

Invest Europe consultation response to draft EU Merger GLs

Introduction

Invest Europe, the association representing Europe's private equity (PE), venture capital (VC) and infrastructure sectors, as well as their investors, welcomes the opportunity to respond to the draft EU Merger Guidelines consultation. We represent more than 600 members, split roughly equally between PE, VC and limited partners (LPs) – with more than 100 associate members representing advisers to our ecosystem. Those members are based in 57 countries, including 42 in Europe, and manage 60% of the European PE/VC industry's €1.247 trillion of assets under management.

Our comments focus on the application of the proposed framework to investment-driven and innovation-driven markets, including aspects relating to counterfactuals, dynamic competition, minority shareholdings, portfolio structures, foreclosure and efficiencies.

PE/VC and infrastructure investors play a central role in financing European companies across their lifecycle, in particular in sectors requiring significant upfront capital, long investment horizons and iterative funding. Such investments are often made in stages, under time-sensitive conditions, and frequently involve non-controlling or minority positions.

While the draft Guidelines are framed to a significant extent around digital and technology-driven cases, a large part of investment activity is directed towards key sectors that underpin European competitiveness, including core infrastructure such as bridges, energy networks, wind farms and other essential physical assets. These capital-intensive, long-horizon investments are central to the EU's competitiveness, resilience and strategic autonomy objectives, and the framework should reflect their characteristics, including the (often non-controlling minority) nature of these investments.

In these markets, mergers, acquisitions and minority investments are not only structural events from a competition perspective, but also key mechanisms through which capital is deployed, companies scale and innovation is brought to market. The design and application of merger control therefore directly shape the conditions under which investment decisions are made and executed.

The draft Guidelines reflect a shift towards a more forward-looking analytical framework. This is a natural development given the increasing relevance of innovation, investment and non-price parameters of competition. At the same time, the draft considerably expands the range of factors, indicators and theories that may be relevant to the assessment of a transaction. Its effectiveness will therefore depend on whether

this broader analytical framework is accompanied by sufficiently clear limiting principles, evidentiary standards and screening mechanisms to ensure predictable and proportionate outcomes.

Experience shows that where analytical concepts are not supported by clear limiting principles, or where structural indicators do not provide a sufficiently reliable screening function, the result can be increased legal uncertainty, extended review timelines and higher transaction costs. These effects can arise even in transactions that do not alter competitive dynamics, but nevertheless become subject to information burdens and/or detailed assessment.

For investment-driven transactions, execution conditions matter. The expected likelihood and timing of review, as well as the degree of procedural complexity, are taken into account at the point when transactions are structured and priced. Where these elements become less predictable, the impact is felt through changes in investment behaviour, including the allocation and timing of capital. These effects are not limited to notified transactions. They may also influence whether transactions are initiated, pursued or completed at all, as parties assess execution risk at an early stage. This dimension is inherently difficult to observe in enforcement outcomes, but forms part of how merger control frameworks are experienced in practice.

For these reasons, it is important that the Guidelines clearly reflect the specific characteristics of financial investment models, including differences in governance, fiduciary duties and investment horizons compared to industrial acquirers. A framework that consistently captures these differences will support more accurate assessments and reduce unnecessary frictions in the review process.

Neither should the existence of multiple funds under common management automatically imply a single commercial strategy or integrated competitive unit. In practice, separate funds frequently operate under different investment mandates, fiduciary duties, investor bases and exit horizons. The assessment should focus on actual governance arrangements, incentives and decision-making structures rather than ownership links alone (including where companies may be treated as part of the same group for jurisdictional purposes).

Overall, the objective should be to ensure that the framework remains operational in practice: capable of addressing transactions that raise genuine competition concerns, while allowing those that do not to be identified and treated proportionately at an early stage.

Please find our full response below.

PART I. – INTRODUCTION AND GUIDING PRINCIPLES

Part I.A – THE ROLE OF EU MERGER CONTROL

This section includes sub-sections 1. The importance of EU merger control for the internal market and competitiveness, and 2. Benefits from scale versus market power, i.e. paragraphs 7-18.

Answer

This section would benefit from more directly reflecting how merger control affects transaction behaviour in practice, beyond final clearance decisions.

