

Public consultation – Draft Merger Guidelines

Fields marked with * are mandatory.

Background and aim of the consultation on the draft text of the EU Merger Guidelines

In line with the objectives of the EU Treaties, the **EU merger rules aim to enable a dynamic and functioning internal market**; by making sure all businesses are able to compete effectively, and to **prevent market distortions that can harm European businesses and consumers** – and ultimately damage productivity and economic growth. While companies combining forces through mergers can generate efficiencies, create pro-competitive scale and bring benefits to the EU economy, some mergers may significantly impede effective competition. This is why the EU has had a **system for reviewing mergers** of an EU dimension since 1990 (with Regulation 4064/89) to check their compatibility with a properly functioning internal market, known as the “[EU Merger Regulation](#)” – a regulation that was updated in 2004 (Regulation 139/2004) and remains in force today.

Mergers “*are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community*”[1]. Article 2 of the EU Merger Regulation requires the European Commission to assess whether a merger would, or would not, “*significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position*”. Where the Commission finds no such impediment the merger is to be approved; if, alternatively, the Commission concludes that the merger would lead to such an impediment, unless the merging parties submit measures remedying this impediment, the merger is to be declared incompatible with the internal market.

EU merger control needs to remain sharp and up-to-date, as market realities change around it. The objective of merger control, in accordance with the EU Merger Regulation, remains valid and unchanged – ensuring mergers do not distort competition in the internal market. However, over the 20 years and more, since the updated 2004 EU Merger Regulation and its accompanying guidelines, there have been significant **market trends and geopolitical developments** that have led to transformational shifts in many markets, leading the Commission’s assessment of mergers under the Merger Regulation to evolve to capture those new realities and protect competition within them. There has also been case law of the Court of Justice which has informed the Commission’s interpretation of the Merger Regulation and its Guidelines.

The draft Merger Guidelines will replace the Horizontal Merger Guidelines[2] (“**HMG**”) (published in 2004) and the Non-Horizontal Merger Guidelines[3] (“**NHMG**”) (published in 2008) (jointly the “**Guidelines**”). The goal is to ensure that the revised Guidelines are up-to-date and flexible enough to allow the Commission to protect competition under the Merger Regulation in evolving modern market realities, while always respecting the overarching legal framework and contribute to the competitiveness and resilience on the Internal Market. In addition, the revised Guidelines should provide increased transparency and predictability to the business community as to how the Commission assesses mergers.

[1] Recital 4 of the EU Merger Regulation.

[2] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004.

[3] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008.

The present consultation relates to the draft text of the revised Merger Guidelines. The consultation has divided the entire text in various sections, on each of which we appreciate your feedback. At the end, there is a possibility to make overarching comments, and include attachments to your contribution.

We very much welcome your contribution on this draft Merger Guidelines text.

Documents accompanying the consultation

The consultation relates to the **draft text of the new Merger Guidelines**, which can be consulted [here](#).

Submission of your contribution

Please reply to this consultation by responding to the questionnaire **here online**. **Note that spontaneous submissions outside of this tool will not be considered for the purpose of this consultation.** You may include documents and URLs for relevant online content in your replies.

When providing feedback, please ensure that comments on each specific section are included directly under that section, rather than in an attachment. It is unnecessary to reiterate or summarise the same arguments in an attachment. Instead, attachments should be used to supply supplementary information, relevant documents, or supporting reports that add value to the feedback.

You are not obliged to complete the questionnaire all at once; you have the option of saving your responses as a "draft" and finalising them later. To do this you should click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access your questionnaire again to continue working on your response.

Questions?

If you have any questions, you can contact us via the following functional mailbox: [COMP MG REVIEW](#). In case of technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

* Contribution publication privacy settings

The Commission will publish online the entire content of your EU Survey reply, including any annexes. Accordingly, please refrain from including business secrets and other confidential information in your submissions.

You can choose whether you agree to have your name published or if you wish to remain anonymous, choosing one of the following two privacy settings. Please note that the name and other details of the organisation on behalf of which you are participating (if applicable) will be published regardless of the privacy setting you choose.

- ☐ **Anonymous** (Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.)
- ☒ **Public** (Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.)

☒ I agree with the [personal data protection provisions](#).

