

Linklaters LLP response to the European Commission's public consultation on the Draft Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004

1 PART I. – INTRODUCTION AND GUIDING PRINCIPLES

Paragraphs 1-6

- (1) We welcome the opportunity to comment on the European Commission's (the "**Commission**") draft Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 (the "**Draft Guidelines**").
- (2) In many important respects, the Draft Guidelines represent a positive step forward. They usefully consolidate the Commission's case law and enforcement experience, facilitating access to established precedent and providing greater transparency about the Commission's analytical approach to merger assessment. We also particularly welcome the Draft Guidelines' more explicit and elaborated recognition that mergers can produce pro-competitive benefits, including through efficiencies, scale, investment and innovation, and the stated ambition to give such benefits appropriate analytical weight. These are significant contributions to predictability and legal certainty.
- (3) The submissions that follow aim to assist the Commission in delivering on those ambitions by identifying specific areas where the analytical framework could be clarified, made more symmetrical as between harm and benefit, and provide greater certainty and transparency for stakeholders.

2 Part I.A – THE ROLE OF EU MERGER CONTROL

Paragraphs 7-18

2.1 Pro-competitive scale rationales should not be arbitrarily confined to global competitive contexts

- (4) The Draft Guidelines' recognition of competitiveness and scale as relevant considerations in the merger assessment is a welcome reflection of an important insight: in capital-intensive markets, the ability to achieve scale frequently determines whether an investment is viable. The current framing, however, ties the recognition of pro-competitive scale primarily to global contexts. The relevant criterion should not be limited to international competition, but should be whether scale creates the conditions for sufficient investment returns and contributes to effective competition in any relevant market.
- (5) Where a merger creates scale that represents a structural prerequisite for investment (e.g. enabling the merged entity to fund infrastructure development) such pro-competitive effects should be capable of being assessed and given appropriate weight on the evidence of each case. The final Guidelines should confirm that scale rationales meeting those conditions are equally capable of producing pro-competitive outcomes regardless of whether the relevant market is global, regional or national in scope.

3 Part I.B – GUIDING PRINCIPLES

Paragraphs 19-51

3.1 The "more likely than not" standard must be the organising principle

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- (6) We welcome the Draft Guidelines' broader and more dynamic approach to merger assessment. The wider range of competitive parameters and the longer time horizons that the Draft Guidelines contemplate will necessarily involve more complex balancing exercises and economic judgments. The EUMR's "more likely than not" standard provides a sound framework to manage the inherent uncertainty in such assessments. To realise fully the predictability and legal certainty that the Guidelines aim to achieve, we invite the Commission to provide additional guidance on how assessments of effects will be carried out and balanced in practice. Clear guidance in this area will strengthen the rules-based character of EU merger control and support effective judicial review of merger outcomes.
- (7) The Draft Guidelines provide that the Commission bears the burden of establishing whether a merger overall gives rise to a significant impediment to effective competition ("**SIEC**") and of demonstrating any anticompetitive effects.[1] However, it is only later (and outside the burden of proof section) that the Commission clarifies the standard of proof as whether the merger is "more likely than not" to result in a SIEC.[2]
- (8) The Draft Guidelines state that "the balance of probabilities standard only applies to the overall conclusion on the SIEC, rather than its constituent parameters and underlying facts".[3] The difficulty with this formulation is that it conflates the quality of evidence required with the need for a probabilistic assessment of merger effects. The Commission cannot make a finding as to the likelihood of a SIEC without considering the likelihood of the chains of causation that lead to it: the overall probabilistic assessment of competitive effects necessarily encompasses the probability of each link in the causal chain. To address this, the final Guidelines should clarify that the Commission is required to carry out a genuinely probabilistic assessment of the full causal chain giving rise to a SIEC.[4] We accept that it may not be required to make a full "more likely than not" assessment for each chain link but the assessment must be a probabilistic one and not one that reverts to a higher level of certainty (appropriately applicable to facts, but not future effects).
- (9) In addition, the complexity of a case does not alter the applicable legal standard. A case involving multiple theories of harm, complex economic modelling or dynamic market conditions is no exception to the balance of probabilities standard: the Commission must still establish, by a sufficiently cogent and consistent body of evidence, that a SIEC is more likely than not to result.
- (10) We suggest the Commission include an explicit statement at the outset of the Guidelines, confirming that:
 - (a) the applicable standard for assessing effects (both on the harm side and on the benefit side) is the 'balance of probabilities' throughout and it should be applied uniformly: this standard does not change with the level of market shares or concentration, or with the economic or analytical complexity of the case, the number/complexity of theories of harm advanced,[5] or the difficulty of the underlying economic assessment;
 - (b) the same evidentiary standard applies symmetrically to the Commission's assessment of harm and to the parties' substantiation of benefit: no higher threshold or more demanding evidentiary requirements may be applied to efficiency or pro-competitive claims than the Commission itself must satisfy to establish a theory of harm.

[1] Draft Guidelines at paragraphs 21-22.

[2] Currently, the SIEC standard first appears at paragraph 32 of the Draft Guidelines, and is preceded by ten pages of introductory material on the role of EU merger control, the benefits from scale, and five other guiding principles.

[3] Draft Guidelines at footnote 63.

[4] The General Court held that, in a concentrated oligopolistic market with multiple theories of harm, the Commission must demonstrate a SIEC with "a strong probability" – explicitly stricter than "more likely than not". The Court of Justice confirmed on appeal that this was an error of law. See: *Commission v CK Telecoms UK Investments*, T-399/16, para 118 and *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 73–79 and 88 (the GC's reasoning was vitiated by errors of law); confirmed in *thyssenkrupp v Commission*, C-581/22 P, paras 126–127.

[5] *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 74 and 79; *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, para 51.

