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Lessons from the life and death of merger efficiency claims

Merger rationales v merger efficiencies

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Merger practitioners often express the view that the European Commission takes a sceptical view of merger efficiencies. However, in this article Lau Nilausen reviews the European Commission's ("EC") assessment of all benefits presented by merging parties in the past decade. While his review demonstrates EC's scepticism, it also shows the sources of efficiency that the EC has accepted in principle and highlights the obstacles that merging parties will need to consider if they wish to demonstrate them successfully.

Introduction

Companies implement transformational strategic changes through mergers and acquisitions. Corporate acquisitions often involve significant premia on pre-transaction valuations[2] of the target company in anticipation that the transaction will unlock new benefits, for example through so-called synergies.[3] However, such synergies are rarely recognised by competition regulators assessing the impact of M&A transactions. In this article, I analyse this potential friction based on the EC's (the Commission) assessments of merger benefits presented by the parties during the merger notification process over the period October 2012 to October 2023.

To explore this issue, I first contrast the Commission's definition of efficiencies with the commercial concept of synergies, or wider deal rationale. This explains some of the divide between the commercial and regulatory view of merger benefits and provides context for further analyses. I then summarise my findings from these analyses at a high level, and in subsequent sections provide more detailed analyses of the specific efficiency claims put forward by the merging parties and the Commission's assessment thereof.

Going into this exercise, anecdotal evidence and personal experience suggested to me that the Commission generally takes a sceptical view on merger efficiencies. My detailed analysis to some extent confirms this. However, it also i) shows that the Commission in principle accepts a number of different sources of efficiencies, and ii) highlights potential obstacles that merging parties will need to consider.

Deal rationale, synergies and efficiencies

The Commission explains in its Horizontal Merger Guidelines[4] that "it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers".[5] The Commission requires that efficiencies must be "substantiated" and "are likely to enhance the ability and incentive of the merged entity to act pro-competitively".[6] In practical terms, the Commission requires that

any such efficiencies i) benefit consumers, ii) are merger-specific, and iii) are verifiable.[7]

The Commission only considers efficiencies pro-competitive if these benefit customers in the specific market(s) in which the Commission has identified competition concerns. The Horizontal Merger Guidelines explain that "efficiencies may increase the merged entity's incentive to increase production and reduce prices, and thereby reduce its incentive to coordinate its market behaviour with other firms in the market" and that "Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation".[8] The Commission's benchmark for assessing efficiency claims is that customers are not worse off as a result of the merger.[9]

The Commission interprets merger-specificity such that "efficiencies are [ ] a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives".[10] The onus is on the merging parties to demonstrate efficiencies are merger-specific.

The verifiability criteria addresses whether "the Commission can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers".[11] Where possible, the parties should in a timely manner provide evidence (such as internal documents) quantifying the efficiencies.[12] When this is not possible, "it must be possible to foresee a clearly identifiable positive impact on customers, not a marginal one".[13]

The Commission's application of these filters has important implications for the difference between efficiencies that the Commission may include in its analysis and synergies that may feature in the parties' rationale for pursuing the deal in the first place. Specifically:

a. The consumer benefit criterion leads the Commission to disregard all synergies which are not likely to result in lower prices, increased production, or improved quality for consumers. Whereas an enhanced ability to compete through such parameters may be a merger rationale, cost reductions that are not passed on to consumers may also motivate mergers. By design, the Commission's test thereby only includes a subset of potential merger benefits.

b. In principle, the parties and the Commission should agree that only merger-specific benefits may count as synergies or efficiencies motivating mergers. In practice, this may not be the case though. For example, the Commission has dismissed merger-specificity on the basis that it could not "rule out alternatives just because they might be more cumbersome or expensive".[14] Merging parties would rationally attach a value to such additional complexity and expense.

c. Mergers are commercial bets that the combined entity can achieve results unavailable to the standalone entities. Acquisitions at prices attracting on average approximately 30% premiums on pre-announcement valuations suggest a strong conviction on the acquirer's part that the transaction can unlock significant upside.[15] However, such forward looking assessments reflecting the business acumen of the parties may not be documented (or documentable) to the standard required by the Commission to consider these verifiable. This will particularly be the case for transformational mergers seeking to unlock investment or innovation rather than incrementally improving existing operating performance.

Importantly, the Commission explains that "the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them".[16] The costs of post-merger integration will naturally occur in the years immediately following the completion of the merger whereas benefits (particularly from investments) may only occur several years into the future.[17] This

biases against recognition of consumer benefits for no reason other than the inherent uncertainty associated with forecasting.

The Commission acknowledges that "in the long run, fixed costs may affect a firm's strategic decision analysis, too, e.g. the production capacity, which, in turn, might impact the subsequent (short run) price formation mechanism. In such a scenario, fixed costs may also be passed on".[18] The Commission's focus on short-term pricing incentives only (as discussed further below) therefore similarly biases against transactions that may unlock potential long-term benefits for consumers.

Part of the disconnect between synergies as viewed through a commercial lens and efficiencies as viewed through a regulatory lens is therefore a feature of the regulatory regime whereby some synergies are excluded by design. However, there remains an overlap between commercial synergies and regulatory efficiencies. I analyse the logic behind the Commission's assessment of these in the following sections.

Implications of Commission practice for assessing efficiencies

Of all the potential economic benefits that a merger may create for the merging entities, consumers and society at large, the Commission's analytical framework includes only those that may reduce prices for consumers in the short run, could not be achieved any other way than through the transaction, and meet certain standards of proof for verifiability. This has different implications for the Commission as a regulator and for the parties engaging with the Commission.

The Commission is by design only concerned with the question of whether efficiencies meeting the abovementioned criteria are sufficient to counteract any concerns it may otherwise have about the impact of the transaction on competition in the affected markets. However, the Commission's review standard for efficiencies means that the absence of efficiencies meeting this standard cannot serve as an indicator that the merger is motivated by anti-competitive ends or that consumers will not benefit in the long run. This is especially so for R&D benefits that are subject to inherent uncertainty and are difficult to quantify. This militates against proposals by some commentators to place the burden of proof on the merging parties to show that their transaction provides verifiable benefits to consumers.[19]

For the parties engaging with the Commission, it is key to recognise that the Commission's competitive assessment will only accept a subset of the benefits that motivate the merger, even if the parties expect these benefits to accrue to consumers. It may nonetheless be helpful to articulate the full range of benefits underpinning the merger rationale to help dispel theories that the merger is motivated by anticompetitive objectives. However, any submission of efficiencies should be limited to those that fall within the Commission's framework.

