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INTRODUCTION

The ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000) ("2000 Guidelines") were an important statement of U.S. antitrust policy. Had they not been rescinded by the previous administration, they would have remained a useful articulation of law in several respects.

However, as the agencies recognized in their call for comments, the 2000 Guidelines were dated in significant ways. They were written before the modern centrality of platform economics, ecosystem competition, AI-intensive innovation, data-driven business models, long-duration R&D programs, and the increasing relevance of dynamic competition across technology, health care, communications, energy, aerospace, and other strategic sectors. They recognized innovation, but did not adequately organize analysis around dynamic competition. They recognized efficiencies, but did not distinguish direct efficiencies from dynamic efficiencies. They recognized innovation markets, but did not provide a sufficiently developed framework for assessing competition in pipelines, capabilities, investment rivalry, or general innovation competition. Their R&D safety zone was comparatively narrow, static, and under-theorized. And, they were limited to collaborations of competitors, saying nothing about collaborations involving firms in a non-horizontal relationship.

The Draft EU MERGER GUIDELINES[1] (April 2026) contain a number of principles that, although designed for merger review rather than collaborations short of merger, offer useful guidance for updating U.S. enforcement policy with respect to collaborations, both horizontal and non-horizontal. Those principles should not be transplanted wholesale. The legal setting is different: the EU draft speaks to merger control under a significant-impediment-to-effective-competition standard and also reflects institutional objectives tied to the internal market and Treaty-based public interests. By contrast, revised U.S. Collaboration Guidelines must remain grounded in U.S. rule-of-reason analysis, U.S. doctrine on ancillary restraints and integration, and the Agencies' traditional focus on protecting the competitive process (and not competitors) and evaluating competitive effects and consumer welfare through price, output, quality, service, and innovation.

Nonetheless, several core ideas in the EU draft are highly transferable. In particular, revised U.S. Collaboration Guidelines should expressly incorporate: (1) a fuller conception of dynamic competition; (2) explicit recognition and treatment of dynamic efficiencies; (3) a modern framework for innovation competition, including pipeline and capability-based rivalry; (4) a forward-looking treatment of entry, expansion, and counterfactual market evolution; and (5) a revised innovation safe harbor, inspired by the EU draft's "innovation shield," but adapted to U.S. law and institutional realities.

[1] European Commission, (Draft) GUIDELINES ON THE ASSESSMENT OF MERGERS UNDER COUNCIL REGULATION (EC) NO 139/2004 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (Apr. 30, 2026) (circulated for public comment).

This submission identifies the most relevant EU principles, explains why they should be incorporated into revised U.S. Collaboration Guidelines, and proposes draft language for a revision.

I. Core Principles from the Draft EU MERGER GUIDELINES That Merit Incorporation

A. Dynamic Competition Should Be Recognized Expressly and Treated as a Central Organizing Principle

The most important advance in the Draft EU MERGER GUIDELINES is the explicit recognition that the benefits of competition are not only reflected in current prices, present output, or existing market shares. The EU draft emphasizes dynamic competitive potential, dynamic entry and expansion, investment and expansion competition, innovation competition, and the need to assess the merger's impact on future rivalry and future consumer welfare. It also expressly distinguishes between direct and dynamic benefits.

Those principles should be incorporated into revised U.S. Collaboration Guidelines. The 2000 Guidelines pointed in similar directions in several places. They identified innovation as a relevant dimension of competition; they recognized that collaborations may help bring products to market faster; they addressed innovation markets; and they framed effects by reference not only to price and output but also to quality, service, and innovation. But those concepts were dispersed and underdeveloped. The 2000 Guidelines were predominantly organized around static market analysis and current competitive interactions.

Modern collaborations frequently implicate dynamic rivalry. This is especially true where firms collaborate in R&D, infrastructure deployment, data pooling, advanced manufacturing, standards-adjacent technical development, AI model training, or commercialization of emerging technologies. In such settings, the most important antitrust question is often not whether the collaboration immediately raises price, but whether it preserves, redirects, accelerates, suppresses, or reallocates rivalry over future investment, product development, product quality, technological pathways, or entry trajectories.

Revised U.S. Collaboration Guidelines should state expressly that the Agencies assess collaboration effects on both current competition and future competition, and that future competition includes not only future product-market rivalry but also rivalry in innovation, investment and expansion, and commercialization.

B. Dynamic Efficiencies Should Be Expressly Recognized as Cognizable Benefits

The 2000 Guidelines recognized efficiencies, but they did so through a framework that was more static than current markets require. Efficiencies were treated primarily as cost savings, quality improvements, or faster product introduction, and the Guidelines were cautious about speculative claims and delayed benefits. That caution remains justified. But the framework should be modernized to better recognize that collaborations can generate benefits not merely by reducing present costs, but by enabling future innovation, investment, development speed, commercialization, deployment scale, interoperability, resilience, and complementary capability integration.