3.2 Evidence

3.2.1 Commission's obligation to investigate both harm and plausibility of pro-competitive effects

- (11) The Commission operates an administrative, not a prosecutorial, system: as such, it is required to investigate all relevant evidence, including evidence of pro-competitive effects, and cannot discharge its duty by assuming that benefits which parties fail to prove do not exist. Merging parties will not always hold all the evidence needed to substantiate efficiency benefits, but the Commission's investigative powers do not have to leave that gap unfilled: instead, it can (and often does) request information from third parties and commission its own economic analysis. The final Guidelines should make clear that the Commission's obligation to conduct an objective assessment encompasses an active duty to investigate the plausibility of pro-competitive effects alongside its assessment of alleged harm, recognising of course that the merging parties have a duty to assist the Commission in its investigation with the evidence in its possession and its views on those pro-competitive effects.

3.2.2 The need for evidentiary rules to preserve symmetry

- (12) The "more likely than not" standard reflects not only a rule of evidence but a policy decision that mergers more likely to benefit (or be neutral) than to harm effective competition should, as a matter of principle, be cleared. If the Commission is to establish a SIEC on a "more likely than not" basis, the evidentiary conditions it applies to evidence of harm and evidence of benefit must be the same. An evidentiary framework that is systematically more demanding on benefit than on harm would tilt the assessment towards intervention in precisely the cases the standard is designed to clear, subverting the policy choice the standard itself reflects.
- (13) Practically speaking, this means the same categories of evidence that are probative of harm should be equally capable of substantiating efficiency claims. Precise quantification should be expected where realistic but should not be a threshold condition where the claimed benefit is qualitative, innovation-related or dynamic in character and is sufficiently supported by robust evidence.
- (14) As well as undermining the "more likely than not" standard, treating similar evidence differently based on whether it supports harm or benefit arguments imposes a practical

efficiency burden on parties. This differentiated standard has historically meant efficiency arguments are in practice rarely raised or pursued, not because they lack substance, but because the evidentiary framework renders them difficult to sustain. One of the great improvements of the Draft Guidelines is the promise that there is a level playing field in this respect, but the Draft Guidelines should carry this promise through and make it a consistent principle throughout the final Guidelines.

(15) Asymmetrical treatment of evidence is illustrated in the following aspects of the Draft Guidelines:

(a) *Treatment of post announcement internal documents.* The Draft Guidelines suggest that post-announcement internal documents have "generally limited" exculpatory value.^[6] However, many efficiencies analysis, including detailed cost-saving models, synergy assessments and investment business cases, are necessarily prepared once a transaction is contemplated. The Commission itself has relied on post-announcement documents (including management presentations, board papers and economic projections) when constructing theories of harm in previous decisions. Consistency would suggest that the same documents, assessed by the same credibility criteria, would carry equivalent weight when parties rely on them for efficiency claims, although the Commission should be entitled to question the quality or veracity of the claims made in the documents.

The governing test under EU law is whether a document is relevant to the facts in issue and is supported by the facts; the Commission cannot exclude categories of evidence from consideration solely on the basis of when they were produced. Accordingly, the final Guidelines should not treat post-announcement documents as presumptively limited in probative weight. The appropriate approach is to assess any document's credibility on its merits, including its authorship, purpose and context, and to apply that approach consistently regardless of whether the document supports a theory of harm or an efficiency claim.

(b) *Third-party evidence.* A structural imbalance also arises from the proposed treatment of third-party evidence. Third-party views can tend to favour theories of harm because competitors and customers are allegedly better placed to comment on existing competitive conditions than on merger-specific, forward-looking efficiencies that are internal to the merging parties. We would encourage the Commission to account for this asymmetry and to actively seek third-party views on the plausibility of claimed efficiencies (not only on alleged harms) as part of its obligation to conduct an objective and balanced investigation.

(c) *Single items of documentary evidence.* A related symmetry concern arises in connection with single items of documentary evidence. Established case law permits the Commission to rely on a single document where its probative value is undoubted,^[7] a rule that applies equally to evidence of harm and evidence of benefit. If a single cogent document can ground a theory of harm, it must be equally capable of substantiating an efficiency claim.

[6] Footnote 61.

[7] *Deutsche Telekom AG v Commission*, T-64/20, para 59 (citing *HeidelbergCement and Schwenk Zement v Commission*, T-380/17, para 460). The rule originates in cartel proceedings: *FMC Foret v Commission*, T-191/06, para 122.

3.2.3 Timing of efficiency evidence

- (16) While we welcome the Draft Guidelines' encouragement of early engagement by the merging parties on efficiencies, we caution the Commission against making this an expectation. There is no legal basis for a rule that requires efficiency claims to be established at a fixed, early procedural stage: the Commission's duty to take account of all relevant evidence extends throughout the administrative proceedings, and that duty cannot be displaced by imposing a procedural deadline on efficiency submissions that has no counterpart in the treatment of evidence relating to theories of harm. Having said this, we recognise that the parties may be well advised to come forward with theories of benefits, and the evidence supporting it, as soon as possible. However, evidence or analysis produced later in the process, because it might have taken time to prepare or for other reasons, should not be discounted on this basis.

3.2.4 Evidentiary best practices

- (17) The Commission's reliance on internal documents is an important and well-established part of its investigative toolkit, and we recognise the probative value such documents can offer. To maximise their contribution to an accurate and balanced assessment, the final Guidelines could provide practical guidance on their use, including: (i) that documents are considered in their full context and not relied upon selectively or in isolation from the broader documentary record; (ii) that the weight accorded to any given document takes account of the level at which it was prepared, its intended purpose, and whether it is representative of the undertaking's views; and (iii) that where documents point in different directions, the Commission's assessment explains why certain documents are accorded greater weight. These principles should apply with equal force to documents relied upon in support of theories of harm and to those relied upon in support of pro-competitive claims.
- (18) Market testing and third-party consultation processes similarly play a valuable role in informing the Commission's assessment. To enhance the reliability of insights gathered, the final Guidelines should acknowledge the importance of structuring these processes in a manner that: (i) allows respondents to address both the potential benefits and potential harms of a proposed transaction; (ii) actively invites views on the plausibility of efficiency and pro-competitive claims and not only on alleged harms; and (iii) takes account of respondents' incentive structures and potential self-interest when assessing the weight to be accorded to their submissions. Adopting these practices would help ensure that market testing generates evidence of probative value and contributes constructively to the Commission's analysis.

