ASCOLA RESPONSE: Call for Evidence on the Revision of the EU Merger Control Guidelines on the Assessment of Horizontal and Non-Horizontal Mergers (2025)

This document represents the comments of some of the members of the Academic Society for Competition Law (ASCOLA) to the Call for Evidence on the Revision of the EU Merger Control Guidelines on the Assessment of Horizontal and Non-Horizontal Mergers by the European Commission in its Call for Evidence of May - September 2025. ASCOLA is an independent, non-profit association composed of scholars from all continents, committed, in their scholarship, to the development of competition law, policy and the economics of competition worldwide. More information can be found on www.ascola.org.

Participation in the process of this response was open to all ASCOLA members. This document was acknowledged by the Executive Committee of ASCOLA. However, this document does not bind any member and does not represent the opinion of all ASCOLA members. The members of the Working Group are listed below. They each individually declare their (lack of) conflicts of interest in accordance with the ASCOLA Declaration of Ethics, in footnote. Please direct any questions to team[at]ascola.org.

Contributions by:

- Anna Tzanaki[1]
- Kalpana Tyagi[2]
- Alexandr Svetlicinii[3]
- David Reader[4]
- Miłosz Malaga[5]

Coordinated by: Annika Stöhr[6] (on behalf of the Executive Committee of ASCOLA)

[1] Senior Lecturer in Law, University of Leeds. In accordance with the ASCOLA Declaration of Ethics, I confirm that I have no conflicts of interest.
[2] Assistant Professor of Intellectual Property and Competition Law, Maastricht University. In accordance with the ASCOLA Declaration of Ethics, I confirm that I have no conflicts of interest.
[3] Associate Professor of Global Legal Studies, University of Macau. In accordance with the ASCOLA Declaration of Ethics, I confirm that I have no conflicts of interest.
[4] Senior Lecturer in Competition Law, University of Glasgow. In accordance with the ASCOLA Declaration of Ethics, I confirm that I have no conflicts of interest.
[5] Assistant Professor, Faculty of Law and Administration, Adam Mickiewicz University in Poznań. In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.
[6] Post-doctoral researcher, Ilmenau University of Technology. In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

On Competitiveness, Innovation and Resilience

- Generally, competition policy and EU merger control should not be instrumentalised in short-sighted ways to embrace traditional protectionist policies and promote European Champions. However, it is encouraging to see that the Commission public consultation on the review of the EU Merger Guidelines emphasises the role of **competitive markets** in **driving investment & innovation.**
  - In this regard, there are cautionary lessons the EU can learn from other jurisdictions that have attempted to expand their merger control regime's view towards investment considerations.
  - For instance, the UK government has equated 'enhancing investment' to 'deregulating' and presenting UK merger control in a more positive light. This oversimplifies the task at hand, creating a false dichotomy between investment and thorough scrutiny. The Commission would do well to avoid viewing investment through this lens, but inspiration can perhaps be gleaned from the CMA's revised guidance[7], aimed to clarify grey areas surrounding jurisdiction, and providing clearer guidance on potential efficiencies arguments, engagement with parties, pre-notification discussions and timeframes, etc. Engagement, in particular, seems to be an area the CMA is trying to promote in the interests of business and investor certainty. This in itself could help create a stable and conducive business environment, welcoming investments including in the form of mergers and acquisitions.
- The EU's new strategic objectives and priorities of global **competitiveness**, innovation and resilience and the way in which they should inform competition policy and merger control enforcement, align well with and could find theoretical support in the work of **Michael Porter.**
  - Porter envisioned a broader competition enforcement approach based on a 'productivity growth' standard that, contrary to the narrower 'consumer welfare' standard that focuses on static allocative efficiency and short-term price effects

[7] Competition & Markets Authority, Mergers: Guidance on the CMA's jurisdiction and procedure, 2 January 2025.

and market concentration, focuses on and prioritises dynamic improvements and innovation.[8]

- According to Porter, the productivity growth standard 'is a positive standard that relates directly to competitiveness, a nation's standard of living, and long-term consumer value.'[9]
- Porter further explains the background thinking to these ideas: 'Defining the goal of antitrust in terms of price-cost margins and profitability creates a zero-sum game between firms and consumers. If consumers are to benefit from lower prices, firms must earn lower profits. In contrast, a productivity growth standard raises no inevitable trade-off. If productivity is growing, consumers can enjoy better products and/or lower prices, companies can earn attractive returns on capital, and workers can enjoy rising wages. A productivity growth standard, then, unites the perspectives of consumers, workers, and companies. It embodies a positive-sum rather than a zero-sum view of competition.'[10]

- In light of this vision of competition policy, Porter's recommendation is to 'reassess the hierarchy of antitrust goals' and put **innovation in the front seat**. Enforcement should focus on prioritising dynamic efficiency and innovativeness and promoting rivalry and healthy competition and protecting the competitive process by removing barriers to innovation and entry.
  - Porter justifies his alternative vision in similar terms as the European Commission that views competition as a driver of innovation: 'Since the seminal contributions of Schumpeter, Solow and Abramovitz, it is widely understood that the only means of achieving sustained productivity growth in an economy is through innovation. Innovation provides products and services of ever-increasing consumer value, as well as ways of producing products more efficiently, both of which contribute directly to productivity. Innovation, in this broad sense, is driven by competition. While technological innovation is the result of a variety of factors, there is no doubt that healthy competition is an essential part. One need only review the dismal innovation record of countries

[8] Michael E Porter, 'Competition and Antitrust: Toward a Productivity-Based Approach to Evaluating Mergers and Joint Ventures' (2001) 46(4) Antitrust Bulletin 919.
[9] Ibid 935.
[10] Ibid.

lacking strong competition to be convinced of this fact. Vigorous competition in a supportive business environment is the only path to sustained productivity growth, and therefore to long-term economic vitality.'[11]

- o Under Porter's approach, to evaluate the intensity of competition the analysis should become broader and be based on a 'five forces model', in which rivalry is measured by relying on the 'balance of competitors' and fluctuations in market shares rather than concentration measures and market shares per se. The 'five forces' framework 'is a dynamic approach to analysing industry structure, based on five competitive forces acting in an industry or subindustry: threat of entry, threat of substitution, bargaining power of buyers, bargaining power of suppliers, and rivalry among current competitors.'[12]
- o The presence of a **complementary product** is neither good nor bad for competition per se. It depends on how the complement influences, for example, barriers to entry or the power of the customer.'[13] Yet, relating to the topic of dynamic competition and digitalization, Brandenburger and Nalebuff have stressed the role of complementary products in competition, and have suggested complementary products as a sixth force.[14] However, complementary products do not directly influence the strength of competition, but affect it indirectly through the influence of complements on the five forces.
- o Innovation is of fundamental importance to high-tech industries, especially in globally competitive markets. The 'productivity growth' framework can address the realities of these industries at their core. The 'five forces' framework is a useful tool to operationalise this approach with particular relevance to the particularities of dynamic industries and digital markets. Incorporating such frameworks in merger control enforcement could thus promote the EU's sustainable competitiveness, innovation and growth.

