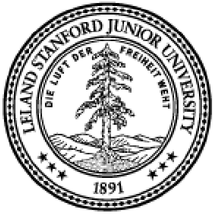

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The Challenge of Merger Control in Digital Markets and the European Commission's New Guidance on Article 22 EUMR

Mariana Martins

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Abstract

In traditional markets, merger control rules have proved to be a reliable and effective tool to assess possible anti-competitive effects resulting from concentrations. Nevertheless, the rise of the digital economy and the special features particular to this industry have brought significant challenges to competition authorities around the world, which have struggled assessing these transactions while applying traditional merger control institutes. Moreover, in the last years, strong technology undertakings have engaged in aggressive M&A strategies to acquire small innovative companies with competitive potential and with that, strengthen their dominant position in the market. Some of these transactions, also called "killer acquisitions", are conducted with the sole purpose of discontinuing the target's innovation projects and preempting future competition. Despite their evident negative effect on competition, most of them do not meet the notification turnover thresholds and therefore escape the scrutiny of the European Union and Member States' merger control regime. This issue suggested a possible enforcement gap in the merger control rules, and for the past years, both European Commission (EC) and National Competition Authorities (NCAs) have tried to address the problem, until recently the EC took a step further regarding this matter. In March 2021, the European Commission published new guidance on the application of the referral mechanism set out in Article 22 of the EU Merger Regulation (EUMR) allowing for concentrations falling below national merger thresholds to be referred to the EC. The new approach, however, has shared opinions. This study aims to discuss the challenge of merger control in such digital markets and to analyze the new referral guidance designed as chosen method to solve this enforcement issue. Moreover, the possible implications of this measure for undertakings planning to conclude M&A transactions in the European Market will be discussed. In order to get to the results, qualitative research will be conducted by analyzing the correspondent set of rules, literature, important cases, and M&A statistics.

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LIST OF ABBREVIATIONS

API	Application Programming Interface
CMA	Competition and Markets Authority
CERRE	Centre on Regulation in Europe
DMA	Digital Markets Act
EC	European Commission
EUMR	European Union Merger Regulation
FTC	Federal Trade Commission
GAFA	Google, Apple, Facebook and Amazon
GAFAM	Google, Apple, Facebook, Amazon and Microsoft
GDPR	General Data Protection Regulation
IP	Intellectual Property
M&A	Mergers & Acquisitions
NCA	National Competition Authority
R&D	Research and Development
SIEC	Significant Impediment to Effective Competition
SSNIP	Small but Significant Non-Transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union

1 INTRODUCTION

Merger control is a fundamental key in the task of protecting competition within a market, and this is of utmost importance because competitive markets attract investments, lead to lower prices, higher quality of goods and services and incentivize innovation. In the European Union, it is regulated by the European Union Merger Regulation (EUMR) of 2004 which establishes a set of rules and procedures to be observed by companies, providing guidance to National Competition Authorities (NCAs) and sets the European Commission (EC) as the main guardian and protector of competition policies within the internal market.

In traditional markets, merger control has proved to be an effective *ex-ante* tool to identify potential anti-competitive mergers. However, market developments brought by the internet and digitalization have transformed how companies in the so-called digital markets conduct their businesses. The rise of online platforms led also to a number of particular characteristics, not common (or at least not in the same proportion) in brick-and-mortar businesses. As a result, competitive dynamics are changing, with digital technologies reshaping existing markets and giving rise to new services.[1]

In digital markets, online platforms play an important role and their particularities not only have led to the creation and rapid strengthening of dominant players, but have also posed challenges to antitrust authorities regarding new anti-competitive practices. In this context, these special features have also called into question the effectiveness of the existing merger control tools in the approach to digital markets.

This dilemma gained special repercussion because in the past years, a great number of acquisitions by big tech players have been observed. Between 2001 and 2018, e.g., Google alone bought an average of one firm per month, every month.[2] Despite its potential anti-

[1] Siyou Zhou, 'Merger Control in Digital Era' (2021) International Federation of European Law (FIDE) Congress < http://dx.doi.org/10.2139/ssrn.3976594> Accessed 10 March 2022
[2] 'List of mergers and acquisitions by Alphabet' (*Wikipedia*) <https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet > cited in Marc Bourreau and

competitive effects, most of these transactions were not reviewed by the European Commission or the competent NCAs as they did not meet the turnover-based jurisdictional threshold.

Accordingly, it was observed that some of these acquisitions by tech giants involved a young innovative target firm and could be taking place with the sole purpose of discontinuing the target's innovation project and preempting future competition.[3] The arrival of the concept of the so-called "killer acquisitions", which were escaping the scrutiny of merger control, increased the concern that the approach towards digital concentrations was being overly permissive and was not meeting the new market needs.[4]

As a result, a progressive debate started regarding the effectiveness of the EU turnover-based threshold and whether it was the most appropriate method to capture these transactions involving high-value nascent firms that generated low or zero turnover but that could harm competition in the internal market. In the light of a possible enforcement gap regarding these transactions, NCAs and the Commission started discussing possible solutions to address the problem.

After holding a number of consultations regarding the matter, in March 2020 the Commission published a new Guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases, which provides a "reinterpretation" of the existing referral mechanism under Article 22 and, according to this document, it would also apply to cases where neither the Commission nor the Member States have jurisdiction. The impacts of such policy shift have been amply criticized and discussed among specialists.

Alexandre de Steel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (2020) Centre on Regulation in Europe (CERRE), 5 < https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_merger_control_EU_2020.pdf> Accessed 15 May 2022

[3] Ibid 3

[4] OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control – Background Note' (2020) Organization for Economic Co-operation and Development (OECD) DAF/COMP(2020), 5 <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> Accessed 15 May 2022

Thus, this study aims to provide an analysis of merger control in digital markets and the challenges brought by it which motivated the new interpretation of Article 22 EUMR provided by the Commission's Guidance; and at last, assess the perceived impacts and impressions of this document. For that, qualitative research will be conducted by analysing the correspondent set of rules, literature, important cases, and M&A statistics.

In Chapter two, the basic topics of merger control in the EU will be outlined, so important concepts for this research such as concentration, community dimension, the allocation of jurisdiction and the referral system can be understood. In Chapter three, the main characteristics of digital markets will be presented so the structural challenges brought by them can be analysed in connection with real-life examples.

In Chapter four, the study will focus on merger control in digital markets by presenting how traditional assessment tools such as market power, market definition and theories of harm have to be adapted to follow the recent developments. Moreover, the M&A activities of the main tech undertakings will be examined, along with the concept of killer acquisitions, so the idea of a perceived enforcement gap can be developed. Regarding that, it will also be discussed how NCAs and the Commission have put efforts to address the issue.

In Chapter five, the Commission's Guidance on Article 22 EUMR will be analysed along with the main changes brought by it, the potential impacts for businesses and how they are supposed to prepare for them. Finally, after having considered the context and the main issues related to merger control in digital markets and the Guidance, initial conclusion can be done regarding the estimated effectiveness of this new measure to address the perceived enforcement gap brought by killer acquisitions and other anti-competitive merger practices.

2 MERGER CONTROL IN THE EUROPEAN UNION

Merger control is one of the core areas of the European Union competition policies. It is an *ex-ante* system designed to prevent mergers, acquisitions and other forms of concentrations that can lead to the creation or strengthening of a dominant position. The objective of examining these mergers is to analyze if they have the potential to generate harmful effects on competition between undertakings and, as consequence, deprive consumers of important benefits that can arise in an effectively competitive market, such as innovation, low prices, and high-quality goods.[5]

The importance of M&A activities for the single market is not denied. They can increase investment in the European economy and the number of competitive players. It is also assumed that the new concentration will have more profit, and thus, will be able to perform bigger investments in innovation, as there is more possibility of diversification of risk through different revenue streams. It can also protect industries from closing, increase efficiency, and often improves the quality of the products/services offered.[6]

However, as explained, some of these combinations may have the effect of a substantial lessening of competition, by taking a player off the market, or can lead to the creation of a monopoly. In a short term, these anti-competitive mergers can result in higher prices, and will diminish the purchaser's power. In a long term, they will reduce incentives to increase efficiency and innovate in the industry affected by it. The challenge, therefore, was to create a system that could embrace and ensure the positive impacts of M&A activities for the European economy at its maximum while protecting competitiveness in the markets concerned.[7]

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[5] Moritz Lorenz, *An introduction to EU Competition Law* (Cambridge University Press 2013) 242-43

[6] John Coffey, Valerie Garrow and Linda Holbeche *Reaping the Benefits of Mergers and Acquisitions: In search of the golden fleece* (Routledge 2002) 8

[7] Carles Esteva Moso, 'EU Merger Control: The Big Picture' (2014) European Commission, 3 <https://ec.europa.eu/competition/speeches/text/sp2014_06_en.pdf> Accessed 30 March 2022

The Council Regulation (EC) No 139/2004, the EU Merger Regulation (EUMR), is the legal basis for merger control in the European Union. The EUMR sets a number of rules and legal instruments governing those concentrations which have a community dimension and can significantly hinder competition in the common market. In addition, there is a Consolidated Jurisdiction Notice [8] and Guidelines which supplement the EUMR framework and provide more details and guidance on both procedural and substantive aspects of the merger control rules in the European Union.

2.1 Jurisdiction for Merger Control

In the European Union, jurisdiction for merger control is allocated between the European Commission and the National Competition Authorities (NCAs) with a clear division of competences. The general rule is that the EC has exclusive power to assess all concentrations with a Community dimension. These are mergers that go beyond the national borders, and because of their potential impact on competition in the internal market, need to be examined solely by the European Commission.[9] In contrast, if the merger does not fulfill the previous requirements, the control is to be done by the NCAs.

This is called the "one-stop-shop" system, which has the subsidiarity principle as its base. In other words, as the Commission is the institution with the most appropriate resources to analyze a concentration with a community-level impact and thus, is more suitable to avoid negative impacts in competition, those cases should be referred to it, and what does not fulfill these requirements, shall be directed to national merger control.[10] This is confirmed by Article 21(2) EUMR, which establishes that, subject to review by EU courts, only the Commission may

[8] Commission, 'Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings' COM (2008) OJ C95/01 (Jurisdictional Notice)
[9] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJL24/1 (EUMR) arts 1 (1) and 4 (1)
[10] Ibid recital 8

take decisions with regard to the application of the EUMR and the Member States shall not apply their national laws to such concentrations (Article 21(3) EUMR).

The idea is to avoid that undertakings intending to merge have to notify different national authorities, which can even lead to conflictive assessments. With this, it is possible to reduce costs and bureaucracy, and provide more legal certainty to the process.[11]

By complying with this system, the Member States contribute to empowering the single market integration and to the formation of a strong and organized merger control instrument in both European and global level, in which the Commission occupies a central role, while keeping their right to assess the transactions with essential national impact.[12]

Therefore, in the cases where the EUMR attributes exclusive jurisdiction to the European Commission, Member States cannot apply their national merger legislation, except in specific circumstances in which both the EC is allowed to assess concentrations that do not meet the community threshold requirement, and the NCAs can review mergers which go beyond the scope of their domestic merger control.

One of these exceptions is presented in Article 21 (4) EUMR, which allows the Member States to take appropriate measures to protect their legitimate national interests and that are compatible with the general principles and provisions of the Community Law. The Merger Regulation allows the Member States to prohibit concentrations that would be otherwise allowed by the Commission in three scenarios of legitimate interest: public security and defence (actions towards ensuring public security interests); plurality of the media (to guarantee plurality of information and opinions and preserve the independence of different sources of opinion); and prudential rules (related to the financial sector and the interest of the Member States of blocking concentrations that would put in risk the financial system).

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[11] Jurisdictional Notice, paras 11-12

[12] Edurne Navarro and others, *MERGER CONTROL IN THE EUROPEAN UNION: Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 66

The other exception to the one-stop-shop rule is the possibility of reallocation of jurisdiction presented by the referral system, which will be further discussed in this study.

2.2 Jurisdictional elements for the European Commission's Assessment

The EUMR sets a two-phase test in the assessment to define the Commission's jurisdiction. To start, a transaction must meet the requirements to be considered a concentration set out in Article 3; and secondly, such concentration must meet the turnover thresholds defined in Article 1.[13] If the transaction succeeds in this test, it is assumed that the European Commission is the most suitable authority to review it, and has, then, exclusivity jurisdiction for it, with some referral exceptions.

2.2.1 Concentration

The notion of concentration is defined in Recital 20 of the EU Merger Regulation and covers all operations between undertakings that result in a lasting change of control of the companies concerned and in the structure of the market. Article 3 EUMR continues the development of the concept and sets out that a concentration may arise from mergers, acquisitions of sole or joint control, and finally, the creation of an economically autonomous joint venture.

A merger is a corporate strategy that occurs when two or more undertakings combine into a new legal entity with new ownership and management structure, and cease to exist as separate ones.[14] It can also occur when one undertaking is absorbed by another, and no longer exists with autonomy, while the latter keeps its legal nature. [15] A recent and well-known

[13] Jurisdictional Notice, para 124
[14] Patrick A. Gaughan, *Mergers, Acquisitions & Corporate Restructurings* (7th edn, Wiley 2015) 11-14
[15] Jurisdictional Notice, para 9

case of two enterprises combining into one is the merger of *Peugeot S.A. (PSA)* and *Fiat Chrysler Automobiles (FCA)* into *Stellantis*, approved by the European Commission in 2020.[16]

Acquisitions, on the other hand, although commonly treated as mergers, are actually a different legal transaction in which one company buys enough amounts of shares or assets to gain control of the other. In this case, the larger and financially stronger company takes over the small one, which ceases to legally exist as a separate entity as it becomes part of this other undertaking, and no new organization is created. [17] Regarding this kind of concentration, Article 3 (1) (b) EUMR clarifies that the acquisition can be done by the means of purchasing security or assets, by contract, or any other compatible form, where the acquirer company is to perform direct or indirect control of the whole or part of the other undertaking.

The idea of control, according to Article 3 (2) EUMR is to be understood as rights, contracts, or any other means which confer the possibility of performing decisive influence over an undertaking on a lasting basis, in particular by (a) ownership or the right to use all assets of a company or (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. This power to exercise decisive influence is strictly connected to the decision-making power of a party over the target company, e.g., of being able to decide on matters such as annual budget, the appointment of senior management, changes in the business plan, etc. [18]

The simple acquisition of a shareholding in another company is not sufficient to fall under the scope of merger control rules, unless this transaction confers to the acquirer sole or joint control over the target company.[19] Moreover, such control has to be acquired on a

[16] *FCA/PSA* (Case M.9730), Commission Decision 167/09/EC [2020] OJ L167/18
[17] Coffey, Garrow and Holbeche (n 6) 4-5
[18] Ovidio Ioan Dumitru, *European Merger Control* (ADJURIS – International Academic Publisher 2020) 59
[19] Ulrich Von Koppenfels, 'A Fresh Look at the EU Merger Regulation? The European Commission's White Paper ''Towards More Effective EU Merger Control'' (2015) 36 Liverpool Law Rev, 9 <https://doi.org/10.1007/s10991-015-9163-x> accessed 20 March 2022

lasting basis, meaning that transactions that result on a temporary change of control are not covered by the regulation.[20]

Pursuant to Article 3 (4) EUMR, joint ventures that carry out functions of an autonomous economic entity on a lasting basis will also fall under the scrutiny of merger control regulation. The temporal element of the permanent nature of the change has not been defined as a fixed number by the European Commission in its decisions, but rather as the result of a case-by-case assessment. Although there is no need to operate for an indefinite period of time, the EC has decided that three years are not enough for the purpose of proving the lasting basis nature of control. Regarding the autonomy requirement, it is important to note that the structural change in the undertaking(s) concerned cannot be just an instrument to boost the competitive activity of the undertakings that created the joint venture, but instead must lead to the appearance on the market of a new player, legally and economically independent of the ones which formed it.[21]

2.2.2 Community Dimension

A concentration will be considered to have a community dimension when its activities can lead to significant structural market changes with effects that go beyond the national borders of the Member States and can hinder competition in the common market.[22]

The concern for the transnationality effects of concentrations is, in fact, a result of one of the main objectives of the merger control system in the European Union, which is supporting the process of integration of national economies in the single market.[23] Such integration, as well as the further development of the internal market, is not possible, however,

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[20] Jurisdictional Notice, para 28
[21] Navarro and others, (n 12) 8-12
[22] EUMR art 2
[23] Navarro and others, (n 12) 65-66

if undistorted competition is not guaranteed at a community level,[24] and this guarantor role is occupied by the European Commission.

In a more practical approach, article 1 EUMR defines the union dimension of a concentration based on a threshold quantitative system, that when triggered, leads to the application of the merger control rules. These thresholds are based on a turnover calculation, which is the amount resulting from the sale of products and provision of services.[25] Its goal is to facilitate the assessment of the transactions whose turnovers exceed the established in the regulation, and thus fall under the scrutiny of merger control by the European Commission, in an application of the "one-stop-shop" rule. Moreover, following the principle of subsidiarity, the concentrations which do not meet the thresholds would be subject to the National Competition Authorities' jurisdiction, as explained before.

According to Article 1 (2) EUMR, a concentration is considered to have a community dimension if the following thresholds are met simultaneously: the aggregate worldwide turnover of all the undertakings concerned exceeds EUR 5000 million; the aggregate Community-wide turnover of at least two of the undertakings concerned surpasses EUR 250 million; neither of the undertakings concerned achieve more than two-thirds of their EU turnover within one and the same Member State.

In the telecommunications sector, the takeover whereby *Telenor,* a company from Norway, acquired sole control of the whole of *DNA,*[26] Finland, is a concentration with a community dimension within the meaning of Article 1 (2) and had to be assessed, therefore, by the European Commission. In this case, no competition concerns were identified in the affected markets.

[24] EUMR recital 2

[25] EUMR art 5

[26] *Telenor / DNA* (Case M.9370) Commission Decision 400/02/EC [2019] OJ L400/2

If such turnover thresholds are not met, a second calculation is introduced in paragraph 3, according to which a concentration will also have a community dimension when: the combined worldwide turnover of all the undertakings concerned exceeds EUR 2500 million; the combined turnover of all the undertakings concerned is more than EUR 100 million in each of at least three Member States; the combined turnover of at least two of the undertakings concerned is more than EUR 25 million in each of at least three Member States already identified; the aggregate EU-wide turnover of at least two of the undertakings concerned exceeds EUR 100 million; neither of the undertakings concerned achieves more than two-thirds of its EU turnover within one and the same Member State.

Although this complex system has the advantage of providing somewhat administrative ease in the assessment of which mergers would fall under the scrutiny of the European Commission, the fact that the thresholds were set too high was seen as a disadvantage. For that reason, paragraph 3 of Article 1 EUMR was inserted with the intent to secure an alternative route to establishing the community dimension when the requirements of paragraph 2 are not met, but lower thresholds are achieved in a wider set of Member States.

