The Draft EC Merger Guidelines: A Transatlantic Perspective

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Abstract: The European Commission published its Draft Merger Guidelines on April 30, 2026, which, once finalized, will replace the separate 2004 Horizontal and 2008 Non-Horizontal Merger Guidelines. We compare the Draft Merger Guidelines with the 2023 US Merger Guidelines, outlining areas of similarity and difference. Specifically, we identify four structural differences: in enforcement objectives, the role of concentration measures, the taxonomy of dynamic theories of harm, and the treatment of pro-competitive benefits. We assess their practical implications for transatlantic merger control. We also offer suggestions for clarification of the final guidelines.

Introduction and Background

The publication of the European Commission's Draft Merger Guidelines ("Draft") on April 30, 2026 marks the most significant reform of EU merger control in two decades.[1] The finalized guidelines will replace the 2004 Horizontal Merger Guidelines and the 2008

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[1] Eur. Comm'n, *Draft Communication from the Commission: Guidelines on the Assessment of Mergers Under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings* (Apr. 30, 2026) [hereinafter *Draft*].

Non-Horizontal Merger Guidelines with a single document.[2] We provide a comparison with the 2023 US Merger Guidelines ("the US MG") issued by the Department of Justice ("the DOJ") and the Federal Trade Commission ("the FTC"). Our goal is to highlight the key differences between the two.

Both the Draft and the US MG update the analytic framework used by enforcement agencies to address modern market realities and incorporate new insights from the academic literature. It is therefore not surprising that there is substantial overlap in the changes introduced. For example, both the Draft and the US MG:

- Focus on the possible effects of a merger and do not label mergers as horizontal or non-horizontal.
- Introduce additional focus on dynamic theories of harm such as potential competition, entrenchment, and innovation.
- Explicitly discuss labor markets.
- Reference case law.
- Adopt a flexible evidentiary framework that weighs a broad range of qualitative and quantitative evidence.
- Emphasize market realities and adopt the agencies' focus on understanding "how competition presents itself" in each market.
- Enumerate a broad menu of potential theories of harm, including novel theories whose specific analytical frameworks are still evolving.

While the two documents signal a move in the same direction by agencies in Europe and the US, they differ in important respects in terms of the objectives of enforcement, the standard of proof and the consideration of efficiencies.

There are several reasons that may explain the difference. The US MG are written in the context of an enforcement regime that ultimately requires the Agencies to challenge mergers in courts, which evaluate the evidence and economic analysis. The Draft, by contrast, fits in an administrative framework in which the Commission's decisions are subject to review by EU Courts, which grant the Commission a degree of discretion regarding complex economic assessments.[3]

[2] Eur. Comm'n, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 5 [hereinafter *2004 Horizontal Merger Guidelines*]; Eur. Comm'n, *Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2008 O.J. (C 265) 6 [hereinafter *2008 Non-Horizontal Merger Guidelines*].

[3] Although EU courts have previously annulled prohibition decisions based on insufficient evidence or speculative theories of harm (e.g. in *Tetra Laval)*, CJEU jurisprudence consistently holds that the Commission enjoys a margin of discretion regarding complex economic assessments. *See, e.g.,* Case C-

The policy backgrounds also differ between the US and Europe. Beyond modernizing the analytical toolkit, the Draft had to account for a shifting political economy of enforcement—with concern among stakeholders about enhancing global competitiveness of European firms and, to a lesser extent, environmental protection. The 2024 Draghi Report on European Competitiveness identified the fragmentation of the EU internal market (particularly in network industries such as telecommunications, energy, banking and defense) as a fundamental constraint on European firms' ability to achieve the scale necessary to compete against large US and Chinese firms.[4] Accordingly, the Draft signals a greater openness to recognizing single-market consolidation and scale as a source of cognizable efficiencies within the merger appraisal framework.

High Level Themes

The Draft opens with a section discussing the role of merger review and its guiding principles. While several themes parallel those in the Introduction to the US MG, the two documents differ in several aspects.

Objectives

The legal standard for declaring a merger anticompetitive is broadly similar: a substantial lessening of competition ("SLC") in the US, versus significant impediment to effective competition ("SIEC") in the EU.[5] Past US guidelines differed in how this legal standard was interpreted in practice. The 1968 Merger Guidelines stated that "the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition."[6] In sharp contrast, the 1982 Guidelines stated that "[t]he unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise", where market power was defined as the "ability of one or more firms profitably to maintain prices above competitive levels

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12/03 P, *Comm'n v. Tetra Laval*, EU:C:2005:87, paras. 38–39; Joined Cases C-68/94 & C-30/95, *France and Others v. Comm'n (Kali & Salz),* EU:C:1998:148, paras. 222–223.

[4] MARIO DRAGHI, THE FUTURE OF EUROPEAN COMPETITIVENESS: A COMPETITIVENESS STRATEGY FOR EUROPE (Eur. Comm'n, Sept. 2024).

[5] *Compare Clayton Act Section 7, 15 U.S.C. § 17 (*prohibiting acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly"*) with Council Regulation No. 139/2004, art. 2(3), 2004 O.J. (L 24) 1, 4* [hereinafter *2004 EUMR*] *(*prohibiting concentrations that "would significantly impede effective competition, . . . in particular as a result of the creation or strengthening of a dominant position"*).*

[6] U.S. Dep't of Justice*, 1968 Merger Guidelines,* Section 1, para. 2 (1968).

for a significant period of time."[7] The 1992 Merger Guidelines contained nearly the same language with only slight modifications.[8] The 2010 Horizontal Merger Guidelines added a few slightly more substantial edits and added "entrench" to "create and enhance". They also explained that "[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[9]

The reference to market power in the 2010 guidelines as the unifying theme did not fully reflect agency practice and created analytical tensions. For example, consider a merger that might lead to higher post-merger price-cost margins (which can be interpreted as an increase in market power) but might also reduce marginal cost and overall likely lead to lower prices and higher output. Alternatively, consider a vertical merger that might increase the merged firm's ability (and incentive) to raise the price of an input to a rival (again suggesting an increase in the merged firm's market power), but also might generate efficiencies through vertical integration that likely lead to lower prices and higher output. Previous guidelines suggested, in contradiction to the "unifying theme," that neither of the mergers in these examples should be viewed as raising concerns despite creating or increasing the merged firm's market power.[10] It seems like the drafters of the 2010 Horizontal Merger Guideline were aware of this tension and tried to redefine market power—somewhat differently than standard economic usage—as the incentive to "increase price or reduce output" rather than focusing on the markup.[11]

Instead, the US MG frame the primary role of merger control directly as preserving the benefits of competition for consumers (and workers)—competition that "incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits."[12] The Guidelines further explain that "mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power *and* deprive the public of these benefits."[13] The word "and" is crucial: a merger results in an SLC if it deprives

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[7] U.S. Dep't of Justice, *1982 Merger Guidelines*, Section I (1982).

