INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE MERGERS WORKING GROUP

FEEDBACK ON THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE REVIEW OF THE EU MERGER GUIDELINES

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FEEDBACK ON THE PUBLIC CONSULTATION

I. INTRODUCTION

This submission is made to the European Commission's Directorate General for Competition (the '**Commission**') on behalf of the Mergers Working Group ('**Working Group**') of the Antitrust Section of the International Bar Association ('**IBA**') in response to the public consultation on the review of the EU merger guidelines published on 8 May 2025, (the '**Consultation'**).[1]

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 80,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Section.[2]

The Working Group welcomes the Consultation and provides constructive comments below, which draw on the vast experience of the IBA's members in merger control law and practice within the EU and other jurisdictions across the globe.

[1] See, https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en. This submission does not necessarily reflect the views of the organisations with which individual members of the Working Group or officers of the Antitrust Section are engaged or employed.

[2] Further information on the IBA is available at http://www.ibanet.org and information about the Antitrust Section is available at https://www.ibanet.org/LPD/Antitrust-Section/Default.aspx.

II. GENERAL COMMENTS ON THE PUBLIC CONSULTATION

The Working Group welcomes the Commission's initiative to revisit and refresh the Commission's Horizontal Merger Guidelines (the '**HMG**') and the Non-Horizontal Merger Guidelines (the '**NHMG**', together with the HMG being the '**EU merger guidelines**'). They were respectively adopted in 2004 (over twenty years ago) and in 2008 (seventeen years ago) and it is appropriate for the Commission (as the Commission itself has acknowledged) to routinely verify on a periodic basis whether its EU merger guidelines remain fit for purpose, relevant and properly reflective of the current state of European legislation and the jurisprudence of the European Court of Justice ('**ECJ**').

Practical Observations

The Working Group agrees on the need to refresh the EU merger guidelines where they appear to be patently out-of-date.[3] On a casual review of the 2004 and 2008 documentation, it is clear that a ***refresh*** to bring the documents up to date would be appropriate, particularly to reflect the correct expression of the SIEC test, as further affirmed by the ECJ in case law over the last twenty years.

While the EU merger guidelines serve an important interpretative and procedural function, they are ***not the appropriate vehicle for effecting substantive amendments to the EU Merger Regulation*** itself. The Regulation, as a legislative instrument adopted through the ordinary legislative procedure, reflects a carefully negotiated balance of legal certainty, institutional competence, and economic flexibility. Attempting to revise its core provisions through soft law instruments such as guidelines risks undermining this balance and may exceed the Commission's interpretative mandate. Moreover, the existing regulatory framework has demonstrated sufficient adaptability to accommodate evolving market dynamics and enforcement priorities. As such, any material reform to the substantive or procedural architecture of EU merger control (if any is required or desired) should be pursued through formal legislative channels, ensuring democratic legitimacy and legal coherence.

With an eye to reducing the number of guidelines from the Commission, the Working Group considers that it would be useful for practitioners and businesses alike for the HMG and the NHMG to be ***combined into a single document for reference***. This would allow holistic guidance for mergers (which often have combined horizontal and vertical effects) to be provided and would ensure that any resulting document can be accessed, reviewed and updated consistently in future.

The Working Group is, however, of the firm belief that the current EU merger guidelines are, in the main, ***fit for purpose***, and that a radical revamp of the EU merger guidelines is not required or appropriate. ***Refresh and update should be the order of the day, rather than any form of material change or, indeed, revolution.***

[3] For example, in the HMG, paras. 2, 3 and 6 refer to the now repealed EU Merger Regulation 4064/89 on the control of concentrations and (ostensibly) the dominance test, and para. 3 refers to the case law in Kali und Salz without reference to more recent case law affirming that judgment. Furthermore, the phrase '*significant impediment to effective competition*' only appears three times in the document, and only within the context of the (old) dominance test or the finding of oligopoly. References to the '*SIEC test*' (as properly formulated) do not appear in the document at all. In addition, '*common market*' appears eleven times rather than '*the European Union*' or '*internal market*'.

To that end, the Working Group would note that the current HMG and the NHMG are 14 and 20 pages respectively. The documents each ***provide concise and clear guidance with an overall brevity that is user-friendly***. The same approach should also be taken to the *refreshed EU merger guidelines*. The Working Group considers that generating a lengthy, complex and overworked set of EU merger guidelines would not be in the interests of stakeholders. A maximum of approximately 35-to-40 pages would be sufficient (consistent with the existing combined length of the current guidelines).

Any refresh of the EU merger guidelines must be firmly grounded in the Commission's decisional practice and the EU court's case law developed over the past twenty years. This body of jurisprudence represents a rich and evolving source of interpretative clarity, analytical methodology, and procedural consistency that has shaped the practical application of merger control across diverse market contexts. Incorporating this decisional practice into the *refreshed EU merger guidelines* would not only enhance legal certainty for undertakings and practitioners but also ensure that the guidelines remain aligned with the realities of enforcement. Moreover, such an approach would reinforce the legitimacy of the guidelines as a reflection of institutional experience, rather than as a departure from established precedent or an abstract theoretical exercise.

Substantive Observations

Merger cases are by their very nature defined by their facts. And no two cases present identical facts, even within the same sector. Accordingly, the Working Group would respectfully ***question the value and the merit of including numerous case studies*** into the *refreshed EU merger guidelines* (for example in the style or manner that is used in the Article 101 TFEU horizontal cooperation guidelines).[4]

Whilst further limited examples may be of some value, the Working Group would encourage the Commission to rather ***elaborate how it intends to exercise review powers in practice***, ***the tools it will use and the elements and analytical framework for assessing whether an SIEC exists or not***, particularly in respect of areas that are not sufficiently elaborated in the current guidelines.

For instance, in the HMG, the section on non-coordinated effects (paras. 24 to 28) is *shorter* than the section on coordinated effects, whilst the decisional practice of the Commission since the adoption of the HMG in 2004 has shown that ***the predominance of the Commission's competition concerns have arisen in respect of non-coordinated effects*** rather than coordinated effects (particularly since the reframing of the substantive test). This elaboration should include detailed criteria and methodologies that will be employed to evaluate the competitive effects of concentrations, taking into account both quantitative and qualitative factors. Additionally, the Commission should provide ***clarity on the thresholds for intervention, the role of market definitions, and the consideration of potential efficiencies*** that may arise from such transactions. By doing so, the Commission can ensure greater transparency and predictability in its decision-making process, thereby fostering a more stable and competitive market environment.

