ALERT MEMORANDUM

New Draft EC Merger Guidelines – Learnings & Implications

May 19, 2026

The European Commission (EC) has published a draft of its long-awaited revision of the Merger Guidelines (Draft Guidelines), combining the 2004 Horizontal Merger Guidelines and 2008 Non-Horizontal Merger Guidelines into a single document that is organized around different theories of harm and endeavors to achieve five principal objectives: (1) to take account of the Draghi Report's call for more dynamic, forward-looking merger control; (2) to acknowledge the benefits of scale, resilience, innovation, and global competitiveness; (3) to reflect the evolution in EC practice over the past 20 years; (4) to tighten the rules for acquisitions by dominant companies; and (5) to signal a greater readiness to take positive account of efficiencies and other benefits.

Announcing the Draft Guidelines, EC President von der Leyen underlined the need "to better support companies to thrive, scale and innovate … so we can meet the realities of the fiercely competitive global economy and boost our competitiveness," while Executive Vice-President Ribera emphasized the "unchanged" purpose of "protecting strong, competitive markets without allowing an accumulation of power that can be abused."

Consistent with EC policy since the Merger Regulation entered into force in 1990, the Draft Guidelines do not suggest that the EC expects to approve the creation of dominant European or national champions (Executive Vice-President Ribera has made clear that, "[i]f anyone thought that this call for the creation of champions was an argument to deregulate, dismantle or reduce safeguards, they are mistaken"). More generally, the EC may be expected to continue to resist political pressure to approve mergers that it believes will harm consumers and competition. However, in recognizing more clearly that mergers may generate

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efficiencies, in identifying a wider set of benefits, including resilience, innovation, and global competitiveness, and encouraging merging parties to articulate and substantiate a "theory of benefit", the environment may become more favorable for certain transactions.

The Draft Guidelines do not represent a revolution, but rather a modernization of the EC's evidentiary toolbox, an evolution in the EC's analytical framework, and a recalibration of enforcement. Their practical implications will take time to emerge. Our current expectation is that the net effect of the Draft Guidelines will be neutral overall, although certain types of transactions (in particular efficiency-enhancing mergers that are predicted to enhance EU competitiveness) may be treated more favorably than in the past, while others (including acquisitions by companies that have entrenched market power) may be reviewed more strictly. Our key takeaways are as follows:

— The EC will consider evidence demonstrating that scale-enhancing transactions will increase EU competitiveness, resilience, and innovation.

— The EC is more open than before to considering evidence of verifiable, merger-related efficiencies that could outweigh or mitigate anti-competitive effects.

— The EC has broadly maintained the existing analytical framework, while emphasizing the importance of dynamic competition and innovation.

— Transactions that entrench pre-existing dominance or may harm future competition may be challenged more readily.

The EC intends to consult widely on the Draft Guidelines. A final text of new Merger Guidelines is expected later this year, although the principles set out in the Draft Guidelines will likely shape the EC's assessment of ongoing cases. Ten features of the Draft Guidelines are described and explained below.

1. **Embracing Draghi's call to view scale-enhancing mergers positively**. The Merger Regulation recognizes that mergers may enhance dynamic competition and the competitiveness of European industry. The Draghi Report recommended that the EC go further and modernize enforcement to better support EU companies in global competition. The Draft Guidelines reflect this by explaining how mergers may enable companies to "scale up," enhancing competitiveness, growth, and innovation. This framing encourages merging parties to position transactions as responses to global competitive pressures. The EC clarifies, however, that scale benefits must be distinguished from market power that harms competition. Accordingly, while certain scale-enhancing transactions may receive more favorable treatment, they are unlikely to be numerous, and EC approval of such transactions will likely require strong evidence of efficiencies or other benefits.

2. **Underlining the importance of dynamic competition**. The EC has historically focused on market shares, the loss of competition between merging companies, and a merger's effect on current conditions of competition. The Draft Guidelines signal a readiness to focus on "dynamic competitive potential," including the loss of R&D and innovation competition, distinguishing between the loss of "market-specific" innovation and "general" innovation. This framework has been applied for many years with respect to "pipeline" competition in the life sciences sector. The Draft Guidelines suggest that a dynamic consideration of future competition and innovation may routinely be undertaken in other sectors. For some transactions, the EC may be more open to approving mergers that involve high shares due to future competition from entrants or innovators. For others, companies with low or even zero market shares may be regarded as important competitive forces, particularly if they have innovation capabilities that could in time impact competition.

3. **Introducing a new "theory of benefits" and integrating efficiencies into the EC's assessment**. Although the EC has long been able

to clear transactions on the ground that anticompetitive effects will be outweighed by merger-related efficiencies, it has never done so. The Draft Guidelines signal a greater willingness on the EC's part to approve efficiency-enhancing mergers. They expand the types of efficiencies that the EC will take positive account of and introduce a more structured "theory of benefit" framework, under which merging parties may explain how merger-specific efficiencies will enhance effective competition, distinguishing between direct efficiencies, such as cost savings and product improvements, and dynamic efficiencies, such as increased incentives to invest and innovate. In practice, this shifts efficiencies from a rarely used defense to a more central part of the EC's analytical framework, although it still requires compelling evidence, robust quantification, and clear pass-on to customers who would otherwise be harmed. Recent EC comments encouraging parties to present merger-specific efficiencies and related deal rationales early in the process, including in cases that do not raise competition concerns, reinforce this approach. If the EC relaxes the "very likely" standard it has historically applied to pass-on, parties with strong early evidence may be better placed to secure approval for transactions that previously would have been challenged.

