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COMMENTS OF ITIF

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PART I. – INTRODUCTION AND GUIDING PRINCIPLES

On April 30, 2026, the European Commission (Commission) issued New Draft Merger Guidelines (Draft Guidelines) and an accompanying public consultation.[1] The New Draft Merger Guidelines would replace the Commission's existing 2004 Horizontal Merger Guidelines and 2008 Non-Horizontal Merger Guidelines and combine the analysis of horizontal and non-horizontal mergers within a single guidance document. This current consultation follows earlier and extensive consultations issued by the Commission on its merger review process, as well as three stakeholder workshops to discuss issues relevant to its revision process.

The Information Technology and Innovation Foundation's (ITIF) Schumpeter Project on Competition Policy appreciates the opportunity to comment on the New Draft Merger Guidelines. ITIF was grateful to provide responses to the Commission's earlier consultation as well as participate in the December 4 workshop in Brussels.[2] While ITIF broadly commends the Commission for taking steps to ensure that its competition policy is more attune to the role mergers play toward enhancing efficiency and driving innovation, it remains concerned that the Commission retains substantial discretion to bring enforcement actions that deviate from this framework, especially in digital and technology markets.

PART I.A – THE ROLE OF EU MERGER CONTROL

1. The Importance of EU Merger Control for the Internal Market and Competitiveness

The Draft Guidelines state that EU merger control supports broader EU policy objectives, including "competitiveness and resilience," critical technologies, defense readiness, green innovation, and media plurality. [3] To be sure, while competition may have broader effects, the Commission should make clear that the causality does not run the other way: While a merger that harms competition may serve broader policy goals like supporting the green transition, mergers that may have negative environmental effects do not necessarily constitute anticompetitive transactions. And, of course, approving mergers and acquisitions may also cohere with broader policy goals like reducing CO2 emissions.[4]

2. Benefits From Scale Versus Market Power

Unfortunately, the Commission does not appear to have fully grasped the distinction between competition enforcement that benefits European competitiveness and making the latter an express part of its competition analysis in evaluating mergers. For example, while the Draft Guidelines rightly regard positively mergers that increase procompetitive scale, they go further and explain how scale can enhance European competitiveness—

[1] European Commission, Review of the Merger Guidelines (Apr. 30, 2026), https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en.

[2] Joseph V. Coniglio and Lilla Nóra Kiss, Comments to the European Commission Regarding Mergers Regulation (Sep. 3, 2025), https://itif.org/publications/2025/09/03/comments-to-the-european-commission-regarding-mergers-regulation [hereinafter ITIF In Depth Comment or ITIF General Comment].

[3] Draft Commission Guidelines on the Assessment of Mergers Under Council Regulation (EC) No. 139/2004 (2026) [hereinafter Draft Guidelines].

[4] *See, e.g.*, Costanza Tomaselli and Bettina Chlond, *Mergers and Emissions*, SSRN (June 12, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6861144.

benefits which should be counted to the extent they enhance competition, even if they also have the second-order effect of enhancing competitiveness.[5]

PART I.B – GUIDING PRINCIPLES

1. Parameters of Competition

ITIF agrees with the Draft Guidelines that merger analysis may require consideration of non-price parameters of competition "covering choice (which may include media and cultural diversity), capacity, investment, innovation, privacy, sustainability, resilience (including security of supply)."[6] However, ITIF disagrees with the Commission that it enjoys a "wide margin of discretion in weighing such price and non-price parameters of competition"—rather, the weights that are placed on various competition parameters should be a function of the importance of that parameter in the market, not the Commission's preferences.[7]

2. Burden of Proof, Theories of Harm and Benefit

The Draft Guidelines state that the Commission has the burden of demonstrating that a merger "significantly impedes the competitive process and, thus, is capable of harming consumers…without, however, having to specifically demonstrate or quantify such consumer harm in every case."[8] While ITIF agrees that providing direct evidence that a merger harms consumers is almost always impractical given the pre-consummation nature of most merger reviews, ITIF believes that the Draft Guidelines should have made clear that anticompetitive effects and harm to the competitive process exist where a merger results in the creation of market power through unilateral or collusive means rather than efficiency benefits.

3. Evidence

Although ITIF appreciates the Commission's desire to assess mergers "based on all available evidence," the Draft Guidelines state that "[t]he only relevant criterion for the purpose of assessing evidence lawfully adduced relates to its credibility" and "[t]here exists no hierarchy between non-technical (or qualitative) and technical (or quantitative) evidence."[9] However, in addition to the "credibility of the statements from customers and competitors," evidence must also be assessed in terms of its overall relevancy and probative value to determine its overall weight.[10] Moreover, quantitative evidence of harm may, as a general matter, be viewed as having more weight than qualitative evidence—in some cases precisely because it is more objective in nature and not as dependent on the credibility of the witness that offers it.

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[5] Draft Guidelines ¶ 15.

[6] *Id.* ¶ 20.

[7] *Id.*

[8] *Id.*

[9] *Id.* ¶ 31.

[10] Judgment of 22 June 2022, thyssenkrupp v Commission, T-584/19, EU:T:2022:386, paragraph 104.

