



# Merger review in digital and technology markets: Insights from national case law

Final Report

Prepared by

Viktorija H.S.E. Robertson

**EUROPEAN COMMISSION**

Directorate-General for Competition

*E-mail: [comp-publications@ec.europa.eu](mailto:comp-publications@ec.europa.eu)*

*European Commission*

*B-1049 Brussels*

**Merger review in  
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Insights from national case law**

Final report

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Author: Viktoria H.S.E. Robertson

*Professor and Head of the Competition Law and Digitalization Group at the Vienna University of Economics and Business; Professor of International Antitrust Law at the University of Graz*

**Abstract**

This Report contains an independent expert study on the national assessment of horizontal and non-horizontal mergers in digital and technology markets. It analyses the substantive assessment of digital and technology merger cases from selected EU Member States as well as from a former Member State, the United Kingdom, against the background of the growing concern about the market power of Big Tech. The Report identifies theories of harm repeatedly relied upon in the national decisional practice, sets out remedies adopted to address these competition concerns, and draws conclusions therefrom for merger assessment in Europe.

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## Executive summary

In the present Report, I provide an independent expert study on the assessment of horizontal and non-horizontal mergers in digital and technology markets, commissioned by the European Commission. I analyse the substantive assessment of digital and technology merger cases from selected European Union (EU) Member States as well as from a former Member State, the United Kingdom, against the background of the growing concern about the market power of Big Tech. Due to the one-stop-shop principle contained in the EU Merger Regulation 139/2004, it is possible that national merger control and EU merger control may not be as aligned as the law and practice on anti-competitive agreements and abuses of a dominant position. While this can give rise to inconsistencies, it can also represent a learning opportunity to allow for best practices on digital mergers to emerge.

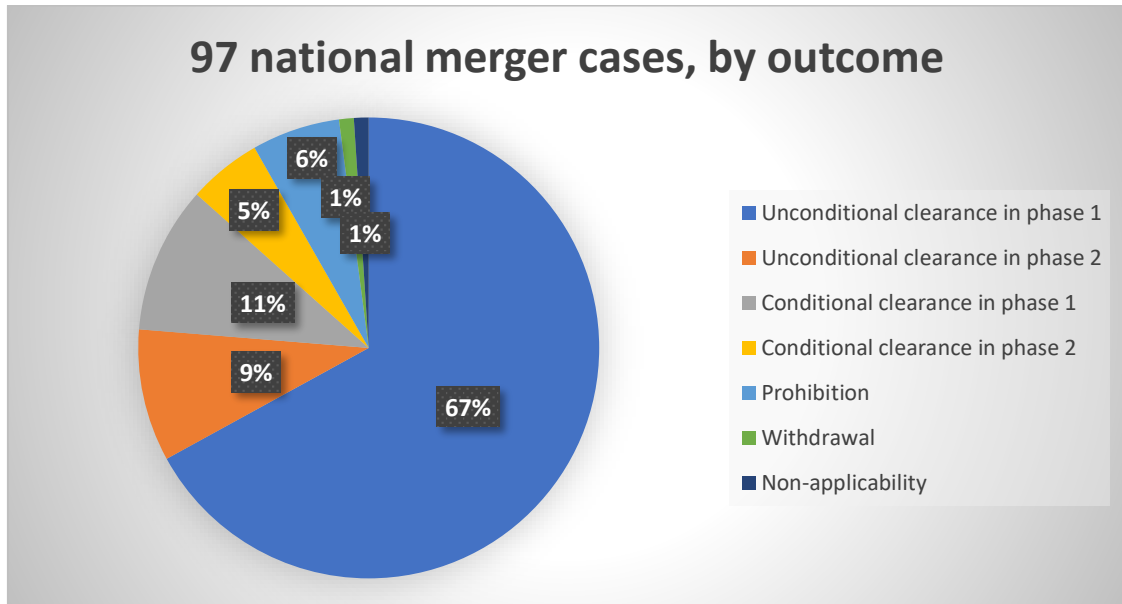
I organised the Report as follows: After an introduction setting out the purpose of the Report (Chapter I), I provide an insight into the way in which the national cases that constitute the basis for this Report were selected (Chapter II). Then, I give a brief overview of the law and economics applicable to digital mergers (Chapter III). Chapter IV contains first quantitative insights from the analysis of 97 national cases. Chapter V contains the main body of the Report and provides qualitative insights from the in-depth analysis of 69 national digital and technology merger cases in selected EU Member States and the United Kingdom. It focuses on theories of harm relied upon and remedies adopted by national competition authorities. Chapter VI concludes. The Annex contains a list of all 97 national cases analysed for this Report (Annex I), as well as a detailed coding of 69 national cases as concerns the theories of harm addressed and the remedies adopted (Annex II). Annex III contains concise case summaries of the 69 national cases on digital and technology mergers.

The present Report is based on a selected number of national merger cases in digital and technology markets. **Case selection criteria** included the jurisdiction in which the case was decided (EU Member State or United Kingdom), the relevant timeframe (1 January 2015 to 31 December 2021), and the digital or technology nature of the case. In order to identify the latter, criteria such as lists of digital companies, NACE codes and the relevant market of a case were relied upon (Chapter II).

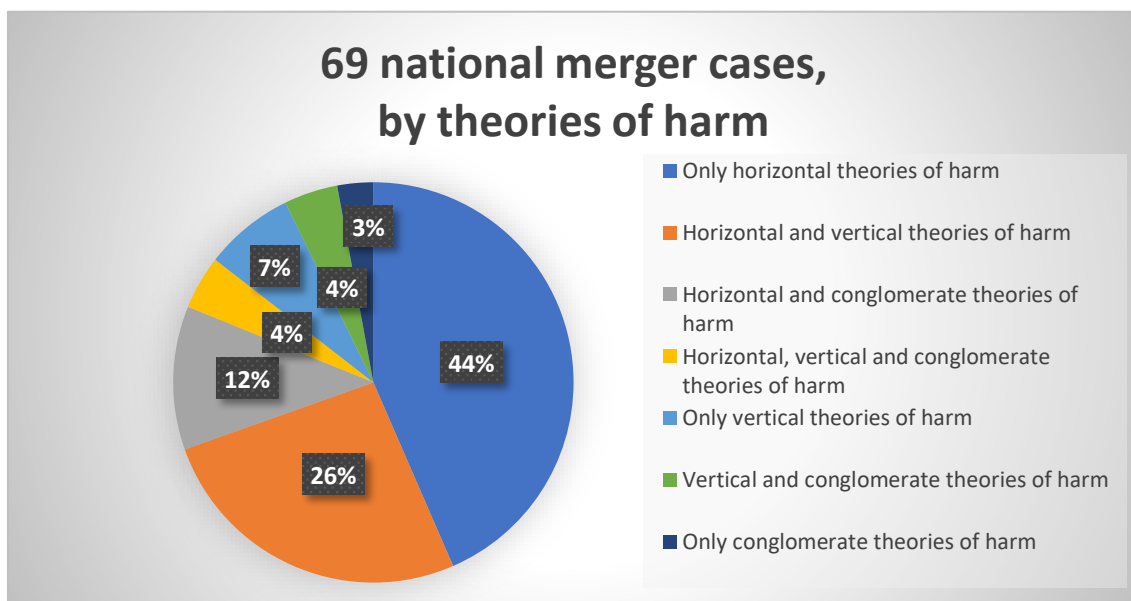
While digital mergers are often associated with Big Tech, the digitalisation of all aspects of business and private life has meant that digital markets and digital mergers have proliferated. Digital platforms are building ever more comprehensive digital ecosystems, and the question arises whether merger control is flexible enough to meet the new anti-competitive threats that digital mergers bring with them (Chapter III).

97 national digital and technology merger cases from 19 different EU Member States and the United Kingdom, from the time period 1 January 2015 to 31 December 2021, were assessed for the present Report (Chapter IV). A number of **quantitative insights** can be drawn from this analysis. Of the 97 cases identified, 74 were unconditionally cleared (65 in phase 1, 9 in phase 2), 15 cases were cleared subject to conditions (10 in phase 1, 5 in phase 2), 6 concentrations were prohibited, one was withdrawn following the national competition authority voicing serious competition concerns, and in one case

merger control was found to be inapplicable. The ratio of unconditionally cleared to conditionally cleared or prohibited mergers already provides a first indication that most digital and technology mergers are understood to be unproblematic by national competition authorities.



Of the 97 cases identified, 69 cases were selected for an in-depth analysis – including all cases that were conditionally cleared, reached phase 2, or were prohibited or withdrawn. Based on their relevance for this Report, a number of unconditionally cleared cases were also included in this sample. It is notable that of the 69 mergers, 30 cases (i.e., over 40%) exclusively assessed horizontal effects. A further 18 cases assessed horizontal and vertical effects, while 5 cases only assessed vertical effects. 8 cases assessed horizontal and conglomerate effects, 3 cases assessed vertical and conglomerate effects, and 2 cases only assessed conglomerate effects. A total of 3 cases assessed horizontal, vertical and conglomerate effects.



Of the 6 cases in which concentrations were prohibited, all cases assessed horizontal effects, and in addition, 4 assessed vertical foreclosure effects. None assessed any conglomerate effects. Of the 16 cases in which concentrations were conditionally cleared, 8 only related to horizontal effects and 2 only related to vertical effects. 2 further cases related to horizontal and vertical effects, while 2 cases only related to vertical and conglomerate effects. 2 conditional clearances related to conglomerate effects only. These quantitative insights highlight that while conglomerate theories of harm have taken centre stage in discussions about digital mergers, the merger practice across the European Union is either still lagging behind these theoretical insights – or horizontal effects continue to represent the number one concern in digital merger control.

69 national digital and technology merger cases in selected EU Member States and the United Kingdom were relied upon for an in-depth, **qualitative analysis**. These cases cover 17 different jurisdictions. To allow for more detailed insights, theories of harm were categorised along the lines of horizontal effects (loss of an actual competitor, loss of a potential competitor, coordinated effects, other horizontal effects), vertical effects (input foreclosure, customer foreclosure, other vertical non-coordinated effects, coordinated effects) and conglomerate effects (foreclosure, other conglomerate effects). It was notable that a total of 51 cases raised issues related to the **loss of an actual competitor** on the relevant market, and 9 of these mergers were cleared subject to conditions, 4 were prohibited and one was withdrawn. Where the clearance of a merger was subject to commitments, the latter sometimes played a role again in later cases (*Just Eat/La Neveva Roja*, ES 2016). It was seen how digital markets can differ from country to country, depending on the success of individual national platforms (e.g., see the analysis of *eBay/Adevinta* in the UK, Germany and Austria, all 2021). The presence of Big Tech companies such as Alphabet, Amazon, Apple, Meta or Microsoft was repeatedly held to constitute an important factor when concluding that a digital acquisition by a non-Big Tech company did not raise competition concerns. In already concentrated online markets, NCAs would sometimes welcome a merger because it could mean that the market would not tip. Multi-homing by users or customers was equally seen as a ‘natural’ remedy against market tipping.

The **loss of a potential competitor** was brought up in 6 cases, of which 5 came from the UK. Recently, this theory of harm was tested both before Austrian and UK courts in the merger of *Meta/Giphy* (AT 2022; UK 2022). The concern here was that the acquisition could stifle potential competition between Meta (formerly: Facebook) and GIF library Giphy for advertising clients, as Giphy had rolled out a promising advertising service prior to the acquisition that allowed it to monetise its services – and that could have competed with Meta’s display advertising. While the UK Competition Appeal Tribunal upheld the national authority’s prohibition of the merger on substance, the Austrian Supreme Cartel Court upheld the Austrian Cartel Court’s conditional clearance of the same concentration.

**Input foreclosure** was the most relied-upon vertical theory of harm in all cases analysed. 27 cases related to this type of concern. The Swedish *Swedbank Franchise/Svensk Fastighetsförmedling* case (SE 2014) about online property portal

Hemnet led to the first Swedish prohibition of a merger, also due to a concern about input foreclosure. The Slovenian merger of *Sully System/CENEJE* (SI 2018) was only cleared after commitments, as the authority was concerned that there might be input foreclosure related to both online advertising through search engines and online price comparison. In several cases, however, the national competition authorities concluded that vertical input foreclosure was not a credible theory of harm based on the low market shares post-merger and/or the competitive constraint expected from competitors that would remain active on either the upstream or the downstream markets.

**Customer foreclosure** was assessed in 11 national cases. In *CTS Eventim/Four Artists* (DE 2017), the German authority prohibited an acquisition based on the finding that it would (also) have further strengthened customer foreclosure. In a further case involving CTS Eventim (AT 2019), the Austrian authority was concerned that, post-merger, the merged entity could engage in customer foreclosure by providing its ticketing services at above market prices to companies outside of the CTS Eventim group. This concentration was cleared subject to conditions. The presence of a sufficient number of competitors on one of the relevant markets was regularly seen as a factor that could mitigate vertical effects. Low turnover was also sometimes seen as hindering a company's ability to foreclose competitors.

In terms of **other vertical theories of harm**, the Czech authority was concerned that, post-merger, comparison shopping site Heureka.cz could ask Rockaway's online shops to collect excessive amounts of data about their users, data that could then be used in the interest of Rockaway Capital's businesses (*Rockaway Capital/Heureka*, CZ 2016). In a number of cases, the national authority also considered whether the acquirer would have access to commercially sensitive information about competitors post-merger (*esure/Gocompare.com* case, UK 2015; *Sully System/CENEJE*, SI 2018; *Sanoma/Iddink*, NL 2019; *Uber International/GPC Computer Software*, UK 2021).

**Conglomerate foreclosure** was by far the most frequently relied-upon conglomerate theory of harm, assessed in 15 cases. In *Rockaway Capital/Heureka*, the Czech authority was concerned that, post-merger, comparison shopping site Heureka.cz would give preferential treatment to online businesses already controlled by the acquirer (CZ 2016). Bundling strategies combining the previously separate offerings of target and acquirer were also regularly assessed, with a view to identifying whether or not this type of strategy would actually be beneficial to the market. In one case, the waning importance of an offline market meant that no harm was seen in a likely online/offline bundle (*Axel Springer/Concept Multimédia*, FR 2018). *Advanced Micro Devices/Xilinx* (UK 2021) was one of only two cases that exclusively focused on conglomerate effects, with no conditions imposed. In *Delivery Hero* (EL 2022), an acquisition in the area of online food platforms was only cleared subject to conditions based on conglomerate competition concerns.

Notably, any detailed consideration of **digital ecosystems** remained largely absent from the theories of harm examined in the 69 merger cases that were analysed in-depth. While *Meta/Kustomer* (DE 2022) outlined conglomerate concerns related to the strengthening of a digital ecosystem through the acquisition, the national authority ultimately cleared it unconditionally. Competition concerns in today's digital markets

may arise not so much because of well-defined competition issues arising in specific relevant markets, and perhaps not even because of every single small merger that is completed. Instead, competition concerns related to digital platforms can arise from the combined effects of these mergers in multi-sided markets with strong network effects, with a great many markets concerned. Furthermore, **data advantages** that are acquired through a merger also require careful consideration. Data capabilities – relating to both personal data and non-personal data – are central to success in many digital markets and can therefore also represent a significant competitive advantage to digital platforms operating across a diverse set of markets. In recent years, multiple aspects of access and use of data as well as of data integration and data protection have come into play in digital merger cases. What matters now is to consolidate the lessons learned from these analyses in order to develop a coherent approach to assessing data aspects in digital merger control. Finally, a more coherent interaction between **merger control and abuse of dominance** in digital markets also seems like a promising avenue in order to make competition law an even more useful tool to grasp competition concerns in digital mergers.

15 national cases involved **remedies** that addressed the competition concerns raised by the national competition authority. A small number of national cases included structural remedies, namely the divestiture of parts of a business (e.g., *Dante International/PC Garage*, CZ 2016; *Pug/StubHub*, UK 2021; *Adevinta/eBay Classifieds Group*, UK 2021). In terms of behavioural remedies, these were found much more often. First of all, in terms of access and interoperability remedies, such were required in a number of cases (e.g., *CTS Eventim/Barracuda Holding*, AT 2019; *Sanoma/Iddink*, NL 2019; *NS Groep/Pon Netherlands*, NL 2020; *Meta/Giphy*, AT 2022). Licenses were also among proposed remedies that could be categorised as a sort of access remedy (*Schibsted/Milanuncios*, ES 2014; not accepted in *Blocket/Hemnet*, SE 2016). Secondly, a broad range of other types of behavioural remedies could be observed, including the promise not to impose exclusivity obligations on trading partners (e.g., *Just Eat/La Nevera Roja*, ES 2016; *CTS Eventim/Barracuda Holding*, AT 2019; *Glovoappro/Foodpanda*, RO 2021), the promise not to gather excessive data (e.g., *Rockaway Capital/Heureka*, CZ 2016), or the commitment not to discriminate between trading partners (e.g., *Sully System/CENEJE*, SI 2018; *Meta/Giphy*, AT 2022). Only two cases on conglomerate concerns included a remedy; in *Rockaway Capital/Heureka* (CZ 2016), the acquirer proposed to include a clear link between Heureka.cz and other Rockaway Capital activities on the website, and committed not to discriminate against independent sellers. In *Delivery Hero* (EL 2022), the acquirer committed not to bundle food-ordering services with restaurant-reservation, and not to use data from a platform for targeted advertising on another absent the users' consent.

A total of 6 concentrations were **prohibited**. Overall, the picture on prohibitions of digital mergers is rather straightforward: apart from the special Hungarian case based on media law (*Magyar RTL Televízió/Central Digitális Média*, HU 2017), all prohibitions related to the loss of an actual competitor (plus, in one case, vertical customer foreclosure) or the loss of a potential competitor plus vertical input foreclosure. This shows that horizontal theories of harm continue to be regarded as the most credible threat to

competitive markets, also in digital environments, despite topical research showing that conglomerate (and vertical) effects resulting from digital mergers merit closer scrutiny.

In Europe, national merger cases in digital and technology markets have proliferated in recent years. The comparison carried out in this Report has found that the analysis by national competition authorities still very much runs along the traditional lines of horizontal – vertical – conglomerate effects. For the **future**, it could be useful to frame theories of harm more in line with the complex and interrelated market realities that we find in the digital environment, and thereby obtain a clearer view of the three issues that have, so far, only been assessed in a smaller number of national cases: digital ecosystems, data advantages and the interaction of mergers with abuse of dominance. A review of the national decisional practice on digital and technology mergers against the background of the European decisional practice, such as the one carried out in this Report, may be a good starting point for further developing merger control in Europe and beyond in order to enable it to fully capture the anti-competitive effects that certain digital mergers are capable of producing.

## I. Introduction: Purpose and organisation of the Report

- (1) The present Report reviews digital<sup>1</sup> and technology<sup>2</sup> mergers in selected European Union (EU) Member States and in the former EU Member State of the United Kingdom and assesses the theories of harm that were identified by national competition authorities (NCAs) in such cases. By focusing on the developing decisional practice in digital and technology mergers at the national level, the Report intends to provide a broad basis for the Commission's reflection in relation to the review of digital and technology mergers.
- (2) The Call for Tenders requires that the expert advice should cover the following issues:
  - (i) an identification of **theories of harm** devised in the decisional practice and the concrete risks identified by NCAs,<sup>3</sup> and
  - (ii) an identification of **remedies** adopted by NCAs to solve these competition concerns.
- (3) Theories of harm are here understood as 'hypothes[es] about how the process of rivalry could be harmed as a result of a merger'.<sup>4</sup> Depending on the type of merger under investigation, a theory of harm may relate to horizontal effects, vertical effects or conglomerate effects.
- (4) I was commissioned by the European Commission to provide the expert Report sought by its Call for Tenders, and hereby present my Report.
- (5) In preparation of this Report, I have reviewed:
  - the decisional practice on digital and technology mergers of NCAs of selected Member States of the EU as well as of the United Kingdom as a former EU Member State,
  - the decisional practice of the European Commission on digital and technology mergers,
  - relevant guidance on digital and technology mergers, and
  - relevant academic literature.
- (6) Based on a review of hundreds of cases from all EU jurisdictions plus the United Kingdom, I compiled a sample of 97 national merger cases from 19 jurisdictions that I coded by outcome. Of these, I ultimately selected a sample of 69 national cases from 17 jurisdictions for an in-depth analysis (for case selection criteria, see Chapter II below). The Report categorises these national cases based on the **types of competition concerns** that arose in digital and technology mergers ('mapping'). For each type of concern, I provide a general overview of the relevant issues, give a quantitative assessment of national cases relating to the type of concern, and then provide a more detailed qualitative analysis. In terms of the

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<sup>1</sup> For a definition of what includes digital mergers, see para (19) below.

<sup>2</sup> For a definition of what includes technology mergers, see para (20) below.

<sup>3</sup> The term NCA is here understood within the meaning of Article 35 of Regulation 1/2003, meaning that certain national courts (eg, the Austrian Cartel Court) will also be regarded as NCAs for the purposes of this Report.

<sup>4</sup> Competition & Markets Authority, Merger Assessment Guidelines (CMA129, 18 March 2021) para 2.11.



qualitative analyses, I describe the concrete conduct, strategy or behaviour concerned in the most relevant national cases identified, and include references to the relevant case law and decisional practice from a comparative perspective. In addition, for each issue and relevant illustrative case, I provide an indication of the outcome of the merger review conducted at the national level. Competition concerns identified by NCAs are examined and put into the context of both the European Commission's decisional practice and academic research on digital and technology mergers.

- (7) Where commitments or other remedies were adopted or imposed, I describe, where available, the type of measure adopted, the main terms, ancillary requirements, enforcement mechanisms, and duration.
- (8) Concerning theories of harm, the Call for Tenders provides that the Report should include both horizontal and non-horizontal theories of harm. As regards horizontal theories of harm, a focus of the Report lies on identifying whether NCAs' assessment of the mergers included competitive concerns because the buyer viewed the target as a potential threat and bought it to either discontinue the target's innovation ('killer acquisition')<sup>5</sup> or incorporate it into its own portfolio ('zombie acquisition'). It is also assessed to what extent the importance of acquiring data through a merger was considered by NCAs.
- (9) As regards non-horizontal theories of harm, the focus of the Report lies on identifying whether NCAs' assessment of the mergers included competitive concerns because of vertical or conglomerate effects that the mergers could entail. Here, possibilities include the risk of foreclosing (potential) competitors in various ways, eg through the degradation of interoperability or refusal to supply.
- (10) The Report is structured as follows: Chapter II gives an insight into the way in which national cases were selected, as these constitute the basis for this Report. Chapter III sets the scene by providing an overview of the law and economics applicable to digital mergers as discussed in the academic literature. Chapter IV contains quantitative insights from the analysis of 97 national digital and technology merger cases in selected Member States of the EU and in the United Kingdom. Chapter V contains qualitative insights from the analysis of 69 national digital and technology merger cases in selected Member States of the EU and in the United Kingdom. It discusses various theories of harm and how they were applied in national cases, and links them to the European decisional practice. Chapter VI provides concise conclusions.
- (11) In Annex I, I provide an overview of those 97 national cases that I consider particularly instructive for this Report, coded by the outcome of the case. In Annex II, I provide a list of those 69 cases that I found to be most relevant for the present Report based on the case selection criteria (Chapter II), and each case is coded

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<sup>5</sup> On this term, which was coined in relation to mergers and acquisitions in the pharmaceutical industry, see Colleen Cunningham, Florian Ederer & Song Ma, 'Killer Acquisitions' (2021) 129 *Journal of Political Economy* 649.

based on the theories of harm employed in that decision. In Annex III, I provide concise summaries of those 69 merger cases.

## II. Case selection

- (12) The following sets out the way in which national cases were selected for this Report.

### 1. Legal background

- (13) Based on the one-stop-shop principle of the European Union Merger Regulation (Article 21 EUMR),<sup>6</sup> EU merger control under the auspices of the European Commission exclusively applies to mergers that come within the jurisdiction of the EUMR. Article 3 EUMR foresees turnover-based thresholds to decide on the Commission's jurisdiction.
- (14) Under Article 4 para 5 EUMR, merging parties whose merger would be notifiable in at least three Member States may make a reasoned submission asking the Commission to review the merger. This has occurred in digital mergers.<sup>7</sup> Referrals from NCAs (Article 22 EUMR) can equally lead to the European Commission assessing a merger, as has occurred in digital markets.<sup>8</sup> In the case of an Article 22 EUMR referral, the Commission can review the merger with respect to the markets of the referring Member State(s).<sup>9</sup>
- (15) While the EUMR relies on different turnover thresholds in order to separate notifiable mergers from those that do not come within the purview of EU merger control, some national merger control regimes – such as the Austrian<sup>10</sup> and German<sup>11</sup> one – have introduced additional transaction value-based thresholds that require the notification of a merger if the acquirer's payment for the target exceeds a certain amount.

### 2. Jurisdictions covered by the analysis

- (16) The literature on digital and technology mergers is frequently focused on cases at the level of the European Union,<sup>12</sup> or compares the EU and US approaches to digital mergers.<sup>13</sup> While this focus is justified based on the overall importance of

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<sup>6</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) [2004] OJ L24/1.

<sup>7</sup> Eg, see European Commission Decision of 3 October 2014, COMP/M.7217 – *Facebook/WhatsApp*.

<sup>8</sup> Although this is a rare occurrence, the recent *Meta/Kustomer* merger was assessed in parallel by the European Commission, following an Article 22 EUMR referral from Austria, and by the German Bundeskartellamt; see European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*; Bundeskartellamt, *Meta/Kustomer* (B6-21/22, 11 February 2022).

<sup>9</sup> See European Commission, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] OJ C113/1, para 11 fn 12.

<sup>10</sup> § 9 para 4 Cartel Act, Austrian Federal Law Gazette I 61/2005 as amended.

<sup>11</sup> § 35 para 1a Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended.

<sup>12</sup> Marc Bourreau and Alexandre de Stree, 'Digital Conglomerates and EU Competition Policy' (CERRE Report, March 2019); Tristan Lécuyer, 'Digital Conglomerates and Killer Acquisitions – A Discussion of the Competitive Effects of Start-Up Acquisitions by Digital Platforms' (N° 1-2020) *Concurrences* 42.

<sup>13</sup> Yong Lim, 'Tech Wars: Return of the Conglomerate – Throwback or Dawn of a New Series for Competition in the Digital Era?' (2020) 19 *Journal of Korean Law* 47, 57 (speaking of 'data-driven network effects'). Sometimes, the UK's approach to digital mergers is incorporated into the analysis: Anne C. Witt, 'Who's Afraid of Conglomerate Mergers' (2022) 67 *Antitrust Bulletin* 208.

these two jurisdictions, it nevertheless risks overlooking important developments in national merger control in EU Member States and misses out on obtaining a broader picture on digital merger control. With the present Report, I intend to bridge this gap by analysing digital and technology merger cases from a wider scope of jurisdictions within the European Union, including the United Kingdom as a former Member State.

### 3. Case selection criteria

- (17) Cases analysed were chosen based on the following criteria:
- (a) the jurisdiction in which the case was decided (EU Member State or United Kingdom),
  - (b) the timeframe in which the decision was rendered (1 January 2015 to 31 December 2021), and
  - (c) the digital or technology nature of the markets analysed in the case.
- (18) The **timeframe** of the Report spans 7 years, from 1 January 2015 to 31 December 2021, with a particular focus on cases emerging over the past five years. This is due to the fact that digital mergers have proliferated during that time. Furthermore, the premise is that the most recent cases can give the most profound insights into adaptations in the substantive merger analysis. A small number of cases were included that were decided prior to 1 January 2015 or after 31 December 2021, due to a particular interest in the analysis that was carried out therein.
- (19) **Digital merger cases** can be enormously varied. This is due to several factors. First of all, a large number of traditional in-person services are moving online. Second, digital platforms are intensifying their conglomeration strategies, meaning they are moving into very varied markets ranging from movie production to restaurant guides. In order to establish which cases should be regarded as ‘digital’ and thus assessed for this Report, a number of selection criteria were established from multiple angles:
- a) Did the case include a well-known **digital platform** operator? Companies in this category included Adobe, Alphabet, Airbnb, Amazon, Apple, Activision Blizzard, Booking.com, Deliveroo, eBay, Facebook, Google, Intuit, Meta, Microsoft, Netflix, PayPal, Rakuten, Salesforce, Spotify, and Uber. In order to compile this list, both the Forbes ‘Top 100 Digital Companies’ list<sup>14</sup> and European case law<sup>15</sup> were relied upon. The focus was on digital services

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<sup>14</sup> Forbes, Top 100 Digital Companies <<https://www.forbes.com/top-digital-companies/list/3/#tab:rank>>. Telecoms were excluded for the purposes of this Report.

<sup>15</sup> In particular, decisions related to Big Tech were regarded as relevant. Big Tech is here understood as the GAFAM companies, ie Google (Alphabet), Apple, Amazon, Facebook (Meta) and Microsoft. **Meta** (formerly Facebook): European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer* (NACE M.73.1 - Advertising, J.62 - Computer programming, consultancy and related activities, J.61.9 - Other telecommunications activities, J.63.12 - Web portals; Article 8(2) with conditions & obligations; referral from Austria, Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal and Romania – Germany carried out its own investigation); European Commission Decision of 3 October 2014, COMP/M.7217 – *Facebook/WhatsApp* (NACE M.73.1 - Advertising, J.62.09 - Other

rather than hardware, although several digital platform providers have moved into offering hardware as well. These cases are covered by the ‘technology’ category (see below).

- b) What was the **NACE code** related to the case? NACE codes that were included in the digital category were identified through a comprehensive case search of all the Big Tech mergers that the European Commission has investigated to date.<sup>16</sup> NACE codes that were understood to be particularly relevant included ‘web portals’, ‘computer programming activities’, ‘data

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information technology and computer service activities, J.61.9 - Other telecommunications activities; Article 6(1)(b) Non-opposition; assessed under Article 4(5) EUMR).

Alphabet (formerly Google): European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit* (NACE J.62.01 - Computer programming activities, C.26.4 - Manufacture of consumer electronics, J.58.2 - Software publishing, J.63.12 - Web portals; Art. 8(2) with conditions & obligations); European Commission Decision of 23 February 2016, M.7813 – *Sanofi/Google/DMI JV* (NACE C.21 - Manufacture of basic pharmaceutical products and pharmaceutical preparations, C.32.5 - Manufacture of medical and dental instruments and supplies, Q.86.9 - Other human health activities; Article 6(1)(b) Non-opposition); European Commission Decision of 13 February 2012, COMP/M.6381 – *Google/Motorola Mobility* (NACE C.26.30 - Manufacture of communication equipment, J.61 - Telecommunications, J.61.20 - Wireless telecommunications activities; Article 6(1)(b) Non-opposition); European Commission Decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick* (NACE M.73.1 – Advertising; Article 8(1) Compatibility).

Apple: European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam* (NACE M.73.1 – Advertising, J.62 - Computer programming, consultancy and related activities, J.63.1 - Data processing, hosting and related activities, web portals, J.63 - Information service activities; Article 8(1) Compatibility; referral from Austria, France, Iceland, Italy, Norway, Spain and Sweden); European Commission Decision of 25 July 2014, COMP/M.7290 – *Apple/Beats* (NACE C.26.4 - Manufacture of consumer electronics, J.58.29 - Other software publishing; Article 6(1)(b) Non-opposition).

Microsoft: European Commission Decision of 21 December 2021, M.10290 – *Microsoft/Nuance* (NACE J.62 - Computer programming, consultancy and related activities; Article 6(1)(b) Non-opposition); European Commission Decision of 5 March 2021, M.10001 – *Microsoft/Zenimax* (NACE J.58.21 - Publishing of computer games; Article 6(1)(b) Non-opposition); European Commission Decision of 19 October 2018, M.8994 – *Microsoft/GitHub* (NACE J.62.01 - Computer programming activities, J.63.1 - Data processing, hosting and related activities, web portals; Article 6(1)(b) Non-opposition); European Commission Decision of 6 December 2016, M.8124 – *Microsoft/LinkedIn* (NACE J.62 - Computer programming, consultancy and related activities, J.63.12 - Web portals; Article 6(1)(b) with conditions & obligations); European Commission Decision of 4 December 2012, COMP/M.7047 – *Microsoft/Nokia* (NACE C.26.3 - Manufacture of communication equipment; Article 6(1)(b) Non-opposition); European Commission Decision of 10 February 2012, COMP/M.6474 – *GE/Microsoft/JV* (NACE J.62 - Computer programming, consultancy and related activities; Article 6(1)(b) Non-opposition); European Commission Decision of 7 October 2011, COMP/M.6281 – *Microsoft/Skype* (NACE J.63 - Information service activities; Article 6(1)(b) Non-opposition) (upheld in Case T-79/12 *Cisco Systems and Messagenet v Commission*, ECLI:EU:T:2013:635); European Commission Decision of 18 February 2010, COMP/M.5727 – *Microsoft/Yahoo! Search Business* (NACE J.63.1 - Data processing, hosting and related activities, web portals; Article 6(1)(b) Non-opposition). Most recently, Microsoft has announced its acquisition of game developer Activision Blizzard, and a merger filing can be expected in this case: Pietro Lombardi and Samuel Stolton, ‘Microsoft heads for second big EU showdown — this time over gaming’ *Politico* (24 January 2022) <<https://www.politico.eu/article/microsoft-activision-eu-showdown-video-game/>>.

Amazon: European Commission Decision of 15 March 2022, M.10349 – *Amazon/MGM* (NACE J.59 - Motion picture, video and television programme production, sound recording and music publishing activities; Article 6(1)(b) Non-opposition).

<sup>16</sup> On these, see footnote 15 above.

processing, hosting and related activities’ and ‘computer programming, consultancy and related activities’.<sup>17</sup>

- c) Was the **relevant market** relied upon in the case related to digital markets? The following keywords were used as an indicator: AdTech, API, app, application, cloud computing, display advertising, internet, Internet of Things/IoT, marketplace, online advertising, online betting/gaming, online communication services, personalised advertising, platform, price comparison, software, wearable.
  - d) **Exclusion criteria:** Cases involving traditional media were excluded, unless they primarily related to social media. Broadcasting and pay-TV cases were also excluded.
- (20) **Technology merger cases** were included as an additional category of cases. The following selection criteria were established from multiple angles:
- a) Did the case include a well-known **high-tech company**? Companies in this category included AMD, Broadcom, Cisco, Dell, Ericsson, Huawei, IBM, Intel, Lenovo, LG Electronics, NEC, Nintendo, Nvidia, NXP Semiconductors, ON Semiconductor, Oracle, Qualcomm, Samsung, SAP, Taiwan Semiconductor, Xiaomi, and ZTE. In order to compile this list, the Forbes ‘Top 100 Digital Companies’ list,<sup>18</sup> the Thomson Reuters ‘Top 100 Global Tech Leaders’ list<sup>19</sup> and European case law<sup>20</sup> were relied upon. The

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<sup>17</sup> In particular, the following NACE codes were identified (if appearing in more than one case, the NACE code is set in italics):

C.21 - Manufacture of basic pharmaceutical products and pharmaceutical preparations

*C.26.3 - Manufacture of communication equipment*

*C.26.4 - Manufacture of consumer electronics*

C.32.5 - Manufacture of medical and dental instruments and supplies

J.58.2 - Software publishing

J.58.21 - Publishing of computer games

J.58.29 - Other software publishing

J.59 - Motion picture video and television programme production, sound recording and music publishing activities

J.61 - Telecommunications

J.61.20 - Wireless telecommunications activities

*J.61.9 - Other telecommunications activities*

*J.62 - Computer programming, consultancy and related activities*

*J.62.01 - Computer programming activities*

J.62.09 - Other information technology and computer service activities

*J.63 - Information service activities*

*J.63.1 - Data processing, hosting and related activities, web portals*

*J.63.12 - Web portals*

*M.73.1 - Advertising*

Q.86.9 - Other human health activities

<sup>18</sup> Forbes, Top 100 Digital Companies <<https://www.forbes.com/top-digital-companies/list/3/#tab:rank>>.

<sup>19</sup> Thomson Reuters, Top 100 Global Tech Leaders <<https://www.thomsonreuters.com/en/products-services/technology/top-100.html>>.

<sup>20</sup> **AMD:** European Commission Decision of 30 June 2021, COMP/M.10097 – *Advanced Micro Devices/Xilinx* (NACE C.26.1 - Manufacture of electronic components and boards; Article 6(1)(b) Non-opposition).

**Broadcom:** European Commission Decision of 23 November 2015, M.7686 – *Avago/Broadcom* (NACE G.46.52 - Wholesale of electronic and telecommunications equipment and parts, C.26.11 - Manufacture of

focus was on hardware required for digital services. It is noteworthy that digital platforms found in the ‘digital’ category are also often producers of the technology they rely on, meaning they may also be considered high-tech companies.

- b) What was the **NACE code** related to the case? NACE codes that were included in the technology category were identified through a case search of important technology mergers that the European Commission has investigated to date.<sup>21</sup> NACE codes that were included in the technology category included ‘manufacture of communication equipment’, ‘manufacture of consumer electronics’, ‘manufacture of electronic components’, ‘wholesale of electronic and telecommunications equipment and parts’ and ‘wholesale of computers, computer peripheral equipment and software’.<sup>22</sup>
- c) Was the **relevant market** relied upon in the case related to high-tech markets? The following keywords were used as an indicator: chips, hardware, patent, and semiconductor.
- d) **Exclusion criteria:** Cases involving technology not directly relevant to digital markets were excluded. Telecommunications operators were also excluded.

#### 4. Identification and analysis of cases

- (21) Based on the selection and exclusion criteria set out above, a large set of cases from across EU Member States and from the United Kingdom could be identified

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electronic components, N.77.4 - Leasing of intellectual property and similar products, except copyrighted works; Article 6(1)(b) Non-opposition); European Commission Decision of 12 May 2017, M.8314 – *Broadcom/Brocade* (NACE C.26.3 - Manufacture of communication equipment, C.26.11 - Manufacture of electronic components; Article 6(1)(b) with conditions & obligations); European Commission Decision of 12 October 2018, M.9054 – *Broadcom/CA* (NACE J.62.01 - Computer programming activities, C.26.11 - Manufacture of electronic components; Article 6(1)(b) Non-opposition); European Commission Decision of 30 October 2019, M.9538 – *Broadcom/Symantec Enterprise Security Business* (NACE J.62.01 - Computer programming activities; Article 6(1)(b) Non-opposition).

Intel: European Commission Decision of 20 May 2021, M.10059 – *SK Hynix/Intel’s Nano and SSD Business* (NACE C.26.2 - Manufacture of computers and peripheral equipment; Article 6(1)(b) Non-opposition); European Commission Decision of 14 October 2015, M.7688 – *Intel/Altera* (NACE C.26.1 - Manufacture of electronic components and boards; Article 6(1)(b) Non-opposition).

Qualcomm: European Commission Decision of 18 January 2018, M.8306 – *Qualcomm/NXP Semiconductors* (NACE C.26.3 - Manufacture of communication equipment, J.62.09 - Other information technology and computer service activities; Article 8(2) with conditions & obligations).

<sup>21</sup> On these, see footnote 20 above.

<sup>22</sup> In particular, the following NACE codes were identified (if appearing in more than one case, the NACE code is set in italics):

*C.26.1 - Manufacture of electronic components and boards*

*C.26.11 - Manufacture of electronic components*

C.26.2 - Manufacture of computers and peripheral equipment

*C.26.3 - Manufacture of communication equipment*

G.46.52 - Wholesale of electronic and telecommunications equipment and parts

*J.62.01 - Computer programming activities*

J.62.09 - Other information technology and computer service activities

N.77.4 - Leasing of intellectual property and similar products, except copyrighted works

based on literature research,<sup>23</sup> database research<sup>24</sup> and outreach to colleagues from various jurisdictions. This sample was selected after careful consideration of the selection criteria, of the need to represent a multitude of jurisdictions, of the date of the decision, of the case's relevance for digital and technology markets, and of the Report's particular interest in cases in which remedies were adopted. From hundreds of cases reviewed, a sample of 97 cases was derived that were considered particularly relevant based on the factors set out above, and full text decisions for all these cases were obtained. All relevant full text decisions are supplied to the Directorate General for Competition together with this Report. A list of the 97 NCA decisions identified as particularly relevant can be found in Annex I. While this list is quite extensive, it can only represent a sample and does not aim to be comprehensive. Rather, the intention is to represent a wide range of digital and technology merger cases that showcase the types of cases encountered in these sectors from a wide range of jurisdictions.

- (22) The 97 decisions considered particularly relevant were then coded based on the type of outcome that the case led to (i.e., cleared/cleared with conditions/prohibited/withdrawn/non-applicability; phase 1/phase 2). Where a case led to an outcome in both phase 1 and 2, only the phase 2 outcome was included. All decisions which led to conditional clearance, a phase 2 investigation, a prohibition or a withdrawal were selected for an in-depth analysis. A further 38 cases with unconditional clearance in phase 1 were also analysed in depth, based on the case's importance and the language capabilities of the expert and her collaborators. This led to an in-depth analysis of a total of 69 cases. Annex II provides a list of these 69 cases that identifies the theories of harm employed in those cases. Annex III provides a concise summary of all those 69 national cases that were considered particularly relevant for the purposes of this Report.
- (23) The 69 national cases that were considered particularly relevant for the purposes of this Report were then analysed in detail as concerns
- (i) the competitive concerns raised by the NCA,
  - (ii) the theories of harm assessed by the NCA, and
  - (iii) the remedies (if any) imposed by the NCA or agreed upon between the merging parties and the NCA.
- (24) Where mergers gave rise to cases in multiple jurisdictions, such cases were particularly focused on for comparative purposes.

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<sup>23</sup> See, especially, Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020).

<sup>24</sup> This was carried out on the Caselex.eu platform.



### III. A short primer on the law and economics applicable to digital merger control

- (25) In digital and technology markets, conglomerate and vertical mergers are increasingly coming into the focus of merger control. Conglomerate mergers are mergers that occur between companies that are not competitors on the same relevant market, while vertical mergers are mergers that occur between companies that are in a vertical relationship, eg as suppliers or customers.<sup>25</sup> Together, these types of mergers will be called non-horizontal mergers to distinguish them from horizontal mergers, i.e. mergers between companies active on the same relevant market.<sup>26</sup>
- (26) The reason for this renewed interest in non-horizontal mergers can be seen in the specific characteristics that dynamic, digital markets display and that have an influence on how digital companies compete.<sup>27</sup> This interest in digital mergers was only heightened by the unprecedented ‘buying spree’ on which a number of digital platforms embarked over the past years,<sup>28</sup> leading to noteworthy digital mergers that were not necessarily considered horizontal and yet understood to be possibly harmful to competition by the public.<sup>29</sup>

#### 1. The nature of digital mergers

- (27) Big Tech is increasingly diversifying its portfolio, creating digital ecosystems with varied offerings for consumers. Over the past few years, the European Commission alone has investigated well over a dozen Big Tech mergers<sup>30</sup> as well as an important number of technology mergers, for example in the area of

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<sup>25</sup> European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Non-horizontal Merger Guidelines 2008) [2008] OJ C265/6, paras 2-5, 91. The US Vertical Merger Guidelines encompass both vertical mergers as under the European definition, as well as vertical issues that arise in mergers of complements, ie conglomerates; US Department of Justice and Federal Trade Commission, Vertical Merger Guidelines (30 June 2020) 1.

<sup>26</sup> On the nature of horizontal mergers, see European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines 2004) [2004] OJ C31/5, para 5; US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (19 August 2010) 1.

<sup>27</sup> For an introduction, see Viktoria H.S.E. Robertson, ‘Antitrust Law and Digital Markets’ in Heinz D. Kurz, Marlies Schütz, Rita Strohmaier and Stella S. Zilian (eds), *The Routledge Handbook of Smart Technologies: An Economic and Social Perspective* (2022) 432.

<sup>28</sup> Alex Sherman and Lauren Feiner, ‘Amazon, Microsoft and Alphabet went on a buying spree in 2021 despite D.C.’s vow to take on Big Tech’ (22 January 2022) *CNBC* <<https://www.cnbc.com/2022/01/22/amazon-microsoft-alphabet-set-more-deals-in-2021-than-last-10-years.html>>.

<sup>29</sup> Eg, see Cecilia Kang and David McCabe, ‘F.T.C. Broadens Review of Tech Giants, Homing In on Their Deals’ *New York Times* (11 February 2020); David McCabe and Jim Tankersley, ‘Biden Urges More Scrutiny of Big Business, Such as Tech Giants’ *New York Times* (16 September 2021); Kiran Stacey, James Fontanella-Khan and Stefania Palma, ‘Big tech companies snap up smaller rivals at record pace’ *Financial Times* (19 September 2021); Richard Waters and Leo Lewis, ‘Why gaming is the new Big Tech battleground’ *Financial Times* (21 January 2022).

<sup>30</sup> For a comprehensive list of these cases, see already footnote 15 above.

semiconductors.<sup>31</sup> Digital and technology mergers are not restricted to Big Tech, however. Another trend that can be noted at the merger stage is that more and more services and retail activities are (also) moving online, something that can be seen in travel agency services,<sup>32</sup> in the sale of books and household goods,<sup>33</sup> in digital property listings<sup>34</sup> or the renting of bicycles through mobile applications,<sup>35</sup> as well as in online betting and gambling.<sup>36</sup>

## 2. Digital mergers and conglomerate theories of harm

- (28) In merger control, horizontal mergers are traditionally viewed as a bigger threat to competition than vertical or conglomerate mergers. This is also how the European Commission frames the issue in its 2008 Non-Horizontal Merger Guidelines.<sup>37</sup> The 2021 Merger Guidelines by the UK's Competition & Markets Authority highlight that over 80% of its merger investigations in phase 1 relate to horizontal mergers.<sup>38</sup> In this assessment, however, digital market environments with their specific market characteristics may be a game-changer.<sup>39</sup>
- (29) In digital markets, mergers often defy traditional categorisations because a merger may at the same time be a vertical merger (where the data from an acquired start-up serves as an additional input), a conglomerate merger (where an aspect of an acquired start-up complements the offerings of the acquiring platform) and a horizontal merger (where an aspect of an acquired start-up already competes with the acquiring platform's offerings).<sup>40</sup>
- (30) After a considerable conglomerate merger wave in the 1960s and 1970s,<sup>41</sup> conglomerate mergers have today returned to the forefront of antitrust debate.

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<sup>31</sup> For a comprehensive list of these cases, see already footnote 20 above.

<sup>32</sup> Office of Fair Trading, *Web Reservations/Hostelbookers.com* (ME/6062/13, 2 August 2013).

<sup>33</sup> Autorité de la concurrence, *Fnac/Darty* (16-DCC-111, 27 July 2016).

<sup>34</sup> Bundeskartellamt, *Axel Springer/Immowelt* (B6-39/15, 20 April 2015); Competition & Markets Authority, *ZPG/Websky* (ME/6690/17, 29 June 2017); Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018).

<sup>35</sup> Autoriteit Consument & Markt, *NS Groep/Pon Netherlands* (ACM/20/038614, 20 May 2020).

<sup>36</sup> Eg, see Malta Competition and Consumer Affairs Authority, *GVC Holdings/Ladbroke's Coral Group* (COMP-MCCAA/4/18, 21 March 2018); Competition and Consumer Protection Commission, *Stars Group/Sky Betting & Gaming* (M/18/038, 18 June 2018); Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>37</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 92.

<sup>38</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 1.10.

<sup>39</sup> On these characteristics, see also Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (9 May 2019) 3 ff.

<sup>40</sup> For instance, in the recently cleared *Microsoft/Nuance* acquisition, the European Commission identified and assessed 'horizontal overlaps between the activities of Nuance and Microsoft in the markets for transcription software', a 'vertical link between Microsoft's cloud computing and Nuance's downstream transcription software for healthcare', 'conglomerate links between Nuance's transcription software products and a number of Microsoft's products' and the 'use of data transcribed with Nuance's software'; European Commission Decision of 21 December 2021, M.10290 – *Microsoft/Nuance*; European Commission, 'Mergers: Commission approves acquisition of Nuance by Microsoft' IP/21/7067 (21 December 2021).

<sup>41</sup> Eg, see Everette Macintyre, 'Statement on Conglomerate Mergers and Antitrust Laws' (2 December 1966)

<[https://www.ftc.gov/system/files/documents/public\\_statements/683731/19661202\\_macintyre\\_conglome](https://www.ftc.gov/system/files/documents/public_statements/683731/19661202_macintyre_conglome)

This comeback, it has been argued, is due to the competitive characteristics found in digital markets, as well as the platform business model popular in that market environment and the network effects specific to some of those markets.<sup>42</sup>

- (31) In the 1970s, several theories were advanced on the reasons for conglomerate mergers. Of these, some still appear relevant in order to understand the intentions behind digital conglomerate mergers, in particular the market power theory and the resource theory.<sup>43</sup> Under the market power theory, digital platforms move into adjacent markets in order to strengthen their stronghold on the initial market. Under the resource theory, the resources that digital platforms readily have available allow them to move into adjacent markets with relative ease.<sup>44</sup>
- (32) In addition, multiple authors have identified factors that specifically explain the reasons for *digital* conglomeration that go beyond how conglomerate mergers of the 1960s and 1970s were understood.<sup>45</sup> These factors directly relate to possible theories of harm under a substantive merger analysis. Lim (2020), for instance, argues that while digital conglomeration continues to serve the goal of diversification, this is ultimately ‘pursued more in fear of displacement rather than business cyclicity’.<sup>46</sup>
- (33) Conglomerate mergers in the digital age can bring about a multitude of benefits for the acquiring platform and its customers, but these benefits can at the same time constitute new barriers to entry for innovators. On the supply-side, Bourreau and de Streel (2019) find that the modular design of many digital products allows digital platforms to make use of their resources for a variety of different purposes, leading to significant economies of scope. Resources can relate to hardware, software or data,<sup>47</sup> for instance. On the demand-side, digital platforms can benefit from consumption synergies that consumers enjoy in multi-product ecosystems.<sup>48</sup> This can directly benefit consumers while at the same time locking them into a particular digital ecosystem and thereby, in the long run, softening competition.
- (34) While tying and bundling are generally recognised as possible anti-competitive effects of conglomerate mergers, and thus a possibility to be assessed in the merger review,<sup>49</sup> Bourreau and de Streel (2019) argue that ‘the specific characteristics of the digital industries may change the effects of conglomerate diversification and affect the balance between pro- and anti-competitive effects’.<sup>50</sup> They propose that tying and bundling, also through digital ecosystems, need to be focused on in digital merger control as a particular barrier to entry for innovating

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rate\_mergers\_and\_antitrust\_laws.pdf>. Conglomerate mergers were then addressed by the 1968 US Merger Guidelines; US Department of Justice, Merger Guidelines (1968), section III.

<sup>42</sup> Lim (n 13) 48.

<sup>43</sup> Bourreau and de Streel (n 12) 6 ff.

<sup>44</sup> Bourreau and de Streel (n 12) 7 (containing further references).

<sup>45</sup> See, in particular, Bourreau and de Streel (n 12); Lim (n 13).

