

RETHINKING ANTITRUST

TECH FREEDOM

#42

*Bilal Sayyed & Mike Walker Discuss the
EC's Draft Merger Guidelines*



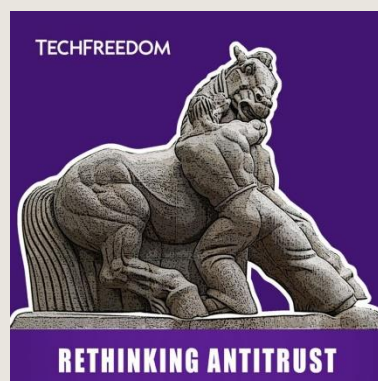
Bilal Sayyed,
TechFreedom



Mike Walker,
Frontier
Economics

*“Dynamic competition
and innovation are what
really drive economic
growth and productivity*

*—
not short-run static
efficiency.”*



MIKE WALKER ON THE EC'S DRAFT MERGER GUIDELINES: TAKING EFFICIENCIES SERIOUSLY!

A Serious Treatment of Efficiencies

- **The draft guidelines are a strong and economically coherent document overall.** A serious, thoughtful effort to update merger analysis without abandoning sound economics, signaling that the Commission intends to take efficiency claims more seriously than it has in the past.
- **The introduction of a “theory of benefit” is a major analytical advance.** It is a more structured way to weigh procompetitive effects alongside theories of harm.
- **The draft usefully expands merger analysis beyond static competition.** The greater focus on dynamic competition, innovation, and investment is a welcome change.
- **The burden of proof should be more symmetrical for harms and benefits.** Potential efficiencies should not face a materially higher evidentiary standard than potential competitive harms.
- **The capabilities-based approach is one of the draft’s strongest features.** A useful way to assess mergers in uncertain, innovation-driven markets, especially where firms’ assets are complementary rather than substitutable.
- **The Commission should be cautious about recognizing resilience and sustainability as merger benefits.** These concepts may lack clear limiting principles in merger control.
- **The “innovation shield” may unduly narrow the Commission’s ability to challenge acquisitions of small firms that could become important competitive threats.**

Bilal Sayyed The European Commission's draft of revised merger guidelines are a big deal.¹ They are not just an update to existing doctrine. I think they are an effort to codify some recent and new thinking of the Commission on innovation, efficiencies, scale, ecosystems, resilience, and sustainability—two concepts that seemed outside the scope of a competitive-effects analysis of mergers [when I was responding](#) to the Commission's initial call for comments.²

This is the [RETHINKING ANTITRUST](#) podcast.³ I'm Bilal Sayyed, the host.

This is the third in my series of conversations with experts on the draft guidelines. Today I'm joined by [Mike Walker](#). Mike is a senior adviser at Frontier Economics and, I think, one of Europe's most experienced competition economists. He previously served as Chief Economic Adviser at the U.K. Competition and Markets Authority.⁴ He's held senior roles at CRA, Lexicon, and other consulting firms. He also teaches, I believe he still teaches, at the College of Europe and Durham University. He is also co-author of *The Economics of EC Competition Law*.

Mike's initial reaction to the draft, which I saw in [a substantive post on LinkedIn](#), was very interesting to me. I read his comments to suggest that he views the draft as serious and thoughtful, and in some ways much better than what came before, especially in the way it takes efficiencies more seriously, including dynamic efficiencies tied to innovation and investment. He's also very focused on the draft's attention to firm capabilities. Mike also seems to have some reservations. So let's get into it. Mike, thank you for being here.

Mike Walker Pleasure to be here. Thank you for the invitation.

Bilal Sayyed What is the purpose of guidelines?

Mike Walker When we were producing our new Merger Guidelines at the CMA, we really had three things in mind.⁵ One was to provide guidance around where we think things might have changed. For the Commission, that means guidance around what has changed since the 2004 [Horizontal Merger Guidelines](#)⁶ and the 2008 [Non-Horizontal Merger Guidelines](#).⁷

¹ European Commission, [\(Draft\) Guidelines on the Assessment of Horizontal and Non-Horizontal Mergers](#) (Apr. 30, 2026).

² [Comments of Bilal Sayyed, TechFreedom, In the Matter of Review of the Horizontal and Non-Horizontal Merger Guidelines, European Commission](#) (Sept. 10, 2025).

³ This is a lightly edited and annotated transcript of the podcast discussion (edited for clarity and to provide citations to cases and other materials referenced in the discussion). The podcast is available at [RETHINKING ANTITRUST PODCAST # 42](#).

⁴ Mike was Chief Economic Advisor of the Competition and Markets Authority for the period September 11, 2013 through December 19, 2025.

⁵ U.K. Competition and Markets Authority, [MERGER ASSESSMENT GUIDELINES](#) (Mar. 18, 2021).

⁶ European Commission, [Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings](#), 2004 O.J. (C 31) 5

⁷ European Commission, [Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings](#), 2008 O.J. (C 265) 6.

So I think that's one purpose: guidance. That seems obvious.

Second, I think guidelines are important because they allow an agency to signal a new approach or a new policy. Clearly, when we did our guidelines at the CMA, it was about [signaling much more focus on innovation and dynamic effects](#).⁸ For these draft guidelines from the Commission, they signal that more dynamic aspect, but also, as you've already alluded to, a changing approach to efficiencies. The Commission is signaling very clearly that it is going to take efficiency claims more seriously in the future, and it is mapping out how it will do that. That's particularly relevant, I'm sure, when we come to discuss dynamic efficiencies and innovation.

