

3 September 2025**2.1.5 In your / your client's experience, do the Guidelines continue to provide correct, clear and comprehensive guidance on merger assessment?**

- Yes, for both the Horizontal and Non-Horizontal Guidelines
- Only the Horizontal Guidelines, but not the Non-Horizontal Guidelines
- Only the Non-Horizontal Guidelines, but not the Horizontal Guidelines
- **No**
- I do not know

2.1.5.1 If no, please explain which parts of the Horizontal and Non-horizontal Guidelines are not correct, clear or comprehensive. Please explain, and, if relevant, identify any differences in this respect between different sectors (energy, basic industries, telecoms, pharmaceuticals, etc).

The revised Merger Guidelines would benefit from an expanded set of safe harbours and well-defined presumptions, particularly for transactions that are unlikely to raise substantive competition concerns. This is especially relevant for private equity-led transactions, which often involve minority shareholdings, non-controlling interests, or investments in companies where there is limited or no competitive overlap with the acquirer's portfolio.

Concretely, Invest Europe suggests three changes to the current guidelines:

- (1) **Increasing horizontal and non-horizontal market share safe harbours.** The Commission's enforcement practice has shown that it has rarely identified or investigated in-depth concerns for concentrations resulting market shares below 30% for horizontal and 40% for non-horizontal concentrations. Consequently, the revised merger guidelines should more clearly articulate (and recital 18 of the Horizontal Guidelines and recital 25 of the Non-Horizontal Merger Guidelines should state) that combined market shares below 30% and 40% "do not require extensive analysis"(as formulated for the HHI presumption in recital 19 of the Horizontal Guidelines).
- (2) **Clarifying market share and HHI thresholds for markets involving private equity players.** The revised set of guidelines should introduce further safe harbour flexibility for Commission case teams to account for the specific legal and economic framework in which private equity players operate. Specifically, the revised guidelines would benefit from a clarification that safe harbour rules

are not automatically displaced by the aggregate holdings of a private equity group unless there is clear evidence of coordinated management or unified commercial strategy across portfolio companies. Realistically, this is most likely to occur across portfolio companies held by the same fund [see response to Question 4.5]. The clear structural separation between the different funds of private equity firms is already reflected in other merger control regimes. For instance, in the United States, Hart-Scott-Rodino (“HSR”) filings are made on a fund-by-fund basis, rather than treating all funds of a private equity firm as a single conglomerate or economic unit. The Foreign Subsidies Implementing Regulation (“FSIR”) also recognises the need to relieve the burden imposed upon private equity firms, by enabling them to only disclose required information for the acquiring fund in many cases. This clarification point should be included as an additional recital in both guidelines’ sections addressing market share and concentration levels (respectively, recitals 14 to 21 of the Horizontal and recitals 23 to 27 of the Non-Horizontal Merger Guidelines).

- (3) **Reflecting the distinct legal and economic framework for private equity investors in existing presumptions.** The revised merger guidelines should more widely and explicitly recognise the distinct legal and economic characteristics of private equity investors compared to traditional industrial acquirers [see response to Question 4.1.3]. More specifically, the guidelines should clarify that private equity investors’ typically time-limited and fund-based investment strategies mean their activities do not raise issues in the same way as strategic acquirers. Accordingly, recital 21 of the Horizontal and recital 27 of the Non-Horizontal Merger Guidelines should be revised to provide that “*the assessment of control, influence, and potential for coordinated effects in transactions involving private equity investors must be based on the actual governance arrangements and economic incentives present in each case, rather than on presumptions applicable to industrial acquirers.*” This approach would also allow Commission case teams to engage on these topics and develop a robust but pragmatic enforcement standard for private equity deals.

