



Washington, DC 20001

to the

Brussels, Belgium

In the Matter of:

General Consultation on the Review of the
Mergers Regulation

Public Comment

Sept 3, 2025

REVIEW MERGER GUIDELINES

Fields marked with * are mandatory.

Introduction

I. Introduction

1.1 Background and aim of the questionnaire

In line with the objectives of the EU Treaties, EU competition rules aim to enable a dynamic and well-functioning internal market, by making sure all businesses are able to compete effectively, and to prevent market distortions that can harm consumers – and ultimately damage productivity and economic growth. While companies combining forces through mergers can generate efficiencies and bring benefits to the EU economy, some mergers may reduce competition.

Article 2 of the EU Merger Regulation requires the Commission to assess whether a merger would “significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position”. Where the Commission finds no such impediment the merger is to be approved; if, alternatively, the Commission concludes that the merger would lead to such an impediment, and unless adequate measures remedying this impediment are put forward by merging parties the merger is to be declared incompatible with the internal market.

Mergers can involve companies that are actual or potential competitors on the same market (“horizontal mergers”) or companies that are active on different levels of the supply chain (e.g. one supplies the other with an input) or in neighbouring markets (“non-horizontal mergers”). To provide guidance on how it assesses these different types of mergers, the Commission has issued guidelines: the Horizontal Merger Guidelines (published in 2004) and the Non-Horizontal Merger Guidelines (published in 2008) (the “Guidelines”).

Like all competition tools, EU merger control needs to remain fit for purpose, as market realities change around it. The objective of merger control, in accordance with the EU Merger Regulation, remains valid and unchanged – ensuring mergers do not distort competition in the internal market. However, in the respectively twenty-one and sixteen years since the adoption of the Guidelines there have been significant market trends and developments that have changed the dynamics of competition. The Commission’s assessment of mergers

under the Merger Regulation has equally evolved, to capture those new realities and protect competition within them. In all these years, there has also been relevant case law of the Court of Justice, which has informed the Commission's interpretation of the Merger Regulation and its Guidelines.

In light of these factors, which apply equally to both the Horizontal and Non-Horizontal Merger Guidelines, the Commission is proposing to revise both sets of guidelines in a holistic exercise. The goal is to ensure the Guidelines are up-to-date in order to allow the Commission to continue to protect competition under the Merger Regulation in evolving market realities, while not intervening in transactions that do not harm competition. In addition, the revised merger guidelines should provide increased transparency and predictability to the business community as to how the Commission assesses mergers today. The Commission will conduct concurrently both an Evaluation and an Impact Assessment to support the review of the Guidelines.

We welcome your input on how the Commission should assess mergers within the framework of the EU Merger Regulation and the principles that should underpin its revised Guidelines.

This questionnaire aims at collecting facts, views and evidence from the public and other stakeholders that will help the Commission determine how to adequately update its Guidelines. It represents one of the methods of information gathering in the context of the revision of the Guidelines.

The Commission will summarise the results of this consultation in a report, which will be published on the Commission's "Have Your Say" platform.

Nothing in this questionnaire should be interpreted as stating an official position of the European Commission.

1.2 Submission of your contribution

Please reply to this public consultation by responding to the questionnaire online. You may include documents and URLs for relevant online content in your replies.

You are not obliged to complete the questionnaire all at once; you have the option of saving your responses as a "draft" and finalising them later. To do this you should click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access your questionnaire again to continue working on your response.

If you have any questions, you can contact us via the following functional mailbox: [COMP MG REVIEW](#). In case of technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

1.3 Duration of the consultation

The consultation on this questionnaire will be open for 16 weeks.

About you

* Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* First name

Lilla

* Surname

Kiss

* Email (this won't be published)

kiss.lilla.nora@outlook.com

* Country of origin

Please add your country of origin, or that of your organisation.

This list does not represent the official position of the European institutions with regard to the legal status or policy of the entities mentioned. It is a harmonisation of often divergent lists and practices.

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Futuna |
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Tristan da Cunha | <input type="radio"/> Zambia |

- ☐ Democratic Republic of the Congo
- ☐ Lesotho
- ☐ Saint Kitts and Nevis
- ☐ Zimbabwe
- ☐ Denmark
- ☐ Liberia
- ☐ Saint Lucia

* I am giving my contribution as

- ☒ Academic/research institution
- ☐ Business association
- ☐ Company/business
- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☐ Other

* If you are giving your contribution for the company / organisation for which you work, or on behalf of a client, please specify the main function / activity of the company / organisation or client:

Text of 1 to 600 characters will be accepted

The Information Technology and Innovation Foundation (“ITIF”) is an independent, non-profit and non-partisan think tank. ITIF’s mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth. ITIF strives to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. ITIF adheres to the highest standards of research integrity and is guided by an internal code of ethics grounded in analytical rigor, pragmatism, and independence from external direction or bias.

* If you are giving your contribution for the company / organisation for which you work, or on behalf of a client, please indicate in which sector it is active (multiple options possible). More details on digital, deep tech innovation, clean and resource efficient technologies, biotechnologies are available in the Commission Guidance Note concerning certain provisions of [Regulation \(EU\) 2024/795](#) establishing the Strategic Technologies for Europe Platform (STEP):

between 1 and 16 choices

MULTIPLE OPTIONS POSSIBLE

- ☐ Agriculture / agri-food
- ☐ Automotive
- ☐ Biotechnologies
- ☐ Clean and resource efficient technologies
- ☐ Construction
- ☐ Consumer goods
- ☒ Deep tech innovation
- ☐ Defense
- ☒ Digital
- ☐ Energy
- ☐ Finance and banking
- ☐ Medias
- ☐ Other
- ☐ Other basic industries (i.e., supplying raw materials to industries which manufacture other goods)
- ☒ Pharmaceuticals
- ☐ Space
- ☒ Telecommunications
- ☐ Transport

Please specify

Competition / Antitrust

Please specify

Please mark the countries where your main business is based.

- | | | | |
|-----------------------------------|----------------------------------|--|---|
| <input type="checkbox"/> Austria | <input type="checkbox"/> Finland | <input type="checkbox"/> Lithuania | <input type="checkbox"/> Slovenia |
| <input type="checkbox"/> Belgium | <input type="checkbox"/> France | <input type="checkbox"/> Luxembourg | <input type="checkbox"/> Spain |
| <input type="checkbox"/> Bulgaria | <input type="checkbox"/> Germany | <input type="checkbox"/> Malta | <input type="checkbox"/> Sweden |
| <input type="checkbox"/> Croatia | <input type="checkbox"/> Greece | <input type="checkbox"/> The Netherlands | <input type="checkbox"/> Others in Europe |

- ☐ Cyprus ☐ Hungary ☐ Poland ☒ Other
☐ Czechia ☐ Ireland ☐ Portugal
☐ Denmark ☐ Italy ☐ Romania
☐ Estonia ☐ Latvia ☐ Slovakia

If other, please specify

United States

*** Organisation name**

255 character(s) maximum

Information Technology and Innovation Foundation

*** Organisation size**

- ☐ Micro (1 to 9 employees)
☒ Small (10 to 49 employees)
☐ Medium (50 to 249 employees)
☐ Large (250 or more)

Transparency register number

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

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Has your company/business been the addressee of a Commission decision under Article 6 or Article 8 of Council Regulation (EC) No 139/2004, or has it been another involved party (such as the target or seller) in a merger for which an Article 6 or 8 decision was issued, or has your company/business organisation acted as external counsel or economic consultant of an addressee of such decision in the last 10 years?

between 1 and 7 choices

- ☒ No
☐ Yes, Article 6.1.(a) decision
☐ Yes, Article 6.1(b) decision (simplified procedure)
☐ Yes, Article 6.1(b) decision (normal procedure)
☐ Yes, Article 6.1(b) in conjunction with Article 6.2 decision

- ☐ Yes, Article 8.1 decision
- ☐ Yes, Article 8.2 decision
- ☐ Yes, Article 8.3 decision

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

☐ **Anonymous**

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

☒ **Public**

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☒ I agree with the [personal data protection provisions](#)

2. Evaluation Criteria

2.1 Effectiveness (Have the objectives been met?)

2.1.1 In your / your client's experience, have the Horizontal Guidelines allowed the Commission to identify correctly the transactions that significantly impede effective competition in the internal market?

