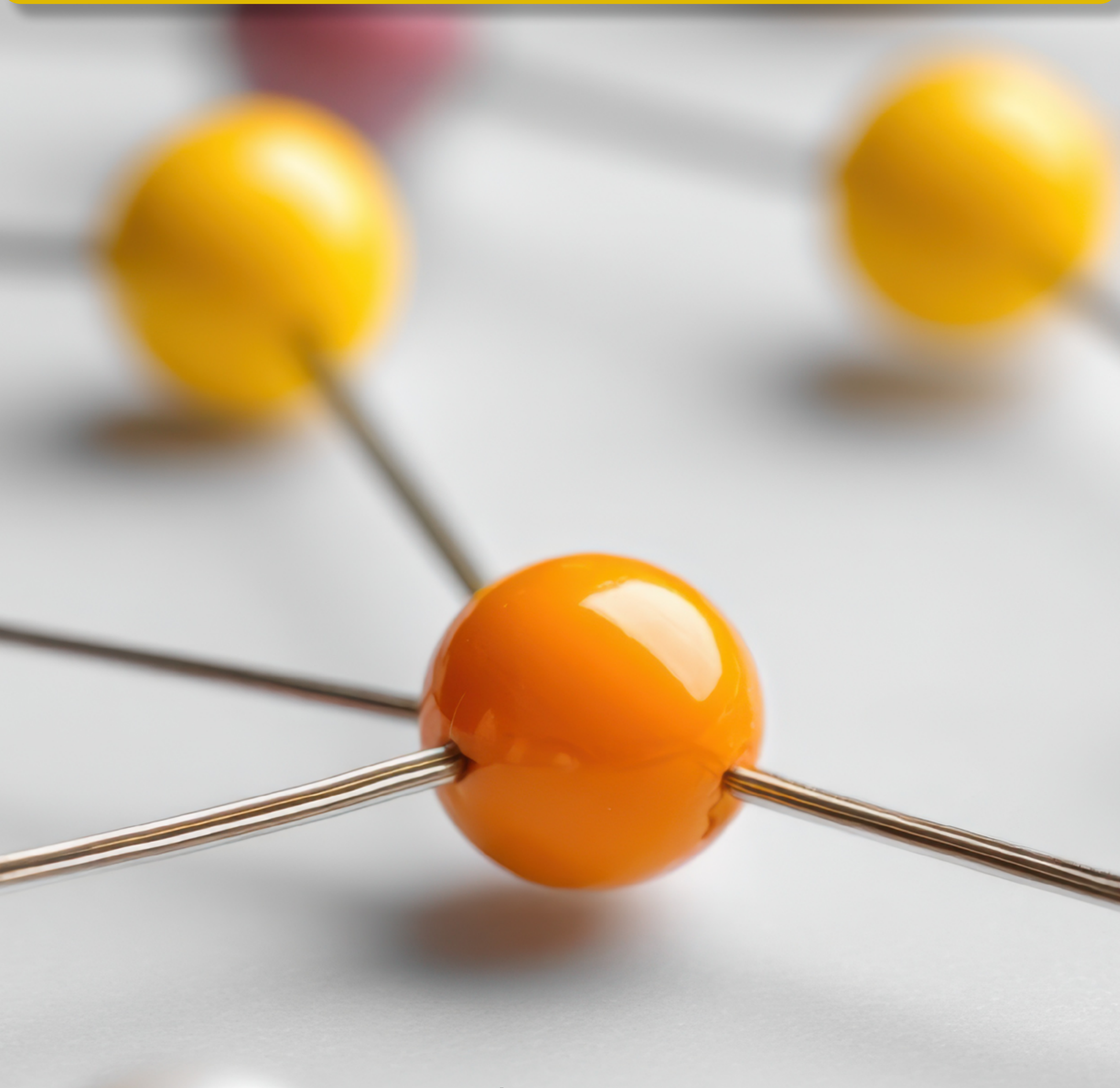
TOMORROW'S MARKET, TODAY'S EVIDENCE: COUNTERFACTUALS IN THE EU DRAFT MERGER GUIDELINES



