

# **BEREC Input to the European Commission's public consultation on the revision of the Merger Guidelines**

2 September 2025

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# 1. Introduction

The EU Merger Guidelines (referred to as Guidelines thereafter) used for the assessment of the competitive impact of mergers – both between actual or potential competitors (horizontal mergers<sup>1</sup>) and between companies active at different levels of the supply chain or in neighbouring markets (non-horizontal mergers<sup>2</sup>) - are now more than 15 years old. Since then, markets have evolved significantly, driven by elements such as innovation, the growing need for resiliency, and varying levels of investment intensity across sectors. Merger assessments have also become more complex. Against this background, on 8 May 2025, the European Commission (EC) opened a public consultation. The aim was to gather feedback from stakeholders on the strategic issues and principles that should be included in the Guidelines, on aspects that have worked well or, by contrast, that need to be changed, as well as practical experience of the parties directly involved in merger cases. This holistic exercise was conducted by the EC until 3 September 2025.

The public consultation is divided into two parts, as follows:

The first part consists of a general questionnaire that addresses high-level aspects such as (i) the criteria the EC is using in their evaluation in terms of effectiveness, efficiency, relevance, coherence, and added value, (ii) the approach that the Guidelines take when considering competitiveness, (iii) relevant guidance on assessing market power and the prevailing market structures, as well as (iv) the impact of market dynamics and innovation on merger control. Also, the topics of (v) sustainability/judicious use of resources, (vi) digitalization and (vii) public policy, defence, security and labour market implications are addressed.

The second part consists of an in-depth questionnaire, accompanied by seven thematic papers in which the EC elaborates on current challenges it faces, as well as on economic parameters used in merger control. The themes addressed both in the technical papers and in the in-depth questionnaire are (i) competitiveness and resilience, (ii) market power, (iii) innovation, (iv) decarbonization, (v) digitalization, (vi) efficiency and (vii) defence and labour considerations. The questions presented here are detailed, technical in nature.

According to the European Commission, this process of revisiting the Guidelines aims to produce a “comprehensive, predictable, and lasting framework”<sup>3</sup>, adequate for conducting sound evaluations regarding all types of mergers, in all the economic sectors.

BEREC, as the technical body of the European regulators in electronic communications, seeks to contribute actively to the development and better functioning of the internal market, by ensuring a consistent and sound application of the EU legal framework in the field of electronic communications networks and services, in all Member States. To that end, and taking due account of the importance that mergers and acquisitions in the telecoms sector have played throughout the last decade, BEREC considers it important to contribute to the

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<sup>1</sup> Horizontal Merger Guidelines. [Link](#)

<sup>2</sup> Non-horizontal Merger Guidelines. [Link](#)

<sup>3</sup> Review of the Merger Guidelines statement – European Commission - [Link](#)

EC's revision of the Guidelines based on its sectoral expertise. On a forward looking basis, merger control will continue to play a pivotal role in ensuring that competition remains effective, since uncontrolled consolidation in the telecoms sector could lead to tighter oligopolies dominated by a few large players and accompanied by a deterioration of the competitive situation in the network industry under National Regulatory Authorities' (NRAs) remit.

Section 2 of this BEREC input portrays the EC's perception of the changing landscape, together with BEREC's observations on the transformation of the electronic communications sector. The EC's policy objectives ranking high on its agenda are presented, accompanied by a high-level BEREC's view on the direction of travel. Going forward, BEREC's input is structured around three main topics, namely (i) overview of the Guidelines and perspectives presented in the documents accompanying their revision (Section 3), (ii) EU's competitiveness in telecoms and the aspects that BEREC believes the EC should be careful about (Section 4) and (iii) the assessment of market power (Section 5). The conclusions and BEREC's views and recommendations are presented in Section 6. The document does not necessarily follow the questions put forward by the EC, but rather pinpoints relevant aspects stemming from the questionnaires and the technical papers which are related to BEREC's competences.

## 2. Evolving market realities

The EC observes that the environment for mergers and acquisitions is undergoing significant transformation, prompting a drive for reassessment of its current Guidelines. According to the EC, the established approach, which relies primarily on case-by-case analysis, may no longer provide the clarity and predictability stakeholders need. The EC's intention is to respond to the increasing dynamism of markets, where competition is influenced by factors extending beyond price, such as innovation, investment, and sustainability. These elements are largely viewed as increasingly important in shaping competitive outcomes, especially in sectors experiencing rapid technological change or facing heightened environmental and societal expectations.

Indeed, BEREC has noted in several recent documents<sup>4</sup> that the electronic communications sector in Europe is undergoing a profound change, with the delineation between "traditional" electronic communications networks and services providers and digital players becoming blurred, through, among other things, the rapid and wide adoption of cloud and edge computing services, the virtualization of network functions, the ubiquitous need for data processing services and the increasing interaction with large content and application providers. At the same time, market structures are evolving, and operators adjust their businesses to remain competitive in a changing environment. In some cases, this involves divesting or outsourcing parts of their operations - a reversal of the previous trend toward

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<sup>4</sup> For example, in BEREC's input to the European Commission's public consultation on the White Paper document BoR(24)100\_1 - [Link](#) and BoR (24) 139 - BEREC Report on the entry of large content and application providers into the markets for electronic communications networks and services – [Link](#)

vertical integration - which has led to the emergence of infrastructure-only providers. In other cases, operators establish partnerships or joint ventures with other private or public entities to support the rollout of very high capacity networks in underserved areas. Therefore, BEREC concurs with the EC that the telecoms sector is undergoing a profound change, with a reassessment of business opportunities based on the re-evaluation of strategies and priorities as regards investments, some operators having a clear focus on expanding beyond their national footprint, while others are preparing exit strategies from some markets or selling assets to finance core activities<sup>5</sup>.

