Baker McKenzie.

RESPONSE TO CONSULTATION: EU MERGER GUIDELINES

26 JUNE 2026

1. Introduction

1.1 Baker McKenzie welcomes the opportunity to provide views on the European Commission's ("Commission") review of the horizontal and non-horizontal EU Merger Guidelines[1] ("Guidelines"). Our comments are based on our extensive experience of advising clients on EU merger control matters.

1.2 In summary, we consider that the Draft Guidelines are a welcome and necessary update. However, the final text should not trade flexibility for uncertainty. The Commission should therefore preserve usable screening criteria, maintain the SIEC and evidentiary standards required by the Courts, apply dynamic theories with methodological discipline, and make efficiencies, including dynamic, sustainability and resilience benefits, genuinely workable in practice.

2. Part I — Introduction and Guiding Principles (paragraphs 1–6)

2.1 We welcome the Commission's efforts to consolidate the EU Merger Guidelines into a single, modernised instrument and endorse the Commission's ambition to integrate the competitiveness imperatives identified in the Draghi Report, to take dynamic competition seriously, and to provide for more granular efficiency analysis. We also welcome the integration of important recent case-law, notably *CK Telecoms* (C-376/20 P), *Wieland-Werke*, *Deutsche Telekom* (T-64/20), *Booking/eTraveli* (M.10615), *Dow/DuPont* (M.7932), *Bayer/Monsanto* (M.8084) and *Illumina/Grail* (C-611/22 P).

2.2 Consistent with our submission from September 2025, it remains our view that the existing legal and analytical framework is largely fit for purpose. The Draft Guidelines should therefore embody a "refresh and update", not a revolution.

2.3 In the light of this, we flag the following over-arching concerns which inform the remainder of our response and which we invite the Commission to bear in mind:

(a) First, legal certainty, predictability and consistency are critical. They are a manifestation of the rule of law in merger control and central to an investment-friendly internal market. For that reason, we strongly recommend that the Draft Guidelines retain the 25% horizontal and 30% non-horizontal thresholds, or replace them with equally usable indicative criteria.

(b) The increasing complexity of the Commission's analytical toolkit places a heightened premium on transparent, methodologically rigorous and reviewable decision-making. Strong safeguards are therefore needed. It is key for the Commission to articulate evidence and market-testing rules. Those should cover how market-test responses, internal documents, qualitative evidence and econometric work will be weighed, tested and disclosed. The framework should also recognise that not all internal documents will carry the same probative weight.

(c) The integrity of the substantive SIEC standard and the evidentiary framework articulated by the Court of Justice must be preserved, regardless of whatever analytical innovations the new Guidelines introduce.

(d) The Draft Guidelines are already lengthy. Brevity in the final text will itself serve legal certainty. Our submission therefore seeks targeted, paragraph-level improvements rather than additional material.

3. Part I.A — The Role of EU Merger Control (paragraphs 7–18)

3.1 We support the Commission's framing of EU merger control as integral to a competitive internal market and to European competitiveness and welcome the integration of the Draghi competitiveness agenda. The

[1] "EU Merger Guidelines" herein is used to refer collectively to the Horizontal Merger Guidelines (the 'HMG') and the Non-Horizontal Merger Guidelines (the 'NHMG'), see, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 31, 05.02.2004, p. 5-18, and the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 265 of 18/10/2008.

recognition of resilience and beneficial scale alongside established concerns about market power is a meaningful recalibration of tone.

3.2 However, we consider that the benefits of scale and scope should remain factors capable of supporting an efficiency defence where an SIEC is otherwise identified — not standalone factors weighing in favour of a finding of SIEC. We therefore invite the Commission to confirm, in terms, that scale and scope are not in themselves new factors capable of grounding an SIEC.

3.3 We also support the integrated approach (a single instrument covering horizontal and non-horizontal analysis), subject to one structural concern. Integration creates a risk of cross-contamination between theories of harm: the analytical pathways for horizontal, vertical and conglomerate concerns are distinct in their economic logic, and the Guidelines should signpost more clearly when the analysis moves between them.

3.4 We also encourage the Commission to retain in the refreshed Guidelines the position that vertical mergers are generally pro-competitive (consistent with paragraphs 11–13 of the existing Merger Guidelines). In addition, we consider that the Draft Guidelines should retain a market share threshold for vertical and conglomerate assessments, and that it aligns with paragraph 112 of the Draft Guidelines (that is to say that vertical and conglomerate effects are unlikely to arise when either the upstream or downstream market share(s) are below 40%).

3.5 Finally, we believe that the Commission should avoid vague and unprincipled formulations such as "incommensurable advantages" (paragraph 300), "strong market power" (footnote 333), and "[h]arm and benefit expected to accrue directly from the merger is inherently more certain than dynamic harm and efficiencies" (paragraph 341). The Draft Guidelines should also avoid Latin tags such as "in tempore non suspecto", particularly in the context of forward-looking dynamic assessments.