Regarding the calculation of thresholds, three elements must be taken into consideration: the undertakings concerned, the turnover calculation and the geographical allocation of turnover. For the purposes of determining jurisdiction, "undertakings concerned" will be the parties directly participating in a concentration within the meaning of Article 3 (1). On this matter, the Jurisdictional Notice provides interpretive guidance on determining the undertakings concerned in the scenarios of mergers, acquisition of sole and joint control, acquisition of control by a joint venture, as well as other specific situations.[27]

Article 5 of the Merger Regulation sets out the rules for the turnover calculation. According to it, when defining the amounts derived by the undertakings concerned, the data

[27] Jurisdictional Notice, paras 129 - 153

from the closest audited financial year to the transaction will be taken into consideration. The turnover can only be associated with the sale of products and provision of services related to the ordinary activities of the undertakings, and any sales rebates, value-added tax and other taxes directly related to the turnover shall be deducted from it. In other words, the turnover taken into account during this process is "net". Additionally, the whole turnover of all companies under the sole control of an undertaking concerned must be aggregated.

The Jurisdictional Notice clarifies that the main objective of the thresholds defined in the Merger Regulation is to identify concentrations that have sufficient turnover in the Community to have a union dimension, and that are transnational by nature, and for that the turnover is to be allocated geographically to the Union and to the individual Member States.[28] Moreover, Article 5 (1) EUMR states that the location of the consumer at the time of the transaction will be the decisive factor when geographically allocating the turnover.

2.3 Referral system

As explained previously, the division of competences regarding merger control in the European Union follows the central principle of the "one-stop-shop rule", in which concentrations having a Union dimension, according to the threshold system, are to be investigated by the Commission, whereas the remaining ones, would be assessed by the Member States, in the case national thresholds are met.

However, in some specific cases, the EUMR allows the Commission to refer a concentration having a Community dimension to the National Competition Authorities of Member States. This mechanism can also occur in the reverse direction, when the Member States refer to the Commission cases that, considering the threshold, should not be assessed at a Union level.

[28] Jurisdictional Notice, para 195

According to the Commission Notice on Case Referral in respect of concentrations,[29] the referral system was designed to facilitate the allocation of cases between the Commission and Member States consistent with the one-stop-shop rule and the principle of subsidiarity. In principle, the reallocation of jurisdiction is only allowed if the other competition authority is considered to be the more appropriate to assess a concentration, when taking into account specific characteristics of the case and the tools and expertise of such authority.

Besides, any decision regarding a referral of a case should take into account the importance of legal certainty regarding jurisdiction, especially from the perspective of the undertakings involved in the concentration. In this sense, referrals should be avoided, unless there is a compelling reason indicating that another competition authority, other than the original, is the most suitable to correctly assess a case.[30]

Such referrals can take place before the notification of the concentration, upon request of the merging parties, or after the case has been already notified to the respective competition authority, in which case the initiative for the referral would come from the competition authorities.

The first case of pre-notification referral is defined in Article 4 (4) of the Merger Regulation. According to it, undertakings part of a concentration with a Union dimension may request to the Commission that the case is reviewed by a National Competition Authority. To succeed, such referral must be made by a reasoned submission (using form RS) and needs to comply with two requirements: that there are indications that the concentration may significantly affect competition in a market within a Member State; and that such market presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State. The Member State referred by the undertakings concerned

[29] Commission, 'Notice on Case Referral in respect of concentrations' (COM) 2005 OJ C56/02 (Commission Notice on Case Referral), para 24
[30] Ibid para 12

has then 15 working days of receiving the submission to agree or object to the proposed referral. If the NCA agrees, the Commission must then decide whether or not to make the referral within a maximum of 25 working days starting from the day of the receipt of the reasoned submission.

The other possibility of pre-notification referral is presented in Article 4 (5) EUMR and represents an indirect route for mergers to be scrutinized by the Commission. In consonance with this article, the parties of a concentration that does not meet the Union dimension criteria, can require (by means of reasoned submission) for to it be reviewed by the Commission. The requirement for it is that such transaction is capable of being reviewed under the national competition laws of at least three Member States. If after being informed of such referral by the Commission, no Member State exercises its right to a veto in the period of 15 working days, the concentration shall be deemed to have a Community dimension.

Accordingly, the EUMR also regulates the cases in which the referral can happen post-notification. The first case of this type of reallocation of jurisdiction is regulated in Article 9 and presents to Member States the option to request a concentration having a Union dimension to be referred to them. The so-called German clause was introduced to meet Germany's concerns of having all cases with a Union dimension being exclusively assessed by the Commission.[31] According to this Article, the referral can happen when two criteria are met in two different scenarios: (1) the concentration notified threatens to affect significantly competition in a market within that Member State and such market concerned must present all the characteristics of a distinct market; (2) the concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

[31] Werner Berg,'New EC Merger Regulation: A First Assessment of Its Practical Impact, The Symposium on European Competition Law' (2020) 24(3) Northwestern Journal of International Law & Business, 688 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1586&context=njilb> accessed 30 March 2022

To trigger the provisions contained in Article 9 EUMR, the Member State must submit its referral request within 15 working days after the transaction was notified to the Commission. Deals can be referred to in whole or in part. If the Commission does a partial referral, it will assess the non-referred part of it. From the Commission's practice over the years, it has become evident that this type of post-notification referral is more likely to occur in cases where the relevant market in question is smaller than the territory of a Member State and the proposed concentration has only a local or regional impact.[32]

Finally, Article 22 of the Merger Regulation presents a post-notification referral of initiative of the Member States to the Commission, which as the main subject of this work, will be further analyzed separately.

2.3.1 Referral under Article 22 EUMR

Article 22 was introduced to the Merger Regulation in 1989. Also called the "Dutch clause", it was designed to give Member States that did not have a national merger control system, such as the Netherlands, the possibility to refer a merger to the Commission which could lead to potentially harmful effects on competition within the internal market.[33] It was applied in this context in 4 cases: *British Airways/Dan* Air [34] in 1993, by Belgium; *RTL/Veronica/Endemol* [35] (1995) and *Kesko/Tuko* [36] (1996), by the Netherlands; and *Blokker/Toys 'R' Us (II)* [37] in 1997, by Finland.

Later, in 1998, Article 22 was amended to allow two or more Member States to make joint referrals when they felt that the EC was the best authority to review the proposed concentrations. The intention was to strengthen the application of the core principles of merger

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[32] Lorenz (n 5) 258
[33] Koppenfels (n 19) 26
[34] *British Airways/Dan Air* (Case IV/M.278) Commission Decision 93/278/EC OJ C68/5 [1993]
[35] *RTL/ Veronica/Endemol* (Case IV/M.553) Commission Decision 96/649/EC OJ C112/4 [1996]
[36] *Kesko/ Tuko* (Case COMP/M.784) Commission Decision 97/409/EC OJ L174/47 [1997]
[37] *Blokker/ Toys'R'Us* (Case IV/M.890) Commission Decision 98/665/EC OJ L316/1 [1998]

control and competition law in the European Union, especially the one-stop-shop rule, in cases with cross-border effects and to alleviate the problem of multiple filings.[38]

The first joint referral by a group of Member States was made in 2002 by the competition authorities of Austria, Germany, Italy, Portugal, Spain and United Kingdom in the case *Promatech/Sulzer Textil*,[39] both companies in the weaving machinery industry. After conducting an in-depth investigation, the Commission concluded that the proposed concentration could create a dominant position in the market and could threaten competition. However, after the offer of divesture measures by the companies, the acquisition was approved. For the undertakings involved in the transaction, this meant an advantage, as instead of having to submit the concentration to the merger control of several Member States, they just needed to obtain approval from the EC.

Article 22 does not specify or require that the Member State intending to use this referral provision needs to have original jurisdiction over the concentration under its national merger control rules. In fact, it was designed exactly to allow National Competition Authorities to refer concentrations to the Commission in cases where they lacked power to review them themselves, but which raised concerns justifying a merger control review.[40] The request can be made by initiative of the National Competition Authorities or by invitation of the EC, which may also inform one or the several Member States that it considers that a concentration fills the criteria for the referral.[41]

For a referral request under Article 22 EUMR to be accepted by the Commission, the following requirements must be met: (i) the concentration must affect trade between

[38] Commission, 'Green Paper of 11 December 2001 on the Review of Council Regulation (EEC) No 4064/89' COM (2001) 745 final, para 86
[39] *Promatech / Sulzer Textil* (Case COMP/M.2698) Commission Decision 2002/251/EC OJ C105/13 [2002]
[40] Nicholas Levy, Andris Rimsa and Bianca Buzato, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules? (2021) 5(4) CoRe, 366 <https://doi.org/10.21552/core/2021/4/5> accessed 4 January 2022
[41] EUMR, Art 22 (5)

Member States; (ii) the concentration threatens to significantly affect competition within the territory of the Member State or States making the request.[42]

To meet this first requirement, the Member State requesting the referral must prove that the concentration is liable to have some discernible influence on the pattern of trade between Member States.[43] In *Coca-Cola Hellenic Bottling Company/Lanitis Bros*,[44] the Commission decided on the presence of this criteria based on the fact that Laitinis Bros exported its products to Greece and each of the parties could be regarded as a potential competitor of the other in their respective home markets. However, in the end, the Commission decided not to accept the referral.

As to the conditions to meet the second criteria, the referring Member State(s) must demonstrate that, based on a preliminary analysis, there is a real risk of significant adverse impact on competition and trade between Member States and for that, the concentration deserves close scrutiny.[45]

To explain better the matter and to avoid unfunded referrals that would only cost time and delay for the merging parties, the Commission set the scenarios in which such threats to competition are usually met and they are presented as follows: (i) cases in which the merger would raise serious competition concerns in one or more markets which are wider than national, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets; (ii) cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case is

[42] EUMR, Art (1)
[43] Commission Notice on Case Referral, para 43
[44] *Coca Cola Hellenic Bottling Company/Lanitis Bros* (Case COMP/M.4124) Commission Decision 2006/836/EC, para 14
[45] Commission Notice on Case Referral, para 44

considered desirable, and where the main economic impact of the concentration is connected to such markets.[46]

In practice, the conditions for this referral are not exactly difficult to meet. First, any concentration involving an undertaking that supply goods or provides services beyond their original territories will have the potential to affect trade between Member States. Secondly, for the second part of the test to be fulfilled, NCAs only have to provide, initially, evidence of a significant effect of competition within its territory.[47]

The request for referral must be made within 15 working days from the date the NCA was notified of the concentration, or in the case there was no notification, from the date it was made known to the Member State concerned.[48] The Commission must inform without delay the other Member States and the undertakings concerned of the referral request, from which time other Member States have 15 working days to join the initial request.[49] Then, the EC will have 10 working days to decide whether it accepts or not the referral. If the request is accepted, the case will be reviewed in respect of the Member States that participated on the request and the ones that did not join it, may continue the assessment of the concentration under their own merger rules. If the Commission misses the deadline, it will be obligated to accept the referral and review the concentration.[50]

The notification of a concentration to the Commission by means of referral request under Article 22 also has the effect of suspending national time limits until the EC has decided where the transaction will be examined. As soon as a Member State has informed the parties of

[46] Commission Notice on Case Referral, para 45
[47] Juan Rodriguez, 'Merger Referrals under the EU Merger Regulation' (2011) European Antitrust Review 2011, 7 < https://www.sullcrom.com/siteFiles/Publications/Rodriguez_EAR_Merger_Referrals3.pdf> accessed 09 May 2022
[48] EUMR, art 22 (1)
[49] EUMR, art 22 (2)
[50] EUMR, art 22 (3)

the concentration and the Commission that it does not wish to join the request, the suspension ends.[51]

Thus, the purpose of Article 22 has been to ensure that cases falling below the Community threshold could still be assessed by the Commission when it's the most appropriate authority to do so, and then avoid parallel review procedures in different Member States.[52] However, the efficiency of the referral presented in Article 22 has been constantly discussed over the years and one of the reasons for that is the fact that when a referral request is made by one or more Member States to the Commission, this does not prevent other NCAs that chose not to join the request of applying their own merger national rules to the case.

In other words, the Commission's competence is limited to reviewing the effects of the proposed concentration in the territory of the Member States that participated on the request, while parallel procedures will run on the territory of the ones who chose to keep jurisdiction. As a result, when this happens, there is a fragmentation of enforcement and consequently, impacts negatively the legal certainty and the one-stop-shop principle that the Commission intended to protect with the referral system. [53]

This issue can be seen very clearly in the the *Sara Lee-Air Fresheneres'* case, where the transaction was not only reviewed by the European Commission, as a result of the referral under Article 22 by five Member States, by also at a national level in seven other countries. This illustrates the lack of efficiency of this referral procedure in consolidating jurisdiction at a Community level. [54]

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[51] EUMR, art 22 (2)

[52] Gianni de Stefano, Rita Motta and Susanne Zuehlke, 'Merger Referrals in Practice – Analysis of the Cases under Article 22 of the Merger Regulation' (2011) 2 (6) Journal of European Competition Law & Practice, 538 <https://doi.org/10.1093/jeclap/lpr074> accessed 25 March 2022

[53] Commission, 'Staff Working Document and White Paper Towards More Effective EU Merger Control' COM (2014) 221 final (2014 Staff Working Document)

[54] *Procter & Gamble/Sara Lee Air Care* (Case COMP/M.5828) Commission Decision 2010/EC [2010] OJ C259/5

Aiming to address this problem, the Commission tried in 2014, in the White Paper towards more effective EU merger control, to propose that a post-notification referral under Article 22 could be done by a Member State, and there would be no need for others to join it. If no competent Member State objected to the referral, the Commission would be, then, competent to assess the effects of the proposed concentration in the whole European Union. Nevertheless, the procedural change was not adopted.

In fact, in the same document, there was an attempt to limit the scope of the Article 22 so only the Member States competent to review the transaction under their own domestic law could request a referral.[55]

With the progressive implementation of national merger control rules by the Member States of the European Union, except for Luxembourg, the Commission developed a practice of discouraging NCAs to do the referral under Article 22 when the proposed concentration fell under their national merger thresholds. The reason for this practice was based on the experience that such transactions usually did not lead to a significant impact on the internal market.[56]

As a result, until June 2022, only 46 requests for referral under Article 22 EUMR were made,[57] where four of them were made prior to 1998 by the Member States that did not have national merger control rules at the time of the referral, which not only shows the little faith the National Competition Authorities had in this system, but also the European Commission's itself, as it also has the discretion of inviting Member States to proceed with a referral.

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[55] 2014 Staff Working Document paras 68-70
[56] Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' COM (2021) 1959 final OJ C113/01 (Guidance on article 22 EUMR), para 8
[57] European Commission, <https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3> accessed 20 June 2022

3 DIGITAL MARKETS AND STRUCTURAL CHALLENGES

Digital markets are defined as the 'confluence of supply and demand for digital goods, rights and services' which unfold on a digital platform, including virtual marketplaces, and are the basis of digital information and communication technologies.[58]

This type of market survives within the so-called "Digital economy", which incorporates all economic activity that results from the use of digital inputs such as digital technologies, digital infrastructure, digital services and data.[59]

Digitization is rapidly transforming industries around the world by providing new, fast and innovative ways to connect customers and suppliers, giving rise to new markets based on innovative services and applications, and transforming the existing ones.[60]

It is undeniable that the fast development of such an industry has brought many benefits to both consumers and suppliers around the world. It has created new categories of products and services of good quality for a low price and it allows consumers to digitally compare products and services so they can make better-informed choices. It has opened possibilities for new business models with a high focus on innovative services, which can be easily scalable from domestic to international markets, with delivery using fast broadband connections.[61] Cross-border transactions have become easier for both companies and consumers, who have more choices, as the accessibility of information and communication, in general, has also increased. In a nutshell, digitization has impacted every industry, from

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[58] Jörn Lengsfeld, *Digital Era Framework* (Dr. Dr. Jörn Lengsfeld 2019) 161
[59] OECD, OECD Handbook on Competition Policy in the Digital Age (OECD 2022), 8 <https://www.oecd.org/daf/competition/oecd-handbook-on-competition-policy-in-the-digital-age.pdf> accessed 17 May 2022
[60] Maher M and others, 'Resetting competition frameworks for the digital ecosystem' (2016) GSMA, 7 <https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf> accessed 12 may 2022
[61] Ministry of Business, Innovation and Employment New Zealand, 'Competition Law and Regulation in Digital Markets: FINAL REPORT' (2022) APEC Competition Policy and Law Group, 7 <https://www.apec.org/docs/default-source/publications/2022/3/competition-law-and-regulation-in-digital-markets/222_cplg_competition-law-and-regulation-in-digital-markets.pdf?sfvrsn=6b8748de_2> accessed 12 may 2022

manufacturing to agriculture. Socially speaking, it has brought individuals and communities together to share information and ideas and this results in more economic opportunities.[62]

However, all these new features of digital markets, which are different from the traditional "brick-and-mortar" businesses, have created concerns regarding many aspects, such as the role of data and potential loss of privacy, network effects, reinforcement of economic inequality by new technologies, domination of the market and concentration of economic wealth by a few large platforms.[63] In fact, as of January 2022, of the top five companies by market value in the world, four of them were in the digital sector, namely Apple, Microsoft, Alphabet and Amazon, respectively.[64]

This new data economy, where platform-based businesses have an increasing role, combines different aspects of the digital economy into a single process, and together are capable of creating new dominant positions for certain companies, increasing their power at a faster pace than it would be possible in a traditional market, allowing them to rapidly extend their power on a transnational level.

The fast development of these digital platforms has a direct influence on the way businesses are conducted: there is an increase of productivity due to fast and constant communication between companies and total costs are lowered. Partnerships are created and strengthened in a more effective way thanks to the elimination of territorial boundaries and the overcome of time zones.[65]

All these changes resulting from the fast development of digital markets have created challenges to many legal institutions. Competition authorities and agencies, e.g., have

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[62] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019) European Commission, 417 < https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 10 March 2022
[63] Ibid 12
[64] 'World Top 1000 Companies List and World Ranks as on January 7th, 2022 from Value.Today' (*Value Today*) < https://www.value.today/> accessed 10 May 2022
[65] Dmitrieva E.I., 'Digital Platforms as a Base for Forming a Digital Economy' (2020) 156 Atlantis Press SARL, 553 < https://doi.org/10.2991/aebmr.k.201205.092> accessed 10 May 2022

been struggling to assess these markets to perform merger control and assess proposed concentrations, as the changes of its characteristics are at a faster pace than the development of appropriate methodologies to analyze if the actions of these companies are harmful to competition or not.

Digital markets have special characteristics which together constitute a multifaceted challenge for competition policymakers, especially when enforcing merger policy. The concerns about this growing market have called out for new policy tools by competition authorities. Thus, in order to understand these challenges, in special related to merger control, an analysis of the main features of digital markets and the structural challenges they represent must take place.

3.1 Characteristics of digital markets

Digital markets are often marked by a strong incentive for innovation, leading to fast technological progress, in extremely connected, shared and personalized platforms characterized by aggressive use of data. For the purposes of analyzing its effects on competition policies, three key features will be discussed in this study: extreme return to scale, multi-sidedness, network effects, the role of data and economies of scope.

