

Comments of the International Center for Law & Economics to the Competition Bureau Canada

Proposed Merger Enforcement Guidelines

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Executive Summary

The International Center for Law & Economics (ICLE) submits these comments on the Competition Bureau's Draft Merger Enforcement Guidelines. The Draft Merger Guidelines consolidate the Bureau's merger-review approach following amendments to the *Competition Act* enacted through Bill C-56 (2023) and Bill C-59 (2024). Those amendments removed the efficiencies defence, introduced structural presumptions based on concentration and market share, authorised consideration of labour-market effects, and expanded private access to the Competition Tribunal.

These comments identify three principal concerns and propose targeted revisions.

The Draft Guidelines presume a substantial lessening or prevention of competition where the post-merger HHI exceeds 1,800 (with an increase of 100 or more) or the parties' combined market share exceeds 30%. These thresholds track the 2023 U.S. Merger Guidelines, which were criticised by the competition-enforcement agencies' own economists as lacking empirical support. Decades of industrial-organization research—including surveys by Steven Berry, Fiona Scott Morton, and Martin Gaynor, and work by former chief economists at both U.S. enforcement agencies—show that concentration measures correlate poorly with competitive harm across industries and market conditions.

Concentration often reflects competitive success. Firms with lower costs or better products gain share as higher-cost rivals lose sales, increasing concentration even as margins decline. The Draft Guidelines also leave unclear how parties may rebut the presumption and how it applies to primarily vertical or conglomerate transactions.

The Bureau should treat structural presumptions as preliminary screens, not near-determinative findings of harm. Below a 30% combined market share, enforcement should be exceptional. Below an HHI of 2,500, presumptions should be readily rebutted. The guidelines should identify rebuttal evidence—entry conditions, rival expansion, switching costs, multi-homing, innovation, merger-specific efficiencies, and direct competitive-effects evidence—and clarify application to non-horizontal transactions.

Following repeal of the former s. 96 efficiencies defence, the Draft Guidelines state efficiencies are “unlikely to change” the Bureau's conclusions when a merger raises significant concerns. This framing treats efficiencies as peripheral, rather than central to competitive effects. Standard price theory predicts the opposite: marginal-cost reductions directly affect pricing and output. A merger that sufficiently reduces marginal cost may lower post-merger prices even if concentration increases. Dynamic efficiencies—innovation, product quality, and faster commercialisation—often generate substantial consumer benefits in research-intensive sectors.

The issue is particularly important for vertical mergers. The elimination of double marginalisation—the pricing distortion that occurs when firms with pricing power operate at successive levels of a supply chain—is an inherent consequence of vertical integration, not a speculative synergy. Empirical

literature consistently finds vertical mergers benefit consumers; a survey of 31 studies found consumer benefit in all but one. Yet the Draft Guidelines apply horizontal structural thresholds to vertical transactions, assert without citation that vertical integration increases coordination risk, and subject double marginalisation elimination to demanding evidentiary requirements. The draft also applies inconsistent reasoning to contractual alternatives, treating contracts as insufficient to prevent foreclosure but sufficient to replicate integration benefits.

The Bureau should integrate efficiencies directly into competitive-effects analysis, apply a realistic merger-specificity standard that accounts for timing and execution costs, and recognise that substantial efficiencies can rebut structural presumptions. For vertical mergers, the Guidelines should establish a safe harbour where shares remain below 40% at each level, recognise elimination of double marginalisation where both levels exercise pricing power, remove the unsupported coordination-risk claim, apply consistent treatment of contracts, and intervene only where foreclosure would harm consumers and impair rivals' ability to compete.

Several provisions extend enforcement theories into areas where economic evidence is thinner and conventional tools are less reliable. In platform markets, the Draft Guidelines risk treating network effects as a presumption of market power. Network effects vary in strength and scope and must be assessed alongside entry conditions, switching costs, innovation, and multi-homing. Platform markets frequently experience rapid displacement by new entrants.

The Bureau should specify that widespread multi-homing and low switching costs ordinarily weigh against a finding of substantial lessening of competition, require concrete evidence that a target is a likely and substantial future competitive constraint before concluding a merger prevents dynamic competition, and evaluate platform-participant mergers under the vertical-effects framework.

The labour-market provisions raise similar concerns. The Draft Guidelines apply a product-market analytical framework to labour markets, even though labour-market definition is more uncertain and the economic literature remains unsettled. Reductions in labour demand can reflect efficiency gains rather than monopsony power, and the two cannot be distinguished without examining downstream output and prices.

The Bureau should require evidence of downstream output effects in labour-market analysis, apply a demanding evidentiary standard, and define labour markets to reflect realistic worker alternatives, including cross-industry substitution and remote-work opportunities.

An error-cost framework links these recommendations. False positives—blocking mergers that would benefit consumers—impose durable costs: forgone efficiencies, deterred transactions, and reduced investment and innovation. False negatives are more likely to self-correct through entry, expansion, and technological change. The Guidelines should therefore direct enforcement toward mergers supported by substantial evidence of harm and exercise restraint where evidence is ambiguous or offsetting benefits are likely. The proposed revisions would reduce false positives while preserving strong enforcement against mergers that demonstrably harm competition and consumers.

I. Introduction and Overview

The International Center for Law & Economics (ICLE) submits these comments on the Competition Bureau's *Proposed Merger Enforcement Guidelines*.¹ ICLE is a non-profit research centre that applies economic analysis to legal and regulatory questions, with a particular focus on competition policy and market institutions. ICLE scholars previously submitted comments to the Bureau on the *Future of Competition Policy in Canada*,² on Canada's *Anti-Competitive Conduct and Agreements Enforcement Guidelines* (attached as Appendix AA),³ and on the Bureau's prior merger-enforcement guidelines (attached as Appendix BB).⁴

The Draft Merger Guidelines aim to consolidate the Bureau's merger-review approach following significant amendments to the *Competition Act* enacted through Bill C-56 (2023) and Bill C-59 (2024).⁵ Those amendments materially expanded the Bureau's enforcement authority. Among other changes, Parliament:

- removed the efficiency defence in merger review (Bill C-56);
- introduced a presumption that a merger is anti-competitive if it significantly increases concentration or market share (Bill C-59);
- strengthened remedies by directing that they preserve or restore the level of competition that would have existed absent the merger (Bill C-59);
- clarified that the Competition Tribunal may consider competitive harm in labour markets when deciding whether to allow a merger or part of a merger (Bill C-59); and
- clarified that the Tribunal may consider coordination risk among competitors (Bill C-59).

Bill C-56 also added “excessive and unfair selling prices” as an anti-competitive act under s. 78, extended s. 90.1's civil-agreements provisions to non-competitors, and increased maximum administrative monetary penalties to the greater of \$10 million for individuals or \$25 million for

¹ Competition Bureau, *Proposed Merger Enforcement Guidelines* (Nov. 13, 2025), <https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/proposed-merger-enforcement-guidelines> [hereinafter *Draft Merger Guidelines*].

² Geoffrey Manne, Dirk Auer, Daniel Gilman & Lazar Radic, *Comments from the International Center of Law and Economics on the Future of Competition Policy in Canada* (Mar. 31, 2023), <https://laweconcenter.org/wp-content/uploads/2023/03/ICLE-Canada-Comments.pdf>

³ Ian Adams, Eric Fruits, Brian Albrecht, Daniel J. Gilman & Geoffrey A. Manne, *Comments of the International Center for Law & Economics to the Competition Bureau Canada: Anti-Competitive Conduct and Agreements* (Jan. 27, 2026), <https://laweconcenter.org/wp-content/uploads/2026/01/Competition-Bureau-Canada-Comments-2026.pdf> (Appendix AA) [hereinafter *ACCA Comments*].

⁴ Geoffrey A. Manne, Ian Adams, Brian Albrecht, Dirk Auer, Lazar Radic & Mario A. Zúñiga, *Comments of the International Center for Law & Economics: Canada Competition Bureau's Update of the Merger Enforcement Guidelines* (Jan. 12, 2025), <https://laweconcenter.org/wp-content/uploads/2025/01/Canada-Merger-Reform-Comments-January-2025.pdf> (Appendix BB).

⁵ *An Act to Amend the Excise Tax Act and the Competition Act*, S.C. 2023, c. 31, pt. 2 [hereinafter *Bill C-56*]; *Fall Economic Statement Implementation Act, 2023*, S.C. 2024, c. 15, pt. 5, div. 6 [hereinafter *Bill C-59*].

corporations, or up to three times the benefit derived from the conduct. Bill C-59 expanded private access to the Competition Tribunal. ICLE addressed those issues in the ACCA Comments submitted in January 2026 (Appendix AA).

Although Parliament broadened the statutory language, the Bureau retains substantial discretion in setting enforcement priorities and interpretive standards. These comments address how the Bureau can exercise that discretion to protect competition without discouraging mergers that benefit consumers.

A. Structural Presumptions

The Draft Merger Guidelines place substantial weight on structural presumptions that economic research shows are unreliable predictors of competitive harm. The proposed thresholds—a Herfindahl–Hirschman index (HHI) of 1,800 with an increase of 100, or a combined market share exceeding 30%—lack empirical support.

Decades of industrial-organization research, including work by economists who have served in U.S. enforcement agencies, show that concentration measures cannot substitute for analysis of entry conditions, firm conduct, and competitive dynamics. The proposed thresholds closely track the controversial 2023 U.S. Merger Guidelines, which agency economists themselves criticised as unsupported by the empirical literature.

The draft further leaves unclear how merging parties may rebut the presumption and how the presumption applies to primarily vertical or conglomerate transactions.

B. Efficiencies

The Guidelines marginalise efficiencies in a manner inconsistent with standard price theory and likely to generate systematic false positives. After Parliament repealed the s. 96 efficiency defence, the Guidelines treat efficiencies as unlikely to affect the Bureau’s conclusions whenever a merger raises structural concerns.

This approach disregards the role of cost reductions in shaping firms’ pricing and output decisions. The problem is particularly acute for vertical mergers. Eliminating double marginalisation is a direct consequence of integration, not a speculative synergy, and empirical literature consistently finds consumer benefits.

The Guidelines also adopt internally inconsistent assumptions about contracts. They treat contracts as insufficient to prevent foreclosure harms, yet sufficient to replicate the benefits of integration.

C. Expanding Theories of Harm

Several provisions extend enforcement theories into areas where economic evidence is limited or the analytical framework fits poorly. The claim that vertical integration increases coordination risk appears without citation or economic reasoning. The treatment of platform mergers risks turning

network effects into a presumption of market power, rather than evaluating them alongside entry, switching costs, and multi-homing.

The labour-market provisions apply a product-market framework to settings where market definition is more difficult and the literature less developed. They also risk misidentifying efficiency-enhancing reductions in labour demand as monopsony power, unless downstream output effects are examined.

