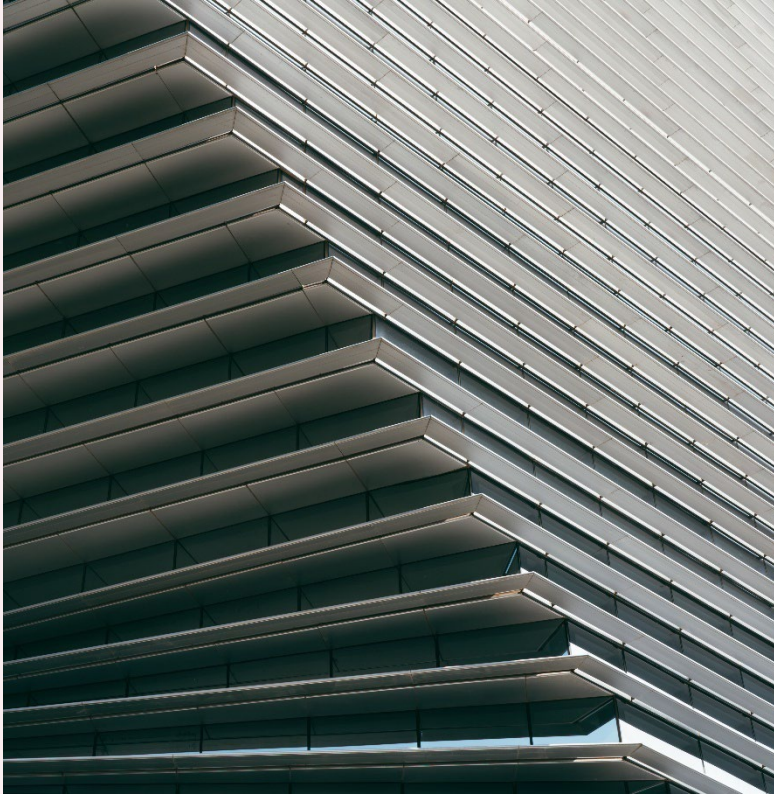
Clifford Chance

BRIEFING



The draft EU merger assessment guidelines

Will "theories of benefit" prevail?

30 April 2026

The European Commission has published new draft guidelines on how it will decide whether to clear or block mergers. They include much more detailed guidance on the circumstances in which the Commission will clear mergers on the basis that their pro-competitive benefits for consumers outweigh their anticompetitive harms, as well as an "innovation shield" safe harbour for transactions involving small innovators. While they also expand on the theories of harm that may be used against mergers, the draft guidelines should, on balance, be positive for dealmakers, if implemented in their current form.

Key issues

1. Will it become easier to secure clearance for mergers that create European champions, even if prices rise for consumers in the short term?
2. How would positive and negative effects on innovation, investment and supply-chain resilience be assessed under the draft guidelines?
3. What pro-competitive benefits of mergers might be accepted as outweighing their anticompetitive effects, and how must they be established?
4. What new theories of harm might the Commission assert against mergers, under the draft guidelines?

Scaling up

The draft guidelines were prompted by the Draghi report on EU competitiveness which, among other things, recommended facilitating mergers that allow European companies to acquire the scale to compete in global markets and giving greater weight to innovation and supply-chain resilience benefits in merger reviews. The draft guidelines also reflect a

wider trend in competition jurisdictions across the world of recognising that intervention in mergers should not be excessively prohibitive, in case such interventionism has a chilling effect on innovation, investment and other factors in economic prosperity.

Some within the EU institutions pressed for radical reforms, including allowing mergers that create "European champions" even if they mean higher prices for EU consumers, and a more favourable approach to monopolies. Others pointed to the legislative limits on the Commission's powers: the EU Merger Regulation requires the Commission to prohibit anticompetitive mergers, even if they create European champions.

The published draft represents a compromise between the two camps. They signal that there will be a change in the way the Commission assesses mergers. To reflect the changed global geo-political and trade context and the increasing importance of scale and innovation the draft guidelines state that "*the approach to balancing different possible effects of a merger needs to be re-examined [...] The assessment of mergers should therefore give adequate weight to scale, innovation, investment and resilience as pro-competitive factors that can benefit from a degree of consolidation and should assess how the proposed concentration will affect future innovation potential*."

While the draft guidelines do not refer to European champions, Commission President Ursula von der Leyen announced the draft guidelines with an aim to "*build the environment for Europe's next champions*" and there is heavy emphasis in the draft on the benefits of scale-enhancing mergers for innovation, ability to compete globally and security and resilience. However, there is also extensive discussion of how mergers can harm these factors by, for example, hampering rivals' ability to achieve global scale or creating excessive dependence on certain suppliers.

