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EUROPEAN COMMISSION - CONSULTATION ON THE DRAFT TEXT OF THE NEW MERGER GUIDELINES

RESPONSE BY FRESHFIELDS LLP

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FRESHFIELDS

Freshfields response to the European Commission's consultation on the draft text of the new Merger Guidelines

1. Introduction

1.1 Freshfields LLP (***Freshfields***) welcomes the opportunity to respond to the European Commission's Consultation on the draft text of the new EU Merger Guidelines (the ***Guidelines***).

1.2 This response is based on our significant experience in advising on a broad range of matters under Council Regulation (EC) No 139/2004 (***EUMR***). As an international leading law firm in merger control review, Freshfields regularly advises clients (including corporates, private equity funds, financial institutions, and sovereign wealth funds across a wide range of industries) on complex cross-border transactions, securing merger control approvals across multiple jurisdictions. More information on Freshfields' experience and expertise in this area can be found here.

1.3 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients, which comprise a wide range of companies active in a variety of sectors. Likewise, this response does not necessarily represent the personal views of all Freshfields lawyers. Freshfields' contact persons for purposes of this consultation are: Paul Van Den Berg (paul.vandenberg@freshfields.com), Thomas Janssens (thomas.janssens@freshfields.com) and Björn Sijtsma (bjorn.sijtsma@freshfields.com).

2. General considerations

2.1 The Guidelines have significantly expanded in all directions. This means both the number and scope of theories of harm has grown alongside the positive guidance on efficiencies. Whether the Guidelines will present a genuine change will therefore depend on their application in practice. While we recognise that the framework must evolve to reflect new market realities, the expansion of theories of harm and the introduction of new indicators should not, of themselves, lower the threshold for intervention or result in the scrutiny of transactions that do not give rise to genuine competition concerns.

2.2 This is all the more important given the mandate underpinning the overhaul: the express goal, as set out in President von der Leyen's mission letter to Executive Vice-President Ribera, was a "*new approach to competition policy*" that is "*more supportive of companies scaling up in global markets*".[1] Executive Vice-President (***EVP***) Ribera has confirmed that the revision is intended to "*encourage pro-competitive mergers that allow European players to grow*"[2] and has reiterated the benefits of scale more generally.[3] The clear objective of the revision is therefore to

[1] Mission Letter from Ursula von der Leyen to Teresa Ribera Rodriguez, Brussels, 1 December 2024 (https://commission.europa.eu/document/download/33d74e86-3a17-472c-ba93-59d1606bbc20_en?filename=mission-letter-ribera_0.pdf).

[2] Financial Times, "EU to relax merger rules in bid to create 'European Champions'", Brussels, 16 April 2026, (https://www.ft.com/content/75073836-d923-4b3f-a1ca-5ae83dcd705a?syn-25a6b1a6=1).

[3] See e.g. Speech by Executive Vice-President Teresa Ribera at the European Competition Forum, Brussels, 17 June 2026 (https://ec.europa.eu/commission/presscorner/detail/en/speech_26_1381).

make pro-competitive mergers easier, not to make mergers generally more difficult. This aim will be undermined if the expanded theories of harm, and the significant amount of discretion the Commission has asserted for itself in certain areas, lead to transactions being subject to greater scrutiny without a corresponding increase in the evidential basis for intervention. We note this would also run counter to the Commission's efforts in recent years to simplify EU merger control.[4]

2.3 One pragmatic solution to reduce this risk is to introduce guidance on when particular theories of harm will be considered relevant by the Commission for a transaction. This will help merging parties distinguish between high and low risk transactions more easily, improve legal certainty and enhance the efficiency of any pre-notification interactions.

2.4 The Guidelines should, as a matter of principle, refrain from introducing any presumptions of harm. However, we note that they still contain several broad assumptions or implied presumptions, including (i) removing the benefit of limbs b) and e) of the Innovation Shield for DMA gatekeepers and the largest firms in a market,[5] (ii) recognising but then immediately downplaying the expected relevance of out-of-market constraints for competitive dynamics,[6] and (iii) linking the market share taxonomy to a shift in evidentiary expectations.[7] These parts of the Guidelines should be moderated or clarified, to avoid being overinclusive or inadvertently shifting in practice the evidentiary burden onto the merging parties. We address these points in more detail in our submission below.

2.5 We welcome the addition of a chapter which explicitly sets out the benefits of scale, which is essential for companies to compete in global markets, especially with operators from outside the EU. Despite these positive signals, certain sectors where scale is an important factor are not explicitly named in the Guidelines other than in footnotes.[8] The Guidelines' framework for balancing immediate competitive harm against longer-term benefits could be strengthened with specific guidance for key sectors such as, for example, the telecoms industry,[9] taking into consideration examples of similar cases in other jurisdictions where applicable.[10]

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4 The Commission stated that "[it] *has sought over the years to focus its resources on cases that could potentially raise competition concerns and reduce (where possible) the administrative burden involved in merger reviews*", which has led to the adoption in 2023 of the "*Merger Simplification Package*" which aimed to streamline the review of "*simple*" transactions, see (https://competition-policy.ec.europa.eu/mergers/publications/simplification-merger-control-procedures_en).

5 Guidelines, para. 192(b) and (e).

6 Guidelines, paras. 101-102.

7 Guidelines, paras. 62 and 127.

8 Guidelines, para. 306, footnote 380, where it is used as a substantive example of the time horizon in which direct efficiencies are assessed by the Commission.

9 We note this would be consistent with the Draghi report, where the benefits of scale for telecoms featured prominently, and public statements by Commission President von der Leyen, where she recommends to "*examine the telecommunications sector more closely*" see Minutes of the 2560th meeting of the Commission Brussels, 18 March 2026, (https://ec.europa.eu/transparency/documents-register/detail?ref=PV(2026)2560&lang=en).

10 For example, in case of the telecoms industry, the UK's CMA Vodafone/Three case provides an illustrative example of how investment commitments can be considered real, verifiable, and sufficient to offset harm.

2.6 We further observe that sustainability features less prominently in the Guidelines than the policy discourse of recent years had led stakeholders to expect. Given the long intervals between revisions, the Guidelines are likely to govern the Commission's practice for a considerable period, and a lack of clear guidance now risks leaving an important and evolving area underdeveloped for years to come. We would therefore welcome greater clarity on the role sustainability will play in the assessment of mergers – including how sustainability benefits may be recognised as part of the pro-competitive and efficiencies analysis – so that businesses can rely on a stable and predictable framework.

2.7 We welcome the express recognition of the failing division scenario, which addresses a genuine gap in the existing framework, and the acknowledgment that a division may serve an "*important purpose other than financial*" within a broader corporate group. We invite the Commission to elaborate on this concept to reflect a range of strategic purposes an unprofitable division may serve – including strategic positioning, brand value, or pipeline development. We are also concerned that defining a failing firm as one "*forced out of the market because of financial difficulties*" is poorly adapted to digital markets, where failure typically manifests as gradual user decline, sustained disinvestment, or strategic deprioritisation rather than acute financial distress.

2.8 In the remainder of this submission, we address our more detailed observations and suggestions on each of the main sections of the Guidelines, which can be summarised as follows:

(a) **Market power:** we welcome the clearer guidance on market power indicators and the absence of formal rebuttable presumptions. We do, however, see a risk that the differentiated evidential standard will operate as an implicit presumption in practice. We recommend the Commission explicitly confirm it remains solely responsible for proving a theory of harm, clarify the newly added indicators (profit margins, low price sensitivity, dynamic competitive potential), and ensure each is applied equally to demonstrate both the existence and the absence of market power.

(b) **Anti-competitive effects**: our central concern is that the materially expanded toolkit is not matched by a corresponding increase in evidentiary discipline. The new dynamic theories - loss of investment, innovation and potential competition - are all inherently forward-looking and difficult for merging parties to rebut. We welcome the Innovation Shield, but seek concrete limiting principles for the entrenchment theory, and recommend that all new and restructured theories be applied with the same rigour the Commission expects of a theory of benefit.

(c) **Efficiencies:** we welcome the introduction of a formal "*theory of benefit*" as a parallel to theories of harm. This formal symmetry should translate into substantive symmetry: dynamic efficiencies must not be held to a higher evidentiary standard, a stricter timeliness test, or a more demanding consumer-benefit and balancing standard than the comparable forward-looking theories of harm.

(d) **Legitimate interest**: we welcome the clarification that Member States and their nationals are "*prima facie not a threat to the public security of another Member State*", which requires a Member State invoking public security to substantiate the claim on request. We recommend confirming that this privileged status extends to all EU-based firms (including those owned by third-country nationals), that the burden of substantiating a public security concern rests with the Member State in all cases, and that the Commission provide guidance to distinguish genuine "*other*" legitimate interests from disguised economic or industrial-policy objectives.

3. Market power and structural indicators

3.1 The Commission has taken a constructive step in setting out, more transparently than before, the structural metrics on which it may rely. Below we identify the elements we consider to be genuine improvements, before setting out the areas where, in our view, the Guidelines would benefit from further clarification or recalibration to preserve an effective, proportionate and balanced market power framework.