4. Overall Assessment of Mergers' Impact, Including Their Benefits

While the Draft Guidelines are correct that "[t]he greater, more certain and immediate the negative effects on competition, the more substantial and certain the efficiencies must be," they go too far in suggesting that "[t]he more market power the merged entity holds, especially in the case of a dominant position, the less likely efficiencies will be sufficient to outweigh competitive harm."[11] Put simply, efficiencies should be assessed to determine whether they outweigh the negative anticompetitive harm created by the merger in a way that is independent of the market power enjoyed by firms pre- or post-merger.

5. Causality Between the Merger and the Competitive Effects

5.1 Relevant Counterfactual

ITIF agrees that, in determining whether a merger will result in anticompetitive effects, the Commission must undertake "a forward-looking analysis of the effects of the merger on competition in comparison with the counterfactual, i.e. comparing the expected future market situation with and without the merger."[12] Moreover, consistent with ensuring that the burden of proof faced by the Commission and defendants is symmetrical, ITIF agrees that the Commission should be required to demonstrate that a merger's harms are specific to that merger vis-à-vis consideration of alternative agreements that might be entered into but suggests that mergers, which would be subject to Commission review, should be excluded from this analysis.

5.2 Failing Firm

The Draft Guidelines state that an otherwise problematic merger may be compatible with the internal market where one merging party is a failing firm because the harm to competition cannot be said to be caused by the merger.[13] However, the Draft Guidelines fail to make clear that, in addition to the failing firm defense, a merger that involves a flailing firm may also obviate the risk of anticompetitive effects. This sort of defense applies if a firm is not able to compete effectively in the future due to, for example, steadily and substantially declining market performance, a lack of resources, and/or heavy financial difficulties--even if it is unlikely to fail. Put simply, just as the Commission analyzes both the entry and expansion of rivals, it must consider not just exit but declining competition when analyzing a merger's effects.

PART II. – COMPETITIVE ASSESSMENT

The Draft Guidelines state that the Commission will consider "not only the short-term constraints that firms impose on one another but also their capabilities and incentives to compete for future business," as well as "the overall impact of the merger on competition within and across markets."[14] While ITIF does not object in principle to such a broad analysis when the evidence supports it, in general the Commission should make clear that it is focused on evaluating the short-term effects of a merger given the limitations associated with

[11] Draft Guidelines ¶ 35.

[12] *Id.* ¶ 37.

[13] *Id.* ¶ 45.

[14] *Id.* ¶¶ 53-4.

speculating about a merger's effects too far into the future and going beyond the standard partial equilibrium analysis--especially when it is already weighing asymmetric parameters of competition.

PART II.A – MARKET POWER

The Draft Guidelines characterize market power as the ability to maintain prices above competitive levels or reduce "quality, choice, capacity, output, investment, innovation, privacy, sustainability or resilience" below competitive levels for a period of time.[15] Here again, although non-price competition is often important, not least in the digital and technology sectors, the Commission's final Guidelines should make clear that these factors are relevant only for the assessment of market power when they constitute actual competition parameters in the relevant market and when the Commission can identify a merger-specific mechanism through which they are likely to decline—especially due to the difficulties associated with measuring substitution along non-price factors.

PART II.A.1 – STRUCTURAL INDICATORS OF MARKET POWER

1.1 Large Market Shares

The Draft Guidelines state that "the higher a firm's market share, the greater the degree of market power it is likely to possess," and set forward a taxonomy of market shares in terms of "'low' for shares under 10 %, 'moderate' for shares ranging from 10 % to just under 25 %, 'material' for shares ranging from 25 % to just under 40 %, 'high' for shares ranging from 40 % to just under 50 %, and 'very high' for shares of 50 % or more."[16] ITIF believes that presumptions of harm based on the market share of a single firm market should be disfavored—especially if there are no additional safe harbors for mergers with low delta HHIs—as they may often involve no substantial lessening of competition (e.g., a firm with a 49% share acquires a firm with a 1% share and obtains a very high share without any substantial lessening of competition, such as in the case where there are three other firms with 20%, 17%, and 13% market shares remaining).[17]

1.2 High Market Concentration

The Draft Guidelines state that markets with an HHI below 1,000 are generally unconcentrated, while markets with an HHI above 2,000 are highly concentrated.[18] In so doing, the Draft Guidelines suggest that they will treat as their marginal case for enforcing a structural presumption six-to-five mergers, which risks chilling transactions that enhance innovation given the well-documented inverted-U relationship between market concentration and innovation, whereby mergers that result in oligopoly market structures may have strong dynamic justifications. ITIF recommends that guidelines treat 3-2 mergers as their marginal cases, which focuses on merger to duopoly (coordination) and merger to monopoly (unilateral effects) cases.

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[15] *Id.* ¶ 55.

[16] *Id.* ¶ 62.

[17] ITIF In-Depth Comment at 40.

[18] Draft Guidelines ¶ 65.