3.1.1 Extreme return to scale

One of the main characteristics of digital businesses and one of its fundamental differences when compared with traditional companies, is its potential to large returns to scale. In other words, once created, a digital offering can be shared to a large number of people at low or zero marginal cost, which implies that the cost of production is much less than proportional when compared to the number of customers served. Thus, although going digital can come with high capital expenditures to set up data centers and other digital infrastructure, what is being

invested in tools such as search engines or mapping services, is rising at a far slower pace than the number of users.[66]

Moreover, this increasing return to scale is possible because in digital markets information goods and services are being exchanged with a fixed or little variable production cost, which means that if a new user is served, costs are not increased by that proportionally. In a traditional business of books, e.g., every new purchase represents a proportional production and distribution cost. Differently, in the sale of an eBook, once production is finished and the cost for that is fixed, it can be distributed at almost no expense for users with access to the internet.[67]

This very singular characteristic, along with the facility of expanding services to different geographic locations at minimal or no extra cost, allows that this kind of business achieves a rapid-scale expansion and may reduce the competition-for-the-market phase, as dominance can be established more easily, when compared to traditional markets.[68]

Large returns to scale can become a barrier for new market entries, once it allows for companies to create a large customer base derived from a strategy of low price and high quality in large-scale operations, that cannot be followed by a potential entrant, that, unless is armed with a much superior and cheaper technology, will assume that it won't be profitable if using small scale operations, and therefore, won't even bother to enter the market. [69]

3.1.2 Multi-sided markets

In the digital economy, multi-sided markets can be defined as "a market in which a firm acts as a platform and sells different products to different groups of consumers, while

[66] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 20
[67] 'Stigler Committee on Digital Platforms, Final Report' (2019) Stigler Center for the Study of the Economy and the State, 36 < https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf > accessed 10 June 2022
[68] Ibid 36
[69] Ibid 36

recognizing that the demand from one group of customer depends on the demand from the other group'. In other words, in multi-sided markets, digital products act as a platform where different categories of consumers are brought together. Thus, although many of these markets start with a two-sides nature, in which consumers and sellers meet on a platform, they tend to rapidly evolve to three sides (consumers, content suppliers and advertisers) or even four, as it happens in the case of payment in cards.[70] PayPal, eBay, Alibaba and Facebook are successful examples of Multisided Platforms.

Digital platforms create and add value from the interaction of one side of the market with the other. This value can be symmetric between the two sides, such as when the only purpose of the platform is the trade of services. This is what happens in Uber, where two groups are being connected: drivers and passengers, which means that they are composed of just a supply-side and demand side. [71]

The value can also be created due to the interaction of one side with the other where the platform works as an aggregator or intermediate, and advertising is the main source of business revenue.[72] Facebook, e.g., connects various groups (users, advertisers, content developers, etc.) and makes the platform available for free for users, which can also become consumers of the products and services that are being advertised. Thus, advertisers pay to reach the consumers amongst Facebook's users, which are a smaller group (when compared to the number of users), but are responsible for the revenue of the company.[73]

Competition in multi-sided markets has unique features that distinguish them from the traditional ones, such as: changes of price and quality on one side, which can have an impact

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[70] OECD, 'Rethinking Antitrust Tools for
Multi-Sided Platforms' (2018), 10 <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf> accessed 10 June 2022
[71] Ibid 214
[72] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Digital platforms and antitrust' (2020) Working Paper 06/2020 Bruegel, 6 <https://www.bruegel.org/wp-content/uploads/2020/11/WP-2020-06-1.pdf > accessed 10 June 2022
[73] Daniel Pereira, 'Multisided Platform Business Model' (*The Business Model Analyst,* 19 March 2022) <https://businessmodelanalyst.com/multisided-platform-business-model/> accessed 9 June 2022

on customers of the other sides; if one side of the platform is exposed to competition, this can lead to restriction of the market power on the other sides of the platform; and indirect network effects can act as a barrier for the entry of new players in the market.[74]

This multi-sidedness peculiarity of digital platforms can represent a challenge for competition authorities when conducting the substantive assessment of a proposed concentration, as in order to analyze and define the market, one should look at all sides of the platform and find a link between the complex relations into the different customers' groups.

3.1.3 Network effects

In digital markets, network effects are related to the fact that when users participate in the platform, that increases its value and attracts more users, contributing to strong market positions. Simply put, the more users are on the network, the richer the user's experience is likely to be, as the value a user gives to a platform increases when more friends are using it as well, such as how it happens on Facebook. This is how the positive direct network effect works, or "same-side effects".[75]

On the other hand, the positive indirect or "cross-side" network effect can be observed, e.g., when the aggregation of data from additional users helps to improve the product quality for all participants.[76] For instance, in eCommerce platforms, users benefit from the participation of users of other categories. In a marketplace like Amazon, for instance, buyers do not benefit from the presence of other buyers directly, but with the presence of more sellers, which means more options and better price and quality, as they will be competing among themselves. The latter is attracted by the presence of the buyers.[77]

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[74] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, (n 72) 6
[75] Ibid
[76] Stigler Committee on Digital Platforms (n 67) 38
[77] Ibid

Network effects can also be negative when the number of users is so big and increasing so much that the platform's value decline, e.g., when the great number of users leads to network congestion.[78]

Network effects can be beneficial for consumers at the early stages, as the great number of users attract competitors, that tend to fight intensely for their market shares and invest in better products and services for competitive prices. In 2016, for instance, it was estimated that Uber covered about 40% of the cost of their rides in order to compete with Lyft.[79] However, network effects also often contribute to a player becoming dominant in the market, as the value of the product increases the more other users consume it. A good example of that happens with social media companies, like Facebook and Instagram: the more users they have, the more interesting they become and the more value they get. The problem is that, in order to guarantee this dominance, many players engage in anticompetitive practices and this can contribute to the development of monopolies.[80]

Thus, network effects can be detrimental to competition as many dominant players use them as leverage to limit consumer's choice and prevent competition, such as by the modification of algorithms, the usage of vertical integration, predatory pricing or the performance of "killer acquisitions". All these strategies create structural barriers for the entry of new players.

3.1.4 The role of data

Another key feature of digital markets is how companies make use of data. With the evolution of technology, businesses were able to collect, aggregate, store and use large

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[78] Commission 'Competition Law 4.0', 'A new competition framework for the digital economy' (2019) Federal Ministry for Economic Affairs and Energy (BMWi), 16 <https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3\> accessed 30 May 2022

[79] Stigler Committee on Digital Platforms (n 67) 39

[80] Ministry of Business, Innovation and Employment New Zealand (n 61) 14

amounts of data to get a competitive advantage over other players, which may then give the company even more access to data. The collected data is an important ingredient to feed Artificial Intelligence technologies and an essential element in production processes, logistics and targeted marketing.[81]

In this context, data protection has become a major issue, and this is because in many cases, consumers are charged reduced or even zero prices to use a determined platform, such as Facebook or Google, but they usually have no knowledge that their data is being collected and monetized by these companies to advertisers. This dissemination of data is, then, a hidden cost to consumers, that are charged "indirectly" for the products that are offered "for free" by the disclosure of their personal data.[82]

The usage of this data can contribute to improving the product's quality, but also secure a competitor's dominance in a market and even guarantee access and expansion to others. In 2017, the Commission fined Google on € 2.42 billion for abusing dominance as a search engine by gathering data about consumers and improving search results in order to give an advantage to its own comparison-shopping service, Factsheet.[83]

Lately, the Commission has been particularly concerned about the holding of data to keep competitors out of the market and how it can be used as an unfair advantage. In Apple's acquisition of Shazam,[84] the Commission raised concerns about whether Apple would obtain access to commercially sensitive data about customers of its competitors for the provision of music streaming in the EEA, and whether such data could allow Apple to directly target its competitor's customers and encourage them to switch to Apple Music, leading to restraint in

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[81] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 24
[82] Ministry of Business, Innovation and Employment New Zealand (n 61) 9
[83] European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet' (2017, *Press Corner European Commission)* <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785> accessed 12 May 2022
[84] European Commission, 'Mergers: Commission clears Apple's acquisition of Shazam' (2018) Press Corner <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662> accessed 12 May 2022

competition in the music streaming services market. However, the Commission found that Shazam's data 'would not materially increase Apple's ability to target music enthusiasts and any conduct aimed at making customers switch would only have a negligible impact'.

The large-scale gathering of data can also represent an important constraint to competition when it has the potential to be a strategic asset and key to the quality of the service, but cannot be readily replicated by other providers, which may lead to consumers finding themselves locked in with the dominant player's services.[85]

3.1.5 Economies of scope

Economies of scope is a term that refers to the decrease of the average cost of a single product due to the joint production with other products in a multi-product company. This is possible when the enterprise can leverage knowledge, learning, organization and management skills to reduce the average total cost of all products because of the occurrence of common resources. These common resources could be, for example, shared distribution or advertising. They are different from economies of scale because they refer to increased variety in products, not higher volume of output.[86]

In digital markets, data plays an important role in turning businesses into economies of scope. This happens because companies can apply machine learning to gather data, improve their products and expand their activities to other areas. As the success of this strategy is proportional to the amount of data being used, this obviously gives a special advantage to big companies dealing with large amounts of data, which allows them to improve their services and grow their business in a way those small players cannot.[87]

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[85] Maher M and others (n 60) 21
[86] John McGee, *Wiley Encyclopedia of Management* (3rd edn, vol 12, John Wiley & Sons) 44
[87] Stigler Committee on Digital Platforms (n 67) 44

Thus, data obtained in a specific market can be used to decrease the cost of innovation and investment to enter a new market. In other words, it makes it cheaper for a single company to develop many kinds of products and services rather than doing it by separate entities, and this is possible because of the leverage that the use of data gives them. For instance, Google used its data obtained as a search engine to get a better position for Google Maps in the market of navigation systems.[88]

The rapid growth of economies of scope represents a challenge for competition authorities, especially regarding the task of defining the market. The difficulty arises because, in this economy, there are multiple markets under one enterprise, which means that the power performed in one market extends to the others and this makes the assessment more complex.

Therefore, the use of these learning technologies and data analysis can directly contribute to large returns to scale and the development of economies of scope that, along with network effects, ultimately are capable of creating digital market concentration.

All these characteristics interact with each other in a way that they create more competition for the market and less competition within the market. The reason for this relies on the fact that even though the innovation boosted by the rise of digital markets creates incentives to invest in new unexplored markets, its specific features create an environment that gives a special advantage to the first mover. Thus, the first player can quickly install its dominant position by using data-driven strategies to increase the number of its users with a moderate cost of production, which makes the task of a second competitor entering in the market and getting profits very hard.[89]

[88] Commission 'Competition Law 4.0' (n 78) 14
[89] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne (n 72) 7

4 MERGER CONTROL IN DIGITAL MARKETS

Merger control is an important *ex-ante* regulation tool to prevent concentrations which have potential anti-competitive effects from happening. In the digital sector, just tech giants of the so-called GAFA platforms (Google, Apple, Facebook – now Meta - and Amazon) have triggered numerous M&A thresholds, and had to have their transactions assessed by competition authorities. However, the speed at which the digital market's special characteristics evolve compared with the number of transactions in this sector has represented a challenge for merger control by both the European Commission and NCAs.

Companies active in the digital industry are usually aggressively involved in M&A, targeting and purchasing interesting start-ups that could benefit them. The motives pushing these transactions can vary and can be, e.g., to secure a new form of technology and implement it into an existing product to improve its functioning; or to secure highly skilled employees of a firm and use their expertise (also called "acqui-hiring").[90]

Such acquisitions can have a remarkable potential to benefit consumers by promoting integration and scale-up of innovation in order to have better-functioning platforms. Nonetheless, these transactions can also raise concerns about competition when they are performed to wipe out potential competitors off the market, or to strengthen a dominant position in a way that the entry of new players becomes extremely difficult.[91]

Prima facie, in order to assess the potential effects of these concentrations, it is necessary to understand how market power and market definition are different in digital markets, how this has become a challenge for competition authorities and what are the main theories of harm in such platforms. Next, a general overview of the past transactions of the leading tech companies can illustrate how these dominant players have behaved in the market

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[90] Elena Argentesi and others, 'Tech-over: Mergers and merger policy in digital markets' (*VOXeu* 04 March 2020) < https://voxeu.org/article/mergers-and-merger-policy-digital-markets> accessed 15 May 2022
[91] Ibid

and gives interesting information to discuss how their strategies along with the special features of this specific industry have represented a challenge for antitrust agencies. Following this, it will be possible to analyze the perceived consequences of the empowerment of these digital platforms and how competition authorities have acted to address these issues.

4.1 Market definition in digital markets

Once the Commission's jurisdiction regarding a proposed concentration has been defined, the following step is conducting the investigation which will review the compatibility of the transaction with the internal market (Article 2 (3) EUMR). The assessment is performed with a substantive test called "SIEC Test" (Significant Impediment to Effective Competition) in which the Commission will analyze the possible anti-competitive effects resulting from the concentration and will estimate the post-market development from a mid and long-term perspective.[92]

Next, the Commission will compare the previous results of possible market change, in the case the notified concentration is approved, with an estimation of the counterfactual situation that would arise in the absence of the concentration. With that, the EC aims to assess the most likely negative effects that could arise, such as increased market power that could lead to high prices, less choice for consumers and decreased quality of goods or services, as there would be no incentive for innovation.[93]

When reviewing the compatibility of the notified concentration to the internal market, the first step to start the substantive assessment is the identification of the relevant market by the definition of both the product market and the relevant geographic market in order to assess the competitive forces to which the undertakings are subject.

[92] Moritz Lorenz (n 5) 261-262.
[93] Ibid

According to the Commission Notice on the definition of the relevant market for the purpose of Community competition law,[94] relevant product market is defined by all the products and/or services that are considered interchangeable or substitutable by the consumer as a result of its characteristics, prices or intended use.

In the same Notice, the Commission suggests a demand substitution test, the so-called SSNIP test (Small but Significant Non-Transitory Increase in Price) [95] to analyze the customer's preferences and determine the range of products that are viewed as substitutes by the consumers. The experiment involves applying a hypothetical small, lasting change in relative prices and evaluating the customers' reactions to that increase. The basic question to be answered with this test is whether the customers would switch to readily available substitutes or suppliers located elsewhere as a result of a hypothetical small but permanent price increase in the product. Ultimately, it aims to understand if when the producer raises the prices this will result in the loss of market shares shares.

Another important element when defining the market of a concentration is the relevant geographic market, referred to as the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from other areas because the conditions of competition are significantly different in those areas.[96] When assessing the relevant geographic market, the Commission takes into consideration not only the product interchangeability, but also geographic and other aspects. For that, the EC uses data provided by the notifying undertakings and then applies the SSNIP test with the goal of analyzing if the customers are willing to change to a supplier further away after a price increase, and if the suppliers of other geographic areas would be willing to enter into new markets. To get a full

[94] Commission, 'Notice on the definition of relevant market for the purposes of Community competition law' COM (1997) OJ C372/03 (Commission Notice on definition of relevant market) para 7
[95] Ibid para 15
[96] Ibid para 8

perspective of the possible scenarios, the Commission takes into consideration factors such as transportation cost, product pricing, national and local preferences and legal barriers.[97]

Ultimately, this assessment allows a preliminary indication of the market power of the undertakings involved once it makes it possible to calculate their market shares, as an indicator in this regard, and the shares of the other market participants as well. [98] In addition, by defining the market, the Commission can also identify potential competitors and assess other indicators, such as potential barriers to entry and risk of potential coordinated effects in mergers.[99]

4.1.1 The challenges in the assessment of market definition

Although the Commission's method to assess market definition and, consequently, market power has proved to be efficient in several cases, it has faced some applicability issues, especially in digital markets, in which characteristics such as its multi-sidedness and network effects represent a challenge for this assessment.

The digital economy can change the very structure of competitive relations with their platform markets, new forms of control over market access, and ability to eliminate or fundamentally transform previously existing markets, resulting, then, into new positions of power that still need to be better understood and conceptualized. [100]

In 1997, when the Commission issued its Market Definition Notice, the digital platform economy was not a concern, so it was clearly not designed to address the peculiarities of search engines, social networks, online marketplaces, app stores, etc.[101] All these changes

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[97] Moritz Lorenz (n 5) 272-273
[98] Commission, 'Staff Working Document Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997' SWD (2021) 199 final (Staff Working Document on the notice on definition of relevant market), 1
[99] OECD, 'Market Definition' (2012) Policy Roundtables, 11 <https://www.oecd.org/daf/competition/Marketdefinition2012.pdf> accessed 15 May 2022
[100] Commission 'Competition Law 4.0' (n 78) 27
[101] Jens-Uwe Franck and Martins Peitz, *Cambridge Yearbook of European Legal Studies* (Vol 23, Cambridge University Press 2021) 92

brought by digital markets demand appropriate tools to assess the potential competition constraints which, because of these special features, need to be different than the ones applied in traditional markets, or at least adapted to be practically applied in a different way.[102]

In the report on "Competition Policy for the Digital era", the authors acknowledge the importance of market definition for competition assessments, however, recommend that, in the case of the digital platforms, less emphasis should be put on market definition and more emphasis should be given to theories of harm and identification of anticompetitive strategies.[103]

The reason for this statement can be directed to the fact that, because of its complexity, competition authorities have to do an extra effort in their analysis to do justice to the interdependencies between the effects digital markets can have on different user groups of two-sided and multi-sided platforms. This analysis tends to be more complex and consumes more resources and, consequently, its results are more prone to error. For instance, in digital markets, market shares are not reliable indicators of market power. Due to this interdependence between user groups, there can be situations where high market shares will not indicate a high degree of market power and others where a platform is considered to have a high market power despite a relatively low market share.[104]

The following are the main characteristics and consequent challenges digital markets represent to the task of assessing market power and market definition:

a) Dynamic and fast-changing market

The dynamic innovative nature of digital markets can make the task of assessing competitive constraints significantly complex. These characteristics tend to turn the relationships in these markets extremely fluid, fast-changing, leading to constant

[102] Commission 'Competition Law 4.0' (n 78) 27
[103] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 4
[104] Jens-Uwe Franck and Martins Peitz (n 101) 95

substitutability and overlap between products and services. For instance, what was once demand for cars, now is a demand for mobility and all the products and services related to it.[105]

In the demand-side substitution, the constant changes in customer preferences place an extra difficulty when doing the substitutability test. Accordingly, the fast pace at how suppliers innovate their products and services makes the potential supply-side substitution assessment more speculative than in traditional industries. Besides, because of this accelerated rhythm of changes, competition authorities also need to adapt regarding the time-lapse on which they perform their market power estimation, as new products can be inserted faster than in traditional markets, and can represent a complete change in the very market structure.[106]

Finally, these characteristics also place a challenge on the applicability of legal precedents, that if forced into a scenario where they no longer apply, can lead to erroneous results. Thus, although uniformity is a necessity for legal certainty, competition authorities need to have the sagacity to revise and adapt outdated rules in order to properly assess these new situations.[107]

b) Markets without a price

It is very common in digital markets the offer of products and services for zero price to consumers as a strategy to gain market share. This is possible, e.g., because of the fixed costs that characterize such markets, and the network effects. In other words, the more consumers use the digital platform because it is free of charge, the more other users will get attracted by it, and with the increase of the market, consumers' utility grows as well.

