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Legislative Update

European Commission Publishes Draft Merger Guidelines: What Dealmakers Need to Know

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On 30 April 2026, the European Commission (the Commission) published its long-awaited draft merger guidelines (the draft Guidelines), which are open for public consultation until 26 June 2026.¹ Once formally adopted, the draft Guidelines will replace the 2004 Horizontal and 2008 Non-horizontal Merger Guidelines with a single document, providing guidance based on theories of harm rather than merger type (horizontal/non-horizontal). The draft Guidelines do not seek to modify the main legal standard applied by the Commission (the “significant impediment to effective competition” test, or SIEC). Instead, as noted by Commission President Ursula von der Leyen, they aim 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.”

1. Background

The review of the EU merger guidelines is the culmination of several converging political, industrial and policy dynamics over the past two decades.

A key inflection point was the prohibition of the *Siemens/Alstom* merger in 2019,² which fostered a perception that EU merger control was ill-equipped to support the emergence of “European champions” capable of competing globally, especially against Chinese state-backed players. This episode generated significant political and institutional pressure for reform of the EU merger control framework.

Since then, the debate has been reinforced by high-caliber policy contributions, notably the work of Enrico Letta on the future of the single market,³ alongside former European Central Bank President Mario Draghi’s September 2024 report on the future of European competitiveness, (the Draghi Report),⁴ both of which pointed to the need to reconcile competition enforcement with broader industrial policy objectives such as innovation, resilience and strategic autonomy.

2. Impact of the Draghi Report

The Draghi Report identified three areas for urgent action: addressing the widening innovation gap between the EU and its United States and China counterparts, accelerating decarbonisation alongside competitiveness and growth, and increasing security and reducing dependencies. Competition policy was explicitly framed as one of the regulatory levers requiring reform if the EU was to address them.

Specifically, the Draghi Report warranted updated EU merger guidelines setting out expressly “how the authority assesses the impact of competition on the incentive to innovate” and “what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate”

thereby arguing the inclusion of an explicit “innovation defence” with ex-post monitoring. The Draghi Report also pressed for a shift from market share-led analysis by giving substantive weight to “innovation and future competition” in merger decisions. Separately, the Draghi Report proposed that for transactions in strategically sensitive sectors (space, defence, energy and security), an independent body process a security and resilience assessment to feed into the competitive analysis as an “additional public interest” input.

3. Implications for Dealmaking in Europe

The draft Guidelines are a significant practical reference point for deal planning. Comprehensive in scope, they set out with clarity the theories of harm the Commission will apply and the evidential standards it expects parties to meet. The draft Guidelines introduce several new topics as well as expanded guidance on efficiencies, non-price parameters of competition, dynamic markets and new sectors such as AI and algorithmic pricing. The revised draft Guidelines are likely to become a reference point for dealmakers not only in the EU but also in the many antitrust jurisdictions around the world that follow the practice of the EU, precisely because of the availability of helpful and clear guidance materials.

The statement from von der Leyen, which accompanied the release of the draft Guidelines that “we must build the environment for Europe’s next champions” is also significant. Previously, the EU has fiercely resisted allowing such considerations to play a role in merger reviews and has been rigorously focussed on assessing the potential for a merger to result in consumer harm, to the exclusion of other public interest factors. The door is now open to a wider range of arguments being put forward for merger clearance in the EU and in particular arguments related to scale efficiencies and security of supply. There may be European-based companies that are reviewing the draft Guidelines and see that their prospects of getting EU merger control approval has improved.

Geopolitics obviously played a big role in the draft Guidelines, but it is interesting to see public acknowledgement of an intention to protect European businesses. The Commission is unapologetic in looking to support domestic businesses, particularly those facing competition on the global stage. The interesting question is whether this development will work to the detriment of non-European businesses looking to acquire an asset based in the EU.

