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The 2026 Draft EU Merger Guidelines: Continuity, Refinement and Recalibration of the EUMR Framework

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SUMMARY: 1. Introduction. – 2. Recalibrating the SIEC Test: Market Power, Resilience and Evidentiary Discipline. - 3. Dynamic Competition, Innovation and Digital Market Concerns. - 4. Efficiencies, Sustainability and Labour-Market Considerations. - 5. Institutional Architecture and the Limits of Member State Intervention. - 6. Conclusion.

1. *Introduction*

On 30 April 2026, the Commission published the Draft Guidelines for the assessment of mergers (hereinafter, "Draft Guidelines"),[1] thereby initiating a participatory review process encompassing a public consultation, a stakeholder workshop and the finalisation of the revised framework in the fourth quarter of 2026. Consistent with the Commission's previous merger guidelines,[2] the Draft Guidelines draw on the case law of the EU Courts and constitute a comprehensive articulation of the Commission's administrative approach to merger control. They are intended to guide the application of Regulation (EC)

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[1] Draft Communication from the Commission - Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter, "Draft Guidelines").

[2] Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6 (hereinafter, "2008 Non-Horizontal Merger Guidelines"); Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5 (hereinafter, "2004 Horizontal Merger Guidelines").

No 139/2004 (hereinafter, "EUMR"),[3] aligning the rigorous criteria and requirements of EU merger control rules with the contemporary exigencies of an increasingly volatile global economy characterised by technological uncertainty, supply-chain fragility and geopolitical fragmentation.

Structured into three distinct parts, this soft-law document serves as a detailed operational framework for both the self-assessment of undertakings' valuation strategies and the exercise of the Commission's decisional discretion in merger control.[4] Although this discretion allows the Commission to exploit the inherent flexibility of EU competition law rules, it remains constrained by the substantive requirements of Article 2 EUMR, the substantive and procedural obligations provided by Article 21 EUMR, and the general principles of EU law, including proportionality, non-discrimination and legal certainty.[5] In this respect, the Draft Guidelines do not merely restate the framework developed under the 2004 EUMR regime and prior enforcement practice; rather, they refine and recalibrate that framework in response to structural transformations in market dynamics and the institutional practice of EU competition law enforcement.

A first and important point of continuity with the previous regime, albeit displaying evolutionary features, lies in the reaffirmation of the "Significantly Impede Effective Competition" (hereinafter, "SIEC") test under Articles 2(2) and 2(3) EUMR as the central substantive standard for merger assessment. Although the previous regime had already moved beyond a strictly dominance-based framework following the introduction of the SIEC test, the Draft Guidelines further develop this evolution by expanding the SIEC assessment's analytical framework to place greater emphasis on non-price dimensions of competition and systemic internal market considerations.[6] In doing so, the Commission departs from the earlier interpretative equilibrium, in which dominance-based analysis remained the prevailing heuristic even after

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[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter, "EUMR").

[4] Judgment of the Court of Justice of 13 July 2023, Case C-376/20 P, *Commission/CK Telecoms UK Investments Ltd*, paras 121-123; 28 June 2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others/Commission*, paras 209-213; O. STEFAN, *Soft Law in EU Competition and State Aid: An Imperfect Solution to Grand Regulatory Challenges*, in C. COLOMBO, K. WRIGHT, M. ELIANTONIO (eds.), *The Evolving Governance of EU Competition Law in a Time of Disruptions - A Constitutional Perspective*, Oxford, 2024, pp. 213-231; P. IBÁÑEZ COLOMO, *The Shaping of EU Competition Law*, Cambridge, 2018, pp. 29-32 and 47-49.

[5] As expressly emphasised in Part III of the Draft Guidelines, cit., paras 378-386.

[6] For instance, see the Draft Guidelines, cit., paras 9 and 10.

the 2004 reform. The current approach, by contrast, reflects a more explicitly pluralistic understanding of competition, as signalled in paragraph 20, where quality, choice, capacity, investment, innovation, privacy, sustainability and resilience are reinforced and operationalised as co-equal parameters of competitive assessment alongside price and output effects.[7]

This conceptual broadening is closely linked to the Draft Guidelines' recalibration of the notion of market power.[8] Whereas traditional competition analysis primarily associated market power with the ability to profitably increase prices above competitive levels, paragraph 55 adopts a considerably broader definition, describing market power as «*the ability of one or more firms to profitably maintain prices above competitive levels or to reduce quality, choice, capacity, output, investment, innovation, privacy, sustainability, or resilience below competitive levels for a period of time*».[9] The significance of this recalibration extends beyond mere terminology. By expressly reinforcing the relevance of non-price dimensions within the definition of market power, the Commission aligns the analytical foundations of merger control with contexts in which competitive constraints are increasingly exercised through innovation, data accumulation, digital ecosystem expansion or quality differentiation rather than through price competition.

