BUNDESRECHTSANWALTSKAMMER

Position Paper No. 43
June 2026

EU Transparency Register Number: 25412265365-88

Contribution to EU Consultation on the Draft Merger Guidelines of 30 April 2026

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The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German Rechtsanwälte. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 167,500 lawyers, vis-à-vis authorities, courts, and organisations at national, European, and international level.

Position Paper

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[1] The index structure is identical to the structure of the consultation form of the European Commission.

1. Part. I. Introduction and guiding principles

This section includes the introduction of Part I, i.e. paragraphs 1-6.

Introduction and Scope of the Submission

1. Subject-Matter

This submission responds to the European Commission's public consultation on the revision of its Merger Guidelines. The Draft Guidelines supersede the 2004 Horizontal Merger Guidelines and the 2008 Non-Horizontal Merger Guidelines (para. 3) and represent the first holistic exercise to integrate horizontal and non-horizontal assessment frameworks into a single analytical instrument. The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) – acting on the basis of extensive practical experience in EU merger proceedings of the individual members of its Competition Law Committee – welcomes the Draft but identifies material shortcomings requiring further elaboration in the final text.

2. Submitter's Standing and Perspective

The BRAK is the umbrella organisation of the self-regulatory bodies of the German Rechtsanwälte. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 167,500 lawyers, vis-à-vis authorities, courts, and organisations at national, European, and international level.

The submission builds on the BRAK's Position Paper No. 41/2025 of September 2025 on the Contribution to the 2025 EU Consultation on the Review of the Merger Guidelines. The BRAK also welcomes the acknowledgement in paras. 11–15 that scale can be pro-competitive and may be necessary for firms to compete in global markets. This is consistent with the BRAK's earlier observation that merger assessment should not focus exclusively on firm-level efficiencies, but should also take into account broader societal and macro-economic effects, including increased global innovation capacity, enhanced strategic autonomy and improved resilience of critical supply chains - when compatible with Art. 2(1)(b) and (2) EUMR (*please also refer to the BRAK Position Paper No. 41/2025, response to Question 3.3*).

2. Part I.A – THE ROLE OF EU MERGER CONTROL

This section includes sub-sections 1. The importance of EU merger control for the internal market and competitiveness, and 2. Benefits from scale versus market power, i.e. paragraphs 7-18.

1. The importance of EU merger control for the internal market and competitiveness (paras. 7–13)

The BRAK welcomes the increased recognition throughout Part I.A (paras. 7–18) that mergers can contribute not only to efficiency gains, but also to innovation, investment, resilience, security of supply and the competitiveness of European industry. In particular, the references in paras. 9, 10 and 15 to resilience, strategic autonomy, innovation capacity and the competitiveness of the internal market reflect concerns that the BRAK has previously raised in the consultation process (*please also refer to the BRAK Position Paper No. 41/2025, responses to Questions 3.3 and 3.4*).

As regards paras. 7–10, while recognition of broader policy objectives is welcome, the proliferation of non-competition objectives (resilience, defence readiness, media plurality, sustainability) creates a risk that the SIEC test is diluted into a policy-discretion exercise. These objectives should be taken into

account only insofar as they manifest in competitively relevant parameters, not as independent grounds for intervention or clearance.

2. Benefits from scale versus market power (paras. 14–18)

Furthermore, para. 18 states that benefits of scale must be distinguished from increasing market power, but fails to provide operational criteria for this delineation. The Guidelines should set out concrete indicators or safe-harbour-type criteria that allow parties to anticipate whether a given transaction will be assessed under the procompetitive scale or the market power lens.

3. Part I.B – GUIDING PRINCIPLES

This section includes sub-sections 1. Parameters of competition, 2. Burden of proof, theories of harm and benefit, 3. Evidence, 4. Overall assessment of mergers' impact, including their benefits, and 5. Causality between the merger and the competitive effects again with sub-sections for 5.1 Relevant counterfactual and 5.2 Failing firm, i.e. paragraphs 19-51.

1. Parameters of competition (para. 20)

As regards para. 20, the BRAK supports the explicit recognition that competition takes place not only on price, but also on non-price parameters such as innovation, investment, sustainability, resilience and quality. Innovation in particular is a key source of dynamic competition and should be assessed as an integral part of the competitive process. In the BRAK's view, innovation should not merely be considered as a possible counterweight to competitive harm but as part of the overall competitive assessment from the outset (*please also refer to the BRAK Position Paper No. 41/2025, response to Question 3.5*).

However, the Commission's claimed margin of discretion in weighing price and non-price parameters (para. 20) amounts to a potentially unreviewable weighing exercise. The Guidelines should require the Commission to disclose its weighing rationale in the Statement of Objections and in the decision, enabling effective judicial review and targeted defence.

2. Burden of proof, theories of harm and benefit (paras. 21–25)

The BRAK welcomes the introduction of a "theory of benefit" in paras. 24 and 25. A more structured framework for assessing efficiencies and other pro-competitive merger effects is helpful and may contribute to greater transparency and predictability. This is in line with the BRAK's previous position that efficiencies should not be treated solely as an ex post defence to an identified SIEC but should form part of the overall assessment of the merger's effects on competition (*please also refer to the BRAK Position Paper No. 41/2025, responses to Questions 8.3(a), 8.3(c) and 8.5*).

It should be noted, however, that the burden of proof remains asymmetric: while the Commission need not quantify harm (para. 22), parties must substantiate efficiencies in detail. The Guidelines should impose an obligation on the Commission to substantively engage with demonstrated efficiencies – a mere finding that they are "insufficient" without reasoned analysis cannot satisfy Article 296 TFEU.

Regarding para. 22, the Commission's ability to establish a SIEC without specifically demonstrating or quantifying consumer harm significantly limits the parties' ability to mount a targeted defence. At minimum, the Commission must articulate the mechanism of harm and its expected competitive effects with sufficient specificity.

3. Evidence (para. 30)

Concerning evidence, the BRAK notes that the Commission can rely on third-party submissions without detailed verification of credibility (para. 30). Since merging parties have limited access to such submissions, key third-party submissions should be disclosed in non-confidential form. The Guidelines should also require systematic discounting of submissions where manifest self-interest is present. Furthermore, following CJEU C-265/17 P (UPS), the Commission must substantively engage with parties' quantitative analyses rather than dismissing them with qualitative assertions.

4. Overall assessment of mergers' impact, including their benefits (paras. 32–36)

Similarly, the overall balancing approach set out in paras. 32–36 is a welcome development. The BRAK has previously argued that efficiencies, innovation and investment effects should be considered as part of the overall competitive assessment rather than being viewed only as a counterbalance to anticompetitive effects (*please also refer to the BRAK Position Paper No. 41/2025, responses to Questions 3.5 and 8.3(a)*). The draft Guidelines move in that direction.

