EC's Draft Merger Guidelines Open New Arguments for Merger Parties

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Executive Summary

- **What's new:** On 30 April 2026, the EC published a draft of its updated merger guidelines introducing material changes to the EU merger control framework, including how the EC assesses killer acquisitions, ecosystems, dynamic competition, scale benefits and efficiencies supportive of "European champions."
- **Why it matters:** The draft guidelines reflect broader policy objectives such as competitiveness, resilience, supply chain security, sustainability and encouraging innovation, giving weight to long-term dynamic effects of a merger and efficiencies in a way not done before.
- **What to do next:** The draft guidelines are out for consultation until 26 June 2026. The final guidelines are anticipated to be issued later this year. From a deal perspective, merger parties should carefully evidence the procompetitive aspects of a merger and develop the positive case for efficiency benefits from a combination at an early stage of deal planning.

On 30 April 2026, the European Commission (EC) published a draft of its updated merger guidelines setting out the analytical framework that the EC will use to assess mergers (Draft Guidelines). The single guidelines document will supersede separate guidelines on the assessment of horizontal and nonhorizontal mergers published in 2004 and 2008.[1]

The Draft Guidelines introduce material changes to the EU merger control framework including how the EC assesses transactions involving small but highly valued targets (so-called killer acquisitions), ecosystems, dynamic competition, scale benefits and efficiencies supportive of "European champions." They reflect broader policy objectives such as competitiveness, resilience, supply chain security, sustainability and encouraging innovation; with these in mind they give weight to the long-term dynamic effects of a merger and efficiencies in a way that was not done before.

However, enforcement will continue to be grounded in existing merger control principles organised around theories of harm. It will therefore be as important as ever for merger parties to carefully evidence the procompetitive aspects of a merger in order to benefit from the broader framework including around efficiencies. Businesses will want to develop the positive case for the efficiency benefits from a combination at an early stage of deal planning.

The Draft Guidelines cover a range of areas in providing an analytical framework for merger control in Europe.

Defining Market Power

Market power is defined as the "ability of one or more firms to profitably maintain prices above competitive levels or to reduce quality, choice, capacity, output,

[1] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2024, p. 5; and Guidelines on the assessment of nonhorizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 26, 18.10.2008, p. 6.

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investment, innovation, privacy, sustainability or resilience below competitive levels for a period of time" and the EC will assess this using a combination of factors, including:

- The number of credible competitors.
- Market shares, now categorised as "low" (under 10%), "moderate" (10% to 25%), "material" (25% to 40%), "high" (40% to 50%) and "very high" (50% or more).[2]
- Concentration levels.
- Customers' and competitors' price sensitivity.
- Profit margins.
- The existence of barriers to competition.

Supporting Competitiveness and Resilience

The Draft Guidelines frame merger control as supporting competitiveness and resilience which will strengthen the EU economy "in the face of shocks and geopolitical shifts, thereby reducing dependencies on a few suppliers or on specific regions of the world."[3] Factors relevant for resilience include the security and diversity of supply chains, the security of critical infrastructure, defence readiness, and building capacity and capabilities in the internal market. The competitive assessment should give adequate weight to scale, innovation, investment and resilience as "procompetitive factors that can benefit from a degree of consolidation."[4]

Promoting Dynamic Competition and Innovation

The Draft Guidelines introduce principles for the assessment of dynamic competition, considering "investment and expansion competition" (the elimination, discontinuation, downsizing, delay or redirection of investment and expansion rivalry between merging firms),[5] loss of potential competition and entrenchment of a dominant position.[6]

The Draft Guidelines provide a summary of innovation-related factors that can be relevant when assessing a firm's competitive strength, reflecting the past decade of EC decisional practice. Factors identified include:

- The number, competitive potential and time-to-market of products in development or R&D projects.
- A firm's track record of bringing to market novel or innovative solutions, investment or technological capabilities.
- Past, current and/or expected R&D spending in the relevant market or industry.
- Size of the R&D organisation (in terms of headcount and infrastructure).
- Patent citations.
- Internal innovation output targets.
- Access to a competitively significant input (*e.g.*, data, technology, user traffic).
- Dynamic capabilities arising from a given business model.
- Complementarities to the company's other products/services.
- Synergies between intangible assets.
- The ability to exploit network effects across products, including if one of the parties has a wider ecosyste of products and/or services.[7]

The Draft Guidelines introduce an "innovation shield": a safe harbour for acquisitions of small innovators and start-ups in which the EC will not "in principle" find a significant impediment to effective competition.[8] If neither of the merging parties is active or, through their R&D project(s), expected to become active in the same relevant market, in the same innovation space, or in a relevant market or innovation space that is vertically or otherwise closely related, they can benefit from the shield.