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TOMORROW’S MARKET, TODAY’S EVIDENCE: COUNTERFACTUALS IN THE EU DRAFT MERGER GUIDELINES
By Kah Loon Tham & Karla Perca López

This article explores one of the quieter, but potentially most consequential, innovations contained in the European Commission's draft Merger Guidelines: the evolving treatment of the merger counterfactual. The authors argue that the revised framework reflects a more dynamic understanding of competition by allowing greater consideration of future market developments, while simultaneously placing greater emphasis on robust contemporary evidence to support those forward-looking assessments. Their analysis demonstrates how evidentiary standards may become increasingly central as merger analysis adapts to rapidly changing markets.

I. INTRODUCTION

Much of the debate around the EU's draft Merger Guidelines (the "Draft Guidelines") has focused on whether Brussels is becoming more receptive to scale, innovation and European competitiveness arguments.[2] The appearance of a "theory of benefit" for demonstrating efficiencies, an "innovation shield" for acquisitions of small innovative companies, and a seemingly more sympathetic stance towards large-scale combinations appear to be genuinely novel elements. That focus is understandable. But for businesses contemplating deals in fast-moving markets, a quieter shift may be equally significant: the way the Draft Guidelines treat the **counterfactual**.

The counterfactual is the world without the merger – the benchmark against which a transaction is assessed. The concept is not new. The 2004 and 2008 guidelines already required the European Commission to compare the conditions that would result from a merger with those that "would have prevailed without the merger".[3] What has changed is the more structured, yet potentially more flexible, approach to the counterfactual analysis in the Draft Guidelines. In markets reshaped by AI, regulatory change, the energy transition, structural declines in demand, supply-chain shocks, or new entry and expansion for example, today's market shares may be a poor guide to tomorrow's competition. Recent cases – e.g. *Illumina/Grail* on stifling innovation in the market for blood-based early cancer detection tests, *Microsoft/Activision* on cloud gaming dynamics, *Booking/eTraveli* on ecosystem effects – all turned in part on what the future would have looked like absent the deal.[4]

Most commentary has noted, correctly, that the Draft Guidelines are more forward-looking. This article explores how that shows up in a specific aspect of the Draft Guidelines: who bears the burden of proof for setting out the counterfactual, and how it will be evidenced.

In short, the Draft Guidelines suggest the Commission could be more receptive to an alternative counterfactual, different from the prevailing conditions of competition. Merging parties would need not only to argue that tomorrow's market will differ from today's, but they would need prove tomorrow's market with today's evidence.

II. WHAT THE DRAFT GUIDELINES SAY ABOUT THE COUNTERFACTUAL

A. Pre-Merger Conditions, but with Three Exceptions

The Draft Guidelines frame the counterfactual as part of the Commission's assessment of the causal link between the merger and its effects on competition. To do this, the Commission "carries out a forward-looking analysis of the effects of the merger on competition in comparison with the counterfactual, i.e. comparing the expected future market situation with and without the merger, absent efficiencies".[5] In most cases, "pre-merger conditions are an instructive benchmark".[6]

But pre-merger conditions "may not be reflective of normal or foreseeable future market conditions" – and therefore may not be the relevant counterfactual – in three circumstances:

- where there is "a sufficient degree of certainty on future changes in market conditions that are unrelated to the merger";
- where "the prevailing situation at the time of the merger is not representative of normal market conditions" (for example, because of temporary market distortions or shocks due to cyclical peaks, downturns or crises, such as war, trade conflict, health emergencies etc); or
- where "the target or the merging firms would have agreed to alternative merger(s) or agreement(s) absent the merger".

The third category is treated cautiously: the Commission "only exceptionally considers a specific alternative merger as part of the prevailing situation without the merger".[7] Even so, in scenarios where multiple buyers are vying for a target firm (e.g. in the case of Netflix, Paramount and Warner Brothers Discovery), or start-up exit processes, this issue may prove determinative.

