DCI SUBMISSION

June, 2026

Comments on the European Commission's Draft Merger Guidelines Dynamic Competition Initiative (DCI)

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I. Introduction

We welcome the European Commission's (EC) draft merger guidelines and the opportunity to comment on them. The need for a more dynamic approach to innovation in merger control is widely recognized both by competition economists, who are critical of the conditions under which European competition authorities assess efficiencies in merger control, and by business school economists who criticize the currently limited analysis of the innovative strengths and weaknesses of merging firms and their competitors (White, 2002).[1] What is needed to improve the relevance of merger control in high-tech industries is, first, to recognize both the importance of competition on innovation and the reciprocal importance of innovation on competition. It is also necessary for merger review to embed a practical framework for examining firms' claims that their transaction will contribute to increased innovation. Merger law must also accept the idea that innovation resulting from a merger may change the competitive conditions in the market and mitigate the merger's market power effect.

Calls for a renewed approach to competition and innovation in dynamic industries have intensified as future economic welfare depends on turning technological progress into innovation. Economists Michael Katz and Howard Shelanski argued that integrating innovation into merger control requires a paradigm shift: innovation reshapes the link between pre- and post-merger markets and is itself a dimension of performance, so a merger can affect welfare through innovation independent of short-run price effects.[2] The OECD reinforced the point that causation runs both ways: competition and innovation are co-determinants of market change, so dynamic effects matter not only for the incentive to innovate but for competition over the longer run.[3]

Draghi's 2024 report made this politically urgent, arguing that Europe must raise its innovation efforts to close the growth gap with the US and China. It called for treating high-tech, winner-takes-all sectors with a more forward-looking, agile approach. The report helped drive the Commission's May 2025 reform of its Merger Guidelines, alongside DG Competition's own

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[1] Lawrence J. White, 'Business School Economics and Antitrust: What's Thought and What's Taught' (2002) 21 Journal of Public Policy & Marketing 254.

[2] Michael Katz & Howard Shelanski, 'Mergers and Innovation' (2007) 74 Antitrust Law Journal 1.

[3] OECD, *Competition and Innovation: A Theoretical Perspective* (2023).

recognition that the 2004 horizontal and 2008 non-horizontal guidelines needed updating for high-tech mergers and dynamic efficiencies.

The draft guidelines of March 2026 visibly mark the shift in the EC's thinking. Against the 2004 horizontal guidelines, "innovation" rises from 8 to 186 occurrences, "dynamic" from 4 to 114, "capabilities" from 1 to 66, and "efficiency" from 29 to 140, while "dynamic efficiency" (which was absent in 2004) now appears 40 times. The move is from static analysis toward longer-term efficiencies, and from firms' incentives toward their capabilities to compete in a dynamic environment. The competitiveness theme itself, while not new, gains even more prominence, building on the Merger Regulation's preamble that corporate reorganizations can serve dynamic competition and raise industry's competitiveness.

The draft guidelines *"aim to increase legal certainty and predictability in the Commission's enforcement of the EUMR, thereby facilitating business and investment decisions within the internal market. Such clarity on how the Commission conducts its assessment, and on how its approach to such assessment has evolved in the light of experience and of the changing global economic landscape, is important to ensure that companies are incentivized to bring forward mergers that would enhance competitiveness and growth"*. It is with this purpose in mind that we provide the following comments.

The guidelines bring at least three major changes to merger control. The first one relates to a revision of the framework laid out in the 2004 Horizontal merger regarding assessing the effects of a merger (**II**), while the others relate to the nature and scope of efficiencies to be considered (**III**) and their determinants (specifically, firm-level capabilities) (**IV**).

II. Efficiencies become central in merger assessments

In the 2004 horizontal merger guidelines, efficiencies were considered as countervailing factors after harm to competition was established. For example, Article 12 stated: *" In order to assess the foreseeable impact of a merger on the relevant markets, the Commission analyses its possible anti-competitive effects and the relevant countervailing factors such as buyer power, the extent of entry barriers and possible efficiencies put forward by the parties (...)"*.

Article 291 of the proposed 2026 merger guidelines recognizes that*: "(...) Greater clarity regarding the role of efficiencies in the merger control assessment is important to avoid chilling effects on transactions that would be beneficial for customers and the internal market"* and states that: *"demonstrated efficiencies will play a key role in the assessment of mergers going forward"*.

a) A preliminary finding of harm is no longer a condition for efficiency claims

In a clear departure from the 2004 guidelines which stated in paragraph 76 that: "*It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have*", the 2026 proposed guidelines state in paragraph 36 that : "(…) *a preliminary finding of harm is not a condition for efficiency claims to be submitted and considered. Early engagement by merging parties on efficiencies during the merger review process, including during the pre-notification stage, is* *welcome as it can foster a timely discussion of the efficiency claims and related evidence, thus enabling the Commission to properly take the theory of benefit into account*".

