
Anti-maverick acquisition targets

Distinguishing between takeovers of effective competitors and mere survivors

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Introduction

A so-called maverick exercises “more of an influence on the competitive process than its market share or similar measures would suggest”.¹ By implication, there may be anti-mavericks whose market shares overstate the extent to which they act as competitive constraints. This potential disconnect between a company’s market share and its influence on the competitive process has (or should have) implications for competition authorities’ appraisals of the likely effects of mergers.

At the extreme, a company on the cusp of exiting a market will exercise no competitive constraint at all on a forward-looking basis regardless of its current market share. The legal standard for such a Failing Firm Defence is strict and the European Commission (the “Commission”) has cleared precious few mergers on that basis. However, the economic logic that underpins the Failing Firm Defence may also apply to acquisitions of anti-mavericks. This is the topic of this article.

The article is structured as follows. Section 1 discusses how the Failing Firm Defence framework may help tell the difference between acquisition targets likely to merely survive and those that may act as effective competitive constraints in the relevant counterfactual. Sections 2 to 4 translate each

of the three requirements of the Failing Firm Defence into their underlying economic rationales and explain how this expands the scope for finding that an acquisition target is unlikely to impose an effective competitive constraint going forward. Section 5 concludes.

Section 1: Distinguishing between effective competitors and mere survivors

Mergers may be “capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living”.² Mergers may also restrict competition.³ The inherently ambiguous effect of mergers is reflected in the Court of Justice of the European Union’s finding that there is “no general presumption that a concentration is compatible with, or incompatible with, the internal market”.⁴ This raises the question of how merging parties, their advisers, and competition authorities can identify those mergers unlikely to result in a significant impediment to effective competition.

The Commission assesses the likely impact of mergers on a forward-looking basis.⁵ This involves “prospective economic analyses seeking to determine the likelihood of certain developments in the relevant market within a

foreseeable time frame” and “an examination of how such a concentration might alter the parameters of competition on the affected markets”.⁶ Any regulatory merger analysis therefore invariably involves an assessment of the merging parties’ likely future counterfactual influence on the competitive process.

Under the Failing Firm Defence, an acquisition target is recognised as not being a competitive constraint on a forward-looking basis if it meets three requirements:⁷

- a. “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”;
- b. “Second, there is no less anti-competitive alternative purchase than the notified merger”; and
- c. “Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market”.

The Horizontal Merger Guidelines present this as the potential basis for clearance of “an otherwise problematic merger”.⁸ However, the inherently forward-looking nature of a merger assessment means that a merger cannot be “otherwise problematic” if the counterfactual meets the abovementioned requirements; rather, meeting these requirements means that the merger was never problematic in the first place under the relevant forward-looking counterfactual.

The logic behind the Failing Firm Defence is “that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger”.⁹ Such an outcome could materialise if “even in the event of the merger’s being prohibited, the acquirer would inevitably achieve or reinforce a dominant position”,¹⁰ or, formulated more generally, “the competitive structure resulting from the concentration would deteriorate in

similar fashion even if the concentration did not proceed”.¹¹

However, a prospective acquisition target’s independent ability to just survive in the immediate future does not mean that it is more likely than not to represent an effective competitive force on a forward-looking basis. For example, firms may stay cash-flow positive by not investing in (i) production capacity to meet market growth, or (ii) replacement of production capacity reaching the end of its economic life. As any resulting capacity constraints would limit the firm’s ability to compete effectively,¹² strategies pursued to ensure a supplier’s short-term survival may render the supplier a price taker unable to exercise competitive constraint in the relevant market.¹³ It is therefore not only failing firms whose past market shares are not indicative of the competitive constraint they likely will exercise in the future.

From an economic perspective, the Failing Firm Defence hence merely represents a safe harbour counterfactual for which the proposed transaction could not result in a significant impediment to effective competition. Other counterfactuals based on less strict characteristics could have the same effect; an acquisition target might be expected to (i) fail on the balance of probabilities even if not with certainty, or (ii) survive on but nonetheless not represent an effective competitive force on a forward-looking basis. The following sections draw on the logic of the three requirements of the Failing Firm Defence to identify characteristics of possible anti-maverick acquisition targets.

Section 2: The acquisition target’s counterfactual competitive position

The first requirement of the Failing Firm Defence is that “the allegedly failing firm would in the near future be forced out of the market because of financial difficulties”.¹⁴ This requirement identifies acquisition targets whose present market shares are not

indicative of the competitive constraints they can be expected to exercise in the future.