Third, I do think there is an element of imposing a constraint on the agency. It's very important that agencies, of course, have a power of discretion when they think about mergers, but there have to be some limiting principles. I think guidelines can provide—or should provide—those limiting principles. They should give firms and their advisers some indication of when a potential merger really won't be a problem and when it potentially might be a problem. And if it is a potential problem, they should indicate what firms need to do to deal with that potential problem. So I think those constraints are also important.

Bilal Sayyed You mentioned the '04 Horizontal and '08 Non-Horizontal Merger Guidelines. How important were those two sets of guidelines, both in the development of the EU's merger analysis and even the CMA's merger analysis?

Mike Walker I think they were both very important. The 2004 Horizontal Merger Guidelines really outlined the Commission's more economic approach to merger control. They came after the Commission had lost three merger challenges in court in 2002.⁹ They also came at the same time as the creation of the chief economist team inside the European Commission.¹⁰ So the 2004 Guidelines were very much about signaling that the Commission was going to take a more economic approach toward merger control.¹¹ They introduced the concept of a theory of harm, and I think in the 30-odd years I've been doing economics and competition policy, the concept of a theory of harm is the single most important improvement. That analytical codification, and forcing both the parties and the authority to be clear about what their theory of harm is, is really important. So I think the 2004 Guidelines were very important in that respect.

I think the 2008 Guidelines were also very important. They were a big step in applying economic analysis to vertical foreclosure in a way that hadn't really been done before. In particular, they highlighted that vertical mergers, which are typically pro-competitive, may nevertheless cause difficulties for non-merging

⁸ Alex Hazel and Rebecca Saunders, U.K. Competition and Markets Authority, [Bringing the CMA's Merger Assessment Guidelines Up to Date](#) (Apr. 8, 2021).

⁹ Case T-310/01, [Schneider Elec. SA v. Comm'n](#), 2002 E.C.R. II-4071; Case C-12/03 P, [Comm'n v. Tetra Laval BV](#), 2005 E.C.R. I-987; Case T-342/99, [Airtours plc v. Comm'n](#), 2002 E.C.R. II-2585.

¹⁰ Lars-Hendrik Roller and Pierre A. Buigues, [The Office of the Chief Competition Economist at the European Commission](#) (May 2005).

¹¹ Mario Monti, European Commissioner for Competition Policy, [A Reformed Competition Policy: Achievements and Challenges for the Future](#) (Oct. 28, 2004); Mario Monti, European Commissioner for Competition Policy, [Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective](#) (Feb. 28, 2004). See also Nick Levy, [Mario Monti's Legacy in EC Merger Control](#), [Competition Policy International](#) (Spring 2005).

parties. The focus became: yes, but when is that anti-competitive? When is it anti-competitive foreclosure? Thinking carefully about that was important. So I think those guidelines were also very important.

You asked how much they affected other agencies—or you mentioned the CMA—but generally I think they influenced European competition authorities greatly. Actually, I think probably the 2008 Guidelines more so, because the level of sophistication around vertical mergers and non-horizontal mergers generally was much poorer than the level of sophistication around horizontal mergers. The 2008 Guidelines really did affect other agencies. Certainly, working in a UK competition authority, those guidelines—both sets of guidelines—were very useful.

Bilal Sayyed What do you see as the most important contributions of this draft? How do they expand on the '04 and '08 Guidelines? What is the most important initiative in these draft guidelines?

Mike Walker I'm going to highlight two issues in terms of importance. One is that the 2004 and 2008 Guidelines are both very static. They're focused on static competition, very much within the concept of consumer welfare in a static sense. Of course, we know that dynamic competition and innovation are what really drive economic growth and productivity, not short-run static efficiency. In that respect, one important contribution these draft guidelines make is simply codifying how the Commission thinks about those issues. I don't think there's anything new there, because the Commission has been taking these issues seriously for years. The **Dow/DuPont** case in 2016 was the first merger that wasn't blocked but was substantially amended on the basis of an innovation theory of harm.¹² So the guidance is important for codifying existing factors, providing more detail around them, and taking more of a capabilities approach. That's all really good and important.

The second thing, which I think is even more important, is that the draft signals a new policy stance around efficiencies. I have said for many years that competition authorities were very poor at handling efficiencies and efficiency defenses. I've been doing this job for more than 30 years, and until very recently I was still waiting for mergers to be cleared on the basis of efficiencies that outweigh the anti-competitive effects of the merger, even though conceptually that is obviously a possibility. So I think it's very important that these guidelines make clear that the Commission is going to take efficiencies seriously.

When they talk about a theory of benefit, I think that's a very useful analytical construct. I hope it will become as important as the theory of harm. It probably won't be used as often. The theory of benefit will only come in where there is a theory of harm and a good efficiency story. But where there is, I think that's a real improvement in practice. Of course, we have to wait and see how much it affects the Commission's actual behavior in looking at cases. But potentially, I think that is a huge improvement.

Bilal Sayyed When I think about efficiency claims and the government's treatment of them, I've been focused on the requirements parties must satisfy to support that claim: merger specificity, verifiability, and pass-through. These guidelines do not change those principles. Why do you think the guidelines signal that the Commission will take efficiency claims more seriously?