Nonetheless, para. 35 should not be understood as creating a de facto presumption that efficiencies can never outweigh competitive harm where a merger results in very substantial market power. Such an interpretation would be difficult to reconcile with the principle that the EUMR contains neither a positive nor a negative presumption of compatibility (C-376/20 P, para. 71). The Guidelines should therefore clarify that the efficiency assessment remains open in all cases, albeit subject to particularly strict scrutiny.

At the same time, further clarification would be useful as to how the Commission intends in practice to weigh benefits relating to innovation, investment, resilience, security of supply and competitiveness against possible anticompetitive effects. While paras. 33–35 expressly recognise several of these benefits, it remains somewhat unclear to what extent broader societal or macro-economic benefits can be taken into account where they are not immediately reflected in short-term consumer welfare. The BRAK has previously suggested considering a complementary framework for assessing such societal efficiencies in appropriate cases, while preserving the central role of the SIEC test and maintaining legal certainty and transparency (*please also refer to the BRAK Position Paper No. 41/2025, response to Question 3.3*).

5. Causality between the merger and the competitive effects (paras. 37–51)

5.1. Relevant counterfactual (paras. 37–44)

As regards the counterfactual (paras. 37–44), para. 40 requires a "sufficient degree of certainty" for future events without operationalising this standard. The Guidelines should specify what types of evidence meet the threshold (e.g., binding contracts, board decisions, regulatory approvals) and clarify by when counterfactual arguments must be submitted.

5.2. Failing firm (paras. 45–51)

Regarding the failing firm defence (paras. 45–51), para. 51 requires "sufficient evidence in due time", but parties must not be precluded from invoking the defence if the target's financial situation deteriorates during proceedings. Additionally, the high bar for failing divisions (para. 50) disregards that legitimate commercial decisions to divest underperforming divisions are not indications of failure; more realistic criteria recognising ordinary business decisions regarding portfolio restructuring should be established. In addition, the Guidelines should state what information or evidence or expert reports would be

expected by the Commission allowing the parties to prepare in advance in the interest of time, e.g. an incremental cost-benefit analysis of closing the business unit, a business unit discontinuation analysis etc. - since concentrations in this scenario regularly are under significant time pressure.

Overall, the BRAK supports the direction taken in Part I.A and Part I.B. The draft Guidelines better reflect modern competitive dynamics and rightly acknowledge that innovation, investment, resilience and scale can be important drivers of competition and competitiveness. Additional guidance on how these factors will be balanced in concrete cases will further improve legal certainty and predictability.

4. Part II – Competitive Assessment

This section includes the introduction of Part II, as well as the introduction of Part II.A – MARKET POWER, i.e. paragraphs 52-59.

5. Part II.A.1 – Structural indicators of market power

This section includes an introduction and sub-sections 1.1 Large market shares, and 1.2 High market concentration, i.e. paragraphs 60-67.

While the Commission acknowledges in the Draft Merger Guidelines that large market shares are only one (structural) indicator of market power and that “typically” assesses them alongside other structural and other indicators of market power (para 64) it should be stressed that all potential indicators of market power have the same relevance and that only the overall assessment allows to conclude the existence of creation of market power. It is appreciated that the Commission has now opted for a holistic assessment of market power and takes into account the aspects such as price sensitivity and profit margins and market barriers. However, to ensure legal certainty, the Commission should clearly state that all such indicators are to be assessed. In contrast, stating in para 57 that market power requires "a combination of factors, none of which is individually decisive" does not support legal certainty as one may infer from this statement that the Commission can cherry-pick which indicators for market power it considers relevant for its assessment.

Para 62 introduces differentiated market share categories: 'low' <10%, 'moderate' 10-25%, 'material' 25-40%, 'high' 40-50%, 'very high' ≥50% which it applies in the context of assessing anticompetitive effects (paras 126-128). However, this categorization does not appear to be in line with the new holistic approach focusing on other indicators as market shares as well. There is a risk that the threshold system masks uncertainty about when other indicators for market dominance become equally decisive, and if there is still a certain hierarchy among the different factors which should be avoided.

6. Part II.A.2 – Other indicators of market power

This section includes sub-sections 2.1 Low sensitivity to price, 2.2 High profit margins, and 2.3 High barriers to competition, i.e. paragraphs 68-79

Also, the BRAK strongly opposes to the Commission’s position set out in para 112 that market shares of 50 % or more “are in themselves – save in exceptional circumstances – evidence of a dominant position”. By circling back to such a formalistic, structural approach to market dominance the Commission contradicts itself when officially announcing its new holistic assessment of market power (see also page 1 of the Commission’s own Summary Document of Key Technical Novelties accompanying its Draft Merger Guidelines).

As regards the “newly” introduced indicators for market power, in particular low sensitivity to price (para 68 et seq.) and high profit margins (para 70-74) the Commission reserves the right to assess these aspects in determining market dominance. However, if the facts investigated by the Commission or as shown by the parties to the concentration direct in the opposite direction, i.e. a high sensitivity to price exists and the profit margins are low, this should be equally factored into the overall assessment as indicators for non-existence of market power.

The Draft Merger Guidelines include extensive explanations on market barriers (barriers to entry and limited switching possibilities) as being indicative of market power (paras 75-79). In principle, these detailed considerations are appreciated as they take into account potential particularity of different types of markets and thereby acknowledge that markets have changed and an update of the rules in line with recent enforcement practice was long overdue.

7. Part II.A.3 – Dynamic competitive potential

This section includes paragraphs 80-83.

The same applies to the factoring-in of dynamic competition potential, in particular in innovation markets, into the assessment of market power. The Commission provides various examples based on its enforcement practice (para 81) but it can already be foreseen that in dynamic markets new considerations and aspects will develop in due course. To rebut market dominance, the parties to the concentration must equally be heard with additional considerations, as they are the ones shaping such innovative markets, and the enforcement practice can only follow suit. There is no room for straightjacketing in dynamic markets. If this comes at the cost of less legal certainty for the parties to the concentration it has at least to be ensured that the Commission continues to remain open to new considerations, also those that speak against the parties’ dynamic competition potential when other market players were able to gain a specific innovative edge.

8. Part II.A.4 – Countervailing factors

This section includes an introduction and sub-sections 4.1 Dynamic entry or expansion of competitors, 4.2 Out-of-market constraints, and 4.3 Countervailing buyer power, i.e. paragraphs 84-110.

The subsection ties into the long acknowledged countervailing factor in the form of competitors’ dynamic entry or expansions of competitors (paras 88 et seq.). It appears appropriate to also include in this subsection (II.A.4.1) considerations regarding the relevance of market entry or expansion of competitors in dynamic, innovation-driven markets taking into account the three cumulative criteria established by the Commission, i.e. likelihood, timeliness and magnitude (paras 93 et seq.). However, if innovations are not yet commercialised it is likely that the regular timeline of market entry or expansion of up to two years (para 86) is not sufficient, and the Commission will therefore likely often need to deviate from this timeframe to which it has attested its openness (para 96; see also page 2 of the Commission’s own Summary Document of Key Technical Novelties accompanying its Draft Merger Guidelines).

