Rebalance Now:
Submission on the draft EU merger guidelines

26.6.2026

General remarks

We welcome the effort undertaken by the European Commission to review and modernise its merger guidelines. The review process has been notably transparent and inclusive. We appreciate the Commission's extensive engagement with a broad range of stakeholders through public workshops, targeted consultations and bilateral exchanges. We regret however that the Commission did commission an important study on the merger guidelines and dynamic effects of merger to an economic consultancy that has potential conflicts of interest, as it works on behalf of powerful clients in mergers.[1]

We welcome the Commission's efforts to ensure that merger assessment remains responsive to contemporary economic and societal realities. In our view, it is absolutely right the guidelines state that „EU merger control contributes to maintaining a balance of power that is essential to democratic societies.“ The recognition of issues such as sustainability, economic resilience and labour market effects as potential theories of harm reflects important developments in competition policy and economic research in general. The mentioning of media plurality as a goal like in the previous guidelines is also welcome.

However, it is important that issues like resilience are not used as a cover for more consolidation. Resilience lies in pluralistic markets that offer choices to switch to alternative suppliers and buyers and prevent the creation of chokepoints through consolidation. It’s very important that the core of merger control is to prevent harmful concentrations of economic power. In this regard, we think the draft guidelines put too much emphasis on scale and the narrative of pro-competitive mergers.

In our view, European merger control has suffered from type II errors/underenforcement for many years, i.e. the key concern are false negatives, not false positives. Few mergers have been investigated in depth, very few mergers have been blocked.[2] In various cases, the Commission opted to allow problematic mergers with commitments. While commitments may alleviate some narrow competitive concerns, they do not prevent an increase in market power of the merged entity, fail to foresee other strategies of abusing market power and are sometimes even directly breached by companies.

Overall, we see negative trends towards more market concentration and less competition in Europe. By not providing the necessary tools and methods for a comprehensive and adequate merger review, the previous guidelines have negatively contributed to these developments. The Commission’s draft for the new guidelines risks to make the same mistake.

The Commission report “Protecting competition in a changing world” (2024) provides a clear picture of the developments: increasing concentration on industry and market level, growing markups and profits especially at the top of the distribution, a rising share of corporate profits as

1 Oxera’s announcement to do the study on behalf of the Commission: https://www.linkedin.com/posts/oxera_we-are-pleased-to-share-that-oxera-has-been-activity-7376610102406959104-aq1P/

2 See Brianna Rock, 'Merger review intervention rates in the EU', Hertie School, published January 17, 2023.

share of the GDP, a growing gap between industry leaders and followers and a decline of business dynamism (as measured by indicators such as market share volatility between leading firms or entry and exit rates).

We also think the draft so far is a missed chance to update the analytical toolkit to assess mergers. Whereas the need for an update of the analytical toolkit was debated during the stakeholder workshops, it did not find its way into the guidelines so far.

1) Scale, European Champions and competitiveness

We recognise the broader policy debate concerning Europe's competitiveness in an increasingly challenging geopolitical environment. However, we are concerned that the draft may place far too excessive emphasis on scale as a means of promoting competitiveness. This is in our view not a solution. On the contrary, more consolidation and market concentration will not lead to more global competitiveness in the medium-term. Market concentration has already been increasing far too long in Europe and has reduced competition in the internal market.[3]

The core objective of EU merger control should thus be the protection of effective competition. Increased scale is not an objective in itself. While larger firms may in some circumstances be better positioned to compete internationally, greater concentration can also reduce competition, weaken incentives to innovate and diminish competitive pressure within the internal market.

The guidelines should thus more clearly acknowledge the potential tension between global competitiveness and competition within the single market. Consumers, workers and businesses benefit from dynamic and contestable markets, and these benefits should not be subordinated to broader industrial policy considerations.

Suggested changes:
The Guidelines should explicitly state that considerations relating to international competitiveness or industrial policy cannot substitute for a competition-based assessment of the effects of a transaction. In merger policy, the maintenance of competition should remain the priority.

2) Market power

We welcome the section that defines market power as a broader phenomenon than dominance. We encourage the Commission to stick with that significant differentiation. We also support the inclusion of additional (potential) criteria of market power like low sensitivity to price, high profit margins and barriers to entry.

We agree that market power can also occur when profit margins are low. One distinction that could be relevant for that assessment is whether the companies at stake are producers or mainly trading or selling. For instance, supermarkets can have lower margins per product, as their turnover of products is high and most products are pre-financed by their suppliers (who often get paid only after their product is sold). So supermarkets don’t have to employ a lot of capital on their own. In that case a measure like return on capital employed might be a better indicator than the margin on specific products.