Welcome aspects: greater transparency in the structural framework

3.2 We welcome the Commission's decision to set out an express taxonomy of market share bands.[11] We similarly support the streamlining of the HHI thresholds into a clear tripartite structure of unconcentrated markets, concentrated markets, and highly concentrated markets.[12] This articulation provides businesses with a more predictable starting point for self-assessment than the previous framework and is, in principle, a positive contribution to legal certainty. We regret, however, the removal of the specific thresholds previously provided for horizontal and vertical concentrations, which offered parties valuable certainty in self-assessment;[13] we would encourage the Commission to reinstate, or otherwise provide an equivalent to, those concentration-specific thresholds in the final Guidelines. Such guidance would be particularly valuable in the foreclosure context, where clear thresholds would assist parties in assessing when an undertaking is likely to be regarded as having significant market power.

3.3 It is also positive that the Guidelines do not seek to introduce formal rebuttable presumptions or a reversal of the burden of proof. As we set out in our consultation response of 3 September 2025 (our ***First Consultation Response***), the burden of proving a significant impediment to effective competition (***SIEC***) rests with the

[11] Guidelines, para 62.
[12] Guidelines, para 65.
[13] Such thresholds were previously set out in the Commission's **Horizontal Merger Guidelines** (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, para. 18) and **Non-Horizontal Merger Guidelines** (Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, para. 25). The Horizontal Merger Guidelines provided specific market share and HHI thresholds below which horizontal concentrations were unlikely to raise competition concerns (notably, a market share below 25% or an HHI below 1,000 post-merger). The Non-Horizontal Merger Guidelines similarly set out safe harbour thresholds for vertical and conglomerate mergers, including a market share threshold of 30% for the parties involved in the relevant markets. These thresholds served as a practical and well-established framework for parties conducting self-assessments prior to notification.

Commission alone in all concentrations, and the EUMR establishes no presumption as to the compatibility or incompatibility of a concentration with the internal market. We welcome the fact that the Guidelines instead treat market shares and concentration levels as useful indicators rather than as decisive or self-standing determinants, consistent with the principle that no single factor is dispositive. We note in this respect the helpful acknowledgements in the Guidelines that high margins may be temporary and reflect innovation and risk-taking,[14] and that market shares may be a less reliable guide in dynamic or volatile markets, or markets characterised by lumpy or large one-off orders.[15]

3.4 The recognition in the Guidelines that out-of-market constraints may play a role in the assessment of market power is helpful.[16] We would, however, encourage the Commission to provide clearer guidance on the weight such constraints will carry in practice. The Guidelines currently characterise out-of-market constraints as not being effective and immediate competitive constraints and state that they "*often constrain the merged entity only to a limited degree*" and are "*typically insufficient on their own*".[17] While we understand the rationale for caution, a framing that consistently downplays these constraints risks under-weighting genuine competitive pressure, including from global firms and alternative sales channels. We invite the Commission to clarify the circumstances in which out-of-market constraints will be given material weight, so that the analysis remains balanced and capable of capturing pro-competitive realities.

Room for improvement: ensuring a fair, proportionate and predictable application

3.5 The express enumeration of market structures that "*may*" be less likely to indicate a SIEC is helpful.[18] The Guidelines should, however, frame this soft safe harbour in the positive, acknowledging that the listed scenarios in fact rarely give rise to a SIEC, but in exceptional circumstances "*may*" still give rise to concerns.

3.6 We support the Commission's choice not to adopt any formal presumptions. However, we remain concerned that the **differentiated evidential standard** set out in the Guidelines may operate, in practice, as a presumption in all but name. The Guidelines note that the Commission "*requires substantial evidence pointing away from a SIEC […]* [for] *mergers in markets where the merged entity has high or very high combined market shares or when the markets are highly concentrated*".[19] A shift in evidentiary expectations based on structural indicators alone is akin to a presumption.

3.7 The burden of proving a SIEC rests entirely with the Commission in all concentrations. The fact that the Commission should produce particularly compelling evidence where the merging parties have low shares does not justify a corresponding standard that effectively reduces that burden in cases involving higher shares. In our view this is in tension with the settled CJEU principle that the EUMR establishes no presumption as to the (in)compatibility of a concentration with

[14] Guidelines, para 70.
[15] Guidelines, para 64.
[16] Guidelines, para 101.
[17] Guidelines, para 102.
[18] Guidelines, para 129.
[19] Guidelines, para 127.

the internal market - and that the burden of proof rests with the Commission - a principle that safeguards the rights of defence and legal certainty for undertakings.[20] Commission decisions resting on such a differentiated standard would be particularly exposed to challenge before the EU courts.

3.8 We therefore urge the Commission to clarify what is meant by "*substantial evidence pointing away from a SIEC*", [21] and in particular to confirm that this language does not alter the allocation or intensity of the legal burden of proof, which remains with the Commission in all cases. Absent such clarification, parties to transactions involving high shares risk being required to defend against theoretical or hypothetical concerns, even where objective market indicators suggest limited or no cause for concern, with the attendant risk of longer reviews, increased cost, and a chilling effect on otherwise pro-competitive transactions.

3.9 We recognise the value in expanding the array of tools available for assessing market power. As regards **profit margins**, it is imperative that this indicator is applied in a predictable manner consistent with economic reality. We invite the Commission to provide further guidance on three points:

(a) First, the Guidelines contemplate assessing whether margins "*materially exceed those in more competitive comparable markets or those of peers within the same market*".[22] We question whether a comparison of margins across different markets is feasible and informative, given the inherent differences in market dynamics and conditions that will exist. A comparison against peers in the same market might be more informative, but should account for the fact that higher margins for a given firm can be the result of pro-competitive dynamics, such as greater efficiency or innovation. At the very least, the Guidelines should therefore specify how a relevant comparator market or group of peers will be selected and that any differences in margins cannot be taken at face value as evidence of market power.

(b) Second, the Guidelines helpfully accept that "*high margins may be less likely to indicate market power if they are temporary*", [23] but provides no guidance on how a "*temporary*" margin is to be identified or over what period; we invite the Commission to define this clearly.

(c) Third, while we agree that industry-wide high margins do not preclude a finding of market power, the Guidelines' suggestion that such margins "*may suggest that this is an industry with significant barriers to competition*"[24] should be applied with care. In a number of sectors – for example digital and pharmaceuticals – high margins are a well-understood and normal feature of the underlying business models, completely unrelated to market power. We therefore invite the Commission to confirm that

[20] Case T-79/12, Cisco Systems Inc. v Commission, [2013] EU:T:2013:635, para. 48; Case C-413/06P, Bertelsmann Sony, [2008] EU:C:2008:392, para. 48.
[21] Guidelines, para 127.
[22] Guidelines, para 72.
[23] Guidelines, para 70.
[24] Guidelines, para 73.

industry-wide margins will be properly contextualised against the established economics of the sector in question.

3.10 We make a similar observation regarding the use of **low price sensitivity** as an indicator of market power. The Guidelines provide that insensitivity to price changes "*can thus be evidence of market power*" and that the Commission may examine customer churn rates, switching patterns and elasticity of demand from natural experiments, with parallel treatment of the responsiveness of rivals' output.[25] We support the analytical logic, but consider that, consistent with the approach taken to market shares and HHI, any new indicator should be accompanied by an indication of the level at which it is said to demonstrate market power. The Guidelines do not specify the churn rate or elasticity threshold above which low price sensitivity will be treated as probative, the criteria a "*natural experiment*" must satisfy to be considered reliable, or how this indicator interacts with the market share framework. We urge the Commission to provide this clarity, so that the indicator operates in an impartial and predictable manner.

3.11 We also invite the Commission to clarify its treatment of **dynamic competitive potential** (***DCP***). The Guidelines define DCP as the range of factors the Commission considers, beyond a static assessment, to capture a firm's influence on the competitive process in innovation-driven markets.[26] Many of the factors listed – R&D spending, the number and potential of products in development, innovation capabilities and R&D organisations – closely mirror the characteristics the Guidelines use to identify an "*important competitive force*" (***ICF***), which is similarly defined as a firm with more influence on the competitive process than its market share would suggest, and which may have a small or even zero market share.[27]

3.12 The dividing line between DCP and ICF is not clearly drawn, and we invite the Commission to explain how the two concepts relate. We make three further observations.

(a) First, the Guidelines present DCP almost exclusively as a basis for finding market power; it should be made explicit that DCP is equally relevant in demonstrating the *absence* of market power, for example where promising competitors or pipeline products will remain post-merger.

(b) Second, the Guidelines note that "*the high valuation of a target by the purchaser, especially compared to its turnover, may also provide an indication regarding the significance of the company's dynamic competitive potential*".[28] We caution against treating acquisition price as a proxy for competitive significance, as a high valuation may reflect efficiencies, synergies, available funding or financing conditions unrelated to any reduction in competition.

(c) Third, the Guidelines do not specify any time horizon over which a firm's dynamic competitive potential is to be assessed; a defined and reasonable

[25] Guidelines, paras 68-69.
[26] Guidelines, para 80.
[27] Guidelines, paras 138-141.
[28] Guidelines, para 81.

time limit is needed to prevent speculative concerns about distant and uncertain competitive developments from driving the analysis.

