ERT Response to European Commission Consultation on Draft Revised Merger Guidelines

26 June 2026

I. Introduction

1. The European Round Table for Industry ("ERT")[1] welcomes the Commission's consultation on the revised Draft Merger Guidelines as a significant effort to modernise EU merger control. ERT has been an ongoing contributor to this review, most recently through the publication of a study on efficiencies in February 2026[2].

2. ERT particularly welcomes the explicit recognition that mergers can support the competitiveness, innovation, scale, investment, resilience, security of supply and global standing of European companies. Whilst we acknowledge that this has always been a part of the Commission's analysis, this reflects the changing economic environment characterised by intense international competition, accelerating technological change and the need for substantial capital deployment. The acknowledgement that consolidation can contribute to these objectives aligns the spirit of the Guidelines directly with recent European reports on competitiveness and the Single Market. However, it remains critical that this renewed spirit is truly reflected in practice by the Commission as it assesses mergers and joint ventures in the future.

3. **Guiding principles v. technical sections**. The guiding principles are well received:

    - First, the need to look at dynamic competition (§§ 10, 53, 80-83, 114);
    - Second, the importance of scale and investment (§§ 11, 12, 15, 20, 34);
    - Third, the need to account for a longer time horizon, in particular for benefits (§§ 10, 25, 27, 306, 328);
    - Fourth, the acknowledgment that the Commission must look beyond price-only competition (§20);
    - Fifth, the commitment to apply the same standard of proof to harm and to benefits (§27), and
    - Lastly, to only conclude on a SIEC after the Commission has conducted a balancing exercise between harm and benefits (§ 36).

4. If fully implemented throughout the final document, these principles would support both consumer welfare and the long-term performance and competitiveness of European

[1] ERT brings together Chief Executives and Chairs of major European multinational companies across a broad range of sectors, working to support a strong, open and competitive Europe.

[2] ERT, *ERT Contribution to the Review of the Merger Guidelines on the Legal Criteria and Standard of Proof for Efficiencies* of February 2026. Other relevant ERT contributions include (i) the *ERT's submission to the EC public consultation on the EU Merger Guidelines* of 3 September 2025 and (ii) the *ERT Expert Paper - EU Merger Control* of 5 July 2021.

industry. However, these principles appear not to be always consistently translated into the technical sections, in particular in relation to the following:

- First, the operative part of the Guidelines should be reviewed so that the benefits of a merger be appraised truly equally to the alleged harm. For example, the notion of a dynamic, long-term assessment is referenced, but the operative provisions on the timeliness of efficiencies may render it largely inapplicable. On efficiencies/benefits more generally, although a door has been opened through the willingness on general terms to apply a symmetrical standard of proof, the changes remain insufficient, with the asymmetrical assessment of counterfactuals, dynamic gains and qualitative evidence, the asymmetrical use of investigation tools, and insufficient account for out-of-market benefits.

- Second, there is a need to simplify – not complexify – the review process. The draft significantly expands and complexifies theories of harm while leaving the standard of proof unchanged. Generalising specific theories of harm such as those relating to minority shareholdings, labour markets, portfolio effects and access to commercially sensitive information, based on limited or unconfirmed decisional practice, gives the impression that the Commission seeks to keep maximum flexibility and discretion to run any plausible theory, which inevitably will lead complexifying the review process even in cases that would not previously have been assessed under these new angles or worse, that have no prima facie antitrust concern. **In that regard, we would recommend clarifying and narrowing down the types of instances where these theories may come into play so that these do not become a mandatory stopover for all cases**. This expansion should not lead to an increased burden on merging parties to supply extensive data to the case team in support of theories that are not relevant to the transaction at hand. This will also reduce predictability for companies insofar as it will make it more complex for merging parties to conduct an effective assessment of the feasibility of transactions, increase legal uncertainty which contradicts the goal of the guidelines to attract investment in Europe and foster European competitiveness and risk undermining the credibility of the European Commission in the eyes of business leaders who may struggle e.g. to understand the rolling out of hypothetical theories of harm in no overlap cases.

- Third, the Commission retains excessive procedural discretion, including on evidence prioritisation and substantive assessment. While recognising non-price parameters of competition is positive, there is a risk for such parameters in practice not being fully factored in. This is notably due to the level of discretion the Commission has in the overall process of assessing anticompetitive and pro-competitive effects and underlying evidence which is at odds with the objective of increasing legal certainty and does not reflect the acknowledged requirement for the Commission to exercise its margin of discretion and assess evidence according to the same principles for both the theory of harm and theory of benefit (§27). A central objective of the final Guidelines should be to introduce further guardrails to that discretion by adding limiting principles, and increase the use of safe harbours, beyond the innovation shield (which is only likely to benefit a limited number of cases) and market share thresholds. For example, specifying whether certain theories of harm are more suitable for digital markets than other markets could be useful.

- Fourth, there are some presumptions on market power, anticompetitive effects or weight of efficiencies which risk neutralising many positive developments of the guidelines especially for mergers including large firms and dynamic efficiencies. Overly permissive language should be reviewed by removing or limiting any statement which creates a presumption of market power, anticompetitive effects or minimises the efficiencies (e.g., §35, 127, 346).

5. **In effect, the new merger guidelines should set a clear signal that triggers a true evolution in administrative practice over the foreseeable future, including beyond the current administration**. ERT would prefer avoiding a situation where the reform will only change the text while leaving the practice globally consistent with previous approaches or up to the goodwill of a given administration. The merger regulation ("EUMR") does not require the Commission to follow its past practice (as acknowledged in §30), only the case-law, and, to the extent that the guidelines are meant to signal a change of direction, citing the Commission's old case references, especially on efficiencies (where the evolution should be the most compelling) has limited value. A greater push to elevate the importance of positive effects in the framework analysis of a merger and to accept the risk of false positives may have to be considered for the reform to make a tangible difference. In case of doubt, the Guidelines should ideally err on the side of innovation, investment and strengthening European industry as a baseline for long-term consumer welfare.

6. **Next steps.** Once the Guidelines have been adopted, the Commission should focus on reviewing the remedy notice as it is affected by the change in the Guidelines. In addition, it is important to review the jurisdictional notice whose principles are copied throughout the world and have led to significant unnecessary administrative burdens to both companies and authorities, particularly in relation to the treatment of joint ventures with no nexus to Europe. ERT encourages the Commission to commit to a timetable to launch these reviews as there are significant opportunities to remove wasteful and costly notifications and reviews.

7. **On the structure and annex of ERT's response to the draft merger guidelines.** The rest of this document provides more specific comments on a per section basis following the structure of the draft merger Guidelines. We also include, in Annex, a revised version of the draft merger guidelines, with suggested drafting changes and comments.

II. General Introduction (Part I)

8. **The Guidelines should clarify how evidence will be weighted and should ensure that** the standard for both harm and benefits is a sufficiently cogent and coherent body of evidence. Yet, paragraph 20 gives the Commission a margin of discretion in weighing price and non-price parameters and paragraph 31 (with footnote 45) confer discretion to the Commission for the assessment of economic matters. When both price and non-price parameters are relevant for competition, they should be given at least equal weighting. It should also be clarified that the Commission cannot, by default, give more weight to its own economic assessments over those submitted by the parties. Further, paragraph 31 gives the Commission seemingly excessive discretion by suggesting that a single document may support a finding of harm (although this is not acknowledged for benefits) and the same paragraph allows for certain evidence to be prioritised and others discounted without any clear criteria. Moreover, the Commission should not automatically attribute high evidentiary value to evidence simply because it runs counter to the parties' interests (footnote 61); the Commission cannot give less value to internal documents

drawn up after the announcement of the merger as most synergy assessments require for the parties to be more advanced in the negotiations (footnotes 55 and 61). More generally, all evidence should be considered and put into context, as well as valued depending on source credibility and corroboration. Context needs to include looking at who prepared the document, for who it was prepared, at what time and for what purpose. Conversely, evidence aligned with the parties' interests should not automatically have limited value if it derives from ordinary course of business, relies on established expertise and is corroborated in the broader context.

