RETHINKING ANTITRUST

TECH FREEDOM #40

Bilal Sayyed, Florian von Schreitter, and Johanna Brock-Wenzek discuss the draft EU Merger Guidelines

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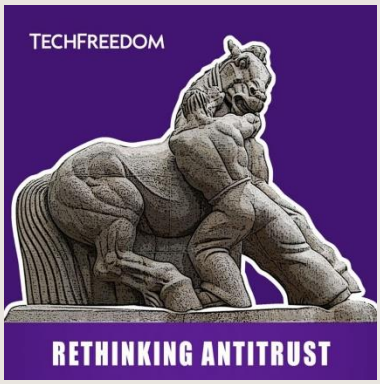
If anyone thought that this call for the creation of champions was an argument to deregulate, dismantle or reduce safeguards, they are mistaken.

Teresa Ribera, Exec. V.P. for Competition



The Draft EU Merger Guidelines: Evolution or Revolution?

The Commission's Vision of the (Draft) Merger Guidelines

Europe needs bold, innovative companies that can compete on the global stage. We have the talent. Now we must build the environment for Europe's next champions. Today, **we are publishing our draft merger guidelines to better support companies to thrive, scale, and innovate.** This is an ambitious approach to our competition policy - so we can meet the realities of the fiercely competitive global economy and boost our competitiveness, while **preserving the predictability and certainty that investors value** most in Europe. *Ursula von der Leyen, President of the European Commission*

We are updating the merger guidelines for a more complex world, making them a sharper instrument to support Europe's competitiveness and long-lasting prosperity. They provide a more dynamic and forward-looking framework to assess how mergers affect innovation, investment, resilience and the ability of European companies to compete globally. This helps us support operations that strengthen our Single Market, enable innovative firms to scale, and bolster Europe's strategic autonomy. But **their founding purpose remains unchanged: protecting strong, competitive markets without allowing an accumulation of power that can be abused.** In other words, keeping fairness at the heart of Europe. This means enforcing our rules firmly and protecting European companies and citizens from harmful market power. Because **our strength lies in clear rules, applied equally to all.** *Teresa Ribera, Executive Vice-President for Clean, Just and Competitive Transition*

***Bilal Sayyed*:** The European Commission has released draft Guidelines on the Assessment of Mergers under the EU Merger Regulation ("Guidelines").[1] If finalized, they will replace the 2004 Horizontal Merger Guidelines[2] and the 2008 Non-Horizontal Merger Guidelines.[3]

Welcome to RETHINKING ANTITRUST.[4] I'm your host, Bilal Sayyed. In this episode, we take a first look at the draft Guidelines and what they tell us about the future direction of EU merger control.

To take this first close look, I'm joined by **Dr. Florian von Schreitter** and **Johanna Brock-Wenzek** of Hogan Lovells. Florian is a counsel in the firm's Antitrust, Competition and Economic Regulation team, in Dusseldorf. He also leads knowledge management for Continental Europe. Johanna is in the same group and is a counsel in Munich, advising national and international clients on EU and German competition law, including merger control, cartel investigations, and related litigation before national authorities and the European Commission.

Florian and Johanna, thank you both for joining me today. Let's start with a broad question.

What drove the Commission to overhaul the Horizontal and Non-Horizontal Merger Guidelines?

***Florian von Schreitter*:** Thanks for having us. It's a pleasure. And a lot to unpack here, I think. I think it's fair to say that several forces converged.

There was no little development in the case law, which was perceived by many to have somewhat outpaced the old merger guidelines framework. The *CK Telecoms*[5] case in particular stands out, which, at least when still at the stage of the General Court, ran, from the Commission's view, the risk to expose certain gaps in how it treated non-coordinated effects and perhaps even the way the Commission could present novel theories of harm in general, because the guidelines of yore, so to

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[1] European Commission, Draft Guidelines on the Assessment of Mergers under Council Regulation (EC) No 139/2004 (April 30, 2026) ("Guidelines"); Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, OJ L 24, 29.1.2004, p. 1.

[2] European Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, OJ C 31, 5.2.2004, p. 5.

[3] European Commission, Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, OJ C 265, 18.10.2008, p. 6.

[4] 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 #40.

[5] Court of Justice (appeal): Case C-376/20 P, *European Commission v CK Telecoms UK Investments Ltd*, EU:C:2023:561; General Court (annulment judgment):Case T-399/16, *CK Telecoms UK Investments Ltd v Commission*, EU:T:2020:217; Case M.7612 – *Hutchison 3G UK / Telefonica UK*, Commission decision of May 11, 2019.

speak, technically still in force, but they were adopted in 2004, so a while back. That might've been another reason. Generally, a facelift was in order.