2 We note that the Draft Guidelines are subject to change at the time of writing, with adoption of the final guidelines expected in Q4 2026.

3 European Commission (2004), Guidelines on the assessment of horizontal mergers, paragraph 9; European Commission (2008), Guidelines on the assessment of non-horizontal mergers, paragraph 20.

4 Case M.10188 – Illumina/Grail; Case M.10646 – *Microsoft/Activision Blizzard*; Case M.10615 – *Booking Holdings/eTraveli Group*.

5 European Commission (2025), Draft Merger Guidelines, paragraph 37.

6 European Commission (2025), Draft Merger Guidelines, paragraph 38.

7 European Commission (2025), Draft Merger Guidelines, paragraph 44.

In addition, the Commission may decide that an otherwise problematic merger is nevertheless compatible with the internal market if one of the merging parties is a failing firm, subject to meeting three "failing firm" criteria.[8]

B. A Wider List Of Permissible Futures

The first category – adjustments for future market conditions unrelated to the merger - is deliberately broad. When considering permissible "future events or market evolutions", the Commission may take into account "sufficiently certain plans of entry, expansion, or exit of firms in or from the market", "technological changes", "changes of customer behaviour and demand", "declining markets", "legal and regulatory changes", "upcoming products or services and future capabilities", and "similar future evolutions".[9] That is a list broad enough to matter across most sectors – but is particularly important in fast-moving sectors such as digital, AI, life sciences, defence and financial services, to name a few.

C. Flexibility, but not Speculation

Importantly, however, this is not an invitation for speculative counterfactuals designed to smooth the path for merger clearance. The Commission says that it "bases its analysis on matters of fact and law existing at the time of its merger review".[10] The European courts, as the Commission cites in the footnotes, have already held 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".[11]

Arguments must therefore be supported by robust, contemporaneous pre-deal evidence, including internal documents, with merging parties expected to provide supporting material early in the review process.

D. New Framework for an old Concept

It is worth being precise about what is and is not new. The 2004 Horizontal Guidelines already required the Commission to compare the merger with "the conditions that would have prevailed without the merger", with pre-merger conditions being the benchmark in most cases, and entry or exit independent of the merger forming an exception. The 2004 Horizontal Guidelines already permitted current market shares to be "adjusted to reflect reasonably certain future changes", and the 2008 Non-Horizontal Guidelines added adjustments for "market developments that result from impending regulatory changes".[12] The three-limbed failing firm criteria are also carried over.

What has changed is the expanded role of the counterfactual. The Draft Guidelines move the counterfactual from a single paragraph in the old guidelines to a central concept (spanning three pages) that is key for assessing market power (especially in more dynamic settings), investment competition, innovation competition, and the theory of benefit. In particular, the Draft Guidelines provide more clarity on when the Commission may depart from taking pre-merger conditions as the counterfactual, and also sets out when the Commission may adjust market power indicators to account for changes in the competitive environment that can be reasonably predicted with a sufficient degree of certainty. The counterfactual therefore sits at the heart of the Commission's "forward-looking approach to identifying market power",[13] assessing mergers from a more dynamic lens.

We set out the expanded importance of the counterfactual in the Draft Guidelines in more detail below.

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8 1) The failing firm would be forced out of the market because of financial difficulties in the near future, 2) there is no less anticompetitive alternative than the merger, 3) absent the merger, the assets of the failing firm would inevitably exit the market, cease to play a competitive role or the market share of the failing firm would in any event accrue to the acquirer. See European Commission (2025), Draft Merger Guidelines, paragraph 45-49.

9 European Commission (2025), Draft Merger Guidelines, paragraph 40.

10 European Commission (2025), Draft Merger Guidelines, paragraph 41.

11 European Commission (2025), Draft Merger Guidelines, footnote 75.

12 European Commission (2004), Guidelines on the assessment of horizontal mergers, paragraphs 9 and 15; European Commission (2008), Guidelines on the assessment of non-horizontal mergers, paragraph 20.