So, would *Siemens/Alstom* – a merger that was blocked in 2017 despite French and German governments' desire to create a European champion – be cleared under these draft guidelines? Probably not, in our view. In that case, the Commission rejected the parties' arguments that the relevant markets would shift from being EU-wide to global in the foreseeable future and arguably history has proven it right. But in future cases with better prospects of future global competition, and evidence that the scaled-up merged entity would bring broader benefits for EU consumers – for example in the form of better bargaining power for scarce global resources or more resilient supply chains – the improved guidance on how the Commission will assess those benefits could make a difference.

And the guidance is improved. The draft is about twice as long as the existing guidelines, so includes much more detail on the circumstances in which the Commission might block a merger, and more detail on the pro-competitive benefits that it might accept to clear an otherwise anticompetitive merger. The key question is whether the extra detail will allow more mergers to be cleared than before. On balance, we think it should. The new explanations of possible anticompetitive effects of mergers are mainly (with some exceptions) derived from the Commission's existing and past practice, whereas the clarifications of how the Commission will assess benefits are largely new. So irrespective of whether the draft guidelines will represent a material relaxation of merger control by the Commission (which we consider unlikely), the new information should allow parties to better formulate the "theories of benefit" for their merger, and to predict how they will be assessed.

Innovation, investment and resilience

A key feature of the revised guidance is their focus on dynamic competition, *i.e.*, possible negative or positive impacts on the parties' ability and incentive to compete in the future, through investment and innovation. The draft guidelines also explicitly acknowledge an expanded list of non-price parameters of competition (including privacy, sustainability, resilience, diversity, security of supply) and recognise that many are not readily quantifiable; the Commission has a margin of discretion in weighing them.

One of the most important changes to the guidelines is the introduction of an "innovation shield" for transactions involving a small innovator or an R&D project with dynamic competitive potential. For example, they say that if a transaction leads to an overlap between one party's R&D project and another party's existing activities, the Commission will not, in principle, block the merger if the merging parties combined market share is less than 40% and there are at least three other firms with independent R&D projects, or if the target is a start-up and the acquirer is not the largest firm in the relevant market. This innovation shield should give start-up investors much better clarity about potential routes to exit their investments. It represents a material expansion from the previous guidelines, which addressed innovation in very general terms.

Theories of benefits

While the Commission has for a long time referred to its allegations of anticompetitive effects as "theories of harm", it now invites merging parties to present their "theories of benefit", *i.e.*, the pro-competitive effects of the merger (formerly referred to as "efficiencies") that might justify clearance of an otherwise anticompetitive merger. The draft guidelines state that "*demonstrated efficiencies will play a key role in the assessment of mergers going forward*", implicitly acknowledging that efficiencies have not, to date, played a material role in the review process.

The draft guidelines broadly retain the existing framework for assessing benefits: the parties must be able to show that they are verifiable (likely to arise in a timely manner), merger-specific and will outweigh any anticompetitive effects of the merger on consumers in the EU. In particular, the test for merger specificity remains the same: if there are other, less anticompetitive ways to achieve the benefits and they are "realistic and attainable", the Commission will not take them into account. This legal test is arguably too strict – it should, in our view, be whether the benefits were likely to be achieved absent the merger – and this is likely to be emphasised (again) by respondents to the Commission's consultation on the draft guidelines.

Regarding the criterion of verifiability, the draft guidelines recognise that the evidentiary standard for demonstrating efficiencies is the same as that for demonstrating a theory of harm. Similarly, they note that the time horizon for assessing efficiencies may be longer if that reflects the market dynamics and the theory of harm. These points address a common criticism of the existing efficiencies framework and should, in principle, lead to a more flexible assessment of merger benefits – in particular, where dynamic efficiencies are concerned.

There is an extensive explanation of the different ways in which mergers can have benefits, including combining scarce complementary assets or capabilities, optimal allocation of scarce R&D resources, creating economies of scale, scope or density, wholesale cost savings (e.g. being

able to source cheaper inputs), direct changes to price incentives due to integration, investing in the security of critical infrastructure and European defence readiness, securing access to critical inputs, allowing sharing of technology and intellectual property and combining complementary products or services. The difficulties of weighing these benefits against anticompetitive harms – benefits to future innovation, for example, may arise in different ways and time periods to harms caused by price-increases – are largely glossed over: this will necessarily require a case-by-case assessment and the draft guidelines say only that a careful analysis is required.

The Commission has resisted calls to take into account benefits that arise in other markets and do not accrue to consumers in the markets in which competition is harmed. However, consistent with the approach it has adopted in relation to the assessment of cooperation agreements between competitors, it does accept that "out-of-market" benefits can be taken into account if the benefits accrue to all consumers (e.g. positive impacts on the environment) or if consumers in the benefitting market are broadly the same as those in the harmed market.

On balance, the additional detail and clarification of the Commission's approach to assessing merger benefits – the section is several times longer than existing guidance – is likely to mean that some mergers can be cleared that previously would never have made it past the planning stage. It will allow parties to better formulate and evidence their theories of benefit. And we expect that Commission case teams will be more open-minded to such arguments, provided they are presented sufficiently early in the process, as they will be keen to show that they are applying their new guidance.

