



3 September 2025

Review of the Merger Guidelines Commission Consultation

Introduction

Supporting competitiveness and putting in place the best possible environment conducive to innovation and the creation, development and success of companies in Europe is one of the key objectives of the EU. Competition policy plays a crucial role in this regard, both in positive terms, but also potentially in negative ones depending on the strategic choices and decisions that will be made, not least regarding mergers and acquisitions.

Since the adoption of the Merger Guidelines, respectively in 2004 (HMG) and 2008 (NHMG), society has undergone significant changes which have impacted businesses and will continue to have substantial impact in the coming years. Businesses are rapidly adapting to technological innovations and to changing markets and consumer trends whilst at the same time national competition authorities are also actively enforcing competition rules.

As outlined in the Competitiveness Compass for the EU, “competition policy is (also) an important lever to strengthen Europe’s competitiveness. Rigorous and effective (antitrust and) merger enforcement in accordance with clear and predictable rules protects fair competition and incentivises companies to innovate and become more efficient. At the same time, in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets, digitalisation and tech innovation. There is a need for a new approach that aligns more closely with shared objectives and enables companies to scale globally, while consistently upholding a level playing field within the Single Market. This should be reflected in revised guidelines for assessing mergers so that innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight in light of the European economy’s acute needs. More broadly, the new approach to EU competition policy calls for not only simplifying and accelerating enforcement but also strengthening and refining its focus. It will ensure a coherent approach conducive to overall EU objectives, in particular closing the innovation gap, addressing the need for efficient scale where relevant, and supporting the decarbonisation of EU industry.”

In line with these principles, the Mission letter to Teresa Ribera provides that the review of the Horizontal Merger Guidelines should give adequate weight to the European economy’s more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defence and security environment.

BusinessEurope supports this new approach, and we commend the Commission for having launched a comprehensive consultation to gather stakeholder opinions about reviewing the Merger Guidelines even though we regret that finalising responses and agreeing a balanced approach had to be undertaken during the summer holidays.



Companies are increasingly facing various types of reporting and notification requirements when carrying out investments and transactions within the EU. In light of this, it is of utmost importance that merger control continues to strive to be effective, predictable, and proportionate. Particularly with regard to predictability, merger control is characterised by an increasingly fragmented landscape, where different Member States adopt specific rules that allow for notifications to be required even below the stipulated turnover thresholds. Enhancing procedural as well as substantive predictability is something the Commission should prioritise when developing merger policy going forward. Furthermore, the Commission should be encouraged to look into its current criteria for efficiencies to ensure they are fit for purpose and do not inadvertently hinder competitiveness, innovation or investment.

BusinessEurope encourages the Commission to take the broad and long-term needs of businesses into account so that the new Guidelines will provide the necessary legal certainty for the diverse and hybrid situations in which businesses may find themselves in the future.

The role of EU merger policy

EU merger control constitutes a fundamental tool for ensuring that markets function well and remain contestable. Well-functioning and vigorous competition is a prerequisite for fostering competitive companies that succeed on their own merits. At the same time, merger control must not be overly intrusive. Market definition should systematically consider competitive dynamics. Overly narrow geographic market definitions that ignore competitive pressures should be avoided. This can lead to under-investment, for example to develop market-based sustainable solutions and technologies. Even though EU merger policy as such does not prevent the creation of large companies, its impact in influencing companies' strategic decisions should not be underestimated. Although most concentrations subject to EU merger control are cleared, numerous transactions have been abandoned and notifications withdrawn possibly in view of an uncertain outcome, high administrative burdens or delays. The cost and administrative efforts of getting the large majority of uncontroversial and non-problematic cases through the merger control process should not be underestimated. Also, the Commission has shown to largely favour structural remedies (instead of behavioural ones). While structural remedies can offer clarity, a more flexible approach, including well-designed behavioural commitments, could better preserve innovation capacity and strategic capabilities, especially in fast-evolving sectors.

The EU Merger Regulation, relevant Notices and Guidelines, and the existing body of case law and practice, give the Commission considerable discretion to identify all the competitive constraints that merging firms face. BusinessEurope supports the Commission exploring how EU competition policy can ensure a coherent approach conducive to overall EU objectives, adapt to developments on relevant markets, and, where necessary have sufficient flexibility to adapt the analysis in relation to mergers that contribute to EU welfare and industrial policy goals.