13 European Commission (2025), Draft Merger Guidelines, paragraph 58.

III. THE COUNTERFACTUAL NOW PLAYS A BIGGER ROLE

A. Dynamic Theories of Harm Need a Dynamic Baseline

The Draft Guidelines articulate a broader set of theories of harm than their 2004 and 2008 predecessors, and distinguish between "direct effects" and "dynamic effects". The seeds were already there – the old guidelines set out the concept of "important competitive force" and innovation as a parameter of competition – but the new framework formalises loss of investment and expansion competition, loss of innovation competition, loss of potential competition, entrenchment and ecosystem theories alongside the more traditional categories. These theories of harm may not be easily assessed by reference to today's market shares alone. The Commission says it "takes a forward-looking and dynamic view of competition", considering firms' "capabilities and incentives to compete for future business", and will, where appropriate, "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" (i.e., the counterfactual).[14]

B. Efficiencies Also Need a Counterfactual

A "theory of benefit" only works if the parties can show those benefits would not happen absent the merger (i.e. efficiencies must be merger-specific). For example, a telecoms operator arguing that a deal unlocks a major network investment must show why this investment would not take place absent the transaction. A pharmaceutical company arguing that a deal accelerates a clinical pipeline must show why the target could not commercialise the product as quickly alone or with another partner. An AI firm arguing that integration is needed to scale a product must show why licensing, partnership, funding or internal development would not achieve the same outcome. The Commission will give more evidentiary weight to evidence on dynamic efficiencies that is "precise, concrete and consistent", particularly if this can be established through documents prepared by third parties, independently of the merging companies.[15]

C. The Counterfactual Cuts Both Ways

The counterfactual is sometimes wrongly framed as a defence-side argument. In reality it is a neutral discipline. It prevents over-enforcement where current market shares exaggerate potential future harm, and prevents under-enforcement where current shares understate future competitive significance. A target with high turnover may be losing relevance to disruption; a target with little turnover may be a key owner of compute, data or talent which means it will likely be a stronger competitive force in the future. Both sides need the same forward-looking, evidence-based discipline.

D. The Counterfactual Paradox

There is a tension at the heart of all of this. The more dynamic a market is, the more important the counterfactual becomes – because the gap between today and tomorrow is wider. But the more dynamic a market is, the harder the counterfactual is to prove. AI, clean tech and pharma are textbook examples. The Draft Guidelines navigate this through the "sufficient degree of certainty" standard and the recognition that the Commission need not engage in speculative long-term forecasting. In practice, the burden of evidencing future market dynamics falls heavily on the party (the merging companies or the Commission) seeking to displace the pre-merger baseline. This is where greater certainty in the final guidelines would be helpful: what is the evidentiary standard for the "sufficient degree of certainty" test, and how does it compare to the evidentiary standards for demonstrating theories of harm and efficiencies?

IV. SIX COUNTERFACTUALS IN DYNAMIC SECTORS

The relevant counterfactual is rarely straightforward, particularly in fast-moving sectors. Most mergers require parties to consider several intersecting dimensions of the counterfactual. Here, we suggest six.

A. The Entry or Expansion Counterfactual

The Draft Guidelines distinguish entry or expansion expected "independently of the merger" – which forms part of the counterfactual – from "merger-induced" entry or expansion, which would not occur in the counterfactual by definition but may nonetheless soften anti-competitive ef-

14 European Commission (2025), Draft Merger Guidelines, paragraphs 53 and 58.

15 European Commission (2025), Draft Merger Guidelines, paragraph 329.

fects.[16] Parties cannot simply point to a rival's post-merger entry opportunity. Instead, the entry and expansion plans of rivals have to be predicted with an "equivalent degree of certainty as other forward-looking elements". In particular, entry or expansion must be sufficiently likely, timely and of sufficient scale and scope to counteract the increase in market power from the merger. The Commission states that in cases involving the loss of potential competition – a particular concern in digital markets, for example – the perceived threat of entry or expansion of other rivals can more often be a sufficient countervailing factor.