This paragraph may be one of the most important in the proposed guidelines. It recognizes implicitly that the method which looked at efficiencies only if it was first established that a merger restricted competition on another dimension (such as price or quantity) did not always enable the Commission to properly assess the benefits of the merger because the claims of benefits by the merging parties were often perceived by the Commission to be little more than speculative afterthoughts to try to save an anticompetitive merger rather than being central for merger decisions. This paragraph encourages the merging parties to think ahead, before the notification of their mergers, about the possible efficiencies (both static and dynamic, as we shall see) such mergers would bring about.

b) The EC will consider both the theory of harm and the theory of benefits to assess SIEC concerns

The Commission also proposes to consider both a theory of harm (put forth by the Commission) and a theory of benefits (put forth by the merging parties) to assess whether the merger gives rise to a "significant impediment to effective competition".

Article 25 explains what a theory of benefit is. It states: "*A theory of benefit sets out how specific merger efficiencies occur and maintain or enhance effective competition, to the benefit of consumers. That is, it explains how the merger may lead to the merging firms profitably decreasing prices; increasing output, innovation, choice or quality; or positively influencing other relevant parameters of competition, such as investment intensity underpinning stronger competitive behaviour across multiple products or geographies, thereby offsetting, on a lasting basis, the harm to consumers brought about by the merger*".

Unlike what was the case under the 2004 EC horizontal merger guidelines, in which considering the theory of harm was sufficient to establish whether a merger was restrictive of competition, the theory of harm and the theory of benefits will have to be examined simultaneously by the Commission to assess whether the merger is likely to be anticompetitive. Paragraph 339 states that: "*In 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. Where the demonstrated efficiencies result in benefits that, on a lasting basis, at least offset the identified harm to competition brought by the merger, the merger will be deemed compatible with the internal market."*

In making this assessment, the Commission must consider all the facts and evidence, including those introduced by the parties to the merger. Indeed, paragraph 32 states : *"On the basis of an overall assessment of the facts and evidence, including facts and evidence provided by the parties regarding any claimed efficiencies, the Commission concludes whether a merger's impact on the competitive process is 'more likely than not' to result in a SIEC."*

Furthermore, the text mandates that the evidence supporting both the theory of harm and the theory of benefits must be evaluated under the same standard. Paragraph 26 states that: *"The Commission assesses carefully and impartially all relevant aspects of the case; examining both* *evidence that indicates, and counters, possible anticompetitive effects. The Commission supports its conclusions with a sufficiently cogent and consistent body of evidence. The merging parties are subject to the same evidentiary standard when establishing the facts in support of their claimed efficiencies, which the Commission also assesses based on the claims put forward by merging parties"* and paragraph 27 states that the standard of appreciation of the evidence must be the same for the theory of harm and the theory of benefit*: "the Commission exercises its margin of discretion according to the same principles as regards the assessment of evidence underlying both a theory of harm and a theory of benefit. The Commission's assessment must be based on evidence that is factually accurate, reliable, consistent and capable of substantiating the conclusions drawn from it".*

Thus, the Commission to a large extent addresses the criticism levied against its practice under the 2004 (and 2008) merger guidelines concerning that efficiencies were treated as offsets to an already-formed theory of harm, rather than shaping the assessment from the start.

c) Questions remaining with respect to proving SIEC and efficiencies

The picture is less clear on the standard of proof. In particular, the draft guidelines may give rise to interpretations that the standard of proof to establish SIEC is more lenient than that for efficiencies.

As we saw, the Commission goes to great length in the draft guidelines to reassure the merging firms that the standard for the assessment of evidence and the standard of proof will be the same for effects restrictive of competition and for efficiencies.

However, the conditions of admissibility for efficiencies to be considered as offsets of impediment to competition are still stricter than the conditions which have to be met for finding that a merger restricts competition.

As an example, paragraph 294 of the proposed guidelines, which mirrors a similar provision in the 2004 horizontal merger guidelines[4], states that: "*to be taken into account in the assessment of the merger, (static and dynamic efficiencies) should fulfil three cumulative conditions: be (i) verifiable; (ii) merger specific; and (iii) benefit consumers*".

With respect to the verifiability condition of the efficiencies, the proposed merger guidelines indicate in paragraphs 307:

"*To verify whether direct efficiencies are substantial enough to counteract a merger's adverse effects on competition, merger synergies and the resulting direct efficiencies should be quantified, where reasonably possible. Where a quantitative analysis of efficiencies is produced, this analysis must provide a reasonable estimate of the size of the efficiencies and rely on a methodology that is sufficiently robust to be verified by the Commission".*

[4] Article 78 of the 2004 horizontal guidelines states: "For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative".

Relatedly, under paragraph 308, the guidelines note: "*Where exact quantification is not possible, the merging parties have to detail the nature of the efficiencies and establish the magnitude of the expected efficiencies showing how they would counteract a merger's adverse effects on competition. This is particularly applicable to merger synergies that are not related to cost savings such as voluntary technology transfer*".

Thus, efficiencies have to be quantified, or their magnitude has to be measured in order for them to be counted against a merger's adverse effect.

However, the burden of proof on the Commission to demonstrate a merger's adverse effect on competition is much lighter and can place the parties in a no-win situation, irrespective of the importance of the anticipated efficiencies, as can be seen by referring to paragraphs 22 and 24 of the proposed guidelines:

Paragraph 22 states: "*The Commission bears the burden of demonstrating any anticompetitive effects arising from the merger, i.e. if the 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*".

