

Response to the Commission’s Public Consultation on the Draft Merger Guidelines

Submitted by Associazione Antitrust Italiana

25 June 2026

Introduction

The *Associazione Antitrust Italiana* (Italian Antitrust Association; “AAI”) welcomes the Public Consultation launched by the European Commission (“Commission”) on the draft Merger Guidelines (“Draft Guidelines”) published on 30 April 2026 and submits the following comments.

The Draft Guidelines represent an ambitious effort to modernize the EU merger assessment framework. They pursue a number of welcome objectives, including consolidating existing merger guidelines,¹ promoting a more dynamic and forward-looking approach, reflecting the evolution in enforcement practice over the past two decades, and responding to the call for enhanced EU competitiveness articulated in the Draghi Report.

In many respects, the Draft Guidelines deliver on these ambitions, recognizing more explicitly the role of innovation, investment, scale and resilience, integrating efficiencies into the assessment, and demonstrating an increased willingness to account for dynamic aspects of competition.

At the same time, the Draft Guidelines give rise to significant concerns.

- *First*, they ² elevate a number of dynamic and non-price concerns – including entrenchment of a dominant position, loss of innovation competition, and access to sensitive competitor information – to standalone theories of harm, some of which remain contested.³
- *Second*, while formally retaining the AIE framework, they significantly broaden the range of effects that may support intervention – including impacts on innovation, investment, expansion and ecosystem competition – potentially making it easier to establish the effects limb.

¹ *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ 2004 C 31/5 (“HMG”), and the *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ 2008 C 265/6 (“NHMG”).

² See Draft Guidelines, Sections II.B.2-9.

³ See, *Booking Holdings/Etraveli Group* (Case COMP/M.10615) decision of September 25, 2023, ¶¶200–203. This decision – including its departure from the NHMG and the Ability Incentive Effect (“AIE”) framework – is currently pending appeal and should continue to be treated as an outlier until the EU Courts rule on the merits of the case.

- *Third*, the proposed approach effectively reverses the burden of proof for transactions involving dominant firms, requiring “*substantial evidence pointing away from a SIEC*” where certain market share and concentration thresholds are exceeded.⁴
- *Fourth*, the Draft Guidelines leave the door open to a *de facto* asymmetric evidentiary standard, under which the Commission need only show that competitive harm is *more likely than not*, while merging parties must prove that efficiencies are “*likely to materialize*”.⁵ Collectively, these changes may result in heightened scrutiny, including for transactions that would previously have been considered unlikely to raise competition concerns.

In sum, taken together, while the Draft Guidelines pursue laudable objectives, in their current form, they do not always provide the legal certainty required to foster investment and support the EU’s competitiveness agenda.

The observations below address a few specific topics, namely (i) the standard and burden of proof; (ii) the treatment of innovation, efficiencies and theory of benefit; and (iii) the proposed approach to foreclosure theories.

1. Standard & Burden of Proof

The Draft Guidelines codify the burden and standard of proof by reflecting the principles developed in the case law.⁶ This codification enhances transparency and legal certainty by bringing together principles that were previously dispersed across the case law and the Commission’s decisional practice.⁷ This is an appropriate development: as soft-law instruments, the Draft Guidelines do not, and cannot, modify the applicable legal standard, which is fixed by Article 2 EUMR and the case law of the Court of Justice.

i. **The settled framework: “more likely than not” as the uniform standard of proof**

The operative standard reflected in the Draft Guidelines is the balance-of-probabilities standard clarified by the Court of Justice. The Commission must establish, on the basis of a “*sufficiently cogent and consistent body of evidence*”,⁸ that the concentration is more likely than not to give rise to a SIEC. In *CK Telecoms*, the Court of Justice rejected the General Court’s requirement

⁴ See Draft Guidelines, ¶127.

⁵ See Draft Guidelines, ¶¶304-305.

⁶ See Draft Guidelines, ¶4.

⁷ See Draft Guidelines, ¶5.