The Horizontal Merger Guidelines explain that “Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors” and “Normally, the Commission uses current market shares in its competitive analysis”.¹⁵ The starting point for the Commission’s assessment is therefore a continuation of the *status quo*.

However, this *status quo* assumption is just a starting point as “current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion” (emphasis added).¹⁶ The Failing Firm Defence is just one such scenario. Importantly, the Failing Firm Defence requires imminent exit of the target company with certainty whereas the impact of mergers is generally assessed against a balance of probabilities standard.¹⁷ Conceptually, acquisitions of companies whose financial situation is critical but not unambiguously terminal could therefore effectively be assessed against a counterfactual based on the target company’s exit.¹⁸

The Commission’s assessments of whether an allegedly failing firm would in the near future be forced out of the market provide, together with other counterfactuals deviating from assumed continuation of the *status quo*, guidance on what features of an acquisition target may support such counterfactual scenarios. These relate to (i) profitability, (ii) access to funding, and (iii) scope for competitive repositioning, as discussed in the following subsections.

The relevance of profitability

Under a Failing Firm Defence, the relevant company or corporate division must suffer non-transitory operating losses.¹⁹ However, a company may not represent an effective competitive constraint on a forward-looking basis even if it is not currently loss-making or

projected to become so in the imminent future. For example, the Commission concluded in *T-Mobile NL/Tele2 NL* that “Tele2 NL cannot be considered an important competitive force”²⁰ and that “the recent and expected evolution of Tele2 NL’s network casts doubts on its current and future ability to grow its customer base while maintaining a sufficiently competitive quality of service”.²¹ This finding did not rely on Tele2 NL’s financial performance but rather on its (i) limited demonstrated ability to gain market share,²² (ii) relatively lower network quality,²³ and (iii) capacity constraints,²⁴ leading the Commission to attribute downward price pressure in the market to capacity increases rather than just Tele2 NL’s offering.²⁵

Whereas the Failing Firm Defence requires irreversibly loss-making operations, such dire business prospects are hence not a prerequisite for finding that an acquisition target may represent a weaker competitive constraint than superficially suggested by its current market share.

The relevance of access to funding

A company may report accounting losses but still generate sufficient positive cash flows to continue operation and meet its financial obligations.²⁶ Accounting losses therefore do not necessarily imply an inability to compete in the short term. Also, it is not current or past performance but “the prospect of future profit that governs incentives to invest”.²⁷ Even cash flow negative firms may therefore represent effective competitive constraints as long as they can attract the capital required to perform at that level. The Failing Firm Defence therefore requires that the acquisition target does not have access to such finance from (i) a corporate parent,²⁸ or (ii) external investors.²⁹

Access to financing requires the ability to generate sufficient returns from the deployment of these funds to compensate the providers of funding for their cost of capital. If the marginal return on capital exceeds the marginal cost of capital, a corporate parent not facing binding financial constraints would

find it favourable to provide the relevant capital.

A capital constrained corporate parent (or other group of owners) may rely on outside financing instead. To attract outside financing, the existing owners of a firm need to give up a claim on the future cash flows from the firm in favour of the new providers of financing such that the latter can earn their cost of capital. When the firm can generate more cash from investing the additional capital than what is needed to compensate the new investors for providing the financing, the existing owners have a clear incentive to seek such financing. However, if the returns that the firm can expect from investing the marginal capital are less than the cost of financing, the existing owners will not have any incentive to dilute their share of future cash flows to be able to make that investment.

Even if a firm is currently profitable and generates sufficient positive cash flows to be able to attract the financing required to invest in the production capacity needed for it to act as a competitive constraint, the current shareholders may not have the incentive to undertake such investments if they require outside financing. The economic ability to access the financing needed to be an effective competitor is therefore not sufficient to conclude that a firm will in fact do so. Even profitable companies with access to financing may therefore not have the incentive to make the investments needed to act as effective competitive constraints going forward. For the same reason, the fact that a company pays dividends or engages in share buy-backs does not necessarily imply that the company is successful or a binding competitive constraint; doing so may merely imply that shareholders are better off receiving cash generated by the business than the business investing this cash into its future operations.

The distinction between the ability and incentive to attract finance for investments highlights an important aspect of any assessment of whether an individual supplier acts as an effective competitive constraint:

competition is not an end in itself for investors/owners but a by-product of investors seeking attractive returns on their investment. If a company's returns on marginal investments fall below investors' hurdle rate for providing financing, the company will only be an effective competitive constraint if it already has excess capacity enabling it to service any additional volume it may attract by offering better terms than its competitors.