This evolution is particularly evident when contrasted with earlier decisional practice, in which non-price factors were increasingly taken into account as relevant aspects of competitive assessment, yet without occupying the same explicit position that they now assume within the analytical framework of the Draft Guidelines.[10] The Draft Guidelines instead integrate them into the core analytical structure of the SIEC test itself. This development is not a mere semantic adjustment but a reconfiguration of the analytical baseline against which mergers are assessed. Arguably, it reflects an implicit

[7] For an empirical investigation into the goals of EU competition law, see M. IACOVIDES, K. STYLIANOU, *The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy*, in *ELO*, vol. 3, 2024, p. 587 ff.

[8] Draft Guidelines, cit., para. 55.

[9] Emphasis added.

[10] Judgment of the General Court of 9 March 2015, Case T-175/12, *Deutsche Börse/Commission*, para. 177; 11 December 2013, Case T-79/12, *Cisco Systems and Messagenet/Commission*, para. 69; Judgment of the Court of Justice of 10 July 2008, Case C-413/06 P, *Bertelsmann and Sony/Impala and Commission*, para. 47; 15 February 2005, Case C-12/03 P, *Commission/Tetra Laval*, para. 43; Commission Decision, 27 March 2017, Case M.7932, *Dow/DuPont*, paras 279, 282-283 and 1987-2038; Commission Decision, 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, para. 350; Commission Decision, 3 October 2014, Case M.7217, *Facebook/WhatsApp*, paras 87 and 102 and fn 79.

recognition that the pre-existing framework, while formally flexible, had become increasingly strained by the rise of digital ecosystems, platform-based markets and data-driven business models that do not conform to traditional price-centric paradigms, notwithstanding their profound societal impact arising from market power.[11]

Against this background, the Draft Guidelines may be understood as pursuing a dual objective. On the one hand, they preserve the core architecture of EU merger control and the centrality of the SIEC test. On the other hand, they adapt that framework to contemporary market realities characterised by digitalisation, sustainability concerns and increasing geopolitical uncertainty. The following sections examine these developments through four interrelated dimensions: the evolving conceptual foundations of merger control, the assessment of dynamic competition and innovation, the growing relevance of efficiencies and non-price considerations, and the institutional framework governing the relationship between the Commission and the Member States.

2. *Recalibrating the SIEC Test: Market Power, Resilience and Evidentiary Discipline*

Turning now to a detailed examination of the Draft Guidelines, the first set of developments concerns the conceptual foundations of merger control under Article 2 EUMR and the evolving understanding of effective competition within the internal market.

Part I of the Draft Guidelines addresses the fundamental mandate established in Article 2(2) and (3) EUMR, which requires the Commission to prohibit concentrations that would result in a Significant Impediment to Effective Competition, particularly through the creation or strengthening of a dominant position. The Draft Guidelines situate this mandate within the broader Treaty framework, which articulates the objective of undistorted competition as a structural condition of the internal market.[12] In doing so, Part

[11] See Communication from the Commission - Commission Notice on the definition of the relevant market for the purposes of Union competition law [2024] OJ C 1645/3 (hereinafter, "2024 Revised Notice on Market Definition"); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A competition policy fit for new challenges, 18 November 2021, COM 713 final.

[12] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Article 3; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C

I lays the conceptual and normative foundations for the subsequent analytical framework of the Draft Guidelines.

This is clearly reflected in paragraph 9, where "resilience" is introduced as an interpretative lens through which effective competition is to be understood.[13] Under the earlier regime, resilience considerations were largely implicit, appearing indirectly through discussions of entry barriers or supply stability. In the current framework, however, resilience becomes an articulated evaluative dimension, reflecting a shift from a predominantly static conception of competition to a more systemic and forward-looking understanding. This development can be seen as a response to empirical changes in market functioning, particularly the increased exposure of EU markets to external shocks, but it also marks a subtle expansion of the Commission's analytical remit under Article 2(3) EUMR.