¹² Case M.7932, **Dow/Dupont**, Commission Decision Declaring A Concentration to Be Compatible with the Internal Market and the EEA Agreement (Mar. 27, 2017).

Mike Walker That's a very good question. I agree with you that efficiencies must be merger-specific, verifiable, and timely. The requirement that merging parties be able to verify those efficiencies—almost to prove them—has been a barrier to efficiency analysis. The very high standard of proof is a very high bar. And with dynamic efficiencies, particularly those involving innovation, firms will never be able to do that because it's not exactly clear what the innovation process is going to lead to. Firms themselves may well be unclear about exactly what the resulting products are going to be. I agree that the tests of specificity, verifiability, and timeliness can be a real block.

So what do I think has changed? I do think the Commission has said in the draft that timeliness has to be considered in context, so not just in an almost immediate sense. I think that's good. I also think they are at least signaling that they will take a better approach to verifiability, in the sense of not requiring a ridiculously high burden of proof, particularly for efficiencies that may be very difficult to identify precisely at the point of merger and that may emerge later.

They also talk about direct efficiencies and dynamic efficiencies. My interpretation of what they're saying is that they need evidence that the merger will change the behavior of the firms, and that the firms will be able to change their behavior in favor of more innovative activity or more investment, without requiring that investment and innovation to happen instantaneously. So I think that is a substantive change.

Bilal Sayyed I do see in the draft that there is some movement on the timeliness question. It's a little less direct than I would like, but there is a footnote about taking account of efficiencies in some matters that might play out over three or four years. I think they could be clearer on that change.

In [TechFreedom's comments](#), we pushed for symmetrical treatment of whatever the burden was—the level of certainty—between the anticompetitive-effects analysis, the probability of harm, maybe the magnitude of harm, and the efficiency claim. Are they signaling that they're going to do that—that there will be this sort of symmetrical treatment? Or do you think they're still suggesting a higher burden on efficiency claims than on the identification of potential or probable harm?

Mike Walker With regard to your first proposition, yes, I agree with you. I've said this publicly several times before. I do think there should be symmetry in the burden of proof with respect to potential harm and potential benefits or efficiencies, and that clearly hasn't been the case.

The next question is whether I think the Commission is moving in that direction. I think it is, although I'm not entirely sure how far it is going on this. In my LinkedIn post, I pointed out a couple of places in the draft guidelines where the Commission seems to be saying: we will look at the anticompetitive effects of the merger and how likely they are, and we'll look at the pro-competitive effects or efficiencies of the merger and how likely they are. We'll weigh those up and do a calculation to see whether the expected harm from the merger is greater or less than the expected benefit. That is exactly how economists think this sort of analysis should be done.

Now, I don't think the draft says explicitly that this is what they're going to do, but I certainly think paragraphs 334 and 341 suggest that is what they are going to do. So, as an economist, I want to say: great, absolutely, that's the right way to do it.

My hesitation is this: back in 2019, the Furman Review in the UK suggested doing this sort of balancing in the context of tech mergers.¹³ My initial reaction was that, yes, that's the right thing to do. Then I was convinced that it would actually be very hard to implement. At the CMA, with a balance-of-probabilities test, it is always feasible to ask whether a merger is more likely than not to harm consumers. But once you start trying to put a number on how much harm there is and what the probability of that harm is, things get potentially very complicated. There might be a spectrum of harms, each with different probabilities.

Colleagues at the CMA convinced me that this was not an implementable test. I still worry that this is a test which is right in theory but difficult in practice. It may be very hard to implement, there may not be real limiting principles, and you may end up with too much discretion for the Commission. So that sounds like I'm being negative about this. I'm actually applauding what the Commission is trying to do. If it thinks it can do this, and do it well, fantastic. I'm just a little surprised that it thinks it can.

Bilal Sayyed The level of discussion in the draft goes well beyond what any other agency has included in its guidelines or practice. I also wonder whether it is possible. In the U.S., we have the same difficulty implementing balancing tests in monopolization cases and even restraint-of-trade cases. Efforts to do it sometimes end up turning on what I call disproportionality between the harm and the benefit, or on the identification of some other way to obtain the efficiency.

The draft also seems to expand the category of efficiencies or benefits that the Commission will accept. I think two of those categories are resilience and sustainability. I was skeptical that those were important foundations for what I would have called an efficiency claim. But I think you have a different view, particularly with respect to resilience. So can you explain why resilience is a proper efficiency or benefit claim in a merger matter? I've always thought about merger analysis as focused on how the merger affects the dynamics of competition between the remaining firms in the market, or eliminates rivalry between the merging firms. The question of resilience, and even sustainability, seems to go beyond that. The competitive dynamics don't seem necessarily tied, or as strongly tied, to decisions around resilience and sustainability. So how do one or both of them fit?

Mike Walker I don't think we disagree as much as you may suggest. Let's start with resilience. This is the concern that you might have a merger that makes the supply chain less resilient—perhaps more geographically concentrated and therefore more prone to particular shocks or geographic errors, or something like that. When I was at the CMA, we did some work thinking about resilience in competition policy, not just in merger control. The chief executive at the time, Andrea Coscelli, and one of my colleagues published a paper on resilience in competition policy.¹⁴ It was actually quite hard to find examples where competition policy seemed to be the best tool for achieving resilience. So I think it will be rare for resilience claims to turn out to be very important in merger control.