9. The statement in paragraph 31 that there is no hierarchy between quantitative and qualitative evidence is welcome and should be reiterated and demonstrated throughout the final document. This is however not the case, as later sections (e.g., for benefits) appear to favour quantitative evidence, creating uncertainty and inconsistency and limiting the role of qualitative evidence. Quantification cannot be the preferable standard for evidence to be valued (e.g., §316, footnote 395). For example, it cannot be systematically required for dynamic (especially non-price) parameters or in cases where the facts are otherwise sufficiently clear and their absence cannot be used to disregard or heavily discount the dynamic gain.

10. In addition, whilst the Guidelines acknowledge at paragraph 30 that "the Commission is mindful of the commercial incentives of the parties providing such information", the Commission should apply more judgement on weighing the credibility of third-party views and insisting on evidence when deciding to open up Phase II cases, particularly where there are no product or service overlaps.

11. On the basis of overall assessment of the facts and evidence (both in regards with harm and efficiencies), the Commission concludes whether a merger is more likely than not to result in a SIEC (§32). Yet, there is a strong presumption that the more market power the entity has, less likely the efficiencies will be sufficient to outweigh harm (§35). While the more market power the entity has, more careful scrutiny is needed, there cannot be a by default presumption on the absence of sufficient efficiencies in such cases as otherwise this may neutralise efficiency claims especially for mergers involving larger firms.

12. **The Guidelines should not disregard the importance of in-market scale**: The guidelines place significant emphasis on the pro-competitive benefits of scale in the context of cross-border mergers, mergers involving complementary assets, or consolidations aimed at strengthening Europe's ability to compete with global players. While there are some positive openings in the current draft regarding in-market scale, a more explicit recognition of these benefits is important to avoid ambiguity and provide greater confidence that competition authorities will fully take into account the positive effects of in-market scale in future consolidation cases, especially for industries where in-market scale is particularly important to generate scale benefits enhancing investment and innovation.

13. Counterfactual assessment shall be dynamic and not isolated from efficiencies. To the extent that the theory of benefit is part of the SIEC assessment (§32), the counterfactual assessment cannot disregard efficiencies when comparing the expected market situation with and without the merger (§37). The commitment to carry out not only static but also dynamic assessment of the effects of the merger requires the Commission to adopt a dynamic approach also when looking at counterfactual. In this context, "*the sufficient degree of certainty*" standard is too high and in practice non-achievable (§§ 39 and 40) and should be replaced with "*more likely than not"*.

14. In any event, the Guidelines should expressly acknowledge that its statement (§38) that the relevant counterfactual will "*in most cases*" be the pre-merger conditions, (i.e., « *the conditions existing absent the merger, i.e., prior to the initiation, negotiation or conclusion of a merger* » (see footnote 71 of the Guidelines)) applies to both harm and efficiencies.

15. **The Commission investigation should symmetrically cover harm and benefits**. The Commission routinely uses its powers under Articles 11, 13 and 18 of the EUMR to gather evidence on harm from third-parties but does not do so for efficiency claims. Where evidence relevant to efficiencies is not in the possession of the parties but held by third-parties like customers, suppliers or technology licensors, the Commission should be required to request it. An asymmetrical investigation would systematically disadvantage theories of benefit. Additionally, the Commission should always consider the proportionality and the efforts needed to answer third-party RFIs'.

16. **The current standard remains too demanding for the failing firm defence**. There should be flexibility to bring forward a counterfactual where, because of financial difficulties, a firm will not contribute effectively to the competitive process in the foreseeable future, without requiring proof that it will exit the market entirely. The requirement to demonstrate imminent market exit sets an unnecessarily high threshold that risks disregarding situations where firms, while not formally exiting the market in the short term, no longer have the capability to exert an effective competitive constraint in the foreseeable future. This is particularly relevant in sectors experiencing sustained margin pressure, declining demand in certain segments, and significant investment requirements, e.g., linked to the green and digital transition or which are by nature capital-intensive. In such contexts, a firm may remain formally active in the market but, due to financial constraints, lack the ability to invest, innovate or compete effectively over the foreseeable future. The Guidelines should therefore allow for a more flexible and forward-looking counterfactual, recognising that a firm which is no longer a viable competitive force should not be treated as such for the purposes of the merger assessment. Considering the above, a more pragmatic and dynamic approach would avoid blocking mergers that preserve **economic activities**, innovation, investment competitive capacity, preserve the presence of industries in Europe, or customers' long term interests. This could be achieved either through lowering the standard for failing firm defence or allowing more flexibility in the assessment of counterfactual to factor in financial difficulties of firms which impact their ability and incentives to invest and innovate moving forward by lowering the sufficient degree of certainty standard in § 40.

17. Furthermore, the counterfactual assessment should be flexible enough to encompass scenarios where a parent company makes a strategic decision to exit a specific market or divest a business unit for its own commercial reasons. In an already concentrated market, it may occur that despite a diligent search, the only interested and viable purchaser is a main competitor. In such instances, the realistic alternative to the merger is not the continued independent operation of the business, but its complete withdrawal or closure. Consequently, blocking the transaction would result in the definitive loss of the business and its operational presence, whereas allowing the merger ensures that the business activity and its underlying assets survive. To ensure this approach remains balanced and strictly bounded, the Commission could evaluate these situations based on internal documents. These should substantiate that market exit would have been the realistic alternative for the seller.

III. Market Powers (Part II, section A)

18. **The shift from Dominance (i.e., high threshold) to Market Power (i.e., low threshold) should not be used to create a negative presumption of harm**. The draft Guidelines frame market power as the governing concept while treating dominance as a residual category (see §§ 111-113). This inverts the hierarchy of the EUMR, where Article 2(3) identifies the creation or strengthening of a dominant position as the primary basis for a SIEC finding, with other forms of market power operating as a complementary gap-filling mechanism. The Guidelines should restore the sequence, with dominance maintaining its first-place position, and simple market power remaining exceptional as a foundation for a theory of harm.

19. In this regard, the treatment of oligopolistic market structures appears problematic (§ 113) as it implies that substantial market power necessarily raises concerns in oligopolistic settings, whereas many oligopolistic markets function competitively and produce efficient outcomes which is also confirmed in the EUMR which recognises that many oligopolistic markets are healthy. The Guidelines should not equate oligopoly with harm absent specific evidence of coordinated or non-coordinated effects, otherwise any merger in an oligopolistic market would be by default problematic.

20. **Market share thresholds risk creating de facto presumptions of harm below dominance**. The classification in section 1.1 describes shares from 25% as “material”, from 40% as “high” and from 50% as “very high” (§62), with presumed dominance (§112). Combining this with the Commission’s statement that it must “closely assess” (§56) any merger creating or increasing market power implies that virtually any horizontal merger producing a meaningful combined share warrants in-depth scrutiny on market power grounds with a by default negative stance that such mergers are harmful. A merger moving market share from 30% to 40% does not by that fact alone indicate a problematic concentration and the Commission should not consider this as leading to market power absent the assessment of other indicators and very specific market circumstances which should be more explicitly recognised in the guidelines. Furthermore, a dynamic assessment would be required: wherever market conditions are evolving, either through technological change, regulatory transition or shifting demand, or more generally, whenever the markets are characterised by dynamic competition based not only on price but also non-price parameters, the Commission should further clarify that it will apply a forward-looking projection rather than relying on static market share figures that may overstate the merged entity’s position. Currently, such a dynamic approach is limited to specific dynamic settings (§ 58), such as highly dynamic or volatile markets (§64c) applying a very high standard of sufficient degree of certainty (§ 58) which is in practice not achievable. This approach is too restrictive considering the overall shift of the guidelines to adopt a dynamic approach in merger assessment. Market power assessment with a dynamic approach therefore should be under a less demanding standard. Furthermore, as the guidelines recognise that a firm may be an ‘important competitive force’ having more influence on the competitive process than its market share or similar measures would suggest (para 64 b), the inverse may also be true where moving forward a firm may be a less competitive force and have a less influence on the competitive process than its market shares suggest due for example to financial or other constraints. The Guidelines should more generally recognise that the market shares may under- but also over-estimate the competitive force of a firm.