Public policy considerations and efficiencies

EU merger policy plays a key role in promoting European competitiveness. It serves both as a lubricant for the economy, enabling a dynamic business sector that can adapt to rapid technological developments, to create synergies and economies of scale and scope. It also needs to capture the imperatives of competition (i.e. price, quality,



innovation, choice etc.) – as well as aspects related to sustainability, digitalisation, resilience and defence and security which are integral parts of how companies compete with each other. Merger policy needs to embrace this and clarify how these aspects can be considered within the framework of an economics-based assessment, which must always be the core of merger control.

BusinessEurope believes that the Commission should apply a more flexible and forward-looking approach when appraising merger-related efficiencies raised by the parties. In particular, out-of-market efficiencies that align with public policy goals — such as fostering investment, innovation, sustainability, or digital transformation — could be considered to a larger extent, especially when these benefits flow through to consumers in the medium to long term. As mentioned, these aspects, for instance innovation and sustainability, are often crucial parameters of competition, and can play a key role in fostering business that stay at the forefront of development. To further increase legal certainty, BusinessEurope suggests that the new Guidelines include clear examples of the efficiencies that may be considered, providing examples of real-life situations, explaining how it expects to assess such situations provided that this would not prevent a case-by-case assessment. Ex ante guidance by competition authorities (preferably in close coordination with the Commission and other national competition authorities to ensure consistency throughout the EU) is also a good way to steer companies at an early stage.

It should be clear that the internal market is and will be a key driver of EU competitiveness. Its effective functioning should be ensured as it is a major advantage of the EU. The EU should ensure a level playing field for all business models allowing them to be competitive and to respond to customer demand, also in a rapidly changing digital environment. In this context, the Commission should explore how EU competitiveness can be enhanced and how, at the same time, the EU can adapt EU competition policy to developments on relevant markets.

Although traditional criteria like market shares, dominance, and potential competition remain important, they may not fully capture the impact of transactions aimed at long-term strategic goals or responding to emerging market realities. As set out, BusinessEurope believes that the Commission should apply a more flexible and forward-looking approach when appraising merger-related efficiencies. The Guidelines should therefore acknowledge that efficiencies benefiting consumers outside the relevant market - including in foreign jurisdictions - can play a legitimate role in merger assessments. An overly rigid focus on in-market consumer benefits risks undermining economically efficient and innovation-enhancing transactions, particularly in globally integrated industries.

In this context, we recommend that the Commission:

- Develops clearer guidance on acceptable evidence for out-of-market efficiency claims, such as prospective economic analysis of the supply side sectors, internal strategic plans, global investment projections, and past innovation outcomes.
- Considers broader economic effects and (global) efficiency gains, especially in cross-border or innovation-driven mergers.
- Recognizes that efficiencies may manifest across borders or ecosystems rather than within narrowly defined product or geographic markets, particularly in telecommunications, clean energy, digital, and AI markets.



This approach would improve accuracy and relevance of competition assessments while supporting broader policy goals tied to growth, sustainability, and resilience in strategic industries.

Supply chain resilience and diversification

Assessments should consider the broader economic impact of supply chain vulnerabilities demonstrated during recent crises. Supply chain resilience should be considered as a legitimate efficiency when mergers reduce dependency on single suppliers or geographically concentrated sources, enhance the continuity, diversification, and resilience of supply chains, especially in sectors where companies from key partner jurisdictions are involved. The Guidelines should establish clear criteria for when resilience benefits can mitigate competitive concerns, especially in critical sectors where companies need to be robust enough to ensure the continuity of the service even in stress situations.

In addition, mergers that strengthen sectors' ability to endure and adapt to future disruptions by increasing production capacity, ensuring technological advancement, or promoting geographical diversification may prove particularly valuable in sectors exposed to systemic risks or geopolitical dependencies.

Dynamic efficiencies and innovation benefits

The Guidelines should recognize that dynamic efficiencies - including enhancements in product quality, diversity, service standards, and innovation capacity - often provide significantly greater and longer-term benefits to consumers than static cost efficiencies. It is advisable that the European Commission develops better methodologies for quantifying innovation benefits and quality improvements, considering longer assessment periods for innovation-intensive sectors. In dynamic, innovation-driven markets, some transactions may generate pro-competitive innovation benefits that outweigh short-term reductions in competition. The Commission should recognise such innovation gains, including those related to complementary R&D capabilities, accelerated product development, and increased investment in early-stage technologies. This would reflect global best practices and help ensure that merger control does not inadvertently chill investment in startups and emerging technologies.