4. Part I.B — Guiding Principles (paragraphs 19–51)

<u>Burden of Proof, Theories of Harm and Benefit (paragraphs 19–27)</u>

4.1 We welcome the codification of the burden and standard of proof, consistent with the Court of Justice's judgment in *CK Telecoms* (C-376/20 P) and the General Court's judgment in *Deutsche Telekom* (T-64/20).

4.2 We therefore consider that it would be inappropriate and counterproductive to introduce structural presumptions of harm into the EU framework, beyond what the case law of the Court has established in GE/Honeywell (T-209/01). Structural presumptions would be overly simplistic, risk serious Type II errors, and chill investment, growth, scale and innovation.

4.3 Beyond the rejection of presumptions of harm, we set out below three points of clarification which we believe would materially improve the predictability of the framework:

(a) the threshold of probability, "more likely than not", needs further articulation in dynamic and forward-looking assessments. In particular, the Draft Guidelines should clarify how the standard operates where the projected magnitude of an effect is high but its likelihood is below 50%;

(b) the relative weight of qualitative versus quantitative evidence is under-specified. The Draft Guidelines should set out how the Commission will weigh these forms of evidence, especially where they are in tension;

(c) the symmetry of the standard between theories of harm and theories of benefit is very welcome, though the Draft Guidelines should confirm that the evidentiary demands on the Commission (when establishing harm) and on the parties (when establishing benefit) are commensurate, and avoid any drift towards a structurally higher bar for efficiency claims.

(d) The Commission should ensure symmetry in evidentiary expectations. Where dynamic harms may be established on the basis of forecasts, internal documents and qualitative evidence, comparable forms of evidence should in principle be capable of substantiating efficiencies and theories of benefit.

Evidence (paragraphs 28–36)

4.4 We recommend that the Draft Guidelines set out the methodological and weighting principles the Commission will apply in relation to market testing, including the heightened scrutiny that should attach to competitor-sourced evidence in markets where rivals have a direct strategic interest in blocking the transaction.

4.5 A related point concerns evidentiary asymmetry. Whereas harm hypotheses can be tested with rivals and customers, this is not the case with efficiency and benefit claims where the underlying information is confidential to the parties. The Draft Guidelines should acknowledge this asymmetry expressly, so that efficiency claims are not held to a higher evidentiary bar than the harm hypothesis.

4.6 As regards internal documents, we are concerned about over-reliance on isolated internal documents in the manner reflected at paragraphs 42, 52 and 54–55. We recommend that the Guidelines articulate the balancing principles drawn from the Court's case law. In Hutchison 3G UK, the Court emphasised that the probative value of internal documents depends on their closeness to the events and on whether their content runs counter to the declarant's interests. Documents must be assessed in context — authorship, audience, intended use, ordinary-course nature — and not by reference to isolated turns of phrase. Some internal documents will therefore carry greater weight than others.

Causality and Counterfactual (paragraphs 37–44)

4.7 We welcome the flexibility to depart from prevailing market conditions where supported by contemporaneous evidence. Guardrails should, in our view, be introduced so as to avoid speculative counterfactuals that favour intervention — for example, by requiring that any departure from prevailing market conditions be supported by contemporaneous, ordinary-course evidence.

Failing Firm (paragraphs 45–51)

4.8 The Draft Guidelines retain a three-limb failing firm test requiring, inter alia, that the failing firm's assets would "inevitably exit the market" absent the merger. Neither *Kali und Salz* (Joined Cases C-68/94 and C-30/95) nor *BASF/Eurodiol/Pantochim* (T-114/02) requires demonstration that the assets themselves would leave the market. The criterion was introduced by the Merger Guidelines and goes beyond what the Court of Justice contemplated.

4.9 We therefore ask that the "assets inevitably exiting the market" criterion be reformulated to align with the Court of Justice's formulation: a concentration is not the cause of the deterioration of the competitive structure where (i) the failing firm would in the near future be forced out of the market because of its financial difficulties if not taken over by another undertaking; (ii) the acquiring undertaking would gain the failing firm's market share if it were forced out; and (iii) there is no less anticompetitive alternative purchase.

4.10 We welcome the Draft Guidelines' explicit inclusion of the failing-division principle recognised in *Aegean/Olympic II* (M.6796) and relevant in *Nynas/Shell/Harburg Refinery* (M.6360). Greater leniency would help rescue failing firms and divisions, and would ensure that European productive assets do not inevitably exit the (global) market in the very capital-intensive sectors the Draghi agenda seeks to support.