- A more 'long-term consumer welfare' standard could also accommodate **resilience** considerations within merger control assessment. As the former Chief Executive of the

[11] Ibid 923.
[12] Ibid 936-937.
[13] Ibid 937.
[14] Adam Brandeburger and Barry Nalebuff, 'Symmetry and the Sixth Force: The Essential Role of Compliments' (2024) CPI Antitrust Chronicle November 2024.

CMA, Andrea Conscelli, and his co-author have noted in the past, 'it is important to remember that the role of competition authorities is to maximise consumer welfare *over time* (including during periods when markets face significant pressures)'[15] and that 'consumer welfare is profoundly affected by disruption to supply, particularly when it occurs in markets for essential goods and services.' [16]

- A resilience view suggests at first instance stricter merger control enforcement. Indirect harm to consumers due to a reduction to resilience would be an additional ground to prohibit mergers whereas it would be difficult to justify approving the merger based on 'resilience efficiencies' alone (even assuming that such benefits are verifiable and an efficiency defence would be accepted by the Commission, which has not happened to date even for mainstream efficiencies).
- Practically, incorporating resilience considerations in EU merger control may inevitably entail trade-offs that lead to implementation challenges. This means that while '[m]ost consumers and businesses would agree in principle that we should take steps to improve resilience [...] in practice, this can come at a cost. Many of the measures needed to ensure continuity of supply in unusual times – diversification of suppliers, reshoring of production, prudential requirements – are often likely to lead to higher prices in normal times. Similarly, from a competition policy perspective, action to promote more resilient market structures – by, for example, prohibiting mergers on the grounds that they will likely reduce resilience – may entail a trade-off between short-run efficiencies and long-run stability.'[17] Clarity on how such practical implementation issues will be resolved is of the essence.
- If such policy choice is conscious, Porter's 'five forces' framework could also help to operationalise the integration of resilience in merger control as it looks at assessing a merger's impact on the **overall competitive dynamics,** including innovation, entry, and power shifts across the value chain. His framework could

[15] Andrea Coscelli and Gavin Thompson, 'Resilience and Competition Policy' (2002) CMA Economics working paper 3.
[16] Ibid 22.
[17] Ibid 3.

be easily adapted to evaluate not just changes in market power but **systemic vulnerabilities.**

- It is of the essence that if such additional merger assessment criterion that goes beyond pure competition grounds is incorporated, it is applied neutrally or impartially to minimise differential effects across Member States or firms that may support or oppose resilient-suspect or beneficial mergers. Otherwise, resilience considerations as other public interest considerations may provide ground for politics to enter EU merger control and opportunities for regulatory capture.

- Thinking of **EU merger control in the context of globalisation,** and global competition and competitiveness, it is important that the revised EU Merger Guidelines consider links to or potential tensions with other complementary pieces of EU legislation, which came into force after the enactment of the EUMR and the last version of the Horizontal and Non-Horizontal Merger Guidelines. The aim should be to facilitate their parallel application or resolve any practical issues (questions A.18, A.19, A.20).
  - One related topic where guidance could be provided is regarding **foreign subsidies** and other competitive advantages that merging parties can obtain outside EU. It would be useful to clarify how such considerations could feature into the competitive assessment and how the application of the EUMR could reconcile with other legal instruments such as the EU Foreign Subsidies Regulation and EU FDI Screening Regulation.
  - In essence: (1) listing various types of competitive advantages that are available to firms outside EU (subsidies, SOEs, public procurement contracts, exclusive rights, etc.); (2) relationship between these competitive advantages and market power: (3) listing specific issues that should be addressed under EU instruments other than EUMR.

On assessing Market Power using Structural Features and other Market Indicators

- Taking inspiration from the US Merger Guidelines (§13 in their 2010 version and guideline 11 in their current 2023 version) that provide guidance on **acquisitions of**

partial ownership or other minority interests, the Commission should develop a coherent framework that addresses how situations of **cross- and common ownership** affect merger analysis and enforcement.

- Minority investments and common ownership are global and growing phenomena. Although common shareholding has started and is particularly prevalent in the US, it is also found in Europe and certain Member States as well as other jurisdictions in significant proportions. In each jurisdiction and its specific institutional setting, minority and common shareholding may manifest in different forms and patterns.[18]
- The US Merger Guidelines emphasise that not only controlling partial acquisitions may create competition concerns. Rather, also acquisitions of non-controlling minority shareholdings may substantially affect competition in different ways such as: i) 'by giving the partial owner the ability to *influence* the competitive conduct of the target firm', ii) 'by reducing the *incentive* of the acquiring firm to compete', iii) 'by giving the acquiring firm access to non-public, competitively sensitive *information* from the target firm.' In particular, the US antitrust 'agencies recognize that cross-ownership and common ownership can reduce competition by softening firms' incentives to compete' and that '[t]he post-acquisition relationship between the parties and the independent incentives of the parties outside the acquisition may be important in determining whether the partial acquisition may substantially lessen competition.'[19] This guidance codifies long-standing as well as recent economic research and case practice.
- Indeed, theoretical and empirical economic research shows that minority shareholdings in the form of cross- and common ownership may contribute to increased market concentration and have an impact on competitive incentives

[18] Nicoletta Rosati et al., 'Common Shareholding in Europe' EUR – Scientific and Technical Research Reports JRC121476 (Publications Office of the European Union 2020); Simona Frazzani et al., 'Barriers to Competition through Joint Ownership by Institutional Investors' (2020) Study for the Committee on Economic and Monetary Affairs, European Parliament, Luxembourg; Albert Banal-Estañol et al., 'Common Ownership Patterns in the European Banking Sector – The Impact of the Financial Crisis' (2022) 18 Journal of Competition Law & Economics 135; Miguel Antón et al., 'Common Ownership Around the World' (2025) NBER Working Paper No. 33965.
[19] U.S. Department of Justice and the Federal Trade Commission, Merger Guidelines, December 18, 2023, section 2.11.

and outcomes.[20] Effects are not limited to product market competition but may extend to innovation and labour market power, which are important aspects of this consultation.[21] These effects can be approximated and captured by modified structural indicators or incentives measurement tools – such as the modified HHI, PPI and GUPPI – under different assumptions about corporate control corresponding to partial ownership situations.[22] Alternatively, the so-called common owners' profit weights - a.k.a. lambdas or kappas - provide quantification measures of the effects of common, or cross-, ownership.[23]

