INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE MERGERS WORKING GROUP

FEEDBACK ON THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE DRAFT EU MERGER GUIDELINES OF 30 APRIL 2026

25 June 2026

Public consultation – Draft EU Merger Guidelines
Response of the International Bar Association – Antitrust Section
Submitted on behalf of the IBA Antitrust Section, in continuity with the submission of the IBA Antitrust Committee Mergers Working Group of 3 September 2025.

Consultation deadline: 26 June 2026

Section A — Respondent details

The introductory questions of the EUSurvey form. Pre-filled where possible; square-bracketed placeholders flag fields requiring the submitter's input.

Contribution publication privacy settings

Setting: Public — organisation details and respondent details to be published.

Personal data protection: Agreed.

Introductory questions

1. Language of contribution: English.

2. First name of respondent: *[To be completed by the submitter.]*

3. Surname of respondent: *[To be completed by the submitter.]*

4. Email: *[To be completed by the submitter — not published.]*

5. I am giving my contribution as: Lawyer (association).

6. Transparency register number: *[IBA is registered — confirm and insert transparency register number.]*

7. Sector of the entity: Other.

7.a. Further specification: The International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA's Antitrust Section represents members in private practice, in-house counsel, public-sector practitioners and academics in more than 80 jurisdictions. Drawing on the IBA's 80,000 individual lawyers across all continents, the Section is well placed to provide international and comparative analysis on competition law, including EU merger control.

The IBA is not sector-specific. This response reflects the cross-sectoral experience of the Section's members in EU merger control and is made by the Mergers Working Group of the Antitrust Section (the "Working Group"), in continuity with its submission of 3 September 2025 (the "2025 IBA Submission").

8. Geographic scope of activities: International.

9. Country in which the IBA Antitrust Section is principally based: Other in Europe (the IBA is headquartered in London, United Kingdom).

10. Has the respondent been an addressee of, or otherwise involved in, a Commission decision under Article 6 or Article 8 EUMR (or acted as external counsel / economic consultant of such an addressee) in the last 10 years?

The IBA Antitrust Section is not itself an addressee of Commission decisions. A substantial proportion of its members regularly act as external counsel to addressees of Article 6 and Article 8 decisions, in normal procedure, simplified procedure and Article 6.2 / Article 8.2 commitment cases.

Executive summary

The International Bar Association Antitrust Section welcomes the Commission's initiative to consolidate and modernise the EU merger guidelines, particularly to reflect the significant developments in the jurisprudence of the European Court of Justice since 2004 and 2008. The Draft Guidelines are a substantial and useful update, particularly in their integrated treatment of horizontal and non-horizontal mergers, their recognition of dynamic competition, and their more developed articulation of the Commission's approach to efficiencies. The Working Group's principal recommendation is that the final Guidelines should preserve the legal certainty, evidentiary discipline and administrability of the existing framework while incorporating these developments.

The response is organised around the following priority recommendations:

Priority	Recommendation	Reason
Preserve the SIEC standard and burden of proof	Avoid structural presumptions of harm and confirm that the Commission bears the legal burden of establishing an SIEC on the basis of cogent and consistent evidence.	This is necessary for consistency with the EUMR and the EU Courts' case law, including *CK Telecoms*.
Restore meaningful screening value	Retain or replace the existing market-share and HHI safe harbours with clear indicative screening criteria that provide genuine planning value.	The removal or downgrading of thresholds materially reduces predictability for low-risk transactions. Existing safe harbours should be preserved.
Ensure rigorous evidentiary standards and market testing	State how market-test responses, internal documents, qualitative evidence and econometric evidence will be weighted, tested and disclosed.	A more discretionary framework requires stronger safeguards to ensure reliable, reviewable decisions. Further explanation on the probative value of internal documents, particularly to recognize that certain internal documents carry more evidentiary weight than others.
Avoid speculative dynamic theories	Clarify the evidentiary standards for dynamic competitive potential, investment, innovation and potential-competition theories of harm.	Dynamic analysis should be rigorous and symmetrical, not a route to intervention based on capability narratives alone.
Clarify the innovation shield	Simplify paragraph 192 and clarify the operation of the shield for global R&D pipelines, start-up acquirers, DMA gatekeepers and residual R&D rivalry.	The shield is welcome but will not provide ex ante certainty unless its conditions are operational and further simplified or refined.
Maintain the vertical-merger framework	Preserve the ability-incentive-effect framework and reinstate language recognising that vertical mergers are	The existing NHMG framework is understood, workable and economically sound. The draft guidelines

	generally pro-competitive absent case-specific evidence to the contrary.	should retain a market share threshold to indicate market power consistent with paragraph 112 (40%) and should also refer to the 30% threshold from the existing framework, which is reflected in the Simplified Procedure Notice but has been omitted from the Draft Guidelines.
Make efficiencies usable in practice	Apply the same standards to theories of benefit as to theories of harm, including dynamic, sustainability, resilience and security-of-supply benefits.	Efficiencies have rarely been outcome-determinative; the final Guidelines should operationalise the promised recalibration and facilitate a proper efficiencies case.
Separate competition review from legitimate-interest review	Confirm that Article 21 EUMR, FDI, Foreign Subsidies Regulation and sectoral considerations do not become freestanding SIEC harms or benefits.	This preserves the one-stop-shop principle and the distinct function of EU merger control.
Protect rights of defence	Strengthen access-to-file, rights of reply, privilege and due-process safeguards, especially where internal documents or third-party evidence are material.	The broader the evidentiary toolkit, the greater the need for procedural discipline.
Keep the final Guidelines concise	Target a materially shorter, navigable final instrument with a glossary, case-law anchors and transitional guidance.	Brevity and structure are themselves tools of legal certainty.

Section B — Substantive feedback on the Draft Guidelines (per section)

Comments are anchored to specific paragraphs of the Draft Guidelines where appropriate. Cross-cutting issues that do not map onto a single Part are addressed in the Final Comments at the end of this submission. Throughout, the Working Group builds on the positions advanced in the 2025 IBA Submission and develops them in response to the text of the Draft Guidelines as now published.

Part I — Introduction and Guiding Principles (paragraphs 1–6)

The Working Group welcomes the Commission's effort to consolidate the 2004 Horizontal Merger Guidelines (the "*HMG*") and the 2008 Non-Horizontal Merger Guidelines (the "*NHMG*", together with the HMG the "*current EU merger guidelines*") into a single, modernised instrument.

The 2025 IBA Submission supported precisely such a consolidation. Mergers often combine horizontal and vertical effects, and a single instrument provides holistic guidance for practitioners and businesses alike. We endorse the Commission's ambition to integrate the competitiveness imperatives identified in the Draghi Report, to take dynamic competition seriously, and to provide for more granular efficiency analysis. We also welcome the integration of important recent case-law — notably *CK Telecoms* (C-376/20 P), *Wieland-Werke*, *Deutsche Telekom* (T-64/20), *Booking/eTraveli* (M.10615), *Dow/DuPont* (M.7932), *Bayer/Monsanto* (M.8084) and *Illumina/Grail* (C-611/22 P).

In continuity with the 2025 IBA Submission, the Working Group considers that the existing legal and analytical framework is, in the main, fit for purpose. The Draft Guidelines should embody a "*refresh and update*", not a revolution.

The Commission's own statistics support that posture: of the 10,011 concentrations notified up to 30 April 2026, 9,639 (96.3%) were cleared under Article 6 or Article 8 EUMR, with or without remedies. The existing framework has, on the evidence, contributed significantly to M&A in the EU economy, and the data do not support structural reform of the substantive standard through soft-law instruments. The EU merger guidelines serve an interpretative and procedural function; they are not the vehicle for substantive amendments to the EUMR itself.

We highlight five cross-cutting concerns that animate the rest of this response and that we invite the Commission to keep in view.

- First, legal certainty, predictability and consistency are not optional features of the framework. They are constitutive of the rule of law in merger control and central to an investment-friendly internal market.
- Second, the shift from rules-based safe harbours and indicative thresholds to a more discretionary, evidence-based framework is liable, unless carefully calibrated, to produce increased uncertainty, divergent outcomes, longer review periods and increased deal cost — particularly for transactions that historically would have been clearly compatible with the internal market. In the Working Group's view, a less structured framework may, if not carefully calibrated, result in increased intervention and more uncertainty for notifying parties and have negative chilling effects on potentially pro-competitive or neutral transactions. We invite the Commission to revisit the Draft Guidelines with that asymmetry in mind.
- Third, the growing complexity of the Commission's analytical toolkit places a heightened premium on transparent, methodologically rigorous and reviewable decision-making.
- Fourth, the integrity of the substantive SIEC standard and the evidentiary framework articulated by the Court of Justice must be preserved, whatever analytical innovations the new Guidelines introduce.
- Fifth, the Draft Guidelines are long. As the 2025 IBA Submission noted, the HMG and NHMG (at 14 and 20 pages) provide concise and user-friendly guidance. Brevity in the final text will itself serve legal certainty. The present submission seeks targeted, paragraph-level improvements rather than additional material.

Five concerns at a glance

Concern	What the Working Group suggests	Why it matters
Preserve safe harbours	Retain the 25% horizontal threshold and introduce a 40% vertical/conglomerate threshold consistent with paragraph 112 or at least align safe harbours with the Simplified Procedure Notice thresholds of 20% and 30% respectively.	*Ex ante* certainty is the principal benefit of soft law for routine deals.
Symmetry of harms and benefits	Apply the same evidentiary standard to dynamic benefits as to dynamic harms; align time horizons; recognise out-of-market benefits.	An asymmetric framework would undermine the new approach on efficiencies.
Articulate evidence and market-testing rules	State how market-test responses, internal documents, qualitative evidence and econometric work will be weighted, tested and disclosed. Recognise that not all	A more discretionary framework needs stronger safeguards to remain reliable and reviewable.

Concern	What the Working Group suggests	Why it matters
	internal documents carry the same probative weight.	
Separate competition review from legitimate-interest review	Confirm that Article 21 EUMR, FDI, the Foreign Subsidies Regulation and sectoral considerations do not become free-standing SIEC harms or benefits.	This preserves the one-stop-shop principle and the distinct purpose of EU merger control.
Keep the final Guidelines concise	Target a shorter, navigable final instrument with a glossary, case-law anchors and transitional guidance.	Brevity and structure are themselves tools of legal certainty.

Part I.A — The Role of EU Merger Control (paragraphs 7–18)

The Working Group supports the Commission's framing of EU merger control as integral to a competitive internal market and to European competitiveness, and welcomes the integration of the Draghi competitiveness agenda. The recognition of resilience and beneficial scale alongside established concerns about market power is a meaningful recalibration of tone. It is consistent with the 2025 IBA Submission: achieving scale by inorganic means is a natural option for companies and a vital part of the EU economy's ability to grow and become more productive.

That said, the benefits of scale and scope should remain factors capable of supporting an efficiency defence where an SIEC is otherwise identified — not standalone factors weighing in favour of a finding of SIEC. The benefits identified at paragraphs 7–18 (network effects, the ability to spread the cost of intangibles, better access to financial markets, the means to expand cross-border, the ability to compete with global rivals) should not be turned against notifying parties to support a theory of harm. We invite the Commission to confirm, in terms, that scale and scope, and separately resilience, are not in themselves new factors capable of grounding an SIEC.