3.13 Finally, we invite the Commission to ensure that the assessment of **resilience** as a pro-competitive factor is applied even-handedly. We welcome the recognition in the Guidelines that mergers can have positive effects on resilience and that scale, innovation, investment and resilience should be given adequate weight as pro-competitive factors that can benefit from a degree of consolidation.[29] We are concerned, however, that as currently framed – with resilience defined around security of supply, critical infrastructure and defence readiness within the internal market[30] – these benefits may, in practice, be more readily available to EU-based acquirers than to non-EU acquirers. That concern is reinforced by a *prima facie* distinction the Guidelines draw, albeit in the separate context of Member State intervention, between EU and third-country interests.[31] A structural disadvantage for non-EU acquirers in accessing resilience-based arguments risks deterring beneficial inward investment. We therefore urge the Commission to confirm – consistently with the non-discrimination principle reflected in paragraphs 382 and 383 of the Guidelines – that resilience benefits will be assessed on their objective merits, and to provide guidance ensuring that the resilience analysis is applied equally regardless of the acquirer's place of establishment.

3.14 More generally, and consistent with our First Consultation Response, we urge the Commission to confirm that each of the new indicators introduced in the Guidelines will be applied equally to demonstrate both the existence and the lack of competitive harm, and that none of them will operate to create a new *de facto* presumption or to shift the burden of proof away from the Commission. We would also welcome clarification as to how the Guidelines are intended to interact with the Commission's Simplified Procedure Notice, as it is presently unclear how the revised structural framework and indicators map onto the categories governing eligibility for the simplified procedure.[32] A commitment to this effect in the final Guidelines, together with clear guidance on the methodology, interpretation and relative weight of each indicator, would be welcomed and would do much to ensure that the expanded toolkit enhances, rather than undermines, the objectivity and predictability of EU merger review.

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[29] Guidelines, fn 18 and para 10.
[30] Guidelines, paras 9, 15(c).
[31] Guidelines, para 370.
[32] By way of illustration, several potential points of tension could arise between the Guidelines and the Simplified Procedure Notice. First, the Simplified Procedure Notice establishes specific market share thresholds for eligibility — for instance, permitting simplified treatment where the combined market share of the parties does not exceed 20% in the case of horizontal overlap, or where the individual and combined market shares of all the parties are below 30% on the upstream and downstream markets in case of vertical relationship — whereas the Guidelines introduce a different banding structure that does not map directly onto these categories. Second, the Guidelines' HHI structure (unconcentrated, concentrated, and highly concentrated markets) does not align seamlessly with the HHI-based criteria used in the Simplified Procedure Notice to determine eligibility. Third, where a transaction falls at the boundary of the Guidelines' market share bands, it remains unclear whether and how this affects the eligibility assessment under the Simplified Procedure Notice, potentially creating uncertainty for parties seeking to determine the applicable procedure at the pre-notification stage. These discrepancies risk undermining the coherence and predictability of the overall merger review framework.

4. Anti-competitive effects

4.1 The Guidelines' expansion of the enforcement toolkit is not, in our view, matched by a corresponding increase in evidentiary discipline. Several of the new and expanded theories of harm — particularly the dynamic theories — are framed in a way that creates a risk of speculative intervention based on uncertain, forward-looking assessments. Our core recommendation is for the Commission to apply stronger evidentiary guardrails throughout this section. While we welcome the added clarity in many areas, we remain firm in our concern about the new dynamic theories where the evidential standards are unclear, and the areas where the Guidelines create legal uncertainty or potential asymmetries.

4.2 This concern is well-illustrated by a cross-cutting feature of the Guidelines' more dynamic approach: the willingness to assess competitive effects over materially longer forecast periods. We recognise that longer prognosis periods can operate in merging parties' favour — for example, by allowing credible longer-term competitive constraints, including from global competitors, to be taken into account, as well as longer-term efficiencies. However, the further into the future the analysis extends, the less certain and less robust the available evidence necessarily becomes. It is therefore essential that the evidentiary requirements applied to long-term effects are proportionate, and applied symmetrically to theories of harm and theories of benefit alike, so that neither the Commission is able to assert, nor merging parties required to rebut, speculative long-term effects on a thinner evidential basis than the analysis demands (we address the corresponding point in respect of long-term efficiencies at paragraph 5.29 below).

4.3 We would also welcome confirmation that, where multiple theories of harm are invoked, the Commission will guard against the double-counting of harm where the same underlying market feature supports more than one theory. Relatedly, the limitation — that the Commission has no duty to undertake a forward-looking analysis where it cannot envisage the long-term effects "*within a reasonable margin of error*"[33] — must operate symmetrically: dynamic theories of harm predicated on predictions that fall outside that margin should not be capable of grounding a finding of SIEC. Our goal is to help the Commission produce a final text that is both analytically robust and practically workable.

Structural overhaul

4.4 The breadth of the new framework means that every notifiable transaction — regardless of type — must now be assessed against all eight theories of harm. This materially increases the analytical burden on merging parties, potentially requiring narrative-building in the Form CO in respect of every theory, which may unnecessarily increase costs and create inconsistency. We would therefore welcome guidance in the final Guidelines on how merging parties should prioritise and sequence their theory of harm analysis in Form CO submissions, particularly for transactions where certain theories are manifestly inapplicable. In this regard, we would also welcome confirmation that the new framework does not, of itself, require parties to include a narrative addressing each of the eight theories in the

[33] Guidelines, fn 82.

Form CO, particularly where this would require information not currently contemplated by the Form CO.

The differentiated evidential standard

4.5 The explicit calibration of the evidentiary standard to market concentration levels is a positive step towards greater legal certainty.[34] However, we reiterate the concern expressed in our First Consultation Response that, at the high share end, the framework's practical effect is difficult to distinguish from a rebuttable presumption of harm. The gap between the principle of '*no formal presumption*' and the practical requirement that parties produce "*substantial evidence pointing away from a SIEC*" remains a key area of ambiguity. To address this, the final Guidelines should clarify that high structural indicators alone cannot discharge the Commission's fundamental obligation to prove a SIEC to the '*more likely than not*' standard. We also recommend that the Commission provide illustrative examples of the type and quality of "*substantial evidence pointing away from a SIEC*" it would consider sufficient.

Loss of head-to-head competition

Important Competitive Force

4.6 The expanded guidance on closeness of competition and the codification of quantitative tools are positive developments. We also welcome the expanded (non-exhaustive) catalogue of seven potential characteristics that may lead to a firm being considered an "*Important Competitive Force*".[35] However, several of these characteristics — in particular those at points (d), (e), (f) and (g), are not hard, objective criteria; they are qualitative and open-ended.[36] This breadth gives the Commission considerable flexibility — and therefore discretion — to characterise a target as an ICF, even where the structural metrics appear benign. A key ambiguity also arises from the interaction between ICF status and the differentiated evidential standard. The final Guidelines should clarify how a zero share merger involving an ICF would be assessed, so as not to undermine the protections offered by the evidential framework for low share transactions. Specifically, the Guidelines should clarify whether ICF status of itself constitutes the "*substantial additional corroborating evidence*" the Commission requires in a low-share case, or whether further, separate evidence is required.

Labour market effects

4.7 We acknowledge that the Guidelines have partially addressed our prior concerns by limiting the assessment to competition effects, rather than to general corporate restructuring.[37] However, significant uncertainty remains. The Guidelines provide no guidance on *how* relevant labour markets will be defined in practice — whether by geography, occupation or otherwise — nor do they clarify the boundary with employment law. More fundamentally, we would welcome confirmation that, consistent with the Commission's established approach to buyer power in product markets, no competition concern should arise on an upstream labour market —

[34] Guidelines, para 127.
[35] Guidelines, para 140.
[36] Guidelines, para 140.
[37] Guidelines, paras 160 – 161.

irrespective of the degree of upstream concentration — where the merged entity does not possess market power in the relevant downstream market. Absent downstream market power, the merged entity has neither the ability nor the incentive to restrict its output, and any input cost advantages (including in respect of labour) would be expected to be passed on to customers rather than to fund an anticompetitive reduction in output. A labour market theory of harm that is disconnected from the downstream market would, in our view, result in an incomplete and incoherent assessment, inconsistent with the consumer welfare standard that underpins the EUMR. To provide greater predictability, we recommend that the final Guidelines include concrete examples of the circumstances in which labour market effects are likely to be assessed.

Minority shareholdings and common ownership

4.8 We support the structured framework and a *de minimis* threshold for minority shareholdings.[38] We would, however, encourage the Commission to raise this threshold from 5% to 10%, for the following reasons:

(a) First, a 10% threshold would align the Guidelines with the Commission's own established practice in adjacent instruments. The Commission's Short Form CO under the simplified procedures uses a 10% threshold in the context of its safeguards and exclusions, and a 10% threshold would therefore promote consistency and predictability across the Commission's merger control framework. It would also align with the position under many national and EU foreign direct investment regimes, which frequently provide a safe harbour for stakes below 10%;

(b) Second, this is consistent with the Commission's own decisional practice. In *Prosus/Just Eat Takeaway*, the Commission required Prosus to reduce its stake in a competitor, Delivery Hero, to just below 10% — not below 5% — reflecting the view that a stake below 10% does not give rise to competition concerns; and

(c) Third, and as a matter of substance, it is difficult to conceive how a non-controlling stake of less than 10% could, on its own, confer a level of influence over a competitor that is material to the competitive assessment. Where such a stake is in fact accompanied by strategic rights (such as veto or board representation rights) sufficient to confer material influence, the transaction would in any event be captured by the control test. Moreover, the risk of any improper exchange of commercially sensitive information arising from a minority stake is addressed by Article 101 TFEU, which provides a dedicated and effective tool for that purpose.

