COMPETITION LAW IN THE DIGITAL AGE

JULY 2026

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

EU DRAFT MERGER GUIDELINES – KEY POINTS FOR TECH COMPANIES

On 30 April 2026, the European Commission **published** the long-awaited draft of the new Merger Guidelines. Once enacted, they will replace the 2004 Horizontal Merger Guidelines and the 2008 Non-Horizontal Merger Guidelines. The draft Guidelines contain several aspects that may be of particular relevance for mergers involving tech companies, digital platforms, and ecosystems.

Innovation and dynamic competition

As the Commission had already foreshadowed, the draft Guidelines introduce a framework for the forward-looking assessment of a merger's impact on innovation and investment. In markets where "innovation or investment in new products, services or processes is an important parameter of competition", the Commission will go beyond a "static assessment of market power" and also consider a company's "dynamic competitive potential" (para. 80 of the Draft Guidelines).. The analysis of a party's competitive potential will include, according to the draft Guidelines, innovation-related factors such as R&D activities, products in development, patent holdings, synergy potentials, and access to data or user traffic that serves as "competitively significant input".

Conversely, if a merger leads to the loss of innovation, this may provide a dedicated theory of harm (paras. 175-191). A merger may lead to a significant impediment to effective competition (SIEC) if it "significantly impedes the process of innovation rivalry". This may be the case, inter alia, if the parties discontinue R&D projects or existing products as a result of the merger.

The draft Guidelines also introduce an "innovation shield" – a safe harbour under which the Commission "in principle" does not find a SIEC in relation to mergers involving small innovative companies such as start-ups or R&D projects, if certain requirements are met (para. 192). The specific conditions depend on the type of overlap the transaction creates (if any). Where, for example, the transaction leads to an overlap between one party's R&D project and the other's existing activities, the merging parties must not have a combined market share of more than 40% and at least three other firms with independent R&D projects of similar competitive potential must remain.

Network effects, data, and privacy

The draft Guidelines devote considerable attention to network effects and their role in the assessment of market power (paras. 153-157). According to the Commission, network effects can "exacerbate" competition concerns, for example if a merger results in a single supplier reaching a "critical scale" of supply. However, the draft Guidelines also clarify that network effects do not in themselves indicate a SIEC. The existence of multi-homing, interoperability, and data portability may serve as mitigating factors.

The draft Guidelines codify the Commission's approach to mergers that give the merged entity access to commercially sensitive information about rivals' activities – including "customer data, user data, or other competitively relevant data" (paras. 282-286). The draft Guidelines state that access to such data may give rise to a SIEC even in the absence of foreclosure.

The draft Guidelines also explicitly list privacy as a non-price parameter of competition (para. 20). In data-intensive industries, a merger may therefore be assessed for its impact on users' privacy protection.

Entrenchment, dynamic foreclosure, and killer acquisitions

A particularly noteworthy innovation is the codification of an "entrenchment" theory of harm (paras. 252-259). Under the draft Guidelines, "entrenchment occurs when the merged firm gains control over certain assets in a way that structurally creates or reinforces existing barriers to entry and expansion resulting in reduced market contestability". According to the draft Guidelines, a merger may result in a SIEC when it leads to the entrenchment of a dominant position within a "core market" or across closely related markets forming an "ecosystem". This theory of harm is based largely on the Commission's **decision** in *Booking/eTraveli*, against which an appeal is currently pending in the General Court. If this concept is included in the final version of the guidelines, it may be particularly important to some tech mergers as relevant acquired assets may include data or important customer acquisition channels or infrastructure. As an example of entrenchment, the Commission mentions that the acquirer may bundle acquired assets to create or extend an ecosystem, with the result that single-product competitors may be impeded.

The draft Guidelines also consolidate input, customer, and conglomerate foreclosure into a unified analytical framework (paras. 208-251), building on the existing three-pronged test of (i) ability, (ii) incentive, and (iii) effect on competition. In this context, the Commission introduces the concept of "dynamic foreclosure" incentives, meaning the progressive undermining of competitors by precluding them from accessing data, customers, or complementary services, or by restricting interoperability.

