#legal spotlight

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The new draft EU Merger Guidelines – Reform process, substance and key take aways for dealmakers

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Reform in the making

- EU Merger Regulation ("EUMR") forms the legal basis for the assessment of concentrations.
- 2004 EU Horizontal and 2008 EU Non-horizontal Merger Guidelines ("Guidelines") set out analytical framework for EU Commission's ("Commission") assessment; shall now be integrated into one document
- 8 May to 3 September 2025 (in-depth) consultation on Guidelines and seven specific reform areas (including resilience, efficiencies, innovation, and digitalization).
  - Stakeholder workshops on 4 December 2025 and 20 January 2026.
  - Conference on 5 March 2026 re Shaping the Future of EU Merger Control.
- Consultation on the published Draft Merger Guidelines ("New Guidelines") until 26 June 2026.
- New Guidelines' implementation expected for Q4 2026 or Q1 2027.

Overarching goals and principles

- Merger control *inter alia*:
  - Ensures competitiveness and resilience of internal market;
  - Supports strong and diversified supply chains including for critical inputs;
  - Fosters transformation also to secure critical technologies and the defence readiness.
- Scale may be positive, especially, to enhance:
  - Innovation and technical progress;
  - Integration and expansion to compete globally;
  - Security and resilience.
- Competition may be multi-faceted and includes not only price but also non-price parameters:
  - Output, quality, (media) diversity, innovation, privacy, capacity, investment, sustainability, or resilience.

Procedural aspects

- Commission bears burden of proof ("more likely than not") for SIEC.
- Commission's theory of harm may be balanced with a theory of benefits established by the parties with the same standard of proof.
- Commission:
  - Decides on a case-by-case basis;
  - Establishes no hierarchy between technical and qualitative evidence;
  - Has a certain discretion in weighing economic evidence as well as harms and benefits;
  - Considers contemporary documents on the theory of harm as particularly relevant evidence.
- A broader array of counterfactual scenarios including future developments and evolutions may be considered where appropriate.

Market power & Theories of harm

- Market power may be grounded in
  - Structural but also non-structural factors including low price sensitivity, and high profit margins;
  - Limited switching possibilities/barriers to entry;
  - Dynamic competitive potential.
- Direct and dynamic effects to be assessed:
  - Loss of head-to-head or potential competition;
  - Loss of investment and expansion rivalry;
  - Loss of innovation (e.g. R&D poles or innovation capabilities) absent innovation shield;
  - Foreclosure, e.g. of customers or products;
  - Entrenchment of dominant position;
  - Coordination (increasing the risk of collusion);
  - Access to commercially sensitive information;
  - Portfolio effects

Efficiencies & Theories of benefit

- Efficiencies (direct and dynamic) must be
  - Verifiable;
  - Merger specific;
  - Benefit (largely the harmed) consumers.
- Efficiencies may merit longer time frames to materialize in certain sectors and circumstances.
- Efficiencies may be *inter alia*:
  - Cost or price;
  - Output and quality;
  - Incentives to invest, improve, and innovate;
  - Technology transfer;
  - Resilience;
  - Sustainability

  related.

Key take aways for dealmakers

- Have realistic expectations on the New Guidelines' impact as EUMR still marks the boundaries.
- Prepare internal documents diligently as they serve as evidence base for Commission (theories of harm) and Parties (theories of benefits/efficiencies) alike.
- Stronger emphasis on non-price parameters including innovation bears chances (efficiencies) as well as risks (new theories of harm) and merits early scrutiny.
- Carefully underpin theories of benefit/efficiencies and present them early in the process.
- Emphasize scale's positive impact, especially in global markets and sectors where European players must join forces to compete.
- Make use of the innovation shield for mergers in R&D heavy industries where feasible.
- Consider that national authorities' practice (including the FCO's) may deviate from the New Guidelines.

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