The Draft EU MERGER GUIDELINES distinguish direct efficiencies from dynamic efficiencies. The core virtue of that distinction is analytical clarity. Dynamic efficiencies are not simply long-term versions of ordinary cost savings. They arise where integration, coordination, or capability-sharing changes the parties' incentives or abilities to invest and innovate, such that consumers are more likely to benefit from future products, better technology, improved quality, or accelerated deployment.

Revised U.S. Collaboration Guidelines should adopt the distinction between direct and dynamic efficiencies. The Agencies should make clear that a collaboration may generate cognizable efficiencies when it:

- combines complementary R&D, engineering, manufacturing, distribution, or commercialization capabilities;
- is reasonably likely to accelerate the creation, development, testing, approval, or deployment of new products or services;
- permits projects of a scale, duration, or technical complexity that are not reasonably feasible for a collaboration participant acting alone;
- improves the likelihood, timing, or scope of successful innovation;
- reduces duplication of investment and innovation efforts that is genuinely wasteful while preserving meaningful independent incentives to innovate elsewhere;
- enables interoperability or integration that is reasonably likely to increase output, quality, innovation, product differentiation, product distribution or product uptake; or
- facilitates investment in new or upgraded infrastructure, manufacturing capacity, or innovation assets that intensify rivalry rather than suppress it.

Dynamic efficiencies may be associated with a short-run diminution of competition as assets are re-directed to increase future output over current output. This requires a change identifying cognizable efficiencies:

> **Cognizable efficiencies** are efficiencies that result in a durable, significant, and non-transitory decrease in price or increase in non-price factors (such as output, quality, service, or innovation) that are greater than a durable, significant, and non-transitory increase in price or decrease in non-price factors (such as output, quality, service or innovation). Cognizable efficiencies must be verifiable, not realistically achievable through significantly less restrictive means, and be reasonably likely to benefit consumers.

The Agencies should no longer implicitly downgrade dynamic efficiencies because they mature over a longer time horizon than short-term price effects or are associated with short-term harm. In innovation-intensive markets, delayed benefits may be economically significant benefits.

C. Investment and Expansion Competition Should Be Recognized as Distinct Competitive Dimensions

The draft EU MERGER GUIDELINES include a distinct section on investment and expansion competition. That concept is relevant to collaborations. In many sectors, firms compete not only through present sales, but through rival decisions to expand capacity, build networks, invest in technical infrastructure, enter adjacent geographies, improve production processes, or scale commercialization capabilities. A collaboration can affect these rivalrous investments in either direction. Some collaborations may strengthen investment competition by enabling firms to invest in facilities, platforms, or technologies that would otherwise be unavailable to them. Others may weaken investment competition by softening the incentive to build, expand, or innovate independently. The 2000 Guidelines did not treat this dimension sufficiently. Revised U.S. Collaboration Guidelines should therefore explain that, under the rule of reason, the Agencies may examine whether a collaboration is **reasonably likely** to:

- reduce or increase independent incentives (or ability) to expand capacity, geographic reach, or product scope;
- reduce or increase incentives (or ability) to undertake competing investment projects;
- delay, redirect, or expand commercialization efforts in ways that lessen or increase future rivalry; or
- increase participants' ability or incentive to invest and thereby intensify current or future competition.

This principle is particularly important where collaborations relate to infrastructure, manufacturing, data assets, advanced chips or computing power, telecommunications networks, transportation systems, pharmaceuticals, defense-related technologies, or large-scale clean-energy projects.

D. Innovation Competition Should Be Expanded Beyond "Innovation Markets" Narrowly Conceived

The 2000 Guidelines addressed innovation markets, but the concept has proven difficult to apply in practice. The draft EU MERGER GUIDELINES provide a more flexible and modern account of innovation rivalry. They distinguish between specific innovation competition—such as rivalry between overlapping pipeline products or R&D projects—and general innovation competition, such as rivalry between firms with important R&D organizations, distinctive innovation capabilities, or particularly strong capacity to generate and commercialize new products.

Revised U.S. Collaboration Guidelines should build on this insight. They should preserve the possibility of innovation-market analysis where appropriate, but should not limit innovation analysis to formal market-definition constructs. Instead, revised U.S. Collaboration Guidelines should recognize that innovation competition may occur through overlapping R&D programs, competing development pipelines, competing commercialization efforts, or broader rivalry among firms with specialized innovation capabilities, technical talent, data access, platform reach, or complementary assets.

