



Review of the EU Merger Guidelines

Summary of Key Technical Novelties

General Principles, Burden of Proof and Evidence

To enhance legal certainty, the Draft Merger Guidelines provide a unified guidance covering the substantive assessment of all types of mergers – including positive guidance on procompetitive scaling-up – and key legal principles (e.g., burden and standard of proof)

- ✚ Introduction of **positive guidance to companies on procompetitive scale-ups** that benefit the internal market and promote global competitiveness
- ✚ Explicit recognition of **non-price parameters of competition, such as innovation, sustainability, resilience, privacy and diversity**
- ✚ Clarifications on the **burden and the standard of proof** in line with case-law
- ✚ **New section on evidence**
- ✚ Articulation of the concepts of **theory of harm** and **theory of benefit** in the description of the effects of mergers
- ✚ **More detailed guidance on the counterfactual analysis**, including a specific framework to account for a more **forward-looking assessments** in duly justified circumstances

Market Power

The Draft Merger Guidelines centre the assessment of mergers' harm on market power, refining and expanding on the criteria used to assess it (e.g., market shares, concentration levels, profit margins and price sensitivity) and the possible factors which can offset it

- ✚ Refined **toolbox focused on analysing different types of merger effects** as opposed to a rigid categorisations of mergers (e.g., into horizontal and non-horizontal)
- ✚ **Holistic assessment of market power** based on structural indicators (such as market shares) and other types of evidence (including profit margins, price sensitivity and barriers to competition)
- ✚ **New section on dominance** and its analytical consequences
- ✚ **New section on dynamic competitive potential** providing guidance on factors to assess firms' competitive position in dynamic markets where structural indicators may not be available or appropriate (because, e.g., innovations are not yet commercialised)

- ✚ **New section on out-of-market constraints**
- ✚ Detailed section on countervailing buyer power, including specific situations arising in case practice
- ✚ Detailed guidance on **countervailing entry and expansion accepting longer timeframes** depending on sector characteristics and theory of harm

Loss of Head-to-head Competition

The Draft Merger Guidelines significantly expand guidance on the assessment of mergers between head-to-head competitors, with new sections on bidding markets, capacity constraints and network effects

- ✚ More detailed **guidance on the role of structural indicators**
- ✚ More detailed **guidance on closeness of competition** and quantitative and qualitative evidence used to assess it
- ✚ Specific guidance on **bidding markets, capacity constraints, network effects, minority shareholdings and common ownership, and non-structural links**
- ✚ **Section on monopsony power** and the circumstances in which buyer power can raise issues by harming trading partners
- ✚ Recognition that buyer power theories of harm can, in specific circumstances, apply to **labour markets**

Loss of Investment, Innovation and Potential Competition, and Entrenchment

With this proposal, the Commission is setting out for the first time a comprehensive framework for forward-looking dynamic competitive assessments of mergers' impact on innovation and investment

- ✚ New detailed guidance on tools to assess **dynamic effects**, including loss of investment and expansion competition, loss of innovation competition and an expanded section on loss of potential competition
- ✚ **Introduction of an 'Innovation Shield'** setting out criteria for mergers involving small innovators or R&D projects that are likely unproblematic
- ✚ **New section on entrenchment of a dominant position**

Foreclosure

The Draft Merger Guidelines put forward a unified and clarified analytical framework for the assessment of foreclosure effects, clarifying the aspects that are relevant at each step of the analysis

- ✚ Unified framework for **input, customer and conglomerate foreclosure**
- ✚ **Rationalisation of the 'ability-incentive-effects' framework to avoid duplications** (covering, e.g., the importance of the input or the customers in the foreclosure effects)
- ✚ **Ability** section includes '**technical possibility**' and significant degree of market power
- ✚ Dynamic approach by adding a new section on **dynamic incentives to foreclosure**

Coordination

The Draft Merger Guidelines modernise the coordinated effects framework, adapting it to new market realities

- ✚ Reference to how **AI and algorithmic pricing** increases market observability and transparency, even in complex markets/products
- ✚ Recognition of **opportunities for coordination beyond symmetrical set-ups**, in line with case practice
- ✚ Inclusion of **follow the leader theory of harm and multi-market coordination**
- ✚ Clarification that reverting to normal competition can, in most cases, be sufficient deterrence

Other Anticompetitive Effects

The Draft Merger Guidelines set out practice as regards other types of anticompetitive effects

- ✚ New section on **portfolio effects**
- ✚ More guidance on **exchange of sensitive information** theories of harm

Efficiencies

The Draft Merger Guidelines significantly expand on the Commission's guidance on merger efficiencies – it now explicitly covers benefits to innovation, investment, resilience and sustainability

- ✚ Expanded section on **direct efficiencies**, detailing the types of merger synergies that lead to efficiencies (including economies of scale and scope)
- ✚ Introduction of a **new category of dynamic efficiencies** that confer the ability or increase the incentives of merging firms to invest or innovate, and whose benefits may materialise over a **longer timeframe**
- ✚ Detailed guidance on **resilience and sustainability benefits**
- ✚ Guidance on how to **balance harm and benefits**, including for **out-of-market** and **collective benefits** of mergers, as well as when the benefits would only materialise later than the harm

Public Security and Other Legitimate Interests

With the aim of reducing uncertainty and fragmentation within the internal market that may hinder scaling-up strategies, the Commission proposes guidance on the measures Member States can take to protect their legitimate interests against mergers of EU dimension

- ✚ New guidance on **legitimate interests** (such as public security, media plurality and prudential rules) that justify **Member State interventions** under the EU Merger Regulation
- ✚ New guidance on the **procedural framework** for the application of Article 21(4) of the EU Merger Regulation