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Mergers in Big
Tech

Mergers in Big Tech: An overview of EU and national case law

INVESTIGATIONS / INQUIRIES, BEHAVIOURAL REMEDIES, MERGER NOTIFICATION, FOREWORD, REMEDIES (MERGERS), MERGER (NOTION), SECTOR INQUIRY, MERGER (UNILATERAL EFFECTS), BIG TECH

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Over the last decade, digital markets have become increasingly concentrated, not only because of their specificity, which makes them prone to the well-known “winner-takes-all” effect, but also due to mergers and acquisitions. Evidence-based analyses have proven that over the last few years, Big Tech has systematically been involved in mergers and acquisitions operations all over the world.

1. Many Acquisitions of Young Firms

Indeed, from 2008 to 2018, Amazon, Facebook and Google concluded 299 operations. The pace of these operations is such that Amazon, Facebook and Google averaged 5,6 and 15 mergers and acquisition deals per year respectively. In particular, most of these transactions were not horizontal and targeted very young businesses that were typically no older than 4 years old (60% of cases) [1].

This last trend was recently confirmed in an inquiry launched by the Federal Trade Commission (FTC) in February 2020 into past acquisitions by the largest technology platforms that did not require reporting to antitrust authorities at the FTC and the Department of Justice. Indeed, of the 616 transactions examined, 39.3% of those in which the age of the target company could be verified involved firms that were less than 5 years old [2].

Not surprisingly, a wide and heated debate emerged on how and whether competition authorities should tackle alleged competition issues stemming from mergers in the digital realm. Of particular concern are killer acquisitions [3] and the conglomerate effects of mergers [4], such as platform enveloping strategies [5] in the digital markets.

2. Regulatory Concerns

If it is true that digital behemoths are attracting attention from public and private antitrust practitioners and academics, it is also true that competition policy and the ability of competition authorities to react swiftly to competition issues stemming from market concentration are also attracting significant public interest.

It will suffice here to summarise some of these issues. First, the traditional trade-off between competition and innovation was discussed. In particular, there is still an ongoing debate on whether market concentration hampers or encourages innovation [6].

Moreover, the debate focused on whether competition authorities have the necessary tools in place to capture and assess killer acquisitions and conglomerate mergers. In particular, there has been intense debate in many jurisdictions about whether to adopt merger control reforms.

Furthermore, on a substantive note, the debate covered several issues, such as the suitability of the current tests to tackle oligopolistic dominance and the hurdles in developing solid theories of harm concerning killer acquisitions, “reverse” killer acquisitions and platform envelopment strategies [7].

Finally, a more open approach towards behavioural remedies seems to be advocated [8]. However, their implementation requires time-consuming monitoring activities and their application has become less straightforward in view of the fact that the distinction between horizontal and vertical mergers has become increasingly blurred.

Thus, this special issue on “Mergers in Big Tech” fits at a time when the debate on market concentration issues in digital markets appears to be well underway, if not consolidated. In light of these developments, this special issue therefore provides readers with an interesting opportunity to understand how competition authorities have addressed these issues and what progress has been made so far in the field of merger control in the digital markets.

3. Regulatory Action & Enforcement

“And yet it moves”! Several policy makers and competition authorities adopted legislative and substantive actions.

For instance, with regard killer acquisitions, the German Bundeskartellamt and the Austrian Bundeswettbewerbsbehörde published the guidelines on the new transaction value thresholds under German and Austrian merger control law in July 2018, which were updated in December 2021 [9].

By the same token, the UK introduced a new (acquirer) jurisdictional threshold to enable the scrutiny of killer acquisitions and vertical or conglomerate mergers involving no horizontal overlap [10]. Most importantly, the CMA has recently blocked the merger between Meta and Giphy [11]. The decision was also upheld by the Competition Appeal Tribunal [12].