5. Part II.A.1 — Structural indicators of market power (paragraphs 60–67)

5.1 We consider that the existing safe harbours in paragraphs 18–21 of the Merger Guidelines should be retained. The 25% combined-share and HHI indicators now survive only as indicative factors, while the 30% non-horizontal threshold has been removed. This materially reduces predictability for low-risk transactions. The Draft Guidelines should retain a threshold for vertical and conglomerate assessments, aligned with paragraph 112: effects should be unlikely where either upstream or downstream share is below 40%.

5.2 We strongly advise against stricter indicators or rebuttable presumptions, which would be too rigid for the complexity of individual cases. A flexible, evidence-based assessment better supports balanced and fair outcomes.

5.3 At a minimum, the Commission should set out indicative screening criteria for transactions unlikely to raise an SIEC absent case-specific risk factors. These criteria should not be formal presumptions, but should provide genuine planning value, drawing on the Draft Guidelines' own share categories, HHI references and evidence of timely, likely and sufficient entry or expansion.

5.4 We consider that paragraph 55 should be revised: maintaining investment or innovation below competitive levels does not necessarily evidence market power, as firms may under-invest or under-innovate for many other economic reasons.

5.5 Paragraph 64(c) should also cover declining or dying markets exposed to volatility and panic exits. As AI accelerates industrial disruption, the Draft Guidelines should address consolidation in declining markets as well as growth stories.

6. Part II.A.2 — Other indicators of market power (paragraphs 68–79)

6.1 As regards low price sensitivity, we do not object in principle to evidence from churn, switching, natural experiments or supply-side responsiveness. The Draft Guidelines should, however, recognise the limits of such evidence in markets with infrequent transactions, lumpy orders, regulated pricing or rapid product turnover, where past behaviour may be a poor guide to future constraints.

6.2 On high profit margins, margins are a recognised input into unilateral-effects analysis, but the Draft Guidelines should avoid creating a near-presumption of market power whenever margins exceed a peer set. High margins may reflect innovation, risk-taking and recovery of unsuccessful R&D, particularly in R&D-intensive sectors.

6.3 We also invite the Commission to clarify the following:

(a) high margins may reflect returns to innovation, research and risk, especially in fast-moving or capital-intensive sectors

(b) benchmarking under paragraph 72 is highly comparator-sensitive; the Draft Guidelines should explain how comparators will be selected and when margin analysis may not be probative due to absence of an appropriate comparator

(c) paragraphs 73–74 should identify a clear route for parties to rebut any inference from margins, since these paragraphs of the Draft Guidelines currently read as if both high and low margins may not be exonerating factors

(d) as regards high and durable barriers to competition, we welcome the consolidated treatment of demand- and supply-side barriers, including ecosystem and portfolio dynamics, regulatory barriers and supply-chain resilience. The Draft Guidelines should, however, guard against double-counting where the same feature is treated both as evidence of market power and as the source of entrenchment harm

7. Part II.A.3 — Dynamic competitive potential (paragraphs 80–83)

7.1 "*Dynamic competitive potential*" is an important addition, reflecting the Commission's focus on innovation-driven markets. We welcome recognition that static market-power assessment may be insufficient, particularly in technology and pharmaceuticals. However, factors such as R&D expenditure, patents, pipelines and access to data should not become a speculative checklist. The Draft Guidelines should explain how these factors will be weighed, to preserve a rigorous, evidence-based approach and legal certainty.

7.2 We recommend that the Draft Guidelines make clear that innovation incentives will be assessed holistically from the outset, without structural presumptions and that this means that positive and negative innovation effects will be considered together in the upfront assessment.

8. Part II.A.4 — Countervailing factors (paragraphs 84–110)

8.1 On dynamic entry or expansion by competitors, the likelihood, timeliness and magnitude criteria are appropriately drawn from case law and the EU Merger Guidelines. However, paragraphs 94–95 risk setting a higher threshold by requiring "concrete plans to enter or expand at the relevant scale", even where entry may depend on post-merger price dynamics. The Draft Guidelines should preserve merger-induced entry as a countervailing factor and avoid evidentiary requirements that make it impracticable.

8.2 As regards out-of-market constraints, we welcome their codification, as they have too often been confined to the market definition exercise and overlooked in the substantive assessment. However, paragraph 102 should be redrafted in more neutral terms: describing such constraints as often limited and typically insufficient risks creating a near-presumption against giving them meaningful weight. Their significance should instead depend on the evidence in each case.

8.3 We consider that paragraph 103 should also recognise digitalisation and AI as cross-industry out-of-market constraints. In many markets, customers are shifting to digital and AI products, creating one-way substitution pressures already visible in media, publishing and retail. The Guidelines should be future-proofed for such forward-looking assessments.

9. Part II.A.5 — Dominance and other types of market power (paragraphs 111–113)

9.1 While paragraph 113's recognition that substantial market power may exist absent dominance is unobjectionable, it could support broad intervention. The Draft Guidelines should therefore specify the threshold of "substantial market power" required for each non-dominance theory in Part II.B, including entrenchment and foreclosure, and should avoid undefined terms such as "strong market power".