Obviously, the fact that consumers are not being directly charged to use a digital platform does not at all imply that these companies are not profiting from this relation. Usually, the non-paying side of the platform is subsidized by profits made on a different side of it, such

[105] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 47
[106] Maher M and others (n 60) 14
[107] Ibid

as advertising. Moreover, by using the service for free, users are providing data to the platform, which will not only be used to improve the service to consumers, but will also be sold to the advertising side of it, which will be able to use this information to better target users. [108] That's the strategy of tech giants such as Google and Facebook, that use the network effects of zero price markets to charge the other side of it.

In traditional markets, low or zero prices strategy immediately raises concerns to competition authorities, as they can be easily associated with predatory strategies used by dominant players to maintain their advantageous position. In digital markets, however, special attention must be taken as it is not an absolute indicator that the platform is engaging in anti-competitive strategies, nor that it has market power.

In the past, the Commission hesitated in acknowledging that there can be a "market" when no transactions involving monetary price are being observed. This was the case, for instance, of merger cases involving TV broadcasters, where it was argued that the fact that there is no trade relationship between the broadcasters of free TV channels and the viewers implied that the latter did not constitute a "market", in the strict economic sense of it. [109]

In the coming years, with the advent of digital markets, the Commission started to recognize the existence of markets even when products are being offered for free for users, acknowledging that remuneration would not be a *sine qua non* condition in the task of defining a market. Since then, many merger cases involved zero-price services, in which the Commission reviewed the non-price elements of the proposed transactions such as quality and innovation to assess product substitutability.

Thus, in the competitive assessment of these mergers, quality can be an important ally for the Commission to consider. For instance, quality differences within the same market

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[108] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 44
[109] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 4
[109] Jens-Uwe Franck and Martins Peitz, *Cambridge Yearbook of European Legal Studie* (n 101) 109

can be indicative if the merging parties are close competitors or not. In the assessment of the *Facebook/Whatsapp*[110] merger, the Commission concluded that the parties were not close competitors because of the quality difference between both products, which was richer for Facebook Messenger. Besides, it was also concluded that in fact the parties' networks overlapped, which indicates that their products were in a sense complementary instead of direct competitors with each other.

This is because in the traditional market definition assessment, the SSNIP test is applied and the price is usually considered the key element for substitution. However, as in digital markets there is not always a direct remuneration relationship between consumer and supplier, differences in product features and functionality are more relevant to analyze the potential customers' switch behavior.

Accordingly, although the Commission has endeavored to adapt their substantive assessment in order to cover the challenges that specific characteristics, such as zero-price markets, can bring, there is no doubt that there is plenty of room for improvement. While the Market Definition Notice presents elements that can be used in the non-price assessment, such as quality, a Staff Working Document of 2021[111] evaluated its effectiveness and considered it to be not fully up-to-date regarding, among other areas: the use and purpose of the SSNIP test; digital markets in general, but especially with respect to products and services free of charge, and digital "ecosystems"; and non-price competition (including innovation).[112]

c) Difficult applicability of the SSNIP test

The SSNIP test is an important tool that gives conceptual clarity regarding demand-side substitutability. The small but significant price increase should be in the range of 5-10%

[110] *Facebook/WhatsApp* (Case M.7217) Commission Decision 2014/217/EC OJ C417/4 paras 101-106.
[111] Staff Working Document on the notice on definition of relevant market (n 98)
[112] European Commission, 'Competition: Commission publishes findings of evaluation of Market Definition Notice' (2021, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3585> accessed 28 May 2022

by the hypothetical monopolist. If the price increase does not decrease demand, or if it does by so little that the increase in revenue outweighs the lost customers, then the market is defined. If not, the market must be widened by including the next closest substitute and then continue the test until the price increase is profitable.[113]

However, this test is not always applicable or is not as easy to apply as in traditional markets. In digital platforms, where products and services are usually offered free of charge, as explained previously, the use of a price-oriented test like SSNIP is unsuitable because a price of zero increased by a certain percentage is still zero. If competition authorities were to increase the price to 1 euro, e.g., for the purposes of comparison, it would still be unsuitable. The reason for this relies on the fact that zero prices are especially attractive because they don't require any investment or commitment, and no payment data is required, saving time and reducing risks of fraud. As a result, the hypothetical increase of zero to 1 euro for the purpose of the test would understate the switching behavior of some customers to the other competitor and would produce an excessively narrow market definition.[114]

In those cases where competition is strong in areas other than just price, such as quality and certain product's characteristics or intended use, the recent literature suggests an adaptation of the traditional test for the Small but Significant and Non-transitory Decrease in Quality test (the SSNDQ test), which, similar to the SSNIP test, asks whether a decrease in quality would be profitable. Nevertheless, it is still unclear how this test could be made applicable in practice as it would be somewhat difficult to precise quantitatively the amount of quality change that would be equivalent to the 5-10 % price increase of the SSNIP test; or to

[113] 'The SSNIP Test' (2020, *LearnEconomicsOnline*), 6 <https://learneconomicsonline.com/blog/archives/1218> accessed 28 May 2022
[114] OECD, 'Quality considerations in the zero-price economy' (2018) DAF/COMP/WD(2018) 135 <https://one.oecd.org/document/DAF/COMP/WD(2018)135/en/pdf> accessed 28 May 2022

quantify the effects that such quality decrease would have on the undertaking's revenue in order to determine whether such quality degradation would be profitable.[115]

Moreover, it is significantly more complicated to apply the SSNIP test in two-sided and multi-sided platforms since digital platforms usually set different prices for each side of the it and the increase of price on one side triggers network effects and additional decrease or increase in demand on the other side.[116]

d) Multisided markets

Usually, digital markets display characteristics of multisided markets, for which reason competition authorities need to consider all sides of these platforms, as well as the interaction between them when analyzing price behavior and defining a market. And to fully assess all the competitive constraints that could possibly arise by a hypothetical monopolist, the Commission needs to take into account all those sides, their potential cross-externalities and the customer behavior on each side of the platform.[117]

In addition, indirect network effects in multisided platforms have implications on substitutability of demand, puts limits on the increase of profit resulting from the increase of price and impose difficulties in setting the level of price based on costs. All this, along with the fact that in many cases multisided platforms provide different services to their customer groups, results in a challenging and unclear assessment of market share and degree of market concentration.[118]

In this context, two approaches can be adopted when defining the market of a multi-sided platform: the single-market approach and the multi-markets approach. In the first, a single market is defined as an intermediation of service offered to both sides of the market.

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[115] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 44
[116] Sung Yoon Yang, 'Rethinking Modes of Market Definition for multi-Sided Platforms' (2018) 9(4) International Journal of Trade, Economics and Finance, 164 <http://www.ijtef.org/vol9/608-AEB3004.pdf> accessed 30 May 2022
[117] Maher M and others (n 60) 9
[118] Sung Yoon Yang (n 116) 165

Alternatively, the Commission can define a market for each side, by analyzing them separately while taking into account how they are linked through cross-group network effects. This is referred to as the multi-markets approach.[119]

The context on how each approach should be used has not yet been well defined by the European Commission, although its practice indicates a strong preference towards an analysis based on the multi-markets approach. In the case of payment card systems such as MasterCard or Visa, the Commission has distinguished three separate markets: an inter-systems market, an issuing market and an acquiring market, a clear application of the multi-market approach.[120] The Member States, on the other hand, have followed a quite heterogeneous approach, with the competition authorities of the Netherlands, e.g., opting for the single market approach in the case of the so-called matching platforms, which are platforms that facilitate transactions, such as online marketplaces, hotel booking, payment card systems and even dating platforms.[121]

On this matter, the literature also lacks uniformity regarding which method to use when defining a market in the platform economy. Part of it understands that the multi-market approach is the most suitable to deal with the demand-side substitutability of two-sided and multi-sided platforms regarding the user groups of all its sides. Moreover, these authors consider that recognizing the possibility of a single-market approach, even in very specific cases, would create a substantial risk of a wrong market assessment.[122] On the other hand, in the report issued by the European Commission, "Competition policy for the digital era", the authors defend the existence of one market in some kind of matching platforms, such as dating

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[119] Jeans-Uwe Franck and Martin Peitz, 'Market Definition and Market Power in the Digital Economy' (2019) Centre on Regulation in Europe (CERRE), 22 <https://cerre.eu/wpcontent/uploads/2020/05/report_cerre_market_definition_market_power_platform_economy.pdf> accessed 3 June 2022

[120] Ibid 23

[121] Jens-Uwe Franck and Martins Peitz, *Cambridge Yearbook of European Legal Studies* (n 101) 104

[122] Jeans-Uwe Franck and Martin Peitz, 'Market Definition and Market Power in the Digital Economy' (n 119) 23

apps, when there are no ads, selling of data, or any kind of partnership. In other words, when the platform is "pure", with the only product to be sold being the matching process.

4.2 Market power in digital markets

Economically speaking, market power can be defined as a company's relative ability to increase the prices of its products/services above the competitive price of the market for an extended period of time without losing market share. It's the ability of an undertaking to control prices by manipulating the level of supply, demand or both.[123]

The ability of these "price makers" to manipulate market price can have many anticompetitive effects, such as increasing obstacles to potential new players into the market. On this matter, the iPhone is a perfect example of market power. When it was launched, Apple had substantial market power, as they basically started the smartphone and app market. Because there were no other competitors, this monopoly allowed them to keep high prices, as this was defined by Apple as a monopoly, and not by the marketplace. As other competitors started to develop other smartphones, Apple's market power diminished and they began to offer iPhones of many variations, including less-expensive models.[124]

In merger control, assessing market power is a fundamental task in order to prevent undertakings from enforcing a dominant position that could lead to competitive constraints, and the first step for this assessment is the market definition. Once the relevant geographic and product market is defined, competition authorities start an analysis, usually taken by quantitative methods, to define if the players are dominant in the market and if the merger could lead to the abuse of such dominance.

[123] Stigler Committee on Digital Platforms (n 67) 34
[124] Will Kenton, 'Market Power' (16 December 2020, *Investopedia)* <https://www.investopedia.com/terms/m/market-power.asp> accessed 20 May 2022

Prima facie, it is important to understand that when performing the review of a proposed concentration, or for any other competition purpose, the Commission is not interested in absolutely preventing market power or the creation of a dominant position. Dominance alone is not prohibited. According to Article 102 TFEU (Treaty on the Functioning of the European Union),[125] in order to represent a violation, there must be an abuse of a dominant position by one or more undertakings within the internal market or in a substantial part of it which affects or has the potential to affect trade between Member States.

Thus, when a dominant position is a result of maximization of efficiency in the production process and the offer of high-quality and services to customers, with no abuse of market power in order to achieve such improvements, it shouldn't be seen as an anti-competitive endeavor. However, if such increased market power: leads to the dominant firm increasing its power on the expanse of its competitors, external producers and consumers; or reduces dynamic efficiency by creating entry or growth barriers to its competitors, then it would be a problem for competition authorities.[126]

In the context of digital markets, it is an especially hard task because first, the very structure of this economy can easily lead to the creation of a dominant firm and high concentration. Strong network effects, followed by economies of scale and scope, the role of data, marginal costs close to zero, and significantly lower distribution costs when compared to brick-and-mortar firms, with easy expansion to global reach allow these companies to extend their market power beyond the traditional market boundaries. In those kinds of environments, consumers can only benefit from them when competitors are trying to be the ultimate winner. Once that position is reached, it can easily lead to a monopoly and a new rival could only overcome this through significant innovation.[127]

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[125] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU)
[126] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne (n 72) 4
[127] Stigler Committee on Digital Platforms (n 67) 35

Usually, in traditional markets market power has been measured by market shares, which can be calculated by taking a company's total amount of sales in a giving period and comparing it with the total sales of the industry during the same time.[128] However, in digital markets, with network effects, prices and the number of sales will not necessarily reflect market power.

The offer of products and services free of charge, a common practice in this industry, is one of the reasons that makes this task so hard. Often, platforms with zero prices compete with the ones that actually charge consumers, which means that when assessing the market share, competition authorities cannot take into account only the paying consumers, or just otherwise this will take to a wrong assessment. Therefore, the lack of meaningful turnover/revenue from undertakings makes it hard to calculate market share with traditional methods.

In the *Facebook/Whatsapp* case,[129] the Commission agreed with the Notifying Party's view that market shares would be of limited use of the assessment of the proposed concentration, since both undertakings mainly offer their products for free. Moreover, although the Commission stated that the market share rate provided by the parties was likely to underestimate their positions in the market, it decided to consider the methodology used by the undertakings, although imperfect. The reason for this relies on the fact that, even though the Commission tried to collect additional metrics to measure the importance of the players in the market for consumer communication apps, no reliable dataset could be produced. This shows how the features of digital markets can make the task of assessing a merger very hard for competition authorities.

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[128] Adam Hayes, 'Market Share' (29 October 2021, *Investopedia*) <https://www.investopedia.com/terms/m/marketshare.asp> accessed 30 May 2022

[129] Case M.7217 (n 110)

In the Commission's report on Competition Policy in the Digital Era, the authors concluded that there is no single parameter that would allow competition authorities to measure market power; and emphasized the need for better frameworks of analysis to be developed, as more cases are reviewed.[130] On the other hand, the authors of the "Market definition and market power in the digital economy" report of CERRE (Centre on Regulation in Europe)[131] developed a number of indicators of market power in two-sided platforms with a particular emphasis on the assessment of barriers to entry. Those are: revenue share, user share and market dynamics, which will be shortly explained ahead.

Regarding revenue shares, the authors point out that both sides of the platform have to be taken into consideration (or, in the case of multi-sided platforms, all sides of it) by assessing their overall revenue shares, as they serve different but interdependent user groups. In the case of "zero-price markets", this revenue assessment becomes obviously meaningless. Besides, it is advocated in this report that such revenue shares should not be interpreted as market shares as they can only be indicative of market power if all undertakings being considered serve the same sides. By contrast, this assessment will not be pertinent if undertakings active in the relevant markets follow different business models.[132]

According to the authors, in two-sided platforms, market shares can also be assessed by performing a comparation between the shares of active users on that determined platform and the shares of the total number of active users. Thus, if multi-homing is particularly strong on one side of the platform, this can imply little competition among platforms for these multi-homers. 'Taking the market share of all comparable offers on this side (even if they turn

[130] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 50
[131] Jeans-Uwe Franck and Martin Peitz, 'Market Definition and Market Power in the Digital Economy' (n 119) 70
[132] Ibid 72

out to be no or only very weak substitutes) then provides a lower bound on a platform's market share on this side'.[133]

Moreover, when considering market dynamics, competition authorities could measure the actual size of the platform on one side and compare it with the market size by considering the 'total number of users active on this platform relative to the total number of active and potential users'.[134]

Finally, in digital markets, large-scale data gathering has become a strong source of market power. Companies have developed business models that facilitate data collection, such as "free of charge" products and services where, in exchange, consumers agree to terms and conditions allowing the use and monetization of their personal data. Access to this data could be easily translated to market power as it creates a barrier for other competitors to enter the market.

Accordingly, competition authorities have to make an extra effort when assessing a merger in order to analyze if there would be a strengthening of data collection by the parties and consequent competitive constraints. In fact, the Commission has concluded that the hold of data is not an absolute indicator that competitors will be left out of the market, especially if the data is widely available and can be easily accessed by competitors, which means that it does not give necessarily a competitive advantage. However, if this data is not available to new market entrants, the possession of these unique insights may allow companies to squeeze out competitors, increasing their market power and leading to not only dominance, but the abuse of it.

[133] Ibid 73
[134] Ibid 74

4.3 Theories of harm

In merger control, theories of harm are used to explain why a particular concentration may represent a threat to competition and should therefore be prohibited. Nevertheless, as it happens with market definition, performing this assessment in digital markets, especially with respect to platforms, is somewhat more complex than in traditional markets.

In the report on Competition Policy in the Digital Era, the authors also acknowledge the importance of the development of theories of harm in order to allow a proper assessment of these digital players. In fact, according to them, competition authorities should put "less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies".[135]

This is because when technologies and markets evolve at this speed, market power can be better measured by entry barriers than market shares. Therefore, when reviewing a proposed concentration, antitrust authorities should focus mainly on the competitive effects on the market, and developing theories of harm is a good tool to do that.

In this context, three key elements are present in theories of harm associated with market power and anticompetitive effects in digital markets: innovation, price and quality. Besides, there can be a loss of competition due to factors such as network effects, multi-homing and Big Data.

4.3.1 Reduced incentives for innovation

The European Commission's Horizontal Merger Guidelines outline merger control as a tool to prevent consumers are deprived of the benefits of a competitive market such as low prices, high-quality products, more options of goods and services, and innovation. Accordingly,

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[135] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 3

the Commission shall prevent a merger will confer an undertaking enough market power which will allow it to, amongst other anti-competitive actions, diminish innovation.[136]

Thus, the race for innovation can be a key element for competition and development and it is an indicator of a successful economy, as competitors will invest in R&D to create new values, open new markets and have a competitive advantage. In the case of two companies with a similar technological level competing for the same market, proper "neck-to-neck" competition will induce investment in innovation to achieve leadership. Besides leading to business growth, it will be ultimately good for consumers, which will have products and services of better quality and more options.

In digital markets, where innovation is an important competitive force, preserving it is even bigger concern for the European Commission, as at the same time it is assumed that a merger may increase the undertaking's incentives to bring new innovations to the market (and as consequence, incentivize other competitors to innovate as well), it is also possible that it might significantly impede competition. This can happen, e.g., when there is a merger between two important innovators with "pipeline" products related to a specific product-market.[137]

This is a special concern in platform-driven business models, which are characterized by the trend to greater concentration because once a company innovates enough and, along with other business strategies, gets enough market power to be a leader, special characteristics of digital markets such as large economies of scale and network effects can create significant advantages for first movers and for the creation of a monopoly. As a result, these companies no longer need to innovate to make high profits as they would be shielded from competition. [138]

[136] Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' COM (2004) 205 OJ C31/05 (Guidance on Horizontal Mergers), para 8
[137] Ibid para 38
[138] Commission 'Competition Law 4.0' (n 78) 21

It is important that the Commission consider theories of harm related to the potential decrease in the incentive for innovation possible because of the special features of digital markets. As explained, after having accomplished a dominant position in the market through an innovation competitive run with other rivals, these dominant players can engage in anti-competitive practices to limit the threat to successful entry and innovation.[139] Consequently, these barriers to entry will decrease incentives for innovation,[140] since once a company has enough market power, investments of this sort will be less necessary to protect a market position.[141]

In the context of start-ups, this concern is especially critical. If there are barriers to entry as a result of the anti-competitive practices of a dominant player, it will be very difficult to small firms to raise funds or convince investors to bet on their ability to innovate and get a market share if the market already has a well-established tech giant.[142] Besides, it has become a common practice between these dominant tech players to acquire start-ups specifically with the intention of discontinuing their innovation projects in order to prevent future competition in the market. These so-called "killer acquisitions" will be further discussed.

Hence, according to the Issue Paper on Big Tech Acquisitions by CERRE (Centre on Regulation in Europe), when reviewing the post-concentration effects of these transactions on innovation in the market, competition agencies should analyze: how substitutable or complementary the existing and future products of the acquiring and acquired companies are; and the degree of synergies between their innovation capabilities. If both criteria are strongly met in the concentration, it should be an indicator that the acquisition will lead to disruption in competition and innovation.