In capital-intensive and innovation-driven markets, merger review is incorporated into deal assessment at the outset. The perceived likelihood, duration and conditions of review can be reflected in transaction pricing, deal structure and the assessment of execution risk at the time of signing. This is particularly relevant where acquisitions form part of the investment lifecycle, including for venture-backed companies where expected exits are embedded in valuations and investment decisions.

The discussion of scale versus market power should also more clearly distinguish between transactions that create or strengthen market power and transactions that enable firms to reach the scale required to invest, commercialise innovation or compete across fragmented markets. In the latter case, scale may be a precondition for effective competition rather than an indicator of concern.

The section could more explicitly recognise that acquisitions can contribute to the reallocation of capital and to the scaling of firms in markets characterised by fragmentation or financing constraints. This would provide a clearer analytical basis for assessing transactions that primarily enable expansion, rather than remove an existing or likely competitive constraint.

Clarifying these elements would improve the internal consistency of the framework and enhance its applicability to transactions that are primarily investment-driven.

Part I.B – GUIDING PRINCIPLES

This section includes sub-sections 1. Parameters of competition, 2. Burden of proof, theories of harm and benefit, 3. Evidence, 4. Overall assessment of mergers' impact, including their benefits, and 5. Causality between the merger and the competitive effects again with sub-sections for 5.1 Relevant counterfactual and 5.2 Failing firm, i.e. paragraphs 19-51.

Answer

The guiding principles should include further operational guidance on counterfactuals, evidence and the application of forward-looking frameworks.

For the relevant counterfactual, the Guidelines should ensure that assumptions regarding future competition are anchored in realistic commercial conditions and are supported by contemporaneous evidence. In innovation-driven markets, the ability of firms to expand or enter independently is often contingent on access to financing, execution capacity and time to scale. Counterfactual scenarios should therefore take into account whether future expansion depends on additional funding rounds and whether such funding is likely to be available on commercially viable terms.

The articulation of theories of benefit provides a useful complement to theories of harm, but its practical application will depend on workable evidentiary standards. Investment-related and innovation-related benefits are often forward-looking and may not be reflected in short-term metrics. The Guidelines should therefore clarify that credible investment plans, R&D pipelines, financing structures, integration strategies and deployment timelines can constitute relevant evidence.

The evidentiary standard set by the Guidelines puts greater emphasis on the quality of internal document and economic evidence, which, coupled with the discretion awarded to the Commission and the theories of harm articulated, increases both cost and burden imposed on investors. This standard should be carefully balanced with the type of investment. For example, minority shareholders with no governance or other decision-making rights should not be held to the same evidentiary standard as a firm acquiring a majority stake.

The increasing reliance on internal documents should also be balanced with contextual assessment. Investment materials frequently explore multiple scenarios and contingencies. These should be assessed against objective indicators such as governance structures, economic incentives and actual ability to execute.

Overall, the framework should include clear principles ensuring that forward-looking harm and forward-looking benefit are assessed on a consistent evidentiary basis. In this context, the Guidelines should also provide clearer indicative thresholds or rebuttable presumptions for transactions that are unlikely to raise competition concerns. This would support a more efficient allocation of resources while maintaining the ability to investigate cases where there is compelling evidence of harm.

Part II. – COMPETITIVE ASSESSMENT**Part II.A.1 – Structural indicators of market power**

This section includes an introduction and sub-sections 1.1 Large market shares, and 1.2 High market concentration, i.e. paragraphs 60-67.

Answer

The section on structural indicators plays an important role in providing an initial and practical assessment of market power. In this context, clearer guidance on the interpretation and use of market shares and concentration measures would improve predictability in merger assessment.

While the Guidelines correctly emphasise that market shares and concentration levels are not determinative, they remain central screening tools for identifying transactions that are unlikely to raise competition concerns. In practice, however, the absence of clear indicative thresholds or presumptions may result in transactions with limited or no competitive overlap being subject to detailed analysis.

Providing clearer indicative thresholds or rebuttable presumptions for such cases would support a more efficient allocation of analytical resources. This is particularly relevant in fragmented markets or in transactions involving limited overlaps, where structural indicators can provide a reliable basis for an initial assessment.