<sup>46</sup> Lim (n 13) 55 (containing references to that effect).

<sup>47</sup> On the particular importance of data for the analysis of conglomerate mergers, see also Lim (n 13) 57 (speaking of ‘data-driven network effects’); Lécuyer (n 12) 47.

<sup>48</sup> Bourreau and de Streel (n 12) 9-13.

<sup>49</sup> See European Commission, Non-Horizontal Merger Guidelines 2008, para 93.

<sup>50</sup> Bourreau and de Streel (n 12) 13.

newcomers.<sup>51</sup> Particular issues they draw attention to include the softening of competition through increased differentiation and platform envelopment, whereby ‘a dominant platform enters a new market pioneered by an entrant platform and forecloses the new entrant’.<sup>52</sup> Here, the issue from a competition law point of view is that once another company’s product is incorporated into the buyer’s digital ecosystem, network effects may be able to further strengthen its market power.<sup>53</sup> Platform envelopment has been described as a possible point of entry for digital platforms that does not involve ‘offer[ing] revolutionary functionality to win substantial market share’.<sup>54</sup>

- (35) While so-called portfolio effects already worried competition authorities in non-digital cases,<sup>55</sup> digital conglomerates may rely on product proliferation in a targeted way as a deterrence strategy to keep potential entrants out of the market.<sup>56</sup> Furthermore, digital conglomerates may sometimes act as a gatekeeper for access to users as well as for access to products and services,<sup>57</sup> a fact that merger control needs to bear in mind. Where a digital conglomerate keeps an essential component to itself, access remedies may be appropriate.<sup>58</sup>
- (36) Pre-emption of potential competitors has been identified as an important driving force behind digital platforms that buy promising start-ups.<sup>59</sup> While it is impossible to predict with certainty whether a certain start-up would have morphed into a credible competitive threat,<sup>60</sup> anecdotal evidence suggests that the digital platforms themselves seem to think so.<sup>61</sup> Ultimately, the impact of a digital merger on innovation may need to be assessed more carefully.<sup>62</sup> Here, the focus may also need to shift to a more long-term view of how a digital market may develop in the future.<sup>63</sup>

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<sup>51</sup> Bourreau and de Streel (n 12) 29.

<sup>52</sup> Bourreau and de Streel (n 12) 16; based on Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, ‘Platform Envelopment’ (2011) 32 *Strategic Management Journal* 1270.

<sup>53</sup> Jacques Crémer, Heike Schweitzer and Yves-Alexandre de Montjoye, *Competition Policy in the Digital Era* (2019) 110-122; Lécuyer (n 12) 47.

<sup>54</sup> Eisenmann, Parker and Van Alstyne (n 52) 1270.

<sup>55</sup> See Witt (n 13) 212.

<sup>56</sup> Based on Richard Schmalensee, ‘Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry’ (1978) 9 *Bell Journal of Economics* 305.

<sup>57</sup> Bourreau and de Streel (n 12) 13-21.

<sup>58</sup> Bourreau and de Streel (n 12) 30.

<sup>59</sup> Lim (n 13) 55; Crémer, Schweitzer and de Montjoye (n 53) 110-122; Jason Furman et al., *Unlocking Digital Competition – Report of the Digital Competition Expert Panel* (2019) paras 1.154 f.

<sup>60</sup> Lécuyer (n 12) 45.

<sup>61</sup> Eg, see Meta CEO Mark Zuckerberg’s emails about smaller rivals, invoking that ‘These businesses are nascent but the networks established, the brands are already meaningful, and if they grow to a large scale they could be very disruptive to us. ... Given that we think our own valuation is fairly aggressive and that we’re vulnerable in mobile, I’m curious if we should consider going after one or two of them.’ On reasons for such an acquisition, Zuckerberg held that it was to neutralize as well as to integrate the target’s services into Facebook’s. Casey Newton and Nilay Patel, ‘“Instagram can hurt us”: Mark Zuckerberg Emails Outline Plan to Neutralize Competitors’ *The Verge* (29 July 2020) <<https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing>>.

<sup>62</sup> Bourreau and de Streel (n 12) 32.

<sup>63</sup> Eg, see European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

- (37) Based on the far-reaching consequences of some of the competitive threats that can arise in connection with digital conglomerate mergers, the Furman Report (2019) proposed that NCAs should be put in a position to apply a ‘balance of harms’ approach whereby in a merger assessment they could take into account anti-competitive effects that have a low probability but a high impact.<sup>64</sup> At present, however, the UK is not following this proposal.<sup>65</sup>
- (38) Of course, conglomerate mergers in the digital economy can also lead to a number of efficiencies that merit closer scrutiny. In this respect, economists have highlighted the realisation of economies of scope, consumption synergies, a complementarity in capabilities, and the provision of an exit strategy for innovative start-ups.<sup>66</sup> In addition, they also do not lead to the removal of a competitor as a horizontal merger would.<sup>67</sup>
- (39) Frequently, a digital merger will have both conglomerate and vertical aspects to it. In a vertical merger, companies are already in a (vertical) business relationship – or could be.<sup>68</sup> While vertical mergers are generally thought to have less anti-competitive effects than horizontal ones, they can lead to reduced output, higher prices or harm to innovation.<sup>69</sup> Particularly the threat of foreclosure or raising rivals’ cost may be applicable in the digital economy.
- (40) While a look to past vertical and conglomerate mergers can provide valuable insights, the competitive dynamics in digital markets are noticeably different,<sup>70</sup> meaning that the analysis initially developed for more traditional conglomerate mergers will not always directly apply to a digital conglomerate merger today. For this reason, it can be particularly insightful to look at national merger enforcement in the EU Member States (and a former EU Member State) in order to get a broad overview on how theories of harm and remedies have evolved in this particular market context in different regions.

### 3. Digital mergers and digital ecosystems

- (41) While the reasons for digital mergers are manifold, it increasingly emerges that competition concerns associated with these mergers need to be understood against

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<sup>64</sup> Furman et al. (n 59) paras 3.88-3.94.

<sup>65</sup> In 2021, this proposal was being put into practice at a slightly lower degree of intervention, namely in the shape of a revised probability standard; see Secretary of State for Digital, Culture, Media & Sport and Secretary of State for Business, Energy and Industrial Strategy, ‘A new pro-competition regime for digital markets’ (CP 489, July 2021) paras 187-191 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1003913/Digital\\_Competition\\_Consultation\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf)>. In 2022, however, the Queen’s Speech made clear that no such change was to be expected; Victoria Ibitoye, ‘UK scraps tougher Big Tech merger-review standard, stays quiet on law to back digital regulator’ *MLex* (6 May 2022) <[https://content.mlex.com/#/content/1376156?referrer=email\\_dailycontentset&dailyId=ecdc6c88629a4326bbe6bfb614c0e59](https://content.mlex.com/#/content/1376156?referrer=email_dailycontentset&dailyId=ecdc6c88629a4326bbe6bfb614c0e59)>.

<sup>66</sup> Lécuyer (n 12) 46-47.

<sup>67</sup> Lécuyer (n 12) 46.

<sup>68</sup> Herbert Hovenkamp, ‘Competitive Harm from Vertical Mergers’ (2021) 59 *The Industrial Organization Society* 139, 158.

<sup>69</sup> Hovenkamp (n 68) 142.

<sup>70</sup> Lim (n 13) 56.

the background of sophisticated digital ecosystems. In the digital sphere, there is a noticeable trend towards the creation and development of ever more tight-knit digital ecosystems that connect goods and services in an intricate, interoperable system – even if the goods and services connected through the ecosystem themselves are not closely related.<sup>71</sup> However, the orchestrators of these digital ecosystems have come to realize that this is their chance to lock-in users, prevent multi-homing and increase their hold on several relevant markets. Conglomerate and vertical mergers can be one vehicle to expand their digital ecosystems.

- (42) Digital ecosystems raise many questions as to how competition law ought to apply to them.<sup>72</sup> These questions are also pertinent in the context of merger control. As ecosystem orchestrators, digital conglomerates are often in multi-contact competition with other digital conglomerates. It can therefore be useful to go beyond a narrow view of the relevant market to assess these cases,<sup>73</sup> essentially relying on market definition as a tool to characterise the market rather than deducing market power from the computed market shares.<sup>74</sup>

#### **4. The appropriate legal framework for assessing digital mergers**

- (43) Against the background of the specific competition dynamics found in digital markets discussed above, the question arises whether digital and technology mergers can be assessed under the traditional merger framework, or whether traditional approaches need to be adapted or even replaced by more suitable ones. These are also questions that the Furman Report (2019)<sup>75</sup> and the Special Advisers' Report (2019)<sup>76</sup> addressed. This applies to substantive as well as procedural questions, although the present Report focuses on the former.
- (44) As Margrethe Vestager, then Commissioner for Competition and today also Executive Vice-President of the European Commission in charge of Europe fit for a digital age, pointed out in 2016, EU merger control rules are generally sufficiently flexible to adjust to the developments that have taken place in digital markets.<sup>77</sup> However, she also acknowledged that there can nevertheless be a need to 'revisit[] theories of harm, so we can intervene in mergers when the owners of ecosystems buy start-ups before they have a chance to grow.'<sup>78</sup> In line with this thinking, it has been argued that in applying the flexible rules of merger control, the specific characteristics and dynamics of digital markets need to be taken into

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<sup>71</sup> Eg, see Mohan Subramaniam et al., 'Competing in Digital Ecosystems' (2019) 62 *Business Horizons* 83; Amelia Fletcher, 'Digital Competition Policy: Are Ecosystems Different?' (2020) DAF/COMP/WD(2020)96; Michael G. Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 *Industrial and Corporate Change* 1199.

<sup>72</sup> This starts with the basic unit of competition law analysis, market definition; eg, see Viktoria H.S.E. Robertson, 'Antitrust Market Definition for Digital Ecosystems' (N° 2-2021) *Concurrences* 3.

<sup>73</sup> Lim (n 13) 61.

<sup>74</sup> Viktoria H.S.E. Robertson, *Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US* (Hart 2020).

<sup>75</sup> Furman et al. (n 59) paras 3.32-3.108.

<sup>76</sup> Crémer, Schweitzer and de Montjoye (n 53) 110-124.

<sup>77</sup> Margrethe Vestager, 'Competition in a Big Data World' (Munich, 17 January 2016).

<sup>78</sup> Margrethe Vestager, 'Shaping Competition Policy in the Era of Digitisation' (Brussels, 17 January 2019).

account.<sup>79</sup> The present Report enquires to what extent NCAs have already done so.

- (45) The European Union relies on a bifurcated approach to merger control: While the European Commission is the sole enforcer of the EU Merger Regulation,<sup>80</sup> NCAs apply national merger rules that foresee lower merger thresholds than the EU rules. While there is a referral system both from the Commission to NCAs and vice versa, these two types of merger regimes exist next to each other. This leads to a situation where a harmonious development of a pan-European approach to digital mergers requires an effort to bring these two parallel regimes into contact that – based on the rules set out in the EUMR – they rarely have.<sup>81</sup>
- (46) Digital and technology mergers that reach the EU’s turnover thresholds fall within the exclusive competence of the European Commission and are thus assessed by it. However, a number of Big Tech mergers were not caught by the jurisdictional thresholds of EU merger control, often because the target’s turnover was below the jurisdictional turnover thresholds. Some of these mergers were caught by national merger control. For instance, some jurisdictions like Austria or Germany introduced an additional transaction value threshold that is able to capture the buy-up of promising start-ups that do not yet generate a substantial turnover.<sup>82</sup> Mergers such as *Apple/Shazam* were referred to the European Commission by an NCA.<sup>83</sup> In other cases, like *Facebook/WhatsApp*, the notifying parties submitted a reasoned submission to the Commission asking it to take the case.<sup>84</sup> Yet other mergers were exclusively assessed on a national basis, such as the Austrian and UK investigations of the *Meta/Giphy* merger<sup>85</sup> or more regional digital platforms. In other cases, like *Meta/Kustomer*, the Commission accepted a referral from a Member State but a non-referring NCA assessed the merger in parallel as it later decided that its (new) transaction value threshold was met.<sup>86</sup> Such parallel reviews constitute an inherent risk of divergence in the assessment, as well as duplicating investigation efforts. For this reason, the one-stop-shop principle contained in the EUMR strives to avoid such situations as far as possible. Wherever this is not

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<sup>79</sup> Bourreau and de Streel (n 12) 24.

<sup>80</sup> Article 22 EUMR.

<sup>81</sup> Contrast this with the parallel application of EU antitrust rules (Articles 101 and 102 TFEU) by the European Commission and NCAs, as foreseen in Regulation 1/2003; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU); Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

<sup>82</sup> Eg, see § 9 para 4 Cartel Act, Austrian Federal Law Gazette I 61/2005 as amended; § 35 para 1a Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended. See also Bundeswettbewerbsbehörde and Bundeskartellamt, Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG) (January 2022).

<sup>83</sup> European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam*, paras 6-9.

<sup>84</sup> European Commission Decision of 3 October 2014, COMP/M.7217 – *Facebook/WhatsApp*, paras 9-12.

<sup>85</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021); *Meta/Giphy*, [2022] CAT 26, 14 June 2022; Kartellgericht, 7 February 2022, 28 Kt 8/21t and 28 Kt 9/21i – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>86</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*; Bundeskartellamt, *Meta/Kustomer* (B6-37/21, 9 December 2021).

possible, close cooperation between the Commission and the NCAs can help alleviate concerns of divergence.<sup>87</sup>

- (47) As the EUMR attributes competences rather than introducing a comprehensive substantive European framework for merger control, a disconnect can also arise between national cases and EU cases as regards the substantive assessment of cases. Sometimes, the European and national levels may also not be fully aware of the plethora of digital and technology cases that other NCAs have already dealt with. Collaboration among NCAs and with the Commission, e.g., through the Merger Working Group,<sup>88</sup> serves as an important mechanism to minimise any such disconnect.<sup>89</sup> This Report aims to further narrow this gap by focusing on national merger cases in the digital and high-tech sectors. It identifies and analyses these cases with a view to understanding the theories of harm that NCAs applied and the remedies that were subsequently imposed (if any).

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<sup>87</sup> In fact, as the German NCA highlighted in its press release, it took the Commission's conditional clearance into account when unconditionally clearing the concentration in *Meta/Kustomer*; Bundeskartellamt, 'Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)' Press Release (11 February 2022) <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11\\_02\\_2022\\_Meta\\_Kustomer.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html)>.

<sup>88</sup> See EU Merger Working Group, 'Best Practices on Cooperation between EU National Competition Authorities in Merger Review' (8 November 2011).

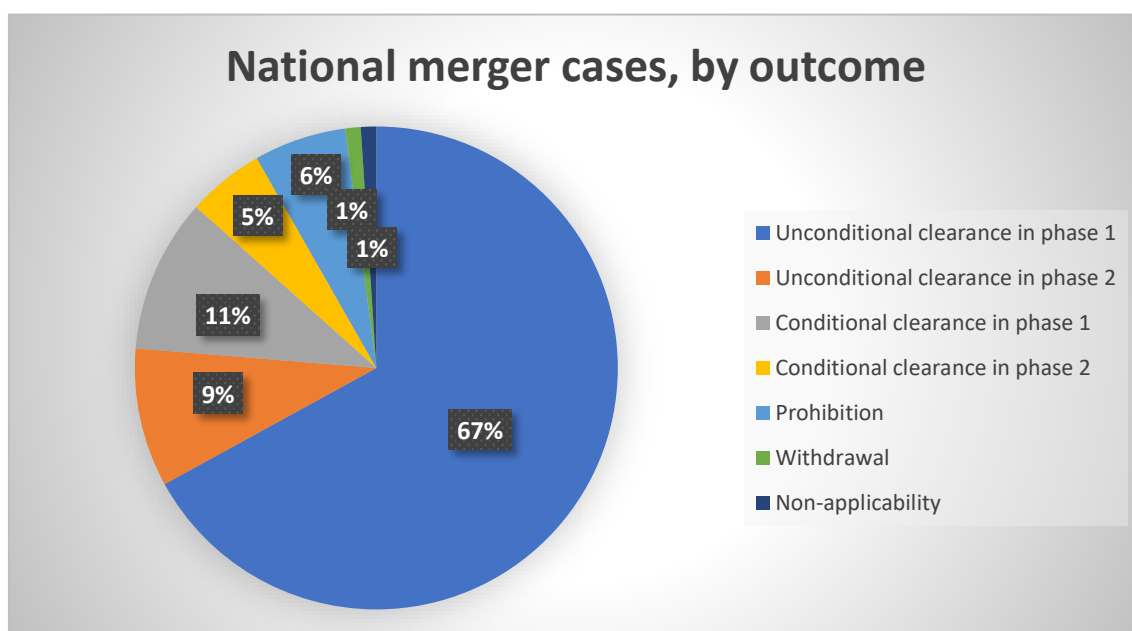
<sup>89</sup> The European Competition Network does not extend to merger review.



#### IV. National digital and technology merger cases in selected EU Member States and the UK: Quantitative insights

- (48) The quantitative analysis of the cases analysed for this Report already allows for a number of insights into this particular area of merger control.
- (49) In preparation for this Report, 97 cases were identified that came within the parameters set out in Chapter II. Concerning their outcome, the 97 cases were decided as follows:
- 65 cases: Unconditional clearance in phase 1<sup>90</sup>
  - 9 cases: Unconditional clearance in phase 2
  - 10 cases: Conditional clearance in phase 1
  - 5 cases: Conditional clearance in phase 2
  - 6 cases: Prohibition
  - 1 case: Non-applicability
  - 1 case: Withdrawal

This distribution can be seen represented below in figure 1.



1. Quantitative insights: Outcome of 97 national merger cases

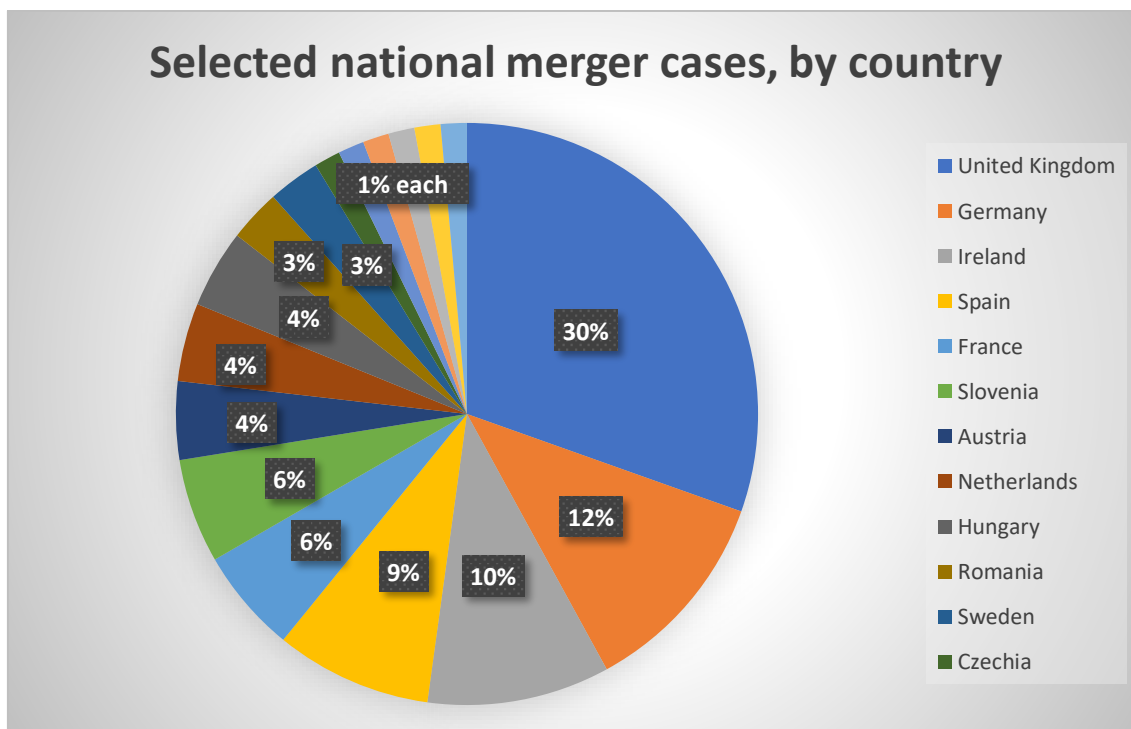
- (50) Out of these 97 cases, all 22 cases that led to a conditional clearance (phase 1 or phase 2), a prohibition or a withdrawal were analysed in depth. All 9 cases that led to a phase 2 investigation were equally analysed in-depth. In addition, based on the case's importance and the language capabilities of the expert and her collaborators, a further 38 cases with unconditional clearance in phase 1 were also analysed in-depth. This led to an in-depth analysis of a total of 69 cases.

<sup>90</sup> In one case, the clearance actually occurred in the pre-phase 1 assessment ('Vorprüfverfahren'); see Bundeskartellamt, *Adevinta/eBay Classifieds Group* (B6-41/20, 23 November 2020).

(51) Of the 69 cases that were selected for an in-depth analysis, the distribution by country was as follows:

- 21 cases from the United Kingdom
- 8 cases from Germany
- 7 cases from Ireland
- 6 cases from Spain
- 4 cases from France
- 4 cases from Slovenia
- 3 cases from Austria
- 3 cases from Hungary
- 3 cases from the Netherlands
- 2 cases from Romania
- 2 cases from Sweden
- 1 case from Czechia
- 1 case from Greece
- 1 case from Italy
- 1 case from Malta
- 1 case from Poland
- 1 case from Portugal

This distribution can be seen represented below in figure 2.



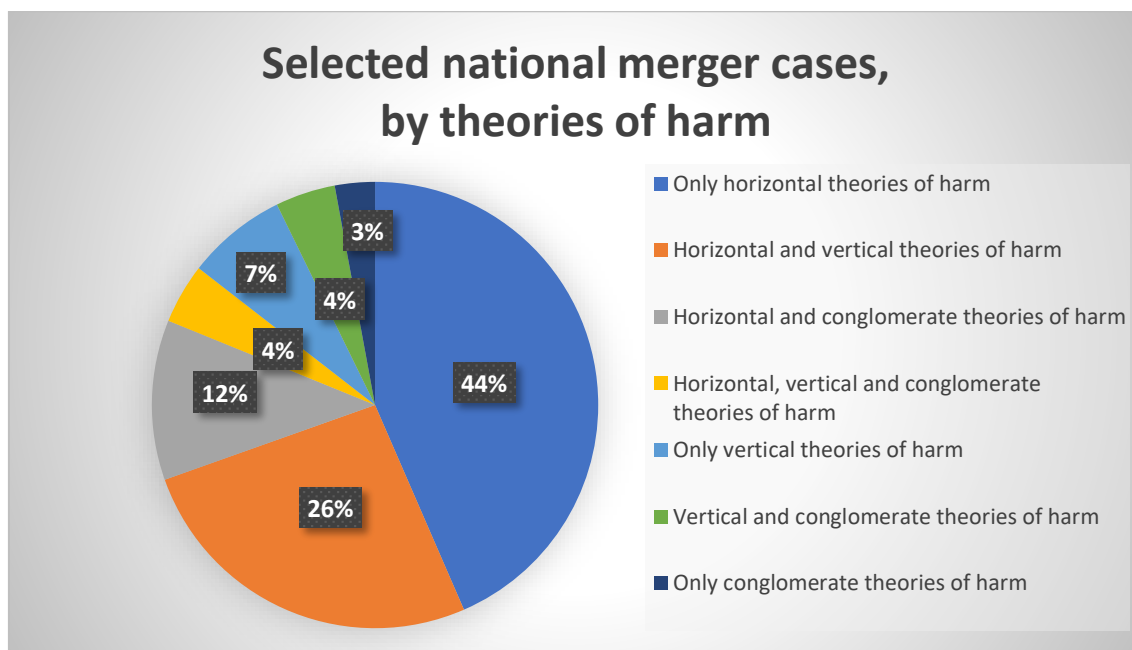
2. *Quantitative insights: Distribution by country of 69 selected national merger cases*

(52) For the remaining 28 cases that were either unconditionally cleared in phase 1 or where merger control was found to be inapplicable, these were only analysed as to their outcome. The distribution by country was as follows:

- 6 cases from the United Kingdom

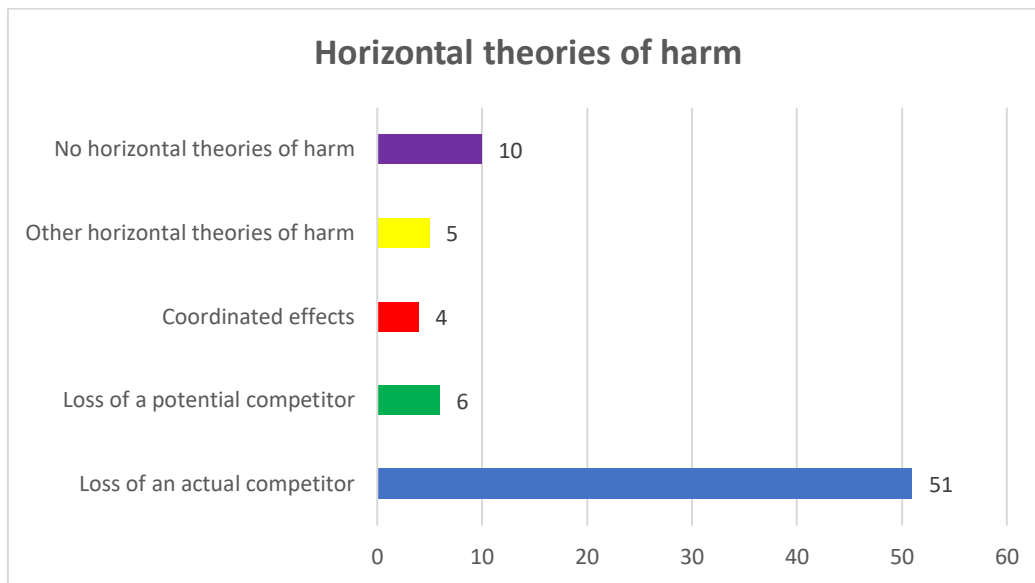
- 5 cases from Portugal
- 4 cases from Estonia
- 3 cases from Greece
- 2 cases from Bulgaria
- 2 cases from Cyprus
- 2 cases from Germany
- 1 case from Czechia
- 1 case from Hungary
- 1 case from Ireland
- 1 case from Spain

- (53) For all 69 cases analysed in-depth, concise case summaries were prepared that can be found in Annex III. The theories of harm that the NCA assessed in the cases at hand were identified for every single case, allowing for a number of insights into the issues that competition authorities tend to focus on in digital and technology mergers. It is noteworthy that nearly a third of all cases analysed in-depth came from the United Kingdom. 10 of the cases analysed in-depth were decided prior to the UK leaving the EU, while the remaining 11 cases were decided since 1 February 2020.
- (54) Of the 69 cases, 30 cases only assessed horizontal effects, 18 cases assessed horizontal and vertical effects, 8 cases assessed horizontal and conglomerate effects, 5 cases only assessed vertical effects, 3 cases assessed vertical and conglomerate effects, and 2 cases only assessed conglomerate effects. A total of 3 cases assessed horizontal, vertical and conglomerate effects. This distribution can be seen below in figure 3.



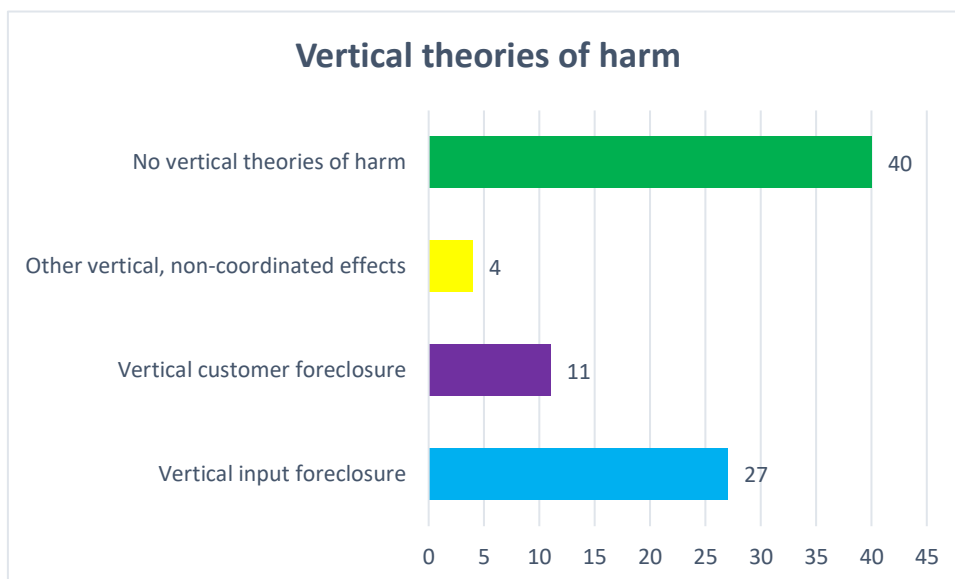
3. Quantitative insights: Combinations of theories of harm in 69 selected national merger cases

(55) The quantitative analysis also allows a glimpse into the specific types of theories of harm that the authorities investigated (see figure 4). 59 cases included horizontal theories of harm, while only 10 cases concerned no horizontal theories of harm at all. In 51 cases, the loss of an actual competitor was assessed, while in 6 cases, the loss of a potential competitor was assessed. In 4 cases, horizontal coordinated effects were assessed. 5 cases assessed other horizontal theories of harm. Note that several cases involved two or more horizontal theories of harm.



4. Quantitative insights: Distribution of horizontal theories of harm in 69 selected national merger cases

(56) 29 cases considered vertical theories of harm, while 40 cases addressed no vertical theories of harm at all. Of these 29 cases, 27 cases assessed input foreclosure, while 11 cases assessed customer foreclosure. 4 cases addressed other vertical, non-coordinated effects, while no cases addressed vertical coordinated effects. Note that several cases involved two vertical theories of harm.



5. Quantitative insights: Distribution of vertical theories of harm in 69 selected national merger cases

- (57) Finally, concerning conglomerate theories of harm, 15 cases addressed conglomerate foreclosure through the linking of sales (tying, bundling), while one further case addressed ecosystem concerns that were considered as a further conglomerate competition concern.
- (58) If one looks at the distribution of theories of harm more closely, it can be seen that in 25 cases, the only theory of harm explored by the authority in some depth related to the loss of an actual competitor (horizontal unilateral effects). Of these mergers, 12 were unconditionally cleared in phase 1, 4 were unconditionally cleared in phase 2, 5 were cleared subject to conditions in phase 1, 2 were cleared subject to conditions in phase 2, one was withdrawn, and one was prohibited.
- (59) In 4 cases that exclusively focused on horizontal theories of harm, in addition to the loss of an actual competitor a further theory of harm related to horizontal effects was assessed. In 2 cases, this was related to horizontal coordinated effects (once in addition to further horizontal effects), in 2 cases to the loss of a potential competitor. In one case, only other non-coordinated horizontal effects were analysed closely.
- (60) In 19 cases where horizontal effects were assessed, vertical foreclosure (input or customer foreclosure) effects were also assessed. Of these, 4 mergers were prohibited. In 3 cases, conglomerate foreclosure effects were assessed in addition to the horizontal and vertical effects; all of these mergers were unconditionally cleared in phase 1.
- (61) In only 10 cases, no horizontal effects were assessed at all and the analysis instead focused on vertical foreclosure effects, other vertical effects, and/or conglomerate effects. None of these mergers were prohibited, and 3 were conditionally cleared in phase 1. 2 were conditionally cleared in phase 2, while 5 were unconditionally cleared in phase 1.

- (62) Of the 6 cases in which concentrations were prohibited, all cases assessed horizontal effects, and 4 in addition assessed vertical foreclosure effects. None assessed any conglomerate effects.
- (63) 15 concentrations were conditionally cleared, meaning that the competition authorities either imposed or accepted remedies in these cases. Of these, 10 cases were cleared subject to conditions in phase 1 and a further 5 were cleared subject to conditions in phase 2.
- (64) Of the 10 cases in which concentrations were conditionally cleared in phase 1, 7 (also) related to horizontal effects, while 3 did not involve an assessment of horizontal effects.
- (65) Of the 5 cases in which concentrations were conditionally cleared in phase 2, 3 (also) concerned horizontal effects, one only concerned vertical and conglomerate effects, and one only concerned conglomerate effects.
- (66) Of the 9 cases in which concentrations were unconditionally cleared in phase 2, all (also) related to horizontal effects. In addition, one case referred to vertical effects and two cases to conglomerate effects.
- (67) In the one case in which the parties withdrew from the proposed concentration, the loss of an actual competitor was at stake.

## **V. National digital and technology merger cases in selected EU Member States and the UK: Qualitative insights and mapping the theories of harm**

- (68) In order to enable qualitative insights on digital and technology merger control by NCAs, cases were categorised based on the theories of harm that were assessed by the authority in question in some depth. A single case can also pertain to several categories in this respect. The following categories and sub-categories were identified based on the European Commission's Guidelines on Horizontal Mergers (2004)<sup>91</sup> and its Guidelines on Non-Horizontal Mergers (2008),<sup>92</sup> the UK Competition & Market Authority's Merger Assessment Guidelines (2021)<sup>93</sup> and the national cases themselves. In particular, the case analysis showed that NCAs closely stay within this traditional categorisation of theories of harm. This in itself is noteworthy and can lead to a type of analysis that reinforces old insights and only gradually adapts to new market environments.
- (69) The categories of theories of harm allow for insights into when a merger is thought to be anti-competitive in digital and technology markets, thereby fulfilling the tests that are known as the SIEC test in the EU terminology (SIEC standing for a significant impediment of effective competition) or the SLC test in the UK (substantially lessening competition). These tests usually ask whether a merger will lead to the creation or strengthening of a dominant position,<sup>94</sup> or whether it might lead to other anti-competitive effects that arise. Anti-competitive effects can arise from non-coordinated (unilateral) or coordinated behaviour. While national merger regimes can deviate from this terminology, in all cases reviewed, they by and large stayed within this framework.

### **1. Horizontal theories of harm**

- (70) Horizontal mergers are concentrations that involve companies that are active on the same relevant market, i.e. the companies are actual or potential competitors.<sup>95</sup> A number of theories of harm related to horizontal mergers can be distinguished that are briefly set out below, followed by an analysis of how these particular theories of harm were applied in the digital and technology merger cases that were identified on a national level. Where appropriate, parallels to European Commission cases are drawn in the discussion that follows.

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<sup>91</sup> European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines 2004) [2004] OJ C31/5.

<sup>92</sup> European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Non-horizontal Merger Guidelines 2008) [2008] OJ C265/6.

<sup>93</sup> Competition & Markets Authority, Merger Assessment Guidelines (CMA129, 18 March 2021).

<sup>94</sup> European Commission, Horizontal Merger Guidelines 2004, para 4.

<sup>95</sup> European Commission, Horizontal Merger Guidelines 2004, para 5.

*i. Non-coordinated effects: Loss of an actual competitor*

a. Specificities of the theory of harm

- (71) Where the merging parties are competitors on the same relevant market, a horizontal merger removes a competitive constraint from the market and the main competition concern thus relates to the loss of competition between the companies that are involved in the merger.<sup>96</sup> This can in turn lead to an increase in prices and a decrease in quality, choice, service and innovation.<sup>97</sup> In addition, other companies might also feel less competitive pressure once a close competitor is removed through a merger.<sup>98</sup>
- (72) Competition authorities take into account a number of factors in order to determine whether anti-competitive effects might materialise due to the loss of an actual competitor, such as the parties' market shares, the closeness of competition between them, the number of effective competitors providing a competitive constraint on the market post-merger, the ability of customers to switch suppliers and related switching costs, the ability and likelihood of expansion by competitors, the merged entity's ability to hinder competitors' expansion, and whether the merger eliminates an important competitive force (i.e., a maverick).<sup>99</sup>
- (73) Recent merger guidelines by the UK's Competition & Markets Authority, which were published in March 2021, include additional guidance on mergers in digital markets. With regard to two-sided platforms, they affirm that depending on the nature of the case, the authority will either look at each side of a platform or consider it overall. The NCA draws attention to the importance of network effects and the possibility of tipping in those markets, as well as to often high barriers to entry, all of which mean that digital mergers may more readily raise competition concerns.<sup>100</sup> The Special Advisers' Report (2019) also described digital market settings in which competitive concerns may arise due to a merger, especially where a market is already concentrated and there are high barriers to entry. In such circumstances, the acquisition of a start-up may further strengthen a dominant platform's market position by increasing barriers to entry, adding to the ecosystem orchestrated by the platform, and reduce innovation in the market.<sup>101</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (74) Of 69 cases analysed in-depth, a total of 51 cases raised issues related to the loss of an actual competitor on the relevant market(s). Of these 51 cases, 9 concentrations were cleared subject to conditions (7 in phase 1, 2 in phase 2), 4 concentrations were prohibited and one was withdrawn. The remaining concentrations were all unconditionally cleared.

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<sup>96</sup> European Commission, Horizontal Merger Guidelines 2004, para 24.

<sup>97</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 4.1.

<sup>98</sup> European Commission, Horizontal Merger Guidelines 2004, para 24.

<sup>99</sup> European Commission, Horizontal Merger Guidelines 2004, paras 26-38; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 4.3.

<sup>100</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, paras 4.21-4.25.

<sup>101</sup> Crémer, Schweitzer and de Montjoye (n 53) 112 ff.



- (75) While all 51 cases that focused on the loss of an actual competitor are summarised in Annex III, the following focuses on those 5 cases that were outright prohibited or withdrawn, followed by the cases in which the NCA only cleared a concentration subject to conditions. Furthermore, commonalities that have emerged among a number of cases that were unconditionally cleared are set out to provide a frame of reference.
- (76) In *Blocket/Hemnet* (2016), the notifying parties withdrew their merger after the Swedish NCA voiced considerable concerns related to horizontal unilateral effects. Blocket was Sweden's largest online marketplace and was also active in digital property listings, where it was the second largest player. Blocket wanted to buy Hemnet, the by far largest player in digital property listings. As Blocket was Hemnet's only credible competitor, this proposed acquisition would have created a single major player on this market. The NCA was concerned this would lead to higher prices for digital property listings, a decrease in quality of the products and services provided and increased barriers to entry and expansion. The commitments proposed by Blocket were not regarded as sufficient (on these, see below at para (259)).<sup>102</sup>
- (77) In the case of *CTS Eventim/Four Artists* (2017), the German NCA prohibited an acquisition primarily based on horizontal unilateral effects (see also para (279)). CTS Eventim, a company active in live entertainment, event venues and ticketing, wanted to acquire a majority stake in Four Artists, a company active in organising live events and as a booking agent for a range of famous German artists. The NCA considered that the acquisition would further strengthen CTS Eventim's already dominant position on the market for ticket system services for event organisers and for booking offices. The NCA underlined how the (then) new German provision of § 18 para 3a ARC<sup>103</sup> on assessing market dominance in multi-sided markets allowed the conclusion that CTS Eventim was indeed dominant on these markets, and how indirect network effects worked to the incumbent's advantage. It found that high barriers to entry, considerable lock-in effects and limited multi-homing by the other market side led to a strong market position, while no innovation-driven competition was discernible. The acquisition would lead to a strengthening of CTS Eventim's market position on the market for ticket system services, thereby significantly impeding effective competition.<sup>104</sup> What is notable is that another acquisition by CTS Eventim earlier that same year had been unconditionally cleared by the German NCA in phase 2.<sup>105</sup>
- (78) *Tobii/Smartbox* (2019) was a completed acquisition that was prohibited by the UK NCA. Both companies produced augmentative assistive communication (AAC) solutions, i.e. communication aids for those that find communication difficult, e.g., due to a disability or a medical condition. AAC solutions consist of AAC hardware, AAC software, access means, (e.g., a switch, an eye gaze camera), and

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<sup>102</sup> Konkurrensverket, *Blocket/Hemnet* (84/2016, 2016).

<sup>103</sup> Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended.

<sup>104</sup> Bundeskartellamt, *CTS Eventim/Four Artists* (B6-35/17, 23 November 2017).

<sup>105</sup> Bundeskartellamt, *CTS Eventim/FKP Scorpio* (B6-53/16, 3 January 2017).

customer support. The concentration was prohibited due to horizontal unilateral effects and vertical input foreclosure effects. Concerning horizontal unilateral effects, the NCA considered that the main horizontal overlap between acquirer and target occurred in the supply of dedicated AAC solutions. It did not accept the argument that the providers faced strong competition from AAC solutions based on mainstream consumer devices because this was not consistent with its market analysis nor with the parties' internal documents. The NCA assessed the possibility of horizontal unilateral effects, particularly as regards price increases, quality deterioration and a reduction in the range of services and/or product development. It emphasised that, pre-merger, the parties had been close competitors, and competition among them led to increased innovation and R&D. Post-merger, the merged entity had a market share of 60-70% in the UK and competitors did not provide a sufficient constraint. Part of the merger strategy had indeed been to reduce the range of products available as well as R&D.<sup>106</sup> On the prohibition, see also paras (281) f.

- (79) *Sabre/Farelogix* (2020) was a further merger that the UK NCA blocked solely based on horizontal unilateral effects. Sabre, a US company providing technology solutions to airlines and travel agents, intended to acquire Farelogix, another US company supplying technology solutions for airlines. Issues raised included slower rates of innovation and product development, reduced product range or quality, and higher prices or less favourable terms of service. While Farelogix was a strong player in merchandising solutions for airlines, Sabre was not (yet). However, the NCA considered that Sabre would become a strong competitor absent the acquisition. Post-merger, only one strong competitor would remain, namely Amadeus. The loss of competition resulting from the acquisition would be significant. As regarded distribution solutions for airlines, the NCA noted that the product offerings by the merging parties were differentiated, and that there were several competitors that posed a credible competitive constraint. Overall, however, it concluded that Farelogix would play an important role in that market absent the merger, and the loss of competition resulting from the acquisition would be significant, with a substantial and long-lasting impact on consumers.<sup>107</sup> On the prohibition, see also paras (283) f.
- (80) In *Swedbank Franchise/Svensk Fastighetsförmedling* (2014), the Stockholm District Court, upon an application by the Swedish NCA, blocked a concentration between the two most important players on the Swedish real estate market who also had high stakes in Hemnet.com, the biggest Swedish portal for real estate advertisements. The Swedish NCA raised concerns about horizontal unilateral effects and vertical input foreclosure. For the purposes of this Report, the latter is of particular interest (see para (148) below).<sup>108</sup>

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<sup>106</sup> Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).

<sup>107</sup> Competition & Markets Authority, *Sabre/Farelogix* (ME/6806/19-II, 9 April 2020).

<sup>108</sup> Stockholms tingsrätt, *Swedbank Franchise/Svensk Fastighetsförmedling* (T 3629-14, 16 December 2014).

- (81) The concentration of *Just Eat/La Nevera Roja* (2016) on the Spanish market for the management of food orders at home via online platforms was cleared subject to conditions (on these, see below at para (261)). The Spanish NCA considered that this horizontal merger raised competition concerns because the acquirer and the target were close competitors and constituted, pre-merger, the biggest and second biggest players on the market for the management of food orders via online platforms. Post-merger, they would have a combined market share of about 70-80%, possibly even higher. In addition, several companies had recently exited that market. The NCA emphasised the importance of network effects in these markets, and high barriers to entry consisting of investments to be made in publicity and marketing. Nevertheless, the NCA also noted that, overall, online food delivery platforms only accounted for 10% of the local food delivery markets in Spain, meaning that the market power of these platforms over restaurants was overall limited.<sup>109</sup>
- (82) In *Just Eat Spain/Canary Delivery Company* (2019), the Spanish NCA noted that the remedies imposed in *Just Eat/La Nevera Roja* had favoured market entry for digital food order platforms and thus led to a more competitive Spanish market, meaning that the concentration under investigation, which concerned the same relevant market, could take place without conditions.<sup>110</sup>
- (83) When MIH Food Delivery Holdings wanted to carry out a hostile takeover of Just Eat in 2019, however, the Spanish NCA only cleared this subject to conditions (on these, see below at para (263)) as MIH would go from having an indirect presence in Spain through its minority stake in Glovo to occupying an important market share with Just Eat. This could lead to an incentive for MIH to prevent Glovo's expansion, Glovo at the time being Spain's second largest food delivery platform.<sup>111</sup> In February 2022, the Spanish NCA unconditionally cleared Delivery Hero's acquisition of Glovo.<sup>112</sup>
- (84) In Romania, the recent *Glovoappro/Foodpanda* (2021) merger on the national market for online food delivery platforms and the national market for online platforms for delivery of multi-category consumer goods raised issues largely identical to the ones resolved in the Spanish *Just Eat/La Nevera Roja* case: In that case, the Romanian NCA was also concerned that, post-merger, the merged entity would be in a dominant position and could use this position to impose exclusivity obligations on restaurants. While users generally multi-homed on the online food delivery platform market, such a strategy of exclusivity would foreclose other

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<sup>109</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016).

<sup>110</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat Spain/Canary Delivery Company* (C/1046/19, 10 September 2019).

<sup>111</sup> Comisión Nacional de los Mercados y la Competencia, *MIH Food Delivery Holdings/Just Eat* (C/1072/19, 5 December 2019).

<sup>112</sup> Comisión Nacional de los Mercados y la Competencia, *Delivery Hero/Glovo* (C/1260/21, 23 February 2022). The same transaction was notified to the Portuguese, Polish and Romanian NCAs. The Portuguese NCA found that Portuguese merger control was not applicable to the transaction; see Autoridade da Concorrência, *Delivery Hero/Glovo* (Ccent. 61/2021, 25 January 2022).

food delivery platforms. The acquisition was cleared subject to conditions (see below, para (262)).<sup>113</sup>

- (85) In *Schibsted/Milanuncios* (2014), the Spanish NCA had to assess the horizontal unilateral effects arising from the acquisition of Milanuncios by Schibsted. Schibsted was a multinational media group, while Milanuncios was an online platform specialised in classified advertisements. The NCA was concerned that this acquisition could strengthen Schibsted's market power vis-à-vis professional advertisers, who would be faced with price increases for classified advertisements. It cleared the acquisition subject to conditions (on these, see below at para (258)).<sup>114</sup>
- (86) In *eBay/Adevinta* (2021), the Austrian NCA required commitments for this transaction involving online classifieds based on its concern that eBay's online marketplace was a close competitor of the Austrian marketplace willhaben.at, especially in respect of C2C<sup>115</sup> transactions. This became apparent through market surveys and was also confirmed by internal documents of the parties. The market was already concentrated, and in the eyes of the authority the risk of non-coordinated effects was considerable. Commitments were necessary to clear this acquisition (on these, see below at para (253)).<sup>116</sup>
- (87) When investigating the same merger, the UK NCA also raised concerns based on horizontal unilateral effects, finding that eBay Marketplace was the largest platform on the market, over twice the size of Facebook Marketplace, its next biggest competitor. Gumtree, which belonged to eBay, was third or fourth (depending on the metric), while Adevinta's Shpock was relatively small but had recently increased its competitive constraint on eBay Marketplace. The parties' platforms were close competitors. Under eBay's ownership, Gumtree had not competed as aggressively as it could have. The NCA reasoned that part of eBay's motivation to sell Gumtree to Adevinta consisted in eBay continuing to exercise some influence on that platform. The concentration was cleared subject to conditions (on these, see below at para (252)).<sup>117</sup>
- (88) In *Dante International/PC Garage* (2016), the Romanian NCA investigated the acquisition by Dante International, a company that provides an online platform and also acts as a retailer thereon, of PC Garage, an online consumer goods retailer. It concluded that the acquisition would further strengthen Dante's market position, and would therefore significantly impede effective competition in certain products. It was only cleared subject to conditions (on these, see below at para (250)).<sup>118</sup>
- (89) In *NS Groep/Pon Netherlands* (2020), the Dutch NCA investigated a joint venture between NS, the largest provider of public transport by train in the Netherlands,

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<sup>113</sup> România Consiliul Concurenței, *Glovoappro/Foodpanda* (86/22.11.2021, 22 November 2021).

<sup>114</sup> Comisión Nacional de los Mercados y la Competencia, *Schibsted/Milanuncios* (C/0573/14, 20 November 2014).

<sup>115</sup> Consumer-to-consumer.

<sup>116</sup> Bundeswettbewerbshbehörde, *eBay/Adevinta* (BWB/Z-5141, Z-5142, Z-5420 and Z-5421, 18 June 2021).

<sup>117</sup> Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).

<sup>118</sup> România Consiliul Concurenței, *Dante International/PC Garage* (84/24.11.2016, 24 November 2016).

and Pon, which produced and imported means of transport. The parties intended to set up a full-function joint venture in the field of shared mobility through one central mobile application and specific mobility hubs. The NCA considered that the joint venture at issue did not raise concerns on horizontal unilateral effects, as the (retail) market for the integrated provision of transport and mobility services via an app was developing strongly, and the joint venture would experience competitive pressure from both local providers of transport modalities and from providers of integrated mobility services.<sup>119</sup> Commitments were required based on vertical effects (on these, see below at para (257)).

- (90) In *Pug/StubHub* (2020), the UK NCA focused on horizontal effects between two close competitors in online exchange platforms for buying and selling tickets to live events. Together, they would make up between 90-100% of the relevant market post-merger, with an increment in the range of 30-40% due to the merger. While Pug's viagogo had had high market shares for a number of consecutive years, StubHub had shown strong growth in previous years. There was no meaningful competitor on the market for secondary ticketing platform services in the UK, the platforms operated in similar ways and invested heavily in advertising. viagogo was found to bid 'on a sizeable proportion of StubHub's keywords' on AdWords, indicating close competition among them. Resellers regarded the parties as substitutes, and regularly multi-homed. The concentration was cleared subject to conditions in phase 2 (on these, see below at para (251)).<sup>120</sup>
- (91) The national case law also allows insights into circumstances when horizontal unilateral effects were *not* thought to arise despite the (also) horizontal nature of the concentration. In a transaction involving two luxury online retailers, *Financière Richmond/Net-A-Porter* (2015), the UK NCA noted that the increment due to the acquisition would be small, and the two parties had different foci and business models with differentiated offerings and a wide range of alternatives – no horizontal unilateral effects were therefore thought to arise.<sup>121</sup> A number of cases relating to IT services did not, in the eyes of the Portuguese and Italian NCAs, raise any competition concerns due to the small size of both acquirer and target.<sup>122</sup> Three cases relating to online shopping services did not, according to the Slovenian NCA, raise any competition concerns because of the low market shares of the parties or the lack of a Slovenian presence of the acquirer.<sup>123</sup> Two Hungarian cases, *eMAG/Extreme Digital* and *Netrisk.hu/Biztosítás.hu* (both

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<sup>119</sup> Autoriteit Consument & Markt, *NS Groep/Pon Netherlands* (ACM/20/038614, 20 May 2020).

<sup>120</sup> Competition & Markets Authority, *Pug/StubHub* (ME/6868/19-II, 2 February 2021).