[8] U.S. Dep't of Justice & Fed. Trade Comm'n, *1992 Horizontal Merger Guidelines*, Section 0.1 (1992).

[9] U.S. Dep't of Justice & Fed. Trade Comm'n, *2010 Horizontal Merger Guidelines*, Section 1 (2010).

[10] *See 2010 Horizontal Merger Guidelines,* Section 10 (noting that the Agencies will not challenge a merger if cognizable efficiencies are sufficient to reverse the merger's potential to harm customers in the relevant market).

[11] *See 2010 Horizontal Merger Guidelines supra note 8* (explaining that a "merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[12] *See US MG*, Section 1.

[13] *Id*. (emphasis added).

the public of the benefits of competition (for example, increases price or reduces output) *and* achieves that result through an increase, extension or entrenchment of market power (i.e., an anticompetitive mechanism). By linking market-specific outcomes, such as price increases, wage reductions, or reduced output, to a mechanism of competition, the US MG maintain a focused competitive harm standard rather than an open-ended social welfare test.

As with the US MG, the unifying theme of the 2004 EU Merger Guidelines was the preservation of the benefits of competition—low prices, wide selection of high quality products, and innovation—by preventing mergers "that would be likely to deprive customers of these benefits by significantly increasing the market power of firms."[14] The Draft lists a comparable set of parameters of competition: price, output, quality, choice, and innovation. However, it diverges from both the 2004 EU guidelines and the US MG in two respects: it decouples the SIEC standard from a formal showing of market power, and it expands the scope of competitive goals to include broader policy objectives.

First, while the Draft discusses market power extensively, it does not tie an SIEC finding explicitly to a reduction in benefits from competition or to the merger's impact on market power. Instead, it conditions it on the Commission's ability to prove one or more theories of harm enumerated in the Draft.[15] In principle, one could argue that establishing an SIEC through one or more theories of harm inherently provides the mechanism through which competition is diminished, with the loss of competitive benefits following as an implicit consequence. The Draft comes close to this logic in para. 23, which explains that a theory of harm describes how the merger "would modify the competitive constraints faced by market participants allowing firms to profitably increase prices or reduce output or quality in various aspects … thereby decreasing consumer welfare"—mechanism-plus-effect language, though not framed as cumulative conditions. If this is indeed the Commission's implicit reasoning, it would be useful for the final guidelines to clarify this conceptual linkage explicitly, by stating that a SIEC requires both a mechanism through which competition is lessened and a resulting deprivation of the benefits of competition.

Second, the Draft introduces a nuanced treatment of sustainability, global competitiveness, and supply chain resilience as dimensions of competitive performance that merit consideration. The Draft recognizes them as part of the EU's broader policy

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[14] *2004 Horizontal Merger Guidelines*, para. 8.

[15] *See Draft*, paras. 115–117 (setting out the core legal framework for establishing an SIEC through specific theories of harm).

objectives and asserts that preventing SIEC can contribute to these objectives.[16] Consistent with this view, the Draft lists sustainability and resilience among the parameters a theory of harm may invoke and defines market power to include the ability to reduce sustainability or resilience below competitive levels.[17] The Draft also counts reduction in resilience—as a result of rivals' exposure to market power or potential unreliability of alternative sources of supply—under potential foreclosure effects.[18]

When discussing efficiencies, the Draft explains how mergers can improve global competitiveness and that this may be considered as a type of efficiency (an improvement in technical and economic progress), whose assessment will be subject to the usual criteria. Moreover, the Draft refers to sustainability and resilience in its discussion of collective benefits that can be counted as efficiencies.[19]

The Draft seems to exclude situations in which a merger allows the parties to improve their position in global markets while leading to a deterioration of competitive conditions in the EU market.[20] By doing so, the Draft seems to avoid a potentially concerning trade-off between competitiveness and consumer benefits. The Draft is, however, less clear on the balancing of such trade-offs with respect to resilience and sustainability. This lack of clarity risks opening the door to an analysis in which scale-enhancing mergers can be credited for certain benefits—such as reduced vulnerability to supply disruptions or improved environmental sustainability—that would be excluded under the 2004 Merger Guidelines analysis. The Draft provides no formal balancing test to resolve conflicts between these policy gains and traditional competition harms, and it remains unclear whether such gains can legally offset price increases or reduced choices in specific markets.

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[16] *See Draft*, paras. 9–18 (acknowledging changing geopolitical trade contexts, the imperative of industrial scale and resilience, and the potential of scale enhancing mergers to contribute to European competitiveness).

[17] *See Draft,* para. 23 and para 55 (defining market power as including the ability of one or more firms to maintain the levels of sustainability or resilience—alongside traditional parameters such as prices, quality and innovation—below competitive levels for a period of time).

[18] *See Draft,* para. 249.

[19] *See Draft*, paras. 298-299 (discussing resilience and sustainability as potentially cognizable efficiencies). This follows the approach previously developed in the guidelines on horizontal co-operation agreements: see Eur. Comm'n*, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements,* 2023 O.J. (C 259) 1, Chapter 9, Section 9.4.3.3 ("Collective benefits").

[20] *See Draft,* para. 15 (discussing the circumstances in which a merger may improve European competitiveness) and para. 297 (framing global competitiveness and scale enhancements as forms of technical and economic progress assessed under the efficiency criteria and stating that the efficiencies must be sufficient to durably counteract the negative effect on competition).

The Treatment of Uncertainty and Burden Shifting

Both the Draft and the US MG explicitly recognize that merger review is an exercise in risk assessment, dealing with probabilities rather than certainties. This predictive mandate is particularly challenging when evaluating forward-looking effects in dynamic markets characterized by rapid innovation. While sharing the predictive mandate, however, the two guidelines' approaches to managing the inherent uncertainty differ.