We also support the integrated approach (a single instrument covering horizontal and non-horizontal analysis), subject to one structural concern. Integration creates a risk of cross-contamination between theories of harm: the analytical pathways for horizontal, vertical and conglomerate concerns are distinct in their economic logic, and the Guidelines should signpost more clearly when the analysis moves between them. We recommend express, well-signposted demarcation throughout the substantive parts of the text.

The Commission should also ensure that case teams clearly separate theories of harm from one another when investigating and prosecuting cases. The Working Group further encourages the Commission to retain in the refreshed Guidelines the position that vertical mergers are generally pro-competitive (consistent with paragraphs 11–13 of the existing NHMG and the framework recommended in the 2025 IBA Submission). In addition, the Working Group believes that the Draft Guidelines should retain a market share threshold for vertical and conglomerate assessments, and that it is made consistent with paragraph 112 of the Draft Guidelines (that is to say that vertical and conglomerate effects are unlikely to arise when either the upstream or downstream market share(s) are below 40%). Simply silently relying on the Notice on a Simplified Procedure and its notions of "*affected markets*" is neither sufficient nor transparent and at least the safe harbour of the Simplified Procedure Notice should be referred to explicitly in the Draft Guidelines themselves.

Finally, we reiterate the caution registered in the 2025 IBA Submission on the term "*ecosystem*". The Commission should resist making "*ecosystem*" a buzzword of competition parlance, alongside other freighted terms such as "*dominance*", "*foreclosure*", "*abuse*" and "*leverage*". Ecosystems are a natural part of a healthy, competitive industrial landscape and generate real benefits for customers and consumers. Neither their existence nor their operation is a theory of harm in itself. We return to this point under Parts II.B.7 and II.B.9.

In the same vein, the Draft Guidelines should delete vague formulations such as "*incommensurable advantages*" (paragraph 300), "*strong market power*" (footnote 333), and "[h]*arm and benefit expected to accrue directly from the merger is inherently more certain than dynamic harm and efficiencies*" (paragraph 341). The Draft Guidelines should also avoid Latin tags such as "*in tempore non suspecto*" — particularly in the context of forward-looking dynamic assessments.

Part I.B — Guiding Principles (paragraphs 19–51)

This Part contains some of the most consequential drafting in the Guidelines, and the Working Group offers paragraph-anchored comments on each of its sub-sections.

Burden of Proof, Theories of Harm and Benefit (paragraphs 19–27)

The Working Group welcomes the codification of the burden and standard of proof, consistent with the Court of Justice's judgment in *CK Telecoms* (C-376/20 P) and the General Court's judgment in *Deutsche Telekom* (T-64/20).

In continuity with the 2025 IBA Submission, the Working Group firmly believes that there can be no general presumption that a concentration is incompatible with the internal market. That principle was confirmed in *CK Telecoms* (para. 71) and in *Bertelsmann and Sony Corporation of America v Impala* (C-413/06 P, para. 48); was firmly established as early as *Kali & Salz* (Joined Cases C-68/94 and C-30/95, para. 222); was reaffirmed by the General Court in *Airtours* (T-342/99, para. 63); and was applied again in *General Electric* (T-209/01, para. 63). Each transaction must be assessed on its individual merits, in accordance with the EUMR and the established case law.

The Working Group acknowledges that the Simplified Procedure does create effective presumptions of compatibility for transactions falling below certain market share thresholds, and considers that this approach is appropriate and should be preserved.

The Working Group accordingly considers that it would be inappropriate and counterproductive to introduce structural presumptions of harm into the EU framework, beyond what the case law of the Court has established in *GE/Honeywell* (T-209/01). Structural presumptions would be overly simplistic, risk serious Type II errors, and chill investment, growth, scale and innovation. We register three specific reasons:

- the legal burden of proof must remain with the Commission to demonstrate, on convincing evidence and on the balance of probabilities, that the merger gives rise to an SIEC. The Commission cannot be absolved of that duty by a structural presumption or procedural shortcut, which would be contrary to the legal scheme of the EUMR and the case law of the EU Courts;
- the absence of any "*safe harbour*" effect at one end of the assessment spectrum does not justify a structural presumption at the other end. Clearing a transaction on simple indicia — low market shares, unconcentrated HHIs — is straightforward, for the Commission and for parties in self-assessment. Establishing harm at the other end requires sophisticated economic analysis of voluminous data and internal documents. Cases such as *Blackstone/Acetex* (M.3625), *Microsoft/Skype* (M.6281) and *Korsnäs/Assidomän Cartonboard* (M.4057) demonstrate this, as do the sixty-seven (67) cases cleared to date under Article 8(1);
- rebuttable structural presumptions raise a practical problem: the evidence that would normally rebut them does not yet exist at the time the Commission is seised, given the forward-looking nature of merger assessment. Economic models and internal documents capable of substantiating clearance either do not yet exist, or arise only after notification, and may not cover a long enough period to defeat the presumption.

Beyond the rejection of presumptions of harm, four points of clarification would materially improve the predictability of the framework:

- the threshold of probability — "*more likely than not*" — needs further articulation in dynamic and forward-looking assessments. In particular, the Draft Guidelines should clarify how the standard operates where the projected magnitude of an effect is high but its likelihood is below 50%;
- the distinction between the concepts of "*dominance*" and "*market power*" should be more clearly articulated in the Draft Guidelines as the Commission makes such a distinction (the Working Group's understanding that all forms of dominance are market power, but not all forms of market power are dominance) – further clarity on these core central concepts under the EUMR would be welcome;
- the relative weight of qualitative versus quantitative evidence is under-specified. The Draft Guidelines should set out how the Commission will weigh these forms of evidence, especially where they are in tension;
- the symmetry of the standard between theories of harm and theories of benefit is welcome in principle. The Draft Guidelines should confirm that the evidentiary demands on the Commission (when establishing harm) and on the parties (when establishing benefit) are commensurate, and avoid any drift towards a structurally higher bar for efficiency claims.

Evidence (paragraphs 28–36)

The Working Group is particularly concerned about the role of market testing. Responses from competitors and customers play a central role in the Commission's evidentiary practice but to be probative require disciplined methodology that would distinguish probative third-party evidence from self-interested or speculative responses.

We recommend that the Draft Guidelines set out the methodological and weighting principles the Commission will apply, including the heightened scrutiny that should attach to competitor-sourced evidence in markets where rivals have a direct strategic interest in blocking the transaction.

A related point concerns evidentiary asymmetry. Harm hypotheses can be tested with rivals and customers; efficiency and benefit claims cannot be, because the underlying information is confidential to the parties. The Draft Guidelines should acknowledge this asymmetry expressly, so that efficiency claims are not held — by virtue of an artefact of evidence-collection methodology — to a higher evidentiary bar than the harm hypothesis.

Procedural fairness requires meaningful rights of reply and rebuttal in respect of market-test responses on which the Commission proposes to rely materially. This means timely disclosure in usable form (subject to legitimate confidentiality protections, including data rooms) and a real opportunity for the parties to test and contextualise that evidence in state-of-play meetings and written submissions.

On internal documents, the Working Group endorses the principles articulated by the General Court in *Wieland-Werke* but is concerned about over-reliance on isolated internal documents in the manner reflected at paragraphs 42, 52 and 54–55. We recommend that the Guidelines articulate the balancing principles drawn from the Court's case law. In *Hutchison 3G UK*, the Court emphasised that the probative value of internal documents depends on their closeness to the events and on whether their content runs counter to the declarant's interests.

Documents must be assessed in context — authorship, audience, intended use, ordinary-course nature — and not by reference to isolated turns of phrase. Some internal documents will therefore carry greater weight than others. The Working Group reiterates the position advanced in the 2025 IBA Submission that internal documents should be approached with caution and not taken at face value to trump solid economic analysis. The implications for in-house counsel, document creation practices and legal professional privilege should be addressed expressly (we return to privilege in the Final Comments below).

On economic and econometric evidence, the Working Group welcomes the continued reliance on econometric tools and the implicit endorsement of the methodological standards articulated by the Court of Justice in *UPS* (C-265/17 P). We recommend that the Draft Guidelines expressly: (i) acknowledge the methodological limits of econometrics and the importance of robustness checks and reproducibility,

particularly in forward-looking assessments; (ii) treat the *UPS* standard as the minimum benchmark for the use of quantitative economic evidence, including disclosure of methodology, data sources and sensitivity analyses; and (iii) articulate the weighted use of ordinary-course internal documents against economic interpretation — recognising that numerical and qualitative data from such documents require economic interpretation that is itself subject to robustness and reproducibility standards. Where the Commission departs from the conclusions of its own economic analysis, the Draft Guidelines should require it to explain why.

Causality and Counterfactual (paragraphs 37–44)

The Working Group welcomes the flexibility to depart from prevailing market conditions where supported by contemporaneous evidence. We ask the Commission to include guardrails to ensure counterfactuals are based on evidence — for example, by requiring that any departure from prevailing market conditions be supported by contemporaneous, ordinary-course evidence rather than post hoc reconstruction.

Paragraph 39(i) would also benefit from a clarification: e.g. "*such as the existence of a signed and binding merger, acquisition or joint venture agreement between other market players in the same markets*". The Working Group respectfully notes the existence and application of the Commission's "*priority rule*" for the assessment of sequential/parallel concentrations that are *notifiable to it*. Regardless of the application of that rule, it would be somewhat anathema to logical assessment if a signed agreement for a merger or acquisition between competitors in the same field were to be totally ignored in a forward-looking assessment of a concentration (regardless of whether that separate transaction was notifiable to the Commission or not). Multiple counterfactuals are usually assessed in complex cases, and variations with and without a contemplated third party merger in the substantive assessment may yet be tenable, without undermining Commission policy on the priority rule.

Failing Firm (paragraphs 45–51)

The Draft Guidelines retain a three-limb failing firm test requiring, *inter alia*, that the failing firm's assets would "*inevitably exit the market*" absent the merger. In continuity with the 2025 IBA Submission, the Working Group considers that this formulation — drawn from paragraph 90 of the HMG — is not anchored in the case law. Neither *Kali und Salz* (Joined Cases C-68/94 and C-30/95) nor *BASF/Eurodiol/Pantochim* (T-114/02) requires demonstration that the *assets* themselves would leave the market (as distinct from the failing undertaking doing so, or its market share accruing in any event to the acquirer). The words "*assets*" and "*exit*" do not appear in *Kali und Salz* at all; the criterion was introduced by the HMG and goes beyond what the Court of Justice contemplated.

The Working Group accordingly suggests that the "*assets inevitably exiting the market*" criterion be dropped, or at least reformulated to align with the Court of Justice's formulation: a concentration is not the cause of the deterioration of the competitive structure where (i) the failing firm would in the near future be forced out of the market because of its financial difficulties if not taken over by another undertaking; (ii) the acquiring undertaking would gain the failing firm's market share if it were forced out; and (iii) there is no less anticompetitive alternative purchase. As currently drafted, the "*assets exit*" criterion sets an evidentiary hurdle that is almost impossible to clear in distressed M&A, particularly in certain sectors like airlines and shipping (where the assets may only be leased by the parties and can be readily re-deployed in other markets) and so risks rendering the defence illusory.