Introductory questions

* 1. Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐

- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 2. First name of respondent

Maria

* 3. Surname of respondent

Goikoetxea

* 4. Email (this will not be published)

mgoikoetxea@actonline.org

* 5. I am giving my contribution as

- ☐ Academic (association)
- ☐ Consumer (association)
- ☐ Large business (association)
- ☒ SME (association)
- ☐ Lawyer/economic consultant (association)
- ☐ NCA
- ☐ Individual citizen
- ☐ Other

* 5.a. If you are giving your contribution on behalf of an entity for which you work, please specify for this entity:

5.a.i. Name:

Association for Competitive Technology

* 5.a.ii. Size

- ☐ Micro (1 to 9 employees)
- ☒ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☐ Large (250 or more)

* 5.b. If you are giving your contribution on behalf of an association, please specify the number of members of your association:

- ☐ 1 to 9 members
- ☒ 10 to 49 members
- ☐ 50 to 249 members

6. Transparency register number:

Check if your organisation is on the transparency register. This is a voluntary database for organisations seeking to influence EU decision-making.

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7. If you are giving your contribution for the entity for which you work, please indicate in which sector the entity is active [Multiple options possible]. If your entity covers several sectors, please indicate either the main one or 'Other'.

More details on digital, deep tech innovation, clean and resource efficient technologies, biotechnologies are available in the Commission Guidance Note concerning certain provisions of Regulation (EU) 2024/795 establishing the Strategic Technologies for Europe Platform (STEP):

- ☐ Agriculture / agri-food
- ☐ Automotive
- ☐ Clean and resource efficient technologies
- ☐ Consumer goods
- ☐ Defense
- ☒ Digital
- ☐ Energy
- ☐ Finance and banking
- ☐ Medias
- ☐ Pharmaceuticals
- ☐ Space
- ☐ Telecommunications
- ☐ Transport
- ☐ Deep tech innovation
- ☐ Biotechnologies
- ☐ Construction
- ☐ Other basic industries (i.e., supplying raw materials to industries which manufacture other goods)
- ☐ Other

7.a. Please further specify the sector if needed, as well as the main function/activity of your entity.

* 8. Please indicate the geographic scope of your (entity's) activities:

- ☒ International
- ☐ Regional
- ☐ National
- ☐ Local

* 9. Please indicate the countries where your main business is based:

- ☐ Austria
- ☒ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czechia
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ The Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovakia
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ Other in Europe
- ☐ Other outside of Europe

10. Has your company/business been the addressee of a Commission decision under Article 6 or Article 8 of Council Regulation (EC) No 139/2004, or has it been another involved party (such as the target or seller) in a merger for which an Article 6 or 8 decision was issued, or has your company/business organisation acted as external counsel or economic consultant of an addressee of such decision in the last 10 years?

- ☒ No
- ☐ Yes, Article 6.1(b) decision
- ☐ Yes, Article 6.1(b) decision (simplified procedure)
- ☐ Yes, Article 6.1(b) decision (normal procedure)
- ☐ Yes, Article 6.1(b) in conjunction with Article 6.2 decision
- ☐ Yes, Article 8.1 decision
- ☐ Yes, Article 8.2 decision
- ☐

Draft Merger Guidelines text (per section)

Please indicate to which sections/sub-sections you would wish to comment.

☐ PART I. – INTRODUCTION AND GUIDING PRINCIPLES

This section includes the introduction of Part I, i.e. paragraphs 1-6

☐ Part I.A – THE ROLE OF EU MERGER CONTROL

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

☐ Part I.B – GUIDING PRINCIPLES

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

☐ Part II. – COMPETITIVE ASSESSMENT

This section includes the introduction of Part II, as well as the introduction of Part II.A – MARKET POWER, i.e. paragraphs 52-59.

☐ Part II.A.1 – Structural indicators of market power

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

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

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

☐ Part II.A.3 – Dynamic competitive potential

This section includes paragraphs 80-83.

☐ Part II.A.4 – Countervailing factors

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

☐ Part II.A.5 – Dominance and other types of market power

This section includes paragraphs 111-113.

☐ Part.II.B.1 – ANTICOMPETITIVE EFFECTS – Introduction: direct and dynamic effects

This section includes paragraphs 114-118.

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

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

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

This section includes paragraphs 169-174.

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

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

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

This section includes paragraphs 193-207

☐ Part.II.B.6 – Foreclosure

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

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

This section includes paragraphs 252-259.

■ Part.II.B.8 – Coordination

This section includes an introduction and sub-sections 8.1. Reaching terms of coordination: market conditions that are conducive to coordination, 8.2. Deviation from coordination: monitoring and deterrence, and 8.3.

Disruption of coordination, i.e. paragraphs 260-281.

■ Part.II.B.9 – Other anticompetitive effects

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

■ Part II.C – BENEFITS FROM MERGERS (EFFICIENCIES)

This section includes the introduction of Part II.C., i.e. paragraphs 291-301.

■ Part.II.C.1 – Assessment of direct efficiencies

This section includes sub-sections 1.1 Taxonomy of direct synergies, 1.2. Verifiability, 1.3. Merger specificity, and 1.4. Benefit to consumers, i.e. paragraphs 302-323.