Further clarification would also be beneficial in situations involving financial investors. In such cases, aggregated market shares may reflect investments across multiple portfolio companies that are independently managed and not coordinated in practice. The same distinction should apply where turnover is attributed to a fund manager or investment company by reference to companies controlled by different funds under its management. While such attribution may be relevant for jurisdictional purposes, aggregated turnover or market shares should not be transposed mechanically into the substantive assessment as evidence of market power, strategic alignment or a unified competitive presence. It is therefore important that the assessment of structural indicators should take into account the actual governance arrangements, economic incentives and absence of strategic alignment across portfolio companies, rather than relying on aggregate ownership metrics alone.

In addition, the Guidelines could provide further guidance on how concentration metrics, including HHI levels and changes in concentration, should be interpreted in dynamic or fragmented markets. In particular, where markets are characterised by entry, expansion or investment-driven competition, structural indicators should be assessed in conjunction with evidence on competitive dynamics.

More generally, clearer safe harbour thresholds or rebuttable presumptions based on market shares and concentration levels would improve predictability, particularly for transactions in fragmented markets or where competitive overlaps are limited.

As noted in our previous submission to the Commission, enforcement practice has consistently shown that transactions involving relatively moderate market shares rarely give rise to substantive concerns. In that context, indicative ranges in the order of approximately 25–30% for horizontal overlaps and 30–40% for non-horizontal relationships have historically provided a reliable basis for identifying transactions that are unlikely to raise competition concerns. In fact, global competition authorities such as the UK Competition and Markets Authority (CMA) or the US Federal Trade Commission (FTC) continue to view quantitative thresholds (of 25% and 30% combined market share respectively) as reliable proxy for identifying transactions that are most likely to raise competition concerns, with qualitative factors assessed only once those thresholds are met.

Reflecting such indicative ranges (and other safe harbours such as based on HHIs) in the updated Guidelines in a unified and rebuttable manner would provide a more structured and operational starting point for the assessment. This would not prevent further scrutiny where justified, but would improve predictability and therefore reduce transaction costs and friction for investors, whilst allowing the Commission to focus its analytical resources on transactions where there is a realistic risk of harm.

Should the Guidelines not include a clear market share threshold, clear safe harbour should be designed, particularly for minority non-controlling interests (both below and above the indicative 5%) with no material overlaps, no ecosystem leverage, and no ability to influence decision making across portfolio companies, ensuring purely financial investments fall outside enhanced scrutiny.

Part II.A.2 – Other indicators of market power

This section includes sub-sections 2.1 Low sensitivity to price, 2.2 High profit margins, and 2.3 High barriers to competition, i.e. paragraphs 68-79

Answer

The increased weight attributed to indicators of market power beyond market shares, including barriers to entry and expansion (including imports), high profit margins, low sensitivity to price and out-of-market constraints, warrants careful calibration.

Existing EU case law, including the MasterCard judgment,¹ limits reliance on out-of-market constraints and cross-market efficiencies. Appropriately increasing the weight

¹ Mastercard v. Commission, Judgment of 11 September 2014, Case C-382/12 P.

given to such constraints is important to ensure that broader portfolio effects are properly reflected in the overall assessment.

Part II.A.3 – Dynamic competitive potential

This section includes paragraphs 80-83.

Answer

The assessment of dynamic competitive potential should be closely linked to evidence of practical ability to become a competitive constraint.

In innovation-driven markets, the existence of a technology or business model does not necessarily imply a credible path to scale. The Guidelines should specify that dynamic competitive potential depends on factors such as access to capital, technical maturity, commercial traction, regulatory constraints and time required to reach scale. This assessment should also take into account regulatory and compliance constraints that may affect the ability of firms, in particular smaller or innovative companies, to scale independently within a commercially relevant timeframe.

This is particularly relevant for smaller or innovative companies (including startups and growth-stage firms) whose development is contingent on further investment. Without such financing, expansion or entry may not occur within a commercially relevant timeframe. The assessment should therefore distinguish between theoretical potential and realistically actionable growth.

Clarifying that dynamic competitive potential must be supported by evidence on financing, execution and timing would reduce the risk of overstating the competitive significance of targets whose future development is uncertain. Where dynamic competitive potential is assessed, the absence of clear indicators or thresholds may increase uncertainty for transactions involving innovative but early-stage firms.