PART II.A.2 – OTHER INDICATORS OF MARKET POWER

2.1 Low Sensitivity to Price

ITIF agrees with the Draft Guidelines both that "[i]nsensitivity to price changes can thus be evidence of market power" and "[w]hen rivals' output is not responsive to increases in market prices, for example due to capacity constraints or increasing marginal costs, this can also be evidence of market power."[19] However, consistent with its emphasis elsewhere in the Draft Guidelines about the non-price dimensions of competition, the Commission should also make clear that changes to non-price dimensionalities can also be relevant to assessing whether a firm does or does not enjoy market power when they feature prominently in how firms compete in a market (e.g., a reduction in quality leads rivals to produce more).

2.2 High Profit Margins

ITIF cautions against the view that profit margins are, while not entirely irrelevant, generally instructive as to whether a firm enjoys market power.[20] Not only are accounting profits distinct from economic profits, but a high profit margin may be a function of firm management, recoupment of fixed costs, and other factors.

2.3 High Barriers to Competition

While ITIF agrees with the Draft Guidelines that "[h]istorical examples of entry and expansion in the industry may provide useful insights into the magnitude of these barriers," the view that "in concentrated markets where incumbents earn substantial profits and where there have only been few instances of significant entry and expansion in the past, the Commission may conclude that barriers to entry and expansion are high" is overly broad.[21] There may be numerous reasons why a particular industry may not witness entry other than due to high entry barriers, and the Commission should prioritize examples of failed entry in determining whether substantial barriers to entry exist rather than the prevalence of entry taken in isolation.

PART II.A.3 – DYNAMIC COMPETITIVE POTENTIAL

The Draft Guidelines suggest that in innovation or R&D markets "market shares in the relevant innovation spaces or at industry level can be calculated based on R&D expenditure, the number of patents, patent citations or any other metrics used internally."[22] However, in analyzing competition in an R&D market, structural presumptions are inappropriate given the lack of a clear and general causal relationship between market structure and innovation—as well as the inverted-U relationship that exists in many real-world cases.

[19] *Id.* ¶¶ 68-9.

[20] *Id.* ¶ 70.

[21] *Id.* ¶ 78.

[22] *Id.* ¶ 81.

PART II.A.4 – COUNTERVAILING FACTORS

4.1 Dynamic Entry or Expansion of Competitors

ITIF agrees with the Draft Guidelines that entry or expansion are normally considered timely if they occur within two years. Doing so, however, would be undercut if the Commission is, as the Draft Guidelines suggest, assessing long-run competitive harms, and thus only considering a subset of the relevant entry period. As such, the Draft Guidelines' proper focus on short-term entry and effects more broadly.

4.2 Out-of-Market Constraints

The Draft Guidelines state that "because they are not effective and immediate competitive constraints, out-of-market constraints often constrain the merged entity only to a limited degree."[23] However, competition in dynamic markets often occurs through disruptive innovations that may not technically be in the same product market, and as such reflect an out-of-market constraint, but which pose an even greater check on market power than that posed by firms that compete in the existing market. As such, the Commission should be careful about making general and unnecessary formalistic assessments about which types of competitive constraints are more likely to check market power but instead address each constraint on a case-by-case basis.

4.3 Countervailing Buyer Power

The Draft Guidelines suggest that large profit margins may indicate that customers lack significant countervailing buyer power. Here again, ITIF cautions against making strong inferences about countervailing buyer power based on profit margins, as there could be numerous ways that buyers exercise countervailing buyer power against the merging parties which may not be narrowly reflected in profit margins.

PART II.A.5 – DOMINANCE AND OTHER TYPES OF MARKET POWER

The Draft Guidelines argue that while "very high market shares of 50 percent or more over a sustained period of time are in themselves — save in exceptional circumstances — evidence of a dominant position," it remains true that "dominance can still be found in case of market shares below 40 percent."[24] This asymmetry should be removed: Just as the Draft Guidelines put forward a presumption of dominance for firms that have an over 50 percent market share, they should put forward an equally strong presumption that a firm which lacks a 40 percent market share is not dominant, except perhaps in exceptional circumstances.

PART II.B – ANTICOMPETITIVE EFFECTS

PART II.B.1 – ANTICOMPETITIVE EFFECTS – INTRODUCTION: DIRECT AND DYNAMIC EFFECTS

ITIF agrees that, subject to qualifications including those outlined *infra*, a merger may result in competitive harm through a "loss of head-to-head competition," "loss of investment and expansion competition," "loss of innovation competition," "loss of potential competition," "foreclosure" and "coordination." However, not

[23] *Id.* ¶¶ 101-03.

[24] *Id.* ¶ 112.

only does ITIF find the Draft Guidelines' treatment of the "loss of innovation competition" and "foreclosure" theories overly broad, but it does not agree in principle with the Draft Guidelines' inclusion of the "entrenchment of a dominant position" and "other anticompetitive effects" theories, which do not involve the sort of alleged harms to competition with which merger policy should be concerned.

PART II.B.2 – LOSS OF HEAD-TO-HEAD COMPETITION

The Draft Guidelines state that mergers between competitors may give rise to a SIEC by removing competition between the merging firms and reducing competitive pressure on remaining competitors.[25] Although unilateral effects is a legitimate theory of harm for the Commission to pursue, the Draft Guidelines go too far by suggesting that where one firm has a high degree of market power, "even a limited degree of competitive interaction can lead to a SIEC if removed."[26] This language suggests that degree of competitive harm required to find a SIEC will increase depending on the initial market share of the merging parties rather than the quantum of harm to competition caused by the merger, which is inappropriate and risks condemning transactions that don't truly result in a SIEC simply because a firm has a high share.