3.3 Relevant counterfactual

- (19) We welcome the Draft Guidelines' approach to the relevant counterfactual as a forward-looking, evidence-based assessment of competitive conditions absent the merger. We suggest one clarification to ensure consistency with the "more likely than not" standard that governs the broader SIEC assessment.
- (20) Where the Commission departs from pre-merger conditions as the benchmark under paragraph 39 of the Draft Guidelines (for example, by incorporating anticipated future market changes or by accounting for alternative transactions) the adjusted counterfactual must itself satisfy the 'more likely than not' standard. The Commission should be required to demonstrate that the adjusted scenario is more likely than not to materialise, applying the same degree of certainty as it applies to other forward-looking elements of its analysis. Since the counterfactual may determine the merger effects, it should be subject to the standard

applicable to the effects analysis, and not the facts analysis. This standard is consistent with the 2023 US Merger Guidelines test, which does not lock the counterfactual to a static pre-merger snapshot. Where market conditions are expected to change through innovation, entry, exit, or exogenous trends, the US Merger Guidelines expressly permit the Agencies to use anticipated future outcomes as the counterfactual benchmark. Similarly, where the Draft Guidelines assess competitive effects over a longer time horizon, it is inconsistent to maintain a purely static pre-merger baseline as the counterfactual: the counterfactual and the theories of harm should therefore be assessed by reference to the same temporal framework.

3.4 Failing firm

- (21) The Draft Guidelines broadly retain the same three conditions for the failing firm defence as the existing framework, with the Draft Guidelines expanded to provide for the firm ceasing to play a competitive role, or the market share of the failing firm accruing to the acquirer.^[8] The conditions as currently articulated will continue to have limited practical utility. In particular, the conditions do not account for situations in which a firm remains nominally present but has ceased or will cease to compete effectively, for example, by withdrawing investment, losing key customers, or curtailing its product offering. A firm in that position may exert a competitive constraint that is already substantially diminished, and the merger's effect on competitive conditions may therefore be far less significant than the status quo ante would otherwise suggest.
- (22) In the final Guidelines, the counterfactual assessment, whether under the failing firm defence or in the broader assessment of the counterfactual, should account for the possibility that a financially distressed firm would cease to invest or compete effectively even absent full market exit. Where the evidence demonstrates that a firm's competitive constraint is already materially diminished, that constraint should be weighted accordingly in the SIEC analysis, regardless of whether the conditions for a full failing firm defence are formally satisfied. To the extent the Commission is not inclined to address these concerns within the scope of the failing firm defence, we suggest that they are more directly addressed in the relevant counterfactual section (specifically, paragraph 40) of the Draft Guidelines, to make explicit that, where a firm's financial situation makes it unlikely to remain an effective competitive force, the counterfactual should reflect this reduced competitive constraint.
- (23) The final Guidelines should also provide indicative guidance on the categories of evidence relevant to establishing that a firm's competitive constraint is materially diminished short of imminent exit, including: deteriorating EBITDA margins, negative cash flow, covenant breaches, cancelled investment projects, staff reductions in sales or R&D, or third-party evidence that customers have already discounted the target as a credible supplier.

[8] Draft Guidelines at paragraphs 46-49.

4 Part II. – COMPETITIVE ASSESSMENT

Part II.A.1 – Structural indicators of market power (and Part.II.B.2 – Loss of head-to-head competition – 2.1 Structural market features)

Paragraphs 60-67 (and 123-129)

4.1 Structural indicators: the need for a balanced and symmetrical approach

- (24) The Draft Guidelines introduce a framework of market share bands that, in the higher bands, places considerable weight on structural indicators as markers of competitive concern. The practical effect is to require substantial evidence pointing away from a SIEC in cases of high or very high combined shares. This creates a risk of shifting the evidential burden to the merging parties, based on a very summary market share based calculation which may not properly reflect the Commission's obligation to establish a SIEC on a more-likely-than-not basis and based on a full-rounded assessment.[9]
- (25) In addition, in doing so, the Draft Guidelines risk creating too close an association between high market shares, market power and harm. Market shares are an indication of possible market power; they do not constitute a finding of market power, and market power is not in itself a SIEC.
- (26) We recommend that these points are clarified in the Draft Guidelines. Every merger must be assessed on the specific facts and evidence, and the Commission retains the obligation to establish a SIEC by a sufficiently cogent and consistent body of evidence in all cases, regardless of the level of the parties' combined shares.[10] Market shares and market structure play a role in this analysis but it is important not to give them too much weight on their own.
- (27) Finally, the approach to structural indicators is not symmetrical. The 2004 Horizontal Merger Guidelines provided specific safe harbour conditions giving merging parties reasonable confidence that transactions below certain combined market share thresholds would not give rise to horizontal competition concerns. The Draft Guidelines have not maintained those provisions in equivalent form, while retaining, and in some respects, strengthening the presumptive significance attributed to high shares. We suggest that, if structural indicators are used to assess competitive risk, they should operate consistently in both directions: robust low-concern indicators should match any strengthened issue indicators. This will best enable merger parties to identify where transactions are unlikely to raise concerns.

[9] *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 84–88; *thyssenkrupp v Commission*, C-581/22 P para 127.

[10] *Ryanair v Commission*, T-342/07, paras 42 and 56.