Finally, the draft Guidelines address the scrutiny of so-called "killer acquisitions" (paras. 193-207): a merger between an incumbent and a potential competitor may lead to a SIEC where it eliminates "an actual or future constraint on the incumbent". Potential competition exists where a firm has the ability and incentive to significantly constrain the incumbent. The Commission notes that it is not strictly necessary to find specific entry plans or decisions. According to the draft Guidelines, this is of particular relevance in "dynamic and fast-moving technology markets, where investment decisions may be made quickly and rather informally".

Outlook

The draft Guidelines were subject to public consultation and should now be revised by the Commission. While they are not yet final, they already provide important signals on how the Commission intends to assess mergers in digital and tech markets going forward.

FREE ACCESS TO WHATSAPP FOR RIVAL AI ASSISTANTS: THE EC IMPOSES INTERIM MEASURES ON META

The European Commission (EC) has adopted interim measures requiring Meta to restore free access to WhatsApp for rival general-purpose AI assistants (the Decision). The Decision, adopted on 9 June 2026, represents only the second time the EC has exercised its interim measures power under Regulation 1/2003 and signals a willingness to intervene swiftly in fast-moving digital and AI markets.

Background

Meta's product portfolio predominantly consists of social networking (Facebook, Instagram), consumer communications (WhatsApp, Messenger), and its own general-purpose AI assistant, Meta AI. The WhatsApp for Business API is the interface through which businesses connect their systems to WhatsApp.

On 15 October 2025, Meta announced an update to its WhatsApp Business Solution Terms which effectively prevented third-party general-purpose AI assistants from delivering their AI assistant services over the API, with effect from 15 January 2026. The EC formally opened an investigation into the matter for a potential alleged abuse of dominant position on 4 December 2025. The EC alleged that, as a result of the new policy, competing AI assistants may be blocked from reaching their customers through WhatsApp, while Meta's own AI service "Meta AI" would remain accessible to users on the platform.

After issuing a statement of objections in February 2026 and a supplementary statement of objections in April 2026, the EC adopted the interim measures decision on 9 June 2026. Article 8(1) of Regulation 1/2003 permits the EC to impose interim measures where there is, prima facie, an infringement of the competition rules and an urgent need for protective measures owing to a risk of serious and irreparable harm to competition. According to the EC, Meta's policy could constitute a "*refusal to provide access to an infrastructure developed for and previously open to third parties*". The EC further alleged that protective measures were urgently needed because Meta's policy "*risks harming competition at a key moment in time for the development of that market*".

Meta revised its policy in March 2026, replacing the access limitations applicable to third-party general-purpose AI assistants on WhatsApp with a pricing framework. However, the EC considered in the Decision that, at first sight, the pricing framework was in practice equivalent to the previous policy.

The Interim Measures

The **Decision** orders Meta to reinstate access for third-party general-purpose AI assistants to the WhatsApp for Business API under the same terms and conditions that were in place before 15 October 2025 across the whole of the EEA. Meta must maintain access on these terms until the EC adopts a final decision in the substantive antitrust proceedings, which remain ongoing. Meta has announced it will appeal the Decision.

The Decision illustrates that the EC is prepared to make use of the full range of tools available under its competition law enforcement framework. It may also signal a greater willingness to deploy interim measures in future cases, particularly in fast-moving digital and AI markets.

FRENCH SUPREME COURT DEFINITIVELY CONFIRMS ANTITRUST SANCTIONS AGAINST APPLE IN LANDMARK DISTRIBUTION CASE

On 13 May 2026, the French Cour de cassation (Supreme Court) **dismissed** all appeals and definitively upheld the condemnation of Apple and its wholesalers — Ingram Micro and Tech Data — for anticompetitive practices in the distribution of Apple-branded products in France.

On 16 March 2020, the French Competition Authority (Autorité de la concurrence), in **Decision n° 20-D-04**, had imposed a record fine totaling approximately €1.2 billion on Apple and its wholesalers, in respect of the following three infringements:

- **Customer-allocation mechanism**: Apple allocated products and customers between its two wholesalers, preventing retailers from putting the wholesalers into competition. Although presented as a logistical necessity to manage shortages during constraint periods such as new product launches, the practice was sanctioned as a restriction of competition by object.
- **Resale price maintenance**: Apple issued recommended prices that, according to the Autorité, were in reality imposed on its Apple Premium Reseller (APR) distributors.
- **Abuse of economic dependence**: a specificity of French law with no EU equivalent, prohibiting the exploitation of the state of economic dependence of a client or supplier even absent a dominant position on the relevant market. This case represents one of the rare successful applications of this provision.