Moreover, although the European Commission (EC) has not yet decided to adopt any merger control reforms, it has recently released a new Guidance on certain case referrals under Article 22 of Regulation n. 139/2004 (hereinafter “EU Merger Regulation” or “EUMR”). The EC actively monitors deal activity to identify transactions that may be candidates for an Article 22 referral. Specifically, the EC will encourage and accept referrals and

may actively call on national competition authorities (NCAs) to make referrals, even if national merger control thresholds are not met [13]. The EC has already implemented this new approach, which was recently confirmed by the General Court [14], in the context of Illumina's acquisition of sole control of Grail [15].

Other competition authorities are considering reforms and amendments to merger regulations. For example, the Australian Competition and Consumer Commission (ACCC) proposed change concerning the reversal of the onus of proof, a substantially reduced test of likelihood and the insertion of a new deeming provision that will prohibit a transaction by a firm with substantial market power where the transaction is likely to entrench, materially increase or materially extend such market power [16]. Furthermore, the Federal Trade Commission and the Justice Department launched a joint public inquiry aimed at modernizing merger guidelines with a focus on digital markets [17].

4. Conclusion

In conclusion, the above-mentioned amendments and reforms to the merger regulations appear to have caught up with the rapid developments in the digital market. However, there is also criticism that these fragmented changes, particularly in Europe, may pose a threat to undertakings because of the unpredictability and inconsistency of merger decisions. Nevertheless, when it comes to Europe, recent EU merger cases such as Google/FitBit and Apple/Shazam have certainly provided guidance to the antitrust community on some specific issues, such as the competition assessment of certain data, and have enriched the analyses of European competition authorities, which have become more sophisticated. This will also have the effect of facilitating the adoption of a same approach in the assessment of mergers, which is strengthened by the coordination activities carried out within the European or International Competition Network. That said, there will always be some differences in merger decisions due to the characteristics of national markets. Time will tell whether the competition authorities are on the right track and a case-by-case approach seems the most appropriate way to assess this.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] For further analyses see Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, Final report, Document prepared by Lear for the Competition and Market Authority, Rome, 9 May 2019.

[2] See *US Federal Trade Commission, The US FTC presents a report on nearly a decade of unreported acquisitions by Big Tech companies, 15 September 2021, e-Competitions September 2021, Art. N° 102759*, and *Chuck Loughlin, Logan M. Breed, The US FTC publishes a report summarizing findings from its study of unreported Big Tech acquisitions, 15 September 2021, e-Competitions September 2021, Art. N° 103949*.

The European Commission also reached similar conclusions in the Commission Staff Working Document Evaluation, of procedural and jurisdictional aspects of EU merger control, see in

particular par. 51-53, SWD (2021) 66 final, 26 March 2021. See, e.g. **European Commission**, *The EU Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control*, 26 March 2021, *e-Competitions March 2021*, Art. N° 99920, **Miranda Cole, Aidan Forde**, *The EU Commission provides guidance regarding its policy change to article 22 of the EU Merger Regulation*, 26 March 2021, *e-Competitions March 2021*, Art. N° 99991, and **Thomas Reyntjens, Laurent Bougard, Amaryllis Müller, Sascha Schubert**, *The EU Commission assesses in a published policy paper whether its jurisdictional merger control thresholds leave an enforcement gap and whether the administrative burden on merging firms and other market participants is proportionate*, 26 March 2021, *e-Competitions March 2021*, Art. N° 100437.

[3] That are mergers concerning Big Tech acquiring start-ups before they have the chance to grow. For further knowledge, see, among others, Tristan Lécuyer, *Digital conglomerates and digital killer acquisitions – A discussion of the competitive effects of start-up acquisitions by digital platforms*, Law & Economics, *Concurrences* N. 1-2020, pp. 42-50.

[4] **OECD**, *The OECD holds a roundtable on conglomerate effects of mergers*, 10 June 2020, *e-Competitions June 2020*, Art. N° 95401.

[5] “Whereby a dominant platform (the enveloper) operating in a multi-sided market (the origin market) enters a second multi-sided market (the target market) by leveraging the data obtained from its shared user relationships”, See Daniele Condorelli and Jorge Padilla, *Harnessing Platform Envelopment in the Digital World*, December 2019, available at SSRN at <https://ssrn.com/abstract=3504025>.