Impossible? No, not impossible. You can imagine a merger that makes you think the supply chain has become less resilient to a particular type of shock. But I don't think it will be very common, because what really drives resilience is firms having optionality. If they have a multitude of suppliers they can use, that's what competition provides. So I actually think resilience is a perfectly reasonable concern, but I don't think

¹³ UNLOCKING DIGITAL COMPETITION, REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 2019).

¹⁴ Andrea Coscelli and Gavin Thompson, *Resilience and Competition Policy* (CMA, Economics Working Paper) (Mar. 31. 2022).

competition policy has a lot to offer here. Just making markets competitive will tend to be the best way of promoting resilience. Keep markets open. Lots of players will tend to be the best way to generate resilience. So I don't think I substantively disagree with where you're coming from on that.

On sustainability, I'm not quite sure what I think about sustainability and merger control. As an economist, to talk about sustainability, I'm going to widen out slightly in the way the guidelines themselves do. The draft guidelines talk about negative and positive externalities. Net zero is one place where those externalities matter a lot. As an economist, I can certainly see that there may be mergers that have either positive or negative externalities affecting consumers who are not directly purchasers of the products in question. Obviously, mergers that increase or reduce the amount of carbon produced will have an effect on all consumers through net zero, for instance. So, as an economist, I can absolutely see why we might care about those externality effects from mergers.

I worry a little bit that, again, we have no limiting principle here. It's not clear to me exactly when or how those calculations will be carried out, or exactly when those externalities are great enough to outweigh the particular effects within the market. I'm also unconvinced that any competition authority will really follow through on the logic of this position, because the logic of this discussion of externalities is that when there is a negative externality from a product, a merger that leads to prices rising and quantity falling is a good thing.

So that means mergers of oil companies that lead to prices rising are a good thing; mergers of gambling companies leading to prices rising are a good thing; tobacco companies—let's get them all to merge. I actually don't think that is where competition authorities want to go. All of those issues—net zero, gambling, tobacco—are public policy issues for which there are better solutions. For net zero, let's have a carbon tax. You can tax tobacco to reduce demand. It just seems to me that while competition authorities may feel they have something to offer, they are not really the best way of doing it. On that basis, they probably shouldn't do it. It's really difficult. I speak from experience of being in a competition agency: it's really difficult to accept that argument when you see governments not doing something about a negative externality, but I think agencies need to take a deep breath and accept that they can't cure all government failures.

Bilal Sayyed On resilience, I think in your discussion a few minutes ago you focused on the difficulty of a merger improving resilience. Can you think of situations where a merger might improve the supply chain or improve resilience factors? I'm not even entirely sure how they're defining resilience. Is it different from the ordinary course of improved access to resources?

Mike Walker Try this. Suppose we have a merger of two firms with significantly different capabilities in terms of how they use inputs to provide products, but we'll assume they're providing similar or the same product. You might imagine that the combined company would be more resilient to changes in the upstream supply chain. If the merger gives the companies different approaches to how they can convert inputs into the downstream product, that could make the firm more resilient.

Now, I think that's very hypothetical. I can't think of a merger in 30 years where we looked at a case and thought, yes, this is an anticompetitive merger, it's going to make prices rise, but it will make security of supply stronger and therefore increase resilience. But I don't think we can say it's impossible. There may

be some cases where there are genuine resilience improvements that will benefit consumers when supply chains are, for whatever reason, a bit vulnerable.

As you can hear, I'm struggling a bit with this because I just don't think it is, in practice, a substantive issue. I know people don't seem to agree with me when I make this statement, but I think one of the things we learned from COVID is that global supply chains are incredibly resilient. I worry that we slightly learned the wrong lesson there.

Bilal Sayyed Let's talk a little bit about the difference between dynamic and direct efficiencies. I thought, as a matter of practice, agencies did take account of dynamic considerations. They were at least aware that market shares and market structure today might not be a good indicator of competitive importance in the near term, the short term, or the long term. Are they really expanding the category of efficiencies they'll consider?

I know from my time at the FTC there was a genuine belief that innovation is the most important factor in economic growth, and staff tried to consider that in any merger that looked like it had some innovation story, either positive or negative.¹⁵ You mentioned Dow/DuPont—that was 10 years ago. Certainly the Commission was thinking about these things before then, and it isn't something missing from its analysis of cases in the last 10 years. Is it really different?

Mike Walker I think there's a bit of a difference between dynamic competition and dynamic efficiencies. Dynamic competition means getting agencies to think about how competition will play out in the long term, rather than just focusing on short-term effects. I think we all agree that is the right approach. The Commission has been doing it for ages, and the CMA has very much followed its lead.

Then we come to dynamic efficiencies. These are efficiencies that are not going to bear fruit immediately. It might be an investment that will take quite a long time before it actually starts to benefit consumers, or it might be putting together complementary R&D assets to create innovation in the longer term. Agencies, in general, have been unwilling to put much weight on those efficiencies as a counterbalance to short-term anticompetitive effects of a merger. That's not a huge conceptual change, but it would be a significant change in practice.

To give an example, when I was at the CMA, one of the last mergers I worked on was the mobile merger between Vodafone and Three.¹⁶ The CMA thought there would be short-term negative price effects, so prices would rise to consumers, but it cleared the merger on the basis of an investment commitment by the parties. The CMA decided—and I completely agree with this analysis—that in the long term the merger would lead to more capacity, lower prices, and better quality.