The Draft explicitly states that a merger leads to an SIEC finding if it is "more likely than not" to significantly impede effective competition, establishing a clear probabilistic threshold. [21] The Draft qualifies that the balance of probabilities applies only to the overall conclusion on the SIEC, not to its constituent parameters and underlying facts.[22] The US MG put significant emphasis on evaluating the risk of a SLC, but they do not specify a "more likely than not" threshold.

Following *Baker Hughes*, the US MG set out a clear, three-step burden-shifting framework. [23] The agencies first establish a *prima facie* case that the merger may SLC. The merging parties may then rebut this concern by challenging the evidence and analysis supporting the *prima facie* case or demonstrating that the merger will not SLC. If the parties succeed, the burden shifts back to the agencies, which bear the ultimate burden of persuasion.

The Draft does not explicitly outline a burden-shifting framework but nevertheless appears to follow a similar analytical sequence, by separating theories of harm (Part II.B) from "theories of benefit" (Part II.C). In practice, however, the Commission will likely evaluate harm and efficiencies concurrently. Similarly, the US agencies during the investigative stage will likely evaluate harm and pro-competitive justifications jointly.

The "margin of discretion" inherent in the EU administrative model facilitates the concurrent approach to assessing harms and benefits. Rather than binding the competitive assessment to rigid consumer welfare calculations within well-defined antitrust markets, the Commission can evaluate qualitative strategic incentives directly, weighing "hard to measure" benefits (e.g. environmental externalities or security of

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[21] *See Draft*, para. 32. This reflects recent EU jurisprudence: *see* Case C-376/20 P, *Commission v. CK Telecoms UK Investments Ltd.,* EU:C:2023:561, paras. 70–87 (holding that approval and prohibition decisions under the 2004 EUMR are symmetrical, and that the applicable standard of proof for an SIEC finding is the balance of probabilities).

[22] *See id* n.63.

[23] *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990) (establishing that once the government shows a transaction leads to high concentration, the burden shifts to the defendant to produce evidence showing that the concentration will not produce anticompetitive effects, after which the burden of persuasion returns to the government).

supply) and price and non-price parameters of competition through administrative judgment.[24] This flexibility is in some respects an institutional strength as it allows the Commission to consider efficiencies that are difficult to quantify precisely or act on nascent competitive threats before they have crystallized into measurable harm. However, it also creates the risk of an asymmetry in how uncertainty is managed in practice between harms and benefits: the framework permits forward-looking, qualitative projections to support a theory of harm, while generally requiring merging parties to meet rigorous standards of verifiability and substantiation for theories of benefit.

Market Power Assessment and the Role of Market Structure

Both the Draft and the US MG use market structure to evaluate competitive effects, albeit with slightly different concentration thresholds. There also seems to be a gap between the two concerning the procedural role of concentration measures. In our view, however, the practical difference in enforcement will likely be limited.

Following US case law, the US MG treat high market concentration as establishing a rebuttable presumption of illegality if the HHI exceeds 1,800 with a delta HHI above 100, or if the merged firm's share exceeds 30% with a delta above 100.[25] This presumption can, in principle, trigger enforcement action on its own. Nevertheless, "[t]his presumption of illegality can be rebutted or disproved." The evidence needed for the rebuttal follows a sliding scale: "[t]he higher the concentration metrics over these thresholds ... the stronger the evidence needed to rebut or disprove it."[26]

The thresholds do not define a safe harbor; in principle, the agencies may bring an enforcement action without relying on a structural presumption and may instead rely on alternative assessments of the harm to competition. Not relying on a structural presumption has the advantage of putting less weight on market definition and more weight on competitive effects. Accordingly, the agencies can decide to define a broader market and focus on competitive effects.

The Draft approaches concentration metrics differently. Market shares are classified across five tiers—Low (<10%), Moderate (10–25%), Material (25–40%), High (40–50%), and Very High (≥50%)—which serve primarily as initial structural screening thresholds, establishing indicative benchmarks where competitive concerns are least likely to arise. The Draft indicates that an SIEC is unlikely where the merging parties' combined share

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[24] *See Draft*, paras. 300 and 342.

[25] *See US MG*, Section 2.1, at 6 (table of structural presumption thresholds).

[26] *See id*.

falls into the Low or Moderate tiers, the post-merger HHI is below 1,000, or other specific structural thresholds are met, which can be taken as a soft safe harbor.[27] Beyond these initial screening thresholds, the Commission pivots directly to a holistic assessment rather than applying a presumption of harm.

This divergence in the use of concentration screens might seem like creating a significant gap between the US and European approaches. In our view, however, this is unlikely to make a meaningful practical difference. We believe that it is unlikely that the US agencies will challenge a merger simply based on concentration metrics marginally over the threshold. Conversely, where the concentration metrics are above the "Very High" threshold, both the Commission and the US agencies will likely require significant analysis and evidence to be persuaded that there is no harm to competition. Therefore, while there is some scope for divergence here, it is likely to be limited in practice, but of course only time will tell.

An important nuance regarding structural screens is that the Draft is stricter for non-horizontal mergers than the 2008 Non-Horizontal Merger Guidelines, which contained a soft safe harbor for vertical and conglomerate transactions where market shares were below 30%.[28] The Draft abolishes this dedicated 30% screen without a replacement, narrowing structural protection for non-horizontal transactions.

Beyond concentration measures, both the Draft and the US MG outline a comparable set of economic tools to directly assess shifts in market power. For example, they both discuss diversion ratios and win/loss bidding data to gauge the closeness of competition between the merging parties. Where data permit, both guidelines endorse merger simulations to quantify the change in the incentive and ability to harm competition post-merger. In auction or RFP-driven markets, both suggest analyzing the frequency with which the merging parties face off as the top two bidders, while in bargaining setting, both suggest examining how the merger alters relative bargaining leverage.[29]

A notable feature in the Draft's market power assessment is the explicit commitment to a dynamic counterfactual. The Commission commits to evaluating the merger's

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[27] *See Draft*, para. 129. These structural screens correspond broadly to the Commission's existing Notice on Simplified Procedure.