Article 24 states "*The merging parties bear the burden of demonstrating any alleged efficiencies stemming from the merger that could counteract its anticompetitive effects*".

In addition, article 20 states: "*In its assessment (...) The Commission enjoys a margin of discretion in weighing such price and non-price parameters of competition in the balancing exercise in order to establish an overall assessment of the merger's effects on businesses and consumers*".

Thus, the Commission does not have to demonstrate the existence of a consumer harm in each specific case and benefits from a margin of discretion in weighing the alleged price and non-price negative effects of a merger being assessed. It may be in a position to consider that the efficiency claims of the parties to a merger should be rejected as insufficient to balance the anticompetitive effects without an explicit justification.

This approach is problematic in itself, but may be the cause of greater concern if the Commission rests its conclusion that the merger leads to a restriction of competition in innovation on a dubious presumption. The draft merger guidelines repeatedly refer to one such dubious presumption. It states at paragraph 175: " (…) *A merger may result in a SIEC either if it significantly (i) impedes the innovation competition process by eliminating competition between the merging firms (...)* "

In paragraph 177, the proposed merger guidelines state: "(…) *the closer the merging firms' innovation projects and capabilities and the larger the expected market position and margins, the weaker the merged entity's incentive will be to innovate post-merger because doing so would cannibalise the other merging party's profitable sales* (…)".

In paragraph 180, the proposed merger guidelines state: "*A merger giving rise to overlaps between R&D projects or between R&D projects and existing products may lead to a SIEC if it significantly alters innovation competition or future product market competition processes.*

This may result from the discontinuation, delay or redirection of one or both of the R&D projects or existing products (…)".

They also state in paragraph 186: "*A merger between firms that have overlapping innovation capabilities or R&D organisations may lead to a SIEC if eliminating such a rival significantly impedes early-stage innovation competition processes (…). By reducing the dynamic competitive process between the merging firms as well as by reducing the pressure to innovate on the few remaining competitors with similar innovation capabilities or R&D organisations, the merger may ultimately significantly alter the competitive process in future product markets by reducing the likelihood that consumers will benefit from new or improved products and processes (…)*".

Those paragraphs clearly seem inspired by the reasoning of the Commission in the Dow/Dupont merger decision.[5] Indeed, in that decision, the Commission had stated:

> "(40) A merger between two out of a limited number of innovators is likely to reduce competition in innovation, and thus limit the overall rate of innovation. This conclusion is supported by a number of articles (…);
>
> (41) The intuition for this proposition relies on the standard logic of unilateral effects. (…) when competing against other firms for the introduction of new products, each firm imposes a "negative externality" on its competitors. If it is successful in introducing a new product, the innovator will capture profitable sales from its rivals. A merger between two potential innovators internalises the negative innovation externality. In other words, from the perspective of each innovator, the lost expected profits on the products of the other merging firm become an opportunity cost of innovating. Following a merger the opportunity cost—that was not present before—leads to lower incentives to innovate for each of the two firms (absent merger-specific efficiencies).
>
> (45) In some economic models of oligopoly, less innovation by the merged entity may lead to a reaction by non-merging parties in the form of higher innovation effort (in the absence of capacity constraints). Even if this potential offsetting effect is present, it is however typically of lower magnitude than the first-round reduction of innovation effort by the merging parties in a concentrated market, thus leading to lower overall innovation".

This analysis, however, is at best incomplete and possibly misleading. Indeed, as the economic controversy following the EC Dow/Dupont merger has shown[6], and as confirmed by the Japanese contribution to the OECD Competition Committee debate on the role of innovation in enforcement cases[7], the merging parties having overlapping R&D projects and eliminating an R&D project post-merger is neither a necessary nor a sufficient condition to establish harm to competition or innovation.

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[5] Case COMP/M.7932 *Dow/Dupont* [2017].

[6] Vincenzo Denicolo & Michele Polo, 'The Innovation Theory of Harm: An Appraisal' (2019) 82 Antitrust Law Journal 921.

[7] OECD, *The Role of Innovation in Enforcement Case – Note by Japan* (2023).

When two competing firms with overlapping R&D projects merge, the transaction is likely to engender a number of effects on the incentive of both the merging parties and of their competitors, some of which will lead to a decrease in competition on innovation and some of which will lead to an increase in competition on innovation.

As Vincenzo Denicolò and Michele Polo state: "*There do exist mechanisms whereby mergers reduce innovation, but there are also others by which mergers spur innovation. Both types of mechanisms are sound, robust and empirically relevant, not simply theoretical curiosities. In particular, (...) we have focused on two mechanisms that may generate a positive impact of mergers on innovation, the coordination of R&D projects and the sharing of new technological knowledge. But other positive mechanisms also exist. The question whether mergers are more likely to stifle or spur innovation is, therefore, ultimately an empirical one. Unfortunately, the available empirical evidence does not seem to be conclusive either. When all is said and done, the question can be attacked only on a case-by-case basis, building on the facts of each specific case*".