I have said publicly a number of times that I think that was standard merger-efficiency analysis: short term harms outweighed by longer-term benefits. Every time I say that in public, people basically laugh and say, no, Mike, that was a really big deal. That was a really significant merger decision changing previous policy.

¹⁵ Bilal Sayyed, *Non-Price Effects in Mergers: Examples From Federal Trade Commission Enforcement, 1992-2023*, Antitrust Chronicle (Jan. 2019).

¹⁶ Competition and Markets Authority, Final Report, *ANTICIPATED JOINT VENTURE BETWEEN VODAFONE GROUP PLC AND CK HUTCHISON HOLDINGS LIMITED CONCERNING VODAFONE LIMITED AND HUTCHISON 3G UK LIMITED* (Dec. 5, 2024).

And I think they're probably right. All that really highlights is that authorities have not been correctly implementing the approach to innovation and dynamic competition when it's going in the opposite direction—where the short-term harm is set against the long-term benefit. They've been fine at thinking about the reverse in cases like Illumina/GRAIL, but not in the other direction.¹⁷ I think these draft guidelines signal that the Commission is willing to make that trade-off now.

Bilal Sayyed I agree with you that that is a positive. I think there's a view that harm can be identified with more certainty than benefits or efficiencies. I don't really know if that's true, and I think if the Commission is open to a more aggressive recognition of future efficiencies, that's a benefit.

In talking about Vodafone, you mentioned investment. The draft guidelines mention, as a standalone theory of harm, loss of investment and expansion competition. That seems to focus on how the transaction may affect the firms, the combined firm, and maybe the industry's, incentives and ability to invest. Is that different from loss of innovation competition? Is there a difference between loss of investment competition and loss of innovation competition?

Mike Walker I think there is a difference. You could have a case where, after firms merge, the competitive threat they pose to each other is removed, and they therefore feel less need to invest in capacity expansion or in improving quality. Is that different from damage to innovation? It is a different mechanism.

Conceptually, though, it's the same issue: the merger reduces competitive constraints between firms, so they compete less hard on relevant competitive metrics. In some industries that might be innovation—Dow/DuPont, pesticides, for example, where innovation is super important. In other industries it might be much more about capacity or quality.

So yes, I think they are different, but conceptually they come from the same place: concern about a loss of competition leading to consumer harm. The other difference, perhaps, is uncertainty around innovation. When you have a lot of innovation competition, two firms compete less strongly in R&D, compete less strongly to innovate, and that may have absolutely no effect on consumers relative to the counterfactual at all. It may turn out that the added innovation they would have produced absent the merger was going nowhere. There is real uncertainty there.

You slightly alluded to this a minute ago, Bilal: authorities discount effects that are uncertain, and of course they should discount them to some extent depending on how uncertain they are. But I do think authorities have historically too often treated uncertainty as a reason to ignore these issues. Decision-makers have too often used uncertainty as an excuse not to make difficult trade-offs. When I was at the CMA, we worked very hard to get decision-makers comfortable making decisions under uncertainty, because in mergers, of course, there is uncertainty. I think that is particularly relevant to these guidelines. More generally, competition authorities worldwide have historically treated uncertainty as a reason not to take countervailing effects seriously, and I think that's been a mistake.

¹⁷ European Commission, [Commission Decision Withdrawing Decisions, Illumina/GRAIL](#) (Sept. 6, 2024) (collecting Commission decisions); [Opinion of the Federal Trade Commission, Illumina/GRAIL](#) (Dkt. No. 9401, Mar. 31, 2023), *vacated and remanded*, *Illumina, Inc., v. FTC*, 88 F.4th 1036 (5th Cir. 2023).

Bilal Sayyed A merger may allow the combined firm to get access to capital at a lower rate, right? That sounds like some kind of efficiency, but I think it has always been a hard sell with agencies.

Mike Walker There is potentially an efficiency there. I have two comments, though. First, you're talking to an economist, and economists are always a bit dubious about some of these access-to-capital arguments when they are made by established firms. We want to say: if you've got a good investment, a good product, or whatever, why is it that you cannot access capital to fund it? The starting point is that capital markets are reasonably efficient, so why are they not providing the capital?

Second, you suggested that this kind of financing argument hasn't been treated as an efficiency. Maybe that is true explicitly. But I think there have been a number of mergers where large firms have been buying relatively small firms, and one of the arguments in favor of the merger is that being bought by a large firm will help the small firm be more successful than it otherwise would be—it will improve distribution, or something along those lines. Implicitly, in quite a lot of those arguments, there is an assumption about financing being part of the deal. So I think the argument is probably taken into account more than you suggest.

Bilal Sayyed The guidelines have two categories: loss of specific innovation competition and loss of general innovation competition. I don't know that I saw anything new in the discussion of loss of specific innovation competition. I think agencies have been doing that for a long time. But loss of general innovation competition seems to suggest a willingness to find innovation harm without necessarily identifying the future output of that innovation activity. What is the basis for thinking that the combination of two firms with, let's say, non-overlapping research tracks or innovation tracks, but with overlapping capabilities, might lead to a loss of general innovation?

Mike Walker General innovation—yes. If you put two firms together with complementary R&D assets, I can imagine that it may not be exactly clear what innovations that will lead to, but I can imagine a reasonable argument that it will lead to more innovation. So I see that more as a theory of benefit than simply as a theory of harm.