The BRAK welcomes the Commission’s formal introduction of out-of-market constraints as additional countervailing factor to be taken into account (para 101 et seq.). It is understood that para 103 only lists examples in so far as they have been assessed in previous cases. The Commission should remain open to other out-of-market restraints in other fact scenarios. Even if out-of-market restraints may generally have a less restraining effect than restraints arising from inside the relevant market (para 102) this is ultimately a case-by-case assessment that the Commission should equally acknowledge. Also, the Commission should clarify in its statement in para 102 that even if certain or a subset of customers remain dependent on the merging parties, out-of-market restraints could suffice to neutralize market

power where large customers or key account customers of out-of-market products are able to restrain the merging parties' behaviour in the relevant markets.

9. Part II.A.5 – Dominance and other types of market power

This section includes paragraphs 111-113.

See answer to Part II.A.2.

The Draft Merger Guidelines omit to clarify the notion and role of "dominance", in particular its relation to a significant impediment of competition (para 111 et seq.). The BRAK strongly encourages the Commission to expand the respective section (and move it to the beginning of Part II), in particular concerning the following important aspects that take due account of the evolution of the substantive test enshrined in Art. 2 EUMR:

- Unilateral effects in an oligopolistic market are assessed against the standard of an SIEC
- Unilateral effects in a non-oligopolistic market are assessed against the standard of a (single firm) dominant position
- Coordinative effects in an oligopolistic market are assessed against the standard of a (collective) dominant position.

The above clarification is highly important to make clear what the applicable benchmark is for the application of the various sections of the Guidelines that discuss the competitive harm (e.g. what is the precise substantive test when foreclosure is assessed – para 243?).

10. Part II.B.1 Anticompetitive Effects – Introduction: direct and dynamic effects

This section includes paragraphs 114-118.

The Draft Merger Guidelines introduce a distinction between "direct" and "dynamic" anticompetitive effects assessed on a "continuum" (para. 115). The BRAK acknowledges this taxonomy as a useful heuristic device. However, two aspects raise concerns regarding legal certainty. First, para. 117 reserves the Commission's right to "develop new theories of harm in light of evolving market realities." An unrestricted reservation to create novel theories undermines the predictability that guidelines are meant to provide and risks reducing the Draft Merger Guidelines to a non-exhaustive illustrative catalogue rather than a normative framework (see BRAK Position Paper, Question 3.5). Second, the statement in para. 118 that different effects may "mutually reinforce each other" lacks methodological guidance. Without clear standards, individually weak theories of harm could be aggregated into a finding of SIEC where none would be sufficient as stand-alone (cf. para. 26).

The final text should (i) qualify the reservation in para. 117 by requiring that any newly developed theory of harm be grounded in established economic principles and subject to the same evidentiary standards as existing theories; and (ii) clarify in para. 118 that the mutual reinforcement of different effects cannot serve as a substitute for the independent substantiation of each individual theory of harm, and that the aggregation of effects must itself be supported by specific evidence demonstrating the reinforcing mechanism.

11. Part II.B.2 – Loss of Head-to-Head Competition

This section includes an introduction and sub-sections 2.1 Structural market features, 2.2. Closeness of competition, 2.3. Important competitive force, and 2.4. Specific market aspects, i.e. paragraphs 119-168.

Safe Harbours and Market Share Thresholds

The BRAK welcomes the introduction of indicative market share thresholds in paras 126–129. The safe harbour zones – combined share below 25%, or combined share below 50% with an HHI delta below 150 – provide useful initial screening criteria. However, these thresholds only indicate the likely "absence" of a SIEC and do not constitute absolute guarantees. Conversely, para. 128 states that even a "very limited" market share increment may give rise to concerns where the acquiring firm holds a dominant position pre-merger. Combined with para. 121 – for dominant firms, the Commission need not demonstrate close competition or the loss of an important competitive force – this creates a significantly lowered intervention threshold that conflicts with the holistic, effects-based approach the Draft Merger Guidelines purport to adopt (BRAK Position Paper, Question 8.3.a).

The final text should clarify that even where the acquiring firm is dominant, the Commission must still identify and evidence a concrete anticompetitive mechanism resulting from the transaction. The mere fact of pre-existing dominance combined with any market share increment should not suffice to establish a SIEC without further analysis of the specific competitive dynamics affected by the merger. An additional safe harbour should be introduced stating that any increment of a market share of less than 3% cannot qualify as a "significant impediment" compared to the ex ante situation.

Important Competitive Force

The Draft Merger Guidelines incorporate the concept of an "important competitive force" (paras 138–142), drawing on CK Telecoms (Case T-399/16). While this judicial endorsement is acknowledged, the concept remains insufficiently defined. The examples in para. 140 are illustrative rather than delimiting. For a concept that triggers intervention below the closeness-of-competition threshold, clearer boundaries are required.

The final text should provide concrete guidance on the evidentiary threshold for establishing that a firm constitutes an "important competitive force," preventing an expansive application that would undermine the safe harbours in paras 126–129.

Labour Markets (paras. 160–162)

The Draft Merger Guidelines extend the assessment to labour markets (paras 160–162). While this reflects evolving conceptions of competitive harm, the inclusion of monopsony effects raises questions of scope and administrability. Labour market conditions are influenced by factors beyond the merging parties' control, the Commission's enforcement practice remains limited, and the evidentiary challenges are considerable. Most controversial could be the argument that any merger will most likely have an impact on a labour market and thereby allows the introduction of public policy arguments of protection of employment in the assessment of the scope of competition defined by the field of activities of the merging firms.

The final text should acknowledge the preliminary character of labour market assessment in merger control, requiring the same rigorous evidentiary standard as traditional product market effects and not relying on labour market theories as a primary basis for intervention absent at least one different established theory of harm.

12. Part II.B.3 – Loss of Investment and Expansion Competition

This section includes paragraphs 169-174.

The Draft Merger Guidelines introduce a standalone theory of harm based on the "loss of investment and expansion competition" (paras 169–174). A SIEC may arise from the "discontinuation, downsizing, delay or redirection of investment projects". Notably, harm may exist even where the merged entity proceeds with its investments, because the "incentive to compete and invest in the future would be likely to decrease" (para. 170).

The BRAK acknowledges that investment rivalry can be important, particularly in capital-intensive industries. However, a theory premised on hypothetical future changes in incentive structures – where the entity continues investing but is presumed to have reduced incentives – operates at a high level of speculation, requiring proof of an inherently unverifiable counterfactual. Furthermore, the theory fails to distinguish between legitimate post-merger portfolio optimisation (a recognised efficiency) and anticompetitive conduct. Rationalisation of overlapping investment projects is a standard synergy frequently cited as pro-competitive. A theory treating any redirection of investment as evidence of harm contradicts the recognition of such efficiencies in Part II.C (BRAK Position Paper, Question 5.1.1).