Thankfully, the Commission's framework for assessing efficiencies is more nuanced than one might perceive at a first glance. On the one hand, the track record of efficiency claims is discouraging with all efficiency claims dismissed in 23 of the 31 mergers in which the parties raised efficiency claims during my assessment period. On the other hand, the Commission accepted that some of the claimed efficiencies in principle may be relevant in 21 of the 31 cases, even if some of these ultimately did not meet all the Commission's requirements. The Commission's reasoning across all cases therefore provides guidance on the kind of claims and evidence which may succeed. I discuss these in detail in the following sections but summarise a few high-level themes here.

The Commission's framework requires a link between efficiencies and consumer prices. The Commission's reasoning emphasises a presumption that prices are set by reference to variable costs. The Commission has

accepted such efficiencies originating from elimination of double marginalisation and convergence to the most favourable pre-merger purchasing terms and/or technical solutions. The Commission has moreover accepted in principle that mergers may create variable costs savings from combining procurement volumes.

The Commission repeatedly argues that fixed cost savings are unlikely to meet its criteria. However, the Commission recognises that capacity constrained suppliers cannot increase sales by cutting prices and therefore have no incentive to do so regardless of their variable cost levels. This creates scope for fixed cost efficiencies as long as these relieve binding capacity constraints.

It may be possible to demonstrate that other cost efficiencies specific to the market in question will be passed on to consumers. To do so, it appears critical to be able to show that the parties as a matter of fact take these costs into account when setting prices, even if the costs as a matter of accounting may be treated as a fixed cost. The more indirect the link between the cost under assessment and prices, the more difficult this task will be.

Verifiability requires support in historical data, internal documents, participants in the market investigation, or third-party data, though even such sources may not be sufficient.

Ultimately, it will always be difficult for an efficiency analysis alone to address a competition concern. However, articulating efficiencies within the wider merger rationale may illustrate why there may be no basis for concern in the first place. Given the strictures of the Commission's efficiency assessment framework, this may be the true value of efficiency analyses.

Introduction to analysis of types of efficiencies

The Commission does not categorise efficiencies. However, to understand the Commission's assessment of efficiency claims, I consider it helpful to anchor the analysis in high-level cost concepts recognised in other parts of the Commission's decision precedent. These cost concepts reflect different causal links between individual cost categories and pricing. Specifically:

a. **Variable costs** are "those which vary depending on the quantities produced".[20]

b. **Long Run Average Incremental Costs (LRAIC)** are "the product-specific costs borne by the firm in the long term associated with total production of the product".[21] In addition to variable costs, these may include costs of capacity, fixed costs of production, and R&D.

c. **Fully Allocated Costs** (or Average Total Costs (ATC), or "LRAIC+") is LRAIC plus an allocation of common costs. In turn, "'Common costs' are shared costs for products or services produced jointly which are not attributable to any single product or service".[22] Such costs include Sales and General Administrative (SG&A) costs.

Cost categories hence range from directly related to sales (variable costs), indirectly related to sales (product specific but not directly variable), or not related at all (common costs). As will become clear from the analysis of different types of costs below, this informs the Commission's assessment, even if the Commission does not explicitly frame it in these terms.

In practical terms, some efficiencies may have elements of more than one of the abovementioned cost categories. My categorisation of efficiency types is therefore subject to a degree of uncertainty. This is even more so because redactions in the Commission's decisions at times makes it difficult to understand the exact nature of the efficiencies claimed. In some cases, these informational challenges have been insurmountable, and I have therefore excluded certain efficiency claims from my analysis.

As explained above, the Commission only includes efficiencies in its competition assessment if these i) provide consumer benefits, ii) are merger-specific, and iii) are verifiable. The first two of these are related and rely on economic reasoning. I therefore consider these together throughout. Verifiability is a separate issue around the type of evidence required. I summarise briefly which types of evidence the Commission has accepted in a separate section at the end.

Variable costs

The Commission explains that "cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers".[23] The Commission explains the underlying logic in as follows: "According to economic theory undertakings maximise their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output and marginal cost is the change in total cost resulting from producing that additional unit of output. It follows from this principle that as a general rule output and pricing decisions of a profit-maximising undertaking are not determined by its fixed costs (i.e. costs that do not vary with the rate of production) but by its variable costs (i.e. costs that vary with the rate of production)."[24]

The Commission has indeed accepted merger efficiencies related to variable costs. I discuss different sources of such efficiencies below.

Elimination of double marginalisation

A variant of variable cost reductions relates to the elimination of double marginalisation in mergers between upstream suppliers and downstream buyers. Double marginalization occurs when a downstream firm applies a mark-up to the price it pays for its inputs, which in turn also includes a mark-up. The Commission explains that "a vertical merger allows the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger" which "may allow the vertically integrated firm to profitably expand output".[25] The intuition is that the merged entity will have an incentive to lower prices downstream as downstream prices will include only a mark-up on upstream variable costs rather than upstream variable costs plus a mark-up. Elimination of double marginalisation is thereby equivalent to a reduction in variable costs for the downstream entity.

The Commission accepted benefits from elimination of double marginalisation in *T-Mobile NL/Tele2 NL*[26] and *Orange/Jazztel*.[27] In both cases, one merging party supplied the other one a wholesale input priced on a per-unit basis. The Commission found that the effect was merger specific as alternatively structured contracts would be "very uncommon" and "particularly difficult" to agree.[28]

In *Asl/ArianeSpace*, the Commission rejected economic modelling submitted by the parties to show efficiencies from the elimination of double marginalisation.[29] The challenge seems more related to the quantification of any benefits than that such benefits in principle may arise.[30]

In *Telia/Bonnier*[31] and *LSEG/Refinitiv*,[32] the Commission rejected efficiencies from elimination of double marginalisation on the basis that the parties' market penetration was so high that lower prices would not expand sales and that the parties therefore had no incentive to pass on the benefits of the removal of double marginalisation. This reasoning links the incentive to reduce prices to the ability to increase sales volumes. A capacity constrained supplier would be equally unable to increase volumes and would therefore (by the same logic) lack the incentive to cut prices even if these exceed marginal costs of production. This may have implications for the assessment of capacity related efficiencies, as discussed below.

