

Draft EU Merger Guidelines: Quinn Emanuel's Response to the Commission's Consultation

I. Introduction

On 30 April 2026, the European Commission ("Commission") published the latest draft Merger Guidelines for public consultation.¹ This marks the first comprehensive revision of the European Union ("EU") merger control guidelines in over two decades. The draft Merger Guidelines reflect the Commission's ambition to move towards a more dynamic enforcement model that responds to evolving market, economic, and geopolitical realities, also taking into account the Commission's decisional practice and the EU Courts' case law. Although the core analytical framework remains largely unchanged, a few seminal changes have emerged. Notably, the draft Merger Guidelines expand the Commission's toolkit through a broader set of theories of harm, as well as a newly structured framework for assessing merger-specific benefits.

We have now submitted our response to the Commission's consultation. While we broadly welcome the proposed reforms, we identify several areas where the draft Merger Guidelines could benefit from further refinement. We discuss the most significant of these below.

II. Structure

The draft Merger Guidelines consolidate the existing Horizontal² and Non-Horizontal Merger Guidelines³ into a single instrument. While certain general principles may apply to both horizontal and non-horizontal mergers, the Commission's approach presents disadvantages compared to the current framework.

First, by addressing non-horizontal mergers jointly with horizontal mergers, the draft Merger Guidelines appear to suggest that non-horizontal mergers, on average, raise concerns. This is not the case. In fact, paragraphs 11-14 of the current Non-Horizontal Merger Guidelines state unequivocally that non-

¹ Press Release, Commission opens consultation on draft of new Merger Guidelines, 30 April 2026, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_26_918.

² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C (2004) 31 ("Horizontal Merger Guidelines").

³ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ (2008) 265 ("Non-Horizontal Merger Guidelines").

horizontal mergers “are generally less likely to significantly impede effective competition than horizontal mergers” and “provide substantial scope for efficiencies”, explaining in detail the reasons for this approach. We urge the Commission to reinstate the above-referenced paragraphs of the current Non-Horizontal Merger Guidelines and to structure the analysis contained in the draft Merger Guidelines into two distinct sections: one dealing with horizontal and one dealing with non-horizontal mergers.

Second, the draft Merger Guidelines are now very lengthy, spanning nearly 100 pages, and convoluted at the expense of legal certainty and practicality. Clearly distinguishing the theories of harm and benefit arising from horizontal and non-horizontal mergers would help streamline the analysis and shorten the text.

III. The role of EU Merger Control

Overall, the introductory paragraphs of the draft Merger Guidelines establish a suitable framing for the text and constitute an improvement over previous iterations in several respects. A key strength is the distinction between pro-competitive scale and the exercise of harmful market power as the guiding analytical principle. Nevertheless, two points would benefit from further clarification.

First, the overview in paragraph 15 of scale-related benefits accurately reflects the increasing importance of scale for firms competing in global markets. In the field of security and resilience, however, the Commission does not clearly define what constitutes “excessive dependencies”, which is relevant to assessing, for instance, when mergers in the defence sector may be considered to enhance European competitiveness.

Second, the concept of “significant market power” referred to in paragraph 17 of the draft Merger Guidelines could benefit from clarification, for instance, by reference to a specific threshold of market power identified in paragraph 62. This is all the more important given that, according to the same paragraph of the draft Merger Guidelines, mergers between firms with “significant market power” may give rise to a significant impediment to effective competition (“SIEC”), even where they do not entail the loss of head-to-head competition between the merging firms within the same relevant market.

IV. Guiding Principles

1. PARAMETERS OF COMPETITION

The draft Merger Guidelines state that, in assessing mergers, the Commission will consider both price and non-price competitive parameters.⁴ Among the non-price considerations identified are output, different dimensions of quality, consumer choice, which may include media and cultural diversity, capacity, investment, innovation, privacy, sustainability, and resilience. The draft Merger Guidelines further indicate that the Commission will enjoy a margin of discretion in determining how these price and non-price factors are to be weighed in the overall competitive assessment.

The Commission’s stated intention not to focus exclusively on price parameters is welcome. However, several of the non-price parameters (e.g., cultural diversity, sustainability, and resilience), reflect broader political objectives that are the subject of ongoing debate, and the draft Merger Guidelines provide only limited guidance on how such factors will be evaluated in practice. Uncertainty also surrounds the balancing of different competitive parameters and the relative weight each will receive in the Commission’s decision-making process. This lack of clarity is particularly significant where non-

⁴ Draft Merger Guidelines, para. 20.

price considerations, many of which are inherently qualitative and difficult to measure, must be assessed against one another and against more traditional price-based effects.