2.1 Structural Market Features

ITIF does not object in principle to the use of structural measures to help assess whether a merger will result in an anticompetitive loss of head-to-head competition, although the Draft Guidelines could make clear that in unilateral effects cases assessing diversion and the closeness of competition is generally a more relevant analysis—two firms may compete in a highly concentrated industry but be one another's least closest competitors, making a substantial lessening of competition through unilateral effects unlikely.[27] And, while ITIF appreciates the Draft Guidelines' effort to put forward safe harbours, the provided thresholds are too low. For example, the single-firm safe harbour should be raised to at least 40 percent, at which level dominance is highly unlikely. Indeed, the inclusion of any single-firm market share presumption of harm should require some safe harbour for transactions that result in a very low HHI delta (e.g., under 100).

2.2 Closeness of Competition

The Draft Guidelines make clear that "the Commission assesses how closely the merging firms compete in light of their market power" and that "the more significant the merging firms' margins, the greater their incentive to soften competition post-merger to avoid 'cannibalizing' own sales."[28] This statement puts perspective entirely overlooks the well-supported Schumpeterian perspective that high margins can spur dynamic competition by increasing firms' incentives and abilities to engage in innovation competition in a way that undercuts a theory of harm predicated on unilateral effects in innovation markets where Schumpeterian competition features prominently.

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[25] *Id.* ¶ 119.

[26] *Id.* ¶ 121.

[27] *Id.* ¶ 123.

[28] *Id.* ¶ 136.

2.3 Important Competitive Force

ITIF does not object in principle to the consideration of whether a competitor is an "important competitive force" to help assess whether a merger will result in an anticompetitive loss of head-to-head competition.[29] That being said, the Draft Guidelines could make clear that in unilateral effects cases assessing diversion and the closeness of competition is generally a more relevant analysis—a firm may be a disruptive maverick but not be a very close competitor to its merger counterparty, making a substantial lessening of competition through unilateral effects an unlikely result of the merger. That is, mavericks are more relevant to coordinated effects theories of harm whereby their loss as an independent force in the market makes it easier for post-merger collusion to occur.

2.4 Specific Market Aspects

The Draft Guidelines list bidding markets, capacity constraints, network effects, purchasing markets, minority shareholdings and common ownership, and non-structural links as specific market aspects that may affect head-to-head competition.[30] However, market features like network effects are in general no more relevant to head-to-head competition than to other theories of harm, like coordinated effects. Moreover, the Draft Guidelines fail to emphasize the importance of capacity constraints—and, in particular, the lack of capacity constraints—when assessing unilateral effects theories in markets where there is relatively little product differentiation: In these cases, if there are few capacity constraints, a merger is highly unlikely to result in a loss of head-to-head competition vis-à-vis unilateral effects.

PART II.B.3 – LOSS OF INVESTMENT AND EXPANSION COMPETITION

ITIF does not dispute that a merger may lead to a SIEC if it significantly alters investment or expansion competition processes through the discontinuation, downsizing, delay or redirection of investment projects.[31] However, ITIF is concerned at the Draft Guidelines' statement that "firms can compete on future product offerings," which suggests that the Commission may generally analyze harms in future product markets—as distinct from both actual or potential harms to competition in existing product markets, or alternatively actual or perceived potential harms to competition in innovation markets.[32] In deciding whether a proposed merger will result in a SIEC, theories based on harm in a future product market are inherently speculative and should not be a part of the Commission's regular enforcement.

PART II.B.4 – LOSS OF INNOVATION COMPETITION

ITIF appreciates the Draft Guidelines' statement that "the assessment of the loss of innovation competition is not focused on a specific future outcome, which may be uncertain, but on whether the merger significantly impedes the process of innovation rivalry, which has the potential to generate innovation and therefore has

[29] *Id.* ¶ 138.

[30] *Id.* ¶¶ 143-168.

[31] *Id.* ¶ 170.

[32] *Id.* ¶ 169.

competitive value in the present."[33] However, as intimated *supra*, ITIF takes issue with the Draft Guidelines' view that structural metrics like the number of remaining competitors that have products or R&D projects are relevant to assess harms given both the lack of any general causal relationship between market structure and innovation as well as the inverted-U relationship that often obtains in reality between them—simply put, increased concentration does not mean reduced innovation competition.

4.1 Loss of Specific Innovation Competition

The Draft Guidelines' discussion of "a merger that involves overlaps between existing products and R&D projects," whereby the Commission "assesses the degree of market power that a merging firm has with respect to the existing products," is likely to create confusion about the relevant market the Commission is analyzing.[34] The Commission could instead make clear that in addition to evaluating harm to actual competition in an innovation market with respect to a merger between two firms with competitive R&D programs, it will also consider harm to perceived potential competition in an innovation market with respect to a merger between a firm with an R&D program and a firm in older-generation product market that is perceived as a potential entrant in the innovation market—a perception which could be supported by market power in existing product markets.