2.2.1 Please indicate how any costs associated with the Guidelines (e.g. by providing incorrect, incomplete, misleading or too strict or flexible guidance on certain aspects) compare to any benefits the Guidelines have brought to you / your client (e.g. by providing helpful guidance for assessing mergers). Please exclude any costs related to the notification of mergers that are unrelated to the Guidelines:

- There are no costs related to the Guidelines (i.e. they include only helpful guidance)

- Any costs have been small compared to the benefits of the Guidelines
- **Costs have been equal to the benefits of the Guidelines**
- Costs have exceeded the benefits of the Guidelines
- Irrespective of the costs, the Guidelines have no benefits
- I do not know

2.2.1.1 Please indicate which costs the Guidelines have generated for you and quantify them.

The current Guidelines can – in certain cases – generate significant costs due to excessive box-checking and the lack of clear, well-defined safe harbours (and specific recognition of the legal and economic framework in which private equity players operate), particularly in no-issue cases. Administrative burdens of preparing extensive filings and responding to information requests can add hundreds of thousands of Euros in legal and advisory fees per transaction, even where there are no substantive competition concerns. Expanding and clarifying presumptions and safe harbours would reduce these unnecessary costs and burdens. Clearer rules would also provide greater legal certainty, encourage more efficient allocation of resources, and support increased EU inward investment.

2.4.7 In your experience or that of your client, do the Guidelines offer sufficient flexibility to take into consideration specific features (e.g. longer investment cycles, innovation intensity, etc)?

- Yes, fully
- Yes to some extent
- **No, to an insufficient extent**
- Not at all
- I do not know

If to some extent or no: How can the Guidelines offer sufficient flexibility to take into consideration specific sectoral features (e.g. longer investment cycles, innovation intensity, etc)?

- The guidelines should only offer indications based on the legal principles and criteria stemming from the merger regulation and the case-law, which are general in nature
- The guidelines should offer sound economic principles that are to be applied with sufficient flexibility on case-by-case basis

- The guidelines should more specifically provide general guidance on individual features (e.g. investment cycles, resilience, etc) that can differentiate economic sectors and how they are to be taken into account.
- I do not know

4.1.3 In your / your client's view, do the current Guidelines, provide clear, correct, and comprehensive guidance with regards to the frameworks to assess the risks of foreclosure post-merger

- Yes, fully
- Yes to some extent
- No, to an insufficient extent
- Not at all
- I do not know

PE fund strategy is not to pursue operational synergies, but rather to invest and hold portfolio companies independently in different sectors and value chains in order to resell them on a short to medium term horizon. In such cases, the investment is made inherently without pursuing vertical integration, customer foreclosure, or coordinated effects. Despite this, foreclosure concerns are sometimes raised by the European Commission (**EC**) in PE transactions involving scenarios where the fund holds multiple assets across the value chain, but without operational coordination, or passive/non-controlling investments in companies active in adjacent markets.

The current Guidelines do not sufficiently differentiate between such financial investments and strategic mergers pursued by industrial operators with actual integration plans. Consequently, the EC will assess mechanically whether the fund might reduce access for rivals or shift input allocation because:

- The thresholds for triggering a foreclosure analysis are not defined i.e. what level of input share or dependency should be considered as “significant”?
- The incentive analysis of the EC often presumes coordination or profit maximization across portfolio companies, when in fact PE funds usually keep assets ring-fenced.
- The consideration of post-merger conduct constraints or commercial realities (i.e. the counterfactual scenario) is not sufficiently developed in practice.

For PE funds, this leads to burdensome information requests, legal costs, and extended timelines, even in cases where there is no plausible foreclosure logic.

In order to address scenarios in which PE funds invest without synergy rationale and improve predictability, the Guidelines could:

- (i) distinguish financial investors from industrial players in foreclosure analysis by explicitly recognizing that PE funds typically lack incentives for foreclosing and that portfolio companies are often independently managed with no strategic alignment.
- (ii) introduce safe harbours for vertical mergers involving financial investors (i) where the upstream/downstream market shares are below 30-35%, and (ii) there is no credible evidence of integrated control or intent to exclude rivals. The main impact on the EC's substantive assessment would be that the transaction would not raise competition concerns, unless there was compelling evidence to the contrary.
- (iii) define structural thresholds for ability and dependency. For example, the risk of foreclosure would only presumably exist where one party has a significant market share in the upstream market (e.g., above 40%) and downstream customers are highly dependent on it. On the contrary, pure ownership, without input control or strategic governance should explicitly not trigger in-depth foreclosure analysis
- (iv) specify that minority or non-controlling interests do not raise foreclosure concerns in the absence of special rights or operational involvement.

