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Client Alert

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European Union: The Commission's Proposed Merger Guidelines

Broader, more discretionary – and less predictable: a recalibration of the Commission's merger toolbox?

First overhaul of the EU merger framework in two decades codifies Commission enforcement and raises strategic stakes for deal teams with an EU nexus.

In brief

The European Commission has published its long-awaited draft Merger Guidelines, which will replace the 2004 Horizontal and 2008 Non-Horizontal Merger Guidelines with a single framework. The text is still in consultation and will likely evolve at the margins, but the Commission's overall direction of travel is clear.

At one level, the draft largely codifies existing practice, reflecting recent merger enforcement and case law (including CK Telecoms, Wieland-Werke, Deutsche Telekom, Booking/eTraveli, Dow/DuPont, Bayer/Monsanto and Illumina/Grail). At this level, the draft is well articulated and useful.

But it goes further. The draft signals some clear changes in approach to testing deals for competition harms:

- A broader and more discretionary analytical framework that may make it easier for the Commission to intervene in some cases.
- More emphasis on non-price parameters and additional theories of harm.
- And less reliance on traditional "safe harbours" such as market shares and Herfindahl-Hirschman Index (HHI) thresholds.

In parallel, the Commission clarifies the other side of the analysis with a "Theory of Benefit" approach. Efficiencies — particularly those linked to innovation, sustainability and resilience — are given greater prominence, alongside new concepts such as the "innovation shield".

Stakeholder submissions are due in before 26 June 2026 and are likely to focus on improving workability; major adjustments appear unlikely. Two particular areas merit further consideration (i) clearer guidance on the role of traditional safe harbours and thresholds (including market shares, HHI and foreclosure-related benchmarks) to improve predictability, and (ii) more workable, less cumulative conditions for a new and helpful innovation shield.

Once adopted, the Guidelines are binding on the Commission in the sense that it is required to justify any departure from them. However, the Commission warns that it is required to enforce the EU Merger Regulation in any event.

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The Commission's message in five points

- **Price is no longer the only/main relevant factor.** Innovation, investment, quality and choice, sustainability, resilience, and security of supply are all explicit parameters of competition that need to be taken into account in the assessment.
- **Low market shares no longer mean low risk.** Concerns can arise even where shares are modest, particularly in dynamic, innovation-driven or data-intensive markets, and qualitative evidence can drive the outcome.
- **Future competition matters as much as current competition.** Pipeline projects, nascent challengers and innovation spaces are squarely in scope, even before a relevant product market is identified and without the need for a market nexus.
- **Internal documents matter more than ever.** Ordinary-course strategy decks, board materials and emails carry significant probative weight and can outweigh expert economic evidence.

- **Efficiencies can help, but only if evidenced early and robustly.** Dynamic efficiencies linked to innovation, investment and resilience receive a more prominent role, but the evidentiary bar remains very high.

The practical consequence, if the current approach is maintained in the final text is that more transactions will require proper Phase I preparation, fewer will be cleared on share-based prima facie arguments, and early strategy considerations and document discipline will become decisive for deal timing.

What is genuinely new

The architecture below tracks the seven shifts most consequential for deal teams. None is wholly without precedent in Commission practice; each is now formalised and, in several cases, expanded.

A broader view of competition: non-price parameters take centre stage

The Draft Guidelines recognise an expansive set of parameters of competition: innovation and Research and Development (R&D), investment and capacity expansion, quality and choice, privacy, sustainability, resilience and security of supply (Draft Guidelines, para. 20). The Commission expressly reserves a margin of discretion in weighing price against non-price parameters.

The breadth and the formality are what is new. A merger unlikely to raise prices may still be challenged because it is seen to slow innovation, weaken investment incentives, entrench an ecosystem advantage, or reduce labour market competition. The Commission also signals that it will accept qualitative evidence that does not lend itself to quantification.