The final text should (i) require the Commission to identify specific and concrete investment projects affected by the transaction, rather than relying on generalised assertions about reduced incentives; (ii) establish clear criteria for distinguishing anticompetitive investment reductions from legitimate post-merger rationalisation that constitutes an efficiency; and (iii) clarify the counterfactual standard, requiring the Commission to demonstrate with specificity what investment trajectory would have been maintained absent the merger.

13. Part II.B.4 – Loss of Innovation Competition

This section includes an introduction and sub-sections 4.1. Loss of specific innovation competition, 4.2. Loss of general innovation competition, and 4.3. Innovation shield, i.e. paragraphs 175-192.

4.1 Specific Innovation Competition and the Cannibalisation Presumption

The Commission relies on a cannibalisation logic: where firms are close innovators and hold larger margins, the incentive to innovate is presumed to decrease post-merger (para. 177). While this has an economic foundation, it represents only one side of the assessment. Merged entities may equally have stronger incentives to innovate due to a larger customer base for amortising R&D costs, complementary assets, and elimination of duplicative research. The Draft Merger Guidelines insufficiently acknowledge these countervailing effects (BRAK Position Paper, Question 5.1.1).

The final text should explicitly recognise that the cannibalisation effect must be weighed against pro-competitive innovation incentives arising from the merger, including access to complementary assets, larger customer bases for amortisation of R&D costs, and the combination of complementary research capabilities. The assessment should require a net effects analysis rather than a one-sided presumption.

4.2 General Innovation Competition (paras. 186–191)

General innovation competition (paras 186–191) represents the most speculative theory of harm. It applies where the Commission identifies overlapping "innovation capabilities" at an industry level, without specific product markets or concrete pipelines, assessing effects on innovation spaces (para.186). This pushes merger control into territory where conventional tools – market definition, market

shares, closeness of competition – provide limited guidance and the risk of speculative intervention is highest (BRAK Position Paper, Question 3.5).

The final text should impose heightened evidentiary requirements for general innovation competition theories, requiring the Commission to identify concrete innovation capabilities at risk of being eliminated and to demonstrate a causal link between the merger and a reduction in innovation diversity that is not merely hypothetical. This could best be achieved by introducing timeframes that should be regarded as relevant periods within which an effect presumably has to materialize in order to be recognized as relevant for the assessment. The use of time frames should be encouraged beyond its one time application in the Draft Merger Guidelines at para. 96.

4.3 Innovation Shield (para. 192)

The Innovation Shield safe harbour (para. 192) is welcome, providing that certain transactions are unlikely to raise innovation concerns where specified conditions are met (market share below 40%, at least three remaining competitors with comparable R&D projects). However, the safe harbour's conditions involve multiple cumulative sub-scenarios and complex threshold determinations that may prove difficult to apply in practice.

The final text should simplify the Innovation Shield conditions to enhance practical administrability and provide clear examples of their application. Where parties demonstrate sufficient remaining innovation competition, this should be treated as a strong indicator against innovation harm regardless of precise market share thresholds.

14. Part II.B.5 – Loss of Potential Competition

This section includes paragraphs 193-207

The Draft Merger Guidelines set out a three-prong cumulative test (para. 194): (a) insufficient actual competitive constraints, (b) the target or acquirer exercises an actual or future constraint as potential competitor, and (c) no other sufficient potential competitors exist post-merger. The BRAK welcomes this structured framework providing greater analytical clarity.

However, several aspects raise concerns. First, "foreseeable future" (para. 203) deliberately avoids a fixed time period, creating significant uncertainty. The Draft Merger Guidelines' own two-year benchmark for countervailing entry (para. 96) suggests temporal framing is feasible. Second, the concept of "actual constraint by a potential competitor" (paras 196–199) risks a mixture of market monitoring and the presence of genuine competitive pressure. Third, para. 202 states that the absence of specific entry plans should not prevent a finding. This, combined with the open time horizon, allows the Commission to construct potential competition theories on the basis of mere capability without demonstrated intent.

Proposal: The final text should (i) introduce an indicative maximum time horizon for potential entry assessments, aligned with the two-year benchmark applied to countervailing entry or, at a minimum, requiring the Commission to justify departures from that benchmark; (ii) establish clear criteria for distinguishing genuine competitive constraint by a potential competitor from mere market monitoring; (iii) clarify that while documented entry plans are not an absolute requirement, the absence of such plans must be compensated by other concrete evidence of ability and incentive to enter; and (iv) strengthen the third prong by requiring the Commission to demonstrate that no sufficient alternative potential competitors exist, rather than merely asserting this.

15. Part.II.B.6 – Foreclosure

This section includes an introduction and sub-sections 6.1. Ability to foreclose, 6.2. Incentive to foreclose, and 6.3. Effect on competition, i.e. paragraphs 208-251.

In the Draft Merger Guidelines the Commission sets out a complex system of economic tests to establish foreclosure effects in the context of vertical mergers. These economic tests rely on very differentiated economic assessments which require a large amount of data and information not only from the parties to the proposed transaction but also from their competitors. The economic criteria the Commission proposes in its Draft Merger Guidelines are of a mostly qualitative nature. As far as the Commission includes quantitative criteria, they are not specified in a way which would allow a reliable assessment by the merging parties. Contrary to other notices of the Commission, in particular the Horizontal Guidelines, the Commission refrains in the Draft Merger Guidelines from defining any safe harbours which the parties to a proposed transaction could easily assess. Instead of creating legal certainty at least for some transactions the Commission requires for all transactions a very complex and detailed economic assessment of the parties. This creates an enormous burden for the parties if they want to assess the prospects for merger clearance before pursuing a proposed transaction further. If the parties based on their own assessment decide to notify a proposed transaction the Commission's assessment may deviate strongly from their own assessment as information supplied by other undertakings in the concerned markets which is not available to the parties of the proposed transaction will be analysed by the Commission and may lead to a different outcome.

Generally, the Commission uses very soft terms without any further guidance which would allow the parties to assess whether in their specific case the Commission would identify a competitive problem. For example, in para 211 of the Draft Merger Guidelines, where the Commission deals with input foreclosure, it lists "raising rivals' cost or making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger" as one of the criteria to be considered. The Commission leaves open whether any raise in rivals' costs or any change of the conditions for the supply of the input would lead to the conclusion that input foreclosure exists. Probably that is not the approach which the Commission would take but nonetheless the soft wording makes it difficult to predict what the Commission would rule in a specific case.

The same applies to the Commission's considerations regarding customer foreclosure in the same paragraph. Here, the Commission says that customer foreclosure "takes place when a supplier integrates with an important customer in the downstream market". However, it is not specified what an important customer is. For example, a certain share of demand would be a helpful criterion for parties to a proposed transaction to assess whether there is a critical degree of customer foreclosure in their case.