Harmful collaborations do not necessarily eliminate all current product-market competition, but still may reduce innovation rivalry. Likewise, many beneficial collaborations do not merely pool existing output but combine complementary innovation assets that increase the probability, speed, or scope of successful development.

Accordingly, in considering a collaboration's effect on innovation competition, revised guidance should instruct that the Agencies may consider:

- overlapping pipeline products or development programs;
- competing and complementary research tracks or engineering efforts;
- the parties' internal documents and statements concerning innovation threats and responses;
- whether one or more participants is an especially important innovative force;
- whether the collaboration is reasonably likely to reduce the number, scope, or intensity of independent innovation efforts;
- whether the collaboration is reasonably likely to accelerate innovation, increase the number of feasible development paths, or improve commercialization prospects; and
- whether other independent firms or projects remain sufficient to constrain any loss of innovation rivalry.

The Agencies should evaluate the likelihood of harm and the likelihood of benefit symmetrically.

E. A More Forward-Looking Treatment of Entry, Expansion, and the Competitive Counterfactual Should Be Adopted

The draft EU MERGER GUIDELINES contain a sophisticated discussion of the relevant counterfactual, including future market developments, expected entry, expansion, technological change, evolving demand, and pipeline products. While the U.S. collaboration context differs, the underlying principle remains highly relevant: an assessment of collaboration agreements should not be confined to a purely static snapshot.

The 2000 Guidelines contained useful language in Section 2.4 on assessing effects as of the time of possible harm to competition. That provision already creates a doctrinal opening for modernization. Revised guidance should make clear that when analyzing collaborations, the Agencies may consider predictable future market developments, including:

- planned entry or expansion;
- impending technological shifts;
- impending commercialization of pipeline products;
- future capacity additions;
- expiration of regulatory, contractual, or technical barriers;
- changes in interoperability or switching conditions; and
- changing innovation trajectories.

At the same time, revised U.S. Collaboration Guidelines should remain clear that speculation is an insufficient basis for factual findings or conclusions. The touchstone should be reasonable predictability based on evidence, including internal documents, actual business plans, objective industry evidence, technical roadmaps, and third-party views.

F. A Revised Innovation Safe Harbor Should Be Adopted

A concrete and potentially useful concept contained in the draft EU MERGER GUIDELINES is the innovation shield. The draft provides a safe harbor for transactions involving small innovative firms or R&D projects under certain conditions. The precise EU thresholds and formulations should not necessarily be imported without additional consideration. But the core idea is sound and useful for U.S. collaboration policy.

The 2000 Guidelines R&D safety zone in Section 4.3 was too narrow and insufficiently forward looking. It turned heavily on a particular innovation-market framing and on the existence of three or more independently controlled research efforts with the required specialized assets and characteristics. That remains a useful baseline, but revised guidance should go further.

A modernized U.S. innovation safe harbor should reflect two propositions:

1. **Not all collaborations involving innovation reduce innovation competition.** Many such collaborations are procompetitive or competitively neutral, especially where the parties are not close current or reasonably likely future competitors, where they contribute complementary rather than substitutable innovation assets, or where sufficient independent innovation efforts remain.

2. **Start-ups, small innovative firms, and pipeline-stage collaborations can be chilled by uncertainty.** Clearer safe-harbor language could reduce deterrence of procompetitive innovation partnerships.

Revised U.S. Collaboration Guidelines should adopt a safe harbor for certain R&D, commercialization, or innovation-support collaborations where:

1. the participants are not substantial current competitors in any relevant market (including R&D or innovation markets) affected by the collaboration;

2. the collaboration does not materially limit independent pricing, output, production, or commercialization decisions outside the scope reasonably necessary to the venture;
3. the participants do not collectively control a substantial share of a current product market or innovation space;
4. the collaboration does not eliminate one of only a small number of significant independent innovation efforts;
5. the collaboration preserves participants' ability and incentive to engage in independent innovation outside the agreed scope, except where limited restraints are reasonably necessary; and
6. information sharing and governance safeguards reduce risks of spillover collusion.

The safe harbor should not apply to naked restraints, sham collaborations, or collaborations that materially reduce independent decision-making beyond what is reasonably necessary.