- ☐ Yes
- ☒ No, the Commission has often intervened in transactions that do not significantly impede effective competition
- ☐ No, the Commission has often cleared transactions that significantly impede effective competition
- ☐ I do not know

2.1.1.1 If no, please identify the transactions involving horizontal overlaps in which the Commission did not assess correctly the impact on competition in the internal market and explain why.

Text of 1 to 3000 characters will be accepted

See response to Question 2.3.2.

2.1.2 In your / your client's experience, have the Non-Horizontal Guidelines allowed the Commission to identify correctly the transactions that significantly impede effective competition in the internal market?

- ☐ Yes
- ☒ No, the Commission has often intervened in transactions that do not significantly impede effective competition
- ☐ No, the Commission has often cleared transactions that significantly impede effective competition
- ☐ I do not know

2.1.2.1 If no, please identify the transactions (involving non-horizontal relationships) in which the Commission did not assess correctly the impact on competition in the internal market and explain why.

3000 character(s) maximum

See response to Question 2.4.6.1.

2.1.3 In your / your client's experience, have the Horizontal Guidelines positively/negatively contributed to promoting competition in the internal market over the last 10 years?

- ☐ Yes, they have positively contributed
- ☐ They have been neutral
- ☒ No, they have negatively contributed
- ☐ I do not know

2.1.3.1 Please explain, and, if relevant, identify any differences in this respect between different sectors or types of technologies (clean and resource efficient technologies, biotechnologies, energy, basic industries, telecoms, pharmaceuticals, etc).

Text of 1 to 3000 characters will be accepted

Despite the differences that inevitably exist between various sectors and technologies, merger guidelines should remain generally applicable, like competition law, and not put forward industry-specific guidance. The particular competitive dynamics that define any given market are ultimately complex, changing, and only understood after investigation in the context of a particular matter, and thus unsuited for guidelines.

2.1.4 In your / your client's experience, have the Non-Horizontal Guidelines positively/negatively contributed to promoting competition in the internal market over the last 10 years?

- ☐ Yes, they have positively contributed
- ☐ They have been neutral
- ☒ No, they have negatively contributed
- ☐ I do not know

2.1.4.1 Please explain, and, if relevant, identify any differences in this respect between different sectors or types of technologies (clean and resource efficient technologies, biotechnologies, energy, basic industries, telecoms, pharmaceuticals, etc)

3000 character(s) maximum

See response to Question 2.1.3.1.

2.1.5 In your / your client's experience, do the Guidelines continue to provide correct, clear and comprehensive guidance on merger assessment?

- ☐ Yes, for both the Horizontal and Non-Horizontal Guidelines
- ☐ Only the Horizontal Guidelines, but not the Non-Horizontal Guidelines
- ☐ Only the Non-Horizontal Guidelines, but not the Horizontal Guidelines
- ☒ No
- ☐ I do not know

2.1.5.1 If no, please explain which parts of the Horizontal and Non-horizontal Guidelines are not correct, clear or comprehensive. Please explain, and, if relevant, identify any differences in this respect between different sectors (energy, basic industries, telecoms, pharmaceuticals, etc).

Text of 1 to 5000 characters will be accepted

See response to Question 2.4.6.1.

2.1.6 Have the Guidelines proven effective in providing legal certainty and transparency to all stakeholders when it comes to assessing horizontal and non-horizontal mergers?

- ☒ Yes, for both the Horizontal and Non-Horizontal Guidelines
- ☐ Only the Horizontal Guidelines, but not the Non-Horizontal Guidelines
- ☐ Only the Non-Horizontal Guidelines, but not the Horizontal Guidelines
- ☐ No
- ☐ I do not know

2.1.7 Is the distinction between effects of horizontal and non-horizontal mergers still relevant?

- ☒ Yes, and it is useful to have separate merger guidelines on horizontal and non-horizontal mergers
- ☐ Yes, but a single document with guidelines addressing horizontal and non-horizontal mergers would be preferable to ensure consistency
- ☐ No, the distinction is artificial as many mergers present horizontal and non-horizontal effects
- ☐ Other

2.2 Efficiency (Were the costs involved proportionate to the benefits?)

2.2.1 Please indicate how any costs associated with the Guidelines (e.g. by providing incorrect, incomplete, misleading or too strict or flexible guidance on certain aspects) compare to any benefits the Guidelines have brought to you / your client (e.g. by providing helpful guidance for assessing mergers). Please exclude any costs related to the notification of mergers that are unrelated to the Guidelines:

- ☐ There are no costs related to the Guidelines (i.e. they include only helpful guidance)
- ☐ Any costs have been small compared to the benefits of the Guidelines
- ☐ Costs have been equal to the benefits of the Guidelines
- ☒ Costs have exceeded the benefits of the Guidelines
- ☐ Irrespective of the costs, the Guidelines have no benefits
- ☐ I do not know

2.2.1.1 Please indicate which costs the Guidelines have generated for you and quantify them.

Text of 1 to 1000 characters will be accepted

See response to Question 2.3.2.

2.2.1.2 If you consider that the costs have been equal to or have exceeded the benefit, please explain your reasons.

Text of 1 to 1000 characters will be accepted

See response to Question 2.3.2.

2.2.2 In your / your client's experience, is there scope for further simplification and cost reduction when it comes to the Guidelines?

- ☒ Yes
- ☐ No
- ☐ I do not know

2.2.2.1 If yes, please explain and provide examples on how the Guidelines can reduce costs and how it can be simplified for this purpose (e.g. new structural presumptions, easier or clearer principles to follow, or on the contrary need to provide more flexibility in the assessment etc.)

Text of 1 to 1000 characters will be accepted

See response to Question 2.3.2.

2.3 Relevance (Is EU action still necessary?)

2.3.1 Do you consider the objectives of the Guidelines to still be relevant today?

	Objective still relevant	Objective no longer relevant	I do not know
Provide guidance as to how the Commission assesses concentrations when the undertakings concerned are actual competitors in the same relevant markets	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provide guidance as to how the Commission assesses concentrations when the undertakings concerned are potential competitors in the same relevant markets	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provide guidance as to how the Commission assesses concentrations where the undertakings concerned are active on different relevant markets, at different steps of in the value chain or neighbouring markets	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provide legal certainty, predictability and transparency	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

2.3.2 Please describe any other objectives that the Guidelines have not sufficiently pursued, explaining their relevance for preserving effective competition in the internal market.