<sup>121</sup> Competition & Markets Authority, *Financière Richmond/Net-A-Porter* (ME/6538-15, 2 September 2015).

<sup>122</sup> Autoridade da Concorrência, *KKR/Cabolink* (Ccent. 41/2018, 8 November 2018); Autorità Garante della Concorrenza e del Mercato, *OEP 14 Coöperatief/Techedge* (28331, 4 August 2020); Autoridade da Concorrência, *Claranet Portugal/Bizdirect* (Ccent. 27/2021, 25 June 2021); Autoridade da Concorrência, *Claranet Portugal/OutScope Solutions* (Ccent. 38/2021, 24 August 2021).

<sup>123</sup> Javna agencija Republike Slovenije za varstvo konkurence, *ECE/ELTUS PLUS* (3061-41/2018, 25 April 2019); Javna agencija Republike Slovenije za varstvo konkurence, *Shoppster/IDEO PLUS* (3061-9/2020-14, 24 April 2020); Javna agencija Republike Slovenije za varstvo konkurence, *Allegro.eu/MIMOVRSSTE* (3061-25/2021-6, 24 January 2022)

- 2019), demonstrated that where online and offline markets can be considered part of the same relevant market, NCAs may raise less competitive concerns because of the constraining effect of one distribution channel on the other.<sup>124</sup>
- (92) Where acquirer and target were not close competitors before the concentration, or where important competitors remained present post-merger, this would assuage an NCA's concerns.<sup>125</sup> Market transparency for consumers – eg induced by online comparison sites – as well as multi-homing were seen as important factors to counter-balance possible anti-competitive effects.<sup>126</sup> Competitive constraints from outside the relevant market were not discarded, e.g., from restaurant-owned delivery systems for online food ordering or from traditional point of sale providers for online payment services.<sup>127</sup>
- (93) Where a market was understood to be dynamic, this would assuage competition concerns.<sup>128</sup> The same applies to low barriers to entry and expansion, or the readiness of customers to switch to alternative suppliers.<sup>129</sup> Whether or not an online platform bound customers through exclusivity clauses was also considered an important competitive factor.<sup>130</sup>
- (94) In technology markets, product differentiation could be such that a seemingly horizontal overlap would not, ultimately, raise any competition concerns.<sup>131</sup> Also, buyer power could act as a countervailing factor.<sup>132</sup>
- (95) In already concentrated online markets, NCAs would sometimes welcome a merger because it could mean that the market would not tip. Multi-homing by

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<sup>124</sup> Gazdasági Versenyhivatal, *eMAG/Extreme Digital* (VJ/14/2019, 17 October 2019); Gazdasági Versenyhivatal, *Netrisk.hu/Biztosítás.hu* (VJ/12/2019, 12 December 2019). This is also reminiscent of the French *Fnac/Darty* merger, see Autorité de la concurrence, *Fnac/Darty* (16-DCC-111, 27 July 2016).

<sup>125</sup> Eg, see Competition & Markets Authority, *Betfair Group/Paddy Power* (ME/6572/15, 17 December 2015); Competition and Consumer Protection Commission, *Paddy Power/Betfair* (M/15/059, 15 January 2016); Competition and Consumer Protection Commission, *Ladbrokes/Gala Coral* (M/16/007, 10 March 2016); Competition & Markets Authority, *ZPG/Websky* (ME/6690/17, 29 June 2017); Competition & Markets Authority, *Blackbaud/Giving* (ME/6700/17, 8 September 2017); Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018); Competition & Markets Authority, *Moneysupermarket.com/Decision Technologies* (ME/6749/18, 7 August 2018); Competition & Markets Authority, *eBay/Motors.co.uk* (ME/6774/18, 12 February 2019); Competition & Markets Authority, *Salesforce.com/Tableau Software* (ME/6841/19, 22 November 2019).

<sup>126</sup> Competition and Consumer Protection Commission, *Stars Group/Sky Betting & Gaming* (M/18/038, 18 June 2018); Competition & Markets Authority, *Google/Looker* (ME/6839/19, 13 February 2020); Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>127</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016); Competition & Markets Authority, *PayPal/iZettle* (ME/6766/18-II, 12 June 2019).

<sup>128</sup> Malta Competition and Consumer Affairs Authority, *GVC Holdings/Ladbrokes Coral Group* (COMP-MCCAA/4/18, 21 March 2018); Comisión Nacional de los Mercados y la Competencia, *Daimler/Hailo/MyTaxi/Negocio Hailo* (C/0802/16, 24 November 2016).

<sup>129</sup> Urząd Ochrony Konkurencji i Konsumentów, *1&1 Internet/Home.pl* (DKK-216/2015, 22 December 2015).

<sup>130</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016); Comisión Nacional de los Mercados y la Competencia, *Daimler/Hailo/MyTaxi/Negocio Hailo* (C/0802/16, 24 November 2016).

<sup>131</sup> Competition and Consumer Protection Commission, *Applied Materials/Kokusai Electric Corporation* (M/19/027, 11 October 2019).

<sup>132</sup> Competition & Markets Authority, *SK hynix/Intel* (ME/6913/20, 28 June 2021).

users or customers was equally seen as a remedy against market tipping.<sup>133</sup> NCAs also took into account the peculiarities of specific online platforms, e.g., the fact that network effects for online dating portals tended to be less pronounced because users usually multi-homed and were not – if the portal was successful – locked in for a long time,<sup>134</sup> or the fact that new competition was on the horizon in a concentrated market.<sup>135</sup>

- (96) The presence of Big Tech companies such as Amazon, Apple, Facebook (now: Meta), Google (now: Alphabet) or Microsoft was repeatedly held to constitute an important factor when concluding that a digital acquisition by a non-Big Tech company did not raise competition concerns.<sup>136</sup>
- (97) The possibility that a (smaller) national online market could be constrained by a (larger) pan-European online market was taken into account in individual cases.<sup>137</sup> However, no horizontal unilateral effects were thought to arise despite a horizontal overlap in the digital service concerned when two completely different geographical markets (in casu: UK – US) were concerned.<sup>138</sup>

c. Discussion

- (98) The 51 national cases in which loss of an actual competitor was considered as a possible theory of harm show how this theory of harm can be and has been adapted to digital and technology markets. In particular, the various factors that have been considered by NCAs on a case-by-case basis allow a glimpse into how flexible this theory of harm is. Multi-homing or dual vendor strategies are regularly assessed, and the nature of competition in digital markets is considered in some detail when the possibility of market tipping and the importance of network effects is assessed.
- (99) The four prohibitions and one withdrawal based on the loss of an actual competitor occurred in diverse market settings, ranging from real estate platforms to online ticketing, augmentative assistive communication and technology solutions for airlines. This shows that this type of competition concern, which was the most prevalent theory of harm applied in case of a prohibition, can arise in multiple digital market settings. *CTS Eventim/Four Artists* (2017)<sup>139</sup> demonstrated how several acquisitions in a row can lead to a situation where one further acquisition

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<sup>133</sup> Eg, see Bundeskartellamt, *Axel Springer/Immowelt* (B6-39/15, 20 April 2015).

<sup>134</sup> Bundeskartellamt, *OCPE II Master (Parship)/EliteMedianet* (B6-57/15, 22 October 2015).

<sup>135</sup> Competition & Markets Authority, *Just Eat/Hungryhouse* (ME/6659-16-II, 16 November 2017).

<sup>136</sup> Eg, see Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018); Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018); Autoridade da Concorrência, *Sonae/CTT - Correios de Portugal JV* (Ccent. 27/2018, 19 July 2018); Bundeskartellamt, *PayPal/Honey Science* (B6-86/19, 17 December 2019); Autoriteit Consument & Markt, *DPG/Sanoma* (ACM/19/038207, 10 April 2020); Competition and Consumer Protection Commission, *Booster/Liftoff Mobile* (M/21/002, 15 February 2021); Comisión Nacional de los Mercados y la Competencia, *Turnitin/Ouriginal Group* (C/1220/21, 19 October 2021).

<sup>137</sup> Comisión Nacional de los Mercados y la Competencia, *Turnitin/Ouriginal Group* (C/1220/21, 19 October 2021).

<sup>138</sup> Competition & Markets Authority, *Auction Technology Group/Live Auctioneers* (ME/6942/21, 29 September 2021).

<sup>139</sup> Bundeskartellamt, *CTS Eventim/FKP Scorpio* (B6-53/16, 3 January 2017).

can be seen as a red flag, while *Tobii/Smartbox* (2019)<sup>140</sup> provided a good indication of when competition from non-specialised products may not be a competitive constraint on a specialised product.

- (100) Of the 9 conditional clearances that involved an analysis of the loss of an actual competitor, 3 concerned food delivery platforms. A further 3 conditional clearances related to classified advertising. Other cases that were cleared subject to commitments related to online retailing, ticketing platforms, and a shared mobility platform. Overall, this highlights areas in which competition concerns appear to arise regularly, and that can be addressed through appropriate remedies.
- (101) In the Austrian and UK *Adevinta/eBay* cases, it could be seen how competition concerns can specifically relate to national players active on national online markets, requiring different remedies in different settings. The competitive constraints may need to be assessed differently depending on the national platform landscape. This was also reflected in the respective commitments accepted in those two cases.
- (102) The research carried out for this Report has brought to light that it would be beneficial to set out more clearly those factors that come into play when assessing horizontal theories of harm in digital market environments in order to allow for a more structured analysis. This, in particular, applies to multi-homing, multi-sidedness, the presence of Big Tech in a market, the impact of product differentiation, market transparency through online comparison sites, and the assessment of closeness of competition in the face of data advantages that span multiple markets. Also, the importance of product differentiation needs to be re-evaluated in the face of ever-changing functionalities of digital platforms – something that might be assessed differently in technology markets.
- (103) It would also be useful to establish under which circumstances market tipping could be achieved – or prevented – by a digital merger.<sup>141</sup>
- (104) When comparing the national cases to a number of mergers cleared by the European Commission, it becomes apparent that the factors on which those cases rely upon are near-identical: As was the case in a number of national cases, the European Commission in *Avago/Broadcom* (2015) relied on the combined market share of the merged entity, the small increment that the transaction would lead to, and a sufficient number of remaining suppliers to conclude that no horizontal unilateral effects would arise.<sup>142</sup> Similarly, in *Microsoft/GitHub* (2018) the Commission reasoned that the small horizontal overlap between the parties, the fact that they were not close competitors and the number of remaining competitors in software development and operations tools meant that horizontal unilateral effects were unlikely to arise post-merger.<sup>143</sup> In *Broadcom/Symantec Enterprise Security Business* (2019), the low combined market shares of the merged entity as

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<sup>140</sup> Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).

<sup>141</sup> Isabelle de Silva, ‘Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital economy’ (N° 2-2018) *Concurrences* 39, paras 31 ff.

<sup>142</sup> European Commission Decision of 23 November 2015, M.7686 – *Avago/Broadcom*, paras 68 ff.

<sup>143</sup> European Commission Decision of 19 October 2018, M.8994 – *Microsoft/GitHub*, paras 81 ff.



- well as the competitive constraints from remaining competitors on the market and the fact that acquirer and target were not close competitors also led the Commission to conclude that no unilateral effects would arise.<sup>144</sup>
- (105) In the *Facebook/WhatsApp* (2014) merger, the European Commission found that the merging parties were not close competitors based on differences in the offerings of their consumer communication services.<sup>145</sup> With the benefit of hindsight, it could be argued that this dynamic market setting may now be seen in a somewhat different light, with the Federal Trade Commission indeed retrospectively challenging this acquisition – which it did not oppose – under a claim of monopolization,<sup>146</sup> an instrument that is not available in the EU.
- (106) In digital merger cases, the creation and strengthening of a dominant position need to be closely related to the market characteristics. As the European Commission already pointed out in *Microsoft/Skype* (2011), market shares may not be good indicators of market power in highly dynamic markets.<sup>147</sup>
- (107) The presence of Big Tech in certain markets was regularly seen as a countervailing factor by NCAs. Interestingly, the European Commission also regarded the strong presence of Google and Facebook in online advertising to act as a competitive constraint on another Big Tech company – namely Apple – in *Apple/Shazam* (2018).<sup>148</sup> In this regard, NCAs need to ensure that where Big Tech platforms are not yet active on a given market, their entry in the foreseeable future is credible, as otherwise their presence would not represent a competitive constraint on the merged entity.<sup>149</sup>
- (108) Google’s and Facebook’s overbearing presence in online advertising was repeatedly held by NCAs to constitute a factor that favours the clearance of a digital merger in which Google was not a party.
- (109) In the national cases that were assessed, none could be observed that assessed the data advantage gained through the merger in as much depth as the European Commission’s *Google/Fitbit* case of 2020.<sup>150</sup> This is further discussed below (para (240)). It is possible, however, that national merger control is not yet to a large extent confronted with cases where data advantages can be identified, especially because the major Big Tech mergers generally come before the European Commission, either directly or through a referral (Articles 4 and 22 EUMR).

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<sup>144</sup> European Commission Decision of 30 October 2019, M.9538 – *Broadcom/Symantec Enterprise Security Business*.

<sup>145</sup> European Commission Decision of 3 October 2014, COMP/M.7217 – *Facebook/WhatsApp*, paras 101 ff, 118 (referring to the market’s dynamism).

<sup>146</sup> *Federal Trade Commission v Facebook*, US District Court for the District of Columbia, Case 1:20-cv-3590 (11 January 2022).

<sup>147</sup> European Commission Decision of 7 October 2011, COMP/M.6281 – *Microsoft/Skype*, para 70-72, 78; upheld in Case T-79/12 *Cisco Systems and Messagenet v Commission*, ECLI:EU:T:2013:635.

<sup>148</sup> European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam*.

<sup>149</sup> de Silva (n 141) para 73.

<sup>150</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*.

ii. *Coordinated effects*

a. Specificities of the theory of harm

(110) A horizontal merger may change the market structure in a way that it becomes ‘possible, economically rational, and hence preferable’, for companies to reach a common understanding aimed at increasing prices, limiting production or dividing the market.<sup>151</sup> In order for such coordination to be sustainable, an authority will assess three factors that need to be fulfilled cumulatively: the ability to monitor competitors’ behaviour on the market (i.e., a certain transparency), the possibility of a credible deterrent mechanism, and no possibility for third parties (customers or competitors) to jeopardise the coordinated behaviour.<sup>152</sup>

b. NCAs applying the theory of harm in digital and technology mergers

(111) Only 4 of the 69 cases analysed in-depth concerned horizontal coordinated effects, all of which were unconditionally cleared. In the majority of cases, these concerns were discussed in relation with the loss of an actual competitor.<sup>153</sup>

(112) In three German cases, horizontal coordinated effects were directly addressed. In *Axel Springer/Immowelt* (2015), the Axel Springer group planned to acquire Immowelt on the market for online real estate platforms. The German NCA considered coordinated effects but concluded that the risk of collusion in a two-sided market such as the one at issue (online real estate platforms) was lower than in traditional markets, especially as the two remaining players – one of which was the merged entity – had considerable structural differences.<sup>154</sup> Similarly, in *ProSiebenSat.1/Verivox* (2015) the German NCA concluded that in a merger involving comparison platforms for final consumer contracts, the merger would reduce the likelihood of collusion between the merged entity and its main competitor by leading to further asymmetries among them.<sup>155</sup> In *Parship/EliteMedianet* (2015), the German NCA regarded the continued presence of a varied field of competitors as a countervailing factor to possible coordinated effects on the national market for online dating platforms.<sup>156</sup>

c. Discussion

(113) The considerations found in national cases show that the characteristics of certain multi-sided digital platform markets were thought to mitigate the risk of horizontal coordinated effects, especially where asymmetries between the remaining competitors were created through a merger.

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<sup>151</sup> European Commission, Horizontal Merger Guidelines 2004, para 39 (direct quote); Competition & Markets Authority, Merger Assessment Guidelines 2021, para 6.1.

<sup>152</sup> European Commission, Horizontal Merger Guidelines 2004, para 41.

<sup>153</sup> Eg, see Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018).

<sup>154</sup> Bundeskartellamt, *Axel Springer/Immowelt* (B6-39/15, 20 April 2015).

<sup>155</sup> Bundeskartellamt, *ProSiebenSat.1/Verivox* (B8-76/15, 24 July 2015).

<sup>156</sup> Bundeskartellamt, *OCPE II Master (Parship)/EliteMedianet* (B6-57/15, 22 October 2015).

iii. *Loss of a potential competitor – non-coordinated or coordinated effects*

a. Specificities of the theory of harm

- (114) The loss of potential or future competition is a further theory of harm in horizontal mergers. While one merging party will already be active on a relevant market, the other might only contemplate entry. In the eyes of the European Commission, this theory of harm will only apply where the potential competitor already poses an important competitive constraint or there is a significant likelihood for it to become an important competitor.<sup>157</sup> Also, there will be no competition concerns if other potential competitors could, post-merger, maintain the competitive pressure.<sup>158</sup>
- (115) The UK's Competition & Markets Authority highlights that either party may be the potential competitor.<sup>159</sup> It also underscores that loss of dynamic competition can be particularly problematic in digital platform markets, 'where the costs and time required to build up a significant user base and achieve network efficiencies might involve years of losses'.<sup>160</sup>
- (116) The Competition & Markets Authority suggests assessing two questions when the loss of potential competition is at issue, namely:
- 'whether either merger firm would have entered or expanded absent the merger, and
  - whether the loss of future competition brought about by the merger would give rise to a[ substantial lessening of competition], taking into account other constraints and potential entrants.'<sup>161</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (117) In 6 of 69 cases analysed in-depth, the loss of a potential competitor was addressed. Of these cases, 5 came from the UK alone. One such case led to conditional clearance in phase 2, while another led to a prohibition; a further one was conditionally cleared in phase 1.
- (118) In *Meta/Giphy*, global technology company Meta (formerly Facebook), with strong market positions in both social media and display advertising, acquired Giphy, the world's leading provider of free GIFs and GIF stickers. Markets affected included the market for searchable GIF libraries, social media and display advertising. Both the Austrian<sup>162</sup> and the UK<sup>163</sup> NCAs were concerned that the acquisition at issue could stifle potential competition between Meta and Giphy for advertising clients, as Giphy had rolled out a promising advertising service before

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<sup>157</sup> European Commission, Horizontal Merger Guidelines 2004, para 60.

<sup>158</sup> European Commission, Horizontal Merger Guidelines 2004, paras 58-60.

<sup>159</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 5.1. Indeed, this is the type of scenario it assessed in Competition & Markets Authority, *Amazon/Roofoods* (ME/6836/19-II, 4 August 2020), a case which preceded the current guidance.

<sup>160</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 5.4.

<sup>161</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 5.7.

<sup>162</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Meta/Giphy*.

<sup>163</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

the acquisition that allowed it to monetise its services – and that could have competed with Meta’s display advertising services. In light of Meta’s significant market power, both in the supply of social media and display advertising services, the UK NCA considered that the acquisition of this potential competitor was significant because Giphy not only had the potential to compete with Meta but had also had plans to move into the UK market. Network effects in those markets and high entry barriers – namely related to interoperability and access to data<sup>164</sup> – were equally considered. The UK NCA concluded that based on the acquisition of a potential competitor, the acquisition would substantially lessen competition. It required a full divestiture of Giphy (see also below, paras (285) f).<sup>165</sup> The case was on appeal before the Competition Appeal Tribunal, which in June 2022 dismissed Meta’s substantive claims and only upheld part of its appeal relating to the UK NCA’s failure to consult with the parties.<sup>166</sup> In order to remedy this situation, the Competition Appeal Tribunal ‘invite[d] the parties to consider what consequential orders should be made’<sup>167</sup> and it remains unclear how this issue will be resolved. One possibility is for the UK NCA to consider its procedural shortcomings and readopt its decisions after remedying them.<sup>168</sup>

- (119) Following an application from the Austrian NCA, the Austrian Cartel Court took a different view and conditionally cleared Meta’s acquisition of Giphy subject to access commitments (see para (255)). This conditional clearance was confirmed by Austria’s Supreme Cartel Court in June 2022.<sup>169</sup>
- (120) The *Meta/Giphy* cases illustrate that while one NCA may view a remedy as sufficient to address a particular competition concern, another NCA may reach a different conclusion on the same matter. While these parallel cases were pursued by one NCA from inside the EU and another from outside the EU, it is to be hoped that no such inconsistencies would arise within the EU.<sup>170</sup>
- (121) In *Adevinta/eBay Classifieds Group* (2021), the UK NCA was concerned that the concentration would hinder actual or potential competition between online classified advertising platforms. The concentration was cleared subject to conditions that included the divestiture of two services (on these, see below para (252)).<sup>171</sup>

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<sup>164</sup> In this respect, the UK NCA relied on its previous Market Study; Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021) paras 28 f, 2.23 ff, 5.7 ff; Competition & Markets Authority, ‘Online Platforms and Digital Advertising Market Study’ (July 2020).

<sup>165</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

<sup>166</sup> *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

<sup>167</sup> *Meta/Giphy*, [2022] CAT 26, 14 June 2022, para 177.

<sup>168</sup> Victoria Ibitoye, ‘Meta scores procedural win in appeal of UK Giphy selloff order, but impact remains to be seen’ *MLex* (14 June 2022)

<[https://content.mlex.com/#/content/1385154?referrer=portfolio\\_openrelatedcontent](https://content.mlex.com/#/content/1385154?referrer=portfolio_openrelatedcontent)>.

<sup>169</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Meta/Giphy*; Bundeswettbewerbssbehörde, ‘Meta (Facebook)/Giphy merger: AFCA appealing against conditional clearance’ (4 March 2022) <<https://www.bwb.gv.at/en/news/news-2022/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance>>; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>170</sup> Indeed, the parallel cases in *Meta/Kustomer* (EU and DE 2022) did not give rise to such an inconsistency.

<sup>171</sup> Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).

- (122) In *Amazon/Roomfoods* (2020), the main theory of harm assessed by the UK NCA concerned the loss of a potential competitor. After Amazon abandoned its market presence in online restaurant platforms in the UK, it set out to acquire a 16% shareholding in Deliveroo, a restaurant delivery platform. The NCA assessed whether it would be likely – absent the transaction – that Amazon would re-enter that market, given its strong and continued interest in the online restaurant platforms market. It also assessed whether such entry would lead to greater competition. The fact that Amazon would only acquire a 16% stake in Deliveroo, rather than a larger one, was decisive in this case. This stake, together with the rights associated with that stake and Amazon’s special status as strategic investor, was considered to provide Amazon with the ability to exercise material influence over Deliveroo’s commercial policy. Two scenarios were assessed by the NCA: Concerning unilateral effects on the entry decision, the authority concluded that it was not sufficiently likely that Amazon’s 16% stake in Deliveroo would keep it from re-entering the market in the face of strong financial incentives to do so. The NCA also assessed what unilateral effects could arise should Amazon re-enter the market. While Amazon could adopt a strategy to compete less aggressively to internalise Deliveroo’s profits, the 16% stake in Deliveroo would not provide a strong enough incentive for this theory of harm to be credible or to influence market outcomes. Amazon could also encourage Deliveroo to compete less aggressively against it. However, the authority considered that there was strong competition between Deliveroo, Uber Eats and Just Eat, limiting Deliveroo’s scope to compete less strongly.<sup>172</sup>
- (123) In that same case, the UK NCA also considered possible horizontal unilateral effects in the supply of online convenience grocery (OCG) shopping. The NCA considered the offerings by Amazon and Deliveroo in OCG to be quite differentiated. A number of competitors existed on that market, including online restaurant delivery providers (e.g., Just Eat, Uber Eats), traditional grocers and convenience stores (e.g., Waitrose, Sainsbury’s, Co-op), as well as grocery delivery specialists (e.g., Ocado). Further expansion was to be expected, also against the background of Covid-19. As a first theory of harm, the NCA assessed (i) Amazon’s ability to discourage Deliveroo from competing against Amazon in OCG. It then asked (ii) whether Amazon could protect its investment by avoiding direct competition with Deliveroo in OCG. In both cases, it concluded that while Amazon would have material influence on Deliveroo, its 16% stake would not allow it to set Deliveroo’s policies single-handedly, and outside competition would constrain it in doing so. Finally, the NCA assessed (iii) whether Amazon could rely on Deliveroo for its presence in OCG rather than developing its own service. Here, it was also considered that Amazon might regard the transaction as a first step towards full acquisition of the target. Viewed within the broader context of the OCG market, the NCA concluded that other competitors were well-

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<sup>172</sup> Competition & Markets Authority, *Amazon/Roomfoods* (ME/6836/19-II, 4 August 2020).

placed to compete in the OCG market and no substantiated competition concerns would arise.<sup>173</sup> The transaction was unconditionally cleared.

- (124) In *PayPal/iZettle* (2019), the UK NCA considered whether iZettle, a financial technology company providing payment services to small businesses, would have developed a more comprehensive offer competing with PayPal's service, leading to a situation in which potential competition was being eliminated through a merger. It concluded, however, that absent the merger iZettle would have focused on its core business rather than on developing such a comprehensive service.<sup>174</sup> The transaction was unconditionally cleared.
- (125) In *Uber International/GPC Computer Software* (2021), Uber, a provider of ride-hailing services, wanted to acquire GPC Computer Software (Autocab), a company that (i) develops and supplies booking and dispatch technology (BDT) enabling taxi companies to connect drivers to end customers, and that (ii) operates the iGo network that connects demand for taxi trips with supply for taxi trips. The UK NCA assessed whether the acquisition could lead to a loss of potential competition. For this, it analysed whether GPC's services would have developed to compete with Uber's services. It concluded that GPC was unlikely to develop a stand-alone consumer-facing app that would directly compete with Uber's app. It was also unlikely that GPC's iGo network would grow to become a significant competitor to Uber.<sup>175</sup> The transaction was unconditionally cleared.

c. Discussion

- (126) In the context of digital markets, the loss of potential competition may well represent a theory of harm that competition authorities need to consider more frequently. Where a digital platform buys a potential competitor in order to prevent any competition from arising, this will necessarily affect innovation, choice and the quality of services. As the national cases have shown, each case needs to be assessed based on its specific facts in order to allow for a proper appraisal of potential competition and the merger's impact thereon.
- (127) Concerns related to potential competition would be the area where one would expect theories of harm related to so-called 'killer acquisitions' to be found, where an acquirer uses M&A in order to kill off potential competitors. However, in digital and technology markets, acquirers do not usually buy start-ups to actually discontinue their innovation, but rather to incorporate their digital services and capabilities into their own digital ecosystem. As such, killer acquisitions in pharmaceuticals<sup>176</sup> cannot be likened to M&A in digital markets. Also, in the national cases that were analysed, very few cases addressed this type of concern.
- (128) In two cases in which the UK NCA assessed whether, absent the merger, the target would have developed its digital services in a way so as to more fully compete

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<sup>173</sup> Competition & Markets Authority, *Amazon/Rooffoods* (ME/6836/19-II, 4 August 2020).

<sup>174</sup> Competition & Markets Authority, *PayPal/iZettle* (ME/6766/18-II, 12 June 2019).

<sup>175</sup> Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

<sup>176</sup> On these, see Cunningham, Ederer and Ma (n 5).

with the acquirer,<sup>177</sup> the NCA found that this was not a likely scenario because the target would have more likely focused on its core business. This type of analysis may come up more frequently in digital markets where a smaller company requires its resources to keep its core business running, while bigger players often have a broader portfolio that they can enrich by buying smaller (potential) competitors.

- (129) The *Amazon/Roofoods* case is particularly instructive as it highlighted how a digital ecosystem's acquisition of a digital platform could lead to competition concerns in various related markets based on the capabilities of the acquirer. While the low shareholding that Amazon set out to acquire led to the conclusion that no competition concerns would arise, a higher stake may well have led to a different outcome. This again confirms that a case-by-case analysis of factors present in each individual case is necessary in order to appraise the consequences of a particular merger for competition.
- (130) The Commission emphasised the criteria it applies to the acquisition of a potential competitor in *Apple/Beats* (2014), where it found that the acquisition of music streaming service Beats by Apple would not eliminate a potential competitor that was set to be a significant competitive constraint on Apple's iTunes service.<sup>178</sup>

#### iv. *Other horizontal theories of harm*

##### a. Specificities of the theory of harm

- (131) Increasing the merged entity's buyer power in an upstream market may constitute an additional theory of harm in a horizontal context.<sup>179</sup> Furthermore, the acquisition of commercially sensitive information in a horizontal context may also raise competition concerns and can be analysed together with.

##### b. NCAs applying the theory of harm in digital and technology mergers

- (132) In only 5 of 69 cases, NCAs addressed horizontal theories of harm not covered by the categories above. One such case was prohibited only based on such a theory of harm, while another was cleared subject to conditions. 3 further cases were unconditionally cleared.
- (133) In the *Meta/Giphy* case (2022) that was conditionally cleared in Austria, the Austrian NCA was concerned that by granting Meta access to sensitive commercial information about competing online services based on other apps' integrated interface with the Giphy library, anti-competitive effects could arise.<sup>180</sup>
- (134) In *Meta/Kustomer* (2021), Meta intended to acquire Kustomer, the provider of a software as a service (SaaS) customer relationship management (CRM) software that can be used for business to consumer (B2C) communications. Markets

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<sup>177</sup> Competition & Markets Authority, *PayPal/iZettle* (ME/6766/18-II, 12 June 2019); Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

<sup>178</sup> European Commission Decision of 25 July 2014, COMP/M.7290 – *Apple/Beats*, paras 35-40.

<sup>179</sup> European Commission, Horizontal Merger Guidelines 2004, para 61.

<sup>180</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*; Bundeswettbewerbsbehörde (n 169).

affected included not only the market for the supply of B2C communication via messaging channels but also the market for service and support related to CRM software and the market for online display advertising. The UK NCA investigated whether the acquisition could further strengthen Meta's data advantage in online display advertising, leading to higher barriers to entry and expansion and reduced competition. While the authority emphasised Meta's competitive advantage due to its access to data, and while it also acknowledged that the merger would increase that advantage, it underlined that additional data gains through Kustomer would be small, due to its size and also taking into account its growth potential, and wouldn't raise competition concerns. The NCA also pointed to the possibility for competitors to access similar data as Meta would gain through the acquisition. The transaction was unconditionally cleared.<sup>181</sup> The European Commission only cleared this transaction subject to conditions.<sup>182</sup>

- (135) In *TF1/Aufeminin* (2018), TF1, a major player in free and pay-TV, wanted to acquire Aufeminin, a digital company amongst others involved in running websites, online advertising and online retailing. The French NCA assessed competitors' concerns that post-merger, TF1 could use the data obtained through Aufeminin to improve its monetisation of online advertising spaces. However, the merged entity would have a very low coverage rate of the female population it aimed at (between 5 and 7%), compared to coverage rates of 79% for Google and 68% for Facebook. Therefore, the NCA did not expect horizontal effects to arise and the transaction was unconditionally cleared.<sup>183</sup>
- (136) In *Parship/EliteMedianet* (2015), the German NCA had considered that two merging online dating portals were not close enough competitors for other non-coordinated horizontal effects to arise.<sup>184</sup>
- (137) An entirely different concern was at stake in *Magyar RTL Televízió/Central Digitális Média* (2017), where Magyar RTL Televízió (RTL) intended to acquire 30% of the shares of Central Digitális Média (CDM), providing RTL the right of control over CDM. RTL was a member of the Bertelsmann group, which operates a number of TV channels, provides broadcasting services and advertising time, and operates several websites. CDM published online press products and advertising space therein. The Hungarian NCA prohibited an acquisition based on the media authority's refusal to approve the concentration for reasons of media pluralism (see also para (280)).<sup>185</sup> While the Metropolitan Court of Budapest as the first instance court upheld the authority's decision,<sup>186</sup> the Hungarian Supreme Court annulled it and ordered the authority to conduct a new competition

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<sup>181</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021).

<sup>182</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>183</sup> Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018).

<sup>184</sup> Bundeskartellamt, *OCPE II Master (Parship)/EliteMedianet* (B6-57/15, 22 October 2015).

<sup>185</sup> Gazdasági Versenyhivatal, *Magyar RTL Televízió/Central Digitális Média* (Vj/87/2016, 24 January 2017).

<sup>186</sup> Fővárosi Törvényszék, *Magyar RTL Televízió/Central Digitális Média* (21.K.700.023/2018/12, 8 June 2018).



proceeding.<sup>187</sup> As the vendor subsequently abandoned the transaction, the Hungarian NCA terminated these proceedings.<sup>188</sup> While these types of concerns lie outside the scope of this Report, they are bound to arise more frequently as digital media gains a stronger foothold.

c. Discussion

- (138) In terms of other horizontal theories of harm, it can clearly be seen that the strengthening of a data advantage is a common theme among a number of national mergers from different jurisdictions. This is also confirmed when looking at other vertical non-coordinated effects that equally focus on the data advantage that a merger may strengthen (see below, paras (196), (237) ff). To become more operational, data-related theories of harm would do well with a more in-depth analysis and an elaboration of possible benchmarks for assessing when the strengthening of a data advantage becomes such as to warrant intervention in a merger case. The ubiquitous, non-rivalrous nature of data needs to be contrasted with realistic opportunities for different players to access such data.
- (139) At the national level, commitments based on data-related concerns have been required, but not when the latter were raised as a possible horizontal concern but rather when they were assessed under a vertical theory of harm or a conglomerate theory of harm.
- (140) By contrast, the European Commission has previously assessed the data advantage an acquisition can give rise to under a horizontal theory of harm in *Google/Fitbit* (2021), which will be further discussed below (para (240)). More recently, this was also analysed in the 2022 conditional clearance of *Meta/Kustomer*.<sup>189</sup>

## 2. Vertical theories of harm

- (141) Vertical effects arise in concentrations that involve companies that are active at different levels of the supply chain, eg between a manufacturer and a retailer or between the supplier of a raw material and a manufacturer.<sup>190</sup> A number of theories of harm related to vertical mergers can be distinguished that are briefly set out below, followed by an analysis of how these particular theories of harm were applied in the digital and technology merger cases that were identified on a national level. Where appropriate, parallels to European Commission cases are drawn in the discussion that follows.
- (142) In general, the approach to vertical and conglomerate mergers has been more lenient as they do not lead to the loss of direct competition.<sup>191</sup> However, based on the specific market characteristics in digital and technology sectors, this insight

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<sup>187</sup> Kúria, *Magyar RTL Televízió/Central Digitális Média* (Kf.IV.38.095/2018/10, 9 December 2019).

<sup>188</sup> RTL continues to pursue this case before the Constitutional Court of Hungary.

<sup>189</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>190</sup> European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Non-horizontal Merger Guidelines 2008) [2008] OJ C265/6, para 4.

<sup>191</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 11 f.

now has to be questioned, and this conclusion is starting to be reflected in several of the national cases discussed below.

*i. Non-coordinated effects: Input foreclosure*

a. Specificities of the theory of harm

- (143) Input foreclosure occurs where the merged entity either refuses to supply its downstream competitors with an input or does so on less favourable terms.<sup>192</sup> This can in turn raise rivals' costs, ultimately leading to higher prices for consumers. To assess whether this type of competitive harm would arise, an authority will assess the (a) ability and (b) incentive of the merged entity to engage in such behaviour, as well as (c) the effects of such behaviour on competition downstream.<sup>193</sup>
- (144) Concerning the ability to engage in input foreclosure, an authority will usually assess whether the input concerned is important for the downstream product, e.g., because it is a critical component, a significant source of product differentiation or because switching suppliers is costly. Concerns may arise when the vertically integrated firm has significant market power in the upstream market.<sup>194</sup> Concerning the incentive to engage in input foreclosure, an authority will typically assess whether this strategy would be profitable and whether the entity has engaged in such strategies in the past.<sup>195</sup> While the impact of a foreclosure strategy on competition is assessed as a final element with a particular emphasis on price effects,<sup>196</sup> digital and technology markets may require different parameters compared to more traditional markets. For instance, parameters may include the access to data that is relevant for competition, the strengthening of a digital ecosystem, and more.
- (145) Input foreclosure will only be seen as problematic where it concerns an important input for the downstream market, and where the merged entity has a significant degree of market power upstream.<sup>197</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (146) A total of 27 of 69 cases that were analysed in-depth assessed the possibility of vertical input foreclosure following the merger, making this the most prevalent vertical theory of harm addressed in the national cases under scrutiny. Of these, 12 cases also addressed a further vertical theory of harm, 20 cases also addressed a horizontal theory of harm, and 5 also addressed a conglomerate theory of harm.

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<sup>192</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 31; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.9.

<sup>193</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 32; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.10.

<sup>194</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 33-35; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.14.

<sup>195</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 40-46; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.19.

<sup>196</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 47.

<sup>197</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 34-35.

3 cases addressed all three types of harm. No case exclusively addressed vertical input foreclosure.

- (147) Of all cases that (also) concerned vertical input foreclosure, 2 concentrations were prohibited, but always in combination with a horizontal theory of harm. 2 cases led to remedies in phase 1 and a further 3 in phase 2. 18 concentrations were unconditionally cleared in phase 1 and a further one in phase 2.
- (148) The Swedish concentration of *Swedbank Franchise/Svensk Fastighetsförmedling* (2014) was blocked because of concerns about vertical input foreclosure, among others. After the acquisition, Swedbank Franchise would directly and indirectly strengthen its influence over Hemnet, to the extent that it could change its business model. Hemnet was the biggest Swedish portal for real estate advertisements. Not only did Hemnet have high market shares, but it was also an unavoidable trading partner. Barriers to entry for potential competitors were high, as Hemnet was owned by real estate agents themselves and they would thus have no incentive to support a new platform. Hemnet would have the ability and incentive to engage in input foreclosure vis-à-vis competing real estate agents, e.g., by extracting monopoly profits or by engaging in price differentiation. The Swedish NCA concluded that this would significantly impede effective competition, the Stockholm District Court concurred and a divestiture was ordered (see also para (278)).<sup>198</sup>
- (149) *Tobii/Smartbox* (2019) was blocked by the UK NCA, among others due to vertical input foreclosure effects. Concerning a possible input foreclosure of Smartbox's Grid software, the authority found that the merged entity would likely have both the ability and incentive to rely on its strong market position in augmentative assistive communication (AAC) software in order to foreclose downstream competitors, e.g., by making their access to its popular software more expensive or of lower quality. Due to consumer demand, downstream competitors were unable to switch away from Smartbox's software. The merger increased the incentive to engage in such a foreclosure strategy. Another theory of harm relating to input foreclosure of Tobii's eye gaze cameras was dismissed because such a strategy might lead to switching to alternative eye gaze cameras, which were available on the market.<sup>199</sup> On the prohibition, see also paras (281) f.
- (150) Vertical input foreclosure was one of the theories of harm that led the UK NCA to prohibit the *Meta/Giphy* merger (2021) in phase 2. The UK NCA assessed whether Meta could foreclose competitors in the market of social media services by preventing their access to Giphy's GIFs, a format that users of social media platforms heavily relied on. Apart from Giphy, the only other comparable service was Google's Tenor. Post-merger, Meta would have the ability to engage in input foreclosure. Based on the benefits awaiting Meta, it would also have the incentive to do so because users wanting to use Giphy's GIF library may very well switch

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<sup>198</sup> Stockholms tingsrätt, *Swedbank Franchise/Svensk Fastighetsförmedling* (T 3629-14, 16 December 2014).

<sup>199</sup> Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).

to one of the Meta platforms. The NCA emphasised how network effects would further amplify this effect and how the overall strategy would further strengthen Meta's market power in the supply of social media services and have a negative impact on competition. The NCA also highlighted the dynamic nature of the multi-sided markets at issue, which led to a lessening of competition on one market (such as the supply of social media services) exacerbating anti-competitive effects on another (such as the supply of display advertising). While Meta offered commitments to the NCA, these were not regarded as sufficient and Meta was therefore ordered to fully divest Giphy (see also below, paras (285) f).<sup>200</sup> The Competition Appeal Tribunal almost entirely dismissed Meta's appeal, and the UK NCA together with the parties must now determine how to proceed based on the lack of consultation that the Competition Appeal Tribunal has found.<sup>201</sup>

- (151) In the Austrian *Meta/Giphy* (2022) case, the NCA noted that the acquisition may restrict non-discriminatory access to Giphy for other online services. On the conditions for clearance imposed by the Cartel Court, see para (255) below. The Cartel Court's conditional clearance was confirmed by the Supreme Cartel Court in June 2022.<sup>202</sup>
- (152) In *CTS Eventim/Barracuda Holding* (2019), CTS Eventim, a German provider of ticketing and live entertainment with a strong market presence in Austria through oeticket, wanted to acquire 71% of shares and sole control of Barracuda Holding, an Austrian provider of concerts. The Austrian NCA was concerned that, post-merger, the merged entity could engage in input foreclosure by making it harder for ticketing providers to access organisers of live events. The concentration was cleared subject to conditions (on these, see below at para (265)).<sup>203</sup>
- (153) The Dutch NCA considered input foreclosure in *Sanoma/Iddink* (2019). In that case, Sanoma, a publisher of (digital) learning materials, wanted to acquire Iddink, a distributor of (digital) learning materials and electronic learning environments in secondary education. The NCA was concerned that the acquisition could foreclose competitors of Iddink's electronic learning environments by providing preferential treatment or better compatibility with Sanoma products on the market for issuing educational materials. As a result, competitors would become less effective, barriers to entry would be raised and opportunities for innovation would be harmed. In view of the digital nature of the market and the need for further digitization in the educational resource chain, this would have a negative impact on price, quality and innovation. The concentration was cleared subject to conditions in phase 2 (on these, see below at para (256)).<sup>204</sup>
- (154) In *NS Groep/Pon Netherlands* (2020), the Dutch NCA assessed a range of vertical relationships in a joint venture between the Netherlands' main train service

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<sup>200</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

<sup>201</sup> *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

<sup>202</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>203</sup> Bundeswettbewerbbehörde, *CTS Eventim/Barracuda Holding* (BWB/Z-4651, 3 December 2019).

<sup>204</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

provider (NS) and a producer of means of transport (Pon). The NCA believed that, due to the joint venture, NS would have both the ability and the incentive to engage in a partial input foreclosure strategy regarding its train services and the integrated provision of transport and mobility services via an app. This could lead to (i) the foreclosure of current providers of integrated mobility services via an app, and (ii) raise barriers to entry into the national market for the integrated provision of transport and mobility services via an app. Based on this, the authority believed that the joint venture could result in a significant restriction of competition, and only cleared it subject to conditions (on these, see below at para (257)).<sup>205</sup>

- (155) In the case of *Sully System/CENEJE* (2018), the Slovenian NCA assessed whether Sully System's acquisition of Ceneje, a company active in the market of online advertising through search engines and online price comparison, could lead to input foreclosure in online price comparison or online non-food retail of consumer goods. Sully System was active in the latter market. As the merged entity would have a market share of more than 30% in at least one relevant market, the NCA assessed more closely whether the merged entity could discriminate between offers of online retailers and use non-objective search and ranking algorithms of online retail offers which would be preferential to the merged entity. The remedies addressed these concerns (on these, see below at para (267)).<sup>206</sup>
- (156) In several cases, NCAs concluded that vertical input foreclosure was not a credible theory of harm based on the low market shares post-merger and/or the competitive constraint expected from competitors that would remain active on either the upstream or the downstream markets.<sup>207</sup> A dual vendor strategy employed by buyers was seen as a countervailing factor in technology markets,<sup>208</sup> similar to multi-homing in digital markets. Where switching costs were not high, this was also seen as an important strategy to counter vertical input foreclosure.<sup>209</sup>
- (157) In *ProSiebenSat.1/Verivox* (2015), the German NCA assessed a merger between a media company (ProSiebenSat.1) and a comparison platform for consumer contracts (Verivox). It assessed whether vertical input foreclosure may arise based on the media company's ability and incentive to grant Verivox better advertising space at more favourable conditions than to competing comparison platforms, thereby restricting effective competition. Verivox was the market leader, Check24 its main competitor, and both together held 95% of the market. ProSiebenSat.1's ability and incentive to engage in such input foreclosure would be restricted as it would lose out on advertising revenue from Verivox's competitors. Also, TV

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<sup>205</sup> Autoriteit Consument & Markt, *NS Groep/Pon Netherlands* (ACM/20/038614, 20 May 2020).

<sup>206</sup> Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018).

<sup>207</sup> Autorité de la concurrence, *Rakuten/Alpha Direct Services* (13-DCC-08, 16 January 2013); Competition and Consumer Protection Commission, *EQT Fund Management/SUSE* (M/18/066, 18 September 2018); Bundeskartellamt, *PayPal/Honey Science* (B6-86/19, 17 December 2019).

<sup>208</sup> Bundeskartellamt, *Cisco Systems/Acacia Communications* (B7-205/19, 6 February 2020).

<sup>209</sup> Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

commercials at ProSiebenSat.1 were not the only advertising channels available to Verivox's competitors. In addition, sellers usually used several price comparison platforms in parallel (multi-homing). The NCA therefore concluded that this would not result in an appreciable restriction, also not through market tipping. The transaction was unconditionally cleared.<sup>210</sup>

- (158) In four concentrations in the online gaming and betting sectors, the Irish NCA assessed the possibility of vertical input foreclosure. In two cases, the provision of live betting exchange data to online betting service providers was at issue, and the NCA asked whether, post-merger, competing fixed-odds betting service providers could be foreclosed by restricting their access to the merged entity's live betting exchange data. The Irish NCA found that this was unlikely, as the data did not constitute an essential input for these providers; there was an array of alternative sources for this data.<sup>211</sup> The UK NCA reached the same conclusion when analysing one of these concentrations.<sup>212</sup>
- (159) In two further cases, the Irish NCA considered whether the concentration could lead to the foreclosure of competing betting and gaming providers from access to the merged entity's odds comparison website. It concluded that the odds comparison website would be unlikely to refuse to display competing offers, as displaying multiple offerings is required for these types of sites. In addition, there were several competing odds comparison services active on the market.<sup>213</sup> Concerning online affiliate marketing services, the Irish NCA concluded that input foreclosure was unlikely to arise as there were many international online market affiliates specialising in the gambling sector, a high number of competing online fixed-odds betting providers and online gaming providers, and low market involvement of the merged entity.<sup>214</sup>
- (160) In *Sonae/CTT* (2018), Sonae and CTT - Correios de Portugal (Post Portugal) notified the creation of a joint venture dedicated to the operation of an e-commerce platform for the provision of intermediation services between traders and consumers. The Portuguese NCA<sup>215</sup> assessed whether the joint venture might

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<sup>210</sup> Bundeskartellamt, *ProSiebenSat.1/Verivox* (B8-76/15, 24 July 2015).

<sup>211</sup> Competition and Consumer Protection Commission, *Paddy Power/Betfair* (M/15/059, 15 January 2016); Competition and Consumer Protection Commission, *Ladbrokes/Gala Coral* (M/16/007, 10 March 2016). Similarly, see also the conclusion on horse racing and football data provision in Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>212</sup> Competition & Markets Authority, *Betfair Group/Paddy Power* (ME/6572/15, 17 December 2015). The UK NCA had also investigated the *Ladbrokes/Gala Coral* merger and only cleared it subject to conditions in phase 2. The competition concerns in that case, however, related to local betting offices rather than any digital concerns. See Competition & Markets Authority, *Ladbrokes/Gala Coral* (ME/6556-15-II, 26 July 2016).

<sup>213</sup> Competition and Consumer Protection Commission, *Stars Group/Sky Betting & Gaming* (M/18/038, 18 June 2018); Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>214</sup> Competition and Consumer Protection Commission, *Stars Group/Sky Betting & Gaming* (M/18/038, 18 June 2018); Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>215</sup> For the Portuguese experience, see also Tânia Luísa Faria, 'Portugal' in Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020) 431, 433.

engage in input foreclosure of other marketplaces. It concluded that Sonae, which had a relatively high market share in certain retail markets (sporting goods, consumer electronics), would not be able to terminate or deteriorate supply conditions to customers that operated on the same market as the joint venture. It would also not be able to stop reselling products to competing marketplaces. Multiple competitors remained on the market that would constrain such a strategy of input foreclosure. The joint venture was unconditionally cleared.<sup>216</sup>

- (161) In *Turnitin/Ouriginal Group* (2021), Turnitin, an international provider of a wide range of software solutions for the educational sector, wanted to acquire sole control over the Swedish Ouriginal Group, which is only active on the market for plagiarism detection software. This transaction did not, in the eyes of the Spanish NCA, raise vertical input foreclosure effects because of the low market shares of the target and was unconditionally cleared.<sup>217</sup> In the UK, the UK NCA believed that the same concentration would lead to horizontal unilateral effects, but applied its *de minimis* exception due to the small nature of the case.<sup>218</sup>
- (162) The UK NCA assessed the possibility of vertical input foreclosure in a number of cases. In *ZPG/Websky* (2017), ZPG, which owns a customer relationship management (CRM) software for real estate agents as well as the online property portal Zoopla, acquired Websky, which runs the CRM property software Expert Agent. The UK NCA assessed whether the merged entity could engage in input foreclosure of property portals in the vertical relationship between online property portals such as Zoopla (downstream) and CRM property software (upstream). In particular, it analysed whether the merged entity could degrade the quality of the upload feed to property portals that are competing with Zoopla. However, the NCA concluded that the merged entity would not have the ability to adopt a foreclosure strategy vis-à-vis rival property portals due to the high number of competitors operating on the market.<sup>219</sup>
- (163) In *Moneysupermarket.com/Decision Technologies* (2018), Moneysupermarket.com agreed to acquire Decision Technologies. Both parties supply digital comparison tool services for mobile and home communications switching. Decision Technologies also operates upstream, providing white label and application programming interface (API) services to providers of digital comparison tools. The UK NCA found that the merged entity would have the ability to foreclose digital comparison tool providers from the supply of white label and API services, which were considered an important input. Decision Technologies was the market leader and no entry was on the horizon. The NCA then assessed a number of factors that would curtail the merged entity's incentive

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<sup>216</sup> Autoridade da Concorrência, *Sonae/CTT - Correios de Portugal JV* (Ccent. 27/2018, 19 July 2018).

<sup>217</sup> Comisión Nacional de los Mercados y la Competencia, *Turnitin/Ouriginal Group* (C/1220/21, 19 October 2021).

<sup>218</sup> Competition & Markets Authority, *Turnitin/Ouriginal* (ME/6931/21, 26 July 2021).