But also turning to the substance of the analysis, the 2004 architecture, speaking about the Horizontal Guidelines, that was built very strongly around static market share thresholds, concentration indicators and they treated efficiencies as more of an afterthought, to be honest.

So in terms of the former, the theories of harm. I think the Commission had a growing interest in bringing novel cases, novel theories of harm around entrenchment, ecosystems, the suppression of innovation, and monopsony, all of which stood awkwardly in the old framework, to be honest.

But on the efficiency side, it's got a lot of tailwind, I think. That's from the Draghi Report.[6] Mario Draghi, the former director of the European Central Bank, who was tasked with conducting a study, presented a report on ways for Europe to improve its competitiveness and lose its status as a laggard on the world stage, especially in economic terms. And one of the core tenets of this report was that European firms need scale to compete globally in an increasingly globalized world. Many perceived that the old treatment of efficiencies, with a limited time horizon for the analysis and a rather high evidentiary bar, couldn't deliver that, and the whole approach had to be more pro-merger in a way.

And that also, I think, connects the whole of Europe as a competitive jurisdiction or geography with the wider regulatory environment which the EU had tabled in the years preceding this reform, where we got the Digital Markets Act,[7] the Digital Services Act,[8] increased Foreign Direct Investment regulation at the EU[9] level and the Member State[10] level, and the Foreign Subsidies Regulation[11] which many of your listeners will know as an infamous piece of legislation. So that had to be acknowledged as a wider trend as well, I think.

***Bilal Sayyed*:** How did the leadership introduce the Guidelines?

***Florian von Schreitter*:** I think, as you say, often with these Guidelines they can be framed in a different way and what you just asked essentially boils down, I think, to a discussion that we had well in advance in Europe before the Guidelines were released: whether this is evolution or revolution and what it actually intends to do. I think, personally, it's neither and the binary itself is kind of a trap. It does correlate somewhat with the message from the very top, where Commission President Ursula

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6 Mario Draghi, *The Future of European Competitiveness*, Report to the European Commission (2024).

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

8 Regulation (EU) 2022/2065, OJ L 277, 27.10.2022, p. 1

9 Regulation (EU) 2019/452, OJ L 79I, 21.3.2019, p. 1.

10 Hogan Lovells, Foreign Direct Investment Global Legal Guide (visited May 14, 2026).

11 Regulation (EU) 2022/2560, OJ L 330, 23.12.2022, p. 1.

von der Leyen strongly emphasized the way in which the merger guidelines would improve competitiveness and help European companies scale.[12]

And in the background of that whole messaging lurks the spirit of the European champion, which is a kind of buzzword that's been floating around for years now, ever since the *Siemens/Alstom* case. That really was kind of the champion of the champion cases where two large train manufacturers, one from France, one from Germany, intended to merge and the Commission eventually blocked that.[13]

But at the same time you have messaging from Competition Commissioner Ribera who very explicitly tells her audience that if anyone thought this was deregulation, they are mistaken.[14] So that's kind of indicative of the Commission's spirit, so to speak, even though it's a new Commission in terms of the individuals in charge. The spirit that blocked *Siemens/Alstom* back then is probably still around. And it's worth noting perhaps what one of the officials who led the review back then—now in private practice—said right off the gate, I think it was even when the draft leaked, that based on the Guidelines as they're written now, *Siemens/Alstom* would still face a high obstacle and wouldn't clear easily.

So you could say that that new framework may not make it easier to translate a European champion argument into evidence-based analysis, but it cannot eliminate the need for that translation. You still have to substantiate your claims.

***Bilal Sayyed*:** Johanna, what do you think are the biggest conceptual shifts that practitioners, interested parties need to be aware of, need to understand, need to reflect on?

***Johanna Brock-Wenzek*:** Thank you Bilal. I think there are three major shifts that will matter in practice.

First, there are new time horizons. Under the old merger guidelines, merger benefits really had to materialize in roughly two years to be taken into account in the analysis. And now benefits that take more time, like five to seven years, have a proper place in the analysis.[15] This is especially important for industries like the defense industry, energy, telecoms, biotech mergers, where investments naturally just take longer to pay off.

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[12] Press Release, *Commission Opens Consultation on Draft of New Merger Guidelines* (Apr. 30, 2026) (Quote of Commission President Ursula von der Leyen).

[13] 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.

[14] Press Release, *Commission Opens Consultation on Draft of New Merger Guidelines* (Apr. 30, 2026) (Quote of Teresa Ribera, Executive Vice-President for Clean, Just and Competitive Transition); Suzanne Lynch, *EU Antitrust Boss Warns of Competition Risks to Merger Overhaul*, Bloomberg News (Apr. 20, 2026).