Text of 1 to 2000 characters will be accepted

The current Guidelines are designed to prevent mergers that result in market dominance or a lack of effective competition, with goals such as increasing innovation treated as benefits that will result rather than as primary objectives of merger policy. This is problematic, as there can often be circumstances where a merger may result in market dominance or a lack of effective competition but nonetheless promote innovation and benefit consumers. Specifically, increased concentration and even dominance can promote innovation by providing firms with a greater incentive and ability to innovate. As such, by framing the goals of merger policy in structural terms—preventing dominance and protecting effective competition—rather than a conduct or performance framework like substantially lessening competition or consumer welfare, the Guidelines' objectives open the door to enforcement that chills innovative and other procompetitive conduct.

2.4 Coherence (Does the policy complement other actions or are there contradictions?)

2.4.1 In your experience or that of your client, are there any inconsistencies or contradictions between any of the individual paragraphs or sections of

the Guidelines? (for example, instances where one paragraph/section of the Horizontal Merger Guidelines is inconsistent with another paragraph/section of the Non-Horizontal Merger Guidelines)

- ☐ Yes
- ☒ No
- ☐ Do not know

2.4.2 In your experience or that of your client, are there any inconsistencies or contradictions between the Guidelines and the judgments of the EU Courts?

- ☐ Yes
- ☒ No
- ☐ Do not know

2.4.3 In your experience or that of your client, are there any inconsistencies or contradictions between the Guidelines and any other legal texts within the EU merger control framework (e.g. Notice on the definition of the relevant market, Implementing Regulation, Notice on Simplified treatment etc)?

- ☐ Yes
- ☒ No
- ☐ Do not know

2.4.4 To the best of your or your client's knowledge, are there any inconsistencies or contradictions between the Guidelines and other Commission instruments in the area of competition policy and enforcement?

- ☐ Yes
- ☒ No
- ☐ Do not know

2.4.5 To the best of your / your client's knowledge, are there any inconsistencies between the Guidelines and EU rules or policies in areas other than competition?

- ☐ Yes

- ☐ No
- ☒ Do not know

2.4.6 How should the Guidelines take into account existing ex-ante regulation in certain sectors (e.g. telecommunications, energy) in its competitive assessment?

- ☐ Not at all
- ☒ To the extent it is binding and effective
- ☐ Should be taken into account but not replace the assessment of market structures
- ☐ I do not know

2.4.6.1 What, if anything, should be changed?

With respect to the horizontal merger guidelines, their most important drawback concerns the single firm market share presumption whereby a merger that results in an over 50% market share is prima facie anticompetitive. While this would imply a market HHI of over 2500, which is typically understood to be highly concentrated, it is possible that the delta HHI from the transaction could be very small and thus the effects on competition and consumers de minimis (e.g., a firm with a 49% share acquires a firm with a 1% share and three other firms with 20%, 17%, and 13% shares remain in the market). The key flaw in the non-horizontal merger guidelines is their inclusion of conglomerate theories of harm, which should not be the focus of enforcement: unlike horizontal mergers that result in coordinated or unilateral effects, as well as vertical mergers that risk foreclosure, there are no ex post limitations on using Articles 101 and 102 to police tying and bundling, which are very often procompetitive.

2.4.7 In your experience or that of your client, do the Guidelines offer sufficient flexibility to take into consideration specific features (e.g. longer investment cycles, innovation intensity, etc)?

- ☐ Yes, fully
- ☐ Yes to some extent
- ☒ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

How can the Guidelines offer sufficient flexibility to take into consideration specific sectoral features (e.g. longer investment cycles, innovation intensity, etc)?



The guidelines should only offer indications based on the legal principles and criteria stemming from the merger regulation and the case-law, which are general in nature

- ☒ The guidelines should offer sound economic principles that are to be applied with sufficient flexibility on case-by-case basis
- ☐ The guidelines should more specifically provide general guidance on individual features (e.g. investment cycles, resilience, etc) that can differentiate economic sectors and how they are to be taken into account.
- ☐ I do not know

2.5 EU added value (Does action at EU level provide clear added value?)

2.5.1 In your experience or that of your client, have the Guidelines at EU level contributed to a consistent approach to merger assessment by the Commission and the EU national competition authorities?

- ☒ Yes
- ☐ No
- ☐ I do not know

2.5.2 Please elaborate on any added value stemming from the fact that the Guidelines are adopted at EU level.

Text of 1 to 2000 characters will be accepted

Because competition policy is an exclusive EU competence, merger control should generally be guided by rules adopted at the EU rather than at the Member State level. This ensures that transactions are assessed under a single, coherent framework, avoiding divergent substantive tests or duplicative procedures. EU-level Guidelines also enable the assessment of mergers in light of the full scope of the internal market and the EEA, capturing competitive dynamics and efficiencies that occur at scale across borders. This is particularly important for transactions where achieving European-scale operations can enhance innovation.

3 Competitiveness

3.1 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how merger control reflects the objective of having a productive and competitive economy?

- ☐ Yes, fully
- ☐ Yes, to some extent

- ☒ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

3.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 5000 characters will be accepted

See response to Question 2.4.6.1. In addition, the section of the non-horizontal merger guidelines that deals with how conglomerate mergers may result in coordinated effects is unclear and should be eliminated in future guidelines. For example, the concern about independent collusive effects from leveraging separate from any exclusionary harm has long been subject to theoretical critiques (i.e., the single monopoly profit theory) and lacks any strong empirical support, including in the merger context.

3.2 What are the benefits that merged companies' increased scale might bring to competitiveness:

3.2.1 In a scenario where the increased scale does not create market power or a dominant position (e.g. a merger between complementary players in terms of products or geography)? Please select the benefits that you / your client believe(s) are relevant for increased competitiveness of the merged entity. For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

- ☒ a. Decreasing average cost curve
- ☒ b. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- ☒ c. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- ☒ d. Access to equity investment
- ☒ e. Ability and incentive to invest (e.g. in network infrastructure)
- ☒ f. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- ☒ g. Ability and incentives to derive value from aggregation of data
- ☒ h. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)
- ☒ i. Ability to procure products more competitively from large suppliers?
- ☒ j. Ability to compete in global markets outside the EU

☒ k. Other factors

3.2.1.1 a. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in efficiencies by decreasing the average cost curve.

3.2.1.1.b Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in network driven efficiencies, both direct and indirect.

3.2.1.1. c. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in efficiencies related to intangible capital, such as IP and brand synergies.

3.2.1.1.d. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in efficiencies related to a greater ability to attract capital that, for example, can be used to fund innovation.

3.2.1.1 e. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in efficiencies that increase a firm's incentive and ability to invest, such as increasing the incentive to protect its market position through innovation, or by increasing its ability to recoup the costs of R&D.

3.2.1.1. f. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 e.

3.2.1.1.g. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in scale and scope driven data efficiencies that benefit consumers.

3.2.1.1. h. Please specify.

Text of 1 to 1000 characters will be accepted

Mergers can result in efficiencies that improve market access.

3.2.1.1.i. Please specify

Text of 1 to 1000 characters will be accepted

Mergers can result in countervailing buyer power that lower supplier costs and benefits consumers with lower prices.

3.2.1.1.j. Please specify

1000 character(s) maximum

The Commission should focus its competitive analysis within the relevant geographic markets at issue.