One weakness in the definition of market power in paragraph 55 is the strong emphasis on supply side market power. Footnote 102 makes the important point that market power can also occur on the buying side. This should be included in the main text of paragraph 55. It should also be stated

3 https://competition-policy.ec.europa.eu/system/files/2024-06/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf

explicitly that buyer power/monopsony power can lead to push supplier's prices below competitive levels and/ or lead to unfair trading practices that limit the economic freedom of their suppliers.

Unfair trading practices as an effect and indicator of market power are not explicitly covered by the way buyer power is introduces as being mutatis mutandis the same as supply side market power. Generally, the effects of mergers also on the value chains upstream should play a bigger role in merger assessment, especially when the market concentration is uneven along different nodes of the value chain (like food supply chains[4]). In that case, mergers can lead to cascading effects further upstream or downstream even beyond the participants in the primary market.

3) The importance of an evidence-based framework

The revised Guidelines should be firmly grounded in evidence and sound economic analysis. As merger assessment increasingly addresses issues such as innovation, resilience, sustainability and labour markets, it is appropriate that analytical frameworks evolve. While taking these issues into account, an evidence-based fight against market concentration should remain core.

The final Guidelines should therefore continue to require that theories of harm and especially claimed merger benefits are supported by robust evidence rather than assumptions or broader policy aspirations. This principle is particularly important where the draft places greater emphasis on factors such as scale, global competitiveness, innovation benefits, resilience gains or efficiencies. Such claims should be assessed against clear evidentiary standards.

In our view, this implies a cautious approach towards claims that a purely based on IO economics with its possibilities to build on varying assumptions without an additional grounding in evidence drawn from real business processes. Accounting and financial data can be helpful for this as well as internal documents or assessments by different parties and market observers. Accounting and financial data can also play an important role in strengthening the analytical framework through which both competitive harms and claimed benefits are evaluated (see next section).

We welcome that the draft guidelines in paragraph 309 and 330 indicate a cautious approach on studies commissioned by the merging parties after the merger has been announced. This could even be made more explicit. Such studies depend a lot on the assumptions being made. IO economics create some space for merging parties and consultancies to tune studies according to their needs. So these studies and their assumptions need to be checked vigorously.

Specific recommendations on evidence:

- **In paragraph 31,** accounting and financial data should be mentioned as a specific category of evidence. If the Commissions considers that accounting and financial data is included in the term "economic evidence" this should be clarified in footnote 56.

- In the same paragraph civil society should be included as a source of evidence in the first sentence. Obviously civil society representatives could also be seen as industry experts, but to mention them explicitly would be a helpful clarification. For the need an benefits to include a broader set of stakeholders in competition proceedings see for example the opinion of the president of the Brazilian competition authority CADE, Diogo Thomson de Andrade, on Google's use of journalistic content. He stressed the importance to include "civil society and of actors who, although not directly competing in the market under scrutiny, represent

4 Rebalance Now/ Misereor 2026: Marktmacht und ihre Folgen. Kartellrechtliche Reformperspektiven für Agrar-Lieferketten. https://rebalance-now.de/wp-content/uploads/2026/04/RBN-Misereor-Marktmacht-Agrar-Lieferketten.pdf (with further evidence).

diffuse interests and perceive, with particular sensitivity, the social, economic and informational effects of any abuse of economic power". He argues that this is even more important „when the conduct under investigation transcends the classic logic of horizontal rivalry and extends to complex ecosystemic structures."[5]

- **Paragraph 309 and 330** on evidence for theories of benefit starts like it is a description for evidence relevant to the assessment of direct and dynamic efficiencies for both merging parties and the Commission. Than they speak more about evidence that the merging parties might use to support their efficiency claims. This seems to leave a gap on the evidence the Commission can use to check those claims. Additional sources of evidence can be important for the Commission and should be included. This would include accounting and financial data, information from third parties, including civil society and public entities (see comment on paragraph 31). Also historic information about pass-on of efficiencies or statements not only to investors but also by investors of the merging parties can be relevant source. E.g. if investors make statements that refer to a consolidation of an industry as a way to raise the value of their investments or raise payouts that would obviously raise doubts about claims that efficiencies will benefit consumers. It would also be useful to include a general remark that the Commission may use any evidence that it seems appropriate to verify the claims by the merging parties.

- **Paragraph 37 and heading I B 5**: we are concerned by the introduction of the term "causality"/ "causal" that was not used in the previous guidelines. This could be understood – even unintentionally – as an additional standard of proof the Commission would be required to meet. Economic processes like all social phenomena are quite complex. What causality could mean in that field is an interesting philosophical and epistemological question. For the purpose of the guidelines we would recommend to not use that term but stick to the established standards set out in paragraph 32 of leading "more likely than not" to effects on competition.