4.9 In addition, the Guidelines do not specify what "*additional rights or links*" trigger the exception to this threshold. Separately, the statement that the HHI "*may be adjusted*" to account for common ownership effects creates uncertainty, as no methodology is provided as to how any such adjustment would be made. We recommend that the final Guidelines provide further guidance on both points.

[38] Guidelines, para 165.

Network effects

4.10 We are concerned that the Guidelines, in particular risk treating network effects as a presumptive barrier to competition, which overstates the risk of market tipping and understates the substantial benefits that network effects can deliver to consumers.[39] Network effects can be a feature of competitive success rather than a market failure, and the risk of tipping is materially mitigated where consumers and businesses are able to multi-home. We endorse the acknowledgement that the presence of network effects "*does not in itself indicate that a loss of head-to-head competition will result in a SIEC*", and the recognition of the mitigating role of multi-homing, interoperability and data portability.[40] We recommend that the final Guidelines build on this by confirming that network effects will be assessed on a case-by-case basis, accounting for both their pro-competitive benefits and their potential costs, rather than being treated as a structural barrier.

New dynamic theories

4.11 A common theme across the new dynamic theories — loss of investment, innovation, and potential competition — is that they are forward-looking, based on effects that are inherently difficult to quantify, and that present significant challenges for parties seeking to rebut them. Our overarching concern is that these theories should be applied with the same analytical rigour that the Commission expects merging parties to apply to their own "*theory of benefit*".

Loss of investment competition

4.12 The theory that harm may arise from a reduction in the "*incentive*" to invest, "*even if the merged entity were to proceed with its investment projects as planned pre-merger*"[41], is particularly difficult to rebut. We recommend that the final Guidelines clarify the evidential standard required to establish such a reduction in incentive, as distinct from a proven project discontinuation.

Loss of innovation competition

4.13 The shift to a process-based assessment — under which the loss of innovation competition is, in the Commission's words, "*not focused on a specific future outcome, which may be uncertain, but on whether the merger significantly impedes the process of innovation rivalry*"[42] — creates a similar challenge. Since the Commission need not point to a specific product outcome, merging parties are left with no clear basis on which to rebut the theory. We therefore request that the final Guidelines provide guidance on what evidence would be considered sufficient to demonstrate that the process of innovation rivalry remains unimpeded. We also invite the Commission to provide clear guidance distinguishing legitimate post-merger rationalisation – such as the reallocation of resources towards higher-value innovation or the elimination of duplicative cost structures – from conduct that genuinely impedes the process of innovation rivalry.

[39] Guidelines, para 154.
[40] Guidelines, paras 155 – 156.
[41] Guidelines, para 170.
[42] Guidelines, para 175.

Loss of potential competition

4.14 The explicit statement that the appropriate time period for "*future constraint*" is "*not limited to a fixed number of years*"[43] creates significant legal uncertainty and risks speculative theories of harm that could chill the start-up ecosystem. This concern is particularly acute in the context of so-called "*killer acquisition*" theories, where extending the forecast period can materially inflate the assessed competitive significance of a nascent target, making prohibition easier on a correspondingly thinner evidential basis.

4.15 We recommend that the final Guidelines provide guidance on the factors the Commission will consider when determining an appropriate and reasonable time horizon for this analysis, and confirm that the evidentiary burden on the Commission increases commensurately as the forecast period lengthens, particularly given that a rigorous framework requires a demonstration that entry is both sufficiently certain and imminent.

The Innovation Shield

4.16 We strongly welcome the innovation shield as a genuinely positive development that provides much-needed certainty for acquisitions of small innovative companies. To improve its workability, we have three key recommendations.

4.17 First, the exclusion of designated gatekeepers and largest firms from limbs (b) and (e) for acquisitions of start-ups with an R&D project is disproportionate. If maintained, the gatekeeper carve-out should be limited to transactions related to the gatekeeper's designated core platform services only. The largest firm carve-out should be conditioned on that firm having market power or a dominant position – merely being the largest firm in a market is not a meaningful benchmark to identify potential competitive concerns early.[44]

4.18 Second, the definition of "*small company*" is explicitly left open, which creates uncertainty as to the scope of the shield. We recommend that the final Guidelines provide greater certainty — for example, through illustrative examples, industry-specific benchmarks, or by anchoring the definition to established and objective criteria used elsewhere in the Commission's approach to innovation policy. Linking the definition to recognised, objective benchmarks in this way would improve predictability for merging parties and ensure consistency between the Innovation Shield and the Commission's broader innovation framework, while retaining the flexibility needed to accommodate differences between sectors.

4.19 Third, in respect of the R&D capabilities threshold in scenario (d),[45] the final Guidelines should provide guidance on the preferred methodology for calculating the 25% share, given that the denominator — the innovation space definition and R&D measurement — is contested.

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[43] Guidelines, para 206, fn 296.

[44] For example, in a five-player market where three players have a 20% share, one player has a 19% share, and one player has a 21% share, the company with the 21% share would be the "*largest firm*". This means the company would not be able to rely on limbs (b) and (e) of the innovation shield, despite the low likelihood it will hold market power and that its acquisitions of start-ups with an R&D project could lead to an SIEC.

[45] Guidelines, para 192(d).

Expanded and restructured existing theories

Foreclosure

4.20 Our primary concern relates to "*dynamic foreclosure incentive*"[46], which may be established even where standard quantitative tools show no profitable foreclosure strategy. We request guidance on the evidential threshold applicable here. In this context, we reiterate the point made in our First Consultation Response that the Commission should avoid embedding a "*pessimism bias*" in its assessment and should give equal analytical weight to possible pro-competitive and anti-competitive market developments. We also note that the explicit discounting of "*contractual safeguards*" [47] is concerning; well-designed and enforceable safeguards can, in appropriate cases, be a relevant factor — particularly where combined with regulatory oversight. Similarly, the statement that "*diagonal mergers*" are "*unlikely to give rise to efficiencies typically associated with vertical integration*"[48] should not create a presumption against such mergers. Finally, the new provisions on supply chain resilience and imports create a structural asymmetry that may disadvantage non-EU firms. The final Guidelines should clarify the boundary between objective supply chain vulnerability and what may amount to an industrial policy preference for EU-based suppliers.

Entrenchment of a dominant position

4.21 We endorse the pre-existing dominance requirement as an important limiting principle. [49] Our more fundamental concern, however, is that even where dominance is established, the theory as currently framed contains no meaningful limiting principles beyond that threshold. Since almost any acquisition of a complementary or adjacent asset can be said, at some level, to reinforce a dominant undertaking's core business, the theory is capable of capturing a very wide range of transactions — including those that are straightforwardly pro-competitive. As a result, merging parties will be unable to assess with any certainty whether a given acquisition is likely to be regarded as anticompetitive entrenchment or as legitimate, pro-competitive ecosystem development — the very kind of scale-enhancing, innovation-driving transaction that the Guidelines elsewhere expressly endorse. [50] Dominance, while a necessary precondition, is therefore not a sufficient limiting principle.

4.22 The Guidelines are also unclear on whether entrenchment and foreclosure are two separate harms or whether foreclosure is simply a mechanism through which entrenchment may occur. This ambiguity creates a risk of double jeopardy for merging parties and complicates the design of effective remedies. We request concrete guidance on the boundary between pro-competitive ecosystem

[46] Guidelines, paras 239 – 242.
[47] Guidelines, para 218.
[48] Guidelines, para 251
[49] We strongly urge the Commission to clarify that the concept of a "*core market*" is applied only when the explicit pre-existing dominance requirement is met as it would otherwise remain open-ended and create legal uncertainty.
[50] See paras 12-17 of the Guidelines, which recognise that scale-enhancing mergers — including those that combine complementary capabilities and drive innovation and investment — can be pro-competitive and beneficial to the internal market. The entrenchment theory, as currently framed, risks capturing precisely such transactions, creating a tension within the Guidelines themselves.

development and anticompetitive entrenchment — including clear, objective criteria identifying when the acquisition of a complementary asset crosses the line into entrenchment — and clarification on the relationship between the two theories. Without such criteria, the theory will materially reduce legal certainty for merging parties and risks the unnecessary scrutiny of pro-competitive transactions that combine complementary assets.