This expansion, however, is counterbalanced by a reinforced evidentiary discipline. The requirement of «a sufficiently cogent and consistent body of evidence», developed in the case law and reaffirmed in the Draft Guidelines, operates as a constraint on this broader interpretative space.[14] Compared to the earlier regime, where forward-looking assessments were often more heavily reliant on structural presumptions (particularly in horizontal merger analysis),[15] the Draft Guidelines emphasise a more explicit articulation of causal mechanisms. This shift is consistent with the Courts' increasing reliance on evidentiary rigour, as exemplified in *CK Telecoms*,[16] and reflects a broader tightening of judicial review over complex economic assessments.

The burden of proof structure set out in paragraphs 21-25 of the Draft Guidelines further illustrates this evolution when compared to the earlier regime. Traditionally, EU merger control practice already involved a dual burden structure, with the Commission responsible for establishing a SIEC and the merging parties responsible for substantiating efficiencies.[17] However, the

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326/47, Articles 119(1) and 120; Consolidated version of the Treaty on European Union - Protocol (No 27) on the internal market and competition [2008] OJ C 115/309.

[13] "Resilience" is defined in the Draft Guidelines as «the readiness and ability of the internal market or part of it to continue servicing customers and to anticipate, withstand and recover from serious shocks». The Guidelines further identify, *inter alia*, the security and diversity of supply chains, the security of critical infrastructure, defence readiness and the ability of undertakings to invest in critical technologies as factors relevant to resilience. Draft Guidelines, cit., para. 9 and fn 18.

[14] Draft Guidelines, cit., para. 26.

[15] 2004 Horizontal Merger Guidelines, cit., paras 12-13.

[16] Above cited, paras 75-77 and 87.

[17] 2008 Non-Horizontal Merger Guidelines, *cit.*, paras 28 and 52; 2004 Horizontal Merger Guidelines, *cit.*, paras 12, 87 and 88.

Draft Guidelines make this structure more explicit and systematic and symmetric. The requirement that the Commission articulate and substantiate its theory of harm is now more clearly mirrored by a corresponding obligation on the parties to develop a structured theory of benefit.[18]

This reflects a procedural refinement of the adversarial dimension of merger proceedings. Under the earlier regime, evidentiary asymmetries were more pronounced, particularly in complex innovation or digital markets where parties had superior access to technical and forward-looking information.[19] The current approach seeks to mitigate this imbalance by formalising the evidentiary dialogue between the Commission and merging parties, thereby enhancing procedural transparency while preserving administrative efficiency.[20]

The counterfactual assessment in Section B.5, particularly paragraph 40, further illustrates both methodological continuity and a significant intensification of analytical demands. The Commission has long relied on counterfactual reasoning in merger control, comparing the notified transaction with a plausible alternative scenario absent the merger. The Draft Guidelines, however, place greater emphasis on the need for sufficiently certain market developments, thereby narrowing the space for speculative or weakly supported projections. Paragraph 43 reinforces this approach by explicitly admitting reliance on non-representative conditions, while limiting the extent to which crisis-driven or anomalous data can influence long-term competitive assessment. Compared to the earlier regime, particularly in the aftermath of financial or socio-economic crises, where exceptional conditions influenced competitive analysis,[21] the present framework is more cautious in allowing short-term distortions to shape structural conclusions.

The failing firm defence, set out in paragraphs 45-51, likewise reflects continuity with earlier doctrine, albeit subject to a reinforced evidentiary

[18] Draft Guidelines, cit., paras 21-25.

[19] For instance, see Commission Decision, 6 December 2016, Case M.8124, *Microsoft/LinkedIn*, paras 248-250; Commission Decision, 3 October 2014, Case M.7217, *Facebook/WhatsApp*, paras 137-139.

[20] See, *inter alia*, paragraph 31 of the Draft Guidelines, which formalises the evidentiary dialogue between the Commission and merging parties by encouraging early engagement on efficiency claims, including during the pre-notification stage, and by clarifying that the Commission's assessment must be based on all available evidence, without any formal hierarchy between qualitative and quantitative evidence, the decisive criterion remaining the credibility and probative value of the evidence adduced.