The Working Group welcomes the Draft Guidelines' explicit inclusion of the failing-division principle — as requested in the 2025 IBA Submission — recognised in *Aegean/Olympic II* (M.6796) and relevant in *Nynas/Shell/Harburg Refinery* (M.6360). Greater leniency would help rescue failing firms and divisions, and would ensure that European productive assets do not inevitably exit the (global) market in the very capital-intensive sectors the Draghi agenda seeks to support.

More broadly, the failing firm framework as drafted is a missed opportunity to address the competitiveness imperatives that animate the rest of the Draft Guidelines. The Commission's commitment to the Draghi agenda sits uneasily with a failing firm test that has, in practice, proved virtually impossible to meet. The Working Group encourages the Commission to revisit the doctrine so that it becomes a genuine, accessible

defence rather than an abstract recital — consistent with European industrial-policy objectives and with the realities of distressed M&A in capital-intensive sectors.

Part II — Competitive Assessment / Part II.A — Market Power: introduction (paragraphs 52–59)

At this introductory level, the Working Group emphasises that market power should remain an evidence-based assessment. The final Guidelines should avoid treating any single indicator as determinative and should keep a clear link between the finding of market power and the specific theory of harm alleged.

Part II.A.1 — Structural indicators of market power (paragraphs 60–67)

This sub-section, together with paragraphs 128–129 of Part II.B.2 below, is where the Draft Guidelines most reduce the *ex ante* comfort previously available to parties. The Working Group regards these changes as among the most consequential of the new framework.

As the 2025 IBA Submission set out, the existing safe harbours in paragraphs 18–21 of the HMG (based on market shares and HHI) should be retained. The 25% combined-share threshold and HHI indicators survive in paragraph 129 of the Draft Guidelines, but only as factors "*indicative*" of the absence of an SIEC; they no longer operate as a presumption of compatibility in the manner of the 2004 Guidelines. The 30% non-horizontal threshold has been removed altogether (paragraph 219). Together, these changes meaningfully reduce *ex ante* comfort for transactions that historically posed no realistic competitive risk.

The Draft Guidelines should retain a market-share threshold for vertical and conglomerate assessments, aligned with paragraph 112 — i.e. vertical and conglomerate effects are unlikely where either upstream or downstream market share is below 40%.

The Working Group strongly advises against stricter indicators or rebuttable presumptions. They would create overly rigid frameworks that do not accurately reflect the complexities of individual cases. A flexible, case-by-case assessment that takes the specific circumstances of each transaction into account allows for a more balanced and fair evaluation and ensures decisions are based on the relevant factors and evidence.

Furthermore, as noted above, the distinction between the concepts of "*dominance*" and "*market power*" should be more clearly articulated in the Draft Guidelines as the Commission makes such a distinction (the Working Group's understanding that all forms of dominance are market power, but not all forms of market power are dominance) – further clarity on these core central concepts under the EUMR would be welcome.

We ask the Commission, at a minimum, to articulate indicative screening criteria signalling a low likelihood of SIEC absent other identifiable risk factors. The criteria should not operate as formal presumptions of compatibility, but should give genuine, usable planning value — drawing for example on the Draft Guidelines' own share categories and HHI references, combined with evidence of timely, likely and sufficient entry or expansion, to identify a category of transactions that will not ordinarily warrant in-depth review.

The criteria should expressly state that they must yield to case-specific evidence of competitive concern, but that, absent such evidence, the Commission will ordinarily clear under simplified procedure. We draw particular attention to the practical consequences of the downgrading for SME transactions, private-equity bolt-ons and routine intra-EU deals that rarely warrant in-depth review, and to the cumulative effect on transaction certainty for the much larger universe of EU mergers that do not raise concerns.

Paragraph 55, first sentence, bundles a large category of features together under the traditional understanding of market power. It should not be assumed that "*maintaining…investment, innovation… etc. … below competitive levels*" equates to market power. There may be many other economic reasons why firms do not invest or innovate. The formulation would benefit from review and revision.

Paragraph 64(c) should expressly contemplate not only "*nascent, fast-growing or characterised by short innovation cycles*" markets, but also declining and dying markets exposed to volatility and panic exits. With the advent of the fourth industrial revolution (AI), a material number of European industries will come under

increasing threat and will seek to navigate decline through consolidation. The Draft Guidelines should prepare the Commission and notifying parties for these eventualities as well as for growth stories.

Part II.A.2 — Other indicators of market power (paragraphs 68–79)

This sub-section codifies, for the first time at Guidelines level, three categories of non-structural indicators of market power: (i) low sensitivity to price (paragraphs 68–69); (ii) high profit margins (paragraphs 70–74); and (iii) high and durable barriers to competition (paragraphs 75–79). The IBA WG welcomes their inclusion: market power is a matter of degree, to be assessed using a combination of factors, none of which is individually decisive. Three sets of comments follow.

On low sensitivity to price (paragraphs 68–69), the Working Group does not object in principle to reliance on customer churn rates, switching patterns and elasticity estimates derived from natural experiments, nor to symmetrical treatment of supply-side responsiveness through capacity adjustments and rivals' supply elasticities.

We ask the Commission, however, to recognise expressly the methodological limits of such evidence in markets with infrequent transactions, lumpy orders, regulated or quasi-regulated pricing and rapid product turnover, where past switching behaviour may be a poor guide to future competitive constraints. The Commission's use of natural experiments should be conditioned on transparent and reviewable identification strategies, consistent with the methodological standards in *UPS* (C-265/17 P).

On high profit margins (paragraphs 70–74), the introduction of margins as a stand-alone indicator of market power is the most significant novelty of this sub-section. The IBA WG recognises that incremental margins are a well-understood input into unilateral-effects analysis (paragraph 28 of the 2004 HMG already refers to high pre-merger margins) and that the inclusion of margin evidence in a structured framework is, in principle, methodologically sound.

The concern is that, in practice, the Draft Guidelines risk operating as a near-presumption of market power whenever margins exceed those of a peer set, without sufficient guardrails to prevent that result. Industries with high margins but high R&D costs should also be treated with the appropriate level of appreciation for how the industry actually operates: high margins function as an incentive to innovate and to cover the cost of unsuccessful R&D attempts.

The Working Group invites the Commission to address the following points expressly:

- first, high margins may reflect the returns to research, innovation and risk-taking, particularly in fast-moving and capital-intensive sectors. The qualification at paragraph 70 is welcome but should be developed into operational guidance rather than left as a conclusory statement;
- second, the benchmarking exercise contemplated by paragraph 72 — comparison against "*more competitive comparable markets*" or "*peers within the same market*" — is methodologically demanding and inherently sensitive to the choice of comparator. The Draft Guidelines should set out how the Commission will identify the comparator set and assess comparability, and should recognise that the absence of an appropriate comparator may render margin analysis non-probative in some industries;
- third, paragraph 73 — that industry-wide high margins do not necessarily indicate the presence or absence of market power — is unobjectionable in principle but, if unbalanced, becomes an evidentiary trap: if low margins are not exonerative (paragraph 74) and high industry-wide margins are not exonerative either (paragraph 73), it is not clear what evidentiary route remains for parties to rebut the inference. The Draft Guidelines should articulate that route expressly;
- fourth, on cost measures, paragraph 71 focuses on incremental costs (typically approximated by variable or direct production costs) for market-power assessment, while broader profitability measures (EBIT, EBITDA, ROCE, ROE) are reserved for barriers-to-entry analysis. In practice, computing incremental margins from accounting data is difficult in many industries, and the analysis often relies on broader profitability measures that capture fixed-cost recovery and the

> returns to past investment. Where such measures are used, the Draft Guidelines should require an explicit adjustment for fixed costs, sunk investment and risk — failing which an apparent supra-competitive return may be no more than a normal return on capital employed.

On high and durable barriers to competition (paragraphs 75–79), we welcome the consolidated treatment of demand-side and supply-side barriers and the express recognition of ecosystem and portfolio dynamics, regulatory and administrative barriers, and supply-chain non-resilience. We ask the Commission to keep in view the reciprocal relationship between this sub-section and the entrenchment doctrine in Part II.B.7: the factors at paragraphs 75–79 are, by construction, the same factors that drive a finding of entrenchment, and there is a real risk of double-counting if the same structural feature is treated both as evidence of pre-existing market power and as the source of the dynamic anticompetitive effect for which the merger is condemned. The Draft Guidelines should explain how that risk will be disciplined.

We further recommend that the inclusion of "*non-resilient supply chains*" at paragraph 76(e) be drafted so that security-of-supply considerations — properly the subject of Part II.C and of Article 21 EUMR — do not operate as a free-standing barrier to competition divorced from the underlying assessment of competitive constraints.

Part II.A.3 — Dynamic competitive potential (paragraphs 80–83)

"*Dynamic competitive potential*" is a new and important addition to the Guidelines, reflecting the Commission's increasing focus on dynamic and innovation-driven markets. The Working Group welcomes the recognition that a static assessment of market power may not be sufficient in all cases, particularly in technology and pharmaceuticals.

The Draft Guidelines list several innovation-related factors that can be relevant: R&D expenditure, patents, pipeline products, and access to competitively significant inputs such as data. These factors matter, but we caution against speculative deployment. Without explicit weighting principles, or an indication of which factors will be treated as more or less probative in a given industry, the catalogue risks operating as a checklist that supports a finding of dynamic competitive potential in almost any innovation-relevant industry. We ask that the Draft Guidelines articulate how the factors will be weighed and triangulated on a case-by-case basis. A rigorous and evidence-based approach is essential to maintain legal certainty.

Second, consistent with the 2025 IBA Submission, the assessment of innovation incentives should be conducted holistically and from the outset, and should not rest on structural presumptions. The Commission should consider both the negative and the positive innovation effects of a transaction in the same analytical exercise. It would be perverse if positive innovation incentive effects (rebalancing R&D portfolios, knowledge spillovers, easing financing constraints on R&D-intensive targets) were excluded from the upfront assessment while negative effects were considered first. In the Working Group's institutional view, dynamic competitive potential and dynamic efficiencies are two sides of the same coin and should be assessed together, on the same evidentiary standards, rather than at different stages.

Third, paragraph 83 acknowledges that barriers to entry or expansion can limit dynamic competitive potential, including in markets requiring significant investment, intellectual-property protection, scarce inputs, skilled labour or lengthy regulatory processes. The cross-reference to Section II.A.2.3 should be supplemented by an express acknowledgement that such barriers can equally limit the dynamic competitive potential of the merging parties themselves, so that the assessment is symmetrical as between the merging parties, remaining competitors and potential entrants.

Part II.A.4 — Countervailing factors (paragraphs 84–110)

We welcome the structured treatment of countervailing factors at paragraphs 84–110, and in particular two innovations: the express recognition of out-of-market constraints (paragraphs 101–103) and the express recognition of imports as a form of countervailing entry or expansion (paragraphs 91–92). Together, these are meaningful improvements on the 2004 HMG and create a clearer link between EU trade policy and merger control practice.