In sectors like telecommunications, the EC notes that persistent market fragmentation has exposed the limitations of a national-level perspective in merger appraisals. The EC has recently voiced its view that the prevalence of numerous small-scale operators across Member States, as opposed to continent-wide players in other major economies, may act as a barrier to achieving the scale required for substantial investment and technological progress. The EC's stated objective is to consider whether a more unified and forward-looking approach could better accommodate the characteristics of dynamic markets, while somewhat acknowledging a broader spectrum of competitive parameters.

### **Strategic Policy Objectives**

The European Commission has articulated a set of strategic policy objectives that it aims to achieve through the review of the Guidelines. The primary intention is to establish a **modernized and systematic framework** that reflects recent developments in EU case law and the EC's evolving decisional practice. Through this, the EC stated that it is seeking to enhance legal certainty and transparency for companies considering mergers or acquisitions, regardless of sector or transaction type.

Another stated objective is **to support concentrations** that, in the EC's view, could bolster productivity, security, and the overall global competitiveness of the European economy, particularly within strategic sectors such as digital, energy, and defense. The EC also aims for the revised Guidelines to address several challenges, including digitalization, decarbonization, and the resilience of supply chains and critical infrastructure. These objectives are intended to ensure that competition policy keeps pace with global technological developments and supports the scaling up of European companies in international markets, while maintaining a level playing field within the Single Market.

In the light of the above, the consultation highlights several key areas of focus:

- **Innovation:** Placing greater emphasis on the impact of mergers on future innovation potential, especially in technology-driven sectors. The revised Guidelines are expected to embrace an 'innovation defense' mechanism, allowing merging parties to justify transactions based on demonstrable innovation benefits, subject to safeguards that prevent abuse.

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<sup>5</sup> Recent examples of reassessment of opportunities concern Vodafone - who recently withdrew its operations from Italy and Spain, and Digi Romania - who entered the Belgian and Portuguese markets.

- **Efficiency and Investment:** Assigning increased weight to efficiencies, investment commitments, and quality improvements, with longer assessment horizons to better capture long-term benefits.
- **Resilience and Security:** Factoring in resilience and security considerations, particularly in strategic and sensitive sectors like defense and supply chains. In the telecommunications sector, BEREC notes that mergers and acquisitions are seen as a means to secure assets, for instance as regards fixed-mobile convergence.
- **Market Definition:** Re-examining whether markets should be defined at the national or EU level, with the goal of facilitating scale and cross-border integration, thereby enhancing investment and innovation capacity.
- **Ex-Post Monitoring:** Reinforcing the role of the ex-post regulatory arm, by way of enabling ongoing monitoring and intervention where necessary to ensure competitive outcomes after mergers are cleared.

By addressing these areas, the EC believes it may be able to achieve three principal policy outcomes:

- The possible establishment of a single, coherent set of Guidelines, streamlining administrative processes and reducing complexity for stakeholders.
- Clarification of ambiguous areas, such as the review of non-notifiable mergers, the application of emerging theories of harm, and the interplay with new regulations like the Digital Markets Act and Foreign Subsidies Regulation.
- The provision of clearer guidance and templates. The EC intends to facilitate pro-competitive cooperation agreements, especially where scale and standardization are necessary for innovation and consumer benefit.

### **BEREC's views**

BEREC strongly supports the vision of a robust competition framework as the foundation for strengthening the EU's global competitiveness within the electronic communications sector. BEREC fully agrees with the European Commission's statement that "Competition stimulates productivity, investment, and innovation". It also supports the EC's ambition to enhance competition law control by providing clear, coherent, unambiguous Guidelines, capable of reducing the uncertainties and streamlining the process. The intention of increasing transparency for the stakeholders as regards the main elements bearing on the EC's appraisals and the incorporation of the recent practice on merger cases, as well as European Court of Justice jurisprudence in the revised Guidelines is seen as highly valuable by BEREC.

At the same time, due to the changing circumstances and the evolving experience based on recent merger cases, it seems that the EC would like to have certain aspects of the merger control assessment systematized and explained in the Guidelines. This has the two-fold aim of enhancing predictability (for instance in light of the emerging theories of harm and innovative approaches used in the recent past) and mitigating, to the extent possible, the complexity of evaluations based on a case-by-case approach that are not swift enough. However, in BEREC's understanding, this cannot be deemed as the rationale upon which to

depart from the established case-by-case approach. Rather, it should be seen as an opportunity to complement that approach by identifying recurrent aspects from past experience for which instructions for evaluation can be put forward. Further details on the importance of the case-by-case approach are provided in section 4.1. below. BEREC cautions against a departure from the case-by-case evaluation, considering that its relevance should not be diminished and that each case needs thorough evaluation taking due account of the specificities, which cannot be comprehensively provided in the form of a checklist.

On the idea of scaling up and overcoming the potential (regulatory) barriers, BEREC points out that, as far as the telecommunications sector is concerned, the operators strategically reassess their business plans, including the optimal scale of their operation, foremost to factor in the above-mentioned challenges. Meanwhile the barriers to expansion are, generally, not rooted in the applicable sectoral regulatory framework in place (EECC, ex-ante control of mergers and acquisitions or ex-post control through competition law). We further elaborate on the alleged relation between consolidation and boosting investment and innovation in section 4 below.

In any event, BEREC maintains its view that true progress in efficiency, innovation, and investment in the telecommunications sector is best achieved through vigorous competition, not by re-aligning regulatory standards, setting geographical market as de facto European and/or reducing the number of market players.