9.2 In addition, it is important to recall that the pathway for non-dominance, oligopolistic SIEC findings under *CK Telecoms* must be subject to the evidentiary discipline required by the Court of Justice in that judgment. The Draft Guidelines should confirm that the substantive standard is not lowered when moving from dominance to substantial market power, and that loss of an important competitive force, closeness of competition and elimination of a meaningful constraint must each be proven by cogent and consistent evidence.

10. Part II.B.1 — Anticompetitive effects: introduction (paragraphs 114–118)

10.1 Part II.B.1 introduces a holistic, two-track framework for assessing anticompetitive effects: direct effects on competition within current product markets, and dynamic effects on the merging firms' and rivals' ability and incentives to invest and innovate (paragraphs 114–115). We welcome the recognition that direct and dynamic effects exist on a continuum, and that theories of harm focused on direct effects may also feature dynamic elements, and vice versa.

10.2 The eight theories of harm materially expand the analytical perimeter compared with the current Merger Guidelines. Although they largely codify approaches tested in recent cases, their cumulative effect, especially alongside the downgrading of structural safe harbours in Parts II.A.1 and II.B.2., is to broaden the circumstances in which the Commission may intervene. We encourage the Commission to bear that potentially cumulative effect in mind.

10.3 Paragraph 117 allows the Commission to develop further theories of harm in light of evolving market realities. While some flexibility is needed, an open-ended catalogue sits uneasily with legal certainty. The Draft Guidelines should specify the methodological safeguards for any new theory, including a clear economic logic linking the merger to the alleged harm, early disclosure to the parties, and a meaningful opportunity to respond in writing and at the oral hearing. Indeed, given the potential breadth of paragraph 117, the Guidelines should provide procedural safeguards where the Commission relies on a novel theory of harm. These should include early identification of the theory, disclosure of the factual and economic basis supporting it, and a meaningful opportunity for the parties to respond before the Commission reaches provisional conclusions.

10.4 Paragraph 118 accepts that anticompetitive effects may reinforce each other, but this creates a risk of double-counting where the same feature — such as network effects, ecosystem strength or data — supports multiple theories of harm. The Draft Guidelines should require any mutual reinforcement to be grounded in concrete merger and market features, not merely in the coexistence of several possible theories. They should also require the Commission to identify the specific causal mechanism by which a given structural feature supports each theory of harm invoked, and to demonstrate that the incremental effect under one theory is not already captured under another.

10.5 The Guidelines should make clear that every theory of harm must identify a specific causal mechanism linking the transaction to the alleged deterioration of competition. The mere existence of market characteristics such as network effects, data advantages, portfolio breadth or ecosystem linkages should not be sufficient. The Commission should articulate how the merger changes incentives or abilities in a manner capable of generating the alleged harm.

11. Part II.B.2 — Loss of head-to-head competition (paragraphs 119–168)

11.1 We recommend that the "*important competitive force*" concept is developed by reference to *CK Telecoms* (C-376/20 P). The key question is whether the merging party's competitive impact exceeds what its market share alone suggests. Paragraphs 138–142 should identify when that standard is met.

12. Labour markets and monopsony (paragraphs 158–162)

12.1 We acknowledge the growing literature and international practice in relation to labour markets. However, we continue to caution against premature formulation of a stand-alone EU labour-market theory of harm.

12.2 We ask that the Draft Guidelines:

(a) include an express acknowledgement that effective collective bargaining agreements may materially limit employers' monopsony or oligopsony power on labour markets,

(b) provide practical guidance for defining relevant labour markets, by reference to skill specialisation, geographic mobility of workers and working-condition attributes (flexibility, shift patterns, sector-specific certifications). The Commission should specify the types of evidence it will use — vacancy data, commuting patterns, employee-turnover data and occupational classification systems — to avoid overbroad market definitions that inflate monopsony concerns;

(c) specify that, when establishing anticompetitive labour-market effects, the Commission will focus on demonstrable reductions in wages, mobility or job quality, supported by ordinary-course HR data, internal workforce-planning documents and labour-market statistics — rather than on restructuring effects or other post-merger operational decisions that fall outside the scope of competition analysis under the EUMR; and

(d) maintain a clear line between competition concerns and social or employment-policy concerns that fall outside the EUMR.

13. Minority shareholdings and common ownership (paragraphs 163–166)

13.1 In our view, the Commission should raise the indicative threshold to 10%, absent special governance rights that confer influence below that level. This is because minority holdings typically begin to confer material governance rights — such as information rights, board representation or vetoes — at around 10%, where they may acquire the capacity to soften competition. The Draft Guidelines should focus on qualitative governance rights and information access, not percentage level alone, and should confirm that the 10% indicator is a screening tool for substantive analysis, not a jurisdictional trigger.