D. Organisation of These Comments

These comments proceed as follows. Section II explains the error-cost framework and its implications for the Bureau's exercise of enforcement discretion. Section III examines the structural presumptions and concentration thresholds, including the limited predictive value of HHI measures, the specific numerical thresholds adopted, and the unclear rebuttal standards. Section IV addresses market definition and its proper analytical role. Section V discusses efficiencies and the failing-firm defence. Section VI analyses vertical mergers, including empirical evidence on competitive effects, the unsupported coordination-risk claim, foreclosure theories and their limits, and the mischaracterisation of double marginalisation as a speculative efficiency. Section VII examines platforms and multi-sided markets, including multi-homing, dynamic competition, and self-preferencing. Section VIII addresses labour-market analysis and the gap between the economic literature and the proposed framework. Section IX sets out specific recommendations for revision.

II. The Error-Cost Framework and Effects-Based Merger Analysis

As noted in ICLE's ACCA Comments, competition enforcement necessarily operates under uncertainty and therefore carries a risk of error. The error-cost framework developed by U.S. Judge Frank Easterbrook and subsequent scholarship recognises that enforcement rules must account for both over- and under-deterrence.

Under that framework, the social costs of false positives (Type I errors) generally exceed those of false negatives (Type II errors). Erroneous intervention can chill pro-competitive conduct, deter innovation, and create lasting legal and economic distortions that market forces cannot readily correct. By contrast, under-enforcement is more often temporary, as entry and competitive pressure tend to erode supra-competitive outcomes over time.

These considerations favour clear limiting principles, rigorous evidence, and interpretive restraint in the Bureau's enforcement approach, particularly in dynamic or innovation-driven markets, where over-enforcement produces the greatest harm.

III. Structural Presumptions and Concentration Thresholds

The Guidelines adopt the structural presumptions in s. 92(2) of the *Competition Act*. A merger that significantly increases market share or concentration is presumed to substantially lessen or prevent competition unless the parties rebut the presumption. Under s. 92(3), a "significant increase" occurs when:

- the post-merger HHI rises, or is likely to rise, by more than 100; *and*
- either the concentration index exceeds, or is likely to exceed, 1,800, or the parties' combined post-merger market share exceeds, or is likely to exceed, 30%.

The Guidelines state that mergers meeting these thresholds are “presumed to substantially harm competition.” Section 92(2) allows the parties to rebut the presumption on a balance of probabilities.

Market-share measures can appropriately serve as an initial screening tool in merger review. The proposed approach, however, raises several concerns.

First, decades of economic research show that market shares and concentration ratios do not reliably predict competitive harm. The structural presumptions therefore place excessive weight on concentration measures.

Second, the numerical thresholds are too low and lack a sound empirical basis across diverse markets, particularly where the Guidelines attach a presumption of competitive harm.

Third, the Guidelines do not clearly specify the evidentiary standard required to rebut the presumption.

Fourth, the Guidelines do not explain how the presumptions apply to primarily vertical or conglomerate transactions that include limited horizontal overlap.

A. The Limited Predictive Value of Concentration Measures

Concentration measures, and market-share thresholds in particular, have limited value in predicting competitive effects. They may serve as preliminary screening tools and, in some markets, they may signal competitive concerns. Decades of economic research nonetheless show that market shares and concentration ratios do not reliably predict competitive harm across industries or sectors. A market with many small firms is not necessarily more competitive than one with fewer large firms. The proposed structural presumptions therefore place excessive weight on concentration measures.

Indeed, concentration often reflects competitive success, rather than market failure.⁶ Firms with lower costs or better products expand, while higher-cost rivals lose sales.⁷ As Chad Syverson observes, “many empirical studies in varied settings have found that greater substitutability/competition—resulting from, say, reductions in trade, transport, or search costs—

⁶ Brian Albrecht, *Competition Increases Concentration*, TRUTH ON THE MKT. (Aug. 16, 2023), <https://truthonthemarket.com/2023/08/16/competition-increases-concentration>.

⁷ See Brian Albrecht, *What Competition Scholars Should Know About the 2025 Economics Nobel*, TRUTH ON THE MKT. (Oct. 14, 2025), <https://truthonthemarket.com/2025/10/14/what-competition-scholars-should-know-about-the-2025-economics-nobel> (“Market structure is an outcome of this competitive process, not just a cause of competitive behavior.”).

shifts activity away from smaller, higher-cost producers and toward larger, lower-cost producers,” increasing concentration even as margins decline.⁸

Treating “too much” concentration as inherently harmful assumes both that market structure determines economic outcomes and that a correct level of concentration can be identified. Economists have rejected that premise since at least the 1970s. As one classic formulation explains:⁹

Once perfect knowledge of technology and price is abandoned, [competitive intensity] may increase, decrease, or remain unchanged as the number of firms in the market is increased.... [I]t is presumptuous to conclude... that markets populated by fewer firms perform less well or offer competition that is less intense.¹⁰

Harold Demsetz’s critique of the “market concentration doctrine” likewise showed that correlations between concentration and profits often reflect efficiency, rather than market power.¹¹ A recent survey of the industrial-organization literature by Steven Berry, Fiona Scott Morton, and Martin Gaynor reached a similar conclusion:

In short, there is no well-defined “causal effect of concentration on price,” but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share . . .

Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates.¹²

⁸ Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSPS. 23, 34 (2019).

⁹ See Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973); see also, e.g., Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951–1009 (Richard Schmalensee & Robert Willig eds., 1989); William N. Evans, Luke M. Froeb & Gregory J. Werden, *Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993); Steven Berry, *Market Structure and Competition, Redux*, FTC MICRO CONFERENCE (Nov. 2017), https://www.ftc.gov/system/files/documents/public_events/1208143/22_-_steven_berry_keynote.pdf; Nathan Miller et al., *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENF’T 248 (2022).

¹⁰ Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, *THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES* 137, 140-41 (1995).

¹¹ Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973); see also Harold Demsetz, *The Market Concentration Doctrine: An Examination of Evidence and a Discussion of Policy* (AEI-Hoover Policy Studies No. 7, 1973), https://masonlec.org/site/rte/uploads/files/GAI/Readings/Economics%20Institute/Demsetz_Market%20Concentration%20Doctrine.pdf.

¹² Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 48 (2019); see also Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, JOHN M. OLIN PROGRAM IN L. & ECON., Stanford Law Sch. Working Paper 24 (Sept. 2006) (“structure-conduct-performance empirical methods have largely been discarded in economics.”).

Concentration measures therefore provide, at most, rough starting points for analysis. Dennis Carlton describes market shares and concentration as “at best crude first steps,” noting a weak empirical link between changes in market share and competitive performance, and observing that no model shows market share alone reliably predicts prices or welfare effects.¹³

Experience in health-care merger enforcement illustrates the point. U.S. enforcement agencies have relied on applied industrial-organization research to challenge anticompetitive hospital mergers successfully in court, while moving beyond traditional structure-conduct-performance (SCP) assumptions. Agency research finds that newer screening tools—particularly willingness-to-pay (WTP) and upward pricing pressure (UPP)—more accurately identify problematic hospital mergers than traditional concentration measures.¹⁴

Static market-share data cannot substitute for analysis of firm conduct and market conditions. Modern competition analysis instead emphasises entry conditions and potential competition. The contestable-markets framework developed by William Baumol, John Panzar, and Robert Willig shows that industry outcomes depend primarily on entry and exit costs, particularly sunk costs, rather than on the number or size of incumbent firms. Even concentrated markets can remain competitive where entry is feasible, because “potential competition enforces cost-minimization regardless of the nature of the industry structure.”¹⁵ David Teece extends this insight to innovation-driven sectors, arguing that market share poorly captures market power when technological change and “unseen” competition constrain incumbents.¹⁶ OECD methodological reviews likewise emphasise contestability, entry barriers, and switching costs—factors not reflected in standard concentration metrics.¹⁷

¹³ Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 COMPETITION POL’Y INT’L 3 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987061.

¹⁴ Christopher Garmon, *The Accuracy of Hospital Screening Methods*, 48 RAND J. E ECON. 1068, 1070 (2017) (Examining post-merger price changes across 28 hospital mergers and first issued as an FTC Bureau of Economics working paper.).

¹⁵ WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 222 (rev. ed. 1988), available at https://archive.org/details/contestablemarke0000baum_e1g8 (“[F]reedom of entry, indeed the mere threat of incursions by entrants into the market, may effectively discipline the monopolist, even if entry is never successful. It can force the monopolist to curb his avarice and forgo profits he might otherwise have enjoyed. Indeed, in the absence of entry barriers, in perfectly contestable markets, it can force him to accept earnings no higher than those available under perfect competition. Potential competition can also force the monopolist to produce with maximal efficiency, and to hunt down and utilize fully every opportunity for innovation.”); see also David J. Teece, *Understanding Dynamic Competition: New Perspectives on Potential Competition, “Monopoly,” and Market Power*, Working Paper (May 22, 2025), <https://ssrn.com/abstract=5356023>.

¹⁶ Baumol, Panzar & Willig, *Id.*

¹⁷ Org. for Econ. Coop. & Dev., *Competition in the Pharmaceutical Industry*, OECD Doc. DAF/CLP(2000)29 (Feb. 6, 2001) (“For many products which face few rivals in their therapeutic class, the primary competitive threat is the threat that rival firms will develop substitutes.”).

Evidence from productivity¹⁸ and innovation¹⁹ studies reinforces this conclusion. Competitive pressure tied to entry and policy changes correlates more strongly with performance than market structure alone. Authorities should therefore treat market shares as incomplete and potentially misleading screens, supplemented—and, where appropriate, displaced—by analysis of entry, expansion, switching costs, innovation, and the durability of any competitive advantage.

Digital markets illustrate these dynamics. Firms such as Facebook, Google, and Amazon achieved large market shares by offering valuable services at low or zero prices and improving user experience. Their positions remain contestable through innovation, as reflected in TikTok’s rapid growth in social media and continued competition in e-commerce from Shopify, Walmart, and specialised retailers.

The final Guidelines should clarify that market-share thresholds function only as initial screens, not presumptions of market power. Below 30%, the Bureau should decline enforcement absent exceptional circumstances. Above 30%, the Guidelines should identify factors—such as entry conditions, rival expansion, customer switching, and innovation—that can rebut any inference of market power drawn solely from market-share data.

B. Structural Presumptions Require Clear Rebuttal Standards

Section 92(2) creates a structural presumption that shifts the burden to the merging parties to show the transaction is unlikely to substantially lessen or prevent competition. The Guidelines add that “the more the thresholds are exceeded, the greater the need for persuasive evidence to refute the presumption.”

As explained in ICLE’s ACCA Comments, the Bureau should clarify that structural presumptions function only as initial screens, not *prima facie*—and potentially determinative—evidence of competitive harm to Canadian consumers. Market definition, market shares, and concentration measures are analytical tools, not conclusions. The Bureau should evaluate them alongside:

- entry conditions and the likelihood of timely, likely, and sufficient entry;
- expansion by existing rivals;
- customer switching costs and multi-homing behaviour;
- innovation dynamics and the pace of technological change; and
- direct competitive-effects evidence, including customer testimony, internal documents, and economic analysis.

The proposed Guidelines also do not specify the evidentiary standard required to rebut a structural presumption. That omission is particularly concerning, given the limited empirical support for the

¹⁸ Stephen J. Nickell, *Competition and Corporate Performance*, 104 J. POL. ECON. 724 (1996).