<sup>219</sup> Competition & Markets Authority, *ZPG/Websky* (ME/6690/17, 29 June 2017).

to foreclose, and found that this strategy would not be profitable. The concentration was unconditionally cleared.<sup>220</sup>

(164) The *Google/Looker* (2020) concentration also involved the possibility of vertical input foreclosure. Google, a global technology company, acquired Looker, a provider of business intelligence (BI) tools, i.e. software that supports corporate decision-making by analysing, visualising and interpreting business data. The UK NCA assessed whether the merged entity could engage in a partial foreclosure strategy based on Google's substantial market power in web analytics and online advertising. As Google generates a wealth of data, the authority assessed whether Google could restrict competing BI tool providers from access to Google-generated data. It found that Google would indeed have the ability to engage in such an input foreclosure strategy: it is important to many businesses to be able to analyse Google-generated data, Google has market power in web analytics and online advertising and can offer a combined product – possibly further enhancing its market power, and it could implement various price- and non-price-based foreclosure mechanisms to restrict access to Google-generated data. The NCA did not consider that Google had an incentive to engage in such a strategy, however. Its internal documents did not reveal any plans to carry out such a strategy. Switching by customers may to some extent hamper the profitability of such a strategy. Targeting individual competing BI tools with such a strategy would also be costly. The concentration was unconditionally cleared.<sup>221</sup>

(165) In *Meta/Kustomer* (2021), the UK NCA also assessed vertical input foreclosure. In particular, it analysed whether Meta could foreclose other providers of customer relationship management (CRM) software by restricting or degrading their access to Meta's messaging channels. This is because CRM providers require Meta APIs to integrate them into their software. While Meta would have the ability to engage in such foreclosure, the authority did not find evidence that it had a sufficient incentive for this strategy. B2C<sup>222</sup> messaging was growing, and such a foreclosure strategy would cut Meta off from revenue-generating CRM providers, as not all customers would switch to relatively small Kustomer. The CMA found it unlikely that such a foreclosure strategy would result in gains exceeding the losses. The CMA also considered that a foreclosure strategy which would target close competitors of Kustomer would not have been possible. The transaction was unconditionally cleared.<sup>223</sup>

### c. Discussion

(166) Vertical input foreclosure is a frequently encountered theory of harm in digital and technology mergers on a national level. While regularly dismissed based on remaining competitive constraints or a lack of market power on any relevant

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<sup>220</sup> Competition & Markets Authority, *Moneysupermarket.com/Decision Technologies* (ME/6749/18, 7 August 2018).

<sup>221</sup> Competition & Markets Authority, *Google/Looker* (ME/6839/19, 13 February 2020).

<sup>222</sup> Business-to-consumer.

<sup>223</sup> For the European Commission's contrary findings on this issue, which led to a conditional clearance of the same merger, see European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.



market, this theory of harm has led to remedies in a number of national mergers, although usually not on a stand-alone basis.<sup>224</sup>

- (167) Particularly in Ireland, but also in the UK, the growing importance of online betting and gaming has also come within the purview of the NCAs, and digital aspects are increasingly considered an important factor to consider in mergers in that sector. At the same time, it was seen that this sector currently appears to be competitive enough to allow for further concentration. This shows how sectors that were previously regarded as non-digital can (partially) morph into digital sectors, at which point know-how regarding how to analyse digital cases becomes essential.
- (168) Against the background of the national cases analysed for this Report, it seems that it could be useful if the particularities of vertical input foreclosure in digital and technology markets were spelled out more clearly in soft law guidance, especially as regards the ability of the other market side to switch or multi-home and the questions of vertical integration and of credible competition. The incentive to engage in input foreclosure also needs to be seen in the context of a digital ecosystem, which can lead to multiple incentives in various markets coming together.<sup>225</sup>
- (169) In the vast majority of cases analysed, not all three cumulative criteria for finding a credible strategy of input foreclosure were fulfilled, leading to a dismissal of this type of theory of harm. This was also seen in a number of Commission decisions in which vertical input foreclosure was dismissed.<sup>226</sup>
- (170) In the European *Meta/Kustomer* (2022) case, the European Commission carried out a similar analysis to that of the UK NCA but was concerned that Meta could engage in input foreclosure of Kustomer's competitors by denying or degrading access to APIs for Meta's various messenger functionalities. It only cleared the acquisition subject to two commitments: Meta guaranteed non-discriminatory access to its publicly available APIs for its messaging channels to competing customer service CRM software providers and new entrants – i.e., companies competing with Kustomer –, and would also make available to them improvements in Meta's messenger functionalities that Kustomer's customers use today.<sup>227</sup> In Germany and the UK, this acquisition was unconditionally cleared.<sup>228</sup> The Commission had issued its conditional clearance while the German NCA's

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<sup>224</sup> But see, on the European level, European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>225</sup> On this, see European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>226</sup> Eg, European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, paras 570-610, 611-648, 649-679, 680-709; European Commission Decision of 6 December 2016, M.8124 – *Microsoft/LinkedIn*, paras 246-277, 370-381. It is also noteworthy how in *Microsoft/LinkedIn*, vertical and conglomerate foreclosure effects were assessed in close proximity, highlighting how these two cannot be easily separated in digital market environments.

<sup>227</sup> European Commission, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' IP/22/652 (27 January 2022); European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>228</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021); Bundeskartellamt, *Meta/Kustomer* (B6-21/22, 11 February 2022).

review was still ongoing, and the German NCA took the Commission's findings – and the commitments accepted by the Commission – into account when unconditionally clearing the transaction.<sup>229</sup>

ii. *Non-coordinated effects: Customer foreclosure*

a. Specificities of the theory of harm

- (171) A second type of foreclosure a vertical merger may give rise to is customer foreclosure, whereby the merged entity forecloses access to customers for its upstream competitors, thereby cutting off or hindering their access to the market.<sup>230</sup> It can do so by sourcing all its requirements from its own upstream operation, by reducing its purchases from an upstream competitor or by buying from upstream competitors on less favourable terms.<sup>231</sup> This increases rivals' costs, possibly leading to higher prices for consumers or reduced innovation.
- (172) To assess whether this type of competitive harm would arise, an authority will assess the (a) ability and (b) incentive of the merged entity to engage in such behaviour, as well as (c) the effects of such behaviour on competition downstream.<sup>232</sup> Concerning the ability to engage in customer foreclosure, an authority may particularly want to consider the size of the customer and the importance of scale upstream.<sup>233</sup>
- (173) Such foreclosure would also deter entry on the upstream market and put competitors on the downstream market at a competitive disadvantage.<sup>234</sup>
- (174) Competition concerns related to customer foreclosure would only arise where the merged entity is an important customer with a significant degree of market power in the downstream market.<sup>235</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (175) A total of 11 of the 69 cases analysed in-depth contained an assessment of customer foreclosure. Only in one case – namely *CTS Eventim/Four Artists*<sup>236</sup> – was this the only vertical theory of harm assessed (in addition to a horizontal theory of harm). In 6 cases, no horizontal theories of harm were assessed in addition to vertical (or vertical and conglomerate) theories of harm.
- (176) Of the cases that assessed vertical customer foreclosure, 2 led to a prohibition and 3 to conditional clearance (2 in phase 1, 1 in phase 2). The remaining concentrations were unconditionally cleared.

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<sup>229</sup> Bundeskartellamt, 'Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)' Press Release (11 February 2022) <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11\\_02\\_2022\\_Meta\\_Kustomer.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html)>.

<sup>230</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 58; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.23.

<sup>231</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 60.

<sup>232</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 59.

<sup>233</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.26.

<sup>234</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 64, 72.

<sup>235</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 58.

<sup>236</sup> Bundeskartellamt, *CTS Eventim/Four Artists* (B6-35/17, 23 November 2017).

- (177) In *Tobii/Smartbox* (2019), a case involving augmentative assistive communication (AAC) solutions, the UK NCA found that the merged entity would likely have both the ability and incentive to limit the compatibility of eye gaze cameras produced by the acquirer's competitors with the target's popular software. This strategy would be profitable as AAC solution providers were not very likely to switch to an alternative software in order to use an alternative eye gaze camera. This foreclosure strategy would lead to lower innovation in eye gaze cameras and higher prices. The acquisition was prohibited (see also paras (281) f).<sup>237</sup>
- (178) In *CTS Eventim/Four Artists* (2017),<sup>238</sup> the German NCA prohibited an acquisition based on the finding that it would (also) have further strengthened customer foreclosure: While an acquisition by CTS Eventim, a company active in live entertainment, earlier that same year had been unconditionally cleared in phase 2,<sup>239</sup> the NCA believed that this further acquisition would contribute to CTS Eventim's strategy of customer foreclosure to the detriment of competition. CTS Eventim's competitors already had restricted access to customers, both because of CTS Eventim's vertical integration and because of CTS Eventim's exclusivity clauses with event organisers. On the prohibition, see also para (279).
- (179) In a further case involving CTS Eventim, *CTS Eventim/Barracuda Holding* (2019), the Austrian NCA was concerned that, post-merger, the merged entity could engage in customer foreclosure by providing its ticketing services at above market prices to companies that do not belong to the CTS Eventim group.<sup>240</sup> This concentration was cleared subject to conditions (on these, see below at para (265)).
- (180) In *NS Groep/Pon Netherlands* (2020), the Dutch NCA concluded that it was not plausible that NS would have the ability and incentive to implement a customer foreclosure strategy vis-à-vis providers of bicycle-sharing and providers of car-sharing. The joint venture was cleared subject to conditions based on concerns related to vertical input foreclosure (on the remedies, see below at para (257)).<sup>241</sup>
- (181) The French NCA considered possible customer foreclosure in *Rakuten/Alpha Direct Services* (2013). In that case, Rakuten, which is active in e-commerce through its electronic marketplace PriceMinister and several price comparison websites, wanted to acquire exclusive control over Alpha Direct Services, a company specialising in inbound logistics services for e-commerce and catalogue-based distance selling. The NCA concluded that customer foreclosure was unlikely to arise based on the many different sellers that the target provided its services to, the number of important competitors in e-marketplaces, and the lack

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<sup>237</sup> Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).

<sup>238</sup> Bundeskartellamt, *CTS Eventim/Four Artists* (B6-35/17, 23 November 2017).

<sup>239</sup> Bundeskartellamt, *CTS Eventim/FKP Scorpio* (B6-53/16, 3 January 2017).

<sup>240</sup> Bundeswettbewerbshörde, *CTS Eventim/Barracuda Holding* (BWB/Z-4651, 3 December 2019).

<sup>241</sup> Autoriteit Consument & Markt, *NS Groep/Pon Netherlands* (ACM/20/038614, 20 May 2020).

of exclusivity contracts by the acquirer's marketplace. The transaction was unconditionally cleared.<sup>242</sup>

- (182) Two Irish cases considered both vertical input and vertical customer foreclosure. In *Stars Group/Sky Betting & Gaming* (2018), the Irish NCA considered whether the merged entity could foreclose competing odds comparison services from accessing customers, or whether it could foreclose competing online affiliate marketing services from accessing customers. It concluded that based on the multiple players active on the market, neither would materialise. The transaction was unconditionally cleared.<sup>243</sup>
- (183) The case of *Sonae/CTT* (2018) also related to possible customer foreclosure by the joint venture creating an e-commerce platform. There, the Portuguese NCA found it unlikely that the owners of the joint venture would adopt a strategy of customer foreclosure by preventing one of the parties' competitors from providing services to the joint venture or reselling its products on the new marketplace. This would prevent the success of a marketplace, which requires two market sides to come on board.<sup>244</sup>
- (184) Under a possible theory of harm related to vertical customer foreclosure, the UK NCA assessed in *Meta/Kustomer* (2021) whether Meta could foreclose other B2C messaging services by preventing them from integrating their services with Kustomer. As Kustomer was a small provider specialised in serving small and medium-sized businesses, and many alternative providers would remain on the market, this was not seen as a credible theory of harm, either. The transaction was unconditionally cleared.<sup>245</sup>
- (185) The presence of a sufficient number of competitors on one of the relevant markets was regularly seen as mitigating any vertical effects.<sup>246</sup> Low turnover was also sometimes seen as hindering a company's ability to foreclose competitors.<sup>247</sup>

### c. Discussion

- (186) Vertical customer foreclosure is a theory of harm that was not seen as a credible threat to competition in many national cases. The analysis related to customer foreclosure is often very price-centric. For digital and technology mergers, further parameters of competition – such as privacy, quality, choice and innovation – would need to be focused on more carefully in order to ensure that the multi-dimensional nature of competition is depicted in the merger analysis.
- (187) It is interesting to note how in *Sonae/CTT*, the two-sided nature of a market was regarded as an intrinsic countervailing factor that would render a strategy based

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<sup>242</sup> Autorité de la concurrence, *Rakuten/Alpha Direct Services* (13-DCC-08, 16 January 2013).

<sup>243</sup> Competition and Consumer Protection Commission, *Stars Group/Sky Betting & Gaming* (M/18/038, 18 June 2018).

<sup>244</sup> Autoridade da Concorrência, *Sonae/CTT - Correios de Portugal JV* (Ccent. 27/2018, 19 July 2018).

<sup>245</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021). Note that in the European Union, this concentration was only conditionally cleared by the European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>246</sup> Eg, see Bundeskartellamt, *PayPal/Honey Science* (B6-86/19, 17 December 2019).

<sup>247</sup> Eg, see Competition and Consumer Protection Commission, *EQT Fund Management/SUSE* (M/18/066, 18 September 2018).

on customer foreclosure futile. Vertical integration and exclusivity contracts already concluded on a relevant market, on the other hand, were seen as factors contributing to a successful customer foreclosure strategy.

- (188) In the Austrian and German cases involving CTS Eventim, it was seen how very similar concerns arose in those cases based on the market power CTS Eventim held in ticketing services, although these concerns were resolved specifically with a view to the national markets concerned.

*iii. Other non-coordinated effects*

a. Specificities of the theory of harm

- (189) In terms of other non-coordinated effects arising from unilateral behaviour of the merged entity, a vertical merger can lead the merged entity to obtain access to commercially sensitive information that may allow it to compete less aggressively or to put competitors at a competitive disadvantage.<sup>248</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (190) Only 4 of the 69 cases analysed in-depth discussed other vertical unilateral effects, but 3 of these cases led to commitments.
- (191) In *Rockaway Capital/Heureka* (2016), private equity company Rockaway Capital intended to acquire control of Heureka.cz, a Czech comparison shopping website, and other online businesses. The Czech NCA was concerned that post-merger comparison shopping site Heureka.cz could ask Rockaway's online shops to collect excessive amounts of data about their users, data that could then be used in the interest of Rockaway Capital's businesses.<sup>249</sup> This concern was explicitly addressed in the commitments offered by Rockaway (on these, see para (266) below).
- (192) In *Sanoma/Iddink* (2019), the Dutch NCA considered it plausible that the merged entity would have access to commercially sensitive information from competitors after the proposed concentration, giving it an advantage over its competitors and possibly impeding competition in the market for the issuance of teaching materials in secondary education. The acquisition was cleared subject to conditions (on these, see para (256) below).<sup>250</sup>
- (193) In the Slovenian case of *Sully System/CENEJE* (2018), the NCA also raised the concern that the acquisition could provide the acquirer with access to commercially sensitive information regarding competitors' activities in the downstream market, and cleared it subject to conditions (on these, see para (267) below).<sup>251</sup>

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<sup>248</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 78; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.3.

<sup>249</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>250</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

<sup>251</sup> Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018).

- (194) In *Uber International/GPC Computer Software* (2021), the UK NCA assessed whether the acquisition would give Uber access to commercially sensitive information about competitors that would allow it to compete more aggressively. However, the NCA considered that more intense competition would, in fact, be beneficial and in any case, competing taxi companies could switch to other booking and dispatch technology providers in case the merged entity engaged in such conduct. The transaction was unconditionally cleared.<sup>252</sup>
- (195) A further case that involved other vertical unilateral effects was the *esure/Gocompare.com* case (2015),<sup>253</sup> where the UK NCA raised the issue that the acquirer might gain access to commercially sensitive information through the target's price comparison website, allowing it to either increase its margins or gain a competitive advantage, eg by enabling it to back-estimate competitors' pricing algorithms or increase prices.<sup>254</sup> In this particular case, the authority concluded that this was not likely to occur and the transaction was unconditionally cleared.<sup>255</sup>

c. Discussion

- (196) Access to commercially sensitive information, and to user data in particular, has only been identified as a competition concern in a limited number of cases – but has led to dedicated remedies. In digital markets that centre around user data, it would not be surprising to see this type of theory of harm resurface more frequently. This is further discussed below (see paras (237) ff).
- (197) In *Apple/Shazam* (2018), the European Commission found that the acquisition would give Apple access to commercially sensitive information about competitors of its Apple Music service, and in particular music streaming service Spotify. However, it regarded it as 'unclear whether the merged entity would be able to put competing providers of digital music streaming apps at a competitive disadvantage' and underlined that the processing of personal data remained subject to the General Data Protection Regulation.<sup>256</sup> It was also not certain that Apple would have the incentive to use such data to disadvantage competitors.<sup>257</sup>
- (198) It is notable that such a reference to data protection rules is absent in the national merger cases analysed in-depth.<sup>258</sup>

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<sup>252</sup> Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

<sup>253</sup> This case was not selected for in-depth analysis.

<sup>254</sup> Competition & Markets Authority, *esure Group/Gocompare.com* (ME/6495-14, 23 February 2015).

<sup>255</sup> Competition & Markets Authority, *esure Group/Gocompare.com* (ME/6495-14, 23 February 2015), para 82.

<sup>256</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) [2016] OJ L119/1.

<sup>257</sup> European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam*, paras 196 ff (direct quote at para 221).

<sup>258</sup> But see, in a case on a possible abuse of a dominant position based on an infringement of data protection rules when collecting users' data, Bundeskartellamt, *Facebook* (B6-22/16, 6 February 2019); questions on this case have now been referred to the Court of Justice by the Oberlandesgericht Düsseldorf; Case C-252/21, *Meta Platforms/Bundeskartellamt* [2021] OJ C320/16 (pending).

*iv. Coordinated effects*

a. Specificities of the theory of harm

(199) Just like a horizontal merger, a vertical merger may also alter the market structure so as to allow companies to reach a common understanding aimed at increasing prices, limiting production or dividing the market.<sup>259</sup> In order to find whether such coordination is sustainable, an authority will assess the same three factors as set out for horizontal coordinated effects: the ability to monitor competitors' behaviour on the market (i.e., a certain transparency), the possibility of a credible deterrent mechanism, and no possibility for third parties (customers or competitors) to jeopardise the coordinated behaviour.<sup>260</sup>

b. NCAs applying the theory of harm in digital and technology mergers

(200) Not one out of the 69 cases analysed in-depth discussed such a theory of harm.

(201) Recently, the agreement between Google and Apple to ensure that Google Search remains the default search engine on Apple devices running on the iOS operating system has been cast in the antitrust spotlight.<sup>261</sup> The prospect of such an agreement between the merged entity and other technology companies could be considered as a possible coordinated effect in a conglomerate or also vertical merger.

### **3. Conglomerate theories of harm**

(202) Conglomerate effects may arise in concentrations that involve companies that are not connected either horizontally or vertically. Competition concerns are especially thought to arise where the companies involved operate in closely related markets, eg where products are complementary.<sup>262</sup>

(203) A number of theories of harm related to conglomerate mergers can be distinguished that are briefly set out below, followed by an analysis of how these particular theories of harm were applied in the digital and technology merger cases that were identified on a national level. Where appropriate, parallels to European Commission cases are drawn in the discussion that follows.

*i. Non-coordinated effects: Foreclosure*

a. Specificities of the theory of harm

(204) Competition concerns can arise in a conglomerate merger when a merged entity utilises its market power on one market as leverage to gain market power in another market, eg by linking the sale of its products.<sup>263</sup> Possibilities include

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<sup>259</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 79 ff.

<sup>260</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 79 ff.

<sup>261</sup> See Daisuke Wakabayashi and Jack Nicas, 'Apple, Google and a Deal That Controls the Internet' *New York Times* (25 October 2020). This deal is being challenged in *US v Google*, US District Court for the District of Columbia, Case 1:20-cv-03010 (complaint brought on 20 October 2020, amended on 15 January 2021).

<sup>262</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 5.

<sup>263</sup> See Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.8(c).

(technical or contractual) tying and (mixed or pure) bundling, including certain rebate schemes.

- (205) To assess whether this type of competitive harm would arise, an authority will assess the (a) ability and (b) incentive of the merged entity to engage in such behaviour, as well as (c) the effects of such behaviour on competition downstream.<sup>264</sup>
- (206) Concerning the ability to foreclose through linking products, the characteristics of a product and how it is purchased are relevant.<sup>265</sup> The Commission has emphasised that foreclosure concerns only arise where the merged entity has considerable market power – but not necessarily beyond the threshold of dominance – in one of the affected markets.<sup>266</sup> Economies of scale and network effects can make conglomerate foreclosure effects more pronounced.<sup>267</sup> Further factors to consider include the feasibility of a combined offering and the loss of sales by rivals.<sup>268</sup> A conglomerate’s foreclosure practices may negatively affect potential entry.<sup>269</sup> Overall, the Commission believes that such foreclosure will only be anti-competitive if it affects a ‘sufficiently large fraction of market output’.<sup>270</sup>
- (207) The UK’s Competition & Markets Authority has emphasised that foreclosure strategies related to conglomerate mergers may be particularly concerning in digital markets.<sup>271</sup> For instance, a foreclosure strategy may raise competition concerns where a product is integrated within a digital ecosystem, thereby effectively reinforcing the platform’s digital ecosystem.<sup>272</sup> While competition law does not primarily focus on the welfare of competitors, this type of ecosystem integration can effectively ensure that (potential) competitors cannot expand and the merged entity’s market power is strengthened.<sup>273</sup> A particular difficulty lies in the fact that ‘these anticompetitive effects may not emerge in full until after the market has reached maturity’, leading to considerable uncertainty in the analysis.<sup>274</sup>

b. NCAs applying the theory of harm in digital and technology mergers

- (208) A total of 15 of the 69 cases analysed in-depth assessed conglomerate theories of harm related to possible foreclosure effects. 7 of these also concerned horizontal effects, 3 of these also concerned horizontal and vertical effects, and a further 3

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<sup>264</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 94; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.32.

<sup>265</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 98.

<sup>266</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 99.

<sup>267</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 101.

<sup>268</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.33.

<sup>269</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 112.

<sup>270</sup> European Commission, Non-horizontal Merger Guidelines 2008, para 113; see also Competition & Markets Authority, Merger Assessment Guidelines 2021, paras 7.35 ff.

<sup>271</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.37.

<sup>272</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.30.

<sup>273</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.31.

<sup>274</sup> Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.37.



also concerned vertical but no horizontal effects. 2 cases exclusively related to conglomerate effects, namely the UK case of *Advanced Micro Devices/Xilinx* (2021)<sup>275</sup> and the Greek case of *Delivery Hero* (2022).<sup>276</sup> Only 3 concentrations were cleared subject to conditions, one in phase 1 and two in phase 2. The remaining 12 concentrations were unconditionally cleared, 10 in phase 1 and 2 in phase 2.

- (209) In *Rockaway Capital/Heureka* (2016), the Czech NCA was concerned that, post-merger, comparison shopping site Heureka.cz would give preferential treatment to online businesses already controlled by the acquirer, Rockaway Capital, thereby foreclosing competitors. Heureka.cz had a market share between 45-55%. The concentration was cleared subject to conditions that addressed this concern (see below, para (266)).<sup>277</sup>
- (210) In *Delivery Hero* (2022), Delivery Hero operated e-food, the leading online food delivery platform in Greece. It wanted to acquire a range of companies, namely Alfa Distributions, which is active in the wholesale supply of consumer goods to supermarkets; Inkat, which is active in the wholesale supply of groceries and operates a retail grocery store chain; Delivery.gr, which provides online intermediation services for restaurants, supermarkets, convenience stores and other local stores; and E-table, which provides online intermediation services for reservations in restaurants. The NCA only assessed conglomerate theories of harm and found that by combining the acquirer's online food ordering platform (e-food) with the targets' online intermediation services, conglomerate effects would arise. Both E-table and Delivery Hero had significant market power in their respective Greek markets. Post-merger, conglomerate foreclosure effects through bundling were likely to arise, as the merged entity would have the ability and incentive to bundle their services for business users. A further concern voiced by the authority related to the combination of data sets from both services that would allow for targeted advertisements with which no competitors could effectively compete. The concentration was cleared subject to conditions (see below, para (264)).<sup>278</sup>
- (211) Concerning a possible foreclosure strategy through bundling between the acquirer's digital learning materials and the target's distribution of such learning materials and the provision of electronic learning environments, the Dutch NCA in *Sanoma/Iddink* (2019) found that the parties could not profitably implement such a strategy based on the limited income resulting from it. The case was cleared subject to conditions based on other theories of harm (see para (256)).<sup>279</sup> In the later case of *DPG/Sanoma* (2020), DPG intended to acquire Sanoma. DPG was active in the field of news media, including the publishing of newspapers and

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<sup>275</sup> Competition & Markets Authority, *Advanced Micro Devices/Xilinx* (ME/6915/20, 29 June 2021).

<sup>276</sup> Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

<sup>277</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>278</sup> Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

<sup>279</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

door-to-door papers, radio and online services, including in the field of online job advertisements, price comparison and car and technology websites and also on the Dutch radio market. The target was active in the field of publishing a large number of magazines, offering online news and online services, including comparison websites. The Dutch NCA found that while acquirer DPG, a media company, might be able to bundle its activities on various markets with its online advertising services, DPG would not have market power in any advertising market that it could transfer to adjacent advertising markets. Post-merger, DPG would also have the ability to use its position in unpaid general online news to refer visitors to its own e-commerce activities, but again this would be unlikely to foreclose competitors. Sufficient alternative channels would remain available for recruiting visitors for providers of job and car advertisements. In the area of price comparison services, it was unlikely that a possible strategy in which hyperlinks are placed from unpaid general online news to price comparison services would lead to foreclosure. The transaction was unconditionally cleared.<sup>280</sup>

- (212) In *Crédit Mutuel Arkéa, Primonial Management, Blackfin, Latour Capital/Primonial Holding* (2015), Crédit Mutuel Arkéa, Primonial Management, Blackfin and Latour Capital wanted to acquire joint control of Primonial Holding. Amongst many others, this transaction concerned the market for price comparison websites regarding insurance and loans in which the Blackfin fund is involved, and the authority analysed possible conglomerate effects relating to this market. The French NCA did not believe any conglomerate foreclosure effects would arise related to the comparison website for loans and insurance operated by one of the parties due to that website's low market shares (0-5% for comparing loans; 10-20% for comparing insurance) and the negligible market shares of the parties in banking and insurance (0-5%).<sup>281</sup>
- (213) In *Blackbaud/Giving* (2017), the UK NCA considered whether the acquisition by an online fundraising platform (OFP) of another could raise conglomerate foreclosure effects, as the acquirer also provided payment services and customer relationship management (CRM) software. As CRM software and OFPs were not complements, and customers did not usually buy these two products from a single source, nor at the same time, it would be difficult for the merged entity to engage in a foreclosure strategy. Concerning a possible bundling of the merged entity's CRM and OFP offerings, the NCA found that Blackbaud had already unsuccessfully tried such a strategy. In addition, a discounted bundle could be pro-competitive as long as CRM competitors were not forced out of the market. Finally, the NCA also considered the possibility that the merged entity could foreclose CRM or OFP competitors by reducing the quality of data integration either between competing OFPs and Blackbaud's CRM software or between competing CRM software and the merged entity's OFPs. Here, the NCA

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<sup>280</sup> Autoriteit Consument & Markt, *DPG/Sanoma* (ACM/19/038207, 10 April 2020).

<sup>281</sup> Autorité de la concurrence, *Crédit Mutuel Arkéa, Primonial Management, Blackfin, Latour Capital/Primonial Holding* (15-DCC-105, 12 August 2015).

underlined that improving data integration between Blackbaud's CRM and its future OFPs would be pro-competitive. However, customers did not choose CRM software based on how well it integrated with only one tool, leading the NCA to conclude that the merged entity would not have the ability to engage in such a foreclosure strategy. Ultimately, the acquisition was unconditionally cleared.<sup>282</sup>

(214) In *Axel Springer/Concept Multimédia* (2018), a transaction that affected the market for online real estate classified ads, the market for classified ads in print media and the national market for online advertising markets, the French NCA assessed whether there was a risk of conglomerate effects due to the target's presence on the market for real estate classified ads in print media as well as online. The NCA considered that while the target's Logic-Immo had a considerable share of the market for real estate classified ads in print media, that market was in decline and it therefore did not possess the type of market power to allow it to leverage it on a connected market. There was therefore no risk of foreclosure on the market for online real estate classified ads. The NCA also assessed whether foreclosure was likely on the market for real estate classified ads in print media, as Logic-Immo already offered an online/offline bundle and Axel Springer's internal documents showed that such an offer was also considered by it. The NCA concluded that the merged entity would have the ability to propose such bundles or bundled rebates. Based on three different scenarios (a discount on print ads; a discount on online ads; tying or a price increase), however, it concluded that the incentive to implement such discounts for bundles or to enforce ties would be limited due to the negative effects on the merged entity. It also concluded that, in any case, the effect of such a bundle on competition on the market would be feeble.<sup>283</sup>

(215) In *TF1/Aufeminin* (2018), the French NCA assessed possible conglomerate effects between TF1's market presence in selling television advertising space and markets on which the target was present, notably the sale of online advertising space and marketing and commercial communication services. While TF1 certainly had the ability to adopt a bundling strategy in the sale of online and television advertising space, bundling TV advertising with online or radio advertising was a common strategy in this sector that TF1's competitors also engaged in. TF1's incentive to carry out this strategy was assessed through several factors. The NCA emphasised that TF1 could benefit from the complementarity of its bundle, the merging of data sets and cost synergies, and concluded that the implementation of such bundles appeared to be one of the objectives of the acquisition. TF1 would use its position on the market for television advertising space as leverage to strengthen its position on the market for online advertising space. On the latter market, however, the new entity would have a market share below 10%. Based on the strong position of TF1's competitors and low barriers to entry, and especially considering the competitive pressure emanating from Big

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<sup>282</sup> Competition & Markets Authority, *Blackbaud/Giving* (ME/6700/17, 8 September 2017).

<sup>283</sup> Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018).

Tech (with Google's market share in online advertising at 50-60%, Facebook at 10-20% and the new entity at only 0-5%), the NCA concluded that conglomerate effects could be discarded.<sup>284</sup>

- (216) The UK NCA assessed two conglomerate theories of harm in *Salesforce.com/Tableau Software* (2019). In that case, Salesforce had acquired Tableau Software. Both parties supply business intelligence (BI) software, and in particular modern BI software making use of artificial intelligence and business analytics. Salesforce also offers a customer relationship management (CRM) platform that integrates with third-party products. First of all, the UK NCA assessed whether the merged entity could foreclose competing BI software providers through technical restrictions or bundling/tying of CRM products with BI products. While the merged entity could have the ability to pursue such a foreclosure strategy, there was no incentive to do so. Second, the NCA considered whether the merged entity could foreclose competing CRM software providers through technical restrictions or bundling/tying of BI products with CRM products. The NCA emphasised that a BI tool was more valuable when it connected to multiple data sources, and in any case the costs would outweigh the benefits for the merged entity. The merger was unconditionally cleared.<sup>285</sup>
- (217) *Advanced Micro Devices/Xilinx* (2021) was the second case that exclusively focused on conglomerate effects. Given that the merged entity would have a strong market position in field programmable gate arrays (FPGAs) for datacentre applications, the UK NCA assessed whether the merged entity could bundle or tie the sale of FPGAs with the sale of its central processing units (CPUs) for datacentre services. It found, however, that the merged entity would not have the ability or incentive to foreclose datacentre CPU suppliers, as datacentre CPUs are mostly not bought together with datacentre FPGAs. Given the merged entity's strong market position in FPGAs for embedded applications, the NCA also assessed whether the merged entity could foreclose competitors supplying CPUs for embedded applications through linking sales. Again, it concluded that embedded CPUs and FPGAs were not usually used together, meaning no anti-competitive outcome was to be expected. The acquisition was unconditionally cleared.<sup>286</sup>
- (218) *Meta/Kustomer* (2021) also concerned conglomerate foreclosure effects. In particular, the UK NCA considered whether Meta (formerly Facebook) could cross-subsidise a free(mium) version of Kustomer's customer relationship management (CRM) with profits from online display advertising, thereby foreclosing competing CRM providers. The UK NCA considered that such a strategy would fit within Meta's overall business strategy of monetising 'free' services, and that Meta would have both the ability and incentive to do so. However, the NCA concluded that this would not have a negative impact on

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<sup>284</sup> Autorité de la concurrence, *TFI/Aufeminin* (18-DCC-63, 23 April 2018).

<sup>285</sup> Competition & Markets Authority, *Salesforce.com/Tableau Software* (ME/6841/19, 22 November 2019).

<sup>286</sup> Competition & Markets Authority, *Advanced Micro Devices/Xilinx* (ME/6915/20, 29 June 2021).

competition. While some competitors may be hard-hit by such a strategy, CRM providers competed on more than just price and there would remain sufficient competition on that market even if such a strategy were to be adopted. The transaction was unconditionally cleared.<sup>287</sup>

- (219) Finally, in *Auction Technology Group/Live Auctioneers* (2021), Auction Technology Group (ATG) agreed to acquire Live Auctioneers. Both operate online auction marketplaces for arts and antiques, a market which the authority noted was national in scope because of the complexity of international transactions in these goods. The UK NCA assessed conglomerate effects that may arise if the merged entity could leverage the target's strong market position in online auction marketplaces for arts and antiques in the US in order to increase the number of auction houses that used the acquirer's services in the UK, eg by engaging in a bundling strategy regarding the target's US bidder base. Based on shares of supply, however, the NCA concluded that the target did not have market power in the US, while the acquirer was already an important market player in the UK and would gain little from such a strategy. Therefore, the merged entity would only have a limited ability to engage in such a leveraging strategy. The transaction was unconditionally cleared.<sup>288</sup>

c. Discussion

- (220) In digital markets, conglomerate foreclosure can involve measures to reduce interoperability with competing products, using commercially sensitive information or data sets from one market as leverage in another, and many other types of strategies. For each type of strategy, it carefully needs to be assessed what impact this could have not only on the relevant markets at issue, but also on other relevant markets in which a digital platform is active. This is what makes conglomerate effects particularly challenging in digital market environments – but it is also a type of analysis that NCAs should not shy away from.<sup>289</sup>
- (221) The possibility that the merged entity would give preferential treatment to one of its services found within the same conglomerate, to the detriment of competitors, was already seen as a concern in the *Czech Rockaway Capital/Heureka* case, and is a concern that also surfaced in the European *Google Shopping* case,<sup>290</sup> where the abuse of dominance at issue related to such behaviour. In the Czech merger case, the remedies aimed to prevent such behaviour.
- (222) An issue that perhaps has not yet been sufficiently discussed in national merger assessments is the fact that data capabilities – relating to both personal data and non-personal data – are central to success in many digital markets and can

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<sup>287</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021).

<sup>288</sup> Competition & Markets Authority, *Auction Technology Group/Live Auctioneers* (ME/6942/21, 29 September 2021).

<sup>289</sup> As aptly put by Witt (n 13), asking who was afraid of conglomerate mergers.

<sup>290</sup> European Commission Decision of 27 June 2017, AT.39740 – *Google Search (Shopping)*; upheld on appeal in Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, ECLI :EU:T:2021:763, currently on appeal as Case C-48/22 P, *Google and Alphabet/Commission (Google Shopping)* [2022] OJ C191/10 (pending).

therefore also represent a significant competitive advantage to digital platforms in distant markets. Here, the decisional practice is still developing. The recent Greek case involving a food delivery platform points towards possibilities in this regard. Going forward, national cases will need to take into account to what extent data capabilities in one market can also be used to an incumbent's advantage in related or entirely different markets. Because of its implications for different markets, this can be looked at under a horizontal<sup>291</sup> or under a conglomerate theory of harm. While a competitive data advantage can transform into benefits for consumers, it could also lead to the foreclosure of competitors.

*ii. Coordinated effects*

a. Specificities of the theory of harm

(223) Just like horizontal and vertical mergers, a conglomerate merger may alter the market structure so as to allow companies to reach a common understanding aimed at increasing prices, limiting production or dividing the market.<sup>292</sup> The framework of analysis is the same as outlined above for coordinated effects in horizontal and vertical mergers.

b. NCAs applying the theory of harm in digital and technology mergers

(224) None of the 69 cases analysed in-depth addressed this theory of harm.

(225) As mentioned above (para (201)), the prospect of an agreement such as the one concluded between Google and Apple to maintain Google Search's status as default search engine on Apple devices<sup>293</sup> could, in the framework of a merger review, be considered as a possible coordinated effect in a conglomerate or also vertical merger.

*iii. Other effects*

a. Specificities of the theory of harm

(226) This category includes any other anti-competitive effects that a conglomerate merger may give rise to and that are not caught by the previous categories. In particular, the strengthening of a digital ecosystem could find its place here.

b. NCAs applying the theory of harm in digital and technology mergers

(227) Only one of the 69 cases analysed in-depth addressed this theory of harm. This was the unconditional clearance of *Meta/Kustomer* (2022) by the German NCA.<sup>294</sup> In that case, the NCA emphasised that this acquisition by Meta also needed to be assessed against the background of Meta's social media ecosystem. In particular, it investigated whether the acquisition could enable Meta to safeguard, further develop or strengthen its own digital ecosystem. This could

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<sup>291</sup> See European Commission, Horizontal Merger Guidelines 2004, para 36.

<sup>292</sup> European Commission, Non-horizontal Merger Guidelines 2008, paras 119 ff.

<sup>293</sup> See *Wakabayashi and Nicas* (n 261). This deal is being challenged in *US v Google*, US District Court for the District of Columbia, Case 1:20-cv-03010 (complaint brought on 20 October 2020, amended on 15 January 2021).

<sup>294</sup> Bundeskartellamt, *Meta/Kustomer* (B6-21/22, 11 February 2022).

then manifest itself on particular relevant markets, such as in social media advertising. In this respect, the NCA particularly considered the data advantage that the acquisition of Kustomer would provide Meta with. It also analysed to what extent the acquisition could help Meta to further develop its offerings. The NCA concluded that, overall, anti-competitive effects on markets in which Meta already had significant market power were entirely possible. However, it refrained from opening phase 2 proceedings as it was not possible to establish, to the required standard of probability, that the services and capabilities associated with Kustomer were of sufficient importance to lead to a strengthening of Meta's ecosystem as sketched by the NCA.

c. Discussion

(228) Theories of harm relating to the strengthening of a digital ecosystem are starting to make their way into national decisional practice, even if no legal consequences have been derived from them so far. This issue is discussed in more detail below (section V.4.i.). Suffice to say that at the European level, the European Commission's recent review of the same merger similarly led to an assessment of the combination of different types of vertical foreclosure strategies.<sup>295</sup>

#### 4. Theories of harm largely absent in the decisional practice

(229) The national case law relating to digital and technology mergers was analysed based on the most common categorisation of theories of harm available today. It is clear, however, that by sticking to these traditional categories, NCAs also necessarily stay within well-trodden paths of merger analysis. In certain circumstances, this may mean that competition concerns may be overlooked or underestimated when they arise in dynamic market environments and against the background of changing competition dynamics that would require an adjustment of the traditional analytical framework. For this reason, the following points out three considerations that may be useful when assessing the analytical framework of merger control against the background of the digitalisation of markets.

i. *Building and reinforcing a digital ecosystem*

(230) With over 800 unchallenged acquisitions over the past decade, Big Tech companies have acquired a substantial number of start-ups without any antitrust

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<sup>295</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

intervention.<sup>296</sup> This has helped the creation of a small number of vast digital ecosystems<sup>297</sup> – and may in itself raise new competition concerns.

- (231) In fact, competition concerns in today’s digital markets may arise not so much because of well-defined competition issues in specific relevant markets, and perhaps not even because of every single small merger that is completed. Instead, competition concerns related to digital platforms arise from the combined effects of these mergers in multi-sided markets with strong network effects, with a great many markets concerned. Of the over 800 acquisitions that were completed by Big Tech in recent years,<sup>298</sup> only one known instance of a prohibition by competition authorities comes to mind – the recent prohibition of the *Meta/Giphy* merger in the UK, which was challenged in court but upheld on substance.<sup>299</sup> This can mean one of three things: (i) either these mergers were not reviewed because of a lack of jurisdiction, or (ii) they are completely benign in their impact on competition, or (iii) they cannot be well depicted under currently applicable theories of harm. For instance, in digital acquisitions it is regularly the case that the acquirer has significant market power, while the target has no noteworthy market power at all and that there is therefore hardly any increment in market shares.<sup>300</sup> However, at least at the level of the European Union, recent decisional practice has shown how the significant impediment of effective competition test under Article 2 para 3 EUMR is starting to accommodate new market realities in complex digital markets that involve digital ecosystems.<sup>301</sup>
- (232) Regularly, acquisitions by digital platforms will lead to a situation where the target’s business is both in a vertical and a conglomerate relationship with the acquirer’s business. For instance, in *Apple/Shazam* (2018), the European Commission underlined that music recognition apps such as Shazam and digital music distribution apps (such as Apple Music or Spotify) were complementary or at least closely related products, that links from the music recognition app were

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<sup>296</sup> Federal Trade Commission, ‘Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study’ (September 2021) <<https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>>; American Economic Liberties Project, ‘Big Tech Mergers’ <<https://www.economicliberties.us/big-tech-merger-tracker/>>; Chris Alcantara, Kevin Schaul, Gerrit De Vynck and Reed Albergotti, ‘How Big Tech got so big: Hundreds of acquisitions’ *Washington Post* (21 April 2021) <<https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/>>; European Commission, Evaluation of procedural and jurisdictional aspects of EU merger control, SWD(2021) 66 final, para 111.

<sup>297</sup> Eg, see Konstantinos Stylianou, ‘Exclusion in Digital Markets’ (2018) 24 *Michigan Telecommunications & Technology Law Review* 181, 207; Georgios Petropoulos, ‘Competition Economics of Digital Ecosystems’ (2020) DAF/COMP/WD(2020)91; Marc Bourreau, ‘Some Economics of Digital Ecosystems’ (2020) DAF/COMP/WD(2020)89.

<sup>298</sup> On these, see the references in n 296 above.

<sup>299</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021); *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

<sup>300</sup> This was the case for a number of Irish cases in the online betting and gaming sectors, as well as in Office of Fair Trading, *Google/BeatThatQuote* (ME/4912/11, 1 July 2011).

<sup>301</sup> Eg, see European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*; European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*. On the challenges of market definition in digital ecosystems, see Robertson (n 72).



also an important tool for customer acquisition, and that data from music recognition apps could be used to improve digital music streaming apps. From this, it assessed both vertical and conglomerate foreclosure strategies. It concluded, however, that while the merged entity would have both the ability and incentive to engage in such strategies, they would not in themselves negatively impact competition.<sup>302</sup> While this might be true for individual foreclosure strategies, what is missing from this and other cases is a more comprehensive understanding of the combination of post-merger strategies that serve to further reinforce digital ecosystems and could thereby, ultimately, negatively impact competition.<sup>303</sup> The same applies to business strategies that transcend individual relevant markets that are frequently the unit of analysis for merger control. This, of course, is closely linked to the spreading of digital ecosystems and the data advantages that are encountered in digital markets. While the effects of an individual merger, viewed in isolation, might not yet give rise to the types of anti-competitive effects that the merger rules are explicitly targeting, it might be the very combination of those effects that ultimately add up to a ‘significant impediment of effective competition’ or a ‘substantial lessening of competition’.

- (233) It would seem that current enforcement guidelines do not yet envisage an assessment that takes the strengthening of a digital ecosystem into account, presumably because they were published at a time when such strategies were not yet commonplace. This is not to say, however, that the EU Merger Regulation or national merger rules necessarily stand in the way of such an assessment. Indeed, the European Commission’s recent *Meta/Kustomer* review assessed the combination of different types of vertical foreclosure strategies.<sup>304</sup> Such theories of harm need to be developed with diligence, and this certainly is work in progress: In the recent unconditional clearance of *Meta/Kustomer* in Germany (2022), for instance, the Bundeskartellamt stated that while it believed the strengthening of Meta’s digital ecosystem through the acquisition was quite likely, it could not prove this to the required legal standard and therefore did not initiate phase 2 proceedings.<sup>305</sup>
- (234) Joint ventures and minority stakes can also be avenues through which digital platforms enlarge their digital ecosystems. For instance, in the *GE/Microsoft* joint venture (2012), a health intelligence platform was created that would add to Microsoft’s increasing ecosystem.<sup>306</sup> In the *Sanofi/Google/DMI* joint venture (2016), a new company providing services for the management and treatment of diabetes was created.<sup>307</sup> And in *Amazon/Room Foods* (2020), a minority stake in a food delivery platform paved Amazon’s way back into the online restaurant

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<sup>302</sup> European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam*, paras 260 ff.

<sup>303</sup> Fletcher (n 71) paras 24 f (containing further references).

<sup>304</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>305</sup> Bundeskartellamt, *Meta/Kustomer* (B7-119/21, 11 February 2022).

<sup>306</sup> European Commission Decision of 10 February 2012, COMP/M.6474 – *GE/Microsoft/JV*. This was cleared unconditionally and subject to a simplified procedure.

<sup>307</sup> European Commission Decision of 23 February 2016, M.7813 – *Sanofi/Google/DMI JV*.

ordering market in the UK.<sup>308</sup> These should therefore be more closely observed as well.

- (235) In the European Commission's *Google/Fitbit* case (2020), the sheer number of relevant markets affected by this acquisition aptly indicated the ecosystem nature of this merger.<sup>309</sup> Most national cases, however, will not look like this because – based on the EUMR's turnover thresholds – NCAs tend to deal with much smaller transactions than the European Commission. An exception are Big Tech acquisitions of small start-ups that do not (yet) generate significant turnover and that could end up before NCAs. These cases, however, may be referred to the European Commission under Article 22 EUMR, or the notifying parties may ask for the Commission to deal with the merger under Article 4 para 5 EUMR.
- (236) The creation and strengthening of digital ecosystems are objectives that several digital platforms pursue, and should therefore not be overlooked in the merger assessment. The ways in which this can be done are manifold and merit more in-depth analysis and research.

## ii. *Data advantages*

- (237) In digital mergers, the acquisition of personal and non-personal data and data sets is regularly seen as a possible competition concern as it could foreclose competitors. At the same time, increased data capabilities can also lead to a considerable improvement in digital services to the benefit of consumers.
- (238) So far, data advantages obtained through an acquisition have been assessed as a novel horizontal unilateral theory of harm, as another type of horizontal harm, or as a vertical or conglomerate concern. While some cases dealt with the merged entity's access to commercially sensitive information about competitors,<sup>310</sup> others concerned data sets about users that could be monetised by a merged entity.<sup>311</sup>
- (239) While the non-rivalrous nature of data is often emphasised in the case law,<sup>312</sup> it should also be borne in mind that different digital platforms have varying abilities to actually access data that is relevant for competition.
- (240) In *Google/Fitbit* (2020), the European Commission assessed the data advantage stemming from the concentration in considerable detail. In that case, the Commission assessed various theories of harm relating to a large number of different relevant markets, highlighting how this transaction is embedded in a vast

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<sup>308</sup> Competition & Markets Authority, *Amazon/Rooffoods* (ME/6836/19-II, 4 August 2020).

<sup>309</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 384 (for an overview of affected markets).

<sup>310</sup> Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018); Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019); Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

<sup>311</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016); Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018).

<sup>312</sup> Eg, see Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021).

digital ecosystem of interconnected products and services.<sup>313</sup> The Commission noted that this transaction did not relate to horizontally affected markets in a traditional sense. Instead, it analysed data-related effects – arising from Fitbit as a source of data on health and personal activities – as horizontal effects, because data was recognised to constitute a valuable asset.<sup>314</sup> These effects were thought to arise in the exploitation of said data for advertising and digital healthcare.<sup>315</sup> If the merger enabled the combination of datasets, this could, in the eyes of the Commission, lead to a situation resembling the one set out in its Horizontal Merger Guidelines,<sup>316</sup> namely the gaining of such control over an asset that competitors' entry or expansion becomes more difficult.<sup>317</sup> The data accumulation through the acquisition of Fitbit would strengthen Google's dominant position in online search advertising,<sup>318</sup> and this was addressed by the Ads Commitment, which foresees that Google will not use certain health data in or for Google Ads and will operate data silos.<sup>319</sup>

- (241) Access to commercially sensitive information about competitors was at issue in cases involving horizontal, vertical as well as conglomerate effects, eg in national cases such as *esure/Gocompare.com* (UK 2015),<sup>320</sup> *Sully System/CENEJE* (SI 2018),<sup>321</sup> *MIH Food Delivery Holdings/Just Eat* (ES 2019),<sup>322</sup> *Sanoma/Iddink* (NL 2019),<sup>323</sup> *Meta/Giphy* (AT 2021),<sup>324</sup> and *Uber International/GPC Computer Software* (UK 2021).<sup>325</sup> This was also the case in the European Commission's cases of *Broadcom/Brocade* (2017)<sup>326</sup> and *Apple/Shazam* (2018).<sup>327</sup>
- (242) In other national cases, access to user data that would become available through an acquisition was at the centre of the analysis, eg in *Rockaway Capital/Heureka* (CZ 2016),<sup>328</sup> *TF1/Aufeminin* (FR 2018),<sup>329</sup> and *Meta/Kustomer* (UK 2021).<sup>330</sup>

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<sup>313</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 384 (for an overview of affected markets).

<sup>314</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, paras 385, 399.

<sup>315</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 400.

<sup>316</sup> European Commission, Horizontal Merger Guidelines 2004, para 36.

<sup>317</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 401.

<sup>318</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 468.

<sup>319</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, Commitments of 4 November 2020, p 1.

<sup>320</sup> Competition & Markets Authority, *esure Group/Gocompare.com* (ME/6495-14, 23 February 2015).

<sup>321</sup> Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018).

<sup>322</sup> Comisión Nacional de los Mercados y la Competencia, *MIH Food Delivery Holdings/Just Eat* (C/1072/19, 5 December 2019).

<sup>323</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

<sup>324</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Meta/Giphy*; Bundeswettbewerbsbehörde (n 169); Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>325</sup> Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

<sup>326</sup> European Commission Decision of 12 May 2017, M.8314 – *Broadcom/Brocade*, paras 235 ff.

<sup>327</sup> European Commission Decision of 6 September 2018, M.8788 – *Apple/Shazam*, paras 196 ff.

<sup>328</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>329</sup> Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018).

<sup>330</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021).

This was also considered in the European case of *Google/Fitbit* (2020).<sup>331</sup> Further national cases, such as *Blackbaud/Giving* (UK 2017)<sup>332</sup> and *Google/Looker* (UK 2020),<sup>333</sup> concerned data integration among digital services. *Delivery Hero* (EL 2022) related to increased capabilities to run targeted advertising.<sup>334</sup> Several national cases related to online betting and gaming concerned access to live betting exchange data or horse racing and football data.<sup>335</sup>

- (243) Overall, therefore, multiple aspects of access and use of data as well as of data integration and data protection have come into play in digital merger cases in recent years. What matters now is to consolidate the various approaches in order to develop a coherent approach to assessing data aspects in merger control. Here, policy choices will need to be made as to the extent to which questions of data protection can and need to filter into the competition assessment.