4.2 Loss of General Innovation Competition

The Draft Guidelines state that mergers between firms with overlapping innovation capabilities may reduce general innovation competition in "future product markets" even where the Commission cannot identify specific overlapping R&D projects.[35] Here again, ITIF rejects theories that conceive of harm in future product markets as far too speculative for general enforcement, and in this case risks condemning transactions involving firms simply because they have a general R&D program without any actual effects on specific R&D competition in an innovation market. This is a recipe for false positives that final guidelines should avoid.

4.3 Innovation Shield

ITIF commends the Commission for its "innovation shield" to ensure that procompetitive transactions that help small firms achieve scale are not unduly chilled.[36] However, the conditions to benefit from the shield are too narrow, especially with respect to the exclusion of gatekeepers from benefiting from the innovation shield in certain circumstances. First, there is no requirement under the DMA to find that a gatekeeper has dominance and thus has the ability to harm competition—rather, gatekeepers and core platform services can be designated by revenue and user thresholds. Moreover, the Draft Guidelines do not even make clear that the limitations on gatekeepers in benefiting from the innovation shield apply only to core platform services, but in theory extend to any acquisition a gatekeeper may make even if there is no competition concern.

[33] *Id.* ¶ 175.

[34] *Id.* ¶ 182.

[35] *Id.* ¶ 186.

[36] *Id.* ¶ 192.

PART II.B.5 – LOSS OF POTENTIAL COMPETITION

ITIF agrees with the Draft Guidelines that a "merger between a firm with market power (incumbent) and a potential competitor can eliminate an actual or future constraint on the incumbent" in a way that results in a SIEC, and which rightfully must involve an analysis of whether other "potential competitors could sufficiently constrain the competitive behavior of the incumbent firm(s)."[37] However, the Draft Guidelines fail to make clear that potential competition theories involving actual potential competition—or potential entrants that do not yet pose an actual constraint, but only a future one—should be limited to cases that involve an existing product market as opposed to an innovation market so as to avoid overly speculative enforcement that chills procompetitive transactions.

PART II.B.6 – FORECLOSURE

While ITIF concurs with the Draft Guidelines that mergers can harm competition through both input foreclosure and customer foreclosure, it rejects the theory of "conglomerate foreclosure" involving mergers that combine complementary products but without any vertical relationship.[38] The reason is simple: Whereas competition law can do little to prohibit vertical foreclosure post-merger (e.g., through the raising of input prices to rivals), practices like bundling and tying can readily be policed post-merger in the limited instances where they are anticompetitive.

6.1 Ability to Foreclose

While ITIF broadly agrees with the Draft Guidelines that "[t]he ability to engage in a foreclosure strategy requires that the merged entity has the technical possibility to foreclose and a significant degree of market power," it notes the apparent double standard in claiming, on the one hand, that the "Commission is unlikely to place significant reliance on contractual safeguards when evaluating whether the merged entity can technically foreclose rivals" while at the same time holding, on the other hand, that the "presence of exclusive contracts between the merged firm and independent firms may also increase the ability to foreclose."[39] That is, the Commission should not treat agreements as unreliable when they can mitigate the anticompetitive effects of a merger but reliable when they can exacerbate them.

6.2 Incentive to Foreclose

The Draft Guidelines state that the Commission will assess whether foreclosure would be profitable for the merged firm, considering lost sales, recaptured profits, margins, diversion, and strategic effects.[40] However, the Commission neglects to include in this analysis the strong procompetitive incentives created by vertical mergers for the elimination of double marginalization (EDM). As ITIF has previously explained, "given the interrelation between foreclosure and EDM incentives, both must be evaluated together in evaluating the

[37] *Id.* ¶¶ 193-4.

[38] *Id.* ¶ 211.

[39] *Id.* ¶¶ 214, 218, 221.

[40] *Id.* ¶ 225.

merged firms incentives, and which can typically be analysed using empirics like margin and diversion data."[41] Moreover, ITIF questions the need for a distinct section on "dynamic incentives" for foreclosure: foreclosure theories are generally applicable across markets, including those defined around innovation.

6.3 Effect on Competition

ITIF takes issue with the Draft Guidelines' identification of a type of "effect on competition" where the "merged entity uses its market power to obtain higher prices or otherwise less favourable terms on rivals, causing harm in the market for the foreclosed product irrespective of whether rivals are weakened in the market where they compete."[42] At bottom, harms to competition that occur through foreclosure should be focused on welfare effects in markets where the merged firm competes with the foreclosed rivals—and thus where harm to competition to exists—not in the upstream or downstream markets through which the input or customer foreclosure, respectively, may occur but where there is no loss of competition--even if higher prices obtain in those markets by means other than a reduction of competition.