- Notably, 'the first two competitive concerns mentioned in the [US Merger] Guidelines [i.e., influence over the acquired firm and incentives of the acquirer] are incorporated into the mHHI and mGUPPI'[24] and the lambdas. All these measurement tools rely on unilateral effects analysis. In other cases, a broader detailed analysis may be required. For instance, cross- and common ownership may lead to information sharing practices or give rise to or amplify coordinated effects concerns.[25] While the EU Merger Regulation cannot capture non-controlling acquisitions as such as they fall outside its scope, the Commission's case practice has often considered cross-ownership (non-controlling structural links) during the substantive assessment of a notifiable merger under the

[20] Timothy F Bresnahan and Steven C Salop, 'Quantifying the Competitive Effects of Production Joint Ventures' (1986) 4 International Journal of Industrial Organization 155; Daniel P O'Brien and Steven C Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67 Antitrust Law Journal 559; José Azar et al., 'Anticompetitive Effects of Common Ownership' (2018) 73 The Journal of Finance 1513; José Azar and Xavier Vives, 'General Equilibrium Oligopoly and Ownership Structure' (2021) 89 Econometrica 999.
[21] Ángel L López and Xavier Vives, 'Overlapping Ownership, R&D Spillovers, and Antitrust Policy' (2019) 127 Journal of Political Economy 2394; Azar and Vives (n 12).
[22] O'Brien and Salop (n 20); José Azar and Anna Tzanaki, 'Common Ownership and Merger Control Enforcement' in Ioannis Kokkoris and Claudia Lemus (eds.), *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishing 2022).
[23] Azar and Tzanaki (n 22) 264-265; Anna Tzanaki et al., 'Common Ownership in Fintech Markets' in Konstantinos Stylianou, Marios Iacovides, and Björn Lundqvist (eds.), Fintech Competition: Law, Policy, and Market Organisation (Hart Publishing 2023); López and Vives (n 20); Matthew Backus, Christopher Conlon and Michael Sinkinson, 'Common Ownership in America: 1980–2017' (2021) 13 American Economic Journal: Microeconomics 273; Antón et al. (n 18).
[24] Andrea Asoni and Yianis Sarafidis, 'Economic Tools for Gauging the Competitive Effects of Partial Acquisitions in the Energy Sector' Summer 2017 ABA Section of Antitrust Law – Transportation and Energy Industries Committee Newsletter 15, 22.
[25] Edward B Rock and Daniel L Rubinfeld, 'Common Ownership and Coordinated Effects' (2020) 83 Antitrust Law Journal 201; Lysle Boller and Fiona Scott Morton, 'Testing the Theory of Common Stock Ownership' (2020) NBER Working Paper No 27515; Vincent Abraham et al., 'Common Ownership and Collusion' (2025) Working Paper, https://papers.ssrn.com/abstract=5290001.

EUMR.[26] Similarly, common shareholding has been taken as an 'element of context' in the appreciation of any impediment to effective competition (SIEC) under the EUMR. In addition, remedy analysis and design has taken such structures into account on several occasions, relying also on related modified structural indices (MHHI).[27]

- The currently applicable EU Horizontal Merger Guidelines list significant cross-shareholdings as an exceptional factor that can defeat enforcement safe harbours based on concentration indices (HHI levels and delta), which cannot be relied upon to infer absence of horizontal competition concerns, and it explains that the MHHI can be used in such cases to take into account the additional effects arising from the non-controlling minority shareholdings.[28]However, no further guidance is provided on this or other points relating to cross- or common ownership in the current Guidelines.
- The aforementioned aspects of the Commission's analysis based on its previous enforcement experience and case practice should be systematised in its revised EU Merger Guidelines. This can be complemented by experience from other jurisdictions and the latest scientific knowledge when the Commission's own experience may be lacking or is more limited. For instance, as economic research is progressing in this area, the Commission should clarify in what circumstances and how pre-existing common ownership may affect merger analysis,[29] what metrics and factors can be used to measure changes in market structure and firm behaviour (e.g. MHHI, mGUPPIs, lambdas), how one goes about assessing 'control' on a case-by-case basis (e.g. by incorporating robustness check analysis, analysing a range of plausible control scenarios and quantifying effects through different assumptions about corporate control) which is often an ex ante uncertain variable absent the concrete fact-specific

[26] Annex II 'Non-Controlling Minority Shareholdings and EU Merger Control' to Commission, Staff Working Document, 'Towards More Effective EU Merger Control,' Brussels, 25 June 2013, SWD(2013) 239 final.
[27] Azar and Tzanaki (n 22) 278 (collecting cases).
[28] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31/05, paragraph 20, footnote 25.
[29] See Azar and Tzanaki (n 22) that provide a framework for the analysis of mergers taking place in an environment of common ownership and their effects and interaction.

context of each case,[30] market characteristics that could be conducive or inimical to potential pro- or anticompetitive effects of common ownership etc.

- It is important to emphasise in this regard is that while at first glance taking into account pre-existing common ownership as a factor in the competitive analysis may appear to imply, as some have argued, a more lenient merger policy, this generalisation is not always true. Azar and Tzanaki have shown that 'the sign and size of the merger effect will largely depend on the relative post-merger stakes of the common shareholders [not only] in the merging firms [but also in] any stakes in non-merging rivals in the same industry as well as on the specific financial structure of the merger deal (for example, cash or share exchange transaction)'.[31] This effectively means that any common ownership does not necessarily cancel out any effects arising from a merger subject to review and that fact-specific analysis (e.g. regarding common shareholdings in the industry, the merger deal structure, countervailing factors such as managerial entrenchment etc.) is needed to arrive to safer conclusions.
- The Commission should also proceed in a similar fashion clarifying and streamlining its policy on merger remedies. In particular, it should be clarified the extent to which divestiture remedies ought to take into account common ownership links between competing firms, which might affect the consideration of potential 'suitable' buyers and their independence. Although theoretically common ownership is analysed as an 'element of context' both during the substantive assessment and at the remedy stage, in at least one recent innovation related case, the presence of common shareholders did not automatically disqualify a proposed buyer from being suitable.[32]

- Lastly, given the Commission's recent decision in *Delivery Hero/Glovo*,[33] in which case a minority shareholding was found to facilitate anticompetitive practices under Articles 101 TFEU, and similar actions in the US where common ownership is claimed to have facilitated collusion through common shareholders' corporate governance rights and

[30] Tzanaki et al. (n 23) empirically assessing the effects of common ownership in private fintech firms and markets using alternative control scenarios to conclude the lack of substantial competition concerns.
[31] Azar and Tzanaki (n 22) 279.
[32] Ibid 278.
[33] Case AT.40795 Food Delivery Services, Commission decision of 2 June 2025.

practices,[34] the interplay of merger control with antitrust enforcement instruments such as Articles 101 and 102 TFEU in cases of cross- and common shareholding should be clarified. For instance, it is notable that in *Delivery Hero/Glovo*, although the non-controlling minority shareholding that was used to enable market sharing arrangements that eliminated overlaps between the parties was subject to the Article 101 infringement decision, the later acquisition of sole control involving the same companies was approved under merger control rules. It therefore seems that the history of prior antitrust enforcement and the fact that the parties 'engineered away' any geographic overlaps did not play a role in the merger analysis. This is problematic from a policy point of view. Such disconnected approach should be reconsidered, and antitrust and merger control enforcement should be viewed holistically to streamline companies' incentives and deter such practices.