- Therefore, we suggest to **rename the heading for section I B 5.** to "Counterfactual and failing firm", as this is the core content of this section. It is not really about "causality". Secondly, we propose to delete the word "causal" in the first sentence of paragraph 37 and simply state "the Commission assesses whether there is a link between the merger and the effects on competition." This could be supplemented by a footnote saying "Link here means that the merger is more likely lead to these effects on competition than not". This helps to avoid the creation of uncertainties about the evidentiary standards.

4) Modernisation of the Analytical Toolkit

The review represents an important opportunity to modernise the analytical framework used in merger assessment. While industrial organisation economics should have a place in merger analysis, the draft does not sufficiently reflect new developments in empirical methods and complementary analytical tools.

In particular, the Guidelines make little reference to financial and capital-market evidence, despite the increasing use of such evidence by competition authorities internationally.[6] Financial analysis

5 Opinion of Commissioner Diogo Thomson de Andrade, Administrative Inquiry No. 08700.003498/2019-03, https://cdn.cade.gov.br/Portal/assuntos/noticias/2026/20260423_IA-Google-News_Voto-Vista-EN-1.pdf, para 111 and 113. He adds that „… the participation of civil society organisations, research centres, professional associations and organisations dedicated to the defence of collective rights allows, in this context, not only to expand the range of information available to the authority, but also to shed light on dimensions of the competition problem that sometimes escape an analysis overly centred on the economic agents directly involved".

6 https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2024-to-2025/annual-report-and-accounts-2024-to-2025

can provide valuable insights into competitive dynamics, market expectations, innovation incentives and the likely effects of transactions.

Recognising these methodologies would not entirely replace traditional competition analysis. Rather, it would enrich the evidentiary toolkit available to the Commission, particularly in complex and dynamic markets, such as digital markets.

Suggested changes:

- The Guidelines should explicitly recognise accounting and financial analysis as a relevant source of evidence in the assessment of competitive effects, innovation incentives and market expectations. As already mentioned above, accounting and financial data should be mentioned as a specific category of evidence in paragraph 31 and 309.

5) „Innovation Shield“ and the Risk of Under-Enforcement

We are concerned by the introduction of the concept referred to as the "innovation shield". The concept risks creating ambiguity regarding the treatment of acquisitions involving innovative start-ups and emerging competitors.

Competition policy experience has demonstrated that acquisitions of innovative firms can, in certain circumstances, eliminate future sources of competition and reduce incentives to innovate. While not every acquisition of a start-up raises competition concerns, the guidelines should avoid creating any presumption that such transactions are inherently beneficial. The burden of proof should remain on the merging parties to demonstrate, through verifiable evidence, that the transaction is likely to enhance rather than diminish innovation and competition.
This is particularly important given growing international concern regarding acquisitions of nascent competitors and so-called "killer acquisitions".[7] The Guidelines should ensure that support for scale-up opportunities does not inadvertently weaken scrutiny of transactions that may undermine future competition.

Overall, the innovation shield protects too many mergers. The shield in its proposed form basically says the European Commission is satisfied with an oligopoly of four competing large firms in all markets. That can and should not be the goal of competition policy. In the second paragraphs of 192 b) and e), it even allows mergers in markets that are more concentrated than that. Therefore, the innovation shield needs to be fundamentally reworked. It should be rebuttable, the exemptions more limited and should pay more attention to the acquirer.

Suggested changes:

- Claims by parties acquiring innovative firms relating to the preservation or expansion of innovation capabilities should be supported by robust evidence and assessed against the counterfactual that the target could develop into an independent competitive constraint.

- The term small innovative company should be defined in the Guidelines. Combining far reaching exemptions with an undefined term to whom they apply creates legal uncertainties and is questionable from a rule of law perspective. “Small innovative company” should be limited to small and medium enterprises or small mid-cap enterprises. It would be strange to label a company as a small innovative company that is otherwise categorised as a large company.

7 https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/05/start-ups-killer-acquisitions-and-merger-control_201583e4/dac52a99-en.pdf

- The innovation shield should pay more attention to the acquirer. It should not cover firms that already possess considerable market power or even dominance. Gatekeeper status precludes reliance on the innovation shield across all sub-paragraphs and criteria. Also market leaders and even the second largest firm in markets should not fall under the shield if it is truly meant to be pro-competitive.