### 3. The Merger Guidelines

Both the Horizontal Merger Guidelines and the Non-horizontal Merger Guidelines are soundly rooted in competition law provisions, mainly aimed at safeguarding effective competition by preventing the entrenchment of market power, based on the identification of Significant Impediments to Effective Competition (SIEC). The assessment criteria put forward by the EC in the case of horizontal mergers are related to (i) market share and market concentration, (ii) anticompetitive effects on the one hand and (iii) efficiencies on the other hand, (iv) countervailing buyer power, (v) disciplining effect of potential competition (effects of new market entry, for instance), and (vi) specifics for a failing firm defence<sup>6</sup>. The latter (i.e. the failing firm defense mechanism) is applicable only in certain cases, while the former factors are always part of the appraisal done by the EC. By contrast, since the non-horizontal mergers are by and large less likely to result in SIECs, besides the market shares and market concentration evaluation, the corresponding Guidelines focus on the specific anticompetitive effects, namely (i) coordinated and (ii) non-coordinated, leading to market foreclosure.

There are several relevant questions that the EC is addressing in its public consultation stemming from the application of the Guidelines. The most important question to inform the

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<sup>6</sup> Under the failing firm defence, a firm may make an otherwise anticompetitive acquisition if financial issues would force the acquiree out of the market and no alternative acquiror exists. In other words, the defence reflects the understanding that a firm's failure and its assets' exit from the market would harm competition more than an anticompetitive merger.



appropriateness of the Guidelines is whether their application was able to lead to the correct identification of transactions that posed SIECs and whether they were able to provide legal certainty and transparency to stakeholders in the market.

Another point that the EC is looking into is related to the relevance of distinguishing between horizontal and non-horizontal mergers, especially in the changing circumstances determined by the movement of markets. Together with the increased interactions and interdependencies between various players on a market, manifested at different levels in the provision/supply chain (for instance, in the electronic communications sector, one undertaking can be an access seeker in an area, an access provider in another, or even part of a joint-venture elsewhere for investing in high-speed connectivity), the question of whether the distinction between horizontal or non-horizontal mergers justifies having different sets of Guidelines going further seems central to the current revision process.

Furthermore, the EC is interested in a fitness check of the high-level objectives of the Guidelines in a forward looking manner, and how to ensure flexibility of the assessments in the future, while not introducing uncertainty in the markets.

### **BEREC's views**

BEREC points to the overarching importance of the Guidelines as one of the most relevant tools to ensure a consistent approach to merger appraisal throughout the EU. Additional to the practice-harmonizing and disciplining effect they entail at EU-level, they serve as a solid basis of knowledge for National Competition Authorities in assessing the competition effects of mergers and acquisitions in their own countries. Having the same set of principles, methods and criteria to evaluate the consequences of concentration operations by undertakings is considered a cornerstone for the protection of the functioning of the internal market.

BEREC also finds that the high-level objectives of the Guidelines are still relevant and advises that they should be kept. Protecting effective competition is still a core objective of regulators, this being the means through which consumers can thrive, benefitting from lower prices, high-quality products, a wide selection of goods and services, efficiency and innovation. BEREC will elaborate further on this point in the next section.

Furthermore, BEREC believes that the Guidelines were by and large successful in identifying situations of emerging SIEC, followed by appropriate imposition of remedies. Rather, when the outcomes (with the benefits of hindsight) were deemed less effective than expected, the issues were related to the remedies-setting part of the assessment and the corresponding enforcement, and not with the incorrect identification of the challenges to effective competition posed by the mergers, as in the case of Telefónica Deutschland / E-Plus (2014)<sup>7</sup>. For instance, if behavioral remedies are set, allowing for a more flexible approach, but they are not monitored closely and enforced adequately, the post-merger results in the markets may prove suboptimal.

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<sup>7</sup> Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition - [Link](#)



Related to the above is the movement observed in telecommunications sector towards oligopolistic market structures. While the ex-ante regulation established in the past was successful in moving the markets for many countries from former monopolies to effective competition, competition has not developed uniformly across all the territories. Oligopolistic structures<sup>8</sup> materialized for a variety of reasons, including global uncertainties, as well as the emergence of a strategic dimension to connectivity. Thus, BEREC considers that merger assessments (and corresponding Guidelines) will play a crucial role in future to prevent the lessening of competition or in the worst case re-monopolization of connectivity markets in Europe.

In that sense, the work done in the “BEREC Report on Oligopoly analysis and regulation” is a good reference to (i) steer the adaptation of the provisions of the EECC on joint dominance and (ii) tackle the competition issues that may arise in oligopolistic market settings. In that report, BEREC called for (i) a clarification on how to apply the existing joint-dominance test in the context of market analyses and (ii) complement such test with an adaptation of the concept of SIEC. Therefore, as early as 2015, BEREC held that replacing the concept of joint SMP with a concept linked to SIEC under Merger Control would allow for more practical triggering and efficient application of the sectoral regulation when needed for tight oligopolies. In the light of the above, a relaxation of merger control rules in the telecommunications sector without hard evidence and assurance of strong enforcement would be a mistake in BEREC’s view.

Regarding flexibility, BEREC holds that its preservation needs to rank high in the EC’s priorities when revisiting the Guidelines. While having a harmonized approach in the EU is seen as the way forward, BEREC cautions that an overly prescriptive set of Guidelines would stifle investment and innovation. The preservation of the case-by-case evaluation is therefore of utmost importance, accompanied by sound economic principles underlying the individual/specific cases assessment. Rather than having a list of criteria to be checked at each evaluation, BEREC deems more value-added by the European Commission presenting the guiding economic principles according to which the analysis is to be made, accompanied by illustrative examples from previous practice/cases for a better understanding of their application.

On distinguishing horizontal from non-horizontal mergers, while BEREC considers this delineation still useful, a single set of Guidelines would be more appropriate. In the digital ecosystem, the interactions between traditional telecommunications providers and digital players, data centers, cloud and edge services providers are frequent, with different positions/status by the undertakings in the supply chain, as expressed already before. So, in practice, it may become increasingly difficult in future to determine unequivocally the type of merger. Furthermore, having the main criteria of evaluation used in both cases (e.g. market shares and concentration, anticompetitive effects, efficiency gains, countervailing power)

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<sup>8</sup> For instance, BEREC analyzed such trends in documents BoR(15)195 – BEREC Report on oligopoly analysis and regulation – [Link](#) - and BoR(17)84 - BEREC views on non-competitive oligopolies in the Electronic Communications Code – [Link](#)

condensed in a single set of Guidelines will, in BEREC's view, streamline the process and make it easier for the stakeholders to follow the EC's thinking regarding the appraisal exercise. However, BEREC believes that the distinction between horizontal and non-horizontal mergers should be kept when necessary - for instance, as regards the prevailing theories of harm.