¹⁹ Richard Blundell, Rachel Griffith & John Van Reenen, *Market Share, Market Value and Innovation in a Panel of British Manufacturing Firms*, 66 REV. ECON. STUD. 529 (1999).

presumptions themselves. Without clear standards, parties cannot predict what evidence will suffice, and enforcement risks becoming discretionary rather than evidence-based.

C. The Proposed HHI Thresholds Lack Empirical Support

The Guidelines adopt an HHI threshold of 1,800, with an increase of 100 or more, to trigger the structural presumption. This threshold appears drawn from the U.S. agencies' 2023 *Merger Guidelines*,²⁰ which departed from prior enforcement practice.

The U.S. agencies' 2010 *Horizontal Merger Guidelines* identified three concentration ranges: “unconcentrated markets” (HHI below 1,500), “moderately concentrated markets” (HHI between 1,500 and 2,500), and “highly concentrated markets” (HHI above 2,500). Mergers producing a moderately concentrated market with an HHI increase above 100 were deemed to “potentially raise significant competitive concerns” and “often warrant scrutiny.”²¹ Even mergers producing a highly concentrated market were not presumed unlawful. Instead, mergers that increased HHI by 100–200 points were likewise said to “*potentially* raise significant competitive concerns and often warrant scrutiny.”²²

The 2023 U.S. revisions proved controversial and departed from both historical agency practice and mainstream economic literature.²³ Agency economists themselves recognised longstanding concerns about overreliance on concentration metrics such as HHIs. In 2022, Steven Berry, Fiona Scott Morton, and Martin Gaynor joined numerous former chief economists from both U.S. competition agencies, as well as Aviv Nevo (soon to become director of the FTC's Bureau of Economics), in cautioning that “regressions of price on the HHI do not predict the competitive effects of mergers and should not be used in merger review.”²⁴

The point was not that increasing concentration can never justify scrutiny or that HHI lacks screening value. Rather, relative HHI changes do not reliably predict competitive harm—or benefit—and therefore should not be embedded in legal presumptions.

²⁰ U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* 2, 5–6 (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

²¹ U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* 19 (Aug. 19, 2010), <https://www.justice.gov/atr/file/810276/dl?inline>.

²² *Id.*

²³ Expediency can be seen as a motivating factor not only in the weakly justified new thresholds, but in a novel “presumption of illegality” absent from prior U.S. merger guidelines—and notably avoided in the Competition Bureau's proposal. See, e.g., Daniel J. Gilman, *What Do We Do with Presumptions in Antitrust?*, TRUTH ON THE MKT. (Jan. 25, 2024), <https://truthonthemarket.com/2024/01/25/what-do-we-do-with-presumptions-in-antitrust>.

²⁴ Nathan Miller *et al.*, *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENF'T 248 (2022), <https://doi.org/10.1093/jaenfo/jnac009>.

The specific numerical revisions adopted in 2023 also lacked support. In comments submitted to the U.S. agencies before adoption of the guidelines, Aviv Nevo and other prominent economists warned:

Our view is that this would not be the most productive route for the agencies to pursue to successfully prevent harmful mergers, and could backfire by putting even further emphasis on market definition and structural presumptions.

If the agencies were to substantially change the presumption thresholds, they would also need to persuade courts that the new thresholds were at the right level. Is the evidence there to do so? . . . Our reading of the literature is that it is not clear and persuasive enough . . . to support a substantially different threshold that will be applied across the board to all industries and market conditions.²⁵

ICLE scholars and others likewise criticised the U.S. revisions in comments to the U.S. Justice Department (DOJ) and Federal Trade Commission (FTC).²⁶ The lower thresholds lack empirical support and risk capturing many mergers that pose no competitive threat. As Nevo, John Asker, and other co-authors observed, the evidence supporting structuralist revisions was “thin.”²⁷ Economic evidence provides no reliable basis to treat an HHI of 1,800 or a 30% market share as a dependable indicator of market power or likely competitive harm.

The Competition Bureau should therefore avoid importing and extending these unsupported presumptions. Under an error-cost framework, the relevant choice is not between more and less aggressive enforcement, but between evidence-based and presumption-based enforcement. Poorly justified presumptions risk increased false positives without offsetting benefits, harming competition in Canada and Canadian consumers.

The Guidelines should clarify three points.

First, HHI calculations depend on market definition, which is itself an analytical construct subject to uncertainty and judgement. Where market boundaries are contested or unclear, structural presumptions based on HHI should carry less weight.

²⁵ John Asker, Kostis Hatzitaskos, Bob Majure, Ana McDowall, Nathan Miller & Aviv Nevo, *Comments on the January 2022 DOJ and FTC RFI on Merger Enforcement*, FTC-2022-0003-1847 (Apr. 20, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-1847>.

²⁶ Geoffrey A. Manne, Dirk Auer, Brian Albrecht, Eric Fruits, Daniel J. Gilman & Lazar Radić, *Comments of the International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines*, Docket No. FTC-2023-0043-0001 (Sept. 18, 2023), <https://laweconcenter.org/wp-content/uploads/2023/09/ICLE-Draft-Merger-Guidelines-Comments-1.pdf>.

²⁷ Asker *et al.*, *supra* note 25, at 5. For an additional critique of the structuralist push by Biden administration enforcers, see Bruce H. Kobayashi & Timothy J. Muris, *Turning Back the Clock: Structural Presumptions in Merger Analyses and Revised Merger Guidelines*, COMPETITIVE ENTER. INST. STUDY (Feb. 22, 2023), <https://cei.org/studies/turning-back-the-clock-structural-presumptions-in-merger-analyses-and-revised-merger-guidelines>.

Second, HHI measures static market structure. It does not capture dynamic competition, innovation, potential entry, or competitive self-correction. High HHIs in rapidly changing markets may reflect temporary leadership rather than durable market power.

Third, below an HHI of 2,500, structural presumptions should apply cautiously and should be readily rebutted by evidence of entry, expansion, innovation, or efficiencies.

IV. Market Definition and Competitive-Effects Analysis

Market definition is a central analytical tool in merger review, but it presents significant conceptual and practical challenges. This section evaluates the Guidelines' approach to defining relevant product and geographic markets and treats market definition as a flexible method for assessing competitive effects, not a rigid requirement.

The discussion reviews the strengths and limits of the hypothetical monopolist (SSNIP) test, including the Cellophane fallacy, critical-loss circularity, non-price competition, and product differentiation. It also addresses the factors that shape geographic market boundaries. The section concludes with recommendations to better align the Guidelines with economic principles and the practical realities of competitive analysis.

A. Market Definition as an Analytical Tool

The Guidelines correctly recognise that market definition is an analytical tool, not an end in itself. As the Guidelines state, "in some reviews, we may not precisely define markets, because we are able to assess the merger's effects on competition without doing so."

This flexibility reflects sound economic principles. Market definition draws a boundary between closer and more distant substitutes. In many cases, precise boundaries are unnecessary and sometimes unattainable. Buyers' close substitutes will not always fall neatly inside a single market, and competitive constraints may arise from both inside and outside any defined boundary.

The Guidelines should emphasise this point more clearly. Market definition serves one purpose: assessing competitive effects. Where the Bureau can evaluate competitive effects directly, market definition becomes less important. Where merging firms compete across multiple overlapping markets with similar competitive conditions, aggregating those markets may simplify analysis without affecting the result.

B. The Hypothetical Monopolist (SSNIP) Test and Its Limits

The Guidelines describe the hypothetical monopolist test—also known as the SSNIP test (a "small but significant and non-transitory increase in price")—as a tool for defining markets. The test asks whether a hypothetical monopolist controlling all products in a candidate market would profitably impose a price increase. The Guidelines specify a 5% increase lasting one year.

The SSNIP framework offers useful conceptual guidance but presents well-known implementation challenges.

1. The Cellophane Fallacy

If current prices already reflect market power, using them as the SSNIP baseline will overstate the relevant market. A monopolist already charging supra-competitive prices would lose substantial sales from an additional 5% increase, incorrectly suggesting a broader market. The Guidelines recognise this concern, noting that “we may use a different base price when market conditions absent the merger would likely result in a lower or higher price in the future.”

2. Critical-loss analysis

Applying the SSNIP test often requires estimating “critical loss”—the maximum quantity loss a hypothetical monopolist could sustain while still finding a price increase profitable. Critical loss depends on margins, which themselves depend on market definition. This creates circularity. High observed margins may indicate market power, implying narrow markets, or efficiency, which does not.

3. Non-price competition

The SSNIP test focuses on price, yet many mergers affect quality, variety, innovation, privacy, or other non-price dimensions. The Guidelines acknowledge this, stating that “depending on the nature of competition, we may assess whether a different exercise of market power would be profit-maximizing, such as a change in product quality, variety, privacy, or any other dimension of competition.” The final Guidelines should provide more specific guidance on applying the hypothetical monopolist framework to non-price competition.

4. Product differentiation

In differentiated-product markets, the SSNIP test may produce very narrow markets, potentially as narrow as a single product. Competitive effects instead depend on substitution patterns and the degree of differentiation. The Guidelines should clarify that diversion ratios, customer-switching evidence, and other direct competitive-effects evidence often provide more reliable guidance than formal market definition in such settings.

C. Defining Geographic Markets Based on Competitive Constraints

The Guidelines apply the hypothetical monopolist test to geographic markets. If buyers would shift purchases to sellers in more distant locations in quantities sufficient to make a price increase unprofitable, those locations become part of the candidate market. The approach is sound in principle but often difficult to implement.

Several factors are particularly important.

- **Transportation Costs:** High transportation costs limit the geographic scope of competition. Bulk commodities and heavy products typically compete in regional, not national, markets.
- **Regulatory Barriers:** Provincial or national regulations may restrict out-of-market suppliers. Licensing requirements, product-approval processes, and language requirements can define practical geographic boundaries.
- **Customer Behaviour:** Actual purchasing patterns, customer location, and willingness to travel or source from distant suppliers provide direct evidence of geographic market scope.

The Guidelines should emphasise that geographic markets must reflect real competitive constraints, not administrative or political borders. Where customers regularly source from multiple provinces or countries, those areas should fall within the geographic market even if suppliers maintain separate regional pricing policies.

V. Countervailing Considerations: Efficiencies and Failing Firms

This section addresses two countervailing considerations identified in the Guidelines: efficiencies (Part 4.7) and failing firms and exiting assets (Part 4.6). Both bear directly on whether a merger causes a substantial lessening or prevention of competition and both warrant clearer, more economically grounded treatment in the final Guidelines.

First, although Parliament repealed the former s. 96 efficiency defence, efficiencies remain central to competitive-effects analysis. Cost reductions, innovation gains, and other merger-specific efficiencies shape firms' pricing, output, and investment decisions and may offset, or more than offset, any increase in concentration. The Guidelines should therefore integrate substantiated efficiencies into the SLOC analysis, rather than treat them as peripheral or unlikely to affect the Bureau's conclusions.