[21] G. AMATO, *Bentornato Stato, ma*, Bologna, 2022; S. CASSESE, *La nuova costituzione economica*, Bari, 2021.

discipline. While the doctrine itself is well established in EU merger control practice,[22] the Draft Guidelines reaffirm its exceptional nature and clarify its cumulative conditions. These require, first, that the allegedly failing undertaking would, in the near future, be forced to exit the market absent an acquisition or successful reorganisation, with temporary financial difficulties or short-term liquidity constraints being insufficient; second, that there is no less anti-competitive alternative to the notified merger, including viable restructuring options or credible alternative purchasers; and third, that, in the absence of the merger, the assets of the failing firm would inevitably exit the market or cease to exert a competitive constraint, or its market share would in any event accrue to the acquiring undertaking. The present articulation can be seen as a consolidation of earlier jurisprudence into a more structured and explicitly evidentiary test, thereby reducing interpretative flexibility and reinforcing legal certainty.

3. *Dynamic Competition, Innovation and Digital Market Concerns*

The most significant novelty introduced by the Draft Guidelines emerges in the substantive assessment of competitive effects. While the underlying analytical framework remains rooted in established merger control principles, the Commission develops a more explicit and systematic account of dynamic competition, innovation-driven rivalry and the competitive significance of digital market characteristics. In this respect, the Draft Guidelines seek to adapt the traditional tools of merger analysis to contexts in which competitive constraints increasingly manifest through innovation, investment, data accumulation, and digital ecosystem expansion rather than solely through price competition.

Accordingly, Part II of the Draft Guidelines develops the substantive assessment of competitive effects. Under the pre-existing framework, structural indicators such as market shares and concentration indices played a central role in the Commission's analysis, often operating as initial proxies for competitive concerns.[23] While this remains true in the Draft Guidelines,

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[22] See in particular Judgment of the Court of Justice of 31 March 1998, Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC)/Commission*; Horizontal Merger Guidelines, cit., paras 89-91.

[23] "Proxies" may be defined as metrics adopted to provide indirect and imperfect approximations of the investigated issues. They have two important roles in competition law enforcement: enforcers use them to draw inferences from the available evidence and to develop filters and screens with a view to demarcating lawful from unlawful conduct. See A.

Section II.A places greater emphasis on the limitations of such indicators when assessed in isolation and stresses the need to complement them with a broader evaluation of competitive dynamics.

The introduction of "dynamic competitive potential" in Section II.A.3 is particularly significant in this respect. In earlier merger control practice, nascent competition concerns were addressed primarily in high-profile cases, especially in transactions involving digital platforms, often on a case-by-case basis without a fully articulated doctrinal framework. The Draft Guidelines systematise this approach by identifying specific analytical proxies, such as R&D intensity, patent portfolios and valuation differentials, that can be used to assess latent competitive pressure.[24]

This represents a shift from an essentially reactive enforcement model to a more anticipatory or proactive one.[25] While earlier regimes certainly allowed for forward-looking assessment, the present framework formalises it as a core analytical pillar of the SIEC test. This is particularly relevant in markets where competitive constraints are not visible in current market shares but are embedded in innovation trajectories.

The Draft Guidelines also place greater emphasis on the role of barriers to entry and expansion in assessing market contestability, particularly in digital and data-intensive markets. While barriers to entry have always formed part of the Commission's competitive assessment, the current framework recognises that privileged access to competitively significant inputs — including data, software, algorithms, technological infrastructure and user traffic — may constitute structural advantages capable of reinforcing market power and limiting effective competition.[26] This reflects the growing importance of data-driven business models, where access to large amounts of data may generate self-reinforcing competitive advantages through network effects, improved product performance, accelerated innovation cycles and lock-in effects. Consequently, the assessment of competitive harm is no longer confined to traditional barriers such as economies of scale or regulatory constraints but increasingly extends to informational and technological asymmetries that may impede entry, expansion and effective rivalry.

KALINTIRI, *Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions*, in *Journal of Competition Law & Economics*, vol. 16, no. 3, 2020, p. 396.

[24] Draft Guidelines, cit., paras 81-83.

[25] P. IBÁÑEZ COLOMO, *The New EU Competition Law*, Oxford, 2023, p. 16.

[26] For instance, see the Draft Guidelines, cit., paras 79, 81, 156, 190 and 240.