## **4. Competitiveness - the case for a robust competition framework**

BEREC's position described next is firmly rooted in the conviction that a robust and well-enforced competition regime is fundamental to promoting investment and innovation within the electronic communications sector. This perspective aligns, in part, with the European Commission's own arguments in the call for evidence for the review of the Guidelines, where the importance of competition as a catalyst for progress is acknowledged.

There is empirical evidence suggesting that reducing the number of competitors (as seems to be proposed by the EC in order to purportedly unleash innovation and investment potential) at the national level does not consistently lead to higher levels of investment or innovation. On the contrary, several studies and market analyses have found that consolidation can result in higher consumer prices, reduced innovation, and fewer choices for end-users, without delivering clear improvements in network quality or investment, as set out below:

- A report<sup>9</sup> published in 2024 by DG COMP illustrates that the more concentrated the market is the less telecom players in that market are willing to invest and innovate in their networks and offer competitive prices to end-users. BEREC is also of the view that the investment decision is mainly triggered by the need to outperform the competition in order to generate future profits in the market, a push forward for consolidation is not necessarily associated with higher investments. Additionally, as far as innovation is concerned, very concentrated markets tend to feature stalling technologies and longer cycles of adoption of technological novelties.
- A separate report<sup>10</sup> published in 2024 by DG COMP provides an analysis of the impact of market concentration on investment in mobile telecommunications. The collected data shows mixed evidence on the relationship between concentration and country-level capital expenditure. Estimates from the empirical model highlight a negative relationship between concentration and investment. This reinforces BEREC's view that less investment occurs in concentrated markets and more investment takes place in less concentrated markets.
- The BEREC report on 'Post-Merger Market Developments - Price Effects of Mobile Mergers in Austria, Ireland and Germany'<sup>11</sup> clearly outlines the pitfalls in terms of price developments when it comes to market consolidation in mobile markets. In all three

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<sup>9</sup> Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years - [Link](#)

<sup>10</sup> Exploring Aspects of the State of Competition in the EU - [Link](#)

<sup>11</sup> Document BoR(18)119 - [Link](#)

country-cases analyzed, involving 4-to-3 mergers, the report finds at least some evidence that retail prices for new customers increased due to the merger compared to a situation without the merger (the counterfactual). Furthermore, regarding the quality effects of mergers, the data from a comprehensive network test analyzed in this report suggest that there are some negative consequences for consumers of the merged entity, which may be due to technical issues with network integration in the short to medium run. The long-run effects still remain uncertain.

- A study<sup>12</sup> issued by CERRE finds no evidence that returns on capital of telecom providers would be significantly enhanced if the services were provided at a larger-than-national scale. Hence, one cannot uncritically rely on the statement that a growing scale would trigger efficiency improvements/value-added within the sector.
- As stated in the BEREC Opinion on the Draft Gigabit Connectivity Recommendation<sup>13</sup> “BEREC believes that a higher WACC is not *the* incentive for investments, but that the WACC is only one of many factors influencing the investment decision. In fact, market circumstances like competition, demand and retail prices in place are the major drivers for investments (...)”.

### **BEREC’s views**

The information presented by the studies and reports highlighted above challenges the assumption that supporting greater concentration through a revised merger policy will automatically yield the intended enhanced economic benefits.

BEREC considers that competition incentivizes operators to upgrade networks, deploy new technologies and deliver better services to consumers, whilst there is evidence to indicate that reducing the number of competitors at the national level does not reliably lead to higher investment or innovation. Considering the EC’s statement about boosting innovation and investments through the revised Guidelines, the idea of relaxing merger controls to allow for scale up should be reevaluated, in BEREC’s view.

In this regard, when assessing which measures the merging parties should implement in order to remedy SIEC, BEREC believes that some situations require structural remedies in place or in addition to behavioral ones, in order to create the conditions for effective competition. In particular, one should be cautious about behavioral remedies such as commitments to certain investment levels, which do not maintain the merging parties’ incentives to compete in the price or the quality dimensions. Indeed, if the levels of investment agreed by the parties are not actually higher than they would have been in the absence of the merger - which may be difficult to assess - then such commitments would not result in practice in positive impact on investment. In this case, the merger would merely allow parties to acquire more market power<sup>14</sup>.

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<sup>12</sup> Ideas for the future of European telecommunications regulations - [Link](#)

<sup>13</sup> See document BoR(23)83 - BEREC Opinion on the Draft Gigabit Connectivity Recommendation, pg 35. [Link](#)

<sup>14</sup> See for example the keynote lecture given by John Vickers, economist at Oxford University, at the conference of the Association of Competition Economics in Milan on 16 November 2024. [Link](#)

Moreover, regarding the message that market fragmentation is dragging down the performance of Europe's telecoms infrastructure and service markets, BEREC is of the view that the fact that some telecom providers are rolling back their cross-border operations is explained by the reassessment of business opportunities. In any case, maintaining a robust competition framework does not prevent cross-border consolidations where national operations do not overlap and it does not prevent operators to gain scale or reduce costs by means other than mergers and acquisitions, such as network sharing agreements, co-investments or wholesale-only business models.

BEREC therefore **cautions** against the assumption that greater market consolidation will automatically yield enhanced benefits, in terms of quality and price. It rather recommends focusing on the potential downsides to competition that could possibly result from a more concentrated European telecommunication market. These include:

- Higher prices for consumers;
- The risk of tight oligopolies and thus of SIEC;
- Quality deterioration;
- Reduced innovation, and fewer choices for end-users.