[15] The draft Guidelines adopt a flexible, forward-looking approach to the timing of efficiencies. See discussion at note 38, *infra*.

And then second, there is the type of evidence that matters. That was significantly expanded. Arguments such as supply chain security, sustainability benefits and resilience can now also be taken into account formally in the analysis. They've always played a role, but rather as political arguments on the side and the Commission often didn't really care about them and could easily dismiss them.

But now that they are formally in the Guidelines, I think it makes a lot of sense for companies to have their ordinary course of business documents reflect this evidence, as this can be very crucial in the merger review.

Third, there is a departure, to a certain extent, from numerical safe harbors. In the past, vertical mergers, if you were below 30% as a combined entity and the market wasn't too concentrated, you were probably fine. This 30% threshold has been removed entirely from the Guidelines and was not replaced. So it becomes more complex and uncertain, if you have an early stage assessment of whether a deal might face problems or not. With more opportunities, but with also more complexity.

***Bilal Sayyed*:** There was concern that incorporating concepts like resilience and sustainability would tilt the analysis away from economic analysis and more towards public policy goals in a way that was potentially dis-favorable to merging parties. But as I hear you describe it, and I think in reading the draft, resilience and sustainability are concepts that also can be captured in your efficiency claim. Improved resilience, improvement on the sustainability side.

***Johanna Brock-Wenzek*:** Absolutely. I think there is a lot of opportunity because it has always mattered, I think, and the 2004 and 2008 merger guidelines just didn't capture it, but it has mattered for a long time already and was important for companies and also for consumer benefits, really. Sustainability essentially is a consumer benefit and it's now officially recognized to be one.

So I think it gives a lot of opportunities to companies to make their case. But it doesn't change fundamentally how the Commission will analyze mergers. It's still very much based on the question of market shares and what it has been before. You have just more arguments to bring forward. And the old guidelines just didn't give any room to these kinds of benefits. So I think it's actually an opportunity for companies.

***Bilal Sayyed*:** What does dynamic competition[16] mean?

***Florian von Schreitter*:** Well, Bilal, does it even matter what it is? It sounds so cool. Can't we just have it?

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[16] The Commission has initiated a third party economic study of the dynamic effects of mergers "which will inform the review of the Merger Guidelines." This study is intended to be published in or prior to September 2026, with a public conference planned for September 2026. European Commission, Review of the Merger Guidelines: *Economic Study of the Dynamic Effects of Mergers* (accessed May 14, 2026).

No, just kidding. Of course, it's important to at least try to point at it and try to find it. I think it actually goes quite smoothly back to your earlier point about market shares and the way in which they play a role in merger control. If you take a really close look at the Guidelines, there are still some thresholds in them, but the wording around them is really, really cautious.

Paragraph 129, where you have a certain combination of market shares and HHI. The infamous Herfindahl-Hirschman Index is still mentioned, but it comes with a framing: these quantifiers may be indicative that a merger does not give rise to a significant impediment to effective competition. So if that's a safe harbor, it's about as soft as it gets, I think.[17]

Dynamic competition on the other end, I think, is the Commission acknowledging that the analysis has to go beyond that, to actually capture what a merger does to a market. It's the recognition that market shares are more of a snapshot and don't account for certain trajectories that you encounter in the market. The assessment of the competition authority, of the officials in charge of the case, has to engage with that trajectory and assess it.

Whenever innovation or investment is an important competitive parameter, the Commission now basically commits to looking at what the Guidelines call dynamic competitive potential, especially of a target in an M&A transaction.[18] That is the business model, the investment track record and the innovation capabilities. So it goes to look beyond just market shares. And that comes with three lenses.

One lens looks at how the companies compete over innovation, both at specific product level and general R&D level. The second looks at competition over investment, including suppression theories of harm where the Commission might argue that a transaction would dampen what the parties or their competitors would otherwise have invested absent the merger. And the third lens is counterfactual reasoning that allows departure from a strict prevailing conditions baseline where the evidence is robust. Generally, in that context, probably the evidentiary burden expands.

As I said, the Commission still refers to some thresholds, but market shares no longer carry the weight they did and parties can now expect a forward-looking case, forward-looking analysis which is anchored in pipeline data (especially in the pharma industry), R&D spend, and a closer look at investment plans. Generally, contemporaneous strategic documents, which may be informative for what the actual competitive potential on both sides of the deal is, and how the dynamics of the market may unfold.

