

A Turning Point in Merger Control

1. New Guidelines, a New Era of Theories of Harm vs Theories of Benefit
2. Competition Parameter: Resilience
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New Guidelines, a New Era in Merger Control?

With the current draft of the new **EU Merger Guidelines**, the Commission is setting out its vision for the future direction of European merger control.

While the draft maintains the **primacy of competition protection**, it also expands the scope of the substantive assessment to include additional economic and structural considerations.

In addition to competitive risks, the potential positive effects of mergers are gaining greater significance, including:

- Increased innovation (para. 325 et seq.),
- Increased investment (para. 293 et seq.),
- Resilience (para. 297 et seq.),
- Sustainability (para. 319 et seq.),
- International competitiveness (para. 9 et seq.).

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Theories of harm vs Theories of benefit

The focus is on **balancing** competitive harm against efficiency gains.

- The Commission bears the burden of proof for harm (para. 21).
- The merging parties bear the burden of proof for the efficiency gains (para. 24).

For the first time, the Guidelines also specify the requirements for a robust “**theory of benefit.**” According to these requirements, positive effects must

- be merger-specific (para. 310 et seq., 331 et seq.) and
- verifiable (para. 304 et seq., 327 et seq.) and
- beneficial to consumers (para. 315 et seq.).

The Draft Guidelines thus **expand the scope for justification** and likely also for remedies. However, the extent of the Commission’s discretion in weighing efficiency remains open.

3

Competition Parameter: Resilience

„Resilience refers to the readiness and ability of the internal market or part of it to continue servicing customers and to anticipate, withstand and recover from serious shocks.“ (Rn. 9 / Fn. 18)

- Mergers can have a **positive** or **negative** impact on resilience (para. 9 / fn. 18).
- The definition refers to the **resilience of the internal market** (para. 9 / fn. 8) – in contrast, however, the efficiencies cited in the Guidelines are company-specific (para. 299).
- Increasing market resilience is regarded as a **collective consumer interest**.
- The practical application in the proceedings remains unclear—where should the efficiency assessment begin?
- The following resilience benefits are specifically mentioned (para. 299):
 - A **combination of complementary assets** that increases security of supply, strengthens infrastructure, and reduces vulnerability to external disruptions.
 - **Access to critical resources and strengthened demand-side market power** reduce vulnerability to supply chain disruptions.
- Creation of **new or improved products** that are more resilient to external disruptions.

4

Sustainability as a Competitive Parameter

In addition to resilience, increased sustainability is also cited as a justification for business combinations:

- **Combining complementary assets** that reduce environmental pollution from production processes
- **Improved access to sustainable inputs**
- Creation of new or improved, **more sustainable products**

This explicitly ties in with the new Horizontal Guidelines: Sustainability as a collective benefit can be factored into the consumer welfare assessment, even if it has no direct individual product benefit. It remains to be seen to what extent the EC will develop a uniform “*more sustainable approach*” in antitrust law.

5

Impact on Austrian Practice

The new EU Guidelines could give market resilience and sustainability **greater practical significance** in the assessment of mergers under the Austrian Competition Act (KartG).

- The new EU Guidelines do not apply directly to Austrian merger control – but they serve as a model and are indeed **transformative for Austrian practice**.
- The EU Guidelines could breathe new life into an exception that has long existed in Austrian law: the economic **justification of mergers** (particularly through **improved international competitiveness**).
- In the future, the considerations now substantiated in the Guidelines for practical application could also be incorporated into the application of Section 12(2) of the KartG, in particular:
 - Resilience,
 - Scale or economies of scale,
 - Sustainability,
 - Innovation (see the materials on the KaWeRÄG 2021)

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