Second, the failing-firm and exiting-assets framework properly focuses on causation. Where, absent the merger, assets would leave the relevant market or cease to impose a meaningful competitive constraint, the merger does not worsen competitive outcomes. The analysis should therefore emphasise realistic counterfactuals, commercially reasonable searches for alternatives, and the likelihood of asset exit, including the failure of a part of a business, rather than formal insolvency alone.

Taken together, these considerations ensure merger review evaluates actual competitive effects. The Bureau should intervene where a transaction causes a material loss of competition, not where efficiencies benefit consumers or where assets would otherwise exit the market.

A. Efficiencies as a Component of Competitive-Effects Analysis

The Draft Merger Guidelines reflect the Bureau's interpretation of Parliament's repeal of the efficiency defence, formerly codified in s. 96 of the *Competition Act*. That repeal marks a significant shift in Canadian merger policy. Under the prior provision, a merger that increased prices could still

proceed if efficiency gains outweighed the associated deadweight loss. The statutory balancing test has disappeared, but the economic logic underlying it has not.

In *Canada (Commissioner of Competition) v. Superior Propane Inc.*,²⁸ the Federal Court of Appeal explained that a merger producing a substantial lessening of competition could be permitted where efficiency gains exceeded and offset the anti-competitive effects. The Court discussed the “total surplus standard,” which focuses on deadweight loss, while also directing the Tribunal to consider the Act’s broader purposes, including competitive prices for consumers.

Under the amended Act, efficiencies appear only as one factor in the non-exhaustive list relevant to a substantial lessening or prevention of competition (SLOC).²⁹ The Draft Guidelines state the Bureau will consider efficiencies “as part of our overall analysis of harm to competition only where they are clearly merger-specific, substantiated with rigorous and independent evidence, and demonstrably likely to enhance competitive outcomes in a way that benefits Canadians.”³⁰ The Guidelines also state efficiencies are “unlikely to change” the Bureau’s conclusion where a merger raises significant competition concerns.³¹

Taken literally, this approach risks treating efficiencies as peripheral, rather than central, to competitive effects. Standard price theory places cost conditions at the core of pricing incentives, output decisions, and responses to entry.³² As ICLE explained in its earlier comments:

And yet it, is not entirely clear—in the aftermath of Bill C-59, and especially following the elimination of the efficiencies defense—how defendants could rebut the structural presumption laid down in s.92, other than by refuting the market-concentration calculus put forward by the Bureau. This essentially turns merger review under the Competition Act into a formalistic exercise where—despite assurances to the contrary—market structure is outcome-determinative. It also jars with the logic that applies to conduct under s. 90.1, thereby rendering the Competition Act conceptually rudderless.³³

1. The economic role of efficiencies

Discounting efficiencies risks systematic error. Enforcement that prioritises structural indicators while downplaying cost reductions invites false positives by condemning transactions that may reduce prices or expand output. The Draft Guidelines move policy in that direction by suggesting efficiencies rarely affect the SLOC determination once market-power concerns arise.

²⁸ 2003 FCA 53, leave to appeal refused, [2003] S.C.C.A. No. 421.

²⁹ *Competition Act* § 93(h).

³⁰ Draft Merger Guidelines ¶ 286.

³¹ Draft Merger Guidelines ¶ 288.

³² See, e.g., DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* (2nd ed.1994) 36-37 (“reasons for mergers and acquisitions” include efficiencies—greater optimal scale, scope synergies, and improved management.).

³³ Appendix BB 5.

The relevant question is not whether efficiencies “preserve or restore competition to a level that would exist without the merger,” but whether they improve consumer welfare despite any reduction in rivalry. A merger may eliminate a competitor yet still benefit consumers if cost savings outweigh any price effects.

Efficiencies also matter at the macroeconomic level. Mergers that eliminate duplicative fixed costs, rationalise production, or achieve economies of scale or scope free resources for use elsewhere in the economy. For a small, open economy such as Canada’s, scale efficiencies may enable domestic firms to compete against larger foreign rivals.

The Guidelines should integrate efficiencies directly into competitive-effects analysis, rather than treat them as a secondary step after identifying an SLOC. Marginal-cost reductions are central to unilateral-effects analysis. If a merger lowers marginal costs sufficiently, the profit-maximising post-merger price may fall relative to pre-merger prices, even when concentration increases.

Joseph Farrell and Carl Shapiro show that whether efficiencies lower prices will depend on the merging firms’ market shares and demand elasticity.³⁴ A merger that lowers marginal costs will often lead the merged firm to reduce prices and expand output. The Guidelines should therefore evaluate efficiency claims carefully, not discount them based on structural indicators alone.

2. *Dynamic and fixed-cost efficiencies*

Dynamic efficiencies warrant similar attention. Improvements in innovation, product quality, and speed of commercialisation often generate large consumer benefits, especially in research-intensive industries. Merger review focused narrowly on short-run price effects risks overstating competitive harm and understating these gains. A merger that accelerates innovation or combines complementary assets can intensify competition over time, even if concentration increases in the short run. Gregory Sidak and David Teece argue that a “neo-Schumpeterian” approach places less weight on market share and more on potential competition and firm capabilities.³⁵

Fixed-cost savings may not immediately reduce prices, but they affect investment incentives, risk tolerance, and capacity expansion. Ignoring fixed-cost efficiencies biases analysis toward static price effects and away from long-run competition. Oliver Williamson demonstrated that merger analysis should weigh scale economies against deadweight loss to avoid significant economic waste.³⁶

³⁴ See, e.g., Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107, 114–16 (1990) (“But if the merger also generates synergies, the new firm’s marginal costs may be lower than those of either of its constituent firms, and this cost reduction may be enough to cause the price to fall.”)

³⁵ Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009).

³⁶ Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968) (“[I]n the occasional case where efficiency and market power consequences exist, can economies be dismissed on the grounds that market power effects invariably dominate? If they cannot, then a rational treatment of the merger question requires that an effort be made to [estimate the tradeoffs].”)

3. Buyer-power efficiencies

The categorical exclusion of cost savings from stronger bargaining with suppliers lacks economic support. Lower input prices obtained through negotiation constitute an efficiency unless they reflect monopsony power that reduces output below competitive levels. The OECD notes that monopsony depresses output and prices below competitive levels, while bargaining power can countervail seller market power and move prices toward competitive levels.³⁷

Economic theory distinguishes between redistributive transfers and true cost reductions that affect downstream pricing incentives.³⁸ Before Bill C-56, the Bureau recognised this distinction in reporting to the OECD, noting that it assessed whether claimed efficiencies merely redistributed income between parties.³⁹

4. Merger specificity

The Guidelines require efficiencies to be “merger-specific.” The economic literature shows that the choice between building and buying capabilities is not costless.⁴⁰ Peter Klein and João Mazzoni find firms vertically integrate to protect relationship-specific investments and resolve conflicts arising from incomplete contracts. Integration may therefore create efficiencies—such as protecting specific assets—that arm’s-length contracts cannot replicate.

Organic expansion takes time, requires capital, and involves execution risk. A merger may enable faster integration, avoid duplication, and transfer tacit knowledge that internal development cannot easily reproduce.

³⁷ Org. for Econ. Coop. & Dev., *Monopsony and Buyer Power*, OECD Doc. DAF/COMP(2008)38 (2009), https://www.oecd.org/content/dam/oecd/en/publications/reports/2009/12/monopsony-and-buyer-power_cf60bdd1/36a2b824-en.pdf.

³⁸ Compare Lars-Hendrik Röller, Johan Stennek & Frank Verboven, *Efficiency Gains from Mergers*, in EUROPEAN MERGER CONTROL: DO WE NEED AN EFFICIENCY DEFENCE? (Fabienne Ilzkovitz & Roderick Meiklejohn eds., 2006) (“Real cost-savings are those savings that correspond to some savings of productive resources in the economy. Rationalisation, economies of scale, technological progress, and slack reduction are all real cost-savings. Also some purchasing economies are real cost-savings.”), with Org. for Econ. Coop. & Dev., *Dynamic Efficiencies in Merger Analysis*, OECD Doc. DAF/COMP(2007)41 (May 15, 2008),

https://www.oecd.org/content/dam/oecd/en/publications/reports/2008/05/dynamic-efficiencies-in-merger-analysis_bffeed6/df6017f9-en.pdf (“[A] post-merger rise in price leads to a redistribution of income from buyers, who pay the higher prices, to the company and its shareholders, who receive the higher profit. Since the dollars of welfare loss suffered by the buyers are balanced by the dollars of welfare gain accruing to the producers, many economists have treated this merely as a transfer of income between the two groups, in which case society as a whole is unaffected... distributional changes generally should not be considered to affect social welfare and, therefore, that such changes can be ignored.”).

³⁹ *Id.*

⁴⁰ Peter G. Klein & João Fernando Rossi Mazzoni, *The Make-or-Buy Decision Revisited*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 447 (Claude Ménard & Mary M. Shirley eds., 2d ed. 2025).

Assuming contracts can replicate integration efficiencies lacks theoretical⁴¹ and empirical support.⁴² If a firm could easily replicate a target's capabilities internally, it would not pay an acquisition premium. The transaction itself provides market-based evidence that the merger creates value not achievable at comparable cost or speed. The Guidelines should compare realistic alternatives, not a hypothetical first-best scenario that ignores timing, risk, and implementation costs.

5. *Interaction with structural presumptions*

The Guidelines do not explain how efficiencies interact with the structural presumption under s. 92(2). If a merger exceeds concentration thresholds, can substantial efficiencies rebut the presumption, or must parties still prove on a balance of probabilities that no SLOC will occur?

The Guidelines should clarify:

- Efficiencies are directly relevant to whether a merger substantially lessens or prevents competition.
- Parties may rebut the structural presumption by demonstrating that efficiencies offset potential harm.
- Where efficiencies are large and merger-specific, the Bureau should not require unattainable precision in quantification. Merger analysis is inherently predictive, and the same uncertainty affecting competitive-effects analysis affects efficiency measurement.

The repeal of s. 96 changed the legal framework, not the economics of competition. The Guidelines should treat substantiated efficiencies as integral to the SLOC analysis under s. 93, rather than as a rare exception to structural concerns. Efficiencies benefit consumers, not “competition” in the abstract. A merger that eliminates duplication, integrates complementary assets, or achieves scale can benefit consumers even if it reduces the number of firms in a narrowly defined market.

B. Failing Firms, Exiting Assets, and the Counterfactual

Section 4.6 of the Draft Merger Guidelines addresses failing firms and exiting assets. It reflects a basic economic principle: if, absent the merger, a firm's assets would leave the relevant market and cease to impose a material competitive constraint, the merger does not cause any incremental loss of competition. The draft recognises this point, stating that parties may show “the merger is not the cause of the loss of a competitor” where, without the transaction, “imminent failure is probable and

⁴¹ See, e.g., Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971) (explaining that, under “bounded rationality” and “transactional failures,” market contracts cannot match a firm's internal control and incentive structures). See also Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) (explaining that significant transaction costs—driven by bounded rationality and opportunism—keep market contracts from matching the efficiencies of internal organisation).