2. BURDEN OF PROOF, THEORIES OF HARM AND BENEFIT

An important feature of the proposed framework is the application of an equivalent evidentiary standard to both (i) the demonstration that a merger would result in a SIEC, including the substantiation of any anticompetitive effects arising from the merger and the resulting theory of harm, and (ii) the proof of any efficiencies capable of offsetting such effects.⁵

Innovation is generally the outcome of trial and error – often even happenstance – and is thus characterised by a significant degree of uncertainty. Balancing dynamic harms against dynamic efficiencies often involves a highly speculative exercise. Consequently, there is a risk that the “*theory of benefit*” envisaged in the draft Merger Guidelines will remain purely theoretical rather than constituting a viable defence in practice.

A calibrated relaxation of the evidentiary burden on merging parties to establish that the concentration will result in measurable efficiencies would better reflect the realities of dynamic competition. One way to achieve this could be to introduce a rebuttable presumption of efficiencies in situations where mergers involve the pooling of complementary capabilities in innovation-intensive sectors, particularly given the Commission's clear statement in paragraph 10 of the draft Merger Guidelines that scale and scope are key to effective competition in such industries.

3. EVIDENCE

To a large extent, the evidence section of the draft Merger Guidelines reiterates principles that have already been established in the EU Courts’ case law. Two points, however, deserve particular attention.

First, paragraph 30 of the draft Merger Guidelines states that the Commission “*is not bound by findings made in a previous case, even where the markets concerned are similar or identical*”. While it is accepted that the Commission is not legally bound by its previous decisions, merging parties naturally look to the Commission's decisional practice as their primary point of reference. It would therefore be appropriate for the Commission to take its own precedent into account, particularly in cases involving the same relevant markets or sectors as those concerned by the notified transaction.

Second, given the Commission's discretion to prioritise certain items of evidence and to assign less weight to others, where adequately justified,⁶ it would be helpful for the final text to clarify the circumstances in which evidence may be discounted. It should also explain whether the Commission intends to attribute different weight to different categories of evidence and, if so, on what basis. This is crucial to allow for judicial review of the Commission’s decisions.

4. OVERALL ASSESSMENT OF MERGERS’ IMPACT, INCLUDING THEIR BENEFITS

The Commission’s adoption of the “*more likely than not*” standard for assessing whether a merger's impact on the competitive process may result in a SIEC is a welcome clarification.⁷ Two observations

⁵ *Id.*, paras 21 *et seq.*

⁶ *Id.*, para. 31.

⁷ *Id.*, para. 32.

follow.

First, the statement 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" would benefit from further clarification.⁸ In particular, it would be helpful to specify the relevant market in which such market power or dominance is to be assessed for the purposes of the efficiencies analysis. Market power or dominance existing prior to the transaction in a market unaffected by the concentration should not, in itself, affect the assessment of whether efficiencies are sufficient to outweigh any competitive harm resulting from the transaction.

Second, further guidance on the treatment of efficiencies during the prenotification phase would be welcome.⁹ Clarification on the general timing, including whether, and if so how, the Commission envisages market testing efficiency claims at an early stage of the prenotification process, while avoiding undue extensions of that process, would enhance predictability for notifying parties.

V. Market Power

1. STRUCTURAL INDICATORS OF MARKET POWER

Paragraphs 55 *et seq.* of the draft Merger Guidelines set out the Commission's approach to the assessment of market power in a clear and structured manner, broadly reflecting relevant case law and modern economic thinking. Paragraphs 58 and 64(c) rightly recognise that, in certain dynamic settings, a static assessment of market power may be of limited analytical value. This is consistent with the approach taken by the EU Courts, notably in the *Skype* ruling, where the General Court of the EU held that, in recent and fast-growing sectors characterised by short innovation cycles, high market shares may turn out to be ephemeral and that, "[i]n such a dynamic context, high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition which Regulation No 139/2004 seeks to prevent".¹⁰ This should be reflected consistently throughout the draft Merger Guidelines, including in paragraphs 112 and 113.

The draft Merger Guidelines introduce a detailed taxonomy of market share thresholds,¹¹ distinguishing between: (i) low (under 10%); (ii) moderate (10% to just under 25%); (iii) material (25% to just under 40%); (iv) high (40% to just under 50%); and (v) very high (50% and above). Paragraph 127 further indicates that where combined market shares fall within the "*high*" or "*very high*" categories, or where the post-merger Herfindahl-Hirschman Index ("HHI") exceeds 2,000 with a non-negligible increment, this may in practice shift the evidentiary burden towards notifying parties, effectively requiring them to rebut a presumption of a SIEC. The final Merger Guidelines should explicitly clarify that the legal burden of establishing a SIEC remains with the Commission, notwithstanding any evidentiary inferences drawn from structural indicators.