21. **On "high profit margins" as an indicator of market power (§§70-74):** ERT strongly opposes the introduction of "high profit margins" as a standalone indicator of market power. First, the use of profit margins as a direct proxy for market power does not rely on any established precedent in EU merger control case law. Second, the Commission is in

no position to appreciate what constitutes a "high" or "normal" profit margin, as this varies drastically across different industries, business models, risk profiles, and investment cycles. There is no consensus on the methodology for such calculation. The draft Guidelines suggest comparing a firm's margins against "more competitive settings" or peers, but such benchmarking is highly subjective and ignores the underlying economics of different sectors. In capital-intensive and highly innovative industries, what might appear as a "high" incremental margin is often an absolute necessity to recoup massive upfront fixed costs, fund long-term R&D and capital investment, and absorb the high risks associated with innovation and investment. Treating high margins as a structural presumption of market power would effectively penalise European companies for their efficiency, financial health, and successful risk-taking, which directly contradicts the Commission's stated goal of promoting investment, resilience, and global competitiveness. ERT urges the Commission to remove this indicator from the final Guidelines.

22. **Dynamic competitive potential and market definition require broader recognition**. ERT welcomes the recognition of dynamic assessment and countervailing factors, but the following adjustments would be needed.

    - First, the Guidelines unduly limit investment-related factors to the firms' business models, including elements such as organisational structures, vertical integration and geographic scope (§82). A firm's capacity to invest depends equally on financial strength, access to capital markets and profitability as a funding source for capital expenditure. The Guidelines should recognise the full range of financial and operational constraints shaping a firm's competitive trajectory in regards to a firm's capacity and incentives to invest.

    - Second, the relationship between the market definition[3] and the market power assessments warrants explicit treatment. Where imports or out-of-market constraints are materially significant, market shares on a narrowly defined market may not reflect the parties' actual competitive position. The relevance of imports should be integrated into the market definition assessment rather than treated as a separate consideration in the competitive assessment, so that the resulting market shares more accurately capture the actual competitive dynamics. Similarly, in all cases where the geographic relevant markets are defined taking into account catchment areas of retail activities, competitive constraints deriving from surrounding catchment areas shall be duly considered when assessing relevance of market shares. The Guidelines should ensure that such factors receive appropriate weight before concluding on market power.

    - Third, paragraph 103 lists "private label" as a potential "out of market constraint" on "branded products". This is certainly true upstream. In addition, regarding the downstream market definition, the Guidelines must acknowledge that, where there is clear evidence, private label and branded products may be considered in the same relevant market (as per previous case law)[4].

[3] See ERT Response to the consultation on the revised draft of the Market Definition Notice.

[4] In the following cases, the EC has either determined that private label and branded products are in the same relevant market or has considered whether they are in the same relevant market but not come to any definitive conclusion because there was no need to: M.7946 – PAI / Nestlé / Froneri; M.7669 – Lion Capital / Aryzta / Picard Groupe ; M.8549 – GROUPE LACTALIS / OMIRA; M.8150 – Danone / Whitewave; M.7625 – ADM / AOR; M.7292 – DEMB / Mondelez / Charger OpCo; M.7057 – Suntory / GlaxoSmithKline;M.7010 – Bolton / Tri-Marine / JV; M.6895 – 3G Special Situations Fund III / Berkshire Hathaway / H J Heinz Company; M.6891 – Agrofert / Lieken;

IV. Anticompetitive effects (Section II. B)

23. As explained below, the anticompetitive effects chapter of the draft Guidelines is the most significantly expanded part of the draft Guidelines. While recognising non-price parameters of competition is a positive step, the operative provisions introduce eight distinct theories of harm without clear limits or thresholds, granting the Commission a level of discretion that is at odds with the stated objective of increasing legal certainty.

24. **Overly broad expansion of the theories of harm.** Eight distinct standalone theories of harm now potentially apply to all mergers, irrespective of sector, size, or market context. All specific criteria are listed without clear limits, making outcomes unpredictable. This will also greatly limit the ability of companies to effectively assess mergers' prospects of success and likely review timeframes prior to entering into a transaction which ultimately results in legal uncertainty with a potential chilling effect on investment in Europe.

25. The Guidelines should clarify in which circumstances each theory of harm is applicable if any, so as to increase legal certainty for the large majority of mergers where most theories will not be relevant; insofar, the section on theories of harm should more clearly be presented as a set of tools to assess different market configurations rather than a checklist that need to be verified in all cases. In this regard, it is of tremendous importance that the Guidelines clarify that, in cases where no market power is identified, no theory of harm should be investigated whatsoever.

26. ERT would also welcome safe harbours analogous to the innovation shield for the other theories of harm, providing predictable starting points and reducing unnecessary burden on notifying parties as well as for the Commission.

27. The Guidance should also make clear that extension of the theories of harm does not compel parties to provide specific information for each hypothetical theory of harm, unless such a theory of harm is demonstrably relevant to the transaction at hand. In practice, the breadth of new theories could make notifications considerably more burdensome. Parties risk facing extensive data requests covering very diverse information including margins (e.g., incremental profit margins, gross margins), market shares of different kinds (e.g., sales-based market shares, capacity market shares, procurement shares, employment shares), investment data, innovation pipelines, capacity information, minority shareholdings, third-party confidential information in their possession, and wide-ranging additional documentation. Without upfront pre-screening of relevant theories, this risks significantly increasing data collection exercises (also for third-parties) and delaying review timelines. In addition, gathering such information may not necessarily be easy (e.g., in case of a public bid, etc.) and producing hard evidence of post-merger innovation may also raise gun-jumping risks. Accordingly, and to support the simplification efforts, the Guidelines should establish a method/process for early identification of the theories of harm that are likely in play for a given transaction, thereby focusing the assessment and limiting the information burden to what is proportionate and relevant.

M.6722 – FrieslandCampina / Zijerveld & Veldhuyzen And Den Hollander; M.6627 – Arla Foods / Milch-Union Hocheifel;
M.6611 – Arla Foods / Milk Link; M.6522 – Groupe Lactalis / Skånemejerier; M.6441 – Senoble / Agrial / Senagral JV; M.6348 – Arla Foods / Allgauland; M.6321 – Buitenfood / Ad Van Geloven Holding / JV; M.6119 – Arla / Hansa; M.5975 – Lion Capital / Picard; M.5902 – LWM / RWI / F&F; M.5875 – Lactalis / Puleva Dairy; M.5046 – Friesland Foods / Campina; M.2072 – Phillip Morris / Nabisco; M.2544 – Masterfoods / Royal Canin; M.1127 – Nestlé / Dalgety

28. ERT believes there are four mutually reinforcing solutions.

    - First, safe harbours and qualifying thresholds that limit discretion and provide predictable starting points.

    - Second, limitations like network-effects analysis confined to digital markets, and pivotal capacity limited to sectors with demonstrable structural scarcity.

    - Third**,** initial screening discussions at an early stage to identify which theories are genuinely in play, focusing the assessment rather than treating every theory exhaustively.

    - Fourth**,** a robust evidentiary basis required before pursuing any particular theory.