By way of example, the two paragraphs on '*Merger eliminates an important competitive force*'

[4] See, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).

could be supplemented and clarified in the light of the ECJ's judgment in *CK Telecoms*.[5] In that case, the ECJ clarified that the relevant question is whether the merging party has a competitive impact greater than what its market share alone would suggest. This means the company's influence on the market is significant even if it does not directly dictate the pricing strategies of others. One or two additional paragraphs could be inserted at this point in the *refreshed EU merger guidelines* to ***elaborate further on the circumstances in which an important competitive force can be identified*** in line with the judgment. For example, the Working Group would draw the Commission's attention to Guideline 2 of the U.S. Merger Guidelines that provides an explicit and somewhat detailed structure to the approach to be taken and also sets out the types of evidence that may be relied upon by the U.S. Agencies.[6]

Most importantly, however, the Working Group considers that it would be inappropriate and counterproductive to introduce ***structural presumptions of harm into the EU merger control framework***.

Further explanation of these points is provided below in respect of each of the Topics.

[5] See, Case C-376/20 P, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0376.
[6] See, Antitrust Division | 2.2. Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms | United States Department of Justice.

III. RESPONSES TO SPECIFIC ELEMENTS OF THE CONSULTATION

A. Topic A: Competitiveness and resilience

The Working Group welcomes the Commission's discussion on this **Topic A** and agrees with a number of the key points raised by the Commission's targeted consultation.

Competition stimulates productivity, investment and innovation. Productivity tends to increase scale, and in turn, productivity increases as productive companies grow or innovate. Achieving increased scale by inorganic means (such as by merger or acquisition) is a natural option for companies, and a vital part of the EU economy and its ability to grow and become more productive.

To that extent, the EU Merger Regulation is – *already* – pro-growth and productivity, as it allows (in accordance with Article 2(2) of the EU Merger Regulation), concentrations that do not give rise to an SIEC. And as the Commission's own statistics bear out, the EU Merger Regulation has contributed significantly to M&A in the EU economy.[7]

Of the **9,704** concentrations notified to the Commission up to 1 August 2025, **9,345** cases have been approved under either Article 6 or Article 8 of the EU Merger Regulation with or without remedies (i.e. **96.3%**). This statistic itself supports the recommendation that ***material changes (or revolution) to the EU Merger Regulation or the EU merger guidelines are <u>not</u> required to address perceived issues that the EUMR is a blocker to pro-competitive growth and scale***. The data supports the view that the existing legal and analytical framework remains sufficiently robust and adaptable to address contemporary challenges in merger control without necessitating structural reform. As such, it does not warrant structural reform – particularly of a kind that *refreshed EU merger guidelines* alone would be ill-equipped to deliver.

It is important to anchor the Commission's practice on preventing situations where a genuine SIEC is likely to emerge and to avoid intervention in situations where the emergence of an SIEC is more ambiguous or even speculative in particular where the merger in question would enable growth, scale, innovation, resilience or other efficiencies.

In this respect, further ***updating*** is needed in respect of the cases in which Commission intervention by way of a decision is likely (i.e. the 363 Phase I remedy cases, the 151 Phase II remedy cases and the 33 prohibition cases to date), that is to say, the **5.6%** of cases where the prospect of an actual or a potential SIEC emerges (not including the 257 withdrawn cases such as *Amazon/iRobot* and *Adobe/Figma*). The EU merger control system has – as the statistics above testify – approved a very large majority of cases and helped companies doing business in the EU to gain scale.

The Working Group agrees that such benefits include network effects, the ability to spread the cost of intangibles over a larger cost base, better access to financial markets, the means for a company to expand into other Member States or increase its global outreach to compete with large global rivals. ***Yet the benefits of scale and of scope should not present in themselves the basis for competition concerns in and of themselves***.

[7] See, https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf

Accordingly, the Working Group would ***advise against articulating (in the refreshed EU merger guidelines) that scale and scope are themselves potentially new factors that may influence the finding as to whether an SIEC will likely result from a merger*** (as per the factors currently contained in para. 26 of the HMG).[8]

The reason for this is that the finding of an SIEC (in a case involving increased scale or scope) should solely be based on the creation or strengthening of ***market power resulting in a significant impediment to effective competition***. And as such, the *refreshed EU merger guidelines* do not need to elaborate on new factors for finding an SIEC based on scale or scope. Indeed, the Working Group would note that scale itself is *already* identified as a factor in the discussion of entry and barriers to entry.[9] The Commission could also consider further developing the *refreshed EU merger guidelines* to provide guidance on scale as a factor which can be positive in enabling the creation of European champions that can compete more effectively against competitors from other regions outside of the European Union provided this does not result in a clear SIEC within the internal market. Such guidance could include factors such as potential growth and entry of global competitors in the internal market, an assessment of how competition may take place on a global scale as well as efficiencies such as the promotion of technical and economic progress in line with Article 2.1(b) of the EUMR.

Furthermore, for the sake of clarity and without prejudice to the comments further below on **Topic F: Efficiencies**, the Working Group would encourage the Commission and the *refreshed EU merger guidelines* to clearly provide for the fact that ***the benefits of scale and scope should only be considered by the Commission (in a case where it identifies an SIEC) as factors that contribute to an efficiency defence rather than any kind of efficiency offence***. That is to say that the benefits identified above by the Commission should not be used as evidence against the notifying parties in support of any theory of harm or in any conclusion on the existence of an SIEC.

In respect of ***resilience and value chains***, the Working Group supports the Commission's focus on these aspects, and whether the NHMG in particular can be further developed to explain how the Commission will ***consider impacts on the value chain in the assessment of an SIEC***.

In particular, the Working Group would encourage the Commission to adopt in the *refreshed EU merger guidelines* the reinvigorated notion that vertical mergers are generally pro-competitive.[10] And that any finding that any vertical aspects of a merger '*results in less competitively priced inputs, less innovative or lower quality products or reduced number of suitable suppliers*' in the value chain may ***only be supported where there are actual on-market concerns in an upstream or downstream market*** (rather than existing in isolation).

Furthermore, the Commission ***must resist the temptation to ultimately render the word 'ecosystem' a 'buzz / bad word' in competition parlance***, in the same way that other terms are used such as '*dominance*', '*foreclosure*', '*abuse*', '*infringement*', '*leverage*' etc. Ecosystems are a natural part of a healthy, competitive industrial landscape, have significant industrial and commercial benefits that generate positive outcomes for customers and consumers, and should not be stigmatized by the unfortunate predisposition in one prohibition decision to rely on it as

[8] Para. 26 of the HMG currently states, '*A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all of these factors need to be present for such effects to be likely. Nor should this be considered an exhaustive list*'.
[9] See paras. 69, 71(b), 72 and 75 of the HMG.
[10] As concisely elaborated already in paras. 11 to 13 of the NHMG.

part of its conclusions on finding an SIEC.[11] Ecosystems, neither in their existence nor in their operation, are not a theory of harm.