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[17] The following market structures may be indicative that a merger between competitors does not give rise to a SIEC: (a) The merging parties have a combined market share below 25 %; (b) The merging parties have a combined market share below 50 % and the HHI delta is below 150; (c) Post-merger HHI is below 1 000; or (d) Post-merger HHI is between 1 000 and 2 000 and the HHI delta is below 250. Guidelines, ¶129.

[18] Guidelines, ¶¶ 80-83 (dynamic competitive potential); 324-326 (assessment of dynamic efficiencies).

It's also worth flagging that a loss of investment and expansion competition is now a standalone theory of harm.[19] So that's probably something we're going to come back to. This whole expansion of the Commission's thinking often cuts both ways, so dynamic competition might get you out of a tough spot that you would have found yourself in in the old world where there was a more technical look at just quantifiers like market shares, but it may also stand in the way of your deal in certain aspects or might create an uphill struggle where you have to defend your case against a novel theory of harm centered on a potential loss of investment, for example.

***Bilal Sayyed*:** They are adopting a general theory of inn**ovation** that may tie the number of competitors or level of investment to higher levels of innovation.[20] Is it your sense that the Commission has a basis for that kind of connection? I always thought of innovation cases as heavily fact-specific. But the way the Commission lays it out here, maybe it's not. Do you have a sense of a basis for that, or are the economists supportive of that? I am curious.

***Florian von Schreitter*:** So am I. We have to see how this unfolds. I think it's probably in a way similar to the term scale, or scale-up, or scaling. Innovation competition and dynamic competition—those were buzzwords of a similar degree, I think, which have been employed both by politicians but also by merger parties, especially those who found themselves hard pressed to get their deal over the finish line.

Personally, I think that one can only hope that whatever comes out of the application of this approach, especially in its very end of it being a theory of harm, that it is strictly fact-based. It's always a bit of crystal ball gazing when you try to assess what competition will look like under very dynamic developments, accounting for different factors, and what the baseline to compare it against is. I think in past cases, the Commission was very keen on looking at internal documents specifically for that, and tried to analyze the R&D pipelines, for example. One can hope that this remains as fact-based as I feel it was in the past, because handling this with care is now more important than ever.

***Bilal Sayyed*:** I remember matters where clients made a strong case that the combined firm would eliminate duplicative R&D, and that should be credited as an efficiency because those capital resources could be used elsewhere.

***Florian von Schreitter*:** Yes, absolutely. And just to add to that, sometimes those competing efforts may lead to results which are different in quality. One can hope that theories of harm centered in dynamic competition don't amount to the Commission saying that a product pipeline has to survive no matter what, even if the product that would have come out of it is inferior to what, for example, the acquirer has to offer or is in the pipeline. And that's not often easy to assess.

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[19] Guidelines, ¶¶ 169-174.

[20] Guidelines, ¶¶ 186-191.

***Bilal Sayyed*:** One of the things the Guidelines does is bring within, at least within the draft, a framework for thinking about entrenchment[21] (including in ecosystems), which reminds me of the conglomerate effects theories in older U.S. cases,[22] and labor market effects.[23] So let's talk a little bit about those frameworks. How meaningful, how significant are they? Where do they come from? Why are they there?

***Florian von Schreitter*:** Yes, why are they? I think in both cases it's one of the aspects that the Commission felt the need to catch up on, one of the developments that they needed to cover in the Guidelines. I think especially so for entrenchment theories of harm, because it faced a lot of criticism for basically applying that theory prematurely, in the eyes of some observers and certainly of the parties, in the *Booking/eTravel*[24] case. There were no horizontal overlaps between the parties, and also no clear, or perhaps even not at all, vertical links between the parties.

The Commission opposed the case based on an entrenchment theory, saying that you can harm competition basically by just structurally reducing market contestability without proving any specific foreclosure conduct that you would assess in your run-of-the-mill vertical merger case. And the Guidelines now pick up on that and basically require three things to support an entrenchment theory: (i) a dominant position in a "core market"; (ii) the assets to be acquired are related to the core market; and, (iii) those assets are important to competition, competition writ large, that their control restricts rivals' ability to enter or expand. So that's what entrenchment means. Basically, you widen your moat, which uncouples the theory of harm in this case from conduct in the market, which is what makes it still quite novel and interesting and not easy to substantiate.

It's probably something that will be of particular relevance to transactions involving gatekeepers under the DMA. We'll find that applied in digital ecosystems, as the authorities like to call it. I don't have a feeling for how many cases we are going to see, if I had to put a number on it, but I think it's definitely here to last. It caused quite a wave when it came around and now it's there. There's more to come, I think.

On labor markets, it's a bit more differentiated, I think. That's another trending topic. I think in the U.S. you also have a keen eye on labor market antitrust, especially on the conduct side. Now, the EU Guidelines are opening it up for merger analysis as well. But I think it's not to be confused with the Commission having decided that it is kind of a workforce protection agency in any way, shape or form.

