

Several key issues to be addressed in the EU Draft Merger Guidelines

The GSMA welcomes the reform of the EU Merger Guidelines. Transparent, predictable merger guidelines are essential for businesses planning investments, acquisitions, and growth strategies across Europe. However, we have identified three critical areas where the current draft falls short. If left unaddressed, these shortcomings risk creating a framework that is systematically biased against mergers - even those that would benefit consumers, strengthen European competitiveness, and drive innovation.

Same “More Likely Than Not” Standard for Harm & Efficiencies

The draft correctly states that the overall test for whether a merger causes a “Significant Impediment to Effective Competition” (SIEC) — the legal standard that determines whether a merger is blocked — should be assessed on a “more likely than not” basis.

However, the draft departs from this standard when assessing efficiencies - the benefits a merger can bring, such as lower prices, greater investment and innovation, or improved products. Specifically, paragraph 310 asks whether alternatives “could” achieve the same benefits absent the merger, rather than whether they “would.” Paragraph 311 requires merging parties to prove that alternatives are not “realistic and attainable” rather than applying the same “more likely than not” test. The result is an asymmetry: the Commission uses one standard (probability) to assess harm and a different, lower standard (theoretical possibility) to assess benefits. The same counterfactual - what would happen absent the merger - must be applied consistently to both sides of the analysis.

What needs to change

- *Paragraph 310 should replace “could not be achieved” with “would not be achieved.”*
- *Paragraph 311 should replace “realistic and attainable” with “would not be more likely than not.”*

We note that the current approach wrongly imports the “indispensability” test from Article 101(3) TFEU (a provision governing anti-competitive agreements), but Article 2(4) of the EU Merger Regulation explicitly limits that cross-reference to joint ventures only. Even the Commission’s own economic advisers, Oxera, have called for “a more consistent approach... to apply the same underlying standard to counterfactual assessment across the guidelines — including failing firm and efficiencies.”

Recognise Scale in Relevant Markets — Not Only Global Scale

The draft emphasises mergers that help European companies compete on the global stage. While this is important, the draft overlooks mergers that enable companies to achieve the scale they need in national, regional, or local markets — markets where scale is equally essential for investment, innovation, and long-term growth, particularly in capital-intensive and R&D-driven industries.

What needs to change

- *Throughout the Guidelines, references to “global” scale should be supplemented with “or in the relevant market.”*

Make Evidence Requirements for Efficiencies and Balancing Workable

The draft creates impractical evidentiary hurdles. It suggests that efficiency studies carry more weight if prepared by “independent external experts *in tempore non suspecto*, prior to the start of negotiations.” It also favours corroboration through “documents prepared by third parties, independently of the merging companies.”

Further, it implies that benefits materialising over a longer timeframe are inherently less predictable and quantifiable. This is not necessarily the case, especially when you look at investment - they may take longer to materialise, but are not uncertain. The draft Guidelines rightly recognise that the assessment of efficiencies should reflect the long-term, investment-driven nature of competition in capital-intensive sectors. It is important to keep the text sufficiently flexible to apply a timeframe aligned with the investment cycles and market dynamics in the relevant sector. Referring to previous cases with a 3–4-year timeframe undermines the required flexibility.

What needs to change

- *Remove the preference for pre-transaction, independently commissioned studies. Instead, accept a broad range of evidence, including internal analyses, external consultant assessments, market dynamics, views of market participants, and past examples of efficiencies in the same or similar markets.*
- *Amend paragraphs 306 and 328 to state that a longer timeframe for benefits “does not make them less predictable and quantifiable” provided they are supported by a “cogent and consistent body of evidence.”*