- The exemptions from merger control should be more limited. Requiring only three other competing firms is too low as a threshold. That would mean that competition policy largely gives up on non-oligopolistic markets. It's also a problem for resilience. There might be situations where companies exit a market for one reason or the other. Therefore from a resilience perspective competition policy should include puffers to prevent a too high market concentration.[8] That is especially the case for far reaching structural presumptions like the innovation shield. The minimum requirement should be at least four firms across all sub-paragraphs.

- We recommend to **delete the second paragraphs of 192 b) and e)**. In particular in the case of e), this creates too much space to build potentially anti-competitive "ecosystems" just below the thresholds of being a gatekeeper or the largest firm in a relevant market. It is also not completely clear what "relevant market" refers to in that case. At least it should read "is not the largest firm in any related market."

6) Efficiencies and Consumer Welfare

The draft appears more receptive to efficiency arguments than previous guidelines. While efficiencies can be relevant in merger assessment, we encourage the Commission to maintain a cautious and evidence-based approach.

Merging parties routinely argue that transactions will generate economies of scale, lower production costs, enhanced innovation, greater resilience or improved sustainability outcomes. Such claims are now a standard feature of merger proceedings and are frequently advanced in support of transactions that would otherwise raise competition concerns.

However, the existence of efficiencies should not be conflated with consumer benefit. Even where efficiencies are realised, they are not automatically passed on to consumers through lower prices, higher quality, greater choice or increased innovation. Instead, efficiencies may be retained by the merged entity in the form of higher profits, increased shareholder returns or enhanced market power.

This distinction is particularly important because efficiency claims are often easier to formulate than to verify. By their nature, many claimed efficiencies concern future business decisions and organisational changes that cannot readily be tested during merger review. There is therefore an inherent asymmetry between the ability of parties to advance efficiency claims and the ability of competition authorities to verify them.

We are concerned that the significant emphasis placed on efficiencies in the draft Guidelines may inadvertently encourage an expansion of speculative claims that increase the complexity of merger proceedings without necessarily improving the quality of decision-making. In practice, such arguments are likely to be developed extensively by merging parties and their advisers, while remaining difficult to challenge conclusively.

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8 See Andrea Coscelli/ Gavin Thompson 2022: Resilience and Competition Policy. CMA Economics working paper, https://www.gov.uk/government/publications/resilience-and-competition-policy-economics-working-paper

For this reason, efficiencies should only play a carefully circumscribed role in merger assessment. The burden of proof should remain firmly on the parties, and claimed efficiencies should be supported by robust evidence demonstrating not only that they are likely to materialise, but also that they are merger-specific and likely to benefit consumers.

It is also important to distinguish very clearly between efficiencies and the effects of market power, e.g. higher bargaining power should not be listed as a possible efficiency.

Suggested changes:

- The Guidelines should ensure to emphasise that efficiencies get weight only where they are verifiable, merger-specific, supported by clear evidence and likely to generate demonstrable consumer benefits within a reasonable timeframe. The Commission should also place greater emphasis on the need for rigorous substantiation and scrutiny of efficiency claims, particularly where such claims are advanced to offset identified competition concerns. The extensive space efficiencies have in the guidelines may not lead to that goal.

- The list of possible efficiencies in the draft guidelines contains items that should not be seen as efficiency or treated with great caution in practice. We focus on two aspects here: bargaining power and elimination of double marginalisation (EDM).

- **On 302c):** Higher bargaining power vis-à-vis suppliers should not be seen as an efficiency. It is actually a distortion of competition. It leads to unfair trading practices, limits the economic opportunities for suppliers, disadvantages competitors of the merged entity on the horizontal market and creates barriers to entry for new companies. Higher bargaining power can also foster consolidation tendencies in supply chains, as other firms upstream react by merging as well. That might be seen as countervailing factors, but it will create further pressure for less concentrated parts of the supply chain and ultimately for consumers. Under a forward looking perspective higher bargaining power therefore is a harm, not a benefit. It is not enough to exclude input cost savings that result from anticompetitive effects. First of all that seems to shift the burden of proof back to the Commission instead of to the merging parties. More importantly, it misses the real issue at stake: input cost savings through higher bargaining power lead to anticompetitive effects themselves. Therefore “and/or benefit from higher bargaining power vis-à-vis suppliers” should be deleted in the first sentence. Also – and as a minimum – the second sentence should be changed to “Where input cost savings are the likely result of the anticompetitive effects of a merger or are likely to result in anticompetitive effects, they are not an acceptable efficiency defence.”