B. The Investment Counterfactual

The Draft Guidelines treat the loss of investment and expansion competition as a standalone theory of harm, capturing "the discontinuation, downsizing, delay or redirection of investment projects".[17] Importantly, "investment competition may be adversely impacted even if the merged entity were to proceed with its investment projects as planned pre-merger", because incentives change once a competitive constraint is removed.

At the same time, merger synergies could lead to dynamic efficiencies by lowering the incremental costs of investment or increasing the merged firm's ability and incentives to invest. However, these must be merger-specific and verifiable. Parties relying on an investment story therefore cannot stop at the merged firm's plan. They must show plausible investment paths absent the merger: build versus buy; standalone capacity to invest; whether overlapping infrastructure projects would have been pursued; and whether the target had the financial and managerial bandwidth to scale alone, for example.

C. The innovation counterfactual

The assessment of the loss of innovation competition, the Commission stresses, "is not focused on a specific future outcome, which may be uncertain, but on whether the merger significantly impedes the process of innovation rivalry".[18] In particular, the discontinuation, delay or redirection of R&D projects ("killer acquisitions" or "reverse killer acquisitions") may lead to a significant impediment to effective competition (SIEC).

However, the Draft Guidelines also recognise that this may be weighed against the incentives of the merged entity to redirect resources liberated by reducing overlapping R&D to "other promising innovation paths".[19] But that argument is itself a counterfactual claim. Parties relying on it must show that the redirected resources would not have gone to those promising paths absent the merger. This will require evidence on innovation incentives, not just innovation intentions, e.g. pipeline maps, R&D budget allocations, project termination histories, patent analysis, technical roadmaps, trial plans, engineering headcount and a credible story about where freed-up capacity will go.

D. The Technology Disruption Counterfactual

AI is the obvious example, but competitive dynamics within markets can change rapidly is several other industries such as cloud computing, automation, green technology, digital payments and new digital platforms. In markets that are nascent, fast-growing or characterised by short innovation cycles, the Commission may consider metrics other than market shares, "adjust current market shares to reflect reasonably certain future changes", or consider "future market share estimates".[20]

The Commission may also consider the "dynamic competitive potential" of firms, e.g. track record in innovation, investment or technological capabilities, access to inputs such as data and technology, etc. In some cases, the target may be both a future competitor and an input into faster innovation by the acquirer. The high valuation of a target by the purchaser, especially compared to its turnover, may indicate the significance of the company's dynamic competitive potential.

The challenge for merging parties (and the Commission) is to avoid both static pessimism and speculative techno-optimism. Instead, assessing the counterfactual in such fast-moving markets where technology disruption is possible – or even likely – will require credible evidence of adoption curves and customer migration patterns; third-party investment in alternative technologies; the technical and commercial readiness of would-be disruptors; switching costs, interoperability and multi-homing among customers; and the parties' and rivals' concrete product roadmaps.

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16 European Commission (2025), Draft Merger Guidelines, paragraphs 87-90.

17 European Commission (2025), Draft Merger Guidelines, paragraph 170.

18 European Commission (2025), Draft Merger Guidelines, paragraph 175.

19 European Commission (2025), Draft Merger Guidelines, paragraph 175.

20 European Commission (2025), Draft Merger Guidelines, paragraph 64.

E. The Regulatory Counterfactual

The Draft Guidelines identify "legal and regulatory changes" as future market evolutions that may be considered in the counterfactual.[21] This is particularly important in regulated sectors such as telecoms, energy and financial services, and increasingly, digital markets and AI.

However, merging parties should not simply point to speculative forthcoming regulation as a possible check on market power in the future. Instead, a credible counterfactual involving regulatory change will need to identify the specific legal instrument, expected timing, implementation pathway, anticipated market effect and documentary evidence – including regulator statements (e.g. annual plans setting out regulatory priorities or roadmaps) – that supports these claims.

