of those factors may be critical, others may be irrelevant and omitted from the analysis.

2. MARKET SHARE AND CONCENTRATION LEVELS

(13) Market shares and concentration levels are first indications of important information about market structure and competition between merging parties.

(14) The Board considers current market shares in its competitive assessment about the effects of the notified transaction on the market. However, it may also consider shares different from actual market shares taking into account some changes very likely to happen (for instance entry to or exit from the market or the growth in undertakings' shares). Market share of the new undertaking created after the merger is calculated by adding the pre-merger market shares of undertakings creating that undertaking. In case of volatile market shares (such as large orders), historic data covering a certain time period are used instead of short term data. The time period to be analyzed may change depending of the characteristics of the relevant market. Historic changes in market shares may provide information about competitive dynamics in the market (such as whether undertakings would

gain market power after the merger or whether the market is stable in terms of innovation and growth).

(15) The concentration levels in a market may provide useful information about the competitive structure. In order to calculate concentration levels, concentration rate (CR4, CR5, etc.) or Herfindahl Hirschman Index (HHI) or other measures can be used.

(16) HHI is calculated by summing the squares of the market shares of each firm in the market. This index gives greater weight to undertakings with larger shares in the market. Although it is necessary to include the shares of all undertakings in the market in the calculation of the index, in case there is a lack of information, undertakings with small market shares may not be included in the calculation because such small firms do not affect index size significantly. While the post-merger absolute value of the HHI is an initial indication of competitive intensity in the market, the change in the concentration level directly caused by the merger is reflected by the change in this index. For instance, HHI would be 3.800 in a market where three undertakings whose market shares are 50%, 30% and 20% respectively, operate.[2] In case the two biggest undertakings merge, HHI would increase to 6.800[3] and the change in HHI would be 3.000.[4]

2.1. Market Share Levels

(17) Very large market shares (for instance 50 % or more) may be used as an evidence of the existence of a dominant position. However, other small firms in the market exercise competitive pressure on the undertaking with a large market share if, for example, they have the ability and incentive to increase their sales volume. Even where the total market shares of merging parties is lower than 50%, competitive concerns may be raised. In those cases, the factors such as the number and strength of other undertakings in the market, whether they are exposed to capacity constraints or whether the merging parties are close competitors are considered. Even if total shares of the merging parties are lower than 40%, it may be concluded that efficient competition is restricted by taking into account all those factors.

(18) In case the sum of the merging parties' shares in the relevant market is lower than 20%, it can be presumed that the merger's negative effects on competition

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[2] (50)2+(30)2+(20)2=3.800

[3] (80)2+(20)2=6.800

[4] 6.800-3.800=3.000

are not so significant to require an in-depth investigation and prohibition of the merger.

2.2. HHI Levels

(19) It is unlikely to identify competitive concerns in transactions where post-merger HHI is lower than 1.000 and in most cases, the Board does not intervene in such transactions.

(20) Except for the following cases, competitive concerns are unlikely in transactions where post-merger HHI is between 1.000 and 2.000 and the change in HHI after the merger is lower than 250 or post-merger HHI is over 2.000 but the change in HHI after the merger is lower than 150 in the market. Factors that are likely to create competitive concerns in such markets are: (a)

One of the merging parties is a potential entrant or a recent entrant with a small market share (b) Some of the merging parties are innovative undertakings in ways not reflected in market shares (c) There are cross-shareholdings among the market participants (d) One of the parties to the transaction is competitive in a way that it may prevent anticompetitive cooperation between market participants although it has small market share (the existence of a maverick firm) (e) Existence of past or ongoing anti-competitive cooperations between market participants or practices facilitating such cooperation (f) One of the parties to the transaction has a pre-merger market share of 50 % of more

(21) These HHI levels and HHI change values are initial indicators of the possibility that competition concerns will arise as a result of the transaction and they are not taken as a certain conclusion that competitive concerns exist.

3. POSSIBLE ANTICOMPETITIVE EFFECTS OF HORIZONTAL MERGERS

(22) Basically, horizontal mergers may lead to significant lessening of competition by creating or strengthening a dominant position in two ways: (A) without coordination between undertakings, increasing market share by eliminating the significant competitive pressure on one or more undertakings (unilateral effects) (b) significant lessening of competition by undertakings which have not coordinated their conduct previously through coordination by changing the nature of the competition in the relevant market (coordinated effects).

3.1. Unilateral Effects

(23) A merger may significantly lessen significant competition by eliminating important competitive pressure on an undertaking and therefore increasing market power. The first direct effect of this transaction is the loss of competition between the parties to the transaction. For example, prior to the merger, if one of the merging firms raises its prices, some of its sales will be reduced to the advantage of other party; however the merger will eliminate this pressure.

(24) Moreover non-merging undertakings in the same market may also benefit from the reduction of competitive pressure as a result of the merger because in case of post-merger price increase, some demand will be switched to competing firms and it may be profitable for non-merging undertakings to increase prices. This reduction in competitive pressure may lead to significant price increases in the relevant market.

(25) A merger giving rise to such unilateral effects would significantly lessen efficient competition by creating or strengthening the dominant position with respect to the undertaking which would have an appreciably larger market share than its closest competitor. In addition, a merger in non-collaborative markets may lead to significant lessening of effective competition by creating unilateral effects because the competitive pressure that the parties put on each other before the merger will be eliminated and thus the competitive pressure on other competitors will be increased.

(26) There are a lot of factors that determine whether a merger will lead to unilateral effects that will significantly lessen efficient competition in the relevant market. Those factors may not be decisive when taken separately; therefore they should be evaluated together. However, not all of these factors need to be present to prove the existence of such unilateral effects. Examples of such factors are given below; however they are not limited to those.

3.1.1. Merging Parties have Large Market Shares

(27) The larger the market share an undertaking has, the more likely it is to possess market power. The higher the market share increase is, the higher the merger will lead to an increase in market power. The larger the increase in the sales base where higher margins are obtained after a price increase is, the more likely it is that the merged firm will find the price increase profitable despite the reduction in

output. Market shares and increases in market are important first indications of market power and increases in market power.