Part II.A.4 – Countervailing factors

This section includes an introduction and sub-sections 4.1 Dynamic entry or expansion of competitors, 4.2 Out-of-market constraints, and 4.3 Countervailing buyer power, i.e. paragraphs 84-110

Answer

As described above in Part II.A.2, out-of-market constraints should be given appropriate weight to ensure that broader portfolio effects are properly reflected in the overall assessment.

Part.II.B.2 – Loss of head-to-head competition

This section includes an introduction and sub-sections 2.1 Structural market features, 2.2. Closeness of competition, 2.3. Important competitive force, and 2.4. Specific market aspects, i.e. paragraphs 119-168.

Answer

The treatment of specific market aspects such as minority shareholdings, common ownership and other non-structural links warrants more precise limiting principles to ensure that the assessment remains proportionate and grounded in demonstrable competitive effects.

Minority shareholdings and non-structural links are common features of modern investment structures, including in private equity and venture capital, where they often reflect financing arrangements rather than strategic attempts to influence competition. In practice, such links do not confer the ability to exercise material influence over competitive behaviour, particularly where they do not involve control, board representation, access to commercially sensitive information or substantive governance rights.

The Guidelines should distinguish between links that may plausibly affect competitive conduct and those whose impact is remote. The existence of minority shareholdings or common ownership should not in itself be treated as indicative of anticompetitive effects without evidence of both ability and incentive to influence market conduct. It is not explained nor justified why 5% would represent the appropriate threshold below which minority shareholdings are presumed not to raise competition concerns. This appears particularly conservative given that passive and non-controlling investments significantly above that level may, in practice, be incapable of influencing competitive conduct where they do not confer governance rights, board representation, access to commercially sensitive information or other forms of material influence.

This question is particularly relevant given that minority shareholdings above 10% may already affect access to simplified merger procedures in certain circumstances. Introducing a 5% benchmark as a substantive indicator of potential concern therefore risks creating uncertainty for a broad category of passive investments that do not confer any meaningful ability to influence competitive behaviour. It has been a long-standing argument of the industry that passive or non-controlling investments of up to 25%, where they do not confer special rights, board representation, access to commercially sensitive information or other means of exercising material influence,

should generally not trigger a full SIEC assessment. Ownership levels should not be used as a proxy for competitive influence in the absence of supporting evidence.

This distinction is particularly important in private capital structures, where investments are often held across separate funds with independent governance, fiduciary duties and investment horizons. The assessment should therefore focus on actual mechanisms of influence, including governance rights, information flows, economic incentives and decision-making mechanisms. The assessment should distinguish between frictions in transaction execution and factors that affect how companies compete in the market.

The assessment of common ownership should also avoid mechanical aggregation of multiple minority interests across portfolio companies without a clear theory of how those interests could affect competitive incentives. Where holdings are managed through separate funds with distinct fiduciary duties and without voting coordination or information sharing, the ability and incentive to influence portfolio companies' competitive strategies may in practice be limited, and this should be reflected in the analysis and therefore the Guidelines.

The same concern is not limited to minority shareholdings. It may also arise where portfolio companies are controlled by different funds under the same manager or investment platform. The fact that such companies may be treated as part of the same group for jurisdictional purposes should not in itself be regarded as evidence of strategic alignment, coordinated conduct or a loss of rivalry. The assessment should instead focus on the actual mechanisms through which influence may be exercised, taking account of governance arrangements, information flows, fiduciary duties and investment incentives.

To conclude, any safe harbour for minority shareholdings should be specifically designed and tailored to overlapping investments, such that a filing obligation arises only where there is demonstrable influence over decision-making at the level of the overlapping activities.

Part.II.B.3 – Loss of investment and expansion competition

This section includes paragraphs 169-174.

Answer

The concept of loss of investment and expansion competition should be applied with a clear distinction between reduced competitive pressure and transactions that enable or accelerate investment.

A finding of harm should require evidence that the merger removes a likely and material source of future investment or expansion. This should not be inferred solely from overlapping activities or strategic proximity. The assessment should consider whether the relevant undertaking had the ability and incentive to expand independently, taking into account financing conditions, execution risk and time to scale.