Read together with paragraph 129, the draft Merger Guidelines appear to move away from the safe harbour thresholds contained in the current Horizontal and Non-Horizontal Merger Guidelines. Under the existing framework, transactions below defined thresholds – such as market shares below 25% or post-merger HHI below 1,000 in horizontal cases,¹² and market shares below 30% in non-horizontal

⁸ *Id.*, para. 35.

⁹ *Id.*, para. 36.

¹⁰ Case T-79/12, *Cisco Systems and Messagenet v Commission*, EU:T:2013:635 ("*Skype*"), para. 69.

¹¹ Draft Merger Guidelines, para. 62.

¹² Horizontal Merger Guidelines, para. 18.

contexts¹³ – are generally considered unlikely to raise competition concerns. Reintroducing those thresholds would, in our view, increase legal certainty and reduce the likelihood that transactions with limited competitive effects are nonetheless subject to scrutiny.

In light of the above, reinstating clear safe harbour thresholds for both horizontal and non-horizontal mergers would materially enhance legal certainty and predictability. Such thresholds would assist merging parties in assessing *ex ante* whether transactions are unlikely to raise competition concerns and would be particularly valuable for foreclosure theories of harm, where clearer benchmarks can help indicate when a firm is unlikely to possess significant market power or the ability to exert meaningful competitive constraints.

2. OTHER INDICATORS OF MARKET POWER

The Commission expands the range of tools available for assessing market power and provides a detailed list of economically grounded indicators for such assessment. This is a welcome development.

However, reference to profit margins in paragraphs 55 and 70 *et seq.* of the draft Merger Guidelines as an indicator of market power merits further consideration. Profit margins are not always a reliable metric of market power, and conducting comparative profitability analyses in the context of merger control proceedings will be burdensome and impractical for undertakings and the Commission alike.

If profit margins are retained in the final version of the Merger Guidelines, additional clarification would be beneficial regarding how high margins may be appropriately interpreted and justified, accounting for sectors in which elevated margins may persist even under conditions of effective competition. This is particularly relevant in certain technology and software-as-a-service markets, where firms often exhibit high EBITDA margins due to scalable business models, very low marginal costs for serving additional users, and stable subscription-based revenue streams. These characteristics can prevail alongside the presence of multiple competitors and continuous market entry.

Similarly, in assessing barriers to entry and expansion, the term “*aggressive IP rights enforcement*”¹⁴ would benefit from further clarification. Intellectual property (“IP”) rights are property rights that warrant protection, including through enforcement before competent courts where necessary. It is unclear at what point the Commission would consider such enforcement to become “*aggressive*”. An overly restrictive interpretation could weaken the ability of innovators to enforce their IP rights against infringers, thereby diluting the value of IP and undermining incentives to innovate, both of which remain essential for Europe’s competitiveness.

VI. Anticompetitive Effects

1. LOSS OF HEAD-TO-HEAD COMPETITION

The introduction of the loss of head-to-head competition as a distinct theory of harm is one of the most significant developments in the draft Merger Guidelines.¹⁵ The emphasis on closeness of competition,¹⁶ the broader non-exhaustive guidance on the concept of an “*important competitive*

¹³ Non-Horizontal Merger Guidelines, para. 25.

¹⁴ Draft Merger Guidelines, para. 79(e).

¹⁵ *Id.*, paras 119-168.

¹⁶ *Id.*, paras 130 *et seq.*

force",¹⁷ the more targeted treatment of specific market features, including labour market assessments,¹⁸ and the introduction of a *de minimis* threshold for minority shareholdings¹⁹ are all welcome additions.

Despite these positive developments, concerns arise regarding the appropriateness of common ownership as a basis for merger assessment. In particular, the draft Merger Guidelines state that common ownership may lessen firms' incentives to compete, thereby constituting a contributing factor to a SIEC arising from a loss of head-to-head competition.²⁰ This explicit formulation warrants caution, as the theory remains largely untested in decisional practice. To date, the Commission has relied on common ownership in only two cases, and in both instances merely as contextual evidence supporting competition concerns identified on other grounds.²¹ It has never treated common ownership as a standalone theory of harm.