On dynamic entry or expansion of competitors (paragraphs 86–100), the cumulative criteria of likelihood, timeliness and magnitude are appropriately drawn from the case law and the 2004 HMG (paragraphs 68–75). The drafting at paragraphs 94–95 risks operating, however, as a higher threshold than the 2004 framework.

The requirement at paragraph 94 of "*concrete plans to enter or expand at the relevant scale*" — even where such plans may be merger-contingent — is in practice almost impossible to satisfy in markets where rival entry is responsive to post-merger price dynamics that can only be observed once the merger has closed. The Guidelines should preserve the doctrinal availability of merger-induced entry as a countervailing factor (acknowledged at paragraph 90) and ensure that the evidentiary requirement is not set at a level that, in practice, defeats it.

On imports (paragraphs 91–92), we welcome the express recognition that imports may operate either as an existing competitive constraint or as a form of countervailing entry or expansion, and that the analysis should take account of trade restrictions, customer preferences (including security of supply), transport costs, lead times, the need for local sales presence and regulatory or certification requirements. We ask that paragraph 92 be redrafted in less restrictive terms.

As currently drafted, paragraph 92 treats opportunistic small-scale increases in imports as "*typically*" insufficient to countervail the increase in market power resulting from the merger, and signals that increased reliance on imports may be discounted on supply-chain resilience grounds. Each consideration is legitimate in its place. But the cumulative effect is to set a high bar for imports to operate as a meaningful countervailing factor, even in industries where import competition observably constrains incumbents' pricing. The Draft Guidelines should clarify that the resilience qualification operates as a factor to be weighed in the assessment, not as a presumptive deduction from the constraining effect of imports.

On out-of-market constraints (paragraphs 101–103), we welcome in principle the codification of a category of constraint that, in the Commission's past practice, has too often been confined to the market-definition exercise and lost in the substantive assessment. The drafting at paragraph 102, however, materially circumscribes the doctrine before it has had the chance to operate: the statement that out-of-market constraints "*often constrain the merged entity only to a limited degree*" and are "*typically insufficient on their own*" reads as a near-presumption against giving meaningful weight to such constraints. The qualifying language should be redrafted in more neutral terms, leaving the weight of out-of-market constraints to the evidence of each case.

Paragraph 103 should also be augmented with a broader cross-industry out-of-market constraint that the Draft Guidelines do not yet address: the unyielding impact of digitalisation and AI. A new paragraph should expressly recognise that many European and global markets will face a major one-way out-of-market threat as customers and consumers move to digital and AI products. That one-way substitution is already a significant constraint in media and music (online streaming), paper and publishing (online books, magazines, brochures and pamphlets) and high-street and shopping-mall retail (e-commerce). These trends will only accelerate. The Draft Guidelines need to be "*future-proof*" for forward-looking assessments in markets that will change radically.

On countervailing buyer power (paragraphs 104–110), the drafting closely tracks paragraphs 64–67 of the 2004 HMG, and we have no fundamental objection to the analytical framework. Three observations follow.

First, the suggestion at paragraph 105 that large pre-merger margins may themselves "*suggest*" that customers lack significant countervailing buyer power risks circularity, particularly when read with paragraphs 70–74: high margins are first treated as evidence of market power and then used to defeat the principal countervailing factor. The Draft Guidelines should explain how that interaction will be disciplined. Second, the framework would benefit from express recognition that monopsony or oligopsony dynamics are common in regulated procurement settings (such as defence and certain healthcare procurement), and that such customers can constrain supplier market power even where they are few in number. Third, paragraph 109 helpfully recognises supply-resilience constraints on monopsonist customers; the same considerations should be applied symmetrically when assessing whether the merger reduces a customer's ability to multi-source.

Part II.A.5 — Dominance and other types of market power (paragraphs 111–113)

We welcome the codification at paragraphs 111–113 of the relationship between dominance and the broader concept of market power, and the express recognition that a firm may possess substantial market power without being dominant — particularly in oligopolistic markets where a small number of competitors hold substantial market power. This codification is consistent with the Court of Justice's confirmation in *CK Telecoms* (C-376/20 P) that the SIEC test is not coterminous with dominance and that non-coordinated effects in oligopolistic markets fall squarely within Article 2(3) EUMR. It is also consistent with the long-established proposition, recognised in *British Airways v Commission* (C-95/04 P), that a dominant position can be found at market shares well below 50% where other factors so indicate.

We welcome, in particular, the preservation at paragraph 112 of the established framework: very high market shares of 50% or more sustained over time are, save in exceptional circumstances, themselves evidence of dominance; dominance can be found below 50% on the basis of other factors; and dominance is generally unlikely below 40%.

The continuity of this framework with paragraph 17 of the 2004 HMG and the body of case law on which it rests — including *British Airways v Commission* (C-95/04 P) — provides legal certainty in an instrument that, as we have noted in our comments on Parts II.A.1 and II.B.2, otherwise reduces ex ante comfort. However, paragraph 219 of the Draft Guidelines should be rendered consistent with paragraph 112 by applying the same 40% market-share threshold for vertical and conglomerate assessments of market power.

Two further observations follow.

First, the recognition at paragraph 113 that substantial market power may exist absent dominance is doctrinally unobjectionable, but in our experience sets the predicate for a wide range of intervention. The Draft Guidelines should articulate, with greater specificity, the threshold of "*substantial market power*" required to ground each of the non-dominance theories of harm developed in Part II.B — and in particular the entrenchment doctrine in Part II.B.7 (presently anchored in dominance) and the foreclosure framework in Part II.B.6 (anchored in "*a significant degree of market power*"). Equally, footnote 333 should not refer to "*strong market power*" without elaboration. The proliferation of distinct — and differently calibrated — market-power thresholds across Part II.B (and elsewhere) is a source of practical uncertainty for parties and advisers and would benefit from a consolidated articulation in this sub-section.

Second, the IBA WG reiterates its concern, registered in its comments on Part I.B and on Part II.A.1, that the analytical pathway for non-dominance, oligopolistic SIEC findings under *CK Telecoms* must be applied with the evidentiary discipline the Court of Justice required in that judgment. The Draft Guidelines should make clear that the substantive standard does not lower with the move from dominance to substantial market power, and that the loss of an important competitive force, closeness of competition, and the elimination of a meaningful constraint must each be established on a sufficiently cogent and consistent body of evidence.

Finally, the IBA WG's primary concern in this area, as expressed in the 2025 IBA Submission, is to avoid the introduction of structural presumptions of harm based on market-share thresholds alone. A case-by-case analysis, based on a comprehensive assessment of all relevant factors, is essential for a fair and accurate merger review. The IBA WG is pleased to see that the Draft Guidelines appear to maintain that approach and recommends that the final version continues to emphasise the importance of a holistic assessment over rigid structural indicators.

Part II.B.1 — Anticompetitive effects: introduction (paragraphs 114–118)

Part II.B.1 introduces a holistic, two-track framework for assessing anticompetitive effects: direct effects on competition within current product markets, and dynamic effects on the merging firms' and rivals' ability and incentives to invest and innovate (paragraphs 114–115). The IBA WG welcomes the recognition that direct and dynamic effects exist on a continuum, and that theories of harm focused on direct effects may also feature dynamic elements, and vice versa. This reflects the development of EU merger control practice over the last decade, including *CK Telecoms* (C-376/20 P), *Dow/DuPont* (M.7932), *Bayer/Monsanto* (M.8084) and *Booking/eTraveli* (M.10615).

We register, however, four cross-cutting concerns about the introductory framing that condition our paragraph-anchored comments on Parts II.B.2–II.B.9.

First, the elevation to eight distinct theories of harm — loss of head-to-head competition; loss of investment and expansion competition; loss of innovation competition; loss of potential competition; foreclosure; entrenchment of a dominant position; coordination; and other anticompetitive effects (commercially sensitive information and portfolio effects) — represents a material expansion of the analytical perimeter compared with the 2004 HMG and the 2008 NHMG. While the eight theories largely codify approaches the Commission has tested in recent cases, their cumulative effect — when read alongside the downgrading of structural safe harbours in Parts II.A.1 and II.B.2 — is to expand materially the circumstances in which the Commission may intervene. We invite the Commission to keep that cumulative effect in view. As an aside, the Commission appears to have dropped the notion or terminology of "*unilateral effects*". That is arguably welcome — the term was somewhat counterintuitive and "*loss of head-to-head competition*" may capture the effects more accurately. The Commission may nonetheless wish to reflect on this.

Second, paragraph 117 expressly contemplates that the Commission may develop further theories of harm "*based on other types of effects in light of evolving market realities*". While the IBA WG acknowledges the need for some flexibility, an open-ended catalogue of theories of harm sits uneasily with legal certainty. We ask that the Draft Guidelines articulate the methodological discipline that will govern any such further theories, including a clear economic logic linking the merger to the alleged harm, disclosure of the theory at the earliest possible stage of the procedure, and a meaningful opportunity for the parties to test the theory in writing and at the oral hearing.

Third, paragraph 118 provides that different anticompetitive effects may mutually reinforce each other and that the combined effect may exceed the sum of its parts. The proposition is unobjectionable in principle but creates a real risk of double-counting where the same underlying market feature (network effects, ecosystem strength, the strategic value of data) is invoked under multiple theories of harm. The Draft Guidelines should state in terms that mutual reinforcement must be reasoned from concrete features of the merger and the affected markets, not from the doctrinal coincidence of multiple potentially-applicable theories. They should also require the Commission to identify the specific causal mechanism by which a given structural feature supports each theory of harm invoked, and to demonstrate that the incremental effect under one theory is not already captured under another. This discipline is especially important where the same feature is relied upon both as evidence of pre-existing market power (Part II.A.2) and as the source of dynamic harm under entrenchment (Part II.B.7) or foreclosure (Part II.B.6). It is equally important that double-counting of harm does not occur in the balancing exercise when theories of benefit are taken into account. The articulation in this sub-section should be precise enough to permit meaningful judicial review consistent with the standard reaffirmed in *CK Telecoms* (C-376/20 P).

Fourth, the symmetry between direct and dynamic effects articulated at paragraphs 114–116 is welcome. Its operational consequence — that direct and dynamic harms may be aggregated, and that direct and dynamic benefits should likewise be aggregated and weighed against them — must be reflected throughout the substantive sections that follow. The introduction should make express the corresponding obligation on the Commission to assess dynamic theories of benefit (Part II.C) with the same analytical seriousness as dynamic theories of harm. Asymmetry between the way harms and benefits are evidenced in practice would undermine the credibility of the new framework if left unaddressed at this introductory level.

Fifth, the Working Group draws attention to footnote 82 of the Draft Guidelines, which records — citing *EVH v Commission* (T-312/20, para. 234) — that the Commission has no duty to carry out a forward-looking analysis on the basis of elements whose long-term effects it is not able to envisage "*within a reasonable margin of error*". That limitation must operate symmetrically. The same margin of error that bounds the Commission's duty to undertake long-term forward-looking analysis must equally bound its licence to do so: dynamic theories of harm predicated on long-term predictions falling outside that margin cannot ground a finding of SIEC. The Draft Guidelines should state this expressly, so that the evidentiary discipline acknowledged in footnote 82 is applied consistently to the expanded dynamic framework introduced by Part II.B.