In practice, especially for growth-stage companies, expansion plans are contingent on access to additional capital or capabilities. Where these elements are uncertain, the likelihood and timing of expansion should be assessed accordingly.

Conversely, transactions may enable investment or expansion that would otherwise be delayed or uncertain. The analysis should allow for this possibility by assessing both the removal and the creation of investment incentives on the basis of concrete evidence.

Part.II.B.4 – Loss of innovation competition

This section includes an introduction and sub-sections 4.1. Loss of specific innovation competition, 4.2. Loss of general innovation competition, and 4.3. Innovation shield, i.e. paragraphs 175-192.

Answer

The analysis of innovation competition should be more closely tied to identifiable mechanisms of harm and supported by evidence on likely future developments.

For specific innovation competition, the Guidelines should require evidence of overlapping R&D activities or development paths that are sufficiently close to exert competitive pressure. For general innovation competition, broad references to innovation capacity or sectoral positioning should not in themselves be sufficient to establish harm.

Forward-looking assessments should be based on sufficiently likely and evidence-based assumptions. In fast-moving and uncertain markets, this requires careful consideration of financing constraints, development timelines and commercial feasibility.

This assessment should also take into account regulatory and compliance constraints that may affect the ability of firms, in particular smaller or innovative companies, to scale independently within a commercially relevant timeframe.

The Innovation Shield is a welcome recognition that acquisitions of innovative companies can form part of a healthy innovation ecosystem and may support the

development, scaling and commercialisation of new technologies. But this will depend on its practical usability. In particular, it should allow parties to assess at an early stage whether a transaction is likely to fall within its scope. Where this is not possible, the perceived regulatory risk may remain unchanged, limiting the effect of the mechanism.

While the Innovation Shield is useful as a pre-screening tool for clearly benign transactions, it offers limited practical comfort in the contested middle ground where private equity investors and larger strategic acquirers are most active. The Guidelines should therefore clarify how the thresholds are calculated, particularly whether they are assessed at group level and whether adjacent portfolio activities are included, as well as how the Innovation Shield applies to serial acquisitions, including whether each transaction benefits individually or whether alternative theories, such as portfolio effects or entrenchment, may nonetheless apply to the transactions in aggregate.

The Guidelines should also provide greater clarity on how the requirement for at least three alternative R&D projects with comparable competitive potential is assessed in practice. In particular, it is unclear whether comparability is assessed by reference to innovation capabilities, development stage, likelihood of successful commercialisation or other factors. The Guidelines should either define the comparability standard more explicitly, including by reference to the indicators of dynamic competitive potential set out elsewhere in the Guidelines, or clarify that it is sufficient for alternative projects to have a plausible ability to develop products capable of serving similar customer needs, rather than requiring innovation capabilities equivalent to those of the merged entity.

The blanket exclusion of DMA gatekeepers from the Innovation Shield may also warrant further (re)consideration. DMA gatekeeper status is determined by reference to specific core platform services and does not necessarily indicate market power or competitive significance in the market or innovation space to which the target relates. The Guidelines should therefore consider whether a more targeted approach, based on the acquirer's position in the relevant market or innovation space affected by the transaction, would better align the Innovation Shield with its objective of identifying transactions that are unlikely to raise innovation competition concerns.

In practice, venture-backed transactions are evaluated on the basis of expected execution risk, including merger review. The expected likelihood and timing of clearance, and the conditions attached to it, are directly reflected in pricing and investor behaviour. Providing clearer and more operational criteria for the Innovation Shield would therefore improve predictability and reduce uncertainty in transactions involving innovative firms.

Finally, the section should recognise that acquisitions may enable the deployment and scaling of innovation. This role should be reflected in the assessment alongside potential risks, based on concrete evidence such as R&D plans, investment commitments and commercialisation strategies.

Part.II.B.5 – Loss of potential competition

This section includes paragraphs 193-207.

Answer

The assessment of potential competition should require robust evidence that a firm would likely have become an effective competitive constraint absent the transaction.

In innovation-driven markets, the existence of a theoretical pathway to entry should not suffice. The assessment should consider whether entry or expansion was realistically likely, taking into account access to capital, execution risk, regulatory barriers, technical feasibility and time to market.