Part II.A.4 – Countervailing factors

Paragraphs 84-110

4.2 Countervailing factors must be assessed as part of the holistic SIEC analysis

- (28) The Draft Guidelines' recognition of buyer power, potential competition, entry and expansion, and other demand- and supply-side constraints as countervailing factors reflects an analytically sound approach that we support.[11] Still, further clarity is needed to fully reflect that the legal standard requires the Commission to assess the economic outcome most likely to ensue, and that this standard demands an assessment of the overall competitive effect (as the Draft Guidelines recognise in other places), not a series of isolated tests applied to individual factors in sequence.
- (29) The Commission assesses theories of harm by reference to the overall competitive picture, and countervailing factors should be assessed on the same basis. The question should be whether the overall competitive outcome, taking all countervailing factors into account, is more likely than not to cause a SIEC, not whether any individual countervailing factor independently neutralises a defined proportion of harm. If a countervailing factor is

established on the evidence, it should carry weight regardless of its scale relative to the merged entity's market shares.

- (30) We therefore suggest the final Guidelines make clear that countervailing factors form part of the holistic SIEC analysis and that their relevance does not depend on meeting an arbitrary magnitude threshold. Countervailing factors should be assessed in tandem with the Commission's theories of harm, so that the overall competitive outcome is the object of the assessment.

[11] Draft Guidelines at paragraphs 84-110.

5 Part.II.B.1 – ANTICOMPETITIVE EFFECTS

Paragraphs 114-118

- (31) The Draft Guidelines expand the analytical scope of merger review, including broadening the market power section and introducing new theories of harm. We welcome the comprehensiveness of this approach and its ambition to equip the Commission with a more complete set of analytical tools. However, we caution that the expansion of the substantive framework must not carry with it a commensurate, and disproportionate, expansion of procedural complexity, including more elaborate filing requirements and broader requests for information. We suggest that the final Guidelines include clear instructions and explicit guardrails for simplification wherever possible. For example, for each new or expanded theory of harm, the final Guidelines should specify safe harbour conditions or equivalent low-concern thresholds below which that theory need not be assessed in any detail.

Part.II.B.2 – Loss of head-to-head competition

Paragraphs 119-168

5.1 Structural market features

- (32) The Draft Guidelines' approach to structural market features risks producing the same evidential imbalance that arises in the general structural indicators' framework. The assessment of structural market features in the loss of head-to-head competition framework must be anchored in the same principles that govern the broader SIEC analysis (i.e. structural indicators inform the competitive assessment rather than displace it). High combined market shares and concentrated market structures are relevant contextual inputs, but they are not of themselves evidence of market power and do not amount to evidence of a SIEC. The Commission's obligation to demonstrate a SIEC through a sufficiently cogent and consistent body of evidence applies in the loss of head-to-head competition framework just as it does across the rest of the competitive assessment, regardless of the parties' combined structural position.
- (33) Further, where high structural indicators trigger heightened scrutiny without a corresponding safe harbour at lower thresholds, parties face a structural asymmetry that is difficult to reconcile with the Commission's overall burden of proof.
- (34) The final Guidelines should confirm that the Commission is required to substantiate, on the specific facts of each case, that the competitive constraint the merging parties exert on each other is of sufficient intensity that its removal is more likely than not to give rise to a SIEC, and that structural indicators alone, however high, cannot satisfy that obligation.

5.2 Closeness of competition

- (35) We welcome the Draft Guidelines' recognition that closeness of competition is one of the factors relevant in assessing whether a loss of head-to-head competition gives rise to a SIEC. The Commission is not required to establish that the merging firms are each other's closest competitors, and a finding of closeness cannot be treated as a condition that, once established, mechanically supports a SIEC finding.^[12] Evidence of closeness must be assessed with appropriate care. Evidence that the merging parties monitor each other's competitive actions, or are active in the same market, cannot without more establish the degree of substitutability required to sustain a theory of harm. The Commission must demonstrate, through a sufficiently cogent and consistent body of evidence, that the merging firms compete closely enough that the removal of the competitive constraint between them is more likely than not to give rise to a SIEC in the specific circumstances of the case.
- (36) The final Guidelines should confirm that closeness of competition, like all other factors in the SIEC assessment, must be weighed in the round as part of the overall balanced assessment required under the EUMR.

[12] *Commission v CK Telecoms UK Investments*, C-376/20 P, para 189.

6 Specific market aspects

6.1 Labour markets

- (37) The Draft Guidelines provide important clarity by confining the labour market's competitive assessment to the dynamics of the labour market, rather than extending it to broader employment effects such as post-merger corporate restructuring. That distinction is analytically sound and practically valuable: it respects the proper boundaries of what merger control is designed to address and avoids importing employment policy considerations into a competition law assessment. To make the framework as useful as possible for businesses, the final Guidelines should also confirm explicitly that headcount reductions, elimination of duplicative roles, or changes to terms and conditions arising from post-merger integration are not competition concerns within the SIEC standard.
- (38) Additionally, certain aspects of the current treatment would also benefit from greater clarity:
- (a) It would be helpful to have an analytical framework for defining relevant labour markets beyond a reference to the Market Definition Notice. We recommend that the final Guidelines address: the relevant skill classifications; how commuting zones are established; the treatment of mobile workers whose geographic market extends beyond the immediate locality of the employer's premises; and how to reconcile cases where the parties' product markets are EEA-wide or global but labour market overlaps are purely local.
 - (b) While the recognition of collective bargaining and sector regulation as countervailing factors is welcome, the Draft Guidelines provide no guidance on how their effectiveness will be assessed. The final Guidelines should clarify what evidence the Commission requires to establish that worker countervailing power is a meaningful constraint and whether sector-level agreements with industry-wide coverage are treated differently from firm-level arrangements.
 - (c) The Draft Guidelines do not identify safe harbour conditions or low-concern scenarios, despite labour market effects being likely to arise in a limited set of cases: primarily those involving specialised workforces with few alternative employment options, or where the merging parties are among a very small number of active

employers in a defined geographic area. The final Guidelines should provide indicative low-concern conditions, for example where post-merger employer concentration falls below a specified threshold, effective collective bargaining is in place, or sector regulation limits the scope for harm.

