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# Merger Control Amid Market Evolutions and Shocks: What the EU Merger Guidelines Should Say

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# Merger Control Amid Market Evolutions and Shocks: What the EU Merger Guidelines Should Say<sup>1</sup>

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## Abstract

The European Commission's 2026 draft merger guidelines make merger review more forward-looking but leave open how anticipated and uncertain cost and demand shifts should affect the merger approval standard. Economic theory can fill this gap. Anticipated adverse cost or demand shifts tend to raise concentration but compress margins, so the required synergy threshold should fall, and merger control should ease. Favourable cost or demand shifts have the opposite implication and call for stricter scrutiny. When future shifts are uncertain, the appropriate merger policy response depends on how the authority accounts for uncertainty in its welfare assessment, yet the guidelines are silent on that choice.

**Keywords:** horizontal mergers, EU merger control, EU Merger Guidelines, cost shocks, uncertainty, merger approval standard

**JEL-Classification:** K21, L40, L41

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## Introduction

Tariffs, geopolitical disruptions, and AI-driven productivity shifts are reshaping competitive conditions across industries, yet merger control guidelines are largely silent on how such shifts should affect the standard for merger approval. The European Commission's draft merger guidelines, published on 30 April 2026 and currently open for public comment, are the most comprehensive overhaul of EU merger control in over two decades.<sup>2</sup> For the first time they explicitly incorporate resilience and geopolitical risk as relevant factors in merger assessment. They also extend the treatment of anticipated future market conditions well beyond what the 2004 Horizontal Merger Guidelines contained — which was limited to adjusting market shares for foreseeable entry, exit, or expansion. The draft guidelines propose a structured analysis covering temporary shocks such as trade conflicts or health emergencies, non-representative market conditions, and the forward-looking adjustment of competitive assessments more broadly.<sup>3</sup> These are genuinely important steps. But the draft's treatment of cost and demand shifts — changes in supply or demand conditions that alter the competitive baseline — remains incomplete. Recent theoretical results clarify why this matters;<sup>4</sup> here, we relate those results to the draft merger guidelines and draw out their policy implications.

Our key findings cut in both directions. An adverse industry-wide cost shift — the kind caused by tariffs and supply chain disruptions — simultaneously raises market concentration and decreases the likelihood that a horizontal merger harms consumers. Tightening merger policy in anticipation of such a shift is therefore the wrong response. The opposite holds when conditions improve: an industry-wide productivity gain or quality improvement driven, for instance, by the diffusion of AI, expands margins and increases the harm a merger can inflict, calling for stricter scrutiny even as concentration may fall. The draft guidelines, as written, do not capture either effect.

## What the draft guidelines say about shocks

The draft guidelines break new ground in several places. Paragraph 9 states that EU merger control supports the EU's broader policy objectives, including the competitiveness and resilience of the internal market, and specifically mentions strengthening resilience in the face of shocks and geopolitical shifts.<sup>5</sup> Paragraph 20 lists resilience, including security of

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<sup>2</sup> European Commission, Draft Guidelines on the Assessment of Mergers under Council Regulation (EC) No 139/2004, published 30 April 2026 (hereinafter "Draft Guidelines"). Open for public consultation until 26 June 2026; finalisation expected Q4 2026.

<sup>3</sup> The 2004 Horizontal Merger Guidelines (OJ C 31, 5.2.2004, p. 5) stated at paragraph 9 that 'in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted,' and at paragraph 15 that 'current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion.' The 2026 draft substantially extends this: paragraph 40 generalises the forward-looking adjustment to technological changes, regulatory shifts, and declining markets; paragraph 43(a) introduces a specific framework for temporary market distortions or shocks 'such as war, trade conflict, health emergencies and other temporary disruptions'; and paragraph 58 instructs that market power indicators beyond market shares — including profit margins — may be adjusted for anticipated changes in competitive conditions.

<sup>4</sup> Volker Nocke, Martin Peitz, and Nicolas Schutz, 'Merger Control in a Changing World,' CEPR Discussion Paper No. 21598 (2026). <https://cepr.org/publications/dp21598>.

<sup>5</sup> Draft Guidelines, para. 9, gives a definition of resilience in footnote 18: "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. Examples of factors that are particularly relevant for the resilience of the internal market include the security and diversity of supply chains, the security and cyber security of physical and digital critical infrastructure, defence readiness and the ability and incentives of companies to invest in critical technologies. Mergers can have both positive and negative effects on resilience."

supply, as a non-price parameter on which merging firms may compete, meaning that a merger's effects on resilience are relevant to the competitive assessment.<sup>6</sup>

On the question of how anticipated future market conditions enter the counterfactual, the draft draws two delimited rules, each anchored in recent EU case law.