3.1.2. Merging Parties are Close Competitors

(28) In relevant markets of differentiated products[5], some products are closer substitutes for each other than others. The higher the degree of substitutability between the merging firms' products is, the more likely it is that the merged firm will raise prices significantly. For example, a merger between two undertakings whose products are regarded first and second choices by a substantial number of consumers may lead to a significant price increase. In such case, competition between the merging parties will be in the center of the analysis as it is an important source of competition in the relevant market. Besides, high pre-merger profit margins[6] also make significant increases in price levels more likely. The merging firms' incentive to raise prices will be constrained in cases where the substitutability of competing undertakings' products is high. Therefore, the higher the degree of substitutability between the products of the merged firm and competing firms is, it is less likely that the merger concerned will significantly decrease competition by creating or strengthening dominant position.

(29) Closeness of competition analysis is one of the basic factors of a merger analysis. Definition of the relevant market is based on the closeness of competition between undertakings. While market definition is about the competitive relation between all competitors who potentially compete, effect-based approach looks at the intensity of competition between especially the merging parties. Especially in markets for differentiated markets, it is accepted that closeness of competition analysis allows a more detailed assessment of a competitive effects of a merger. If merging parties are not close competitors but are close competitors to other undertakings, the merger will lead to less problems. If the competition between the merging parties is close and their relation with competitors is distant, the competitive power that the merging parties obtained by means of the transaction

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[5]Products in a market may be differentiated in many ways. For example differentiation in terms of geographic location is important for retail sales channels, banks, travel agencies, or petrol stations. Similarly differentiation may be based on brand, image, technical specifications, quality or level of service. The level of advertising expenditures in a market is an indicator of undertakings' effort to differentiate their products.

[6] Generally, the relevant margin (□) refers to the ratio of the difference between price (p) and costs incurred for producing one more products (c) to price [□ =(p-c)/p]. Which cost items are taken as a basis for the calculation of the said margin is critical in the analyses on the effects of the merger on price.

will be stronger. The elimination of close competition in this way may lead to unilateral price increases.

(30) Substitutability between products for closeness of competition assessment can be considered by means of customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticities of the products concerned[7], or diversion ratios[8], in case the relevant data are available. With respect to bidding markets, it is possible to analyze whether the bids submitted by one of the merging parties in the past exerted competitive pressure on the bids of the other party.

(31) Assessment of substitutability closeness can start with a qualitative analysis which compare merging parties' differentiated products in respect of quality, visuality, price and other features that are deemed convenient by customers. Analysis of consumer preferences can provide more information. The analysis about close substitutes can look into market shares of the products in the market and the changes in those and the changes in terms of product prices or marketing and promotion activities. Consumer surveys which are reliable in terms of sampling and survey design can be important sources for consumer preferences and behavior such as demographic features, brand loyalty, switching and searching costs regarding suppliers and whether consumers see products as close substitutes. In close substitution analysis, information and documents including regulatory framework as well as undertakings' assessments about competing products, providing new products and entry to the market.

(32) Additional tests can be made to further develop substitutability closeness test[9].

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[7]The cross-price elasticity of demand measures the extent of change in a product's demand in response to a change in the price of another product, all other things remaining stable. The price elasticity of demand measures the extent of change in a product's demand in response to a change in its price.

[8]The diversion ratio from product A to product B is the proportion of the sales transferred to product B due to a price increase in A to the total loss in the sales of product A.

[9]The most prevalent method to assess substitutability closeness is to measure the deviation ratio. It shows to what extent the customers will leave the products of firm A to the products of firm B in case the prices of the products of firm A raises. Deviation rate is the combination of two variables: Cross elasticity of demand and price elasticity of demand. Cross elasticity of demand (or cross price elasticity of demand) measures to what extent the demand to a product changes in response to a change in a price of another products, other conditions remaining stable. The price elasticity of demand measures the extent of change in a product's demand in response to a change in its price. The higher the deviation rate between the products of the merging products is, the closer the competition will be and the higher the risk of unilateral price increases will be. Depending on the deviation rate, it is possible to consider whether the merged firm will have incentives to increase prices and if so to what extent. The relevant factor reflecting that kind of unilateral effect is upward pricing pressure (UPP). UPP Test basically evaluates the net effects of the merger on the merged firm's pricing.

(33) The ability to increase product supply is important in terms of close competition analysis between competitors in markets where the products are homogeneous. Players with the ability to increase product supply can make a stronger competitive pressure than the players with limited capacity can.

(34) In some markets it is be relatively easy and less costly for undertakings to reposition their products or extend their product range. In particular, how repositioning or product range extension by merging parties or competitors may influence price increase by the merged undertaking should be analyzed. Moreover, product repositioning or product range extension is mostly less profitable than the current conditions as it high sunk costs and risks. Especially in differentiated product markets, undertakings can reposition their products after the merger. Depending on the effects on price and product positioning of merging firms, this may result in increasing welfare. However, it may sometimes result in product repositioning, terminating the production of some products and decreasing the product variety for consumers. In cases where quality is important in consumer preferences, and an important competition parameter in the market, the effects of the merger on consumer welfare in addition to price are considered.

3.1.3. Customers have limited possibilities of switching supplier

(35) Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because switching to other suppliers requires bearing substantial switching costs. Such customers are particularly vulnerable to price increases. The merger may weaken these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that use both merging firms as a source of supply for obtaining competitive prices. Past customer switching patterns and reactions to price changes may provide important information in this respect.

3.1.4. Competitors are Unlikely to Increase Production in Response to Price Increase

(36) When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially in response to prices increase, the merged undertaking may have an incentive to reduce output below the combined pre-merger levels, thereby raising market price. The merger provides an incentive mechanism for the merged undertaking to reduce output by giving it a larger base of sales where higher margins resulting from an increase in prices induced by the output reduction are enjoyed.

(37) Conversely, when market conditions are such that competing undertakings have enough capacity and find it profitable to increase output sufficiently, it does not seem possible that the merger will significantly decrease competition by creating or strengthen a dominant position or in another way. However, it is unlikely that competing undertakings will increase output if they face capacity constraints and the expansion of capacity is costly or if existing excess capacity is significantly more costly to operate than capacity currently in use.