The relevance of the ability to reposition

The Failing Firm Defence requires that a struggling merger party cannot avert exit by repositioning in the market.³⁰ Hypothesising such a counterfactual raises several issues.

First, to be a relevant counterfactual, potential repositioning needs to be not only hypothetically possible but also likely to happen on the balance of probabilities. The Commission acknowledges that such changes may sit outside of what the firm may be reasonably expected to be able to implement,³¹ and that a merger in fact may be a way to acquire the prerequisite capabilities.³²

Second, the mere existence of such a counterfactual just means that this becomes the basis for the assessment of potential effects of the proposed transaction. Whereas repositioning may improve the target company's commercial prospects, it may do so through differentiation vis-à-vis the acquirer. This in turn may imply that the firms would not be as close competitors on a forward-looking basis as their existing market positions may suggest.³³

Third, any investments needed to implement any repositioning may require access to finance.³⁴ However, outside equity investors may require a realistic prospect of a future exit from this investment, possibly through a future merger. Whereas it may superficially seem attractive to delay market consolidation (and thereby whatever competition concerns this may imply) in the hope that a target company instead may reposition, the implied

scepticism towards consolidation as a way of making an industry investable may thereby block the access to the funding needed to make that repositioning possible. If an industry requires consolidation to offer the returns on capital needed to attract investment, firms in that industry therefore cannot be presumed to have access to the capital needed to reposition instead of pursuing such consolidation.

Section 3: The counterfactual diversion of market shares

The second requirement of the Failing Firm Defence is that “there is no less anti-competitive alternative purchase than the notified merger”.³⁵ This seeks to ensure that “the effect on competition in the market would not be worse if the transaction were approved compared to the alternative scenario (namely the competition in the market absent the merger), which could be the case for instance if the acquirer would in any event gain all the market share of the acquired company”.³⁶ The question at hand is therefore not in fact whether some other buyer may step in but how the acquisition target’s market shares might divert in a relevant counterfactual to the merger.

Different counterfactual diversion of market shares may result from (i) consolidation with an alternative acquirer, or (ii) competition between remaining suppliers. The latter of these options is critically linked to the question of what would happen to the target company’s assets in case of exit instead of corporate consolidation, as discussed in the next section.

Under the Failing Firm Defence, the onus is on the merging parties to demonstrate that no alternative buyer exists which would be more favourable to the future market structure.³⁷ It may superficially seem reasonable to assume that it should be possible to find some alternative acquirer in a counterfactual in which there is no lower boundary on the acquisition price. However, the counterfactual acquirer may need to buy not only the target company’s production assets but the firm as

a going concern in order to also acquire the firm’s customers/market share and thereby ensure a different counterfactual competitive structure. Taking over a going concern involves assuming also its liabilities. As a matter of economics, we are not aware of any basis for presuming that there will be multiple buyers that can make a positive business case from taking over the liabilities of a firm about to be overwhelmed by these very same liabilities.

The Failing Firm Defence safe harbour is therefore based on very strict assumptions. Moving outside of that safe harbour to a counterfactual assessed on the balance of probabilities, it becomes even more tenuous to assume that some other acquirer capable of ensuring a more favourable market structure would be waiting in the wings. A transaction may therefore not be problematic against a standard merger assessment standard even if it does not meet the Failing Firm Defence safe harbour.

The Commission’s reasoning also raises the question of whether a hypothetical alternative acquirer may achieve a commensurate redistribution of market shares. For example, customers may prefer to organically switch supplier rather than migrate onto the acquirer’s product offering. Similarly, an alternative acquirer may be motivated by the ability to buy the target company’s assets for purposes other than servicing the target company’s existing customers.³⁸ The relevant question is therefore not whether there may be some alternative acquirer but what the specific alternative would be and what that would mean for market shares.