F. The Disrupted Market Counterfactual

In cases where the prevailing market conditions may not be representative of normal times due to temporary market distortions or shocks (e.g. from cyclical peaks, downturns or crises like war, trade conflict, or pandemics), the Commission may look at market conditions that existed prior to the temporary disruption or that can reasonably be expected with a sufficient degree of certainty to exist once demand and supply have recovered from the disruption.[22]

In some sectors, things are unlikely to ever go back to normal following such disruption. Parties in disrupted sectors should therefore not accept pre-crisis conditions as the baseline without challenge – but this will require evidence of what normalisation will look like, e.g. third-party forecasts, contemporaneous internal planning documents, evidence of permanently changed consumer behaviour, etc.

V. PRACTICAL STEPS FOR BUSINESSES

A. The Counterfactual Audit

Merging parties should run a counterfactual audit before notification (and ideally, even before signing). The audit asks what each party would do absent the transaction, what rivals and customers would do, which claims rest on contemporaneous evidence rather than management belief, which are contradicted by internal documents, and which depend on the merger itself and therefore cannot be part of the counterfactual at all.

A good counterfactual file will pull together standalone business plans, pre-signing board papers, investment committee materials, capex and R&D forecasts, pipeline plans, customer-switching evidence, regulatory scenarios, competitor-monitoring materials, financing constraints, evidence of alternative transaction discussions, and third-party reports and market forecasts.

B. The Theory Of No-Causation

In addition to theories of harm and theories of benefit, merging parties should also consider a third concept: the theory of no-causation. Where prices would rise anyway absent the merger because of input shocks, where the target would exit anyway, where R&D would be redirected anyway, where capacity would close anyway, or where customers would switch anyway because of technology change, the alleged harm is not caused by the merger. Articulating that clearly, and evidencing it well, will become as important as articulating the deal's benefits. However, the Commission and the European Courts are clear that internal documents drawn up after or close to the announcement of the merger "have generally limited value in terms of exculpatory evidence".[23] In other words, this is not a free pass to "make things up".

C. Common Mistakes to Avoid

- **Confusing the counterfactual with the deal rationale.** A board paper saying the merger is attractive because it creates scale does not prove that scale could not be achieved absent the merger.
- **Overstating certainty.** In dynamic markets, credibility often comes from acknowledging uncertainty and explaining probabilities, dependencies and scenarios – not asserting that the future is fixed.
- **Relying solely on economist-built forecasts.** Models can help, but they need to be anchored in business evidence: actual plans, budgets, customer behaviour, and market facts.

21 European Commission (2025), Draft Merger Guidelines, paragraph 40.

22 European Commission (2025), Draft Merger Guidelines, paragraph 43.

23 European Commission (2025), Draft Merger Guidelines, footnote 54.

- **Assuming future change always helps the case for clearance.** A dynamic counterfactual can support clearance, but it can equally support intervention. If a target is likely to become a strong future competitor, this makes the deal riskier, not safer.
- **Leaving internal documents unexplained.** A single strategy slide can distort the narrative if taken out of context. Businesses should be ready to explain what documents meant, what assumptions they used and whether they reflected real plans or exploratory thinking.

VI. CONCLUSION: EVIDENCE BEATS IMAGINATION

The Draft Guidelines have built more flexibility into the counterfactual – but it is also clear that flexibility comes with evidential discipline. Forward-looking analysis must be grounded in matters of fact and law existing at the time of review; it cannot rest on elements whose long-term effects cannot be envisaged within a reasonable margin of error.

Businesses should treat the counterfactual as a core part of deal strategy, to be developed early, supported by contemporaneous evidence, tested against internal documents, and explained by the people who understand the business best.[24]

The future matters more than ever in the Draft Guidelines. But the most effective submission will not be the one that imagines the most attractive future with the merger. It will be the one that proves, with credible evidence, what the future would realistically have looked like without it.

24 See our earlier CPI article by Mark Caines and Kah Loon Tham: "Mind the Engagement Gap: Direct Business Testimony as a Competitive Edge in Merger Control" (Competition Policy International, August 2025)