I agree with what you were saying about it being harder to understand how the theory of harm would work if you're putting together complementary R&D assets from firms that are not currently using those assets to compete against each other in some specific innovation pipeline. If you put them together and then say there is some harm to general innovation, I agree—that is hard for me to understand.

So I think the concept of general innovation is important, but much more in terms of potential theories of benefit from putting together complementary capabilities.

Bilal Sayyed There is an innovation shield which, I think, is intended to constrain the Commission's ability to investigate or challenge acquisitions of small firms by larger firms where, although there may be overlapping innovation capabilities or even projects, that innovation or R&D represents a relatively small percentage of the ongoing innovation in the industry or among other firms engaged in similar R&D efforts.

In our preparation for this exchange of ideas, I think you suggested that this innovation shield, in most cases, eliminates the idea of harm through so-called killer acquisitions. What are your thoughts on the innovation shield? Is it necessary? Does it get them anywhere? What is its rationale for being in the document?

Mike Walker Why is it in the document? I guess because the Commission received a lot of feedback that these sort of killer-acquisition arguments are used, or at least raised, too frequently. That may be true. When I was at the CMA, one legitimate pushback we heard on these killer-acquisition arguments was that a small firm's being bought by a large firm is often part of the small firm's exit strategy. Entrepreneurs come up with a great idea, it is successful, and then they want to be bought out. That's a reward. And if you don't allow them to be bought out, you may reduce the amount of innovative entrepreneurial activity because you reduce incentives to be an entrepreneur. Fine. I think that's a perfectly reasonable argument.

I don't, however, think it is always a winning argument. I certainly don't think it is a winning argument in cases where there are a variety of firms that might be willing and able to buy that entrepreneurial small firm. In those cases, it's not clear to me why we should allow the largest firm always to be the one that buys it. I would also say that those arguments most typically came up in the context of GAFAM—Google, Apple, Facebook, Amazon, Microsoft, the sectors where this was most problematic because those firms are all gatekeepers.¹⁸ So if the idea is to impose some constraints on the Commission because it thinks these arguments have been listened to too often, I think that's a shame, because it completely kills the killer-acquisition idea.

There are definitely occasions where large firms want to buy a small firm that they see as a competitive threat, even if that small firm has not yet produced a product that is a direct product threat. And I worry that the Commission is giving up the ability to address that. So I'm not in favor of the innovation shield.

Bilal Sayyed I also wonder, at a practical level, whatever someone thinks of the theory of killer acquisitions or the likelihood of it, there are not many cases of killer-acquisition enforcement. So I also wonder why they are putting in place a restriction when they don't appear to be doing many such cases right now.

Is this really just a signal to the industry that, to the extent this is a theory of harm, the Commission will use it only very narrowly? The document says gatekeepers are not, in a sense, eligible to rely on this innovation shield. I don't think there is a direct suggestion in the document that the Commission will apply a different standard to acquisitions by gatekeepers. So I wondered whether this was simply a signal to the market that acquisitions by firms other than gatekeepers might avoid the burden of an investigation, even if the outcome might be the same if a gatekeeper were the acquirer.

Mike Walker I think that makes sense. Whatever else it does, it does send that signal, so you may well be right.

Bilal Sayyed The importance of a capabilities analysis—is this a broader theory that you think is a significant improvement on either current practice or existing guidelines?

Mike Walker When we are thinking about dynamic competition and how a market might play out, both in the counterfactual and with the merger, we are by definition dealing with things that are unobservable. We don't know what the future is, and so there is a lot of uncertainty. One reason the capabilities approach is very helpful in trying to understand how markets might develop and how a merger might affect that development is that it asks us to look at the capabilities of the firms that are merging and see what those capabilities tell us about the likely effect of the merger.

¹⁸ European Commission, [GATEKEEPERS PORTAL](#), Digital Markets Act.

If you have two firms merging that have very similar capabilities, then yes, they are largely substitutable. A merger between substitutes is generally not good for competition in either the short run or the long run. Where you have mergers between firms with distinct but complementary assets, it is much more likely that the merger is going to be pro-competitive because combined assets are more likely to lead to products or innovation that either firm on its own would not produce.

This is not some massively dissimilar idea. If you think in a vertical framework, this is exactly what you are doing when you put together complements. It is entirely standard that the initial direct effect of those mergers is often pro-competitive; any anticompetitive phase of harm comes through foreclosure. So this capabilities approach seems to me to be a good way of dealing with uncertainty.

I actually think most competition authorities, including the Commission, have been using a capabilities approach when thinking about dynamics and uncertainty for ages. Certainly there is some recent literature on it.¹⁹ When I read that literature, my reaction was, yes, that's right—that is basically how we do these things. So what is the improvement here? I think the improvement is that the Commission has now put it in the draft guidelines. Those guidelines spent nearly 70 times more on it than the 2004 Guidelines and not at all in the 2008 Guidelines—or maybe the other way around—but in any event they now deal with it explicitly, alongside the increased focus on dynamic competition and the uncertainty around it. That is why I think it is important that the guidelines spend so much time talking about capabilities. I think it is an unambiguous improvement in the guidelines, even if it is allied to what I think the Commission and most agencies already do.