[139] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, (n 72) 15
[140] Guidance on Horizontal Mergers (n 136) 71
[141] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, (n 72) 15
[142] Ibid

4.3.2 Excessive prices and network effects

Even though many services and products are offered "free of charge" by digital platforms, the market power and network effects common in this industry can lead to pricing strategies harmful to consumers. For instance, while not charging on one side of the platform, a company can try to balance this by charging excessive prices on the other side.

Consumers are attracted to the platform because of this zero-price offer, but later it stops being just a matter of price, but of value as well, cause the more users participate in the platform, the more other users will be attracted by it. Because of this value created around the platform, the market power achieved on one side of it can be used to charge monopoly prices on the other side. This value, which keeps users in it, also makes it hard for other competitors to stay in the business because they lack the most valuable side of it: consumers.[143]

Thus, network effects play a very important role in the pricing on these platforms. If a consumer leaves one side of the platform, network effects will be reduced on the other side of it with a consequent decrease in demand and value and companies will feel obliged to reduce prices to compete with other firms. Accordingly, the opposite situation can also happen and that is the scenario that concerns competition authorities when assessing a proposed concentration. If in one of the undertakings, network effects are already high, this will not only increase the prices that can be charged on the other side of the platform, but will also reduce the market attractiveness to other competitors. If that's the case, the concentration will affect competition in the internal market.[144]

[143] Ibid
[144] Bruno Jullien and Wilfried Sand Zantman, 'The economics of Platforms: A theory guide for competition policy' (2019) TSE Digital Center Policy Papers series, No.1, 5 <https://ssrn.com/abstract=3502964> accessed 01 June 2022

4.3.3 Degradation of quality due to decreased privacy protection

When assessing a proposed concentration, competition authorities take into consideration not only price, but quality as well, in which reductions can be as harmful to consumers as increased prices because of a monopoly, e.g. In markets where products are often offered for "free", the price cannot be the only parameter used, and in these cases, assessing quality disruptions can be a way out to analyze competitive constraints. Accordingly, as those markets are marked by extensive personal data collection, which is the real payment behind these "free" subscriptions, privacy considerations could, in some cases, indicate product quality, or the decrease of it.[145]

Recent theories of harm take great consideration on data gathering and its potential effects on competition, overall quality of the services and products, and ultimately, consumer welfare. The Commission's concern relates to the fact that some platforms may perform excessive data collection to increase their market power and strengthen their positions as gatekeepers of determined markets. This degradation of privacy policies could also lead to a lower quality of products and services due to the reduced data protection.[146]

In recent cases, privacy has been recognized as a non-price parameter of competition in digital markets. In *Microsoft/Linkedin,*[147] the Commission endorsed this approach by assessing the potential impact a merger can have on non-price competition in the form of degradation of service quality. Correspondingly, in the *Facebook/Whatsapp* merger, the Commission indicated that data privacy and data security constitute key parameters of non-price competition in communication services markets.[148]

[145] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (2018) University of Oslo Faculty of Law Research Paper No. 2018-26, 4 < https://ssrn.com/abstract=3232701> accessed 10 May 2022
https://ec.europa.eu/competition/information/digitisation_2018/contributions/samson_esayas.pdf
[146] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, (n 72) 13
[147] *Microsoft/LinkedIn* (Case M.8124) Commission Decision 02/EC [2016] OJ C388/4, para 255
[148] Case M.7217 (n 110)

However, competition authorities have not developed yet how these considerations could be actually operationalized with a concrete theory of harm. In fact, on *Facebook/Whatsapp*, the Commission reiterated the traditional approach in which privacy concerns are to be dealt with under EU data protection rules. Hence, there is still great uncertainty in this matter regarding the importance of privacy assessment for competition enforcement and how relevant spending resources on this would be to competition enforcement. Nevertheless, the answer to this relevance doubt can be found in how much data privacy is valued by consumers in these markets in which personal data is a key input for providing services, e.g., targeted ads. Thus, a reduction in data privacy could indicate an increase in personal data being collected which can lead to a decrease of overall quality of privacy.[149]

4.3.4 Foreclosure in competition due to Big Data

The term Big Data usually refers to the "three Vs": the volume of information, the velocity at which it is created and collected and the variety of data being gathered. Regarding this matter, competition authorities are especially concerned about who is collecting the data; who are the subjects providing them; whether there are comparable data available from multiple sources; the value of the data; and the potential decrease in its value over time. [150]

Although it is recognized the importance of data as a key ingredient for companies to develop new, high-quality, innovative services and products, antitrust authorities fear that the use of big data can create a barrier to entry by facilitating the achievement of a dominant position by using unique datasets that competitors don't have access to. In an interview in 2018, the European Commissioner for competition, Margarethe Vestager, explained that "in some areas, these data are extremely valuable" and "They can foreclose the market – they can give

[149] Samson Esayas (n 145) 5
[150] Troy Segal, 'Big Data' (28 March 2022, *Investopedia*) < https://www.investopedia.com/terms/b/big-data.asp> accessed 10 June 2022

the parties that have them immense business opportunities that are not available to others". Thus, she highlighted the importance that EU regulators assess the effect of Big Data when evaluating mergers.[151]

In traditional theories of harm, foreclosure can happen, e.g., when the undertakings combine in the transaction complementary products and, as a result, their rivals are refused access to an important input. In data-driven markets, this theory of harm is developed following the idea that when the merging parties have two previously independent datasets, the concentration can lead to the creation of a larger dataset giving the company a competitive advantage that will not be able to be overcome by competitors if there is no alternative way of getting access to data in order to compete in the market.[152]

According to the Franco/German study on Competition Law and Data, [153] there are five types of exclusionary practices coming from the use of Big Data:

(I) Refusal to provide access to data, which can be anticompetitive when a certain set of data is essential for the activity of competitors, but is mainly collected/provided by a dominant player that refuses to share access to its rivals;

(II) Discriminatory access, when vertically integrated companies get access to strategic information and use that to distort competition, e.g., marketplace operators that also operate as online retailers and get access to data about their competitors selling on that marketplace and use it to get advantage;

(III) Exclusive agreements involving data access, which can raise antitrust concerns when a dominant third-party data provider uses exclusive contracts with its

[151] Natalia Drozdiak, 'EU Asks: Does Control of 'Big Data' Kill Competition?' (2 January 2018, WSJ) <https://www.wsj.com/articles/eu-competition-chief-tracks-how-companies-use-big-data-1514889000> accessed 10 June 2022

[152] Elena Argentesi and others (n 90) 11

[153] Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (2016), 17-20 <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=B433476372FD2F7A43EF4F482255113D.1_cid387?__blob=publicationFile&v=2> accessed 12 June 2022

customers in order to get an advantage with other suppliers, or even when there is exclusivity in the collection of data from consumers;

(IV) Tied sales and cross-usage, which can happen when a company uses data collected in a given market to increase its market power in another market where it is not dominant in an anti-competitive way. Although this can create efficiencies by the use of valuable data in the new market, it can be an important foreclosure element that will prevent rivals from competing because of the favorable position the dominant player achieved due to the use of data;

(V) Discriminatory pricing, when dominant companies with market power collect data about their customer's purchasing habits and can better analyze information such as their willingness to pay for a given good or service, and to use that information to set different prices for different customer groups.

Finally, in recent decisions, the Commission has shown growing concern about the role of data in anticompetitive practices. In *Google/Fitbit,*[154] e.g., the Commission assessed the proposed acquisition by Google of Fitbit, an activity tracker that uses a wrist like a watch to track day-to-day activities for fitness purposes. In this case, a couple of the theories of harm were related to data, such as the possibility that Google could start using Fitbit customer's data in order to strengthen its market position in the supply of general search services and in digital healthcare services; and foreclosure from access to Fitbit data to the detriment of digital healthcare players.

Nevertheless, the Commission concluded that the transaction would not be able to cause any significant increase of Google already existing data advantage in the supply of general search services;[155] accordingly, that the combination of Google and Fitbit's data base is not likely to lead to a significant impediment to effective competition as a result of horizontal

[154] *Google/Fitbit* (Case M.9660) Commission Decision 194/2021/EC [2021] OJ C194/6, para 255
[155] Ibid para 747

effects in the concerned market for the supply of digital healthcare services; [156] Regarding the foreclosure theory of harm, the Commission considered that it cannot be excluded that Google will have, after the Transaction, the ability to foreclose competitors in the downstream markets for digital healthcare by restricting access to the Fitbit Web API (Application Programming Interface).[157]

4.4 Mergers and Acquisitions in digital markets

In the past years, the number of mergers and acquisitions in digital markets has increased exponentially. The target companies of these acquisitions vary in a wide range of economic sectors and usually have products and services that complement the ones provided by the acquirer company. In this process, a common pattern is usually followed: first, these companies become dominant in their original market, such as search engine for Google, and then start acquiring companies in new sectors to add revenue streams and block competitors.[158] With the purpose of assessing these companies' strategies and the increase of market power as a consequence of these acquisitions, data from the GAFA group until April of 2022 will be discussed in the next paragraphs.

4.4.1 Google

Since its foundation, Google has made over 200 acquisitions, spending more than USD 26.88 billion on those, and among the GAFA group, is the leader in this aspect. It has invested in multiple AI sectors, usually involving cybersecurity, social platforms, AdTech and

[156] Ibid 484
[157] Ibid 520
[158] Chris Alcantara and others, 'How Big Tech got so big: Hundreds of acquisitions' (21 April 2021, *The Washington Post*) < https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/> accessed 13 June 2022

others. [159] Its biggest acquisition so far is Motorola, for USD 12.5 billion, in 2011, which was a very strategic move since Motorola had 17.000 patents and 7.500 more pending. With this acquisition, Google managed to strengthen the company's patent portfolio and increased protection to Android from anti-competitive threats. The move also gave Google better tools to compete with Samsung.[160]

Among the acquired companies are other big dominant players such as YouTube and Waze, transactions with the evident scope of spreading Google's dominance. YouTube, for instance, was the main competitor of Google's video hosting service, Google Video, which was gradually ceasing to exist due to the popularity of its competitor. Google's response was buying it for USD 1.65 billion in 2006. Accordingly, with the purchase of Waze, Google not only neutralized an ascending rival to its Maps product, but also gained access to user's location data, which allowed the company to improve its search engine's results and better target the users.[161]

However, their acquisition activities are not restricted to buying big players. Over the years, Google has acquired a great number of small start-ups either to take ascending potential competitors off the market, or to combine its technology with their products in order to improve its functioning. In 2010, e.g., Google bought a California-based startup called Fflick, a Twitter movie recommendation service, for USD 10 million, a price relatively low, compared to the other acquisitions. The idea behind it was to use its technology to improve users' connectivity while using YouTube.[162]

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[159] 'Acquisitions by Google' (April 26 2022, *Tracxn*) < https://tracxn.com/d/acquisitions/acquisitionsbyGoogle> accessed 13 June 2022
[160] Nicolas Lekkas, 'GAFAM: The Big Five Tech Companies Facts (FAAMG)' (19 May 2022, *Growth Rocks*) <https://growthrocks.com/blog/big-five-tech-companies-acquisitions/> accessed 14 June 2022
[161] Nicolás Rivero, 'The acquisitions that made Google a search monopoly' (16 February 2022, *Quartz*) <https://qz.com/1920334/the-acquisitions-that-built-googles-monopoly-on-search/> accessed 13 June 2022
[162] 'Google buys SayNow, fflick' (26 January 2022, *Phys.Org*) < https://phys.org/news/2011-01-google-saynow-fflick.html> accessed 13 June 2022

Google's acquisitions have played an important role in ITS growth from the leader in search engine to other markets. It has services for mapping (Google Maps, Waze, Google Earth), email (Gmail), time management (Google Calendar), cloud storage (Google Drive), video chat (Google Meet), among others. This is a perfect illustration of how these dominant players can increase their power in an economy of scale and scope where network effects and data analysis are used as tools to ensure a digital market concentration, and help these undertakings in becoming true gatekeepers in some markets.

The consequences of these acquisitions by Google have raised concerns to the European Commission as to the potential threat to competition. In *Google/Fitbit,*[163] the most recent case assessed by it, the EC had concerns specifically to advertising: if Google would use the database about Fitbit's users' health and fitness to target them with personalized ads, which would make competition extremely hard for its rivals; if there would be a monopoly of the access to API in the market for digital healthcare provided by Fitbit and that was used by many other players in order to provide services to Fitbit users and obtain their data in return; potential disadvantage for competing manufacturers of wrist-worn wearable devices by degrading their interoperability with Android smartphones. In the end, the acquisition was approved subject to full compliance with a commitment package offered by Google.

4.4.2 Apple

Founded in 1976, Apple is not only the oldest firm among the Big Four but also the world's most valuable company. [164] During the years, it has made over 100 acquisitions, spending over USD 28.48 billion on them. The investment varies in sectors such as AI infrastructure, Music Tech, Image Recognition and more.[165]

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[163] Case M.9660 (n 154)
[164] Chris Alcantara and others (n 158)
[165] 'Acquisitions by Apple' (April 26 2022, *Tracxn*) < https://tracxn.com/d/acquisitions/acquisitionsbyApple > accessed 13 June 2022

Unlike the other companies of the GAFA group, their strategy has been mostly focused on acquiring small companies that can easily integrate to projects they are already developing internally.[166] In fact, apart from a few big transactions, such as Beats Music in 2014 for USD 3 billion, the vast majority of the companies acquired were significantly smaller, without a major public profile. Thus, Apple has used its acquisition strategy to boost expansion in areas where it does not dominate by getting talented technical staff from smaller companies and by seeking these firms that, although small, have a specific technology that could be used to set them apart from competitors.[167] One example of this is the purchase of the Israeli RD sensing company PrimeSense for USD 350 million, whose technology was a key element in the development of Apple's FaceID.[168]

In the case *Apple/Shazam*,[169] in 2018, the Commission received a notification of concentration of the mentioned companies by a referral request under Article 22(1) EUMR. The transaction did not meet the turnover set by the EU Merger Regulation, but it triggered the national merger notification threshold in Austria. There, the Austrian competition authority concluded that although the concentration did not have a Union dimension, it could affect trade within the Single Market and had the potential to threaten competition within its territory. Subsequently, six other Member States joined the request based on the competitive threat that such transaction would represent in their territories as well: Iceland, Italy, France, Norway, Spain and Sweden.[170]

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[166] Arick Hesseldahl ‚What to do with Apple's Cash' (1 March 2007, *Business Week*) <https://web.archive.org/web/20080514121620/http://www.businessweek.com/technology/content/mar2007/tc20070301_402290.htm> accessed 13 June 2022

[167] Kif Leswing, 'How Apple does M&A: Small and quiet, with no bankers' (1 May 2021, *CNBC*) <*https*://www.cnbc.com/2021/05/01/how-apple-does-ma-small-and-quiet-with-no-bankers.html#:~:text=%E2%80%9CApple%20is%20buying%20more%20smaller,buy%20companies%20that%20address%20them> accessed 13 June 2022

[168] Justin Harper, 'Apple buys a company every three to four weeks' (24 February 2021, *BBC*) <https://www.bbc.com/news/business-56178792> accessed 14 June 2022

[169] *Apple/Shazam* (Case M.8788) Commission Decision 151/2018/EC OJ C151/54

[170] European Commission, 'Mergers: Commission to assess the acquisition of Shazam by Apple' (6 February 2018, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_664> accessed 14 June 2022

In the assessment of the case, the main theory of harm regarded the possible post-transaction foreclosure of competing providers of digital music streaming apps as a result of Apple getting access, with the acquisition, of commercially sensitive data on its rivals, especially Spotify. Accordingly, this could be done by denying or impeding access of Apple Music's rivals to (i) Shazam's referral mechanism as a customer acquisition channel; (ii) Shazam's referral mechanism as a user engagement tool and that enriches user experience; (iii) and/or the application of Shazam User data as an input to improve existing functionalities or to offer additional functionalities on music streaming services.[171]

In order to get a conclusion, the Commission analyzed these basic key elements: if there would be indeed access to commercially sensitive information; if Apple would be able to use customer information to put competitors at a competitive disadvantage; and what would be Apple's incentives to put the other competitors in disadvantage. At last, after having reviewed other non-horizontal effects, the Commission concluded that the concentration would not significantly impede effective competition in the music streaming market in the EU or in any of the referring States.

4.4.3 Facebook (Meta)

Prima facie, although recently the company was rebranded to "Meta", it will be referred to as "Facebook" in this study. Since Facebook's creation in 2004, back then "The Facebook", it has made over 90 acquisitions spending more than USD 25.8 billion on them. According to its Annual Reports, almost all its revenue comes from selling advertising placement to marketers, and a fair share of these profits are reinvested in a strong diversification

[171] Case M.8788 (n 169) 195

strategy. It has acquired companies in different sectors such as social platforms, online photos and virtual reality, which vary from small young start-ups to full established businesses.[172]

Over the years, it has become clear that Facebook has been using its acquisition strategy to consolidate its social media dominance. In 2010, it spent USD 40 million on buying the portfolio of patents of Friendster, a trending social network before the ascension of Mark Zuckerberg's creation. The patents covered areas such as methods for calculating, displaying and acting upon relationships in a social network and system, and methods for managing an online network, which would give Facebook a good advantage in the sector.[173]

One of the reasons for this acquisition relied on Facebook's attempt to protect themselves as a social network from Google, which owned a larger patent portfolio and had recently launched a direct competitor to Facebook, Google+, which was not successful, as a result of Facebook's strategies and network effects.[174] Today, the company owns four of the top five social media and messaging platforms: Facebook, Instagram, Facebook Messenger and WhatsApp, which proves that, although it has explored other sectors, it has also put great efforts in securing dominance in its core business.

WhatsApp was Facebook's most costly acquisition so far (USD 19 billion) and one of the biggest in Silicon Valley. Specialists point out three benefits Facebook was planning to get from it: to reclaim the teen group of users, whose interest in Facebook was decreasing; it would allow Facebook to get market power into the mobile messaging market; and it presented Facebook with general big user growth opportunity.[175]

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[172] 'Acquisitions by Facebook' (April 26 2022, *Tracxn*) <https://tracxn.com/d/acquisitions/acquisitionsbyFacebook > accessed 13 June 2022
[173] Morison & Foerster LLP, 'Facebook quietly buys up social networking patents' (3 September 2010, *Lexology*) <https://www.lexology.com/library/detail.aspx?g=e30dc59b-76cf-4816-b394-1f3cef732bdd> accessed 13 June 2022
[174] 'Facebook's Patent Acquisitions? They're More About Google Than Yahoo' (28 April 2012, *Tech Crunc*h) <https://techcrunch.com/2012/04/27/facebook-google-patents/> accessed 15 June 2022
[175] Kristin Burnham, 'Facebook Acquires WhatsApp: 3 Key Benefits' (20 February 2014, *InformationWeek*) <https://www.informationweek.com/social/facebook-acquires-whatsapp-3-key-benefits> accessed 13 June 2022

In WhatsApp's case, much has been talked about the sharing of users' data for advertising and other purposes with Facebook and its companies. However, according to them, the information is solely used for purposes of receiving services that will help WhatsApp improve its business; and that will keep WhatsApp and the other Facebook family services safe and secure. They claim that no data is being shared from WhatsApp to improve Facebook products or provide more relevant Facebook ad experiences.[176] Moreover, they state that messages are private and that the content of them is not shared, as it is protected by end-to-end encryption.

