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MAY 2026

NEW EC MERGER GUIDELINES:

TEN THINGS WE LEARNED AND WHAT THEY MEAN FOR BUSINESS

On 30 April 2026, the European Commission published its highly-anticipated draft merger guidelines (the "**Guidelines**"), nearly a full year after the initial consultation first opened. Once formally adopted, the Guidelines will replace the 2004 horizontal and 2008 non-horizontal merger guidelines with a single set of guidance organised around theories of harm rather than merger type. European Commission President Ursula von der Leyen noted that the Guidelines 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."

The Guidelines represent a recalibration rather than a revolution. They expand on theories of harm but also introduce new pathways for merging parties to advocate for their deal, including through alignment with broader EU policy objectives. However, the core legal standard remains unchanged - the Commission must demonstrate that a transaction results in a "significant impediment to effective competition" ("**SIEC**"), and high market shares and market power will continue to attract close scrutiny. As Commissioner Ribera has emphasised, "[i]f anyone thought that this call for the creation of champions was an argument to deregulate, dismantle or reduce safeguards, they are mistaken."

The Commission's proposed framework creates new avenues for positive argumentation from merging parties but also sharpens the Commission's enforcement toolkit. The following ten key developments illustrate how we expect this balance to play out in practice.

Ten Key Developments

1. **A new "theory of benefit" framework and a modernised approach to efficiencies**. The Guidelines formally introduce a "theory of benefit," encouraging merging parties to articulate and substantiate how specific efficiencies enhance effective competition. The framework distinguishes between "direct efficiencies" (e.g., cost savings, improved products) and "dynamic efficiencies" (e.g., increased ability and incentives to invest and innovate).

   In the past, merging parties have rarely sought to rely on efficiencies due to the high standard of proof. For dealmakers, the message from the Commission is now clear: build your theory of benefit early as part of your deal rationale, ensure your strongest efficiency arguments are well-evidenced, and raise these benefits during pre-notification. The Commission reportedly engaged with efficiency claims submitted by the Airbus/Air France joint venture parties early in the process before unconditionally clearing the transaction.

2. **Greater openness to scale-enhancing mergers**. The Guidelines expressly acknowledge that scaling up within the internal market to compete in global markets "can be procompetitive and have a positive impact on the EU economy and its competitiveness." This gives businesses greater room to frame consolidation as part of a competitiveness narrative - particularly where mergers combine complementary capabilities, enable cross-border expansion, or operate in capital-intensive industries where scale drives innovation. However, the benefits of scale must be distinguished from increasing market power that would harm consumers. Notably, the Guidelines adopt a multi-factor approach to assessing market power: structural indicators such as market shares provide "useful first indicators," but the Commission will also consider profit margins, customers' and competitors' price sensitivity, and barriers to competition when assessing market power.

3. **A stronger focus on dynamic competition**. The Guidelines introduce "dynamic competitive potential" as a dedicated concept, assessing firms' competitive significance beyond current market shares through factors such as R&D spending, patent portfolios, pipeline products, and access to critical data or technology. The Commission makes clear that firms with small or even zero market shares

may qualify as important competitive forces if they possess promising innovation capabilities. For dealmakers, this means heightened scrutiny of future competitive pathways - but also opportunities to highlight the competitive pressure exerted by rivals with modest current positions.

4. **Resilience and sustainability recognised as consumer benefits**. The Guidelines explicitly broaden consumer benefits beyond traditional price and quality considerations to include additional factors such as resilience (e.g., reduced exposure to supply chain shocks) and sustainability (e.g., reduced environmental pollution, access to sustainable inputs). Benefits must be verifiable, merger-specific, and flow to the consumers who would be harmed, but the Commission acknowledges a margin of discretion in weighing non-price parameters that reflect Treaty-recognised EU policy objectives. This creates scope for well-evidenced sustainability or resilience arguments. The Commission's ongoing review of the UPM/Sappi merger may provide an early preview of how resilience arguments could play out against traditional theories of harm tied to high market shares and increased prices.

5. **An innovation shield for start-ups and small innovators**. The Guidelines introduce an "innovation shield" under which certain transactions involving small innovative companies (including start-ups) or R&D projects with dynamic competitive potential should not, in principle, give rise to a SIEC finding. The shield applies across five scenarios depending on the nature of the overlap created by the transaction:

   (a) where no overlap arises — i.e., neither party is active or expected to become active in the same relevant market, innovation space, or vertically/closely-related market;

   (b) where the overlap is between one party's R&D project and the other's existing activities -- provided the parties do not individually or collectively hold more than 40% of the relevant market *and* at least three independent firms with R&D projects of comparable competitive potential remain;

   (c) where the overlap is between the parties' respective R&D projects -- provided at least three independent firms with R&D projects of comparable competitive potential remain (no market share threshold applies);

   (d) where the overlap is between the parties' R&D capabilities -- provided their combined share does not exceed 25% in the relevant innovation space and does not exceed 25% of R&D activities at the industry level; and

   (e) where the overlap is between one party's R&D project and the other's activities in an upstream, downstream, or closely-related market -- provided the parties do not individually or collectively hold more than 40% in that related market.