29. While the guiding principles state that on the basis of overall assessment of the facts and evidence (both in regards with harm and efficiencies), the Commission concludes whether a merger is more likely than not to result in a SIEC (§ 32), the chapter of anti-competitive effects deviates from this principle considering that the Commission may find that a merger may lead to a SIEC based on theories of harm (e.g. §§ 117, 119, 121, 123, 124, 126, 127, 130, 131, 138, 139, 170, etc.). It should be rectified throughout the section that the assessment of anti-competitive effect may only lead to a conclusion on whether there is a harm under one or several theories which is yet not sufficient to conclude on a SIEC (before assessing theories of benefit).

30. **Several theories of harm require clearer limits and balanced approach towards presumptions**. When looking at specific theories of harm identified in the draft, there are a number of clarifications or limitations required.

31. On closeness of competition, the Guidelines (§135) should specify that the Commission will preferably conduct diversion ratio analysis based on available data instead of leaving full discretion on the evidence that the Commission can use to conduct such analysis[5]. The guidelines should avoid the presumption that in case of substantial market shares, firms may still place an important competitive constraint on each other even if products are not close substitutes (§136). This section is about close competition and not the impact of high market shares on competitive dynamics which is addressed in the section on market power. Finally, the assessment of closeness of competition should be also dynamic and forward-looking to understand whether moving forward the parties will remain close competitors.

32. On pivotal capacity (§150-152), the draft introduces a theory based on one precedent (COMP/M.9706 Novelis/Aleris) that is not backed by case-law and does not reflect commercial reality in most sectors. It is equally unclear how the Commission will establish that capacity is pivotal and what pivotality level would be considered problematic (a firm appears to quickly reach 100% pivotality). Furthermore, companies typically do not hold detailed information on competitor capacities, and internal antitrust compliance programs typically would discourage such exchanges. Finally, in many markets, like software and

[5] The EC has applied diversion ratios in previous merger cases in the telecoms sector, but not always following the same trend. From the EC decision in case M.7612 - Hutchison 3G UK /Telefonica UK, the EC changed the approach taken so far in the analysis of diversion ratios and started to use surveys instead of the MNP data, which was the criteria used in the previous cases to determine the parties were, at least, close competitors (recital 446 and following).

services, capacity constraints are irrelevant or readily resolved. The concept of pivotal capacity should either be removed, or restricted to clearly defined situations of structural long-term capacity scarcity.

33. On labour market effects (§160-162), which is also not grounded on any case-law or decisional practice, a stand-alone theory of harm should remain genuinely exceptional. European workers already benefit from extensive protections through labour laws and collective agreements, making the import of this US-origin concern unnecessary. It could also lead to tension with the free movement of workers if impact on labour markets are assessed nationally for mergers which otherwise generate efficiencies on EU-wide markets. Companies operating on a global scale should not face a single national labour concern blocking an otherwise beneficial transaction. The absence of a sensible remedy, given that behavioural remedies would cannibalise the merger's efficiencies, further undermines the theory's utility. ERT proposes to remove this reference as the Guidelines should not introduce untested theories.

34. On minority shareholdings and common ownership, the proposed 5% safe harbour threshold (§165) is too low. A threshold of at least 25% appears more appropriate, and consistent with threshold levels set at national levels in Europe such as in Germany and Austria (25%). Outside of the EU, countries have also set their passive-investor thresholds at higher levels; e.g., Brazil (20%)[6] and US (10%)[7]. Higher thresholds are also applicable in many European national FDI screening regimes. In addition, it should be clear that additional influence factors, like board seats, must be found besides minority share (even if such share is relatively significant). This is what the Commission did in COMP/M. 11936 Naspers/Just Eat Takeaway where the minority shareholding was 27% and there were other criteria present like participation in the supervisory board, expertise in the food delivery sector, access to Delivery Hero's management, and proved flow of information. The Guidelines must distinguish between structural cross-holdings between competitors, which may affect competitive incentives, and passive institutional ownership through diversified index funds, of the kind managed by BlackRock or Vanguard, which is the reality of public capital markets. The *DuPont* common ownership case should remain the exception.

35. On important competitive force, the drafting is overly broad and the attached criteria vague. This creates a risk in which almost any active competitor could potentially qualify as an important competitive force. This should be limited to the case when the competitor has a disruptive behaviour and for other competitors to react or replicate such a behaviour significant investment or time is necessary. Further, the Commission should be required to demonstrate, with cogent and credible evidence, that the firm will continue to exercise such a role and be financially sustainable over time. A firm pursuing an unsustainable strategy does not constitute a sustainable competitive constraint. Moreover, future changes in market conditions and competitive dynamics should also be included in the assessment. In fast-moving markets characterised by rapid technological change, it is particularly difficult to predict whether a current player will remain an important competitive force over the coming years; the Guidelines should expressly acknowledge this temporal limitation. The concept must also work in both directions: if the Commission can argue loss of an important competitive force, the parties should equally be able to argue that remaining potential competition constitutes a sufficient constraint (e.g., in

[6] The 20% threshold doesn't automatically trigger the inclusion in the size-of-person test, it must be coupled with at least one shareholder right sufficient to establish control, CADE, *case 08700.000641/2023-83*, 24 March 2024.

[7] Clayton Act, Section 7A(c)(9), codified (15 U.S.C §18a(9))

footnote 212, one should recognise that not only the acquirer and the target could be a competitive force but also other remaining competitors). In the same context, the statement that the presence of an important competitive force post-merger does not in itself dispel competition concerns (§ 139) does not help and is not consistent with the logic that a removal of an important competitive force following a merger may result in a harm (§138). It should be nuanced mentioning that the presence of an important competitive force post-merger may be evidence that a merger is less likely to result in a harm. The criteria listed in §140, include unprecedented grounds: for example, it would not be acceptable that the ability to multi-source from different geographic locations listed under §140 (f) lead to preventing a merger between two European players in a global market dominated by suppliers from third countries, as this may prevent their ability to scale and compete globally.

36. If one of the merging parties may be an important competitive force due to the impact it has on competitive process, the inverse is also possible, when at least one of the merging parties may have more limited influence on competitive process than their market share or similar metrics would suggest (due to limited capabilities or more limited ability or incentive to invest or innovate compared to rivals). As in the case of important competitive force (§§ 138, 139), the Guidelines should also recognise that the more limited the role of at least one of the merging parties in the competitive interactions on different parameters of competition, the less likely for a merger to cause competitive harm. Both assessments should also include a dynamic approach to take into account of the potential future changes in the market and in competitive interactions.

37. ERT welcomes the acknowledgement that other factors than market shares and HHI are necessary to support the finding of competitive harm (§126) and would recommend avoiding any presumption that high market shares, high increments or high HHI levels and delta are more likely to be more harmful or support a SIEC (§§ 124-126). A presumption that there is a need for substantial evidence pointing away from a SIEC where market shares are high or very high or when the markets are highly concentrated and the merger results in non-negligible increases in concentration levels (§ 127) gives too much weight to static indicators (markets shares and HHI) which is in contradiction with the dynamic approach the guidelines announce to take and with the introductory section recognising scale benefits in certain settings. Overall, this creates a by default negative stance for any merger involving large firms or concentrated markets and neutralises many positive developments of guidelines regarding efficiency defence.

38. Finally, as parameters of competition may be related to both price and non-price elements (§20), it is important to assess the loss of head-to-head competition not only based on tools allowing to measure the impact of the merger on prices (§137) but also on tools measuring the impact of a merger on all parameters of competition, otherwise the outcome will only give a partial understanding of the impact of the merger concentrated on short-term price effects.

