



BRUSSELS À JOUR

The Review of the Merger Guidelines – 20 Years on

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the latest developments
from the European capital of
competition law.

Facing geopolitical turmoil and pivotal challenges from digitalisation to decarbonisation, the EC on 8 May 2025 launched its review of the Merger Guidelines. Both the 2004 Horizontal Merger Guidelines and the 2008 Non-Horizontal Merger Guidelines offer practical insights into the EC's approach to assessing the competitive impact of mergers in the single market. However, are the Merger Guidelines still up to the task? Do they even properly reflect the current state of the EC's enforcement practice after cases such as *Illumina/Grail* or *Booking/eTraveli*, to drop just a few names? Find out what is on the EC's mind.

The Winds of Change...

Currently, the EC applies 20-year-old guidelines (or does it?) to assess mergers under the EUMR, determining the fate of companies and their deals... for better or for worse. Do you remember what the world looked like when the EC passed the Horizontal Merger Guidelines? We do. 2004 was the year when Mark Zuckerberg launched thefacebook.com, the European Union expanded eastward by 10 new member states and George W. Bush was re-elected as President of the United States of America. Much has changed since in business and politics, and in merger control, too. That's why the EC, as a first step of its review process, launched a comprehensive consultation on the Merger Guidelines and issued a tender for an economic study on the dynamic effects of mergers.

The review of the Merger Guidelines, likely long overdue, was one of the tasks that EC's President Ursula van der Leyen included in her [mission letter](#) to DG COMP boss Teresa Ribera. The challenge to adapt the Guidelines to current realities can be seen also in the context of the *Draghi* report from September 2024. In his report, the former ECB chief explicitly called for "updated guidelines to make the current Merger Regulation fit for



purpose.”¹ Further, he asks for an “innovation defence”, meaning the deal-making parties’ opportunity to justify mergers by stressing its innovation-enhancing effects. As a direct answer to *Draghi*, the EC reacted by announcing the review process in its Competitiveness Compass for the EU (see our previous edition [here](#)).

To whom it may concern

As part of the consultation, the EC has issued a general questionnaire, addressed to the general public. In its more than 80 questions, the EC not only reaches out for input on the guidelines’ structure (e.g. “Is the distinction between effects of horizontal and non-horizontal mergers still relevant?”), but also seeks feedback on indicators to rely on for the purpose of assessing whether a merger is likely to impede effective competition. While reading the general questionnaire, one term stands out: “strategic sectors”. While the EC does not offer a detailed definition in its questionnaire, the term appears to include at least the clean tech, deep tech, digital, security and defence sectors. The EC wants to know whether mergers can positively or negatively impact strategic sectors, and in which cases efficiencies can outweigh harm in these very sectors. It specifically asks if and how, from the respondents’ perspective, the competition in the single market could benefit from consolidation in strategic sectors. The frequent use of the term and the reference to potential benefits associated with consolidation might indicate a minor (?) evolution in the future merger guidelines, as past guidelines did not attach any importance to such (geopolitical) topics.

The Seven Papers – A Deeper Dive

In addition to the general questionnaire, the EC has issued seven papers to consult in more detail on various specific legal and policy issues, a list of “hot topics” if you will. Each paper sets the scene for a particular issue and raises a number of specific questions. Let’s take a look.

- **Competitiveness and resilience.** Following up on the Competitiveness Compass, the first topic in focus concerns the competitiveness and resilience of the EU – two keywords that are often used together these days. The questionnaire seems to acknowledge that a modern merger control regime must be able to support start-ups, scale-ups and medium-sized companies to grow in global markets, enhancing investment and innovation whilst safeguarding a level-playing field in the single market. The reference to scale-ups could spark a renewed discussion around “European Champions”, although the EC is more likely to be interested in specific efficiencies that scaling up companies may bring to EU consumers. The reference to resilience is curious and has so far attracted much less attention in EU merger control. Resilience could obviously relate to traditional supply chain issues but also to defence readiness (in the wider sense). Interestingly, the EC’s recent [White Paper for European Defence – Readiness 2030](#), released on 12 March 2025, also mentions M&A as a mean to build a “true EU-wide Market for defence equipment” and suggests that the EUMR may allow the EC to take that aspect into account when

¹ The future of European competitiveness, Part B, 9 September 2024, p. 299 (see [here](#)).



assessing mergers. Stakeholders are asked to give feedback, how scaling up and market strength should be weighed against potential competitive harm.