Finally, the IBA WG notes the introduction of "*diagonal mergers*" as a new concept, where one party controls an input or customer base important for the other party's competitors. This expands the scope of foreclosure analysis beyond traditional vertical and conglomerate mergers. The final Guidelines should provide more clarity on the evidentiary standards that will be applied to these new and expanded theories of harm, to ensure that the Commission's analysis remains rigorous and evidence-based. For theories of harm related to dynamic competition and potential competition in particular, speculation must be avoided and any finding of SIEC grounded in a solid factual basis.

Part II.B.2 — Loss of head-to-head competition (paragraphs 119–168)

This is a substantively dense sub-section and our comments are grouped accordingly.

Structural market features (paragraphs 119–129)

Please see our comments under Part II.A.1 above on the downgrading of the 25% combined-share and HHI indicators, and the Working Group's firm view that the existing safe harbours should be retained.

Important competitive force (paragraphs 138–142)

The Working Group reiterates the recommendation made in the 2025 IBA Submission that the "*important competitive force*" concept be developed by reference to the Court of Justice's judgment in *CK Telecoms* (C-376/20 P). The relevant question, as the Court clarified, is whether the merging party has a competitive impact greater than its market share alone would suggest — i.e. whether its influence on the market is significant even if it does not directly dictate the pricing strategies of others. We ask that paragraphs 138–142 be supplemented to set out the circumstances in which an important competitive force can be identified consistently with that judgment, drawing where helpful on the explicit and structured approach taken in Guideline 2 of the 2023 U.S. Merger Guidelines.

As currently drafted, the test risks being applied elastically, capturing benign minority and growth-stage acquisitions that, on close analysis, fund innovation rather than suppress it. The case-law anchors derived from *Dow/DuPont* (M.7932) and *Bayer/Monsanto* (M.8084) provide a useful starting point for the necessary discipline. Furthermore, the Working Group would respectfully suggest that paragraph 136 would also benefit from a clearer treatment of cannibalisation, so that the paragraph is clear on its face. Paragraphs 140(d) and (g) appear somewhat duplicative and could probably be combined for greater clarity and precision.

Labour markets and monopsony (paragraphs 158–162)

The Working Group acknowledges the growing body of economic research on labour-market concentration and the corresponding evolution in international practice — notably Guideline 10 of the 2023 U.S. Merger Guidelines, which states that mergers may violate antitrust law where they substantially lessen competition for workers, creators, suppliers or other providers. The 2025 IBA Submission identified this as a meaningful development in modern merger control and welcomed concise guidance on the topic.

We recommend, however, caution in codifying a stand-alone labour-market theory of harm. Its empirical foundations in the EU context are still developing and the analytical framework needs further refinement — in particular on the definition of the relevant labour market, the role of mobility data, and the relevance of countervailing collective-bargaining power. We consider that the Draft Guidelines should:

- include an express acknowledgement that effective collective bargaining agreements may materially limit employers' monopsony or oligopsony power on labour markets, consistent with the recognition at paragraph 162 that the countervailing power of workers is an important limiting factor. The Draft Guidelines should make clear that, where effective collective bargaining is in place, the risk of anticompetitive wage suppression is correspondingly reduced;
- provide practical guidance for defining relevant labour markets, by reference to skill specialisation, geographic mobility of workers and working-condition attributes (flexibility, shift patterns, sector-specific certifications). The Commission should specify the types of evidence it

will use — vacancy data, commuting patterns, employee-turnover data and occupational classification systems — to avoid overbroad market definitions that inflate monopsony concerns;

- specify that, when establishing anticompetitive labour-market effects, the Commission will focus on demonstrable reductions in wages, mobility or job quality, supported by ordinary-course HR data, internal workforce-planning documents and labour-market statistics — rather than on restructuring effects or other post-merger operational decisions that fall outside the scope of competition analysis under the EUMR; and
- maintain a clear line between competition concerns and social or employment-policy concerns that fall outside the EUMR. The labour-market analysis must remain anchored in the assessment of market power and competitive constraints, rather than serving as a vehicle for broader social-policy objectives.

Minority shareholdings and common ownership (paragraphs 163–166)

We press the Commission to raise the indicative threshold to 10%, absent special governance rights that confer influence at a lower level. This threshold would also be consistent with the current Form CO, which requires notifying parties to disclose minority stakes of 10% or more, thereby indicating that the Commission does not consider stakes below that level to be of material competitive significance. The guidelines should align with this existing Form CO requirement. Empirically, minority holdings begin to attract material governance rights — information rights, observer or board representation, blocking minorities on reserved matters — at or around the 10% level. It is at that level that they acquire the capacity to soften competition in the manner the theory contemplates.

The Draft Guidelines should clarify that the assessment focuses primarily on the qualitative governance rights and information access conferred by the shareholding, rather than on the percentage level alone, and that the 10% indicator is a screening device for substantive analysis, not a jurisdictional trigger. A 10% threshold would more accurately reflect when minority shareholdings raise genuine competitive concerns, without sweeping in routine portfolio investments by institutional shareholders, pension funds and sovereign wealth vehicles.

The Commission should also be mindful that paragraph 165 as currently drafted (with a 5% threshold) may have a symbolic chilling effect on investment and M&A activity in the EU. A higher threshold (10%) would send a clear message that passive investments below 10% are generally considered innocuous from a merger-control perspective, unless special governance rights confer influence below that level.

Common-ownership theories must be applied with caution, given the absence of empirical consensus and the significant implications for institutional investors, pension funds and sovereign wealth vehicles.

Part II.B.3 — Loss of investment and expansion competition (paragraphs 169–174)

The Working Group is concerned that elevating loss of investment or expansion to a stand-alone theory, decoupled from product-market overlap, risks unwarranted interventions. The relevant evidentiary discipline should track the principles derived from *Dow/DuPont* (M.7932) and *Bayer/Monsanto* (M.8084), including the requirement of identifiable late-stage initiatives. Speculative "*capability*" narratives, untethered from observable competitive interactions, should not be sufficient to ground a theory of harm under this head.

More broadly, on the use of internal documents in theories of harm that are difficult to discern (in particular investment, innovation and expansion theories), the Draft Guidelines should clarify the methodology for weighing the probative value of internal documents. They should also recognise that not all internal documents carry equal evidential weight — e.g. lower-management or technicians' emails or notes may not truly reflect the real "*thinking*" within an organisation.

Part II.B.4 — Loss of innovation competition (paragraphs 175–192)

Loss of specific and general innovation competition (paragraphs 175–191)

The Working Group considers that there cannot be a presumption of harm for mergers between innovative companies in concentrated sectors with high barriers to entry. As the 2025 IBA Submission emphasised, the Draft Guidelines should not incorporate the tenets of the 2017 and 2018 Commission Chief Economist Team papers, which advocated structural presumptions of harm to innovation and whose underlying models were shown to contain errors. Any analysis must start from a neutral position and undertake a careful case-by-case assessment.

The Working Group accordingly invites the Commission to articulate how it intends to assess innovation in a holistic manner, balancing both positive and negative merger effects on innovation incentives. All of the effects of a concentration on innovation incentives, including spillover effects, should form part of the main competitive assessment — not just the negative ones. By way of illustration, the Commission should be open to recognising:

- that a merged firm may be able to increase its price-cost margins, generating greater returns for innovative products and stimulating demand-led investment;
- that, even where R&D investments exhibit decreasing returns, it may be optimal for a merged entity to consolidate research efforts and concentrate R&D in the most productive units, with overall benefits for the probability of invention; and
- that mergers may spur innovation through strategic coordination of physical assets, knowledge sharing, pooling of patent portfolios and combination of R&D talent, and through scale and scope effects on output that in turn raise the incentive to invest.

We are concerned that elevating innovation harm to a stand-alone theory, decoupled from product-market overlap, risks speculative interventions — particularly in pharmaceuticals, agrochemicals and high-tech sectors. The evidentiary discipline derived from *Dow/DuPont* (M.7932) and *Bayer/Monsanto* (M.8084) — including the requirement of identifiable, late-stage R&D programmes — should be expressly preserved. We further ask for clarification of the distinction between "*specific*" and "*general*" innovation competition, and of the analytical conditions applicable to each.

The Working Group would welcome guidance on how the Commission intends to undertake innovation/R&D benchmarking, as it appears to have done in *Chr. Hansen/Novozymes* (M.11043), where it compared the parties' R&D capabilities with those of competitors on a number of factors, including total R&D spend, number of R&D centres, scientists, active pipeline projects and patent portfolio breadth. We commend to the Commission the analytical approach taken in *Axalto/Gemplus* (M.3998), where the Commission concluded on the facts that the parties would have a strong incentive to innovate post-merger and that the number of R&D projects post-merger was likely to exceed the pre-merger total.

Innovation shield (paragraph 192)

The Working Group supports, in principle, the introduction of an innovation shield as a practical and welcome innovation in EU merger practice. A tailored innovation shield is a useful tool to direct scrutiny at the narrow category of transactions where killer-acquisition concerns are genuine, while enabling predictability for the much larger category of innocuous deals.

We have, however, serious concerns about how the shield as currently drafted will operate in practice. It is multi-limbed and condition-laden, and will be difficult for parties and for the Commission to apply. The innovation shield should be simplified.

We ask for the following scenario-specific refinements:

- the 25% / 40% market-share thresholds should be the only thresholds for (b) and (d);
- on scenario (b), the "*three independent R&D competitors*" requirement should be deleted (it does not, for example, appear in 192(d)). R&D projects are typically secret, particularly where based on know-how rather than patents. It may be difficult for parties to assess whether the condition is met — let alone properly so (including with respect to licensing, co-development and framework agreements). What constitutes "*competitive potential similar to those of the merged entity*" (whether

assessed by stage of development, therapeutic area or indication, time-to-market, or some composite measure), and how global R&D pipelines are to be treated where the relevant product market is EU- or EEA-wide, are all also difficult questions. The test needs to be simplified and this three-party limb deleted;

- the carve-outs for start-up acquirers that are neither the largest firm in the relevant market nor a DMA gatekeeper are welcome, but could form their own stand-alone category under paragraph 192;
- the operation of the shield where R&D pipelines are global rather than EU-specific should be taken into account;
- the evidentiary burden, when the shield is invoked by parties, should remain on the Commission to demonstrate that the shield is not applicable.

On combining the carve-outs in (b) and (e), we press the Commission to clarify: (i) the meaning of "*largest firm in the relevant market*" — whether by revenue, capacity, market share or some composite measure, and whether the assessment is conducted at EU, EEA or global level; and (ii) the interaction with DMA gatekeeper designations, including whether a firm that is a DMA gatekeeper in one core platform service but not in the market relevant to the shield is excluded from the shield's benefit. Left unresolved, these ambiguities will materially undermine the shield's utility for the transactions it is designed to facilitate.