The Commission dismissed benefits from elimination of double marginalisation in *PKN Orlen/Grupa Lotos* on the basis that pricing in the market was set at import parity levels.[33] This reasoning is interesting as it presumes no link between prices and costs at all and takes prices as exogenously given. This in turn raises questions about whether the transaction is capable of any anti-competitive effects in the first place.

The Commission rejected benefits from elimination of double marginalisation in *Wieland/Aurubis/Schwermetall* on the basis that "Wieland already has joint control over Schwermetall" and therefore "already benefits from the typical advantages of vertical integration".[34]

In summary, there is a *prima facie* strong case for efficiencies originating from elimination of double marginalisation. There may be cases in which such efficiencies may not be passed on to consumers. However, such cases may raise other questions about whether there is a competition problem to resolve in the first place.

Best-in-class savings

Mergers may reduce variable costs by allowing the parties to align input prices to the lowest paid between the two or by converging on the best technical solutions applied by each party.

The Commission accepted this in *FCA/PSA*,[35] and in *GE/Alstom*.[36] However, the Commission dismissed such savings in *Ineos/Solvay* on the basis that they "could be achieved by each party to the JV on stand-alone basis".[37] In *PKN Orlen/Grupa Lotos,* the Commission argued that assuming "similar prices for Lotos as Orlen currently achieves" may "result in an overestimation of such synergies".[38] In *Tata/Thyssenkrupp*, the Commission dismissed benefits of migrating to each party's best practices on the basis that the parties had sufficient scale individually to implement best practices.[39]

Any economic entity should be motivated to minimise its input costs. This supports a presumption that i) the pre-merger entities have sought to extract the best possible supplier terms as standalone entities, and ii) that the merged entity will migrate its purchases to its cheapest pre-merger suppliers or to seek similar terms from other suppliers. I therefore see no obvious conceptual basis for the Commission's dismissal of such benefits in certain cases.

Procurement scale savings

The Commission explains that "Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale".[40] Mergers may thereby reduce variable costs by allowing the parties to negotiate lower input prices as a consequence of their combined higher purchasing volumes.

The Commission accepted that mergers may give rise to such efficiencies in principle but rejected specific efficiencies claimed based on lack of verifiability in *Ineos/Solvay*,[41] and in *Siemens/Alstom*.[42]

The Commission rejected merger-specificity for such efficiencies in certain cases. Specifically, the Commission argued in *FCA/PSA*[43] and in *Olympic/Aegean*[44] that the parties could realise such savings through other manners of cooperation, and in *Tata/Thyssenkrupp*[45] and in *PKN Orlen/Grupa Lotos*[46] that the parties already operated at substantial scale and therefore independently would benefit from favourable input costs. Whether alternative modes of cooperation are practically feasible is a factual, industry-specific matter. In relation to whether all scale benefits have been exhausted by the parties individually, I am not aware of any basis for presuming that this is the case. The Commission's concerns in that regard therefore seem to ultimately be a matter of evidence.

The Commission finally also dismissed that such efficiencies might benefit consumers in

certain cases. Specifically, the Commission argued i) in *Olympic/Aegean* that they were not demonstrated to be "route-specific or [ ] would benefit passengers in the routes of concern",[47] and ii) in *PKN Orlen/Grupa Lotos* that "prices [ ] are set at import parity" and therefore would not reflect these costs.[48] Of these arguments, the second one is most interesting as it recognises that market prices may be entirely independent of a particular supplier's variable cost of production. Whereas that reduces the scope for efficiencies, it also reduces the scope for market power.

Customer acquisition costs

A merger may reduce the costs that the merging parties otherwise would incur to win customers.

The Commission dismissed such benefits in *Hutchison/Wind* on the basis that even though the combined entity would incur lower customer acquisition costs in total, the cost of acquiring an individual customer would be unchanged such that the combined entity's pricing incentives towards new customers would be unchanged.[49] The reduction in customer acquisition costs is therefore equivalent to a reduction in fixed costs, as discussed below.

In *Siemens/Alstom*, the Commission dismissed efficiency claims in relation to the cost of preparing bids on the basis that these are "generally sunk by the time the bid price is determined (as these are incurred in the period leading to the final bid) and hence a change in these costs is not expected to change the final price set by the bidding supplier".[50] The Commission further considered efficiencies in relation to costs originating from the sales process in case a bid is won, acknowledging that "a reduction in these costs may induce a certain reduction in the bid price".[51] It is strictly speaking true that costs which are incremental to a bid when the bidding process commences may have become irreversible by the time that the bid is submitted and therefore should no longer influence the bidder's last minute pricing incentives. However, that presumes that companies are willing to repeatedly enter bidding processes knowing that these have a certain cost but then ignoring some of these costs when setting the price which is the sole purpose of the bidding process. It may be the case that the parties in question behaved that way, but it is not clear that they can be presumed to do so.

In *Siemens/Alstom*, the Commission also dismisses relevance of such savings on the basis that "the cost saving appears to relate more to the loss of competition between the merging parties than to a genuine reduction in the bidding cost per company in any given tender".[52] The Commission makes a similar argument in *Hutchison/Wind*.[53] This suggests that the Commission is unlikely to accept such efficiencies even in principle, as further supported by the Commission's guidance that "Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers".[54]

General variable costs

In *Tronox/Cristal*, the description of variable cost savings is not sufficiently granular for me to link these to one of the categories above. The Commission dismissed these efficiencies on the basis that i) certain cost savings were specific to plants outside the EEA and that "The Notifying Party has not demonstrated how the reduction in variable costs at these plants would benefit EEA customers",[55] and ii) certain cost savings "do not improve the choice of suppliers available to consumers relative to the pre-merger situation, since consumers could also have purchased from the firm with lower costs absent the merger".[56] This is a helpful reminder that efficiencies, however valuable they may be, are only relevant to the Commission's assessment if related to the specific market for which the Commission has concerns. The Commission's argument that consumers could buy from the supplier with the lowest cost of production absent the merger does not address the benefits that

may arise for competition and pricing from lower costs becoming more broadly available.