The first rule, in paragraph 40, says the Commission may take into account future market evolutions — entry, exit, technological change, regulatory shifts — that 'can be predicted with a *sufficient degree of certainty* based on available evidence.'<sup>7</sup> The phrase traces directly to *EVH v Commission* (T-312/20), in which the General Court held that the Commission has no duty to carry out a forward-looking analysis on elements 'of which it is not able to envisage, within a reasonable margin of error, the long-term effects.'<sup>8</sup>

The second rule, in paragraph 43(a), addresses shocks explicitly: where market conditions at the time of notification are distorted by 'cyclical peaks, downturns or crises, such as war, trade conflict, health emergencies and other temporary disruptions,' the Commission may use an adjusted benchmark — either pre-shock conditions, or post-shock normal conditions that can be predicted 'with a sufficient degree of certainty' to prevail once the market has recovered.<sup>9</sup>

Finally, paragraph 58 instructs that market power indicators, including market shares and profit margins, may be adjusted for changes in the competitive environment that can be 'reasonably predicted with a sufficient degree of certainty.'<sup>10</sup>

### **What 'sufficient certainty' means in EU law**

In EU merger law, 'sufficient degree of certainty' is a threshold, not a sliding scale. Under the standard set in *EVH* and confirmed by the Court of Justice on appeal, the Commission must base its prospective analysis on facts and law existing at the time of notification. Future

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<sup>6</sup> Draft Guidelines, para. 20, listing 'resilience (including security of supply)' alongside output, quality, capacity, investment, innovation, privacy, and sustainability as non-price parameters of competition. Case references include M.7967 – Ball/Rexam; and M.8713 – Tata Steel/thyssenkrupp/JV, paras 1318 et seq. On how competition authorities should assess whether a merger reduces supply-chain resilience, including the availability of credible alternative suppliers in times of stress, see Iain Boa and Will Carpenter, 'Supply chain resilience in merger assessments,' *Journal of European Competition Law & Practice* (2026), <https://doi.org/10.1093/jeclap/lpag016>.

<sup>7</sup> Draft Guidelines, para. 40: "The Commission takes into account future events or market evolutions unrelated to the merger that can be predicted with a sufficient degree of certainty based on available evidence. This may be the case, for instance, with sufficiently certain plans of entry, expansion, or exit of firms in or from the market, which can be expected to take place independently of the merger, technological changes, changes of customer behaviour and demand, declining markets, legal and regulatory changes, upcoming products or services and future capabilities, or similar future evolutions."

<sup>8</sup> Judgment of 17 May 2023, *EVH v Commission*, T-312/20, EU:T:2023:252, paras 233–234, confirmed by Court of Justice in Joined Cases C-464/23 P et al., judgment of 26 June 2025. The judgment holds that the Commission "has no duty to carry out a forward-looking analysis on the basis of elements of which it is not able to envisage, within a reasonable margin of error, the long-term effects."

<sup>9</sup> Draft Guidelines, para. 43(a): "temporary market distortions or shocks due to cyclical peaks, downturns or crises, such as war, trade conflict, health emergencies and other temporary disruptions, in which case the Commission may compare the merger-specific effects with market conditions that existed prior to the temporary peak or disruption or that can reasonably be expected with a sufficient degree of certainty to exist once demand and supply will have settled following a temporary peak or recovered from a distortion."

<sup>10</sup> Draft Guidelines, para. 58: "Under its forward-looking approach to identifying market power, the Commission may adjust market power indicators, such as market shares and profit margins, to account for changes in the competitive environment that can be reasonably predicted with a sufficient degree of certainty."

events can only enter the analysis if they clear the certainty threshold; otherwise, current conditions are the default baseline.

The overall standard of proof, established by the Court of Justice in *CK Telecoms* (C-376/20 P), is that a SIEC is 'more likely than not' — balance of probabilities.<sup>11</sup> But this governs the *conclusion* on competitive harm, not the incorporation of uncertain future events into the baseline. The two standards operate at different levels: the balance-of-probabilities test asks whether the merger is likely to harm competition given the relevant market conditions; the sufficient certainty threshold asks which market conditions should be treated as relevant in the first place.

This creates a two-tier structure. Foreseeable shocks — a tariff already announced, a foreign competitor that has publicly signalled exit, a regulatory change already enacted — can and should be built into the counterfactual. Uncertain shocks — the kind that may or may not materialise depending on trade policy developments, geopolitical escalation, or macroeconomic conditions — cannot. They remain outside the analysis.