We further submit that the shield should remain anchored in identifiable on-market activities, products or services. Limbs that depend on abstract constructs such as "*innovation spaces*" or "*R&D activities at industry level*" (paragraph 192(d)) are difficult to operationalise and risk introducing greater uncertainty than they remove. The shield should be reformulated, where possible, by reference to delineable product or technology markets.

A simplified, two- or three-limb structure — focused on (i) no overlap; (ii) limited overlap with adequate residual R&D rivalry; and (iii) acquirer carve-outs — would deliver more genuine *ex ante* certainty than the present architecture.

Part II.B.5 — Loss of potential competition (paragraphs 193–207)

The Working Group considers that the analysis of loss of potential competition should be anchored in rigorous, evidence-based standards. As the 2025 IBA Submission set out, establishing an SIEC arising from the elimination of potential competition should require concrete and objective proof of: (i) the potential entrant's ability and incentive to make the necessary sunk-cost investments; (ii) the likelihood that the party will become an effective competitive force in the future, including by reference to factors such as brand, market presence and access to customers; (iii) the profitability and sustainability of such entry on a long-term basis; and (iv) the existence or absence of alternative actual or potential suppliers.

The recent U.S. judgment in *FTC v Meta Platforms* (the *Meta/Within* case) provides a useful comparator. Applying a "*reasonable probability*" standard, the court required concrete, objective proof that the relevant party had the "*available feasible means*" to enter and, separately, evidence that its presence "*in fact tempered oligopolistic behaviour*". The Working Group considers that EU practice would benefit from similarly rigorous, evidence-based standards, in order to avoid unwarranted interventions that capture transactions which, on the facts, would not produce the predicted competitive effects.

Part II.B.6 — Foreclosure (paragraphs 208–251)

The Working Group welcomes the codification of a single foreclosure framework covering input, customer and conglomerate foreclosure. As we said in the 2025 IBA Submission, the ability–incentive–effect framework articulated in the existing NHMG is clear, understood and usable, and should not be jettisoned. The Working Group also reiterates that vertical mergers are more likely than not to be pro-competitive. Any finding that vertical aspects of a merger result in less competitive inputs, less innovative or lower-quality products, or a reduced number of suitable suppliers, must be supported by actual on-market concerns in an identifiable upstream or downstream market — not by abstract harm hypotheses.

The removal of the 30% non-horizontal threshold (formerly available under the 2008 NHMG) removes an important *ex ante* reference point and contributes to the broader reduction in transaction certainty noted earlier. This threshold (which is operates as a safe harbour under the Notice on Simplified Procedure) should be reinstated and could also operate as an indication of absence of concerns aligned with paragraph 112, so that a 40% market-share threshold applies. The Commission would, of course, remain free in individual cases to look below this level where there were indications of market power below it, in line with the guidance set out in the Draft Guidelines themselves.

We ask the Draft Guidelines to:

- reinsert a threshold for vertical and conglomerate assessments, set at 40% so as to be consistent with paragraph 112;
- clarify the threshold of "*bargaining leverage*" sufficient to trigger conglomerate concerns absent foreclosure (paragraphs 287–290 are also relevant — see Part II.B.9 below);
- simplify the operation of "*diagonal merger*" theories (paragraph 251). More fundamentally, the Working Group questions whether diagonal mergers warrant treatment as a stand-alone category at all. On analysis they appear to be a particular configuration of customer foreclosure, in which the foreclosed party is a rival of, rather than a counterparty to, the merging parties. Simpler guidance — anchored in the established vertical-foreclosure framework, with the "*diagonal*" pattern flagged as one configuration among others — would be more workable and would avoid the proliferation of parallel analytical pathways for what is essentially the same theory; and
- confirm that firewalls and ringfencing remain a proportionate remedial tool for information-flow concerns.

Part II.B.7 — Entrenchment of a dominant position (paragraphs 252–259)

The Working Group asks for:

- a clearer demarcation between Article 102 TFEU concerns and merger-specific entrenchment, to avoid duplication and inconsistency with the recently revised Article 102 Guidelines;
- recognition that the *Booking/eTraveli* (M.10615) doctrine, applied broadly, could amount to a *de facto* "no-merger" rule for already-strong firms. The Guidelines should articulate the doctrine in terms that avoid that outcome; and
- objective indicia of "*entrenchment*", including a workable definition of the "*core market*" and of the "*interconnected ecosystem*" concept, while avoiding notions of "*strong market power*" as in footnote 333.

We submit two further substantive concerns.

First, the entrenchment theory as articulated risks operating as a back-door codification of an ecosystem theory of harm. The Working Group reiterates the position advanced in the 2025 IBA Submission – and as noted further above in this submission - that the Commission must resist the stigmatisation of "*ecosystems*", which are a natural part of a healthy, competitive industrial landscape and are not, in themselves, a theory of harm. The treatment of the term in the *Booking/eTraveli* decision — where it appears some thirty times — illustrates the risk of doctrinal drift through repeated use. The Commission has been careful, to date, to disclaim any stand-alone "*ecosystem*" theory and this should be clearly stated in the Draft Guidelines.

Second, it is in any event premature to codify the entrenchment doctrine while *Booking/eTraveli* (M.10615) remains under appeal before the General Court (and potentially the Court of Justice). The Working Group understands that the judgment in that case will be handed down on 9 September 2026, thereby giving the Commission sufficient time to read, understand and reflect upon the judgment so that it can be meaningfully incorporated into the Draft Guidelines in all respect (and not just in respect of ecosystems, but all potentially relevant other areas e.g. use of the counterfactual, etc.).

Part II.B.8 — Coordination (paragraphs 260–281)

The IBA WG notes that the Draft Guidelines preserve the core analytical framework for coordinated effects established in *Airtours/First Choice* and the 2004 HMG — centred on the ability to reach terms of coordination, monitor adherence and deter deviation. We suggest that the Draft Guidelines would be strengthened by more detailed guidance on the evidentiary standards the Commission will apply, particularly in oligopolistic markets not characterised by express collusion.

Specifically, the Draft Guidelines should clarify the quantity and quality of evidence required to demonstrate that a merger will make coordination significantly more likely. This should include a requirement for the Commission to articulate a credible mechanism for coordination, including the specific parameters on which firms would coordinate and the means by which monitoring and retaliation would realistically occur.

While we welcome the acknowledgement of algorithmic and AI-driven coordination risks (paragraph 267), the Draft Guidelines should provide a more developed framework for assessing such technologically-enabled coordination. This should include guidance on how the Commission will distinguish between pro-competitive algorithmic pricing (e.g. efficient responses to market signals) and anti-competitive tacit coordination, in order to avoid chilling innovation in pricing and data analytics.

Part II.B.9 — Other anticompetitive effects (paragraphs 282–290)

Access to commercially sensitive information (paragraphs 282–286)

The Working Group suggests that these paragraphs include one or two sentences to explain the specific situations in which this risk may arise in practice for more clear and practical guidance.

Further, we suggest that self-imposed firewalls and ringfencing remain available as proportionate tools for information-flow concerns. The analytical framework should not require remedies – particularly divestment remedies – where the parties have anticipated such concerns and implemented measures effectively. Divestment remedies to address CSI spillover concerns should be recognized as inherently disproportionate in the absence of other factors pointing to an SIEC. Where notifying parties can show they have already taken appropriate steps — through governance frameworks and firewall mechanisms — to protect CSI, of which the Commission can take note, formal remedies should be excluded. Any concerns about post-completion non-compliance can be addressed under the normal operation of Article 101 TFEU and national equivalents by the Commission, national competition authorities and affected third parties.

Portfolio effects (paragraphs 287–290)

The Working Group welcomes the codification of portfolio effects as a recognised theory of harm. We ask for clarification of the threshold of "*bargaining leverage*" sufficient to trigger concerns absent foreclosure, so that conglomerate transactions involving complementary products are not captured on attenuated theoretical bases.

Part II.C — Benefits from mergers (efficiencies): introduction (paragraphs 291–301)

The Working Group strongly supports the symmetrical assessment of theories of benefit and theories of harm, the recognition of dynamic, sustainability, resilience and security-of-supply benefits, and the abandonment of the rigid two-year benefits horizon. These are meaningful and welcome recalibrations.

Notwithstanding this welcome textual reorientation, the Working Group notes — as recorded in the 2025 IBA Submission — that, historically, efficiency claims have never been outcome-determinative in the Commission's merger assessments. There have been isolated cases in which the Commission engaged with efficiency arguments at an early stage and cleared transactions where such arguments formed part of the competitive narrative (including, notably, the recent *Airbus/Air France* joint-venture clearance).

But a successful, stand-alone efficiency defence resulting in the approval of a merger that would otherwise have been prohibited has not, to the Working Group's knowledge, been recorded in Commission practice. The absence of any clear precedent in which efficiencies alone tipped the balance from prohibition to clearance underlines that the current framework has, in practice, been unduly restrictive. The Draft Guidelines' statement that "[d]*emonstrated efficiencies will play a key role in the assessment of mergers going forward*"

(paragraph 291) signals a meaningful shift that we urge the Commission to operationalise through concrete evidentiary and procedural commitments. The key question remains whether the Draft Guidelines would permit the clearance of a merger on benefit grounds that would otherwise have been prohibited under the 2004 HMG.

The Working Group accordingly suggests that the Guidelines say, in terms, that efficiency claims are to be taken seriously as an integral part of the overall assessment, and not approached with a default presumption of insufficiency. The Working Group respectfully notes that, historically, efficiency claims have rarely been treated as outcome-determinative in Commission practice, and invites the Commission to operationalise the promised recalibration through a framework and practical enforcement that allows efficiencies to have a real positive impact in the assessment of mergers.

Furthermore, in the introduction to this part, the Draft Guidelines should include an explanation of how the Commission will calculate and present the quantification of the harm against which the benefits must be weighed. Currently, the text is silent as to how this will take place.

We would also encourage the Commission to review paragraph 300 of the Draft Guidelines to make it clearer on its face. Notions such as "*incommensurable advantages*" are unhelpful and should be deleted from the text.

Part II.C.1 — Assessment of direct efficiencies (paragraphs 302–323)

The Working Group strongly supports the framing of the taxonomy of direct synergies (paragraph 302) as illustrative and non-exhaustive, rather than as a prescriptive checklist. We ask that this non-exhaustive character be preserved in the final text, and that parties retain the procedural ability to advance synergies falling outside the taxonomy on the merits — both as a matter of rights of defence and to avoid the doctrinal closure that has affected other recent regulatory instruments.