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

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

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

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

■ Part III – MEASURES TO PROTECT LEGITIMATE INTERESTS

This section includes paragraphs 358-362.

■ Part III.A – SUBSTANTIVE ASSESSMENT

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

■ Part III.B – PROCEDURAL FRAMEWORK

This section includes sub-sections 1. The notification and standstill obligation, 2. Possible Commission decisions, and 3. Interaction with other EU law proceedings, i.e. paragraphs 390-399.

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

This section includes paragraphs 169-174.

Please provide your feedback on the above section/sub-section. If your comment or suggestion refers to a specific paragraph, please identify it clearly.

The way the Commission operationalises ‘investment and expansion competition’ will materially affect whether European small businesses and startups can attract capital, exit successfully, and reinvest the proceeds into the next generation of European innovation.
ACT commends the Commission for formally recognising that competition in paragraphs 169–174 is not

confined to static product markets. The framing of ‘investment and expansion competition’ correctly reflects the reality that in digital markets, today’s competitive constraint is often tomorrow’s product, a capability being developed, a platform being scaled, or a market being entered.

In particular, we welcome:

- The acknowledgment in paragraph 169 that investment competition is relevant across infrastructure, networks, capacity, and technologies, categories that map directly onto the ecosystem dynamics including cloud infrastructure, distribution networks, and software development toolchains.
- The recognition in paragraph 173 that ‘the ability to leverage investments across markets’ and ‘cross-market expansion through strategic investments’ are relevant analytical factors. This reflects how modern companies grow, rarely staying within a single product category.

These are meaningful advances over the previous guidelines, and we support their inclusion in principle.

While the conceptual framework is robust, the criteria set out across paragraphs 171–174 are insufficiently defined to provide the legal certainty that merging parties and their advisers require. Terms such as ‘dynamic competitive potential’, ‘degree of dynamic competitive interaction’, and ‘closeness of competition’ between investment projects are not adequately operationalised.

This is not a minor drafting concern. In digital markets, investment decisions, including decisions about whether to pursue an acquisition, accept an offer, or enter a market organically, are made under significant uncertainty and time pressure. If the merger review framework adds a further, ill-defined layer of analytical discretion, the practical effect will be that parties become unable to assess with reasonable confidence whether a transaction will face scrutiny.

The illustrative examples throughout paragraphs 169–174 and the accompanying footnotes draw heavily from infrastructure-intensive industries: telecommunications network competition (footnote 250), metals capacity (footnote 251), and airline networks (footnote 252). While footnote 252 briefly references ‘bundled services that compete with standalone products in digital markets’, this is insufficient to anchor the framework in the realities of software and app ecosystem competition.

Digital investment competition operates differently from infrastructure competition in several important respects. Highly competitive digital technology markets are characterised by short product cycles, low marginal cost of distribution, and reliance on platforms and cloud infrastructure, and pivoting between product categories.

Investment capacity often includes talent, data, and codebases rather than in fixed physical assets. Further, small technology developers frequently compete in dynamic multi-sided markets. The Commission should develop a dedicated digital markets supplement to paragraphs 169–174 or incorporate digital market-specific guidance directly into the text.

We recommend that paragraph 171 be amended to articulate, in parallel with the factors used to identify harm, the circumstances in which a transaction is beneficial to the ecosystem. In doing so, the Commission should address benefits including (i) the unlocking access to capital, distribution, or complementary technology that the target could not otherwise reach on a comparable timetable; (ii) enabling combined R&D programmes; (iii) preserving investments that would otherwise be discontinued or relocated outside the EU; and (iv) extending a successful European product or platform into adjacent or international markets. The Commission should also make clear that the absence of such factors is not itself evidence of anticompetitive effect, and that the burden of demonstrating likely investment or expansion harm firmly rests on the Commission.

Because paragraphs 169–174 introduce concepts such as ‘dynamic competitive potential’, ‘closeness of competition’ between investment projects, and cross-market expansion analysis that will be unfamiliar to most merging parties (particularly SMEs), we encourage the Commission to provide a pre-notification consultation opportunity giving SME parties the opportunity to obtain non-binding views on whether a contemplated transaction is likely to invoke analysis under these factors before the SME incurs full notification costs.

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

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

Please provide your feedback on the above section/sub-section. If your comment or suggestion refers to a specific paragraph, please identify it clearly.

The Innovation Shield, is, in our view, the single most important development in EU merger control for technology markets in a generation. ACT's research across the technology SME communities in the EU, the UK, and the United States demonstrates that European SME technology firms adopt and deploy frontier technologies, including AI, at lower rates than their U.S. counterparts, with regulatory uncertainty consistently cited among the top factors causing delays, scaled-back launches, and lost customers. The Innovation Shield should directly resolve this problem by reducing uncertainties that undermine pro-competitive acquisitions for EU SMEs and startups. We wish to make this support unambiguous before addressing specific concerns, because the reforms we seek are refinements to a framework we endorse.