More generally, a requirement that “the competitive structure of the market would in any event deteriorate to at least the same extent without the concentration”³⁹ equates consolidation of market shares to changes in the competitive structure of the market. However, just as a maverick may exercise a competitive constraint disproportionate to its market share, an acquisition target may equally not do so even if it does not face the risk of imminent failure.⁴⁰ For example, a

capacity constrained supplier without the incentives to invest to alleviate these constraints would logically not form part of the marginal supply that determines market prices regardless of its market share.⁴¹ The takeover of such an infra-marginal supplier may therefore not undermine competition understood as a “dynamic process of rivalry between firms which are incentivised to win customers’ business over time by offering them a better deal”.⁴²

Section 4: The counterfactual supply capacity

The third requirement of the Failing Firm Defence is that “in the absence of a merger, the assets of the failing firm would inevitably exit the market”.⁴³ As a matter of economics, this is consistent with the following considerations:

- a. If the assets of the failing firm would exit the market altogether, the failing firm’s customers would need to be serviced based on the remaining suppliers’ previously unused capacity. If this creates capacity constraints amongst these suppliers, the result will be a reduction in the intensity of competition.⁴⁴ The exit of a failing firm’s capacity therefore represents a risk to the competitive structure of a market.
- b. If the assets of the failing firm would be acquired and deployed by the remaining competitors, the resulting distribution of market shares may imply a more favourable market structure than that implied by the proposed merger.⁴⁵ Also, the acquisition of the failing firm’s assets may alleviate capacity constraints amongst the remaining competitors and thereby strengthen competition.⁴⁶ A counterfactual scenario without the exit of the failing firm’s assets may thereby represent an opportunity for stronger competition.

A finding that “the assets of the failing firm would inevitably exit the market” therefore (i) implies that an acquisition of the failing firm

may preserve supply and thereby competition, and (ii) precludes the possibility of a more competitive counterfactual than the proposed transaction. Such strict findings against any competitive risks are consistent with the Failing Firm Defence standard acting as a safe harbour. The strictness of this test in a Failing Firm Defence context is illustrated by the fact that the Commission has found that this criterion was not met on the basis that “at least some” relevant assets “would likely continue to be used”.⁴⁷

We can again see how these considerations in a less strict form may give competition authorities comfort under the general merger assessment standard.

First, assets may leave the market in the relevant counterfactual on the balance of probabilities even if such exit is not verifiably certain. The acquisition of a firm in financial distress may therefore not raise competitive concerns on an appropriate counterfactual even if the third requirement of the Failing Firm Defence is not met.

Second, the third requirement under the Failing Firm Defence standard is premised on the notion that “If such assets were taken over by competitors in the course of bankruptcy proceedings, the economic effects would be similar to a takeover of the failing firms themselves by an alternative purchaser”.⁴⁸ This treats the takeover of a firm’s assets as equivalent to the takeover of a going concern. However, whereas it is reasonable to assume that the takeover of a going concern also implies the acquisition of its customer relationships, the same does not necessarily apply to the acquisition of, say, a production facility. Whereas treating an acquisition of a company’s assets as equivalent to an acquisition of the company *in toto* may be appropriate for the purposes of defining a safe harbour, it is hence not necessarily so for the purposes of defining a merger counterfactual under a balance of probabilities standard.

Third, exit can happen through gradual retirement of assets over an extended period

rather than as a single one-off event. For example, a sub-scale firm may not find it profitable to replace assets as they physically depreciate and will thereby gradually edge towards market exit. The alternative to an acquisition that may allow the acquirer to rapidly build efficient scale by buying operational assets may therefore be that the would-be acquisition target slowly withers away, leaving would-be acquirers a more arduous path of organic growth.

Notably, competition authorities identify lack of scale as an impediment to competition in several contexts,⁴⁹ typically in support of theories of harm. However, market characteristics that put sub-scale suppliers at a competitive disadvantage for the purposes of assessing theories of harm equally make these suppliers unlikely sources of material capacity growth enabling them to bid aggressively to attract customers. The alternative to suppliers building scale through acquisitions of competitors on the market off-ramp therefore cannot be presumed to be that the suppliers of least favourable scale would make the capacity investments necessary to create a more favourable market structure.

Fourth, whereas the outcome of market exit is presumptively unfavourable when this leads to the exit of assets/capacity, there is no way of knowing what would happen in a scenario in which the exiting firm puts its assets/capacity up for sale in a piecemeal fashion rather than selling its business as a going concern. If the would-be acquirer in the proposed merger is well placed to pick up these assets, such a process may not improve the market structure vis-à-vis the proposed merger. Even in the presence of possible alternative buyers, the economic loss and disruption from a disorderly exit may not justify taking a chance on these alternative buyers coming through.⁵⁰ A proposed merger would therefore need to present quite obvious concerns for a competition authority to be able to argue that the unknowable outcome of the sale of the exiting firm's assets/capacity on the balance of probabilities would lead to a more

favourable market structure. These factors illustrate that even when assets persist physically, their re-entry into effective competition can be uncertain.