On appeal, the Paris Court of Appeal (6 October 2022) upheld the customer-allocation and abuse of economic dependence findings but overturned the RPM decision, narrowing the scope of the infringements and reducing the overall fine to approximately €416 million. The Supreme Court has now confirmed that judgment on all counts, ending a 14-year enforcement saga.

Close scrutiny of the allocation mechanism, qualified as a restriction of competition by object

The Supreme Court upheld the finding that Apple's allocation system was not a set of soft recommendations but a concerted mechanism of customer and product allocation amounting to a hardcore restriction within the meaning of the applicable vertical block exemption regulations and a by-object restriction of competition. Apple's justification based on supply constraints was unavailing where less restrictive alternatives existed, particularly as the alleged shortages were in part organized by Apple itself and the mechanism was maintained beyond any genuine constraint periods. The argument that the allocation instructions had not been followed in practice, supported by economic studies showing deviations between -59% and +26%, was similarly found insufficient to disprove the agreement. The Court found that the agreement had been established by a body of evidence including direct proof – which the Court held could include contemporaneous emails, not merely formal contractual clauses.

A rare and significant application of the French abuse of economic dependence provision

The Court also confirmed the abuse of economic dependence finding. It rejected Apple's quantitative approach - based on its overall market share (16.3% by volume, behind Samsung at 27.2%) - and approved a qualitative analysis grounded in the brand's ecosystem, including brand loyalty, high switching costs and contractual lock-in effects. On this basis, the APR distributors, deriving between 78 and 90% of their revenue from Apple products, were found to be in a state of near-total economic dependence, with no commercially viable alternative available within a reasonable time. The abuse consisted in discriminatory supply conditions for the APRs, which favoured Apple's own retail channels and placed the APRs at a competitive disadvantage.

The Court left open whether abuse of economic dependence requires an appreciable effect on competition. While the Court of Appeal had ruled out this threshold, the Supreme Court treated this reasoning as superfluous and instead based its decision on demonstrated tangible effects – namely, as evidenced in the Court of Appeal judgment, the fall in the APR share of sales of Apple-branded products (excluding iPhones) from 13% in 2008 to under 6% in 2013, as Apple's own channels expanded.

Resale price maintenance: rejection of the RPM allegation
Absent any contractual clause imposing minimum resale prices, the Autorité had built its RPM case on indirect evidence, including the narrow gap between the reseller purchase price and Apple's list price and the near-perfect alignment of APR retail prices with Apple's own. The Court of Appeal found this insufficient on the facts. Absent direct evidence of adherence to a given price level and any price policing or retaliatory measures, Apple's price transparency did not amount to an invitation to adhere to imposed prices, the observed price parallelism being better explained by structural market characteristics – including narrow APR margins and inter-brand competitive pressure - than by an agreement on prices. While the Autorité had challenged this dismissal and sought to reinstate the RPM finding, the Court of cassation confirmed the Court of Appeal's sovereign appreciation of the evidence and the application of a strict standard of proof in this respect.

Procedural takeaways: access to the file and business secrets
Apple and its wholesalers also raised procedural objections, arguing that the Autorité had breached their defence rights by relying, before the Court of Appeal, on documents in the file that it had not specifically discussed during the administrative phase, including documents protected as business secrets. The Court rejected these objections, holding (i) that the documents were on file and accessible – the Autorité is under no obligation, in its decision, to cite every document on file and is not precluded from invoking such documents on appeal, provided they remain within the scope of the objections and introduce no new factual element ; and (ii) with respect to the protection of business secrets, that the parties could have sought to lift the protection and could not complain of an information gap of their own making – thus placing the onus on the parties to engage actively with the evidence.

HP INK CARTRIDGES AS CLICKBAIT FOR PRIVATE LABEL CARTRIDGES: ONLINE DISTRIBUTORS RISK EXCLUSION

Hewlett Packard (HP) is a manufacturer of printers and printing supplies, such as ink cartridges. HP sells these printers and cartridges under its own brand. Digital Revolution is an operator of web shops in various Member States under the trade name 123inkt. Through these web shops it also sells printers and cartridges, including cartridges for various HP printer models. These comprise both cartridges from HP and private label cartridges under its own trade name that can be used in HP printers.

