Rethinking Antitrust #46

More Ambition, More Discretion:
Anna Tzanaki on the Draft EC Merger Guidelines

Bilal Sayyed: *The release of the draft revised EU merger guidelines reflects a broader political moment in EU governance, EU economic governance.*[1] *Read alongside the Draghi Report,*[2] *the draft raises familiar questions about innovation, scale, resilience, competitiveness, and about how those priorities may be balanced or in tension within the Commission, including President von der Leyen and Competition Commissioner Ribera.*[3]

Welcome to Rethinking Antitrust. I'm Bilal Sayyed. Today we're going to do another discussion on the draft EU merger guidelines, this time with Dr. Anna Tzanaki. Anna is a Senior Lecturer in Law at the University of Leeds, where she specializes in EU and comparative competition law, mergers and acquisitions, corporate governance — I have your compilation, your edited corporate governance book — and digital markets and new technologies. She's, I think, well placed to help us.[4] So let's get right into it. Anna, why is the Commission moving to revise the 2004 and 2008 horizontal and non-horizontal merger guidelines?[5]

Dr. Anna Tzanaki: Hello, everyone. It's a pleasure to be here. Thank you, Bilal, for the invitation. That's a very good question — why do we have these draft guidelines, and why now? There is a technical answer and there is a more policy, political aspect, I would say. So the technical answer is that 20 years have passed, a lot of things have happened since we had the first horizontal merger guidelines in Europe, so the Commission perhaps wanted to incorporate the decisional practice and a lot of developments into the new guidelines.

Now, there could be a more pragmatic or almost cynical view, you could say, that this project was a little bit precipitated by broader considerations and things that have happened at the European

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[1] Draft Communication from the Commission, Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Apr. 30, 2026) [hereinafter Draft Guidelines]. Press Release, European Commission, Commission Opens Consultation on Draft of New Merger Guidelines, IP/26/918 (Apr. 29, 2026) [hereinafter Consultation Press Release].

[2] Mario Draghi, The Future of European Competitiveness, Part A: A Competitiveness Strategy for Europe (Sept. 2024); id., Part B: In-Depth Analysis and Recommendations (Sept. 2024) [hereinafter Draghi Report].

[3] Ursula von der Leyen has served as President of the European Commission since 2019. Teresa Ribera Rodríguez has served as Executive Vice-President for a Clean, Just and Competitive Transition, with responsibility for the competition portfolio, since December 2024.

[4] Dr. Anna Tzanaki is co-editor, with Florence Thépot, of the Research Handbook on Competition and Corporate Law (Edward Elgar 2025).

[5] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5 [hereinafter 2004 Horizontal Guidelines]; 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 [hereinafter 2008 Non-Horizontal Guidelines]. The Draft Guidelines would replace both. Consultation Press Release, supra note 1.

level. One of those things was the Draghi Report. And following on that, it was the President of the European Commission who insisted to precipitate the revision of the guidelines.[6]

As an aside — it's interesting, because I work on this area and I was very curious to see when we'd have the guidelines. So last year I was at a conference and there was a high-level EU Commission official there, and I asked him, oh, when are you going to have the guidelines? And he said, oh, you know, these things take years, it will not be here until '27, blah, blah, blah. And then when I saw the draft and how the process was precipitated, I was kind of laughing in the back of my head a little bit. So things can happen if there is a political will, which is good or bad.

Bilal Sayyed: So, okay. So that touches on something I wanted to mention too, which is, I'm not as close to Europe as you, either physically or academically or in practice. But I did go to some of the events that they held around the draft.[7] And my sense, both from those meetings and from things leading up to the draft and reaction to the Draghi Report, was that the leadership — I should be careful — the leadership of DG Comp, the staff leadership, did not think there was a lot that merger control could do to respond to the points in the Draghi Report or the larger questions. And as you noted, they did move quite fast to get this draft out. And we'll talk about it, but I think the draft is in fact at least potentially responsive to the Draghi Report and brings in some things that I think other guidelines should have. And so I am usually more of a technocrat and don't really want the political influence in antitrust. But I think the political leadership here has actually been really beneficial, potentially shaking not only DG Comp but other agencies to make changes that are potentially pro-growth. You think of that as cynical; I think of it as admirable.

Dr. Anna Tzanaki: It is. European politics are more complicated. We have so many member states, but it could also be beneficial in the sense that we're not so divided sometimes at federal level. The Commission is a political body, but then DG Comp is a very technocratic institution, as you say. So this is good and bad.

Having said that, you're totally right that you can sense a little bit — when the draft guidelines themselves were released on the 30th of April, you could see the slightly different positioning of Ribera, who represents this technocratic part of the European Commission, DG Comp — that she said basically, we'll more or less do the same business as usual, but the wrapping is a little bit different, but we're very firm in protecting consumers and so on. And in the press she has reiterated

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[6]Ursula von der Leyen, Mission Letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition 5 (Brussels, Sept. 17, 2024) ("Your work to modernise competition policy will include a review of the Horizontal Merger Control Guidelines."). The President returned to the theme. Statement by President von der Leyen with President Costa following the informal EU leaders' retreat, STATEMENT/26/405 (Brussels, Feb. 12, 2026) ("We need European champions. That is why we are revising the merger guidelines. A draft will be presented in April, followed by consultations with the Member States.").

[7]DG Competition held three stakeholder workshops in the course of the review: Workshop 1, Scale, Competitiveness and Efficiencies (Dec. 4, 2025); Workshop 2, Innovation, Investment, Sustainability, Labour and Democracy (Jan. 20, 2026); and Workshop 3, The draft text of the Merger Guidelines (June 10, 2026). European Commission, Review of the EU Merger Guidelines - Stakeholder Workshops. In addition, DG Competition hosted a conference, Shaping the Future of EU Merger Control, on March 5, 2026. European Commission, Shaping the Future of EU Merger Control - Conference.

many times also — merger control, and other officials as well, other officials from the Commission, that merger control is not the biggest problem here. It is maybe a tiny part.[8]

But at the same time, the Draghi Report and von der Leyen, the President of the European Commission, do understand that the problem is the fragmentation or the integration of the European market. If we want to go ahead with innovation and all this other stuff that are very relevant for merger control, we need to finally act as a single market. And that's not an easy feat, but perhaps this evolution of mentality does help quite a bit. So everybody understands — like, even the political leadership understands — that perhaps it's not the biggest problem, it will not make such a huge difference. But I think perhaps even psychologically it makes a difference. Things need to move, so we start moving. So I see that as a positive indeed.

Bilal Sayyed: Yeah, that's I think the same when I'm thinking about it. And I actually think it might have a bigger influence than people are suggesting or coming to. So maybe that's the perfect lead-in to why I feel that way — but I'm going to ask you why I feel that way. So what do you think are the biggest or most important changes in the draft? And do they align with these broader concerns about European competitiveness that motivate or come out of the Draghi Report? Or, Cristina Caffarra said something which I thought was very funny but very true: how many reports do we need from former Italian prime ministers before we get moving?[9]

Dr. Anna Tzanaki: Yeah, that's right. The problem with Europe is not the talent or the inspiration. The action is a little bit of a problem. I agree with that. Well, I think here, I'm very impressed indeed how quickly the President felt that we need to act on those declarations or promises that we make. Okay, we've concluded on these findings, we have these reports — in fact, what do we do with this? We either can pore over them or we do something, otherwise we'll be extinct, kind of. And some people are very alarmist around this debate.

So what do I see as the major changes? I think a very important thing that happened is that we don't see the merger regulation as a technocratic piece anymore. It is put in a broader context. It is there to serve the integration of the internal market. And we see this in other areas of European competition policy. The European market integration was always an overarching principle — in some areas it was not so obvious, but for example, in vertical restraints, which you don't have, you don't have this in the US, for example. Now we see this in merger control. I think there is a reason.

[8] Executive Vice-President Ribera's statement accompanying the draft emphasized continuity: the guidelines are "a sharper instrument to support Europe's competitiveness" providing "a more dynamic and forward-looking framework," but "their founding purpose remains unchanged: protecting strong, competitive markets without allowing an accumulation of power that can be abused." Consultation Press Release, supra note 1. She had made the point more sharply before publication, telling Bloomberg that it was not necessary to relax the rules and that "[i]f relaxing means tolerating abuses, the answer is obviously no." Suzanne Lynch, EU Antitrust Boss Warns of Competition Risks to Merger Overhaul, Bloomberg (Apr. 20, 2026).

[9] Cristina Caffarra is an economist and co-founder of the CEPR Competition Research Policy Network. The reports are Mario Monti, A New Strategy for the Single Market: At the Service of Europe's Economy and Society (May 9, 2010); Enrico Letta, Much More Than a Market — Speed, Security, Solidarity (Apr. 2024); and the Draghi Report, supra note 2.

And related to that, we see also all these other objectives, as you said — competitiveness, resilience, sustainability, things like that — that it's not obvious that should be part of merger control, but somehow in this draft the opening paragraphs make clear that whatever the goals of the EU are, merger control needs to be tied to that somehow.[10] So merger control is part of a bigger project — this is made very, very clear. So this is the philosophical change, let's say.

Then I think a hugely significant change is the move towards more dynamic competition, language and narratives and theories and efficiencies — and efficiencies now are everywhere. This goes back again to the Draghi Report, which talks about, we need an innovation defense. So we need to make it workable, explain to companies how they can actually make an argument like this. What evidence they need to bring and so on. He also talks about remedies.[11] Now, remedies are not on the table in this reform, because the guidelines are only about the substantive assessment of mergers.[12] But I'm pretty sure in the near future, if the guidelines pass in something close to their current form, it will be a chain effect — other issues will need to be reconsidered. So I do think it's quite a significant change.