### *iii. Concentration and abuse of dominance*

- (244) In substantive terms, the theories of harm relied upon in merger control are, of course, closely related to the types of abuse of dominance that one encounters in digital markets. For instance, the UK NCA's concern in *Google/BeatThatQuote* (2011)<sup>336</sup> related to the manipulation of search results to demote rivals and to improve own services' ranking – reminiscent of the self-preferencing that the European Commission identified as anti-competitive in the abuse of dominance case of *Google Shopping* (2017).<sup>337</sup> Similar concerns arose in the *Rockaway Capital/Heureka* merger (CZ 2016).<sup>338</sup>
- (245) In the German *CTS Eventim/Four Artists* case, the German NCA highlighted that it regarded CTS Eventim's exclusivity contracts with event organisers as contributing to an abusive customer foreclosure vis-à-vis competing ticketing platforms. It believed that the same analysis had to apply when assessing this concentration.<sup>339</sup>

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<sup>331</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*.

<sup>332</sup> Competition & Markets Authority, *Blackbaud/Giving* (ME/6700/17, 8 September 2017).

<sup>333</sup> Competition & Markets Authority, *Google/Looker* (ME/6839/19, 13 February 2020).

<sup>334</sup> Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

<sup>335</sup> Competition & Markets Authority, *Betfair Group/Paddy Power* (ME/6572/15, 17 December 2015); Competition and Consumer Protection Commission, *Paddy Power/Betfair* (M/15/059, 15 January 2016); Competition and Consumer Protection Commission, *Ladbrokes/Gala Coral* (M/16/007, 10 March 2016); Competition and Consumer Protection Commission, *Flutter Entertainment/Stars Group* (M/20/001, 12 May 2020).

<sup>336</sup> Office of Fair Trading, *Google/BeatThatQuote* (ME/4912/11, 1 July 2011) para 68.

<sup>337</sup> European Commission Decision of 27 June 2017, AT.39740 – *Google Search (Shopping)*; upheld on appeal in Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, ECLI :EU:T:2021:763, currently on appeal as Case C-48/22 P, *Google and Alphabet/Commission (Google Shopping)* [2022] OJ C191/10 (pending).

<sup>338</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>339</sup> Bundeskartellamt, *CTS Eventim/Four Artists* (B6-35/17, 23 November 2017).

- (246) While a great many number of food delivery mergers were considered by several NCAs (e.g., ES 2016, 2019 and 2022; ES 2019; RO 2021; EL 2022),<sup>340</sup> the European Commission recently started investigations in that sector.<sup>341</sup> While the Commission's investigations appear to focus on a possible agreement to share markets, it will also be interesting to see to what extent competition concerns voiced in the merger decisions are encountered in the antitrust probes.
- (247) While the UK decided not to challenge Meta's acquisition of Instagram in 2012,<sup>342</sup> and both the European Commission and the United States Federal Trade Commission decided not to challenge Meta's acquisition of WhatsApp in 2014,<sup>343</sup> the Federal Trade Commission is currently trying to break up these merged entities ex post based on a claim of monopolisation.<sup>344</sup> The question whether a similar approach would also be feasible under EU law is currently being considered in a preliminary ruling before the Court of Justice of the European Union.<sup>345</sup> In *Towercast v Autorité de la concurrence*, the French Cour d'appel de Paris asked the Court to specify whether Article 21 EUMR precludes an NCA from assessing whether a concentration that has neither a Union dimension nor comes within the national jurisdictional thresholds, and that has not been referred to the European Commission based on Article 22 EUMR, may constitute an abuse of a dominant position under Article 102 TFEU. The preliminary ruling could open up new avenues in this regard.
- (248) These small glimpses into national merger control show that a more cohesive approach to abuses of dominance on the one hand and theories of harm under merger control on the other hand can be a useful tool to better grasp competition concerns in digital mergers. Here, ongoing legislative developments – e.g., new § 19a ARC<sup>346</sup> or the Digital Markets Act<sup>347</sup> – can provide a new impetus for updating theories of harm so that they better reflect economic realities.

## 5. Remedies

- (249) Two types of remedies are generally distinguished, structural remedies and behavioural remedies. Within these categories, however, a great many different

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<sup>340</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016); Comisión Nacional de los Mercados y la Competencia, *Just Eat Spain/Canary Delivery Company* (C/1046/19, 10 September 2019); Comisión Nacional de los Mercados y la Competencia, *MIH Food Delivery Holdings/Just Eat* (C/1072/19, 5 December 2019); Comisión Nacional de los Mercados y la Competencia, *Delivery Hero/Glovo* (C/1260/21, 23 February 2022); România Consiliul Concurenței, *Glovoappro/Foodpanda* (86/22.11.2021, 22 November 2021); Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

<sup>341</sup> European Commission, 'Antitrust: Commission confirms unannounced inspections in the online food delivery sector' IP/22/4345 (6 July 2022).

<sup>342</sup> Office of Fair Trading, *Facebook/Instagram* (ME/5525/12, 14 August 2012).

<sup>343</sup> European Commission Decision of 3 October 2014, COMP/M.7217 – *Facebook/WhatsApp*;

<sup>344</sup> *Federal Trade Commission v Facebook*, US District Court for the District of Columbia, Case 1:20-cv-3590 (11 January 2022).

<sup>345</sup> Case C-449/21, *Towercast v Autorité de la concurrence* [2021] OJ C452/9 (pending).

<sup>346</sup> Act against Restraints of Competition, German Federal Law Gazette I 2013/1750, 3245 as amended.

<sup>347</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, DMA) [2022] OJ L265/1.

remedies can be envisaged that may address the competition concerns raised in a specific merger.<sup>348</sup> The following sets out the various remedies that were approved in all digital and technology cases involving remedies that were analysed for this Report.

*i. Structural remedies*

- (250) A small number of national cases included structural remedies. To address the Romanian NCA's concerns related to horizontal unilateral effects in *Dante International/PC Garage* (2016) (see above, para (85)), Dante committed to (i) divest four online stores active in the non-food retail market (namely, pcfun.ro, shopit.ro, garagemall.ro and electrofun.ro) as an ongoing concern, and (ii) not to be involved in the divested activities for at least 10 years.<sup>349</sup>
- (251) To address its concerns related to horizontal unilateral effects in *Pug/StubHub* (2021) (see above, para (90)), the UK NCA required a partial divestiture of StubHub, namely of the StubHub International business (i.e., StubHub outside of North America). This was regarded as the only effective remedy for this completed transaction.<sup>350</sup>
- (252) To address the UK NCA's concerns related to horizontal unilateral effects in *Adevinta/eBay Classifieds Group* (2021) (see above, paras (87), (121)), the parties proposed the following commitments: (i) divestiture of Gumtree UK (incl Motor.co.uk) on a debt-free basis, (ii) divestiture of Shpock to RussMedia Equity Partners on a debt-free basis, (iii) provision of transitional services in relation to Shpock and Gumtree UK. The NCA accepted these commitments.<sup>351</sup>
- (253) Involving the same transaction, *eBay/Adevinta* (2021), Adevinta and eBay also agreed to commitments with the Austrian NCA to address the latter's concerns related to horizontal unilateral effects (see above, para (86)). Adevinta and eBay proposed and the Austrian NCA accepted the following commitments: (i) in order to eliminate incentives for anti-competitive behaviour, eBay reduces its economic stake in Adevinta to 33% or less within 18 months; (ii) in order to prevent eBay's ability to engage in anti-competitive behaviour, both parties take measures to prevent the exchange of information and to reduce the economic influence of eBay on willhaben.at. In particular, eBay commits to restrict the voting rights of eBay-appointed board members on issues related to willhaben.at and Adevinta commits not to exercise its right to appoint a managing director as well as several board members at willhaben.at. The commitments are binding as long as eBay appoints a director to Adevinta's board and eBay's financial or voting interest in Adevinta is 25% or higher; but for a maximum of ten years.<sup>352</sup>

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<sup>348</sup> European Commission, Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1, paras 22-70.

<sup>349</sup> România Consiliul Concurenței, *Dante International/PC Garage* (84/24.11.2016, 24 November 2016).

<sup>350</sup> Competition & Markets Authority, *Pug/StubHub* (ME/6868/19-II, 2 February 2021).

<sup>351</sup> Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).

<sup>352</sup> Bundeswettbewerbsbehörde, *eBay/Adevinta* (BWB/Z-5141, Z-5142, Z-5420 and Z-5421, 18 June 2021).

ii. *Behavioural remedies: access and interoperability*

- (254) Several national cases included various types of access remedies. To address the Austrian NCA's concerns related to customer foreclosure in *CTS Eventim/Barracuda Holding* (2019) (see above, para (179)), CTS Eventim committed that its Austrian ticketing service oeticket would, for a duration of five years, (i) provide customers that wanted to use its ticketing services with non-discriminatory access to its full range of services, including advertising contracts, and (ii) not to engage in self-preferencing in relation to the content and the way that events are promoted on oeticket.com.<sup>353</sup>
- (255) To address vertical foreclosure concerns raised in *Meta/Giphy* (2022) (see above, para (151)), the Austrian Cartel Court imposed the following conditions for clearance of the merger: Meta has to (i) provide non-discriminatory access to Giphy's GIF library for competing social media providers (for a duration of five years) and (ii) grant alternative GIF libraries, under certain conditions, access to Giphy's GIF library via programming interfaces (APIs) to allow the establishment of an additional GIF provider other than Giphy (Meta) and Tenor (Google) (for a duration of seven years).<sup>354</sup> The conditional clearance was confirmed by Austria's Supreme Cartel Court.<sup>355</sup>
- (256) To address the Dutch NCA's concerns related to vertical input foreclosure in *Sanoma/Iddink* (2019) (see above, para (153)), Sanoma agreed to (i) grant publishers access to the Magister API under fair, reasonable and non-discriminatory (FRAND) conditions, including the necessary information to enable the same link with Magister for all publishers; (ii) provide information about Magister to publishers who request this under FRAND conditions, if they provide similar information to Sanoma; and (iii) conclude a service agreement with publishers for the disclosure and use of digital learning resources of publishers via Magister, which includes the option for publishers to have it established by means of their own audit that the publisher in question gains access to the Magister API in a FRAND manner and a dispute settlement procedure is to be arranged.<sup>356</sup>
- (257) To address the Dutch NCA's concerns related to vertical input foreclosure in *NS Groep/Pon Netherlands* (2020) (see above, para (154)), the parties to the joint venture agreed to grant (potential) competitors of the joint venture, access to the application programming interfaces (APIs) of the train and OV-fiets services on equal (commercial) conditions as these are made available to the joint venture.<sup>357</sup>
- (258) In two national cases, it was considered whether exclusive licenses could constitute an effective remedy to address competition concerns related to horizontal unilateral effects, thus granting (limited) access through a license. In one case it was considered an appropriate remedy, while another time it was not

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<sup>353</sup> Bundeswettbewerbsbehörde, *CTS Eventim/Barracuda Holding* (BWB/Z-4651, 3 December 2019).

<sup>354</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Facebook/Giphy*.

<sup>355</sup> Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>356</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

<sup>357</sup> Autoriteit Consument & Markt, *NS Groep/Pon Netherlands* (ACM/20/038614, 20 May 2020).

regarded as sufficient. To address the Spanish NCA's concerns related to horizontal unilateral effects in *Schibsted/Milanuncios* (2014) (see above, para (99)), Schibsted committed to maintain the free option of direct publication of advertisements on the milanuncios.com portal. Furthermore, Schibsted committed to allow a third party (licensee) to exploit – on an exclusive basis – professional advertisements displayed on the platform related to the motor segment of milanuncios.com. The merged entity committed to let the licensee automatically export advertisements by professional advertisers to the motor section of the portal, and to access the contact details of professional advertisers. The licensee would also exclusively receive the income from classified ads published by professional advertisers in the motor segment. Among others, the licensee would be allowed to redirect user traffic from clicks on classified ads to its own platform. The exclusive license would be valid for two years.<sup>358</sup>

- (259) To address the Swedish NCA's concerns related to horizontal unilateral effects in *Blocket/Hemnet* (2016) (see above, para (76)), Blocket proposed to grant an exclusive license to a smaller website (Bovision) for a certain period of time, whereby Blocket would automatically refer users that were accessing its website for properties sold through realtors to Bovision. This would, in the acquirer's view, remove the horizontal overlap between Blocket and Hemnet. As Bovision was only a very small player however, the NCA did not consider this an effective remedy. In relation to real estate agencies, the remedies proposed by Blocket involved limitations of sellers' commitments to future advertising on Hemnet, a time-limited price cap for advertisements, and further commitments. As the market test was overall negative, and the NCA did not believe this to be an effective remedy, the authority moved to block the concentration. Faced with this possibility, the parties withdrew their notification.<sup>359</sup>

*iii. Further types of behavioural remedies*

- (260) A range of different behavioural remedies apart from access remedies were included in national cases. There have been a number of mergers related to food delivery services, covering Spain, Romania and Greece. Competition concerns related to these concentrations were resolved through very similar commitments that aimed at preventing exclusivity obligations for business partners.
- (261) To address the Spanish NCA's concerns related to horizontal unilateral effects in *Just Eat/La Nevera Roja* (2016) (see above, para (81)), Just Eat proposed and the Spanish NCA accepted the following commitments: (1) not to impose exclusivity on restaurants (currently or in the future) affiliated with it; (2) no tying of commissions paid by affiliated restaurants (current or in the future) to an exclusivity obligation; (3) no penalisation of affiliated restaurants (current or in the future) for joining third platforms. The public documents did not state the duration of these commitments. Just Eat further promised to communicate these

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<sup>358</sup> Comisión Nacional de los Mercados y la Competencia, *Schibsted/Milanuncios* (C/0573/14, 20 November 2014).

<sup>359</sup> Konkurrensverket, *Blocket/Hemnet* (84/2016, 2016).



commitments to its affiliates within two weeks of them being accepted by the NCA. The NCA considered that these commitments would severely limit Just Eat's ability to engage in exclusivity strategies, thus allowing restaurants to continue multi-homing. Bearing in mind the expansive nature of the relevant market and different competitive strategies employed by different platforms, the NCA considered that the commitments would allow the market to remain competitive.<sup>360</sup>

- (262) To address the Romanian NCA's concerns related to horizontal unilateral effects in *Glovoappro/Foodpanda* (2021) (see above, para (84)), Glovo offered and the Romanian NCA accepted the following commitments related to exclusivity clauses with restaurants: Glovo would (1) not impose an exclusivity obligation on restaurants in current or future intermediation agreements with restaurants, (2) not contractually base the level of commissions paid by restaurants on exclusivity, (3) not penalize restaurants for joining another online food ordering platform, and (4) not renew the target's exclusivity obligations vis-à-vis restaurants.
- (263) To address the Spanish NCA's concerns related to horizontal unilateral effects in *MIH Food Delivery Holdings/Just Eat* (2019) (see above, para (83)), MIH proposed the following commitments: (1) MIH would not obtain access to commercially sensitive information of either Delivery Hero or Glovo; (2) MIH would not influence Glovo's strategy in markets where it competed (or may compete) with Just Eat in Spain; (3) Delivery Hero (and Glovo) would not be able to access commercially sensitive information of Just Eat. These commitments would be binding for three years.<sup>361</sup>
- (264) In the recent case of *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (2022), the Greek NCA only cleared these acquisitions by the food-delivery platform Delivery Hero subject to conditions, namely that Delivery Hero would not bundle food-ordering services with restaurant-reservation services when offering these to business users. This non-bundling commitment was also not allowed to be circumvented by offering rebates or lower fees. Furthermore, Delivery Hero committed that it would not use data collected from its food-delivery platform for personalised advertising for its restaurant-booking services (or vice versa) unless users consented to this in accordance with applicable data protection rules.<sup>362</sup> The commitments were entered into for a duration of two years, but depending on market developments the Greek NCA can prolong them by an additional year.<sup>363</sup>

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<sup>360</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016).

<sup>361</sup> Comisión Nacional de los Mercados y la Competencia, *MIH Food Delivery Holdings/Just Eat* (C/1072/19, 5 December 2019).

<sup>362</sup> Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

<sup>363</sup> 'Delivery Hero wins conditional approval for Greek acquisitions' *MLex* (2 May 2022) <[https://content.mlex.com/#/content/1374846?referrer=email\\_dailycontentset&dailyId=137821cefd9e45fbb3e5c211a46cffb5](https://content.mlex.com/#/content/1374846?referrer=email_dailycontentset&dailyId=137821cefd9e45fbb3e5c211a46cffb5)>.

- (265) In a further case, non-exclusivity was equally seen as a remedy to resolve concerns related to vertical input foreclosure. In the Austrian case of *CTS Eventim/Barracuda Holding* (2019) (see above, para (151)), CTS Eventim committed that its Austrian ticketing service oeticket would, for a duration of five years, (i) not require exclusivity from brick-and-mortar resellers, (ii) not require exclusivity from customers of its JetTicket brand, and (iii) not impose exclusivity beyond two years with white label ticketing platforms in Austria.<sup>364</sup>
- (266) To address the Czech NCA's concerns related to vertical effects in *Rockaway Capital/Heureka* (2016) (see above, para (191)), Rockaway Capital proposed to limit the possibility to gather excessive data related to a specific, score-based service that shows the reliability of the online store from the customers' perspective. In particular, Heureka.cz would not oblige sellers to provide other data than the users' email addresses, and it was not allowed to favour sellers that provided more data or disadvantage those who did not.<sup>365</sup>
- (267) To address the Slovenian NCA's concerns related to vertical input foreclosure and other vertical effects in *Sully System/CENEJE* (2018) (see above, paras (155) and (193)), the parties offered the following commitments to the authority: (i) Ceneje would not discriminate, either directly or indirectly, between online retailer ads, in particular with regard to appearance and display, (ii) Ceneje would maintain neutral and objective search and ranking algorithms used for online retailers' ads, (iii) Ceneje would maintain neutral and objective recommendations, (iv) Sully System's website would include a statement that Ceneje is a member of the Rockaway Group, (v) Sully System would ensure that Ceneje meets all its obligations in the proposed commitments, (vi) Sully System would provide historical price data to the authority every six months for a period of 30 months.<sup>366</sup>
- (268) To address the Dutch NCA's concerns related to other non-coordinated vertical effects, namely the access to commercially sensitive information, in *Sanoma/Iddink* (2019) (see above, para (192)), Sanoma agreed to implement internal measures to ensure that Sanoma does not have access to competitively sensitive information about other publishers.<sup>367</sup>
- (269) Only in one case were remedies designed to address conglomerate effects arising from a merger. To address the Czech NCA's concerns related to conglomerate foreclosure in *Rockaway Capital/Heureka* (2016) (see above, para (209)), Rockaway Capital proposed to include a clear link between Heureka.cz and other Rockaway Capital activities on the website, and committed not to discriminate against independent sellers, especially as regards the prescribed number of positions of recommended shops and the minimum number of search results.<sup>368</sup>

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<sup>364</sup> Bundeswettbewerbshörde, *CTS Eventim/Barracuda Holding* (BWB/Z-4651, 3 December 2019).

<sup>365</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>366</sup> Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018).

<sup>367</sup> Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

<sup>368</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

*iv. Discussion*

- (270) It is notable that very few national cases resorted to structural remedies in order to address competition concerns. If this occurred, then it was to address horizontal unilateral effects. Behavioural remedies have been the prevalent way to resolve competition concerns in national merger cases in the digital and technology sectors.
- (271) Over the past years, access and interoperability commitments have become a regularly encountered remedy in digital merger cases. In particular, the access to APIs on non-discriminatory terms, as was also required in *Google/Fitbit* (2020),<sup>369</sup> has become a more frequent type of access remedy that intends to ensure interoperability so that no foreclosure effects can arise while at the same time enabling efficiencies from mergers to materialise. Other types of access remedies included access to services and access to a GIF library. None of the national cases analysed in-depth led to a finding of vertical input foreclosure that warranted the granting of a license that would be comparable to the licenses that resolved the competition concerns in *Avago/Broadcom*.<sup>370</sup>
- (272) Behavioural remedies outside of access commitments constituted the most prevalent types of remedies found in national cases. While an exclusive license for exploiting professional advertisements was considered an effective remedy to address a concern related to horizontal unilateral effects (*Schibsted/Milanuncios* 2014), this type of remedy was proposed but not considered sufficient in a further case (*Blocket/Hemnet* 2016). In a range of cases revolving around digital platforms, non-exclusivity commitments were seen as appropriate remedies to address possible horizontal unilateral effects. When it comes to addressing concerns related to vertical effects, these were resolved with behavioural remedies such as transparency provisions, the commitment not to engage in self-preferencing, non-discrimination commitments, and a commitment not to access commercially sensitive information.
- (273) It is notable that no national cases included commitments to keep certain acquired data sets separate – as was the case in the European Commission’s *Google/Fitbit* decision (2020).<sup>371</sup>
- (274) While conglomerate concerns appear to be on the rise in digital mergers, no extensive experience with remedies to address these concerns has been gathered on a national level. Only one case addressed competition concerns related to conglomerate effects, and required the merging party to make its link with the target transparent and not to discriminate against independent sellers. Here, the question needs to be asked to what extent and under what circumstances behavioural remedies can be sufficient to address such concerns, particularly

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<sup>369</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, Commitments of 4 November 2020, p 3.

<sup>370</sup> European Commission Decision of 23 November 2015, M.7686 – *Avago/Broadcom*, paras 119 ff (for the commitments offered).

<sup>371</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, Commitments of 4 November 2020, p 1.

where an acquirer owns a digital ecosystem in which monitoring behavioural commitments can be particularly challenging. For this purpose, an independent expert (i.e., a software engineering company) was appointed in *Google/Fitbit* (2020) in order to assist the monitoring trustee with reviewing the implementation of the commitments.<sup>372</sup> A similar approach was taken in the commitments offered in the Commission's *Meta/Kustomer* case (2022).<sup>373</sup>

- (275) To allow for a comparison, several examples shall illustrate remedies that the European Commission has regarded as apt in cases involving conglomerate effects: In *Broadcom/Brocade* (2017), the Commission was concerned that the merged entity could foreclose competitors by degrading the interoperability of the merged entity's FC SAN switches with competing components, as well as by misusing confidential information it may obtain on suppliers of competing components, in particular regarding Cisco (conglomerate effects). The Commission accepted the parties' revised commitments in this respect, which consisted of an interoperability commitment and a commitment to protect confidential information.<sup>374</sup> In *Qualcomm/NXP Semiconductors* (2018), licensing and interoperability commitments were designed to address the Commission's concerns that the merged entity could engage in a number of conglomerate foreclosure strategies to its own advantage. A number of divestitures of patents also formed part of the commitments.<sup>375</sup>
- (276) In *Microsoft/LinkedIn* (2016), the European Commission raised competition concerns related to conglomerate foreclosure effects through a pre-installation of professional social network (PSN) LinkedIn on Microsoft Windows PCs and a degradation of interoperability with competing PSNs. These concerns were also addressed through access remedies as well as the possibility for original equipment manufacturers to uninstall LinkedIn should it be pre-installed. The access remedies ensured that not only would Microsoft refrain from pre-installing LinkedIn on its Windows operating system, but it would also maintain the interoperability of competing PSNs with its Office products, eg through APIs.<sup>376</sup> In *Google/Fitbit* (2020), certain API commitments were designed to address the European Commission's concerns that Google could leverage its dominant position in licensable smart operating systems to the market for wrist-worn wearables, eg by degrading the interoperability of Android smartphones with other wearables than Fitbit through APIs.<sup>377</sup> Similarly, in *Meta/Kustomer* (2022), the European Commission accepted a commitment from Meta to make its B2C

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<sup>372</sup> See, in particular, European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, para 28 of the commitments.

<sup>373</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*, para 17 of the commitments.

<sup>374</sup> European Commission Decision of 12 May 2017, M.8314 – *Broadcom/Brocade*, paras 235 ff.

<sup>375</sup> European Commission Decision of 18 January 2018, M.8306 – *Qualcomm/NXP Semiconductors*, paras 491-807, 808-918 and Commitments, p 6-9.

<sup>376</sup> European Commission Decision of 6 December 2016, M.8124 – *Microsoft/LinkedIn*, paras 278-352 and Commitments, p 5-7.

<sup>377</sup> European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*, paras 716-817 and Commitments of 4 November 2020, p 4-5.

messaging channel APIs available to third parties that provide customer relationship management software on a non-discriminatory basis.<sup>378</sup>

## 6. Prohibition decisions

- (277) Out of all 97 cases analysed, only 6 led to prohibition decisions.<sup>379</sup> These 6 prohibitions shall briefly be outlined in the following to appreciate which theories of harm led to these far-reaching merger decisions.
- (278) In *Swedbank Franchise/Svensk Fastighetsförmedling* (2014), a concentration was blocked because of concerns about horizontal unilateral effects and vertical input foreclosure. For the purposes of this Report, the latter is of particular interest (see above, para (148)).<sup>380</sup> This was the first time a Swedish court prohibited a merger.
- (279) In *CTS Eventim/Four Artists* (2017), the German NCA's concerns related to horizontal unilateral effects (see above, para (77)) as well as vertical customer foreclosure (see above, para (178)) led to the prohibition of this acquisition.<sup>381</sup> The parties appealed the prohibition before the Higher Regional Court Düsseldorf, which confirmed the Bundeskartellamt's prohibition decision.<sup>382</sup> Upon further appeal, this was also confirmed by the German Federal Court.<sup>383</sup>
- (280) In the Hungarian case of *Magyar RTL Televízió/Central Digitális Média* (2017), an acquisition was blocked based on media law (see above, para (137)).<sup>384</sup>
- (281) The completed acquisition in *Tobii/Smartbox* (2019) was prohibited and the divestiture of Smartbox ordered due to competition concerns related to horizontal unilateral effects (see above, para (78)) as well as vertical input (see above, para (149)) and customer (see above, para (177)) foreclosure.<sup>385</sup> Tobii had proposed two different sets of remedies to the UK NCA, with a structural element to address the horizontal competition concerns and a behavioural element to address the vertical competition concerns. Concerning the structural element, Tobii proposed to divest Smartbox's augmentative assistive communication (AAC) hardware business (partial divestiture) and to keep Smartbox's AAC software business, while granting the buyer a perpetual license for Smartbox's popular software on FRAND terms as well as allowing it to resell Tobii's eye gaze cameras. However,

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<sup>378</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*, para 1 of the commitments.

<sup>379</sup> Although *Meta/Giphy* in the UK is labelled as a 'clearance' decision of an already completed acquisition, this amounted to a substantive prohibition by requiring a full divestiture of the target, and is therefore also counted as such; Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

<sup>380</sup> Stockholms tingsrätt, *Swedbank Franchise/Svensk Fastighetsförmedling* (T 3629-14, 16 December 2014).

<sup>381</sup> Bundeskartellamt, *CTS Eventim/Four Artists* (B6-35/17, 23 November 2017).

<sup>382</sup> Oberlandesgericht Düsseldorf, 5 December 2018, Kart 3/18 (V) – *CTS Eventim/Four Artists*.

<sup>383</sup> Although the Higher Regional Court had not allowed a further appeal on legal grounds, the Federal Court decided to accept such an appeal (even after the parties had abandoned the merger); Bundesgerichtshof, 24 March 2020, KVR 3/19 – *CTS Eventim/Four Artists*. Subsequently, the Federal Court confirmed the Bundeskartellamt's decision that the strengthening of a dominant position can be a valid reason for prohibiting a merger where competition would be further limited by a concentration; Bundesgerichtshof, 12 January 2021, KVR 34/20 – *CTS Eventim/Four Artists*.

<sup>384</sup> Gazdasági Versenyhivatal, *Magyar RTL Televízió/Central Digitális Média* (Vj/87/2016, 24 January 2017).

<sup>385</sup> Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).

the NCA concluded that these commitments would not effectively address the competition concerns it had identified, based on a risk framework including specification risks, circumvention risks, distortion risks and monitoring and enforcement risks. Based thereon, the NCA concluded that the proposed remedies would not fully address these risks and would only have a limited impact in addressing the competition concerns identified. Full divestiture was regarded as the only effective remedy available.

- (282) While the Competition Appeal Tribunal agreed with Tobii that the Competition & Markets Authority's had not provided sufficient evidential basis for its concerns relating to partial input foreclosure, it upheld the NCA's divestiture decision on all but this one ground.<sup>386</sup> Tobii was not granted permission to appeal that decision.<sup>387</sup> Tobii has since divested Smartbox.<sup>388</sup>
- (283) In *Sabre/Farelogix* (2020), the proposed acquisition of Farelogix by Sabre was also prohibited by the UK NCA based on horizontal unilateral effects (see above, para (79)).<sup>389</sup> The parties had offered commitments to the authority, including (i) making Farelogix's FLX Services available at the same or lower prices to those at the time, including levels of support, for an agreed-upon period of time, (ii) offering all current Sabre GDS customers and all current FLX OC customers the opportunity to extend their existing contract on the same terms for a period of at least three years, (iii) to continue investing in the development of FLX Services capabilities at levels no less than current levels, for an agreed-upon period of time, and (iv) to continue to offer and support FLX Services capabilities to any third parties and all outlets that wish to use them to connect to Sabre, other GDSs, other distribution partners, or directly to travel agents on an agnostic basis, for an agreed-upon period of time. The NCA concluded, however, that the parties' remedies proposal did not weigh up the loss of competition that would result from Farelogix no longer being an independent player that competes to meet airlines' evolving needs. It regarded the prohibition of the merger as the only effective means of avoiding a significant lessening of competition.
- (284) The Competition Appeal Tribunal dismissed Sabre's appeal of the NCA decision.<sup>390</sup> As a result of this case, the merger was terminated on 1 May 2020.<sup>391</sup> In the United States, the Department of Justice equally sought to prohibit the merger that it viewed as 'a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out'.<sup>392</sup> While this case was cleared by

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<sup>386</sup> *Tobii/Smartbox*, [2020] CAT 1, 10 January 2020.

<sup>387</sup> *Tobii/Smartbox*, [2020] CAT 6, 17 February 2020.

<sup>388</sup> 'Tobii divests Smartbox' (6 October 2020) <<https://www.tobii.com/group/news-media/press-releases/2020/10/tobii-divests-smartbox/>>.

<sup>389</sup> Competition & Markets Authority, *Sabre/Farelogix* (ME/6806/19-II, 9 April 2020).

<sup>390</sup> *Sabre/Farelogix*, [2021] CAT 11, 21 May 2021.

<sup>391</sup> 'Sabre and Farelogix \$360m merger deal cancelled' (1 May 2020) <<https://www.phocuswire.com/sabre-farelogix-merger-terminated>>.

<sup>392</sup> *Sabre/Farelogix*, Complaint in Case 1:19-cv-01548-UNA (20 August 2019).

- a US District Court in a rather controversial judgment,<sup>393</sup> the case was subsequently vacated because the parties abandoned their merger.<sup>394</sup>
- (285) Most recently, the UK NCA ‘cleared’ Meta’s completed acquisition of Giphy subject to conditions in December 2021 – with the condition being a full divestiture of Giphy, thus effectively amounting to an ex post prohibition.<sup>395</sup> The NCA voiced concerns related to horizontal effects (loss of a potential competitor; see above, para (118)) as well as to vertical input foreclosure (see above, para (150)). In order to address the authority’s concerns, Meta had offered a number of commitments: (i) an open access remedy relating to APIs, (ii) a commingling remedy that would allow Giphy search results to be interspersed with results from another GIF provider, and (iii) a white label licensing remedy to sell a white label copy of Giphy’s content library and a license to use Giphy’s search algorithm for five years. The authority was not satisfied with these proposed behavioural commitments as the competition concerns that arose in this dynamic market would not be alleviated by time-limited behavioural changes. It also highlighted a risk of Meta circumventing the commitments, and difficulties in monitoring and enforcing.
- (286) This case was on appeal before the Competition Appeal Tribunal on six grounds, of which the Tribunal dismissed five and only upheld one in relation to a failure on the part of the UK NCA to properly consult with the parties.<sup>396</sup>
- (287) Overall, the picture on prohibitions of digital mergers is rather straightforward: apart from the special Hungarian case based on media law, all prohibitions related to the loss of an actual competitor (plus, in one case, vertical customer foreclosure) or the loss of a potential competitor plus vertical input foreclosure. This shows that horizontal theories of harm continue to be regarded as the most credible threat to competitive markets, also in digital environments, despite recent research that has shown that conglomerate (and vertical) effects resulting from digital mergers merit closer scrutiny.<sup>397</sup>

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<sup>393</sup> *US v Sabre/Farelogix*, 452 F. Supp. 3d 97 (D. Del. 2020). That court applied two-sided market theory in a way that does not correspond to market realities (see p 136), holding that two-sided platforms cannot compete with one-sided market offerings based on *Ohio v American Express*, 138 S. Ct. 2274, 2285 (2018).

<sup>394</sup> As the Department of Justice explained when asking the US Court of Appeals for the Third Circuit to vacate the District Court judgment, it also did so because that judgment’s pronouncements regarding competition among one- and two-sided businesses would have too much of a bearing on future antitrust cases; US Department of Justice’s Motion to Vacate, Case No. 20-1767 (12 May 2020). The District Court’s judgment was vacated on 20 July 2020.

<sup>395</sup> Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

<sup>396</sup> *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

<sup>397</sup> Witt (n 13).

## VI. Conclusions

- (288) In Europe, national merger cases in digital and technology markets have proliferated in recent years. This has enabled the comparative analysis of the decisional practice carried out in this Report. This comparison allows us, for the first time, a glimpse into the theories of harm that NCAs have applied in these merger cases as well as a better understanding of the types of remedies that NCAs regarded as effective to address the competitive concerns they found to arise.
- (289) While this conclusion is not the place to repeat the main findings deduced from this comparison – for this, the reader is referred to the executive summary and the introduction – it is safe to say that the NCA analysis still very much runs along the traditional lines of horizontal – vertical – conglomerate effects. Within these traditional categories, however, NCAs are increasingly accommodating the specific characteristics of competition in digital and technology markets: data and data capabilities as an important asset, multi-homing of users as a factor to consider, the presence of Big Tech conglomerates as a competitive force that smaller players need to reckon with, ecosystem competition, and many more. Types of anti-competitive behaviour that appear to be encountered more frequently in these digital and technology markets are also increasingly being considered when remedies are negotiated.
- (290) Going forward, it will be useful to keep two things in mind: First of all, digital markets are often highly dynamic, meaning that merger analysis may need to go beyond the traditional framework in order to do better justice to the complexities of digital markets. While the merger laws are often flexible enough to accommodate markets that are constantly evolving, they also need to be applied with this flexibility in mind. Here, it will be decisive how courts review NCA decisions in digital and technology markets. Merger remedies also need to adapt to this dynamism. As was seen, access and interoperability remedies have already become an often-used remedy in these types of cases, and this may increase as we move into the future.
- (291) Secondly, as national merger control is increasingly gaining experience in assessing mergers in digital markets with a focus on keeping these markets competitive, cooperation among NCAs and between the European Commission and NCAs will remain essential. For Europe, it continues to be the case that numerous mergers in the digital sphere are analysed at a national level, as they can only reach the European Commission based on a referral from NCAs or a request from the parties as long as European turnover thresholds are not reached. Here, European consistency will continue to depend on close cooperation between and among NCAs and the European Commission. This is what is required in order for merger control in Europe to reach its full potential.
- (292) In some parts of this world, legislative proposals have already been tabled to better adapt merger control to digital markets. While a Report comparing national merger cases is not the place to discuss any such proposals in detail, it is worth noting that no such proposals have been adopted yet. In the UK, a bespoke merger



regime for digital mergers was proposed that should not only include a transaction value threshold but also bring about a change in the probability standard that applies to mergers of companies with a strategic market status.<sup>398</sup> Currently, it appears that these legislative proposals will not be adopted as originally planned.<sup>399</sup>

- (293) A legislative act that was recently published is the Digital Markets Act (DMA) at the European Union level.<sup>400</sup> In the DMA, a certain concern with mergers by Big Tech has become palpable. First of all, designated gatekeepers will need to keep the European Commission informed of their acquisitions, thus allowing the Commission to monitor their M&A behaviour and giving it insights into acquisition strategies by gatekeepers.<sup>401</sup> The DMA also goes further and foresees that once a designated gatekeeper has systematically infringed the DMA, the Commission may not only increase the fine to 20% (instead of 10%) of the previous year's turnover,<sup>402</sup> but it may also impose, based on a market investigation into that systematic non-compliance, a remedy that can include 'the prohibition, during a limited period, for the gatekeeper to enter into a [merger] regarding the core platform services or the other services provided in the digital sector or enabling the collection of data that are affected by the systematic non-compliance'.<sup>403</sup> While this new power will have to be tried and tested, it indicates that the buying spree on which many Big Tech companies have gone over the past decade has raised concerns as to the contestability of these markets.
- (294) In the area of soft law, the Korean Fair Trade Commission (KFTC) just launched a study into platform merger review, inquiring into the types of harms that such merger reviews should focus on.<sup>404</sup>
- (295) Apart from the legislative and soft law proposals that are currently underway in different parts of the world, a lot can be done with the merger laws we currently have in Europe. For the future, it could be useful to frame theories of harm more in line with the complex and interrelated market realities that we find in the digital environment, and thereby obtain a clearer view of the three issues that have, so far, only been assessed in a smaller number of national cases: digital ecosystems, data advantages and the interaction of mergers with abuse of dominance. A review of the national decisional practice on digital and technology mergers against the

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<sup>398</sup> Secretary of State for Digital, Culture, Media & Sport and Secretary of State for Business, Energy and Industrial Strategy (n 65).

<sup>399</sup> Ibitoye (n 65).

<sup>400</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, DMA) [2022] OJ L265/1.

<sup>401</sup> Article 14 DMA. More precisely, that Article speaks of concentrations 'where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data'.

<sup>402</sup> Article 30 para 2 DMA.

<sup>403</sup> Article 18 para 2 DMA.

<sup>404</sup> Wooyoung Lee, 'South Korea launches new study to come up with platform merger review guidelines' *MLex* (15 March 2022) <[https://content.mlex.com/#/content/1365494?referrer=email\\_dailycontentset&dailyId=f986fa0ee8864bdba7c0d88f4b4892fc](https://content.mlex.com/#/content/1365494?referrer=email_dailycontentset&dailyId=f986fa0ee8864bdba7c0d88f4b4892fc)>.

background of the European decisional practice, such as the one carried out in this Report, may be a good starting point for further developing merger control in Europe and beyond in order to enable it to fully capture the anti-competitive effects that certain digital mergers are capable of producing.

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*Meta/Giphy*, [2022] CAT 26, 14 June 2022.

*Sabre/Farelogix*, [2021] CAT 11, 21 May 2021.

*Tobii/Smartbox*, [2020] CAT 1, 10 January 2020.

*Tobii/Smartbox*, [2020] CAT 6, 17 February 2020.

- Office of Fair Trading, *Google/BeatThatQuote* (ME/4912/11, 1 July 2011).
- Office of Fair Trading, *Facebook/Instagram* (ME/5525/12, 14 August 2012).
- Office of Fair Trading, *Web Reservations/Hostelbookers.com* (ME/6062/13, 2 August 2013).
- Competition & Markets Authority, *esure Group/Gocompare.com* (ME/6495-14, 23 February 2015).
- Competition & Markets Authority, *Ticketmaster/Seatwave/Timbre* (ME/6505-14, 26 March 2015).
- Competition & Markets Authority, *Financière Richmond/Net-A-Porter* (ME/6538-15, 2 September 2015).
- Competition & Markets Authority, *CliniSys Group/Roper Technologies* (ME/6564/15, 11 December 2015).
- Competition & Markets Authority, *Betfair Group/Paddy Power* (ME/6572/15, 17 December 2015).
- Competition & Markets Authority, *Mapil Bidco/Chain Reaction Cycles/Decade* (ME/6569/16, 30 June 2016).
- Competition & Markets Authority, *Ladbrokes/Gala Coral* (ME/6556-15-II, 26 July 2016).
- Competition & Markets Authority, *ZPG/Websky* (ME/6690/17, 29 June 2017).
- Competition & Markets Authority, *Blackbaud/Giving* (ME/6700/17, 8 September 2017).
- Competition & Markets Authority, *Just Eat/Hungryhouse* (ME/6659-16-II, 16 November 2017).
- Competition & Markets Authority, *Moneysupermarket.com/Decision Technologies* (ME/6749/18, 7 August 2018).
- Competition & Markets Authority, *eBay/Motors.co.uk* (ME/6774/18, 12 February 2019).
- Competition & Markets Authority, *PayPal/iZettle* (ME/6766/18-II, 12 June 2019).
- Competition & Markets Authority, *Salesforce.com/Tableau Software* (ME/6841/19, 22 November 2019).
- Competition & Markets Authority, *Tobii/Smartbox* (ME/6780/18-II, 15 August 2019).
- Competition & Markets Authority, *Google/Looker* (ME/6839/19, 13 February 2020).
- Competition & Markets Authority, *Flutter Entertainment/Stars Group* (ME/6865/19, 31 March 2020).
- Competition & Markets Authority, *Sabre/Farelogix* (ME/6806/19-II, 9 April 2020).
- Competition & Markets Authority, *Amazon/Roofoods* (ME/6836/19-II, 4 August 2020).
- Competition & Markets Authority, *Pug/StubHub* (ME/6868/19-II, 2 February 2021).
- Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).
- Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).
- Competition & Markets Authority, *SK hynix/Intel* (ME/6913/20, 28 June 2021).
- Competition & Markets Authority, *Advanced Micro Devices/Xilinx* (ME/6915/20, 29 June 2021).
- Competition & Markets Authority, *Turnitin/Ouriginal* (ME/6931/21, 26 July 2021).
- Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021).



Competition & Markets Authority, *Auction Technology Group/Live Auctioneers* (ME/6942/21, 29 September 2021).

Competition & Markets Authority, *Decision to impose a penalty on Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002* (20 October 2021).

Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021).

Competition & Markets Authority, *Decision to impose a penalty on Meta Platforms, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002* (4 February 2022).

Competition & Markets Authority, *Microsoft/Nuance* (ME/6940/21, 2 March 2022).

## **United States**

*Ohio v American Express*, 138 S. Ct. 2274, 2285.

*US v Sabre/Farelogix*, 452 F. Supp. 3d 97 (D. Del. 2020).

*US v Google*, US District Court for the District of Columbia, Case 1:20-cv-03010 (complaint brought on 20 October 2020, amended on 15 January 2021).

*Federal Trade Commission v Facebook*, US District Court for the District of Columbia, Case 1:20-cv-3590 (11 January 2022).

Federal Trade Commission, Statement Concerning *Google/DoubleClick*, FTC File No. 071-0170 (11 December 2007).

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## Annex I: 97 national cases on digital and technology mergers, coded by outcome

Outcome	
UCPH1	Unconditional clearance phase 1
UCPH2	Unconditional clearance phase 2
CCPH1	Conditional clearance phase 1
CCPH2	Conditional clearance phase 2
PROH	Prohibition
WITH	Withdrawal
NONAPP	Non-applicability

ID running number of the case summaries provided in Annex III. Where an ID is assigned, the national decision was also coded based on the theories of harm employed (see Annex II).

ID	Country	Decisional body	Date	Case name	Case number	Outcome
1	AT	Bundeswettbewerbsbehörde	03.12.2019	<i>CTS Eventim/Barracuda Holding</i>	BWB/Z-4651	CCPH1
2	AT	Bundeswettbewerbsbehörde	18.06.2021	<i>eBay/Adevinta</i>	BWB/Z-5141, Z-5142, Z-5420 and Z-5421	CCPH1
3	AT	Kartellgericht	07.02.2022	<i>Meta/Giphy</i>	28 Kt 8/21t and 28 Kt 9/21i	CCPH2
	BG	Комисия за защита на конкуренцията	11.10.2016	<i>Net Info/Credit Garant</i>	818/11.10.2016	UCPH1
	BG	Комисия за защита на конкуренцията	01.08.2019	<i>Ozone Entertainment/Pulsar</i>	906/01.08.2019	UCPH1
	CY	Επιτροπή Προστασίας Ανταγωνισμού	12.06.2020	<i>CVC Capital Partners/Skroutz Internet Services</i>	23/2020	UCPH1
	CY	Επιτροπή Προστασίας Ανταγωνισμού	01.09.2021	<i>Tencent/IC Entertainment</i>	58/2021	UCPH1
4	CZ	Úřad pro ochranu hospodářské soutěže	16.05.2016	<i>Rockaway Capital/Heureka</i>	ÚOHS-S0013/2016/KS-21123/2016/840/DVá	CCPH1

ID	Country	Decisional body	Date	Case name	Case number	Outcome
	CZ	Úřad pro ochranu hospodářské soutěže	27.06.2016	<i>Rockaway Capital/Sully System/Netretail</i>	ÚOHS-S0223/2016/KS-26867/2016/840/DVá	UCPH1
9	DE	Bundeskartellamt	20.04.2015	<i>Axel Springer/Immowelt</i>	B6-39/15	UCPH1
10	DE	Bundeskartellamt	24.07.2015	<i>ProSiebenSat.1/Verivox</i>	B8-76/15	UCPH1
11	DE	Bundeskartellamt	22.10.2015	<i>OCPE II Master/EliteMedianet</i>	B6-57/15	UCPH2
12	DE	Bundeskartellamt	03.01.2017	<i>CTS Eventim/FKP Scorpio</i>	B6-53/16	UCPH2
13	DE	Bundeskartellamt	23.11.2017	<i>CTS Eventim/Four Artists</i>	B6-35/17	PROH
14	DE	Bundeskartellamt	17.12.2019	<i>PayPal/Honey Science</i>	B6-86/19	UCPH1
15	DE	Bundeskartellamt	11.11.2019	<i>Cisco Systems/Acacia Communications</i>	B7-205/19	UCPH1
	DE	Bundeskartellamt	06.07.2020	<i>Parship &amp; Elite Partner/Lovoo</i>	B6-29/20	UCPH1
	DE	Bundeskartellamt	23.11.2020	<i>Adevinta/eBay Classifieds Group</i>	B6-41/20	UCPH1
16	DE	Bundeskartellamt	11.02.2022	<i>Meta/Kustomer</i>	B6-21/22	UCPH1
	EE	Konkurentsiamet	26.02.2016	<i>Tulika Takso and AS Tallink Takso/Taxofon Eesti OÜ</i>	5.1-5/16-006	UCPH1
	EE	Konkurentsiamet	30.05.2017	<i>auto24/Meediamootor OÜ</i>	5-5/2017-031	UCPH1
	EE	Konkurentsiamet	08.06.2017	<i>AS Eesti Meedia/OÜ Patsiendiportaal</i>	5-5/2017-035	UCPH1
	EE	Konkurentsiamet	20.12.2019	<i>Media Investments &amp; Holding/AllePal</i>	5-5/2019-070	UCPH1
	EL	Επιτροπή Ανταγωνισμού	17.10.2019	<i>OPAP/DeepInvestments/Padian/GML Interactive</i>	693/2019	UCPH1
	EL	Επιτροπή Ανταγωνισμού	24.06.2020	<i>Saiga/Skroutz</i>	714/2020	UCPH1
	EL	Επιτροπή Ανταγωνισμού	01.03.2021	<i>OPAP/Kaizen Gaming Internaional</i>	725/2021	UCPH1
17	EL	Επιτροπή Ανταγωνισμού	18.04.2022	<i>Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table</i>	775/2022	CCPH2
43	ES	Comisión Nacional de los Mercados y la Competencia	20.11.2014	<i>Schibsted/Milanuncios</i>	C/0573/14	CCPH2
44	ES	Comisión Nacional de los Mercados y la Competencia	31.03.2016	<i>Just Eat/La Nevera Roja</i>	C/0730/16	CCPH1
45	ES	Comisión Nacional de los Mercados y la Competencia	24.11.2016	<i>Daimler/Hailo/MyTaxi/Negocio Hailo</i>	C/0802/16	UCPH1

ID	Country	Decisional body	Date	Case name	Case number	Outcome
46	ES	Comisión Nacional de los Mercados y la Competencia	10.09.2019	<i>Just Eat Spain/Canary Delivery Company</i>	C/1046/19	UCPH1
47	ES	Comisión Nacional de los Mercados y la Competencia	05.12.2019	<i>MIH Food Delivery Holdings/Just Eat</i>	C/1072/19	CCPH1
48	ES	Comisión Nacional de los Mercados y la Competencia	19.10.2021	<i>Turnitin/Ouriginal Group</i>	C/1220/21	UCPH1
	ES	Comisión Nacional de los Mercados y la Competencia	23.02.2022	<i>Delivery Hero/Glovo</i>	C/1260/21	UCPH1
5	FR	Autorité de la concurrence	16.01.2013	<i>Rakuten Europe/Alpha Direct Services</i>	13-DCC-08	UCPH1
6	FR	Autorité de la concurrence	12.08.2015	<i>Crédit Mutuel Arkéa/Latour Capital/BlackFin/Primonial</i>	15-DCC-105	UCPH1
7	FR	Autorité de la concurrence	01.02.2018	<i>Axel Springer/Concept Multimédia</i>	18-DCC-18	UCPH2
8	FR	Autorité de la concurrence	23.04.2018	<i>TF1/Aufeminin</i>	18-DCC-63	UCPH1
18	HU	Gazdasági Versenyhivatal	20.02.2017	<i>Magyar RTL Televízió/Central Digitális Média</i>	Vj/87-198/2016	PROH
	HU	Gazdasági Versenyhivatal	14.11.2018	<i>Renesas Electronics Corporation/Integrated Device Technology</i>	VJ/35-10/2018	UCPH1
19	HU	Gazdasági Versenyhivatal	17.10.2019	<i>eMAG/Extreme Digital</i>	VJ/14/2019	UCPH2
20	HU	Gazdasági Versenyhivatal	12.12.2019	<i>Netrisk.hu/Biztosítás.hu</i>	VJ/12/2019	UCPH2
21	IE	Competition and Consumer Protection Commission	15.01.2016	<i>Paddy Power/Betfair</i>	M/15/059	UCPH1
22	IE	Competition and Consumer Protection Commission	10.03.2016	<i>Ladbrokes/Gala Coral</i>	M/16/007	UCPH1
23	IE	Competition and Consumer Protection Commission	18.06.2018	<i>Stars Group/Sky Betting &amp; Gaming</i>	M/18/038	UCPH1
24	IE	Competition and Consumer Protection Commission	18.09.2018	<i>EQT Fund Management/SUSE</i>	M/18/066	UCPH1
25	IE	Competition and Consumer Protection Commission	11.10.2019	<i>Applied Materials/Kokusai Electric Corporation</i>	M/19/027	UCPH1
	IE	Competition and Consumer Protection Commission	14.02.2020	<i>BoyleSports/GT Retail</i>	M/19/032	UCPH1