Bilal Sayyed I've wondered for some time about both entrenchment and ecosystems. What is unique about ecosystems such that we at least imply that we are applying a slightly different approach to market definition and to possible competitive-effects theories? Why is any good ecosystem case not simply a unilateral-effects case, a coordinated-effects case, or current foreclosure or future foreclosure of an entrant? Why is that not sufficient?

Mike Walker What is the concern with ecosystems in merger control? I guess the concern is a merger between firms that are not providing either complements or substitutes, but in some way it increases the market power of the acquiring company. The standard way people think about ecosystems is a firm with a core product in which it has market power—Google Search is the classic example—and then building up an ecosystem around that to make it harder for other firms to compete against that core source of market power.

So you put together an ecosystem of other products. They may be complements in production or in usage—consumers use them along with the core product—and the idea is that this just makes it harder for other firms to enter. At some level, I agree that's not new. The idea that a vertical merger, for instance, might be anticompetitive because it makes it harder for firms to enter and compete against the upstream firm's market power isn't new.

¹⁹ See, e.g., Frederic Jenny, *Dynamic Capabilities Analysis and Merger Control: Is a Long-Delayed Convergence Finally on The Way?*, 29 NETWORK L. REV. 2025; Richard J. Gilbert, *Merger Enforcement in the High-Tech Economy: The Role for a Dynamic Capabilities Framework*, 86 NETWORK L. REV. 2025; Svend Albaek and Raphael De Coninck, *Dynamic Capabilities and EC Merger Control: A Difficult Match*, 94 NETWORK L. REV. 2025).

What may be new is simply the extent of the ecosystems that have been built up around those core bits of market power. That said, I'm not really sure what ecosystem-specific concerns add in merger control. Within the economic literature, it is quite hard to get a clear grip on exactly what the problem with ecosystems is, beyond the fairly standard concern of raising barriers to entry or possible foreclosure. So I think I'm quite sympathetic to your concern.

I guess on entrenchment—which I think is where you're really headed—I think that is much easier analytically. In markets where substantial net-growth effects are at work, and where a merger can tip or accelerate tipping, there are legitimate concerns that mergers can cause markets to tip earlier without the competition needed to ensure they tip to the best place, or that mergers can be used to entrench market power already generated by network effects. All of this seems to be tied to a broader concern: there are a handful of extremely powerful tech firms with frankly ridiculous amounts of market power, and competition agencies are broadly powerless to do much more than fiddle around the margins. We would quite like not to make the same mistakes we made 20 years ago. I think that is a very different concern, and I think it's reflected in these guidelines.

Bilal Sayyed You phrased it as a ridiculous amount of market power that some tech companies have, and that the Commission or other agencies are not in a good position to restrain or constrain the exercise of that market or monopoly power. From the U.S. perspective, market or monopoly power gained through a better product is not actionable; exclusionary conduct is what is actionable.

Of course, we're talking about mergers, and mergers may lead to the ability or incentive to exclude. Why do you say competition agencies are constrained in their ability to address these market-power concerns? I want to distinguish between cases where there is a bad act and where there is not. If there is no bad act, I don't think agencies should constrain the firms. That sounds like regulation, or ex ante regulation. Where there is a bad act, why are agencies limited in their ability to constrain or reverse that?

Mike Walker You talk about regulation as a constraint—absolutely. That's where we've ended up in Europe with the Digital Markets Act,²⁰ which is trying to constrain the market power of very large digital platforms. In the UK, the CMA has its Digital Markets Unit, which is trying to do something similar.²¹ Those are both regulatory constructs.

Now, we can argue about how successful or unsuccessful those regimes have been. I think the DMA has definitely done some good things, but there are also a bunch of investigations going on. The original idea was that the regulation would not be very controversial once in place and would simply lead to changes in behavior. I think the Commission has found it difficult to implement the DMA as successfully as it would have liked. But I think everybody agrees we would be in a much better world if those positions of quite significant market power had not grown up in the first place. And that's where merger control comes in.

So I think what the Commission is getting at when it worries about entrenchment or ecosystem theories of harm is that regulating firms with a lot of market power after the fact is really difficult. If we can avoid either the creation or the prolongation of that market power in the first place, that is better. If there is a

²⁰ Regulation (EU) 2022/1925, OJ L 265, 12.10.2022, p. 1.

²¹ Competition and Markets Authority, [DIGITAL MARKETS COMPETITION REGIME GUIDANCE SUMMARY](#) (Dec. 19, 2024).

concern that mergers are contributing to either the creation or prolongation of that market power, then I think it is legitimate for merger-control authorities to want to intervene. But I think we're going a bit beyond what is actually in the draft guidelines now.

Bilal Sayyed Do you think they get the balance right, or the description right, between scale and dominance?

Mike Walker There is clearly an attempt to respond to political pressure around national champions or European champions. The Commission is trying to respond to that pressure in an intellectually coherent manner. The argument that a merger that increases scale could have pro-competitive effects is not entirely illegitimate on its face. You can certainly imagine situations where increased scale leads to efficiencies that are beneficial to consumers.

I would, however, raise two flags. First, if you are going to tell me that this is a merger that is pro-competitive because it leads to a larger firm, and scale is an important competitive benefit in this industry, my question is going to be: why haven't we seen that scale grow organically? If scale is such an important competitive advantage, we would expect organically larger firms to be more successful and therefore to become the larger firms over time. Why have we not seen that organic growth? My second concern is that this can become an argument used to justify mergers that are really just pure national or European champion arguments of a kind that I think, broadly speaking, are being discredited. I have never really understood the idea that protecting a firm from domestic competition is going to make it better able to compete internationally. It just doesn't make sense to me.