- Another issue of great current importance not explicitly raised in the Commission's questionnaire but that should be addressed in its review of the Merger Guidelines is **AI collaborations and partnerships**, which are often structured not as traditional M&A transactions but have more complex structures combining (reverse) acqui-hires, non-exclusive licenses etc. ('**quasi mergers**').
  - Commission guidance could usefully clarify the conditions and considerations under which such deals could be subject to EU merger control review and their substantive assessment, especially the question/analysis of the acquisition of control or decisive influence under the EUMR. Vertical integration aspects that these deals most often raise would also merit further guidance. Similarly, for ecosystem dynamics and concerns in this particular type of deals given that the AI industry requires significant scale and market leaders have significant positions already and have an advantage in the ongoing AI race.
  - Cases such as Microsoft/OpenAI or Microsoft/Inflection AI show that the Commission is vigilant and attentive of contemporary developments in the fast-moving AI industry and open to flex its jurisdictional and substantive frameworks to address competition and innovation concerns posed by such deals. This is a positive development. However, clear guidance could help attract

[34] Texas et al. v. BlackRock, Inc. et al., Docket No. 6:24-cv-00437 (E.D. Tex. Nov 27, 2024).

rather than discourage AI investment in the EU. Importantly, such transactions may have positive (e.g., AI startup growth) as well as negative effects on competition and innovation. It would be useful to make this explicit, as the Commission has informally done,[35] and clarify when or which of those aspects could be relevant in an EU merger control assessment.

- The issue of AI partnerships is particularly relevant to key themes of the current consultation such as the EU's innovation and competitiveness and it also relates to the topic of "killer acquisitions", both from a jurisdictional and substantive point of view (as these deals may often fall below the EUMR thresholds or may be particularly concerning/ important in terms of dynamic effects and innovation). Following the ECJ's judgment in *Illumina/Grail*, that restricted the Commission's flexibility to capture such type of below-threshold transactions,[36] the Commission together with its revised Merger Guidelines providing substantive guidance on these types of deals should also clarify its referral practice, ideally in collaboration with Member States given further enforcement possibilities under national call-in powers or Art.102 TFEU in light of *Towercast* (see next section).

On Innovation and other Dynamic Elements in Merger Control

- It is encouraging to see that the Commission reflects on how to better integrate innovation and dynamic elements in EU merger control and seeks to provide systematic, coherent and clear guidance through its revised EU Merger Guidelines on these issues. It would be particularly useful to distil and systematise lessons learned from past merger practice, such as *Dow/DuPont*, *Bayer/Monsanto*, and *Illumina/Grail*, regarding the role of innovation in merger assessments as well as the latest scientific and economic learning in the upcoming Guidelines.

[35] Speech by EVP Margrethe Vestager at the European Commission workshop on "Competition in Virtual Worlds and Generative AI", 28 June 2024: https://ec.europa.eu/commission/presscorner/detail/en/speech_24_3550.

[36] See Press Release, 'Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft', 18 September 2024: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727.

- In attempting to systematise the case law, the Commission could review its decisional practice and Court merger rulings and illuminate what it considers to be relevant innovation and what the parameters are to assess **innovation effects** under the SIEC test. Effects on merging parties' incentive and ability to innovate are a useful framework to build upon. Static structural factors should be deprioritised as they are not useful indicators of market power and are less relevant in rapidly changing dynamic industries. Investment, entry, future competition and capabilities assessment should be elevated as factors in the competitive analysis that should be more forward-looking. Productivity and dynamic efficiency should also be recognised to have particular importance in this context.
- In addition, while there is often criticism that the assessment of innovation or dynamic aspects may render merger control more uncertain, uncertainty as regards innovation is something to be embraced, rather than shied away from. Omitting such parameters or characteristics of competition from the analysis, especially in dynamic industries, would give a sense of false certainty and possibly lead to wrong outcomes.

- High on the Commission's agenda for merger enforcement reprioritisation are mergers leading to **elimination of potential competition and 'killer acquisitions'**, i.e., 'defensive acquisitions of nascent or emerging innovative competitors' that could be a future competitive threat.
  - The EC is now in a position, largely of its own making, where Member State call-in powers have become a collective loophole to empower upward referrals under Article 22 EUMR.[37] While the limits of the expanded Article 22 referral mechanism are not crystallised,[38] the Commission is now de facto empowered to review mergers below the EUMR thresholds which may have great relevance to the EU's renewed focus on innovation and competitiveness in a context of global technological leadership and strategic autonomy. As a result, innovation

[37] For an overview of the history and evolution of the Article 22 policy and its implications for EU merger control, see Anna Tzanaki, 'Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution Through a Law & Economics Lens' (2025) Antitrust Law Journal, forthcoming.
[38] See the pending appeal in Case T -15/25: Action brought on 10 January 2025 – Nvidia v Commission.

and future competition theories of harm have gained major attention and importance at EU level.

- However, from a substantive point of view, the Commission's new Article 22 policy is not strictly speaking limited to referrals of merger cases fitting the economic theory of 'killer acquisitions.' Indeed, a non-killer acquisitions case was referred under Article 22 that the Commission accepted and assessed leading to its abandonment, which may suggest it risks overshooting its intended purpose (even following the European Court of Justice's judgment in *Illumina/Grail*[39]).[40]
- We call for a more holistic approach to killer acquisitions, one that considers the merits of Art. 101 and 102 TFEU as alternative options. Indeed, following the ECJ's judgment in *Towercast*,[41] it is now clear that Article 102 TFEU can be invoked by national authorities against previously unchecked mergers. As this provision is directly applicable, it is available to private parties to enforce at national level, and it also remains an option for Member States without any call-in powers that would like to pursue such mergers.[42]
- This could include guidance on when each tool is likely to be used (e.g., when the *Towercast* option could kick in - especially if it applicable to vertical mergers in cases such as *Illumina/Grail* or might be limited only to cases of superdominance;[43] taking advantage of interim measures under Art.101/102),