B. Topic B: Assessing market power using structural features and other market indicators

The Working Group considers that the current HMG provides clear, precisely defined and comprehensive guidance on the Commission's approach to assessing market power under the EU Merger Regulation.

As noted above, the Working Group believes that the HMG (and to the extent relevant the NHMG) are fit for purpose and should not be entirely reworked. Rather, ***a refresh and update are preferable***, particularly to further elaborate on non-coordinated effects, the notion of an important competitive force and other developments in case law and decisional practice (such as *CK Telecoms*). The Commission's recognition of this in para. 37 of Topic B is welcome.

The Working Group firmly believes that ***the existing safe harbors based on market shares and HHI levels contained in paras. 18 to 21 of the HMG should be retained***.[12]

Yet, as noted above, the Working Group strongly advises against the adoption of stricter indicators or rebuttable presumptions. The rationale behind this recommendation is to ***avoid creating overly rigid frameworks that may not accurately reflect the complexities and nuances of individual cases***. Stricter indicators or rebuttable presumptions could lead to a one-size-fits-all approach, which may not be suitable for all situations and could potentially stifle innovation and competition. Instead, the Working Group advocates for ***a more flexible and case-by-case assessment that takes into account the specific circumstances and context of each situation***. This approach allows for a more balanced and fair evaluation, ensuring that decisions are made based on a comprehensive understanding of the relevant factors and evidence.

The Working Group considers that it would be inappropriate and counterproductive to introduce ***structural presumptions of harm into the EU merger control framework***.

Such an approach (beyond the case law of the ECJ as established in *GE/Honeywell*),[13] would not only be overly simplistic, but would potentially result in serious Type II errors and could create ***counterproductive chilling effects*** in terms of investment, growth, scale and innovation.

The EU Merger Regulation itself is neutral as to whether mergers are de facto '*good for competition*' or '*bad for competition*'. Indeed, the case law of the ECJ has confirmed that ***there is no general presumption that a concentration is compatible with, or incompatible with, the internal market*** (see, to that effect, *CK Telecoms*[14] and *Bertelsmann and Sony Corporation of America v Impala*).[15]

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[11] See, Case M.10615 – *Booking Holdings/Etraveli Group*, https://ec.europa.eu/competition/mergers/cases1/202451/M_10615_10430872_121034_7.pdf, where the term '*ecosystem*' is used 30 times.

[12] The Working Group would note also the last sentence of para. 21 which provides "*they do not give rise to a presumption of either the existence or the absence of such concerns*".

[13] See, Case T-209/01, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62001TJ0209.

[14] See *CK Telecoms*, para. 71.

[15] See, C-413/06 P, para. 48, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2008%3A392.

The principle in question was firmly established by the ECJ as early as 1998 in *Kali & Salz*, where the Court stated in paragraph 222 that: "[s]*uch an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market*". This analytical framework was subsequently reaffirmed by the General Court in *Airtours*,[16] paragraph 63, which emphasized that: "[t]*he prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.*" The General Court reaffirmed this principle in *General Electric*,[17] emphasizing that Regulation No 4064/89 (the old Merger Regulation) ***did not establish any presumption regarding the compatibility or incompatibility of a notified concentration with the internal market***. Rather, each transaction must be assessed on its individual merits, in accordance with the substantive criteria laid out in the EU Merger Regulation and interpreted through established jurisprudence.

Introducing structural presumptions of harm, that when applied, would inherently mean that the burden of proof automatically switches to the notifying party/ies, would be inappropriate given that:

- The ***legal burden of proof remains with the Commission*** to demonstrate on the basis of convincing and compelling evidence (i.e. in accordance with the applicable case law) that a proposed merger presents an SIEC on the balance of probabilities (and the Commission should not be absolved of its duties in this respect by any form of structural presumption or procedural shortcut - – this would be contrary to the legal scheme of the EU Merger Regulation and the case law of the EU Courts).

- The fact that there is an apparent potential '*safe harbor*' for notifying parties in para. 18 of the HMG where a merger is unlikely to result in an SIEC, is entirely ***irrelevant*** and does not justify a *quid pro quo* application of a further structural presumption at the other end of the assessment spectrum. Arguably, it is much easier for the Commission (and the parties in self-assessment prior to pre-notification), to reach the conclusion that an SIEC will *not* arise based on simple indicia such as low market shares, unconcentrated HHI results, and low HHI deltas. ***The same cannot be said of mergers, potentially at the other end of the spectrum, where a more sophisticated and complex economic assessment is required using voluminous data and internal documents, and a proper and full consideration of all the potential and actual features of competition in the relevant markets, pipelines and innovation spaces***. This is demonstrated by cases such as *Blackstone/Acetex* (geographic market definition),[18] *Microsoft/Skype* (very high market shares),[19] and *ASD/Cartonboard* (countervailing buyer power),[20] as well as the sixty-six (66) cases cleared by the Commission to date under Article 8(1), including the most recent unconditional clearance of *Liberty Media/Dorna Sports* on 25 June 2025.

- Introducing rebuttable presumptions of harm also introduces the possibility that the

[16] See, Case T-342/99.
[17] See, footnote 13, para. 63.
[18] See, Case No COMP/M.3625 - *Blackstone/Acetex*.
[19] See, Case No COMP/M.6281 - *Microsoft/Skype*.
[20] See, Case No COMP/M.4057 - *Korsnas/Assidomin Cartonboard*.

parties cannot actually rebut the structural presumption (even if it is rebuttable) because ***the evidence which would normally be capable of rebutting it, does not yet exist*** (given the forward-looking nature of the merger control assessment). That is to say that the economic modelling and the internal documents that would support the detailed, convincing and compelling reasons why an SIEC will not arise in a proposed merger either do not exist, or would only be generated after the Commission is seised of jurisdiction, and would not necessarily contain sufficient data/inputs, or be able to be extended over a sufficiently lengthy period of time, to rebut the presumption. As a result of this basic proposition, notifying parties would naturally be exposed to an unfortunate *inequality of arms in the legal assessment*, and there would be risk of potential infringements of their procedural rights of defence. In turn, this could expose the Commission to further judicial scrutiny of its merger control decisions, as well as negative judgments from the ECJ.