In Section II.B, the taxonomy of anticompetitive effects further develops this evolution. Traditional merger control distinguished primarily between horizontal, vertical and conglomerate effects, with a strong emphasis on price effects and foreclosure risks.[27] The Draft Guidelines retain this analytical structure but expand its internal logic by incorporating innovation-based harm and ecosystem-related competition concerns.[28]

More precisely, the Draft Guidelines identify a broader taxonomy of anticompetitive effects capable of giving rise to a SIEC. Alongside traditional theories of harm, such as the loss of head-to-head competition, foreclosure and coordination, the document expressly incorporates the loss of investment and expansion competition, the loss of innovation competition, the elimination of potential competition and the entrenchment of dominant positions through the reinforcement of structural barriers to entry and expansion.[29] The Draft Guidelines further recognise that mergers may produce other forms of anticompetitive harm, including through the acquisition of commercially sensitive information or the strengthening of portfolio-based market power.[30] Importantly, the Commission also acknowledges that these effects may operate cumulatively and mutually reinforce one another, while reserving the possibility of developing additional theories of harm in light of evolving market realities and the specific characteristics of individual transactions.[31]

The introduction of the "innovation shield" in Paragraph 192 of the Draft Guidelines is especially noteworthy when compared to earlier enforcement practice. Historically, efficiencies linked to innovation were recognised but often treated cautiously due to evidentiary difficulties. By contrast, Paragraph 192 provides that, in cases involving small innovative undertakings, including start-ups or R&D projects with dynamic competitive potential, the Commission will, in principle, not find a SIEC under a range of theories of

[27] 2008 Non-Horizontal Merger Guidelines, *cit.*; 2004 Horizontal Merger Guidelines, *cit.*

[28] The concept of "digital ecosystem" is increasingly recognised as a relevant analytical shortcut in EU competition law. For the definition of "digital ecosystem", see 2024 Revised Notice on Market Definition, cit., para. 104; Commission Decision, 25 September 2023, Case M.10615, *Booking Holdings/Etraveli Group*; Judgment of General Court of 14 September 2022, Case T-604/18, *Google and Alphabet/Commission*, paras 115-117. For legal and management analysis of ecosystems, see M. JACOBIDES, I. LIANOS, *Ecosystems and competition law in theory and practice*, in *Industrial and Corporate Change*, vol. 30, no. 5, 2021, p. 1199 ff.; M. JACOBIDES, C. CENNAMO, A. GAWER, *Towards a theory of ecosystems'*, in *Strategic Management Journal*, 2018, vol. 39, no. 8, p. 2256 ff.; J. MOORE, *Predators and Prey: A New Ecology of Competition*, in *Harvard Business Review*, vol. 71, 1993, p. 75 ff.

[29] Draft Guidelines, cit., para. 116.

[30] *Ibidem.*

[31] Draft Guidelines, cit., paras 117 and 118.

harm (including the loss of innovation competition, potential competition, entrenchment and foreclosure) provided that certain conditions are met.

These conditions are strictly structured and relate, *inter alia*, to the absence of current or prospective overlaps in the same relevant market or innovation space, the existence of a sufficient number of independent undertakings with comparable R&D projects or competitive potential, and the observance of specified thresholds concerning market shares and R&D activity.[32] In addition, the framework introduces further qualifying criteria in cases involving start-ups and established undertakings, in particular where the acquiring undertaking is neither the largest player in the relevant market nor a "gatekeeper".[33]

This architecture reflects a more formalised and *ex ante* approach to innovation-related efficiencies and dynamic competitive potential. Compared with earlier decisional practice, in which such considerations were integrated primarily on a case-by-case basis, the present provision articulates a more explicit and conditional safe-harbour logic within the same SIEC assessment.

At the same time, the foreclosure analysis in Section II.B.6 maintains continuity with earlier doctrine but is applied in a more structured and economically formalised manner. The "ability and incentive" framework was already well established in prior case law and guidelines,[34] but the Draft Guidelines now integrate it more systematically into the overall SIEC analysis, particularly in relation to digital ecosystems and data-driven markets.

More precisely, the "ability" limb is further specified through an explicit focus on the technical capacity to implement foreclosure strategies, including the denial or degradation of access to key inputs, infrastructure or interfaces, as well as the manipulation of contractual terms, interoperability or compatibility conditions, product quality and bundling or tying practices.[35] This assessment is complemented by a more structured consideration of market characteristics, including the availability and attractiveness of alternative sources of supply, the capacity of rival suppliers to expand, the role of demand-side purchasing behaviour and the presence of exclusive arrangements that may

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[32] Draft Guidelines, cit., para. 192.
[33] *Ibidem*. For the definition of "gatekeeper", see Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, Article 2.
[34] 2008 Non-Horizontal Merger Guidelines, cit., paras 18, 29, 52, 65, 93 and 113; 2004 Horizontal Merger Guidelines, *cit.*, paras 17, 36 and 38.
[35] Draft Guidelines, cit., paras 215-218.