HP printers contain firmware (software programmed into a device) that controls the printer, while both HP printers and cartridges contain secure chips. The firmware ensures that the two sets of chips can communicate with each other. This enables a check, during which the chip on a cartridge sends a secret code to the HP printer. If the check is successful, the firmware allows the cartridge to be used. If the check is not successful, the firmware blocks the use of the cartridge, which cannot be used on the printer. Private label cartridges can also be equipped with a chip that can communicate with an HP printer. At some point, HP started periodically changing the secret code, requiring the use of a particular authentication system called ‘Dynamic Security’. This system, over time, makes private label cartridges redundant for use in HP printers. When selling HP printers that are equipped with Dynamic Security, 123inkt places letters in the printer boxes advising customers to disable the printers’ automatic updates to keep using private label cartridges.

In addition to Dynamic Security, since 2020, HP has used a selective distribution system for its products in the European Economic Area (EEA), Switzerland and the United Kingdom. Only authorised distributors may buy HP products and may resell them only to other authorised partners or end users. To become an authorised distributor, companies must register online and accept the contractual criteria. HP then records them as authorised distributors of its selective distribution system. This easy-to-complete process has resulted in several thousand authorised HP distributors across Europe, including 123inkt.

However, HP considered some distribution practices adopted by 123inkt as problematic. To begin with, when a customer comes across an original HP cartridge on one of 123inkt’s web shops, a red message appears that advises that customer to choose a cheaper 123inkt private label cartridge instead. Next, after a customer adds an original HP cartridge to the online shopping basket, an offer for a private label cartridge appears directly below the product, with a “replace” button. Finally, when a customer has bought an original HP cartridge from 123inkt, an employee actually calls the customer and offers to exchange the HP cartridges for private label cartridges. According to HP, these practices constitute bait-and-switch conduct. In addition, HP carried out test purchases via the 123inkt website and discovered HP cartridges being sold without packaging or with an expired manufacturer’s warranty, and counterfeit HP cartridges. So, HP ended the distribution agreement in 2023.

In response to these steps taken by HP, 123inkt initiated two separate stand-alone actions based on, among other things, competition law. First, it claimed a prohibition on Dynamic Security in the firmware of HP printers, arguing that this constituted an abuse of a dominant position infringing Article 102 TFEU. Second, it claimed that HP’s selective distribution system was void because it infringed Article 101(1) TFEU’s prohibition on anticompetitive agreements and did not meet the criteria for an exception under the ECJ’s **1977 Metro judgment.**

In the first procedure, the Dutch Supreme Court dismissed the claims of 123inkt in **June 2026** because the claimant did not fulfil its burden of substantiating the relevant market definition it advocated, which is a separate product market for cartridges of each HP printer model (aftermarkets on which HP holds a high market share). The Court noted that instead of general references to prohibitions, broad market definitions and market share percentages, a carefully conducted market definition exercise was needed, as well as insight into market structure, characteristics and the actual functioning of the relevant market (or markets) and the effect of the alleged infringement on those markets. Due to the claimant not properly discharging its burden of proof, the Court found that it still appears plausible that there is a larger system market for printing systems as the European Commission held in the **EFIM case** (which includes printers and the aftermarket of cartridges) and on which HP does not have a dominant position that it can potentially abuse. This is because buyers can and do compare printers, including lifetime use costs covering costs of cartridges. Excessive cartridge prices may lead them to switch to other printer brands. In addition, the Court held that Dynamic Security is a lawful method to exclude counterfeit cartridges.

As for the second procedure on selective distribution, HP invoked the exception for selective distribution systems from the prohibition of anticompetitive agreements of Article 101 TFEU as affirmed by the ECJ in its Metro judgment. The Amsterdam District Court **held** that the characteristics of HP's printers and cartridges do not make a selective distribution system necessary because these products are not high quality, high tech or luxury products, nor products that otherwise justify selective distribution. Therefore, the exception developed by the ECJ in its Metro judgment does not apply.

So, the District Court still had to decide if HP's selective distribution system infringed Article 101 by object or by effect. This is in line with the framework for assessment developed by the UK Competition Appeal Tribunal (CAT) in the **2024 Up and Running judgment** to which the Amsterdam District Court explicitly referred. Notably, the UK Court of Appeal overturned the CAT's ruling in **May 2026** but the rule remains unchanged: a selective distribution system which does not meet the Metro criteria does not, of itself, indicate in law that such a system is to be treated as a by-object or by-effect restriction of competition.