BEREC considers that effects on prices and quality are still of utmost importance. As stated in the in-depth consultation, the effects of mergers on innovation are often more difficult to predict than effects on price. Since merger analysis is, by nature, a forward-looking and predictive exercise, BEREC believes that the approval of mergers based on anticipated innovative benefits should be based on robust, concrete and detailed evidence. It is essential that the benefits are not only well-founded but demonstrably outweigh any foreseeable negative outcomes in the relevant market. BEREC considers it inherently challenging to establish such a case prior to implementation (ex-ante), and consequently highly doubts the existence of a robust reasoning for the introduction of an 'innovation defense' mechanism within electronic communications. In BEREC's view, a well-functioning merger control process, based on sound evidence rather than on unaccounted and difficult-to-verify benefits, remains a more reliable foundation for safeguarding competition, ensuring affordability, and supporting long-term investment across the sector.

#### **4.1. A cautionary case-by-case approach is still relevant**

In its public consultation for the review of the Guidelines, the EC signals an openness to moving beyond the traditional case-by-case assessment of mergers, suggesting a shift towards an undefined framework that would actively support concentrations believed to enhance the productivity, security, and competitiveness of the European economy as a whole<sup>15</sup>. As BEREC mentioned above and substantiated with information, such an approach raises concerns about adverse effects caused by greater market consolidation.

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<sup>15</sup> See the European Commission's Call for evidence for an evaluation and impact assessment run in parallel published on 2025 May 8<sup>th</sup>: *"While the Commission has so far dealt with issues stemming from changing market realities [...] on a case-*

## **BEREC's views**

While this approach is intended to address new strategic and economic challenges, BEREC has reservations about its effectiveness in substantially resolving the EU's competitive issues particularly in the telecoms sector. It also maintains that the implementation of the regulatory framework for electronic communications and the cautionary approach towards acceptance of mergers in this sector have been instrumental in driving operators to invest in network upgrades, adopt new technologies, and deliver improved services to consumers. It is BEREC's view that the presence of multiple operators in the market creates incentives for continuous innovation and efficiency, benefiting both end-users and the broader economy reliant on the communications infrastructure.

Within this context, BEREC considers that the existing Merger Regulation and accompanying Guidelines have provided legal certainty, transparency, and predictability for stakeholders across the sector. Notably, the body of evidence cited in respect of competition outcomes from national mergers at EU level tends to focus on mergers already reviewed by the EC under the current regime and the outcomes are rarely clear-cut positive, particularly when it concerns investment or innovation. This suggests that caution, not relaxation, is warranted and that potentially an even more holistic evaluation of market dynamics and competitive signals may in fact be more appropriate. In light of the above, BEREC notes that the revision of the Guidelines should not alter the general approach provided in the Merger Regulation.

Further to the above, there is still considerable uncertainty regarding transactions that have not been subject to EC scrutiny, particularly those where the value does not meet the thresholds prescribed by the EU Merger Regulation. In this respect, the EC underlines in its in-depth consultation that negative effects resulting from mergers *"may be particularly substantial in the case of small and medium-sized companies ("SMEs"), which are not necessarily publicly listed but may nevertheless have global leadership positions in their respective sectors"*. This statement is understood to imply that the extent of negative effects from a merger, and the areas where the EC should exercise particular vigilance, cannot be determined solely by the size of the entities involved, in BEREC's opinion. On the one hand, intuitively, the bigger the entities concerned, the higher the foreseen impact on the market. On the other hand, if small or medium-sized companies are highly relevant for shaping the competitive environment in their sectors (as it is the case in telecoms for local/regional competitors), then their competitive constraints prove very relevant in the appraisal of the merger. Indeed, BEREC concurs with the EC's statement that an undertaking's size does not necessarily reflect its ability to invest and innovate. In other words, BEREC stresses that there is no deterministic conclusion on the impact of merger that can be drawn based solely/foremost on the undertakings' sizes. While, of course, BEREC does not imply that all the mergers (irrespective of their value) are to be scrutinized by the EC, the case-by-case

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*by-case basis in line with general principles of the existing Merger Guidelines, such a case-by-case approach may no longer provide sufficient clarity and predictability to stakeholders in future cases. [...] By providing clear guidance for companies operating in these new market realities, the revised Merger Guidelines will provide predictability and legal certainty and a modernised framework supportive of concentrations capable of increasing the productivity, security and competitiveness of the European economy as a whole."*

approach is strongly upheld and BEREC is not in favour of adopting a ‘standardized’ mechanism for reaching conclusions based on a check-list for the telecommunications sector.

## 4.2. Appropriateness of the geographical dimension of markets

While supporting strengthening of the competitiveness of the EU on a global market and harmonization of rules, BEREC reminds that the electronic communications markets are essentially national in scope or even regional if we were to consider the fixed telecommunications networks. In that regard, BEREC upholds the view expressed in the EC’s in-depth consultation that it is inevitable (to a certain extent) that for some goods/services competition does not take place at a global or even European level, for example products with the need for local infrastructure. BEREC stresses the fact that, the lower the granularity of the defined market, the more likely it is that the assessed number of competitors is relatively higher and, by consequence, the foreseen impact of the merger may be diluted/biased towards overestimating the robustness of competition. In light of the above, BEREC holds that telecom mergers should continue to be assessed with regards to the relevant geographic scope and not at a higher-than-national level unless a transnational market<sup>16</sup> is identified. The assessment of a telecom merger should only be carried out at European level once the market in question has been effectively integrated at European level, with transnational substitutability of supply and demand. This cannot however be envisaged by BEREC in the case of electronic communications, based on the foreseeable circumstances.