Capacity costs

The Horizontal Merger Guidelines explain that "efficiencies may increase the merged entity's incentive to increase production".[57] The ability to produce in turn depends on production capacity. The operating economics of a combined entity may i) enable the continued operation of assets that otherwise would be retired, ii) improve capacity utilisation through the withdrawal of excess capacity, or iii) enable the expansion of capacity. I consider these types of efficiencies below.

Retention of capacity

In *Nynas/Shell*, the parties submitted that the transaction would create efficiencies by increasing production capacity and reducing reliance on more costly external sources of supply.[58] The Commission accepted that these efficiencies would benefit consumers against a counterfactual in which the relevant "capacity would entirely disappear and EEA demand would have to be partly satisfied by more costly imports".[59] The Commission explained that i) "binding capacity constraints in the absence of the notified transaction would [ ] reduce Nynas' incentives to compete aggressively",[60] ii) "Nynas would benefit from lower variable costs" than "the variable costs of external sources that it would have to rely upon in the absence of the notified transaction" whereby "Nynas' cost savings will be likely reflected in its prices",[61] and iii) that "Nynas indeed plans to significantly expand its EEA sales".[62] The Commission found that the relevant capacity effects were merger specific based on i) absence of viable alternative expansion plans,[63] ii) alternatives being placed outside of the EEA,[64] and iii) the limited potential impact of marginal capacity improvements otherwise possible.[65]

The Commission's reasoning in *Nynas/Shell* raises two particularly interesting issues.

First, the Commission implicitly acknowledges that relieving a capacity constraint is pro-competitive as it removes barriers for suppliers to bid aggressively for new volumes. This shows that efficiencies may not only relate to variable costs but also to any cost category enabling the investments needed to avoid or release binding capacity constraints.

Secondly, the Commission implicitly acknowledges that the alternative to investments in inhouse supply may be sourcing at higher marginal costs from external suppliers. The logic here is effectively parallel to that of elimination of double marginalisation: the price paid to an external supplier would need to cover all of its costs of production and investments whereas the Commission excludes irreversible investment costs from its assessment of the cost of inhouse supply such that the variable costs of inhouse supply are relatively low. A transaction pivotal to enabling inhouse supply may thereby create a relevant efficiency.

More efficient use of capacity

In *UPS/TNT*, the parties submitted that the transaction would create "economies of scale and re-optimized routes across a combined network".[66] The parties made similar claims in *FedEx/TNT*.[67] The Commission accepted these efficiencies in both cases.[68] The Commission accepted merger-specificity in *UPS/TNT* on the basis that "no agreements of this scale exist currently in the market" and that "such arrangements could bring significant additional costs, less flexibility and more risk",[69] and adopted a similar reasoning in *FedEx/TNT*.[70]

Interestingly, the Commission treated these cost savings as variable costs,[71] despite any individual delivery being *prima facie* unlikely to result in any meaningful direct costs for the parties. This is consistent with the CJEU's observation that "an item of cost is not fixed or variable by nature" and that variable costs are those "which vary depending on the quantities produced".[72] A cost may therefore be variable for the purposes of determining

efficiencies (and pricing incentives more broadly) even if that cost does not change in response to the sale of a single unit of output but does change in response to a commercially relevant change in volumes.[73]

In *Hutchison Austria/Orange Austria* and *Hutchison UK/Telefonica UK*, the parties submitted that combining their respective networks would increase network capacity, quality and speed and reduce network congestion.[74] The Commission accepted in *Hutchison UK/Telefonica UK* "that a reduction in incremental costs of network expansions increases, all else being equal, the incentives of firms to engage in capacity expansions",[75] but considered that the parties overestimated the magnitude of congestion,[76] and that any such benefits in any event were insufficient to offset the Commission's concerns.[77] In *Hutchison Austria/Orange Austria*, the Commission similarly accepted that alleviation of capacity constraints may enable more aggressive pricing but dismissed such benefits on the basis that the parties did not evidence that such constraints were binding pre-merger.[78] The Commission finally dismissed merger specificity in both cases by reference to the parties' ability to engage in network sharing agreements and other kinds of network optimisation, even if less attractive than a merger.[79] Despite the Commission's dismissal of these efficiencies, the Commission's logic confirmed that capacity expansions relieving supply constraints may be valid merger efficiencies.

In *Siemens/Alstom*, the parties submitted that the transaction would enable "optimisation of production capacity" with "a reduction in fixed costs of underutilised production sites".[80] The parties made similar submissions in *Outokumpu/Inoxum*[81] and *PKN Orlen/Grupa Lotos*.[82] The Commission dismissed such efficiencies on the basis that they did not relate to the marginal costs determinative of incentives to expand production and lower prices.[83] In contrast to the mobile mergers mentioned in the paragraph immediately above, the potential efficiencies here did not work to relieve capacity constraints. This may explain why the Commission did not accept them even in principle.

In *Tronox/Cristal*, the parties submitted that the transaction "would increase the Parties' effective capacity" based on "the sharing of best practises" which only Tronox had been able to implement.[84] The Commission dismissed this efficiency claim as i) not relevant for the plants principally serving EEA consumers,[85] ii) unrelated to product markets for which the Commission had concerns,[86] iii) of uncertain scope for the products relevant to the Commission's concerns,[87] and iv) not sufficiently timely.[88] The Commission dismissed merger specificity on the basis that i) Cristal in theory would be able to achieve Tronox's level of efficiency without the transaction,[89] and ii) Tronox already could use its expertise to optimise its own plants.[90] The Commission's reasoning in relation to merger specificity demonstrates a reassuring faith in the power of competition, consistent with its guidance that "Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation".[91] On the other hand, it invokes a purely hypothetical ability of a merger party to improve a measure of performance despite past failures to do so.