Also with regard to conglomerate foreclosure the Commission uses very soft criteria. The Commission holds that conglomerate foreclosure "occurs when the combination of products in related markets gives the merged firm the incentive to leverage a strong market position from one market to another" (para 211). First, it is difficult to anticipate when the Commission will conclude that there is an incentive to leverage a strong market position. Second, it is not defined what the Commission considers to be a "strong" market position in contrast to a dominant market position or market power.

In para 219 the Commission discusses one of the conditions for an ability to foreclose, namely a significant degree of market power. However, again, the Commission stops short of defining a market share threshold under which there is a safe harbour and there is no significant degree of market power. It is also unclear how the concept of market power relates to the concept of a strong market position.

In para 221 the Commission states that the ability to foreclose requires “that the merged firm could negatively affect the overall availability of inputs”. It would be hard to perceive that any negative effect on the overall availability of inputs would lead to the prohibition of a merger because of foreclosure effects. Nonetheless, it remains unclear what the threshold to an appreciable effect would be.

In para 228 the Commission states that it intends to consider internal documents of the parties to a proposed transaction to establish whether there are any incentives to foreclose. However, internal documents are an unreliable source. Internal policies may have changed since the creation of the document and moreover, any undertaking considering a transaction would avoid creating documents that could hinder clearance. Under rule of law, it is furthermore questionable that the companies have an obligation to produce internal documents to a regulator outside of an investigation into alleged misconduct.

When it comes to the assessment of direct incentives for foreclosure the Commission shows that it wants to rely on hypothetical reviews of diversion ratios, customer switching and substitutability (para 240). According to the Commission, the profit effect from total foreclosure provides a useful first indicator of foreclosure incentives. The Commission goes on to say in para 232 that “a simple comparison between the lost revenues from trade with affected counterparties and the gains from diverted sales can be informative in assessing those incentives”. This kind of comparison may be more complex than it appears it would be based on many assumptions which are by nature debatable. When the parties want to assess in advance whether the Commission would see a problem, they might easily end up with a different result than the Commission in its review.

When the Commission speaks about the effects on competition in para 243 it continues to use very soft wordings and criteria. The Commission states that if conduct is “liable to harm effective competition” this may lead to the establishment of a foreclosure effect. However, the commission fails to set out any criteria for assessing which degree of harm to effective competition would justify the finding of an appreciable foreclosure effect. As noted regarding paras 211 et seq., the Commission should much more often relate the wording back to the substantive test in Art. 2 EUMR, which includes both an SIEC and a dominant position that apply respectively depending on the theory of harm.

In para 246 it is mentioned that foreclosing firms that play “an important role” in the competitive process will often lead to a significant impediment of effective competition. However, it is not specified what an important role might be. The same is true for a statement in para 249 where the commission mentions that foreclosure can make rivals “less resilient by exposing them to market power and potential unreliability of alternative sources of supply”. First of all, it is unclear what less resilient exactly means. Furthermore, the consideration of a potential unreliability of alternative sources of supply contributes to a high degree of uncertainty for the assessment here.

16. Part.II.B.7 Entrenchment of a dominant position

This section includes paragraphs 252-259.

The problems identified for the section of the Draft Merger Guidelines on foreclosure exist also in the section on a possible entrenchment of a dominant position. The Commission works with very soft criteria and it remains unclear from which threshold they would influence the assessment. For example, in para 256 the Commission states that a restriction of the ability of incentives of rival firms to enter or expand may indicate an entrenchment of a dominant position. However, it appears unlikely that any restriction of a rival firm will be relevant for the Commission’s assessment. However, the degree of restriction that marks a problem for clearance remains unclear. The Commission also fails to provide any safe harbours on which companies could rely when they are assessing the feasibility of a proposed transaction.

17. Part.II.B.8 Coordination

This section includes an introduction and sub-sections 8.1. Reaching terms of coordination: market conditions that are conducive to coordination, 8.2. Deviation from coordination: monitoring and deterrence, and 8.3. Disruption of coordination, i.e. paragraphs 260-281.

The problems for legal certainty which exist in the sections of the Draft Merger Guidelines on foreclosure and entrenchment exist also in the section on coordination. The Commission uses very soft economic criteria and complex economic assessments without giving a meaning for degree of certainty for an assessment of the parties to a proposed transaction of the prospects for merger clearance. Here again, the Draft Merger Guidelines omit to relate the subsection back to the substantive test in Art. 2(2) EUMR as it has evolved over time: Coordinative effects in an oligopolistic market are assessed against the standard of a (collective) dominant position. Unilateral effects in an oligopolistic market are assessed against the standard of an SIEC.

In para 265 the Commission sets out that the reduction in the number of firms in the market may be a factor that facilitates coordination. It is obvious that any concentration will reduce the number of firms in a market. This shows that the Commission obviously does not want to say that any concentration leads to a particular risk of coordination. However, the Commission does not define any minimum number of firms that need to remain in a market or a safe harbour in the sense of a number of competitors which need to be present at least on a market to be certain that there are no coordination issues.

Another problem is that the Commission intends to consider in its merger review information which the parties to a concentration do not have and cannot include in their analysis. For example, in para 267 the Commission explains that similarities in terms of cost structure, market presence, capacity levels or levels of vertical integration can make it easier for firms to align incentives or reach an understanding on the terms of coordination. However, competitors do not have detailed information on each other's cost structure and capacity levels. Accordingly, they cannot perform the kind of assessment which the Commission declares to be relevant.

On some occasions the Commission seems to suggest that undertakings engage an illegal behaviour. In para 267 the Commission discusses access to information as a risk for coordination. The Commission mentions that access to information can be obtained through private exchanges such as those occurring at trade associations. However, any trade association will be careful not to distribute any information that competitors must not exchange under Art. 101 TFEU. Also in para 273 the Commission mentions the exchange of information through trade associations as a practise which may increase observability. Again, any well organised trade association will be careful not to disseminate any information of strategic relevance for its member companies in order not to facilitate any violations of Art. 101 TFEU. Any such concerns should be addressed and properly established under Art. 101 TFEU and not be considered without further investigation in the context of a merger review.

18. Part.II.B.9 Other anticompetitive effects

This section includes an introduction and sub-sections 9.1. Access to commercially sensitive information, and 9.2 Portfolio effects, i.e. paragraphs 282-290.

Also in this section of the Draft Merger Guidelines the Commission uses very soft and unspecified terms. Some quantitative criteria would be helpful for the self-assessment here as well. For instance, in para 288 the Commission states that an increase of market power through a broader portfolio could be a problem for merger clearance or any safe harbour in which companies could be certain to get merger clearance when they assess the feasibility of a proposed transaction.

19. Part II.C - Benefits from Mergers (Efficiencies)

This section includes the introduction of Part II.C., i.e. paragraphs 291-301.