[28] *See 2008 Non-Horizontal Merger Guidelines*, para. 25 (establishing a 30% market share and 2,000 post-merger HHI soft safe harbor).

[29] *Compare Draft*, paras. 123–145 (detailing qualitative and quantitative tools—including diversion ratios, win/loss bidding records, top-two bidder frequencies, bargaining leverage models, and merger simulations—to assess closeness of competition and market power shifts) *with US MG,* Section 2.2 and Section 4.2 (addressing customer substitution, win/loss data, auction/bargaining dynamics, and quantitative models).

outcome in relation to what would reasonably have occurred absent the transaction.[30] This baseline can depart from prevailing pre-merger conditions due to forward-looking shifts unrelated to the merger—such as impending technological shocks, market entry, or industry restructuring under failing-firm scenarios.

The US MG similarly evaluate merger effects against a but-for, or counterfactual, baseline absent the merger. While both regimes share this economic logic, the US MG integrate counterfactual adjustments organically within specific doctrines—such as potential competition, entry and failing-firm defenses—rather than articulating a standalone counterfactual rule.

As part of its greater emphasis on dynamics (for the counterfactual and for the merger assessment), the Draft introduces the concept of "dynamic competitive potential".[31] In dynamic markets—characterized by rapid innovation, significant R&D investment, or strong network effects—a static assessment of market power based on current revenues or output may fail to capture a firm's true competitive significance. The Draft therefore directs the Commission to supplement static metrics with a forward-looking assessment of firms' dynamic capabilities in the context of dynamic theories of harm. This assessment includes R&D intensity and infrastructure, patent portfolio strength and pipeline products, access to critical inputs (data, technology, user traffic), investment and cross-market expansion plans, ecosystem and portfolio power, supply chain resilience, and capacity constraints. The framework formalizes what has been implicit in Commission practice in several major cases—including *Dow/DuPont* and *Bayer/Monsanto*—and represents an advance in the treatment of innovation-intensive industries.[32]

While we welcome this development, the focus on dynamic competitive potential also introduces real measurement challenges. Dynamic competitive potential is inherently forward-looking and difficult to quantify with precision. The Commission's assessment of a firm's innovation capabilities, pipeline products, or ecosystem positioning necessarily relies on qualitative evidence—internal documents, market investigation responses, or expert testimony—that may be harder to objectively verify than traditional market share data.

The US MG similarly consider forward-looking, non-price variables, and analyze dynamic capabilities within the context of specific guidelines—most notably Guideline 4,

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[30] *See Draft*, paras. 39–42.

[31] *See Draft*, paras. 80–83 (setting out the framework for assessing dynamic competitive potential and forward-looking market power).

[32] *See*, *e.g.*, Case M.7932, *Dow/DuPont*, Comm'n Decision, 2017 O.J. (C 353) 9; Case M.8084, *Bayer/Monsanto*, Comm'n Decision, 2018 O.J. (C 459) 10; Case M.10806, *Broadcom/VMware*, Comm'n Decision, 2025 O.J. (C/2025/2799).

Guideline 6, as well as under Section 4.4.B.[33] The US and EU approaches are broadly aligned on this point, though, as discussed below, the Draft potentially accommodates a wider range of dynamic effects.

Theories of Harm

The Draft organizes anticompetitive effects around eight distinct theories of harm, which may apply individually or cumulatively. This represents a significant expansion and reorganization compared to the 2004 and 2008 guidelines, and in many ways mirrors the structure of the US MG.

Static Effects

Loss of head-to-head competition. The core horizontal theory remains the elimination of direct competitive pressure between the merging parties. The Draft's treatment of this theory of harm is consistent with established economic analysis and the US MG. Like Guideline 2 of the US MG, the Draft evaluates the degree of competitive interaction between the parties—assessed through closeness of competition measures such as diversion ratios, win/loss data, and internal documents—and whether that interaction exerts a material constraint on the merged entity's pricing, output or quality decisions.[34] The Draft retains the concept of "important competitive force"—capturing firms that exercise disproportionate competitive influence relative to their market share—from the 2004 Horizontal Merger Guidelines.[35]

The Draft explicitly incorporates labor market effects, establishing that a merger between employers can create or strengthen monopsony or oligopsony power. This allows the Commission to intervene based on upstream harm to workers—such as lower wages, reduced mobility, or compressed employment options—independent of whether

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[33] *See US MG*, Section 2.4 (assessing capabilities for potential entry and, in fn. 23, contemplating harm in markets "that do not yet consist of commercial products"); *id.* Section 2.6 (evaluating how assets or network effects entrench dominance*);* and *id.* Section 4.4.B (looking beyond current sales when market shares overstate or understate a firm's future competitive significance).

[34] *Compare Draft*, paras. 119–168, *with US MG*, Guideline 2, at 6–8, and Section 4.2 ("Evaluating Competition Among Firms"). Both frameworks rely on diversion ratios, win/loss bidding data, and ordinary-course business documents to evaluate closeness of competition.

[35] *Compare Draft*, paras. 138–142, *with 2004 Horizontal Merger Guidelines*, paras. 37–38 (describing an "important competitive force" as an undertaking that may exert disproportional competitive influence relative to its market share).

the transaction produces a corresponding effect on downstream consumer markets.[36] This focus aligns directionally with Guideline 10 of the US MG.

Both the Draft and the US MG follow a well-established principle of no cross-market balancing of harms and benefits. The US MG explicitly state that anti-competitive harm in a labor market cannot be justified or mitigated by pro-competitive benefits in a separate product market.[37] While the Draft is less explicit regarding labor markets specifically, its general framework bars balancing across unrelated markets but unlike the US MG expressly permits "out-of-market" benefits where markets are related and the harmed and benefiting consumer groups substantially overlap and extends the doctrine to collective benefits.[38] Consequently, under both guidelines, harm to labor is a standalone ground for intervention that in principle cannot be traded off against efficiencies in unrelated markets, but the Draft provides a route, not present in the US MG, to credit related-market and collective benefits.