reinforce foreclosure effects.[36] In this context, contractual safeguards are treated with caution, particularly when they are temporary or susceptible to renegotiation.[37]

The "incentive" limb is likewise developed in a more systematic manner, by distinguishing between direct and dynamic incentives to foreclose.[38] Direct incentives are assessed on the basis of the overall profitability of a foreclosure strategy, taking into account the trade-off between losses arising from reduced sales and gains stemming from recaptured demand across the merged entity's operations, supported by quantitative indicators such as departure rates, diversion ratios and profit margins, as well as qualitative and documentary evidence.[39] Dynamic incentives, by contrast, capture the forward-looking rationale for foreclosure strategies aimed at strengthening or extending market power over time, in particular by limiting rivals' scale, access to inputs or customers, or incentives to invest and innovate.[40]

4. *Efficiencies, Sustainability and Labour-Market Considerations*

Beyond theories of harm, the Draft Guidelines also reflect a broader understanding of the benefits that concentrations may yield. This development is particularly visible in the treatment of efficiencies, sustainability objectives, and labour-market considerations, all of which illustrate the Commission's broader attempt to incorporate dynamic and non-price dimensions into merger assessment.

The three cumulative criteria of verifiability, merger specificity, and consumer benefit remain of key importance to the assessment, as they were under the previous regime. However, the Draft Guidelines broaden the conceptual scope of efficiencies by expressly distinguishing between direct and dynamic efficiencies and by embedding their assessment within a more explicitly forward-looking analytical framework.[41] In particular, innovation, investment, sustainability and resilience are recognised as potential sources of efficiency gains, reflecting the view that the benefits of a concentration may materialise through dynamic competitive processes extending beyond immediate price effects.[42]

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[36] *Ibidem*.
[37] Draft Guidelines, cit., para. 218.
[38] *Ivi*, paras 225-228.
[39] *Ivi*, paras 229-238.
[40] *Ivi*, paras 239-242.
[41] *Ivi*, paras 294-297.
[42] *Ivi*, paras 298-301.

The enhanced role attributed to sustainability is particularly significant in this respect. Under the previous regime, sustainability considerations generally appeared only indirectly through innovation or cost-efficiency claims. By contrast, the Draft Guidelines expressly recognise the preservation of green innovation and the transition towards low-carbon technologies as relevant competitive parameters within the merger assessment.[43] Sustainability-related efficiencies may therefore form part of the parties' theory of benefit, provided that they are substantiated and sufficiently likely to materialise.[44] Equally significant is the Commission's willingness to adopt a more flexible and forward-looking temporal perspective when assessing such efficiencies. This is especially relevant in sectors characterised by long investment horizons, substantial research and development requirements, or complex decarbonisation pathways, where the benefits of a concentration may emerge only over an extended period. The Draft Guidelines thus suggest a more dynamic understanding of consumer and societal welfare, one capable of recognising efficiency gains linked not only to short-term price effects but also to longer-term innovation, resilience and environmental objectives.

A further development concerns the express recognition of labour-market effects within the competitive assessment. Although labour-market considerations have occasionally emerged in prior enforcement practice, the Draft Guidelines acknowledge more clearly that mergers may generate purchasing market power vis-à-vis workers by reducing competition between employers.[45] In particular, concentrations affecting specialised workforces or highly concentrated labour markets may strengthen the merged entity's bargaining position, potentially leading to lower wages, reduced labour mobility or less favourable working conditions.[46] While labour-market effects remain ancillary to the traditional product-market analysis, their inclusion reflects the broader trend towards a more comprehensive assessment of competitive dynamics and confirms the Commission's increasing attention to non-price dimensions of competition.

The distinction between direct and dynamic efficiencies is especially noteworthy in this respect. While direct efficiencies continue to encompass more traditional forms of cost savings and quality improvements,[47] dynamic

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[43] Draft Guidelines, cit., para. 9.
[44] For instance, see the Draft Guidelines, cit., paras 34, 297-299, 302, 319 and 322.
[45] Draft Guidelines, cit., paras 83 and 160-162.
[46] *Ibidem.*
[47] For the definition of "direct efficiencies" and a non-exhaustive taxonomy of the direct synergies capable of generating them, see paras 295, 302 and 303 of the Draft Guidelines.

efficiencies are those that enhance the merged entity's ability or incentives to invest and innovate.[48] This reflects a more explicit recognition that concentrations may, in certain circumstances, generate pro-competitive benefits by enabling scale-intensive, capital-intensive or risk-intensive innovation projects that might not otherwise be pursued.