[39] Joined Cases C-611/22 P and C-625/22 P Illumina v Commission and Grail v Commission, Judgment of 3 September 2024, ECLI:EU:C:2024:677.
[40] Ibid. Tzanaki analyses the cases where the new Article 22 policy has been applied in light of the 'killer acquisition' theory of harm and also explains that the Commission's 'repurposing' of Article 22 EUMR to ad hoc expand of its merger control jurisdiction below the EUMR thresholds is counterproductive as it does not effectively address the main deficiencies of the thresholds-based system of competence allocation, i.e. the 'deterrence' and the 'externality' problem, from a substantive and jurisdictional point of view respectively. Indeed, due to the overbroad and unprincipled nature of the new Article 22 policy, substantive concerns due to the shape and application of the law (EU merger control system) rather than being eliminated (underdeterrence below the thresholds) may take a different form (overdeterrence).
[41] Case C-449/21 Towercast, Judgment of 16 March 2023, ECLI:EU:C:2023:207.
[42] Ibid, sections II.D and E where Member States' enforcement actions following the *Towercast* principle are discussed, as well as the relationship between Article 22 EUMR and Article 102 TFEU and how the availability of this merger enforcement alternative under EU antitrust affects the dynamics of merger competence allocation between the Commission and Member States.
[43] Ibid (attempting to rationalise the use of Article 102 TFEU (antitrust enforcement) vs Article 22 EUMR (merger enforcement) based on objective and clear principles).

the potential for the Commission to have oversight via Member States through a resurrection of Art.105, etc.

- In the Political Guidelines of the Commission's President Ursula von der Leyen and the mission letter to the new Competition Commissioner Teresa Ribera, particular emphasis is placed on **killer acquisitions of EU innovative target companies and start-ups by foreign companies**.
    - Concerns over this type of acquisitions bring together the topics of innovation, globalisation and competitiveness and have opened a debate about their relevance and integration into existing frameworks of EU merger control.
    - It is important to note, however, that instrumentalization of innovation related theories of harm such as killer acquisitions should not become a means of EU protectionism. The most sustainable and beneficial in the long-term industrial policy for the EU includes a 'neutral' competition policy which focuses on protecting competition in product markets, creates an environment conducive to innovation and growth by fostering dynamic competition and investment in new and clean technologies and high-tech industries while it maintains a level playing field in the market for corporate control for all companies active in the EU. A merger policy that reflects these principles promotes and is in the best interests of the EU internal market.
    - Mergers and acquisitions are a valuable exit strategy for EU entrepreneurs. By undermining the position of the most promising potential acquirers – those firms that are most successful in their industries due to potential competition concerns, merger policy may undermine the incentives of entrepreneurs to innovate in the first place, which in turn may increase their cost of raising capital to scale up their businesses. Ironically, it may also undermine the efficiency of management of target companies, and hence their performance and competitiveness, due to the lack of discipline from a vigorously competitive market for corporate control. Henry Manne's seminal work is highly instructive in this regard.[44] From that point of view, merger policy should remain disciplined and intervene only in cases of very concentrated and dynamically stagnant markets. Otherwise, EU

[44] Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) Journal of Political Economy 110.

merger policy risks to be completely counterproductive even by its own dubious objective of protecting EU innovative start-ups and aiming to foster their scaling up. Merger policy offers no short cuts to sustainable competitiveness.

On Sustainability and Clean Technologies

- The fundamental role of environment protection and sustainability concerns as a general principle of EU law is unquestionable in the system of EU Treaties.[45] Therefore, in view of systemic interpretation of law, we support the inclusion of a section devoted to sustainability in the revised Guidelines. Indeed, the revised Guidelines would follow developments in other areas of EU and national competition laws (see, e.g., sections on sustainability agreements in the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023),[46] Guidelines regarding Sustainability claims by the Netherlands Authority for Consumers and Markets (2023)[47] or Guidance on environmental sustainability agreements by the UK Competition and Markets Authority (2023)[48]).
- Concerns regarding sustainability and clean technologies should be treated with the same approach and methodology as other well-recognised, so-called non-competition concerns. Such approach would allow to include these indispensable aspects in the assessment, but at the same time avoid fragmentation, instrumentalization and arbitrary application of the EUMR.
- To date, sustainability or clean technology considerations have been considered within the existing traditional framework of EU merger control, especially in the context of assessing potential efficiencies.

[45] Julian Nowag, Environmental Integration in Competition and Free-Movement Laws (OUP 2016).
[46] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJEU C/2023/259 of 21.7.2023, 117 et seq.
[47] The Netherlands Authority for Consumers & Markets, Guidelines regarding Sustainability Claims version 2, 2023, https://www.acm.nl/system/files/documents/guidelines-sustainability-claims_1.pdf.
[48] Competition & Markets Authority, Guidance on the application of the Chapter I provision of the Competition Act 1998 to environmental sustainability agreements between businesses operating at the same level of the supply chain, published 12 October 2023, https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.

- For instance, in *Aurubis/Metallo* (2020),[49] unconditionally approved following a Phase-II review, the EC assessed the possibility of the merger generating green innovation efficiencies.[50] The key concern was whether the merger would have led to increased buyer power, and thus to higher prices for final products and lowered incentives and ability to invest and collect copper scrap for recyclers. The EC ultimately found that anticompetitive harm was unlikely, based on several factors including the dynamic character of the market and possible synergies between the parties. The parties claimed efficiencies in the form of positive environmental benefits due to technological complementarities and efficiency gains from their improved capabilities for metal extraction. The EC accepted some of these claims (improved metal extraction) as possible, but it considered others (green efficiencies) to be not verifiable or merger specific in this case.

- Following the OECD Roundtable Report on Efficiencies in Merger Control[51], we note that there are three most commonly used approaches towards sustainability concerns in assessing concentrations. Such analysis may be performed (1) within the competitive assessment (which was the case in the Commission's *Aurubis/Metallo* decision, as discussed above); (2) as balancing of public interests and detriment (when negative conclusions resulting from a competitive assessment may be outweighed with public interest benefits, such as merger-specific contribution to rapid reduction of greenhouse gas emissions); or (3) as part of a separate assessment (where competition authorities conduct two separate assessments: competitive one and public interest test, including environmental protection and sustainability considerations).

On Digitalisation

- In recent years we have witnessed significant legislative and enforcement efforts concerning the landscape of digital markets in the EU, seeking to recognise and strengthen rights of the users of online platforms and other market participants. At the same time, we appreciate that mergers hold great relevance for shaping these markets, which are usually already highly concentrated. Therefore, we share the view that the

[49] Case M. 9409 Aurubis/ Metallo Group Holding, Commission decision of 4 May 2020, OJEU C/2020/224.
[50] Ibid.
[51] OECD, Efficiencies in Merger Control (2025) OECD Roundtables on Competition Policy Papers No. 321, 34

mentioned efforts need to be complemented with clear and targeted merger guidelines regarding concentrations occurring in such markets.

