ERT Response to European Commission Call for Evidence on Merger Guidelines

3 September 2025

SUMMARY OF MAIN RECOMMENDATIONS

a) While the Commission's merger control reviews must remain independent of outside political influence, DG COMP should take into consideration wider EU objectives such as competitiveness, sustainability, social fairness, security, efficiency, innovation or resilience when assessing the effects of mergers. As articulated in the Mission Letter of the Commission President, the Horizontal Merger Guidelines should be revised to "give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defence and security environment".

b) To consider those wider EU objectives, ERT believes that the Commission should continue its journey towards a more holistic approach to consumer welfare in its substantive merger assessments. DG COMP should adopt an even more forward looking view which considers not only short term effects on price, quality and choice but also sufficiently takes into account how innovation and investments resulting from cooperation and mergers can benefit consumers and sustainability goals in the longer run.

c) More consistency is needed in the application of the standard of proof, in particular with respect to the requirements for a successful efficiencies defence, which should become an effective and widely used tool of competition policy in the renewed EU merger control policy.

d) ERT also suggests that a more comprehensive and nuanced approach be applied in relation to the imposition of remedies. Structural remedies have proven not to be always suited to certain markets which are subject to permanent evolution. In certain cases, behavioural remedies are more effective and should be preferred. They also have the advantage of providing more flexibility to adapt to changing circumstances.

e) ERT considers that the following procedural modifications should be included in the EU merger control instruments:
   - A local nexus test should be introduced to avoid that joint ventures with no effect in the EU require merger control notification and review. ERT believes that this could be done by amending the Jurisdictional Notice and could inspire other authorities around the world to also abandon an unnecessary burden on cooperation, especially in relation to the effective promotion of sustainability objectives.
   - ERT urges the Commission to safeguard legal certainty and predictability for M&A deals in line with the Court of Justice of the European Union's (CJEU) Illumina/Grail Judgment. Unpredictable call-in rights or non-turnover based thresholds under national law should not form the basis of a referral procedure from national competition authorities (NCAs) to DG COMP under the EU Merger Regulation (EUMR). If the Commission wants to expand its jurisdiction in order to review potential so-called 'killer acquisitions' which otherwise fall below its thresholds, the EUMR thresholds must be amended, for instance, by introducing a new threshold based on transaction value over €2 billion with a local nexus test.

- The mechanisms for referral from NCAs to DG COMP should be adapted in a way that merging parties can refer the transaction to DG COMP and the NCAs do not have a veto right. This would create more one-stop-shop procedures and substantially reduce red tape for companies.

Many of the above-mentioned improvements to the EU merger control regime, which are necessary to adopt the new approach mandated in President von der Leyen's Mission Letter, could be achieved by revising the Horizontal Guidelines as well as other EC notices, such as the Jurisdictional Notice (for instance, for the local nexus test). If amendments to those soft law instruments are not sufficient to deliver the urgent priorities as set out above, the Commission should initiate a review of the EUMR to ensure maximum legal certainty, predictability and alignment with EU objectives.

1. Revising the EU merger control policy to strengthen EU competitiveness, resilience and innovation

It is clear from President von der Leyen's mandate for Executive Vice-President Ribera that a thorough evaluation of the current EU merger control framework is essential so that it better reflects Europe's economic needs more broadly. This is an opportunity for the Commission to ensure that, going forward, EU merger decisions safeguard effective competition in all its forms for the benefit of European consumers and citizens while taking into account the EU's wider policy objectives, such as the competitiveness of the EU, the digitalisation of the economy, sustainability goals and economic security under a more holistic view of consumer welfare.

To this end, one of the main priorities in Teresa Ribera's Mission Letter is the review of the Horizontal Merger Control Guidelines (the Guidelines), as one of the key elements to ensure that DG COMP's merger decisions give adequate weight to the European economy's acute needs in respect of resilience, efficiency and innovation, as well as appropriate time horizons and investment intensity in certain strategic sectors. ERT welcomes this shift of approach of the Commission and its willingness to review the Guidelines taking into account the current and future needs of the EU.

The review of the Guidelines must therefore be broad and deep, with a wider scope than just compiling and codifying previous case-law, simply crystallising the status quo. The review of the Guidelines should be accompanied by the review of other EC notices to ensure this change of approach (for instance the jurisdictional notice). If amendments to those soft law instruments are not sufficient to deliver the urgent priorities as set out above, the Commission should initiate a review of the EUMR to ensure maximum legal certainty, predictability and alignment with EU objectives.

2. Expansion of the substantive analysis and specification of the efficiencies defence

a) Broader consumer welfare concept coherent with other EU objectives

Consumer welfare has historically been interpreted narrowly by DG COMP. At the same time, consumers do not care just about prices or the short term. There are other features of products and services which consumers value and need, such as quality, design, innovation, choice, reputation, environmental and social impact, etc. These need to be considered more holistically. To adequately protect these aspects of consumer welfare, a longer-term perspective is needed, taking into account companies' requirements on returns of investment, as these will impact the capacity to invest and innovate in the mid- to long-term.