⁴² Jeffrey T. Macher & Barak D. Richman, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences*, 10 BUS. & POL. 1 (2008) (review of empirical studies finds that, as transactions grow more complex or require relationship-specific investment, firms shift from simple contracts to integrated governance, because contracts cannot match a firm's administrative control and flexibility).

the assets of the firm are likely to exit the relevant market and no longer materially impact competition in that market.”⁴³ This causation focus accords with s. 93(b) of the *Competition Act*, which asks whether “the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail.”

The Draft Guidelines emphasise that “probable business failure does not provide a defence for a merger that is likely to prevent or lessen competition substantially.”⁴⁴ Instead, financial distress and asset exit function as rebuttal evidence on causation. A categorical defence could immunise harmful mergers where less harmful alternatives exist. At the same time, if the counterfactual is asset exit and loss of competitive constraint, blocking the merger would not improve competitive outcomes.

1. Insolvency requirements versus asset exit

The draft defines a “failing firm” narrowly: a firm that is insolvent or likely to become insolvent, has initiated or is likely to initiate bankruptcy proceedings, or faces receivership.⁴⁵ It also requires proof the firm cannot reorganise successfully under insolvency regimes or voluntary arrangements.⁴⁶

This approach may be too restrictive. Section 93(b) refers to “the business, or a part of the business.” Many transactions involve business units, facilities, or product lines that would exit the relevant market even if the corporate parent remains solvent.

Economically, the relevant question is whether the assets that constrain competition would continue to do so absent the merger. A plant, network, or product line likely to shut down or redeploy outside the relevant market no longer disciplines rivals, even if the firm as a whole remains financially viable.⁴⁷ The Guidelines should clarify that failure or exit of a “part of the business”—such as a division, line of business, or local operation—can satisfy this element, provided the parties show those assets would cease materially affecting competition.

2. Alternative purchasers and commercial reality

The Draft Guidelines require “reliable and objective evidence” of financial distress and state that “subjective expectations or unsupported projections will not be considered credible.”⁴⁸ That standard is appropriate. Parties hold superior information and may have strategic incentives.

⁴³ Draft Merger Guidelines ¶ 277.

⁴⁴ Draft Merger Guidelines ¶ 277.

⁴⁵ Draft Merger Guidelines ¶ 280.

⁴⁶ Draft Merger Guidelines ¶ 281.

⁴⁷ Org. for Econ. Coop. & Dev., Competition Comm., *The Failing Firm Defence*, OECD Doc. DAF/COMP(2009)38, at 12 (Aug. 17, 2010), https://www.oecd.org/content/dam/oecd/en/publications/reports/2010/10/the-failing-firm-defence_a0e37e7e/c90c3d1e-en.pdf (“In some instances, the merger under review involves the acquisition of a firm’s division. In those cases, the merging parties may argue that the exit of that particular division from the market would occur (i) whether or not the merger materialises and (ii) irrespective of the financial health of the parent company.”).

⁴⁸ Draft Merger Guidelines ¶ 282.

Predicting exit nonetheless involves uncertainty. The Guidelines should not require certainty. A workable standard is whether contemporaneous financial information, internal documents, and third-party evidence show exit is more likely than continued operation at the current competitive level absent the merger.

Section 4.6 also requires proof that “no alternative to the merger [is] likely to result in a materially greater level of competition.”⁴⁹ It identifies three alternatives: acquisition by a competitively preferable purchaser (CPP), retrenchment or restructuring, and liquidation.⁵⁰ The draft asks whether another purchaser could produce a materially higher level of competition and pay more than liquidation value plus transaction costs. It also contemplates requiring an independent third party to search for buyers.⁵¹

Focusing on counterfactual competitive effects is appropriate. The CPP requirement, though, risks favouring smaller but less efficient firms. As Lars Persson explains, interpreting “competitively preferable” to mean a lower market-share buyer would advantage smaller bidders even when larger firms would generate greater producer and consumer surplus.⁵² Smaller firms may also use the condition to block acquisitions that would otherwise increase total surplus.

A stringent “no alternative” requirement combined with mandatory independent searches could impose delay and cost on financially distressed firms. Distressed sellers often retain advisors, canvass strategic and financial buyers, and explore restructuring. The Bureau should evaluate whether the parties conducted a commercially reasonable search given their financial condition, timing constraints, market conditions, and the business’s scale. Presuming unspecified additional searches would uncover a superior buyer risks converting an economic inquiry into a procedural hurdle.

3. *Retrenchment, restructuring, and liquidation*

The Draft Guidelines recognise that retrenchment—downsizing or withdrawing from certain products or regions—may allow a firm to survive as a competitor.⁵³ The key question is whether such a strategy would preserve materially greater rivalry in the relevant market than the proposed merger. The Guidelines should focus on whether retrenchment maintains effective competitive constraints, not whether it preserves the firm as a legal entity or employer.

The discussion of liquidation notes that it may “facilitate entry into a market” by allowing competitors to acquire customers or assets.⁵⁴ The effect depends on asset characteristics and market structure. Where assets are fungible and easily redeployed—such as standardised equipment—liquidation may support competition. Where assets are highly specific, capable buyers are few, or

⁴⁹ Draft Merger Guidelines ¶ 279.

⁵⁰ Draft Merger Guidelines ¶ 283.

⁵¹ *Id.*

⁵² Lars Persson, *The Failing Firm Defense*, 53 J. INDUS. ECON. 175 (2005).

⁵³ Draft Merger Guidelines ¶ 283.b.

⁵⁴ Draft Merger Guidelines ¶ 283.c.

local demand is weak, liquidation may remove them from the market entirely. The Guidelines should recognise liquidation as superior only when redeployment is reasonably likely to preserve or enhance competition.

4. *Clarifying the framework*

The Guidelines would be clearer if they explicitly stated that s. 4.6 applies to both firm-wide failure and the failure or exit of a “part of the business” within the meaning of s. 93(b). That clarification would align the Guidelines with the statute and the economic focus on whether specific assets continue to constrain rivals.

Coupled with a likelihood-based evidentiary standard and a commercially realistic assessment of alternatives, this approach preserves the central insight of the failing-firm and exiting-assets analysis: the Bureau should intervene when a merger causes a meaningful loss of competition, not when it merely changes the owner of assets that would otherwise leave the market.

VI. Vertical Mergers and Competitive Effects

A vertical merger joins firms at different levels of a supply chain—for example, a manufacturer acquiring a distributor or a content producer acquiring a distribution platform. The Guidelines correctly centre the analysis on “ability and incentive” to harm competition,⁵⁵ and paragraph 230 properly recognises that, where rivals retain “access to many effective alternatives,” substantial harm may be unlikely.⁵⁶ Those are appropriate analytical starting points.

The draft nevertheless departs from established economic learning in several important respects. It overstates coordination risks from vertical integration, relies on horizontal-style structural presumptions ill-suited to vertical relationships, and treats efficiencies—particularly predictable benefits of integration—as unlikely to matter in practice. It also frames foreclosure concerns without sufficient attention to realistic counterfactuals and the conditions required for competitive harm.

A large empirical literature finds vertical mergers are commonly pro-competitive, increasing output and benefiting consumers. By setting thresholds and evidentiary standards that discount these effects, the Guidelines risk condemning transactions that improve market performance. The final Guidelines should align vertical-merger analysis with evidence-based competitive-effects principles.

A. Empirical Evidence on Vertical Mergers

A substantial body of economic research finds that vertical mergers typically improve efficiency and benefit consumers. Francine Lafontaine and Margaret Slade surveyed the theoretical and empirical

⁵⁵ Draft Merger Guidelines ¶ 224.

⁵⁶ Draft Merger Guidelines ¶ 230.

literature on vertical restraints and vertical integration in the *Handbook of Industrial Organization* and concluded:⁵⁷

[W]e are therefore somewhat skeptical about claims that vertical restraints or vertical integration are likely to harm consumers. In our view, restraints that are imposed should, absent evidence of foreclosure, be assessed under a rule of reason, and firms should almost always be allowed to integrate vertically when that is their choice.⁵⁸

Empirical evidence points in the same direction. The Global Antitrust Institute's 2018 submission to the U.S. Federal Trade Commission reviewed 31 studies of vertical mergers across multiple industries and found consumer benefits in nearly every case, with "only one study that found evidence vertical integration harmed consumers."⁵⁹ More recent work reinforces this pattern. A 2025 field experiment by Chiara Farronato, Andrey Fradkin, and Alexander MacKay examined Amazon's private-label products, a form of vertical integration into retail. Using a browser extension that hid Amazon's own brands from shoppers, the authors found that removing private labels would reduce consumer surplus by 5.4%, with roughly 10% of that reduction attributable to higher prices charged by third-party sellers.⁶⁰

These results reflect basic economic logic. Unlike horizontal mergers among direct competitors, vertical mergers combine firms at different levels of the supply chain and commonly increase output. Manufacturers and distributors both profit from higher sales volumes. Vertical integration often eliminates double marginalisation, reduces free-riding on dealer services, and improves quality assurance.

Benjamin Klein and Kevin Murphy analysed these mechanisms in detail.⁶¹ They show that vertical restraints frequently arise from manufacturers' efforts to maximise product value to final consumers. Restrictions on distributor conduct can align distributor incentives with consumer welfare, rather than undermine it.

⁵⁷ Francine Lafontaine & Margaret E. Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008); see also Francine Lafontaine & Margaret E. Slade, *Transaction Cost Economics and Vertical Market Restrictions—Evidence*, 55 ANTITRUST BULL. 587 (2010); Geoffrey Manne, Kristian Stout & Eric Fruits, *The Fatal Economic Flaws of the Contemporary Campaign against Vertical Integration*, 68 U. KAN. L. REV. 923 (Jun. 2020).

⁵⁸ Francine Lafontaine & Margaret E. Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 680 (2007).

⁵⁹ Global Antitrust Inst., *Vertical Mergers*, COMMENT ON THE FED. TRADE COMM'N'S HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY 6–8 (Sept. 6, 2018), <https://gaidigitalcommons.org/vertical-mergers>.

⁶⁰ Chiara Farronato, Andrey Fradkin & Alexander MacKay, *Self-Preferencing at Amazon: Evidence from Search Rankings*, Nat'l Bureau Econ. Rsch., Working Paper No. 32,359, at 3–4 (2025).

⁶¹ Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988).

B. The Coordinated-Effects Claim Lacks Economic Support

The Guidelines state that “generally speaking, the greater the degree of vertical integration in a market, the greater the risk of coordinated behaviour.”⁶² The draft offers no citation or economic explanation for this proposition, and economic theory does not support it.

Coordinated effects require competitors to reach agreement on coordination terms, monitor compliance, and punish deviation. Vertical integration does not facilitate these mechanisms. Daniel Reiffen and Michael Vita show input foreclosure becomes profitable only when the integrated firm possesses market power at *both* vertical levels and foreclosure raises rivals’ costs enough to offset lost input sales.⁶³ Michael Salinger likewise demonstrates foreclosure requires substantial market power both upstream and downstream.⁶⁴ Neither condition implies that vertical integration promotes horizontal coordination.