(38) Although capacity constraints are regarded as important for markets where goods are relatively homogeneous, they may also be important for markets for differentiated products depending on the substitutability between products. Unilateral effects may arise in markets where there are homogeneous products as well as where there are differentiated products. In markets where the products are homogeneous, the variables on the supply side are more important however analyzing the demand side is more important in markets where the products are differentiated. In a market where the products are homogeneous the fact that competing undertakings which are not party to the merger have a large idle capacity decreases the possibility of unilateral effects. On the other hand, in a market where the products are differentiated, even if there are idle capacities, in case the undertakings producing close substitutes merge and in case consumers will not be the buyers of competing suppliers to the extent that post-merger price increases will be prevented, unilateral effects may occur.

3.1.5. Merged Undertaking has enough capacity to hinder expansion by its competitors

(39) Some mergers if proceed, may result in granting the merged undertaking a position where it will have the incentive to make the expansion of relatively smaller or potential competitors more difficult or restrict the ability of competitors to compete and encourage the merged undertaking's behavior to these ends. In such a case, competitors will not, either individually or together, be in a position to exercise pressure on the merged entity so that it will not increase prices or take other actions that may harm competition. For example, the merged undertaking may have such a degree of control over inputs or distribution channels that expansion or entry by competitors may be more costly. Similarly, the merged undertaking's control over patents or other types of intellectual property rights may bear the same results. In markets where interoperability between different infrastructures

or platforms is important[10], a merger may give the merged undertaking the opportunity and incentive to decrease the quality of service or raise the costs of its competitors. In making assessments within this framework, the financial strength of the merged undertaking relative to its competitors should be taken into account, inter alia.

3.1.6. Merger eliminates an important competitive force

(40) Some undertakings have more influence on the competitive process in the market they operate than their market shares or similar indicators suggest. A merger involving such a firm may cause significant and anti-competitive changes on competitive dynamics of the market, in particular in case the relevant market is concentrated. For example, one of the merging parties may be an undertaking which has recently entered the market and which is expected to exert significant competitive pressure on the actual participants in the market in the future.

(41) In markets where innovation is an important competitive force, a merger may increase the merged undertaking's ability and incentive to bring innovations to the market, which may result in creating competitive pressure on competitors to offer innovations in that market or increase the current pressure. Alternatively, a merger between two innovators may significantly lessen competition. Similarly, an undertaking with a relatively small market is regarded as an important competitive force if it has promising pipeline products.

3.2. Coordinated Effects[11]

(42) Some market structures may make it possible, economically rational, and hence preferable for undertakings operating in that markets to adopt on a sustainable basis a behavior pattern aimed at making sales at increased prices. A merger in a concentrated market may significantly lessen effective competition, through the creation or strengthening of a joint dominant position because such a transaction increases the ability of undertakings to coordinate their behavior and increase prices without entering into an agreement or resorting to a concerted practice within the meaning of article 4 of the Act no 4054. A merger may make the current coordination stronger for undertakings which were already coordinating their behavior before the merger or enable them to coordinate on higher prices.

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[10] Network industries such as energy, telecommunication and digital platforms are examples of such markets.

[11] Also known as cooperation generating effects

(43) Coordination may appear in various forms. In some markets, the most likely coordination involves keeping prices above the competitive level. In other markets, coordination aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate for dividing the market according to geographic area or other customer characteristics, or by allocating contracts in bidding markets.

(44) Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, sustainability of the coordination requires three conditions. First of all, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, there must be some deterrence mechanism that will be activated if deviation from coordination is detected. Third, the outsiders, such as current and future competitors that are not within the scope of the coordination, as well as customers, should not be able to jeopardize the results expected from the coordination.

(45) With respect to the analysis of whether it is possible to reach terms of coordination and whether the coordination is likely to be sustainable, the changes that the merger brings about on the conditions of the relevant market should be revealed. The reduction in the number of undertakings operating in a market may be a factor that facilitates coordination. A merger may increase the likelihood or significance of coordination generating effects in other ways. For instance, one of the merging parties may be a maverick firm that has a history of preventing or disrupting coordination by not following price increases by its competitors, or having an incentive to making different strategic choices than its coordinating competitors prefer. In case the merged undertaking adopts strategies similar to those of other competitors, the remaining undertakings will be able to coordinate more easily, and the merger will increase the likelihood, sustainability or effectiveness of coordination.

(46) If one of the parties to the transaction is competitive in a way that it may disrupt anticompetitive cooperation between market participants although it has small market share (the existence of a maverick firm) may result in a transaction restrictive of competition. A maverick firm may create effects triggering competition.

(47) The features of a maverick firm are independent and aggressive pricing, innovative conduct or low costs, considerable amount of active capacity

especially with low market shares and a different business model. However, at this point the most important feature of a maverick firm is being an undertaking which starts or increases its competition depending on price or market conditions. If the maverick firm is erased from the market, the competition in the market may decrease because the effect of the undertaking on its competitors is more than its market share[12].

(48) In addition to the issues listed above, in order to show that a firm is a maverick firm, whether the price policy of the firm affects competitors' pricing strategy, whether the maverick firm internalizes the price increases when the competitors reflect costs to prices during price increase terms. If the firm's market share increases while its competitors' market share is stable or decreasing or the considerable part of this increase is taken from the competitors, it can be an indicator. Moreover, this type of action and whether there is a reason for rapid growth strategy must be considered.

(49) In assessing coordination generating effects, all available data related to the characteristics of the relevant market, including past behavior of undertakings and structural features of the market, should be taken into account. Evidence of past coordination in the relevant market is important if the characteristics of the relevant market have not changed appreciably or are not likely to do so in the near future. Evidence indicating coordination in similar markets may provide useful information, as well.

3.2.1. Reaching a Common Understanding about Terms of Coordination

(50) In case the competitors arrive at a common perception as to how the coordination should work easily, coordination will be more facilitated. It is important for reaching a common understanding that coordinating firms should have similar views regarding which actions will be taken be in accordance.