4. Key Themes of the Revision

i. Market Power

While high market shares will continue to attract close scrutiny, the draft Guidelines introduce more structured indicators to assess market power. In addition to market shares, which still constitute useful first indicators, the Commission will also consider “profit margins” of the merged entities and the sector, customers’ and competitors’ price sensitivity, and barriers to competition when assessing market power. The draft Guidelines also introduce a new focus on “dynamic competitive potential”, which requires looking beyond market shares into R&D, patent portfolios, pipeline products and access to critical data or technology. Competitive assessment will also include loss of investment competition, loss of innovation competition and the entrenchment of dominant positions through adjacent acquisitions.

ii. Efficiencies and a New ‘Theory of Benefit’

The draft Guidelines significantly sharpen and elevate the role of efficiencies in EU merger control, encouraging merging parties to proactively articulate and substantiate how specific efficiencies enhance effective competition, but also tighten the evidentiary bar. While the draft Guidelines reflect a more expansive and forward-looking conception of efficiencies, they continue to apply a cautious balancing approach, requiring robust evidence before efficiencies can meaningfully affect the merger assessment.

The draft Guidelines introduce a new “theory of benefit”. It provides for a more detailed account of traditional or “direct” efficiencies, which typically arise from integration of existing operations. In addition, the Guidelines place greater emphasis on “dynamic” efficiencies, including enhanced

incentives and ability to invest, innovate and develop new products, faster deployment of new technologies and improved ability to finance risky or long-term projects. These are particularly relevant in fast-moving sectors such as digital markets, pharmaceuticals and high-tech industries, although they are inherently more uncertain and harder to quantify. The draft Guidelines also emphasise that these efficiencies must ultimately translate into improved outcomes for users, such as innovation, quality or price effects, rather than remaining purely internal gains.

Importantly, the framework now explicitly incorporates resilience and sustainability-related efficiencies, reflecting broader EU policy objectives. Resilience benefits may include more robust supply chains and improved ability to withstand shocks while sustainability gains can involve reduced emissions, greater energy efficiency or circular economy improvements. In addition, the Commission acknowledges that efficiencies may in some cases generate collective benefits that extend beyond direct consumers or the immediate relevant market, particularly in relation to sustainability objectives.

At the same time, the evidentiary and analytical threshold remains high. All efficiencies must be merger-specific, verifiable and likely to benefit consumers, with a clear causal link to the transaction and a recognition that efficiencies are less likely to offset harm if the merger leads to significant market power or dominance. Timing is a key focus as the draft Guidelines clarify that efficiencies that arise only in the longer term will be carefully assessed against more immediate competitive harms. If benefits are delayed or uncertain, they are typically discounted, particularly if they depend on speculative future developments.

iii. Innovation Shield

The draft Guidelines significantly strengthen the Commission's toolkit for assessing mergers in fast-moving, innovation-led and digital markets. They also provide a more developed framework for assessing whether a merger may reduce innovation competition, investment competition or potential competition. This is not limited to classic pipeline overlaps in sectors such as pharma or agrochemicals. The draft is broad enough to capture a wider range of digital, technology and R&D-driven markets, including those in which innovation is less formalised and future product development may be harder to map.

The Commission also introduces an "innovation shield" for certain acquisitions involving small innovative companies, startups or R&D projects with dynamic competitive potential. There is helpful acknowledgement that many acquisitions of smaller innovators are benign or procompetitive. They may provide funding, scale, distribution, technical support or commercialisation capabilities that allow the target's innovation to develop more effectively than it could on a standalone basis. However, the shield is subject to defined conditions, including around the parties' current or expected overlaps, their position in relevant markets or innovation spaces, and the presence of other independent firms pursuing similar R&D or innovation projects.

Specifically, based on the draft Guidelines, the innovation shield is likely to apply if: (1) the target's dynamic competitive potential has not yet materialised into actual competitive overlaps with the acquirer; (2) neither party holds significant market power in the relevant market or innovation space; (3) other firms are independently pursuing comparable R&D or innovation projects; (4) the transaction is not structured so as to eliminate a potential future competitor; and (5) the acquiring party can demonstrate that the acquisition enhances, rather than substitutes, the target's independent development trajectory. Parties seeking to rely on the innovation shield will need to address each of these criteria expressly in their notification materials.

iv. Technology and Dynamic Competition

The draft Guidelines sharpen the Commission's toolkit for ecosystem and platform cases. A transaction may raise concerns not because the parties are close competitors today but because the acquisition gives the buyer control over assets including data, technology, IP, infrastructure, customer access, distribution channels or complementary products that make it harder for rivals to enter, expand or compete effectively.