ID	Country	Decisional body	Date	Case name	Case number	Outcome
26	IE	Competition and Consumer Protection Commission	11.05.2020	<i>Flutter Entertainment/Stars Group</i>	M/20/001	UCPH1
27	IE	Competition and Consumer Protection Commission	15.02.2021	<i>Booster/Liftoff Mobile</i>	M/21/002	UCPH1
28	IT	Autorità Garante della Concorrenza e del Mercato	04.08.2020	<i>OEP 14 Coöperatief/Techedge</i>	28331	UCPH1
29	MT	Malta Competition and Consumer Affairs Authority	21.03.2018	<i>GVC Holdings/Ladbrokes Coral Group</i>	COMP-MCCAA/4/18	UCPH1
30	NL	Autoriteit Consument & Markt	28.08.2019	<i>Sanoma/Iddink</i>	ACM/19/034816	CCPH2
31	NL	Autoriteit Consument & Markt	10.04.2020	<i>DPG/Sanoma</i>	ACM/19/038207	UCPH1
32	NL	Autoriteit Consument & Markt	20.05.2020	<i>NS Groep/Pon Netherlands</i>	ACM/20/038614	CCPH1
33	PL	Urząd Ochrony Konkurencji i Konsumentów	22.12.2015	<i>1&amp;1 Internet/Home.pl</i>	DKK-216/2015	UCPH2
34	PT	Autoridade da Concorrência	19.07.2018	<i>Sonae/CTT - Correios de Portugal JV</i>	Ccent. 27/2018	UCPH1
	PT	Autoridade da Concorrência	08.11.2018	<i>KKR/Cabolink</i>	Ccent. 41/2018	UCPH1
	PT	Autoridade da Concorrência	07.02.2019	<i>Siris/Travelport</i>	Ccent. 1/2019	UCPH1
	PT	Autoridade da Concorrência	25.06.2021	<i>Claranet Portugal/Bizdirect</i>	Ccent. 27/2021	UCPH1
	PT	Autoridade da Concorrência	24.08.2021	<i>Claranet Portugal/OutScope Solutions</i>	Ccent. 38/2021	UCPH1
	PT	Autoridade da Concorrência	25.01.2022	<i>Delivery Hero/Glovo</i>	Ccent. 61/2021	NONAPP
35	RO	România Consiliul Concurenței	24.11.2016	<i>Dante International/PC Garage</i>	84/24.11.2016	CCPH1
36	RO	România Consiliul Concurenței	22.11.2021	<i>Glovoapro/Foodpanda</i>	86/22.11.2021	CCPH1
37	SI	Javna agencija Republike Slovenije za varstvo konkurence	12.04.2018	<i>Sully System/CENEJE</i>	3061-27/2017-71	CCPH1
38	SI	Javna agencija Republike Slovenije za varstvo konkurence	25.04.2019	<i>ECE/ELTUS PLUS</i>	3061-41/2018	UCPH1
39	SI	Javna agencija Republike Slovenije za varstvo konkurence	24.04.2020	<i>Shoppster/IDEO PLUS</i>	3061-9/2020-14	UCPH1
40	SI	Javna agencija Republike Slovenije za varstvo konkurence	24.01.2022	<i>Allegro.eu/MIMOVSTE</i>	3061-25/2021-6	UCPH1
47	SE	Stockholms tingsrätt	16.12.2014	<i>Swedbank Franchise/Svensk Fastighetsförmedling</i>	T 3629-14	PROH

<b>ID</b>	<b>Country</b>	<b>Decisional body</b>	<b>Date</b>	<b>Case name</b>	<b>Case number</b>	<b>Outcome</b>
48	SE	Konkurrensverket	2016	<i>Blocket/Hemnet</i>	84/2016	WITHDR
	UK	Competition & Markets Authority	23.02.2015	<i>esure Group/Gocompare.com</i>	ME/6495-14	UCPH1
	UK	Competition & Markets Authority	26.03.2015	<i>Ticketmaster/Seatwave/Timbre</i>	ME/6505-14	UCPH1
	UK	Competition & Markets Authority	02.09.2015	<i>Compagnie Financière Richemont/Net-A-Porter</i>	ME/6538-15	UCPH1
	UK	Competition & Markets Authority	11.12.2015	<i>CliniSys Group/Roper Technologies</i>	ME/6564/15	UCPH1
49	UK	Competition & Markets Authority	17.12.2015	<i>Betfair Group/Paddy Power</i>	ME/6572/15	UCPH1
	UK	Competition & Markets Authority	30.06.2016	<i>Mapil Bidco/Chain Reaction Cycles/Decade</i>	ME/6569/16	UCPH1
50	UK	Competition & Markets Authority	29.06.2017	<i>ZPG/Websky</i>	ME/6690/17	UCPH1
51	UK	Competition & Markets Authority	08.09.2017	<i>Blackbaud/Giving</i>	ME/6700/17	UCPH1
52	UK	Competition & Markets Authority	16.11.2017	<i>Just Eat/Hungryhouse</i>	ME/6659-16-II	UCPH2
53	UK	Competition & Markets Authority	07.08.2018	<i>Moneysupermarket.com/Decision Technologies</i>	ME/6749/18	UCPH1
54	UK	Competition & Markets Authority	12.02.2019	<i>eBay/Motors.co.uk</i>	ME/6774/18	UCPH1
55	UK	Competition & Markets Authority	12.06.2019	<i>PayPal Holdings/iZettle</i>	ME/6766/18-II	UCPH2
56	UK	Competition & Markets Authority	22.11.2019	<i>Salesforce/Tableau Software</i>	ME/6841/19	UCPH1
57	UK	Competition & Markets Authority	15.08.2019	<i>Tobii/Smartbox</i>	ME/6780/18-II	PROH
58	UK	Competition & Markets Authority	13.02.2020	<i>Google/Looker</i>	ME/6839/19	UCPH1
59	UK	Competition & Markets Authority	09.04.2020	<i>Sabre/Farlogix</i>	ME/6806/19-II	PROH
60	UK	Competition & Markets Authority	04.08.2020	<i>Amazon/Roofoods</i>	ME/6836/19-II	UCPH2
61	UK	Competition & Markets Authority	02.02.2021	<i>Pug/StubHub</i>	ME/6868/19-II	CCPH2
62	UK	Competition & Markets Authority	16.02.2021	<i>Adevinta/eBay Classifieds Group</i>	ME/6897/20	CCPH1
63	UK	Competition & Markets Authority	29.03.2021	<i>Uber International/GPC Computer Software</i>	ME/6903/20	UCPH1
64	UK	Competition & Markets Authority	28.06.2021	<i>SK hynix/Intel</i>	ME/6913/20	UCPH1
65	UK	Competition & Markets Authority	29.06.2021	<i>Advanced Micro Devices/Xilinx</i>	ME/6915/20	UCPH1
66	UK	Competition & Markets Authority	26.07.2021	<i>Turnitin/Ouriginal Group</i>	ME/6931/21	UCPH1
67	UK	Competition & Markets Authority	27.09.2021	<i>Meta/Kustomer</i>	ME/6920/20	UCPH1
68	UK	Competition & Markets Authority	29.09.2021	<i>Auction Technology Group/Live Auctioneers</i>	ME/6942/21	UCPH1
69	UK	Competition & Markets Authority	06.12.2021	<i>Meta/Giphy</i>	ME/6891/20-II	PROH
	UK	Competition & Markets Authority	02.03.2022	<i>Microsoft/Nuance</i>	ME/6940/21	UCPH1

## Annex II: 69 particularly relevant national cases on digital and technology mergers, coded by theories of harm

Outcome
Unconditional clearance phase 1
Unconditional clearance phase 2
Conditional clearance phase 1
Conditional clearance phase 2
Prohibition
Withdrawal

ID running number of the case summaries provided in Annex III

Horizontal theories of harm	
HAC	Loss of an actual competitor
HPC	Loss of a potential competitor
HCOORD	Coordinated effects
HOTHR	Other

Conglomerate theories of harm	
CFOR	Foreclosure through linking sales
CCOORD	Coordinated effects
COTHR	Other

Vertical theories of harm	
VIF	Input foreclosure
VCF	Customer foreclosure
VNONOTHR	Other non-coordinated effects
VCOORD	Coordinated effects

Remedies	
STR	Structural remedy
BEH	Behavioural remedy (other than access)
ACC	Access remedy
NO	No remedies
PROH	Concentration prohibited

ID	Country	Date	Case name	Case number	Horizontal	Vertical	Conglomerate	Remedy
1	AT	03.12.2019	<i>CTS Eventim/Barracuda Holding</i>	BWB/Z-4651	NA	VIF; VCF	NA	ACC; BEH
2	AT	18.06.2021	<i>eBay/Adevinta</i>	BWB/Z-5141, Z-5142, Z-5420 and Z-5421	HAC	NA	NA	STR
3	AT	07.02.2022	<i>Meta/Giphy</i>	28 Kt 8/21t and 28 Kt 9/21i	HPC; HOTHR	VIF	NA	ACC
4	CZ	16.05.2016	<i>Rockaway Capital/Heureka</i>	ÚOHS-S0013/2016/KS-21123/2016/840/DVá	NA	VNONOTHR	CFOR	BEH



ID	Country	Date	Case name	Case number	Horizontal	Vertical	Conglomerate	Remedy
5	FR	16.01.2013	<i>Rakuten Europe/Alpha Direct Services</i>	13-DCC-08	NA	VIF; VCF	NA	NO
6	FR	12.08.2015	<i>Crédit Mutuel Arkéa/Latour Capital/BlackFin/Primonial</i>	15-DCC-105	HAC	NA	CFOR	NO
7	FR	01.02.2018	<i>Axel Springer/Concept Multimédia</i>	18-DCC-18	HAC; HCOORD	NA	CFOR	NO
8	FR	23.04.2018	<i>TF1/Aufeminin</i>	18-DCC-63	HOTHR	NA	CFOR	NO
9	DE	20.04.2015	<i>Axel Springer/Immowelt</i>	B6-39/15	HAC; HCOORD	NA	NA	NO
10	DE	24.07.2015	<i>ProSiebenSat.1/Verivox</i>	B8-76/15	HCOORD	VIF	NA	NO
11	DE	22.10.2015	<i>OCPE II Master/EliteMedianet</i>	B6-57/15	HAC; HCOORD; HOTHR	NA	NA	NO
12	DE	03.01.2017	<i>CTS Eventim/FKP Scorpio</i>	B6-53/16	HAC	VIF	NA	NO
13	DE	23.11.2017	<i>CTS Eventim/Four Artists</i>	B6-35/17	HAC	VCF	NA	PROH
14	DE	17.12.2019	<i>PayPal/Honey Science</i>	B6-86/19	NA	VIF; VCF	CFOR	NO
15	DE	11.11.2019	<i>Cisco Systems/Acacia Communications</i>	B7-205/19	HAC	VIF	NA	NO
16	DE	11.02.2022	<i>Meta/Kustomer</i>	B6-21/22	HAC	NA	COTHR	NO
17	EL	18.04.2022	<i>Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table</i>	775/2022	NA	NA	CFOR	BEH
18	HU	20.02.2017	<i>Magyar RTL Televízió/Central Digitális Média</i>	VJ/87-198/2016	HOTHR	NA	NA	PROH
19	HU	17.10.2019	<i>eMAG/Extreme Digital</i>	VJ/14/2019	HAC	NA	NA	NO
20	HU	12.12.2019	<i>Netrisk.hu/Biztosítás.hu</i>	VJ/12/2019	HAC	NA	NA	NO

ID	Country	Date	Case name	Case number	Horizontal	Vertical	Conglomerate	Remedy
21	IE	15.01.2016	<i>Paddy Power/Betfair</i>	M/15/059	HAC	VIF	NA	NO
22	IE	10.03.2016	<i>Ladbrokes/Gala Coral</i>	M/16/007	HAC	VIF	NA	NO
23	IE	18.06.2018	<i>Stars Group/Sky Betting &amp; Gaming</i>	M/18/038	HAC	VIF; VCF	NA	NO
24	IE	18.09.2018	<i>EQT Fund Management/SUSE</i>	M/18/066	NA	VIF; VCF	NA	NO
25	IE	11.10.2019	<i>Applied Materials/Kokusai Electric Corporation</i>	M/19/027	HAC	NA	NA	NO
26	IE	11.05.2020	<i>Flutter Entertainment/Stars Group</i>	M/20/001	HAC	VIF	CFOR	NO
27	IE	15.02.2021	<i>Booster/Liftoff Mobile</i>	M/21/002	HAC	NA	NA	NO
28	IT	04.08.2020	<i>OEP 14 Coöperatief/Techedge</i>	28331	HAC	NA	NA	NO
29	MT	21.03.2018	<i>GVC Holdings/Ladbrokes Coral Group</i>	COMP-MCCAA/4/18	HAC	NA	NA	NO
30	NL	28.08.2019	<i>Sanoma/Iddink</i>	ACM/19/034816	NA	VIF; VCF; VNONOTHR	CFOR	ACC
31	NL	10.04.2020	<i>DPG/Sanoma</i>	ACM/19/038207	HAC	VIF	CFOR	NO
32	NL	20.05.2020	<i>NS Groep/Pon Netherlands</i>	ACM/20/038614	HAC	VIF; VCF	NA	ACC
33	PL	22.12.2015	<i>1&amp;1 Internet/Home.pl</i>	DKK-216/2015	HAC	NA	NA	NO
34	PT	19.07.2018	<i>Sonae/CTT - Correios de Portugal JV</i>	Ccent. 27/2018	NA	VIF; VCF	NA	NO
35	RO	24.11.2016	<i>Dante International/PC Garage</i>	84/24.11.2016	HAC	NA	NA	STR
36	RO	22.11.2021	<i>Glovoappro/Foodpanda</i>	86/22.11.2021	HAC	NA	NA	BEH

ID	Country	Date	Case name	Case number	Horizontal	Vertical	Conglomerate	Remedy
37	SI	12.04.2018	<i>Sully System/CENEJE</i>	3061-27/2017-71	NA	VIF; VNONOTHR	NA	BEH
38	SI	25.04.2019	<i>ECE/ELTUS PLUS</i>	3061-41/2018	HAC	NA	NA	NO
39	SI	24.04.2020	<i>Shoppster/IDEO PLUS</i>	3061-9/2020-14	HAC	NA	NA	NO
40	SI	24.01.2022	<i>Allegro.eu/MIMOVRS TE</i>	3061-25/2021-6	HAC	NA	NA	NO
41	ES	20.11.2014	<i>Schibsted/Milanuncios</i>	C/0573/14	HAC	NA	NA	ACC
42	ES	31.03.2016	<i>Just Eat/La Nevera Roja</i>	C/0730/16	HAC	NA	NA	BEH
43	ES	24.11.2016	<i>Daimler/Hailo/MyTaxi/ Negocio Hailo</i>	C/0802/16	HAC	NA	NA	NO
44	ES	10.09.2019	<i>Just Eat Spain/Canary Delivery Company</i>	C/1046/19	HAC	NA	NA	NO
45	ES	05.12.2019	<i>MIH Food Delivery Holdings/Just Eat</i>	C/1072/19	HAC	NA	NA	BEH
46	ES	19.10.2021	<i>Turnitin/Ouriginal Group</i>	C/1220/21	HAC	VIF	NA	NO
47	SE	16.12.2014	<i>Swedbank Franchise/Svensk Fastighetsförmedling</i>	T 3629-14	HAC	VIF	NA	PROH
48	SE	2016	<i>Blocket/Hemnet</i>	84/2016	HAC	NA	NA	WITHDR
49	UK	17.12.2015	<i>Betfair Group/Paddy Power</i>	ME/6572/15	HAC	VIF	NA	NO
50	UK	29.06.2017	<i>ZPG/Websky</i>	ME/6690/17	HAC	VIF	NA	NO
51	UK	08.09.2017	<i>Blackbaud/Giving</i>	ME/6700/17	HAC	NA	CFOR	NO
52	UK	16.11.2017	<i>Just Eat/Hungryhouse</i>	ME/6659-16-II	HAC	NA	NA	NO
53	UK	07.08.2018	<i>Moneysupermarket.com/ Decision Technologies</i>	ME/6749/18	HAC	VIF	NA	NO
54	UK	12.02.2019	<i>eBay/Motors.co.uk</i>	ME/6774/18	HAC	NA	NA	NO
55	UK	12.06.2019	<i>PayPal Holdings/iZettle</i>	ME/6766/18-II	HAC; HPC	NA	NA	NO

ID	Country	Date	Case name	Case number	Horizontal	Vertical	Conglomerate	Remedy
56	UK	22.11.2019	<i>Salesforce/Tableau Software</i>	ME/6841/19	HAC	NA	CFOR	NO
57	UK	15.08.2019	<i>Tobii/Smartbox</i>	ME/6780/18-II	HAC	VIF; VCF	NA	PROH
58	UK	13.02.2020	<i>Google/Looker</i>	ME/6839/19	HAC	VIF	NA	NO
59	UK	09.04.2020	<i>Sabre/Farlogix</i>	ME/6806/19-II	HAC	NA	NA	PROH
60	UK	04.08.2020	<i>Amazon/Roofoods</i>	ME/6836/19-II	HPC	NA	CFOR	NO
61	UK	02.02.2021	<i>Pug/StubHub</i>	ME/6868/19-II	HAC	NA	NA	STR
62	UK	16.02.2021	<i>Adevinta/eBay Classifieds Group</i>	ME/6897/20	HAC; HPC	NA	NA	STR
63	UK	29.03.2021	<i>Uber International/GPC Computer Software</i>	ME/6903/20	HPC	VIF; VNONOTHR	NA	NO
64	UK	28.06.2021	<i>SK hynix/Intel</i>	ME/6913/20	HAC	NA	NA	NO
65	UK	29.06.2021	<i>Advanced Micro Devices/Xilinx</i>	ME/6915/20	NA	NA	CFOR	NO
66	UK	26.07.2021	<i>Turnitin/Ouriginal Group</i>	ME/6931/21	HAC	NA	NA	NO
67	UK	27.09.2021	<i>Meta/Kustomer</i>	ME/6920/20	HOTHR	VIF; VCF	CFOR	NO
68	UK	29.09.2021	<i>Auction Technology Group/Live Auctioneers</i>	ME/6942/21	HAC	NA	CFOR	NO
69	UK	06.12.2021	<i>Meta/Giphy</i>	ME/6891/20-II	HPC	VIF	NA	YS

## Annex III: Concise summaries of 69 national cases on digital and technology mergers

*Note:* In order to provide some context, the summaries below briefly describe the market upon which the national competition authority (NCA) relied, even where the NCA did not provide a final delineation of the relevant market. The names of NCAs are provided in the original language.

**(1) Austria: CTS Eventim/Barracuda Holding (3 December 2019)**

**NCA:** Bundeswettbewerbsbehörde

**Case number:** BWB/Z-4651

**Concentration:** CTS Eventim, a German provider of ticketing and live entertainment with a strong market presence in Austria through oeticket, wanted to acquire 71% of shares and sole control of Barracuda Holding, an Austrian provider of concerts.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The authority was concerned that, post-merger, the merged entity could engage in input foreclosure by making it harder for ticketing providers to access organisers of live events. In addition, the authority was concerned that the merged entity could engage in customer foreclosure by providing its ticketing services at above market prices to companies that do not belong to the CTS Eventim group.

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the competition concerns raised by the authority in relation to customer foreclosure, CTS Eventim committed that oeticket (i) would provide its customers that wanted to use its ticketing services with non-discriminatory access to its full range of services, including advertising contracts, and (ii) would not self-preference in relation to the content and the way that events are promoted on the ticketing platform oeticket.com (all for a duration of five years).

In order to address competition concerns related to vertical input foreclosure, oeticket would (i) not require exclusivity from brick-and-mortar resellers, (ii) not require exclusivity from customers of its JetTicket brand, and (iii) not impose exclusivity beyond two years with white label ticketing platforms in Austria (all for a duration of five years). Further commitments related to promoting local and national artists for a duration of five years, and to ensuring there were festival passes for youth (up to 16 years) for festivals in Austria.

**Noteworthy:** Acquisitions by CTS Eventim were also cleared by the German authority, once subject to conditions.

**(2) Austria: eBay/Adevinta (18 June 2021)**

**NCA:** Bundeswettbewerbsbehörde

**Case numbers:** BWB/Z-5141, Z-5142, Z-5420 and Z-5421

**Concentration:** Adevinta wanted to acquire the eBay Classifieds Group (eCG) from eBay, while eBay would acquire 33% of voting rights and 44% of the financial shares in

Adevinta. Adevinta holds a 50% interest and exercises joint control over the leading Austrian online classifieds portal willhaben.at. Until 6 February 2021, Adevinta was also present in Austria through its online classifieds portal shpock.at.

**Horizontal theories of harm:** eBay's online marketplace and willhaben.at were close competitors on the Austrian market, particularly as regards online sales among consumers (C2C transactions). This became apparent through market surveys and was also confirmed by internal documents of the parties. The market was already concentrated, and in the eyes of the authority the risk of non-coordinated effects was considerable.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** To address the authority's competition concerns, the parties proposed the following commitments: (i) in order to eliminate incentives for anti-competitive behaviour, eBay reduces its economic stake in Adevinta to 33% or less within 18 months; (ii) in order to prevent eBay's ability to engage in anti-competitive behaviour, both parties take measures to prevent the exchange of information and to reduce the economic influence of eBay on willhaben.at. In particular, eBay commits to restrict the voting rights of eBay-appointed board members on issues related to willhaben.at and Adevinta commits not to exercise its right to appoint a managing director as well as several board members at willhaben.at. The commitments are binding as long as eBay appoints a director to Adevinta's board and eBay's financial or voting interest in Adevinta is 25% or higher; but for a maximum of ten years.

**Noteworthy:** The merger was originally notified in Austria in December 2020, but subsequently withdrawn; at that time, shpock was still controlled by Adevinta. The merger was cleared subject to conditions in the UK (see below).<sup>1</sup> In Germany, it was unconditionally cleared.<sup>2</sup> The Austrian authority drew attention to its close cooperation with the German and UK authorities.

(3) **Austria:** *Meta/Giphy* (22 July 2021),<sup>3</sup> (7 February 2022),<sup>4</sup> (23 June 2022)<sup>5</sup>

**NCA:** Bundeswettbewerbsbehörde; Kartellgericht; Kartellobergericht

**Case numbers:** BWB/Z-5549 (Bundeswettbewerbsbehörde); 28 Kt 6/21y (Kartellgericht, 22 July 2021 – gun jumping); 28 Kt 8/21t and 28 Kt 9/21i (Kartellgericht, 7 February 2022); 16 Ok 3/22k and 16 Ok 4/22g (Kartellobergericht, 23 June 2022)

**Concentration:** Global technology company Meta (formerly Facebook) acquired the GIF library Giphy. After Meta received a €9.6million fine for not notifying this acquisition to

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<sup>1</sup> Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).

<sup>2</sup> Bundeskartellamt, *Adevinta/eBay Classifieds Group* (B6-41/20, 23 November 2020); Bundeskartellamt, 'Bundeskartellamt clears merger between eBay Classifieds Group and Adevinta' (24 November 2020) <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/24\\_11\\_2020\\_ebay\\_Adevinta.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/24_11_2020_ebay_Adevinta.pdf?__blob=publicationFile&v=5)>.

<sup>3</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Facebook/Giphy* (fine for gun-jumping and non-notification).

<sup>4</sup> Kartellgericht, 7 February 2022, 28 Kt 8/21t and 28 Kt 9/21i – *Meta/Giphy* (conditional clearance).

<sup>5</sup> Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*. On this case, see also Oberster Gerichtshof, 'Bestätigung der kartellrechtlichen Nicht-Untersagung eines Zusammenschlusses unter Auflagen' (24 June 2022) <<https://www.ogh.gv.at/entscheidungen/entscheidungen-ogh/bestaetigung-der-kartellrechtlichen-nicht-untersagung-eines-zusammenschlusses-von-m-und-g-unter-auflagen/>>.

the Austrian NCA,<sup>6</sup> the authority carried out an in-depth investigation and referred the acquisition to the Cartel Court (phase 2). The Cartel Court cleared the acquisition subject to conditions, a decision which was confirmed by the Supreme Cartel Court.

**Horizontal theories of harm:** In terms of horizontal unilateral effects, the authority pointed out that the acquisition might stifle potential competition between Meta and Giphy for advertising clients.

The authority was also concerned that the acquisition could lead to other horizontal unilateral effects by granting Meta access to sensitive commercial information about competing online services based on other apps' integrated interface with the Giphy library.

**Non-horizontal theories of harm:** In terms of vertical input foreclosure, the authority noted that the acquisition may restrict non-discriminatory access to Giphy for other online services.

**Outcome:** Conditionally cleared in phase 2.

**Remedies:** To address the competition concerns raised by the acquisition, the Cartel Court imposed the following conditions for clearance of the merger: Meta has to (i) provide non-discriminatory access to Giphy's GIF library for competing social media providers (for a duration of five years) and (ii) grant alternative GIF libraries, under certain conditions, access to Giphy's GIF library via programming interfaces (APIs) to allow the establishment of an additional GIF provider other than Giphy (Meta) and Tenor (Google) (for a duration of seven years).

**Noteworthy:** This merger had to be notified based on the transaction value threshold that Austria introduced in 2017. Based upon an application by the authority, the Cartel Court conditionally cleared the concentration in February 2022.<sup>7</sup> The conditional clearance was confirmed by the Supreme Cartel Court in June 2022.<sup>8</sup>

#### (4) **Czechia:** *Rockaway Capital/Heureka* (16 May 2016)<sup>9</sup>

**NCA:** Úřad pro ochranu hospodářské soutěže

**Case number:** ÚOHS-S0013/2016/KS-21123/2016/840/DVá

**Concentration:** Private equity company Rockaway Capital intended to acquire control of Heureka.cz, a Czech comparison shopping website.<sup>10</sup> Rockaway Capital also controlled CZC.cz, an online electronics retailer, and other online businesses.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** Comparison shopping site Heureka.cz had a market share between 45-55%. The authority was concerned that, post-merger, Heureka.cz would

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<sup>6</sup> Kartellgericht, 22 July 2021, 28 Kt 6/21y – *Facebook/Giphy*.

<sup>7</sup> Bundeswettbewerbshörde, 'Meta (Facebook)/Giphy merger: AFCA appealing against conditional clearance' (4 March 2022) <<https://www.bwb.gv.at/en/news/news-2022/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance>>.

<sup>8</sup> Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

<sup>9</sup> This summary is based on Jiří Kindl and Michal Petr, 'Czech Republic' in Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020) 165, 176.

<sup>10</sup> Rockaway Capital also intended to acquire mall.cz, a major Czech online shopping mall. This acquisition was unconditionally cleared; see Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Sully System/Netretail* (ÚOHS-S0223/2016/KS-26867/2016/840/DVá, 27 June 2016).

give preferential treatment to online businesses already controlled by Rockaway Capital. A further concern related to the possibility that Heureka.cz could ask online shops to collect excessive amounts of data about their users, data that could then be used in the interest of Rockaway Capital's businesses.

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the concerns voiced by the authority, Rockaway proposed the following commitments: (i) a clear link between Heureka.cz and other Rockaway Capital activities would be published on the website, ensuring transparency, (ii) it would not discriminate against independent sellers (especially as regards the prescribed number of positions of recommended shops that should have been increased in order to avoid a decrease in the number of positions available to independent shops as compared with pre-merger situation and the minimum number of search results of goods compared solely by price), and (iii) it would limit the possibility to gather excessive data related to a specific, score-based service that shows reliability of the online store from the customers' perspective. In particular, Heureka.cz would not oblige sellers to provide other data than the users' email addresses, and it was not allowed to favour sellers that provided more data or disadvantage those who did not.

**(5) France: Rakuten/Alpha Direct Services (16 January 2013)**

**NCA:** Autorité de la concurrence

**Case number:** 13-DCC-08

**Concentration:** Rakuten, which is active in e-commerce through its electronic marketplace PriceMinister and several price comparison websites, wanted to acquire exclusive control over Alpha Direct Services, a company specialising in inbound logistics services for e-commerce and catalogue-based distance selling.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** As logistics costs are an important part of the cost structure in e-commerce, the authority considered that this transaction would allow PriceMinister to internalise some of these costs. This could lead to an anti-competitive outcome if the transaction foreclosed the access of competing marketplaces to such services (input foreclosure), or foreclosed the access of inbound logistics services to distance sellers (customer foreclosure). Below a market share of 30%, competition authorities generally rule out these types of effects. Alpha Direct Services had market shares on the national market for upstream logistics services between 0 and 5%, while a great number of bigger competitors existed on the market. On a possible national market for inbound logistics services for e-commerce, its market shares were estimated at 10 to 20%, again with a number of competitors on the market. Therefore, no input foreclosure was expected to arise.

Concerning a possible customer foreclosure, the authority noted that the target and its competitors offered their services to many different distance sellers. While PriceMinister was one of the most visited marketplaces, a number of important competitors (including Amazon, eBay, CDiscount and Fnac) operated on the market and PriceMinister's vendors did not have exclusivity contracts. Also, PriceMinister remained a relatively small e-commerce actor. Therefore, the authority expected no vertical restraints to arise.



**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The authority assessed possible vertical theories of harm in-depth, but concluded that such effects were unlikely to arise.

(6) **France:** *Crédit Mutuel Arkéa, Primonial Management, Blackfin, Latour Capital/Primonial Holding* (12 August 2015)

**NCA:** Autorité de la concurrence

**Case number:** 15-DCC-105

**Concentration:** Crédit Mutuel Arkéa, Primonial Management, Blackfin and Latour Capital wanted to acquire joint control of Primonial Holding. Amongst many others, this transaction concerned the market for price comparison websites regarding insurance and loans in which the Blackfin fund is involved, and the authority analysed possible conglomerate effects relating to this market.

**Horizontal theories of harm:** Assessed by the authority, but not relevant in the present context.

**Non-horizontal theories of harm:** As the parties involved were active on several connected markets, the authority considered possible conglomerate effects. Only the analysis regarding conglomerate effects relating to price comparison websites is discussed here. The authority noted that Comparadise, owned by Blackfin, operated a comparison website for loans and insurance on markets where Crédit Mutuel Arkéa and Blackfin were present. The authority observed that Comparadise had low market shares on the market for comparison websites in general as well as on possible markets for comparing insurance (10-20%) or for comparing loans (0-5%). In addition, the website faced competition from a number of specialised comparison websites, both in insurance and in loans. In both banking and insurance, the market shares of the parties involved were between 0-5%. Based on its view that foreclosure effects usually do not arise where market shares are below 30%, the authority did not consider that the merger gave rise to a potential risk.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

(7) **France:** *Axel Springer/Concept Multimédia* (1 February 2018)

**NCA:** Autorité de la concurrence

**Case number:** 18-DCC-18

**Concentration:** The Axel Springer group, which acquired the real estate web portal SeLogger in 2010 (case 10-DCC-152), wanted to acquire Concept Multimédia, which through Logic-Immo runs a web portal as well as print magazines on real estate. The transaction concerned the market for online real estate classified ads, the market for classified ads in print media and the national market for online advertising markets.

**Horizontal theories of harm:** The authority's main competition concern was related to possible horizontal effects on the market for online real estate classified ads for professionals due to the creation of a new entity with a market share exceeding 50% in value. The authority particularly investigated a possible rise of prices, a risk of competitor

foreclosure due to bundling or related to the acquisition of data, and coordinated effects. First, the risk of price increases resulting from the transaction were ruled out since, prior to the transaction, the parties did not exert any significant competitive pressure on each other. Second, the bundled offer likely to be implemented by the new entity on the market for online real estate classifieds would not lead to a significant elimination of competition. Third, the risks of coordinated effects between the new entity and the Le Bon Coin group could be ruled out insofar as the detection condition, one of the three criteria necessary to identify such an effect, was not met. The authority noted that these two players, which have significant differences in their positioning and business models, operated in a market with limited price transparency.

**Non-horizontal theories of harm:** The authority assessed whether there was a risk of conglomerate effects due to the target's presence on the market for real estate classified ads in print media as well as online. The authority considered that while Logic-Immo had an important share of the market for real estate classified ads in print media, that market was in decline. Therefore, the market power of Logic Immo on the market for real estate classified ads in print media would not be sufficient to create a leverage effect on a connected market. There was thus no risk of foreclosure on the market for online real estate classified ads. The authority also assessed whether foreclosure was likely on the market for real estate classified ads in print media, as Logic-Immo already offered an online/offline bundle and SeLoger's internal documents showed that such an offer was also considered by it. The authority concluded that the merged entity would have the ability to propose such bundles or bundled rebates. Based on three different scenarios (a discount on print ads; a discount on online ads; tying or a price increase), the authority concluded that the incentive to implement such discounts for bundles or to enforce ties would be limited. It also concluded that, in any case, the effect of such a bundle would only lead to a marginal reduction of competition in the market for property advertisements in the print media.

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**Noteworthy:** Conglomerate effects were not considered an issue because of the decline of an offline market. Also note the German decision (case B6-39/15) on Axel Springer's purchase of Immowelt AG, another online portal for online real estate classified ads. On the market for online advertising, the authority considered that the strong presence of Google and Facebook – with a combined market share exceeding 65% – meant that no anti-competitive effects should be expected on that relevant market.

**(8) France: TF1/Aufeminin (23 April 2018)**

**NCA:** Autorité de la concurrence

**Case number:** 18-DCC-63

**Concentration:** TF1, a group active in free and pay-TV, wanted to acquire sole control of Aufeminin, a digital company involved mainly in publishing websites, selling online advertising space and online retailing. TF1 also operated websites. Aufeminin was previously controlled by the Axel Springer group. Markets concerned included the sale of television advertising space, the sale of advertising space in the printed press, the sale

of online advertising space, the operation of websites and marketing and commercial communication services.

**Horizontal theories of harm:** No horizontal effects were expected due to the low market shares of the merging parties on those markets where there was a horizontal overlap (i.e., especially printed press, marketing services and various retailing activities). Only the overlap on the markets for the sale of online advertising space and the operation of websites led to closer scrutiny. Regarding the market for the sale of online advertising, the authority emphasised that post-merger TF1 could use the data obtained through Aufeminin to improve its monetisation of online advertising spaces. However, the merged entity would only cover, on a daily basis, between 5 and 7% of the female population it aims at, compared to coverage rates of 79% for Google and 68% for Facebook. Therefore, the authority did not expect horizontal effects to arise in this respect. Concerning the operation of websites dedicated to female topics, the merged entity would have a low market share below 15% and would continue to be subject to strong competition.

**Non-horizontal theories of harm:** Based on TF1's low market shares as an online advertising agency on the online advertising sales and intermediation markets, the authority did not expect any vertical effects to arise.

The authority more closely assessed possible conglomerate effects between TF1's market presence in selling television advertising space and markets on which the target was present, notably the sale of online advertising space and marketing and commercial communication services. When assessing a possible bundling strategy in the sale of online and television advertising space, the authority found that TF1 certainly had the ability to engage in such a strategy. It also highlighted, however, that bundling TV advertising with online or radio advertising was a common strategy in this sector that TF1's competitors also engaged in. TF1's incentive to carry out this strategy was assessed through several factors. The authority particularly emphasised that TF1 could benefit from the complementarity of its bundle, the merging of data sets, and cost synergies, and concluded that the implementation of such bundles appeared to be one of the objectives of the acquisition. The authority considered that TF1 would use its position on the market for television advertising space as leverage to strengthen its position on the market for online advertising space. On the latter market, however, the new entity would have a market share below 10%. Based on the strong position of TF1's competitors and low barriers to entry, and especially considering the competitive pressure emanating from GAFAM (with Google's market share in online advertising at 50-60%, Facebook at 10-20% and the new entity at only 0-5%), the authority concluded that conglomerate effects could be discarded.

Further conglomerate effects the authority briefly assessed (but dismissed) related to the sale of advertising space on television and in the printed press, and to the sale of television advertising space on television and marketing and commercial communication services.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** On the market for online advertising, the authority considered that the strong presence of Google and Facebook meant that no conglomerate effects would arise

even if the merged entity were to engage in bundling of online and television advertising space – as was to be expected.

**(9) Germany: Axel Springer/Immowelt (20 April 2015)**

**NCA:** Bundeskartellamt

**Case number:** B6-39/15

**Concentration:** Axel Springer planned to acquire Immowelt on the market for online real estate platforms, and its daughter company Immonet should enter into a joint venture with the target.

**Horizontal theories of harm:** The acquisition would lead to the merging of the second-biggest and the third-biggest online real estate platforms in Germany, meaning that this narrow market would be further concentrated. However, Immoscout would undoubtedly remain the market leader, with only a few smaller, sometimes specialized further competitors and meta search engines present on the market. Despite this concentrated market, the Bundeskartellamt found that the merger would indeed be pro-competitive as it would help ensure that the market would not tip. It also noted that users in this market tended to multi-home, further safeguarding against market tipping.

The authority also considered whether coordinated effects would arise, but concluded that the risk of collusion in such a two-sided market was lower than in traditional markets, especially as the two remaining players had considerable structural differences.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** Not only did the German Bundeskartellamt not regard this horizontal merger as harmful for competition on the narrow market of online real estate platforms, it also found that the merger was indeed pro-competitive as it would help to ensure that the market would not tip.

**(10) Germany: ProSiebenSat.1/Verivox (24 July 2015)**

**NCA:** Bundeskartellamt

**Case number:** B8-76/15

**Concentration:** The media company ProSiebenSat.1 proposed to acquire the comparison platform Verivox on the market for the operation of online platforms for final consumer contracts, including electricity and gas contracts, insurance, banking, mobile telephony, etc.

**Horizontal theories of harm:** No noteworthy horizontal overlaps.

Concerning coordinated effects, the authority assessed whether the merger could increase the likelihood of collusion between Verivox and Check24, its main competitor. It found that by leading to further asymmetries among these competitors, the opposite was the case.

**Non-horizontal theories of harm:** The Bundeskartellamt assessed whether, post-merger, ProSiebenSat.1 might have the ability and the incentive to grant Verivox better advertising space at more favourable conditions than it does to Verivox's competitors, and whether this could restrict effective competition. Verivox was the market leader,

Check24 its main competitor (both together held 95% of the market). ProSiebenSat.1's ability and incentive to engage in such input foreclosure would be restricted as it would miss out on advertising revenue from Verivox's competitors. Also, TV commercials at ProSiebenSat.1 were not the only advertising channels available to Verivox's competitors. In addition, sellers usually used several price comparison platforms in parallel (multi-homing). The Bundeskartellamt therefore concluded that this would not result in an appreciable restriction, also not through market tipping.

**Remedies:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Noteworthy:** This conglomerate merger was unconditionally cleared after a careful analysis of the various effects that arise in digital multi-sided markets.

**(11) Germany: OCPE II Master (Parship)/EliteMedianet (22 October 2015)**

**NCA:** Bundeskartellamt

**Case number:** B6-57/15

**Concentration:** The fund OCPE II Master is, amongst others, the owner of the online dating portal Parship.de, which it acquired in 2015 (cleared by the Bundeskartellamt on 24 March 2015). It proposed to acquire EliteMedianet, which runs two popular online dating portals (ElitePartner.de and AcademicPartner.de), on the national market for online dating platforms.

**Horizontal theories of harm:** The authority analysed whether this horizontal acquisition by one online dating platform of another could lead to competitive harm. Despite the high combined turnover-based market shares of the merging parties, the authority concluded that the case raised no competition concerns. Concerning non-coordinated effects due to obtaining a dominant position, the authority concluded that the market environment was such that the merging parties would not obtain a single dominant position post-merger, and in particular there was no danger of tipping. Contrary to other digital markets, network effects on this market are limited because users (singles) tend to multi-home, there is a large degree of platform differentiation, and online dating platforms constantly need to acquire new users due to users (singles) leaving the market as customers when they find a match or because they are dissatisfied when they do not find a match (no lock-in). Users also have a sufficient number of alternatives available to them, and market entry barriers are rather low.

Concerning non-coordinated effects other than obtaining a dominant position, the authority concluded that the merging parties were not close enough in competition to lead to any such effects. Due to the presence of a varied field of competitors, the authority also did not expect any coordinated effects to arise.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**Noteworthy:** This case showed what type of digital market environment would not warrant intervention; the specific characteristics of online dating platforms led to the unconditional clearance of this merger. In 2020, similar considerations led to the unconditional clearance of the acquisition of The Meet Group (which operates the Lovoo

online dating platform) by Parship and ElitePartner, which were by then owned by media group ProSiebenSat.1.<sup>11</sup>

**(12) Germany: CTS Eventim/FKP Scorpio (3 January 2017)**

**NCA:** Bundeskartellamt

**Case number:** B6-53/16

**Concentration:** CTS Eventim, a company active in live entertainment, event venues and ticketing, wanted to increase its stake in FKP Scorpio, an organiser of rock/pop festivals and tours.

**Horizontal theories of harm:** The authority assessed whether the increase in CTS Eventim's stake in FKP Scorpio could lead to horizontal unilateral effects in a range of markets. Concerning rock/pop tour concerts, the authority considered that CTS Eventim's importance on that market had taken a dive since 2016, while FKP Scorpio did not have an important position on that market. Therefore, no competition concerns would arise. On regional markets for music festivals, the authority concluded that there was no considerable overlap in the geographic market between the parties' activities, other music events could be a constraining factor, and there were low barriers to entry; no competition concerns would arise.

**Non-horizontal theories of harm:** The authority assessed whether vertical foreclosure effects could arise because events organised by FKP Scorpio were also sold via CTS Eventim's ticketing system. It assessed this two-sided market in some depth, and concluded that FKP Scorpio's events were already available via CTS Eventim's ticketing system, which was probably dominant (both vis-à-vis event organisers and vis-à-vis points of sale). The increase in CTS Eventim's stake would, however, not further strengthen that market position and would therefore not lead to input foreclosure.

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**Noteworthy:** While the authority did not consider that this acquisition would strengthen the market leader's dominant position, this was seen differently in *CTS Eventim/Four Artists*, decided in the same year.

**(13) Germany: CTS Eventim/Four Artists (23 November 2017)**

**NCA:** Bundeskartellamt

**Case number:** B6-35/17

**Concentration:** CTS Eventim, a company active in live entertainment, event venues and ticketing, wanted to acquire a majority stake in Four Artists, a company active in organising live events and as a booking agent for a range of famous German artists.

**Horizontal theories of harm:** The authority considered that the acquisition would further strengthen CTS Eventim's already dominant position on the market for ticket system services for event organisers and booking offices. The authority underlined how the (then) new German provision of § 18 para 3a ARC<sup>12</sup> on assessing market dominance in multi-

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<sup>11</sup> Bundeskartellamt, *Parship and ElitePartner/Lovoo* (B6-29/20, 6 July 2020).

<sup>12</sup> Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended.

sided markets allowed the conclusion that CTS Eventim was indeed dominant on these markets, and how indirect network effects worked to the incumbent's advantage. It found that high barriers to entry, considerable lock-in effects and limited multi-homing by the other market side led to a strong market position, while no innovation-driven competition was discernible. The acquisition would lead to a strengthening of CTS Eventim's market position on the market for ticket system services, thereby significantly impeding effective competition.

**Non-horizontal theories of harm:** CTS Eventim's competitors already had restricted access to customers, both because of CTS Eventim's vertical integration and because of CTS Eventim's exclusivity clauses with event organisers. Through recent transactions, CTS Eventim had further strengthened its dominant position.<sup>13</sup> This further acquisition would contribute to CTS Eventim's strategy of customer foreclosure.

**Outcome:** Prohibited.

**Remedies:** NA

**Noteworthy:** The parties appealed the prohibition before the Higher Regional Court Düsseldorf, which confirmed the Bundeskartellamt's prohibition decision.<sup>14</sup> Upon further appeal, this was also confirmed by the German Federal Court.<sup>15</sup>

The authority underlined that it regarded CTS Eventim's exclusivity contracts with event organisers as contributing to an abusive customer foreclosure vis-à-vis competing ticketing platforms; the same analysis had to apply when assessing this concentration.

#### (14) Germany: *PayPal/Honey Science* (17 December 2019)

**NCA:** Bundeskartellamt

**Case number:** B6-86/19

**Concentration:** PayPal, a provider of payment services including a popular 'digital wallet', wanted to acquire Honey Science, a developer of browser extensions that automatically apply coupon and discount codes during virtual check-out.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The authority took into consideration that PayPal has quite a strong market position on the market for payment systems, and assessed possible vertical and conglomerate effects. On the market for online payment systems, it did not expect an appreciable restriction of competition because a number of strong payment service providers had emerged in recent years (including Klarna, WireCard, Adyen). It also mentioned Apple Pay and Google Pay as possible competitive constraints, as these have significant resources and a large user base. These can therefore be expected to make use of network effects. This competition would act as a competitive constraint

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<sup>13</sup> See Bundeskartellamt, *CTS Eventim/FKP Scorpio* (B6-53/16, 3 January 2017).

<sup>14</sup> Oberlandesgericht Düsseldorf, 5 December 2018, Kart 3/18 (V) – *CTS Eventim/Four Artists*.

<sup>15</sup> Although the Higher Regional Court had not allowed a further appeal on legal grounds, the Federal Court decided to accept such an appeal (even after the parties had abandoned the merger); Bundesgerichtshof, 24 March 2020, KVV 3/19 – *CTS Eventim/Four Artists*. Subsequently, the Federal Court confirmed the Bundeskartellamt's decision that the strengthening of a dominant position can be a valid reason for prohibiting a merger where competition would be further limited by a concentration; Bundesgerichtshof, 12 January 2021, KVR 34/20 – *CTS Eventim/Four Artists*.

countervailing vertical or conglomerate effects, eg in the shape of foreclosure practices or tying and the leveraging of market power to third markets.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** This merger had to be notified based on the transaction value threshold that Germany introduced in 2017. In the assessment of whether Honey's activity on the German market was substantial, the authority emphasised that many online businesses are easily scalable with minimal effort. It also underlined the fact that many online businesses can only be monetised a significant period of time after their market entry, meaning that current sales figures do not reflect their competitive potential.

**(15) Germany: Cisco Systems/Acacia Communications** (6 February 2020)

**NCA:** Bundeskartellamt

**Case number:** B7-205/19

**Concentration:** Cisco Systems, a worldwide developer and producer of network devices, proposed to acquire Acacia Communications, which produces semiconductors for specific applications.

**Horizontal theories of harm:** Based on the relevant markets at issue, the authority found that Acacia's and Cisco's respective market positions would not be strengthened.

**Non-horizontal theories of harm:** To assess possible vertical concerns related to input foreclosure, the authority analysed the downstream markets for optical networks, switches and routers. While Acacia was not active on those markets, Cisco had high market shares on them. The authority expected no appreciable restrictions of competition to arise, however, as there were a great number of competitors active on the various market levels. Customers usually buy individual network components and employ a (at least) dual vendor strategy. In terms of a possible foreclosure of competitors in relation to digital signal processors, the authority concluded that while the merged entity would have the ability for this type of conduct, it would have no incentive to do so and there would also be no effects on the market following such behaviour. Reasons for this conclusion included high profit margins for digital signal processors, the high number of competitors and vertically integrated companies. Similarly, for optical networks the authority found that while the merged entity might have the ability to foreclose competitors as regards optical transceiver modules, it would have no incentive to do so based on a sufficient number of credible competitors remaining on the market.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In China, the merger was only cleared subject to conditions.<sup>16</sup> In Austria, the merger was unconditionally cleared,<sup>17</sup> while in the US the Hart-Scott-Rodino waiting period expired.<sup>18</sup>

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<sup>16</sup> State Administration for Market Regulation, *Cisco Systems/Acacia Communications* (14 January 2021).

<sup>17</sup> Bundeswettbewerbbehörde, *Cisco Systems/Acacia Communications* (BWB/Z-4545, 3 September 2019).

<sup>18</sup> 'Cisco-Acacia merger receives antitrust approval in US, still needs OK in Germany and China' *MLex* (27 September 2019) <[https://content.mlex.com/#/content/1131563?referrer=portfolio\\_openrelatedcontent](https://content.mlex.com/#/content/1131563?referrer=portfolio_openrelatedcontent)>.



**(16) Germany: Meta/Kustomer** (11 February 2022)

NCA: Bundeskartellamt

**Case number:** B6-21/22

**Concentration:** The digital platform Facebook (now Meta) intended to acquire Kustomer, the provider of a cloud-based customer relationship management (CRM) platform to business users.

**Horizontal theories of harm:** There is a small horizontal overlap between Meta's Unified Inbox service, which only encompasses communication channels offered by Meta, and Kustomer's CRM service. Based on the commitments Meta made vis-à-vis the European Commission,<sup>19</sup> the German authority considered that the concentration would only have negligible effects on that market.

**Non-horizontal theories of harm:** The German authority emphasised that the concentration also needed to be assessed against the background of Meta's social media ecosystem. In particular, it investigated whether the acquisition could enable Meta to safeguard, further develop or strengthen its own digital ecosystem. This could then manifest itself on particular relevant markets, such as in social media advertising. In this respect, the authority particularly considered the data advantage that the acquisition of Kustomer would provide Meta with. It also analysed to what extent the acquisition could help Meta to further develop its offerings. The authority concluded that, overall, anti-competitive effects on markets in which Meta already has significant market power were entirely possible. However, the authority refrained from opening phase 2 proceedings as it was not possible to establish, to the required standard of probability, that the services and capabilities associated with Kustomer were of sufficient importance to lead to a strengthening of Meta's ecosystem as sketched by the authority.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** This case had to be notified in Austria and Germany due to the transaction value threshold that both countries adopted in 2017. This was not a case of the one-stop-shop rule, as Austria had referred the case to the Commission while Germany had not. At the time of the Austrian referral, the German authority had not yet concluded whether the transaction did, in fact, have to be notified to it.<sup>20</sup> The president of the Bundeskartellamt stated that 'it is with unease that we ultimately had to acknowledge that the effects of the acquisition would not have warranted a prohibition under existing competition law'.<sup>21</sup> The European Commission had conditionally cleared this merger.<sup>22</sup> Australia and the UK

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<sup>19</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>20</sup> This was then established in a separate decision, which at the time of writing is on appeal before the Oberlandesgericht Düsseldorf. See Bundeskartellamt, *Meta/Kustomer* (B6-37/21, 9 December 2021).

<sup>21</sup> Andreas Mundt in Bundeskartellamt, 'Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)' Press Release (11 February 2022) <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11\\_02\\_2022\\_Meta\\_Kustomer.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html)>.

<sup>22</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

had also cleared this merger.<sup>23</sup> In its press release, the Bundeskartellamt emphasised that the European Commission had cleared this transaction on 27 January 2022.<sup>24</sup>

**(17) Greece: Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table** (18 April 2022)<sup>25</sup>

**NCA:** Επιτροπή Ανταγωνισμού (Hellenic Competition Commission)

**Case number:** 775/2022

**Concentration:** Delivery Hero operated e-food, the leading online food delivery platform in Greece, which is also active, inter alia, in the market for online intermediation for the sale of groceries. It wanted to acquire the following companies: Alfa Distributions, which is active in the wholesale supply of consumer goods to supermarkets; Inkat, which is active in the wholesale supply of groceries and operates a retail grocery store chain; Delivery.gr, which provides online delivery intermediation services for restaurants, supermarkets, convenience stores and other local stores; and E-table, which provides online intermediation services for reservations in restaurants.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The authority's investigation found that by combining the acquirer's online food ordering platform with the targets' online intermediation services for reservations in restaurants, conglomerate effects would arise. Both E-table and Delivery Hero had significant market power in their respective Greek markets. Post-merger, conglomerate foreclosure effects through bundling were likely to arise, as the merged entity would have the ability and incentive to bundle their services for business users. A further concern voiced by the authority related to the combination of data sets from both services that would allow for targeted advertisements with which no competitors could effectively compete.

