

June 26, 2026

**MERGER GUIDELINES REVIEW**  
**Observations on the Draft Merger Guidelines**

1. This submission responds to the European Commission’s consultation on the draft Merger Guidelines (the “Draft Guidelines”).
2. We welcome the Commission’s consolidation of the Horizontal and Non-Horizontal Merger Guidelines in Draft Guidelines to reflect the Commission’s decisional practice and the jurisprudence of the EU Courts over the past 20 years and to take account of the Draghi Report’s recommendation that the EU merger control considers scale, innovation, investment, resilience, sustainability, and security.
3. By confirming that mergers may generate efficiencies, indicating a readiness to take positive account of merger-related efficiencies, including dynamic efficiencies, and encouraging merging parties to articulate and substantiate a “theory of benefit” early in the process, the Commission has rightly shifted efficiencies from a rarely used defence to a more central part of its analytical framework, sending a positive signal to companies contemplating mergers that will enhance competitiveness, growth, and innovation, and enable the EU to compete more effectively on a global basis.
4. Specifically, we welcome the following:
  - The emphasis given to assessing the counterfactual;
  - The importance attached to dynamic competition; and
  - The recognition that mergers may generate efficiencies and increase innovation.
5. Our submission focuses on six points: (1) legal certainty; (2) evidentiary discipline and procedural safeguards; (3) safe harbors and screening criteria; (4) analytical frameworks for theories of harm; (5) symmetry between theories of harm and theories of benefit; and (6) efficiencies.
6. **Legal certainty.** The Draft Guidelines are intended to increase legal certainty and predictability. This is a sound objective. In several places, however, the Draft Guidelines risk undermining this objective:
  - First, the EC Courts have made clear that the Commission bears the legal burden of establishing a significant impediment to effective competition (“SIEC”). High market shares, high margins, ecosystem features, or dynamic capabilities may be relevant evidence, but they should not operate as presumptions of market power or harm.

Accordingly, consistent with the *Deutsche Telekom* judgment, we recommend that the Draft Guidelines make clear that the Commission bears the burden of establishing an SIEC on the basis of clear, consistent, and compelling evidence. We further recommend deleting or redrafting para. 127, which, read together with para. 62, suggests a *de facto* reversal of the burden of proof by requiring “*substantial evidence pointing away from a[n] SIEC*” for transactions that give rise to combined shares exceeding 40% or where the affected markets are highly concentrated markets and that result in a non-negligible increases in concentration levels.

- Second, the Draft Guidelines introduce various other indicators of market power including low sensitivity to price and high profit margins. These are generally less reliable. We recommend that the Commission either remove these indicators or introduce limiting principles, including to define what constitutes “high” or “higher” margins, what comparators should be used, and how the parties can rebut an inference of market power.
- Third, the Draft Guidelines state that the Commission is not bound by findings made in previous cases, even where the affected markets are similar or identical (para. 30). We recognize that the Commission may not be legally bound by prior findings, but suggest that such findings should represent the starting point for the Commission’s assessment of a transaction affecting the same market and that the Commission should not, without good reason, treat materially similar cases differently.
- Fourth, the Draft Guidelines introduce new theories of harm or develop existing ones, including dynamic competitive potential, investment, innovation, or potential competition theories of harm. We recommend that the Commission confirm that it bears the burden in respect of such theories of harm and must establish them on the basis of rigorous evidence. The Commission should further confirm – including through the introduction of safe harbors and screening criteria – that merging parties need not address every possible theory of harm proactively. The Commission should identify at an early stage the theories it considers plausible, so that investigations can focus on the issues that matter.

7. **Evidentiary discipline and procedural safeguards.** The Draft Guidelines contain evidentiary principles (paras. 26-31), which is welcome. Given, however, the expanded complexity of the Commission’s analytical toolkit and the broader and more evidence-intensive framework presented in the Draft Guidelines, we recommend greater evidentiary discipline and stronger procedural safeguards:

- First, the Commission’s assessment in any case necessarily rests on a sufficiently cogent and consistent body of evidence. Reliance on a single item of documentary evidence, even where that document has probative value (para. 31), should therefore be an exception, not a general rule.
- Second, internal documents, while often probative, should be assessed together with economic and other empirical evidence. In addition, the Commission should examine the context of any document, including its authorship, purpose, audience, timing, and ordinary-course character, and appreciate that internal

documents may reflect advocacy, optimism, negotiation positions, incomplete information, or the limited perspective of a particular business person.