4.23 We also consider it premature, and a matter of significant concern, to codify a novel legal doctrine that draws so heavily on a single contested decision (*Booking/eTraveli*) before that decision has been subject to full judicial scrutiny. We understand that the General Court is expected to deliver its judgment on the appeal in *Booking/eTraveli* later this year. There is therefore a real risk that, if the Guidelines are adopted in their current form before that judgment, they will codify a theory of harm that is subsequently found by the Court to be unfounded or to have been misapplied — placing the Guidelines in direct tension with, or even in violation of, a binding judgment of the EU Courts. In our view, the Commission should not place itself in that position. We therefore strongly recommend that the Commission either (i) defer finalising the entrenchment theory until the General Court has delivered its judgment in *Booking/eTraveli*, so that the position can be assessed in light of it, or (ii) remove the entrenchment theory from the Guidelines pending such clarification. Grounding the theory firmly in established and judicially-confirmed EU case law is essential, both as a matter of legal certainty and to avoid the criticism levelled at the equivalent provision in the 2023 US Merger Guidelines (Guideline 6), which has been heavily critiqued for relying on outdated precedent and for creating a *de facto* presumption against any acquisition by a dominant firm.

Other theories

Access to commercially sensitive information

4.24 We support the structured treatment of this theory.[51] We are concerned, however, that even with the analytical structure the Commission has put around it, the theory lacks a meaningful limiting principle and is, in practice, very difficult for merging parties to rebut — particularly in the context of vertical mergers in data-intensive industries. In almost any such transaction, the merged entity will gain access to some degree of information concerning rivals; if that access, of itself, is treated as capable of grounding a theory of harm, the theory risks applying to an entire category of otherwise pro-competitive transactions, with no clear basis on which parties can demonstrate the absence of harm.

4.25 Two refinements would materially improve the workability of the theory. First, the Commission should draw a clearer distinction between "*commercially sensitive*" and "*competitively sensitive*" information and frame the theory by reference to the latter. Much information that is commercially sensitive in a general business sense — and which any undertaking would legitimately treat as confidential — is not capable of affecting the competitive process if accessed by a rival. It is the narrower category of competitively sensitive information (such as current or future pricing, output, capacity or strategic intentions) that genuinely raises competition concerns,

[51] Guidelines, paras 282 – 286.

and that is the focus of the Commission's established framework under Article 101 and of the coordination theory elsewhere in these Guidelines. Framing the theory by reference to "*commercially sensitive*" information risks capturing the mere acquisition of confidential business information that has no bearing on competition.

4.26 Second, the Guidelines should set out clear, objective criteria identifying when access to such information crosses the threshold from a normal incident of vertical integration into a genuine competition concern — for example, by reference to the competitive significance of the information, the merged entity's ability and incentive to use it to harm rivals, and the adequacy of safeguards such as effective information barriers and applicable legal (e.g., GDPR) and contractual restrictions. Without such criteria, and consistent with our concerns regarding the entrenchment theory, the theory will materially reduce legal certainty for merging parties and risks the unnecessary scrutiny of pro-competitive vertical transactions in data-intensive sectors.

Portfolio effects

4.27 We welcome the structured treatment of portfolio effects.[52] As with the access to information theory, however, we recommend the final Guidelines clarify the threshold at which the breadth of a combined product portfolio becomes a competition concern rather than a normal feature of commercial activity. Many transactions that bring together complementary or unrelated products sold to a common customer base deliver clear benefits to customers — including the convenience of one-stop-shop supply, reduced transaction costs, and improved service. The Guidelines should make clear that portfolio breadth is not, of itself, a source of competitive harm, and should identify the specific circumstances in which a broader portfolio is capable of conferring and being used to exercise market power to the detriment of customers.

AI-facilitated coordination

4.28 Given the treatment of AI and algorithmic tools as a factor relevant to coordinated effects is novel and untested, we request guidance on the threshold at which the use of such tools creates a sufficient risk of coordination, as opposed to merely increasing price transparency or reflecting efficient, independent responses to market conditions. Without such guidance, there is a risk that the legitimate and widespread use of algorithmic pricing tools is treated as presumptively problematic.

Resilience as a Parameter of Competition

4.29 We welcome the recognition of resilience as a parameter of competition. However, the Guidelines do not answer key questions, such as when supply chain concentration becomes a competition problem rather than an industrial policy concern, how resilience harm is weighed against efficiencies, and whether a negative impact on resilience is a standalone theory of harm. We recommend further clarification, particularly on the interaction between resilience and the efficiencies framework, and reiterate our September 2025 point that this should not duplicate public interest reviews. More specifically, given the growing convergence between merger control, the Foreign Subsidies Regulation and foreign

[52] Guidelines, paras 287-290.

investment screening — all of which increasingly assess the same substantive considerations, including resilience and security of supply, through different lenses — we consider it essential that the Commission ensures consistency and avoids duplication across these regimes, both in the conduct of its investigations and in the substantive assessment. We would welcome a clear commitment from the Commission to coordinate its assessment of resilience (and other common substantive considerations) across the EUMR and the FSR, so as to ensure a single, coherent outcome.

5. Efficiencies / Theory of Benefit

5.1 The introduction of the '*theory of benefit*' as a formal parallel construct to the theories of harm is unreservedly welcome, including the explicit statement that "*demonstrated efficiencies will play a key role in the assessment of mergers going forward*".[53] As explained in our First Consultation Response, under the existing framework, efficiencies are positioned as a reactive afterthought, which has reflected the Commission's assessment in practice. The Commission historically has not found efficiencies to offset anticompetitive effects to such an extent that it has cleared a transaction solely on that basis. This has left consumer benefits largely unexplored in the decisions on significant transactions and contributed to the perception by businesses that these synergies and consumer benefits – that often form the crux of the transaction rationale – are irrelevant. This longstanding absence of precedent where efficiencies were outcome-determinative underscores the importance of ensuring that the revised framework delivers practical, not merely formal, change.

5.2 Against that background, the express call in the Guidelines for parties to "*articulate and substantiate, in due time, a theory of benefit*"[54] and the confirmation that "*a preliminary finding of harm is not a condition for efficiency claims to be submitted and considered*"[55] is particularly welcome as it presents an opportunity for a meaningful shift where efficiencies are a core part of the competitive assessment that the Commission must engage with when raised and that must be addressed in the Commission's decision. It is very helpful that the Commission has also explicitly recognised that efficiencies extend beyond lower prices or improvements in quality, which has historically been the Commission's focus when it has considered efficiency claims. The introduction of a formal taxonomy of efficiencies that includes scale, sustainability, resilience and innovation as well as a bifurcation into direct and dynamic efficiencies better reflects contemporary understanding on how consumers can receive benefits from mergers.[56] It is, however, also important that this taxonomy is treated as illustrative rather than exhaustive, so that the Commission remains open to recognising additional forms of efficiencies not expressly listed.

5.3 There is a risk that the revised framework, while introducing new terminology and structure, does not materially lower the practical hurdles associated with advancing efficiency claims. As a result, efficiencies may continue to play a marginal role in

[53] Guidelines, para 291.
[54] Guidelines, para 25.
[55] Guidelines, para 36.
[56] Guidelines, paras 302 and 325.

cases, notwithstanding the increased emphasis placed on them in the Guidelines. More broadly, the effectiveness of the framework will depend not only on the text of the Guidelines, but on how the Commission exercises its discretion in practice; without a demonstrable shift in decisional practice, the current reforms risk remaining largely formal.

5.4 Despite the welcome efforts in the Guidelines, a key question remains as to whether the revised framework would in practice permit the clearance of a transaction on the basis of efficiencies that would otherwise have been prohibited; absent such outcome-determinative potential, the reorientation towards a theory of benefit risks remaining largely rhetorical rather than operational.

5.5 Specifically, to bridge the gap between the Commission's ambitious policy objectives and practical feasibility, the Commission should:

(a) make further clarifications and revisions to the evidentiary standard to ensure symmetry with the theory of harm framework and avoid the insurmountable hurdles in demonstrating efficiencies;

(b) re-evaluate the merger-specificity test as it relates to comparing different transaction structures;

(c) re-evaluate and clarify the requirement that benefits accrue to the same (or substantially the same) groups of consumers harmed by the merger, which does not always reflect innovation outcomes; and

(d) clarify its approach to balancing benefits and harms, particularly in instances where the theories are not directly comparable (due to e.g. different projected time horizons).

Verifiability — evidentiary standard risks creating insurmountable hurdles

5.6 The Guidelines provide a more explicit and structured articulation of the evidentiary requirements applicable to efficiencies. We welcome the note that the Commission will assess theories of harm and benefit "*according to the same evidentiary standard*"[57] and based on evidence that is "*factually accurate, reliable, consistent and capable of substantiating the conclusions drawn from it*"[58]. This is particularly important given that the legal burden of establishing a SIEC rests with the Commission, considering both anticompetitive and procompetitive effects. The new framework should not in practice create an equivalent or higher burden on notifying parties to establish efficiencies, nor introduce implicit presumptions against their relevance unless proven to a disproportionate standard.

5.7 Placing the evidentiary burden for efficiencies solely on the merging parties fails to account for asymmetric access to market data in many cases. It is appropriate to expect notifying parties to substantiate internal synergies. However, when it comes to systemic efficiencies—such as positive consumption externalities—the relevant information may sit with third parties and be out of the merging parties' reach. In these scenarios, the Commission holds a clear informational advantage. To ensure a balanced assessment, the Guidelines should include a procedure where the

[57] Guidelines, para 26.
[58] Guidelines, para 27.