Legal Framework: Efficiencies as Part of the Overall Assessment

Statutory Basis and the SIEC Standard

Article 2(1)(b) EUMR requires the Commission to take into account the development of technical and economic progress, provided it benefits consumers and does not form an obstacle to competition (Draft Guidelines, para. 33). The Commission determines whether a merger's impact on competition is "more likely than not" to result in a SIEC (para. 32). Demonstrated efficiency claims form an integral part of this overall assessment (para. 32, para. 33); they are not a procedural afterthought but a substantive element to be weighed alongside anticompetitive effects.

The BRAK expressly endorses this conceptual approach and maintains that efficiencies should not be viewed as a counterbalance to the negative effects of a concentration but should be considered as part of the assessment of the overall effects (BRAK Position Paper, Question 8.3.a; Question 5.1.1; Question 3.5, *Wirtz*, Wohin mit den Effizienzen in der europäischen Fusionskontrolle?, EWS 2002, 59). The Draft Guidelines move in this direction by permitting early engagement on efficiencies before any preliminary finding of harm (para. 36). However, the continued language of the merged parties "bearing the burden" of demonstrating efficiencies (para. 24) - and the structural placement of Section II.C after the entirety of Section II.B on anticompetitive effects - still conveys an impression of sequentiality that is at odds with the stated ambition of holistic assessment.

The final text should explicitly state, in Part I.B.4, that the overall assessment is not sequential but integrative; that efficiencies can prevent a SIEC from arising in the first place (rather than merely "counteracting" an already-established harm); and that the structural placement of Section II.C does not imply any temporal or logical priority of the theory of harm over the theory of benefit. The concept should be signalled at the very beginning of Part II and should refer to its legal basis in Art. 2(1)(b) and (2) EUMR.

Theory of Benefit: New Concept and Evidentiary Framework

Definition and Scope

The Draft Guidelines introduce the theory of benefit as the merging parties' counterpart to the Commission's theory of harm. It explains how specific merger efficiencies maintain or enhance effective competition, to the benefit of consumers, for instance by leading to decreased prices, increased output, innovation, choice or quality, or positively influencing other relevant parameters (para. 25). The Commission applies the same margin of discretion to theories of benefit as to theories of harm (para. 27).

Evidentiary Standard - Symmetry and Practical Constraints

The Draft Guidelines state that the merging parties are subject to the same evidentiary standard as the Commission when establishing facts in support of efficiencies (para. 26). Efficiency claims must be supported by a sufficiently cogent and consistent body of evidence (para. 26). The Commission exercises its margin of discretion according to the same principles for both theories (para. 27). This formal symmetry is welcome.

In practice, however, the Commission's theory of harm can rest on market investigation questionnaires, internal documents of the parties and econometric estimates - i.e., evidence the Commission itself generates through its investigative powers (para. 29) - whereas the merging parties must typically produce evidence of future efficiency gains that have not yet materialised and that are inherently more difficult to prove. The BRAK's position that the assessment should focus on identifying the pro-competitive effects of the claimed efficiencies (BRAK Position Paper, Question 8.5) therefore calls for methodological flexibility on the part of the Commission: where non-price efficiencies are claimed (innovation, resilience, sustainability), the standard should not effectively require the same degree of quantification as is applied to cost savings.

The final text should acknowledge that the practical difficulty of proving forward-looking non-price efficiencies requires the Commission to accept qualitative evidence of sufficient probative value, including business plans, investor presentations and expert assessments, without insisting on exact quantification where the nature of the efficiency makes this unrealistic. The principle that "there exists no hierarchy between qualitative and quantitative evidence" (para. 31) should be expressly applied to efficiency claims.

20. Part II.C.1 Direct Efficiencies: Taxonomy, Verifiability and Merger Specificity

This section includes sub-sections 1.1 Taxonomy of direct synergies, 1.2. Verifiability, 1.3. Merger specificity, and 1.4. Benefit to consumers, i.e. paragraphs 302-323.

1.1 Taxonomy and Scope of Recognised Synergies

The Draft Guidelines provide a non-exhaustive list of direct synergies, including complementary assets lowering variable costs, economies of scale/scope/density, wholesale cost savings, elimination of double marginalisation, securing access to critical inputs, voluntary technology transfer, and combining complementary products or services (para. 302). The breadth of this taxonomy is welcomed. In particular, the recognition that securing access to critical inputs can constitute an efficiency (para. 302(e)) and the explicit acknowledgment of resilience and sustainability as parameters of competition (para. 20) represent material advances.

1.2 Verifiability - Timeliness and Quantification

Direct efficiencies are "timely" if synergies in principle occur without delay; however, the time horizon may be longer if consistent with the characteristics and dynamics of the market and the theory of harm (para. 306). The BRAK takes the strong position that the timeframe for assessing efficiencies should be the same as for the assessment of the SIEC (BRAK Position Paper, Question 8.4). This principle is of critical importance: the Draft Guidelines themselves accept longer timeframes for countervailing entry depending on sector characteristics (para. 96), and they accept that theories of harm can concern "the foreseeable future" depending on market dynamics. Imposing a shorter time horizon for the assessment of benefits than for harm would be conceptually incoherent.

The final text should state unambiguously that where the Commission's own theory of harm rests on long-term dynamic effects, efficiency claims operating within the same or a shorter time horizon are presumed to be timely. The principle of temporal symmetry between harm and benefit should be elevated from an implicit possibility (para. 306) to an express rule.

1.3 Merger Specificity - Realistic Assessment of Alternatives

The Draft Guidelines require merging parties to demonstrate that claimed efficiencies could not be achieved to a similar extent by less anticompetitive arrangements (para. 310). The parties need not cover mere hypothetical possibilities but should address all arrangements that are reasonably practical (para. 311). The BRAK is of the view that the question of whether efficiencies could be achieved by behavioural forms of collaboration is a decision for the merging parties, and the Commission should not second-guess this (BRAK Position Paper, Question 8.6).

The merger-specificity requirement, if interpreted expansively, can negate even compelling efficiencies by postulating theoretical alternative arrangements (joint ventures, licensing agreements). The Draft Guidelines' own proviso - that alternatives must be "reasonably practical" and "realistic and attainable" (para. 311) - already limits this risk; the submission argues that this limitation should be strengthened.

The final text should clarify that the merger-specificity analysis must be realistic and informed by the merging parties' business judgment and established industry practice; that the Commission should not require proof of the non-existence of all conceivable alternatives; and that alternatives which would themselves raise competition concerns under Article 101 TFEU are by definition not "less anticompetitive" for purposes of the merger-specificity inquiry.

21. Part II.C.2 Dynamic Efficiencies

This section includes sub-sections 2.1 Taxonomy of direct synergies, 2.2. Verifiability, 2.3. Merger specificity, and 2.4. Benefit to consumers, i.e. paragraphs 324-338.

Definition and Practical Significance

The Draft Guidelines introduce dynamic efficiencies as a separate and new category: they confer the ability or increase the incentives to invest or innovate in new or improved products or services, improved distribution or production, or other procompetitive parameters (para. 296). Their benefits may materialise over a longer timeframe. This recognition is the single most significant conceptual advance in the revised framework regarding efficiencies and is welcomed by the BRAK's emphasis that innovation can lead to the finding that a concentration is pro-competitive, avoiding the finding of a SIEC (BRAK Position Paper, Question 5.1.1; Question 3.5).