39. On the loss of investment competition, such newly introduced theories should remain grounded in cogent and consistent evidence. In addition, it is important to look at the actual effects, given that in a horizontal merger there will always be a reduction of competitors, but that could still have a positive effect on investment. In particular, the draft (§170) indicates that even where the merged entity proceeds with all its pre-merger investment plans, there could still be a negative impact from a future change of investment incentives. This goes against a counterfactual analysis: if the investments continue as planned, the merger impact should be deemed positive or at least neutral and therefore this statement shall be removed. Conversely, investments previously

included in internal documents but potentially abandoned post-merger do not necessarily imply that a merger leads to a reduction of investment, as companies may also change their investment strategies to adapt to prevailing market conditions, which can change over time. Some evolution or optimisation of investment plans when combining businesses is entirely normal. Finally, a reduction of investment in absolute terms should not, as such, be problematic if the reduced investment leads to a more efficient investment, e.g., through the ability to increase output. In this context, as it is already the case for network effects (§§ 155 and 156), the Guidelines should clarify that a merger resulting in a loss of a competitor does not in itself indicate a loss of investment competition resulting in a harm as such loss may be mitigated by the increase of scale which may positively impact incentives to invest both of merging parties and their rivals – if absent a merger investments capacity was constrained or would weaken over time. Finally, the Guidelines should add some safeguards to provide more legal certainty, for examples the Guidelines should qualify that the loss of investment may result in harm only in case it is material with a negative impact on consumer welfare and make clearer that a loss of investment is only problematic if it results from a lack of competition as opposed to efficiency-enhancing reductions. Other safeguards should be related to the absence of market power or existence of countervailing factors.

40. Loss of investment competition needs to be assessed based on clearly defined criteria instead of making reference to the criteria defined for loss of head-to-head competition which creates legal uncertainty (§172). In this context, it would be important to provide further guidance on how close competition is assessed (§174) and separate its assessment from the assessment of the competitive constraint exerted by rivals as these are two different indicators. Indeed, in the first case the Commission should assess the extent to which the parties' investment and expansion strategies constrain or respond to one another, while in the second case the Commission should assess the extent to which firms not involved in the merger are able and incentivised to maintain, reduce or enhance investment and expansion pressures post-merger.

41. There is also a tension between the section on investment competition and the Commission's commitment to resilience. Certain sections of the draft Guidelines (§9 and footnote 256) equate more competitors with greater resilience, but in certain industries requiring significant investments to be made over time for a market player to remain relevant and competitive, resilience requires substantial per-player investment that sub-scale competitors cannot sustain. Few companies, each investing substantially may produce better outcomes than more companies investing less. The Guidelines should acknowledge that consolidation can support resilience and not only the inverse, as already recognised in the introduction.

42. On loss of innovation, the draft Guidelines (§175) remove the requirement to identify a specific product that could be delayed and introduce harm at product, innovation-space and industry level. This extension of the *Dow/DuPont* case cannot be one-size-fits-all approach: it may potentially suit pharmaceutical markets with identifiable pipelines, but it is e.g., rarely workable in software and services where innovation is incremental and distributed. In sectors where expansion is easy, the mere disappearance of capabilities without an actual pipeline should not trigger any theory of harm. An industry-level innovation theory should require market-specific justification.

43. ERT welcomes the innovation shield as a safe harbour for acquisitions of start-ups and smaller R&D-focused companies, addressing the significant uncertainty around whether such acquisitions are viewed as killer acquisitions. However, the shield should extend to

infrastructure-driven innovation. As drafted, it focuses on R&D-heavy technology markets, leaving outside its scope innovation requiring physical assets, networks and large-scale operational capabilities.

44. On loss of potential competition, the new distinction between actual and future potential competition raises fundamental difficulties. If an acquirer is unaware that a target plans to enter a market, it is hard to see how that target could have influenced its competitive behaviour. The Guidelines should clarify what constitutes '*being aware'*, whether it is limited to public information, and what likelihood threshold applies. The concept should be limited to situations where the Commission can demonstrate, e.g., on the basis of internal documents, that preventing competitor entry is the main objective of the merger, as in the French Doctolib decision[8] or in the ongoing EU Zoetis investigation.[9] Where, however, entry would happen immediately and at significant scale (meeting the Commission's own criteria for entry as a countervailing factor under §93 of the draft), the competitive constraint from the potential competitor should be assessed on a different footing. In addition, the threshold for future potential competition should be higher than for actual potential competition. In any event, it is essential that the concept works in both directions: parties should be able to equally argue -and the Commission should accept- that potential competition from a third-party constitutes an equally valid competitive constraint.

45. On entrenchment of a dominant position, the draft generalises the Booking/E-Traveli theory beyond digital markets, posing a significant risk for traditionally strong companies seeking to expand into adjacent markets. In digital markets, entrenchment may be demonstrated through network effects and data accumulation; it is far less clear how this would apply in other industries. In addition, the Booking/E-Traveli case has not been finally adjudicated, making codification premature. Given the limited case-law support for this concern as a standalone theory of harm, ERT considers that entrenchment would be more appropriately treated as an aggravating factor; not as a stand-alone theory warranting its own section.

46. On exchange of information, section 9.1 of the draft Guidelines elevates access to commercially sensitive information from a sub-theory within vertical and conglomerate mergers (§ 78 of the current Non-Horizontal Merger Guidelines) to a standalone theory of harm, placed on par with foreclosure and coordination. This elevation draws predominantly on the highly fact-specific decision in Case M.11956 – UMG/Downtown, which involved a database solution offered to third-party customers and whose particular circumstances cannot serve as the basis for a general theory of harm. In the large majority of the cases cited in this section (see footnote 352[10]), the Commission did not find that access to commercially sensitive information gave rise to a SIEC. The elevation of this exceptional case into a general theory of harm goes beyond the existing case-law support and risks creating uncertainty for transactions involving any degree of information access. Consistent with the foreclosure framework, the Guidelines should require the Commission to assess (i) ability, (ii) incentive, and (iii) whether such access would give rise to a significant impediment to effective competition. The Commission's dismissal of contractual and regulatory safeguards (see § 285) contradicts cases where it has itself relied on such protections as sufficient to exclude any ability or incentive to share

[8]For a breach of article 102 TFEU, Autorité de la Concurrence, Décision 25-D-06, 6 November 2025

[9]For a potential breach of article 102 TFEU, European Commission, Commission opens investigation into possible anticompetitive conduct by Zoetis over novel pain medicine for dogs, 26 March 2024

[10] This includes Novo Holdings/Novo Nordisk/Catalent, CVC/Ethniki, Google/Fitbit, NVIDIA/Mellanox, Apple/Shazam, Precision Castparts/Titanium Metals, TomTom/Tele Atlas.

information[11]. The burden must therefore lie on the Commission to demonstrate why, exceptionally, such safeguards are insufficient. Paragraph 284 further fails to weigh the material disincentives that merging parties face, such as reputational harm, civil liability, regulatory sanctions and loss of customers, which may render information sharing commercially irrational (see TomTom/Tele Atlas, §274), and disregards the possibility of pro-competitive effects (see Apple/Shazam, § 256).

47. As regards the new paragraphs on portfolio effects (§§287-290), which appear to be largely based on Commission's experience in Mars/Kellanova (M. 11753), ERT's view is that it should be clarified that such theory should only be considered as a plausible theory if there is sufficient concrete evidence.

V. Benefits from Merger (Efficiencies)

48. **Introduction - Equality of harm and fairness requires a symmetrical appraisal of benefits and harm.** The draft Guidelines represents a step forward on efficiencies notably by affirming that "*demonstrated efficiencies will play a key role in the assessment of merger going forward*" (§291) and that the Commission will now make an "*overall assessment of mergers*"; by formally recognising dynamic efficiencies; and that by acknowledging that the Commission will follow a symmetrical evidentiary standard for benefits and harm (§§26 and 304) (i.e., *based "a sufficiently cogent and consistent body of evidence, to the same evidentiary standard as the anticompetitive effects*"). In accordance with the H3G case-law, such evidentiary standard is the "*more likely than not*" standard (as acknowledged in §32). **This should be stated even more explicitly in the benefits section, in line with what has been laid out in the section on the Guiding Principles.**

49. As flagged in ERT's policy paper on efficiencies, the principle of equality of arms and fairness should govern the treatment of efficiencies throughout the merger review process; with four consequences:

    - First, the evidentiary standard must be genuinely symmetrical ("more likely than not") and the intensity of evidence required should remain entirely dependent on what is necessary and proportionate in each given case. The Commission should not be permitted to build a theory of harm on the basis of limited or isolated evidence while requiring the merging parties to produce a comprehensive and quantified body of evidence to substantiate efficiencies.