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[21] Guidelines, ¶¶ 252-259.

[22] *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *See also* Complaint, *Federal Trade Commission v. Whole Foods*, ¶43.d (D.D.C. Jun. 6, 2007).

[23] Guidelines, ¶¶ 160-162.

[24] Case M.10615 – *Booking Holdings/eTraveli Group*, Commission Decision of Sept. 25 2023.

Companies are buyers of labor and workers are sellers, so the whole eye on labor markets is still under the monopsony label where merging companies might accumulate too much of buying power in a specific market for employees and that then can lead to a significant impediment to effective competition. But as I said, I don't think it's a general protective workforce spirit that's at work here, so I resist calling it completely transformative.

Comparing it to entrenchment theories of harm, I also dare say we're going to see relatively less cases of labor market monopsony. The live caseload will probably be rather small. It will affect highly specialized parts of the workforce where only a few employers compete for their labor. Absent that rather small pond, I struggle to say how the Commission would actually arrive at the conclusion that there could be a problem in the labor market in terms of buyer power.

***Bilal Sayyed*:** Johanna, we touched on this just a few minutes ago, but maybe we should return to it. Loss of general innovation competition. Expand a little bit on what we said a few minutes ago.

***Johanna Brock-Wenzek*:** It's very unspecific and I also think it's a very blurry concept of a theory of harm. I think as Florian said, it just remains to be seen how the Commission intends to apply this. I doubt that they will exclusively rely on this theory of harm to block any transactions. At least that would definitely go to the courts.

I think what is really important is that the companies, from an early stage of the transaction, be aware that innovation is important in the analysis if they are active in an industry that is driven by innovation and where R&D plays a major role. Even though it might not be exactly the same products you develop, you should think about how you, from an early stage, can present to the Commission, through board presentations and other documents that relate to the transaction and the efficiencies, that general innovation concerns are not an obstacle for the transaction, that the companies intend to stay innovative, even though there might be efficiencies that lead to giving up certain products as pipeline products, to the benefit of another one. This should be reflected in the internal documents from an early stage because it will be very hard for the Commission to prove this concern if they don't have clear evidence in the documents.

It's a very blurry concept and I hope it's not going to be applied too often, or at least limited to very clear-cut cases where the documents just look very bad. Otherwise it will be hard to prove for the Commission.

***Bilal Sayyed*:** What is the innovation shield?[25]

***Johanna Brock-Wenzek*:** It exempts certain acquisitions of small innovative startups with R&D projects from strict merger investigations. I think the idea is to allow those mergers to happen. However, there is a cap for it. The merging parties can't account for more than 25% of R&D spending

[25] Guidelines, ¶192.

in their respective industries. So it's not as easy as it first looks on paper. But in general, it's meant to enable the acquisition of small innovative startups.

***Bilal Sayyed*:** The draft recognizes that scale may be pro-competitive.[26] I think that reflects an influence of the Draghi Report. Am I right that scale is recognized as pro-competitive and is this a new shift?

***Johanna Brock-Wenzek*:** Yes, that is a fundamental shift. **Scale is now officially recognized as a positive factor in merger review.** It basically comes from saying that resilience is an important factor and, with scale, there may come resilience, and resilience might be a benefit to consumers.

But it can be mistaken for allowing dominance. **Scale is not the same as dominance.** While scale can be treated as a pro-competitive factor, this can only happen when the market is big enough to absorb such a large company without it becoming dominant and having excessive market power. So there still has to be a benefit to consumers.

It is not about creating European or national champions. It's meant to allow European companies to hopefully better compete globally. But I think it's also very important to note that, while the Draghi Report wanted more competitive companies, it didn't want dominant companies that eventually harm consumers in the EU.

Guillaume Loriot, the Commission's Deputy Director of Mergers, put it very well. He paraphrased Darwin and said that dinosaurs were very large and had big scale, but they went extinct because bodily strength didn't make them more resilient. The framework actually captures that idea. Being big isn't a virtue in itself, being big in a way that preserves competition and resilience is what the Commission is looking for.

***Bilal Sayyed*:** Is this focus on resilience, sustainability, and larger scale for goals that may be broader than, or may be viewed as broader than affecting what you might call "local markets" or European markets?[27] Is this a move towards industrial policy under the guise of improvements in competition law? What do you think?

***Florian von Schreitter*:** Many critics have argued that, even well before the release of the draft. I somewhat resist the framing. I understand why it's seductive because where it came from was pretty clear as soon as the Draghi Report was out. We had politicians in the European Parliament and elsewhere clamoring that Europe isn't doing enough and that merger control, and competition more generally, has to play its part. But to the extent that caused pressure in a way that might have distorted

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[26] Guidelines, ¶¶ 11-18.