The classic economic insight remains straightforward: vertically related firms have complementary, not collusive, incentives. A manufacturer benefits when distributors sell more units, and a distributor benefits when suppliers produce efficiently. Vertical integration tends to align these incentives, rather than support coordinated output restriction.

The Guidelines should remove the unsupported claim in paragraph 245 or provide economic reasoning and empirical evidence to justify it.

C. Foreclosure Theories in Vertical Mergers

The Guidelines identify foreclosure as the primary concern in vertical mergers. They state a vertical merger may harm competition if it gives the merged firm the ability and incentive to foreclose rivals’ access to an important input or customer base.

This concern is theoretically plausible but often overstated. Foreclosure harms competition only if several conditions hold simultaneously:

- **Control of a Critical Input or Customer Base:** The acquired business must control access that rivals cannot readily replicate or replace.
- **Ability to Foreclose:** The merged firm must be able to deny or degrade access. Contracts, regulation, or the loss of profitable upstream sales may make foreclosure infeasible.
- **Incentive to Foreclose:** Foreclosure must be profitable. If the upstream division earns substantial revenue from selling to rivals, refusing to deal reduces profits. The merged firm

⁶² Draft Merger Guidelines ¶ 241(a) (“[G]enerally speaking, the greater the degree of vertical integration in a market, the greater the risk of coordinated behaviour.”).

⁶³ Daniel P. Reiffen & Michael Vita, *Comment: Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 920-21 (1995).

⁶⁴ Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345, 346-48 (1988).

will foreclose only if downstream gains exceed lost upstream profits—a condition economic models find uncommon.

- **Competitive Harm:** Even where foreclosure occurs, consumer harm requires a substantial reduction in downstream competition. If rivals can expand or entry is feasible, foreclosure may disadvantage competitors without harming competition or consumers.

Empirical evidence supports this framework. Studies of vertical integration in cable television, telecommunications, and other sectors generally find neutral or positive effects on prices and output. The theoretical possibility of foreclosure does not justify a presumption against vertical mergers.

D. Structural Presumptions Apply Poorly to Vertical Mergers

The Guidelines apply the same structural presumptions—30% market share and an HHI of 1,800—to vertical mergers as to horizontal mergers. They state the Bureau is “more likely to investigate further” where the merged firm’s share exceeds 30% at either level of the supply chain.⁶⁵

The economics differ fundamentally. A 30% share at one level of a supply chain does not raise the same concerns as a 30% share among direct competitors. Where rivals can obtain inputs or reach customers through alternative trading partners, even a substantial share at one level may pose little competitive risk.

The Guidelines should recognise this distinction. A safe harbour would improve predictability and align enforcement with economic evidence. Vertical mergers should be presumed unlikely to harm competition where the merged firm holds less than a 40% share at each vertical level and rivals have practical access to alternative suppliers or customers.

Below those thresholds, enforcement should require specific evidence of foreclosure that would competitively impair—not merely disadvantage—rivals.

E. Inherent Elimination of Double Marginalisation

The Guidelines treat elimination of double marginalisation as an “efficiency” subject to sceptical evidentiary standards. Footnote 128 states the Bureau “will consider these claims in light of the criteria in paragraph 285, including considering whether any potential elimination of double marginalization is merger-specific, or could be partially or entirely achieved through other contracts, agreements or supply relationships.”⁶⁶ This framing misunderstands the economic nature of double marginalisation.

⁶⁵ Draft Merger Guidelines ¶ 229.

⁶⁶ Draft Merger Guidelines n.128 (“Firms may claim that non-horizontal mergers allow the merged firm to ‘internalize’ existing double marginalization. We will consider these claims in light of the criteria in paragraph 285, including considering whether any potential elimination of double marginalization is merger-specific, or could be partially or entirely achieved through other contracts, agreements or supply relationships.”).

Double marginalisation is a *pricing distortion*, not a cost. When two firms with pricing power operate at successive levels of a supply chain, each applies a markup. The combined markup exceeds what a single integrated firm would charge. Vertical integration eliminates the distortion by aligning pricing incentives. The upstream division no longer marks up sales to the downstream division because both operate under a unified profit objective.

This distinction has three implications.

- **Automaticity:** Unlike speculative synergies that depend on post-merger integration, eliminating double marginalisation occurs mechanically upon integration. It requires no reorganisation or managerial effort. Where both levels exercised pricing power pre-merger, the distortion disappears.
- **Evidentiary Burden:** Applying paragraph 285's efficiency criteria reverses the proper inquiry. The relevant question is whether both levels possessed pricing power before the merger. If so, elimination follows. The Bureau should explain why the effect would not occur, rather than require parties to prove that it will.
- **Contract Alternatives:** Footnote 128 suggests contracts or supply agreements could replicate the effect.⁶⁷ Yet footnote 106 states "contractual terms are unlikely to eliminate all potential means of foreclosure."⁶⁸ The logic must be consistent. If contracts cannot reliably prevent foreclosure harms, they also cannot reliably reproduce integration benefits. If contracts could perfectly replicate integration, firms would not pay acquisition premiums to integrate.

F. An Unduly High Bar for Pro-Competitive Benefits

Apart from double marginalisation, the Guidelines set an unduly high bar for crediting genuine efficiencies, such as cost savings from synergies, scale, or rationalisation. Paragraph 288 states that "generally, when a merger otherwise presents significant competition concerns, even gains that are supported by rigorous evidence are unlikely to change our conclusions regarding harm to competition."⁶⁹ In practice, this approach risks nullifying efficiency analysis whenever a transaction triggers the structural presumption.

Parliament preserved an efficiencies pathway. Although Bill C-56 repealed the explicit s. 96 defence, s. 93(h) continues to direct the Tribunal to consider "any other factor that is relevant to competition in a market."⁷⁰ Merger-specific efficiencies that enhance consumer welfare are plainly relevant to

⁶⁷ Draft Merger Guidelines n.128 ("Firms may claim that non-horizontal mergers allow the merged firm to 'internalize' existing double marginalization. We will consider these claims in light of the criteria in paragraph 285, including considering whether any potential elimination of double marginalization is merger-specific, or could be partially or entirely achieved through other contracts, agreements or supply relationships.").

⁶⁸ Draft Merger Guidelines n.106 ("Where a merger otherwise results in the ability and incentive to foreclose, we presume that contractual terms are unlikely to eliminate all potential means of foreclosure, unless the contrary is clearly demonstrated.").

⁶⁹ Draft Merger Guidelines ¶ 288.

⁷⁰ Competition Act, R.S.C. 1985, c. C-34, s. 93(h).

competitive effects. A framework that recognises efficiencies in principle but discounts them in practice undermines that statutory direction.

VII. Merger Analysis in Multi-Sided Platform Markets

The Draft Merger Guidelines recognise that multi-sided platforms often feature network effects, economies of scale and scope, differentiated monetisation strategies, and dynamic forms of competition.⁷¹ These features make careful analysis especially important. As ICLE noted in its ACCA Comments, however, they also make it critical to anchor enforcement in clear evidence of substantial competitive harm, rather than in broad structural concerns about size, concentration, or business model.

The draft emphasises that network effects and scale economies “may reinforce the growth and market position of incumbents” and in some cases may lead to “tipping.”⁷² Network effects are real, but their competitive significance is context-dependent. Users typically value participation by relevant trading partners or contacts, not total global scale, and even strongly networked markets have experienced rapid displacement by entrants. For similar reasons, static measures such as market share or concentration are unreliable indicators of competitive effects in platform markets, where pricing structures, cross-subsidisation, and non-price competition complicate traditional metrics.

The platform provisions should therefore emphasise limiting principles. Network effects are a potential source of market power, not a presumption of it. Their significance depends on switching costs, multi-homing behaviour, entry conditions, and innovation dynamics. The same logic applies to concerns about potential competition, self-preferencing, interoperability, and data control. Consistent with an error-cost framework, speculative tipping theories should not substitute for an effects-based assessment grounded in evidence that a merger is likely to substantially lessen or prevent competition.

A. Multi-Homing as a Constraint on Platform Power

The Draft Merger Guidelines state the Bureau “may assess the extent of ‘multi-homing,’” noting that multi-homing can allow participants to benefit from network effects while preserving competition among platforms.⁷³ That observation is important. As ICLE has explained in prior submissions, widespread multi-homing and low switching costs limit the extent to which network effects produce durable market power. Users and business customers can shift activity across platforms, and rivals can reach those users without displacing an incumbent entirely. Many platform environments—including online marketplaces, ride-hailing, and app-based services—exhibit precisely this pattern of overlapping use and ready switching.

⁷¹ Draft Merger Guidelines § 4.4.3.

⁷² Draft Merger Guidelines ¶ 248.

⁷³ Draft Merger Guidelines ¶ 249.

The Guidelines should give this principle operational effect. They should identify circumstances in which multi-homing and low switching costs generally weigh against a finding of a substantial lessening or prevention of competition in platform merger cases. Consistent with the need for clear limiting principles, relevant indicators could include evidence that a significant share of participants uses two or more platforms for the same function, that technical and contractual switching costs are low, and that viable alternative channels remain available to reach end users or advertisers.

B. Potential Competition Requires Concrete Evidence

The Draft Merger Guidelines recognise that “dynamic competition may be particularly important in platform markets” and that the “most effective competitive threat” may come from displacement or disintermediation by an innovative or nascent competitor.⁷⁴ In innovation-driven markets, the asymmetry of error costs is especially pronounced. False positives that block or burden pro-competitive integrations can chill investment and innovation across the economy, while false negatives are more likely to be corrected over time through entry and technological change. These considerations apply with particular force to platform mergers that may integrate complementary technologies, data, or user groups.

Consistent with an error-cost framework, the Guidelines should require concrete, case-specific evidence that a target is likely to become a substantial competitive constraint on the acquirer. Relevant indicators could include objective signs of expansion, active innovation pipelines, or demonstrated success in a relevant niche. Theoretical possibilities that a complementary or niche service might someday evolve into a rival platform should not, without more, support a finding of a substantial lessening or prevention of competition.

C. Platform-Participant Mergers and Self-Preferencing

For mergers between a platform operator and a participant, the draft states the Bureau “may focus on whether the platform operator would engage in self-preferencing, or otherwise foreclose competing platform participants,” including whether the merged firm could deprive rival platforms of scale or network effects.⁷⁵

As ICLE explained in earlier comments, self-preferencing is typically a form of vertical integration. It often produces pro-competitive benefits, including lower costs, improved quality, stronger investment incentives, and better coordination across complementary services. Empirical research on self-preferencing is mixed and context-specific and does not support categorical presumptions of harm.

⁷⁴ Draft Merger Guidelines ¶ 250.

⁷⁵ Draft Merger Guidelines ¶ 251.b.

The Guidelines should align platform-participant mergers with the general vertical-effects framework. Self-preferencing theories of harm should be pursued only where three conditions are present:

1. the platform possesses durable market power protected by substantial entry or expansion barriers;
2. users face meaningful obstacles to multi-homing or switching; and
3. evidence shows integration is likely to produce net consumer harm—such as higher prices, reduced quality, or diminished innovation—after accounting for efficiencies.

