SVENSKT NÄRINGSLIV
SWEDISH ENTERPRISE

European Competition
Directorate-General for Competition

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Public consultation – Draft Merger Guidelines

Here follows the comments and proposals of the Confederation of Swedish Enterprise on the European Commission's public consultation on the new draft merger guidelines.

Our input in the Commission's previous consultation

We submitted comments in previous Commission consultation during the autumn of 2025. In our reply, dated 1 September 2025, we summarised the following key issues for the Commission to consider in the continued work on preparing new merger guidelines:

- Maintain a merger control regime that is neither tightened nor diluted compared with the current situation.
- Continue to apply an evidence-based method with a focus on the effects of concentrations on competition and consumer welfare.
- Clarify how it intends to ensure that the scope of merger control is proportionate and predictable in relation to mechanisms such as thresholds and the ability to request notifications in individual cases.
- Clarify how companies can invoke efficiency gains as a means of compensating for a reduction in competition resulting from a concentration. Broaden and clarify different aspects of efficiency and quality that may be taken into account in such an assessment.
- Describe how efficiency gains outside the relevant market can be invoked, without creating an unclear assessment.

Framework for our assessment

This response focus on our view of the most central aspects of the draft that have a bearing on the policy orientation. In that regard, we consider as particularly relevant the question of how interventionist merger control should in general be and whether the regulatory framework should become less interventionist in order to facilitate the creation of large European companies, "European Champions". This, for example, by in the Commission's balancing test providing better conditions for invoking efficiency gains on the part of the merging parties, and giving these greater weight in the balancing test carried out, where these are weighed against the risk of a significant impediment of competition (SIEC).

We also consider it relevant to address how the Commission proposes that parameters other than price should be taken into account in the competition law assessment, including societal objectives such as sustainability and resilience, as well as to what extent effects that go beyond the market and consumers should be included in the assessment.

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The assessment takes as its starting point the fact that the current draft of the Commission's merger guidelines, which describes the Commission's analytical framework, is ultimately constrained by the provisions of the Merger Regulation (Regulation (EC) No 139/2004). The Commission cannot therefore deviate from what follows from the Merger Regulation and the case law of the EU courts. This sets a framework for how the guidelines can be changed, and ensures that certain important provisions, principles and approaches are not altered.

Our overall assessment of the policy orientation and its effects

Our overall assessment is that the draft entails a certain change in the competition policy orientation, but that it can be described as a well-balanced adjustment rather than a shift. There remains a strong focus on ensuring that concentrations do not lead to the creation of market power that can cause a significant impediment to competition. Effective competition is the best tool not only for promoting lower prices but also for stimulating productivity, investment and innovation.

At the same time, greater scope is created for companies to invoke efficiency gains, as these appear to be able to obtain a more equivalent position with the examination of potential harm to competition in certain respects. However, such efficiency gains must still be verifiable, specifically linked to the concentration and benefit consumers.

That merger control may include more long-term, dynamic effects, and take into account aspects such as innovation, resilience and sustainability in the assessment, does not in itself lead to any shift in the policy orientation, but is rather an update of the regulatory framework in line with how markets function in practice and creates a clearer and (at least over time) more predictable and accurate assessment. This is because additional aspects are considered to be parameters of competition rather than supplementary policy objectives to be weighed against the competition interest. These aspects are also something which in the assessment can both be invoked as efficiency gains, but which may also form part of a theory of harm. The possibility of such a broader assessment therefore does not automatically lead to less interventionist merger control.

Accordingly, the proposal is unlikely, in terms of effects, to lead to any major changes in the overall merger assessment, in the sense that many more cases would be cleared by the Commission. Possibly, an assessment where more companies choose to (early in the process) put forward efficiency arguments may create a better evidentiary basis for the Commission, which may create conditions for the Commission to accept more concentrations subject to remedies, both structural and behavioural.

Without going into further detail, we consider that the adjustment of the competition policy orientation expressed in the draft of new merger guidelines is limited and well balanced.

Our analysis of the proposal for new merger guidelines

In the draft, the Commission notes that global trade and geopolitics have changed, and that there is therefore a need to reassess how the Commission balances different effects of a concentration. The Commission considers that the economy has shifted towards more innovation-intensive sectors and towards a greater dependence on critical supply chains,

where scale, innovation and ensuring reliable access to critical inputs may be decisive for the ability to compete.