Having said that, DG Comp, as we said, it's a very traditional technocratic institution, so I don't expect that in practice things will change massively. But still, for the history and the institutional nature of that institution, I think still it's quite a significant change.

Bilal Sayyed: So I think I'm going to ask you a question that we probably didn't think about or prepare for. But 20, 30 years ago — maybe slightly more, maybe around 30 years ago — I remember Bill Kovacic telling me that when the electricity markets started to move towards a deregulated structure as opposed to a regulated structure, he mentioned one company — this was in class — he mentioned one company that basically said, okay, I need to remove from the leadership all the people who grew up in this regulated space, because they're not going to know how to react to a deregulated market. I wouldn't — and I'm not calling for the firing of the leadership, the career leadership, the civil service leadership in DG Comp or DG Connect or wherever. But I wonder if in a couple of years, if the staff — this is not a criticism of the staff — but if you don't see results, if you continue to have complaints from merging parties that their efficiency claims aren't being taken into account, if the next step really is to get a change in leadership that is on board. Now, I read the draft as suggesting they are on board, but of course the proof will be in implementation. But that's an observation.

[10]See Draft Guidelines, supra note 1, ¶¶ 7–13, and in particular ¶ 9 (EU merger control "supports the EU's broader policy objectives, including the competitiveness and resilience of the internal market") and ¶¶ 11–13 (scale-enhancing cross-border mergers may be procompetitive and contribute "to the further integration of the internal market").

[11]The Draghi Report proposed permitting merging parties to show that a transaction "increases the ability and incentive to innovate, allowing for an 'innovation defence.'" Draghi Report, supra note 2, pt. B, at 299. On remedies, it recommended that the Commission "increase the weight of innovation and investment commitments, as well as efficiencies," and "[f]ocus remedies on commitments to invest according to detailed time schedules, launch of services or access to data or platforms, rather than partial de-consolidations." Id. at 74.

[12]The Commission's remedies practice is governed by a separate instrument, unchanged by this review. Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008 O.J. (C 267) 1.

Dr. Anna Tzanaki: Interesting, I think. And I haven't thought about this, but a reaction that comes to my mind now: I think you're totally right that here what is asked for is a cultural shift. Things have moved, technology has moved, geopolitics has moved. We need to rethink ourselves in the first place. I think this is what the political leadership is asking, in a way. They don't tell them, 'Oh, throw out your competition books; let's go against our industrial policy.' I don't think this is what they're trying to do. So from that point of view, I'm sympathetic to what the Commission is trying to do. So it's not that it's all about politics.

The issue about accountability is huge, I think, because a lot of good things are in the guidelines — but perhaps we'll discuss this more later. But one thing that it's also quite striking is that the Commission has a lot of leeway with the new theories and the new contexts that they have provided, with so many factors. So a question of accountability arises from many points of view. And if that accountability cannot come from the courts, through a judicial route, then perhaps we will see some countervailing political accountability — perhaps someone needs to deliver something; if they don't, maybe some things will happen. I don't know, it's a speculation. But it's a valid speculation. We will have to see how they will implement first the guidelines that they came up with. First, we need to see what will be the end result of this consultation process. And then we will see.

Bilal Sayyed: They do suggest that they are on pace to get these out, if not by the end of this year, by early next year. What they seem to envision is a six-month process of comments, consultation. They have a workshop in September to look at another report on dynamic efficiencies.[13] So I think they're trying to move pretty fast, and I compare it to the —

Dr. Anna Tzanaki: It's incredibly fast for Europeans, to understand this, which is good. It's good. Like, I think this is a very positive sign, that if we want to act on things, we can do it. So I applaud them for that.

Bilal Sayyed: Agree. I still feel like I have a chance to comment on the 2024 draft exclusionary conduct guidelines, since they're still sitting out there.[14] But I think that's more important. Since I mentioned that, I wonder if the ethos that's been incorporated in here may find its way into the exclusionary conduct guidelines too, when they turn back to them.

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[13] The consultation ran from April 30 to June 26, 2026. Consultation Press Release, supra note 1. The review process was considerably longer, beginning with a Call for Evidence and an initial consultation in May 2025, a General and In-depth Consultation from May to September 2025, the stakeholder workshops and the March 2026 conference, supra note 7, and continuing after this conversation was recorded. Id. The report referred to was published on August 24, 2026. European Commission, Directorate-General for Competition, Economic Study on the Dynamic Effects of Mergers (Publications Office of the European Union 2026) (vol. 1, Main Report; vol. 2, Detailed Literature Review) [hereinafter Economic Study]. It is to be presented at an economic workshop in Brussels on September 11, 2026.

[14] Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (2024). See also Rethinking Antitrust Podcast #12.

So you're coming on the podcast after I've talked with Greg Werden and Mike Walker. Mike Walker was a former chief economist at CMA.[15] He's very excited about the inclusion of a broader discussion of efficiencies, the long-term dynamic efficiencies, moving away from static concepts. But how do you interpret dynamic competition, dynamic efficiencies, and also theories of harm? This forward-looking dynamic approach isn't only pro-merger; it opens up the door to theories of harm that are also forward-looking. Now, maybe they've been a focus over the past decade without people recognizing or accepting that this was a dynamic approach. But there's positives and negatives — well, I should say there are opportunities and constraints with this sort of dynamic approach.

Dr. Anna Tzanaki: I think it's so exciting. As I said, I think from a position where we were very defensive towards issues of innovation, and looking at them cautiously within existing frameworks, now we took a leap of faith and suddenly we say, okay, we need to tackle the elephant in the room. We need to put it at the center and look at it from all sides, both harm and benefit, and see what we're going to do with it. So killer acquisitions or other innovation theories of harm are not completely new to EU merger control. What is new is that we start to think about the issue more holistically, I think.

And I think it's quite significant that there is a repositioning by the European Commission, that does not want to portray itself anymore only as an authority that looks at innovation as a bad thing. They want to show that, look, we take innovation seriously; efficiency is an important part of the story for certain transactions. And this is why I think we see the innovation shield in the draft.[16] And I think this was an idea — I said a lot — that perhaps Commissioner Ribera was a bit more careful, but I think the innovation shield was one of her ideas. She wanted to portray the whole project in a positive way, not only for press reasons, but I think for substantive reasons also — that we have some safe harbors there for innovation. We try, in other words, to see, as I said, both the positives and the negatives in these innovation theories. And I think that's quite significant.

Bilal Sayyed: So, there have not been anywhere in the world a lot of killer acquisition cases.[17] Notwithstanding the interesting idea and theory. Big companies have been buying small companies for a long time, including startups. Liad Wagman and others have a nice paper going across a couple

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[15] Rethinking Antitrust Podcast #41, Guidelines Without Guidance: Greg Werden Evaluates the Draft EU Merger Guidelines (May 2026); Rethinking Antitrust Podcast #42, Mike Walker on the EC's Draft Merger Guidelines: Taking Efficiencies Seriously! (June 8, 2026). Mike Walker served as Chief Economic Adviser at the U.K. Competition and Markets Authority. On dynamic efficiencies, see #42 at 4–5, 8; his overall assessment — that the draft guidelines are "very good" and "an unambiguous improvement" — appears id. at 14–15.

[16] Draft Guidelines, supra note 1, ¶¶ 192-201 (Innovation shield).

[17] The theory originates with Colleen Cunningham, Florian Ederer & Song Ma, Killer Acquisitions, 129 J. Pol. Econ. 649 (2021), who concluded that "conservatively, 5-7% of pharmaceutical acquisitions in their sample qualify as killer acquisitions." Economic Study, supra note 13, vol. 2, ¶ 5.17, at 92. The transactions identified since have largely been screened candidates rather than adjudicated cases: a 2024 study commissioned by DG Competition flagged 92 of 3,193 European pharmaceutical transactions as "potential killer acquisitions," meaning only that no technical or commercial explanation for a post-transaction discontinuation could be found in public sources, id. ¶ 5.18, at 92-93, and a study of 470 GAFAM acquisitions identified 26 involving nascent competitors, id. vol. 1, ¶ 7.35, at 89. The Study identifies no consummated transaction as a killer acquisition; its one named candidate, Adobe/Figma, was abandoned. Id. vol. 1, ¶¶ A2.18-A2.22, at 294-97.

of industries[18] showing how buying up small firms who are probably not competitors, either ever or at the stage they're acquired, it's a common practice. It's a build or buy decision.

Dr. Anna Tzanaki: A hundred percent. Now, there is a political twist to this too. So the killer acquisition story was not just a technical issue for the European Commission either. This was again seen as kind of an existential threat, because the fear was not that any big company will acquire a small company; the fear was that big tech companies will come and buy European small startups. So it was seen that perhaps it is a threat again to the internal market, to the innovation made in Europe, and therefore there was perhaps an extra sensitivity. And then I would say perhaps it had to do with a person — the previous Commissioner, Vestager, has a different profile[19] or preferences in terms of enforcement to the current one, probably.

Bilal Sayyed: And I remember when Ribera was selected, chosen — however that process works — at least I do remember some concerns, comments in the US about putting a socialist in charge of competition. I agree with you from wherever we are, 3,000 miles away — it looks like she's a little bit to the left of the President, and wanting to say, we're still going to enforce.

Dr. Anna Tzanaki: She has a lot of experience. She strikes me as a very grounded person. She's not so much in the air.

Bilal Sayyed: Yeah. I mean —

Dr. Anna Tzanaki: There's the rhetoric.

Bilal Sayyed: There's no sense she fought — and maybe this is a question — I don't have any sense that she fought the release of the guidelines, and you said that...

Dr. Anna Tzanaki: She understood — and that's why I'm saying she's a very smart woman. She seems to me simple, grounded. She understands what she needs to do, she understands that it's her mission; she's also politically accountable for this. And then I think the term socialist or not is very European relative. So for an American it may sound, oh, the end of the world, but I'm not sure it's like that for all the cases. Let's put it like this.