If the merger does create an overlap in R&D projects, capabilities or activities, various criteria are taken into account to determine whether the innovation shield applies. Important factors include the presence of at least three independent competitors and the market share of the merger parties (individually or combined) measured against 25% and 40% thresholds. In the specific case of an acquisition of a start-up with an R&D project, an acquirer can still benefit from the shield provided it is not the largest firm in the relevant market or a gatekeeper.[9] Companies designated as gatekeepers under the Digital Markets Act (DMA) are excluded from safe harbours such as the innovation shield.

The Draft Guidelines note that entrenchment may be found to occur "when the merged firm gains control over certain assets in a way that structurally creates or reinforces existing barriers to entry and expansion resulting in reduced market contestability." The Draft Guidelines note that the EC may identify

[2] Para. 62

[3] Para. 9

[4] Para. 10

[5] Para. 170

[6] Para. 114 onwards

[7] Para. 81

[8] Para. 192

[9] The EU's DMA established a set of criteria to identify "gatekeepers," which are defined as large digital platforms providing "core platform services," such as online search engines, app stores or messenger services.

the potential for entrenchment when at least one of the merging firms is dominant in one ("core") market or several closely related or "interconnected" markets (which may give rise to an "ecosystem") and the acquired assets are related to the merged firm's core market(s) and are important to effectively compete in the core market.

Supporting Sustainability

The Draft Guidelines expand the importance of sustainability as a factor relevant to the assessment of a merger as well as merger efficiencies: Merger control is to allow for "the preservation of green innovation competition, which supports sustainability and the transition to low carbon technologies."[10] Demonstrated efficiency claims "may refer to efficiencies in the form of sustainability or resilience benefits" and, if realised, "may increase the competitiveness of European industry and deliver significant consumer benefits."[11] The Draft Guidelines adopt a flexible, forward-looking approach to the time horizon for efficiencies, allowing benefits to materialise over a longer time horizon as long as "it is possible to verify that they will be substantial enough to counteract the merger's anticompetitive effects."[12] This is particularly relevant for mergers in industries undergoing decarbonization and energy transition, with longer R&D and investment timelines.

Specific Considerations in Relation to Digitalisation

Reflecting the growth of digital markets over the past two decades, digitalisation is heavily discussed. Industries that rely on big data, AI and algorithmic tools are categorised as susceptible to coordination, particularly where firms share external providers for automated pricing systems or where such technologies improve market observability.[13] Privileged access to data, software and algorithms through agreements preexisting or expected to follow a merger are now identified as entry barriers that can amplify suspected harmful effects.[14] The prevalence of multisided platforms (*e.g.*, an online app store) is acknowledged and positive network effects recognised as capable of amplifying anticompetitive harm and triggering market tipping.[15]

A Dynamic Assessment of Efficiencies

The Draft Guidelines provide that "demonstrated efficiencies will play a key role in the assessment of mergers going forward" and recognise that greater clarity regarding the role of efficiencies in the merger control assessment is important to "avoid chilling effects" on investment.[16] This may support a positive "theory of benefit" where, for example, a merger strengthens supply security or defence capabilities. The Draft Guidelines provide examples of merger efficiencies. Direct efficiencies arising from integration of the merger parties include combining scarce complementary assets or capabilities, economies of scale, wholesale cost savings, securing access to critical inputs, and technology transfer, with the merged entity rolling out its know-how, intellectual property and technology over a larger customer base. Additional dynamic efficiencies (arising from the incentives facing the merged entity to invest or innovate) include access to finance from a larger, financially sound firm and optimal allocation of scarce resources between research projects of the merged entity so that it significantly increases the likelihood of successful innovation or significantly reduces its development time.[17]

The Draft Guidelines note that companies are advised to raise efficiencies arguments early on in the merger review process.

Public Policy, Security and Labour Markets

The Draft Guidelines bring public policy, security, media plurality and labour-market considerations much more clearly into the merger-control framework. Member state intervention falls under a clearer procedural and substantive framework. Public security and media plurality remain national prerogatives, but the Draft Guidelines make clear that the EC will police the boundaries: Measures must genuinely pursue the stated public interest, must comply with EU law, and cannot be used as disguised industrial policy or protectionism.[18]

Security, resilience, critical inputs, critical infrastructure and defence readiness are brought into the EC's own competition assessment.

Labour-market harm is expressly discussed as a potential example of purchasing market power being investigated.[19] The EC could investigate whether a deal reduces competition between employers and gives the merged entity greater power over workers, leading to lower wages, worse conditions or reduced mobility. Transactions involving specialised workforces, few alternative employers or concentrated local/niche labour markets may now require a labour-market narrative alongside the traditional product-market one.

[10] Para. 9
[11] Para. 34
[12] Para. 328
[13] Para. 267(f), 272
[14] Para. 79(a)
[15] Para. 153-154
[16] Para. 291
[17] Paras. 302, 325
[18] Para. 367
[19] Para. 160

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