Practical impact: Substantive analyses must move beyond price-centric models. Closing memos and risk assessments should engage with each non-price parameter materially relevant to the transaction, including resilience and sustainability.

Reduced reliance on market shares and the erosion of safe harbours

Market shares remain relevant, and the Draft Guidelines introduce descriptive labels: under 10% is “low”, 10–25% “moderate”, 25–40% “material”, 40–50% “high”, 50% or more “very high” (Draft Guidelines, para. 62). The Draft Guidelines stop short of proposing presumptions of anti-competitive harm at higher market shares, as some commentators had feared. However, where combined shares are “high” or “very high”, or post-merger HHI exceeds 2,000 with a non-negligible delta, the practical evidentiary burden falls on the parties to produce substantial evidence pointing away from a “significant impediment to effective competition” (SIEC) i.e., a competition problem. Moreover, the comfort previously offered by safe harbours is explicitly relativised: dominance can be found below 40%, and the Commission may rely on qualitative evidence (internal documents, market feedback, diversion ratios) even where shares look modest. Against that backdrop, it will be important for the final Guidelines to strike a clear balance between preserving a full, effects-based assessment (including dynamic considerations) and maintaining predictability for transactions within traditional safe harbours. There remains scope for the Commission to provide more explicit reassurance on the continued relevance of those safe harbours in practice.

The Draft Guidelines single out categories where static, share-based analysis is unreliable: nascent or fast-growing markets, those characterised by short innovation cycles, network effects, data advantages or high entry barriers. These are precisely the sectors most active in current EU M&A: digital, pharma and life sciences, energy and clean tech, and defence.

Practical impact: Transactions previously self-classified as “safe” on share-based grounds should be re-tested. In dynamic markets, Phase I needs to be treated as a substantive review and parties will need to be prepared to substantiate the case with evidence beyond shares from the outset.

Future and innovation competition: codified and substantially expanded

The Draft Guidelines codify and expand three forward-looking theories. The first is loss of specific innovation competition, addressing overlaps between R&D projects or between an R&D project and an existing product, and explicitly capturing “killer” and “reverse killer” acquisitions (Draft Guidelines, para. 180). The second is loss of general innovation competition, applying to overlapping innovation capabilities and early-stage efforts within innovation spaces, that is, before a relevant product market has crystallised (Draft Guidelines, para. 186). The third is loss of potential competition, covering nascent or future challengers.

Critically, the Commission does not need to prove that a target would have become a major competitor; it suffices that the target could have constrained the acquirer in the future. The Draft Guidelines also formalise an investment-and-expansion theory of harm (Draft Guidelines, para. 170), particularly relevant for capital-intensive sectors.

Practical impact: Early-stage assets, R&D projects and minority or pipeline acquisitions face heightened risk even where revenues are modest or zero. Innovation pipelines should be mapped and innovation rivalry language reviewed in contemporaneous documents.

The innovation shield: helpful in principle, narrow in practice

The Draft Guidelines introduce an explicit "innovation shield" for acquisitions of small innovative companies, start-ups or R&D projects with dynamic competitive potential (Draft Guidelines, para. 192). Where the shield applies, the Commission will in principle not find an SIEC under any theory of harm. Five qualifying scenarios are set out, anchored on conditions such as no overlap in the same relevant market or innovation space, combined shares not exceeding 40% with at least three other firms with similar innovation capabilities, or, for capability overlaps, a combined share not exceeding 25% in the innovation space and at industry level.

The shield is genuinely useful for venture- and growth-stage M&A involving non-dominant acquirers. Three caveats apply: the conditions are narrow and cumulatively demanding; the shield is fragile where the acquirer has market power; and it does not displace the overall "more likely than not" SIEC standard if the qualifying conditions are not met.

Practical impact: Where a transaction may benefit from the shield, the entire deal narrative needs to be designed around it from the term-sheet stage. Each condition of the shield needs to be properly tested and verified, and alternative comfort points need to be identified in case the shield turns out not to be applicable. Careful articulation of the competitive landscape may be required to achieve reliable market shares in innovation spaces – which may be difficult if R&D programs are not public.