Along the same line of reasoning, Bruno Jullien and Yacine Lefouillihave studied various possible effects of the merger of two competitors with competing lines of R&D such as the innovation diversion effect, the demand expansion effect, the margin expansion effect, the spillover effect and they have argued that there is no justification to the claim that a merger between two out of a limited number of innovators is likely to lead to a reduction of innovation in a market characterized by limited knowledge spillovers and in the absence of other possible countervailing efficiencies.[8]

Building on these reflections, an economic study group convened by the Japanese Fair Trade Commission[9] has systematically mapped all the potential effects of a merger on the incentives of the merging parties and on those of their competitors to innovate following a merger by two innovating firms. These effects go in different directions and the report suggests that: " Given (the) characteristics of R&D competition, for appropriate assessment of impacts on innovation, it is increasingly more important to take into consideration not only quantitative variables such as the number and market share of each competitor but also the quality aspects of respective factors constituting R&D competition, for example, in the following points.

• The level of R&D capabilities of competitors (whether they are powerful and capable innovators)

• The mode of R&D, such as whether the results of R&D are at an uncertain stage

• Technical characteristics such as whether the technology is basic and versatile."

It thus seems that, unlike some competition authorities, the Commission has not fully integrated the evolution of economic developments regarding the effect of mergers between innovators on

[8] Bruno Jullien & Yassine Lefouili, 'Horizontal Mergers and Innovation' (2018) 14 Journal of Competition Law & Economics 364.

[9] OECD (n 7).

innovation, with the risk that it will use, in its theories of harm, presumptions that are not supported by the most recent economic analysis.

III. A more holistic and long-term approach to the assessment of mergers

a) Scope of efficiencies

The guidelines' second novelty is a shift toward a more holistic and long-term perspective with respect to competition and efficiencies than in the 2004 horizontal guidelines. This shift manifests itself in three ways: first, the definition of the dimensions of competition in the proposed guidelines is much wider than in the 2004 horizontal guidelines; second, the concept of efficiencies is much more detailed in the 2026 guidelines, with numerous developments on the importance of long term efficiencies and innovation; third, the time horizon for the analysis of the effects of mergers is more flexible in the 2026 proposed merger guidelines than it was in the 2004 horizontal guidelines.

The 2004 horizontal merger guidelines were biased toward counting only as relevant efficiencies those that reduced the marginal cost of production or distribution and thus offset the possible anticompetitive effect of mergers on price or quantity.

It is true that paragraph 77 of the 2004 guidelines stated that: *"The Commission considers any substantiated efficiency claim in the overall assessment of the merger*" and Article 81 of the same guidelines acknowledged the possibility of efficiencies through innovation in stating that *" Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation (...)".*

But paragraph 80 of the same guidelines stated: "*Mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. For example, cost savings in production or distribution may give the merged entity the ability and incentive to charge lower prices following the merger. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers. Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers*".

As already mentioned, the 2026 proposed merger guidelines enlarge the scope of the non-price dimension of competition and of the efficiencies which can be assessed against reductions in competition.

For example, they state in paragraph 20: "*In its assessment, the Commission identifies the business models of different market participants and the key price and non-price parameters on which they compete, and examines how the merger affects such parameters negatively or positively. Non-price competition can encompass a variety of parameters to the extent they are relevant for the competitive process in the markets at hand, including output and quality in various aspects, also covering choice (which may include media and cultural diversity),* *capacity, investment, innovation, privacy, sustainability, resilience (including security of supply). A merger can have an impact on one or multiple parameters of competition, and that impact is subject to an overall assessment"*.

Three comments are relevant.

First, the inclusion of investment in the list of dimensions on which firms compete is confusing since investment is a means to compete rather than a dimension of competition. In other words, whereas consumers can be expected to consider that price, quality, sustainability, resilience, or the protection of privacy are positive attributes of the goods and services which they will consider when choosing one supplier over the others, it does not make sense to think that the importance of the firms' investments is a determinant of consumers' choice of a supplier over another.

Second, considering "investment" as a dimension of competition may generate perverse outcomes. If "investment" is a dimension of competition, the agency would presumably want mergers to lead to more investment (by, for example, protecting competition between investing firms). However, as investment is an input to (or driver of) competition, more investment is not automatically a good thing. A firm may spend significant amounts of money for projects, but if its investment processes are inefficient, then this outcome is good neither for consumers nor for society.

Third, the efficiencies associated with the new dimensions of competition mentioned by the proposed 2026 EC merger guidelines are different from traditional production or distribution efficiencies because they have the character of a public good, to the extent that they benefit society as a whole rather than only the parties exchanging the goods or services in question on a market. A merger that would allow productive efficiencies would decrease the cost of production of the good produced, which could benefit either the suppliers or the consumers of the good (or both) but would not directly affect the consumers of other goods and services. An increase in the environmental quality of the production of a good will benefit not only the consumers of the good but, to the same extent, also consumers of other goods or services who are subject to the same environment. Similarly, an innovation, because it implies an increase the stock of knowledge of society, benefits not only the producers and consumers of the good in question but all of society.