The assessment of corporate concentrations should therefore attribute sufficient weight to scale, innovation, investment and resilience as pro-competitive factors that may benefit from a certain degree of consolidation, and should also assess how the proposed concentration affects future innovation potential. The assessment should, where appropriate, take dynamic aspects and long-term effects into account.

Furthermore, the Commission describes a number of typical situations where increased company size (scale) may strengthen European competitiveness. We share the Commission's description of reality and consider it a reasonable starting point for reviewing the regulatory framework. We agree with the Commission's assessments and consider it positive that it highlights and clarifies how scale may strengthen competitiveness.

The advantages resulting from a corporate concentration may be described as efficiencies. Corporate concentrations may promote competitiveness and growth in different ways, for example by creating economies of scale, complementary characteristics and synergies, opening new markets for companies' products, etcetera.

The Commission proposes a clearer framework for the assessment of efficiencies, where companies are encouraged to formulate these within the framework of a theory of benefit, a "theory of benefit", in the same way and to the same evidentiary standard as the Commission may formulate theories of harm. The Commission encourages the parties to develop such theories of benefit early in the process, even before the Commission has made any assessment regarding potential competition concerns.

How significant a change this will lead to in the actual review, and in the outcomes, is difficult to assess. The Confederation of Swedish Enterprise has here made its own assessment based on views from our member organisations and member companies. We have also taken into account the assessments expressed publicly by a number of internationally leading law firms in the field of competition law (for example Paul Weiss, White & Case, De Brauw, Sullivan & Cromwell).

The fundamental assessment remains unchanged – but the use of theories of benefit will likely be given greater weight, with greater openness to arguments relating to competitiveness in various forms. The theory of benefit thus becomes potentially a clearer counterweight to theories of harm. If the theory of benefit is presented earlier in the process, it potentially has greater opportunities to obtain equivalent weight to potential theories of harm (at the same time, the impact depends partly on how companies choose to use this opening – companies that assess that a concentration is unlikely to encounter objections from the Commission have weak incentives to analyse and prepare a theory of benefit from the outset, whereby such a theory may nevertheless need to be developed later in the process).

One may gain the impression that the assessment of the two components becomes more symmetrical, where similar principles are used to assess the evidence/indications of harm and benefit respectively. In the description of how these are to be weighed against each other, there are no formulations that clearly give precedence to either side. On the contrary, they are equated, for example in relation to the time aspect – both competitive harm and

benefit are to be given less weight the further into the future such effects can be expected to arise.

Also in relation to its own discretion in making balanced assessments, the Commission's wording gives the impression that these two parts are equated to a greater extent:
"The Commission exercises its margin of discretion according to the same principles as regards the assessment of evidence underlying both a theory of harm and a theory of benefit."

At the same time, robust evidence will continue to be central, and the core criteria remain, namely that efficiency gains must be verifiable, specifically linked to the concentration and benefit consumers. This ensures that the effects of a more equal assessment are nonetheless limited. A fully equal treatment is hardly achieved. The Commission does not appear to fully equate the two sides, as it does not choose to introduce the same explicit formulations regarding the required standard of probability for efficiency gains. For a SIEC to arise, the formulation "more likely than not" is used. Had a truly equal assessment been intended, the same formulation would have been used for efficiency gains.

The Commission opens up for a more dynamic assessment and distinguishes between direct and dynamic effects of a concentration. A more dynamic assessment, where more aspects of competition and how a market functions and develops are considered, and where a more long-term perspective is taken, is something that many stakeholders have requested and may appear entirely reasonable. However, it should be emphasised that this also works "in both directions". It opens up for considering long-term efficiency gains, but also new theories of harm that in various ways focus on risks that a SIEC may arise in the longer term.

In the concrete situation, the Commission can often draw conclusions about the risk of a SIEC based on market structure, documentation and pricing incentives. Efficiency gains, however, often require internal modelling within the company, proof of implementation and a logic for how the gains are passed on to customers, and are often met with scepticism regarding implementation risk, particularly when it comes to dynamic efficiencies which are inherently more uncertain.

The draft attempts to mitigate this by allowing flexibility where quantification is not reasonably possible and by encouraging other types of evidence, but this does not eliminate the inherent asymmetry that may still exist in this respect.