However, similar to not fulfilling its burden of proof for substantiating its proposed relevant market definition in the first procedure, 123inkt failed to meet the burden of proving a breach of the prohibition of Article 101(1) TFEU in the second procedure. Whether a selective distribution system is a restriction of competition by object must be assessed in light of the wording of the agreement, its legal and economic context (including the nature of the products or services and the market structure) and, where relevant, its objectives. According to the District Court in its **February 2026 judgment**, 123inkt did not put forward concrete facts or circumstances on this point. Its general arguments that a ban on sales to non authorised distributors is a by-object restriction and that every selective distribution system is by definition restrictive of competition are not sufficient; a fortiori, 123inkt did not put forward sufficient concrete facts for a by-effect restriction. The District Court noted that HP's system is in principle open to all, that the criteria are only mildly restrictive and that cumulative anti competitive effects are not plausible. 123inkt therefore did not put forward enough evidence to demonstrate that the system is by its nature harmful to competition and therefore prohibited. The District Court therefore dismissed 123inkt's claim that HP's selective distribution system infringed Article 101(1) TFEU, explaining that it is not enough to show that the system did not meet the Metro criteria as it was still required to have an object or effect of restricting competition, which had not been proved.

THE ITALIAN COMPETITION AUTHORITY LAUNCHES MARKET INVESTIGATION INTO THE *QUANTUM COMPUTING* SECTOR

On 10 March 2026, the Italian Competition Authority (ICA) adopted **decision no. 31872** (Opening Decision), initiating a sector inquiry into quantum computing and launching a public consultation to gather stakeholders' views on the competition issues raised by the development of these technologies.

Quantum computing is an innovative computing paradigm based on quantum mechanics, capable of processing information in fundamentally different ways compared to classical systems. By relying on qubits rather than traditional bits, quantum computing has the potential to deliver a step change in computational capacity, with potentially disruptive applications across a wide range of sectors (e.g. cybersecurity, biotechnology, materials science, process optimisation and fintech).

The ICA's inquiry reflects the view that quantum computing has reached a critical stage of development, where the competitive dynamics likely to shape the sector are already beginning to emerge, even though the relevant markets have not yet fully consolidated. The ICA therefore seeks to assess the emerging competitive landscape at an early stage and to identify potential distortions before they materialise.

In particular, the Opening Decision identifies four main areas of potential concern:

- Quantum computing is costly and complex to develop, with the result that only a limited number of large digital players may be able to compete effectively. If quantum computing services are offered through existing cloud infrastructures, these players may be able to leverage their existing market positions into quantum computing and increase customer dependence on a single provider.
- The sector is still in the process of being shaped, as the main technologies, programming languages and development tools have not yet stabilised. Firms are therefore also competing to influence the standards and technological trajectories that the sector will follow. Those that succeed may acquire a competitive advantage that is difficult for rivals to overcome.
- The rapid growth in quantum-related patents may make it harder for new players to enter the market, especially if key technologies are locked up at an early stage.
- The ICA is concerned that large companies may acquire promising start-ups before they grow into real competitors, reducing competition at a stage where the market is still developing (so-called killer acquisitions).

The inquiry forms part of the broader context of the ICA's enhanced enforcement powers under Article 1(5) of Decree-Law No. 104/2023. Under that provision, the Authority may impose corrective measures - including structural or behavioural remedies - following a sector inquiry, even in the absence of a finding of an antitrust infringement.

The inquiry is expected to be completed by 31 December 2026.

COMPETITION LAW IN THE DIGITAL AGE

JULY 2026

BONELLIEREDE	**www.belex.com** Milan, Genoa, Rome, Addis Ababa*, Brussels, Cairo*, Dubai, London *: *in cooperation with local law firm*
BREDIN PRAT	**www.bredinprat.com** Paris, Brussels
DE BRAUW	**www.debrauw.com** Amsterdam, Brussels, London, Singapore
HENGELER MUELLER	**www.hengeler.com** Frankfurt, Berlin, Dusseldorf, Munich, Brussels, London
SLAUGHTER AND MAY	**www.slaughterandmay.com** London, Beijing, Brussels, Hong Kong
URÍA MENÉNDEZ	**www.uria.com** Madrid, Barcelona, Bilbao, Bogotá, Brussels, Lima, Lisbon, London, Porto, Santiago, Valencia