Theories of harm

Much of the section on possible anticompetitive effects of mergers draws on the Commission's past and recent decisional practice. So, for example, there are new sections explaining theories of harm regarding entrenchment of a dominant position (following the precedent of *Booking.com/eTraveli*), increased bargaining power as a result of having a larger portfolio of products (*Mars/Kellanova*) and access to commercially sensitive information about rivals' activities.

However, the draft guidelines also set out new ways in which the Commission might challenge a merger, that are not based on (or were not decisive elements of) its past decisions. These include:

- reduced competition for workers that leads to downwards pressure on wages. The draft guidelines seem to suggest that lower wages might be sufficient evidence of competitive harm, even if effects on the downstream supply market in which the parties compete cannot be proven;
- "common ownership", where competitors in a sector have a significant proportion of their shareholders in common. The empirical evidence that common ownership reduces incentives to compete remains highly disputed, but if this theory of harm is preserved in the final guidance, parties would have to challenge its validity before the EU Courts; and
- a broader concept of "foreclosure" in cases involving parties with vertically-related activities or complementary products. In particular, where a merger can be shown to create an incentive and ability for the merged entity to increase prices of inputs sold to its downstream

rivals, the draft guidelines indicate these "rent extraction" effects will suffice to establish anticompetitive harm, even if there is no evidence that rivals would be excluded or weakened as a result. There is also a new emphasis on "dynamic" incentives to foreclose rivals, for example, where increasing the prices of rivals' inputs would not make sense on the basis of short-term profitability but would prevent rivals from achieving the scale to compete more effectively in the long term.

Policing member states' interventions in mergers

The draft guidelines also cover the Commission's approach to assessing whether EU governments have a "legitimate interest" in blocking a merger on non-competition grounds (such as foreign investment / national security reasons), when it has been cleared by the Commission on competition grounds. Much of this is a summary of the EU Courts' case law in this area, but there is a notable statement that the Commission will expect strong justifications for any action taken against an acquirer that is based in another EU member state, as EU law requires that such investors are treated as "prima facie not a threat to the public security of another Member State".

Next steps

The consultation on the draft guidelines runs until 26 June. If you would like to discuss your views on the draft and/or Clifford Chance's response to the consultation, please reach out to one of the contacts below, or your usual Clifford Chance contact.

EU ANTITRUST CONTACTS

Marc Besen
Partner, Düsseldorf
Email: marc.besen
@cliffordchance.com

Luciano Di Via
Partner, Rome
Email: Luciano.divia
@cliffordchance.com

Michael Grenfell
Partner, London
Email: michael.grenfell
@cliffordchance.com

Nelson Jung
Partner, London
Email: nelson.jung
@cliffordchance.com

Jotte Mulder
Counsel, Amsterdam
Email: jotte.mulder
@cliffordchance.com

Alex Cook
Partner, Prague
Email: alex.cook
@cliffordchance.com

Ashwin van Rooijen
Partner, Brussels
Email: ashwin.vanrooijen
@cliffordchance.com

Caroline Scholke
Partner, Düsseldorf
Email: caroline.scholke
@cliffordchance.com

Dimitri Slobodenjuk
Partner, Düsseldorf
Email: Dimitri.slobodenjuk
@cliffordchance.com

Aleksander Tombiński
Partner, Brussels
Email: aleksander.tombiński
@cliffordchance.com

Nivi Balaji
Counsel, Brussels
Email: nivi.balaji
@cliffordchance.com

Philipp Girardet
Partner, London
Email: Philipp.girardet
@cliffordchance.com

Sue Hinchliffe
Partner, London
Email: sue.hinchliffe
@cliffordchance.com

Johannes Lüer
Counsel, Düsseldorf
Email: johannes.luer
@cliffordchance.com

Miguel Odriozola
Partner, Madrid
Email: miguel.odriozola
@cliffordchance.com

Milena Robotham
Partner, Brussels
Email: milena.robotham
@cliffordchance.com

Katrin Schallenberg
Partner, Paris
Email: katrin.schallenberg
@cliffordchance.com

Sophie Scholl
Senior Associate, London
Email: sophie.scholl
@cliffordchance.com

David Tayar
Partner, Paris
Email: david.tayar
@cliffordchance.com

Eleonora Udroiu
Counsel, Budapest
Email: Eleonora.udroiu
@cliffordchancebadea.com

Jennifer Storey
Partner, London
Email: Jennifer.storey
@cliffordchance.com

Iwona Terlecka
Counsel, Warsaw
Email: iwona.terlecka
@cliffordchance.com

Stavroula Vryna
Partner, London
Email: Stavroula.vryna
@cliffordchance.com

Elizabeth Sinclair
Partner, London
Email: elizabeth.sinclair
@cliffordchance.com

Anastasios Tomtsis
Partner, Brussels
Email: anastasios.tomtsis
@cliffordchance.com