- The EU Merger Guidelines should therefore include a section specific to digital markets. That section could refer to characteristics of digital markets, as identified in the Digital Markets Act (and its travaux préparatoires) and in the present Commission's questionnaire, as well as considered in recent cases (e.g., *Travelport/Worldspan*,[52] *Google/DoubleClick*,[53] *Vivendi/Activision*,[54] *Microsoft/Yahoo! Search Business*,[55] *Microsoft/Skype*,[56] *Facebook/WhatsApp*,[57] *Microsoft/LinkedIn*[58]).
- At the same time, such a section needs to be transparent about its understanding of the notion of 'digital markets', so that merging parties can be sure of the standards that will be used to assess their proposed transactions. Such an understanding needs to properly balance the legitimate standard of legal certainty with adequate flexibility, ensuring that novel digital services are not missed out. We suggest that such understanding is informed by a definition already present in the EU legal order, for instance the definition of a 'Information Society service' as included in the Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services[59] (and then relied upon in the Digital Services Act and the Digital Markets Act). In any event, such understanding should not be as enumerative as adopted with respect to 'core platform services' in Article 2 (2) DMA.

- We appreciate differences between competition law and the EU Merger Regulation on one hand and the Digital Markets Act on the other. However, we believe that the present Guidelines' revision provides a good opportunity to ensure more clarity and coherence between the EUMR and the DMA in certain aspects. We also support the view that

[52] Commission decision of 21.08.2007, M.4523 TRAVELPORT / WORLDSPAN, OJEU L/2007/314 of 01.12.2007.
[53] Commission decision of 11.03.2008, M.4731 GOOGLE / DOUBLECLICK, OJEU C/2008/184 of 22.07.2008.
[54] Commission decision of 16.04.2008, M.5008 Vivendi/Activision, OJEU C/2008/137 of 04.06.2008.
[55] Commission decision of 18.02.2010, M.5727 Microsoft/Yahoo! Search Business, OJEU C/2010/020 of 27.01.2010.
[56] Commission decision of 07.10.2011, M.6281 Microsoft/Skype, OJEU C/2011/341 of 22.11.2011.
[57] Commission decision of 03.10.2014, M.7217 Facebook/WhatsApp, OJEU C/2014/417 of 21.11.2014.
[58] Commission decision of 06.12.2016, M.8124 Microsoft/LinkedIn, OJEU C/2016/388 of 21.10.2016.
[59] OJEU L/2015/241 of 17.9.2015.

competitive dynamics and parameters of competition in digital markets, as identified in the questionnaire, need to be reflected in the revised Guidelines.

- Drawing inspiration from the DMA's substantive provisions included in Articles 5-7 and from hitherto Commission's decisional practice under Article 102 TFEU (as invoked in para. 88 of the questionnaire), the theories of harm could be developed further. Aspects such as 'tipping' ('winner takes most'), network effects, interoperability or customer inertia should be treated as often prominent structural characteristics and thus entry barriers to digital markets. We believe that in many cases the use of 'entry barriers' methodology would be most useful.
- Regarding data-driven competition (and to certain extent privacy protection-driven competition), these matters are of utmost importance for functioning in many digital markets and therefore should be treated as obligatory factors of assessing market power, present and future, of the merging parties, in particular when such data is unique, specific or not accessible for other market participants. Therefore, we especially want to stress the paramount importance of non-price factors, in particular data, being carefully reflected in competitive assessment, in particular in nascent or growing digital markets. [60]
- Targeted foreclosure deserves special recognition as a theory of harm applicable in digital mergers. Factors that might be taken into account in the course of the assessment include ecosystem dynamics and the market power of the merged entity (we suggest that particular attention is paid when a merger involves a gatekeeper or other large digital market participant). We believe that the Commission's practice, and the decision in *Meta/Kustomer*[61] in particular, sets a proper standard for the assessment of such subtle foreclosure forms.
- We note however, that these novel theories of harm may be attributed rather to larger market participants than to any regular undertaking present in a given digital market. Indeed, smaller market participants might be presumed not to have the ability to engage in such strategies or conducts after a merger.

[60] On how to develop data-based theories of harm see, e.g., Wolfgang Kerber & Karsten K. Zolna, 'The German Facebook case: the law and economics of the relationship between competition and data protection law' (2022) 54 European Journal of Law and Economics 217.
[61] Commission decision of 27.01.2022, M.10262 META (FORMERLY FACEBOOK) / KUSTOMER, OJEU C/2022/417 of 31.10.2022.

- The Guidelines could, therefore, reflect specifically on concentrations involving gatekeepers within the meaning of Article 2 (1) DMA. As the designation of a given undertaking as a gatekeeper can inform merger control proceedings in terms of market structure (with its low or no contestability) and potential market impact of transactions performed by such entities. Given high uncertainties and dynamics of digital markets, we suggest that all concentrations involving gatekeepers are assessed with the use of in-depth market testing, normally performed in Phase 2 investigation only. Alternatively, or in parallel, the Commission could encourage the merging parties to propose commitments in response to these uncertainties. These could be time-limited behavioural commitments corresponding to a time when the market is more stable and the outcome of the conditionally cleared merger is less uncertain.
- In order to better assess the context of an examined concentration, the Commission may take into account information on previous mergers, gathered on the basis of Article 14 DMA, and include it in relevant competitive assessment.

* The adequacy of maintaining different frameworks of analysis for horizontal and non-horizontal relationships depends on characteristics of the individual merging parties and the relevant markets involved. In short, we believe that the hitherto methodology remains viable with respect to mergers that do not involve gatekeepers or other very large market participants. Mergers in highly non-contestable digital markets need to be assessed with adequate scrutiny to specific conglomerate aspects.
    - For mergers involving gatekeepers or other larger market participants, application of horizontal or non-horizontal frameworks may lead to omission of key consequences of a given transaction, which may include entrenchment. Therefore, the revised Guidelines could take a more holistic approach to these mergers.
    - First, the Commission should treat any market, where parties to such transaction are actually or (plausibly) potentially present, as affected by the envisaged merger. Second, assessment of increased market power should not be performed separately for every identified relevant market, but instead should be performed in a more integrative way. Third, in such scenario the Commission may investigate if the merged entity would have been more likely to engage in any of the conducts as prohibited by Articles 5-7 DMA.