## 4.3. Lessons from the Digital Markets

As stated in the EC’s in-depth consultation, “*markets shaped by digitalization are often characterized by “winner-takes-most” dynamics that benefit the leading companies with a certain degree of market power*”, and “*Where dominant companies build ecosystems of interlinked products and services and where markets are prone to network effects making the value of the products and services depend on the number of buyers, sellers or users, existing competitors and new entrants face significant barriers to entry and expansion.*”

### **BEREC’s views**

BEREC believes that digital markets could serve as a good example of how small players active on isolated markets can later on accelerate transformation into dominant ecosystems players and eventually prevent effective competition, especially considering the fact that delineation of digital services markets becomes more and more blurred. This calls for increased vigilance, especially with regard to killer acquisitions, which tend to be of particular concern in the digital sector.

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<sup>16</sup> Up to now, there was no transnational telecommunications market identified in Europe.



#### **4.4. A combined framework balancing ex-ante regulation and competition law oversight**

In view of the above, BEREC considers that the effectiveness of EU Merger Regulation cannot be evaluated in isolation. It is understood that such regulation has worked in tandem with ex-ante regulation and ex-post competition law at both EU and national levels. Particularly, the ex-ante regulatory regime in the telecommunications sector needs to continue to be regarded as complementary to the merger control process, both approaches being rooted in the aligned legal frameworks and complementing each other in a coherent and consistent manner, for the robust correction of anticompetitive practices and effects in the markets.

BEREC maintains that this combined regulatory setup has struck an effective balance to date. This multifaceted regulatory architecture (ex-ante regulatory safeguards, and competition law) has enabled a competitive environment characterised by the following:

- Innovation and efficient investment, consumer protection, and market resilience through the presence of multiple operators;
- Cross-border coordination where relevant, while keeping the inherent national scope of telecom markets;
- Realisation of economies of scale through network sharing, co-financing schemes and wholesale-only models.

Therefore, BEREC considers that any realignment of merger policy should be approached with caution. The current framework, which balances ex-ante regulation and competition law, has provided transparency and predictability for stakeholders as well as safeguarding consumer interests. BEREC cannot stress enough the importance of the complementarity between ex-ante regulation and the control exerted through merger regulation, the two regimes working together to achieve the same target of effective competition/a level playing field. A shifting merger policy that moves away from this balanced approach could risk undermining the very competitive dynamics that have historically driven progress in the sector. In any event, any relaxing on the competition law front would make the sectorial ex ante regulation all the more necessary.

On a final note, BEREC reminds that some incentives for dominant operators to engage in anticompetitive practices will persist regardless of the robustness of the regulatory frameworks in place. There is no piece of regulation that can completely eliminate this risk, but it is acknowledged that the frameworks currently in place have enabled significant progress in the sector, particularly in fostering investment in new network deployments and expanding fibre coverage with multi-player markets<sup>17</sup>. BEREC underscores the necessity of maintaining a layered regulatory toolkit, including ex-post oversight once a merger is cleared that would allow for pro-active prevention of all forms of anti-competitive conduct that may emerge post-merger. In this regard, telecommunications regulators are particularly well

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<sup>17</sup> For relevant EU figures with regards to fixed Very High Capacity Networks coverage, fibre footprint and subscriptions, 5G coverage, prices, or operators' revenues, see section 2 of BEREC input to the European Commission's call for evidence on the Digital Networks Act - [Link](#).



placed to carry out such monitoring after telecom mergers, in close cooperation and support of competition authorities, given their sector-specific expertise and continuous market oversight.

## 5. Market power assessment

Single or collective dominance (as described by market power) represents the core concept that authorities dealing with competition issues always base their appraisals on. In merger control, the existence or entrenching of dominance may lead to a positive finding of SIEC. At the same time, the SIEC test enables intervention in cases of mergers arising in oligopolistic markets but not raising single or collective dominance issues<sup>18</sup>.

To evaluate the possibility that a merger creates a SIEC, the European Commission relies on structural indicators and features of the concerned market, as well as on other market indicators - such as diversion ratios, profit margins, capacity constraints, switching costs, barriers to entry, amongst others. Some of these indicators are included explicitly in the current Guidelines, others are not, but they already constitute 'best practice' stemming from the analyses of the cases under scrutiny so far.

In BEREC's view, all of the structural indicators listed in the Guidelines and presented in the consultation documents, together with the EC approach in applying the Guidelines appear appropriate and should be maintained as a core element of merger assessments.

Additionally, BEREC suggests that the EC's experience with the designation of digital gatekeepers under the Digital Markets Act is incorporated into the new Guidelines. Particularly, aspects such as data-driven advantages are seen as highly relevant by BEREC, since undertakings can achieve important data-related advantages, such as synergies generated by access to and collection of personal and non-personal data, scale and scope effects with regard to data, the ability to combine data from different sources - which can be leveraged in markets.

### 5.1. Structural indicators and their assessment

In general, the Guidelines appear to enable the European Commission to assess proposed mergers with sufficient flexibility and without being overly prescriptive. The EC should continue to apply a balanced approach to structural indicators, recognising their value as a starting point but not treating them as determinative. Overall, the current Guidelines appear to strike the right balance.

In relation to the "*role and level of market share and concentration levels*," while structural indicators such as market shares and concentration measures (e.g. HHI) are used in all instances to inform the structural transformation of a market following a merger (being in the

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<sup>18</sup> See, for instance, keynote speech – Guillaume Lorient – Deputy DG for mergers in DG Comp - [Link](#) - during the event "EU Merger Regulation 139/2004: 20 Years that Made a Difference - [Link](#)

front line of providing an indication of arising or, by contrast, unlikely competition concern), the economic analysis of competitive conditions of the market must inform their interpretation. While there is overall agreement that a high market share (with 50% being an established threshold) shall trigger the thorough analysis of other factors, BEREC notes that a high pre-merger market share may result from the particularities of competition in that market. For example, high market shares may be the result of efficiency and/or economies of scale/scope rather than market power (the “Demsetz critique”) or, in certain markets, from the competition for the market (e.g., bidding markets, where market shares may understate the level of competition). Consequently, presumptions based on structural indicators, while a useful starting point, should be considered carefully in the context of the nature of competition in the industry.