G. Broader Non-Price Dimensions of Competition Should Be Incorporated

The draft EU MERGER GUIDELINES identify a broader set of competitive parameters: price, output, quality, choice, capacity, investment, innovation, privacy, sustainability, and resilience. Not all of these should be imported into revised U.S. Collaboration Guidelines. But a revised U.S. statement should expressly recognize that collaboration analysis may involve non-price dimensions beyond innovation in the narrow sense. At minimum, revised U.S. Collaboration Guidelines should state that the Agencies may evaluate effects – both harms and benefits - on:

- price;
- output;
- quality;
- service;
- innovation;
- investment;
- capacity and deployment;
- commercialization speed; and
- where competitively relevant, reliability or continuity of supply.

These dimensions matter to the extent that they affect consumer welfare or the competitive process.

The EU draft's concepts of "resilience" and "security of supply" should be translated with care. They are best incorporated not as independent industrial-policy goals, but as competition-relevant attributes of products, supply arrangements, or innovation incentives. Thus, the Agencies may recognize reliability of supply, capacity robustness, or reduced vulnerability to disruption as procompetitive benefits where these are valued by customers and are verifiable.

H. Scale Should Be Recognized as Potentially Procompetitive

The draft EU MERGER GUIDELINES distinguish beneficial scale from market power. That principle should be incorporated in revised U.S. Collaboration Guidelines. Collaborations often exist because certain projects require scale: costly R&D, manufacturing platforms, standards-related implementation, infrastructure development, broad distribution, or rapid market deployment.

The 2000 Guidelines recognized scale and scope economies. A revision should expressly state that scale can be procompetitive when it enables lower costs, better quality, faster innovation, broader deployment, or other direct or indirect consumer benefits that would be difficult to achieve independently. But revised U.S. Collaboration Guidelines should also reiterate that scale is not an affirmative defense when it merely facilitates market power, collusion, or the suppression of independent rivalry.

II. Principles That Should Be Incorporated Only in Modified Form

A. The Industrial Policy and Competitiveness Language of the Draft EU Merger Guidelines Should Be Adapted for Competition Analysis

The draft EU MERGER GUIDELINES are being considered within an institutional setting that expressly attends to the internal market, European competitiveness, resilience, defense readiness, and other Treaty-linked goals. Those features should not be copied verbatim into revised U.S. Collaboration Guidelines. However, the underlying economic insight is valuable: collaborations may generate efficiencies by enabling firms to achieve scale, combine capabilities, and develop strategic technologies in ways that benefit customers through lower prices, improved quality, faster innovation, and increased output. Revised U.S. Collaboration Guidelines should capture that substance while avoiding broad industrial-policy language untethered to antitrust analysis.

B. Sustainability and Privacy Should Be Referenced

The draft EU MERGER GUIDELINES gives express attention to sustainability and privacy as possible parameters of competition. Revised U.S. Collaboration Guidelines should incorporate those concepts, but cautiously. They are best framed as examples of product quality or service attributes where customers demonstrably value them and where the collaboration affects them in competition-relevant ways. That is a narrower and more administrable formulation.

III. Proposed Structure for Revised U.S. Collaboration Guidelines

Revised U.S. Collaboration Guidelines should retain but update the basic architecture of the 2000 Guidelines. A sensible structure would:

1. retain the distinction between per se unlawful agreements and collaborations analyzed under the rule of reason;
2. preserve the focus on integration, necessity, and independent decision-making;

3. broaden the description of competitive dimensions to include dynamic competition;
4. expressly distinguish direct and dynamic efficiencies;
5. modernize the treatment of innovation competition, investment competition, and potential competition;
6. modernize the treatment of entry and counterfactual market evolution; and
7. replace or expand the existing R&D safety zone with a more modern innovation safe harbor.

IV. Proposed Draft Language for Revised U.S. Collaboration Guidelines

The following draft language is offered as proposed text for revised U.S. Collaboration Guidelines and is intended to supplement and revise the 2000 Guidelines' framework rather than significantly revise antitrust doctrine. Other sections in the 2000 Guidelines, if readopted into revised U.S. Collaboration Guidelines, would need conforming changes.

A. Revised Section 2.1—Potential Procompetitive Benefits

Proposed text: Collaborations among firms in horizontal or non-horizontal relationships may benefit competition and consumers by combining complementary assets, capabilities, or economic activities in ways that enhance the ability or incentive of the collaboration, its participants, or both, to compete. The primary benefit of collaborations is their potential to generate efficiencies.

Collaborations may enable participants to offer goods or services that are cheaper, higher quality, more differentiated, more reliable, or brought to market faster than would be possible absent the collaboration. Collaborations also may facilitate the creation of new or improved products, services, or production processes; improve interoperability or compatibility; expand output, capacity or deployment; or permit investments that increase the participants' ability to compete.