In continuity with the 2025 IBA Submission, the Working Group presses the following specific changes to the consumer-benefit limb (paragraph 308 et seq.):

- efficiency claims should be capable of being made by reference to *any type of customer* throughout the value chain, and not only by reference to the narrower concept of "*consumers*". The benefits of efficiencies frequently accrue to commercial customers, and the Guidelines should accommodate that;
- efficiency claims should be capable of being framed by reference to both *variable and fixed cost savings*. There is no economic basis for confining the analysis to variable-cost savings: durable reductions in fixed costs frequently translate into competitive prices, expanded output and accelerated investment, and the Article 101(3) framework recognises them in the analogous setting. For example, closing a duplicative facility may enable the merged entity to make greater innovation investments — a benefit that should not be excluded by virtue of its fixed-cost nature. The Draft Guidelines should explicitly recognise that fixed-cost savings can lead to greater capital investment, and footnote 391 should be lifted into the main text and developed;
- in network and ecosystem industries, notifying parties should be permitted to claim efficiencies across the entire organisation, so that *out-of-market* efficiencies can be taken into account (as has been the case in certain airline alliance cases under Article 101 TFEU). There should be no rigid requirement that the consumers or customers harmed are substantially the same as those benefiting from the efficiencies;
- notifying parties should be able to make efficiency claims in respect of *non-price and non-cost elements* — including innovation advances, time savings, positive externalities for the wider public (such as those generated by green technologies and products), and benefits from enhanced defence and security. In its *Communication on the Defence Simplification Omnibus* of 17 June 2025, the Commission affirmed its intention to assess mergers not solely through the lens of traditional competition metrics but also by reference to their broader contributions to the Union's defence and security

objectives — including the benefits of enhanced strategic autonomy and operational efficiencies. The Draft Guidelines should be made consistent with that Communication.

On timing, the Working Group considers that paragraph 306 could be developed with reference to actual periods of time. For example, the words "*without delay*" should be deleted: they imply that only efficiencies on completion would be accepted. The principle should be that efficiencies arising within the first three years post-completion will be timely, but that efficiencies beyond three years — and potentially up to fifteen years — can be taken into account (especially dynamic efficiencies in industries with long investment and innovation cycles).

On verifiability, the Working Group asks for clarification of when qualitative or non-quantifiable benefits will be accepted (paragraph 308). Quantification should not become a self-defeating standard for benefits that, by their nature, do not lend themselves to precise measurement (resilience, security of supply, certain dynamic effects). The Draft Guidelines should also recognise that factors such as time have an economic value that can be quantified — as in *A++ Joint Venture*. They should further acknowledge that the evidence which would normally substantiate efficiencies frequently does not yet exist at the point of notification, given the forward-looking nature of the assessment. The Commission should make allowance for that evidentiary hurdle and extend a measure of benefit of the doubt where legitimate, good-faith, substantiated and well-resourced efficiency claims are advanced (supported, where appropriate, by reputable third-party economists).

Relatedly, the Draft Guidelines recognise that consumers' willingness to pay may be derived from consumer surveys, notably conjoint studies (paragraph 320 and footnote 398). The Working Group welcomes that recognition but observes that survey and conjoint evidence submitted by notifying parties has, in practice, rarely if ever been accepted by the Commission. For the recognition to be meaningful rather than illusory, the final Guidelines should articulate *ex ante* the methodological criteria — survey design, sampling, framing and disclosure for testing by the Commission and interested parties — under which such evidence will be accepted.

The Working Group also seeks clarification of footnote 407, which provides that an increase in access to capital for companies that are not financially constrained is "*not sufficient to establish an efficiency*". The final Guidelines should explain how financial constraint will be evidenced, and confirm that this qualification will not harden into a presumption against efficiency claims founded on a reduced cost of capital or improved access to finance — considerations of particular significance in the capital-intensive sectors that the competitiveness agenda specifically targets.

On merger-specificity (paragraph 313 et seq.), the Working Group reiterates the position advanced in the 2025 IBA Submission that it should be sufficient for notifying parties to demonstrate that the efficiencies arise as a result of the proposed concentration. It should not be a requirement to demonstrate the absence of less anticompetitive, realistic and attainable alternatives of a non-concentrative or concentrative nature. The Commission should not have to assess the commercial options or alternatives that might hypothetically have been pursued by parties that have signed, or are about to sign, a transaction agreement.

More broadly, the counterfactual deduction for benefits "*achievable by other means*" should be revisited: where a benefit in fact arises from the merger and would not, on the realistic counterfactual, be delivered with the same probability, timing and magnitude by an alternative course of action, it should be credited in full. A speculative possibility that the parties could achieve the benefit by other means should not extinguish a concrete and merger-generated efficiency.

Paragraph 311 — requiring the Commission to "*address all arrangements that are reasonably practical, including all established practices in the industry concerned, detail the firms' economic incentives to collaborate, and take into account their business situation*" — is unnecessarily burdensome. It risks more frequent stops of the clock in Phase II and a material increase in external economic and legal costs. The Working Group is therefore of the view that it should be deleted.

The Working Group respectfully submits that paragraph 314 imposes requirements that risk undermining the practical utility of the efficiencies framework and should be removed or substantially revised to ensure that efficiency claims are not discouraged by disproportionate procedural burdens.

The Working Group also objects to the last sentence of paragraph 315: "*the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger*". More flexibility could be allowed in this respect.

The "*substantially the same*" requirement does not stem from legislation or case law (it was included at paragraph 43 of the old Article 81 Guidelines), and does not represent a fair limitation on the inclusion of efficiencies, particularly in ecosystem and network industries. Deleting this requirement would give greater impact to the Draghi initiatives in the assessment of efficiencies and increase the likelihood that the Draft Guidelines materially strengthen the prospect of an effective efficiencies defence.

Part II.C.2 — Assessment of dynamic efficiencies (paragraphs 324–338)

The Working Group strongly supports the framing of the taxonomy of dynamic efficiencies (paragraph 325) as illustrative and non-exhaustive (see also our observations on Part II.C.1). The Working Group would note, however, that reliably determining the value of future profits in the assessment of incentives to invest or innovate (paragraph 327(b)) may be inherently difficult.

The Working Group further reiterates the position advanced in the 2025 IBA Submission that there should be no rigid limitation on the timing for the achievement of efficiencies, and no presumption that efficiencies achieved later in time — or after a period of delay — are less likely to materialise.

If the Commission is prepared to establish an SIEC by reference to products, pipelines or innovation spaces situated five, ten or even fifteen years in the future, symmetry requires that efficiency claims be assessed over a comparable horizon. We accordingly welcome the abandonment of the rigid two-year horizon and invite the Commission to ensure that the residual drafting of paragraphs 324–338 does not reintroduce, by default or by implication, a short-horizon presumption inconsistent with the symmetry principle. (The corresponding language inherited from paragraph 83 and the last sentence of paragraph 86 of the HMG should not, in our view, be carried over.) Our comments above in respect of paragraph 306 are reiterated here in respect of the timing of dynamic efficiencies.

On evidentiary sources, we welcome the express recognition of pre-merger studies by independent experts, historical innovation data and analyses prepared "*in tempore non suspecto*" (paragraph 330) — though we suggest that the Draft Guidelines use plain English rather than Latin legal phrases. We also suggest that the Guidelines acknowledge that such sources establish commercial thinking and capability rather than competitive effect: numerical and qualitative data require economic interpretation, and that interpretation is what the assessment of dynamic efficiencies properly turns on.

We further ask for guidance on early engagement with the Commission to test dynamic efficiency claims, including in pre-notification and Phase I dialogue.

The Working Group submits that out-of-market efficiencies (paragraphs 355–356) should be accommodated more generously than the draft suggests. Where benefits accrue to consumers in an adjacent market, an over-strict in-market requirement risks excluding genuinely pro-competitive transactions on doctrinal grounds disconnected from consumer welfare. The evidentiary standards for out-of-market efficiencies should be workable and consistent with the Article 101(3) TFEU framework as applied in *Booking/eTraveli*.

Part II.C.3 — Balancing benefit and harm (paragraphs 339–357)

The Working Group welcomes the clarification that the Commission will undertake a balancing exercise.

As noted above, paragraph 339 should be elaborated, however, to explain how the Commission will first model, quantify and assess "*the harm*" — which is noticeably absent — whether on price effects or non-price effects.

In continuity with the 2025 IBA Submission, the Working Group further reiterates that the threshold at which efficiencies are accepted as outweighing competitive harm should be lowered. Where efficiency claims are credible and, on the balance of probabilities, more likely than not to cover materially all or most of the competitive harm identified in the balancing exercise, they should be accepted. A rigid, dogmatic insistence on an overall net positive outcome derived from projections of harm and of benefits sits uneasily with the inherently forward-looking and probabilistic character of the assessment.

We therefore welcome the Guidelines' engagement (paragraphs 339–357) with the difficult question of how price effects should be weighed against non-price parameters, short-term harms against longer-term benefits, and effects of different likelihood and magnitude. The final Guidelines should provide concrete methodological guidance on the role of likelihood and magnitude in the SIEC standard, and on whether and how high-impact / low-likelihood scenarios are to be accommodated within a "*more likely than not*" framework.

For example, the last sentence of paragraph 339 should be reworded to read: "*Where the demonstrated efficiencies result in benefits that, on a reasonably foreseeable basis, appear to largely balance or outweigh the identified harm to competition brought by the merger, the merger will be deemed compatible with the internal market*".

Part III — Measures to protect legitimate interests (paragraphs 358–362)

The Working Group welcomes the structured framework introduced for Member State interventions on grounds of legitimate interest, and the Commission's reaffirmation of its exclusive competence under the one-stop-shop principle. Our substantive comments follow in Part III.A below.

Part III.A — Substantive assessment (paragraphs 363–389)

The Working Group welcomes the structured framework for "*legitimate interests*" in light of *VIG/AEGON CEE* and *UniCredit/Banco BPM*, and acknowledges that Part III of the Draft Guidelines provides useful procedural and analytical guardrails for Member State action under Article 21 EUMR. Its inclusion is a constructive step that improves predictability for businesses and Member State authorities alike.

The Working Group reiterates, however, the position advanced in the 2025 IBA Submission that the legitimate interests Member States may invoke under Article 21(4) EUMR are substantively distinct from the Commission's competition assessment.

We ask the Draft Guidelines, while preserving the Part III architecture, to include an express statement confirming that security, media plurality and prudential considerations assessed under Article 21(4) and related instruments will not be imported into the Commission's core SIEC analysis as free-standing harms or benefits. The principled boundary between the two regimes should be maintained to preserve the integrity and distinct purpose of each.

We further ask for clarification on the interaction between Article 21 EUMR review and (i) national FDI regimes; (ii) the Foreign Subsidies Regulation; and (iii) sectoral interventions in energy, banking, media and telecommunications. National-security concerns, in particular, are generally best addressed through FDI regimes — almost all EU Member States now operate one — and through the EU's Foreign Direct Investment Regulation cooperation mechanism, rather than through the substantive merger control assessment.

The U.S. CFIUS framework offers a well-established model for the parallel but separate treatment of national security and competition assessments. Bifurcation helps preserve the integrity and distinct purpose of merger control. The principles of proportionality, non-discrimination and compatibility with other provisions of EU law are well articulated in the Draft Guidelines; their practical application, however, will depend on coordination mechanisms between the Commission and Member State authorities that the Draft Guidelines could usefully address in more concrete terms.

More broadly, we ask that the Draft Guidelines address, expressly, the coherence between this framework and (i) the DMA's gatekeeper framework — particularly in relation to the innovation shield and to

entrenchment / ecosystem theories of harm; and (ii) the Foreign Subsidies Regulation's M&A tool, to avoid duplicative assessments and inconsistent outcomes.