Evidentiary Requirements and the Risk of Under-Enforcement

The merging parties must demonstrate "with a sufficient degree of likelihood" that the merged entity would invest or innovate post-merger (para. 327). Both the ability and incentive to invest or innovate must be shown concretely (para. 327). The BRAK's position - that the assessment should focus on identifying the pro-competitive effects of the claimed efficiencies to make sure no SIEC would arise (BRAK Position Paper, Question 8.5) - underscores that the proper focus should be structural: does the merger create conditions under which investment and innovation are more likely to occur? It should not require the Commission (or the parties) to predict the precise outcome of innovation processes.

The final text should clarify that "concrete evidence" (para. 327) means evidence of the structural conditions (complementary assets, financial capacity, incentive alignment) that make investment or innovation more likely, not evidence predicting the specific commercial success of a future product or technology. This aligns with the principle that the assessment of efficiencies is about likelihood, not certainty, just as the Commission's own theories of harm are probabilistic (para. 32).

Innovation Shield - Interface with Efficiency Claims

The Draft Guidelines establish an Innovation Shield providing safe-harbour criteria for mergers involving small innovators or R&D projects (para. 192). This is a welcome de minimis mechanism. However, transactions that fall outside the Innovation Shield's numerical thresholds should not for that reason be treated as presumptively harmful. The Innovation Shield is a sufficient condition for compatibility but should not be read as a necessary one. Innovation efficiencies can affirmatively demonstrate pro-competitive effects in transactions that do not qualify under the safe harbour.

The final text should explicitly state that the Innovation Shield does not create a negative inference: failure to meet its criteria does not indicate that the merger raises innovation concerns or that innovation efficiencies are unlikely to materialise.

22. Part II.C.3 Balancing Harm and Benefit

This section includes an introduction and sub-sections 3.1. Balancing between symmetric benefit and harm, 3.2. Balancing between asymmetric benefit and harm, and 3.3. Balancing across different consumer groups/markets, i.e. paragraphs 339-357.

Symmetric Balancing - Same Parameter, Same Time Period

Where harm and benefit concern the same parameter and time period, the Commission may use quantification tools such as GUPPI, CMCR and merger simulations (para. 343). The more a merger increases market power, the less likely cost savings will suffice (para. 343). This approach is sound for price effects but should not dominate non-price balancing.

Asymmetric Balancing - Different Parameters or Time Periods

Where harm and benefit concern different parameters, the Commission considers orders of magnitude (para. 348). Where effects accrue at different times, later effects carry less weight, having regard to market characteristics and innovation cycles (para. 350). Conversely, where harm is itself expected to materialise only in the future, more immediate benefits may suffice to offset it (para. 350). This two-way formulation represents a significant improvement over the prior regime's unidirectional discounting of future benefits.

The BRAK submits that paras. 348 and 349 bear the risk of being misunderstood as meaning that the negative and positive effects on consumers need to be weighted. This understanding would be conceptually incomplete, because the benchmark is not only the net effect on consumers (Art. 2(1)(b)) but the net effect on competition with the aim to ascertain if, on balance, the merger leads to an SIEC or not (Art. 2(2) EUMR).

The final text should make clear in para. 348 or 349 that the net effect on competition with the aim to ascertain if, on balance, the merger leads to an SIEC or not, will be the yardstick for the Commission's assessment. The final text should also make explicit that the Commission may not systematically discount future benefits while simultaneously relying on speculative long-term harm. The principle of temporal symmetry expressed at para. 350 should be elevated to a binding interpretive rule rather than a discretionary consideration.

Out-of-Market and Collective Benefits

Benefits in related markets can be taken into account provided that harmed consumers substantially overlap with beneficiaries (para. 355). Collective benefits, such as sustainability and resilience improvements, can also be taken into account on the same condition (para. 356). These benefits must be verifiable, merger-specific and sufficient to fully compensate harmed consumers (para. 357). In the 3rd stakeholder workshop on 10 June 2026, however, it was not always clear to stakeholders that the Draft Guidelines, in their current formulation, confine the assessment of out-of-market and collective benefits to firm-level, consumer-facing efficiencies and do not provide a framework for assessing wider societal or macro-economic aggregate benefits extending the substantive test enshrined in Art. 2 EUMR.

The BRAK therefore suggests that the final text should expressly clarify this limitation: Art. 2(1)(b) EUMR, as reflected in the Draft Guidelines, allows the Commission to take into account efficiencies that can be attributed to the merging parties and that ultimately benefit the consumers affected by the merger, but it does not itself establish a methodology for weighing broader societal aggregate benefits (such as effects on strategic autonomy, overall innovation capacity, employment or the resilience of critical supply chains) against a SIEC.

To the extent the Commission wishes to consider such societal or macro-economic efficiencies in addition to firm-level efficiencies, a distinct analytical framework would be required. Under the BRAK's proposal (BRAK Position Paper, Question 3.3; Question 8.3.c), this separate framework would apply only in borderline SIEC cases where the merger has substantial macro-economic implications and where societal benefits are of an exceptional magnitude. It would assess, in a structured manner, potential positive effects on European strategic autonomy, global innovation capacity, long-term employment and investment within the EU, and the resilience and security of critical supply chains, as a complement - but not an alternative - to the standard SIEC analysis. To safeguard the integrity of merger control and avoid politicisation, the BRAK's proposed framework would operate under strict conditions: (i) clearly defined quantitative and qualitative thresholds determining when such a supplementary assessment may be initiated; (ii) precise substantive criteria for identifying and measuring societal or macro-economic efficiencies; (iii) mandatory consultation of the relevant Directorates-General (such as DG GROW, DG TRADE and DG DEFIS, as appropriate); (iv) transparent publication of the Commission's reasoning where societal efficiencies are taken into account; and (v) sunset clauses attached to any remedies or conditions based on such efficiencies, ensuring that decisions remain subject to review if the anticipated societal benefits do not materialise.

The final Guidelines should, at a minimum, clarify that their current framework is confined to firm-level efficiencies and, if the Commission intends to consider societal aggregate benefits, signal the need for a distinct, well-defined analytical tool or EU legislation along these lines. In that regard, the Commission should revise para. 299 to the extent that in the current text it is fully unclear why the alleged efficiencies of "resilience" and "sustainability" refer to pro-competitive effects that can be included in the assessment under Art. 2(1)(b) or Art. 2(2) EUMR.

23. Part III – MEASURES TO PROTECT LEGITIMATE INTERESTS

This section includes paragraphs 358-362.

24. Part III.A – SUBSTANTIVE ASSESSMENT

This section includes sub-sections 1. Types of measures covered, 2. Notion of legitimate interests, again with sub-sections for 2.1 Recognised interests, and 2.2 Other public interests, 3. Compatibility with the general principles of EU law, again with sub-sections for 3.1. Proportionality, 3.2. Non-discrimination,

and 3.3. Other principles of EU law, and 4. Compatibility with other provisions of EU law, i.e. paragraphs 363-389.