Bilal Sayyed: Yeah, yeah. So I agree with you. I just remember that commentary and suggestion that it was going to slow down the response.

Dr. Anna Tzanaki: The dynamics are interesting. So perhaps we'll get a more balanced outcome in the end because of that, because you don't have like a one-sided view. And this is a good thing about European politics. Perhaps we see a good merging from that point of view. We'll see.

Bilal Sayyed: Well, it's funny. I think when Mike was on the podcast — I just can't remember if we kept this in — I said, all these questions we've been talking about are the negative aspects of it,

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[18] See Ginger Zhe Jin, Mario Leccese & Liad Wagman, M&A and Technological Expansion, 33 J. Econ. & Mgmt. Strategy 338 (2024); Ginger Zhe Jin, Mario Leccese & Liad Wagman, How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy, 89 Int'l J. Indus. Org. (2023); Federal Trade Commission, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (Sept. 2021).

[19] Margrethe Vestager served as Commissioner for Competition from 2014 to 2024, latterly as Executive Vice-President.

and it wasn't intended; it was more, what do you think of things? And he had some concerns, or questions, but at the end he said, look, these are really good, on the whole. He says, I'm excited — I'm paraphrasing — he's excited about them. And I think I said something like, yeah, it's very admirable that people in government are actually trying to do a good job that builds on and takes on expertise. Even if it's a political reaction ...

Dr. Anna Tzanaki: Exactly. She tries to do it seriously, I think, and she relies a lot on her staff, so I respect her.

Bilal Sayyed: Yeah. My experience with socialists is they're very serious, very dour, and they want to — not much fun. But I'm kidding. What do I know? What do I know? But anyway, all right.

So, help me understand where concerns about innovation were driving what I'll call restrictive approaches to mergers. Of course, because the Commission has thought about innovation concerns for 10, 15 years — I'm sure they're always thinking about it, but I think putting it front and center in cases, it's probably 10 to 15 years old. What were they doing that some thought was unhelpful in developing a culture of innovation, or support for innovation, accepting the risks that come with an innovation or efficiency defense?

Dr. Anna Tzanaki: It's clear they've accepted the fact that a merger is a route to exit. So for entrepreneurs it may be hugely important to know that, VCs are out there or big firms are out there to acquire them at some point, and then perhaps they have more incentives to innovate in the first place. So I think this is something that the Commission explicitly acknowledges.[20] It's not that they accept it unquestioningly — and that is why we still have innovation theories of harm — but they take it on board. Which is to say they do try to look at all the sides, as I said before, and I think that's why we have this innovation shield, and they try to rebalance a little bit the debate, but also in the draft to maybe delineate a little bit better in which cases really killer acquisitions — because it's a very broad theory and term, in fact. So where does this really apply? Can entrepreneurs really rely or have a safe harbor? No. Is there a chance that the Commission can come after us or not? This will play in evaluations. We see it already happening. So the repercussions of this are quite huge for European startups as well. And I think they understood that.

Bilal Sayyed: Well, I think it's a positive. We could spend all day talking about innovation. That to me is the very strong positive aspect of the draft. I think scale, the acceptance of scale, is potentially a benefit under some conditions.

Dr. Anna Tzanaki: Acknowledging reality.

Bilal Sayyed: Again, when I was younger, pre-2004/2008 guidelines, what I would hear was that Europe protected competitors and not competition.[21] I think the 2004 guidelines and even the 2008 non-horizontal guidelines really should have put that to rest. There were theories of how foreclosure might affect competition, not just competitors. And I really wonder if this idea that — this is a question — if this idea that Europe was not open to innovation or was more risk-averse or whatever

[20] Draft Guidelines, supra note 1, ¶ 16 (acquisitions of start-ups "are unlikely to give rise to competition concerns").

[21] See, e.g., William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels (Nov. 9, 2001).

the word is — you know better than me — is that true? Was it this attitude that has created the difficulty for Europe? It's something else, I think. It's not attitude. There are people there that build businesses.

Dr. Anna Tzanaki: I think initially, at the very beginning of the merger regulation, we had the dominance test.[22] So that created issues, because in order to prove that test, things were interrelated with size and so on. So there were allegations that that test operated sometimes against companies almost like an efficiency offense rather than defense. But I think we're way past that era, so we're not there.

Having said that, there is also some philosophical tradition in the EU, the ordo-liberalism school, that we value the competitive process as such, the liberty of other businesses to participate in the marketplace and so on. In other words, it was not efficiency at all costs.[23] This was always clear in Europe. Now they do try to modernize that thinking a little bit, which I think is hugely significant. They understand the reality that we have a US and China, and we can still have this mantra, but it will not help us economically or otherwise to survive in this world. So perhaps we should be a little bit more pragmatic. That is how I see it, at least. And I think, as you say, this is a positive thing. I don't see it negatively in any event.

Bilal Sayyed: So, of course, there are a lot of theories in the guidelines, or in the draft, that at least I'm sort of skeptical of their practical utility, in the sense of finding cases that really fit. So the guidelines have what I would call an extensive discussion of common ownership. They have a few paragraphs — more than, I don't know what a few is — on portfolio effects.[24] These — I'll call them theories of harm or vectors of harm — have been around for a long time. Not a lot of cases. I'm wondering what you make of the inclusion of these theories in the draft. And is there tension between dynamic competition theories — moving away from, at least in some instances, a static model — but also bringing into the guidelines as theories of harm, things like common ownership, portfolio effects, which, I think some portion of the competition community is skeptical that bringing cases around those would have positive effects.

Dr. Anna Tzanaki: This is again hugely interesting. I was a bit surprised to see especially common ownership in the draft, but this was great news for me, because I have a lot of work in this area. So

[22] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1989 O.J. (L 395) 1, art. 2(3) (concentrations that create or strengthen a dominant position as a result of which effective competition would be significantly impeded); Council Regulation (EC) No 139/2004 of 20 January 2004, 2004 O.J. (L 24) 1, art. 2(2)-(3) (adopting the significant-impediment-to-effective-competition test). On efficiencies under the successor regime, see 2004 Horizontal Guidelines, supra note 5, ¶¶ 76-88.

[23] Dr. Tzanaki points to the following, the first three broadly supporting and the fourth contesting the ordoliberal influence on EU competition law: Flavio Felice & Massimiliano Vatiero, Ordo and European Competition Law, in 32 Research in the History of Economic Thought and Methodology (Emerald 2014); Christian Ahlborn & Carsten Grave, Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective, 2 Competition Pol'y Int'l 197 (Autumn 2006); Elias Deutscher & Stavros Makris, Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus, 11 Competition L. Rev. 181 (2016); and, contra, Pınar Akman, The Role of 'Freedom' in EU Competition Law, 34 Legal Stud. 183 (2014). On the ordoliberal reading of the Digital Markets Act, see Manuel Woersdoerfer, The Digital Markets Act and E.U. Competition Policy: A Critical Ordoliberal Evaluation, 22 Phil. of Mgmt. 149 (2023).

[24] Draft Guidelines, supra note 1, ¶¶ 162-168 (minority shareholdings and common ownership); id. ¶¶ 287-96 (portfolio effects).

it's fascinating. I have to compliment the Commission for doing that, for — I think here they did try to follow best practice. The US guidelines have a section on minority shareholding, partial acquisitions, common ownership[25], and also the UK guidelines have a section on minority shareholding.[26] So I don't think this is as revolutionary.

Now, I recognize that the paragraphs that are in the guidelines are not perfect. They could be substantially improved.[27] I do understand that the guidelines are already very long — it's almost 100 pages — so if you expand on each individual issue... But nonetheless, I think if you put something in the guidelines, you need to be a little bit careful how you present it. You need a framework for how to implement those things.

Now, on the common ownership specifically, I think the problem is that those situations standalone — and the Commission is clear about this[28] — they cannot capture, because non-controlling minority shareholding standalone we cannot capture; only if it's a part of the context they can be evaluated. And of course, we always need to evaluate the context. So I don't see anything groundbreaking in that. It's not that they said, as in the US, they can do it — we have Texas v. BlackRock and so on now pending in the courts in the US[29] — that it's a standalone case based on common ownership concerns. Here, the issue is that we have a regular merger and then there are a lot of cross-shareholdings in that industry. And in order to estimate, starting from structural indicators and so on, market shares, HHIs, you need to understand the industry. So I think it's good that they do that.

And they cite the case — they cite the Dow/DuPont and other cases, where they have an annex.[30] Common ownership was not a decisive element in that case, but they did say that common ownership here may raise issues or underestimate the degree of market power or effects in ways we don't understand, because the problem is we don't understand control. What happens in these cases in terms of corporate governance, if we have minority shareholders that are not formally controlling — we don't have the de jure control — it's messy. You have to see, based on evidence, who has

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[25] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 11 (Dec. 18, 2023) [hereinafter 2023 Merger Guidelines] (partial ownership, cross-ownership and common ownership).

[26] U.K. Competition and Markets Authority, Merger Assessment Guidelines ¶ 2.13 (CMA129, Mar. 18, 2021) ("acquiring material influence over another").

[27] For Dr. Tzanaki's specific proposals for improving the paragraphs on common ownership and minority shareholding, see Anna Tzanaki, Reviewing the EU Merger Guidelines: Response to the Public Consultation on the Draft Text of the New EU Merger Guidelines (2026).

[28] Draft Guidelines, supra note 1, ¶ 166 (treating common ownership over the merging firms and their rivals as a contributing factor rather than a stand-alone theory of harm).

[29] Complaint, Texas v. BlackRock, Inc., No. 6:24-cv-00437-JDK (E.D. Tex. filed Nov. 27, 2024); Amended Complaint (Jan. 16, 2025). The court largely denied the defendants' motions to dismiss, allowing the Clayton Act claims to proceed. Opinion and Order on Motions to Dismiss, id. (Aug. 1, 2025) (Kernodle, J.).