PART II.B.7 – ENTRENCHMENT OF A DOMINANT POSITION

The Draft Guidelines state that a merger may harm competition through the entrenchment of a dominant position, such as in cases where there is "an input or a complement with a degree of commonality between the customer bases or be otherwise commercially or technically related to the merged firm's activities in the core market(s)."[43] Here again, ITIF objects to the inclusion of these sorts of conglomerate theories in the Draft Guidelines: "[T]he Commission should not assess the competition risks of non-horizontal mergers that are not based on foreclosure conduct" but "anticompetitive bundling or tying should be addressed post-merger through Articles 101 and 102 where applicable."[44]

PART II.B.8 – COORDINATION

Unlike entrenchment theories which seek to use merger policy to unnecessarily target behavior like tying and bundling that can be addressed *ex post* through Articles 101 and 102 in the limited cases where it is anticompetitive, coordination is a primary concern of merger enforcement given the difficulty to police consumer harm through tacit collusion post-merger.

8.1 Reaching Terms of Coordination: Market Conditions That Are Conducive to Coordination

The Draft Guidelines state that "[r]eliance on big data, AI, advanced algorithms and machine learning technologies may facilitate coordination" and that "[t]hese tools can be used to monitor or forecast firms' prices or strategies, enhancing market observability."[45] While it is possible that algorithms may in some cases

[41] ITIF In-Depth Comment at 43.

[42] Draft Guidelines ¶ 244.

[43] *Id.* ¶¶ 252-255.

[44] *Id.* ¶ 74.

[45] *Id.* ¶ 267.

be used to facilitate collusion, the relationship between these tools and cartelization remains a matter of study and is far too premature to be included in merger guidelines.

8.2 Deviation From Coordination: Monitoring and Deterrence

While the Draft Guidelines state that "the use of AI and automatic algorithms based on large datasets improve market observability," they fail to mention how AI may provide firms with new avenues to stealthily deviate from coordination, and as such make coordination less rather than more likely.[46]

8.3 Disruption of Coordination

To the extent that the Draft Guidelines consider AI and advanced algorithms as a factor in determining whether firms can reach a collusive agreement and deter cheating, they should also consider how, through mechanisms like lowering barriers to entry, AI "may also increase firms' incentives to disrupt cartel behavior, resulting in less collusion throughout the economy as a general matter."[47]

PART II.B.9 – OTHER ANTICOMPETITIVE EFFECTS

ITIF objects to the Draft Guidelines' inclusion of the catch-all "other anticompetitive effects" theory as only creating unnecessary uncertainty in guidance whose purpose should include providing greater clarity to what business practices should be unlawful.[48] To the extent that the Commission has theories of harm in mind other than those it has already specified in the Draft Guidelines, it should similarly specify what they are and under what conditions it believes a merger will result in a SIEC.

9.1 Access to Commercially Sensitive Information

The Draft Guidelines state that a merger may give the merged entity access to commercially sensitive information of rivals and result in a SIEC where "it allows the merged entity to price less aggressively, to the detriment of consumers or when it undermines rivals' incentives to compete, dissuading them from investing, expanding, lowering prices or entering a market."[49] ITIF has concerns with the inclusion of this theory of harm in the Draft Guidelines for, among other reasons, the same grounds it rejected the Draft Guidelines' inclusion of conglomerate theories: While post-merger information sharing among the merged firm and its rivals can be anticompetitive in limited circumstances, such practices can be readily addressed through Articles 101 and 102—unlike tacit collusion.

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[46] *Id.* ¶ 272.

[47] *See* Joseph V. Coniglio, Testimony Before the House Judiciary Committee Regarding Artificial Intelligence Trends in Innovation and Competition, House Judiciary Comm., 119th Cong. (Apr. 3, 2025) (written statement), https://itif.org/publications/2025/04/03/testimony-house-judiciary-committee-artificial-intelligence-trends-innovation-competition/.

[48] Draft Guidelines ¶¶ 282-90.

[49] *Id.* ¶ 282.

9.2 Portfolio Effects

The Draft Guidelines state that "mergers that combine products belonging to different relevant markets, but which together form a portfolio of products sold to the same customers may give rise to a SIEC, even where these products are neither substitutes nor complements and where foreclosure is not a concern."[50] One theory of harm put forward in the Draft Guidelines concerns "mergers between manufacturers or wholesalers" whereby "a broader portfolio may strengthen the merged firm's bargaining position vis-à-vis retailers by increasing the cost for retailers of walking away from negotiations relative to the cost that the merged firm would incur from failed negotiations."[51] However, such portfolio effects theories should not be included in the Commission's revised merger guidelines. To be sure, this is not because it is impossible that consumers may be harmed in certain cases from the exercise of increased bargaining power, but because that harm is untethered to a reduction of competition, either horizontally or through foreclosure, that creates an increase in power in a relevant market created by the merger.

PART II.C – BENEFITS FROM MERGERS (EFFICIENCIES)

ITIF commends the Draft Guidelines for making clear that greater clarity is needed to avoid chilling beneficial deals and that "scale and innovation are critical to compete in innovation-heavy sectors."[52] However, ITIF does not believe that the Draft Guidelines should distinguish between so-called "direct efficiencies," which are short-term efficiencies that can include "new and improved products," and what are deemed "dynamic efficiencies" that typically require "large sustained investments and involves uncertain returns in the future" and appear to be focused on the long-run.[53] As noted *supra*, merger enforcement should in general focus on assessing the short-term impact of a transaction—including with respect to R&D and innovation—rather than task the Commission with attempting to discern typically uncertain long-run effects.

