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NetChoice Comments
On the European Commission's Merger Guidelines Consultation

NetChoice welcomes the European Commission's Review of its Merger Guidelines and supports the Commission's stated objective to ensure merger guidelines are "fit for today's fast-changing economy" while providing predictability for businesses.

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that online business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression. We work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in our nation's capital, and in international internet governance organizations.

We urge the Commission to ground its revisions in sound economic principles that recognize the pro-competitive benefits of mergers, particularly in dynamic technology markets. The guidelines should focus on evidence-based analysis of consumer welfare rather than structural presumptions that could discourage innovation and investment.

Shifting from Competitor Protection to Consumer Welfare

The European Union faces significant competitive challenges in the global economy. As the Draghi Report correctly identified, Europe lags behind other regions in innovation, investment, and economic dynamism.[1] Merger policy plays a crucial role in addressing these challenges—either by facilitating the scale and efficiency needed for global competitiveness, or by creating regulatory barriers that inhibit growth.

Historically, EU merger review has often focused on protecting competitors and market structure rather than analyzing the effects on consumers. THis approach has led to interventions in transactions that would have benefited consumers through lower prices, better products and increased innovation. The

[1] Draghi, Mario. "The Future of European Competitiveness" (Report to the European Commission, September 2024).

revised guidelines present an opportunity to refocus merger analysis on what should be its primary concern: consumer welfare.

Recent Commission decisions demonstrate the costs of this misplaced focus.

- ● **Amazon–iRobot (2024):** The Commission blocked Amazon's proposed acquisition of iRobot, citing concerns that Amazon could foreclose rival robot vacuum makers on its marketplace. Yet this speculative theory ignored strong consumer benefits, including the ability of a global platform to expand distribution, reduce costs, and accelerate innovation in household robotics. In March 2025, iRobot raised concerns about its ability to stay in business after financial decline. By treating scale and integration as inherently suspect, the decision deprived consumers of potential improvements in quality and affordability.
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- **Illumina–Grail (2022/2023):** The Commission moved to block Illumina's acquisition of Grail, a cancer-detection startup, despite Grail's life-saving diagnostic innovations and despite the U.S. Federal Trade Commission initially losing its challenge in U.S. courts. The Commission's use of Article 22 referral powers—claiming jurisdiction over a deal that did not meet EU thresholds—created uncertainty for innovators and chilled investment in the biotech sector. The result was years of delay in bringing early cancer detection technologies to market, directly undermining public health goals.
- **Booking–eTraveli (2023):** The Commission prohibited Booking Holdings' acquisition of eTraveli, an online travel agency, on concerns that it would strengthen Booking's travel ecosystem. This decision disregarded that consumers benefit from more integrated, user-friendly services in online travel, and it penalized efficiencies that could have improved price transparency, convenience, and cross-border travel competitiveness.

The EU guidelines should embrace the underlying principle that competition law protects the competitive process for the benefit of consumers, not individual competitors, and not address other non-competition related policy concerns.

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[1] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010)

Research consistently demonstrates that mergers often generate significant efficiencies, spur innovation, and benefit consumers.[2] Yet the Commission's approach in cases like Booking-eTraveli ignored how travel platform integration creates consumer benefits through improved price transparency, convenience, and service quality. The guidelines should reflect empirical reality by creating balanced frameworks that

[2] U.S. Chamber of Commerce, Evidence of Efficiencies in Consummated Mergers (2024)

properly weigh pro-competitive benefits against potential harms, recognizing that efficiency gains and innovation benefits often materialize over time, and avoiding presumptions that treat scale or market presence as inherently problematic.

These cases underscore how reliance on speculative theories of harm and structural presumptions, rather than demonstrated consumer impact, risks blocking beneficial combinations. They also reveal how expanding jurisdiction through Article 22 referrals increases uncertainty for companies considering mergers, especially in fast-moving sectors where time-to-market is critical.

Supporting European Competitiveness

The Commission should also support European competitiveness through merger policy. The Draghi Report highlighted Europe's competitiveness challenges and the need for policy reforms that enable European companies to compete globally. Merger policy plays a crucial role in this effort. The guidelines should recognize that preventing beneficial consolidations can weaken companies' ability to compete with rivals from other regions who benefit from larger domestic markets or more permissive regulatory environments.

This does not mean abandoning competition enforcement, but rather ensuring that enforcement focuses on genuinely harmful transactions while allowing pro-competitive mergers that strengthen European industry. The guidelines should explicitly acknowledge that preserving European competitiveness is served by allowing mergers that create efficiencies, foster innovation, and enable companies to achieve global scale.

Following the Draghi Report's recommendation, the guidelines should include a meaningful innovation defense that allows merging parties to demonstrate how their combination will enhance innovation capabilities. This is crucial for competitiveness—even where a merger might raise some traditional competition concerns, this should be balanced against demonstrable innovation benefits that could strengthen Europe's position in global markets. The guidelines should recognize that in rapidly evolving technology sectors, innovation benefits may outweigh static competition concerns.