6.2 Minority shareholdings and common ownership

- (39) The clarification that minority shareholdings below 5% will not ordinarily give rise to a standalone theory of harm absent additional rights or links is consistent with the Commission's practice and provides useful guidance. Two aspects of the current treatment would benefit from equivalent elaboration at higher thresholds in order to extend the same level of clarity when assessing shareholdings above 5%.
- (40) First, the Draft Guidelines state that a minority shareholding may give rise to a SIEC even absent additional rights or influence where it is sufficiently high to lower incentives to compete substantially.^[13] This may significantly expand the scope of the assessment. The final Guidelines should, if possible, provide more clarity regarding the shareholding range above which the Commission is likely to pursue a standalone concern without additional rights, and the mechanism by which a purely financial interest (without governance rights or information flows) is said to reduce competitive incentives sufficiently to support a SIEC finding.
- (41) Second, paragraph 166 introduces common ownership by institutional investors as a factor capable of justifying an upward adjustment of market shares. This is an economically contested area with limited Commission practice. Without clarity on the threshold and the causal mechanism, a market share adjustment to reflect common ownership risks introducing a structural presumption inconsistent with the "more likely than not" standard and would create significant uncertainty for institutional investors holding diversified portfolios. The final Guidelines should confirm what evidence the Commission requires to establish that a common ownership link materially affects competitive incentives in a specific case and should make clear that the adjustment is not applicable as a matter of course wherever an institutional ownership link exists.

[13] Footnote 241.

7 Part.II.B.3 – Loss of investment and expansion competition

Paragraphs 169-174

7.1 Investment in assets: applying a consistent analytical approach in the competitive assessment

- (42) The Draft Guidelines helpfully distinguish between investment in assets and investment in innovation as separate categories of dynamic efficiency.^[14] We suggest that this distinction is applied consistently across the final Guidelines as a whole in order to provide further clarity in other sections.
- (43) In relation to the investment in assets assessment specifically, the current treatment articulates theories of investment harm in detail but contains no equivalent framework for circumstances in which a merger may strengthen investment incentives. A key premise of a consistent analytical approach to investment competition is that a merger's effects on investment incentives can run in either direction: consolidation may reduce investment incentives where it diminishes competitive pressure or, for example, strengthen them where it creates the scale necessary to fund infrastructure that neither party could have supported

independently. Equally, where one party's investment capacity is structurally impaired and it cannot fund otherwise profitable investment independently, the competitive constraint removed by the merger may be limited. An analytical framework designed only to capture investment harm and not investment benefit will systematically undercount the pro-competitive case in precisely the transactions where investment effects are central to the competitive assessment.

- (44) This asymmetry should be corrected in the final Guidelines. The forward-looking approach that the Draft Guidelines apply to innovation effects, and their recognition that mergers may both harm and benefit innovation, should apply equally to investment in assets. The Guidelines should provide clear guidance on the evidence capable of substantiating these assessments, including investment plans, approved budgets, historical capital expenditure records and financing structures, evaluated on the same credibility criteria as the Commission's own forward-looking analysis.

[14] Footnote 364.

8 Part.II.B.4 – Loss of innovation competition

Paragraphs 175-192

8.1 The innovation shield

- (45) The innovation shield is a welcome concept as a means of providing predictability for transactions involving start-ups and other innovative companies, though we believe that two aspects of the design would benefit from clarification.
- (46) First, the three-firm condition and the 40% market share threshold are both expressed by reference to static product market metrics that are poorly suited to assessing dynamic innovation competition. This does not reflect the Commission's actual practice,[15] which reflects that innovation competition frequently spans adjacent technology spaces and nascent markets in which current product market shares give little indication of future innovative capacity. The final Guidelines should supplement any numerical conditions with a case-specific consideration of any projects or programmes in meaningful competitive tension with the merged entity's innovation pipeline.
- (47) Second, it is unclear whether the shield operates as a safe harbour (precluding the Commission from pursuing an innovation harm theory where its conditions are met) or as a rebuttable presumption (shifting the burden to the Commission to identify specific reasons for a SIEC finding). Without clarity on burden allocation and on what evidence the Commission must adduce to depart from a shield finding, the shield risks functioning as a factor to be weighed rather than a threshold protection. The final Guidelines should clarify whether satisfaction of the stated conditions creates a legal expectation that no SIEC will be found, or whether the Commission may nevertheless depart from the shield and, if so, on what grounds.

[15] Case M.7932 – *Dow/DuPont*, Commission Decision of 27 March 2017, recitals 2163 and 2221-2222.

9 Part.II.B.6 – Foreclosure

Paragraphs 208-251

9.1 Non-horizontal effects and the removal of non-horizontal safe harbours

- (48) The Draft Guidelines do not replicate the specific market share safe harbours for non-horizontal mergers contained in the 2008 Non-Horizontal Merger Guidelines ("NHMG"), which provided that the Commission was unlikely to identify competition concerns where the parties' shares did not exceed specified thresholds.^[16] This raises significant timing risks for transactions that do not warrant closer scrutiny, as well as increased costs due to uncertainty. The removal of these safe harbours sits uneasily with the Commission's Simplified Procedure Notice, which continues to allow non-horizontal transactions below certain share thresholds to benefit from simplified treatment. The final Guidelines should reinstate safe harbour provisions for non-horizontal mergers, or at minimum provide low-concern indicators of equivalent specificity and predictability.
- (49) The Draft Guidelines also use inconsistent terminology in relation to the concept of related markets across the vertical effects, entrenchment and portfolio effects provisions. The foreclosure chapter refers to "related markets", the entrenchment provisions to "closely related markets", and the portfolio effects provisions to products that "belong to different relevant markets and together form a portfolio". This inconsistency creates uncertainty about how these frameworks map onto each other and about the standard the Commission will apply in determining whether markets are sufficiently related for the purposes of each theory of harm. The final Guidelines should standardise this terminology and provide a clear, consistent definition of the degree of relatedness required under each framework.