4.2 From your perspective, on which structural indicators should the Commission rely to assess whether a merger is likely to significantly impede effective competition? (both 4.2.a and 4.2.b)

If we fully support the EC's objective to identify mergers that may significantly impede effective competition (**SIEC**), we also would like to ensure proportionate enforcement and avoid undue burdens on transactions that raise no realistic competition concerns.

For this, our recommendation would be for the EC to adopt economically grounded approach based on clear and objective structural indicators. For PE funds, structural indicators are key not only to assess competitive impact, but also to ensure predictable, proportionate and cost-efficient merger control. By doing this, the EC would be able to enhance the effectiveness and efficiency of merger control review while preserving competition and fostering investment across the EU.

First, the Guidelines should provide for updated safe harbours based on market share. In order to provide legal certainty and procedural efficiency, especially for transactions that do not involve strategic synergies or market consolidation (PE funds often acquire businesses in fragmented or moderately concentrated markets, without pursuing combinations that would raise structural concerns) we propose to set:

- (i) A safe harbour for horizontal mergers where the combined market share is less than 25%¹ in any relevant market;
- (ii) A similar safe harbour for vertical mergers where the upstream and downstream shares are each less than 35%² and no credible theory of input foreclosure applies;
- (iii) In both cases, these safe harbours should operate as rebuttable presumptions of no harm to competition, unless there is compelling evidence to prove otherwise.

Please note that we have in mind that the EU Simplified Procedure plays an important role in reducing administrative burdens for transactions that clearly raise no competition concerns. However, our proposals are aimed at facilitating the filing procedure for transactions that, while not qualifying for simplified treatment, similarly raise no substantive concerns - such as private equity deals involving market shares slightly above the thresholds (e.g. 35% in a vertical market) or facing uncertainty due to complex market definitions. We believe that substantive safe harbour could provide greater legal certainty and proportionality in such scenarios.

Second, the substantive analysis should rely less on overlaps when considering entities without integration: PE funds typically involve separate portfolio companies managed independently, with no commercial coordination or integration. In this context, structural indicators should focus on whether the fund can realistically align incentives or strategic behaviour across entities and the absence of shared governance, cross-directorships, or information flows between portfolio companies.

Third, we believe that the use of the HHI and delta HHI as an indicator remain relevant. Nonetheless, thresholds - and therefore the presumption of absence of competition concerns - should be updated in order to reduce administrative and timing burdens on PE transactions that are clearly non-problematic, especially in fragmented industries.

Finally, minority or passive investments under 25%, with no special rights or board representation should not trigger a full SIEC assessment to the extent that such participation are rarely used to coordinate behaviour, and do not provide access to sensitive commercial information. This is all the more necessary given that, since the revision of the EC guidelines on simplified procedures, there is an exclusion clause in the event of minority participation above 10% in a similar, related or connected market.

4.5 How can the Commission establish that non-horizontal mergers (i.e., between companies that are active at different stages of the value chain or in closely related

¹ In this regard, recent guidelines issued by the French Competition Authority set thresholds of 25% instead of 20%, which appear to be working well in practice.

² French Competition Authority also applies this threshold.

markets) will lead to competitors being — fully or partially — foreclosed from the market, ultimately harming consumers? Please describe the situations where such foreclosure is likely, identifying the evidence and metrics that the Commission should rely on for its assessment.

Private equity firms possess a unique legal and economic structure that limits their ability and incentive to foreclose competitors. The Commission’s assessment of foreclosure risks should reflect these specific characteristics. The following factors could be included in separate recitals in the Non-Horizontal Guidelines’ (the ‘Guidelines’) sections on foreclosure risks (currently Sections IV.A and V.A) to demonstrate the likelihood of such risks.