[6] See, among others, HM Government, *Competition and Innovation in Digital Markets*, Report by David Deller, Thanh Doan and Franco Mariuzzo with Sean Ennis, Amelia Fletcher and Peter Ormosi, BEIS Research Paper Number: 2021/040, April 2021.

[7] For further information, see *Concurrences*, *EU Merger Control and Digital Markets Seminar*, held in Brussels the 31 May 2022, synthesis available at the following link: *EU Merger Control and Digital Markets - Concurrences*.

[8] Thomas Wilson, *Mergers remedies – is time to go more behavioural?*, *Kluwer Competition Law Blog*, 21 February 2020.

[9] See, e.g. **Falk Schöningh, Johanna Brock-Wenzek, Florian von Schreitter**, *The German Parliament passes amendments of antitrust law affecting the merger control regime*, 19 January 2021, *e-Competitions January 2021*, Art. N° 98799, **Marcel Nuys, Annika Gante, Peter Rowland, Kyriakos Fountoukakos, Florian Huerkamp**, *The German Parliament passes the digital competition act bringing significant changes to the competition law landscape*, 19 January 2021, *e-Competitions January 2021*, Art. N° 98736, and **Marcio da Silva Lima, Maren Steiert**, *The German Parliament approves the competition law reform providing the Competition Authority with regulatory tools to impede market-dominant companies active in the digital markets from possible abuses of their competitive dominance*, 19 January 2021, *e-Competitions January 2021*, Art. N° 98864.

See also, **OECD**, *The OECD holds a roundtable on start-ups, killer acquisitions and merger control*, 11 June 2020, *e-Competitions June 2020*, Art. N° 95418.

[10] See **Christopher Hutton, Matt Giles, Joe Beautridge**, *The UK Government announces a series of reforms for strengthening the UK Competition regime*, 20 April 2022, *e-Competitions April*

2022, Art. N° 106929, **Bill Batchelor, Aurora Luoma, Giorgio Motta, Ingrid Vandenborre, Frederic Depoortere**, *The UK Parliament revamps antitrust rules with broader jurisdictional reach, tougher penalties and more flexible procedure for merger control*, 20 April 2022, *e-Competitions April 2022*, Art. N° 106391, and **Stephen Wisking, Veronica Roberts, Kristien Geeurickx**, *The UK Government publishes its response to the consultation proposing a wide range of far-reaching changes to the competition and consumer protection regimes*, 20 April 2022, *e-Competitions April 2022*, Art. N° 106321.

[11] **UK Competition Authority**, *The UK Competition Authority finds that the takeover of the largest provider of GIFs by the largest social media company raises competition concerns (Facebook / Giphy)*, 12 August 2021, *e-Competitions July 2021*, Art. N° 101990.

[12] See **UK Competition Authority**, *The UK Competition and Appeal Tribunal endorses the competition authority's assessment of a Big Tech's acquisition of a social media company (Meta / Giphy)*, 14 June 2022, *e-Competitions July 2022*, Art. N° 107122.

[13] See, e.g. **Bill Batchelor, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre, Niels Baeten**, *The EU Commission releases the new Article 22 EU Merger Regulation Guidance, which creates legal uncertainty for merger control and a de facto killer acquisition review power*, 26 March 2021, *e-Competitions March 2021*, Art. N° 100475, **Philippe-Emmanuel Partsch, Fynn Dewald, Joe Zeaiter**, *The EU Commission publishes guidance on the application of the referral mechanism set out in article 22 of the Merger Regulation to certain categories of cases*, 26 March 2021, *e-Competitions March 2021*, Art. N° 100901, and **Matthew Levitt, Paul Lugard, Jody Boudreault, Roxane Tonnelier**, *The EU Commission publishes its findings of the evaluation of procedural and jurisdictional aspects of EU merger control and new guidance on the application of Article 22 of the EU Merger Regulation*, 26 March 2021, *e-Competitions March 2021*, Art. N° 101811.