- Third, market testing is a central part of merger control. The Draft Guidelines recognize that responses to information requests may reflect their authors' commercial incentives (para. 30). In addition, respondents may lack context or information, and may be confronted by long questionnaires with questions that are open to interpretation or are not neutral. The Commission should explain how it will assess the reliability, probative value, and potential bias of third-party evidence, and provide that merging parties will have time and opportunity to test such evidence, subject to appropriate confidentiality protections.
8. **Safe harbors and screening criteria should retain practical value.** The existing Guidelines include market share and HHI safe harbors that allow companies and their counsel to predict whether a given transaction is likely to raise competition concerns. The Draft Guidelines remove or degrade those safe harbors and screening criteria. This is regrettable and, we recommend, should be reversed. Safe harbors do not prevent the Commission from investigating mergers that fall within those harbors, but do enhance predictability, particularly with respect to low-risk transactions.
9. The Draft Guidelines appear to reduce that predictability in several respects. In particular, the existing 25% horizontal market-share safe harbor and HHI indicators are maintained, but are cited as factors that are “indicative” of the absence of an SIEC rather than as factors that create a presumption of compatibility. The Draft Guidelines also introduce additional market-share bands at para. 62 that create complexity. We recommend that the Commission maintain the existing safe harbors with clear screening criteria that identify transactions unlikely to raise concerns absent case-specific evidence to the contrary. In particular, the Commission should:
- Restore the 25% horizontal market-share safe harbour and HHI-based indicators as factors that support a presumption of compatibility;
  - Restore the 30% share threshold for non-horizontal mergers;
  - Explain the exceptional circumstances in which the Commission may investigate a transaction that falls within a safe harbor; and
  - Increase the 5% threshold for minority shareholding to 15%, unless a lower shareholding is accompanied by governance rights that confer influence exceeding that level.
10. **Theories of harm need clear analytical frameworks.** The Draft Guidelines replace the clear distinction between horizontal and non-horizontal mergers with eight distinct theories of harm. In doing so, they codify and expand several theories of harm applied in the past, including loss of investment and expansion competition, loss of innovation competition, loss of potential competition, diagonal foreclosure, entrenchment of a dominant position, access to commercially sensitive information, and portfolio effects. Without clear limiting principles, such theories risk being difficult for companies to assess and for the Commission to apply consistently.

11. The Commission should make clear that all theories of harm must be grounded in a clear economic mechanism, must be merger-specific, must be quantifiable, and must be likely to have significant anticompetitive effects. It should not be sufficient to show that the merged entity will have greater capabilities, a broader portfolio, more data, a stronger ecosystem, or greater scale – all of which can equally be pro-competitive, as the Draghi Report has urged the Commission to recognize. Situations where such factors will lead to an SIEC are likely to be rare. In pursuing such theories of harm the Commission should be required to identify the mechanism by which the harm to competition is likely to occur and the evidence supporting such an inference.
12. We recommend the following:
  - First, the Commission should retain the distinction between horizontal and non-horizontal mergers and, in respect of the eight theories of harm identified in the Draft Guidelines, (re)introduce clear safe harbors or screening criteria to allow parties to assess potential regulatory risk.
  - Second, the Commission should refrain from codifying a stand-alone labor-market theory of harm absent a refined analytical framework and against the background of strong labor market protection in Europe.
  - Third, common ownership theories of harm (paras. 163-166) should be applied with caution. The 5% shareholding safe harbor identified in the Draft Guidelines should be increased to at least 15%, unless a lower shareholding is accompanied by governance rights that confer competitively significant influence.
  - Fourth, the Commission should not codify a loss of investment and expansion competition theory of harm that treats ordinary post-merger rationalization as harmful. Companies regularly redirect investment from less promising projects to more promising ones. Such re-allocation may be efficient and indicative of competition. A theory of harm concerning reduced investment should be based on a clear analytical framework and require evidence of likely anticompetitive effects, not merely a change in investment allocation.
  - Fifth, innovation theories should be anchored in identifiable overlaps, capabilities, or projects, and should not become a general presumption against acquisitions in R&D-intensive sectors.
  - Sixth, the concept of an innovation shield introduced in the Draft Guidelines should be simplified and made easier to apply. The Commission should not require the existence of “three independent R&D competitors” as the confidential nature of R&D makes this challenging to assess for the parties. The Commission should clarify the meaning of “*largest firm in the relevant market*”, and either remove the reference to DMA gatekeepers or clarify whether they could still benefit from the shield outside of the market of their core platform service(s). Finally, the Commission should make clear that failure to qualify for the shield will not create a presumption of harm.
  - Seventh, non-horizontal theories should generally be subject to the ability-incentive-effects framework that has been applied for 20 years and is firmly

grounded in sound economic reasoning. The recognition that vertical and conglomerate mergers often generate efficiencies and should be approved absent compelling case-specific evidence to the contrary should also be retained.

- Eighth, the foreclosure theory of harm requires at least the following refinements:
  - The concept of dynamic foreclosure incentives should be limited by setting a clear timeframe for assessment and requiring likely and significant anticompetitive effects and not – as currently envisaged at para. 244 – worse terms for rivals.
  - Diagonal mergers should be included as a foreclosure mechanism under the vertical ability-incentive-effects framework rather than as a standalone theory of harm.
- Ninth, the Commission should refrain from codifying the entrenchment theory of harm unless and until the EU Courts have confirmed the existence of such a theory in the *Booking/eTraveli* case. Even if the EU Courts uphold that decision, the Commission should clarify the limiting principles that apply to such a theory, so that merging companies can determine what level of entrenchment may be sufficient to support an adverse finding.