Expanded foreclosure and ecosystem theories

The Draft Guidelines strengthen the Commission's ability to intervene where a merger enables input or customer foreclosure, leverages data, platform or interoperability advantages, or strengthens an ecosystem across related markets. A new framework for assessing entrenchment of a dominant position (Draft Guidelines, para. 252) addresses cases where a firm dominant in a "core market" acquires complementary assets (data, technology, distribution channels or complementary products) that reinforce barriers to entry. Notably, this framework is not confined to digital sectors, and access to commercially sensitive information can give rise to an SIEC even in the absence of foreclosure. The Commission's ecosystem theory of harm is currently being tested before the General Court in Case T-1139/23, *Booking Holdings v. Commission* (Booking/eTraveli), following the July 2025 hearing. A judgment is expected in due course—most likely in 2026 or early 2027, which may – if handed down in time – prompt revisions to this part of the Guidelines.

Coordinated effects analysis has also been refreshed: the Draft Guidelines expressly contemplate that big data, AI, advanced algorithms and shared automated pricing tools may facilitate tacit coordination by enhancing market observability (Draft Guidelines, para. 267(f)).

Practical impact: Transactions involving vertical, conglomerate or "diagonal" elements, particularly in digital, data-driven and platform sectors, may face materially higher scrutiny than historically. Ecosystem maps and data-flow analyses should be developed early, not just in response to a Phase I information request. The loss of a 30% safe harbour for assessing foreclosure risks may render it more difficult to advise deal makers on antitrust risk.

Labour markets: explicitly in scope

The Draft Guidelines openly recognise that mergers can give rise to monopsony or oligopsony concerns on labour markets, treating employers as buyers of labour and workers as sellers (Draft Guidelines, paras 160-161). Where a merger creates or strengthens monopsony power, the resulting reduction in wages, mobility or working conditions can be an independent competitive harm under the EU Merger Regulation (EUMR); downstream consumer harm is a related but not necessary consequence.

Countervailing factors, including effective collective bargaining and applicable labour regulation, may temper concerns, and the analysis is confined to merger-induced loss of competition (not, for example, ordinary post-merger restructuring).

Practical impact: Transactions involving specialised, geographically concentrated or otherwise constrained workforces should expect substantive labour-market analyses. Hiring, mobility and overlap data may need to be developed for the filing in deals where this would not previously have featured at all.

Efficiencies: more welcome in theory, still hard in practice

The Draft Guidelines reframe efficiencies as "benefits" and helpfully distinguish direct efficiencies (cost savings, immediate quality improvements) from dynamic efficiencies (the ability or incentive to invest or innovate, including through scale, complementary asset combinations, securing access to critical inputs or improved access to finance for capital-constrained firms) (Draft Guidelines, paras 293, 325). Sustainability and resilience benefits are explicitly recognised, and collective benefits (including environmental benefits) may be weighed (Draft Guidelines, paras 299-300). However, the Draft Guidelines exclude efficiencies that may arise from alternative commercial scenarios and make clear that efficiencies must benefit "substantially the same customers" as those that would be impacted by anticompetitive harm (Draft Guidelines, para 357). This is the same position as under the Commission's Horizontal Cooperation Guidelines and has been criticised as not giving sufficient weight to environmental benefits (e.g., emission

reductions) that are, by their nature, liable to benefit society at large, beyond direct customers. (Draft Guidelines, paras 299-300, 356-357).

Parties may submit efficiency claims and a structured "theory of benefit" without first conceding harm, with the same evidentiary standard applying to harm and benefit (Draft Guidelines, paras 25-26). The substantive bar, however, remains demanding: efficiencies must be merger-specific, which the Commission continues to interpret narrowly – meaning that otherwise merger specific efficiencies that could (as assessed by the Commission) have been achieved through less anticompetitive means do not count (Draft Guidelines, para 310). Efficiencies must also be verifiable, sufficient to outweigh harm and timely passed through to consumers. As market power increases, the level of proof rises sharply, and a merger to monopoly will almost never be saved on efficiencies.