Expansion of capacity

Merger parties in the telecommunications space have submitted that their transactions would enable network expansions in the case of *Orange/Jazztel*,[92] *Vodafone/Liberty Global*,[93] *Hutchison UK/Telefonica Ireland*,[94] *Hutchison Austria/Orange Austria*,[95] and *Telefonica/E-Plus*.[96] The Commission has dismissed that such expansions would benefit consumers for a plethora of reasons, including i) immateriality,[97] ii) that savings related to fixed rather than variable costs,[98] iii) absence of a causal link between cost savings and speedier roll-out,[99] and iv) that consumers could access the services through other suppliers.[100] The Commission has dismissed merger specificity by reference to i) potential co-deployment/network sharing as an alternative,[101] ii) pre-existing incentives for

network expansion,[102] iii) pre-existing spectrum rights enabling network expansion,[103] and iv) availability of wholesale access options as an alternative to deployment of own networks.[104] In short, it seems difficult to convince the Commission that a transaction may unlock investments in new supply capacity. This contrasts with the Commission's in-principle acceptance of potential benefits from incremental improvements to existing capacity, as set out in the examples above.

In *Wieland/Aurubis/Schwermetall,* "the Notifying Party stated that following the Transaction it intends to increase the *Schwermetall*'s capacity".[105] The Commission rejected that such an increase would be merger specific on the basis that existing capacity was sufficient to meet the parties' production plans.[106] This again reiterates that it is capacity constraints that create the causal link between otherwise fixed costs of investments and the Commission's assessment of pricing incentives. Nonetheless, it is unclear why the merged entity would invest in additional capacity if not to pursue increased sales.

Fixed cost of production

Costs may be specific to a product but not vary depending on production volumes, for example costs related to the operation of a manufacturing site. Mergers may reduce such costs, for example by consolidating production on fewer sites. I consider these types of efficiencies below.

Scale advantages/elimination of duplication

The parties claimed efficiencies from elimination of overlapping roles and benefits of shared assets in *GE/Alstom*,[107] *Telia/Bonnier*,[108] *Telefonica/E-Plus*,[109] and *Olympic/Aegean*.[110] The Commission dismissed these by reference to a lack of connection between the relevant cost categories and the parties' pricing.[111] This is consistent with the Commission's framework to only consider efficiencies likely directly passed on to consumers.

The Commission rejected similar efficiencies in *Ryanair/Aer Lingus* on the basis that cost reductions might require "a possible lessening in service quality for passengers".[112] Interestingly, the Commission did not reject efficiencies on the basis that they were of a fixed cost nature. Whereas that may reflect ambiguity around what costs are fixed and variable for an airline, the Commission did draw such a distinction in *Olympic/Aegean*.

The reference to concerns around potential quality reductions opens up different conceptual problems. For example, how does one measure quality? Is a quality reduction necessarily bad if it enables lower prices? After all, Ryanair's business performance suggests that many consumers are willing to opt for a leaner product in exchange for lower prices.

The Commission has also challenged this type of efficiencies by reference to merger-specificity. Specifically, the Commission i) challenged the importance of scale for the ability to achieve savings in *Ryanair/Aer Lingus*,[113] ii) found that "a significant share" of the envisaged efficiencies could be achieve on a stand-alone basis in *GE/Alstom*,[114] and iii) invoked the ability to generate substantially similar savings through network-sharing agreements in *Hutchison Austria/Orange Austria*[115] and *Hutchison UK/Telefonica Ireland*.[116]

Improving ability and incentives to invest

The parties argued that fixed cost efficiencies would enable investments for the benefit of consumers in *Hutchison/Wind*,[117] *Hutchison/Telefonica,*[118] and *Telefonica/E-Plus*.[119] The Commission did not dismiss the claims in principle. Each case raised slightly different issues.

In *Hutchison/Wind*, the Commission accepted that "in principle, offering a better network to consumers would benefit consumers",[120] but dismissed the efficiency

claim by reference to lack of merger-specificity due to the ability to realise investments through network sharing.[121]

In *Hutchison/Telefonica*, the Commission explained that "For a firm with more subscribers to have a greater incentive to make incremental investments, the incremental profit from such investments would need to increase with the scale of the firm",[122] but dismissed the efficiency claim inter alia on the basis that "the Notifying Party's studies on cash flow constraints allowed no inferences on the effect of fixed costs savings from the Transaction on investment in that specific case".[123]

In *Telefonica/E-Plus,* the Commission dismissed submissions from the parties that pricing in fact would reflect fixed cost savings,[124] and dismissed merger-specificity by reference to the ability to generate efficiencies from network sharing arrangements.[125]

Merger-specificity aside, the telecoms mergers above illustrate how difficult it can be to convey such efficiencies to the Commission, even with multiple analyses submitted by the merging parties. This may perhaps reflect the weaker causal link between savings and consumer benefit for this type of efficiency than for e.g. investments relieving capacity constraints, as discussed above.

The Commission's scepticism towards such efficiencies is further illustrated by *PKN Orlen/Grupa Lotos*. In this case, the parties argued that the transaction would improve their access to capital and thereby enable R&D.[126] The Commission dismissed that the parties had any problem accessing capital in the first place.[127] The Commission then dismissed merger-specificity on the basis that any such potential effect could be achieved by merging with non-competing businesses.[128]

Monetisation of tax losses

In *Hutchison UK/Telefonica Ireland*, the parties submitted that "the merger would lead to economies of scale" which would "permit the merged entity to price more aggressively than in the absence of the merger".[129] Part of these benefits derived from Hutchison UK's "un-recouped tax deductions [which] can be used in order to reduce future tax payments".[130] The Commission dismissed this inter alia on the basis of lack of merger-specificity as "if Three were to become profitable it could apply the tax reduction resulting from the losses in previous years".[131]

Access to the value of carried-forward tax losses is a straightforward merger rationale.[132] It is not clear how this can be dismissed by reference to speculative future profitability of the party whose poor profitability created the losses in the first place. Moreover, monetisation of tax losses should improve cash flows, and may therefore relieve investment constraints (if such exist). It therefore seems that there might be scenarios in which tax losses could be a source of merger efficiencies.