In addition, no consensus has ever been reached regarding the validity of such theory of harm. On the contrary, it has been the subject of substantial criticism.²²

First, critics argue that the theory fails to adequately distinguish between formal asset ownership and the realities of asset management. Although asset managers may appear as shareholders in public records, their ability to exercise voting rights is frequently constrained by client mandates, internal policies, proxy advisers, and other governance arrangements. These factors may significantly limit their ability to influence firms' competitive strategies.

Second, critics contend that the empirical evidence underpinning the common ownership theory does not sufficiently account for the considerable market heterogeneity of incentives across, and even within, fund families. Active and index funds pursue fundamentally different investment strategies and objectives,²³ while diversified funds typically hold asymmetric interests across competing firms. Consequently, individual funds may lack incentives to maximise industry-wide profits, particularly as strong competitive performance remains central to attracting investors and generating returns.

¹⁷ *Id.*, para. 140.

¹⁸ *Id.*, paras 160 et seq.

¹⁹ *Id.*, para. 165.

²⁰ *Id.*, para. 166.

²¹ Commission's decision of 27 March 2017 in Case M.7932 – Dow/DuPont, C(2017) 1946 final, paras 2337 et seq.; and Commission's decision of 29 May 2018 in Case M.8084 – Bayer/Monsanto, C(2018) 3557 final, para. 228.

²² See, e.g., D. Ginsburg and K. Klovers, "Common Sense about Common Ownership", *Concurrences Review*, n°2-2018, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169847; A. Burnside and A. Kidane, "Common ownership: an EU perspective", *Journal of Antitrust Enforcement*, 2020/8, available at <https://academic.oup.com/antitrust/article/8/3/456/5788527>; T. Lambert and M. Sykuta, "The Case for Doing Nothing about Institutional Investors' Common Ownership of Small Stakes in Competing Firms", *University of Missouri School of Law*, n°2018-21, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173787; L. Bebcuk, A. Cohen and S. Hirst, "The Agency Problems of Institutional Investors", *Journal of Economic Perspectives*, 2017/31, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982617; J. Azar, M. Schmalz and I. Tecu, "Anticompetitive Effects of Common Ownership", *Journal of Finance*, 2018/73(4), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=%202427345; and E. Elhauge, "The Causal Mechanisms of Horizontal Shareholding", *Ohio State Law Journal*, 2021/1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3370675.

²³ Index funds try to match the performance of a specific market benchmark, while active funds try to outperform their benchmark.

Diversification across industries may further create conflicting incentives, making it difficult to assume aligned interests across different asset managers.

Third, commentators question whether asset managers possess the practical ability to influence firms' competitive behaviour. They argue that coordinated voting across fund families is inherently unlikely and that key commercial decisions are generally taken by management rather than shareholders. Corporate governance frameworks and regulatory regimes further limit shareholder involvement, while specific rules, such as the UCITS Directive,²⁴ disincentivise asset managers from exercising significant influence. Empirical evidence is likewise said to provide limited support for the ability of asset managers to effectively shape management decisions through voting, engagement, or remuneration policies.

If the Commission decides to retain paragraph 166, it should clarify that market shares, concentration measures, or other competitive indicators will be adjusted not only where common ownership exists, but also where there is a clearly identifiable mechanism through which common owners both have the ability and incentive to influence managerial decision-making.. Such mechanisms could include voting rights, board appointments, shareholder engagement, executive remuneration arrangements, board interlocks, or other governance channels affecting managerial incentives.

Clarifying these transmission mechanisms would improve legal certainty and ensure that any assessment remains grounded in the economic effects of common ownership rather than in the ownership structure itself. It would also help distinguish situations where common ownership is unlikely to affect competitive incentives from those where such effects may plausibly arise.

More fundamentally, identifying a credible transmission mechanism is necessary not only to establish whether common ownership may affect competition, but also to assess the magnitude of any effect. Absent evidence on how common ownership influences managerial incentives, it remains difficult to determine whether, and to what extent, market shares, concentration measures, or other indicators should be adjusted.

2. LOSS OF INNOVATION COMPETITION

The “*innovation shield*” is a welcome addition to the draft Merger Guidelines,²⁵ as it provides greater legal certainty for acquisitions of small innovative companies while reflecting the growing evidence that such transactions are unlikely to raise competition concerns. In this respect, the draft Merger Guidelines provide that mergers involving start-up acquisitions are seldom problematic and may even enhance dynamic competition. They also stipulate that the Commission will, in principle, exclude any finding of a SIEC in certain narrow and cumulative circumstances only.