I think the Commission has actually been very good on this. You can think of the obvious example of the rail merger a few years ago that it blocked—Alstom.²² The Commission had a lot of pressure on it to clear that merger, and it said no, we are not going to clear it. I think all of the market evidence suggests that was the right decision. So I think where this appears in the guidelines is a bit of a sop, to show that the Commission is not going to be entirely doctrinaire in dismissing these arguments. But I still think it is going to be a high hurdle to get over in any particular case.

Bilal Sayyed I'd be interested in your views, from a comparative perspective, on the EU, CMA, and U.S. Merger Guidelines²³—or, even if not articulated in guidelines, the framework used in reviewing mergers.

Mike Walker Look, I'm obviously biased here because I was the CMA chief economist when we issued the 2021 Merger Guidelines. So I think the CMA Merger Guidelines are a very good document. I also think these draft guidelines from the Commission are very good. One place where I'm happy to say they are better than the CMA's is around the treatment of efficiencies. That is an unambiguous improvement. The discussion of theories of benefit is, I think, an improvement. I would be extremely surprised if the CMA did not take up the language of theories of benefit, because it is a helpful framing.

²² Case M.8677 – *Siemens/Alstom*, Commission Decision of Feb. 6, 2019. The parties appealed to the General Court, which upheld the Commission decision. Case T-584/19, *Alstom SA and Siemens Mobility GmbH v European Commission*, Judgment of the General Court of 22 June 2022, EU:T:2022:386.

²³ U.K. Competition and Markets Authority, *MERGER ASSESSMENT GUIDELINES* (Mar. 18, 2021); U.S. Dep't. of Justice and Fed. Trade Comm., *MERGER GUIDELINES* (2023).

So I think the CMA Guidelines are great, and I think these Commission draft guidelines are good. The U.S. Guidelines are quite different. I like the U.S. Guidelines because they seem to me much more a signal of intent, and they clearly lay out different theories of harm. One criticism of those Guidelines at the time was that they were very legal and much less economics-driven than in the past. Obviously, there is a lot of pushback from the agencies that the economics has not changed and that it made sense to put all of it in the same place, perhaps in an annex, which I broadly understand.

But as guidance around how agencies will actually do the economics—which is the bit I care about—I think the Commission's draft guidelines and the CMA Guidelines are more helpful than the U.S. Guidelines. As quite a bold statement of intent as to how the U.S. agencies want to shake up merger control under the Biden administration, I think the U.S. Guidelines were good. I also like the way they highlighted labor-market issues, for instance, which was something that had been largely absent in Europe. I know the EU draft guidelines do talk a little bit about labor-market issues, and I think that's a good thing. But I still think the CMA Guidelines are great.

Bilal Sayyed I thought there was a significant difference between the Commission's 2024 draft on exclusionary conduct—or what I'll call the exclusionary-conduct guidelines—and the earlier guidance notice on exclusionary conduct, from around 2008.²⁴ The 2024 draft, which is still in draft, seemed to fall back on legal characterization of conduct into buckets and to move away from economic analysis. Do you see a lower profile for economic analysis in the draft merger guidelines as compared to the 2004 and 2008 Guidelines?

Mike Walker No, I don't. On the common areas between the 2004 and 2008 Guidelines and the new guidelines, the economics is pretty much the same. That makes absolute sense to me. All the analysis around static competition remains very important because, of course, that is still probably true of most mergers agencies look at. I don't see any great change there.

The changes are really in the way the Commission has extended the analysis when thinking about these dynamic issues, and I don't see the way it has done that as non-economic. I think these are economically very coherent guidelines. Because of the nature of this conversation, you asked me a lot of questions about where I might disagree with the guidelines, and of course there are places where I do disagree or where I think they could be clearer. But fundamentally, I think they are excellent draft guidelines. I think they're economically very coherent.

From my own experience, writing guidelines is really tough. I think the Commission should be commended for doing a great job. At the CMA, we didn't have to get our guidelines past 27 member states. I think it's impressive that the Commission has done this in pretty short order.

Bilal Sayyed Is there anything missing from the guidelines that you think should be in there? Not so much increased clarity, but is there something missing in terms of a theory of harm or a theory of benefit that would improve the guidelines?

²⁴ European Commission, (Draft) Guidelines on the Application of Article 102 To Abusive Exclusionary Conduct By Dominant Undertakings (2024); European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Dec. 5, 2008).

Mike Walker No, I don't think there is, or at least nothing has struck me so far. I don't get hung up on how many theories of harm there are, or how many theories of benefit there are. I don't think that's the right approach. What you need to worry about is the analytical framework for thinking about the competitive issues. And as long as you get that right, you will be able to analyze issues that arise in mergers both in terms of how they might harm consumers in the short and long run and how they might benefit consumers in the short and long run. And the guidelines fundamentally do a good job of that.

Bilal Sayyed Well, maybe that's the place to stop. Mike, thank you for joining. We didn't know each other before I emailed you or messaged you on LinkedIn, and I'm grateful for your participation. I think you've given us a perspective—I don't want to say it's unique—but it is certainly one I might not have heard had I not reached out and you agreed to do this. So thank you. Thank you for joining.

Mike Walker Thank you. It's been a pleasure and a very interesting discussion.

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