Contribution to environmental goals

Transactions that promote environmental goals, such as decarbonization, green innovation or circular economy transitions could also be assessed under the same three-pronged test as other efficiencies: consumer benefit, merger-specificity, and verifiability.

Proving efficiencies

The revised Guidelines should also address the current imbalance in evidentiary standards between demonstrating competitive harm and proving efficiencies. A longer period of assessment for sectors where investments cycles are long (e.g. increasing the two- to four-year time period for assessing merger efficiencies) would allow efficiencies stemming from economies of scale to be captured, along with greater infrastructure quality and wider coverage, opening up access to innovative services for European consumers and businesses. It would be useful to agree on valid models to quantify and assess evidence on long-term quality improvements resulting from innovation or



infrastructure improvements. That would allow merging parties to bring forward solid, reasonable and successful arguments related to non-price benefits.

Also, both, notifying parties and third parties, should be granted more flexibility when responding to an information request. Unclear, overly detailed, voluminous, irrelevant requests, short deadlines, formalities of requests, may affect the quality of the information provided, especially regarding markets outside the EU. Moreover, they put an unnecessary burden, not only on the merging parties, but also on third parties such as competitors or customers asked to respond.

We recommend that the Commission:

- Adopts more flexible analytical frameworks for assessing dynamic efficiencies, particularly regarding standards of proof and time horizons.
- Accepts alternative forms of evidence including internal business documents, strategic plans, innovation roadmaps, sectoral case studies, and expert evaluations - especially in innovation-driven or fast-evolving industries.
- Provides more detailed guidance on acceptable types of evidence and standards, including how this information will be assessed and prioritized in evaluations.
- Considers qualitative assessments as a useful complement to quantitative analysis, particularly for dynamic efficiencies that may be difficult to quantify but still substantial.
- Allows longer time horizons for efficiency realization, recognizing that innovation benefits may materialize over extended periods and should not be discounted prematurely.

Assessing competitive pressure

The Commission should consider clarifying how a sufficiently dynamic view of markets can be used when appraising the existence of sufficient competitive pressure from remaining firms and from potential market entry, as this is a condition for accepting efficiencies. In situations where markets are rapidly evolving, dominance can often be temporary. In such cases, the Commission should adopt a dynamic analysis and long-term view of the markets when appraising the existence of competitive pressure. The Commission should also not require disproportionate evidence when asking the parties to provide information that efficiencies directly benefit consumers, and that they are merger-specific, substantial, timely and verifiable.

Integrating efficiencies into merger remedies

The Guidelines should recognize that efficiency-related commitments can provide effective, proportionate alternatives to structural remedies. Efficiency-driven commitments such as investment obligations, access guarantees, or R&D commitments can address competition issues while ensuring that consumers and markets benefit from proposed transactions. It is advisable that behavioral remedies which would be structured around specific efficiencies, such as technology deployment or improved service quality, particularly in strategic sectors including telecommunications, AI, and clean energy where scale and integration can drive innovation and resilience are considered by the European Commission when reviewed Guidelines are presented.



Market power: caution against new presumptions

BusinessEurope cautions against the introduction of presumption-based approaches that would shift the burden of proof onto merging parties. Market power and competition concerns should be identified using the traditional metrics of market shares and concentration. It is also reasonable to consider other metrics such as diversion ratios, profit margins and pivotality to capture competitive dynamics more accurately. Sector-specific aspects should also be considered, such as access to data. Such a holistic and empirical-based approach would be undermined by introducing simplistic presumptions that would also put considerable burdens on companies to rebut such presumptions, leading to higher costs and discouraging pro-competitive deals, especially in rapidly evolving or innovation-led sectors where static metrics may misrepresent competitive dynamics. The merger guidelines should reflect an efficient-focused approach based on an effect-based analysis, otherwise it would be very difficult, if not impossible, for the companies concerned to discharge the burden of proof.

