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Scaling up European innovation through acquisitions: A soft law response

Europe should wake up, the [Draghi report](#) stated more than a year ago. One of the priorities was and still is to close the innovation gap in advanced technologies.

Among the many strategic, economic and legal implications of warning as severe as this, an unobvious one was recently [contextualised](#) by the Organisation for Economic Co-operation and Development ([OECD](#)).

Europe is lacking in many ways but not when it comes to ideas and entrepreneurial skills, or innovative start-ups. The real Achilles heel, the OECD has [clarified](#), lies in the fact that the most promising SMEs, once profitably established and intercepted by the market, are invariably [acquired](#) by the highest bidder. With this loss of autonomy and control, incentives and propension to invent and patent also tend to 'perish'[1].

A first [response](#) to killer innovation acquisitions has been promptly provided. A regulatory amendment has been introduced both at [EU](#) and at national levels, [Italy](#) for example, proving so far to be [less successful](#) than expected.

In this article, a different legal fast track will be explored with the view to support the European consolidation in innovation markets and advanced technologies in response to the Mario Draghi memento.

The Guidelines on the evaluation of [horizontal](#) or [non-horizontal](#) mergers which provide competition authorities with a safe [guide](#)[2] in deciding whether to authorise or prohibit a merger, have recently been the subject of [consultation](#) and [proceedings](#), as they show 'the limits of time'. The current revision of these guidelines will update the framework for assessing mergers in light of new market realities and reflect the practice and case law of the Court of Justice.

'Born' to operate in mature markets with stable innovation and as such relying on a static approach – essentially based on price and market share variables, the Guidelines are unable to grasp the new dimensions of competition. They also struggle to identify the dynamics that are asserted in the new digital economy with a high rate of innovation, as well as the overall effects attributable to the concentration phenomena of European companies.

Therefore, it is time to promptly make the Guidelines match with the new era, considering market dynamics as well as the European Union's strategic [priorities](#) in the field of industrial policy, digitalisation and environmental sustainability.

[1] See V. Falce et S. Firpo "Gli Orientamenti antitrust da modernizzare », *ilsole24ore*, 9 September 2025 (in Italian)

[2] No doubt that these guidelines have played a fundamental role in antitrust enforcement, fostering the convergence of enforcement practice, reducing interpretative uncertainties and, ultimately, improving the predictability of merger decisions at European and national level.

THE WAY FORWARD

The way forward was deftly [foreseen](#) by the OCED which in 2025 marked 'the importance for competition authorities to have sufficient flexibility in the analysis of mergers to address changing market realities and business models'.

The [European agenda](#) itself calls for a new approach. On the economic front, global challenges require support for European champions. On the legal front, competition takes on a new strategic dimension that must be balanced with stronger guarantees in terms of procedural transparency, legal certainty, and predictability of decisions. The political mandate of European Commission Vice-President Teresa Ribera follows these same [priorities](#): pursuing European strategic autonomy, considering the pressures of globalisation, digitalisation, sustainability, and innovation, while promoting the simplification of rules and the reduction of costs for businesses.

As a result, the Guidelines should adapt to the new multidimensional framework of competition and the renewed geopolitical landscape. They should favour a holistic, inter-sectoral and technologically neutral approach, which identifies principles applicable to each sector, in the context of the European agenda.

Under a different angle, the Guidelines should favour a dynamic and substantial [approach](#) so as to measure the 'net loss of competition' deriving from each operation. The [measurement](#) is not merely in terms of price, but also and above all in terms of effects on innovation, efficiency, quality, reliability and sustainability.

Overall, the Guidelines should foster a future-proof approach, that can address market conditions, technologies and external growth processes of companies. On the merits, it is now a matter of declining the new architecture through concrete measures.

This means, first and foremost, focusing on [non-short-term indicators](#) linked to the productive

functions of supply, with particular attention to the impact of each operation on the quality and quantity of innovation that the post-merger company is capable of achieving in the medium term.

In this sense, inventiveness^[3] should be included among the independent dimensions of the assessment, and a specific role should be recognised for innovative spaces. The EU's 'innovation spaces' concept – as developed in the [Dow/DuPont](#) (Case COMP/M.7932) and [Bayer/Monsanto](#) (Case COMP/ M.8084) decisions – takes a broader perspective. The key distinction is that the European Commission's [innovation spaces](#) approach allows for the assessment of innovation competition across multiple product groups, rather than limiting the analysis to specific, directed research efforts. This broader view enables competition authorities to consider innovation capabilities that could potentially affect various products, providing a more comprehensive framework for evaluating competitive dynamics in innovation-driven markets. The belief is that a merger can be pro- or anti-competitive even without affecting prices. For example, because it improves or, conversely, reduces the variety and quality of services, or because it limits or, on the contrary, increases the environmental and energy impact of production processes.

As a result, the parameter of the 'sufficient level of likelihood' must be used to measure the impact of the transaction with respect to the inventive capacity of the post-merger firm and the foreseeable effects on technological rivalry. A focus on the external growth requires not only start-ups and small companies, but also large companies to enable the promotion of competition and competitiveness in strategic sectors (e.g. defence, energy, semiconductors). In these sectors, size can be fundamental for the exercise of the activity. Mergers can strengthen resilience if they allow European companies to locate critical assets, improve security of supply or reduce dependencies on non-EU suppliers. On the other hand, this means avoiding the possibility that the post-merger company increasing systemic

^[3] The set and value of intangible assets including R&D portfolios, patents, ongoing projects, planned expenses and expected strategic investments.

risk, especially in the presence of cross-border interdependencies.