13.2 Common-ownership theories must be applied with caution, given the absence of empirical consensus and the significant implications for institutional investors, pension funds and sovereign wealth vehicles.

14. Part II.B.3 — Loss of investment and expansion competition (paragraphs 169–174)

14.1 We consider that treating loss of investment or expansion as a stand-alone theory, detached from product-market overlap, risks speculative intervention. The evidentiary standard should follow Dow/DuPont (M.7932) and Bayer/Monsanto (M.8084), including identifiable late-stage initiatives; capability narratives alone should not suffice.

14.2 More generally, where theories rely on future investment, innovation or expansion that has not yet materialised, the Draft Guidelines should require objective indicators demonstrating both ability and incentive to pursue the alleged competitive strategy. Evidence of generic capability, resources or technical expertise should not, without more, support intervention.

14.3 The Draft Guidelines should also explain how internal documents will be weighed in investment, innovation and expansion theories, recognising that not all documents have equal evidential value and that lower-level emails or notes may not reflect the organisation's actual thinking.

15. Part II.B.4 — Loss of innovation competition (paragraphs 175–192)

15.1 We are concerned that elevating innovation harm to a stand-alone theory, decoupled from product-market overlap, risks speculative interventions, particularly in pharmaceuticals, agrochemicals and high-tech sectors. The evidentiary discipline derived from *Dow/DuPont* (M.7932) and *Bayer/Monsanto* (M.8084). including the requirement of identifiable, late-stage R&D programmes, should be expressly preserved. We further ask for clarification of the distinction between "specific" and "general" innovation competition, and of the analytical conditions applicable to each.

15.2 We would welcome guidance on how the Commission intends to undertake innovation/R&D benchmarking, as it appears to have done in *Chr. Hansen/Novozymes* (M.11043), where it compared the parties' R&D capabilities with those of competitors on a number of factors, including total R&D spend, number of R&D centres, scientists, active pipeline projects and patent portfolio breadth. We commend to the Commission the analytical approach taken in *Axalto/Gemplus* (M.3998), where the Commission concluded on the facts that the parties would have a strong incentive to innovate post-merger and that the number of R&D projects post-merger was likely to exceed the pre-merger total.

16. Innovation shield (paragraph 192)

16.1 We support, in principle, the introduction of an innovation shield as a practical and welcome innovation in EU merger practice.

16.2 We have, however, concerns about how the shield as currently drafted will operate in practice and think it could be simplified in the following ways:

(a) use only the 25% / 40% market-share thresholds for limbs (b) and (d);

(b) delete the "three independent R&D competitors" requirement in limb (b), which may be difficult to apply given confidential pipelines, differing forms of collaboration and uncertainty over comparable competitive potential;

(c) account for global R&D pipelines where relevant markets are EU- or EEA-wide; and

(d) once parties invoke the shield, the Commission bears the burden of showing that it does not apply.

16.3 We further submit that the shield should remain anchored in identifiable on-market activities, products or services. Limbs that depend on abstract constructs such as "innovation spaces" or "R&D activities at industry level" (paragraph 192(d)) are difficult to operationalise and risk introducing greater uncertainty than they remove. The shield should be reformulated, where possible, by reference to delineable product or technology markets.

16.4 A simplified, two- or three-limb structure — focused on (i) no overlap; (ii) limited overlap with adequate residual R&D rivalry; and (iii) acquirer carve-outs — would deliver more genuine *ex ante* certainty than the present architecture.

17. Part II.B.5 — Loss of potential competition (paragraphs 193–207)

17.1 We consider that the analysis of loss of potential competition needs to be anchored in rigorous, evidence-based standards. As such, we think that establishing an SIEC arising from the elimination of potential competition should require concrete and objective proof of: (i) the potential entrant's ability and incentive to make the necessary sunk-cost investments; (ii) the likelihood that the party will become an effective competitive force in the future; (iii) the profitability and sustainability of such entry on a long-term basis; and (iv) the existence or absence of alternative actual or potential suppliers.

18. Part II.B.6 — Foreclosure (paragraphs 208–251)

18.1 We ask the Draft Guidelines to:

(a) reinsert a threshold for vertical and conglomerate assessments, set at 40% so as to be consistent with paragraph 112;

(b) clarify the threshold of "bargaining leverage" sufficient to trigger conglomerate concerns absent foreclosure; and

(c) simplify the operation of "*diagonal merger*" theories (paragraph 251). We consider that it is questionable whether diagonal mergers warrant treatment as a stand-alone category at all. On analysis they appear to be a particular configuration of customer foreclosure, in which the foreclosed party is a rival of, rather than a counterparty to, the merging parties.