Coordinated effects. The Draft preserves the *Airtours* conditions for coordinated effects (sufficient market transparency to monitor adherence, a credible deterrent mechanism, and the inability of outsiders, entrants, and customers to destabilize the coordination) alongside the antecedent requirement that the firms be able to reach a common understanding on the terms of coordination, while modernizing the framework to address the digital environment.[39] The explicit treatment of algorithmic pricing, AI-facilitated market transparency, and reliance on a common external provider for automated pricing decisions (para. 267(f))—a pattern commonly described as hub-and-spoke coordination—reflects enforcement experience in several recent EU investigations and aligns with the growing body of economic research on algorithmic collusion.

The US MG address similar concerns under Guideline 3, focusing on market characteristics that facilitate coordination and on the elimination of mavericks. The analytical frameworks are broadly consistent, though the EC's structured *Airtours* checklist provides greater legal certainty than the US agencies' more flexible, fact-specific approach.

One nuance emphasized in the US MG, but less explicit in the Draft, is the role of a merger's effect on the alignment of incentives between market participants, which can

[36] *See Draft*, paras. 158–162.

[37] *See US MG*, Section 2.10 (Guideline 10), at 26–27. Note that in many cases there will be no benefits downstream to offset any potential harms upstream; indeed, competition in both markets may be harmed simultaneously.

[38] *See Draft*, paras. 354–357.

[39] *See Draft*, para. 263.

be thought of as either a clarification or a generalization of the concept of a maverick.[40] Rather than focusing exclusively on whether the acquisition target has historically behaved as a maverick, the US MG evaluate whether a target's unique structural position—such as asymmetric cost structures or vertical configuration—disincentivizes it from coordinating with rivals. Additionally, the US MG no longer specifically discuss "parallel accommodating conduct"—a concept introduced in the 2010 Horizontal Merger Guidelines—bringing the approaches taken in US MG and the Draft into closer alignment.

Dynamic Effects

Both the US MG and the Draft put substantial emphasis on the dynamic effects and the most significant advances in the Draft concern the treatment of these effects. Especially in the consideration of innovation, the Draft goes beyond the US MG. We group the Draft's treatment of these effects into four theories of harm

Loss of investment and expansion competition. The Draft elevates the loss of investment and expansion competition to a standalone theory of harm, separate from the loss of head-to-head competition and from loss of innovation competition.[41] This move reflects the concern that mergers can harm competition by eliminating the "competitive spur" to invest and expand even without affecting current market prices or innovation pipelines. If a merger eliminates an expansion-minded rival, the resulting reduction in competitive friction can soften the pressure on all remaining market participants to deploy capital, build capacity, or enter adjacent markets. The Commission may identify a competitive impairment if a merger is projected to result in the downsizing, deferral, or strategic redirection of investment projects, without having to establish a direct link to price or quality effects.

This theory sits in some tension with the Draft's own stated objective of facilitating consolidation for global competitiveness. A merger that eliminates a domestic rival's local expansion plans may simultaneously reduce competitive pressure in the EU market and strengthen the merged entity's ability to compete globally. How the Commission weighs these competing effects—and what evidentiary standard it applies to each—will be a critical determinant of the framework's practical impact on capital-intensive industries.

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[40] The *US MG* notes at 9 that "[r]emoving a firm that has different incentives from most other firms in a market can increase the risk of coordination."

[41] *See Draft*, paras. 169–174 (establishing the loss of investment and capacity expansion competition as a standalone theory of harm).

Loss of innovation competition. The Draft provides a comprehensive treatment of innovation competition.[42] It distinguishes two distinct levels of innovation competition: *specific innovation competition* (between identified R&D projects targeting specific future products, assessed through the existing market power and head-to-head competition framework applied to R&D activities) and *general innovation competition* (between firms' broader innovation capabilities and R&D organizations, assessed within forward-looking "innovation spaces" before specific product markets have crystallized).

The concept of innovation spaces—only implicitly defined by the scope of research programs, specialized engineering teams, and global discovery centers rather than by the targeted future product markets—is the most novel element of this framework. It allows the Commission to assess competitive harm at an early stage of the innovation process, before commercial products are defined, by mapping the competitive landscape of a firm's R&D activities against those of comparable innovators in the relevant scientific or technological domain.

The operationalization of general innovation competition loss introduces substantial economic and evidentiary friction. By detaching the competitive assessment from defined product markets and moving it into abstract "innovation spaces," the analysis becomes inherently more speculative. The Commission risks over-identifying anti-competitive harm by treating a shared technological baseline or scientific domain as evidence of future commercial rivalry.

In contrast, the US MG do not formally distinguish a specific form of general innovation competition, and the concept of innovation markets is tethered to future product markets. This approach was recently solidified in *FTC v. Edwards Lifesciences*,[43] where the court granted a preliminary injunction by adopting a relevant product market defined around pre-commercial medical devices in late-stage clinical development, even though neither merging party had a product commercially available. The US MG address early-stage innovation concerns through potential competition and entrenchment guidelines (Guidelines 4 and 6), through the innovation-capability analysis in Section 4.2.E (firms that are "two of a small number of companies with specialized employees, development

[42] *See Draft,* paras. 175–191 (codifying the assessment of specific and general innovation competition). This distinction formalizes prior Commission enforcement practice; *see, e.g.*, Case M.7932, *Dow/DuPont,* Comm'n Decision, Annex 4 (Mar. 27, 2017); and Case M.8084, *Bayer/Monsanto,* Comm'n Decision, paras. 1180–1262 (Mar. 21, 2018).

[43] *FTC v. Edwards Lifesciences Corp.,* No. 1:25-cv-02569(D.D.C. Jan. 28, 2026) (enjoining an acquisition based on a market defined around pre-commercial TAVR-AR devices in clinical trials, explicitly applying the US MG's framework for pipeline products*).*

facilities, intellectual property, or research projects in a particular area"), and through market definition around products that "do not yet exist."[44]

A notable feature of the Draft's innovation competition framework is the "innovation shield". Distinct from the structural screens applied to static markets, the innovation shield operates as a specialized, rule-based safe harbor, under which the Commission "in principle does not find a SIEC in relation to any theory of harm" for qualifying acquisitions of small innovative companies and startups."[45] By creating explicit safe harbors, the Commission appears to be signaling a commitment not to over-enforce against nascent transactions, thereby protecting startup exit incentives.