PART II.C.1 – ASSESSMENT OF DIRECT EFFICIENCIES

1.1 Taxonomy of Direct Synergies

The Draft Guidelines provide an underinclusive list of direct efficiencies, which are defined as efficiencies which "result directly from the integration or combination of merging firms' assets and businesses" and typically derive "from cost savings or quality efficiencies, leading directly to lower prices, new and improved products, higher product quality or variety and improvements in other non-price parameters of competition."[54] Specifically, the list is underinclusive by virtue of focusing on static and non-innovation efficiencies while making no mention of direct efficiencies that take the form of facilitating innovation, and especially incremental innovations that are responsible for most of the gains in innovation-related economic growth by incumbents and can be regularly realized in the short-term post-merger. Moreover, the list is

[50] *Id.* ¶ 287.

[51] *Id.* ¶ 289.

[52] *Id.* ¶¶ 291-93.

[53] *Id.* ¶ 296.

[54] *Id.* ¶¶ 295, 302.

overinclusive by listing EDM as an efficiency when, as discussed *supra*, it should be assessed when determining whether a firm has incentives to foreclose—and not as part of the theory of benefit.

1.2 Verifiability

ITIF agrees that efficiencies must be sufficiently verifiable to be credited. However, the substantiality requirement is misplaced in the verifiability analysis—verifiable efficiencies should be credited regardless of how substantial they are, even if they are ultimately outweighed by anticompetitive harms at the balancing part of the Commission's analysis. Indeed, ITIF has already made clear that "the Commission should not require quantitative evidence to justify efficiency claims as a general matter, even if it may require a greater amount of qualitative evidence to justify efficiency claims if quantitative evidence is absent."[55]

1.3 Merger Specificity

ITIF is concerned that the Commission's requirement that alternative arrangements "would not be realistic and attainable" may place too high a burden on the merging parties to prove merger specificity. Indeed, ITIF has already made clear that "to determine whether efficiencies are merger-specific, the Commission should ask whether the merger is reasonably necessary to achieve them."[56]

1.4 Benefit to Consumers

ITIF does not object to the Draft Guidelines' view that, to be credited, efficiencies should be in some way passed on to consumers. However, ITIF is concerned about the Draft Guidelines' discussion of how efficiencies can also take the form of "[q]uality benefits" which "cover those that lead to an increase in quality, also including greater choice or any improvement in other non-price parameters of competition, including resilience and sustainability."[57] While quality efficiencies should most certainly be considered, unless they reflect a key parameter of competition in the market, they should generally be assessed in terms of whether a merger lowers quality-adjusted prices, as opposed to quality benefits taken in isolation.

PART II.C.2 – ASSESSMENT OF DYNAMIC EFFICIENCIES

As noted *supra*, ITIF does not believe that the Draft Guidelines need to distinguish between direct and dynamic efficiencies but agrees that the "conditions set out in relation to verifiability, merger-specificity and benefits to consumers of direct efficiencies are equally applicable" to efficiencies involving innovation.[58]

2.1 Taxonomy of Dynamic Synergies

While the Draft Guidelines note that economies of scale may "increase the incentive to invest or innovate," the taxonomy of dynamic synergies fails to specify how increased concentration through a merger can also

[55] ITIF In-Depth Comment at 89.

[56] *Id.* at 88.

[57] Draft Guidelines ¶ 319.

[58] *Id.* ¶ 324.

enhance the ability of firms to innovate.[59] For example, firms can avail themselves of resources that can be used to fund R&D and help withstand the "gales of creative destruction" that typify many dynamic markets.

2.2 Verifiability

ITIF agrees that dynamic efficiencies must be sufficiently verifiable to be credited.[60] However, the substantiality requirement is misplaced in the verifiability analysis: Verifiable efficiencies should be credited regardless of how substantial they are, even if they are ultimately outweighed by anticompetitive harms at the balancing part of the Commission's analysis. Indeed, ITIF has already made clear that "the Commission should not require quantitative evidence to justify efficiency claims as a general matter, even if it may require a greater amount of qualitative evidence to justify efficiency claims if quantitative evidence is absent."[61]

2.3 Merger Specificity

ITIF does not object to the view that to be credited dynamic efficiencies must be sufficiently merger specific. However, ITIF is concerned that the Commission's requirement that "no realistic and less anticompetitive arrangement" be attainable to achieve the dynamic efficiencies places too high a burden on the merging parties.[62] Indeed, ITIF has already made clear that "to determine whether efficiencies are merger-specific, the Commission should ask whether the merger is reasonably necessary to achieve them."[63]

2.4 Benefit to Consumers

ITIF does not object to the Draft Guidelines' view that, to be credited, dynamic efficiencies should be in some way passed on to consumers. However, ITIF is concerned about the Draft Guidelines' discussion of how efficiencies can also take the form of quality benefits here seem misplaced—new products are themselves a presumptive improvement in product quality. In this sense, direct efficiencies and dynamic efficiency benefits are not necessarily symmetric with respect to the structure of the Draft Guidelines.