Particular attention should be paid to the notion of so-called "must-have products". This concept should be treated with caution given it lacks clear antitrust legal or econometric grounding, and if used should be clearly and narrowly defined, and their competitive assessment should always consider the countervailing strength of buyer power. Theories of harm based on conglomerate or portfolio effects risk overstating market power if they overlook the relative bargaining position of the parties. In practice, the existence of "dependent" economic entities often reflects the interplay between seller and buyer power rather than one-sided market dominance. To ensure legal certainty and balanced outcomes, merger assessments should explicitly recognise that the competitive dynamics of consumer goods markets hinge on this two-way relationship between sellers and powerful buyers, rather than presuming structural dependence from the mere presence of must-have brands.

Other issues

Distinguishing between strategic acquisitions and investment-driven transactions:

The current EU merger framework treats all acquisitions the same, without distinguishing between strategic takeovers and purely financial investments. This can lead to excessive regulatory burdens, especially for investors like venture capital firms or sovereign wealth funds that don't seek to influence the target's operations. Such uniform treatment may deter legitimate investments with no real competition concerns. A revised approach that differentiates between strategic control and passive investment would make merger reviews more accurate and proportionate—without weakening standards—while signalling the EU's openness to non-distortive capital.

Killer acquisitions: call-in powers and legal uncertainty:

Increasing reliance on the concept of "killer acquisitions" — particularly in digital and innovation-driven markets — has led to a presumption that acquisitions of smaller or nascent competitors inherently pose a threat to future competition. While it is important to safeguard innovation, such a broad approach may result in false positives, especially in ecosystems where acquisition remains a legitimate and vital exit strategy. Innovation often comes from companies of various sizes, not just large incumbents and therefore, "killer acquisition" theories should be applied when there is clear evidence of actual harm to innovation pipelines. BusinessEurope is worried about the growing number of Member



States that have broad jurisdiction to review merger and acquisitions based on other criteria than turnover (call-in powers). A rigid interpretation of the killer acquisition theory risks deterring investors, limiting cross-border innovation, and ultimately harming consumer welfare in the long run.

Objectively determinable thresholds are essential for parties to a concentration to establish whether the transaction triggers merger filing requirements and minimise case-by-case consultations and disputes. The earlier practice of the European Commission to encourage referral requests from Member States under Art. 22 EUMR, even if a transaction falls below the national merger thresholds, has led to great legal uncertainty. Any new possibilities to examine certain cases that are currently below the thresholds, should always make sure to guarantee legal certainty whilst avoiding disproportionate burdens. The new guidelines should propose a clear test and criteria for the substantive assessment for such “killer acquisitions” which should be consistent with the overall economic assessment, time frame and rules of evidence. A consistent test would deter national competition authorities from making referral requests, which are unnecessary or driven by other policy considerations. In the context of acquisitions involving early-stage or innovative European firms, particularly by tech or life sciences players, the Commission should consider developing clear criteria and remedies that support the preservation and scaling of European innovation.

The concept of “control”:

The current EU Merger Regulation captures transactions based on a concept of “control,” which may not always provide sufficient clarity in cases involving minority shareholdings and cross-border structural links. The lack of predictability can create legal uncertainty for investors who often operate under different corporate governance frameworks and strategic investment models. The revised Guidelines should, therefore, provide greater clarity on the thresholds and conditions under which minority acquisitions may trigger a notification; the assessment criteria for joint commercial strategies or strategic interdependence; and the distinction between passive investment and structural integration. Such clarification would align with the EU’s objective of maintaining an open investment climate, while ensuring the effective monitoring of genuinely competition-distorting links.

Enhancing alignment between EU Merger Control and the Foreign Subsidies Regulation:

The Foreign Subsidies Regulation (“FSR”) has introduced an additional layer of scrutiny in transactions involving non-EU undertakings. While the objective of preserving a level playing field is legitimate, the current lack of procedural coordination between the FSR and EU merger control creates legal uncertainty and administrative burdens for merging parties, particularly those operating in sectors with complex public-private dynamics.

This disconnect may discourage investment, even when transactions raise no real competition concerns. The revised Merger Guidelines should clarify how FSR reviews impact merger procedures (e.g. timing, sequencing, conditions) to enhance predictability and procedural efficiency. Aligning merger control with broader EU policies—while keeping clear boundaries between competition law and sectoral regulation—would strengthen enforcement coherence and boost investor confidence from the EU’s close economic partners.