ACT has significant concerns, however, regarding the non-largest / non-gatekeeper carve-out in conditions (b) and (e). While we understand the intention to prevent large incumbents from using the Shield to entrench their positions, the current drafting introduces a structural problem: it makes Shield eligibility contingent on the acquirer's regulatory classification under the Digital Markets Act, rather than on the competitive effects of the specific transaction. A company designated as a gatekeeper under the DMA is not ipso facto acting anticompetitively in every acquisition it makes. By categorically excluding gatekeeper-designated acquirers from the Shield, the current conditions (b) and (e) risk creating a two-tier system in which the same pro-competitive acquisition that would qualify for the Shield if made by a mid-market company is denied protection solely because the acquirer holds a DMA designation in an unrelated market. This is analytically incoherent and risks distorting acquisition markets in ways that do not serve competition. ACT urges the Commission to replace the categorical gatekeeper exclusion with a transaction-specific assessment of whether the acquirer's position in the relevant market, rather than its regulatory status in other markets, is such as to raise genuine entrenchment concerns. The extension of the Shield across all four major theories of harm is analytically coherent and closes the risk of strategic theory-shopping by the Commission in complex cases, and ACT supports this dimension of the framework.

Additionally, the definition of 'small innovative company' is left explicitly variable by industry (footnote 271) without a baseline that parties can use to self-assess eligibility before committing to a transaction. The reference to Recommendation 2026/720 is welcome but a non-binding Recommendation is insufficient to anchor a structural safe harbour. The Commission should either confirm that Recommendation 2026/720 applies directly for merger control purposes or publish a companion notice with sector-specific guidance, including indicative thresholds by reference to employee count, revenue, R&D intensity, and company age.

The numerical thresholds in conditions (b), (d), and (e) provide welcome clarity in principle but are undermined in practice by two problems. First, digital market definition is among the most contested areas of competition law: a company may have a 38 per cent share on one plausible definition and a 44 per cent share on another, making reliable self-assessment impossible. The Commission should clarify when the Shield applies, and whether a benefit-of-the-doubt principle applies where shares are below threshold on any plausible market definition. Second, condition (d)'s 25 per cent R&D capability share has no specified measurement methodology, patent counts, R&D expenditure, and headcount give materially different results. The Commission should specify a primary methodology that is certain, objective, and predictable.

Two further structural concerns require attention. The 'three other firms with similar competitive potential'

requirement in conditions (b) and (c) risks excluding the Shield from exactly the transactions where it is most needed: genuinely novel innovation spaces where few comparable R&D projects yet exist. The Commission should clarify that firms with the capability and intent to enter a nascent space satisfy the comparator requirement or provide a reduced threshold for demonstrably pre-market categories.

The Shield should provide value to investors and founders by giving them the ability to determine eligibility at the point investment or transaction terms are agreed. We encourage the Commission to confirm that eligibility is assessed against the position of the target at the time this agreement is reached with reasonable adjustments for ordinary growth between signing and closing. We also request that the Commission provide an optional pre-notification channel for parties to obtain a non-binding view on Shield eligibility on an accelerated timetable.

Final comments and document upload

Do you wish to make any additional comments that may be relevant for the revision of the draft Merger Guidelines?

We would like to make some final comments on the innovation shield:

The Commission should also clarify how the Shield interacts with parallel instruments, including Article 22 referrals, national powers, and review under the Digital Markets Act and the Foreign Subsidies Regulation, to make sure that the Shield is not undermined through procedural pathways operating in parallel.

Finally, we urge the Commission to match the Innovation Shield's substantive protection with proportionate procedural treatment. A startup being acquired still faces full filing requirements, management disruption, and deal uncertainty costs even where a Significant Impediment to Effective Competition (SIEC) finding is ultimately precluded. The Commission should initiate a parallel consultation on a fast-track simplified procedure for transactions that prima facie qualifies for the Shield, with a reduced notification burden and a shorter Phase I timetable. Without this, the Shield's benefits will be real but partial, and the small innovative companies it is designed to protect will continue to bear disproportionate procedural costs that the substantive reform alone cannot address.

Please attach any documents in your possession that support your replies, and that may assist the Commission in its assessment of those replies, clearly identifying the question/section to which they refer if relevant. Please make sure that any such documents are as concise as possible. It is unnecessary to reiterate or summarise the same arguments made previously in an attachment. Attachments should be used to supply supplementary information, relevant documents, or supporting reports that add value to the feedback.

End of the questionnaire. Thank you for your contribution.

Contact

[Contact Form](#)