The BRAK welcomes the Commission's reaffirmation of the "one-stop-shop" principle and its exclusive competence for concentrations with an EU dimension (paras 358–359). A centralized system is essential to ensure legal certainty, procedural efficiency, and a coherent application of the substantive test under the EU Merger Regulation. From a practitioner's perspective, predictability and transparency remain key objectives of the Guidelines and should be further strengthened throughout the text.

At the same time, we emphasize that the interaction between EU-exclusive competence and Member State interventions pursuant to Article 21 EUMR requires clearer and more structured guidance. While paras 360–362 set out the substantive conditions for national measures, and paras 363–365 clarify the types and scope of Member State measures covered, the draft Guidelines would benefit from a more systematic framework explaining how these requirements are to be applied in practice.

In line with our general position, the Guidelines should provide more precise and operational criteria, as current guidance in several areas lacks clarity and predictability for practitioners and companies.

In particular, we support the strict interpretation of Member State derogations and the requirement that such measures be proportionate, evidence-based and limited to what is strictly necessary (paras 360–362). However, the evidentiary burden and the required standard of proof should be expressed more specifically. As in other areas of merger control, a lack of clear methodological guidance risks shifting substantial uncertainty into pre-notification discussions and parallel procedures, thereby increasing administrative burden and reducing efficiency.

The BRAK further agrees that the Commission must be able to effectively review Member State measures, including de facto binding acts and omissions (paras 363–365). However, in line with our broader concerns regarding procedural transparency, the Guidelines should clarify the procedural interface between Commission review and national decision-making, including timing, information exchange, and legal remedies. This is necessary to avoid legal fragmentation in practice despite the formal "one-stop-shop" principle.

With regard to legitimate interests (paras 366–376), the BRAK supports the restrictive approach adopted by the Commission. In particular, the strict scrutiny of public security claims (paras 368–371) is essential to prevent the misuse of Article 21 EUMR for other policy purposes. This reflects the broader principle that merger control should not be instrumentalized to pursue objectives unrelated to competition. At the same time, we note that the increasing relevance of broader economic and strategic considerations in EU policy debates calls for greater conceptual clarity. As highlighted in our previous submission, the current framework does not sufficiently address the relationship between competition objectives and wider societal or macro-economic considerations.

In this context, the distinction between competition assessment under the EUMR and parallel public interest reviews (e.g. media plurality, prudential supervision) (paras 372–376) is appropriate. However, the Guidelines should more clearly explain how parallel assessments interact in practice and how conflicts between outcomes are to be managed. Greater transparency would enhance legal certainty for merging parties and reduce the risk of inconsistent decision-making across jurisdictions.

We also support the emphasis on general principles of EU law, in particular proportionality, non-discrimination, and legal certainty (paras 378–385). These principles are essential safeguards against protectionist or arbitrary national measures. However, the Guidelines should further operationalize these

principles by providing illustrative examples and clearer benchmarks for their application. This would align with our overarching interest in improving the practical usability of the Guidelines.

Finally, the BRAK agrees with the importance of safeguarding the internal market and preventing fragmentation (paras 383–389). Nevertheless, the increasing complexity of parallel EU and national regulatory frameworks (e.g. FDI screening, sectoral regulation) requires a more coherent and integrated approach. The Guidelines should therefore provide clearer guidance on how Article 21 EUMR interacts with these regimes to ensure consistency, avoid duplication, and maintain the effectiveness of EU merger control as a centralized system.

25. Part III.B – PROCEDURAL FRAMEWORK

This section includes sub-sections 1. The notification and standstill obligation, 2. Possible Commission decisions, and 3. Interaction with other EU law proceedings, i.e. paragraphs 390-399.

The BRAK welcomes the Commission's attempt in paragraphs 390–399 to clarify the procedural framework and substantive assessment of Member State measures under Article 21(4) EUMR. The section addresses an area of increasing practical relevance where legal certainty, transparency and coherent allocation of competences between the EU and Member States are of paramount importance. Specifically:

Scope of recognized interests and notification obligations (paras. 390–392)

The BRAK supports the clarification that recognized interests constitute a narrow exception to the notification and standstill obligation. However, the current draft risks reinforcing an overly broad and discretionary approach to determining "reasonable doubt" (para. 391). This may lead to legal uncertainty for Member States and, in particular, for undertakings affected by national measures.

In line with our general emphasis on legal certainty and transparency in merger control, the Guidelines should provide clearer and more objective criteria for:

- determining when a measure "genuinely" pursues a recognized interest; and
- assessing when "reasonable doubt" arises, triggering notification obligations.

Without such clarification, the practical scope of Article 21(4) EUMR risks becoming unpredictable and may lead to inconsistent application across Member States.

Procedural framework and timelines (paras. 392–394)

The description of the notification process and the 25-working day assessment period (para. 393) is helpful. Nevertheless, we note that the absence of a binding deadline in cases of non-notification (para. 394) creates asymmetry and may undermine procedural predictability for affected undertakings.

Consistent with our broader concern regarding efficiency and procedural clarity in merger control, the Guidelines should:

- clarify the conditions under which the Commission will exercise its discretion in non-notified cases; and
- consider introducing indicative procedural principles to ensure timely intervention and avoid prolonged legal uncertainty.

Commission powers and interim measures (para. 395)

We recognize the need for effective enforcement powers, including interim measures. However, the Guidelines should further specify the substantive threshold and procedural safeguards applicable to interim decisions, in particular with regard to proportionality.

Given our general position that enforcement tools must remain predictable and transparent, more detailed guidance on the circumstances justifying suspension of national measures would enhance legal certainty and safeguard the balance between EU and national competences.

Preliminary assessment and informal guidance (paras. 396–397)

The introduction of preliminary assessment letters and informal guidance mechanisms (including comfort letters) is welcome. Such instruments can contribute to flexibility and efficiency.

However, we emphasize that these tools should not evolve into de facto extensions of formal procedures without a clear legal framework. In line with its broader criticism of procedural expansions lacking explicit legal basis (e.g. in pre-notification practice), the Guidelines should:

- clarify the legal nature and effects of preliminary assessments and comfort letters; and
- ensure that their use does not undermine the formal procedural safeguards foreseen by the EUMR.

Overlap with other EU procedures (paras. 398–399)

We welcome the recognition that Article 21(4) procedures may overlap with other EU regulatory frameworks. However, the current drafting remains too general.

To ensure coherence with other EU policies (a key concern identified by us) the Guidelines should provide more specific guidance on:

- coordination mechanisms between the Commission and sector-specific regulators; and
- the interaction between Article 21(4) EUMR and parallel procedures under EU law, in order to avoid duplication, conflicting outcomes, or excessive administrative burden.

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