Rather than relying on open-ended qualitative principles, the Draft establishes a matrix of structural conditions based on the specific nature of the competitive overlap: [46]

- R&D Project vs. Existing Activity: Where one party's R&D project overlaps with another's existing market activities, neither party individually nor on a combined basis may hold more than 40% of the relevant market, and at least three independent R&D competitors with comparable competitive potential must remain.
- Direct R&D Project Overlap: Where the parties' R&D projects overlap, no market share threshold applies; only the requirement to maintain at least three independent, comparable R&D competitors remains.
- R&D Capability Overlap: Where the parties' general R&D capabilities overlap, the shield requires a combined market share below 25% in the relevant innovation space and below 25% at the industry R&D level.
- Activities in related markets: Where one merging party's R&D project's target product market is related to another party's activities in an upstream, downstream or otherwise closely related market, the merging parties individual or combined share is below 40% in the upstream, downstream or otherwise closely-related market.

The lower 25% threshold for broad capability overlaps is likely intended as a response to the inherent measurement uncertainty of early-stage innovation spaces and overlaps in those spaces. While the Commission may view a 25% threshold as a cautious

[44] *See US MG*, Guidelines 4 and 6 (potential competition and entrenchment); *id.* Section 4.2.E (innovation-capability analysis); *id.* Section 4.3.D.7 (defining markets for non-existent products); and *id.* Guideline 4, fn. 23 (pipeline products).

[45] *See Draft*, para 192 (establishing safe harbor conditions and market share/competitor thresholds for acquisitions of innovative targets and startups, referred to as the "innovation shield").

[46] The Draft contains a further condition not separately discussed here in para. 192(a) (no overlap of any kind between the parties' activities, R&D projects, or innovation spaces).

standard, from an economic perspective the logic is flipped: given that general innovation loss theories are inherently speculative and may result in over-identifying harm, the safe harbor threshold should logically be *higher*, not lower, to shield benign early-stage transactions. Setting a restrictive 25% threshold narrows safe harbor access precisely where the theory of harm is most unproven, exposing broad R&D capability overlaps to administrative overreach.

Transactions involving a target that meets specific startup criteria can qualify for the shield even if they exceed the applicable market share thresholds in the first and last scenarios above, provided the acquirer is not a designated Digital Markets Act (DMA) gatekeeper and is not the single largest firm in the relevant market. Notably, the exclusion of the "largest firm" introduces an administrative metric distinct from the legal concept of dominance.

The US MG contain no equivalent safe harbor. Under Guidelines 4 and 6, the US agencies subject acquisitions of nascent or innovative targets to individualized, fact-specific scrutiny regardless of the target's scale. While this avoids the arbitrary boundaries of the EU's structural thresholds, it leaves US deal parties dependent on the case-by-case evaluation of ordinary-course internal documents and other evidence to determine whether an acquisition will be challenged as an anti-competitive market foreclosure.

Loss of potential competition. The Draft signals a lowering of the threshold for potential competition theories.[47] EU case law—most notably *Generics* (UK), *Lundbeck*, and *Servier*—established that to classify a firm as a potential competitor, there must be a “real and concrete possibility” of entry.[48] The 2004 Horizontal Merger Guidelines mirrored this by requiring that entry be likely in a “relatively short period of time” or that the entrant possess “assets that could easily be used to enter the market without incurring significant sunk costs”.[49]

The Draft continues to distinguish between the loss of a future constraint and the loss of an existing constraint, but it seems to materially expand the reach of the former. For theories based on the loss of future constraint, the Draft replaces the legacy requirement of short-term entry or near-immediate asset conversion with a broader standard: potential entry can now be inferred from a firm’s objective capabilities—

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[47] *See Draft*, paras. 193–207.

[48] *See, e.g.,* Case C-307/18, *Generics (UK) and Others*, EU:C:2020:52, paras. 36–39; Case C-591/16 P, *Lundbeck v. Commission*, EU:C:2021:243, para. 54; and Case C-176/19 P, *Commission v. Servier and Others*, EU:C:2024:549, paras. 100–105 (confirming the requirement of "real and concrete possibilities" of market entry based on structural evidence and tangible preparatory steps).

[49] *2004 Horizontal Merger Guidelines*, para. 59.

technical know-how, financial resources, adjacency in related markets—without requiring entry plans or concrete preparatory steps.[50]

The US MG address potential competition in Guideline 4 that distinguishes between actual potential competition (loss of future constraint) and perceived potential competition (loss of an existing constraint through perception of future competition).[51] Actual potential competition requires a showing of reasonable probability of entry and that entry would have a deconcentrating effect on the market. Perceived potential competition asks whether a current market participant could reasonably regard the merging firm as a potential entrant whose presence disciplines competition.

On paper, the difference between the US MG and the Draft lies in how future constraints are assessed: by decoupling future entry from documented commercial intent, the EC's objective capability framework appears to lower the bar compared to the US framework. In practice, however, this difference will likely be more procedural than substantive. The lower threshold may grant the Commission some additional administrative leverage during investigations to challenge transactions involving adjacent players without needing to produce internal entry plans.

The Draft's framework for establishing objective entry potential—which includes factors such as possession of sufficient resources, adjacency in related markets, and a track record of expansion elsewhere—is predominantly focused on assessing a firm's *ability* to enter, with little guidance on how the Commission will assess *incentive* to enter. In technology markets, many large firms in adjacent sectors may satisfy the ability criteria without having any commercial intention to compete in the relevant market. Hopefully, the final guidelines will clarify how the incentive dimension will be evaluated to avoid systematic over-identification of potential competitors.[52]

Foreclosure. The Draft presents a unified template for all foreclosure analysis—organizing input foreclosure, customer foreclosure, and conglomerate (tying and bundling) theories within a single analytical structure organized around ability, incentive, and competitive effect.[53] The approach emphasizes qualitative assessment of forward-looking strategic logic: it may infer an incentive to foreclose if a foreclosure strategy serves a firm's long-term competitive positioning or undermines the dynamic potential

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[50] *Draft*, paras. 201 and 202 ("specific entry plans or a firm decision by the company to enter may evidence potential entry, they are not necessary for such finding.")

[51] *See US MG,* Section 2.4.

[52] *See also* Svend Albæk & Raphaël de Coninck, *Dynamic Capabilities and EC Merger Control: A Difficult Match?*, NETWORK LAW REVIEW (2025), (raising the concern that the Draft's objective-evidence criteria for potential competition are predominantly ability-focused, with insufficient weight on commercial incentive to enter).