The expected probability of successful entry should also be assessed in a manner consistent with how such projects are evaluated in practice, including the likelihood of securing financing and the risks associated with development and commercialisation.

Where these elements are uncertain, the likelihood and timing of entry should be treated accordingly. This would reduce the risk of intervention based on scenarios that are not supported by sufficiently likely and evidence-based assumptions, while preserving the ability to address cases where future competition is supported by concrete evidence.

Part.II.B.6 – Foreclosure

This section includes an introduction and sub-sections 6.1. Ability to foreclose, 6.2. Incentive to foreclose, and 6.3. Effect on competition, i.e. paragraphs 208-251.

Answer

The foreclosure framework would benefit from clearer differentiation between transactions involving operational integration and those involving financial investors whose portfolio companies are independently managed.

The existence of assets at different levels of a value chain should not in itself imply ability or incentive to foreclose. The assessment should identify whether coordination mechanisms exist in practice, including shared management, governance rights, contractual arrangements or access to sensitive information.

Investment structures should also be taken into account. In particular, where portfolio companies are held through separate funds with distinct fiduciary duties and without shared governance or coordination mechanisms, this may limit both the ability and the incentive to engage in foreclosure. These structural features should be reflected explicitly in the assessment.

Further clarity on thresholds for input control and customer dependency would improve predictability. Ownership alone should not trigger in-depth analysis absent evidence of meaningful control over inputs or commercially viable foreclosure strategies.

The removal of previous screening thresholds for non-horizontal relationships may increase uncertainty in cases where upstream and downstream shares are limited and there is no credible theory of foreclosure. Reintroducing a rebuttable safe harbour for such circumstances would improve predictability while allowing closer scrutiny where supported by evidence.

A proportionate approach would focus on cases where foreclosure mechanisms are concretely identifiable and supported by evidence.

Part.II.B.7 – Entrenchment of a dominant position

This section includes paragraphs 252-259.

Answer

The assessment of entrenchment is closely related to the treatment of portfolio effects. We therefore refer to our observations on portfolio effects set out in Part II.B.9 below, including the suggestion that entrenchment-related concerns should be tied to clearly identifiable mechanisms of harm and that safe harbours should be available for investments lacking a demonstrable link to core market power.

Part.II.B.9 – Other anticompetitive effects

This section includes an introduction and sub-sections 9.1. Access to commercially sensitive information, and 9.2 Portfolio effects, i.e. paragraphs 282-290.

Answer

The treatment of portfolio effects should be grounded in clearly identifiable mechanisms of harm rather than inferred from the breadth of activities or investments.

A portfolio of products, assets or investments does not in itself indicate the ability to affect competition. The assessment should specify how the portfolio would be used to influence market outcomes, for example through bundling, tying, foreclosure or other conduct, and should be supported by evidence of both ability and incentive.

This is particularly important for private capital investors. Portfolio companies are often independently managed and do not operate under a unified commercial strategy. The existence of multiple investments should therefore not be treated as indicative of market power in the absence of coordination mechanisms.

The Guidelines should clarify that portfolio effects require a concrete and evidence-based mechanism of harm. This would avoid over-expansion of the concept and maintain consistency with the broader analytical framework.

The Guidelines should also distinguish between portfolio effects arising from an integrated industrial or commercial portfolio and the mere existence of portfolio companies held by funds under common management. The latter should not, absent evidence of influence, coordination or strategic alignment, be treated as evidence of an ability to leverage market power, pursue bundling or foreclosure strategies, or coordinate competitive conduct across portfolio companies.

The Guidelines should design safe harbours for investments lacking a demonstrable link to core market power, for example where there is no ability to influence competitive conduct and no credible pathway to entrenchment, allowing to exclude routine minority, non-controlling or purely financial investments from enhanced scrutiny.

As regards access to commercially sensitive information, the Guidelines should make clear that only meaningful information flows and substantive structural links can give rise to competitive concerns. They should also recognise, from the outset, that effective safeguards (such as robust information barriers) implemented by the parties may prevent any real ability to influence competitive conduct.

Part II.C – BENEFITS FROM MERGERS (EFFICIENCIES)

Part.II.C.2 – Assessment of dynamic efficiencies

This section includes sub-sections 2.1 Taxonomy of direct synergies, 2.2. Verifiability, 2.3. Merger specificity, and 2.4. Benefit to consumers, i.e. paragraphs 324-338.