⁸ See Draft Guidelines, ¶26.

that the Commission establish a “*strong probability*” of a SIEC,⁹ confirming that the Commission is not subject to a heightened standard of proof in merger control.¹⁰

In line with the case law, the Draft Guidelines indicate that the balance-of-probabilities standard is symmetric: the EUMR contains no presumption either in favour of compatibility or incompatibility of a notified concentration, and the same standard therefore applies to clearance and prohibition decisions.¹¹ The Draft Guidelines further correctly present that standard as uniform across all mergers reviewed by the Commission, irrespective of the nature or complexity of the theories of harm or benefit, the stage of the procedure or the ultimate outcome of the Commission’s investigation.¹²

That framework also draws an important distinction between the Commission’s burden to establish anticompetitive effects and the parties’ burden to substantiate efficiencies. The Draft Guidelines rightly state that the burden of demonstrating countervailing efficiencies lies on the notifying parties.¹³ This allocation is consistent with the Court of Justice’s position, which has excluded any presumption of “standard” efficiencies, since such a presumption would amount to an impermissible reversal of the burden of proof borne by the notifying parties.¹⁴ Consistently with that approach, the Draft Guidelines require the parties to articulate and substantiate a structured theory of benefit explaining how the alleged efficiencies would occur and maintain or enhance effective competition to the benefit of consumers.¹⁵

This settled framework is important because it preserves the balance between effective merger enforcement and legal certainty. The concern, however, is that certain formulations in the Draft Guidelines may dilute that balance in practice, by making it easier for the Commission to infer

⁹Judgment of 28 May 2020, *CK Telecoms UK Investments v Commission*, T-399/16, para. 118.

¹⁰Judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 75-77, 87-88.

¹¹Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, paras 48, 50-53, excluding any general presumption as to the compatibility or incompatibility of a notified concentration; Draft Guidelines, ¶32 and fn. 63. The Draft states that the EUMR contains neither positive nor negative presumptions of compatibility or incompatibility with the internal market.

¹²Draft Guidelines, ¶ 32 and fn. 64, citing Judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 69, 73, 74, 79, 114; Judgment of 17 May 2023, *EVH v Commission*, T-312/20, para. 49.

¹³ See Draft Guidelines, ¶24.

¹⁴Judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, paras 238-239, 242-243: to acknowledge a category of “standard” efficiencies would create a presumption and, accordingly, an impermissible reversal of the burden of proof, which lies on the notifying parties. See also Draft Guidelines, ¶24, fn. 40.

¹⁵ See Draft Guidelines, ¶25.

competitive harm while requiring more concrete proof from notifying parties when they rely on efficiencies.

ii. The risk of presumptions in cases involving dominant firms

In the section on market shares and concentration levels, the Draft Guidelines state that, where the merged entity has high or very high combined market shares, or where the market is highly concentrated and the merger results in non-negligible increases in concentration, the Commission “*requires substantial evidence pointing away from a SIEC*” in order to conclude that the merger is compatible with the internal market.¹⁶ Read in isolation, this formulation may create uncertainty as to whether such indicators are being treated as implying a quasi-presumption of incompatibility.

Market shares and concentration levels are relevant indicators of market power and may justify closer scrutiny. However, they remain evidentiary factors to be assessed within the Commission’s overall appraisal. The final Guidelines should therefore clarify that the wording of paragraph 127 does not reverse the burden of proof or alter the balance-of-probabilities standard. Elevated market shares, high concentration or dominance may inform the Commission’s assessment, but should not require notifying parties, as a condition of clearance, to rebut a SIEC that has not been substantiated under the applicable legal standard.

iii. The need to preserve symmetry in the assessment of harm and efficiencies

A related point concerns the evidentiary treatment of efficiencies. The Draft Guidelines correctly state that efficiency claims must be supported by a sufficiently cogent and consistent body of evidence, “*to the same evidentiary standard as the anticompetitive effects*”.¹⁷

However, the Draft Guidelines also provide that efficiencies must be verifiable in order for the Commission to assess whether they are “*likely to materialise*”, timely and substantial enough to counteract the predicted anticompetitive effects.¹⁸ This formulation is not problematic if “*likely to materialise*” is understood consistently with the balance-of-probabilities standard applicable to the overall SIEC assessment.¹⁹

The final Guidelines should avoid any ambiguity on this point. If the likelihood requirement for efficiencies were applied more strictly than the standard used to establish competitive harm, the result would be an asymmetric evidentiary framework: harm could be established on a “*more likely than not*” basis, while offsetting efficiencies would face a higher practical threshold. Accordingly, the final Guidelines should confirm that theories of benefit and theories

¹⁶ See Draft Guidelines, ¶127.