[53] *See Draft*, paras. 208–251.

of rivals, even absent evidence of short-term financial gain from the foreclosure strategy itself.[54] As mentioned above, the Draft abolishes the 30% soft safe harbor that existed under the 2008 Non-Horizontal Merger Guidelines.[55]

This approach marks a significant departure from the 2008 Non-Horizontal Merger Guidelines, effectively lowering the threshold for intervention in non-horizontal transactions. By permitting qualitative-only showings of strategic incentive alongside its quantitative apparatus—customer departure rates, diversion ratios, margin analysis and bargaining models—the Draft expands the Commission's latitude to establish foreclosure concerns. In addition, the Draft expands the Commission’s qualitative toolkit for assessing these transactions by introducing expansive dynamic theories of harm—such as entrenchment, portfolio effects, and loss of general innovation competition.[56] The broadening of the qualitative toolkit jointly with the reduction in structural safe harbors is consistent with trends, in both the EU and the US, of increased scrutiny of non-horizontal mergers and could be a sign of things to come.

The US MG take a somewhat different approach. The focus remains on incentive and ability, but this is incentive and ability to SLC rather than to foreclose. This subtle difference carries several analytical implications. First, it rolls the competitive effect analysis directly into the incentive and ability assessment, rather than treating them as separate sequential steps, thereby blurring the line between incentive and ability. Second, it lends itself to basic questions, or factors, that can be used to evaluate the incentive and ability to SLC using the standard tools agencies use to evaluate market power and substitution.[57] Among other things, this has the advantage of further harmonizing the analysis of horizontal and non-horizontal effects.

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[54] *See Draft,* para. 225 (establishing that “[t]he Commission is not limited to carrying out a comparative quantitative assessment of profitability under a foreclosure strategy, but may take account of … qualitative evidence supporting an incentive to engage in foreclosure for strategic reasons.”).

[55] *Compare 2008 Non-Horizontal Merger Guidelines*, para. 25 (establishing that the Commission was unlikely to find competitive concerns where the post-merger market share was below 30% in upstream and downstream markets and the post-merger HHI was below 2000) *with Draft* (omitting a standalone vertical market share safe harbor).

[56] The *Draft* introduces a theory of harm based on portfolio effects in paras. 287-290, which has no equivalent in the *US MG*. According to this theory, a broader portfolio of products or services may increase the market power of the merged firm and lead to increased prices or worse conditions for its customers.

[57] Specifically, the four factors are: (1) the availability of substitutes; (2) the competitive significance of the “related products” (i.e., the product that might be used to foreclose); (3) the effect on competition in the relevant market; and (4) the degree of competition between the merged firm and the dependent firms. *See* Alison Hole, Michael LeGower, Michael Lipsitz & Aviv Nevo, *Economics at the FTC: Non-Horizontal Mergers, the CARS Rule, and the Non-Compete Rule*, REVIEW OF INDUSTRIAL ORGANIZATION 933 (2024).

One of the tools in the US MG is a market share threshold: a 50% market share in a related product or input market raises an inference that the merging firm has the ability to foreclose rivals.[58] The Draft contains no equivalent standalone vertical market share presumption. With the Draft's dropping the 30 % soft safe harbor, both regimes now lack explicit safe harbors for low-share vertical mergers.

The Theory of Benefit and Efficiencies

The Draft's most publicly prominent feature is the introduction of a "theory of benefit" framework, which nominally places pro-competitive justifications on equal evidentiary footing with theories of harm. The Draft explicitly states that the evidentiary standard for demonstrating efficiencies is identical to the standard for proving a theory of harm. Rather than treating efficiencies as a later-stage defense—as the US MG do[59]—the Draft invites merging parties to integrate pro-competitive rationales directly into the competitive narrative from the outset. [60] This is a positive development since it signals greater openness to arguments about the benefits the merger may bring.

The Draft distinguishes between direct efficiencies (cost savings, scale economies, elimination of double marginalization, combining complementary assets, access to critical inputs) and dynamic efficiencies (increased ability and incentive to invest and innovate through combining complementary R&D capabilities, securing access to scarce inputs, eliminating hold-up problems, or enabling financial support for capital-constrained firms). The Draft also allows for collective benefits arising from the internalization of externalities, which may be particularly relevant for environmental sustainability. To be credited, the efficiencies, whether direct or dynamic, must satisfy three cumulative conditions: they must be verifiable, merger-specific, and benefit consumers.[61]

The explicit recognition of dynamic efficiencies—and the acknowledgment that they may materialize over longer time horizon and that the appropriate time horizon for their assessment depends on the theory of harm—is a genuine advance on the existing

[58] *See US MG*, Guideline 5.

[59] *See US MG*, Section 3.3 ("Procompetitive Efficiencies" as rebuttal evidence).

[60] *See Draft*, paras. 26, 32, 36, and 291–297 (establishing the equal evidentiary standards, inviting the merging parties to submit efficiency claims early in the review process, and establishing the theory of benefit framework).

[61] *See Draft*, paras. 295–323 (distinguishing direct from dynamic efficiencies and setting out the three cumulative criteria: verifiability, merger-specificity, and consumer pass-through).

guidelines.[62] As mentioned above, the Draft also explicitly recognizes that efficiencies may be associated to the internalization of consumption externalities, for instance, regarding sustainability and supply chain resilience, leading to collective benefits.[63]

Despite the stated symmetry, there is a potential asymmetry in enforcement that could limit the theory of benefits' practical impact. The Commission retains a broad margin of discretion to hypothesize ecosystem harm, strategic foreclosure, or innovation suppression based on qualitative theories of strategic incentives, without being required to quantify competitive harm. Efficiency claims, by contrast, must, in general, be supported by precise, verifiable, and contemporaneous evidence—typically internal business documents, detailed synergy analyses, and economic modeling—that demonstrate the specific mechanism by which the merger generates the claimed benefits.[64]

The Commission has the institutional discretion to develop and pursue qualitative theories of harm that might face higher evidentiary hurdles in the US. The Commission also assesses whether the merging parties have met the appropriate standard of proof in substantiating their efficiency claims (its assessment being subject to review by the Court). The result is that the bar for efficiency claims may remain high while the bar for theories of harm has, if anything, been lowered through the acceptance of non-quantified strategic narratives.