Answer

The treatment of dynamic efficiencies should better reflect how investment and innovation benefits arise in practice.

Dynamic efficiencies may include increased ability to finance long-term investment, faster deployment of innovation, improved access to markets, or integration of complementary capabilities. These effects often depend on scale and may materialise over longer time horizons. Further clarification would also be beneficial on how resilience-related effects are assessed, including whether the relevant benchmark is the resilience of the merged entity or the resilience of competition in the market as a whole.

The evidentiary framework should allow such benefits to be substantiated through forward-looking materials, including investment plans, financing structures, R&D pipelines, product roadmaps and deployment timelines. Requiring the same level of certainty as for short-term efficiencies may not be appropriate given the nature of these benefits.

The assessment of merger specificity should also take into account whether alternative routes are realistically available. Where standalone expansion depends on uncertain future financing or significantly longer timelines, this should be reflected in the analysis.

More explicit guidance on these points is necessary for dynamic efficiencies to be effectively taken into account in practice.

Part.II.C.3 – Balancing benefit and harm

This section includes an introduction and sub-sections 3.1. Balancing between symmetric benefit and harm, 3.2. Balancing between asymmetric benefit and harm, and 3.3. Balancing across different consumer groups/markets, i.e. paragraphs 339-357.

Answer

The balancing framework should clarify how forward-looking harm and benefit are weighed in practice.

In practice, both harm and benefit are assessed on a forward-looking basis. The Guidelines should ensure that a consistent approach is applied to probability, timing and evidence. Where potential harms are considered despite uncertainty, credible and evidence-based benefits should be capable of being considered under similar conditions.

Dynamic and investment-related benefits may accrue over time or across different markets or user groups. The Guidelines should clarify how such effects are

incorporated into the balancing exercise, including how differences in timing and distribution are addressed.

Applying a consistent evidentiary approach to both harm and benefit would improve predictability and strengthen the operational value of the framework. Further clarity would also be helpful on how different parameters of competition are weighed where they diverge in practice. In particular, situations may arise where short-term price effects and longer-term effects on resilience, investment or scale move in different directions. The Guidelines could explain how such trade-offs are assessed within the SIEC framework.

Part III – MEASURES TO PROTECT LEGITIMATE INTERESTS

Part III.A – SUBSTANTIVE ASSESSMENT

This section includes sub-sections 1. Types of measures covered, 2. Notion of legitimate interests, again with sub-sections for 2.1 Recognised interests, and 2.2 Other public interests, 3. Compatibility with the general principles of EU law, again with sub-sections for 3.1. Proportionality, 3.2. Non-discrimination, and 3.3. Other principles of EU law, and 4. Compatibility with other provisions of EU law, i.e. paragraphs 363-389.

Answer

The treatment of legitimate interests and Member State intervention would benefit from further clarification as to how these mechanisms interact in practice with the EU merger control framework. Greater clarity would support the effective operation of the EUMR's one-stop-shop principle and help reduce fragmentation arising from parallel or overlapping review processes.

Paragraph 366 identifies recognised legitimate interests, including public security, which in practice may overlap with other regulatory frameworks, notably foreign direct investment (FDI) screening. In current transaction practice, parties may therefore face parallel or sequential review processes at EU and Member State level, even where the merger itself does not raise substantive competition concerns.

This interaction is already reflected in merger proceedings, where parties may disclose concurrent filings or related regulatory processes. However, the draft Guidelines do not clarify how such parallel assessments are expected to interact or how they may affect the overall review process.

For transaction planning purposes, this is relevant not only from a procedural perspective but also in terms of execution risk. Even where a transaction is expected to be cleared under the EU Merger Regulation, the possibility of additional intervention

at a later stage may be factored into deal structuring, timing and pricing. This is particularly relevant in investment-driven transactions, where the feasibility of the transaction depends on the expected probability and timing of completion.

Providing greater clarity on how the Commission and Member States assess and coordinate the application of legitimate interests, including in situations of parallel or related proceedings, would improve predictability without affecting the allocation of competences. This would contribute to a more transparent and operational framework for merger assessment.