Compared with earlier practice, the Draft Guidelines also adopt a more structured balancing exercise between anticompetitive effects and demonstrated efficiencies.[49] While the burden remains on the merging parties to substantiate efficiency claims, the Draft Guidelines articulate more clearly the role that direct and dynamic efficiencies may play in counteracting competitive harm, including in relation to innovation, security of supply and other non-price parameters of competition. The result is a more calibrated and economically nuanced efficiency assessment, one that retains the traditional cumulative conditions while expanding the range of benefits capable of being recognised within the SIEC analysis.

5. *Institutional Architecture and the Limits of Member State Intervention*

The recalibration of the substantive assessment is accompanied by a parallel refinement of the institutional and procedural architecture governing merger control. In this respect, Part III of the Draft Guidelines further clarifies the allocation of responsibilities between the Commission and the Member States, while strengthening the procedural mechanisms designed to safeguard the integrity of the internal market and ensure the coherent application of the EUMR. While the "one-stop-shop" principle has always constituted a central feature of EU merger control, the Draft Guidelines place greater emphasis on its systemic function in safeguarding the integrity of the internal market by preventing regulatory fragmentation, enhancing legal certainty, reducing administrative burdens and strengthening the competitiveness and resilience of the Union economy.[50]

At the same time, the Draft Guidelines delineate more precisely the conditions under which Member States may intervene to protect legitimate interests falling outside the scope of the EUMR. Paragraphs 360-362 are noteworthy in this respect, as they articulate in greater detail the substantive

[48] For the definition of "dynamic efficiencies" and a non-exhaustive taxonomy of dynamic synergies that may lead to dynamic efficiencies, see paras 296, 325 and 326 of the Draft Guidelines.
[49] Draft Guidelines, cit., paras 339-357.
[50] Draft Guidelines, cit., para. 358.

and evidentiary burden resting on Member States seeking to justify national measures affecting concentrations with an EU dimension. In particular, Member States are required not only to demonstrate the legitimacy of the interest pursued, but also to establish the suitability, proportionality and compatibility of the measures adopted with the general principles and other provisions of EU law. The current framework reflects a more proceduralised and rule-bound approach to Member State intervention, thereby reinforcing evidentiary discipline at the national level, mirroring the Commission's own evidentiary obligations under the SIEC assessment.

The clarification of the notion of legitimate interests in paragraph 366 of the Draft Guidelines further contributes to this development. While public security, media plurality and prudential rules continue to constitute recognised interests capable of justifying national intervention, the Draft Guidelines subject such claims to closer scrutiny and expressly seek to prevent their use as vehicles for arbitrary discrimination or disguised restrictions on fundamental freedoms. This is particularly evident in the treatment of public security, where the Commission reiterates that derogations must be interpreted strictly and may be relied upon only where a genuine and sufficiently serious threat to a fundamental interest of society can be demonstrated.[51] In doing so, the Draft Guidelines further consolidate the balance between the preservation of Member State prerogatives and the protection of the internal market from fragmentation through unilateral national measures.[52]

The procedural framework set out in Paragraphs 390-397, including notification obligations, standstill requirements, interim measures, preliminary assessment letters and comfort letters, likewise reflects the further development of the Article 21 EUMR enforcement architecture. Rather than introducing

[51] Draft Guidelines, cit., paras 368-371.

[52] Recent developments concerning the Italian Government's exercise of the so-called golden power in relation to UniCredit's proposed acquisition of Banco BPM provide an illustrative example of the tensions addressed by Part III of the Draft Guidelines. Following the Commission's review of the concentration under the EUMR, the Italian authorities imposed a number of conditions pursuant to the national golden power regime. The Commission subsequently expressed concerns that such measures could interfere with its exclusive competence over concentrations with an EU dimension under Article 21 EUMR and risk fragmenting the internal market through unilateral national intervention. Against this background, the clarification provided in paragraphs 368-371 of the Draft Guidelines appears particularly timely and arguably reflects the Commission's growing concern with ensuring that Member State measures pursuing legitimate interests do not undermine the coherent application of the EUMR or the institutional balance upon which the EU merger control system is founded. See Commission Preliminary Assessment, 14 July 2025, Case M.12052, *UniCredit/Banco BPM*.