However, the Commission's 2026 proposed merger guidelines states for all efficiencies:

"*354. Harm arising in one geographic or product market or one side of a multi-sided product market cannot be balanced against and compensated by benefits accruing in another unrelated geographic or product market or side of the multi-sided market*."

The rule according to which a merger which will result in a SIEC but will increase productive efficiency should be allowed only if the efficiency gains passed on to the consumers of the relevant good or service offset the loss of consumer surplus that they suffer due to the restriction in competition ensures that neither the consumers of the relevant good or service (potentially affected by the loss of consumer surplus due to the anticompetitive nature of the merger) nor other consumers (unaffected) will be worse off than if those efficiency benefits had not occurred. The rule ensures that only the efficiency benefits that have a net positive effect for suppliers and consumers will be implemented.

But applying the same rule, while discounting the off-market benefits of a cleaner production process or of an innovation for non-consumers of the relevant product or service, inevitably leads to the fact that some innovations or some measures for a cleaner environment which would have a high social benefit will not be implemented. In such cases, protecting consumer welfare on the markets on which the suppliers are present will not be conducive to a socially optimal level of protection of the environment or of innovation.

Contrary to an often-repeated claim, the refusal to take into consideration the out-of-market efficiencies in competition law cannot be justified by the desire to avoid having to make interpersonal comparisons of utility between consumers on different markets. Indeed, this stand implicitly assumes that the consumer surplus decrease associated with the increase in the negative externality or the increase in consumer surplus associated with the increase in the positive externality for consumers on markets other than the market affected by the restriction to competition due to the merger is not worth taking into account (i.e., is equal to 0).

However, the Commission's 2026 proposed merger guidelines~~,~~ accept that the principle just discussed might not apply in some cases. It states:

"*355. However, where two markets are related, benefits achieved on separate markets (or sides of a multi-sided market) can be taken into account provided that the group of consumers negatively affected by the merger and benefiting from the efficiencies are substantially the same. That is when there is a substantial overlap between both groups of consumers. These are referred to as 'out-of-market' benefits".*

The implementation of this last rule, proposed by the European Commission, is not without difficulties with respect to the definition of what markets are considered "related markets". In another part of the Guidelines (on "entrenchment"), the Commission seems to define a similar concept. Accordingly, markets are "related" if they have a "plausible connection" (para. 255). It is unclear if the same definition applies here, and a clarification could be useful.

In the hypothetical case of a merger between two pharmaceutical companies with complementary technologies aiming to develop a new vaccine to stop an epidemic (for example, Covid) for which neither of the merging firms has a medicine, blocking the merger because of localised market power harms, while ignoring the consumer welfare gain of the consumers who, although they will not be vaccinated, will never contract the disease because the epidemic will be stopped thanks to the vaccine runs against common sense and would in all likelihood result in a sub-optimal production of innovation in the health sector.

Similarly, blocking a merger between two firms having complementary technologies and likely to rapidly develop safer planes than the existing ones by combining their technologies (as was the case in the General Electric/Honeywell merger), without regard for the consumer surplus increase of the air travelers associated with the increased safety of air travel because they are only indirect beneficiaries of the technology and not its direct buyers, would not make sense (and, in the specific case of the General Electric/Honeywell blocked merger, resulted in delaying the innovation by a decade and by imposing a significant cost for the air travelers). This raises the question of whether vertically related markets (such as the market for airplanes and the market for air travel) should be considered related) .

Finally, disruptive innovations generally eliminate or bypass a traditional market by promoting an entirely new service based on a different business model which makes the supply of the original service less valuable than it previously was. Typically, disruptive innovations create new markets rather than duplicating what is being produced on traditional markets. This raises the question of how the rule should be applied in this case. Would a merger aiming to innovate disruptively ever be in a position to argue that the restriction to competition it implies is compensated by efficiency benefits (given that these benefits would be on a different and emerging market) ?

This question is all the more important that the proposed 2026 merger guidelines indicate in paragraph 34*: "Demonstrated efficiency claims may refer to efficiencies in the form of sustainability or resilience benefits, innovations with a potential to disrupt or transform markets, or to the generation of scale effects that will reduce unit costs or facilitate the financing of necessary investments. If realised, such efficiencies may increase the competitiveness of European industry and deliver significant consumer benefits within the meaning of Article 2(1)(b) EUMR"*

b) Dynamic effects or a longer time frame for the analysis?

With respect to the time frame of the analysis, article 83 of the 2004 horizontal guidelines clearly established that innovation efficiencies were likely to be given a lower weight in the analysis than cost reductions, which could be implemented more rapidly. Indeed, it stated that: *" In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely".*

In its theory of harm discussion, the Commission indicates in paragraph 114 of the proposed merger guidelines: *"In its assessment of the anticompetitive effects of a merger, the Commission undertakes a holistic assessment. A merger may result in both direct and dynamic effects and there may be links between these two types of effects"* and paragraph 115 adds: *"Some anticompetitive effects and the underlying theories of harm are more focused on the direct effects of the merger, such as the loss of head-to-head competition between merging firms active in the same relevant market, while others are more focused on the dynamic effects of the merger, such as the loss of investment, expansion and innovation competition. The analysis of the effects of a merger is however undertaken in a continuum whereby anticompetitive effects based on a theory of harm that is focused on the merger's direct effects may feature elements related to dynamic effects and vice-versa".*

With regard to the assessment of the efficiency benefits of mergers, the Commission distinguishes direct effects and "dynamic" effects. According to article 295: *"Direct efficiencies result directly from the integration or combination of merging firms' assets and businesses. They are the most common type of efficiencies, typically deriving 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."*

"Dynamic" efficiencies are defined in article 296 of the guidelines: *"Dynamic efficiencies confer the ability or increase the incentives to invest or innovate into new or improved products or services, improved distribution or the efficiencies which can be counted as offsetting the reduction in competition associated with the merger"*.