Moreover, the efficiencies of a transaction should also be valued as an integral part of the overall assessment (and not as a defence), evaluating them positively when they are significant (but not necessarily specific to the transaction), predictable (and not speculative), and capable of translating into benefits for the market (and not only within the company). At the same time, they should avoid imposing the requirement of being timely and certain (for the simple fact that innovative processes are subject to uncertainties and continuous adjustments to be assessed on a case-by-case basis). The [Draghi report](#) calls for the introduction of an 'efficiency defence' within EU merger control. Mario Draghi observes that 'updated (EU merger) guidelines should explain what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate'. Moreover, the innovation defence 'cannot be used to justify further concentration by already dominant companies or in cases in which the concentration poses significant risk of entrenching a dominant position, ultimately harming effective competition'. Finally, 'to prevent improper uses of this innovation defence', it is subject to additional behavioural commitments (investment levels monitored *ex post*).

It cannot be ruled out that the benefits of a transaction might be predictable in the short term and based on a static approach (as in the case of the closure or integration of production facilities). However, in most transactions, measuring the quality and transferability of efficiencies (for example, innovation, digitalisation, and sustainability) requires a dynamic approach and advanced quantitative methods. In this sense, more evidence needs to be analysed (such as historical data and operational plans, consolidated R&D expenditure, the increase and quality of patents registered or expected after the transaction, the achievement of technological milestones, and the reduction of unit costs per product), and risk and

uncertainty analysis tools need to be integrated into the assessment.

In this regard, [out-of-market efficiencies](#) must be systematically recognised, especially in critical sectors such as infrastructure, energy, and telecommunications, where environmental or safety benefits may outweigh mere price effects. These efficiencies occur in [markets](#) other than those directly affected by the merger but may nevertheless have overall positive effects on consumer welfare or the economy.

One point remains clear. In the absence of credible competitive pressure, the expected benefits may not translate into widespread advantages, especially in markets with high barriers to entry or characterised by lock-in phenomena. For almost 20 years, the International Competition Network itself has [recognised](#) that even in the presence of a dominant position, a transaction may be justified if it allows for investments in R&D or industrial capacity that cannot be achieved individually by the parties.

It is essential, therefore, that the post-merger competitive environment remain sufficiently dynamic to prevent exclusionary behaviours. The [sustainability of efficiencies](#) also depends on the existence of post-merger competitive pressures: in markets with high barriers to entry, low contestability, or lock-in effects, the benefits are likely to remain within the dominant company, without positive externalities for the market and consumers. In this sense, the durability of the dominant position requires an even more detailed analysis of the link between declared efficiencies and benefits that can actually be transferred to the entire system.

Last, Europe should resist the temptation to introduce [negative structural presumptions](#). While having the merit of lightening the burden on competition authorities, they would affect each and any sector, placing an excessive burden on the companies concerned in terms of evidence, without being supported by adequate, reliable, solid, and persistent [cross-sector case studies](#).

From this point of view, this means confirming the rationale behind European merger control. Its purpose should not be to prohibit, except in exceptional cases, but to preventively monitor a lawful and natural business activity, namely external growth. It is therefore necessary to avoid turning into a general rule structural indicators that are only relevant in certain contexts (ecosystems). If applied indiscriminately, they risk favouring dangerous [false positives](#) that could 'compromise innovation, efficiency, and competition, precluding consumers from enjoying the potential benefits'.

A MORE AMBITIOUS RESPONSE

An urgent *caveat* is needed.

The above proposals are a necessary but not sufficient condition to promote the attractiveness of the European market for businesses and investors, thereby boosting the competitiveness of the [European system](#).

An ambitious goal such as this requires 'unity of intent' as Mario Draghi suggested during the high-level conference on competitiveness. It requires a broader reflection aimed at even more transparent and predictable enforcement of the rules by which each merger is assessed.

Specifically, this means ensuring the urgency of response which concluded his speech, guaranteeing that a merger is:

1. notified to a single authority and only once (principles of one-stop-shop and single point of contact). Any additional European or national interests, if relevant (such as those relating to security, defence, or resilience), are weighed through specific sub-procedures, in a spirit of loyal cooperation between the various authorities involved, without interfering with antitrust categories and assessments and without involving multiple notifications and/or parallel or overlapping proceedings;

2. through structured coordination with other Directorates/institutions and various authorities, including national ones, to consider these additional European and national interests, even if not strictly related to competition, always in accordance with the principle of convergence and non-contradiction with European law. For example, recently in Italy, a transaction which is problematic, not for market reasons, but from a national security perspective (specifically, economic security linked to the protection of savings), it is to be hoped that a single decision, transparent in its stages and predictable in its conclusions, will be reached by the parties, the market, and investors alike.

When it comes to European acquisitions and start-up innovation, it is not a question of 'what', rather of 'when'.

There is a common understanding in [competition policy](#) that Europe does not need to scrap the system that has guided European or national assessment up to now. Rather, it is urgent to modernise the approach (from static to dynamic), integrating variables (such as innovation and research, reliability of supply, or sustainability) and indices (such as technological and regulatory changes, product and service quality, the weight of imports and alternative parameters to sales value and volume).

Guidelines must establish principles and provide general guidance (valid for every sector and technology), while maintaining the necessary flexibility. In this sense, the new methods should modulate assessments considering evolving processes and market dynamics.

The revision of the Guidelines is expected in 2027. Can we really afford to wait that long? Inaction threatens at least our competitiveness, as Mario Draghi [recently pointed out](#). Therefore, the course must be set immediately, together with the

identification of a single institutional interlocutor and a unified decision-making process, transparent in its stages and predictable in its conclusions.

Only once revised, the Guidelines will effectively be able to promote the consolidation of European companies. It will then contribute in a [synergistic manner](#) to advancing the European Union's new strategic priorities for [competitiveness compass](#).

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