- We appreciate the significance of ecosystems for the competitive assessment of mergers in digital markets and we share the view that this aspect needs to be included in the revised Guidelines. At the same time, the revised Guidelines could further clarify that notion for the purposes of mergers' competitive assessment, as para. 104 of the Market Definition Notice is relatively broad in these terms.
  - Indeed, the merged entity's ability to build or reinforce the existing ecosystem should be part of the competitive assessment of a given digital concentration. The Commission should verify the market relevance of such ecosystem, also in terms of the merged entity's ability to control innovation and other market developments within that ecosystem and the potential to extend that ability outside the ecosystem.
  - If the identified ecosystem holds significant market importance, the Commission should assess the concentration's impact on access conditions for the ecosystem's actual and potential users (including business users), use of users' data as well as any interoperability concerns. We share the view, that such assessment should rely on a combination of conglomerate and horizontal methodologies, instead of being limited to 'traditional' approaches.[62]
  - Data-related concerns need to be assessed with particular scrutiny in concentrations involving ecosystems. We share the view that ecosystem operators may largely benefit from access to data to leverage their power in conglomerate circumstances.
- We acknowledge the view that in digital markets, the Commission may presume under certain circumstances that certain mergers can have long-run negative effects and reverse the burden of proof, requiring the parties to demonstrate that such risks would not materialise or be outweighed with efficiencies or other gains.[63]
- We consider the Commission's case practice regarding privacy and data protection considerations as generally appropriate. The revised Guidelines could provide guidance on the relationship between data protection and privacy considerations.
- We share the view that the reduction of privacy standards (as per the GDPR) may be regarded as reduction of quality and thus a competition concern fitting the EUMR's mandate.

[62] OECD, 'Theories of Harm for Digital Mergers', Competition Policy Roundtable Background Note (2023), 29.
[63] Ibid, 31.

On Efficiencies

- In the current framework, it is almost impossible and highly unattractive for the merging parties to put forward arguments regarding efficiencies, which partly shows that the 'balancing' mechanisms in the EUMR do not work well in practice.
    - To date, no merger has been approved by the Commission solely on the basis of the parties' efficiency claims. This means that although an efficiency defence is theoretically possible, in practice to successfully prove efficiencies under the current Horizontal Merger Guidelines' 3-prong test is quite demanding.
    - Especially, the time horizon for considering efficiencies to be timely can be quite narrow in certain cases of dynamic and innovation-oriented industries where any claimed efficiencies may be significant but may be realised in the longer term. The analysis in this regard should avoid being overly formalistic. Rather, flexibility could be a virtue, and potential longer-term efficiencies could be claimed based on more demanding evidence on a sliding scale the further the time horizon of such claimed efficiencies is.
    - As an alternative to the existing framework, the marginal role of the efficiencies could be maintained if the revised guidelines allow for a broader recognition of non-competition concerns within the competitive assessment.
- A better way to support European companies' scaling up and start-ups' growth is by designing a pro-competitive merger policy that allows room for substantiated efficiencies, especially 'innovation **efficiencies**' and 'investment **commitments**' in the spirit of the Draghi Report. Boosting innovation and increasing investment are singled out as key pathways for the EU to enhance its competitiveness in that report.
    - The Draghi Report emphasises the 'innovation defence' which merger policy should take seriously to enable more consideration of efficiencies towards strengthening merging firms' ability and incentive to innovate and invest in new technologies. This way, one could look into future potential competition and innovation where merging parties can pool resources to achieve scale needed to compete and innovate at global level rather than following a backward-looking approach focusing on existing market shares.

- Relatedly, an alternative solution would be to incorporate and strengthen efficiencies in merger analysis by treating them not as part of a defence (procompetitive effects to outweigh anticompetitive effects) but as part of the remedy. This would entail conditionally approving mergers by imposing commitments regarding future pro-competitive investments (in R&D, technological innovation, infrastructure development) that can be monitored ex post, which could not only eliminate competition risks but further promote competitiveness and growth.
- By de-emphasizing cost and static indicators in certain cases of dynamic and high-tech markets, and extending the time horizon for the competitive assessment, an 'efficiency defence' and efficiency considerations more broadly bear more promise.
- Certain strategic sectors (telecoms, energy, AI) where investment and innovation play a key role could be particularly fit for such an approach.

- Call for the revised guidelines to take a more **holistic approach to efficiencies** by considering the role that (behavioural) **remedies** seem to play in ensuring efficiencies are realised. Nearly 1-in-5 of the EC's Phase 2 merger cases are cleared with behavioural remedies – quite high compared to some other agencies (and contributing to only 9% of Phase 2 cases being cleared outright). This might imply that the EC imposes behavioural remedies as a precaution, when it is unsure of the true effects of a merger or whether efficiencies will be realised.
  - The remedies point could also feed-in to the similarities between the prohibition rates for horizontal and non-horizontal mergers, despite the guidelines saying the latter is typically less problematic and more efficiency enhancing. Further clarity may be needed on this.

On Public Policy, Defence and Security

- Public policy matters should be included in the competitive assessment of mergers. However, such assessment needs to be performed transparently and coherently to avoid the risks of instrumentalization and politization of competition law and policy and at the same time improve the transparency of the merger decisions. Methodologically, public policy matters should be treated to large extent as other non-competition concerns.

- In the competitive assessment the Commission should allow for raising arguments regarding public policy as put forward by the merging parties, but also by other market participants (during the market test; by interested third parties etc.).
- The revised Guidelines could reflect on the recent Court's case law from other areas of competition law that could be relevant for application of the EUMR, which confirms that the final decision may not undermine the general principles of EU law and other overriding provisions, even if in line with substantive or procedural competition rules,[64] and thus recognise the restrictive role of important public policy factors (including general principles and overriding provisions).

- On the role of Article 21 (4) EUMR, we note that it has been very limited, despite some previous attempts by Member States to intervene in mergers on industrial policy grounds (sometimes packaged as more virtuous public interest reasons). We suggest that the Guidelines address and give guidance on the role of said provision.
- In our view, the revised Guidelines could better reflect how the Commission assesses defence and security considerations in EU merger control in relation to the following aspects: (1) Assessment of security interests under Article 21(4) EUMR; (2) Defence exception under Article 346 TFEU; (3) Assessment of dual-use products and services.
  - According to the accumulated practice on invocation of Article 21(4) EUMR, the Commission accepted the legitimate interventions of the Member States based on the public security considerations related to protection of confidential information and sensitive technologies, compliance with public procurement, security of supply and maintenance of military capabilities.[65]
  - At the same time, the Commission was unwilling to recognize Member States' interventions in mergers with a "Community dimension" where such