There seems to be a confusion in the proposed guidelines between dynamic efficiencies and efficiencies which manifests themselves in the longer term. But it also appears clear that when it comes to assessing the positive effects of a merger, the Commission is willing to consider the longer term efficiency effects.

The proposed guidelines suggest in paragraph 297 that: *"Both direct and dynamic efficiencies should preserve or enhance competition and positively affect parameters of competition such as price, output and quality in various forms, including choice, innovation, investment, resilience or sustainability, on a lasting basis, thereby contributing to technological and economic progress. Their effects must be sufficient to durably counteract, that is, with an equivalent degree of likelihood over time, the negative effects on competition and, in particular, the potential harm to consumers, that a merger might otherwise have"*.

With respect to the verifiability of claimed efficiency benefits from the merger, the Commission states in paragraph 306 of the proposed 20926 guidelines:*"Direct efficiencies are timely if the synergies and the resulting consumer benefits in principle occur without delay. However, the time horizon may be longer if that is consistent with the characteristics and dynamics of the market and the theory of harm. However, a longer time frame for benefits to materialise may make them less predictable and quantifiable"*.

As regards dynamic efficiencies, the Commission states in paragraph 328: *"(...) The sooner investment or innovation is expected to materialise after closing, the more likely that investment or innovation is considered timely. The benefits to consumers from dynamic efficiencies may materialise in a longer time horizon as long as it is possible to verify that they will be substantial enough to counteract the merger's anticompetitive effects. The appropriate time horizon will also depend on the characteristics and dynamics of the market and the theory of harm. However, in the same way as for a theory of harm, a longer time frame for benefits to materialise may make them less predictable and quantifiable"*.

Overall, whereas the analysis of the effects of a merger by the Commission in the 2004 horizontal merger guidelines was principally focused on short-term analysis, the 2026 Proposed Merger Guidelines, which integrate the effects of mergers on innovation, take a longer-term perspective.

A similar shift in perspective is also noticeable with respect to other dimensions of the analysis of mergers.

The 2004 EC horizontal merger guidelines, paragraph 9 stated *: "In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger"*.

In contrast, the proposed 2026 merger guidelines state in paragraph 40: *"The Commission takes into account future events or market evolutions unrelated to the merger that can be predicted with a sufficient degree of certainty based on available evidence. This may be the case, for instance, with sufficiently certain plans of entry, expansion, or exit of firms in or from the market, which can be expected to take place independently of the merger, technological changes, changes of customer behaviour and demand, declining markets, legal and regulatory changes, upcoming products or services and future capabilities, or similar future evolutions*".

This does not mean that in the past the Commission did not take into consideration predictable future events or market evolutions, but the inclusion of paragraph 40 in the 2026 proposed guidelines underscores the more forward-looking perspective that the Commission proposes to follow in the future.

This new perspective is reiterated in the proposed guidelines for a number of elements relevant to the analysis of mergers.

For example, with respect to market shares, paragraph 64 states : *"Market shares – especially those based on the previous year – may not fully reflect a firm's market power. This may be the case, for instance, in the following circumstances:*

(…)

b) Where a firm's dynamic capabilities are not reflected in its static capabilities: A firm may be an 'important competitive force' having more influence on the competitive process than its market share or similar measures would suggest or have a particular 'dynamic competitive potential'. The Commission may assess the competitive relevance of an 'important competitive force', including its market power, using evidence other than market shares (e.g., perceptions of its competitive strength in internal documents or in replies to market investigation questionnaires, or diversion ratios).

c) In highly dynamic or volatile markets, where market shares can change frequently and significantly over time, market shares may provide a less reliable indicator of current and future market power: This includes, for instance, markets that are nascent, fast-growing or characterised by short innovation cycles. The same might be true in volatile markets, where entry, expansion or exit of suppliers occurs often, or those undergoing important structural transitions (e.g., regulatory or technological changes).

In such markets, in addition to considering metrics other than market shares, the Commission may find it useful to (i) assess several years of historic market share data to identify underlying trends, (ii) adjust current market shares to reflect reasonably certain future changes (e.g., exit, entry, or expansion) or (iii) consider future market share estimates (reflecting expected changes such as from firms' internal projections)".