R&D and know-how

The Commission explains that "Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation. A joint venture company set up in order to develop a new product may bring about the type of efficiencies that the Commission can take into account".[133]

In *Aurubis/Metallo*, the parties submitted that the transaction would improve quality of metal scrap recovery by combining the parties' know-how and technologies.[134] The Commission accepted this.[135] However, the Commission has rejected R&D-related efficiencies on the basis that i) the party gaining access to IP/know-how could develop an alternative independently,[136] ii) the parties could have reached a licensing agreement,[137] iii) the parties provided insufficient evidence as to what innovation might occur,[138] iv) elimination of duplicative research efforts may hurt consumer choice,[139] and v) there

would be a lack of passing-on of innovation to consumers.[140]

The Commission's abovementioned reasons for dismissing R&D related efficiencies illustrate an inherent friction between the Commission's framework for assessing efficiencies and the nature of intangible assets developed through R&D or commercial experience. On the one hand, "The Commission regards dynamic competition in R&D as an important mechanism of economic growth",[141] and reasonably so. On the other hand, such competition would need to be "timely".[142] However, the Commission's recognition that "Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes" necessarily implies that such innovations must confer advantages that are not easily replicable in the short term.[143] There is therefore no clear basis for presuming that R&D synergies can be replicated in a timely manner or that any party has any natural incentive to share existing IP through licensing.

It seems reasonable to expect companies to be able to articulate which R&D projects would benefit from the proposed transaction if such benefits were part of the deal rationale. However, it seems prima facie impossible to predict the results of those efforts and thereby assess whether duplication of effort rather than pursuit of different projects would lead to greater consumer benefit. The kind of certainty that the Commission is seeking therefore seems an impossible hurdle in the context of such efficiencies.

SG&A costs

SG&A costs are the general costs of operating an entity which are generally not specifically related to any product. A merger may allow for reductions in such costs by eliminating duplicative roles as the combined entity will only need one CEO, one investor relation department, etc.[144]

The Commission dismissed such efficiencies as irrelevant due to the absence of a direct link to pricing in *FCA/PSA*,[145] *UPS/TNT*,[146] *Telefonica/E-Plus*,[147] and *PKN Orlen/Grupa Lotos*.[148] As a matter of economics, there is no clear link between costs that are not specific to any products and the pricing of such products.[149] It is therefore unsurprising that the Commission presumes that such efficiencies would not translate into lower prices.

Verifiability

Claims for efficiencies clearing the hurdles described above in relation to consumer benefit and merger specificity also need to clear the final hurdle of verifiability, i.e. demonstrate that "the Commission can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers".[150] Most rejections of verifiability relate to insufficient evidence and summarising these would not add value. I therefore focus the discussion below on types of evidence that did meet the Commission's standards, or which the Commission suggests might do so.

The Commission has accepted verifiability of efficiencies based on i) historical data (*T-Mobile NL/Tele2 NL* and *Orange/Jazztel*),[151] ii) internal documents (*Nynas/Shell*, *UPS/TNT*, *FedEx/TNT*, and *Hutchison Austria/Orange Austria*),[152] iii) inputs from participants in the market investigation (*UPS/TNT*),[153] and iv) external data (*Nynas/Shell*).[154]

The availability of such evidence may depend on the nature of the transaction. I would expect merging parties with a history of performance in well-established markets more likely to have access to such information than parties seeking a transformational transaction across new and evolving markets. This may pose additional challenges for parties in situations in which dynamic markets may induce the Commission to test more novel theories of harm.

1 Lau Nilausen is a Senior Vice President at Compass Lexecon. The author gratefully acknowledges the contribution of Finnian Spratt. The author thanks Valérie Meunier and Andrew Tuffin for their comments. The views expressed in this article are the views of the author only and do not necessarily represent the views of Compass Lexecon, its management, its subsidiaries, its affiliates, its employees or its clients.

2 Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings, 7th Edition, page 321, Table 8.3.

3 Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings, 7th Edition, page 136*ff*, Synergy.

4 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

5 Horizontal Merger Guidelines, paragraph 76.

6 Horizontal Merger Guidelines, paragraph 77.

7 Horizontal Merger Guidelines, paragraph 78.

8 Horizontal Merger Guidelines, paragraphs 82 and 81, respectively.

9 Horizontal Merger Guidelines, paragraph 79.

10 Horizontal Merger Guidelines, paragraph 86.

11 Horizontal Merger Guidelines, paragraph 86.

12 Horizontal Merger Guidelines, paragraph 86.

13 Horizontal Merger Guidelines, paragraph 86.

14 Case M.6497 Hutchison Austria/Orange Austria, paragraph 417.

15 Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings, 7th Edition, page 321, Table 8.3. I note that transactions taking companies private attract similar premia to transactions involving strategic buyers. The fact that a buyer is willing to pay a premium on pre-transaction valuations therefore does not prima facie suggest any anti-competitive motive behind the transaction.

16 Horizontal Merger Guidelines, paragraph 83.

17 Case M.7612 Hutchison UK/Telefonica UK, paragraphs 2367 and 2454.

18 Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07), paragraph 52.

19 See e.g. How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews, ProMarket, Tommaso Valletti, 28 June 2021: "But then we pass the ball to them, with the rebuttable part: 'Can you prove that this merger will benefit consumers and that it is the only way to bring these benefits?' If not, the merger is blocked."

20 Case C-62/86, AKZO v Commission EU:C:1991:286, paragraph 71.

21 Case T-336/07 Telefónica v Commission EU:T:2012:172, paragraph 238.

22 Commission Recommendation of 11 September 2013, on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU), paragraph 6(b).

23 Horizontal Merger Guidelines, paragraph 80.

24 Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, paragraph 98.

25 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 55. (Vertical Merger Guidelines).