Such benefits may arise through a variety of mechanisms. For example, a collaboration may combine complementary research and development, engineering, manufacturing, distribution, commercialization, or other capabilities; permit projects of a scale, duration, or technical complexity that would not be feasible for a participant acting alone; reduce duplication that is genuinely wasteful while preserving meaningful independent rivalry; accelerate development, testing, approval, deployment, or commercialization; or improve coordination among complementary assets in ways that increase output, quality, innovation, or consumer choice.

The Agencies recognize that procompetitive benefits may be direct or dynamic.

- **Direct benefits** include, for example, reductions in marginal or variable costs, improvements in product quality, enhanced service, increased output, or accelerated commercialization reasonably attributable to the collaboration.
- **Dynamic benefits** include, for example, increased incentives or ability to invest, innovate, expand capacity, develop or deploy complementary technologies, pursue projects of

substantial scale or complexity, improve production or distribution capabilities, or bring new or improved products to market.

In some markets, particularly those characterized by significant research and development, platform effects, infrastructure deployment, technical standard-setting, or long development cycles, the principal benefits of a collaboration may arise not from immediate reductions in price or increases in output, but from improvements in future competition. A collaboration may, for example, enable investment, innovation, commercialization, expansion, or technical development that likely would not occur, or would occur less effectively or less rapidly, absent the collaboration.

The Agencies consider only those efficiencies that are cognizable.

> **Cognizable efficiencies** are efficiencies that result in a durable, significant, and non-transitory decrease in price or increase in non-price factors (such as output, quality, service, or innovation) that are greater than a durable, significant, and non-transitory increase in price or decrease in non-price factors (such as output, quality, service or innovation). Cognizable efficiencies must be verifiable, not realistically achievable through significantly less restrictive means, and be reasonably likely to benefit consumers.

B. New Section 2.1.A—Dynamic Competition and Dynamic Competitive Potential as Sources of Procompetitive Benefits

Proposed text: In evaluating collaborations, the Agencies may consider whether a collaboration is likely to preserve, enhance, or intensify dynamic competition or dynamic competitive potential. Competition may occur not only through current price and output rivalry, but also through efforts to innovate, invest, develop new products or technologies, commercialize pipeline products, expand capacity, deploy infrastructure, improve quality, enter adjacent markets, or otherwise compete for future business.

A participant in a collaboration may contribute to dynamic competition even if its current market share is limited, its products are not yet commercialized, or its principal significance lies in its capabilities or incentives to shape future competition. In appropriate cases, the Agencies may consider evidence concerning a participant's dynamic competitive potential, including its assets, capabilities, technical personnel, data access, intellectual property, pipeline products, commercialization plans, expansion plans, investment incentives, or record of innovation and entry.

A collaboration may generate dynamic efficiencies by enabling, accelerating, or expanding efforts that otherwise would likely occur later, on a smaller scale, with lower probability of success, or not at all. Such benefits may include, among other things, increased investment in research and development or productive capacity; faster or more effective commercialization; the pursuit of complementary or technically demanding development paths; improved interoperability or deployment; broader or more reliable supply; or strengthened incentives to compete through innovation, expansion, or entry.

Whether a collaboration is likely to preserve or enhance dynamic competition depends on the facts and circumstances of the market and the collaboration. Relevant considerations may include the extent to which the collaboration combines complementary rather than substitutable capabilities, preserves meaningful independent incentives to innovate or expand outside the collaboration, enables projects that would not be practical independently, and leaves sufficient actual or potential sources of future rivalry to constrain the participants and the collaboration. A collaboration may enhance dynamic competition by enabling investment, development, deployment, or commercialization that likely would not occur, or would occur less effectively or less rapidly, absent the collaboration. Whether a collaboration is likely to preserve, intensify, redirect, or diminish dynamic competition depends on the facts and circumstances of the market and the collaboration.

The Agencies do not rely on mere speculation regarding future benefits. In assessing dynamic competition and dynamic competitive potential, the Agencies may consider reasonably reliable evidence, including business records, technical roadmaps, internal planning documents, commercialization plans, investment budgets, regulatory pathways, customer evidence, and the significance of other actual or potential sources of future competition. The Agencies will not attempt to predict or evaluate de minimis benefits to competition.

C. Revised Section 2.2 – Potential Anticompetitive Harms

Proposed text: Collaborations may harm competition and consumers by increasing the ability or incentive of the collaboration, its participants, or both, profitably to raise price above or reduce output, quality, service, innovation, investment, capacity, commercialization, or other competitively significant dimensions below what likely would prevail absent the relevant agreement.

Such harms may arise through a variety of mechanisms. Among other things, agreements may limit independent decision-making; combine the control of, or financial interests in, production, key assets, or decisions regarding price, output, quality, service, innovation, investment, commercialization, capacity, or expansion; or otherwise reduce the participants' ability or incentive to compete independently.