Fifth, and critically, the benefit of avoiding a reduction in capacity can outweigh a finding that the acquiring firm's "main competitors are likely to gain significant parts of" the exiting firm's market share absent the proposed transaction.⁵¹ Similarly, increases in capacity can be a critical driver of price reductions independent of the contribution to competition of any one supplier.⁵² By implication, mergers that may release capacity constraints (either by making capacity available to a supplier better able to use it or by enhancing investment incentives through scale economies)⁵³ may improve market outcomes even if implying increased market concentration. A merger's impact on competition may therefore depend on its effect on the incentives to invest in capacity; the greater the incremental supply capacity a merger is likely to unlock, the more likely it is that customers may benefit from lower prices even when faced with a more concentrated set of suppliers.

Section 5: Conclusion

The Failing Firm Defence is based on strict requirements consistent with a role of a safe harbour counterfactual. The fact that a target company does not meet these requirements therefore does not mean that it represents an effective competitive constraint, or even can be expected to survive, on the balance of probabilities. The Failing Firm Defence is therefore suitable for identifying acquisitions that do not raise competition concerns but is unsuitable for defining the universe of failing firms the acquisition of which may be similarly unproblematic.

The final requirement of the Failing Firm Defence that "in the absence of a merger, the assets of the failing firm would inevitably exit the market"⁵⁴ may seem the least relevant for the assessment of acquisitions not involving a target on the cusp of failing. However, the recognition implicit in this requirement that

the key to competition lies in releasing capacity constraints may have profound implications for the assessment of mergers more generally: in circumstances in which scale enables investments, greater market concentration may not imply a lessening of competition or inferior outcomes for customers.

Regulators may be justifiably hesitant to place their faith in possible future capacity expansions to override the effects of greater

market concentration. That may be addressable through the construction of commitments, as in *Vodafone/Three*.⁵⁵ However, no predictive powers or new economic theory are required to establish that a functionally capacity constrained supplier without incentive to expand is unlikely to presently or prospectively be an effective competitive constraint on the balance of probabilities. There may therefore be scope for a market to consolidate without any adverse effects on its competitive structure.

1 Case C-581/22 P, thyssenkrupp AG v European Commission EU:C:2024:821, para. 242.
 2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, recital 4.
 3 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) (the “Horizontal Merger Guidelines”), para. 2.
 4 Case C-376/20 P, Commission v CK Telecoms UK Investments EU:C:2023:561, para. 71.
 5 Case M.8792 T-Mobile NL/Tele2 NL, para. 443.
 6 Case C-376/20 P, Commission v CK Telecoms UK Investments EU:C:2023:561, paras. 82 and 84.
 7 Horizontal Merger Guidelines, para. 90.
 8 Horizontal Merger Guidelines, para. 89.
 9 Horizontal Merger Guidelines, para. 89.
 10 Case No IV/M.308 Kali- Salz/MdK/Treuhand, para. 71.
 11 Joined Cases C-68/94 and C-30/95, French Republic/ Commission and SCPA/Commission, EU:C:1998:148, para. 115. See also Case M.2314 BASF/Eurodiol/Pantochim, para. 143.
 12 Horizontal Merger Guidelines, paras. 32-35; CMA, Merger Assessment Guidelines, 18 March 2021 (CMA129), para. 4.12(c); CMA, Merger remedies, 19 December 2025 (CMA87), para. 6.32; Case M.9343 Hyundai Heavy Industries/Daewoo Shipbuilding, para. 858; Case C-581/22 P, thyssenkrupp AG v European Commission EU:C:2024:821, para. 296, and Case M.8792 T-Mobile NL/Tele2 NL, paras. 453 and 524.
 13 A supplier does not need to have completely exhausted its capacity to lose its ability to act as an effective competitive constraint (see e.g., Case M.9343 Hyundai Heavy Industries/Daewoo Shipbuilding, para. 992).
 14 Horizontal Merger Guidelines, para. 90.
 15 Horizontal Merger Guidelines, paras. 14 and 15.
 16 Horizontal Merger Guidelines, para. 15.
 17 See e.g. Case C-376/20 P, Commission v CK Telecoms UK Investments EU:C:2023:561, para. 87, and Case C-581/22 P, thyssenkrupp AG v European Commission EU:C:2024:821, para. 127.
 18 In *Kali- Salz*, the Commission relied on exit occurring “in the near future with a sufficient degree of probability” (Case No IV/M.308 Kali- Salz/MdK/Treuhand, para. 77).
 19 Case M.5830 Olympic/Aegean, paras. 1828, 1932, and 1950, and Case M.7758 Hutchison/Wind, para. 600.
 20 Case M.8792 T-Mobile NL/Tele2 NL, paras. 443 and 565.
 21 Case M.8792 T-Mobile NL/Tele2 NL, para. 484.
 22 Case M.8792 T-Mobile NL/Tele2 NL, paras. 445 and 455.
 23 Case M.8792 T-Mobile NL/Tele2 NL, para. 476.
 24 Case M.8792 T-Mobile NL/Tele2 NL, para. 477.
 25 Case M.8792 T-Mobile NL/Tele2 NL, para. 453.