[16] See paragraph 25 and footnote 3 of the NHMG.

10 Part.II.B.7 – Entrenchment of a dominant position (and Part II.A.5 – Dominance and other types of market power)

Paragraphs 252-259 (and 111-113)

10.1 Definitions of dominance and market power

- (50) The Draft Guidelines risk importing into merger control the presumption that a market share of 50% or above is, save in exceptional circumstances, evidence of a dominant position. That presumption is analytically misplaced in the merger control context. Even under Article 102, the Courts have confirmed that the importance of market shares may vary from one market to another and that a substantial market share "is not a constant factor" when it comes to evidence for dominance.^[17] In the forward-looking context of merger control, the position is stronger still: dominance must be established prospectively, on the specific facts of each case, through a multi-factor assessment that goes beyond market share alone. Importing a rebuttable presumption derived from Article 102 into prospective merger appraisal risks converting what the case law treats as an evidential starting point into a structural trigger for intervention.
- (51) The final Guidelines should make clear that the Commission retains the obligation to establish a SIEC on a "more likely than not" basis regardless of the level of the parties' combined share. Any finding of increased dominance should be accompanied by a specific and substantiated explanation of the competitive mechanism by which the creation or strengthening of that dominant position is more likely than not to result in a SIEC.
- (52) Finally, the analytical framework and standard of proof should be confirmed as identical in dominance and gap cases: in either case, the Commission must present objective evidence of the expected competitive impact of the transaction, assessed on the same "more likely than not" standard. A dominance finding should not in practice operate as a lower-threshold route to prohibition.

[17] *Hoffmann-La Roche v Commission*, C-85/76, para 40; *Gencor v Commission*, T-102/96, para 201.

10.2 Entrenchment as a theory of harm

(53) The enunciation of entrenchment as a stand-alone theory of harm in paragraph 252 of the Draft Guidelines is helpful, and so too the Commission's position that this theory will only be applied where the acquiring firm is found to hold a dominant position. The three cumulative conditions in paragraphs 253, 255, and 256 (dominance, asset relatedness, and the importance of the assets in restricting rivals' ability to enter or expand) provide a workable analytical structure, and paragraph 259 appropriately provides for cumulative assessment with dynamic foreclosure where the evidence supports each.

(54) This analytical framework could be further strengthened in several ways:

- (a) *Ecosystem definition.* First, we note that the concept of an "ecosystem" in paragraph 252 is not grounded in the EUMR or in the applicable case law and cannot itself constitute a legal basis for a finding of SIEC or entrenchment. As currently framed, the concept risks becoming a shortcut that substitutes for the rigorous effects analysis the law requires. The Commission must demonstrate a SIEC through a sufficiently cogent and consistent body of evidence; invoking an ecosystem rationale does not displace that obligation or relax the standard of proof.

We therefore suggest that the final Guidelines provide a clear definition of when a group of related markets may constitute an "ecosystem" for the purposes of the entrenchment analysis, including indicators applicable outside digital sectors, and confirm that the ecosystem concept does not substitute the Commission's obligation to identify and substantiate the specific competitive mechanism giving rise to harm. Such indicators could include: (i) the existence of shared data flows across the relevant markets, (ii) evidence that competitive conditions in one market are materially affected by the merged entity's position in an adjacent market, or (iii) interdependencies between products or services such that customer choices in one market materially influence choices in another.

- (b) *Entrenchment and dynamic foreclosure.* We would welcome further clarification in the final Guidelines regarding the distinction between entrenchment and the concept of dynamic foreclosure introduced in the Draft Guidelines (at paragraphs 239–242). Both theories concern circumstances in which a merged entity may reinforce its market position through scale, network effects, or data accumulation, and both contemplate forms of harm that may not be fully captured through static analysis. This overlap between entrenchment and dynamic foreclosure may create uncertainty in practice, particularly in digital and platform markets.
- (c) *Evidentiary threshold for entrenchment.* Unlike a standard horizontal merger, where the Commission can point to a concrete increase in combined market share as the starting point for its analysis, an entrenchment theory may involve no change to the dominant firm's share in its core market. The Commission must instead predict how acquiring assets in a related or adjacent market will make the dominant position harder for rivals to challenge in the future. This is an inherently forward-looking exercise and, as the case law on conglomerate effects confirms, requires a precise examination supported by convincing evidence.[18] That evidence must establish a nexus between the merger and the claimed entrenchment effect: if the transaction leaves the dominant firm's competitive standing in its core market entirely

unchanged, the theory risks being applied to any acquisition by a dominant firm regardless of its connection to the core market.

- (d) *Harm to consumers.* The Commission should clarify, as it does earlier in the Draft Guidelines, that establishing an entrenchment theory of harm requires finding that the merger impairs the competitive process, not merely that it disadvantages rivals.^[19] This distinction is essential to prevent the entrenchment theory from operating as an efficiency offense: an acquisition that makes the dominant firm more efficient or strengthens its competitive position may adversely affect rivals without ultimately worsening outcomes for consumers. In alignment with the Draft Guidelines' guiding principles, entrenchment findings should be grounded in a clear competitive mechanism that identifies how consumers are worse off as a result of the merger.
- (e) *Caution regarding Booking Holdings/eTraveli Group.*^[20] We note that while *Booking Holdings/eTraveli Group* is the Commission's leading application of ecosystem concerns in the merger control context, it is currently subject to appeal before the General Court. The final Guidelines should avoid enshrining as general principle an approach that has not yet been fully tested before the EU Courts.