Collaborations also may facilitate explicit or tacit coordination through facilitating practices such as the exchange or disclosure of competitively sensitive information, common governance or joint decision-making over competitively significant variables, or increased concentration in a relevant market or competitive space. Such coordination may concern not only present price or output rivalry, but also innovation, investment, commercialization, expansion, entry, or other forms of future competition.

In some markets, particularly those characterized by significant research and development, platform effects, infrastructure deployment, technical standard-setting, or long development cycles, the principal competitive harms of a collaboration may arise not from an immediate price increase or output reduction, but from the lessening of dynamic rivalry. A collaboration may, for example, reduce incentives to pursue overlapping research paths, delay or redirect the commercialization of new products, weaken incentives to expand capacity or technical capabilities, or diminish rivalry for future business opportunities. These dimensions matter to the extent that they affect consumer welfare or the competitive process.

The Agencies consider both direct and dynamic anticompetitive harms. The significance of any such harm depends on the facts and circumstances, including the nature of the collaboration, the market setting, the degree of independent rivalry that would likely exist absent the collaboration, and the extent to which the collaboration preserves or diminishes the participants' ability and incentive to compete.

D. New Section 2.2.A—Dynamic Competition and Dynamic Competitive Potential as Possible Sources of Anticompetitive Harm

Proposed text: In evaluating collaborations, the Agencies may consider whether the collaboration is likely to affect dynamic competition or dynamic competitive potential. Competition often takes place not only through current price and output rivalry, but also through efforts to innovate, invest, develop new products or technologies, commercialize pipeline products, expand capacity, deploy infrastructure, improve quality, enter adjacent markets, or otherwise compete for future business. These dimensions matter to the extent that they affect consumer welfare or the competitive process.

A firm may constitute a significant competitive constraint even if its current market position is limited, its products are not yet commercialized, or its principal significance lies in its capacity or incentive to shape future competition. In appropriate cases, the Agencies may consider evidence concerning a participant's dynamic competitive potential, including its assets, capabilities, technical personnel, data access, intellectual property, pipeline products, commercialization plans, expansion plans, investment incentives, or record of innovation and entry.

A collaboration may harm dynamic competition by reducing, delaying, redirecting, or suppressing independent efforts that otherwise would likely have contributed to future rivalry. Such effects may include, among other things, reductions in independent research and development, diminished incentives to invest or expand, slower or more limited commercialization, fewer feasible development paths, reduced experimentation among technical approaches, or the elimination of a particularly important disruptive or expansionary force. Whether a collaboration is likely to preserve, intensify, redirect, or diminish dynamic competition depends on the facts and circumstances of the market and the collaboration.

The Agencies do not rely on mere speculation regarding future competition. In assessing dynamic competition and dynamic competitive potential, the Agencies may consider reasonably reliable evidence, including business records, technical roadmaps, internal planning documents, commercialization plans, investment budgets, regulatory pathways, customer evidence, and the existence and significance of other actual or potential sources of future rivalry. The Agencies will not attempt to predict or evaluate de minimis harms to competition.

E. Revised Section 2.4—Time of Assessment of Competitive Effects

Proposed text: The competitive effects of a relevant agreement may change over time, depending on changes in market conditions, technology, the scope of the collaboration, or the participants' incentives and capabilities. The Agencies assess the competitive effects of a relevant agreement at the time of reasonably likely harm to competition and reasonably likely benefit to competition. Reasonably likely harms and reasonably likely benefits may occur at the time of formation of the collaboration, or later, during the term of the collaboration. Reasonably likely harms and reasonably likely benefits may occur at different times during the term of the collaboration.

In appropriate cases, the Agencies will consider reasonably predictable future developments, including entry, expansion, exit, technological change, commercialization of pipeline products, changes in customer demand, capacity additions, changes in regulatory or technical conditions, or other developments that may affect current or future competition. The Agencies do not rely on speculative plans or speculative projections, but may consider such developments when supported by reasonably reliable evidence, including business records, contemporaneous plans, market evidence, or other objective indicia.

In assessing competitive effects over time, the Agencies may consider both direct and dynamic effects, including effects on current rivalry and on innovation, investment, commercialization, expansion, or other dimensions of future competition. In some markets, the principal competitive effects of a collaboration may concern future products, future capacity, future innovation, or future business opportunities rather than immediate price or output effects.

Where a collaboration has been formed and investments have been made in reasonable reliance on it, the Agencies may consider such reliance in assessing later-arising competitive effects, consistent with the facts and circumstances of the case.