Facebook's alleged use of data to improve its market power and shore itself as a dominant company has raised competition concerns and resulted in the first decision by a competition authority in which privacy protection was explicitly taken into consideration. Although this was not a merger case itself, it has deeply influenced the way competition regulators analyze the role of data in assessments of proposed concentrations. In the so-called "German Facebook Case", the German NCA (the *Bundeskartellamt*) conducted a three-year investigation and concluded that Facebook required its users to accept to a privacy policy where their data is being shared across WhatsApp, Instagram and other third-party and websites.[177]

This strategy of collecting data from multiple sources and combining them without explicit consent, besides resulting in an infringement of the General Data Protection Regulation (GDPR) rules, was considered to be an exploitative abuse by Facebook, as a dominant firm. That is because this "bunding of consent" would allow Facebook to build comprehensive consumer profiles that would assist in better-targeted advertising. Besides, it was stated that Facebook used its dominant position in the market to implement a "take it or leave it" privacy

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[176] 'How we work with the Facebook Companies' (*WhatsApp Help Center)* <https://faq.whatsapp.com/2776997199019255/?locale=en_US®ion_hint[0]=IN_EEA> accessed 14 June 2022

[177] 'German competition regulator restricts Facebook data use' (*Simmons Simmons*) <https://www.simmons-simmons.com/en/publications/ck09rn9q9mpa90b330civ07ok/150219-german-competition-regulator-restricts-facebook-data-use> accessed 14 June 2022

policy that could lead to a no longer "voluntary" consent from users.[178] At last, the *Bundeskartellamt* did not charge Facebook with any fine, but ordered changes in the way it collects data and their privacy policy so user's consent would be indeed voluntary.

In the assessment of the *Facebook/WhatsApp* [179] case, the Commission assessed the impact of the transaction on markets for (i) consumer communication services; (ii) social networking services and (iii) online advertising services. For that, it analyzed some theories of harm related to the use of data for anticompetitive purposes. To start, it assessed the possibility of Facebook using WhatsApp users' data to introduce targeted advertising on WhatsApp, which would have the effect of reinforcing Facebook's dominant position in the online advertising market. In this case, the EC decided that, even if there is an introduction of advertising on WhatsApp by the merged entity, there would still be space for competition, as there are a sufficient number of other ads providers in the market.[180]

Regarding the theory of harm on which the merged entity could start collecting valuable data from WhatsApp users in order to provide more accurate and efficient targeted ads on Facebook, the Commission was concerned that with the collection of data and integration of social networking and consumer communication app, Facebook could materially strengthen their market position in the online advertising field. Nevertheless, it was concluded that the transaction would not result in serious doubts to competition in the internal market, as even if the data is used to improve ads on Facebook, there will still be a large amount of Internet user data that are valuable for advertising purposes, that are not within Facebook's exclusive control and are collected by other companies such as such as Apple, Amazon, eBay, Microsoft, AOL, Yahoo!, Twitter, IAC, LinkedIn, Adobe and Yelp, among others.[181]

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[178] *Facebook* (Case B6-22/16) Bundeskartellamt Decision 2019
[179] Case M.7217 (n 110)
[180] Ibid
[181] Ibid

4.4.4 Amazon

Amazon started as a bookstore and grew to be the biggest retailer globally. One of the reasons for this exponential growth is related to its many strategic acquisitions, going beyond the eCommerce industry and expanding to other sectors such as artificial intelligence and cloud computing. Despite the diversification strategy, most of its investments are still in the sector it is most known for: selling merchandise online.[182] Amazon has made, in total, more than 80 acquisitions, having spent over USD 34.8 billion on those.[183]

Over the years, Amazon has made very strategic acquisitions. In 2021, it bought the Hollywood studio MGM for USD 8.45 billion,[184] which as a result, added 21.000 movies and TV shows to the library of Amazon's streaming service, Prime Video. With that, Amazon was hoping to strengthen its position in order to compete with its main content streaming rival, Netflix. [185] In 2020, Amazon acquired the company Zoox for USD 1.2 billion, a developer of autonomous vehicles. In this case, Amazon was interested in its transport technology in order to improve its logistics network and offer cheaper and faster delivery.[186]

Although all of Amazon's acquisitions aim at specific goals and have contributed to their dominance in the retail market and other sectors where it is fighting for market power, some say one of its most successful takeovers happened in 2017, with the purchase of the American multinational supermarket Whole Foods Market. The chain of supermarkets costed Amazon USD 13.7 billion and it was its most expensive acquisition so far.

This acquisition, which was cleared by the U.S. Federal Trade Commission (FTC), allowed Amazon to enter the grocery market, provided them a brick-and-mortar presence to

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[182] Chris Alcantara and others (n 158)
[183] 'Acquisitions by Amazon' (April 26 2022, *Tracxn*) <https://tracxn.com/d/acquisitions/acquisitionsbyAmazon> accessed 13 June 2022
[184] Nicolas Lekkas (n 60)
[185] Carmen Ang, ' Amazon's Most Notable Acquisitions to Date' (27 May 2021, *Visual Capitalist*) <https://www.visualcapitalist.com/most-notable-amazon-acquisitions/> accessed 13 June 2022
[186] Nicolas Lekkas (n 60)

sell their flagship devices, helped them to improve its logistics, but also gave them extensive access to data. This, in fact, in pointed out by specialists as one of the main reasons for this purchase.

With a massive amount of data collected from grocery shoppers, Amazon would be able to get more insight into the shopping preferences of each customer, tailoring the experience to the individual. This gives Amazon a more competitive advantage to better target ads and promotions than traditional grocery shops typically do.[187]

Amazon's activities, however, have raised competitive concerns amongst competition authorities in the United States and Europe as well. In 2020, the European Commission opened a formal investigation because of Amazon's anti-competitive practices consisting in systematically relying on non-public data of the independent sellers who sell on its marketplace in order to get an unfair competitive advantage for the benefit of its own retail business. Accordingly, the Commission also investigated a potential preferential treatment of Amazon's own retail offers in its marketplace, which makes it hard for independent sellers to compete.[188]

Regarding merger control, the Commission only assessed the *Amazon/MGM*[189] case, in which it investigated the horizontal overlaps and the vertical links between the merging parties' activities with respect to AV content value chain; the vertical link regarding the activities of the undertakings in the upstream market for the production and licensing of films for theatrical release and the downstream market for the theatrical exhibition of films; and the

[187] Greg Petro, 'Amazon's Acquisition Of Whole Foods Is About Two Things: Data And Product' (2 August 2017, *Forbes*) <https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/?sh=43263dafa808> accessed 17 June 2022

[188] European Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (10 November 2022, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 14 June 2022

[189] European Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (10 November 2020, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 13 June 2022

conglomerate links between MGM's catalogue and Amazon's existing content in its streaming service, Prime Video, in order to analyze if the concentration would significantly impact Amazon's position as a provider of marketplace services.

4.5 Killer acquisitions

The term "killer acquisitions" was originally used in the pharmaceutical industry to refer to dominant firms that may acquire innovative businesses with the only purpose of discontinuing the target's innovation projects and preempting future competition.[190] Later, with the strengthening of similar acquisition approach by many of the big tech companies, the term was extended to the digital industry as well.

This phenomenon raises antitrust concern because start-ups play a vital role in competitive markets as they can use their innovative ideas and products to help to break up concentrated markets, to force less efficient players to improve in order to compete and ultimately, enhances consumer welfare. However, because they are young and lack market power, these nascent firms are usually more exposed to exclusionary conduct by dominant players.[191]

In digital markets, competition authorities are specially concerned because in the last years, in this race to achieve dominance in various sectors, big tech companies (especially the GAFA group) have engaged in a strong acquisition strategy, where a significant part of targets are young innovative start-ups. Those are usually small companies with considerable access to data and high innovation potential that, in the future, could become possible competitors and for that, represent attractive targets for large dominant firms.[192]

[190] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer acquisitions' (2021) 129 (3) Journal of Political Economy <https://ssrn.com/abstract=3241707> accessed 15 June 2022
[191] OECD Secretariat, 'Start-ups, 'Killer Acquisitions and Merger Control – Background Note' (n 4) 5
[192] Leonardo Rocha e Silva and others, Killer acquisitions: startups, disruptive innovation and antitrust intervention – Where are we and where are we heading to?' (2019) IBRAC

Initially, the acquisition of small start-ups by larger companies concerned competition authorities regarding an anticompetitive growth of market share, which would represent barriers to new potential entrants. However, the 2018 research that developed the idea of killer acquisitions brought up the situation where large incumbents acquire innovative small businesses and do not carry on with the development of the product/service, but rather discontinue it to ensure its market position, which consequently blocks innovation.[193]

Besides, the special features of digital markets such as network effects and the fact that competition tends to be for the market and not in the market, as explained previously, increase the probability that potential competitors will be nascent firms. Because these markets are extremely innovative, products are easily substitutable, for which reason large companies have a special interest in trying to control potential threats for them in the market, which depending on the case can be a small but innovative start-up.

Larger firms are not usually the most efficient innovators, unless they feel threatened by competitors, which will not happen if they carry on with killer acquisitions. [194] Therefore, such takeovers not only impede competition, but often represent a constraint to the development of a product, a service, or an idea that could have increased consumer welfare. This innovative expression, which is especially critical in these high-tech sectors, will be, then, jeopardized if it is "killed" by stronger players aiming to prevent competition.[195]

A 2021 report from the Federal Trade Commission (FTC)[196] provided data from the acquisitions by the GAFAM group (Google, Apple, Facebook, Amazon and Microsoft) from

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<https://www.ibrac.org.br/UPLOADS/Eventos/433/25_IBRAC_2019_KILLER_ACQUISITIONS_EN.pdf> accessed 15 June 2022

[193] OECD Secretariat, 'Start-ups, 'Killer Acquisitions and Merger Control – Background Note' (n 4) 5

[194] Leonardo Rocha e Silva and others (n 192)

[195] Václav Šmejkal, 'Concentrations in digital sector - a new eu antitrust standard for "killer acquisitions" needed?' (2020) 7(2) InterEULawEast < https://doi.org/10.22598/iele.2020.7.2.1> accessed 9 January 2022

[196] Federal Trade Commission, 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study' (2019) FTC <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf> accessed 18 June 2022

2010 to 2019. According to the study, the five companies reported 819 total non-reportable transactions over the 10-year period. The vast majority of the target companies were very small: 40% were bought for less than USD10 million and 80% for less than USD 50 million; 55% had less than 10 staff and 90% had less than 50 staff; and 47.9% had less than 5 years old (using the latest founding date approach).

Although some of these transactions could clearly have anticompetitive effects, they usually escape the scrutiny of competition authorities, as they do not meet the notification thresholds, and therefore, are not subject to any antitrust review.

This is also a reality of the European Union, as the notification threshold established by the Merger Regulation is based primarily on a revenue criterion, where the lowest alternative aggregate threshold in each of at least three Member States has to be more than EUR 100 million; and in each of at least three Member States, the aggregate turnover of at least two of the undertakings concerned is more than EUR 25 million.[197] Thus, as explained previously, if a concentration does not meet the community dimension, which is defined by its turnover worldwide and within the European Union, it won't be assessed by the Commission. For that reason, killer acquisitions usually escape the scrutiny of merger control rules, as in the early stages of their development, these targets concentrate on creating a larger user base, collecting data or carrying out R&D on new technologies before seeking to monetize their products/services. As consequence, they tend to have low turnover and then do not grab the attention of competition authorities.[198]

However, it is important to note that not always the acquisition of small start-ups by dominant firms will be necessarily bad for the market. It might be that the innovation introduced by the start-up will be combined with the dominant firm resources, IP and skill set in order to create efficiencies and improve or develop a product/service, which would be good

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[197] EUMR art 1 (b) and (c)
[198] OECD Secretariat, 'Start-ups, 'Killer Acquisitions and Merger Control – Background Note' (n 4) 5

for the market. In those cases, the acquisition happens to use the small business features in order to strengthen a market position, and this is not a problem by defect as dominance is not prohibited by competition law rules, but rather the abuse of it. Besides, some of these start-ups don't have sufficient capital to scale up and become fully competitive without outside financing, so the prospect of a takeover by another bigger company can be an incentive for a start-up to develop new attractive technologies.[199]

This scenario demands a reflection on how mergers in innovative markets should be assessed so there is no excessive market intervention, since, as mentioned, it is also possible that these transactions may actually translate into relevant synergies and efficiencies resulting from the combination of the innovative ideas of the start-up and the established structure of the buyer. In those cases, it is necessary to establish a balance between the costs related to an excessive intervention and the results of that in the market dynamics, versus the same information regarding an under-enforcement context.[200]

The very special characteristics of these sorts of transactions, which involve targets with low turnover that do not trigger notification thresholds, and the high volume of them, especially in the pharma and digital sectors, have made competition authorities struggle in finding the right tools to identify and assess killer acquisitions.

In digital markets, these transactions not only are different because of the motivation behind them, but also because of the peculiar features present in the digital industry. Sometimes the target companies are acquired in such an early phase of their development that is difficult to estimate it the parties would even be potential competitors. Thus, the possibility of having anti-competitive transactions escaping from merger regulation control led to a call for reevaluation of assessment tools.

[199] Ministry of Business, Innovation and Employment New Zealand (n 61) 19
[200] Leonardo Rocha e Silva and others (n 192)

4.6 The perceived enforcement gap and possible solutions

The recent market developments over the years, especially in the digital industry, have resulted in a substantial increase in concentrations involving large companies and small target firms that may play or have the potential to develop an important competitive role in the market, even though they do not generate significant turnover yet. As explained, in some cases, those concentrations appear to be "killer acquisitions'.[201]

In 2016/2017, a public consultation held by the European Commission specifically inquired, among other issues, about the possible existence of an enforcement gap concerning acquisitions of notably high-value targets with no or limited turnover. Although the majority of respondents did not perceive an enforcement gap regarding the acquisitions at issue, mention was made to several acquisitions by dominant digital players of smaller companies that escaped merger control scrutiny at EU level. The respondents listed acquisitions by Google of DailyDeal (2011 – USD 114 million transaction value), Waze (2013 – USD 1.1 billion), Nest Labs (2014 – USD 3.2 billion), Dropcam (2014 – USD 555 million), DeepMind Technologies (2014 – USD 600 million), Dark Blue Labs and Visual Factory (2014 – USD 50 million); Skybox (2014 – USD 500 million) and Moodstock (2016); in addition, they mentioned the acquisition by Microsoft of Mojan AS (2014 – USD 2.5 billion) and the acquisition by Facebook of Oculus VR (2014 – USD 2 billion).[202]

A qualitative examination by the Commission services concluded that of 744 transactions over the years 2015 and 2019, 191 appeared to be concentrations with some local nexus with the EU and a cross-border dimension. Of those, 87 were cases that might have potentially merited review. Regarding takeovers held by large tech companies, the Commission services mentioned that, despite the GAFAM companies having made hundreds of acquisitions

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[201] Guidance on article 22 EUMR (n 56) para 9

[202] Commission, 'Staff Working Document - Evaluation of procedural and jurisdictional aspects of EU merger control' SWD (2021) 66 final (Staff Working Document on procedural and jurisdictional aspects of EU merger control), paras 87 and 89

over the years, the minority of them were caught by the Commission's jurisdiction. According to data provided by Bloomberg regarding the period 2015-2019, the large majority of these transactions were valued below EUR 1 billion. During the same period, the Commission only identified six transactions by the GAFAM group above EUR 1 billion, namely Microsoft/GitHub, Amazon/Whole Foods Market, Microsoft/LinkedIn, Google/HTC assets, Google/Looker and Google/Fitbit. [203]

Thus, during this period, the study also showed that a number of acquisitions below EUR 1 billion deal value of potentially nascent competitors did not meet the Commission's jurisdictional threshold. These included tech sector transactions, such as Facebook/Giphy (2020), Facebook/Play Giga (2019), Amazon/Ring (2018), Apple/NextVR (2020), and Takeaway/Delivery Hero (2018); healthcare sector transactions, such as Merck/Immune Design (2019) and Roche/Spark Therapeutics. [204]

With the increase of these cases, the matter of how to deal with the acquisitions of these small but with significant competitive potential start-ups have emerged. In particular, a debate has started on whether the current European merger regime is fit for the task of identifying and blocking those concentrations that would be killer acquisitions or if there is a need for modification of the assessment tools.

In the European Commission's report on competition policy for the digital era, [205] the authors noted that the merger control of these specific acquisitions is particularly difficult for a number of reasons: To start, most of these acquisitions do not meet the community threshold defined in the EUMR and therefore, escape the jurisdiction of the European Commission. According to the current European merger regime, if the target company does not

[203] Ibid paras 111 and 112
[204] Ibid para 110
[205] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 111-113

have a significant turnover, the transaction will not be considered to have potential competitive effects in the internal market, and therefore is concluded without merger control.

Second, even if the concentration does fall under the jurisdiction of the EUMR, these companies are acquired in such an early stage of development that is hard for the competition authority, at the time of the acquisition, to estimate the possible effects of the transaction to the internal market. In those cases, there may not yet be a significant horizontal overlap between the core market dominated by the buying company and the one in which the small player is inserted, which makes the assessment of the case more challenging, at least with the existing merger regulation tools. [206]

In this context, the debates regarding the effectiveness of European merger control acquired a sense of urgency and the questions involved aspects such as the theories of harm being used, which would be outdated, and the fitness of the turnover-based threshold to the assessment of these particular acquisitions. One of the main origins of the urgency in these discussions is the *Facebook/WhatsApp* case, in which Facebook concluded the acquisition for the purchase price of USD 19 billion. Despite its high evaluation by Facebook (that considered for that the number of active users), WhatsApp's turnover was not high enough to trigger the jurisdiction of the European Commission. In this case, the review by the EC only happened because of a referral request pursuant to Article 4 (5) EUMR, since it met the threshold of three Member States. The fact that such an important transaction could escape merger control by the Commission, despite its clear potential impact on the competitive relations in the internal market, raised questions about whether the jurisdiction thresholds would be sufficient to ensure the goals intended by the EUMR. [207]

To address this problem, competition authorities and the literature, in general, have thought about many solutions for assessing such transactions. One of them involves the

[206] Ibid
[207] Staff Working Document on procedural and jurisdictional aspects of EU merger control (n 202) para 53

introduction of *ex- post* controls where there is a disparity between the turnover and the purchase price. Because of the special characteristics of digital markets and the low turnover, most of these small start-ups impose challenges in the estimation of potential anti-competitive effects regarding these transactions, *ex-post* control would allow competition authorities to monitor the behavior of the new firm, instead of just concentrating on the hard task of modeling future impacts. This method, however, brings many doubts regarding, e.g., its applicability only when *ex-ante* control has not been performed or in any case, as a safeguard against control evasion due; and, moreover, it is argued that it would increase uncertainty to the merging companies.[208]

Another option being brought by many authors is the adaptation of theory of harms to the digital world to properly assess those specific cases. Hence, competition authorities should develop theories of harm that analyze potential anti-competitive effects that are particular to the digital world. For instance, when a large dominant firm buys a small start-up with the sole purpose of disrupting innovation and preempting competition, unlike in traditional "conglomerate" theories of harm, the risk assessment will not be limited to the foreclosure of rival's access to inputs, but it extends to the empowerment of the platform's dominance. Thus, according to the report on Competition policies for the digital era, the best alternative to improve this assessment is to inject some "horizontal" elements into the existing theories of harm. With that, competition authorities will be able to assess, e.g., whether the acquirer benefits from barrier to entry associated with network effects; if the target is an actual or potential competitive threat to the acquirer within that technological market; if the merger is justified by efficiencies, etc. This would allow taking the dominant player's business strategies

[208] Václav Šmejkal (n 195) 8

into account, as well as the competitive risks they would raise, and would help to avoid "false negatives".[209]

Moreover, the main proposed solutions refer to the modification of the turnover-based notification threshold or its complementation with other supposedly more suitable metrics such as market share and the value of the transaction.