- The introduction of such rebuttable presumptions would ***create legal uncertainty and significantly increase the costs of the EU merger process*** by requiring the parties to gather a considerably greater amount of information to put forward '*particularly strong evidence*' that the notified concentration would not lead to any SIEC. In terms of timing, this would likely entail ***an increase in the length of pre-notification*** for complex cases (which can already run to 9-to-12 months and longer), ***an increase in the number of pull-and-refile cases in Phase I*** (already in 2023 three of the four conditional Phase I cases involved a pull-and-refile), and ***an increase in complex cases in Phase II*** (i.e. an increase in Article 8(1) decisions that could in reality have been resolved and decided in Phase I), as the Commission would not need to demonstrate '*serious doubts*' but simply rely on a presumption.

Notwithstanding the above, the Working Group does believe that it would be helpful to ***elucidate in the refreshed EU merger guidelines the possibility for alternative approaches to assessing market power*** to be taken into account.

Capacity shares are a good example of assessing market power on a basis different from that based on output or sales. In certain industries, it may be appropriate to consider the different bases on which economic activities may be measured. For example, in airline mergers, data relating to passenger and cargo transported are routinely assessed, as well as other elements such as seat capacity, gauge factors, frequencies, unidirectional shares and *aller-retour* shares. In other industries, it may also be useful to consider equivalent factors, and other elements, such as shares incorporating captive activities, as well as on-market activities, and the activities of interim resellers as well as downstream suppliers in the same class (as opposed to defining a separate trade market).

The Working Group welcomes the Commission's suggestion that the *refreshed EU merger guidelines* ***reflect on the type of evidence needed to support the idea that a merger is more likely than not to result in an SIEC***. Clarification on the nature and level of evidence that is typically required to conclude on the existence of an SIEC would be useful.

The General Court has confirmed that internal documents have high probative value, especially where they were drawn up by the people directly involved in the notifying parties' business on the relevant market, at the material time.[21]

[21] See, T-251/19 - *Wieland-Werke v Commission*, para. 117: "*Contrary to what the applicant submits, the*

However, the Working Group would caution against an absolute reliance on internal documents of notifying parties and targets when not understood or read in their correct context or without the proper perspective of the company in question. ***The probative value of internal document evidence should be properly assessed as part of the substantive investigation.***

This is particularly the case with the use of email evidence, and specifically the case with forward looking predictions or internal strategy. Internal communications and documents of certain employees of a company may not properly reflect the actual strategic thinking of the decision-making bodies or people leading an organization. In addition, the internal estimates of the parties' market shares and respective positions may be unreliable – as has been revealed in several market reconstruction exercises undertaken by the Commission. ***The refreshed EU merger guidelines should provide further guidance on internal data and document evidence and apply a cautious approach where such evidence is not merely taken at face value*** (and is not used to trump solid economic analysis of effects).

Finally, the Working Group firmly believes that ***the framework for the assessment of coordinated effects and vertical foreclosure remain fully fit for purpose***.

The NHMG should not be substantially changed but lightly refreshed. The ***ability-incentive-effect framework is clear, understood and usable and should not be jettisoned***. Whilst recent academic literature may point to certain issues in vertical mergers, the Working Group would suggest that these are highly fact-specific and limited examples, rather than ordinary course, and therefore should not be addressed in the *refreshed EU merger guidelines*. Rather indeed, the Commission should further stress that vertical mergers are more likely than not to be pro-competitive (as noted above) and that coordinated effects are less likely to arise in practice, except in cases where the *Airtours* criteria are patently likely to be met.

Furthermore, the Working Group would note in the light of the U.S. experience (where during the period 2022-2023 there was a period of uncertainty around the 2020 Vertical Merger Guidelines created by the then leadership of the U.S. FTC in contrast to the approach of the U.S. DOJ), ***it is highly important for the Commission to retain a grounded approach in durable and certain legal principles based on established jurisprudence – and avoid creating legal uncertainties or doubts*** (the 2023 US Merger Guidelines ultimately superseded the fragmented approach that arose during that period).

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content of those internal documents must be regarded as particularly credible. Those documents were drawn up by persons who were directly involved in the applicant's business on the relevant market, at the material time. They were intended to clarify how decisions were taken within the undertaking. Thus, in order to be useful, they had to reflect accurately the applicant's position on the market or to supply reasonable estimates on the development of that position, in the light of the strategy implemented by the applicant and its competitors' relative position on that market. By contrast, those documents in no way sought to defend the applicant's interests in the context of the present dispute. Moreover, their content even runs counter to those interests, since they can be relied on in support of the Commission's position. In the light of the case-law according to which, first, it is necessary to attach great importance to the fact that documents were drawn up in close connection with the events or by a direct witness of those events, and, second, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (judgment of 16 June 2015, FSL and Others v Commission, T-655/11, EU:T:2015:383, paragraph 183), the probative value of those documents must therefore be regarded as high".

C. Topic C: Innovation and other dynamic elements in merger control

Further explanation as to how the Commission intends to assess innovation would be welcome.

However, the *refreshed EU merger guidelines* should not simply incorporate tenets of the old CET papers from 2017 and 2018.[22] These prior papers would not provide an appropriate basis for the refreshed EU merger guidelines because of the structural presumptions of harm that they advocated and because the underlying model developed for these papers was demonstrated to contain certain errors.[23]

The Working Group firmly believes that ***there cannot be a presumption of harm for mergers between innovative companies in concentrated sectors with high barriers to entry***. Rather, any analysis must commence from a neutral starting point and undertake a careful case-by-case analysis, as per the approach enshrined by the case law mentioned above.

The Commission should ***articulate how it should assess innovation in a holistic manner*** in such an analysis, rather than simply applying presumptions or simplistic economic assertions. The ***refreshed EU merger guidelines should avoid presumptions*** (as extolled by the old CET papers) such as:

- A merger will reduce R&D investment in each of the merging firms' products.

- Even though competitors of the merged entity will respond with an increase in R&D investment (in anticipation of increased profits), the increase in innovation by third parties will not outweigh the decrease by the merged entity (so there is an overall decrease in innovation in the industry).

- The strength of the negative effect on innovation incentives will increase the closer the merging parties' products are closer substitutes.

- A merger reduces price competition between firms by *internalizing* the constraint that each merging firm previously exerted on each other, so the profit levels of the merged entity change, and as a result, will impact on its incentives to innovate.

- If a merger increases pre-innovation profits in the product market by more than post-innovation profits, post-merger price coordination will exert a downward (i.e. negative) pressure on the incentive to innovate.

- A loss of innovation competition is expected to be significant if a merger brings together two of a limited number of innovators, and the merging firms (absent the merger) would have been likely to divert significant future sales from each other when introducing innovative products.