Notably, this “*innovation shield*” is effectively unavailable to “*gatekeepers*” solely on the basis of their designation under Article 2 of the Digital Markets Act (“DMA”),²⁶ and where they exceed a 40% share on a market deemed “*closely related*” to the target’s research and development (“R&D”) activities. However, the criteria for designation as “*gatekeepers*” under the DMA are distinct from, and unrelated to, the notion of “*market power*” or “*dominance*” under EU competition rules, including merger control.

²⁴ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, OJ L 302 (2009).

²⁵ Draft Merger Guidelines, paras 192 *et seq.*

²⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (“Digital Markets Act” or “DMA”).

Excluding companies that are designated as “gatekeepers” under the DMA from the innovation shield may therefore unduly restrict acquisitions through which large digital firms enter adjacent or emerging markets, potentially limiting opportunities for start-ups and weakening dynamic competition. This approach may be counterproductive, as it could reduce the ability of major platforms to enter and exert competitive pressure on incumbents in neighbouring markets.

Accordingly, the Commission should either remove the restriction in the final Merger Guidelines or, at a minimum, provide clearer guidance on the notion of “*closely related markets*” in the digital economy and introduce a more proportionate mechanism than a blanket exclusion. A more consistent with the spirit of EU merger control and the DMA approach would be, for instance, to revert to the narrower formulation contemplated in an earlier (leaked) draft of the Merger Guidelines, where the gatekeeper exception was confined to acquisitions in markets involving “*core platform services*” for which the undertaking has been designated as a “*gatekeeper*”.

VII. Benefits from mergers

One of the most significant improvements in the draft Merger Guidelines is the introduction of the efficiencies section,²⁷ which develops a “*theory of benefit*” as a formal counterpart to theories of harm and distinguishes between direct and dynamic efficiencies. These additions are highly welcome, not least the explicit recognition that demonstrated efficiencies will play a key role in the Commission’s future assessment of mergers. We offer the following observations:

First, the Commission’s stated intention to assess dynamic efficiencies is most welcome. However, this entails an inherently complex, forward-looking and often highly speculative exercise, in relation to which the Commission enjoys a broad margin of discretion rendering judicial review very difficult if not impossible in practice. For this reason, the Commission should set out a clearer standard and a detailed methodology for balancing potential harms and benefits arising from a given transaction, which would in turn allow EU Courts properly to review it.

Second, for both direct and dynamic efficiencies, the draft Merger Guidelines maintain the principle that “*the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger*”.²⁸ This narrow approach to distributional effects is, however, difficult to reconcile with the draft Merger Guidelines’ stated objective in paragraphs 7-9 and paragraph 300 of recognising broader benefits, such as innovation, sustainability, security, and resilience, which often accrue to society at large. Limiting the analysis to a narrowly defined group of affected consumers risks negating the relevance of these wider considerations.

Moreover, in many cases, the principal benefit of a merger lies in the creation of entirely new products, technologies, or even markets. An assessment centred on existing consumers may therefore overlook significant sources of value, especially in cases involving disruptive innovation where future beneficiaries cannot be clearly identified *ex ante*.

Although the draft Merger Guidelines allow, in principle, for a balancing of effects across related markets, the requirement that “*substantially all*” affected consumers be compensated sets an unduly high threshold that may be difficult to reach in practice. The final Merger Guidelines should therefore adopt a more flexible approach, allowing substantial efficiencies to be taken into account even where their benefits extend beyond the narrowly defined group of directly affected consumers.

²⁷ Draft Merger Guidelines, paras 291-357.

²⁸ *Id.*, paras 315 and 334. See also *id.*, paras 322 and 352-357.

VIII. Conclusion

Taken as a whole, the draft Merger Guidelines represent a significant modernisation of EU merger control, with a stronger focus on dynamic competition, innovation, and broader economic effects. They introduce a more structured framework for assessing both theories of harm and efficiencies, alongside a wider range of indicators of market power. However, this expansion also brings increased complexity and areas of legal uncertainty, particularly in relation to non-price parameters, evidentiary standards, and the treatment of efficiencies. It also risks prolonging merger investigations. The reduced reliance on safe harbours and greater flexibility in structural indicators may affect predictability for merging parties. Clarification on burden of proof, key concepts, and the role of precedent would improve consistency and legal certainty. Overall, the direction of reform is welcome, but further refinement is needed to ensure a balanced and workable framework.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:



Marixenia Davilla

Partner

Brussels

Marixeniadavilla@quinnemanuel.com Tel: +32 2 416 50 13



Nicolas Papageorges

Associate

Brussels

Nicolaspapageorges@quinnemanuel.com Tel: +32 2 415 50 15



Evangelia Petsa

Associate

Brussels

evangeliapetsa@quinnemanuel.com Tel: +32 2 415 50 54

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