4.6.1 Notification threshold

Regarding the discussion about the notification threshold, the authors of the Commission's report on competition policy for the digital era concluded that, although it is clear that potential anti-competitive concentrations should be reviewed by competition authorities, it is too early to change the EUMR's jurisdictional threshold for two reasons: (i) it would increase legal uncertainty in the market; (ii) such change would represent an increase of the administrative burden under the Commission's jurisdiction. [210] In addition, the decision on changing the notification thresholds would also lead to transaction costs involved in the legislative change and the indication of a more interventionist approach by the competition regulators.[211]

Accordingly, some authors defend the idea that the change in the turnover criteria by the EUMR would be one of the most direct ways to remediate this situation and to expand the scope of the EUMR application and, consequently, the Commission's power to assess new categories of concentrations. However, they also acknowledged that the jurisdictional expansion could overcharge the system that would probably receive dozens of thousands of notifications per year.[212]

[209] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 121
[210] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 113
[211] Leonardo Rocha e Silva and others (n 192)
[212] Václav Šmejkal (n 195) 8

An alternative for this could be to demand a certain turnover to only one of the parties of the transaction (usually the acquiring one), which is a concept used already in other countries such as Brazil and Colombia. Nevertheless, if the European Union local nexus is still maintained, acquisitions, e.g., from Chinese companies that buy small start-ups to enter into the European markets would not be captured. This means that the turnover criterion, in order to have efficiency, would need to be supplemented by other criteria related to specific sectors. [213] Thus, in order to avoid capturing too many irrelevant transactions, a new threshold could be used only regarding transactions with specific characteristics, e.g., the acquisitions by dominant firms in markets characterized by strong network effects. Nevertheless, designing this new system in a way that legal certainty is not jeopardized would be a great challenge. [214]

According to the literature, another solution for the notification threshold problem would be to use other conceivable metrics, such as market share and transaction value, which could be complementary to the existing monetary one. However, each alternative has its downsides which need to be carefully examined before implementing such important change.

a) Market share

This criterion has been used by many jurisdictions such as Spain, Singapore, Canada and the UK and combines the market shares of the merging companies, or their share of sales of goods or services, and usually supplements a turnover-based notification threshold system. This metric allows a post-merger assessment and consequent increase of control by the competition authorities of situations such as when a company with a dominant position in the market acquires a smaller one.[215] In the UK, for instance, there are two alternative thresholds: the target's UK turnover exceeds GBP 70 million; and if the transaction results in the creation

[213] Ibid
[214] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 113
[215] Siyou Zhou (n 1)

of, or increase in, a 25% or more combined share of sales or purchases in the UK, of goods or services of a particular description.[216]

A market share-based notification threshold system would have the advantage of filling the gap present when the target company has not yet generated enough revenue to trigger the turnover threshold. Besides, it would allow the antitrust regulator to *ex-ante* evaluate the parties' market power and with that, estimate the degree of market concentration after the merger. With this system, e.g., the UK's competition authority was able to review important transactions such as Facebook/Instagram, which did not fall under the scrutiny of the Commission's jurisdiction due to the turnover threshold.[217]

Regarding the downsides of implementing this system in the case in question, namely killer acquisitions specifically related to digital markets, there would be extra challenges. This is because, in order to estimate market share, first the market must be defined. Given the special characteristics of digital platforms, such as multi-sidedness and network effects, this would be a difficult task.[218]

b) Value of the transaction

This would be a complementary threshold, which would have the goal of capturing transactions that, despite the low turnover, have high value, which could mean future strength and a threat to potential competition, and, because of that, should be investigated.[219] In the case of the acquisition of small start-ups, if a buyer is willing to pay a high purchase price for a small company that generates minimum turnover, this is an indicator of the importance being attached to its ideas or technology being developed.[220]

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[216] Timothy McIver and Anne-Mette Heemsoth, 'Merger Control in the UK (England and Wales): Overview' (*Thomas Reuters Practical LawI)* <https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=(sc.Default)#:~:text=informed%20of%20it.,Thresholds,services%20of%20a%20particular%20description> accessed 17 June 2022
[217] Václav Šmejkal (n 195) 7
[218] Ibid
[219] OECD Secretariat, 'Start-ups, 'Killer Acquisitions and Merger Control – Background Note' (n 4) 14
[220] Václav Šmejkal (n 195) 6

Such criterion has already been introduced in the national legislation of countries such as Austria and Germany and it doesn't mean that every high-value transaction will be considered anti-competitive or will be assessed by their National Competition Authorities. The value criterion is combined with the monetary turnover, and, in most of the cases, just then national merger control rules are triggered.[221]

However, the transaction-value metric pitfalls should also be taken into consideration. The introduction of an additional transaction value threshold was discussed in the European Commission's consultation on the Evaluation of procedural and jurisdictional aspects of EU merger control [222] and the respondents pointed out some aspects of it to bear in mind: (i) the purchase price is subjective and will not give a precise indication of the possible competitive meaning of the transaction; (ii) a jurisdictional test based on the value of the transaction would not ensure sufficient EEA local nexus; (iii) the valuation of transaction may pose a big challenge in itself and may vary significantly across sectors; (iv) there is a high risk of catching a large number of "false positive" cases or spending too much time and resources on consultations to clarify jurisdictional questions.

About the potential difficulties of implementing such threshold change, Commissioner Vestager explained other potential downsides such as the difficulty in determining the valuation moment due to the volatility of exchange rates or stock prices; it would lead to a significant increase in notified concentrations which would lead to excessive administrative burden. Finally, she pointed out that there is a fine line between introducing a transaction value threshold that is too low and captures too many transactions and one which is too high and does not capture enough.[223]

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[221] Marc Bourreau and Alexandre de Steel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (2020) Centre on Regulation in Europe (CERRE), 15 < https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_merger_control_EU_2020.pdf> Accessed 18 June 2022
[222] Staff Working Document on procedural and jurisdictional aspects of EU merger control (n 202), para 204
[223] Margareth Vestager, European Commissioner for Competition, 'The Future of EU Merger Control' (Speech at the International Bar Association 24th Annual Competition Conference, 11 September 2020)

In the report on Competition policy for the digital era,[224] the authors defend the idea that a change in the notification threshold metric would be too soon and that, instead, the EU should wait and assess if the implementation of the new transaction value-based threshold works in Austria and Germany and whether the referral system would be able to ensure that the Commission extends its jurisdiction to EU-wide relevant transactions.

4.7 Actions taken by National Competition Authorities

In order to provide an answer to the perceived enforcement gap brought by the acquisitions of small companies with low turnovers that did not trigger the existing notification thresholds and to follow up on the market's general development, some jurisdictions decided to extend the scrutiny of their merger regime.[225]

In the U.K., the Competition and Markets Authority (CMA) exercises its jurisdiction not only by relying on a turnover threshold, but also on a "Share of Supply Test". Thus, the CMA will only assess a merger when at least one of these two jurisdictional tests is satisfied: if the turnover associated with the enterprise being acquired exceeds GBP 70 million; and, if as a result of the transaction, the parties will together supply or acquire at least 25% in the supply or consumption of goods or services supplied in the UK. Overall, flexibility is considered an important part of this system, as it allows the CMA to capture important transactions, including killer acquisitions, as happened in the prohibition of *Facebook/GIPHY*.[226]

<https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 18 June 2022

[224] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 115

[225] Nicholas Levy, Andris Rimsa and Bianca Buzato (n 40) 369

[226] 'CMA Merger control jurisdiction to be expanded further' (10 May 2022, *Shearman & Sterling*) <https://www.shearman.com/en/perspectives/2022/05/cma-merger-control-jurisdiction-to-be-expanded-further> accessed 19 June 2022

In addition, recently the U.K. government announced changes in the merger control regime and the CMA is expected to have its jurisdictional power extended and one of the reasons behind this decision is to capture killer acquisitions.[227] The changes involve an increase in the existing turnover threshold and the introduction of an "Acquirer Only Test", according to which a new threshold is created where the acquirer has an existing share of supply of goods or services of 33% in the U.K., or a substantial part of the U.K., and has a turnover of at least GBP 350 million in the U.K. This will grant to the CMA wider jurisdictional reach so it can exercise its powers to certain vertical and conglomerate mergers, especially regarding killer acquisitions.[228]

In Europe, Austria and Germany were the first countries to extend the coverage of their merger control regime with an additional deal-value metric. This change was intended to cover especially digital transactions in which the low turnover of the target company was not representative of the potential effects of the concentration to competition in the market. Based on this new system, a proposed concentration would be notifiable if the transaction value exceeds EUR 400 million (Germany) or EUR 200 million (Austria), as long as certain revenue thresholds are met and the target has significant activities in Germany or Austria.[229]

The Digitalization Act, which entered into force in January of 2021, puts Germany among the first major jurisdictions to adopt special competition rules for digital platforms. The purpose behind this is to fill the presumed gap brought by the fast development of digital

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[227] 'Changes To UK Competition Rules Will Extend CMA Powers' (22 June 2022, *Conventus Law*) <https://conventuslaw.com/report/changes-to-uk-competition-rules-will-extend-cma-powers/> accessed 18 June 2022

[228] Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty, 'Consultation outcome - Reforming competition and consumer policy: government response' (2022) Department for Business, Energy & Industrial Strategy <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response> accessed 18 June 2022

[229] Dirk Schroeder and others, 'Germany and Austria introduce Transaction Value Merger Notification Thresholds' (2017) Cleary Gottlieb < https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/2017_06_27-germany-_-austria-revised--new-merger-thresholds.pdf> accessed 19 June 2022

markets and to block alleged abuses of market power. [230] Amongst the main changes, is the introduction of new tools to control platform conduct, that will allow its competition authority to capture the successive acquisition of nascent competitors by digital platforms.[231]

4.8 The European Commission's attempt over the years to address the problem

Ever since the competition problems resulting from the special characteristics of digital markets, and later the issue with the so-called killer acquisitions, became evident, the Commission engaged in a number of consultations in order to better assess the problem and the potential solutions for it.

In 2016, the Commission conducted a public consultation on procedural and jurisdictional aspects of EU merger control [232] focused mainly in two issues: whether the initiatives taken in 2013 to simplify the merger system achieved its goal, namely the reduction in the burden involved in the merger system without jeopardizing effective merger control; and whether the current EU merger control regime provides the necessary tools to capture and assess the proposed concentrations which have the potential to affect competition in the internal market. For that, it was also assessed the effectiveness of the turnover-based jurisdictional threshold regarding, in particular, transactions where the target company has a low turnover, as was seen in digital and pharma markets.

Between 2017 and 2019, the Commission Services engaged in a number of specific work streams especially focused on competition and digitization. In 2019, Commissioner Vestager appointed a panel of three advisers from outside the EC to work on a report on the

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[230] 'Germany Adopts New Competition Rules for Tech Platforms' (January 202, *Jones Day*) <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules> accessed 20 June 2022

[231] Latham & Watkins Antitrust & Competition Practice, 'The New German Digitalization Act: An Overview' (2021) Client Alert – News Flash N. 2849 <https://www.lw.com/thoughtLeadership/the-new-german-digitalization-act-an-overview> accessed 20 June 2022

[232] Staff Working Document on procedural and jurisdictional aspects of EU merger control (n 202), para 204

challenges of competition policies in the digital era,[233] where perceived gaps due to the activities of dominant firms in digital markets would be analyzed as well as the potential solutions for that. As explained, the authors concluded that, although it is clear that the acquisition of small start-ups by large players, that may qualify as killer acquisitions, place challenges for competition assessment, it is still too soon to change jurisdictional thresholds.[234]

According to the report,[235] any change of such magnitude could only take place if there was an absolute certainty that the EU merger regime is not suitable anymore to evaluate certain transactions, which was considered to be not the case. Instead, the authors recommended monitoring closely the referral activities of Member States along with the performance of the new transaction value-based threshold recently introduced in Austria and Germany.

In December of 2020, the Commission proposed the Digital Markets Act (DMA),[236] a reform of the digital space with a comprehensive set of rules to make the digital sector fairer and to regulate the gatekeeper power of the largest digital companies. The DMA only places obligations on gatekeepers, which are undertakings providing core platform services that meet the qualitative and quantitative criteria set out in Article 3 of the DMA.

Among the goals intended with the DMA, is providing the EC with better conditions to monitor the market development in the digital industry, in order to become aware of killer acquisitions and block them. Thus, it imposes on gatekeepers the obligation to inform the Commission of any intended concentration where the target company is another platform provider from the digital sector, regardless if such transaction would be notifiable to the

[233] 'Shaping competition policy in the era of digitisation' (2019, *European Commission*) <https://ec.europa.eu/competition-policy/policy/europes-digital-future/shaping-competition-policy-era-digitisation_en> accessed 18 June 2022
[234] Jacques Crémer, Yves-A de Montjoye, and Heike Schweitzer (n 62) 115
[235] Ibid
[236] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final

Commission or NCAs.[237] The text of the DMA is intended to be fully adopted in September or October of 2022.[238]

In 2021, the Commission launched a Staff Working Document on the evaluation of procedural and jurisdictional aspects of EU merger control [239] with the analysis of the lengthy consultations conducted during the years regarding certain specific themes of the European merger control regime. One of the issues evaluated was the effectiveness of a purely turnover-based jurisdictional threshold in the assessment of transactions with potential competition impacts, especially high-value acquisitions of companies with limited turnover. Regarding that, the findings indicated that the current jurisdictional threshold based on a turnover analysis, complemented by referral mechanisms has generally proved to be effective in capturing significant transactions to the internal market and that the lack of a value-based threshold was not impeditive of a proper assessment.

In addition, the Evaluation acknowledged that a number of transactions escape the Commission's scrutiny and highlighted the importance of the referral mechanisms to ensure the Commission's review of transactions that could have a cross-border impact but don't trigger the community turnover threshold. Accordingly, it argues that the Commission should not discourage referrals under Article 22 of the EUMR when the concentration does not meet the national merger control thresholds since this approach would limit the effectiveness of the referral system as a corrective mechanism to the turnover-based thresholds.[240]

Finally, in the effort of addressing the perceived enforcement gap problem, in March 2021, the European Commission published a Guidance encouraging Member States' competition authorities to do referrals under Article 22 EUMR. With that, the EC aimed to

[237] Ibid para 12
[238] 'Digital Markets Act (DMA)' (*European Commission*) <https://ec.europa.eu/competition-policy/sectors/ict/dma_en> accessed 20 June 2022
[239] Staff Working Document on procedural and jurisdictional aspects of EU merger control (n 202)
[240] Staff Working Document on procedural and jurisdictional aspects of EU merger control (n 202), para 270

secure jurisdiction over transactions with potential anti-competitive effects that escaped the European merger control scrutiny.

5 EUROPEAN COMMISSION'S NEW GUIDANCE ON ARTICLE 22 EUMR

In March 2021, the European Commission published a new Guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases, which complements the Commission Notice on Case Referral regarding concentrations. The Guidance provides a "reinterpretation" of the existing referral mechanism under Article 22 indicating that it should also apply to cases where neither the Commission nor the Member States have jurisdiction. Thus, this *ex-post* review brought by the new guidance represents a major expansion of the Commission's remit over concentrations.[241]

As explained previously, when the parties' revenues do not meet the Community jurisdictional threshold, there can be a referral request under Article 22 EUMR, in the case the proposed concentration could affect trade between Member States and significantly threaten competition within the territory of the Member State or the States making the request. Until recently, however, the Commission discouraged the referral when the proposed concentration was not notifiable under the national merger regime of the Member State. This new guidance reverses this policy, as the Staff Working Paper on evaluation of procedural and jurisdictional aspects of EU merger control, also released in March 2021, concluded that referrals under Article 22 of the EUMR should be encouraged. According to the evaluation, in order to capture the transactions with potential anti-competitive effects that were escaping merger review, when the conditions are met, Member States should do the referral, even when the concentration does not meet their national jurisdictional thresholds.[242]

According to the new guidance,[243] the reinterpretation of the referral mechanism set out in Article 22 EUMR can contribute to addressing the issue of concentrations involving

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[241] Aidan Forde, 'Commission provides guidance regarding its Article 22 policy change' (30 March 2021, *Covington*) <https://www.covcompetition.com/2021/03/commission-provides-guidance-regarding-its-article-22-policy-change/> accessed 20 June 2022
[242] Ibid
[243] Guidance on article 22 EUMR (n 56) para 9

companies that play or may develop an important competitive role in the market, even though they generate low or no turnover at the moment of the concentration. Those have become a reason for concern, especially in the digital and pharmaceutical industry and others where innovation is an important parameter of competition, where companies conducting promising R&D projects are acquired even before they are finalized or explored commercially. In some cases, an acquisition of such targets might result in the increase of market power, creating barriers to entry, or in the interruption of the project that was being developed, impeding the innovation that would come with it. It is important to note, however, that the Guidance leaves the door open to transactions of any industry as long as they fill the criteria established for the referral, not being limited to the digital and pharma sectors.

Even though the term "killer acquisitions" is not used in the Guidance, it has the clear purpose of addressing the enforcement gap brought by transactions where the low turnover of the target company does not reflect its competitive potential. The Guidance provides a non-exhaustive list of undertakings that will usually be part of these proposed concentrations. Thus, it includes cases where the target firm:[244] (i) is a start-up or recent entrant that, despite its potential to compete in the market, has not yet fully developed or implemented a business model to generate significant revenue; (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries. Moreover, during the assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.

[244] Ibid para 19

The new policy set out by the Guidance also provides an important change in the merger control regime by allowing the Commission to review transactions even after they have been concluded already.[245] Although it is explained that generally concentrations will only be reviewed until six months after material facts about the transaction have been made public, there might be exceptional situations in which the concerns with consumer welfare and the potential anti-competitive effects may justify a late referral.