3.2.1.1.k Please list and specify

1000 character(s) maximum

There are countless examples of how mergers can result in these and other types of efficiency benefits. As one recent comprehensive study in the United States found, "There is zero basis to doubt the once-settled wisdom underpinning the basic framework for merger review: mergers can and do advance procompetitive business objectives....[T]here is evidence of mergers leading to efficiencies in a wide range of industries, including for both goods and services, and for both highly commoditized and highly differentiated products." See Maureen K. Ohlhausen & Taylor M. Owings, Evidence of Efficiencies in Consummated Mergers, (June 2023).

3.2.2 In a scenario where the increased scale creates or strengthens market power or a dominant position, please indicate which of the benefits identified above are still relevant for increased competitiveness of the merged entity, and comment on whether it may damage the competitiveness of other companies or the economy. For each selected benefit, please provide concrete examples and underlying data. Please also specify which metrics can be used to measure these elements.

Minimum 1 selection(s)

- ☒ a. Decreasing average cost curve
- ☒ b. Network effects (i.e., whereby a product or service gains additional value as more people use it)
- ☒ c. Intangible capital (assets lacking physical substance, e.g. patents, copyrights, goodwill, know-how)
- ☒ d. Access to equity investment
- ☒ e. Ability and incentive to invest (e.g. in network infrastructure)
- ☒ f. Ability and incentives to innovate (i.e. R&D, including high-risk innovation)
- ☒ g. Ability and incentives to derive value from aggregation of data
- ☒

h. Improves access to market (i.e. ability to reach new customers or geographies in the internal market or outside the internal market)

☒ i. Ability to procure products more competitively from large suppliers?

☒ j. Ability to compete in global markets outside the EU

☒ k. Other factors

3.2.2.1.a. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 a.

3.2.2.1.b. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 b.

3.2.2.1.c. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 c.

3.2.2.1.d. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 d.

3.2.2.1.e. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 e.

3.2.2.1.f. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 f.

3.2.2.1.g. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 g.

3.2.2.1.h. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 h.

3.2.2.1.i. Please specify.

Text of 1 to 1000 characters will be accepted

See response to 3.2.1.1 i.

3.2.2.1.j. Please specify

1000 character(s) maximum

See response to 3.2.1.1 j.

3.2.2.1.k. Please list.

1000 character(s) maximum

Efficiency benefits may flow from a merger even if it creates or strengthens market power or a dominant position. Indeed, in one important U.S. study which analyzed 130 transactions across various industries where the average combined market share was over 20%, the average HHI over 3,300 and the average delta HHI over 120, the data showed that “merging parties are more likely to lower prices drastically than non-merging parties, while the probability of substantial price increases is similar across the two groups,” with one explanation being “cost synergies that are large enough to induce the merging parties to lower prices.” Bhattacharya et al., *Merger Effects and Antitrust Enforcement: Evidence From U.S. Consumer Packaged Goods* (2023).

3.3 How should the Commission assess the benefits of companies’ gaining scale through mergers when they create market power or a dominant position? Please explain in particular under which conditions such benefits could be sufficient to outweigh competitive harm and under which circumstances such benefits would be passed on to business customers /consumers. Please illustrate with the specific benefits you considered relevant.

Text of 1 to 3000 characters will be accepted

The Commission should attempt to weigh any verifiable and merger-specific consumer benefits—lower prices, increased output, improved quality, greater innovation—with the anticompetitive harms—higher prices, decreased output, diminished quality, less innovation—resulting from the creation of increased market power or dominance. If the benefits outweigh the harms, the merger should be approved; if they do not, it should be challenged.

3.4 From your/your client's perspective, how can the merger guidelines contribute to i.) the security of supply, and ii.) resilience of the EU economy against outside shocks and dependency on third country input?

Text of 1 to 3000 characters will be accepted

The purpose of merger guidelines should be to promote sound competition enforcement and provide businesses with certainty, both of which can positively contribute to the security of supply and resilience of the EU economy. However, merger guidelines should not attempt to expressly incorporate these latter two goals into their analysis, as doing so risks undermining the core purposes of merger guidelines to promote sound competition enforcement and provide clear, transparent guidance for businesses.

3.4.1 Please explain how merger control can take into account the effects of a merger on i.) security of supply and ii.) resilience (both negative and positive impacts)

3000 character(s) maximum

Merger control—as distinct from competition guidelines and enforcement—can broadly consider both security of supply and resilience on a case-by-case basis. For example, a merger between a European firm and an American firm that shifts production to the United States could benefit European consumers and competition with little risk to the security of supply or resilience. However, the acquisition of a key European concern by a Chinese firm could raise serious concerns about security of supply and resilience that outweigh any competitive or efficiency benefits.

3.4.2 Please also specify in which sectors security of supply and resilience are particularly important (e.g. for essential or strategically significant goods)

3000 character(s) maximum

ITIF has produced reports about strategic industries that Western economies should seek to support in order to better compete against China, which now dominates many areas. See Robert D. Atkinson and Ian Tufts, *The Hamilton Index, 2023: China Is Running Away With Strategic Industries*, ITIF (Dec. 13, 2023).

3.5 From your/your client's perspective, how can the revised merger guidelines contribute to increased innovation? Please explain what innovation effects (both negative and positive) of a merger the revised merger guidelines can take into account and how

Text of 1 to 3000 characters will be accepted

See response to Question 2.3.2. While the current horizontal mergers correctly note how merger efficiencies can include “new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation,” there are a number of transactions which may enhance innovation and benefit consumers even if they result in dominance or a lack of effective competition. This is consistent with the long established “inverted-U” literature showing how increased concentration can result in greater innovation, including in oligopoly markets or markets with a dominant firm where effective competition may not exist. Future guidelines should attempt to address this “innovation gap” by moving away from structural metrics like dominance and effective competition to a more direct focus on the competitive process and anticompetitive effects.

3.5.1 Please also specify in what sectors innovation is particularly important for competition

3000 character(s) maximum

Innovation competition is ubiquitous across the modern economy and is of general importance in merger enforcement. Guidelines should treat innovation as a primary parameter of competition just like price, output, and incremental quality improvements, as opposed to a secondary parameter (e.g., privacy, which can be a form of quality competition in some cases). To be sure, some industries—and especially digital markets—may be especially defined by innovation competition relative to old economy industries where competition occurs more statically through price and output. Enforcers should analyze the market realities associated with each transaction to understand how competition works in the particular market at issue.

3.6 From your / your client's perspective, how can the merger guidelines contribute to increased investment? Please explain what investment effects (both negative and positive) of a merger the merger guidelines can take into account and how

3000 character(s) maximum

M&A is a critical channel for investment. In general, entrepreneurs treat M&A as a key exit strategy to monetize the business they have invested in. As such, merger guidelines that unduly chill M&A, either through poor substantive guidance or a lack of clarity, can thus have serious detrimental effects on the entrepreneurial spirit and investment in the overall economy.

3.6.1 Please also specify in what sectors investment is particularly important

3000 character(s) maximum

Investment is important across all sectors of the economy. However, it can be particularly important in innovation-intensive industries that have high fixed costs and/or require heavy spending on R&D.

3.7. In your / your client's view, what would constitute pro-competitive consolidations in global strategic sectors, digital and deep technology innovation, clean and resource efficient technologies and biotechnologies (e.g., IoT, cloud, quantum, telecom, data, advanced connectivity, cybersecurity, and/or AI), that would benefit competition in the Single Market? Please explain why in particular in terms of harm and benefits to competition.

Text of 1 to 3000 characters will be accepted

Consolidations and partnerships in global strategic sectors can be critical to driving innovation that benefits the Single Market. These can include transactions between large American technology firms and European AI startups that provide the latter with the scale, resources, and know-how they need to innovate more quickly and effectively—benefiting competition and consumers in the Single Market.