BEREC considers that **common ownership** (i.e. the simultaneous ownership of shares/control in competing firms) could be a structural indicator that merits further consideration, not only in terms of acquisition or control, but in terms of the alignment of incentives between competitors post-merger. Although the EC has not yet adopted a formal framework for common ownership analysis, it is increasingly discussed by regulatory agencies globally (e.g. OECD<sup>19</sup>). Indeed, there is growing literature on the impact of common ownership on competition and prices, with certain studies using modified measures of concentration (e.g., HHI of common ownership between firms within markets)<sup>20</sup>. For instance, Azar, Schmalz and Tecu (2018) highlighted that the impact of common ownership could undermine the use of traditional “*structural indicators*”.

This highlights how the use of structural indicators based on market outcomes alone could be undermined by common ownership. A merger that results in highly concentrated common ownership reduces competition, even where market shares are not concerning. In telecoms, enhanced dimension is attributed to the structural ownership links between operators since the observed trend is convergent to oligopolistic market structures.

Common ownership has featured in the European Commission’s decisional practice<sup>21</sup>, but BEREC is of the view that a “*structural indicator*” should be a useful screening tool, providing clarity as to when common ownership could be concerning or not<sup>22</sup>. In a broader outlook, BEREC considers valuable the incorporation of the indicators used by the EC in the assessment of its recent cases in the revised Guidelines, to reflect the current practices.

In terms of merger decisions, the assessment of remedies could benefit from a greater consideration of “*structural indicators/market features*” where these are critical to the potential

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<sup>19</sup> OECD “*Common Ownership by Institutional Investors and its Impact on Competition: Background Note by the Secretariat*”, 2017. [Link](#)

<sup>20</sup> An early example - Azar, José and Schmalz, Martin C. and Schmalz, Martin C. and Tecu, Isabel, Anticompetitive Effects of Common Ownership (May 10, 2018). *Journal of Finance*, 73(4), 2018. [Link](#)  
There, they find that “*In the US airline industry, taking common ownership into account implies increases in market concentration that are 10 times larger than what is “presumed likely to enhance market power” by antitrust authorities.*”

<sup>21</sup> European Commission Decision of 27.3.2017, Case M.7932, Dow/DuPont, declaring a concentration to be compatible with the internal market and the EEA Agreement.

<sup>22</sup> Common ownership is now included in the U.S. Department of Justice and the Federal Trade Commission “*Merger Guidelines*”, 2023. [Link](#)

success of the remedies - for example, in the case of a *Maverick* firm that is set apart from potential entrants for partly structural reasons<sup>23,24</sup>. Arguably, this was the case in the failure of MVNO entrants to expand in order to replace the exit of MNOs in the mergers in the mobile sector of the mid-2010s (in Ireland and Germany), where significant barriers to entry and expansion of MVNOs and MNOs remained post-merger. For Austria, the remedy package that aimed to facilitate MNO entry was not taken, but the MVNO remedy became effective in the medium run. Notably, the EC Remedies Notice does not require that a remedy recipient replicate the specific competitive role of the divested party, but only that it be an “*effective competitor*”<sup>25</sup>.

Given the inherent uncertainty in ex-ante interventions, no approach will eliminate the risk of error in either assumptions or analysis underpinning merger determinations. To learn from experience, BEREC considers beneficial for authorities/agencies to revisit the assumptions and analysis in decisions in order to introduce an “*error correction mechanism*”<sup>26</sup>, to better guide future assessments. The European Commission has a strong track record of conducting such ex-post assessments. BEREC deems this commendable and notes that it should be continued. In relation to this process of revisiting the Guidelines, an ex-post study of the assumptions regarding “*structural indicators*” could provide the EC with insight in relation to the validity regarding the assumptions and analysis of structural indicators<sup>27</sup>.

## 5.2. Coordinated effects

Since the standard of proof for coordinated effects in an oligopolistic setting is very high/demanding, establishing a SIEC in cases where the merged entity will not have a dominant position has proven to be often decisive in merger reviews.

In telecoms, oligopolistic structures are prevalent especially due to the economies of scale and barriers to market entry. Particularly in the mobile telecommunications markets, entry is profitable only for a limited number of players because of limited spectrum licences, the requirement to build a nationwide network and to acquire a sufficiently large customer base in order to operate beyond the minimum efficient scale. Normally, there is no single dominance. However, the 4-to-3 mergers have generally resulted in price increases, as mentioned before. Besides these price increases, the effective evaluation of the coordinated effects such mergers triggered was deemed difficult. For instance, in Case No COMP/M.6497 – HUTCHISON 3G AUSTRIA / ORANGE AUSTRIA<sup>28</sup>, SIEC was found and the EC concluded that the merging parties were close competitors, as well as that the merger would remove

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<sup>23</sup> Almost by definition, a “*Maverick*” firm would be found to differ substantially from most potential recipients of remedies that are already in the market. This would be assessed in the SIEC analysis.

<sup>24</sup> Document BoR(18)119 - BEREC “*Report on Post-Merger Market Developments -Price Effects of Mobile Mergers in Austria, Ireland and Germany*”: [Link](#)

<sup>25</sup> While closeness of competition typically features heavily in the analysis in “Gap” mergers, the role of a “*Maverick*” does not necessarily receive the same emphasis in the assessment of the remedies.

<sup>26</sup> See for example, European Commission (2005), *Merger Remedies Study*, DG Competition, European Commission. [Link](#)

<sup>27</sup> For example, the Competition and Markets Authority commissioned a report by KPMG specifically on its assumptions regarding entry and expansion in its decisions “*Entry and expansion in UK merger cases An ex-post evaluation*”, 2017. [Link](#)

<sup>28</sup> [Link](#)

Hutchison's incentive to act as an important competitive force. Absent the merger, Orange would remain a comparably relevant competitor. However, despite the fact that indications with respect to coordinated effects were found, the required standard of proof was not met.