(51) The less complex and the more stable the economic environment in the relevant market is, the easier it is for the undertakings to reach a common understanding on the terms of coordination. For instance, coordination is easier and more likely in a market where few undertakings are operating compared to a market with many undertakings. It is also easier to coordinate on price in a market for a single and/or homogeneous product, than a market with many and/or differentiated products. Similarly, it is easier to coordinate on price when demand and supply

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[12] Board decision dated 18.11.2009 and numbered 09-56/1325-331.

conditions are more stable than when they are continuously changing. In this context, volatile demand, substantial internal growth by some undertakings in the market or frequent entry by new undertakings indicate that the current condition of the market is not sufficiently stable to make coordination possible. In markets where innovation is important, coordination is more difficult since especially substantial innovation gains give an undertaking significant advantages over its competitors.

(52) Coordination by way of market division will be easier if customers have similar characteristics as the coordinating undertakings will allocate them easily in this case. Such characteristics are defined on geographic location or type of the customer concerned or the fact that the customer concerned frequently buy from one specific undertaking. Coordination by way of market division is easier when it is easy to identify each customer's supplier and customers are allocated among their incumbent supplier.

(53) Coordinating undertakings may resort to other ways to overcome problems stemming from the complexity of the economic environment apart from market division. For instance they may reduce the complexity of coordinating on a large number of prices by establishing simple pricing rules. One example of such a rule is reducing the coordination problem by establishing a small number of pricing steps. Another example is establishing a fixed relationship between certain base prices and a number of other prices and ensuring that the prices in question move in parallel. Publicly available key information, exchange of information through associations of undertakings, or information received through cross-shareholdings or joint ventures may also help reaching coordination. The more complex the conditions of the relevant market are, the more transparency or communication is needed to reach a common understanding on the terms of coordination.

(54) The more the undertakings in the relevant market have symmetric structure in terms of cost structures, market shares, capacity levels and levels of vertical integration, the easier it is for them to reach coordination. Structural connections such as cross-shareholdings or participation to joint ventures are among factors that encourage undertakings to align their behavior.

3.2.2. Detecting Deviations from Coordination

(55) It is often an attractive choice for coordinating undertakings to increase their market share by deviating from the terms of coordination, for instance through

lowering prices, offering secret discounts, increasing quality or capacity or trying to win new customers. Credible threats including timely and sufficient retaliation may prevent firms from deviating. Therefore, the relevant market must be sufficiently transparent to allow the coordinating undertakings to monitor to detect those deviating from the common strategy and to retaliate in time if necessary. In addition, in markets where the buyer power is low and there are a lot of buyers, buyers may inform players about each other for price cutting and facilitate the detection of deviation.

(56) The lower the number of undertakings operating in the market is, the higher the transparency in the market is. Moreover how transparent a market is often depends on how transactions take place in that market. For example, transparency is expected to be higher where transactions take place on a public exchange or in an auction. On the contrary, transparency may be low in markets where transactions are made confidentially through bilateral negotiations between buyers and sellers. The key element in evaluating the level of transparency in the market, is to identify to what extent undertakings can get information about the actions of other undertakings from the information available to them. Coordinating firms should be able to interpret with some certainty whether unexpected behavior or situation in the relevant market is the result of deviation from coordination. For instance, in unstable environments it is difficult to know whether a loss in an undertaking's sales are due to an overall reduction in demand or due to low prices offered by a competing undertaking. Similarly, when there are fluctuations in overall demand or cost conditions it is difficult to detect deviations from coordination because the reduction in prices may stem from changes in demand and costs or a deviation from coordination. In mature markets or markets which do not grow and in cases where there is no demand shock, it can be said that the market has a stable demand. Under the assumption that in markets with stable demand, players may adopt similar actions in every period, coordinative result is more likely.

(57) In markets where it is difficult to detect deviations, undertakings may still engage in practices which have the effect of easing the monitoring task, even if they do not intend to do so. These practices, such as information exchange through associations of undertakings, announcements about price, etc., voluntary publication of certain information, most-favored-customer clauses or meeting-competition may increase transparency or help evaluation related to undertakings' choices. Cross-directorships in more than one undertaking,

participation in joint ventures and similar agreements are among factors that make monitoring mechanism easier.

3.2.3. Deterrent Mechanisms

(58) Coordination cannot be regarded as sustainable unless coordinating undertakings are convinced that that it is in their best interest to adhere to the terms of coordination among other opportunities. Sustainability of the coordination among competitors depend on the credibility of the retaliation mechanism that can be activated by other undertakings against those deviating from coordination.

(59) It is unlikely that retaliation which appears with significant delay or is not certain to be activated will offset the benefits from deviating from common strategies. For example, if transactions in the relevant market are realized on a large-scale and infrequent basis, it will be difficult to establish a sufficiently severe deterrent mechanisms since the gains from deviating at the right time may be certain, immediate and large whereas the losses to be born due to deterrent mechanisms will be small and materialize with delay.

The speed with which deterrent mechanisms can be implemented is mainly related to transparency. If undertakings are only able to observe their competitors' actions after a substantial delay, the retaliation mechanisms will also be implemented with delay and this will influence whether it is sufficient to deter deviation.

(60) The credibility of the deterrent mechanisms before undertakings depends on whether the other coordinating firms have an incentive to retaliate against any deviation. Some deterrent mechanisms, such as punishing the undertaking that deviates from the common strategy by temporarily engaging in a price war with it or increasing output significantly, cause short-term economic losses for the retaliating undertakings. This may not remove the incentive to retaliate. since short-term losses may be smaller than the benefits to be gained in the long term as a result of returning to coordination due to retaliating.

(61) The fact that undertakings have excess capacity makes it possible to punish the party deviating from coordination and thus is a deterring factor. On the other hand, it may be encouraging since undertakings can provide more benefits from deviating. The effects of excess capacity

And coordinated effects are considered based on the characteristics of each merger.

(62) Retaliation does not have to take place in the same market as the deviation. When the coordinating firms have commercial interaction in other markets, the risk of applying various methods of retaliation increases. The retaliation could take many forms, including cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.

3.2.4. Reactions of Outsiders

(63) The success of the coordination depends on the condition that the actions of non-coordinating undertakings and potential competitors, as well as customers, do not jeopardize the outcome expected from coordination. For example, if coordination aims at reducing overall capacity in the market, this consumers will be hurt only if non-coordinating firms are unable or have no incentive to respond to by sufficiently increasing their own capacity to prevent the ultimate decrease in total capacity, or at least to render the capacity decrease unprofitable.