4. Assessing market power using structural and other market features

4.1 In your / your client's view, do the current Guidelines:

4.1.1 Provide clear, correct, and comprehensive guidance with regards to structural indicators to assess market power or dominance, including market shares and concentration level?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☒ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

4.1.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

See response to Question 2.4.6.1.

4.1.2 Provide clear, correct, and comprehensive guidance with regards to the frameworks to assess the risks of coordination post-merger?

- ☐ Yes, fully
- ☒ Yes, to some extent
- ☐ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

4.1.2.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

see response to Question 3.1.1.

4.1.3 Provide clear, correct, and comprehensive guidance with regards to the frameworks to assess the risks of foreclosure post-merger?

- ☐ Yes, fully
- ☒

Yes, to some extent

- ☐ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

4.1.3.1. Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines

3000 character(s) maximum

see response to Question 3.1.1.

4.2 From your perspective, on which structural indicators the Commission should rely on to assess whether a merger is likely to significantly impede effective competition?

4.2.a. Are market shares, concentration levels, barriers to entry or expansion, and diversion ratios still relevant for this assessment?

Text of 1 to 3000 characters will be accepted

Structural evidence like market shares and overall industry concentration levels can be a starting point to assess the anticompetitive effects of mergers, provided that any structural presumptions of harm are appropriately limited to cases where anticompetitive harm is especially likely. The consideration of barriers to entry is also relevant when assessing arguments from the merging parties that entry is likely to counteract any anticompetitive harms. Diversion ratios are also useful to analyze unilateral effects but should not form the basis for any presumption of anticompetitive harm.

4.2.b. Are there other metrics that you / your client believe(s) are relevant to assess the existence of market power post-merger?

Text of 1 to 3000 characters will be accepted

In addition to structural factors, conduct or historical evidence that looks at whether, for example, a firm has been able to exercise market power in the past, or the effects of similar transactions in the industry, can provide strong circumstantial evidence as to the competitive effects of a merger. Moreover, like market structure (albeit not to the extent of creating a presumption of anticompetitive harm), a firm's intent in engaging in a transaction can also be probative as to what the effects of a transaction might be. Finally, economic analyses that predict the merger's effects on market performance can also be highly instructive toward discerning whether a transaction is anticompetitive.

4.3 How can the Commission establish that a merger will lead to the creation or strengthening of a dominant position? Please describe the evidence and metrics that the Commission should rely on.

Text of 1 to 3000 characters will be accepted

Data driven structural evidence, like market shares and concentration, can provide evidence that a merger may result in the creation or strengthening of a dominant position, such as through the use of HHI and delta HHI thresholds that seek to identify which transactions are most likely to be anticompetitive (i.e., mergers that create a monopoly or duopoly). Evidence of firm intent, which can also be probative, and other helpful data points are often gathered through review of internal documents from the merging parties. Stronger circumstantial evidence based on past industry behavior (e.g., past collusion, natural experiments) can be gathered through engagement with third parties and other industry sources. Finally, to predict the merger's effect on economic performance, econometric analyses and merger simulations can be used and are often helpful for predicting post-merger effects on competition.

4.4 How can the Commission establish that a merger will lead to a significant impediment of effective competition in cases where the merged entity will not have a dominant position? Please describe the situations and circumstances under which this could occur (e.g., oligopolistic structure, mergers between close competitors), as well as the evidence and metrics that the Commission should rely on in its assessment.

Text of 1 to 3000 characters will be accepted

Focusing merger enforcement on cases where a dominant position is created/enhanced—as opposed to merely impeding effective competition—helps protect against false positives in merger enforcement. To be sure, a “gap” may exist in cases where a merger may not create a dominant position but where there is nonetheless an oligopoly that can result in anticompetitive coordination inconsistent with effective competition. However, the Horizontal Guidelines make clear that “the concept of dominance has also been applied in an oligopolistic setting to cases of collective dominance,” and the Commission should analyze whether a merger may result in harmful collusion by looking at the sort of intent, structural, conduct, and performance evidence discussed in response to Question 4.3.

4.5 How can the Commission establish that non-horizontal mergers (i.e., between companies that are active at different stages of the value chain or in closely related markets) will lead to competitors being — fully or partially — foreclosed from the market, ultimately harming consumers? Please describe the situations where such foreclosure is likely, identifying the evidence and metrics that the Commission should rely on for its assessment.

Text of 1 to 3000 characters will be accepted

The same type of intent, structure, conduct, and performance evidence that is used to evaluate horizontal mergers should be used to assess the competitive effects of non-horizontal mergers. However, whereas structural evidence like the market shares of a vertically integrated firm may be relevant to assess the likelihood that it will be able to foreclose rivals and increase power over price, there should not be any structural presumption of harm—even in cases where a firm may have dominant share both downstream and upstream in a vertical merger. This is because, unlike in horizontal mergers, vertical consolidation inherently involves incentives to reduce price through double marginalization concomitant with any incentives to foreclose, making it inappropriate to structurally presume anticompetitive harm.

4.6 How can the Commission establish that a merger will increase the risks of companies' coordinating their market behaviour or render coordination more stable or effective? Please describe the circumstances that could facilitate this, identifying the evidence and metrics the Commission should rely on in its assessment.

Text of 1 to 3000 characters will be accepted

The same sorts of intent, structure, conduct, and performance evidence that is generally used to evaluate a merger's effects are applicable to specific theory of harm involving coordinated effects. With respect to structure, the more concentrated the market (except in the limit case of merger to monopoly), in general the more likely collusion will be. With respect to intent, internal documents showing an intent to engage in collusion post-merger will of course be highly probative. Natural experiments, such as a history of past attempted collusion, can also shed light on whether coordinated effects are likely, as can evidence that one of the merging parties is a maverick firm. Economic models (e.g., price leadership) can also help quantify the likelihood of coordinated effects.

5. Innovation and other Dynamic Elements in Merger Control

5.1 In your/your client's view, do the current Guidelines provide adequately clear, correct and comprehensive guidance on how the Commission considers innovation and other dynamic criteria in its assessment of the impact of mergers on competition (dynamic merger effects are linked to firms' forward-looking behaviours, particularly their ability and incentive to invest and innovate, as well as to enter or exit a market in the mid-to-long term. Dynamic merger effects can be either positive, leading to efficiencies, or negative, leading to harm)?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☒ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

5.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

See response to Question 3.5.

5.2 In what circumstances can mergers negatively impact the ability and incentives of the merged company to innovate (e.g. a merger between strong innovators, acquisition of an innovator, acquisition of an input critical for other companies to innovate)? Based on which evidence and metrics can the Commission conclude that a merger will likely harm innovation?

Text of 1 to 3000 characters will be accepted

Mergers may harm innovation if they lead to a reduction in quality vis-à-vis reduced incremental product improvements, either through collusion, unilateral, or vertical effects. The competitive effects of such transactions are generally assessed using the same type of evidence discussed above: intent, structural factors, past conduct and relevant natural experiments, as well as predictive economic models. Mergers may also harm innovation to the extent that there are adverse coordinated or unilateral effects in a market for research and development where the parties compete. In such cases, while structural presumptions of harm are not permissible—there are typically no market shares—other types of circumstantial evidence, as discussed above, can be utilized to evaluate competitive effects in an “innovation market.”