Investment cycles are relevant to the assessment of ability and incentive to engage in anticompetitive foreclosure. Typical “hold periods” in private equity range from 3 to 7 years (most commonly 3 to 5 years), and different funds invest at different times, as investors commit capital and seek its return in different fundraising cycles. Where portfolio companies are not operationally integrated—which occurs in most private equity deals—their ability to coordinate commercial behaviour is reduced, as their incentives are unaligned and they cannot recoup lost profits that benefit another portfolio company, even in a vertical context. The Guidelines should therefore acknowledge that acquisitions and investments by private equity firms are, by nature, characterised by limited risks of anti-competitive foreclosure.

The Guidelines’ sections on foreclosure risks should consider that private equity funds are subject to strict ring-fencing and fiduciary duties. These duties mean that private equity firms with separate funds cannot coordinate their commercial behaviour in a non-horizontal context, as one fund’s portfolio companies cannot be prioritised over those of other funds. The Guidelines should assess foreclosure based on a case-by-case analysis of whether coordination mechanisms exist, such as common management, cross-directorships, or contractual exclusivity. The absence of such mechanisms should weigh against a finding of likely foreclosure. Deal teams must rigorously assess all potential opportunities and synergies for investment committees and LPs, so internal documents should be considered as evidence of whether portfolio companies can work together; if no likely cross-coordination is identified, this should indicate that a foreclosure strategy cannot be profitably employed.

Non-controlling co-investors also ensure that portfolio companies do not enter into non-arm’s length agreements with one another. If portfolio companies do enter into such an agreement, the holding private equity firm must recuse itself from the agreement vote and co-investors will ensure that the agreement is not approved, as they have no interest in favouring businesses that they do not own. Therefore, non-controlling co-investors and separation between funds act as a structural barrier which reduces the likelihood of anti-competitive foreclosure. The absence of non-controlling

co-investors should be considered in the Commission's assessment of private equity firms' ability and incentive to engage in anti-competitive foreclosure.

5.5 In what circumstances can mergers positively impact the ability and incentives of the merged company to invest? Based on which evidence and metrics can the Commission conclude that a merger advances investment? Please distinguish between mergers creating market power or a dominant position and those that do not, as relevant.

As a preliminary note, it should be highlighted that in contrast to strategic industrial consolidations aimed at capturing market power, many mergers initiated by PE funds do not lead to dominance, but rather improve the operational capabilities and long-term strategic outlook of undersized companies.

In this regard, we consider that there is a risk of over-enforcement towards certain type of mergers that could drive down investments in Europe. Indeed, excessively lengthy reviews or ambiguous standards applied to unproblematic transactions could deter investors. For private equity funds, regulatory uncertainty may delay transactions involving capital deployment in EU-based companies, redirect investment flows to less regulated jurisdictions, and damage the competitiveness of European targets, in particular SMEs and scale-up technology companies. This is particularly harmful given Europe's current need for private capital to accelerate in particular digital and energy transitions. A proportionate approach to merger control is essential to ensure that the regulatory process does not become an obstacle to the type of investment that the EU is seeking to attract.

With specific regard to the issue at hand, mergers, particularly those carried out by PE funds, can directly promote investment in several ways:

- (i) Capital expansion: mergers led by private equity firms are often associated with significant capital contributions to support digitalization, decarbonization, R&D, and operational expansion, particularly in smaller mid-cap companies. This is essential in fragmented EU markets, where independent companies may find it difficult to access sufficient financing.
- (ii) Improved resource allocation: mergers facilitate the reallocation of capital and talent within underperforming or inefficient market structures. In particular, in overly fragmented sectors, consolidation can lead to economies of scale, improved supply processes, and shared technology platforms, without necessarily resulting in market dominance.

(iii) Market access and competitiveness: for EU-based firms to compete globally in digital, green tech and advanced manufacturing, they need to reach scale and stability quickly. In this regard, mergers are key tools to achieve that objective.

On the other hand, in order to assess whether a merger would positively impact the ability and incentives of the merged company to invest, the EC should consider both ex-ante and ex-post indicators: historical CapEx and projections, R&D spending commitments (including evidence of new pipelines or innovation plans), forecasts for employment growth, plans presenting the results achieved in terms of digitization, plans showing that access to new markets is possible only through the contemplated transaction. In this regard, in transactions not resulting in market shares leading to a dominant position, if these indicators are provided by the parties to the EC, there should be a presumption that the merger supports productive investment.