Commission actively deploys its statutory market-testing and investigative tools to help verify credible, broader efficiency claims.

5.8 In the assessment of competitive harm, the Commission frequently relies on forward-looking and probabilistic evidence, including by evaluating impacts on competitive processes such as innovation incentives, capabilities and R&D rivalry, without requiring precise or fully realised downstream outcomes.

5.9 By contrast, although the Guidelines state that theories of harm and benefit are subject to the same evidentiary standard, the efficiency-specific provisions risk creating a higher practical evidentiary burden for efficiency claims — particularly those relating to innovation, investment or resilience. The Guidelines require parties to substantiate dynamic efficiencies with "*concrete evidence*"[59], to explain "*as concretely as possible the nature of the investment or innovation in question*"[60] and to quantify the resulting efficiencies where reasonably possible. Where precise quantification is not available, parties must still establish the nature and magnitude of the expected efficiencies and show how they would counteract predicted harm. These requirements may, in practice, create an implicit expectation that parties demonstrate specific, quantifiable and non-speculative outcomes, even where the relevant efficiencies are inherently forward-looking and probabilistic.

5.10 This creates a risk of asymmetry, whereby dynamic efficiencies, which may materialise on a longer time horizon, must be evidenced to a higher standard than comparable forward-looking theories of harm. This would be directly inconsistent with the symmetry norm the Guidelines purport to establish and would undermine the stated objective of giving "*adequate weight to innovation, investment and resilience*" through a genuinely "*forward-looking approach*".[61] This concern is further reinforced by the Guidelines' repeated reference to "***demonstrated efficiencies***", which may signal a more restrictive or quasi-deterministic evidentiary threshold than the "*more likely than not*" standard applied to harm.

5.11 The Guidelines do, appropriately, recognise that certain efficiencies may not be capable of precise quantification and may instead be assessed on the basis of qualitative evidence or broader analytical considerations.[62] However, it is very brief and there remains a risk that, in practice, greater weight will continue to be placed on quantifiable evidence, with non-quantifiable efficiencies being accorded less significance in the overall assessment. This may create gravitational pull toward efficiencies that are more readily expressed in precise, measurable terms, at the expense of longer-term or more complex benefits that are equally real but less amenable to quantification. In many sectors, including pharmaceuticals, defence, clean energy, and digital markets, innovation, quality, and investment are the primary drivers of competition, and the benefits they generate do not always lend themselves to precise quantifiable expression. A mechanistic application of the quantification requirement risks systematically underweighting precisely the categories of efficiency the Guidelines seek to elevate — which would be directly

[59] Guidelines, para 327.
[60] Guidelines, para 327.
[61] Guidelines, para 293.
[62] Guidelines, para 308 (direct efficiencies) and para 329 (dynamic efficiencies).

inconsistent with their stated ambition. In particular, this creates a structural bias against dynamic efficiencies that materialise over longer time horizons.

5.12 Relatedly, the requirement that efficiencies be "*timely*" also warrants further clarification, particularly in relation to dynamic efficiencies. While it is appropriate that efficiencies must be capable of materialising within an appropriate timeframe, an overly narrow interpretation of "*timely*" risks systematically excluding efficiencies that arise over longer innovation or investment cycles, and creates inconsistency with the timeline standard applied to certain theories of harm.[63] In many sectors, including pharmaceuticals, advanced manufacturing and digital markets, the most significant efficiency gains—such as new product development, infrastructure deployment or R&D synergies—may materialise only over several years. The Guidelines should therefore make clear that timeliness must be assessed in a manner that is proportionate to the nature of the efficiencies claimed and the characteristics of the industry concerned, rather than by reference to any implicit or standardised timeframe. In particular, dynamic efficiencies should not be discounted solely because they do not materialise "*shortly after closing*",[64] where there is credible evidence that they will arise within the normal innovation or investment cycle of the industry. The Guidelines should therefore avoid formulations suggesting that efficiencies must arise "*without delay*"[65] (with respect to direct efficiencies) or "*shortly after closing*" (with respect to dynamic efficiencies) and instead recognise that multi-year timeframes — including significantly longer periods in appropriate sectors — may be consistent with a finding of timeliness.

5.13 In addition, with respect to documentation, the Guidelines expressly reference "*pre-merger studies by independent external experts*"[66] and state that evidence may be more persuasive where it is "*prepared by third parties, independently of the merging companies*".[67] This risks creating an implicit hierarchy of evidence. Such studies tend to focus on shorter-term, readily verifiable efficiencies. By contrast, contemporaneous internal business documents, including integration plans, operational forecasts, investment programmes and R&D pipelines, as well as disclosures made to investors in public markets, often provide the most direct and reliable evidence of the parties' incentives and ability to realise efficiencies and should be accorded at least equal probative weight. Moreover, such pre-merger studies are, in practice, rarely available given timing, cost and information constraints, and should not be treated as inherently more compelling.

5.14 More broadly, the Commission should ensure that evidence is assessed holistically, taking into account its probative value in context rather than through a mechanistic or formalistic evaluation of individual items in isolation. This is consistent with the Commission's general evidential principle that it "*supports its conclusions with a*

[63] For example, the forward-looking assessment for the potential competition theory of harm is "*not limited to a fixed number of years*" as per fn. 296 of the Guidelines, which suggest a significantly more flexible approach to what timelines are considered by the Commission.
[64] Guidelines, para 328.
[65] Guidelines, para 306.
[66] Guidelines, para 330.
[67] Guidelines, para 330.

sufficiently cogent and consistent body of evidence"[68] — a standard that should apply symmetrically to efficiency evidence as to harm-side evidence.

5.15 To ensure that the efficiencies framework operates effectively in practice, the Commission should therefore clarify that:

(a) once efficiencies have been credibly put forward, it will assume a more active role in testing and substantiating them where appropriate, including through its market investigation tools, rather than treating efficiencies as purely party-driven submissions;

(b) it will fully address efficiency claims in its decision, ensuring it engages fully with the evidence put forward by the parties;

(c) dynamic efficiencies may be assessed by reference to their expected impact on competitive processes (including innovation and investment), without requiring proof of specific downstream outcomes; and

(d) neutrality will be maintained across different categories of evidence including qualitative and probabilistic evidence and internal documents.

Merger-specificity

5.16 The Guidelines importantly note that efficiencies need not be rejected on the basis of "*mere hypothetical possibilities"*[69] that they could be achieved through a less anticompetitive arrangement. This is a necessary inclusion, which will provide a level of comfort for merging parties that the Commission's assessment will be grounded in realistic considerations rather than abstract alternatives.

5.17 However, there is significant room for the Commission to provide additional comfort. There still exists a high burden for parties to address "***all*** *arrangements that are reasonably practical, including* ***all*** *established practices in the industry concerned*" (emphasis added)[70] which is in tension with the claim that merging parties do not need to cover mere hypothetical possibilities. This formulation risks maintaining an unduly high evidentiary burden in practice, particularly in the context of the Commission's expanded theories of harm. This risk is compounded by the potential for speculative analysis of alternative arrangements that may exist in the market but were never realistically contemplated by the parties.

5.18 Critically, the Commission discounts an important business consideration from the assessment when it states that the "*…most profitable option does not imply that the alternatives are unrealistic or unattainable…* [and that] *it is sufficient that the alternative brings added value*"[71]. While this may be intended to avoid an overly permissive approach to merger-specificity, it does not fully reflect commercial decision-making. In practice, profitability is closely linked to incentives, feasibility and the likelihood of implementation. In particular, firms may rationally choose to pursue higher-risk, higher-return strategies—especially in innovation-driven sectors—where the expected returns justify the investment. Discounting

[68] Guidelines, paras 26, 54 and 304.
[69] Guidelines, para 311.
[70] Guidelines, para 311.
[71] Guidelines, para 313.

profitability as a relevant consideration therefore risks understating whether an alternative is genuinely viable in practice.

5.19 For the merger-specificity test not to represent an artificial stumbling block in the recognition of efficiencies, the Commission should:

(a) only require evidence on the viability of alternative arrangements that the merging parties seriously considered in the ordinary course of their assessment of the transaction, as these are most likely to reflect commercially realistic options; and

(b) clarify that profitability and expected returns are relevant factors in assessing whether an alternative is genuinely viable and ensure that any alternative structure relied upon constitutes a credible commercial substitute capable of delivering substantially equivalent efficiencies in practice, taking into account differences in incentives, execution and timing.

Consumer benefits and distribution of efficiencies

5.20 The Guidelines maintain the principle that efficiencies must benefit "*substantially the same consumers as those who would otherwise be harmed by the merger*"[72] for both direct and dynamic efficiencies. This framework should be modernised, especially in relation to dynamic efficiencies. In particular, many of the categories of efficiencies emphasised in the Guidelines — such as innovation, sustainability and resilience — naturally give rise to benefits that extend beyond narrowly defined customer groups to completely new groups in the future. The Guidelines should therefore adopt a more flexible approach to the consumer-benefit condition so that broader groups of beneficiaries are not excluded where the efficiencies are sufficiently connected to the merger and its effects.