5.2.1 In what circumstances can the elimination of a (small but particularly) innovative player with a large competitive potential (e.g., in the case of nascent and emerging market or rapidly developing sectors) harm competition? Based on which evidence and metrics can the Commission conclude that the elimination of a (small but particularly) innovative player with a large competitive potential harms competition?

3000 character(s) maximum

In addition to a merger between two actual competitors that reduces incremental innovation or more disruptive R&D competition in an innovation market, a merger may also harm innovation in cases where an actual R&D competitor acquires a firm that is a perceived entrant in this R&D or innovation market. However, due to the speculative nature of these theories of harm, it is prudent to condemn these transactions only if there is clear and direct evidence of anticompetitive harm (e.g., a consummated transaction where the acquired firm ceases to engage in the R&D that the potential entrant would have competed with), rather than rely solely on circumstantial evidence.

5.3 In what circumstances can mergers positively impact the ability and incentives of the merged company to innovate? Based on which evidence and metrics can the Commission conclude that a merger advances innovation? Please distinguish between mergers creating market power or a dominant position, and those that do not, as relevant.

Text of 1 to 3000 characters will be accepted

Mergers can enhance innovation in two general ways and independent of whether they result in competitive harms (even if in some cases harms may outweigh innovation benefits). First, horizontal mergers may enhance innovation by providing firms with increased incentives and abilities to innovate, such as by giving firms a greater ability to appropriate the costs of their innovation. Indeed, even mergers that impede effective competition or create a dominant position can enhance innovation and benefit consumers by increasing the

incentive and ability for the merged firm to engage in innovative behavior (e.g., a 4-3 merger). Second, non-horizontal mergers can enhance innovation capabilities through the combination of complementary assets. An example would be an innovative pharmaceutical company being bought by a large incumbent who has the resources and know how to more efficiently bring new drugs to market.

5.3.1. What elements, evidence and metrics can the Commission consider when balancing the potential positive benefits and spillovers of enhanced R&D capabilities against the potentially anticompetitive effects of a merger?

Balancing the dynamic and innovation benefits of a merger with potential short-run static harms like higher prices can be extremely difficult and may not admit of suitable quantitative metrics that can help predict the overall effect on market performance. With respect to structural evidence, the inverted-U framework provides a useful starting point: mergers that create a monopoly (unilateral effects) or duopoly (coordinated effects) are less likely to have dynamic benefits that outweigh short-run harms than cases where at least three competitors remain in a market.

5.4 In what circumstances can mergers negatively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger will likely harm investment? Please distinguish between mergers creating market power or a dominant position, and those that do not, as relevant

Text of 1 to 3000 characters will be accepted

See response to Question 5.2.

5.5 In what circumstances can mergers positively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger advances investment? Please distinguish between mergers creating market power or a dominant position, and those that do not, as relevant

Text of 1 to 3000 characters will be accepted

See response to Question 5.3.

5.6. In what circumstances can the elimination of a potential competitor (that is likely to enter the market in a near future or already exert competitive constraints even if not in the market) harm competition? Based on which evidence and metrics can the Commission conclude that the elimination of a potential competitor harms competition?

3000 character(s) maximum

Mergers that reduce perceived potential competition (i.e., the acquisition of a firm that is perceived as a potential competitor) or actual potential competition (i.e., the acquisition of a firm that has the ability to enter the market and compete) can, under certain circumstances, harm competition in an existing product market. Relevant factors in analyzing competitive effects would include the existence of a highly concentrated market, a clear perception or capability of the potential competitor to affect competition, as well as an already existing or likely procompetitive impact on the market.

5.7 How far in the future should and can the Commission look at when assessing the impact of a merger on competition (e.g., whether companies will invest or innovate post-merger, or whether prices will increase because of the merger)? How and under what circumstances should the Commission's assessment consider long investment cycles in a given industry? Based on what evidence should the Commission assess uncertainties linked to the future?

3000 character(s) maximum

The Commission should focus on the short-run competitive effects of a merger, typically within two years of consummation. However, the analysis of longer-term historical industry trends can be helpful in understanding these short-run competitive effects—for example, evidence that an industry is undergoing another cycle of disruptive economic change, which makes anticompetitive effects unlikely.

6. Sustainability and clean and resource-efficient technologies

6.1 In your/your client's view, do the current Guidelines provide clear, correct, updated, and comprehensive guidance on how merger control reflects the transition to a sustainable and climate-neutral economy with clean and resource-efficient technologies solutions?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☐ No, to an insufficient extent
- ☒ Not at all
- ☐ I do not know

6.1.1 Please explain which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

See responses to question 6.3.

6.2 From your/your client's perspective, what are the new competitive dynamics that are linked to the transition to a sustainable and climate-neutral economy with clean tech solutions?

Text of 1 to 3000 characters will be accepted

A successful transition to a sustainable and climate-neutral economy will be supported by innovation that creates low-cost and efficient next-generation energy solutions. Because the Guidelines' focus on preventing dominance and impediments to effective competition will chill transactions with innovation benefits that outweigh potential short-run harms, they may unnecessarily hinder the transition to a green economy.

6.3 In your/your client's view, should the Guidelines better reflect how the clean transition and sustainability goals may be considered by the Commission in its merger control analysis (e.g., as important characteristics of products and services, on which companies compete, or as driving companies' incentives to invest and develop innovative and clean (tech) solutions)?

Text of 1 to 3000 characters will be accepted

The Guidelines should focus on promoting competition through lower prices, increased output, improved quality, and greater innovation—not sustainability. However, promoting competition and innovation is consistent with sustainability goals: fostering innovation in merger enforcement will, ceteris paribus, lead to greater and greener energy innovation.

6.4 Please explain in which circumstances mergers may reduce competition by affecting any of the following aspects: (i) investment in, development, and supply of sustainable and decarbonised products and clean tech solutions, (ii) maximum extension of the lifespan of resources ('circular economy'), and (iii) access to affordable and decarbonised energy (e.g., merger between two competing businesses or the acquisition of a critical input). In addition, please explain which evidence and metrics the Commission should rely on.

Text of 1 to 3000 characters will be accepted

Mergers can reduce competition in these markets just like any others and for the same reasons: coordinated effects, unilateral effects, and vertical foreclosure effects. And the same sort of evidence that is generally relevant to merger analysis—purpose, structure, conduct, and performance—will be relevant to assess competitive effects in these contexts.

6.5 What competitive benefits can mergers bring, in terms of (i) investment in, development, and supply of sustainable and decarbonised products and clean tech solutions, (ii) maximum extension of the lifespan of resources

(‘circular economy’), or (iii) access to affordable and decarbonised energy? Please provide examples of such benefits (e.g. better access to critical inputs, increased ability to invest and innovate, or increased buyer power), describing the circumstances under which these would likely benefit, not only the merging companies, but the overall EU industry and consumers.

Text of 1 to 3000 characters will be accepted

Mergers can enhance competition in these markets just like any others and for the same reasons—in particular, increased scale and scope that spurs innovation which, in this context, would entail the development of new sustainable energy products and technologies.

6.6 Under which conditions the merger benefits relating to the EU’s clean transition and sustainability/clean tech could be sufficient to outweigh the merger competitive harm, and under which conditions such benefits would be passed on to business customers and consumers? Please illustrate with the specific benefits you considered relevant.