[14] Case T-227/21, *Illumina v Commission*, 13 July 2022.

[15] See Eric Paroche, Pierre Chellet, *Referral: The French Competition Authority refers a merger to the European Commission (Grail / Illumina)*, 20 April 2021, *Concurrences N° 3-2021*, Art. N° 101746, pp. 127-128. See, e.g. **French Competition Authority**, *The EU Commission reviews the merger between two biotech companies specialized in genomic sequencing (Grail / Illumina)*, 20 April 2021, *e-Competitions April 2021*, Art. N° 100379, **Michael Clancy, Peter L'Ecluse, Catherine Longeval, Koen T'Syen**, *The EU Commission plans on reviewing a transaction even though EU and national turnover thresholds are not reached (Grail / Illumina)*, 20 April 2021, *e-Competitions April 2021*, Art. N° 102436, and **Catherine Gordley**, *The EU Commission unleashes new approach to article 22 referrals regarding an acquisition in the healthcare sector (Grail / Illumina)*, 20 April 2021, *e-Competitions April 2021*, Art. N° 100806.

Also see Eric Paroche, Pierre Chellet, *Interim measures: The European Commission strikes back with interim measures after two companies implemented their merger in violation of the standstill obligation (Grail / Illumina)*, 29 October 2021, *Concurrences N° 1-2022*, Art. N° 105462, pp. 126-127. See e.g. **European Commission**, *The EU Commission adopts interim measures to prevent harm to competition following a merger between biological and pharmaceutical companies (Grail / Illumina)*, 29 October 2021, *e-Competitions October 2021*, Art. N° 103224, **Michael Clancy, Peter L'Ecluse, Catherine Longeval, Koen T'Syen**, *The EU Commission announces interim measures to avert possibly irreversible consequences of a merger between two pharmaceutical companies (Grail / Illumina)*, 29 October 2021, *e-Competitions October 2021*, Art. N° 103345, and **David Henry, Matt Evola, Jon B. Dubrow, Joel R. Grosberg, Lisa Peterson Rumin, Mary**

Hecht, *The EU Commission imposes interim measures on two healthcare companies for breaching the EU Merger Regulation by gun jumping (Grail / Illumina)*, 29 October 2021, *e-Competitions October 2021*, Art. N° 104950.

[16] See, e.g. *Liza Carver, Linda Evans, Sarah Benbow, Patrick Gay*, *The Australian Competition Authority proposes radical changes to the way mergers are regulated in Australia recommending the introduction of a mandatory and suspensory merger review process*, 27 August 2021, *e-Competitions August 2021*, Art. N° 103959, *Tihana Zuk, John McKellar, Lauren Satill, Olivia Duce*, *The Australian Competition Authority announces significant proposed reforms to national merger laws*, 27 August 2021, *e-Competitions August 2021*, Art. N° 103694, and *Matthew Bull, Prudence Smith, Jeremy P. Morrison, Debra R. Belott*, *The Australian Competition Authority proposes substantial changes to national antitrust merger review including introducing mandatory review and increased scrutiny of companies with substantial market power*, 27 August 2021, *e-Competitions August 2021*, Art. N° 102347.

[17] See, e.g. *US Federal Trade Commission*, *The US FTC and DoJ launch a joint public inquiry aimed at strengthening enforcement against illegal mergers*, 18 January 2022, *e-Competitions January 2022*, Art. N° 105917, *Logan M. Breed, Chuck Loughlin, Lauren Battaglia*, *The US DoJ and FTC announce a joint effort to modernize the horizontal and vertical federal merger guidelines*, 18 January 2022, *e-Competitions January 2022*, Art. N° 104708, and *Thomas O. Barnett, Anne Y. Lee, Terrell McSweeney*, *The US FTC and DoJ launch a joint public inquiry into the agencies' horizontal and vertical merger guidelines to decipher whether the guidelines properly implement the statutory ban on transactions that may substantially lessen competition or tend to create a monopoly*, 18 January 2022, *e-Competitions January 2022*, Art. N° 104783.