[27] Guidelines, ¶¶ 9, 10, 15, 20, 34, 55, 92, 298-99, 302(e), 321-22, .

the orthodoxy of competition law beyond recognition, I think the Commission does a good job here withstanding that. Industrial policy, in a strict sense, where you pick winners, engage in some kind of favoritism, protect your incumbents, and shield national interests, is precisely something the Commission seeks to counter.

It has actually spawned an entirely new section, Part III of the Guidelines where the Commission deals with Article 21 of the European Union Merger Regulation,[28] a provision primarily known because it enshrines the one-stop-shop principle under EU merger control (meaning that if the jurisdictional triggers are met and the EU Commission has jurisdiction over a merger, it is the only European competition agency that will deal with that case, and decide the fate of that merger).

Article 21, in its fourth paragraph, also opens a back door for Member States to weave in their own particular national interests, but it does so in a deliberately limited way, allowing Member States to intervene, especially on grounds of national security. Because of rumblings in recent years and contentious cases where the Commission clashed with Member States under certain conditions, with the Member State interfering with "Golden Power Rules" (and similar)[29] in the results of merger reviews, we now have this Part III where the Commission signals that it will police the boundaries of legitimate interest carve-outs under the law.[30] Protectionist intervention which is just dressed in security clothing, if you will, won't be tolerated.

So I think what has changed is narrow. This goes back to Johanna's earlier point. We now have resilience, sustainability and also dynamic efficiency arguments in the Guidelines. They now live inside the substantive analysis. That is certainly doctrinally significant and also significant in actually conducting merger reviews, but it is not the same as outsourcing the entire assessment to the desires of an industrial strategy.

The interesting question, I think, is to what extent people, especially politicians, will in the end turn out to be pleased by what the result of this reform process is. Can both Draghi, the man who championed the champions, if you will, and the new theories of harm which we have in the Guidelines, be right at the same time? Yes, to a point maybe. We have a symmetric recalibration in the design and not just theory of harms, but also, officially acknowledged, theories of benefits that parties can present.[31] If

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[28] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, OJ L 24, 29.1.2004, p. 1.

[29] "Golden power rules" refer to Member States' foreign direct investment screening mechanisms allowing national authorities to block or condition acquisitions on grounds of public security or public order. See Article 21(4) of Council Regulation (EC) No 139/2004 (EU Merger Regulation), OJ L 24, 29.1.2004, p. 1; Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, p. 1.

[30] Guidelines, ¶¶ 366-376.

[31] Guidelines, ¶¶ 24-25; 32-36; 339-357.

that actually operates symmetrically, well, that's something to see as merger reviews unfold under the new Guidelines, when they are adopted. It's an open question, I think.

***Bilal Sayyed*:** Under what conditions will efficiencies outweigh harms or potential harms?

***Johanna Brock-Wenzek*:** I think it will matter in some instances, but under very narrow conditions, realistically. I think it will be most relevant for very capital-intensive sectors, with very long investment cycles: defense, energy segments, strategic infrastructure, also some clean technology. It might be possible now to show efficiencies that were not relevant to the review before, because of the extended timeframe and because resilience is now recognized as a consumer benefit. That could make a real difference for these companies.

But outside of these sectors, it may be very difficult to prove efficiencies that outweigh harm. The requirements may still be interpreted very narrowly. The efficiencies have to be specific to the merger itself, so that remains unchanged, and it has to be passed through to consumers.[32] Showing that may stay equally difficult. It is not something that is now designed to suddenly allow for mergers that would have been, otherwise, very problematic.

I think what has changed is the structure of the analysis and not the standard of proof. So it may still be difficult to prove those efficiencies. But efficiencies should be taken into account from the very early stage of deal planning, have these efficiencies discussed at the deal rationale stage. And if you can show that story, you might be successful, perhaps under very narrow conditions. The approval of *Airbus/Air France*[33] shows that this can be successful. I think there were very good efficiencies there, very well-documented efficiencies from a very early stage of the transaction. That might be a good model.

***Bilal Sayyed*:** Do the Guidelines treat gatekeepers in the same manner they treat everyone else?

***Johanna Brock-Wenzek*:** The Guidelines kind of pull the DMA designation into the merger analysis as a warning flag. Gatekeepers are excluded to some extent from the innovation shield.[34] The review regime doesn't really change but it requires more evidence to defend an acquisition by a gatekeeper. It's not a fundamentally different review regime that is put in place for them. Entrenchment theory may

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[32] Guidelines, ¶ 294 (efficiencies must be verifiable, merger-specific, and benefit consumers).