wholly new mechanisms, the Draft Guidelines systematise existing practices and place greater emphasis on structured *ex ante* review, procedural transparency and institutional dialogue, thereby reinforcing the Commission's supervisory role within the Union's merger control system. In particular, the codification of procedural mechanisms governing the interaction between the Commission and Member States contributes to reducing legal uncertainty surrounding the exercise of national powers in transactions with an EU dimension, while facilitating the early identification and resolution of potential conflicts between national measures and the objectives of the EUMR. The current framework therefore seeks not only to clarify the procedural conditions under which Member States may invoke legitimate interests, but also to strengthen the Commission's capacity to supervise and coordinate the application of Article 21 EUMR in a manner consistent with the integrity of the internal market. In this respect, the Draft Guidelines reinforce the Commission's preventive and coordinating functions, thereby consolidating its supervisory role within the Union's merger control system.

6. *Conclusion*

Taken together, the Draft Guidelines therefore represent not a rupture but a significant refinement and recalibration of EU merger control. They preserve the core architecture of the EUMR while systematically extending its analytical reach into domains that were previously treated as peripheral or case-specific. At the same time, this expansion is accompanied by a parallel tightening of evidentiary standards and procedural discipline. The cumulative effect is a more integrated and forward-looking enforcement framework that reflects both continuity with the established EUMR regime and a gradual evolution in the Commission's understanding of effective competition. Rather than departing from the foundations of the post-2004 merger control system, the Draft Guidelines clarify, systematise and operationalise developments that had already begun to emerge in the Commission's decisional practice, the Union Courts' case law and broader policy debates. In this respect, they seek to ensure that the SIEC framework remains capable of addressing contemporary competitive dynamics while preserving the legal certainty, analytical rigour and institutional balance that have long characterised EU merger control.

ABSTRACT (ita)

Il contributo analizza la bozza di linee guida, pubblicata dalla Commissione europea il 30 aprile 2026, per l'applicazione del regolamento (CE) n. 139/2004 sul controllo delle concentrazioni (EUMR). Sebbene questo strumento di *soft law* introduca significativi sviluppi nell'analisi delle operazioni di concentrazione, esso non segna una cesura rispetto al quadro normativo e interpretativo consolidatosi dopo la riforma del 2004. Al contrario, la bozza di linee guida si inserisce in un processo di progressivo affinamento e ricalibrazione del sistema delineato dall'EUMR, volto ad adattarne gli strumenti analitici alle trasformazioni della società contemporanea. In tale prospettiva, la Commissione riconosce un maggiore rilievo ai parametri concorrenziali diversi dal prezzo, alle caratteristiche dei mercati digitali, alla sostenibilità e agli effetti delle concentrazioni sui mercati del lavoro, rafforzando al contempo gli oneri probatori e la disciplina procedurale che governano l'accertamento di un ostacolo significativo ad una concorrenza effettiva (il c.d. *Significant Impediment to Effective Competition*). Il contributo evidenzia altresì come la bozza di linee guida precisi ulteriormente l'assetto istituzionale del controllo europeo delle concentrazioni, con particolare riguardo alla ripartizione delle competenze tra la Commissione e gli Stati membri ai sensi dell'art. 21 EUMR. Nel complesso, la bozza di linee guida non altera i fondamenti del sistema europeo di controllo delle concentrazioni, ma sistematizza e rende operative evoluzioni già emerse nella prassi decisionale della Commissione, nella giurisprudenza degli organi giurisdizionali dell'Unione europea e nel più ampio dibattito sulle finalità del diritto della concorrenza.

ABSTRACT (eng)

This article examines the draft Guidelines published by the European Commission on 30 April 2026 for the interpretation and enforcement of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EUMR). While the draft Guidelines introduce significant developments in merger assessment, they do not constitute a departure from the framework that has guided EU merger control since the 2004 reform. Rather, they reflect the result of a process of continuity, refinement and recalibration aimed at adapting the EUMR framework to the changing conditions of contemporary societies. Against this background, the article analyses the enhanced role attributed to non-price parameters of competition, digital market characteristics, sustainability considerations and labour-market effects, alongside the strengthening of evidentiary standards and procedural discipline within the Significant Impediment to Effective Competition test. It further examines the extent to which the draft Guidelines clarify the institutional architecture of EU merger control, particularly in relation to the allocation of responsibilities between the Commission and the Member States under Article 21 EUMR. This contribution argues that, rather than altering the foundations of the post-2004 merger control regime, the draft Guidelines systematise and operationalise developments already emerging from the Commission's decisional practice, the case law of the EU Courts and broader policy debates concerning the future direction of competition law.