Innovation is a factor which has recently gained more attention from DG COMP, but just as a theory of harm in some specific sectors. It should also be considered as a potential pro-competitive effect and/or as an efficiency when assessing the effects of a specific transaction.

b) Long-term perspective on the substantive merger control analysis

The reviewed EU merger control framework should take a dynamic and long-term view that enables sustainable market structures, boosts EU investment and competitiveness and provides for economic security, as emphasised by President von der Leyen in her new mandate and Mario Draghi in his report.

In the substantive merger control analysis, the timeline considered in the assessment of a transaction's impact should be consistent with the usual investment cycles in the relevant sector or industry. This will in some cases require an extended time horizon compared to the current practice.

c) Efficiencies

The current approach taken by the Commission when assessing efficiencies is not balanced with regard to differing standards of proof for harm and for efficiencies. In practice, the Commission hardly recognises the pass-on of efficiencies to consumers (e.g. including distribution reach, innovation, investment, quality), the feasibility of efficiencies and when they kick in, putting at odds the recognition of efficiencies, especially those based on mid/ long-term investment strategies.

A revised EU merger control regime should specify the standard of proof for efficiencies and which substantive requirements – and by when they have to materialise – would have to be met for a successful efficiencies defence. Such provisions do not exist today, leaving a disproportionate margin of discretion to the Commission that often appears to presume a lack of efficiencies and imposes an insurmountable burden of proof on the parties to rebut that presumption.

The reviewed framework should allow for more openness to pro-competitive evidence that outbalances potential short-term price increases, expressly acknowledging the need to attribute sufficient importance to efficiencies in terms of innovation, performance, quality, sustainability and investments, as pointed out in the Draghi report.

The standard of proof for parties to a transaction to satisfy in relation to efficiencies should be the same as the standard to be satisfied by the Commission to substantiate its theory of harm. It is entirely disproportionate that the standard for the Commission to demonstrate a theory of harm could be as low as showing that the significant impediment of effective competition is 'more likely than not', while asking the notifying parties to show that efficiencies are verifiable, passed on to consumers and merger-specific with a degree of strong probability (which in practice DG COMP has so far never recognised).

Moreover, the Guidelines should provide that out-of-market efficiencies are considered in the substantive assessment in order to allow merger control decisions to support wider EU objectives (competitiveness, sustainability, security and resilience), as mandated by President von der Leyen.

d) Remedies

Authorities are often sceptical about the effectiveness of behavioural remedies and give disproportionate preference to structural remedies. Especially in certain markets with heavy

investments or long innovation cycles, structural remedies do not capture all relevant market dynamics, are often backward-looking and undermine the pro-competitive rationale for consolidation. Behavioural remedies would allow for more flexibility and adaptability for the markets in permanent movement. In some cases, behavioural remedies would be more effective than structural ones as they can better capture market dynamics (e.g. certain forms of access to infrastructure).

A modernised merger control regime should include a specific mention of behavioural remedies. In the remedy design, the relevant considerations should be consistent with the ones taken into account in the theory of harm (i.e. including also considerations related to the impact on security, resilience, sustainability, innovation, investments or competitiveness).

3. Reduction and clarification of notification requirements

a) Local nexus requirement for joint ventures (JVs)

Only transactions with a local effect on EU markets should trigger an EU merger control notification obligation. ERT therefore proposes the introduction of an additional jurisdictional requirement of an appreciable local effect for JVs in the foreseeable future.

Reviewing transactions with no local effect within the Single Market does not create any added value and is a waste of resources and cost for the Commission and the parties to the transaction. It moreover is not in line with ICN Recommended Practices and ICC Recommendations for Merger Control. The burden of current JV notification rules in the EU and around the world may lead companies to avoid full-function JVs for less efficient structures.

NCAs around the world have replicated the EU approach of assessing JV jurisdiction solely based on the global turnover of the parents, leading to the absurd result that e.g. a recycling JV in Namibia may be notifiable to the Commission and dozens of other authorities around the world without a nexus to said jurisdictions. There is no benefit of such notifications for anyone, even if they run under the simplified procedure.

The EU must set the right example for authorities around the world, not least because JVs may be the ideal vehicle for sustainability cooperations in markets where they are most needed.

In addition to the introduction of a jurisdictional requirement on an appreciable local effect for JVs to justify an EU merger control notification obligation, the text of the Commission Jurisdictional Notice and in particular the Commission's interpretation of "undertakings concerned" in the context of JVs should be amended (see paragraphs 139 and 140 of the Commission Jurisdictional Notice).

b) One-stop-shop and updated thresholds

In order to safeguard the efficiencies of a centralised EU merger control ('one-stop-shop'), the referral mechanisms should be adjusted in a way that merging parties can request a referral of the transaction to DG COMP and that the NCAs do not have the possibility to block the referral.