26 Case M.8792 T-Mobile NL/Tele2 NL, paragraphs 892 to 898.

27 Case M.7421 Orange/Jazztel, paragraphs 732 and 741 to 750.

28 Case M.7421 Orange/Jazztel, paragraph 744. Case M.8792 T-Mobile/Tele2, paragraph 898.

29 Case M.7724 ASL/ArianeSpace, paragraph 444.

30 Case M.7724 ASL/ArianeSpace, paragraphs 355 and 359.

31 Case M.9064 Telia/Bonnier, paragraph 1294.

32 Case M.9564 LSEG/Refinitiv, paragraph 2523.

33 Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2049.

34 Case M.8900 Wieland/Aurubis/Schwermetall, paragraph 196.

35 Case M.9730 FCA/PSA, economic annex, paragraph 104.

36 Case M.7278, GE/Alstom, paragraph 1320.

37 Case M.6905 Ineos/Solvay, paragraph 1139.

38 Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2045.

39 Case M.8713 Tata/Thyssenkrupp, paragraph 1447.

40 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), paragraph 217.

41 Case M.6905 Ineos/Solvay, paragraph 1147 and 1149.

42 Case M.8677 Siemens/Alstom, paragraph 1256 to 1258.

43 Case M.9730 FCA/PSA, economic annex, paragraph 104.

44 Case M.5830 Olympic/Aegean I, paragraphs 1784 and 1792.

45 Case M.8713 Tata Steel/Thyssenkrupp, paragraph 1445.

46 Case M.9014 PKN Orlen/Grupa Lotos, paragraphs 2044 and 2045. See also paragraph 2041.

47 Case M.5830 Olympic/Aegean I, paragraph 1797.

48 Case M.9014 PKN Orlen/Grupa Lotos, paragraphs 2046 and 2047.

49 Case M.7758 Hutchison/Wind, paragraphs 1399.

50 Case M.8677 Siemens/Alstom, paragraph 1261.

51 Case M.8677 Siemens/Alstom, paragraph 1262.

52 Case M.8677 Siemens/Alstom, paragraph 1261.

53 Case M.7758 Hutchison/Wind, paragraphs 1399.

54 Horizontal Merger Guidelines, paragraph 80.

55 Case M.8451 Tronox/Cristal, paragraph 460.

56 Case M.8451 Tronox/Cristal, paragraph 464.

57 Horizontal Merger Guidelines, paragraphs 82 and 81, respectively.

58 Case M.6360 Nynas/Shell, paragraphs 443 and 444.

59 Case M.6360 Nynas/Shell, paragraph 463. See also paragraph 465.

60 Case M.6360 Nynas/Shell, paragraph 467.

61 Case M.6360 Nynas/Shell, paragraph 468.

62 Case M.6360 Nynas/Shell, paragraph 471.

63 Case M.6360 Nynas/Shell, paragraphs 459 and 460

64 Case M.6360 Nynas/Shell, paragraph 412.

65 Case M.6360 Nynas/Shell, paragraph 416.

66 Case M.6570 UPS/TNT, paragraphs 869.

67 Case M.7630 FedEx/TNT, paragraph 511.

68 Case M.6570 UPS/TNT, paragraph 897. Case M.7630 FedEx/TNT, paragraph 563.

69 Case M.6570 UPS/TNT, paragraph 910.

70 Case M.7630 FedEx/TNT, paragraphs 544 to 549.

71 Case M.6570 UPS/TNT, paragraph 897. Case M.7630 FedEx/TNT, paragraph 563.

72 Case C-62/86 AKZO v Commission EU:C:1991:286, paragraphs 94 and 71, respectively.

73 See also Nilausen, L. (2022), "Navigating potential inconsistencies in assessments of pricing incentives", The Analysis, Compass Lexecon.

74 Case M.6497 Hutchison Austria/Orange Austria, paragraph 409. Case M.7612 Hutchison UK/Telefonica UK, paragraph 2338.

75 Case M.7612 Hutchison UK/Telefonica UK, paragraph 2536.

76 Case M.7612 Hutchison UK/Telefonica UK, paragraph 2503.

77 Case M.7612 Hutchison UK/Telefonica UK, paragraphs 2427, 2454, 2536 and 2538.

78 Case M.6497 Hutchison Austria/Orange Austria, paragraph 426.

79 Case M.6497 Hutchison Austria/Orange Austria, paragraphs 417 and 419. Case M.7612 Hutchison UK/Telefonica UK, paragraphs 2389, 2472, 2473, 2395.

80 Case M.8677 Siemens/Alstom, paragraph 1249 and 1268.

81 Case M.6471 Outokumpu/Inoxum, paragraph 828.

82 Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2055.

83 Case M.8677 Siemens/Alstom, paragraph 1268. Case M.6471 Outokumpu/Inoxum, paragraph 840. For *Outokumpu/Inoxum*, the Commission further dismissed merger-specificity on the basis that "it seems that at least part of the synergies could have been achieved independently by each of the Parties" (paragraph 849). Case M.9014 PKN Orlen/Grupa Lotos, paragraphs 2056. For Case M.9014 PKN Orlen/Grupa Lotos, the Commission also argued that import parity pricing does not support an assumption of pass-on (paragraph 2057).