[30] Case M.7932 - Dow/DuPont, Commission Decision (Mar. 27, 2017), Annex 5, Assessment of the Effects of Common Shareholding on Market Shares and Concentration Measures ¶ 81 (the Commission "considers that, in general, market shares used by the Commission for the purpose of the assessment of the Transaction tend to underestimate the concentration of the market structure and, thus, the market power of the Parties, and that common shareholding in the agrochemical industry is to be taken as an element of context in the appreciation of any significant impediment to effective competition that is raised in the Decision").

control based on one situation. And in a common ownership story, it's even more complicated, because here we talk about — usually these common owners may have what I call joint de facto control.[31] Good luck. There's a lot of factual issues that need to be looked at and appreciated, and I think the Commission in that decision did not want to go down that route, because I don't think they had evidence to do that. But they included it as a potential consideration, as a theoretical matter, and they left the question open on the facts.

So I think it's a positive that we start to think about that. I still believe, though, that the draft guidelines could be improved on those points, and on shareholdings in general. Like, they don't explain very much how influence could happen — so what channels of corporate governance could give rise to control, what kind of control, formal, informal, they could be. They could expand, I think, a little bit more on this aspect, because the guidelines talk about incentives and how incentives to compete can change, but they don't talk so much about the ability. And I think there is space, so —

Bilal Sayyed: We've talked — and I want to keep talking about it — common ownership, theories of either harm or as a mechanism to effectuate either a unilateral or coordinated effect, or even foreclosure, exclusionary. But before we do that, I want to distinguish between minority ownership, where there is an incentive and ability framework — an active minority shareholder, and a minority shareholder who has an interest in a competing business — that's a little different than the common ownership theories. The 2010 horizontal merger guidelines — and I think it carries over to the 2023 US merger guidelines — I think have a good section on minority ownership, minority shareholding.[32] Under incentive, ability, access to confidential information, there has been a sense that they have competing interests.

Common ownership is a little bit different. I think most investment funds, institutional investors, are relatively silent, not participating in the governance the same way Third Point and Dan Loeb did in Dow/DuPont.[33] And I think you're right — neither agency has really found a very good common ownership case either, where one institutional investor is having an effect, or collectively having an effect. I know the Texas case is out there. But we were interested in this in the first Trump administration. And I don't think this is a big issue — we weren't quite sure how to deal with it. But the bureau director, Ian Conner, at the time — this was at the tail end — suggested that the staff should think about the common ownership question in the context of merger investigations. I think it was something like, probably: do you see evidence of one or more large, non-controlling, arguably not active shareholders trying to influence decisions by one or more companies? In a merger of

[31] Anna Tzanaki, Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy, 18 J. Competition L. & Econ. 168 (2022), and in particular § II.A (Varieties of common ownership compared to a full merger), where the conceptualization of this form of control is developed; see also Anna Tzanaki, Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?, in Intersections Between Corporate and Antitrust Law 287 (Marco Corradi & Julian Nowag eds., Cambridge Univ. Press 2023) (examining the concept from competition law, corporate law and competition economics perspectives).

[32] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 13, at 33 (Aug. 19, 2010) [hereinafter 2010 Horizontal Merger Guidelines] ("The Agencies therefore also review acquisitions of minority positions involving competing firms."); see 2023 Merger Guidelines, supra note 25.

[33] Third Point LLC, led by Daniel Loeb, took a position in Dow Chemical and pressed publicly for changes in strategy and governance in the period preceding the Dow/DuPont transaction.

two chemical companies, 15% of those shares, 20%, are going to be held by three or four, maybe five institutional investors.[34] And I think Ian's thought — maybe other people's thought — was, we want to at least look to see if people are attempting to influence them.

Dr. Anna Tzanaki: 100%.

Bilal Sayyed: I don't know if the next administration kept at that, but we would be now six, seven years into that project, and you could issue a little bit of a report, if it had been done. You also could see if the chairman was — if the board basically said, well, let's not build that plant because we know —

Dr. Anna Tzanaki: We have anecdotal evidence at least of this happening.

Bilal Sayyed: So let's talk about that.

Dr. Anna Tzanaki: So I think this is very significant. So we're going nowhere until we understand those channels of control — and we can only pretend; we can have a paragraph in the guidelines, but unless we understand that, then we cannot act on any of those theories.

And I can say also the opposite. Common ownership to me, it's extremely fascinating, because it cannot be only a channel of bad. It can also be something very good, especially if the Commission is serious about sustainability. And the Texas case, it's exactly about that. It's about sustainability. So if this is a problem, actually it could be viewed as something good in the European context, in European merger control.

And I should also say that the guidelines mention that common ownership could be a contributing factor, an element of context — that Dow/DuPont calls it — and in the context of a theory of harm. But I've done some work together with José Azar, who started this whole thing about common ownership.[35] And there is a chapter about merger control and common ownership — merger control enforcement and common ownership. And we say — there were some people who actually said that, look, a merger, if you look at common ownership as context in a merger case, that means that the merger — if, let's say, common ownership was harmful already — will make that environment better.[36] So it's a beneficial thing happening. So if we look here at the merger-specific effects, the merger will attenuate that situation. And this is not in the draft. This is something that I want to point out.

In response to that literature, me and José came and said, look, that could be right. And for sure, we have to take it into account given the pre-existing context of common ownership. But this is

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[34] Dow/DuPont, supra note 30, Annex 5 ¶ 80 (finding that seventeen common shareholders collectively owned around 21% of BASF, Bayer and Syngenta and around 29-36% of Dow, DuPont and Monsanto).

[35] José Azar & Anna Tzanaki, Common Ownership and Merger Control Enforcement, ch. 10, in Research Handbook on the Law and Economics of Competition Enforcement 243 (Ioannis Kokkoris & Claudia Lemus eds., Edward Elgar 2022). Professor Azar is a co-author of the paper that gave rise to the modern literature. José Azar, Martin C. Schmalz & Isabel Tecu, Anticompetitive Effects of Common Ownership, 73 J. Fin. 1513 (2018).

[36] The argument appears in Roman Inderst & Stefan Thomas, Price Pressure Indices, Innovation, and Mergers Between Commonly Owned Firms, 10 J. Eur. Competition L. & Prac. 572 (2019), and in Christopher Conlon, Comment on Common Ownership and Merger Guidelines (Feb. 2022). For the response, see Azar & Tzanaki, supra note 35.

also in principle not the correct answer, because we still need to look at the facts and see what were the common shareholdings in the merging parties vis-à-vis the competitors, compare that, and then see the financial aspects of the deal. If there was a share swap and so on, and not cash for the deal, you need to see how much it was exchanged for what — what you had before, what you had after — in order to evaluate the precise effects. So you cannot give a very theoretical answer that is right without actually looking at the facts of that context. This is what we said with José. So we need a more nuanced analysis anyway.

So taking one side and portraying common ownership only as a theory of harm, I also think is not entirely right. So it's not that common ownership could be only something harmful in the context of mergers. And we need to be careful how we implement this in practice, if we take common ownership seriously. And the problem is that I don't think we understand corporate governance so well, or what these investors actually are doing. But we need to start doing that, because these investors are more and more active in the EU. Or we have other forms of common ownership in the EU — maybe it's not the big three institutional investors we have in the US, but we have other kinds of funds and other forms of common ownership. So the analysis is still relevant.

Bilal Sayyed: So let me expand on the benefits of common ownership. The US is one of the few, maybe only — I should be more careful — the US is one of the few countries with a prohibition, a statute that prohibits interlocking directorates.[37]

Dr. Anna Tzanaki: They still happen, though.

Bilal Sayyed: It's an interesting question. I want to do a podcast on Section 8, because I think it's worth thinking about. And I can think of benefits of having an interlock; I can think of harms. And in fact, I used to wonder about the US position until Tim Muris told me that Bill Baxter thought Section 8 was the most important antitrust statute.[38] And I said, all right, if Bill Baxter thinks this is important, maybe I ought to think about it a little bit more. So what are the benefits of common ownership? What are the benefits?

Dr. Anna Tzanaki: I think in the context of interlocking directorates, both the harm and the benefit of common ownership amplifies. And if you talk to corporate governance people, they see interlocks as a good thing. They don't see the antitrust risk, in other words. So they can see that you have people who have experience in the same industry, that they can bring that to another company. This could have beneficial spillover effects and so on. And this, I think, it's especially common and useful in innovation-related — speaking about innovation — or in the VC context, let's put it. A lot of those VCs are on the boards of many firms in the same industry. So there are certain efficiencies.

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[37] Clayton Act § 8, 15 U.S.C. § 19. "[A] specific provision on the issue of interlocking directorates only exists in very few jurisdictions," most of which allow the interlock to be justified by a lack of competitive injury. Florence Thépot, Interlocking Directorates in Europe: An Enforcement Gap?, in Intersections Between Corporate and Antitrust Law 190, 190, 201-02 (Marco Corradi & Julian Nowag eds., Cambridge Univ. Press 2023).

[38] William F. Baxter served as Assistant Attorney General for the Antitrust Division from 1981 to 1983.

Now — so there are some papers, mostly from the US, that document this.[39] In Europe, there's not much work on this, and it would be good to understand more about those efficiencies as well. But I think it's notable that we see those papers mostly again coming from the innovation side, the startup environment, where the guidelines are also centered.

Bilal Sayyed: So I think what you might be saying — just make sure I understand, as I'm the audience — a diffusion of knowledge, diffusion of best practices.

Dr. Anna Tzanaki: Yes.

Bilal Sayyed: Sometimes coordination does lead to positive outcomes. I think you mentioned sustainability. I guess the idea is if you've got 20% of your shareholders —

Dr. Anna Tzanaki: Yeah. This can be for the good.