Compared to the US MG, the Draft offers a richer vocabulary of potential efficiencies, such as the explicit treatment of dynamic efficiencies, sustainability benefits, and supply chain resilience, but it is not clear that it reduces the evidentiary burden on merging parties. Similarly, the US MG remain conservative on efficiencies, requiring that they be verifiable, merger-specific, and capable of passing on benefits to consumers within a relatively shorter period.[65] The Draft offers longer time horizons for dynamic efficiencies but the Commission's discretion in weighing incommensurable parameters means that efficiency claims will much more likely succeed where they align with the Commission's policy priorities, rather than purely on their economic merits.

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[62] *See Draft*, para. 328.

[63] *See Draft,* paras. 330-357 (addressing long-term innovation horizons, collective benefits, environmental sustainability externalities, and supply chain resilience).

[64] *See Draft*, paras. 307–309 (emphasizing that efficiency claims must be substantiated with quantifiable synergy assessments and contemporaneous business documents prepared in the ordinary course of business prior to transaction negotiations)

[65] *See US MG*, Section 3.3 ("Procompetitive Efficiencies") (requiring that cognizable efficiencies must "within a short period of time, . . . prevent the risk of a substantial lessening of competition in the relevant market").

Concluding Comments

The Draft represents a significant evolution of the EU merger control framework. The introduction of a unified document, the formal development of dynamic theories of harm, and the theory of benefit framework are all meaningful improvements on the 2004 and 2008 guidelines. The Draft's explicit engagement with the economics of innovation, investment, and ecosystem competition reflects recent developments in competition economics and aligns EU merger control more closely with the analytical framework of the US MG.

We emphasize four differences between the Draft and the US MG.

The scope of enforcement objectives. The Draft explicitly incorporates broad policy considerations—global competitiveness, supply chain resilience—as parameters of competition relevant to the merger analysis. The US MG do not mention global competitiveness, and their treatment of resilience is brief,[66] where the Draft's treatment is extensive and operationalized.[67] The Draft incorporation of broader policy considerations creates an incentive for merging parties in the EU to frame their transactions in terms of enhanced global competitiveness and resilience. The Draft explicitly requires, at least in relation to competitiveness, verifiable, merger-specific benefits to consumers and the maintenance or enhancement of effective competition. Nevertheless, it is possible that, going forward, the Commission might be more permissive toward mergers that have the potential to strengthen EU firms' global competitive position.

Concentration measures as safe harbor versus presumption. The US MG use concentration metrics to generate rebuttable presumptions of harm; the EC Draft uses them primarily to establish safe harbors below which transactions are presumed unproblematic. The US agencies might in principle challenge a transaction on structural grounds alone, while the Commission generally seems to require a theory of competitive harm is ordinarily required. The picture is more complex than a simple more-permissive/less-permissive comparison, however. While for horizontal transactions, the EC's 25% soft safe harbor provides a structural comfort zone absent in the US MG, it is likely that in practice the US agencies will need substantial evidence on direct competitive effects to prevail without a structural presumption and similarly are less likely to challenge mergers based only on a "marginal" structural case.

[66] *See US MG*, Section 1 ("The Overview") (listing "resiliency" among the benefits of competition), and Section 4.2.D (directing the Agencies to consider a merger's effect on "the market's resilience in the face of future shocks to supply or demand").

[67] *See Draft,* paras. 9–18.

The innovation shield. The innovation shield is a significant innovation with no US equivalent. For deal parties, the availability of the shield depends on whether the acquirer is the largest firm in the relevant market or a designated DMA gatekeeper—a standard distinct from, and broader than, the legal concept of dominance. An acquirer may be legally dominant yet still benefit from the shield if it is not the single largest firm in the market; conversely, the largest firm may receive no shield protection even if it falls below the dominance threshold. Transactions involving designated DMA gatekeepers receive no benefit from the shield regardless of the target's size or the nature of the overlap. For other acquirers, the shield provides meaningful protection—though parties should note that the shield's conditions involve innovation space market shares, a metric subject to the Commission's discretion in defining relevant innovation spaces.

The treatment of benefits. The Draft introduces a formal symmetry between theories of harm and theories of benefit, which in practice will not necessarily translate into practical symmetry in the evidentiary demands placed on the Commission and on merging parties. The Commission's margin of discretion allows it to develop and apply qualitative theories of harm without quantified competitive models; efficiency claims can be held by the Commission to a standard of precision and verifiability that qualitative harm theories are not.

Furthermore, by introducing unquantifiable strategic parameters—such as European scale, sustainability, and supply chain resilience—into either the competitive or the efficiency assessment, the Draft opens the door to potential regulatory capture. Corporate interests or member states seeking to engineer "European champions" can exploit these qualitative avenues to lobby the administrative process, to shifting the merger review from an objective competition assessment toward an ad-hoc industrial policy negotiation. By more explicitly codifying how non-traditional policy gains will—and will not—be weighed against traditional competitive harms, the Commission could effectively tie its hands against future political pressure and member-state lobbying aimed at engineering national or European champions

For standard commercial transactions outside these political considerations, this asymmetry means that efficiency arguments are most likely to succeed where they can be quantified, where they relate to efficiencies the Commission has previously credited (such as scale efficiencies in network industries or dynamic efficiencies in innovation-intensive sectors), and where they are supported by contemporaneous internal documentation prepared before the merger agreement was signed.

The Commission should consider addressing the following points in the final guidelines:

- Clarify that an SIEC finding requires both an impairment of the competitive process (a theory of harm) and a resulting deprivation of competitive benefits to consumers (or supplier/workers if focusing on harm in an input market)

- Define a transparent balancing framework for non-traditional considerations (e.g., sustainability, resilience, competitiveness) to prevent ad-hoc industrial policy negotiations and tie DG COMP's hands against capture.
- Provide more detailed guidance on the assessment of collective benefits.
- Calibrate the evidentiary standard towards efficiency claims so that qualitative, forward-looking theories of harm face substantiation requirements comparable to those imposed on theories of benefit.
- Add explicit criteria for evaluating a firm’s commercial incentive to enter adjacent markets, preventing the over-identification of potential competitors based solely on financial or technical ability.