The same approach applies to the assessment of the economic power of firms in dynamic markets. In the 2026 proposed guidelines the Commission states : "*70.Profit margins (the difference between prices and costs) are typically higher in markets where firms have market power. They are therefore indicative of the degree to which merging firms hold market power. On the other hand, high margins may be less likely to indicate market power if they are* *temporary, including where they reflect the outcome of research, innovation and risk-taking, in markets characterised by a fast pace of innovation".*

With respect to entry, the 2004 EC horizontal merger guidelines indicated: "*74.The Commission examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants (100). However, entry is normally only considered timely if it occurs within two years".*

The 2026 proposed guidelines indicate in paragraph 96: *"The Commission examines whether entry or expansion would be sufficiently swift and sustained to countervail the increase in market power otherwise resulting from the merger. Entry or expansion are normally considered timely if they occur within two years. However, what constitutes an appropriate period depends on the characteristics and dynamics of the market, the theory of harm considered, as well as the capabilities of future entrants. Therefore, the Commission remains open to consider longer time periods where appropriate in specific cases".*

The same flexibility with respect to the time dimension applies to the analysis of the competitor's potential to constrain the merging firms. Paragraph 203 of the proposed guidelines states: *"The relevant time period for the potential competitor's potential to significantly constrain the incumbent firm depends on the specific circumstances and market characteristics of each case, including innovation and development cycles"* and paragraph 206 states: *"The Commission assesses the potential entrant's ability and incentive to enter as well as its potential to significantly constrain the incumbent in the future based on what can be predicted with a reasonable degree of certainty based on available evidence. The appropriate time period for the relevant foreseeable future depends on the characteristics and dynamics of the market".*

Analyzing the incentives of the merging firms to foreclose, the Commission again suggests that a longer time perspective may be appropriate by stating in paragraph 239 of the proposed guidelines: *"The merged entity may have an incentive to engage in foreclosure not to capture immediate gains but to strengthen, entrench or extend its market power over time. (...) Such dynamic foreclosure incentives may be material even where an assessment based on current diversion ratios, departure rates, and margins would not identify a profitable foreclosure strategy".*

Altogether, if the Commission remains cautious and reiterates that efficiency benefits which might materialize in the distant future may be accorded les weight than immediate effects, the 2026 proposed guidelines offer a clear contrast with the 2004 horizontal guidelines by emphasizing that a number of elements of the competition analysis of a merger must be conducted in a time perspective which is adjusted to the dynamics of the sector.

IV. Capabilities as a determinant of firm's innovation

The third major change introduced by the 2026 draft Merger Guidelines is the consideration of capabilities as a determinant of a firm's innovation potential. As previously mentioned, the word capabilities, which appeared only once in the 2004 Horizontal guidelines, appears 68 times in the 2026 proposed guidelines.

This is more than a mere stylistic change. The Commission makes clear that to assess what it calls the "dynamic competitive potential" of the merging firms in the relevant innovation space and of its actual or potential competitors, it is necessary to look beyond the question of how the incentives of the market players will be affected by the merger and ask whether the merged firms and/or their competitors/potential entrants have the capabilities to innovate. From this standpoint, the Commission echoes the claim made by a number of business school economists and innovation economists that it is not enough to look only at incentives to anticipate whether a merger could lead to innovation. Capabilities also matter.

While greater attention to firm-level capabilities is an important – and long overdue – development, we wish to draw attention to several issues with its current incorporation into the guidelines. To set out our comments, we first recite the definition of "innovation capabilities" given in footnote 265:" *For the purpose of this section, references to innovation capabilities include both innovation capabilities stricto sensu and innovation resources. Innovation capabilities stricto sensu are assets such as know-how, intellectual property rights, and specialised technologies. Innovation (or R&D) resources are assets such as general-purpose technologies, specialised laboratories, pools of skilled workers, natural resources and infrastructure that are fundamental to develop new products and processes in the industry".*

To begin with, this definition is likely to create interpretive problems. As noted, the guidelines define "innovation capabilities" solely "for the purposes of this section". First, it is unclear why the definition only applies to a particular portion of the guidelines. Considering that "innovation capabilities" appears throughout the text (*e.g.,* on efficiencies or countervailing factors), it would be beneficial to explicitly extend the definition to the entirety of the guidelines, or better explain why it applies solely to competitive assessment. The second point is related. The guidelines state that the definition is "solely for the purposes of this section". But it is unclear what "section" means – does it refer to "loss of general innovation competition", "loss of innovation competition", or "dynamic effects"?

Moving onto the substance, we note that the given definition is much more restrictive than the definition of capabilities given by the specialists of innovation in the OECD Oslo Manual ([10]). Indeed, the latter document, the relevant capabilities of firms for innovation are defined as follows: *"Business capabilities include the knowledge, competencies and resources that a firm accumulates over time and draws upon in the pursuit of its objectives. (…) Business capabilities of relevance to innovation include management capabilities, workforce skills, and technological capabilities. The discussion of technological capabilities covers technical expertise, design capabilities and digital competences".*

The draft 2026 merger guidelines' definition of capabilities distinguishes between innovation capabilities (stricto sensu) and innovation resources, but it makes clear that it defines innovation capabilities as one set of assets (such as intellectual property rights) and innovation resources as another set of assets (such as the pool of skilled workers). It omits entirely from its analysis the management capabilities necessary for innovation mentioned in the OECD Oslo Manual