4. **Recognizing resilience, sustainability, and security as consumer benefits**. Consistent with the Draghi Report's recommendations, the Draft Guidelines incorporate a broader set of parameters into the EC's assessment, including sustainability, resilience, and security. This gives the EC greater latitude to consider factors that have not traditionally been assessed and expands the concept of consumer benefit beyond price and quality alone. The EC also makes clear that, like efficiencies, such benefits must be verifiable, merger-specific, and accrue to the same customers who would otherwise be harmed. The Draft Guidelines further emphasize the EC's discretion in weighing these considerations. As a practical matter, however, the EC is unlikely to approve many transactions that raise competition concerns on the basis of broader sustainability, resilience, or security considerations.

5. **Introducing an "innovation shield."** The Draft Guidelines introduce an "innovation shield" that, in defined circumstances, limits the likelihood of an adverse finding for transactions involving small innovative companies or R&D projects with dynamic competitive potential. The shield is framed through several scenarios that turn on the nature of overlap—between products, projects, or capabilities—and on thresholds related to market shares, the number of remaining independent R&D rivals, and the combined share of R&D activities in the relevant innovation space. Acquisitions of start-ups may benefit even where certain market share thresholds are exceeded, provided the acquirer is not the largest player in the relevant market and does not qualify as a gatekeeper under the Digital Markets Act.

6. **Confirming "entrenchment" as a theory of harm**. The Draft Guidelines formalize the "entrenchment of a dominant position" as a separate theory of harm, focusing on transactions that give a dominant firm control over assets, data, or other inputs that may reinforce its dominance by creating or exacerbating structural barriers to entry or expansion. This theory, developed by the EC in its *Booking/eTraveli* prohibition decision, remains controversial, including because the EC did not appear to apply any clear limiting principle in that case, notwithstanding its obligation to show a "significant" impediment to effective competition. The General Court's forthcoming judgment in the appeal of that decision is expected to clarify the theory and may affect the EC's ability to rely on it in future cases.

7. **Identifying new non-price theories of harm**. The Draft Guidelines identify various non-price theories of harm that were not addressed in prior versions of the Guidelines, including potential effects on labor markets and on minority shareholdings or common ownership structures.

With respect to labor markets, and consistent with enforcement practice in certain other jurisdictions, the EC states that it will assess whether a merger creates or strengthens monopsony power, including by reducing worker mobility or exerting downward pressure on wages. With respect to minority shareholdings and common ownership structures, the Draft Guidelines explain they may raise competition concerns where they affect firms' incentives to compete. The Draft Guidelines also expand the circumstances in which the acquisition of sensitive competitor data, which has historically raised concerns principally in vertical cases, may be considered problematic. By recognizing these theories of harm, the EC may increase the information that merging parties must disclose and the level of scrutiny applied to transactions.

8. **Taking a dynamic view of foreclosure**. The Draft Guidelines introduce a "dynamic foreclosure" theory of harm, which is premised on the notion that, in markets where viability depends on achieving scale, data, or a critical mass of customers, incentives to foreclose rivals may be strongest over a longer time horizon. Taking a long-term perspective may allow the EC to intervene in cases where a merger is expected to gradually weaken rivals' ability to compete. The framework aligns EU merger control with broader digital and data-driven competition concerns advanced by the EC. However, as with other forward-looking theories of harm or benefit, claims about more distant future effects require stronger evidence to meet the legal standard applied by EU courts.

9. **Broadening portfolio effects theory of harm**. The EC has historically raised portfolio concerns in cases where it determines that merging companies could foreclose rivals by bundling non-competing products. The Draft Guidelines expand the situations in which portfolio concerns may arise to include cases where a broader portfolio may strengthen the merging companies' bargaining power and enable them to raise prices post-merger. The EC tested this theory in the recent *Mars/Kellanova* case, which involved a combination of non-overlapping consumer products. Companies involved in transactions that combine broad or complementary product portfolios should therefore anticipate granular questions about customer-level dynamics, negotiation patterns, and the potential for cross-portfolio strategies capable of harming competition.

10. **Warning Member States against frustrating cross-border deals**. Finally, and to the surprise of many, the Draft Guidelines include a dedicated section clarifying how Member States may exercise their rights under the Merger Regulation to protect legitimate interests—including public security and plurality of the media—raised by transactions that fall within the EC's exclusive competence. This section reflects friction with certain Member States that have intervened to impede competitively benign transactions on grounds that the EC believed were disproportionate, discriminatory, and incompatible with EU law. The clarifications provided in the Draft Guidelines may help encourage companies to propose cross-border mergers that might otherwise have faced political headwinds.

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