PART II.C.3 – BALANCING BENEFIT AND HARM

ITIF broadly agrees with the Draft Guidelines' statement that, "[i]n assessing whether a merger results in a SIEC, the Commission carries out a balancing exercise between the harm and benefit to competition likely to be brought by the merger."[64] However, ITIF is concerned that the Draft Guidelines' bifurcation between direct efficiencies—which as described therein appear to be static in nature—and dynamic efficiencies—which focus on efficiencies related to increased innovation—may result in chilling mergers that have innovation benefits given the Draft Guidelines' claim that "[h]arm and benefit expected to accrue directly

[59] *Id.* ¶ 325.

[60] *Id.* ¶ 327.

[61] ITIF In-Depth Comment at 89.

[62] Draft Guidelines ¶ 331.

[63] ITIF In-Depth Comment at 88.

[64] Draft Guidelines ¶ 331.

from the merger is inherently more certain than dynamic harm and efficiencies."[65] This is not correct: Some efficiencies related to innovation, such as incremental product improvements, may be far more certain than certain cost efficiencies that may only be realized over the long term—for example, economies of scale related to the recovery of long-run fixed costs.

3.1 Balancing Between Symmetric Benefit and Harm

ITIF finds helpful the Draft Guidelines' decision to distinguish between balancing analyses that involve symmetric benefits and harms from those that do not. ITIF suggests that, in addition to noting that in the symmetric case a merger's harms and benefits are "directly comparable," it might specifically add the language of "commensurable" to distinguish this scenario from the asymmetric case where harms and benefits are not commensurable but nonetheless "comparable."[66]

3.2 Balancing Between Asymmetric Benefit and Harm

ITIF acknowledges the difficulties associated with balancing asymmetric benefits and harms—for example, higher prices with innovation benefits. As such, ITIF cautions against the apparent posture of the Draft Guidelines to suggest that weighing incommensurable harms and benefits should be achieved through quantitative means, when practically speaking only a rigorous qualitative comparison may be possible.[67] Moreover, with respect to temporal asymmetry, ITIF again expresses hesitation about the Commission's ability to weigh, for example, short-term harms against long-run benefits. In particular, ITIF is concerned about situations where the Commission may identify long-run harms caused by the transaction but only evaluate short-term benefits. Except in exceptional circumstances driven by the evidence before it, the Commission should always seek to assess harms and benefits using the same time horizon. Instead, the more administrable approach would be to avoid the problem of temporal asymmetry by evaluating only a merger's short-term harms and benefits—especially in cases where asymmetries also exist with respect to the parameters of competition.

3.3 Balancing Across Different Consumer Groups/Markets

ITIF does not object in principle to the Draft Guidelines' recognition that "[s]ome benefits may accrue to different markets at the same time (e.g., the same innovation may benefit consumers in different geographic markets), while others may have to be split between different relevant markets (e.g., in the case of investment), which then would be compared against the harm stemming from the merger in such relevant market."[68] However, ITIF cautions against an analysis that is open to the simultaneous weighing of harms and benefits across different markets, different dimensionalities of competition, and different time periods, as this may create administrability issues. ITIF recommends that the Commission prioritize adequately capturing non-price dimensionalities of competition like innovation and, where possible, accounting for out-of-market efficiencies—as well as, when appropriate, defining broad platform markets that take into account

[65] *Id.* ¶ 341.

[66] *Id.* ¶ 343.

[67] *See, e.g.*, *id.* ¶¶ 347-49.

[68] *Id.* ¶ 353.

both sides of platform--before attempting to weigh harms and benefits across different time horizons, focusing instead on short-term harms and benefits.

PART III – MEASURES TO PROTECT LEGITIMATE INTERESTS

PART III.A – SUBSTANTIVE ASSESSMENT

ITIF greatly appreciates the Draft Guidelines' affirmation that "[t]he principle of non-discrimination forbids the application of different rules to comparable situations or the application of the same rule to different situations."[69] Unfortunately, by placing unique restrictions of the availability of gatekeepers—who are disproportionately American—from benefiting from the innovation shield—even if the market does not involve a designated core platform service (over 90 percent of which are also American)—the Draft Guidelines incorporate the DMA's discriminatory policy of targeting U.S. digital firms in a way that undermines the non-discrimination principle the Draft Guidelines rightly espouse.

PART III.B – PROCEDURAL FRAMEWORK

ITIF agrees with the Draft Guidelines that the exception to the notification and standstill obligation associated with the recognised interests is to be considered narrowly. In general, ITIF believes that merger enforcement should be centralized at the Commission, not member state, level to minimize the compliance and enforcement burdens placed on the business community.

CONCLUSION

ITIF appreciates the considerable effort that went into preparing the Draft Guidelines and the opportunity to participate in the Commission's review of its merger guidelines. While ITIF believes that the Draft Guidelines have many features that will significantly improve merger enforcement in Europe, there remain a number of areas where the Draft Guidelines can and should be substantially improved.

Very truly yours,

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[69] *Id.* ¶ 381.

[70] The author thanks Viraj Mehrotra for his assistance.