26 A company may generate positive cash flows despite reporting accounting losses, e.g. as a consequence of
its accounts including non-cash costs such as depreciation of equipment. However, depreciations allocate the
cost of investing in the asset over time. A company not able to recover the cost of its investments will not have
an incentive to replace its production assets when they reach the end of their economic life. This may limit the
firm's ability to compete in the long term.

27 Case M.7758 Hutchison/Wind, para. 617.

28 Case M.5830 Olympic/Aegean, paras. 2012-2039.

29 Case M.7278 GE/Alstom, para. 1220.

30 Case M.5830 Olympic/ Aegean, para. 2043.

31 Case M.6796 Aegean/Olympic II, para. 722.

32 Case No IV/M.308 Kali- Salz/MdK/Treuhand, para. 76.

33 Commission Notice on the definition of relevant market for the purposes of Union competition law
(C/2024/1645), para. 110.

34 Case M.6796 Aegean/Olympic II, paras. 722 and 734.

35 Horizontal Merger Guidelines, para. 90.

36 Case M.7278 GE/Alstom, para. 1134 (see also para. 1152). See also Case M.9287 Connect Airways/Flybe,
para. 259.

37 Case M.5830 Olympic/Aegean, paras. 2074 and 2086-2087, Case M.890 Blokker/Toys 'R' US, para. 113,
Case No IV/M.308 Kali- Salz/MdK/Treuhand, paras. 81-85 and Case M.9014 PKN Orlen/Grupa Lotos, para.
94.

38 See CMA, Merger remedies, 19 December 2025 (CMA87), paras. 6.34 and 6.37 for such considerations in the
context of takers of divestiture remedies.

39 Case M.7278 GE/Alstom, para. 1152.

40 In *GE/Alstom*, the Commission accordingly considered not only whether Alstom was a failing firm but also
whether it was “an operator whose future competitive importance would likely be significantly reduced” (Case
M.7278 GE/Alstom, para. 1214).

41 See discussion and references in section 1 above.

42 Merger remedies, CMA, 19 December 2025 (CMA87), para. 3.8(a).

43 Horizontal Merger Guidelines, para. 90.

44 Case M.2314 BASF/Eurodiol/Pantochim, para. 161: “the worst case scenario for customers would be the exit
from the market of Eurodiol’s capacities which would inevitably be followed by supply problems and price
increases. In such a situation it is likely that price competition would cease and be replaced by a massive
increase of prices”. See also discussion and references in section 1 above.

45 Case M.7278 GE/Alstom, para. 1227.

46 This requires that the exiting firm had excess capacity. As noted in section 3, a capacity constrained supplier
would be unlikely to act as a material competitive constraint in the first place.

47 Case M.9287 Connect Airways/Flybe, para. 257.

48 Case M.2314 BASF/Eurodiol/Pantochim, para. 141.

49 See for example, U.S. Department of Justice & Federal Trade Commission, 2023 Merger Guidelines, page 19:
lack of scale may “limit the ability of rivals to improve their own products and compete more effectively”; CMA,
Merger Assessment Guidelines, 18 March 2021 (CMA129), para. 8.41(d): economies of scale “may prevent
small-scale entry from acting as an effective competitive constraint in the market”; CMA, Merger remedies, 19
December 2025 (CMA87), para. 6.14: a “divestiture remedy” must meet the standard of “the smallest viable,
standalone business that can compete successfully on an ongoing basis”.

50 Case M.2314 BASF/Eurodiol/Pantochim, paras. 153 to 156.

51 Case M.2314 BASF/Eurodiol/Pantochim, para. 151.

52 Case M.8792 T-Mobile NL/Tele2 NL, para. 453.

53 Case M.8792 T-Mobile NL/Tele2 NL, para. 544.

54 Horizontal Merger Guidelines, para. 90.

55 CMA, ME/7064/23, 5 December 2024, paras. 76-88.