The Guidance encourages merging parties to provide information about the intended transaction in a voluntary way so, depending on the case and on the amount of data shared with the Commission, an early indication of whether the concentration would constitute a good candidate for a referral under Article 22 EUMR can be given to the parties. [246] Besides, The Guidance Paper also invites third parties to inform the EC or the NCAs about transactions that could be good candidates for referral [247] and proposes close cooperation with NCAs in the identification of other potential candidates for the referral mechanism in question.[248]

National Competition Authorities have 15 working days to refer a merger to the Commission after the concentration is "made known" to the Member States concerned.[249] On this matter, the Guidance does not provide further explanation on the level of information the NCA should have about the proposed concentration in order to proceed with the referral. It is implied, however, that the information should be sufficient for the elaboration of a preliminary assessment of the transaction.

Accordingly, the period established for the Commission to inform other Member States and the undertakings involved about the referral request remains the same as defined in

[245] Ibid para 21
[246] Ibid para 24
[247] Ibid para 25
[248] Ibid para 23
[249] Ibid para 28

the Merger Regulation: 15 working days after being informed; and after that, the EC has 10 days to analyze if the referral will be accepted or not.[250]

5.1 Illumina/Grail

So far, two cases have been referred (and accepted) under the new Guidance on Article 22 EUMR, namely: *Illumina/Grail* [251] and *Meta/Kustomer.*[252] The latter was a result of a referral request by Austria (followed by nine other Member States), where the transaction was notifiable under the national merger legislation. Considering this, in order to analyze the development of the main changes brought by the new Guidance, this study will focus on the first case.

The *Illumina/Grail* was the first referral of this kind and involved Illumina, a DNA sequencing giant which develops, manufactures and commercializes systems for cancer detection on blood-based tests, and Grail, a US-based oncology company that developed tests to allow the early detection of several cancer types by using blood samples. Despite its innovative advances, Grail was still developing the monetization plan of its business and in April of 2021 it began limited commercial activities in the United States, but still no sales within the European Union.[253]

In September 2020, Illumina announced its intention to acquire its competitor Grail for the value of USD 7.1 billion and although some serious anti-competitive issues could be identified in the case, the Commission could not review it, as the undertakings' turnovers did not reach the community threshold. In February 2021, the Commission invited NCAs in

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[250] Ibid paras 29 and 30
[251] *Illumina/Grail* (Case M.10188) - case pending
[252] 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (2022, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_652> accessed 23 June 2022
[253] Sean Paul Brankin and Isobel Thomas'They are out to get you' (9 March 2022, *Lexology*) <https://www.lexology.com/library/detail.aspx?g=dd292e63-e5e8-4ee9-b83f-e20e5032a841> accessed 24 June 2022

Member States to proceed with the referral of the transaction, pursuant to Article 22 (5) of the EUMR. In March of the same year, even though the proposed concentration did not meet its domestic merger thresholds, the French Competition Authority (FCA) referred the transaction to the EC, followed by the competition agencies of Belgium, Greece, the Netherlands, Iceland and Norway.[254]

Against this referral, the merging parties requested a suspension of it to the FCA on the grounds that there was no respect for the principle of legal certainty once the transaction did not trigger the French national threshold and there were no particularly serious anti-competitive effects. Moreover, the undertakings argued that the 15 working-day period on which the FCA could request the referral was already expired; and that the undertakings were not consulted to provide explanations. Nevertheless, the request for suspension was refused by the FCA and the referral was accepted by the Commission.[255]

Pursuant to a preliminary investigation, the Commission's main concerns about this transaction regarded its potential impact on the development and supply of NGS-based cancer detection tests (Next Generation Sequencing) and the possibility that, with the acquisition, Illumina would engage in vertical input foreclosure strategies in this market given its leading position. According to the Commission, as a result, both GRAIL's rivals and European patients could be affected by the possible harm to innovation, which would reduce choices available to doctors, patients and the health care system itself, creating a barrier to entry.[256]

However, following the acceptance of the referral by the Commission, on April 2021, Illumina brought an action before EU General Court [257] claiming mainly that the Court

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[254] Jeremie Marthan and others, 'Latest developments on the Article 22 EUMR referral mechanism: the only thing that's certain is the uncertainty' (30 April 2021, *Lexology*) <https://www.lexology.com/library/detail.aspx?g=66bd7c48-bb11-4ce4-85af-3c8964d08375> accessed 24 June 2022

[255] Ibid

[256] 'Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina' (22 July 2021, *Press Corner European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844> accessed 24 June 2022

[257] Case T-227/21 *Illumina v. Comission* [2021] – case pending

should: (i) annul the decision of the European Commission to accept the referral request; (ii) annul the five decisions issued by the Commission to the Netherlands, Belgium, Greece, Iceland and Norway allowing them to join the referral request; (iii) annul the referral request.

To support the action, Illumina relied on four legal arguments:[258] (i) that the Commission did not have jurisdiction over the transaction and performed a wrong interpretation of Article 22 of the Merger Regulation, contrary to the principles of subsidiarity, legal certainty and proportionality; (ii) that the referral request submitted by the FCA did not respect the time limited defined in the EUMR and in the Guidance, for which reason the EC should not have accepted the referral; (iii) that the Commission engaged in actions towards the concentration in question, following the new policy brought with the new Guidance on article 22 EUMR, before the document was published, what harms Illumina's legitimate expectations and legal certainty; (iv) and finally, that there were factual errors in the Commission's invitation letter to refer addressed to the Member States, and that the rights of defense regarding the referral were not respected.

The European Court of Justice will issue a decision in this case on July 2022 [259] and its ruling will certainly reverberate on the adoption by NCAs of the new interpretation of Article 22 EUMR, encouraging (or not) new referrals. In the *Illumina/Grail* case, competition authorities of Austria, Spain and Slovenia decided not to join the referral due to an alleged lack of jurisdiction over the case since the transaction did not meet the national merger thresholds. [260] Thus, it has to be analyzed if after this decision these NCAs will keep this line of thought or will be convinced to adopt the reformed system.

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[258] Ibid

[259] Foo Yun Chee, 'EU court to rule July 13 on Illumina challenge of EU review of Grail -sources' (25 May 2022, *Reuters*) <https://www.reuters.com/markets/deals/eu-court-rule-july-13-illumina-challenge-eu-review-grail-sources-2022-05-25/> accessed 24 June 2022

[260] Jeremie Marthan and others (n 254)

5.2 The impact of the new referral rules on M&A in the EU and critics

The Guidance on Article 22 of the EUMR represents a significant expansion of the Commission's jurisdictional power and, according to the results of its studies, it was a reasonable approach to address the perceived enforcement gap brought by the development of digital markets. However, this policy shift has not been received so well among competition specialists, lawyers and companies, as despite the major impact it would bring to the European merger scenario, it was implemented quickly and with no public consultation regarding its specific changes.[261]

The reaction of the NCAs to the Guidance Paper has been mixed. Some jurisdictions have shown more inclination to accept and using it more often in the future, such as France, Luxembourg and Belgium. On the other hand, the competition agencies of other Member States are still skeptical about the new recommendation. In *Illumina/Grail*, for instance, Austria, Ireland, Latvia, Lithuania, Slovenia and Spain did not join the referral request as they considered that once a concentration is not notifiable under their own national merger rules, the transaction cannot be referred to the Commission.[262]

The Guidance brings wide-ranging implications for businesses and raises concerns especially regarding:

a) Legal uncertainty

The policy shift regarding Article 22 effectively means, in practice, that companies cannot rely anymore on not meeting the Community or Member States' thresholds to exclude the possibility of the proposed concentration being reviewed by the European Commission. Therefore, the effect of every transaction in every Member State will need to be examined, regardless of the size of the deal, and merging parties will have to consider with respect to several Member States whether the transaction is likely to significantly affect competition or

[261] Nicholas Levy, Andris Rimsa and Bianca Buzato (n 40) 375
[262] Ibid

not. Given the subjective nature of the criteria in the Guidance on Article 22, which gives significant discretion to NCAs, such assessment will be complex, burdensome and uncertain. As a result, companies will have to consider proceeding straight away with quite a burdensome notification to the Commission. This could of course delay the transaction, which cannot be completed due to the standstill obligation.[263]

Uncertainty is increased by the possibility of post-closing review. According to the Guidance,[264] a referral request must be made within 15 working days of the data the concentration was "made known" to the Member State concerned. This expression is interpreted in the sense of having sufficient information to make a preliminary assessment of the transaction. In the cases where the undertakings have not approached voluntarily the NCA, the Guidance allows *ex-post* review generally until six months after the closing or even more, in exceptional situations, which reflects the high degree of discretionarily involved in this assessment. This possibility is not discussed in detail in the Guidance, thus leaving the door open for referrals potentially indefinitely after a transaction has closed.[265]

Considering the possibility of potential referral to the Commission, the parties would have to adopt practical steps to mitigate the risks that can come with this uncertainty, such as: performing a complex risk assessment with a qualitative analysis of the transaction; adding contractual protections to the purchase agreement, which will need to include provisions for a potential referral such as conditions precedents or long-stop dates and/or extensions; and taking into account that Member States are entitled to refer transactions that were made known

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[263] 'EU Commission's Article 22 EUMR Guidance: More Uncertainty for Merger Control' (26 April 2021, *Squire Patton Boggs*) (<https://www.squirepattonboggs.com/-/media/files/insights/publications/2021/04/eu-commission-article-22-eumr-guidance/article_22_eumr_guidance.pdf> accessed 25 June 2022

[264] Guidance on article 22 EUMR (n 56) para 28

[265] Ruben Elkerbout, Berend Reuder and Tom Heurkens, 'Netherlands: New Guidance On Article 22 Of The European Union's Merger Regulation: The End Of Legal Certainty In Merger Control?' (07 June 2021, *Mondaq*) <https://www.mondaq.com/antitrust-eu-competition-/1076454/new-guidance-on-article-22-of-the-european-union39s-merger-regulation-the-end-of-legal-certainty-in-merger-control#:~:text=Introduction%20to%20the%20new%20guidance&text=Article%2022%20of%20the%20European%20Union's%20Merger%20Regulation%20(EC%2F139,turnover%20threshold%20for%20merger%20contro
> accessed 25 June 2022

to them, parties will have to brainstorm provisions regarding deal publicity and agency outreach, addressing in the agreement the pros and cons of a voluntary outreach.[266]

b) Timetable delays

A referral under Article 22 EUMR involves a lengthy process and the parties have to wait 40 working days to know whether the transaction will be subject to the Commission's review or not: 15 working days for the NCA to refer a transaction to the EC after it was made known to it; then competent NCAs will have 15 working days after being informed by the Commission to decide whether join the initial request or not; and after the expiry of this period, 10 working days for the Commission to decide whether the referral request will be accepted or not.

The wait of almost 2 months can be burdensome for time-critical transactions, as this process introduces complexity, if not delays, to deal with timelines. Either way, parties should consider the potential 40 working day referral process and take into account the potential review of the proposed concentration by the Commission in their transaction documents and planning process.[267]

c) Uncertainty regarding deal completion

Before the Guidance, a straightforward assessment based on a turnover threshold criterion made it clear for businesses if a transaction would trigger merger control review or not, which would allow the parties to establish reasonable expectations of when the deal would be closed.

With the current jurisdictional developments, the need to perform an assessment regarding potential anti-competitive effects in many Member States along with the long waiting

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[266] Tobias Caspary, Neda Moussavi and Annalie Grogan, 'Reinvention of the Dutch Clause: The European Commission Takes Merger Control Jurisdiction Over Non-Reportable Deals' (16 April 2022, *Lexology*) <https://www.covcompetition.com/2021/03/commission-provides-guidance-regarding-its-article-22-policy-change/> accessed 26 June 2022

[267] Ibid

period of 40 working days to hear about the acceptance of a referral adds a further layer of complexity to the deal timeline and places great uncertainty about when or even if the deal will be ever completed.

Thus, the risk of referral must now be taken into account in the deal planning, immediately addressing it in the deal documentation, as parties are expected to suspend the implementation of the transaction (if not already completed) as soon as they are notified of a referral request having been made.[268] Considering the new changes, the parties will have to therefore assess whether they are willing, with the transaction, to have a subsequent review by the European Commission and this might bring implications in some areas of the agreement, such as interim covenants, price structure, buyer protection conditions, etc.

In the case of transactions that are not usually subject to merger review due to the low aggregate turnover, parties will have to assess whether they are willing to close the deal with no prior notification but risk a post-closing assessment.

d) Voluntary referrals

Under the Guidance, the parties are encouraged to voluntarily present information about their intended transaction and, provided that it is sufficient for the Commission to perform a preliminary assessment, it may give "an early indication" whether the proposed concentration would be a good candidate for a referral request under Article 22 EUMR.

In theory, this would be a good strategy for companies to prepare for a potential assessment by the European Commission and NCAs, whose preliminary answer would give the parties an insight as to whether additional documentation and measures regarding a potential referral would be necessary or not; and, in the case the transaction is cleared on a preliminary basis, the parties would be able to set a timetable regarding the completion of the deal. On the

[268] Thomas Vinje and others, 'New approach to Article 22 EUMR – A back door to close the "enforcement gap"? (2020) Clifford Chance, 2 <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/10/new-approach-to-article-22-eumr-a-back-door-to-close-to-enforcement-gap.pdf> accessed 25 June 2022

other hand, considering the wording of the Guidance, such "early indication" does not seem to be biding, which means parties could not rely on it to exclude the risk of a referral. Besides, there is no indication of a timeline for the Commission to give such an answer, which gives again considerable discretion to the Commission and does not fulfill its intended goal of providing "comfort" to the merging parties.[269]

e) Increase in the number of referrals and burden over Member States

The possibility of referring mergers that do not meet the national jurisdictional threshold to the Commission might significantly increase the number of cases being assessed by the EC, which will result in the necessity of more allocation of human and financial resources for this task. Besides, it also imposes an extra burden over Member States, which are presented with the new task of proactively reviewing the market for non-reportable deals and potential referral cases.[270]

[269] Ruben Elkerbout, Berend Reuder and Tom Heurkens (n 265).
[270] Tobias Caspary, Neda Moussavi and Annalie Grogan (n 267)

CONCLUSION

Digital markets are typically complex and for that, it has been evident that competition authorities have struggled in the task of maintaining the balance between the speed in which these transactions have been happening and a proper fact-based investigation with suitable and customized tools to assess these peculiar concentrations. Although the decision-making process should not be rushed just so that the antitrust authority can analyze all cases quickly, there is no doubt the need to improve the current substantive assessment regarding digital mergers, which will, as consequence, increase the pace of the processing of these cases.

Thus, at the same time, it has been recognized by several competition authorities, including the EC, that there are many antitrust issues regarding digital mergers, a mere unfounded threat cannot be sufficient to impede these transactions from happening, with the risk of enhancing legal uncertainty and hindering the market development. Instead, there is the need for proper research and evidence gathering in order to come up with a better strategy that can make the case-by-case analysis more accurate and efficient.

Towards that, it has been discussed in this study that there are a few changes that can lead to better assessment results when compared to the current ones. For instance, although conducting market definition research is an important assessment tool, the complexity of digital markets, where there is a strong interdependency between the different sides of a platform, has turned this into a difficult task, which can lead to wrong results.

Accordingly, there should be more emphasis added to developing adequate theories of harm and identification of anti-competitive strategies which take into consideration the special features of digital markets. There is no sense in trying to force the traditional market approach, for what reason adequate theories of harm should consider, e.g., anti-competitive results caused by network effects, the role of data and the possible barriers to entry those can create.

Moreover, regarding the fact that some of these takeovers by Big Tech firms can be qualified as “killer acquisitions”, this should not be an absolute presumption. Although it is true that those sorts of acquisitions can harm innovation and lead to young start-ups not having an incentive to enter the market (“kill zones”) or doing just enough investment in innovation so a bigger company can make a takeover offer, these acquisitions can also represent advantages. Accordingly, many start-up owners might get more incentive to innovate with the prospect of a buyout and it reduces the costs for new market entrants. Ultimately, the takeover can lead to advantages for consumers, once it can result in efficiency.

Although it is evident that killer acquisitions should not pass unhindered by the EU merger control, the present study inevitably leads to the initial conclusion that the solution found by the European Commission to address this issue is questionable and so far, burdened with many uncertainties. The shift in the policy regarding the referral mechanism of Article 22 EUMR, brought by the Commission’s Guidance, seemed like the easiest choice as no legislative change would be required to adopt it. Nevertheless, this unprecedented *ex-post* review of non-reportable mergers brings significant consequences not only for transacting parties, but NCAs as well.

Notification thresholds, whether they are turnover or transaction value-based, e.g., exist to provide certainty and to clearly separate the cases in which the parties will have the legal obligation to notify their mergers. With these parameters clear, companies can properly prepare and consider the need for assessment from competition authorities before closing the deal. With the policy shift, the fact that parties to a concentration, even when falling below national thresholds, will have to systematically assess whether the transaction can significantly affect competition in any EU Member State will definitely have implications in the market and will affect the timing and even the feasibility of transactions.

If, even when the transaction does not meet the national threshold, the parties decide to consider the possible referral, a burdensome and complex assessment will have to be conducted, which will take time and resources and, in the end, the parties will have to wait long 40 working days for an outcome. On the other hand, if they decide to proceed with the transaction without notifying the Member State(s), there is the risk of post-closing referral for a quite long (if not indefinite) period of time.

It is true, however, that finding the best way to approach digital transactions is not an easy task with a straightforward solution, for which reason several studies regarding the effectiveness of the turnover-based threshold and possible changes have been conducted. The new transaction value-based thresholds imposed in Austria and Germany provide interesting solutions, however, agreeing with the report on Competition policies in the Digital Era, perhaps is more reasonable to use and evaluate these Member States experiences first before implementing changes at the turnover threshold in a Community level.

In this case, a safer solution could be to establish specific clear and defined criteria for certain types of goods and services, which could address the problem of the possible enforcement gap in digital markets, however without compromising legal certainty. To implement that, however, further studies must be considered.

As this problem will not wait for the end of these long investigations, a few measures could be taken in the meantime to at least minimize the potential anti-competitive effects coming from specific digital mergers. Those can discourage undertakings planning to use the unique characteristics of the digital industry to abuse market power or to engage in killer acquisitions.

In this sense, European competition authorities should enhance their level of cooperation, so they can together better assess these transactions. Moreover, instead of strengthening unclear *ex-post* reviews, antitrust agencies could engage in a systematic

monitoring activity of digital transactions, especially the ones involving early acquisitions of innovative start-ups. With this, they can examine and report the results and effects of such concentrations in order to improve future assessments and somehow estimate their behavior in the market. This will allow the development of better and more accurate theories of harm and for better clarity, the implementation of guidelines addressing them and the results of the monitoring activity.

Regardless of the solution chosen by competition authorities, it is very important that the Guidance on Article 22 EUMR is interpreted restrictively and does not, in any case, represent a self-granted permission so Member States can review any merger, especially when it has already been concluded, but rather when it has the potential to significantly affect competition. In this sense, it must be treated as a "safety net" to exceptional pharma and digital transactions, and even in those cases, further guidance is necessary to address the specific points which have raised debates among companies and specialists.

Although the number of referrals under the new Guidance has been low, it may be misleading as the decision in the *Illumina/Grail* case, if endorsed by the European Court of Justice, may certainly lead to more Member States making use of this referral. For that reason, so far only a preliminary assessment can be done as to the effectiveness and consequences of the new approach.

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