(64) The effects of entry to the relevant market and countervailing buyer power of customers on the sustainability of the coordination must be analyzed. For instance, a large buyer which satisfies a large amount of its requirements from one supplier or offers long-term contracts to its suppliers may make coordination unstable by tempting one of the coordinating firms to deviate from coordination and make huge gains

3.2.5. General Criteria about the Assessment of Coordinated Effects

(65) In the assessment that an agreement can be made about coordination conditions, the market features mentioned above and the three conditions in paragraph 44. For the assessment of the three conditions, all of the market features in the table are required.

	The necessary criteria	Factors that affect this criterion
1	Few firms	
2	Frequent communication with customers	Lack of huge purchases at once
3	Barriers to Entry	

4	The existence of a balance point which can be accepted by all players	Homogeneous products Transparent market Symmetry Stable demand conditions Low buyer power
5	Ability to detect deviations	Homogeneous products Transparent market Symmetry Stable demand conditions Low buyer power
6	Compliance/ deterrence	Symmetry Stable demand conditions No delays in following the players' actions Interaction in more than one market Excess capacity

3.3. One of the Merging Parties is a Potential Competitor

(66) A merger between an undertaking already active on the relevant market and a potential competitor may have similar anti-competitive effects to a merger between two undertakings already active.

(67) A merger with a potential competitor can generate horizontal anti-competitive effects, in the form of bilateral or coordination-generating effects if the potential exercises significant competitive behavior on the undertakings already active in the market. This is the case if the potential competitor possesses assets which it can forward to the market without incurring significant sunk costs. Anti-competitive effects may also occur where one of the merging parties is very likely to incur the necessary sunk costs to enter the relevant market in a relatively short period of time and this entry would exercise competitive pressure on the behavior of undertakings in the market.

(68) In order for a merger with a potential competitor to significantly impede efficient competition by creating or strengthening a dominant position, two basic conditions must be fulfilled. First, the potential competitor must already be exerting a significant competitive pressure on market participants or there must be a significant likelihood that it will turn into an effective competitive force. The plans of the potential competitor to enter the relevant market in a short time are notable indicators in this sense. Second, there must not be a sufficient number of other potential competitors to maintain sufficient competitive pressure after the

merger. Potential competition is more important in markets where the competition in the market is restricted due to intellectual property rights or network effects. Therefore, mergers can be potentially restrictive of competition in markets which develop with innovations or where multilateral platforms are operating and there are important network effects such as pharmaceuticals and biotechnology. In the potential competition analysis, first whether entries are profitable; thus, possible should be considered by taking into account issues such as how the market will be shaped in the future and economies of scope, product differentiation, access to scarce sources. In order to evaluate the level of pressure made by the potential competition which is expected to be eliminated by the merger, the possibility that the potential competitor may be an efficient competitive power, the size of the potential competitor and the estimated time of entry to the relevant market. At this point, consumer surveys, undertakings' own self-assessments or the development of innovation programs can be taken into account. The amount of the transaction value can be added to the analysis as an indicator that the merger may be realized with a potential competitor.

3.4. One of the Merging Parties is a Startup

(69) It is important to look at potential competition restrictive effects in cases where large incumbent companies are acquiring nascent firms/startups. This kind of acquisitions may involve the risk that the product may not be adopted or developed or may be ignored or may be pushed out of the market. Those acquisitions are called killer acquisitions in the literature.

(70) The defining characteristics of killer acquisitions are concerns are by nature actually or potentially at horizontal levels and product development ends finally. At first, although undertakings seem to be producing a complementary or irrelevant product, there may be concerns at horizontal level.

(71) Killer acquisition theory is one of the theories of harm applicable with respect to acquisition of developing firms. It is obvious that theories of harm regarding vertical or multi-market mergers such as output restrictions or tying can be applicable in terms of those acquisitions. Focusing on only one side of multilateral markets should be avoided.

(72) Purchasing developing firms means purchasing firms which own goods or services whose competition potential is unknown. In this case, it is possible that the target has not entered the market or has entered the market but is not mature

yet. In both cases, a static analysis of the market may not be adequate. This uncertainty may occur under the following conditions:

- The cases where existing small overlaps in the markets may grow (for instance a competing platform does not have the necessary scope for network effects that will make it a strong competitor)
- The cases where there are not actual overlaps but there are potential overlaps (for instance earning money from advertising)
- The cases where there are not overlaps but there are potential overlaps to raise in the future as a result of the change of existing markets (for instance existing interconnected markets; smart watch/smart phone).

(73) Potential competition harm theory is closely related to killer acquisition harm theory. The concern here is that the product obtained as a result of the merger can be a competitor and thus to control this product (but not to kill it) may eliminate competition thread. Especially like the pharmaceutical sector, there may be cases where parties are not currently competing but may start to compete after research or development activities. In those cases, the effect of the transaction on innovation and future competition is important. It is not possible to talk about an effect on current competition. Starting from the acquisition of a developing firm/product and competition potential, this theory should also be considered.

(74) The difference between killer acquisition theory and elimination of potential competition is that not only competition but also the product itself is eliminated. An example may be the difference between the case where a retailer purchases a competing store to close it and the case where the retailer purchases a competing store to eliminate pricing pressure.

(75) Those two kinds of harm theories may be seen in different markets and sectors; however, they are observed the most in pharmaceuticals, chemicals and technology markets where firms acquire developing firms.

(76) In terms of the acquisition of developing firms, the analysis about what will happen if the acquisition is not realized, in other words within the scope of counterfactual analysis, whether the target will be independent and if yes how strong the competitive pressure will be can be taken into account. For instance, whether funds can be obtained from private investors or investment markets, whether the target may be acquired even for a lower price and if it can be acquired how strong the competitive pressure it can make may be important.

(77) On the other hand, in the counterfactual analysis about the development of the product of the acquiring undertaking, the possibility that a third party may enter the market and develop its capacity to produce a version of the product of the developing undertaking. For instance, in cases where the incumbent undertaking is dominant and a new entry is unlikely, a loss of a small player may constitute an important loss of competitive pressure.