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[22] See, Federico, G., Langus, G. and T. Valletti, *Horizontal Mergers and Product Innovation*, (July and October 2017 and March 2018). See also Federico, G, *Horizontal Mergers, Innovation, and the Competitive Process*, Journal of European Competition Law and Practice (November 2017); and Federico, G., Langus, G. and T. Valletti, *A Simple Model of Mergers and Innovation*, Economics Letters (May 2017).

[23] See, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3146731, https://www.sciencedirect.com/science/article/abs/pii/S0165176518300697 and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135177.

The Working Group recommends that the *refreshed EU merger guidelines* provide that the Commission should undertake - with the engagement of the notifying parties - ***a comprehensive and holistic assessment of innovation incentives upfront***. The Working Group believes that a new approach (departing from the old CET papers) is required for the assessment of innovation and that ***it should not rely on presumptions***.

A holistic analysis of innovation is required because it would be perverse if certain (positive) innovation incentive effects that arise naturally were to be excluded whilst other (negative) innovation incentive effects were only considered in the upfront substantive analysis by the Commission's case team (supported by the CET).

It should be recalled that ***incentive effects arise naturally*** as a result of the combination of the companies' upstream R&D activities (they are not the result of a commercial strategy decision-making process) and ***innovative incentive effects are distinguishable from classical downstream synergies*** that are rightly assessed in the weighing of efficiencies (e.g. production synergies that reduce marginal cost as a result of a commercial strategy).

Three examples of ***positive effects of mergers on innovation incentives*** can be identified for instance:

- A merged firm may be able to increase its price-cost margins, thereby generating greater returns for innovative products. As a result, the merged entity may invest in innovation, which in turn ***stimulates demand***. Ultimately, the demand effect may be greater than the effect the merger has on prices.

- Even if R&D investments exhibit decreasing returns, it may be optimal for a merged entity, after a merger, to *shut down research units and concentrate the R&D effort on other units*. This possibility may arise because the combined research units may replicate the same discovery or make discoveries that are close substitutes. A streamlining strategy could potentially counter the anticipated negative effects on innovation incentives as might otherwise by predicted by a structural presumption about R&D unit/line/project closures. The merged entity may in fact ***increase its R&D investment in the research units*** that remain active to such an extent that the overall probability of invention increases (or inventions in other areas now become possible). As such, horizontal mergers may be good both for innovation and for consumer welfare. This possibility is more likely to be the greater the value of innovations, and the more highly correlated are the R&D projects of different firms.

- Mergers may spur innovation even without synergies, and regardless of concerns about the '*appropriability*' of inventions. The merging parties may be able to engage in ***strategic coordination, combine their physical assets, and give rise to the sharing of innovative technological knowledge***. Important ***spillover effects*** and synergies arising from innovation mergers (such as ***knowledge sharing, pooling of patent portfolios and the combining of R&D talents***) that yield important natural benefits (even before the creation of a merged firm's newly determined innovation strategies that may give rise to efficiencies). These benefits can decrease production costs or raise the quality of products that in turn produce production synergies and an expansion effect on output (a scale effect) - thus spurring incentives to further invest in innovation. And innovation efforts can be used across the broader output of the merged entity (thereby reducing

costs) and in turn spur further investment. As the output base grows, this increases the incentive to invest in innovation.

The Working Group suggests that the *refreshed EU merger guidelines* should ***take a neutral position when assessing the impact of a merger on innovation*** and should ***balance the various effects at work***. The Commission should take account of *both* benefits and theories of harm in its substantive assessment when considering whether there is a potential SIEC in respect of innovation. ***All the effects of a concentration on the incentives to innovate, including spillover effects, should be part of the main competitive assessment carried out by the Commission (and not just the negative effects)***.[24]

Furthermore, the Working Group would ***welcome guidance from the Commission on how it would undertake an innovation/R&D benchmarking exercise***, as it appears to have done in the recent *Chr. Hansen/Novozymes* case (where it ultimately concluded that innovation concerns could be excluded).[25] In that case, the Commission allegedly compared the Parties' capabilities with competitors on a number of factors, such as total R&D spend in value, number of R&D centres, scientists, active pipeline projects and extent of patent portfolios.

The Working Group ***welcomes the Commission's initiative to review the failing firm defence***. It should be noted that there have been two such cases under the HMG (not one): *Harburg Refinery* and *Aegean/Olympic*.[26]

The ***refreshed EU merger guidelines should be broadened to explicitly include the failing division principle*** (as was the case in *Aegean/Olympic*, where Olympic was a portfolio investment of Marfin Group and it was established that the latter had no incentive to further invest in its loss-making subsidiary) and more generally to ***anchor the analysis on a counterfactual analysis without overreliance on rigid criteria***.

The three criteria in para. 90 of the HMG arguably go beyond the parameters discussed by the ECJ in *Kali und Salz*,[27] particularly in respect of the criterion requiring the assets to exit the

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[24] Perhaps a useful example for inclusion as a footnote in the *refreshed EU merger guidelines* is Case No COMP/M.3998 - *Axalto/Gemplus* SIM card case, in which the Commission specifically examined the impact of the merger on innovation. The *Axalto/Gemplus* decision found that innovation was a "*key driver for competition*" among the most important SIM card manufacturers, as customers (i.e. mobile telecommunication operators) regularly seek to upgrade their offering by supplying new products and new services (see here). The market investigation showed that the two merging companies were exerting a constraint on each other as the most important innovators (the parties' data illustrated that they were the first to introduce major innovations in seven major innovation events out of eleven in the past six years). Nonetheless, the Commission found that the new entity and its main competitors would have a strong incentive to innovate. This was because SIM card manufacturers make their margins in the first year immediately following the launch of a new product. After this initial period, prices decrease dramatically as competitors are able to supply the product. As a result, the Commission concluded that the parties would have no interest in reducing R&D efforts. To the contrary, the new entity would "*reallocate R&D capacities so that the number of R&D projects post-merger is likely to be greater than the R&D projects of the two companies pre-merger*". The market investigation and the parties' internal documents confirmed that the parties would maintain a strong incentive to innovate in both the short-term and the long-term. The *Axalto/Gemplus* case is highly fact-specific but it is a useful example of how innovation incentives can be assessed in the substantive assessment by the Commission.

[25] Case COMP/M.11043 – *Chr. Hansen/Novozymes,* https://ec.europa.eu/competition/mergers/cases1/202447/M_11043_10384533_5307_3.pdf.

[26] See, Case No COMP/M.6360 - *Nynas/Shell/Harburg Refinery* and Case No COMP/M.6796 – *Aegean/Olympic II*.