Harm to individual rivals, or a change in their relative position on a platform, should not by itself be treated as harm to competition where those rivals can reach customers through other platforms or distribution channels.

D. Interoperability and Data Theories of Harm Require Evidence

The Draft Merger Guidelines state that mergers involving “tool[s] that make multi-homing easier,” “input[s] or data on which competing platforms rely,” or “complementary, interoperable or related products” may raise concern if they increase incentives to deny interoperability, undermine multi-homing, or raise switching costs.⁷⁶ As ICLE explained in earlier comments, broad and open-ended theories of harm in these areas risk turning merger enforcement into *de facto* regulation of platform design, interoperability, and ecosystem architecture—especially where standards rely on notions of “fairness” or structural preference, rather than demonstrated competitive harm.

The Guidelines should clarify that concerns about interoperability, switching costs, or data control must rest on specific evidence of a profitable and likely foreclosure strategy that would substantially lessen or prevent competition. A general preference for “open” systems or ecosystem neutrality should not substitute for a competitive-effects showing.

The Guidelines should also recognise that not all tools, inputs, or datasets confer market power. Where such assets are reproducible, obtainable from multiple sources, or capable of being developed within a reasonable timeframe, their acquisition will generally not provide the ability to foreclose rivals or entrench market power.

Incorporating these principles—together with the error-cost framework, market-power screens, and the treatment of self-preferencing discussed above—would make the platform-merger section more predictable and more consistent with an effects-based analysis grounded in clear evidence of harm to competition and consumers.

⁷⁶ Draft Merger Guidelines ¶¶ 251c, 252.

VIII. Labour-Market Effects and Merger Analysis

Bill C-59 authorised the Competition Tribunal to consider labour-market effects in merger review,⁷⁷ and the Guidelines appropriately acknowledge that authority. Paragraph 80 explains that, when assessing harm among buyers—including buyers of labour—the Bureau will examine how suppliers respond to the exercise of market power.⁷⁸ Footnote 72 properly emphasises the importance of workers’ outside options,⁷⁹ and footnote 75 recognises that anticompetitive effects may include reduced wage growth or diminished benefits.⁸⁰ These are sound starting points.

The difficulty lies in applying a mirror-image framework to labour and product markets. The draft suggests the Bureau will “apply the same framework to mergers among buyers, including buyers of labour,”⁸¹ yet the economics of monopsony differ in important respects from monopoly analysis. The empirical literature remains unsettled, market definition is unusually challenging, and employment effects cannot be assessed without reference to downstream output and prices. Efficiencies that reduce labour demand may accompany increased production and consumer benefits, making input-side evidence alone insufficient to establish competitive harm.

The final Guidelines should therefore adopt a cautious, evidence-based approach to labour-market enforcement. Labour effects should be evaluated in context, with careful attention to worker mobility, realistic alternatives, and downstream competitive outcomes, rather than through a mechanical application of product-market presumptions.

A. The Evidence on Labour-Market Power Remains Unsettled

The economic literature on labour-market power remains less developed than the industrial-organization literature on product-market competition. As ICLE scholars have explained, many monopsony models in labour economics rely on assumptions about worker mobility, employer conduct, and market structure that have not been tested against the evidentiary standards applied in antitrust cases.⁸² Industrial-organization models, by contrast, have been refined through decades

⁷⁷ *Fall Economic Statement Implementation Act, 2023*, S.C. 2024, c. 15, s. 255 (adding subsection 93(1.1) to the *Competition Act*, allowing the Tribunal to consider “harm to competition in a labour market” when assessing whether a merger substantially lessens or prevents competition).

⁷⁸ Draft Merger Guidelines ¶ 80(b).

⁷⁹ Draft Merger Guidelines n.72 (“If the merged firm controls a large share of purchases in the relevant market, a presumption of substantial harm may apply and we are likely to investigate further. For example, we may consider the alternatives available to suppliers (or workers) and whether there are barriers that prevent new buyers or employers from entering or expanding.”).

⁸⁰ Draft Merger Guidelines n.75.

⁸¹ Draft Merger Guidelines n.89.

⁸² See Brian Albrecht, Dirk Auer & Geoffrey A. Manne, *Labor Monopsony and Antitrust Enforcement: A Cautionary Tale*, INT’L CTR. FOR L. & ECON. (May 2025), <https://laweconcenter.org/resources/labor-monopsony-and-antitrust-enforcement-a-cautionary-tale> (“The models commonly employed in labor economics to support these claims rely on assumptions about worker mobility, employer conduct, and market structure that likely oversimplify real-world dynamics.... The economic models commonly used to study labor markets have not been subjected to the same level of antitrust scrutiny as those employed in industrial-organization (IO) economics to analyze product markets.”).

of enforcement and litigation, while labour-economics models largely developed without a direct enforcement context.

Direct estimates of labour-market power are also limited and highly variable. Suresh Naidu, Eric Posner, and Glen Weyl report labour-supply elasticity estimates ranging from 0.1 to 4.2, implying workers receive between 9% and 81% of their marginal product, depending on the study.⁸³ The wide dispersion suggests labour-market conditions differ substantially across occupations and industries, making broad generalisations unreliable.

Empirical studies linking employer concentration to wages face similar methodological constraints. Steven Berry, Martin Gaynor, and Fiona Scott Morton observe that concentration-wage studies “are not ultimately informative about whether monopsony power has grown and is depressing wages.”⁸⁴ Ivan Kirov and James Traina likewise find rising markdowns correlate more strongly with technology adoption than with employer concentration, concluding that “concentration is likely an inappropriate measure of labor-market power.”⁸⁵

Given this unsettled evidence, the Bureau should not ground enforcement priorities on indirect and inconclusive measures of competitive harm.

B. Labour-Market Analysis Requires Product-Market Context

The Guidelines assume labour-market analysis parallels product-market analysis. Important conceptual differences limit that analogy. In product markets, competitive harm appears directly in higher prices or reduced output. In labour markets, merger effects cannot be evaluated in isolation from downstream product markets.

Consider a merger that eliminates redundancies and reduces the combined firm’s demand for labour. Viewed only on the input side, fewer hires and lower wages may resemble monopsony power. Yet if the same merger increases downstream output because the combined firm operates more efficiently, the effect is efficiency-enhancing rather than anticompetitive. Ioana Marinescu and Herbert Hovenkamp recognise this point: an efficiency defence in a labour-market case “must show that post-merger reorganization will decrease the need for workers and will not lower total production. Both of these requirements are essential.”⁸⁶

This distinction matters because efficiencies and monopsony can appear identical when assessed solely from employment effects. Consolidating facilities, integrating distribution, or removing overlapping roles may reduce labour demand even where the merger has no anticompetitive purpose

⁸³ Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549-50 (2018) (summarising studies reporting residual labour elasticities ranging from 0.1 to 4.2).

⁸⁴ Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 62 (2019).

⁸⁵ Ivan Kirov & James Traina, *Labor Market Power and Technological Change in U.S. Manufacturing* 3, 32, Working Paper (2023).

⁸⁶ Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1062 (2019).

or effect. The Bureau cannot distinguish pro-competitive efficiencies from monopsony without examining downstream prices and output.

The consumer-welfare standard compounds this difficulty. A merger that lowers wages but also lowers consumer prices presents a trade-off that competition law does not clearly resolve. Some argue harm to workers alone should establish a violation, regardless of downstream effects.⁸⁷ That position sits uneasily with a consumer-focused competition framework. Where consumer benefits and worker impacts diverge, the Guidelines should acknowledge the policy choice rather than assume the answer.

C. Challenges in Defining Labour Markets

Footnote 28 notes the Bureau may need to “adapt our analysis to defining markets for the purchase of a product, including labour.”⁸⁸ The challenge is more substantial. Market definition in labour markets raises problems not present in product markets.

Workers are not products. Individuals with similar skills can work across multiple occupations and industries. An accountant may work for a bank, a hotel, or a technology firm. A truck driver may haul goods for a manufacturer, retailer, or logistics company. Because workers can shift across employers and sectors, labour markets are often broader than product markets—not narrower, as the Guidelines elsewhere imply.

Geographic scope presents similar difficulties. Remote work has expanded potential employment areas for many occupations, while commuting patterns vary across regions and job types. The economic literature offers no settled method for defining labour-market boundaries.

These issues matter because market definition determines concentration measures. Narrowly defined labour markets will produce high concentration by construction, regardless of competitive conditions. The Bureau should therefore approach labour-market definitions cautiously and avoid excluding realistic employment alternatives available to workers.

IX. Revisions to the Draft Merger Enforcement Guidelines

This section proposes targeted revisions to improve the Guidelines’ predictability, administrability, and economic coherence. Across multiple topics, the central recommendation is an effects-based approach grounded in clear evidence of substantial competitive harm and informed by the asymmetric costs of enforcement errors.

To that end, the section recommends clarifying that structural presumptions are preliminary screens rather than near-determinative findings; strengthening the treatment of efficiencies and failing-firm scenarios; refining market-definition tools; and adopting workable limiting principles, including

⁸⁷ See C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2083 (2018) (arguing that “harm to input markets suffices to establish an antitrust violation”).

⁸⁸ Draft Merger Guidelines n.28.

market-power screens and safe harbours, particularly for vertical and platform transactions. It also urges careful treatment of labour-market theories and network-effects claims to ensure enforcement rests on demonstrated competitive impairment, not speculative or purely structural concerns.

A. Evidence-Based Enforcement and Restraint in Close Cases

The Guidelines should state, in both the introduction and the executive summary, that the Bureau will pursue enforcement only where supported by evidence of substantial competitive harm. Where competitive effects are ambiguous, disputed, or likely offset by efficiencies, the Bureau should exercise restraint.

This approach follows the error-cost framework. False positives impose greater and more durable costs than false negatives: erroneous intervention chills pro-competitive conduct and deters innovation, while under-enforcement often corrects through entry and competitive pressure. In close cases, non-intervention should therefore be the default.

B. Structural Presumptions and Rebuttal Standards

The Guidelines should clarify that structural presumptions are preliminary screens, not near-determinative findings of harm. Concentration measures correlate poorly with competitive outcomes across many industries. The presumption under subsection 92(2) should trigger closer investigation, not impose a heavy burden on merging parties to prove a negative.

The Bureau should raise, or at minimum not lower, the numerical thresholds. The HHI threshold of 1,800 (with an increase of 100) and the 30% market-share threshold track the 2023 U.S. Merger Guidelines, which agency economists criticised as lacking empirical support. Below an HHI of 2,500, structural presumptions should apply cautiously and be readily rebutted. Below a combined market share of 30%, the Bureau should adopt a strong presumption against enforcement absent extraordinary circumstances, such as coordinated effects, exclusionary conduct, or prevention of entry by a disruptive competitor.