[18] *Commission v Tetra Laval BV*, C-12/03 P, paras 41 and 44.

[19] Draft Merger Guidelines at paragraphs 21 and 22, and footnote 38. Footnote 38 provides that: "*the fact that rivals may be harmed because a merger leads to efficiencies cannot in itself give rise to competition concerns*".

[20] Case M.10615 – *Booking Holdings / eTraveli Group*, Commission Decision of 25 September 2023, paras 917-919.

11 Part.II.B.9 – Other anticompetitive effects

Paragraphs 282-290

11.1 Portfolio effects

- (55) A portfolio effects theory of harm should require the Commission to identify a concrete mechanism by which the portfolio translates into harm to effective competition (whether through bundling, tying, cross-subsidisation, exclusion, increased bargaining power) rather than simply harm to competitors. Portfolio breadth that allows the merged firm to offer better, cheaper or more convenient product combinations can be an efficiency rather than a harm. The Commission must therefore demonstrate why, in the specific circumstances of the transaction, the portfolio creates anticompetitive harm. Evidence of combined demand for the products in the portfolio is relevant to this assessment: it bears both on whether the merged entity could leverage its portfolio to foreclose rivals and on the extent to which the combination generates efficiencies for customers.
- (56) The final Guidelines should draw a clear distinction between: (i) acquisitions by a dominant firm that remove a credible competitive threat to its dominant position, which may properly give rise to concerns under a portfolio theory; and (ii) acquisitions that expand a firm's portfolio but where no specific mechanism links that expansion to a concrete harm to effective competition. The latter should not give rise to a competition concern absent a clearly articulated and substantiated mechanism.

12 Part II.C – BENEFITS FROM MERGERS (EFFICIENCIES)

Paragraphs 291-301

12.1 Efficiencies must be integrated into the SIEC assessment, not treated as an after-the-fact defence

(57) The increased focus on, and weight given to, efficiencies as an analytical counterweight to theories of harm is one of the most significant and welcome features of the Draft Guidelines. The conditions applied to efficiency claims have in practice been considerably more demanding than the corresponding standard applied to theories of harm (resulting in a historical lacuna of successful efficiencies arguments), and the final Guidelines provide an opportunity to address this gap. To deliver on the intention to give efficiencies appropriate analytical weight going forward, the final Guidelines would benefit from addressing some stumbling blocks present in the proposed treatment of efficiencies. In addition, we suggest that the final Guidelines include illustrative examples to assist merger parties in evaluating potential efficiencies and engaging with the Commission.

(58) In particular:

- (a) *Treat efficiencies as part of the overall SIEC.* The current approach may require parties to satisfy a higher evidentiary threshold for efficiencies than the “more likely than not” standard. We recommend efficiencies be assessed as part of the overall SIEC from the outset, and that the Guidelines clarify that the “more likely than not” standard applies equally to the Commission’s assessment of efficiency claims.
- (b) *Separate ‘establishing efficiencies’ from ‘balancing’.* ‘Efficiencies’ refers to the merger-specific improvements in costs, quality, capacity or innovation that the transaction generates. ‘Balancing’ refers to the separate question of whether those demonstrated efficiencies sufficiently offset established harm to avoid a SIEC finding. The Draft Guidelines tend to run these together; separating them sequentially would give each step the analytical clarity and weight it deserves, and would in particular enable efficiency claims to be assessed on their own merits, consistent with the Guidelines’ stated ambition, before any balancing exercise begins.
- (c) *Clarify the meaning of counteract.* We recognise that the term “counteract” in paragraph 297 of the Draft Guidelines derives from Recital 29 of the Merger Regulation. However, read together with Articles 2(2) and 2(3), efficiencies must counteract harm such that the concentration does not give rise to a SIEC, not that efficiencies must independently outweigh an established finding of harm. This is consistent with the principle, confirmed in *Deutsche Telekom AG v Commission*, that anticompetitive effects must amount to a SIEC, and it is not sufficient that they are merely present in the transaction. The Commission must assess the economic outcome most likely to ensue,^[21] giving full and equal weight to both harm and benefit.

[21] *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, para 52; *Commission v CK Telecoms UK Investments*, C-376/20 P, para 52.

12.2 Part.II.C.1 – Assessment of direct efficiencies

Paragraphs 302-323

12.2.1 Verifiability

- (59) We note that the timeliness conditions in paragraphs 306 and 328 of the Draft Guidelines (requiring efficiency benefits to materialise “without delay” or “shortly after closing” respectively) have no counterpart in the Commission’s own projections of harm over extended horizons. If the Commission projects competitive harm over a longer time horizon, it should apply a consistent standard to benefits of the same class, including those arising from infrastructure, capacity investment or innovation that by their nature take time to materialise.

12.2.2 Benefit to consumers

- (60) The Draft Guidelines acknowledge that out-of-market efficiencies may in principle be taken into account in the balancing framework.[22] However, the operative provisions require that such efficiencies benefit consumers in the relevant market and accrue to “substantially the same consumers” as those harmed by the merger (paragraph 315). This significantly limits the scope for out-of-market efficiencies to be given meaningful weight in the overall assessment and is difficult to reconcile with the Draft Guidelines’ own preamble, which emphasises the importance of mergers that deliver benefits to European consumers more broadly and that contribute to EU competitiveness and resilience.
- (61) The “same consumers” requirement limits proper consideration of benefits to consumers in adjacent, related or downstream markets that may be just as material as benefits within the relevant market. This is particularly relevant in capital-intensive sectors such as telecommunications, energy and digital platforms, where investments in infrastructure assets, resilience, clean technology and cybersecurity generate benefits that extend across multiple customer groups and markets.
- (62) We would welcome the final Guidelines allowing the Commission greater flexibility to credit out-of-market benefits where the affected and benefiting consumer populations substantially overlap, particularly in capital-intensive sectors where infrastructure-level investments generate benefits distributed across multiple customer groups. The degree of overlap should be assessed on the evidence of each case rather than by reference to defined product market boundaries.