84 Case M.8451 Tronox/Cristal, paragraphs 385 and 389.

85 Case M.8451 Tronox/Cristal, paragraphs 426 and 438.

86 Case M.8451 Tronox/Cristal, paragraph 424.

[87] Case M.8451 Tronox/Cristal, paragraphs 426 and 427.
[88] Case M.8451 Tronox/Cristal, paragraph 428.
[89] Case M.8451 Tronox/Cristal, paragraphs 418 to 421.
[90] Case M.8451 Tronox/Cristal, paragraph 437.
[91] European Commission, Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, paragraph 16.
[92] Case M.7421 Orange/Jazztel, paragraph 707.
[93] Case M.8864 Vodafone/Liberty Global, paragraph 632.
[94] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 746.
[95] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 404. See also paragraph 433.
[96] Case M.7018 Telefonica/E-Plus, paragraph 867.
[97] Case M.7421 Orange/Jazztel, paragraph 716. Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 855.
[98] Case M.8864 Vodafone/Liberty Global, paragraph 645.
[99] Case M.8864 Vodafone/Liberty Global, paragraph 645
[100] Case M.6992 Hutchison UK/Telefonica Ireland, paragraphs 845 to 851.
[101] Case M.7421 Orange/Jazztel, paragraph 712. Case M.6497 Hutchison Austria/Orange Austria, paragraph 418. Case M.7018 Telefonica/E-Plus, paragraph 1098, 1110, 1116, 1120, 1122, 1145.
[102] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 840.
[103] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 878.
[104] Case M.6497 Hutchison Austria/Orange Austria, paragraph 418.
[105] Case M.8900 Wieland/Aurubis/Schwermetall, paragraph 718.
[106] Case M.8900 Wieland/Aurubis/Schwermetall, paragraphs 720 to 722.
[107] Case M.7278 GE/Alstom, paragraphs 1242 and 1277.
[108] Case M.9064 Telia/Bonnier, paragraph 1286.
[109] Case M.7018 Telefonica/E-Plus, paragraph 1197.
[110] Case M.5830 Olympic/Aegean I, paragraph 1795.
[111] Case M.7278 GE/Alstom, paragraphs 1334 to 1336. Case M.9064 Telia/Bonnier, paragraph 1297. Case M.5830 Olympic/Aegean I, paragraph 1795. Case M.7018 Telefonica/E-Plus, paragraph 1202.
[112] Case M.6663 Ryanair/Aer Lingus, paragraph 1659.
[113] Case M.6663 Ryanair/Aer Lingus, paragraph 1659.
[114] Case M.7278 GE/Alstom, paragraphs 1331, 1315, and 1316.
[115] Case M.6497 Hutchison Austria/Orange Austria, paragraph 442.
[116] Case M.6992 Hutchison UK/Telefonica Ireland, paragraphs 769 to 777.
[117] Case M.7758 Hutchison/Wind, paragraphs 1394 and 1435.
[118] Case M.7612 Hutchison UK/Telefonica UK, paragraphs 2551 and 2555.
[119] Case M.7018 Telefonica/E-Plus, paragraph 868.
[120] Case M.7758 Hutchison/Wind, paragraph 1465.
[121] Case M.7758 Hutchison/Wind, paragraphs 1417 and 1422.
[122] Case M.7612 Hutchison UK/Telefonica UK, paragraph 2570.
[123] Case M.7612 Hutchison UK/Telefonica UK, paragraph 2574.
[124] Case M.7018 Telefonica/E-Plus, paragraphs 1059, 1061, 1062, 1063, 1065, 1066, 1072, 1073, 1075, 1079, and 1081.
[125] Case M.7018 Telefonica/E-Plus, paragraph 1098, 1101, 1104, and 1108.
[126] Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2021.
[127] Case M.9014 PKN Orlen/Grupa Lotos, paragraphs 2024, 2027, 2028, and 2029.
[128] Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2025.
[129] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 746a.
[130] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 755.
[131] Case M.6992 Hutchison UK/Telefonica Ireland, paragraph 766.
[132] Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings, 7th Edition, page 179, Tax Motives.
[133] Horizontal Merger Guidelines, paragraph 81.
[134] Case M.9409 Aurubis/Metallo, paragraphs 836, 844 and 851.
[135] Case M.9409 Aurubis/Metallo, paragraph 843. Case M.7932 Dow/DuPont, Annex 4, paragraph 107.
[136] Case M.9409 Aurubis/Metallo, paragraph 852. Case M.6905 Ineos/Solvay, paragraph 1188.
[137] Case M.9409 Aurubis/Metallo, paragraph 851. Case M.7932 Dow/DuPont, paragraph 3282.
[138] Case M.9064 Telia/Bonnier, paragraph 1296. Case M.8677 Siemens/Alstom, paragraph 1266.

[139] Case M.8677 Siemens/Alstom, paragraphs 1263 and 1267.

[140] Case M.7932 Dow/DuPont, paragraphs 3283 and 3294.

[141] Commission Decision of 30 September 2016 in Case AT.39612 – Perindopril (Servier), paragraph 2578.

[142] Horizontal Merger Guidelines, paragraph 68.

[143] Communication from the Commission – Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03), paragraph 7.

[144] In *Ineos/Solvay*, the parties argued that the transaction would create variable cost synergies, an aspect of which was "variable SG&A savings" (Case M.6905 Ineos/Solvay, paragraph 1093). It is not clear from the redacted decision what these were.

[145] Case M.9730 FCA/PSA, economic annex, paragraph 106.

[146] Case M.6570 UPS/TNT, paragraph 900.

[147] Case M.7018 Telefonica/E-Plus, paragraph 1209.

[148] Case M.9014 PKN Orlen/Grupa Lotos, paragraph 2052.

[149] As the Commission explains, "it is primarily incremental costs that are relevant for pricing purposes" (Case M.6570 UPS/ TNT Express, paragraph 900) and "true common costs are not taken into account in LRAIC" (i.e. Long Run Average Incremental Costs) (European Commission, Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, page 5, footnote 2).

[150] Horizontal Merger Guidelines, paragraph 86.

[151] Case M.8792 T-Mobile/Tele2, paragraph 897. Case M.7421 Orange/Jazztel, paragraph 734*ff*.

[152] Case M.6360 Nynas/Shell, paragraph 447. CASE M.6570 UPS/TNT, paragraphs 871 and 872. Case M.7630 FedEx/TNT, paragraphs 535 to 543. Case M.6497 Hutchison Austria/Orange Austria, paragraph 442. The Commission similarly dismissed efficiencies due to lack of support from internal documents in Case M.6497 Hutchison Austria/Orange Austria, paragraph 412, Case M.8900 Wieland/Aurubis/Schwermetall, paragraph 719, Case M.6992 Hutchison UK/Telefonica Ireland, paragraphs 830 and 834, Case M.7612 Hutchison UK/Telefonica UK, paragraph 2438 and Case M.7018 Telefonica/E-Plus, paragraphs 1203 and 1204.

[153] Case M.6570 UPS/TNT, paragraph 869.

[154] Case M.6360 Nynas/Shell, paragraph 452. The Commission dismissed verifiability of variable cost efficiencies on the basis of a lack of external sources that would have allowed the Commission to verify the efficiency quantification in Case M.9014 PKN Orlen/Grupa Lotos, paragraphs 2049 and 2052.