19. Part II.B.7 — Entrenchment of a dominant position (paragraphs 252–259)

19.1 We invite the following improvements:

(a) a clearer demarcation between Article 102 TFEU concerns and merger-specific entrenchment, to avoid duplication and inconsistency with the anticipated Guidelines on Exclusionary Effects under Article 102;

(b) recognition that the Booking/eTraveli (M.10615) doctrine, applied broadly, could amount to a de facto "no-merger" rule for already-strong firms. The Guidelines should articulate the doctrine in terms that avoid that outcome; and

(c) objective indicia of "*entrenchment*", including a workable definition of the "*core market*" and of the "*interconnected ecosystem*" concept, while avoiding notions of "*strong market power*" as in footnote 333.

20. Part II.B.8 — Coordination (paragraphs 260–281)

20.1 We note that the Draft Guidelines preserve the core analytical framework for coordinated effects established in *Airtours/First Choice* and the current EU Merger Guidelines — centred on the ability to reach terms of coordination, monitor adherence and deter deviation. We suggest that the Draft Guidelines would be strengthened by more detailed guidance on the evidentiary standards the Commission will apply, particularly in oligopolistic markets not characterised by express collusion.

20.2 Specifically, the Draft Guidelines should clarify the quantity and quality of evidence required to demonstrate that a merger will make coordination significantly more likely. This should include a requirement for the Commission to articulate a credible mechanism for coordination, including the specific parameters on which firms would coordinate and the means by which monitoring and retaliation would realistically occur.

21. Part II.C.1 — Assessment of direct efficiencies (paragraphs 302–323)

21.1 We encourage the Commission to make the following specific changes to the consumer-benefit limb (paragraph 308 et seq.):

(a) Efficiency claims should be capable of being made by reference to any type of customer throughout the value chain, and not only by reference to the narrower concept of "consumers".

(b) Efficiency claims should be capable of being framed by reference to both variable and fixed cost savings. There is no economic basis for confining the analysis to variable-cost savings: durable reductions in fixed costs frequently translate into competitive prices, expanded output and accelerated investment, and the Article 101(3) framework recognises them in the analogous setting.

(c) In network and ecosystem industries, notifying parties should be permitted to claim efficiencies across the entire organisation, so that out-of-market efficiencies can be taken into account (as has been the case in certain airline alliance cases under Article 101 TFEU).

(d) Notifying parties should be able to make efficiency claims in respect of *non-price and non-cost elements* — including innovation advances, time savings, positive externalities for the wider public (such as those generated by green technologies and products), and benefits from enhanced defence and security.

21.2 On timing, we consider that paragraph 306 could be developed with reference to actual periods of time. For example, the words "without delay" should be deleted: they imply that only efficiencies on completion would be accepted. The principle should be that efficiencies arising within the first three years post-completion will be timely, but that efficiencies beyond three years — and potentially up to fifteen years — can be taken into account (especially dynamic efficiencies in industries with long investment and innovation cycles).

21.3 On verifiability, we ask for clarification of when qualitative or non-quantifiable benefits will be accepted (paragraph 308). Quantification should not become a self-defeating standard for benefits that, by their nature, do not lend themselves to precise measurement (resilience, security of supply, certain dynamic effects).

21.4 On merger-specificity (paragraph 313 et seq.), we consider that it should be sufficient for notifying parties to demonstrate that the efficiencies arise as a result of the proposed concentration. It should not be a requirement to demonstrate the absence of less anticompetitive, realistic and attainable alternatives of a non-concentrative or concentrative nature. The Commission should not concern itself with the commercial options or alternatives that might hypothetically have been pursued by parties that have signed, or are about to sign, a transaction agreement. See also paragraph 29.17 below in relation to sustainability benefits and merger specificity.

21.5 Paragraph 311 — requiring the Commission to "*address all arrangements that are reasonably practical, including all established practices in the industry concerned, detail the firms' economic incentives to collaborate, and take into account their business situation*" — is unnecessarily burdensome. It risks more frequent stops of the clock in Phase II and a material increase in external economic and legal costs. It should be deleted.

21.6 We also query inclusion of the paragraph 315 requirement that efficiencies benefit "*substantially the same consumers*" as those harmed. This Commission-made policy is not a fair limitation on the inclusion of efficiencies, particularly in ecosystem and network industries. Deleting this requirement would give greater impact to the Draghi initiatives in the assessment of efficiencies and increase the likelihood that the Draft Guidelines materially strengthen the prospect of an effective efficiencies defence.

22. Part II.C.2 — Assessment of dynamic efficiencies (paragraphs 324–338)

22.1 We support the framing of the taxonomy of dynamic efficiencies (paragraph 325) as illustrative and non-exhaustive. We also consider that efficiencies should not be subject to rigid timing limits or presumptions against later-arising benefits. If the Commission can assess SIEC by reference to products, pipelines or innovation spaces five, ten or fifteen years ahead, symmetry requires efficiency claims to be assessed over a comparable horizon. We therefore welcome the abandonment of the two-year horizon and ask the Commission to ensure that paragraphs 324–338 do not reintroduce a short-horizon presumption, expressly or by implication.