[22] See paragraph 355 (balancing across different consumer groups/markets); see also paragraphs 300, 321 and 322 (which address consumers’ valuation of quality and collective benefits more broadly).

12.3 Part.II.C.2 – Assessment of dynamic efficiencies

Paragraphs 324-338

12.3.1 Merger specificity: realistic alternatives, not speculative counterfactuals

- (63) The Draft Guidelines require merging parties to demonstrate there are no less anticompetitive alternatives that could deliver comparable efficiencies (i.e. that a less anticompetitive alternative would not be “realistic and attainable”). This goes beyond the EUMR, which requires a test of causal connection between the merger and the efficiency (not a test of indispensability) and asks whether “the efficiencies brought about by the concentration counteract the effects on competition”. [23] The burden of establishing merger-specificity (including the absence of less anticompetitive alternatives) rests with the merging parties. In practice, this requires parties to disprove an open-ended category of alternatives, without the Commission being obliged to identify the specific alternative it considers available.

- (64) The final Guidelines should address this by requiring that once merging parties have established a credible basis for the efficiency claim, the Commission must identify the specific less anticompetitive alternative it relies upon and demonstrate that it is realistic and achievable. This would be consistent with the existing constraint that the Commission may only consider alternatives that are reasonably practical having regard to established business practices in the industry concerned, and reflects the fact that merging parties lack access to the Commission's information-gathering powers.
- (65) The proposed approach in the Draft Guidelines also exposes merging parties to speculative counterfactuals which are not subject to thresholds of likelihood. This is inconsistent with the counterfactual methodology the Commission applies to the competitive effects assessment where, for purposes of the harm analysis, the Commission assesses competitive effects against a counterfactual that is realistic and more likely than not to occur. There is no principled basis for applying a different, less demanding counterfactual standard when assessing whether a less anticompetitive alternative to the merger was available. Harm and benefit should be assessed to the same threshold.
- (66) The final Guidelines should anchor the merger-specificity standard in the causality test of the EUMR and should make explicit that a theoretical possibility of an alternative does not suffice to defeat an efficiency claim where that alternative is not demonstrably practicable.

[23] EUMR Recital 29 establishes a straightforward causality requirement: efficiencies must be "brought about by the transaction". The EUMR's legal base (Articles 103 and 352 TFEU) does not incorporate the indispensability condition in Article 101(3) TFEU, and the Guidelines should not introduce it by analogy.

12.4 Part.II.C.3 – Balancing benefit and harm

Paragraphs 339-357

- (67) We welcome the Draft Guidelines' stated intention to treat dynamic efficiencies more seriously and to consider them earlier in the analytical process as a "theory of benefit". The recognition that dynamic efficiencies may materialise over a longer time horizon, provided they are verifiable, is a meaningful step forward.
- (68) Certain elements of the operative text could be strengthened to deliver more fully on this intention in practice. First, the Draft Guidelines introduce a timeliness or "immediacy" requirement for efficiency claims that effectively constrains dynamic efficiencies.[24] Dynamic efficiencies (infrastructure deployment, capacity expansion, research-to-market cycles) by their nature take longer to materialise than static price or cost efficiencies. Including an "immediacy" condition risks systematically disadvantaging mergers in sectors where the primary benefits are long-horizon in character.
- (69) The final Guidelines should either remove the immediacy condition or clarify that it does not apply to dynamic efficiencies, and should confirm that the relevant question is whether the efficiency is verifiable and sufficiently substantiated, not whether it materialises within an arbitrarily short period. Where the Commission relies on a theory of harm projecting damage over an extended period, it should not assess countervailing efficiency claims by reference to a shorter horizon.
- (70) Further, the language used in the balancing section of the Draft Guidelines[25] uses terms such as "unlikely" and "less likely" in a manner that predetermines outcomes and may amount to a structural presumption against efficiencies in specific market configurations. In particular, the proposition that harm arising from a combination of two close competitors will

"unlikely be offset by limited cost savings"[26] effectively forecloses the balancing exercise in precisely the market configurations characteristic of many capital-intensive EU sectors.

(71) The Draft Guidelines offer what may be a significant opportunity to develop an EU practice on the substantive assessment of efficiency claims on their merits, and we welcome that ambition. In our experience, efficiency arguments have rarely been assessed on their substantive merits in practice, in part because the analytical framework has not provided the necessary space; the Commission's commitment to changing this is particularly welcome. However, the balancing section as currently drafted risks foreclosing that assessment before it begins: presumptive language that predetermines the outcome in defined market configurations is not consistent with the case-by-case approach the Draft Guidelines' stated intention requires. The final Guidelines should ensure the framework they create is equal to the ambition they express.

(72) The final Guidelines should also remove all categorical and presumptive language from the balancing section and replace it with neutral, case-specific formulations that require the Commission to assess the magnitude and likelihood of both harm and benefit on the evidence of each case.

[24] Draft Guidelines at paragraphs 306 (direct efficiencies: synergies and consumer benefits must 'occur without delay') and 328 (dynamic efficiencies: investment or innovation must materialise 'shortly after closing').

[25] Draft Guidelines at paragraphs 343–346.

[26] Draft Guidelines at paragraph 344.

13 PART III – MEASURES TO PROTECT LEGITIMATE INTERESTS

(73) We welcome the Commission's approach in Part III of the Draft Guidelines, which provides a principled framework for the exercise of Member State prerogatives under Article 21 EUMR. The substantive and procedural framework provide legal certainty and appropriately constrain the risk of protectionist intervention by Member States. The requirement that Member State measures be appropriately recognised legitimate interests and comply with the principles of EU law (in particular proportionality and non-discrimination) ensures that Article 21 EUMR cannot be used for narrow national interests undermining the collective benefit of the internal market.