Finally, the draft Guidelines expressly bring AI and algorithmic pricing into the coordinated effects framework. The Commission recognises that pricing technologies and algorithmic tools may increase market transparency and make it easier for firms to monitor each other's behaviour, even in markets that might otherwise appear complex.

5. Other Revisions to the Assessment Toolkit

i. Portfolio Effects and Commercially Sensitive Information

The draft Guidelines introduce, for the first time, a dedicated section on portfolio effects, recognising that a merger combining complementary products sold to the same customer base may raise concerns independent of any horizontal or vertical overlap. Parties to transactions with multiproduct portfolios, particularly in consumer goods, digital markets, and technology, should model portfolio effects as a primary rather than a residual theory of harm moving forward.

Separately, the draft Guidelines expand guidance on the exchange of commercially sensitive information in vertical transactions: The merged entity's access to rivals' sensitive information including pricing, cost structures and customer data may now constitute an independent basis for a SIEC finding without the need to establish full foreclosure. This is particularly relevant for data-rich acquisitions and vertical integration in supply chains.

ii. Burden and Standard of Proof and Evidence

The draft Guidelines expressly codify the burden and standard of proof in line with EU case law, most notably the *Deutsche Telekom* (November 2024) and *CK Telecoms* (July 2023) judgments. They recall that the Commission bears the burden of demonstrating that a merger would significantly impede effective competition, on the basis of a "sufficiently cogent and consistent body of evidence", but is not required to specifically demonstrate or quantify consumer harm in every case. Conversely, the merging parties bear the burden of proving any efficiencies they invoke.

The draft Guidelines also clarify the types and weight of evidence that the Commission will rely on in its merger assessment, such as internal documents, economic data, third-party submissions, views of market participants and address the reliability, probative value and relative hierarchy of evidence.

iii. Protection of National Interests

The draft Guidelines provide structured guidance on the measures Member States may take under Article 21(4) EUMR to protect their legitimate interests against mergers with EU dimension, a provision that in the past generated legal uncertainty and inconsistent national practice.

Article 21(4) EUMR carves out a limited exception to the Commission's exclusive competence over EU mergers allowing Member States to intervene in a cleared merger and/or impose additional conditions on it, on noncompetition grounds (while being prevented from using that prerogative as a tool for disguised industrial policy or economic protectionism). The inclusion of this structured framework reflects enforcement gaps exposed in the *VIG/AEGON CEE* and *UniCredit/Banco BPM* cases, in which the Commission challenged national interventions as disproportionate and incompatible with the exclusive competence framework under the EUMR.⁵

The draft Guidelines define the narrow scope of "recognised interests" that can justify Member State intervention, expressly recognising "public security, plurality of the media, and prudential rules" as such, and allowing Member States to act on that basis without prior notification. Measures pursuing any other public interests (such as safeguarding the provision of a vital service) may be considered legitimate but must be notified to and approved by the Commission before implementation and remain subject to proportionality and non-discrimination requirements and compatibility with the principles and provisions of EU law.

6. Outlook

The recent *Airbus/Air France* case already previewed the relevance of the draft Guidelines, particularly in relation to efficiency claims. While “the transaction did not require an in-depth investigation, [the Commission] did not need to conclude on these efficiencies.”⁶ However, it recognised that engaging on this question early on had allowed the Commission to assess and provide guidance on the plausibility of the specific efficiency claims submitted by the parties. This suggests a willingness on the part of the Commission to engage in “efficiency talks” during prenotification so parties should seek to identify and substantiate the theory of benefit early on as part of the deal rationale.

The draft Guidelines are open to public consultation until 26 June 2026. It remains to be seen what impact the consultation will have on the final draft, but substantial changes are rather unlikely. The Commission intends to finalise and adopt the Guidelines before the end of 2026.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ https://ec.europa.eu/commission/presscorner/detail/es/ip_26_918.

² Case M.8677 - *SIEMENS/ALSTOM*, Article 8 (3) Regulation (EC) 139/2004 of 6 February 20219.

³ The Letta Report: “Much More Than a Market” (April 2024).

⁴ The Draghi Report: “The future of European competitiveness” (September 2024).

⁵ Cases M.10494 and M.12052.

⁶ See M.11295 *Airbus/Air France*. https://ec.europa.eu/commission/presscorner/detail/en/mex_26_916.