Genuine uncertainty about future cost conditions is not merely a modelling inconvenience; it is the normal state of affairs when reviewing mergers in tariff-exposed, geopolitically sensitive markets, or industries undergoing rapid technological change. The draft guidelines acknowledge that such conditions exist — indeed, paragraphs 9 and 43 presuppose them — but they provide no framework for handling the uncertainty itself.

### **The economics: how shocks affect the merger standard**

The underlying analysis covers horizontal merger policy under industry-wide cost and demand shocks in a series of oligopoly models.<sup>12</sup> The results are consistent and, in a specific sense, surprising.

Start with a deterministic cost shock. An industry hit by an industry-wide cost increase — rising input prices, tariff pass-through, or the exit of a cheap foreign supplier — sees differences in market shares magnify.<sup>13</sup> Less efficient, smaller firms are hurt relatively more

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<sup>11</sup> Judgment of 13 July 2023, *European Commission v CK Telecoms UK Investments Ltd*, C-376/20 P, EU:C:2023:561, para. 87. The Court established that "balance of probabilities" — more likely than not — is the correct standard for the Commission to establish a SIEC, and that the prospective nature of the analysis "precludes a requirement for that institution to meet a particularly high standard of proof."

<sup>12</sup> Nocke, Peitz, and Schutz (2026) use the homogeneous-good Cournot model as the main model, with extensions to multiproduct Bertrand competition with constant elasticity of substitution (CES) and multinomial logit (MNL) demand. The result under Cournot competition that merger harm depends on pre-merger margins traces to Farrell and Shapiro (1990): the pricing externality that the merged entity internalises post-merger is proportional to pre-merger margins. Nocke and Whinston (2022) formalise this as the result that, in Cournot competition, only the change in HHI and the level of pre-merger margins jointly determine unilateral effects. An adverse cost shift compresses those margins, reducing the internalisable externality and therefore the harm the merger can cause. Reisinger and Zenger (forthcoming) show that, in the homogeneous-goods Cournot model, a demand-induced increase in industry concentration is associated with a reduction in the amount of required synergies. See Joseph Farrell and Carl Shapiro, 'Horizontal Mergers: An Equilibrium Analysis,' *American Economic Review* 80(1), 107–126 (1990); Volker Nocke and Michael Whinston, 'Concentration Thresholds for Horizontal Mergers,' *American Economic Review* 112(6), 1915–1948 (2022); Markus Reisinger and Hans Zenger, 'The Competitive Effects of Mergers with Cournot Competition,' *RAND Journal of Economics* (forthcoming).

<sup>13</sup> Nocke, Peitz, and Schutz (2026), Proposition 1. Under log-concave inverse demand — an assumption satisfied by linear demand and many demand systems commonly used in empirical work — an adverse industry-wide additive cost shock induces a sum-preserving spread of equilibrium market shares, raising the HHI. The key condition is incomplete cost pass-through, which log-concave demand implies. For multiplicative shocks, the corresponding condition is increasing demand elasticity.

because their margins were thinner to begin with; their output contracts more than proportionally, boosting the market shares of larger, more efficient rivals. Concentration, measured by the Herfindahl-Hirschman Index (HHI), rises.

One might expect this to call for tighter merger scrutiny. Our analysis shows the opposite.<sup>14</sup> Merger harm depends on the pricing externalities that a merged entity would internalise post-merger — and those are proportional to pre-merger margins. An adverse shock compresses margins for all firms. This reduces the ability of a hypothetical merged entity to exploit its joint market power. The synergy threshold — the minimum cost saving the merger must generate to leave consumers no worse off — therefore *falls* after an adverse shock.

This is not paradoxical once the mechanism is understood. The HHI increase and the required synergy decrease are both caused by the same event: margin compression. Concentration goes up, but the bar for merger approval goes down. Reading the concentration increase as a signal of greater merger harm, without adjusting for the margin effect, gives the wrong answer.

The result extends cleanly to price competition with differentiated products.<sup>15</sup> As the industry is struck by an adverse shock, all firms respond by reducing their markups, which lowers the market power effect of any potential merger.<sup>16</sup> Larger firms (which are more productive) respond to such a shock by lowering their markups by more than smaller firms. This reallocates consumers towards larger firms, thereby increasing concentration.

The opposite holds for favourable shifts. An industry-wide productivity gain or quality improvement — driven, for instance, by the diffusion of AI across a sector — expands margins as firms become more efficient. Concentration may fall as smaller firms benefit disproportionately. But the synergy threshold rises: larger margins mean a merged entity can extract more from the exercise of joint market power, so a merger must generate greater efficiencies to leave consumers no worse off. An authority that expects falling concentration and concludes that merger policy can safely ease would again be reading the signal incorrectly.