(78) In terms of the development of target product, the following can be taken into account: whether it will be popular, whether it will benefit from network effects, whether its production costs will decrease after it gains economies of scope or benefiting from learning by doing, whether it will compete with new competing products after its demand structure and product features change.

(79) Generally, an important point of counterfactual analysis is the time period considered. If a developing firm is acquired, the competitive pressure may not start to affect consumers until one or two years after. The effects of some of this kind of transactions will last for years; thus, considering a short time period involves the risk of underestimating anticompetitive effects. Moreover, even if a product has not entered the market yet, its development is important and should be taken into account. For instance, it takes a long time for a medicine on R&D line to reach the market but if the necessary time for a newly developed product for being launched is delayed, this may mean a loss of welfare.

(80) In the scenario where there is not a merger, to determine the possibility of a developing firm as a competitor, the reason of the transaction can be questioned. For instance, the acquiring undertaking see which strengths of the target, whether the acquiring undertaking has objectives related to tying the product of the target with another product or input are important. In other words, whether other undertakings will see the same economic opportunity or whether they will be interested in acquiring the target in the absence of the merger should be considered. At this point, opinions about the nature of the risks that potential buyers estimate and about whether the target can be an independent business or not. In case competitors are not interested in acquisition, it will be useful to understand the reason and its relation with potential competition. In order to analyze whether the acquisition of developing firms are killer acquisitions, good will and motivations leading to this policy should be focused on. Internal documents and documents related to investment policies can be taken as a basis; however it is possible that they may not be available.

(81) It is necessary to assess the efficiencies to be created by the said acquisitions. In terms of the assessment of developing firms, one of the observable efficiencies is that the new product contributes to the existing product as an important input. The scope of the efficiencies narrow if it is understood that the acquired product is a potential competitor and a substitute for the existing product according to the research made. Moreover, arguments that the acquisition increases the possibility of an innovative product to reach the market and encourage investments that will benefit consumers can be taken into account. The effects of such acquisitions on innovation should also be considered.

(82) Lastly, it is possible that the current market definition and the market shares can be misleading as the existing competitive constraints are not enough to reflect the future constraints.

3.5. Mergers creating or strengthening buyer power in upstream markets

(83) To what extent a merger will increase buyer power on suppliers in upstream markets is one of the important issues to be taken into account in the assessment. If a merger creates market power for a buyer in the upstream market (buying market) or increases the market power of a buyer, it may result in significant lessening of competition especially by means of creating a dominant position or strengthening the dominant position. The merged firm may reduce the quantity of inputs it purchases and obtain that inputs at lower prices. However, this will lead to a reduction in the level of output in the final product market, and thus harm consumer welfare. Such conditions may arise when the upstream market is relatively fragmented in particular with respect to sellers. In case the merged entity limits the access of its competitors to inputs by using its buyer power, competition in the downstream markets may also be adversely affected.

(84) On the other hand, an increase in the buyer power may be beneficial for competition. An increase in the buyer power may lower input costs without restricting competition in downstream market. Consequently, prices may be lowered for the benefit of customers.

3.6. Effects related to innovation and consumer data

(85) Mergers may have positive effects on innovation however they may lead to a decrease in the incentive to innovate. The net effect of the merger on innovation depends on the nature of the innovation activities, the structure of the relevant markets, the dynamics of the innovation competition in the market, innovation and

the importance attributed to the customers. In detecting the importance of the innovation in the market, the size of R&D investments of undertakings, the importance of intellectual property rights or the economic reasons of the merger can be taken into account.

(86) In terms of innovation activities, competitors may correspond to a subset of the competitors in the market, besides, they may cover undertakings that do not carry out activities in the relevant product market but have the assets used in innovation activities. Undertakings whose innovation activities and strategies overlap to a large extend and who tend to produce closely competing products may be close competitors in terms of innovation activities. Mergers who combine complementary assets in terms of innovation activities may create effects increasing innovation. In an analysis about innovation competition's dynamics, the degree of overlapping or complementariness between the innovation activities of undertakings as well as of the degree of competitive pressure on the merged firm and the barriers to making innovation activities are important. In this analysis, rather than the market shares of the undertakings in the relevant market, market power and competition analysis based on innovation capacities considering variables such as the number of patents, R&D laboratory, the number of R&D employees.

(87) Moreover, the data owned by undertakings are also important in determining their competitive power. In assessing the transactions, variables such as the nature of and the field of use of the data owned by the undertaking may affect the level of the competition in the market. Within this framework, data can be addressed with the concept of privacy or alone as an input as a quality element.

(88) Privacy right concerning personal data or the amount of personal data provided to undertakings and the related risks can be a variable affecting the value attributed to a product by the customer. Since consumer preferences can be shaped in a way to provide data as less as possible or to have control over data, the privacy right related to personal data can be perceived as an element of product quality. Therefore, unilateral effects created by the merger can create negative results in terms of the privacy right concerning personal data like other variables of quality. In determining the markets where privacy right is important for consumers, consumer surveys giving information about issues such as consumer awareness for using personal data and information and documents where undertakings evaluate competition variables may be useful. The fact that

the products in the market provide differentiated features in terms of the privacy right concerning persona data is an indicator that privacy is one of the elements of product quality for consumers. However, the fact that there is not such differentiation in the market does not mean that the effects of competition in terms of privacy is not worth analyzing. The lack of differentiation in terms of privacy standards may stem from the lack of competitive pressure in the market or the concentrated structure of the market. Therefore, the assessment should focus on whether privacy is an important indicator of consumer welfare by taking into account the issues such as functionality and the value attributed by consumers to privacy.

(89) On the other hand, data collected by undertakings become an inseparable part of the prices and commercial conditions in multilateral digital markets. The said data is used for developing the business and services. Besides they are important in terms of the services provided in the related markets and allow platforms who provide "zero price" services to earn revenues from the services they provide with targeted advertising Thus, basically, data is an important input in terms of online services, production processes, logistics, smart devices and artificial intelligence. Issues such as over-collecting data or intensely using data or combination of data and preventing access to data or discrimination about access may result in increasing market power, creating barriers to entry or lock-in to a platform. Therefore, it is necessary to examine the effects of the data power to be owned by undertakings and their opportunities to collect data on competition. In those examinations analyses can be made on the following, reproduction of data, whether it can be collected from other sources, its degree of substitution with data sets, when it becomes old, the type of the data parties to the transaction collect and how frequent they collect those data, the amount of the data collected by competing undertakings, policies about protection and processing data or the size of the data set needed to enter the market.

