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Insights

THE DRAFT EU MERGER GUIDELINES – KEY TAKEAWAYS FOR DEALMAKERS

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SUMMARY

On 30 April 2026, the European Commission released its much awaited draft merger guidelines ("**Draft Guidelines**").

The Draft Guidelines are intended to replace two current and dated guidance documents: the Commission's Horizontal Merger Guidelines (published in 2004) and its Non-Horizontal Merger Guidelines (published in 2008). The Draft Guidelines propose to bring the approach to European merger control into line with a changed geo-political, security and trade context, as well as reflecting other policy drivers that have become much more prominent since 2004 and 2008, such as innovation, resilience and sustainability.

The release of the Draft Guidelines follows significant political pressure within the Commission to modernise the approach to merger control and help European businesses succeed on the world stage. The release of the Draft Guidelines – an area traditionally reserved to the Competition Commissioner and specialists within the Directorate General for Competition – has been a key priority for Commission President Ursula von der Leyen, who noted when the Draft Guidelines were released that they are intended to better support companies to thrive, scale and innovate, and to *"meet the realities of the fiercely competitive global economy and boost our competitiveness, while preserving the predictability and certainty that investors value most in Europe."*

WHAT ARE THE KEY PROPOSED CHANGES?

While the Draft Guidelines may, on their face, appear to provide a dramatic change and expansion to the previous guidelines (indeed, the Draft Guidelines run to 98 pages while the previous two sets of guidelines totalled just 34 pages), they reflect to a large extent Commission policy and practice already developed since the previous versions were published.

Notably, the Draft Guidelines do not (and cannot) change the key legal tests that the Commission must consider when reviewing a merger (i.e., whether the merger would result in a *"significant impediment to effective competition"* – or "SIEC" – in the EU). Nor do they change what transactions are notifiable, or the broader process. Rather, they seek to clarify and update the factors that the Commission will consider when substantively assessing a transaction.

With that in mind, some of the most notable additions or changes included in the Draft Guidelines are:

- **Expansion of parameters of competition:** Historically, price and quality have been seen as the key parameters of competition – more competition leads to better quality products at lower prices. However, reflective of its decisional practice since the current guidelines came into effect as well as broader developments in society, the Draft Guidelines expressly refer to multiple other potential parameters of competition such as choice (including media and cultural diversity), capacity, investment, innovation, privacy, sustainability and resilience (including security of supply). This shows a willingness by the Commission to consider the impact of a merger on areas beyond simply price and quality (or adopting those two factors as a proxy) when weighing up the overall competitive impact of the deal.

- **A greater nod to efficiencies:** Pro-competitive efficiencies form part of the current guidelines, but have always been a fallback argument. The Draft Guidelines considerably expand the Commission's approach to efficiencies, dedicating around 16 pages to the approach to assessing efficiencies and merger benefits (which can extend beyond pure monetary efficiencies into wider benefits such as sustainability and resilience). Notably, the Draft Guidelines introduce a new concept of a "theory of benefit", requiring parties to explicitly articulate and substantiate a full theory of how the merger benefits consumers. This is a stark contrast to the current situation, where very often any arguments about efficiencies and consumer benefits will form a secondary part of the merger parties' case. This presents greater opportunities for businesses to advocate for their deals, but will also require rigorous quantification and testing of benefits to justify their relevance in a merger control assessment.

- **Safe harbour for small innovative companies:** Acquisitions involving these types of businesses, which could include start-ups and R&D projects, would benefit from a new Commission safe harbour which states that there is in principle no SIEC in relation to any theory of harm if certain criteria are met. This clears the way for an unconditional phase one clearance. Termed an "innovation shield" by the Commission, it would apply only in specific circumstances based on the extent of overlaps between the parties, market shares and the number (and size) of potential competitors. This possible easing of the bureaucratic burden is welcome – especially if the theories that underlie the shield can be applied more broadly, albeit without the protection of the shield itself. However, the Draft Guidelines' safe harbours are untested, and in some markets it could be difficult to identify potential competitors and

measure market shares. We will only know how effective this safe harbour is in practice once a few cases have been decided using it, assuming it remains in the final version of the Guidelines.

- **Support for "European Champions"?** The Commission states its support for scaling up European firms so that they can compete with major international players on global markets. This now forms part of what the Commission sees as the role of EU merger control, and is set out in the introduction to the Draft Guidelines, providing a conceptual framework for what follows. This aligns with the broader political push in the Draghi Report and from Commission President von der Leyen for the development of "European Champions" to enhance Europe's competitiveness. However, the Draft Guidelines also highlight an important note of caution – scaling up is no justification for a potentially harmful increase in market power. To this end, the newly enunciated theory of harm regarding the entrenchment of a dominant position could become a tricky obstacle for businesses seeking to justify an acquisition on the basis of scaling up.

- **Entrenchment attracts further scrutiny – including for ecosystems:** The entrenchment of a dominant position, absent from the current guidance documents, has been articulated as a theory of harm of particular interest for the Commission. It applies where an acquisition structurally creates or reinforces barriers to entry, and takes account of broad market dynamics, including network effects, scale economies and customer inertia. Furthermore, the dominant position is to be assessed not only within the merged entity's core market, but also within its ecosystem of interconnected markets. The impact of mergers on markets within a company's ecosystem is becoming a greater point of focus for the Commission and other competition agencies, particularly in a recent Commission online services case. The Commission's intention to look at a broad range of markets and market dynamics when investigating potential entrenchment could exacerbate deal uncertainty – and this uncertainty might have a chilling effect on the Commission's efforts to support scaling up.

- **More than market shares – recognition of dynamic competition factors:** The Commission's merger reviews have long taken account of many factors beyond just market shares, in particular where market power alone does not represent the competitive reality – notably in markets involving significant innovation or investment. Such factors include the nature of a company's R&D activities (e.g. time-to-market, track record and R&D spend and headcount), its catalogue of patents, access to significant data and other inputs, network effects and the complementarity of product portfolios. These and other factors form a company's "dynamic competitive potential", and are considered during the Commission's assessment where relevant. Their inclusion brings the Draft Guidelines in line with current merger control practices at the Commission and other merger control authorities globally, and is a reminder of how businesses can demonstrate the lack of competitive harm from a proposed

acquisition. Conversely, it is also a warning to businesses of the wide range of factors that the Commission can consider when assessing whether there are competition concerns.

WHAT ARE THE NEXT STEPS?

The Draft Guidelines are open to public consultation until 26 June 2026. In addition, the Commission intends to continue engaging with stakeholders, before finalising and formally adopting the guidelines by the end of 2026.

If you would like to discuss the Draft Guidelines and the impact of EU merger control on your business, please contact the team: Dave Anderson, Julie Catala Marty, Andrew Hockley, Christine Graham, Paul Culliford, and Tom Wright.

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