Bilal Sayyed: Right. But the idea is maybe 20% of your shareholders are saying, we want you to move from gasoline to clean fuel, and we're telling all of the companies we hold shares in that that's what we're doing. Allegedly. That can help the move — if you think clean air is a positive, I think most of us do — that helps the move if it's a coordination problem.

Dr. Anna Tzanaki: Some people say, perhaps there is a government failure that common owners or the institutional investors can make up for that through governance. So there's the argument.

Bilal Sayyed: I do. I had clients who were both institutional investors and also activist investors. So I spent a lot of time on the common ownership literature, particularly when I was in government. And I was less than entirely convinced about it, but this was still at an early stage, and I do remember every couple of days I'd see a new paper on SSRN. But what I do remember Martin saying — he presented the activists as the positive.[40] That the institutional shareholders were generally voting for the board, not really shaking things up, at least publicly — they weren't running campaigns — but that the activists were. And he saw the activist class as, I think, a better model — I don't want to put words in his mouth — better model for governance. You wanted active directors.

Dr. Anna Tzanaki: But I think what Martin, perhaps, or generally this literature tried to say is that, at least in the US context of corporate governance and finance, given the fact that we have this new reality of the institutional investors, that de facto are some kind of permanent owners — they have

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[39] See Juanita González-Uribe, Exchanges of Innovation Resources Inside Venture Capital Portfolios, 135 J. Fin. Econ. 144 (2020) (documenting increased exchanges of innovation resources between companies sharing a venture capital investor, with the increase larger where the companies are in the same industry); Ofer Eldar & Jillian Grennan, Common Venture Capital Investors and Startup Growth, 37 Rev. Fin. Stud. 549 (2024) (finding that after legal changes facilitating common venture capital investment, same-industry startups in venture capital portfolios raised more capital, failed less and exited more successfully, with "VC directors serving on other startup boards" the primary mechanism associated with those outcomes). Dr. Tzanaki also points to Ofer Eldar, Yaron Nili & Yingze Xu, Common Ownership Directors (June 15, 2025), which generalizes the point beyond venture capital.

[40] See Martin C. Schmalz, Competitive Harm from Common Ownership: Common Ownership Theories, Governance "Mechanisms" & Policy, slide 66, presented at Fed. Trade Comm'n, Hearing #8 on Competition and Consumer Protection in the 21st Century, New York University School of Law (Dec. 6, 2018) (BlackRock, Vanguard and State Street "voted against & caused Trian to lose a pro-competitive campaign at DuPont in 2015").

a lot of power; perhaps they have more power than their shareholding is even indicating.[41] So the fact that managers know this, that they always have these institutional investors in the back of their head — at least there is an external point of threat, let's say, and those are the activists in this case, that they can shake things up. So they don't completely — I wouldn't say collude, but align in certain ways that sometimes could be beneficial, sometimes could not. And this is also not very transparent. So this could create some issues. Activists then can come in and bring some new ideas, excitement.

Bilal Sayyed: Motivation.

Dr. Anna Tzanaki: Motivation, exactly. Change things.

Bilal Sayyed: Yeah. It's hard to change a corporate culture. And you can have two models. A block of shareholders that, for whatever reason, are prepared to move and can maybe help solve the collective action problem. Or you have, in a sense, the maverick activists. This is: I see some money here, I want to push these guys to improve.

Dr. Anna Tzanaki: No, that's why I don't want to make very generalized claims, because depending on the context, sometimes you may want the collective action and sometimes you may need that activism. So that is why I insist that this common ownership thing is much more subtle than we think. So I don't think just making two general statements helps too much.

Bilal Sayyed: I agree. That's why my podcasts run long. But okay. But just as an example, you mentioned sustainability. We don't have to talk about Larry Fink and others who want to save the planet, allegedly[42] — that shouldn't be a bad thing. But — sorry. But sustainability is in the guidelines as a factor, as a competitive factor. So of course there's a possibility — at least people feel there's a possibility — that transactions will be blocked because they are not, I don't know, clean-energy friendly. But of course what I thought — well, that was my position going in.

Dr. Anna Tzanaki: It's the opposite way. I think, as with scale and investment and other similar factors that now the Commission explicitly is taking into account, I think they see it as a positive factor, where — in other words, they could see issues. Now they want to make that transition to clean energy easier and smoother, so to say. So if you claim clean tech or efficiency considerations in your deal, perhaps it will be a little bit easier for the deal during the substantive assessment. And they have already done this in some cases.[43] So in that respect, you could say this is a continuation of already existing practice.

[41] Schmalz, supra note 40, slide 66 (an investor with the largest voting block "is pivotal in close elections, and therefore powerful — want it or not[,] . . . [a]lso in activist campaigns").

[42] Laurence D. Fink is chairman and chief executive of BlackRock.

[43] Case M.9409 - Aurubis/Metallo Group Holding, Commission Decision ¶¶ 835, 844 (May 4, 2020) (clearing the transaction unconditionally; accepting as "at least a possibility" the parties' claim that combining their technologies would improve metal extraction and raise payments to scrap suppliers, but rejecting their environmental-benefit claim as "not verifiable," untimely, and possibly not transaction specific).

And look, the politics here are again in the background. So it's not by chance that there is this Clean Industrial Deal, an energy deal, at the European level.[44] And this is a very big deal for the EU, because we don't want to be dependent, in terms of energy and so on, on other powers or countries. So for Europe, it's also very important, this transition to a more sustainable, clean-tech energy world.

Bilal Sayyed: Yes. So these are identified as efficiencies or benefits, and I assume part of it is the investment required to move. The combination has helped solve the collective action problem. But maybe there's a little bit of that, the good company buys the bad company — okay, good. They'll move forward. So yeah, again, I think there are opportunities there for parties to say, look, we need you to take account of a broader scope of efficiencies, and —

Dr. Anna Tzanaki: Can be done a little bit more easily, because now explicitly the guidelines recognize things like collective benefits — things that consumers value indirectly, that they don't get direct value through the price or quality.[45] So that makes the framework a little bit more flexible to accommodate all those considerations — I think still within the standard consumer welfare framework that we know.

Bilal Sayyed: So yeah, I was going to ask about that. So I think you sound comfortable that sustainability — I'll say resilience — are within the consumer welfare framework. Well, first, am I correct that you see it's within there? If you think it is, does that make this welfare analysis almost meaningless? You did say it's sort of — it is hard to... And yes, I like clean air, but you know what? We don't walk everywhere. There are trade-offs.

Dr. Anna Tzanaki: So, there are good aspects, but there are also very tricky aspects. So I don't want to be naive in this. The Commission will have a hard job. They try to make it easier for themselves in terms of implementing by tying it to this consumer welfare framework, because, as we said in the beginning, they still see themselves as technocrats. They have the standard frameworks that we've been using. They don't want to be seen as an erratic industrial-policy organization or as a politically influenced enforcer. So I don't think they want to do that. And they put constraints on themselves for a reason.

Now, practically there are still challenges of how you quantify or somehow you translate those very non-measurable aspects into a framework that can be comparable to other more tangible parameters. It still is not going to be easy. They said they want to go down that path and balance those aspects, and if they're not quantifiable, find some way to compare the magnitudes and likelihoods and things like that. I wish them good luck. I would be very interested to see how they do this.

Dr. Anna Tzanaki: But I think it's interesting that there is some kind of alignment, I think, with the cooperation agreements that we see under Article 101[46], and that they already start to think

[44] Communication from the Commission, The Clean Industrial Deal: A Joint Roadmap for Competitiveness and Decarbonisation, COM(2025) 85 final (Feb. 26, 2025).

[45] Draft Guidelines, supra note 1, ¶ 322 (distinguishing use value benefits, non-use value benefits and collective benefits).

[46] Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, 2023 O.J. (C 259) 1, ch. 9 (¶¶ 515-603) (sustainability agreements).

about sustainability in the same way — that these collective actions, as you said, could have benefits; perhaps in some cases we can allow for those benefits under certain limitations and so on. I think a bit more broadly.

Bilal Sayyed: So I think the 1992 horizontal merger guidelines were the first guidelines to reference innovation. And the only place they mention innovation is in a footnote.[47] And the story, which I got from Jon Baker — Jon worked on the guidelines[48] — was: they were basically sitting around, working on the guidelines, and either Jon said or someone else said, we really ought to say something about innovation, because it's clearly important. And Jon says, but we didn't know what to say. But we wanted to signal that it was important. And so it's in a footnote, without any discussion of how a merger might affect innovation or how you might think about innovation and competition.

And after the '92 guidelines, you had the release three, four years later of the intellectual property guidelines, which had some concept of R&D markets, innovation markets.[49] It wasn't exactly the first time, because in the mid-to-late '80s, some of the joint venture material that was in the international operations guidelines talked about research joint ventures.[50] But that was a path — the introduction of the R&D market or innovation market. And then the 2010 horizontal merger guidelines codified what had been happening over the previous 10, 12 years[51], which was a focus on innovation effects in cases — the creation of new products, improvement of existing products, how would a merger affect those.

So every time I see something in guidelines that's not so clear, I think about what Jon said, which is: we want to say something, and we will — this is a, whatever, 50, 100-year project, whatever — and the next time we will have something to say, because we're thinking about it. People will come in and tell me a story about innovation. They'll tell me a story about sustainability, resilience. And the — I say technocrat, I think that's a positive — the technocrats in DG Comp will say, okay, we have to think about it. How do we think about it?

Dr. Anna Tzanaki: Yeah, well, yeah.

Bilal Sayyed: Well, I think — this is a little bit off — but the market definition in hospital cases has developed over time and took account of these travel models that came out of environmental

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[47] U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Merger Guidelines § 0.1 n.6 (Apr. 2, 1992) ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation").