13. **Theories of harm and theories of benefit should be assessed symmetrically.** The introduction of a “theory of benefit” is one of the most important and welcome developments in the Draft Guidelines. It should allow parties to present the pro-competitive rationale for a transaction at an early stage, rather than treating efficiencies only as a late-stage defense to a theory of harm.

14. For that change to be meaningful, however, theories of benefit must be assessed under a framework that is symmetrical with the framework applied to theories of harm. Symmetry should not be limited to a statement of principle. It should apply to the standard of proof, the treatment of evidence, the counterfactual, the time horizon, and the balancing of harm and benefit.

15. At present, the Draft Guidelines risk being symmetrical in form but asymmetrical in substance. The Commission may advance dynamic or forward-looking theories of harm on the basis of uncertain future effects, while merging parties are required to demonstrate efficiencies to a level of certainty that may be difficult to meet in practice. That imbalance would undermine the purpose of introducing theories of benefit. We recommend that the Commission:

- Confirm that the same “more likely than not” standard applies to both anticompetitive effects and claimed benefits. Where harm is uncertain, remote, long-term, or difficult to quantify, it should not be credited more readily than a benefit with the same characteristics. Equally, where dynamic harms are assessed over a long time horizon, dynamic benefits should be assessed over a comparable horizon.

- Clarify the relationship between a theory of benefit and the traditional efficiencies analysis. If the theory of benefit is simply a front-loaded version of the existing efficiencies defense, it may increase the burden on parties without changing outcomes. The Commission should make clear that parties may refine and supplement their theory of benefit as an investigation proceeds and that any failure to articulate every element during pre-notification should not preclude later consideration.
  - Explain when the same economic fact will be treated as a benefit and when it may support a theory of harm. Scale, data assets, innovation capabilities, R&D depth, portfolio breadth, and resilience may all generate competitive benefits. They may also, in some circumstances, form part of a theory of harm. Without a clear demarcation, parties may still be reluctant to advance efficiency evidence for fear that it will be used against them, which would undermine the purpose of the theory of benefit framework.
16. **Efficiencies should be workable in practice.** The Draft Guidelines' broader recognition of efficiencies is welcome. In particular, we support the recognition of dynamic efficiencies, sustainability benefits, resilience, security of supply, innovation, investment, and scale. These benefits are highly relevant to modern merger assessment and the EU's competitiveness agenda.
17. The key issue is whether these benefits can be established in practice. Historically, efficiencies have rarely, if ever, been outcome-determinative in EU merger control. We recommend that the Commission operationalize the efficiencies framework in a way that companies can use. We suggest five refinements.
- First, the Commission should recognize that many dynamic efficiencies cannot be precisely quantified at the time of notification. Innovation, resilience, and security-of-supply benefits often involve uncertainty. That does not make them speculative or irrelevant. The Guidelines should make clear that credible qualitative evidence may be sufficient where precise quantification is not reasonably possible.
  - Second, the Commission should avoid an overly narrow approach to timing. Some efficiencies, particularly in capital-intensive, regulated, or innovation-driven sectors, will materialize over longer periods. The relevant time horizon should reflect the market and the theory of harm. If the Commission assesses harm over five, ten, or more years, it should be prepared to assess benefits over the same period.
  - Third, the merger-specificity requirement should be applied pragmatically. The Commission should not require parties to disprove every hypothetical less anticompetitive alternative. Nor should the Commission have to consider all alternatives (para. 311). The relevant question should be whether the claimed efficiencies arise from the notified concentration when compared with a realistic counterfactual.
  - Fourth, the Commission should take a more flexible approach to out-of-market benefits. Benefits such as sustainability, resilience, security of supply, and scale may accrue across markets, across Member States, or to EU consumers more

broadly. A strict “same consumers” or “full compensation” requirement risks excluding precisely the benefits the Draft Guidelines now recognize. The Commission should assess the overall net effect on EU consumer welfare, rather than treating consumers in the market of harm as the only relevant beneficiaries.

- Fifth, efficiencies should inform remedies. Remedies should not be designed in a way that destroys the benefits the merger is expected to generate. Where the Commission has residual concerns about whether dynamic efficiencies will materialize, it should consider whether investment-based commitments, R&D commitments, capacity commitments, or other forward-looking remedies can preserve the pro-competitive rationale of the transaction while addressing the identified concern.

18. **Conclusion.** The Draft Guidelines are an important opportunity to modernize EU merger control, give practical effect to the EU’s competitiveness agenda, and reinforce the disciplined, evidence-based framework that has underpinned EU merger review for over 20 years. To achieve that result, the Commission should be clearer, more operational, and more balanced. It should preserve the existing burden of proof, restore meaningful safe harbors, apply a symmetrical framework to harm and benefits, make efficiencies usable, and impose limiting principles on novel theories of harm. These changes would ensure that EU merger control remains predictable, administrable, and effective and encourage companies to pursue transactions that promote competition, innovation, resilience, and growth.