**Outcome:** Conditionally cleared in phase 2.

**Remedies:** Delivery Hero committed (i) not to tie online intermediation services for food ordering (e-food) with online reservation services in restaurants (e-table) when offered to business users (ie, restaurants). This also extends to special discounts and reduced fees that would have the same effect. Furthermore, Delivery Hero would (ii) not use end user data collected from one platform to run targeted advertisements on the other, unless end users have previously provided consent to this, in accordance with existing data protection rules. A monitoring trustee will ensure the implementation of these commitments over the course of two years, which is the time during which they apply. The authority may, however, decide to extend this duration by one year depending on how the market evolves.

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<sup>23</sup> Competition & Markets Authority, *Meta/Kustomer* (ME/6920/20, 27 September 2021); Australian Competition & Consumer Commission, *Meta/Kustomer* (18 November 2021).

<sup>24</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>25</sup> This summary is based on the press release published by the Hellenic Competition Commission, 'Decision No. 775/2022 – approval of Delivery Hero's acquisition of companies Alpha Distributions SA, Inkat SA, Delivery.gr Single Member P.C. and E-Table Single Member P.C., subject to commitments' <<https://www.epant.gr/en/enimerosi/press-releases/item/2189-press-release-the-hellenic-competition-commission-approves-delivery-hero-s-acquisition-of-four-companies-subject-to-commitments.html>>

**Noteworthy:** The authority noted that, post-merger, the merged entity's e-food and delivery.gr platforms will together have a high combined market share on the market for online intermediation for the sale of groceries. Due to other supermarkets' bargaining power, however, it did not consider that the merged entity would be able to restrict competition in this respect. The authority imposed a data separation remedy to Delivery Hero's ecosystem with the intention of limiting the likelihood of a data leveraging strategy from online delivery to online intermediation markets and vice versa.

**(18) Hungary:** *Magyar RTL Televízió/Central Digitális Média* (24 January 2017)<sup>26</sup>

**NCA:** Gazdasági Versenyhivatal

**Case number:** VJ/87/2016

**Concentration:** Magyar RTL Televízió (RTL) intended to acquire 30% of the shares of Central Digitális Média (CDM), providing RTL the right of control over CDM by holding more than 50% of the voting rights in CDM and having the power to designate, appoint or dismiss the majority of CDM's executive officers. RTL was a member of the Bertelsmann group, which operates a number of TV channels, provides broadcasting services and advertising time, and operates the websites [www.rtl.hu/rtlklub](http://www.rtl.hu/rtlklub) and [www.rtl.hu/most](http://www.rtl.hu/most). CDM published online press products and advertising space therein. The main portals operated by CDM were [startlap.hu](http://startlap.hu) (portal), [24.hu](http://24.hu) (news site), [NLCafé](http://NLCafé) (content for women), [HaziPatika.com](http://HaziPatika.com) (health site), [Vezess.hu](http://Vezess.hu) (content on cars), [Hirstart.hu](http://Hirstart.hu) (news aggregator), [Citromail.hu](http://Citromail.hu) (email client/service) and [SegmentAd](http://SegmentAd) (email database).

**Horizontal theories of harm:** No assessment was carried out by the competition authority, see below.

**Non-horizontal theories of harm:** No assessment was carried out by the competition authority, see below.

**Outcome:** Prohibited.

**Conditions:** NA

**Noteworthy:** The Media Council of the National Media and Infocommunications Authority (NMIA), based on the Hungarian Media Services Act, refused to approve the concentration based on concerns related to media pluralism. However, the Media Council of the NMIA also established its lack of jurisdiction in terms of the email client [citromail.hu](http://citromail.hu) and email database [SegmentAd](http://SegmentAd). As regards the relevant market, the NMIA established that it was the combination of media content for information and orientation that appeared on the Hungarian television and digital platforms. The Hungarian authority is bound by the resolution of the Media Council of the NMIA and, due to the latter's refusal, it prohibited the concentration without investigating the competitive effects of the merger – neither in case of [citromail.hu](http://citromail.hu), nor [SegmentAd](http://SegmentAd) – as the transaction would have only been implemented in whole by the parties.

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<sup>26</sup> Thank you to Dániel Élő for providing a summary of this case, which was subsequently shortened by the author of this Report.

While the Metropolitan Court of Budapest as the first instance court upheld the authority's decision,<sup>27</sup> the Hungarian Supreme Court annulled it and ordered the authority to conduct a new competition proceeding.<sup>28</sup> Although the authority initiated competition proceedings in March 2020, the transaction was abandoned by the vendor, thus leading to a termination of these proceedings. RTL continues to pursue this case before the Constitutional Court of Hungary.

**(19) Hungary: eMAG/Extreme Digital (17 October 2019)<sup>29</sup>**

**NCA:** Gazdasági Versenyhivatal

**Case number:** VJ/14/2019

**Concentration:** Dante operates the online store eMAG and intended to acquire sole control over Extreme Digital, the operator of an online store (edigital.hu) as well as of 16 brick-and-mortar retail outlets in Hungary. There was a particular overlap in the parties in the sale of consumer electronics.

**Horizontal theories of harm:** The authority concluded that the sale of consumer electronics constitutes one single market, no matter whether distribution occurs online or offline. The parties' combined market share on this market was below 20%, meaning that no anti-competitive effects would be found to arise. Even when only looking at the online segment, however, the authority found that it would be unlikely for anti-competitive effects to arise because of a transparency in market prices, the price sensitivity of online consumers, the remaining competition from competitors, and market contestability.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 2.

**Conditions:** NA

**Noteworthy:** The case demonstrates how the interplay between online and offline markets is increasingly incorporated into the antitrust assessment.

**(20) Hungary: Netrisk.hu/Biztosítás.hu (12 December 2019)<sup>30</sup>**

**NCA:** Gazdasági Versenyhivatal

**Case number:** VJ/12/2019

**Concentration:** Netrisk.hu, an insurance mediation company, intended to acquire direct and sole control over its competitor Biztosítás.hu. The two companies were the most important online market participants in the relevant market concerned, which was determined to be the market of non-life insurance mediation by brokers.

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<sup>27</sup> Fővárosi Törvényszék, *Magyar RTL Televízió/Central Digitális Média* (21.K.700.023/2018/12, 8 June 2018).

<sup>28</sup> Kúria, *Magyar RTL Televízió/Central Digitális Média* (Kf.IV.38.095/2018/10, 9 December 2019).

<sup>29</sup> The present summary is based on the press release of the Hungarian NCA; Gazdasági Versenyhivatal, 'The Hungarian Competition Authority authorised the acquisition of Extreme Digital by eMAG' (17 October 2019) <[https://www.gvh.hu/en/press\\_room/press\\_releases/press\\_releases\\_2019/the\\_hungarian\\_competition\\_authority\\_authorised\\_the](https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_hungarian_competition_authority_authorised_the)>.

<sup>30</sup> The present summary is based on the press release of the Hungarian NCA; Gazdasági Versenyhivatal, 'The GVH authorised the merger of Netrisk and Biztosítás.hu' (12 December 2019) <[https://www.gvh.hu/en/press\\_room/press\\_releases/press\\_releases\\_2019/the-gvh-authorised-the-merger-of-netrisk-and-biztositas.hu](https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the-gvh-authorised-the-merger-of-netrisk-and-biztositas.hu)>.

**Horizontal theories of harm:** The authority analysed both the impact the transaction would have on the market, and the competitive pressure that can be expected from traditional (ie, non-online) insurance mediators and insurers' online platforms. It found that the transaction would not lead to an anti-competitive outcome, especially as the price of an insurance is set by insurers and agents, while insurance mediators cannot directly increase prices. The authority also took into account the bargaining power of insurance companies. The merging of databases through the acquisition would not, in the eyes of the authority, have a substantial impact on data usability.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 2.

**Conditions:** NA

**Noteworthy:** The case demonstrates how the interplay between online and offline markets is increasingly incorporated into the antitrust assessment.

**(21) Ireland: Paddy Power/Betfair (15 January 2016)**

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/15/059

**Concentration:** Paddy Power, an international multi-channel betting and gaming company with an online as well as a brick-and-mortar presence in the UK and in Ireland, wanted to enter into a merger with Betfair, an international online-only gambling operator. Markets affected included the national market for the provision of online fixed-odds betting services and the national market for the provision of online gaming services.

**Horizontal theories of harm:** On the market for online betting services, the authority concluded that the merging parties were not such close competitors on this market that they would find it profitable to increase their prices post-merger.

On the market for the provision of online fixed-odds betting services, the merged entity would face strong competition from various large competitors, and was therefore unlikely to be able to increase its prices.

On the very competitive market for online gaming services, the merged entity would only have a slight increase in market share compared to Paddy Power's pre-merger market share, and no anti-competitive effects were therefore considered to arise.

Overall, the authority noted that although Paddy Power was the market leader in a number of relevant markets, its market shares had declined over the last years.

**Non-horizontal theories of harm:** The authority analysed possible vertical effects in the provision of live betting exchange data to online betting service providers, data that Betfair provided and Paddy Power had previously purchased from it. This kind of data is used by providers of online betting services to set their prices for fixed-odds events. The authority assessed a possible input foreclosure of competing fixed-odds betting service providers through restricting their access to Betfair's live betting exchange data. They concluded, however, that Betfair's data did not constitute an essential input for these providers, which is also seen in the fact that a number of online betting service providers did not purchase this data from Betfair. In addition, there were an array of alternative sources for this data. The authority thus concluded that the merger would not lead to vertical input foreclosure.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(22) Ireland: Ladbrokes/Gala Coral (10 March 2016)**

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/16/007

**Concentration:** Ladbrokes is a multi-channel betting and gaming company with online and brick-and-mortar presence in Ireland, the UK, Spain and Belgium. It also owns the online betting exchange Betdaq. Ladbrokes intended to merge with businesses of the Gala Coral group that equally runs a multi-channel betting and gaming company with online presence in Ireland and brick-and-mortar presence in the UK and Italy. Markets affected included the national market for the provision of online fixed-odds betting services and the national market for the provision of online gaming services

**Horizontal theories of harm:** The horizontal overlap in online betting, online gaming and telephone betting services was assessed. The authority considered that a number of large competitors operated on these markets that would act as competitive constraints on the merged entity, and that the target's share of these markets was rather insignificant.

**Non-horizontal theories of harm:** A potential vertical overlap between the parties concerned the sale of betting exchange data, which Ladbrokes sold in Ireland. When assessing whether this could lead to the foreclosure of competing fixed-odds betting service providers, the authority relied on the same analysis it had carried out in *Paddy Power/Betfair* (case M/15/059) and highlighted that not only was this not essential input, but there were also alternative sources for obtaining such data.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(23) Ireland: Stars Group/Sky Betting & Gaming (18 June 2018)**

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/18/038

**Concentration:** Stars Group is a global provider of technology-based products and services related to online gaming and interactive entertainment. Amongst others, it offers online gaming and online sportsbook betting, operates real-world poker tournaments, and provides affiliate marketing services and odds comparison through iBus. Stars Group intended to acquire Cyan Blue, which controls the Sky Betting & Gaming group. The Sky Betting & Gaming group is active in online and mobile betting and gaming services and also operates Oddschecker, an odds comparison service that provides customers with price/odds comparisons but also offers betting and gaming providers advertising space. Markets affected included the national market for the provision of online fixed-odds betting services, the national market for the provision of online gaming services, the national market for the supply of online advertising space on gambling-related websites, and the national market for the provision of odds comparison services.

**Horizontal theories of harm:** In terms of horizontal overlaps, the authority considered effects on the following markets: online betting services, online gaming services, online advertising space on gambling-related websites, and online gambling affiliate marketing

services. Based on the low combined market shares of the merged entity and the large number of competitors active in these markets, the transaction did not raise competition concerns in the eyes of the authority. In particular, the authority underlined that in online gaming services, there was a high degree of market transparency for consumers, including through odds comparison websites, and consumers tended to multi-home, thereby ensuring there would not be anti-competitive effects.

**Non-horizontal theories of harm:** In terms of vertical relationships, the authority assessed odds comparison and online affiliate marketing. In odds comparison, Stars Group had an affiliate contract with Sky's Oddschecker. The authority thus analysed whether, post-merger, the merged entity may have the ability and incentive to foreclose competing providers from accessing odds comparison or to foreclose competing odds comparison services. It concluded that neither would be the case based on the large number of online fixed-odds betting providers and online gaming providers present on the market, and in the light of the small market share increase in these markets for the merged entity. The authority also held that Oddschecker was unlikely to refuse to display competing offers on its comparison site, as displaying multiple offerings is required for these types of sites. In addition, there are several competing odds comparison services active on the market. In conclusion, the authority found that the merged entity would have neither the ability nor the incentive to foreclose competing providers from accessing odds comparison.

On the market for online affiliate marketing services, the authority analysed whether, post-merger, the merged entity may have the ability and incentive to foreclose competing online fixed-odds betting providers or online gaming providers from accessing online affiliate marketing services, or to foreclose competing online affiliate marketing services. It concluded that based on the high number of international online market affiliates specialising in the gambling sector, the high number of competing online fixed-odds betting providers and online gaming providers, and the low market involvement of iBus, no vertical foreclosure concerns would materialise.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(24) Ireland:** *EQT Fund Management/SUSE* (18 September 2018)

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/18/066

**Concentration:** EQT, a group of private equity funds investing in portfolio companies, wanted to acquire SUSE, an open source software provider with a focus on infrastructure software and middleware. EQT already held four companies active in software, but none of these horizontally overlapped with SUSE.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The transaction would lead to vertical integration between SUSE in infrastructure software and middleware (upstream) and EQT's software companies in application software (downstream). The authority therefore assessed possible vertical foreclosure, once upstream in the supply of infrastructure, middleware and database software; and once downstream in the purchasing of infrastructure,

middleware and database software. On input foreclosure, the authority considered that the low market shares held by the merged entity would not allow it to engage in the foreclosure of Linux operating systems for servers or any of the types of software. On customer foreclosure, EQT's low turnover in application software led the authority to conclude that the merged entity would not be able to foreclose upstream competitors from accessing application software providers.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(25) Ireland:** *Applied Materials/Kokusai Electric Corporation* (11 October 2019)

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/19/027

**Concentration:** Applied Materials proposed to acquire sole control of Kokusai Electric Corporation, a transaction that affected the national market for the supply of wafer fabrication equipment tools (semiconductors).

**Horizontal theories of harm:** Based on the intricacies and great differentiation within the sector of wafer fabrication equipment, the authority found that the deposition tools offered by the acquirer and the target were not substitutes and did not compete with each other; there was only a minimal overlap that was not considered to raise any competition concerns.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(26) Ireland:** *Flutter Entertainment/Stars Group* (12 May 2020)

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/20/001

**Concentration:** Flutter Entertainment, a gambling operator active amongst others online as well as through 620 Paddy Power outlets in the UK and Ireland, proposed to acquire Stars, a Canadian operator of technology-based product offerings in the gambling and interactive entertainment industries. Stars did not operate local betting offices in Ireland.

**Horizontal theories of harm:** The authority assessed the horizontal overlap in the provision of online gambling services in Ireland and the likelihood of unilateral effects following the merger. In online betting services, it found that the parties were not each other's closest competitors and that a high degree of transparency allowed consumers easy comparison and switching. It concluded that unilateral effects post-merger were unlikely to be successful. In online fixed-odds betting services, it found similar market conditions as those outlined above.

In online gaming services, the authority found that the merged entity would not have the ability to unilaterally raise prices. And in online poker services, the authority found that there were relatively low entry barriers and market transparency contributed to easy switching for consumers, making unilateral effects unlikely.

The authority did not raise any concerns relating to the small horizontal overlap in the supply of odds comparison services.



**Non-horizontal theories of harm:** The authority identified a number of (actual and potential) vertical relationships between the merging parties. As concerns odds comparison services, the authority noted that Stars' service Oddschecker had an affiliate contract with Flutter. However, two competitors that were more important than Oddschecker would continue to represent a competitive constraint for Oddschecker. The authority also highlighted that the merged entity was unlikely to foreclose rival online betting services providers from accessing odds comparison services, because that would make Oddschecker less compelling in the eyes of consumers.

Concerning online affiliate marketing services, the authority noted that Stars' iBus affiliate marketing services were of limited relevance in Ireland, and over 35,000 online marketing affiliates specialising in the gambling sector continued to provide such services after the merger. On the provision of horse racing and football data, the authority considered that a number of alternative horse racing and football data providers would continue to exist post-merger, representing a competitive constraint. Finally, the authority did not believe any vertical competition concerns would arise in relation to the provision of gaming developments services and the provision of online betting exchange data.

Concerning the adjacent market of matched betting services, the authority concluded that the merged entity would neither have the ability nor the incentive to foreclose matched betting services providers from the market, as these could gather the data required through other means and constituted a means for customer acquisition for online betting services providers.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The authority assessed the closeness between competitors by analysing their Google AdWord spending as directed at their competitors. As Oddschecker was not a service with a dominant position, the likelihood of it engaging in self-preferencing by providing a better positioning for its own services was not assessed.

This concentration was also unconditionally cleared in Bulgaria,<sup>31</sup> Malta,<sup>32</sup> Spain<sup>33</sup> and the UK.<sup>34</sup>

**(27) Ireland: *Booster/Liftoff Mobile* (15 February 2021)**

**NCA:** Competition and Consumer Protection Commission

**Case number:** M/21/002

**Concentration:** Booster proposed to acquire Liftoff Mobile on the national market for mobile app advertising intermediation. Booster is owned by Blackstone, an alternative asset manager and provider of financial advisory services. Among its assets is Vungle, a provider of technology-enabled advertising services to advertisers. Liftoff Mobile provides mobile online advertising services.

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<sup>31</sup> Комисия за защита на конкуренцията, *Flutter Entertainment/Stars Group* (269/16.04.2020, 16 April 2020).

<sup>32</sup> Malta Competition and Consumer Affairs Authority, *Flutter Entertainment/Stars Group* (COMP-MCCAA/03/2020, 18 February 2020).

<sup>33</sup> Comisión Nacional de los Mercados y la Competencia, *Flutter Entertainment/Stars Group* (C/1094/20 12 Mar 2020, 12 March 2020).

<sup>34</sup> Competition & Markets Authority, *Flutter Entertainment/Stars Group* (ME/6865/19, 31 March 2020).

**Horizontal theories of harm:** The authority identified a horizontal overlap between Liftoff Mobile and Vungle. However, it found that the transaction would raise no competition concerns because this overlap was minimal and the parties' combined market share would be below 5%. In addition, a number of important competitors were present on the market, including Google and Facebook, which would continue to exert important competitive pressure.

**Non-horizontal theories of harm:** No relevant vertical relationship was identified.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In the eyes of the authority, the presence of Google and Facebook indicated that the merged entity would be subject to intense competition.

**(28) Italy: OEP 14 Coöperatief/Techedge (4 August 2020)**

**NCA:** Autorità Garante della Concorrenza e del Mercato

**Case number:** 28331

**Concentration:** OEP 14 Coöperatief, a private equity firm, proposed to acquire Techedge, an Italian company active in the management and digitalisation of business processes.

**Horizontal theories of harm:** Due to the low market shares of the undertakings involved, both in the area of information technology and in the area of software services, and due to the presence of important competitors, the authority did not consider any anti-competitive effects to arise.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(29) Malta: GVC Holdings/Ladbrokes Coral Group (21 March 2018)**

**NCA:** Malta Competition and Consumer Affairs Authority

**Case number:** COMP-MCCAA/4/18

**Concentration:** GVC Holdings, a multinational sports betting and gaming group, wanted to acquire the Ladbrokes Coral Group, a multinational multi-channel betting and gaming company that operates betting shops as well as online betting and gaming. The markets affected were found to be the national market for the provision of online fixed-odds sportsbook betting services and the national market for the provision of online gaming services.

**Horizontal theories of harm:** The authority found that the aggregate market share for the supply of online fixed-odds betting services via sportsbook would be between 15-25%. In online gaming services, the combined market share would amount to 25-35%. Post-merger, a number of important competitors would continue constraining the merged entity – some with the same or higher market shares than the latter. The authority also noted that a substantial number of gaming licenses had been awarded and that many international online gaming companies would be authorised to operate in Malta. It described the market as dynamic with noticeable fluctuations.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(30) Netherlands: Sanoma/Iddink (28 August 2019)**<sup>35</sup>

**NCA:** Autoriteit Consument & Markt

**Case number:** ACM/19/035555

**Concentration:** Sanoma, a publisher of (digital) learning materials, wanted to acquire Iddink, a distributor of (digital) learning materials and electronic learning environments in secondary education

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The authority was concerned that the acquisition could foreclose competitors of Iddink's electronic learning environments by providing preferential treatment or better compatibility with Sanoma products on the market for issuing educational materials (input foreclosure). As a result, competitors would become less effective, barriers to entry would be raised and opportunities for innovation would be harmed. In view of the digital nature of the market and the need for further digitization in the educational resource chain, this would have a negative impact on price, quality and innovation.

On customer foreclosure regarding the issuance of educational materials, the authority did not believe the merged entity would have an incentive to foreclose after the proposed concentration.

The authority considered it plausible that Sanoma would have access to commercially sensitive information from competitors after the proposed concentration, giving it an advantage over its competitors and possibly impeding competition in the market for the issuance of teaching materials in secondary education.

The authority found that the merged entity could not profitably implement a foreclosure strategy through bundling based on the limited income resulting from such a foreclosure strategy.

Overall, the authority found that the concentration would significantly impede effective competition.

**Outcome:** Conditionally cleared in phase 2.

**Conditions:** To address the competition concerns it had identified, the authority cleared the concentration subject to the following conditions: Sanoma would (i) grant publishers access to the Magister<sup>36</sup> API under fair, reasonable and non-discriminatory (FRAND) conditions, including the necessary information to enable the same link with Magister for all publishers; (ii) provide information about Magister to publishers who request this under FRAND conditions, if they provide similar information to Sanoma; (iii) implement internal measures to ensure that Sanoma does not have access to competitively sensitive information about other publishers; and (iv) conclude a service agreement with publishers for the disclosure and use of digital learning resources of publishers via Magister, which

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<sup>35</sup> Thank you to Dániel Élő for providing a summary of this case, which was subsequently shortened by the author of this Report.

<sup>36</sup> Magister is an educational platform that provides a digital learning environment, student administration functionalities and an app for students and parents; see Magister, <<https://www.magister.nl/>>.

includes the option for publishers to have it established by means of their own audit that the publisher in question gains access to the Magister API in a FRAND manner and a dispute settlement procedure is to be arranged.

**Noteworthy:** After the Court of Rotterdam's ruling partially setting aside the initial decision,<sup>37</sup> the authority carried out additional investigations and retained the conditions for the clearance of the acquisition.<sup>38</sup> On 12 July 2022, the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven) ruled that the authority had rightly cleared the transaction subject to conditions, and consequently upheld the authority's decision of 28 August 2019.<sup>39</sup>

**(31) Netherlands: DPG/Sanoma** (10 April 2020)<sup>40</sup>

**NCA:** Autoriteit Consument & Markt

**Case number:** ACM/19/038207

**Concentration:** DPG intended to acquire Sanoma. DPG was active in the field of news media, including the publishing of newspapers and door-to-door papers, radio and online services, including in the field of online job advertisements, price comparison and car and technology websites and also on the Dutch radio market. The target was active in the field of publishing a large number of magazines, offering online news and online services, including comparison websites.

**Horizontal theories of harm:** The activities of the parties horizontally overlapped in the provision of general (online) news and the provision of online advertising space. Although DPG would become an important provider of unpaid general online news, it would continue to experience competitive pressure from other (unpaid) online news media (e.g., NOS, Mediahuis and RTL) and from other news channels such as print, radio and TV. In addition, DPG had no incentive to degrade the quality of its unpaid general online news offerings given the reach achieved with these offerings and the importance of reach for (i) generating advertising revenue and (ii) referral to e-commerce services. In terms of advertising space, the merged entity would only have limited market power and would experience fierce competition from Google and Facebook. The authority therefore did not expect any negative consequences for competition in this area.

**Non-horizontal theories of harm:** The authority investigated vertical as well as conglomerate theories of harm, but concluded that the concentration was unlikely to significantly impede effective competition. While DPG could use the concentration to improve its position in paid general online news, such a strategy would not foreclose competitors. DPG might also be able to bundle its activities on various markets with its online advertising services, but the authority concluded that DPG would not have market power in any advertising market that it could transfer to adjacent advertising markets.

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<sup>37</sup> Rechtbank Rotterdam, *Sanoma/Iddink* (ROT 19/5120, 4 March 2021), ECLI:NL:RBROT:2021:1766.

<sup>38</sup> Autoriteit Consument & Markt, 'After follow-up investigation, ACM still conditionally clears acquisition of Iddink Group by Sanoma Learning' (27 August 2021) <<https://www.acm.nl/en/publications/after-follow-investigation-acm-still-conditionally-clears-acquisition-iddink-group-sanoma-learning>>.

<sup>39</sup> College van Beroep voor het Bedrijfsleven, *Sanoma/Iddink* (21/467, 21/468 & 21/469, 12 July 2022), ECLI:NL:CBB:2022:411.

<sup>40</sup> Thank you to Dániel Élő for providing a summary of this case, which was subsequently shortened by the author of this Report.

Post-merger, DPG would also have the ability to use its position in unpaid general online news to refer visitors to its own e-commerce activities, but again this would be unlikely to foreclose competitors. This is because in online job and car advertisements, the concentration would not lead to market power. Sufficient alternative channels would remain available for recruiting visitors for providers of job and car advertisements. The same was true for price comparison services, where placing hyperlinks from unpaid general online news to price comparison services would not lead to foreclosure.

**Outcome:** Unconditionally cleared in phase 1.

**Conditions:** NA

**Noteworthy:** As in many other cases, the strong market position of Facebook and Google in online advertising was seen as an important constraining factor on the merged entity.

**(32) Netherlands: NS Groep/Pon Netherlands (20 May 2020)**<sup>41</sup>

**NCA:** Autoriteit Consument & Markt

**Case number:** ACM/20/038614

**Concentration:** NS Groep (NS) and Pon Netherlands (Pon) intended to set up a full-function joint venture (JV) in the field of shared mobility through one central mobile application and specific mobility hubs. NS was the largest provider of public transport by train in the Netherlands and also offered shared bicycles at train stations under the OV-fiets brand. Through a subsidiary, it offered shared (electric) bicycles, shared (electric) cars and shared (electric) cargo bikes. Pon produced and imported means of transport such as (electric) bicycles, (electric) scooters and cars. These constituted an important input for the provision of such services. In addition, Pon was also active in the field of partial transport services through other companies.

**Horizontal theories of harm:** The authority assessed a range of markets in which both parties were active, including the provision of shared bicycles (NS, Hely<sup>42</sup> and Next<sup>43</sup>), the provision of shared cars (Pon, Hely and Next) and the distribution of transport and mobility services via an app (Hely and Next).

Concerning the provision of (e-)shared bicycles to the general public, the authority concluded that competition would not be significantly impeded as Next's offer was largely aimed at private hubs, its market share added very little to the JV, and there was competitive pressure from other parties in Amsterdam.

In relation to the provision of shared cars, the authority found that several factors indicated that the JV would not significantly impede effective competition, namely the low joint market share of the parties, the existing competitive pressure from other suppliers of station-based shared cars, the (potential) competitive pressure from suppliers of free-floating shared cars and the fact that the market was still in full development.

Concerning the (retail) market for the integrated provision of transport and mobility services via an app, the authority found that this market was developing strongly. The JV would experience competitive pressure from both local providers of transport modalities

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<sup>41</sup> Thank you to Dániel Élő for providing a summary of this case, which was subsequently shortened by the author of this Report.

<sup>42</sup> Hely was a subsidiary of NS.

<sup>43</sup> Next Urban Mobility was a subsidiary of Pon.

and from providers of integrated mobility services, leading the authority to conclude that no anti-competitive effects would arise.

**Non-horizontal theories of harm:** The authority assessed a range of vertical relationships. The authority believed that, due to the JV, NS would have both the ability and the incentive to engage in a partial input foreclosure strategy regarding its train services and the integrated provision of transport and mobility services via an app. This could lead to (i) foreclosure of current providers of integrated mobility services via an app, and (ii) raise barriers to entry into the national market for the integrated provision of transport and mobility services via an app. Based on this, the authority believed that the JV could result in a significant restriction of competition. The commitments submitted by the parties removed this risk in the eyes of the authority (see below).

In terms of shared bicycles and shared cars, the authority concluded that it was not plausible that NS would have the ability and incentive to implement a customer foreclosure strategy vis-à-vis providers of bicycle-sharing and providers of car-sharing.

**Outcome:** Conditionally cleared in phase 1.

**Conditions:** To address the authority's competition concerns, the parties offered to grant (potential) competitors of the JV access to the application programming interfaces (APIs) of the train and OV-fiets services on equal (commercial) conditions as these will be made available to the JV.

**Noteworthy:** In this case, vertical input foreclosure concerns alone led to the necessity of commitments on the part of the notifying parties.

**(33) Poland: 1&1 Internet/Home.pl (22 December 2015)<sup>44</sup>**

**NCA:** Urząd Ochrony Konkurencji i Konsumentów

**Case number:** DKK-216/2015

**Concentration:** 1&1, which belongs to the United Internet Group (UI) and offers cloud computing services, proposed to acquire Home.pl on the national market for .pl national domains (registration and operation), the national market for hosting services and the national market for cloud computing.

**Horizontal theories of harm:** On the market for the .pl national domain (registration and operation), the authority assessed the market shares of the merging parties and found that as regards registration services, those were at 40-50%, while for operation services they were at 30-40%. The target's market share in both had recently dropped, while the main competitor's share of the market (Nazwa for registration services, Name for operation services) was steadily increasing. Also, the HHI delta did not exceed 150, from which the authority concluded that the likelihood of strengthening the market position of the merged entity was very small. Post-merger, the merged entity would continue to be constrained by other companies. Also, entry barriers were low, as was evidenced by 203 companies that had the status of 'NASK Partner' (NASK stands for the Polish Research and Academic Computer Network) in 2014, meaning they could provide registration and operation services related to the national domain .pl.

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<sup>44</sup> Thank you to Klaudia Majcher for providing a summary of this case, which was subsequently shortened by the author of this Report.

On the market for hosting services, the merged entity would have a market share below 40% (the national dominance benchmark). The target's market share was much larger than the acquirer's. Post-merger, market concentration would only increase insignificantly and the merged entity would face competition from other companies.

The authority rejected the argument that the transaction would impair competition due to the capital potential of UI. UI, which started to operate in Poland in 2010, had not achieved any considerable market success and had not created a recognisable brand in Poland despite its capital and significant advertising efforts. Hence, UI's financial position would not contribute to the strengthening of the merged entity's position in a way that could distort competition.

The authority also noted that entry barriers in both markets under investigation were low, and switching rates indicated low customer loyalty.

In the national market for cloud computing, the aggregate market shares of both companies were insignificant (0-5%), which is why it was not further investigated.

**Non-horizontal theories of harm:** The undertakings concerned did not operate in any upstream or downstream market in which their individual or joint market shares would exceed 30%. No markets were affected by the concentration in a conglomerate sense.

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**(34) Portugal: Sonae/CTT - Correios de Portugal JV (19 July 2018)**

**NCA:** Autoridade da Concorrência

**Case number:** Ccent. 27/2018

**Concentration:** Sonae and CTT - Correios de Portugal (Post Portugal) notified the creation of a joint venture (JV) dedicated to the operation of an e-commerce platform for the provision of intermediation services between traders and consumers. A number of markets were affected, including the market for the provision of online marketplace services, the market for online advertising and the markets for information technology services, cybersecurity services and data analytics services.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** The JV would create a new player on the market for the provision of online marketplace services, possibly leading to more diverse offerings on that market. The authority noted that the main players on that market consisted of Aliexpress, Amazon, eBay and Rakuten, all of which were B2C platforms with generalist offerings. There were also non-generalist players, C2C platforms and non-transactional platforms active on that market. While Sonae was active in online advertising, its market presence was not significant. Also due to the strong market presence of Facebook and Google on that market, the authority did not express competition concerns related to online advertising.

The authority also assessed the presence of CTT on a number of markets related to an online marketplace, such as logistics services, express delivery and payment processing. Due to the low market shares, the authority generally considered that no competition concerns would arise. It then considered the presence of Sonae on a number of vertically related markets, including IT services and the retail sale of children's clothing, sporting

goods and consumer electronics. It concluded that Sonae would not be able to adopt any strategy that would involve the termination or deterioration of supply conditions to customers that operated on the same market as the JV (input foreclosure). It also held that Sonae would not be able to foreclose the JV's competitors by no longer reselling products to competing marketplaces. Despite its relatively high market share in certain retail markets (sporting goods, consumer electronics), there remained multiple competitors that would constrain such a strategy of input foreclosure. Based on the ownership structure of certain companies associated with Sonae, it was also unlikely that they would have an incentive to adopt such a strategy to the benefit of the JV. Overall, the authority therefore found that the JV would neither be able to nor have the incentive to engage in input foreclosure of other marketplaces. Also, it found it unlikely that Sonae and CTT would adopt a strategy of customer foreclosure by preventing Sonae's competitors in various markets from providing services to the JV or reselling its products on its marketplace. This would prevent the success of a marketplace, which requires two market sides to come on board.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The authority relied on two-sided market economics to explain why the envisaged JV would not have an incentive to engage in customer foreclosure. It also drew attention to market leaders Google and Facebook in online advertising.

**(35) Romania: Dante International/PC Garage (24 November 2016)**<sup>45</sup>

**NCA:** România Consiliul Concurenței

**Case number:** 84/24.11.2016

**Concentration:** Dante International is a company that provides an online platform and also acts as a retailer thereon (dual presence). It also provides electronics and IT products. Dante wanted to acquire PC Garage, an online consumer goods retailer with a focus on IT products and electronics.

**Horizontal theories of harm:** The authority found that the acquisition would serve to further strengthen Dante's market position, and would therefore significantly impede effective competition in certain products.

**Non-horizontal theories of harm:** Dante's vertical integration was noted by the authority.

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the competition concerns raised by the authority, Dante committed (i) to divest four online stores active in the non-food retail market (namely, pcfun.ro, shopit.ro, garagemall.ro and electrofun.ro) as an ongoing concern, (ii) not to be involved in the divested activities for at least 10 years.

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<sup>45</sup> This summary is based on the account of Raluca Dinu, 'Romania' in Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020) 451, 451-452; 'Dante International, PC Garage merger gets conditional Romanian approval' *MLex* (29 November 2016) <[https://content.mlex.com/#/content/846719?referrer=search\\_linkclick](https://content.mlex.com/#/content/846719?referrer=search_linkclick)>.



**(36) Romania: Glovoappro/Foodpanda (22 November 2021)**<sup>46</sup>

**NCA:** România Consiliul Concurenței

**Case number:** 86/22.11.2021

**Concentration:** Glovo wanted to acquire Foodpanda on the national market for online food delivery platforms and the national market for online platforms for delivery of multicategory consumer goods.

**Horizontal theories of harm:** The authority was concerned that the merged entity would have a dominant position and would then be able to impose exclusivity clauses on restaurants. While users tend to multi-home on this market, such exclusivity clauses would reduce the beneficial effect of this multi-homing.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the authority's competition concerns, Glovo proposed not to impose exclusivity obligations on restaurants. This included the following, more detailed commitments: (1) not to impose an exclusive obligation on restaurants in current or future intermediation agreements with restaurants, (2) not to contractually base the level of commissions paid by restaurants on exclusivity, (3) not to penalise restaurants for joining another online food ordering platform, and (4) not to renew the target's exclusivity obligations vis-à-vis restaurants.

**(37) Slovenia: Sully System/CENEJE (12 April 2018)**<sup>47</sup>

**NCA:** Javna agencija Republike Slovenije za varstvo konkurence

**Case number:** 3061-27/2017-71

**Concentration:** With the contract on the sale of business shares, Sully System acquired sole control over Ceneje, a company active in the market of online advertising through search engines.

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** In the proposed concentration there were vertical overlaps as the online price comparison market in which Ceneje was present, is vertically linked to the online retail market for non-food consumer goods, in which Sully System operated. The authority first assessed the effects of the proposed concentration on the online price comparison market (the upstream market) and then on the online retail market for non-food consumer goods (the downstream market). The merged entity would have a market share of more than 30% in at least one relevant market. Its main concerns were twofold. First, the merged entity could engage in input foreclosure, especially by discriminating between offers of online retailers and by using of non-objective search and ranking algorithms of online retailers offers which would be preferential to the merged entity. Secondly, the authority was also concerned with regard to the merged entity's access to commercially sensitive information regarding competitors' activities in the downstream market.

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<sup>46</sup> This summary is based on the summary provided on the Caselex Platform, <caselex.eu> (Remedies Module).

<sup>47</sup> Thank you to Martina Repas for providing a summary of this case, which was subsequently shortened by the author of this Report.

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** To address these competition concerns, the parties offered the following commitments to the authority: (i) Ceneje would not discriminate, either directly or indirectly, between online retailer ads, in particular with regard to appearance and display, (ii) Ceneje would maintain neutral and objective search and ranking algorithms used for online retailers ads, (iii) Ceneje would maintain neutral and objective recommendations, (iv) Sully System's website would include a statement that Ceneje is a member of the Rockaway Group, (v) Sully System would ensure that Ceneje meets all its obligations in the proposed commitments, (vi) Sully System would provide historical price data to the authority every six months for a period of 30 months.

The authority decided that the proposed commitments were appropriate and thus able to eliminate the competition concerns.

**Noteworthy:** As in the Czech case of *Rockaway Capital/Heureka*,<sup>48</sup> a transparency commitment was regarded as an important aspect to counter competition concerns.

**(38) Slovenia: ECE/ELTUS PLUS (25 April 2019)**<sup>49</sup>

**NCA:** Javna agencija Republike Slovenije za varstvo konkurence

**Case number:** 3061-41/2018

**Concentration:** Under a contract for the sale and purchase of assets, ECE would become the owner of ELTUS PLUS's online store. ECE is a company dealing with the sale of energy, and also offers online shopping services.

**Horizontal theories of harm:** In the proposed concentration there were horizontal overlaps in the online non-food retail market, on which the undertakings concerned only had negligible market shares.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In assessing the market shares of the undertakings concerned on the market of online retail sale of non-food goods in Slovenia, the authority took into account only competitors with a seat in Slovenia whose activities are exclusively the online retail sale of non-food goods. Among these, it considered only those who offered products of all those categories that are common to the online offers of the undertakings concerned.

**(39) Slovenia: Shoppster/IDEO PLUS (24 April 2020)**<sup>50</sup>

**NCA:** Javna agencija Republike Slovenije za varstvo konkurence

**Case number:** 3061-9/2020-14

**Concentration:** Shoppster, owned by Slovenia Broadband in Luxembourg, acquired 100% of shares in IDEAL PLUS under a contract for the sale of shares. Shoppster was

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<sup>48</sup> Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

<sup>49</sup> Thank you to Martina Repas for providing a summary of this case, which was subsequently shortened by the author of this Report.

<sup>50</sup> Thank you to Martina Repas for providing a summary of this case, which was subsequently shortened by the author of this Report.

established to provide retail services by mail order or online, while IDEO PLUS provides online retail services.

**Horizontal theories of harm:** There was a partial horizontal overlap between the activities of the associated undertaking of Shoppster and IDEO PLUS in the segment of mobile phone sales. The authority found that the sale of mobile phones by these undertakings was not substitutable: While IDEO PLUS sold mobile telephones over-the-counter, the associated undertaking of Shoppster exclusively sold them through a range of packages, i.e. by linking those sales to its mobile telephony services. IDEO PLUS also sold mobile phones through its online store for non-food goods, while Shoppster's associated undertaking Telemach is a telecommunication operator that operates in the market of telephony services, where it offered the option of buying mobile phones online. Considering the market shares of the undertakings concerned, the presence of competitors and low barriers to entry, the authority concluded that the proposed concentration would not eliminate effective competition in the relevant market.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

(40) **Slovenia:** *Allegro.eu/MIMOVRSSTE* (24 January 2022)<sup>51</sup>

**NCA:** Javna agencija Republike Slovenije za varstvo konkurence

**Case number:** 3061-25/2021-6

**Concentration:** The subject of the concentration is the acquisition of the entire business share in Mimovrste, which is fully owned by Mall Group, which is owned by EC Investment, Bonak and Rockaway e-commerce. With the contract, the parties agreed that Allegro.eu would buy 100% of the shares of Mall Group, and later the shares would be transferred to Allegro.pl. Allegro.pl would eventually become the sole shareholder of Mall Group, thus acquiring sole control over Mimovrste. Mimovrste provides retail services by mail order or online. Its core business is managing an online store platform. Allegro.eu is an online platform operating in Poland.

**Horizontal theories of harm:** In the proposed concentration there was a horizontal overlap between the activities of the undertakings concerned. However, there was no such overlap in the relevant Slovenian market, since Allegro.eu and its associated undertakings did not operate in Slovenia. Consequently, the authority was of the opinion that the proposed concentration would not have negative effects on competition in the food retail market and in the non-food retail market in Slovenia, especially due to actual and potential competition as well as low entry barriers.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

(41) **Spain:** *Schibsted/Milanuncios* (20 November 2014)

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<sup>51</sup> Thank you to Martina Repas for providing a summary of this case, which was subsequently shortened by the author of this Report.

**NCA:** Comisión Nacional de los Mercados y la Competencia

**Case number:** C/0573/14

**Concentration:** Schibsted, a multinational media group, wanted to acquire Milanuncios, an online platform specialised in classified advertisements.

**Horizontal theories of harm:** The authority was concerned that this acquisition could raise horizontal unilateral effects by strengthening Schibsted's market power vis-à-vis professional advertisers, which would be faced with price increases for classified advertisements.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 2.

**Remedies:** In order to address the authority's competition concerns, Schibsted would allow a third party to exploit – on an exclusive basis – professional advertisements displayed on the platform related to the motor segment of milanuncios.com. The merged entity also had to give automatic access to professional advertisers' data. The licensee would also be allowed to redirect traffic to their own website. The exclusive license would be valid for two years.

**(42) Spain:** *Just Eat/La Nevera Roja* (31 March 2016)

**NCA:** Comisión Nacional de los Mercados y la Competencia

**Case number:** C/0730/16

**Concentration:** Just Eat planned to acquire La Nevera Roja on the Spanish market for the management of food orders at home via online platforms, accessed via internet or mobile applications. While Just Eat had its seat in London, La Nevera Roja was founded in Spain in 2010.

**Horizontal theories of harm:** The authority considered that this horizontal merger may raise competition concerns because the acquirer and the target were close competitors and constituted, pre-merger, the biggest and second biggest players on the market for the management of food orders via online platforms. After the merger, they would have a combined market share of about 70-80%, possibly even higher. In addition, several companies had recently exited that market. The authority emphasised the importance of network effects in these markets, and high barriers to entry consisting of investments to be made in publicity and marketing. The authority was concerned that the merged entity may have both the ability and the incentive to start implementing a strategy of exclusivity, thus foreclosing competing platforms from access to restaurants (customer foreclosure). Nevertheless, the authority also noted that online food delivery platforms only accounted for 10% of the local food delivery markets in Spain, meaning that the market power of these platforms over restaurants was overall limited. Restaurants also had the option of opting for providing home delivery themselves, further restricting the platform's market power over it.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the authority's competition concerns relating to a possible foreclosure of other food order platforms, Just Eat proposed the following commitments: (1) not to impose exclusivity on restaurants (currently or in the future) affiliated with it;

(2) no tying of commissions paid by affiliated restaurants (current or in the future) to an exclusivity obligation; (3) no penalisation of affiliated restaurants (current or in the future) for joining third platforms. The public documents did not state the duration of these commitments. Just Eat further promised to communicate these commitments to its affiliates within two weeks of them being accepted by the authority.

The authority considered that these commitments would severely limit Just Eat's ability to engage in exclusivity strategies, thus allowing restaurants to continue multi-homing. Bearing in mind the expansive nature of the relevant market and different competitive strategies employed by different platforms, the authority considered that the commitments would allow the market to remain competitive.

**Noteworthy:** This acquisition involved a multinational acquiring a local competitor in a market that has been uprooted due to digitalisation.<sup>52</sup>

In the case of *Just Eat Spain/Canary Delivery Company*,<sup>53</sup> the authority emphasised that the commitments accepted in *Just Eat/La Nevera Roja* had favoured market entry in Spain for digital food order platforms and thus led to a more competitive market.

**(43) Spain: Daimler/Hailo/MyTaxi/Negocio Hailo** (24 November 2016)

**NCA:** Comisión Nacional de los Mercados y la Competencia

**Case number:** C/0802/16

**Concentration:** Daimler and Hailo wanted to jointly acquire MyTaxi and Hailo, which enabled end users to hire taxi services online. The two businesses should be merged after the joint acquisition. Markets affected included, among others, the Barcelona and Madrid markets for intermediary services for contracting taxi routes or journeys through apps.

**Horizontal theories of harm:** Concerning horizontal unilateral effects, the authority found that the concentration would significantly strengthen the market power of the resulting entity, which combined two close competitors. It also considered that end users could turn to other means for hailing a ride – radiotaxi, street hailing, third apps – that constrained the resulting entity. Also, market penetration by the resulting entity was low among end users (5%) and a little higher among taxis (20-30%). Taxis did not enter into exclusivity contracts. Although the new entity would likely enjoy market power post-merger, the authority considered that this was a dynamic market that had seen rapid expansion, and there were no barriers to expansion despite the economies of scale and network effects at work in this market. Therefore, no competition concerns would arise.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The characteristics of this particular digital market directly affected the competitive assessment of the merger.

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<sup>52</sup> José Marino García García and Pablo Ibáñez Colomo, 'Spain' in Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020) 499, 500-501.

<sup>53</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat Spain/Canary Delivery Company* (C/1046/19, 10 September 2019).

**(44) Spain: Just Eat Spain/Canary Delivery Company** (10 September 2019)

NCA: Comisión Nacional de los Mercados y la Competencia

**Case number:** C/1046/19

**Concentration:** Just Eat Spain, which started operating in 2010 and covers 95% of Spanish territory with its digital platform for food orders, wanted to acquire the local Canary Delivery Company, which provides an online food order management platform in the Canary Islands.

**Horizontal theories of harm:** The authority found that while Just Eat would increase its market share in the national market for the management of food orders at home via online platforms, that increase would only be marginal. In addition, in the years preceding the transaction Just Eat had continuously lost market share. The foreseen market entry of Uber Eats and the consolidation of Deliveroo were also seen as indicators of a dynamic market. The authority noted that these market entries occurred at a time when the remedies from the transaction *Just Eat/La Nevera Roja*<sup>54</sup> were still in force, favouring market entry in Spain.

In the local market for online food order management platforms, the transaction would lead to an important increase in market share of 50-70%, leading to a market share of 80-90%. Assessing the risk that the merging entity would raise prices or have the ability and incentive to foreclose restaurants for competitors by entering into exclusivity contracts with them, the authority considered that the recent and successful entry of competitor Glovo in 2018 and the entry of Uber Eats in the summer of 2019 indicated that this was not realistic. The authority also highlighted that the target had a very limited turnover and only a single employee (the owner).

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The authority emphasised that the remedies imposed in the case of *Just Eat/La Nevera Roja* had favoured market entry in Spain for digital food order platforms and had thus led to a more competitive market.

**(45) Spain: MIH Food Delivery Holdings/Just Eat** (5 December 2019)

NCA: Comisión Nacional de los Mercados y la Competencia

**Case number:** C/1072/19

**Concentration:** MIH Food Delivery Holdings, which is owned by Prosus, wanted to engage in a hostile takeover of Just Eat on the national market for food order handling through online platforms. MIH held several stakes in assets related to the digital consumer home delivery sector, and in particular a minority share in Delivery Hero, an online food delivery platform active in more than 40 countries (but not Spain). Delivery Hero, however, also had a minority stake in Glovo, Spain's second largest food delivery platform.

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<sup>54</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016).

**Horizontal theories of harm:** Through the acquisition, MIH would go from only having an indirect presence in Spain through its minority stake in Glovo to occupying an important market share with Just Eat. This could lead to an incentive for MIH to prevent Glovo's expansion. In addition, MIH's stakes in Glovo and Just Eat could also facilitate coordination amongst these competitors.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the authority's competition concerns relating to non-coordinated and coordinated effects, MIH proposed the following commitments: (1) MIH would not obtain access to commercially sensitive information of either Delivery Hero or Glovo; (2) MIH would not be able to influence Glovo's strategy in markets where it competes (or may compete) with Just Eat in Spain; (3) Delivery Hero (and Glovo) would not be able to access commercially sensitive information of Just Eat. These commitments would be binding for three years.

**Noteworthy:** Following on the heels of Just Eat's acquisition of Canary Delivery, this hostile takeover did not succeed as only an insignificant number of Just Eat shareholders took MIH up on its final offer.<sup>55</sup>

**(46) Spain: Turnitin/Ouriginal Group** (19 October 2021)

**NCA:** Comisión Nacional de los Mercados y la Competencia

**Case number:** C/1220/21

**Concentration:** Turnitin, an international provider of a wide range of software solutions for the educational sector, wanted to acquire sole control over the Swedish Ouriginal Group, which is only active on the market for plagiarism detection software.

**Horizontal theories of harm:** Following the acquisition, the merged entity would obtain a market share of 50-60% on the Spanish market for anti-plagiarism software, with an increase of 0-10% due to the acquisition. The next biggest competitor, Blackboard, had a market share of 10-20%. On a European scale, however, Blackboard was the market leader (20-30%), with Grammarly and the merged entity each having a market share of about 10-20%. The authority found that a number of factors mitigated the risk of anti-competitive effects, including the small size of the national market, the possibility of a supranational market and the presence of competitors both in Spain and in the EEA – where they had a larger market share. Also, the market share of Ouriginal both in Spain and in the EEA was small, meaning that the additional market share gained by Turnitin through the was is small. The authority also considered that this was an expanding market without significant barriers to entry apart from the necessary investment to develop a database. The Spanish authority also considered that the recent and successful market entry by Google and Microsoft would exert competitive pressure on the merged entity.

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<sup>55</sup> 'Prosus Statement: Lapse of the Offer for Just Eat plc By Prosus N.V. Through Its Wholly-owned Indirect Subsidiary MIH Food Delivery Holdings B.V.' *Businesswire.com* (10 January 2020) <<https://www.businesswire.com/news/home/20200110005400/en/Prosus-Statement-Lapse-of-the-Offer-for-Just-Eat-plc-By-Prosus-N.V.-Through-Its-Wholly-owned-Indirect-Subsidiary-MIH-Food-Delivery-Holdings-B.V.>>.