Text of 1 to 3000 characters will be accepted

Weighing the innovation benefits of a merger in the energy space toward developing new sustainable technologies against short-run harms to consumer welfare (e.g., higher energy prices) is a complex exercise that is unlikely to admit of any clear quantitative metrics for predicting post-merger market performance. However, and consistent with the inverted-U relationship between concentration and innovation, the innovation benefits are much more likely to outweigh short-run competitive harms in cases where the merger does not involve the creation of a monopoly (unilateral effects) or duopoly (coordinated effects).

7 Digitalisation

7.1 In your/your client’s view, do the current Guidelines adequately reflect the evolutions linked to the digitalisation of the economy?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☐ No, to an insufficient extent
- ☒ Not at all
- ☐ I do not know

7.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

There is no need for Guidelines to provide guidance that is specifically tailored to digital markets. Rather, the Guidelines should be industry-agnostic and set out general legal and economic principles that are applicable in digital markets. Indeed, phenomena like network effects, non-price competition, the use of data, and dynamic entry are not all unique to the digital space, even if they are often particularly relevant to analyzing competitive effects in these markets.

7.2 From your/your client's perspective, what are the new competitive dynamics that are linked to the digitalisation of the economy that should be reflected in the merger guidelines?

Text of 1 to 3000 characters will be accepted

Digital markets typically exhibit several characteristics that are relevant to merger enforcement. First, innovation and quality are often the primary parameter of competition in digital markets, as opposed to price or quantity. As a result, increased market concentration is more likely to yield efficiencies associated with stimulating innovation that outweigh any anticompetitive harms. Second, digital markets are often dynamic and fast moving, where firms "leapfrog" one another with new and innovative products rather than competing for an existing market. For these reasons, structural evidence is more unlikely to be a strong predictor of anticompetitive effects in dynamic markets.

7.3 How can mergers between companies active in different markets shaped by digitalisation harm competition? Please explain whether due to the specific competitive dynamics in those markets, non-horizontal mergers might harm competition in non-traditional ways, that is not necessarily because the merged entity will adopt a foreclosure conduct but because of e. g. increased barriers to entry or elimination of potential competition linked to digital ecosystems, data accumulation, interoperability degradation, targeted foreclosure. Please explain why and how this could harm competition and which evidence and metrics the Commission can rely on.

Text of 1 to 3000 characters will be accepted

Non-horizontal mergers may or may not harm competition in digital markets just as in other markets and there is no need for separate guidelines focusing on foreclosure harms in the digital space. Sometimes, firms that compete in different markets may be seen as potential competitors to one another in a way that raises concerns about "killer acquisitions" that reduce potential competition. However, fears about underenforcement in the form of failing to protect potential competition in technology markets from "killer acquisitions" appear to be overstated. In particular, concerns about killer acquisitions may be more well-founded in pharmaceutical markets characterized by drastic innovations, where innovation milestones are easy to observe, rather than in technology markets.

7.4 In markets driven by technological changes, what would be an appropriate timeframe for the Commission to adequately assess the impact of mergers on competition? Should there be a distinction between markets before and after “tipping” to a leading company?

Text of 1 to 3000 characters will be accepted

Recognizing the dynamic and innovative nature of competition in digital markets does not mean that agencies should abandon competition law's focus on a merger's short-run harms, typically around two years. Indeed, there is all the more reason to maintain a short-run focus given these market features—the more a market is defined by fast-moving technological changes, the harder it will be for the Commission to predict the mid- to long-term effects on competition from a transaction. Indeed, with respect to “tipping,” or the idea that network effects create a first-mover winner-takes-all scenario in digital markets, there a number of highly consequential cases demonstrating that it often fails to occur in digital contexts. For example, while eBay, Yahoo!, and MySpace all had first-mover advantages in e-commerce, search, and social media in the short-run, none of these firms ultimately emerged as the leading platform over time.

8 Efficiencies

8.1 In your/your client's view, do the current Guidelines provide clear, correct and comprehensive guidance on how the Commission assesses merger efficiencies?

- ☐ Yes, fully
- ☒ Yes, to some extent
- ☐ No, to an insufficient extent
- ☐ Not at all
- ☐ I do not know

8.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what would be missing for the Guidelines.

Text of 1 to 3000 characters will be accepted

See response to Question 3.5.

8.2 Are there any efficiencies that are specific to certain types of mergers?

8.2.a Are there efficiencies specific to mergers between firms offering complementary products, offers or services?

- ☒ Yes
- ☐ No

8.2.a Please explain your reply.

Text of 1 to 3000 characters will be accepted

See response to Question 3.2.1.

8.2.b Are there efficiencies that are specific to vertical mergers, i.e. between firms active at different levels of the supply chain?

- ☒ Yes
☐ No

8.2.b Please explain your reply.

Text of 1 to 3000 characters will be accepted

See response to Question 3.2.1.

8.2.c Are there efficiencies specific to horizontal mergers, i.e. between firms that are actual or potential competitors in the same market to offer products or services competing directly?

- ☒ Yes
☐ No

8.2.c Please explain your reply.

Text of 1 to 3000 characters will be accepted

See response to Question 3.2.1.

8.3. Under which circumstances can a merger that reduces effective competition generate efficiencies that outweigh the harm to consumers brought by the merger?

8.3.a Under which circumstances can efficiencies outweigh harm when it comes to cost savings passed on to consumers? Please explain your reply and give examples

Merger activity is ubiquitous across the economy. The vast majority of mergers either have no prospect of competitive harm, countervailing efficiency benefits that outweigh any de minimis loss of competition, or both. Only a very small percentage of transactions raise the possibility of competitive harms that outweigh any merger-specific, verifiable, efficiency gains that benefit consumers through lower prices, increased output, better quality, or enhanced innovation.

8.3.b Under which circumstances can efficiencies outweigh harm when it comes to improved quality of product and services valued by consumers, e.g. through increased investment or innovation? Please explain your reply and give examples

The ability of firms to improve quality through, for example, incremental product innovations, is an important efficiency benefit in many transactions—both horizontal and non-horizontal. Indeed, research has found that most economic productivity growth comes from incumbent firms and incremental product improvements. See, e.g., Garcia-Macia et al., How Destructive Is Innovation? (May 2018).

8.3.c Under which circumstances can efficiencies outweigh harm when it comes to products and services in strategic sectors whose supply would be reduced in the EU without the merger or whose supply would be increased in the EU as a result of the merger? Please explain your reply and give examples

From a competition perspective, the circumstances in which efficiencies can outweigh competitive harms do not necessarily change simply because a transaction may or may not increase supply in the EU. An exception to this rule may occur in circumstances where the geographic market used to analyze the transaction is limited to the EU. For example, even where output falls more in another jurisdiction, if output increased in Europe, the transaction still may be approved as the former inefficiencies could be seen as out of market. Other non-competition regimes, however, may place an additional value on efficiencies that increase supply in Europe in a way that factors into an overall merger control regime. For example, if a merger moves strategic supply away from China toward Europe in a way that results in efficiency benefits, but also roughly equal competitive harms, the merger may ultimately be approved on non-competition grounds.

8.3.d Are there other relevant circumstances in which efficiencies can outweigh harm?

☒ Yes

☐ No

8.3.d If yes, please explain your reply and give examples

3000 character(s) maximum

Mergers may result in efficiencies in markets other than the relevant product market that has been defined. These efficiencies could far outweigh any competitive harms and yet not be counted, which could chill transactions that benefit consumers overall. This concern is particularly acute in the digital economy, where indirect network externalities regularly exist. For this reason, in these cases, it is important to ensure that relevant platform markets are defined broadly and in a way that takes into account the various sides that a platform may have to avoid false positives.