¹⁷ See Draft Guidelines, ¶¶26-27 and 304.

¹⁸ See Draft Guidelines, ¶¶304-305.

¹⁹ See Draft Guidelines, ¶32; Judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, para. 87.

of harm are assessed according to the same balance-of-probabilities standard, thereby ensuring that duly substantiated efficiencies are weighed symmetrically within the SIEC assessment.

2. Innovation, Efficiencies & Theory of Benefit

The draft Guidelines assign a more prominent role to efficiencies in merger assessment. This reflects an important shift away from an approach that implicitly treats mergers as either harmful to competition or competitively neutral. The Guidelines recognise a broader range of efficiencies, including innovation, scale, resilience and sustainability.

At the same time, the draft remains firmly anchored in the existing SIEC framework. Efficiencies ultimately remain relevant only insofar as they benefit consumers: the traditional concept of pass-on of cost savings is now complemented by a broader notion of quality pass-on. As recognised in paragraph 320, where efficiencies increase quality, "consumers' valuation for quality has to be appraised and, to the extent possible, quantified", often through measures of consumers' willingness to pay. Similarly, paragraph 323 recognises that efficiencies may induce the merged firm to charge higher prices in order to "claw back" part of the benefits generated by quality improvements. Only the net benefits effectively passed on to consumers may therefore be considered in the competitive assessment.

Within the boundaries of the existing framework, the Guidelines nevertheless introduce important innovations that make merger control better suited to address the realities of a dynamic economy and, to some extent, the challenges arising from current geopolitical developments.

In particular, the taxonomy of efficiencies is sufficiently broad and flexible to accommodate additional forms of efficiencies beyond those expressly identified in the draft. This flexibility is welcome. Competition authorities and practitioners have limited experience in identifying and assessing efficiencies, and the framework should therefore avoid becoming unduly prescriptive.

The draft also appropriately recognises that dynamic efficiencies may not immediately translate into observable outcomes or readily quantifiable savings. Paragraph 293 rightly adopts a forward-looking perspective, providing that the assessment of efficiencies should give adequate weight to innovation, investment and resilience, while taking into account the merger's impact on the parties' ability and incentive to invest and innovate. We particularly welcome the explicit adoption of the "ability and incentive" framework in this context.

Further refinements could nevertheless improve legal certainty and ensure that the flexibility introduced by the Guidelines does not inadvertently translate into uncertainty or excessively burdensome evidentiary requirements for merging parties.

i. Merger specificity

The Guidelines should place greater emphasis on the need to assess whether comparable efficiencies would realistically arise in the counterfactual, rather than merely whether they could theoretically be achieved through less anticompetitive means.

Paragraph 311 states that the merging parties should provide evidence that alternative arrangements would not be "realistic and attainable". This is the correct approach. However, the Guidelines would benefit from further clarification regarding the meaning of these concepts. In particular, an alternative should be regarded as realistic only where the parties would have both the ability and the incentive to pursue it absent the merger.

Against this background, the statement that "it is sufficient that the alternative brings added value to the merging parties" appears overly broad. The fact that an alternative may generate some value does not demonstrate that it constitutes a genuine and viable substitute for the merger. The relevant question should be whether, in the circumstances of the case, the alternative represents a realistic commercial option that the parties would plausibly implement.

Without such clarification, the specificity requirement risks becoming detached from commercial reality and setting an unnecessarily high threshold for the recognition of merger-specific efficiencies.

ii. "Diffuse" benefits

The draft Guidelines introduce several categories of benefits arising from efficiencies that extend beyond the immediate consumption of the relevant product(s). In particular, paragraph 321 distinguishes between "use value benefits", namely benefits derived from product characteristics affecting the use of the product, and "non-use value benefits", namely benefits derived from characteristics that are unrelated to the use of the product but are nevertheless valued by consumers, such as environmental considerations, resilience concerns or the impact of individual consumption decisions on others. Paragraph 322 further introduces the concept of "collective benefits", defined as benefits accruing to a wider section of society from addressing consumption externalities, for example in relation to sustainability or resilience. The Guidelines also recognise the possibility of efficiencies arising outside the affected market, including in other product or geographic markets.