    - Second, the Commission's stated commitment to a longer-term and dynamic assessment of mergers must apply consistently to both sides of the competitive assessment (harm and benefits). Article 2 of the EUMR requires the Commission to assess whether a concentration results in a significant impediment to effective competition; this assessment necessarily encompasses both potential harm and potential benefits over the appropriate time-horizon. If the Commission may consider competitive harm that materialises over a period extending beyond the short term - for instance through a gradual reduction of investment incentives or a progressive weakening of competitive constraints - then it should also be able to consider efficiencies, third-party entry and expansion over comparable periods. Any

[11] Novo Holdings/Novo Nordisk/Catalent, §174 et seq.; Rolex/Bucherer, §112 et seq.; NVIDIA/Mellanox, § 284 et seq.; Precision Castparts/Titanium Metals, § 202

framework that applies a longer horizon to theories of harm while confining the assessment of efficiencies to a shorter window would be inconsistent.

- Third, the Commission must apply the same counterfactual scenario to its assessment of competitive harm and to its assessment of efficiencies; it cannot rely on one assumed market evolution when establishing a theory of harm and on a different, less favourable assumption when evaluating the benefits of the merger.

- Fourth, in all cases that warrant it, theories of benefit must be considered from the outset of the proceedings, on an equal footing with theories of harm, rather than being deferred to a later balancing stage where they are structurally disadvantaged. The balancing exercise between benefits and harm should be equal and out-of-market efficiencies should also be more fully acknowledged.

50. These principles that follow from the Guiding Principles have not been fully implemented yet in the operational part of the draft Guidelines.

51. **Additional requirements for efficiencies which seem to create an imbalance with the assessment of harm.** Besides the 3 prone-test, the Guidelines impose additional criteria for evaluation of efficiencies which are not applied to harm, by requiring the efficiencies to (i) be sufficient to durably (i.e., with an equivalent degree of likelihood over time) counteract the negative effects; (ii) positively impact parameters of competition on a lasting basis; and (iii) not to be temporary (§§ 25, 297, 305, 327). Durability/lasting basis should either be dropped as a criteria in symmetry with harm or be addressed in the same way both for harm and efficiencies.

52. While the guiding principles clearly state that on the basis of an overall assessment of the facts and evidence on harm and efficiencies the Commission concludes whether a merger's impact on the competitive process is 'more likely than not' to result in a SIEC, the Guidelines preserve the concept of the former logic where harm is established and the efficiencies are an afterthought when stating that the efficiencies shall offset predicted harm (e.g. §§ 25, 35, 297, 304, 308, 316, 327, 328, 330). It cannot be requested from the merging parties at the stage of the assessment of the theory of benefits to show how the efficiencies would counteract a merger's adverse effects on competition It would be more adapted to the new context to leave the appreciation of whether benefits outweigh harm or harm exceeds benefits to the balancing exercise which should intervene at the final stage of the assessment.

53. **Symmetrical evidentiary standard, including for assessing dynamic harm/benefits**. The application of the requirement that efficiency claims be supported to "*the same evidentiary standard as the theory of harm*" (§ 304) is undermined by statements such as the fact that dynamic benefits are "*inherently … less certain*" (§ 341) or the quality of evidence is particularly important for dynamic efficiencies and should support the conclusion that they would likely materialise (§ 330), which risks re-introducing an asymmetry between dynamic harm and dynamic efficiencies through the back door.

54. The draft Guidelines require that efficiencies be "*quantified where reasonably possible*" (§§ 307, 316, 320, 329, 336) and that the parties provide a "*reasonable estimate of the size of the efficiencies*" (§307) and the benefits should be "with sufficient likelihood quantified as far as possible, for the efficiencies to be appraised and compared to harm" (§316)), which is (i) in tension with the general principle (§ 31) that there is no hierarchy

between qualitative and quantitative evidence and (ii) in contrast to the standard for the Commission which does not have to quantify the harm (§22). Further, the requirement in footnote 395, paragraphs 308, 316, 329 for "*exact" or "precise" quantification'* as well as the fact of giving advantage to harm in the case where harm and benefits have the same magnitude absent an exact quantification of benefits (footnote 395), sets an impossible standard. Dynamic efficiencies may be difficult to quantify (even though they may clearly be more likely than not), and excessive emphasis on quantification risks rendering the dynamic efficiencies framework inoperative in practice.

55. Qualitative efficiencies should carry full evidentiary weight and be capable of offsetting modelled anticompetitive effects. A framework admitting qualitative harm but only quantitative benefits is asymmetrical. More guidance is needed on how to establish the magnitude of the expected efficiencies in case of qualification (§§ 308, 316 and 336).

56. Practically, the allegation that evidence carries more weight if drawn up by independent experts prior to negotiations (§§ 309 and 330) is unrealistic. Synergy calculations are produced during the merger process; no party draws detailed plans before due diligence, which is the only way to access data from a merger counterparty. The relevant distinction should be between advocacy materials and genuine business planning documents, including post-merger business plans, synergy calculations and investment simulations on which the parties rely to make decisions, which should be given high probative value regardless of timing. The requirement on third party shall be dropped, especially that it is not very clear what independent expert refers to and in practice such assessments are performed with consultancy firms. Furthermore, for evidence on dynamic efficiencies to have an evidentiary value requiring such evidence to be "*precise, concrete and consistent"* is an additional asymmetric requirement not present for harm (§ 330). More guidance should be provided on how to prove "incentives to invest/innovate" (§327) in practice as there is a tension between the requirement to "*explain and substantiate with a sufficient degree of likelihood"* that parties will invest or innovate and "*explain as concretely as possible the nature of the investment"*(§327) and a dynamic approach which looks at long-term incentives, especially that this requirement does not apply to dynamic harm.

57. The draft Guidelines' statement, in the section on merger specificity, that higher profitability of a merger does not mean that alternatives are unrealistic or unattainable (§313) is unhelpful, as it ignores the commercial reality that a merger may be the only viable means of achieving efficiencies at the necessary speed and scale.

58. Statements such as "*In general, efficiencies will only benefit consumers if the successful investment or innovation lowers variable or incremental costs at the product market level that will be passed on in the form of lower prices."* (§335) are unsubstantiated and biased and should thus be removed. In many industries (especially R&D-intensive and investment-intensive industries and heavy industries such as steel, energy, chemicals, telecom and defence), lower fixed costs provide pricing leeway. Operating profit, which incorporates fixed costs such as R&D, is **routinely used** to determine pricing freedom. The Commission's statement that "*fixed costs are unaffected by the quantity produced and do not affect firms' pricing decisions*" (footnote 390) is simply **not true**. Further, fixed cost savings fund innovation and investment even if not immediately passed-on in price. Marginal costs of innovation/investment (the additional costs of producing more) are relevant for the incentive to invest and innovate. The Guidelines should reflect this, especially in that the importance of fixed costs is recognised in footnote 391 and in §317.