[48] Jonathan B. Baker discussed the drafting of the 1992 guidelines on this podcast. See Rethinking Antitrust Podcast #6, Rethinking Merger Analysis: The 1992 Horizontal Merger Guidelines (with Jim Rill, Jon Baker and Paul Denis) (Nov. 21, 2023).

[49] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.3 (Apr. 6, 1995) (innovation markets). The 2017 guidelines superseded them and renamed the concept 'research and development markets.' Id. (Jan. 12, 2017).

[50] U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations (Nov. 10, 1988), reprinted in 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988) (Special Supplement), pt. II, Case 6 (research and development joint venture, identifying research and development markets and technology markets among the potentially relevant markets). The draft was published for comment at 53 Fed. Reg. 21,584 (June 8, 1988).

[51] 2010 Horizontal Merger Guidelines, supra note 32, § 6.4, at 23 (innovation and product variety).

economics.[52] So if you give someone a problem, eventually some good ideas come out of it. In a way saying — and you're not saying this, or maybe you are saying this, but you're not saying it in a critical or negative way — even if the guidelines are unclear, incomplete, signaling that these are issues they're thinking about?

Dr. Anna Tzanaki: They do signal a direction. So this we have to give to them. Not everything is clear in the draft, but still, it takes courage to move, to decide where you're going to move. So this is something.

Now, on the innovation, I think it's very interesting, because I think the Commission here has some ideas what they want to do, but I do also see a tension. So from one point of view, we see this positive picture of scale, innovation, investment, tied to this new concept of a theory of benefit.[53] But then we also see that somewhere in the paragraphs of these draft guidelines, the Commission comes and reminds us: competition is the driver of innovation. There are these phrases here and there, and there is a lot of focus in general on the process of innovation, which is valued as such. And that is why we have new theories like loss of innovation — and not only specific innovation, but general innovation, which is general R&D efforts. And it almost seems to me that de-duplicating those efforts, it's not necessarily seen as an efficiency — quite the contrary, it's seen almost as a harm. So I'm not sure what is the guidance there, in other words. I'm not sure how every case will be looked at. So there is a lot of gray area, I think, still.

Bilal Sayyed: So yeah, I noticed that the theory of general innovation harm[54] — it was more grounded than I anticipated when I saw that in the table of contents. While it does seem, at least in some sense, tied to some product that they can envision — maybe it's a pharmaceutical product, not a specific treatment for a specific condition. So it was a little more grounded than I thought, because I've talked a little bit about this with Greg Werden and Mike Walker. I had an earlier podcast with Rich Gilbert, which I've gone back to now a few times.[55]

Dr. Anna Tzanaki: It's good. It's good.

Bilal Sayyed: It's good. And you'll even, later — I don't know, before the end of the month — I will get out an annotated transcript of that with footnotes. So I've made the transcript readable, and now I am going through the literature to document — he said there's a study this, there's a study that, and I'm like, okay, we're going to put those footnotes in.

[52] See Michael J. Doane, Luke M. Froeb & R. Lawrence Van Horn, How Well Do Travel Cost Models Measure Competition Among Hospitals? (Vanderbilt Univ. Owen Graduate School of Management Working Paper Series, Mar. 10, 2012) (describing the problem of estimating demand for medical care as "not unlike the problem of estimating demand for environmental amenities, where travel cost demand estimation has been successfully employed," while arguing that the methodology may be ill-suited to the hospital application).

[53] The draft applies the same evidentiary principles to "both a theory of harm and a theory of benefit." Draft Guidelines, supra note 1, ¶ 27.

[54] Draft Guidelines, supra note 1, ¶¶ 175-79 (loss of innovation competition); id. ¶¶ 180-85 (loss of specific innovation competition); id. ¶¶ 186-91 (loss of general innovation competition).

[55] Rethinking Antitrust Podcast #31, Innovation and Competition Policy (with Rich Gilbert) (June 10, 2025).

And I think, again, I think DG Comp folks are not just saying innovation for innovation's sake. I think they potentially could give a little bit more guidance that the elimination of an R&D track is not per se —

Dr. Anna Tzanaki: I think they had some specific cases in mind, and they put it there, and cite those cases. And obviously this is much more clear in the pharmaceutical sector or biotech cases, in these pipeline-product spaces — even though we don't have final products, it's very clear that there is some kind of competitive relationship, either at the R&D level. Now, for other markets — talking about digital or technology — this is much more complex. So there, how this is going to be implemented and what's going to happen, things are a bit more fluid, I think.

Bilal Sayyed: We've always had the problem in merger review, merger control, about showing that there are threats that we can't identify, we can't name. Now, sometimes you get a little bit of credit for that. It's a new market, it's a growing market — people probably are investing to get in there without being very public about it. They don't have a regulatory process. So I think people have accepted that in growing markets, entry is more likely than in stagnant markets. So I think that recognizes some type of innovation. So I think they're trying to be grounded. Again, I think the focus on innovation, the seriousness they appear to be taking it, is, as you said, positive. And why not develop a more general theory of innovation, or a theory of innovation harm, outside the context of regulated industries where there's a process to get to market?

Dr. Anna Tzanaki: That's fair and legitimate, and it's better that it is in the guidelines than it is not. So now we have to wait for practice to see how that is really going to be implemented — if we see that it's going to be implemented only in specific sectors where this is more relevant, as we said, or if this is something broader.

Bilal Sayyed: What the US had done — and I think this is probably true elsewhere — in the mid-'90s to the early 2000s, you did see innovation market cases[56], where the harm was focused on — I don't want to call it — well, on the innovation effort, the R&D effort, the innovation effort. And then over time, I think people got a little uncomfortable with that. They wanted to tie that innovation to a future product where there was some — more than, much more than, de minimis likelihood that product would come to market. Even the general — the general innovation, what you might think of as general innovation cases — one thing is the effort.

Dr. Anna Tzanaki: Another thing is the success of that innovation. Another thing is the final product. And somehow we need to tell a story about how these are even vaguely or remotely related somehow. Is it just theoretical?

Bilal Sayyed: Well, I thought — and I think I'm lifting from Mike — Mike focused on the discussion of capabilities.

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[56] See Bilal Sayyed, Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022, pt. IV.C-IV.D, at 47-50 (working paper, draft of Dec. 20, 2022); see also Ciba-Geigy Ltd., 123 F.T.C. 842 (1997); Am. Home Prods. Corp., 119 F.T.C. 217 (1995); Sensormatic Elecs. Corp., 119 F.T.C. 520 (1995); Dow Chem. Co., 131 F.T.C. 600 (2001); Bayer AG, 134 F.T.C. 184 (2002).

Dr. Anna Tzanaki: Right. I think that's a very good focus. And again, going back to my earlier point: we don't understand governance so much. It's so fundamental that we don't look at companies only from the outside, but we try to understand what they're actually doing and what they're able to do as well. And otherwise, it's just buzzwords.

Bilal Sayyed: So, okay, so maybe this is a buzzword. I know — in the, I don't know if I know this — sometimes a large company is buying a small company because they want the management team. And they basically say — we're a big — they don't say it this way — we're a big, stagnant company; we want to buy the entrepreneur because we think he can run the assets better than our current board. They don't say it this way.

Dr. Anna Tzanaki: And we forget that. Standard theory tells us why mergers happen — to improve management, very often. And we forget this in competition assessments sometimes.

Bilal Sayyed: Well, we forget it, or we don't accept it, or we think — putting aside the question of acqui-hires — why don't you just hire somebody? Why do you have to take the assets? Why don't you hire that guy you want, or that woman you want — I don't want to be sexist or misogynist. Why not hire them? Or why this one person? There are a lot of talented people in the world.

Dr. Anna Tzanaki: You want the team.

Bilal Sayyed: Yeah, of course, of course. Well, it's not only you want the team. You want a team that appears to be functioning well.

Dr. Anna Tzanaki: Exactly.

Bilal Sayyed: You can go out and say, I got the smart guy here, I got the smart woman there.

Dr. Anna Tzanaki: It's like football. You don't want one player. One player will not win. You want players that can work together, and they can be the winning team, because in the end it's a team.

Bilal Sayyed: Yeah, right. A group of individuals may not work together well. So I would like to see a little bit more acceptance of this idea publicly. Now, I think agencies accept it. They see that this is a way to bring new management in, and they don't challenge — it just sort of dies. I think they do accept it. I think, of course, there are cases where they don't. And I think of, like that Harry's razor case, now five, six, seven years ago[57], where the idea was,

Dr. Anna Tzanaki: We want to bring new management, direction, things to the company.

Bilal Sayyed: Yeah, right, yeah. We don't need the razors; we need the guys. So again, I think there's a —

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[57] In re Edgewell Personal Care Co., FTC Docket No. 9390 (complaint issued Feb. 3, 2020) (alleging that the acquisition would neutralize "one of the most successful challenger brands ever built"). Edgewell abandoned the transaction a week later, and the Commission dismissed the complaint without prejudice. Order Dismissing Complaint, In re Edgewell Personal Care Co., FTC Docket No. 9390 (Feb. 25, 2020).

Dr. Anna Tzanaki: I have a lot of examples about this.

Bilal Sayyed: Okay. Well, I was going to say — so you've done, edited really, the collection of corporate governance and competition. So you're one of a few people doing this. So talk a little bit more about it.

Dr. Anna Tzanaki: It's very hard to combine fields, I think. So I'm very grateful to the people committing to this book, too — contributing there. But yeah, I think we need to do more of that work. I do value within competition, that with people working with law and with economics. But as I said — about common ownership, about capabilities, about other things — we need to understand both markets and companies, better. They're not disconnected things; it's a continuation.

