

EFFICIENCY DEFENCE 2.0

Do the draft Merger Guidelines mark a new dawn for substantiating efficiencies?

COMPETITION

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On 30 April, the European Commission published its long-awaited draft of new Merger Guidelines. In this article, we discuss perhaps the most eye-catching amendment: the Commission’s revisited approach to the assessment of efficiencies.

Efficiencies in EU merger control to date: a lost cause?

In EU merger control, a merger can be approved if the parties demonstrate that merger-specific efficiencies – such as cost savings or innovation gains – are likely to benefit consumers and outweigh any resulting harm to competition. However, to date, **efficiencies have played a limited role and have rarely been decisive in securing clearance.** The conventional view is that authorities have applied a high standard of proof when assessing efficiencies. Indeed, while merger notifications would often allude to the pro-competitive nature of the merger, there are relatively few mergers where the parties have presented any significant evidence to substantiate the claimed efficiencies. Where efficiencies have been reflected in authorities’ decisions, they have taken the form of cost efficiencies that feed into prices, thus directly offsetting the predicted adverse price effects.

As such, the Commission’s draft Merger Guidelines have been welcomed with cautious enthusiasm, with some commentators alluding to a paradigm shift in the

EU merger control. Indeed, the Commission not only introduces new concepts – such as ‘the theory of benefit’ – but is also explicit in stating that ‘demonstrated efficiencies will play a key role in the assessment of mergers going forward’.¹

Thus, the draft Merger Guidelines can be interpreted as a call for an increased, timely engagement on efficiencies in return for what looks like a more symmetric treatment of efficiencies and harms. It is less clear, however, whether the increased willingness to engage with efficiencies will open the floodgates for successful efficiency arguments. Based on established case practice and economic research, should we expect a lower bar for substantiating efficiencies?

New guidelines, old questions

The draft Merger Guidelines set out a range of potential pro-competitive merger benefits, such as lower costs and prices, higher quality, and stronger innovation, resilience, and sustainability, which may offset anti-competitive effects. The draft distinguishes between two types of efficiencies. **‘Direct efficiencies’** arise from

¹ Draft Merger Guidelines, para. 291.

integrating the parties' assets and directly reduce costs or improve quality, leading to lower prices or better products. **'Dynamic efficiencies'** strengthen incentives or the ability to invest and innovate, generating benefits over time.

To rely on such benefits, parties must present a clear **'theory of benefit'**, explaining the mechanism through which the merger generates efficiencies and how these translate into sustained improvements in effective competition and consumer welfare. If demonstrated, the Commission will then balance their magnitude and timing against the identified harm when assessing whether the merger leads to a significant impediment to effective competition (SIEC).

The draft introduces three main changes compared to existing EU guidelines on the role of efficiencies in merger assessment.²

First, efficiencies play a **more prominent role**. The draft includes a dedicated and substantially expanded section on efficiencies and their role is reinforced throughout the document.

Second, the **scope of efficiencies is broader**. Earlier guidance focused on cost, price, and quality effects, with limited treatment of dynamic efficiencies. The draft formalises the distinction between direct and dynamic efficiencies and highlights additional sources of benefits, including scale, resilience, and sustainability, particularly in sectors with high investment and innovation needs.

Third, the draft Merger Guidelines provide a **more detailed and structured framework for balancing efficiencies against harm**. In particular, they focus on how the magnitude and likelihood of efficiencies are balanced against the strength of the competitive concerns. The draft also adopts a more forward-looking approach, recognising that dynamic benefits such as innovation, investment, scale, resilience, and sustainability may materialise over a longer time horizon than short-term price effects.

However, despite the stronger emphasis and expanded guidance, the **core legal framework for assessing efficiencies remains unchanged**. Efficiencies are still considered only if they are verifiable, merger-specific, and benefit consumers, although the draft explains these criteria in more detail.

The bar remains high

While the draft Merger Guidelines leave little doubt as to the increased prominence of efficiencies, they do **not lower the evidentiary threshold for their acceptance**. Parties must substantiate efficiency claims with robust, case-specific evidence and demonstrate a clear causal link to the merger, quantifying benefits where possible.

First, with respect to **'direct efficiencies'**, the draft Merger Guidelines do not signal a case for fixing what is not broken when it comes to assessing direct efficiencies that might offset any price increases resulting from a merger. The Commission maintains, for example, that it 'may quantify the net effect of harm and cost efficiencies on consumers by assessing the compensating marginal cost reduction required to offset harm'.³ Notably, the Commission and national authorities will be bound by the CJEU CK Telecom ruling, where the Court explicitly rules out the notion of 'standard efficiencies' – i.e. a presumption that all mergers result in some cost savings that should be factored in any analysis of unilateral incentives to increase prices post-merger. This reiterates the importance of demonstrating (not presuming) efficiencies in horizontal merger cases, particularly those involving firms competing on price in oligopolistic markets prone to unilateral effects.