5.21 The Guidelines make a positive step in recognising that benefits may accrue to several consumer groups in the form of "*collective benefits*"[73] and can be assessed across closely related customer groups as "*out-of-market benefits*"[74]. But the Guidelines only consider out-of-market and collective benefits relevant to the extent that they are "*valued by and fully compensate substantially all harmed consumers"*[75] and must accrue to harmed consumers who "*substantially overlap with, or form part of, the beneficiary group"*[76]. In practice, collective benefits or out-of-market benefits often generate benefits that extend beyond the merging parties' customer base, including to consumers in other markets or to society more broadly. As a result, such benefits are inherently difficult to confine to the group of consumers affected by the merger, making it unlikely that the required overlap — and full compensation — can be precisely demonstrated in practice. This should be reflected in the Guidelines.

5.22 The Commission's standard significantly constrains the relevance of dynamic efficiencies. It may also introduce asymmetry with the assessment of harm, where the Guidelines are willing to assess forward-looking and dynamic effects on future

[72] Guidelines, paras 315 and 334.
[73] Guidelines, para 352.
[74] Guidelines, para 355.
[75] Guidelines, para 357.
[76] Guidelines, para 357.

competitive conditions.. Many dynamic efficiencies give rise to positive externalities or broader societal benefits that cannot readily be attributed to a specific group of consumers within the relevant market. For example: (i) innovation may result in new products or markets benefiting future consumers; (ii) sustainability-related efficiencies generate system-wide environmental benefits; and (iii) resilience improvements strengthen supply chains across multiple downstream markets. In these circumstances, it may not be feasible to demonstrate a significant overlap between the consumers affected by short-term adverse effects and those benefiting from efficiencies, nor to show that such benefits fully compensate those consumers. A strict application of this requirement therefore risks excluding the very categories of efficiencies that the Guidelines seek to elevate.

5.23 More broadly, the framework should recognise that efficiencies may accrue at different levels of the value chain, including to intermediate or commercial customers, and should not be restricted to final consumers alone. In addition, efficiencies are not limited to reductions in variable or marginal costs. Reductions in fixed costs—such as through rationalisation or the elimination of duplication—can generate significant benefits, including through increased capacity for investment and innovation, and should be fully taken into account in the assessment.

5.24 The Commission should therefore:

(a) adopt a more flexible approach to the distribution of benefits, including where these accrue to future or new groups of consumers that are difficult to predict;

(b) remove the requirement that out-of-market or collective benefits must be fully internalised by harmed consumers to be relevant;

(c) ensure that sustainability and resilience efficiencies are assessed in a manner that is consistent with their recognised importance for consumers and the functioning of the internal market; and

(d) clarify that efficiencies accruing to intermediate or commercial customers, and fixed-cost efficiencies that support investment, innovation, capacity expansion, will be taken into account.

Balancing asymmetric benefits and harms

5.25 The Guidelines' attempt to structure the balancing of harms and benefits is positive. However, important questions remain as to how this framework will be applied in practice, particularly where harms and benefits are asymmetric in nature or arise over different time horizons.

5.26 The Guidelines envisage that, where possible, different effects of a merger (e.g. price increases vs quality improvements) should be translated into a common metric, including through willingness-to-pay analyses or modelling techniques.[77] While such approaches can be informative, they are inherently sensitive to assumptions, data availability and methodological choices, and may not always be

[77] Guidelines, para 347.

feasible or robust—particularly in relation to dynamic efficiencies such as innovation, resilience or sustainability.

5.27 Where effects cannot be directly compared, the Commission indicates that it will consider the relative "*orders of magnitude*"[78] of harms and benefits, or carry out a "*careful assessment*".[79] Whilst we appreciate the flexibility, it introduces a degree of uncertainty as to how such qualitative comparisons will be conducted in practice, and how different dimensions of competition will be weighed against each other.

5.28 More broadly, there is a risk that the framework gives rise to a structural bias in favour of short-term and more readily quantifiable effects. While the Guidelines recognise that longer-term or dynamic benefits may offset immediate harms, the expectation that such benefits be "*larger and more likely*"[80] the further into the future they arise may be difficult to satisfy in practice, given the inherent uncertainty associated with forward-looking efficiencies.

5.29 We support the Guidelines' recognition that efficiencies may materialise over a longer time horizon, and that the relevant period should reflect the characteristics and dynamics of the market rather than any fixed or default timeframe. This is an important and welcome corrective to the historically restrictive treatment of longer-term and dynamic efficiencies. We note, however, that the longer the time horizon, the less certain and less robust the available evidence necessarily becomes. This applies equally to long-term harms and long-term benefits. It is therefore essential that the evidentiary standard applied to long-term efficiencies is proportionate and is no more demanding than the standard applied to long-term theories of harm assessed over a comparable horizon. A framework that accepts speculative long-term harm while requiring near-certainty for long-term benefits would be inconsistent with the symmetry the draft Guidelines purport to establish between theories of harm and theories of benefit and would undermine the Commission's stated objective of giving adequate weight to innovation, investment and resilience.

5.30 In addition, while the Guidelines acknowledge that empirical tools—such as consumer surveys or modelling—may be used to inform the balancing exercise, it would be helpful to clarify that such tools are not a prerequisite, particularly in relation to innovation and investment incentives.

5.31 The Commission should therefore ensure that:

(a) The balancing framework does not systematically favour short-term or readily quantifiable effects over longer-term efficiencies.

(b) Timing assumptions and discounting approaches are applied symmetrically to harms and benefits.

(c) The treatment of uncertainty is consistent across theories of harm and benefit, including in relation to dynamic efficiencies.

(d) A reasoned and sufficiently detailed explanation will be provided whenever efficiency claims, that have been duly substantiated by the merging parties,

[78] Guidelines, para 348.
[79] Guidelines, para 349.
[80] Guidelines, para 350.

are rejected. This recommendation is advanced not as a challenge to the Commission's discretion in assessing efficiencies, but as a means of ensuring that such discretion is exercised in a manner that is transparent, consistent, and conducive to legal certainty for all market participants, as transparency in the submission of efficiency claims without a corresponding transparency in their evaluation, delivers only half of the predictability that the Guidelines are intended to provide.

(e) Where efficiencies are credible and, on the balance of probabilities, likely to offset all or materially most of the identified harm, they should be capable of supporting a finding of compatibility. A rigid requirement to demonstrate a precisely quantified net positive outcome risks being inconsistent with the inherently forward-looking and probabilistic nature of the assessment.

6. Measures to protect legitimate interests

6.1 We welcome the opportunity to comment on the Guidelines' treatment of measures taken by Member States to protect legitimate interests under Article 21 EUMR. This is, to our knowledge, the first occasion on which the Commission has set out comprehensive guidance on the operation of Article 21, and we regard the initiative as a significant and constructive contribution to legal certainty. The Guidelines rightly emphasise that the "*one-stop-shop*" system established by the EUMR prevents the fragmentation of the internal market, increases legal certainty and reduces administrative burden, and thus contributes to the integration, competitiveness and resilience of the internal market, and companies' ability to grow.[81]

6.2 We note that Article 21 (4) EUMR has become more important than ever in recent years, which justifies inclusion in the Guidelines. This is because the proliferation of national regulation restricting cross-border transactions, in particular foreign investment screening regimes, in recent years has weakened the effects of the one-stop shop and erected barriers for transactions between the Member States that risk the completion of the internal market which one of the primary objectives of the Treaties. It is therefore welcome and necessary that the Commission takes measures to ensure that such national regulations comply with Union law and do not lead to unjustified barriers within the single market.

6.3 We note that the Guidelines are based on and supported by a clear and long-standing jurisprudence of the Court of Justice which has, in our experience, not been applied consistently in practice at national level. We express the hope that the Guidelines will lead to a more predictable and consistent application of these principles, thereby improving the conditions for legitimate intra-EU transactions. Below we identify the elements we consider genuine improvements and set out the areas where, in our view, the Guidelines would benefit from further clarification or recalibration.

Types of measures covered

6.4 We welcome the broad scope of the measures captured by the Guidelines. The definition extends to "*all measures by Member States that condition, prohibit or*

[81] Guidelines, para 358.

otherwise hinder the implementation of a merger with an EU dimension"[82], encompassing "*all legislative and regulatory acts, as well as decisions and other administrative acts or practices, including omissions to act*" such as a failure to grant a necessary authorisation, adopted "*at any level of governance*" or by national courts.[83] We agree that the substance of a measure, rather than its legal form, should be determinative, and we support the recognition that measures may infringe Article 21 EUMR to the extent they are binding "*or de facto binding*".[84] This broad and effects-based scope is essential if Article 21 is to operate effectively and capture the wide array of restrictive measures that might exist.

6.5 We invite the Commission to clarify one point of scope. It is not clear from the Guidelines whether commitments offered by an undertaking to a Member State in order to obtain a clearance or authorisation decision — and, more generally, conditions accepted by the parties in the course of a national process — fall within the notion of a "*measure*" for the purposes of Article 21. Such commitments may, in substance, hinder the implementation of a merger with an EU dimension in the same way as a measure unilaterally imposed by a Member State, and may be the practical and unavoidable price of obtaining clearance. We would welcome confirmation that the Commission's assessment looks to the substantive effect of such commitments, and that parties are not deprived of the protection of Article 21 merely because a restriction took the form of an "*agreed*" condition rather than an imposed one.