59. Finally, the margin of discretion provided to the Commission without clearly defined limiting principles creates an asymmetry in the assessment of harm versus benefits

(§300) especially when incommensurable price and non-price parameters of competition are involved (§ 342). It should at least be clarified that when applying its margin of discretion the Commission cannot give more weight to evidence showing harm versus evidence showing benefits. In this context requesting the parties to provide evidence on efficiencies that relies on a methodology that is "sufficiently robust to be verified by the Commission" (§ 307) is vague and gives too much of a discretion to the Commission to reject any evidence- notably economic evidence – provided by the parties. It should be recognised that economic evidence is inherently based on assumptions (be it to prove harm or efficiencies) and if the main assumptions are supported by evidence and the assessment is not very sensitive to modification of underlying assumptions, then the economic evidence cannot be rejected based on the robustness criteria.

60. **Symmetrical timing.** Despite recognising that benefits may take longer to materialise, the draft Guidelines still state that efficiencies should occur "*in principle without delay*" (§ 306) or shortly after closing (§ 328) that "*a longer time frame for benefits to materialise may make them less predictable and quantifiable*" (§ 306, §328), "*the sooner the investment is expected to materialise after closing, the more likely that investment is considered timely*" (§ 328). This is problematic because dynamic efficiencies (innovation, investment, R&D, sustainability, resilience, security of supply) inherently materialise over longer timeframes as it takes time for example to engage such investments or innovation and also it takes time for such investments or innovation to produce results but this does not automatically mean that such efficiencies may be less predictable or less quantifiable (this is also true for direct efficiencies). For dynamic efficiencies, there should also be a clear distinction between the change of ability or incentive to invest (which indeed should intervene shortly after closing) and materialisation of such ability and incentive to invest which may take longer time as explained above.

61. As currently drafted (footnote 380), the Guidelines reference a time horizon of three to four years for the materialisation of efficiencies, drawn from sector-specific precedents in telecommunications cases and referring only to direct efficiencies. This reference risks being applied as a general ceiling across all industries, including for dynamic efficiencies, which would be inconsistent with the Commission's own recognition that dynamic efficiencies, by their nature, require longer investment and innovation cycles to materialise. In capital-intensive sectors such as energy, steel, defence, transport and telecommunications, R&D programmes, infrastructure deployment and sustainability transitions routinely operate on horizons of seven to ten years or longer. The Guidelines should therefore establish that the relevant time horizon for the assessment of efficiencies is to be determined by reference to the characteristics and investment cycles of the industry in question, and that no single timeframe applies as a default across all sectors. This would be consistent with existing case law, which has assessed efficiencies by reference to industry-specific dynamics. It should also be clarified that the timeline for dynamic efficiencies is necessarily longer than for direct efficiencies. Finally, it is not clear why the timeliness criteria of efficiencies should be aligned with harm (§ 306, 328) as depending on the case there may be an asymmetry between two – indeed there may be an immediate harm and long-term benefit or an immediate benefit but long-term harm.

62. **Symmetrical counterfactual.** One of the most critical issue concerns the "no less anticompetitive alternative" test which would require the merging parties to demonstrate that efficiencies could not be achieved "*by less anticompetitive arrangements between the merging parties or other market participants*" (§310) and must address "*all arrangements that are reasonably practical, including all established practices in the industry concerned*". (§ 310). This test transposes the Article 101, paragraph 3 TFEU requirement (which is an *ex post* analysis) to merger control (which is an *ex ante* analysis where alleged harm is uncertain) while Article 2, paragraph 1, point b of the EUMR only

requires that efficiencies be brought about by the merger and contains no indispensability condition. This is not an accidental omission - where the EUMR intends for Article 101(3) TFEU to apply, it says so expressly, as demonstrated by Article 2(4) in the context of joint ventures. It is also not a requirement of the case-law. Article 101 TFEU aims at limiting ongoing coordination between independent companies, while the EUMR regulates the creation of a single entity. Article 102 is therefore the better analogy to interpret the EUMR.

63. The practical consequence of such a counterfactual test is that the Commission can always hypothesise an alternative, whether it be a joint production agreement, joint ventures or licensing, without proving that such alternatives are equally available, viable, timely, effective and manageable from a legal risk perspective. Then, the parties are effectively asked to prove a negative (*probatio diabolica*) and to assess all conceivable alternatives. Even though the Guidelines allow the parties not to address mere hypothetical possibilities, the standard remains very high as the parties need to address all arrangements that are reasonably practical (§ 311) explaining that the parties may provide evidence that such agreements do not exist or are very uncommon (§312) which requires the parties to prove something that does not exist and therefore becomes a theoretical and burdensome exercise, especially that the theory of harm has not been developed on the basis of such counterfactual scenarios. Additionally, the mere fact that a certain type of agreement is "typical" in an industry, does not mean that it is reasonable for a specific situation or company. Also, all horizontal collaborations could potentially have their own concerns under Article 101 (1) and might require a full self-assessment under Article 101(3). It seems inefficient and disproportionate to require merging parties to perform such a hypothetical assessment.

64. ERT supports replacing the '*no less anticompetitive alternative'* prong with a single counterfactual test: efficiencies are merger-specific where they would not exist in the counterfactual absent the merger, applying the '*more likely than not'* standard, equally applicable to harm. Keeping the same counterfactual also guarantees that, when balancing between benefits and harm (even when of different kind), "*the effects of a merger are made comparable*" (§347). In this context, §311 should be removed or replaced by a statement that the counterfactual should be the same for assessing harm and efficiencies

65. While the only way to achieve true symmetry is the removal of the NLAA leg, in any event, one cannot retain a vague '*realistic and attainable'* (§§48 and 311) standard. At the very least, the counterfactual scenario should only include alternatives that are equally available, viable, timely, effective and manageable from a legal and business risk perspective and which the parties have considered in their internal business documents as an alternative to a merger.

66. Furthermore, if the Commission contests the less anti-competitive alternative assessment of the Parties, then the burden of proof should shift towards the Commission to prove how an alternative scenario may provide similar benefits in a similar timeframe- the applicable standard being the same as for the theories of benefits, meaning it will not be sufficient for the Commission to point out to an alternative scenario, but the Commission should provide concrete evidence on the benefits such a scenario may delivery – fulfilling the verifiability and benefit to consumer test.
67. Finally, it should also be clarified that if different arrangements already exist in the market prior to the merger, this could be evidence that there is no further possibility of creating synergies through similar arrangements.

68. ERT is also very concerned by the proposed claw-back mechanism (§ 323). The claw-back mechanism risks requiring the parties to demonstrate that post-merger investment in better products will not be accompanied by any price increases. This would set an unrealistically high standard and would dramatically limit the relevance of the efficiency defence. The relevant question is whether consumers are better off with the merger than without it, not whether there is a price increase where the merger delivers a higher-quality product. A price increase reflecting enhanced value is not an inefficiency unless solely due to competitive harm. The proposed mechanism will be extremely difficult to prove and quantify, risking rendering the theory of benefits purely theoretical. The negative and complex experience of claw-back in State aid confirms this. It is not the Commission's role to impose a price status quo, which would effectively freeze entire industries' ability and incentive to invest in higher-value products.

69. It is also welcomed that the Guidelines consider that the efficiencies may integrate benefits to consumers not only when such benefits result from the merging parties' activities but also when they result from the conditions in the relevant market overall, including rivals' activities (§ 315), so that the efficiencies are assessed having regarding to competition as a whole (§ 301). Of course, such wider analysis of the benefits should not be necessary if benefits realised between the parties are already sufficient to counterbalance the harm.

70. Furthermore, there cannot be an analogy between cost efficiencies and quality efficiencies in terms of their pass-on to customers. If there can be cost efficiencies which are not passed to the customers in the form of lower prices, this is less relevant for quality related efficiencies which by nature are passed on to customers in the form of improved quality. Therefore, the considerations relevant for the pass-on of cost efficiencies cannot be also relevant for pass-on of quality efficiencies (§ 323), otherwise the Commission needs to clarify how such considerations are applied in the case of quality efficiencies.