22.2 In our view, out-of-market efficiencies (paragraphs 355–356) should be treated more generously than the draft suggests. Where benefits accrue to consumers in an adjacent market, an over-strict in-market requirement risks excluding genuinely pro-competitive transactions on doctrinal grounds disconnected from consumer welfare.

23. Part II.C.3 — Balancing benefit and harm (paragraphs 339–357)

23.1 We welcome the clarification that the Commission will undertake a balancing exercise. Paragraph 339 should, however, explain how the Commission will model, quantify and assess "*the harm*" — which is noticeably absent — whether on price effects or non-price effects.

23.2 We welcome the Guidelines' coverage (paragraphs 339–357) on how to weigh price effects against non-price parameters, short-term harms against longer-term benefits, and effects of different likelihood and magnitude. The final Guidelines should provide concrete methodological guidance on the role of likelihood and magnitude in the SIEC standard, and on whether and how high-impact / low-likelihood scenarios are to be accommodated within a "*more likely than not*" framework.

23.3 For example, we suggest that the last sentence of paragraph 339 should be reworded to read: "*Where the demonstrated efficiencies result in benefits that, on a reasonably foreseeable basis, appear to largely balance or outweigh the identified harm to competition brought by the merger, the merger will be deemed compatible with the internal market*".

24. Sustainability

24.1 We acknowledge that, by preserving green competition, EU merger control already plays an important role in supporting sustainability and the transition to low carbon technologies. We commend the Commission for having drafted guidance which we believe will strengthen this role in line with the Commission's objectives.

24.2 Indeed, we think the Commission has successfully incorporated sustainability considerations into several key areas of the Draft Guidelines (e.g. theory of benefit) such that it is now clearer when and how sustainability considerations can be an important part of the substantive analysis[2].

24.3 We welcome the descriptions of "use", "non-use" and "collective" benefits (aligned with the approach adopted by EU Horizontal Cooperation) and ask the Commission to confirm and expand that approach in the final text — including by addressing how such benefits will be evidenced and weighed.

<u>Collective benefits (paragraphs 322)</u>

24.4 The Draft Guidelines recognise that certain types of efficiencies can bring "benefits of much wider scope, including to society at large" but in the same paragraph stipulates that "the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger."3

24.5 We consider this to represent a missed opportunity to ensure that all relevant benefits are taken into account.

24.6 Although this approach is aligned with that of the Horizontal Cooperation Guidelines which rely on the CJEU judgment in Mastercard4, we consider that when analysed more closely, that judgment does not support the exclusion of these wider collective benefits. That is because Mastercard concerned the question

[2] See, for example paras 20, 23, 34, 55, 76 133, 297-300, 315, 319-322, 339-342 and 348 of the Draft Merger Guidelines.

[3] Draft Merger Guidelines, para 315.

[4] Case C-382/12 P, *MasterCard Inc. v. Eur. Comm'n*, ECLI:EU:C:2014:2201

whether one group (merchants, in that case) can be required to pay for private benefits for another group (bonuses and positive network effects for card users, in that case).

24.7 The answer was understandably negative, because the case concerned private benefits and costs, and those who enjoy the benefits must bear the costs.

24.8 In contrast, the sustainability analysis of transactions which internalise externalities - and therefore correct market failures - concerns a different question: can a group of consumers that in the counterfactual impose the costs of their consumption on the rest of society, demand that they receive full compensation when a transaction seeks to remove those costs on society and internalise them in the price that the consumers pay?

24.9 The answer should be negative, consistent with the principle that underpins *Mastercard*, that those who enjoy the benefits of consumption must bear the full costs.[5]

24.10 We therefore invite the Commission to reconsider whether *Mastercard* requires the exclusion of wider out-of-market benefits where a transaction internalises negative externalities and corrects market failures. In our view, it does not. A rigid "same consumers" requirement risks under-valuing transactions that reduce wider societal costs, including environmental externalities, and is difficult to reconcile with the Commission's past decisional practice[6] and the more recent approach of certain national competition authorities under Article 101(3).

24.11 Disregarding broader out-of-market efficiencies would underestimate efficiencies, especially for mergers that promote innovation, the green transition or resilience effects that almost by definition tend to materialize fully beyond the affected markets. Mergers that have the greatest overall benefit on society would be the ones least likely to meet the requirements set out in the Draft Guidelines.