F. Revised Section 3.1—Rule-of-Reason Analysis

Proposed text: Collaborations not challenged as per se unlawful ordinarily are analyzed under the rule of reason to determine their competitive effect. Rule-of-reason analysis focuses on the state of competition with, as compared to without, the relevant collaboration agreement. The central question is whether the collaboration is likely to harm competition by increasing the ability or incentive of the collaboration profitably to raise price or reduce output, quality, service, or innovation below what likely would prevail in the absence of the collaboration.

In applying the rule of reason, the Agencies may examine both direct and dynamic effects. Direct effects include changes in existing product-market competition. Dynamic effects include changes in incentives or ability to innovate, invest, expand, commercialize new products, improve quality, or compete for future business.

The Agencies' inquiry is flexible and varies with the nature of the collaboration, the market setting, and the available evidence. In appropriate cases, the Agencies may consider the participants' business purpose, the design and governance of the collaboration, the competitive significance of overlapping activities, the role of complementary assets or capabilities, the participants' independent incentives absent the collaboration, and the likely impact of the collaboration on present and future rivalry.

G. New Section 3.31(c)—Relevant Agreements Affecting Investment, Expansion, or Innovation Competition

Proposed text: Collaborations may affect competition not only by limiting present rivalry in price, output, or other competitively significant variables, but also by altering the participants' incentives or ability to invest, expand, or innovate independently. The Agencies may examine whether a collaboration is reasonably likely to reduce, delay, redirect, or suppress independent rivalry in:

- research and development;
- commercialization of new or improved products;
- capacity expansion;
- deployment of infrastructure or technical capabilities;
- entry into new products, technologies, geographies, or customer groups; or
- other competitively significant investment activity.

These dimensions matter to the extent that they affect consumer welfare or the competitive process. The Agencies also may examine whether a collaboration is likely to increase the participants' ability or incentive to engage in such activity and thereby intensify competition. Relevant evidence may include the participants' internal documents, plans, budgets, technical assessments, the nature of overlapping or complementary capabilities, the number and significance of remaining independent efforts, and the likely pace and direction of market development.

H. Revised Section 3.32(c)—Research and Development; Innovation Competition

Proposed text: A collaboration's competitive effects on innovation may be analyzed as part of an analysis of its effect in a relevant goods, technology, or service market. In other cases, the Agencies may analyze a collaboration's effects on competition in research and development or innovation more directly. Innovation competition may arise through rivalry between existing products and pipeline products, between overlapping research and development programs, between efforts to commercialize competing products or technologies, or among firms with important innovation capabilities that are likely to shape future competition. When analyzing innovation competition, the Agencies may consider, among other things:

- the proximity of overlapping research or development efforts;
- the participants' current and expected roles in product development and commercialization;
- the participants' research, engineering, or technical capabilities;
- factors that may affect the participants' ability or incentive to engage in current or future research, development or commercialization;
- whether one or more participants is a particularly important source of innovation or disruptive change;
- the number, quality, and independence of remaining competing innovation efforts;
- the likelihood, timing, and significance of future products or technologies; and,
- whether the collaboration is likely to accelerate, preserve, or diminish meaningful innovation rivalry.

The Agencies do not require certainty regarding the precise form of future products or the exact market in which they may compete. Where supported by evidence, the Agencies may consider the reasonably likely effect of a collaboration on the innovation process itself.

I. Revised Section 3.35—Entry and Expansion

Proposed text: Entry or expansion may deter, prevent, or counteract anticompetitive harm arising from a collaboration. In assessing entry or expansion, the Agencies consider whether such entry or expansion is likely, timely, and sufficient in magnitude, character, and scope to constrain the exercise of market power.

The Agencies may consider both present and reasonably predictable future entry or expansion, including by firms with pipeline products, adjacent capabilities, technical assets, or commercialization plans. In markets where innovation or investment is an important dimension of rivalry, the Agencies may consider whether potential entrants or expanding rivals have the capabilities and incentives to constrain a reduction in current or future competition.

Relevant evidence may include business plans, technical development status, internal documents, customer views, regulatory pathways, access to key inputs, switching conditions, and the expected timing and scale of entry or expansion.

J. Revised Section 3.36—Identifying Procompetitive Benefits of the Collaboration

Proposed text: Collaborations may generate procompetitive benefits that enhance the ability or incentive of the collaboration or its participants to compete. These benefits may include lower costs, improved quality, increased output, enhanced service, accelerated commercialization, improved interoperability, increased capacity, or the creation of new or improved goods, services, or technologies.