Evidence-Based Analysis and Avoiding Harmful Presumptions

Modern markets, particularly in technology sectors, evolve rapidly. Static measures like market share and concentration ratios often fail to capture competitive dynamics in innovative industries. The guidelines should emphasize effects-based analysis that considers the pace of innovation and market evolution, barriers to entry and expansion , the role of potential competition and market contestability, and dynamic efficiency gains from mergers.

The guidelines should also avoid presumptions based on market share that would likely increase false positives—blocking pro-competitive mergers—while providing little additional protection against genuinely harmful transactions.

The guidelines should better recognize the legitimate benefits of mergers in modern global markets to encourage startup growth. Entrepreneurs should be able to choose their path to build and exit the market, including acquisition by a strategic firm. The guidelines should recognize that many established firms often have superior ability to invest in long-term research and development, attract top talent and expertise, weather market volatility and economic uncertainty, and compete effectively in global markets.

Many companies, both historically as well as in the modern age, have competed across multiple dimensions and with companies from seemingly unrelated sectors. The guidelines should adopt broad market definitions that reflect how such companies actually compete for user attention, advertiser spending, and developer resources. Market leadership can shift quickly due to rapid innovation, including importantly from Artificial Intelligence. This dynamic makes developing competition often more important than current market structure, while entry barriers may be lower than a static view of the analysis suggests.

While network effects may exist in markets involving technology, there is no evidence such effects create barriers to entry or "winner-take-all" outcomes. History demonstrates that even companies with strong network effects—from MySpace to Internet Explorer—can be displaced by innovative competitors. The guidelines should require concrete evidence that network effects create genuine barriers to competition rather than simply reflecting consumer preference for superior services.

Rejecting Novel Theories and Leveraging Existing Tools

The Commission should avoid creating new theories of harm around “self-preferencing” in merger review particularly since such conduct is already addressed through sector specific regulation. Additionally, the controversial Digital Markets Act (DMA) explicitly prohibits self-preferencing by designated gatekeepers.

Competition authorities should not duplicate or undermine sectoral regulation through merger review. Where self-preferencing raises genuine competition concerns, existing tools—including the DMA, competition law enforcement against unilateral conduct, and behavioral merger remedies—provide adequate mechanisms for intervention. Creating overlapping theories of harm in merger review would create regulatory uncertainty and potentially conflicting obligations for businesses. Moreover, companies may be driven by consumer demand to feature their own products and services, demonstrating it is often a legitimate business practice that can benefit consumers through better integration, quality control, and user experience.

Beyond self-preferencing, the Commission should avoid adopting vague "ecosystem" theories of harm that lack grounding in established economic principles. Such theories create uncertainty and could discourage legitimate business combinations that benefit consumers. Traditional foreclosure analysis provides adequate tools for addressing genuine competitive concerns in non-horizontal mergers.

The Commission should maintain separate analytical frameworks for horizontal and non-horizontal mergers, recognizing that non-horizontal mergers are generally less likely to harm competition and often generate significant efficiencies. Vertical mergers often eliminate double marginalization, improve coordination at different points of the supply chain, and enable more efficient business operations. The guidelines should properly credit these benefits rather than focusing primarily on speculative theories of harm, and do so in separate guidance documents.Academic research consistently demonstrates that technology acquisitions are driven by the desire to combine complementary capabilities, boost talent and expertise, and accelerate innovation—not eliminate competition.[3] Large-scale empirical studies have found that the vast majority of technology acquisitions result in continued development and integration of acquired technologies rather than discontinuation. The so-called "killer acquisition" theory also ignores economic reality. Companies do not invest hundreds of millions or billions of dollars simply to shut down innovative technologies. Instead, acquisitions typically occur because larger firms can provide the resources, distribution channels, and expertise needed to bring innovations to market more effectively than standalone entities.

The guidelines should focus exclusively on competition issues rather than incorporating broader policy objectives that are better addressed through other regulatory mechanisms. While goals like sustainability, media plurality, and national security may be important, mixing them with competition analysis creates uncertainty and undermines the coherence of merger review.

Conclusion

The Commission's guidelines revision offers an opportunity to modernize EU merger policy for the digital age while strengthening its economic foundations. By focusing on consumer welfare, recognizing the ability of mergers to generate innovation, properly crediting efficiencies, and avoiding speculative theories of harm, the Commission can create guidelines that protect competition while supporting European innovation and competitiveness.

The expanding use of Article 22 "call-in" powers creates harmful uncertainty for businesses. The guidelines should clarify when Article 22 references will be accepted and establish clear procedural requirements. When intervention is necessary, behavioral remedies should be preferred over structural remedies that prevent efficiency realization.

We urge the Commission to ground revisions in sound economic principles and empirical evidence. NetChoice looks forward to continued engagement and stands ready to provide additional input as the Commission develops its revised guidelines.

Respectfully submitted,

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[3] Bryan, K. A., & Hovenkamp, E. (2020). "Startup Acquisitions, Error Costs, and Antitrust Policy." *University of Chicago Law Review*, 87(2), 331-356.