[27] See, Cases C-68/94 *France v Commission* (*Kali und Salz*), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0068.

market absent the merger (which is very difficult to establish). ***The refreshed EU merger guidelines should be revised to essentially render the test easier to satisfy, in line with the proper case law and a general counterfactual analysis***. Indeed, the ECJ's *obiter* indicates that a concentration is not the cause of the deterioration of the competitive structure (of a market) if it is clear that:

- *the failing firm would in the near future be forced out of the market* (because of its financial difficulties) *if not taken over by another undertaking*;

- *the acquiring undertaking would gain the market share of the failing firm if it were forced out of the market*;

- *there is no less anticompetitive alternative purchase than the notified concentration*.

The Working Group believes that ***it should be easier to evidence that a firm in difficulty is a failing firm*** (and without the need to reproduce multiple counterfactual analyses of theoretical alternative scenarios for the ailing firm) and that ***it should not be necessary to demonstrate that the 'assets would inevitably exit the market'*** (a criterion invented by the HMG – neither of the word '*assets*' nor '*exit*' appear in the *Kali und Salz* judgment).

Greater leniency should be introduced to allow the rescue of failing firms and divisions, and particularly, to ensure that European assets do not inevitably exit the (global) market.

The Working Group would welcome the *refreshed EU merger guidelines* provide ***further clarification on the approach to, and factors involved in, assessing and establishing an SIEC arising from the elimination of potential competition***. Such factors may include whether a potential entrant will have the ability and incentive to make the necessary sunk cost investments, whether that party is likely to become an effective competitive force in the future (and whether it has the requisite brand, market presence, access to customers, etc.), whether such entry would be profitable and sustainable on a long-term basis, whether there are or there are not alternative actual or potential suppliers who would be able to maintain competitive pressure in the market after the merger, and ultimately whether the elimination of the potential competition would have a '*significant*' impediment to effective competition.[28] Further explanation as to what the materiality threshold for '*significant*' would be welcome.

In addition, in respect of ***the elimination of nascent competition***, the Working Group would equally welcome ***clarification on the approach to, and factors involved in, assessing and establishing an SIEC on this basis.*** In particular, it would be useful to test whether the target company is able – absent the merger – to make the necessary level of investments and other contributions into its business activities (e.g. management, expertise, etc.) that can be brought to them by the acquiring company, and whether the target company will indeed grow into an effective competitive force absent the merger (i.e. evidence beyond mere supposition should be required). The *refreshed EU merger guidelines* could provide guidance on how the Commission will evaluate the extent to which the target company is a potential competitive threat to the acquiring company, the likelihood that the target company would have become a significant competitor in the future, even without the merger, the target company's innovative capabilities and potential to disrupt the market, or its potential to enter new geographic or

[28] See, for example, Case COMP/M.11043 – *Chr. Hansen/Novozymes,* https://ec.europa.eu/competition/mergers/cases1/202447/M_11043_10384533_5307_3.pdf.

product markets. The U.S. FTC experience in this area is particularly enlightening and should be researched by the Commission in its consideration of the standards to be applied in the exercise of its prosecutorial discretion in such cases.[29]

D. Topic D: Sustainability and clean technologies

Whilst the Working Group recognizes that ***the Commission's initiative to consider sustainability in the context of the assessment of an SIEC represents a departure from the position taken by the U.S. Agencies and potentially therefore further complicates the international regulatory environment, the Working Group welcomes this initiative***. This development marks a long-overdue step toward addressing a notable *lacuna* in both the HMG and the NHMG, where the intersection between merger control and environmental objectives has thus far remained underdeveloped.

Sustainability factors (such as a product's energy efficiency) are features that are relevant to the market definition or closeness of competition between merging parties' offerings. This element will only become more commonplace as the net zero transition gains pace.

The Working Group therefore recommends that the *refreshed EU merger guidelines* should ***clarify how the Commission will identify and analyze such factors*** as part of its merger assessment framework. In particular, it would be helpful to explain:

- whether the Commission will systematically evaluate if certain sustainability factors (such as energy performance) are a parameter of competition in a given market;

- if there are industries where sustainability issues are a known driven of competition (e.g., energy, basic industries, household paper and plastics, etc.);

- the appropriate methodology to assess sustainability factors and the sources to be relied upon (e.g., industry reports, internal documents, the transaction rationale, market feedback).

In evaluating sustainability factors, the *refreshed EU merger guidelines* should explain how the Commission will ***ensure it does not penalize notifying parties for investments in sustainability efforts***. The approach should avoid defining unduly narrow markets or pursuing theories of harm that would exclude competitors that have not made such investments.

The Working Group considers that sustainability considerations should be included in the SIEC analysis because they represent '*technical and economic progress*' within the meaning of Article 2(1)(b) of the EU Merger Regulation. Thus, the substantive assessment should include

[29] The US experience in *FTC v. Meta/Within* provides a powerful cautionary tale and a source for the detailed standards that could be applied to a theory of harm here. The U.S. FTC pursued two theories of potential competition: (i) actual (Meta would have entered *de novo*) and (ii) perceived (Meta's presence on the "*edge*" of the market disciplined competitors). While the court accepted both theories as legally viable, it found the U.S. FTC's evidence failed to meet the high evidentiary bar. For the actual potential competition claim, the court applied a "*reasonable probability*" standard and concluded the U.S. FTC had not proven Meta had the "*available feasible means*" to enter, specifically lacking the capability to create fitness content. For the perceived potential competition claim, the court required evidence that Meta's presence "*in fact tempered oligopolistic behavior*", which the U.S. FTC's evidence was "*insufficient*" to show. This case demonstrates that U.S. courts demand concrete, objective proof for such theories, providing a model for the rigorous, evidence-based standards the refreshed EU merger guidelines should adopt.

consideration of '*the sustainable development of economic activities and a high level of protection and improvement of the quality of the environment*'.

However, the *refreshed EU merger guidelines* should make it clear that the analysis can go beyond the physical characteristics of products, the efficiencies from cost reductions and innovation, to ***include as assessment of the wider impact of a merger on sustainability, e.g. by assessing externalities that have a broader impact on the environment***.

The Working Group suggests that it would be helpful for the Commission to align the refreshed EU merger guidelines with the approach taken in the context of competitor cooperation agreements in relation to benefits and these could include:

- individual use value benefits, such as improvements in product quality or lower prices, which arise in the relevant markets;

- individual non-use value benefits, which include indirect benefits resulting from the consumers' appreciation of the impact of their sustainable consumption on the wider public;

- collective benefits on different markets, such as positive externalities that benefit society as a whole.

The Working Group suggests ***it may be useful to provide one or two illustrative examples of benefits*** which might fall into one or more of the categories above.