   For scenarios (b) and (e), a further carve-out applies to acquisitions of start-ups specifically: even where the market share thresholds are exceeded, the shield still applies if the acquirer is neither the largest firm in the relevant market nor is a gatekeeper within the meaning of the Digital Markets Act. Although carefully bounded, this is positive news for early-stage tech and life science deals.

6. **A spotlight on portfolio effects**. The Guidelines introduce a standalone section on portfolio effects, going beyond traditional conglomerate foreclosure analysis to cover mergers that combine products from different markets but sold to the same customers, potentially increasing bargaining power even absent tying or bundling. The Commission will examine whether a broader portfolio strengthens the merged firm's negotiating position - as illustrated in *Mars/Kellanova*, where it assessed whether combining food and snack portfolios would increase leverage over retailers. Transactions involving significant cross-portfolio dynamics should therefore anticipate increased scrutiny.

7. **Innovation and R&D rivalry front and centre**. The Guidelines provide detailed guidance on how mergers affecting innovation competition will be assessed, distinguishing between the loss of "specific" innovation competition (overlapping R&D projects) and the loss of "general" innovation competition (overlapping capabilities or R&D organisations). Internal R&D strategy, integration plans, and post-merger plans will all face scrutiny where the Commission suspects innovation rivalry could be reduced.

8. **Entrenchment as a standalone harm and a long-term view of foreclosure**. The Guidelines formalise "entrenchment of a dominant position" as a distinct theory of harm, focusing on mergers that give the combined firm control over assets that structurally reinforce barriers to entry. They also introduce

"dynamic foreclosure", recognising that incentives to foreclose may be particularly strong in markets where competitive viability depends on achieving critical scale, data, or customer reach. This longer time horizon means the Commission may challenge foreclosure strategies even where current quantitative indicators do not suggest short-term profitability.

9. **Coordination and non-price theories of harm now more prominent.** The Guidelines elevate several non-price theories of harm, most notably impacts on labour markets, access to commercially sensitive data, and minority shareholdings that weaken incentives to compete or facilitate information flows. On labour markets, the Commission will assess whether a merger creates or strengthens monopsony power, potentially leading to lower wages or reduced worker mobility - a meaningful expansion reflecting broader global enforcement trends. With respect to commercially sensitive information, prior guidance already recognised that vertical integration could grant access to rivals' sensitive data, but the new Guidelines significantly expand this concept, treating it as a standalone harm even absent foreclosure, as illustrated in *Boeing/Spirit*. The Guidelines also address minority shareholdings and common ownership as potential contributing factors to a SIEC where they confer financial interests, influence, or information flows that weaken incentives to compete, consistent with the position adopted by the Commission in its review of *Prosus/JustEat*.

   Coordinated effects, specifically in the context of AI and algorithmic pricing, also feature prominently. The Commission recognises that artificial intelligence may facilitate coordination by enabling firms to monitor or forecast competitors' prices or strategies, thereby enhancing market observability. Additionally, the use of a common external provider for automated pricing decisions, or of most-favoured nation clauses, may facilitate coordination. For transactions in sectors where algorithmic pricing tools or shared pricing infrastructure are prevalent, this represents a new dimension of scrutiny.

10. **New guidance for Member States on intervening in cross-border deals.** The Guidelines add a dedicated section on when and how Member States may exercise their prerogatives under Article 21 of the EU Merger Regulation to protect national interests in respect of transactions reviewed by the Commission, clarifying recognised legitimate interests and stressing that measures must be proportionate and non-discriminatory. This addition reflects recent cases in which the Commission challenged national interventions in *VIG/AEGON CEE* and *UniCredit/Banco BPM*. Executive Vice-President Ribera told the College of Commissioners that Member State interventions had in some cases "unnecessarily hindered the expansion of European businesses," and that the Guidelines should "clarify the circumstances in which such interventions were justified, thereby offering greater certainty for businesses." For dealmakers, this represents a positive push toward greater predictability in cross-border transactions.

Looking forward

The Guidelines are intended to sharpen and modernise the EU merger control framework without softening enforcement. The draft tracks the themes that were raised in the original public consultation last year, and are already being seen in action in the Commission's recent decisional practice. The key development for businesses and dealmakers is that the Commission has opened new doors for positive argumentation around efficiencies, scale, resilience, and sustainability - but parties who choose to walk through those doors must bring well-evidenced cases with the relevant argumentation reflected at the earliest stages of deal planning.

The Guidelines are now open to public consultation until 26 June 2026. The Commission intends to finalise and adopt the Guidelines in Q4 2026. It remains to be seen what impact the consultation will have on the draft, but wholesale changes are considered unlikely. Only future enforcement will reveal how far the Commission is willing to move from prior practice in reality.

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