(90) Moreover, market share definition, which creates challenges for all competition law enforcement in digital markets and accurate evaluation of the power of undertakings in the relevant markets should be attached importance. Although those undertakings, in some cases, may not show a significant presence in the markets defined as the relevant market, thanks to their ecosystems and data set they may be stronger than estimated. Therefore, market shares calculated based on the number or amount of sales may be misleading in terms on undertakings in digital markets. The number of users, number of visits, the ecosystems owned

And especially the scope and volume of the data owned are important parameters for measuring the market power.

(91) In analyzing the acquisitions in digital markets, although basic titles such as horizontal overlaps and vertical overlaps can be used, under those titles, whether there are digital products that must communicate with each other in order to function or vertical overlap concerning products that receive data input from each other or whether complementary products that have overlapping user base should be analyzed.

(92) In acquisitions with horizontal overlaps, it can be said that mergers between companies operating in online markets lead to certain concerns for users and competitors within the context of competition. In terms of the competitors of the merged undertaking, since the merged undertaking will have a data set and user combination, it can increase the quality of products and services for its users and advertisers and thus increase its market power. Therefore, it will be difficult for the competitors in the market to compete with this undertaking efficiently after the transaction.

4. COUNTERVAILING BUYER POWER

(93) Not only competitors but also customers may exert competitive pressure on a supplier. If the customers have significant buyer power, even undertakings with very high market shares will not be able to significantly lessen competition. In other words, they will not have the power to determine economic parameters, by acting independently of its competitors, such as price, supply, production and distribution amounts. In this context, countervailing buyer power should be understood as the bargaining strength that they gain vis-à-vis the seller in commercial transactions due to their size, significance for the seller and ability to switch to alternative suppliers.

(94) The Board will consider how customers will counter the increase in market power that a merger will create. Buyer power will be at issue if customers could threaten to resort to alternative suppliers within a reasonable time frame in case the supplier increases prices or lower the quality of products. This is the case where the customers could switch to other suppliers in a short time, threaten to vertically integrate and be active in the upstream market or to encourage new entry to supplier's market by switching large orders to another undertaking planning to enter the upstream market. Buying power may be exercised by refusing or

delaying the purchase of other products offered by the supplier. In addition if there is significant buyer power, it will be difficult for coordinated effects to occur.

(95) Whether the customers have an incentive to use their buyer power may be important in some cases. For example, customers' desire to encourage a new entry by a supplier to the upstream market will diminish if lower input costs provided by such entry could also be reaped by its competitors in the downstream market. Countervailing buyer power is more likely when the buyers are vertically integrated and financing is possible for a new entry.

(96) Countervailing buyer power which offsets anti-competitive effects of a merger cannot be found in case only a particular segment of customers with bargaining strength is shielded from significantly higher prices created by the merger Moreover, it is necessary that the buyer power should exist not only prior to the merger but also after the merger since the buyer power of customers will be reduced afterwards, if a merger of two suppliers removes an important alternative source of supply.

5. ENTRY

(97) When entering a market is sufficiently easy, the risk that mergers will pose anti-competitive effects will be low. Therefore, entry analysis is one of the important elements of the overall competitive assessment. For entries to exert sufficient competitive pressure on the merging parties, they must be be likely, timely and sufficient.

5.1. Likelihood of entries

(98) While assessing the competitive effects of mergers, the Board examines whether entry is likely and whether potential entries prevent anticompetitive behavior of the incumbents in the market after the merger. For entry to be likely, it must be sufficiently profitable taking into account the increase in the amount of sales created by the entry and the potential responses of the incumbents. entry is not possible in cases where large-scale facilities need to be established for an economically profitable entry because such large-scale entries will repress the actual prices downwards. In addition, entry is more unlikely if the incumbents in the market offer customers long-term contracts to protect their market shares or giving price reductions customers that are the target of the entrant. When high risk and costs to be incurred if the entry fails are high, the possibility of entry to

the markets be less likely. In case sunk costs are high, the costs to be incurred if entry fails will be higher.

(99) Potential entrants may encounter some barriers to entry which determine entry risks and costs and thus effect the profitability of entry. Barriers to entry are certain advantages that incumbent undertakings have over potential entrants and that stem from the characteristics of the market. If barriers to entry are low, the behavior of the merged undertaking may be restricted by entries. On the contrary, if the barriers to entry are high, entries will not restrict the merged undertaking's incentive to increase the prices. Analyzing a market in terms of past entry and exit may provide important information about the size of entry barriers.

(100) Entry barriers can have various forms:

(a) There may be legal entry barriers. For instance, a regulatory authority may restrict the number of licenses and thus the number of market participants They may also take the form of tariff and non-tariff trade barriers.

(b) Incumbents in the market may have technological advantages that may make it difficult for other undertakings in the market to compete successfully such as privileged access to essential inputs and natural resources and innovation, R&D facilities and intellectual property rights For instance, it may be difficult to access essential inputs or those inputs and relevant processes may be protected by intellectual property rights. Economies of scale and scope, distribution and sales networks or restrictions to access to important technologies may also constitute entry barriers.

Especially advantages stemming from the data owned in terms of digital platforms may constitute barriers to entry to the relevant markets or downstream markets or related markets where data is an important input. Access to data can be an essential input for undertakings wishing to enter the market and create costs for users to switch to competing platforms; thus, foreclose the market to competitors. It can also be an entry cost for undertakings wishing to enter the market. It is accepted that data is very valuable for developing and providing digital services, the size of the data that is owned and can be used by big incumbents provide them with an important advantage while creating a barrier to potential entry and expanse for smaller firms.

(c) The current position of an incumbent may also constitute entry barriers. For instance it will not be easy to enter markets where experience and reputation is important, both of which are difficult to obtain for an entrant. In this context,

factors such as consumer loyalty to a particular brand, the close relationships between actual suppliers and customers, the importance of promotion or advertising and other issues that may affect an undertaking's reputation may be taken into account. Entry barriers may also arise where the incumbents are able to put the large excess capacities to use in a short time or where customers have to incur significant costs if they switch to a new supplier.