While these categories capture different factual scenarios, it is less clear that they reflect analytically distinct concepts. Rather, they appear to share a common characteristic: the benefits generated by the merger are distributed across a wider group of individuals or society at large, rather than being captured directly through the use of the product or service by customers in the affected market. The extent to which such benefits are relevant within the current framework depends on the value that customers in the affected market attach to them. These categories could usefully be treated under the broader notion of "diffuse" benefits.

In the draft Guidelines, the distinction between non-use value benefits, collective benefits and out-of-market benefits does not appear to lead to different substantive tests. The relevant question remains the same in all cases: whether the merger generates verifiable benefits that are sufficiently linked to the affected markets and can be taken into account in the overall balancing exercise.

The challenge arises from the way the current framework seeks to operationalise these benefits. Consistent with the consumer-centred logic of the existing system, paragraphs 315 and 334 require that efficiencies benefit substantially the same consumers who would otherwise be harmed by the merger. Paragraph 357 further requires merging parties to identify the beneficiaries of the efficiencies, demonstrate the overlap between those beneficiaries and the harmed consumers, and quantify the share of the benefits accruing to the latter.

While understandable in principle, these requirements may prove difficult to apply in practice where the efficiencies are genuinely diffuse. Consider, for example, efficiencies relating to supply-chain resilience. Such benefits may extend across a broad range of consumers, businesses and economic actors. In these circumstances, identifying the precise beneficiaries, determining the degree of overlap with harmed consumers and quantifying the share of benefits accruing to them may become highly speculative.

The same difficulties arise where different dimensions of public interest interact. A merger may generate significant resilience benefits while producing less favourable sustainability outcomes, or vice versa. The Guidelines provide limited guidance on how such effects should be assessed and weighed within the overall balancing exercise.

The Guidelines also provide limited guidance on the methodology that should be used to estimate the proportion of diffuse benefits accruing to affected consumers. It is unclear, for example, whether such an assessment should be based on the relative share of affected consumers within the overall group of beneficiaries, on measures of willingness to pay, or on other proxies. Different approaches may lead to materially different outcomes, particularly where the benefits are broadly dispersed across society.

Given the limited experience available in assessing these forms of efficiencies, the Guidelines should avoid imposing overly detailed evidentiary requirements at this stage. Instead, they should preserve sufficient flexibility to allow diffuse benefits to be incorporated into the assessment where there is credible evidence that the affected consumers form part of the broader group of beneficiaries, without requiring an excessively granular demonstration of beneficiary identification, overlap and allocation of benefits.

iii. Incommensurable advantages

Paragraph 300 recognises that certain efficiencies may further objectives of EU policies recognised in the Treaties and generate benefits for customers, the internal market and society

at large. It further acknowledges that such advantages may be incommensurable and may not be adequately reflected in customers' individual purchasing decisions because of market failures. The explicit recognition of these benefits is a welcome development and reflects the increasing importance of considerations such as sustainability, resilience and strategic autonomy in the broader economic environment.

At the same time, the Guidelines should ensure that the concept of incommensurable advantages remains closely linked to the competitive assessment of the specific transaction. Given the breadth of EU policy objectives that may be relevant in a particular sector, there is a risk that such advantages could be invoked in support of a wide range of mergers without a sufficiently close connection to the merger itself.

Further guidance would be welcome on the role that incommensurable advantages should play within the overall balancing exercise. By definition, such advantages cannot readily be expressed in the same units as the competitive harm identified by the Commission. While paragraph 300 appropriately recognises the Commission's margin of discretion in weighing such effects, greater clarity on the relevant considerations and evidentiary requirements would enhance predictability and ensure consistent application across cases.