Practical impact: Efficiencies need to be developed early and in parallel with the theory of harm, rather than introduced late in the process. In practice, engagement late in Phase II (e.g., post-Statement of Objections) is unlikely to be effective absent a well-developed evidentiary record. Any efficiencies case must be robustly substantiated, including by reference to contemporaneous internal documents and concrete integration plans, and must credibly address pass-on to customers. Late-stage, high-level or purely model-based claims are unlikely to carry significant weight. Against that backdrop, the draft Guidelines are helpful in articulating a more structured framework for developing "theories of benefit." This points to a more disciplined approach: parties should assess at an early stage whether a credible, evidence-based benefits narrative can be built alongside the theory of harm, and ensure it is properly documented and embedded in internal materials. Done properly, this allows efficiencies to form part of a coherent and proactive engagement strategy with the Commission, rather than a defensive add-on.

Takeaways

Earlier and deeper substantive risk assessment

The antitrust risk assessment of a transaction must extend beyond market overlaps and shares, taking into account innovation spaces and pipelines, future plans, ecosystem dependencies, data assets and labour considerations as relevant. This work needs to be done prior to signing, not in the four to six weeks before notification.

Document discipline is now a priority workstream

Internal documents drawn up in the ordinary course are routinely treated as particularly probative, both inculpatory and (more rarely) exculpatory. Strategy decks, board papers and integration plans drafted before the deal is contemplated are the most credible evidence the Commission will see, and inconsistent characterisations of the rationale across legal, commercial and investor materials substantially raise risk. Discipline in document creation and proper document management must be applied from day one through closing, and by all parties involved in the transaction (including their financial advisors).

Phase I is no longer "light"

Phase I reviews involve more substantive information requests, which will further increase the importance of pre-notification engagement. Case teams will seek to formulate, establish and investigate theories of harm early-on in the process, so the pre-notification stage will increasingly become the stage where the case is won or lost. Building case-team relationships and submitting a credible substantive narrative early is no longer optional for any deal that is not plainly simplified.

Remedies: the sooner, the better

Structural remedies (clean divestitures of stand-alone businesses) remain strongly preferred. Behavioural commitments, including access, interoperability and data-sharing remedies, face increased scepticism unless they are unambiguously enforceable and clearly cure the identified harm. Late-stage "fix-it-first" solutions are less likely to succeed than they once were. Remedy strategy should be planned, with a credible upfront buyer where realistic, well before submission. Increasing use of the upfront "hybrid-fix-it-first" approach is likely.

Continuity in outcomes, change in assessment

Most transactions notified to the Commission will continue to be cleared, often unconditionally and frequently under the (super-)simplified procedure. The Commission remains formally open to pro-competitive deals, including those that combine complementary capabilities to allow EU companies to scale, secure critical inputs or compete more effectively globally (Draft Guidelines, para. 11-15). There is no "European champion" trump card, but scale and resilience can, in the right cases, support a credible theory of benefit.

The shift lies elsewhere. Predictability is lower, discretion is higher, and preparation matters more. The Commission has formalised a more interventionist analytical framework, expanded its toolkit across price and non-price dimensions, and reduced the comfort that share-based safe harbours used to offer. Each individual element has antecedents in recent practice; what is new is their

aggregation into a single, expressly forward-looking instrument with discretionary headroom. The draft Guidelines will be of immense value to the Commission. Only well-advised and prepared parties will be able to claim the same.

The practical takeaway: deals will be won or lost earlier, often before notification, through strategy, evidence and narrative consistency. The antitrust workstream needs to be embedded at the term-sheet stage, the substantive case built and evidenced before the SPA is signed, and the document record must support, not undermine, the story the parties will tell the Commission.

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