71. **Customers' willingness to pay appreciation should accept a flexible approach.** In the case of dynamic efficiencies, where investment or innovation is related to a new technology or a new product/service yet unknown to customers, the willingness to pay cannot be measured as for existing products and services. In this case, requiring a similar standard of proof will disregard any dynamic efficiency especially if the guiding principle would be that if the firms and investors are wary about consumers' willingness to pay, this may indicate that the expected consumer benefits may be low at the time of merger and foreseeable future (§ 336). Instead, the Guidelines should allow for a more flexible approach considering alternative indicators of likely consumer benefit, such as evidence of improved technical performance, increased reliability, enhanced functionality, broader accessibility, accelerated innovation or investment timelines, reduced environmental impact, or evidence of unmet customer demand. The existence of uncertainty regarding the future commercial success or adoption of an innovation or a novel product or technology shall not, in itself, preclude the Commission from taking such benefits into account.

72. **Out-of-market benefits need full recognition**. The draft contains a welcome opening towards out-of-market efficiencies (e.g., "*certain types of efficiencies can also bring benefits of much wider scope, including to society at large*" at § 315), and collective benefits, including scale, resilience, sustainability and security of supply (§298).

73. For companies such as, but not limited to, those active in critical infrastructure and investment-heavy businesses (e.g., steel, defence, telecoms, energy, transport), the recognition of efficiencies related to supply-chain stability and cybersecurity resilience is

important. In these cases, benefits to consumers may also be demonstrated through quality, reliability, security and innovation outcomes, even where this is not expressed in terms of price efficiencies or do not benefit solely or largely the consumers directly harmed by the mergers. For such businesses, investments often benefit (i) future customers; (ii) a customer group(s) different to the group(s) directly impacted by the merger; and (iii) enterprise or wholesale customers, rather than the retail segments examined in static models focusing on short-term price effects. It is important that the Guidelines expressly acknowledge that mergers can generate cross-group benefits and a full pass-on requirement for the directed impacted customer group may be too narrow in certain cases.

74. In the current draft, the acknowledgement of out-of-market efficiencies is limited to the extent that such broader benefits are otherwise fully tied back to consumers in the affected market. Statements referring to "*fully compensate substantially all harmed consumers*" (§ 357) or to "*efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger*" (§§315. 321), effectively render out-of-market efficiencies irrelevant in practice.

75. As explained in the ERT Policy paper on efficiencies, these requirements do not stem from the case-law, which merely requires that efficiencies <u>also</u> benefit affected customers. Thus, as long as consumers in the relevant market are not left without any material benefit, out-of-market efficiencies should be fully recognised.

76. **Symmetrical holistic balancing of the benefits and the harm**. The draft Guidelines state that "*competition is an important long-term driver of efficiency and innovation*" (§346), and that "*the lower the effective competitive constraint on the merging parties post-merger, the less incentive for the merging parties to maintain or build on the efficiencies*" (§346). These statements should also recognise that scale can equally be a driver of innovation and investment, particularly in capital-intensive or technology-driven sectors where larger firms are better positioned to make transformative R&D or other asset investments and keep up with the pace of innovation cycles and technological progress (which is recognised in the introduction section).

77. By the same token, the draft Guidelines (§351) introduce an asymmetric treatment of temporary benefits v temporary harm when they state that "*[w]hen the benefits are temporary or expected to decrease over time, it is less likely that they will be sufficient to counteract the harm*" (§351 and §25 requiring efficiencies on a lasting basis). The Commission does not apply the same logic to temporary (or diminishing) harm. To keep the standard of proof truly symmetrical, temporary harm should equally be treated as less likely to justify a harm.

78. Finally, the draft Guidelines (§339) should recognise that the benefits should offset the identified harm (not more than that and not for a longer time period ("on a lasting basis") than for the period where harm has been identified). It should also be acknowledged that efficiencies partially offsetting the harm are still relevant for discussions on acceptable remedies.

79. **No double discounting for benefits through presumptions.** The objective of the balancing exercise is to weight potential harm against potential benefits to conclude on whether a merger may result in a SIEC. This exercise should be the only valid tool to conclude on a SIEC and there cannot be any presumptions on top of it which disregard positive impacts of mergers to the benefit of harm. Any such presumption – the more a merger increases market power, less likely a certain level of cost saving is sufficient to

ensure that consumers will not be harmed (§ 343) or the harm arising from a merger between two close competitors is highly concentrated market will unlikely be offset by limited costs savings or small increases in product quality (§ 344) should be deleted.

80. **Urgent Need to Review the Notices:** The European Commission occupies a uniquely influential position in global antitrust enforcement. As one of the world's leading competition authorities, it is widely regarded as a model by other agencies, and its rules and practices are often replicated well beyond Europe. That leadership brings with it a special responsibility: the Commission should ensure that its merger control framework remains fit for purpose, proportionate, and aligned with modern commercial realities, because inefficiencies in the EU system are exported internationally.

81. This is particularly evident in the current treatment of joint ventures under the EUMR. The existing approach can require notification and review of transactions where there is no existing, potential or future nexus to Europe, creating unnecessary burdens both for companies and for the Commission itself. The consequence is a system that diverts time and resources to the assessment of deals that will not have an effect in the EU now or in the future. Because the lack of local nexus requirement has been replicated in a number of jurisdictions throughout the world, the burden of setting up local full-function joint ventures is multiplied globally, and businesses are facing multiple unnecessary filings and authorities are reviewing cases with no connection to their markets. The use of the Simplified Procedure under the EUMR in non-nexus joint venture cases provides little relief when many other authorities have adopted rules that are similar to the EU.

82. Against that background, the Commission should publicly commit to reviewing the EUMR notices, including the Jurisdictional Notice. A review would provide an opportunity to introduce a clearer local nexus test for joint ventures (including the ability to capture potential future effects) and to ensure that the EU framework targets transactions that genuinely merit EU scrutiny. The introduction of a local nexus test would neither require a revision of the EUMR nor go against the Court of Justice case law. It would indeed rely on the basic rules of public international law, i.e., the territoriality principle and the effects doctrine. When applied to competition law, these two sets of rules mean that the competition rules of a legal order may apply only to facts that have an impact on domestic competition and that the effects must be rather substantial, direct and foreseeable within the said legal order. To put it differently, the mere triggering of the EUMR thresholds is not enough for establishing jurisdiction. The effects doctrine requires that a concentration has a sufficient (i.e., direct, significant and predictable) effect on (a part of) the EU market. Given the Commission's role as an international benchmark, such a reform would not only improve the efficiency and proportionality of EU merger control, but could also encourage other authorities around the world to revisit and modernise parallel rules that currently impose avoidable costs and administrative burdens.

VI. Conclusion – need for additional changes to make the Guidelines operational

83. In summary, ERT essentially calls for:

- clearer limits on theories of harm;
- less explicit or implied presumptions of harm and stronger safe harbours, where the case-by-case assessment should prevail;

- proportionate evidence requirements grounded on the “more likely than not” standard that equally apply to harm and benefits;

- a realistic framework for dynamic efficiencies taking long-term horizon where appropriate (including fuller recognition of out-of-market efficiencies);

- the removal of the ‘no less anticompetitive alternative” test to the benefit of a symmetrical counterfactual;

- equal treatment of harm and benefit throughout the investigation; including a symmetric evidentiary standard for the assessment of harm and efficiencies, with the requirement for a robust and cogent body of evidence;

- to err on the side of innovation, investment and strengthening European industry;

84. Timetable for reviewing the EUMR notices.

85. These changes would make the framework more predictable and proportionate while preserving effective intervention where concerns are genuinely substantiated.

86. Taken together, these reforms would ensure EU merger control remains a credible, rules-based framework supporting both consumers and European competitiveness. ERT stands ready to engage further with the Commission on any of the issues raised in this response.