A natural implication concerns mergers in growing versus declining industries. Under incomplete pass-through, merger control should be softer in a declining industry — where adverse cost or demand trends compress margins — even though concentration rises; and tougher in a growing industry driven by productivity gains or quality improvements, even though concentration falls. In both cases, the concentration trend points in the wrong direction.

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<sup>14</sup> Nocke, Peitz, and Schutz (2026). Formally, the required synergy threshold — the minimum cost reduction a merger must generate to leave consumer surplus unchanged — is decreasing in the size of the common marginal cost shock under incomplete pass-through. The mechanism is the Farrell–Shapiro (1990) one: merger harm depends on the pricing externality internalised post-merger, which is proportional to pre-merger margins. Adverse shocks compress margins and therefore compress potential harm.

<sup>15</sup> Volker Nocke and Nicolas Schutz, "Multiproduct-Firm Oligopoly: An Aggregative Games Approach," *Econometrica* 86(2), 523–557 (2018); and "An Aggregative Games Approach to Merger Analysis in Multiproduct-Firm Oligopoly," *RAND Journal of Economics* 56(3), 233–250 (2025). These papers provide the aggregative framework used to extend the results from homogeneous-good Cournot to differentiated-products Bertrand competition.

<sup>16</sup> Nocke and Whinston (2022) already showed that less competitive markets require larger synergies for a merger not to harm consumers.

## The role of uncertainty: two approaches, two opposite prescriptions

The question of what shift to expect presupposes that the authority knows one is coming. Often it does not — tariff trajectories, geopolitical escalation, and AI-driven productivity diffusion are all genuinely uncertain in both their direction and magnitude. Our paper analyses two approaches to handling such uncertainty, with strikingly different implications.<sup>17</sup>

Under a *maxmin* approach — protecting consumers against the worst-case scenario — adverse cost uncertainty calls for *softer* merger policy.<sup>18</sup> The logic follows from the deterministic result: if the worst-case shock is adverse, and adverse shocks reduce merger harm, then a policy calibrated to worst-case conditions should approve mergers that would be blocked under current conditions.

Under a risk-neutral *expected consumer surplus* standard the prescription reverses. A mean-preserving spread in the distribution of cost shocks — greater uncertainty without changing the mean — calls for *tougher* merger policy. At the synergy level that leaves expected consumer surplus unchanged in the absence of uncertainty, a merger turns harmful in expectation once cost uncertainty increases. The mechanism is that consumer surplus is convex in price — meaning that a given price reduction benefits consumers more than a price increase of equal size harms them. Variance in costs translates into variance in prices, and the merger dampens this variance in a way that is harmful in expectation.<sup>19</sup>

The draft guidelines are silent on which of these objectives governs. That silence is in tension with paragraph 35 of the draft, which already calibrates the required level of efficiencies to the degree of certainty about competitive harm: the more uncertain the harm, the lower the bar for efficiencies. Extending that logic consistently to uncertainty over the external cost and demand environment in which the merger operates would point towards the expected consumer surplus standard — and would call for stricter merger policy when that environment is genuinely uncertain.

## Where the draft guidelines need strengthening

We see three specific points at which the draft guidelines' treatment of shocks and uncertainty is incomplete or potentially misleading, and where the theory provides guidance.

**First**, the counterfactual adjustment for shocks does not automatically correct the merger standard. Paragraph 43(a) instructs the Commission to compare merger effects against adjusted market conditions — pre-shock or expected post-shock conditions. This is the right baseline for measuring merger-specific effects. But the adjustment does not tell the Commission how to interpret market power indicators under those adjusted conditions. Our results show that, in the adjusted baseline reflecting an adverse shock, the Commission should expect compressed margins — and should calibrate the required synergy threshold accordingly. Without this additional step, adjusting the counterfactual for the shock corrects

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<sup>17</sup> Both approaches are well-established in decision theory. The maxmin criterion is axiomatized by Itzhak Gilboa and David Schmeidler, 'Maxmin Expected Utility with Non-Unique Prior,' *Journal of Mathematical Economics* 18(2), 141–153 (1989). The subjective expected utility approach is axiomatized by Leonard J. Savage, *The Foundations of Statistics* (Wiley, New York, 1954).

<sup>18</sup> Nocke, Peitz, and Schutz (2026). This holds under incomplete pass-through in the Cournot model and extends to the CES and MNL models. The result reverses when pass-through is more than complete.