And when we talk about mergers, all the more so, because control is at the center of this, or efficiencies is at the center of this — without understanding the business strategy aspect or the corporate governance aspect, then what were we doing? It's fields — not only the Commission, that they have a history and they have to evolve their policy accordingly, but also fields have to evolve with the times, and they need to speak to other disciplines, I think, for that matter, and learn. So we have to be open.

Bilal Sayyed: Do you think — well, this is a question — do you think they're open? Putting aside the guidelines, or maybe not putting aside — do you think they're open?

Dr. Anna Tzanaki: I'd like to hope so. I'm not sure that — sometimes being too — we're all overspecialized nowadays, which is good and bad. So the danger there, or the risk, is that sometimes we think only from the perspective of within the field, and that could be tricky. But the good news is that reality is always a reminder — such as innovation — that pushes us a little bit to think outside of our little boxes. And I think this is precious. So I'm counting on the external forces.

Bilal Sayyed: So I don't know if you listened to my podcast on the Meta case[58], and the experiments about either who's in the market or what is the market. Where do people go if they can't get on Facebook or TikTok or whatever. And on that podcast, I told a little story about 20-ish years ago, maybe slightly more, when I was at the Commission with Muris. Dave Scheffman was economics director. Either Tim was asking, or I was asking, or maybe someone was asking about experimental economics. Of course, there are always good people at the agencies — young people. They refresh the place. They come in with new theories, new, different backgrounds. And I remember Dave saying — somebody asked, why aren't we using experiments in our antitrust cases, maybe in our consumer protection cases, or to think about them? And Dave said, it's not ready. It's not ready. And maybe he was right, maybe he was wrong, I don't know. But I asked that question to the guys who worked on the Meta case for Meta. I said, why is it ready now? I said, I know somebody asked

[58] FTC v. Meta Platforms, Inc., 811 F. Supp. 3d 67 (D.D.C. 2025) (Boasberg, C.J.) (entering judgment for Meta after trial, on the ground that the agency had not established a separate market for personal social networking services or monopoly power within it); see id. at 84 ("The most-used part of Meta's apps is thus indistinguishable from the offerings on TikTok and YouTube."); id. at 102-03 (discussing the natural experiment created by India's ban on TikTok). See also Rethinking Antitrust Podcast #39, FTC v. Meta: The Experiments That Undercut the FTC's Monopolization Case (Mar. 30, 2026).

about this 20 years ago, and Scheffman — serious guy — he says, not ready. They said, well, it's 20 years, right? Maybe it was ready then, but now it's 20 years later.

So people are open. The backgrounds definitely are — well, the backgrounds of people coming into the Bureau of Economics, at least, when I was last at the Commission, they were coming in with different disciplines or focus on different disciplines. They knew the basic IO theories. But they could bring different tools.

Dr. Anna Tzanaki: And I completely, 100% agree with you. And I will respond with a previous question of yours. So you said earlier about this case that Bill Kovacic just mentioned, about the [electricity]. It's the same story. If you only have IO-trained economists that know how to do the economics in a certain way, those are the guys that look at the cases — the practice will not change significantly. So you need the critical mass. It's not that we need to fire all those other people, but institutional innovation is also very important — on the legal side, but also on the economic side — to speak to what is current now, try to understand things that are new, cutting-edge theories and things like that, apply things in a different way. I think — you raise basically a huge issue. We can talk about this.

Bilal Sayyed: Well, let's talk about it a little. This is a big thing, for Bill. He talks a lot about institutional self-review, self-criticism.[59] How — where are the competition agencies in Europe on that? DG Comp, CMA — are they open to new ideas in terms of capabilities, functionalities?

Dr. Anna Tzanaki: I think they try. I think the CMA is one of the leaders — they already have a functional digital markets unit and so on.[60] Other leading national authorities are also, I think, trying. I think for the Commission, it is a little bit trickier, because of the structure — DG Comp, DG Connect — and the different division of responsibilities. So perhaps we need to think of the institutional setup there more broadly. But definitely this is something that we should think about seriously. And when I said in the beginning, oh, we will not look at this moment at remedies, because this is not part of the review of the draft guidelines — it's the same with institutions. If we change the substance, certain other things will need to change if we want to do this right. So incorporating scientists that do other things beyond the standard econometric models — it would be helpful, I think.

Bilal Sayyed: Okay. So since you mentioned DG Connect — and I mentioned them a little while ago — I could talk all day, but we've got to wrap up. Is there some interplay between the DMA, DSA, gatekeepers and these guidelines?[61] There's a certain relatively small group of firms who have

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[59]See Federal Trade Commission, The Federal Trade Commission at 100: Into Our 2nd Century - The Continuing Pursuit of Better Practices (Jan. 2009) (report by Chairman William E. Kovacic) (urging that the Commission embrace “an ethic of continuous self-assessment and improvement”); Alison Jones & William E. Kovacic, The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms 14-31 (Apr. 17, 2020) (distinguishing agency “capacity” - human talent and supporting resources - from “capability” - statutory powers, organizational structure and quality-control processes).

[60]See Competition and Markets Authority, Guidance on the CMA's digital markets competition regime (Dec. 19, 2024).

[61]Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), 2022 O.J. (L 265) 1; Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services (Digital Services Act), 2022 O.J. (L 277) 1.

some form of ex ante competition regulation. How are they affected by the guidelines — or are they affected by the guidelines?

Dr. Anna Tzanaki: Well, that's a good question. And there are different levels, again, to respond to this. I think on one level you can say, no, there is no connection — there are two different pieces of legislation. And in fact, the guidelines implement legislation; they're soft law. It's only binding on the Commission. It's an interpretation, in other words, of the substantive rules that we have in the merger regulation. And then the DMA, it's a completely different piece that applies specifically and only to gatekeepers that are designated under the DMA.

Having said that, this is not completely true, because we do have one provision in the DMA that talks about mergers. And in that case, it only imposes a reporting obligation for gatekeepers[62] — that they have to report all their acquisitions in the digital space. But besides that, if you look more broadly, you can definitely see some philosophical connections, so you can see some complementarity from that point of view. Because we talked about the innovation shield — gatekeepers are excluded from the possibility to be considered eligible, for the most part.[63] And then you see other theories of harm that do not target gatekeepers directly, but — you mentioned portfolio effects, or there is an entrenchment theory of harm that now we have in the draft guidelines, that did not exist before.[64] And this, I think, could be more easily applicable to some big players, let's say, in that sense. And the idea behind the entrenchment theory of harm is, again, to protect contestability of markets, which is one of the main ideas of the DMA. So there are certainly some parallels that you can find in certain theories of the guidelines and the DMA, I would say.

Bilal Sayyed: So is Mario Draghi happy about this draft of guidelines? Has he commented? Has anyone asked him?

Dr. Anna Tzanaki: I'm not sure if he's cheering, but I'm sure he's happier — or not completely unhappy. This is how I would put it. So it's a start.

Bilal Sayyed: Is he an unhappy guy?

Dr. Anna Tzanaki: I don't know him, so I cannot tell. But this is how I position it. As I said, Draghi actually recommended many more things than these guidelines do and can do. Let's put it like this, because it's one piece of the merger control puzzle — even if that is a very small piece of the broader proposal of Draghi of what we need to do in Europe. So it's a piece of a sub-piece. And for that reason, I'm not sure that the Commission with this draft could deliver on all these proposals that Draghi did anyway. Draghi said a lot of other things. We need investment commitments, like behavioral remedies — something that the CMA did[65], and the Commission so far is against this.

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[62]Digital Markets Act, supra note 61, art. 14(1) ("A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 . . . irrespective of whether it is notifiable.").

[63]Draft Guidelines, supra note 16, ¶¶ 192-201. The shield applies only in defined circumstances, including combined shares of no more than 25% in the innovation space and at industry level, and does not extend to gatekeepers or dominant undertakings.

[64]Draft Guidelines, supra note 1, ¶¶ 252-62 (entrenchment of a dominant position).

[65]The Draghi Report recommended that remedies focus on "commitments to invest according to detailed time schedules, launch of services or access to data or platforms, rather than partial de-consolidations." Draghi Report, supra note 2, pt.

And actually, they haven't changed their remedies notice and stuff like that. So we have to see where this goes, and if the draft will stay like this — it will be more ambitious in the end, it will be a little bit more contained. But I think it's definitely one step in the direction that Draghi proposed. We definitely have to say that. So the future looks fascinating, I would put it.

Bilal Sayyed: Okay. So you live in Europe. Do you look forward to a better future? All right, all right. No, no, I'm teasing about that.

Dr. Anna Tzanaki: But it's good to have people — both political figures or respected people who have different backgrounds and experiences, high-level figures, but also technical personnel — who take this thing seriously. And they do try to make an effort. I think that's important.

Bilal Sayyed: My experience is, in the US, at the FTC, when a new chairman comes in, if they have an agenda, the staff works to implement it. I worked basically for two chairs, Tim Muris and Joe Simons. They were both thoughtful in an academic way, but they also had a lot of experience, both at the Commission before becoming chair, and in practice. And of course, Tim is an academic; Joe is not an academic, but he has academic tendencies in terms of writing and such. But of course, you can't run an agency from the chairman's office. You can't do everything you want to do. You have to have people implement it. And the staff, whatever their preferences, generally was on board and could take their — I'll call it technocratic expertise — and apply it to a new agenda. Now, neither Tim nor Joe had agendas that were dramatically different than what came before them — although some differences, maybe different focus.

And I thought that in the Biden administration, Chair Khan, and others with her, supporting her, had a different view[66] of the staff — that they didn't trust the staff, and that the staff would not, in a sense, move in the direction that the chair wanted to go. And I thought they wasted 18 months — maybe a little bit longer, maybe a little less — in fighting or distrusting the staff, rather than acknowledging the staff's capabilities to move. At most, you're bringing 25 to 30 merger cases a year, three to five conduct cases[67] — about all an agency can handle, an agency that size. So there's always stuff to do. You can always move towards a new issue and find things. Because they're out there; they're missed. So where is DG Comp here? Maybe that's an unfair question.