Furthermore, the Working Group would note that certain concentrations may restrict price competition but generate sustainability-related efficiencies – and these will need to be factored into the analysis. The ***refreshed EU merger guidelines should make it clear that this is a possibility*** – i.e. the sustainability benefits of a merger may avoid a finding of an SIEC (or at least be taken into account when assessing whether an SIEC exists or not).

The Working Group considers that ***the refreshed EU merger guidelines should recognize that it will not be necessary to quantify sustainability benefits precisely*** (e.g. where the benefits are clear and obviously of a sufficient scale to offset a limited price increase). It should also be acknowledged that that that the quantification exercise may not be straightforward and that it may not always be possible to provide cogent evidence of as-of-yet undetermined benefits. In the context of environmental sustainability, it is not unusual that the benefits may materialize in future, over a relatively long period of time – and it will be necessary for the refreshed EU merger guidelines to recognize this. The guidance should explain that notifying parties should apply these techniques in a way that is commensurate with the size of the merger's effects. Parties should also follow the best practices appropriate for the industry in which they operate and the nature of environmental benefits in question.

The Commission should proactively ***welcome parties to discuss at an early stage the proposed methodology and approach to setting out and assessing such benefits and at the same time be conscious that the application of such an approach may create friction with merger control processes in other jurisdictions***.

E. Topic E: Digitalization

The Working Group considers that the existing HMG provide clear and helpful guidance on how the Commission considers all markets, including digital markets. However, the Working Group considers that the guidance should be ***refreshed*** to properly reflect current practices. This may mean that the refreshed EU merger guidelines should potentially consider digitalization as a further (neutral) topic to be considered in the overall assessment of a notified concentration.

The Working Group would, however, ***advise against creating factors or elements that may insinuate that mergers in the digital economy raise particularly unique – or worse – negative implications for competition***. The *refreshed EU merger guidelines* would best be sector agnostic otherwise they could cover particular issues arising in a variety of sectors from airlines to energy mergers to pharmaceuticals, etc. The Working Group reiterates its comments above in respect of '*ecosystems*' and the need for caution on the part of the Commission to avoid creating an atmosphere in which certain types of mergers and acquisitions in the technology space are seen as inherently *'bad' ab initio*.

F. Topic F: Efficiencies

The Working Group would note that to date, the Commission has never approved a merger based on efficiencies. The fact that one prohibited case included a partial acceptance of some efficiency claims (and balanced against the competition harm) is of little value or guidance

The fact that there have been no efficiency defence case to dates underlines that the current HMG guidance in respect of efficiencies requires revision.

The Working Group considers that ***it is incumbent on the Commission*** – in the framework of the EU Merger Regulation – ***to ensure that that there is a genuine prospect for the efficiency defence to be realistically available to notifying parties in cases that present an SIEC***. In the alternative, the Working Group would question the merit of the existence of a hypothetical defence that could never in practice be relied upon.[30]

The present framework for assessing efficiencies requires that they (i) benefit consumers, (ii) be merger-specific, and (iii) be verifiable. The Working Group considers the framework for assessing efficiencies, as articulated by the Commission, to be conceptually sound and methodologically coherent. However, it remains concerned that the Commission's application of this framework in practice has been ***unduly restrictive***, often setting an evidentiary threshold that is practically difficult to meet and thereby limiting the relevance of efficiency claims in merger assessments. ***The refreshed EU merger guidelines should provide further explanation that the Commission will apply a more considerate approach to genuinely considering efficiencies claims (including sustainability efficiency claims as noted above)***.

In respect of ***the consumer (customer) benefits criterion***, the re-articulated and more approach

[30] The Working Group notes that Case No COMP/M.4057 - *Korsnas/Assidomin Cartonboard* helpful includes a conclusion that the merger would likely generate merger-specific efficiencies that would be passed on to consumers. The case was approved largely on countervailing buyer power grounds but is instructive. Notably, the Commission concluded, '*The submission by the parties raises a lot of issues, which cannot be fully assessed within the context of a first phase investigation, in particular with respect to savings in input costs and staff reduction*'.

of the *refreshed EU merger guidelines* should, for example:

- Allow notifying parties to ***make efficiencies claims that relate to any type of customer, and not just 'consumers'*** (benefits to customers throughout the value chain should be capable of being assessed and accepted);

- Allow notifying parties to ***make broader efficiencies claims***, and to include variable and fixed cost savings, so that a holistic approach to efficiencies can genuinely be taken (e.g. closing a duplicative factory could allow the merged entity to make greater innovation investments);

- Allow notifying parties ***in network and ecosystem industries to claim efficiencies across their entire organization***, so that so-called '*out-of-market*' efficiencies can be taken into consideration (as has been the case in certain airline alliance cases under Article 101 TFEU) and ***there should be no requirement that the harmed consumers/customers are substantially the same as those benefiting from the efficiencies***;[31]

- Allow notifying parties to ***make efficiencies claims over non-price and non-cost elements*** (or elements that cannot easily be valued or quantified), such as innovation advances, time-savings (as in airline cases), positive externalities enjoyed by the wider public (as per new green technologies and products) or benefits of enhanced defence and security. In its Communication to the European Parliament and the Council on the Defence Simplification Omnibus, dated 17 June 2025,[32] the European Commission affirmed its intention to assess mergers not solely through the lens of traditional competition metrics, but also by considering their broader contributions to the Union's defence and security objectives. In particular, the Commission emphasized that it would evaluate the overall benefits of such transactions, including those arising from enhanced strategic autonomy and operational efficiencies within the Union—benefits which, by their nature, may not be fully captured through conventional competition analysis alone (see also Topic G below);

- Allow notifying parties to ***make efficiencies claims over a longer period of time, and materially longer than the typical range of three-to-four years*** (if the Commission can establish an SIEC in respect of products, pipelines and innovation spaces that could be five, ten or even fifteen years away), there should be no limitation on the timing for the achievement of all efficiencies (and there should be no presumption that efficiencies achieved later in time or after a period of some delay are less likely to materialize).[33]

In respect of the ***merger-specificity criterion***, the Working Group considers that ***it should be sufficient for the notifying parties to demonstrate only that the efficiencies arise as a result***

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[31] For the sake of completeness, the Commission-made rule in para. 583 of the Horizontal Cooperation Guidance that requires that '*Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same*' should not apply.

[32] See, https://defence-industry-space.ec.europa.eu/document/download/b2bcc9a0-5259-4543-9e1c-3af1dde8fbec_en?filename=Defence-Simplification-Omnibus.pdf.

[33] Para. 83 (and the last sentence of para. 86) of the HMG should be deleted in its entirety in the *refreshed EU merger guidelines*.

of the proposed concentration. It should not be a requirement for the parties to demonstrate that there are no less anticompetitive, realistic and attainable alternatives of a non-concentrative nature or of a concentrative nature.