- **On para 302d):** Elimination of double marginalisation and Cournot effect: these are theoretical constructs whose presence in reality is questionable and which should be treated with great caution. They are derived from a model of serial monopolies of single product firms. The model builds on a number of necessary assumptions for it to work. Even in theory, it cannot easily be applied to an oligopolistic setting of imperfect markets or to firms with multiple products. Empirical studies on the matter have produced mixed results.

- EDM also conflicts with common business practices like internal business units within larger companies that have separate Profit & Loss accounts and tend to maximise each unit’s profit (especially if they are used to determine bonuses for the unit’s managers). Also tax legislation limits cross subsidization as conceived under the assumption of EDM, even more so when the two activities take place in different countries. In our view there should be no general assumption of EDM or a Cournot effect. If they are not deleted from the guidelines completely, it should at least be added that in case of EDM or Cournot effect claims it needs to be checked whether the assumptions for these models are met in reality. We would suggest to **add the following language:** „EDM and Cournot effect are based on serial monopolies of one-product companies. In cases of imperfect competition and multiproduct firms the Commission will check if the conditions for assuming these efficiencies are actually met. This includes assessing the business realities of the specific case including the internal organisation and accounting of different business units within the merging parties."

- **On paragraph 309:** as mentioned before, we suggest to include accounting and financial data as evidence, also historical evidence from previous mergers and so on (see section on evidence above). We would also point to the role of investors in the merging parties for the question whether claimed efficiencies will be passed on or more likely lead to higher payouts instead. If the merging parties face pressure from investors like activist investors to merge one should assume there will be pressure to distribute efficiency gains to investors instead of consumers.

7) Labour Markets and Monopsony Power

We welcome the increased attention that the draft Guidelines devote to labour market effects. This reflects a growing body of economic evidence demonstrating that mergers can affect competition not only in product markets, but also in labour markets.[9]

Mergers may reduce competition for workers, weaken bargaining power, suppress wage growth, reduce labour mobility or diminish incentives to improve working conditions. These effects can arise even where product-market concerns are limited.

While the draft appropriately recognises these risks, the analytical framework remains relatively underdeveloped. Greater guidance would improve legal certainty and facilitate consistent enforcement.

The Commission should therefore provide additional clarity regarding the assessment of labour market concentration, the identification of relevant labour markets and the types of evidence that may be used to evaluate potential harm to workers. Relevant evidence may include wage data, hiring patterns, employee mobility indicators and other empirical measures of labour market competition.

Suggested change:

- The Guidelines should provide a more detailed framework for assessing monopsony power and labour market effects, including illustrative examples and relevant evidentiary factors. They should also clarify that significant adverse effects on workers may constitute an independent basis for intervention where supported by evidence.

8) Effective Enforcement

The draft Guidelines set out an ambitious analytical framework and a substantial future enforcement agenda. Effective implementation will require corresponding resources and expertise.

As merger assessment increasingly incorporates complex questions relating to innovation, resilience, labour markets and sustainability, the demands placed on the Commission will continue to grow. It is therefore important that the Commission is equipped with sufficient financial, technical and human resources to implement the revised framework effectively.

9 https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/03/competition-issues-in-labour-markets_02ec78ba/66980788-en.pdf

If the Commission really accepts efficiencies and theories of benefit that it must also be ready to act if efficiencies are not passed on to clients/ consumers. Therefore, the Commission should already prepare to be better prepared to investigate excessive pricing and exploitative abuses. This also would be supported by a stronger use of accounting and financial data as a source of evidence.

Strong substantive rules can only achieve their objectives if they are supported by equally strong enforcement capacity.

Conclusion

Overall, we welcome the Commission's efforts to modernise the EU merger framework and appreciate both the openness of the review process and the willingness to engage with a broad range of stakeholders.

The draft appropriately seeks to address emerging societal challenges, including sustainability, resilience and labour market effects. These developments represent an important step towards a more comprehensive and forward-looking approach to merger assessment.

At the same time, the final guidelines should be firmly anchored in the protection of effective competition and rigorous, evidence-based analysis. In our view, the draft places too much emphasis on considerations of scale, competitiveness and efficiencies without always applying a correspondingly demanding evidentiary framework to such claims.

We therefore encourage the Commission to strengthen the safeguards surrounding acquisitions of innovative firms, maintain a rigorous and reserved approach to efficiency claims, further develop its framework for labour market analysis and recognise a broader range of analytical tools and sources of evidence including financial analysis.

Taken together, these changes would improve legal certainty, strengthen the analytical foundations of the guidelines and help that EU merger control can promote competitive, innovative and dynamic markets across the European Union.

Imprint

Rebalance Now e.V.

Pellenzstr. 39,

50823 Köln

Germany

https://rebalance-now.de/en