In appropriate cases, the Agencies also consider dynamic efficiencies. Dynamic efficiencies may arise where a collaboration enables or strengthens investment, innovation, commercialization, expansion, or deployment that likely would not occur, or would occur less effectively or in a less timely manner, absent the collaboration.

If the Agencies conclude that a relevant agreement has caused, or is likely to cause, anticompetitive harm, they consider whether the agreement is reasonably necessary to achieve cognizable efficiencies.

K. Revised Section 3.36(a)—Cognizable Efficiencies

Proposed text: Cognizable efficiencies are efficiencies that result in a durable, significant, and non-transitory decrease in price or increase in non-price factors (such as output, quality, service, or innovation) that are greater than a durable, significant, and non-transitory increase in price or decrease in non-price factors (such as output, quality, service or innovation). Cognizable efficiencies must be verifiable, not realistically achievable through significantly less restrictive means, and be reasonably likely to benefit consumers.

Efficiency claims must be substantiated so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, when and how it would be achieved, and why the relevant agreement is reasonably necessary to achieve it. Such claims may be supported by internal business records, technical analyses, integration or development plans, evidence of complementary assets or capabilities, customer evidence, or other reliable indicia.

The Agencies recognize that dynamic efficiencies, including efficiencies relating to innovation, investment, or commercialization, may be more difficult to quantify precisely than immediate cost savings. The Agencies nevertheless may credit such efficiencies when they are supported by reasonably reliable evidence and are not unduly speculative. The Agencies are less likely to credit efficiencies that are vague, speculative, not supported by ordinary-course evidence, or dependent on contingent future events lacking reliable support.

L. Revised Section 4.3—Safety Zone for Research and Development and Innovation Collaborations

Proposed text: Absent extraordinary circumstances, the Agencies ordinarily do not challenge a collaboration centered on research and development, innovation, or the development of new or improved products, services, or technologies where:

1. the collaboration does not include naked restraints on price, output, customers, or territories;
2. the participants' restraints on independent conduct are reasonably related to and reasonably necessary for the procompetitive purposes of the collaboration;
3. the collaboration does not materially restrict independent commercialization, pricing, output, or innovation outside the scope of the collaboration except as reasonably necessary to achieve cognizable efficiencies;
4. the participants are not substantial current competitors in a relevant market affected by the collaboration, or, if they are, the collaboration does not materially reduce significant existing competition in that market;
5. there are at least three other independent research, development, or innovation efforts, or other comparable competitive efforts, with the specialized assets, capabilities, or characteristics likely to constrain any reduction in innovation competition resulting from the collaboration; and
6. the collaboration is structured with safeguards reasonably designed to limit unnecessary sharing of competitively sensitive information and spillover effects on competition outside the collaboration.

In assessing whether this safety zone applies, the Agencies may consider evidence regarding pipeline products, innovation capabilities, technical assets, commercialization plans, the number and significance of independent remaining efforts, and the extent to which the collaboration combines complementary rather than competing capabilities.

This safety zone does not apply where the facts indicate that the collaboration is likely to suppress meaningful independent innovation, investment, expansion, or commercialization rivalry, or where the collaboration is a device for coordinating conduct unrelated to its legitimate purposes.

M. New Section 4.4—Innovation Safe Harbor for Early-Stage and Complementary Collaborations

Proposed text: Absent extraordinary circumstances, the Agencies are unlikely to challenge an early-stage innovation collaboration involving one or more emerging firms, start-ups, or pipeline-stage technologies where:

1. no participant possesses substantial market power in a current product market likely to be affected by the collaboration;
2. the collaboration primarily combines complementary assets, capabilities, or development efforts rather than eliminating significant existing or likely future head-to-head competition;
3. the collaboration does not eliminate one of only a small number of significant independent innovation efforts;
4. the participants retain substantial freedom to pursue innovation outside the defined scope of the collaboration, except as reasonably necessary to protect the collaboration's legitimate objectives; and
5. the collaboration includes reasonable safeguards against spillover coordination in pricing, output, or other competitively significant conduct.

This section states an enforcement intention only and does not create any presumption of legality.

CONCLUSION

At the time of their rescission, the ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS no longer provided an adequate account of how modern competitor collaborations affect competition. The Draft EU MERGER GUIDELINES, though written for a different legal framework, offer several principles that should inform revised U.S. Collaboration Guidelines. Properly adapted, they would modernize the U.S. antitrust framework for evaluating business collaborations in a way that is fully consistent with rule-of-reason analysis and better aligned with contemporary markets.

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TechFreedom intends to file a second comment requesting that the Agencies provide clarity on the burden-shifting framework they will use to evaluate the overall competitive effect of a collaboration.

Respectfully submitted,

__________/s/__________
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