[10] OECD, *The Oslo Manual: Measurement of Scientific, Technological and Innovation Activities* (2018).

definition and described in the business and management literature.[11] On this point, it is worth mentioning that the OECD Oslo Manual states not only the crucial elements of the management capabilities necessary for innovation but also how such capabilities can be assessed–when it states:

"5.43. A major innovation management capability is to stimulate, collect and evaluate novel ideas produced within the firm. Data collection can identify the use or importance of the following methods:

• knowledge management systems

• idea management platforms

• employee suggestion schemes

• financial and non-financial incentives (awards, promotion) for employees to propose innovative ideas

• delegating decision-making to innovation project managers and innovation staff

• involving employee representatives in innovation decisions

• actions to identify, promote and motivate key individuals and groups to drive innovation.

5.44. The organisation of innovation activities within the firm includes the development or modification of an innovation strategy, the establishment or reorganisation of units within a firm with a responsibility for innovation (for example a research and experimental development [R&D] department or a design lab), and human resource practices to encourage innovation throughout the firm.

5.45. Innovation management requires assigning responsibility for innovation within the firm. Respondents can be asked if responsibility is assigned to a separate department, to specific individuals (innovation managers), distributed across multiple business functions, or combined with general management. Innovation activities can be organised within clearly defined projects (see subsection 4.5.2) to achieve a particular objective, or organised as non-structured processes. Firms can use more than one method to assign responsibility or organise their innovation activities".

The narrow definition of capabilities used by the Commission, which is centered on assets of the firms rather than on their business capabilities, may be the reason it considers, in paragraph 79 of the 2026 proposed merger guidelines, that *"superior innovation capabilities that are difficult to replicate"* may constitute a barrier to entry and expansion. However, to the extent that these assets have been accumulated by the firm because of superior management capabilities, the Commission's qualification of these "superior capabilities" as a potential barrier to entry comes down to considering that the (good) performance of a firm and its efficiency (static or dynamic) constitute a structural barrier to entry in the market.

[11] Selcukhan Unekbas, 'The EU Draft Merger Guidelines' Treatment of Capabilities Needs Revisiting' (*ProMarket,* 5 June 2026).

The risk then exists that the Commission may be tempted to oppose mergers between firms that have shown they have superior innovation capabilities, on the basis of the fact that reinforcing their innovation capacities could increase the barriers to entry on the market and weaken the competition from less capable firms. Such an outcome would set us back to the early 2000s, at a time when the EU Commission was more concerned about the welfare of relatively less efficient competitors than the welfare of consumers. More broadly, the resource-based view of the firm (on which the capabilities literature builds) makes a central point that firms wanting to gain competitive advantage should control things that are "non-replicable" (Barney, 1991). From that perspective, taking aim at superior capabilities just because they are difficult to replicate looks like the "efficiency offense" dressed in new clothing.

V. Conclusion

The approach to efficiencies and innovation proposed in the merger control guidelines circulated in March 2026 is clearly an improvement over that of the 2004 guidelines for four main reasons. First, it bases the overall judgment of a merger on the simultaneous consideration of the theory of harm and the theory of benefit. Second, it recognizes that competition can be multidimensional. Besides competition on price, innovation, resilience, or environmental impact can also be important dimensions of competition, and the Guidelines suggest that to assess the impact of a merger, its effects on all relevant dimensions of competition should be considered. Third, it recognizes that the time frame of the competition analysis of mergers should be adapted to the dynamics of the relevant market. Finally, it acknowledges that the capabilities of the merging firms and their competitors to innovate are relevant dimensions to be considered when assessing the potential effects of a merger.

One may regret that the Commission largely bases its proposals on the experience acquired through the past case load rather than on the analytical developments which have, in recent years, enriched our understanding of the determinants of innovation, and that the approach proposed by the Commission is not truly dynamic not only because it does not integrate the potential effect of innovation on market structures, but also because the resource focused definition of the capabilities to be considered as a determinant of mergers does not appear to include managerial capabilities which are crucially important, as shown in the work of OECD on innovation and by strategic management literature and also as the proposed guidelines introduce some confusion by suggesting that firms compete on investment and that the superior innovation capabilities of merging firms could be a competitive concern.

Nevertheless, the proposed guidelines suggest that the merging parties will have the possibility of benefiting from a more in-depth evaluation of their claims that mergers could lead to efficiencies and innovation.

Given the margin of discretion of the Commission in balancing the possible advantages and costs of mergers, the extent to which it will, in practice, be open to efficiency and innovation claims remains to be seen and it appears possible that, just as occurred over the past twenty two years when the Commission never accepted a merger on the basis of an efficiency defence, it may never, in the future, consider that the likely long term benefits of a merger in terms of innovation or efficiencies will be sufficient to offset the restriction to competition implied by the merger.

However, this appears unlikely, not because the Commission might lower its standards, but because the quality of the notification of mergers with respect to efficiency and innovation claims is likely to increase significantly if the merging parties feel that their arguments will receive a fair hearing.