Perhaps more novel is the Commission's explicit recognition of quality-related direct efficiencies, of which there are some, albeit few, examples in case practice. Here, the key seems to be the quantification of the benefits such that they can be assessed directly against the harms manifested through price effects (e.g. through evidence establishing consumers' willingness to pay for quality improvements). While outside the EU, the UK Competition and Markets Authority's (the CMA) decision on *Vodafone/Three* illustrates how survey-based

² See 2004 Horizontal Merger Guidelines, paras. 76 to 88. The 2008 Non-Horizontal Merger Guidelines refer to the 2004 Horizontal Merger Guidelines regarding efficiencies.

³ Draft Merger Guidelines, para. 317.

evidence can be used in practice, highlighting the need for careful survey design and the role of complementary (in that case econometric) methods to assess consumers' valuation of quality attributes.⁴

Second, as regards '**dynamic efficiencies**', the Commission goes well beyond the current Merger Guidelines in explaining how a merger could enhance innovation and investment incentives. This could manifest through various mechanisms, e.g. by bringing together scarce complementary assets, and through economies of scale, scope and density, which may 'decrease the incremental cost of investment and innovation'.⁵

The '**verifiability**' criterion alone will come with **substantial evidence requirements**. The parties would need to demonstrate that (i) the merger would improve the '**ability**' of the merged entity to invest and innovate (e.g. by alleviating financial constraints) and that (ii) the merger would increase parties' '**incentive**' by altering 'the trade-off they face between investment or innovation costs, on the one hand, and potential future profits, on the other'.⁶

Starting with the '**ability**', the Commission sets out that without a merger, the parties might suffer from a 'structural lack of access to capital markets' and that **an acquisition by a financially sound firm may alleviate the target's financial constraints to invest and innovate**.⁷ There are few (if any) instances where such efficiencies would have been accepted to date. Finance literature provides some support for such efficiencies – subject to specific circumstances. There is empirical research to suggest that small R&D-intensive firms face a higher cost of capital than their more established, larger competitors.⁸ Greater internal liquidity, in turn, enables financially constrained firms to pursue more investment opportunities.⁹

That said, **a merger's impact on boosting the parties' investment prospects is ambiguous** and the

'theory of benefit' requires careful financial analysis. Assuming imperfect capital markets (a necessary condition for a merger to affect the target's ability to finance investments), a merger may either reduce or increase the merged entity's cost of capital. This depends on, for example, whether the increased scale and diversification of services would translate to a better credit rating and lower cost of debt, or, conversely, the extent to which the merger is debt-financed and results in higher default and equity risks.

With regards to the '**incentive**', it appears that the Commission's reasoning on the 'trade-offs' aligns with theoretical economic literature. Mergers can impact dynamic innovation incentives through different channels. First, **a merger can internalise innovation externalities**. A merging firm will consider that any innovation may (i) cannibalise the sales of what will become part of the same company (as is typically the case in horizontal settings), but may also (ii) generate positive demand or knowledge 'spillovers' for what used to be a separate company, which can be internalised after the merger. Second, **a merger may give rise to a so-called appropriability effect** whereby the merged entity's incentives to innovate and invest are increased because higher post-merger margins make it easier to recoup R&D (or investment) costs. According to this literature, whether mergers stimulate or stifle innovation incentives depends on the balance between reduced competitive pressures and improved appropriability of R&D returns, the nature of innovation and the intensity of pre-merger rivalry.

Theoretical research shows that mergers often *reduce* innovation incentives by weakening competitive pressure,¹⁰ but this finding is sensitive to the organisation of research activities post-merger¹¹ and the degree of product differentiation.¹² For example, relatively recent

⁴ See CMA on the Vodafone / CK Hutchison JV merger inquiry, available at [Link](#).

⁵ Draft Merger Guidelines, para. 325.

⁶ *Ibid.*, para. 327.

⁷ *Ibid.*, para. 325 (g).

⁸ Hall, B. H. & Lerner, J. (2010). The Financing of R&D and Innovation, *Handbook of the Economics of Innovation*.

⁹ Denis, D. J. & Sibilkov, V. (2010). Financial Constraints, Investment, and the Value of Cash Holdings, *The Review of Financial Studies*.

¹⁰ Federico, G., Langus, G., & Valletti, T. (2017). A Simple Model of Mergers and Innovation, *Economic Letters*.

¹¹ Denicolò, V. & Polo, M. (2018). Duplicative Research, Mergers and Innovation, *Economic Letters*.