24.12 To the extent that the Commission does not accept our submissions above we would request three clarifications:

(a) First that the concept of consumers being "substantially the same" covers a situation where the market consumers are a sub-set of the consumers benefitting from the effects of the merger (e.g. If the market is Belgium and the merger results in a reduction of greenhouse gases benefitting the whole world);

(b) Secondly, a nuanced approach is taken to assessing such benefits reflecting the specificity of the climate crisis and greenhouse gases;[7]

(c) For consistency with the Horizontal Guidelines, recognise that in some instances a detailed quantitative assessment may not be appropriate: e.g. where the competitive harm is clearly insignificant compared to the potential benefits for consumers in the relevant market[8] (and, of course citizens in general and the planet).

<u>Magnitude of sustainability benefits and harm avoided</u>

24.13 We note that in the balancing of the benefits and harms of a merger the Commission considers the "magnitude" of harm/benefit, e.g. when there is asymmetric harm.[9] This will be relevant for mergers which promise significant environmental benefits but where a price increase (which might be temporary) cannot

---

[5] *See also* ACM, *ACM's Oversight of Sustainability Agreements: Competition and Sustainability*, ACM (Oct. 4, 2023); ACM, *Shell and TotalEnergies Can Collaborate in the Storage of CO2 in Empty North Sea Gas Fields*, ACM (June 27, 2022), https://www.acm.nl/en/publications/acm-shell-and-totalenergiescan-collaborate-storage-co2-empty-north-sea-gas-fields.

[6] For example, Case IV.F.1/36.718 – CECED. This concerned an agreement between washing machine manufacturers (via CECED) to phase out the least energy-efficient washing machines, effectively setting a minimum energy standard. The agreement restricted competition (it limited product choice and standardised offerings), so it fell within Article 101(1). The Commission granted an exemption under Article 101(3) because: it produced "environmental results for society" that would "adequately allow consumers a fair share of the benefits. Even if no benefits accrued to individual purchaser, these benefits were sufficient to outweigh the restriction.

[7] In this context note the "more permissive approach" taken by the UK CMA to "climate change agreements" in its "Green Agreements Guidance" of 12 October, 2023 (see paras 2.4 to 2.6 and 6.1 to 6.9).

[8] Para 569 of the Horizontal Guidelines, 1 June, 2023.

[9] Draft Merger Guidelines, para 348.

be ruled out. Our concern is that the Draft Guidelines may prompt the Commission to focus unduly on the risk of short-term price increases at the expense of longer-term benefits (which may unduly disadvantage "society at large"[10] and parties arguing for sustainability efficiencies).

24.14 In particular, we note that the Draft Guidelines then explain that the Commission will "assign less weight to [benefits] the later the effect is expected to materialise in the future, having regard to the characteristics and dynamics of the market in terms of innovation cycles".[11]

24.15 We understand the logic here (in the sense that future benefits might be less likely to arise) but believe that sustainability benefits (especially where climate change is at issue) have characteristics which make them eligible for nuanced treatment.

(a) First, even though environmental benefits may take longer to materialise, this does not necessarily make them less predictable or less quantifiable. It is conventional for the benefits of avoided emissions to be calculated over the longer term.

(b) Given that the benefits involve internalisation of negative externalities, the assessment of 'magnitude' should take into account the typically exponential environmental harm (including from a potentially catastrophic climate 'tipping point' being reached) that would occur in the absence of the benefit.

24.16 We therefore think that the Guidelines should explain that the Commission's assessment of magnitude of benefit in relation to sustainability effects will often involve forecasts over the longer term and a consideration of the environmental harm and cost being avoided which might also increase exponentially over that same period[12].

<u>Merger specificity (section 1.3)</u>

24.17 The requirement to demonstrate that sustainability efficiencies could not be achieved through less restrictive alternatives[13] is often difficult to meet in practice. In many cases, the types of gains invoked (e.g. greener inputs, decarbonisation initiatives, or supply-chain optimisation) may be replicable through cooperation agreements, licensing or industry-wide initiatives, even if these are less effective or slower.

24.18 This creates an unduly high evidentiary hurdle, as parties must not only show that the merger enhances sustainability, but also convincingly rule out realistic alternative mechanisms, which are frequently present in precisely the types of sectors where sustainability efficiencies arise.

24.19 In our view the Commission is not well-placed to second-guess the parties' views on the best way to achieve the efficiencies, in particular where the counterfactual is a market failure. It is true that mergers are structural and completely eliminate incentives on the parties to compete with each other. That means the competitive impact may be more permanent. But it also means that the parties are more committed than in the case of mere agreements, which in turn leads to a greater likelihood that efficiencies are actually achieved.

24.20 Accordingly, if a merger is genuinely intended to, and objectively can, achieve proportional sustainability efficiencies, we believe that the Commission should not block a merger solely because a lesser commitment was in theory possible.

26 June 2026

[10] See "Benefits from mergers" above and Draft Merger Guidelines, para 300.
[11] Draft Merger Guidelines, para 350.
[12] See "The Economics of Climate Change: the Stern Review", 30 October, 2006.
[13] Draft Guidelines, para 331.