(101) When assessing whether or not entry would be profitable, expected changes to the market are taken into account. Entries to a market that is likely to grow in the future are more likely to be profitable than entries to a market that is expected to decline. Unless the entrant can obtain a sufficiently large market share, scale economies and network effects may prevent new entries from being sufficiently profitable.

(102) If the equipment and technologies currently used by undertakings active on other markets can easily be used in the market where the merger takes place, entry will be easy as the sunk costs will be low.

5.2. Timeliness of Entries

(103) The Board examines whether entry is sufficiently rapid and sustainable to prevent the exercise of market power. Whether the entry is timely depends on the characteristics and dynamics of the market, as well as on the specific capabilities of a potential entrants. Normally, an entry is considered timely if it is realized within two years.

5.3. Sufficiency of Entries

(104) An entry must have the sufficient power and scope to eliminate the anti-competitive effects of the merger. For instance, small-scale entry to a narrow segment of the market will not be sufficient to eliminate the anti-competitive effects of the merger.

6. EFFICIENCIES

(105) Mergers may be a requirement of competition and there is a possibility that competition will increase as a result of such transactions. Efficiency gains brought about by a merger may counteract its harm on competition and consumers. The Board performs an overall assessment when examining a merger and take into consideration technical and economic progress which is to the consumers' advantage and which does not harm competition.

(106) The Board considers the parties' arguments about efficiency gains in the assessment to determine whether the merger will significantly lessen efficient competition by creating a dominant position or strengthening the existing dominant position and if it considers those realistic, it may authorize the transaction. This is the case if the new undertaking created after the merger has an incentive to act competitively for the benefit of consumers.

(107) In order for a merger to be authorized by considering efficiency gains, the efficiencies to be gained have to benefit consumers, be specific to the merger under examination and be verifiable.

6.1. Benefit to Consumers

(108) The main criterion in assessing efficiency gain claims is that consumers will not be in worse conditions as a result of the merger compared to pre-merger situation. In order to meet that criterion, efficiencies should be substantial, timely and should benefit consumers in markets where competition concerns exist.

(109) Mergers may provide efficiency gains that can lead to benefits to consumers, especially lower prices. For example, cost advantages in production or distribution may give the merged undertaking the opportunity to charge lower prices from consumers. Mergers that lead to reductions in variable or marginal costs meet more easily the criterion of benefiting consumers than those that lead to reductions in fixed costs. Cost reductions resulting from anti-competitive reductions in output in the market cannot meet that criterion.

(110) Consumers may also benefit from new or improved products or services launched by means of efficiency gains in the sphere of R & D and innovation. For instance a joint venture company set up in order to develop a new product will likely meet the criterion of benefiting consumers.

(111) Efficiency gains may have an effect that will reduce the risk of anticompetitive coordination between undertakings in the market. The new undertaking will have the opportunity to lower its prices and increase its sales amount thanks to the efficiency gains resulting from the merger, thus it will not find involving an anticompetitive act with other undertakings profitable.

(112) The longer the time period in which efficiencies are materialized the less importance and weight the Board assigns to them. In other words, in order to be considered as a counteracting factor against anticompetitive effects, the efficiencies gains should not take a long time to be realized.

(113) Whether efficiency gains will be passed on to consumers depends on the degree of competitive pressure on the undertaking to be created as a result of the merger exerted by other undertakings active in the market or by new entries. The greater the negative effects on competition created by a merger, the greater the efficiency gains that must be realized and passed on to consumers. Therefore, it is highly unlikely to provide, as a result of any merger, efficiency gains that are sufficient to counteract the anticompetitive effects of a merger leading to a monopoly or acquiring a market power approaching that of a monopoly.

6.2. Merger specificity

(114) In order for efficiency gains to be considered as a counteracting factor against anticompetitive effects, they must be a direct consequence of the merger under examination and it and cannot be achieved by another, less anticompetitive transaction. The obligation is on the parties of the merger under examination to prove in due time that there are no less anti-competitive concentrative transaction (for instance another merger) or non-concentrative transaction having the same characteristics (for instance a licensing agreement). The Board will only consider alternatives that are reasonably practical having regard to the realities of the market.

6.3. Verifiability

(115) Efficiency gains have to be verifiable by the Board. In other words, the Board must be sufficiently confident that the efficiency gains claimed will absolutely be materialized and be adequate in terms of scope to counteract anticompetitive effects. The more precise the demonstrated by the parties concerning efficiency gain claims are, the more confident the Board will be and thus include those points into its assessment. Therefore efficiency gains and the resulting benefit to consumers should therefore be demonstrated in a quantitative way as much as possible. When the necessary digital data are not available to demonstrate efficiency gains quantitatively, parties may make an estimation about the size of the efficiency gains. However, these estimations should be verifiable by the Board. The board will not take into account efficiency gain claims that are marginal, exaggerated and baseless.

(116) Information showing whether efficiency gains that will ensure that the Board will authorize the merger is generally in the possession of the merging parties. Therefore the burden of proof to demonstrate that the claimed efficiencies are merger-specific and benefit consumers is on merging parties.

(117) Evidence supporting efficiency claims includes, in particular, internal documents that were prepared by the management before the merger, reports prepared for partners or financial markets or results regarding similar issues from past example cases.

7. FAILING FIRM DEFENSE

(118) The Board may clear a merger that creates anticompetitive effects if one of the merging parties is a failing firm. The basic requirement is that the decrease in competition level in the market after the merger is not the result of the merger. In other words, if competition would be decreased in the absence of the merger at least as the same extent as when the merger is allowed; it means this basic requirement is fulfilled.

(119) The Board uses the following three criteria assessing the failing firm defense: First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative way than the merger under examination. Third, if the merger is not cleared, the assets of the allegedly failing firm would inevitably exit the market.[13] It is for the merging parties to demonstrate that those three criteria are fulfilled concerning the merger.

[13]The first criterion implies exit by the allegedly failing firm without being subject to an acquisition and thus a decrease in the number of market participants; the third criterion implies the assets (equipment pool, brand, commercial credit) owned by the firm will exit the market.