- **Assessing market power using structural features and other market indicators.** The second topic notes – unsurprisingly – that market shares might not necessarily reflect the market power of a company accurately. Especially in recent and fast-growing sectors characterised by short innovation cycles, high market shares may turn out to be only a temporary phenomenon. The questionnaire suggests that, following the practice of the EC, other structural criteria have to be taken into account like capacity shares, diversion ratios, profit margins, distribution of spare capacities or a firm’s pivotality. Also, the questionnaire introduces the idea of an increased use of rebuttable presumptions for scenarios in which competition concerns are likely to arise, shifting the burden of proof to the merging parties.
- **Innovation and other dynamic elements in merger control.** This paper focusses on long-term competitiveness, investments and innovation. While it acknowledges that mergers can increase the ability of the merged firm to innovate it also notices the risk that comes with restricting innovation competition. As possible metrics the questionnaire suggests firm-level R&D expenditures, number of patents, churn rates, market share fluctuations, innovations diversion ratios or evidence of technological spillover. It also asks for feedback on how the EC can take future market developments into account. On the efficiency side, the EC’s focus on innovation and investments begs the question whether there may be increased scope for investment commitments to get deals approved, as proposed in particular for the telecoms sector in the *Draghi* report.
- **Sustainability and clean technologies.** Topic number 4 refers to the Clean Industrial Deal for competitiveness and decarbonisation in the EU, picking up *Draghi’s* suggestion that the global drive for decarbonisation offers a growth opportunity for the industry in the EU. The questionnaire highlights the importance of supporting the investment in innovative clean tech and decarbonised production processes while avoiding so-called “green killer acquisitions” and greenwashing attempts. The questionnaire asks how green incentives and efficiencies can be quantified and verified in merger control.
- **Digitalization.** The fifth topic is also in line with a key element of the *Draghi* report and the Competitive Compass: closing the productivity gap by using digitalisation as a tool. It recognizes that markets shaped by digitalisation go through transformational changes quickly and are often characterized by “winner-takes-it-most” dynamics so that it is essential to neither intervene too late nor too soon. Questions also refer to the relevance of privacy and data protection.
- **Efficiencies.** Topic number 6 invites the stakeholders to discuss across the board how merger efficiencies should be taken into account in merger control cases and puts into question the current criteria, under which merger efficiencies are considered by the EC: (i) benefit to consumers, (ii) merger-specificity and (iii) verifiability. The issue of efficiencies cuts across and is intrinsically linked to a number of the issues discussed in the other papers such as, e.g., when the EC refers to new “green” products or “out of market efficiencies”. Just how do you quantify or put a price tag on benefits that are more of a political nature, do you simply waive the strict quantification requirements for such efficiencies?



- **Public policy, security and labour market considerations.** Topic number 7 is the topic which is most likely to be described as “innovative” – or one might say politically inspired. It pursues the idea that merger control does not – or, rather, should not? – only ensure the welfare of consumers but can rather benefit wider societal goals such as fostering a competitive defence industrial ecosystem, protecting plurality of the media and securing the availability of quality jobs for Europeans. These goals are to be achieved by preventing companies from becoming “too-powerful-to-care” or “too-big-to-fail”.

FOMO – The Fear of Missing Out

While the EC’s Article 22-odyssey shows the eagerness of reviewing mergers, the review does not address the elephant in the room – the more and more increased review timeline of mergers by the EC with an extended pre-consultation phase before the parties even manage to get on the “official” clock with their case. Addressing this point would not only benefit the parties by reducing the burden but also very likely the EC staff, adjusting the workload at a (more) reasonable level. Remedies are also beyond the scope of the EC’s consultation, although the EC’s remedies policy has also evolved in recent years and there is the question whether remedies, instead of merely removing competition concerns, could play a crucial role in ensuring that the deal generates greater and sufficient efficiencies to offset any competitive harm that it might cause, particularly where those benefits might be of a broader political nature.

Too late and (still) to slow?

The 16-week consultation phase ends on 3 September 2025. Subsequently, the EC plans to summarize and publish the findings, to then organise a stakeholders’ workshop which leads up to the publication of a first, to-be-commented draft of the revised Merger Guidelines. A finalized version is not expected before late 2027. This drove eight MEPs to openly criticize the “lengthy timeline” to call instead for “a timeframe that reflects the urgency of this challenge” (see [here](#)). The EC did not yet react to this request.

More than ever, in the case of the review of the Merger Guidelines – *only time will tell*.

Until next time, yours truly.



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