The Guidelines should also specify the evidentiary standard for rebuttal. The draft does not explain what evidence suffices to overcome the presumption on a balance of probabilities. The Bureau should identify categories of rebuttal evidence, including: ease of entry and the likelihood of timely, sufficient entry; expansion by existing competitors; low switching costs or widespread multi-homing; rapid innovation that renders market shares unstable; substantial merger-specific efficiencies; and direct evidence—such as customer testimony, internal documents, or econometric analysis—showing the merger will not substantially lessen competition.

Finally, the Guidelines should clarify how the presumption applies to vertical and conglomerate transactions. Where a transaction is primarily vertical or conglomerate but includes limited horizontal overlap, the presumption should apply only to the horizontal component. Applying horizontal thresholds to vertical relationships lacks economic justification, as discussed in Section VI.

C. Market Definition as a Tool for Assessing Competitive Effects

The Guidelines should emphasise that market definition is a tool for assessing competitive effects, not an independent requirement. Where competitive effects can be analysed directly—through diversion ratios, natural experiments, or bidding data—formal market definition becomes less important. The draft acknowledges this principle but should state it more prominently.

The Bureau should also provide guidance on applying the hypothetical monopolist test to non-price dimensions. The Guidelines recognise that harm may involve quality, variety, privacy, or innovation, yet do not explain how to conduct a SSNIP-equivalent analysis in such settings. In differentiated-product markets, diversion ratios and customer-switching evidence often offer more reliable guidance than formal market boundaries.

Finally, geographic market definition should rest on actual competitive constraints. Relevant considerations include purchasing patterns, transportation costs, and regulatory barriers, rather than administrative or political borders. Where customers routinely source from multiple provinces or countries, those areas should be included in the geographic market.

D. Integrating Efficiencies into Competitive-Effects Analysis

The Guidelines should integrate efficiencies directly into the competitive-effects analysis, rather than treat them as secondary considerations. Marginal-cost reductions bear directly on unilateral effects. If a merger lowers marginal costs sufficiently, the profit-maximising post-merger price may fall even where concentration increases. The current statement that efficiencies are “unlikely to change” the Bureau’s conclusion where significant concerns arise risks nullifying the analysis whenever the structural presumption is triggered.

The Guidelines should also recognise dynamic and fixed-cost efficiencies. Improvements in innovation, product quality, and speed of commercialisation account for a substantial share of consumer-welfare gains in research-intensive industries. Fixed-cost savings affect investment incentives, risk tolerance, and capacity expansion. An approach focused only on short-run price effects will understate these benefits and overstate competitive harm.

Buyer-power efficiencies should not be categorically excluded. Lower input prices obtained through negotiation constitute efficiencies unless they reflect monopsony power that reduces output below competitive levels. Economic theory distinguishes between redistributive transfers and cost reductions that affect downstream pricing incentives.

The Bureau should apply a realistic merger-specificity standard. Merger specificity requires a comparison of practical alternatives that accounts for execution costs, timing, and risk—not a hypothetical scenario in which contractual arrangements costlessly replicate integration. Transaction-cost economics shows firms integrate precisely because contracts cannot replicate certain organisational efficiencies, including protection of relationship-specific investments.

Finally, the Guidelines should clarify how efficiencies interact with the structural presumption. Evidence of substantial, merger-specific efficiencies should be capable of rebutting the subsection 92(2) presumption. Where efficiencies are significant but difficult to quantify precisely, the Bureau should not require a level of certainty greater than that demanded when predicting competitive harm.

E. Ground the Failing-Firm Analysis in Commercial Reality

The Guidelines should clarify that the failing-firm and exiting-assets analysis applies to parts of a business, not only to firm-wide insolvency. Section 93(b) of the *Competition Act* refers to “the business, or a part of the business, of a party to the merger.” A plant, product line, or local operation that is unprofitable and likely to shut down no longer constrains rivals, even if the parent firm remains solvent. The Guidelines should therefore recognise that exit of a business unit can satisfy the analysis.

The Bureau should also adopt a commercially realistic approach to alternative purchasers. A stringent “no alternative” requirement combined with a mandatory independent search can impose substantial cost and delay on firms already under financial stress. The relevant question is whether the parties conducted a commercially reasonable search in light of their financial position, timing constraints, and market conditions. The competitively preferable purchaser standard should not favour smaller, less-efficient acquirers merely because they hold a lower market share, a concern identified in the economic literature on failing-firm analysis.

Finally, the Guidelines should clarify when liquidation preserves competition. Liquidation promotes competition only where assets are likely to be redeployed within the relevant market. When assets are highly specific, capable buyers are few, or local demand is weak, liquidation may remove those assets from the market entirely. Liquidation should be treated as a superior alternative only where redeployment that maintains competitive constraints is reasonably likely.

F. Clarify the Treatment of Vertical Integration

The Draft Merger Guidelines should delete the unsupported claim that greater vertical integration increases coordination risk. Paragraph 245 states that “the greater the degree of vertical integration in a market, the greater the risk of coordinated behaviour,” yet provides no citation or economic reasoning. Coordinated effects require firms to reach consensus, monitor adherence, and punish deviations—mechanisms vertical integration does not facilitate. If the Bureau maintains this proposition, it should identify supporting evidence.

The Draft Guidelines should establish a vertical safe harbour. Where the merged firm holds less than 40% share at each vertical level, the transaction should be presumed efficient absent specific evidence that foreclosure would competitively impair—not merely disadvantage—rivals.

The draft should recognise the inherent elimination of double marginalisation. Where both vertical levels exercise pricing power, integration removes the double markup by construction. This is a

pricing correction, not a speculative post-merger synergy. The guidelines therefore should not apply paragraph 285's efficiency criteria to this category of gain, and the burden should rest on the Bureau to explain why the effect would not occur, rather than on the parties to prove that it would.

The Bureau should apply consistent treatment of contracts. The Draft Merger Guidelines state that contractual terms are unlikely to eliminate foreclosure harms (footnote 106), yet the guidelines also suggest contracts may replicate integration benefits (footnote 128). Both propositions cannot simultaneously hold. If contracts cannot prevent harms, they likewise cannot fully reproduce integration benefits.

The Bureau should also revise paragraph 288 to provide a meaningful efficiencies pathway. The current statement that efficiency gains are "unlikely to change" conclusions where a merger raises concerns effectively nullifies efficiencies analysis. Parliament retained s. 93(h), which permits the Tribunal to consider "any other factor that is relevant to competition in a market." Merger-specific efficiencies that enhance consumer welfare fall squarely within that provision, and the Draft Guidelines should give it operational effect.

Finally, the Guidelines should require evidence of competitive impairment, not mere rival disadvantage. Enforcement under the guidelines should target only those vertical mergers where foreclosure would materially impair rivals' ability to compete and where that impairment would likely harm consumers. A change in competitors' relative position, standing alone, does not establish a substantial lessening or prevention of competition.

G. Applying Effects-Based Analysis to Platform Mergers

Treat network effects as a factor to be assessed, not a presumption of market power. Network effects exist, but they are often limited and localised. Their competitive significance depends on entry conditions, switching costs, multi-homing, innovation, and the availability of alternatives. Speculative "tipping" theories should not substitute for evidence that a specific merger is likely to substantially lessen or prevent competition.

The Draft Merger Guidelines should also specify when multi-homing and low switching costs defeat a finding of substantial lessening of competition. Relevant evidence could include a significant share of participants using two or more platforms for the same function, low technical and contractual switching costs, and viable alternative channels for reaching users.

The Bureau should also require concrete evidence before concluding that a merger eliminates potential competition. The guidelines should identify objective indicia—such as documented expansion plans, innovation pipelines, or demonstrated success in a relevant segment—showing the target is likely to become a substantial competitive constraint. The mere possibility that a niche or complementary service could evolve into a rival platform should not, without more, support a finding of substantial lessening or prevention of competition.

Finally, the draft should align platform-participant mergers with the vertical-effects framework. Self-preferencing theories of harm should proceed only where three conditions are present: durable market power protected by substantial entry or expansion barriers, meaningful obstacles to multi-homing or switching, and evidence that integration is likely to produce net consumer harm after accounting for efficiencies. Harm to individual rivals, or changes in their relative position on a platform, should not be equated with harm to competition where those rivals can reach customers through other channels.

H. Labour-Market Harms Require Evidence of Downstream Effects

The Draft Merger Guidelines should require evidence of downstream output effects. The Bureau should pursue labour-market theories only where evidence shows a merger reduces output or raises prices in a downstream product market, or where the merger's predominant effect is wage suppression without offsetting efficiency gains. A merger that reduces labour demand while increasing output is efficiency-enhancing, not anticompetitive.

The Guidelines should apply a demanding evidentiary standard. The economic literature on labour-market power remains less developed than the industrial-organization literature on product-market power, and Canadian legal precedent on labour-market merger effects is limited. The Bureau should require direct evidence of wage suppression or output reduction, rather than reliance on concentration metrics that are especially unreliable in labour markets given cross-industry substitution and variable worker mobility.

The Guidelines should also define labour markets to reflect realistic worker alternatives. Labour-market definitions should account for cross-industry substitutability, commuting patterns, and remote-work opportunities. Artificially narrow markets—limited to specific occupations, bargaining units, or a small set of employers—will overstate concentration and mislead competitive analysis.

Finally, the guidelines should recognise that monopsony analysis differs from monopoly analysis. The assumption that labour-market analysis mirrors product-market analysis obscures the difficulty of distinguishing efficiency-enhancing reductions in labour demand from anticompetitive monopsony. The Bureau cannot draw that distinction without examining the merger's effects on downstream output and prices.

X. Conclusion

The amendments to the *Competition Act* enacted through Bills C-56 and C-59 expand the Bureau's merger-enforcement authority. That authority remains discretionary. These comments address how it can be exercised consistently with the economic evidence on merger effects.

The three concerns identified at the outset—unsupported structural presumptions, the sidelining of efficiencies, and the extension of merger theories into areas with limited evidence—share a common source. Each treats market structure as a reliable proxy for competitive outcomes and discounts the mechanisms through which mergers benefit consumers. The industrial-organization literature

reviewed here does not support that approach. Concentration measures correlate weakly with competitive harm across industries and market conditions. Vertical mergers typically benefit consumers. Efficiencies—particularly the elimination of double marginalisation—directly affect pricing and output in ways structural indicators cannot capture.

Section II's error-cost framework gives these findings practical significance. Blocking a merger that would benefit consumers imposes durable costs: forgone efficiencies, reduced investment, and chilled innovation. By contrast, if a harmful merger escapes challenge, entry, expansion, and technological change often erode supra-competitive returns over time. This asymmetry does not favour inaction. It favours precision-targeted intervention where evidence of harm is substantial, and restraint where evidence is ambiguous or offsetting benefits are likely.

The recommendations in Section IX would move the Guidelines toward that standard. Structural presumptions should operate as screening tools rather than near-determinative findings. Efficiencies should form part of the competitive-effects analysis. Vertical-merger enforcement should focus on demonstrable competitive impairment, not structural suspicion. Platform and labour-market theories should require concrete evidence of consumer harm. These changes would reduce false positives without weakening enforcement against genuinely anticompetitive mergers.

ICLE appreciates the Bureau's openness to public input through this consultation and remains available to provide further analysis on any of the issues addressed in these comments.