Dr. Anna Tzanaki: I don't see these trust issues so much, which is a positive. Because despite politics — and I'm not sure that Ribera and von der Leyen are completely aligned — you don't see

B, at 74. The Competition and Markets Authority accepted such a remedy in the Vodafone/Three joint venture, concluding that a legally binding Network Commitment "would, in time and once fully implemented, address our SLCs." Competition and Markets Authority, Anticipated Joint Venture Between Vodafone Group plc and CK Hutchison Holdings Limited, Final Report ch. 16, ¶¶ 16.112, 16.299 (Dec. 5, 2024). The undertakings were accepted on March 28, 2025.

[66] Lina M. Khan served as Chair of the Federal Trade Commission from 2021 to 2025.

[67] Annual number of challenges to mergers by each federal antitrust agency is usually below 25, and in the range of 18-22, but may occasionally reach or exceed 25. See, generally, Federal Trade Commission and Department of Justice, Antitrust Division, Annual Report to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, available at the website of the Federal Trade Commission. On non-merger enforcement, see Federal Trade Commission, Nonmerger Enforcement Actions, FY 1996-2025 (showing 162 enforcement actions initiated over a 30-year period); Department of Justice, Antitrust Division, Antitrust Division Workload Statistics FY 2015-2024; Antitrust Division Workload Statistics FY 2010-2019; Antitrust Division Workload Statistics FY 2000-2009.

this in the implementation. They try to merge this, and I think it's a huge positive. It's a huge institutional success, and we should not underplay it. So from that point of view, I'm with them. I'm proud to be European, so to say. And this is a sign of good leadership, because without your staff you're nowhere. Nothing is going to happen, obviously. So this is good. Now, if the best can happen — of course, in this process some compromises will need to happen, and you have to see how and where. But I think the trust issue is very important if you want to deliver something, and it seems that, at least to this extent, they are delivering something. So this is something positive.

Bilal Sayyed: Yeah, I agree. I was over for two of the three workshops, conferences, they did, and I saw what I thought was some resistance to accepting that there was a role for DG Comp to play in improving.

Dr. Anna Tzanaki: I think that is still there, and it's still in the draft guidelines. I don't want to sugarcoat it. But still, from the moment they understood this is their political mission and they're accountable, Ribera and her staff moved their feet. That's it.

Bilal Sayyed: Yeah. No, I agree. I was surprised at the openness to change that's reflected in the draft. There's stuff in there I don't like. I don't mind if somebody writes a few paragraphs on portfolio theories, because maybe there is some situation that makes sense — but I don't think there are a lot of such cases. So, focusing on the positive — every merger should have a theory of benefit. That's what you tell your clients: we have to tell a story about why this deal is good. And that they are signaling they're more open. Maybe people practicing in Europe every day knew they had to tell a positive story, but if you're outside the walls of that activity, practice, you just hear what you hear in the paper. You see these stories about how they don't want deals.

Dr. Anna Tzanaki: In the beginning, they wanted to rethink themselves and re-portray themselves in a more positive light. At the same time, they were very careful, I think, to show that they didn't want to be perceived as too soft either. That's why they have all these counterbalancing theories, I think. So they try to be very cautious. The only problem here is, by having a very broad spectrum, then in practice you don't know what's going to happen in your case. They have a lot of possibilities, a lot of cards in their hands. So I think this is the only kind of minus in this process. There are a lot of possibilities, a lot of new theories. They keep up with developments. They codify things that have happened in actual cases — this is great. The problem is that the Commission now — I do think they have much more discretion in their hands.

Bilal Sayyed: So maybe we'll end here. I asked Greg Werden, I asked Mike Walker, what's the purpose of guidelines and do these guidelines guide?[68] Can you tell your — or draft guidelines guide — can you tell your client, yes, you can get this deal done, or no, you can't. And it's rare there's a lot of certainty in drafts. I think over time they've gotten less certain in the US — a lot more, we may do this, as opposed to, we will do this or we will not do this. But I think a good lawyer can work with these guidelines to tell their client: you're not going to have a portfolio theory

[68]See Rethinking Antitrust Podcast #41, supra note 15, at 3, 23; Rethinking Antitrust Podcast #42, supra note 15, at 2, 15.

of harm thrown at you. You're not going to have a common ownership theory thrown at you. And they've accepted some things.

So I think it's hard to write guidelines. I helped write a nine-page vertical merger guidelines[69]. That was hard, too, in a sense.

Dr. Anna Tzanaki: I can understand that. So from that point of view, they're very laudable. I still have some concerns on the certainty point, and why I'm saying this: I'm not sure to whom these guidelines are addressed. Are they addressed to themselves — the Commission as a whole? Are they an intra-Commission communication strategy? Are they addressed to only companies? Are they addressed to the courts? Look, we have discretion in this area, and so we have a margin of discretion[70] — you cannot, this is a judgment call for us, basically. I'm not entirely sure.

Bilal Sayyed: Well, they are public, so they're a message to everybody. In that sense, they're not hidden. Lawyers will point to things, judges will point to things, the staff.

Dr. Anna Tzanaki: But I'm mentioning specifically that they're not only meant to be communicated to companies. I think that's my point.

Bilal Sayyed: I agree with that. It's slightly different, but when I talked with Jim Rill and others about the '92 horizontal merger guidelines[71] — and I think this is true of what the EU, Mario Monti, did with the 2004 horizontal merger guidelines, after a series of losses — the '92 horizontal merger guidelines, and I believe it's true the 2004 EU horizontal merger guidelines, they imposed some discipline on the staff as to what a good case needed to look like. And in that sense, it was a communication to the staff. We cannot — and this is speaking about the US — we cannot go into court and say market structure, market structure, entry barriers. We have to tell a story. And I thought that was true — with the slightly different loss of Airtours, Schneider and Tetra Laval[72] — the 2004 horizontal merger guidelines imposed the discipline on the staff that this is what a good case will look like. I agree with you that this draft, in its full 98 pages, may move a little bit away from that. But parties can still point to things in there and say, you are not meeting a specific burden, or, you

[69] U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020). The document runs to twelve numbered pages.

[70] Draft Guidelines, supra note 1, ¶ 27 (the substantive rules of the Merger Regulation "confer on the Commission a certain margin of discretion with regard to assessments of an economic nature."); see Case C-12/03 P, Commission v. Tetra Laval BV, 2005 E.C.R. I-987, ¶ 39 (Grand Chamber) ("Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature.").

[71] James F. Rill served as Assistant Attorney General for the Antitrust Division from 1989 to 1992 and oversaw the drafting of the 1992 guidelines. See Rethinking Antitrust Podcast #6, supra note 48.

[72] Mario Monti served as Commissioner for Competition from 1999 to 2004. The Court of First Instance annulled three prohibition decisions in 2002, in each case faulting the evidentiary basis of the Commission's economic analysis. Case T-342/99, Airtours plc v. Commission, 2002 E.C.R. II-2585, ¶ 294 (June 6, 2002) (the decision was "far from basing its prospective analysis on cogent evidence"); Case T-310/01, Schneider Electric SA v. Commission, 2002 E.C.R. II-4071, ¶ 411 (Oct. 22, 2002); Case T-5/02, Tetra Laval BV v. Commission, 2002 E.C.R. II-4381, ¶ 155, aff'd, Case C-12/03 P, supra note 70.

are clear that efficiencies are not off the table, that we can tell a story that is broader than you're telling the court or you're telling us today.

Dr. Anna Tzanaki: I agree with you. The problem is that there are a lot more and a lot more soft factors there in the guidelines. Before, we had at least some structural safe harbors, for good or bad. Now this is all gone.[73] So for that reason, I'm saying that the Commission's role is perhaps — as an unintended side effect of the innovation that they tried to do — expanded. So perhaps in practice there will be more self-constraint in how they implement this document, and we will learn from that. But just by reading the document, it's not entirely clear that they don't have more leeway than perhaps you would like in some cases.

Bilal Sayyed: So we'll end on this question. Do you think some or enough of that can be corrected between the draft and the final?

Dr. Anna Tzanaki: I would like to hope so, and that's the purpose of the consultation. I do intend to respond to the consultation, and some of my comments will be around that. Because at the end of the day, I'm a lawyer, so legal certainty is an important aspect as well. So we don't only need to keep up with economics. Economics can be good up to a certain point. But making the analysis too complex, without any clear guiding or limiting principle — that could also be a concern.

Bilal Sayyed: Okay, well, I think we'll end there. This has been the Rethinking Antitrust podcast. I'm Bilal Sayyed. My guest has been Anna Tzanaki.

I thought this was a good conversation — hope you liked it. So we'll see — we'll have you back. And thank you.

Dr. Anna Tzanaki: Thank you so much, Bilal.

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[73] The draft retains four market structures that "may be indicative that a merger between competitors does not give rise to a SIEC": combined market share below 25%; combined market share below 50% with an HHI delta below 150; post-merger HHI below 1,000; or post-merger HHI between 1,000 and 2,000 with an HHI delta below 250. Draft Guidelines, supra note 1, ¶ 129. Three carry over from the 2004 Horizontal Guidelines, supra note 5, ¶¶ 18-20, though the framing is weaker: levels at which the Commission was previously "unlikely to identify horizontal competition concerns" are now merely indicative, and the draft cautions that even a limited increment may raise concerns where a firm already holds significant market power. Id. ¶ 128. The 2008 non-horizontal safe harbor is not carried forward. Compare 2008 Non-Horizontal Guidelines, supra note 5, ¶ 25, with Draft Guidelines, supra note 1, ¶ 214. The draft does, however, add the innovation shield. Supra note 16.