8.4 If efficiencies (contrary to competitive harm) will not materialise right after the merger, what is a reasonable and acceptable timeframe to consider that merger efficiencies are likely enough and substantial enough to compensate consumers harm? Under what circumstances should this timeframe be longer or shorter? Please explain.

Text of 1 to 3000 characters will be accepted

As with merger analysis generally, efficiency gains that arise in the short-term (typically two years after consolidation) is a sufficient time frame for purposes of ensuring verifiability. Indeed, multiple studies have

confirmed that the impact of merger efficiencies is felt two years after consummation. See, e.g., Siebert, Estimating Differential Dynamic Merger Effects on Market Structure and Entry in Related Markets, (2019); Davis et al., Private Equity, Jobs, and Productivity (2014); Groff et al., Measuring Efficiency Gains from Hospital Mergers (2007).

8.5 How can the Commission assess whether the merger efficiencies claimed by the merging parties are substantial and likely to materialize? Please explain in particular what the most reliable evidence or metrics would be to verify efficiencies.

Text of 1 to 3000 characters will be accepted

To determine whether efficiencies are sufficiently substantial enough to outweigh any competitive harms, data-driven economic modeling of a merger's future effects can be particularly helpful. With respect to likelihood and verifiability, in addition to these economic tools, evidence of the nature and extent of efficiency gains in prior similar transactions can also be highly instructive.

8.6 In you/your client's views, how should the Commission assess whether the merger efficiencies could be achieved by less anti-competitive means, such as a cooperation agreement or a different merger? Please explain in particular how realistic those alternatives have to be.

Text of 1 to 3000 characters will be accepted

To determine whether efficiency gains are merger-specific, evidence of past transactions or other industry behavior that shows whether similar benefits can (or cannot) be achieved through other means is often the most probative. In addition, evidence from company documents about firm intent can also be relevant in this context, as the merger itself may have been analyzed as the most effective way to obtain efficiency gains relative to other less burdensome options.

9. Public policy, defence and security as well as labour market considerations

9.1 In your / your client's view, do the Guidelines provide clear, correct, and comprehensive guidance regarding (i) labour markets, (ii) media plurality or (iii) strategic sectors and other public policy considerations?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☐ No, to an insufficient extent
- ☒ Not at all
- ☐ I do not know

9.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what would be missing from the Guidelines.

Text of 1 to 3000 characters will be accepted

See response to Question 9.3.

9.2 Do you consider that new or additional guidance regarding (i) labour markets, (ii) media plurality, (iii) infrastructures critical for the EU economy (e.g., telecommunications networks, electricity distribution network, etc.), (iv) strategic sectors (v) other public policy considerations should be included in the revised merger guidelines?

- ☐ Yes
- ☒ No
- ☐ I do not know

9.3 Please explain and specify in which circumstances you / your client believe(s) that a merger can result in harm in labour markets and to workers, and how this may also impact consumers.

Text of 1 to 3000 characters will be accepted

Merger enforcement should focus on protecting competition, innovation, and consumers, not labor. Including labor risks complicates antitrust analysis by attempting to weigh economic harms and benefits in separate labor and product markets in ways that go beyond even a total welfare standard. For example, many mergers may benefit consumers through HR efficiencies that harm workers, but greatly benefit consumers with lower prices. Indeed, a desire to use merger enforcement as a proxy to protect competition for labor, even in a merger to monopoly scenario, overlooks that market power and employer power are not at all symmetric—labor markets are typically much broader than product markets. For example, a software engineer who works for a monopoly firm may find robust competition for their labor from firms in other high-tech markets. As such, mergers that increase employer power should not be condemned unless they also result in harm to consumers and competition. This typically occurs only in mergers that result in the creation of a monopsony labor market where both workers and consumers could be harmed.

9.4 Please explain and specify in which circumstances you / your client believe(s) that a merger can have positive effects in labour markets and to workers, and how this may also impact consumers.

Text of 1 to 3000 characters will be accepted

Increased output that benefits consumers will ceteris paribus also benefit workers. For this reason, by policing mergers that reduce output and approving transactions that improve output, merger enforcement can benefit not just consumers but workers.

9.5 Do you consider that mergers can benefit or harm diversity and media plurality?

- ☒ Yes
- ☐ No
- ☐ I do not know

9.5.1 Please explain and specify in which circumstances increased market power through mergers can benefit or harm diversity and media plurality, and ultimately consumers.

Text of 1 to 3000 characters will be accepted

In media markets, protecting competition and consumer welfare may have direct second-order effects on protecting diversity of opinions, even if this should not be a goal of competition enforcement.

9.6 In your / your client's view, do the Guidelines provide clear, correct, and comprehensive guidance regarding defence and security considerations?

- ☐ Yes, fully
- ☐ Yes, to some extent
- ☐ No, to an insufficient extent
- ☒ Not at all
- ☐ I do not know

9.6.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what would be missing from the Guidelines

3000 character(s) maximum

The Guidelines should focus on the Commission's competition analysis. To the extent that defence and security considerations factor into its broader merger control regime, that should be addressed separately.

9.7 Do you consider that new or additional guidance regarding defence and security considerations should be included in the revised merger guidelines?

- ☐ Yes
- ☒ No

9.8 Do you consider that mergers can positively or negatively impact defence and security and defense capabilities?

- ☒ Yes
- ☐ No
- ☐ I do not know

9.8.1 Please explain in which circumstances mergers could improve or harm security and defence capabilities. Please distinguish between mergers creating market power or a dominant position, and those that do not, as relevant.

Text of 1 to 3000 characters will be accepted

By enhancing output and innovation in strategic sectors, mergers can improve their performance. By contrast, mergers that lead to a reduction in output or innovation can result in harm to strategic sectors.

9.9 Do you consider that mergers can positively or negatively impact strategic sectors (other than clean tech, deep tech, digital and security and defence sectors) capabilities?

- ☒ Yes
- ☐ No
- ☐ I do not know

9.9.1 Please explain in which circumstances mergers could improve or harm strategic sectors (other than clean tech, deep tech, digital and security and defence sectors) capabilities. Please specify the strategic sector(s) and distinguish between mergers creating market power or a dominant position, and those that do not, as relevant

3000 character(s) maximum

By enhancing output and innovation in strategic sectors, mergers can improve their performance. By contrast, mergers that lead to a reduction in output or innovation can result in harm to strategic sectors. In its Hamilton Index, ITIF has identified 10 industries that are particularly strategic in the context of global competition with China: IT and Information Services, Computers and Electronics, Chemicals, Machinery and Equipment, Motor Vehicles, Basic Metals, Fabricated Metals, Pharmaceuticals, Electrical Equipment, and Other Transportation. See Rob Atkinson and Ian Tufts, The Hamilton Index, 2023: China Is Running Away With Strategic Industries (Dec. 2023).

10. Final comments and document upload

10.1 Do you wish to make any additional comments that may be relevant for the revision of the Guidelines?

Text of 1 to 1000 characters will be accepted

No.

10.2 Please attach any documents in your possession that support your replies to the questions above, and that may assist the Commission in its assessment of those replies, clearly identifying the question to which they refer. Please make sure that any such documents are as concise as possible.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

10.3 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- ☒ Yes
- ☐ No

End of the questionnaire. Thank you for your contribution.

Contact

COMP-MG-REVIEW@ec.europa.eu