¹² Jullien, B. & Lefouilli, Y. (2020). Mergers and Investments in New Products.

research by Bourreau et al. (2024)¹³ shows that production synergies can partially offset anti-competitive innovation effects, offering conditions under which mergers may raise incentives to innovate. Valletti (2025), bringing together the recent research (including the Bourreau et al. paper), concludes that ‘in models with competition both over innovation and final products, in the absence of synergies or positive spillovers, a merger is likely to be bad for consumers’.¹⁴

This is also supported by empirical research, with studies from Szücs (2014)¹⁵ and Haucap et al. (2018)¹⁶ finding that mergers often lead to declines in R&D intensity and innovation outputs, particularly in research-intensive sectors such as the pharmaceutical industry. The magnitude of these effects appears stronger when pre-merger competition was high, consistent with the often-cited inverted-U relationship between competition and innovation (as famously set out by Aghion et al. (2005)¹⁷).

In all, economic research shows that dynamic efficiencies are uncertain and context-dependent, which in turn supports applying a high standard of proof to arguments that they will increase investment and innovation. Therefore, it seems reasonable to assume that while the Commission signals more receptiveness to dynamic efficiencies, the evidential standards to demonstrate such efficiencies will remain unchanged. The Commission has commissioned an economic study on the dynamic effects of mergers, which is expected to provide further insights – and concrete tools – for assessments of competitive harms and benefits associated with investment and innovation.¹⁸

Towards uncharted waters in balancing harms and benefits

An important challenge that will become increasingly prevalent with the draft Merger Guidelines is **the**

balancing of adverse price effects with the new types of efficiencies discussed by the Commission, ranging from innovation and investment to resilience and sustainability. It goes without saying that not all efficiencies can be assessed against the harms in a simple price-based, or otherwise like-for-like manner. In footnote 395, the draft Merger Guidelines note that: ‘When exact quantification is not possible, the merging parties have to establish the magnitude of the claimed efficiencies’ and that the claimed benefits must be ‘of a higher magnitude than the harm’.¹⁹

There is thus inevitably a **substantial element of judgement** to be exercised by the authorities and not many examples to draw upon. Further discretion will become relevant in establishing how, for example, resilience-related benefits will, to a sufficient extent, apply to the consumers in the relevant markets affected by the merger. While the Commission notes that ‘collective benefits’ can be taken into account if harmed consumers substantially overlap with the beneficiaries, it remains to be tested how the more wide-ranging societal benefits would be weighed against direct harms.²⁰ At the same time, not all harms from mergers revolve around higher prices, as already exemplified in several merger reviews by the Commission and national authorities. **Many of the novel theories of harm pertain to non-price factors**, too, whether to do with the plurality of media, labour market conditions or quality-related aspects. As such, consideration given to non-price outcomes is not limited to efficiencies.

The balancing of such effects is largely new territory for the Commission and competition authorities in the EU. Outside the EU (even if not very far), e.g. the UK CMA’s review of *Vodafone/Three* involved an unprecedentedly detailed analysis of efficiencies associated with greater investments in mobile telecoms infrastructure, where the claimed benefits – ultimately safeguarded through commitments – were assessed against price effects.²¹

¹³ Bourreau, M., Jullien, B. & Lefouili, Y. (2024). Horizontal Mergers and Incremental Innovation, *working paper*.

¹⁴ Valletti, T. (2025). The innovation theory of harm in merger control: Some clarifications, *Economics Letters*.

¹⁵ Szücs, F. (2014). M&A and R&D: Asymmetric Effects on Acquirers and Targets, *Research Policy*.

¹⁶ Haucap, J., Rasch, A., & Stiebale, J. (2018). How Mergers Affect Innovation: Theory and Evidence, *International Journal of Industrial Organization*.

¹⁷ Aghion, P., Bloom, N., Blundell, R., Griffith, R., & Howitt, P. (2005). Competition and Innovation: An Inverted-U Relationship, *The Quarterly Journal of Economics*.

¹⁸ The economic study will be published in September 2026, see [Link](#).

¹⁹ Draft Merger Guidelines, footnote 395.

²⁰ *Ibid*, paras. 356 – 357.

²¹ CMA on the Vodafone / CK Hutchison JV merger inquiry, available at [Link](#).

Further, the CMA has under its ‘relevant customer benefits’ doctrine cleared, for example, hospital mergers that were deemed to give rise to a substantial lessening of competition but were (based on substantial scrutiny of ‘benefits cases’) found to enable improvements in healthcare services and bring benefits to patients.²² A common denominator between these somewhat different examples is that the merging parties presented, and the authorities scrutinised, extensive plans on how exactly the envisaged improvements would be executed, adding concreteness to the ‘theories of benefit’ and, in the case of *Vodafone/Three*, arguably contributing to

the CMA’s decision to approve an investment commitment.

The draft Merger Guidelines will almost certainly encourage merging parties to bring forward efficiencies that were previously expected to fail to meet the authorities’ scrutiny – even if in principle covered by the existing Guidelines. Economics suggests that while there is a case for such dynamic efficiencies in the right circumstances, the bar for accepting merger efficiencies should remain high.

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²² See, for example, CMA on Central Manchester University Hospitals / University Hospital of South Manchester merger inquiry, available at [Link](#).