<sup>19</sup> Nocke, Peitz, and Schutz (2026). This holds for log-concave demand satisfying an additional regularity condition on demand curvature. Results are confirmed in the CES and MNL models if the consumers' outside option not to participate in the market is sufficiently attractive.

one mistake (using a distorted baseline) while leaving another (reading concentration metrics without accounting for margin compression).

**Second**, the 'sufficient degree of certainty' standard creates an unguided discontinuity. Under the current draft, future market evolutions either clear the certainty threshold and enter the counterfactual, or they do not and the current baseline applies. For shocks that fall below the threshold — uncertain tariff escalation, possible geopolitical disruption, contested trade policy — there is no framework for what the Commission should do. Should it proceed as if the shock will not happen? Take the expected value? Apply some precautionary adjustment? The draft is silent, but the answer matters, because it determines which side of our two uncertainty prescriptions the Commission implicitly adopts.

**Third**, the draft's treatment of supply- and demand-side shifts is explicitly limited to temporary distortions. Paragraph 43(a) instructs the Commission to look through conditions that are 'distorted' by war, trade conflict, or health emergencies — restoring either pre-shift or expected post-recovery conditions as the baseline. But many of the shifts that may reshape EU markets in the coming years are not obviously temporary. A permanent geopolitical realignment that restructures supply chains, a lasting increase in input costs following a trade war, or an AI-driven productivity improvement that permanently lowers industry costs all require a different approach: not adjusting away from current conditions to recover a pre-shift baseline, but treating the expected future conditions as the relevant competitive environment and assessing the merger within it. The draft provides no guidance for this case, and the distinction matters — because, as our results show, the direction of the permanent shift determines whether the merger approval standard should ease or tighten.

## **Implications for the Commission as it finalises the guidelines**

The Commission is consulting on the draft until 26 June 2026 and expects to finalise the guidelines in Q4 2026. We suggest three additions that would substantially improve the treatment of shocks and uncertainty within the existing legal framework.

**1. Margin adjustment alongside market share adjustment.** When paragraph 43(a) is applied — the counterfactual is adjusted for a temporary shock — the Commission should also adjust the relevant margin estimates. An adjusted baseline reflecting adverse conditions will show compressed margins, and the required synergy threshold for merger clearance should reflect this. This need not add complexity: it simply requires that UPP indicators and other margin-based tools be computed using the adjusted-baseline margins, not the distorted ones.

**2. Addressing uncertainty.** For shocks that do not meet the 'sufficient certainty' threshold, the draft should clarify the Commission's approach. Our research suggests that under the expected-consumer-surplus standard greater cost uncertainty should tighten the merger standard, holding other things equal. The Commission does not need to adopt a formal probabilistic model; it is sufficient to state that more uncertain market conditions should lead to larger required efficiencies, particularly in markets exposed to significant input price risk.

**3. Guidance for permanent shifts.** The Commission should clarify how the counterfactual analysis proceeds when an anticipated change in market conditions is not temporary. Our argument is straightforward: if a shift can be expected with sufficient confidence, it should enter the forward-looking baseline under paragraph 40, and the merger should be assessed against that expected future competitive environment — with the margin implications our research identifies fully taken into account.

## Conclusion

The draft EU merger guidelines of April 2026 represent a genuine advance in the treatment of resilience and forward-looking market conditions. The explicit recognition of resilience as both a policy objective and a parameter of competition, and the structured approach to adjusting the competitive assessment for anticipated shifts in market conditions, are valuable contributions. But the draft is limited to cases where future market conditions can be predicted with sufficient confidence. What it lacks is guidance on how anticipated shifts in supply and demand conditions should affect the merger approval standard, and on how to proceed when the direction and magnitude of such shifts is itself uncertain.

Our research provides that guidance. Adverse cost shifts raise concentration and reduce the required synergy threshold — the merger standard should ease, not tighten. The opposite holds for favourable shifts: productivity gains or quality improvements call for stricter scrutiny even as concentration may fall. An authority that misreads or ignores these effects will systematically approve mergers it should block, and block mergers it should approve.<sup>20</sup> When the direction or magnitude of the shift is itself uncertain, our results show that the appropriate policy response depends on the welfare criterion that the authority applies — a question the current draft does not address. The finalisation of the guidelines in Q4 2026 offers the opportunity to correct that.

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<sup>20</sup> The issue is not specific to the EU. It applies to Guideline 7 of the 2023 US Merger Guidelines (US Department of Justice and Federal Trade Commission, December 18, 2023), which calls for a stronger presumption of harm when an industry undergoes a consolidation trend. When that trend is driven by an adverse industry-wide cost or demand shift — which raises concentration through a reallocation of market shares — our results under incomplete pass-through suggest the merger standard should ease rather than tighten.

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