The Commission should not concern itself with the commercial options or alternatives for legitimate market operators that have already signed, or about to sign, a transaction agreement.

Firstly, does not appear to be any legal basis for this Commission-made requirement, and secondly, the Commission should treat the existence of a signed or a near-signed legal agreement as a legal fact, and not concern itself with hypothetical alternatives – particularly when it comes to mergers and acquisitions involving the interests of legitimate shareholders and stakeholders. ***Para. 85 of the HMG should be cut back materially so as to only retain the first two sentences of that paragraph in the refreshed EU merger guidelines***.

In respect of the ***verifiability criterion***, the refreshed EU merger guidelines should acknowledge that, whilst efficiencies have to be verifiable and quantified (and rightly so), ***the evidence which would normally be capable of substantiating efficiencies does not yet exist*** (given the forward-looking nature of the assessment).

That is to say that the economic modelling and the internal documents that would support the detailed, convincing and compelling reasons why efficiencies claims should be accepted either do not exist, or would only be generated after the Commission is seised of jurisdiction. It is often the case that detailed economic modelling containing the necessary data/inputs over the relevant period of time that would be used to convince the Commission, are not generated for the purposes of assisting the management or the owners of a company to enter into a transaction.

The ***refreshed EU merger guidelines should make an allowance for evidentiary hurdles for the parties – and allow the notifying parties some 'benefit of the doubt' when legitimate, good faith, substantiated and well-resourced (i.e. supported by reputable third-party economists) efficiencies claims are made***.

Finally, in consideration of the balancing test, ***the threshold for accepting efficiencies will outweigh competitive harms should be lowered***. That is to say that, if efficiencies claims are accepted, and they are more likely than not to cover materially all or most of the competitive harm in the balancing exercise, they should be accepted.

A rigid, dogmatic insistence of an overall net positive outcome based on projections of harm and projections of benefits appears questionable. There should be an ***overall leniency*** to trust notifying parties (particularly when they have made public statements about the quantum of synergies and benefits).

G. Topic G: Public Policy, security and labor market considerations

The Working Group does not consider it necessary for the *refreshed EU merger guidelines* to provide detailed guidance in respect of the public policy considerations raised in **Topic G**, in order to reduce the length of the guidance itself.

The Working Group considers that such public policy matters are more exceptional in nature, than general, and therefore should only be incorporated into the guidance, at the most, in a very

brief fashion. Guidance should be anchored in a competition analysis, i.e. when such factors form relevant parameters of competition to be analyzed as part of the merger control assessment or as part of a positive efficiencies analysis within the broader context of Article 2(1)b EUMR.

In respect of ***labor market considerations***, specifically, the Working Group would bring the Commission's attention to the 2023 U.S. Merger Guidelines' dedicated section (Guideline 10) that states that mergers can violate antitrust law if they "*may substantially lessen competition for workers, creators, suppliers, or other providers*".[34] The analysis of labor market impacts has therefore been formally integrated into U.S. mainstream merger review. This is not treated as a "*public policy*" consideration but as a core application of antitrust principles to input markets. The U.S. Agencies analyze whether a merger will create or enhance employer buying power (monopsony), potentially leading to lower wages, slower wage growth, or degraded benefits and working conditions. This shift is supported by a growing body of economic research on the effects of labor market concentration and has been a focus of recent U.S. enforcement actions.

The U.S. approach demonstrates an evolution in thinking, where harm to workers is viewed as a direct competitive harm, on par with harm to consumers. ***This therefore potentially represents a major development that suggests that labor market effects may be moving from to a central issue in modern merger control.*** Accordingly, more (but concise) guidance on this topic from the Commission in the *refreshed EU merger guidelines* would be welcome.

In respect of ***defence***, the Working Group would note that in its Communication to the European Parliament and the Council on the Defence Simplification Omnibus,[35] the Commission affirmed its intention to assess mergers not solely through the lens of traditional competition metrics, but also by considering their broader contributions to the Union's defence and security objectives.

In particular, the Commission emphasized that it would evaluate the overall benefits of such transactions, including those arising from enhanced strategic autonomy and operational efficiencies within the Union—benefits which, by their nature, may not be fully captured through conventional competition analysis alone. ***The Working Group considers that it may be useful for the refreshed EU merger guidelines to incorporate a paragraph or two to render them consistent with this prior Communication***.

When it comes to legitimate interests that Member States can invoke under ***Article 21(4) of the EU Merger Regulation***, this falls outside the Commission's merger control assessment and within the competence of the Member States subject to them adhering to the parameters of Article 21(4) EU Merger Regulation and the EU Treaties.

The EU merger guidelines would therefore not be the right document to include guidance on how this provision is applied by the Commission and the Member States.

Security and other legitimate interests can be invoked by Member States, in compliance with the EU Merger Regulation and EU law, outside the merger control assessment framework by,

[34] See, Antitrust Division | 2.10. Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers | United States Department of Justice.
[35] See, https://defence-industry-space.ec.europa.eu/document/download/b2bcc9a0-5259-4543-9e1c-3af1dde8fbec_en?filename=Defence-Simplification-Omnibus.pdf.

for example, Member States using their extensive powers to protect security under their Foreign Direct Investment regimes.[36]

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[36] Almost all EU Member States now have a FDI regime and the EU's Foreign Direct Investment Regulation provides for cooperation amongst the Member States and with the Commission in this area. For the sake of completeness, and by way of illustration, we also note that the U.S. also provides well-established model for addressing national security concerns through a process that is entirely separate from standard antitrust merger review. The Committee on Foreign Investment in the United States ('CFIUS') is a mandatory, inter-agency process specifically designed to review foreign investments for national security risks. Chaired by the Secretary of the Treasury, CFIUS's jurisdiction covers any transaction that could result in foreign control of a U.S. business, with a particular focus on those involving critical technologies, critical infrastructure, or sensitive personal data (so-called 'TID businesses'). The CFIUS review is not a competition assessment; it is a risk-based assessment that considers the "threat" posed by the foreign investor and the "vulnerability" of the U.S. business. If CFIUS identifies a national security risk, it has broad powers to impose mitigation measures, such as requiring the divestiture of sensitive assets, appointing security officers, or implementing access controls on data. In cases where risks cannot be mitigated, CFIUS can recommend that the President block or unwind the transaction. This bifurcated system ensures that national security considerations are addressed by a specialized body with the appropriate expertise, without conflating them with a competition review. This U.S. model offers a powerful example of how to handle security concerns robustly while preserving the integrity and distinct purpose of merger control.