Notion of legitimate interest

6.6 We strongly welcome the Commission's clarification that, because the EU is founded on common values and promotes solidarity among Member States, "*Member States or their nationals are thus prima facie not a threat to the public security of another Member State*", with the consequence that a Member State invoking public security in relation to a merger involving firms based in, or owned by nationals of, another Member State must "*be able to adequately substantiate such claims upon request by the Commission*".[85] This is a welcome restatement of principle.

6.7 We make three observations to ensure the principle operates effectively and consistently with the case law.

(a) The Guidelines make a distinction between mergers involving firms based in another Member State (or owned by nationals from another Member State) on the one hand, and acquisitions involving firms or nationals of third countries on the other hand. It applies the aforementioned *prima facie* presumption only to the first category. It would be helpful and appropriate to clarify that the privileged status of an EU firm applies to all firms based in the EU, even where they are owned or controlled by third-country nationals in accordance with the jurisprudence of the ECJ.[86]

[82] Guidelines, para 363.
[83] Guidelines, para 364.
[84] Guidelines, para 365.
[85] Guidelines, para 370.
[86] Cf. Judgment of 13 July 2023, Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter, C-106/22, EU:C:2023:568, para 46, which clarifies that the scope of the fundamental freedom is not touched by the nationality of a company's shareholders.

(b) Relatedly, we invite the Commission to recognise that, as a matter of the free movement of capital under Articles 63-66 TFEU, there should in general be a presumption that investments — including investments by undertakings owned by third-country nationals — are not harmful, with the onus resting on the Member State to substantiate any genuine and sufficiently serious threat to a fundamental interest of society. We acknowledge the express caveat preserving Member States' powers in relation to acquisitions involving firms or nationals of third countries. But the free movement of capital, uniquely, also extends to third country investors, and the requirement that public-security derogations be interpreted strictly and not be deployed for "*purely economic ends*" applies irrespective of the origin of the investor. We therefore invite the Commission to confirm that the burden of substantiating a public-security concern rests with the Member State in all cases.

(c) Beyond the three expressly recognised interests of public security, media plurality and prudential rules, the Guidelines provide that Member States may pursue "*any other legitimate interest*", offering only the examples of safeguarding the provision of a vital service and consumer protection.[87] Given that "*other*" interests are, by definition, the category most susceptible to protectionist abuse and least anchored in EU law, it would be helpful for the Commission to provide further guidance on the criteria by which it will determine whether a claimed interest qualifies as a legitimate one — in particular, how it will distinguish genuine non-competition public interests from disguised economic or industrial-policy objectives.

General principles of EU law

6.8 We welcome the emphasis the Guidelines place on the principle of non-discrimination, including the confirmation that acquisitions by companies from other Member States "*cannot be treated less favourably than acquisitions by national companies*".[88]

6.9 Against that benchmark, we draw the Commission's attention to a practice that appears difficult to reconcile with the principles set out in the Guidelines. A number of Member States subject investments originating from other EU Member States to investment-screening procedures from which investments by their own nationals are exempt. Given the Commission's own assumption that investments from other Member States are *prima facie* not a threat to public security, and the principle that acquisitions by companies from other Member States cannot be treated less favourably than acquisitions by national companies, we question whether the screening of intra-EU investments on terms not applied to domestic investors is compatible with the framework articulated in the Guidelines, and would assume that none of these legislative measures have been notified according to Article 21 (4). In our view, the logic of the Guidelines points towards the conclusion that EU investors should not, as a matter of principle, be made subject to such screening at all, safe perhaps the scope of application of Art. 346 TFEU. We invite the Commission to address this directly.

[87] Guidelines, para 377.
[88] Guidelines, para 382.

6.10 We likewise welcome the emphasis on the principles of proportionality and legal certainty. Our understanding is that these principles apply independently of the origin of the companies involved, and we would welcome confirmation to that effect. These principles are an essential safeguard to protect the one-stop-shop principle and prevent arbitrary or disguised restrictions, and all companies active in the Union, independent from their origin, are entitled to the benefits of the one-stop-shop.

6.11 Finally, we note the link the Guidelines draw to the EU FDI Screening Regulation: measures adopted for the protection of public security "*following a review under the EU FDI Regulation, based on the opinion of the Commission in relation to the specific transaction*" are presumed compatible with the general principles and other provisions of EU law.[89] We welcome this attempt at coherence between the two regimes, but flag that the scope of application of the two instruments is not congruent: the FDI Screening Regulation is concerned with foreign (third-country) direct investment, whereas Article 21 EUMR applies to all measures affecting mergers with an EU dimension regardless of the origin of the parties. We invite the Commission to explain more fully how the two frameworks interact — in particular, the extent to which alignment with an FDI screening outcome confers the presumption of compatibility, and how a measure that falls within the scope of Article 21 but outside the FDI Screening Regulation (for example, a measure directed at an intra-EU acquisition) is to be treated.

Procedural framework

6.12 We welcome the clarifications the Guidelines bring to the procedural framework, which materially enhance legal certainty. We particularly welcome the requirement that measures pursuing interests other than the three recognised interests must be notified to the Commission before adoption and not implemented before the Commission's approval, coupled with the expectation that, even for the recognised interests, Member States should inform the Commission when adopting measures applicable to a merger with an EU-dimension. We agree that this prevents circumvention by the simple expedient of labelling a measure as pursuing a recognised interest as is consistent with ECJ jurisprudence. We also welcome the structured set of outcomes — the triggering of a 25-working-day assessment period on complete notification, the availability of interim decisions to suspend national measures adopted in breach of the standstill obligation, and positive and negative decisions on compatibility. An effective and explicit notification obligation of this kind is, in our view, vital to the effective implementation of EU law in this area.

6.13 We note, however, that the procedural framework as currently drafted addresses only the relationship between the Member State and the Commission; it is silent on the role of the undertakings involved in the merger. The Guidelines do not explain what part, if any, the merging parties play in the Article 21 procedure, nor what recourse is available to them where they consider that a Member State has failed to comply with its obligations under Article 21 — for example, by adopting a restrictive measure without notification, or by acting in breach of the standstill obligation. Given that the parties are most directly and immediately affected by such measures and are often best placed to bring non-compliance to the

[89] Guidelines, para 389.

Commission's attention, it would be helpful for the Commission to set out the options available to undertakings. We would welcome guidance confirming, in particular, that the parties may lodge a complaint with the Commission (which the Guidelines envisage as a possible trigger for action where a measure has not been notified), the procedural rights they enjoy in that context, and the means by which they may seek the suspension of measures adopted in breach of the notification and standstill obligations.

7. Conclusion

7.1 Freshfields welcomes the Commission's initiative to update its guidance on the assessment of mergers under the EUMR. The Guidelines are an opportunity to provide a clearer, more modern and more predictable framework for merger review, reflecting the realities of dynamic markets, global competition, innovation, investment, resilience and sustainability. We particularly welcome the Guidelines' recognition that scale can generate important pro-competitive benefits, the introduction of a formal "*theory of benefit*" framework, the more structured discussion of efficiencies, and the guidance on the interaction between the EUMR and Member State measures under Article 21.

7.2 At the same time, the Guidelines represent a significant expansion of the Commission's analytical framework. The number and scope of theories of harm have increased materially, including through the introduction or expansion of several inherently forward-looking theories relating to innovation, investment, potential competition, entrenchment, access to commercially sensitive information, resilience and algorithmic coordination. This broader framework will only enhance merger review if it is accompanied by appropriate evidentiary discipline, clear limiting principles and safeguards against speculative intervention.

7.3 The final Guidelines should also preserve legal certainty. In particular, we encourage the Commission to clarify that the expanded set of structural indicators and theories of harm does not create *de facto* presumptions of harm or shift the burden of proof onto merging parties. Clearer guidance is needed on when particular theories of harm are likely to be relevant, how market power indicators should be interpreted, how longer forecast periods will be assessed, and how the Commission will distinguish genuine competition concerns from ordinary pro-competitive commercial conduct.

7.4 The effectiveness of the new efficiencies framework will be a particularly important test of whether the Guidelines deliver substantive change. We welcome the Commission's recognition that efficiencies are not confined to price reductions and may include scale, innovation, sustainability, resilience and other dynamic benefits. However, this recognition must be operationalised in practice. Efficiencies should not be subject to a higher practical evidentiary burden than comparable theories of harm, should not be excluded merely because they materialise over longer industry-specific investment cycles, and should not be artificially constrained by overly narrow requirements as to the consumer groups benefiting from them. Where efficiencies are credible and likely to offset the identified harm, they should be capable of supporting a finding of compatibility.

7.5 In short, the Guidelines should make pro-competitive mergers easier, not merger review more burdensome or intervention more speculative. The final text should therefore combine the Commission's welcome ambition to reflect modern market realities with clear evidentiary standards, limiting principles and procedural safeguards. Freshfields would welcome the opportunity to continue engaging with the Commission as it finalises the Guidelines and would be pleased to provide any further input that may assist in that process.

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