[33] European Commission, Daily News, *Commission Clears Creation of Joint Venture by Airbus and Air France* (Apr. 28, 2026) ("*As part of the investigation, Airbus and Air France submitted efficiency claims. … Engaging on this question early on … allowed the Commission to assess and provide guidance on the plausibility of the efficiency claims.*").

[34] Guidelines, ¶192.

be intended to fit gatekeeper business models.[35] So it's almost by design that they will just face strict scrutiny, but they have before as well. So it adds another layer of regulatory burden for them.

***Bilal Sayyed*:** How about the DSA?

***Johanna Brock-Wenzek*:** There is kind of an indirect influence of the DSA, but I would not overstate the connection. The DSA is about regulating online content and services, not about reviewing mergers. But the values it promotes, like media pluralism, transparency, accountability for large online platforms, that all feeds into how the Commission frames its concerns about platform consolidation. Particularly media diversity, I think is key here.[36]

Whether there will be coordination between the DMA, DSA and Merger Control Enforcement really remains to be seen.[37] We don't know whether the different teams will actually coordinate in practice. Hopefully, but there's nothing really in the paper about that. So it remains to be seen how that will interplay with the new Guidelines.

***Bilal Sayyed*:** Who are the winners and losers out of this rethink by the Commission? Who benefits here from this rethink of the Guidelines?

***Florian von Schreitter*:** Well, I think the Commission would say competition benefits. That is the one big winner. It's tough to say because there were a few industries where the broader audience expected protectionist tendencies, perhaps, or that the Commission sort of blessed individual industries with a lower bar to clear for merger control. I don't think that's happened. I wouldn't say there are very clear winners, but there's perhaps some alignment between the Guidelines and what the Draghi Report said.

***Johanna Brock-Wenzek*:** The Draghi Report really singled out a few sectors where it said that scale mattered for competitiveness: defense and aerospace, clean technology and strategic infrastructure. And I think, as we said before, for many of those industries, the extended timeframe for proving that mergers create efficiencies is a key structural change that might make a difference for

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[35] Guidelines, ¶253 (Commission will assess market power in ecosystems as well as individual markets for purposes of considering if a merger will raise entrenchment concerns). See also European Commission, Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law (C/2024/1645) (Feb. 22, 2024) at §4.4 (market definition in the presence of multi-sided platforms); §4.5 (market definition in the presence of after-markets, bundles and (digital) eco-systems).

[36] Guidelines, ¶¶ 372-74 discuss media plurality.

[37] DG-COMP (Directorate-General for Competition) handles enforcement of the provisions of the DMA and the Merger Regulation (in separate units). DG-CONNECT (Directorate-General for Communications Networks, Content and Technology) oversees the DSA, coordinating with the National Digital Service Coordinators. It is intended that relevant Directorates cross coordinate on the DMA and DSA.

those sectors.[38] For clean technology, the key benefit to consumers may often be gains in sustainability. That this is now something that can be taken into account is a win for companies active in the clean technology and sustainability sector. For the defense and aerospace industry, it's probably the resilience and scale arguments that may be beneficial to them, but I think it remains to be seen.

It's not closely aligned with the Draghi Report and I think it's also not meant to be, as Florian said. I think it was not the intention, at least not of the Commission probably, to make it easier for those sectors mentioned in the Draghi Report to generally become European champions. It still has to be shown that this is beneficial to the European consumers, and this remains as hard to prove as it always was.

***Bilal Sayyed*:** I think we've said this is not industrial policy masquerading as competition policy; maybe we have hedged a little bit on that. Do we see differences among the Commissioners, the different portfolios, on this question of what role competition should play in addressing broader policy or industrial policy concerns? In the U.S., we've sort of worked our way down to three large telecom carriers, maybe even two. Is that going to happen in Europe and is that going to happen because of a view that it's pro-competitive? I thought Draghi was focused on why Europe has so many telecom companies.

***Florian von Schreitter*:** I think he was. If we're talking about outside pressure, the telecom industry is probably one of the most vocal actors. I don't want to dive too deep on this because it's very complicated in terms of the economics that underpin the whole argument. But the clash of the whole thinking that you have here is basically the telecom industry arguing that it needs to merge and thus scale up whatever comes out of it, have a larger company, because that allows it to invest. And, the watchers of the orthodoxy say no, that can't happen, because if we only have two or perhaps even one strong player in the national market that would be very, very anti-competitive.

The background to that last line of argument is basically that the European internal market that we all came to embrace and love is still, in many instances, very fragmented. And telecom is one of those industries where that's true because we have national markets with individual regulation.