**Non-horizontal theories of harm:** Although Ouriginal offered its product to third parties so they could incorporate it into their integrated offerings, in the light of its low market shares the authority considered that there was no risk of foreclosure effects due to the merger. In the same vein, the authority did not consider conglomerate effects to arise.

**Outcome:** Unconditionally cleared in phase 1.

**Noteworthy:** The acquisition was also cleared in the UK<sup>56</sup> and in Australia.<sup>57</sup> The Spanish authority regarded the recent market entry by Google and Microsoft as important competitive pressure on the merged entity.

**(47) Sweden:** *Swedbank Franchise/Svensk Fastighetsförmedling* (16 December 2014)<sup>58</sup>

**NCA:** Stockholms tingsrätt

**Case number:** T 3629-14

**Concentration:** Swedbank Franchise acquired Svensk Fastighetsförmedling, a real estate agency. Swedbank Franchise's subsidiary, Fastighetsbyrån, and Svensk Fastighetsförmedling were the two most important players on the Swedish real estate market and each other's closest competitors. The dominant platform for real estate online advertisements, Hemnet, was owned by Fastighetsbyrån (25%), Svensk Fastighetsförmedling (25%) and two associations of real estate agents, where Fastighetsbyrån and Svensk Fastighetsförmedling were members of one of them.

**Horizontal theories of harm:** The acquisition would create a dominant position on real estate agency services in a large number of local markets in Sweden and result in a significant impediment of competition. This aspect is not further analysed here.

**Non-horizontal theories of harm:** After the acquisition, Swedbank Franchise would directly and indirectly (via one of the associations) strengthen its influence over Hemnet. Swedbank Franchise would be able to change Hemnet's business model. Not only did Hemnet have high market shares, but it was also an unavoidable trading partner. Barriers to entry for potential competitors were high, as Hemnet was owned by real estate agents themselves and they would thus have no incentive to support a new platform. Hemnet would have the ability and incentive to engage in input foreclosure vis-à-vis competing real estate agents, eg by extracting monopoly profits or by engaging in price differentiation. As Hemnet would strengthen its dominant position, the authority concluded that this would significantly impede effective competition.

**Outcome:** Prohibited.

**Remedies:** Divestiture.

**Noteworthy:** Based on an application from the Swedish authority (Konkurrensverket), the Stockholm District Court prohibited the concentration.

Because the individual turnover thresholds were not met, the concentration had not been notified prior to its implementation. Later, a voluntary notification was submitted.

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<sup>56</sup> Competition & Markets Authority, *Turnitin/Ouriginal* (ME/6931/21, 26 July 2021).

<sup>57</sup> Australian Competition and Consumer Commission, *Turnitin/Ouriginal Group* (25 November 2021).

<sup>58</sup> This summary is based on Peter Forsberg, Xandra Carlsson and Sebastian Wiik, 'Sweden, Overview of merger control activity during the last 12 months' in Nigel Parr and Catherine Hammon (eds), *Merger Control* (5th edn, 2016) 191, 194-195; Björn Lundqvist, 'Sweden' in Daniel Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)Evolution* (XXIX FIDE Congress 2020) 517, 517-518.



This was the first time a Swedish court prohibited a merger. While the parties initially appealed the Stockholm District Court's judgment before the Market Court, they subsequently withdrew their appeal.

**(48) Sweden:** *Hemnet/Blocket* (2016)<sup>59</sup>

**NCA:** Konkurrensverket

**Case number:** 84/2016

**Concentration:** Blocket, Sweden's largest online marketplace that was also active in digital property listings, wanted to buy Hemnet, the by far largest player in digital property listings.

**Horizontal theories of harm:** As Blocket was the second largest player in digital property listings – and Hemnet's only credible competitor –, this proposed acquisition was thought to give rise to horizontal unilateral effects through the creation of a single major player on this market. The authority was concerned this would lead not only to higher prices for digital property listings, but also to a decrease in quality of the products and services provided and to increased barriers to entry and expansion.

Blocket pointed out that its acquisition would end the loyalty between real estate agencies and Hemnet (on this, see the *Swedbank Franchise/Svensk Fastighetsförmedling* case),<sup>60</sup> thereby making this market considerably more competitive.

**Non-horizontal theories of harm:** NA

**Outcome:** Withdrawal.

**Remedies:** To address concerns related to horizontal unilateral effects, Blocket proposed to grant an exclusive license to a smaller website (Bovision) for a certain period of time, whereby Blocket would automatically refer users that were accessing its website for properties sold through realtors to Bovision. This would have, in the acquirer's view, removed the horizontal overlap between Blocket and Hemnet. As Bovision was only a very small player, the authority did not consider this an effective remedy.

In relation to real estate agencies, the remedies proposed by Blocket involved limitations of sellers' commitments to future advertising on Hemnet, a time-limited price cap for advertisements, and further commitments. As the market test was overall negative, and the authority did not believe this to be an effective remedy, the authority moved to block the concentration.

**Noteworthy:** This acquisition was abandoned when it became clear to the parties that the authority intended to apply to the court to prohibit the concentration.

**(49) United Kingdom:** *Betfair Group/Paddy Power* (17 December 2015)

**NCA:** Competition & Markets Authority

**Case number:** ME/6572/15

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<sup>59</sup> This summary is based on Sweden, 'Agency decision-making in merger cases: from a prohibition decision to a conditional clearance' (3 November 2016) DAF/COMP/WP3/WD(2016)70, 4-5; Sweden, 'Annual Report on Competition Policy Developments in Sweden' (9 June 2017) DAF/COMP/AR(2017)16, 7; Lundqvist (n 58) 519-520.

<sup>60</sup> Stockholms tingsrätt, *Swedbank Franchise/Svensk Fastighetsförmedling* (T 3629-14, 16 December 2014).

**Concentration:** Paddy Power, an international multi-channel betting and gaming company with an online as well as a brick-and-mortar presence in the UK, wanted to enter into a merger with Betfair, an international online-only gambling operator. Markets affected included the national market for the provision of online fixed-odds betting services, the national market for the provision of online gaming services and the at-least national market for the supply of betting exchange data

**Horizontal theories of harm:** The authority assessed whether the merger would lead to less competitive fixed odds or prices on the market for online betting and gaming services. For fixed-odds betting, it found that the parties were not each other's closest competitors and that a number of suppliers remained post-merger that would exercise a competitive constraint on the merged entity.

For online gaming, it concluded that the merged entity's combined share of supply would be rather low, with at least three competitors having a higher market share, in addition to the parties not being particularly close competitors.

Overall, the authority concluded that no horizontal unilateral effects should arise.

**Non-horizontal theories of harm:** The authority assessed whether, post-merger, the merged entity could engage in input foreclosure related to the supply of exchange data. However, it concluded that Betfair's exchange data – while useful – did not constitute an essential input, with plenty of alternative information sources available. Therefore, it concluded that no vertical input foreclosure was likely to arise.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The Competition & Markets Authority relied on Google AdWord spending in its analysis of whether the parties were close competitors. This merger was also unconditionally cleared by the Ireland (case M/15/059).<sup>61</sup> The number of operators would be reduced from eight to seven through the merger – this is often not the case when Big Tech platforms are involved.

(50) **United Kingdom:** *ZPG/Websky* (29 June 2017)

**NCA:** Competition & Markets Authority

**Case number:** ME/6690/17

**Concentration:** ZPG, which owns a customer relationship management (CRM) software for real estate agents as well as the online property portal Zoopla, acquired Websky, which runs the CRM property software Expert Agent. Markets affected included the national market for the supply of CRM property software, the national market for the provision of services to estate agents and consumers through property portals, and the national market for the automatic uploading of property information to property portals.

**Horizontal theories of harm:** The authority assessed whether the horizontal overlap in the provision of CRM property software could lead to competition concerns. As the merged entity would remain subject to a sufficient number of credible and effective competitors on that market, it concluded that no anti-competitive effects would arise. Pre-

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<sup>61</sup> Competition and Consumer Protection Commission, *Paddy Power/Betfair* (M/15/059, 15 January 2016).

merger, the CRM property software offered by the parties was not in particularly close competition due to the differentiated nature of the offerings.

**Non-horizontal theories of harm:** The authority assessed whether the merged entity could engage in input foreclosure of property portals in the vertical relationship between online property portals such as Zoopla (downstream) and CRM property software (upstream). In particular, it analysed whether the merged entity could degrade the quality of the upload feed to property portals that are competing with Zoopla. However, the authority concluded that the merged entity would not have the ability to adopt a foreclosure strategy vis-à-vis rival property portals due to the high number of competitors operating on the market.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** As is pertinent in digital cases, the authority emphasised that an anti-competitive effect didn't necessarily need to relate to prices but could also consist in a degradation of quality.

(51) **United Kingdom:** *Blackbaud/Giving* (8 September 2017)

**NCA:** Competition & Markets Authority

**Case number:** ME/6700/17

**Concentration:** Blackbaud (everydayhero) was in the process of acquiring Giving (JustGiving), both of which operated online fundraising platforms (OFPs) in the UK. Blackbaud also provided payment services and customer relationship management (CRM) software for non-profit organisations (NPOs).

**Horizontal theories of harm:** JustGiving is the UK's leading OFP, while everydayhero is a smaller and lesser-known OFP. The increment in market share through the merger was limited, and everydayhero was not an important competitive constraint on JustGiving. However, a significant number of competitors were active on the market for direct OFPs (especially Virgin Money Giving, BT MyDonate) that would continue to constrain the merged entity's market power.

**Non-horizontal theories of harm:** In terms of conglomerate effects, the authority assessed whether, post-merger, the merged entity could link its CRM software for NPOs with its OFPs, thereby foreclosing competitors in CRM software for NPOs or in OFPs. It concluded that, in general, CRM software for NPOs and OFPs were not complements and it would be difficult for the merged entity to engage in a foreclosure strategy. Customers did not usually buy these two products from a single source, nor at the same time.

Relating to the possibility that the merged entity could foreclose CRM competitors by bundling its CRM and OFP offerings, the authority found that Blackbaud had previously and unsuccessfully tried such a strategy. In addition, a discounted bundle could be pro-competitive, as long as CRM competitors were not forced out of the market. Therefore, the authority concluded that no conglomerate foreclosure concerns arose.

Concerning the possibility that the merged entity could foreclose CRM or OFP competitors by reducing the quality of data integration either between competing OFPs and Blackbaud's CRM software or between competing CRM software and the merged entity's OFPs, the authority underlined that improving data integration between

Blackbaud's CRM and its future OFPs would be pro-competitive. In addition, customers did not choose CRM software based on how well it integrated with one tool, leading the authority to conclude that the merged entity would not have the ability to engage in such a foreclosure strategy.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In the face of multiple competitors active on a relevant market, the NCA regarded improved data integration as a pro-competitive aspect of the merger at issue.

**(52) United Kingdom: *Just Eat/Hungryhouse* (16 November 2017)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6659-16-II

**Concentration:** Just Eat, a major online food ordering platform, wanted to acquire Hungryhouse, another online food ordering platform and subsidiary of Delivery Hero. Such food ordering marketplaces are an intermediary between consumers and restaurants.

**Horizontal theories of harm:** As the market for online food ordering platforms had become more concentrated in the years preceding the acquisition, the authority analysed whether it might give rise to horizontal unilateral effects. The merged entity would have a market share of 80% in UK online food ordering platforms, with an increment of under 10% due to the acquisition. However, ordering and logistics specialists also constrained competition on that market. Already pre-merger, Hungryhouse had only posed a limited competitive constraint on Just Eat, and had been loss-making for years. The authority also expected this sector to be dynamic, with new competition on the horizon. Therefore, it did not believe that horizontal unilateral effects would arise.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**Noteworthy:** Just Eat's M&A activity also gave rise to several merger cases in Spain.<sup>62</sup>

**(53) United Kingdom: *Moneysupermarket.com/Decision Technologies* (7 August 2018)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6749/18

**Concentration:** Moneysupermarket.com agreed to acquire Decision Technologies. Both parties supply digital comparison tool services for mobile and home communications switching. Decision Technologies also operates upstream, providing white label and application programming interface (API) services to providers of digital comparison tools.

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<sup>62</sup> Comisión Nacional de los Mercados y la Competencia, *Just Eat/La Nevera Roja* (C/0730/16, 31 March 2016); Comisión Nacional de los Mercados y la Competencia, *Just Eat Spain/Canary Delivery Company* (C/1046/19, 10 September 2019); Comisión Nacional de los Mercados y la Competencia, *MIH Food Delivery Holdings/Just Eat* (C/1072/19, 5 December 2019).

**Horizontal theories of harm:** While this horizontal merger involved two of the more important competitors on the market for digital comparison tool services for mobile and home communications switching with a combined share of supply of 25-30%, a sufficient number of competitors would remain active on that market as well as through other switching routes that would restrain the merged entity. Also, the merging parties were not particularly close competitors. In particular, uSwitch as the market leader for home communications switching would continue to provide an important competitive constraint.

**Non-horizontal theories of harm:** The authority assessed whether the merged entity might engage in a vertical input foreclosure strategy by foreclosing the supply of white label and API services for the use by digital comparison tool providers. White label services were considered an important input. However, such a strategy could lead to switching away from the merged entity – but also to a revenue gain for the merged entity where customers switch to the merged entity’s own digital comparison tool. While a number of alternative white label service providers operate on the market, Decision Technologies was the market leader and no entry was on the horizon, meaning that it had at least some ability to engage in such a foreclosure strategy. The authority then assessed a number of factors that would curtail the merged entity’s incentive to foreclose, and found that this strategy would not be profitable. For this reason, it concluded that no competition concern would arise based on vertical input foreclosure.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(54) United Kingdom:** *eBay/Motors.co.uk* (12 February 2019)

**NCA:** Competition & Markets Authority

**Case number:** ME/6774/18

**Concentration:** eBay agreed to acquire Motors.co.uk. Both parties supply online classified vehicle advertising services. eBay has two brands dedicated to this business: eBay Motors and Gumtree Motors.

**Horizontal theories of harm:** The authority assessed possible horizontal unilateral issues. It found that although the merging parties offered relatively similar online classified vehicle advertising services, they were not each other’s closest competitors. In addition, there was only a limited increment in the merged entity’s market position through the merger. Autotrader was a closer competitor that constrained both parties, and CarGurus had been gaining market share and competed aggressively. Overall, this led the authority conclude that no competition concerns would arise.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In terms of the closeness of competition, it is possible that a number of digital merger cases underestimate the network effects and the impact of digital ecosystems on this analysis.

**(55) United Kingdom:** *PayPal/iZettle* (12 June 2019)

**NCA:** Competition & Markets Authority

**Case number:** ME/6766/18-II

**Concentration:** PayPal, a technology platform company that provides online and offline payment services, acquired iZettle, a financial technology company providing (primarily offline, but to a limited extent also online) payment services to small businesses. In the UK, the companies overlapped in the provision of offline payment services through mobile point of sale (mPOS) services, a relatively new technology that involves a card reader and an app that allows merchants to accept card payments.

**Horizontal theories of harm:** The authority underlined that mPOS was a fast-moving and dynamic market in which a particular emphasis had to be put on future competition. However, it also found that traditional point of sale providers significantly constrained mPOS providers, and that there were a whole range of such competitors (including Worldpay, Barclaycard, Shopify). Also, two further major providers of mPOS (Square, SumUp) continued to operate on the market.

The authority also considered whether iZettle would have developed an omni-channel offer competing with PayPal's service, leading to a situation in which potential competition was eliminated. It concluded, however, that absent the merger, iZettle was likely to have focused on its core business rather than on developing an omni-channel service.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(56) United Kingdom:** *Salesforce.com/Tableau Software* (22 November 2019)

**NCA:** Competition & Markets Authority

**Case number:** ME/6841/19

**Concentration:** Salesforce acquired Tableau Software. Both parties supply business intelligence (BI) software, and in particular modern BI software making use of artificial intelligence and business analytics. Salesforce also offers a customer relationship management (CRM) platform that integrates with third-party products.

**Horizontal theories of harm:** As the parties were not close competitors, and a number of BI suppliers remained on the market that would exert a competitive constraint on the merged entity, the authority did not think that any horizontal unilateral effects would arise.

**Non-horizontal theories of harm:** The authority assessed two conglomerate theories of harm related to foreclosure. First of all, it assessed whether the merged entity could foreclose competing BI software providers through technical restrictions or bundling/tying of CRM products with BI products. While the merged entity could have the ability to pursue such a foreclosure strategy, there was no incentive to do so. Second, the authority considered whether the merged entity could foreclose competing CRM software providers through technical restrictions or bundling/tying of BI products with CRM products. The authority emphasised that a BI tool was more valuable when it connected to multiple data sources, and in any case the costs would outweigh the benefits for the merged entity.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** In Austria, Salesforce was fined €100,000 for gun jumping in the same merger case.<sup>63</sup> Considering the integration or improvement of interoperability within a merged entity's services, the issue regularly arises that such behaviour can prove pro-competitive, while at the same time further entrenching a dominant company's market power. Here it appears that competition authorities are called upon to make a nearly impossible choice. Further research into this issue is required.

**(57) United Kingdom: Tobii/Smartbox (15 August 2019)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6780/18-II

**Concentration:** Tobii had acquired Smartbox Assistive Technology and Sensory Software International (together: Smartbox). Both produce augmentative assistive communication (AAC) solutions, i.e., communication aids for those that find communication difficult, eg due to a disability or a medical condition. AAC solutions consist of AAC hardware, AAC software, access means (e.g., a switch, an eye gaze camera), and customer support. Markets affected included the national market for supply of dedicated AAC solutions, the global market for upstream supply of AAC software and the equally global market for upstream supply of eye gaze cameras in AAC.

**Horizontal theories of harm:** The authority considered that the main horizontal overlap between acquirer and target occurred in the supply of dedicated AAC solutions. It did not accept the argument that the providers faced strong competition from AAC solutions based on mainstream consumer devices because this was not consistent with its market analysis nor with internal documents of the parties outlining their competition. Prices for dedicated AAC solutions had remained constant over preceding years, and qualitative evidence also pointed to a lack of such competition.

The authority assessed the possibility of horizontal unilateral effects, particularly as regards price increases, quality deterioration and a reduction in the range of services and/or product development. It emphasised that, pre-merger, the parties had been close competitors and competition among them had led to increased innovation and R&D. The closeness of competition was also supported by diversion ratios between Tobii and Smartbox products. The merged entity now had a market share of 60-70% in the UK and competitors did not provide a sufficient constraint on the merged entity. The authority emphasised that part of the merger strategy was indeed to reduce the range of products available as well as R&D.

**Non-horizontal theories of harm:** The authority assessed three vertical theories of harm relating to possible foreclosure effects.

Concerning a possible input foreclosure of Smartbox's Grid software, the authority found that the merged entity would likely have both the ability and incentive to rely on its strong market position in AAC software in order to foreclose downstream competitors, eg by making their access to its popular software more expensive or of lower quality. This is

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<sup>63</sup> Kartellgericht, 22 April 2021, 27 Kt 9/21g – *Tableau/Salesforce*.

enabled by downstream competitors being unable to switch away from Smartbox's software due to consumer demand. The merger, according to the authority, increased the incentive to engage in such a foreclosure strategy. This would, in the end, harm consumers and end users.

Relating to a possible customer foreclosure of competitors to Tobii's eye gaze camera, the authority found that the merged entity would likely have both the ability and incentive to limit the compatibility of eye gaze cameras produced by competitors with Smartbox's software. This strategy would be profitable, as dedicated AAC solution providers were not very likely to switch to an alternative software in order to use an alternative eye gaze camera. This foreclosure strategy would lead to lower innovation in eye gaze cameras and higher prices, and thus affect AAC solutions overall.

Finally, the authority assessed possible input foreclosure of Tobii's eye gaze cameras but found that it was unlikely that the merged entity would make access to Tobii's eye gaze cameras more expensive, because of alternatives available on the market. There would also be a lack of incentives for such a strategy, as this might lead to switching to alternative eye gaze cameras rather than switching to the merged entity's dedicated AAC solutions.

The authority emphasised that the market was not very dynamic, with no evidence of recent successful entry or expansion and buyer power not very strong.

**Outcome:** Prohibited in phase 2.

**Remedies:** Tobii had proposed two different sets of remedies to the authority, with a structural element to address the horizontal competition concerns and a behavioural element to address the vertical competition concerns. Concerning the structural element, Tobii proposed to divest Smartbox's AAC hardware business (partial divestiture) and to keep Smartbox's AAC software business, while granting the buyer a perpetual license for Smartbox's popular software on FRAND terms as well as allowing it to resell Tobii's eye gaze cameras. However, the authority concluded that these would not effectively address the competition concerns it had identified, based on a risk framework including specification risks, circumvention risks, distortion risks and monitoring and enforcement risks. Based thereon, the authority concluded that the proposed remedies would not fully address these risks and would only have a limited impact in addressing the competition concerns identified. Full divestiture was regarded as the only effective remedy available.

**Noteworthy:** In case 1332/4/12/19, the Competition Appeal Tribunal upheld the Competition and Markets Authority's divestiture decision on all but one ground.<sup>64</sup> In particular, the Competition Appeal Tribunal agreed with Tobii that the authority had not provided sufficient evidential basis for its concern relating to partial input foreclosure. In another judgment, Tobii was not granted permission to appeal that decision.<sup>65</sup> Tobii has since divested Smartbox.<sup>66</sup>

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<sup>64</sup> *Tobii/Smartbox*, [2020] CAT 1, 10 January 2020.

<sup>65</sup> *Tobii/Smartbox*, [2020] CAT 6, 17 February 2020.

<sup>66</sup> 'Tobii divests Smartbox' (6 October 2020) <<https://www.tobii.com/group/news-media/press-releases/2020/10/tobii-divests-smartbox/>>.



The relevant market underlying the authority's analysis is noteworthy, as the authority considered both a cluster market (dedicated AAC solutions) as well as the individual components of the latter.

**(58) United Kingdom: *Google/Looker* (13 February 2020)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6839/19

**Concentration:** Google, a global technology company, acquired Looker, a provider of business intelligence (BI) tools, ie software that supports corporate decision-making by analysing, visualising and interpreting business data. Google operates both GDS, a free BI tool that is interoperable with Google's many products and services, and GBQ, a cloud-based data warehouse. Google's products are not currently interoperable with leading rival data warehouses (e.g., provided by Amazon, Microsoft, Oracle, Snowflake and others). Looker's BI tools interoperate with over 45 data warehouses.

**Horizontal theories of harm:** The authority assessed whether the loss of competition by an actual competitor would raise competition concerns. It found that the market for BI tools was very competitive and dynamic, and customers tended to multi-home. In addition, the merged entity had a low combined share of supply, with customers not regarding GDS as a viable alternative to Looker. Post-merger, there were also significant competitive constraints present on the market. The authority concluded that the merger did not raise competitive concerns in this regard.

**Non-horizontal theories of harm:** The authority assessed whether the merged entity could engage in a partial foreclosure strategy based on Google's substantial market power in web analytics and online advertising. As Google generates a wealth of data, the authority assessed whether Google could restrict competing BI tool providers from access to Google-generated data. It found that Google would indeed have the ability to engage in such an input foreclosure strategy: it is important to many businesses to be able to analyse Google-generated data, Google has market power in web analytics and online advertising and can offer a combined product (possibly further enhancing its market power), and it could implement various price- and non-price-based foreclosure mechanisms to restrict access to Google-generated data. However, the authority did not consider that Google had an incentive to engage in such a strategy, and its internal documents did not reveal any plans to carry out such a strategy. Switching by customers may to some extent hamper the profitability of such a strategy. Targeting individual competing BI tools with such a strategy would also be costly.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** The Competition & Markets Authority investigated a number of mergers in business intelligence tools, including *Salesforce/Tableau Software* (2019)<sup>67</sup> and *Google/Looker* (2020). This could indicate an ongoing concentration of this market.

**(59) United Kingdom: *Sabre/Farelogix* (9 April 2020)**

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<sup>67</sup> Competition & Markets Authority, *Salesforce.com/Tableau Software* (ME/6841/19, 22 November 2019).

**NCA:** Competition & Markets Authority

**Case number:** ME/6806/19-II

**Concentration:** Sabre, a US company providing technology solutions to airlines and travel agents, intended to acquire Farelogix, another US company supplying technology solutions for airlines.

**Horizontal theories of harm:** The authority assessed whether the acquisition would raise horizontal unilateral effects in the supply of merchandising solutions or distribution solutions to airlines. Issues raised included slower rates of innovation and product development, reduced product range or quality, and higher prices or less favourable terms of service.

While Farelogix was a strong player in merchandising solutions for airlines, Sabre was not (yet). However, the authority considered that Sabre would become a strong competitor absent the acquisition. Post-merger, only one strong competitor would remain, namely Amadeus. The loss of competition resulting from the acquisition would be significant.

As regarded distribution solutions for airlines, the authority noted that the product offerings by the merging parties were differentiated, and that there were several competitors that posed a credible competitive constraint. Overall, however, it concluded that Farelogix would play an important role in that market absent the merger, and the loss of competition resulting from the acquisition would be significant, with a substantial and long-lasting impact on consumers.

**Non-horizontal theories of harm:** NA

**Outcome:** Prohibited in phase 2.

**Remedies:** The parties offered commitments to the authority, which included (i) making Farelogix's FLX Services available at the same or lower prices to those at the time, including levels of support, for an agreed-upon period of time, (ii) offering all current Sabre GDS<sup>68</sup> customers and all current FLX OC customers the opportunity to extend their existing contract on the same terms for a period of at least three years, (iii) to continue investing in the development of FLX Services capabilities at levels no less than current levels, for an agreed-upon period of time, and (iv) to continue to offer and support FLX Services capabilities to any third parties and all outlets that wish to use them to connect to Sabre, other GDSs, other distribution partners, or directly to travel agents on an agnostic basis, for an agreed-upon period of time.

The authority concluded, however, that the parties' remedies proposal did not manage to weigh up the loss of competition that would result from Farelogix no longer being an independent player that competes to meet airlines' evolving needs. It thus regarded the prohibition of the merger as the only effective remedy.

**Noteworthy:** The Competition Appeal Tribunal dismissed Sabre's appeal of the decision.<sup>69</sup> As a result of this case, the merger was terminated on 1 May 2020.<sup>70</sup> In the United States, the Department of Justice equally sought to prohibit the merger and called it 'a dominant firm's attempt to eliminate a disruptive competitor after years of trying to

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<sup>68</sup> Global Distribution System.

<sup>69</sup> *Sabre/Farelogix*, [2021] CAT 11, 21 May 2021.

<sup>70</sup> 'Sabre and Farelogix \$360m merger deal cancelled' (1 May 2020) <<https://www.phocuswire.com/sabre-farelogix-merger-terminated>>.

stamp it out.<sup>71</sup> While this case was cleared by a US District Court in a rather controversial judgment,<sup>72</sup> the case was subsequently vacated because the parties had abandoned their merger.<sup>73</sup>

**(60) United Kingdom: Amazon/Roofoods (4 August 2020)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6836/19-II

**Concentration:** Amazon wanted to acquire a 16% minority shareholding and certain rights (including board representation) in Roofoods, which operates restaurant delivery platform Deliveroo. This transaction occurred on the national market for the supply of online restaurant platforms. The authority did not consider Deliveroo to be a failing firm.

**Horizontal theories of harm:** Following a referral for further investigation, the authority mainly considered horizontal effects that could arise in the form of a loss of potential competition as a result of the transaction. It emphasised that Amazon had previously had a market presence in online restaurant platforms in the UK (2016-2018). The authority assessed whether it would be likely – absent the transaction – that Amazon would re-enter that market. It indicated that Amazon’s global strategy to promote and grow Prime could fit with re-entering this market. Internal documents showed that Amazon regards restaurant delivery as an integral part of its food strategy. The authority concluded that this indicated a strong and continued interest by Amazon in the online restaurant platforms market, in which it could benefit from its vast logistics expertise. Amazon could either build its own offering, acquire or invest in an existing platform, or partner with one. The authority then asked whether Amazon would be likely to re-enter the market in the absence of the merger, and whether such entry would lead to greater competition. The fact that Amazon would only acquire a 16% shareholding in Deliveroo, rather than a larger stake, was particularly emphasised. Two scenarios were assessed by the authority: Concerning (i) unilateral effects on the entry decision, the authority concluded that based on mixed evidence it was not sufficiently likely that Amazon’s 16% stake in Deliveroo would keep it from re-entering the market in the face of strong financial incentives to do so. Regarding (ii) post-entry unilateral effects, the authority considered what could occur should Amazon re-enter the market. While Amazon could adopt a strategy to compete less aggressively to internalise Deliveroo’s profits, the authority concluded that the 16% stake in Deliveroo would not provide a strong enough incentive for this theory of harm to be credible or to influence market outcomes. Also, Amazon could encourage Deliveroo to compete less aggressively against it. However, the authority considered that there was

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<sup>71</sup> *Sabre/Farelogix*, Complaint in Case 1:19-cv-01548-UNA (20 August 2019).

<sup>72</sup> *US v Sabre/Farelogix*, 452 F. Supp. 3d 97 (D. Del. 2020). That court applied two-sided market theory in a way that does not correspond to market realities (see p 136), holding that two-sided platforms cannot compete with one-sided market offerings based on *Ohio v American Express*, 138 S. Ct. 2274, 2285 (2018).

<sup>73</sup> As the Department of Justice explained when asking the US Court of Appeals for the Third Circuit to vacate the District Court judgment, it also did so because that judgment’s pronouncements regarding competition among one- and two-sided businesses would have too much of a bearing on future antitrust cases; US Department of Justice’s Motion to Vacate, Case No. 20-1767 (12 May 2020). The District Court’s judgment was vacated on 20 July 2020.

strong competition between Deliveroo, Uber Eats and Just Eat, limiting Deliveroo's scope to compete less vigorously.

The authority also considered possible horizontal unilateral effects in the supply of online convenience grocery (OCG) shopping. The authority considered the offerings by Amazon and Deliveroo in OCG to be quite differentiated, and also listed a range of competitors on that market, including online restaurant delivery providers (e.g., Just Eat, Uber Eats), traditional grocers and convenience stores (e.g., Waitrose, Sainsbury's, Co-op), as well as grocery delivery specialists (e.g., Ocado). Further expansion was to be expected, also against the background of Covid-19. As a first theory of harm, it assessed (i) Amazon's ability to discourage Deliveroo from competing against Amazon in OCG. It then asked (ii) whether Amazon could protect its investment by avoiding direct competition with Deliveroo in OCG. In both cases, it concluded that while Amazon would have material influence on Deliveroo, its 16% stake would not allow it to set Deliveroo's policies single-handedly, and outside competition would constrain it in doing so. Finally, the authority assessed (iii) whether Amazon could rely on Deliveroo for its presence in OCG rather than developing its own service. Here, it was also considered that Amazon might regard the transaction as a first step towards full acquisition of the target. Viewed within the broader context of the OCG market, the authority concluded that other competitors were well-placed to compete in the OCG market and no substantiated competition concerns would arise.

**Non-horizontal theories of harm:** Already in phase 1, the authority had dismissed a possible bundling of Amazon Prime and Deliveroo Plus, ie the latter's subscription service, as there would be no sufficient incentive to do so.

**Outcome:** Unconditionally cleared in phase 2.

**Remedies:** NA

**Noteworthy:** This is a rare case in which the authority assessed whether the loss of potential competition could lead to competition concerns. It was primarily due to the low stake of 16% that the concerns were dismissed. The case is a good indication that in the case of platform mergers that involve an important ecosystem orchestrator, attention also needs to be paid to (even loosely) connected markets (potentially) served by the digital ecosystem in question.

**(61) United Kingdom: Pug/StubHub (2 February 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6868/19-II

**Concentration:** Pugnacious Endeavors, which trades as viagogo, is a global provider of online exchange platforms for buying and selling tickets to live events. It acquired StubHub, which is owned by eBay, and is a global provider of online exchange platforms for buying and selling tickets to live events; it is the largest secondary ticketing platform in the world.

**Horizontal theories of harm:** The authority focused on horizontal effects between two close competitors that made up between 90-100% of the relevant market post-merger. The merger resulted in an increment in the range of 30-40%. While viagogo had high market shares for a number of consecutive years, StubHub had shown strong growth in

previous years. There was no meaningful competitor on the market for secondary ticketing platform services in the UK. The platforms operated in similar ways, and invested heavily in advertising. viagogo was found to bid ‘on a sizeable proportion of StubHub’s keywords’, indicating close competition among them. Resellers regarded the parties as substitutes, and regularly multi-homed. Ticketing platforms on the primary market, such as Ticketmaster, were not regarded as a viable alternative in many instances, and therefore did not constitute a competitive constraint. Neither non-specialist online channels nor social media or offline channels were regarded as viable alternatives to secondary ticketing platforms.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 2.

**Remedies:** The authority required a partial divestiture of StubHub, namely of the StubHub International business (ie, StubHub outside of North America). This was regarded as the only effective remedy for this completed transaction.

**Noteworthy:** The authority considered advertising spend on a competitor’s keywords to assess closeness of competition. StubHub International was subsequently acquired by Digital Fuel Capital.<sup>74</sup>

**(62) United Kingdom: Adevinta/eBay Classifieds Group** (16 February 2021)

**NCA:** Competition & Markets Authority

**Case number:** ME/6897/20

**Concentration:** Adevinta agreed to acquire the eBay Classifieds Group (eCG) from eBay, while eBay agreed to acquire 33.3% of voting rights (44% of economic interest) in Adevinta. Schibsted was the majority shareholder in Adevinta; its voting rights would be reduced to 39.5% post-merger (33.1% of economic interest). Adevinta provides online classified advertising services (Shpock; MB Diffusion). eCG provides online classified advertising services (Gumtree; Motors.co.uk), and eBay operates the online marketplace eBay.co.uk. The merger affected the markets for the supply of online generalist classified advertising services and C2C online marketplaces and the market for the supply of online classified advertising platforms and online marketplaces for motor vehicles, among others. The authority found that generalist online classified advertising services (such as Adevinta’s Shpock and eCG’s Gumtree) were in the same relevant market as online marketplaces (e.g., eBay Marketplace).

**Horizontal theories of harm:** The authority was concerned that the merger would lead to a substantial lessening of competition due to horizontal unilateral effects, risking less choice and innovation as well as higher fees. It found eBay Marketplace to be the largest platform on the market, over twice the size of its next biggest competitor (ie, Facebook Marketplace). Gumtree was third or fourth (depending on the metric), while Shpock was relatively small but had recently increased its competitive constraint on eBay Marketplace. The parties’ platforms were close competitors (either actual or potential).

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<sup>74</sup> Competition & Markets Authority, ‘Merger investigation into the Completed acquisition by PUG LLC (viagogo) of the StubHub business of eBay Inc.’ (8 September 2021) <[https://assets.publishing.service.gov.uk/media/61379adfe90e07044435c8d0/Viagogo\\_StubHub\\_Case\\_closure\\_summary.pdf](https://assets.publishing.service.gov.uk/media/61379adfe90e07044435c8d0/Viagogo_StubHub_Case_closure_summary.pdf)>.

The authority also found that under eBay's ownership, Gumtree had not competed as aggressively as it could have. It reasoned that part of eBay's motivation to sell Gumtree to Adevinta consisted in eBay continuing to exercise some influence on that platform.

**Non-horizontal theories of harm:** NA

**Outcome:** Conditionally cleared in phase 1.

**Remedies:** In order to address the horizontal unilateral theories of harm identified by the authority, the parties proposed the following commitments: (i) divestiture of Gumtree UK (incl Motor.co.uk) on a debt-free basis, (ii) divestiture of Shpock to RussMedia Equity Partners on a debt-free basis, (iii) provision of transitional services in relation to Shpock and Gumtree UK. The authority accepted these commitments.

**Noteworthy:** This concentration was also cleared subject to conditions in Austria,<sup>75</sup> although the conditions – due to different online classified advertising platforms operating on that geographic market – were different. Germany unconditionally cleared this transaction.<sup>76</sup>

**(63) United Kingdom: Uber International/GPC Computer Software (29 March 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6903/20

**Concentration:** Uber, a provider of ride-hailing services, wanted to acquire GPC Computer Software (Autocab), a company that (i) develops and supplies booking and dispatch technology (BDT) enabling taxi companies to connect drivers to end customers, and that (ii) operates the iGo network that connects demand for taxi trips with supply for taxi trips.

**Horizontal theories of harm:** At the time of the proposed merger, Uber and Autocab only competed to a limited extent. The authority assessed a loss of competition between the merging parties in the supply of BDT services and referral networks, particularly with a view to future potential competition. However, Autocab was unlikely to develop a stand-alone consumer-facing app that would directly compete with Uber's app. It was also unlikely that iGo would grow to become a significant competitor to Uber. Overall, the authority concluded that horizontal competition would not be substantially lessened due to the merger.

**Non-horizontal theories of harm:** Under a vertical foreclosure theory of harm, the authority assessed whether the quality of Autocab's BDT and iGo services may decline post-merger, thereby putting taxi companies and aggregators using Autocab's services (i.e., downstream competitors) at a disadvantage. The authority found that a quality degradation by Autocab would need to be significant in order to cause customers to switch to competitors (such as Uber). As there were enough BDT providers operating on the market, taxi companies could switch to those, with relatively low switching costs. Regarding iGo, the merged entity would not have the ability to foreclose aggregators (e.g., travel companies, emergency transport companies) because there were a number of alternatives present on the market and these aggregators already multi-homed.

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<sup>75</sup> Bundeswettbewerbbehörde, *eBay/Adevinta* (BWB/Z-5141, Z-5142, Z-5420 and Z-5421, 18 June 2021).

<sup>76</sup> Bundeskartellamt, *Adevinta/eBay Classifieds Group* (B6-41/20, 23 November 2020).

In terms of further vertical non-coordinated effects, the authority also assessed whether the acquisition would give Uber access to commercially sensitive information about competitors that would allow it to compete more aggressively. The authority considered that more intense competition would, in fact, be beneficial. In addition, competing taxi companies could switch to other BDT providers in such a case.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**(64) United Kingdom: SK hynix/Intel (28 June 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6913/20

**Concentration:** SK hynix, a multinational active in the design and manufacturing of semiconductor products, wanted to acquire sole control of the NAND<sup>77</sup> and SSD<sup>78</sup> business of Intel.

**Horizontal theories of harm:** SK hynix's business includes the design and manufacture of NAND flash memory, NAND-based SSDs and managed NAND products. It overlaps with Intel's business in this respect. Therefore, the authority assessed whether horizontal unilateral effects would arise in one of the two markets affected due to the acquisition. SK hynix holds investments in Kioxia, which also manufactures NAND and SSDs. The authority concluded, however, that this has not softened competition in the past.

In 3D NAND, the authority found that the acquisition would reduce the number of competitors from 6 to 5, meaning that a number of credible competitors would continue to exercise a competitive constraint on the merged entity. The merged entity would have a market share of 20-30%. Pre-merger, the parties were not particularly close competitors. In enterprise SSDs, the merged entity would have a market share of 30-40%, with 4 bigger and a number of smaller competitors remaining active on the market. Again, the parties were not particularly close competitors. The authority also noted the buyer power present in that market.

The authority concluded that no horizontal unilateral effects were likely to arise post-merger.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** This acquisition was also cleared in the EU.<sup>79</sup>

**(65) United Kingdom: Advanced Micro Devices/Xilinx (29 June 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6915/20

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<sup>77</sup> NAND is a type of flash memory.

<sup>78</sup> Solid-state drive.

<sup>79</sup> European Commission Decision of 20 May 2021, M.10059 – *SK Hynix/Intel's NAND and SSD Business*.

**Concentration:** Advanced Micro Devices (AMD), a global semiconductor company supplying central processing units (CPUs), agreed to acquire Xilinx, another global semiconductor company supplying field programmable gate arrays (FPGAs).

**Horizontal theories of harm:** NA

**Non-horizontal theories of harm:** As there was no horizontal overlap, the authority considered conglomerate effects. Given that the merged entity would have a strong market position in FPGAs for datacentre applications, the authority assessed whether the merged entity could engage in a foreclosure strategy by bundling or tying the sale of FPGAs with the sale of its CPUs for datacentre services. It found, however, that the merged entity would not have the ability or incentive to foreclose datacentre CPU suppliers, as datacentre CPUs are mostly not bought together with datacentre FPGAs.

Given the merged entity's strong market position in FPGAs for embedded applications, the authority also assessed whether the merged entity could foreclose competitors supplying CPUs for embedded applications through linking sales. Again, it concluded that embedded CPUs and FPGAs were not usually used together, meaning no anti-competitive outcome was to be expected.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** This acquisition was also cleared in China,<sup>80</sup> the EU<sup>81</sup> and Singapore.<sup>82</sup>

**(66) United Kingdom: Turnitin/Ouriginal (26 July 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6931/21

**Concentration:** Turnitin, an international provider of a wide range of software solutions for the educational sector, wanted to acquire sole control over the Swedish Ouriginal Group, which is only active on the market for plagiarism detection software. The authority considered the affected market to be the national market for the supply of anti-plagiarism software to higher education customers.

**Horizontal theories of harm:** The authority found that the parties involved were close competitors, with the acquirer being the target's main competitive constraint. The parties also had a very high aggregate share of supply (90%), with few additional competitors on the market. The additional market share gained by the acquirer would not be high, however. The authority noted that Google and Microsoft had recently entered the market. Overall, the authority considered that there was a realistic prospect the merger would lead to a significant lessening of competition.

**Non-horizontal theories of harm:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

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<sup>80</sup> State Administration for Market Regulation, *Advanced Micro Devices/Xilinx* (27 January 2022). In China, the acquisition was cleared in phase 2 subject to conditions.

<sup>81</sup> European Commission Decision of 30 June 2021, COMP/M.10097 – *Advanced Micro Devices/Xilinx*.

<sup>82</sup> Competition and Consumer Commission of Singapore, *Advanced Micro Devices/Xilinx* (400/140/2021/003, 30 August 2021).



**Noteworthy:** This merger was also cleared in Spain<sup>83</sup> and Australia.<sup>84</sup> While the Spanish authority had considered entry barriers to be low in this market, the UK authority believed they were high. The Competition & Markets Authority could not rule out that competition would be harmed based on horizontal unilateral effects, but relied on the *de minimis* exception in this case.

**(67) United Kingdom: Meta/Kustomer (27 September 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6920/20

**Concentration:** Global technology company Meta (formerly: Facebook) intended to acquire Kustomer, the provider of a software as a service (SaaS) customer relationship management (CRM) software that can be used for business to consumer (B2C) communications. Markets affected included not only the market for the supply of B2C communication via messaging channels but also the market for service and support related to CRM software and the market for online display advertising.

**Horizontal theories of harm:** The authority assessed whether Meta's data advantage in online display advertising would be strengthened based on the merger, leading to higher barriers to entry and expansion and reduced competition. While the authority emphasised Meta's competitive advantage due to its access to data, and while it acknowledged that the merger would increase that advantage, it also underlined that additional data gains through Kustomer would be small and wouldn't raise competition concerns. The authority also pointed to the possibility for competitors to access data similar to the one Meta would gain through the acquisition.

**Non-horizontal theories of harm:** Related to a possible vertical input foreclosure, the authority assessed whether Meta could foreclose other providers of CRM software by limiting or degrading their access to Meta's messaging channels. This is because CRM providers require Meta APIs to integrate them into their software. While Meta would have the ability to engage in such foreclosure, the authority did not believe that it had a sufficient incentive for this strategy. B2C messaging is growing, and such a foreclosure strategy would cut Meta off from revenue-generating CRM providers, as not all customers would switch to relatively small Kustomer. This was therefore not seen as a credible theory of harm.

Under a further possible theory of harm related to vertical customer foreclosure, the authority assessed whether Meta could foreclose other B2C messaging services by preventing them from integrating their services with Kustomer. As Kustomer is a small provider specialised in serving small and medium-sized businesses, this was not seen as a credible theory of harm.

Finally, under a conglomerate theory of harm, the authority also considered whether Meta could cross-subsidise a free(mium) version of Kustomer with profits from online display advertising, thereby foreclosing competing CRM providers. This would fit within Meta's

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<sup>83</sup> Comisión Nacional de los Mercados y la Competencia, *Turnitin/Ouriginal Group* (C/1220/21, 19 October 2021).

<sup>84</sup> Australian Competition and Consumer Commission, *Turnitin/Ouriginal Group* (25 November 2021).

overall business strategy, and it would have both the ability and incentive to do so. However, the authority concluded that this would not have a negative impact on competition. While some competitors may be hard-hit by such a strategy, CRM providers compete on more than just price and the authority concluded that there would remain sufficient competition on that market even if such a conglomerate foreclosure strategy were to be adopted.

**Outcome:** Unconditionally cleared in phase 1.

**Remedies:** NA

**Noteworthy:** This case was equally cleared subject to conditions by the European Commission,<sup>85</sup> while the German Bundeskartellamt cleared it unconditionally.<sup>86</sup> The analysis that the Competition & Markets Authority engaged in for this merger did not follow the usual approach of horizontal/vertical/conglomerate, but instead the CMA formulated four distinct theories of harm that reflect the specificity of digital markets including the importance of data in these markets. This could mark the beginning of the development of theories of harm that no longer clearly distinguish between horizontal, vertical and conglomerate effects, but that are more closely adapted to the market realities of digital platforms and ecosystems.

**(68) United Kingdom:** *Auction Technology Group/Live Auctioneers* (29 September 2021)

**NCA:** Competition & Markets Authority

**Case number:** ME/6942/21

**Concentration:** Auction Technology Group (ATG) agreed to acquire Live Auctioneers. Both operate online auction marketplaces for arts and antiques, a market which the authority noted was national in scope because of the complexity of international transactions in these goods.

**Horizontal theories of harm:** The authority assessed horizontal effects related to the provision of auction marketplaces for arts and antiques. As the acquirer was primarily focused on UK bidders, while the target was primarily focused on North American bidders, and they each provided different offerings to their clients, the authority found that pre-merger they were not close competitors. It also noted competitive constraints in the UK from two further online auction marketplaces for arts and antiques, as well as out-of-market constraints (e.g., white label solutions). The merger would not change the competitive dynamics on the UK market.

**Non-horizontal theories of harm:** The authority assessed conglomerate effects that may arise if the merged entity can leverage the target's strong market position in the US in order to increase the number of auction houses that use ATG's services in the UK, eg by engaging in a bundling strategy regarding the target's US bidder base. Based on shares of supply, however, the authority concluded that the target did not have market power in the US, while ATG was already an important market player in the UK and would gain little

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<sup>85</sup> European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*.

<sup>86</sup> Bundeskartellamt, *Meta/Kustomer* (B7-119/21, 11 February 2022).

from such a strategy. Therefore, the merged entity would only have a limited ability to engage in such a leveraging strategy.

**Remedies:** NA

**Outcome:** Unconditionally cleared in phase 1.

**Noteworthy:** Despite the worldwide reach of online auction marketplaces, the authority emphasised that the acquirer and the target were not close competitors because they each focused on a different geographic market, due to buyer preferences but also the complexity of international transactions in arts and antiques.

**(69) United Kingdom: Meta/Giphy (6 December 2021)**

**NCA:** Competition & Markets Authority

**Case number:** ME/6891/20-II

**Concentration:** Global technology company Meta (formerly Facebook), with strong market positions in both social media and display advertising, acquired Giphy, the world's leading provider of free GIFs and GIF stickers. Markets affected included the market for searchable GIF libraries, social media and display advertising.

**Horizontal theories of harm:** In terms of horizontal unilateral effects, the authority assessed whether there would be a loss of potential competition in display advertising that could lead to a substantial lessening of competition. While Meta is an important player in display advertising, Giphy had recently come up with its Paid Alignment advertising offering that allowed it to monetise its services. Through this offering, brands could raise brand awareness, meaning this service was competing with display advertising (until Meta terminated it upon acquisition). Giphy had plans to move into the UK market. In light of Meta's significant market power, the authority considered that this acquisition of a potential competitor was significant because Giphy had the potential to compete with Meta. Network effects in those markets and high barriers to entry were equally considered. The authority concluded that based on the acquisition of a potential competitor, the acquisition would substantially lessen competition.

**Non-horizontal theories of harm:** The authority assessed the possibility of vertical input foreclosure of Giphy's GIFs, thereby foreclosing competitors in social media markets. The authority emphasised that users of social media platforms heavily relied on GIFs, with sometimes over 25% of content including a GIF. Apart from Giphy, the only other comparable service is Google's Tenor. Post-merger, Meta would have the ability to engage in input foreclosure. Based on the benefits awaiting Meta, it would also have the incentive to do so because users wanting to use Giphy's GIF library may very well switch to one of the Meta platforms. Here, the authority emphasised the network effects at work. This strategy would further strengthen Meta's market power in social media and have a negative impact on competition.

The authority highlighted the dynamic nature of the multi-sided markets at issue, which meant that a lessening of competition on one market (such as social media) exacerbated anti-competitive effects on another (such as display advertising).

**Outcome:** Conditionally cleared in phase 2. The decision required a full divestiture of Giphy, thereby effectively constituting a prohibition of the completed acquisition.

**Remedies:** In order to address the authority's concerns, Meta offered a number of commitments: (i) an open access remedy relating to APIs, (ii) a commingling remedy that would allow Giphy search results to be interspersed with results from another GIF provider, and (iii) a white label licensing remedy to sell a white label copy of Giphy's content library and a license to use Giphy's search algorithm for five years.

The authority was not satisfied with these proposed behavioural commitments as the competition concerns that arose in this dynamic market would not be alleviated by time-limited behavioural changes. It also highlighted a risk of Meta circumventing the commitments, and difficulties in monitoring and enforcing.

**Noteworthy:** In October 2021, Meta was fined GBP 50.5million for disregarding the freeze order imposed by the Competition & Markets Authority.<sup>87</sup> Meta continuously disregarded the Competition & Markets Authority's freeze order and was therefore subjected to an additional fine of GBP 1.5million in February 2022.<sup>88</sup> This case was on appeal before the Competition Appeal Tribunal on six grounds, of which the Tribunal dismissed five and only upheld one in relation to a failure on the part of the UK NCA to properly consult with the parties.<sup>89</sup> It now remains to be seen how the parties resolve this issue.<sup>90</sup>

The acquisition was conditionally cleared by Austria's Cartel Court, where the Austrian NCA unsuccessfully appealed the conditional clearance before the Supreme Cartel Court in March 2022.<sup>91</sup>

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<sup>87</sup> Competition & Markets Authority, *Decision to impose a penalty on Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002* (20 October 2021).

<sup>88</sup> Competition & Markets Authority, *Decision to impose a penalty on Meta Platforms, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002* (4 February 2022).

<sup>89</sup> *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

<sup>90</sup> Victoria Ibitoye, 'Meta scores procedural win in appeal of UK Giphy selloff order, but impact remains to be seen' *MLex* (14 June 2022)

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<sup>91</sup> Kartellgericht, 7 February 2022, 28 Kt 8/21t and 28 Kt 9/21i – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.



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