Overall, the assessment changes in a significant way from a procedural perspective – an efficiency defence is no longer merely a potential (albeit encouraged by the Commission) option in a situation where a theory of harm has already been established and doubts about the appropriateness of a concentration are present. Efficiencies become a more institutionalised part of the assessment through the theory of benefit, at least according to the Commission's proposed structure, where the assessment of evidence and uncertainties is to a greater extent equated between the harm and benefit components.

What final effects this will lead to, in terms of the number of approved, conditionally approved and prohibited corporate concentrations, is difficult to assess. Even if the process changes, much suggests that the final effects in these respects will nevertheless be limited, for the reasons set out above.

As already mentioned, the Commission describes a more dynamic assessment where more aspects of competition and effects of a concentration can be considered. In today's markets, there is often much more than only price and quality in general terms that may be relevant competition parameters between companies, and where a more structured assessment may be required in which these are taken into account – for example innovation, resilience and sustainability.

Including these parameters within the framework of merger control is welcome. It better reflects how competition between companies is actually conducted, and what matters in this respect. The various parameters can be used both within a theory of harm and a theory of benefit, so it is not given whether this overall leads to a more or less interventionist assessment. However, it results in a clearer assessment, with a clearer structure for how such factors can be invoked by either side, which creates greater predictability.

We do not consider that these aspects of the draft automatically lead to a reduced focus on well-functioning markets. Nor does it lead to other policy objectives entering and making the assessment more complex or unclear, since different aspects of quality competition are still assessed, rather than merger control being used as a tool to achieve other policy objectives, with the risk that the competition interest is set aside in some respect.

A further argument for this is that the Commission continues to take a relatively strict view on effects outside the market (out-of-market benefits and collective benefits). It considers that such effects must be verifiable and concentration-specific, and are only relevant to the extent that they are valued by and fully compensate essentially all affected consumers.

We consider this to be a sound policy development. Competition rules should focus on competitive aspects and well-functioning markets, and maintain a reasonable balance that does not unduly interfere with the freedom of companies and markets. Other policy objectives should primarily be pursued through other types of regulatory frameworks. Otherwise, there is a risk that competition objectives will be set aside, and that the assessment becomes more unclear, unpredictable and politicised.

Predictability and the role of market-share based guidance

While we recognise the Commission's intention to develop a more flexible and forward-looking framework, capable of addressing new market dynamics and evolving theories of harm, we are concerned that the draft guidelines risk placing insufficient weight on predictability and administrability.

The current guidelines for non-horizontal mergers articulate a 30 % benchmark, below which the Commission is unlikely to find concern in non-horizontal mergers. While not being an absolute safe harbour, it provides a well-established and effective form of indicative safe harbour. These thresholds play a crucial role in enabling businesses to self-assess agreements with legal certainty and at low cost, thereby supporting efficient decision-making and reducing unnecessary administrative burdens.

By contrast, the draft merger guidelines appear to move further away from structured, market-share based indicators in favour of a fully effects-based and case-by-case assessment. While such flexibility has clear merits, particularly in complex or fast-moving markets, it can also come at the expense of legal certainty and may lead to increased

compliance costs and more cautious or delayed investment decisions, even in transactions that are unlikely to raise competition concerns.

We consider that non-binding but clearly articulated market-share based benchmarks continue to serve an important function in merger control. Even where they do not constitute formal safe harbours, such indicators provide valuable guidance to businesses, enhance transparency in enforcement, and promote a more proportionate allocation of resources by both the Commission and notifying parties.

Against this background, we encourage the Commission to retain, and where appropriate further develop, indicative market-share thresholds for non-horizontal mergers. A balanced approach, combining flexibility with meaningful guidance, would better ensure both effective enforcement and the predictability necessary for well-functioning markets.

Entrenchment

The draft guidelines expand the range of theories of harm, including entrenchment, and may be read as allowing intervention based on a broad set of structural and qualitative indicators. While such flexibility may be justified in certain circumstances, it risks weakening the link between intervention and clearly evidenced anticompetitive effects.

In this context, we consider that, at least in non-horizontal settings, a finding of likely foreclosure—supported by evidence of ability and incentive—should remain a central analytical anchor, rather than one of several optional scenarios. This would help ensure that merger control remains firmly grounded in demonstrable effects on competition.

Best regards

Stefan Sagebro