We further note, in continuity with the 2025 IBA Submission, the Commission's *Communication on the Defence Simplification Omnibus* of 17 June 2025, in which the Commission affirmed its intention to assess mergers not only through the lens of traditional competition metrics but also by reference to their broader contributions to the Union's defence and security objectives. The Draft Guidelines would benefit from a short statement reflecting the substance of that Communication, to ensure consistency across the Commission's soft-law instruments.

Part III.B — Procedural framework (paragraphs 390–399)

The Working Group welcomes the clarification of the procedural framework and asks the Commission to confirm that Article 21 interventions do not suspend or dilute the EUMR notification and standstill obligations. The Draft Guidelines should also explain how the Commission will coordinate Article 21 review with other EU or national proceedings, without impairing the parties' rights of defence or prolonging review beyond what is necessary and proportionate.

Final comments and overarching observations

The Working Group concludes with a set of cross-cutting observations that, in its institutional view, the Commission should bear in mind as it finalises the Draft Guidelines. These are matters of broad applicability that we wish to register without anchoring them to a single Part, and which build on, and maintain continuity with, the 2025 IBA Submission.

Rights of defence and due process

The shift towards more discretionary, holistic and evidence-intensive assessments must be matched by reinforced procedural safeguards — including timely access to the file, meaningful state-of-play meetings, and transparent reasoning in Phase I and Phase II decisions. At the same time, pre-notification discussions and Phase II stops of the clock should not be unnecessarily drawn out by case teams in a rigid implementation of the Draft Guidelines. We have addressed certain specific procedural concerns in our comments on Part I.B above (market testing) and below (legal professional privilege).

Legal professional privilege

The Working Group asks the Draft Guidelines to reaffirm that the legal privilege principles established in the case law of the EU courts are not eroded by the heavy reliance on internal documents in the new assessment framework. Clarification is also required on the treatment of in-house counsel materials in jurisdictions where privilege extends to in-house lawyers.

We further ask for:

- express recognition that external legal advice does not lose its privileged character merely because it is shared between merging parties or their external legal advisers (or between an acquiring or joint venture party and its counterparty) in the context of preparing a notification, negotiating remedies or coordinating responses to Commission requests. A common-interest / joint-defence framework, familiar from other EU and Member State procedures, should be expressly acknowledged;
- clear protection for lawyers' correspondence and analyses prepared in connection with the design, negotiation and submission of remedies — including draft commitments, internal memoranda assessing remedy adequacy, and counsel-to-counsel exchanges, as they are clearly prepared "for the purposes of providing or seeking legal advice". These materials sit at the core of the rights of defence and should not be exposed through Article 11 requests or inspections; and

– articulation of the Commission's approach to a set of recurring but untested scenarios: privilege over communications with foreign-qualified counsel; treatment of materials reviewed by counsel in pre-notification but reverting to the client's custody; treatment of legal memoranda incorporated into business records; and the operation of clawback in the merger-review context.

Sustainability benefits

The Working Group commends the Commission for having incorporated sustainability considerations into key areas of the Draft Guidelines (e.g., market power, theory of harm and theory of benefit) such that it is now clearer when and how sustainability considerations can be an important part of the substantive analysis.

We consider the following areas of guidance to be very welcome additions:

– sustainability can result in verifiable, merger-specific benefits to consumers, which may come from "*(i) a combination of complementary assets that reduce the environmental pollution of production processes, (ii) improved access to sustainable inputs or (iii) the creation of new or improved products that are more sustainable*" (paragraph 299);

– quality benefits cover those that lead to an increase in quality, also including greater choice or any improvement in other non-price parameters of competition, including resilience and sustainability (paragraph 319);

– consumers may derive benefits from product characteristics that affect the use value of the product ("*use value benefits*"), as well as from product characteristics that are unrelated to the use but are valued by consumers for other reasons, such as a concern for the environment, a concern for disruptions of future consumption (i.e., resilience) or a concern for the impact of their individual consumption on others ("*non-use value benefits*") (paragraph 321); and

– collective benefits may accrue to a wider section of society from addressing consumption externalities, for example as regards sustainability and resilience (paragraph 322).

We welcome the descriptions of "*use*", "*non-use*" and "*collective*" benefits (aligned with the approach adopted in the Horizontal Cooperation Guidelines) and ask the Commission to confirm and expand that approach in the final text — including by addressing how such benefits will be evidenced and weighed.

Collective benefits

The notion of collective benefits is of particular importance as regards sustainability benefits. However, while the Draft Guidelines recognise that certain types of efficiencies can bring "*benefits of much wider scope, including to society at large*", the Commission stipulates in the same paragraph that "*the efficiencies must benefit substantially the same consumers as those who would otherwise be harmed by the merger, so that they are not worse off as a result of the merger*" (paragraph 315).

As welcome as the Draft Guidelines are, we consider this to represent a missed opportunity to ensure that all relevant benefits (which the Commission acknowledges will arise) are taken into account.

We note that this approach is aligned with that of the Horizontal Cooperation Guidelines, which rely on the judgment of the Court of Justice in *Mastercard*. However, we consider that, when analysed more closely, this judgment does not support the exclusion of these wider collective benefits. That is because *Mastercard* concerned the question whether one group (merchants, in that case) can be required to pay for private benefits for another group. The answer was understandably negative, because the case concerned private benefits and costs, and those who enjoy the benefits must bear the costs.

In contrast, the sustainability analysis of transactions which internalise externalities — and therefore correct market failures — concerns a different question: can a group of consumers that in the counterfactual impose the costs of their consumption on the rest of society demand that they receive full compensation when a transaction seeks to remove those costs on society and internalise them in the price that the consumers pay?

We consider that the answer should be negative, consistent with the principle that underpins *Mastercard*: that those who enjoy the benefits of consumption must bear the full costs.

The Working Group therefore respectfully considers that a closer reading of the *Mastercard* judgment does not support the exclusion of wider collective benefits in the sustainability context, and invites the Commission to consider an interpretation that would accommodate out of market benefits that correct market failures.

Quantification

The Draft Guidelines should acknowledge that certain concentrations may restrict price competition while generating sustainability-related efficiencies, and that those efficiencies may bear on the SIEC assessment. It will not always be possible — nor should it always be required — to quantify sustainability benefits precisely, particularly where they materialise over a long period or where the relevant benefits are clearly of a sufficient scale to offset a limited price increase. The Working Group invites the Commission to welcome early dialogue with notifying parties on methodology and approach, while remaining mindful of the potential friction with merger-control processes in other jurisdictions.

Merger specificity

The requirement to demonstrate that sustainability efficiencies could not be achieved through less restrictive alternatives (paragraph 331) is often difficult to meet in practice. In many cases, the types of gains invoked (e.g. greener inputs, decarbonisation initiatives, or supply-chain optimisation) may be replicable through cooperation agreements, licensing or industry-wide initiatives, even if these are less effective or slower.

This creates a high evidentiary hurdle, as parties must not only show that the merger enhances sustainability, but also convincingly rule out realistic alternative mechanisms, which are frequently present in precisely the types of sectors where sustainability efficiencies arise.

In our view, the Commission is not well placed to second-guess the parties' views on the best way to achieve the efficiencies, in particular where the counterfactual is a market failure. It is true that mergers are structural and completely eliminate incentives on the parties to compete with each other. That means the competitive impact may be more permanent. But it also means that the parties are more committed than in the case of mere agreements, which in turn leads to a greater likelihood that efficiencies are actually achieved.

Accordingly, if a merger is genuinely intended to — and objectively can — achieve proportional sustainability efficiencies, we believe that the Commission should not block a merger solely because a lesser commitment was in *theory* possible.

Length and predictability of review

We register a concern that the new framework will lead to longer pre-notification, Phase I and Phase II timelines in complex cases, more frequent stop-the-clock decisions and increased recourse to commitments — with significant cost and certainty implications for parties. That is particularly so where Phase II documentation requests are voluminous. We invite the Commission to keep these practical consequences in view as it finalises the Guidelines and the soft-law instruments around them.

Standard of judicial review

The Working Group submits that the Draft Guidelines should be drafted to preserve effective judicial review by the General Court and the Court of Justice. Broad discretionary statements risk insulating decisions from meaningful scrutiny.

This concern is heightened by the empirical reality that judicial review in EU merger control is not always effective in practice to obtain real outcomes for merging parties and their transactions. Appeals are rare in absolute terms; many transactions are withdrawn or abandoned before any formal prohibition decision is taken; and the General Court's procedural rhythm means that judgments often arrive long after the commercial decisions to which they would otherwise speak have crystallised. The Draft Guidelines' six

references to a "*margin of discretion*" are notably concentrated in evidentiary assessment — precisely the area in which judicial scrutiny is hardest to apply with rigour. The Working Group accordingly suggests that the Draft Guidelines articulate the Commission's evidentiary obligations with sufficient specificity to permit meaningful review, rather than license open-ended discretion.

International convergence

The Working Group encourages alignment with — or a principled justification for departures from — the approaches of the FTC/DOJ 2023 Merger Guidelines, the CMA's framework, and the ICN Recommended Practices for Merger Analysis. Where the EU framework diverges, the Draft Guidelines would benefit from express acknowledgement of the divergence and the principled basis for it. As the 2025 IBA Submission noted, the period of regulatory uncertainty in the United States in 2022–2023 around the 2020 Vertical Merger Guidelines underscores the importance of grounding EU practice in durable and certain legal principles based on established jurisprudence.

Length of the final Guidelines

The Working Group reiterates the recommendation made in the 2025 IBA Submission that the refreshed Guidelines should be concise and user-friendly. The current HMG and NHMG, at 14 and 20 pages respectively, show that concise guidance is workable. A longer instrument would itself become a source of complexity and uncertainty, and would invite paragraph-by-paragraph litigation in areas where the Court of Justice has already provided sufficient interpretative steering.

Application to specific sectors

While our submission is sector-neutral in its principal lines, the Working Group identifies the following sectors which may attach particular importance in the application of the new Guidelines:

- capital-intensive sectors (energy, telecommunications, defence, infrastructure): the new framework's flexibility on time horizons and resilience benefits is welcome;
- pharmaceuticals and life sciences: clarification on the operation of innovation harm and the innovation shield in pipeline-overlap cases;

digital and technology: interaction between entrenchment theory, ecosystem analysis and DMA designations. The Working Group reiterates the caution registered in the 2025 IBA Submission against any drift towards treating mergers in the technology space as inherently problematic *ab initio*;

- financial services and asset management: common-ownership and minority-shareholding analysis; and
- consumer goods: portfolio effects and bargaining leverage.

Drafting and presentational matters

We suggest the following improvements to the presentational architecture of the Guidelines:

- a consolidated table of case-law anchors and a glossary of key concepts (including "*important competitive force*", "*ecosystem*", "*dynamic foreclosure*" and "*diagonal merger*") would assist practitioners and Commission services alike; and
- transitional guidance should be provided on the application of the new Guidelines to ongoing pre-notification and Phase I cases at the time of adoption.

Process and engagement

The Working Group proposes continued dialogue post-adoption — for example, joint workshops on application and periodic review of the innovation shield. In addition, a "*merger control hotline*" for informal consultation questions on the application of the final Guidelines (distinct from the normal informal consultation process) could be useful for "*quick*" questions.

International Bar Association — Antitrust Section