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[64] See C-255/22 P - Orlen v Commission, para. 96; T-791/19 - Sped-Pro v Commission, para. 104.
[65] Case No. COMP/M.1858 Thomson-CSF/Racal (II), decision of 15 June 2000; Case No. COMP/M.4561 GE/Smiths Aerospace, decision of 23 April 2007; Case No. COMP/M.3418 General Dynamics/Alvis, decision of 26 May 2004; Case No. COMP/M.3559 Finmeccanica/Augusta-Westland, decision of 20 September 2004; Case No. COMP/M.3720 BAES/AMS, decision of 14 March 2005.

interventions pursued predominantly economic interests even when labelled as "strategic national interests"[66] or "economic security"[67] including cases where Member States intervened for the purpose of securing energy supplies.[68]

- o Therefore, the revised Merger Guidelines could provide additional explanations as to the Commission's approach in distinguishing between measures based on genuine public security (such as those exhibited in the aforementioned merger cases in the defence industry) and measures motivated by predominantly economic considerations. Furthermore, in light of the recent case developments[69] the Commission should highlight the importance of notifications by the Member States invoking Article 21(4) EUMR containing reasonable explanation as to the motivation of the specified measures. In this regard, it will be also important to address the relationship of the measures that can be adopted by the Member States using their foreign investment screening legislation (as harmonized under Regulation 2019/452) in relation to mergers falling under the scope of EUMR. Guided by the recent jurisprudence of the CJEU,[70] the Commission can reiterate that enforcement of national FDI screening legislation in relation to mergers with a "Community dimension" should satisfy the requirements of Article 21(4) EUMR.

- The invocation of the "defence exception" under Article 346 TFEU allows Member States to authorize a merger that would be blocked by the Commission under the EUMR or exempt the merger from the Commission's scrutiny by ordering the undertakings concerned not to notify the merger under the EUMR fully or partially (in relation to defence-related activities). In this regard, the Commission should consider adopting a more detailed guidance on the measures that are permitted under Article 346 TFEU and those that would have to comply with the requirements of Article 21(4) EUMR. For example, several conditions for a legitimate invocation of Article 346 TFEU can be

[66] Case No. IV/M.1616 BSCH/A. Champalimaud, decision of 20 July 1999.
[67] Case No. COMP/M.3768 BBVA/BNL, decision of 27 April 2005; Case No. COMP/M.3780 ABN AMRO/Banca Antonveneta, decision of 27 April 2005; Case No. COMP/M.12052 Unicredit/Banco BPM, decision of 14 July 2025.
[68] Case No. COMP/M.4197 E.ON/Endesa, decision of 20 December 2006; Case No. COMP/M.4685 ENEL/Acciona/Endesa, decision of 5 December 2007.
[69] Case No. M/10494 VIG/Aegon CEE, decision of 21 February 2022.
[70] Case C-106/22 Xella, judgment of 13 July 2023.

derived from earlier Commission's merger decisions:[71] (1) the invocation was used only in relation to the production of arms, munitions and other specific military supplies while the "civilian" activities of the merging undertakings were subject to the Commission's assessment; (2) national measures were necessary for the protection of "essential security interests"; (3) there are no significant spill-overs between military and civilian activities of the merging undertakings; (4) the exempted military activities have limited impact on other Member States.

- Article 21(4) EUMR does not permit Member States to exempt a merger from the Commission's scrutiny under EUMR if the requisite quantitative thresholds are met. At the same time Article 21(4) EUMR allows certain derogations from the "one stop shop" principle by allowing Member States to block a merger cleared by the Commission under EUMR or to impose conditions on such merger. However, Article 21(4) EUMR could not serve as a legal basis for Member States to proceed with a merger that was blocked by the Commission on competition grounds. Another important difference between the two legal grounds is that the "defence exemption" under Article 346 TFEU can be invoked only in relation to a restricted range of products and services that have military/defence functionalities while Article 21(4) EUMR does not constrain Member States' intervention by the nature of the products/services concerned.
- The revised Merger Guidelines should address the invocation of Article 346 TFEU in light of the case law of the CJEU, which has adopted a restrictive approach towards the "defence exception", which prevents its application to non-military products and services, even those that have dual-use functionalities.[72]
- Given the importance attributed to the development of the Single Market for Defence in recent policy documents,[73] the revised Merger Guidelines could offer more clarity on key aspects related to the competitive assessment of

[71] Case No. IV/M.528 British Aerospace, decision of 24 November 1994.
[72] Case T-26/01 Fiocchi Munizioni v Commission, judgment of 30 September 2003; Case C-337/05 Commission v Italy, judgment of 8 April 2008; Case C-615/10 Insinööritoimisto InsTiimi Oy, judgment of 7 June 2012.
[73] Enrico Letta, Much More Than a Market: Speed, Security, Solidarity, April 2024; Sauli Niinistö, Safer Together – Strengthening Europe's Civilian and Military Preparedness and Readiness, 30 October 2024; European Commission, White Paper for European Defence – Readiness 2030, 28 March 2025.

concentrations in the defence industry. In addition to the clarification regarding invocation of Article 21(4) EUMR and Article 346 TFEU, the Commission should consider offering further insights on issues related to the definition of the relevant product and geographic markets, the role of buyer power in defence markets, as well as specifics of dual-use products and technologies.

- In relation to the definition of the relevant geographic market, the Commission should adopt a forward-looking approach and anticipate the establishment of the common market for defence, which could lead to the expansion of the geographic dimension from national (as defined in previous merger cases due to regulatory fragmentation and preferences for national suppliers[74] to EU/EEA-wide markets.[75]
    - o Given the existence of monopsonies in the defence markets and the prevalence of long-term supply contracts, the Commission could consider introducing further clarification on the limited role of the current market shares and turnover of the undertakings as an imperfect proxy for the level of competition on the relevant markets. The existence of potential competitors regardless of their current market shares could constitute a sufficient competitive pressure especially given substantial buyer power of the procurement authorities.[76]
- In relation to dual-use products, it is important to clarify the meaning of "dual use" in the context of merger control that should be distinguished from the definition of dual-use items under Regulation 2021/821 (list-based categorization of dual-use goods aligned with international non-proliferation regimes) and public procurement (distinction between military and civil purchases under Directive 2009/81/EC as well as Commission's Communication on application of Article 346 TFEU in the field of defence procurement COM 2006/779).

[74] Case No. IV/M.17 Aerospatiale/MBB, decision of 25 February 1991; Case No. M.8425 Safran/Zodiac Aerospace, decision of 21 December 2017; Case No. M.9434 UTC/Raytheon, decision of 13 March 2020.
[75] Case No. COMP/M.1745 EADS, decision of 11 May 2000; Case No. COMP/M.1797 SAAB/Celsius, decision of 4 February 2000.
[76] Case No. COMP/M.3418 General Dynamics/Alvis, decision of 26 May 2004.