3. Foreclosure Theories

The Draft Guidelines seek to adapt the Commission's foreclosure framework to modern market realities and the evolution of enforcement practice. The proposed revised framework, however, lends itself to a number of criticisms.

iv. Expansion of foreclosure theories and the need for clear evidentiary standards

By collapsing traditional vertical and conglomerate foreclosure theories into a single framework, the Draft Guidelines substantially expand the circumstances in which foreclosure concerns may arise. Foreclosure is effectively recast as a general theory of harm, capable of arising whenever a transaction enables the merged entity to restrict rivals' access to assets, resources or capabilities important for effective competition. Foreclosure analysis is thus no longer confined to traditional supplier-customer relationships but may extend to digital ecosystems, data, interoperability layers, customer access channels and other forms of indirect linkage between the parties.

This broader framework makes clear evidentiary safeguards all the more important. The mere existence of an ecosystem link, a data advantage or another potential foreclosure vector should not suffice to support a finding of competitive harm. The Guidelines should make clear that

identifying a plausible foreclosure mechanism does not relieve the Commission of its burden to establish a SIEC on the basis of *robust* and *verifiable evidence*.²⁰

v. Preserving the central role of the ability–incentive–effects framework

The Guidelines should reaffirm the central role of the AIE framework in assessing foreclosure theories. The Commission’s decisional practice demonstrates the framework’s suitability across a wide variety of non-horizontal theories of harm, including traditional input and customer foreclosure, tying and bundling, and more recent theories involving interoperability restrictions²¹²² and ecosystem dynamics. The emergence of new foreclosure mechanisms does not justify departing from the analytical discipline the AIE framework provides.

vi. Greater guidance on dynamic and ecosystem-based foreclosure theories

The Draft Guidelines place increased emphasis on dynamic forms of foreclosure, including effects on innovation, investment, expansion and ecosystem competition. While these developments reflect legitimate concerns, the final Guidelines would benefit from clearer guidance on the circumstances in which such theories may be relied upon and the evidence required to support them.

In particular, greater clarity would be welcome on the distinction between harm to competitors and harm to the competitive process, the treatment of speculative future effects, the circumstances in which advantages resulting from integration, scale or data accumulation should be regarded as legitimate competitive outcomes, and the assessment of dynamic foreclosure incentives where exclusion may not be profitable in the short term but may entrench market position over time. Dynamic analysis should be rigorous and symmetrical, not a route to intervention based on capability narratives alone.

vii. Legal certainty and predictability

While the broader foreclosure framework reflects developments in markets and enforcement practice, the final Guidelines should preserve the legal certainty, evidentiary discipline and

²⁰ The expanded catalogue of foreclosure mechanisms (¶210) – including quality degradation, interoperability restrictions, delayed product releases, preferential access, degraded post-sale services and conduct preventing rivals’ pipeline products from reaching the market – is not, in itself, a cause for concern. These additions merely codify theories already examined in recent Commission cases. *See, inter alia*, *Broadcom/VMware* (Case COMP/M.10806), decision of July 12, 2023 on quality reduction and *Synopsys/Ansys* Case COMP/M.11481), decision of January 11, 2025 on interoperability degradation.

²¹ *See, inter alia*, *Google/FitBit* (Case COMP/M.9660), decision of December 17, 2020; *Broadcom/VMware* (Case COMP/M.10806), decision of July 12, 2023; *Nvidia/Run:ai* (Case COMP/M.11766), decision of 20 December 2024; *Synopsys/Ansys* (Case COMP/M.11481), decision of January 11, 2025.

²² *See Google/FitBit* (Case COMP/M.9660), decision of December 17, 2020.

analytical rigour that characterised the 2008 NHMG. Businesses contemplating mergers require a sufficiently predictable framework to assess antitrust risk. The Guidelines would benefit from additional clarification regarding evidentiary standards, the relative weight of qualitative and quantitative evidence, and the circumstances in which intervention is likely warranted.

Consideration should also be given to retaining indicative screening thresholds for non-horizontal mergers; the removal of the 30% safe harbour contained in the 2008 NHMG reduces *ex ante* predictability and may increase uncertainty for transactions unlikely to raise genuine competition concerns.