Only in rare cases has the European Commission intervened in an oligopolistic setting by establishing competitive concerns based on coordinated effects. One example is CASE M.7758-HUTCHISON 3G ITALY / WIND / JV<sup>29</sup>, where several MNOs stated in public that they were in favor of market consolidation ("market repair")<sup>30</sup>. In its assessment, the EC found that both merging parties were important competitive forces and would continue absent the merger. Therefore, it was expected that the merged entity would have a lower incentive to compete as aggressively as both parties did before. The two other MNOs would also compete less vigorously. With respect to coordinated effects, the EC found that reaching terms of coordination would likely be possible post-merger. The evidence included parallel price increases in the past, as well as the status quo of markets shares amounting to 30-32% for all three MNOs after the merger. Coordination was deemed sustainable based on several direct and indirect methods for detecting deviations (for example, observable tariffs and data on mobile number portability) and price wars as punishment. Outsiders like a new entrant or MVNOs would not be able to jeopardize coordination. Additionally, public statements by MNO senior executives and communication through investment banks were considered to facilitate consolidation.

But this finding of coordinated effects is typically an exception in the context of the appraisals. Since the 4-to-3-mergers in the telecommunications sector have generally resulted in price increases post-merger (especially during periods when remedies were not (yet) effective), research on how these price increases took place might show whether and, if so, how coordinated effects took place. Therefore, BEREC advises that the European Commission looks more closely into the post-merger behavior of the competitors, especially as regards pricing as one of the well-recognized parameters that coordination may resort to. The relevance of such evaluations with the benefit of hindsight is further enhanced in the telecommunications sector due to the oligopolistic market structures.

On the contrary, an example of a reverse situation (i.e. a transformation of 3-to-4) is the case of Iliad/Free's entry in France, where some research argues that MNOs' strategies post entry of a fourth operator were consistent with a breakdown of tacit semi-collusion: before entry, the undertakings already present in the market could successfully coordinate on restricting product variety to avoid cannibalization, but, after entry, this outcome became harder to sustain because of increased business stealing incentives. Consumers gained considerably

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<sup>29</sup> [Link](#)

<sup>30</sup> In that case, one of the merging parties internally calculated and quantified the value of the market repair, while the CEO of non-merging parties explicitly supported a 4-to-3 consolidation and even offered to buy spectrum and/or towers to support the consolidation. At the same time, financial analysts suggested to buy shares of a non-merging MNO due to the expected merger-related market improvement and related EBITDA increases.

from the added variety and, to a lesser extent, from the price responses in the market<sup>31</sup>. If this 3-to-4 entry led to the breakdown of collusion, a 4-to-3 merger might enable collusion.

Another aspect that BEREC would like to draw attention to is related to the **product variety** in the market or service differentiation. Finding coordinated effects in mergers should be more open for different methods of coordination and **product variety** should be included as a potential parameter to coordinate on.

## 6. Conclusions

BEREC highly appreciates the opportunity to provide insights to the revision of the Merger Guidelines at this stage in the process. The EU Merger Guidelines are vital instrument for a consistent and coordinated control throughout Europe and a very important source of guidance for the national authorities. BEREC strongly supports the current competition focused goals, the case-by-case assessments procedure, and rejects an approach based on “one size fits all” rules.

BEREC strongly believes that competition is the primary driver of investment, innovation, and sectoral progress. While consolidation may theoretically result in certain efficiencies, evidence from DG COMP, BEREC, and CERRE shows that mergers in the telecommunications sector do not consistently boost innovation or generate benefits for citizens and/or operators. Additionally, 4 to 3 mergers in the mobile sector were proved to raise prices. At the same time, regulation is not the main issue when considering constraints to scaling, as BEREC explained already in more detail into its input to the EC’s exploratory consultation on the future of the electronic communications sector and its infrastructure and the EC’s White Paper<sup>32</sup>. Therefore, BEREC urges caution to avoid telecom sector re-monopolization, and calls on the European Commission not to relax its merger control appraisals with the aim of promoting consolidation in a sector where such an approach is deemed detrimental to the ecosystem without strong, compelling evidence on the benefits. BEREC also believes that digital markets, characterized by “winner-takes-most” dynamics, could serve as an instructive example, especially considering the fact that delineation of digital services markets becomes more and more blurred.

Telecommunications markets are mainly national/regional in nature and the reviews must match the geographical scope. The market definition should be reflective of the actual or potential competitive constraints in the market, an incorrect geographic definition resulting in biased conclusions of the assessment.

BEREC considers that the evaluation of structural indicators together with other relevant data should jointly be used to assess SIEC, but underlines that an undertaking’s size alone is not

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<sup>31</sup> See [Bourreau](#) et al. (2021), “Market Entry, Fighting Brands, and Tacit Collusion: Evidence from the French Mobile Telecommunications Market.” - [Link](#)

<sup>32</sup> BEREC input to the EC’s exploratory consultation on the future of the electronics communications sector and its infrastructure - [Link](#) and BEREC’s input to the EC public consultation on the White Paper “How to master Europe’s digital infrastructure needs?” - [Link](#)

a reliable measure of the merger impact. While market shares are indispensable, they should be interpreted conservatively. For the telecommunications sector, the appraisal exercise should incorporate indicators from digital gatekeeper experience. Additionally, BEREC explicitly recognizes the importance of common ownership's impact on competition.

Demonstrating coordinated effects proved challenging, especially in oligopolistic markets that are currently prevalent in many electronic communications markets, in many MSs. BEREC calls for closer scrutiny of post merger pricing and explicit consideration of diverse coordination methods, including product differentiation, to detect anticompetitive risks.

Finally, merger regulation and ex ante telecom oversight should operate jointly to sustain competition, innovation, and resilience. Relaxing this synergy could undermine both sector progress and consumer protection.