What we have seen these last 12 to 18 months or so is a continuous back and forth and public letters and conference discussions between those two camps with, especially, Commission officials saying

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[38] The draft Guidelines adopt a flexible, forward-looking approach to the timing of efficiencies. Direct efficiencies should in principle materialize "without delay," but the acceptable time horizon may be longer depending on the characteristics and dynamics of the market and the theory of harm. Guidelines, ¶ 306. For dynamic efficiencies, the Guidelines recognize that benefits to consumers may materialize over a longer period, provided they are verifiable and sufficiently certain to offset harm, with later benefits potentially receiving less weight in the balancing of harms and benefits. Id., ¶¶ 328, 350. The draft notes that time horizons of three to four years have been accepted in some sectors, reflecting a departure from a rigid short-term approach. Id. ¶ 306 & n. 380.

you can't expect us to blindly say yes to a 4-to-3 or perhaps even 3-to-2 merger just for the sake of scale. Because what's actually the inhibiting factor for you to scale up is the fragmentation of the market, and the regulatory obstacles that keep you from scaling and entering new markets. You could scale-up absent those obstacles. Those aren't merger-control-related obstacles.

Competition policy and merger control, in particular, only get you so far. In terms of pressures, that was your initial question. That's definitely there. Arguably, it's even on the inside of DG-Comp, with Teresa Ribera, the Competition Commissioner, not just having the hat of Competition Commissioner, but being in charge of a Clean, Just and Competitive Transition (her formal title). So, there's already a lot, and perhaps the embodiment of the friction between industrial policy-adjacent thinking and competition policy-related thinking.

***Bilal Sayyed*:** What's the playbook here for merger activity? Should firms change the way they act to get their deals done? How do firms get deals done with these Guidelines?

***Johanna Brock-Wenzek*:** I think it requires, as I said before, a shift in deal preparation from the very earliest stage, because it gives you so many opportunities to show, in the very early stages of the transaction, benefits for consumers (for example) or efficiencies that benefit the consumers later. So, it's good to get the positive story about why the merger is good for competition as early as possible in the deal documents and the ordinary course of business documents, and out in the world, really, to the regulator as soon as possible.

I think the Commission really encourages companies to engage as early as possible in pre-notification discussion about efficiencies. This is something that requires the companies to produce affirmative evidence trails that show the merger's benefits, and if that's not there, it will be harder to make use of all the new possibilities the Guidelines give companies to show efficiencies and positive effects for competition of their merger. Especially for DMA gatekeepers, who have to be aware when planning a deal that they may have a heavier procedural burden to meet, probably, with the new Guidelines. So this is also something they need to keep in mind.

***Florian von Schreitter*:** I think, perhaps, and hopefully definitely better structured, better reasoned decisions. That's not to say that they were bad in the past. Far from it. Especially the ones for the more problematic cases, or problematic in the Commission's view where they were extensive pieces of work with a lot of evidence adduced.

This new set of Guidelines is so comprehensive and has so many angles to it that it will allow more complex and dynamic reviews in how the decisions are argued. If that translates to vastly different outcomes, I would doubt that, actually. I don't think there will be dramatically different outcomes. There might be marginal cases which actually tip on the new concepts, and as Johanna said, well-prepared parties who look at the bigger picture and also get their larger advocacy right will probably have a few more wins than were conceivable five years ago.

But one also has to bear in mind that merger control will only get you so far in terms of solving the problems of competitiveness. For the vast amount of deals, it wasn't that much of an obstacle to begin with. I think we have had since 1990 in the EU just over 30 prohibition decisions. That's not much. So you can't say that there is a ridiculously high intervention rate which has thwarted deals continuously.

Of course, you never know what never left the boardroom because of certain concerns. Coming back to the initial question, I think we're not going to see wildly different outcomes compared to the world we were in a month ago.

***Johanna Brock-Wenzek*:** I would say it just becomes more complex. It definitely will not change the outcome substantially.

***Florian von Schreitter*:** I think there's more room to navigate, but there's also more rigor. That's all in the Guidelines, and it's perhaps a little something for everyone and we all know that makes for a good circus.

***Bilal Sayyed*:** A reference to a circus seems like the place to end.

Johanna, Florian, thank you for joining. I hope you enjoyed it. I think listeners have learned a lot. I'm going to spend a little more time on the Guidelines with some economists, get their view. But this is a good kickoff. Thank you both for joining.

I'm Bilal Sayyed. This has been the RETHINKING ANTITRUST Podcast. Thank you.

***Florian von Schreitter*:** Thanks for having us.

***Johanna Brock-Wenzek*:** Thank you. Thank you so much.