In addition, the level of thresholds and interplay among them should be improved. Considering inflation as well as the heavy administrative burdens for business created by the proliferation of regimes (notably on FDI, FSR), competition authorities should regularly re-evaluate the level of their thresholds with the objective of increasing them. In the EU, this

should be done in coordination between EC and NCAs so as not to distort the current equilibrium of EU/ national dimensions of mergers in the EU.

c) Thresholds ensuring legal certainty and foreseeability

In Illumina/Grail, the CJEU has underscored the importance of legal certainty and foreseeability in EU merger control.[1] It has clearly spelt out that turnover-based thresholds for national merger control regimes are an important guarantee for undertakings' rights.

Current developments at the national level to establish call-in rights for transactions below the thresholds and extending jurisdiction for NCAs even beyond the closing of the transaction will negatively affect investments and economic growth.

EU merger control policy should not follow this trend. DG COMP should acknowledge the CJEU's position that unpredictable call-in rights or non-turnover-based thresholds under national law cannot form the basis of a referral procedure under the EUMR.

To give the Commission the powers to address the perceived enforcement gap regarding transactions where the undertakings' turnover does not adequately represent their competitive importance, a reform of the EUMR's turnover thresholds would be required. Such reform would have to balance the principle of subsidiarity in the context of national merger control regimes with the efficiencies brought about by having a one-stop-shop merger control. If a transaction value threshold were to be considered, ERT would propose not setting such a threshold below €2 billion and combining it with a robust local effects test.

Moreover, recent legislation (article 14 of the Digital Markets Act) that obliges some specific companies, the so-called 'gatekeepers', to inform the Commission about intended concentrations even if not reaching the legal thresholds, could be expanded into a notification obligation and incorporated into a revised EUMR but limited to the undertakings subject to DMA.

4. Further simplification of procedures and focus on the most complex cases

ERT welcomes the Commission's efforts to streamline the proceedings for simple and super simple cases, especially the improvements that have come with the 2023 Notice on Simplified Procedure. For other cases, however, EU merger control procedures are still among the most burdensome and time-consuming in the world. This creates significant costs for both the Commission and the undertakings (as well as third parties receiving multiple questionnaires). The Mission Letter of Executive Vice-President Ribera states that rules should be "simpler, more accessible to citizens and more targeted", and based on the "principles of proportionality, subsidiarity and Better Regulation". In order to deliver on this mandate, ERT suggests the following improvements:

a) Recognise and set boundaries to the prenotification phase

Prenotification is currently not formally recognised in the EUMR but given its factual relevance for procedures and deals, timelines should be regulated. The EUMR should limit the pre-notification period to 2-3 weeks in normal cases, to three months in complex cases and to six months in exceptionally complex cases.

[1] Cf. para 208: Undertakings that are potentially subject to notification and standstill obligations must be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected.

b) Decide on necessity of in-depth analysis depending on market feedback

The Commission should follow the approach of other competition authorities (e.g. the Finnish authority) to reach out to market participants with a general request but only go further if there is a specific reason – e.g. in case the market reaction points toward the need for a more detailed assessment.

c) Fast-track procedure in complex cases

In order to speed up the process, merging parties should be able to request that the Commission engage in remedy discussions at any time in the process. The Commission should also provide merging parties with much earlier feedback and access to file (on a rolling basis). This will allow the parties to address material concerns (including market feedback) as well as any factual misunderstandings earlier in the process.

d) Limit detailed decisions to select categories of cases

Merger control procedures at the Commission are particularly burdensome due to the need for the Commission to write elaborate decisions even in cases which do not give rise to any issues. This requires the Commission to gather detailed information from both the parties as well as other market participants. To alleviate this burden, the Commission should only be required to write detailed decisions in cases in which it does not unconditionally clear a transaction in phase 1 or where third parties have shown sufficient interest to be formally admitted to the merger control procedure. Similarly, third parties should only be allowed to challenge a clearance decision at the European Courts if they were previously admitted to the procedure.

e) Publish important takeaways of substantial and jurisdictional analyses

Should the Commission's investigation touch upon factual aspects or points of law in cases which do not require a detailed decision but may be of general interest and relevance for businesses, the Commission should publish such information in a case report to allow the general public to benefit from such information.

Relatedly, ERT encourages the Commission to publish, e.g. in Policy Briefs, the takeaways from decisions on jurisdictional questions it dealt with. ERT Member companies have been struggling to self-assess jurisdictional questions and increasingly had to consult the Commission's Legal Services on whether a transaction is notifiable or not.

f) Strengthen checks and balances within DG COMP

In order to ensure a better exercise of rights of defence for the parties and to guarantee more objective decisions, a modernised merger control regime should strengthen checks and balances within the procedures, for instance, by strengthening the role of the hearing officer or by transparently separating investigation and decision teams in complex cases.

About ERT:

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open, and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €3 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €100 billion annually in R&D, largely in Europe.